CASE NO. 20 -

IN THE
SUPREME COURT OF THE UNITED STATES

LEDINSON CHAVEZ

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the trial court's jury instruction on aiding and abetting aggravated identity theft comply with this Court's mandate in *Rosemond v. United States,* when the instruction did not advise the jury that Chavez had to have advance knowledge of the identity theft in order to be convicted as an aider and abettor?

LIST OF ALL THE PARTIES

Petitioner, and defendant below, is Ledinson Chavez. Chavez's co-defendants below were Claudia Lopez, Oskel Lezcano, Ariel Borrego-Hernandez, Sergio Betancourt, and Yuriesky Diaz Rodriguez. Respondent is the United States of America.

RULE 29.6 STATEMENT

The petitioner is an individual, not an entity or corporation. As such, none of the disclosures required by United States Supreme Court Rule 29.6 apply.

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The Opinion of the United States Court of Appeals for the Sixth Circuit issued on February 21, 2020 is unpublished and is attached as Appendix A. The Opinion of the United States Court of Appeals for the Sixth Circuit, denying *en banc* rehearing, dated April 9, 2020, is attached as Appendix B. The United States District Court for the Western District of Kentucky wrote a memorandum opinion, filed on November 29, 2018, denying Chavez's motion for a new trial. That opinion is attached as Appendix C.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals issued its opinion on February 21, 2020, and Petitioner filed a timely petition for *en banc* rehearing. The Court of Appeals denied the petition for *en banc* rehearing by order entered April 9, 2020. The instant petition is timely filed. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

A. Introduction

This matter involves a jury instruction given on the charge of aiding and abetting aggravated identity theft which did not instruct the jury that Petitioner Lendinson Chavez ("Petitioner" or "Chavez") was required to have "advance knowledge" of the identity theft by his alleged cohort in order to be convicted as an aider and abettor. The conviction on this charge subjected Chavez to a 24-month mandatory-minimum sentence, which runs consecutive to his other sentence. Certiorari is warranted because the instruction given, the Sixth Circuit Pattern Instruction on aiding and abetting crimes, does not comply with this Court's mandate in *Rosemond v. United States,* 572 U.S. 65, 67 (2014) – that the jury must be instructed on the "advance knowledge" requirement for a compound crime such as aiding and abetting identity theft. The Sixth Circuit agreed that the jury was required to be instructed on the advanced knowledge requirement but held that its instruction was sufficient. It was not. Certiorari should be granted to correct the Sixth Circuit and district court's error. Further, the pattern instruction must be revised to comply with *Rosemond.*

B. Facts Related to Underlying Trial

The government accused Chavez of engaging in a healthcare-fraud scheme wherein the alleged conspirators, starting in late 2013 and continuing through 2014, billed United Healthcare for medical services that were never performed. Specifically, the government claimed that the conspirators set up chiropractic clinics and used those clinics to bill for muscle-relaxant injections that never took

place. For one—and only one—of those clinics (Ledic Therapy), the government also alleged that, on August 13, 2014 (months after the bulk of activity related to the healthcare-fraud scheme), Chavez aided and abetted other conspirators in the unauthorized use of chiropractor Todd Black's identification, which resulted in an additional charge—aggravated identity theft in furtherance of the healthcare fraud. Other clinics had been set up using various chiropractors' identities—including Black's identity—where the conspirators had permission to use those identities. This makes Ledic Therapy an outlier that came at the end of the alleged healthcare-fraud scheme. Notably, there was no evidence that Chavez used Black's identity without authorization, or that Chavez even knew that someone else was planning to do so.

The jury was not instructed that Chavez needed to have advanced knowledge that one of his cohorts would fraudulently use Mr. Black's identity in order to be convicted on this charge as an aider and abettor. Specifically, the jury was instructed as follows:

(2) But for you to find the defendant guilty of aggravated identity theft as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of aggravated identity theft was committed.

(B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.

(C) And third, that the defendant intended to help commit or encourage the crime.

[1]

Chavez seeks certiorari to reverse the district court and the Sixth Circuit Court of Appeals because the instruction failed to include the advance-knowledge requirement, in violation of *Rosemond v. United States*, 572 U.S. 65 (2014).

C. Procedural History

Petitioner timely filed a motion for a new trial. The district court denied the motion. Chavez timely appealed, arguing that the district court's instruction on aiding and abetting aggravated identity theft failed to comply with *Rosemond*. While agreeing that *Rosemond* required that the jury be instructed on the advance knowledge requirement to convict on a charge of aiding and abetting aggravated identity theft, the United States Court of Appeals for the Sixth Circuit nonetheless rejected the argument and affirmed the district court. In doing so, the Sixth Circuit held that the pattern instruction used by the district court complied with *Rosemond*, notwithstanding the fact that the same pattern instructional language used in the instant case was held to be deficient by the Sixth Circuit in *United*

[1] **Appendix 37** - Jury Instr., R.E. 400, Page ID 2935–36.

States v. Henry, 797 F.3d 371, 374 (6th Cir. 2015). A timely petition for rehearing was denied. This petition follows.

REASON TO GRANT THE PETITION

Certiorari should be granted because the Sixth Circuit, in conflict with this Court, has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Pursuant to *Rosemond v. United States,* 572 U.S. 65, 67 (2014), the trial court must instruct the jury on the "advanced knowledge" requirement for the charge of aiding and abetting aggravated identity theft. The Sixth Circuit agrees with this. "Chavez is right that aiding and abetting aggravated identity theft requires the intent to assist the *identity theft,* not just the underlying offense." (Slip Op., at 12.) "He's also right that such intent must include (at a minimum) 'advance knowledge' of the identity theft." (*Id.*)

Indeed, "a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission." *Rosemond,* 572 U.S. at 76. "An intent to advance some different or lesser offense is not, or at least not usually, sufficient." *Id.* In *Rosemond*, this Court observed that a district court errs by not explaining that a defendant charged with aiding and abetting an 18 U.S.C. § 924(c) violation requires "advance knowledge of a firearm's presence". *Id.* at 81. "An active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun." *Id.* at 77-78. "In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one." *Id.*

This Court stated that the advance knowledge requirement gives the undecided aider and abettor a choice before the crime is carried out; specifically to withdraw from the crime, or alter the scheme so that it does not present the dangers of a weapon: "When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an *armed* offense." *Id.* at 78. "[T]hat means knowledge at a time the accomplice can do something with it—most notably, opt to walk away." *Id.*

In fact, and in deference to this Court, the Sixth Circuit's pattern instruction on aiding and abetting a §924(c) violation was changed to expressly incorporate this Court's "alter that plan" and "withdraw from the enterprise" language drawn from *Rosemond*:

(2) But for you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] was committed.

(B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would use or carry a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice was using or carrying a firearm.]

2

While the pattern aiding and abetting instruction for §924(c) violations was altered to comply with *Rosemond*, the pattern instruction for aiding and abetting other crimes remains deficient as applied to compound crimes. The pattern instruction, Sixth Circuit Pattern Jury Instruction 4.01, which was used by the district court in this case, does not satisfy or incorporate *Rosemond's* advance-knowledge instructional language like the §924(c) pattern instruction:

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[2] **Appendix 44** - Sixth Circuit Pattern Criminal Jury Instructions 12.04, *available at* https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%2012_0.pdf.

(2) But for you to find _____ guilty of _____ as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of _____ was committed.

(B) Second, that the defendant helped to commit the crime [or encouraged someone else to commit the crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime.

[3]

Without the advance knowledge instruction, the jury was permitted to convict Chavez of aggravated identity theft regardless of *when* he determined that the health care scheme would involve a cohort fraudulently using the identity of Dr. Black. Taken straight from *Rosemond*, in telling the jury to consider merely whether Chavez "helped to commit the crime or encouraged someone else to commit the crime," the court did not direct the jury to determine when Chavez obtained the requisite knowledge, i.e., to decide whether Chavez knew about the identity theft in sufficient time to withdraw from the crime. *See Rosemond*, 572 U.S. at 82. "So, for example, the jury could have convicted even if [Chavez] first learned" that Dr. Black's identity would be stolen to perpetuate the health care scheme only after that occurred, "and he took no further action to advance the crime." *Id.* Accordingly, "[t]he court's statement failed to convey that [Chavez] had to have advance knowledge, of the kind we have described, that a confederate would" steal the identity of Mr. Black. *Id.*

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[3] **Appendix 40** - Sixth Circuit Pattern Criminal Jury Instructions 4.01, *available at* https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%204_0.pdf

As articulated by this Court and courts of appeals, the advance knowledge requirement is a fundamental principal of aiding and abetting law. In *Pereira v. United States*, a mail fraud case, this Court found the requisite intent for aiding and abetting because the defendant took part in a fraud knowing that his confederate would take care of the mailing. 347 U.S. 1, 12 (1954). In *Bozza* v. *United States*, this Court upheld a conviction for aiding and abetting the evasion of liquor taxes because the defendant helped operate a clandestine distillery knowing the business was set up "to violate Government revenue laws." 330 U.S. 160, 165 (1947).

Even more recently, the Sixth Circuit, in *Henry v. United States,* found plain error because "[t]he court never instructed the jury that Henry had to have *advance knowledge* that a (real) firearm would be used." *United States v. Henry,* 797 F.3d 371, 374 (6th Cir. 2015). The district court in *Henry* gave the Sixth Circuit pattern instruction 4.01, the same instruction utilized in the instant case. The Sixth Circuit said flatly, "the jury instruction was wrong." *Id.* "With respect to the intent requirement, the instruction required only that Henry 'intend[ed] to help commit or to encourage the crime.'" *Id.* "As a result, the jury could have convicted Henry of violating § 924(c) merely because he 'intend[ed] to help commit or to encourage' the predicate offense—the bank robbery—without ever finding that he had the requisite intent and advance knowledge related to his compatriot's firearm possession." *Id.*

The Sixth Circuit's rational in *Henry* was sound and should now be applied to Mr. Chavez's case. "[T]he jury could have convicted [Chavez] of [aggravated-

identity-theft] merely because he 'intend[ed] to help commit or to encourage' the predicate offense—[the health care fraud]—without ever finding that he had the requisite intent and advance knowledge related to his compatriot's" stealing Mr. Black's identity. *See id.*

Perhaps the best way to demonstrate that certiorari is warranted is a side-by-side comparison of the deficient instruction given at trial in *Rosemond*, the pre-*Rosemond* instruction given in *Henry*, the deficient instruction given in the instant case, and the newly drafted Sixth Circuit pattern instruction for § 924(c) violations, which accounts for *Rosemond*.

ROSEMOND JURY INSTRUCTION

> As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:
>
> (1) the defendant knew his cohort used a firearm in the drug trafficking crime, and
>
> (2) the defendant knowingly and actively participated in the drug trafficking crime.[4]

HENRY JURY INSTRUCTION
(*Rosemond* Deficient)

> (2) But for you to find the defendant guilty through aiding and abetting, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

[4] **Appendix 46** – Instruction given by the trial court in *Rosemond*.

