No.

in the

Supreme Court

of the

United States

Term,

HOLLI WOMACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

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APPENDIX

1. COURT OF APPEALS ORDER August 29, 2023
2. SUPREME COURT DECISION October 17, 2022
3. COURT OF APPEALS ORDER April 11, 2022
4. DISTRICT COURT DECISION September 14, 2020

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

File Name: 23a0201p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SYLVIA HOFSTETTER (20-6245); HOLLI WOMACK (20-6426); CYNTHIA CLEMONS (20-6427); COURTNEY NEWMAN (20-6428),

Defendants-Appellants.

Nos. 20-6245/6426/6427/6428

On Remand from the Supreme Court of the United States.

United States District Court for the Eastern District of Tennessee at Knoxville.
No. 3:15-cr-00027—Thomas A. Varlan, District Judge.

Argued: May 3, 2023

Decided and Filed: August 29, 2023

Before: SILER, COLE, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Loretta G. Cravens, CRAVENS LEGAL, Knoxville, Tennessee, for Appellant in 20-6245. Karen Savir, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant in 20-6426. Randall E. Reagan, THE LAW OFFICE OF RANDALL E. REAGAN, Knoxville, Tennessee, for Appellant in 20-6427. Christopher J. Oldham, Knoxville, Tennessee, for Appellant in 20-6428. Brian Samuelson, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. **ON SUPPLEMENTAL BRIEF:** Loretta G. Cravens, CRAVENS LEGAL, Knoxville, Tennessee, for Appellant in 20-6245. Kevin M. Schad, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant in 20-6426. Randall E. Reagan, THE LAW OFFICE OF RANDALL E. REAGAN, Knoxville, Tennessee, for Appellant in 20-6427. Christopher J. Oldham, Knoxville, Tennessee, for Appellant in 20-6428. Brian Samuelson, Tracy L. Stone, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

SILER, J., delivered the opinion of the court in which COLE and NALBANDIAN, JJ., joined. COLE, J. (pp. 9–13), delivered a separate concurring opinion.

OPINION

SILER, Circuit Judge. This matter comes before us on remand from the Supreme Court of the United States. All four Defendants were found guilty of maintaining a drug-involved premises. Sylvia Hofstetter was also found guilty of conspiring to distribute controlled substances, distributing controlled substances, and money laundering.

After we affirmed the convictions, the Supreme Court decided *Ruan v. United States*, 142 S. Ct. 2370, 2375 (2022), clarifying the applicable mens rea for an unlawful distribution charge, and remanded the case. Defendants now argue that the district court erred regarding the jury instructions for the maintaining-a-drug-involved-premises charge, and Hofstetter further argues the district court erred as to the instructions for her distribution-of-a-controlled-substance and conspiracy-to-distribute-and-dispense-controlled-substances charges.

Defendants' arguments are unavailing. The district court's instructions were not plainly erroneous regarding the maintaining-a-drug-involved-premises and conspiracy-to-distribute-and-dispense-controlled-substances charges. Moreover, Hofstetter's argument regarding the instruction for the distribution-of-a-controlled-substance charge is foreclosed by *United States v. Anderson*, 67 F.4th 755 (6th Cir. 2023) (per curiam). We affirm.

I. BACKGROUND

This case comes on remand from the Supreme Court pursuant to its holding in *Ruan*, 142 S. Ct. 2370. The facts and procedural history are known to the parties so we only include the background relevant to the remaining questions before us.

From 2009 to 2015, Hofstetter managed pain clinics in Florida and Tennessee. Hofstetter also co-owned and managed an additional clinic in Tennessee. Cynthia Clemons, Courtney Newman, and Holli Womack were employed as nurse practitioners at these clinics. After suspecting the clinics of illegally prescribing opioids, the government indicted all four Defendants on multiple charges. After a four-month trial, the Defendants were found guilty of

maintaining a drug-involved premises. Hofstetter was also found guilty of conspiring to distribute controlled substances, distributing controlled substances, and money laundering.

Hofstetter was sentenced to 400 months in prison, Clemons to 42 months, Newman to 40 months, and Womack to 30 months. We affirmed their convictions and sentences on appeal. *United States v. Hofstetter*, 31 F.4th 396, 410 (6th Cir. 2022).

After our decision, the Supreme Court ruled on the mens rea required to convict a defendant for distributing controlled substances under 21 U.S.C. § 841. *Ruan*, 142 S. Ct. at 2375. The Court then vacated and remanded our decision in *Hofstetter* "for further consideration in light of" the *Ruan* decision. Thus, the only issues now before us concern whether the jury instructions were proper.

II. ANALYSIS

The district court's instructions were not plainly erroneous regarding the maintaining-a-drug-involved-premises and conspiracy-to-distribute-and-dispense-controlled-substances charges. Moreover, Hofstetter's argument regarding the distribution-of-a-controlled-substance instruction is foreclosed under our precedent in *Anderson*, 67 F.4th 755.

A. Ruan

In *Ruan*, the Supreme Court considered the Controlled Substances Act, which makes it unlawful, "[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance[.]" 21 U.S.C. § 841(a)(1). Federal regulations further explain that a prescription is "authorized" only when a practitioner issues the prescription "for a legitimate medical purpose . . . acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). The defendants in *Ruan* argued that the jury instructions were improper because the jury was not required to find that the defendants had knowledge of the illegal acts, i.e., had knowledge that the prescriptions were not authorized. 142 S. Ct. at 2375–76.

The Court held that "§ 841's 'knowingly or intentionally' mens rea applies to the 'except as authorized' clause." *Id.* at 2376 (emphasis omitted). "This means that once a defendant meets

the burden of producing evidence that his or her conduct was 'authorized,' the [g]overnment must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* As a result of this holding, it is insufficient for the government to prove that a prescription was "*in fact*" not authorized. *Id.* at 2375. Instead, the government must prove the defendant subjectively knew or intended that the prescription was unauthorized. *Id.*

B. The Drug-Involved Premises Instruction

Each Defendant was convicted of maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1). The district court instructed the jury as follows:

> Count 13 of the superseding indictment charges that from in or about September 2013 through on or about March 10, 2015 . . . Hofstetter, Newman, Clemons, and Womack, aided and abetted by one another and others, did knowingly and intentionally open, use, and maintain a business . . . for the purpose of illegally distributing Schedule II controlled substances[.]
>
> In order to prove a defendant guilty of opening, using, or maintaining a drug-involved premises, the government must prove each of the following elements beyond a reasonable doubt . . . :
>
> First, that the defendant knowingly opened, used, or maintained a place, whether permanently or temporarily;
>
> And second, that the defendant did so for the purpose of distributing any controlled substance.

The district court also stated that "whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint."

The parties agree that the holding in *Ruan* applies to convictions under § 856(a)(1). Thus, under *Ruan*, the district court must have instructed the jury that knowledge of illegal distribution is an element of offenses under § 856(a). Defendants argue that the instructions given by the district court were erroneous because "the jury was instructed on an objective, not subjective state of mind as to this offense."

Because none of the Defendants objected during trial to the proposed jury instructions relevant to the § 856 charges, we review for plain error. *United States v. Stewart*,

729 F.3d 517, 530 (6th Cir. 2013). "To prevail on plain-error review, [a] defendant must show: (1) error, (2) that is clear and obvious, and (3) that affects [her] substantial legal rights." *Id.* at 528–29. Regarding jury instructions, "plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *Id.* at 530 (quoting *United States v. Morrison*, 594 F.3d 543, 546 (6th Cir. 2010)).

The jury instructions for the charges under § 856(a)(1) were not plainly erroneous. The district court's drug-involved premises instruction did not spell out the "knowingly" mens rea standard required under *Ruan*, 142 S. Ct. at 2375, for the second element. But plain error review requires the court to review jury instructions "as a whole," within context. *Dimora v. United States*, 973 F.3d 496, 502 (6th Cir. 2020) (per curiam); *Stewart*, 729 F.3d at 530. Taken as a whole, the jury instructions made clear that the jury had to find that Defendants knowingly opened the clinics for the purpose of illegally distributing Schedule II controlled substances.

Before giving the instructions regarding the two elements required for the jury to convict under § 856(a)(1), the district court provided an overview of the charge. "Count 13 of the superseding indictment charges that . . . Hofstetter, Newman, Clemons, and Womack, aided and abetted by one another and others, did *knowingly and intentionally*, open, use, and maintain a business . . . *for the purpose of illegally distributing* Schedule II controlled substances[.]" In addition, the district court summarized Count 13 of the indictment for the jury as "charg[ing] defendants with maintaining drug-involved premises, that is, knowingly and intentionally opening, using, and maintaining businesses for the purpose of illegally distributing controlled substances outside the usual course of professional practice and not for a legitimate medical purpose[.]" In context, the instructions make clear that to find Defendants guilty, the jury was tasked with making a subjective inquiry into whether the Defendants purposefully, with knowledge or intent, illegally distributed controlled substances.

Defendants argue that this instruction did not cure the district court's earlier comment that "whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint." This argument is unavailing. Whether a prescription was unauthorized is an objective question because "the regulation defining the scope of a doctor's prescribing authority does so by reference to objective

criteria[.]" *Ruan*, 142 S. Ct. at 2382. In contrast, as *Ruan* makes clear, the subjective question is whether Defendants knowingly or with intent issued unauthorized prescriptions. The jury instructions, taken as a whole, properly communicate this difference under the lowered plain error standard.

C. Hofstetter's Distributing-a-Controlled-Substance Instruction

Hofstetter argues that the district court erred in its jury instruction related to her deliberate ignorance with respect to the charge for distributing and dispensing controlled substances in violation of 21 U.S.C. § 841(a)(1). Hofstetter's argument is foreclosed by our precedent. Between the time *Ruan* was decided and oral argument in this case, our court decided *Anderson*, 67 F.4th 755. It explained that a deliberate ignorance instruction "substantially cover[s] the concept of knowledge through the description of deliberate ignorance and the juxtaposition of 'knowledge' with '[c]arelessness, negligence, or foolishness.'" *Id.* at 766 (citation omitted).

Moreover, the court held that a "deliberate ignorance" instruction "specifically covers the holding of *Ruan*, by referring continuously to the 'knowledge of the defendant,' his 'deliberate ignorance,' and if he 'knew' that the prescriptions were dispensed illegitimately." *Id.* (citation omitted).

Here, the district court instructed the jury that they had to find two elements to convict under § 841(a)(1):

> First, that the defendant knowingly or intentionally distributed or caused to be distributed a controlled substance by writing prescriptions outside the scope of professional medical practice and not for a legitimate medical purpose;
>
> And second, that the defendant knew at the time of distribution that the substance was a controlled substance.

Regarding the knowledge element, the district court instructed that Hofstetter could be found guilty if the jury believed she was deliberately ignorant of the illegal distribution of controlled substances:

> Although knowledge of the defendant cannot be established merely by demonstrating that she was careless, knowledge may be inferred if the defendant deliberately blinded herself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious.
>
> If you are convinced that a defendant deliberately ignored a high probability that the controlled substances, as alleged in these counts, were distributed outside the usual course of professional practice and not for a legitimate medical purpose, then you may find that the defendant knew that this was the case.
>
> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed outside the usual course of professional practice and not for a legitimate medical purpose, and that the defendant deliberately closed her eyes to what was obvious.
>
> Carelessness or negligence or foolishness on her part are not the same as knowledge, and are not enough to find her guilty of any offense charged under this law.

The above jury instruction is almost verbatim the instruction this court approved in *Anderson*. *See* 67 F.4th at 766. Because of this, we are obliged to affirm. *See Salmi v. Sec'y of Health & Hum. Servs.*, 774 F.2d 685, 689 (6th Cir.1985) ("A panel of this Court cannot overrule the decision of another panel."); *see also* 6 Cir. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc.").

D. Hofstetter's Conspiracy-to-Distribute Instruction

Hofstetter last argues that the district court erred, under *Ruan,* in its jury instructions regarding her conviction for conspiracy to distribute and dispense controlled substances in violation of 21 U.S.C. § 846. This was not objected to at trial nor raised in her initial brief on appeal, so we review for plain error. *Stewart*, 729 F.3d at 530.

The district court's instructions were not plainly erroneous. The district court instructed the jury they had to find that she "combine[d], conspire[d], confederate[d], and agree[d] . . . to *knowingly, intentionally, and without authority* distribute, or cause to be distributed, outside the usual course of professional practice and not for a legitimate medical purpose," a controlled substance. The district court properly instructed the jury. *See United States v. Ruan*, 56 F.4th 1291, 1299 (11th Cir. 2023) (per curiam) (holding that the district court did not err regarding the

§ 846 charge "because the conspiracy instructions already required [the jury] to find that the defendant acted with subjective knowledge").

AFFIRMED.

CONCURRENCE

COLE, Circuit Judge, concurring. I agree with the majority that we are bound by our court's recent decision in *United States v. Anderson*, 67 F.4th 755 (6th Cir. 2023) (per curiam), and therefore join the opinion in full. But I write separately to highlight how *Anderson* conflicts with the Supreme Court's opinion in *Ruan v. United States*, 142 S. Ct. 2370 (2022).

In *Anderson*, this court held that jury instructions nearly identical to those given on Hofstetter's 21 U.S.C. § 841 charge were proper under *Ruan*. Judge White penned a forceful dissent, explaining why the instruction does not meet the Court's mens rea standard for unauthorized prescription distribution. *Anderson*, 67 F.4th at 771–72 (White, J., concurring in part and dissenting in part). As I agree with her dissent, I will not spend much space reiterating her arguments. But the specifics of the instant case cast further doubt on *Anderson*'s holding.

In the case at hand, this panel ordered supplemental briefing on the issue of *Ruan*'s impact on the jury instructions—briefing that was filed prior to *Anderson*'s publication—in which the government conceded that "the § 841 instructions here likely fell short of conveying the requisite mens rea." (Appellee Suppl. Br. 6.)

Here, as in *Anderson*, the district court instructed the jury that it had to find two elements to convict Hofstetter under § 841(a)(1):

> First, that the defendant knowingly or intentionally distributed or caused to be distributed a controlled substance by writing prescriptions outside the scope of professional medical practice and not for a legitimate medical purpose;
>
> And second, that the defendant knew at the time of distribution that the substance was a controlled substance.

(Trial Tr., R. 897, PageID 61805.)

The issues with the instruction begin on its face. Grammatically, the "knowingly or intentionally" mens rea in the first paragraph of the instruction applied directly to the "distributed or caused to be distributed" clause. But it is unclear whether the mens rea phrase also applied to

all of the following clauses—the "controlled substance" and "writing prescriptions outside the scope of professional medical practice" clauses—so it is not clear that the district court properly instructed the jury that the knowledge requirement applied through to the "outside the scope of professional medical practice" clause.

But if the mens rea clause should be read as extending to the entirety of the first instructional paragraph, then the second paragraph would be redundant: The first statement would then necessarily indicate that the defendant had to know the substance distributed was a controlled substance, a clause that comes before the "outside the scope of" clause. In this respect, the instruction as written only definitively required a knowledge or intent mens rea as to the "distributed or caused to be distributed" clause and not the subsequent clauses in the first instruction, including the authorization clause. In other words, although the instructions pinpointed key elements of a § 841 offense, they did not make clear that, to be found guilty, Hofstetter had to know that the prescriptions were unauthorized. Yet under *Ruan*, the jury must explicitly be told that knowledge of the prescription's illegality is an element of the offense. *Ruan*, 142 S. Ct. at 2375–76. The uncertainty in the given instructions does not fulfill the Court's edict.

Understanding this, the government therefore argued that while the district court likely abused its discretion by providing erroneous instructions, any such instruction was harmless error.

The record supports the government's concession that the instructions were, in fact, erroneous. Unlike the instructions for the maintaining-a-drug-involved-premises charge, the instructions for the distribution charge did not clarify the requisite mens rea. Elsewhere, the district court instructed the jury that a defendant violates § 841(a)(1) when they "distribute[] a controlled substance without a legitimate medical purpose and while acting outside the usual course of professional practice." (Trial Tr., R. 897, PageID 61804.) Nowhere does the instruction associate the requisite knowledge mens rea with the lack of authorization or distribution outside of a legitimate medical purpose, nor did the district court clarify that it had to be illegal distribution. In fact, the district court attached *no* mens rea to the authorization element.

A review of the jury verdict sheet bolsters the conclusion that the § 841 charge does not comply with the Court's holding in *Ruan*. For the maintaining-a-drug-involved-premises charge, the jury was instructed that to return a guilty verdict, they had to find that the defendants "did knowingly and intentionally open, use, and maintain a business . . . *for the purpose of illegally distributing* Schedule II controlled substances[.]" (Jury Verdict, R. 860, PageID 60529 (emphasis added).) Meanwhile, for the distribution charge, the jury was instructed that they needed to find that Hofstetter "did knowingly and intentionally distribute or cause to be distributed, outside the usual course of professional practice and not for a legitimate medical purpose," a controlled substance. (*Id.* at PageID 60531.)

For the foregoing reasons, then, the district court did not instruct the jury that to find Hofstetter guilty of distributing a controlled substance in violation of § 841(a)(1), the government had to prove beyond a reasonable doubt that Hofstetter subjectively knew the distribution occurred outside a legitimate medical purpose, i.e., illegally.

A closer look at *Anderson* reveals the same flaw. The two elements provided to the jury in this case, distribution and outside the scope of professional conduct, are substantially similar to those provided to the jury in *Anderson*. 67 F.4th at 766. In both cases, as the government conceded here and as Judge White notes in her *Anderson* partial dissent, "[u]nlike the instruction on the first element, the second element's instruction identified no *mens rea* requirement. The Supreme Court's *Ruan* opinion, however, teaches that the second element too must be performed knowingly or intentionally. Without such clarification, this charge by itself does not satisfy *Ruan*." *Id.* at 772 (White, J., concurring in part and dissenting in part) (citation omitted).

Anderson instead holds that the deliberate indifference instruction ensures the charge's correctness under the abuse-of-discretion standard. The explanation is that the instructions "substantially cover the concept of knowledge through the description of deliberate ignorance and the juxtaposition of knowledge with carelessness, negligence, or foolishness." *Id.* at 766 (cleaned up).

But that is not what the deliberate indifference instruction accomplishes nor what *Ruan* dictates. This instruction tells the jury that it may "infer[]" knowledge if it finds that a defendant

"deliberately ignor[ed] the obvious," and so the defendant "was aware of a high probability that the controlled substances were distributed" outside authorized practice. (Trial Tr., R. 897, PageID 61806–07.) Importantly, though, the second element of the offense, knowledge of unauthorized distribution, "does not depend on perceiving or ignoring probabilities. [The defendant] either understood and intended to prescribe[] controlled substances without a legitimate medical purpose in the usual course of professional practice, or he did not." *Anderson*, 67 F.4th at 772 (White, J., concurring in part and dissenting in part). In this way, a deliberate indifference instruction does not inform the jury that both elements of the § 841 offense—distribution and outside the course of professional conduct—must be done with knowledge or intent. *Id.* Per *Ruan*, "the [g]overnment must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Ruan*, 142 S. Ct. at 2376. As the deliberate indifference instruction does not hold the government to that burden, it is inadequate, on its own, under *Ruan*.

And beyond that, *Anderson* does not cite any caselaw, within or outside of our circuit, providing that a deliberate indifference instruction makes up for or imposes a missing knowledge requirement. Instead, it cites a case concerning a good-faith instruction in a tax evasion case where instructions stating that the jury had to find that the defendant acted willfully, meaning "voluntarily and deliberately, and intending to violate a known legal duty," covered the defendant's requested but omitted good-faith instruction. *United States v. Damra*, 621 F.3d 474, 502 (6th Cir. 2010). This principle does not resolve the issue with Hofstetter's jury instructions for two reasons: A good-faith instruction is not identical to a deliberate indifference instruction, nor did we hold in *Damra* that a good-faith instruction cures otherwise defective instructions because the main elements in *Damra* were not defective.

In § 841(a) prosecutions, what commonly separates lawful acts from unlawful ones is whether or not the distribution was authorized: "In § 841 prosecutions, then, it is the fact that the doctor issued an *unauthorized* prescription that renders his or her conduct wrongful, not the fact of the dispensation itself. In other words, authorization plays a 'crucial' role in separating innocent conduct . . . from wrongful conduct." *Ruan*, 142 S. Ct. at 2377 (citation omitted). Here, the jury was never instructed that Hofstetter had to have the knowledge or intent to

illegally distribute controlled substances in an unauthorized manner, and a deliberate indifference instruction cannot cure that initial error.

The government, prior to *Anderson*'s publication, agreed that the deliberate indifference instruction did not remedy the error in the jury instruction, and I agree. But bound as we are by *Anderson*, I concur in the judgment's affirmance.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 17, 2022

Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 East Fifth Street
Cincinnati, OH 45202-3988

Re: Holli Womack
v. United States
No. 22-5076
(Your No. 20-6426)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Xiulu Ruan* v. *United States*, 597 U. S. ___ (2022).

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.

Sincerely,

Scott S. Harris

Scott S. Harris, Clerk

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

File Name: 22a0071p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SYLVIA HOFSTETTER (20-6245); HOLLI WOMACK (20-6426); CYNTHIA CLEMONS (20-6427); COURTNEY NEWMAN (20-6428),

Defendants-Appellants.

Nos. 20-6245/6426/6427/6428

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.
No. 3:15-cr-00027—Thomas A. Varlan, District Judge.

Argued: January 18, 2022

Decided and Filed: April 11, 2022

Before: SILER, COLE, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Loretta G. Cravens, CRAVENS LEGAL, Knoxville, Tennessee, for Appellant in 20-6245. Kevin M. Schad, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant in 20-6426. Randall E. Reagan, THE LAW OFFICE OF RANDALL E. REAGAN, Knoxville, Tennessee, for Appellant in 20-6427. Christopher J. Oldham, Knoxville, Tennessee, for Appellant in 20-6428. Brian Samuelson, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. **ON BRIEF:** Loretta G. Cravens, CRAVENS LEGAL, Knoxville, Tennessee, for Appellant in 20-6245. Kevin M. Schad, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Cincinnati, Ohio, for Appellant in 20-6426. Randall E. Reagan, THE LAW OFFICE OF RANDALL E. REAGAN, Knoxville, Tennessee, for Appellant in 20-6427. Christopher J. Oldham, Knoxville, Tennessee, for Appellant in 20-6428. Brian Samuelson, Tracy L. Stone, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

OPINION

COLE, Circuit Judge. Between 2009 and 2015, Sylvia Hofstetter managed three "pain-management clinics" in Florida and Tennessee on behalf of three clinic partners. Hofstetter also co-owned and managed an additional clinic in Tennessee from 2012 to 2015 without those partners. Cynthia Clemons, Courtney Newman, and Holli Womack were employed as nurse practitioners at these clinics in 2013 and 2014. The clinics displayed numerous indicators of illegal opioid prescription practices, so the government investigated all four women and eventually them on multiple charges. A four-month trial ensued, and the jury convicted each defendant of maintaining at least one drug-involved premises. Hofstetter was also found guilty of conspiring to distribute controlled substances, distributing controlled substances, and money laundering.

On appeal, the defendants challenge their maintaining-a-drug-involved-premises conviction, arguing that: (1) the underlying statute is unconstitutionally vague as applied to them; (2) the district court erred when instructing the jury; (3) insufficient evidence supported the jury's verdict; and (4) the jury's verdict was inconsistent. Hofstetter separately raises additional issues specific to her convictions, including that: (1) the district court abused its discretion when it denied three evidentiary challenges; (2) the district court erred when instructing the jury about her distribution-of-a-controlled-substance charge; and (3) she did not receive a fundamentally fair trial due to spoliation, *Brady* obligations, and the government's improper remarks during closing arguments. Finding no error, we affirm on all issues.

I. BACKGROUND

Beginning in 2008 or 2009, three partners ran a medical clinic in Hollywood, Florida. The Florida partners hired Sylvia Hofstetter to work at the clinic's front desk, and she soon became the office manager. One of the partners admitted that, over time, pain management dominated the clinic's business, so much so that the other practice areas dwindled, and the clinic eventually became a "pill mill." During this period, the Florida partners suspected Hofstetter of

embezzling funds from the clinic, and they fired her. A few months later, following a year-long investigation, the Drug Enforcement Administration ("DEA") raided the Hollywood clinic and seized approximately 1,900 patient files. The U.S. Attorney's Office for the Southern District of Florida declined to prosecute the case due to its already high workload.

