No. 12-6097

In the United States Court of Appeals for the Tenth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ZACHARY C. WILLIAMS, DEFENDANT-APPELLANT.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HONORABLE JOE HEATON
DISTRICT JUDGE

D.C. NO. CR-10-216-HE

BRIEF OF PLAINTIFF-APPELLEE
ORAL ARGUMENT NOT REQUESTED

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Statement of Jurisdiction

The jurisdiction of the District Court was based originally on a violation of the laws of the United States. The United States District Court for the Western District of Oklahoma has jurisdiction over offenses against laws of the United States which occur in this district. 18 U.S.C. § 3231. In the Superseding Indictment, the defendant was charged with violations of Title 21, United States Code, Sections 841(a)(1), 846, and Title 18, United States Code, Section 371. (Doc. 92).

The United States Court of Appeals for the Tenth Circuit has jurisdiction to review final orders in the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 1291. This is an appeal from the judgement and commitment as to the defendant on April 12, 2012. (Doc. 366). Notice of appeal was filed by the defendant on April 13, 2012. (Doc. 365).

Statement of the Issues

1. Since it is impossible for prescription drugs to have adequate directions for use as a matter of law, did the District Court correctly

instruct the jury on exceptions that must apply under the Food Drug and Cosmetic Act in order for prescription drugs not to be misbranded?

2. Can the defendant appeal a jury instruction given for a count on which he was acquitted?

3. Did the district court correctly deny the defendant's motion to dismiss based on tribal sovereign immunity?

Statement of the Case

The defendant Zachary C. Williams ("Williams"), along with Sarah J. Garwood and Derek B. Kelley were Indicted by a Federal Grand Jury on July 7, 2010. (Doc. 1). Williams, Garwood, and Kelley were charged with conspiracy to distribute and distribution of fioricet, a controlled substance, in violation of Title 21, United States Code, §§ 841(a)(1), 846. Further, the defendants were charged with a conspiracy to introduce misbranded prescription drugs into interstate commerce in violation of the Food Drug and Cosmetic Act. Subsequently, the government filed a Superseding Information as to Sarah J. Garwood on December 1, 2010 (Doc. 67), and filed a Petition to enter plea of guilty and Plea Agreement

as to Sarah J. Garwood on December 20, 2010 (Docs. 72,73). The government dismissed Derek B. Kelley from the Indictment. (Doc. 69).

On December 8, 2010 a Superseding Indictment was filed against Zachary C. Williams, Michael Fels, Sharon L. Drew, and Health Solutions Network, LLC. (Doc. 92). The Superseding Indictment charged the defendants's with conspiracy to distribute and with distribution of fiorciet, a controlled substance, in violation of Title 21 of the United States Code. Count 2 of the Indictment charged the defendants with conspiracy to hold misbranded prescription drugs for sale after shipment in interstate commerce and to introduce into interstate commerce misbranded drugs with the intent to defraud and mislead in violation of Title 21, United States Code, Sections 331(a) and (k) and 333(a)(2). Thereafter, defendants Williams, Fels, and Drew were arraigned on the Superseding Indictment on February 4, 2011. (Docs. 110, 111, 112). Health Solutions Network was arraigned on February 14, 2011. (Doc. 120). After the denial of multiple pretrial motions filed by the defendant, Williams filed a Notice of Appeal to this Court regarding the denial of those pretrial motions. (Doc. 212). (Case No. 11-6248). This Court denied the defendant's motion

to stay proceedings in the district court, and entered an order dismissing the appeal of defendant Williams on October 25, 2011. (Doc. 266).

Subsequently, defendants Fels and Drew entered into plea agreements with the government. (Docs. 288, 293). Fels and Drew entered pleas of guilty to Superseding Informations on October 9, 2011. (Docs. 286, 291).