(A) First, that the crime charge was committed.

(B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.

(C) And third, that the defendant intended to help or encourage the crime.[5]

CHAVEZ JURY INSTRUCTION
(*Rosemond* Deficient)

(2) But for you to find the defendant guilty of aggravated identity theft as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of aggravated identity theft was committed.

(B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.

(C) And third, that the defendant intended to help commit or encourage the crime.[6]

NEW SIXTH CIRCUIT § 924(c) PATTERN INSTRUCTION
(*Rosemond* Compliant)

(2) But for you to find [the defendant] guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor, you must be convinced that

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[5] **Appendix 49** - Instruction given by the trial court in *Henry*.
[6] **Appendix 37** - Instruction given by the trial court in the instant case.

the government has proved each and every one of the following elements beyond a reasonable doubt:

> (A) First, that the crime of using or carrying a firearm during and in relations to a [crime of violence] [drug trafficking crime] was committed.
>
> (B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of using or carrying a firearm during and in relations to a [crime of violence] [drug trafficking crime].
>
> (C) And third, that the defendant intended to help commit [or encourage] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would use or carry a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice was using or carrying a firearm.][7]

Quite simply, the district court's instructions[8] in this case lacked any reference to "advance knowledge" or "foreknowledge" and did not sufficiently explain that, to be convicted of aiding and abetting aggravated identity theft,

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[7] **Appendix 44** - Sixth Circuit Pattern Criminal Jury Instructions 12.04, *available at* https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%2012_0.pdf.
[8] **Appendix 37** - Jury Instr., R.E. 400, Page ID 2935–36.

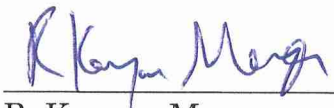
Chavez had to know about the use of Todd Black's identification sufficiently beforehand so that he "had a realistic opportunity to withdraw."[9] Thus, the district court's instructions permitted Chavez to be convicted even if his alleged knowledge of the unauthorized use of Todd Black's identification came after, in the midst of, or slightly before the compound crime. That is precisely the issue that *Rosemond* sought to correct—namely, convicting a defendant of a compound crime for which he lacked the requisite foreknowledge.

This Court should grant certiorari to clarify that the Sixth Circuit's holding is in conflict with *Rosemond* and even the Sixth Circuit's own opinion in *Henry*.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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[9] ***See*** **Appendix 44** - Sixth Circuit Pattern Criminal Jury Instructions 12.04, *available at* https://www.ca6.uscourts.gov/sites/ca6/files/documents/pattern_jury/pdf/Chapter%2012_0.pdf.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:15-cr-00054-5-RGJ

LEDINSON CHAVEZ — Defendant

* * * * *

MEMORANDUM OPINION AND ORDER

On August 30, 2018, a jury convicted Defendant, Ledinson Chavez, of conspiracy to commit health care fraud in violation of 18 U.S.C. §§ 1347 and 1349 (Count 1), health care fraud in violation of 18 U.S.C. §§ 1347 and 2 (Count 2), aggravated identity theft in violation of 18 U.S.C. §§ 1028A(a)(1), 1028A(c)5, and 2 (Count 13), and conspiracy to commit money laundering in violation of 18 U.S.C. §§ 1956(h) and 1956(a)(1)(B)(i) (Count 16). [DE 399, Jury Verdict; DE 207, Indictment]. Chavez now moves for an order compelling the United States to produce documents cataloguing the items in Sergio Betancourt's possession at the time of each of his arrests. [DE 398]. The United States filed a Response [DE 411], and Chavez did not file a reply. Chavez also moves for judgment of acquittal on Count 13 under Federal Rule of Criminal Procedure 29 [DE 410] and judgment of acquittal on Count 16 under Rule 29 or, in the alternative, a new trial on Count 16 under Rule 33 [DE 451]. The United States filed Responses [DE 419; DE 455], and Chavez filed Replies [DE 438; DE 460]. These matters are ripe for adjudication.

Having considered the parties' filings and the applicable law, the Court **DENIES** Chavez's Motion for Documents Reflecting Inventory of Items in the Possession of Sergio Betancourt on Each Date of His Arrest [DE 398]; **DENIES** Chavez's Motion for Judgment of Acquittal on Count

13 [DE 410]; and **DENIES** Chavez's Motion for Judgment of Acquittal or for a New Trial on Count 16 [DE 451].

DISCUSSION

A. Motion for Documents Reflecting Inventory of Items in the Possession of Sergio Betancourt on Each Date of His Arrest

Chavez has filed a Motion seeking "inventories of items seized from Sergio Betancourt at the time of his arrest in June 2015 as well as during his arrest in 2017." [DE 398 at 2891]. Chavez argues these documents are "material to preparing the defense." *Id.* The United States has filed a Response, arguing that Rule 16 does not require it to produce documents at this stage of the proceedings—*i.e.*, after a jury has already found Chavez guilty. [DE 411 at 3001–02]. The United States also asserts that even if Rule 16 did require disclosure at this stage, the documents requested are not material to preparingC havez's defense. *Id.* at 3003. Regardless, the United States claims that the documents sought do not exist, and Rule 16 does not require the whole cloth creation of such documents. *Id.* at 3002–04. Finally, the United States claims that Chavez may obtain any existing documents by contacting the Deputy Marshals involved in coordinating Sergio Betancourt's 2015 and 2017 arrests. *Id.*

Rule 16 requires the United States to "permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places" in the United States' "possession, custody, or control" that are "material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(E)(i). Thus, by its own terms, Rule 16 is limited to documents that are "within the government's possession, custody, or control." Further, Rule 16 only applies to documents that already exist, and the United States is not required to create new documents for discovery purposes. *See, e.g.*, *United States v. Amaya-Manzanares*, 377 F.3d 39, 42–43 (1st Cir. 2004) ("Rule 16(a)(1)(E) did not apply to a the document until it was created."); *United States v.*

Kahl, 583 F.2d 1351, 1354 (5th Cir. 1978) (upholding a district court's refusal to grant discovery of government statistical compilations because such compilations did not exist); *United States v. Schembari*, 484 F.2d 931, 935 (4th Cir. 1973) ("[T]he government cannot disclose what it does not have … "); *United States v. Harper*, 432 F.2d 100, 102 (5th Cir. 1970) (holding that "the failure to produce non-required records when they do note xist"doe s notviol ate the Jencks Act).

Here, the United States affirmatively represents that no inventory records exist. [DE 411 at 3003–04]. If the documents do not exist, the United States is not required to manufacture them. Further, the United States has provided Chavez with the opportunity to conduct further discovery on this point by contacting the Deputy Marshals involved in the arrests of Sergio Betancourt. *Id.* at 3004. This will allow Chavez to discover information regarding what was in Betancourt's possession at the time of his arrests. Accordingly, the Court denies Chavez's Motion.

B. Motions for Judgment of Acquittal Under Rule 29

1. Legal Standard

Chavez moves for judgment of acquittal under Rule 29 for Counts 13 [DE 410] and 16 [DE 451]. A court should grant a motion for judgment of acquittal under Rule 29 only when the evidence admitted at trial, viewed in the light most favorable to the United States, was insufficient to permit a rational trier of fact to find guilt beyond a reasonable doubt. *United States v. Connery*, 867 F.2d 929, 930 (6th Cir. 1989) (citations omitted). Grant of a motion of acquittal is "confined to cases where the prosecution's failure is clear." *Id.* (citing *Burks v. United States*, 437 U.S. 1, 17 (1978)). In evaluating challenges to sufficiency of evidence, courts must not "weigh the evidence presented, consider the credibility of witnesses, or substitute [its] judgment for that of the jury." *United States v. Siemaszko*, 612 F.3d 450, 462 (6th Cir. 2010) (citations and quotation omitted). "Circumstantial evidence alone is sufficient to sustain a conviction and such evidence

need not 'remove every reasonableh ypothesis except that of guilt.'" *United States v. Meyer*, 359 F.3d 820, 826 (6th Cir. 2004) (quoting *United States v. Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989) (citation and quotation omitted)).

2. Count 13—Aggravated Identity Theft

Chavez argues that the United States failed to present sufficient evidence upon which a reasonable jury could find Chavez guilty of aggravated identity theft under 18 U.S.C. § 1028A. [DE 410 at 2995]. 18 U.S.C. § 1028A "imposes a two-year sentence for anyone who, [i] during and in relation to any felony violation enumerated in subsection (c), [ii] knowingly transfers, possesses, or uses, [iii] without lawful authority, [iv] a means of identification of another person." *United States v. Michael*, 882 F.3d 624 (6th Cir. 2018). Health care fraud is a predicate felony for aggravated identity theft. 18 U.S.C. §§ 1028A(c)(5), 1347; *United States v. Abdur-Rahman*, 708 F.3d 98, 100–01 (2d Cir. 2013). And anyone who "aids, abets, counsels, commands, induces or procures" the commission of a felony is punishable as a principal. 18 U.S.C. § 2. Aiding and abetting requires an "affirmative act in furtherance of the offense, with the intent of facilitating the offense's commission." *United States v. Carbins*, 882 F.3d 557, 563 (5th Cir. 2018).

In this case, chiropractor Todd Black testified that his license, social security card, and chiropractor license were used to credential Ledic Therapy Group Corp. ("Ledic Therapy") without Black's consent. [DE 429, Aug. 17, 2018 Tr. Vol. 5, 4082:15–25, 4083:1–16]. Black had originally supplied this information to Betancourt and Oskel Lezcano to credential Med Center Chiropractic & Rehab, LLC. [DE 429, Aug. 17, 2018 Tr. Vol. 5, 3958:11–17]. Black did not consent to the use of his information to credential any other clinic. *Id.* Indeed, it is undisputed that Black's driver's license, social security number, and chiropractor license are "means of identification" that were used to credential Ledic Therapy without lawful authority under 18

U.S.C. § 1028A. But Chavez argues that the United States failed to show Chavez personally "transferred, possessed, or used" Black's identity in credentialing the clinic. [DE 410 at 2995].

