NO. 14-30131

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

V.

DELYLE SHANNY AUGARE,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
D.C. NO. CR-13-65-GF-BMM

ANSWERING BRIEF OF THE UNITED STATES

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INTRODUCTION

The means by which Shanny Augare and his primary confederate, Francis Onstad, stole money from the Po'Ka Project were myriad. And while some were simple and unsophisticated, others were layered with fraudulent invoices, deceptive documents, and multiple financial transactions designed with a significant degree of sophistication to perpetrate and conceal the crime. The means used to keep the maximum amount of federal money flowing to the program were very sophisticated, using several actors, numerous nominee vendors, and dozens of fraudulently created documents layered on top of false audit trails and obstructionist efforts to stymie inquiry.

Augare was given a sentence two levels below the advisory guideline range but took issue with the assessment of a two-level increase in the computation for using sophisticated means.

The district court did not abuse its discretion in applying a two-level enhancement in the calculation of the advisory guideline calculation for sophisticated means.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered on June 30, 2014. ER 90. Defendant filed a timely notice of appeal on that same date. ER 135.

STATEMENT OF THE ISSUES

Whether the district court erred in finding that at least one of the avenues of theft and fraud involved sophisticated means worthy of a two level enhancement.

STATEMENT OF THE CASE

Augare was indicted on July 18, 2013. Augare pleaded guilty to four counts of the indictment on February 28, 2014. ER 132, CR 138. Augare was sentenced to forty-four months of custody and $1,000,000 in restitution on June 24, 2014. ER 133, ER 240. He now appeals.

STATEMENT REGARDING ORAL ARGUMENT

Under Rule 34(a), *Federal Rules of Appellate Procedure*, the United States advises the Court of its view that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record.

STATEMENT OF FACTS[1]

I. The Blackfeet Tribe obtains a federal SAMHSA grant to fund the Po'Ka Project for disadvantaged and at-risk youth on the Blackfeet Reservation.

The Blackfeet Indian Reservation in north central Montana is home to the Blackfeet Tribe of Indians, a federally recognized Indian Tribe, governed by the Blackfeet Tribal Business Council, with its headquarters at Browning, Montana.

The Blackfeet Po'ka Project was developed to help troubled Native American youth of the Blackfeet Indian Tribe. Po'ka was funded by a federal grant from 2005 through 2011. Po'ka received its funding from the Substance Abuse and Mental Health Services Administration (SAMHSA) of the Department of Health and Human Services through a grant relationship between SAMHSA and the Blackfeet Tribe. The Tribe in turn operated the Po'Ka Project as a tribal enterprise. Managers and staff were tribal employees subject to tribal employment rules and regulations, with oversight from the

[1] Unless otherwise credited, the facts are taken from the government's Offer of Proof (SER 1-12), to which the defendant had no objection. SER 41. The government's Offer of Proof was also the basis for those paragraphs of the PSR describing the offense conduct, to which Augare made no objection, but for the application of the enhancement being challenged on appeal. ER 38.

Blackfeet Tribal Business Council. Beginning in 2005 with a $1,000,000 federal disbursement, the grant ultimately became a $9 million program over a six year period (2005-2011). After the start-up award, the funding arc started with a $1,000,000 award (2006), rose to $2,000,000 per year for three years (2007, 2008, 2009), and then tapered off to $1,000,000 in 2010 and $300,000 in 2011.

The Po'Ka Project had two senior administrators. Francis Onstad had the title of Director, and Augare was the Assistant Director. The grant required a program evaluator so Po'Ka retained Dr. Gary Conti, an Oklahoma State University education professor as their evaluator. Conti used a company called Learning Associates as the contracting entity. Conti in turn, through Learning Associates, hired Dr. Dorothy Still Smoking as the local evaluator. During the later years of the grant, the In-Kind Coordinator was Katheryn Elizabeth Sherman.

According to the SAMHSA grant synopsis, the Po'Ka Project — also known as Blackfeet Children System of Care — was a reservation-wide children's mental health system. "Po'Ka goals are: (1) to implement the systems of care philosophy at the local Tribal

level; and (2) to identify, plan for, or enhance coordination and facilitate a wraparound process enabling children with SED (Severe Emotional Disorders) and their families to access services to meet their needs."

It was the tribe's stated intent and proposal that the Po'Ka Project would become, at the end of the federal grant, an on-going sustainable social services program; a completely tribal service provider — entirely self-sufficient and reliant on no funding source other than the Blackfeet Tribe—when the federal support finally stopped. This particular SAMHSA grant required that the Tribe provide a certain amount of funding.