Jury trial then commenced against Williams and Health Solutions Network on November 14, 2011. (Doc. 295). On November 21, 2011 the jury found Williams Guilty as to Count 2 of the Superseding Indictment charging conspiracy to distribute misbranded drugs in violation of the Food Drug and Cosmetic Act, and found Williams Not Guilty on Counts 1, 3, 4, 5, and 6 of the Superseding Indictment charging conspiracy to distribute and distribution of a controlled substance. (Doc. 313). Williams was sentenced on April 6, 2012 and committed to the custody of the Bureau of Prisons for a term of 37 months on Count 2 with a term of supervised release of 2 years. (Doc 363). A Notice of Appeal was filed by Williams on April 12, 2012. (Doc 362).

Statement of Facts[1]

In February of 2009, Williams brought a proposal to the Business Committee of the Ponca Tribe of Oklahoma for an online pharmacy. (Tr., Vol. 1, pp. 63-64). The Business Committee, comprised of seven members, is the governing body of the Ponca Tribe. (Tr., Vol. 1, p. 64). A written pharmacy distribution proposal was presented to the Business Committee and introduced at trial as Exhibit 12. (Aplee. App. at 056). The proposal was from defendant Williams' company, Abaci Holdings Inc., representing that Abaci would use telemedicine and online technologies to fill prescriptions that had been transmitted electronically. Further the proposal represented that Abaci was a member of "The American Telemedicine Association and are leaders in the use of online technologies." (Aplee. App. at 058). The representation that Abaci Inc. was a member of the American Telemedicine Association was in fact false. (Tr., Vol. 3, p. 494).

[1]Citations of record in the trial transcript are designated as trial transcript, volume number, and page number "Tr.__, Vol. __, p.__" . The Appellee's Appendix is designated as "Aplee. App. at __".

Williams, Fels, and others represented to the Business Committee that there would be a licensed pharmacist on duty and physically present in the pharmacy at all times. (Tr., Vol. 1, pp 69-70, 135, 153). The Tribe's role was to enact a Pharmacy Act and to issue a license to the pharmacy doing business as White Eagle Rx. (Tr., Vol. 1, pp. 71-74, 119-121, 142). Williams and Fels brought a Pharmacy Act already drafted to the Tribe and informed them that the Act was substantially the same as that of the State of Oklahoma. (Tr., Vol. 1, pp. 71-73). The Act was adopted by the Business Committee and introduced in evidence at trial as government's Exhibit 17. (Aplee. App. at 069).

The Pharmacy Act adopted by the Ponca Tribe was replete with inconsistencies. For example, the Act called for the creation of a "Advisory" that consisted of three persons, including a pharmacist who was to be a member of the Ponca Tribe, and to be appointed by the Chief. However, there was no Chief of the Ponca Tribe; there has not been one since the 1940's. (Tr., Vol .1, pp. 73-74). Moreover, there never was a member of the Ponca Tribe that was a licensed pharmacist. (Tr., Vol. 1, p. 103). Therefore no Advisory was ever formed. (Tr., Vol. 1, pp. 74, 142).

Further, the Act adopted by the Ponca Tribe provided that a Board of Pharmacy would be created, and under the Act, it was the Board of Pharmacy that had the authority to issue a pharmacy license. Again, no Board of Pharmacy was ever created by the Ponca Tribe, and no Board of Pharmacy ever gave a license to White Eagle Rx. (Tr., Vol. 1, pp. 74, 142). Likewise, the Ponca Tribe never gave a license to any individual as a pharmacist. (Tr., Vol. 1, pp. 74-76). And Williams never informed the members of the Business Committee that he was not a pharmacist and that his other business was as the owner of an exotic dance or strip club. (Tr., Vol. 1, p. 106).

In June of 2009, Williams met with Paula Mendoza, Secretary-Treasurer of the Business Committee, and advised her that he needed a license for White Eagle Rx in order to obtain drugs for distribution. (Tr., Vol. 1, pp. 76-78). Since Mendoza did not know how to make a license, Williams either gave her an example or told her what to put in the license. The license was introduced at trial as government Exhibit 18. (Aplee. App. at 089). The license was signed by Paula Mendoza as Secretary-Treasurer and by a member of the Ponca Tax Commission by the name of

Lena Gawhega. (Tr,, Vol. 1, pp. 76-78; 108-110). There was no Pharmacy Board to issue the license, and the Tax Commission never met to authorize Gawhega to sign the license. (Tr., Vol. 1, p. 110).

