FILED
United States Court of Appeals
Tenth Circuit

September 29, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DWAYNE EDWARD RASMUSSEN,

Defendant - Appellant.

No. 20-6101
(D.C. No. 5:19-CR-00160-C-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **McHUGH**, **BALDOCK**, and **BRISCOE**, Circuit Judges.

Defendant Dwayne Rasmussen was convicted by a jury of three counts of bank robbery, in violation of 18 U.S.C. § 2113(a), and was sentenced by the district court pursuant to 18 U.S.C. § 3559(c) to mandatory terms of life imprisonment on each of the three counts. Rasmussen now appeals, challenging both his convictions and sentences. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm Rasmussen's convictions and sentences.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I

A

In the spring of 2019, four bank robberies were committed in or near Oklahoma City, Oklahoma: (1) the Weokie Federal Credit Union in Oklahoma City on March 5, 2019; (2) a Bank of the West branch in Oklahoma City on March 18, 2019; (3) the RCB Bank in Yukon, Oklahoma, on April 5, 2019; and (4) a Community Bank of Oklahoma branch in Chickasha, Oklahoma, on April 30, 2019. All four robberies bore certain similarities. In each instance, bank employees described the robber as a short, white, middle-aged male wearing dark clothing and gloves. Further, in all four robberies, the robber demanded only bills in denominations of twenty, fifty, or one hundred. And in at least three of the four robberies, the robber placed the bills in a cloth grocery bag that he had carried into the bank.

Law enforcement officials obtained eyewitness identifications in all but the RCB Bank robbery. More specifically, employees from all of the banks except for RCB identified Rasmussen as the suspect in photographic lineups. As for the RCB Bank robbery, law enforcement officials decided not to utilize a photographic lineup because the suspect in that robbery was wearing a shoulder-length wig and dark sunglasses. Law enforcement officials also determined that Rasmussen's DNA was on a sponge that was used as a door stop and then left behind during the Community Bank robbery.

B

On May 6, 2019, a criminal complaint was filed against Rasmussen in the United States District Court for the Western District of Oklahoma. The complaint charged Rasmussen with one count of bank robbery, in violation of 18 U.S.C. § 2113(a), in connection with the April 30, 2019 robbery of the Community Bank of Oklahoma branch in Chickasha.

On June 4, 2019, a federal grand jury returned a single-count indictment against Rasmussen. The indictment, like the complaint, charged Rasmussen with violating 18 U.S.C. § 2113(a) by robbing the Community Bank of Oklahoma in Chickasha on April 30, 2019.

On the afternoon of June 20, 2019, one of the prosecutors sent an email to Rasmussen's attorney, William Early, stating as follows:

> As discussed, the United States is prepared to proceed with the Rule 11 schedule for this afternoon subject to the terms we discussed over the phone. In exchange for information and cooperation related to the charged bank robbery, which occurred on or about April 30, 2019, and other possible bank robberies and/or federal crimes committed by Mr. Rasmussen and others involved, the United States would agree to have Mr. Rasmussen plea to a two-count superseding information with both counts charging bank robbery. Additionally, the United States will not pursue the sentencing enhancement of mandatory life in prison pursuant to 18 USC § 3559(c)(1).
>
> We have an interest in wrapping up all bank robberies involving Mr. Rasmussen, even if they occurred outside of the Western District of Oklahoma. This tentative agreement is subject Mr. Rasmussen providing the full spectrum of his federal criminal conduct and of others potentially involved. We reserve the right to revoke this agreement and pursue all of our rights according to law if Mr. Rasmussen fails to provide the complete truth regarding the charged bank robbery and any other bank robberies and/or federal crimes he and others may have

> committed. The other standard ground rules for a Rule 11 apply as well. A letter outlining those ground rules will be provided at the Rule 11.

ROA, Vol. 1 at 565.

