No. _____

IN THE SUPREME COURT OF THE UNITED STATES

LILI TYDINGCO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Ninth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LILI ZHANG TYDINGCO, Defendant-Appellant.	No. 23-10016 D.C. No. 1:15-cr-00018-RVM-1 MEMORANDUM*

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Ramona V. Manglona, Chief District Judge, Presiding

Argued and Submitted June 10, 2024
Honolulu, Hawaii

Before: CALLAHAN, HURWITZ, and H.A. THOMAS, Circuit Judges.

Lili Tydingco appeals her conviction after a third trial for unlawfully harboring a noncitizen in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). We have jurisdiction under 28 U.S.C. § 1291. "We review the district court's evidentiary rulings for abuse of discretion." *United States v. Shih*, 73 F.4th 1077, 1096 (9th Cir. 2023). "We review de novo a district court's admission of evidence in alleged

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

violation of the Confrontation Clause." *United States v. Cazares*, 788 F.3d 956, 976 (9th Cir. 2015). We affirm.

1. Customs and Border Protection (CBP) Officer Ronald Muna testified regarding an interview of Tydingco that he conducted when Tydingco first brought X.N.—the noncitizen whom Tydingco was accused of harboring—into Saipan. Tydingco argues that this testimony was inadmissible because it was based only on CBP records that Officer Muna had reviewed, rather than on Officer Muna's personal recollection of the interview. Officer Muna testified, however, that his account of the interview was based on his own memory. And although he acknowledged weaknesses in his recollection of the interview, the strength of his memory does not present an issue "of admissibility but rather one of credibility and the proper weight to be accorded his testimony. Such are jury functions." *United States v. Haili*, 443 F.2d 1295, 1299 (9th Cir. 1971).

2. Tydingco further argues that Officer Muna's testimony violated the Confrontation Clause because some of her interview with him was conducted through an interpreter who was not called to testify. But, as Tydingco acknowledges, we already decided when reviewing her second trial that her interpreted statements during her interview with Officer Muna were admissible. We found that Tydingco was fluent in English and therefore could have corrected any mistranslation. *United States v. Tydingco* (*Tydingco II*), 2022 WL 445527, at

*2 (9th Cir. Feb. 14, 2022).

3. Tydingco argues that the admission of her signed written statement violated the Confrontation Clause, because there was insufficient evidence that the translation of her statements was reliable. "[A]s long as a translator acts only as a language conduit, the use of the translator does not implicate the Confrontation Clause." *United States v. Aifeng Ye*, 808 F.3d 395, 401 (9th Cir. 2015). Here, the interpreter who translated Tydingco's statements had no motive to distort them; the same interpreter was used without issue both when Tydingco initially drafted her statement and when she returned to the police station to review it; and Tydingco identifies no particular translation errors the interpreter made. *See United States v. Nazemian*, 948 F.2d 522, 527–28 (9th Cir. 1991) (considering these factors to find a translated statement admissible). Additionally, as we explained in *Tydingco II*, Tydingco's English fluency means that she could have corrected any error the interpreter made. 2022 WL 445527, at *2. The district court therefore did not err in finding that the interpreter acted only as a language conduit.[1]

4. Tydingco challenges the admissibility of CBP Officer Trisha Aguon's

[1] Tydingco also argues that the Government forfeited this issue by failing to defend the admissibility of her signed statement in its answering brief. The Government, however, argued generally that Tydingco's translated statements were admissible because she spoke English, referencing the signed statement in support of this argument. The issue therefore was not forfeited.

testimony regarding electronic records of Tydingco and X.N.'s entry into the United States. Officer Aguon testified that these records showed that Tydingco was forwarded to a secondary inspection upon arrival to the United States with X.N., and that Tydingco presented a return ticket to China that had been purchased for X.N. Tydingco argues that Officer Aguon had no ability to testify to these matters as a lay witness because she had no personal memory of the events reflected in these records.

