IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 16 611335 A**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
ARTHUR W. BOEDECKER	)	**JUDGMENT ENTRY DENYING THE DEFENDANT'S MOTION TO DISMISS THE INDICTMENT**
	)	
	)	
Defendant.	)	

***John P. O'Donnell, J.*:**

The indictment in this case was returned on November 10, 2016 and charges the defendant with two counts of fourth degree felony theft and seven counts of money laundering. The theft in count one is alleged to have been committed "on or about February 24, 2005 to September 21, 2011" and count two claims theft "on or about January 26, 2012 to May 24, 2014." The state further alleges that the first money laundering (count three) was committed on or about June 30, 2011 and the last money laundering (count nine) was committed on May 14, 2014, with the other counts committed on various specific dates between those times.

On December 27 the defendant filed a motion to dismiss the indictment on the grounds 1) that count one was returned beyond the applicable statute of limitations, 2) that counts one and two improperly allege separate offenses as single counts, and 3) that the money laundering counts fail to charge a criminal offense. The state opposed the motion to dismiss on January 20, 2017 and a hearing was held on March 13. This entry follows.

THE FACTS[1]

Arthur W. Boedecker worked as an electric lineman for the FirstEnergy Corporation since at least the mid-2000s. He was a member of Local 270 of the Utility Workers Union of America. At some times relevant to this case he also served as an official of the union. Most recently, he was the local's vice president in parts of 2013 and 2014.

When union members and officials participate in union activities that cause them to miss work they are entitled to "lost time" payments from the union. The payments are made when a member submits to the local a voucher averring that wages were forgone because the member lost paid hours at work while engaged in union business. But the benefit is more accurately described in shorthand as "lost time and pay" because a union member is not entitled to the payment from the union if the employer compensated the member for the time. Over the period charged in the indictment's theft counts Boedecker submitted many vouchers claiming either lost time for instances where he had actually been paid by FirstEnergy or for hours that were not actually lost. The union then paid him the claimed amounts.

The union did not discover any of the false claims until 2014, when Boedecker claimed lost time for a union meeting convened at FirstEnergy's request. That claim raised suspicions because when FirstEnergy calls a meeting it pays its employees' wages and the union is not responsible for lost time payments. Ultimately the union, with the assistance of the United States Department of Labor, determined that Boedecker applied for and collected from the union $40,203.98 that he was not entitled to from February 2005 through May 2014.

[1] No evidence was proffered at the hearing nor is there evidence of record attached to the defendant's motion or the state's brief. Nevertheless, the parties seem to agree that the narrative of events given here is a more or less accurate summary of the facts the state believes it can prove in support of its case.

THE LAW

Motion to dismiss

Rule 12(C) of the Ohio Rules of Criminal Procedure provides that "[p]rior to trial, any party may raise by motion any defense . . . or request that is capable of determination without the trial of the general issue." Unlike the civil rules, the rules of criminal procedure do not expressly provide for a motion to dismiss. Nevertheless, the Ohio Supreme Court has tacitly endorsed the availability of a motion to dismiss a criminal indictment in the context of defendants' claims that: a criminal charge was premised on an unconstitutional law (*Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524 (1999)); a prosecution was barred by double jeopardy (*State v. Thomas,* 61 Ohio St. 3d 254 (1980)); an indictment was barred by *res judicata* (*Eastman v. State*, 131 Ohio St. 1 (1936)); and that a prosecution was prohibited by a grant of immunity (*State v. Adamson*, 1998-Ohio-284, 83 Ohio St. 3d 248), to name a few. Therefore I will consider and decide the motion to dismiss on its merits.

A motion to dismiss an indictment tests the sufficiency of the indictment on its face. *State v. Silos*, 104 Ohio App.3d 23, 26 (1995). It does not depend upon the quantity or quality of evidence that may be produced or any information contained in the bill of particulars. *State v. Jackson*, 9th Dist. Lorain No. 10CA009791, 2011-Ohio-4998, ¶19. For the purposes of this motion I will assume that the prosecutor can prove the facts summarized in the preceding section of this opinion, and I will assume that the union first discovered Boedecker's thefts in 2014.

Statute of limitations

Boedecker's first argument is that count one should be dismissed as filed beyond the six-year statute of limitations because the latest date of offense is September 21, 2011, i.e. more than six years before the November 2016 indictment.