A few months before the raid, the Florida partners decided to open another pain clinic in Knoxville, Tennessee on Gallaher View Road. The partners asked a new employee, Christopher Tipton, to help them expand. They also re-hired Hofstetter and put her in charge of day-to-day operations at the Gallaher View clinic, despite her suspected history of embezzlement. The next year, in 2011, the Florida partners opened a third clinic in Lenoir City, Tennessee, and Hofstetter ran this clinic too. One of the Florida partners testified that the partners did not intend Gallaher View or Lenoir City to be legitimate clinics, and that Hofstetter was involved in discussions about their intent "to open pill mills in Tennessee." (Trial. Tr., R. 936, PageID 74947–48.)

In 2012, after receiving many complaints from neighboring businesses and pressure from their landlord, the Florida partners closed the Gallaher View clinic and transferred its patients to the Lenoir City clinic. When the Gallaher View clinic closed, Hofstetter approached Tipton about opening their own clinic together but without the Florida partners. Tipton agreed, and he and Hofstetter opened a "secret clinic" on Lovell Road.[1] (Trial Tr., R. 918, PageID 64999.) To identify new patients for the Lovell Road clinic, Hofstetter instructed her staff to call patients who had been discharged from other pain clinics for exhibiting signs of drug abuse. The FBI began investigating all the Tennessee clinics in 2013 or 2014 and eventually shut down both the Lenoir City clinic and the Lovell Road clinic on March 10, 2015.

Cynthia Clemons, Courtney Newman, and Holli Womack were nurse practitioners at the Lenoir City and Lovell Road clinics in 2013 and 2014. During their tenures at the clinics, Clemons, Newman, and Womack each wrote hundreds of prescriptions, only three percent of which were for non-opioids and non-benzodiazepines.

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[1]This clinic was initially located on Gallaher View Road. Hofstetter and Tipton moved it to Lovell Road in 2013, but the procedures, staff, and patients were the same at both locations. We refer to this clinic as the "Lovell Road clinic" to avoid confusion with the first clinic on Gallaher View Road.

The government filed the first indictment in this case on March 4, 2015. Over the next three years, the government filed a series of superseding indictments and eventually filed the fourth and final superseding indictment on May 1, 2018. The final 21-count indictment charged all four defendants-appellants[2]—Hofstetter, Clemons, Newman, and Womack—with maintaining a drug-involved premises and conspiring to distribute and dispense controlled substances. Additionally, Clemons, Hofstetter, and Newman were charged with illegally distributing and dispensing controlled substances. Hofstetter was also charged with a RICO conspiracy, two counts of conspiring to launder money, and five counts of money laundering.

On October 21, 2019, the four defendants proceeded to a four-month jury trial. At trial, the government's witnesses included one of the Florida partners, Tipton, and the clinics' former medical directors, employees, patients, and neighbors. Collectively, they testified that the owners and medical directors knew the clinics were not legitimate pain management clinics, as did some staff and patients. They also testified that Hofstetter prioritized profit over patient care by soliciting and accepting patients who had been discharged from other clinics for addiction-related behaviors; restricting the length of appointments to maximize fee collection; and instructing non-qualified staff to see patients and fill out patient charts.

The government's expert witnesses, including nurse practitioners, anesthesiologists, and pain-management physicians, also testified that Clemons, Newman, and Womack failed to maintain adequate patient charts, and that they prescribed opioids at extremely high doses after incomplete medical examinations and diagnoses that fell below the standard of care. Witness testimony also portrayed the clinics as displaying numerous "red flags" indicative of criminal activity. *See infra* parts II.C.i and II.D.

After the government closed its case-in-chief, the defendants each moved for judgments of acquittal. The district court initially reserved ruling on these motions but later denied them, finding that "the government ha[d] presented sufficient evidence for a rational jury to return a verdict of guilty [on] all counts." (Trial Tr., R. 885, PageID 60982–90.)

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[2]The government indicted 130 defendants in this case, including the Florida partners, Tipton, and other clinic staff. Except for Hofstetter, Clemons, Newman, and Womack, all other defendants pleaded guilty for their roles in operating or benefitting from the clinics.

The jury issued its verdict on February 13, 2020. It found all four defendants guilty of maintaining a drug-involved premises at Lovell Road, and it convicted Hofstetter and Clemons of maintaining a drug-involved premises at Lenoir City. The jury also acquitted Clemons, Newman, and Womack of multiple charges, including drug conspiracy charges and distribution-of-controlled-substances charges.

Hofstetter was separately found guilty of maintaining a drug-involved premises at Gallaher View, a RICO conspiracy charge, two drug conspiracy charges, two money laundering conspiracy charges, two counts of money laundering, and one count of illegally distributing and dispensing controlled substances. She was acquitted of two distribution charges.

The defendants renewed their motions for acquittal following the verdict, and they also requested a new trial. The district court denied these motions without a hearing on September 14, 2020.

Hofstetter was sentenced to 400 months in prison, Clemons to 42 months, Newman to 40 months, and Womack to 30 months. The defendants timely appealed their judgments of conviction and sentences. This Court has appellate jurisdiction under 28 U.S.C § 1291.

II. ANALYSIS

A. The Constitutionality of 21 U.S.C. § 856(a)(1)

Clemons, Newman, and Womack superficially challenged the constitutionality of 21 U.S.C. § 856(a)—the maintaining-a-drug-involved-premises statute—in their motions for acquittal, asserting summarily that the statute is void for vagueness. Hofstetter did not raise this challenge at all before the district court. The district court ruled that the defendants had waived the argument but nevertheless analyzed its merits when the court denied the motions. The district court's merits analysis preserves this argument for appeal. *See United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011). We therefore review de novo the question of whether § 856(a) is unconstitutionally vague. *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)).

A criminal statute is vague if it either "fails to provide the kind of notice that [] enable[s] ordinary people to understand what conduct it prohibits" or "encourages arbitrary and discriminatory enforcement." *United States v. Bowker*, 372 F.3d 365, 380 (6th Cir. 2004) (internal quotation omitted) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)), *vacated on other grounds*, 543 U.S. 1182 (2005). "Few statutes meet the void-for-vagueness threshold: a 'strong presumptive validity' applies to all acts of Congress and mere 'difficulty' in determining a statute's meaning does not render it unconstitutional." *United States v. Kettles*, 970 F.3d 637, 650 (6th Cir. 2020) (quoting *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963)). Hypothetical vagueness is not enough to warrant a new trial—the statute must be unconstitutionally vague as applied to this particular case. *Id.*; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) ("We consider whether a statute is vague as applied to the particular facts at issue[.]"). Accordingly, to prevail, the defendants must show that § 856(a)(1) failed to provide sufficient warning that their conduct would violate the law. *See Kettles*, 970 F.3d at 650.

We have not yet decided whether § 856(a)(1) is unconstitutionally vague in a published opinion. *Cf. United States v. Rosa*, 50 F. App'x 226, 227 (6th Cir. 2002) (holding that § 856(a)(2) was not unconstitutionally vague as applied to the defendant because it furnished fair notice). Defendants ask us to find that § 856(a)(1) is unconstitutionally vague for three reasons. First, they contend that the phrase "for the purpose of . . . distributing . . . controlled substances" renders § 856(a)(1) unconstitutional because, read literally, any staff member at a pharmacy or physicians' office would violate the statute. At heart, this argument relates to the notice and breadth of the statute with respect to others (not to the defendants themselves), so we need not address it. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 495 (1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."). Second, the defendants suggest that they were convicted of *lawful* distribution under the plain language of the statute, thereby demonstrating that § 856(a) is impermissibly vague. And third, the defendants claim that the statute did not provide them with fair notice about the illegality of their conduct. Because the defendants contend that the statute is ambiguous, they ask us to apply the rule of lenity.

The government takes the opposite view. It cites to cases that examine the applicability of § 856(a)(1) to drug possession or distribution from private homes and urges us to adopt here a similar interpretation of the law. *See United States v. Shetler*, 665 F.3d 1150, 1164–65 (9th Cir. 2011); *United States v. Lancaster*, 968 F.2d 1250, 1253–54 (D.C. Cir. 1992); *United States v. Clavis*, 956 F.2d 1079, 1094 (11th Cir. 1992). In this peripheral context, the cases hold that the phrase "for the purpose of" gives fair notice to a defendant accused of distributing controlled substances out of their personal residence because it excludes one-off drug sales or incidental consumption at home. *Lancaster*, 968 F.2d at 1253–54; *Clavis*, 956 F.2d at 1094. These cases, however, do not concern pain management clinics, so those arguments do not aid our consideration of the question the defendants raise here.

We conclude that § 856(a)(1) is not unconstitutionally vague as applied to the defendants because their conduct put them on notice that they violated the statute, regardless of any potential vagueness when applied to differently situated medical practitioners. There is no as-applied vagueness when a statute furnishes fair notice that a defendant's conduct, if proven at trial, is proscribed. *See United States v. Farah*, 766 F.3d 599, 614 (6th Cir. 2014) (rejecting a void for vagueness claim when the defendant's conduct "surely [fell] within the ambit of [the statute]"). Here, the jury concluded that the defendants knowingly used the clinic to distribute controlled substances illegally, and there was sufficient evidence to support that conclusion. *See infra* part II.C.i. Section 856(a)(1) prohibits such conduct, so the defendants had notice that their illegal prescription practices fell within the statute's purview.

Moreover, contrary to the defendants' assertion that they could have been convicted under § 856(a)(1) for *lawful* opioid distribution, the procedural history of this case shows that this did not occur here. The government indicted the defendants for "knowingly and intentionally open[ing], us[ing], and maintain[ing] a business . . . for the purpose of illegally distributing and dispensing Schedule II controlled substances outside the scope of professional practice and not for a legitimate medical purpose[.]" (Fourth Superseding Indictment, R. 320, PageID 5235.) The district court instructed the jury to find the defendants guilty only if the government proved that the drug distribution occurred "for the purpose of illegally distributing Schedule II controlled substances[.]" (Trial Tr., R. 897, PageID 61800.) The government

submitted sufficient evidence for the jury to conclude that the defendants maintained or used the clinics for the purpose of distributing controlled substances illegally. *See infra* part II.C.i. And the jury's verdict form indicated that the defendants were found guilty for using or maintaining the clinic "for the purpose of illegally distributing Schedule II controlled substances[.]" (Jury Verdict, R. 860, PageID 60530.) Whether section 856(a) may be read to convict a defendant for *lawful* opioid prescriptions has no bearing on this case. Thus, to the extent the defendants argue that the statute led to arbitrary enforcement, their argument lacks merit. We therefore decline to order a new trial on this basis.

B. The Jury Instructions

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)). If a district court refuses to issue an instruction as requested by a defendant, however, the given instruction "must amount to abuse of discretion in order for us to vacate a judgment." *Id.* And if a defendant did not request a specific instruction from the district court, we review the instruction for plain error. *United States v. Semrau*, 693 F.3d 510, 527 (6th Cir. 2012).

i. The Drug-Involved Premises Instruction

All four defendants were charged with maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1). At the close of evidence, the district court instructed the jury as follows:

> Count 13 of the superseding indictment charges that from in or about September 2013 through on or about March 10, 2015 . . . Hofstetter, Newman, Clemons, and Womack, aided and abetted by one another and others, did knowingly and intentionally, open, use, and maintain a business . . . for the purpose of illegally distributing Schedule II controlled substances . . . .
>
> In order to prove a defendant guilty of opening, using, or maintaining a drug-involved premises, the government must prove each of the following elements beyond a reasonable doubt . . . :
>
> First, that the defendants knowingly opened, used, or maintained a place, whether permanently or temporarily;

> And second, that the defendant did so for the purpose of distributing any controlled substance.

(Trial Tr., R. 897, PageID 61800.) The defendants now argue that the district court's § 856(a)(1) instructions were erroneous because the "jury should have been instructed that the distribution of the controlled substances from the clinics had to have been done without a legitimate medical purpose and outside the usual course of professional practice." (Clemons Br. 41; *see also* Hofstetter Br. 44; Newman Br. 24; Womack Br. 23–24.) In other words, because the district court did not include *illegal* distribution as a third element of the § 856(a)(1) offense, the defendants say the instructions violated their due process rights. *See Patterson v. New York*, 432 U.S. 197, 210 (1977) ("[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged."). The defendants also submit that the § 856(a)(1) instructions were confusing, misleading, and prejudicial.

Before the district court issued the above instructions, it provided the defendants with advance copies of its proposed language and convened three charging conferences to review the draft instructions. None of the defendants objected to the § 856(a)(1) instructions at that time. We therefore review the instructions "as a whole, for plain error." *United States v. Stewart*, 729 F.3d 517, 530 (6th Cir. 2013). "To prevail on plain-error review, [a] defendant must show: (1) error, (2) that is clear and obvious, and (3) that affects [her] substantial legal rights." *Id.* at 528–29. "In the context of challenges to jury instructions, plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *Id.* at 530 (quoting *United States v. Morrison*, 594 F.3d 543, 546 (6th Cir. 2010)). "[A]n improper jury instruction will rarely justify reversal of a criminal conviction when no objection [was] made at trial," and "an omitted or incomplete instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law." *Id.* (quoting *United States v. Rayborn*, 491 F.3d 513, 521 (6th Cir. 2007)).

This Court has already concluded that the § 856(a)(1) instructions in this case were not clearly erroneous, in two nearly identical orders that responded to motions for release pending appeal by Clemons and Newman. *United States v. Clemons*, No. 20-6427, Dkt. 23-2, slip op. 3

(6th Cir. Feb. 25, 2021); *United States v. Newman*, No. 20-6428, Dkt. 18-2, slip op. 3 (6th Cir. Feb. 18, 2021). The previous panel provided three main reasons for doing so.

First, "the instruction was an accurate statement of the law" because it set forth the elements of a § 856(a)(1) violation "exactly as listed in the United States Code." *Clemons*, slip op. 3; *Newman*, slip op. 3. In general, "a proposed jury instruction must be a correct statement of [the] law," so we do not find fault on the part of the district court when it issues instructions that "more closely mirrored the statute" than the defendant's proposed language does. *Pritchard*, 964 F.3d at 523 (internal quotation omitted). We therefore agree that we "cannot conclude the district court abused its discretion," much less plainly erred, in providing "language more faithful to the statute" over the defendants' alternative language.[3] *Id.*

Second, "this [c]ourt has consistently listed the elements of a 21 U.S.C. § 856(a) conviction without including illegal distribution," even in pill mill cases. *Clemons*, slip op. 3; *Newman*, slip op. 3; *see also United States v. Sadler*, 750 F.3d 585, 592 (6th Cir. 2014) ("To support [a § 856(a)(1)] charge, the government had to show that the [defendants] knowingly maintained their [pain] clinics for the purpose of distributing a controlled substance."); *United States v. Lang*, 717 F. App'x 523, 545 (6th Cir. 2017) ("To convict a defendant on [a § 856(a)(1)] charge[], the government must prove beyond a reasonable doubt that the defendant (1) knowingly (2) maintained any place, whether permanently or temporarily, (3) for the purpose of distributing a controlled substance.") (citing *United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010)). Defendants do not cite, and we have not found, any case law that answers the question of whether the district court was required to list *illegal* drug distribution as one of the elements of a § 856(a)(1) offense in a pill mill case. And "[a] lack of binding case law that answers the question presented" precludes "our finding of plain error." *United States v. Al-Maliki*, 787 F.3d 784, 794 (6th Cir. 2015) (citing *United States v. Woodruff*, 735 F.3d 445, 450 (6th Cir. 2013)).

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[3]Womack contends that two recent Supreme Court decisions demonstrate that "merely tracking the language of the statute may not suffice to properly instruct a jury as to what they must find for guilt." (Womack Br. 24 (citing *Rehaif v. United States*, 139 S. Ct. 2191, 2199 (2019), and *Maslenjak v. United States*, 137 S. Ct. 1918, 1930 (2017).) These cases, however, contain inapposite facts and do not bear on the instructions at issue here.

Third, "taken as a whole, [the instructions] made it clear to the jury that they had to determine that the premises were used for the illicit distribution of drugs." *Clemons*, slip op. 4; *Newman*, slip op. 4. The district court began by instructing the jury that the § 856(a)(1) offense "charges that . . . [the defendants] did knowingly and intentionally open, use, and maintain a business . . . *for the purpose of illegally distributing Schedule II controlled substances*[.]" (Trial Tr., R. 897, PageID 61800 (emphasis added).) This explanation immediately preceded the district court's recitation of the statutory elements of a § 856(a)(1) offense. Given the proximity of the illegality explanation to the recitation of the elements, the instruction did not "likely produce a grave miscarriage of justice." *Stewart*, 729 F.3d at 530. Furthermore, the indictment and the jury verdict form underscore the completeness of the jury instruction when taken as a whole because language in both also made clear that the defendants were being charged for and convicted of unlawful opioid distribution. Accordingly, the district court did not plainly err by giving the instruction, and we affirm the district court.

ii. The Pinkerton Liability Instruction

Hofstetter and Newman were both charged with distributing and dispensing controlled substances, aided and abetted by each other, in violation of 21 U.S.C. § 841. The district court explained to the jury that the government could prove Hofstetter and Newman guilty of this crime in one of three ways:

> The first is by convincing you that they personally committed or participated in this crime.
>
> The second 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.

(Trial Tr., R. 897, PageID 61819–20.) Third, the district court also noted that the jury could find the defendants guilty "if [they] intentionally helped or encouraged others to commit the crime"—that is, under an aiding and abetting theory of liability. (*Id.* at PageID 61819.) Only Hofstetter was convicted.

Hofstetter argues on appeal that the jury should not have been told about the second conspiracy-based method of liability. In particular, she claims that the jury should not have been

able "to consider the conspiracy law as a means to convict" her because she was not charged with conspiracy in this count, and the elements for aiding and abetting are different from conspiracy. (Hofstetter Br. 20.) Because she did not object to the district court's instructions before it issued them, we review the instructions for plain error. *Semrau*, 693 F.3d at 527.

The conspiracy-based method that the district court outlined is known as *Pinkerton* liability. *See Pinkerton v. United States*, 328 U.S. 640 (1946). "*Pinkerton* is a doctrine about guilt-stage liability for a co-conspirator's substantive offenses." *United States v. Hamm*, 952 F.3d 728, 747 (6th Cir.), *cert. denied*, 140 S. Ct. 2695 (2020), and *cert. denied sub nom. Shields v. United States*, 141 S. Ct. 312 (2020). We have long held that "persons indicted as aiders and abettors"—as Hofstetter was with respect to this claim—"may be convicted pursuant to a *Pinkerton* instruction." *United States v. Lawson*, 872 F.2d 179, 182 (6th Cir. 1989) (quoting *United States v. Cerone*, 830 F.2d 938, 944 (8th Cir. 1987)). Further, "a district court may properly provide a *Pinkerton* instruction regarding a substantive offense, even when the defendant is not charged with the offense of conspiracy." *United States v. Budd*, 496 F.3d 517, 528 (6th Cir. 2007) (affirming the district court's instructions, which included a *Pinkerton* instruction for a non-conspiracy offense); *see also United States v. Adkins*, 372 F. App'x 647, 652 (6th Cir. 2010). Accordingly, there is no plain error in the district court's given instruction, and we affirm.

iii. The Deliberate-Indifference Instruction

Hofstetter also challenges the district court's deliberate-indifference instruction with respect to her distribution charge. Hofstetter requested different instructions than the one the district court gave, so this Court reviews the district court's instruction for abuse of discretion. *See Pritchard*, 964 F.3d at 522. "A trial court has broad discretion in crafting jury instructions and does not abuse its discretion unless the jury charge fails accurately to reflect the law." *United States v. Geisen*, 612 F.3d 471, 485 (6th Cir. 2010) (internal quotation and citation omitted).

To convict Hofstetter of unlawful distribution under 21 U.S.C. § 841(a)(1), the government was required to prove that Hofstetter "knowingly or intentionally" distributed a

controlled substance "outside the scope of professional medical practice and not for a legitimate medical purpose[.]" (Trial Tr., R. 897, PageID 61805.) With respect to the knowledge element, the district court instructed the jury that Hofstetter could be found liable under the doctrine of deliberate indifference:

> Although knowledge of the defendant cannot be established merely by demonstrating that she was careless, knowledge may be inferred if the defendant deliberately blinded herself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious.
>
> If you are convinced that a defendant deliberately ignored a high probability that the controlled substances, as alleged in these counts, were distributed outside the usual course of professional practice and not for a legitimate medical purpose, then you may find that the defendant knew that this was the case.
>
> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed outside the usual course of professional practice and not for a legitimate medical purpose, and that the defendant deliberately closed her eyes to what was obvious.
>
> Carelessness or negligence or foolishness on her part are not the same as knowledge, and are not enough to find her guilty of any offense charged under this law.

(*Id.* at PageID 61806–07.) Hofstetter argues that this instruction does not incorporate the deliberate indifference standard announced in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011). Specifically, Hofstetter claims the jury should have been instructed that a defendant is not deliberately indifferent unless she "subjectively believe[s] that there is a high probability that a fact exists" and "take[s] deliberate actions to avoid learning of that fact." (Hofstetter Br. 40 (quoting *Global-Tech*, 563 U.S. at 769).)

Hofstetter's proposed instruction and the one given are functional equivalents: both require the defendant to have been aware of a "high probability" that a fact exists and to have "deliberately" avoided full knowledge. In addition, the district court's instruction tracks (and adds to) the language in this Court's model jury instructions on deliberate indifference, which have been approved as consistent with *Global-Tech*. *See* Sixth Circuit Pattern Instruction 2.09; *United States v. Reichert*, 747 F.3d 445, 451 (6th Cir. 2014). The Supreme Court also acknowledged that similar instructions complied with *Global-Tech*. 563 U.S. at 769 & n.9 (citing, *e.g.*, *United States v. Holloway*, 731 F.2d 378, 380–81 (6th Cir. 1984) (per curiam)).

Accordingly, the district court did not abuse its discretion with respect to the deliberate-indifference instruction.

Because there is no plain error in either the maintaining-a-drug-involved-premises instruction or the *Pinkerton* instruction, and because the district court did not abuse its discretion by instructing the jury as to deliberate indifference, we affirm each of the three contested jury instructions.

C. Sufficiency of the Evidence

We review de novo the sufficiency of the evidence to sustain a conviction when a defendant raises a challenge under Federal Rule of Criminal Procedure 29. *United States v. Emmons*, 8 F.4th 454, 477 (6th Cir. 2021) (quoting *United States v. Gunter*, 551 F.3d 472, 482 (6th Cir. 2009)).

Rule 29 requires courts to "enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction[,]" regardless of the jury's verdict, upon a defendant's motion. Fed. R. Crim. P. 29(a). When considering the sufficiency of the evidence, we "review[] the evidence in the light most favorable to the prosecution" and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Emmons*, 8 F.4th at 477–78 (quoting *United States v. Wallace*, 597 F.3d 794, 800 (6th Cir. 2010)). In so doing, we make "[a]ll reasonable inferences . . . to support the jury verdict[,]" *United States v. LaVictor*, 848 F.3d 428, 456 (6th Cir. 2017), and do not "reweigh the evidence, reevaluate the credibility of witnesses, or substitute [our] judgment for that of the jury," *Emmons*, 8 F.4th at 478 (quoting *United States v. Callahan*, 801 F.3d 606, 616 (6th Cir. 2015) (alteration in original)). Moreover, "[c]ircumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *LaVictor*, 848 F.3d at 456 (quoting *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999)).

"[A] defendant claiming insufficiency of the evidence [therefore] bears a very heavy burden." *Emmons*, 8 F.4th at 478 (quoting *United States v. Abboud*, 438 F.3d 554, 589 (6th Cir. 2006)). And "[t]he general hesitancy to disturb a jury verdict applies with even greater force

when a motion of acquittal has been thoroughly considered and subsequently denied by the trial judge." *United States v. Fisher*, 648 F.3d 442, 450 (6th Cir. 2011) (internal quotation and citation omitted). Here, on two separate occasions, the district court held that there was sufficient evidence to support the jury's verdict on these counts. We find the same.

i. The Drug-Involved Premises Convictions

The four defendants were each charged with one to three counts of maintaining a drug-involved premises under 21 U.S.C. § 856(a)(1). They were also charged for these offenses under 18 U.S.C. § 2, which imposes liability under an aiding and abetting theory. Hofstetter was convicted of three counts, Clemons of two, and Newman and Womack of one each. All four defendants argue that there was insufficient evidence to support their convictions.

