

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

S)))))))))Q  
No. 93-8045  
Summary Calendar  
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERNANDO JIMENEZ-ESPARZA,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Western District of Texas  
(EP 92 CR 269 H 4)  
S)))))))))Q  
September 23, 1993

Before GARWOOD, SMITH AND DeMOSS, Circuit Judges.\*

GARWOOD, Circuit Judge:

Defendant-appellant Fernando Jimenez-Esparza (Jimenez), a travel agent at the Horizon Travel Agency in El Paso, Texas, a family-owned and run business, was convicted, following a jury trial, of conspiring to bring aliens into the United States, knowing that the aliens had entered the country illegally, and to

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\* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

transport and move, and conceal and harbor, the illegal aliens within the United States, contrary to 18 U.S.C. § 371 and 8 U.S.C. § 1324(a)(1). His involvement in the charged conspiracy consisted primarily of providing airplane tickets for illegal aliens to various places within the United States. Jimenez appeals, arguing that the evidence supporting his conviction is insufficient. Finding to the contrary, we affirm.

### **Facts and Proceedings Below**

Acting on a tip from an informant, David Ramirez (Ramirez), a Special Agent for the Immigration and Naturalization Service (INS), assumed an undercover role as a provider of fraudulent immigration documents for illegal aliens, using the name "Macario." On May 15, 1992, Ramirez met with David Munoz-Juarez (Munoz) and Luz Pineda-Gonzalez (Pineda) at a Church's Chicken Restaurant in El Paso. Ramirez first spoke with Munoz, who requested his assistance in transporting six illegal aliens whom Munoz had brought to El Paso from Central America. Pineda approached the two men, and Munoz introduced her to Ramirez as his wife.<sup>1</sup> In Pineda's presence, Ramirez agreed to transport the six aliens from El Paso to Albuquerque, New Mexico, for the price of \$200 per alien, or \$1,200. The plan was for the aliens to fly to New York from Albuquerque in order to avoid Border Patrol scrutiny at the El Paso airport. During the conversation, Ramirez offered for sale counterfeit social security, resident alien, and Texas birth

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<sup>1</sup> Although testimony at Jimenez's trial described Pineda as Munoz's common law wife, there was also evidence that Pineda was married to a man in California.

registration cards. Munoz and Pineda declined to pay for the documents, however, because the \$350 cost per set of documents was not covered by the fee they had charged each alien for bringing them into the United States.

As agreed upon during the May 15 meeting, Ramirez met Munoz and Pineda on May 18 at a "drop house" where the aliens had been kept near the international border between the United States and Mexico. Ramirez suggested moving the aliens away from the border. Munoz mentioned to Ramirez that he dealt with particular travel agents in El Paso to obtain the airline tickets for the aliens and instructed Ramirez to call him at the Horizon Travel Agency after settling the aliens at a hotel in El Paso.

Ramirez called Munoz at the travel agency to inform him of where the aliens were. Munoz, who did not trust Ramirez this early in their relationship, suggested that he leave the money with the travel agent at Horizon Travel for Ramirez to pick up when he returned from Albuquerque. During the telephone conversation, Munoz passed the receiver to the travel agent, whom Ramirez later identified as Jimenez; Jimenez informed him over the telephone that he had the money.

Ramirez and another undercover agent drove the six aliens to the airport in Albuquerque. Each of the aliens had airline tickets issued by Horizon Travel. On May 21, after his return from New Mexico, Ramirez went to the Horizon Travel Agency and asked for Jimenez. After Ramirez introduced himself and asked for the money,

Jimenez took him to a back room and paid him \$1,100.<sup>2</sup> Jimenez commented that he had heard that the aliens had arrived safely. He asked Ramirez for a phone number, informing the agent that he might have further need of his services. Jimenez cautioned Ramirez that the fewer people who knew about it the better, because it was a sensitive matter.

On June 3, 1992, Munoz called Ramirez to seek his help in transporting a female alien to Albuquerque. Ramirez met with Munoz at the Church's restaurant, where he informed Munoz that he would not take a single alien to Albuquerque, but only groups. He did agree, however, to help Munoz smuggle her out of the El Paso airport. Ramirez took the alien to a motel to wait while he met with Munoz and Jimenez at the Horizon Travel office. Jimenez suggested that the alien take the 5:30 flight because earlier flights attracted more attention from the Border Patrol. Jimenez issued a ticket for the 5:30 flight, and Ramirez took the alien to the airport and helped her board her flight. Ramirez returned to Horizon Travel the next day and collected \$150 in cash from Jimenez.

Jimenez called Ramirez on June 9 about transporting between four and eight Mexican aliens to Albuquerque. Ramirez recorded the conversation. Jimenez asked about the price, and Ramirez told him he would charge \$250 per person if there were only four aliens, but only \$200 apiece if there were eight.

On June 10, co-defendant Angel Bahamonde-Calle (Bahamonde),

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<sup>2</sup> Munoz and Pineda had paid the remaining \$100 to the other undercover agent as a down payment before the trip to Albuquerque.

who had been referred to Ramirez by Munoz, called the agent to obtain his help in transporting two Peruvians to the Albuquerque airport. Ramirez met with Bahamonde and agreed to take the aliens for \$200 each.

On June 11, Jimenez again called Ramirez to request assistance in transporting six Mexicans to Albuquerque. Jimenez stated during the conversation, which Ramirez recorded, that "they are going to cross them. I hope they don't catch them there at the crossing." Ramirez arranged to take the aliens for \$200 apiece.

Later that same day, other undercover agents working with Ramirez picked up two Peruvian aliens from Bahamonde near the drop house where Ramirez had met the first group of aliens. Ramirez met them and took them to Horizon Travel where they picked up the six aliens from Jimenez. When Ramirez arrived at the travel office, Jimenez told six people waiting in the lobby, "Your ride is here." Each of the six, whom Ramirez took to Albuquerque along with the other two aliens, had airline tickets issued by Horizon Travel.

On June 16, Jimenez paid Ramirez \$1,200 at the travel office for the six Mexican aliens moved on June 11.

That same day, Ramirez called Jimenez over the telephone in response to a page. Again, the agent recorded the conversation. Jimenez informed him that he had between four and ten Colombians whom he wanted taken to Albuquerque. The group of four included a mother with three children; the woman had papers, but her children were undocumented. Ramirez was willing to charge a lower price for a larger group: \$350 if only four aliens or \$200 if there were as many as ten.

On June 22, Ramirez spoke with Jimenez to inform him that he would be out of town for two weeks and that Jimenez could contact one of his associates, who was also an undercover INS agent.

On June 24, Munoz called Ramirez to ask him to smuggle five Hondurans to Albuquerque; the aliens were located at the same house near the border where Ramirez had picked up other aliens. In addition, Munoz told Ramirez that Bahamonde had three female aliens from Colombia that Ramirez could transport at the same time. Munoz and Ramirez agreed that the agent would pick up the aliens at the Horizon Travel office. Munoz cautioned Ramirez that Jimenez did not like the aliens to be at the office for too long. Ramirez set the arrangements for the next day.

On June 25, Ramirez called Munoz at the travel agency office; Munoz informed him that the aliens were there but did not have airline tickets at that time because Jimenez had not arrived. When Ramirez arrived at Horizon Travel, Jimenez was just going into the business. Ramirez informed Jimenez that his associates would transport the aliens to Albuquerque, and that Ramirez would come back to the travel office that day for the money once he knew his associates had reached Albuquerque. Once inside the office, Ramirez found Pineda waiting with five Hondurans and Bahamonde with three Colombians. Pineda suggested a price of \$150 per aliens with the promise of more business for Ramirez. She told Ramirez that one of the Honduran nationals had not paid her fee, and asked if he could put the alien on a bus to Los Angeles. Jimenez commented that Immigration officers checked the bus station.

Ramirez left Horizon Travel with the aliens and Bahamonde,

ostensibly to take the eight aliens to a motel where they would wait for clothing and airline tickets. The agents took Bahamonde to the Federal Building where he was arrested, then took the aliens to the motel room where they were arrested. Ramirez called Munoz at the travel office and informed him of the room number at the motel and told him to buy clothing for the aliens. When Munoz and Pineda left the area of the travel office, they were arrested.

