No. 21- _____

In the
SUPREME COURT of the UNITED STATES
October Term, 2021

FRANCIS P. SALEMME,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the jury instruction regarding accessorial liability that fails to distinguish between aiding and abetting liability and accessory after the fact liability (as requested by petitioner) is in conflict with, *inter alia, Middleton v. McNeil*, 541 U.S. 433 (2004).

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption of this petition, the following individual was party to the proceeding before the court whose judgment is sought to be reviewed:

PAUL M. WEADICK

CORPORATE DISCLOSURE

There are no corporate entities involved in this case.

RELATED CASES

United States v. Weadick, Nos. 18-1899 and 18-1933, United States Court of Appeals for the First Circuit

United States v. Salemme and Weadick, No. 16-cr-10258, United States District Court, District of Massachusetts

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Petitioner Francis P. Salemme ("Salemme") respectfully petitions for a writ of certiorari to review the decision and order of the United States Court of Appeals for the First Circuit entered in this case.[1]

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the First Circuit, *United States v. Weadick and Salemme*, 15 F.4th 1 (1st Cir. 2021), dated September 24, 2021, appears as Appendix ("App.") A to this petition. The judgment of the United States District Court for the District of Massachusetts, entered September 14, 2018, is attached

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[1]Unless otherwise indicated, quotations in this petition omit all internal alterations, quotation marks, footnotes, and citations.

as App. B. The order of the First Circuit on Salemme's petition for rehearing and rehearing *en banc,* dated November 18, 2021, is attached as App. C.

JURISDICTION

The opinion of the Court of Appeals for the First Circuit was entered on September 24, 2021. The petition for rehearing and rehearing *en banc* was denied by that Court on November 18, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, Section 2, of the United States Code provides, in relevant part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Title 18, Section 3, of the United States Code provides, in relevant part:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Title 18, Section 1512, of the United States Code provides, in relevant part:

> (a)
>
> (1) Whoever kills or attempts to kill another person, with intent to—
>
> ****
>
> (C) prevent the communication by any person to a law enforcement officer . . . of the United States of information relating to the commission or possible commission of a Federal offense . . . ;
>
> shall be punished as provided in paragraph (3).

STATEMENT OF THE CASE

Background

Salemme appealed to the United States Court of Appeals for the First Circuit from a judgment of the United States District Court for the District of Massachusetts (Burroughs, J.), entered September 14, 2018, convicting him, after a jury trial, of murder of a witness, in violation of Title 18, United States Code, section 1512(a)(1)(C).

Although Salemme raised other points below, the focus of this petition is a faulty jury instruction that failed to convey to the jury the essential meaning of the relevant legal standard regarding accessorial liability. This error is in conflict with this Court's precedents, raises an issue that taints the jury's verdict in an outcome-determinative fashion, and thus presents an important reason why this Court should grant Salemme's petition for certiorari.

Pertinent Facts

Together with a co-defendant, Paul M. Weadick ("Weadick"), Salemme was charged in 2016 with the 1993 murder of Steven DiSarro ("DiSarro") with the intent of preventing his communication to law enforcement of information relating to the commission of a federal offense. Specifically, it was alleged that DiSarro owned a night club known as The Channel, and that Salemme and his son ("Salemme Jr.") had a hidden interest in that club; that they were under federal and state investigations to which The Channel was relevant; that the Salemmes and Weadick had participated in the murder;

and that Salemme transported DiSarro's body to associates of his who arranged to have it buried. This offense incorporated an aiding and abetting theory pursuant to 18 U.S.C. § 2. There was no evidence that Salemme was involved in the principal act of murdering a witness.

There was evidence introduced that, if believed, Salemme was involved in the disposal of DiSarro's body. The government argued at trial that, in the Salemme home in Sharon, Massachusetts, Salemme Jr.[2] choked DiSarro to death while Weadick held his legs. Salemme was said to have disposed of the body by contacting his associate, Robert DeLuca; driving the body to Providence, Rhode Island; and giving it to Joseph DeLuca (Robert's brother). The DeLuca brothers were said to have arranged with an individual named Billy Ricci to bury the body behind a mill that Ricci owned in Providence. Over 23 years later, negotiating with the government while facing legal troubles of his own, Ricci offered the government DiSarro's body and the link to the DeLuca brothers.

Salemme was not charged as an accessory after the fact (pursuant to 18 U.S.C. § 3), however, because the statute of limitations for that offense had expired long before the indictment in this case. The crux of this petition is that the jury was not properly instructed on the distinction between aiding and abetting liability and accessory after the

[2]Salemme, Jr. died prior to the prosecution of this case and hence was not charged in it.

fact liability and that, as a consequence, Salemme was erroneously convicted of an offense with which he was not charged.

The First Circuit's Opinion

As pertinent to this petition, the First Circuit misapprehended the instructional error that we raise in multiple ways. First, the court analyzed the error as if Salemme were simply seeking an instruction on a lesser-included offense. (App. A, pp. 22) Second, the court stated that "being an accessory after the fact is [not] a complete defense to the charged crime." (*Id.*) Third, the court suggested that explaining the distinction between aiding and abetting liability and accessory after the fact liability "poses a risk of confusing the jury" (*id*.) when the exact opposite was the case. Fourth, the court failed to recognize that the "requested instruction was essential to the effective presentation of the particular defense." (App. A, pp. 23) Fifth, the court inexplicably concluded that explaining the critical distinction between the two forms of accessorial liabiilty "would have likely undercut [Salemme's] defense, which was that he took no part in the killing at all." (*Id.*) Finally, the court brings its misapprehension of the issue into high relief when it concludes that "even on appeal he does not dispute that the instruction given clearly set out the elements of aiding and abetting. Nor does he show that it was clear or obvious that the requested instruction was necessary to his defense." (*Id.*)

REASON FOR GRANTING THE WRIT

THE FIRST CIRCUIT COURT OF APPEALS HAS FAILED TO RECOGNIZE THE CRITICAL ERROR IN ITS FAILURE TO REQUIRE THAT THE JURY IN THIS CASE BE PROPERLY INSTRUCTED ON THE LIMITED SCOPE OF "AIDING AND ABETTING" LIABILITY IN CONTRADICTINCTION TO "ACCESSORY AFTER THE FACT" LIABILITY WHERE THE DISTINCTION RESULTS IN A CONVICTION BASED ON FLAWED JURY INSTRUCTIONS. BY THE FAILURE TO REQUIRE AN INSTRUCTION THAT EFFECTIVELY EXPLAINS ACCESSSORIAL LIABILITY TO THE JURY, THE COURT OF APPEALS' DECISION STANDS IN CONFLICT WITH, *INTER ALIA*, *MIDDLETON V. MCNEIL,* 541 U.S. 433 (2004). CERTIORARI IS NECESSARY TO RESOLVE THIS CONFLICT WITH THIS COURT'S PRECEDENTS

The decision of the Fist Circuit on Salemme's argument about the district court's failure to distinguish aiding and abetting from accessory after the fact wholly and repeatedly misses Salemme's point. The issue raised has nothing to do with a lesser-included charge. (App. A, p. 22) Likewise, the court's employment of the rubric of a "complete defense" (*id.*) misapprehends the essence of the argument. The court overlooks the fact that since the jury was not told that being an accessory after the fact did not fall within the meaning of "aiding and abetting," the remaining ambiguity deprived the jury of a clear understanding without which an untainted verdict would be impossible.

