

ANALYSIS

I. The United States' Bill of Particulars did not Constructively Amend the Indictment

The defendant claims that the Government's bill of particulars on Count Seven improperly amended the Indictment. To support this argument, the defendant relies solely on *United States v. Gavin*, 583 F.3d 542 (8th Cir. 2009). However, *Gavin* is distinguishable and does not apply to these facts of before the Court. The only issue considered in *Gavin* was whether certain jury instructions amended the indictment. *Gavin*, 583 F.3d at 586. Here, the issue is whether facts alleged in a bill of particulars can amend an indictment.

While an indictment may otherwise be valid under Federal Rule of Criminal Procedure 7(c)(1), it may or may not include enough facts for a defendant to prepare an adequate defense. *United States v. Rigas*, 490 F.3d 208, 237 (2d Cir. 2007). In cases where the indictment includes only the constitutionally required facts, the defendant may ask the government for a bill of particulars under Federal Rule of Criminal Procedure 7(f) for further clarification. *United States v. Livingstone*, 576 F.3d 881, 883 (8th Cir. 2009). The Supreme Court of the United States has been very clear that "a bill of particulars cannot save an invalid indictment." *Russell v. United States*, 369 U.S. 749, 770 (1962). This is so because a bill of particulars is meant only to "inform the defendant of the nature of the charges against him and to prevent or minimize the element of surprise at trial." *United States v. Wessels*, 12 F.3d 746, 750 (8th Cir. 1993). Thus, given the nature of a bill, it is also true that "a bill of particulars may contain facts not alleged in the indictment." *United States v. Dolan*, 120 F.3d 856, 866 (8th Cir. 1997); *see also Rigas*, 490 F.3d at 237 (holding that a bill of particulars cannot add additional charges or alter existing charges), *United States v. Spector*, 326 F.2d 345, 347 (7th Cir. 1963), *United States v. Lefkoff*, 113 F.Supp. 551, 554 (E.D. Tenn. 1953)("The offense charged cannot be changed, modified or

vitalized by a bill of particulars.”), 41 AM. JUR. 2D *Indictments and Informations* § 151 (2010)(“A bill of particulars is not part of the indictment or information, and it cannot validate a defective one, cure a defect, or add to or subtract from the indictment or information or change the crime charged.” (citations omitted)).

A constructive amendment occurs “when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them.” *United States v. Huntsman*, 959 F.2d 1429, 1435 (8th Cir. 1992). Because a bill of particulars is incapable of adding to or subtracting from the elements listed in an indictment, it follows that a bill of particulars by definition may not constructively amend an indictment. *See* 41 AM. JUR. 2D *Indictments and Informations* § 151 (2010).

The bill of particulars on Count Seven merely provided additional facts for the defendants to prepare an adequate defense, and these facts did not add or alter the charges in Count Seven. Therefore, the bill of particulars did not amend the Indictment.

II. The Jury was Not Required to be Instructed on the “Manner and Means” of the Conspiracy Charged in Count Seven

The defendant contends that it was error for the Court not to include the “‘manner and means’ of the conspiracy” in Court’s Instruction 26.² To support this argument, the defendant states that Model Instruction 5.06A requires that the jury be instructed regarding the “manner

²The defendant does not explain what she means by “manner and means of the conspiracy.” However, during the jury instruction conference, the defendant raised issues about including “objects of the conspiracy” and “overt acts” in the jury instructions. Therefore, in this Response, the United States will assume that the defendant’s motion is addressing those same two issues raised during the instruction conference.

and means” by which the conspiracy was accomplished.³ However, Model Instruction 5.06A only requires that the instruction include the *offense* which the conspirators agreed to commit; it does *not* require that the jury be instructed on the object(s) of the conspiracy or how the conspiracy was to be carried out. In the second element described in Court’s Instruction 26, the Jury in this case was instructed that it must find, *inter alia*, that “two or more persons corruptly entered into an agreement to corruptly obstruct, influence, or impede an official proceeding.” This instruction was proper.

Similarly, the Jury should not have been instructed on the requirement of any overt acts performed for the purpose of carrying out or furthering the conspiracy. The overt act instruction requested by the Defendant is listed as Element Four in Model Instruction 5.06A. That instruction is based on the statutory language contained in 18 U.S.C. 371, which requires that "one or more of such persons do any act to effect the object of the conspiracy..." However, the conspiracy charged in Count Seven is charged under 18 U.S.C. § 1512(k), not Section 371. Section 1512(k) does not contain any language that requires proof of any acts committed in furtherance of the conspiracy; therefore proof of an overt act is not required. *See United States v. Shibani*, 513 U.S. 10 (1994)(holding that in order to establish a violation of § 846, the Government need not prove the commission of any overt acts in furtherance of the conspiracy because the statute's plain language does not require an overt act); *Nash v. United States*, 229 U.S. 373, 378(1913)(holding that an overt act is not required for antitrust conspiracy liability); *Singer v. United States*, 323 U.S. 338, 340 (1945)(holding that the Selective Service Act does not

³During the instruction conference, the United States objected to the use of Model Instruction 5.06A because that instruction applies to offenses charged under the general conspiracy statute, 18 U.S.C. 371, whereas the defendant was charged under a specific conspiracy statute, 18 U.S.C. 1512(k). The United States still maintains that the use of Model Instruction 5.06A is inappropriate.

require an overt act for the offense of conspiracy). Thus, it was proper for this Court not to instruct the Jury on any requirement of proof of any overt acts.

III. The Evidence Supports the Jury's Guilty Verdicts for Counts Seven and Eight

A. Standards

In his or her motion for a judgment of acquittal, a defendant bears the heavy burden of establishing that "no reasonable jury could have found [him or her] guilty beyond a reasonable doubt." *United States v. McClellon*, 578 F.3d 846, 854 (8th Cir. 2009)(quoting *United States v. Thomas*, 565 F.3d 438, 441 (8th Cir. 2009)). While reviewing a defendant's attempt to satisfy this burden, district courts should "view[] the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict." *Id.* When the defendant's motion is based on evidentiary insufficiency, the verdict "must" be upheld "if the evidence so viewed is such that there is an interpretation of the evidence that would allow a reasonable-minded jury to find the defendant[] guilty beyond a reasonable doubt." *United States v. Lewis*, 557 F.3d 601, 612 (8th Cir. 2009)(quoting *United States v. Vig*, 167 F.3d 443, 447 (8th Cir. 1999)).

"A motion for new trial based upon the weight of the evidence is disfavored." *United States v. Hawkins*, 548 F.3d 1143, 1148 (8th Cir. 2008)(quoting *United States v. Davis*, 534 F.3d 903, 912 (8th Cir. 2008)). Thus, an order granting a new trial under Federal Rule of Criminal Procedure 33 is justified "only if the evidence weighs so heavily against the verdict that a miscarriage of justice may have occurred." *United States v. McClellon*, 578 F.3d 846, 854 (8th Cir. 2009)(quoting *United States v. Starr*, 533 F.3d 985, 999 (8th Cir. 2008)). Given this

precedent, a district court must exercise its discretion to grant a new trial "sparingly and with caution." *Id.*; see also *United States v. Cole*, 537 F.3d 923, 926 (8th Cir. 2008), *United States v. Smart*, 501 F.3d 862, 865 (8th Cir. 2007).

B. Discussion

The defendant contends that the evidence was insufficient to support the Jury's guilty verdicts on Counts Seven and Eight because the United States failed to prove that "the defendants had a specific intent to obstruct a federal judicial or grand jury proceeding."

Count 7 charged that "from on or about March 4, 2009, until on or about August 6, 2009, in the Eastern District of Arkansas, the defendants... did conspire with each other to corruptly obstruct, influence, and impede an official proceeding, in violation of Title 18, United States Code § 1512(c)(2). All in violation of Title 18, United States Code § 1512(k)." The Court instructed the Jury, in Court's Instruction No. 26, on Count 7 as follows:

"The crime of conspiracy to obstruct an official proceeding, as charged in Count Seven of the indictment, has three essential elements, which are:

One, that on or about the dates alleged in the indictment, an official proceeding was either pending, or was about to begin, or was reasonably foreseeable.

Two, that two or more persons corruptly entered into an agreement to corruptly obstruct, influence, or impede an official proceeding. The defendants must have specifically contemplated some particular official proceeding in which the documents or testimony might be material.

Three, that the defendant knowingly and intentionally became a member of the conspiracy to do such acts."

