IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff

v.

BRYAN J. SEVERSON,

Defendant.

ORDER

07-CR-74-C

The grand jury has returned a 28-count indictment against defendant Bryan J. Severson based on his alleged participation in the collapse of the First National Bank of Blanchardville (FNBB). Before the court are defendant's motion to sever Counts 20, 24, 25 and 28, motion for a bill of particulars, and motion to dismiss ten of these charges on the ground of multiplicity (dkts. ##13-15). The government opposes all three motions. See Gov't Resp., dkt. #23. For the reasons stated below, I am denying all three of defendant's motions.

A. Severing Counts 20, 24, 25 and 28

Defendant claims that these four counts are misjoined to the others, in violation of Fed. R. Crim. P. 8; in the alternative, he seeks relief from prejudicial joinder under Fed. R. Crim. P. 14. Most of the charges in the indictment allege that Severson aided and abetted

bank fraud and money laundering by the former president of FNBB. Defendant contends that counts 20, 24, 25 and 28 do not belong in this group because they arise out of two different loans defendant used to purchase his own home, and thus are not part of the larger alleged bank fraud scheme related primarily to defendant's businesses. See Brf. in Support, dkt. #20, at 2-3. The government does not deny that counts 20, 24, 25 and 28 arise out of personal loans associated with defendant's home, but it alleges that these loans were part of the continuing pattern of conduct relating to the misapplication of funds from FNBB by its president, and defendant's use of those funds.

There is no reason to sever counts 20, 24, 25 and 28 from the other 24 charges against defendant. Fed. R. Crim. P. 8(a) provides that "the indictment . . . may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are connected with or constitute parts of a common scheme or plan." It is a non sequitur for defendant to contend that the acts charged in these four counts are not related to the overarching bank fraud scheme simply because they involve his home mortgage. These counts are properly joined to the other counts because they allege similar conduct as part of the same scheme against the same victim during the same time frame as the other counts.

For the same reason, defendant is not entitled to severance under Rule 14, which allows relief from prejudicial joinder. There will be no prejudice to defendant from trying these four counts with the other 24. Defendant suggests that "the trial may become stagnant as it goes off on a tangent of a personal loan . . .." Dkt. #20 at 2. This concern

incorrectly assumes that the personal loan is tangential to the rest of the charged scheme. To the contrary, defendant's alleged conduct regarding these loans appears to be part and parcel of the overarching bank fraud scheme. The fact that a different set of witnesses may testify about these transactions is of no moment and hardly threatens to stagnate this week-long trial. There is no reason to sever any of the charges.

B. Bill of Particulars

Pursuant to Fed. R. Crim. P., defendant has asked the government to provide these particulars in a bill:

Count 1, ¶ 6: Identify all checks that were NSF;

Count 1, ¶ 7: Identify the false financial statements;

Count 1, ¶ 8: Identify all signed loan documents in blank that defendant is alleged to have written; and

Count 1, ¶ 8: Identify all back-dated false loan notes in defendant's loan histories.

Dkt. #74.

Defendant acknowledges that bills of particular ordinarily are not provided for this sort of information, but expresses concern that he cannot ascertain the scope of the government's charge from the voluminous information disclosed to him, particularly in the absence of sufficiently detailed FBI reports, and in the absence of genuine open file disclosure from the government. Brf. in Support, dkt. #21, at 1-2.

The government responds first by noting this circuit's antipathy toward bills of particulars, United States v. Fassnacht, 332 F.3d 440, 447 (7th Cir. 2003), then by outlining the extraordinary lengths to which it has gone to make its case accessible and understandable to defendant and his attorney: contrary to its usual practice, the government drafted a speaking indictment, it now has provided virtually open file discovery (only one report has not been disclosed and its disclosure is imminent) and it has provided defendant the materials in a logically organized fashion accompanied by an inventory. Gov't. Response, dkt. #23, at 1-3. The government contends that it has no obligation to outline for defendant its theory of prosecution, and if defendant is under time pressure, the remedy is a motion for a continuance rather than a bill of particulars. Id. at 3-4.

The government is correct. The Court of Appeals for the Seventh Circuit disfavors bills of particulars, deeming them unnecessary whenever the indictment sets forth the elements of the offense charged, the time and place of the accused's conduct that constituted a violation, and a citation to the statutes violated. Fassnacht, 332 F.3d at 446-47. Because every valid indictment contains this information, it is difficult to envisage a circumstance in which a defendant in this circuit would be entitled to a bill.

In any event, a bill of particulars is not designed to provide a defendant with a detailed disclosure of the government's witnesses, legal theories or evidentiary detail. Wong Tai v. United States, 273 U.S. 77, 82 (1927). The Court of Appeals for the Seventh Circuit has hewn to this policy for the last quarter-century. "The test for whether a bill of particulars

is necessary is 'whether the indictment sets forth the elements of the *offense charged* and sufficiently apprises the defendant of the *charges* to enable him to prepare for trial." United States v. Kendall, 665 F.2d 126, 134 (7th Cir. 1981), (quoting United States v. Roya, 574 F.2d 386, 391 (7th Cir. 1978) (emphasis in original). The defendant has no right, under the guise of a bill of particulars, to force the government to reveal the details of how it plans to prove its case. United States v. Glecier, 923 F.2d 496, 502 (7th Cir. 1991). As the court states in Kendall, 665 F.2d at 135. "It is established that a defendant is not entitled to know all the *evidence* the government intends to produce, but only the *theory* of the government's case." (Emphasis in original.) It is appropriate for the court to look at post-indictment discovery to determine whether a bill of particulars is required. United States v. Canino, 949 F.2d 928, 949 (7th Cir. 1991) (a bill of particulars is not necessary where the information is available in some other satisfactory form). When the grand jury returns a "speaking" indictment, there is less need for a bill of particulars. Glecier, 923 F.2d at 502.

However helpful defendant might find a bill of particulars in this prosecution, the government is not obliged to provide one. The government has provided more information than is required of it and is poised to provide the rest of its information. This court will not freeze the government's case with an unnecessary bill.

C. Multiplicity of the Indictment

Defendant contends that the grand jury engaged in an unconstitutional charging frenzy by leveling three different charges against each of five discrete incidents, thereby turning five charges into fifteen in violation of the proscription against multiplicity. Dkt. #15. The government responds that under the test of Blockburger v. United States, 284 U.S. 299 (1932), none of the charges against defendant is multiplicitous. The government is correct.

The Supreme Court framed the test for multiplicity in Blockburger::

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not.

Id. at 304.

Although the Court briefly endorsed a transactional codicil to this test, see Grady v. Corbin, 495 U.S. 508, 521-22 (1990), within three years the Court abandoned this position and returned to Blockburger's elements-only test, see United States v. Dixon, 509 U.S. 688, 711-12 (1993); see also United States v. Hatchett, 245 F.3d 625, 630-32 and 642 (7th Cir. 2001) (government may charge one cocaine transaction as two felonies: distribution to the buyer and aiding and abetting the buyer's re-distribution).

In defendant's case, the grand jury has charged that each of the five transactions violated 18 U.S.C. §§ 646, 1344, and 1957. The court already has provided draft jury instructions to the parties that include elements of the offense for each of these three statutes. Although these draft elements are subject to change after the parties provide their input, they clearly establish that each of the charged statutes contains at least one element that the others do not:

Elements of Bank Fraud

> (1) There was a scheme to defraud First National Bank of Blanchardville, by means of false representations or statements as charged in the count that you are considering;
>
> (2) The defendant aided and abetted Mark Hardyman execute this scheme in the manner stated in the count that you are considering;
>
> (3) The defendant did so knowingly and with the intent to defraud; and
>
> (4) At the time of the charged offense the deposits of First National Bank of Blanchardville were insured by the Federal Deposit Insurance Corporation.

Dkt. #25 at 15-16

Elements of Misapplication of Bank Funds

> (1) At the time of the offense charged in the count you are considering, Mark R. Hardyman was an officer of First National Bank of Blanchardville;

(2) The deposits of First National Bank of Blanchardville were insured by the Federal Deposit Insurance Company;

(3) Hardyman used his position as an officer willfully to misapply money belonging to the bank or entrusted to its care;

(4) Hardyman did so with the intent to defraud the bank;

(5) The amount of the money willfully misapplied exceeded $1000; and

(6) Defendant knowingly aided and abetted this willful misapplication of bank money.

Id at 18-19

Elements of Unlawful Transactions (Money Laundering)

(1) Mark R. Hardyman engaged in a monetary transaction;

(2) The defendant knew that this transaction involved criminally derived property;

(3) The property had a value greater than $10,000;

(4) The property was derived from bank fraud or misappropriation of bank funds;

(5) The transaction occurred in the United States; and

(6) Defendant knowingly aided and abetted this unlawful monetary transaction.

Id at 22.

Because none of these charges has coterminous elements, they do not violate the rule against multiplicity and defendant is not entitled to have any of them dismissed.

ORDER

It is ORDERED that defendant Bryan J. Severson's motion to sever charges, for a bill of particulars, and to dismiss counts from the indictment are DENIED.

Entered this 14th day of September, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge