FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DAVID LONICH, *Defendant-Appellant.*	Nos. 18-10298 18-10395 D.C. No. 3:17-cr-00139-SI-3
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BRIAN SCOTT MELLAND, *Defendant-Appellant.*	Nos. 18-10299 18-10408 D.C. No. 3:17-cr-00139-SI-2
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DAVID LONICH, *Defendant-Appellant.*	Nos. 18-10300 18-10394 D.C. No. 3:14-cr-00139-SI-2

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UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. BRIAN SCOTT MELLAND, *Defendant-Appellant.*	Nos. 18-10301 18-10407 D.C. No. 3:14-cr-00139-SI-4
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SEAN CLARK CUTTING, *Defendant-Appellant.*	Nos. 18-10303 18-10405 D.C. No. 3:14-cr-00139-SI-3
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. SEAN CLARK CUTTING, *Defendant-Appellant.*	Nos. 18-10304 18-10390 D.C. No. 3:17-cr-00139-SI-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted February 10, 2021
San Francisco, California

Filed January 10, 2022

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Before: Andrew D. Hurwitz and Daniel A. Bress, Circuit Judges, and Clifton L. Corker,[*] District Judge.

Opinion by Judge Bress

SUMMARY[**]

Criminal

The panel affirmed Sean Cutting's, Brian Melland's, and David Lonich's convictions, but vacated their sentences and remanded for resentencing, in a complex case arising from fraudulent schemes concerning bank loans and real estate in Sonoma County, California.

The panel held the Sixth Amendment's Speedy Trial Clause was not violated. Defendants claimed a Speedy Trial Clause violation as to all charges first brought in the October 2016 superseding indictment. Defendants then argued this court should reverse their convictions as to the charges in the original March 2014 indictment because of "prejudicial spillover" from evidence used to prove the charges in the allegedly unconstitutional superseding indictment. The panel had no occasion to consider defendants' "prejudicial spillover" theory because the panel held that the government's decision to file new charges in the superseding indictment did not infringe defendants' Speedy Trial Clause

[*] The Honorable Clifton L. Corker, United States District Judge for the Eastern District of Tennessee, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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rights. As to the first factor in the balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the length of the delay, the parties disagreed on when defendants' Speedy Trial Clause rights attached for the new charges first brought in the superseding indictment. Defendants argued the original indictment should be used as the start date for the new charges in the superseding indictment. The government contended the date it filed the superseding indictment should be used. The panel did not need to resolve that debate because it concluded that, even assuming the clock started at the time of the original indictment, there was no Speedy Trial Clause violation because the delay caused no relevant prejudice to defendants.

Defendants challenged the jury instructions on the money laundering (18 U.S.C. § 1957) and misapplication of bank funds (18 U.S.C. § 656) charges, contending that the instructions' overarching definition of "knowingly" conflicted with the required mental states for the two charged offenses. The panel held that the district court's general "knowingly" instruction was permissible and that defendants in any event did not show prejudice from the instruction.

Melland argued that there was insufficient evidence to support his conviction for bribery by a bank employee (18 U.S.C. § 215(a)(2)), which was based on his securing a $50,000 investment in Melland's energy-drink start-up. The panel held that, as the parties effectively agree, the district court appropriately stated the law when it instructed the jury that, to find Melland "acted corruptly," as required under § 215(a)(2), the jury must determine he "intend[ed] to be influenced or rewarded in connection with any business or transaction of" a financial institution. Noting that the

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circumstantial evidence was plentiful, the panel held that there was sufficient evidence to support the conviction.

Lonich argued that there was insufficient evidence to support his conviction for attempted obstruction of justice (18 U.S.C. § 1512(c)(2)) by encouraging a straw buyer to mislead the grand jury about his role in a scheme to gain control of a real estate development. The panel held that § 1512(c)(2) requires a showing of nexus to an official proceeding, but rejected Lonich's argument that no reasonable jury could have found the required nexus here. Noting that neither party disputes using a "consciousness of wrongdoing" mens rea requirement for purposes of evaluating the sufficiency of the evidence, the panel held that a reasonable jury could find that the government met its burden of proof in demonstrating Lonich's criminal intent.

The panel held that defendants' sentences must be vacated. The district court applied several enhancements that dramatically increased defendants' recommended Guidelines sentencing ranges. These enhancements were premised on a critical factual finding: that defendants caused Sonoma Valley Bank (SVB) to fail, making defendants responsible for associated losses. Addressing the standard of proof that the government was required to meet to demonstrate whether defendants caused SVB to fail, the panel focused on factors five and six of the non-exhaustive factors set forth in *United States v. Valencia*, 222 F.3d 1173 (9th Cir. 2000). Given the extremely disproportionate sentences that the disputed enhancements produced, the panel held that a clear and convincing evidence standard applies to the factual underpinnings for these enhancements. The panel concluded that the government did not demonstrate by clear and convincing evidence that defendants caused SVB to fail, where the district court made

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