

UNPUBLISHED

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

CHARLES LEE REED, a/k/a Fourteen,  
*Defendant-Appellant.*

No. 98-4662

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee,*

v.

MARY ALICE TUSHKA,  
*Defendant-Appellant.*

No. 98-4767

Appeals from the United States District Court  
for the Western District of North Carolina, at Bryson City.  
Lacy H. Thornburg, District Judge.  
(CR-97-293)

Submitted: October 31, 2000

Decided: November 28, 2000

Before LUTTIG and TRAXLER, Circuit Judges, and  
HAMILTON, Senior Circuit Judge.

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Affirmed by unpublished per curiam opinion.

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**COUNSEL**

David G. Belser, PARKE & BELSER, P.A., Asheville, North Carolina; Patrick B. Ochsenreiter, OCHSENREITER LAW FIRM, Asheville, North Carolina, for Appellants. Mark T. Calloway, United States Attorney, Thomas R. Ascik, Assistant United States Attorney, Asheville, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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**OPINION****PER CURIAM:**

Charles Lee Reed appeals his convictions for assault with an axe with intent to commit murder, 18 U.S.C.A. §§ 113(a)(1), 1153 (West 2000); assault with a dangerous weapon with intent to do bodily harm, 18 U.S.C.A. §§ 113(a)(3), 1153; assault resulting in serious bodily injury, 18 U.S.C.A. §§ 113(a)(6), 1153; and committing and aiding and abetting in the commission of first degree burglary, 18 U.S.C.A. §§ 2, 13, 1153 (West 2000); N.C. Gen. Stat. § 14-51 (1993). Mary Alice Tushka appeals her conviction for committing and aiding and abetting in the commission of first degree burglary. Finding no error, we affirm their convictions.

Tushka first challenges the district court's instructions on the burglary charge, arguing that, in explaining the requisite intent to commit the underlying felony, the court erroneously referred to the previously given instructions on the federal assault charges, rather than instructing as to felony assault under North Carolina law. During the charge conference, it was suggested that, although the assault definitions under federal and state law differ, the court could merely refer to the prior instructions on federal assault when instructing on the felony underlying the burglary. Tushka failed to object in the district court to this instruction. Because Tushka invited this error, this court will

not review her claim. *See Shields v. United States*, 273 U.S. 583, 586 (1927); *United States v. Herrera*, 23 F.3d 74, 75-76 (4th Cir. 1994) (declining, under invited error doctrine, to review challenge to jury instruction).

Tushka also argues that the district court erred in instructing the jury on the elements of aiding and abetting. She contends that the instruction, as given, allowed a conviction without proof that, at the time of the breaking and entering, she herself had the specific intent to commit a felony assault. Read as a whole, *see Smith v. University of N.C.*, 632 F.2d 316, 322 (4th Cir. 1980), however, we find that the jury instructions on the charge of aiding and abetting burglary fairly and adequately submitted the issues and applicable law to the jury. *See United States v. Bostian*, 59 F.3d 474, 480 (4th Cir. 1995); *United States v. Cobb*, 905 F.2d 784, 788-89 (4th Cir. 1990). Accordingly, we affirm Tushka's conviction on this charge.

Reed challenges under *Bruton v. United States*, 391 U.S. 123 (1968), the testimony of a government witness concerning a statement made by a non-testifying co-defendant. He contends that although the statement "did not explicitly implicate" him, it "had the effect of inculcating [him] by implication."

In *Bruton*, the Supreme Court held that a defendant's Sixth Amendment right to cross-examine witnesses against him is violated when the defendant is inculpated by an out-of-court statement by a non-testifying co-defendant that is admitted at their joint trial. 391 U.S. at 126. However, a "*Bruton* problem exists only to the extent that the co-defendant's statement in question, on its face, implicates the defendant." *United States v. Locklear*, 24 F.3d 641, 646 (4th Cir. 1994). Also, a statement that is not facially incriminating is admissible, even if it is incriminating when linked with other evidence introduced at trial. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Because the challenged statement was not facially incriminating to Reed, it was properly admitted under the *Bruton* rule.

Lastly, Reed contends that his counsel was ineffective for failing to challenge, under *Bruton*, the admission of the co-defendant's statement and for failing to request a jury instruction on the effect of intoxication on the formation of specific intent. We find, however,

that these claims are more properly raised in the district court in a motion under 28 U.S.C.A. § 2255 (West Supp. 2000), because the record does not conclusively demonstrate that counsel rendered ineffective assistance. *See United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997).

Accordingly, we affirm Tushka's and Reed's convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

*AFFIRMED*