Nos. 10-10318 & 10-10330

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSEPH SILVA, et al.

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL / DETENTION STATUS

Defendant Georgia Silva was sentenced on July 1, 2010, to 18 months' imprisonment. Pursuant to Circuit Rule 28-2.4, I state that, according to the Federal Bureau of Prisons inmate locator database, defendant Georgia Silva is currently confined and has an actual or projected release date of October 19, 2011.

s/ Angela M. Miller
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JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant on July 1, 2010, and defendant filed a timely appeal on July 6, 2010. G.E.R. 9.[1] This Court has jurisdiction under 28 U.S.C. 1291.

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[1] Citations to "G.E.R. __" refer to pages in appellant Georgia Silva's Excerpts of Record filed with appellant Georgia Silva's opening brief. Citations to "J.E.R. __" refer to pages in appellant Joseph Silva's Excerpts of Record filed with appellant Joseph Silva's opening brief in *United States v. Joseph Silva*, No. 10-10318, which has since been consolidated with this case. S.S.E.R. 15. Citations to "S.E.R. __" refer to pages in appellee's Supplemental Excerpts of Record filed

(continued…)

STATEMENT OF THE ISSUES

Whether the evidence was sufficient to support defendant's conviction for violating 18 U.S.C. 245(b)(2)(B).

STATEMENT OF THE CASE

On October 22, 2009, a federal grand jury returned a 2-count superseding indictment charging Georgia Silva and her husband, Joseph, with violating federal law. G.E.R. 1-2. The indictment charged the Silvas with two counts of interfering with a victim's federally protected activities on account of the victim's race, causing bodily injury, in violation of 18 U.S.C. 245(b)(2)(B).[2]

The trial began on March 9, 2010. At the close of the government's case, defense counsel moved, pursuant to Federal Rule of Criminal Procedure 29, for judgments of acquittal, alleging, generally, that the evidence was insufficient to support the charged offenses. S.S.E.R. 4-5; see Fed. R. Crim. P. 29. The trial court reserved judgment on the motions. S.S.E.R. 6-8. On March 11, 2010, the jury found defendants guilty on Count 1 and not guilty on Count 2. S.E.R. 90.

(... continued)
with the government's Brief for the United States as Appellee in *United States v. Joseph Silva*, No. 10-10318. Citations to "S.S.E.R. __" refer to pages in appellee's Second Supplemental Excerpts of Record filed with this brief. Citations to "G. Silva Br. __" refer to pages in appellant Georgia Silva's opening brief.

[2] Count 1 was based upon defendants' actions toward Vishal Wadhwa; Count 2 was based upon defendants' actions toward Ayesha Mathews. G.E.R. 1-2.

Thereafter, the district court denied defendants' motions for judgments of acquittal as to Count 1. S.S.E.R. 13-14. The district court sentenced both defendants to eighteen months' imprisonment. J.E.R. 76-81; S.E.R. 93-99. This appeal followed. G.E.R. 9.

STATEMENT OF FACTS

In the early evening of July 14, 2007, Vishal Wadhwa, his fiancée, Ayesha Mathews, and Mathews's cousin, Marianna Abraham, visited El Dorado Beach in South Lake Tahoe, California. S.E.R. 4-5, 18-19, 33-34. El Dorado Beach is a public beach administered by the City of South Lake Tahoe. G.E.R. 10-11.

Wadhwa, Mathews and Abraham are of Indian descent. S.E.R. 4, 16-17, 32-33. Wadhwa and Abraham are United States citizens, S.E.R. 4, 32; Mathews holds a green card, S.E.R. 17.

The three accessed the beach via stairs that led from a grassy picnic area near the parking lot to the beach below. S.E.R. 6-7, 21, 36. This picnic area is considered part of the public beach. G.E.R. 14. Mathews and Abraham walked along the beach near the water, while Wadhwa, who was talking on his cell phone, remained near the stairs. S.E.R. 7, 20, 35-36.

As Mathews and Abraham began walking back toward the stairs to leave, they passed by Georgia and Joseph Silva, who were sitting on the beach. S.E.R. 7-10. Georgia called Mathews and Abraham "Indian sluts." S.E.R. 8, 22-23. As

Mathews and Abraham continued walking toward the stairs, they heard Georgia say "fat Indian asses" or "fat asses." S.E.R. 11, 24. When the two women reached Wadhwa, they told him what happened. S.E.R. 11, 25.

Wadhwa approached the Silvas to ask them why they had verbally attacked Mathews and Abraham. S.E.R. 11, 26, 37-39. The Silvas immediately stood up, S.E.R. 39-40, and became "aggressive really fast," S.E.R. 11. The Silvas mocked Wadhwa's accent, S.E.R. 11, 40-41, and Joseph called Wadhwa an "Indian fuck," S.E.R. 11, "Indian piece of shit," S.E.R. 40; see also S.E.R. 27, and "Arab asshole," S.E.R. 27, in an aggressive tone, S.E.R. 27. Joseph also told Wadhwa: "I'm gonna take you down." S.E.R. 40. Georgia called Wadhwa, Mathews and Abraham "relatives of Osama bin Laden," and told them to "get out of this country." S.E.R. 40; see also S.E.R. 11, 27. Wadhwa told the Silvas he was going to call the police, to which Georgia responded: "Yes, go ahead and call the American cops." S.E.R. 40.

Wadhwa called 911 because he felt "threatened." S.E.R. 41. He walked away from the Silvas and headed up the stairs to provide the police with his specific location, S.E.R. 43; Mathews and Abraham followed behind him, S.E.R. 43; see also S.E.R. 12, 27. The Silvas followed the group up the stairs. S.E.R. 13, 28.

When the Silvas reached the grassy picnic area at the top of the stairs, Wadhwa was still on the phone with the police. S.E.R. 29. Georgia appeared to intentionally bump into Wadhwa and say "oops."[3] S.E.R. 13, 29, 44. Georgia told Mathews and Wadhwa to "go back where you came from," S.E.R. 54; see also S.E.R. 58-59, and began hitting Mathews and Wadhwa with sandals she had been carrying,[4] S.E.R. 13, 29, 45. During this assault, both Georgia and Joseph continued to utter racial slurs, S.E.R. 13, 46, and Joseph threatened to "take [Wadhwa] down," S.E.R. 46.

Georgia then ran toward Wadhwa and "kind of plowed him to the ground." S.E.R. 13; see also S.E.R. 47. As Georgia and Wadhwa were on the ground "flailing * * * at each other," S.E.R. 60, Joseph approached Wadhwa and kicked him in the face, S.E.R. 14, 30, 48, 55, 61, 68-69, 74, breaking Wadhwa's cheekbone, S.E.R. 64.

Bystanders were eventually able to separate Georgia and Wadhwa. S.E.R. 15, 31, 49. One bystander, who is of Indian descent, S.E.R. 73, overheard Georgia say "fucking Hindus" as he was trying to separate her from Wadhwa, S.E.R. 75.

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[3] Wadhwa's call to 911, which was played for the jury, includes Georgia in the background saying "oops," and Joseph calling Wadhwa an "Indian piece of crap." S.E.R. 42-43.

[4] This incident, to the extent it was directed at Mathews, formed the basis of Count 2 of the indictment. See G.E.R. 2. Both Georgia and Joseph were acquitted on Count 2.

Once separated, Georgia continued to move toward Wadhwa. S.E.R. 76. That same bystander stepped in to keep Georgia from Wadhwa. S.E.R. 76. As he did so, Georgia told him: "You must be Chinese. You seem like a nice person." S.E.R. 76. Several eyewitnesses testified under cross-examination that the Silvas appeared to be intoxicated. S.E.R. 56-57, 63, 77, 78.

Police and paramedics arrived soon thereafter. S.E.R. 15, 31, 50, 55, 66-67, 72. As Wadhwa was led to the ambulance, Georgia called Wadhwa a terrorist and again told him to "get out of this country." S.E.R. 50; see also S.E.R. 62.

Joseph initially told a police officer that his wife had been in a fight with Wadhwa and that he (Joseph) had to protect her. S.E.R. 79. Joseph denied participating in the fight. S.E.R. 79. Joseph eventually admitted hitting Wadhwa, but explained to the police officer that he did so only after Wadhwa hit him. S.E.R. 80. After interviewing additional witnesses, the officer returned to Joseph, who spontaneously told the officer: "Those fucking Indians are liars. We did nothing wrong." S.E.R. 81. When the officer told Joseph that he had spoken with other witnesses who had seen the incident, Joseph responded: "Yeah, well, they're all probably fucking Indian." S.E.R. 81-82.

SUMMARY OF THE ARGUMENT

The government presented sufficient evidence to support defendant's conviction for violating 18 U.S.C. 245(b)(2)(B). The evidence at trial established

that El Dorado Beach is administered by the City of South Lake Tahoe's Department of Parks and Recreation, and that the grassy picnic area at the top of the stairs is considered part of El Dorado Beach. This evidence is more than sufficient to support defendant's conviction.