With the license, Williams began operation of White Eagle Rx. Although White Eagle Rx operated on Ponca Tribal Land, it was a closed door pharmacy. (Tr., Vol. 1, pp. 18-20). The pharmacy operated out of the vacant jail of the disbanded Ponca Tribal police. (Tr., Vol. 1, p. 18). No Tribal members ever filled a prescription at While Eagle RX and indeed, no walk-in customers at all were allowed. (Tr., Vol. 1, pp. 19, 143-44). White Eagle Rx was a fulfillment pharmacy that obtained prescriptions from a website online, counted pills into a bottle, placed it in a Federal Express shipping envelope, and shipped it to a customer. (Tr., Vol. 1, p. 18).

If members of the Ponca Tribe wanted to obtain a prescription they went to a pharmacy located at the White Eagle Indian Health Clinic on Ponca Land a short distance away from White Eagle Rx. (Tr., Vol. 2, pp. 80, 184-184). The pharmacy at the White Eagle Indian Health Clinic was operated by a pharmacist licensed by the State of Oklahoma, and the

pharmacy was licensed by the State of Oklahoma. The pharmacist at that clinic, Michael Brown, later was asked to meet with the Business Committee along with Williams regarding the operation of White Eagle Rx. Brown advised the Business Committee that White Eagle Rx's operations were illegal because they were dispensing drugs without any pharmacist checking the orders. (Tr., Vol. 2, pp. 192-93). Williams, who was present, contended to the contrary to the Business Committee.

Sarah Garwood was the manager of White Eagle Rx hired by Williams. (Tr., Vol. 2, p. 269). She was hired by Williams whom she knew was not a pharmacist. In addition she was not a pharmacist and that was known to Williams. (Tr., Vol. 2, p. 274). Further she had been convicted of a state drug offense, and Williams was aware of that as well. (Tr., Vol. 2, pp. 274-75). If Garwood had problems in day-to-day operations, she would first attempt to reach Williams, and if Williams was not available, then she would contact Drew and/or Fels. Garwood described Fels and Drew as bigger bosses that helped set up White Eagle Rx. (Tr., Vol. 2, p. 273).

To fill orders, Garwood would log onto websites, get orders to dispense, and download and print labels for the bottles. (Tr., Vol. 2, pp. 275-77). Tribal employees were hired to fill the pill bottles and to fill packages for FedEx shipment. (Tr., Vol. 2, p. 275). The tribal employees received little or no training, none had any type of pharmacy license, and, in fact, they identified the pills they shipped from pictures posted on the wall. (Tr., Vol. 2, pp. 330-339; 345-349). White Eagle Rx filled 800 to 1200 prescriptions a day. (Tr., Vol. 2, p. 281). Further, over 90% of all drugs sold were tramadol, soma, or fioricet. (Tr., Vol 2, p. 284; Tr., Vol. 3, p. 496). It was undisputed at trial that tramadol, soma, and fioricet are drugs available by prescription only. (Tr., Vol. 2, p. 355; Tr., Vol. 4, p. 573).

The employees were under pressure to get out as many prescriptions as possible per day. (Tr., Vol. 2, p. 285) Orders were frequently misfilled. (Tr., Vol. 2, pp. 287-88). Misfilled pills were returned to White Eagle Rx, and, if the pills were whole, they were reused. (Tr., Vol. 2, p. 288). Further, Sarah Garwood testified that there was never a pharmacist on duty at White Eagle Rx, she never talked to a pharmacist before filling an

order, there were no video cameras operational, she never spoke to a doctor, and never spoke with a customer. (Tr., Vol. 2, pp. 290-292). Rather, Williams and Fels controlled the operations of White Eagle Rx and hired and fired all employees. (Tr., Vol. 2, p. 297). Garwood was advised not to ship any prescriptions to the State of Oklahoma because it would be illegal there, but she shipped to all 49 other states . (Tr., Vol. 2, p. 301).

