No. 13-10510

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
APPELLEE

v.

WILLIAM AUBREY,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND SENTENCING GUIDELINES

OTHER AUTHORITIES

GLOSSARY OF ABBREVIATIONS

FDHC	Fort Defiance Housing Corporation
HUD	U.S. Department of Housing and Urban Development
NAHASDA	Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. § 4101 et. seq.
NHA	Navajo Housing Authority
SWONAP	HUD's Southwest Office of Native American Programs
TDHE	Tribally Designated Housing Entity

STATEMENT OF JURISDICTION AND BAIL STATUS

This is an appeal from the judgment of conviction and sentence in a criminal case. The district court (Dawson, J.) had jurisdiction under 18 U.S.C. § 3231. Judgment was entered on September 20, 2013. ER108-13.[1] Aubrey filed a timely notice of appeal. ER114-15; Fed. R. App. P. 4(b)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. Although Aubrey was sentenced to a term of imprisonment, this Court granted his motion for bail pending appeal on December 17, 2013, ER125, and he is currently released.

STATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support Aubrey's convictions under 18 U.S.C. § 1163 for converting or misapplying housing grant funds that belonged to an Indian tribal organization or were entrusted to that organization's agents.

2. Whether the district court plainly erred in instructing the jury.

3. Whether the district court abused its discretion in admitting summary testimony and exhibits.

4. Whether the district court clearly erred in calculating the advisory Sentencing Guidelines range, either by overstating the amount of loss or by imposing an abuse-of-trust enhancement.

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[1] Citations are to the Excerpts of Record (ER), Supplemental Excerpts of Record (SER), and district court docket (CR). We cite Aubrey's opening brief as "Br.," and the government and defense exhibits as "GX" and "DX."

STATEMENT OF THE CASE

A. Procedural History

In December 2012, a grand jury returned a second superseding indictment charging Aubrey with conversion and misapplication of funds from a tribal organization, in violation of 18 U.S.C. § 1163 (Count 4); and embezzlement, theft, misapplication and conversion of money and funds from a tribal organization, in violation of 18 U.S.C. § 1163 (Count 5). Aubrey and co-defendant Chester Carl with also charged with bribery relating to federal program funds, in violation of 18 U.S.C. § 666 (Counts 2 and 3); and conspiracy to commit bribery relating to federal program funds, in violation of 18 U.S.C. § 371 (Count 1). ER25-39.

After a 15-day trial, the jury found Aubrey guilty on Counts 4 and 5; it found Aubrey and Carl not guilty on the bribery charges. ER2638-39.

On September 10, 2013, the district court sentenced Aubrey to 51 months' imprisonment, to be followed by three years of supervised release. ER2709. The court held a restitution hearing in November 2013 (ER2722-62), but has not (as of this writing) decided whether to award restitution or in what amount.

B. Statement of Facts

1. Overview

This case concerns Aubrey's misuse of Indian Housing Block Grant funds awarded to the Navajo Nation to build affordable homes for its people. Aubrey was the co-owner and operator of Lodgebuilder, a for-profit construction and develop-

ment company to which the Fort Defiance Housing Corporation—a downstream recipient of the grant funds—delegated responsibility for building 90 homes on Navajo land near Chilchinbeto, Arizona. ER27-28. In his capacity as a developer and consultant for the Chilchinbeto project, Aubrey gained access to the more than $11.5 million in grant funds allocated to that project in fiscal years 2002 and 2003. ER418. There was no dispute at trial that Aubrey put some of those funds toward their designated purpose of paying for goods supplied and work performed at Chilchinbeto. But taken in the light "most favorable to the jury's verdict," *United States v. Hicks*, 217 F.3d 1038, 1041 (9th Cir. 2000), the evidence also established that, by the Spring of 2004, Aubrey ceased using the earmarked grant funds for those payments. Instead, Aubrey continued to deposit the funds into bank accounts he controlled and from which he paid personal expenses, including substantial gambling debts. ER28-29, 32, 2077-82. In this way, and as explained further below, Aubrey converted and misapplied Navajo Nation funds that the tribe entrusted to Fort Defiance to pay for particular construction costs.

2. Background On Indian Housing Block Grant Funding

The funds Aubrey converted and misapplied came from Indian Housing Block Grants awarded to the Navajo Nation under the Native American Housing Assistance and Self-Determination Act (NAHASDA), 25 U.S.C. § 4101 et seq. Enacted in 1996 and effective in 1998, NAHASDA shifted primary responsibility for administering and managing Native American housing programs to tribal governments. ER220-21.

Under NAHASDA, the U.S. Department of Housing and Urban Development (HUD) allocates federal money to Indian tribes using a formula that considers the tribes' populations and other factors. ER224. HUD issues the funds to each tribe's Tribally Designated Housing Entity (TDHE), which administers the funds in accordance with NAHASDA and its implementing regulations. ER223-25.

The tribe in this case, the Navajo Nation, is the largest recipient of NAHASDA block grant funds. Its TDHE, the Navajo Housing Authority (NHA), received approximately $90 million annually in NAHASDA funds during the relevant period. ER224. But that annual funding is not a fungible pool of money that the Navajo Nation can put toward whatever housing-related purpose it likes. ER230. To secure the funds in the first place, NHA must submit annual Indian Housing Plans specifying how NAHASDA funds are to be expended. ER225; SER47-120 (2003 Housing Plan). Once the tribe's Housing Plan is approved and funds allocated, the funds are available through a line of credit and are released by HUD only when NHA confirms that eligible work has been performed and requests funds to pay for that work. ER230, 321-22. The funds drawn by NHA in each of these requests must then be used to pay the expense that prompted the request. This means that, when NHA draws and releases NAHASDA funds based on a roofing bill, the funds issued must go to pay the roofer. ER234-235, 275, 330-31, 424-25. The funding recipient cannot instead put the funds to a different use and expect to reimburse the roofer for the relevant costs when funds from another source become available. ER288-90, 862-63,

1993. NAHASDA funds, in short, may be spent solely on work that is eligible under the statute, approved under the Indian Housing Plan, and verified as complete by the responsible TDHE. ER287-88, 820-21; 25 U.S.C. § 4111(g).

NHA, the TDHE in this case, did not undertake all housing projects on the Navajo Nation Reservation on its own. Due in part to the Reservation's physical expanse (it covers more than 25,000 square miles in Arizona, Utah and New Mexico) and political composition (it is divided into 110 chapters comparable to county governments), NHA has awarded NAHASDA funds and delegated responsibility for those funds to designated sub-grantees. ER307-10.

Among those sub-grantees was Fort Defiance Housing Corporation (Fort Defiance or FDHC), a Navajo-owned corporation formed under the laws of the Navajo Nation. ER26-27, 312. Like other sub-grantees, FDHC was a non-profit organization granted NAHASDA funds for the purpose of providing housing to the Navajo people. ER335-36, 819. FDHC signed formal sub-grant agreements with NHA pledging to adhere to the annual Indian Housing Plans submitted by NHA and approved by HUD, and also to abide by the governing federal and Navajo Nation laws and regulations. SER17-27, 121-131. Those agreements acknowledged NHA's authority to examine FDHC's books and records in the course of an audit, to terminate the agreement based on FDHC's failure to carry out the assigned tasks or maintain satisfactory records, and to retain the benefit of any work completed prior to termination. SER125, 128.

The sub-grant agreements further specified that FDHC was to receive the NAHASDA funds allotted to the Navajo Nation "on a cost reimbursement basis" through HUD's line-of-credit system. SER123. This meant that, to obtain the funds, FDHC had to submit a standard requisition form—supported by relevant documentation—identifying the funding-eligible work performed during the relevant time period, requesting payment, and agreeing to return any excess funds. ER425, 945; SER150-57. If NHA inspectors verified that the claimed work had in fact been performed, NHA approved the request, HUD released NAHASDA funds to NHA, and NHA issued a check to cover the approved requisitions. ER425. The funds were then in the hands of FDHC, which had a fiduciary obligation to manage them in accordance with NAHASDA, its implementing regulations, and the relevant grant agreements. ER1270.

3. Fort Defiance Delegates The Chilchinbeto Finances To Aubrey

At Chilchinbeto, this payment process played out differently because FDHC had delegated its responsibility to manage and distribute NAHASDA funds to Aubrey and his company, Lodgebuilder. ER396, 818. This was not the first time that Lodgebuilder had stepped into FDHC's shoes in managing funds. ER349. In fact, FDHC had chosen Lodgebuilder for other projects on the Navajo Reservation, ER2362, becoming Lodgebuilder's biggest client and enabling Aubrey to have frequent contact with the FDHC Board (including at meetings at Las Vegas casinos that Aubrey financed, ER1577-78), and to exert influence over the composition of the

Board (as when Aubrey selected NHA employee Marcus Tulley for an open Board spot, ER1573). Tulley was later named FDHC's Chief Operating Officer, but he confirmed that Aubrey had the "real authority" over financial and other matters, ER1580, as the FDHC Board did little more than sign off on "already decided" matters just "to make it official." ER1573.

By mid-2002, when the Chilchinbeto project was still in the pre-construction phase, ER315, FDHC's relationship with Lodgebuilder had raised red flags with HUD's Southwest Office of Native American Programs (SWONAP). SWONAP issued a report in August 2002 addressing various issues arising from that relationship, ultimately finding that FDHC was in violation of fiscal controls and was unable to substantiate that NAHASDA grant funds were being used solely for authorized purposes. ER352-53, 358-61; SER28-40.