Ramirez and another undercover agent returned to Horizon Travel later that afternoon. Jimenez took the agents to an office, gave them airline tickets for the four aliens from Honduras who had paid, and paid the agents their fee for transporting the aliens to Albuquerque. The agents arrested Jimenez.

A grand jury indicted Jimenez, Munoz, Pineda, and Bahamonde on July 15, 1992, charging them with one count of conspiring to bring into the United States, transport and move, and conceal and harbor illegal aliens (count one) and with four substantive counts of harboring four illegal aliens (counts two through five). Jimenez pleaded not guilty and was tried before a jury on November 2 and 3, 1992.<sup>3</sup> At the beginning of the trial, the government moved to dismiss counts two and three. The jury convicted Jimenez of count one and acquitted him of counts four and five. On January 13, 1993, the district court sentenced Jimenez to 5 months' imprisonment, 3 years of supervised release, and a \$50 mandatory special assessment.

Jimenez filed a timely notice of appeal on January 20, 1993,

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<sup>3</sup> Munoz and Bahamonde pleaded guilty; Pineda proceeded to trial with Jimenez.

contesting only the sufficiency of the evidence underlying his conviction.

### **Discussion**

Upon a claim of insufficient evidence to support a conviction, we review the evidence, whether direct or circumstantial, and all the inferences reasonably drawn from it, in the light most favorable to the verdict. *United States v. Salazar*, 958 F.2d 1285, 1290-1291 (5th Cir.), *cert. denied*, 113 S.Ct. 185 (1992). To establish that Jimenez was guilty of conspiracy, the government was required to prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to pursue an unlawful objective, (2) that Jimenez knew of the conspiracy and intended to and did join it, and (3) that one of the members of the conspiracy performed an overt act in furtherance of the conspiracy. *United States v. Parekh*, 926 F.2d 402, 406 (5th Cir. 1991). Jimenez's arguments on appeal concern the evidence supporting the latter two elements.

The government was required to prove that Jimenez joined in the object of the conspiracy, but it was not necessary to prove that he had committed a substantive offense that was the object of the conspiracy. *United States v. Cuesta*, 597 F.2d 903, 917 (5th Cir.) (" . . . the essence of conspiracy is unlawful agreement rather than accomplishment of the unlawful objective"), *cert. denied*, 100 S.Ct. 451 (1979). *See also Iannelli v. United States*, 95 S.Ct. 1284, 1289 (1975) ("Traditionally the law has considered conspiracy and the completed substantive offense to be separate crimes"), *overruled on other grounds, Brown v. Ohio*, 97 S.Ct. 2221



(1977).

Jimenez argues that, while he may have suspected that Munoz and Ramirez were breaking the immigration laws, there was no evidence that he knew of the illegal nature of the conspiracy. He contends that he may have known that the people for whom he provided the airplane tickets were foreigners, but he did not know that they were in this country illegally.

The record disputes these claims. When Jimenez paid Ramirez \$1,100 for transporting the first group of aliens to Albuquerque in May, he commented that he had heard the people had arrived safely and cautioned Ramirez about telling too many people about the "sensitive matter." In connection with moving several of the aliens within the United States, Jimenez made several suggestions about avoiding INS or Border Patrol officers: on June 3, he arranged an earlier flight from the El Paso airport for an alien because later flights attracted more scrutiny, and on June 25, he cautioned Munoz about sending an alien to Los Angeles on the bus because the bus station in El Paso was checked by INS officers.

On June 9 and 16, Jimenez initiated contacts with Ramirez to transport aliens to Albuquerque. Each time he asked a price. Ramirez's asking price of between \$200 and \$350 per person suggests an illegal nature to the transaction, as that price is much too high to charge for a legal four-hour drive from El Paso to Albuquerque.

There is also other evidence revealing Jimenez's knowledge of the illegal status of the aliens involved. On June 11, following up on his June 9 conversation with Ramirez, Jimenez informed

Ramirez that the people to be taken to Albuquerque were crossing the border and expressed hope that they were not caught during the crossing. During the June 16 conversation with Ramirez, Jimenez mentioned that one alien had papers but that her children were undocumented.