Even if Officer Aguon's testimony about these records was inadmissible, any error was harmless. *See United States v. Lague*, 971 F.3d 1032, 1041 (9th Cir. 2020) ("Reversal is not required if 'there is a fair assurance of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict.'" (quoting *United States v. Bailey*, 696 F.3d 794, 803 (9th Cir. 2012))). Officer Aguon's testimony that Tydingco was forwarded to a secondary inspection likely had minimal impact, as Officer Muna permissibly testified about conducting the secondary inspection. And Officer Aguon's testimony that Tydingco presented a return ticket was corroborated by both Officer Muna and Officer Aguon's permissible testimony that CBP consistently checks passengers arriving in Saipan on the Conditional Parole Program for return tickets. Additionally, Officer Aguon was subject to extensive cross-examination in which she acknowledged that she had no memory of the events about which she testified

and admitted that the records could have been mistaken. The testimony that Tydingco challenges therefore likely did not impact the jury's verdict. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (factors considered when assessing the harmfulness of an error include "whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [and] the extent of cross-examination . . . permitted").

5. Tydingco argues that the admissible evidence was insufficient to support the jury's verdict. On our review of Tydingco's first trial, however, we held that the evidence we find admissible today was sufficient to support her conviction. *United States v. Tydingco* (*Tydingco I*), 909 F.3d 297, 301–02 (9th Cir. 2018).

6. Tydingco argues that the district court erred in failing to instruct the jury that the term "harbor" as used in 8 U.S.C. § 1324(a)(1)(A)(iii) requires active concealment and a deliberate attempt to facilitate a noncitizen's unlawful presence in the United States. As Tydingco recognizes, our decision in *Tydingco I*, 909 F.2d at 302–03, expressly rejected this argument, and there have been no intervening decisions that undermine this holding. *Tydingco I* therefore forecloses Tydingco's challenge to the jury instructions.

AFFIRMED.

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LILI ZHANG TYDINGCO, Defendant-Appellant.	No. 20-10210 D.C. No. 1:15-cr-00018-1 MEMORANDUM*

Appeal from the United States District Court
for the District of the Northern Mariana Islands
Ramona V. Manglona, Chief District Judge, Presiding

Argued and Submitted January 21, 2022
Honolulu, Hawaii

Before: O'SCANNLAIN, MILLER, and LEE, Circuit Judges.

Following a jury trial, Lili Tydingco was convicted on one count of alien harboring, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). After we reversed her conviction because of instructional error, *United States v. Tydingco*, 909 F.3d 297 (9th Cir. 2018), Tydingco was retried and again convicted; she again appeals. We have jurisdiction under 28 U.S.C. § 1291, *see* 48 U.S.C. § 1824(b), and we reverse

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and remand.

1. The district court did not err in instructing the jury. As Tydingco concedes, the instructions complied with the statement of law in our prior decision in *Tydingco*, 909 F.3d at 302–04.

2. Sufficient evidence supports Tydingco's conviction. At the second trial, the government presented the same evidence that we previously found sufficient. *See Tydingco*, 909 F.3d at 301–02 & n.1.

3. We review the district court's admission of evidence for an abuse of discretion. *United States v. Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). For evidentiary errors, reversal is required "unless there is a 'fair assurance' of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict." *United States v. Bailey*, 696 F.3d 794, 803 (9th Cir. 2012) (quoting *United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc)). "[I]n cases of 'equipoise,' we reverse." *United States v. Liera*, 585 F.3d 1237, 1244 (9th Cir. 2009) (quoting *United States v. Seschillie,* 310 F.3d 1208, 1215 (9th Cir. 2002)).

The district court abused its discretion in admitting Rebecca Castro's sham-marriage and witness-tampering testimony. Federal Rule of Evidence 404(b) prohibits the admission of otherwise relevant evidence of prior acts unless the evidence is used for a non-propensity purpose "such as proving . . . knowledge."

Fed. R. Evid. 404(b)(2). When Rule 404(b) evidence is offered to prove knowledge, the prior act must be sufficiently similar to the charged act as "to make the existence of the defendant's knowledge more probable than it would be without the evidence." *United States v. Rodriguez*, 880 F.3d 1151, 1167 (9th Cir. 2018) (quoting *United States v. Hardrick*, 766 F.3d 1051, 1055 (9th Cir. 2014)).