To support a conviction under § 856(a)(1), the government needed to prove, beyond a reasonable doubt, that the defendants "knowingly open[ed], lease[d], rent[ed], use[d], or maintain[ed] any place, whether permanently or temporarily," for the purpose of illegally distributing controlled substances. *United States v. Elenniss*, 729 F. App'x 422, 428 (6th Cir. 2018) (quoting 21 U.S.C. § 856(a)(1)); *see also United States v. Russell*, 595 F.3d 633, 644 (6th Cir. 2010).

a. Knowingly

First, the government submitted significant circumstantial evidence that would allow a reasonable jury to conclude that the defendants knew they maintained or used the clinics to distribute controlled substances illegally. For example, none of the clinics accepted insurance, and each charged a flat cash fee of $300 to $350 per appointment. Third parties often paid other patients' fees, and groups of patients sometimes arrived together in a single car, often from out-of-county. The waiting rooms were frequently crowded to standing room only, and patients commonly waited hours for appointments.

Additionally, former patients testified that they went to the clinics while exhibiting symptoms of drug withdrawal, appearing "high" or "junked out." (Trial Tr., R. 922, PageID 66038–40; Trial Tr., R. 923, PageID 66206.) The signs of addiction were "obvious." (Trial Tr.,

R. 921, PageID 65599.) One witness said the parking lot "looked more like . . . a place where people go to get high versus go to obtain a prescription." (Trial Tr., R. 924, PageID 66518–19.) A former staff member testified that, on his first day, he found a crowd of people waiting for the Lenoir City clinic to open, who were "all talking to each other about [which provider] . . . would get them the most medicine." (Trial Tr., R. 936, PageID 74712, 74722–23.) The Gallaher View and Lovell Road clinics received complaints that the clinics' customers engaged in petty crimes and drug deals and discarded syringes in the clinic parking lots.

The clinics also allegedly fostered criminal activity among the staff members, who engaged in kickback schemes from pharmaceutical companies and drug-testing laboratories in return for their business. Staff members also accepted bribes from patients in return for their help in passing drug tests or skipping long wait times.

Other former staff members quit the clinics shortly after being hired. For example, a former physician's assistant quit after just six weeks on the job. She testified: "You go into a clinic like that, and you see all of the irregularities. You see all of the different things happening. You look at the patients. You put it all together. . . . [T]hat place did not follow medical standard of care." (Trial Tr., R. 919, PageID 65328–29.) She drew these conclusions without having any previous pain management experience.

Former clinic medical directors echoed these concerns, sometimes raising them with Hofstetter directly. For example, former medical director Dr. Marc Valley prepared a report outlining all the problems of the clinics—including prescriptions that had "no purpose in chronic pain management" and diagnoses that did not support the use of controlled substances. (Gov't Trial Ex. 498, R. 1188-7, PageID 81135.) His report concluded: "This clinic fits all criteria for the definition of 'Pill Mill.' . . . . [T]his is the most egregious example of inappropriate medical oversight and opioid management that I have ever seen." (*Id.* at PageID 88136–37.) He gave the report to Hofstetter.

It is true, as the defendants emphasize, that some of the government's witnesses testified only about one particular clinic and not about the others. Other witnesses did not know or interact with each defendant. And still others did not notice illegal or concerning activity at the

clinics. But we cannot reweigh the evidence, reevaluate witness credibility, or prioritize our judgment over the jury's, so these discrepancies do not counsel in favor of reversal. *Callahan*, 801 F.3d at 616. It is also true that the government did not produce any direct evidence that Clemons, Womack, and Newman *knowingly* used the clinics for the purpose of illegal drug activity. But this is irrelevant. Circumstantial evidence, on its own, is sufficient to sustain a conviction. *LaVictor*, 848 F.3d at 456. And here, there is certainly enough circumstantial evidence to support the jury's conclusion that the defendants "would know that the clinics in this case were pill mills, and by choosing to associate themselves with the clinics, . . . [they] agreed to assist in the diversion of opioids to drug addicts and drug dealers." (Trial Tr., R. 885, PageID 60983.)

b. Maintained or Used

A defendant need not lease or own the building to "maintain" it under the second element. *Russell*, 595 F.3d at 644. Instead, "*control*, duration, acquisition of the site, renting or furnishing the site, repairing the site, *supervising*, protecting, supplying food to those at the site, and continuity" all evince "maintenance." *Id.* (emphasis added). The government submitted sufficient evidence to show that Hofstetter supervised the clinics. She oversaw the clinics as office manager and part owner by administering daily operations and managing personnel. She controlled the clinics by instructing staff to modify medical records and directing employees without medical licenses to attend to patients.

The record also sufficiently supports a finding that Clemons, Newman, and Womack "used" the clinics for the purpose of distributing controlled substances illegally. Section 856(a)(1) "uses the disjunctive conjunction 'or' between the listed alternative ways of violating the statute, [so] § 856(a)(1) is violated simply by *using* a place for the commission of the specified drug crimes; proof that the defendant 'maintain[ed]' the premises, which is a separate way of violating the statute, is not necessary for conviction." *United States v. Facen*, 812 F.3d 280, 289 (2d Cir. 2016). Thus, whether the government proved that Clemons, Newman, and Womack "maintained" the premises is not the sole inquiry; we must also consider whether the defendants used the premises for the purpose of illegal drug distribution.

The government showed that Clemons, Newman, and Womack each used the clinics to write hundreds of prescriptions for opioids and benzodiazepines during their tenures at the clinics, and in roughly the same proportion: 54 to 57 percent of their prescriptions were for oxycodone, 24 to 33 percent for oxymorphone, and 8 to 14 percent for morphine. Non-opioid, non-benzodiazepines accounted for less than three percent of their prescriptions. Drawing the evidence in the light most favorable to the prosecution, the jury could have reasonably concluded that Hofstetter maintained the clinics, and Clemons, Newman, and Womack used the clinics, to distribute drugs illegally.

c. For the Purpose of Illegal Distribution

To prove the last element, the government was required to show that each defendant "was significantly motivated to maintain [or use] the premises for drug-related purposes." *United States v. Serrano-Ramirez*, 811 F. App'x 327, 339 (6th Cir. 2020); *see also Russell*, 595 F.3d at 642 (finding that a defendant maintains or uses a place "for the purpose of" distributing drugs if the "drug distribution was a *significant or important reason*"). There must also be sufficient evidence that the controlled substances were distributed illegally, or "without a legitimate medical purpose." *United States v. Chaney*, 921 F.3d 572, 591 (6th Cir. 2019).

Sufficient evidence supports this element as to each defendant. When Hofstetter opened her own clinic with Tipton at Lovell Road, she instructed her staff to solicit patients that had been discharged from other pain clinics for signs of drug abuse, such as displaying "track marks" or testing positive for illegal drugs. (Trial Tr., R. 906, PageID 76749.) Hofstetter used this strategy to build much of the initial patient base at Lovell Road. The government also submitted evidence that Hofstetter prioritized profit over patient care: she limited appointments to 15 minutes, she instructed staff members with no medical training to fill out patient charts, and she generally focused on getting "the patients . . . in there and paying their fee." (Trial Tr., R. 906, PageID 76794.)

Sufficient evidence also supports the jury's finding that Clemons, Newman, and Womack used the clinics for the purpose of distributing opioids unlawfully. In addition to the number of opioid prescriptions that they issued (in the same proportions, described above), Dr. John Everett

Blake—an anesthesiologist and pain management physician—testified that high-dose opioids accounted for the vast majority of treatment offered at the clinics, and that *none* of the opioid prescriptions he reviewed in about 90 patient files were written for a legitimate medical purpose. Another expert witness testified that none of the files he reviewed contained the necessary elements of a medical chart, noting that medical histories and results from physicals, diagnoses, and treatment plans all fell below the standard of care. *See infra* part II.D.ii. And former patients testified that they visited the clinics to obtain opioids to feed their addictions or to resell.

Moreover, former staff member Stephanie Puckett testified that she and another staff member participated in one of the pharmaceutical kickback schemes, where they received a payout each time they prescribed a specific pain cream. Because Puckett and the other staff member could not write prescriptions themselves, they asked Clemons, Newman,[4] and Womack to participate in the scheme and, according to Puckett, all three women agreed. Womack even allegedly signed a blank prescription for the pain cream, so that Puckett could copy it and place them in the file of every Womack patient with insurance.

Clemons, Newman, and Womack highlight that some of the clinics' former patients testified that they did experience chronic pain and needed medication to control it. But this argument does not change our analysis because:

> [W]e look at a provider's reason for issuing the prescription when determining whether it was issued for a legitimate medical purpose, rather than the patient's underlying conditions . . . a [provider] prescribing opioid painkillers to anyone walking through the door is not saved if a person happens to have an underlying condition that could justify the prescription.

Chaney, 921 F. 3d at 590–91 (collecting similar cases).

Clemons, Newman, and Womack also emphasize that some witnesses testified that the defendants acted professionally and ethically with respect to prescriptions. And Dr. Blake testified that reasonable minds could differ as to the standard of care offered by the providers, in

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[4]Newman disputes that the trial record supports an inference of her involvement in this scheme. Specifically, she highlights Puckett's recross-examination testimony as demonstrating that Newman was not involved. Newman's argument, however, distorts the scope of the recross-examination, and a reasonable jury could have viewed Puckett's testimony as implicating Newman.

part because the Tennessee guidelines at the time did not limit the amount of medication that could be prescribed to a patient. In essence, with these challenges, Clemons, Newman, and Womack ask us to weigh some testimonies over others and to assess witness credibility, which we may not do when considering the sufficiency of the evidence on appeal. *Emmons*, 8 F.4th at 478. There was sufficient evidence for a reasonable jury to conclude that the evidence proved each element of this offense, and we affirm the defendants' convictions.

ii. Hofstetter's Conspiracy Convictions

Hofstetter also argues that insufficient evidence supported her three conspiracy convictions: a conspiracy to distribute controlled substances at Gallaher View and Lenoir City, a conspiracy to distribute controlled substances at Lovell Road, and a RICO conspiracy.

To prove that Hofstetter participated in the first two drug conspiracies, the government was required to show that she, along with at least one other individual, "agreed to violate a drug law (such as § 841(a)(1)'s ban on distributing drugs) and that [she] knowingly and voluntarily entered into this agreement." *United States v. Wheat*, 988 F.3d 299, 306 (6th Cir. 2021). Because conspiracy is an inchoate offense, the essence of a conspiracy "is an agreement to commit an unlawful act." *Id.* (quoting *Iannelli v. United States*, 420 U.S. 770, 777 (1975)). The government did need not to prove that Hofstetter "completed [her] agreed-upon drug crime" or even that she "took an overt act to implement the crime." *Id.* Furthermore, "[a]n agreement can be tacit, not formal, and the 'government may meet its burden of proof through circumstantial evidence.'" *United States v. Williams*, 998 F.3d 716, 728 (6th Cir. 2021) (quoting *United States v. Layne*, 192 F.3d 556, 567 (6th Cir. 1999), *cert. denied*, 529 U.S. 1029 (2000)).

Benjamin Rodriguez, one of the Florida partners, testified that the partners discussed that they did not intend Gallaher View and Lenoir City to be legitimate clinics, and that Hofstetter was involved in those discussions and aware of their intent. Rodriguez described that Hofstetter "would always call us the three amigos and that we were here to open up a pill mill." (Trial. Tr., R. 936, PageID 74948.) Witnesses also testified that Hofstetter approached Tipton about opening Lovell Road, without the Florida partners, and that she found patients for this new clinic

by soliciting patients that had previously been discharged from other clinics for exhibiting signs of drug abuse.

Rodriguez and Tipton also described how the Florida partners fired Hofstetter from the Hollywood clinic for suspected embezzlement, but then later re-hired her to run the Tennessee clinics and retained her even though they believed her to be embezzling again. The government argued that this evidence further demonstrates that the Florida partners and Hofstetter intended to operate the clinics unlawfully. *See infra* part II.D.i.a. Viewing all the evidence in the light most favorable to the government, we find that there was sufficient support for the jury's conclusion that Hofstetter knowingly agreed to violate a drug law at the clinics. Hofstetter's arguments about conflicting testimony and weight of the evidence are not for us to consider. *See LaVictor*, 848 F.3d at 456.

To prove that Hofstetter participated in a RICO conspiracy, the government was required to show that she "intended to further an endeavor which, if completed, would satisfy all the elements of a substantive RICO criminal offense[.]" *United States v. Fowler*, 535 F.3d 408, 420 (6th Cir. 2008) (quotation marks and brackets omitted) (quoting *United States v. Saadey*, 393 F.3d 669, 676 (6th Cir. 2005)). A substantive RICO offense requires the government to prove: (1) the existence of an enterprise that affects interstate commerce; (2) Hofstetter's association with the enterprise; (3) Hofstetter's participation in the conduct of the enterprise's affairs; and (4) that the participation occurred through a pattern of racketeering activity. *Id.* at 418.

Hofstetter appears to challenge the evidentiary support for the first element: she suggests that the clinics were not "RICO organization[s]" because there is not substantial evidence that they "unlawfully distribute[d] pain medication outside the usual course of professional practice and for no legitimate medical purpose." (Hofstetter Br. 42–43.) She highlights specific testimony in support. But as already discussed throughout this section, the government submitted sufficient evidence for the jury to find otherwise. Hofstetter offers no other argument as to this charge. We therefore affirm the verdict.

iii. Hofstetter's Distribution Conviction

Finally, Hofstetter challenges the sufficiency of the evidence supporting her conviction for distributing and dispensing controlled substances outside the scope of professional practice, in violation of 21 U.S.C. § 841(a)(1). Specifically, Hofstetter argues that "[n]o witness testified that . . . [she] ever engaged in prescribing the medication outside the usual course of professional practice . . . or instructed anyone to do so." (Hofstetter Br. 41.)

The evidence, however, supports Hofstetter's conviction under an aiding and abetting theory of liability. To prove Hofstetter was guilty of aiding and abetting unlawful distribution, the government was required to show that she "(1) [took] an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 572 U.S. 65, 71 (2014). As discussed above, there was more than sufficient evidence to support the jury's conclusion that Hofstetter took affirmative acts to further the unlawful distribution of opioids, and that she intended to do so.

iv. Hofstetter's Money Laundering Convictions

Hofstetter generally alleges "that the jury verdict was against the manifest weight of the evidence," but she does not specifically argue that there was insufficient evidence to support her money laundering convictions. (*See* Hofstetter Br. 40–44.) Because Hofstetter fails to raise an argument as to these convictions in her brief before this Court, she has forfeited the issue. *See Watkins v. Healy*, 986 F.3d 648, 667 (6th Cir. 2021).

D. Hofstetter's Evidentiary Challenges

Hofstetter challenges three of the district court's evidentiary rulings at trial, each of which pertain to her alone. We review the district court's evidentiary rulings for abuse of discretion. *United States v. Dixon*, 413 F.3d 540, 544 (6th Cir. 2005). An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, uses the wrong legal standard, or misapplies the correct standard. *United States v. Gibbs*, 797 F.3d 416, 422 (6th Cir. 2015). Absent a "definite and firm conviction" that the district court committed a clear error in judgment, we "leave rulings about admissibility of evidence undisturbed[.]" *Dixon*, 413 F.3d at

544 (citation omitted). If we find the district court erroneously admitted evidence, "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).

i. Evidence of Hofstetter's Embezzlement

This standard applies where, as here, we review a district court's determination that Federal Rule of Evidence 404(b) is inapplicable because the evidence is intrinsic. *Id.* at 779. In this circumstance, we "must also find that . . . the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice pursuant to Federal Rule of Evidence 403." *Id.* (quoting *United States v. Joseph*, 270 F. App'x 399, 406 (6th Cir. 2008) (per curiam)).

At trial, the government introduced evidence that Hofstetter "embezzled very large amounts of money from other pill mill owners in this case (*i.e.*, [the Florida partners])" multiple times in both Florida and Tennessee. (Resp. to Def.'s Mot. in Limine, R. 624, PageID 11350.) The government explained that Hofstetter's alleged embezzlement was "part and parcel of [her] overall criminal conduct in this case" and reflected "the general illegitimacy of the Tennessee clinics." (*Id.*) Moreover, the government argued that the Florida partners' willingness to rehire Hofstetter after suspecting her of embezzlement showed that they accepted the "cost of doing illegal business[.]" (*Id.* at PageID 11350–51.) Hofstetter moved to exclude evidence about her unindicted embezzlement conduct.

The district court denied Hofstetter's motion orally at a pretrial conference. Hofstetter then filed a subsequent motion on the same issue, which the district court construed as a motion for reconsideration. Following a hearing, the district court again permitted the government to admit the evidence for three primary reasons. First, the district court found that the evidence of the alleged embezzlement was intrinsic because "the alleged thefts [had] a temporal and spatial connection to and arise from the same events as the charged conspiracies." (Mem. Op. and Order, R. 718, PageID 14246.) Second, even if the evidence were not intrinsic, it would nevertheless be admissible because it "tend[ed] to show [Hofstetter's] motive and intent in allegedly joining the alleged conspiracies." (*Id.* at PageID 14250.) Third, the district court

determined that the probative value of the evidence was not substantially outweighed by a danger of unfair prejudice.

At trial, one of the Florida partners testified that the partners fired Hofstetter from the Hollywood clinic because they suspected that she embezzled clinic funds. Tipton testified that the Florida partners also suspected her of embezzling funds at the Gallaher View clinic but decided not to fire her again. The district court overruled Hofstetter's objections at trial, but it instructed the jury to consider the evidence only as it related to Hofstetter's intent and motive to join the conspiracy "and her knowledge that the clinics . . . were allegedly not legitimate pain clinics." (Trial Tr., R. 901, PageID 61954–55.)

Hofstetter does not dispute that the evidence is intrinsic, but instead argues that the district court "relied on clearly erroneous facts that [she] came to Tennessee to start up illegal pain clinics" when it determined that the testimony was relevant to her motive or intent. (Hofstetter Br. 35.) She also argues that the testimony should have been excluded because any relevance was "substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, or misleading the jury[.]" (*Id.*)

a. Intrinsic Evidence

Under Federal Rule of Evidence 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 this rule is to prevent the jury from inferring that a defendant "probably committed the crime charged" because she committed other, unrelated crimes. *Emmons*, 8 F.4th at 473 (quoting *United States v. Phillips*, 599 F.2d 134, 136 (6th Cir. 1979)).

Rule 404(b) is not implicated, however, when evidence of other crimes or wrongs "is part of a continuing pattern of illegal activity." *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013) (quoting *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995)). Such "intrinsic" acts "are those that are inextricably intertwined with the criminal act charged or a part of the criminal activity as opposed to extrinsic acts, which are those that occurred at different times and under different circumstances from the offense charged." *Churn*, 800 F.3d at 779 (internal

quotation omitted). "[E]vidence relating to the background of the charged offense, known as '*res gestae* evidence,' is also considered 'intrinsic . . . .'" *United States v. Sumlin*, 956 F.3d 879, 889–90 (6th Cir. 2020). "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.* at 890 (quoting *United States v. Hardy*, 228 F.3d 745, 748 (6th Cir. 2008)).

Intrinsic evidence is an exception to Rule 404(b) because it "is probative of the crime charged," so it is not subject to the general prohibition on evidence of prior bad acts. *Sumlin*, 956 F.3d at 889. We therefore allow district courts to admit intrinsic evidence. *Churn*, 800 F.3d at 779.

Here, the district court found that the evidence of Hofstetter's purported embezzlement was intrinsic to the charged offenses because it allegedly occurred during the same period of time and in the same place as Hofstetter's conspiratorial conduct, it directly related to her involvement in the Florida and Tennessee clinics, and it arose from the same events as the embezzling offenses for which Hofstetter was indicted. In other words, the district court found that the evidence was a prelude to, inextricably intertwined with, and probative of the criminal activity for which Hofstetter was being tried. The district court did not abuse its discretion in reaching this conclusion because it correctly applied the appropriate legal standard and relied on accurate findings of fact.

Likewise, the district court did not abuse its "substantial discretion in balancing probative value . . . and unfair prejudice" under Rule 403 when it determined that the embezzlement evidence was not *unfairly* prejudicial. *United States v. Zipkin*, 729 F.2d 384, 390 (6th Cir. 1984) (internal quotations omitted) ("The usual approach on the question of admissibility on appeal is to view both probative force and prejudice most favorable towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.") (quoting 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 403[03] (1982)). The district court found that the thefts were "not collateral to the charged offenses," so the danger of unfair prejudice did not substantially outweigh the probative value of the theft evidence. (Mem. Op. and Order, R. 718, PageID 14250); *see also Churn*, 800 F.3d at 779.

Because Hofstetter's alleged embezzlement arose from the same—not auxiliary—circumstances as the charged offenses, the district court did not err. *See United States v. Lang*, 717 F. App'x 523, 531 (6th Cir. 2017) (affirming the district court's admission of evidence that the defendant skimmed cash from a pill mill because "any unfair prejudice that resulted from [its] admission [was] simply not enough" to overcome its "substantial probative force").

b. Motive or Intent

Even if the embezzlement evidence were not intrinsic, Rule 404(b) would not bar its admission because relevant evidence of "other crimes, wrongs, or acts" is admissible for non-propensity purposes, such as proving intent or knowledge. Fed. R. Evid. 404(b)(1)–(2); *United States v. Clay*, 667 F.3d 689, 693–94 (6th Cir. 2012). The district court may admit such evidence under Rule 404(b) if it determines that: (1) there is sufficient evidence the act occurred; (2) the act is admissible for a proper purpose; and (3) the probative value is not substantially outweighed by the danger of unfair prejudice. *United States v. Hardy*, 643 F.3d 143, 150 (6th Cir. 2011).[5]

Here, the embezzlement evidence was admissible under Rule 404(b). First, there was sufficient evidence that Hofstetter was fired from the Hollywood clinic for embezzlement and that the Florida partners believed she was embezzling funds again in Tennessee. Two of Hofstetter's co-conspirators testified at length about her embezzlement, and Hofstetter did not dispute that she embezzled clinic funds. Second, the embezzlement evidence was offered for two non-propensity purposes: to support the charge that Hofstetter intended to conspire with the Florida partners, and to show that Hofstetter knew the clinics were being operated illegally. Both are permissible purposes under Rule 404(b). Fed. R. Evid. 404(b)(2). Third, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. For all these reasons, we affirm the district court's decision to admit the embezzlement evidence.

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[5]Our precedent reflects an intra-circuit split about the appropriate standard of review when reviewing evidentiary rulings under Rule 404(b). *Compare Clay*, 667 F.3d at 694 (using de novo review because determining "whether the evidence was admitted for a proper 404(b) purpose . . . is a question of law"), *with United States v. Jenkins*, 345 F.3d 928, 936 (6th Cir. 2003) (reviewing for abuse of discretion). Because Hofstetter's claim fails under the less deferential de novo review, we need nod decide which standard of review should apply to Rule 404(b) challenges.

ii. Michael Carter's Testimony

At trial, the government called Michael Carter as an expert witness. Carter had been a nurse practitioner for 45 years, and he held multiple advanced degrees in nursing, including a Doctor of Nursing Science. He testified about the standard of care for nurse practitioners; how nurses formulate diagnoses and develop therapeutic plans; Tennessee legal requirements for nurse practitioners prescribing drugs; and registered nurses' general knowledge of controlled substance prescriptions. Carter also reviewed 90 patient files from the clinics and assessed their adequacy in terms of patient history, family history, medical history, description of the medications prescribed, and notes regarding examinations, practitioners' findings, treatment goals, and follow-up.

Hofstetter moved to strike Carter's testimony, arguing that he lacked expertise in pain management and therefore could not assess whether the prescriptions were issued for legitimate medical purposes. The district court denied the motion, concluding that Carter's testimony was properly confined to his area of expertise. The district court later evaluated the same challenge again when it ruled on Hofstetter's motion for judgment of acquittal.

Federal Rule of Evidence 702 governs the admissibility of expert testimony and permits "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education [to] testify in the form of an opinion or otherwise[.]" Fed. R. Evid. 702. Rule 702 "should be broadly interpreted on the basis of whether the use of expert testimony will assist the trier of fact." *United States v. L.E. Cooke Co.*, 991 F.2d 336, 341 (6th Cir. 1993). We apply a four-prong test to determine the admissibility of expert testimony: "(1) a qualified expert (2) testifying on a proper subject (3) which is in conformity to a generally accepted explanatory theory (4) the probative value of which outweighs its prejudicial effect." *Id.* (quoting *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1208 (6th Cir. 1988)). On appeal, Hofstetter challenges only the first two prongs—i.e., that Carter was not qualified and that he testified on an improper subject—but she does not identify an erroneous factual finding or an improper use of legal standards.

Regarding the first prong, the district court carefully analyzed Carter's qualifications and concluded that Carter's five degrees in nursing and his extensive clinical and professional

experience qualified him "to testify to the standard of care for nurse practitioners across specialties." (Order, R. 794, PageID 38776.) The district court recognized that Carter did not qualify as a pain-management expert.

