FOR PUBLICATION

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-14192

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN CHUN,
DANIEL TONDRE,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:20-cr-00120-WFJ-JSS-1

Before NEWSOM, BRASHER, and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

BACKGROUND

In *United States v. Simon*, 12 F.4th 1 (1st Cir. 2021), the First Circuit affirmed the convictions of the founder and four executives of Insys Therapeutics, Inc. ("Insys"),[1] under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d),[2] for conspiring to bribe physicians to prescribe Subsys, a fentanyl-laced spray medication administered beneath the tongue. Insys developed, and the U.S. Food and Drug Administration ("FDA") approved, Subsys in early 2012 for use in the treatment of breakthrough cancer pain.[3] The "icing on the cake" of the bribery scheme was the "speaker program," *id.* at 17, in which Insys paid selected physicians—in particular those specializing in pain medicine and prescribing Subsys off-label—hefty honoraria to speak at dinner meetings Insys' representatives hosted. The purpose of

[1] Insys was a publicly held pharmaceutical firm. *Simon*, 12 F.4th at 15.

[2] The defendants were also found guilty of mail fraud and wire fraud, which constituted the predicate acts underlying the RICO offense. Four of the defendants were found guilty of honest services mail and wire fraud. Those acts also constituted predicate acts.

[3] The term "breakthrough cancer pain" is a term of art: it refers to brief spikes in pain (typically lasting less than one hour) in patients with cancer who are already dealing with constant and relatively steady pain. All other uses of Subsys were deemed "off-label." *Simon,* 12 F.4th at 15.

these speaker programs was ostensibly to introduce Subsys to physicians in the community, but their true purpose was to put cash in the hands of the prescribing physicians.

Michael Babich, Insys' President and Chief Executive Officer, and Alec Burlakoff, Insys' Vice President of Sales, pleaded guilty to the RICO conspiracy[4] and testified as prosecution witnesses at the trial. Burlakoff referred to the speakers, including Dr. Steven Chun, an appellant here, as "whales":

> physicians who "had agreed in a very clear and concise manner that they were up for the deal, which meant that they would be compensated based on the number of prescriptions of Subsys they wrote. A corollary to that deal was that "the more they wrote and the more they increased the dose, the more they'd get paid to speak." At Burlakoff's urging, regional sales managers were to have a "candid conversation" with each potential whale and make clear that if the physician was going to receive payments from Insys, he was "going to write a significant amount of Subsys prescriptions to new patients as well as increase the doses of current patients." Burlakoff told sales managers to view speakers as their "business partners."

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[4] Burlakoff pleaded guilty to the RICO conspiracy. On January 23, 2020, the District Court sentenced him to 26 months in prison and a three years of supervised release. *USA v. Babich et al.*, 1:16-cr-10343, ECF No. 1313 (D. Mass. Jan. 10, 2019).

Id. at 18 (alterations adopted). As for the speaker program, Burlakoff had this to say:

> [T]he speaking events themselves had little to no attendance. Often, only the speaker, a friend or family member, and the sales representative were on hand. Even when more people were in attendance, the speaker programs were mostly "social outings" or "just a reason to gather people and have dinner and pay [the doctor]." Although sales representatives were required to submit sign-in forms and attendee evaluation forms to a third-party compliance firm (Sci Medica), they frequently submitted inaccurate documentation, including sign-in sheets with names and signatures of people who were not present, to give the speaking programs an aura of legitimacy.

Id. at 19. The dinners were obvious shams. They were created to hide the fact that the honoraria Insys paid the speakers violated the "Anti-Kickback Statute," 42 U.S.C. § 1320a-7b(b), which prohibits the payment or receipt of kickbacks in connection with a federal healthcare program, such as Medicare.

The jury returned verdicts against the founder of Insys and four of its executives on May 2, 2019. *USA v. Babich et al.*, 1:16-cr-10343, ECF No. 841 (D. Mass. Jan. 10, 2019). This brings us to the case at hand.

* * *

On March 12, 2020, a Middle District of Florida grand jury returned an indictment against Steven Chun and Daniel Tondre.

The grand jury superseded the indictment on February 5, 2022—34 months later. The superseded version charged the defendants with committing 16 separate offenses, all based on the bribery scheme involved in *Simon*.

Count One alleged that, from August 2012 through July 2015, six individuals conspired in violation of 18 U.S.C. § 371 to violate the Anti-Kickback Statute by soliciting or receiving bribes for prescribing Subsys. Those six individuals were (1) Chun, a physician specializing in pain medicine and an enrolled Medicare provider; (2) Tondre, a sales representative and trainer for Insys whose sales territory included Chun and his medical practice; (3) Babich, Insys' President and Chief Executive Officer; (4) Burlakoff, Insys' Vice President of Sales; (5) Liz Gurrieri, an Insys technician; and (6) Pharmacist 1, who filled Chun's prescriptions.

Counts Two through Six alleged that, between May 4 and June 22, 2015, Tondre violated the Anti-Kickback Statute by paying Chun a bribe for prescribing Subsys. Counts Seven through Eleven alleged that Chun violated the Anti-Kickback Statute by accepting payments for writing Subsys prescriptions. Counts Twelve through Sixteen alleged that Chun on two occasions and Tondre on five committed identification fraud—using without authority the identification of another—between April 4 and June 16, 2015, in violation of 18 U.S.C. § 1028(a)(7).

Chun and Tondre entered pleas of not guilty to both indictments and stood trial before a jury on May 9, 2022.[5] The Government rested its case on May 19, and Chun did likewise. Tondre chose to testify at trial. At the close of the evidence, the defendants moved the District Court for judgment of acquittal.[6] The Court denied their motions. The jury found Chun guilty on Counts One and Seven through Eleven and Tondre guilty on Counts One through Six, Twelve, and Sixteen. Following the District Court's imposition of their sentences,[7] Chun and Tondre appealed their convictions and sentences.

Both Chun and Tondre challenge the District Court's denial of the motions for judgment of acquittal. We discuss the Court's ruling in Part I. In Part II, we consider the District Court's handling of two notes the jury submitted to the Court during deliberations.

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[5] On the eve of trial, the District Court, on the Government's motion, dismissed Counts Thirteen though Fifteen pending against Chun and Tondre.

[6] *See* Fed. R. Crim. P. 29(a). On May 23, the Court granted Chun's motion as to Counts Twelve and Sixteen.

[7] After denying Chun's Rule 29(c) and Rule 53 alternative motions for judgment as a matter of law and for a new trial, the District Court sentenced Chun on December 5, 2022, to concurrent prison terms of 42 months on the six counts of conviction and a three-year term of supervised release. On December 15, 2022, the District Court sentenced Tondre to concurrent prison terms of 48 months on the eight counts of conviction and a three-year term of supervised release.

Part III addresses an issue involving Chun's sentence. Part IV concludes, finding no basis for disturbing the District Court's judgments, and therefore affirms.

I. MOTIONS FOR JUDGMENT OF ACQUITTAL

We must preface the Part I discussion with an explanation of how the Government chose to try this case. It treated the trial as an extension of the trial in *Simon* except that the *Simon* defendants would not be standing in the dock, and the trial would be held in Tampa, Florida, not in Boston, Massachusetts. But the Government's star witnesses, Babich and Burlakoff, would be the same. They had been charged as RICO conspirators in *Simon* and having pleaded guilty, testified at the trial of their co-conspirators. And they had been charged as Count One conspirators here, although not indicted, and, as in *Simon,* testified at the trial of two of their co-conspirators, repeating much of what they testified to in *Simon*. And the time frames of the *Simon* conspiracy and the Count One conspiracy are the same, August 2012 through July 2015.

So, although the jury would not know about *Simon,* it would learn that Babich and Burlakoff had pleaded guilty to criminal conduct that occurred while they were at Insys, a conspiracy involving themselves and four Insys executives—John Kapoor, Joe Rowan, Sunrise Lee, and Mike Curry—that occurred during the time frame of the conspiracy alleged in Count One. The jury would also learn of the price they paid for their criminal conduct. Babich testified that he made $60 million exercising Insys stock options. Burlakoff had this to say: "It was all taken. . . . I owe 59 million in restitution."

Asked if it was "joint and several with anyone else, he said, "[with] Mike Babich and John Kapoor."

* * *

We now discuss whether the court erred in denying Chun and Tondre's motion for judgments of acquittal. The questions this part poses are whether the evidence was sufficient to convict Chun[8] on Count One and on Counts Seven through Eleven. We answer those questions by reviewing the evidence de novo count by count, considering it in the light most favorable to the Government and drawing all reasonable inferences and credibility choices in favor of the jury's verdicts. *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir. 1998). Evidence is sufficient to sustain a conviction if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Starr*, 159 F.4th 901, 910 (11th Cir. 2025) (citing *Cavazos v. Smith*, 565 U.S. 1, 7, 132 S. Ct. 2, 6 (2011)). The guilty verdict need not be inevitable based on the evidence presented at trial; it need only be reasonable. *United States v. Browne*, 505 F.3d 1229, 1253 (11th Cir. 2007). We begin our review with the Count One conspiracy.

[8] Tondre makes largely the same insufficiency argument as Chun, so we refer to them collectively as "Chun" in sections A and B—unless otherwise stated. Tondre makes a separate safe harbor provision argument, which we address individually in section C.

A. Conspiracy Count

We begin with the first count, that Chun conspired to violate the Anti-Kickback Statute. The elements of conspiracy are "(1) an agreement among two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation in the agreement; and (3) an overt act by a conspirator in furtherance of the agreement." *United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003). An agreement is rarely, if ever, established by direct evidence. Rather it is usually shown by circumstantial evidence. *United States v. Pulido*, 133 F.4th 1256, 1276–77 (11th Cir. 2025). What the Government must prove is "the existence of an *agreement* to achieve an unlawful objective and the defendant's *knowing* participation in that agreement." *United States v. Chandler*, 388 F.3d 796, 806 (11th Cir. 2004).

