IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

REPORT AND RECOMMENDATION

DARWIN MOORE and BRUCE KNUTSON,

07-CR-025-C

Defendants.

REPORT

The grand jury charged defendants Darwin Moore and Bruce Knutson in a two count indictment with conspiring to abstract, purloin and steal money belonging to a gaming casino operated by an Indian Tribe, and with actually doing so, in violation of 18 U.S.C. §§ 371 and 1167(b). On May 31, 2007 the court granted the government's motion to dismiss Count 2 of the indictment, leaving only the conspiracy charge. *See* dkt. 25. Before the court are defendants' two joint motions to dismiss the indictment, filed prior to the dismissal of Count 2. First, defendants claim that the indictment fails to state an offense, *see* dkt. 18; second, defendants claim that this court has no jurisdiction over the charge(s) because the requisite statutory loss to the casino is ephemeral, *see* dkt. 19.

For the reasons stated below, I am recommending that the court deny these motions.

I. The Indictment

In light of the government's voluntary dismissal of Count 2, this court only needs to consider Count 1 of the indictment, which charges a § 371 conspiracy to steal more than $1000 from an Indian casino, in violation 18 U.S.C. § 1167(b).[1]

Count 1 states that the Ho-Chunk Nation operates a casino in Baraboo Wisconsin that is licensed by the National Indian Gaming Commission. From March 1, 2005 to April 1, 2005, the casino held a promotion called the "Tax Times Blues Giveaway." The indictment charges that, according to the rules and regulations of this promotion, the casino would draw five names on April 14, 2005, one each hour from 6:00 p.m. to 10:00 p.m. and would pay $10,000 to each person whose name was drawn. The indictment explains that

> In order to play, participants were required to register at the Players Registration/Guest Services desk. Upon registration, every participant would receive one free entry form. The entry forms were printed on bright orange paper. Slot players would earn one entry form for every 50 points earned playing slot machines. Blackjack players would earn one entry form for every hour of blackjack played. The entry forms required the participants to list their name, address and birthdate. Participants were required to deposit the entry forms in various designated barrels throughout the casino.

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[1] This statute provides:

> Whoever abstracts, purloins, wilfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by or for or licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined under this title or imprisoned . . .

Indictment, Dkt. 1, at 2.[2]

The indictment charges that from sometime in March 2005 until the drawing on April 14, 2005, Moore and Knutson conspired with each other and with others to violate § 1167(b). The indictment alleges the means and manners of the conspiracy were that "the defendants took steps to win the Tax Times Blues Giveaway by cheating, that is, by stuffing the promotion barrels with counterfeit entry forms." Dkt. 1 at 2-3. The government alleges that the defendants purchased bright orange paper in order to create authentic-looking entry forms, which they deposited into the promotional barrels at least 22 times on one day as specified in the indictment. *Id*. at 3. According to the indictment, Knutson had earned a total of 6 valid forms from the casino according to the printed rules, while Moore had earned a total of 19 valid entry forms. According to the indictment, the men (and their confederates) deposited 4,710 entry forms for Knutson and 4,645 for Moore. According to the indictment, on April 14, 2005, the casino drew Knutson's name at the 6:00 drawing and paid him $10,000.

II. Additional Facts Proffered by Defendants

In support of their motions to dismiss, defendants have proffered interstitial facts. For instance, while acknowledging what the rules actually *stated* as to how a person could obtain an entry form, defendants observe that "those rules were silent as to other ways to obtain forms. The rules did not explicitly prohibit obtaining forms other than by playing slots or blackjack."

[2]A verbatim copy of the rules and regulations is attached to the government's responsive brief (dkt. 22) as Exhibit A.

Joint Motion to Dismiss, Dkt. 18, at 2. Defendants point out that the casino became aware of their barrel-stuffing activities on April 6, 2005 when Grace Hewitt, Moore's recently-scorned girlfriend, contacted the casino to provide the who, what, when and where of this plan. Thereafter, a casino investigator watched Moore and Knutson every time they entered the casino and placed entry forms into one of the barrels. Defendants report that although the casino knew the defendants were placing large numbers of entry forms into the barrels, the casino did not intervene. Instead, the casino let the drawings go forward as planned, and even paid Moore a $10,000 prize based on his name being drawn from the barrel.

III. Analysis

The defendants assert that Count 1 fails to allege an offense because it does not charge an agreement to accomplish an *unlawful* purpose, an element of criminal conspiracy. *See* Seventh Circuit Pattern Jury Instruction 5.08; *United States v. Re,* 401 F.3d 828, 834 (7th Cir. 2005)("to sustain a conspiracy conviction, the government must prove that two or more persons joined together for the purpose of committing a criminal act and that the charged party knew of and intended to join the agreement"). If the defendants' alleged agreement to stuff the barrels with homemade entries was incapable of violating of § 1167(b), then there can be no violation of § 371. In making this argument defendants assure the court that they are *not* asserting that the government's proof is insufficient to prove the charged crime.

