

claimed that there was a variance between the indictment and the proof at trial which was prejudicial, warranting reversal, in that it resulted in the admission of irrelevant evidence and inadmissible hearsay, and trial in an improper venue. Specifically, appellant claimed that the government had failed to prove that there had been one large conspiracy as the indictment charged and had instead shown multiple distinct conspiracies.

After oral argument, the panel afforded the parties the opportunity to submit additional briefs addressing the issue of whether, if there was a variance, the jury instructions cured any prejudice that may have resulted. These briefs revealed that the jury instructions had no such salutary effect. After considering the record, we agree with the appellant and reverse the conviction. We find it unnecessary, therefore, to reach the additional issues raised by the appellant in his appeal.

DISCUSSION

A variance is shown when, viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the elements of the crime charged beyond a reasonable doubt. United States v. Abushi, 682 F.2d 1289, 1293 (9th Cir. 1982). If the variance between the indictment and proof affects the substantive rights of the parties, then it is prejudicial and warrants reversal. United States v. Kenny, 645 F.2d 1323, 1334 (9th Cir. 1981), cert. denied 452 U.S. 920 (1981).

We agree with the appellant that there was a variance here. Based upon the government's proof, no rational trier of fact could

have found a single conspiracy beyond a reasonable doubt.

The government tried to prove that this was a "wheel" type conspiracy in which the central "hub" engages in various individual transactions which are the "spokes". These separate transactions are linked together by a "rim", which is the overall agreement among the parties to carry out the objectives of the conspiracy. Without the "rim", each of the "spokes" is a separate conspiracy. See Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Kenny, 645 F.2d at 1334-1335.

In order to establish the overall agreement, "the government need not show direct contact or explicit agreement between the defendants. It is sufficient to show that each defendant knew or had reason to know of the scope of the conspiracy and that each defendant had reason to believe that their own benefits were dependent upon the success of the entire venture." United States v. Kostoff, 585 F.2d 378, 380 (9th Cir. 1978) "Evidence of only a slight connection is necessary." United States v. Kenny, 645 F.2d at 1335.

Simply put, even under these liberal standards of proof, the government failed to show that the appellant had any link to the other transactions. Thus, there were multiple conspiracies here and not one large conspiracy. This variance affected the substantive rights of the appellant in that it resulted in the admission of prejudicial evidence and trial in an improper venue.

By proceeding on the single conspiracy theory, the government was able to introduce irrelevant and prejudicial evidence regarding

the prior transactions and hearsay of the purported co-conspirators. The jury instructions did nothing to cure this prejudice and even compounded it by specifically advising the jury that they could impute the overt acts of the purported co-conspirators to the appellant.

The single conspiracy indictment also allowed for venue to be founded in the District of Arizona based upon acts committed by the purported co-conspirators. Venue may be found in any district in which an overt act in furtherance of the conspiracy has been committed. United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974). Because the government failed to prove that any overt act involving appellant's alleged transaction took place in Arizona, the District of Arizona was not a proper venue. See United States v. Durades, 607 F.2d 818, 820 (9th Cir. 1979). Prosecution in an improper venue infringed appellant's substantive rights. Id.

For the above-stated reasons, the conviction is REVERSED.