Regarding the second prong, Hofstetter argues Carter should not have been allowed to opine on whether the prescriptions were issued for legitimate medical purposes because such testimony required pain-management expertise that he did not have. The district court, however, found that Carter did not testify to the ultimate issue of whether there was a legitimate medical purpose for the various prescriptions in the files he reviewed. Instead, the district court concluded that Carter testified about whether the *content of the files* offered a basis for a legitimate prescription:

> While the government did repeatedly ask the witness whether there was a legitimate medical purpose for prescriptions in certain medical files, . . . [t]he context of these questions and responses makes clear that the government was not eliciting opinions from the witness as a pain management expert, which he admittedly is not, but rather asking him to testify to whether he could identify a legitimate medical purpose for the prescription based on the content of the files. Each exchange took place immediately after the government took the witness through a specific file and asked him questions about the file's adherence to the standard of care. Thus, by testifying that he could not identify such a legitimate purpose for the prescription, the witness was testifying to a failure of the standard of care, i.e., an inadequate history, inadequate physical, inadequate assessment and an inadequate plan.

(*Id.* at PageID 38778–79 (internal modifications omitted).)

The record supports the district court's conclusion that Carter limited his assessments to the content of the files and the extent to which the files demonstrated that the clinics' nurse practitioners adhered to the standard of care, which fell within his area of expertise. Accordingly, Carter did not testify as a pain-management expert, and the district court did not abuse its discretion by refusing to strike his testimony.

iii. Rebuttal Evidence

Hofstetter, along with the other defendants, called two expert witnesses who also examined fifteen patient files from the clinics. The defense's expert witnesses concluded that

the patients had been prescribed opioids for legitimate medical purposes. To rebut this testimony, the government called four of the fifteen patients. Hofstetter objected to this testimony before and during trial, arguing that it did not constitute rebuttal evidence, and she repeated her argument when she moved for a new trial. The district court ruled that the rebuttal witnesses' testimony "fell within the proper scope of rebuttal testimony" because it "defused the impact of the opinion testimony offered by defendants' witnesses that the prescriptions those four (4) patients received . . . were prescribed for a legitimate medical purpose and within the usual course of professional practice." (Mem. Op. and Order, R. 951, PageID 70975.) Hofstetter alone now argues that the patients were not proper rebuttal witnesses.

"The proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party." *United States v. Levy*, 904 F.2d 1026, 1031 (6th Cir. 1990) (quoting *United States v. Papia*, 560 F.2d 827, 848 (7th Cir. 1977)). Hofstetter therefore argues unpersuasively that the rebuttal witnesses served an improper purpose. The defense's expert witnesses testified that practitioners at the clinics issued legitimate opioid prescriptions to at least some patients. In rebuttal, the government called four of those patients, all of whom testified that they had been addicted to drugs when they went to the clinics, that it was easy to obtain opioid prescriptions at the clinics, and that they used the prescriptions they received to fuel their addictions. Because this rebuttal testimony casted doubt on the legitimacy of the prescriptions and the practitioners' adherence to the standard of care with respect to those specific patients, the rebuttal witnesses defused the impact of the defense's expert testimony and served a proper function.

Hofstetter also contends that the rebuttal witnesses were improper because the government could have questioned them earlier in the trial. But rebuttal testimony "is not limited by the fact that the [government] could have introduced the proffered evidence in [its] case-in-chief." *United States v. Caraway*, 411 F.3d 679, 683 (6th Cir. 2005); *see also United States v. Bland*, No. 06-5876, 2007 WL 2781114, at *3 (6th Cir. Sept. 25, 2007). The timing of when these witnesses were called is therefore irrelevant. For these reasons, Hofstetter has failed to show that the district court abused its broad discretion in permitting the government's rebuttal witnesses to testify.

In sum, the district court did not abuse its discretion when it admitted evidence about Hofstetter's unindicted embezzlement, declined to strike Carter's assessments of the patient files, and permitted the government's rebuttal witnesses. We affirm each of the district court's contested evidentiary rulings as to Hofstetter. *See Levy*, 904 F.2d at 1031.

E. The Fairness of Hofstetter's Trial

Hofstetter alleges that the government violated her constitutional right to a fair trial for three reasons: (1) the government destroyed patient files seized during the 2010 investigation of the Hollywood clinic; (2) the government breached its *Brady* obligations by failing to disclose information about a criminal investigation of Walmart; and (3) the government committed prejudicial prosecutorial misconduct during closing arguments by making comments that impermissibly shifted the burden of proof to Hofstetter. We consider each argument in turn.

i. Spoliation

We review the district court's conclusions of law de novo. *United States v. Cody*, 498 F.3d 582, 586 (6th Cir. 2007). When the district court's conclusion is based on spoliation, "[t]he district court's factual determinations giving rise to the spoliation finding are reviewed for clear error." *Byrd v. Alpha Alliance Ins. Corp.*, 518 F. App'x 380, 383 (6th Cir. 2013) (citing *Adkins v. Wolever*, 692 F.3d 499, 506 (6th Cir. 2012)). "The evidence must be considered in the light most favorable to the party that prevailed in the court below . . . ." *United States v. Garrido*, 467 F.3d 971, 977 (6th Cir. 2006).

In December 2010, the DEA seized about 1,900 patient files at the Hollywood clinic pursuant to a search warrant. The warrant and seizure followed a year-long investigation of the clinic, which was precipitated by signs of the clinic's illegal practices and included undercover agents who posed as patients. After the seizure, the DEA reviewed the files pertaining to the undercover officers but did not review other patient files. Ultimately, the case was not prosecuted due to an overwhelming caseload at the U.S. Attorney's Office. Pursuant to a Florida medical board requirement, the DEA destroyed the patient files after five years.

Meanwhile, the FBI's investigation into the Tennessee clinics was underway. A detective involved in the FBI investigation became aware of the DEA's 2010 Hollywood clinic investigation and reached out to the DEA to obtain the files in late 2015. The FBI detective and the DEA agent discussed transferring the 2010 Hollywood files to the FBI, but the DEA agent never did so. The agent stopped responding to the FBI detective's inquiries about the files, first because of her involvement with an out-of-state murder investigation, and then because of the unexpected death of her husband. The agent then left the DEA without telling the detective, and the DEA agent who inherited the case destroyed the files according to Florida law.

Hofstetter sought to suppress all evidence of the treatment of patients at the Hollywood clinic associated with the patients' files that were seized by the DEA. Alternatively, Hofstetter asked the district court to instruct the jury that the files would have been exculpatory for her and unfavorable to the government. A magistrate judge held an evidentiary hearing and recommended denying the motion, and the district court adopted the magistrate's recommendation. Later, Hofstetter asked the district court to enter a judgment of acquittal or grant a new trial based on spoliation, which the district court also denied. On appeal, Hofstetter once again argues that her due process rights were violated due to spoliation.

The Due Process Clause of the Fourteenth Amendment requires criminal prosecutions to "comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Fairness requires "that criminal defendants be afforded a meaningful opportunity to present a complete defense." *Id.* For this reason, the prosecution must deliver "exculpatory evidence into the hands of the accused[.]" *Id.* Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), a defendant's due process rights are violated when material exculpatory evidence is suppressed, regardless of whether the suppression results from good or bad faith. *United States v. Jobson*, 102 F.3d 214, 218 (6th Cir. 1996). But when the government "fails to preserve evidence whose exculpatory value is indeterminate and only 'potentially useful' to [a] defendant, we apply a different test." *Id.* (internal quotation omitted). Potentially useful evidence is that "of which no more can be said than that it could have been subjected to tests, the results of which *might* have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (emphasis added). In this scenario, a defendant must establish three elements: (1) that the

government acted in bad faith when it failed to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before it was destroyed; and (3) that the defendant would not be able to obtain comparable evidence by other reasonable means. *Jobson*, 102 F.3d at 218 (citing *Youngblood*, 488 U.S. at 57–58).

Here, the Hollywood clinic patient files were never reviewed, so there was no evidence that they were materially exculpatory. Because the files were only potentially useful, we proceed to the *Youngblood* test.

The first two elements are inter-related because the "presence or absence of bad faith by the [government] for purposes of the Due Process Clause must necessarily turn on the [government's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Id.* (quoting *Youngblood*, 488 U.S. at 56–57 n.*). To establish bad faith, Hofstetter must show "official animus" or a "conscious effort to suppress exculpatory evidence." *Id.* (internal quotation omitted). But neither the DEA nor the U.S. Attorney's Office reviewed the content of the files before they were destroyed, and there is no evidence that the government suspected the files were exculpatory. Furthermore, the files were destroyed as part of a standard, state-mandated file closure process, so there is no suggestion of animus.

Hofstetter also had other reasonable means to obtain comparable evidence after the 2010 Hollywood files were destroyed. She had access to substantively similar patient files from the Hollywood clinic for the time period of December 2010 to December 2015, and she could have used them to argue that the patients at the Hollywood clinics received legitimate prescriptions for controlled substances. *See Kordenbrock v. Scroggy*, 919 F.2d 1091, 1103 (6th Cir. 1990) (en banc). Hofstetter has not established any of the *Youngblood* elements, nor has she shown any error in the factual findings of the district court. The district court was therefore correct in declining to acquit Hofstetter or grant a new trial based on spoliation.

ii. Brady *Obligations*

"We review denials of a motion for a new trial based on *Brady* violations for abuse of discretion, but assess the existence of a *Brady* violation de novo." *United States v. Fields*, 763 F.3d 443, 458 (6th Cir. 2014).

The government called Stan Jones as an expert witness to testify based on his experience investigating pill mills for the DEA. At trial, Jones testified about the customs and red flags of pill mills, prescribing practices of nurse practitioners at pill mills, characteristics of patient charts at pill mills, and DEA regulations pertaining to pill mills. Jones retired from the DEA and began working at Walmart as a Global Investigator in November 2018. He remained in that position at the time of his testimony.

After trial, Hofstetter presented an article by ProPublica—an investigative journalism publication—which reported that Walmart was the subject of a Department of Justice investigation for its past opioid dispensing practices. Hofstetter then moved for a judgment of acquittal, arguing in part that the government violated her due process rights by failing to disclose the Walmart investigation per its *Brady* obligations. Specifically, Hofstetter argued that she could have used the information to impeach Jones's testimony. The district court denied her request, finding that it was "unclear how an investigation of practices [at Walmart] that likely predated [Jones's] arrival . . . could have been used to impeach him, especially because [he] testified based on his experience not as a Walmart employee but as a DEA agent[.]" (Mem. Op. and Order, R. 951, PageID 70964–66.) On appeal, Hofstetter repeats her Walmart argument verbatim.

Brady requires the government to turn over evidence to a defendant if it is "both favorable to the accused and material to guilt or punishment." *Owens v. Guida*, 549 F.3d 399, 415 (6th Cir. 2008). To determine whether the government violated its *Brady* obligation, we look to three elements: (1) the challenged evidence must favor the defendant, "either because it is exculpatory, or because it is impeaching"; (2) the government must have suppressed the evidence, "either willfully or inadvertently"; and (3) the defendant must have incurred prejudice. *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). To establish prejudice, Hofstetter must show "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* at 281, 289.

Here, a *Brady* violation did not occur. First, there is no evidence demonstrating that the information about Walmart would impeach Jones. Nothing indicates that Jones worked at Walmart while the company engaged in allegedly criminal distribution practices, and Jones did

not testify based on his experience at Walmart. Second, there is no evidence that the government had access to the information about Walmart and suppressed it. *See United States v. Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (noting that the government has a duty to "disclose material evidence that is favorable to the defendant over which the prosecution team has control"). Third, even if the Walmart information had some impeachment value and the government had suppressed this evidence, Hofstetter cannot show that the nondisclosure would have produced a different verdict. Additionally, because other articles on the Walmart investigation predated the ProPublica article and were available to Hofstetter at the time of trial, she cannot establish prejudice. Finding that no element of the *Brady* test has been satisfied, we affirm the district court.

iii. Closing Remarks

"Whether statements made by a prosecutor amount to misconduct and whether such statements render a trial fundamentally unfair are mixed questions of law and fact," and we review them de novo. *United States v. Carson*, 560 F.3d 566, 574 (6th Cir. 2009).

After trial, Hofstetter challenged three statements made during closing arguments, contending that each impermissibly attempted to shift the burden of proof. The first pertains to a comment the government made during closing when it summarized the testimony of two witnesses—Kim Chambers and Gayle Fristoe—both of whom had briefly worked at the clinics:

> I want you to think about the raw emotion you saw, especially from Ms. Fristoe[,] when they talked about working at these places years after the fact. Especially with Ms. Fristoe, you could tell she still felt that emotion from being even a small part in perpetuating these places. Guilt that you've never heard about from these three defendants.
>
> We discussed decisions and choices. Ms. Chambers, five shifts, Ms. Fristoe, 24 shifts, Ms. Newman, five and a half months, Ms. Womack, 11 months, three of which she had her DEA license, Cynthia Clemons, 16 months.

(Trial Tr., R. 885, PageID 60813.) Hofstetter claims that the phrase, "guilt you never *heard* about from these three defendants" violated the rule that defendants are not obligated to present evidence or prove their innocence. (Hofstetter Br. 24 (original emphasis modified).)

Second, during Hofstetter's closing argument, defense counsel made a series of assertions about an individual who did not testify, including: "She is an investigator. She's a nurse by profession. . . . [S]he works for the Department of Health. . . . If there's been a complaint, she goes and checks the complaint out." (Trial Tr., R. 885, PageID 60961–62.) The government objected to these statements because they were not supported by evidence in the record, emphasizing that the defense had "subpoena power" but "did not subpoena" the individual about whom they were speaking. (*Id.* at PageID 60962.) Hofstetter argued the subpoena statement "was a direct effort to shift the burden" by suggesting that Hofstetter "had an obligation to subpoena and call a witness in the case." (Hofstetter Br. 24–25.)

Third, during the government's rebuttal argument, the prosecutor told the jury:

> Remember, as we get into this, that every single fact witness you heard of, like they put up two opinion witnesses and an investigator to talk about some stats, every fact witness, every person who saw something, smelled something, felt something, did something, heard something, someone who was there, somebody with knowledge, those—every single one of those witnesses was put on by the United States.

(Trial Tr., R. 897, PageID 61704.) Hofstetter argues that this statement "is a clear comment on the fact that the defendants did not call a fact witness[.]" (Hofstetter Br. 25.)

"[A] prosecutor is entitled to comment on a defendant's failure to call witnesses to contradict the government's case," but "must avoid commenting in such a way that he treads on the defendant's constitutional rights and privileges," such as the right not to testify. *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993). To evaluate whether a prosecutor's comments constitute misconduct, we use a two-step test. *Carson*, 560 F.3d at 574. We first determine whether the statements were improper. *Id.* If the statements were improper, we then consider whether they were flagrant and warrant reversal. *Id.* Flagrancy is assessed through four factors: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *Id.* (quoting *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001)).

Taking the third statement first, the government's rebuttal statement was not improper. The government may comment on a defendant's failure to rebut evidence, so long as a rebuttal witness was available, and the prosecutor does not comment "implicitly or explicitly on the defendant's failure to testify." *Moore v. Mitchell*, 708 F.3d 760, 806 (6th Cir. 2013). This is especially true when the government responds to a defense assertion that "open[s] the door to [the] rebuttal." *United States v. Wimbley*, 553 F.3d 455, 461 (6th Cir. 2009) (citation omitted). And this is exactly what happened here—the government responded to the defense's suggestion that the government obfuscated certain aspects of the evidence by highlighting the number of its fact witnesses. The rebuttal comment therefore had a proper purpose and did not impugn Hofstetter's decision not to testify.

The second statement at issue was also proper. The government was entitled to object to the defense's closing remark because it was not supported by evidence in the record. To emphasize that point, the government stressed that the defense could not speculate about a witness it chose not to call, but it did not shift the burden to Hofstetter to call witnesses in her defense.

Finally, the first statement does not constitute prosecutorial misconduct. For starters, the statement referred to "these three defendants"—meaning Clemons, Newman, and Womack, but not Hofstetter. (*See* Trial Tr., R. 885, PageID 60813.) Even assuming that the statement somehow implicitly suggested that Hofstetter failed to testify, the statement was not flagrant. The source of any impropriety stems from a single word—"from"—that the prosecutor used. Had the prosecutor said, "[g]uilt that you've never heard about *regarding* these three defendants," the statement would have been proper. *See Wimbley*, 553 F.3d at 461. Relative to the extensive evidence put forth over the course of a four-month trial, this isolated word cannot alone mislead the jury or prejudice Hofstetter. Likewise, nothing in the trial transcript indicates that the government deliberately made the statement improperly. For all these reasons, we find that no prosecutorial misconduct occurred.

Finding that Hofstetter's constitutional right to a fair trial was not violated, we decline to order a new trial on this basis and affirm the district court.

F. The Consistency of the Jury's Verdict

Hofstetter, Clemons, and Newman were each convicted of at least one count of maintaining a drug-involved premises. Clemons and Newman were acquitted of distributing controlled substances, and Hofstetter was acquitted of two counts of this offense but convicted of one. Clemons and Newman were also acquitted of conspiring to distribute controlled substances. Hofstetter, Clemons, and Newman argue that they are entitled to a new trial because the jury's verdicts as to these counts are "so inconsistent that they are arbitrary and irrational[.]" (Clemons Br. 48; *accord* Newman Br. 32–35.)

Generally, we do not review allegedly inconsistent verdicts in criminal cases. *United States v. Randolph*, 794 F.3d 602, 610 (6th Cir. 2015). This is because the Supreme Court has held that a jury may "announce logically inconsistent verdicts in a criminal case." *United States v. Clemmer*, 918 F.2d 570, 573 (6th Cir. 1990). Juries are permitted "to acquit out of compassion or compromise or because of . . . lenity." *United States v. Lawrence*, 555 F.3d 254, 262 (6th Cir. 2009) (internal quotations omitted). Accordingly, an inconsistent verdict is as likely to result from the jury's error in acquitting a defendant of one offense as it is from the jury's error in convicting her of another. *Id.* at 261–62 (citation omitted). Put differently, when an inconsistent verdict occurs, "it is unclear whose ox has been gored." *United States v. Powell*, 469 U.S. 57, 65 (1984). And because the government "is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." *Id.* Rather, the defendant's protection derives from "independent review of the sufficiency of the evidence undertaken by the trial and appellate courts." *Id.* at 67.

There are two exceptions to this general rule. We may review an inconsistent verdict only when: (1) the verdict is "marked by such inconsistency as to indicate arbitrariness or irrationality," or (2) "a guilty verdict on one count necessarily excludes a finding of guilt on another." *Randolph*, 794 F.3d at 610–11 (internal quotations omitted). The defendants' arguments do not implicate this latter exception, which only applies when a defendant is *convicted* of two "logically inconsistent" crimes. *United States v. Smith*, 749 F.3d 465, 498 (6th Cir. 2014) (quoting *United States v. Ruiz*, 386 F. App'x 530, 533 (6th Cir. 2010)); *see also*

Powell, 469 U.S. at 69 n.8. And, as we explain below, the first exception is not satisfied because the verdict is not arbitrary or irrational.

i. The Drug-Involved Premises Conviction and Conspiracy Acquittals

By convicting the defendants under § 856(a)(1), the jury must have found that they each "knowingly open[ed], lease[d], rent[ed], use[d], or maintain[ed] . . . , whether permanently or temporarily," at least one clinic for the purpose of illegally distributing controlled substances. *Elenniss*, 729 F. App'x at 428 (alterations in original). To find Clemons and Newman guilty of conspiring to distribute controlled substances unlawfully, the jury would have needed to find they "agreed to violate a drug law (such as § 841(a)(1)'s ban on distributing drugs) and that [they] knowingly and voluntarily entered into this agreement." *Wheat*, 988 F.3d at 306. What then, explains the jury's acquittal on the conspiracy counts? The jury could have found that the government proved beyond a reasonable doubt that the defendants used the clinics for unlawful drug distribution, but not that they knowingly entered an agreement to violate a drug law. Such a finding is internally consistent.

This logic applies even if the jury convicted Clemons, Newman, and Womack of maintaining a drug-involved premises under an aiding and abetting theory. If the jury found the defendants guilty of aiding and abetting the maintenance of a drug-involved premises, it would have concluded that they took "an affirmative act in furtherance of th[e] offense" and intended to facilitate the offense's commission. *Rosemond*, 572 U.S. at 71. Aiding and abetting does not "presuppose the existence of an agreement." *United States v. McCullah*, 745 F.2d 350, 355 (6th Cir. 1984) (quoting *Pereira v. United States*, 347 U.S. 1, 11 (1954)). Instead, aiding and abetting "have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspiracy." *Id.* (citation omitted). In other words, "[c]onspiring to commit a crime with another and aiding and abetting in its substantive commission are distinct crimes." *United States v. Holmes*, 797 F. App'x 912, 918 (6th Cir. 2019) (quoting *United States v. Townes*, 512 F.2d 1057, 1058 (6th Cir. 1975)). Conspiracy requires an agreement; aiding and abetting does not.

The different elements of these two distinct offenses demonstrate that it was not arbitrary or irrational for the jury to convict Clemons, Newman, and Womack of maintaining a drug-involved premises while simultaneously acquitting them of conspiring to distribute controlled substances.

ii. The Drug-Involved Premises Conviction and Distribution Acquittals

The same is true regarding the jury's acquittal of Clemons and Newman on the substantive distribution charges. The distribution counts alleged that Clemons, Womack, and Hofstetter illegally distributed controlled substances on specific occasions: on or about November 14, 2013, on or about February 10, 2014, and on or about September 8, 2014. The jury found that the government met its burden of proof only as to Hofstetter and the November 14, 2013 occurrence. Acquitting Clemons and Womack of their charges means that the jury determined the government did not prove that they had distributed controlled substances illegally (or aided and abetted someone who did) on those specific dates. This outcome is not per se inconsistent with the maintaining-a-drug-involved premises convictions. The jury may have concluded that Clemons and Womack illegally distributed controlled substances on dates other than those listed in the indictment. Alternatively, the jury may also have concluded that Clemons and Womack aided and abetted the use of the clinics for the purpose of distributing controlled substances—i.e., they took an affirmative step to further the offense—but that they did not illegally distribute the prescriptions themselves. These possibilities demonstrate that the jury's verdict does not warrant appellate review.

iii. Hofstetter's Conviction and Newman's Acquittal of Illegal Distribution

Finally, Hofstetter alone argues that it was internally inconsistent for the jury to convict her and simultaneously acquit Newman of the same count of aiding and abetting the distribution of controlled substances. She claims that her guilt depends on Newman's guilt because they were both charged with aiding and abetting each other.

The relevant count of the indictment alleges the following: "[O]n or about November 14, 2013 . . . SYLVIA HOFSTETTER and COURTNEY NEWMAN, *and others*, aided and abetted by one another" knowingly distributed controlled substances unlawfully. (Fourth Superseding

Indictment, R. 320, PageID 5235 (emphasis added).) Similarly, the jury concluded that "defendants Hofstetter and Newman, aided and abetted by one another *and others*" knowingly did the same. (Jury Verdict, R. 860, PageID 60531 (emphasis added).) Based on this language, the jury could have decided that the government submitted sufficient evidence to show that Hofstetter aided and abetted some other nurse practitioner in issuing an illegal prescription—either alone or with other staff members or the Florida partners—but that the government did not produce enough evidence to prove beyond a reasonable doubt that Newman was involved. Accordingly, the verdict is not irrational.

Admittedly, the evidence presented in this case suggests that the outcome on this count is somewhat inconsistent. But we may not review a claim of inconsistent verdicts between co-defendants on appeal. *See United States v. Ross*, 703 F.3d 856, 883 (6th Cir. 2012) (declining to review the jury's decision to acquit one co-conspirator, but not the other). "[A]ll we know is that the verdicts are inconsistent"—we do not know whether the jury "really meant" to acquit or convict. *Powell*, 469 U.S. at 68. For this reason, Hofstetter must rely on sufficiency-of-the-evidence review to overturn her conviction, and we have already concluded that the record supports the jury's verdict. Having been "found guilty beyond a reasonable doubt after a fair trial, [Hofstetter] has no constitutional ground to complain that [Newman] was acquitted." *See Randolph*, 794 F.3d at 610 (quoting *Harris v. Rivera*, 454 U.S. 339, 348 (1981)).

In sum, the jury's decision to acquit Clemons, Newman, and Womack of conspiracy and the substantive drug offenses is not inconsistent with the jury's decision to convict them of maintaining a drug-involved premises. And the jury's decision to convict Hofstetter and acquit Newman of aiding and abetting the issuance of the same unlawful prescription is not reviewable.

