IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff, No. 2:10-cr-00256-KJM

vs.

ALETHA COLWELL, ORDER

Defendant.

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I. INTRODUCTION

On February 9, 2011, Aletha Colwell ("Colwell") was convicted by a jury for theft of government property under 18 U.S.C. § 641 ("Section 641"). ECF 46. These misdemeanor proceedings were conducted by a magistrate judge with the parties consent under 28 U.S.C. § 636(a)(5). On May 11, 2011, Colwell filed a timely appeal to this Court under Federal Rules of Criminal Procedure 58(g)(2). App. 472, item 53.[1] On appeal, Colwell presents two issues. First, Colwell argues that the magistrate judge erred in denying her Rule 29 motion, claiming that a rational trier of fact could not have found beyond a reasonable doubt that the

[1] "App." refers to the Defendant's Appendix in Support of Appeal from Decision by United States Magistrate Judge, ECF 70, attachments 1-6.

essential elements of the crime were complete after July 2, 2005. Second, Colwell asserts that the magistrate judge erred in failing to instruct the jury on her defense theory because his instructions allowed the jury to treat theft as a continuing offense. The court finds the first issue is dispositive, and therefore does not reach Colwell's second issue regarding jury instructions. For the reasons set forth below we REVERSE the decision of the magistrate judge.

II. STATEMENT OF FACTS

The underlying facts are as follows. Before her death on April 24, 2004, Colwell's mother legally received monthly Widow's Insurance Benefits from the Social Security Administration ("SSA"). App. 71-83, 437-439. These funds were deposited every month into a SAFE Credit Union savings account held jointly by Colwell and her mother. *Id*.

Upon her mother's death, Colwell became the sole owner and controller of the joint account. App. 237. Colwell did not notify the SSA and continued to receive and utilize the entirety of her mother's benefits by transferring, bit by bit, each monthly payment from the joint account to her private checking account or withdrawing money directly.[2] App. 71-73, 109, 404-436. Colwell's pattern persisted for fourteen months, until the SSA made its final deposit on June 30, 2005. App. 72, 77-79.

By July 2, 2005, only $41 of the SSA's June 30th deposit of $941 remained in the joint account. App. 227-228, 428-432. On July 4, 2005, Colwell transferred $35 out of the joint savings account and, on July 8, she took out the last $6. App. 312-14, 432. In the meantime, the SSA received notification of Colwell's mother's death, ceased monthly payments to the joint account, and began attempts to contact Colwell. App. 99-102.

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[2] During this time, the government had no access to any benefits deposited into the account. If the United States wished to reclaim the money, it was required to go through the bank and follow "special procedures." App. 241-245.

On July 2, 2010, the government filed an Information charging Colwell with Theft of Government Property in violation of Section 641.[3] App. 1-3. At trial Colwell argued that the charges were brought after the five-year statute of limitations period set forth in 18 U.S.C. § 3282 had expired, because the final theft occurred June 30, 2005, when the last payment was deposited in Colwell's account and she formed the intent to keep it. ECF 70 at 16-17. On this theory, Colwell made a motion at the close of the government's case for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure ("Rule 29"). App. 248-261. The magistrate judge denied this motion as well as Colwell's renewed motion after her case-in-chief. App. 321-324.

In denying defense motions for acquittal, the magistrate judge reasoned that the jury could find that the act of theft was not complete until after July 2, 2005. Relying on evidence that Colwell was taking the money to live on, the magistrate judge believed a jury could find Colwell was making the decision to take the money each time "as she needed it." App. 259-260, 311-315. This conclusion was supported by Colwell's response on cross-examination that if she "had gotten a job and not had the financial problems" she would not have continued taking the money, that she was utilizing the money for living expenses, and would transfer the money specifically when needed. App. 311-315. In the same line of questioning, however, Colwell asserted that she knew, before the funds entered her account, that she was going to spend the money. App. 304-305, 307, 312.

Further, Colwell requested a specific statute-of-limitation jury instruction, stating that the government "must prove by clear and convincing evidence that the elements of the crime were not completed by July 2, 2005." App. 11. The magistrate declined to include the instruction, reasoning that the other instructions adequately instructed the jury as to Colwell's theory of defense.

[3] The government dismissed Count Two charging Colwell with Retention of Stolen Government Property at the beginning of trial, and proceeded solely on a charge of Theft of Government Property. App. 17.

On April 27, 2011, the jury convicted Colwell of violating Section 641, for the theft of $41, as alleged in Count One of the Information. App. 471-472.

III. ANALYSIS

Colwell's first issue on appeal is whether the magistrate judge erred in denying her Rule 29[4] motion by determining that a rational trier of fact could have found beyond a reasonable doubt that the essential elements of the crime were not complete until after July 2, 2005. As stated above, our ruling is based solely on resolution of this first issue.

Colwell argues the magistrate judge erred in denying her Rule 29 motion because no rational trier of fact could have found the elements of the crime were complete after the statute of limitations ended on July 2, 2005. Colwell challenges the evidence regarding the element of intent to steal or knowingly convert the Social Security benefits deposited by the government into her account on June 30, 2005. ECF 70:15-18. Colwell also asserts that the government failed to prove she did not have the requisite intent to keep the funds when they were deposited.

A. Standard of Review

A defendant may appeal a magistrate judge's judgment of conviction or sentence to a district judge within 14 days of its entry. FED. R. CRIM. P. 58(g)(2)(B). The scope of appeal from a judgment of conviction by a magistrate judge is the same as an appeal from the judgment of a district court to a court of appeals. FED. R. CRIM. P. 58(g)(2)(D); *Volk v. United States*, 57 F. Supp. 2d 888, 892 (N.D. Cal. 1999).

This court reviews de novo a magistrate judge's denial of a Rule 29 motion for acquittal. *See United States v. Bahena-Cardenas*, 70 F.3d 1071, 1072 (9th Cir. 1995). Such a denial is reviewed in the same manner as a challenge to the sufficiency of the evidence.

[4] Rule 29 states: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction." FED. R. CRIM. PROC. 29(a).

United States v. Shirley, 884 F.2d 1130, 1134 (9th Cir. 1989). "We review the evidence presented against [Colwell] in the light most favorable to the government to determine whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Shirley*, 884 F.2d at 1134 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original). "The reviewing court must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict." *Walters v. Maass*, 45 F.3d 1355, 1358 (9th Cir. 1995) (citation omitted). "Circumstantial evidence and inferences drawn from it may be sufficient to sustain a conviction." *United States v. Lewis*, 787 F.2d 1318, 1323 (9th Cir. 1986) (citations omitted). "However, mere suspicion or speculation[5]" is insufficient. *Lewis*, 787 F.2d at 1323 (citation omitted).

B. Discussion

I. Continuing Offense

To obtain a misdemeanor conviction under Section 641, the United States must prove the following elements: (1) that Colwell embezzled, stole, purloined, or knowingly converted to her use or the use of another, money or things of value; (2) that the money or property was federal money or property of a value less than $100; and (3) that Colwell did such acts willfully and with the intent to appropriate money to a use inconsistent with the owner's rights and benefits. 18 U.S.C. § 641; *See Ailsworth v. United States*, 448 F.2d 439, 442 (9th Cir. 1971) ("The intent, which is required to constitute a violation of § 641, is the intent to appropriate it to a use inconsistent with the owner's rights and benefits.") (citation omitted). The government charged Colwell with stealing and/or knowingly converting funds. App. 471-72. The first two elements are not at issue here. It is clear that Colwell stole or knowingly converted

[5] "Speculation" is defined as "[t]he act or practice of theorizing about matters over which there is no certain knowledge." BLACK'S LAW DICTIONARY 1407 (7th ed. 1999).

the federal funds with a value of less that $100. The question then is when did Colwell form the intent to steal or knowingly convert the funds.

Under Section 641, the concepts of stealing and conversion are mutually exclusive and, as such, will be discussed separately. *Morissette v. United States*, 342 U.S. 246, 271-72 (1952). Resolution of the present issue turns on whether a violation of stealing or knowingly converting funds under the first paragraph of Section 641 is a "continuing offense," defined as an "unlawful act or series of acts set afoot by a single impulse and operated by an unintermittent force, however long a time it may occupy." *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166 (1939) (citation and quotation omitted); *see also Caywood v. United States*, 232 F.2d 220, 235 n.12 (9th Cir. 1956).

