

12-85

To Be Argued By:
PETER S. JONGBLOED

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-85

UNITED STATES OF AMERICA,
Appellee,

-vs-

FRANCISCO J. NUNEZ-BANUELOS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Janet B. Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 6, 2012. Appendix (“A__”) 6. On January 6, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A7, A31. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issue
Presented for Review**

Was the evidence sufficient for a jury to conclude that the defendant intended to deceive and to defraud the Connecticut Department of Labor where the defendant used a social security number that he knew did not belong to him to obtain unemployment benefits?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-85

UNITED STATES OF AMERICA,
Appellee,

-vs-

FRANCISCO J. NUNEZ-BANUELOS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Francisco Nunez-Banuelos is a Mexican citizen who came to the United States unlawfully. He was never assigned a social security number or an alien registration number. Given his immigration status, Nunez-Banuelos was ineligible to work legally in the United States and, consequently, was not entitled to receive unemployment compensation benefits from the Connecticut Department of Labor.

Nunez-Banuelos circumvented those restrictions by making up and knowingly using the made up social security number xxx-xx-1102. He provided this number to his employers so that he could be hired, and later, he used the same social security number to obtain unemployment benefits. In particular, from December 2007 to April 2008, Nunez-Banuelos collected 17 unemployment benefit checks.

A jury convicted Nunez-Banuelos of one count of misusing a social security number and 17 counts of mail fraud. On appeal, Nunez-Banuelos claims that his convictions should be reversed because the evidence was insufficient to show that he acted with the intent to deceive and the intent to defraud the Connecticut Department of Labor.

As shown below, this claim lacks merit. The evidence at trial amply showed that Nunez-Banuelos's actions were intentional and committed for the purposes of deceiving and defrauding the Department of Labor. The district court's judgment should be affirmed.

Statement of the Case

On November 10, 2011, a federal grand jury returned a Superseding Indictment against Nunez-Banuelos. A4. Count One charged him with the misuse of the social security number xxx-xx-1102, in violation of 42 U.S.C. § 408(a)(7)(B). Counts Two through Eighteen

charged him with mail fraud, in violation of 18 U.S.C. § 1341. A9-16.

On December 9, 2011, the jury trial began in the United States District Court for the District of Connecticut before the Honorable Janet Bond Arterton. A5. On December 13, 2011, the jury convicted Nunez-Banuelos of all 18 counts. A6. The district court denied Nunez-Banuelos's motion for judgment of acquittal on December 12, 2011. A5.

On January 3, 2012 the district court sentenced Nunez-Banuelos to time served and one year of supervised release. In addition, the court ordered Nunez-Banuelos to pay \$11,439 in restitution to the Connecticut Department of Labor, and a special assessment of \$1,800. A6. Final judgment entered on January 6, 2012, A6, and Nunez-Banuelos filed a timely notice of appeal that same day, A7, A31.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The unemployment benefit system in Connecticut.

The Social Security Act of 1935 established a combined federal and state unemployment insurance system, designed to provide benefits to people out of work due to no fault of their own. Government Appendix ("GA__") 40-42. Through this system, unemployment benefit checks are

paid directly to the laid-off worker on a weekly basis. GA42-43, GA57-58.

The unemployment insurance system is administered for the federal government by state employment offices, which in Connecticut is the Connecticut Department of Labor (“DOL”). GA40-44. In Connecticut, unemployment benefits are funded through a tax on Connecticut employers. GA42. Employees do *not* contribute anything towards the unemployment insurance system; the program is funded solely through the employer tax. GA42.

To be eligible for unemployment benefits from the DOL, an individual applicant must satisfy three criteria. First, the applicant must have money in the DOL unemployment fund provided through the unemployment tax levied on the applicant’s former employer(s). GA44-45. Second, the benefit applicant must have been laid off through no fault of his own. GA44-45.

Third, and significantly here, the applicant must be a United States citizen, possess an assigned social security number, or be otherwise authorized to work in the United States. GA45-47. The employee’s social security number—a unique nine-digit number assigned to United States citizens and other legal residents, GA412—is a key feature of the system. GA46-47. Indeed, for every new claim for unemployment benefits, the claimant is asked whether he is a United States citizen, and if the answer is no

(and the claimant is not otherwise authorized to work), the claim is denied. GA46-47.