Defendants must offer this assurance because although F.R. Crim. Pro. 12(b)(3)(B) allows a defendant to challenge the indictment if it "fails to state an offense," Rule 12(b)(2)

indicates that pretrial motions are limited to issues the court can determine without a trial of the general issue. As the court noted in *United States v. Yaska*, 884 F.2d 996 (7th Cir. 1989),

> [Rule] 12(b) permits pretrial motions to be raised which are capable of determination without trial of the general issue. A defense generally is capable of determination before trial if it involves questions of law rather than fact. If the pretrial claim is substantially intertwined with the evidence concerning the alleged offense, the motion to dismiss falls within the province of the ultimate finder of fact.

Id. at 1001, n.3, citations omitted. *See also United States v. Knox*, 396 U.S. 77, 83 n.7 (1969)(challenges to whether the government can prove the elements of the charge should be decided at trial, not in pretrial motions); *cf. Costello v. United States*, 350 U.S. 359, 409 (1956)("An indictment returned by a legally constituted an unbiased grand jury . . . if valid on its face, is enough to call for trial of charge on the merits. The Fifth Amendment requires nothing more.")

An indictment is constitutionally sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Fed. R. Crim. P. 7(c)(1) requires an indictment to "be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Defendants acknowledge this case law but assert that most of it is irrelevant because their narrow claim is that the government has pled itself out of court by alleging facts in Count 1 that, even if true, do not state a crime. According to defendants, Count 1 alleges nothing more than

an exploitation of a loophole in the contest rules which at most rerouted $10,000 that the casino intended to give away in any event. If this is true, contend the defendants, then they must be spared the toll of a criminal trial, including the possibility of an unfair and improper conviction of a non-existent crime. *Cf. United States v. Thompson*, ___ F.3d ___, 2007 WL 1160403 (7th Cir. 2007)(in public corruption/mail fraud cases, the government must eschew theories of prosecution that twist rules violations into federal crimes).

Analysis of defendants' argument requires the court to define some terms from § 1167(b). Neither the statute nor this circuit's pattern instructions define the verbs "to abstract" or " to purloin." When a word is not defined by statute, courts normally construe it in accord with its ordinary or natural meaning. *United States v. Westmoreland*, 122 F.3d 431, 435 (7th Cir. 1997). Black's Law Dictionary (6th ed. 1990) defines "abstract" as "to take or withdraw from; . . . to remove or separate." *Id.* at 10. West's Legal Thesaurus/Dictionary (Statsky, 1996) defines "abstract" as "to take away or remove (to abstract the funds). Steal, separate, disengage, detach, disunite, isolate, divide, part, appropriate, purloin, take dishonestly, seize, divert, ..." *Id*. at 8. Black's does not define "purloin;" West's entry says "see pilfer; embezzle; larceny." *Id.* at 621. My rudimentary CALR search did not reveal anything useful other than the Seventh Circuit's observation that both terms can be synonyms for "stealing." *See United States v. Jones*, 372 F.3d 910, 912 (7th Cir. 2004)(a §656 prosecution). As a practical matter, then, the operative phrase in § 1167(b)–and likely the only one on which the court will instruct the jury in this case–is "carries away with intent to steal."

The Seventh Circuit defines the word "steal" in a pattern instruction for bank theft in violation of 18 U.S.C. § 2113: "to take with the intent to deprive the owner of the rights and benefits of ownership." In *United States v. Kucik*, 909 F.2d 206 (7th Cir. 1990), the defendant challenged this instruction as not sufficiently capturing the *scienter* necessary to steal; the court found the argument intriguing but academic because "the wording of the instruction given by the district court is overwhelmingly suggestive of wrongfulness." *United States v. Kucik*, 909 F.2d 206, 212 (7th Cir. 1990). The court held that there is a presumption evident in ordinary English usage "that when one steals one does so with ill purpose." Whether the jury in the instant case would benefit from a definition of "intent to steal" is a question the parties should be prepared to answer at the final pretrial conference.

But for the purposes of resolving defendants' motion to dismiss for failure to state an offense, this is the operative question: is it impossible to view the conduct alleged in the indictment as an agreement to steal prize money from the casino? I conclude that the answer is no, it is not impossible. Therefore, pretrial dismissal of Count 1 is inappropriate.

Although defendants announce their exculpatory exegesis of Count 1 with the force and authority of a law of nature, it is merely one of several arguable interpretations of the charge's allegations. For instance, defendants point out that the although the rules for the drawing specified how a person would earn additional entries, the rules were silent about whether alternate forms of entries were permissible. Here's what the rules provide:

> **REGISTRATION FOR SLOT PLAYERS**
> You must register at the Players Registration/Guest Service Booth. You will receive one FREE entry upon registration. Once registered, slot players will earn entry [*sic*] for every 50 points earned or one hour of Blackjack played.

