No. 11-3140

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAY SCHMELTZ,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLEE

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT REGARDING ORAL ARGUMENT

The government requests oral argument.

JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case.

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final

judgment against defendant on January 31, 2011 (R. 283, Judgment),[1] and defendant filed a timely notice of appeal on February 9, 2011 (R. 286, Notice of Appeal). This Court has jurisdiction under 28 U.S.C. 1291.

GOVERNMENT'S STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

In a case where defendant was convicted on one count of falsifying a document, and where the indictment identified three potential falsehoods contained within the falsified document, whether the indictment was duplicitous and, if so, whether the district court plainly erred in failing to instruct the jury that it must unanimously agree on the particular falsehood contained in the document.

STATEMENT OF THE CASE

On April 14, 2009, a federal grand jury returned a twelve-count indictment charging defendant Jay Schmeltz and three of his co-workers at the Lucas County Sheriff's Office with various federal offenses relating to the use of force against a pretrial detainee, the detainee's subsequent death, and the resultant cover-up of Schmeltz's and his co-workers' actions. (R. 2, Indictment). The indictment alleged that defendant, a Deputy Sheriff with the Lucas County Sheriff's Office, struck Carlton Benton, a pretrial detainee, and that defendant's actions resulted in

[1] Citations to "R. __" refer to documents, by number, in the district court record. Citations to "GX __" refer to government exhibits admitted at trial and included in the government's appendix.

bodily injury to Benton, in violation of 18 U.S.C. 242 (Count 3). The indictment also alleged that John Gray, a Sergeant with the Lucas County Sheriff's Office, "assaulted and strangled" Mr. Benton, and then failed to obtain needed medical care and treatment for him – actions which ultimately resulted in bodily injury and death, in violation of 18 U.S.C. 242 (Counts 1 and 2). The indictment further charged Gray and defendant Schmeltz each with falsifying two official reports relating to the use of force against Mr. Benton, in violation of 18 U.S.C. 1519 (Counts 4 and 5 (Gray) and Counts 6 and 7 (Schmeltz)), and charged James Telb, the Lucas County Sheriff, and Robert McBroom, a Lucas County Sheriff's Office Internal Affairs investigator, with misprision of a felony, in violation of 18 U.S.C. 4 and 2 (Count 8). The indictment also charged each defendant with one count of making a false statement to a special agent of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001 (Count 9 (Gray), Count 10 (Telb), Count 11 (Schmeltz), and Count 12 (McBroom)). Defendant Schmeltz did not object to the indictment as duplicitous.

All four defendants pleaded not guilty to the charges and proceeded to a jury trial. The jury convicted Schmeltz on Count 6 and acquitted him on Counts 3, 7 and 11. (R. 256, Verdict).[2] The district court sentenced Schmeltz to a term of

[2] The jury convicted defendant Gray of depriving Mr. Benton of his rights under color of law, resulting in Benton's bodily injury, as charged in Count 2, but (continued…)

imprisonment of twelve months and one day, and a term of supervised release of two years. (R. 283, Judgment). The district court ordered Schmeltz to pay a fine of $6000 and a special assessment of $100. (R. 283, Judgment). Schmeltz filed a timely notice of appeal on February 9, 2011. (R. 286, Notice of Appeal).

STATEMENT OF FACTS

On May 28, 2004, Carlton Benton, a pretrial detainee housed at the jail in the Lucas County Sheriff's Office (LCSO), was taken from the jail and admitted to St. Vincent's Hospital after suffering seizures. (R. 301, Tr. p. 117 (stipulation); R. 274, Tr. p. 193 (Beisser)). Two days later, on May 30, two LCSO sheriff's deputies, Patrick Mangold and Jay Schmeltz, the defendant here, were sent to St. Vincent's Hospital to relieve the sheriff's deputies guarding Benton at the hospital. (R. 297, pp. 9-10, 17-18 (Mangold)). When Mangold and Schmeltz arrived at the hospital, Benton was restrained in the Intensive Care Unit with leg irons and handcuffs, which were secured to the bed. (R. 297, Tr. pp. 9-10, 18-19 (Mangold)).

That same day, doctors at the hospital decided to discharge Benton. (R. 274, Tr. pp. 193-194 (Beisser)). Mangold attempted to remove Benton's handcuffs so

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(…continued)
specifically found that Gray's actions did not result in Mr. Benton's death. (R. 256, Verdict). The jury also convicted Gray on two counts of falsifying a document; he was acquitted on Counts 1 and 9. Defendants Telb and McBroom were acquitted on all counts.

that medical personnel could disconnect medical equipment. (R. 297, Tr. p. 20 (Mangold)). Benton became agitated and began struggling with Mangold. (R. 297, Tr. pp. 20-21 (Mangold)). Schmeltz attempted to help Mangold by spraying Benton with mace, a chemical agent. (R. 297, Tr. p. 22 (Mangold)). The mace, however, made the situation worse, and Benton continued to struggle. (R. 297, Tr. p. 22 (Mangold)). Mangold used restraining blows against Benton and sprayed him with mace, which had little effect. (R. 297, Tr. pp. 22-23 (Mangold)). Mangold and Schmeltz, with the help of another sheriff's deputy, Jeff Pauwels, were eventually able to place Benton into additional restraints and move him to a wheelchair. (R. 297, Tr. pp. 23, 31 (Mangold)). Specifically, Benton was secured in leg irons, which permitted Benton to make only "very short, unbalanced steps" (R. 297, Tr. pp. 24, 28 (Mangold)), handcuffs and a belly chain, which ran around his waist and prevented his hands from extending up, down, or out (R. 297, Tr. pp. 26-27 (Mangold)). While restrained in this manner, Benton did not pose a threat to anyone at the hospital. (R. 297, Tr. p. 30 (Mangold)).

The sheriff's deputies transported Benton from the hospital to a waiting LCSO van without difficulty, and made the ten-minute trip back to the jail without incident. (R. 297, Tr. pp. 32-33 (Mangold)). John Gray, the sergeant overseeing the booking area of the jail, directed William Ginn, a corrections officer, and Daniel Hannon, a deputy sheriff, to help transport Benton into the booking area.

(R. 298, Tr. pp. 6-7 (Ginn), 85-86, 89 (Hannon)). Benton was verbally uncooperative when exiting the van, but was not considered a threat. (R. 298, Tr. pp. 11-12 (Ginn), 91-93 (Hannon)). The officers were able to transport Benton into the booking area without incident. (R. 298, Tr. p. 93 (Hannon)).

Once in the booking area, Schmeltz "shoved" Benton. (R. 298, Tr. pp. 15 (Ginn), 233 (Edwards)). Benton was unable to break his fall, given the restraints (R. 298, Tr. pp. 15-16 (Ginn), 104 (Hannon), 169-170 (Farias), 233 (Edwards)), and he landed on the floor after hitting his head against the wall and falling onto some chairs (R. 298, Tr. pp. 15-16 (Ginn), 170 (Farias), 233-234 (Edwards)). According to witnesses present in the booking area, there was no law enforcement purpose for shoving Benton. (R. 297, Tr. p. 43 (Mangold); R. 298, pp. 16 (Ginn), 103 (Hannon)). In addition to multiple witnesses who saw Schmeltz shove Benton (R. 298, Tr. pp. 15 (Ginn), 233 (Edwards)), video from a camera set up in the booking area clearly showed Schmeltz pushing Benton (R. 297, Tr. pp. 38-42 (Mangold); R. 298, Tr. pp. 100-102 (Hannon), 171 (Farias)).

Schmeltz picked up Benton from the floor and, along with Mangold, Gray, Ginn, Pauwels and Hannon, escorted Benton a short distance to an elevator to take him to a medical unit on the second floor of the jail. (R. 297, Tr. pp. 42-45 (Mangold); R. 298, Tr. pp. 17 (Ginn), 107 (Hannon)). Benton was speaking incoherently on the elevator ride up to the second floor. (R. 297, Tr. p. 46

(Mangold)). Once on the second floor, the officers were joined by Officer Justin Jones. (R. 297, Tr. p. 47 (Mangold); R. 298, Tr. p. 189 (Jones)). All seven officers, including Schmeltz, then escorted Benton, who remained shackled, into a medical cell. (R. 297, Tr. pp. 47-49 (Mangold); R. 298, Tr. pp. 17-18 (Ginn), 107-108 (Hannon)).

