UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 24-80103-CR-CANNON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DUSTIN SEAN MCCABE,

Defendant.
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ORDER DENYING DEFENDANT'S MOTION TO SEVER TRIAL

THIS CAUSE comes before the Court upon Defendant Dustin Sean McCabe's Motion to Sever Counts 1 and 2 of the Indictment from Counts 3 through 5 of the Indictment (the "Motion") [ECF No. 30]. The Court has reviewed the Motion, the United States' Opposition [ECF No. 31], Defendant's Reply [ECF No. 40], and the United States' Supplemental Notice Regarding Anticipated Witness Testimony Overlap [ECF No. 49]. The Court also held a hearing on the Motion [ECF No. 44].[1] Following that review, Defendant's Motion [ECF No. 30] is **DENIED**.

[1] The transcript of this hearing is cited in this Order using the following convention: Tr. __.

RELEVANT FACTUAL BACKGROUND AND PARTIES' ARGUMENTS

The factual allegations pertinent to the instant Motion are as follows and taken from the United States' Indictment [ECF No. 3], the proffered facts in the Response to Defendant's Motion [ECF No. 31], and as further articulated by the parties in open court [ECF No. 44].[2] [3]

In early March 2020, Defendant purchased a boat (the "Southern Comfort") and registered it for recreational use with the United States Coast Guard [ECF No. 3 ¶ 3]. Despite registering the Southern Comfort as a recreational vessel, Defendant used it to provide commercial scuba diving charter services through his company, Florida Scuba Charters [ECF No. 3 p. 7].

On March 28, 2020, Defendant was contacted via Facebook by J.H., a woman he took out for scuba diving on the Southern Comfort that day, warning Defendant that his propeller was engaging while the engine was supposed to be in neutral [Tr. 32]. J.H. knew that Defendant's propeller was malfunctioning because she was almost sucked into the propeller herself—her speargun saved her by blocking the propeller, leaving her with a large bruise but no serious injuries [Tr. 32].

The next day, on March 29, 2020, during another scuba-diving trip with Defendant on the Southern Comfort, a woman ("M.C.") lost her life when she was sucked up into the propeller and ultimately drowned [ECF No. 3 p. 5]. Afterwards, Defendant refused to send the Coast Guard a report of the casualty because he felt as though the Coast Guard was "out to get him" [ECF No.

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[2] The Court looks to the allegations in the indictment to determine whether initial joinder of claims was proper under Rule 8; if a Rule 14 analysis is warranted, the Court looks to the face of the indictment *and* the Government's proffered "evidence [to] show the connection between the charges." *United States v. Dominguez*, 226 F.3d 1235, 1241 (11th Cir. 2000). Defendant concedes that the Court may consider the Government's proffer in its evaluation of the present Motion. [Tr. 7].

[3] Nothing in this Order should be construed to undermine Defendant's presumption of innocence or read as a comment on the truth of the allegations.

31 p. 2].

Then on March 31, 2020, Defendant sent text messages to a Coast Guard officer that Florida Scuba Charters was "shut down" and that he had "no income" [ECF No. 31 p. 3]. That same day, he asked J.S., the general manager of the Palm Beach Marina, to scan and email a handwritten PPP loan application to him, on which Defendant claimed that his current monthly payroll for Florida Scuba Charters was $7,300.00 [ECF No. 31 p. 3; *see* Tr. 12].[4]

A week later, in April 2020, the Coast Guard formally suspended Defendant from operating the Southern Comfort as a passenger vessel, and Defendant stopped operating Florida Scuba Charters [ECF No. 3 p. 7].[5] Shortly thereafter, around May 2020, Defendant submitted his first PPP loan application [Tr. 13]. Then, between the months of February and August 2021, Defendant submitted an additional PPP loan application as well as forgiveness applications for the two previously obtained loans [ECF No. 3 pp. 3, 9]. To qualify for and obtain/forgive these small business loans, Defendant allegedly falsified an Internal Revenue Service form (Form 1120) and misrepresented Florida Scuba Charter's number of employees, amount of monthly payroll, and the way it spent its previously obtained loan from the program [ECF No. 3 p. 7].

On August 22, 2024, a grand jury in the Southern District of Florida returned an indictment charging Defendant with one count of Seaman's Manslaughter, in violation 18 U.S.C. § 1115 (Count I); one count of False Statement within the Jurisdiction of an Agency of the United States, in violation of 18 U.S.C. § 1001(a)(2) (Count II); and three counts of Wire Fraud, in violation of 18 U.S.C. § 1343 (Counts III–V) [ECF No. 3]. In anticipation of trial, Defendant moves to sever

[4] "PPP loans" are a type of loan that was associated with the federal government's small business relief program during the Coronavirus Pandemic.

[5] The Government maintains that Defendant sold his Vessel in November 2020 [ECF No. 31 p. 4] while Defendant argues that it was repossessed [ECF No. 44]. This fact is immaterial to the disposition of this Order.

Count I (Seaman's Manslaughter) and II (false statements), on the one hand, from Counts III through V (wire fraud), on the other [ECF No. 30]. Defendant argues that the claims were improperly joined initially under Rule 8(a) because Defendant's actions do not form a common scheme or plan, and even if they did, jurors would be unable to isolate manslaughter from wire fraud such that the proceedings would unfairly prejudice him [ECF No. 30 p. 2; Tr. 8]. Defendant also states that trying all counts together would compromise his right to testify on his own behalf because "it might be advisable for him to testify in the Seaman's Manslaughter case but not the fraud cases" [ECF No. 30 p. 2]. In response, the United States argues that joinder is proper because the crimes are part of the same, intertwined story; the death of M.C. on the Southern Comfort in late March 2020 caused Defendant's business to cease operating and "form[ed] the impetus for his PPP [loan] fraud," as reflected in Defendant's statements following M.C.'s death and in Defendant's false statements to the Small Business Administration about the continued operation of his company [ECF No. 31 pp. 6, 10, 13 (citing Fed. R. Crim. P. 8(a)); Tr. 24]. The United States also argues that severance under Rule 14 is not warranted, citing overlapping evidence and witnesses and the Eleventh Circuit's general presumption against severance of properly joined counts [ECF No. 31 p. 18]. Finally, the United States argues that nothing in this case suggests that a jury would be unable to follow instructions that differentiate one charge from another, and therefore, Defendant's risk of prejudice is no higher than normal in a multi-count trial [ECF No. 31 p. 19].

LEGAL STANDARDS

Assessing whether separate charges may be tried together is a two-step inquiry: first whether initial joinder is proper under Rule 8(a), and second whether severance is warranted under Rule 14. *United States v. Hersh*, 297 F.3d 1233, 1241 (11th Cir. 2002); Fed. R. Crim. P. 8(a);

Fed. R. Crim. P. 14. Rule 8(a) permits joinder of offenses that "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). The Eleventh Circuit "construe[s] Rule 8(a) "broadly in favor of initial joinder" so that charges that are similar may be tried together "even if [the] offenses do not arise at the same time or out of the same series of acts or transactions."" *United States v. Annamalai*, 939 F.3d 1216, 1223 (11th Cir. 2019) (citing *Hersh*, 297 F.3d at 1241); *see also Dominguez*, 226 F.3d at 1238 (11th Cir. 2000) (upholding joinder of drug related charges and mortgage fraud related charges because "one illegal activity provides the impetus for the other illegal activity"). The Government bears the burden of establishing that initial joinder was proper under Rule 8(a). *United States v. Russell*, 703 F.2d 1243, 1247 (11th Cir. 1983). And to determine whether initial joinder is proper, the Court looks to "the allegations stated on the face of the indictment." *United States v. Weaver*, 905 F.2d 1466, 1476 (11th Cir. 1990).

In the event that "the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government," the trial court may, under Federal Rule of Criminal Procedure 14, "order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). "To warrant severance under the rule, the defendant bears a heavy burden in demonstrating clear and compelling prejudice from the inclusion of the count in question 'which could not be alleviated by the trial court and that he was unable to obtain a fair trial.'" *United States v. Kabbaby*, 672 F.2d 857, 861 (11th Cir. 1982) (quoting *United States v. DeSimone*, 660 F.2d 532, 539 (5th Cir. 1981)). When deciding whether to sever a trial, the "trial court [must] balance the rights of the defendants and the government to a trial that is free from the prejudice that may result from joint trials against the public's interest in efficient and economic administration of justice." *United States v.*

Novaton, 271 F.3d 968, 989 (11th Cir. 2001) (quotations omitted). But severance is not the only tool at the Court's disposal. "Severance is not required when "the possible prejudice may be cured by a cautionary instruction."" *United States v. Slaughter*, 708 F.3d 1208, 1213 (11th Cir. 2013) (quoting *United States v. Walser*, 3 F.3d 380, 386 (11th Cir. 1993)). It is only when "under all the circumstances of a particular case, it is apparent that the average juror could not follow the court's limiting instruction and appraise the independent evidence against a defendant solely on that defendant's own acts, statements, and conduct in relation to the allegations contained in the indictment and render a fair and impartial verdict," that severance is necessary. *Annamalai*, 939 F.3d at 1224 (internal quotations and citations omitted) (affirming district court's refusal to sever charges that were all "connected to the same general fraudulent scheme").

DISCUSSION

I. Initial Joinder Under Rule 8(a)

On the surface, Defendant has a facially appealing argument that the manslaughter charge and financial-fraud charges do not have overlapping victims and are not similar in nature. But the Court concludes that Defendant's offenses are ultimately not misjoined, because the Government has met its burden to show that the charges are factually and temporally interconnected and intertwined sufficient to constitute part of a common scheme or plan as understood under Rule 8(a). Fed. R. Crim. P. 8(a).

"Separate charges in complex cases are properly joined as long as they arise out of the same underlying conduct." *Annamalai*, 939 F.3d at 1223. For example, in *Annamalai*, the Eleventh Circuit upheld joinder of seemingly unrelated offenses (bankruptcy fraud, money laundering, obstruction of justice, and conspiracy to harbor a fugitive), with separate victims, on the grounds that they were all in furtherance of Defendant's "use [of a] Hindu Temple as part of a criminal scheme to defraud his followers and commit bank fraud." *Id.* at 1221. Similarly in *Dominguez*, the Eleventh Circuit affirmed the denial of a motion to sever in the context of drug-related and fraud-related charges, because the government theorized (and later proved at trial) that the defendant "submitted fraudulent income tax returns when applying for mortgage loans in order to conceal the fact that his income had been derived from drug activity." 226 F.3d at 1237–39. Here, under the United States' theory, Defendant made a false statement regarding the true nature of Florida Scuba Charter's commercial purpose (Count II), and then he unlawfully and negligently operated the business and modified the Southern Comfort by removing the main deck engine controls in order to do so [ECF No. 3 p. 7]. M.C. died as a result of Defendant's negligence while on a trip with Defendant on the Southern Comfort (Count I) [ECF No. 3 p. 4]. And in the months that followed her death—while still invoking the company name despite its essentially forced dissolution by marine authorities in light of M.C.'s death, Defendant falsely applied for a series of small business loans for personal benefit—lying about the continued operation of the business (Counts III-V) [ECF Nos. 4 pp. 7–9, 31 p. 5]. The United States' motive-based theory that M.C.'s death served as the impetus for the financial crimes—and the temporal proximity between the initial false statements to the U.S. Coast Guard, the negligence, and the resulting financial fraud—are sufficiently interconnected to form a common plan as understood in joinder case law. Contrary to Defendant's position, a criminal defendant need not have a pre-meditated, specific intent to commit each and every criminal act that comes about for the end result to constitute a common scheme or plan for purposes of Rule 8(a) [Tr. 26]. Defendant, in open court, argued that *United States v. Davis*, 773 F.2d 1180, 1181 (11th Cir. 1985), stands for the proposition that "You have to wake up one day and say, these are the criminal acts that I'm going to commit, and this is [] the result I want" [Tr. 26], but the Court finds no language in *Davis*, or in any other Eleventh

Circuit case, that supports Defendant's interpretation of Rule 8(a)'s "common scheme or plan" prong. Rather, there are ample examples where a criminal defendant commits subsequent offenses that spontaneously stem from his initial offense, and a "common scheme or plan" develops in real time. *See e.g., Dominguez*, 226 F.3d at 1238 (involving drug dealing at first and then mortgage fraud and money laundering); *Annamalai*, 939 F.3d at 1223 (involving fraud at first and then obstruction of justice and providing false statements under oath).

II. Rule 14 Relief from Prejudicial Joinder

Having established that joinder was initially proper under Rule 8(a), the Court now concludes that Defendant has failed to meet Rule 14's heavy burden to show that possible prejudice to him from a joint trial outweighs "the public's interest in efficient and economic administration of justice." *Novaton*, 271 F.3d at 989 (citing Fed. R. Crim. P. 14). First, juries are presumed to follow instructions and will be instructed to consider each crime separately in accordance with the Eleventh Circuit's pattern instructions. *See Annamalai*, 939 F.3d at 1224; 11th Cir. Pattern Jury Instruction 10.2 (providing that "each count of the indictment charges a separate crime" and that jurors "must consider each crime and the evidence relating to it separately"). Second, to the extent Defendant raises a general concern that his right to testify may be impaired by trying the manslaughter and financial charges together [ECF No. 30 p. 2], there are procedural guardrails against this possibility. Defendant is free to testify to whichever combination of charges he wishes, or none, and cross-examination will be limited to that direct testimony in accordance with Rule 611. *See* Fed. R. Evid. 611 (limiting cross-examination to the subject matter of the direct examination and matters affecting witness credibility). *See Hersh*, 297 F.3d 1243 n.15 (quoting *United States v. Forrest*, 623 F.2d 1107, 1115 (5th Cir. 1980) ("[S]everance is not mandatory simply because a defendant indicates that he wishes to testify on some counts but not on others.")).

Moreover, although Defendant raises a concern about prejudice given the nature of the manslaughter charges and M.C.'s death [Tr. 8], Defendant has not demonstrated that his ability to present his chosen defense will materially differ whether the counts are severed or proceed as indicted. Ultimately, given the interconnected nature of the offenses and the standard tools at the Court's disposal to mitigate prejudice, the Court is satisfied that Defendant has not met his burden to warrant severance in light of the overlapping facts, witnesses, and evidence, all of which support an efficient single trial on the offenses charged in the indictment.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Sever [ECF No. 30] is **DENIED**.

ORDERED in Chambers at Fort Pierce, Florida, this 12th day of February 2025.

AILEEN M. CANNON
UNITED STATES DISTRICT JUDGE

cc: counsel of record