As discussed, Count One alleged that, from August 2012 through July 2015, Chun was a member of a conspiracy consisting of himself, Insys, Babich, Burlakoff, Tondre, Gurrieri, and Pharmacist 1. The conspirators' objective was to violate the Anti-Kickback Statute by paying physicians to prescribe Subsys. The first question we must ask is whether the evidence presented at trial established an agreement to violate the Anti-Kickback Statute. If so, we must then ask whether the evidence showed that Chun was a party to the agreement at some point in time and that one of the parties to the agreement committed an overt act in furtherance of the agreement's objective. To answer the first question, we go back in time, to Insys' organization and the development of the scheme where

Insys paid physicians to prescribe Subsys to their patients. Babich and Burlakoff take us there.

Babich came on the scene before Subsys became a reality. Insys was a privately held corporation. John Kapoor founded it in 2004. He hired Babich, a banker, in 2009. At the time, Insys' scientists were in the process of developing drugs and putting them through clinical trials in anticipation of FDA's eventual approval of the drugs for distribution. The clinical trial of Subsys concluded in 2011, and, in January 2012, the FDA approved Subsys as a treatment for "breakthrough cancer pain"— "the spikes of pain that patients experience when they have cancer." With Subsys' approval in hand, Kapoor appointed Babich as the company's Chief Executive Officer.

At this point, Insys' executives "were getting ready to launch Subsys itself, meaning sell[ing] it across the United States." And Babich was "prepar[ing] the company for [an] initial public offering," going to New York, and trying to raise money, with the hope that Insys would "be on one of the stock exchanges."

The Subsys marketing program in the first six months of 2012 was not successful. As Babich expressed it, "we were not bringing in as much revenue of the drug as possible that we thought we could, patients were starting on too low of doses and dropping off, and we had many sales reps who weren't getting . . . more than one script per month." To generate more prescriptions, they launched a speaker program in mid-2012 as a pilot project. By the fall of 2012, the project was well underway nationwide. The program focused on the high prescribing doctors. Insys' "greatest chance at success" was getting the top doctors to use its product because they were already prescribing large volumes of other rapid onset fentanyl prescriptions.

Babich opined that the speaker program was a "legitimate marketing strategy." He explained:

> As a legitimate marketing strategy it's commonplace for companies to have a physician educate other physicians in their area about their experiences with the product itself. Usually you might have seen them when you go to dinner sometimes, there will be a private dining room and people in suits or nice dresses having dinner, and if it looks like a doctor or someone speaking, that's usually a speaker program. So by design that's the way that they're supposed to go.

Some of Insys' sales representatives and physicians did the speaker programs "very well." But some didn't. They put on what Babich would call "illegal sales programs," where the physicians invited to the speaker dinners didn't even show up. The Insys sales representative "may have signed forged sign-in sheets or done anything to make it look . . . to the corporate office that the program was done correctly in order to get the payment to the physician." Babich admitted the speaker programs were illegal because "we traded cash for prescriptions."

Burlakoff joined Insys in June 2012. He came from an Insys competitor, Cephalon, where he had been in charge of speaker development in his role as Market Development Manager. He knew

Tondre, a Cephalon sales representative, and Chun, a pain medicine specialist.

In June 2012, Insys did not have a speaker program. Soon after arriving at Insys, Burlakoff met Chun and learned that he had been trained as a speaker. Sometime later, in the summer of 2012, he went to dinner with Chun; Aqsa Nawaz, Chun's girlfriend; and Tracy Kane, an Insys sales representative. They "talked about several things to try to break the ice, but ultimately the conversation revolved around [Burlakoff's] desire to utilize [Chun] as a speaker in exchange for his business." In Burlakoff's words, "I needed him to write Subsys and a lot of it."

> I said, listen, this is my position as Vice President of Sales, I have bosses to answer to, I do have a large budget, at least in respect -- in perspective to other pharmaceutical companies, I had 100,000, I let him know I had 100,000, I planned on using every Penni [sic] of it so long as he was prescribing Subsys in return.

Chun "verbally agreed" with Burlakoff's plan.

Insys had a form speaker agreement drafted by legal counsel. On July 17, 2012, Chun became the first physician to sign the agreement. Babich signed for Insys. The agreement provided that the payment to the physician as speaker would be consistent with the fair market value of the services provided by the speaker and not based on the volume or value of any business the speaker generated for Insys. As Burlakoff put it, the notion that the physician would not be paid on the basis of the volume or value of any business he generated was "false." It was "just fluff language that no one at the company reads, nor do any of the physicians read." "If we didn't have a 2-to-1 return on investment, that speaker no longer spoke." Exhibit B to the agreement provided for a $2,400 honorarium for each program Chun conducted and $1,200 for any additional programs conducted the same day.

