

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

LOUIS DANIEL SMITH, also known
as Daniel Smith, also known as Daniel
Votino,

Defendant.

NO: 2:13-CR-14-RMP-1

ORDER DENYING DEFENDANT’S
MOTION FOR JUDGMENT OF
ACQUITTAL OR IN THE
ALTERNATIVE FOR A NEW TRIAL

BEFORE THE COURT is pro se Defendant Louis Daniel Smith’s Motion for Judgment of Acquittal or in the Alternative for a New Trial, ECF No. 717, and Memorandum in Support, ECF No. 750. The Court has reviewed the motion and memorandum, all relevant filings, including both Mr. Smith’s Reply, ECF No. 757, and Mr. Smith’s Amended Reply, ECF No. 758, and is fully informed.

BACKGROUND

A grand jury indicted Defendant Smith on January 25, 2013, for one count of conspiracy, in violation of 18 U.S.C. § 371; four counts of introducing misbranded drugs into interstate commerce, in violation of 21 U.S.C. § 331(a); and

1 one count of smuggling, in violation of 18 U.S.C. § 545. ECF No. 1. A jury trial
2 commenced on May 18, 2015. ECF No. 672. On May 27, 2015, the jury returned
3 a verdict, finding Mr. Smith guilty of one count of conspiracy, three counts of
4 introducing misbranded drugs into interstate commerce with the intent to defraud,
5 and one count of smuggling. ECF No. 692. The jury acquitted Mr. Smith on count
6 five, introducing misbranded drugs into interstate commerce. ECF No. 692.

7 During trial, Mr. Smith was represented by Assistant Federal Defender
8 Matthew Campbell. Mr. Campbell moved for acquittal at the close of the United
9 States' case and he renewed the motion prior to closing arguments. The Court
10 denied both motions. Mr. Campbell subsequently filed a motion for Judgment of
11 Acquittal. ECF No. 718. However, after the Court approved Mr. Smith's request
12 to proceed pro se, Mr. Smith moved to strike Mr. Campbell's motion for judgment
13 of acquittal. ECF No. 737. The Court granted that motion. ECF No. 739.

14 DISCUSSION

15 A. Motion for Judgment of Acquittal

16 In reviewing a motion for judgment of acquittal pursuant to Federal Rule of
17 Criminal Procedure 29(c), the Court must determine whether "viewing the
18 evidence in the light most favorable to the government, the jury could reasonably
19 find the defendant guilty beyond a reasonable doubt." *United States v. Hazeem*,
20 679 F.2d 770, 772 (9th Cir. 1982); *United States v. Nevils*, 598 F.3d 1158, 1161
21 (9th Cir. 2010) (en banc).

1 Rule 29, therefore, presents a two-step inquiry. *Nevils*, 568 F.3d at 1164-65.
2 First, the Court must review the evidence in the light most favorable to the United
3 States. When “faced with a record of historical facts that supports conflicting
4 inferences” the Court “must presume—even if it does not affirmatively appear in
5 the record—that the trier of fact resolved any such conflicts in favor of the
6 prosecution, and must defer to that resolution.” *Id.*(quoting *Jackson v. Virginia*,
7 443 U.S. 307, 326 (1979)). Second, the Court must determine whether “any”
8 rational trier of fact could have found the defendant guilty beyond a reasonable
9 doubt. *Id.*

10 Mr. Smith argues that there was insufficient evidence to convict him for
11 conspiracy, felony misbranding, or smuggling. Regarding the misbranding
12 convictions, Mr. Smith argues that the United States failed to show that he knew
13 that the manufacturing facility was not registered with the Secretary of Health and
14 Human Services, that Mr. Smith expected someone to be misled by the lack of
15 registration, or that Mr. Smith intended to defraud anyone by failing to oversee the
16 registration of the manufacturing facility. Mr. Smith misunderstands the crime for
17 which he was convicted.

18 Section 331(a) of Title 21 of the United States Code criminalizes the
19 introduction of a misbranded drug into interstate commerce. 21 U.S.C. § 331(a).
20 This crime may be charged either as a misdemeanor, which is a strict liability
21 crime requiring no evidence of intent, or as a felony, requiring evidence of intent to

1 defraud or mislead. *United States v. Dotterweich*, 320 U.S. 277, 284 (1943);
2 *United States v. Watkins*, 278 F.3d 961, 964 (9th Cir. 2002). The intent element
3 applies to the act of introducing misbranded drugs into interstate commerce, not to
4 the act of misbranding the drugs. 21 U.S.C. § 331(a) (criminalizing the
5 introduction of misbranded drugs into interstate commerce, whereas § 331(b)
6 criminalizes the “adulteration or misbranding” of drugs).

