

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p>UNITED STATES OF AMERICA</p> <p style="text-align:center">v.</p> <p>MICHAEL YOUNG</p>	<p>CRIMINAL ACTION</p> <p>NO. 14-183-2</p>
--------------------------------------------------------------------------------------------------------	----------------------------------------------------------

Baylson, J.

June 5, 2015

MEMORANDUM RE DEFENDANT’S MOTION TO SEVER OFFENSES

By Order dated May 5, 2015 (ECF 61), the Court granted defendant’s motion for a severance of Count I from Counts II and III of the Superseding Indictment in this case and directed that the trial on May 14, 2015 proceed on Counts II and III only. This Memorandum will explain the Court’s reasoning.

I. HISTORY OF CASE

Defendant was indicted for interference with interstate commerce by armed robbery in violation of 18 U.S.C. § 1951(a) and use of a firearm in violation of 18 U.S.C. § 924(c), in connection with the robbery of the Chuen Hing Grocery in South Philadelphia on January 28, 2014. The co-defendant in this case, Dylan Capone, has pleaded guilty with a cooperation plea agreement and intends to testify against Young.¹ Young was arrested after running away from police shortly after the robbery. The government asserts that a surveillance video in the Chuen Hing Grocery shows two men participating in the robbery. The government acknowledges that a victim said a third man was involved in the robbery, but he remains unidentified. The victims themselves are unable to identify either Young or Capone.

Subsequent to the first Indictment, the government filed a Superseding Indictment on

¹ Capone did testify against Young at Young’s criminal trial on Counts II and III of the Superseding Indictment held May 14-15 and 19-20, 2015. At that trial, the jury returned a guilty verdict against Young.

February 19, 2015 (ECF 46), asserting that Michael Young, alone, was liable for interference with interstate commerce by robbery of the Santa Fe Food Market, also in South Philadelphia, on January 20, 2014, approximately one week prior to the Chuen Hing robbery. The government asserts that its evidence of Young's involvement in the Santa Fe robbery does not rely on victim eyewitness identification. Instead, the government relies on two pieces of evidence:

(1) testimony by Capone that Young admitted his involvement in the Santa Fe robbery, and
(2) identification of Young by his sister in a surveillance video taken from outside the Santa Fe Food Market. Young's sister testified before the grand jury that the person in the video is Young, and he is shown in the video wearing a sweater that his sister knows belongs to him.

On April 15, 2015, Young moved to sever the offenses in the Superseding Indictment (ECF 54) because of misjoinder under Fed. R. Crim. P. 8(a) and/or because of undue prejudice under Fed. R. Crim. P. 14(a). The government responded on April 24, 2015 (ECF 56), and the Court held oral argument on May 5, 2015.

At the hearing, the Court questioned counsel closely about United States v. Reicherter, 647 F.2d 397 (3d Cir. 1981), which remains the leading Third Circuit case on a criminal defendant's motion for severance because of claims that defending against two separate offenses in a single trial would be prejudicial. In Reicherter, the Third Circuit affirmed the denial of severance because defendant failed to make a sufficient factual showing of undue prejudice. 647 F.2d at 401.

The Court suggested defense counsel make an *ex parte* offer of proof of the prejudice that Young would suffer if forced to defend against both robbery offenses in the same case. See id. at 400-01 (implying a defendant should be given the opportunity to make a showing that severance is

warranted). After the Assistant United States Attorney left the Courtroom, the Court received an *ex parte* offer of proof from defense counsel, the transcript of which has been sealed.

In ruling following the *ex parte* hearing, the Court held that joinder of the offenses was proper under Fed. R. Crim. P. 8(a). However, the Court also concluded that defense counsel showed some specific prejudice that defendant would suffer if he had to defend against both of these very serious robbery charges during the same trial.

After the hearing, the Court **GRANTED** the motion to sever under Fed. R. Crim. P. 14(a) and ordered the trial of only the Chuen Hing Grocery robbery and accompanying § 924(c) charge to begin on May 14, 2015.

II. GOVERNMENT MOTION FOR RECONSIDERATION

Following the close of the evidence, the government filed a motion for reconsideration on May 7, 2015 (ECF 62), asserting that it had recently discovered additional facts which showed a linkage between the Chuen Hing and Santa Fe robberies. Specifically, as stated at a hearing held on May 11, 2015, the government asserted that a victim of the Santa Fe robbery had, upon questioning during a recent interview, identified a photograph of the gun seized from Capone after the Chuen Hing robbery as “similar” to the gun that she saw in the hands of the robber of the Santa Fe Food Market on January 20, 2014. The Court has put the word “similar” in quotation marks because it is not clear exactly what adjective the witness would use if she were to testify at trial. The witness only relied on the photograph to identify the gun, and her exact testimony at trial would depend on her observation of the actual gun in Court, the phrasing of questions, her recollection, and the extent of cross-examination.

After considering the government’s motion for reconsideration, the Court **DENIED** it and

set the trial of the Chuen Hing robbery and the firearms charge, Counts II and III of the Superseding Indictment, to begin on May 14, 2015.

