

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 10 2004

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MANJIT KAUR,

Defendant - Appellant.

No. 03-30306

D.C. No. CR-02-00224-FVS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, Chief Judge, Presiding

Argued and Submitted June 8, 2004
Seattle, Washington

Before: PREGERSON, FERGUSON, and CALLAHAN, Circuit Judges.

Manjit Kaur appeals her conviction on charges of distributing and possessing pseudoephedrine knowing or having reasonable cause to believe that it would be used to manufacture methamphetamine. She contends that the district court erred in joining her case with those of her co-defendants, abused its

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discretion in denying her motions to sever, and abused its discretion in formulating a jury instruction explaining the meaning of “reasonable cause to believe.” We address Ms. Kaur’s jury instruction claim in a separate concurrently-filed published opinion because it raises an issue of first impression in this circuit. In this disposition we address only Ms. Kaur’s claims regarding misjoinder and severance. As the parties are familiar with the facts, we recite them only as necessary to explain our decision.

A claim that defendants were misjoined under Federal Rule of Criminal Procedure 8 is a question of law we review de novo. *United States v. Vasquez-Velasco*, 15 F.3d 833, 843 (9th Cir. 1994). Because cases can be joined under Federal Rule of Criminal Procedure 13 only if they could have been joined under Rule 8, a claim of misjoinder under Rule 13 likewise is reviewed de novo. We review denial of a motion to sever for abuse of discretion. *United States v. Alvarez*, 358 F.3d 1194, 1206 (9th Cir. 2004).

Under Federal Rule of Criminal Procedure 8(b), an indictment may charge two defendants together “if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.” In addition, separate cases may be joined together for trial under

Federal Rule of Criminal Procedure 13 only “if all offenses and all defendants could have been joined in a single indictment.”

In this circuit, “‘transaction’ is interpreted flexibly, and whether a ‘series’ exists depends on whether there is a logical relationship between the transactions.” *Vasquez-Velasco*, 15 F.3d at 843 (quotation and citations omitted). A logical relationship is often demonstrated at trial through evidence of “the existence of a common plan, scheme, or conspiracy.” *Id.* at 843, 844 & n.8 (quotation and citation omitted). “Mere factual similarity of events will not suffice.” *United States v. Ford*, 632 F.2d 1354, 1372 (9th Cir. 1980).

There is a preference in the federal system for jointly trying defendants who were indicted together. *Zafiro v. United States*, 506 U.S. 534, 537 (1993); *United States v. Polizzi*, 801 F.2d 1543, 1553 (9th Cir. 1986). Further, “permitting initial joinder of charges against multiple defendants whenever the common activity constitutes a substantial portion of the proof of the joined charges” serves “Rule 8(b)’s goal of maximum trial convenience consistent with minimum prejudice.” *Ford*, 632 F.2d at 1372.

But even where joinder was proper, a defendant may nevertheless be entitled to severance “[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the

government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

To obtain reversal of a denial of a motion to sever, a defendant must demonstrate prejudice from the joint trial. *Vasquez-Velasco*, 15 F.3d at 845-46.

The propriety of the district court's initial joinder of fifteen defendants became moot when the district court divided the fifteen defendants into smaller groups for trial. The court safeguarded against prejudice to the defendants by granting them leave to opt out of any pretrial motion and to move for severance. Thus, even assuming Ms. Kaur could demonstrate that the district court erred in this initial joinder, Ms. Kaur cannot show prejudice resulting from the consolidation of her case with those of fourteen others for pretrial purposes. *See United States v. Sarkisian*, 197 F.3d 966, 976 (9th Cir. 1999) (misjoinder subject to harmless error review).

The district court did not err in continuing to join Ms. Kaur's case with that of Balraj Singh ("B. Singh") because Ms. Kaur and B. Singh each had a role in a single series of prohibited transactions. Further, because Ms. Kaur and B. Singh were indicted together, there was a preference that they be tried together. Severance was not required because the court protected against *Bruton* problems by screening testimony about the defendants' statements before the testimony was

presented to the jury. The witnesses did not testify about portions of the defendants' statements that incriminated the other defendant. In any event, Ms. Kaur and B. Singh both testified at trial and were available for and subject to cross-examination by each others' counsel. Further, severance was not required because Ms. Kaur's and B. Singh's defenses were not mutually antagonistic. Each claimed not to know that the Action distributed at Sunset would be used to manufacture methamphetamine; the jury could have accepted either's defense without convicting the other. *See United States v. Throckmorton*, 87 F.3d 1069, 1072 (9th Cir. 1996) ("To be entitled to severance on the basis of mutually antagonistic defenses, a defendant must show that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.").

However, the district court did err in continuing to join Ms. Kaur's case with that of Amandeep Singh ("A. Singh"). To the extent a logical relationship exists between the two cases, it exists only from the perspective of the Drug Enforcement Agency and its confidential source, and not from the perspective of the defendants. There was no evidence at trial that Ms. Kaur and A. Singh ever met, spoke, or coordinated their efforts. That they were both investigated for the same type of criminal activity at the same time by the same individuals is

coincidental. This is the type of mere factual similarity that cannot, without more, support joinder.

We conclude that the misjoinder of, and later failure to sever, the cases against A. Singh and Ms. Kaur was prejudicial and “had substantial and injurious effect or influence in determining the jury's verdict.” *United States v. Lane*, 474 U.S. 438, 449 (1986) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Because there was absolutely no link between these two defendants, this is an unusual case: they did not participate in the same act or transaction. First, Ms. Kaur’s codefendant, A. Singh, possessed and distributed not only pseudoephedrine but also methamphetamine. This created a high risk of Ms. Kaur being found guilty by association. *See United States v. Satterfield*, 548 F.2d 1341, 1346-47 (9th Cir. 1977) (where one defendant is charged with offenses in which the other defendants did not participate, “codefendants run a high risk of being found guilty merely by association.”). Second, Ms. Kaur’s defense was that she did not know that the pseudoephedrine would be used to make methamphetamine. The joinder with A. Singh’s case weakened this defense; absent the joinder of A. Singh, no evidence of methamphetamine would have been presented to the jury.

Accordingly, the district court should not have joined—and once it did, should have corrected that error by severing—the cases against Ms. Kaur and A. Singh. Therefore, we REVERSE and REMAND for a new trial.