Unquestionably, an instruction highlighting accessory after the fact in the context of aiding and abetting would have been "consistent with the evidence," within the

meaning of *United States v. Rivera-Figueroa*, 149 F.3d 1, 6 (1st Cir. 1998). Although Salemme challenged the credibility of the testimony regarding his involvement after the fact, there is no question that the jury heard that evidence. And there is no question that the jury did not hear evidence regarding his involvement in the killing, beyond his allegedly being present at the scene of the crime. Accordingly, understanding that he could not be convicted if it believed that his only conduct occurred after the killing was pivotal and Salemme was entitled to an unambiguous jury charge. It is unimaginable that there is a more "complete defense" than "I was not charged with that crime."

Furthermore, far from creating confusion for the jury (App. A, pp. 22-23), making certain that the jury understood the distinction between the two types of accessorial liability "was essential to the effective presentation of the particular defense. *Id.*

The decision (App A., p. 23) also suggests (but does not explain how) the argument that Salemme could not be convicted as an accessory after the fact somehow "undercuts his defense." Such a suggestion is based on a misapprehension of the issue, but in any event, the law is clear that a defendant is entitled to an instruction as to an inconsistent defense. *See, e.g., Mathews v. United States*, 485 U.S. 58, 63 (1988) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," (citing *Stevenson v. United States*, 162 U.S. 313 (1896)).

As the court below has explained, its "examination of jury instructions focuses on whether they adequately explained the law or whether they tended to confuse or mislead the jury on the controlling issues." *United States v. Gonzalez-Velez*, 466 F.3d 27, 35 (1st Cir. 2006). It is not a new revelation that jury instructions are intended to direct a jury to the proper legal standards that must be followed in determining the issues that have been presented for the jury's consideration. This notion give effect to the clear Supreme Court precedent found, *e.g.,* in *Middleton v. McNeil*, 541 U.S. 433 (2004):

> In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement. . . . If the charge as a whole is ambiguous, the question is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution."

Id. at 437.

Applying this understanding to the present case, the jurors were deprived of an instruction that was essential to their navigation of Salemme's criminal liability. It is inconceivable that, in the context here, an instruction on aiding and abetting that did not clarify that "after-the-fact" conduct was not included within "helping someone else commit the charged crime" and "assist[ing] in the commission of the charged offense," which is what the jury was instructed it must find in order to convict for aiding and abetting the offense.

The decision (App.A, p. 23) states that Salemme never raised this argument in the district court. That is incorrect. The only reason that the court could have reached such a

conclusion is based on its misapprehension of the nature of Salemme's argument, which was never about the aiding and abetting argument as given, but as to the critical need for additional instruction distinguishing aiding and abetting from accessory after the fact. Similarly, the conclusion that "it was [not] clear or obvious that the requested instruction was necessary to his defense" (*id*.) reflects only that the court below overlooked and misapprehended the arguments that Salemme presented both in that court and in this petition.

Finally, to the extent that the decision is founded in the plain error rule, that reasoning was also predicated on the notion that there was no error at all. (App. A, p. 22). In light of what we urge above, there indeed was such an error, and it was plain. If the jury had been properly instructed (rather than confused), there was unquestionably a reasonable view of the evidence under which it could have acquitted Salemme. The jury was deprived of that opportunity because it was misled by the instruction.

Furthermore, even if treated as a plain error issue, the vacatur of the conviction would be required just the same. Convicting Salemme based on faulty jury instructions affects his substantial rights and reflects adversely on the fairness of his trial and the public perception of the administration of justice. Simply stated, if the jury believed that Salemme was "guilty" only as an accessory after the fact, then (since he was not and could not have been charged with that offense) the conviction cannot stand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the First Circuit, and upon such review, the conviction in this case should be vacated.

Respectfully submitted,

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February, 2022

APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 18-1899, 18-1933

UNITED STATES,

Appellee,

v.

PAUL M. WEADICK,

Defendant, Appellant.

No. 18-1932

UNITED STATES,

Appellee,

v.

FRANCIS P. SALEMME,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Allison D. Burroughs, U.S. District Judge]

Before

Kayatta and Barron, Circuit Judges,
and Smith, District Judge.*

Mark W. Shea, with whom Shea and LaRocque, LLP was on brief, for appellee Weadick.

* Of the District of Rhode Island, sitting by designation.

Lawrence Gerzog for appellee Salemme.

Randall Ernest Kromm, Assistant United States Attorney, with whom William J. Ferland, Assistant United States Attorney, Donald C. Lockhart, Assistant United States Attorney, and Harvey Smith, Office of General Counsel, U.S. Marshals Service, were on brief, for appellant.

September 24, 2021

KAYATTA, Circuit Judge. Francis P. Salemme and Paul M. Weadick were tried and convicted of murdering Steven DiSarro in 1993 in order to prevent DiSarro from talking with federal agents about his activities with Salemme, Weadick, and Salemme's son, Frank Jr. See 18 U.S.C. § 1512(a)(1)(C). At the time of the murder, Salemme was the boss of a criminal organization known as the New England La Cosa Nostra ("NELCN").

The principal issues on this appeal arise from the admission at trial of a large amount of evidence concerning the prior criminal activities of Salemme and several witnesses. Weadick complains, among other things, that by trying him jointly with Salemme and then introducing evidence covering three decades of crimes by Salemme, the government deprived him of a fair trial. Salemme, in turn, argues that much of that evidence about his past was inadmissible hearsay or propensity evidence. For the following reasons, we reject these contentions and the other challenges raised in this appeal.

I.

In 1992, DiSarro bought a closed nightclub in Boston with funds he received from Frank Jr. Because DiSarro was under investigation at the time, the papers listed DiSarro's stepbrother as the owner. Frank Jr. was kept on the books as a part-time manager, which allowed him to avoid a full curfew as a condition of pre-trial release following his arrest on labor racketeering

charges. Weadick, a close friend of Frank Jr., was hired as a night manager. Weadick and Frank Jr. had a history of ripping off drug dealers together, knowing that the specter of the NELCN would deter any retaliation.

