as a co-conspirator, his presence at the Strasburg property on multiple occasions, and the evidence discussed above about drug activity at the house, there was sufficient evidence for the jury to conclude that possession with the intent to distribute at 19504 Strasburg was a foreseeable crime within the scope of and in furtherance of the conspiracy. Thus, Sadler is liable for this substantive offense under *Pinkerton*. *See Martin*, 920 F.2d at 348–49.

4. Felon in Possession

Sufficient evidence supports Sadler's conviction under 18 U.S.C. § 922(g)(1) for being a felon in possession of a firearm. "The elements of the crime of being a felon in possession of a firearm are: 1) a prior felony conviction; 2) knowing possession of a firearm; and 3) the firearm must have traveled in interstate commerce." *United States v. Mayberry*, 540 F.3d 506, 514 (6th Cir. 2008) (citing 18 U.S.C. § 922(g)(1)). Sadler does not dispute that he is a convicted felon or that the gun he allegedly possessed travelled in interstate commerce. Thus, if a reasonable jury could find, beyond a reasonable doubt, that Sadler possessed the firearm at issue, his conviction will stand.

"Possession may be 'either actual or constructive and it need not be exclusive but may be joint.'" *United States v. Paige*, 470 F.3d 603, 610 (6th Cir. 2006) (quoting *United States v. Covert*, 117 F.3d 940, 948 (6th Cir. 1997)). "Constructive possession may be proved by direct or circumstantial evidence and it is not necessary that such evidence remove every reasonable hypothesis except that of guilt." *Coffee*, 434 F.3d at 895–96 (citing *Craven*, 478 F.2d at 1333). "Proof that 'the person has dominion over the premises where the firearm is located' is sufficient to establish constructive possession." *Id.* at 896 (quoting *United States v. Kincaide*, 145 F.3d 771, 782 (6th Cir. 1998)). "However, presence alone near a firearm was found, without more, is insufficient to establish 'knowledge or intention to exercise control' over the firearm." *Id.* (quoting *United States v. Arnold*, 434 F.3d 396, 403 (6th Cir. 1993)).

The government charged Sadler with possession of a .40 caliber Smith & Wesson handgun found on June 15, 2016, during a search of 15652 Eastburn. Police saw Sadler leaving that house earlier that day. Sadler's children lived at the home with their mother, and police found some of Sadler's belongings in the house. Police found the firearm on the top shelf of a

kitchen cabinet. A forensic scientist identified Sadler's DNA on the firearm. After his arrest, Sadler told police that "he was taking full responsibility for the firearm . . . that w[as] found in the residence on Eastburn Street." (John Pickett Trial Test., R. 706, Page ID #4208). Even without unequivocal evidence that Sadler owned or resided at the Eastburn property full-time, this evidence is sufficient to establish constructive joint possession. *See Coffee*, 434 F.3d at 896–97 (finding constructive possession despite conflicting testimony about the defendant's primary residence at the time of the search).

5. Conspiracy to Obstruct Justice

Sufficient evidence supported Sadler's conviction for conspiring to obstruct justice. Under 18 U.S.C. § 1512, it is a crime to conspire to use "the threat of physical force against any person . . . with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding." § 1512(a)(2)(A), (k). The government charged Sadler with conspiring to threaten William Dennis. To sustain this conviction, Sadler must have agreed with another person to threaten Dennis in hopes of preventing or influencing his testimony at trial. Although the government's evidence on this charge is circumstantial, that does not preclude the jury from finding Sadler guilty beyond a reasonable doubt. *See United States v. Ledbetter*, 929 F.3d 338, 355 (6th Cir. 2019) (upholding conviction for conspiracy to obstruct justice based on circumstantial evidence alone). There are three key pieces of evidence here: Sadler found out who would be testifying against him at trial;[9] Sadler and his mother then called Dennis' mother— [illegible] discussed Dennis' future testimony; and *immediately* after that call, an unknown person called Dennis' mother and said, "Tell William to shut up or one of y'all are going to go missing." (Francine Leatherwood Test., R. 791, Page ID #7875).

[illegible] that "there was absolutely no testimony from any witness, including William Dennis Sr., that Mr. Sadler ever threatened [Dennis] or directed anyone to threaten him." (Def. Sadler 19-2221 Br. at 14). "But that misses the point at this stage, where all inferences must be made in favor of the prosecution and the evidence need not 'exclude every reasonable hypothesis except that of guilt.'" *Ledbetter*, 929 F.3d at 355 (quoting *Johnson v.*

[9]As discussed below, this evidence was admissible. *See infra* Part II.B.2.

Coyle, 200 F.3d 987, 992 (6th Cir. 2000)). A jury could infer intent based on the timing of the calls in relation to Sadler's discovery that Dennis would testify. It could further infer an agreement to threaten Leatherwood with physical force by the back-to-back calls from Sadler and the threatening caller. The timing of these events could have led the jury to conclude, beyond a reasonable doubt, that Sadler had agreed with the unknown caller to threaten Leatherwood with the use of physical force.

6. Witness Tampering

A person commits a substantive offense under § 1512 when he or she "uses . . . the threat of physical force against any person, or attempts to do so, with intent to . . . influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. § 1512(a)(2)(A). The jury found Sadler guilty of tampering with two witnesses: Dennis and Alexander.

a) William Dennis Sr.