Notwithstanding those findings, in October 2002, FDHC entered into a renewed agreement with Lodgebuilder covering the period of the Chilchinbeto project. SER41-46. The agreement did not establish Lodgebuilder as a general building contractor on the Chilchinbeto project. Entitled "Development/Consultant Agreement," it instead stated that Lodgebuilder would provide construction management services, prepare the monthly payment requests for approval by FDHC and NHA, ER371, distribute the NAHASDA funds awarded FDHC to the suppliers and contractors who performed the work, and secure the third-party funding needed to cover the full cost of the project. SER43-44; *see* ER246, 561-62, 651 (Indian

Housing Plans contemplated use of matching or leveraged funding from third parties, some kicking in at the project's completion, to cover costs that exceeded NAHASDA allotment). As for Lodgebuilder's own compensation, the agreement specified that Lodgebuilder would be paid like the other companies working at Chilchinbeto—on a line-item basis in accordance with NAHASDA cost guidelines. ER825-26; SER44.

FDHC entered into this development-consultant agreement with Lodgebuilder two months before NHA submitted its final Indian Housing Plan allocating $9.374 million in NAHASDA funds to Chilchinbeto for fiscal year 2003. SER47, 67. That allotment was less than the $10.8 million than FDHC had sought in an earlier proposal. ER630-31. HUD approved the Housing Plan as submitted by NHA. And aware of the final appropriation, FDHC entered into a sub-grant agreement with NHA in May 2003 to build 90 units at Chilchinbeto with $9.374 million in NAHASDA funds, ER819-20; SER122, which was in addition to the $2.26 million in funds allocated to get the project started in 2002, ER418.

4. Aubrey Converts And Misapplies The Grant Funds

Construction at Chilchinbeto began in the summer of 2003. ER1130-31; SER132. As contemplated by its agreement with FDHC, Lodgebuilder prepared monthly requisition requests that FDHC signed and submitted to NHA, which verified that the work had been completed, drew funds from its HUD line of credit, and issued checks to FDHC. ER1584, 1882-92.

FDHC, in turn, passed the NAHASDA funds to Aubrey in one of two ways. ER1585-93. During the early and late stages of the project, Aubrey endorsed the NHA checks and deposited them into FDHC accounts that he controlled at the same bank (Mesquite Bank, later Bank of Nevada) that housed his personal accounts. ER1585-86; SER139-40, 162-65 (GX24C and D, GX37C and D). After SWONAP raised concerns about FDHC's relationship with Lodgebuilder, however, FDHC and Aubrey changed their practice for a four-month period. ER1586, 2044. During that time, FDHC deposited the NHA checks into an account at Wells Fargo bank, but then immediately issued checks for the full amount of the NAHASDA funds for Aubrey to deposit at his bank. ER1590; SER148 (GX30D). Under either method, the NAHASDA funds received from FDHC ended up in the same place—Aubrey's joint money market account with his wife, Brenda Todd. ER2085; SER197 (GX42).

Once the funds were in that account, Aubrey treated them as his own, engaging in an array of transactions that obscured the source and application of the money. Account records, for example, revealed that Aubrey had a pattern of moving the exact amount of NAHASDA funds just deposited into the joint account back to a Fort Defiance account that he controlled, and then immediately back to the joint account. *E.g.*, ER2033-34, 2150-51; SER140-42, 164-65, 179-80. Beyond circular transactions of that nature, Aubrey paid business and personal expenses from the joint account, *e.g.*, ER2077; SER179-80 (GX39D), including payments to Aubrey's own liquid-coating company (Thermo-flex), ER2028-29, 2081. He also transferred money from

the joint account to another personal account to finance gambling debts and buy jewelry. ER2036-38, 2046, 2079, 2082.

This web of transactions did not initially prevent Aubrey from keeping up with the expenses at Chilchinbeto. ER1154. But that changed in the spring of 2004. As construction work advanced, the remaining NAHASDA funds dwindled. SER154 (GX37A: 93 percent of NAHASDA funds had been issued by April 2004). The project superintendent at Chilchinbeto—longtime Aubrey employee Dale Rowton—heard complaints that contractors were not being paid. ER1155-56. Rowton questioned Aubrey, who told him not to release checks because NHA had not paid Lodgebuilder on the requested draw. ER1156-58, 1241. That was false: with a few exceptions or adjustments not relevant here (ER1888), NHA paid all eligible work expenses listed in requisitions and independently verified by NHA inspectors, totaling more than $9.1 million in NAHASDA funds through June 2004. ER1896; SER184. Those included payments for site electrical, flooring, and stucco work, which were the tasks performed by three of the companies that did not get paid. ER2004-06; *see* ER972-78 (stucco), 1093-95 (electric); 1234-40 (flooring).

The clearest example of Aubrey's failure to put the NAHASDA funds to their designated purpose involved Four States Electric. In March 2004, Four States contacted Rowton to bid on electrical work at Chilchinbeto. ER1065-68. Although he was a Lodgebuilder employee, Rowton informed Four States that its bid had been accepted and signed the contract with Four States on FDHC's behalf. ER1068-73,

1144. Four States performed the agreed-upon work in March and April 2004 and submitted timely bills to FDHC. SER206-08. The ensuing requisitions reflected Four States' performance and requested a total of $200,000 in NAHASDA funds for site electrical work. SER154, 169, 185. On each occasion, NHA issued checks containing the requested amounts to FDHC, which passed the funds to Aubrey. ER1891-96; SER161, 176-77, 190-92. Aubrey, in turn, deposited those funds at his bank and moved them among accounts from which he paid personal expenses—including payments to two casinos totaling more than $100,000 in May 2004 and another $50,000 payment to the Paris Casino in June 2004. ER2079-82; SER179, 195. Yet neither FDHC nor Aubrey on its behalf paid Four States Electric. ER1094-95, 2074-76, 2078-81. Concerned by Lodgebuilder's failure to pay Four States and others, Rowton left the Chilchinbeto project—the only time in his career that he abandoned a jobsite. ER1152-53.

After learning that FDHC failed to pay vendors and contractors at Chilchinbeto, NHA terminated FDHC's sub-grant agreement and investigated the whereabouts of the NAHASDA funds. ER477, 488-91, 499, 885-88, 1874. NHA finance officials were informed that they would have to obtain the relevant records from Lodgebuilder's office in Nevada, rather than from FDHC. ER402, 1299, 1335, 1875. When it was finally able to sort through the disorganized set of documents that Lodgebuilder submitted, NHA confirmed that Aubrey had failed to pay numerous contractors and vendors for their work at Chilchinbeto and could not verify all of

Lodgebuilder's claimed expenditures as permissible. ER826-30, 1906-07. In total, Aubrey estimated that the Chilchinbeto contractors were owed more than $1.2 million. ER829-30; SER229 (DX511). Four States and other contractors were able to recoup some of the funds owed them years later in FDHC's bankruptcy. ER987, 1094. An audit conducted in the course of that bankruptcy determined that Lodgebuilder had received $11.6 million in NAHASDA funds for the Chilchinbeto project in fiscal years 2002 and 2003, but could verify only $7.1 million in expenses incurred. SER216 (GX101).

C. Rulings Under Review

The rulings on review are (I) the denial of Aubrey's motions for judgment of acquittal, ER2168-69, 2458, 2650-51; (II) the district court's jury instructions, ER2473-74, 2840-41; (III) the admission of summary testimony and exhibits, ER2054, 2089-90; and (IV) the calculation of the Sentencing Guidelines range, ER2688-91.

SUMMARY OF ARGUMENT

I. The evidence was sufficient to prove that Aubrey violated 18 U.S.C. § 1163. The jury rationally found that Aubrey converted and misapplied tribal organization funds based on evidence that NHA released the earmarked grant funds to Fort Defiance to pay for specific construction costs and that, rather than paying contractors like Four States Electric, Aubrey deposited the funds into his own accounts and used them to pay personal expenses. The jury was not required to accept Aubrey's alternative theories that the grant funds "belonged" to him or to the

contractors, or to find that Fort Defiance held the funds "in trust." To the extent a trust requirement exists, though, it was satisfied here.

The district court properly rejected Aubrey's post-trial efforts to rework the evidence. His arguments do not rebut either the court's finding that Aubrey was guilty at least of misapplication or the inferences the jury drew from Aubrey's pattern of paying personal expenses immediately after depositing grant funds. The arguments also depend on speculative claims about money Aubrey spent and work Lodgebuilder performed that are not borne out by the trial record.

II. The district court did not plainly err in instructing jury. The instructions adequately reflected Aubrey's theory that the grant funds were reimbursements that belonged to him, would have barred conviction had the jury accepted that theory, and did not suggest that Aubrey could be convicted as an "agent" of the Navajo Nation. Nor did any imperfection in the instructions affect Aubrey's substantial rights.

III. The district court did not reversibly err in admitting the summary exhibits and testimony of a government auditor. The court had the discretion to admit the summary charts along with the financial documents used to prepare them, and it soundly concluded that the auditor's use of a method similar to a basic accounting principle in performing calculations did not transform his testimony from lay to expert. Regardless, any error in failing to designate the witness an expert was harmless.

IV. The district court correctly calculated the Guidelines range. The court reasonably estimated a loss exceeding $1,000,000 based on the money Aubrey's crimes

caused NHA to spend and testimony regarding the amount of personal expenses Aubrey paid out. The court also properly found that Aubrey occupied a position of trust given FDHC's delegation of financial control to him, the position facilitated his offense, and a two-level enhancement under U.S.S.G. § 3B1.3 was thus warranted.

ARGUMENT

I. The Evidence Was Sufficient To Support Aubrey's Convictions.

Aubrey challenges (Br. 17-38) the sufficiency of the evidence, primarily arguing that the grant funds he converted and misapplied did not "belong to" NHA. Both that argument and his fact-specific challenges to Counts 4 and 5 lack merit.

A. Background

Counts 4 and 5 charged Aubrey with converting or misapplying money and funds from a tribal organization, in violation of 18 U.S.C. § 1163. ER39. Count 4 charged that, from May 20, 2004 to on or about June 8, 2004, Aubrey knowingly and willfully converted to his own use and misapplied funds that either belonged to NHA and FDHC as its sub-grantee or had been intrusted to the custody or care of NHA and FHDC as agents of the Navajo Nation. ER39. Aubrey was charged in Count 5 with embezzling, stealing, converting, and misapplying those same NHA and FDHC funds "[o]n or about June 24, 2004." ER39.[2]

[2] Counts 4 and 5 were limited to those dates because the statute of limitations barred charges for conduct more than five years prior to May 19, 2009, the date of the original indictment. ER1, 2576.