Once inside the medical cell, officers placed Benton on the bed, face down. (R. 297, Tr. p. 53 (Mangold); R. 298, Tr. pp. 19 (Ginn), 191 (Jones)). Officers attempted to remove Benton's restraints, but Benton began to struggle, making it difficult. (R. 297, Tr. p. 54 (Mangold); R. 298, Tr. pp. 20 (Ginn), 113 (Hannon)). At no time did Benton pose a physical threat to the officers. (R. 297, Tr. p. 55 (Mangold); R. 298, Tr. pp. 20 (Ginn), 117 (Hannon)). Mangold started to back out of the cell to allow Benton some time to calm down before trying again to remove his restraints. (R. 297, Tr. pp. 55-56 (Mangold)). Gray, meanwhile, said "I got this" (R. 297, Tr. p. 56 (Mangold)), and placed Benton into a carotid artery restraint hold or sleeper hold[3] (R. 297, Tr. p. 56 (Mangold); R. 298, Tr. pp. 23

[3] A carotid artery restraint hold, commonly referred to as a sleeper hold, is a hold sometimes used by law enforcement officers to gain a person's compliance. (R. 273, Tr. p. 48 (Luettke)). An officer places his forearm across one side of a subject's neck, and his bicep across the other; the inside of the officer's elbow protects the subject's airway. (R. 273, Tr. pp. 48 (Luettke), 136 (Reedy)). The officer then applies pressure to both sides of the subject's neck, restricting the blood flow to the brain. (R. 273, Tr. pp. 48 (Luettke), 136 (Reedy)). When done correctly, the subject is rendered unconsciousness in about six seconds and there is

(continued…)

(Ginn), 110 (Hannon), 192 (Jones)). Within a few seconds of applying the sleeper hold, Benton's body became limp. (R. 297, Tr. p. 58 (Mangold); R. 298, Tr. pp. 25 (Ginn), 118 (Hannon)). A few seconds after that, Benton began "to gasp for air making choking sounds." (R. 297, Tr. p. 58 (Mangold)). Mangold told Gray to stop (R. 297, Tr. p. 60 (Mangold); R. 298, Tr. p. 196 (Jones)), but Gray maintained his hold around Benton's neck, even after Benton became "limp and still" (R. 297, Tr. pp. 60-61 (Mangold); R. 298, Tr. p. 197 (Jones)).

While Benton lay motionless on the bed, and with Gray still holding Benton around the neck, the officers removed Benton's restraints. (R. 297, Tr. pp. 61-62 (Mangold); R. 298, Tr. p. 117-118 (Hannon)). Gray told the officers in the cell to leave. (R. 298, Tr. pp. 25 (Ginn), 115, 117 (Hannon), 197 (Jones)). Benton remained motionless on the bed as the officers left the medical cell (R. 297, Tr. pp. 60-61 (Mangold); R. 298, Tr. pp. 24 (Ginn), 115 (Hannon), 197, 214 (Jones)); Gray was still holding Benton around the neck (R. 297, Tr. pp. 62-63 (Mangold);

(…continued)
no detectable injury to the neck. (R. 273, Tr. pp. 140-142 (Reedy)). On the LCSO's use of force continuum, a sleeper hold is located one level below deadly force. (R. 273, Tr. pp. 53-55 (Luettke)). A sleeper hold is often referred to, incorrectly, as a "choke hold." (R. 273, Tr. p. 137 (Reedy)). A choke hold occurs when an officer places his or her forearm across a subject's throat to collapse that person's airway, causing easily detectable injuries to the person's neck. (R. 273, Tr. pp. 137-138 (Reedy)).

R. 298, Tr. pp. 25-26 (Ginn), 117 (Hannon)). Gray was the last officer to leave the room. (R. 298, Tr. p. 119 (Hannon)).

According to several witnesses who were in the medical cell, there was no law enforcement purpose for placing Benton in a sleeper hold because Benton, who was restrained in leg irons, handcuffs and a belly chain, was not posing a physical threat to anyone inside the room. (R. 297, Tr. pp. 57-58 (Mangold); R. 298, Tr. pp. 26 (Ginn), 115-116 (Hannon), 199, 204 (Jones)).

The officers passed a nurse's station as they left the medical cell, but none of the officers told the nurse on duty that Benton was unconscious. (R. 297, Tr. pp. 65 (Mangold), 180 (Sylvester); R. 298, Tr. pp. 27 (Ginn), 120 (Hannon), 198 (Jones)).

The medical officer on duty shut the door to Benton's cell after all the officers left. (R. 297, Tr. pp. 148, 154 (Coleman)). She looked through the window in the door and noticed Benton lying on his stomach. (R. 297, Tr. p. 153 (Coleman)). None of the officers said anything to her about Benton's condition, so she began her rounds. (R. 297, Tr. pp. 155-156 (Coleman)). When she returned to Benton's cell, he was lying in the same position as before and did not respond to her knock on the door. (R. 297, Tr. pp. 158-159 (Coleman)). She and other officers entered Benton's room, checked his pulse, determined he was not breathing, and began CPR. (R. 297, Tr. p. 160 (Coleman); R. 298, Tr. p. 200

(Jones)). An ambulance was called, and Benton was returned to the hospital. (R. 297, Tr. p. 160 (Coleman)). Benton never regained consciousness, and died two days later on June 1, 2004. (R. 274, Tr. p. 194 (Beisser)).

Per LCSO policy, any officer who uses force against an inmate, or witnesses another officer use force against an inmate, is required to write a report documenting the circumstances surrounding the use of force. (R. 273, Tr. pp. 26-28, 32, 52 (Luettke)). Corrections officers are required to document this information in a corrections officer report. (R. 273, Tr. p. 34 (Luettke)). These official reports are supposed to include as much detail as possible to provide the reader with a clear understanding of why force was used in a particular situation, the type of force used, and the disposition of the inmate following the use of force. (R. 297, Tr. pp. 13-14 (Mangold); R. 273, Tr. pp. 26-28 (Luettke)).

Following the incident in the medical cell, officers Mangold, Ginn, Hannon, and Schmeltz completed corrections officer reports. (R. 297, Tr. p. 68 (Mangold); R. 298, Tr. pp. 29 (Ginn), 121 (Hannon); see also GX 313, Mangold report; GX 307, Ginn report; GX 310, Hannon report; GX 318, 5/30/2004 Schmeltz report; GX 319, 6/1/2004 Schmeltz report). Mangold was directed to write a report that only covered the incident at the hospital (R. 297, Tr. pp. 68-69 (Mangold)); as such, Mangold's report does not include information about the incident in the medical cell (R. 297, Tr. p. 71 (Mangold); GX 313, Mangold report). Neither

Ginn's nor Hannon's report includes Gray's or Schmeltz's use of force against Benton. (R. 298, Tr. pp. 29-30 (Ginn), 123 (Hannon); GX 307, Ginn report; GX 310, Hannon report). In fact, Ginn and Hannon reached an understanding about what they were going to include and exclude from their reports. (R. 298, Tr. pp. 82 (Ginn), 124 (Hannon)). Ginn excluded information about Gray's use of force and Benton's condition because Ginn was "scared and afraid" about including that information in a report that Gray, his supervisor, would ultimately review. (R. 298, Tr. p. 27 (Ginn)). Similarly, Hannon excluded the incident that occurred in the medical cell because he did not want to get Gray in trouble. (R. 298, Tr. pp. 123-124 (Hannon)). Ginn did not include Schmeltz's use of force against Benton because he was afraid of what the other officers would think if he included it in his report. (R. 298, Tr. p. 30 (Ginn)). Hannon excluded the booking incident because he assumed it was available for review on the booking camera. (R. 298, Tr. p. 123 (Hannon)).

Schmeltz prepared two reports; neither includes his own use of force against Benton, Gray's use of a sleeper hold against Benton inside the medical cell, and the fact that Gray had rendered Benton unconscious with the sleeper hold. (GX 318, 5/30/2004 Schmeltz report; GX 319, 6/1/2004 Schmeltz report).

Mangold later met with Pauwels and Schmeltz and tried to convince them to report the incident inside the medical cell to someone higher up in the chain of

command. (R. 297, Tr. pp. 74-75 (Mangold)). Pauwels originally agreed, but later changed his mind. (R. 297, Tr. p. 74 (Mangold)). When Mangold approached Schmeltz, Schmeltz was reluctant to report the incident, and said, "This will get swept under the rug." (R. 297, Tr. p. 75 (Mangold)). Schmeltz then told Mangold that he was not going to report the incident. (R. 297, Tr. p. 75 (Mangold)).

The coroner initially ruled that Benton died a natural death from a seizure disorder, in association with his use of a particular medication. (R. 297, Tr. p. 223 (Beisser)). This determination was made, however, without knowing that Benton had been subjected to a sleeper hold. (R. 297, Tr. pp. 213-214, 220 (Beisser)). After learning later that Benton was subjected to a sleeper hold and conducting a further investigation, the coroner determined that Benton died from anoxic encephalopathy following the application of a sleeper hold; the coroner ruled the death a homicide. (R. 297, Tr. pp. 229-234, 236 (Beisser)).

SUMMARY OF ARGUMENT

Defendant Schmeltz was not entitled to a special unanimity instruction because the indictment in this case was not duplicitous. Although the indictment listed three material omissions to support the violation charged in Count 6, an indictment is not rendered duplicitous merely because it presents multiple factual predicates as proof of a violation. In the violation charged here, a particular omission simply constitutes a means of satisfying a necessary element of 18 U.S.C.

1519, as the statute targets the creation of false *documents*, not the individual false statements contained in a falsified document. A jury must unanimously agree upon the elements of each offense, but need not unanimously agree upon the specific *means* of satisfying an element. Under this Court's precedents, Schmeltz's argument should be rejected.

The unanimity instruction the district court gave the jury, which was consistent with this Circuit's pattern jury instructions, was correct. Even assuming the district court was required to provide a special unanimity instruction, defendant Schmeltz cannot show that he was prejudiced by the instruction given. The evidence at trial, which he does not contest on appeal, overwhelmingly supports a finding that he omitted the three statements set forth in the indictment, and that any of those omissions would support a conviction under the count charged.

ARGUMENT

THE DISTRICT COURT DID NOT PLAINLY ERR IN INSTRUCTING THE JURY THAT IT NEED NOT BE UNANIMOUS ON THE MEANS OF VIOLATING THE STATUTE BECAUSE THE INDICTMENT WAS NOT DUPLICITOUS AND THE INSTRUCTION GIVEN WAS CORRECT

Defendant argues that a special unanimity instruction was required because the indictment, which charged two separate violations of 18 U.S.C. 1519 and listed three material omissions from each document rendering each document false, was duplicitous. Defendant further argues that the instruction the district court gave the jury, which permitted them to find defendant guilty of 18 U.S.C. 1519 without

reaching unanimity on a particular omission, was plainly erroneous and prejudicial. Defendant is incorrect as a matter of law. Because the indictment was not duplicitous, but instead set forth three separate means by which defendant violated the statute, a special unanimity instruction was not required and the instruction the district court gave was correct.

A. Standard Of Review

Whether a defendant was charged under a duplicitous indictment is a legal question this Court reviews *de novo*. *United States* v. *Campbell*, 279 F.3d 392, 398 (6th Cir. 2002).

Ordinarily, a challenge to the indictment must be made before trial. See Federal Rule of Criminal Procedure 12(b)(3)(B); see also *United States* v. *Kakos*, 483 F.3d 441, 444 (6th Cir. 2007). In a case such as this, where a defendant does not object to an alleged duplicitous indictment before trial, "the case proceeds under the presumption that the court's instructions will clear up any ambiguity created by the duplicitous indictment." *Kakos*, 483 F.3d at 444. A defendant is thus limited post-trial to challenging the harm resulting from the duplicitous indictment. *Id.* at 445. Where, as here, a defendant has failed to object both to the indictment *and* the jury instructions, this Court's review is limited to plain error. *Id.* at 445. This Court will reverse only if a plain error affected a defendant's substantial rights. *United States* v. *Lloyd*, 462 F.3d 510, 514 (6th Cir. 2006).

B. Discussion

A duplicitous indictment "joins in a single count two or more distinct and separate offenses." *Campbell*, 279 F.3d at 398. "The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or on both." *United States* v. *Duncan*, 850 F.2d 1104, 1108 n.4 (6th Cir. 1988), overruled on other grounds by *Schad* v. *Arizona*, 501 U.S. 624 (1991). Thus, the primary concern in a case where a defendant is charged under a duplicitous indictment is that the defendant may be denied his right to a unanimous jury verdict. *United States* v. *Savoires*, 430 F.3d 376, 380 (6th Cir. 2005).