The government reasons that the prior act and the charged offense both involved Tydingco's "agreeing to help Chinese citizens circumvent U.S. immigration laws for her own financial benefit." That rationale is devoid of record support: There was no evidence that Tydingco received, or expected to receive, any financial benefit for her role in the sham-marriage proposal. Further, Castro's testimony does not tend to make it more probable that Tydingco knew that X.N., the alien she was charged with harboring, was in the United States illegally. The evidence may have demonstrated that Tydingco knew that marriage is one pathway to citizenship, but that knowledge has no logical connection to whether she knew that X.N., a minor student, was not authorized to remain in the United States.

The district court also abused its discretion in admitting Castro's testimony that Tydingco encouraged her to leave the jurisdiction so that she would be unable to testify. The relevance of this testimony came from the fact that it suggested consciousness of guilt. But that theory of relevance depends on the underlying sham-marriage testimony, which, as we have explained, should not have been

admitted.

The admission of Castro's testimony was not harmless. As we observed when we reversed Tydingco's conviction after her first trial, "substantial evidence emerged from which a reasonable jury could infer that [Tydingco]—despite knowing of facts from which a reasonable person would infer the risk of X.N.'s presence being unlawful—did not *actually* draw that inference *herself*." 909 F.3d at 305. Tydingco's defense theory was plausible, and Castro's inadmissible propensity testimony directly undermined that defense.

The limiting instructions did not cure the error. The court told the jury that it could give Castro's testimony "such weight as [the jury] fe[lt] it deserve[d]" for the purpose of proving Tydingco's knowledge and consciousness of guilt. But because the testimony was not relevant to those issues, the jury should not have been able to give it *any* weight. By telling the jury that it could consider the evidence—which was relevant only for its forbidden propensity inference—the court wrongly invited the jury to rely on prejudicial evidence that it should not have heard in the first place. *See United States v. Santini*, 656 F.3d 1075, 1079 (9th Cir. 2011) (per curiam). Because the limiting instructions were ineffective, and the evidence went to the heart of Tydingco's defense, the government has not established that "it is more probable than not that the error did not materially affect the verdict." *Bailey*, 696 F.3d at 803 (quoting *Morales*, 108 F.3d at 1040).

4. The district court did not prejudicially err in admitting the testimony of Customs and Border Patrol Officer Ronald Muna. At trial, Officer Muna discussed translations of statements made in Chinese by Tydingco at her border interview that an interpreter had orally translated for her. Tydingco argues that these statements are inadmissible testimonial hearsay. But translated statements are admissible under the Federal Rules of Evidence and the Confrontation Clause if they "fairly should be considered the statements of the speaker." *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012) (quoting *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991)). In assessing such statements, the court "must consider all relevant factors." *Id.* The dispositive factor here is Tydingco's English fluency. Tydingco understands English, was present when the interpreter relayed her statements to Officer Muna, and never corrected the translation or expressed any confusion about it. Therefore, the translated statements may fairly be considered Tydingco's own statements for the purposes of hearsay analysis and the Confrontation Clause. *See* Fed. R. Evid. 801(d)(2)(B).

The government also elicited testimony from Officer Muna about the relevant parole program. Tydingco argues that this was improper expert testimony from a lay witness. We conclude that any error in permitting Officer Muna to testify about the parole program was harmless. The testimony was brief and was not referred to in closing argument. It was also irrelevant to the jury's

determination because Tydingco never argued that she had applied for or received an extension of X.N.'s parole.

REVERSED and REMANDED.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. FRANCISCO MUNA TYDINGCO, *Defendant-Appellant*.	No. 17-10023 D.C. No. 1:15-cr-00018-RVM-2

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LILI ZHANG TYDINGCO, *Defendant-Appellant*.	No. 17-10024 D.C. No. 1:15-cr-00018-RVM-1 OPINION

Appeals from the United States District Court
for the District of the Northern Mariana Islands
Ramona V. Manglona, Chief Judge, Presiding

Argued and Submitted October 16, 2018
San Francisco, California

Filed November 27, 2018

Before: Sidney R. Thomas, Chief Judge, Susan P. Graber, Circuit Judge, and Robert S. Lasnik,[*] District Judge.