At trial, the parties presented contrasting theories of the case and views of the evidence. ER76 (prosecutor's comment that two sides were "ships passing in the night"). The government focused on the money for the construction payments that NHA had issued at FDHC's request during the time period charged in the indictment. The prosecution established that NHA had paid out grant funds to cover specific project costs submitted by FDHC, that FDHC turned those funds over to Aubrey to distribute to the contractors whose work had justified the funding, and that—rather than paying all contractors—Aubrey deposited the funds into personal accounts from which he paid gambling debts and other personal expenses. ER76-77. Aubrey, by contrast, insisted that the case was about the total amount of money that it cost to build the 90 homes at Chilchinbeto. He thus argued that, because Lodgebuilder supposedly spent more on the Chilchinbeto project than the $9.156 million in NAHASDA funds distributed to FDHC through June 2004, he was entitled to treat reimbursement payments as "his own money," rather than tribal money earmarked to pay specific project costs. ER72-73, 178-79, 2570.

Based on this theory, Aubrey moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 at the close of the government's case. ER71-73. The district court denied the motion orally, ER77-78, and denied Aubrey's renewed motion at the close of evidence. ER2458. The jury found Aubrey guilty of Counts 4 and 5. ER96-97.

Aubrey filed a post-verdict motion for acquittal under Rule 29(c), which the district court denied at the sentencing hearing. ER100-02. The court acknowledged that there was an issue at trial "as to whose money it was" that Aubrey had put to "personal use." ER100. The court found, however, that Aubrey had created the "difficulty" by commingling "his money with the Navajo Housing Authority money" in his personal accounts. ER100. The court described the grant money as "trust funds in th[e] sense * * * that they were * * * delivered ultimately to Mr. Aubrey for specific purposes; that is, to pay contractors for work performed on the * * * Chilchinbeto housing project." ER100-01. When Aubrey "took those funds," the court explained, he had a duty "to pay them to the individuals whose work formed the basis of the requisition" that caused NHA to release the funds. ER100. The court found that Aubrey had not done so. The "undisputed" evidence instead showed that, while funds "paid out based on [specific] requisitions * * * ended up in the hands of Mr. Aubrey," "some of the contractors for whose work [those] requisition[s] w[ere] made did not get paid." ER101. The court therefore concluded that the evidence supported the jury's verdicts on Counts 4 and 5, "at least" on the basis that Aubrey misapplied protected funds. ER101-02.

The court elaborated on its reasons for denying the Rule 29 motion later in the hearing. ER2662-66. The court referenced evidence that Aubrey did not pay "people for * * * whose work[] he had requisitioned money," and failed to apply the funds received "to the purposes for which they were entrusted to his care." ER2663. Nor,

the court continued, could Aubrey avoid responsibility on the theory that he would have compensated unpaid contractors after additional funding kicked in at the end of the project. That argument instead underscored that Aubrey had used the earmarked funds "somewhere else" and hoped to "ma[k]e [them] up later." ER2664 (finding that Aubrey did this "with the electrical money," which he had put "to some * * * purpose other than that for which it was requisitioned"). Finally, the court emphasized the untoward consequences of Aubrey's "theory of the case," which would allow recipients of earmarked funds to pull "a great scam"—*viz.*, "play with other people's money till you can get it from another source." ER2664.

B. Standard of Review

This Court reviews de novo the district court's denial of a motion for judgment of acquittal under Fed. R. Crim. P. 29. *United States v. Wigan*, 700 F.3d 1204, 1210 (9th Cir. 2012). In reviewing the sufficiency of the evidence, the Court "construe[s] the evidence 'in the light most favorable to the prosecution,'" and then asks "whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Nevils*, 598 F.3d 1158, 1161 (9th Cir. 2010) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trial evidence need not "rebut all reasonable interpretations of the evidence that would establish the defendant's innocence, or 'rule out every hypothesis except that of guilt beyond a reasonable doubt,'" *id.* at 1164; it need only show that the trier of fact could reasonably arrive at its conclusion. *Id.* at 1165.

C. The Evidence Was Sufficient To Prove That Aubrey Converted Or Misapplied Grant Funds That NHA Released To Fort Defiance To Pay Particular Project Costs.

1. The government presented sufficient evidence to support Aubrey's Count 4 and 5 convictions for violating 18 U.S.C. § 1163. Modeled after the general federal theft statute (18 U.S.C. § 641), *see Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1472 (9th Cir. 1989), Section 1163 broadly applies to "[w]hoever embezzles, steals, knowingly converts to his use or the use of another, willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, goods, assets, or other property belonging to any Indian tribal organization or intrusted to the custody or care of any officer, employee, or agent of an Indian tribal organization." 18 U.S.C. § 1163; *see United States v. Anderson*, 391 F.3d 1083, 1087-88 (9th Cir. 2004) (explaining that by using the term "whoever" in Section 1163, Congress intended to reach "anyone and everyone" who "steals money or property from an Indian tribal organization"). The government thus had to prove that, during the relevant time periods, (i) Aubrey converted or willfully misapplied funds and (ii) those funds either belonged to an Indian tribal organization (NHA or FDHC) or were entrusted to the custody or care of NHA or FDHC as agents of the Navajo Nation. ER2840-41 (jury instructions).

a. Taken in the light most favorable to the prosecution, *Nevils*, 598 F.3d at 1161, the evidence established both of these elements beyond a reasonable doubt. First, the government proved the conversion-or-misapplication element through the example of Four States Electric, a business that performed site electrical work at

Chilchinbeto in March and April 2004.[3] The evidence showed that Four States billed FDHC for its work during that period, FDHC requested NAHASDA grant funds from NHA specifically to pay for that (and other) work, NHA distributed the funds based on that request, and FDHC immediately transferred the funds to Aubrey to pay out pursuant to its developer-consultant agreement with Lodgebuilder. ER1080, 2073-79; SER43-44, 153-54, 164, 166-69, 179, 206-08. The evidence further established that, within three days of transferring the grant funds into his accounts, Aubrey paid more than $100,000 to two casinos, in addition to other personal expenses. ER2077-79; SER179-80. He did not, however, pay the contractor (Four States) that FDHC was duty-bound to pay with the allocated funds. ER100-01, 1094. And when confronted by his own employee about the non-payment, Aubrey falsely blamed it on NHA's supposed failure to issue requisitioned funds. *See United States v. Harris*, 185 F.3d 999, 1006 (9th Cir. 1999) (explaining that "[i]ntent could be inferred from the tricks and deceptions [the defendant] used to cover up what he did"). The jury reasonably concluded from the totality of this evidence that Aubrey converted the funds destined for Four States to his own use or, at the least, that he misapplied them,

[3] Aubrey complains (Br. 44) that he was convicted merely for failing to pay contractors on time. But the fact of non-payment both proved the offense and was part and parcel of it. That is, failure to remit the earmarked funds showed that Aubrey misapplied those funds, ER100-01; and when paired with evidence of the personal expenses Aubrey paid out, it allowed the jury to infer that Aubrey put the funds to his own use and thus converted them, ER2844 (defining "conversion").

ER101—*viz.*, he knowingly put them to an "unauthorized" use. ER2844-45 (instructions defining conversion and misapplication).

b. The jury also rationally found that the funds Aubrey converted had been entrusted to FDHC as an agent of NHA, an Indian tribal organization. ER2840-41.[4] Specifically, the relevant grant agreements and witness testimony established that NHA disbursed the grant funds to FDHC for the exclusive purpose of reimbursing particular project costs at Chilchinbeto. ER330-31, 820-21 (NHA Grants Manager Louis Shepherd); SER121-22. HUD and NHA officials testified that subgrantees in FDHC's position are obliged to use the disbursed funds to pay the costs listed in the corresponding payment request and that FDHC (or Aubrey as its consultant) was not free to unilaterally reallocate the funds as it saw fit, whether based on changing budget conditions or otherwise. ER234-35, 275, 287-88 (Jennifer Bullough, HUD's Office of Native American Programs); ER330-31, 862-63 (Shepherd); ER1506, 1545-46 (NHA Chief Operations Officer Leon Porter); ER1880, 1992-93, 2002-03 (NHA Chief Financial Officer Marlene Lynch). When they were placed in FDHC's hands, therefore, the funds constituted the kind of "earmarked" money that is unlawfully converted if not put to its designated purpose. *See* 3 Wayne R. LaFave, Substantive Criminal Law § 19.6(d), at 104 (2d ed. 2003) (explaining that "a building contractor

[4] There was no dispute at trial that NHA qualified as an "Indian tribal organization" as that term is defined in Section 1163. ER2842 (Instruction No. 17); *see United States v. Brame*, 657 F.2d 1090, 1091 (9th Cir. 1981).

who receives from the landowner an advance payment on the contract and who thereafter spends the money for his own purposes and does not fulfill the contract, is not guilty of embezzlement, *unless the money is earmarked* to be used only for a construction purpose") (emphasis added).

Aubrey responds (Br. 21-22) that the grant funds here were issued to reimburse the cost of work already performed, rather than advanced to pay for future work. But he cites no legal authority attributing significance to that distinction. Nor is there a basis in logic for doing so. Suppose, for example, that FDHC had given Aubrey signatory authority on the Wells Fargo account into which it deposited some of NHA's checks (ER1589-93) and that Aubrey had written a large check on that account to a casino instead of paying the companies whose bills had prompted NHA to disburse funds to FDHC in the first place. It would not matter in that scenario that the NHA payment was a reimbursement rather than an advance; Aubrey would still have converted and misapplied NHA funds placed in FDHC's custody or control. *Cf. United States v. Coin*, 753 F.2d 1510, 1511 (9th Cir. 1985) (affirming Section 1163 conviction where defendant requisitioned tribal money to pay existing bills but diverted some funds to personal use). The result should be no different in this case simply because FDHC transferred the NHA-issued funds to Aubrey and counted on him to pay contractors from accounts that he controlled.