While Chavez is correct that the United States offered no direct evidence at trial that Chavez personally transmitted Black's documents to credential Ledic Therapy, there was ample circumstantial evidence upon which a reasonable jury could find Chavez guilty of aggravated identity theft. Chavez's name appears as the incorporator of Ledic Therapy with the Kentucky of Secretary of State. [DE 307 at 1679–80]. Chavez's driver's license and social security number were in the credentialing documents transmitted to United Health Care along with Black's driver's license, social security number, and chiropractor license. [DE 428, Aug. 15, 2018 Tr. Vol. 3, 3881:7–21]. Chavez managed the Klondike Lane clinic where Black was a chiropractor. [DE 385, Aug. 21, 2018 Tr. Vol. II, 2704:2–5]. And, when Betancourt asked Chavez about a clinic Lezcano had set up for Betancourt, Chavez said, "it was fine 'cause [Chavez] had his own—like, his own office – his own clinic." *Id.* at 2703:25, 2704:1. The United States asked Betancourt, "Was that the Ledic Therapy?" *Id.* at 2704:4. Betancourt answered, "Yes." *Id.* at 2704:5. A jury could reasonably rely on these facts to infer that Chavez, as head of Ledic Therapy, knowingly transmitted Black's means of identification to credential Ledic Therapy without Black's consent.

Chavez nonetheless argues that the credentialing documents cannot be considered because the United States did not prove that Chavez signed the letter contained within the credentialing documents transmitted to United Health Care. [DE 410 at 2995]. As both parties note, this issue was discussed extensively at trial. [DE 410 at 2995; DE 419 at 3163]. The Court admitted the Secretary of State records under Federal Rule of Evidence 803(6) but instructed the jury not to consider documents for any other purpose than notice that such document was filed and processed, and not for the truth of the matter asserted or validity of Chavez's signature, which was hearsay

within hearsay not subject to any exception. [DE 429, Aug. 17, 2018 Tr. Vol. V, 3974:14–23]. The Court admitted the credentialing documents under Rule 803(6)(E) because either Chavez signed the document himself or, as Chavez asserted, they were signed by one of his co-conspirators. [DE 442, Aug. 29, 2018 Tr. Vol. XII, 4988:11–15].

Chavez's reliance on the signature issue is misplaced. Even if the jury could not find directly that Chavez signed the credentialing documents, it could still reasonably conclude that the surrounding evidence—*i.e.*, that Chavez's name was listed as the incorporator of Ledic Therapy with the Kentucky of Secretary of State; that Chavez's driver's license and social security number were in the credentialing documents transmitted to United Health Care with Black's personal information; that Chavez managed the Klondike Lane clinic, where Black was a chiropractor; and that Chavez admitted Ledic Therapy was "his clinic"—sufficiently proved that Chavez transmitted Black's personal information. Further, the jury could have reasonably concluded, even without direct evidence, that Chavez signed the credentialing documents. The United States presented the jury with documents containing what Chavez did not dispute was his signature. [*See, e.g.*, DE 433, Aug. 23, 2018 Tr. Vol. IX, 4645:20–23]. The jury could have reasonably compared Chavez's verified signature on these documents with the signature on the Ledic Therapy credentialing documents and concluded that both signatures belonged to Chavez. Regardless, the question of Chavez's signature, while certainly relevant, is not dispositive. To find otherwise would violate the Sixth Circuit's mandate that district courts not "weigh the evidence presented, consider the credibility of witnesses, or substitute [its] judgment for that of the jury." *Siemaszko*, 612 F.3d at 462. There is sufficient circumstantial evidence on which the jury could have based its decision. Chavez's Motion is thus denied.[1]

[1] There was also sufficient evidence for a reasonable jury to conclude that Chavez aided and abetted the transmission of Black's personal information, even if Chavez did not transmit the information himself. A

3. Count 16—Concealment Money Laundering

Similarly, Chavez argues that there was no evidence from which a reasonable jury could find Chavez guilty of concealment money laundering. [DE 451 at 5243]. To convict Chavez of concealment money laundering under 18 U.S.C. §§ 1956(h) and 1956(a)(1)(B)(i), the United States had to prove: (1) the use of funds that were proceeds of unlawful activity; (2) knowledge that the funds were proceeds of unlawful activity; and (3) knowledge that the transaction was designed, in whole or in part, to conceal the nature, location, source, ownership, or control of the proceeds. *United States v. Warshak*, 631 F.3d 266, 319 (6th Cir. 2010) (citing *United States v. Marshall*, 248 F.3d 525, 538 (6th Cir. 2001) (citation and quotation omitted)).

Chavez does not dispute that the United States proved Chavez (1) used funds that were proceeds of unlawful activity, or (2) knew those funds were the proceeds of unlawful activity. [DE 451 at 5243]. But Chavez argues that the United States failed to show a transaction that was undertaken to conceal. *Id.* Chavez categorizes the United States' proof of concealment into five actions: (1) the creation of entities in the chiropractors' names and bank accounts for those entities; (2) commingling of legitimate and illegitimate funds; (3) cash withdrawals and disbursements from those accounts; (4)C havez's failure to report purported income on his tax return; and (5) the purchase of cars. *Id.* Chavez contends that none of these actions is a transaction using the health-care-fraud proceeds that was designed to conceal, and thus Count 16 must be reversed. *Id.*

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witness testified that Chavez was aware of the health care fraud conspiracy and was aware of the falsely-billed injections from the beginning. [DE 395, Aug. 22, 2018 Tr. Vol 1-A, 2844:7–13]. Another witness testified that Chavez and his co-conspirators discussed the falsely-billed injections after United Health Care conducted site visits at the clinics. [DE 384, Aug. 20, 2018 Tr. Vol 1, 2546:11–16]. And, as noted above, Chavez admitted that Ledic Therapy was "his clinic." [DE 385, Aug. 21, 2018 Tr. Vol. II, 2703:25, 2704:1]. Chavez must have known that a chiropractor's information was required to credential his clinic. The United States was not required to show that Chavez personally transferred, possessed, or used Black's personal information. The United States only needed to show that Chavez aided and abetted others to transfer, possess, or use Black's identity. 18 U.S.C. § 2; *Carbins*, 882 F.3d at 563. A reasonable jury could find that the United States did so.

Chavez is correct that under 18 U.S.C. §§ 1956(h) and 1956(a)(1)(B)(i), there must be (1) a separate predicate offense from which the allegedly laundered proceeds were derived, and (2) Chavez must have used those proceeds in a separate transaction meant to conceal the proceeds' source. To be considered "proceeds" for money laundering purposes, the United States must show that the predicate felony—here, health care fraud—was complete and that Chavez controlled the proceeds of that fraud. *United States v. Kerley*, 784 F.3d 327, 344 (6th Cir. 2015). Indeed, "the primary issue in a money laundering charge involves determining when the predicate crime becomes a completed offense after which money laundering can occur." *Id.* (citing *United States v. Nolan*, 223 F.3d 1311, 1315 (11th Cir. 2000) (internal quotation omitted)).

To determine whether the United States has proven a distinct predicate offense, then the Court must "consider the government's theory of the case, as alleged in the indictment." *Kerley*, 784 F.3d at 344 (citing *United States v. Crosgrove*, 637 F.3d 646, 655 (6th Cir. 2011)). Here, Count 1 charged Chavez with conspiracy to commit health care fraud by falsely and fraudulently billing United Health Care for injections never rendered. [DE 207 at 722–24]. Count 2 charged Chavez with a substantive count of health care fraud under 18 U.S.C. § 1347 for falsely and fraudulently billing United Health Care for injections and other services never rendered. *Id.* at 725. Count 16 charged Chavez with conspiracy to commit money laundering, alleging that Chavez and others knowingly conducted and attempt to conduct financial transactions, knowing that the property involved in the financial transactions represented proceeds from violations of 18 U.S.C. § 1347. *Id.* at 730–31.

The Court must also consider the underling statute. A person violates 18 U.S.C. § 1347 when the person "(1) knowingly devise[s] a scheme or artifice to defraud a health care benefit program in connection with the delivery of or payment for health care benefits, items, or services;

(2) execute[s] or attempt[s] to execute this scheme or artifice to defraud; and (3) act[s] with intent to defraud." *United States v. Martinez*, 588 F.3d 301, 314 (6th Cir. 2009).

Because of the "executes or attempts to execute" language, health care fraud is complete, at the latest, when the payment is received in the mail from the health care benefit program for the fraudulent claim. *See United States v. Halstead*, 634 F.3d 270, 280 (4th Cir. 2011) ("At the moment that the healthcare provider paid money to Priority One, the crime of healthcare fraud was complete, and the money that the healthcare provider paid to Priority One was the 'proceeds' of the healthcare fraud."). Courts have held similarly in related contexts requiring a predicate offense. *See, e.g.*, *United States v. Rayborn*, 491 F.3d 513, 517 (6th Cir. 2007) ("The first step in the scheme was the commission of the underlying offense of mail fraud, which occurred when Rayborn sent fraudulent tax documents and other loan application materials to Wells Fargo."); *United States v. Prince*, 214 F.3d 740, 748 (6th Cir. 2000) (wire fraud was complete once the victims wired the money); *United States v. Bikundi*, No. 14-030-BAH, 2016 WL 912169, at *1 (D.D.C. Mar. 7, 2016) (health care fraud was complete once the defendant received the fraudulent Medicaid funds).

Kerley is particularly instructive. There, like here, the defendant argued that the relevant funds were not obtained from a completed predicate offense. 784 F.3d at 344. The Sixth Circuit examined the indictment and relevant statute and determined that neither required the deposit of unlawful proceeds to complete the offense. *Id.* Instead, the court found that the health care fraud and money laundering offenses were separate and distinct, noting that "[b]ecause Whaley's receipt of the GLT check was the last possible act in the alleged scheme, Whaley's deposit of the check—which occurred subsequent to his receipt—was separate from the completed wire fraud offense." *Id.* (citing *United States v. Cefaratti*, 221 F.3d 502, 511 (3d Cir. 2000)).

Like in *Kerley*, neither the Indictment nor statute in this case require the deposit of unlawful proceeds to complete the predicate offense. The Indictment's health-care-fraud charge alleges that Chavez "falsely and fraudulently billed United Healthcare for injections and other services never rendered." [DE 207 at 725]. The underlying statute, 18 U.S.C. § 1347, requires a person to "knowingly and willfully execute[], or attempt[] to execute, a scheme or artifice" to either (1) "defraud any health care benefit program" or (2) "to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program ..." Thus, as in *Kerley*, the predicate offense was complete, at the latest, once Chavez and his co-conspirators received the checks mailed from United Health Care. Chavez and his co-conspirators had complete control of the funds once they received those checks, which they subsequently endorsed and either deposited into bank accounts or cashed in Miami, Florida. Chavez's deposit or cashing of those checks was thus a separate and distinct offense that formed the basis of the UnitedS tates' moneyl aunderingc harge.