The Executive Direct of the Oklahoma State Pharmacy Board, John Foust, testified that under the Oklahoma Pharmacy Act, pharmacists must be physically present when prescriptions are being dispensed at all times, and further that this was the standard of care throughout the United States. (Tr., Vol. 2, p. 361-363). He confirmed that Williams did not have a pharmacy license from the State of Oklahoma, and that White Eagle Rx was not licensed by the State of Oklahoma. (Tr., Vol. 2, pp. 352-353). In addition, in 47 of 50 states the State Boards of Pharmacy require a pharmacy to have a license in that state to ship prescription drugs into those states. (Tr., Vol. 2, p. 355). White Eagle Rx was not licensed in any state to which it shipped prescription drugs. (Tr., Vol. 3, pp. 531-32).

Foust also testified that a pharmacist has a corresponding duty to insure that a prescription is issued pursuant to a valid doctor-patient relationship. (Tr., Vol. 2, p. 353). And the fact that the prescription labels on their face showed that the doctor and the patient were generally in different states, led Dr. Foust to opine that any pharmacist should be concerned whether there was a valid doctor-patient relationship. (Tr., Vol. 2, p. 354).

Customers of Health Solutions Network and White Eagle Rx who testified at trial stated they never saw or spoke to a doctor who approved their prescription and indeed did not even know the doctor. (Tr., Vol. 3, pp. 386, 398-99, 413, 431, 455-56). Similarly, a doctor from Puerto Rico, a graduate of medical school in the Dominican Republic, testified that he contracted with Health Solutions Network to review online questionnaires but he never examined, spoke to, or even emailed any customer. (Tr., Vol. 3, pp. 478-79). Indeed, in each instance the customer picked the drug they wanted, not the doctor. (Tr., Vol. 3, p. 476). Customers were led to believe that they were dealing with a licensed pharmacist and pharmacy. (Tr., Vol. 3, pp. 408-009). In addition, Williams, Fels, and others set up White

Eagle Rx on Indian land with the intent to attempt to avoid federal law. (Tr., Vol. 3, p. 497).

Finally, without refutation, Steven M. Crawford, M.D., Professor and Chairman of the Department of Family and Preventive Medicine at the University of Oklahoma Health Sciences Center, testified that it is outside the scope of accepted medical practice to prescribe drugs solely on the basis of an online questionnaire. (Tr., Vol. 4, p. 575). Further, Dr. Crawford testified that the Model Guidelines for Appropriate Use of the Internet and Medical Practice by the Federation of State Medical Boards of the United States provide that a prescription based solely on an online questionnaire is not an acceptable standard of care. (Tr., Vol. 4, pp. 581-82). And he testified, without refutation, that there is no valid doctor-patient relationship based solely on an online questionnaire. (Tr., Vol. 4, pp. 585-86).

Summary of the Argument

Prescription drugs are drugs intended for use by man that are not safe for use except under the supervision of a practitioner licensed by law to administer such drugs. Since they can only be used under a physicians

supervision, it is impossible to provide adequate directions for use to a layman. Prescription drugs, therefore, can legally flow through interstate commerce only if they fall under one of two exceptions. First, they must be in the possession of a pharmacy regularly and lawfully engaged in dispensing prescription drugs or, second, they must be dispensed pursuant to a valid prescription based on a bonafide doctor-patient relationship. The District Court correctly instructed the jury on these exceptions, and there was sufficient evidence for the jury to find the defendant failed to meet either of these two exceptions.

The defendant cannot base an appeal on a jury instruction given for counts for which he was acquitted. Further, the defendant never offered a specific objection to the instructions of which he complains.

The defendant's contention that the district court erred in denying his motion to dismiss on the grounds of tribal sovereign immunity was presented in a perfunctory manner. Moreover, the argument is without merit. Criminal laws of general applicability throughout the United States apply to Indians on Indian land as to all other citizens. Thus the tribe has no immunity from criminal prosecution by the United States.

Argument

I. Prescription drugs cannot have adequate directions for use for a layman since prescription drugs can be used only under a physicians supervision and can be legally dispensed only when they fall under one of two exceptions. The District Court correctly instructed on those exceptions.

A. Standard of review.

"We review de novo the jury instructions as a whole and view them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case." *United States v. Diaz,* 679 F.3d 1183, 1188 (10th Cir. 2012) (quoting *United States v. Bedford*, 536 F.3d 1148, 1152 (10th Cir. 2008) (internal quotations marks omitted). "We review the district court's decision to give or to refuse a particular jury instruction for abuse of discretion." *Id.* (quoting *Bedford*, 536 F.3d at 1152) (internal quotations marks omitted); *see United States v. Ransom*, 642 F.3d 1285, 1288 (10th Cir. 2011).

Reversal is warranted only when a prejudicial error results. *United States v. Cardall*, 885 F.2d 656, 673 (10th Cir. 1989). When a defendant fails to object to the jury instructions at trial, review is for plain

error. *United States v. Klien*, 922 F.2d 610, 613 (10 th Cir. 1990). "Plain error occurs when there is (i) error, (ii) that is plain, which (iii) affects the defendant's substantial rights, and which (iv) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Lopez-Medina,* 596 F.3d 716, 738 (10th Cir. 2010) (quoting *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1199 (10th Cir. 2007)) (internal quotation marks omitted).

This Court must "determine whether, as a whole, the instructions correctly state the governing law and provide the jury with an ample understanding of the issues and the applicable standards." *United States v. Visinaiz,* 428 F.3d 1300, 1308 (10th Cir. 2005) (quoting *United States v. Smith,* 413 F.3d 1253, 1273 (10th Cir. 2005)) (internal quotation marks omitted). Regarding the second prong, the error is plain if it is "clear or obvious under current law." *United States v. Cooper,* 654 F.3d 1104, 1117 (10th Cir. 2011) (quoting *United States v. Goode,* 483 F.3d 676, 681 (10th Cir. 2007)) (internal quotation marks omitted). As for the third prong of the test, an error must be "prejudicial," which means that there must be a reasonable probability that the error affected the outcome of the trial.

United States v. Thornburgh, 645 F.3d 1197, 1212 (10th Cir. 2011); *United States v. Fishman,* 645 F.3d 1175, 1196 (10th Cir. 2011). As to the fourth prong, it is notable that there is a relationship between that prong and the third: "[I]n most circumstances, an error that does not affect the jury's verdict [i.e., the third prong] does not significantly impugn the 'fairness,' 'integrity,' or 'public reputation' of the judicial process [i.e., the fourth prong]." *United States v.* Marcus, 130 S.Ct. 2159, 2166 (2010) (quoting *Johnson v. United States,* 520 U.S. 461, 467 (1997)).

B. Discussion.

The defendant's brief is confusing since the issues and propositions do not correspond. The defendant's first proposition and first two issues represent a fundamental misunderstanding of the Food Drug and Cosmetic Act. It was undisputed at trial that tramadol, soma, and fioricet are drugs available by prescription only. Prescription drugs are "drug[s] intended for use by man which because of [their] toxicity or other potentially harmful effect, or the method of [their] use, or the collateral measures necessary to [their] use, [are] not safe for use except under the supervision of a practitioner licensed by law to administer such drug[s]."

21 U.S.C. § 353(b)(1)(A). "[S]ince a prescription drug by definition can be used only under a physicians supervision . . . it is impossible to provide 'adequate directions for use' to a layman." *United States v. Evers*, 643 F.2d 1043, 1051 (5th Cir. 1981). Thus, prescription drugs are per se misbranded. 21 C.F.R. § 201.5; *United States v. An Article of Device*, 731 F.2d 1253, 1261 (7th Cir. 1984) (prescription devices are presumptively misbranded under 21 U.S.C. § 352(f)).

