USA v. Chalhoub

2018 | Cited 0 times | E.D. Kentucky | March 23, 2018

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY

SOUTHERN DIVISION

LONDON

UNITED STATES OF AMERICA, Plaintiff, V. ANIS CHALHOUB, M.D., Defendant.

Criminal No. 6:16-cr-00023-GFVT-HAI

MEMORANDUM OPINION

& ORDER

*** *** *** *** This matter is before the Court on a number of Motions in Limine brought by both parties. [R. 98; R. 99; R. 100; R. 107.] As explained further, and for various reasons, the motions will be DENIED and GRANTED as set forth below.

I In June 2016, a Federal Grand Jury returned an Indictment against Anis Chalhoub, M.D. [R. 1.] Chalhoub was charged with one count of health care fraud according to 18 U.S.C. § 1347. [Id.] The Government alleges that, from March 2007 through July 13, 2011, Chalhoub makers in patients without Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 1 of 13 - Page ID#:

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II Motions in limine are utilized to enable more expedient trial practice by resolving particular evidentiary disputes. See Bishop v. Children's Center for Developmental Enrichment, 2011 WL 6752421, at * I (S.D. Ohio Dec. 23, 2011) (citations omitted). Many disputes are not capable of being resolved at this stage, however, because it is difficult to predict all the potential circumstances under which evidence might become valuable and admissible. See Luce v. United States, 469 U.S. 38,41 (1984). Evidence is only excluded at this stage if it is obviously inadmissible on any potential ground. Jonasson v. Lutheran Child and Family Servs., 115 F.3d 436, 440 (7th Cir. 1997). Unless that high standard is met, admissibility questions should be postponed until trial, id., meaning that denial of a motion in limine does not preclude a party from reasserting that motion during trial. Luce, 469 U.S.

at 41.

Dr. Chalhoub maintains some of the noticed evidence is inadmissible under Federal Rule of Evidence 404(b). admissible to prove a person's character in order to show that on a particular occasion the person

Fed. R. Evid. 404(b)(1). Nevertheless, the rule goes on proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake,

Fed. R. Evid. 404(b)(2). The Sixth Circuit has adopted a three-part test that courts use to decide whether to admit or exclude evidence under Rule 404(b):

First, the district court must decide whether there is sufficient evidence that the other act in question actually occurred. Second, if so, the district court must decide whether the evidence of the other act is probative of a material issue other than character. Third, if the evidence is probative of a material issue other than character, the district court must decide whether the probative value of the evidence is substantially outweighed by its potentially prejudicial effect. Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 2 of 13 - Page ID#:

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United States v. Jenkins, 345 F.3d 928, 937 (6th Cir. 2003) (emphasis in original); see also United States v. Yu Qin, 688 F.3d 257, 262 (6th Cir. 2012).

Fed. R. Evid. 404 advisory committee's note. is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of

United States v. Weinstock, 153 F.3d 272, 276 (6th Cir. 1998) (quoting United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1995)). Ultimately, this Court has broad discretion to determine whether bad acts evidence is admissible. See, e.g., United States v. Stout, 509 F.3d 796, 799 (6th Cir. 2007).

A As a preliminary matter, not all of these matters can be handled at this stage. Orders in limine which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise. Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975). Some motions to exclude evidence have been mooted and some are not fully briefed. Also, this Court cannot rule on hypothetical situations, which both parties rely on significantly in their motions. - 1 at 8.] Rumors are certainly inadmissible pursuant to the rule against hearsay. Fed. R. Evid. 802. However, in their response, the Government predictably argues that they are not seeking to here. Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 3 of 13 - Page ID#:

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Second, Chalhoub seeks to exclude testimony regarding an indicia of fraud. [R. 98-1 at 14.] The United States responded th does not intend to call a law enforcement witness for this [R. 104 at 13.] Accordingly, this issue is denied as moot. Third, Dr. Chalhoub objects to categorizing the Executive Health Resources (EHR) Review as a peer review. [R. 98- See id.] The Government denied

as moot. Fourth, Chalhoub objects to cardiac nurse Betsy Reynolds providing expert testimony during the trial. [R. 98-1 at 17.] The Uni 15.] This issue is denied as moot.