During the time at issue in this case, the unemployment claim process in Connecticut was initiated by the claimant with a telephone call to the DOL. GA47. During this initial telephone call, to determine whether the claimant is eligible to receive benefits, the claimant must provide the DOL with several pieces of information, including his social security number, date of birth, address, work history, and citizenship status or other authorization to work in the United States. GA47-50. Throughout this process, the claimant is advised that the information provided to the DOL must be truthful. GA50. In particular, the claimant is advised both over the phone and through a “benefits rights” booklet that is mailed to claimants (available in both English and Spanish) that eligibility for unemployment benefits depends on being either a United States citizen or being otherwise authorized to work in the United States. GA50-52, GA55-56. After submitting a successful initial claim for unemployment benefits, to obtain continued benefits, the claimant must file weekly claim reports over the telephone. In these telephone calls, the claimant must input both his social security number and a unique pin number, and answer a series of questions. GA51.

B. Nunez-Banuelos obtains unemployment compensation benefits for which he is not eligible.

Nunez-Banuelos is a Mexican citizen who came to the United States illegally. GA392-93 (Nunez-Banuelos admitted to immigration officer that he came to the United States illegally), GA395 (Nunez-Banuelos gave immigration officer his Mexican passport). Because he was in the United States illegally, Nunez-Banuelos did not have a green card or other authorization to work in the United States. GA394.

At some point after Nunez-Banuelos came to the United States, he worked for two different companies in Connecticut, Laredo Concrete and Castle Concrete Corporation. A condition of employment at both companies was that Nunez-Banuelos (like all employees) provide them with his social security number. GA148-54 (Castle Concrete), GA198-201 (Laredo Concrete). In particular, the owners of both Castle Concrete and Laredo Concrete testified that they pay quarterly unemployment compensation taxes to the DOL. GA156, GA203-204. This process involves making periodic reports to the DOL about the work and pay of their employees using the employee's social security number. GA156-57, GA166, GA204.

Because Nunez-Banuelos was not eligible to work legally in the United States, he made up a social security number to give to his employers.

Indeed, Nunez-Banuelos explained to a law enforcement officer that he had “made up” a social security number and had been using that number since entering the United States. GA363 (agent testifying that “I asked him to provide me a social security number. He informed me that he only had recalled the first three digits of the social security number, and he informed me that the number was not real and that he had made it up and had been using it since he had come to the United States.”). And in fact, W-2 earning statements from Nunez-Banuelos’s two employers reflected that he gave them a social security number. GA162-63, GA207-209, GA367.

Of course, because Nunez-Banuelos had “made up” his social security number, the number that he gave his employers did not belong to him. GA417. The number that Nunez-Banuelos provided to his employers (the number ending in 1102) belonged to a woman who was born in Oregon. GA417, GA424-26. Indeed, the Social Security Administration notified Nunez-Banuelos that he was not authorized to work using that number. In a letter dated July 2, 2007, the Social Security Administration informed Nunez-Banuelos that the social security number he had provided to Laredo Concrete did not match with the Social Security Administration’s records. GA366-69.

Nonetheless, approximately five months after receiving this letter from the Social Security

Administration, Nunez-Banuelos used his made-up social security number to obtain unemployment compensation benefits. On December 27, 2007, Nunez-Banuelos called the DOL to initiate a claim for unemployment benefits. GA247-48, GA254-56.

During the benefit application process Nunez-Banuelos was repeatedly notified that eligibility for benefits was contingent upon being able to legally work in the United States. For example, the automated system, which is available in both English and Spanish, GA234, advised him that “[i]n order to complete this process you will need your social security number” and “[i]f you are not a U.S. citizen, you will also need your alien registration number.” GA234. Nunez-Banuelos was further told “that you are mandated by federal and state law to provide your social security number to the Connecticut Department of Labor for use in the administration of the unemployment insurance program.” GA235. The automated system further informed Nunez-Banuelos that “your social security number will be also be used in the administration of the employment service program.” GA235.

Nunez-Banuelos was further warned that “[t]he information requested is necessary to determine your entitlement for the benefits for which you are applying. Disclosure of the requested information is voluntary. However, if you elect not to disclose any information re-

quested, your claim cannot be processed,” and that “[k]nowingly providing false information or failing to disclose material facts in order to obtain benefits is a violation of law and will result in an order to repay any overpaid benefits, as well as civil and/or criminal penalties.” GA239.

After all of these messages, Nunez-Banuelos was prompted to enter his social security number. GA235. At this prompt, Nunez-Banuelos entered the social security number ending in 1102, thereby representing that this number had been assigned to him by the Commissioner of Social Security. GA256. Indeed, Nunez-Banuelos admitted that he used this social security number to obtain unemployment benefits. GA363. The social security number that Nunez-Banuelos provided to the DOL in his unemployment claim was the same number referenced in the July letter from the Social Security Administration. GA249, GA368-69.