And, "[p]rescription drugs legally flow through interstate commerce only when they fall under one of two exceptions." *United States v. Patwardhan*, 422 Fed. Appx. 614, 616 (9th Cir. 2011). Thus, a prescription drug is not considered misbranded if it is in the possession of someone who can lawfully engage in the dispensing of the drug, 21 C.F.R. § 201.100, or it is dispensed upon a prescription of a practitioner licensed by law to administer such drug. 21 U.S.C. § 353(b)(1)(C). *Id.* Pursuant to 21 C.F.R. § 201.100(a)(1)(ii), a prescription drug is misbranded unless it is "in the possession of a retail, hospital, or clinic pharmacy or a public health agency regularly and lawfully engaged in dispensing prescription drugs . . . ."

A drug is also "misbranded" unless dispensed upon a "prescription of a practitioner licensed by law to administer such drug." 21 U.S.C. § 353(b)(1)(C). The word "prescription" means a valid prescription. *United States v. Smith*, 573 F.3d 639, 651 (8th Cir. 2009). The word prescription "does not include pieces of paper by which physicians are directing the issuance of a medicine, remedy, or drug to patients who do not need it, persons they have never met, or individuals who do not exist." *United States v. Nazir*, 211 F.Supp.2d 1372, 1375 (S.D. Fla. 2002), affirmed sub nom *United States v. Munoz*, 430 F.3d 1357 (11th Cir. 2005). Thus, a prescription drug is misbranded if it is dispensed other than pursuant to a valid prescription. *Munoz,* 430 F.3d at 1366; *Smith*, 573 F.3d at 651. Further, a prerequisite to the issuance of a valid prescription is a bonafide physician-patient relationship. *Smith*, 573 F.3d at 652. And a valid prescription must be one that is issued in the usual course of professional practice for legitimate medical purpose. *Id.*

Because the defendant failed to raise his constructive amendment argument in the District Court, this Court will review it under plain error. Contrary to the defendant's claims in Proposition One, the misbranding

instruction did not result in any error – much less affect his substantial rights or the fairness of the proceedings. This Court "will only find that a constructive amendment occurred when the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment." *United States v. Wonschik*, 353 F.3d 1192, 1197 (10th Cir. 2004) (internal quotations omitted).

The District Court was correct in not instructing the jury on adequate directions for use since it is impossible for prescription drugs to have adequate directions for use for a layman. Moreover, the defendant's proposed jury instructions submitted to the court did not request any instruction on adequate directions for use. (Doc. 247); (Aplee. App. at 045). And the defendant did not request any language in the court's instructions defining adequate directions for use. (Tr. Vol. 4 at 776).

The district court here correctly instructed the jury as to the two exceptions applicable in this case:

> Federal law provides that prescription drugs, such as fioricet, soma, and tramadol are misbranded if they are not in the possession of a retail pharmacy regularly and lawfully engaged in the dispensing of

> prescription drugs, or if the drugs are not dispensed pursuant to a valid prescription.

Count 2 -Underlying Offense Explained. (Doc. 300, Aplee. App. at 032).

And this Court will not reverse a conviction based upon insufficient evidence unless no rational trier of fact could have reach the disputed verdict. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). Moreover, the evidence necessary to support a verdict "need not conclusively exclude every other reasonable hypothesis and need not negate all possibilities except guilt." *United States v. Parrish,* 925 F.2d 1293, 1297 (10th Cir. 1991). The evidence only has to "reasonably support the jury's finding of guilt beyond a reasonable doubt." *Id.*

Thus, regardless of the question of whether the Ponca Tribe could issue a pharmacy license in the first place, there was ample evidence from which the jury could find that White Eagle Rx was not lawfully engaged in dispensing prescription drugs. It was never issued a license by a Pharmacy Board as called for by the Ponca Pharmacy Act. Further the unrefuted testimony of Steven M. Crawford, M.D. was that the issuance of a prescription based solely on an online questionnaire was outside the

course of accepted medical practice and did not establish a valid doctor-patient relationship. *See Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

The Indictment was not constructively amended, and there was sufficient evidence to convict the defendant of conspiracy to distribute misbranded prescription drugs. The argument of the defendant is without merit.

II. The defendant cannot base an appeal on a jury instruction given on a count for which he was acquitted.

A. Standard of Review.

In the absence of a specific objection, the court need only review an instruction for plain error. *United States v. Willis,* 476 F.3d 1121, 1127 (10th Cir. 2007).

B. Discussion.

In an attempt to bootstrap an argument regarding the definition of valid prescription in the trial court's instructions, defendant basis almost his entire argument in his Proposition Two on the contention that the district court incorrectly found that fioricet was a controlled substance. Similarly, in his Proposition Three the defendant attacks the definition of White Eagle Rx as an online pharmacy in the jury

instructions for Count 1. Thus, the defendant attacks the definition of valid prescription given in the court's instructions on Count 1 for distribution of a controlled substance. To be appealable under 28 U.S.C. § 1291, a judgement of conviction and sentence is necessary. *United States v. Thompson,* 814 F.2d 1472, 1474 (10th Cir. 1987); *United States v. Tovar-Rico,* 61 F.3d 1529, 1536 (11th Cir. 1995); *United States v. Townsend*, 474 F.2d 209, 213 *(*5th Cir. 1973) (appellant does not challenge this instruction . . . nor would there be any purpose since he was acquitted of the charge). Here, the defendant was neither convicted nor sentenced on Count 1.

Moreover, the defendant in his jury instructions submitted to the court never offered a proposed definition of valid prescription. (Doc. 247). And at trial, the defendant only offered a general objection to the definition of valid prescription without offering any specific objection as to the language used or any alternative. When a general objection is lodged without specific particularity to allow the trial court to rule on the defendant's specific concerns, review is for plain error. *United States v. Ellzey,* 936 F.2d 492, 500 (10th Cir. 1991). Likewise, the jury instructions

submitted by the defendant had no instructions on "online pharmacy" or for the standard in determining whether White Eagle Rx had a valid pharmacy license. (Doc. 247, Aplee. App. at 045). Indeed, the instructions on Count 1 proposed by the defendant urged the Court to instruct that the government had to prove that the defendant had distributed controlled substance by means of the internet. (Doc. 247, Aplee. App. at 046). And during the instructional conference, the defendant offered no specific objections to the terms. (Tr., Vol. IV, p. 776).

There is no error here. The defendant's argument is a complete non sequitur. With no basis whatsoever, he speculates that what he calls erroneous definitions of valid prescription and online pharmacy for Count 1 of the Indictment somehow influenced the jury in finding the defendant guilty on Count 2 of the Indictment. The defendant concedes that the court gave what he calls a "correct" legal definition of valid prescription in the jury instruction defining the offense of distributing misbranded drugs. And the defendant concedes the jury instruction in Count 1 on online pharmacy did not directly relate to Count 2 of the indictment. Yet somehow what he calls the "incorrect" definitions under Count 1 for the

distribution of a controlled substance, for which the defendant was acquitted, were prejudicial and influenced the jury.

The Court instructed the jury that the laws the defendants were charged with conspiring to violate were different. (Doc. 300, pp. 20-21, Aplee. App. at 020-021) And the Court explained the underlying offense in Count 1, conspiracy to distribute controlled substance. (Doc. 300, p. 028, Aplee. App. at 028). The Court separately instructed the jury on the underlying offense in Count 2, conspiracy to distribute misbranded drugs. (Doc. 300, pp.32-33, Aplee. App. at 032-033). That the jury was able to acquit the defendant of Count 1 and convict the defendant on Count 2 shows that the jury clearly understood the instructions. The claim that supposedly conflicting definitions were prejudicial is fanciful and speculative. The argument is without merit.

III. Neither a tribe, its members, or its agents have immunity from criminal prosecution by the United States, and the defendant is none of the above.

A. Standard of Review.

A district court's denial of a motion to dismiss based on tribal sovereign immunity is reviewed *de novo*. *Miner Electric Inc., v. Muscogee (Creek) Nation,* 505 F.3d 1007, 1009 (10th Cir. 2007). However, this Court will not consider "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation." *Murrell v. Shalala,* 43 F3d. 1388, 1390, n.2 (10th Cir. 1994).

B. Discussion.

It has long been established that Indian tribes are dependent nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). As such, tribes have limited powers of self government. See *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 425-26 (1981) (a tribe's inherent sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependant status . . .); *Montana v. United States*, 450 U.S. 544, 564 (1981) (the exercise of tribal power beyond what is necessary to protect tribal self government . . . is inconsistent with the dependent status of the tribes); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (Indian tribes cannot

exercise their powers in a manner that conflicts with the United States' overriding sovereignty). In addition, the tribes are not states. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (tribal reservations are not states).

Further, "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted). Thus, Congress can regulate and modify the status of the tribes. *Id*. For example in 1871, Congress enacted a statute that changed the status of an Indian tribe from a "power . . . capable of making treaties to a power with whom the United States may [not] contract by treaty." *Id* at 202; 25 U.S.C. § 71[2]. In addition, Congress granted United States citizenship to the Indians, 8 U.S.C. § 1401(b), making them "subject to all restrictions to which any other American citizen is subject . . ." *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005).

In *United States v. Juvenile Male*, 431 F.Supp.2nd 1012 (D.Ariz

[2] "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . ." 25 U.S.C. § 71.

2006), a juvenile Indian male was charged in the United States District Court with aggravated sexual abuse of a minor Indian on the Navajo reservation. The juvenile served subpoenas under Rule 17 of the Federal Rule of Criminal Procedure for records maintained by school and social service agencies under the control of the Navajo Tribe. The tribe resisted claiming, among other reasons, that they had sovereign immunity from such service of subpoena. The District Court characterized the argument as "frivolous." *Id*. at 1015. The District Court ruled that

> The United States of America is a country. Its sovereignty extends to its full geographical limits. And, under Article VI of the United States Constitution, its Constitution and laws "shall be the supreme Law of the Land." An Indian tribe is not a legal unit of international law. . . . An Indian tribe is not a foreign state under the Constitution.

Id. (citations omitted). Further the court held that

> The doctrine of sovereign immunity protects a tribe as an entity from lawsuits without congressional consent . . . This immunity protects a tribe as an entity from unconsensual civil actions against it.

Id. at 1016. (citations omitted). The court concluded that,

> tribal immunity has no application to claims made by the United States. As the court stated in *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456,

> 1459 (9th Cir.1994), "tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers."

Id. at 1017.

Criminal laws of general applicability throughout the United States apply to Indians on Indian land as to all other citizens. *United States v. Begay*, 42 F.3d 486, 498 (9th Cir. 1994). The Controlled Substances Act, as well as the Food, Drug and Cosmetic Act, are laws of general applicability. Thus, an Indian that commits a drug crime on Indian land "is subject to arrest for violation of the federal drug laws just as is any other American citizen." *United States v. Drapeau*, 414 F.3d 869, 878 (8th Cir. 2005); see also *United States v. Yannott*, 42 F.3d 999, 1004 (6th Cir. 1994) (Indian defendant charged as felon in possession of a firearm in Indian country subject to criminal penalties because the statutes are federal laws of general applicability making certain actions criminal regardless of where they are committed). Defendant cannot cite not a single case that holds a tribe, its members, or its agents have immunity from criminal prosecution by the United States.

The District Court currently denied the motion to dismiss based on tribal immunity.

CONCLUSION

The judgement of the District Court should be affirmed in all respects.

Oral Argument

Oral argument is not needed to resolve this appeal. All issues presented can be decided as a matter of law. The government does not request oral argument.

Respectfully submitted,

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CERTIFICATION OF DIGITAL SUBMISSIONS

I certify that all required privacy redactions have been made, and, with the exception of those redactions, every document submitted in digital form or scanned PDF format is an exact copy of the written document filed with the Clerk.

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s/Randal A. Sengel
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CERTIFICATE OF MAILING AND ELECTRONIC SERVICE

This is to certify that on January 22, 2013, I electronically transmitted the attached brief to the Clerk of Court using the CM/ECF System for filing and transmittal of a Notice of Docket Activity to the following CM/ECF registrants: William P. Earley.

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