Moreover, the government need not establish that a victim's injury occurred on government-administered property for the government to prove a felony violation of 18 U.S.C. 245. Rather, to establish a felony violation of the statute, the government must prove that a defendant interfered with a victim because of the victim's race and because the victim was enjoying a facility administered by the State or its political subdivision, and that bodily injury occurred as a result of the defendant's actions. Here, the testimony established that defendant's conduct, which began on the beach and ended at the picnic area, was part of a course of action that was intended to (and did) interfere with the victim's use and enjoyment of a facility (*i.e.*, the beach area) administered by the State or its political subdivision, and that the victim was injured as a result of defendant's actions. Thus, even if the evidence did not establish that the picnic area was a public facility, the government nonetheless established that defendant violated 18 U.S.C. 245(b)(2)(B).

ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION

A. Standard Of Review

This Court reviews claims of insufficiency of the evidence *de novo*. *United States v. Webster*, 623 F.3d 901, 907 (9th Cir. 2010). Evidence is considered sufficient to support a conviction if, when viewed "in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ibid.*; see also *United States v. Nevils*, 598 F.3d 1158, 1169 (9th Cir. 2010).

B. The Evidence Was Sufficient To Support The Jury's Verdict

The government presented sufficient evidence to support defendant's conviction for violating 18 U.S.C. 245(b)(2)(B). Specifically, the government presented sufficient evidence that the grassy picnic area, where defendant physically assaulted Mr. Wadhwa, was administered by the State of California or a subdivision thereof. See 18 U.S.C. 245(b)(2)(B).[5]

[5] Defendant does not challenge the sufficiency of the evidence with respect to the other elements the government must prove to establish a violation of 18 U.S.C. 245(b)(2)(B).

Defendant does not dispute that the evidence was sufficient to establish that the "shoreline of El Dorado Beach" is administered by a subdivision of California, nor could she. G. Silva's Br. 10. Gary Moore, the director of the City of South Lake Tahoe's Parks and Recreation Department, testified that El Dorado Beach is a public beach owned by El Dorado County, which is a political subdivision of the State of California. G.E.R. 10-11. Moore also testified that El Dorado County leases the property of El Dorado Beach to the City of South Lake Tahoe, which is also a political subdivision of California. G.E.R. 11.

Defendant instead argues (G. Silva Br. 10) that there was "no evidence presented * * * concerning the ownership of the picnic area." This argument, however, simply ignores Moore's testimony that El Dorado Beach included acreage *beyond* the shoreline of the beach, and that the City of South Lake Tahoe's Parks and Recreation Department administers and maintains "all that acreage" through landscaping, general janitorial functions, and by "paving parking lots." G.E.R. 11-12. When discussing the acreage of El Dorado Beach, Moore testified that there were "two stairways *on the property* and one boat ramp."[6] G.E.R. 12 (emphasis added). Moore then testified that the grassy picnic area is *also*

[6] Moore identified Government's Exhibit 17 as one of the stairways providing access to the shoreline of El Dorado Beach. G.E.R. 14, 18.

considered part of El Dorado Beach. Specifically, the government asked if the area "where the picnic tables and the trees are[] is * * * also a public part *of the beach*?" G.E.R. 14 (emphasis added). Moore replied, "Yes, it is." G.E.R. 14. Moore further explained that the picnic area is "a public park." G.E.R. 14.

Moore's testimony that the grassy picnic area at the top of the staircase is a public park on the acreage of El Dorado Beach is more than sufficient to support the jury's verdict that defendant interfered with Mr. Wadhwa's enjoyment of El Dorado Beach because of his race and because he was enjoying a facility "provided or administered by a state or subdivision." S.S.E.R. 12. Indeed, Moore explained that as part of the maintenance "of all that acreage" of El Dorado Beach, his department engages in landscaping, general janitorial functions, and "paving parking lots." G.E.R. 12. If, however, the public administration of El Dorado Beach was limited to the shoreline, as defendant asserts, G. Silva Br. 10, there would be no need for the Parks and Recreation Department to engage in "landscaping" or to "pav[e] parking lots" as part of the City's maintenance of El Dorado Beach. G.E.R. 12. Moore's testimony thus makes clear that (1) the grassy picnic area where defendant physically assaulted Mr. Wadhwa, as well as the adjacent parking lot, S.E.R. 6-7, were considered part of "all that acreage" comprising El Dorado Beach, G.E.R. 12; and (2) "all that acreage" fell under the

administration of the City of Lake Tahoe's Parks and Recreation Department, G.E.R. 12, 14. No further evidence was necessary to support the jury's verdict.