Schmeltz bases his duplicity argument on the indictment's reference in Count 6 to three omissions which rendered his May 30, 2004, incident report false.[4] Schmeltz's argument suggests that each omission was a separate act that cannot be joined in a single count. He is incorrect.

> Section 1519 of Title 18 penalizes any person who
>
> knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper

[4] To the extent defendant Schmeltz's argument pertains to Count 7, it is misplaced, as he was acquitted of submitting a falsified document on June 1, 2004. (R. 256, Verdict).

> administration of any matter within the jurisdiction of any department or agency of the United States.

18 U.S.C. 1519 (emphasis added). It is clear from the plain language of the statute that Congress did not intend to criminalize every individual *false statement* contained in a single falsified document.[5] Rather, the statute criminalizes the creation of a *false document*, however that is achieved. That is why the government charged Schmeltz with two counts of violating 18 U.S.C. 1519 – Schmeltz created two falsified documents: one on May 30, 2004 (Count 6), and one on June 1, 2004 (Count 7), each containing three material omissions.

To establish a violation of 1519, the government must prove each of the following elements beyond a reasonable doubt:

(1) that the defendant knowingly falsified or made a false entry in a record or document;

(2) that the record or document related to a matter within the jurisdiction of a federal agency; and,

(3) that the defendant falsified or made a false entry in the record or document intending to impede, obstruct, or influence the investigation of a matter within the agency's jurisdiction.

---

[5] Where the focus of a criminal prosecution is on false statements, it may be appropriate to charge individual false statements in separate counts. See, *e.g.*, 18 U.S.C. 1001(a)(2) (prohibiting the making of false statements during a federal investigation); see also *United States* v. *Dedman*, 527 F.3d 577, 600 n.10 (6th Cir. 2008) (suggesting, in *dicta*, that separately alleged false statements must be charged separately under 18 U.S.C. 1001(a)(2)), cert. denied, 129 S. Ct. 2379 (2009).

United States v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). The indictment here charged Schmeltz with one count of "knowingly falsif[ying] a document – specifically an official Correction Officer Report reflecting his actions, and the actions of his fellow corrections officers, in relation to the uses of physical force on C.B. on May 30, 2004 – with the intent to impede, obstruct, and influence the investigation and proper administration of that matter." (R. 2, Indictment). The indictment then alleged that Schmeltz committed the first element of the offense – falsifying a document – in more than one way. Accordingly, the indictment lists the various *means* by which Schmeltz was alleged to have knowingly falsified the document (*e.g.*, omitting his own assault on Benton, omitting Gray's assault on Benton, and omitting Benton's condition following Gray's assault). (R. 2, Indictment). Doing so did not render the indictment duplicitous. *United States* v. *Washington*, 127 F.3d 510, 513 (6th Cir. 1997) ("The mere existence * * * of multiple factual predicates for violation of a statute does not render the indictment duplicitous."). The three omissions are simply different means of satisfying a necessary element of Section 1519; they do not themselves constitute separate offenses or elements.[6] See *United States* v. *Mangieri*, 694 F.2d 1270, 1282 (D.C.

[6] In fact, to have charged each falsehood/omission as a separate offense in this case could have rendered the indictment multiplicitous. An indictment is multiplicitous, and implicates the double jeopardy clause, where it charges a single

(continued…)

Cir. 1982) (explaining that because 18 U.S.C. 1014 targets fraudulent loan transactions rather than the falsehoods used to achieve the illegal transactions, "the government could use various misrepresentations in each fraudulent application to prove each offense without being duplicitous"). In these circumstances, unanimity is not required.