> "A requirement contained in certain legislation, regulations, or administrative policies is that **a recipient must maintain a specified level of financial effort** in the health area for which Federal funds will be provided **in order to receive Federal grant funds**." (Emphasis added).

Comprehensive Community Mental Health Services for Children with Serious Emotional Disturbances (SED), CMHS Child Mental Health Service Initiative Number: 93.104.

To achieve the goal of self-sufficiency, the Tribe was required to provide in-kind matching contributions to continue to secure federal payments with the idea that as federal participation declined, tribal

participation would rise to fill the funding void left by the absence of federal funds.

An in-kind contribution is a non-cash contribution provided by non-federal third parties in support of the project funded by the grant, and its objectives. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefitting and specifically identifiable to the project or program.

Only if Po'Ka met the in-kind contribution targets could they receive the maximum amount of federal money from the grant. Consistent with the sustainability objective of the grant, the Tribe's in-kind contribution requirement was the highest in the later years of the grant. The Blackfeet Tribe was required to provide $7.0 million of in-kind contributions from FYs 2009 through 2011. That created an environment where the appearance of substantial in-kind contributions became paramount if the maximum flow of federal money from the grant was going to continue.

II. Augare and his accomplices defraud the United States with false claims about the Tribe's matching contribution, a critical component to continued federal funding.

The in-kind commitment could never be honestly met, so the conspirators began making up facts and documents to try and satisfy SAMHSA and the auditors that the in-kind contributions represented on their reports to SAMHSA were legitimate. They did so by inflating the figures related to in-kind contributions, assigning values to non-existent and illegitimate "contributions," and manufacturing fraudulent invoices and records to support fictional or inflated contributions. The misrepresentations as to in-kind amounts were made in monthly reports to SAMHSA and the documents were generated later to placate auditors conducting a required annual audit of the Tribe's operations.

These annual audits are required of tribes receiving federal grant funds to insure that the grant funds are being used for their intended purpose and that the requirements of the contract agreement are being met. If auditors make negative findings, those findings can result in action by the federal agency to rescind the

contract, demand repayment, or make an offset, where the government deducts money from future payments.

Several witnesses, whose names were used as in-kind contributors, denied preparing or signing the invoice, and denied contributing time or goods to the Po'Ka Project, at least in the amount claimed. Other representations were apocryphal on their face, such as donated time from the staff of one of Montana's U.S. Senators.

Based on email evidence and the statements of cooperating witnesses, Onstad and Augare, along with Conti, Sherman, and others, conspired to make the false representations as to the in-kind contributions made to the Po'Ka Project, and then actively managed the creation of false documentation to cover the representations so that the auditors would not question the contributions and the federal money would continue flowing unabated. The false representations were in effect false claims that resulted in the expenditure of federal grant money that would not have been expended had the principals honestly represented the inadequate level of non-federal support.

Auditors with the Office of Inspector General (OIG), U.S. Department of Health and Human Services, have determined that $4.6 million in Po'Ka claims, expenditures, and costs were unsupported, inflated, or completely falsified.

III. Once the federal money was in the hands of the Tribe, Augare and his accomplices, Onstad and Conti, employed a number of devices to steal Po'Ka funds.

Onstad and Augare embezzled from the program in numerous, relatively minor, ways, such as travel fraud, misuse of Po'Ka credit cards, fraudulent claims of overtime, taking food from the program, etc. Augare, in particular, used Po'Ka fuel cards to provide himself and his family with fuel for their private vehicles. Although Augare insisted that such use could be justified because he used his vehicle for project purposes, over $80,000 in fuel charges (during a three year audit period) were made against the Po'Ka account, suggesting that Augare's claim was largely self-serving. Augare did admit that on numerous occasions he put in for travel mileage and while on travel also used Po'Ka fuel cards which were paid directly out of Po'Ka funds, therefore "double-dipping"—being personally compensated for an expense already paid for by the grant.

But by far, Augare's most significant embezzlement came in the agreement that he and Onstad appear to have reached with Conti, wherein Onstad or Augare would approve or arrange for the approval of excessive payments to Conti with the understanding that he would kick back a full one-half of the payment.

Between August 2008 and August 2011, Onstad and Augare approved over $475,000 in Po'Ka grant monies for Conti (Learning Associates). In turn, between August 2008 and September 2011, Conti transferred $231,550 to the Child Family Advocacy Center (commonly referred to as the Child Family Advocacy Fund or CFAF) bank accounts at the Wells Fargo Bank in Cut Bank, Montana.

Between September 2008 and September 2011, Onstad and Augare withdrew $225,482 from the CFAF accounts. Much of that money went into their personal accounts at Stockman Bank and from those accounts much was spent on gambling and travel[2].

[2] Augare also pleaded guilty to and was sentenced for tax evasion. The sentence for tax evasion would be unaffected by Augare's complaint on appeal so will not be further discussed.

IV. The District Court applied a sophisticated means enhancement in calculating the advisory sentencing guidelines.

The PSR calculated the advisory guideline range as follows:

Base Offense Level (USSG § 2B1.1(a))	6
Special Offense Characteristics (USSG § 2B1.1(b)(1)(H)($400,000 to$1,000,000 loss)	+14
Special Offense Characteristics (USSG § 2B1.1(b)(10)(C)(sophisticated means)	+2
Role in the Offense Adjustment (USSG §3B1.1(c)(manager/organizer)	+2
Role in the Offense Adjustment (USSG §3B1.3)(abuse of trust)	+2
Adjusted Offense Level	26
Criminal History Computation (USSG § 4A1.1)	I
Adjustment for Acceptance of Responsibility (USSG § 3E1.1)	-3
Total Offense Level	23

PSR ¶¶ 46-57. The advisory guideline range was 46 to 47 months. PSR ¶ 149.

At sentencing, Augare objected to the PSR's inclusion of a two level enhancement for sophisticated means. USSG § 2B1.1(b)(10)(C).

ER 38. The district court heard Augare's argument (ER 38-46), and then ruled that:

> "So, I think, in this circumstance, comparing the two types of activity, the travel fraud and gas card abuse with the transfer to CFAF, and the arguable effort through in-kind contribution fraud to keep the money available, warrants the application of the enhancement, so I am going to deny your motion (objection to the sophisticated means enhancement) on that point."

ER 46.

While accepting that the first type of theft was not likely sophisticated (ER 40-41), the district court found that other aspects of the scheme were sophisticated (ER 44). Had Augare's objection to the calculation been sustained, his Total Offense Level would have been 21 with an advisory guideline range of 37 to 46 months. The district court utilized a downward variance to sentence Augare within the lower guideline range, and sentenced him to 44 months in custody.

SUMMARY OF ARGUMENT

Augare maintains that the district court should not have added two levels for using sophisticated means to accomplish the theft under USSG § 2B1.1(b)(10)(C). The district court focused on 1) the complex and laborious method of covering up false representations

with fraudulent invoices, and 2) that particular embezzlement device whereby Augare used a nominee vendor (Conti) and a children's charity bank account (CFAF) as pass-through vehicles to extract money from the grant for the personal benefit of the principal actors. The district court did not clearly err in its fact finding[3] or abuse its discretion in reaching the conclusion that at least two aspects of the criminal activity were sophisticated.

Moreover, although Augare was subject to a two level enhancement, the sentencing court used a variance to sentence Augare below the calculated guideline range. This outcome clearly

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[3] It is important to note that by the time of Augare's sentencing on June 24, 2014, the district court had presided over two trials of co-defendant Gary Conti in which the fraudulent voucher scheme and the CFAF kick-back scheme had been thoroughly examined. Conti's first trial, which took place from March 4-7, 2014, resulted in conviction on a single count—Count 29, Bankruptcy Fraud—and a mistrial declared as to the remaining 27 counts against him. SER 70-73; CR 143, 148, 150, 152. Conti was retried on the mistried counts and was convicted of 26 of 27 counts on May 22, 2014, after a second four-day trial. SER 77-79; CR 193, 195, 197, 199. There is no question that the district court was uniquely familiar with the facts of the case. *Consider*, *United States v. Ferguson*, 507 Fed.Appx. 623 (8th Cir. 2013), *citing United States v. Fetlow*, 21 F.3d 243, 250 (8th Cir. 1994) (sentencing court may consider evidence introduced at trial of codefendant if that evidence is relevant to disputed issue at sentencing and sentencing judge presided over codefendant's trial).

suggests that even though the court properly used the guidelines as a starting point, it did not feel wedded to them and elected to show lenience despite the finding as to sophisticated means.

ARGUMENT

Standard of review:

The district court correctly applied the sophisticated means enhancement required, upon proper finding, under USSG §2B1.1(b)(10)(C). With regard to an enhancement for sophisticated means, this Court reviews the district court's interpretation of the Guidelines *de novo*, and its application of the Guidelines to the facts for an abuse of discretion. *United States v. Jennings*, 711 F.3d 1144, 1146 (9th Cir. 2013) (considering "sophisticated means" under the tax guidelines, USSG § 2T1.1(b)(2)). Augare asserts that *de novo* review is appropriate (Opening Br. p 12), but in this case there was no legal interpretation of the guidelines, merely an application of the facts to the guidelines. Therefore, review is for abuse of discretion.

A district court's factual determinations in exercising that discretion are reviewed for clear error. See, e.g., *United States v. Christensen*, 732 F.3d 1094, 1100 (9th Cir. 2013). A finding of fact is

clearly erroneous only where it is "(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *United States v. Pineda–Doval*, 692 F.3d 942, 944 (9th Cir. 2012).

Argument:

Augare alleges on appeal that nothing about his crimes involved sophisticated means, and therefore, the district court erred in making that finding. As noted, discretion is the proper standard of review and in this case sentencing discretion was not abused; a finding that using fraudulent invoices to hide false claims made to SAMHSA, and using three layers of financial transactions and charity to embezzle from the Po'Ka Project, were sophisticated means was not clearly erroneous. USSG § 2B1.1(b)(10)(C) provides, in pertinent part, that "If … (C) the offense otherwise involved sophisticated means, increase by 2 levels." "'[S]ophisticated means' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.... Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts ...

ordinarily indicates sophisticated means." USSG § 2B1.1 cmt. n.8(B).

Conduct need not involve highly complex schemes "or exhibit exceptional brilliance" to justify a sophisticated means enhancement. *Jennings*, 711 F3d at 1145 ("Defendants' effort to conceal income by using a bank account with a deceptive name was sufficiently sophisticated to support application of the sentencing enhancement."). Consider also, *United States v. Rubio*, 579 Fed.Appx. 609, 610-11 (9th Cir. 2014) (unpublished) (supervisory role in scheme to fabricate documents and use domestic bank accounts to facilitate scheme).

The sophisticated-means enhancement is appropriate when the offense conduct, viewed as a whole, "was notably more intricate than that of the garden-variety [offense]." *United States v. Hance*, 501 F.3d 900, 909 (8th Cir. 2007). "Even if any single step is not complicated, repetitive and coordinated conduct can amount to a sophisticated scheme." *United States v. Huston*, 744 F.3d 589, 592 (8th Cir. 2014) (internal citation omitted). See also, *United States v. Adepoju*, 756 F.3d 250, 257 (4th Cir. 2014) ("The enhancement

applies where the entirety of a scheme constitutes sophisticated means, even if every individual action is not sophisticated"); also *United States v. Barrington*, 648 F.3d 1178, 1179 (11th Cir. 2011), *cert. denied,* 132 S.Ct. 1066 (2012) ("Repetitive, coordinated steps can be sophisticated, even if no single step is particularly complex.").

Augare is correct when he posits that sophistication requires more than the concealment or complexities inherent in fraud. USSG § 2B1.1 cmt. n. 9(B). Fraud *per se*, without more, is inadequate for demonstrating the complexity required for enhancement under USSG § 2B1.1(b)(10)(C). But there was more to this scheme than merely embezzling the money. It was thoroughly laundered—first to look like the Po'Ka checks were legitimate payments to Conti for services rendered, and then through the Child Family Advocacy Fund bank account to make it appear—since the payment was to a fund for the benefit of Blackfeet children instead of directly to Augare and Onstad—as a charitable contribution from Conti. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." USSG

§2B1.1 cmt. n. 9(B); see *Stinson v. United States*, 508 U.S. 36, 38 (1993) (holding that Guidelines commentary explaining or interpreting a rule "is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). "Off-shore" accounts or corporate "shells", however, are not prerequisites to sophistication; merely examples. See, *Guidry*, *infra*, 199 F.3d at 1158 (the district court's application of the sophisticated-means enhancement was appropriate, even though the defendant did not use a sham corporation or offshore bank accounts).