Once the speaker program was fully underway, Insys' Director of Sales targeted physicians he referred to as "high decile customers." As Burlakoff explained, "the doctors [we]re decile based on . . . the number of prescriptions, net revenue and gross revenue they produce[d] for the rapid onset opioid market, so that would include us and all competitors, and then separately just Subsys." Chun was a high decile customer. Insys' Director of Sales Operations "analyzed him as someone that was just an extremely high prescriber of the rapid onset opioid market." Insys rated him as "a 10 for the rapid onset opioid market and an 8 or 9 for Subsys." Burlakoff received an email from Babich stating: "Chun is the Six Million Man. A rep could theoretically make 600,000 a year just off him."

Burlakoff referred to doctors who would prescribe Subsys in return for speaker events as: "Game changers, President's Club makers, a rep's dream, you know, golden goose, I mean, but more often than not we used the term whales." President's Club makers, Burlakoff said, "meant that that physician, if he does what he says he's going to do and prescribes Subsys in exchange for the speaker programs we give him, he's going to send the representative to President's Club, which is the highest reward a representative can be given in the industry."

Burlakoff left Insys in the summer of 2015. Chun served as an Insys speaker from July 2012, when he signed the speaker agreement, until Burlakoff departed. Tondre, who made the arrangements for the majority of Chun's speaker programs, testified that he set up 100 programs. By the time the Insys speaker program had run its course in 2015, Chun had received honoraria totaling $278,900.

Michael Frey—a former family medicine physician who, in 2018, pleaded guilty twice to conspiracy to violate the Anti-Kickback Statute, and, cooperating with the Government,[9] testified against colleagues in similar cases—was well acquainted with Chun. Frey attended a three-day "speaker training" session with Chun and over 50 other physicians in Boca Raton, Florida, on November 14–16, 2014. He testified that during the session, he, Chun, Dr. De la Garza, and another physician were sitting at a table talking about the speaker fees they were receiving, and that "Dr. Chun . . . bragged that he was the highest paid speaker in the country for his prescription writing."

The Government's proof that the Count One conspiracy existed as alleged was overwhelming. The jury found, and we affirm,

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[9] *United States v. Michael Frey, M.D.*, No. 2: 18-cr-71-FLM-99CM, 2018 WL 2835942 (M.D. Fla. May 18, 2018).

that Chun conspired with four of his co-conspirators—Insys, Babich, Burlakoff and Tondre—to violate the Anti-Kickback Statute.

B. Substantive Counts

We now move to Counts Two though Eleven, alleging the Anti-Kickback Statute crimes Chun, Tondre, and their Count One co-conspirators agreed to commit. The Anti-Kickback Statute states:

> Whoever *knowingly and willfully* solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--
>
> > (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
> >
> > (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $100,000 or imprisoned for not more than 10 years, or both.

42 U.S.C. § 1320a-7b(b)(1) (emphasis added).[10]

Chun is alleged to have committed the offenses described in Counts Seven through Eleven in 2015.[11] On May 4, 5, 11, 12 and June 22, respectively, he allegedly received kickbacks in the form of speaker honoraria for programs that took place in restaurants in Florida: in Sarasota on April 14 and 28, May 4 and 9, and June 16, and in Naples twice on May 8. The honoraria totaled $16,700.

Chun presents two arguments in challenging these five counts. One is that the Government failed to tether the Insys speaker program scheme to the Anti-Kickback Statute federal healthcare requirement. The other is that the Government failed to prove that, in accepting the speaker fees, he acted with the specific intent to disobey the law. We consider these arguments in turn.

1. Federal Healthcare Requirement

The Anti-Kickback Statute prohibits a practitioner from "knowingly" accepting remuneration in exchange for "any item or service for which payment may be made in whole or in part under a Federal health care program." 42 U.S.C. § 1320a-7b(b)(1). We have not addressed in a published opinion what the Government

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[10] The Government charged Tondre under Section 1320a-7b(b)(1)'s counterpart, 42 U.S.C. § 1320a-7b(b)(2), which makes "knowingly and willfully offer[ing] or pay[ing] any remuneration" a felony as well.

[11] The offenses Tondre committed as alleged in Counts Two through Six occurred in 2015 on the same dates. On those dates, he paid Chun kickbacks in the amounts indicated in the text.

must show to establish this element. But the Fifth Circuit addressed it in *United States v. Shah*, 95 F.4th 328 (5th Cir. 2024). There, the Court held that the Government need only show that the defendant "knowingly agreed to accept remuneration for referring patients that *could* be federally insured." *Id.* at 352.

We choose to adopt the Fifth Circuit's reading for two reasons. First, the statute requires only that the "payment *may* be made . . . under a Federal health care program." 42 U.S.C. § 1320a-7b(b)(1) (emphasis added). The word "may" suggests that the defendant is liable if there is a possibility that payment could come from a federal health care program. This makes sense given the nature of most medical practices, where Medicare constitutes a portion, but not the entirety, of the patients' insurance coverage. Second, this reading is in line with the plain reading of 42 U.S.C. § 1320a-7b(h) ("[A] person need not have actual knowledge of this section or specific intent to commit a violation of this section.").