Sufficient evidence showed that Sadler used threats of physical force with the intent to influence or prevent Dennis' testimony in this trial. After learning that Dennis would testify in this case, Sadler and his mother called Dennis' mother, asking whether she knew that her son was testifying and commenting on his decision to testify. An unknown caller immediately called Leatherwood back and said: "Tell William to shut up or one of y'all are going to go missing." (Francine Leatherwood Test, R. 791, Page ID #7875).[10] Around the same time, Sadler sent a Facebook message to Dennis' sister—Andrea Leatherwood—saying, "That's crazy how your brother are main witness, but we telling on him. Little bro turn in his grave, that's how shit . . . ." (Andrea Leatherwood Test., R. 791, Page ID ##7890–91).

Sadler argues that his statements were not threats and that, even if they were, there was no evidence indicating that Dennis found out about the threats. First, his statements that Dennis would "turn in his grave" and that, if Dennis did not "shut up . . . [,] one of y'all are going to go missing" satisfy the threats-of-physical-force requirement. *See United States v. Thompson*,

[10]Having concluded that this statement was made as part of a conspiracy, *see supra* Part II.A.5, Sadler would be liable for this substantive offense committed by a co-conspirator under the *Pinkerton* doctrine, *see supra* Part II.A.3.b.

758 F. App'x 398, 411–12 (6th Cir. 2018) (defendant's statement that "I'm going to get her," when referring to the witness, satisfied "threat" requirement). Second, for purposes of § 1512 liability, it does not matter that Sadler made the threats to Dennis' family members, or that Dennis may not have heard about them. The statute encompasses threats "against *any* person," *id.*, even if not made directly to the witness and the witness never learned of the threat, *see United States v. England*, 507 F.3d 581, 589 (7th Cir. 2007) (upholding conviction when the defendant threatened the witness's father even though the witness never heard about the threat).

b) Amacio Alexander

There is also sufficient evidence supporting the jury's finding that Sadler threatened Alexander. On June 19, 2016, Sadler approached Alexander while Alexander was at his aunt's house. Sadler drove up to the house in a black truck and, without getting out of the vehicle, approached Alexander and said, "Take back what you said. Don't go to court or your family going to see your face on a T-shirt." (Alexander Test., R. 705, Page ID #4064). Alexander believed this was a reference to "memorial T-shirt[s]" and believed it was a death threat. (*Id.*) The geolocation data on Sadler's phone confirmed that he was near Alexander's aunt's house around the time of this incident. Based on this evidence, a rational jury could have found that Sadler threatened Alexander with the intent to prevent him from testifying.

B. Evidentiary Objections

Sadler challenges the district court's decision to admit two pieces of evidence against him: (1) evidence of two incidents where he sold heroin to an undercover police officer in 2012, and (2) his former attorney's testimony discussing when Sadler learned about the witnesses in this case.

1. Sadler's 2012 Heroin Sales

We "generally review the district court's admission or exclusion of evidence for abuse of discretion." *Emmons*, 8 F.4th at 473 (quoting *United States v. Bell*, 516 F.3d 432, 440 (6th Cir. 2008)). "A district court has abused its discretion when its decision rests on the wrong legal standard, a misapplication of the correct standard, or on clearly erroneous facts." *United States v. Gibbs*, 797 F.3d 416, 422 (6th Cir. 2015). "If evidence was erroneously admitted, we ask

whether the admission was harmless error or requires reversal of a conviction." *United States v. Churn*, 800 F.3d 768, 775 (6th Cir. 2015) (citing *United States v. Martinez*, 588 F.3d 301, 312 (6th Cir. 2009)). This standard applies when reviewing a district court's determination that Federal Rule of Evidence 404(b) is inapplicable because the evidence is intrinsic or *res gestae*. *Id.* at 774, 779. Here, the district court abused its discretion by admitting evidence of two instances where Sadler sold drugs in 2012. But, ultimately, the error is harmless.

Under Rule 404(b)(1), "[e]vidence of any other crime, wrong, or act is not admissible 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). "The purpose of Rule 404(b) is to prevent a jury from 'convict[ing] a "bad man" who deserves to be punished not because he is guilty of the crime charged but because of his prior or subsequent misdeeds' and from 'infer[ring] that because the accused committed other crimes, he probably committed the crime charged.'" *Emmons*, 8 F.4th at 473 (quoting *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979)).

However, Rule 404(b) does not apply when the prior bad act forms the basis of the charges for which a defendant is being tried. *See United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013) (Rule 404(b) "is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of illegal activity" (quoting *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995))). That is, if evidence is "intrinsic," Rule 404(b) will not apply as long as the acts "are part of a single criminal episode." *Id.* (quoting *Barnes*, 49 F.3d at 1149). "Intrinsic acts are those that are . . . a part of the criminal activity[,] as opposed to extrinsic acts, which are those that occurred at different times under different circumstances from the offense charged." *Churn*, 800 F.3d at 779 (quoting *United States v. Stafford*, 198 F.3d 248 (Table), 1999 WL 1111519, at *4 (6th Cir. 2012)). A similar but distinct doctrine involves an exception to Rule 404(b) for *res gestae*, or background, evidence. *See Adams*, 722 F.3d at 810 (citing *United States v. Clay*, 667 F.3d 689, 697 (6th Cir. 2012)). Such evidence "consists of those other acts that are inextricably intertwined with the charged offense."[11] *United States v. Hardy*, 228 F.3d

[11]We have not always been clear when distinguishing between *res gestae* and intrinsic evidence. *Adams* indicates that these concepts are different. *See* 722 F.3d at 810, 822. However, later cases have merged the two.