2. Aubrey nevertheless contends (Br. 19-26) that the second element was not satisfied because, once NHA disbursed the grant funds, they did not "belong to" a tribal organization and were not held "in trust."

a. As an initial matter, Aubrey's arguments concerning the phrase "belonging to" overlook the remaining language in Section 1163 ("intrusted to the custody or care of any officer, employee, or agent of" a tribal organization) and the government's principal theory of liability at trial—namely, that NHA entrusted the funds at issue to Fort Defiance as an agent of the Navajo Nation. ER39 (superseding indictment); ER154 (opening statement); 2603-05 (rebuttal argument). As explained above, pp. 19-21, the evidence was sufficient to support Aubrey's guilt on that theory.

In any event, Aubrey's arguments on the "belonging to" issue lack merit. He asserts (Br. 14, 20-21) that the homes built with the grant funds, not the funds themselves, are what "belong[ed] to" NHA, and that the cost of building those homes exceeded the grant funding. But this focus on the total cost of the project has nothing to do with the status of specific grant funds at the time that Aubrey diverted them to his own use in May-June 2004. ER2167-68. Nor does it overcome the district court's finding that, at the time of Aubrey's offense conduct, the Chilchinbeto homes could not have qualified for a certificate of occupancy and so were "worthless" to NHA. ER2665, 2678. While Aubrey continues to blame NHA for the delay in completing the homes, the trial evidence showed that his own misapplication of funds is what forced NHA to terminate the sub-grant agreement with FDHC. ER498-99, 853.

Finally, his total-cost theory should be rejected for the reason underscored by the district court—it would absolve funding recipients who "play with other people's money" in the hope of repaying it later, ER2664, so long as they could come up with evidence after the fact that the funding party got good value for the non-converted portion of the funds.

Aubrey next contends (Br. 22) that the grant funds belonged to the contractors from the moment that NHA released requested funds to FDHC. That theory is in tension with his argument elsewhere (Br. 32; ER2560) that the funds belonged to Lodgebuilder, an argument that is itself undermined by the fact that the unpaid contractors recovered from *Fort Defiance*—not Aubrey or Lodgebuilder—in bankruptcy. ER987, 1094; *see* ER960-62, 1066-72 (evidence that when Lodgebuilder employees signed contracts with vendors, they did so on behalf of FDHC).

Aubrey's contractor theory is also unsupported by the evidence. He relies on the district court's passing statement, made when denying him bail pending appeal, "that once the application was made and the payment was approved [the money] belonged to the subcontractors who * * * turned up in this case not receiving payment." ER117. But Aubrey takes that statement out of context. The court made its remark immediately after reaffirming that it "disagree[d] with [Aubrey's] position that the progress payments belonged to Lodgebuilder, Bill Aubrey, * * * or someone else." ER117. The court then referred back to its prior rulings denying Aubrey's motions for acquittal, in which it had rejected Aubrey's position and instead agreed

with the government that Aubrey misappropriated funds released to FDHC and earmarked to pay specific construction costs, including the work performed by unpaid contractors like Four States. ER100-01, 2662-66.

b. Aubrey's other main argument—raised for the first time on appeal—is that the government was required to prove that the grant funds were held "in trust" in order to convict him under the second clause of Section 1163. Br. 19-20, 23. But Aubrey cites no case holding that the phrase "intrusted to * * * [an] agent of an Indian tribal organization" in Section 1163 demands a formal trust relationship, and that result is not "plain" given the statutory text or this Court's cases. *See United States v. Smith*, 520 F.3d 1097, 1106 n.5 (9th Cir. 2008) (reviewing for plain error where defendant "did not raise [his] specific insufficiency of the evidence claim in his [Rule 29] motion"); Webster's II New Riverside University Dictionary 436 (1984) (first definition of "entrust" is "[to] give over (something) to another for care, protection, or performance"). To the contrary, courts have not demanded such a relationship in grant-funding cases under the theft statute (18 U.S.C. § 641) on which Section 1163 was modeled. They have instead asked whether the party whose funds are protected by the statute exercised sufficient supervision and control over the funds to demonstrate continued interest in them. *See United States v. Kranovich*, 401 F.3d 1107, 1113 (9th Cir. 2005); *United States v. Gibbs*, 704 F.2d 464, 466 (9th Cir. 1983); *see also United States v. Garcia-Pastrana*, 584 F.3d 351, 369-71 (1st Cir. 2009) (applying supervision-and-control standard to determine whether embezzled funds

"'were funds . . . of a health care benefit program'" under 18 U.S.C. § 669, another statute modeled after Section 641).

NHA's supervision and control here were sufficient for the grant funds to retain their protected character when they were disbursed to FDHC. *See Garcia-Pastrana*, 584 F.3d at 371 (explaining that "the relevant entity for purposes of the 'supervision and control' prong is the" entity protected by the statute). The requisition process required NHA to verify work through documentation and inspection before approving requested payments for disribution. ER425; *see United States v. Johnson*, 596 F.2d 842, 846 (9th Cir. 1979) (treating pre-payment verification as sign of supervision). The sub-grant agreement, moreover, required FDHC to comply with NHA's policies and submit numerous reports to NHA, ER1285; SER124, and it gave NHA the authority to audit FDHC or demand an accounting, SER125. Trial testimony confirmed that NHA exercised that audit and investigation authority in response to (and also prior to) Aubrey's misuse of the grant funds, eventually obtaining records from Lodgebuilder in an effort to account for misappropriated funds. ER402, 886-88 (Shepherd); ER1906-08 (Lynch). That was enough to establish supervision and control under this Court's cases. *See United States v. Von Stephens*, 774 F.2d 1411, 1413 (9th Cir. 1985) (audit and reporting requirements, as well as power to examine recipient's bank accounts, constituted supervision and control); *Gibbs*, 704 F.2d at 465 (periodic reports and audits).

Even if the statute required that the funds be held formally "in trust," however, that requirement was satisfied here. This Court's decision in *Johnson* dictates that result. *Johnson* was a Section 641 prosecution in which a city agency received HUD redevelopment funds and used the funds to pay a union for verified maintenance work that union workers performed in the city. 596 F.2d at 843-44. The defendant, a union officer who pocketed money that he had caused the agency to pay to fictitious union employees, argued that the funds were no longer property of the United States for purposes of Section 641 because "title to the funds passed to the [city agency]" as soon as "they had been transferred to the agency." *Id.* at 844. This Court rejected that argument. It concluded "that the grant funds deposited with the [city agency] were deposited in trust * * * to be held and disbursed in accordance" with the legislation and regulations governing the grant program. *Id.* at 845.

The grant funds in this case are analogous in relevant respects. Testimony established that, as in *Johnson*, NHA as a funding recipient was required to disburse the grant funds pursuant to the NAHASDA statute and its implementing regulations, *e.g.*, ER227, 268-69, 1992-93, and that those obligations carried over to FDHC via the sub-grant agreement. ER1285; SER121-30. FDHC thus held the grant funds received from NHA "in trust," *Johnson*, 596 F.2d at 845, to be disbursed strictly in accordance with the NAHASDA regime. And as the district court concluded, the trust character of the money did not dissipate the moment FDHC transferred the

funds to Aubrey, who retained the "duty to * * * pay them to the individuals whose work formed the basis of the requisition." ER101.

c. This Court's cases following *Johnson* refute Aubrey's additional argument (Br. 23-24) that he can avoid liability because the regulations and agreements did not expressly prohibit recipients from commingling grant funds with money from other sources. *See Gibbs*, 704 F.2d at 466 (rejecting argument that Section 641 conviction invalid because protected funds had been commingled); *Von Stephens*, 774 F.2d at 1413 (affirming conviction where protected party contributed 49 percent of funds commingled with non-protected funds). It is enough, these cases hold, that the protected party exercise sufficient control and monitoring to preserve the protected nature of the funds. *Id.*; *Gibbs*, 704 F.2d at 466. And to the extent the cases are read to require that a "substantial portion" of commingled funds come from the protected entity, *see Garcia-Pastrana*, 584 F.3d at 371, the evidence here satisfies that standard. Chilchinbeto funds constituted almost half of the NAHASDA funding allocated to FDHC in 2003, SER122 ($9.374 of $21.358 million), and more than half of the $17.1 million that Aubrey identified as passing through his money market account during the relevant period, ER2144. *See Von Stephens*, 774 F.2d at 1413. The absence of an express commingling prohibition therefore did not give Aubrey license to treat earmarked grant funds as his own.

The decision in *United States v. Lequire*, 672 F.3d 724 (9th Cir. 2012) (cited at Br. 23), is not to the contrary. *Lequire* addressed "the crime of embezzlement of

insurance premiums" under 18 U.S.C. § 1033(b). 672 F.3d at 728; *see United States v. Renzi*, -- F.3d --, 2014 WL 5032356, at *18 (9th Cir. Oct. 9, 2014) (explaining that "*Lequire* specifically dealt with embezzlement under § 1033(b)(1)," and declining to extend its reasoning to fraud prosecution on a misappropriation theory). This Court explained that the term "embezzlement" was undefined in Section 1033(b)(1), that some cases defined the term to require that the property be held "in trust," and that the parties there had "agree[d]" that Lequire could be guilty of embezzlement only if the premiums his insurance agency handled were "held in trust." *Lequire*, 672 F.3d at 728. To decide whether they were so held, this Court looked to state law governing the relevant insurance contract. The Court deemed controlling a 1933 Arizona Supreme case holding that no trust relationship exists in the insurance context when, as was true in *Lequire*, "an insurance agent is allowed by contract to commingle funds in a single account and has the duty to pay over premiums to the insurance company, regardless of whether the premiums have actually been collected." *Id.* at 729 (emphasis omitted).