Later that same afternoon, Rasmussen, Early, and the prosecutors met for a Rule 11 conference. At the outset of the conference, Rasmussen was provided with a copy of a letter written by the prosecutor who had emailed defense counsel earlier in the day. That letter outlined the government's approach to the Rule 11 conference:

> You and your client have advised the United States Attorney's Office that you are interested in cooperating in the investigation of criminal charges by the Department of Justice. The following procedure is necessary to allow the United States to evaluate your client's proposed cooperation. Your client will be interviewed by a representative of the United States Attorney's Office and investigating agents. Your client will reveal everything that he knows about crimes in Oklahoma and elsewhere and he will do so completely and truthfully. It is understood that your client is not entitled at this juncture to any consideration regarding possible charges against him as a result of providing such a statement. Any consideration given him as a result of his proposed cooperation will be unilaterally determined by me after the statement is made.
>
> The following ground rules apply to your client's proffered cooperation:
>
> 1. No statements made by your client during the interview(s) will be used against him in the government's case-in-chief in any criminal prosecution, other than a prosecution for perjury, giving a false statement, or obstruction of justice.
>
> 2. The government may use against your client information directly or indirectly derived from statements he makes or other information he provides during the interview(s), and may pursue and use against him the fruits of any investigative leads suggested by such statements or other information. This provision is required in order to eliminate the necessity for a Kastigar hearing, at which the government would have to prove that the evidence it would introduce at trial is not tainted by any statements or other information given by your client.

> 3. In the event that your client becomes a witness in any trial or other judicial proceeding, the government may cross-examine him concerning any statements or information provided during the interview(s). In addition, at any trial or other judicial proceeding, the government may introduce evidence regarding such statements or information in rebuttal. These provisions are necessary to ensure that your client does not abuse the opportunity for an interview, does not make material false statements to a government agency, and does not commit perjury when testifying at a trial or other judicial proceeding.
>
> 4. It is understood by your client and the government that this agreement does not constitute plea bargaining. If, however, this agreement is later construed to constitute plea bargaining, your client knowingly and voluntarily waives any rights he has, pursuant to Federal Rules of Evidence 410 and Federal Rules of Criminal Procedure 11(f), which would otherwise prohibit the use against him of statements made during plea discussions.
>
> 5. No agreements, promises, understandings or representations have been made by the parties or counsel other than those contained in writing herein, nor will any such agreements, promises, understandings or representations be made, unless committed in writing and signed by your client, his counsel, and an Assistant U.S. Attorney. This agreement does not obligate the Government to enter into any future plea bargain with your client, or to file any kind of motion regarding any cooperation he provides. This agreement applies only to statements made by your client in interviews conducted by this Office or its agents after the date it is countersigned below and does not apply to statements made at any other time.

Id. at 566–67. Both Rasmussen and Early signed and dated the letter, thereby attesting that they had read and agreed with the letter. *Id*. at 568.

After the parties concluded the Rule 11 conference, the government provided Rasmussen and Early with a formal, written plea agreement tailored to Rasmussen's case. That written plea agreement provided, in part, that Rasmussen would plead guilty to two

counts of bank robbery and that, in exchange, the government would agree not to seek an enhanced sentence under 18 U.S.C. § 3559(c).

In July 2019, Early moved to withdraw from representing Rasmussen. The district court granted that motion and appointed a new attorney, David Autry, to represent Rasmussen. Autry entered his appearance in the case on July 29, 2019.

After Autry entered his appearance in the case, the parties met again for a second Rule 11 meeting. After that meeting, Autry advised the government attorneys that Rasmussen would not enter into the written plea agreement provided to him by the government and instead wanted to amend one of the terms of that agreement. The government refused to agree to the proposed amendment. Consequently, the parties proceeded to trial.

Shortly prior to trial, the government filed an information to establish Rasmussen's prior convictions pursuant to 18 U.S.C. § 3559(c). The information noted the existence of four prior convictions: (1) a 1984 conviction in Love County, Oklahoma, for robbery with a firearm after former conviction of a felony; (2) a 1985 conviction in Marshall County, Oklahoma, for robbery with a firearm; (3) a 1992 conviction in Oklahoma County, Oklahoma, for robbery with firearms after former conviction of two or more felonies; and (4) a 1991 conviction in the United States District Court for the Western District of Oklahoma for robbery of a bank by force and violence by use of a weapon. The information in turn alleged that, due to these prior convictions, the applicable penalty if Rasmussen was convicted of the charged bank robbery was a mandatory sentence of life imprisonment pursuant to § 3559(c).