Chavez nonetheless disputes that any of the United States' five categories of activities—(1) the creation of entities in the chiropractors' names and bank accounts for those entities; (2) commingling of legitimate and illegitimate funds; (3) cash withdrawals and disbursements from those accounts; (4) Chavez's failure to report purported income on his tax return; or (5) the purchase of cars—constitutes a transaction distinct from the predicate offense. [DE 451 at 5243]. Chavez instead argues that each of those categories were either part of the predicate offense itself or otherwise not designed to conceal proceeds from the predicate offense. *Id.* Specifically, Chavez claims that none of the bank accounts in which Chavez and his co-conspirators deposited United Health Care checks was established to help conceal proceeds of health care fraud. *Id.* at 5243–47. The defendants in *Halstead* made a similar claim, arguing that the health care fraud and money

laundering charges related to the same conduct and thus were not separate and distinct. 634 F.3d at 280. The Fourth Circuit rejected this argument:

> While Halstead entered into a single agreement with Burns and others for the purpose of fraudulently obtaining funds from insurance companies and healthcare providers, they agreed to commit several crimes including healthcare fraud, mail fraud, and money laundering. Entering into a single agreement to commit numerous crimes does not insulate the conspirators from liability for the crimes that they thereafter commit in furtherance of their agreement.

Id. Similarly, in *United States v. Mankarious*, the Seventh Circuit noted that "it does not matter when all the acts constituting the predicate offense take place. It matters only that the predicate offense has produced proceeds in transactions distinct from those transactions allegedly constituting money laundering." 151 F.3d 694, 706 (7th Cir. 1998). Thus, while health care fraud and money laundering activities often occur in short succession, the ultimate question is whether the health care distribution and the subsequent attempt to conceal are separate and distinct transactions. *Bikundi*, No. 14-030-BAH, 2016 WL 912169, at *1.

While receipt and deposit of the United Health Care funds into bank accounts established by Chavez and his co-conspirators overlapped, the two actions were separate and distinct. As previously discussed, the health care fraud was completed, at the latest, once the checks mailed from United Health Care to the clinics were received. After the checks were already mailed, Chavez and his co-conspirators opened bank accounts in Florida and subsequently deposited the checks into those accounts to conceal the funds from the chiropractors. [DE 455 at 5284–85]. These transactions were thus separate and distinct from the underlying offense.

Finally, Chavez argues that the United States failed to show that concealment was an "animating purpose" of the money laundering transactions. *Id.* at 5247. To find money laundering, "it is not enough for the government to prove merely that a transaction had a concealing effect. Nor is it enough that the transaction was *structured* to conceal the nature of illicit funds.

Concealment—even deliberate concealment—as mere facilitation of some *other* purpose, is not enough to convict." *United States v. Faulkenberry*, 614 F.3d 573, 586 (6th Cir. 2010) (citing *Cuellar v. United States*, 553 U.S. 550 (2008)). Instead, concealment must "be an animating purpose of the transaction,"a lthough itne ed not "bethe *only* purposeo f thetra nsaction." *Id.*

In this case, a jury could reasonably find that concealment was an animating purpose of the post-fraud transactions. Chavez established several bank accounts in Miami with names nearly identical to accounts set up by chiropractors in Louisville. For example, Chavez established Locklear Chiropractic LLC and its corresponding bank account in Miami after Victor Locklear set up the Kentucky Locklear Chiropractic LLC. [DE 455 at 5285]. Thereafter, United Health Care checks mailed to Locklear ChiropracticLL C in Louisville were deposited into Chavez's Locklear account in Miami. *Id.* No billings to United Health Care originated from the Miami account. *Id.* Chavez also set up the Klondike Chiropractic Medical Center and Billing, LLC bank account in Miami after Michael Kowalski opened a business bank account in the name Klondike Medical Center LLC at Chase Bank in Louisville. *Id.* United Health Care checks were then endorsed and deposited into Chavez's Klondike Miami account. *Id.* The purpose of depositing the funds into accounts in Miami named nearly identically to those accounts set up by the chiropractors in Kentucky was to conceal the amounts of the fraudulently received funds from the chiropractors who may have noticed the deposits of such large amounts of funds into the accounts. A reasonable jury could find that an animating purpose of Chavez's decision to open like-named accounts in Miami and deposit and withdraw funds in those accounts was to conceal their illicit nature. Accordingly, there is no basisfor the Court to disturb the jury's verdict under Rule 29.[2]

[2] While Chavez's and his co-conspirators' creation of and subsequent deposits into Miami bank accounts is sufficient to maintain Chavez's conviction, the other four categories of activities also constitute a separate and distinct transaction for money laundering purposes. Specifically, the commingling of funds, the disbursement of those funds, the failure to file a tax return, and the purchase of cars with those funds all

C. Motion for a New Trial Under Rule 33

1. Legal Standard

In the alternative, Chavez seeks a new trial for Count 16 under Rule 33. [DE 451 at 5251]. Rule 33 provides that "[u]pon the defendant's motion, [a district] court may vacate any judgment and grant a new trial if the interest of justice so requires." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010) (quoting Fed. R. Crim. P. 33(a)). Rule 33's "interest of justice" standard allows the grant of a new trial where substantial legal error has occurred. *United States v. Whittle*, 223 F. Supp. 3d 671, 675 (W.D. Ky. 2016), *aff'd*, 713 F. App'x 457 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1580 (2018) (citing *Munoz*, 605 F.3d at 373). The court may grant a new trial on one of two grounds: (1) newly discovered evidence under Rule 33(b)(1); or (2) a motion "grounded on any reason other than newly discovered evidence" under Rule 33(b)(2). *Id.* The burden is on the defendant to justify a new trial. *United States v. Carson*, 560 F.3d 566, 585 (6th Cir. 2009). "The decision to grant or deny a motion for a new trial is entirely within the discretion of the district court, and [the Sixth Circuit] will not reverse absent a showing of an abuse of discretion." *United States v. Anderson*, 76 F.3d 685, 692 (6th Cir. 1996); *see also United States v. Farrad*, 895 F.3d 859, 885 (6th Cir. 2018); *United States v. Callahan*, 801 F.3d 606, 616 (6th Cir. 2015). "[S]uch motions should be granted sparingly and with caution." *United States v. Turner*, 995 F.2d 1357,

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occurred after United Health Care mailed the fraudulently obtained checks. And a jury could reasonably find that these transactions were designed to conceal the proceeds of the underlying fraud. Although 18 U.S.C. § 1956 does not criminalize the spending of illegally obtained money, a reasonable jury may find that purchases are intended to conceal depending on the context in which they occur. *See Warshak*, 631 F.3d at 321 ("[A] particular transaction must be viewed in context when determining whether it was designed to conceal.") (citing *United States v. Burns,* 162 F.3d 840, 848 (5th Cir. 1998); *United States v. Garcia-Emanuel,* 14 F.3d 1469, 1476 (10th Cir. 1994)). Here, Chavez purchased the cars shortly after obtaining the illicit funds and has offered no alternative explanation for the purchases. *See United States v. Stoddard*, 892 F.3d 1203, 1215 (D.C. Cir. 2018) (considering an "innocent explanation" for car purchases in the money laundering context). And failure to file a tax return, considered with other financial activity, is evidence of intent to conceal. *United States v. Mangual-Santiago*, 562 F.3d 411, 429 (1st Cir. 2009), *cert denied*, 558 U.S. 912 (2009).

1364 (6th Cir. 1993); *see also United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007) (Rule 33 motions "are granted only in the extraordinary circumstance where the evidence preponderates heavily against the verdict." (citation and quotation omitted)).

2. Count 16

Chavez does not assert newly discovered evidence under Rule 33(b)(1). Instead, he argues that a new trial is in the interest of justice because (1) the United States created a merger problem by basing its health-care-fraud and money-laundering charges on the same conduct, and (2) the United States misstated the law throughout its closing in a way that prejudiced Chavez's defense against the concealment-money-laundering charge. [DE 451 at 5251–52].

A merger problem arises "when defining 'proceeds' as 'receipts' automatically makes commission of the predicate offense a commission of money laundering and where the predicate offense carries a much lower statutory maximum sentence than the associated money laundering charge." *Crosgrove*, 637 F.3d at 655. However, merger does not occur when the predicate felony elements do not automatically lead to commission of concealment money laundering. *Buffin v. United States*, 513 F. App'x 441, 446 (6th Cir. 2013).

In *Buffin*, the court compared the elements of the predicate felony (mail fraud) with concealment money laundering and found that they were not the same. *Id.* There was thus no merger problem. *Id.* Similarly, in *Halstead*, the defendant claimed that his health-care-fraud and money-laundering transactions were coextensive. 634 F.3d at 280. The court disagreed because the money laundering transactions "were separate from the transactions constituting healthcare fraud. The healthcare fraud charges were defined by the obtaining of money from the fraudulent billing of healthcare providers, while the money laundering charge was defined by

transferring the proceeds thereafter." As a result, "the merger problem never arises" in such circumstances. *Id.*

As in *Halstead*, the predicate offense of health care fraud was complete once Chavez and his co-conspirators received the checks United Health Care mailed to the clinics. The separate offense of money laundering occurred when Chavez and his co-conspirators deposited and cashed those checks. By definition, then, the elements for the underlying health care fraud and the elements of concealment money laundering are not coextensive. Specifically, both the Indictment and the underlying statute define health care fraud as obtaining of money from the fraudulent billing of health care providers, while the money laundering charge is defined by transferring the proceeds *after the required predicate offense is completed*. Chavez's case therefore presents no merger problem.

Similarly, the United States' closing argument did not prejudice Chavez's defense against the concealment-money-laundering charge. First, Chavez argues that the closing argument conflated health care fraud and concealment money laundering. [DE 451 at 5251]. For example, during its closing, the United States stated that "[t]he entire scheme is concealment." [DE 414, Aug. 30, 2018 Tr. 3097:20–21]. And during its rebuttal, the United States stated:

> How were they to know that these other fake companies, these billing companies, were set up in Florida in their name without their knowledge? They didn't know that money was going there. You heard testimony about that. You heard testimony that there were mailboxes at the different clinics that the doctors didn't have a key to so that they didn't see all the checks that came in. All this to conceal what was going on.

Id. at 3143:7–14. Chavez argues that "[t]his conflation of the import of 'concealment' misstates what is required to prove concealment money laundering … and leads to a merger problem that can be cured only by removing from the evidentiary scales the evidence of nominee accounts and commingling of funds." [DE 451 at 5251].

The merger argument was discussed above, and it fails here for the same reasons. The United States' above statements address actions taken after United Health Care mailed the relevant checks to the clinics. Those actions were separate transactions and do not create a merger problem. Because there is no merger problem, the closing arguments could not have conflated health care fraud and concealment money laundering.

Second, Chavez again argues that the United States failed to prove that intent to conceal was an animating purpose behind the money laundering transactions. *Id.* at 5252. This argument is discussed at length above, and reference to the animating purpose behind Chavez's post-fraud transactions was not improper. The jury had all the information concerning the concealment-money-laundering charge, and the closing arguments were proper for concealment money laundering. The jury was free to draw inferences, assess witnesses' credibility, and interpret evidence for or against Chavez. There is thus no justification for the Court to take the extraordinary step of disturbing the jury's verdict under Rule 33.