In so holding, however, the Court in *Lequire* acknowledged that "the right to commingling, in and of itself, [does not] negate[] a trust relationship." 672 F.3d at 731. That is consistent with the line of Section 641 cases, cited above, affirming embezzlement and conversion convictions despite the commingling of grant funds. *See Van Stephens*, 774 F.2d at 1413; *Gibbs*, 704 F.2d at 466. Along with this Court's earlier decision in *Johnson*, 596 F.2d at 845-46, those cases—not *Lequire*—are the ones

presenting circumstances most analogous to Aubrey's conversion and misapplication of Indian block grant funds.[5]

D. Aubrey's Count-Specific Challenges To The Sufficiency Of The Evidence Fail.

Aubrey renews (Br. 27-38) fact-specific challenges to the sufficiency of the evidence developed for the first time in his post-verdict Rule 29(c) motion. The district court correctly rejected Aubrey's attempts to rework the evidence in his favor.

1. On Count 4, Aubrey argues (Br. 33-38) that the verdict was irrational because, (a) in the eight months prior to the indictment period, he deposited enough money from non-grant sources into his personal accounts to cover all of the personal expenses documented by the government auditor; and (b) he spent $690,000 of his own money at Chilchinbeto and was thus entitled to keep the April and May 2004 grant payments as "partial reimbursements." Neither of these theories grapples with the district court's rationale for denying the Rule 29(c) motion—*viz.*, that Aubrey was guilty at least of misapplication because he did not use earmarked grant funds to pay a contractor (Four States Electric) whose work had formed the basis for releasing those funds. ER100-01, 2663-66. When combined with evidence that Aubrey lied when

[5] Aubrey does not contend that, as in *Lequire*, non-federal law has a role to play in this case. *Cf. Johnson*, 596 F.2d at 845 (holding that grant funds were delivered "in trust" without consulting state law). Nor does he specify which body of law would govern. *Compare* SER130 (NHA's sub-agreement with FDHC governed by Navajo Nation law), *with* SER202 (FDHC's contract with Four States governed by Arizona law). Potential choice-of-law difficulties further counsel against relying on local law in the context of federal grant funds distributed to an Indian tribal organization.

confronted about the non-payment, ER1156-58, 1241, his conceded failure to put the funds to their designated purpose constitutes sufficient evidence to convict on Count 4. ER2663-64, 2680 (concession that Four States was not paid).

Aubrey's theories do not pan out even on their own terms. Both theories depend on a series of transactions ending with the March 17, 2004 deposit of $800,000 derived from the Vista del Lago project. With that deposit, the balance in the Aubrey-Todd joint account exceeded $1.1 million. ER2864 (DX599-2). But that deposit had been consumed by April 13, 2004, when the joint account balance was lower than it had been before the $800,000 infusion. ER2864, 2867. And by the May-June 2004 period relevant to Count 4, the balance had further dwindled to $115,730. ER2873 (DX599-2). (This was so despite the April 2004 requisition payment of $204,900, which temporarily boosted the joint account balance (ER2869) but which Aubrey did not use to pay flooring or electrical contractors, ER1240-41.) Aubrey therefore could *not* have covered the almost $142,000 in personal expenses that he incurred between May 20 and June 8, 2004 without additional money. It was common-sense, not "speculation," Br. 34, for jurors to infer that Aubrey took this additional money from the grant funds paid in the May 2004 requisiton. After all, Aubrey transferred $282,000 of those grant funds into the joint account on May 20—the same date that he paid out $113,800 to two casinos and thousands in equestrian expenses. SER179-80. That timeline supports the jury's determination that Aubrey put grant funds earmarked for other purposes to his personal use.

Aubrey's partial-reimbursement theory (Br. 37-38) is similarly unavailing. The theory fails at the threshold because Aubrey was not entitled to do what he claims he did: front money for certain project costs, request payment based on the work of third parties, and then pay himself before paying the parties whose work prompted the funding. ER862-63, 876 (Shepherd) (explaining that a grant recipient cannot treat as its "own" money that was requisitioned for a specific line-item category and then decide to pay itself instead of contractors); ER1506, 1545 (Porter) (money in draw-down request is "misused" unless paid to whoever did the listed work).

The theory also rests on the speculative premise that Aubrey used $690,000 of the $800,000 Vista de Lago deposit to pay Chilchinbeto project costs between March and June 2004. But Aubrey gives no reason to believe that he spent those funds on Chilchinbeto at the same time he was instructing project superintendent Rowton *not* to pay contractors. ER1156-58, 1241; *see* CR155 at 12-14 (government's Rule 29 response showing that, during relevant period, $628,000 in grant payments were made to bring project from 91% to 97% complete). Nor do the bank records cited by Aubrey (Br. 37) conclusively demonstrate that all of the money funneled through his accounts was spent on Chilchinbeto. After reviewing the relevant documents, NHA finance officials could not verify that all of Lodgebuilder's reported expenses were proper, ER1906 (Lynch), or that Aubrey put the grant funds toward their intended purpose. ER887-88 (Shepherd); *see also* ER1913 (Lynch's testimony that, for another 2004 project, NHA had to reimburse HUD because Lodgebuilder could not provide

documentation backing up claimed costs). The record also reveals that Lodgebuilder had other projects underway at the relevant time, ER2567, including at least one other FDHC project (Springstead Estates) that generated costs and income in 2003 and 2004 and thus could have been the source of expenditures from Aubrey's FDHC accounts. ER1882 (first Chilchinbeto payment also included payment for Springstead work); SER223 (Lodgebuilder claimed $393,800 in income from Springstead Estates in 2004). The jury therefore was not required to accept Aubrey's claim that he spent $690,000 at Chilchinbeto, much less agree that he was entitled to pay himself rather than the contractors.

2. Contrary to Aubrey (Br. 27-32), the evidence was also sufficient to support the jury's verdict on Count 5, which involved the June 2004 period following the final requisition payment. ER39. The evidence on that count showed that (i) FDHC requested $133,700 in payment for work performed prior to June 1 on streets ($84,000), site electrical ($36,000), and gutters ($13,700); (ii) NHA issued a check in the requested amount; (iii) Aubrey deposited the check into an FDHC account at his bank on June 21, 2004; and (iv) the next day, Aubrey transferred $45,000 from that FDHC account to the joint Aubrey-Todd account. SER181-85, 192-96. Two days later, on June 24, Aubrey cut a $50,000 check to the Paris Casino from his separate personal account, and the bank covered that check by sweeping in $25,400 attributable to the recently deposited grant funds. ER2080-82; SER196. These actions followed Aubrey's pattern of depositing grant money into his personal

accounts and then, within days, paying out large-scale personal expenses. *See* SER143-49, 179-80 (exhibits showing, respectively, $20,000 casino payment day after 9/2003 deposit; $60,000 casino payment day after 10/2003 deposit; $80,000 casino payment day after 12/2003 deposit; $113,800 in casino payments day after 5/2004 deposit). Taken in the light most favorable to the prosecution, that pattern of conduct supported the jury's reasonable inference that Aubrey was putting grant funds earmarked for another purpose to his personal use.

Aubrey counters (Br. 28-32) by dissecting the June payment request. Noting that Four States Electric did not bill for work done in May or June, Aubrey infers (Br. 29-30) that the $36,000 in grant funds allocated for site electrical work must have been intended to cover the payroll costs of "ditch and backfill" work that Lodgebuilder, not Four States, performed. Because Lodgebuilder also paid out $84,000 to another company for street materials, Aubrey continues, he was entitled to pocket the entirety of the June 2004 requisition payment.

Aubrey's cited materials, however, do not show that Lodgebuilder performed ditch-and-backfill work for which it was due reimbursement in June 2004. The testimony from Four States' proprietor confirms only that Lodgebuilder dug the ditches into which Four States placed conduits and cables. ER1074 (after Lodgebuilder "started the contractor digging the ditches and whatnot," Four States installed PVC conduits and high-voltage cabes "in those ditches"). But by Aubrey's own account (Br. 29), Four States "did no work in May or June of 2004," meaning that Lodge-

builder must have dug those ditches *before* May 1, 2004. SER206-08; *see* ER1082 (proprietor's testimony that, after superintendent left the project in April 2004, "[t]here was nobody there to dig ditch"). Finally, even if the June requisition payment had been based on Lodgebuilder's ditch-and-backfill work, that would show only that Aubrey again paid himself before paying a contractor (Four States) that was owed payment for its site electrical work, an action that was impermissible according to the trial testimony. ER876.[6] The district court therefore properly rejected Aubrey's new spin on the evidence.

II. The District Court Did Not Commit Reversible Plain Error In Instructing The Jury.

Aubrey next argues (Br. 39-45) that the district court erred in omitting from its jury instructions a phrase embodying his theory of defense. He fails, however, to demonstrate reversible error.

A. Standard of Review

When a defendant preserves the claim by making a "specific objection," Fed. R. Crim. P. 30(d), this Court reviews "de novo whether the district court's jury instructions adequately presented the defendant's theory of the case and whether the district

[6] Aubrey disputes (Br. 32-33 n.6) that he improperly paid his own company (Thermo-Flex) for stucco-related materials while stiffing the stucco contractor, claiming that non-payment was justified by the contractor's lack of progress. Suffice it to say that the contractor, who testified at trial, denied Aubrey's allegation of shoddy work, attributed the problems to the sub-par materials Aubrey provided, and eventually collected partial payment in FDHC's bankruptcy. ER963-65, 987.

court presented the jury with every element of the crime." *United States v. Jinian*, 725 F.3d 954, 960 (9th Cir. 2013). If the "instructions fairly and adequately covered the elements of the offense," then the Court "review[s] the instructions' precise formulation for an abuse of discretion." *Id.* (citation omitted).