On the first day of trial, November 18, 2019, Autry asked the district court to find that a plea agreement was "reached in principle at a minimum that would allow . . . Rasmussen to plead guilty to two counts of bank robbery based on a Superseding Information and allow him to reserve the right to appeal the substantive and procedural reasonableness of his sentence." *Id*. at 570. Autry noted that he "made it clear to the" prosecutors during the second Rule 11 conference "that [Rasmussen] did not want to plead guilty unless he could reserve his right to appeal his sentence because he believe[d] that some of the prior convictions or most of the prior convictions that would be used to calculate his criminal history [we]re invalid for a legal reason." *Id*. Autry asserted that one of the prosecutors "said that they would agree to that," but Autry acknowledged "that never got consummated with a signed petition to enter [a] guilty plea because" he (Autry) had to be hospitalized "due to some medical problems." *Id*. Autry stated that "[a]fter [he] got out of the hospital, [he] was told that they were not prepared to offer us that, and that . . . Rasmussen would not be allowed to enter a conditional plea" and would instead "have to plead, if at all, to the standard plea agreement, which waived his right to appeal his sentence but for the Court going above the advisory guideline range that it finds to apply to the case." *Id*. at 570–71. The prosecutors, however, disputed Autry's assertions and objected to the district court enforcing any type of alleged agreement. Ultimately, the district court rejected Autry's request, noting that "an agreement is not an agreement until it's finalized" and finding that "[t]his one never was." *Id*. at 572.

The case proceeded to trial, but the jury was unable to reach a verdict. The district court declared a mistrial and set a new trial date.

On December 4, 2019, a federal grand jury returned a superseding indictment charging Rasmussen with four counts of bank robbery, all in violation of 18 U.S.C. § 2113(a). Count 1 alleged that on or about March 5, 2019, in Oklahoma City, Rasmussen robbed the Weokie Credit Union. Count 2 alleged that on March 18, 2019, Rasmussen robbed the Bank of the West branch. Count 3 alleged that on April 5, 2019, Rasmussen robbed the RCB Bank. Count 4 alleged that on or about April 4, 2019, Rasmussen robbed the Community Bank of Oklahoma.

Rasmussen moved to dismiss Counts 1 through 3 of the superseding indictment. In support, Rasmussen argued that "[o]n June 20, 2019, [he] entered into a Rule 11 agreement with the government" that "required [him] to truthfully divulge the entirety of his conduct relating to any bank robberies in the Western District of Oklahoma and elsewhere," and that the government had agreed "to allow him to plead guilty to a two-count superseding information charging two bank robberies." *Id*. at 547–48. Rasmussen argued that the government violated the terms of this purported Rule 11 agreement by charging him with Counts 1 through 3 of the superseding indictment, and had in turn violated his due process rights. "In effect," Rasmussen argued, "the government ha[d] abused the grand jury process by seeking additional charges against [him] after having failed to convict him at jury trial on the single-count indictment." *Id*. at 550. Rasmussen argued that he "should be tried solely on the charge contained in the original indictment, and the charges of three additional bank robberies should be dismissed." *Id*. Rasmussen also filed a separate

motion asking the district court to sever for separate trial each of the four counts in the superseding indictment.

The district court denied both of Rasmussen's motions and the case proceeded to a second trial on January 14, 2020. After six days of testimony, the jury returned a verdict of guilty on Counts 1 (Weokie Credit Union), 2 (Bank of the West), and 4 (Community Bank of Oklahoma) of the superseding indictment, and not guilty on Count 3 (RCB Bank). *See id*. at 602, 643–44.

On June 17, 2020, the district court sentenced Rasmussen to mandatory terms of life imprisonment on each count of conviction pursuant to 18 U.S.C. § 3559(c). The district court also ordered Rasmussen to pay restitution in the amount of $37,784.00 and to pay a special assessment fee of $300.00.

Judgment in the case was entered on June 18, 2020. Rasmussen has since filed a timely notice of appeal.

II

Rasmussen asserts three issues in this appeal. First, he argues that the government should have been barred from pursuing the three additional counts of bank robbery that were added in the superseding indictment. Second, he argues that, in any event, all four counts in the superseding indictment should have been severed for separate trials. Third, he argues that his mandatory life sentences should be vacated because they are "based on prior sentences which are infirm." Aplt. Br. at 20. For the reasons that follow, we reject all of these arguments.