Defendant's reliance (G. Silva Br. 11-12) on this Court's decision in *United States v. Bennett*, 621 F.3d 1131 (9th Cir. 2010), is wholly misplaced. In *Bennett*, this Court recognized, based on "a century of corporate law," that the property of a wholly-owned subsidiary is not owned by the subsidiary's parent company. *Id.* at 1136. Thus, the government in *Bennett* failed in its efforts to show that the defendant fraudulently obtained assets owned by a federally-insured bank, where the funds at issue were maintained by the bank's wholly-owned subsidiary. *Id.* at 1138. Here, Moore's testimony explained that El Dorado Beach included the grassy picnic area at the top of the staircase leading to the shoreline, and that "all that acreage" was administered by the City of Lake Tahoe. G.E.R. 12.

In any event, the statute does not require the government to prove that a physical assault took place on property administered by a State to establish a felony violation of the statute. The statute was enacted to "prevent and punish *violent* interferences with the exercise of specified rights," *Johnson v. Mississippi*, 421 U.S. 213, 224 (1975), and was not limited to punishing violent assaults on State-administered property. It would be contrary to Congress's intent to immunize from felony prosecution a situation where a defendant takes immediate,

violent action to interfere with a victim because of that victim's race and because that victim had been participating in or enjoying a State benefit or facility, but where the violence occurs outside the area administered by the State. For example, the statute would certainly criminalize as a felony a situation where a defendant selects his victim on the basis of race and intends to interfere with that victim's right to enjoy a publicly administered beach, but who does so by chasing the victim off the beach and into a nearby private home and then assaulting the victim in the home. Where it is clear that the victim is selected on the basis of race and because he was enjoying a government provided benefit or facility, and where, in doing so, the defendant causes bodily injury, the defendant is properly charged with a felony violation of 18 U.S.C. 245(b)(2). See *United States v. Franklin*, 704 F.2d 1183, 1185 (10th Cir.) (defendant convicted of violating 18 U.S.C. 245(b)(2)(5) for killing two African-American men "as they *left* the park" where they had earlier been jogging with two Caucasian women) (emphasis added), cert. denied, 464 U.S. 845 (1983); *United States v. Lane*, 883 F.2d 1484, 1487 (10th Cir. 1989) (defendant convicted for interfering with victim because of victim's race and because victim had been enjoying private employment as a radio host, in violation of 18 U.S.C. 245(b)(2)(C), when shooting took place in front of victim's *home*), cert. denied, 493 U.S. 1059 (1990).

Here, the government established that the events on the beach, the staircase, and the grassy picnic area were all part of one continuous course of action – action that was designed to interfere with Mr. Wadhwa because of his race and because he had been enjoying a publicly administered beach. The government also established that the victim suffered bodily injury as a result of defendant's actions. The precise location of the physical assault is thus of little consequence, given that defendant's actions were taken (1) because of Mr. Wadhwa's race, and (2) because he had been enjoying the beach – a place defendant acknowledges (G. Silva Br. 12-13) is administered by a subdivision of the State.[7]

APPELLANT'S ADOPTION OF ISSUES RAISED BY CO-DEFENDANT

Appellant indicates (G. Silva Br. 13) her intent to join in the arguments raised by appellant Joseph Silva; specifically, she intends to join in those arguments concerning the district court's admission of evidence pursuant to

[7] Defendant's actions would constitute a felony violation of 18 U.S.C. 245(b)(2) regardless of whether the grassy picnic area is considered a part of El Dorado Beach (as the government maintains) or simply a park administered by a non-governmental entity that is nonetheless accessible to the public (as defendant suggests, see G. Silva Br. 10-11). See 18 U.S.C. 245(b)(2)(F) (criminalizing interference with a victim because of the victim's race and because the victim was enjoying a public accommodation, which includes parks); see also *United States v. Allen*, 341 F.3d 870, 878 n.11 (9th Cir. 2003) (holding that a park is a "public accommodation" and collecting cases upholding convictions for violating 18 U.S.C. 241 and 18 U.S.C. 245 premised on racially-motivated attacks at public parks), cert. denied, 541 U.S. 975 (2004).

Federal Rule of Evidence 404(b), and the district court's exclusion of evidence pertaining to the defendants' state court proceedings. The government responded to these arguments in its Brief for the United States as Appellee in *United States v. Joseph Silva*, No. 10-10318, pp. 11-25, and adopts and incorporates those same arguments in the present case.

CONCLUSION

This Court should affirm defendant's conviction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that *United States v. Joseph Silva*, No. 10-10318 (9th Cir.), is related to, and has been consolidated with, the present appeal.

s/ Angela M. Miller
ANGELA M. MILLER
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,995 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: February 2, 2011

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Angela M. Miller
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