Unsophisticated embezzlement would be taking the money directly from the program by unauthorized or inflated overtime (which Augare did), use of a tribal credit card for personal expenses (which Augare did), or manipulating travel vouchers to enhance reimbursement beyond what was owed (which Augare did). But here, Onstad and Augare provided Conti with inflated payments that Conti returned, in part, as kick-backs to an account disguised as a children's charity. A simple investigation may suggest that Conti's regular payments to the CFAF are merely philanthropic; an

investigator would be initially misled by the transaction without knowing that Augare and Onstad controlled the account. Even then it may be implied that Onstad and Augare are using the money from the account for worthy charitable purposes. Only through extensive forensic review of four bank accounts could the trail of payments be followed all the way into the personal bank accounts of Augare and Onstad. Using a bank account with a deceptive name—even without the numerous other contortions of documents and transactions present here—would be sufficiently sophisticated to warrant the enhancement. *Jennings*, 711 F.3d at 1145; see also, *United States v. McCants*, 554 F.3d 155, 163 (D.C. Cir. 2009) ("That we can imagine scenarios involving more elaborate means to avoid detection or conviction does not render the district court's resolution of the question invalid.").

The sentencing court cited Augare to *United States v. Tanke*, 743 F.3d 1296 (9th Cir. 2014). ER 46. In *Tanke*, this Court found that although the defendant did not use "fictitious entities, corporate shells, or offshore financial accounts," as the Sentencing Commission's commentary contemplates, he created at least six false

invoices and falsified carbon copies of checks in Azteca's check register on at least 10 occasions to conceal the payments. *Id.*, at p. 1307. "These means as a whole were sufficiently sophisticated to support the district court's decision." *Id., citing*, *United States v. Horob*, 735 F.3d 866, 872 (9th Cir. 2013) (*per curiam*) (affirming the application of the sophisticated means enhancement because, among other things, the defendant "fabricated numerous documents" and "the complicated and fabricated paper trail made discovery of his fraud difficult"). *Id.* Taken as a whole, the facts of this case illustrated an even greater level of sophistication.

Additional support for the district court's decision comes from *United States v. Guidry*, 199 F.3d 1150 (10th Cir. 1999), where the Tenth Circuit found that the district court's application of the sophisticated-means enhancement was appropriate, even though the defendant did not use a sham corporation or offshore bank accounts. *Id.*, at 1158. The defendant in *Guidry* made her embezzlement particularly difficult to detect by using checks that were made payable to a bank, not herself, which are harder to trace, by only depositing a small fraction of her embezzled funds in a bank, which

made her embezzlement difficult for the IRS to investigate. By never withdrawing more than $10,000.00 in one day, Guidry demonstrated that she knew that depositing any more would require the bank to notify the IRS of the deposit. Such manipulations indicated to the court that she adopted a certain level of sophistication to conceal her embezzlement. *Id*. The *Guidry* court found that "her meticulous scheme was designed, at least in part, to conceal the existence and extent of her failure to file a truthful tax return." *Id*., at 1158-59.

Using a children's charity account as a "drop" for the kick-backs—with the implications for both concealment and tax avoidance that flow from such a ruse— is sophisticated. Augare, Conti, and Onstad designed a "meticulous scheme" to embezzle from the Po'Ka grant, to conceal the embezzlement from auditors and the tribe, and to give Conti "tax-neutrality" in the receipt of the inflated amounts and was a complicated and intricate plan which provided the court with ample basis for the discretionary application of the enhancement. See *United States v. Wu*, 81 F.3d 72, 73–74 (7th Cir. 1996) (upholding adjustment when defendant concealed money in relative's account); *United States v. Becker*, 965 F.2d 383, 390 (7th

Cir. 1992) (same); *United States v. May*, 568 F.3d 597, 607 (6th Cir. 2009) (upholding adjustment when defendant concealed money in third-party accounts); *United States v. Clarke*, 562 F.3d 1158, 1166 (11th Cir. 2009) ("For purposes of the sophisticated means enhancement, we see no material difference between concealing income and transactions through the use of third-party accounts, as was the case here, and using a corporate shell or a fictitious entity to hide assets.").

The district court's finding was not clearly erroneous and there was no abuse of discretion in the application of the enhancement.

CONCLUSION

Augare's judgment and sentence should be affirmed.

DATED this 26th day of November, 2014.

Respectfully submitted,

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s/ Carl E. Rostad
CARL E. ROSTAD
Assistant United States Attorney

STATEMENT OF RELATED CASES

The following appeals have been taken from the same case:

United States v. Katheryn Elizabeth Sherman, CA 14-30135

United States v. Frances Kay Onstad, CA 14-30139

United States v. Gary Joseph Conti, CA 14-30232

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and the body of the argument contains 4,398 words.

DATED: November 26, 2014.

s/ Carl E. Rostad
CARL E. ROSTAD
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States 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.

s/ Carl E. Rostad
CARL E. ROSTAD
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