In March of 1993, a federal agent approached DiSarro, telling him that he was under investigation and asking him to cooperate. Upon hearing this news, Salemme voiced concern that DiSarro would implicate Frank Jr. and eventually Salemme himself. Weadick expressed similar concerns to Frank Jr. Around the same time, Frank Jr. and Salemme also told others that they suspected DiSarro of stealing from the nightclub. Having trouble getting a meeting with DiSarro, Weadick and Frank Jr. discussed inviting him to Salemme's house to make him feel safe.

Soon thereafter, DiSarro was approached by another federal agent, who told him he had been indicted, and, for the second time, asked him to cooperate with the government. DiSarro reported this contact to both his stepbrother, who nominally owned the club, and his wife. The next morning, DiSarro's wife watched him get into a car she didn't recognize, but her description of the vehicle matched a car Frank Jr. sometimes used. She never saw her husband again.

Over twenty years later, a Rhode Island excavator, who had been charged with committing various offenses, led law enforcement officials to a location in Rhode Island where they

unearthed DiSarro's remains. Forensic examination revealed that DiSarro had been strangled. The excavator's information also led to Robert DeLuca, a captain in the NELCN, who confessed that he had received DiSarro's body from Salemme with orders to dispose of it. DeLuca reported that he had heard from Salemme that Weadick had driven DiSarro to Salemme's house, where Frank Jr. strangled DiSarro as Weadick held his legs, all in Salemme's presence.

DeLuca's information provided the breakthrough law enforcement had been looking for in investigating DiSarro's disappearance. Eventually, the government initiated this case by indicting Salemme and Weadick for murdering DiSarro with the intent, at least in part, to prevent him from talking to federal authorities. Frank Jr. had died by the time charges were filed.

At trial, Steven Flemmi -- a confessed murderer -- testified that he walked in on DiSarro's murder at Salemme's house as it was happening, just as DeLuca described it. Weadick's girlfriend at the time of the murder testified that she had overheard Weadick and Frank Jr. expressing concerns that DiSarro "had a big mouth" right before the murder. She also reported that Weadick left their apartment shortly thereafter and was in an agitated state when he returned. He gave her a man's bracelet and told her that she would not need to worry about seeing DiSarro again. Later, as they were driving south of Boston, Weadick told

her that a location they had passed would be a good place to bury a body.

After twenty-three days of trial, the jury found both defendants guilty. This appeal followed.

II.

Much of the evidence admitted against Salemme and Weadick consisted of out-of-court statements made by other individuals associated with NELCN activities. Salemme and Weadick each argue that various such statements were improperly admitted under Federal Rule of Evidence 801(d)(2)(E) as statements by a party's co-conspirator. Weadick also contends that the admission of certain out-of-court statements made by his co-defendant, Salemme, violated his rights under the Confrontation Clause because Salemme did not take the stand.

A.

Federal Rule of Evidence 801(d)(2)(E) allows a court to admit out-of-court statements by a party's co-conspirator if made during the conspiracy and in furtherance of that conspiracy. As we apply the rule in this circuit, a party seeking to introduce a statement under the rule must prove to the district court by a preponderance of the evidence that: (1) when the statement was made, the declarant was a member of a conspiracy, (2) the defendant was also (or later became) a member of the same conspiracy, and (3) the statement was made in furtherance of that conspiracy. See

United States v. Saccoccia, 58 F.3d 754, 778–79 (1st Cir. 1995). We have dubbed the district court's determination as to whether the proponent has satisfied this burden a "Petrozziello ruling," after our holding in United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977). See United States v. Ciresi, 697 F.3d 19, 25 (1st Cir. 2012). The district court may provisionally admit the statement when it is introduced and defer a final Petrozziello ruling until the close of evidence. Id. If the district court decides at the close of evidence that one or more provisionally admitted statements is inadmissible, the court must "give a cautionary instruction to the jury, or, upon an appropriate motion, declare a mistrial if the instruction will not suffice to cure any prejudice." United States v. Ciampaglia, 628 F.2d 632, 638 (1st Cir. 1980).

In accord with these procedures, the district court in this case provisionally admitted several sets of out-of-court statements against Salemme and Weadick and then, at the close of evidence, issued a final Petrozziello ruling finding those statements admissible under Rule 801(d)(2)(E). Salemme and Weadick challenge various aspects of that ruling on appeal. As we will note, some of those challenges were properly preserved, while others were not.

1.

We begin by quickly disposing of Salemme and Weadick's general arguments that cover all the statements before moving to objections to specific sets of statements. First, Salemme and Weadick contend that it was improper for the district court to find that they were members of any conspiracy at all, given that neither of them was specifically charged with the crime of conspiracy. But the hearsay exception under Rule 801(d)(2)(E) can apply "regardless of whether the conspiracy furthered [by the alleged hearsay] is charged or uncharged and regardless of whether [the conspiracy] is identical to or different from the crime that the statements are offered to prove." United States v. Lara, 181 F.3d 183, 196 (1st Cir. 1999) (internal citations omitted). Therefore, whether preserved or not, this general argument fails.

Salemme and Weadick also complain that the district court abused its discretion by making a blanket Petrozziello ruling, finding that the Rule 801(d)(2)(E) standard was satisfied "with regard to all of the statements that were [provisionally] admitted under the co-conspirator exception" at once (emphasis added). They argue that the district court should instead have identified the particular conspiracy furthered by each challenged statement. But this argument ignores the fact that the district court explicitly gave Salemme and Weadick the opportunity to request additional findings. Neither defendant requested any

additional findings on the Petrozziello ruling, and Salemme affirmatively indicated that he was not making any such request.[1] Having thus assured the court that no more specific findings were needed or requested, defendants cannot now complain that the district court's ruling was too general. See United States v. Medina, 427 F.3d 88, 91 (1st Cir. 2005); see also United States v. Castellini, 392 F.3d 35, 50 (1st Cir. 2004) (rejecting a procedural argument that the district court "never made explicit findings regarding the existence of the conspiracy and whether the statements were made in furtherance of the conspiracy" where the defendant "did not ask the court to be more specific"). Their second general argument to the district court's Petrozziello rulings therefore also fails.

2.