ly background. [R. 99 at 4 5.] The Defendant objects and requests this Court consider this objection in the course of trial, and this Court agrees. [R. 105 at 5.] While some potential family evidence could be irrelevant, the United States is merely speculating on what Dr. Chalhoub could introduce at trial. Without knowledge of specific evidence that would indicate it is clearly inadmissible for any purpose, the Court should defer those rulings until trial and determine those questions in the proper context. Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975); Deer & Co. v. FIMCO, Inc., 260 F.Supp.3d 830, 834 (W.D. Ky. 2017); Gresh v. Waste Services of America, Inc., 738 F.Supp.2d 702, 706 (E.D. Ky. 2010). Accordingly, this issue is denied as moot. Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 4 of 13 - Page ID#:

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Chalhoub pressured other doctors to perform medical tests. [R. 107 at 3.] Again, parties do not

detail the evidence they seek to admit and disagree as to the scope of the type of pressure Dr. Chalhoub used. Absent the surrounding evidence presented at trial, this Court declines to rule on this issue prior to trial and denies it as moot.

B -1 at 4.] In United States v. Jackson-Randolph, the Sixth Circuit noted a three-part test for determining whether the probative value of lavish lifestyle evidence outweighs the prejudicial effect of that evidence. 282 F.3d 369, 378 (6th Cir. 2002). In that case, the court found that there is other credible evidence, direct, or circumstantial, of the illegal activity; (2) the money

spent was not available to the defendant from a legitimate source; and (3) the accumulation of great wealth or extravagant spending relates to the period of Id. Despite setting forth these factors, the Sixth Circuit also recommended a case-by-case analysis, emphasizing the notion Id. (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 240 (1940)). The problem with a general rule of permitting evidence of for committing a crime is that it ignores the real possibility that the extreme or extravagant wealth or spending was made possible by legitimate means and Courts are instructed to determine whether the relevance of motive is outweighed by unfair prejudice as contemplated by Fed.R.Evid. 403 and the due process clause Jackson-Randolph, 282 F.3d at 378. Case:

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This evidence is best evaluated in the course of trial, as the analysis is case-by-case. The intend to highlight or draw attention to specific n clothing and expensive cars, unless Chalhoub somehow o 3.] The United States asserts that and expenses increased as the number of

pacemakers he installed increased, which proves the first and third elements from Jackson-Randolph, that the evidence of lavish lifestyle is directly connected to the time period of the alleged illegal activity. [See id.]

that all of See id.] The analysis therefore turns on whether this evidence of expenses tracking with income, tracking with pacemaker installation is more probative than prejudicial. At this point, the Court finds that the evidence as specifically indicated by the Government is more probative than prejudicial, as it necessarily shows the jury a requisite intent, or motive, to commit the crimes alleged by the Government. That the illegal activity caused financial gains for Chalhoub is highly relevant and, as long as the Government stays within the bounds explained in their Response, is less prejudicial than probative.

trial courts shoul

expenditures. Jackson-Randolph, 282 F.3d 369, 376 (6th Cir. 2002). However, as the Government has cabined the evidence they intend to admit, it is admissible. More specific findings will be held in the course of trial. Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 6 of 13 - Page ID#:

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he received for using certain products from a company called Bytronics. [R. 98-1 at 6.] Dr. Patil, a witness for the Government, stated that Dr. Chalhoub was taken on an exotic hunting trip in Montana by Bytronics. [Id. t will present such excluded. [R. 104 at 6.]

used to demonstrat United States v. Carter, 483 F. App'x 70, 75 (6th Cir. 2012). Though Defendant argues this evidence is prejudicial, nfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence United States v. Amr, 132 F. App'x 632, 634 35 (6th Cir. 2005) (quoting United States v. Schrock, 855 F.2d 327, 333 (6th Cir.1988)). This evidence is certainly prejudicial but seems to support a finding of fraud. If Dr. Chalhoub was installing pacemakers in order to obtain benefits, like an exotic hunting trip, then that supports the by this Court and this matter will be taken up in the course of trial.