The defendant's only objection to this jury instruction was that it failed to instruct the Jury about the

object(s) of the conspiracy and that it did not instruct the Jury about overt acts. The United States opposed - and still opposes - instructing the Jury that “the defendants must have specifically contemplated some particular official proceeding in which the documents or testimony might be material.”

Count 8 charged that “from on or about March 4, 2009, until on or about May 5, 2009, in the Eastern District of Arkansas, the defendants... aiding and abetting one another, did corruptly conceal, and attempt to corruptly conceal, one or more of the following documents and objects, to wit: a special power of attorney, a general power of attorney, and pre-signed blank checks and other financial documents or objects related to a bank account ending in the numbers 8796, with the intent to impair the document’s and other object’s availability for use in an official proceeding. All in violation of Title 18, United States Code, Sections 1512(c)(1) and 2.” The Court instructed the Jury, in Court’s Instruction No. 28, on Count 8 as follows:

“The crime of Concealing an Object from Use in an Official Proceeding, as charged in Count Eight of the Indictment has four essential elements, which are:

One, that on or about the dates alleged in the indictment, an official proceeding was pending, was about to begin, or was reasonably foreseeable;

Two, that the defendant corruptly concealed or attempted to corruptly conceal one or more of the following documents, to wit: a special power of attorney, a general power of attorney, and pre-signed blank checks and other financial documents or objects related to a bank account ending in the numbers 8796; and

Three, that the defendant acted knowingly and intentionally; and

Fourth, the natural and probable effect of defendants' conduct would be the interference with the due administration of justice.”

This instruction was largely crafted by the defendant, and the defendant did not object to this instruction. The United States objected to - and still opposes - the inclusion of the fourth element in this instruction.

The Court further instructed the Jury, in Court's Instruction 30, that: "The crime charged in Count Eight of the indictment includes an Attempt to Conceal an Object from Use in an Official Proceeding. A person may be found guilty of an attempt if he or she intended to corruptly conceal documents and voluntarily and intentionally carried out some act which was a substantial step toward that concealment, and if successful, the concealment would have the natural and probable effect of interfering with the due administration of justice." The defendant had no objection to this instruction.

The evidence at trial established that Randeep Mann was interviewed by a federal agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) about the West Memphis bombing on February 4, 2009 - the same day as the bombing. (Sangeeta Mann was present during and participated in that interview.) Then, on March 4, 2009, Randeep Mann was arrested for unlawfully possessing 40 mm high explosive grenades after federal and state agents executed a state search warrant on the Mann residence.⁴ (Sangeeta Mann was present during part of the execution of the search warrant.) On March 5, 2009, a criminal complaint was filed in federal court charging Randeep Mann with a violation of Title 26, U.S.C., Section 5861(d). Randeep Mann appeared later that same day in federal court before a United States magistrate judge for his initial appearance on the complaint. (Sangeeta Mann was present at his initial appearance.) At the initial appearance, a detention hearing was scheduled for Randeep Mann on March 9,

⁴Randeep Mann has remained in federal custody since his arrest on March 4, 2009. He was detained as a flight risk by the Honorable H. David Young, United States Magistrate Judge, after a two-day detention hearing held on March 9-10, 2009.

2009. The evening after the initial appearance, ATF agents executed a federal search warrant on the Mann residence. Sangeeta Mann was present during part of the execution of the search warrant.

Randeep Mann has remained in federal custody since his arrest on March 4, 2009. While in custody, he made several phone calls from jail to Sangeeta Mann; those phone calls were recorded in accordance with jail policies. During one of those calls, on March 6, 2009, Sangeeta Mann tells Randeep Mann that “Drake,” one of Randeep Mann’s attorneys, told her that chances were high that federal agents would be coming to the Manns’ office soon. Randeep Mann then immediately, in code, instructs Sangeeta Mann to go to the office and remove some items from his desk and to give them to Tim or Riley. On March 11, 2009, at 7:12 a.m., Sangeeta Mann informs Randeep Mann that federal agents had executed a search warrant on the clinic the night before. Randeep Mann then asks her if she had gone into the office and gotten anything. Sangeeta Mann responds, “We did good. We did good.”

