

USA v Kaur, No. 03-30306

SEP 10 2004

CALLAHAN, Circuit Judge, dissenting:

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

Because Manjit Kaur has not, and cannot, show prejudice from her joint trial with Amandeep Singh (“A. Singh”), I respectfully dissent.

Regardless of the propriety of the joinder of the trials, for Ms. Kaur to obtain relief from the district court’s denial of her motion to sever she must demonstrate prejudice from the joint trial. *United States v. Vasquez-Velasco*, 15 F.3d 833, 845-46 (9th Cir. 1994) (“The party seeking reversal of the denial of a motion to sever bears the burden of proving such ‘clear,’ ‘manifest’ or ‘undue’ prejudice from the joint trial, that [it] violates one of his substantive rights, so that the prejudice is of ‘such a magnitude that the defendant was denied a fair trial.’” (alteration in original) (quotation marks and citations omitted)).

This case is controlled by our opinion in *Vasquez-Velasco*. There we explained: “In assessing whether joinder was prejudicial, of foremost importance is whether the evidence as it relates to the individual defendants is easily compartmentalized. Central to this determination is the trial judge's diligence in instructing the jury on the purpose of the various types of evidence.” 15 F.3d at 846 (citations omitted).¹ We further held:

¹ See also *United States v. Cuzzo*, 962 F.2d 945, 950 (9th Cir. 1992) (noting that (a) in assessing prejudice to a defendant from the “spillover” of

Vasquez-Velasco has not presented any reasons, other than the emotionally-charged nature of the Camarena murder, as to why the jury would be unable to consider separately the evidence that applies to the two pairs of murders. Instead, those factors we traditionally rely on to demonstrate lack of prejudice are all present. First, the district court carefully instructed the jury that the tapes could not be considered as evidence against Vasquez-Velasco and that the jury should not be swayed by their emotions. Second, the murders of Walker and Radelat and of Camarena and Zavala were separate incidents that occurred approximately a week apart. As such, they were discrete acts that a jury could compartmentalize reasonably easily. Third, the fact that the jury returned discrete and selective verdicts against each of the four codefendants on four separate days can be seen as evidence of their ability to compartmentalize both the charges and the evidence.

Id.

The record in this case shows that the joinder was harmless error. The prosecutor presented the case in subparts, frequently reminding the jury that testimony and evidence was being presented only against specific defendants. Although A. Singh pleaded guilty before the trial concluded, this was after the government presented evidence against him that was separate and distinct from the evidence presented against Ms. Kaur and Balraj Singh.² Also, although there was evidence that A. Singh, unlike Ms. Kaur or Balraj Singh, possessed not only

incriminating evidence, the primary consideration is whether the jury could compartmentalize the evidence as it relates to separate defendants, (b) a critical factor is the judge's diligence in instructing the jury on the various strands of evidence, and (c) the fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence).

² See *United States v. Duran*, 189 F.3d 1071, 1081-82 (9th Cir. 1999) (“Evidence is susceptible of compartmentalization when the acts constituting the crimes that were allegedly misjoined are discrete.”).

pseudoephedrine, but also methamphetamine, such evidence is hardly as prejudicial as the murder evidence in *Vasquez-Velasco*.³ The judge carefully instructed the jury to compartmentalize its deliberations.⁴ Furthermore, the jury, by convicting Ms. Kaur and acquitting A. Singh, demonstrated that it had followed the judge's instructions.

The majority, instead of determining whether the evidence was easily compartmentalized, whether the jury was carefully instructed and whether the jury was improperly influenced, simply decides that the joinder was error and then concludes that because the joinder "weakened" Ms. Kaur's defense she was entitled to a new trial. This approach is contrary to that taken in *United States v. Lane*, 474 U.S. 438, 449 (1986) (holding that misjoinder only requires reversal if it results in actual prejudice) and *Vasquez-Velasco*, and fails to give appropriate deference to the trial judge who was most familiar with the defendants, the

³ See also, e.g., *United States v. Sarkisian*, 197 F.3d 966, 977 (9th Cir. 1999) ("Although there was more evidence supporting Mikayelyan's involvement in the scheme than that of either Sarkisian or Ivanchikov, it cannot be said that the difference between their respective culpabilities was so substantial as to unfairly influence the jury's verdict.").

⁴ Jury Instruction 27 read: "A separate crime is charged against each defendant in each count. The charges have been joined for trial. Not only must you separately decide the case of each defendant, but also you must separately decide each crime charged against each defendant. Your verdict on any count should not control your verdict on any other count involving that defendant or any other defendant."

evidence and the jury.

_____In conclusion, I would affirm Ms. Kaur's conviction because the record in this case does not support a determination that Ms. Kaur was prejudiced by being tried with A. Singh.