745, 748 (6th Cir. 2000). "Typically, such evidence is a prelude to the charged offense, is directly probative of the charged offense, arises from the same events as the charged offense, forms an integral part of a witness's testimony, or completes the story of the charged offense." *Id.* "Concerned with the potential for abuse of background evidence as a means to circumvent Rule 404(b)," we have recognized "severe limitations as to 'temporal proximity, causal relationship, or spatial connections' among the other acts and the charged offense." *Adams*, 722 F.3d at 810 (quoting *Clay*, 667 F.3d at 698). We must be careful not to allow *res gestae* evidence as a "'backdoor to circumvent [the] goals' of Rule 404(b)." *Gibbs*, 797 F.3d at 423 (quoting *Clay*, 667 F.3d at 698).

Sadler believes the district court improperly admitted evidence relating to his 2012 heroin sales—which he does not dispute happened—as intrinsic evidence. The government alleges that these sales were evidence of the "Polo" conspiracy. The district court overruled Sadler's objection to this evidence and found that it was "relevant because it's certain acts alleged[ly] by the defendant . . . during the time frame of the conspiracy relating to the overall charge." (Trial Tr., R. 706, Page ID #4127). The district court did not consider whether the testimony was admissible under any exception to Rule 404(b), such as proof of motive, opportunity, intent, plan, knowledge, or lack of accident. *See* Fed. R. Evid. 404(b)(2).

The parties' dispute boils down to the degree of relatedness between Sadler's 2012 heroin sales and the broader "Polo" conspiracy between 2010 and 2016. The government argues that the jury could reasonably infer that these sales were *part of* the "Polo" conspiracy. It relies on the following threads to tie Sadler's 2012 sales to the broader "Polo" conspiracy: Sadler sold heroin; "Polo" sold heroin; Sadler sold heroin in small plastic bags; "Polo" sold heroin in small plastic bags; Sadler sold those bags for roughly $20; "Polo" sold bags for $20; Sadler used a phone to set up drug deals; "Polo" used phones to coordinate drug deals; Sadler's sales were in 2012; "Polo" allegedly operated in 2012. But, as Sadler notes, "[t]he similarities that the

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See Churn, 800 F.3d at 779 ("*Res gestae* is sometimes also known as 'intrinsic evidence.'"). As we have recognized, "the distinctions among *res gestae*, inextricably intertwined evidence, intrinsic evidence, and background evidence [are] far from clear." *Id.* (quoting *Adams*, 722 F.3d at 822 n.26). Ultimately, we do not need to split hairs deciding whether this is "intrinsic" or "*res gestae*" evidence because under either theory, the outcome is the same.

government claims are unique, are actually so generic that [we] . . . give them no credence whatsoever." (Def. Sadler Reply Br. at 3).

The government's comparisons are flawed for several reasons. First, they do not indicate that the 2012 sales were intrinsic evidence that was "part of a single criminal episode." *Adams*, 722 F.3d at 822 (quoting *Barnes*, 49 F.3d at 1149). The evidence does not show that Sadler's sales were "Polo" sales. There is no evidence that Sadler set up the sales using either "Polo" phone, he did not use a runner, and the sales were in a different part of town than "Polo" sales. Sadler pulled up to the undercover officer in a car, driven by the mother of his children, with a child in the backseat. Officers did not see other cars waiting or other drug deals happening at the same time. Sadler's 2012 drug sales are thus not intrinsic evidence because they have no bearing on whether he agreed, knowingly joined, and participated *in the conspiracy*. *See Williams*, 998 F.3d at 728 (listing elements of conspiracy); *United States v. Peete*, 781 F. App'x 427, 434 (6th Cir. 2019) (noting that evidence is intrinsic if it "tends to logically prove *an element* of the crime charged" (emphasis added) (quoting *United States v. Till*, 434 F.3d 880, 883 (6th Cir. 2006))). Indeed, in a similar drug conspiracy case, we found evidence of the defendant's past drug sales inadmissible extrinsic evidence when the parties involved in those deals were not the alleged co-conspirators, and the prior sales did not "tend to establish the charged conspiracy itself." *United States v. Hardy*, 228 F.3d 745, 749–50 (6th Cir. 2000). Without some connection to the conspiracy itself, prior bad acts are not intrinsic to the alleged conspiracy even if the bad act is of the same kind alleged in the conspiracy charge. *See id.*

Second, the 2012 sales are not *res gestae* or background evidence. Although courts can admit such evidence even when the prior acts are not "identical" to those charged, the facts must be "closely related." *Churn*, 800 F.3d at 779 (quoting *United States v. Vincent*, 681 F.2d 462, 465 (6th Cir. 1982)). Here, Sadler's 2012 drug deals are not "closely related" to the "Polo" conspiracy. The spatial and temporal connections between "Polo" and Sadler's 2012 sales are tenuous at best. Most of the evidence at trial concerned "Polo" deals between 2015 and 2016. But even in the earlier "Polo" sales, the evidence showed a clear pattern of "Polo" using the same two phones and the same handful of locations. Although Sterling Heights is a suburb just east of Detroit, it is roughly ten miles away from the small area where "Polo" operated. The

2012 deals did not happen at a "Polo" stash house or other identifiable "Polo" hotspot like Hamburg Street or the intersection of Bringard and Bradford. Rather, they were in a Meijer parking lot ten miles away.

We require a much stronger connection between the prior act and the conduct charged to support a finding that the past act was intrinsic or *res gestae* evidence. *See Churn*, 800 F.3d at 779 (admitting evidence of a non-charged fraudulent transaction because that transaction was with the same victim and the fraudulent deals were set up around the same time, and thus it was evidence of "the very scheme alleged in the indictment"); *United States v. Hughes*, 562 F. App'x 393, 396 (6th Cir. 2014) (admitting "intrinsic" evidence showing that the defendant—who was charged with carjacking a Pontiac Sunfire—used a Sunfire to commit several robberies within three hours of the alleged carjacking). The district court thus abused its discretion by admitting this evidence as intrinsic or *res gestae* evidence. Because the 2012 sales are not relevant to the charged offense and do not provide any necessary background, the only inference that can be drawn from them is that Sadler's prior drug-dealing activity makes it more likely that he would join a conspiracy involving those types of crimes. This is precisely the kind of inference that Rule 404(b) seeks to avoid. *See* Fed. R. Evid. 404(b); *see also United States v. English*, 785 F.3d 1052, 1059 (6th Cir. 2015) (Clay, J., concurring) (noting that defendant's prior fraudulent conduct was not *res gestae* because it involved "discrete instances of fraudulent conduct constituting only gratuitous evidence of [the defendant's] propensity to commit fraud").

After seemingly concluding that Rule 404(b) was not implicated, the district court did not consider whether any exceptions to Rule 404(b) applied. But we do not need to remand on this issue because the error in admitting evidence of Sadler's 2012 drug deals was harmless. "[A]n error is harmless unless one can say, with fair assurance[,] that the error materially affected the defendant's substantial rights—that the judgment was substantially swayed by the error." *Gibbs*, 797 F.3d at 425–26 (quoting *Clay*, 667 F.3d at 700). As discussed above, a rational jury could have found beyond a reasonable doubt that Sadler was guilty of conspiracy under § 846 even without considering the 2012 drug sales. *See supra* Part II.A.1.b.

2. Prior Attorney's Testimony

Sadler next argues that the district court erred by allowing his former attorney—Doraid Elder—to testify at trial because that testimony violated the attorney-client privilege. "[W]hether the attorney-client privilege applies is a mixed question of law and fact, subject to *de novo* review." *Automated Sols. Corp. v. Paragon Data Sys., Inc.*, 756 F.3d 504, 517 (6th Cir. 2014) (quoting *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 712 (6th Cir. 2006)). "The purpose of attorney-client privilege is to ensure free and open communications between a client and his attorney." *Id.* (quoting *In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006)). "The burden of establishing the existence of the privilege rests with the person asserting it." *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1999). In deciding whether a communication is privileged, we have held that: "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." *Reed v. Baxter*, 134 F.3d 351, 355–56 (6th Cir. 1998). While this definition seemingly only applies to the client's statements, courts generally agree that an attorney's statements to a client can also fall within the privilege if that communication would reveal client confidences or legal advice. *See In re Grand Jury Procs.*, 616 F.3d 1172, 1182 (10th Cir. 2010). However, those communications are not protected "when an attorney conveys to his client facts acquired from other persons or sources." *Id.* (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)).

Elder testified that he gave Sadler the witness list in this case shortly before Sadler made threatening calls to Francine Leatherwood (Dennis' mother) and sent threatening messages to Andrea Leatherwood (Dennis' sister). The government sought to admit this evidence because the temporal proximity of these events circumstantially showed that Sadler intended to "influence, delay, or prevent the testimony of any person in an official proceeding" as required to prove witness tampering. The district court allowed Elder to testify, but limited Elder's testimony to the following issues: (1) whether Elder had conversations with Sadler between March 19 and 23, 2018; (2) whether Elder and Sadler met on March 23, 2018; (3) whether Elder

gave Sadler a witness list and the grand jury testimony transcript on that day; and (4) whether those materials identified cooperating witnesses. Whether these types of communications are privileged is a matter of first impression. We agree with the district court that the Seventh Circuit's decision in *United States v. Defazio*, 899 F.2d 626 (7th Cir. 1990), is instructive here.

> In *Defazio*, the defendant was charged with tax fraud. During the course of the IRS's pre-indictment investigation, the defendant's attorney met with IRS agents to discuss his audit. [899 F.2d] at 634. The agents told the attorney that the IRS "had completed their investigation and are ready to refer the case [for prosecution] and that if you have any defenses you would like to present, he would be glad to listen to them." *Id.* Later, the attorney met with the defendant to discuss his meeting with the IRS, and the fact that criminal prosecution was likely. *Id.* After this discussion, the defendant transferred assets, for nominal consideration, to a newly created corporation. *Id.*
>
> The Government sought to prove that the transfers were part of the defendant's willful attempt to evade income taxes by calling the attorney to testify "only to what the IRS agent said to him, and that he later relayed those statements to [the defendant]." *Id.* at 635. The trial court allowed the attorney to testify to this effect, and the defendant appealed. The Seventh Circuit upheld the trial court's decision, concluding that "the content of [the attorney's] testimony is unprivileged because it did not reveal, either directly or implicitly, legal advice given [to the defendant] or any client confidences." *Id.* Accordingly, allowing the attorney to testify as to what the IRS agent told him, and that he later relayed the IRS agent's statements to the defendant, did not violate attorney-client privilege.