Colwell cites *United States v. Beard*, 713 F. Supp. 285 (S.D. Ind. 1989), for the proposition that stealing or knowingly converting as charged under Section 641 is not a continuing offense. The Ninth Circuit has not ruled on whether theft under the first paragraph of Section 641 constitutes a continuing offense or not. The magistrate judge relied on Colwell's Second Amended Proposed Jury Instructions, proposed instruction number 7, when instructing the jury that theft is not a continuing offense. App. 263:8-13; ECF 33 at 9 (citing *Beard*, 713 F. Supp. at 290, and *United States v. Yashar*, 166 F.3d 873, 880 (7th Cir. 1999)). This Court finds the analysis in *United States v. Pease*, 2008 WL 808683 (D. Ariz. March 24, 2008), which relies on *Beard*, accurately explains that the crime of conversion in paragraph one of Section 641 is not a continuing offense. In *Pease*, the court applied the test set forth in *Toussie v. United States*, 397 U.S. 112 (1970). *Pease*, 2008 WL 808683 at *1-3. The Supreme Court in *Toussie* held that a particular crime is a continuing offense if either (1) "[t]he explicit language of the substantive criminal statute compels such a conclusion," or (2) "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115. Applying the first part of the *Toussie* test, the *Pease* court found "nothing in the language of the first paragraph [of Section 641] to suggest that Congress

intended to create a continuing offense." *Pease*, 2008 WL 808683 at *2. Applying the second part of the *Toussie* test, the *Pease* court found that the nature of the offense of conversion does not support a determination that Congress intended it to be a continuing offense. *Id*. Analogous to the case at bar, the defendant in *Pease* was accused of conversion of government funds under paragraph one of Section 641. *Id*. at *2. Citing "classic examples" of continuing offenses such as conspiracy, the *Pease* court explained that conversion is not like those examples because "'[w]hat the converter intends to do (or in fact does) with the converted property is irrelevant: the act of 'conversion' is completed upon the initial interference with the owner's interest.'" *Id.* (quoting *Beard*, 713 F. Supp. at 291). This court agrees with the *Pease* court's analysis and finds the magistrate judge correctly determined that theft under paragraph one of Section 641 is not a continuing offense. The question then is whether Colwell formed the requisite intent when the federal funds were deposited or when she transferred the funds from her savings to her checking account.

ii. "Steal" Under Section 641.

There are two elements of stealing relevant to the issue at bar. First, under Section 641, "[t]o steal means to take away from one in lawful possession without right with the intention to keep wrongfully." *Morissette*, 342 U.S. at 271 (quotation and citation omitted). Second, "an essential element of the crime of stealing property belonging to the United States is that the government: (1) had an interest in the goods stolen, and (2) suffered a property loss." *United States v. Long*, 706 F.2d 1044, 1048 (9th Cir. 1983) (quotations and citations omitted).

To establish the "intent" element of stealing, the government relies on Colwell's testimony regarding what she would have done had she found a job. App. 311-315. However, the government's assertion that Colwell would not have spent the money had she obtained a job is mere speculation and should not have been relied on by the jury to support a conviction. *Lewis*, 787 F.2d at 1318; App. 311:10-13. Colwell's circumstances were volatile and there are no facts established in the record to support the inference that Colwell would have stopped

spending the money if she had secured a job. *See United States v. Bennett*, 621 F.3d 1131, 1139 (9th Cir. 2010) (finding the government produced no evidence and the record contained nothing from which a jury could logically infer one company had control over another); *Juan H. v. Allen*, 408 F.3d 1262, 1278-79 (9th Cir. 2005) (granting writ where, after resolving all conflicting factual inferences in favor of prosecution, only speculation supported petitioner's conviction for first degree murder); *United States v. Hill*, 835 F.2d 759, 762 (10th Cir. 1987) (finding defendant's change of heart was evidenced by his actions and "unrefuted by any other evidence"). A jury may draw reasonable inferences from proven facts but a response to a hypothetical question, by its nature, is not a proven fact. *See Walters*, 45 F.3d at 1358. Colwell's testimony indicates she formed the intent to keep and spend the funds before they were deposited on June 30, 2005. Upon being asked at what moment she decided to spend the money, Colwell replied: "before it was even there." App. 302:19-21. The government argues that Colwell's testimony, that had she found a job she would not have continued to take the money, shows she could have formed the intent to steal the funds on or after July 2, 2005. However, Colwell went on to testify she knew she would spend the money "between her and her son," saying specifically "you have to eat" and that there were always "things coming up." App. 311:10-13, 312:12-24. Colwell also stated she never intended to return the money to the government, thus showing her intent to permanently dispossess the government of the funds. App. 307:20-25. Moreover, she consistently spent all of the money she received in the prior fourteen months, and stated during trial that she intended to spend the money deposited on June 30, 2005 in a similar manner. App. 302:19-21, 304:16-19. This testimony, demonstrating defendant's intent to spend and control all funds deposited on June 30, 2005, cannot be overcome by a single speculative statement. The government failed to establish that the intent element was satisfied on or after July 2, 2005.

In an effort to establish the second element of stealing, that the government had an interest in the goods stolen and suffered a property loss when the funds were transferred, the

government cites *United States v. Miller*, 520 F.2d 1208, 1210 (9th Cir. 1975), for the proposition that "[m]oney directly deposited into a bank account in error by the Security Administration remains property of the United States." ECF 76 at 9; *see* App. 370:10-12. Essentially, the government asserts this to prove that each withdrawal from the account was a separate theft of government property, that Colwell stole from the government each time she transferred the funds from her savings account. However, *Miller* does not support the proposition that the funds are the government's property if and until they are transferred out of Colwell's savings account. *Miller* holds that the government retains a property interest in the funds solely for the purpose of proving an element of a Section 641 claim. *Miller*, 520 F.2d at 1210. Applying *Miller*, the government lost control of the funds once they were deposited in Colwell's savings account, but it nevertheless retained a property interest in the erroneously issued check upon which conviction under Section 641 could be premised. *Id.* (explaining the check at issue "constituted a 'thing of value' of the United States" and "the right to the funds represented by the check did not pass from the federal government"). This conclusion is consistent with testimony from a bank representative explaining the government had "no access to the account itself" and would have to "go through the bank" to reclaim the money. App. 244:11-21.

In further support of its claim that Colwell stole the $41 only when she transferred the money, the government explains Colwell had to transfer the funds from her savings account to her checking account in order to spend it. ECF 76 at 11. The government appears to argue that Colwell did not control the funds until they were transferred from her savings to her checking account. Colwell did testify at one point that she transferred money because she had to have it in her checking account in order to spend it. App. 303:7-9. However, the record shows Colwell did not have to transfer the funds in order to utilize them. *See* App. 404-432 (showing multiple instances of Colwell both directly withdrawing and transferring monies from her savings account). Colwell also explained there were transfer limits on her account, which

supported her reasons for making separate transfers of money. App. 306:15-25. In sum, the funds became Colwell's money when they were deposited, at which point she could either keep them in her savings account or spend them. The timing of any subsequent decision to actually spend the funds is not relevant because Colwell wrongfully intended to keep the money when it was deposited in her savings account. App. 304-305, 307, 312. The evidence is insufficient for a rational trier of fact to conclude Colwell did not control the money in her savings account once it was deposited by the government.

Because Colwell controlled the money once it was deposited in her account and had the intent to take it when it was received, a rational jury could not have found beyond a reasonable doubt that she only later stole the money when she moved the funds around in order to spend them. Moreover, the jury could not have reasonably relied on the speculative statement made by Colwell, and contradicted by the evidence, to find she formed her intent at a later time. The evidence in the record is insufficient to support a conviction for stealing on or after July 2, 2005.

iii. "Knowingly Convert" Under Section 641

"The offense of conversion includes the element of serious interference with another's property rights. Thus, if [Colwell] did not know that [she] was seriously interfering or that the property was another's, [she] does not have the requisite intent and cannot be convicted of conversion." *United States v. Scott*, 789 F.2d 795, 798 (9th Cir. 1986). Conversion under Section 641 differs from stealing in that it "may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful." *Morissette*, 342 U.S. at 271-72. Knowingly convert includes the intent to "*wrongfully*... deprive another of possession of property." *Id*. at 276 (emphasis original). "[T]he act of 'conversion' is complete upon the initial interference with the owner's interest." *Beard*, 713 F. Supp. at 291.