Here, the Government introduced evidence that Chun had participated in the Medicare program, and, therefore, that he had Medicare patients. Based on this, a jury had sufficient evidence to find that Chun knowingly agreed to accept remuneration for referring patients who could be federally insured.

2. Specific Intent

Willful conduct under the Anti-Kickback Statute requires that the act be "committed voluntarily and purposely, with the specific intent to do something the law forbids." *United States v. Nerey*, 877 F.3d 956, 969 (11th Cir. 2017) (quoting *United States v. Vernon*, 723 F.3d 1234, 1256 (11th Cir. 2013)).[12] Chun points to several pieces of evidence as proof that he lacked the specific intent to violate the law. First, he states that he was not aware ahead of time who or how many people would be attending the events. Second, he had no role in forging or submitting the forged sign-in sheets. Finally, Chun argues that from the circumstantial evidence in the record, the jury could not have found that he served as a speaker for Insys in exchange for writing Subsys prescriptions.

While these points could have been persuasive at trial, the jury ultimately chose not to accept them. The evidence that Chun had the specific intent to do something the law forbids was overwhelming. He knew the speaker programs were shams, and he nevertheless collected payment for them. For example, several attendees testified that Chun's programs lacked any educational component, were poorly attended, or were attended by inappropriate people—such as family members. The jury also heard testimony that Tondre asked Chun who he wanted to invite to his speaker programs. The Government introduced evidence that during the time these sham events were occurring, Chun began prescribing more and more Subsys—proof that the speaker programs existed to induce him to prescribe more.

[12] Chun also argues that the jury's conviction for illegal renumerations required an impermissible stacking of inferences. The stacking-of-inference argument is a ubiquitous argument, made in countless criminal, and civil, cases. It is frivolous. So, we do not address it.

As for the sign-in sheets, the Government introduced evidence that they contained forged signatures for each of the speaker events described in Counts Two through Eleven. Additionally, several attendees appeared on multiple sign-in sheets. And Chun's nurse practitioner testified that her signature had been forged on multiple sign-in sheets and, in one instance, had been misspelled in the same way Chun frequently misspelled it. Not only does this contradict Chun's argument that he had no role in forging the sign-in sheets, but it is also circumstantial evidence that he was aware of the illegitimate purpose of the speaker programs.

Chun seems to have missed the essence of what made his conduct illegal. His crime was not forging the signatures of physicians and others who did not attend his programs. His crime was being paid to prescribe—for which the Government provided ample evidence. In sum, the jury had sufficient evidence to support its verdicts.[13]

[13] Tondre alludes to an insufficiency of the evidence argument for the substantive counts in the "Summary of the Argument" section of his initial brief. He argues that he did not pay Chun for the events nor did he cause Chun's pay to be increased in any material way. Like with Chun, there was overwhelming evidence for the jury to find that Tondre acted with specific intent to do something the law forbids. In addition to introducing evidence that Tondre forged the sign-in sheets, which he concedes, the Government also introduced evidence that Tondre was aware that the speaker programs were poorly attended, had inappropriate attendees, and lacked a proper educational component. A reasonable jury could easily find that Tondre knew the true purpose of the speaker programs was not to educate local physicians about Subsys, but rather to transfer cash from Insys to Chun in exchange for prescribing Subsys.

C. Safe-Harbor Provision

Finally, we address Tondre's remaining challenge to the District Court's denial of his motion for judgment of acquittal. Tondre argues that there was insufficient evidence introduced at trial for the jury to convict him of participating in a conspiracy to violate the Anti-Kickback Statute. Specifically, he argues the Anti-Kickback Statute contains a safe-harbor provision for employees, and, as an employee of Insys, he is shielded from prosecution. Tondre did not raise this issue below. However, he asserts that since the safe harbor provision is not an affirmative defense, but rather a broad exclusion of who the Anti-Kickback Statute applies to, his failure to raise the issue at the District Court does not constitute a waiver.

The safe harbor provision of the Anti-Kickback Statute provides that "Paragraphs (1) and (2) shall not apply to . . . any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services." 42 U.S.C. § 1320a-7b(3)(B).

We have previously held that the safe harbor provision contained in 42 U.S.C. § 1320a-7b(3)(B) is an affirmative defense. *See Vernon*, 723 F.3d at 1271. Affirmative defenses, if not raised at trial, are waived. *See United States v. Najjar*, 283 F.3d 1306, 1308 (11th Cir. 2002). Because Tondre failed to raise this affirmative defense at trial, it is waived and we do not consider it further.

II. JURY QUESTIONS

Chun[14] argues that, by answering two questions posed by the jury, the District Court invaded the province of the jury.

"A trial judge has some obligation to make reasonable efforts to answer a question from the jury." *United States v. Rodriguez*, 765 F.2d 1546, 1553 (11th Cir. 1985). The district court has considerable discretion when responding to jury questions, but it does not have the discretion to "misstate the law or confuse the jury." *United States v. Lopez*, 590 F.3d 1238, 1247–48 (11th Cir. 2009). Challenged supplemental jury instructions are reviewed in light of the entire jury charge to determine whether the jury was misled. *Id.* at 1248. District courts should "answer within the specific limits of the question presented and resolve the jury's difficulties with concrete accuracy." *United States v. Joyner*, 882 F.3d 1369, 1375 (11th Cir. 2018) (internal quotation marks omitted).

"We review a district court's response to a jury question for an abuse of discretion." *Lopez*, 590 F.3d at 1247. When applying an abuse of discretion standard, "we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004).

[14] Tondre adopts Chun's arguments regarding the next two issues on appeal.

A. May 23 Jury Question

On the first day of jury deliberations, May 23, the jury posed the following question to the Court:

> Dear Judge, We would like to review any data from which we can calculate the per unit cost (not PDE[[15]]) of the various strengths of Subsys to compare how much 1 x 600 mcg or 1 x 800 mcg costs compared to 0.5 x 1200 mcg or 0.5 x 1600 mcg.

The Court convened a meeting of the parties to decide how to respond to the jury's question. The Government had alleged that part of Chun and Tondre's scheme was that Chun prescribed higher doses of Subsys than strictly necessary to increase Insys' profits. Chun argued at trial that higher dosages of Subsys were actually cheaper per mcg of effective ingredient than lower doses. For example, a 1600 mcg dose of Subsys was less than twice as expensive as an 800 mcg dose.

The Government identified two pieces of evidence to provide to the jury. One was Government Exhibit 600 ("Exhibit 600"), and the other was Government Exhibit 600-A ("Exhibit 600-A"). Exhibit 600 contained thousands of entries of prescriptions Chun had written for Medicare patients over many years. Exhibit 600-A was a subset of Exhibit 600 covering just the indictment period. The spreadsheet contains dozens of data points for each prescription issued by Chun, including drug name, strength, and cost. The

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[15] Prescription Drug Event.

Government argued that, although the exhibits weren't exactly what the jury requested, the exhibits contained data from which the jury could calculate what it was looking for.

Defendants objected to providing those exhibits to the jury on two grounds. First, the exhibits did not contain the data the jury was asking for. And, second, the jury had specifically requested "(not PDE)" in its question, and the exhibits explicitly provided PDE data.

The Court overruled the objection, finding that the jury could possibly extrapolate the data it was looking for. At no point did the defendants suggest providing another exhibit to the jury. Thus, the District Court provided the following answer to the jury's question:

> Re. your note: You might consult Govt. Exhibit 600 & the excerpt 600A. A laptop will be provided in the morning to view CDs. You may or may not find these exhibits helpful...

On appeal, Chun argues that the District Court improperly directed the jury to specific evidence and suggested that it rely on that evidence in making its determination of facts. He heavily relies on *United States v. Rivera-Santiago*, 107 F.3d 960 (1st Cir. 1997), to make his argument. In *Rivera-Santiago*, the jury asked the judge "if there were any signs of flashing lights from the suspect aircraft and suspect vessel." *Id.* at 964. The judge answered the jury by reading a selection of testimony from one of the witnesses. *Id.* at 964–65.

The First Circuit found that the district court deprived the defendant of his Sixth Amendment right to trial by jury by usurping the jury's fact-finding role. *Id.* at 965. It noted that "the culling of testimony in response to a jury's open-ended question may, in effect, make the court a finder of fact." *Id.* (citation modified).

In addition to not being precedential, *Rivera-Santiago* is distinguishable from the present case in multiple ways. First, and most importantly, the District Court here did not cull the evidence. The Court provided the exhibits to the jury in their entirety and informed the jury that it "may or may not find these exhibits helpful." When a judge speaks to a jury, his influence "is necessarily and properly of great weight." *Quercia v. United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 699 (1933). By selecting certain pieces of evidence and not others, the judge is implicitly telling the jury that that specific piece of evidence contains the answer to its question or that it is more credible than other evidence presented by the parties. This is doubly so when a judge directs the jury to a specific selection from that piece of evidence—the judge is essentially telling the jury that he believes that evidence is credible and any evidence that contradicts it is not credible. That did not happen here. The Court provided the only exhibit[16] with the requested information in its entirety and included a caveat that the jury "may or may not find these exhibits helpful."

[16] Chun raises the argument in his Reply Brief that Government Exhibit 286 contains the per-unit data the jury requested. This is unpersuasive for several

Additionally, Chun's argument that the Court should not have provided the jury with Exhibits 600 and 600-A because the jury specifically requested "non-PDE" exhibits is misplaced. The jury was looking for an exhibit to help it calculate per unit cost, as opposed to PDE. That does not mean that the jury categorically rejected any exhibits that contained PDE data, but rather that it wanted an exhibit from which it could extrapolate the per unit cost.

B. May 24 Jury Question

On the last day of deliberations, May 24, the jury posed the following question to the District Court:

> We, the jury, are requesting the exhibit number associated with a text message from defendant Tondre in 2013 in which he "forwards" in part a direct message purportedly from defendant Chun and whose original message is not present in evidence.

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reasons. First, Chun had the opportunity to raise this issue with the Court during their conference when deciding how to answer the jury's question but failed to do so. As such, it is difficult to say that the Court abused its discretion by not pointing the jury to an exhibit it was not made aware of. Additionally, Chun has failed to show that Exhibit 600 and Exhibit 600-A lack the necessary data for the jury to calculate the per-unit cost of Subsys. Unlike instances where competing witnesses give contradictory testimonies and the jury must weigh credibility, here, presumably, both sets of exhibits accurately convey the actual price Insys billed Medicare for Subsys. If that is not the case, Chun failed to brief that point both at the District Court and now on appeal, so we do not consider it. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir. 2004).

The Court conferenced with the parties on how to respond. The Government identified three exhibits containing five individual text messages that fit the jury's description: Government Exhibits 212-B, 213-B, and 213-D. Each message was from Tondre's phone and started with the phrase "From chun."[17] The purported original messages were not found on Chun's phone, but the Government claimed that was because Chun had deleted them to cover up his relationship with Tondre.

The defendants did not dispute the fact that the jury was referring to those exhibits. Rather, they objected to the Government's characterization of those text messages as "forwarded." The problem, according to the defendants, was that the Government did not establish that the messages were actually forwarded; it merely referred to them as forwarded in its closing argument. However, as the District Court correctly pointed out, the defend-

[17] Government Exhibit 212-B. Texts from Tondre to Karen Hill:

"From chun You got already 1600mcg times 90."

"From chun this amLooking for sub pts."

Government Exhibit 213-B. Texts from Tondre to Joe Rowan:

"From chun You got already 1600mcg times 90."

"From chun this amLooking for sub pts."

Government Exhibit 213-D. Text from Tondre to Joe Rowan:

"From chun Git going ast least 3 new pts. Not to mention usual follow up pts times 8 rx today already" ants did not object to that characterization during closing argument. Overruling the defendants' objection, the Court relayed the following to the jury:

> You may be referring to Exs. 212B, 213B, and 213D??
> Please consider all the evidence as a whole.

The Court did not repeat the jury's use of the word "forwarded" and did not add any commentary about the exhibits or how they should be evaluated.

Chun argues on appeal that the District Court's answer to the jury's question was tantamount to it submitting extraneous information because it validated the Government's claim that those text messages were indeed forwarded by Chun. We disagree.

This is not a matter of authentication, but rather one of identification. The jury asked for the exhibits where Tondre "forwards" (in quotes) part of a message "purportedly" from Chun. The jury was not asking the Court to confirm that the messages were forwarded. And, in fact, the Court flagged the uncertainty surrounding the evidence. It was also not asking the Court to go on a fishing expedition to unearth evidence for it. The jury remembered a specific piece of evidence presented by the Government and described it to the Court the same way the Government had referred to it: messages sent from Tondre, purportedly forwarded from Chun, in

2013, whose originals were not in evidence.[18] Therefore, the District Court did not abuse its discretion by answering the jury's question.

III. SENTENCING

Chun challenges his sentence with the argument that the District Court erred by holding him accountable for the entire amount paid by Medicare instead of the net value of the improper benefit conferred by the illegal remunerations.

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[18] Although the Government did not confirm during trial that the texts contained in Government Exhibits 212-B, 213-B, and 213-D were forwarded, it did confirm a similarly worded text message, in Government Exhibit 211-B, was forwarded while cross-examining Tondre. The extracted text reads:

> From Aqsa ce :)Everything is under control. Come Monday, ur numbers will get back to where I had them :)

On cross examination, the Government questioned Tondre:

> Q: And this is a text that was forwarded . . . to Karen Hill . . . [f]rom you. . . . What does it say?
>
> A: Oh. It says, from Aqsa, everything is under control. Come Monday your numbers will get back to where I had them. That was from Aqsa.
>
> Q: So the text -- so you're forwarding a text from Ms. Nawaz in this particular e-mail, aren't you?
>
> A: It appears to be that way, yes.

This is clearly insufficient to prove that every text with "From chun" preceding it was forwarded by Chun. However, this shows that the jury was familiar with Tondre forwarding text messages to other people using this format.

The Sentencing Guidelines set a base offense level of 8 for a defendant convicted of a kickback offense. U.S.S.G. § 2B4.1(a). But, if "the greater of the value of the bribe or the improper benefit to be conferred . . . exceed[s] $6,500, [the offense level is increased] by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount." U.S.S.G. § 2B4.1(b)(1)(B). The District Court's Probation Office found that Chun and Tondre were accountable for $4,451,212 that Medicare paid for Subsys prescriptions written by Chun. This corresponded to an 18-level enhancement under U.S.S.G. § 2B4.1(b)(1)(J), with a Guidelines range of 78 to 97 months' imprisonment. The Probation Office recommended the same enhancement and range for Tondre.

At sentencing, Chun objected to the Probation Office's use of the total amount billed to Medicare as loss when calculating his offense level increase, arguing that the Court should instead use the value he received in bribes as the loss. The Court responded that the benefit conferred under § 2B4.1 was Insys' revenue because that was the whole reason Insys was giving the bribes. Chun responded that no improper benefit was conferred because the medication he prescribed was medically necessary. Therefore, under § 2B4.1, the greater value was the bribe because the benefit conferred was $0. At no point during the sentencing hearing did Chun argue that the $4.5 million loss amount was too high because it considered Insys' total revenue instead of its profits.

The District Court overruled Chun's objection. The Court stressed the fact that the jury had determined that the benefit had, at least in part, been induced by the illegal payments made by Insys to Chun. Even if Chun would have otherwise prescribed similar medication to his patients, the market as a whole suffered from Insys bribing Chun to prescribe its medication as opposed to its competitors' medication.

The Court sentenced Chun to 42 months' imprisonment—a downward variance from the Guidelines range of 78 to 97 months. The Court explained that it did not think that all of the $4.5 million was stolen and that Chun had indeed treated a lot of sick people. The Court also stated that the commercial bribery guideline is somewhat overstated. It further credited Chun's crime-free record and his support for his elderly mother. Finally, and importantly, the Court concluded the sentencing hearing by stating that even if it had ruled in Chun's favor on the Guidelines, it still would have given Chun the same sentence—whether it was an upward or downward variance.[19]

On appeal, Chun argues that to calculate the benefit conferred, the Court should have deducted any direct costs incurred in the preparation of the Subsys prescriptions. In other words, the

[19] At his sentencing hearing, Tondre adopted Chun's objection to the loss amount. The Court sentenced Tondre to 48 months' imprisonment—a downward variance of 30 months from the low end of his Guidelines range. As with Chun's sentencing, the Court stated that it would have imposed the same sentence regardless of whether it ruled for Tondre on his loss calculation objection. Therefore, Tondre's argument is the same as Chun's.

Court should have used net profit, not gross revenue, because that is a better approximation of the benefit conferred to Insys. Furthermore, Chun argues that because the Government did not present any evidence to calculate the necessary deductions, calculating the benefit conferred would be impracticable. Therefore, the Court should have used the value of the bribe, as U.S.S.G. § 2B4.1(b)(1) instructs. And, because the value of the bribe is less than $250,000, the enhancement would only be 10 levels—8 less than what the District Court imposed. This would have given Chun an offense level of 20 and a Guidelines range of 33 to 41 months' imprisonment.

Typically, we review de novo the district court's interpretation of the Sentencing Guidelines, and we review its factual findings for clear error. *United States v. DeVegter*, 439 F.3d 1299, 1303 (11th Cir. 2006). However, we need not decide the District Court's Guidelines calculations here. As this Court has previously held, "we need not review an issue when (1) the district court states it would have imposed the same sentence, even absent an alleged error, and (2) the sentence is substantively reasonable." *United States v. Goldman*, 953 F.3d 1213, 1221 (11th Cir. 2020) (citing *United States v. Keene*, 470 F.3d 1347, 1349 (11th Cir. 2006)). In such a case, any possible error would be harmless. *Goldman*, 953 F.3d at 1221. And it would be a waste of judicial resources, since a remand for resentencing would result in little more than the same district judge imposing the same sentence for the same reason. *See Keene*, 470 F.3d at 1349.

When considering substantive reasonableness, we consider the sentence imposed in light of the hypothetical Guidelines range assuming the defendant's preferred calculation. *Goldman*, 953 F.3d at 1221. Using Chun's Guidelines calculation, he would still be facing a sentencing range of 33 to 41 months' imprisonment. Chun and Tondre were sentenced to 42 and 48 months respectively.

Here, the District Court stated that it would have imposed the same sentence regardless of how it ruled on the loss calculation. The burden is on the defendant to prove that the sentence imposed is unreasonable in light of the record and the sentencing factors. *Keene*, 470 F.3d at 1350. Chun fails to make any showing that the sentence imposed was substantively unreasonable. The Court took the various sentencing factors into consideration—crediting Chun for his crime-free record and for taking care of his elderly mother. Additionally, the Court considered the fact that the Guidelines enhancements overstated Chun's offense conduct, but it stressed that the sentences imposed were appropriate considering the offense conduct and trial evidence.

In sum, we conclude that the District Court would have imposed the same sentence regardless of any error in calculating the Guidelines range and that the resulting sentences were substantively reasonable. Accordingly, any error—if indeed there was one—would be harmless.

IV. Conclusion

For the reasons we have expressed in Parts I–III, the judgments of the District Court are **AFFIRMED.**