(Dist. Ct. Order, R. 653 at 5–6). As the district court noted, Elder's testimony did not disclose the contents of any meetings or conversations with Sadler beyond those facts that the government relayed to Elder. "Like the IRS statements in *Defazio*, this information did not reveal either directly or implicitly, legal advice or any client confidence." (*Id.* at 6). Elder's testimony merely indicated when Sadler received specific types of information from the government—vis-à-vis his attorney—about the case. In this context, the communications are not protected by the attorney-client privilege.

C. Jury Instructions

Both Defendants argue that the district court made multiple errors in its jury instructions concerning 21 U.S.C. § 841(b)(1)(C)'s death-or-injury-results provision. That provision imposes an enhanced sentence if a defendant is found guilty of distributing, or conspiring to distribute, a

controlled substance and "death or serious bodily injury results from the use of such substance." § 841(b)(1)(C). Whether death or serious bodily injury results from a particular substance is a question for the jury. *Burrage*, 571 U.S. at 210.

We generally "review the legal accuracy of jury instructions *de novo*." *United States v. Pritchard*, 964 F.3d 513, 522 (6th Cir. 2020) (citing *United States v. Roth*, 628 F.3d 827, 833 (6th Cir. 2011)). However, "a district court's refusal to give an instruction requested by the defendant must amount to abuse of discretion in order for [us] to vacate a judgment." *Id.* (citing *Roth*, 628 F.3d at 833). If the defendant failed to request a specific instruction from the district court, we review that omission for plain error. *United States v. Semrau*, 693 F.3d 510, 527 (6th Cir. 2012) (citing *United States v. Carmichael*, 232 F.3d 510, 523 (6th Cir. 2000)). Even if the district court plainly erred, the error must have "affected substantial rights," meaning that we will not reverse or vacate a decision unless the error "affected the outcome of the district court proceedings." *United States v. Castano*, 543 F.3d 826, 833 (6th Cir. 2008) (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)).

Neither Defendant raised the precise objections that they now raise on appeal. Arguments challenging the district court's jury instructions are properly preserved when the defendant "objected to [the] jury instructions on [the same] ground in the trial." *United States v. Blackwell*, 459 F.3d 739, 764 (6th Cir. 2006) (internal citation omitted) (citing *Carmichael*, 232 F.3d at 523). Before the district court, Tempo objected to two jury instructions concerning causation and *Pinkerton* liability related to the death-or-injury results enhancement. However, he did not ask for the specific instructions that he now alleges the district court improperly omitted. Sadler similarly argues that the death-or-injury results instruction used the wrong causation standard and omitted an element of that enhancement. Sadler claims that "[t]his was objected to in a timely manner by . . . his attorney." (Def. Sadler 19-2217 Br. at 43). But he does not cite any part of the record showing that his attorney lodged these objections, and we have found none. Thus, neither Defendant properly preserved these objections. Because Defendants argue that the district court improperly omitted necessary instructions, but neither Defendant requested those specific instructions at trial, we review the instructions for plain error. *See Semrau*, 693 F.3d at 527 (citing *Carmichael*, 232 F.3d at 523).

1. Causation Instruction

The jury instructions correctly stated the causation standard under § 841(b)(1)(C). Both Defendants argue that the "results from" language requires a showing of proximate causation, which includes a foreseeability requirement. *See United States v. Jeffries*, 958 F.3d 517, 520 (6th Cir. 2020). Defendants thus argue that the district court erred by giving the following jury instruction:

> In determining whether the serious bodily injury or death of these individuals resulted from the use of Heroin of Fentanyl that was distributed, the government is not required to prove that the defendant or defendants knew ahead of time that the Distribution of a Controlled Substance would or could result in a serious bodily injury, or in the death of, these individuals. In other words, *the government need not prove that the serious bodily injury or death was foreseeable* to the defendant or defendants. . . .
>
> If you find that one or more of the defendants is guilty of the charged [offenses], you may find that the controlled substance so distributed caused a serious bodily injury or death if he or she would not have suffered that serious bodily injury or death if he or she not used that Substance. Along those lines, if you find that the substance distributed combined with other drugs or factors to produce his or her serious bodily injury or death, you may find that the substance caused the serious bodily injury or death of the victim if the victim would have avoided that serious bodily injury or lived *but for his or her use of that substance*. That is, you may find the substance distributed by the defendant caused a victim's serious bodily injury or death if, so to speak, this substance was the straw that broke the camel's back. But the government must prove beyond a reasonable doubt that the serious bodily injury or death would not have occurred had the substance distributed by the defendant not been ingested by the individual.

(Jury Instrs., R. 662, Page ID #3588–89 (emphasis added)). At trial, Tempo asked for an additional "superseding cause instruction." (Tempo Mot. for Jury Instr., R. 345, Page ID #1803). Sadler raises the argument for the first time on appeal. Because neither defendant specifically requested a proximate-cause instruction, we review this instruction for plain error. *See Pritchard*, 964 F.3d at 522 (citing *Roth*, 628 F.3d at 833).

There is no dispute that § 841(b)(1)(C) requires but-for causation. *Burrage*, 571 U.S. at 218–19. At the time of the trial, this circuit had not addressed whether the sentencing enhancement also required proximate causation. But we recently took up this question and decided that § 841(b)(1)(C) does not require a showing of proximate causation, including

foreseeability. *Jeffries*, 958 F.3d at 520, 524; *see also United States v. Daniels*, 653 F.3d 399, 409 (6th Cir. 2011) (noting that the inquiry is whether the error was plain at the time of appellate review, not at the time of trial). Thus, the district court properly instructed the jury on the applicable causation standard under § 841(b)(1)(C).

2. Chain of Distribution

Even if "Polo" drugs were the but-for cause of the victims' overdoses, Defendants argue that the jury was also required to find that they were personally linked to these drug sales in order to impose an enhanced sentence under 21 U.S.C. § 841(b)(1)(C). The death-or-injury-results enhancement applies only if the defendant violated a substantive provision of § 841—that is, there must be an underlying crime. *See* § 841(b)(1)(C). When a defendant's underlying crime relies on a conspiracy theory of liability, then the district court cannot impose the enhanced sentence unless the jury finds that the defendant was part of the distribution chain that led to the victim's overdose. *Hamm*, 952 F.3d at 745. This rule emerged through two cases: *United States v. Swiney*, 203 F.3d 397 (6th Cir. 2000) and *United States v. Hamm*, 952 F.3d 728 (6th Cir. 2020).

In *Swiney*, nine co-defendants were convicted of conspiring to distribute heroin under § 846. 203 F.3d at 400. One unindicted co-conspirator sold heroin to a man who later overdosed on that heroin. *Id.* at 400–01. The district court refused to apply the death-or-injury-results enhancement to the conspiracy defendants because there was "no proof linking the heroin which caused" the overdose to other co-conspirators, and we affirmed. *Id.* at 401. We concluded that "before any of the [d]efendants can be subject to the sentence enhancement of 21 U.S.C. § 841(b)(1)(C)" the jury must find that the defendants were "part of the distribution chain." *Id.* at 406. We vacated the defendants' sentences and remanded the case for the district court to make this factual determination. *See id.*

In *Hamm*, we reiterated that "to apply the § 841(b)(1)(C) sentencing enhancement" to any underlying conspiracy crime, "the jury need[s] to find beyond a reasonable doubt that [the defendant] w[as] part of the distribution chain." 952 F.3d at 747. But *Hamm* also extended *Swiney*, applying the chain-of-distribution requirement when the underlying crime is a

substantive offense under § 841 that is based solely on a conspiracy *theory*, even if the underlying crime is not conspiracy under § 846. 952 F.3d at 746–47. Specifically, *Hamm* held that a defendant who did not personally commit the underlying crime, but who is nevertheless liable as a co-conspirator, cannot be sentenced under the death-or-injury-results enhancement unless he was part of the chain of distribution. *Id.* Such co-conspirator liability, known as "*Pinkerton* liability," "is a way of holding members of a conspiracy liable 'for acts committed by other members.'" *Id.* at 744 (quoting Kumar Katyal, *Conspiracy Theory*, 112 Yale L.J. 1307, 1336 (2003)).

In *Hamm*, the defendants were convicted of distribution charges under § 841. *Hamm*, 952 F.3d at 746–47. The two defendants worked together with another woman, Tracey Myers, to buy carfentanil in Cincinnati and bring it back to Kentucky. *See id.* at 748. But, once in Kentucky, Myers and the two defendants each used or sold their carfentanil on their own terms. *See id.* At some point, Myers gave carfentanil to her cellmates while in jail, and her cellmates overdosed on the drugs. *Id.* The defendants were convicted of distributing carfentanil, and each received a 20-year sentence because the carfentanil caused Myers' cellmates' overdoses. *See id.* at 746–47. We concluded that, without the *Pinkerton* doctrine imposing liability onto co-conspirators, the defendants could not have been convicted under § 841(a). *See id.* at 747 ("No one is alleging that [the defendants] actually sold carfentanil to [the overdose victims]; they are only liable for the distribution to [the overdose victims] as . . . Myers' co-conspirators."). Because the defendants were only liable as co-conspirators, "it ma[de] little sense to say that *Swiney* [wa]s a conspiracy case but this one [wa]s not." *Id.* at 747. We thus held that the district court could not have imposed the sentence enhancement unless the jury found that the defendants were in the chain of distribution. *Id.* at 747; *see also Williams*, 998 F.3d at 734 ("To prove that [the defendant] was liable for the death of others, moreover, the government cannot rely on *Pinkerton* liability, and must show that [the defendant] was in the chain of distribution that caused the victim's death or injury."). But the jury was not instructed on this element. *See Hamm*, 952 F.3d at 747. By failing to give a chain-of-distribution instruction, the district court "misstated the law." *Id.*; *see also United States v. Nelson*, 27 F.3d 199, 200, 202 (6th Cir. 1994) (finding plain error when district court failed to instruct the jury on a critical element under a similar sentencing enhancement provision—18 U.S.C. § 924(c)(1)(A)). The district court here

did not give a chain-of-distribution instruction for either Tempo or Sadler. Because their underlying crimes were different, and the effects of any error differ, they require separate discussions.

a) Kenneth Sadler: § 846 Conspiracy

The district court plainly erred by omitting a chain-of-distribution instruction as part of the jury instructions for Sadler's § 846 conspiracy count. The district court instructed the jury that:

> If you find that the defendant is guilty of the conspiracy charged in Count One, and that the distribution of Heroin or Fentanyl causing the serious bodily injury or death *was in furtherance of the conspiracy and was committed by or reasonably foreseeable to him*, you may find that the Heroin or Fentanyl so distributed caused a serious bodily injury or death if he or she would not have suffered a serious bodily injury or died had he or she not used that substance.

(Jury Instrs., R. 662, Page ID ##3574 (emphasis added)). Sadler did not object to this instruction or request a chain-of-distribution instruction before the district court. We therefore review this instruction for plain error. *See Castano*, 543 F.3d at 833.