Opinion by Judge Graber

SUMMARY[**]

Criminal Law

The panel reversed Lili Tydingco's conviction for harboring an illegal alien, reversed Francisco (Frank) Tydingco's conviction for aiding and abetting the harboring, and remanded for a new trial.

The panel held that the evidence—viewed in the light most favorable to the government—is sufficient for a rational trier of fact to find that Lili harbored an illegal alien and that Frank had the specific intent to facilitate Lili's commission of that crime.

The panel held that the instruction defining "harbor" was erroneous because it did not require the jury to find that the defendants intended to violate the law, and the error was not harmless.

[*] The Honorable Robert S. Lasnik, United States District Judge for the Western District of Washington, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the instruction defining "reckless disregard" was plainly erroneous because it did not require the jury to find that Lili subjectively drew an inference that the alien was, in fact, an alien and was in the United States unlawfully. The panel held that the instruction may have affected the outcome of the trial, and the error constitutes a miscarriage of justice, warranting a new trial, because the jury could have convicted the defendants on an invalid legal theory.

COUNSEL

Steven P. Pixley (argued), Saipan, Commonwealth of the Northern Mariana Islands, for Defendant-Appellant Francisco Muna Tydingco.

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Garth R. Backe (argued), Assistant United States Attorney; Shawn N. Anderson, United States Attorney; United States Attorney's Office, Saipan, Commonwealth of the Northern Mariana Islands; for Plaintiff-Appellee.

OPINION

GRABER, Circuit Judge:

Defendants Lili and Francisco ("Frank") Tydingco stand convicted, respectively, of harboring an illegal alien and of aiding and abetting the harboring, in violation of 8 U.S.C.

§ 1324(a)(1)(A)(iii). On appeal they argue, first, that the evidence was insufficient to support their convictions. We disagree and, therefore, reach their additional arguments concerning trial error. We hold: (1) the instruction defining "harbor" was erroneous because it did not require the jury to find that Defendants intended to violate the law, and the error was not harmless; and (2) the instruction defining "reckless disregard" was plainly erroneous because it did not require the jury to find that Lili subjectively drew an inference that the alien was, in fact, an alien and was in the United States unlawfully; the instruction may have affected the outcome of the trial, and the error constitutes a miscarriage of justice, warranting a new trial, because the jury could have convicted Defendants on an invalid legal theory. Accordingly, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2013, Defendants traveled from their home on Saipan in the Commonwealth of the Northern Mariana Islands ("CNMI") to China, Lili's native country, with their two children. Lili is a legal permanent resident of the United States through her marriage to Frank. While in China, Defendants met X.N.'s father, who asked Defendants to take 10-year-old X.N., a Chinese national, home with them to attend school in the United States. Lili contacted a friend of hers who knew someone who had brought a child to the United States to study in the past, and the friend told Lili that it was possible to bring X.N. to the United States.

Defendants returned to the CNMI with X.N. on September 26, 2013. The CNMI has a "parole" program designed to support its tourism industry. Pursuant to this program, Chinese and Russian nationals may enter the CNMI

without a visa and stay for up to 45 days. United States Customs and Border Protection ("CBP") requires proof of a ticket booked on a return flight within the 45-day window before an alien may "parole in" to the CNMI.

At immigration control in the Saipan airport, CBP sent Lili and X.N. to "secondary processing" for a more thorough investigation because X.N. was a minor traveling without her parents. Lili presented a notarized letter of authorization from X.N.'s parents stating that Lili and Frank would be X.N.'s guardians during her studies in the United States. She also told the CBP officer that they were going to "see how it would work out having X.N. stay with [us] and go to school." The officer told Lili to get the authorization letter stamped at the local police station, but otherwise said nothing about X.N.'s attending school on Saipan. At some point during processing, Lili or X.N. showed proof that X.N. had a return flight to China booked for October 28, 2013. The parole program allows a seven-day buffer from the date of a return ticket to account for problems that might prevent a flight from departing as scheduled, so the officer stamped the I-94—a paper record of entry and departure dates—in X.N.'s passport with "Nov 04 2013" to indicate that X.N. had to leave the CNMI by November 4.

After passing through immigration control, Defendants and X.N. went through customs. Frank filled out a customs declaration form for his family and X.N. In the section that asked about the purpose of the trip, Frank filled in the bubble for "Returning Resident." He filled in only the CNMI bubble in the section that asked for country of permanent residence, but he also wrote X.N.'s name under "Travelers," provided her correct passport number, and listed China as her country of citizenship.

About two weeks after returning to Saipan, Defendants enrolled X.N. in public school. Lili stated that she did not apply for a student visa for X.N. because the school never asked for one; Lili simply gave the school a copy of X.N.'s passport and the authorization letter. Defendants also filled out other forms to enroll X.N. in school, including a consent to disclose X.N.'s directory information and a hand-drawn map accurately depicting the location of their house relative to the school.

X.N. lived with Defendants until February 2015. After X.N. left her home, Lili voluntarily spoke to an agent from Homeland Security and signed a written statement. The statement acknowledged that Lili understood "that there are immigration laws" and that she "had to follow certain steps and pay certain fees" to obtain her green card. Lili also said that she "had [X.N.]'s passport and saw the I-94 showing she was paroled in until November 2013." An agent present for Lili's interview testified, on cross-examination, that the interviewing agent did not ask Lili if she knew what an I-94 was. He could not recall whether the interviewer asked Lili if she knew what a student visa was. The agent also testified that Lili said she knew what "being paroled in" meant. The government indicted Defendants after Lili's interview.

Defendants moved for acquittal after the close of the government's case. The district court denied both motions. Following their convictions, Defendants timely appeal.

DISCUSSION

A. *Sufficiency of the Evidence*[1]

Only Lili's mental state was truly in dispute at trial. Lili admitted seeing X.N.'s I-94 and the mandatory departure date of November 4, 2013 (indeed, Lili personally brought X.N. through immigration control), yet Lili kept X.N. in her house long after that mandatory departure date passed. Lili also understood that the United States has immigration laws, and she understood that obtaining legal status (as she did) requires an alien to follow certain procedures. The evidence also showed that Lili expected to be paid for keeping X.N. in the family home. On this record, a rational juror could have found that Lili knew that X.N.'s continued presence in the United States was unlawful after November 4, 2013, and that Lili intended to violate the immigration laws.

With respect to Frank, the fact that he was named as a guardian in the Chinese letter of authorization from X.N.'s parents is circumstantial evidence tending to show that he actively participated in the plan to bring X.N. to the CNMI for a period longer than is authorized by law. And as the district court observed, Frank knew that, when X.N. came to Saipan, she had a return ticket to China booked for October 28, 2013, within the parole period. A rational juror could conclude that Frank intended to give X.N. a place to live long

[1] We review de novo the sufficiency of the evidence. *United States v. Garrison*, 888 F.3d 1057, 1064 (9th Cir. 2018). In doing so, we view the evidence in the light most favorable to the government and ask whether a rational trier of fact could have found that the government proved the essential elements of the crime beyond a reasonable doubt. *Id.* at 1063. In analyzing the sufficiency of the evidence, we apply the legal principles that we hold, below, are required to instruct a jury properly.

after her parole period ended and that he had a financial motive for doing so: Defendants' family had modest income, and Frank was an active participant in what occurred. For example, he flew to China with Lili to bring X.N. back to Saipan, he filled out the customs form at the border, and he enrolled X.N. in school.

In short, the evidence—viewed in the light most favorable to the government—is sufficient for a rational trier of fact to find that Lili harbored an illegal alien and that Frank had the specific intent to facilitate Lili's commission of that crime. Therefore, Defendants are not entitled to outright reversal of their convictions. We turn, then, to Defendants' claims of instructional error and their request for a new trial.

B. *The Meaning of "Harbor" and the Necessary Mens Rea*[2]

Title 8 U.S.C. § 1324(a)(1)(A)(iii) criminalizes the conduct of any person who:

> knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

[2] We review de novo whether a jury instruction misstates a required element of a charged offense. *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). Ordinarily, such an error requires reversal unless it is harmless beyond a reasonable doubt. *United States v. Pierre*, 254 F.3d 872, 877 (9th Cir. 2001).

Here, the court instructed the jury simply that the term "harbor" "means 'to afford shelter to.'" The instructions did not include any requirement that the jury consider whether Defendants intended to violate the law. Defendants asked the court to instruct the jury that it had to find that they sheltered X.N. for the specific purpose of avoiding detection by immigration authorities. The court declined to give that proposed instruction. We hold that, although the court properly rejected Defendants' particular formulation, harboring instructions must require a finding that Defendants intended to violate the law.

In *United States v. Acosta de Evans*, 531 F.2d 428, 429 (9th Cir. 1976), we rejected the defendant's argument that "harbor" means "to harbor so as to prevent detection by law enforcement agents," in the context of considering the sufficiency of the evidence to sustain the defendant's conviction. In concluding that the evidence sufficed even though the defendant did not have the specific intent to prevent detection, we held that—as the court instructed here—"harbor" means "afford shelter to." *Id.* at 430. *Acosta* addressed an earlier version of the statute but, like the present statute, it criminalized "conceal[ing], harbor[ing], or shield[ing] from detection" an unlawful alien. *Id.* at 429 n.1. Textually, the *Acosta* holding comports with the list of prohibited acts, because one is guilty of the crime if one *either* "harbor[s]" *or* "shield[s] from detection." 8 U.S.C. § 1324(a)(1)(A)(iii). When Congress uses different terms in the same statute, we presume that each term has a distinct meaning. *SEC v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003).

Nearly 30 years after *Acosta*, we decided *United States v. You*, 382 F.3d 958 (9th Cir. 2004). There, we held that jury

instructions on harboring an illegal alien "must require a finding that the defendants intended to violate the law." *Id.* at 966. The district "court instructed the jury that it must find that [the defendants] had acted with '*the purpose of* avoiding the aliens' detection by immigration authorities.'" *Id.* (brackets omitted). We held that the instruction "contained the necessary *mens rea* element" because it required the jury to find that the defendants acted with the required intent to violate the law. *Id.* Thus, an additional instruction that the defendants had requested would have been redundant. *Id.* In other words, we held that the instruction concerning a specific intent to avoid detection was sufficient, but we did not hold that it is necessary.

The government argues, first, that the statement in *You* concerning the required content of a jury instruction on intent was mere dictum, rather than a holding that we must follow. We are not persuaded. The opinion considered the question at some length, relying on two analogous decisions in which we held that a district court should have instructed the jury that it must find that the defendants intended to violate the law. *Id.* at 965–66. Moreover, the discussion was the sole analytical underpinning for the conclusion that an additional instruction was not needed. *See Barapind v. Enomoto*, 400 F.3d 744, 751 (9th Cir. 2005) (en banc) (per curiam) (footnote omitted) (explaining that an issue presented for review on appeal, which this court addressed and decided, "became law of the circuit, regardless of whether it was in some technical sense 'necessary' to our disposition of the case").

Next, the government asserts that we need not follow *You* because it was wrongly decided. Whether we agree with *You* or not, we are bound to follow it. *See Miller v. Gammie*,

335 F.3d 889, 899–900 (9th Cir. 2003) (en banc) (holding that a three-judge panel must follow a prior decision of this court unless it is "clearly irreconcilable" with the reasoning or theory of an intervening Supreme Court decision or other higher authority).

