NO.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Defendant-Appellant.	)	DC# CR

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE ROBERT TAKASUGI
United States District Judge

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I.

STATEMENT OF ISSUE PRESENTED

DID THE DISTRICT COURT ERR IN REFUSING TO GIVE A SPECIFIC UNANIMITY INSTRUCTION WHEN THEFTS ON THREE SEPARATE OCCASIONS WERE ALLEGED IN A SINGLE COUNT OF THE INDICTMENT AND THE GOVERNMENT NEITHER ALLEGED IN THE INDICTMENT NOR REQUESTED AN INSTRUCTION REQUIRING A FINDING THAT THE TAKINGS WERE PART OF A PRE-CONCEIVED PLAN?

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is from a judgment of conviction for the offense of theft by a bank employee, in violation of 18 U.S.C. § 656. Ms. was sentenced on June 5, 2006 to serve twelve months and one day in custody and three years of supervised release. ER 20 .

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. A timely notice of appeal was filed on June 7, 2006. ER 25.

B. COURSE OF PROCEEDINGS.

The initial indictment charging Ms. was filed on April 23, 2004. CR 11. Ms. was arraigned on the indictment and pled not guilty on May 3, 2004. CR 19.

On October 20, 2005, in preparation for trial, the defense filed proposed jury instructions. CR 49, 50. A first superseding indictment making technical changes to the charge in the original indictment was filed on October 21, 2005. ER 1-2.

Trial commenced on October 25, 2005. After the jury had been empaneled,

Ms. was arraigned on the first superseding indictment and entered a not guilty plea. RT(10/25/05) 12-13. Counsel then made opening statements, RT(10/25/05) 14-19, and the government began to present its evidence, RT(10/25/05) 19.

The parties concluded their presentation of the evidence and the court held a conference on jury instructions on October 26, 2005. ER 5-9. The court declined to give a specific unanimity instruction proposed by the defense, and the defense objected to this ruling. ER 9.

The parties then gave their closing arguments, RT(10/26/05) 114-59, and the jury retired to deliberate, RT(10/26/05) 167. It returned a verdict of guilty the next day. RT(10/27/05) 14.

C. BAIL STATUS OF DEFENDANT.

Ms. is presently on bond pending appeal.

III.

STATEMENT OF FACTS

The first superseding indictment under which Ms. was prosecuted charged that she was an employee – or person connected in some capacity – with a branch of Union Bank of California. ER 1. The indictment further charged that Ms. had stolen over $70,000 while working at the bank. ER 1. Though it

was not specifically alleged in the indictment, the money that was allegedly taken was money that had allegedly been contained in Von's/Pavilion's grocery store deposits that were received by the bank during the one week Ms. was working there. RT(10/25/05) 40, 94; RT(10/26/05) 63-64.

The government's evidence at trial established several facts that were undisputed. One was the jurisdictional fact that Union Bank of California was federally insured. RT(10/26/05) 6. Another was that there was a difference between (1) the amount of money that Von's/Pavilion's grocery store deposit slips showed were supposed to be in the bags of deposits sent to the bank and (2) the amount of money that was actually in the bags when the money was counted. See RT(10/25/05) 40-42, 45, 92-112. A third undisputed fact was that Ms. was a temporary agency employee working in the cash vault where the deposit bags were opened on the days the bags with allegedly missing money were processed. See RT(10/25/05) 22-23, 57; RT(10/26/05) 48, 61.

What was disputed was whether Ms. took any money. Initially, there was some dispute about whether money had been stolen at the bank as opposed to missing from the deposits when they arrived. Two bank witnesses, while acknowledging that there were sometimes shortages, claimed that the typical shortage was almost never more than $100 or $1,000. RT(10/25/05) 42-43, 94. But bank records showed shortages which were labeled "CCV Adj," to represent an adjustment for cash that had been credited but was not actually in the deposit bags, RT(10/26/05) 14-18 as high as $10,000, $13,500, $13,800, $18,000, and $66,000 on a single day, see RT(10/26/05) 150-52; Def. Ex. 102.

