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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID WEIMERT,

Defendant.

OPINION & ORDER

14-cr-22-jdp

Defendant, David Weimert, is charged with six counts of wire fraud in violation of 18 U.S.C. § 1343. Defendant has moved to dismiss the indictment on the grounds that it fails to state an offense and that the wire fraud statute is void for vagueness as applied to the conduct charged in the indictment. Dkt. 13. In the alternative, defendant has moved for a bill of particulars. Dkt. 12. The magistrate judge issued a Report and Recommendation that defendant's motions be denied. Dkt. 27. Defendant has lodged objections. Dkt. 32.

Pursuant to 28 U.S.C. § 636(b)(1) and this court's standing order, I am required to review de novo the objected-to portions of the Report and Recommendation. Defendant objects to essentially the entire Report and Recommendation, and thus I re-evaluate his motions in light of his objections. Although my analysis differs somewhat from the magistrate's because I have the benefit of defendant's objections, I adopt the recommendation that defendant's motions be denied.

A. Failure to state an offense

Defendant breaks his presentation out into three headings, but he makes one core argument: if the government were to prove only the facts alleged in the indictment, it would not show that defendant had committed a crime. Defendant contends that the indictment as written is missing facts necessary to satisfy elements of the crime, and he is entitled to know what those

facts are before trial. The magistrate salvaged the indictment, defendant argues, only by providing the missing factual allegations and drawing impermissible inferences in the government's favor.

I am not persuaded. Defendant advances a cramped, hypertechnical reading of the indictment. The indictment, read in the light of common sense, quite plainly alleges that defendant schemed to defraud his employers by inducing them to believe—falsely—that the prospective purchaser of Chandler Creek would not do the deal unless defendant personally acquired a minority interest in the property.

1. Standard of review

Defendant contends that the magistrate applied the wrong standard of review. According to defendant, the magistrate used obsolete case law which led him to evaluate the indictment in the "light most favorable" to the government. Defendant contends that under the proper standard, the court favors the government only to the extent that the court accepts the factual allegations as true. Defendant cites *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009), for this notion.

But *Moore* does not take a strict "just the facts" approach. *Moore* also explains that in evaluating the sufficiency of the indictment, "we look at the indictment as a whole, focusing on a practical, rather than a hypertechnical, reading of the document." *Id*. The *Moore* court applied this notion to the case before it: "At this stage, our inquiry is narrow. We must decide *whether it's possible to view the conduct alleged* as an agreement to steal $10,000 from the casino." *Id*. (emphasis added). The *Moore* court certainly viewed the indictment in a light favorable to the government, and not merely by accepting the truth of the factual allegations. In challenges to the indictment, the phrase "light most favorable" may have fallen out of fashion, but the

concept has not. In reviewing the sufficiency of an indictment, the indictment is viewed deferentially, which is to say in a light favorable to the government.

2. Unnecessary implications

Defendant acknowledges that the indictment must be read to include facts that are necessarily implied, as provided in *United States v. Palumbo Bros.*, 145 F.3d 850, 860 (7th Cir. 1998). Defendant contends that the magistrate deviated from this standard by drawing "unnecessary" inferences. As I interpret defendant's argument, he contends that the court may consider facts necessarily implied in the indictment, but the court may not draw permissive inferences. *Palumbo* establishes the first premise, but defendant does not cite any authority for the second. Defendant's argument that the court can draw only those inferences that are logically necessary is hard to square with the principle that the indictment must be read as a whole, according to common sense, and not hypertechnically.

Defendant cites three examples of the magistrate's drawing of improper inferences in the Report and Recommendation's paraphrase of the allegations in the indictment. The first two are closely related. Example one. The indictment states that Weimert falsely represented:

> that the Burke Group would purchase IDl's share of Chandler Creek contingent on WEIMERT purchasing a minority interest in Chandler Creek as part of the deal.

Indictment, ¶ 6. Defendant contends that the Report and Recommendation improperly restates this passage to mean that the Burke Group would purchase IDI's share *only if* Weimert bought a minority interest in Chandler Creek. Defendant does not expressly articulate why this is an unfair paraphrase of the indictment. I gather that defendant thinks a correct paraphrase would be that the Burke Group offered to buy Chandler Creek *if* Weimert purchased a share, not *only if* he did so.

Example two. The indictment states that Weimert failed to disclose that:

> WEIMERT was the one who desired a minority ownership interest for himself in Chandler Creek as part of the deal, not the Burke Group.

Indictment, ¶ 7. Defendant contends that the Report and Recommendation improperly restates this allegation to mean "that Burke Group had not propounded any such condition; rather, it actually was Weimert's idea as part of his plan to obtain for himself this ownership interest." Report and Recommendation at 4. Again, defendant does not expressly state his objection to this paraphrase. But, presumably, he objects to the statement that the Burke Group had not actually propounded the condition that Weimert buy a share of Chandler Creek, because the Burke Group had included that condition in its offer.

