

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)
)
 Plaintiff,) **Criminal ACTION**
)
 v.) No. 07-10234-MLB
)
 STEPHEN J. SCHNEIDER and LINDA K.)
 SCHNEIDER, a/k/a LINDA ATTERBURY,)
 d/b/a SCHNEIDER MEDICAL CLINIC,)
)
 Defendants.)
_____)

MEMORANDUM AND ORDER

This case comes before the court on the following motions:

- 1) The government's motion in limine (Doc. 253) and defendants' response (Doc. 292);
- 2) Defendants' objections to the government's exhibits (Doc. 255) and the government's response (Doc. 270);
- 3) Defendants' motion in limine to preclude evidence (Doc. 262), the government's response (Doc. 283) and defendants' reply (Doc. 303);
- 4) Defendants' motion in limine to include evidence (Doc. 264), the government's response (Doc. 282) and defendants' reply (Doc. 302); and,
- 5) Defendants' motion to allow the jury to visit the clinic (Doc. 300) and the government's response (Doc. 304).

The court held a hearing on these motions on January 26, 2009. This order summarizes the court's oral rulings that were made during the hearing and, in addition, rules on matters that it took under advisement.

Analysis

To the extent it can with the information before it, the court will briefly rule on each issue. The court cautions the parties, however, that nothing in this order will preclude the admissibility of the excluded evidence if it otherwise becomes relevant at trial. See Turley v. State Farm Mut. Ins. Co., 944 F.2d 669, 673 (10th Cir. 1991) ("The better practice would seem to be that evidence of this nature . . . should await development of the trial itself.").

I. Government's Motion in Limine (Doc. 253)

A. Character Witnesses

Each defendant is limited to two character witnesses.

B. Exculpatory Hearsay

The government seeks to exclude any exculpatory statements made by defendants. Generally, this evidence is inadmissible hearsay. See United States v. Savaiano, 843 F.2d 1280, 1298-99 (10th Cir. 1988). The court, however, cannot rule on each statement as they have not been identified.

C. Good Acts

Defendants are entitled to put on evidence that the clinic was a legitimate operation and that they were treating patients accordingly.

D. Defendants' Religion

Defendants have failed to cite any authority to support their argument that this evidence is admissible. The government's motion is sustained.

E. Jury Nullification

Defendants will not attempt to introduce jury nullification

evidence or arguments.

F. The DEA FAQ

The government asserts that this document is inadmissible. Defendants claimed during the hearing that the document is not being offered for the truth of the matter and that the court can take judicial notice under Fed. R. Evid. 201(b). The court immediately held a Rule 201(e) hearing with respect to the FAQ documents.¹ Defendants argued that the FAQ was an adjudicative fact that the court could take judicial notice of. Rule 201(b) states that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." "Judicial notice is appropriate where a matter is 'verifiable with certainty.'" York v. Am. Tel. & Tel. Co., 95 F.3d 948, 958 (10th Cir. 1996). "[T]he effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and, in effect, directing a verdict against him as to the fact noticed." United States v. Boyd, 289 F.3d 1254, 1258 (10th Cir. 2002). "Judicial notice is when the judge recognizes the truth of certain facts, which from their nature are not properly the subject

¹ There are several FAQ-related documents. FAQ stands for Frequently Asked Questions. The original FAQ was published in August 2004 as a paper entitled Prescription Pain Medications. It was "supported by" the Drug Enforcement Administration and two non-governmental organizations. It was not published in the Federal Register. At least four DEA "Notices" pertaining to the original FAQ were subsequently published in the Federal Register in 2004, 2005 and 2006. 69 FR 67170-01, 70 FR 2883-01, 70 FR 50408-02 and 71 FR 52716-01.

of testimony, or which are universally regarded as established by common knowledge." Meredith v. Beech Aircraft Corp., 18 F.3d 890, 895 (10th Cir. 1999)(footnote omitted).

Defendants have not established that the contents of the FAQ are not subject to reasonable dispute. The DEA has publicly stated in subsequent published "Notices" that the original FAQ has misstatements. If a document is acknowledged by its sponsoring agency to have misstatements it could not conceivably be considered to contain facts which cannot be reasonably questioned. The court declines to take judicial notice of the original FAQ.

The court will not rule on the admissibility of the original FAQ at this time, which is dependent on defendants laying a proper foundation and otherwise establishing its relevance. Defendants have conceded that if the original FAQ is admissible, so too are the Federal Register Notices.

G. Criminal Convictions older than Ten Years

Defendants have not addressed this motion. The government's motion is sustained.

II. Defendants' Objections to the Government's Exhibits (Doc. 255)

A. Photos of Patients

Use of Driver's License photographs to identify the patients is appropriate but probably unnecessary. The court will rule on the photographs if they are offered at trial.

B. Summary Charts, Summary Evidence, Expert Exhibits, Actiq Charts

The court will rule on these exhibits during trial.

C. Class Bias

The exhibits are admissible as they are directly relevant to the crimes charged. Defendants' objection is overruled.

D. Other Crimes

This evidence is not admissible unless defendant Linda Schneider testifies.

E. Cumulative Exhibits

Defendants will raise these objections during trial.

III. Defendants' Motion in Limine (Doc. 262)

A. Wealth Bias

The court has already ruled that this evidence is admissible, but not for the purpose of proving "wealth bias" as the court understands that term.

B. Patient Deaths

Defendants' seek to limit the admission of patient deaths under Rule 403. Defendants assert that complexity of defending a case in which defendants are charged with over sixty alleged deaths is overwhelming and nearly impossible.

The court finds under Rule 403(b), that the probative value of the evidence of over sixty deaths is substantially outweighed by confusion of issues and the potential to mislead the jury. Moreover, the evidence of the large number of deaths will certainly cause delay and result in a needless presentation of cumulative evidence. The government may present evidence of the three charged deaths in counts 2, 3 and 4. The government may also present evidence of Kandice B.'s death in order to prove the allegations in count 5.

C. Red Flags

The court already determined that the experts' testimony

pertaining to "red flags" is admissible and defendants' concerns are "more appropriate for cross examination." (Doc. 209 at 13). The testimony is relevant to the crimes charged and its probative value outweighs any potential prejudice. Defendants' motion to exclude this testimony is overruled.

D. Mental State

Evidence regarding defendants' mental state is not admissible under Rule 704(b).

E. Legal Conclusions

Defendants assert that the terms "legitimate medical purpose" and "usual course of professional practice" should not be used by the experts because they are an ultimate issue for the jury to decide. Defendants cite United States v. Chube II, 538 F.3d 693 (7th Cir. 2008) to support their opinion that Dr. Parran's anticipated testimony is inappropriate. However, the Chube panel found that Dr. Parran's testimony regarding legitimate medical purpose was permissible:

THE WITNESS: I believe I recall it pretty well.... It is never appropriate to write a prescription for the spouse of a patient when that prescription is intended for the patient; even more so when it's a Schedule II narcotic.... It's not consistent with the usual course of medical practice.

Q. And that would not be for a legitimate medical purpose, correct?

A. Correct.

THE COURT: Counsel, this is being asked regarding standard of care, not legality?

[PROSECUTION]: Absolutely, your Honor.

Thus, what the jury heard was (1) an opinion from the expert that no legitimate medical purpose existed for the prescription in question; and (2) a clarification from the court that the "standard of care" is an issue distinct from the question of "legality." The former was just what defense counsel, during a sidebar immediately preceding this exchange, had argued that Dr. Parran could testify to,

and the latter reflected the distinction that the Doctors now claim was not properly drawn during the trial. We are satisfied that the district court did not abuse its discretion in permitting this line of questioning and that a properly instructed jury could keep the relevant concepts straight.

Chube II, 538 F.3d at 698-99.

The Eighth Circuit also found that Dr. Parran could testify as to whether a prescription was issued for a legitimate medical purpose. See United States v. Katz, 445 F.3d 1023, 1031-31 (8th Cir. 2006). The court held that a "court can allow opinion testimony if the expert's specialized knowledge is helpful to the jury to understand the evidence or determine a fact in issue, even if the opinion embraces an ultimate issue to be decided by the jury." Id. at 1032. Moreover, in United States v. Armstrong, 550 F.3d 382, 390 (5th Cir. 2008), the court discussed the defendant's experts offering opinions that the defendant was not acting outside the scope of professional pain management practice. In a footnote, the court stated that "[a]lthough an expert's opinion as to an ultimate fact issue may be helpful, the jury was instructed that it is not required to follow the opinions of the experts who testify." Id. at n. 17. The court finds that expert opinion on whether defendant Schneider issued prescriptions for a legitimate medical purpose and acted within the scope of professional practice would be helpful to the jury. The court will instruct the jury that it must weigh the evidence, including expert opinions, and determine whether it finds defendants have violated section 841. The testimony is not improper. See Doc. 209. Defendants may submit proposed limiting instructions for use during and at the conclusion of trial.

F. Inflammatory Rhetoric

The following terms are excluded under Fed. R. Evid. 403: "script doctor" and "pill mill." The term "narcotics delivery system" is admissible as defendants have failed to show how that term is prejudicial or improper.

G. Unqualified Witnesses, Medical Testimony from Lay Witnesses, Information Not Known to Defendants

The court will rule on the admissibility of this testimony during trial.

H. Audit Results

Defendants again state that the audit results should be excluded. Defendants cite three cases to support their argument. The cases, however, are not on point with the evidence offered by the government. Defendants' arguments regarding billing errors and complexity of the coding can be raised on cross-examination.

I. Hearsay

Because defendants have not specifically identified the testimony they seek to exclude under the hearsay rule, the court will rule on hearsay objections during trial.

J. Civil Settlements

The government responded that it does not intend to offer any evidence of the settlements. Defendants' motion is sustained.

IV. Defendants' Motion in Limine (Doc. 264)

A. Context of Clinic

The court has already ruled that defendants may put on evidence that the clinic was run professionally and legitimately.

B. "Fired" Patients, Patients who Benefitted from Treatment and

Non-Pain Patients

These witnesses may testify but defendants must provide the government with the names and contact information of the witnesses and identify supporting documents 48 hours prior to their testimony.

C. Miscellaneous Evidence

This evidence appears relevant to establish the legitimacy of the clinic.

D. Scope of Federal Investigation

Defendants have failed to establish that this evidence is relevant to the crimes charged.

E. DEA FAQ

The court has ruled on this issue.

F. Letter

The court cannot rule on the admissibility of this evidence as defendants have failed to attach the letter as an exhibit.

V. Defendants' Motion to Allow Jurors to Visit the Clinic (Doc. 300)

Defendants' motion is denied. A clinic visit would require several hours to accomplish and special transport would have to be arranged to take the jurors to and from the clinic. Defendants have failed to establish how photographs and testimony regarding the clinic will not be sufficient.

Conclusion

The government's motion in limine (Doc. 253) is granted in part and denied in part. Defendants' objections to the government's exhibits (Doc. 255) are granted in part and denied in part. Defendants' motion in limine to preclude evidence (Doc. 262) is granted in part and denied in part. Defendants' motion in limine to

include evidence (Doc. 264) is granted in part and denied in part. Defendants' motion to allow the jury to visit the clinic (Doc. 300) is denied.

IT IS SO ORDERED.

Dated this 28th day of January 2009, at Wichita, Kansas.

s/ Monti Belot

Monti L. Belot

UNITED STATES DISTRICT JUDGE