Secondly, assuming that some money had been taken at the bank, there was a dispute about whether Ms. was the person who had taken it. The strip unit detail sheets for the deposit bags that were allegedly missing money, which are records that accompany the deposit bags and are supposed to be signed by the teller who processed the bags, were not signed by Ms. The strip unit detail for one of the bags that was allegedly missing money was unsigned, and the strip unit details for the other two bags that were allegedly missing money had the initials "R.T.," which matched the initials of an employee named Roshanna Tatum.[1] See RT(10/25/05) 57; RT(10/26/05) 11-13, 50-51. Two or three other strip unit details were signed by Ms. RT(10/26/05) 79-80, and a bank investigator's report indicated that videotapes showed Ms. signing just two such documents on the days the money was allegedly taken, see RT(10/26/05) 77.

There were also several employees who failed to comply with the instructions a substitute supervisor gave them when the discrepancy in funds was discovered. See RT(10/25/05) 46-48. This included one teller who passed off a bag to another teller before it had been completely counted, a second teller who left his work station after finding a difference when he was told to stay at his work station if that happened, and a third teller who failed to call the supervisor as instructed when he found additional differences. RT(10/25/05) 47-48.

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[1] Ms. Tatum was called as a witness by the government and denied that she had written the initials, see RT(10/26/05) 50-51, but the defense questioned her denial, see generally RT(10/26/05) 149-50.

The critical evidence consisted of bank videotapes of Ms. working in the cash vault on the days when the money was allegedly taken. These videotapes were presented to the jury through a bank investigator named Patricia Rivera who also testified about what she claimed she observed on the tapes. See RT(10/25/05) 60-84. Ms. Rivera claimed that she saw Ms. taking money on three separate occasions and played those sections of the videotape for the jury. See RT(10/25/05) 60-73, 74-77, 79-84; RT(10/26/05) 22. The three things Ms. Rivera claimed she saw Ms. doing were segregating large and small bills, using bags on her desk to create a cover of sorts, and putting her hands down in her lap so she could put money inside her clothing. RT(10/26/05) 22. But Ms. Rivera admitted that there were other times when Ms. had her hands in her lap, below the counter, or under some bags and did not take any money. RT(10/26/05) 25-27, 34. Ms. Rivera also acknowledged that there was no sorting of money during the half hour between Ms. returning from her lunch break and the alleged second taking of money. RT(10/26/05) 29-32. Finally, Ms. Rivera acknowledged that another worker's head was turned toward Ms. on one of the occasions when Ms. was supposedly taking money, though Ms. Rivera disagreed with defense counsel's characterization of the other woman as "facing in the direction" of Ms. and claimed the woman was actually "facing down." RT(10/26/05) 41-42.

V.

SUMMARY OF ARGUMENT

The general rule is that separate takings of property are separate theft offenses. There are exceptions to this general rule when there is a single accounting to be completed at the end of the day or a preconceived plan at the time the takings commence, but there was no allegation or instruction regarding such circumstances here.

This meant the three separate takings to which the government and its witnesses pointed to were separate offenses which should have been charged in separate counts. This made the single-count indictment duplicitous if it was meant to include all of the takings rather than just whichever one the government thought was most strongly shown by the evidence.

The defense waived its right to challenge the form of the indictment prior to trial, but this does not mean it was entitled to no relief at all. It was still entitled to relief in the form of a specific unanimity instruction, to make sure that the jurors unanimously agreed on at least one of the takings. Without such an instruction, different jurors could have convicted based on different takings without unanimously agreeing on any one. This possibility violated Ms. right to a unanimous jury verdict and requires reversal and a new trial.

VI.

ARGUMENT

A. REVIEWABILITY AND STANDARD OF REVIEW.

As noted supra p. 3, the defense requested a specific unanimity instruction which would have required the jury to unanimously agree on at least one of the three occasions the government alleged Ms. had taken money. ER 3-4, 7-8. The district court rejected that proposed instruction and defense counsel objected. ER 9. Such a ruling is reviewed for abuse of discretion. United States v. Kim, 196 F.3d 1079, 1082 (9th Cir. 1999).

