

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Case No. 08-00026-04-CR-W-FJG
)
 CHRISTOPHER L. ELDER,)
)
 Defendant.)

ORDER

This matter is currently before the Court on Defendant Elder's Motion to Strike Paragraphs One Through Seven From the Indictment on Grounds That the Paragraphs are Surplusage and a Generic Statement of Law That [is] More Properly Addressed in Jury Instructions (doc #23). For the reasons set forth below, this motion is denied.

Paragraphs One through Seven of the indictment provide as follows:

Controlled Substances Act

1. The Controlled Substances Act (CSA) and the Code of Federal Regulations (CFR) govern the manufacture, distribution and dispensing of controlled substances in the United States.

2. Under federal law, a physician can only issue a prescription for a controlled substance if it is issued for a legitimate medical purpose, and in the usual course of the physician's professional practice. A prescription that does not meet these requirements is an invalid prescription. "An order purporting to be a prescription, issued not in the usual course of professional treatment ... is not a prescription within the meaning and intent of the CSA and the person knowingly filling such a purported prescription, as well as the person issuing it shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." 21 C.F.R. § 1306.04(a).

3. This regulatory framework places a similar burden on pharmacists. While the responsibility for the proper prescribing and dispensing of controlled substances rested initially with the physician, the regulation imposes a "corresponding responsibility" upon the pharmacist who fills the prescription. 21 C.F.R. § 1306.04(a).

4. The CSA separates controlled substances into five drug schedules – Schedules I, II, III, IV, and V – based upon the substances' potential for abuse, among other things. Abuse of Schedule III controlled substances may lead to moderate or low physical dependence or high psychological dependence. Abuse of

Schedule IV and V controlled substances may lead to more limited physical dependence or psychological dependence compared with the drugs or other substances in Schedule III. 21 U.S.C. § 812.

Charged Controlled Substances

5. Hydrocodone is the generic name for a prescription painkiller. Drug products containing hydrocodone are classified under the CSA as Schedule III controlled substances, based on their potential for abuse and physical and psychological dependence. When hydrocodone is legally prescribed for a legitimate medical purpose, it is typically used to combat acute, severe pain under the careful supervision of a treating physician. Accordingly, the prescription is usually for a modest number of pills to be taken over a short period of time. Lorcet is a brand name for a Schedule III controlled substance containing hydrocodone. Dosage units are normally expressed in milligrams with the first number being hydrocodone and the second number being Acetaminophen: i.e., a drug prescribed as Lorcet 10/650 contains 10 milligrams of hydrocodone and 650 milligrams of Acetaminophen; and a drug prescribed as Lortab 10/500 contains 10 milligrams of hydrocodone and 500 milligrams of Acetaminophen.

6. Alprazolam, more commonly referred to by one of its brand names, Xanax, is the generic name for an addictive prescription sedative and anti-anxiety agent that is classified as a Schedule[] IV controlled substance.

7. Promethazine with codeine, the generic name for a Schedule V narcotic sometimes branded as Phenergan with Codeine, is used for the temporary relief of coughs and upper respiratory symptoms associated with allergy or common cold. A commonly known substance which contains codeine in liquid form is promethazine with codeine syrup.

(Indictment at 2-3)

Defendant Elder makes the following argument in support of his motion to strike surplusage:

The first seven paragraphs of the indictment discuss certain provisions of the Code of Federal Regulations and provide a generic description of those provisions and also a description of brand names of certain drugs. The paragraphs contain vague terms such as “usual course of a physician’s practice”; “usual course of ... treatment”; “typically used”; “commonly referred to”; and, “commonly known [as].” No statements contained in these paragraphs constitute elements of the offense. The paragraphs will be confusing and potentially misleading, to the jury and are not properly drafted clear statements of the law. The information contained in these paragraphs should be addressed in jury instructions if applicable at all.

(Defendant Elder’s Motion to Strike Paragraphs One Through Seven From the Indictment on Grounds That the Paragraphs are Surplusage and a Generic Statement of Law That [is] More Properly Addressed in Jury Instructions (doc #23) at 1)

The Government responds that the challenged language should not be stricken as surplusage

because it is legally relevant and because it is not inflammatory or prejudicial. (Government's Response to Defendant Elder's Motion to Strike Surplusage (doc #46) at 2-3) Further, the challenged language provides important background information that is essential to the jury's understanding of the charges contained in the indictment. (Id. at 3)

Rule 7(c)(1) of the Federal Rules of Criminal Procedure states that “[t]he indictment ... must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Rule 7(d) states that the court, on motion of the defendant, may strike surplusage from the indictment. A motion to strike surplusage from an indictment is addressed to the sound discretion of the district court and should be granted only where it is clear that the allegations at issue are not relevant to the charge made or contain inflammatory and prejudicial matter. See United States v. Michel-Galaviz, 415 F.3d 946, 948 (8th Cir. 2005); United States v. Figueroa, 900 F.2d 1211, 1218 (8th Cir.), cert. denied, 496 U.S. 942 (1990); Dranow v. United States, 307 F.2d 545, 558 (8th Cir. 1962). “Motions to strike surplusage are not granted lightly, and carry a significant burden of persuasion.” United States v. Schraud, 2007 WL 4289660, *8 (E.D. Mo. Dec. 4, 2007). “In cases of factual and legal complexity, background information is particularly helpful for providing context to the alleged criminal conduct.” Id. See also United States v. Climatemp, Inc., 482 F. Supp. 376, 391-92 (N.D. Ill. 1979)(“There is nothing prejudicial about those portions [of the indictment which give background about the sheet metal industry in general and in Chicago in particular], and they are indeed relevant to forming an understanding about the nature of this action.”), aff'd, 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).

Paragraphs One through Seven of the indictment provide relevant background to the charges against defendant Elder. While defendant Elder argues that terms such as “usual course of a physician's practice” and “usual course of ... treatment” contained within these paragraphs are vague, these terms come directly from the Code of Federal Regulations.¹ The background

¹(See 21 C.F.R. § 1306.04 for the terms “usual course of his professional practice” and “usual course of professional treatment.”)

