

STATE OF MAINE
KNOX, SS.

MAINE SUPERIOR COURT
LOCATION: ROCKLAND
Docket No. KNOCD-CR-21-185

STATE OF MAINE,
Plaintiff

v.

MALCOLM STEWART,
Defendant

)
)
)
)
)
)
)
)
)
)
)

MOTION FOR BILL OF
PARTICULARS

NOW COMES Mr. Stewart by and through counsel, and hereby moves
this Court to order a Bill of Particulars in this matter pursuant to M.R.U.Crim.P.
16(d) stating as cause as follows:

PROCEDURAL POSTURE

Mr. Stewart was indicted by a Grand Jury on March 25, 2021 of two counts
of theft by deception (Class B), 17-A M.R.S. S 354. Mr. Stewart was arraigned by
video on May 20, 2021. Mr. Stewart pleaded ‘not guilty’ and the court set a

\$50,000 unsecured bond. A Dispositional Conference was scheduled for July 22, 2021 and later continued until September 30, 2021 as Mr. Stewart tried to obtain representation.

On February 8, 2022, undersigned counsel entered an appearance on behalf of Mr. Stewart. A Judicial Settlement Conference was held on April 21, 2022. The matter was not resolved and the Court conducted a conference on June 6, 2022. The time to file pretrial Motions was extended by the Court and are due on September 23, 2022.

INDICTMENT

The Indictment charges Mr. Stewart with two counts of Theft By Deception under 17-A M.R.S. §354(1)(B)(1).

BACKGROUND

Castle Builders, Inc. opened in 2017 employing office staff and laborers. Malcolm Stewart, the founder, had a background in sales but not as much in construction. He was the salesman for Castle Builders, Inc. and his wife, Elizabeth managed the finances. Castle Builders, Inc. offered residential construction and

renovation services. At the start, Castle was highly successful and generated repeat business.

As with many construction businesses, there were errors made in accounting and related to the work force, to name two areas. Work crews saw consistent turnover. But at no point did Castle ever fail to pay a worker, even though some work checks initially had insufficient funds. As time progressed, Castle saw its income dwindling and its bills expanding as evidenced by the monthly summary. Castle hoped to secure cash infusion by bringing in a financial partner(s), but were unable to close any deal. Finally, without money to pay the employees, Mr. Stewart closed his business on September 8, 2019, leaving behind all of his business and main personal assets. Both he and his wife filed for bankruptcy. Subsequently, Mr. Stewart was employed as a car salesman, sometimes working 60 hours per week. His wife has worked stocking shelves at a store and is currently a public high school custodian. Currently, Mr. Stewart is unable to work for any significant periods due to health problems. He receives dialysis three times per week.

SUMMARY OF APPLICABLE LAW

A person is guilty of theft by deception if the person obtains or exercises control over property of another as a result of deception and with intent to deprive the other person of the property. 17-A M.R.S.A. § 354; *State v. Bouchard*, 881 A.2d 1130, 2005 ME 106 (Me. 2005). “The Criminal Code instructs that an '[i]ntent to deprive' includes, among other things, an intent '[t]o use or dispose of the property under circumstances that make it unlikely that the owner will recover it.' 17-A M.R.S.A. § 352(3)(C) (1983).” *Bouchard*, 881 A.2d 1130. “A person acts intentionally with respect to a result of the person's conduct when it is the person's conscious object to cause such a result.” 17-A M.R.S. § 35(1)(A) (2012); *State v. Woodard*, 2013 ME 36, 68 A.3d 1250 (Me. 2013).

MEMORANDUM OF LAW

M.R.U.Crim.P. 16(d) provides in full that:

- (1) Bill of Particulars. A motion for a bill of particulars may be and granted by the court if defense counsel or the unrepresented defendant satisfies the court that
 - (A) Discovery has been completed under this Rule; and
 - (B) That such discovery is inadequate to establish a record upon which to plead double jeopardy, or to prepare an effective defense because further information is necessary respecting the

charge stated in the charging instrument, or to avoid unfair prejudice.

The Government has charged Mr. Stewart in a two-count indictment with two counts of Theft By Deception under 17-A M.R.S. §354(1)(B)(1).

The Government has produced multiple rounds of discovery. While additional discovery might be pertinent for other pretrial matters, it does not impact this Motion.

The Indictment in this matter is problematic and has been addressed in the Motion to Dismiss filed contemporaneous with this action. In the event the Court denies that Motion, a bill of particulars is necessary. *State v. Ardolino*, 1997 ME 141, ¶ 5, 697 A.2d 73 (“The purpose of a bill of particulars is to enable the defendant...to establish a record upon which to plead double jeopardy if necessary.”); *State v. Gauthier*, 2007 ME 156, ¶ 17, 939 A.2d 77 (“The test for determining whether an indictment is sufficient is whether an accused...could...be protected against a subsequent prosecution for the same cause.”)

In the absence of more detailed specification, the defense cannot adequately prepare for trial. As discussed in the Motion to Dismiss, Appendix A of the Indictment contains 57 names referencing Count I. Based on the Indictment, this suggests that the Government would intend to call all persons

to testify since they are the named victims in Appendix A. Also as discussed in the Motion to Dismiss, this could create M.R.Evid. 404(b) issues. To expand upon this, if the Government indicted Mr. Stewart based on one name on Appendix A, it might argue that it would be allowed to bring in evidence against Mr. Stewart as to others pursuant to the common scheme exception. This would arguably implicate M.R.Evid. 403. Yet, because they are named in the Indictment, the likely argument is that all testimony should be presented as substantive evidence. Without knowing the specific Government belief related to prosecution, Mr. Stewart “will be disabled from preparing a defense, caught by unfair surprise at trial, or hampered in seeking the shelter of the Double Jeopardy Clause.” *United States v. Sepulveda*, 15 F.3d 1161, 1192-93 (1st Cir. 1993).

WHEREFORE, Mr. Stewart seeks that this honorable Court to order a bill of particulars together with any and all other relief that is fit and just.

Dated this 22nd day of September 2022 at Portland, Maine.

Respectfully submitted,

¹ The Double Jeopardy Clause could be implicated if the Government believes that a conviction can be established based upon a findings as to one or more, but not all persons named in Appendix A.

/s/David J. Bobrow

Attorney for Malcolm Stewart
BEDARD AND BOBROW, PC
9 Bradstreet Lane
P.O. Box 366
Eliot, ME 03903
207.439.4502
djblaw@bedardbobrow.com

CERTIFICATE OF SERVICE

I hereby certify that on this date that a copy of this Motion was provided, via email and mail, to the Office of the Attorney General through the Assistant Attorney Generals in this matter.

Date: 09/22/2022

/s/David J. Bobrow