The government asserts Colwell did not interfere with the funds until she transferred them from her savings account. This argument is flawed for the reasons discussed

above in considering *Miller*. *See* pages 8-9, *supra*. When the funds were deposited in Colwell's account the government retained a property interest that would support a Section 641 charge, but it no longer had control over the funds. *Miller*, 520 F.2d at 1210. The fact that Colwell kept the money in her savings account and later transferred it does not support a finding that she knowingly converted the funds when she transferred them. *See Beard*, 713 F. Supp. at 291 ("The fundamental flaw with the government's argument is that retention of the converted property is not in any way an element or part of the crime of conversion. Conversion is simply the wrongful assumption and exercise of control over another's property") (citation omitted). The record indicates that Colwell knew she was seriously interfering with the government's property interest when she kept the money in her savings account after it was deposited rather than notifying the government of her mother's death. App. 298:12-25; *see Scott*, 789 F.2d at 798. Colwell's subsequent decision to spend the money once it was in her account cannot rationally be construed as an initial interference as the government suggests. *See Pease*, 2008 WL 808683 at *2 ("what the converter intends to do (or in fact does) with the converted property is irrelevant") (quotation and citation omitted). The record also reflects there were no statements to contradict when Colwell formed her intent other than her speculative response to the government's hypothetical on cross-examination.

Additionally, analysis of the "intent" element of conversion is similar to that provided above with respect to "stealing." The statement Colwell made regarding what she would have done had she obtained a job is speculative. A rational juror could not have inferred that Colwell would have refrained from using the funds based on her hypothetical response to government's cross-examination regarding her potential future employment. *See Bennett*, 621 F.3d at 1139-40 (vacating sentence for several counts "[b]ecause the government relied solely on [a company's] status as a wholly-owned subsidiary, and presented no evidence indicating what kind of parent-subsidiary relationship actually existed[.] [A]ny inference drawn... would be impermissible speculation. That status, standing alone, provides no basis from

which to infer control beyond a reasonable doubt."); *Allen*, 408 F.3d at 1277 ("a 'reasonable' inference is one that is supported by a chain of logic, rather than... mere speculation dressed up in the guise of evidence"). Thus, the element of "serious interference" was satisfied when Colwell received the funds, and she could not have formed the intent to wrongfully convert government funds on or after July 2, 2005. *Compare United States v. Collins*, 56 F.3d 1416, 1421 (D.C. Cir. 1995) (government employee who used government computer for his own purposes did not violate § 641 because his work did not interfere with the government's use of the computer).

Colwell knew the funds were not hers and the government no longer had control over them when they were deposited. App. 244:11-21, 298:12-25. The jury could not have relied on Colwell's assertion regarding what she would have done if she had found a job for the same reason it could not rely on her statement about what she would have done had she, for example, won the lottery. Removing such a speculative inference, a rational trier of fact is left with evidence establishing that Colwell knew she was going to keep the money when it was deposited and could not have found beyond a reasonable doubt that she did not form the requisite intent to knowingly convert the funds when they were deposited in her savings account.

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IV. CONCLUSION

Viewing the evidence and testimony presented at trial in a light most favorable to the government and construing all reasonable inferences in favor of the government, the court concludes that a rational jury could not have found from the evidence that Colwell formed the requisite intent after July 2, 2005, to steal or knowingly convert the social security benefits. The only rational conclusion to be drawn from the record at trial is that the offense was complete when the funds were deposited in Colwell's account and she intended to keep them. The magistrate judge erred as a matter of law in finding that a rational jury could convict Colwell beyond a reasonable doubt on the basis of the evidence presented. *See United States v. Scott*, 452 F.2d 660, 662 (9th Cir. 1972). The denial of Colwell's Rule 29 motion should be REVERSED.

IT IS SO ORDERED.

DATED: May 8, 2012.

UNITED STATES DISTRICT JUDGE