Did the district court err in refusing to dismiss the additional robbery charges contained in the superseding indictment?

Rasmussen frames his first issue on appeal in several different ways, at one point arguing that the government should have been barred from seeking the superseding indictment and at another point arguing that the government abused the grand jury process by obtaining the superseding indictment. At bottom, however, Rasmussen appears to be arguing that the district court erred in refusing to dismiss the three additional robbery charges that were contained in the superseding indictment. "We generally review a district court's denial of a motion to dismiss an indictment for an abuse of discretion." *United States v. Mobley*, 971 F.3d 1187, 1194–95 (10th Cir. 2020).

In the motion to dismiss that he filed with the district court, Rasmussen alleged that "[o]n June 20, 2019, [he] entered into a Rule 11 agreement with the government" that "required [him] to truthfully divulge the entirety of his conduct relating to any bank robberies in the Western District of Oklahoma and elsewhere." ROA, Vol. I at 547. Rasmussen further alleged that "[i]n exchange for [his] truthful statements regarding his activities, the government stated in a letter to [his] former attorney that it 'would agree' to allow him to plead guilty to a two-count superseding information charging two bank robberies" and "would not pursue a sentencing enhancement of mandatory life imprisonment under 18 U.S.C. § 3559(c)(1) upon conviction." *Id*. at 547–48. Rasmussen alleged that he "fulfilled his end of the agreement by providing truthful information regarding his activities," but acknowledged that, "[d]espite th[at] fact[,] . . . plea negotiations broke down because the government would not agree to allow him to

enter a conditional plea which would permit him to challenge the substantive and procedural reasonableness of his sentence." *Id*. at 548. Rasmussen argued that "[t]here was nothing to suggest that if [he] was truthful, the government would be able to seek a superseding indictment charging 4 counts of bank robbery in the event that a plea agreement was not reached." *Id*. at 549. He in turn argued that "[s]eeking—and obtaining—a superseding indictment charging additional counts beyond the single count charged in the original indictment violate[d] the Rule 11 agreement, regardless of whether a plea agreement was eventually consummated." *Id*. He also argued that "it appear[ed] that information given by [him] in his Rule 11 debriefings may well have been used to secure, or assisted in securing, the superseding indictment against him." *Id*. at 550 n.2.

In his appellate brief, Rasmussen makes similar, but not entirely identical, arguments. Similar to his arguments below, Rasmussen alleges that the written communications between the prosecutors and his former attorney discussing the initial Rule 11 meeting required only that he be completely truthful about his role in the bank robbery charged in the indictment and about any other bank robberies or federal crimes he may have committed.[1] Rasmussen further alleges, as he did below, that he "cooperated with the government," "was debriefed under Rule 11 twice," and "was

[1] Rasmussen concedes, however, that the email sent by one of the government attorneys to his defense counsel "contained the usual disclaimers and boilerplate stating that it did not in itself constitute a plea bargain, that no promises were being made at this stage, and that the quality and extent of . . . Rasmussen's cooperation would be evaluated unilaterally by the U.S. Attorney's Office." Aplt. Br. at 24.

apparently truthful with the government about his activities." Aplt. Br. at 18. And Rasmussen concedes, as he did below, that no plea agreement was reached because the government would not agree to allow him to "appeal the substantive and procedural reasonableness of his sentence." *Id*. at 19.

Rasmussen argues in his opening appellate brief that an "oral agreement" was reached between Autry and the prosecutors. *Id*. According to Rasmussen, "[t]here was an oral discussion between" Autry and two of the prosecutors during the "second Rule 11 interview." *Id*. at 3. Autry allegedly told the prosecutors that "Rasmussen would not plead guilty" unless he would "be able to appeal the procedural and substantive reasonableness of his sentence." *Id*. Rasmussen alleges the prosecutors "appeared to orally agree to this," but he concedes "this term was never reduced to writing, in any plea agreement or otherwise." *Id*.