B. THE DISTRICT COURT SHOULD HAVE GIVEN THE SPECIFIC UNANIMITY INSTRUCTION PROPOSED BY THE DEFENSE.

1. The Three Takings by Ms. that the Government Claimed the Videotape Showed Were Separate Offenses.

One of the prosecutors himself stated – in the government's opening statement – that Ms. took money "on three separate occasions." RT(10/25/05) 15. Similarly, the main bank witness, Ms. Rivera, acknowledged on cross examination that "there are three times when [she] claim[ed] Ms. was taking money." RT(10/26/05) 22. In her testimony on direct examination,

Ms. Rivera pointed to three separate places on the videotapes, which were on different days and/or hours apart. See RT(10/25/05) 60-84.

The general rule is that such separate takings are separate offenses. This was described as "settled law" more than sixty years ago, in the case of Cartwright v. United States, 146 F.2d 133 (5th Cir. 1994), which this Court distinguished but did not disapprove in United States v. Paulino, 717 F.2d 1226 (9th Cir. 1982). See Paulino, 717 F.2d at 1227; Cartwright, 146 F.2d at 135. Many subsequent cases have stated and applied a similar rule. See, e.g., United States v. Billingslea, 603 F.2d 515, 520 (5th Cir. 1979); United States v. DiGilio, 538 F.2d 972, 980 (3rd Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

Separate takings can be charged as one offense when there is a single accounting to be completed at the end of a day, see e.g., United States v. Paulino, 717 F.2d at 1217, or when there is a preconceived plan at the time the takings commence, see Billingslea, 603 F.2d at 520. The government neither alleged in the indictment nor sought an instruction on any such theory in the present case, however, and so it should not be permitted to rely upon such a theory now. Compare United States v. Parisien, 413 F.3d 924, 926-27 (8th Cir. 2005) (allowing aggregation of takings where jury was instructed that it had to find whether defendant had engaged in a continuing course of conduct).[2] The "three separate

[2] Parisien used a test that is somewhat looser than the test established in Billingslea, in that Parisien focuses on intent which may have developed at any time during the series of multiple takings. See Parisien, 413 F.3d at 927. The Court need not consider this distinction in the present case because the government did not propose an instruction in either the form suggested by

occasions" to which the prosecutor referred in his opening statement must be viewed as three separate offenses.

2. Because the Three Takings Were Separate Offenses, the Defense was Entitled to a Specific Unanimity Instruction.

Despite the government's and its witnesses' description of thefts "on three separate occasions," despite the general rule that separate takings constitute separate thefts, and despite the government's failure to add an allegation to the indictment and request an instruction triggering one of the exceptions to this general rule, the first superseding indictment[3] under which Ms. was prosecuted charged just one theft offense. This made the indictment duplicitous if the government meant the one count to include all of the takings rather than just whichever taking it considered to be most strongly shown by the evidence.[4] Still,

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Billingslea or the form approved in Parisien.

[3] The only changes in the superseding indictment were a change in the amount which Ms. had allegedly taken – from $75,991 to $72,021 – and a characterization of her as a person "connected in any capacity" with the bank in addition to the characterization of her as an employee. Compare ER 1-2 with CR 11.

[4] An indictment is duplicitous if it charges more than one offense in a single count. See 1A Charles Alan Wright, Federal Practice and Procedure: Criminal 7 (3d ed. 1999). This contrasts with a multiplicitous indictment, which charges a single offense in multiple counts. See id. at 7-8.

the defense did not directly[5] challenge the form of the indictment, and that means any challenge based solely on the form of the indictment is waived. See United States v. Savage, 67 F.3d 1435, 1439 (9th Cir. 1995), cert. denied, 516 U.S. 1136 (1996); United States v. Gordon, 844 F.2d 1397, 1400 (9th Cir. 1988).