III. CONCLUSION

For the reasons articulated above, we affirm the district court on all issues.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 3:15-CR-27-TAV-DCP
	)	
SYLVIA HOFSTETTER,	)	
COURTNEY NEWMAN,	)	
CYNTHIA CLEMONS, and	)	
HOLLI WOMACK,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This criminal case is before the Court on two motions for judgment of acquittal and a new trial, one by defendant Hofstetter [Doc. 890] and the other jointly submitted by defendants Newman, Clemons, and Womack [Doc. 870]. The government responded in opposition [Doc. 891], and defendants did not timely reply.[1] Also before the Court is defendant Hofstetter's motion [Doc. 892] for oral argument on her motion for judgment of acquittal and a new trial, which the government opposes [Doc. 893]. After considering the record and controlling law, for the reasons that follow, the Court will **DENY** defendants' motions [Docs. 870, 890, 892].

[1] Defendant Hofstetter filed a "supplement" [Doc. 899] to her motion, along with a motion [Doc. 898] seeking leave to do so. As opposed to a supplement, the Court interprets defendant's filing as an untimely reply to the government's response to her motion. *Compare* LR 7.1(c), *with* LR 7.1(d); *see also* E.D.TN. LR 7.1(a). The government has not responded to defendant's filing, and the time for doing so has passed. In light of the lack of objection, the Court will excuse the untimeliness of defendant's reply and consider the arguments set forth therein. To that extent, defendant's motion [Doc. 898] is **GRANTED**.

I. Background

This case arises out of the operation of pain management clinics by the Urgent Care & Surgery Center Enterprise ("UCSC") in Hollywood, Florida and East Tennessee. According to the Fourth Superseding Indictment [Doc. 320], the clinics at issue were in fact "pill mills" where medical providers wrote unreasonable and medically unnecessary prescriptions for opioids and other narcotics [*Id.* ¶ 2].

Defendant Sylvia Hofstetter, who had previously worked at UCSC's clinic in Hollywood, Florida, administered and managed two (2) clinics owned and operated by UCSC in East Tennessee, the Comprehensive Healthcare Systems ("CHCS") clinics [*Id.* ¶¶ 20, 54.4, 54.21–23]. She also owned, administered, and managed East Knoxville Healthcare Services ("EKHCS"), a clinic in Knoxville, Tennessee [*Id.* ¶ 20]. Defendants Courtney Newman and Cynthia Clemons were employed as nurse practitioners at CHCS and EKHCS [*Id.* ¶¶ 23–24], and defendant Holli Womack was employed as a nurse practitioner at EKHCS [*Id.* ¶ 25].

An investigation into UCSC and these pain clinics ultimately resulted in the return of a twenty-one-count indictment [Doc. 320]. Defendant Hofstetter was charged with a RICO conspiracy (Count One), conspiracies to illegally distribute and dispense controlled substances (Counts Two and Four), money laundering conspiracies (Counts Three and Five), money laundering (Counts Six through Ten), maintaining drug-involved premises (Counts Eleven through Thirteen), and illegally distributing and dispensing controlled

substances (Counts Fourteen through Nineteen). Defendants Newman and Clemons were charged with conspiracies to illegally distribute and dispense controlled substances (Counts Two and Four), maintaining drug-involved premises (Counts Eleven and Thirteen), and illegally distributing and dispensing controlled substances (Counts Fourteen and Seventeen as to defendant Newman; Counts Fifteen, Sixteen, Eighteen, and Nineteen as to defendant Clemons). The indictment charged defendant Womack with conspiracies to illegally distribute and dispense controlled substances (Counts Two and Four) and maintaining a drug-involved premises (Count Thirteen).

Defendants proceeded to a jury trial on October 21, 2019. At the close of the government's case-in-chief, all defendants moved for a judgment of acquittal [Docs. 818, 828], which the Court denied. Rough Draft Transcript, Jan. 27, 2020, p. 209–17. After a nearly forty-day long trial and several days of deliberation, the jury found defendant Hofstetter guilty on the RICO conspiracy charge, the two drug conspiracy charges, the two money laundering conspiracy charges, two counts of money laundering, the three counts charging maintenance of a drug-involved premises, and one count of illegally distributing and dispensing controlled substances (i.e., Count Fourteen) [Doc. 860]. Defendants Newman, Clemons, and Womack were acquitted on several charges, but all three were found guilty on Count Thirteen, charging maintenance of a drug-involved premises. Additionally, defendant Clemons was convicted of a second count of maintaining a drug-involved premises (i.e., Count Eleven).

Defendants now renew their motions for acquittal and alternatively request a new trial [Docs. 870, 890].

II. Legal Standards

When reviewing a motion for judgment of acquittal based on insufficiency of the evidence under Rule 29 of the Federal Rules of Criminal Procedure, the Court must decide "whether, after viewing the evidence in a light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gardner*, 488 F.3d 700, 710 (6th Cir. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In doing so, the Court may not weigh evidence, assess witness credibility, or "substitute its judgment for that of the jury." *United States v. Chavis*, 296 F.3d 450, 455 (6th Cir. 2002). This standard places a "very heavy burden" on defendants. *Id.*

Alternatively, the Court "may vacate any judgment and grant a new trial" under Rule 33 "if the interest of justice so requires." Fed. R. Crim. P. 33(a). A Rule 33(a) motion "may be premised upon the argument that the jury's verdict was against the manifest weight of the evidence," *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007), but such motions should be granted only "in the extraordinary circumstances where the evidence preponderates heavily against the verdict." *Id.* (quoting *United States v. Turner*, 490 F. Supp. 583, 593 (E.D. Mich. 1979)). In contrast to a Rule 29 motion, however, a district judge considering a Rule 33 motion "may act as a thirteenth juror,

assessing the credibility of witnesses and the weight of the evidence." *Id.* (citing *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998)).

III. Analysis

The Court first turns to defendant Hofstetter's motion [Doc. 892] for oral argument on her motion for judgement of acquittal and a new trial. The government has responded in opposition [Doc. 893]. For the reasons discussed by the government in its response, the Court does not find that the issues raised in defendant's motion necessitate oral argument. Rather, the relevant facts and legal arguments are adequately presented in the parties' extensive filings [*see* Docs. 890, 891] such that the decision process would not be significantly aided by oral argument. Accordingly, defendant's motion for oral argument [Doc. 892] is **DENIED**.

Next, turning to defendants' opposed motions for acquittal and a new trial [Docs. 870, 890; *see* Doc. 891], each of defendants' arguments falls into one of three different categories of challenges: (1) challenges to the jury's verdict (including alleged inconsistencies in the verdict, erroneous jury instructions, and the unconstitutionality of 21 U.S.C. § 856(a)(1), the statute proscribing maintenance of a drug-involved premises), (2) issues arising from the trial of this case (including alleged evidentiary errors and prosecutorial misconduct), or (3) challenges to pre-trial rulings (including rulings on venue, spoliation, the admissibility of alleged thefts by defendant Hofstetter, and the requested trial continuance). The Court will address each category in turn.

A. Challenges to the Verdict

1. Inconsistent Verdicts

Defendants Newman, Clemons, and Womack (the "nurse practitioner defendants") argue that it was inconsistent for the jury to acquit them of Counts Two, Four, Fourteen, Sixteen, and Eighteen yet also find them guilty of Counts Eleven and Thirteen [Doc. 870 p. 6–8]. Although inconsistent verdicts are generally not reviewable as the government argues [Doc. 891 p. 3–4], defendants contend that this case falls into one of the two exceptions to this rule because the jury verdicts are sufficiently inconsistent to indicate arbitrariness or irrationality [Doc. 870 p. 10]. The Court finds that the verdicts are not logically inconsistent and that even if they were, they would not be reviewable.

Inconsistent verdicts in a criminal case "generally are not reviewable." *United States v. Randolph*, 794 F.3d 602, 610 (6th Cir. 2015). Indeed, "[c]onsistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." *United States v. Powell*, 469 U.S. 57, 62 (1984) (quoting *Dunn v. United States*, 284 U.S. 390, 393 (1932) (affirming the continuing validity of this rule)). Even where verdicts are inconsistent, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* at 64–65 *(citing Dunn*, 284 U.S. at 393). As the Supreme Court has noted, "inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the

Government at the defendant's expense" because "[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* at 65. But the government is precluded from correcting such an error in defendant's favor by the Constitution's Double Jeopardy Clause. *Id.* (citing *Green v. United States*, 355 U.S. 184, 188 (1957), and *Kepner v. United States*, 195 U.S. 100, 130, 133 (1904)). Thus, even where the jury evidently failed to follow the court's instructions, uncertainty as to which party the inconsistent verdicts benefitted, and the government's inability to challenge an acquittal, "militate[] against review of such convictions at the defendant's behest." *Id.*

The Sixth Circuit has recognized two exceptions to the general rule of verdict non-reviewability, which is also known as the "*Dunn* rule." *Randolph*, 794 F.3d at 610–11; *see also Powell*, 469 U.S. at 63. First, where jury verdicts "are marked by such inconsistency as to indicate arbitrariness or irrationality, . . . relief may be warranted." *Randolph*, 794 F.3d at 610 (quoting *United States v. Lawrence*, 555 F.3d 254, 263 (6th Cir. 2009)). *But see Lawrence*, 555 F.3d at 263 (stating that in light of *Powell* and other authorities, "the district court was on shaky footing to even entertain [defendant's] inconsistent-verdicts challenge"). Second, "where a guilty verdict on one count necessarily excludes a finding of guilt on another," producing a "mutually exclusive" verdict, a court may review the verdict. *Randolph*, 794 F.3d at 610–11 (quoting *United States v. Ruiz*, 386 F. App'x 530, 533 (6th Cir. 2010)). In formulating the second

exception, the Supreme Court "contemplated a situation in which a defendant receives two guilty verdicts that are logically inconsistent, for example if a jury convicted a defendant of both larceny and embezzlement based on the same underlying conduct." *Ruiz*, 386 F. App'x at 533; *see also Powell*, 469 U.S. at 69 n.8 (citing *United States v. Daigle*, 149 F. Supp. 409, 414 (D.D.C. 1957)).

Defendants argue that this case falls within the first exception: the "not guilty" verdicts in Counts Two, Four, Fourteen, Sixteen, and Eighteen are "marked by such inconsistency" with the "guilty" verdicts in Counts Eleven and Thirteen "as to indicate arbitrariness or irrationality" [Doc. 870 p. 10].[2] For this reason, defendants contend, the Court should grant them a judgment of acquittal on Counts Eleven and Thirteen under Rule 29 [*Id.*].

Defendants advance several arguments in support of their argument these verdicts are extraordinarily inconsistent. First, they assert that because it was uncontested that the defendants prescribed the Schedule II controlled substances referenced in Counts Two and Four and that they worked at the clinics, the jury's acquittal of defendants on those

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[2] Counts Two and Four, as described on the verdict form, charged defendants Hofstetter, Newman, Clemons, and Womack with conspiracy to distribute certain Schedule II controlled substances at the Gallaher View Road and Lenoir City clinics in Count Two and the Lovell Road Clinic in Count Four [Doc. 860 p. 1, 4]. Counts Fourteen, Sixteen, and Eighteen, as described on the verdict form, charged defendants Hofstetter and Newman (Count Fourteen) and defendants Hofstetter and Clemons (Counts Sixteen and Eighteen) with distributing or causing to be distributed, outside the usual course of professional practice and not for a legitimate purpose, Schedule II controlled substances on specific dates [*Id.* at 10–12]. Finally, Counts Eleven and Thirteen, again as described on the verdict form, charged defendants Hofstetter, Newman, and Clemons (Count Eleven) and defendants Hofstetter, Newman, Clemons, and Womack (Count Thirteen) with maintaining a premises for the purpose of illegally distributing Schedule II controlled substances [*Id.* at 8–9].

counts must logically have rested on the conclusion that defendants did not prescribe the substances unlawfully [Doc. 870 p. 7]. Similarly, defendants argue that it was uncontested that defendants wrote the prescriptions at issue in Counts Fourteen, Sixteen, and Eighteen, so logically-speaking, the jury must have concluded that defendants did not illegally prescribe the controlled substances. Thus, defendants conclude that it is illogical and irreconcilable for the jury to acquit defendants on "the only logical basis for the underlying charges [the illegal nature of the prescriptions] only to convict on another count that required them to find" the substances were issued illegally, i.e. Counts Eleven and Thirteen [*Id.* at 8].

Defendants' arguments rest on a mistaken assumption that betrays the speculative nature of their conclusion that the verdicts are illogical and irreconcilable. Defendants' characterization of the verdicts in Counts Two and Four and Counts Fourteen, Sixteen, and Eighteen as inconsistent with the verdicts in Counts Eleven and Thirteen assumes that the jury's verdicts in Counts Two, Four, Fourteen, Sixteen, and Eighteen reflect the jury's finding that defendants did not prescribe "outside the usual scope of professional practice and without a legitimate purpose," i.e. illegally [*Id.* at 9–10]. Yet, the elements of these offenses as described in the jury charge reveal this assumption does not follow necessarily from the verdicts returned. Rather, in Counts Two and Four, the jury was charged that it must find two things for each defendant: (1) "that two or more persons conspired, or agreed, to distribute" the substances at issue, and (2) "that the person knowingly and voluntarily joined the conspiracy." *See* Closing Jury Charge, p. 59–60.

The instructions for Counts Two and Four incorporated the instructions regarding the law of conspiracy, *id.* at 59, which charged, among other things, that if the jury was convinced a criminal agreement existed, then the government must prove that a defendant "knew the conspiracy's main purpose, and that she voluntarily joined it intending to help advance or achieve its goals." *Id.* at 30. As the government suggests [Doc. 891 p. 4], it is perfectly possible that the jury concluded that the nurse practitioner defendants did not satisfy the second element on Counts Two and Four, i.e. the jury could have found that defendants did not knowingly and voluntarily join the conspiracy.

As to Counts Fourteen, Sixteen, and Eighteen, the jury was charged that they must find: (1) that the defendant knowingly or intentionally distributed or caused to be distributed a controlled substance by writing prescriptions outside the scope of professional medical practice and not for a legitimate medical purpose, and (2) that the defendant knew at the time of distribution that the substance was a controlled substance. *See* Closing Jury Charge, p. 83. Although it is possible, as defendants argue, that the jury found defendants did not write prescriptions illegally as a general matter and so they did not do so on the occasions specified in Counts Twelve, Fourteen, and Eighteen, it is also possible that the jury decided the government had not established beyond a reasonable doubt that the charged practitioners prescribed illegally on November 14, 2013, to Anna Vann-Keathley, on February 10, 2014, to Sandra Boling, and on September 8, 2014, to Henry Reus, *id.* at 95–97, or as the government speculates [Doc. 891 p. 4], the jury might have acquitted defendants on these counts because they did not find the death

enhancements applied,[3] or the jury might have decided to exercise lenity toward the nurse practitioner defendants on the drug distribution counts.

As the above discussion reveals, defendants' construction of the reasoning underlying the verdicts in Counts Two, Four, Fourteen, Sixteen, and Eighteen—and thus their conclusion that those verdicts are inconsistent with the verdicts in Counts Eleven and Thirteen—is not logically compelled but speculative. Much less can it be said that the jury verdicts "are marked by such inconsistency as to indicate arbitrariness or irrationality." *Randolph*, 794 F.3d at 610 (quoting *United States v. Lawrence*, 555 F.3d 254, 263 (6th Cir. 2009)). Because no exception to the general rule of nonreviewability applies, the rationales for preserving the jury verdicts in Counts Eleven and Thirteen, despite any conjectural inconsistency with other verdicts, carry their full force in this case. *Powell*, 469 U.S. at 64–65.

Indeed, as the government argues [Doc. 891 p. 6–7], any inconsistency in the verdicts resembles the inconsistency that the Supreme Court preserved from review in *United States v. Powell*. There, the defendant argued the jury could not have acquitted her of conspiracy to possess cocaine and possession of cocaine and consistently found her guilty of using the telephone to facilitate those offenses. 469 U.S. at 69. Yet, the Court held that the *Powell* defendant's proposed exception to the *Dunn* rule for cases where the jury acquitted defendant of a predicate felony but convicted of the compound felony

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[3] The Supreme Court has repeatedly affirmed "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Powell*, 469 U.S. at 63 (quoting *Harris v. Rivera*, 454 U.S. 339, 346 (1981), and citing *Standefer v. United States*, 447 U.S. 10, 22–23 (1980)).

"threaten[ed] to swallow the rule." *Id.* at 67–68. The *Powell* court noted that the Supreme Court articulated the *Dunn* rule in a case with facts not dissimilar to *Powell*: "In *Dunn*, the defendant was acquitted of unlawful possession, and unlawful sale, of liquor, but was convicted of maintaining a nuisance by keeping unlawful liquor for sale at a specified place." *Id.* And the Court acknowledged the persuasiveness of the dissent's argument that "the jury could not have convicted on the nuisance count without finding that the defendant possessed, or sold, intoxicating liquor." *Id.* at 68. Recognizing that the government, in *Powell*, did not dispute the inconsistency of the verdicts, the Supreme Court found that defendant was "given the benefit of her acquittal on the counts on which she was acquitted" and that it was "neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted." *Id.* at 69. *Powell* exemplified, the Supreme Court wrote, the case where "all we know is that the verdicts are inconsistent," and the defendant's argument "necessarily assumes that the acquittal was proper—the one the jury 'really meant,'" but "[t]his, of course, is not necessarily correct." *Id.* at 68.

Applying *Powell* here, even assuming defendants' assumption that the jury can only be viewed as having convicted them in Counts Eleven and Thirteen based on a finding they rejected in Counts Two, Four, Fourteen, Sixteen, and Eighteen, namely that defendants wrote prescriptions illegally, this inconsistency falls squarely within the protections of the *Dunn* rule. And, defendants have not identified a precedent that supports their proposed application of an exception in this case. The only case

defendants cite in support of reviewing the verdict here did not involve inconsistent verdicts, as is alleged here, but "internal inconsistency in the same count, as it relates to the same defendant, in the same verdict" [Doc. 870 p. 10 (citing *Randolph*, 794 F.3d at 613)]. *See Randolph*, 794 F.3d at 611.[4] Accordingly, the Court rejects defendants' challenge to the verdicts based on inconsistency.

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[4] The government, perhaps trying to address all possible arguments for reviewing the verdicts, generously interprets defendants' motion as also citing *United States v. Lawrence*, 555 F.3d at 263, and *United States v. Ruiz*, 386 F. App'x at 533, in support of defendants' verdict inconsistency argument. But, as the government contends [Doc. 891 p. 7–9], neither of these opinions support review of the verdicts here.

The Sixth Circuit panel in *Lawrence* overruled the district court's finding that a sentence of life imprisonment on one count and a sentence of death on the other were reviewable because they could only be explained by "complete arbitrariness." 555 F.3d at 261–62. Most of the Court's reasoning and its holding pertained to whether inconsistent juror findings, as opposed to inconsistent verdicts, could justify subjecting the verdicts to review, *id.* at 263–68; thus, *Lawrence* is distinct factually and legally from this case.

In *Ruiz*, the Sixth Circuit found that *Powell* controlled and precluded review of jury verdicts where the jury acquitted the defendant of conspiracy to distribute cocaine and convicted her of violating the Travel Act, 18 U.S.C. § 1952(a)(3), which prohibits traveling in interstate commerce with the intent to promote or facilitate an unlawful activity. 386 F. App'x at 532–33. The unlawful activity underlying the Travel Act charge was identified as "a business enterprise involving an unlawful conspiracy to possess with the intent to distribute a controlled substance," and defendant argued that the conspiracy charge and Travel Act were "mutually exclusive crimes" because the jury could not have convicted her of the Travel Act charge without finding that a conspiracy existed, but, she argued, her acquittal on the conspiracy charge demonstrated that they did not so find. *Id.* at 532. Quoting *Powell*, the Sixth Circuit held, "[t]here is no reason to vacate a conviction 'merely because the verdicts cannot rationally be reconciled.'" *Id.* at 533–34 (quoting 469 U.S. at 69). As the government contends, "the facts in the instant case are conceptually indistinguishable from the Travel Act conviction in *Ruiz*" [Doc. 891 p. 9], in that defendants here argue the jury found defendants not guilty in certain counts of a necessary element of offenses of which the jury found them guilty in other counts. Thus, *Ruiz* cuts against review of the verdicts in this case.

Moreover, even if the government is correct that defendants intended to argue the verdicts in this case were mutually exclusive, *Ruiz* makes clear that the mutually exclusive exception applies to inconsistency between two guilty verdicts, rather than inconsistency between an acquittal on one count and a guilty verdict on another. *See Ruiz*, 386 F. App'x at 533.

Defendant Hofstetter advances a similar argument as to the inconsistency of the jury's acquittal of defendant Newman on Count Fourteen and conviction of defendant Hofstetter on the same count [Doc. 890 p. 22]. Although defendant Hofstetter does not support her contention that this inconsistency provides a basis for acquittal with any authority, the government's response, which quotes *United States v. Lawrence* and *Powell* [Doc. 891 p. 27], correctly assumes that the rule of verdict nonreviewability applies similarly to inconsistent verdicts between different defendants. Indeed, as the government argues [*id.*], the jury's acquittal of defendant Newman is quite as curious as its conviction of defendant Hofstetter on Count Fourteen. As the parties agree [*id.*; Doc. 890 p. 22], defendant Newman wrote the prescription at issue in Count Fourteen. But the inconsistency of finding defendant Hofstetter guilty but not the defendant who wrote the prescription could indicate that the jury decided to exercise lenity toward defendant Newman. It does not "show that they were not convinced of . . . defendant [Hofstetter]'s guilt." *Powell*, 469 U.S. at 64–65 (citing *Dunn*, 284 U.S. at 393). Thus, the Court will also decline to vacate defendant Hofstetter's conviction on Count Fourteen.

2. Plainly Erroneous Jury Instructions

Both the nurse practitioner defendants and defendant Hofstetter also argue that the jury instructions for Counts Eleven through Thirteen were plainly erroneous and that this

plain error provides a basis for granting defendants a new trial on these counts [Doc. 870 p. 10–14; Doc. 890 p. 6–8].[5] The contested instruction reads as follows, in part:

> (4) In order to prove the defendant guilty of opening, using, or maintaining a drug involved premises, the government must prove each of the following elements beyond a reasonable doubt as to each of Counts Eleven, Twelve, and Thirteen:
>
> (A) First, that the defendant knowingly opened, used, or maintained a place, whether permanently or temporarily; and
>
> (B) Second, that the defendant did so for the purpose of distributing any controlled substance.

Closing Jury Charge, p. 76. Defendants contend that it was plain error that the jury was not instructed that it must find a third element beyond a reasonable doubt to convict defendants under 21 U.S.C. § 856(a)(1), that is that defendants' conduct under these counts was unlawful, in that they prescribed outside the usual course of professional practice and without a legitimate medical purpose [Doc. 870 p. 11]. The government argues that the instructions are not plainly erroneous [Doc. 891 p. 10].

"A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection" prior to jury deliberation. Fed. R. Crim. P. 30(d). "Failure to object . . . precludes appellate review, except as permitted under Rule 52(b)." *Id.* Defendants do not contend that they objected to the Court's jury instruction prior to jury deliberation, that they did not receive the opportunity to object to the instructions, or that they

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[5] As acknowledged by defendant Hofstetter [Doc. 890 p. 6], defendant Hofstetter's argument on this issue draws almost verbatim from the nurse practitioners' motion although defendant Hofstetter challenges her convictions on Counts Eleven through Thirteen, while the nurse practitioner defendants challenge their convictions on Counts Eleven and/or Thirteen. Thus, the Court principally references the nurse practitioners' motion under this section.

proposed an alternative instruction that was not adopted over their objection. In fact, defendants received multiple opportunities to request instructions and object to the closing jury charge. At an informal charge conference and two (2) formal charge conferences, the Court discussed a series of jury charge drafts, the first of which generally incorporated the Court's typical instructions, defendants' requested instructions [Docs. 676, 677, 812, 829, 830, 842], and certain instructions submitted pretrial [Doc. 675] into the comprehensive jury charge proposed by the government [Docs. 671, 813, 838]. Prior to each conference, the Court provided a copy of the then-proposed jury charge to the parties for their review, and the parties had the opportunity at each conference to raise any objections to the jury charge, to propose alternative wording, and to advocate for their proposed instruction when another party opposed it. The first jury charge draft included identical language to that quoted above, language that came from the government's proposed instructions for Counts Eleven through Thirteen [Doc. 671 p. 53], and defendants do not suggest that they objected to this language or proposed alternative language that the Court later rejected. Thus, as the government argues [Doc. 891 p. 10], and as defendants impliedly acknowledge, a plain error standard applies [Doc. 870 p. 14]. *See* Fed. R. Crim. P. 30(d), 52(b); *see also United States v. Thomas*, 11 F.3d 620, 629 (6th Cir. 1993) ("Because defendants failed to object to the jury instructions, we review only for plain error.").