The evidence presented to the Jury revealed that the items removed from Mann’s desk were a special power of attorney, a general power of attorney, and pre-signed blank checks and other financial documents related to a bank account in the name of Sandip Mann (Randeep Mann’s brother). The evidence also demonstrated that, after removing the checks and bank records from the medical clinic, Sangeeta Mann took the items to Gerald Riley, a close friend of Randeep Mann, and asked him to keep them. Later on, Gerald Riley informed Sangeeta Mann that ATF agents knew about the items she had taken from the office and given to him; Sangeeta Mann told Riley that was impossible and further stated, “Well, they don’t know everything.”

Evidence presented at trial also showed that Sangeeta Mann also moved, concealed, and or destroyed other potential evidence in this case while her husband was in custody. In some of

the phone calls, she talked to her husband about firearms that were located in the office; however, when ATF agents executed a search warrant on the clinic, they did not find any firearms. Randeep Mann, speaking in code on one of the jail calls, also directs Sangeeta Mann to remove “Dan’s papers”⁵ from the medical clinic; Sangeeta Mann later confirms that she did so. Two witnesses also testified that, shortly after Randeep Mann had been arrested, Sangeeta Mann called them and asked them to haul away a truck- and a car-load full of items from the Mann’s residence. Those items were taken to the witnesses house and most of them were then burned in the yard. When ATF agents searched the burn pile, they located a three-ring binder from a bank bearing the name “Sunny Mann” on it.⁶

From this and other evidence, a reasonable jury could have found that all of the elements of Counts 7 and 8 had been proven beyond a reasonable doubt. The defendant claims that the evidence was insufficient to prove “an intent to conceal the documents from the grand jury.” That, however, is not the law and the Jury was not instructed in that manner. Furthermore, it cannot be forgotten that, given the nature of “intent,” that juries are often called upon to infer the defendant’s intent based upon the facts proven at trial. In fact, the Jury in this case was instructed, in Court’s Instruction 32, that:

“Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of defendant's knowledge or intent.

You may, but are not required to, infer that a person intends the natural and probable

⁵“Dan” is Kundan Mann, son of Randeep Mann. A witnesses testified at trial that Randeep Mann offered the witness \$50,000 to finish the job (the bombing of Dr. Trent Pierce) because “Dan”didn’t do it right the first time.

⁶“Sunny” is the nickname of Randeep Mann’s brother, Sandip Mann.

consequences of acts knowingly done or knowingly omitted.”

Given the facts detailed above, it was perfectly reasonable - and lawful - for the Jury to infer and conclude that the defendant had the requisite state of mind to find her guilty of Counts 7 and 8.

Finally, it must be noted that the defendant focuses exclusively on the grand jury as the “official proceeding”⁷ in this case. However, the United States presented evidence of several “official proceedings:” the grand jury, the detention hearing (“a proceeding before a United States magistrate judge”), the federal search warrant on the medical clinic (“a proceeding before a United States magistrate judge”), and the trial itself (“a proceeding before a judge or court of the United States”).

In order to prevail on her motion, the defendant must establish that, viewing the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict, no reasonable jury could have found her guilty beyond a reasonable doubt. The defendant simply has not overcome her burden.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court deny the Defendant’s Motion for Judgment of Acquittal and Motion for New Trial.

⁷The Jury was instructed in Court’s Instruction 27 that the term “official proceeding” includes “a proceeding before a judge or court of the United States, a United States magistrate judge, ... or a Federal grand jury.”

Respectfully submitted,

JANE W. DUKE
UNITED STATES ATTORNEY

/s/ Michael Gordon

By: MICHAEL GORDON

Bar Number 00795383

KAREN WHATLEY

Bar Number 94132

Assistant United States Attorneys

P.O. Box 1229

Little Rock, AR 72203

501-340-2600

karen.whatley@usdoj.gov

michael.gordon@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2010, I electronically filed the foregoing with the Clerk of the Court, which shall send notification of such filing to the following:

Timothy O. Dudley

todudley@swbell.net

Danny Crabtree

danny.crabtree@sbcglobal.net

Erin Cassinelli Couch

erin@lassiterandcouch.com

Jack Lassiter

jack@lassiterandcouch.com

J. Blake Hendrix

hendrixlaw@mac.com

John Wesley Hall , Jr.

forhall@aol.com, karabinz@aim.com, pjbenca@aol.com, sbruno@hall-benca.com,
tjlelm@windstream.net, tlavelle@hall-benca.com

Peter Drake Mann

mann@gill-law.com, debbye@gill-law.com

/s/ Michael Gordon

By: MICHAEL GORDON