7 Mr. Smith was indicted for felony introduction of misbranded drugs into
8 interstate commerce. ECF No. 1. Therefore, the United States was required to
9 prove that Mr. Smith acted with intent to defraud or mislead when he introduced
10 the drugs into interstate commerce. The United States presented ample evidence in
11 the form of emails, testimony, and shipping documents from which a reasonable
12 jury could conclude that Mr. Smith intended to mislead authorities regarding the
13 purpose for which he intended sodium chlorite and MMS to be used when he
14 introduced the substances into interstate commerce. Therefore, the United States
15 met its burden, and there is no basis for an acquittal regarding Counts 2 through 4.

16 Mr. Smith argues that there was insufficient evidence to convict him of
17 smuggling because the United States did not prove that Mr. Smith was the importer
18 of the sodium chlorite, that sodium chlorite was merchandise contrary to law when
19 it was imported, or that Mr. Smith intended to defraud anyone when he imported
20 the sodium chlorite. Mr. Smith’s definition of “importer” is incorrectly narrow.

21 An importer is someone who “brings an article into the country from the outside or

1 causes an article to be brought into a country from the outside.” ECF No. 690-1.

2 This is the ordinary meaning of “importer.” An importer need not be the
3 individual who personally transports the product over the border, nor is the
4 importer necessarily the individual listed on the customs form as the “importer.”

5 There was competent testimony during trial explaining that the term “importer” on
6 the customs forms does not necessarily mean the person who has requested and
7 paid for the importation.

8 Additionally, Mr. Smith’s name does appear on some of the customs forms.
9 Most importantly, PGL Waste Water Systems appears on the customs forms, and
10 the evidence showed that Mr. Smith owned and operated PGL Waste Water
11 Systems. Additionally, the customs forms stated that the sodium chlorite was
12 being imported for use in water purification, but the evidence demonstrated that
13 Mr. Smith intended to use the sodium chlorite to manufacture MMS, a misbranded
14 and unregulated drug. This evidence is sufficient for a reasonable jury to conclude
15 that Mr. Smith, with the intent to defraud, imported sodium chlorite contrary to
16 law.

17 Mr. Smith also argues that United States Trial Attorney Christopher Parisi
18 impermissibly argued during closing argument that Mr. Smith filled out the
19 shipping documents for the sodium chlorite himself. Mr. Smith fails to provide a
20 citation to the transcript of Mr. Parisi’s closing argument, and the Court’s
21 recollection is that Mr. Parisi spoke generally of Mr. Smith as the importer or

1 argued that Mr. Smith requested the importation of sodium chlorite but never
2 explicitly stated that Mr. Smith himself filled out the shipping documents as
3 opposed to filling out other documents. Therefore, the Court finds this argument
4 unpersuasive.

5 Finally, Mr. Smith briefly notes that the Court declined to answer the Jury's
6 question regarding the definition of exporter. Mr. Smith fails to argue the
7 significance of this omission. The Court may exercise discretion when responding
8 to a jury note. *See United States v. Ninete*, 141 F. App'x 531 (9th Cir. 2005). The
9 Court exercised its discretion when it concluded that the definition of "exporter"
10 was irrelevant to the crimes charged and therefore declined to address it.

11 Accordingly, the Court finds that there is no basis for acquittal on Count 6.

12 Mr. Smith argues that the Court must grant an acquittal on Count 1,
13 conspiracy, because the United States failed to prove beyond a reasonable doubt
14 that Mr. Smith smuggled the sodium chlorite into the United States or that he
15 intended to defraud or mislead anyone. For the same reasons that the Court has
16 denied Mr. Smith's motions for judgment of acquittal as to Counts 2 through 4 and
17 Count 6, the Court denies Mr. Smith's motion for judgment of acquittal on Count 1.

18 **B. Motion for New Trial**

19 Rule 33 of the Federal Rules of Criminal Procedure provides, "[u]pon the
20 defendant's motion, the court may vacate any judgment and grant a new trial if the
21 interest of justice so requires." Fed. R. Crim. P. 33(a). "The district court need not

1 view the evidence in the light most favorable to the verdict; it may weigh the
2 evidence and in so doing evaluate for itself the credibility of the witnesses.”
3 *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1211 (9th Cir.
4 1992) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980)). “If
5 the court concludes that, despite the abstract sufficiency of the evidence to sustain
6 the verdict, the evidence preponderates sufficiently heavily against the verdict that
7 a serious miscarriage of justice may have occurred, it may set aside the verdict,
8 grant a new trial, and submit the issues for determination by another jury.” *Id.* at
9 1211-12 (quoting *Lincoln*, 630 F.2d at 1319).