In addition to providing the DOL with this false social security number, Nunez-Banuelos answered a number of other questions. For example, he provided the DOL with his full name, his birth date, his address and his telephone number. GA256-61. Moreover, Nunez-Banuelos falsely stated that he was a United States citizen. GA263.

After Nunez-Banuelos filed this initial claim for benefits with the DOL, he made subsequent calls to the DOL to obtain weekly benefit pay-

ments. GA276-92. In response to these benefit claims, the DOL mailed 17 unemployment benefit checks to Nunez-Banuelos. GA58-60. The checks were made payable to Nunez-Banuelos at the address he had provided, and each check showed the social security number ending in 1102 that he had provided to the DOL. GA63-64. On the back of each check was the following language: “By endorsing this check, I hereby certify that: (1) I gave no false information in the process of filing my initial application for unemployment benefits. . . .” GA65. Under those pre-printed words on each of the 17 checks, Nunez-Banuelos signed his name. GA113-35. And, indeed, Nunez-Banuelos deposited each of the 17 checks that were made payable to him into his bank account. GA113-35.

In all, Nunez-Banuelos received 17 unemployment checks to which he was not entitled on various dates from December 2007 through April 2008. GA113-135. Each check was in the amount of \$334. GA113-135.

Nunez-Banuelos’s conduct came to the attention of law enforcement during an investigation into several individuals who had collected unemployment insurance benefits using invalid social security numbers. GA355-57. Although Nunez-Banuelos was not a target of this original investigation, he happened to be present during the execution of a federal search warrant in

June 2011 related to the investigation. GA355-60.

During the search, Nunez-Banuelos was told that he could leave, GA361, but he stayed and spoke—voluntarily—with the agents executing the search, GA362. During these conversations, Nunez-Banuelos admitted that he had entered the United States illegally, that he was using a made-up social security number, and that he had used this same “made up” social security number, xxx-xx-1102, to collect unemployment benefits. GA363, GA392-93. In addition, Nunez-Banuelos voluntarily produced various documents to the agents, including the July 2007 letter from the Social Security Administration. GA365-69.

Summary of Argument

The jury’s guilty verdict was supported by overwhelming evidence that Nunez-Banuelos, who was unlawfully in the United States, intentionally misused a social security number, which he admitted to making up and which had been assigned to another person, in order collect unemployment compensation benefits. Nunez-Banuelos was notified by the DOL that unless he had a social security number and was a United States citizen or was authorized to work in the United States, he was not entitled to the benefits. To overcome this hurdle, Nunez-Banuelos intentionally used someone else’s social security

number when seeking the benefits. On this record, the jury could reasonably find that Nunez-Banuelos intended to deceive the DOL.

Likewise, the jury verdict was supported by overwhelming evidence that Nunez-Banuelos intended to defraud the DOL because he sought unemployment benefits knowing that he was not entitled to receive them. As part of the application process, Nunez-Banuelos learned that as an unlawful alien, he was not entitled to benefits that his employer had paid. Despite this warning, he made false representations about his citizenship and his social security number in order to collect unemployment compensation benefits that he was not entitled to receive. Thus, the jury could reasonably find that Nunez-Banuelos intended to defraud the DOL.

Argument

I. The evidence was sufficient to show that Nunez-Banuelos intended to deceive and to defraud the Department of Labor.

A. Governing law and standard of review

1. Sufficiency of the evidence

Rule 29(a) of the Federal Rules of Criminal Procedure provides that the district court “on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.”

In *United States v. Reifler*, 446 F.3d 65 (2d Cir. 2006), this Court explained the “heavy burden” faced by a defendant challenging his conviction based upon a claim of insufficient evidence:

In considering such a challenge, we must credit every inference that could have been drawn in the government’s favor, and affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt[.] We defer to the jury’s determination of the weight of the evidence and the credibility of the witnesses, and to the jury’s choice of the competing inferences that can be drawn from the evidence. Pieces of evidence must be viewed not in isolation but in conjunction, and the conviction must be upheld if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt[.]

Id. at 94-95 (internal citations and quotations omitted); *see also United States v. Pica*, 692 F.3d 79, 86 (2d Cir. 2012) (holding that in reviewing a challenge to sufficiency of the evidence, “we view the evidence in the light most favorable to the prosecution” and that “[u]nder this exceedingly deferential standard of review, we will affirm the conviction if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt” (internal quotations and ci-

tations omitted)), *cert. denied*, 133 S. Ct. 1582 (2013).