Based upon all of these allegations, Rasmussen argues that the government's conduct in seeking and obtaining the superseding indictment was improper. In particular, Rasmussen argues "that the government's fulfillment of its obligations under the Rule 11 agreement—filing, at most, a two count superseding information and foregoing a notice seeking a mandatory life sentence based on [his] previous convictions—was not contingent on [him] pleading guilty." *Id*. at 22–23. Instead, he argues, "[h]is *only* obligation under the Rule 11 agreement was to tell the truth." *Id*. at 23 (emphasis in original). Rasmussen also argues that "the government abused the grand jury process by seeking additional charges afer [sic] having failed to convict [him] at" the first trial. *Id*.

at 26. "This," Rasmussen argues, "smacks of retaliation for having not prevailed initially." *Id*.

We reject Rasmussen's arguments. To begin with, the record on appeal fully supports the district court's finding that "no agreement was reached between" Rasmussen and the government. ROA, Vol. I at 585. And, indeed, Rasmussen comes close to conceding the point in his appellate brief. *E.g.*, Aplt. Br. at 25 ("Although there may not have been a written plea agreement executed by the parties . . . ."). To be sure, Rasmussen argues that "there was a written Rule 11 agreement" that was distinct from a written plea agreement. *Id*. But Rasmussen did not make any such distinction below and, in any event, the record fails to support that argument. *Id*. Most notably, the written letter that was provided to Rasmussen and his initial counsel prior to the first Rule 11 meeting, which they both read and signed, expressly stated that the government was providing Rasmussen with no consideration for his participation in the Rule 11 meeting.

As for Rasmussen's argument that there was an oral agreement between Autry and the prosecutors, he made that argument below only in objections to two paragraphs contained in the presentence investigation report (PSR), and not in the context of his motion to dismiss the additional counts contained in the superseding indictment. *See* ROA, Vol. II at 101–02, 105. In any event, the district court rejected Rasmussen's objections to the PSR and, in doing so, found that no binding plea agreement was entered into between Autry and the prosecution. ROA, Vol. III at 1136, 1140.

Ultimately, all of the evidence in the record on appeal fully supports the district court's finding that no plea agreement was reached by the parties. For example, all of the written communications between the government attorneys and Rasmussen's attorneys emphasized that no agreements had been made by the parties or counsel and that the Rule 11 meetings/discussions, and Rasmussen's participation therein, did not obligate the government to ultimately enter into a plea agreement with Rasmussen. In turn, all of the evidence in the record indicates that when it came to finalizing a plea agreement, the parties could not agree on the terms and no agreement was reached.

Lastly, we reject Rasmussen's arguments that the government abused the grand jury process and retaliated against him after the first trial. Absent a plea agreement or some other type of binding agreement, nothing precluded the government from seeking and obtaining the superseding indictment and, in doing so, adding additional charges against Rasmussen. Further, although Rasmussen has argued in passing that the government may have relied on information it obtained from him during the Rule 11 meetings to seek the additional counts in the indictment, he conceded at oral argument that, in fact, the government did not use any of that information against him in obtaining the superseding indictment or at the second trial.

For all of these reasons, we conclude that the district court did not abuse its discretion in denying Rasmussen's motion to dismiss the new counts in the superseding indictment.[2]

Did the district court err in refusing to sever the counts for trial?

In his second issue on appeal, Rasmussen argues that the district court erred in refusing to sever for trial the four counts in the superseding indictment. Generally speaking, we review the denial of a motion to sever for an abuse of discretion. *United States v. Hill*, 786 F.3d 1254, 1272 (10th Cir. 2015). A defendant "bears a particularly heavy burden when seeking to demonstrate [such] an abuse of discretion." *Id*.

Rule 8(a) of the Federal Rules of Criminal Procedure governs the joinder of offenses. It provides, in pertinent part, that "[t]he indictment . . . may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . 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).

[2] In the heading to Issue I in his appellate brief, Rasmussen also argues that "the government should have been precluded from seeking a mandatory life sentence upon conviction." Aplt. Br. at 20 (capitalization omitted). Notably, Rasmussen does not mention this argument in the body of his brief. In any event, to the extent the argument is actually preserved, it appears to hinge on Rasmussen's assertion that he and the government entered into some type of binding agreement. For the reasons discussed above, there is no merit to that assertion.

Rule 14 of the Federal Rules of Criminal Procedure, entitled "Relief from Prejudicial Joinder," creates a narrow exception to Rule 8(a). Rule 14(a) provides, in pertinent part, that "[i]f the joinder of offenses . . . in an indictment . . . appears to prejudice a defendant or the government, the court may order separate trials of counts." Fed. R. Crim. P. 14(a).

Notably, Rasmussen concedes that the four counts alleged in the superseding indictment were "of the same or similar character, since they charge[d] the same crime." Aplt. Br. at 27. Thus, he is not alleging that the superseding indictment violated Rule 8(a). Indeed, he admits in his opening brief that "joinder of the [four] bank robbery counts was appropriate under Rule 8(a)." *Id*. at 28.

Rasmussen instead argues that he "was prejudiced by the joint trial of all [four] charges." *Id*. In support, Rasmussen notes that "[w]hen the Community Bank robbery was the only charge" he faced "and he went to trial, the evidence of that offense, standing by itself, was so questionable that the jury could not agree to a verdict and a mistrial was declared." *Id*. But, Rasmussen argues, "[t]he joinder of offenses lent it and the other charges an apparent strength they did not have individually." *Id*. He further argues that "[t]he disparate outcomes of the first trial and the second with respect to the Community Bank robbery is direct evidence of the unfairly prejudicial impact of a joint trial on all charges, and undercuts the logic of the district court's denial of the severance motion." *Id*. In sum, he argues that the jurors in his case "could have readily decided to convict on at least one demonstrably weak charge because there were [sic] a plethora of similar charges." *Id*. at 29.

Rasmussen's allegations of prejudice are insufficient to satisfy the requirements of Rule 14. At bottom, Rasmussen appears to be alleging that the joint trial of the four counts alleged in the superseding indictment effectively prevented the jury from being able to adequately distinguish between the evidence presented on each count and arrive at a reliable judgment. A review of the evidence presented at trial, however, belies that argument. Each of the four counts alleged in the superseding indictment occurred on separate dates and involved distinct banks and bank employees. As a result, "[t]he evidence was not . . . too confusing or unfairly overlapping." *United States v. Gonzales*, 535 F.3d 1174, 1184 (10th Cir. 2008) (quotation marks omitted). Further, the evidence presented at each trial, including the eyewitness identifications of Rasmussen, was sufficient to support each of the three counts of conviction. *Id*.

Notably, the jury convicted Rasmussen on only three of the counts and acquitted him on the fourth. *See United States v. Hastings*, 577 F.2d 38, 40 (8th Cir. 1978) (holding that the fact the jury acquitted defendant on two of the four counts with which he was charged "strongly rebut[ted] [his] claim" that the district court abused its discretion in denying his motion to sever the counts for trial). The one count on which Rasmussen was acquitted was the RCB Bank robbery. That robbery was the only one of the four robberies in which no bank employee identified Rasmussen as the suspect. Thus, contrary to Rasmussen's suggestion, the record establishes that the jury was able to distinguish between the evidence presented on each count and arrive at a reliable judgment. *Cf. Zafiro v. United States*, 506 U.S.

534, 539 (1993) (holding that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a 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").

It is also relevant to note that even if Rasmussen could demonstrate prejudice or a significant risk of prejudice, that "alone would still not require severance under Rule 14." *Hill*, 786 F.3d at 1273. In *Zafiro*, the Supreme Court held that "less drastic measures, such as limiting instructions," rather than severance, "often will suffice to cure any risk of prejudice." 506 U.S. at 539. Notably, the district court in this case gave a limiting instruction to the jury at the second trial. That instruction advised the jury that they "must separately consider the evidence . . . on each count charged and return a separate verdict on each count," and that their "verdict as to any one count . . . should not influence [their] verdict as to any other count." ROA, Vol. I at 627 (Instruction No. 14).

Thus, in sum, we conclude the district court did not abuse its discretion in denying Rasmussen's motion to sever the four counts for purposes of trial.

Rasmussen's life sentences

In his third and final issue on appeal, Rasmussen challenges the district court's conclusion that it was required by 18 U.S.C. § 3559(c) to impose terms of life imprisonment for each of the three counts of conviction. We review de novo the

district court's imposition of a statutory mandatory minimum sentence. *United States v. Hebert*, 888 F.3d 470, 472 (10th Cir. 2018).

Section 3559(c) provides, in pertinent part, that "a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if . . . the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of . . . 2 or more serious violent felonies . . . and . . . each serious violent felony . . . used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony." 18 U.S.C. § 3559(c). The statutory phrase "serious violent felony" is defined to include "a Federal or State offense . . . consisting of . . . robbery," as well as "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." 18 U.S.C. § 3559(c)(2)(F).

Rasmussen argues that the district court erred in applying § 3559(c) and sentencing him to mandatory terms of life imprisonment. To begin with, Rasmussen argues that when the government filed its information seeking the application of § 3559(c), it cited to four of his prior convictions. Rasmussen argues that at least two of those prior convictions—one from Love County and another from Marshall County—"were found to be too old to count for any criminal history points," and

thus should not be used to "ratchet [his] punishment up to mandatory life." Aplt. Br. at 31. We reject this argument, however, because the district court did not rely on either of these prior convictions in imposing mandatory life sentences under § 3559(c). Instead, the district court relied on Rasmussen's 1991 federal conviction for bank robbery and his 1992 Oklahoma County conviction for robbery with a firearm. Unlike the Sentencing Guidelines, which exclude older prior sentences for purposes of calculating a defendant's criminal history category, *see* U.S.S.G. § 4A1.2(e) (outlining which prior sentences are included and excluded for purposes of criminal history calculation), 18 U.S.C. § 3559(c) does not exclude any prior convictions for serious violent felonies. Consequently, it was entirely proper for the PSR and the district court to rely on any of Rasmussen's prior convictions, so long as they qualified as "serious violent felonies" under § 3559.

Rasmussen also makes a convoluted argument regarding his 1992 Oklahoma County conviction for robbery with a firearm. In short, he appears to be challenging the legality of the sentence that he served for that conviction due to the manner and order in which it was served when reviewed in conjunction with his 1991 federal conviction. This argument, however, is irrelevant to the applicability of § 3559(c) because it is the fact of conviction that matters, not the sentence. *See* 18 U.S.C. § 3559(c) (applicability of the mandatory life sentence depends, in part, upon prior

"convictions" for "2 or more serious violent felonies"). And nowhere does Rasmussen dispute the fact of his 1991 Oklahoma County conviction.[3]

Rasmussen also argues, relatedly, that had he been allowed to serve his 1991 federal sentence before his 1992 Oklahoma County sentence, the 1991 federal conviction would be considered "too old to serve as a predicate for designating him a career offender." Aplt. Br. at 33. This argument is flawed for at least two reasons. First, it is the date a sentence is imposed, rather than when it is completed, that matters for purposes of determining whether a prior conviction is counted under the Sentencing Guidelines in determining a defendant's criminal history and whether he is considered a "career offender." *See* U.S.S.G. § 4A1.2(e). Second, even assuming, for purposes of argument, that Rasmussen was not properly categorized as a "career offender" under U.S.S.G. § 4B1.1, he remains subject to 18 U.S.C. § 3559(c) and its requirement of mandatory life sentences. As previously discussed, the date of a prior conviction is irrelevant to the applicability of § 3559(c). *See United States v. Bredy*, 209 F.3d 1193, 1198 (10th Cir. 2000) (holding that § 3559(c)'s "lack of time limitations on predicate convictions does not violate substantive due process"). Thus, Rasmussen was unquestionably subject to § 3559(c) and its mandatory requirement of a life sentence for each of his current convictions. And § 3559(c)'s requirement of a mandatory term of life imprisonment trumps any determination

[3] In any event, Rasmussen all but concedes that he has two other state convictions that would qualify as "serious violent felonies" for purposes of § 3559(c). *See* Aplt. Br. at 31.

regarding whether or not Rasmussen was a "career offender" under the Sentencing Guidelines. In other words, even if Rasmussen was not considered to be a "career offender" under the Sentencing Guidelines (due to the age of his prior convictions), he still would have remained subject to § 3559(c) and its requirement of mandatory life sentences for each of his current convictions.

Thus, in sum, the district court did not err in sentencing Rasmussen to mandatory life sentences pursuant to § 3559(c).[4]

III

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

[4] Rasmussen also argues on appeal that the district court, in calculating his advisory Guidelines sentencing range, erred in applying several sentencing enhancements. It is unnecessary for us to address these arguments because the life sentences that were mandated by § 3559(c) effectively overrode the advisory Guidelines sentencing range.