10 Mr. Smith argues that his counsel operated under a known conflict of
11 interest. “In order to demonstrate a violation of his Sixth Amendment rights,
12 a defendant must establish that an actual conflict of interest adversely
13 affected his lawyer’s performance.” *Culyer v. Sullivan*, 446 U.S. 335, 350
14 (1980). “[A] defendant who shows that a conflict of interest actually
15 affected the adequacy of his representation need not demonstrate prejudice
16 in order to obtain relief.” *Id.* Even so, a defendant must still demonstrate
17 that his counsel “actively represented conflicting interests,” for until he has
18 done so, he has not established the “constitutional predicate” for the
19 ineffective assistance claim. *Id.* at 350. “[A]n actual conflict of interest” is
20 “precisely a conflict *that affected counsel’s performance* – as opposed to a
21

1 mere theoretical division of loyalties.” *Mickens v. Taylor*, 535 U.S. 162, 171
2 (2002) (emphasis in original).

3 Mr. Smith contends that his counsel, Mr. Campbell, operated under a
4 conflict of interest because a different attorney in his office, the Federal Defenders
5 of Washington, previously represented Linda Bridgeman when she was called to
6 testify before the grand jury. Ms. Bridgeman allegedly testified before the grand
7 jury, yet the United States declined to call Ms. Bridgeman at trial. Mr. Smith
8 claims that Ms. Bridgeman was a material witness for the defense, but she
9 allegedly refused to be interviewed by Mr. Campbell, citing her right to conflict-
10 free representation. Mr. Smith argues that Ms. Bridgeman’s refusal to be
11 interviewed or questioned by Mr. Campbell adversely affected Mr. Campbell’s
12 performance.

13 Although Mr. Smith is not required to show prejudice in order to establish a
14 conflict of interest, he must show that there was an actual conflict of interest that
15 adversely affected counsel’s performance. Mr. Smith has not satisfied this
16 requirement because he fails to inform the Court how exactly Ms. Bridgeman
17 might have testified or how her testimony may have been material to the defense.
18 Without such information, there is no way for the Court to know whether Mr.
19 Campbell did not call Ms. Bridgeman to testify because she refused or rather he
20 simply elected not to call her based on sound trial strategy.

1 Additionally, this Court is not privy to what occurred during Ms.
2 Bridgeman’s testimony in front of the grand jury and does not know the
3 methodology employed by the Federal Defender’s office in determining conflicts.
4 The Court relies on the expertise of the Federal Defenders to determine whether an
5 actual conflict of interest exists. In this case, the Federal Defenders determined
6 that the previous representation of Ms. Bridgeman did not present a conflict of
7 interest that prevented Mr. Campbell from representing Mr. Smith. The Court
8 gives deference to that determination.

9 Mr. Smith also moves for a new trial on the basis of ineffective assistance of
10 counsel. A defendant who brings a claim of ineffective assistance of counsel bears
11 the burden to meet a two part test. First, a defendant must show that counsel's
12 performance was so deficient that it “fell below an objective standard of
13 reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The Court
14 “begin[s] with the premise that ‘under the circumstances, the challenged action[]
15 might be considered sound trial strategy.’” *Cullen v. Pinholster*, 131 S.Ct. 1388,
16 1404 (2011) (quoting *Strickland*, 466 U.S. at 689). The Court “affirmatively
17 entertain[s] the range of possible reasons . . . counsel may have had for proceeding
18 as they did.” *Id.* at 1407. “Counsel should be strongly presumed to have rendered
19 adequate assistance and made all significant decisions in the exercise of reasonable
20 professional judgment.” *Id.* at 1403 (quoting *Strickland*, 466 U.S. at 690) (internal
21 quotation marks omitted).

1 Second, a defendant must show that his counsel's alleged deficient
2 performance prejudiced the defense. To meet this standard, a defendant must
3 demonstrate "that there is a reasonable probability that, but for counsel's
4 unprofessional errors, the result of the proceeding would have been different."
5 *Strickland*, 466 U.S. at 694.

6 Mr. Smith claims that Mr. Campbell provided ineffective assistance of
7 counsel based on several alleged failures: to timely obtain and review all relevant
8 discovery; to interview witnesses; to review and admit relevant evidence; to
9 investigate relevant case law; to pursue a lack of specific intent defense at trial; to
10 pursue a good faith or advice of counsel defense; to present any defense at all; to
11 make a compelling closing argument; to object during the United States' closing
12 argument; to move for a mistrial; to effectively cross-examine witnesses; and to
13 prepare or investigate the case.