CONCLUSION

For the reasons set forth above, and being otherwise sufficiently advised, **THE COURT HEREBY ORDERS** that:

(1) Chavez's Motion for Documents Reflecting Inventory of Items in the Possession of Sergio Betancourt on Each Date of His Arrest [DE 398] is **DENIED**;

(2) Chavez's Motion for Judgment of Acquittal on Count 13 [DE 410] is **DENIED**; and

(3) Chavez's Motion for Judgment of Acquittal or For a New Trial on Count 16 [DE 451] is **DENIED**.

Rebecca Grady Jennings, District Judge
United States District Court

November 28, 2018

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-5016

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LEDINSON CHAVEZ,

Defendant - Appellant.

Before: ROGERS, STRANCH, and THAPAR, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that Ledinson Chavez's conviction and sentence are AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0052p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEDINSON CHAVEZ,

Defendant-Appellant.

No. 19-5016

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 3:15-cr-00054-5—Rebecca Grady Jennings, District Judge.

Argued: December 5, 2019

Decided and Filed: February 21, 2020

Before: ROGERS, STRANCH, and THAPAR, Circuit Judges.

COUNSEL

ARGUED: R. Kenyon Meyer, DINSMORE & SHOHL, LLP, Louisville, Kentucky, for Appellant. L. Jay Gilbert, UNITED STATES ATTORNEY'S OFFICE, Louisville, Kentucky, for Appellee. **ON BRIEF:** R. Kenyon Meyer, DINSMORE & SHOHL, LLP, Louisville, Kentucky, for Appellant. L. Jay Gilbert, UNITED STATES ATTORNEY'S OFFICE, Louisville, Kentucky, for Appellee.

OPINION

THAPAR, Circuit Judge. Four men from Miami drove to Louisville with a plan to set up chiropractic clinics. But Oskel Lezcano (who all agree was the mastermind) had another, more lucrative idea: file false claims with the patients' insurers and get paid for treatments that never

happened. The other men involved—Ledinson Chavez, Sergio Betancourt, and Yuriesky Diaz—joined in.

The plan worked (for a while). One reason for its success: aggressive marketing. The conspirators recruited and paid patients both to come to the clinics and to recruit others. Many of the patients worked at a shipyard called Jeffboat. Jeffboat (through its claim administrator, United Healthcare) paid the clinics more than $1 million for fake injections of a muscle relaxant.

Eventually, the government discovered the scheme and brought criminal charges against the four men. Chavez went to trial. He claimed that he was innocent and had no idea that Lezcano was cooking the books. But to no avail. The jury found Chavez guilty of healthcare fraud, conspiracy to commit healthcare fraud, aggravated identity theft, and conspiracy to commit money laundering for purposes of concealment.

Chavez now appeals those convictions and his 74-month sentence. He alleges a host of trial errors, which fall into three groups: (1) two challenges to the sufficiency of the evidence and a related challenge to the prosecutor's closing argument, (2) two hearsay arguments, and (3) three objections to the jury instructions. He also raises one sentencing argument. We affirm.

I.

A.

Sufficiency of the Evidence: Aggravated Identity Theft. Chavez argues the evidence was insufficient to find him guilty of aggravated identity theft. For this challenge, we take the evidence in the light most favorable to the government and ask whether any rational trier of fact could have convicted on the count. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To prove aggravated identity theft, the government had to show that Chavez knowingly and without authority transferred, possessed, or used someone else's personal identification while committing another crime enumerated in the statute (here, healthcare fraud and conspiracy). 18 U.S.C. § 1028A(a)(1). The jury found that the government carried its burden. That finding was rational based on everything the jury heard and saw.

During the conspiracy, the clinics asked United Healthcare to make them approved out-of-network providers. To that end, the clinics sent in applications with identifying documents (driver's license, Social Security card, and chiropractic license) for the chiropractors who allegedly worked at the clinics. One application packet, submitted on behalf of a clinic called Ledic Therapy Group, included the documents of chiropractor Todd Black. But Black testified that he had never heard of Ledic Therapy Group, never worked there, and never authorized the clinic to use his information.

That's the identity theft Chavez was charged with: knowingly using Black's documents, without his permission, in the Ledic application. The evidence was sufficient to convict him. The Ledic packet didn't just contain Black's identifying documents. It also had Chavez's driver's license and his Social Security number. And the documents' cover sheet purported to be signed by Chavez (with a signature that resembled the one on his driver's license). A reasonable jury could have taken those documents at face value—particularly with no evidence to the contrary.

True, Chavez tried to exclude the Ledic documents from evidence and, after that failed, asked that the jury be told not to consider his name on the documents. But the district court admitted them in full. And when we analyze the sufficiency of the evidence, we look at all the evidence admitted. *See Lockhart v. Nelson*, 488 U.S. 33, 40–42 (1988); *United States v. Quinn*, 901 F.2d 522, 530–31 (6th Cir. 1990).

Chavez also argues that even if he submitted the documents, the evidence didn't prove that he *knew* Black hadn't authorized their use. Chavez points out that Black had done work at other Lezcano-affiliated clinics and routinely provided his documentation for administrative purposes. But there's no reason to think anyone (Chavez included) would have understood Black's consent for some uses to extend to *all* uses—including the Ledic application. Again, Black testified that he never worked at Ledic, never authorized his information to be used for Ledic's benefit, and had never even heard ofL edicunti l this case.

Of course, it's *conceivable* that Chavez somehow made an honest mistake about whether heha dpe rmission to use Black's credentials. B ut the jury was entitled to think of that possibility

(if at all) as a mere "fanciful conjecture," not a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 20 (1994). Particularly since there was no evidence to support that conjecture.

B.

Sufficiency of the Evidence: Conspiracy to Commit Concealment Money Laundering. Chavez also argues that the government failed to prove he conspired to commit concealment money laundering. To prove concealment money laundering, the government had to show (1) that a person conducted a financial transaction (2) that involved the proceeds of unlawful activities, (3) that he knew involved some illegal proceeds, and (4) that he knew was "designed" (at least in part) to conceal or disguise certain facts about the proceeds. 18 U.S.C. § 1956(a)(1), (a)(1)(B)(i); *see Cuellar v. United States*, 553 U.S. 550, 563–67 (2008). And to prove conspiracy, the government had to show that the defendant knowingly agreed with someone else to commit this crime. *United States v. Bazazpour*, 690 F.3d 796, 802 (6th Cir. 2012). The jury found the government carried its burden. Again, that finding was rational.

Why? Because for at least some clinics, the conspirators created duplicate business entities with identical names (one in Kentucky, one in Florida) and opened parallel bank accounts for those entities. The chiropractors at the clinics would have access to one set of accounts. The conspirators used the duplicate accounts to store the proceeds of their healthcare scheme and to pay themselves. The chiropractors never saw these duplicate accounts.

Chavez doesn't argue that the government failed to prove his knowledge of these accounts or his agreement to deposit illegal proceeds in them. (In fact, he personally opened some of them.) And the jury easily could have inferred a concealment purpose behind these parallel accounts. If the chiropractors had found out how much money the clinics were moving, they might have started to ask inconvenient questions. So a rational juror could infer that the conspirators opened the accounts to conceal their fraudulent-billing scheme from the chiropractors by using bank accounts the chiropractors could not monitor.

Even so, Chavez says that it would have made no sense to conceal funds by depositing them in a bank account with his own name on it. But the jury didn't have to find that the conspirators wanted to hide this money from the *whole world*. It could just find that they wanted

to hide it from the *chiropractors*. That satisfies the statute, which (1) demands only a partial purpose of concealment; (2) covers efforts to conceal the funds' "nature," "location," "source," "ownership," or "control"; and (3) doesn't specify *from whom* the transaction must be designed to conceal those attributes. 18 U.S.C. § 1956(a)(1)(B)(i); *see also Cuellar*, 553 U.S. at 559 (noting that "nature"re fers to "the funds' illegitimate character").

Chavez also challenges the *timing* of the money-laundering offense. By definition, money laundering involves the "proceeds" of illegal activity. 18 U.S.C. § 1956(a)(1). That implies that you can't commit money laundering unless some other crime has *already* been committed (though not necessarily *completed* since it could be a continuing offense). *See United States v. Santos*, 553 U.S. 507, 511 (2008) (plurality opinion); *United States v. Kerley*, 784 F.3d 327, 344–45 (6th Cir. 2015). Chavez says that depositing United Healthcare checks in the bank accounts was a necessary step in the healthcare fraud. Thus, he reasons, those funds were not "proceeds" and the deposits couldn't constitute money laundering. The conclusion follows from the premise. But the premise is wrong.

That's because the law Chavez was convicted under "prohibit[s] the 'scheme to defraud,' rather than the completed fraud." *Neder v. United States*, 527 U.S. 1, 25 (1999); *see* 18 U.S.C. § 1347(a). Thus, the crime was committed the moment the conspirators submitted false claims for payment. Under a "scheme to defraud" statute, liability doesn't wait to attach until *after* the victim falls for the ruse and cuts a check. *See United States v. Turner*, 465 F.3d 667, 680 (6th Cir. 2006). Much less until after the fraudster *deposits* that check. *See Kerley*, 784 F.3d at 344–45. So there's no timing problem with Chavez's conviction.

C.

The Government's Closing Argument. Even if the *evidence* was sufficient to prove a concealment scheme distinct from the fraud scheme, Chavez argues that the government's *closing argument* improperly equated the two.

Chavez didn't object at the time, so we review for plain error. *See United States v. Collins*, 78 F.3d 1021, 1039 (6th Cir. 1996). The word "plain" has teeth: it means an error so obvious that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance." *United States v. Frady*, 456 U.S. 152, 163 (1982). That didn't happen here.

To be sure, the prosecutor said at one point that "[t]he entire scheme is a concealment." R. 414, Pg. ID 3097. Out of context, that *might* sound like he was trying to blur the distinction between (1) the scheme to commit healthcare fraud and (2) the scheme to launder the *proceeds* of the healthcare fraud. But in context, the prosecutor made the "entire scheme" comment when discussing one element of money laundering: purpose to conceal. He seems to have been arguing that the secrecy of the overall operation (*e.g.*, paying the recruiters in cash) showed that the conspirators had an interest in concealment. If so, that would support an inference that the bank accounts were also designed with a concealment purpose, a necessary element of the crime.

On this reading, there was no error in the closing argument. Since this reading is plausible, we cannot find *plain* error. In any event, Chavez hasn't argued that the alleged error affected his substantial rights—as was his burden. *See* Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 734–35 (1993). So if nothing else, his failure to meet that burden rules out a new trial on this ground.

II.