This Court's precedents make clear that setting forth multiple means of violating a statute does not render an indictment duplicitous, and therefore does not require the district court to provide the jury with a special unanimity instruction. In *Washington*, the government charged the defendant in one count with possession with intent to distribute cocaine, in violation of 18 U.S.C. 841(a)(1). 127 F.3d at 512. At trial, the government presented evidence of two separate drug transactions, either of which could have served as the predicate offense for a conviction under the statute. *Id.* at 513 n.3. This Court rejected the defendant's

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(…continued)
criminal offense in multiple counts. *United States* v. *Hart*, 70 F.3d 854, 859 (6th Cir. 1995), cert. denied, 517 U.S. 1127 (1996). The Ninth Circuit, for example, has held that a defendant may only be charged with a single violation of 18 U.S.C. 1001(a)(2), which prohibits making materially false, fictitious or fraudulent statements in a matter within the jurisdiction of the United States, even where a defendant makes multiple, but identical, false statements on different occasions. *United States* v. *Stewart*, 420 F.3d 1007, 1013-1014 (9th Cir. 2005); see also *United States* v. *Sue*, 586 F.2d 70, 71 (8th Cir. 1978) (making multiple false representations in a single document to a lending institution constitutes one offense under 18 U.S.C. 1014; indictment that charged falsehoods contained in separate paragraphs in single document as separate offenses was multiplicitous).

duplicity argument, holding that the government's presentation "of multiple factual scenarios to prove that offense does not render the count duplicitous." *Id.* at 513; see also *United States* v. *Campbell*, 279 F.3d 392, 398 (6th Cir. 2002) (single conspiracy count alleging multiple objectives is not duplicitous, therefore indictment did not raise unanimity concerns); cf. *Mangieri*, 694 F.2d at 1281 (holding "the making of a number of false statements to a lending institution in a single document constitutes only one criminal violation under 18 U.S.C. 1014") (citation omitted).

This Court reached a similar conclusion in *United States* v. *Damrah*, 412 F.3d 618 (6th Cir. 2005). The indictment in *Damrah* charged the defendant in a single count with violating 18 U.S.C. 1425(a) and (b). *Id.* at 622. The defendant argued that Sections 1425(a) and (b) were separate offenses, not different means of committing a single offense. *Ibid.* This Court rejected that argument, explaining that it was "not duplicitous to allege in one count that multiple means have been used to commit a single offense." *Ibid.*

Because the indictment was not duplicitous, a special unanimity instruction was not necessary. *United States* v. *Anderson*, 605 F.3d 404, 415 (6th Cir. 2010) ("Because of our conclusion that the indictment is not duplicitous, the district court properly acted within its discretion by denying the jury instructions that [the defendant] requested to cure the alleged duplicity."); *Campbell*, 279 F.3d at 398.

Schmeltz nonetheless argues that the district court plainly erred in affirmatively instructing the jury that they must unanimously agree that the defendant violated the statute in at least one of the ways set forth in the statute, but that they "need not agree that the same way has been proved." (R. 277, Tr. p. 32). See *United States* v. *Duncan*, 850 F.2d 1104, 1112 n.8 (6th Cir. 1988) (suggesting, in *dicta*, that special unanimity instruction may still be necessary in case where "multiple means" of violating a statute are set forth in a single count in a non-duplicitous indictment). Schmeltz's argument fails for the same reason his duplicity argument fails: Schmeltz was charged in Count 6 with a single offense of falsifying a single document by means of three omissions, any of which was sufficient to render the document false.

The district court's instruction is consistent with this Circuit's pattern jury instruction, "8.03B Unanimity Not Required – Means." This instruction is appropriate where, as here, "the indictment alleges that the defendant committed a single element of an offense in more than one way." Sixth Circuit Pattern Jury Instruction, 8.03B Unanimity Not Required – Means, Note.

Other courts have applied a similar approach in similar situations. For example, in *United States* v. *Bellrichard*, 62 F.3d 1046 (8th Cir. 1995), the defendant was charged with 24 counts of mailing threatening communications based on 24 mailings sent to a district judge and prosecutor. The jury, during its

deliberations, asked the trial judge whether all members of the jury had "to all agree on the same threatening sentence in the letter" before finding the defendant guilty, or whether they could find the defendant guilty even if individual jurors disagreed on which parts of the letter were threatening provided all jurors found some part of the letter threatening. *Id.* at 1049. The district court instructed the jury that it

> must unanimously find beyond a reasonable doubt that the letter which you are considering contains a threat as defined in the Court's instructions. While you may disagree as to various parts of the language used, nonetheless you must consider the letter as a whole, since the whole letter is the result of the sum of its parts.

Ibid. The defendant argued on appeal that the district court's instruction violated his Sixth Amendment right to a unanimous verdict. *Ibid.*

The Eighth Circuit rejected the defendant's argument. *Bellrichard*, 62 F.3d at 1049. ("In returning general verdicts, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.") (citations omitted). The court of appeals reasoned that the district court's instruction was consistent with the language of the statute, which criminalized the mailing of threatening communications. Accepting the defendant's argument, the court explained, would require the court to interpret the statute as criminalizing "isolated phrases or words contained in a communication, rather than * * * the communication as a whole." *Ibid.* The court of appeals acknowledged that jurors

"may have disagreed as to which portions of particular letters were threatening," but explained that it had "no reason to believe that the jury did not unanimously agree on the ultimate factual issue, which was whether each [communication]" violated the statute. *Id.* at 1050; see also *United States* v. *McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995) (jury consensus on particular false statement contained in falsified passport application not necessary, in prosecution under 18 U.S.C. 1542).

Even assuming the district court plainly erred in instructing the jury that it need not reach unanimity on the means by which defendant falsified the report, defendant cannot establish prejudice from the error. The jury was presented with overwhelming evidence that defendant omitted three material statements from his May 30, 2004, report. First, multiple witnesses testified that they saw Schmeltz shove Benton in the booking area. (R. 298, Tr. p. 15 (Ginn); R. 298, Tr. p. 233 (Edwards)). Others testified that they saw the video of the incident, which clearly showed Schmeltz shoving Benton. (R. 274, Tr. p. 46 (Keller); R. 297, Tr. pp. 38-42 (Mangold); R. 298, Tr. pp. 100-102 (Hannon), 171 (Farias)). This same video was played for the jury at trial. (R. 297, Tr. p. 41). Second, multiple witnesses testified that Schmeltz was in the medical cell with them when Gray applied the sleeper hold on Benton. (R. 297, Tr. pp. 56-57 (Mangold); R. 298, Tr. pp. 20-21 (Ginn), 110-112 (Hannon)). These same witnesses all testified that they saw Gray

use the sleeper hold on Benton. (R. 297, Tr. p. 56 (Mangold); R. 298, Tr. pp. 23 (Ginn), 110-111 (Hannon)). Third, those same witnesses testified that Benton became limp and motionless after Gray applied the sleeper hold (R. 297, Tr. p. 58 (Mangold); R. 298, Tr. pp. 25 (Ginn), 118 (Hannon)), and that he remained that way when Gray ordered the officers from the medical cell (R. 297, Tr. pp. 60-61 (Mangold); R. 298, Tr. pp. 24 (Ginn), 115 (Hannon)). Finally, the jury heard testimony that officers are supposed to include in their reports any force they use or force they witness (R. 273, Tr. pp. 26-34 (Luetkke); R. 274, Tr. p. 31 (Keller); R. 297, Tr. p. 14 (Mangold); R. 298, Tr. pp. 11 (Ginn), 90 (Hannon)), and that failing to document Schmeltz's or Gray's use of force in their reports rendered the reports inaccurate and untruthful (R. 274, Tr. pp. 27, 31, 150-151 (Keller); R. 297, Tr. pp. 71 (Mangold), 96-97 (Luettke); R. 298, Tr. pp. 29-30, 81-82 (Ginn), 123-125 (Hannon)).

Schmeltz does not challenge any of this evidence on appeal – evidence that is more than sufficient to support a conviction based upon any of the three omissions. See *Lloyd*, 462 F.3d at 515 (where uncontroverted facts were sufficient to support either offense charged in a duplicitous indictment, defendant could not establish that language of indictment "had any effect at all on his right to a unanimous jury verdict," and therefore defendant could not establish plain error); see also *United States* v. *Thomas*, 74 F.3d 701, 712-713 (6th Cir. 1996) (in case

charging computer transfer of obscene computer files, where each obscenity count listed more than one computer file, no plain error where facts were such that it was "unlikely that the jury would have any trouble reaching unanimity" on at least one of the files included in each of the counts). Schmeltz's argument therefore fails under plain error review.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5674 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: May 23, 2011

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the CM/ECF system on May 23, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Angela M. Miller
ANGELA M. MILLER
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Title
2	Indictment
256	Verdict
273	11/3/2010 Transcript
274	11/5/2010 Transcript
283	Judgment
286	Notice of Appeal
297	11/2/2010 Transcript
298	11/4/2010 Transcript
301	11/17/2010 Transcript