

AUG 25 2009

Jankey v. Los Burritos, Inc., Nos. 06-56720, 06-56734MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GRABER, Circuit Judge, dissenting:

I respectfully dissent with respect to the appeal, because I think it is clear that the jury found that Jankey did not visit the restaurant. Jankey made inconsistent statements at trial regarding his alleged visits to Los Burritos. No witness testified that he had been there. The only evidence he produced, other than his own inconsistent testimony, was a cash receipt, but it did not contain his name or any other identifying information. The jury sent written questions to the judge inquiring about the absence of various kinds of corroborative evidence as to Jankey's alleged visits to the restaurant. In the circumstances, I am convinced that the jury found that Jankey never went to the restaurant and, therefore, that the instructional error was harmless under the standard set in Dang v. Cross, 422 F.3d 800, 811 (9th Cir. 2005).¹

¹ Because I find that the instructional error was harmless, I would not reach Defendants' cross-appeal.