The jury found that Sadler conspired to distribute controlled substances, that the substances distributed as part of that conspiracy resulted in death and serious bodily harm, and that those distributions were in furtherance of the conspiracy and reasonably foreseeable to Sadler. But the jury did not receive a chain-of-distribution instruction and, thus, did not decide whether Sadler was "part of the distribution chain" as required under *Hamm* and *Swiney*. *Hamm*, 952 F.3d at 745 (quoting *Swiney*, 203 F.3d at 406). Because the district court sentenced Sadler under the death-or-injury-results provision without the necessary factual findings by the jury, the district court plainly erred. *See Nelson*, 27 F.3d at 200, 202.

This error substantially affected Sadler's rights because, "taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *Castano*, 543 F.3d at 833. An erroneous jury instruction affects a defendant's substantial rights when it "could have led the jury to convict the defendant under a lower standard." *Id.* at 836. Here, the jury found that Sadler was part of the "Polo" conspiracy, but the jury did not consider

whether Sadler was "part of the chain of distribution" of the drugs that killed or injured the victims. Therefore, the district court improperly imposed the 20-year minimum sentence under § 841(b)(1)(C). *See Hamm*, 952 F.3d at 745; *see also United States v. Donovan*, 539 F. App'x 648, 653 (6th Cir. 2013) (vacating defendant's sentence because "[a] defendant may not be sentenced under the statutory penalties for a cocaine conspiracy following a general jury verdict on a conspiracy to distribute both cocaine and marijuana as the jury may have found only a marijuana conspiracy"). The chain-of-distribution instruction could have monumental effects for Sadler. Without the 20-year enhancement, Sadler's sentence would have been five years shorter. He is entitled to have a jury decide whether he was in the chain of distribution. Therefore, we vacate his sentence and remand on this question.

b) Demarco Tempo: Pinkerton *Liability*

Tempo similarly argues that the district court improperly omitted a chain-of-distribution instruction. However, he believes that this instruction was necessary because the jury convicted him of substantive offenses under § 841 solely under a *Pinkerton* conspiracy theory. In its jury instructions, the district court explained that:

> There are multiple ways that the government can prove a defendant guilty [distribution under § 841]. The first is by convincing [the jury] that the defendant personally committed or participated in this crime. The second is by showing that the defendant aided and abetted the commission of the charged offense. The third is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement. This is often called "Pinkerton Liability."

(Jury Instrs., R. 662, Page ID #3580). As to the death-or-injury-results enhancement on the substantive distribution counts, the court instructed that:

> [T]he government need not prove that the serious bodily injury or death was foreseeable to the defendant or defendants. Rather, the government must prove beyond a reasonable doubt that:
>
> (A) The defendant is guilty of the charged Distribution of a Controlled Substance under *at least one of the theories of liability* described above;
>
> (B) That the victim . . . used the Heroin of Fentanyl so distributed . . .;

(C) That he or she suffered a serious bodily injury or died; and
(D) That he or she would not have suffered a serious bodily injury or died but for the use of the Heroin or Fentanyl.

(*Id.* at Page ID ##3588–89 (emphasis added)).

At trial, Tempo objected to the *Pinkerton* instruction, but he did not ask for a chain-of-distribution instruction. Rather, he argued that the *Pinkerton* instruction was erroneous because "no conspiracy ha[d] been established" that involved Tempo. (Trial Tr., R. 727, Page ID #6626). The district court overruled that objection. Because Tempo lodged his objection to *Pinkerton* on different grounds than he now presents, we review the district court's omission of a chain-of-distribution instruction for plain error. *See Castano*, 543 F.3d at 833.

As *Hamm* made clear, the death-or-injury-results enhancement cannot apply if the defendant is convicted on a *Pinkerton* theory unless the jury also finds that the defendant was in the chain of distribution. *Hamm*, 952 F.3d at 745. Here, the district court gave a *Pinkerton* instruction but not a chain-of-distribution instruction on Tempo's substantive charges. Because the district court failed to instruct the jury that, *if it found Tempo liable under a Pinkerton theory*, it must *also* determine whether he was in the chain of distribution, the district court plainly erred.

Although Tempo argues that this error alone necessitates vacation and remand, such a remedy is warranted only if the error "affect[ed] substantial rights," meaning it "affected the outcome of the district court proceedings." *Castano*, 543 F.3d at 833 (quoting *Olano*, 507 U.S. at 734). Unlike Sadler's conspiracy conviction—and unlike the defendants in *Hamm* who could be found liable only on a *Pinkerton* theory—a rational jury could have found, beyond a reasonable doubt, that Tempo was a principal in the crime *and/or* an aider and abettor. *See supra* Part II.A.1.a. In this context, omitting a chain-of-distribution instruction did not substantially affect Tempo's rights because he "is not being held responsible for someone else's actions based on his status as a co-conspirator, but is being punished for his own actions." *Davis*, 970 F.3d at 657 (quoting *United States v. Atkins*, 289 F. App'x 872, 877 (6th Cir. 2008) (refusing to require a *Swiney/Hamm* instruction because the defendant was liable as a principal)). Thus, even though the district court plainly erred by omitting a chain-of-distribution instruction with the *Pinkerton* instruction, that error does not warrant remand. *See Castano*, 543 F.3d at 833.

D. Vagueness

Finally, Tempo argues that the death-or-injury-results enhancement is unconstitutionally vague. In whole, this provision provides that if a defendant violates § 841(a) by distributing schedule I or II controlled substances:

> if death or serious bodily injury results from the use of such substance [then the defendant] shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine . . . , or both.