On cross-examination, his co-conspirator, Munoz, admitted that he told Jimenez what kind of business he was in when he approached him about providing airline tickets. Munoz also stated that he told Jimenez that Macario (Ramirez) "was going to carry out the work of transporting some illegals."

We are satisfied that the record supports a determination that Jimenez was aware of the illegal nature of the conspiracy and intended to join it.

Jimenez next argues that there was no evidence that he participated in the conspiracy. He points to the district court's dismissal of two substantive counts and the jury's acquittal of him on the remaining two substantive counts, arguing that these actions prove he was not involved in the conspiracy.

Where a defendant is charged with multiple counts in a single proceeding and is acquitted of one or more but not all of those counts, he may not rely on his acquittal to challenge the evidence supporting his conviction on the remaining count(s). "Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient." *United States v. Powell*, 105

S.Ct. 471, 478 (1984) (internal citations omitted). Thus, we look at the evidence of Jimenez's involvement in the conspiracy as though no other counts were charged. *United States v. Montalvo*, 820 F.2d 686, 690 (5th Cir. 1987) ("[O]ur review of the sufficiency of the evidence supporting [the defendant's] conviction must be uncolored by his acquittal on the other counts").

Jimenez argues that there was no evidence that he was engaged in an illegal agreement with Bahamonde.<sup>4</sup> Again, the evidence shows otherwise. Bahamonde contacted Ramirez upon referral from Munoz, and Ramirez transported Bahamonde's two Peruvian aliens on June 11 along with the six Mexican aliens he picked up at Horizon Travel from Jimenez. When Munoz contacted Ramirez about the aliens to be transported on June 25, he mentioned that Bahamonde would also have some aliens. The June 25 transaction, leading to the arrests, involved Munoz's five Hondurans and Bahamonde's three Colombians; Ramirez and his associates were to transport all the aliens together.

Next, Jimenez asserts that the June 11 transaction in which he dealt alone with Ramirez cannot be used as evidence of his involvement in the conspiracy because there was nothing to show the participation of his alleged co-conspirators. As the government points out, however, this transaction was part of a series of similar transactions involving the same *modus operandi* and stemming from their relationships with Munoz. Further, the transaction

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<sup>4</sup> We note that Jimenez could be convicted of conspiracy even if it were shown that Bahamonde had no part in the conspiracy. A conspiracy need only involve two persons; Munoz, Pineda, and Jimenez make three.

provides evidence of Jimenez's knowledge of the unlawful purpose of the conspiracy and his intent to participate in the scheme.

Finally, Jimenez argues that there is no evidence that he engaged in any overt act to bring the illegal aliens into the United States or to move them once inside the country. The record before us, however, reveals that Jimenez provided airplane tickets for the illegal aliens, paid money to Ramirez for Munoz for transporting the aliens to Albuquerque, and harbored the aliens at his business in a room away from the view of customers. By these actions, he aided his co-conspirators.

Further, even if Jimenez's own actions were not enough, the government was entitled to rely on actions of his co-conspirators in order to prove the conspiracy count. "It is well settled that to make out the crime of conspiracy, once the unlawful agreement is shown, proof of a single overt act in furtherance of that agreement by a single conspirator establishes the guilt of each member of the conspiracy." *United States v. Veltre*, 591 F.2d 347, 350 (5th Cir. 1979). Even if Jimenez had not himself fulfilled this last requirement, he could still be held responsible for the conspiracy if any one of his co-conspirators had engaged in an overt act in furtherance of the conspiracy. There is ample proof in the record of the actions taken by Munoz, Pineda, and Bahamonde in bringing the illegal aliens into the United States and providing for their transport within the country.<sup>5</sup>

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<sup>5</sup> For example, two aliens testified for the government concerning Munoz's and Pineda's roles in smuggling them into the United States. In addition, the fact that Munoz and Pineda hired Ramirez to help transport the aliens to Albuquerque is an overt act

### **Conclusion**

The evidence produced at trial was sufficient to support Jimenez's conviction. His conviction and sentence are

AFFIRMED.

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sufficient to establish action on behalf of the conspiracy's objective.