This does not mean the defense was entitled to no relief at all, however. One of the risks that arises out of a duplicitous indictment is the possibility of a nonunanimous verdict, see United States v. Arreola, 446 F.3d 926, 934 (9th Cir. 2006); United States v. Savage, 67 F.3d at 1439; Wright, supra p. 10 n.4, at 85, which implicates a right – the right to a unanimous verdict – that is "rooted in the Sixth Amendment" and has a "fundamental role" in a criminal trial, United States v. Gomez-Lepe, 207 F.3d 623, 630 (9th Cir. 2000). As explained by then-Judge, now-Justice, Kennedy:

> [T]he requirement of a unanimous verdict is firmly established in the federal system. . . . The dynamics of the jury process are such that often only one or two members express doubt as to view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict . . . .

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir.1978) (Kennedy, J.), quoted

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[5] Defense counsel did characterize the indictment as duplicitous in making his argument about why a specific unanimity instruction was required and did suggest that the government should be required to make an election if the specific unanimity instruction was not given. ER 8. Defense counsel did not move to dismiss the indictment, however.

in Gomez-Lepe, 207 F.3d at 630.

A defendant is entitled to protection from a duplicitous charge's potential infringement upon this right even if she does not object to the form of the indictment. Such protection is provided by a specific unanimity instruction that requires the jury to unanimously agree on one of the offenses in the duplicitous charge. See Savage, 67 F.3d at 1439; Gordon, 844 F.2d at 1400. Where the defendant does not request even that relief, she waives her claim entirely, or at least is limited to review for plain error. See United States v. Technic Services, Inc., 314 F.3d 1031, 1040 & n.3 (9th Cir. 2002); Savage, 67 F.3d at 1439. But where the defendant does request the protection of a specific unanimity instruction, that protection must be provided. As explained in Gordon:

> In this case, Gordon first raised the duplicity issue in his Rule 29 motion at the close of the government's case-in-chief and he has not made any showing of good cause. We conclude that appellants have waived an objection to the form of the indictment and their right to force the government to divide Count I into two separate conspiracy counts. Appellants, however, have a right under Article III, sec. 2 and the sixth amendment to a unanimous jury verdict. (Citation omitted.) This constitutional claim was not waived. (Footnote omitted.)

Gordon, 844 F.2d at 1400-01 (emphasis in original).

The need for a specific unanimity instruction in the case of a duplicitous indictment is also made clear by the general case law regarding such instructions. There are three different circumstances in which a specific unanimity instruction is required. The first circumstance in which a specific unanimity instruction is required is "where the jury actually indicates, by note to the court, that it is confused." United States v. Anguiano, 873 F.2d 1314, 1319 (9th Cir.),

cert. denied, 493 U.S. 969 (1989). A second circumstance in which a specific unanimity instruction is required is "where the indictment is sufficiently broad and ambiguous so as to present a danger of jury confusion." Id. Then, a third circumstance in which a specific unanimity instruction is required is "where the evidence is sufficiently factually complex to indicate that jury confusion may occur." Id. at 1320.

A duplicitous indictment falls within the second of these circumstances, because duplicity makes an indictment overly "broad and ambiguous." This Court found not just error, but plain error, in failure to give a specific unanimity instruction to cure a duplicitous indictment in United States v. Payseno, 782 F.2d 832 (9th Cir. 1986). See id. at 834, 837. After noting that "the government introduced evidence of three offenses supporting one count of the indictment," id. at 836, the Court found plain error and reversed because "there exists the genuine possibility that some jurors may have believed the defendant used extortionate means on one occasion while others may have believed that he was guilty of engaging in extortion at a different time and place," id. at 837.

In the present case, there are circumstances directly analogous to the circumstances in Payseno, to wit, a genuine possibility that some jurors may have believed Ms. took money on one of the three occasions the government and its witnesses claimed while others may have believed that she took money on one of the other occasions. And review is not limited to plain error, because in contrast to Payseno, there was a request for a specific unanimity instruction in the lower court. If there was reversible error to be found in Payseno, there is reversible error to be found here.

3. The Error Was Not Harmless.

This is not a case where the evidence was so clearcut that the failure to give a specific unanimity instruction could be said to be harmless, moreover. While the government and the bank's main witness, Ms. Rivera, characterized the videotapes as clear, defense counsel could argue that they were not. Among the things defense counsel pointed out on the videotapes were (1) other occasions on which Ms. was doing the things that Ms. Rivera claimed were suspicious, such as tearing up documents, putting her hands in her lap, and putting her hand on her bag; (2) other workers that were right next to Ms. when she was supposedly taking the money and at least arguably looking at her; and (3) the fact that Ms. was not sorting money prior to one of the alleged thefts the way Ms. Rivera claimed Ms. did before taking money. See RT(10/26/05) 25-42 (cross examination), 134-40 (closing argument).

Defense counsel also noted that the number of times Ms. was seen signing strip unit detail sheets matched the number of sheets with her actual signature, suggesting that she was not the one who had put the initials "R.T." on the receipts for the missing money. See supra p. 5. See also RT(10/26/05) 140-41 (closing argument). Defense counsel then noted that there were other possible suspects, including the coworker who had the initials "R.T." – Roshanna Tatum – and the three other employees who failed to comply with instructions they were given by their substitute supervisor when the discrepancy in funds was discovered, see supra p. 5. See also RT(10/26/05) 148-50.

Finally, defense counsel had a classic reasonable doubt argument – drawing

an analogy to a sort of a shell game, but with a baseball and baseball caps, at local baseball games. He suggested that one just couldn't be sure what one saw on the videotapes and that that constituted reasonable doubt at least.

> They say seeing is believing. Well, I tell you not seeing is not believing and not seeing beyond reasonable doubt is not believing beyond a reasonable doubt. You may remember that's the way I ended my opening statement; now let me tie in my closing argument.
>
> I don't know if any of you are baseball fans, but this reminds me a little bit of a game they have in the video screen at Dodgers games. They have three hats up there, three different little baseball hats and a little baseball. And it's sort of like the shell game you may have heard. They move around all the little hats, and they race the ball around, and everybody watches, everybody in the audience – at least most people – are sitting there watching the hats and the balls go round. And at the end, the ball is under one of the hats. And, you know, everybody knows which hat the ball is under. And they start shouting the number out to the guy who announces and they don't all shout the same number, though. Some shout number one, some shout number three. And you know they're not as split up sometimes because sometimes it's usually easier to follow, other items it's not. But everyone is so sure that they know what hat the ball is under. A few people aren't, but most people are so sure, and a good portion of them are wrong.

RT(10/26/05) 127-28. See also RT(10/26/05) 153-54.

The verdict depended, of course, on what the jurors saw. It was supposed to depend on something they saw unanimously. But without a specific unanimity instruction it did not. What it depended on instead was whether each individual juror saw something at some point. The jurors could have convicted because one set of jurors saw a theft on the first occasion, a second group of jurors saw a theft on the second occasion, and still a third group of jurors saw a theft on the third occasion.

VI.

CONCLUSION

The "three separate occasions" on which the government claimed Ms. took money should have been charged as three separate thefts. Charging the separate thefts in one count created a duplicitous indictment, and Ms. was entitled to protection from that duplicity in the form of a specific unanimity instruction. The district court's failure to give such an instruction violated Ms. Sixth Amendment right to a unanimous jury verdict. Reversal is necessary because there is a genuine possibility that the jurors could have convicted her without unanimously agreeing on any one of the three alleged thefts.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: June __, 2014

By_____
CARLTON F. GUNN
Deputy Federal Public Defender

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that appellant is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: June __, 2014

_____
CARLTON F. GUNN
Deputy Federal Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(c) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,883 words.

DATED: June __, 2014

_____
CARLTON F. GUNN
Deputy Federal Public Defender