Chavez next challenges the district court's evidentiary rulings. We review evidentiary rulings for an abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). That means that we check whether the district court (1) misunderstood the law (here, the Federal Rules of Evidence), (2) relied on clearly erroneous factual findings, or (3) made a clear error of judgment. *See United States v. Daneshvar*, 925 F.3d 766, 775 (6th Cir. 2019); *United States v. Mack*, 808 F.3d 1074, 1084 (6th Cir. 2015). But even if the district court abused its discretion, we may not grant a new trial if the record gives us a "fair assurance" that the verdict wasn't "substantially swayed" by the evidentiary error. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *see* 28 U.S.C. § 2111.

Chavez attacks two pieces of evidence: (1) a notebook that belonged to Diaz and (2) the Ledic Therapy Group packet Chavez apparently signed. He argues that the district court erred by admitting the exhibits because they were hearsay (and, in the packet's case, compounded the error by not giving appropriate hearsay limiting instructions).

The basics: in most cases, an out-of-court assertion (or "statement") is hearsay if it is offered to prove the truth of the matter asserted. Fed. R. Evid. 801(a), (c). Hearsay is inadmissible unless it falls within an exception. Fed. R. Evid. 802, 803, 804, 807. But some kinds of statements (often called "exclusions") need no exception because they are not considered hearsay in the first place—even when offered for their truth. Fed. R. Evid. 801(d).

A.

Diaz's Notebook. Diaz had a notebook with jottings that look like the kind of notes anyone might keep about his business—a mishmash of names, addresses, telephone numbers, dollar figures, and other numbers, almost all of it meaningless to an outsider. Several pages are covered by names sitting atop strings of numbers. For example:

> [First and last name]
> 16/20/-16-17-18-19-20=>5

On two other pages, Diaz added up what appear to be dollar amounts under the headings "Papo" (Chavez's nickname) and "Mio y Papo." These two cryptic arithmetic problems are the only references to Chavez in the notebook.

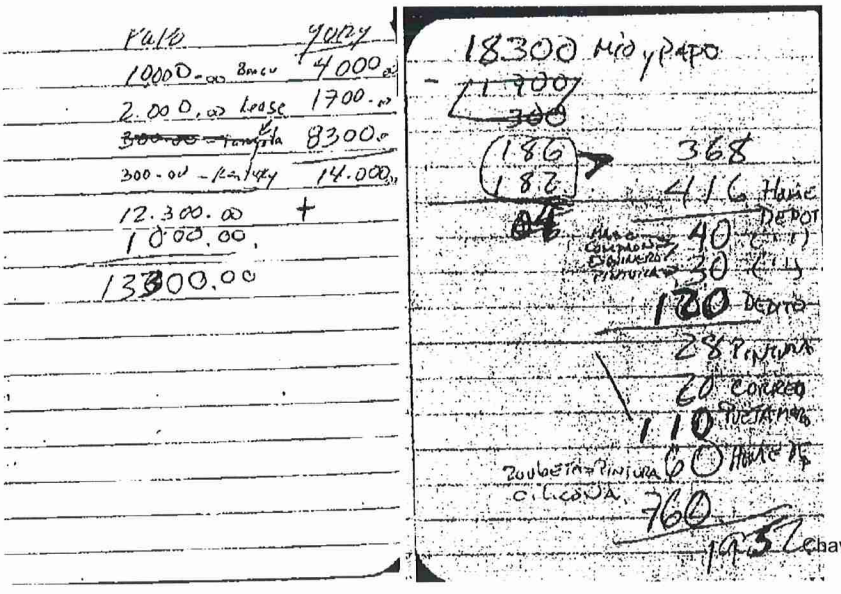
For purposes of hearsay, these notes qualify as "statements." A "statement" is simply something that its maker intends as an "assert[ion] [of] a proposition that could be true or false." *United States v. Rodriguez-Lopez*, 565 F.3d 312, 314 (6th Cir. 2009); *see also* Fed. R. Evid. 801(a) & advisory committee's note to subdivision (a) (1972 Proposed Rules). Diaz surely intended for his notes to record *something* about his business. That it's hard to say exactly *what* doesn't mean that they weren't "statements."

The harder question is whether the prosecution used the notes to prove the truth of what they asserted. Fed. R. Evid. 801(c)(2). For the most part, the government didn't. And to the extent that it did, any error was harmless. But all this requires more explanation.

Start with the strings of numbers. As the government mentioned in its closing argument, two witnesses testified that these numbers recorded a patient's visits: "16/20" meant a patient had completed sixteen of the twenty appointments needed before he got paid. But that didn't go to the truth of the matters asserted. The government was not trying to figure out whether it was true that the particular patient whose name Diaz wrote had visited the clinic sixteen out of twenty times. The witnesses were simply explaining *what the notes were talking about*, not whether they were *accurate*. If it turned out the notes were wrong—say, if a patient had only been to the clinics six times, not sixteen—that wouldn't have contradicted any testimony or government argument. Simply put, the government didn't care whether it was true that a patient went there sixteen times.

The "Papo" notes call for more focused analysis about two points: (1) the contents of the notes and (2) the fundamentals of hearsay.

As to the first, the simplest way to achieve that clarity is to look at the notes. So here they are in full:



As to the second: remember that evidence is only hearsay to the extent that it (1) asserts a proposition and (2) is used to prove the truth of that very proposition ("the matter asserted"). Fed. R. Evid. 803(c); *see also, e.g.*, *United States v. Hathaway*, 798 F.2d 902, 905 (6th Cir. 1986).

So do the "Papo" notes assert a proposition that they were also used to prove? And if so, what is that proposition? Given how cryptic the notes are, those questions are easier asked than answered. Let's start by ruling somec andidates *out*.

It's tempting to think (and Chavez argues) that the notes must be hearsay because (1) they use Chavez's nickname and (2) they were used to link Chavez to the conspiracy. But that line of thought gets us nowhere. For starters, the *name* "Papo" can't assert a proposition because, by itself, it's *just* a name. It identifies a person, but it says nothing *about* that person. In grammatical terms, it's a subject with no predicate. That isn't a proposition or statement at all. *Cf. United States v. Snow*, 517 F.2d 441, 442–44 (9th Cir. 1975) (holding that the defendant's name written on apiec eo f tapew as not a statement).

Thus, to identify the matters asserted in the notes, it's not enough just to know that they mention Chavez. We must also know *what they say about him*. Unfortunately, no witness explained what the numbers on these two pages stood for or how they were associated with Chavez. (The government asked Betancourt once, but he failed to answer and the government failed to ask again.)

Still, this much is clear: just as the proposition asserted can't be "Papo," it also can't be "Chavez is a member of the conspiracy." On one page, the word "Papo" is the heading of a simple addition problem. On the other, Diaz wrote "18300 Mio y Papo" near some other hard-to-follow calculations. Unless Diaz wrote in some elaborate numeric code (a theory never floated at trial), these notes don't *assert* that Chavez belongs to the conspiracy.

In the end, the only plausible meaning of the notes is something akin to "Chavez is owed"—or maybe "spent" or "received"—"these amounts of money." In other words, the only real candidates are propositions about particular financial transactions in which Chavez was asserted to be involved.

Thus, the *only* hearsay use would be if the prosecution used the notes to prove that Chavez was owed, spent, or received the amounts of money listed in the notes. And with only one possible exception, the prosecution never argued that the notes proved any specific fact about Chavez's finances.

What's the possible exception? In closing, the government connected the note "18300 Mio y Papo" with a check Diaz received for $18,300. It then connected that check with the money-laundering charge, implying that Chavez's name next to the check amount was evidence against him on that count. The precise nature of all these connections was hard to follow. But if the government was asking the jury to construe "18300 Mio y Papo" as evidence of a financial transaction in which Chavez was involved, that was indeed a hearsay use. The note *asserted* that Chavez had some connection with the check. And the government was using that assertion to *prove* that Chavez had some connection with the check. That was hearsay.

But any hearsay error was harmless. The government produced voluminous evidence of the conspirators' financial transactions—Chavez's included. Diaz's $18,300 check was no more than one thread in that elaborate tapestry. The other evidence showed that Chavez personally opened at least two bank accounts for the clinics to deposit fraudulent checks and that he personally deposited checks from United Healthcare into those accounts. All told, the idea that the verdict was "substantially swayed" by any hearsay use of the note "18300 Mio y Papo" is implausible. *Kotteakos*, 328 U.S. at 765.

B.

The Ledic Therapy Group Documents. The Ledic Therapy Group documents, sent as an application to United Healthcare, included Todd Black's identification without his permission. The cover sheet appeared to be signed by Chavez, whose driver's license and Social Security number were also in the packet. Chavez says the whole packet was inadmissible hearsay and the signature was *double* hearsay, so the district court should have at least redacted it or told the jury not to assume it was genuine.

But this is not a "hearsay within hearsay" fact pattern. *See* Fed. R. Evid. 805. Considered simply as an exhibit, the packet wasn't a statement. It was just physical evidence

relevant (1) to prove that it existed and (2) to corroborate that United Healthcare received it (which was established by testimony).

Of course, there are out-of-court statements *in* the packet. Those statements would be hearsay unless they fell within an exception or exclusion. Chavez is right that the signature on the cover sheet is such a statement. True, a name *alone* isn't a statement. But the signature on the cover sheet conveys something more—ita sserts "Ia m Ledinson Chaveza nd Ia m responsible for these documents." *See* Fed. R. Evid. 801(a); *United States v. Vigneau*, 187 F.3d 70, 74 (1st Cir. 1999). Still, that's single-level hearsay at most—there's no double hearsay. Thus, this evidence needs only one layer of exceptions or exclusions to be admissible.

Two exclusions together did the job. How so? The district court found that *either* Chavez signed his name *or* one of his co-conspirators signed it to promote their shared goal of committing healthcare fraud. Either way, the signature wasn't hearsay. A party's own statements aren't hearsay when offered against him. Fed. R. Evid. 801(d)(2)(A). Nor are statements his co-conspirators made during and in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E). That takesc areo f Chavez's hearsay argument.[1]

III.

Chavez next attacks the district court's jury instructions. He contends that (1) the court's instruction on aiding and abetting aggravated identity theft was deficient, (2) it was unfair for the jury instructions to quote the text of each count as charged in the indictment, and (3) the court erred by not giving a multiple-conspiracies instruction.

The district court has "broad discretion in drafting jury instructions." *United States v. Beaty*, 245 F.3d 617, 621 (6th Cir. 2001). To overcome that discretion, Chavez must show that

[1]In passing, Chavez suggests that if a co-conspirator signed his name, that wouldn't be enough to connect him to the documents. But that isn't a hearsay argument. If it's an evidentiary argument at all, it's a relevance argument Chavez has likely forfeited by burying it within his hearsay discussion. *See, e.g.*, *United States v. Taylor*, 800 F.3d 701, 715 (6th Cir. 2015); *Salkil v. Mt. Sterling Twp. Police Dep't*, 458 F.3d 520, 531 (6th Cir. 2006); *see also generally Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680–82 (11th Cir. 2014) (discussing this and other ways parties can fail to raise issues for review). Even if Chavez properly raised a Rule 401 relevance argument to the signature, the argument would fail because relevance is an "extremely liberal" test satisfied by "even the slightest probative worth." *Douglas v. Eaton Corp.*, 956 F.2d 1339, 1344 (6th Cir. 1992), *abrogated on other grounds by Weisgram v. Marley Co.*, 528 U.S. 440 (2000).

the "instructions, viewed as a whole, were confusing, misleading, or prejudicial." *United States v. Pensyl*, 387 F.3d 456, 458 (6th Cir. 2004) (cleaned up). That's a high bar. Chavez can't clear it.