Aubrey, however, failed to preserve his claims that the court's final instructions inadequately covered his theory of defense or introduced confusion by supplying a definition of the term "agent." At the charge conference, Aubrey raised only one objection to the court's instructions on Counts 4 and 5—that the court had divided the statute into two elements, whereas his proposed instruction broke it down into three elements. ER2473-74. Although Aubrey cited a proposed instruction that "happened to contain * * * the language" that he now identifies as reflecting his theory of defense, he did not alert the court to "the need for such language or the failure of the court's instruction to include it." *United States v. Hofus*, 598 F.3d 1171, 1175-76 (9th Cir. 2010). His claims should therefore be reviewed for plain error. *See id.*; *United States v. Chi Mak*, 683 F.3d 1127, 1137 & n.1 (9th Cir. 2012).

B. The District Court's Jury Instructions Correctly Stated The Law And Were Adequate To Guide Deliberations.

The district court did not commit an error, plain or otherwise, in instructing the jury on Counts 4 and 5. Aubrey's contrary argument (Br. 40-44) faults the court for failing to instruct the jury that the funds at issue must have "belonged to the Navajo Housing Authority and its subgrantee Fort Defiance Housing Corporation, as agents

of the Navajo Nation, *rather than belonged to defendant William Aubrey or someone else*." ER2815 (emphasis added). Read as a whole, however, the court's instructions adequately encompassed Aubrey's theory that the grant funds were reimbursements that belonged to him upon payment. *See United States v. Johnson*, 680 F.3d 1140, 1147 (9th Cir. 2012) ("The relevant 'inquiry is whether the jury instructions as a whole are misleading or inadequate to guide the jury's deliberations.'") (citation omitted).

The first element of the instructions required the jury to find that Aubrey converted or willfully misapplied—or for Count 5, that he embezzled, stole, converted, or misapplied—"money or funds." ER2840-41. The court then provided separate definitions of the unlawful activites, all of which specified that the monies or funds taken through the criminal conduct must be those "of another." The court thus defined

- "Conversion" as deliberately taking or retaining "the monies or funds of another with the intent to deprive the owner of its use or benefit either temporarily or permanently," ER2844;
- "Willful misapplication" as taking or using "the money or funds of another knowing that such taking or use is unauthorized or unjustifiable or wrongful," ER2845;
- "Embezzlement" as "wrongfully and intentionally tak[ing] the monies or funds of another after the monies or funds have lawfully come into possession or control of the person taking it," ER2846; and

- "Stealing" in part as "willfully obtain[ing] or retain[ing] possession of monies or funds which belong[] to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit or ownership," ER2847.

When combined with the court's instruction on the second element (ER2840-41), these definitions made clear that the jury could not convict on Counts 4 and 5 if it accepted Aubrey's argument that the grant funds were reimbursements that belonged to him rather than to the tribe or its agents. *E.g.*, ER2560 (defense argument in closing that, "if [Aubrey] shows that it's reimbursed, it becomes his money"). The court therefore correctly concluded (ER2474) that its "combination instruction" "adequately instructed" the jury on the elements of the offense and Aubrey's theory of defense. *See United States v. Keyser*, 704 F.3d 631, 641-42 (9th Cir. 2012) ("[A] defendant is entitled to have his theory fairly and adequately covered by the instructions, but is not entitled to an instruction in a particular form.").

Moreover, Aubrey's proposed instruction did not accurately reflect the law or the charges in the second superseding indictment. As explained above, p. 22, Aubrey errs (Br. 41, 44) in reading the statute to cover only conversion or misapplication of funds "belonging to any Indian tribal organization," when it also criminalizes those acts where funds are "intrusted to the custody or care of any officer, employee, or agent of" such an organization. 18 U.S.C. § 1163. Tracking both portions of the statute, the superseding indictment thus alleged that Aubrey converted and misapplied moneys and funds belonging to NHA "and its sub-grantee, [FDHC], and *intrusted to*

the custody and care of [NHA] and [FDHC] as agents of the Navajo Nation." ER39 (emphasis added). Aubrey's instruction, however, would have omitted this second basis for liability, contravening the statutory language, the charges in the indictment, and the rule that the prosecution may charge in the conjunctive and establish guilt by proving "any one of th[e] conjunctively charged acts." *See United States v. Booth*, 309 F.3d 566, 572 (9th Cir. 2002). Because Aubrey's proposed instruction was not legally accurate, the district court committed no error in refusing to give it. ER2473-74.

Aubrey also briefly argues (Br. 45), for the first time on appeal, that the jury instructions improperly allowed him to be convicted "as an 'agent' of an Indian tribal organization," when the indictment (ER39) named NHA and FDHC as the agents of the Navajo Nation to whom funds had been awarded. According to Aubrey, the jury could have convicted on that basis because the court's instruction on the second element of the Section 1163 violation included funds entrusted "to the custody or care of an agent of an Indian tribal organization," and an earlier instruction defined the term "agent" for purposes of the bribery counts. ER2839-41.

Again, however, Aubrey fails to read the instructions "'as a whole, and in context.'" *United States v. Moran*, 493 F.3d 1002, 1009 (9th Cir. 2007). Just above the elements in the Count 4 and 5 instructions, the court recited the corresponding allegations from the indictment, which identified NHA and FDHC "as [the] agents of the Navajo Nation" to whom the grant funds had been entrusted under the government's theory. ER2840-41. Given this immediately preceding reference, jurors

would have had no reason to reach back to the earlier instruction defining the term "agent" for purposes of the bribery counts. That is especially true when the parties never referenced the "agent" definition in addressing Counts 4 and 5. In accordance with the indictment, the government instead focused in closing arguments on NHA and FDHC, emphasizing the latter's receipt of Indian block grant funds pursuant to the sub-grantee agreement and Aubrey's access to the funds once they had been transferred to FDHC. *See* ER2503-04 (arguing, in reference to the second element of Counts 4 and 5, that NHA "receives the NAHASDA funds as a grantee for the Navajo Nation," and that FHDC receives those funds as "a nonprofit * * * sub-grantee"); ER2508 (arguing that the case was about "what happened to the money" after "NHA issued the check to" FDHC); ER2588, 2603 (same in rebuttal).

Even were the instructions erroneous, Aubrey is still not entitled to relief under the plain-error standard. To secure reversal under that standard, he must show that the asserted errors prejudiced his substantial rights by affecting the outcome of the trial and so seriously undermined the fairness or integrity of the proceeding as to warrant reversal. *See Chi Mak*, 683 F.3d at 1133. He cannot make these showings. The court's instructions (1) allowed Aubrey to develop and argue his theory that he was not guilty of conversion or embezzlement because the funds at issue belonged to him, and (2) when read as a whole and in context, *see Moran*, 493 F.3d at 1009, would have barred conviction if the jury accepted that theory. Moreover, it is "extremely unlikely" that the jury was confused as to the relevant "agent" of the Navajo Nation

when the same page of the jury instructions listing the elements of the Section 1163 offense identified NHA and FDHC as the agents and the government did not urge conviction on an Aubrey-as-an-agent theory. *See United States v. Fernandez*, 388 F.3d 1199, 1250 (9th Cir. 2004) (finding no effect on substantial rights where jury instruction included extraneous ground for conviction but government did not rely on that ground and evidence did not support it). Aubrey is therefore not entitled to relief.

III. The District Court Did Not Abuse Its Discretion In Admitting The Summary Testimony And Exhibits.

Aubrey argues (Br. 46-49) that the district court abused its discretion in admitting the summary exhibits prepared by, and the supporting testimony of, a government witness. He again fails to show reversible error.

A. Background

The government called James Hoogoian, a forensic auditor with HUD's Office of Inspector General, to introduce a series of charts reflecting the movement of funds among Aubrey's business and personal accounts following each NHA requisition payment between July 2003 and June 2004. ER2016-17, 2023; SER140-49, 164-65, 179-80, 195-96. Hoogoian prepared the charts by reviewing multiple bankers' boxes worth of documents (including checks separately admitted into evidence), and tracking the series of transactions that consumed each deposit. ER2017-20, 2029. He determined from the identity of the payee for certain higher-value transactions which ones constituted payments for personal expenses, and then set those out in separate

tables within each exhibit. ER2022. When questioned by the prosecutor, Hoogoian agreed that he followed a procedure "similar in concept" to the "last-in first-out" accounting method. ER2029; *see* ER2091 (proffer that Hoogoian used method analogous to last-in first-out, but was "really just tracking the money. Money came in, the money went out, and he tried * * * to track it."); *United States v. Intercontinental Industries, Inc.*, 635 F.2d 1215, 1220-21 (6th Cir. 1980) (calling last-in first-out "an accepted accounting method" for tracing funds).

At the start of the testimony, Aubrey suggested that Hoogoian was testifying as an expert and requested the expert discovery materials required by Fed. R. Crim. P. 16. ER2016. The government responded that Hoogoian was providing foundation for charts to be introduced as summary exhibits under Federal Rule of Evidence 1006, which allows parties to "use a summary, chart, or calculation to prove the content of voluminous writings * * * that cannot be conveniently examined in court." The district court admitted the exhibits over Aubrey's objection, ER2023, and allowed Aubrey a continuing objection to the testimony. ER2029. The court denied, however, Aubrey's motion for a mistrial, rejecting his contention that Hoogoian had been qualified as an expert and ruling that Hoogoian's "description of the method he used [did not] call[] for expert testimony." ER2053-54.

The next day, anticipating that Hoogoian would be cross-examined regarding alternative methods for tracking funds, the government asked him if he had performed any other type of analysis. ER2086-87. When Aubrey objected, the district

court ruled that comparing different accounting methods would implicate an area of expertise, and the government withdrew the question. ER2086-88.