To demonstrate plain error, defendants must show: "1) an error 2) that is plain and 3) that seriously affects [their] fundamental rights." *United States v. Balark*, 412 F. App'x 810, 814 (6th Cir. 2011) (quoting *United States v. Aaron*, 590 F.3d 405, 408 (6th Cir. 2009)). If defendant satisfies these requirements, the court "has discretion to 'correct the error only if the error seriously affected the fairness, integrity or public reputation of the judicial proceedings.'" *Id.* (quoting *Aaron*, 590 F.3d at 408). "An instruction is not plainly erroneous unless there was an egregious error, one that directly leads to a miscarriage of justice." *Id.* (quoting *United States v. Yang*, 281 F.3d 534, 551 (6th Cir. 2002)). Defendants cannot meet this standard.

First and fatally, defendants do not show that the Court erroneously instructed the jury. Defendants appear to argue that the Court's charge as to Counts Eleven through Thirteen should have instructed the jury that they must find (1) each defendant knowingly opened, used, or maintained a premises, (2) for the purpose of distributing any controlled substance, and (3) she did so unlawfully or outside the scope of professional practice and without a legitimate medical purpose. Defendants seem to argue that because Congress enacted § 856(a)(1) to address the problem of distributing substances "commonly understood to be illegal in any circumstance, such as crack cocaine" [Doc. 870 p. 12], the absence of an instruction that substances must be distributed illegally under § 856(a)(1) is confusing and misleading [*Id.* at 12–13]. If the jury followed the instructions only as written, defendants contend, "they had little choice but to convict the Defendants, even if

they believed that the Defendants had done nothing unlawful" [*Id.* at 13]. Yet, as defendants appear to acknowledge [*Id.* at 11–12], the Court's instruction tracks the language of the statute. Title 21, § 856(a)(1) of the United States Code states, "it shall be unlawful to—(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance."

And, although the Sixth Circuit does not have a pattern instruction for § 856(a)(1), precedent and other circuits' pattern instructions support the Court's formulation of the elements for finding a defendant guilty under § 856. In *United States v. Chaney*, a case involving allegations of a pain clinic unlawfully distributing controlled substances, namely oxycodone and hydrocodone, the Sixth Circuit stated that convicting a defendant on charges of maintaining drug-involved premises in violation of 21 U.S.C. § 856 required the government to "prove beyond a reasonable doubt that the defendant (1) knowingly (2) maintained any place, whether permanently or temporarily, (3) for the purpose of distributing a controlled substance." 921 F.3d 572, 589–90 (6th Cir. 2019) (quoting *United States v. Lang*, 717 F. App'x 523, 545 (6th Cir. 2017)); *see also Lang*, 717 F. App'x at 545 (applying this formulation of the § 856 elements to a defendant accused of operating a Tennessee pain clinic as a "pill mill"). The Court's charge folded the first element into the second element, but it is otherwise nearly identical to the formulation in *Chaney*, and the Court's instruction is practically indistinguishable from

the Seventh Circuit's and the Eighth Circuit's pattern instructions for § 856.[6] The other circuits with published pattern instructions for this provision have slightly different formulations, but none includes the element defendants suggest it is legal error to omit.[7]

Defendants cite two cases in support of their contention that the Court erred by failing to include language clarifying that § 856 "require[s] an unlawful purpose" [Doc. 870 p. 12], both of which are non-controlling district court opinions outside this circuit. In support, defendants cite opinions from the Middle District of Pennsylvania and the Southern District of West Virginia involving opioid prescriptions that specified that a conviction under § 856(a)(1) requires the government to show that defendant maintained the premises for the purpose of distributing outside the usual course of professional practice and not for a legitimate medical purpose. *See United States v. Li*, No. 3:16-cr-194, 2019 WL 1126093, at *8 (M.D. Penn. Mar. 12, 2019) (government must

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[6] *See* Committee on Federal Criminal Jury Instructions of the Seventh Circuit, 21 U.S.C. § 856(a)(1) Maintaining Drug-Involved Premises–Elements, Pattern Criminal Jury Instructions of the Seventh Circuit 720 (2012 ed. plus 2015–2017 and 2018 changes) ("The government must prove both of the following elements beyond a reasonable doubt: 1. The defendant knowingly [opened; leased; rented; used; maintained] a place; and 2. The defendant did so for the purpose of [manufacturing; distributing; using] a controlled substance. The government is not required to prove that was the defendant's sole purpose."), and Judicial Committee on Model Jury Instructions for the Eighth Circuit, Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2017 ed.) ("The crime of maintaining a place for the purpose of [distributing] a controlled substance as charged in [Count __ of] the Indictment has two elements, which are: *One*, the defendant knowingly [maintained] a[n] (describe place as charged in the Indictment); and *Two*, the defendant did so for the purpose of [distributing] a controlled substance (describe controlled substance as charged in the Indictment).").

[7] 3 Modern Federal Jury Instructions-Criminal P 56.06 (2020); *see also* Ninth Circuit Jury Instructions Committee, Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, 9.31 Controlled Substance—Maintaining Drug-Involved Premises (21 U.S.C. § 856(a)(1)), at 430.

show that defendant "maintained [the premises] for the purpose of distributing or dispensing outside the usual course of professional practice and not for a legitimate medical purpose any controlled substance"), and *United States v. Nasher-Alneam*, 399 F. Supp. 3d 561, 565 (S.D. W. Va. 2019) (government had to show that defendant maintained the premises "for the purpose of illegally distributing the controlled substances identified in the indictment[,] not for legitimate medical purposes in the usual course of professional medical practice and beyond the bounds of medical practice.").

Although defendants could have cited *Li* and *Nasher-Alneam* prior to jury deliberations as a basis for modifying the government's proposed instruction on Counts Eleven through Thirteen, neither opinion establishes that failure to include an "illegal purpose" element in the jury charge is legal error in an opioid prescriptions case. This is especially true considering the Sixth Circuit's contrary formulations of the § 856 elements in *Lang* and *Chaney*. Both cases involved similar facts to those before the Court—pain clinics allegedly distributing controlled substances illegally—and yet the Sixth Circuit adopted the same list of elements that it applied to convictions under § 856(a)(1) involving controlled substances commonly understood to be illegal. *See Lang*, 717 F. App'x at 545 (citing *United States v. Russell*, 595 F.3d, 633, 644 (6th Cir. 2010) (a case in which the Sixth Circuit upheld convictions under § 856(a)(1) involving crack cocaine) for the § 856 elements). Indeed, the *Li* court signaled with a "*cf.*" that its formulation differed from that offered in *Lang*. 2019 WL 1126093, at *8; *see also Lang*, 717 F. App'x at 545 (holding that convicting a "pill mill" defendant under § 856(a)(1)

required the government to show a defendant "(1) knowingly (2) maintained any place . . . , (3) for the purpose of distributing a controlled substance"). Thus, defendants fail to demonstrate that the contested language as to Counts Eleven through Thirteen is legally erroneous because, like the formulations of the elements of § 856 in *Lang* and *Chaney*, it does not use the language "unlawful" or "illegal" or "outside the usual course of professional practice and not for a legitimate medical purpose."

Moreover, as the government emphasized in its response [Doc. 891 p. 10], the jury charge *did* instruct the jury that a conviction under § 856 rests on a finding that the controlled substances at issue in Counts Eleven and Thirteen were prescribed illegally. *United States v. Beaty*, 245 F.3d 617, 621 (6th Cir. 2001) (instructing that "no single provision of the jury charge may be viewed in isolation, rather, the charge must be considered as a whole" (citing *United States v. Lee*, 991 F.2d 343, 350 (6th Cir. 1993))). First, in its summary of the fourth superseding indictment, the Court stated that Counts Eleven through Thirteen charged defendants with "maintaining drug-involved premises, that is knowingly and intentionally opening, using, and maintaining businesses for the purpose of *illegally* distributing controlled substances *outside the usual course of professional practice and not for a legitimate medical purpose* in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2." Closing Jury Charge, p. 22 (emphasis added). Then, immediately above the contested language in the section of the charge pertaining to Counts Eleven through Thirteen, the Court stated that the indictment charged defendants in Counts Eleven through Thirteen with maintaining premises "for the purpose of

illegally distributing Schedule II controlled substances." *Id.* at 75–76 (emphasis added). Finally, as the government notes [Doc. 891 p. 10], the Court repeatedly mentioned the legal standard for illegally distributing controlled substances, including twelve (12) instances that used the language of distributing "outside the usual course of professional practice and not for a legitimate medical purpose" or words to that effect. Closing Jury Charge, p. 22, 23, 60, 61, 84, 87, 89, 94, 95, 96, 97. The Court's charge also included a "general statement of the law regarding distribution of a controlled substance," which included a section on the "manner and issuance of prescriptions" outlining "how controlled substances must be prescribed under federal law in order for such prescriptions to be legal" and how the jury must determine whether a defendant prescribed controlled substances illegally, that is "without a legitimate medical purpose, and outside the usual course of professional practice." *Id.* at 82–90.

And, of course, as the government notes [Doc. 891 p. 10], the Court gave its charge after the jury had heard testimony from four (4) medical experts whose testimony focused on the standard for legal distribution of controlled substances, as well as extensive arguments as to whether defendants distributed controlled substances without a legitimate medical purpose and outside the course of professional practice. It is simply inconceivable, as the government argues, "to think that the jury misunderstood that the prescriptions underlying the convictions in Counts Eleven through Thirteen had to have been written outside the usual course of professional practice and not for a legitimate medical purpose" [Doc. 891 p. 11]. Thus, even if the Court were to find that the

instructions were erroneous and plainly so, satisfying the first two elements of the plain error doctrine, it does not believe the instructions affected the substantial rights of defendants. *See United States v. Sherrod*, 33 F.3d 723, 726 (6th Cir. 1994) (finding that any potential ambiguity did not affect defendant's substantial rights where "the way the case was litigated" evidenced the more probable interpretation given to the instruction by the parties and the court).

Defendants' argument that the instructions were so confusing and legally flawed as to leave the jury with no choice but conviction of defendants, even if the jury believed them innocent of illegal distribution, is unpersuasive. Rather, the jury instructions mirrored the statutory language, Sixth Circuit precedent, and pattern instructions issued by other federal appellate courts. *United States v. Haynes*, 98 F. App'x 499, 504 (6th Cir. 2004) ("Because the jury instruction accurately incorporated the pertinent federal statute and accurately incorporated a pattern jury instruction that is consistent with circuit precedent on the elements of aiding and abetting, it was not plainly erroneous." (citing *United States v. Lowery*, 60 F.3d 1199, 1202 (6th Cir. 1995)), *vacated on other grounds*, 543 U.S. 1112 (2005). Moreover, the instructions clearly conveyed that Counts Eleven through Thirteen charged defendants with knowingly and intentionally opening, using, and maintaining businesses for the purpose of illegally distributing controlled substances and instructed the jury as to the legal standard for illegal distribution. Defendants have not demonstrated that the charge was "erroneous . . . or misleading," much less that the Court's instructions regarding Counts Eleven through Thirteen "affecte[ed] the

defendant[s'] substantive rights or the fairness, integrity, or public reputation of the judicial process." *Balark*, 412 F. App'x at 818. Accordingly, the jury instructions on these counts do not provide a basis for granting defendants a new trial.

Defendant Hofstetter also objects to the Court's failure to include certain of her proposed instructions in the final charge [Doc. 890 p. 17–20]. The government counters that defendant Hofstetter fails to specifically identify deficiencies in the jury charge that her proposed instructions would have resolved, deficiencies that defendant Hofstetter made on the record in compliance with Rule 30(d) and thus preserved for review; thus, it argues the Court should reject this point of error as "unpreserved, undeveloped, and non-specific" [Doc. 891 p. 30]. The government is correct that the failure to include defendant Hofstetter's proposed instructions is not reversible error.[8]

First, defendant Hofstetter points to four (4) instructions that she proposed but that the Court did not include in its final charge [Doc. 890 p. 17–18]. Defendant Hofstetter does not point to a place in the record where she objected to the final charge on the ground that it did not include these instructions. Nor does she articulate what standard of

[8] Defendant Hofstetter argues in her reply that the government is mistaken that the issues concerning the jury instructions were "unpreserved, under developed and non-specific and therefore should not be considered by this Court," pointing to the fact that defendants submitted proposed jury instructions and that she "set out that the submitted Jury Instruction Charges were important to the issues in this case" [Doc. 899 p. 3]. As the text of Rule 30(d) suggests, proposing jury instructions does not constitute an objection to the final charge sufficient to preserve the issue for appellate review, and defendant Hofstetter points to no place in the record where she objected to the final charge's language as to Counts Eleven through Thirteen. Thus, if defendant Hofstetter intends to argue that a plain error standard does not apply to evaluating the jury instructions on those counts—she does not specify the standard she believes applies—she fails to do so persuasively. Because defendant Hofstetter arguably did preserve the issue of the instruction on deliberate ignorance, the Court applies an abuse of discretion standard to that issue. *See supra* p. 25–26.

review she believes applies to the alleged error of failing to include them. Nor, as the government points out, does she identify any deficiency in the Court's final charge. Rather, she simply states that her proposed instructions came from *United States v. Zolot*, No. 11-10070, 2014 WL 2573984 (D. Mass. June 6, 2014), and that defendants believed these instructions "necessary and essential" apparently in light of the publicity the opioid crisis has received and the government's characterization of the nurse practitioner defendants as drug dealers [*Id.* at 18]. This barebones recital of defendant's preference for certain instructions does not satisfy the standard for plain error. *Balark*, 412 F. App'x at 814.

Similarly, defendant Hofstetter notes that she proposed a different instruction for reasonable doubt than that finally adopted by the Court [Doc. 890 p. 18], but she does not state that she objected to the failure to include this instruction prior to jury deliberation, illuminate how the Court's instruction was deficient, or even explain why her instruction was preferable. Thus, defendant has not shown that the failure to adopt her language was erroneous.

Finally, defendant believes the Court erred by overruling defendants Newman and Clemons's objection [Doc. 830] to a "deliberate ignorance" instruction and failing to adopt defendant Hofstetter's requested willful blindness instruction [Doc. 890 p. 19–20]. Defendant Hofstetter did not join defendant Newman and Clemons's filed objection, and she does not point to a place in the record where she objected to the Court's giving an instruction about deliberate ignorance or objecting to the final instruction because it did

not incorporate defendant Hofstetter's preferred willful blindness language. At one point, defendant Hofstetter's attorney stated that she was not suggesting the Court give a deliberate ignorance instruction, just that if it did so, it should use defendant Hofstetter's proposed willful blindness language [Doc. 929 p. 14], but defendant Hofstetter did not clearly raise an objection. Thus, the plain error standard likely applies, but even if defendant Hofstetter successfully preserved this objection, she cannot establish reversible error.

Defendant Hofstetter does not show that either the Court's decision to give a deliberate ignorance instruction or the language it employed were erroneous. "A trial court has broad discretion in drafting jury instructions and does not abuse its discretion unless the jury charge 'fails accurately to reflect the law.'" *Beaty*, 245 F.3d at 621 (quoting *United States v. Layne*, 192 F.3d 556, 574 (6th Cir. 1999)). The Sixth Circuit will reverse a judgment based on an improper jury instruction "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* (quoting *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999)). Moreover, when a district court gives a deliberate ignorance instruction "that does not misstate the law but is unsupported by sufficient evidence, it is, at most, harmless error." *Id.* (citing *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995)).

Defendant does not demonstrate that the Court's jury instructions failed accurately to reflect the law. In support of her contention that the Court should not have given a deliberate ignorance instruction, defendant cites *United States v. Gonzalez-Pujol*, No. 13-

40, 2016 WL 590219 (E.D. Ky. Feb. 10, 2016), highlighting the court's caution therein that giving a deliberate ignorance instruction "creates a risk that the jury 'might misunderstand the instruction and convict a defendant based on what he *should* have known rather than on what he *did* know, thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt.'" [Doc. 890 p. 19 (citing 2016 WL 590219, at *1)]. Additionally, defendant submits that the Court erred by failing to use the willful blindness language for which defendant advocated from *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011) [Doc. 890 p. 19–20]. Neither case provides a basis for reversal.

As the Court noted in ruling on defendant's objection at the second formal charge conference, *United States v. Gonzalez-Pujol* is not applicable to the context in which this Court gave the deliberate ignorance instruction [Doc. 930 p. 6–7]. The district court in *Gonzalez-Pujol* examined the propriety of a deliberate-ignorance instruction in the context of a single-aim conspiracy. 2016 WL 590219, at *2–3. But the deliberate ignorance instruction the government requested and the Court gave in this case applied only to the knowledge element of the substantive drug distribution charges, Counts Fourteen, Sixteen, and Eighteen, and the Court added language to the charge clarifying that the deliberate ignorance instruction applied only to those counts and not the conspiracy counts. Closing Jury Charge, p. 85. And the Court rejected defendant Hofstetter's proposed instruction from *Global-Tech* because that decision pre-dated the most recent Sixth Circuit pattern instruction for deliberate ignorance, which the Court

adopted [Doc. 929 p. 13]. *See* Sixth Circuit Pattern Instruction 2.09. And, as the government stated in objecting to defendant Hofstetter's language at the charge conference [Doc. 929 p. 12], the Sixth Circuit Pattern Criminal Jury Instruction Committee adopted the language used by the Court after concluding that this standard incorporates the "two basic requirements" for willful blindness articulated in *Global-Tech. Id.*, Committee Commentary 2.09. Thus, defendant has not demonstrated that the Court erred either by giving a deliberate ignorance instruction or by employing the Sixth Circuit pattern instruction for deliberate ignorance. Rather, the Court's instruction accurately reflects the law and is far from plainly erroneous.

3. Constitutionality of 21 U.S.C. § 856(a)(1)

The nurse practitioner defendants also contend, without citation, that 21 U.S.C. § 856(a)(1) is overly broad and therefore unconstitutional as applied to them [Doc. 870 p. 15]. Defendants appear to argue that this statutory provision is unconstitutional as applied in the jury instructions, absent language specifying that the underlying prescriptions must have been prescribed illegally [*Id.*]. The government notes the Court's repeated instructions that the controlled substances at issue in this case and specifically in Counts Eleven through Thirteen must have been distributed illegally, and it argues that courts have consistently upheld the constitutionality of § 856(a)(1) [Doc. 891 p. 11 (string citing cases including *United States v. Rosa*, 50 F. App'x 226, 227 (6th Cir. 2002)).

Defendants do not identify a court that has found § 856(a)(1) to be generally unconstitutional or unconstitutional as applied, and the Sixth Circuit has not ruled on the question. *Cf. Rosa*, 50 F. App'x at 227 (rejecting defendant's argument that § 856(a)(2) was unconstitutionally vague). Moreover, the courts that have examined the issue of § 856(a)(1)'s constitutionality appear to have uniformly found it to be constitutional. *See, e.g.*, *United States v. Lancaster,* 968 F.2d 1250, 1253–54 (D.C. Cir. 1992) (rejecting vagueness challenge to § 356(a)(1) as applied to defendant's conduct); *United States v. Clavis,* 956 F.2d 1079, 1094 (11th Cir. 1992) (finding that challenge to § 856(a)(1) as void for vagueness failed and noting that "[t]he presence of the two intent elements, 'knowingly' and 'for the purpose' does much to eliminate the contention of vagueness or unfairness in application"); *United States v. Rodriguez*, No. CR10-384, 2011 WL 675541, at *2 (W.D. Wash. Feb. 15, 2011) (stating that all courts to examine whether § 856(a)(1) is unconstitutionally vague have found it constitutional). Finally, "[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in [a] skeletal way, leaving the court to put flesh on its bones." *El-Moussa v. Holder*, 569 F.3d 250, 257 (6th Cir. 2009) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997)). Here, it is unclear even whether defendants intend to challenge § 856(a)(1) as void for vagueness or under some other constitutional standard. And, the Court will not speculate as to the issue they intend to raise. Accordingly, the Court finds this constitutional argument does not provide a basis for granting a new trial.

B. Issues Arising from the Trial

Next, the Court turns to alleged trial errors arising from the Court's decisions to admit certain evidence, from the testimony of certain witnesses, or from alleged prosecutorial misconduct. Defendant Hofstetter's motion raises most of the errors examined in this section, but the Court discusses the nurse practitioners' arguments where applicable.

1. Alleged Errors Related to Evidence and Witness Testimony

a. Alleged *Brady* Violation Regarding Stan Jones's Testimony

Proceeding chronologically through the trial, the Court first examines defendant Hofstetter's objection to the testimony of Stan Jones. Defendant Hofstetter argues that her due process rights were violated because the prosecution failed to disclose information about a reported Department of Justice (DOJ) investigation of Walmart, Mr. Jones's employer at the time of his testimony [Doc. 890 p. 14]. Defendant first learned about the investigation from a ProPublica article published on March 25, 2020 [*Id.*; *see also* Doc. 890-1], which reported that DOJ officials intervened to prevent criminal prosecution of Walmart for opioid dispensing practices that violated the Controlled Substances Act. Defendant contends that Mr. Jones "knew or should have known" about the investigation and that the information should have been disclosed "as exculpatory evidence under *Brady v. Maryland*[,] 373 U.S. 83 (1963)," so that defendants could have challenged Mr. Jones's credibility as "a key witness for the government to explain the red flags of pill mills" [Doc. 890 p. 15].

The government argues: (1) Mr. Jones was not an agent for the government when he testified and was never involved in this case or the underlying investigation prior to his retirement from the Drug Enforcement Administration (DEA), which is why Mr. Jones testified as an unbiased expert in drug diversion based on his DEA experience, not his experience at Walmart; (2) the prosecution team in this case was not involved in the DOJ investigation reported in the ProPublica article and has no knowledge of whether any such investigation exists or existed beyond the article; (3) the ProPublica article does not indicate—and defendants provide no information about—when the alleged bad behavior at Walmart occurred, and Mr. Jones was hired in November 2018, months after Walmart announced a plan to implement new opioid prescription limits [Doc. 891 p. 25 (citing Vanessa Romo, *Walmart Will Implement New Opioid Prescription Limits By End of Summer*, NPR, May 8, 2018, https://www.npr.org/sections/thetwo-way/2018/05/08/609442939/walmart-will-implement-new-opioid-prescription-limits-by-end-of-summer)]; and (4) numerous news articles in the months leading up to this trial reported on lawsuits filed against Walmart based on its alleged role in fueling the opioid epidemic, so "there was already plenty of information about Walmart's opioid dispensing practices in the public domain prior to trial" to enable effective cross-examination of Mr. Jones.

Violation of a defendant's Fifth Amendment due process rights under *Brady* involves a three-part test: "The evidence at issue must be favorable to the accused, either

because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *United States v. Castano*, 906 F.3d 458, 466 (6th Cir. 2018) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). Showing prejudice means proving the evidence was material, that is that the "nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Id.* (quoting *Strickler*, 527 U.S. at 281); *see also United States v. Paulus*, 952 F.3d 717, 726 (6th Cir. 2020). "There can be no *Brady* violation where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information.'" *Id.* (quoting *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991)).

Defendant does not satisfy any part of the *Brady* test. First, defendant has not established that the information about Walmart would be impeaching because defendant has not shown that Mr. Jones was working at Walmart while it was operating pursuant to allegedly criminal distribution policies. Defendant appears to suggest that she would have used the investigation to impeach Mr. Jones when he responded "No" to the question "You all wouldn't dispense anything that you all didn't consider safe and effective?" [Doc. 890 p. 14], but the trial transcript makes clear that Mr. Jones was testifying about Walmart's present prescribing practices [Tr., Oct. 28, 2019, Doc. 917 p. 88]. Thus, it is unclear how an investigation of practices that likely predated Mr.

Jones's arrival at Walmart could have been used to impeach him, especially because Mr. Jones testified based on his experience not as a Walmart employee but as a DEA agent, except for the brief exchange above, which defendant instigated on cross-examination [*See id.* at 15, 20–21].

Second, the defendant has not shown—and the government contests—that the government had information about the investigation in its possession, so it could not have suppressed the evidence willfully or inadvertently. *See Castano*, 906 F.3d at 466 ("This is not a *Brady* violation because the government did not suppress evidence in its possession . . . . As to [witness's] 2005 conviction, it did not appear in the FBI printout, and the government cannot be accused of suppressing evidence it did not have.").