We turn now to the specific statements whose admission Salemme and Weadick challenge under Rule 801(d)(2)(E). Salemme directs us first to a portion of the trial transcript containing a recorded conversation in which Frank Jr. brags about several

[1] During a conference on jury instructions prior to the district court's final ruling on the Petrozziello objection, Weadick challenged the scope of the conspiracy upon which the Petrozziello finding rested, but only to the extent it covered the statements made prior to 1989, when the acquisition of the nightclub was first pursued. The trial court seemed to agree with Weadick that the evidence only supported a finding that he participated in the alleged conspiracy after 1989, and it noted that the pre-1989 statements came in through other means rather than through the co-conspirator exception.

exploits and successes by him and his father. Because Salemme made no relevant objection to this testimony at trial, we would ordinarily review the belatedly challenged admission of the testimony only for plain error, see United States v. Sandoval, 6 F.4th 63, 92 (1st Cir. 2021), but Salemme waives even that review by offering no explanation at all for how the testimony prejudiced him. See Pabon, 819 F.3d at 29 (finding a defendant's argument waived because he "made no attempt" to show how he carried his plain error burden).

Salemme directs us to only one other specific instance of error in allowing testimony under the co-conspirator exception: testimony by Thomas Hillary (a person indebted to Salemme) that DiSarro said he could not loan Hillary any money because Salemme would kill him if he did. Again, Salemme made no timely objection was made at trial, so we review for plain error. Because the record otherwise supported the charge that Salemme had helped kill DiSarro to silence him, the evidence was independently admissible under Federal Rule of Evidence 804(b)(6). See United States v. Houlihan, 92 F.3d 1271, 1281–82 (1st Cir. 1996) (hearsay objection waived by homicide); see also Giles v. California, 554 U.S. 353, 367 (2008) (noting that Rule 804(b)(6) codified the forfeiture-by-wrongdoing doctrine). Thus, any potential error on this point was harmless. See United States v. Barone, 114 F.3d 1284, 1296–97 (1st Cir. 1997) ("[W]e may affirm the district court's

evidentiary rulings on any ground apparent from the record on appeal.").

For his part, Weadick points us to five sets of statements that he says were admitted over his timely objection on hearsay grounds. Given that Weadick's counsel made several statements that might be construed as timely objections, and that he "noted [Weadick's] objections" to the district court's Petrozziello findings at the close of evidence, we give Weadick the benefit of the doubt and review the admission of these five sets of statements for abuse of discretion, see United States v. Delgado-Marrero, 744 F.3d 167, 179 (1st Cir. 2014), keeping in mind that "[w]e may not disturb the verdict if [an] error was harmless," id. at 207 (citing Fed. R. Evid. 103(a) and Fed. R. Crim. P. 52(a)).

The first two sets of challenged statements involved Salemme blaming others (including Flemmi) for DiSarro's murder, which Weadick contends could not have been made in furtherance of a conspiracy involving him and thus were impermissible hearsay. But the government did not offer those statements to prove that they were true. See Fed. R. Evid. 801(c)(2). To the contrary, the government contended that they were obviously false, and for

that reason evidenced Salemme's consciousness that he was guilty of something that needed to be blamed on others.[2]

The third set of statements Weadick challenges came from an intercepted recording of a conversation between Salemme and Natale Richichi, a member of the Gambino family of New York, during a 1991 meeting at a Hilton Hotel in Boston. The transcript of the recording reveals that Richichi and Salemme discussed DiSarro owing someone money. During that discussion, Salemme said that he told his son, "DiSarro is gonna turn on you, he's a snake, he's a sneak, he's no fuckin' good." Weadick contends that these statements were not in furtherance of any conspiracy that he was a part of, while the government maintains that these statements were in furtherance of a conspiracy between Weadick and Salemme because the discussion was apparently aimed at getting Richichi's support for Salemme as leader of the NELCN. Whatever one makes of these statements, their admission caused no material harm. Weadick argues only that the statements were prejudicial because they revealed Salemme's disdain for DiSarro. But plenty of evidence in the record echoed these same sentiments, including one witness's testimony that Salemme believed DiSarro was stealing from the

[2] The government also admitted as to Salemme a plea agreement in which Salemme admitted to lying when he tried to blame DiSarro's murder on a person named Nicky Bianco. Weadick expressly waived any objection to that evidence, albeit preserving his spillover argument, which we address later in this opinion. See infra Part IV.A.

nightclub and another witness's testimony that DiSarro believed Salemme was "crazy" and was "going to kill" him.

The fourth set of statements came from an audiotaped conversation of Frank Jr. talking to another individual in 1990. In it, Frank Jr. explained that he was in the process of acquiring the nightclub. He also mentioned collecting illicit payments in exchange for providing protection of some sort. Weadick again argues that these statements were not in furtherance of a conspiracy he was a part of. But given the collateral and attenuated substance of these conversations, which had little if any link to Weadick, it is highly improbable that these statements influenced the verdict. Accordingly, any potential error was harmless.

The fifth -- and potentially most prejudicial -- set of statements relates to two conversations between Salemme and Robert DeLuca. For context, DeLuca testified that on the day of the murder, Salemme told him to have "a hole dug" because Salemme would be delivering him "a package." The next day, DeLuca received the "package," a dead body wrapped in a blue tarp. The day after that, Salemme told DeLuca that Frank Jr. had strangled and killed DiSarro, and that Flemmi had walked in, coincidentally, during the murder. Then came the challenged statements: DeLuca testified that, a couple weeks later, Salemme told him that law enforcement had contacted Weadick about DiSarro's murder. When DeLuca asked

about Weadick's involvement, Salemme responded that Weadick had taken DiSarro to the house where he was murdered and held his legs while Frank Jr. strangled him. Sometime later, when DeLuca and Salemme were incarcerated together, Salemme said that law enforcement had gone to see Weadick again but that Weadick would "stand" (i.e., not talk).

Weadick maintains that the statements tying him to the murder were not made during or in furtherance of a conspiracy involving him and Salemme because they were "made weeks and months after the conspiracy to kill DiSarro had concluded" and provided "no significant benefit" to the members of that conspiracy. This argument might have more pull if the district court had determined that Weadick was only part of a conspiracy to murder DiSarro, and not part of some other conspiracy with Salemme. That is because a conspiracy endures only "as long as the co-conspirators endeavor to attain the 'central criminal purposes' of the conspiracy," United States v. Berroa, 856 F.3d 141, 155 (1st Cir. 2017) (quoting United States v. Upton, 559 F.3d 3, 10 (1st Cir. 2009)), and "[m]ere efforts to conceal a crime do not automatically extend the life of the crime itself," unless "the proof shows 'an express original agreement among the conspirators to continue to act in concert in order to cover up' their crime," United States v. Twitty, 72 F.3d 228, 233 (1st Cir. 1995) (quoting Grunewald v. United States, 353 U.S. 391, 404 (1957)).

But the district court's Petrozziello ruling was not so narrow, and the record supports a finding that a larger, ongoing NELCN conspiracy existed. See United States v. Marino, 277 F.3d 11, 26 (1st Cir. 2002) (explaining that membership in the same crime family with common goals can establish a conspiracy, even if "organized crime membership alone" does not (quoting United States v. Gigante, 166 F.3d 75, 82 (2d Cir. 1999))). Salemme's statements to DeLuca were plainly made "in furtherance" of that larger conspiracy. Salemme informed DeLuca of Weadick's involvement in the murder to reassure DeLuca that, despite being questioned by law enforcement, Weadick would not expose them. We have previously held that statements keeping co-conspirators "abreast of current developments and problems facing the group" or "provid[ing] reassurance" are in furtherance of a conspiracy. Ciresi, 697 F.3d at 29-30.

And the record supports the conclusion that Weadick was a member of the larger NELCN conspiracy. Simply put, it seems quite unlikely that Weadick would work scams with Frank Jr. backed by the threat of the NELCN muscle, have access to the club's books while managing it as a front for NELCN leadership, and participate with Salemme himself in the murder of a threat to NECLN, all without himself having signaled his support of the criminal conspiracy known as NELCN. Cf. United States v. Azubike, 564 F.3d 59, 65 (1st Cir. 2009) ("[D]rug organizations do not usually take

unnecessary risks by trusting critical transactions to outsiders." (quoting United States v. Azubike, 504 F.3d 30, 37 (1st Cir. 2007))). Although several people associated with the NELCN testified that they did not know Weadick, "each coconspirator need not know of or have contact with all other members." United States v. Cortés-Cabán, 691 F.3d 1, 13 (1st Cir. 2012) (quoting United States v. Martínez-Medina, 279 F.3d 105, 113 (1st Cir. 2002)). We therefore find no abuse of discretion in the district court's Petrozziello ruling admitting Salemme's statements to DeLuca.

B.

Weadick next contends that the statements we just discussed -- the statements Salemme made to DeLuca -- raise a problem under Bruton v. United States, 391 U.S. 123 (1968). Bruton held that the introduction at trial of statements made by a non-testifying co-defendant violates a defendant's Sixth Amendment right to confront the witnesses against him if the statements "facially incriminate" the defendant. United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010). But not all such statements implicate the Sixth Amendment; only "testimonial" ones do. Davis v. Washington, 547 U.S. 813, 821 (2006). And the Supreme Court has explained that "statements in furtherance of a conspiracy" are "by their nature . . . not testimonial." Crawford v. Washington, 541 U.S. 36, 56 (2004). Thus, Bruton "does not bar the use of a co-conspirator statement made in furtherance of the

conspiracy and admissible under a traditional hearsay exception." United States v. De La Paz-Rentas, 613 F.3d 18, 29 (1st Cir. 2010). Since we have held that the district court did not abuse its discretion in admitting Salemme's statements to DeLuca under the co-conspirator exception to hearsay, the admission of those statements poses no Bruton problem.

III.

Weadick and Salemme make several challenges to the jury instructions. Because neither defendant made a timely objection to the relevant instructions, see Fed. R. Crim. P. 30(d), we review only for plain error, see United States v. McPhail, 831 F.3d 1, 9 (1st Cir. 2016).

A.

Weadick and Salemme each challenge an instruction by the district court addressing the element of motive. Weadick also argues that there was insufficient evidence of his intent to support his conviction.

1.

The statute under which the defendants were charged makes it a crime to kill someone "with intent to . . . prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . ." 18 U.S.C. § 1512(a)(1)(C). Obviously, as here, when the killing is achieved

as intended, no actual communication takes place. So the trial judge decided to instruct the jury that the communication that was prevented by the killing need only have been "possible." Specifically, the trial judge instructed the jury that the government bore the burden of proving "beyond a reasonable doubt that at least some part of a defendant's motive in killing Steven DiSarro was to prevent a communication or possible communication to a federal officer or judge" (emphasis added).

Weadick and Salemme argue that the government was required to prove a "reasonable likelihood" that DiSarro would have made a communication of concern, and that the district court erred by instructing the jury that the relevant communication need only have been "possible." They rely chiefly on the Supreme Court's opinion in United States v. Fowler, 563 U.S. 668 (2011). But Fowler addressed a different question: When a defendant kills a person to prevent the person from talking with law enforcement officials generally, rather than federal officials specifically, is there a violation of the federal witness tampering law? 563 U.S. at 670. Relying in part on the need to have a federal nexus so as not to federalize the treatment of witness tampering in run-of-the-mill state law matters, id. at 677, the Court held that the federal witness tampering statute requires the government to prove a "reasonable likelihood" that "at least one of the relevant communications would have been made to a federal officer," id. at

677–78. In this case, the evidence clearly meets that standard: Salemme and Weadick first expressed concern after a federal agent sought cooperation from DiSarro, and his death occurred the day after he reported a second contact from a federal agent.

Still, Weadick and Salemme argue, perhaps DiSarro would not have made any communication at all. Whether Fowler's "reasonable likelihood" standard applies equally to that issue is unclear. We have not considered the question previously, but two circuits that have considered it have concluded that Fowler does not apply. See United States v. Tyler, 956 F.3d 116, 127 n.15 (3d Cir. 2020); Stuckey v. United States, 603 F. App'x 461, 461–62 (6th Cir. 2015). Accordingly, Weadick and Salemme have not established plain error. See United States v. Rivera-Morales, 961 F.3d 1, 13 (1st Cir. 2020) ("[A] criminal defendant generally cannot show that a legal error is clear or obvious in the absence of controlling precedent resolving the disputed issue in his favor.").

2.

Relatedly, Weadick argues that the government did not provide sufficient evidence of his intent to prevent a communication with a federal law enforcement officer or judge. He says that, even assuming there was sufficient evidence that he assisted in murdering DiSarro, there was no evidence that he did so with the specific intent of preventing DiSarro from becoming a

federal witness. The district court denied Weadick's Rule 29 motion on this point. See United States v. Salemme, No. 16-CR-10258-ADB, 2018 WL 3429909, at *2 (D. Mass. July 16, 2018). We review that denial de novo, asking "whether, after assaying all the evidence in the light most amiable to the government, and taking all reasonable inferences in its favor, a rational factfinder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." United States v. Martínez-Mercado, 919 F.3d 91, 98 (1st Cir. 2019) (quoting United States v. George, 841 F.3d 55, 61 (1st Cir. 2016)). In doing so, however, we decline to weigh the evidence or make credibility judgments, as those tasks fall "solely within the jury's province." United States v. Acevedo, 882 F.3d 251, 259 n.8 (1st Cir. 2018) (quoting United States v. Hernández, 218 F.3d 58, 64 (1st Cir. 2000)).

Here, a reasonable jury could have found that Weadick killed DiSarro with the specific intent to prevent him from speaking with federal law enforcement officers. Weadick's girlfriend at the time testified that she dated and lived with him for over a year and that she heard Weadick and Frank Jr. talk about "law enforcement quite a bit and their concern about it." She also testified that, at one point, Weadick "had gotten quite angry" at DiSarro because DiSarro "had a big mouth" and "was talking about things he shouldn't be." She further testified that Weadick was

also involved in conversations where the participants said that DiSarro was "probably worried that someone's going to kill him because of the way he's talking, running his mouth." Finally, DiSarro's murder occurred the morning after a second federal agent contacted him, and after Weadick had already expressed concerns about DiSarro implicating the Salemmes. That chronology added yet another basis for inferring that DiSarro was murdered precisely to keep him from caving into pressure from law enforcement.

A rational factfinder also could have found a reasonable likelihood that the communication Weadick intended to prevent would have been made to one or more federal law enforcement officers. See Fowler, 563 U.S. at 678. As we have already explained, it is at least reasonably likely that any relevant communication made by DiSarro would have been directed to the federal agents who had recently sought his cooperation. We therefore see no error in the district court's denial of Weadick's Rule 29 motion.

B.

At the end of trial, both defendants asked the court to instruct the jury on the elements of the offense of being an accessory after the fact.[3] The theory was that if the jurors

[3] An accessory after the fact is a person "who helped the principal after the basic criminal event took place." See Figueroa-Cartagena, 612 F.3d at 73 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 189 (2007)); 18 U.S.C. § 3.

disbelieved most of the government's evidence, but believed some of what DeLuca said about Salemme's effort to have the body buried, then Weadick or Salemme was guilty only of being an accessory after the fact, not of committing or aiding and abetting a murder. The district court refused to give the instruction, and Salemme challenges that refusal on appeal. Despite Salemme requesting this instruction with specificity and the district court rejecting his request on the merits, our review under current circuit precedent is still for plain error because Salemme failed to object after the jury was charged. See McPhail, 831 F.3d at 9. But see United States v. Pérez-Rodríguez, No. 19-1538, 2021 WL 3928896, at *20-22 (1st Cir. Sept. 2, 2021) (Lipez, J., concurring). That being said, as we will explain, the standard of review makes no difference in this instance because there was no error.

A defendant "is ordinarily entitled to a lesser-included charge" or an instruction for a complete defense if doing so is "consistent with the evidence." United States v. Rivera-Figueroa, 149 F.3d 1, 6 (1st Cir. 1998) (citing Schmuck v. United States, 489 U.S. 705, 715-16 & n.8 (1989)). But, as the district court correctly noted, being an accessory after the fact is neither a complete defense to the charged crime nor a lesser-included offense. See id. at 6 n.5. And as we have previously observed, giving an instruction on an uncharged accessory-after-the-fact offense poses a risk of confusing the jury. United States v.

Otero-Méndez, 273 F.3d 46, 56 (1st Cir. 2001). Under these circumstances, a defendant cannot establish an abuse of discretion (let alone plain error) unless, among other things, he can show that the "requested instruction was essential to the effective presentation of the particular defense." See id. at 55 (quoting United States v. Rosario-Peralta, 199 F.3d 552, 567 (1st Cir. 1999)). Salemme makes no such showing. Indeed, any claim that Salemme helped out afterward would have likely undercut his defense, which was that he took no part in the killing at all. All in all, we agree with the district court that it was not necessary to instruct the jury as to the elements of being an accessory after the fact.

Salemme also makes a separate, slightly different argument on appeal. He contends that the district court, in instructing on aiding-and-abetting liability, should have added a warning that helping a perpetrator only after the fact was not aiding and abetting. Salemme never raised this particular argument in the district court. And even on appeal he does not dispute that the instruction given clearly set out the elements of aiding and abetting. Nor does he show that it was clear or obvious that the requested instruction was necessary to his defense. We therefore reject this argument for the lack of any plain error.

IV.

Finally, we turn to several miscellaneous, allegedly prejudicial errors Weadick and Salemme argue were made by the district court. We discuss each in turn.

A.

Weadick challenges the district court's denial of his motion to sever. We review that denial only for an abuse of discretion. United States v. Azor, 881 F.3d 1, 10 (1st Cir. 2017). Weadick contends that severance was necessary to avoid evidentiary spillover. Evidentiary spillover occurs "where evidence establishing the guilt of one defendant, but not admissable [sic] against the other, may create an atmosphere clouding the jury's ability to evaluate fairly the guilt or innocence of the latter." United States v. Perkins, 926 F.2d 1271, 1281 (1st Cir. 1991); see also United States v. Martínez, 994 F.3d 1, 15–16 (1st Cir. 2021) (describing spillover as "where the crimes of some defendants are more horrific or better documented than the crimes of others" (quoting United States v. Innamorati, 996 F.2d 456, 469 (1st Cir. 1993))).

Some amount of spillover is inherent in trying multiple defendants together. See United States v. DeLuca, 137 F.3d 24, 36 (1st Cir. 1998). "To prevail on an evidentiary spillover claim, the defendant must prove 'prejudice so pervasive that a miscarriage of justice looms.'" United States v. Paz-Alvarez, 799 F.3d 12, 30

(1st Cir. 2015) (quoting United States v. Levy-Cordero, 67 F.3d 1002, 1008 (1st Cir. 1995)). "[W]here the evidence against a defendant might show [his] association with his co-defendants even if he were tried alone, the argument for prejudice becomes much weaker." Azor, 881 F.3d at 12 (citing King v. United States, 355 F.2d 700, 704 (1st Cir. 1966)). "Even where large amounts of testimony are irrelevant to one defendant, or where one defendant's involvement in an overall agreement is far less than the involvement of others, we have been reluctant to secondguess severance denials." Id. (quoting United States v. Boylan, 898 F.2d 230, 240 (1st Cir. 1990)).

With these principles in mind, we turn to Weadick's arguments. First, echoing his earlier contention that he was not a member of any conspiracy with Salemme or the NELCN beyond arguably a narrow conspiracy to murder DiSarro, Weadick contends that a number of co-conspirator statements admitted against Salemme at trial would not have been admissible against him in a separate trial. However, as we have already explained, the specific statements Weadick points to, with one exception, were either equally admissible against him or harmless. See supra Part II.A. As such, the admission of these statements did not require severance. See United States v. Floyd, 740 F.3d 22, 37 (1st Cir. 2014) (explaining that there was no plausible basis for severance where "[m]uch of the evidence about which the defendants

complain would have been admissible against them even if they had been tried separately").

The one exception is Salemme's admission that he lied when he claimed that a third party was responsible for DiSarro's murder in his 1999 proffer to the government, which was admissible against Salemme alone. But, like the statements just discussed, Salemme's admission did not create the sort of "extreme prejudice" that would warrant a separate trial for Weadick. Houlihan, 92 F.3d at 1295. The district court made clear during jury instructions, and Weadick argued in closing, that the jury was free to convict Salemme and acquit Weadick. See United States v. Capelton, 350 F.3d 231, 239 (1st Cir. 2003) (upholding the denial of a severance motion in part because the district court instructed the jury to evaluate each defendant individually). Salemme's admission did not change that. It was offered only to show Salemme's consciousness of guilt, and it did not mention Weadick or otherwise implicate him in DiSarro's murder. Certainly someone killed DiSarro and had him buried, so evidence that implicated Salemme, and not Weadick, was a mixed bag at worst for Weadick. And given the testimony of Weadick's girlfriend, of Flemmi, and of DeLuca, as well as the evidence of Weadick's relationship with Frank Jr., it is very unlikely that Salemme's admitted lying made any difference. See United States v. Appolon, 695 F.3d 44, 54 (1st Cir. 2012) (requiring a defendant moving to sever to show

"more than just a better chance of acquittal at a separate trial" (quoting United States v. DeCologero, 530 F.3d 36, 52 (1st Cir. 2008))).

Second, Weadick argues that he was prejudiced by the introduction of certain witnesses' prior crimes. For example, Flemmi testified to his involvement in the murders or attempted murders of over a dozen individuals. Weadick asserts that he was prejudiced by the sheer volume of prior-acts evidence, as well as by the brutal detail elicited regarding two murders in particular -- one that took place at Salemme's house in Flemmi's presence, see infra Part IV.C, and another that Salemme ordered DeLuca to commit.

Salemme does not challenge the admissibility of this testimony. Indeed, he elicited some of it himself in what Weadick presumes was an actual or anticipated attempt to impeach the witnesses. Weadick, though, points out that some of the evidence of murders predated his earliest possible involvement in any NELCN conspiracy and was prejudicial spillover evidence that never would have been admitted had he been tried alone. We are skeptical. It would be an unusual defendant who would not want the jury to know that the government's key witness is a murderer many times over.

Be that as it may, even if we assume that Weadick -- unlike Salemme -- would not have impeached Flemmi, et al. with their prior crimes, a divergence in defense strategy generally

poses no mandatory severance absent a true antagonism, "such that if the jury believe[d] one defense, it [was] compelled to convict the other defendant." United States v. Peña-Lora, 225 F.3d 17, 33 (1st Cir. 2000) (emphasis in original) (quoting United States v. Woods, 210 F.3d 70, 79 (1st Cir. 2000)). Clearly, no such antagonism existed here. With or without the impeachment, both defendants took the position that Flemmi was not to be believed, and neither sought to use the evidence (or its absence) to point the finger at the other. At most, we have an example of a disagreement in how best to use (or not use) evidence toward a shared end, and Weadick's inability to pursue his preferred tactic is unlikely to have caused any cognizable harm. See DeCologero, 530 F.3d at 53.

Finally, as to prejudice, precisely because the testimony did not concern Weadick, its prejudicial impact was muted. We do agree that in painting Salemme and his associates so badly, the testimony created some risk of guilt by association. But evidence plainly admissible against Weadick already made clear that Weadick was close to the Salemmes and they were very bad guys. The district court, too, told the jury that it could acquit Weadick while convicting Salemme, and that it could not use evidence of any prior crimes to establish a propensity to commit the charged crime. All in all, we find no error of law or abuse of discretion in holding a single trial to adjudicate the charges that Weadick

and Salemme together murdered DiSarro to keep him from talking with federal authorities.

B.

Weadick next says the district court erred in allowing the government to introduce evidence showing that, prior to DiSarro's murder, he and Frank Jr. had worked together to con drug dealers and users. He argues that this evidence was irrelevant, see Fed. R. Evid. 402, that it amounted to improper propensity evidence, see Fed. R. Evid. 404(b), and that, in any event, its probative value was outweighed by the risk of unfair prejudice it posed, see Fed. R. Evid. 403. Assuming a proper objection was made, we review for abuse of discretion. Grossmith v. Noonan, 607 F.3d 277, 279 (1st Cir. 2010).

The evidence Weadick challenges includes testimony from a witness with NELCN connections that Frank Jr. and Weadick "robbed together." Another witness, a former officer for the New Hampshire State Police, testified that while he was undercover posing as a prospective seller of cocaine in 1987, Weadick and Frank Jr. approached him about buying drugs. He testified that they became uninterested and left when the officer told them that he did not have the drugs in the car and that they would have to go to another location to get them. Other troopers later stopped Weadick and Frank Jr.'s vehicle and searched the car for money. Although no money was found, the officers found a package of flour, wrapped

tightly in tape, which the officer testified was roughly the size and bulk of the amount of money they would have been dealing with. Finally, a third witness, DiSarro's stepbrother, testified that DiSarro had told him that Weadick and Frank Jr. had "ripped off a drug dealer and then pushed him out of the car while it was going down the road."

We see no abuse of discretion in the district court's finding that the drug-transaction evidence was admissible against Weadick. Rule 404(b) prohibits the use of evidence of "any other crime, wrong, or act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). For example, if the drug-con evidence had been offered solely to suggest that Weadick was a criminal and was therefore more likely to have committed the charged crime, the evidence would be inadmissible under Rule 404(b). But that is not what happened here. Rather, the drug-con evidence was admitted "to help the jury understand the basis for the co-conspirators' relationship of mutual trust," which in turn would help it evaluate whether and why Weadick might have agreed to help Frank Jr. murder DiSarro. United States v. Escobar-de Jesus, 187 F.3d 148, 169 (1st Cir. 1999). That is a relevant and permissible purpose in a conspiracy

case such as this.[4] Id.; see also United States v. Vizcarrondo-Casanova, 763 F.3d 89, 94 (1st Cir. 2014).

It is true that the government likely could have introduced other evidence establishing a relationship between Weadick and Frank Jr. But, as the district court pointed out, the drug-con evidence was the only evidence showing that their relationship included criminal activities, which strengthens the inference of loyalty and mutual trust and shows that Weadick's involvement in the Salemme family's crimes was not limited to DiSarro's murder. And any danger of unfair prejudice stemming from this evidence was low: The drug cons that Weadick allegedly participated in with Frank Jr. were not similar to the charged crime of murder, and they were far less serious. Moreover, the details elicited regarding the drug cons were not excessive. See Vizcarrondo-Casanova, 763 F.3d at 94–95 (asking whether the evidence of this type included more details than necessary to establish trust and whether the government had other evidence to establish a relationship of trust). As such, the district court did not abuse its discretion in finding that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice or other related concerns. See Fed. R. Evid. 403;

[4] We therefore need not address the district court's alternate basis for admitting the drug-con evidence under Rule 404(b), namely that it was "intrinsic to the charge[d] conspiracy."

Martínez-Mercado, 919 F.3d at 101 (explaining that Rule 404(b) requires a determination as to whether (1) the evidence has a non-propensity purpose, and if so, (2) the probative value of the evidence is substantially outweighed by the danger of unfair prejudice).

Pushing back, Weadick argues that the government's evidence showing his involvement in the drug scams was weak. For example, he notes that on cross-examination, one witness admitted that he only "vaguely" remembered the Weadick drug robberies and that he could not remember specifics. Likewise, DiSarro's stepbrother on cross-examination admitted that he could not recall for certain whether Weadick was involved in the cons and that he may have been wrong in saying he had been. Weadick also points out that some law enforcement officers who conducted surveillance of Frank Jr. never observed Weadick with him -- implying that Weadick and Frank Jr. were not as close as the other evidence made it seem or that the witnesses testifying to Weadick's involvement in the drug cons were mistaken. But all these arguments go to the weight of the evidence, not to its admissibility. See United States v. Mehanna, 735 F.3d 32, 65 (1st Cir. 2013).

C.

Salemme challenges on propensity grounds the introduction of Flemmi's testimony that he was with Salemme at Salemme's home in 1968 when another person was murdered. Salemme

points to no indication that he objected to this evidence, so we review only for plain error. It is not obvious that the evidence had no non-propensity relevance and purpose -- it explained why Salemme would not have been concerned when Flemmi stumbled upon Salemme, Frank Jr., and Weadick committing the DiSarro murder. See Escobar-de Jesus, 187 F.3d at 169 (allowing evidence of a prior crime to help demonstrate a relationship of mutual trust). The evidence also had a potential for unfair prejudice given certain similarities between Flemmi's testimony and the DiSarro murder. But there is no reason to treat as plain error the district court's balancing of these attributes in favor of admitting the evidence.[5]

D.

Lastly, Weadick argues that the prosecutor committed Napue error by failing to correct allegedly false testimony a witness gave during the trial. In Napue v. Illinois, the Supreme Court held that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment," including when "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. 264, 269 (1959).

[5] Although the district court at the end of trial concluded this evidence was intrinsic to the charged crime, we may affirm a district court's evidentiary ruling on any ground apparent in the record. See United States v. Brown, 669 F.3d 10, 21 (1st Cir. 2012).

Weadick focuses on DeLuca's testimony that Salemme had told him DiSarro "was an informant" who "was giving information to" an Assistant United States Attorney. Weadick asserts that "DiSarro never communicated with [that Assistant] at any time prior to his death." But that is beside the point. As the government explained to the jury, this testimony from DeLuca was elicited only to show that Salemme believed DiSarro was cooperating with federal authorities:

> Now, was Steven DiSarro actually cooperating with the federal government? No. No. But it doesn't matter because to satisfy the element of this offense, all the government needs to show is that the defendant is motivated by his belief . . . that the person is a cooperator.

Weadick does not dispute that Salemme in fact expressed such a belief, accurate or not, to DeLuca. Accordingly, we reject his claim of Napue error.

V.

For the foregoing reasons, we affirm the convictions of both Salemme and Weadick.

APPENDIX B

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA
v.
FRANCIS P. SALEMME

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: **1: 16 CR 10258 - 001 - ADB**

USM Number: 24914-013

Steven C. Boozang, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC§1512(a)(1)(C)	Murder of a Witness	05/10/93	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/13/2018
Date of Imposition of Judgment

/s/ Allison D. Burroughs
Signature of Judge

The Honorable Allison D. Burroughs
Judge, U.S. District Court
Name and Title of Judge

9/25/2018
Date

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: life

☑ The court makes the following recommendations to the Bureau of Prisons:

Judicial recommendation that the defendant be placed in a medical facility.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of : 24 month(s)

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

ADDITIONAL SUPERVISED RELEASE TERMS

1. You must not knowingly have any contact, direct or indirect, with the victim's family.

2. You must pay the balance of the restitution imposed according to a court-ordered repayment schedule.

3. You are prohibited from incurring new credit charges or opening additional lines of credit without the approval of the Probation Office while any financial obligations remain outstanding.

4. You must provide the Probation Office access to any requested financial information, which may be shared with the Financial Litigation Unit of the U.S. Attorney's Office.

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$	$ 15,880.00	$ 9,118.00

☐ The determination of restitution is deferred until _____ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Nicholas DiSarro on behalf of Steven DiSarro family	$9,118.00	$9,118.00	
TOTALS	$ 9,118.00	$ 9,118.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☑ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

It is ordered that the defendant shall make restitution to Nicholas DiSarro on behalf of the Steven DiSarro family in the amount of $9,118.00. The restitution shall be paid by the defendant jointly and severally with Paul M. Weadick.

Payment of the restitution shall begin immediately and shall be made according to the requirements of the Federal Bureau of Prisons' Inmate Financial Responsibility Program while the defendant is incarcerated and according to a court-ordered repayment schedule during the term of supervised release.

All restitution payments shall be made to the Clerk, U.S. District Court for transfer to the identified victims. The defendant shall notify the United States Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the restitution remains unpaid.

DEFENDANT: FRANCIS P. SALEMME
CASE NUMBER: **1: 16 CR 10258 - 001 - ADB**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☑ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☑ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Paul M. Weadick, 16-CR-10258-002-ADB, Total Amount - $9,118.00, Joint and Several Amount - $9,118.00., Restitution to Nicholas DiSarro on behalf of the Steven DiSarro family

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 18-1932

UNITED STATES,

Appellee,

v.

FRANCIS P. SALEMME,

Defendant - Appellant.

Before

Howard, Chief Judge,
Lynch, Thompson, Kayatta, Barron, Gelpí, Circuit Judges,
and Smith, District Judge.[*]

ORDER OF COURT

Entered: November 18, 2021

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Francis P. Salemme, Lawrence Gerzog, Donald Campbell Lockhart, Randall Ernest Kromm, William Joseph Ferland

[*] Of the District of Rhode Island, sitting by designation.