Finally, the government urges us to seek en banc rehearing because *Acosta* and *You* conflict irreconcilably. *See United States v. Torre-Jimenez*, 771 F.3d 1163, 1167 (9th Cir. 2014) (citing *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (en banc)) ("Moreover, if we thought that two controlling cases were in irreconcilable conflict, we could not simply pick one to follow—we would be required to call this case en banc."). In our view, we can harmonize the two cases despite some tension between them.

You requires only an instruction that the defendant intended to violate the law. One way to demonstrate such an intention is to prove that the defendant sought to prevent immigration authorities from detecting an illegal alien's presence. But that is not the only way. For example, a defendant who chooses to publicize her harboring of an illegal alien in order to call attention to what she considers an unjust immigration law intends to violate the law, even though she does not intend to prevent detection. *See United States v. Dann*, 652 F.3d 1160, 1174 (9th Cir. 2011) (stating that "the government is correct" in interpreting *Acosta* to mean that it did not have to prove that the defendant "harbored [the alien] to prevent detection by immigration authorities"); *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989) (explaining that *Acosta* held that "'harbor' . . . does not require an intent to avoid detection").

In summary, the jury instructions were legally deficient by not requiring the jury to find that Defendants intended to violate the law. The omitted instruction was not harmless beyond a reasonable doubt, because it went to the heart of Lili's primary defense—that she did not understand the immigration laws and did not act with the intent to violate the law. Indeed, the government expressly concedes that, if the harboring instruction was erroneous, the error was not harmless. Frank's conviction rises or falls with Lili's in this respect, because his conviction for aiding and abetting cannot stand without her conviction for the underlying offense of harboring.

C. *The Meaning of "Reckless Disregard"*

The district court instructed the jury that "reckless disregard" means "being aware of facts which, if considered and weighted in a reasonable manner, indicate a substantial and unjustifiable risk that" the person harbored was in fact an alien and was in the United States unlawfully. The government concedes that the instruction was plainly erroneous in light of *United States v. Rodriguez*, 880 F.3d 1151 (9th Cir. 2018).[3] *Rodriguez* held that reckless disregard requires that *the defendant herself* must be aware of facts

[3] When a defendant fails to object to an instruction below, we review for plain error. *United States v. Conti*, 804 F.3d 977, 981 (9th Cir. 2015). We may correct a plain error when: (1) there was error, meaning "a deviation from a legal rule that is not waived"; (2) the error is plain, "meaning 'clear' or 'obvious'"; (3) the error was prejudicial, meaning a "'reasonable probability'" exists that it "'affected the outcome of the district court proceedings'"; and (4) the error "'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *United States v. Olano*, 507 U.S. 725, 734, 736 (1993)).

from which an inference of risk could be drawn *and* the defendant must actually draw that inference. *Id.* at 1159–62.

The parties dispute whether the erroneous instruction, to which Defendants did not object at trial, prejudiced Defendants. Defendants bear the burden of showing prejudice, which requires some intermediate level of proof that the error affected the outcome at trial: more than a mere possibility, *United States v. Gonzalez-Aguilar*, 718 F.3d 1185, 1189 (9th Cir. 2013), but less than a preponderance of the evidence, *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004). To determine whether the error affected the outcome, we consider the whole trial record, including "the strength of the evidence against" Defendants and "the arguments made by the parties." *United States v. Garrido*, 713 F.3d 985, 995 (9th Cir. 2013) (internal quotation marks omitted). We also consider "whether the defendant contested the omitted element 'and raised evidence sufficient to support a contrary finding.'" *United States v. Conti,* 804 F.3d 977, 982 (9th Cir. 2015) (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). In sum, we must decide whether a reasonable probability exists that the jury would have found Lili not guilty[4] had the district court defined "reckless disregard" to mean: "*the defendant knew of* facts which, if considered and weighed in a reasonable manner, indicate a substantial and unjustifiable risk that the alleged alien was in fact an alien and was in the United States unlawfully, *and the defendant knew of that risk*." *See Rodriguez*, 880 F.3d at 1162 (providing a sample instruction).

[4] Frank's conviction for aiding and abetting cannot stand without Lili's conviction for the underlying offense, so the instruction necessarily prejudiced him if it prejudiced Lili.