Ohio Revised Code section 2901.13(A)(1)(a) provides that prosecution for a felony theft offense shall be barred unless it is commenced within six years after an offense is committed. R.C. 2901.13(E) goes on to say that "an offense is committed when every element of the offense occurs." Additionally, in the case of an offense of which an element is a continuing course of conduct, the period of limitation does not begin to run until such course of conduct terminates. *Id.*

The first element of theft by deception is the intention "to deprive" an owner of its property. R.C. 2913.02(A)(3); Count one of the indictment. To deprive one of something means to take away possession or deny the ability to use it. Deprivation is a one-time event: it happens as soon as a thing is taken from its owner. This is true even though a deprivation is permanent: once the union, in this case, was deprived of its money possession was never restored, so it was always deprived of it. But to consider the element of deprivation as a continuing course of conduct would mean eliminating the statute of limitations for theft and there is no evidence that the legislature intended that result.

In this case the deprivation of property, for any given fraudulent voucher, occurred when Boedecker cashed a check he got in reliance on a fake voucher; for the purpose of this motion I will assume that the various dates in the indictment represent dates when Boedecker actually cashed checks, not when he submitted vouchers. Accordingly, for count one, each deprivation occurred no later than September 21, 2011.

The same can be said for the element of knowingly obtaining property. To obtain is to get, and you only get a particular thing once even if you have it forever. Just as a lawyer "obtains" a law license on the date she is admitted to the bar but she doesn't obtain it again and again each day it is valid or each time it is renewed, Boedecker obtained the union's money

either when he got the check or cashed it (a distinction that doesn't have to be analyzed in the context of the pending motion), but he didn't continue to obtain it for as long as it stayed in his wallet or bank account.

So neither the element of deprivation of property nor the element of obtaining property connote a continuing course of conduct.

But the element of exerting control is different. To use Boedecker's hypothetical of a housekeeper who steals $1,000 from his employer's safe, the housekeeper exerts control over the $1,000 for as long as he has it or directs its use. If the larcenous housekeeper takes $1,000 on January 1, 2010 and puts it under his mattress until January 1, 2011 when he uses it to buy something, he has exerted control – by merely possessing it – until the latter date. The same is true if he uses the money to pay a phone bill of $83.33 each month for a year; he has exerted control over the money – or at least some of it – until it's gone. Control includes possession but isn't limited to possession, and both possession or control imply a continuing course of conduct.

A thief *obtains* property – thereby *depriving* its owner of it – only once, but he *exerts control* over it as long as he continues to possess it or control its use. And that is the case even though the element of deception – the means by which control over the property is gotten – happens only once, i.e. at the time a fake voucher is presented, because the control is continuing even if the deception is not. Imagine a painting stolen on January 1, 2010 being found on the thief's wall on January 1, 2016. Is he immune from prosecution and the painting now his because six years has elapsed without a prosecution?

Because there is no record evidence demonstrating when Boedecker's control over the property he obtained by deception ended, it is impossible to calculate the exact date the offense

was committed under R.C. 2901.13(E) and his motion to dismiss based upon the expiration of the limitations period must be denied.

There are two other reasons why, on the assumed facts, prosecution on count one cannot be deemed barred by the passage of more than six years. R.C. 2901.13(G) provides that "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered." Corpus delicti means the body or substance of the crime, included in which are usually two elements: the act and the criminal agency of the act. *State v. Maranda*, 94 Ohio St. 364, 365 (1916). Here the crimes, and the means by which they were committed, were not discovered until 2014, so the 2016 indictment is well within the six years beginning when the substance of the crimes was known. Additionally, R.C. 2901.13(H) allows for the tolling of the statute of limitations period "during any time when the accused purposely avoids prosecution." That may include any time Boedecker was out of Ohio. While it is not necessary to have affirmative proof that tolling under this section did or did not occur to decide whether a statute of limitations is a bar to prosecution, this case's procedural posture – a motion to dismiss with no real evidence, only some assumed facts – precludes an ultimate factual determination that the limitations period was not tolled under R.C. 2901.13(H).

For these reasons, the defendant's motion to dismiss count one as barred by the statute of limitations is denied.

Multiple offenses charged within the same count

Boedecker has separately moved to dismiss counts one and two on the basis that they both charge two or more offenses in the same count. He notes that discovery under Criminal Rule 16 has revealed that "the state intends to offer evidence of distinct, separate alleged thefts

over . . . more than nine years."[2] The state admits as much in its brief in opposition to the motion to dismiss where it describes each deceptive lost time payment as a separate theft.[3]

Duplicity in an indictment occurs when two or more distinct offenses are joined in a single count. *State v. Blankenburg*, 197 Ohio App. 3d 201, 228, 2012-Ohio-1289, ¶131. The prohibition against duplicity is geared to protect the accused's Sixth Amendment right to notice of the nature of the charge against him and prevent confusion as to the basis of the verdict. *State v. Smith*, 9th Dist. Summit No. 8869, 1978 Ohio App. LEXIS 8415, *3 (Oct. 4, 1978). Boedecker argues both – that he does not have notice of the specific crimes he is alleged to have committed and the allegations will inevitably lead to confusion of the jurors – in in addition to claiming that he is arbitrarily exposed to felony charges when each separate alleged theft constituted only a misdemeanor amount.[4]

But Ohio's legislature has commanded prosecutors to join multiple offenses like these in a single count. R.C. 2913.61(C)(1) provides that when a series of thefts is committed by the same person in the same relationship to another then all of the offenses "shall be tried as a single offense." Moreover, the jury is to determine the value of property stolen by aggregating the value of "all offenses in the series." I am not aware of any decisional authority to the effect that this statute is unconstitutional. As to the defendant's particular complaints here, the exact dates and times offenses allegedly occurred are not generally required in an indictment. *State v. Gingell*, 7 Ohio App. 3d 364, 367 (1982). That information can be provided through discovery, which is the case here, where the prosecutor has apparently produced a dated voucher and other corresponding documents for each alleged offense in the series.

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[2] Motion to dismiss, page 12.
[3] Brief in opposition, pp. 2-3.
[4] Mtn. to dismiss, p. 12.

Confusion about the basis for a verdict is also not a concern. Although Criminal Rule 31(A) requires juror unanimity on each element of a crime, jurors need not agree to a single way by which an element is satisfied. *State v. Gardner*, 118 Ohio St. 3d 420, 2008-Ohio-2787, ¶38. Different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. *Schad v. Arizona*, 501 U.S. 624, 631-632 (1991). Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. *Id.*

Given the mandatory application of R.C. 2913.61(C)(1), the jury need only unanimously conclude that, between the dates alleged in each of counts one and two, Boedecker, 1) with purpose to deprive Utility Workers Union of America Local 270 or the Fidelity Deposit Company of Maryland of its property, 2) did knowingly obtain or exert control over it by deception, and that 3) the value of the property was $5,000 or more. If the jury hears, for example, evidence that on the first of each month for seven years Boedecker obtained by deception $120 in lost time payments that he wasn't entitled to – for a total of $10,080 ($120 times 84 months) – then the jury, if all 12 jurors believe beyond a reasonable doubt that each voucher was a theft, may return a verdict of guilty with a further finding that the amount stolen was $5,000 or more. At the same time, if, on the same evidence, less than all jurors believe beyond a reasonable doubt that the first 42 months of vouchers were thefts and less than all jurors believe that the last 42 months were thefts, but they are unanimous that Boedecker, with purpose to deprive, knowingly obtained or exerted control over more than $5,000 by deception, then they may return a guilty verdict even if they don't agree that it's the same $5,000. This is the effect of R.C. 2913.61(C)(1): it relieves the state from having to prove every incident beyond

a reasonable doubt as long as they prove at least one incident and an aggregate amount beyond a reasonable doubt.

As to the defendnat's assertion that he is unfairly charged with felony theft when, at most, he committed a series of misdemeanors, I am not aware of any legal constraints on the prosecutor's discretion to charge the more serious offenses and Boedecker has not brought any to my attention. To the contrary, R.C. 2913.61(C)(1) requires the individual instances to be aggregated.

Boedecker's motion to dismiss counts one and two because they each include more than one incident of alleged theft and unfairly expose him to felony convictions is denied.

Failure to charge an offense

Boedecker claims that the money laundering charges under R.C. 1315.55(A)(3) – counts three through nine – fail to charge a criminal offense.

R.C. 1315.55(A)(3) provides that "[n]o person shall conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity." The state's theory for the money laundering counts is that, on each of the seven dates covered in those counts, Boedecker conducted a transaction by depositing the stolen money into a personal bank account and then used the money to carry on corrupt activity in the form of additional thefts.

The defendant's argument for why these counts should be dismissed rests on the grounds that: the counts do not identify the specific corrupt activity sought to be facilitated, nor does the indictment include a racketeering charge under R.C. 2923.32(A)(1) that could be linked to each money laundering count; the corrupt activity sought to be facilitated cannot be the underlying

thefts because "theft in furtherance of theft is a nonsensical result"[5]; and the indictment does not charge Boedecker with knowledge of the source of the funds which are the subject of the transactions.

Criminal Rule 12(C)(2) allows a defendant to file a pretrial motion alleging the failure to charge an offense. Criminal Rule 7(B) requires an indictment to contain a statement that the defendant has committed a public offense, and the "statement may be in the words of the applicable section of the statute, provided that the words of the statute charge an offense, or in words sufficient to give the defendant notice of all elements of the offense." Putting aside the dates of the alleged offenses, counts three through nine have the following identical language:

> [T]he defendant unlawfully did conduct or attempt to conduct a transaction with the purpose to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of corrupt activity.

This is the exact language of R.C. 1315.55(A)(3), thus the indictment satisfies Criminal Rule 7(B) by including every element of the crime, giving Boedecker notice of the elements the state expects to prove. An indictment is not required to identify the precise type of conduct by which a defendant violated a criminal statute. *State v. Murphy*, 65 Ohio St. 3d 554, 583 (1992). That flesh on the skeleton of an indictment is provided through discovery.

But Boedecker says that a charge under R.C. 1315.55(A)(3) "cannot stand alone and necessarily requires a charge of engaging in a pattern of corrupt activity [under R.C. 2923.32] in the indictment"[6] because the elements of R.C. 1315.55(A)(3) are already prohibited by the elements of R.C. 1315.55(A)(1), so the legislature must have intended to proscribe, by

[5] Mtn. to dismiss, p. 14.
[6] *Id.*, p. 13.

subsection (A)(3), something not already prohibited by subsection (A)(1), otherwise (A)(3) is "subsumed by subsection (A)(1) and made redundant."[7]

R.C. 1315.55(A)(1) provides:

> No person shall conduct or attempt to conduct a transaction knowing that the property involved in the transaction is the proceeds of some form of unlawful activity with the purpose of committing or furthering the commission of corrupt activity.

Contrary to Boedecker's argument, the two subsections do not cover the same conduct: (A)(1) requires that a transaction involve proceeds of unlawful activity and that the defendant know that fact; (A)(3), on the other hand, prohibits any transaction – with ill-gotten property or property that was legally acquired – used with the purpose to carry on corrupt activity. It is true that the state alleges here that the property Boedecker used in each transaction was the proceeds of unlawful activity – namely theft – but that doesn't preclude a prosecution under (A)(3) because the source of the funds doesn't matter.

The defendant also contends that a conviction under (A)(3) requires proof of corrupt activity, so the indictment cannot charge an offense without either a separate charge for engaging in a pattern of corrupt activity or "identification [in the indictment] of the specific corrupt activity."[8] There is no question that the prosecution will have to produce evidence proving that Boedecker conducted a given transaction with the purpose to carry on "corrupt activity," as that term is defined at R.C. 2923.31(I), but there is no requirement to describe in the indictment the particular conduct that constitutes corrupt activity. *Murphy*, supra. Boedecker is on notice of the

[7] Mtn. to dismiss, p. 13.
[8] *Id.*, p. 14.

corrupt activity the state intends to prove through R.C. 2923.31(I) – which includes theft of more than a thousand dollars within the definition of corrupt activity – and discovery in the case.

Finally, the defendant claims that the underlying thefts (counts one and two) cannot be the "corrupt activity" alleged in the money laundering counts (three through nine) because Boedecker would then be accused of the "nonsensical"[9] crime of committing "money laundering with stolen funds to promote the stealing of funds."[10] First, as noted above, the state doesn't have to prove that stolen funds were the subject of the transactions alleged in counts three though nine. Second, under Boedecker's reasoning, he is immune to prosecution under 1315.55(A)(3) because he was canny enough to use stolen money to help steal more money. There is nothing in the statutory language that compels that result. Perhaps the defendant really means the state must choose between charging him with theft or money laundering. If so, then by analogy an accused drug pusher who uses the proceeds from one illegal drug sale to carry on the next sale could not be charged with both drug trafficking and money laundering. I am not aware of any authority to that effect, nor has Boedecker cited to any. Assuming Boedecker did steal the money as alleged by the state, and assuming he then conducted transactions with the stolen money to promote, manage, etc. subsequent thefts, two crimes were committed: the conduct is different and the elements of the crimes are not redundant.

[9] *Id.*
[10] *Id.*

CONCLUSION

For the reasons given here, the defendant's December 27, 2016 motion to dismiss the indictment is denied.

IT IS SO ORDERED:

Judge John P. O'Donnell

March 20, 2017
Date

SERVICE

A copy of this journal entry was sent by email on March 20, 2017 to the following:

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