D The Government seeks to exclude or, in testimony, who seeks to testify as an expert for Dr. Chalhoub. [R. 100 at 2.] The Government

bases much of their case on a report from Dr. Spragg, a cardiologist at Johns Hopkins University. [R. 110 at 1.] Dr. Stavens is a cardiologist at Cardiovascular Specialists, P.S.C, in Louisville, Kentucky, who based his report on seventeen (17) patients Dr. Chalhoub treated from 2000 to Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 7 of 13 - Page ID#:

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2008. The Government alleges only three of those patients overlap with the G report from Dr. Spragg. [R. 110 at 2.]

The admissibility of expert testimony is governed by Federal Rule of Evidence 702, which states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702. From Rule 702 comes a two part test for admitting expert testimony. First, is the expert qualified and the testimony reliable? And, second, is the evidence relevant and helpful to the trier of fact? See, e.g., United States v. Jones, 107 F.3d 1147, 1156 (6th Cir. 1997).

The seminal case applying the first prong of the test is Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). In that decision, the Supreme Court explained that a district court's gatekeeping responsibility is implicit in Rule 702, on a reliable founda Daubert, 509 U.S. at 597. Further,

the Supreme Court listed several specific factors to help determine the reliability of expert testimony based on scientific knowledge. See id. at 590, n. 8. These factors include whether a theory or technique can be or has been tested; whether the theory has been subjected to peer review and publication; whether there is a high known or potential error rate; whether there are certain operation standards that should have been or were followed; and whether the theory or technique is generally accepted within the scientific community. Id. at 592-94. Later, in Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the Supreme Court determined that the gatekeeping obligation and subsequent factors established in Daubert apply with equal force to non-scientific experts. Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 8 of 13 - Page ID#:

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considerable leeway in deciding in a particular case how to go about determining whether partic Kumho, 526 U.S. at 152.

United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000). The Supreme Court in Daubert referred to this See id.; Daubert, 509 U.S. at 591-93. Because validity for one purpose is not necessarily scientific validity for othe

courts must consider whether a particular expert's testimony will truly assist the trier of fact to understand the evidence in the case at hand. Daubert, 509 U.S. at 591. Notably, the Court's s not intended to supplant the adversary system or the role Allison v. McGhan Medical Corp., 184 F.3d 1300, 1311 (11th Cir. 1999). Whether or not to admit expert testimony is a matter over which the district court ultimately enjoys broad discretion. See, e.g., Tamraz v. Lincoln Elec. Co., 620 F.3d 665, 672 (6th Cir. 2010).

The Government does not argue, and this Court finds no reason in the record, that Dr. Stavens should be disqualified based on a lack of knowledge of the field. The Court reserves that determination for trial. Rather, the Government the United States v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000).

the cases used by the United States. The United States relies on United States v. Dobbs, 506 F.2d 445, 447 (5th Cir.1975), which is cited by the Sixth Circuit, holding in idence of noncriminal However, the Sixth vid would only be relevant if the Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 9 of 13 - Page ID#:

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indictment charged the defendants w United States v. Daulton, 266 F. App'x 381, 386 (6th Cir. 2008) (quoting United States v. Scarpa, 913 F.2d 993, 1011 (2d Cir.1990).); see also United States v. Garvin, 565 F.2d 519, 521 (8th Cir. 1977) (onesty in some transactions is usually irrelevant to the issue of fraud in a different transaction. However, the issue here is the existence of a criminal purpose to defraud and a scheme to defraud . . . .

Here, the Government has charged Dr. Chalhoub not with individual counts of health care fraud and not with detailed allegations of fraudulently installed pacemakers, but instead generally [f]rom on or about . . . March 2007, through at least on or about July 13, 2011, Chalhoub did devise and intend to devise a scheme and artifice to defraud and obtain Chalhoub is defending against the allegation that he constructed a scheme or artifice to defraud. Presenting evidence that he was not constructing a scheme or artifice to defraud during the same time period alleged in the indictment is relevant. Rather than excluding this evidence, instead, - examination, presentation of contrary evidence, and careful instruction on the burden of proof Daubert, 509 U.S. at 596

The Government makes a valid objection that the report is irrelevant because it covers a time period of 2000 to 2008 and covers only three Court agrees in part. The Defendant is permitted

as it pertains to the relevant time period in the indictment to present a defense against the scheme and artifice to defraud. inextricably intertwined

proof at trial. United States v. Daulton, 266 F. App'x 381, 384 (6th Cir. 2008). As for the Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 10 of 13 - Page ID#:

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ven if Dr. Stavens did not have records of the time period in which the alleged unnecessary pacemakers were installed, he can still opine on Dr. caring for specific patients that will be necessary to form their case that the pacemakers installed were not unnecessary. Further, a sampling of Cardiovascular S 2008, and did not find any deviation from the standard of care in services rendered by Chalhoub. Dr. Stavens should be allowed to testify that he, on behalf of Cardiovascular Specialists, periodically retained an independent auditor to review medical records to ensure all doctors within the practice are meeting the standard of care [R. 105 at 7.] This does not seem to be relevant or helpful to the trier of fact. See, e.g., United States v. Jones, 107 F.3d 1147, 1156 (6th Cir. 1997). The Impact audit does not seem to have occurred during the indictment period and this Court cannot determine how it is relevant. This evidence is preliminarily excluded. This Court does not make any findings as to the first element of Daubert admissibility, but only holds that

E Similarly, using the same authority at infra § II.D, there are a number of other motions to exclude evidence that can be addressed. Dr. Chalhoub will be permitted to present evidence of Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 11 of 13 - Page ID#:

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defraud as long as these patients are the same patients that the Government intends to use in their case or were during the relevant indictment period. [See R. 99 at 2.]

The converse of this conclusion also has to be true. The Government may introduce -1 at 7.] This information is inextricably intertwined with the conduct from the indictment and will only aid the jury in making its determination. This does not open the door for the Government or the Defendant to admit all types of evidence from the relevant time period. This Court only acknowledges that, as the Government has alleged a scheme or artifice to defraud, the proof allowed in will be somewhat broader than if the indictment charged individual counts.

F This Court declines to rule on whether the pacemaker installed in C.H. in 2001 is admissible, but will rule in the course of trial when more of the record can be developed. The Government argues

evidence relating to is probative of his intent, preparation, plan, kn Fed. R. Evid. 404(b)(2). [R. 102 at 2.] Simply saying it is admissible pursuant to Rule 404(b) does not make it so and without more explanation, this Court declines to rule on how this pacemaker installation is related to the indicted conduct.

III The rulings in this order are preliminary and may change in the course of trial as evidence is admitted. he district court may change its ruling at trial for whatever reason it deems appropriate. . . . The rationale is that facts may have come to the district court's attention which it did not anticipate at the time of its initial ruling. United States v. Yannott, 42 F.3d 999, 1007 (6th Cir. 1994). Accordingly, it is hereby ordered: Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 12 of 13 - Page ID#:

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1. [R. 98] is GRANTED IN PART and DENIED IN PART s explanation above; 2. s Motion in Limine [R. 99] is GRANTED IN PART and DENIED IN PART s explanation above; 3. The Stavens [R. 100] is GRANTED IN PART and DENIED IN PART, consistent with s explanation above; 4. [R. 107] is GRANTED IN PART and DENIED IN PART s explanation above; and 5. GRANTED. This the 23rd day of March, 2018. Case: 6:16-cr-00023-GFVT-HAI Doc #: 109 Filed: 03/23/18 Page: 13 of 13 - Page ID#:

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