If there are conflicts in the testimony or evidence, the reviewing court “must defer to the jury’s resolution of the weight of the evidence and the credibility of the witnesses, and to the jury’s choice of the competing inferences that can be drawn from the evidence.” *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) (internal citations and quotations omitted). “In other words, the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt.” *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (internal citations and quotations omitted).

Circumstantial evidence is just as valuable as direct evidence. “[T]he law draws no distinction between direct and circumstantial evidence,” and “[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable.” *United States v. MacPherson*, 424 F.3d 183, 190 (2d Cir. 2005). Indeed, “jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences.” *United States v. Huevo*, 546 F.3d 174, 182 (2d Cir. 2008). “The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter to suffi-

ciency analysis because it is the task of the jury, not the court, to choose among competing inferences.” *MacPherson*, 424 F.3d at 190. As there is rarely direct evidence of a person’s state of mind, “the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom.” *Id.* at 189; *see also United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003).

This Court reviews the district court’s denial of a defendant’s motion for acquittal *de novo*, although it views the evidence in the light most favorable to the government. *United States v. Cho*, 713 F.3d 716, 720 (2d Cir. 2013) (per curiam). On appeal, “[t]he question is not whether this [C]ourt believes the evidence adduced at trial established guilt beyond a reasonable doubt, but rather, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (internal citations and quotations omitted).

2. Misuse of a social security number

Section 408(a)(7)(B) of Title 42, United States Code, criminalizes the misuse of a social security number. To prove a violation of this statute, the government must prove, beyond a reasonable doubt, that the “defendant (1) for any purpose, (2) with the intent to deceive, (3) represented a particular social security number to be his or another person’s, (4) which representation is

false.” *United States v. Perez-Campos*, 329 F.3d 1214, 1215 (10th Cir. 2003); *United States v. Porter*, 409 F.3d 910, 915 (8th Cir. 2005). *See also* 2 Leonard B. Sand, et al., *Modern Federal Jury Instructions—Criminal*, ¶ 39A.11, Instr. 39A-56. To satisfy the intent element of this statute, the government must prove that the defendant acted with the “intention of misleading someone.” 2 *Sand*, Instr. 39A-60. *See also United States v. Sirbel*, 427 F.3d 1155, 1159-60 (8th Cir. 2005).

3. Mail fraud

Section 1341 of Title 18 is the mail fraud statute. It criminalizes devising a scheme to defraud by means of false representations and in furtherance of the scheme, causing the mails to be used. To prove a violation of the mail fraud statute, the government must prove three elements beyond a reasonable doubt: “(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails . . . to further the scheme.” *United States v. Litwok*, 678 F.3d 208, 213 (2d Cir. 2012) (quotations and citations omitted); *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004). *See also* GA477 (jury instructions for mail fraud counts). *See* 2 *Sand*, ¶ 44.01, Instr. 44-3.

As relevant to this appeal, the government must prove that the defendant acted with an intent to defraud. *United States v. Novak*, 443 F.3d

150, 156 (2d Cir. 2006); *United States v. Ramirez*, 420 F.3d 134, 144 (2d Cir. 2005). This Court, following the Supreme Court, has broadly interpreted “scheme to defraud” to include “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.” *United States v. Altman*, 48 F.3d 96, 101 (2d Cir. 1995) (quoting *Durland v. United States*, 161 U.S. 306, 313 (1896)). Furthermore, “the words ‘to defraud’ commonly ‘signify the deprivation of something of value by trick, deceit, chicane, or overreaching.’” *Id.* at 102 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). An intent to defraud, therefore, “means to act with the specific intent to deceive for the purpose of causing some financial or property loss to another.” GA481 (jury instructions). “Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim.” *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

In proving fraudulent intent, the government need not prove that actual harm occurred to the victim. All that is required is a showing that the defendant contemplated or intended harm. “While this language does not require the government to prove that the victims of the fraud were *actually* injured, the government must, at a minimum, prove that defendants *contemplated*

some actual harm or injury to their victims. Indeed, [o]nly a showing of intended harm will satisfy the element of fraudulent intent.” *Novak*, 443 F.3d at 156 (internal citations and quotations omitted).

