UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 25-cr-00076-JMC**
	:	
CORTNEY MERRITTS,	:	
	:	
Defendant.	:	

GOVERNMENT'S NOTICE OF INTENT TO INTRODUCE
OTHER ACTS EVIDENCE UNDER FED. R. EVID. 404(b)

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby provides notice to the Court and to the defendant, Cortney Merritts, of the government's intent to introduce other acts evidence under Federal Rule of Evidence 404(b) during its case-in-chief in the trial of the above-captioned matter. The evidence is admissible because the government will offer it not to show Defendant's criminal propensity, but rather to establish his motive, knowledge, intent, plan, and absence of mistake in carrying out his fraudulent scheme.

I. Factual Background

Defendant is indicted on two counts of Wire Fraud, in violation of 18 U.S.C. § 1343, for submitting fraudulent loan applications to the United States Small Business Administration ("SBA") under the Economic Injury Disaster Loan Program ("EIDL") and the Paycheck Protection Program ("PPP"). In both applications, Defendant materially overstated the revenue he generated from his moving business, resulting in him receiving government funds to which he was not entitled.

Defendant submitted his first EIDL application on April 3, 2020, as a sole proprietor seeking both a loan and an advance under the business name "Vetted Courier and Logistics."

Defendant stated in his application that his company was in the "Transportation" business, was established in August 2017, and had generated $32,000 in revenue between January 30, 2019, and January 30, 2020. Based on the government's evidence, Defendant had indeed been operating his own moving company and had been paid for services by other moving companies, and his checking account had received deposits totaling $31,354 in 2019. Defendant also claimed in this application that his business had six employees. However, there is no record of Defendant having any formal employees, nor did he did pay any federal or state payroll taxes for any employees in 2019 or 2020.

The SBA approved this application. The United States Treasury loaned Vetted Courier and Logistics $8,500 on July 7, 2020, and based on Defendant's claim that he had six employees, gave his company a $6,000 advance the following week. Defendant used the $14,500 for various personal expenditures. In 2023, after Defendant failed to make any payments and following repeated notices that his loan was delinquent, the SBA charged off the total principal and interest that he owed the agency. Defendant is not charged in connection with this first EIDL application.

On July 8, 2020—one day after receiving the loan proceeds for Vetted Courier and Logistics—Defendant submitted a second EIDL application to the SBA in an attempt to obtain additional money from the United States government. This time, Defendant claimed he operated a transportation business under his own name, "Cortney Merritts." Defendant fabricated this business, and in doing so made it more successful than his actual one. In his first EIDL application, Defendant had certified that his transportation business had generated $32,000 in revenue between January 30, 2019, and January 30, 2020, an amount that was consistent with the total deposits in his checking account. Defendant claimed in this second EIDL application that "Cortney Merritts" had generated $53,000 in revenue during the same period. And whereas Defendant had certified in his first EIDL application that his transportation business had six employees, Defendant claimed in the second EIDL application to have ten. This enabled him to request an advance of up to $10,000, the maximum amount available. Defendant claimed in this application that "Cortney Merritts" was established on February 1, 2019. However, there is no evidence that Defendant operated a separate enterprise distinct from Vetted Courier and Logistics.

Defendant did not receive the funds he was hoping for. The SBA's system determined that the applicant information for "Cortney Merritts" was nearly identical to the prior application for "Vetted Courier and Logistics" and therefore denied Defendant's second application.

On April 22, 2021, Defendant applied for a PPP loan under the business name "Cortney Merritts." He represented in this application that this was a sole proprietor transportation business that he established in 2020, and that he was its sole employee. Defendant's bank deposits suggest that as the pandemic spread in 2020 and early 2021, his business generated significantly less revenue than in 2019. In 2019, Defendant's bank deposits totaled $31,354; in 2020, excluding payments from the government, they totaled only $25,423; and by April 21, 2021, Defendant's checking and savings accounts had a combined balance of $98.43. Though Defendant's bank deposits in 2020 from sources other than the government were less than $26,000, he claimed in his application that his business's gross income in 2020 was $128,000. He made that claim twice in the application form itself, as well as in an IRS Form 1040 Schedule C he submitted with his application as supporting documentation. Defendant certified that the information in his application was materially accurate.

Based on Defendant's representation that his business had generated over $100,000 in gross income, Defendant was able to request a $20,832 PPP loan—the maximum amount available for a sole proprietor with no employees. Relying on Defendant's representations, a lender approved, and the SBA guaranteed, the $20,832 PPP loan Defendant requested. The funds were disbursed to his account on May 12, 2021. After fraudulently obtaining the PPP loan, Defendant used the proceeds for his personal benefit and not for any business purpose. On July 11, 2022, Defendant applied for his PPP loan to be forgiven and represented that he had complied with all requirements of the PPP rules. Based on his representations in that application, the SBA compensated the lender for forgiving Defendant's outstanding principal balance of $20,832 and interest of $254.

II. Applicable Law

Federal Rule of Evidence 401 provides that evidence is relevant if "it has any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence[.]" Rule 402 provides that "relevant evidence is admissible unless," *inter alia*, another Rule of Evidence provides otherwise.

"Rule 404(b) is a rule of inclusion rather than exclusion[,]" and "is quite permissive, prohibiting the admission of other crimes evidence in but one circumstance—for the purpose of proving that a person's actions conformed to his character." *United States v. Bowie*, 232 F.3d 923, 929–30 (D.C. Cir. 2000) (citations and quotations omitted). Such evidence is allowed for any other purpose unrelated to the defendant's character or propensity to commit crime, such as proving, without limitation, "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). As such, Rule 404(b) prohibits "evidence of any other crime, wrong, or act" only when its *sole* purpose is to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *Id.* 404(b)(1); *see also United States v. Cassell*, 292 F.3d 788, 792 (D.C. Cir. 2002) ("[A]ny purpose for which bad-acts evidence is introduced is a proper purpose so long as the evidence is not offered *solely* to prove character") (emphasis in original).

Evidence admissible under Rule 404(b) remains subject to Rule 403's balancing test, which permits a court to exclude otherwise-admissible other acts evidence "'if its probative value is substantially outweighed by a danger of … unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'" *United States v. McGill*, 815 F.3d 846, 880 (D.C. Cir. 2016) (quoting Fed. R. Evid. 403). Taking the rules together, then, other acts evidence is admissible at trial if it satisfies two prongs: (1) the evidence is probative of a material issue other than the defendant's character, and (2) the probative value of the evidence is not substantially outweighed by the risk of undue prejudice. *United States v. Miller*, 895 F.2d 1431, 1435 (D.C. Cir. 1990).

Notably, in the context of Rule 404(b), the D.C. Circuit has held that "the danger of unfair prejudice [is] minimal" where the other acts evidence adds "no emotional or other pejorative emphasis not already introduced" by the evidence of the charged crimes themselves. *United States v. Straker*, 800 F.3d 570, 591 (D.C. Cir. 2015); *see also United States v. Bell*, 795 F.3d 88, 99-100 (D.C. Cir. 2015) (upholding admission of other crimes evidence under Rule 404(b) where the contested evidence "did not involve conduct any more sensational or disturbing than the other conduct attributed to the [defendant]" (internal alterations and quotation marks omitted)); *United States v. Mosquera-Murillo*, 153 F.Supp.3d 130, 185 (D.D.C. 2015) (allowing admission of Rule 404(b) evidence where it involved conduct "that is no more serious than that charged in the indictment").

III. Discussion

A. Rule 404(b) Evidence

Defendant is charged with Wire Fraud for having knowingly and intentionally devised a scheme to misrepresent his business activities to the United States government to obtain funds he was not entitled to receive. The elements of the offense of Wire Fraud include that the defendant acted knowingly and with the intent to defraud, and that the scheme included a material misrepresentation or concealment of a material fact. *See* Mod. Crim. Jury Instr. 3rd Cir. 6.18.1343 (2018).

To help prove those elements, **first**, the government intends to introduce evidence at trial regarding Defendant's first EIDL application submitted in April 2020. The mere existence of that earlier application is powerful evidence of the falsity of the second EIDL application that was submitted in July 2020, as well as the PPP loan that was submitted in April 2021. There is no evidence that Defendant operated more than one transportation business during the time period relevant to this case. Yet in April 2020 Defendant submitted an EIDL application for "Vetted Courier and Logistics," which he claimed was established in August 2017, had generated $32,000 in revenue between January 30, 2019, and January 30, 2020, and had six employees. Then, three months later in July 2020, Defendant submitted a *second* EIDL application for another transportation business, this time operated under his own name, "Cortney Merritts," which he claimed was established in February 2019, had generated $53,000 in revenue between January 30, 2019, and January 30, 2020, and had ten employees.

Based on the government's evidence that Defendant only operated one transportation business, the information submitted in the two EIDL applications cannot both be true. The government does not seek to introduce evidence concerning the first application to demonstrate Defendant's criminal propensity or bad character—rather, the government seeks to introduce that evidence to show that two EIDL loan applications covering the same time period were submitted, that the information submitted in the two applications was inconsistent, and that, if anything, the revenue information submitted in support of the first loan application was *more* consistent with the total deposits in Defendant's checking account. Again, the existence of the first application shows the falsity of the other. The government also seeks to introduce evidence concerning the first application as evidence of Defendant's motive in submitting the two later loan applications for which he is charged, by showing that Defendant submitted the second EIDL application the very next day after he received thousands of dollars from the United States government as a result of the first application.

Evidence concerning the April EIDL application therefore easily satisfies Rule 404(b)'s permissive standard that it is not being offered for the sole purpose of proving that Defendant's actions in submitting the two later fraudulent loan applications for which he is charged conformed to his character. Rather, the evidence is offered to show that Defendant's submission of the later, fraudulent loan applications was knowing, intentional, and not the result of mistake or accident.

Second, the government intends to introduce evidence at trial that Defendant filed a 2019 federal tax return in which he claimed only $1 of income with no wages or salaries, that he did not pay any federal or state payroll taxes for any employees in 2019 or 2020, and that he did not file any tax returns whatsoever for 2020, 2021, or 2022, for himself or any business associated with him. This evidence is also not being offered to show that Defendant's submission of the two charged loan applications was in accordance with his character or propensity to commit crime. Rather, as with the first EIDL loan application, evidence of Defendant's tax filings, or lack thereof, covering the same timeframes covered by the fraudulent loan applications, is being offered to prove that the revenue and employee figures claimed in those loan applications were false. For example, Defendant's July 2020 EIDL application claimed that his business had generated $53,000 in revenue between January 30, 2019, and January 30, 2020, and had ten employees. Yet when Defendant filed his federal tax return for 2019 just three months earlier, on April 10, 2020, he declared no wages or salaries whatsoever, and claimed only $1 of total income. Consequently, evidence of Defendant's 2019 tax filing is being offered because it is inconsistent with the revenue information provided in the charged EIDL application, which helps to prove that that revenue information was false. Similarly, evidence that Defendant did not pay any federal or state payroll taxes for any employees in 2019 or 2020 is offered not to show Defendant's criminal propensity, but rather to show that the certification in the charged EIDL application that his company had ten employees was false. Finally, evidence that Defendant did not file any tax returns for 2020, 2021, or 2022, for himself or any business associated with him, is being offered to show that Defendant's claim in the charged PPP loan application that his business's gross income in 2020 was $128,000 was false. This evidence is especially probative because Defendant's PPP loan application included a 2020 Form 1040 Schedule C in which he reported that his business had $128,000 in gross income, $5,166 in total expenses, and a net profit of $121,634. Evidence that that tax form was never filed with the Internal Revenue Service is further evidence that the information it contained was false. Because the proffered evidence concerning Defendant's tax filings, or lack thereof, demonstrates his motive, knowledge, intent, plan, and absence of mistake in providing false information to the SBA in the charged loan applications, it is admissible under Rule 404(b).

Having satisfied Rule 404(b)'s permissive standard, the proffered evidence as to Defendant's first EIDL application, and his tax filings, also easily clears Rule 403's requirement that the probative value of the evidence not be substantially outweighed by the dangers of unfair prejudice, confusing the issues, and misleading the jury. It is axiomatic that "all evidence offered by the prosecution in a criminal case is intended to be prejudicial." *United States v. Williams*, 271 F.R.D. 1, 2 (D.D.C. 2010). Consequently, the Court must assess "whether the prejudice is 'unfair,'" and "whether the danger of 'unfair prejudice' *substantially* outweighs the probative value of the evidence." *Id.* (emphasis in original); *see also United States v. Loza*, 764 F. Supp. 2d

55, 58 (D.D.C. 2011) ("Under Rule 403, the test is 'unfair prejudice,' not prejudice or harm to the defense.").

Moreover, Rule 403 imposes a "high barrier to justify the exclusion of relevant evidence." *United States v. Lieu*, 963 F.3d 122, 128 (D.C. Cir. 2020). Here, there is nothing "unfair" about demonstrating to the jury that Defendant knowingly and intentionally committed the crimes with which he is charged, which is exactly why the evidence is being proffered. And evidence supporting the government's theory that the revenue and employee figures submitted in the second EIDL application and in the PPP application were inflated and materially false is highly probative of Defendant's state of mind, plan, and absence of mistake as to the charged Wire Fraud scheme, the elements of which will require the government to prove that Defendant acted knowingly and with intent to defraud.

As noted above, in the context of Rule 404(b), "the danger of unfair prejudice [is] minimal" where the other acts evidence adds "no emotional or other pejorative emphasis not already introduced" by the evidence of the charged crimes themselves. *Straker*, 800 F.3d at 591. Here, evidence that Defendant submitted an earlier uncharged EIDL application is of essentially the same nature as the charged conduct—submitting loan applications seeking government funds—and therefore "d[oes] not involve conduct any more sensational or disturbing than the other conduct attributed to the defendant." *Bell*, 795 F.3d at 99-100. Nor does the filing of tax returns (or the failure to do so) that are inconsistent with the revenue and employee figures submitted in the charged loan applications threaten to unduly enflame the jury. Moreover, even assuming there was a danger of unfair prejudice to Defendant (there is not), the Court could instruct the jury as to the limited purpose of the evidence. *See United States v. Crowder*, 141 F.3d 1202, 1210 (D.C. Cir.

1998); *see also United States v. Long*, 328 F.3d 655, 662 (D.C. Cir. 2003) ("[L]imiting instructions ordinarily suffice to protect the defendant's interests.").

B. Intrinsic Evidence

Finally, while the indictment puts Defendant on notice that he is charged with violating 18 U.S.C. § 1343 for (1) on July 8, 2020, submitting a fraudulent EIDL application, and (2) on April 22, 2021, submitting a fraudulent PPP loan application, *see* ECF No. 17, evidence concerning Defendant's other actions listed in the indictment is still admissible at trial as intrinsic evidence relevant to the charged scheme.

Evidence that is "intrinsic" to the crime charged is not subject to the limitations of Rule 404(b) because, by its very nature, it does not involve "other crimes, wrongs, or acts," and thus there is no concern that it might be used as improper character evidence. *Bowie*, 232 F.3d at 927. As the D.C. Circuit has explained, "[g]enerally intrinsic evidence includes 'act[s] that [are] part of the charged offense' or 'some uncharged acts performed contemporaneously with the charged crime … if they facilitate the commission of the charged crime.'" *Bell*, 795 F.3d at 100 (quoting *Bowie*, 232 F.3d at 929); *see also United States v. Alexander*, 331 F.3d 116, 126 (D.C. Cir. 2003) ("[I]f evidence is offered as direct evidence of a fact in issue, not as circumstantial evidence requiring an inference regarding the character of the accused, it is properly considered intrinsic.") (internal quotations omitted); *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996) ("[A]cts are intrinsic when they are inextricably intertwined or [the] acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.") (internal quotations omitted). Intrinsic evidence is part of the chain of events completing the story of the crime, *United States v. Fortenberry*, 971 F.2d 717, 721 (11th Cir. 1992), evidence that is "linked together in time and circumstances" with the crime charged, *United States v. Beechum*, 582 F.2d 898, 912 (5th Cir.

1976), and evidence that is part of a "continuing pattern of criminal activity," *United States v. Toney*, 161 F.3d 404, 413 (6th Cir. 1998).

Here, acts set forth in the indictment that fall outside of the actual submission of the two loan applications that are charged as Counts One and Two, but that are nonetheless inextricably intertwined with Defendant's fraudulent scheme to get more money from the government than he was entitled to based on legitimate businesses and business expenses, are admissible as intrinsic evidence. For example, evidence that Defendant used the proceeds from the initial April 2020 EIDL loan for his personal benefit and not for any legitimate business purpose, and that the loan balance was charged off in 2023 after Defendant failed to make repayments, ECF No. 1 ¶¶ 18-19, or that the PPP loan was forgiven in 2022 after Defendant falsely represented that the loan proceeds had been used for payroll and other business expenses, when in fact he had used those proceeds for his personal benefit, *id.* ¶¶ 32, 34-36, cannot be excised from Defendant's fraudulent scheme, for which he was indicted and stands trial. Such facts and evidence are all part of a single and intertwined story. *See United States v. McClellon*, No. 2:22-CR-00073-LK, 2023 WL 9002865, at *3 (W.D. Wash. Dec. 28, 2023) (evidence that the defendant spent PPP funds for personal expenses rather than business expenses was intrinsic evidence not subject to Rule 404(b), and "it is difficult to envision the Government trying its case without evidence of how [the defendant] spent the PPP funds").

Alternatively, even if the Court were to determine that such evidence is not intrinsic, it would still be admissible pursuant to Rule 404(b) because it would be offered to show Defendant's motive, knowledge, intent, plan, and absence of mistake in carrying out his scheme to submit fraudulent EIDL and PPP loan applications for his fictitious transportation business, "Cortney Merritts," to obtain funds that he was not entitled to and that he used for personal gain.

CONCLUSION

The proffered evidence pertaining to Defendant's April 2020 EIDL loan application and his tax filings, or lack thereof, during the relevant time period is admissible under Federal Rule of Evidence 404(b). The evidence is highly probative of Defendant's motive, knowledge, intent, plan, and absence of mistake as to the charged fraud scheme. The evidence is also no more inflammatory than the charged crimes themselves, ensuring there would be no unfair prejudice from its use at trial. Moreover, evidence concerning the forgiveness of Defendant's EIDL and PPP loans, and how he spent the proceeds from those loans, is admissible as intrinsic evidence, or alternatively as other crimes evidence pursuant to Rule 404(b).

WHEREFORE, the government respectfully requests that the Court allow the introduction of the aforementioned evidence at trial.

Respectfully submitted,

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