FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
v.

TED STEVENSON ANGWIN and
CHRISTINE KHAMIS,

Defendants-Appellants.

Nos. 00-50276
00-50411

D.C. No.
CR-99-3149-K

OPINION

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, U.S. District Judge, Presiding

Argued and Submittedrt

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that a conviction for bringing in illegal aliens cannot be premised on aiding and abetting; (4) denying the defendants' motions for acquittal for insufficient evidence; and (5) upwardly adjusting Angwin's sentence for creating a substantial risk of death or serious bodily injury. We have jurisdiction

While Khamis did not testify at trial, she did give a state-

States counters that Khamis's defense that she was duped did not preclude the jury accepting Angwin's duress defense.

To warrant severance on the basis of antagonistic defenses, codefendants must show that their defenses are irreconcilable and mutually exclusive. See United States v. Sherlock

the defendants. The defenses presented by Angwin (duress) and Khamis (lack of knowledge) were in this factual context only minimally inconsistent, let alone antagonistic. The district court therefore did not abuse its discretion in declining to sever the defendants' trial.

2. Angwin's Brk 89 saim

Angwin also contends that the admission of Khamis's statement violated his Confrontation sause rights under Brk 89 v. United States, 391 U.S. 123 (1968), since Khamis did not testify and was not subject to cross-examination.

Under Brk 89

win's testimony was not irreconcilable with Khamis's statement). At most, Khamis's statement was only mildly incriminating, particularly since it was consistent with Angwin's own testimony at trial. As a result, Khamis's statement does not approach the expressly inculpatory confession at issue in Bruton.

Even if the district court erroneously admitted Khamis's statement under Bruton, that error was harmless. To establish that the district court's error was harmless, the United States must show that the error was harmless beyond a reasonable doubt. See United States v. Davis, 932 F.2d 752, 761 (9th Cir. 1991) (noting that an appellate court should not reverse a conviction if "substantial, independent and credible evidence of

Morales also testified that the motorhome stopped right where his group had been waiting only about fifteen minutes after they arrived. Even without Khamis's statement, the United States had sufficient evidence to persuade a jury beyond a reasonabwdoubted thaAngwieen hisuilty.re

United States, 519 U.S. 172, 174 n.1 (1997); United States v. Fleming, 215 F.3d 930, 938 (9th Cir. 2000). We will only reverse if an erroneous evidentiary ruling more likely than not affected the verdict.

See Weil v. Selzter, 873 F.2d 1453, 1460 (D.C. Cir. 1989); Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1293-94 (7th Cir. 1988). The burden of establishing that certain conduct qualifies as evidence of habit falls on the party wishing to introduce the evidence. See Weil, 873 F.2d at 1461. Rule 406 is an exception to the general exclusion of character

tion in finding that Angwin's proffered evidence of habit was not relevant.**4**

in general does not describe his conduct with sufficient particularity to be probative of whether he acted in conformity with that general practice on this particular occasion. Thus, the district court did not abuse its discretion in excluding Angwin's proffered conduct evidence, as his training and experience in the Auxiliary did not qualify as evidence of habit under Rule 406.

Even if the district court should have admitted the evidence, its failure to do so was still harmless error. Since an error in interpreting the rules of evidence is not of constitutional magnitude, the United States must show only that the prejudice resulting from the error was more probably than not harmless. See United States v. Mett, 178 F.3d 1058, 1066 (9th Cir. 1999). Angwin makes little effort to argue that he suffered prejudice from the district court's ruling, and given the substantial evidence of guilt, see Section II.A.2 supra, the United States has shown that the error more probably than not did not affect the verdict.

C. Angwin's Motion to Dismiss Counts One and Three

Angwin also asserts that a defendant may not be found guilty pursuant to of aiding and abetting a violation of 8 U.S.C. section 1324(a)(2).[5] In Angwin's view, subsection (a)(2) does not subject defendants to aiding and abetting liability, while subsection (a)(1) does expressly impose such liability. A district court's decision regarding whether to dismiss an indictment based on its interpretation of a federal statute is reviewed de novo. See United States v., 207 F.3d 569, 571 (9th Cir. 2000).

Subsection (a)(1)(A) provides that a person who, knowing

[illegible]

States, conceals, harbors, or shields from detection, encourages or induces such an alien to enter, or engages in a conspiracy to commit or aids and abets the commission of any of those acts shall be punished according to subsection (a)(1)(B). Subsection (a)(1)(B)(i) provides a maximum term of ten years for: (1) bringing in an alien regardless of whether it is done for commercial purposes; (2) conspiring to commit any of the subsection (a)(1)(A) offenses regardless of whether the conspiracy is performed for commercial purposes; or (3) transporting, harboring, or inducing entry for the purpose of commercial advantage or private financial gain. For non-commercial acts of transporting, harboring, or inducing entry, or for the aiding and abetting of any of the offenses (whether commercial or not), a defendant is subject to a maximum term of five years pursuant to subsection (a)(1)(B)(ii).

Subsection (a)(2) provides that any person who "knowing or in reckless disregard of the fact that an alien has not

1324, and render the aiding and abetting language in subsection (a)(1) surplusage.

On its surface, Angwin's interpretation has some appeal, as subsection (a)(1) expressly imposes aiding and abetting liability while subsection (a)(2) does not. On closer examination, however, the defendant's proposed construction of section 1324 is incorrect. The aiding and abetting provision in subsection (a)(1) does not impose aiding and abetting liability where

(a)(2)(B)(ii) regarding smuggling performed for financiat4 Tn in section 112 of the Immigration Reform and Control Act of 1986 ("IRCA"). See Pub. L. No. 99-603,§ 112, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324) (page numbers unavailable). In section 203 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress inserted the aiding and abetting language of subsection (a)(1)(A)(v)(II), amended the penalty provisions in subsection (a)(1)(B) accordingly, added the three-year mandatory minimum sentence for first and second violations of subsection (a)(2)(B)(ii), and imposed five-year minimum and fifteen-year maximum sentences for third and subsequent violations. See Pub. L. No. 104-208, § 203, 110 Stat. 3009, at 3009-565 to 3009-567 (1996) (codified at 8 U.S.C. § 1324). Prior to IRCA, section 1324 did not include any additional punishment for smuggling performed for financiat4 Tn, did not explicitly delineate a penalty for aiding and abetting smuggling offenses, and established a maximum sentence of five years for each alien brought into the United States. See § 1324, Historicat4and Statutory Notes, 1986 Amendments.

After IIRIRA, however, the penalties facing an aider and abettor of certain offenses under subsection (a)(1) changed

18. In other words, the aiding and abetting language in subsection (a)(1) creates an exception to the general rule established by Title 18.

As for subsection (a)(2), IIRIRA increases the penalties facing defendants who bring an alien into the country for commercial purposes but does not provide different penalties for aiders and abettors. Defendants who bring an alien into the United States for commercial advantage or private financial gain are no longer merely subject to a ten-year maximum sentence; they are also subject to a mandatory minimum sentence of three years for first or second violations and a five- to fifteen-year term for third or subsequent violations. Congress did not insert in subsection (a)(2) a provision analogous to subsection (a)(1)(A)(v)(II) that would impose lesser penalties for aiders and abettors. Congress's failure to include such an exception to Title 18 under subsection (a)(2) at the same time that Congress created an exception to Title 18 under subsection (a)(1) and at the same time that Congress increased the penalties under subsection (a)(2) suggests that Congress did

into the United States for commercial purposes as the most serious offense, as shown by the mandatory minimum sen-

the light most favorable to the prosecution, determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Deeb, 175 F.3d 1163, 1168 (9th Cir. 1999).

1. Angwin's Conviction for Bringing in Illegal Aliens

Angwin does not dispute that there was substantial evidence upon which a jury could have concluded that he was guilty beyond a reasonable doubt. Instead, he argues that the evidence was not sufficient for him to be found guilty of aiding and abetting the bringing of aliens into the United States since the aliens had already entered the country when he picked them up. Angwin also asserts that the United States did not present adequate asonable ason6-ave hiw the Unit8 TD -0.0996 Tc 0.0offe teufficrableurpto bri aserc su

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[9] Indeed, Angwin cites no authority for the proposition that the crime of smuggling is complete the moment the alien

purpose of financial gain. Given Vincente-Morales' testimony that he expected that he would have to pay for his transporta-

might not in itself provide sufficient evidence to persuade a jury beyond a reasonable doubt that she knowingly aided and abetted the transportation of the aliens in order to help them remain in the United States illegally. If the only additional piece of evidence against Khamis Ary ento r failurnce al xbechee

Second, Khamis made a statement to Agent Searle that was inconsistent with Angwin's testimony at trial with respect to certain details about their travel such as the time they left the rest area and why they stopped along the highway and that

mony, and Vincente-Morales' testimony. Vincente-Morales testified that he saw a hand near the front and to the side of

United States, but act in that manner because someone had a gun to his head."); United States v. Chavez-Palacios, 30 F.3d 1290, 1294 (10th Cir. 1994) (finding that a defendant's presence in a vehicle, knowledge that aliens were present, and awareness that he knew that he might "get in trouble" for driving the van constituted sufficient evidence); id. ("Although the defendant offered evidence of his so-called `mere presence' defense, our task is not to review matters of credibility and assess the weight of the evidence. .. . [T]he jury's finding of guilt means that it found that the defendant

