

SEP 12 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GABRIEL ORTIZ-ROMERO,

Defendant - Appellant.

No. 06-50056

D.C. No. CR-04-00363-1-NAJ

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Napoleon A. Jones, District Judge, Presiding

Argued and Submitted November 9, 2007
Pasadena, California

Before: PAEZ and RAWLINSON, Circuit Judges, and CONLON,** District Judge.

Gabriel Ortiz-Romero was convicted of numerous counts of bringing aliens to the United States and transporting undocumented aliens within the United States in violation of 8 U.S.C. § 1324(a). He appeals his convictions on various grounds.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

1. **Eye-witness identification**

We assume without deciding that the identification given at the scene of the accident and the photo array presentations several days after the accident were impermissibly suggestive and that the district court erred by admitting the subsequent identification testimony at trial.¹ *See United States v. Montgomery*, 150 F.3d 983, 992-93 (9th Cir. 1998) (discussing standard for admission).

Nevertheless, any error was harmless due to the substantial evidence of Ortiz-Romero's presence. *See, e.g., United States v. Simoy*, 998 F.2d 751, 753 n.1 (9th Cir. 1993).

2. ***Daubert* error**

Similarly, although the district court erred by not making an express finding that Officer Vandiver's challenged expert testimony was reliable, the error was harmless due to Officer Vandiver's qualifications and the other, admissible testimony of accident reconstruction and blood pattern evidence. *See United States v. Jawara*, 474 F.3d 565, 583 (9th Cir. 2007).

3. **Instructional error under *Lopez***

¹ Because we assume error, we do not address whether, as Ortiz-Romero contends, the Government bears the burden of demonstrating the reliability of the in-court identifications by clear and convincing evidence. *See Cossel v. Miller*, 229 F.3d 649, 655 (7th Cir. 2000).

The Government concedes that the jury instructions in this case were erroneous, as to the “bringing to” counts, because the instructions mischaracterized the termination point of a “bringing to” offense. *See United States v. Lopez*, 484 F.3d 1186, 1191 & n.7 (9th Cir. 2007) (en banc) (“reject[ing] the ‘immediate destination’ (or ultimate destination) test set forth in *United States v. Ramirez-Martinez* [273 F.3d 903 (9th Cir. 2001)]”). Nevertheless, the error was harmless.²

The evidence clearly established that the aliens were not dropped off at a point within the United States—terminating the “bringing to” offense—prior to Ortiz-Romero’s actions. *See Lopez*, 484 F.3d at 1191. Rather, the aliens’ guide stayed with them and directed them into the van driven by Ortiz-Romero. Any rational trier of fact would have concluded that Ortiz-Romero acted to aid and abet the “bringing to” offense prior to the completion of that offense, due to the apparently co-ordinated effort. The dissent cites our recent case, *United States v. Hernandez-Orellana*, Nos. 06-50584, 06-50620, 2008 WL 3852623 at *10 (9th

² We reject Ortiz-Romero’s argument that the error conceded by the Government is structural. *See Neder v. United States*, 527 U.S. 1, 12-13 (1999) (“[T]his Court has applied harmless-error review in cases where the jury did not render a ‘complete verdict’ on every element of the offense”); *cf. Powell v. Galaza*, 328 F.3d 558, 566 (9th Cir. 2003) (“The instructional errors at issue in *Carella*, *Neder* and *Rose* were subject to harmless error review precisely because the juries in those cases made other factual findings that were untouched by the court’s errors.”).

Cir. Aug. 20, 2008) to support a contrary conclusion. However, in that case, no evidence linked the defendant to the planning activities in Mexico. *See id.* By comparison in this case, the guide linked Ortiz-Romero's involvement to the activities in Mexico.

4. Instructional error under *Munoz*

The Government also concedes that the jury instructions in this case, as to the "bringing to" counts, were erroneous under *United States v. Munoz*, 412 F.3d 1043, 1046-47 (9th Cir. 2005). Nevertheless, the error was clearly harmless. We agree with the Government's statement that "the evidence overwhelmingly established the pecuniary motive" and that any rational juror would have concluded that Ortiz-Romero acted with the required intent as an aider and abettor to financially benefit a principal to the crime.

5. Prosecutorial misconduct

Finally, we reject Ortiz-Romero's claim of prosecutorial misconduct in closing arguments, a claim which was not raised below and is therefore reviewed for plain error. *United States v. Washington*, 462 F.3d 1124, 1136 (9th Cir. 2006). Under the circumstances of this case, the prosecutor's remarks did not constitute impermissible vouching, nor did they misconstrue the law regarding the requirement that the jury not speculate, but base its deliberations on the evidence

presented, or the lack of evidence. Moreover, even if there was any marginal impropriety in the prosecutor's remarks, the error was not plain.

AFFIRMED.