Third, defendant has certainly not shown that the nondisclosure was material, i.e. that the ability to *attempt* to impeach Mr. Jones, who was one of numerous government witnesses and who was not a fact witness, would have produced a different verdict. Additionally, defendant had access to numerous news stories reporting lawsuits based on alleged distribution misdeeds by Walmart, information she could have used to impeach Mr. Jones in the manner she suggests she would have used the undisclosed investigation. *See id.* (stating that there was no *Brady* violation nondisclosure of government witness's convictions in part because defendant "had the 'essential facts' of [witness's] indictments, from which the defense could have learned of his convictions").

Accordingly, defendant has failed to show entitlement to relief based on a *Brady* violation involving Mr. Jones.[9]

b. The Failure to Strike Michael Carter's Testimony

Defendant Hofstetter contends that the Court improperly denied defendants' oral motion to strike the testimony of Dr. Michael Carter, one of the government's expert witnesses, and argues this error entitles her to a new trial [Doc. 890 p. 5]. Defendant fails to raise any new issues or engage with the Court's extensive and detailed ruling denying defendants' motion [Doc. 794]. Rather, she simply states that Dr. Carter had no qualifications upon which to provide expert testimony in pain management, that he was permitted to opine on whether a legitimate medical purpose existed for prescriptions issued at the clinics in this case, and that his testimony was therefore "erroneous and prejudicial" to defendant Hofstetter, such that she is entitled to a new trial [Doc. 890 p. 5]. The only authority defendant cites in support of her argument is a Sixth Circuit opinion that merely states the standard for admissibility of expert testimony and the advisability of a cautionary jury instruction if a witness testifies as both a fact witness and an expert witness [*Id.* (citing *United States v. Lopez-Medina*, 461 F.3d 724, 725 (6th Cir. 2006))]. Yet, defendant does not allege that Dr. Carter testified as a fact witness, merely that he was unqualified, and she does not address the Court's lengthy discussion of Dr.

[9] In her reply, defendant Hofstetter argues that the government does not indicate whether Mr. Jones had information regarding this investigation and that the Court should hold an evidentiary hearing at which Mr. Jones would testify under oath about his knowledge of the investigation [Doc. 899 p. 2–3]. Defendant offers no legal authority for granting her request, and the Court will accordingly deny it.

Carter's qualifications to testify to his "expertise area, the practices of nurse practitioners across specialties and, specifically, the nurse practitioner standard of care" [Doc. 794 p. 2–4]. Nor does she acknowledge the Court's finding that the government confined Dr. Carter's testimony to his specialty area.

While defendant claims Dr. Carter opined on the legitimacy of prescriptions for pain medications and whether they were provided in violation of the standard of care [Doc. 890 p. 5], she does not point to any places in the record where he did so or address the Court's examination of Dr. Carter's testimony for opinions he expressed beyond his expertise [Doc. 794 p. 4–6]. Indeed, the Court specifically addressed this argument in its order:

> While the government did repeatedly ask the witness whether there was a legitimate medical purpose for prescriptions in certain medical files, . . . [t]he context of these questions and responses makes clear that the government was not eliciting opinions from the witness as a pain management expert, which he admittedly is not, but rather asking him to testify to whether he could identify a legitimate medical purpose for the prescription based on the content of the files. Each exchange took place immediately after the government took the witness through a specific file and asked him questions about the file's adherence to the standard of care. Thus, by testifying that he could not identify such a legitimate purpose for the prescription, the witness was testifying to a failure of the standard of care, i.e. an "[in]adequate history, [in]adequate physical, [in]adequate assessment and an [in]adequate plan."

[*Id.* at 5–6 (citing Rough Draft Transcript for Dec. 9, 2019, at 169)].

Moreover, the Court's order carefully applied Rule 702 to Dr. Carter's testimony, finding that his testimony was admissible under the test articulated by the Sixth Circuit in *U.S. v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993), and that defendants' principal

arguments went to the weight the jury should give Dr. Carter's opinion. The Court noted that this was a matter for cross-examination, and that defendants vigorously cross-examined Dr. Carter [Doc. 794 p. 6–8]. Defendant does not address any of these conclusions or observations. Accordingly, defendant does not demonstrate that the failure to strike Dr. Carter's testimony was reversible error.[10]

c. Failure to Strike Testimony of Jon West

Defendant Hofstetter also contends that the Court erred by failing to grant a defense motion joined by defendant Hofstetter to strike Jon West's testimony and that she is entitled to a new trial on this basis [Doc. 890 p. 21–22]. Mr. West was the government witness who analyzed and testified about the DOMEX analyses of patient files seized from the pain clinics in these cases [Doc. 891 p. 21]. It became apparent on cross-examination of Mr. West that he was testifying about a dataset comprised of 7,000 patient files and that defense counsel was cross-examining him about a different data set, one based on 700 patient files [Doc. 891 p. 22]. The Court recessed for the day [Tr., Dec. 18, 2020, at 228]. The next morning, the government explained that it had mistakenly provided defendants with a spreadsheet based on the 700 patient files, believing the

[10] Additionally, as the government notes [Doc. 891 p. 21], defendant arguably forfeited her challenge to Dr. Carter's testimony. Defendants did not raise any arguments regarding Dr. Carter's qualifications in their *Daubert* motion [Doc. 444], even though they reviewed his report, as demonstrated by their objection to the files he reviewed and the relevance of a regulation his report cited [*Id.* at 11, 17–18]. *See In re Bayer Healthcare & Merial Ltd. Flea Control Prods. Mktg. & Sales Practices Litig. v. Bayer Health*, 752 F.3d 1065, 1078 (6th Cir. 2014) (holding that plaintiffs forfeited any *Daubert* challenge by failing to raise it before the district court). Thus, defendant Hofstetter may have forfeited her challenge to Dr. Carter's testimony by failing to raise an issue she could have raised in her *Daubert* motion until the testimony was heard at trial.

spreadsheet it had received from DOMEX that it sent to defendants contained the 7,000-patient dataset [Rough Draft Transcript, Dec. 19, 2020, at 6]. Defendant Clemons subsequently moved to strike Mr. West's testimony, and defendant Hofstetter moved to join the motion [*Id.* at 13]. After the parties conferred and failed to agree on a solution, the Court suspended Mr. West's testimony and ordered that defendants would have the two-week trial break to review the spreadsheet the government had not previously provided to defendants [*Id.* at 37–38].

Defendant Hofstetter now argues she is entitled to a new trial because the government did not provide a DOMEX spreadsheet standardizing raw data from the 7,000 patient files in discovery but only a DOMEX spreadsheet standardizing data from 700 patient files and because the Court's order did not provide defendants adequate time to "defend against this new evidence" [Doc. 890 p. 21–22].

As a preliminary matter, defendant was not entitled to the spreadsheet she objects she received late. The magistrate judge found that the DOMEX reports, the spreadsheets discussed above, were not subject to the July 2 discovery deadline because "the Court consider[ed them] to be expert or summary materials, analyzing information already disclosed" [Doc. 348 p. 8 n.8]. Later, the magistrate judge reiterated, "the Court agrees with the Government that the spreadsheets requested by the Defendants are likely not discoverable, at least not at this juncture." Accordingly, Magistrate Judge Debra C. Poplin denied the motion because defendants had not followed the Court's procedure for

seeking discovery, holding that she also found the motion to be moot because the government represented that it had disclosed the spreadsheets to defendants [Doc. 372 p. 2–3].

Although the magistrate judge qualified her conclusion that the spreadsheets were "likely" not discoverable "at least not at this juncture," defendant presents no arguments now suggesting that the spreadsheets were discoverable. The magistrate judge's conclusion that the DOMEX reports were non-discoverable comports with the undersigned's conclusion in ruling on the motion to strike that the spreadsheet supplied to defendants at the time of their motion qualified as a summary chart of previously disclosed voluminous writings under Federal Rule of Evidence 1006 [Rough Draft Transcript, Dec. 19, 2020, at 37], and defendant does not challenge that ruling. Thus, the government's accidental withholding of the spreadsheet containing the 7,000 patient files does not provide a basis for a new trial. Nor does defendant cite any authority for finding that the Court's discretionary decision to give defendants two (2) weeks to review the new spreadsheet constitutes reversible error, and the Court finds no reason to do so. Defendant is not entitled to relief on this ground.

d. The Admission of an Email Allegedly Containing Hearsay

The Court turns next to the admission of an email containing alleged hearsay, which both the nurse practitioner defendants and defendant Hofstetter contend was error

to some degree [Doc. 870 p. 14; Doc. 890 p. 13–14]. The email at issue, Exhibit 2086,[11] was sent by Dr. Mark Blumenthal, whom the government alleged was a coconspirator, to defendant Hofstetter on February 6, 2011 [*Id.*; *see also* Tr., Jan. 6, 2020, Doc. 927 p. 84]. The email referenced a chance meeting between Dr. Blumenthal and Knox County Criminal Court Judge Mary Beth Leibowitz, during which Dr. Blumenthal said Judge Leibowitz warned him about increasing law enforcement attention to patients and prescribers [*Id.*]. Specifically, as defendant Hofstetter notes, the email said: "Knox County had a tremendous drug problem. Legal authorities, pharmacy authorities, and medical authorities are all up a tree about what to do. Everyone involved with scheduled medications is under close scrutiny, and that inherently includes us" [*Id.*].[12] Defendant Clemons objected to the admission of the email at the time it was offered because it contained inadmissible hearsay, namely the statements attributed to Judge Leibowitz, and she also objected to the general admission of emails written by Dr. Blumenthal as hearsay [*Id.* at 51–52, 53]. Defendant Hofstetter also made a somewhat unclear objection to the

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[11] The nurse practitioner defendants do not reference an exhibit number, and defendant Hofstetter references Exhibit 2085 [Doc. 890 p. 13], but the government states, and defendants' description of the email makes clear, that defendants intended to object to the admission of Exhibit 2086.

[12] Although defendant Hofstetter appears to object generally to the admission of the email, she and the nurse practitioner defendants only identify the statements that could have been attributed to Judge Leibowitz as prejudicial [Doc. 870 p. 14; Doc. 890 p. 13–14]. The Court notes for background that Blumenthal also wrote, "She told me to be exceedingly careful. Law enforcement does understand that patients have legitimate needs that have been poorly met, but they are more concerned right now about patients and prescribers who are out of compliance. We cannot afford the appearance of impropriety" [Tr., Jan. 6, 2020, Doc. 927 p. 85]. Dr. Blumenthal went on to suggest that they should "[t]ighten up our prescribing . . . techniques" because they were "simply seeing too many patients who represent a hazard to [their] practice" and "[b]roaden [their] practice as rapidly as possible to include other management—pain management modalities" [*Id.* at 85–86].

admission of the email related to the government's characterization of Dr. Blumenthal as a coconspirator [*Id.* at 56–57].

The Court found that the email was admissible, based on consideration of all the proof before the Court, because the statements by Dr. Blumenthal were non-hearsay, co-conspirator statements under Rule 801(d)(2)(E) [Tr., Jan. 6, 2020, Doc. 927 p. 82]. The Court also found that, in the alternative, the statements would be admissible to show the impact on the listener, in this case defendant Hofstetter, by illuminating "her knowledge and what further actions she might have taken after receiving the information" [*Id.*]. In other words, the Court found that any statement attributed to Judge Leibowitz was not offered to prove the truth of the matter asserted and was thus not hearsay under Federal Rule of Evidence 801(c)(1). The Court also overruled any objection under Federal Rule of Evidence 403 to the admission of Judge Leibowitz's alleged statements because it had instructed the jury that they should not take the statements as offered for the truth of the matter asserted and because it did not find the probative value of those statements, offered for the impact on the listener, to be substantially outweighed by the danger of confusion or unfair prejudice [*Id.*].[13]

Here, the nurse practitioner defendants assert without development or citation of rule or case law that it was error to permit "any testimony and explanation by the Court [as to] who Judge Leibowitz was" because this "may have influenced [the jury] to believe

[13] The Court instructed the jury that "anything that was said by Mary Beth Leibowitz [was] not being offered for the truth of the matter asserted, but [they] should just consider it for the impact it may have had on either Dr. Blumenthal or to whomever he related that information . . . ." [Tr., Jan. 6, 2020, Doc. 927 p. 85].

that there was a judgment by another court that some or all of the activities of the Defendants may have been previously judged unlawful [Doc. 870 p. 14]. Defendant Hofstetter merely restates the parties' positions as to the admissibility of the letter and the hearsay statements by Judge Leibowitz and cites a Seventh Circuit case and Federal Rule of Evidence 801(d)(2)(E) for the standard for admitting a coconspirator statement. Then she states without further explanation that admitting the email was error and "created an impermissible prejudice against her through the hearsay statements" of Judge Leibowitz [Doc. 890 p. 13–14].

Without further elaboration by defendants as to why the admission of the email or the statements attributed to Judge Leibowitz was erroneous, the Court finds no reason to reconsider its prior ruling. *Cf. El-Moussa*, 569 F.3d at 257 (quoting *McPherson*, 125 F.3d at 995–96) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."). For a court to properly admit coconspirator statements as non-hearsay, the government "must show by a preponderance of the evidence that (1) the conspiracy existed, (2) the defendant against whom the hearsay is offered was a member of the conspiracy, and (3) the hearsay statement was made in the course of and in furtherance of the conspiracy." *United States v. Smith*, 320 F.3d 647, 654 (6th Cir. 2003) (citing *United States v. Enright*, 579 F.2d 980, 986–87 (6th Cir. 1978)). "This preliminary finding is the sole province of the judge who may, as was done here, admit the hearsay statements subject to a later ruling that the government has met its burden." *Id.* (citing *United States v. Vinson,* 606 F.2d 149, 153

(6th Cir.1979)). The Court made such an initial finding as to Dr. Blumenthal [Tr., Jan. 6, 2020, Doc. 927 p. 82], and it also made *Enright* findings after the close of the government's case that "the government has demonstrated by a preponderance of the evidence that a conspiracy existed, that the defendants were participants, and that the statements made by the various alleged coconspirators were made in the course of and in furtherance of the conspiracy" [Tr., Jan. 8, 2020, Doc. 928 p. 157]. Defendants have presented no reason to reconsider this ruling as it applies to Dr. Blumenthal's February 6th email.

Furthermore, defendants do not even attempt to explain how Judge Leibowitz's alleged statements were hearsay under Rule 801(c), given that they were not offered for the truth of the matter asserted. And defendants' conclusory arguments that Judge Leibowitz's statements were highly prejudicial and potentially confusing because they were made by a judge, even though the government made clear that Judge Leibowitz made the comments in the context of a conversation with her friend Dr. Blumenthal and even though the Court instructed the jury they should not consider her statements for their truth, are unpersuasive. Thus, neither the admission of Dr. Blumenthal's email nor the statements attributed to Judge Leibowitz provide a basis for relief.

e. Objection to Rebuttal Witness Testimony

Defendant Hofstetter contends that the Court mistakenly overruled defendants' objection to the government's four (4) rebuttal witnesses and that she is thus entitled to a new trial [Doc. 890 p. 4–9]. Specifically, she argues that the witnesses were patients who

did not "rebut new evidence or new theories proffered in the defendant's case in chief" but rather repeated similar testimony to those patients who testified during the government's case in chief about their history of drug abuse [*Id.* at 4 (quoting *United States v. Bland*, No. 06-5876, 2007 WL 2781114, at *3 (6th Cir. Sept. 25, 2007) (unpublished))]. Yet, as the Court stated in its ruling denying defendants' objection, *see* Rough Draft Transcript, Jan. 14, 2020, at 67, and as the Sixth Circuit noted in the case cited here by defendant, the court has broad discretion to define the scope of rebuttal testimony. *See Bland*, 2007 WL 2781114, at *3. As the Court recognized in its ruling, "[t]he proper function of rebuttal evidence is to contradict, impeach or defuse the impact of the evidence offered by an adverse party," and contrary to defendant's seeming suggestion, it is within the Court's discretion to limit it to rebutting new evidence or new theories proffered in the defendant's case in chief, meaning that it does not have to do so. *Id.*

Here, the rebuttal testimony offered by the government's four (4) patient witnesses defused the impact of the opinion testimony offered by defendants' witnesses that the prescriptions those four (4) patients received at the clinics in this case were prescribed for a legitimate medical purpose and within the usual course of professional practice. Thus, the witness testimony fell within the proper scope of rebuttal testimony. And, defendant points to no place in the record and presents no authority that supports a finding the Court abused its discretion by overruling defendant's objection to the government's rebuttal testimony. Thus, the Court does not find that overruling defendant's objection to

admitting the testimony of the four (4) rebuttal witnesses provides a basis for granting a new trial.

f. Insufficiency of the Evidence

Although she does not mention a specific conviction she seeks to challenge, defendant Hofstetter appears to argue the Court should acquit her of all her convictions based on insufficiency of the evidence under Federal Rule of Criminal Procedure 29 [Doc. 890 p. 23–25]. As noted above, the jury found defendant Hofstetter guilty on Count One (RICO), Counts Two and Four (conspiracy to distribute controlled substances), Counts Three and Five (conspiracy to commit money laundering), Counts Six and Seven (violations under 18 U.S.C. § 1957(a)), Counts Eleven, Twelve, and Thirteen (maintaining a drug-involved premises), and Count Fourteen (substantive drug distribution) [Doc. 860]. Yet, defendant Hofstetter challenges the sufficiency of the evidence supporting these convictions by generally discussing evidence offered at trial, without specifying why the evidence she highlights undermines a specific conviction or how the Court erred in considering the evidence in its ruling on defendants' Rule 29 motions. The government responds with a general overview of the evidence, noting that the Court issued a comprehensive ruling on defendant Hofstetter's Rule 29 motion at trial and that the government continues to rely on the record in support of defendant Hofstetter's convictions [Doc. 891 p. 27].

As noted above, defendant "bears a very heavy burden" in a sufficiency of the evidence challenge to her conviction. *United States v. Davis*, 397 F.3d 340, 344 (6th Cir.

2005) (citing *United States v. Spearman*, 186 F.3d 743, 746 (6th Cir. 1999)). The court "will sustain a jury's guilty verdict so long as, 'after viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *United States v. Ware*, 282 F.3d 902, 905 (6th Cir. 2002)); *see id.* (noting that the same standard for sustaining a jury verdict applies to the district court's denial of defendant's Rule 29 motion for a judgment of acquittal).

Defendant Hofstetter does not meet her burden. First, defendant Hofstetter seems to challenge her conviction on Count Fourteen, stating that "[n]o witness testified that defendant Hofstetter ever engaged in prescribing the medication outside the usual course of professional practice and without a legitimate medical purpose or instructed anyone to do so" and that the testimony of the government's expert witnesses regarding the medical files did not provide proof that defendant Hofstetter knew of the clinic prescribers' practices [Doc. 890 p. 23].[14] Yet, the jury instructions charged the jury that they could find defendant Hofstetter guilty of Count Fourteen if they found she had "intentionally helped or encouraged others to commit the crime," i.e. aided and abetted, and the instructions stated that the government "must prove that the defendant did something to help or encourage the crime with the intent that the crime be committed." Closing Jury Charge, p. 79, 99. The government marshaled considerable evidence that defendant

[14] Defendant Hofstetter raised the issue of insufficiency of the evidence underlying the substantive drug charges against her in a general manner in her Rule 29 motion at trial [Doc. 828 p. 1–2].

Hofstetter, like the other defendants, knew she was working at a pill mill and thus helped or encouraged the crime of illegal drug distribution. Specifically, the government presented evidence that the clinics did not accept insurance and charged $300 per visit, that the waiting rooms were packed, patients were nodding off in the waiting rooms, neighboring businesses complained about the clinics' patients' behavior, and other evidence indicating the clinics were operating to distribute controlled substances illegally. Viewing the evidence in the light most favorable to the government, a rational jury could find that even the most absentee manager would have known she was helping others commit the crime of illegally distributing controlled substances. And, the testimony of multiple witnesses, including defendant Hofstetter's business partner Christopher Tipton, coconspirator Benjamin Rodriguez, and clinic employees such as Stephanie Puckett and two nurse practitioner witnesses, contradicts defendant Hofstetter's characterization of her involvement in the clinics. They and others testified that defendant Hofstetter, contrary to her suggestion here, had a controlling management style, had sufficient contact with the clinics' clients to make frequent derogatory comments about them, sought to increase profits at the clinics by active oversight of the doctors ostensibly in charge of maintaining clinic standards, was made aware by Dr. Blumenthal and others that the clinics needed to improve their practices to avoid legal enforcement action against them, and laundered money from the clinics for her personal financial benefit. Thus, viewing the evidence in the light most favorable to the

government, a rational jury could also find that defendant Hofstetter intended that the crime charged in Count Fourteen be committed.

Defendant also seems to suggest that the jury's acquittal of the nurse practitioner defendants on the substantive drug distribution counts undermines her conviction on Count Fourteen, but the jury's decision does not demonstrate that a rational jury could not have found the nurse practitioners guilty on these counts, simply that this jury found the nurse practitioners not guilty, perhaps out of leniency. Indeed, in its original ruling, the Court held:

> Although there has been evidence that patient files were manipulated by some clinic staff, the Court finds after reviewing the testimony presented by the government, both [in] its case in chief as well as the testimony presented in the entirety of the trial, that a rational jury could conclude beyond a reasonable doubt that defendants were prescribing controlled substances outside the usual course of professional practice and not for a legitimate medical purpose. Among other things, . . . the government's witnesses opined that charting, assessment of patients' risk of abuse, physical examination, and other practices at the clinics were inadequate and that the treatment plans [at] the clinics were generally limited to the prescription of high dose opioids written for patients despite, among other factors introduced by the government, . . . minimal findings on their MRIs, their relative young age, and potential for drug abuse. . . . The Court . . . finds that this and other evidence presented by the government is sufficient for a rational jury to find the government proved the other elements of the distribution counts, those being Counts Fourteen, Sixteen, and Eighteen, beyond a reasonable doubt.

Rough Draft Transcript, Jan. 27, 2020, p. 216–17. Defendant presents no evidence or argument that would persuade the Court to overturn its initial Rule 29 ruling on this issue.

Secondly, defendant Hofstetter appears to renew her argument at trial that the government failed to prove conspiratorial agreement regarding the conspiracy counts

(Counts One (RICO), Two, and Four) [Doc. 890 p. 24–25]. The evidence defendant offers now (without citation to the record)—apparently to show there was insufficient evidence to demonstrate defendant's involvement in a RICO conspiracy or conspiracy to distribute controlled substances unlawfully—merely indicates that some of defendant Hofstetter's coconspirators testified that some of the prescriptions issued at the clinics were issued legally [*Id.*]. The evidence does not undermine the Court's conclusion in its ruling at trial that the government presented sufficient evidence of conspiratorial agreement to sustain convictions when the evidence was viewed in a light most favorable to the government. Rough Draft Transcript, Jan. 27, 2020, p. 212–13. The Court notes again the "pill mill" proof discussed above in support of its finding at trial that "a rational jury could find that defendants had at least a silent, mutual understanding that by working at the clinics, they were agreeing to participate in the unlawful distribution of controlled substances," as well as the other elements of the charged conspiracy offenses. *Id.* And, defendant does not marshal any support for or develop her argument that the government did not prove conspiratorial agreement as to the RICO Count. Thus, the Court will not address this challenge or defendant Hofstetter's cursory insufficiency-of-evidence challenge to her other convictions. *See El-Moussa*, 569 F.3d at 257 (quoting *McPherson*, 125 F.3d at 995–96) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

2. Prosecutorial Misconduct

The Sixth Circuit has held that a prosecutor's comments "may not have the effect of shifting the burden of proof from the government to the defendants or abrogating the presumption of innocence to which (defendants) are entitled." *United States v. Robinson*, 651 F.2d 1188, 1197 (6th Cir. 1981) (internal citation omitted). The Sixth Circuit applies a two-step analysis in determining whether prosecutorial misconduct has occurred. *United States v. Wimbley*, 553 F.3d 455, 461 (6th Cir. 2009) (internal citation omitted). First, a court "determine[s] whether a statement by the prosecutor was improper," and second, "[i]f the statement was improper, [a court] must next decide whether the statement was so 'flagrant' as to warrant reversal." *Id.* The Court weighs four (4) factors to determine whether the statement was sufficiently flagrant to justify reversal: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *United States v. Carter*, 236 F.3d 777, 783 (6th Cir. 2001).

Specifically, in examining whether a prosecutor improperly commented on a defendant's failure to testify, thus violating the defendant's Fifth Amendment privilege against compelled self-incrimination, the Sixth Circuit applies a similar four-prong analysis. *United States v. Wells*, 623 F.3d 332, 338 (6th Cir. 2010). The Court considers: (1) "whether the comments were manifestly intended to reflect on the accused's silence

or are of such a character that the jury would 'naturally and necessarily' construe them as such"; (2) "whether the comments were isolated or extensive"; (3) "whether there was otherwise overwhelming evidence of guilt"; and (4) "whether appropriate curative instructions were given." *Id.* (quoting *United States v. Gonzalez*, 512 F.3d 285, 292–93 (6th Cir. 2008)).

Defendant Hofstetter and the nurse practitioner defendants object to comments made by the prosecution that allegedly shifted the burden of proof to defendants [Doc. 870 p. 14; Doc. 890 p. 8–11]. The nurse practitioners' arguments raise this issue in a perfunctory manner that could permit the Court to deem the issue waived as to them. *See El-Moussa*, 569 F.3d at 257 (quoting *McPherson*, 125 F.3d at 995–96). Defendant Hofstetter, however, develops the issue more fully, pointing to three (3) specific instances of alleged prosecutorial misconduct [Doc. 890 p. 8–11]. The Court notes that it previously considered and rejected defendants' arguments in denying their motions to declare a mistrial. Rough Draft Transcript, Jan. 28, 2020, p. 19–22, 131–32.

Defendant Hofstetter first argues that Assistant United States Attorney Kelly Pearson improperly shifted the burden to defendants in her closing argument when she said, "guilt you never heard about from these three defendants." The statement appears in the following context:

> I want you to think about the raw emotion you saw especially from Ms. Fristoe when [she] talked about working at these places years after the fact. You can tell with Ms. Fristoe she felt the emotion of being a small part in perpetuating these places. Guilt you never heard about from these three defendants.

Rough Draft Transcript, Jan. 27, 2020, p. 53. Defendant Hofstetter suggests this statement improperly shifted the burden of proving guilt beyond a reasonable doubt to defendants by commenting on the fact that they did not testify and suggesting that they had some obligation to present evidence or prove their innocence to the jury [Doc. 870 p. 14; Doc. 890 p. 8–11]. The government argues that the context of this comment makes clear that the government intended to draw attention to the absence of evidence from any of the many trial witnesses to suggest that the nurse practitioner defendants had "any qualms or reservations about prescribing vast quantities of opioids at pill mills" [Doc. 891 p. 14]. Ms. Pearson's use of the word "guilt," the government contends, referenced "emotional contrition during the operation of the pill mills, not legal guilt at trial" [*Id.* at 15].

Defendant Hofstetter does not counter the Court's legal reasoning in finding at trial that Ms. Pearson's statement did not impermissibly shift the burden of proof. She simply restates the standard of law and the defense arguments in moving for a mistrial and does not present any authority for finding either that the government's statement was "improper" or that the statement was "so 'flagrant' as to warrant reversal" [Doc. 890 p. 10–11]. Thus, the Court finds no basis to reconsider its ruling that Ms. Pearson's comment was not "improper," in that the context of the statement made clear that it was not an attempt to shift the burden of proof but rather a comment on the absence of evidence that the nurse practitioner defendants felt "emotional contrition" for their criminal acts, in contrast to witnesses, such as Ms. Fristoe, who deeply regretted even

their short employment at the clinics. *See* Rough Draft Transcript, Jan. 28, 2020, p. 21. And, assuming arguendo that the comment was improper, it does not satisfy the factors articulated in *Carter* for overturning the verdict. First, the remark did not have a tendency to mislead the jury or prejudice the defendant because the context of the statement made it extremely unlikely that the jury would understand the government to be suggesting defendants should have presented evidence of their innocence, and the Court instructed the jury in its opening charge and its closing charge about the burden of proof. Second, the remark was isolated and minor—less than a sentence in two (2) hours of closing argument. Third, defendant does not suggest it was deliberately made, and the government argues persuasively that it did not intend the meaning defendants attribute to it. And, fourth, the evidence against the defendants, especially defendant Hofstetter, was strong, so it is unlikely that Ms. Pearson's statement, even if improper, would have changed the verdict against defendant Hofstetter or the other defendants. Thus, Ms. Pearson's statement does not provide a basis for reversal.[15]

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[15] Defendant Hofstetter argues in her supplement to her new trial motion that the government failed to address the argument in her motion that Ms. Pearson's statement represented an impermissible comment on defendants' election not to testify [Doc. 899 p. 1–2]. In fact, defendant Hofstetter did not make this argument in her new trial motion, instead arguing only that Ms. Pearson's comments shifted the burden of proof. However, the Court notes that even if defendant had made this argument, it would have failed for similar reasons to those underlying the Court's ruling on her argument that Ms. Pearson improperly shifted the burden of proof: (1) Ms. Pearson's comments did not manifest the intent to "reflect on the accused's silence" and were not "of such a character that the jury would 'naturally and necessarily' construe them as such"; (2) they were isolated and not extensive as discussed; (3) there was significant evidence of guilt; and (4) the Court instructed the jury in its opening and closing charges that they should not consider or discuss defendants' election not to testify. *See Wells*, 623 F.3d at 338.

Second, defendant Hofstetter contends that Assistant United States Attorney Tracy Stone improperly shifted the burden of proof twice—first during defendant Hofstetter's closing argument and second during the government's rebuttal argument. Defendant Hofstetter objects to Mr. Stone's comment, "They have subpoena power, they did not subpoena Ms. Rucker" [Doc. 890 p. 9]. Defendant does not explain how this comment was improper when Mr. Stone made it as an objection to the speculation—as the government characterized it—of defendant Hofstetter's counsel as to the findings and manner of Ms. Rucker's investigation. *See* Rough Draft Transcript, Jan. 27, 2020, p. 191. Mr. Stone's comment on defendant's subpoena power immediately succeeded Mr. Stone's saying, "There are no facts in evidence." *Id.* Thus, the context makes clear that Mr. Stone was arguing that defendant could not make arguments based on facts not in evidence by speculating about the findings of a witness she chose not to call. And, the Court notes that it permitted defense counsel to continue his argument after the government's objection, *id.* at 191–192, so it is unlikely the jury focused on Mr. Stone's objection to defendant's detriment. Defendant identifies no basis for finding this comment improper, and the Court finds none.

Defendant also objects to the following statement by Mr. Stone on rebuttal: "Remember, as we get into this, that every single fact witness you heard of, they put up two opinion witnesses and an investigator to talk about some stats. Every fact witness, every person who saw something, smelled something, felt something, did something, heard something, someone who was there, somebody with knowledge, those—every

single one of those witnesses was put on by the United States" [Doc. 890 p. 9]. *See also* Rough Draft Transcript, Jan. 28, 2020, p. 91. Citing no authority for the alleged impropriety of this statement and failing to address the reasoning of the Court's previous ruling on this issue, defendant merely says, "This statement is a clear comment on the fact that the defendants did not call a fact witness and an attempt to shift the burden from the government onto the defendants to present evidence, or in some way prove innocence" [Doc. 890 p. 10].

Yet, as the government suggests, the Sixth Circuit's decision in *Moore v. Mitchell*, 708 F.3d 760, 806–807 (6th Cir. 2013), makes clear that Mr. Stone's statement was not an improper burden-shifting comment. The defendant in Moore argued that the prosecutor improperly shifted the burden of proof by commenting on the defense's failure to present an expert witness. *Moore*, 708 F.3d at 806. While contending that the victim was on his knees when he was shot, the prosecutor said, "The defense has every ability to subpoena in any expert they want to prove otherwise. Where were they? Where were they?" *Id.* Although the court found that defendant had defaulted the claim, it also found that the underlying claim was meritless because "[t]here is "nothing impermissible about the prosecutor's commenting on the defendant's failure to rebut evidence, so long as he does not violate the defendant's Fifth Amendment rights by commenting implicitly or explicitly on the defendant's failure to testify." *Id.* The court elaborated, "Where there are witnesses other than the defendant who could have been called to refute a point made by the prosecution, it is permissible for the prosecution to comment on the defendant's

failure to rebut that proof." *Id.* Moreover, the court emphasized, the trial court "properly instructed the jury that the prosecution had the burden of proof and Moore did not have to present a defense." *Id.* at 807.

Mr. Stone's comment about the witnesses called by defendant and the witnesses called by the government did not improperly shift the burden of proof; rather, it was a permissible comment on defendants' failure to rebut the evidence offered by the government through its numerous fact witnesses.

Moreover, as the Court noted in its original ruling, *see* Rough Draft Transcript, Jan. 28, 2020, p. 132, Mr. Stone made this statement in direct rebuttal to defense suggestions in their closing arguments that the government was concealing or obfuscating certain aspects of proof. For instance, the over-arching theme of defendant Hofstetter's closing argument was that the government "want[ed the jury] to convict [her] on the noise," which defense counsel defined as "the stuff that distracts you, the flashing lights, the extras, the things you get caught up in" but that "don't really impact what is the fact." Rough Draft Transcript, Jan. 27, 2020, p. 162. Defendant Hofstetter also stated that the government "didn't bother to look at all the documents" related to the case in their investigation and that they "gave [the jury a] few emails, not a lot" and suggested that the government had not provided the kind of information upon which the jury could rest a conviction. *Id.* at 173. Defendant also argued that the government's case was "built upon 20[/]20 hindsight and a 30,000 view from the sky looking down, not looking at the evidence as it took place on a daily basis," suggesting that the government's witnesses

were motivated by the desire for personal benefit and fear of prosecution. *Id.* at 188–89. Counsel for defendant Womack characterized the government as "trying to puff up" its case and "throwing things at [the jury] that just aren't right, sometimes wrong, sometimes misleading." Rough Draft Transcript, Jan. 28, 2020, p. 82. Counsel for defendant Newman said the "government's case sort of amounts to throwing things up against the wall to see what sticks." *Id.* at 51.

Given these statements by defense counsel, it was not improper for Mr. Stone to comment on the number of fact witnesses put on by the government and the fact that defendants had only put on opinion witnesses and an investigator. Rather, Mr. Stone's statement was "a fair response to the defense's assertions, which 'opened the door to [the] rebuttal.'" *United States v. Wimbley*, 553 F.3d 455, 461 (6th Cir. 2009) (discussing *United States v. Newton*, 389 F.3d 631 (6th Cir. 2004), *vacated on other grounds*, 546 U.S. 803 (2005), in which "the defense asserted that the government had withheld an audiotape from the jury [and t]he prosecutor responded by arguing that [the defendant] could have played the audiotape for the jury if he deemed it crucial the case" and the Sixth Circuit held that the prosecutor's response was appropriate); *see also United States v. Hunt*, 278 F. App'x 491, 497 (6th Cir. 2008) (holding that the prosecutor did not improperly shift the burden of proof where the prosecutor asked the defendant, "[I]f you think there is other evidence you need to get in, that's kind of your job, right?" because the exchange immediately followed defendant's "insinuat[ion] that the government was deliberately withholding evidence from the jury"). And if this was not clear from the

words of the contested statement itself, the context of the government's statement illuminates that the government's remarks "were not intended to shift the burden of proof or otherwise mislead the jury or prejudice the defendant." *Hunt*, 278 F. App'x at 497. As the government points out [Doc. 891 p. 16–17], the contested statement followed Mr. Stone's opening remarks, in which he directly addressed defense accusations of puffing and throwing things up against the wall, and his comment that the government "didn't hide anything from [the jury]." Rough Draft Transcript, Jan. 28, 2020, p. 86, 89, 91. The Court also notes again that it instructed the jury as to the burden of proof in its opening and closing charges. Thus, the statement to which defendant Hofstetter objects was not improper and did not constitute prosecutorial misconduct.[16]

C. Challenges to Pre-Trial Rulings

1. Venue

Defendant Hofstetter also assigns error to the magistrate judge's denial of successive motions for change of venue filed by defendant Hofstetter [Doc. 890 p. 15–16]. As the government notes [Doc. 891 p. 28], this issue was fully litigated before the

[16] Defendant Hofstetter argues in her reply that the government failed to address the argument in her motion that Mr. Stone's statement represented an impermissible comment on defendants' election not to testify [Doc. 899 p. 1–2]. In fact, defendant Hofstetter did not make this argument in her new trial motion, instead arguing only that Mr. Stone's comments shifted the burden of proof. However, the Court notes that even if defendant had made this argument, it would have failed for similar reasons to those underlying the Court's ruling on her argument that Mr. Stone improperly shifted the burden of proof: (1) Mr. Stone's comments did not manifest the intent to "reflect on the accused's silence" and were not "of such a character that the jury would 'naturally and necessarily' construe them as such"; (2) they were isolated and not extensive, in that they represented a few sentences in two-hour-plus closing arguments by the government; (3) there was significant evidence of guilt; and (4) the Court instructed the jury in its opening and closing charges that they should not consider or discuss defendants' election not to testify. *See Wells*, 623 F.3d at 338.

magistrate judge. Magistrate Judge C. Clifford Shirley denied defendant's first motion for a change in venue in February 2018 after a thorough examination of the parties' arguments and legal analysis [Doc. 309 p. 37–42], holding that defendant had not established a presumption of prejudice and that accordingly defendants must show they had suffered actual prejudice, which the Court found must be determined "shortly before the jury [was] empaneled" [*Id.* at 41–42]. Defendant Hofstetter sought leave to pursue a second motion for change of venue in February 2019, which led Judge Poplin to set a hearing on defendant's second venue motion [Doc. 440]. Judge Poplin ultimately denied the motion, echoing Judge Shirley's reasoning and holding that defendants failed to show presumed prejudice from pretrial publicity and that voir dire would be "sufficient to expose any actual prejudice" against defendants [Doc. 610 p. 10].

Defendant does not explain why the magistrate judges' rulings were in error, superficially rehearsing the arguments that the magistrate judges rejected in their orders [Doc. 890 p. 15–16]. Without more, the Court finds no reason to reconsider the magistrate judges' well-reasoned conclusions. Accordingly, the Court does not find that the denial of defendant's venue motions constitutes reversible error.

2. Spoliation

Similarly, defendant Hofstetter assigns error [Doc. 890 p. 3] to the Court's adoption of the pretrial report and recommendation (R&R) of Judge Poplin [Doc. 474] denying defendant Hofstetter's motion and amended motion to suppress evidence based on spoliation [Docs. 405, 410]. Once again, the government notes that this issue was

fully litigated [Doc. 891 p. 28] and once again, defendant Hofstetter points to no legal error in the magistrate judge's R&R or the Court's adoption of the R&R [Doc. 523]. Indeed, defendant Hofstetter refers only generalities to the magistrate judge's finding that the destroyed evidence was not materially exculpatory and argues her due process rights were violated because government witnesses testified about the Hollywood clinic and defendant Hofstetter could not review the files seized from that clinic [Doc. 890 p. 3]. However, defendant does not challenge the legal reasoning supporting Judge Poplin's conclusion that the evidence was not materially exculpatory or her analysis of the case under *Arizona v. Youngblood*, 488 U.S. 51 (1988). Once again, defendant Hofstetter has presented no basis for the Court to reconsider its prior ruling.

3. Trial Continuance

Defendant Hofstetter argues that the Court erred by granting only a brief continuance to allow defendant Clemons's co-defense counsel, Jeff Whitt, to prepare for trial. Mr. Whitt was appointed after Cullen Wojcik, original co-counsel with Randall Reagan, experienced a health crisis preventing him from appearing [Doc. 890 p. 16–17]. Defendant argues that the Court's decision to continue the trial until October 21, 2019, left Mr. Whitt with too little time to prepare for his assigned trial role, that of preparing defendants' expert witnesses to testify and preparing to cross-examine the government's expert witnesses, given the complexity of the case [*Id.*]. The government counters that Mr. Whitt proved himself to be "highly effective in matters relating to expert witnesses" and that the verdicts reflect that: "No defendant was found liable for a death

enhancement," "none of the providers were convicted of a drug conspiracy," and "no prescriber-defendant was convicted of a specific drug distribution" [Doc. 891 p. 29]. The government also contends that the expert testimony was "less critical" to defendant Hofstetter than to the prescribers because she was an owner-manager of the clinics [*Id.*].

The Court agrees with the government that defendant Hofstetter's bare assertions of "great disadvantage in [trial] preparation" do not support a finding that the Court abused its discretion in granting a continuance of the length it did. *United States v. Vasquez*, 560 F.3d 461, 466 (6th Cir. 2009) (citations omitted) (noting that the denial of a continuance is only an abuse of discretion amounting to a due process violation when it represents "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay"). In addition to recognizing, as the government did, Mr. Whitt's high level of preparation and competence in cross-examining the government's expert witnesses and preparing defendants' expert witnesses, the Court highlights three (3) aspects of its original order denying a continuance. First, the Court noted in summarizing the case that the trial date had been continued seven (7) times previously, several times at defendant Hofstetter's behest, including a continuance of five (5) weeks to allow Mr. Whitt to prepare for trial [Doc. 673 p. 1–2]. Mr. Whitt had advised that he believed the earliest he could be prepared for trial would be six (6) weeks after his appointment, but the magistrate judge noted in her order that Mr. Whitt would likely receive an additional four (4) to six (6) weeks after the start of trial to prepare before the government presented its experts based on the government's projected schedule [*Id.* at 3].

Second, the Court noted the government's efforts to reduce the evidence Mr. Whitt would need to review, by decreasing the number of files its own experts reviewed, significantly reducing the number of overdose deaths it intended to prove, and reducing the estimated length of its case in chief [*Id.* at 9, 13]. Finally, the Court highlighted the number of days the Court planned not to hold trial principally during the government's case in chief, thus providing additional time for Mr. Whitt to review files and otherwise prepare [*Id.* at 11–12]. In light of these considerations and defendant Hofstetter's failure to present any legal authority for finding the Court abused its discretion, the Court does not find its denial of a continuance to be reversible error.

4. Thefts

Defendant Hofstetter argues that the Court erred in admitting evidence of uncharged thefts of clinic monies [Doc. 890 p. 11–12]. As the government notes [Doc. 891 p. 29], this issue has twice been litigated [Docs. 641, 718], and each time the Court concluded that evidence of defendant's alleged thefts was admissible for certain purposes. Defendant's arguments in the instant motion do not reveal error in the Court's previous rulings and, as a result do not entitle her to the relief sought.

First, defendant argues that, under Federal Rule of Evidence 404(b), evidence of her alleged thefts was admitted in error because the government's purpose in proffering it "was to introduce propensity evidence of Ms. Hofstetter's alleged criminal character to label the defendant as a criminal in order to prove the defendant's character to show that on a particular occasion [she] acted in accordance with [that] character" [Doc. 890 p. 12].

But the Court has previously found this evidence probative of material issues other than character and thus admissible as evidence pertaining to those material issues. Specifically, the Court held, "evidence that defendant was embezzling monies from her alleged co-conspirators is admissible to prove defendant's knowledge that the UCSC clinics were not legitimate pain clinics and defendant's motive and intent in joining the conspiracies alleged in the indictment" [Doc. 718 p. 8–9]. Ultimately, defendant's 404(b) argument in the instant motion merely parrots her Rule 404(b) argument previously raised—and rejected—on this issue and does not identify any error in the Court's reasoning behind its prior rejection of this same argument. Moreover, the Court repeatedly instructed the jury that it was to consider any such evidence only for the specific, permissible purposes cited by the Court and not as evidence of bad character to show a propensity to act in conformity therewith. *See United States v. Bradley*, 917 F.3d 493, 508 (6th Cir. 2019) ("[J]urors are presumed to follow the trial court's instructions." (quoting *United States v. Hynes* 467 F.3d 951, 957 (6th Cir. 2006))). For these reasons, the Court finds defendant's argument without merit and will otherwise decline to again reconsider its prior Rule 404(b) ruling on evidence of defendant's alleged thefts.

Second, seemingly in support of a Rule 403 argument, defendant points to the testimony of co-conspirator Christopher Tipton regarding her alleged thefts. Defendant states that this witness testified that the owners of the UCSC clinics became aware of defendant's alleged thefts through "a comment made by an employee to them" but that they "did not know" whether the allegation was true [Doc. 890 p. 12]. Defendant claims

that the admission of this testimony "resulted in confusion of the issues, misleading the jury and unfair prejudice" [*Id.*].

The Court does not agree. Evaluating the probative value of this evidence as compared to the danger of unfair prejudice it posed, the Court does not find it erred in admitting this evidence. Evidence that the clinic owners, despite their knowledge of allegations that defendant had stolen clinic monies, had hired her to open and manage their Tennessee clinics carries significant probative value with respect to several material issues. Specifically, as the Court discussed in its prior written opinion on the admissibility of evidence of defendant's alleged thefts, this testimony tends to show that defendant "knew she could continue to embezzle money from the clinics with little consequence" and "supports a finding that [defendant] knew the enterprises clinics were not legitimate pain clinics," reflecting on defendant's "motive and intent in allegedly joining the conspiracy" [Doc. 718 p. 9]. This, in combination with the fact that the alleged thefts are not collateral to the charged offenses [*Id.* (citing *Lang*, 717 F. App'x at 531)], leads the Court to again conclude that the prejudice resulting from the admission of this testimony was not unfair and did not substantially outweigh the probative value of the evidence.

Defendant's other Rule 403 arguments, i.e., those related to confusion of the issues and misleading the jury—arguments that were not raised in defendant's initial motion [*see* Doc. 585]—are especially conclusory and perfunctory. *See El-Moussa v. Holder*, 569 F.3d 250, 257 (6th Cir. 2009) (quoting *McPherson v. Kelsey*, 125 F.3d 989, 995–96

(6th Cir. 1997)). And in light of the probative value of the evidence, as just discussed, as well as Rule 403's favoring admission, *Lang*, 717 F. App'x at 531, the Court is unconvinced that the probative value of this evidence was substantially outweighed by these other dangers. For these reasons, defendant has not shown that she is entitled to relief on these grounds either.

Lastly, defendant points to the testimony of co-conspirator Benjamin Rodriguez, a co-owner of the UCSC clinics, regarding the alleged thefts. She claims his testimony, which provided that some unspecified individual had alleged defendant was "accepting tips," was "a bad element," and "was stealing money from the business," included inadmissible hearsay and constituted a "direct comment on her character" in violation of Rules 403 and 404(b). With respect to defendant's Rule 403 and Rule 404(b) arguments, the Court relies on the discussion herein, *supra*, as well as its prior orders, to conclude that this evidence was not erroneously admitted under these Rules. With respect to defendant's hearsay objection, more context is helpful.

Immediately prior to the witness tendering the objected-to testimony, the witness relayed that due to "another problem" involving defendant, of which the owners had become aware, defendant, as opposed to the individual the owners had originally selected, was to come to Tennessee to open and operate pain clinics on behalf of the enterprise. The government then asked the witness to explain what the problem was with defendant to which he had referred. In response, the witness supplied the objected-to testimony. Defendant objected on the basis of hearsay. The government responded in

opposition, clarifying its intended purpose for eliciting testimony related to defendant's alleged thefts (i.e., to explain how defendant ended up opening and operating the owners' clinics in Tennessee) and noting that it would otherwise concede as to hearsay objections not involving a co-conspirator statement. The Court permitted the government to proceed with direct examination.

At the outset, the Court notes that the parties seemingly agreed that the testimony would be inadmissible to prove the truth of the matter asserted if the declarant was not a co-conspirator, but defendant did not provide further argument on this point at trial. As a result, the record is unclear with respect to whether the testimony involved a co-conspirator statement and thus whether the statement was admissible as such. But even assuming the declarant was not a co-conspirator, the Court finds no error in admitting the statement because it was not offered to prove the truth of the matter asserted, i.e., that defendant was stealing money from the clinics. Rather, as the government asserted in responding to defendant's objection at trial, this testimony was admitted for permissible, non-hearsay purposes as repeatedly discussed by the Court.[17]

In sum, for the reasons discussed herein, as well as in prior orders, the Court does not find that the evidence regarding defendant's alleged thefts was admitted in error.

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[17] Similarly, the Court notes that the context in which the testimony was provided makes plain that the government did not offer this testimony as impermissible character evidence. Rather, the government's stated purpose for eliciting testimony related to defendant's alleged thefts aligned with the permissible purposes for such evidence identified by the Court. Specifically, the Court has consistently held that evidence that the owners hired defendant to run their Tennessee clinics despite their knowledge of theft allegations against her is probative of her knowledge of the conspiracy's objective and her motive and intent in participating in the operation of the enterprise's Tennessee clinics [*see* Doc. 718 p. 9].

IV. Conclusion

For the reasons explained above, defendants' motions for a judgment of acquittal and a new trial [Docs. 870, 890] are hereby **DENIED**; Defendant Hofstetter's motion for oral argument [Doc. 892] is likewise **DENIED**; and Defendant Hofstetter's motion [Doc. 898] for leave to file a supplement is, to the extent discussed *supra*, note 1, **GRANTED**.

IT IS SO ORDERED.

s/ Thomas A. Varlan
UNITED STATES DISTRICT JUDGE