1990), in which the First Circuit found that the district court erred in applying the adjustment even where the defendant had participated in transporting over fifty aliens on a thirty-four foot boat. See 916 F.2d at 30-31 (noting that the adjustment is appropriate for cases involving "glaring examples of inhumane and ruthless conduct" but reversing the district court's upward adjustment since there was insufficient evidence of inhumane treatment).7

The defendant's argument is not compelling. There was ample evidence in the record from which the district court could conclude that the aliens driven by Angwin were placed at substantial risk of serious injury or death. With fourteen aliens, Khamis and Angwin in the motorhome, the vehicle was carrying sixteen people, even though it was only rated to hold six. The aliens were crowded into the motorhome in small compartments; three of the aliens were hiding in the shower, four were in the bathroom, two were crouching under the table, o9t. small comrouchi were ed. N ere;

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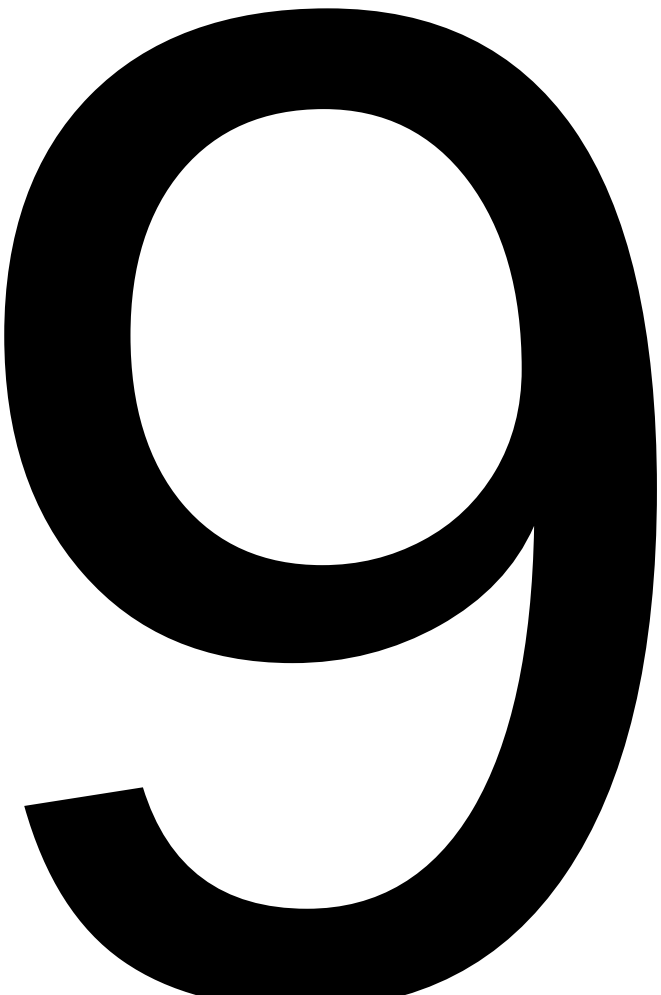

the motor home infers her knowledge of the particular criminal activity of which she was accused. Khamis' presence in the motor home proves nothing. The jury instructions clearly stated that more was required:

> It is not enough that the Defendant merely associated with that person, or was present at the scene of the crime, or unknowingly or unintentionally did things that were helpful to the principal. The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the offense of bringing in . . . illegal aliens for financial gain.

When looking at the facts, it is unclear whether Khamis knew that the people in the motor home were illegal aliens, much

ment that he saw a hand waving. This testimony is ambiguous at best. Vincente-Morales did not actually see the person who was waving the hand, and he could not tell if the hand belonged to a male or female because he was distracted -- the hand was toward the fplao if thmote ohome,se he warunnavind

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actually saw the aliens and spoke to them. In Loya, there was evidence that the defendant met with the illegal aliens at the border. Id. at 1488-89. Similarly, in

ment to Agent Searle that was inconsistent with Angwin's testimony about the details of their travel. It is unclear exactly what inconsistencies the majority found, but they apparently eluded the Government. There is no mention of these inconsistencies in the Government's argument that there was sufficient evidence for Khamis' conviction. Assuming that there were inconsistencies, all this means is that she did not corroborate the testimony of a guilty person. This is hardly enough to find guilt beyond a reasonable doubt.

The evidence presented by the prosecution builds, at best, a fragile foundation upon which to rest Khamis' conviction and creates, if anything, an inference that it is slightly more probable that Khamis is guilty. "Slightly more probable" does not satisfy the beyond-a-reasonable-doubt standard required for a conviction in a criminal case. Jackson v. Virginia, 443 U.S. 307, 320 (1979). The Supreme Court has held that "[a]ny evidence that is relevant -- that has any tendency to make the existence of an element of a crime slightly more probable than