At the same sidebar, the court denied Aubrey's renewed motion for a mistrial. It explained that Hoogoian's testimony to that point had been permissible "laywitness testimony," and that, although Hoogoian "may be an expert, * * * he hasn't testified as an expert." ER2089. The court determined that Hoogoian was "testifying to facts of which he has personal knowledge" gained through review of documents that were produced to Aubrey during discovery and "his own investigation as to the payees[,] and he's subject to cross-examination on that." ER2089. The court further explained that it had taken an "in-depth look" at the issue overnight and was "very well satisfied that [Hoogoian] has not offered expert testimony," since his testimony was grounded in "stuff of which he has * * * present knowledge based on documents that he reviewed." ER2090. Having concluded that Hoogoian did not testify as an expert, the court did not give an expert-testimony instruction to the jury. But it did instruct the jurors, in accordance with Ninth Circuit Pattern Instruction 4.16, that "[c]ertain charts and summaries have been admitted in evidence," those "[c]harts and summaries are only as good as the underlying supporting material," and jurors should "give them only such weight as you think the underlying material deserves." ER2832.

B. Standard of Review

This Court reviews for abuse of discretion "a district court's admission of summary evidence." *United States v. Anekwu*, 695 F.3d 967, 981 (9th Cir. 2012). If the trial

court identified the correct legal rule, then its ruling must be affirmed unless the "court's application of the correct legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *United States v. Redlightning*, 624 F.3d 1090, 1110 (9th Cir. 2010) (citing *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). Even when this Court finds an abuse of discretion, it will not reverse based on a "nonconstitutional error" unless "it is more likely than not that the error affected the verdict." *United States v. Marguet-Pillado*, 560 F.3d 1078, 1081 (9th Cir. 2009).

C. The District Court Properly Admitted The Summary Exhibits And Hoogoian's Supporting Testimony.

The district court soundly exercised its discretion in admitting the summary charts and supporting testimony under Fed. R. Evid. 1006, which allows admission of summary charts when "the underlying materials upon which the summary is based are (1) admissible in evidence and (2) were made available to the opposing party for inspection." *United States v. Rizk*, 660 F.3d 1125, 1130 (9th Cir. 2011). The purpose of the rule is to permit the use of summaries that "'would be useful to the judge and jury.'" *Id.* (citation omitted). While Rule 1006 governs admission of summary charts in place of voluminous materials, trial courts retain the discretion under other rules of evidence to admit the charts along with the underlying materials if the charts will be helpful to the factfinder. *See Anewku*, 695 F.3d at 982.

The district court properly admitted the charts and testimony under these standards. Hoogoian prepared the charts from underlying bank records that were admissible in evidence—and in some instances introduced by Aubrey, ER2907 (bank statements at DX580-1, 599-2)—and available to the defense for inspection. *See Rizk*, 660 F.3d at 1130. It is true that, in contrast to *United States v. Olano*, 62 F.3d 1180, 1203-04 (9th Cir. 1995) and *United States v. Baker*, 10 F.3d 1374, 1412-13 (9th Cir. 1993) (cited at Br. 48-49), the district court admitted the summary charts as substantive evidence rather than a demonstrative aid. But this Court has since clarified that there is no "bright-line rule against admission of summary charts as evidence." *Anewku*, 695 F.3d at 981-82 (alteration and quotation marks omitted). Indeed, the Court in *Anewku* found no abuse of "discretion in admitting both the summary chart and underlying [bank] records" where, as here, the defendant had the opportunity to cross-examine the analyst who prepared the chart and the court cautioned the jury with Pattern Instruction 4.16. *Id.* at 982; *see id.* at 981 (reciting contents of limiting instruction). For the same reasons, the district court did not abuse its discretion in admitting the charts and testimony here.

There is no merit to Aubrey's remaining argument (Br. 48-49) that Hoogoian gave what amounted to expert testimony because, to prepare the summary charts, he performed calculations under a basic accounting method. Aubrey begins this argument (Br. 46) from the dubious premises that "[s]pecific identification is required as an element" of a Section 1163 offense, and "the use of 'last-in-first-out'" is an

impermissible "equitable substitute for" such identification.[7] Even putting that aside, the argument fails. Rule 1006 contemplates that a witness's "calculation[s]" will go before the jury, Fed. R. Evid. 1006, and performing such calculations is a recognized part of summary witness testimony, which "'requires that [the witness] draw conclusions from the evidence presented at trial.'" *United States v. Pree*, 408 F.3d 855, 869 (7th Cir. 2005).

Hoogoian's role in performing and explaining his calculations did not transform his testimony from lay to expert. ER2089-90. His single reference to preparing the summary charts using a method "similar" to last-in first-out accounting did not itself "call[] for expert testimony." ER2054. Nor did the fact "[t]hat he performed 'routine calculations and culling through of documents' to arrive at his conclusions * * * require him to be qualified as an expert." *United States v. Weaver*, 281 F.3d 228, 231 (D.C. Cir. 2002)(two postal inspectors whose testimony rested on knowledge gained from reviewing documents gave lay not expert testimony, even though they performed calculations and defendant claimed second witness's analysis "did not

[7] Aubrey did not request a jury instruction containing a specific-identifcation element, and his supporting quotation from *Lequire*, 672 F.3d at 731, addressed a civil action for conversion under Arizona law, not the elements of a federal crime. The other cited case, *United States v. Henshaw*, 388 F.3d 738, 741 (10th Cir. 2004), approved use of last-in first-out analysis in a civil conversion action brought by the government. *See also United States v. Griffith*, 584 F.3d 1004, 1021 (10th Cir. 2009) (holding for purposes of Section 641 offense that, "even if [veterans'] funds are commingled in an account with other funds, they will retain their [veterans'] character as long as they are readily traceable and may be accounted for with a standard accounting method, such as first-in, first-out tracing").

comport with basic accounting principles"); *see United States v. Hamaker*, 455 F.3d 1316, 1331-32 (11th Cir. 2006) (same as to FBI financial analyst who reviewed voluminous records and performed calculations in winnowing them down). Courts have instead recognized that these tasks are consistent with the role of a lay witness and that cross-examination, not an expert label, is the mechanism for challenging witness determinations as reflected in summary charts. *See Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 515 n.9 (9th Cir. 1985). The court here soundly concluded that Hoogoian served as a lay witness whose calculations using basic arithmetic were subject to cross-examination and that, although "he may be an expert," he did not testify as one. ER2089; *see Hamaker*, 455 F.3d at 1332 ("[T]he fact that [FBI witness] is a financial expert does not in and of itself require that his testimony about financial records be treated as expert testimony.").

Regardless, any error in failing to treat Hoogoian as an expert witness was harmless. Aubrey does not claim that Hoogoian, an experienced auditor, could not have been qualified as an expert. ER2013-14. Nor was Aubrey prejudiced by the absence of the safeguards that would apply had Hoogoian been so qualified: pre-trial notice under Rule 16 or instructions cautioning the jury not to give "special weight" to the testimony. *See United States v. Gadson*, 763 F.3d 1189, 1212 (9th Cir. 2014); Ninth Cir. Pattern Instruction 4.14. As to notice, Aubrey received various drafts of the summary charts prior to trial and, despite claiming (Br. 49) that he was not informed of the precise method of Hoogoian's calculations, had the opportunity to

point out perceived flaws in those calculations during cross-examination and in closing argument. ER2093-2148; *cf. Rizk*, 660 F.3d at 1131 n.2 (explaining that claimed flaws in summary charts go "to their weight rather than their admissibility"). Moreover, Aubrey emphasized in his questioning that Hoogoian was *not* testifying as an expert. ER2093-94. That reduced any risk that the jury might give extra weight to the testimony—a risk that is already low when someone testifies as a lay witness, even one who "has recourse to relevant background and training." *See Gadson*, 763 F.3d at 1212. In sum, given Aubrey's access to drafts of the summary charts, his opportunity for cross-examination, and the court's cautionary instruction, any error was harmless.

IV. The District Court Correctly Calculated The Advisory Guidelines Range.

Aubrey argues (Br. 50-58) that the district court incorrectly calculated the Sentencing Guidelines range by overstating the amount of loss and applying an abuse-of-trust enhancement. These arguments lack merit.

A. Background

The Presentence Investigation Report (PSR) calculated an advisory Guidelines range of 51 to 63 months, based on a total offense level of 24 and a criminal history category of I. PSR ¶ 67. The Probation Office began with a base offense level of six and added 16 levels under U.S.S.G. § 2B1.1(b)(1)(I) based on a loss amount of more than $1,000,000 but less than $2,500,000. *Compare* PSR ¶¶ 21, 23, 28 (calculating loss at greater than $2.2 million based on trial evidence and NHA's victim statement that it spent $1.1 million to cover additional Chilchinbeto costs), *with* CR163 at 3-4 (govern-

ment's more "conservative" estimate of $1.9 million in sentencing memorandum). The PSR also added a two-level role enhancement under U.S.S.G. § 3B1.3 because Aubrey abused a position of public or private trust. PSR ¶ 30.

The district court overruled Aubrey's objections (CR160) to both enhancements. Regarding loss, the court found that Aubrey's offense conduct provoked "a cascade of consequences," forced NHA "to pull the plug" on the Chilchinbeto project, and "caused consequential damages that exceeded $1 million." ER2687-88 (noting that NHA provided a figure of $2.2 million in damages). While noting that it "put some stock" in the government auditor's charts showing more than $1.9 million in grant funds diverted to Aubrey's personal use over the course of the Chilchinbeto project, the court stated that it did not "rest [its] decision entirely on that in finding that the loss amount was more than $1 million but less than $2,500,000." ER2688. The court also rejected Aubrey's challenge to the abuse-of-trust enhancement. ER2688-91. This was not, the court explained, "a simple case of misapplication. It involves a person who was really controlling the entire operations of a nonprofit and * * * running millions of dollars through a personal account, combining it with trust monies, and then gambling and doing the other things that were evidenced during the trial." ER2691.