An intent to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case. See *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999) (explaining that fraudulent intent may be shown by circumstantial evidence that the defendant made misrepresentations to the victim with knowledge that the statements were false); *United States v. Porter*, 441 F.2d 1204, 1210 (8th Cir. 1971) (“Intent can seldom be shown by actual testimony reflecting a defendant’s state of mind. The cases are legion that intent may properly be inferred from all the facts and circumstances surrounding the transactions.”) (citing cases)).

Thus, this Court has counseled that while deceitful misrepresentations alone are insufficient and must be coupled with a contemplated harm, a fraudulent intent may be established when the scheme necessarily poses harm to others. See *Guadagna*, 183 F.3d at 130 (“However, [w]hen the necessary result of the . . . scheme is to injure others, fraudulent intent may be inferred from the scheme itself.”) (internal quotations and citations omitted)). In such cases, “a jury may bring to its analysis of intent on individual

counts all the circumstantial evidence it has received on the scheme and the purpose of the scheme in which the defendant allegedly participated.” *Id.* Indeed, this Court has explained that “[t]he government was not required to produce evidence of intent independent of the scheme to defraud.” *United States v. Naiman*, 211 F.3d 40, 49 (2d Cir. 2000).

B. Discussion

In this appeal, Nunez-Banuelos challenges the sufficiency of the evidence to support the intent elements of his convictions, namely, the sufficiency of the evidence that he intended to deceive and to defraud the DOL with his use of a social security number and his representations that he was a United States citizen.

1. Nunez-Banuelos misused a social security number with the intent to deceive the DOL.

Nunez-Banuelos argues here, as he did before the jury, that the evidence did not show that he misused a social security number because he lacked the intent to deceive the DOL. For this reason, he claims that his conviction under 42 U.S.C.A. § 408(a)(7)(B) ought to be reversed.

This argument failed to persuade the jury because it ignored the overwhelming evidence establishing that he misused a social security number with the intent to deceive. In a nutshell,

the evidence showed that Nunez-Banuelos used a social security number that had not been assigned to him to apply for unemployment benefits for which he was not eligible.

As a preliminary matter, Nunez-Banuelos knew that he was using a social security number that did not belong to him. He admitted that he was a citizen of Mexico, that he had come to the United States illegally, and that he did not have a “green card” to work in this country. GA392-94. To obtain work with employers who required a social security number, Nunez-Banuelos admitted that he “made up” a social security number. GA148-54, GA198-201, GA363. And if there was ever any doubt about whether Nunez-Banuelos knew that he was not authorized to use the number he was providing employers, that doubt evaporated when he received a letter from the Social Security Administration notifying him that he was not authorized to use the social security number that he had been using. GA366-69. Given these facts, the jury reasonably could have concluded that Nunez-Banuelos knew that at no point was he *ever* assigned a social security number by the Commissioner of Social Security, much less the number that he was using to work.

Further, the jury could reasonably conclude that Nunez-Banuelos intended to deceive the DOL by claiming that he had been assigned a social security number. Less than five months

after receiving the letter from the Social Security Administration notifying him that he was not authorized to use the social security number ending in 1102, Nunez-Banuelos used that precise number to file a claim for unemployment benefits with the DOL. GA247-48, GA254-56. When Nunez-Banuelos called the DOL to file his claim, he was notified—repeatedly—that he had to provide a social security number or alien registration number to obtain unemployment benefits. GA47-52, GA234, GA235, GA239. Accordingly, Nunez-Banuelos was put on immediate notice that he needed a social security number to complete his claim. Instead of hanging up when he received this notice, Nunez-Banuelos filed his claim, in which he affirmatively represented that he had a valid social security number, ending in 1102. GA235, GA256. From these facts, the jury could reasonably have concluded that Nunez-Banuelos intended to deceive the DOL to obtain unemployment benefits.

On this record, this case is similar to the Eighth Circuit’s decision in *United States v. Sirbel*. In that case, the defendant provided a social security number to a bank in an attempt to open an account, even though he had been notified a few months earlier that the number had not been issued in his name, and that his name did not match the name associated with the social security number. 427 F.3d at 1160. Further, the defendant had made statements indicating that

the number belonged to his father. *Id.* On this record, the Eighth Circuit had little trouble concluding that the jury could reasonably have found that the defendant knew that the number was not his and that he acted with the intent to deceive when he provided that number to the bank.

Here, as in *Sirbel*, Nunez-Banuelos was told that the number was not assigned to him, and indeed, he admitted making up that number. Nevertheless, Nunez-Banuelos provided that number to the DOL to get unemployment benefits. Thus, here, as in *Sirbel*, the jury could reasonably have inferred that Nunez-Banuelos acted with the intent to deceive when he provided his made up social security number to the DOL in his unemployment benefit claim.

In sum, Nunez-Banuelos knew that providing a made up social security number was the only way for him to get unemployment benefits. Therefore, to get those benefits, he intentionally misrepresented to the DOL that the social security number ending in 1102 had been assigned to him by the Commissioner of Social Security. Nunez-Banuelos's actions in seeking unemployment benefits demonstrated his intent to deceive the DOL into thinking that he had been assigned social security number ending in 1102 and therefore was entitled to receive unemployment compensation benefits. This evidence of intentional deceit was sufficient for a jury to find

that Nunez-Banuelos acted with intent to deceive.

2. Nunez-Banuelos intended to defraud the DOL.

Nunez-Banuelos next argues here, as he did to the jury, that the evidence did not show that he committed mail fraud because there was insufficient evidence that he intended to defraud the DOL. All of the evidence set forth above, *see* Part B.1., *supra*, however, that showed he intended to deceive the DOL with the misuse of a social security number, also demonstrated that he intended to defraud the DOL.

Further, the evidence fully established that Nunez-Banuelos's deceitful use of the social security number to obtain unemployment benefits was intended to defraud the DOL. He knowingly made misrepresentations to the DOL—about his social security number and his citizenship status, for example—that he knew were not true. *See Guadagna*, 183 F.3d at 129 (fraudulent intent may be shown by evidence that the defendant made misrepresentations to the victim with the knowledge that the statements were false). In addition, Nunez-Banuelos intended to harm the DOL by causing it to pay him benefits for which he was not legally entitled. He did this by voluntarily calling the DOL to initiate the claims process, and then calling weekly to obtain weekly unemployment checks for a total of 17 weeks.

GA276-92. And indeed, the DOL *was* harmed by Nunez-Banuelos's scheme because it paid him for those claims. GA63-65, GA113-35. On this record, where the scheme necessarily posed a harm to the victim, the jury could reasonably infer that Nunez-Banuelos intended to harm the victim. *See Guadagna*, 183 F.3d at 130 (“[W]hen the necessary result of the . . . scheme is to injure others, fraudulent intent may be inferred from the scheme itself.”) (internal quotations and citations omitted)). Accordingly, the evidence was fully sufficient to support Nunez-Banuelos's mail fraud convictions.

To be sure, Nunez-Banuelos argued to the jury that he might have thought that he was entitled to unemployment benefits even if he did not have a valid social security number. *See* Defendant's Br. at 15-16. But this argument was one for consideration by the jury, which also had before it for consideration the myriad warnings given to Nunez-Banuelos about the need for a valid social security number to obtain unemployment benefits. And the jury's decision, having weighed this evidence, is entitled to deference.

Similarly, the fact that Nunez-Banuelos did not seek continued unemployment benefits after he obtained employment, or the fact that he was law-abiding in other respects of his life, *see* Defendant's Br. at 16, were facts and arguments for consideration by the jury. Against these facts, the jury also weighed the considerable evidence,

described above, the Nunez-Banuelos knowingly misused a social security number with the intent to deceive and defraud the DOL, and ultimately, with the intent to receive unemployment benefits. As this Court has explained, “[t]he possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter to sufficiency analysis because it is the task of the jury, not the court, to choose among competing inferences.” *MacPherson*, 424 F.3d at 190. On the record before the jury in this case, it cannot be said that the evidence of Nunez-Banuelos’s intent was “nonexistent or so meager that no reasonable jury could find built beyond a reasonable doubt.” *Guadagna*, 183 F.3d at 130. Accordingly, this Court should reject Nunez-Banuelos’s invitation to re-weigh the evidence.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 12, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Peter S. Jongbloed", written in a cursive style.

PETER S. JONGBLOED
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Law Student Intern

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Addendum

42 U.S.C. § 408(a)(7)(B):

Whoever...for the purpose of causing an increase in any payment authorized under this subchapter (or any other program financed in whole or in part from Federal funds), or for the purpose of causing a payment under this subchapter (or any such other program) to be made when no payment is authorized thereunder, or for the purpose of obtaining (for himself or any other person) any payment or any other benefit to which he (or such other person) is not entitled, or for the purpose of obtaining anything of value from any person, or for any other purpose...with intent to deceive, falsely represents a number to be the social security account number assigned by the Commissioner of Social Security to him or to another person, when in fact such number is not the social security account number assigned by the Commissioner of Social Security to him or to such other person...shall be guilty of a felony....

18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail mat-

ter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.