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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 08-00026-03/04-CR-W-FJG
	)	
TROY R. SOLOMON and	)	
CHRISTOPHER L. ELDER,	)	
	)	
Defendants.	)	

UNITED STATES' SUGGESTIONS IN OPPOSITION TO DEFENDANT SOLOMON'S AND ELDER'S MOTIONS FOR JUDGMENT OF ACQUITTAL PURSUANT TO FED. R. CRIM P. 29, OR IN THE ALTERNATIVE MOTIONS FOR NEW TRIAL PURSUANT TO FED. R. CRIM. P. 33

The United States of America provides the following suggestions in opposition to defendant Solomon's and defendant Elder's motions for judgment of acquittal or, in the alternative, for a new trial :[1]

Suggestions in Opposition

I. The evidence introduced at trial was sufficient to support the jury's guilty verdicts as to both defendant Solomon and defendant Elder.

A. The legal standard for sufficiency.

A motion for judgment of acquittal based upon sufficiency of the evidence should be denied if the record, "viewed most favorably to the government, contains substantial evidence supporting the jury's verdict, meaning evidence sufficient to prove the elements of the crime beyond a reasonable doubt." *United States v. Hodge*, 594 F.3d 614, 617-18 (8th Cir.), *cert. denied* __ U.S. __, 130 S.Ct. 3401 (2010).

[1] The United States has submitted a single pleading in response to motions by both defendants in part because defendant Elder adopted the arguments made by defendant Solomon (although some points made by defendant Solomon have no application to defendant Elder).

B. Sufficient evidence supported the conclusion that the drugs were dispensed other than for a legitimate medical purpose and not in the course of professional practice.

Sufficient evidence in the record supported the jury's determination that the drugs in this case were prescribed other than for a legitimate medical purpose and not in the course of professional practice, and that the drugs had been dispensed or distributed. The jury was entitled to render their verdicts based upon all of the evidence in the record, not solely the testimony of Dr. Morgan, the government's medical expert. The totality of the evidence in the record established that all of the prescriptions written in Texas and filled at the Medicine Shoppe in Belton, Missouri, whether written by Dr. Elder or by Dr. Okose, were fictitious, in that they were written without the patient's knowledge or consent, and the drugs were diverted and never provided to the patients for whom the prescriptions had ostensibly been written. Consequently, the only inference possible is that these prescriptions were, by definition, illegitimate and not written in the course of professional practice.

The arguments made by the defendants appear to assume that expert testimony is necessary to support a finding that prescriptions were not written for a legitimate purpose. In fact, "expert testimony is not always required in order to show that a physician is acting for other than proper medical purposes [in violation of § 841]." *United States v. Armstrong*, 550 F.3d 382, 388-89 (5th Cir. 2008) (quoting *United States v. Chin*, 795 F.2d 496, 503 (5th Cir. 1986). The *Armstrong* Court explained that:

> While expert testimony may be both permissible and useful, a jury can reasonably find that a doctor prescribed controlled substances not in the usual course of professional practice or for other than a legitimate medical purpose from adequate lay witness evidence surrounding the facts and circumstances of the prescriptions. *United States v. Rogers*, 609 F.2d 834, 839 (5th Cir.1980). There

> are § 841 cases in which the trier of fact does not need outside, specialized knowledge to understand the evidence or determine the facts. *See United States v. Word*, 806 F.2d 658, 663–64 (6th Cir.1986) (finding that expert testimony about the usual course of professional conduct and legitimate medical purposes may help a jury, it was not necessary on the facts of the case on appeal); *United States v. Smurthwaite*, 590 F.2d 889, 892 (10th Cir.1979) (finding expert testimony unnecessary to prove prescriptions were outside of professional practice where evidence included visits less than five minutes in length, charging patients per prescriptions, little or no physical examination of patients at initial or follow-up visits, and defendant had some knowledge that prescriptions pills were used for parties rather than weight-loss); *United States v. Larson*, 507 F.2d 385, 387 (9th Cir.1974) (similar). Jurors have had a wide variety of their own experiences in doctors' care over their lives, thus and expert testimony is not necessarily required for jurors to rationally conclude that seeing patients for as little as two or three minutes before prescribing powerful narcotics is not in the usual course of professional conduct.

Id. at 389 (footnotes omitted).

In *Armstrong* itself, the Court concluded that no expert testimony was needed where the government's evidence included a number of factors including, but not limited to, an extremely high volume of patients seen, phony preprinted medical comments placed in files, a lack of meaningful physical examination and documentation, and a cash-only payment policy. *Id.* at 389-90.

The evidence against Solomon and Elder irrefutably established that the prescriptions filled by the Medicine Shoppe for Elder and Okose had no legitimacy whatsoever, as they were not written for any patient's actual medical treatment, but instead were false prescriptions written using patient identity information purloined from various sources. Dr. Morgan's testimony underscored this conclusion and assisted the jury in understanding the evidence.

The evidence in this case included numerous indications that the prescriptions written were fictitious. These indications included, but were not limited to, the following:

- The 544 prescriptions written in this case by defendant Elder were supposedly for patients of South Texas Wellness Center. However, not a single medical file for any of these patients could be located in response to a grand jury subpoena (Testimony of Pleshette Johnson and Judi Watterson). In about 2006, Elder told Pleshette Johnson that he had taken the files subpoenaed by the government (about 100 of the 544) and placed them in his truck, where they had later burned in a fire. However, Elder later told the Texas Medical Board in a letter dated April 15, 2008, that he had never treated the six patients named in the government's indictment and had no records for them (GE[2] 1221). Dr. Morgan testified that the practice of physicians is to create and maintain medical records for the patients they treat, particularly where, as here, the physician is prescribing controlled medications.
- Two of the patients for whom Elder wrote prescriptions had died before the supposed date of their examination by Elder (GE 5.1, 5.2, 6.1, 6.2, 6.3, 43.10, 43.16). A third person for whom Elder had prescribed, Dolores Cooks, testified at trial that she had never been a patient of Elder or of South Texas Wellness Center, that she had never seen the prescription written in her name, and that she did not use the pain medication supposedly prescribed for her by Elder (GE 37.13, 37.14, 1188.8). A number of the prescriptions contained invalid address information (GE 1.1, 1.2, 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 1172). In

[2] "GE" is short for "Government Exhibit."

some cases, the same patient identity was used for different prescribing doctors (GE 35.67 (Botto) and GE 37.64 (Elder)).

- One prescription listed the address of 3558 Sunforest Drive, Houston, Texas, a house owned by defendant Solomon and occupied by Delmon Johnson and Phillip Parker (GE 37.66, 37.67, 1185).
- Dr. Morgan testified that is would be unusual for a physician to prescribe both hydrocodone and cough syrup containing codeine for the same patient.
- Sheets of patient name and address information for the Elder prescriptions were faxed from Solomon's home FAX machine to the Medicine Shoppe in Belton, Missouri. In some cases, Solomon mailed stacks of photocopied driver's licenses to the Medicine Shoppe. These sheets were organized by drug, suggesting that the names were provided to Elder by Solomon in order to write phony prescriptions to obtain specific drugs at specific times (GE 43.1, 47.1, 49, 51.1, 51.07). For example, the first set of prescriptions from Elder, filled about August 17, 2004, contained 15 prescriptions for cough syrup with codeine, and the names for these prescriptions are grouped together on the sheets sent to Missouri. The next six sets of prescriptions contain none for codeine cough syrup, but then the last two sets, filled October 19, 2004, and October 26, 2004, suddenly contain 14 and 26 such prescriptions, respectively. Such a pattern cannot have resulted from actual prescribing based upon the examination of real patients, which would have produced a random distribution of such prescriptions. Moreover, Elder told DEA investigators that he did not prescribe cough syrup with codeine to any patients.

- In addition, the sheets sent from Solomon to the Medicine Shoppe contained different handwriting, some appearing to be Solomon's but other handwriting clearly not Solomon's or Elder's. This pattern suggests that Solomon procured patient identity information from a variety of sources, then providing the names to Elder for the writing of the false prescriptions in those names.
- Elder had access to South Texas Wellness Center prescription pads and he sometimes claimed to have misplaced pads, which contained 50 sheets per pad. Elder saw very few patients per day at South Texas.
- Solomon paid for the Medicine Shoppe prescriptions by sending large amounts of U.S. currency in small, used, bills, through UPS to an intermediary, Cindy Martin. Solomon counseled Martin to structure any cash deposits of the money, that is, break the deposits down into amounts less than 10,000. Martin hand delivered these funds to pharmacist Lynn Rostie after withdrawing a percentage of the money for herself.
- The drugs from prescriptions filled by the Medicine Shoppe were shipped by Rostie, using Federal Express, to South Texas Wellness Center and, later, to the address of Solomon's pharmacy, Ascencia Nutritional Pharmacy. The boxes were either picked up by Delmon Johnson or delivered to Ascencia and Solomon. The boxes were not opened at South Texas Wellness Center and the drugs were not provided to any patient of the clinic. Instead, the boxes were loaded into either Solomon's car or Philip Parker's car and driven off the premises. The boxes were addressed to Elder.
- On February 1, 2005, Elder began work at the Westfield clinic in the north part of Houston, over 30 miles away from the building that housed South Texas Wellness Center

and Ascencia. On that day, he prescribed Lortab or vicodin for 41 of the 43 patients for whom he wrote prescriptions. Elder wrote prescriptions for 45 more patients on February 2, 2005. At Elder's request, Westfield staff photocopied these prescriptions and gave Elder a copy. On February 3, 2005, Solomon faxed photocopies of all of these prescriptions to the Medicine Shoppe in Missouri. Solomon also faxed a list written in Elder's handwriting containing the address information corresponding to the Westfield patients. The original prescriptions were all filled by the patients at C&G pharmacy, which was located in the same building as Westfield.

- Ascencia Nutritional Pharmacy also filled the photocopied Westfield prescriptions. The names on some of the prescriptions were then slightly altered, and Ascencia filled the prescriptions again usually within about two weeks, even though the original prescription was for a 30-day supply (GE 409, 219, 200, 414, 229, 230).
- Beginning in late December 2004 and continuing through October 2005, Solomon submitted thousands of prescriptions written by Dr. Peter Okose to be filled by the Medicine Shoppe. Eventually these prescriptions were submitted by FAX. These prescriptions were often submitted in groups where all of the patients had the same last name (such as "Johnson"), or all of the patients' last names began with the same latter (J or T or M, for example). The prescriptions were on pre-printed pads with standard dosages of hydrocodone and alprazolam. Large groups of patients received precisely identical prescriptions for hydrocodone, alprazolam, or cough syrup with codeine. Both Frank Van Fleet, Missouri Board of Pharmacy Inspector, and Dr. Morgan, testified that

these prescribing patterns could not possibly reflect legitimate medical care for real patients, and had to be fraudulent.

- Once Ascencia Nutritional Pharmacy opened for business in late December 2004, it began filling the same pre-printed controlled substance prescriptions for Dr. Okose. The prescriptions came bundled in stacks of 100. The filled prescriptions were placed in boxes which were then placed in Solomon's or Parker's cars. However, according to Okose's office manager, Okose's clinics did not dispense medications to patients and these boxes were never delivered to the clinics.
- During the period of the conspiracy, the Medicine Shoppe in Belton filled prescriptions for over two million hydrocodone pills alone. It became one of the largest suppliers of hydrocodone in the state of Missouri. Likewise, in 2005 Ascencia became on of the largest suppliers of hydrocodone in the state of Texas despite having just opened its doors.

As can be seen from this review of just some of the evidence at trial, the evidence that these prescriptions were written not in the usual course of professional practice or for other than a legitimate medical purpose is definitive. The defendants appropriated the identities of patients from a variety of sources and wrote completely fictitious prescriptions solely for the purpose of obtaining drugs for diversion. Indeed, on cross-examination defendant Elder agreed "that for a prescription to be a legal prescription written in the ordinary course of medical practice, you have to see the patient, you have to have an examination of the patient, and you have to issue your prescription in good faith based upon signs and symptoms that the patient is presenting." (Tr. Of Elder Cross-Examination, at p. 4).

Defendant Solomon also argues that there was insufficient evidence of dispensing or distribution of a controlled substance. In fact, there was substantial evidence of both dispensing and distribution. First, however, it should be noted that on the facts of this case dispensing and distributing are quite different activities, with important ramifications for different types of charges.

As defined in jury instruction 42, dispense means "to deliver a controlled substance to an ultimate user by, or pursuant to a lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for delivery." In this case, controlled substances were dispensed when pharmacist Rostie at the Medicine Shoppe in Belton filled the prescriptions mailed or faxed to her from Texas (including those prescriptions written by Elder) and mailed the drugs back to Texas. As established above, every one of these prescriptions was written not in the usual course of professional practice or for other than a legitimate medical purpose. Consequently, the evidence supported the guilty verdicts against both defendants on the drug conspiracy and substantive drug distribution counts based simply upon the prescriptions being filled by Rostie's pharmacy; no further evidence of diversion was required.

The money laundering counts, applicable here only to Solomon, are different. For those counts, the government had to establish that the cash mailed by Solomon to Cindy Martin in Missouri was the proceeds of a specified unlawful activity, to wit, the distribution of narcotics. And in this case the evidence firmly established that predicate.

To start, the evidence discussed at length, above, shows that the millions of dosage units involved in this case did not go back to the patients named on the prescriptions, but instead were

taken to Ascencia Nutritional Pharmacy and from there were driven away by Solomon and Parker. Moreover, Solomon paid for the Missouri prescriptions in cash, in $10,000 to $15,000 amounts per payment, in small bills. Over the course of the conspiracy this cash totaled in the hundreds of thousands of dollars.

In addition, a financial analysis of Solomon's taxes and bank accounts demonstrated that in 2005 Solomon claimed $59,000 in income but deposited over $700,000 into his business account in that year, with at least $369,000 of that amount in cash (financial analyst Lori Nelson testified that the cash deposits were almost certainly more than that amount) (GE 1121). Solomon also paid $25,000 in cash to Pleshette Johnson and her mother during the conspiracy period.

This evidence provided an extremely strong circumstantial case that the controlled substances acquired by the conspiracy had been diverted and sold on the street. This conclusion was underscored by the direct evidence provided by witness Lillian Zapata. Ms. Zapata testified that she was present with Solomon when he drove to a bad part of town and met with a man there. Solomon took a box from his car and delivered it to the other person. He then told Zapata, "That's what three million dollars looks like," a comment the jury could reasonably take to mean that Solomon had just completed a sale for a large quantity of drugs.

Altogether, the jury had substantial evidence from which it could reasonably conclude that Solomon had distributed the controlled substances obtained by the conspiracy through the writing of fraudulent prescriptions, and that the cash he mailed to Cindy Martin in Missouri represented the proceeds of that illegal distribution.

II. The Court properly gave the willful blindness instruction as to defendant Solomon.

The Court properly gave a willful blindness instruction in this case as to defendant Solomon. Solomon's own testimony concerning his supposed reliance on Philip Parker's advice and instructions provided the factual predicate for the instruction.

The standards for giving a willful blindness instruction were discussed in the recent case of *United States v. Clay*, __ F.3rd __, 2010 WL 3363091 (8th Cir. Aug. 27, 2010):

> A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance." *United States v. Gruenberg*, 989 F.2d 971, 974 (8th Cir.1993) (citation and quotations omitted). "Ignorance is deliberate if the defendants were presented with facts putting them on notice criminal activity was particularly likely and yet intentionally failed to investigate." *United States v. Whitehill*, 532 F.3d 746, 751 (8th Cir.2008). Evidence is sufficient to support such an instruction "if a jury could find beyond a reasonable doubt the defendants had either actual knowledge of the illegal activity or deliberately failed to inquire about it before taking action to support the activity." *Id.* "If reasonable inferences support a finding the failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge." *Id.* (quoting *Gruenberg*, 989 F.2d at 974).

The key point here is that the evidence may establish either that the defendant had actual knowledge, or that he was willfully blind. *See also United States v. Chavez-Alvarez*, 594 F.3d 1062, 1067 (8th Cir. 2010); *United States v. Lewis*, 557 F.3d 601, 613 (8th Cir. 2009). No doubt, as Solomon notes, evidence existed from which the government could, and did, argue Solomon's direct knowledge of the scheme. But Solomon's own testimony also provided a predicate for the wilful blindness theory. Solomon testified that he relied upon the advice of Parker, an attorney, concerning the legality of submitting prescriptions to the Missouri pharmacy. Solomon testified that Parker came over to Solomon's house late at night to use Solomon's home office FAX

machine. Solomon also testified that Parker gave Solomon the UPS envelopes, already sealed, and asked Solomon to mail them, and that Parker alone took custody of the boxes of drugs received from the Medicine Shoppe.

These facts, as Solomon related them, squarely gave rise to a wilful blindness issue. Parker's alleged conduct would give to suspicions of wrongdoing in a reasonable person and Solomon's failure to inquire about Parker's odd behavior and requests could fairly be characterized as wilful blindness on Solomon's part.

In any event, even if giving the instruction was error it did not affect Solomon's substantial rights, given the overwhelming evidence of his guilt. *See United States v. Ramon Rodriguez*, 492 F.3d 930, 938 (8th Cir. 2007).

III. The Court did not commit plain error by failing *sua sponte* to give a good faith instruction applicable to defendant Elder.

The Court did not commit plain error by failing *sua sponte* to give a good faith instruction applicable to defendant Elder. Of course, Elder requested no such instruction, and no factual predicate existed to give such an instruction in any event.

A Court is not required to give a good faith instruction *sua sponte* where a defendant has not requested one. *United States v. Rice*, 449 F.3d 887, 896 (8th Cir. 2006). In this case, the jury instructions as a whole properly apprised the jury of the knowledge and *mens rea* required to find defendant Elder guilty.

In any event, no factual predicate existed in the record for a good faith instruction for defendant Elder. Elder did not testify that he relied upon anyone else's advice or counsel in his actions, in direct contrast to Solomon. Instead, Elder contended that he had written prescriptions for patients and after that had no idea that the prescriptions had been submitted to a Missouri

pharmacy. He disclaimed all knowledge of the Medicine Shoppe and any shipments of drugs from Missouri.[3] Given his own testimony and factual contentions, "good faith" played no part in his own alleged actions in this case; his criminal liability was framed entirely by his knowing participation in the conspiracy or his complete ignorance of it.

IV. The Court did not err by allowing the defense to seat a new juror after submitting their peremptory strikes.

The Court properly declined allow the defense to strike an additional juror after submission of the defense peremptory strikes.

After the parties had submitted their strikes and the jury had been seated, counsel for Solomon approached the Court and said that a clerical error had been made resulting in the seating of a juror the defense meant to strike. At that time, the defense did not identify this juror specifically. In their motion, the defense now identifies the juror as a former probation officer who went to church with AUSA Rhodes, the lead counsel for the government. The Court declined to strike the juror and seat a juror in his place.

At least one court which has faced this issue has held that counsel's error in this situation "constituted waiver of the intended use of that peremptory strike." *United States v. Thompson*, 32 F.3d 567, 1994 WL 442500 (5th Cir. Aug. 3, 1994). Here, as in *Thompson*, counsel has failed to allege any basis for believing that the seated juror had any actual bias. This juror was questioned during voir dire and indicated that he could serve as a fair and impartial juror despite going to church with Mr. Rhodes.

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[3] No doubt the Court will recall the "white box/brown box" argument made by defendant elder.

In addition, Solomon does not allege that the jurors who were actually stricken by the defendants were not intended to be stricken. That is to say, the defendants presumably struck a juror they intended to strike and they therefore received the benefit of the strike. It would be pure speculation to say that the defendants suffered any prejudice as a result of one juror being on the juror that they intended to strike versus a different juror being on the jury who they intended to strike and actually did strike.

V. The Court did not err by declining to sever the counts in this case.

Defendant Elder argues that he was prejudiced by the joinder of the money laundering counts with the drug dispensing and distribution counts. In fact, no prejudice resulted, as that evidence was admissible in any event on the drug counts and the evidence of Elder's guilt was overwhelming.

The financial evidence admitted in the case, including the mailing of cash payments to Cindy Martin in Missouri and the generation of hundreds of thousands of dollars in unexplained cash, was relevant to the drug conspiracy counts as well as to the money laundering counts. This evidence helped prove the existence of a conspiracy to create and submit fictitious prescriptions for the purpose of diverting the controlled substances for street sale. This evidence would have been admissible even if the drug conspiracy was the sole charge.

To grant a motion for severance, a defendant must show prejudice that is severe or compelling. *United States v. Jenkins-Watt*, 575 F.3d 950, 967 (8th Cir. 2009). In *Jenkins-Watt*, the court upheld joinder where the appellant had not been involved in all of the transactions in the case. *Id.*

In this case, Elder's arguments for prejudice are grossly misplaced. The jury convicted Elder because the evidence against him was overwhelming. *See id.* at 968 (no actual prejudice from joinder where there is overwhelming evidence of guilt). The evidence showed that Elder had made vastly inconsistent statements regarding whether he had actually treated the patients named on the Medicine Shoppe prescriptions, whether he had actually written those prescriptions or they had been forged, and her he had custody of those patients files. The evidence showed that Elder provided Solomon with the Westfield prescription copies and handwritten list of patient names and addresses, and that Elder had telephone contact with Solomon at the time Solomon faxed that material to Missouri. Solomon and Elder also had telephone contact on the day of the search warrants for South Texas Wellness Center and Ascencia. In addition, the evidence showed that Elder had deliberately, almost grotesquely, attempted to disguise his handwriting when asked to give a handwriting sample to government, an action which is entirely inexplicable if he were innocent.

Elder argues that the jury conflated evidence concerning other defendants with his situation, but there is no indication that is so. The government never argued that Elder had received any particular amount of payment for his services to the conspiracy, but only that such payments would have been in cash (similar to Solomon's payments to the Johnsons) and would be difficult to trace, an argument made in direct response to Elder's argument that the government had not done a financial analysis as to him. The jury's verdict was based on the overwhelming evidence of Elder's guilt, much of if from his own testimony, not on any confusion about the financial evidence.

CONCLUSION

The United States respectfully urges that the Court deny the defendants' motions..

Respectfully submitted,

Beth Phillips
United States Attorney

/s/ James Curt Bohling

By James Curt Bohling, #54574
Assistant United States Attorney
Chief, Monetary Penalties Unit

Charles Evans Whittaker Courthouse
400 East 9th Street, 5th Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on September 24, 2010, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

John R. Osgood
Commercial Federal Bank
Suite 305
740 NW Blue Parkway
Lee's Summit, Missouri 64086

Chip Lewis
2120 Welch Street
Houston, Texas 77019

/s/ James Curt Bohling

James Curt Bohling
Assistant United States Attorney