The court rejected Aubrey's request for a downward variance and imposed a sentence of 51 months, the bottom of the advisory Guidelines range. ER2698, 2709.

B. Standard of Review

A district court's calculation of the amount of loss under the Guidelines is a factual finding reviewed for clear error. *United States v. Stargell*, 738 F.3d 1018, 1024 (9th Cir. 2013). This Court reviews under a two-part standard imposition of an abuse-of-trust enhancement under U.S.S.G. § 3B1.3. *See United States v. Laurienti*, 731 F.3d 967, 973 (9th Cir. 2013) (*Laurienti II*). This Court decides de novo "[w]hether a defendant acted from a 'position of trust' as defined by the Guidelines," and if so, it reviews "for clear error the court's decision whether the defendant's abuse of this position significantly facilitated the offense." *Id.*

C. The District Court Reasonably Estimated The Amount Of Loss.

The Guidelines provisions governing theft crimes tie offense-level enhancements to the amount of loss attributable to the defendant's conduct. They prescribe a 10-level enhancement when, as Aubrey's convictions alone establish, the loss exceeds $120,000, and a 16-level enhancement when the loss is more than $1,000,000 but less than $2,500,000. U.S.S.G. § 2B1.1(b)(1)(F) and (I). The Guidelines instruct courts to base their loss findings on the greater of actual or intended loss, define "actual loss" as "the reasonably foreseeable pecuniary harm that resulted from the offense," *id.* § 2B1.1 cmt. n.(3)(A)(i), and permit a court to consider "gain" to the defendant when loss cannot reasonably be determined, *id.* § 2B1.1 cmt. n.(3)(B). The sentencing court need not, however, determine loss with precision. *See United States v. Garro*, 517 F.3d 1163, 1167 (9th Cir. 2008). Instead, the Guidelines provide that the court "need

only make a reasonable estimate of the loss" and that, because the judge who presided over trial "is in a unique position to assess the evidence and estimate the loss," the estimate reached "is entitled to appropriate deference" on appeal. U.S.S.G. § 2B1.1 cmt. n.(3)(C); *see Garro*, 517 F.3d at 1167. The court may find the amount of loss by a preponderance of the evidence. *Id.* at 1168.[8]

The district court soundly applied these standards in calculating the amount of loss. The court had before it two measures that both pointed toward a loss greater than $1 million but less than $2.5 million. First, the court found that Aubrey's offense conduct caused a "cascade of consequences," ER2687-88, including requiring NHA to expend an additional $1.1 million in paying contractors and vendors at Chilchinbeto. PSR ¶ 23. In addition, the trial testimony and summary exhibits of auditor Hoogoian showed that, over the course of the Chilchinbeto project, Aubrey paid more than $1.9 million in personal expenses from money that is traceable to grant payments. SER197. It was appropriate for the court to consider this complete project timelime because, under the relevant-conduct rules, Aubrey's pattern of depositing grant funds and then immediately paying large-scale expenses was "part of the

[8] Aubrey alludes (Br. 50-51) to cases applying a clear-and-convincing-evidence standard to loss findings that have an extremely disproportionate effect on a sentence. But that standard does not apply to the six-level difference at issue here, where the enhanced range (51-63 months) is not more than double the non-enhanced range (27-33 months). *See United States v. Pike*, 473 F.3d 1053, 1058 (9th Cir. 2007) (reversing application of heightened standard to five-level increase).

same course of conduct" as the Count 4 and 5 offenses. *See* U.S.S.G. § 1B1.3(a)(1)(A) and (a)(2).

None of Aubrey's arguments demonstrates clear error in the court's finding. He renews (Br. 52-56) his trial theory that the Chilchinbeto project was underfunded and that this underfunding, not his offense conduct, caused NHA's additional expenditures. But the court reasonably rejected that causation argument based on testimony (a) refuting Aubrey's claim (Br. 53) that NHA "slashed" the budget—the funding amount had been listed in the sub-grant agreement FDHC signed and in the Indian Housing Plan a few months earlier, ER819-20, 2599; SER47, 67—and (b) establishing that his failure to pay specific contractors is what forced NHA to "pull the plug" (ER2688) on the project in the summer of 2004. ER499.

Nor was the court required to accept the project cost numbers that Aubrey presented in support of his underfunding theory. While Aubrey touts (Br. 53) one portion of NHA CFO Lynch's testimony on cross-examination, he overlooks her testimony elsewhere—and in the exhibit that she referenced on cross, SER230-31 (DX516, 516-1)—that NHA was unable to verify many of the expenses that Aubrey claimed. ER1906. In that same vein, the government presented evidence at sentencing (including Lodgebuilder's own work-in-progress reports) indicating that Aubrey spent far less than the $12.3 million in project costs that he claims. SER216, 222-23 (GX102 shows approximately $10.6 million in Lodgebuilder costs at Chilchinbeto from 2002 to 2004; bankruptcy report at GX101 can confirm only $7.1

million in expenses). Given these competing strands of evidence, the district court did not clearly err in settling on its loss estimate or in rejecting Aubrey's request to limit loss to the amounts underlying his Count 4 and 5 convictions. *See United States v. Reed*, 80 F.3d 1419, 1424 (9th Cir. 1996) (reaffirming that, "'[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous'"). Nor did the court abuse its discretion (Br. 56) in refusing to rehash the same arguments and evidence at another hearing. *See United States v. Laurienti*, 611 F.3d 530, 551 (9th Cir. 2011) (*Laurienti I*).

Finally, having found that NHA's additional expenses were among the "consequences" caused by Aubrey's conduct, ER2687, the court was not required (Br. 54) to reduce the loss amount based on the $1 million in leveraged funding that was provided during FDHC's bankruptcy (and that might have kicked in earlier had Aubrey's misdeeds not sunk the project). The Guidelines do provide for reductions based on money returned to a victim, U.S.S.G. § 2B1.1 cmt. n.(3)(E)(i), but only in cases where the money is "returned 'prior to the discovery of the offense.'" *Garro*, 517 F.3d at 1167. That did not happen here.

D. The Abuse-Of-Trust Enhancement Was Sound.

The Guidelines prescribe a two-level enhancement "[i]f the defendant abused a position of public or private trust * * * in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Sentencing courts conduct a two-step inquiry, asking whether the defendant held a "position of public

or private trust" within the meaning of the Guidelines and whether that position significantly facilitated the commission of the crime. *See Laurienti II*, 731 F.3d at 973. The district court correctly answered both questions in the affirmative.

Aubrey contends at the outset (Br. 57) that the enhancement was barred by the second sentence in U.S.S.G. § 3B1.3, which precludes an increase "if an abuse of trust or skill is included in the base offense level or specific offense characteristic." But this Court has held that the second sentence bars an enhancement "only if the *base offense level* necessarily includes an abuse of trust, regardless whether the defendant's *offense of conviction* includes an abuse of trust." *Laurienti I*, 611 F.3d at 556. The Court separately determined in *Laurienti* that not every offense covered by the embezzlement and fraud guidelines includes an abuse of trust, and that the second sentence in U.S.S.G § 3B1.3 therefore does not preclude the enhancement in cases—like this one, PSR ¶ 27—where § 2B1.1 sets the base offense level. *See* 611 F.3d at 555.

Aubrey further contends (Br. 57-58) that, while his position at Lodgebuilder entailed the "professional and managerial discretion" contemplated by the Guidelines, the enhancement was improper because he did not have a similar position at FDHC or NHA. The district court rigtly rejected that distinction, finding that Aubrey "was really controlling the entire operations of a nonprofit [FDHC] and * * * running millions of dollars through [his] personal account." ER2691; *see* U.S.S.G. § 3B1.3 cmt. n.1 (those occupying position of trust "are subject to significantly less supervision than employees whose responsibility are primarily non-discretionary in nature"). That

finding is supported by trial evidence showing that FDHC delegated financial management of the Chilchinbeto project to Aubrey's company, SER42-44, that his company then stepped into the shoes of FDHC, ER818 (Shepherd), and that Aubrey had "the real authority" at FDHC because he "handl[ed] all of the finances." ER1580 (Tulley). The court therefore correctly determined that Aubrey occupied a position of trust within the meaning of the Guidelines. *See Laurienti II*, 731 F.3d at 973.

There was also no clear error in the finding that Aubrey's role in managing the finances at FDHC significantly facilitated his commission of the offense. *See id.*[9] The evidence showed that non-profit FDHC handed Aubrey millions in grant funds and exercised little oversight as he shifted the funds among the various accounts he controlled. ER2691. Aubrey insists (Br. 58) that his crime was "easily detected" because contractors eventually complained to NHA. But Aubrey's unsupervised role in disbursing the funds still enabled him to obscure the whereabouts of the missing money long enough to put it to his own use. Indeed, in part because Aubrey (rather than FDHC) controlled the records that NHA officials sought when investigating the

[9] The government was not required to make an additional showing that Aubrey's breach of trust was "particularly egregious." Br. 57 (citing *United States v. Christiansen*, 958 F.2d 285, 287 (9th Cir. 1992)). Aubrey derives that requirement from cases that construed an earlier version of U.S.S.G. § 3B1.3 and that this Court has overruled in light of intervening Guidelines amendments. *See United States v. Contreras*, 593 F.3d 1135, 1136 (9th Cir. 2010) (en banc). Regardless, for the reasons given by the court, Aubrey's breach was particularly egregious.

reported non-payments, ER402, 1299, 1335, 1875, the precise scope of Aubrey's misdeeds remains unclear to this day.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, I hereby certify that this brief contains 13,977 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief has been prepared in a proportionally spaced, 14-point Garamond typeface using Microsoft Word.

DATED: OCTOBER 14, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2014, I electronically filed the foregoing Brief for the United States with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

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CERTIFICATE OF RELATED CASES

I hereby certify that undersigned counsel for the United States is not aware of any related cases in this Court as defined in Circuit Rule 28-2.6.

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