Neither example one nor example two represent unfair paraphrases of the indictment. Example one is a fair paraphrase of paragraph 6, based on the meaning of the phrase "contingent on." The Burke Group's offer included the requirement that Weimert purchase a share of Chandler Creek. Presumably, the Burke Group would have relented on this condition had the issue been pressed, but the gist of the indictment is that Weimert led his supervisors to believe that the Burke Group would not relent. Example two is a fair paraphrase of paragraph 7, which conveys the idea that the Burke Group would not have included in its offer the condition that Weimert buy a share of Chandler Creek on its own initiative, but did so only because Weimert wanted a share for himself and he contrived to get the Burke Group to include that condition. Examples one and two do not demonstrate the drawing of any far-fetched or unreasonable inferences; they demonstrate a practical, common-sense reading of the indictment.

Example three is the one that defendant deems "most egregious." The indictment provides:

> It was further part of the scheme to defraud that WEIMERT procured an offer to purchase Chandler Creek from the Burke Group that was contingent on WEIMERT purchasing a minority interest of Chandler Creek as part of the deal, by obtaining a similar offer from N.K. that was based upon terms dictated by WEIMERT

Indictment, ¶ 8. Defendant alleges that the Report and Recommendation improperly restates this as:

> Further, to trigger Burke Group's right of first refusal on the purchase, Weimert recruited a straw bidder, "N.K.," to present an offer to purchase Chandler Creek on terms that Weimert had dictated to N.K.

Defendant makes his objection to this paraphrase clear: he objects to the characterization of N.K. in this passage as a "straw bidder," and later in the Report and Recommendation as a "shill." According to defendant, nothing in the indictment necessarily implies that N.K. did not make a legitimate bid that N.K. was prepared to honor.

This is a fair point. The indictment does not expressly state that N.K.'s bid was phony. Nor does the indictment *necessarily* imply that N.K. was a straw bidder, although that might be one reasonable inference from the facts alleged (because the terms were "dictated" by defendant, which hints at something less than completely above-board). But ultimately it does not matter, because N.K.'s bid need not have been phony to be part of defendant's scheme to defraud his employers. Defendant might have obtained and used a legitimate bid to get the Burke Group to exercise its right of first refusal, so long as he was able somehow to induce the first bidder to include the condition that favored defendant. Thus, even if example three represents an unwarranted inference that N.K. was a straw bidder, it is immaterial to the question of whether the indictment states an offense.

3. Stating an offense

Defendant contends that the Report and Recommendation entirely missed his core argument: "the indictment fails to state an offense because it lacks any facts indicating that Mr. Weimert employed material misrepresentations or omissions as part of his scheme to defraud." Dkt. 32, at 2.

Defendant contends—rightly—that an indictment charging fraud cannot simply recite the elements of the offense, and that it must allege underlying facts with sufficient particularity to allow defendant know what he is charged with. Apparently, the Seventh Circuit has not required that an indictment charging a scheme to defraud must allege the scheme with particularity. *See* Defendant's Objections, Dkt. 32, at 3. But defendant is right that fundamental fairness would require the indictment to allege enough facts to substantially inform him of the material misrepresentations or omissions that lie at the heart of the scheme to defraud.[1]

Contrary to defendant's insistence, the indictment does just that. Defendant contends that paragraphs 5-8 of the complaint contain only (1) an alleged misrepresentation that the indictment itself shows to have been true, and (2) an omission of a fact that was self-evident to defendant's superiors. Dkt. 3, at 3. The alleged misrepresentation that was actually true is that the Burke Group would buy Chandler Creek "contingent" on defendant acquiring a minority interest. The omitted but self-evident fact is that defendant wanted to acquire a minority interest in Chandler Creek, a fact that defendant's employers must have understood because defendant brought the deal to them for their consideration. Defendant's argument is that the

[1] The court's review of the cases cited by defendant, and their authorities and reasoning, leads the court to question whether any circuit actually requires that a scheme to defraud be plead with "particularity," in the sense that it must provide all details of the time, place, and circumstances of each alleged misrepresentation or omission. The indictment must of course provide reasonable certainty of the charge, but that may not require all details of the time, place, and circumstances of each alleged misrepresentation or omission.

indictment does not allege that he did anything that could constitute wire fraud, because it does not allege any material misrepresentations or omissions. As defendant put it in his first brief in support of his motion to dismiss: "The indictment describes an arms-length transaction between knowledgeable parties, who were openly notified by Mr. Weimert of his participation in the transaction and agreed to it." Dkt. 14, at 7.

The indictment does not allege an arms-length transaction by any stretch. One of the buyers, defendant, was an employee and officer of the sellers. The sellers, defendant's employers, were informed that defendant was a participant in the deal, but they were not "openly notified" of the full extent of defendant's participation in the transaction. It might be the case that defendant's scheme to defraud did not involve any affirmative misrepresentations by Weimert. He might have contrived to make his employers believe that the Burke Group required Weimert to take a minority interest without ever saying anything that was literally false. But a scheme to defraud is nevertheless clearly set out in paragraphs 5 through 8. Defendant induced the Burke Group to include as a term of its offer that defendant take a personal stake in the deal by dictating that a similar term be put into an initial offer by N.K. The material omission is not that defendant wanted to take a personal stake in the property. Rather, the material omission is that defendant's personal stake was not a term that the Burke Group had initiated or required. Defendant induced IDI to take the Burke Group offer, and thereby give defendant an interest in the property, by leaving IDI with the mistaken impression that the Burke Group insisted on Weimert acquiring a minority interest in the property.

The indictment provides adequate notice to defendant so that he can prepare his defense. Defendant does not contend that the indictment fails to state the elements of the offense or that it would not allow defendant to plead the judgment in this case as a bar to any

future prosecution. Accordingly, the indictment is sufficient to state an offense under the three-part test set out in *Moore*, 563 F.3d at 585.

B. Void for vagueness

Defendant contends that the Report and Recommendation simply failed to address his argument that the wire fraud statute is void for vagueness. Defendant's objection covers this territory succinctly, and so will I.

The essential principles of the void-for-vagueness doctrine are set out in *Skilling v. United States*, 561 U.S. 358, 402-03 (2010). A criminal statute must define the offense with sufficient definiteness so that (1) ordinary people can tell what conduct is prohibited and (2) arbitrary and discriminatory enforcement is discouraged. Courts should preserve criminal statutes against void-for-vagueness challenges by imposing a constitutionally definite construction if possible. *Id*. at 405-06. The court should construe ambiguities in criminal statutes in favor of lenity. *Id*. at 410-11. In *Skilling*, the Court avoided the vagueness of the honest services doctrine in 18 U.S.C. § 1346 by construing the doctrine to include only cases in which victims were deprived of honest services through bribery or kickbacks. *Id*. at 403. Defendant contends that the Report and Recommendation should have followed this analytical framework but did not.

Defendant contends that the wire fraud statute is impermissibly vague because ordinary people would not know what "scheme to defraud" means, and it is not enough that a definition is provided in the Seventh Circuit Pattern Jury Instructions. Because the crime is impermissibly vague, the court should impose a limiting construction if it can. Defendant proposes a limiting construction: "A scheme constituting a wire fraud offense would require a plan of action intending to deprive a victim of property employing a false statement or omission of a fact with the capability of influencing its recipient's decision." Dkt. 14, at 10. I do not have to decide the question of whether the wire fraud statute *as written* is void for vagueness. But I will accept

defendant's proposal that one way or the other (either because of the meaning of "fraud" or because the statute needs a saving construction), a scheme to defraud has to include either a false statement or an omission of a fact with the capability of influencing the recipient's decision. Put a bit more simply, if the wire fraud statute is to be applied in a constitutional manner, a scheme to defraud has to include a material misrepresentation or omission. So far, so good.

The last step in defendant's void-for-vagueness argument is his contention that the indictment in this case does not allege a material misrepresentation or omission. Thus, according to defendant, the indictment in this case applies the wire fraud statute in an unconstitutional manner. In reference to this last step of defendant's void-for-vagueness argument, the Report and Recommendation says that defendant's constitutional argument is merely a reprise of his argument that the indictment fails to state an offense. The Report and Recommendation is fundamentally correct. Defendant invokes constitutional principles, but the analysis is the same as in his challenge to whether the indictment states an offense. The question is whether the indictment alleges facts that, if proven, would violate the properly limited statute. For the reasons stated in Part A of this opinion, the indictment alleges a scheme to defraud in which defendant employed a material omission of fact to secure for himself an interest in the Chandler Creek property.

C. Bill of particulars

I had thought that defendant's motion for a bill of particulars had been mooted by the government's concession, Dkt. 33, that it will not use certain discovery materials in its case-in-chief. Defendant did not object to that component of the Report and Recommendation. But defendant again requests a bill of particulars in his second objection to the government's proposed jury instructions. Dkt. 64.

The Report and Recommendation expresses some sympathy for defendant's position because the government had provided about 45,000 pages of discovery in an awkward, unsearchable format. Dkt. 27, at 14. But the government redressed that problem with Dkt. 33, a letter indicating that the evidence it would introduce in its case-in-chief was in the first 2,475 pages. Given that defendant has not reiterated his objection that he has been buried in discovery, I will consider that issue resolved.

That leaves defendant's other argument for a bill of particulars—that the indictment does not fairly apprise him of the charge so that he can prepare for trial. "The test for whether a bill of particulars is necessary is 'whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial.'" *United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981) (quoting *United States v. Roya*, 574 F.2d 386, 391 (7th Cir. 1978)). For the same reasons that I have concluded that the indictment states an offense and provides adequate notice of the charge, defendant cannot make a case that he is entitled to a bill of particulars. Weimert may not know exactly how the government will prove its case, or exactly the evidence it will use to do so. But a defendant does not have the right to know these things. *Id*. at 135. In this case, Weimert has fair notice of the charges he faces, and a very good idea of what documentary evidence the government will present in it case-in-chief. Weimert is thus well positioned to prepare his defense, and his motion for a bill or particulars will be denied.

ORDER

It is ordered that:

1. Defendant David Weimert's motion to dismiss the indictment, Dkt. 13, is DENIED.

2. Defendant David Weimert's motion for a bill of particulars, Dkt. 12, is DENIED.

Entered this 28th day of October, 2014.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge