

PETITIONER'S APPENDIX



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Rehearing en Banc Granted in Part, Opinion Vacated in Part by [United States v. Ray](#), 9th Cir., September 4, 2020

811 Fed.Appx. 414

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3. United States Court of Appeals, Ninth Circuit.

UNITED STATES of
America, Plaintiff-Appellee,

v.

[Daniel RAY](#), aka Popeye, aka
Daniel T. Ray, aka Daniel Thomas
Ray, Defendant-Appellant.
United States of America,
Plaintiff-Appellee,

v.

Patrick John Bacon, Defendant-Appellant.

No. 18-50115, No. 18-50120

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Argued and Submitted January
6, 2020 Pasadena, California

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FILED April 28, 2020

Synopsis

Background: Defendants were convicted in the United States District Court for the Central District of California, [Percy Anderson](#), J., of assault with deadly weapon with intent to do bodily harm, and aiding and abetting assault causing serious bodily injury, and they appealed.

Holdings: The Court of Appeals held that:

[1] district court properly precluded defendant's duress defense;

[2] district court did not abuse its discretion in rejecting defendant's request to include his non-self-inculpatory

statements made prior to, and after, his self-inculpatory statements; and

[3] district court did not abuse its discretion in applying two-level "more than minimal planning" increase in sentencing defendants.

Affirmed in part, vacated in part, and remanded.

Additional opinion, [956 F.3d 1154](#).

West Headnotes (3)

[1] **Criminal Law** 🔑 [Compulsion or necessity; justification in general](#)

District court properly precluded defendant's duress defense in assault prosecution, absent evidence that defendant had no reasonable opportunity to escape.

[2] **Criminal Law** 🔑 [Rule of Completeness](#)

District court did not abuse its discretion in assault prosecution when it rejected defendant's request pursuant to rule of completeness to include his non-self-inculpatory statements made prior to, and after, his self-inculpatory statements, where there was no misleading impression that completed paragraph would correct.

[3] **Sentencing and Punishment** 🔑 [Planning](#)

District court did not abuse its discretion in applying two-level "more than minimal planning" increase in sentencing defendants for assault with deadly weapon with intent to do bodily harm and aiding and abetting assault causing serious bodily injury, in light of evidence that incident was coordinated assault. [U.S.S.G. § 2A2.2\(b\)\(1\)](#).

Attorneys and Law Firms

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[Ethan Atticus Balogh](#), Coleman & Balogh LLP, San Francisco, CA, for Defendant - Appellant

Appeal from the United States District Court for the Central District of California, [Percy Anderson](#), United States District Judge, Presiding. D.C. No. 5:17-cr-00159-PA-2, D.C. No. 5:17-cr-00159-PA-1

Before: [WATFORD](#) and [BENNETT](#), Circuit Judges, and [RAKOFF](#),* District Judge.

MEMORANDUM*

Patrick Bacon and Daniel Ray were convicted of assault with a deadly weapon with intent to do bodily harm, under [18 U.S.C. § 113\(a\)\(3\)](#), and assault causing serious bodily injury, under [id. § 113\(a\)\(6\)](#), via [id. § 2\(a\)](#) (aiding and abetting). Defendants were sentenced to 120 months and 100 months in prison, respectively. They appeal the convictions and sentences. We have jurisdiction under [28 U.S.C. § 1291](#) and [18 U.S.C. § 3742](#).¹

[1] 1. Reviewing de novo, the district court properly precluded Bacon's duress defense. See [United States v. Ibarra-Pino](#), 657 F.3d 1000, 1004 (9th Cir. 2011) (defendant must make a "prima facie showing of duress in a pretrial offer of proof"). Bacon has not shown that he "had no reasonable opportunity to escape." [United States v. Wood](#), 566 F.2d 1108, 1109 (9th Cir. 1977) (per curiam); see also [United States v. Houston](#), 648 F.3d 806, 817 (9th Cir. 2011).

[2] 2. Reviewing "the district court's decision on the Rule of Completeness for an abuse of discretion," [United States v. Vallejos](#), 742 F.3d 902, 905 (9th Cir. 2014), we find the district court did not abuse its discretion. First, there is no "misleading impression," [id.](#) (citation omitted), that the *416 completed paragraph after Bacon's statement that he was "raised to be an honest person," would correct. Nor can the defendant include additional portions simply because they would give context to the jury. See [id.](#) (district court properly rejected redacted portion of defendant's confession

that he sought to include to "show the jury the 'flavor of the interview,' to 'humanize' [defendant], to prove his 'character,' and to convey to the jury the voluntariness of his statement"). Second, defendant cannot "elicit[] his own exculpatory statements, which were made within a broader, inculpatory narrative." [United States v. Ortega](#), 203 F.3d 675, 681-82 (9th Cir. 2000). The district court properly rejected Bacon's request to include his statements made prior to, and after, his statement that he said "something like 'go in peace.' " See [id.](#) at 682 ("[N]on-self-inculpatory statements are inadmissible even if they were made contemporaneously with other self-inculpatory statements.").

3. Turning to Ray and applying the "two-step inquiry for considering a challenge to a conviction based on sufficiency of the evidence," [United States v. Nevils](#), 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc), we find there was sufficient evidence to support his conviction for assault. Viewing the video evidence and eyewitness testimony in the light most favorable to the prosecution, at least one rational juror could have found that Ray aided and abetted the assault.

4. Ray also argues there is insufficient evidence that the government proved the offense took place within the special maritime and territorial jurisdiction of the United States. Even if Ray preserved this claim, there is sufficient evidence, such as uncontroverted testimony by the prison guards, that the government proved this element. See [United States v. Read](#), 918 F.3d 712, 718 (9th Cir. 2019) ("[U]ncontradicted testimony from inmates or employees at a federal prison can establish the jurisdictional element of [18 U.S.C. § 113](#)").

5. Ray claims the district court improperly excluded a note allegedly written by Bacon. Reviewing admissibility of evidence under [Federal Rule of Evidence 804\(b\)\(3\)](#) for abuse of discretion, see [United States v. Rhodes](#), 713 F.2d 463, 473 (9th Cir. 1983), we find the district court did not abuse its discretion. Among other things, the note was hearsay, irrelevant, and not a statement against interest. See [United States v. Oropeza](#), 564 F.2d 316, 325 (9th Cir. 1977). The district court also did not abuse its discretion in preventing Ray from cross-examining Bacon about the properly excluded note. See [United States v. Shabani](#), 48 F.3d 401, 403 (9th Cir. 1995) (no abuse of discretion "as long as the jury receives sufficient information to appraise the biases and motivations of the witness") (citation omitted). Because this "evidentiary ruling was well within" the district court's discretion, there is no constitutional error. [United States v. Waters](#), 627 F.3d 345, 353 (9th Cir. 2010).

6. For sentencing, “we review the district court’s identification of the correct legal standard *de novo* and the district court’s factual findings for clear error.” *United States v. Gasca-Ruiz*, 852 F.3d 1167, 1170 (9th Cir. 2017) (en banc). “[A]pplication of the Sentencing Guidelines to the facts of a given case should be reviewed for abuse of discretion.” *Id.* On *de novo* review, the district court correctly identified the proper legal standard for a mitigated role adjustment under U.S.S.G. § 3B1.2(b), see *United States v. Diaz*, 884 F.3d 911, 916 (9th Cir. 2018) (proper standard is to compare “defendant’s conduct ... against that of other participants in his or her own criminal scheme”); see *Gasca-Ruiz*, 852 F.3d at 1171, 1174-75 (if the district court identifies the right guideline *417 and commentary “we will not assume that the court applied the wrong legal standard” absent something more). The record does not show that the district court improperly compared Ray to a hypothetical average offender rather than an average participant in the scheme. The district court compared Ray to the average defendant only in the context of the facts of the case. The district court’s finding that Ray was “indispensable” to the attack was also not legal error. The district court relied on multiple factual findings to support its conclusion that Ray was not a minor participant. See *Diaz*, 884 F.3d at 915 (defendant’s essential or indispensable role is not outcome determinative). Lastly, the district court did not abuse its discretion in applying the Note 3(C) factors to Ray. Ray must prove he was “*substantially less culpable* than the average participant in the charged criminal activity.” *Id.* at 914 (internal quotations omitted). Based on the record he has not carried that burden. Thus, the district court did not abuse its discretion.

[3] 7. The district court did not abuse its discretion, see *Gasca-Ruiz*, 852 F.3d at 1170, in applying a two-level “more than minimal planning” increase under U.S.S.G. § 2A2.2(b)(1). The district court properly found that this was a coordinated assault, and the guidelines focus on the characteristics of the offense, not the individual. See § 2A2.2(b)(1) (“[I]f the assault involved more than minimal planning....”) (emphasis added).

8. The parties agree that the district court plainly erred in calculating Ray’s criminal history score. See *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc) (a finding of plain error requires error that is plain and affects substantial rights). The district court improperly counted three of Ray’s juvenile offense convictions. See U.S.S.G. § 4A1.2(d)(2); see also *United States v. Johnson*, 205 F.3d 1197, 1199-1200 (9th Cir. 2000). The district court’s plain error affected Ray’s substantial rights because it increased the suggested sentencing guidelines range.² See *Molina-Martinez v. United States*, — U.S. —, 136 S. Ct. 1338, 1345-46, 194 L.Ed.2d 444 (2016). Thus, we vacate Ray’s sentence. We decline the government’s request for a limited remand and remand to the district court for resentencing on an open record. See *United States v. Matthews*, 278 F.3d 880, 885-86 (9th Cir. 2002) (en banc).

AFFIRMED in PART, VACATED and REMANDED in PART.

All Citations

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Footnotes

- * This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.
- 1 In a concurrently filed opinion, we address Bacon’s argument that the district court abused its discretion by precluding Dr. Karim, Bacon’s expert witness, from testifying in support of Bacon’s insanity defense.
- 2 Ray’s criminal history score resulted in his criminal history category increasing from IV to V.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES

Plaintiff-Appellee,

v.

DANIEL RAY, AKA Popeye, AKA Daniel
T. Ray, AKA Daniel Thomas Ray,

Defendant-Appellant.

No. 18-50115

D.C. No. 17-CR-00159-PA-2
Central District of California,
Los Angeles

ORDER

Before: WATFORD and BENNETT, Circuit Judges, and RAKOFF*, District Judge.

Appellant, Daniel Ray, filed a petition for panel rehearing and for rehearing en banc. [Dkt. 60]. The panel has unanimously voted to deny the petition for rehearing. Judges Watford and Bennett have voted to deny the petition for rehearing en banc, and Judge Rakoff so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.