

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1701

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TITO AHMAD EL-MASRI, a/k/a Tito Ahmad Masri, and
MOHAMED HUSSEIN EL-BETAR, a/k/a Muhamad Hussein Betar,
a/k/a Muhamade Hussein Betar, a/k/a Danny Betar,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(6:92-CR-020-C)

(December 1, 1993)

Before GOLDBERG, JONES, AND DUHÉ, Circuit Judges.

EDITH H. JONES, CIRCUIT JUDGE:*

Appellants Tito Ahmad El-Masri ("El-Masri") and Mohamed Hussein El-Betar ("El-Betar") were convicted by a jury of conspiring to obtain fraudulent immigration documents for the benefit of El-Masri's brother, Asad Ahmad El-Masri ("Asad Ahmad") and Asad Ahmad's brother-in-law, Mahmood Fayz Khaliki ("Khaliki") in violation of 18 U.S.C. §§ 371, 1546, 1542. El-Betar was

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

additionally convicted of entering into a fraudulent marriage with a United States citizen in violation of 8 U.S.C. § 1325(b). El-Masri was sentenced to nine months of imprisonment and a \$50.00 special assessment. El-Betar was sentenced to 14 months of imprisonment, a \$50.00 special assessment, and three years of supervised release.

El-Betar claims that there was insufficient evidence to support his conviction for marriage fraud, and both appellants claim that there was insufficient evidence to support their convictions for conspiracy. El-Betar complains that the court erred by improperly admitting his confession into evidence. Additionally, El-Masri complains that the court erred by permitting his conviction for aiding and abetting, violating Bruton, improperly joining parties, and improperly enhancing his sentence. Finding no reversible error, we affirm the convictions and sentences.

BACKGROUND

El-Masri is a Palestinian who came to the United States in 1983 on a student visa. He was lawfully admitted as a permanent resident alien of the United States after marrying a United States citizen, Angelita El-Masri ("Angelita"). El-Betar is a Palestinian who also came to the United States on a student visa. He married Araceli Cadena ("Cadena") on October 8, 1988 after knowing her for ten days. Immediately following their hasty marriage, El-Betar applied to be admitted as a permanent resident alien.

The Immigration Reform and Control Act of 1986 simplified the process by which certain illegal aliens could apply for legal status in the United States by implementing the Special Agricultural Workers' ("SAW") Program. To be eligible for SAW, individuals must have worked in perishable commodities for a period of 90 days between May 1, 1985 and May 1, 1986. After supplying the proper authorities with documentation verifying that they satisfied the requirements, the workers are given "green cards" and legal status in the United States.

El-Masri and El-Betar conspired to submit fraudulent applications for the SAW Program in order to obtain Temporary Resident Alien cards for Asad Ahmad and Khaliki. The Immigration and Naturalization Service ("INS") began its investigation of El-Masri and El-Betar when it uncovered discrepancies in the Application for Legalization filed by Asad Ahmad. During the course of the investigation, the INS contacted Cadena, El-Betar's wife, who subsequently admitted her involvement in the fraudulent document scheme and implicated both appellants.

DISCUSSION

A. Sufficiency of the Evidence

1. Marriage Fraud

El-Betar complains that there was insufficient evidence for the jury to convict him of marriage fraud. We can reverse his conviction for marriage fraud only if when viewing the evidence in the light most favorable to the verdict with all reasonable inferences and credibility choices made in support of the jury's

verdict, a rational jury could not find the essential elements of marriage fraud beyond a reasonable doubt. See United States v. Wilson, 887 F.2d 69, 72 (5th Cir. 1989) (quoting United States v. Yamin, 868 F.2d 130, 133 (5th Cir. 1989)).

El-Betar was convicted under 8 U.S.C. § 1325(b), which provides that "[a]ny individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws" has committed an offense. 8 U.S.C.A. § 1325(b) (West Supp. 1993). This statute clearly provides that the essential elements of marriage fraud are: (1) an individual knowingly (2) enters into a marriage (3) for the purpose of evading United States immigration laws.

El-Betar came to the United States on a student visa. Angelita El-Masri ("Angelita") testified that shortly after El-Betar's arrival in this country, his top priority became finding an American wife. He met Araceli Cadena, his future wife, a little over a month later.

Cadena testified that she and El-Betar had known each other for one week and were engaged only three days before getting married. Although El-Betar is of the Islamic faith, they were originally married in a court by a judge. Before they were married, Cadena did not know any members of El-Betar's family and had met only two of his friends.

Cadena testified that "immediately" after being married, El-Betar asked her to help him obtain legal status in the United States. At that point, she felt as if he had only married her for

the purpose of helping him obtain U.S. citizenship. She testified that she had married him out of love and was very hurt by his request. She, therefore, refused to help him. He became very angry and left her for the first time.