III. DISCUSSION

The following discussion of the Court's decision to grant severance includes several hypotheticals as to how a trial (or trials) of the offenses with which Young is charged may proceed. These hypotheticals are offered for illustrative purposes only. The Court fully recognizes that, as to the merits of the government's evidence, Young is presumed innocent, the government has the burden of proving Young guilty beyond a reasonable doubt, and Young has the absolute right not to testify, in which case the Court must charge the jury that it is not to consider Young's decision not to testify in any way.

Fed. R. Crim. P. 14(a) provides that if the joinder of offenses appears to prejudice a defendant, "the court may order separate trials of counts . . . or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). The decision of whether to sever rests in the sound discretion of the trial judge, who is best situated to weigh potential prejudice of a joint trial to the defendant against the interests of judicial economy. Reicherter, 647 F.2d at 400. A trial court may grant a motion to sever if the defendant demonstrates that trying counts together would cause a "clear and substantial prejudice resulting in a manifestly unfair trial." Id. In considering a motion for severance, a primary concern is whether the jury can reasonably be expected to "compartmentalize" the evidence as it relates to each separate count and consider it for its proper purposes. Id.

Having established those doctrinal parameters, the Court turns to the evidence in this case. As the Court briefly explained at the hearings, the government's evidence against Young as to the

two robberies is asymmetrical. Of the two robberies, the government's evidence against Young regarding the Chuen Hing robbery is stronger. The government has direct evidence of Young's participation—principally, testimony of co-defendant Capone, Young's arrest while in flight shortly after the robbery, and the recovery of the gun—that is potentially incriminating. Experience teaches that this incriminating evidence would likely lead defense counsel to recommend strongly to Young that he not testify with regard to the Chuen Hing robbery.

On the other hand, the evidence against Young as to the Santa Fe robbery is comparatively less strong. The victims are not able to identify anyone. Moreover, the grand jury testimony of Young's sister—that she identified Young in a photograph standing outside the Santa Fe Grocery wearing a sweater that she bought for him—is based on a very fuzzy photograph. At trial, Young's sister would be subject to vigorous cross-examination. Having reviewed the photograph, the Court is not sure whether a jury would credit her identification of Young. The photograph does not clearly show the face or the type of clothing the person in the photograph is wearing, nor the actual commission of any crime.

In light of the limitations of this evidence, the government's case against Young as to the Santa Fe robbery is likely to rely heavily on Capone's anticipated testimony that Young admitted his commission of the Santa Fe robbery as they were planning the Chuen Hing robbery. However, Capone is cooperating with the government and likely wants to please the government as much as possible in order to receive a 5K1.1 departure motion and a sentence below the seven year mandatory minimum for the firearm offense. Moreover, the testimony the government says Capone will give regarding Young's admission is uncorroborated.

The new fact that the government introduced in its motion for reconsideration—that one of

the Santa Fe victims will testify that the gun recovered after the Chuen Hing robbery, near where Capone and Young were arrested, is “similar” to the gun she saw in the hands of the Santa Fe robber—is circumstantial evidence against Young but would be subject to many variables in front of a jury.

In order to determine the merits of the request for severance, the Court must assume what might happen in a joint trial of both robberies based on incomplete information. The Court does not know and cannot inquire whether Young will testify at trial, as he cannot be forced to make any decision about testifying until the government has rested its case, and Young has called any other defense witnesses. Accordingly, the Court must make a decision about the potential prejudice that would arise from a joint trial without knowing whether Young will testify, what evidence the government will introduce, and what cross-examination of witnesses would yield.

As the government has pointed out, there are many cases in which district courts have allowed, and the Third Circuit has affirmed, joint trials of two or more Hobbs Act robberies, particularly where they have been committed within a short time frame. The Court recognizes these principles, and as noted above, the Court concludes the joinder of the two offenses in the Superseding Indictment was proper under Fed. R. Crim. P. 8(a).

In this case, however, the Court is concerned in the event that Young desires to testify in defense of the Santa Fe robbery, but not in defense of the Chuen Hing robbery. If faced with both charges at a single trial, Young would face a dilemma in determining whether to testify in his own defense. As noted, Young is unlikely to testify as to the Chuen Hing robbery. However, he may want to testify to deny commission of the Santa Fe robbery, in which the evidence against him is relatively less strong. Even if Young decided not to testify at all, the prejudice would be reduced,

but not eliminated.

In a joint trial, the Court could, and probably would, restrict the government's cross-examination to the scope of Young's direct testimony. Thus, if Young limited his direct testimony to a denial of the Santa Fe robbery, the Court would likely not allow the government to cross-examine Young as to the Chuen Hing robbery. In this event, the Court would undoubtedly instruct the jury that although they could consider Young's credibility regarding his denial of the Santa Fe robbery, they could not, in any way, consider in deliberations Young's decision not to testify regarding the Chuen Hing robbery. Even with such an instruction, the jury could regard Young's failure to testify about the Chuen Hing robbery—reasonably but improperly—as an implied admission. Or the jury could decide to convict Young of the Santa Fe robbery based largely on the government's evidence against him regarding the Chuen Hing robbery.

The Court concludes that such scenarios would be prejudicial to Young, given the distinct asymmetry of the government's evidence as to the two robberies. Courts have been concerned about the potential prejudice to a defendant being tried with a codefendant in one trial should the jury disregard limiting instructions and infer defendant's guilt from a codefendant's confession. See Bruton v. United States, 391 U.S. 123, 135-136 (1968) (holding that a defendant is deprived of his Confrontation Clause rights when his non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant). Similarly, courts have been concerned about the potential prejudice from a joinder of offenses because (1) the jury could cumulate evidence of separate crimes; (2) the jury may improperly infer a criminal disposition and treat the inference as evidence of guilt; and (3) the defendant may be confounded in presenting defenses, as where he

desires to assert his privilege of self-incrimination with respect to one crime but not the other. See United States v. Delbridge, No. 05-0135, 2007 WL 710245, at *2 (W.D. Pa. Mar. 6, 2007); United States v. Rich, 326 F. Supp. 2d 670, 680 (E.D. Pa. 2004); Cross v. United States, 335 F.2d 987, 989-90 (D.C. Cir. 1964).

In some cases, courts have concluded that prejudice may arise from the joinder of a strong evidentiary case with a weaker one. See, e.g., Bean v. Calderon, 163 F.3d 1073, 1083-85 (9th Cir. 1998) (holding joinder was improper because “[c]onsolidation of the relatively weak” evidence from one murder offense with the more compelling evidence from the second murder offense “violated [defendant’s] right to due process by leading the jury to infer criminal propensity” and permitted the jury to rely on the evidence from the stronger case to strengthen the otherwise weak evidence against defendant in the second case); Gregory v. United States, 369 F.2d 185, 189 (D.C. Cir. 1966) (holding that although the offenses were properly joined under Fed. R. Crim. P. 8, severance should have been granted under Fed. R. Crim. P. 14 because “there was not only the danger of the evidence with respect to the two robberies cumulating in the jurors’ minds tending to prove the defendant guilty of each, but the evidence as to one of the robberies was so weak as to lead one to question its sufficiency to go to the jury”). Joinder of counts tends to prejudice jurors’ perceptions of a defendant and of the strength of the evidence against him. United States v. Lewis, 787 F.2d 1318, 1319 (9th Cir. 1986).

In United States v. Bergrin, No. 09-469, 2011 WL 4407433, at *2 (D.N.J. Sept. 21, 2013), the court granted a defendant’s motion to sever offenses on the grounds that the disparity in evidence against him on two separate counts would have led to unacceptable prejudice. Defendant was charged with conspiring to murder and murdering K.D.M., a witness, and

conspiring to murder “Junior the Panamanian,” another witness. Bergrin, 2011 WL 4407433, at *1. The government proffered that it would have introduced strong evidence connecting defendant to the murder of “Junior,” including audio recordings in which defendant explicitly discussed the murder. Id. at *2. In contrast, the government’s evidence regarding the murder of K.D.M. would have been more circumstantial and comparatively much weaker. Id. The court concluded that the jury would inevitably have used the evidence regarding Junior’s murder to infer defendant’s guilt for K.D.M.’s murder, regardless of any limiting instructions, because the jurors could not be expected to compartmentalize evidence where the nature of the two charges was similar and the level of evidence as to each was asymmetrical. Id. at *3.

In United States v. Ragghianti, the Ninth Circuit held that the trial court erred in failing to grant a defendant’s motion to sever counts in light of the weakness of the evidence against him. 527 F.2d 586, 588 (9th Cir. 1975). Defendant was indicted on two counts for two separate bank robberies. Id. at 587. The Ninth Circuit ruled that trial on both counts had been prejudicial to defendant because there was a lack of evidence against him on the first count, which led to the trial court granting a motion for acquittal on that count. Id. The court noted that a lack of evidence on one charge joined with a similar charge could be prejudicial in two ways: it could lead the jury to believe that defendant is bad because he was charged with several things or it could prevent defendant from testifying on one count but not the other. Id. at 587-88.

In another Ninth Circuit case, the court concluded that the trial court’s failure to sever firearm counts supported by weak evidence manifestly prejudiced a defendant’s chance for acquittal. Lewis, 787 F.2d at 1323. Defendant was convicted for conspiracy, bank larceny, killing to avoid apprehension for bank larceny, and being a felon in receipt of a firearm. Id. at

1320. The evidence on the killing charge was sparse. Id. at 1322. Defendant asserted that he was prejudiced by a joint trial of the murder and firearm counts because evidence on the firearm charge included evidence of past perjury and a prior burglary conviction, which would have been inadmissible in a trial on only the larceny and murder charges since defendant would not have testified. Id. at 1321. The court held that the larceny and murder counts should have been severed from the firearm count because the evidence of defendant's prior convictions presented on the firearm charge influenced the jury's determination on the killing charge, for which the evidence against defendant was weak. Id. at 1323.

IV. CONCLUSION

Although the term "asymmetrical" has not been specifically used in any precedents this Court can find, that word describes the situation in this case, and this Court followed the precedents discussed above in granting Young's motion for severance because a joint trial had the potential of undue and unfair prejudice.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.