A.

Aiding and Abetting. The district court told the jury that it could find Chavez guilty of aggravated identity theft in either of two ways: if he personally committed that crime or if he aided and abetted its commission. Chavez argues that the court erred when it gave the latter instruction. Why? Because (he says) the court didn't instruct that to convict Chavez as an aider and abettor, thegov ernment had to prove his "advanceknow ledge"o f thei dentity theft.

That language comes from *Rosemond v. United States*, a case about aiding-and-abetting liability for the layered (or "compound") offense of using or carrying a firearm while committing certain violent or drug-related crimes. 572 U.S. 65, 67 (2014); *see* 18 U.S.C. § 924(c)(1)(A). In *Rosemond*, the Supreme Court applied basic complicity principles to hold that you don't automatically aid and abet a § 924(c) violation just because you intentionally assist the *underlying* crime. 572 U.S. at 76. Instead, you must intend to assist the § 924(c) violation itself—gun use included. *Id.* In the Court's words, "the intent must go to the specific and entire crime" for which you're charged as an aider and abettor. *Id.* In a § 924(c) case, that requirement is met if you "actively participated in the underlying crime with *advance knowledge* that a confederate would useor c arry a gun during [its] commission." *Id.* at 67 (emphasis added).

Chavez didn't raise this *Rosemond* issue at trial, so again we review for plain error. And again, there was no error—plain or otherwise. To be sure, aggravated identity theft, like § 924(c), is a double-decker crime—it requires an identity theft "during and in relation to" an underlying felony (here, healthcare fraud). 18 U.S.C. § 1028A(a)(1). So Chavez is right that aiding and abetting aggravated identity theft requires the intent to assist the *identity theft*, not just the underlying offense. He's also right that such intent must include (at a minimum) "advance knowledge" of theidentit y theft. Af ter all, youc an't intentionally assist anidentit y theft that you only learn about after it'sbe en committed.

Where Chavez goes wrong is in his belief that the instruction here said anything different. The jury was told that to convict Chavez as an accomplice, the government had to prove:

> (A) First, that the crime of aggravated identity theft was committed.
>
> (B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.
>
> (C) And third, that the defendant intended to help commit or encourage the crime.

R. 400, Pg. ID 2935. The instruction then explained that it wasn't enough for the government to prove Chavez "may have known about the crime"—rather, it had to prove "that [he] did something to help ore ncouragethe crime with theint ent that thec rimebe c ommitted." *Id.*

All that was correct. And it covered the "advance knowledge" requirement (even if the district court didn't use those precise words). Again, you can't "d[o] something to help or encourage [a] crime with the intent that the crime be committed" if you don't already know about "the crime." Nor was there any danger that the jury would misunderstand "the crime" that Chavez must have intended to assist as referring to the *underlying* offense of healthcare fraud. In the context of the instruction, "thec rime" clearly meant "thec rime of aggravated identity theft."

That clarity sets this instruction apart from the one in *Rosemond* and from two others our court has rejected in § 924(c) cases after *Rosemond*. The instructions in all three of those cases wrongly implied that a defendant who intended to help only the *underlying* offense could still be charged and convicted for aiding and abetting the *compound* crime. *See Rosemond*, 572 U.S. at 82; *United States v. Henry*, 797 F.3d 371, 374 (6th Cir. 2015); *United States v. Richardson*, 793 F.3d 612, 630–31 (6th Cir. 2015), *vacated and remanded on other grounds*, 136 S. Ct. 1157 (2016) (mem.). The instruction here, in context, implied nothing of the kind.

B.

Quoting the Indictment. Chavez also argues that the jury instructions should not have incorporated parts of the indictment. The government says the plain-error standard applies while Chavez insists he preserved this argument at trial. Either way, the jury instructions survive.

In general, a district court can give a jury a copy of the indictment so long as the court instructs the jury that the indictment isn't evidence of guilt. *United States v. Smith*, 419 F.3d

521, 531 (6th Cir. 2005). Here, the district court gave an appropriate and thorough instruction and provided only quotations, not the whole indictment. Still, Chavez argues that those excerpts were unfairly prejudicial on balance.

Of the four counts read to the jury, three did little more than recite the elements of the corresponding crimes. The fourth was Count I, the charge for conspiracy to commit healthcare fraud. That count was longer than the others and had more factual detail. But that didn't make it objectionable. It described the alleged conspiracy only in broad strokes and in a neutral, evenhanded tone. *Cf. United States v. Scales*, 594 F.2d 558, 562 (6th Cir. 1979) (no abuse of discretion for giving a summary of the indictment that wasn't "inflammatory or prejudicially worded"). And thede scription wasn't confusing, misleading, or prejudicial.

Chavez raises three counterarguments, none successful. First, he leans on *United States v. Arboleda*, 20 F.3d 58 (2d Cir. 1994). But there, the district court read the prosecutor's *rebuttal argument* back to the jury hours after deliberation had started. *Id.* at 62. So that case and this one are worlds apart.

Second, Chavez says a lay jury would be tempted to infer guilt from the way the district court introduced each count: "The Grand Jury charged Count [X] of the Indictment as follows[.]" R. 400, Pg. ID 2915, 2923, 2931, 2937. But again, the district court properly instructed the jury that the indictment did "not even raise any suspicion of guilt." *Id.* at 2898. And we presume that the jury followed the court's clear instruction. *See Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir. 2000).

Finally, Chavez argues that including Count I risked a nonunanimous verdict by confusing the jury about the object of the conspiracy. But it was clear that the object of the conspiracy (which the jury had to find unanimously) was "to commit the crime of health care fraud." R. 400, Pg. ID 2927. Just as clear was what that meant in the context of this case: "to obtain money from a health care benefit program by billing for services, specifically injections, which were never provided." *Id.* at 2923. Those were the indictment's own words. If anything, including them made it *less* likely that the jury would convict without finding that Chavez knew about the fraudulent billing.

C.

Multiple Conspiracies. Finally, Chavez says the district court should have given this circuit's pattern jury instruction about multiple conspiracies. That instruction reminds jurors that to return a guilty verdict on a conspiracy count, the defendant must have joined the conspiracy *charged in that count*, not just any conspiracy. Sixth Cir. Pattern Jury Instruction 3.08(3).

Why does Chavez say the instruction was necessary here? Because the indictment didn't just charge that he conspired with Lezcano, Betancourt, and Diaz. It also charged that those four conspired with two other named individuals (and with other known and unknown co-conspirators). And Chavez points to evidence from which (he argues) the jury could have found that those two people were in a separate conspiracy.

Why would *that* matter? Because, as Chavez sees it, any conspiracy that didn't include everyone named in the indictment isn't "the conspiracy charged in the indictment." Appellant Br. at 66. In other words, even if the government proved that Chavez was part of a conspiracy to commit healthcare fraud, its failure to prove that the two others were *also* members means that Chavez must go free.

Chavez is incorrect—it only takes two to conspire. *See United States v. Crayton*, 357 F.3d 560, 567 (6th Cir. 2004) (citing *United States v. Anderson*, 76 F.3d 685, 688–89 (6th Cir. 1996)); *see also, e.g.*, *Breese v. United States*, 203 F. 824, 831 (4th Cir. 1913).[2] If the government proves a conspiracy between any two or more people named in an indictment, it can convict them. As far as *those* defendants are concerned, it doesn't matter if *others* listed in the indictment weren't in the conspiracy—whether because they were innocent altogether or (as Chavez would have it here) because their conspiracy was a separate one.

---

[2]The oldest American case on point seems to be *People v. Olcott*, 2 Johns. Cas. 301 (N.Y. Sup. Ct. 1801) (Kent, J.). The indictment charged a conspiracy between three people. One was deceased. Another had been acquitted—which meant, under the now-abandoned rule of consistency, that no one else could be convicted of conspiring with him. Justice James Kent (later and better renowned as Chancellor Kent) explained that the other living defendant could still be convicted if a jury found that he had conspired with the dead man. *See id.* at 302, 310–11.

IV.

The Sentencing Enhancement. Chavez received a two-level Guideline enhancement for being a "manager" or "supervisor" of the healthcare fraud. United States Sentencing Guidelines Manual § 3B1.1(c) (U.S. Sentencing Comm'n 2018). He now argues that he should not have received that enhancement becauseh e didn't manage or supervisea ny participant in the scheme.

But Chavez did manage or supervise a participant: Orlando Rodriguez, a Jeffboat employee who recruited patients to the clinics. According to Rodriguez, Chavez (1) recruited him as a patient-for-hire, (2) was often the one who paid him (sometimes showing up at his apartment with cash, sometimes depositing money directly into his bank account), (3) gave him money to distribute to the other Jeffboat workers Rodriguez recruited, and (4) was often the one who confirmed new patients had been referred by Rodriguez. True, Chavez appears to have shared his managerial role with Lezcano and Betancourt. But nothing in § 3B1.1 excludes co-managers. *Cf.* U.S.S.G. § 3B1.1 cmt. n.4 ("There can, of course, be more than one person who qualifies as a leader or organizer[.]"). Thus, the district court did nor err in applying the enhancement.

* * *

We affirm.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: February 21, 2020

Mr. Jay Gilbert
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Mr. R. Kenyon Meyer
Dinsmore & Shohl
101 S. Fifth Street, Suite 2500
Louisville, KY 40202

Re: Case No. 19-5016, *USA v. Ledinson Chavez*
Originating Case No. : 3:15-cr-00054-5

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Ms. Vanessa L. Armstrong

Enclosures

Mandate to issue.

No. 19-5016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 09, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LEDINSON CHAVEZ,

Defendant-Appellant.

ORDER

BEFORE: ROGERS, STRANCH, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: April 09, 2020

Mr. R. Kenyon Meyer
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Re: Case No. 19-5016, *USA v. Ledinson Chavez*
Originating Case No.: 3:15-cr-00054-5

Dear Mr. Meyer,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Jay Gilbert

Enclosure

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA Plaintiff

v. Criminal Action No. 3:15-cr-00054-RGJ

LEDINSON CHAVEZ Defendant

* * * * *

JURY INSTRUCTIONS

DEFINITION OF THE CRIME

Aiding and Abetting Aggravated Identity Theft – 18 U.S.C. § 2

(1) For you to find Ledinson Chavez guilty of aggravated identity theft as charged in Count 13, it is not necessary for you to find that he personally committed the crime. You may also find the defendant guilty of the crime if he intentionally helped or encouraged someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find the defendant guilty of aggravated identity theft as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of aggravated identity theft was committed.