After being away from the relationship for quite some time, El-Betar sought out Cadena. Upon locating her, he again requested that she help him file the appropriate immigration papers. This time she agreed to help him because she loved him and feared that he would leave her again. He immediately presented her with the necessary papers which he had prepared beforehand. Once she signed the papers, he was no longer mad at her.

El-Betar frequently abandoned their relationship. As Cadena described it, they were separated "all the time," one time for over six months. She testified that El-Betar had told a lot of people that he had only married her for his papers. Throughout the relationship, he lived with many different women, and Cadena caught him with other women several times.

Cadena felt as though El-Betar did not love her. He never invited her to go to his home in Israel even though he traveled to Israel one summer without her and stayed for an entire month. He only sent her flowers, wrote love letters, and bought her gifts during the periods when they were separated in order to get her to reconcile with him. When she allowed him to come back to the relationship, he never did things to lead her to believe that he loved her.

El-Masri's wife, Angelita, testified that it was clear to all who observed El-Betar that the only person in El-Betar's marriage that was truly in love was Cadena. Angelita testified that she heard El-Betar say that he married Cadena only for his green card and that he did not love her.

The government presented sufficient evidence for the jury to find beyond a reasonable doubt that El-Betar knowingly entered into his marriage with the intent of evading immigration laws. As a court of review, it is not up to us to evaluate the credibility of the testifying witnesses; that is a job left to the jury. We affirm El-Betar's conviction for marriage fraud.

2. Conspiracy

Both El-Betar and El-Masri complain that there was insufficient evidence to support their convictions for conspiracy to obtain immigration documents by fraud. We disagree. The essential elements of conspiracy are: (1) an agreement by two or more people to pursue an unlawful objective together; (2) the defendant's voluntary decision to join the conspiracy; and (3) performance by one of the members of the conspiracy of an overt act in furtherance of the conspiracy. United States v. Parekh, 926 F.2d 402, 406 (5th Cir. 1991) (quoting United States v. Tullos, 868 F.2d 689, 693 (5th Cir. 1989)).

Both of the appellants' wives testified to being present at several meetings at which El-Masri, El-Betar, Asad Ahmad, and Khaliki planned the conspiracy. The women testified to specific details regarding the meetings, such as who served as translator,

who set forth the agenda, and details of the plan to be followed by the conspirators.

Additionally, Cadena testified how the appellants convinced her to provide them with her invaluable assistance in obtaining the documents for the SAW program because of her connections with the people whose signatures were required on the documents. She testified that both El-Masri and El-Betar gave her the fraudulent immigration papers and went with her to get her boss to sign them. Cadena also accompanied the appellants to San Antonio to file the papers. Both appellants repeatedly asked her to help procure additional fraudulent papers after she refused to help them. Other government witnesses testified that the appellants had them sign false affidavits in support of the fraudulent applications for the work permits. The fraudulent nature of several of the documents was proffered to the jury.

From this evidence, reviewed under the standard cited above, it was rational for a jury to conclude that appellants were guilty of conspiring to obtain immigration documents by fraud.

B. Aiding and Abetting

El-Masri complains that he was found guilty of aiding and abetting the conspiracy in contravention of the principle that one cannot be convicted of a crime for which one has not been indicted. However, it is well established that one who has been indicted as a principal may be convicted on evidence showing that he merely aided and abetted the commission of the offense. United States v. Walker, 621 F.2d 163, 166 (5th Cir. 1980). Aiding and abetting is

an alternative charge in every count of an indictment, whether explicit or implicit. Id. El-Masri was indicted as a principal for the substantive offense of conspiring to obtain immigration documents by fraud. Therefore, his conviction for aiding and abetting was proper.

C. El-Betar's Confession

El-Betar complains that statements that he made to a United States Border Patrol officer confessing his involvement in the fraudulent document scheme were improperly admitted into evidence. El-Betar made the confession after appearing at the border patrol office on his own initiative. While speaking with the officer, he admitted his involvement in helping obtain fraudulent immigration documents.

At no point during the discussion with the border patrol officer was El-Betar placed under arrest or restricted from leaving the office. The record does not suggest that El-Betar was in custody at the time of his statement or that his statement was the result of anything other than his freely and voluntarily explaining his version of the events. Even so, the officer, as an added precaution, read Miranda warnings to El-Betar from a form which El-Betar signed. The form had assurances by El-Betar that he was willing to answer questions, did not desire a lawyer, and understood what he was doing. It also stated that he was not pressured or coerced into making the statement.

Miranda protections are implicated only when an individual is under custodial interrogation. United States v.

Pofahl, 990 F.2d 1456, 1487 (5th Cir. 1993). A person is in custody for Miranda purposes when under formal arrest or when a reasonable person in his position would have understood that there was a restraint on his freedom of movement comparable to formal arrest. Id. Because El-Betar was not in custody and voluntarily made the confession, the court did not err in allowing it into evidence.

D. Bruton Argument

Relying on Bruton v. United States, 391 U.S. 123 (1968), El-Masri asserts that the district court committed reversible error in allowing into evidence El-Betar's confession. Bruton issues are reviewed for an abuse of discretion. United States v. Beaumont, 972 F.2d 91 (5th Cir. 1992). The district court did not abuse its discretion and, therefore, there is no error.

In Bruton, the Supreme Court held that it was a violation of a defendant's Sixth Amendment right of confrontation for the trial court to admit an out-of-court statement made by a nontestifying co-defendant that expressly incriminates the initial defendant. Bruton, 391 U.S. at 126. The statement cannot be introduced at the trial, even if the court instructs the jury that it is not to consider the statement against the initial defendant. Id. at 127. El-Masri claims that the district court violated Bruton in allowing El-Betar's statement to the Border Patrol officer into evidence. The flaw in El-Masri's argument is that the rule of Bruton is not absolute.

In Richardson v. Marsh, 481 U.S. 200 (1987), the Court limited Bruton and held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Richardson, 481 U.S. at 211 (footnote omitted). Thus, in order to cause a Bruton violation, the co-defendant's statement must directly allude to the complaining defendant. United States v. Espinoza-Seanez, 862 F.2d 526, 534 (5th Cir. 1988). Even an indirect reference to a co-defendant is not enough to implicate Bruton. United States v. Restrepo, 994 F.2d 173, 187 (5th Cir. 1993).

The officer's testimony at the appellants' trial did not refer to El-Masri at all. The officer testified concerning El-Betar's confession, taking special care to leave out any references to El-Masri. The testimony regarding El-Betar's statement could not have been a crucial factor to the jury in the case made by the government against El-Masri, as there was ample evidence outside of the confession to implicate El-Masri. The confession was properly admitted.

D. Joinder of Parties

El-Masri complains that it was error for the district court to require him to stand trial along with El-Betar when El-Betar was under indictment for the additional offense of marriage fraud. We disagree. The general rule is that those who are indicted together are tried together. United States v. Branch, 989

F.2d 752, 756 (5th Cir. 1993) (citing Zafiro v. United States, ____ U.S. ___, ___, 113 S.Ct. 933, 937 (1993)). This is especially true when the defendants are charged with the same conspiracy. Featherson, 949 F.2d at 773.

The appellants were indicted together for conspiracy. The evidence presented at trial relating to the additional charge against El-Betar was neither so complex nor confusing as to leave the jury unable to separate the evidence applicable against each defendant. United States v. Welch, 656 F.2d 1039, 1054 (5th Cir. 1981). El-Masri has failed to make out a sufficient claim that the trial court abused its discretion in trying the appellants together.

E. Admission of Asad Ahmad's Passport Page into Evidence

Both appellants contend that the district court erred in allowing into evidence a page from the passport of Asad Ahmad El-Masri. Admission of evidence is reviewed for abuse of discretion. United States v. Jimenez Lopez, 873 F.2d 769, 771 (5th Cir. 1989). Additionally, any error is reviewed under the harmless error doctrine, and evidentiary rulings must be affirmed unless they affect a substantial right of the appellant. Id.

The Federal Rules of Evidence provide that a document is properly authenticated when the proponent supplies the court "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Additionally, one is in conformity with this rule when one supplies the court with testimony from a witness with knowledge that the

matter is what it is claimed to be. Fed. R. Evid. 901(b)(1). El-Masri contends that the document is an obvious forgery and should never have been admitted into evidence. However, the government proffered the testimony of Angelita El-Masri for purposes of authentication. She testified that she found the document as part of Asad Ahmad's passport, and the court admitted it into evidence as such. Angelita's testimony was sufficient to authenticate the document. It then became the jury's task to ascertain the credibility of the witness and the probative value to be afforded the document. The district court committed no error in admitting this document into evidence.

F. Enhancement of El-Masri's Offense Level for His Leadership Role

Finally, El-Masri complains that his sentence was improperly enhanced four levels for being an organizer and leader pursuant to § 3B1.1(a) of the Federal Sentencing Guidelines. This court will disturb a district court's factual findings regarding sentencing only if the district court's findings are clearly erroneous. United States v. Whitlow, 979 F.2d 1008, 1011 (5th Cir. 1992). A factual finding is clearly erroneous only if it is implausible in light of the record read as a whole. Id. Regarding El-Masri's role in the conspiracy, the record indicates that it is plausible that he was an organizer and leader of the conspiracy. The district court did not err in enhancing El-Masri's offense level for his leadership role in the conspiracy.

CONCLUSION

Finding no reversible error, we affirm the decision of the district court.