Dkt. 23, Exh. A.[3]

Under the maxim *expressio unius est exclusio alterius*, a logical inference–perhaps the most logical inference–from this rule is that the only permissible method by which to obtain entries after the initial freebie is by gambling at the casino. This would be a logical goal of the casino for this type of a promotion. From this, one logically could infer that it would be cheating if a couple of men did not follow this rule, but instead counterfeited 9000+ entry forms and submitted them. If one were to draw this inference, one logically could draw the further inference that the counterfeiters' recruitment of confederates surreptitiously to drop these counterfeit entries into the barrels in dribs and drabs demonstrated that they knew that they were cheating. These inferences then would allow the culminating inference that men who knowingly cheated in order to win a large cash drawing were acting with intent to steal.

Granted, a jury need not draw these inferences from the facts alleged in Count 1, but they *could*. The fact that Count 1's allegations support both criminal and innocent interpretations of defendants' conduct dooms their first motion to dismiss. Only the jury may

[3] Defendants point out that the title of this section would seem to limit the drawing to slot players alone, although the text indicates that blackjack players also can earn points. A reading of the entire document suggests that it is a boilerplate form that was poorly edited for this contest. For instance, there is reference to needing a driver's license and social security card to claim prizes "$600.00 and over" when the only prizes offered in this drawing were $10,000 each. The form also states that there would be "no refunds on ticket sales." Maybe this sloppy drafting will inure to the defendants' benefit at trial, but it does not advance their argument for pretrial dismissal.

decide what to make of all this. Rule 12(b)(2) prohibits pretrial dismissal of the conspiracy charge for failure to state a claim.

This leaves defendants' jurisdictional claim in their second motion to dismiss. Defendants argue that because the casino intended to give the $10,000 won by Knutson to *somebody*, it was factually and legally impossible for the casino to be a theft victim. The victim, if there is one, is some unknown and unknowable drawing entrant who would have won the 10:00 p.m. drawing in Knutson's place.

Now that the government has dismissed the substantive § 1167(b) count, this motion falls by the boards. The § 371 conspiracy charge is an inchoate crime that requires the government to prove only an *agreement* unlawfully to take $10,000 of the casino's money (plus an overt act that need not involve payment of the prize money). A would-be thief can conspire to steal money that the owner intends to give away to someone else.

Picking up on this last point, defendants' starting premise is flawed. A pickpocket cannot defend his theft of a philanthropist's wallet on the ground that the philanthropist was headed to a charity ball where he intended to shower his Grants and Franklins on the needy. Common sense dictates that funds intended by their owner for an identifiable class of recipients (even if the specific recipient is unknown) remain the property of the owner until a qualified recipient receives them. It deprives the owner of the rights and benefits of ownership to divert the money to a different purpose.

In the instance case, the casino labeled its "Tax Time Blues Giveaway" as a "marketing and promotional program" (*see* Exh. A) by which it intended to generate good will among its

customers and to encourage them to spend even more money at the casino.[4] Until the casino's money reached the pocket of a customer who had played by the casino's rules, the casino retained control of its money. Defendants, by diverting the money, "took" it from the casino. Paying out $10,000 on a counterfeit entry form not only thwarted the casino's intent to reward and encourage its customers but it also might reduce future gambling among casino customers if they perceived the drawing to have been rigged or perceived the casino to be ineptly run.

True, the casino could have prevented the money from walking out the door with Knutson, but this decision has become irrelevant in light of Count 2's dismissal, and it does not make the alleged "theft" less of a theft. If a bank learns that one of its tellers intends to embezzle from an internal account earmarked for imminent disbursal to charity, and observes without intervening while the teller actually takes the money, the teller is still an embezzler and the bank is still his victim.

In sum, the indictment is not deficient. The facts set forth in Count 1 sufficiently allege a conspiracy to commit a cognizable violation of 18 U.S.C. § 1167(b). The government has not pled itself out of court.

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[4] For instance, the rules require a drawee to be present in the casino at the time of the drawing and to claim the prize within five minutes. This helped assure a full casino from 6:00 to 10:00 on April 14. Perhaps one or two of those present chose to gamble while they waited.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I recommend that this court deny both motions to dismiss the indictment.

Entered this 31st day of May, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge

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WESTERN DISTRICT OF WISCONSIN
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Re: United States v. Darwin Moore & Bruce Knutson
Case No. 07-CR-025-C

Dear Counsel:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the newly-updated memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before June 11, 2007, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by June 11, 2007, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,

Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, Chief Judge