14 Mr. Smith has not informed this Court of what evidence or which witnesses
15 Mr. Campbell should have called that would have changed the outcome of his trial.
16 Mr. Smith's failure to do so prevents him from establishing prejudice related to
17 Mr. Campbell's alleged failure to timely obtain and review all relevant discovery,
18 to interview witnesses, to review and admit relevant evidence, to investigate
19 relevant case law, to prepare or investigate the case, or to present any defense at
20 all.

1 Additionally, Mr. Smith cannot show prejudice based on Mr. Campbell's
2 failure to pursue a lack of specific intent defense at trial because the United States
3 presented overwhelming evidence, much of it comprised of e-mails written by or to
4 Mr. Smith himself, that Mr. Smith was aware of the illegality of his conduct and
5 intentionally attempted to evade authorities by pretending that MMS was a water
6 purification product rather than a drug. Mr. Smith fails to identify any specific
7 evidence that Mr. Campbell could have presented that would have shown that Mr.
8 Smith did not intend to defraud or mislead the government. The Court rejects Mr.
9 Smith's allegation that simply arguing a lack of intent would have changed the
10 outcome of Mr. Smith's trial in the face of overwhelming evidence to the contrary.

11 Similarly, Mr. Smith cannot show prejudice from Mr. Campbell's alleged
12 failure to pursue a good faith or advice of counsel defense at trial. To be entitled to
13 receive a jury instruction on advice of counsel, a defendant must show: (1) the
14 defendant made a full disclosure of all material facts to his or her attorney, (2) the
15 attorney advised the defendant on a specific course of conduct, and (3) the
16 defendant relied on this advice in good faith. *United States v. Ibarra-Alvarez*, 830
17 F.2d 968, 973 (9th Cir. 1987).

18 Mr. Smith argues that he was "ripped off" by a company called the Pro-
19 Advocate Group that allegedly advised Mr. Smith that he could create a private
20 health care membership to avoid prosecution. However, Mr. Smith does not
21 provide support that he was specifically advised by licensed attorneys that his

1 conduct was legal or that he relied on the alleged advice. Instead, substantial
2 evidence supports the conclusion that Mr. Smith knew that his conduct was illegal.
3 Mr. Smith's failed attempts to evade detection or prosecution do not support an
4 advice of counsel defense, and Mr. Campbell's failure to raise the defense based on
5 those facts does not amount to ineffective assistance of counsel.

6 Mr. Smith also makes several arguments regarding closing arguments. He
7 states that Mr. Campbell "neglected to inform the Jury in closing argument that the
8 Government had completely failed to prove Smith's knowledge, or specific intent
9 in Smith's alleged failure to register, requiring an acquittal for felony misbranding
10 on Counts 2-4." ECF No. 750 at 25. Even if Mr. Campbell had been allowed to
11 make this statement during closing, which is an inaccurate statement of the law and
12 therefore objectionable, Mr. Smith cannot show that the outcome of his trial would
13 have been different if Mr. Campbell had made this statement before the jury.
14 Whether Mr. Smith was aware of the lack of registration is irrelevant to whether he
15 intended to mislead authorities when he introduced misbranded drugs into
16 interstate commerce.

17 Similarly, Mr. Smith argues that Mr. Campbell should have argued that Mr.
18 Smith could not be convicted for smuggling because he was not the "importer" and
19 because his conduct did not rise to the level of a conspiracy. Both arguments are
20 based on misperceptions of the law, as previously addressed by this Court, and
21 neither is likely to have changed the outcome of Mr. Smith's trial given the

1 overwhelming evidence that he spearheaded the entire scheme to sell MMS as a
2 drug.

3 Mr. Smith also argues that counsel for the United States made an
4 impermissible statement during closing argument, namely, that Mr. Smith “filled
5 out” the shipping documents. Mr. Smith cites to a portion of the transcript in
6 which Mr. Parisi stated, “Look at the words he said in his emails, the false
7 paperwork he filled out, and he sent to his suppliers and the FDA and everyone
8 else.” Tr., ECF No. 705 at 96-97. Mr. Parisi did not state that Mr. Smith
9 personally filled out the shipping documents. Moreover, Mr. Parisi previously had
10 discussed in his closing argument who did in fact fill out the shipping documents.
11 ECF No. 705 at 44 (“Now, during cross examination in the defense case, Mr.
12 Campbell made it clear that the paperwork was filled out by someone named Stan
13 Nowak; and that may be true.”). Therefore, Mr. Smith cannot show that the
14 outcome of his trial would have been different had Mr. Campbell objected to this
15 statement.

16 Similarly, Mr. Smith contends that Mr. Parisi’s use of the word “imagine”
17 was impermissible and prejudicial to his defense. Yet Mr. Parisi simply employed
18 a trial tactic during closing argument in which he asked the jury to visualize the
19 facts and evidence that they had already seen and heard. Nothing about Mr.
20 Parisi’s use of this tool was impermissible during closing argument, and Mr.

1 Campbell's failure to object to it does not rise to the level of ineffective assistance
2 of counsel.

3 Mr. Smith next alleges that a key government witness testified that the FDA
4 had received "several reports of harm" in direct contravention of a Court order
5 excluding such evidence. Mr. Smith does not cite to the record, and the Court does
6 not recall this testimony. Moreover, if the testimony did actually occur, Mr. Smith
7 cannot establish prejudice because evidence of the harm associated with MMS was
8 contained in the consumer health reports that already were admitted exhibits.

9 Mr. Smith also contends that the United States elicited false testimony from
10 Joe Lachnit, who allegedly stated that Linda Bridgeman was a "janitor" and that he
11 was "merely a consultant for PGL." Mr. Smith maintains that Mr. Campbell
12 should have objected and moved for a mistrial on the basis of these alleged
13 misrepresentations. However, there is no basis for this Court to conclude that
14 either statement would have had any effect on the evidence presented, the law as it
15 applied to that evidence, or the jury's determination. Mr. Smith cannot show that
16 Mr. Campbell's failure to object to testimony of such minor importance fell below
17 an objective standard of reasonableness or that the desired objections would have
18 changed the outcome of Mr. Smith's trial.

19 Additionally, Mr. Smith contends that one government witness, Matthew
20 Darjany, was sleep deprived and under the influence of several medications when
21 he testified. Mr. Smith attached to his Motion for Judgment of Acquittal a

1 “preliminary declaration” allegedly signed by Mr. Darjany stating the same. The
2 declaration was not made under oath and is not notarized, and the meaning of a
3 “preliminary declaration” is unclear. However, the relevant issue is that Mr.
4 Smith fails to show that Mr. Campbell was aware of Mr. Darjany’s alleged
5 condition. Mr. Campbell is held to the standard of a reasonable attorney. Without
6 proof that Mr. Campbell was aware of Mr. Darjany’s allegedly impaired condition,
7 which was not apparent to the Court when watching Mr. Darjany testify in open
8 court, Mr. Campbell’s failure to cross-examine Mr. Darjany regarding an unknown
9 condition does not constitute ineffective assistance of counsel.

10 Finally, Mr. Smith moves for a new trial based on the argument that the
11 Court denied Mr. Smith’s constitutional right to effective assistance of counsel
12 when it permitted Mr. Campbell to proceed to trial despite Mr. Campbell’s
13 statements to the Court that he was unprepared. The Court has addressed this
14 claim extensively both in open court and in written orders. The Court conducted
15 repeated *Faretta* hearings with Mr. Smith throughout the pendency of this case.
16 Mr. Smith insisted on representing himself until immediately before trial was to
17 commence.

18 The Court will not grant a new trial based on Mr. Smith’s last minute
19 decision to have appointed counsel nor based on the Court’s denial of a seventh
20 continuance after trial had been delayed repeatedly and after the Court had warned
21 both Defendant and stand-by defense counsel more than two months earlier that no

1 further continuances would be granted barring exceptional circumstances.
2 *See, e.g.*, ECF No. 532 at 3. It is unreasonable for Mr. Smith to complain that he
3 was denied effective assistance of counsel and that the counsel whom he requested
4 on the eve of trial had insufficient time to prepare when Mr. Smith previously
5 rejected any counsel. Any prejudice that Mr. Smith alleges he suffered as a result
6 of the appointment of counsel was prejudice that he caused himself and does not
7 create a basis for acquittal or a new trial.

8 Accordingly, **IT IS HEREBY ORDERED** that Defendant Louis Daniel
9 Smith's Motion for Judgment of Acquittal or in the Alternative for a New Trial,
10 **ECF No. 717**, is **DENIED**. **The Court will not reconsider this Order.**

11 **DATED** this 23rd day of September 2015.

12
13 *s/ Rosanna Malouf Peterson*
14 ROSANNA MALOUF PETERSON
15 Chief United States District Court Judge
16
17
18
19
20
21