Lili's mental state was the main disputed issue at trial. The government provided uncontested evidence of the other elements of harboring an illegal alien: that X.N. was an alien, that X.N. remained in the United States unlawfully, and that Lili afforded shelter to X.N. And the government offered strong evidence on the mental-state element: Lili brought X.N. through immigration control and saw the I-94 with a mandatory departure date of November 4, 2013, yet she kept X.N. in her home until 2015.

X.N. also had a return flight (that she never boarded) booked within the parole program's 45-day window. That reservation suggests that *someone* connected to X.N. knew the requirements of the parole program, but the evidence did not definitively show that Lili booked the flight or even knew about it.

Lili's defense strategy focused on sowing doubt about whether she knew (or knew of the risk) that X.N.'s continued presence on Saipan was unlawful. Through cross-examination and some of the government's exhibits, substantial evidence emerged from which a reasonable jury could infer that Lili—despite knowing of facts from which a reasonable person would infer the risk of X.N.'s presence being unlawful—did not *actually* draw that inference *herself*, as *Rodriguez* requires. 880 F.3d at 1160. Lili said that she consulted with a knowledgeable friend before agreeing to bring X.N. to the United States, and the friend told her that it was possible to bring a child to the United States to study. Lili also explicitly told a CBP officer, while going through immigration control, that X.N. would attend school on Saipan; she received no response to that information other than an instruction to have the authorization letter from X.N.'s parents stamped at the local police station.

Moreover, Lili gave the public school extensive documentation connecting herself to X.N.—something the jury could have inferred that she might not have done had she appreciated the facts of X.N.'s unlawful status. Among other things, Lili gave the school the authorization letter listing herself and Frank as X.N.'s guardians, a consent form to release X.N.'s directory information to the public, and a hand-drawn map showing precisely where Defendants lived. Lili also said that she never sought a student visa for X.N. because the school never asked for one and simply accepted X.N.'s passport and the notarized letter from her parents in China. One reasonable view of that evidence is that Lili did not realize that X.N. needed other documents to make her long-term presence in the United States legal.

In sum, Lili has shown more than a mere possibility that the jury would have reached a different verdict if properly instructed on reckless disregard. *Gonzalez-Aguilar*, 718 F.3d at 1189. But prejudice alone does not require reversal. We also must decide whether the error "seriously affects the fairness, integrity or public reputation of judicial proceedings" before exercising our discretion to correct the error. *Johnson v. United States*, 520 U.S. 461, 469–70 (1997) (brackets omitted) (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)).

Here, the jury might have relied on a legally invalid theory to convict Lili: that she acted in reckless disregard because a reasonable person, aware of the facts that Lili knew, would have understood the risk that X.N. remained in the country unlawfully—even if Lili herself did not understand that risk. The jury's "possible reliance on a legally invalid theory constitutes a miscarriage of justice which would seriously affect 'the fairness, integrity or public

reputation of judicial proceedings.'" *United States v. Vasquez-Hernandez*, 849 F.3d 1219, 1229 (9th Cir. 2017) (quoting *Garrido*, 713 F.3d at 998).

Accordingly, we hold that Defendants have met their burden under *Olano* to show that reversal and remand for a new trial is warranted.

REVERSED and **REMANDED.**

FILED

JUL 30 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LILI ZHANG TYDINGCO, Defendant-Appellant.	No. 23-10016 D.C. No. 1:15-cr-00018-RVM-1 District of the Northern Mariana Islands, Saipan ORDER

Before: CALLAHAN, HURWITZ, and H.A. THOMAS, Circuit Judges.

Judge Callahan and Judge H.A. Thomas have voted to deny the appellant's petition for rehearing en banc, and Judge Hurwitz so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing en banc (Dkt. No. 45) is **DENIED**. The appellant's motion for an extension of time to file a petition for rehearing en banc (Dkt. No. 43) and corrected motion for an extension of time to file a petition for rehearing en banc (Dkt. No. 44) are **DENIED** as moot.