21 U.S.C. § 841(b)(1)(C). The district court found that this provision was not unconstitutionally vague, and we review that decision *de novo*. *United States v. Hart*, 635 F.3d 850, 856 (6th Cir. 2011) (citing *United States v. Suarez*, 263 F.3d 468, 476 (6th Cir. 2001)). "Vagueness may invalidate a criminal statute if it either (1) fails 'to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits' or (2) authorizes or encourages 'arbitrary and discriminatory enforcement.'" *United States v. Bowker*, 372 F.3d 365, 380 (6th Cir. 2004) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999), *vacated on other grounds*, 543 U.S. 1182 (2005)).

Tempo first argues that § 841(b)(1)(C) is unconstitutionally vague because it "fails to specify" both an *actus reus* and a *mens rea*. (Def. Tempo Br. at 40). However, the *actus reus* is clear: the sentencing enhancement applies to violations of § 841(a), which in turn proscribes possessing or distributing controlled substances. *See* § 841(a)(1). And we have held that the *mens rea* carries over from the underlying offense: the enhancement applies only when a defendant "knowingly and intentionally" violates § 841(a)(1). *Jeffries*, 958 F.3d at 522–23. The only circuit to address this question found that § 841(b)(1)(C) is not vague for lack of a *mens rea*. *United States v. Waldrip*, 859 F.3d 446, 451 (7th Cir. 2017); *see also United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994) (noting, without addressing vagueness, that § 841(b)(1)(C) "puts drug dealers and users on clear notice that their sentences will be enhanced if people die from using the drugs they distribute"). Therefore, the statute is not vague for lack of a *mens rea* or *actus reus* requirement.

Tempo next argues that the "or both" language—indicating that a defendant may face imprisonment, a fine, *or* both—is unconstitutionally vague. On the one hand, the provision instructs that, if the drugs cause death or serious bodily injury, the defendant "*shall* be sentenced to a term of imprisonment of not less than twenty years." § 841(b)(1)(C) (emphasis added). On the other hand, it allows courts to impose imprisonment, a fine, "*or* both." *Id.* (emphasis added). The word "or" would seemingly allow a court to bypass the mandatory minimum and apply only a fine. Tempo argues that this "language is directly contradictory, and this lack of clarity . . . constitutes a notice deficiency, raising serious due process concerns." (Def. Tempo Br. at 41). But the Supreme Court has already addressed this discrepancy:

> Although this language, read literally, suggests that courts may impose a fine *or* a prison term, it is undisputed here that the "death results" provision mandates a prison sentence. Courts of Appeals have concluded, in effect, that the "or" is a scrivener's error. The best evidence of that is the concluding sentence of § 841(b)(1)(C), which states that a court "shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph *which provide for a mandatory term of imprisonment if death or serious bodily injury results*."

Burrage, 571 U.S. at 209 n.2 (internal citations omitted) (citing *United States v. Musser*, 856 F.2d 1484, 1486 (11th Cir. 1988) (per curiam)). Any ambiguity in the "or both" language has thus been sufficiently clarified to put people on notice of the mandatory minimum. *See United States v. Lanier*, 520 U.S. 259, 267 (1997) (stating that the touchstone of notice is whether the statute is clear or whether courts have made clear that the statute prohibits the defendant's conduct). Section 841(b)(1)(C) is not void for vagueness.[12]

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[12]Tempo also argues that the death-or-injury-results enhancement is "facially overbroad," (Def. Tempo Br. at 41), but his argument is essentially a recitation of his vagueness arguments. He argues that "[t]he statute on its face continues to leave our courts guessing as to what Congress intended, so surely it cannot be held to provide fair notice to a person of ordinary intelligence." (*Id.*) However, "for a statute to be found unconstitutional on its face on overbreadth grounds, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court." *Hart*, 635 F.3d at 857 (quoting *Leonardson v. City of E. Lansing*, 896 F.2d 190, 195 (6th Cir. 1990)). Tempo has not identified any protected conduct or otherwise indicated that the law cannot be applied constitutionally. Thus, this argument lacks merit.

III. CONCLUSION

For these reasons, we **AFFIRM** Defendant Tempo's convictions and sentence, **AFFIRM** Defendant Sadler's convictions, but **VACATE** Defendant Sadler's sentence, and **REMAND** for a new trial on the sole question of whether Defendant Sadler was within the chain of distribution as required before imposing an enhanced sentence under 21 U.S.C. § 841(b)(1)(C).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 19-2217/2221/20-1177

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

KENNETH SADLER (19-2217/2221); DEMARCO TEMPO (20-1177),

Defendants - Appellants.

FILED
Jan 21, 2022
DEBORAH S. HUNT, Clerk

Before: DAUGHTREY, COLE, and CLAY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

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

IN CONSIDERATION THEREOF, it is ORDERED that Demarco Tempo's convictions and sentence are AFFIRMED. IT IS FURTHER ORDERED that Kenneth Sadler's conviction is AFFIRMED, but his sentence is VACATED and REMANDED for a new trial on the sole question of whether Kenneth Sadler was within the chain of distribution as required before imposing an enhanced sentence under 21 U.S.C. § 841(b)(1)(C).

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-1177

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 11, 2022
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEMARCO TEMPO,

Defendant-Appellant.

ORDER

BEFORE: DAUGHTREY, COLE, and CLAY, 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