(B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.

(C) And third, that the defendant intended to help commit or encourage the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help or encourage the crime with the intent that the crime be committed.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of aggravated identity theft as an aider and abettor.

4.01 AIDING AND ABETTING

(1) For you to find _____ guilty of _____, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of _____ as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of _____ was committed.

(B) Second, that the defendant helped to commit the crime [or encouraged someone else to commit the crime].

(C) And third, that the defendant intended to help commit [or encourage] the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help [or encourage] the crime with the intent that the crime be committed.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of _____ as an aider and abettor.

Use Note

If the underlying crime is based on 18 U.S.C. § 924(c)(1)(A)(i), *i.e.*, Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) or Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (see Instruction 12.03), use the accomplice liability instructions provided for those particular crimes in Instructions 12.04 and 12.05 respectively.

The bracketed language in paragraphs (1), (2)(B), (2)(C) and (4) should be included when there is evidence that the defendant counseled, commanded, induced or procured the commission of the crime.

Committee Commentary 4.01
(current through July 1, 2019)

In United States v. Katuramu, 2006 WL 773038, 2006 U.S. App. LEXIS 7640 (6th Cir. 2006) (unpublished), a panel approved Instruction 4.01(3) and (4).

The standard for accomplice liability is set out in 18 U.S.C. § 2:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A defendant need not be specifically charged with aiding and abetting to be convicted under 18 U.S.C. § 2, but can be charged as a principal and convicted as an aider and abettor. Standefer v. United States, 447 U.S. 10 (1980). The district court may give an instruction on aiding and abetting as an alternative theory even if the indictment does not include aiding and abetting language and does not refer to the aiding and abetting statute, 18 U.S.C. § 2. United States v. McGee, 529 F.3d 691, 695-96 (6th Cir. 2008).

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding the jury instruction using the first sentence of paragraph 4.01(2)(C) to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). If the crime underlying the aiding and abetting instruction is based on 18 U.S.C. § 924(c)(1)(A)(i), *i.e.*, Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) or Possessing a Firearm in Furtherance of a Crime of Violence or Drug Trafficking Crime (see Instruction 12.03), use the accomplice liability instructions provided for those particular crimes in Instructions 12.04 and 12.05 respectively.

In United States v. Brown, 151 F.3d 476 (6th Cir. 1998), the court reversed convictions for aiding and abetting a violation of 18 U.S.C. § 1001 (making false statements to a federal agency) for two reasons. First, the court found the evidence of mens rea insufficient because the defendant lacked the "specific intent" required for aiding and abetting. *Id.* at 487. The government's theory was that the defendant aided and abetted the making of false statements in vouchers for Section 8 housing eligibility because the vouchers were given to persons other than those on the waiting list. Because there was no evidence the defendant knew the function of the waiting list for Section 8 housing, the court held the mens rea evidence did not meet the standard for aiding and abetting. In addition, the court held that the evidence of conduct was insufficient because the defendant failed to engage in the sort of active role necessary to an aiding and abetting conviction. *Id.* There was no evidence the defendant helped in the preparation or

submission of the documents to HUD; overall, her participation was too limited to establish that she did any act to bring about filing false documents with HUD.

Another offense raising unique questions on the application of § 2 is the Illegal Gambling Business Statute, 18 U.S.C. § 1955. In United States v. Hill, 55 F.3d 1197, 1199 (6th Cir.1995), the court held that aiding and abetting liability for § 1955 offenses required particular knowledge of the predicate offense. The court stated that § 1955 offenses required what it called a "refined theory" of accomplice liability under § 2, *id.* at 1201, and explained that § 2 is applicable to § 1955, but only "when the aider and abettor has knowledge of the general nature and scope of the illegal gambling enterprise and takes actions that demonstrate an intent to make the illegal gambling enterprise succeed by assisting the principals in the conduct of the business." *Id.* at 1199. The point of this standard is to insure that the defendant knew he was an accomplice to an illegal gambling business which met the size, scope and duration requirements to be a federal crime under § 1955. *Id.* at 1202.

The court has also resolved specific accomplice liability questions for the offense of felon-in-possession-of-a-firearm under 18 U.S.C. § 922(g)(1). In United States v. Gardner, 488 F.3d 700 (6th Cir. 2007), the court reversed the defendant's conviction for aiding and abetting a felon in possession on the basis that the evidence was insufficient. Accomplice liability requires the government to prove that the defendant intended to aid the commission of the crime. The court held that to meet this element in the context of a felon-in-possession charge, "the government must show that the defendant knew or had cause to know that the principal was a convicted felon." *Id.* at 715, *citing* United States v. Xavier, 2 F.3d 1281, 1286 (3d Cir. 1993). Because the government presented no such evidence, the court reversed the conviction.

In order to aid and abet, one must do more than merely be present at the scene of the crime and have knowledge of its commission. The Supreme Court set out the standard for the offense in Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), when it quoted Judge Learned Hand's statement from United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938):

> In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'.

Accord, United States v. Martin, 920 F.2d 345, 348 (6th Cir. 1990); United States v. Quinn, 901 F.2d 522, 530 n.6 (6th Cir. 1990).

This requires proof of something more than mere association with a criminal venture. United States v. Morrow, 923 F.2d 427, 436 (6th Cir. 1991). The government must prove "some active participation or encouragement, or some affirmative act by (the defendant) designed to further the (crime)." *Id.*

The defendant must act or fail to act with the intent to help the commission of a crime by another. Simple knowledge that a crime is being committed, even when coupled with presence at the scene, is usually not enough to constitute aiding and abetting. United States v. Luxenberg, 374 F.2d 241, 249-50 (6th Cir. 1967). Because of its importance in determining whether the

accused is an accomplice, the jury must be charged fully and accurately as to intent. The failure to instruct on intent constitutes plain error. United States v. Bryant, 461 F.2d 912 (6th Cir. 1972).

Although the defendant must be a participant rather than merely a knowing spectator before he can be convicted as an aider and abettor, it is not necessary for the governments to prove that he had an interest or stake in the transaction. United States v. Winston, 687 F.2d 832, 834 (6th Cir. 1982).

12.04 AIDING AND ABETTING USING OR CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE OR DRUG TRAFFICKING CRIME (18 U.S.C. §§ 924(c)(1)(A)(i) and 2)

(1) For you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime], it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped [or encouraged] someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find _____ guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

> (A) First, that the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] was committed.
>
> (B) Second, that the defendant helped to commit [or encouraged someone else to commit] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime].
>
> (C) And third, that the defendant intended to help commit [or encourage] the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime]. The defendant intended to aid and abet the crime of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] if he had advance knowledge that an accomplice would use or carry a firearm during the commission of a [crime of violence] [drug trafficking crime]. Advance knowledge means knowledge at a time the defendant can attempt to alter the plan or withdraw from the enterprise. Knowledge of the firearm may, but does not have to, exist before the underlying crime is begun. [It is sufficient if the defendant gained the knowledge in the midst of the underlying crime, as long as the defendant chose to continue to participate in the crime and had a realistic opportunity to withdraw. You may, but need not, infer that the defendant had sufficient foreknowledge if you find that the defendant chose to continue his participation in the crime after the defendant knew an accomplice was using or carrying a firearm.]

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of using or carrying a firearm during and in relation to a [crime of violence] [drug trafficking crime] as an aider and abettor.

Use Note

If aiding and abetting the offense of Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime (see Instruction 12.02) is involved, use this

instruction instead of Instruction 4.01.

In paragraph (2)(C), the two bracketed sentences at the end of the paragraph should be used only if the evidence suggests that the defendant gained knowledge of the firearm in the midst of the underlying crime.

The Committee did not draft instructions specifically to cover subsections (c)(1)(A)(ii) (brandishing a firearm) or (c)(1)(A)(iii) (discharging a firearm), but the pattern instructions can be easily modified to fit these provisions.

Committee Commentary
(current through July 1, 2019)

In Rosemond v. United States, 134 S. Ct. 1240 (2014), the Court vacated a conviction for using or carrying under § 924(c) based on aiding and abetting because of error in the jury instructions. In the wake of *Rosemond*, the Sixth Circuit reversed a § 924(c) conviction, finding a jury instruction using paragraph (2)(C) in Instruction 4.01 Aiding and Abetting to be plain error. The court explained, "*Rosemond* clarifies that intent must go to the *entire crime* – that [defendant] intended to aid in an *armed* bank robbery." United States v. Henry, 2015 WL 4774558, at *2, (6th Cir. Aug. 14, 2015) (italics in original, *citing Rosemond*, 134 S. Ct. at 1248, 1251). *See also* United States v. Richardson, 2015 WL 4174809, at *14-15 (6th Cir. July 13, 2015) (jury instruction was error but harmless). This new instruction, 12.04 Aiding and Abetting Using or Carrying a Firearm During and in Relation to a Crime of Violence or Drug Trafficking Crime, responds to these cases and should be used in conjunction with Instruction 12.02 Using or Carrying a Firearm when the charge is based on accomplice liability.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JUSTUS ROSEMOND,** **Defendant.**	**JURY INSTRUCTIONS** **Case No. 2:07CR886DAK**

INSTRUCTION NO. 38

Under the aiding and abetting statute, it is not necessary for the government to show that a defendant physically committed the crime with which he or she is charged in order for you to find the defendant guilty.

A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proved that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense.

As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of the crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly seeks by some act to help make the crime succeed.

As to Count II, to find that the defendant aided and abetted another in the commission of the drug trafficking crime charged, you must find that:

(1) the defendant knew his cohort used a firearm in the drug trafficking crime, and

(2) the defendant knowingly and actively participated in the drug trafficking crime.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. CASE NO. 11-20233

MICHAEL HENRY,

Defendant.
_____/

JURY INSTRUCTIONS

of the defendant's acts and words, along with all other evidence, in deciding whether the defendant acted knowingly. It is not necessary for the prosecution to prove that the defendant specifically knew that his acts were a violation of any particular law.

AIDING AND ABETTING

(1) For you to find the defendant guilty of any crime charged, it is not necessary for you to find that he personally or directly committed that crime himself. You may, alternatively, find him guilty if he intentionally helped or encouraged someone else to commit the crime. A person who does this is guilty through a theory called "aiding and abetting."

(2) But for you to find the defendant guilty through aiding and abetting, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime charged was committed.

(B) Second, that the defendant helped to commit the crime or encouraged someone else to commit the crime.

(C) And third, that the defendant intended to help commit or encourage the crime.

(3) Proof that the defendant merely may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty.