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Tenth Circuit

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SHAKEEL A. KAHN, Defendant - Appellant.	No. 25-8004

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:17-CR-00029-ABJ-1)

Beau B. Brindley, Chicago, Illinois, for Defendant-Appellant.

Z. Seth Griswold, Assistant United States Attorney (Darin D. Smith, United States Attorney, Stephanie I. Sprecher, Assistant United States Attorney, with them on the brief), Casper, Wyoming, for Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **MATHESON**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

Shakeel A. Kahn, with the help of his wife, brother, employees, and patients, sold prescriptions for oxycodone and other drugs to the patrons of

his pain clinics in Wyoming and Arizona. One woman, Jessica Burch, died after overdosing on the oxycodone that he prescribed to her.

Kahn was charged with multiple crimes, including several counts of unlawful dispensing of a controlled substance via an unauthorized prescription and one count of leading a continuing criminal enterprise. Kahn was previously convicted of several charges after his first jury trial, which this court affirmed. The Supreme Court granted Kahn's subsequent petition for certiorari and ultimately vacated his convictions for legal error in a jury instruction. On remand, Kahn was tried for a second time and was convicted on seventeen of the twenty-one charges. He now appeals his convictions.

On appeal, Kahn challenges: (1) the admission of expert testimony into evidence regarding the law governing prescriptions; (2) the sufficiency of the evidence to support his convictions for leading a continuing criminal enterprise and for unlawfully dispensing a controlled substance resulting in the death of Jessica Burch; and (3) the use of a regulation to guide whether Kahn's prescriptions were authorized and lawful. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

"Because this appeal is before this court following a jury verdict, we state the facts in the light most favorable to the jury's decision." *Little v.*

Budd Co., Inc., 955 F.3d 816, 818 (10th Cir. 2020). Shakeel A. Kahn, a licensed medical doctor, operated pain clinics in Arizona and Wyoming. His brother Nabeel Khan managed the Arizona clinic, and his wife Lyn Kahn managed the Wyoming clinic. Kahn opened the Wyoming clinic after some pharmacies in Arizona stopped filling the prescriptions he wrote. Kahn's practice was to provide cookie-cutter prescriptions for opioids and other controlled substances to patients for a flat "office visit" fee. Aplt. App. II at 50–51. By the time he had moved his practice to Wyoming, he would hand out 30-day prescriptions for "120 oxycodone 15[milligram]s and 120 oxycodone 30[milligram]s" for $500. Aplt. App. XIV at 49.

According to Dr. Gina Moore, a medical expert who testified for the Government at Kahn's trial, oxycodone is a type of opioid pain medication. The medical community measures the effects of opioid medication against morphine, using a standard called morphine milligram equivalents (MME). A daily dose of greater than 100 MME is associated with a risk of overdose and addiction and the Center for Disease Control Guidelines in place at the time of these events recommended that prescriptions for greater than 90 MME be avoided. For oxycodone, 90 MME per day would translate to about 2 tablets of 30mg strength. By comparison, a 30-day prescription of 120 oxycodone 30mg pills and 120 oxycodone 15mg pills was 270 MME. In some cases, Kahn wrote prescriptions for oxycodone at as high as 950 MME.

Additionally, the likelihood of developing dependency on opioids increases dramatically when the supply of an opioid prescription is for five days or greater. Kahn's prescriptions were routinely written for a 30-day supply, with many patients receiving such a prescription *monthly*.[1]

He would provide these prescriptions proportional to the amount that patients would pay. His patients would commonly pay for the prescriptions in cash and sometimes with goods, for which he had a bartering system. For example, Kahn testified during trial that he "received firearms for medical services." Aplt. App. XX at 216.

Kahn's brother, Nabeel, enforced payment at the Arizona clinic while it was still operating. Kahn testified that he "used" Nabeel as his "boogeyman," Aplt. App. XIX at 134, to "scare certain people." Aplt. App. XX at 217. Nabeel also helped Kahn create a contract called a Drug Addiction Statement, which all patients had to sign. It purported to make patients swear that Kahn wasn't a "drug dealer," that the patient wasn't an "addict,"

[1] As will be explained in more detail later, one of Kahn's challenges on appeal relates to his conviction for engaging in a continuing criminal enterprise, which, at the risk of over-simplification, requires that he unlawfully engaged in and led the distribution of controlled substances with at least five other co-conspirators. It is helpful to compare Kahn's prescriptions to more routine oxycodone prescriptions to understand the permissible universe of inferences the jury could make about his prescribing habits and about the mental state of those with knowledge of his prescribing habits.

and it provided for a $100,000 monetary penalty for each civil or criminal action taken against Kahn or his "officers and agents" because of something the patient did or caused. Aple. Supp. App. II at 119.

Kahn would often write prescriptions without seeing patients first or performing medical exams. He would at times direct Nabeel, Lyn, and others to provide patients with their prescriptions and collect payment while he was out of town. At least three of his patients brought new patients to Kahn's clinics and would pay for their prescriptions and other fees. Kahn would sometimes negotiate prices directly with the three who were bringing new patients in without examining the new patients. When his practice in Arizona came under investigation by the Medical Board, he and his wife Lyn padded patient files with falsified information to make it look like he had performed adequate medical care and evaluations prior to writing the prescriptions. One woman, Jessica Burch, died after snorting crushed oxycodone pills prescribed to her by Kahn.

A grand jury returned a third superseding indictment against Kahn charging him with: one count of conspiracy to dispense and distribute controlled substances resulting in death, one count of possession of a firearm in furtherance of a federal drug trafficking crime, eight counts of unlawful dispensing of a controlled substance via unauthorized prescription, three counts of aiding and abetting via unauthorized

prescription the possession of a controlled substance with intent to sell, five counts of unlawful use of a telephone to facilitate the unlawful dispensing of a controlled substance, one count of engaging in a continuing criminal enterprise, and two counts of money laundering.[2]

Kahn was convicted of several charges after his first jury trial. However, the convictions were later vacated after the Supreme Court held in *Ruan v. United States* that the mens rea of the statute underlying most of the convictions, 21 U.S.C. § 841, applied to the "except as authorized" language within the statute and that a medical professional could not be held criminally liable unless they knew they were not authorized to prescribe or to fill the prescription. 597 U.S. 450, 454 (2022). On remand from the Supreme Court, this court vacated Kahn's convictions and

[2] Specifically, Kahn was charged as follows: one count of conspiracy to dispense and distribute oxycodone, alprazolam, hydromorphone, and carisoprodol resulting in death (Count 1), 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C) & (b)(2); one count of possession of firearms in furtherance of a federal drug trafficking crime, 18 U.S.C. § 924(c)(1); five counts of dispensing of oxycodone, 21 U.S.C. §§ 841(a)(1) & (b)(1)(C); three counts of aiding and abetting possession with intent to distribute oxycodone, 21 U.S.C. §§ 841(a)(1) & (b)(1)(C), 18 U.S.C. § 2; five counts of unlawful use of a communication facility, 21 U.S.C. § 843(b); three counts of aiding and abetting the dispensing of oxycodone, 21 U.S.C. §§ 841(a)(1) & (b)(1)(C), 18 U.S.C. § 2; one count of engaging in a continuing criminal enterprise (Count 21), 21 U.S.C. § 848(a), (b), & (c); and two counts of engaging in monetary transactions derived from specified unlawful activity, 18 U.S.C. § 1957. Kahn's sufficiency of the evidence challenges on appeal relate only to Counts 1 and 21, but his other challenges relate to all counts charged under 21 U.S.C. § 841.

remanded back to the district court for a new trial because the error "infected the instructions given on all counts" and was not harmless. *United States v. Kahn*, 58 F.4th 1308, 1322 (10th Cir. 2023).

Upon retrial, Kahn was convicted by the jury on seventeen of twenty-one counts. He was found not guilty on three of the eight counts of unlawful dispensing of a controlled substance via unauthorized prescription and on one of the five counts of unlawful use of a telephone to facilitate the unlawful dispensing of a controlled substance. He moved for judgment of acquittal or for a new trial, but the district court denied his motion. Thereafter he was sentenced to 48 months for the four counts of unlawful use of a telephone, 120 months for the two money laundering counts, and 240 months for the remaining ten counts, these sentences to be served concurrently, and five years as to the firearm possession count, to be served consecutively to all other sentences. Thus, his aggregated sentence was for 300 months or 25 years' imprisonment. His terms of supervised release are to be served concurrently upon his release, with five years being the longest term.

II

Kahn now brings several claims of error on appeal. He contends that the district court erred by allowing the Government's expert witnesses to "opine about the law governing [] prescriptions" and by denying his motion

for judgment of acquittal or for new trial and finding sufficient evidence to support the jury's verdict of guilty for the counts of unlawful distribution resulting in death and continuing criminal enterprise. Op. Br. at 6. He also contends that a DEA-registered prescriber, as a legal matter, cannot be held criminally liable under 21 U.S.C. § 841. We will address each claim of error in turn.

A

Kahn first challenges the admission of testimony from the Government's expert witnesses.[3] He argues the expert testimony amounted to "improper legal opinions regarding the scope of a registrant-physician's prescribing authority." Op. Br. at 26.

We review the "admission of expert testimony" for abuse of discretion. *United States v. Miller*, 891 F.3d 1220, 1226 (10th Cir. 2018) (quoting *United States v. Varma*, 691 F.2d 460, 463 (10th Cir. 1982)). "The district court abuses its discretion if the court's decision 'is arbitrary, capricious,

[3] The Government argues this challenge is waived and precluded by the law of the case doctrine. We need not address the Government's arguments on these points because Kahn's challenges to the testimony fail on the merits. *See United States v. Wells*, 873 F.3d 1241, 1250 (10th Cir. 2017) (declining to reach waiver issue where substantive argument failed on the merits); *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000) (Law of the case doctrine is "only a rule of practice in the courts and not a limit on their power." (quoting *United States v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991)).

whimsical or manifestly unreasonable, or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *United States v. Chapman*, 839 F.3d 1232, 1237 (10th Cir. 2016) (quoting *United States v. Medina-Copete*, 757 F.3d 1092, 1100–01 (10th Cir. 2014)).

Although Kahn does not point to any Federal Rule of Evidence that he argues should sustain his objection, we assume he raises Rule 702 error. Under Rule 702, the trial court must exercise a gatekeeping function on expert testimony, allowing an expert to testify only if it is more likely than not that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). For this reason, an expert witness cannot "define the legal parameters within which the jury must exercise its fact-finding function." *Specht v. Jensen*, 853 F.2d 805, 809–10 (10th Cir. 1988) (en banc). However, expert witnesses may still "refer to the law in expressing an opinion without that reference rendering the testimony inadmissible." *Id.* at 809. "[A] witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Id.* For example, "a court may permit an expert to testify that a certain weapon had to be registered with" a federal agency, as well as permit "a medical expert [to] testify[] that specific

conduct constitutes medical malpractice." *Id.* at 809–10. But a court may not permit an expert to testify to legal conclusions, such as that "warrantless searches are unlawful" or that "a warrantless search" was conducted. *Id.* at 808.

Here, the challenged testimony was offered as evidence to prove the mens rea element for the charges against Kahn under 21 U.S.C. § 841(a)(1), which prohibits "any person knowingly or intentionally" from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance" except as authorized. 21 U.S.C. § 841(a)(1). The Supreme Court held in *Ruan v. United States* that 21 C.F.R. § 1306.04(a), the regulation that defines the proper purposes to issue prescriptions, "defin[es] the scope of a doctor's prescribing authority" using reference "to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" 597 U.S. at 467 (quoting 21 C.F.R. § 1306.04(a)). The Supreme Court also held that "[t]he Government . . . can prove knowledge of a lack of authorization through circumstantial evidence," including evidence showing that the defendant failed to meet the "objective criteria" underlying § 1306.04. *Id.* (noting "'the more unreasonable' a defendant's 'asserted beliefs or misunderstandings are,' especially as measured against objective criteria, 'the more likely the jury . . . will find that the Government has

carried its burden of proving knowledge" (alteration in original) (quoting *Cheek v. United States*, 498 U.S. 192, 203–04 (1991)).

Kahn challenges testimony from the Government's witnesses where they "claim[ed] that . . . § 1306.04 defines the scope of a practitioner's authorization" and quoted language from § 1306.04, including the phrases "legitimate medical purpose" and "usual course of professional treatment." Op. Br. at 26. He also challenges Dr. Jed Shay's testimony, elicited from his counsel on cross examination, that "a licensed physician who exercises judgment in a way that deviates from standard practices in the medical community is 'just as guilty' as one with a suspended medical license." *Id.* (quoting Aplt. App. VIII at 123–24).

The district court did not err by allowing this testimony. *Ruan* explains that the language of § 1306.04 can be used to assist the jury in evaluating evidence that goes to the "lack of authorization" element of § 841. 597 U.S. at 467. Furthermore, testimony from medical experts that a defendant's medical treatment of their patients was "illegitimate or inappropriate," as here, "falls within the limited vernacular that is available to express whether a doctor acted outside the bounds of his professional practice" and thus doesn't have a sufficiently "specialized" legal meaning that renders the testimony inadmissible. *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006); *accord United States v. Schneider*,

704 F.3d 1287, 1294 (10th Cir. 2013) ("The concern . . . is when an expert uses a specialized legal term and usurps the jury's function. The use of the phrase 'other than legitimate medical purposes' does not cause such a problem."); *United States v. Chube II*, 538 F.3d 693, 698 (7th Cir. 2008) ("When all is said and done, we agree with the Government that it is impossible sensibly to discuss the question whether a physician was acting outside the usual course of professional practice and without a legitimate medical purpose without mentioning the usual standard of care."); *see also United States v. MacKay*, 715 F.3d 807, 838 (10th Cir. 2013) (no error where expert used the phrases "cause of death" and "death resulted from" during her testimony where "she explained her observation based on the evidence in the case" instead of "tell[ing] the jury [the defendant] was guilty").

Kahn argues that authorization is "not a peripheral legal concept[,] . . . [i]t [is] the central dividing line between lawful medical practice and federal felony liability." Reply Br. at 8. We disagree with this argument because the dividing line between lawful medical practice and federal felony liability is the mens rea requirement in § 841(a)(1), which is to *knowingly and intentionally* commit the actus reus without authorization. *Ruan*, 597 U.S. at 467.

Finally, it should be noted that the testimony Kahn most strenuously objects to, that a licensed physician who deviates from standard medical

practice is "just as guilty" as one practicing without a valid license, was elicited by Kahn's own counsel on cross-examination and was not objected to at the time by either party. "[A] party who induces an erroneous ruling" is prevented "from being able to have it set aside on appeal." *United States v. Burson*, 952 F.2d 1196, 1203 (10th Cir. 1991). This testimony appears to be invited error, or at least waiver, and Kahn does not argue for plain error review of this testimony in his briefs. This court therefore will not consider that testimony as part of Kahn's appellate argument. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). In sum, there was no Rule 702 error.

B

In the district court, Kahn moved for acquittal or a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33, which was denied. Kahn now challenges the district court's denial of that motion. Specifically, he challenges the sufficiency of the evidence as to Count 1, conspiracy to dispense and distribute oxycodone, alprazolam, hydromorphone, and carisoprodol resulting in death, 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C), and (b)(2), and Count 21, continuing criminal enterprise (CCE), 21 U.S.C. § 848. Both offenses carry substantial mandatory minimum sentences. *See* 21 U.S.C. §§ 841(b), 848(a).

"We review de novo the district court's denial" of a Rule 29 motion. *United States v. Hamilton*, 587 F.3d 1199, 1205 (10th Cir. 2009). "In reviewing the sufficiency of the evidence, we consider all 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.'" *United States v. Lowe*, 117 F.4th 1253, 1270 (10th Cir. 2024) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "We may reverse only if *no* rational trier of fact" could have found the Government met its burden of proof. *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011) (emphasis added) (quoting *United States v. Ramos-Arenas*, 596 F.3d 783, 786 (10th Cir. 2010)).

Kahn was convicted of engaging in a CCE, charged under 21 U.S.C. § 848, related to the unauthorized dispensing of oxycodone and other controlled substances, in violation of various subsections of 21 U.S.C. § 841. The Government thus had the burden of proving the following elements beyond a reasonable doubt at trial: (1) Kahn violated § 841; (2) the violations were part of a continuing series of violations; (3) Kahn committed the violations in concert with five or more persons with respect to whom he occupied a position of organizer, supervisor, or other position of management; and (4) from which he obtained substantial income or resources. *See* 21 U.S.C. § 848(c).

Here, Kahn contests only one element: that the Government adduced sufficient evidence to show that he committed the violations in concert with five or more persons and that he occupied the requisite managerial role over such persons. The district court found that Kahn exercised a managerial role over at least seven co-conspirators: (1) Nabeel Khan, his brother; (2) Lyn Kahn, his wife; (3) Stacy Drndarski, a front desk receptionist at Kahn's Arizona clinic and a patient; (4) David Drndarski, Stacy's husband and a patient; (5) Christopher Muelhausen, a patient; (6) Paul Beland, a patient; and (7) Deni Antelope, a patient. The Government, for its part, argues that it put forward enough evidence to prove that Kahn exercised a managerial role over the seven people just discussed plus Jessica Burch and her partner Anthony Vargas, for a total of nine co-conspirators. On appeal, Kahn argues that Lyn and Nabeel did not have the "requisite state of mind" necessary to be considered co-conspirators, and that he did not exercise a managerial role over Nabeel, the Drndarskis, Muelhausen, Beland, and Antelope. Op. Br. at 39–40.

Kahn's arguments are not persuasive. On this record, the district court was correct to find that, at the very least, six individuals – Lyn, Nabeel, Stacy, Muelhausen, Beland, and Antelope – acted in concert with, and under the control of Kahn to sell unauthorized prescriptions for controlled substances. We will begin with the applicable law and then

proceed to analyze Kahn's arguments as to each co-conspirator in turn, first reviewing the evidence that was adduced at trial for each.

Again, to sustain a conviction for a CCE under § 848, otherwise known as the kingpin statute, the Government must prove beyond a reasonable doubt that Kahn committed the underlying violations in concert with five or more persons and that he occupied a position of organizer, supervisor, or other position of management. The phrase "in concert with" means that "[a] conspiracy is . . . a necessary part of a CCE violation" and requires some "proof of an agreement among the persons involved in the [CCE]." *United States v. Allen*, 24 F.3d 1180, 1186 (10th Cir. 1994) (quoting *Jeffers v. United States*, 432 U.S. 137, 149–50 (1977)). To establish the existence of a conspiracy, the Government must prove that there was a "joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of the underlying substantive criminal offense.'" *Ocasio v. United States*, 578 U.S. 282, 287 (2016) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)) (alterations accepted). It is sufficient that the Government proves the "conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support." *Id.* at 288 (quoting *Salinas*, 522 U.S. at 64). What follows then is that "innocent participants in criminal activity may not be counted as part of a continuing criminal enterprise." *United States v. Smith*, 24 F.3d 1230, 1234 (10th Cir. 1994). But the

Government also need not "prove an express or formal agreement" was reached to perpetrate the crime; rather, it is sufficient that the Government proves the existence of a "mutual understanding" to do so. *United States v. Rutland*, 705 F.3d 1238, 1250 (10th Cir. 2013) (quoting *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 474 (10th Cir. 1990)). Circumstantial evidence is "sufficient to prove the existence of" such a mutual understanding. *United States v. Brooks*, 736 F.3d 921, 938 (10th Cir. 2013).

Once it is shown that Kahn acted in concert with five or more persons, the Government must also prove that Kahn was an organizer, supervisor, or occupied some other position of management over his co-conspirators. *United States v. Apodaca*, 843 F.2d 421, 425–26 (10th Cir. 1988). The terms "organizer, supervisor, or manager" are not technical and should be given their ordinary meaning. *Id.* The statute's language is disjunctive and denotes "differing levels of managerial control and coordination." *Id.* at 426. An organizer, for instance, is a person who "puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise" and need not necessarily be "able to control those whom he or she organizes." *Id.* (first quoting 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 58.21 (1977), and then quoting *United States v. Ray*, 731 F.2d 1361, 167 (9th Cir. 1984)). "[T]he defendant need not have had personal contact with each of

the five persons involved . . . [n]or must each transaction with or instruction to those persons organized or managed specifically originate with the defendant," as "mere delegation" of duties is enough. *Id.* Thus, a "defendant may not insulate himself from liability by delegating authority." *United States v. McSwain*, 197 F.3d 472, 479 (10th Cir. 1999). However, "a mere buyer-seller relationship, *without more*, [is] insufficient to establish that [the defendant] held some managerial role with respect to" the co-conspirators. *Apodaca,* 843 F.2d at 426. We now apply these legal principles to the co-conspirators.

Nabeel Khan. Nabeel helped manage Kahn's Arizona clinic, discussed office visit pricing with Kahn, advised patients of the prices for their prescriptions, drafted the Drug Addiction Statement that patients were required to sign, provided prescriptions and collected payment when Kahn was out of town, and was Kahn's "boogeyman" who enforced payment when patients tried to negotiate price reductions. Aplt. App. XX at 217. Nabeel stopped working at the Arizona clinic when Kahn moved his practice to Wyoming but would still discuss pricing with Kahn. At times, Nabeel would also accept payment from Arizona-based patients, like Stacy and David, either in person from those who were traveling to Wyoming or through the mail from others. Nabeel similarly provided prescriptions to Christopher Muelhausen when Kahn was out of town. Once, Kahn discussed

with Nabeel over the phone that two patients hadn't reimbursed him for their prescription because they didn't have the money and then "told Nabeel that he may have [another] patient that may want to buy them." Aplt. App. XVI at 33. And Kahn stored the cash he collected from patients in "the house that h[e] and Nabeel lived in" located in Arizona. *Id.* at 48.

Kahn asserts that Nabeel's behavior as described here was simply the performance of normal office duties, so Nabeel cannot be considered a CCE participant because he did not have the "requisite state of mind." Op. Br. at 40. For the same reasons, Kahn asserts Nabeel was not his supervisee. On the contrary, the record evidence here amply supports a finding that Nabeel was a CCE participant and that Kahn exercised some position of management over him. Nabeel appeared to be acting as a second in command to Kahn, at the very least helping to set prices for prescriptions and continuing to accept cash payment and provide prescriptions to patients still located in Arizona after Kahn's practice moved to Wyoming. The unusual nature of the prescriptions, paired with the payment made in cash or in goods or services, and done without a connection to medical care, at least circumstantially shows that Nabeel had a "mutual understanding" to engage with Kahn in the illicit sale of prescriptions for controlled substances. *Rutland*, 705 F.3d at 1250 (citation omitted). Nabeel did all this at the direction of Kahn, who quite literally was Nabeel's employer as the

owner of the Arizona clinic. It is difficult to imagine a clearer case of a position of management over another than the relationship of employer to employee. And Kahn never argues that Nabeel engaged in this conduct without his knowledge or approval.

Lyn Kahn. Lyn managed Kahn's Wyoming clinic. Lyn pled guilty to conspiring with Kahn "and others to commit the illegal diversion of prescription drugs." Aplt. App. II at 58. She testified for the Government at trial. She testified that Kahn wrote prescriptions in the name of her daughter, Shaina, and that Lyn filled these prescriptions, picked them up herself, and gave them to Kahn so he could give them to Nabeel. She testified that she filled patients' prescriptions in Wyoming with the knowledge that Kahn had not provided any medical care or evaluation and then would send the drugs through the mail to where the patients resided in Arizona. Sometimes those patients would travel to Wyoming from Arizona or elsewhere and stay at her home while they filled their prescriptions. For example, she testified that she and Kahn provided a letter indicating proof of residency at her home in Wyoming to Stacy Drndarski so Stacy could obtain a Wyoming driver's license to "help her . . . get her meds" more easily after a local pharmacy "stopped filling [prescriptions] for [Kahn's] patients." Aplt. App. XVI at 29.

Once, she watched Kahn remove the labels from a patient's prescription before she sent them via FedEx to a different patient who then "sent money" back to them "a day or so later." *Id.* at 35. She was aware that Kahn's practice was "cash-only" and that he "traded office visits for guns" and a "Harley-Davidson motorcycle," among other things. Aplt. App. XV at 256–58. Finally, she helped Kahn add false information to patient files when the Arizona Medical Board began investigating Kahn's practice "to make the chart[s] look better" by indicating that Kahn had provided medical care to patients when he had, in fact, not. *Id.* at 292.

Kahn argues that Lyn did not believe Kahn was doing anything wrong at the time of these events and so she did not have the requisite criminal intent to be considered a CCE participant. This argument is rendered nearly frivolous by the fact that Lyn pled guilty to engaging in a criminal conspiracy with Kahn to illegally divert prescription drugs – thereby admitting under oath to having the requisite criminal intent to be Kahn's co-conspirator for purposes of the CCE. *See Allen*, 24 F.3d at 1186. Even without the guilty plea, the record evidence here strongly supports, even more so than Nabeel, the conclusion that Lyn was a participant in the CCE.

Stacy and David Drndarski. Stacy and her husband David were initially Kahn's patients in Arizona. Stacy testified that, at her first visit, Kahn tried to "get[] to know [her] and . . . what [her] needs were . . .

medically." Aplt. App. XI at 79. But she also testified that Kahn prescribed her benzodiazepines, muscle relaxants, sleep medication, and opioids like Percocet and oxycodone during her first two visits without counseling her on side effects and, in some instances, without her having requested the specific medication. Once she began working for Kahn, she testified, "he didn't really ask . . . questions anymore" and instead just handed her the prescriptions "when [they] were leaving work." *Id.* at 79, 132.

Stacy became Kahn's employee at his Arizona clinic, and the cost of her prescriptions eventually came out of her paycheck once she was unable to afford cash payments. There were no set hours at the clinic, and Stacy would be responsible for setting up appointments with patients for their next visits. She noticed that Kahn saw pain management patients for "maybe 5, 10 minutes" at a time. *Id.* at 95. Stacy also would be "given a list to call patients" to inform them of price increases for their next visit, "[a]nd the amount was next to their name" for her to reference. *Id.* at 82. Stacy would also provide prescriptions to patients "if they came in and paid" at the direction of Kahn. *Id.* at 82–83. Stacy was aware that other patients paid in cash and sometimes traded office visits for other things of value. For instance, she testified that a man who worked at a "tire shop" traded "tires for a vehicle of . . . Kahn's" for prescriptions. *Id.* at 91. She was also aware that patients were paying for, or "sponsoring," other patients' prescriptions,

and that Kahn would give one patient all the prescriptions for multiple people and accept payment for all from that one patient. *Id.* at 101. Her husband David, also a patient of Kahn's, provided prescriptions to one of Kahn's patients in the parking lot of the Arizona clinic and received cash payment for it while Stacy waited in the car nearby. She was present when David traded "a Harley and some guns" with Kahn as payment for their prescription medication. *Id.* at 87. Eventually, David began to sell his and Stacy's medications to pay for their visits with Kahn. When pharmacies in Arizona stopped filling prescriptions written by Kahn, he asked Stacy to "record it when [she] would go up to the pharmacist to fill [a] prescription to see what they would say," which she agreed to and did. *Id.* at 138. The pharmacists would tell her that they had "issues with this . . . particular doctor." *Id.* at 139.

Stacy and David helped Kahn move his practice to Wyoming, and Stacy stopped working for Kahn once he did. Stacy began to travel to Wyoming to get her and David's medications. Sometimes, she would still pick up prescriptions from Kahn when he came back to Arizona or from Nabeel at his home. When authorities "raided" Kahn's home and Nabeel's home, Lyn contacted Stacy and informed her of the searches and "asked . . . if [she] had any contact with the police." *Id.* at 199–200. Stacy and David's home was searched by authorities shortly thereafter.

Kahn asserts that Stacy and David did not have a conspiratorial agreement with Kahn and were not his supervisees. Yet again, this argument is belied by the record evidence, which proved that Stacy and David both personally knew that Kahn was selling prescriptions for unusually high amounts of oxycodone and other substances for cash or goods, and facilitated this by trading prescriptions for cash in a parking lot and monitoring the actions of local pharmacists at his direction. And again, Stacy was his employee at his Arizona clinic, primarily tasked with calling patients to inform them that the prescription prices were going up for certain medications. We quite easily agree with the district court that the Drndarskis qualify as CCE co-conspirators with Kahn.

Christopher Muelhausen. Muelhausen was a pain patient of Kahn's for years and at the height of his addiction was using about 20 oxycodone pills per day. He sold the medication he didn't use himself to pay for his visits with Kahn. For instance, during his visits with Kahn, he would often request and be prescribed medications such as Soma or Xanax so he could then sell them or trade them on the street. At one point he "heard rumors from the other patients that [Kahn] was allowing" patients to get a prescription every two weeks rather than every thirty days, so he asked Kahn if he could also come in every two weeks. Aplt. App. IX at 262. Kahn agreed but told him "the price was going to change." *Id.* at 263. Muelhausen

began to go to the clinic every two weeks, and he would get the same prescription he was originally getting for 30 days so that, in his words, "[w]hatever I was getting prescribed . . . would be times two." *Id.* At one visit, Muelhausen wanted to talk about how high the price was for visits. Kahn told him he knew "that [Muelhausen and others] sell them for 20 bucks on the street" and that the visits "would be th[e] amount that was mentioned." *Id.* at 265–66. Muelhausen would go to visits and be visibly high or withdrawing from oxycodone, and Kahn would never comment about his condition. He testified to how a typical visit with Kahn would go: "Go in, make your payment, they would count it with a money counter, and then go see the doctor, and he would have the prescriptions already preprinted or written out." *Id.* at 271.

Muelhausen eventually began to "sponsor" other patients at Kahn's clinic, which meant he brought them to their appointments, negotiated their prescription payments for them, and sometimes helped them pay for their prescriptions. *Id.* at 280. In return, he would take a cut of their medication. For instance, Stacy testified that Muelhausen brought Jessica Burch and her partner, Anthony Vargas, to their appointments and would sometimes pay for them when they were not physically present at the office. Muelhausen would call Kahn about bringing his "friend[s]" in as new patients and Kahn would agree to see them, set up appointments, and

inform him of the cost there on the phone without knowing who the patient was or any of their medical history. *Id.* at 299. Kahn directed Muelhausen to pick up prescriptions from the clinic for other patients and coordinated with Muelhausen when pharmacies wouldn't fill prescriptions for certain patients.

Kahn argues that he wasn't aware that Muelhausen was paying for other patients' visits. Kahn argues that even if he did know, that fact is insufficient to establish a managerial role because such conduct is "incidental" to a buyer-seller relationship. Op. Br. at 41–42 (quoting *United States v. Bass*, 310 F.3d 321, 327 (5th Cir. 2002)). But Kahn did not merely sell oxycodone prescriptions to Muelhausen. The record evidence indicates that Muelhausen brought in new "patients" to see Kahn, who in turn would communicate pricing to Muelhausen directly on the phone. And Kahn directed him to pick up other patients' prescriptions and would assist Muelhausen when pharmacies wouldn't fill prescriptions. Muelhausen was akin to a street corner drug dealer, acting under the direction of the kingpin with the prescription pad – Kahn. So were Paul Beland and Deni Antelope, who we will discuss next.

Given that we agree with the district court there was sufficient evidence to prove the first five people were involved in the CCE conspiracy under Kahn's supervision, we also affirm the conviction for this crime.

Nevertheless, we soldier on to consider Kahn's arguments regarding other co-conspirators.

Paul Beland. Beland struggled with a lifelong drug addiction and was referred to Kahn as a patient by another physician in Wyoming for pain management for back pain. When Beland called to make an appointment, Lyn scheduled it and told him it would cost $500. When Beland asked what the charge was for, Lyn said "[d]on't worry; you'll get what you want." Aplt. App. V at 265–66. Beland testified that he asked for certain strengths of oxycodone tablets at his first visit because of Kahn's behavior. In Beland's words, "if he's already going to offer me 30s and 15s and he has his back turned to me, that's not a doctor. . . . If he's asking me what works for me, I'm going to tell him the most that I can that works for me." *Id.* at 285–86.

Beland would sometimes pick up his prescriptions from an employee at a vape shop owned by Kahn, paying for them in cash and receiving the prescriptions in a sealed envelope along with medical forms. He asked Kahn for his prescription of 30-milligram oxycodone to be bumped up from 120 pills to 180 pills, which Kahn provided upon request without seeing Beland or conducting an exam. Beland relocated to Massachusetts but thereafter traveled to Wyoming to get prescriptions from Kahn.

Eventually, Kahn told Beland that he would take $50 off the cost of his prescriptions for every pain patient Beland referred to him, up to three

patients maximum. Beland testified that he told Kahn specifically how many oxycodone pills each patient would be prescribed at each visit:

> [T]he patient or client would get – the pills, 120 of the 30s, 120 of the . . . 15s, the first visit. The second visit would be 180 of . . . the 30s, 180 of the 20s. And then . . . the third month, it would go up from there to the 300s because then, by now, I'm already at that 300 [of each strength oxycodone pill]. On the third – on the fourth visit I'm at the 300.

Aplt. App. VI at 20. Beland referred patients pursuant to this arrangement, even going as far as to refer his partner who did not need pain medication, so he could fill her prescriptions and take her pills for himself. After this, Beland's relationship with Kahn became a "business relationship" and "grew from there." *Id.* at 26. Beland testified that Kahn told him he knew "these are being sold on the street [and he] need[ed] [a] cut" and that Beland agreed Kahn's cut for "300 30s [and] 180 20s" would be a thousand dollars. *Id.* Beland sold some of his prescription medication to pay for travel to Wyoming and to pay Kahn his cut of the money, and then he consumed the rest of the medication, as well as heroin. He would call Lyn to get appointments for new patients, tell Kahn the dosage and amount of oxycodone he wanted, fly to Wyoming to get his cut of the medication from the new patient, and then wire money back to Kahn. Beland testified Kahn knew he was paying for patients' visits because he was "wiring [Kahn] the money . . . [via] Western Union." *Id.* at 42. He would "send a chunk of

money" to Kahn every so often as he sold the pills he was taking from the patients for whom he was paying. *Id.* at 44.

In a recorded phone call, Beland spoke with Kahn about how much oxycodone to prescribe a new patient without Kahn having ever met the patient. Kahn told Beland that the "new guy" should be prescribed less than Beland "because of the way things are right now." Aple. Supp. App. II at 19. On the same phone call, Kahn agreed to prescribe Xanax to Beland's partner on a one-time basis because "[this] shit [was] getting hot" and the "FDA's come down on Xanax and on narcotics." *Id.* at 22–23. Kahn once sold Beland prescriptions written for the Drndarskis when they couldn't pay for them with the knowledge that Beland would then "sell" the pills to others. Aplt. App. XVI at 33–35. Beland sent cash to Kahn for those prescriptions overnight through the United States Postal Service. Beland was arrested about a year after he began seeing Kahn and ended up pleading guilty to conspiring with Kahn to illegally divert prescription drugs.

Kahn argues that he did not have a managerial role over Beland because there was no conspiratorial agreement that Beland would sell his prescribed medication. Once again, we disagree. The record evidence shows that Beland brought in at least two new patients from out of state to see Kahn after negotiating with him on the phone about the price and amount of the prescriptions, and that he wired or mailed cash to Kahn for these

patients' prescriptions. For the same reasons as discussed for Muelhausen, there is sufficient evidence to show that Beland was under the managerial control of Kahn for purposes of the CCE conviction.

Deni Antelope. Finally, Antelope was Kahn's patient who, like Beland and Lyn, also pled guilty to conspiring with him to illegally divert prescription drugs and testified for the Government at his trial. At the time she was Kahn's patient, she lived in Riverton, Wyoming. She initially sought out Kahn's care because her sister told her that he was "giving out oxycodone" and she wanted to obtain it to then sell it in Riverton and on "the rez." Aplt. App. XIV at 24. Antelope almost immediately began sponsoring other patients' visits to Kahn, beginning with one of her sisters and her then-spouse. She testified that around her fourth visit, "[she] and Dr. Kahn talked about bringing more people" in to get prescriptions from him. *Id.* at 36. Kahn asked her if she "knew more people who needed pain management" and asked if she knew the street price of oxycodone. *Id.* at 36–37. Her spouse, who was in the room with her, replied that it went for about a "dollar per milligram." *Id.* at 40. By the end of the visit, Antelope had agreed to "bring more people" in to get prescriptions from Kahn. *Id.* at 48.

Antelope began bringing people to whom she was selling oxycodone for visits with Kahn. She would call Lyn to set up the appointments, bring in the new patients, and be in the room for their first visit. Kahn would

prescribe them "[t]he regular" dosage and amount that "he could start with," which was "120 oxycodone 15s and 120 oxycodone 30s." *Id.* at 49. Antelope would bring about two or three patients per day and pay the $500 for the new patients she brought to the clinic. In return for paying for their fees and incidentals for the trip to Kahn's clinic, she would take 90 of the 120 pills of each strength oxycodone they were prescribed, which she would then sell on the street. She had about 15 to 20 people who she regularly brought to the clinic to get prescriptions. In her words, "the ones that were the most addicted to [oxycodone] stayed with [her]" because they would run out of money and so they needed her to pay Kahn for their pills. *Id.* at 64–65. She would pay the fees for the patients in front of Lyn. In addition to bringing new patients into the clinic, Antelope was involved with Kahn's practice in other ways. For example, Lyn asked her to get another patient to pay his debt for a prescription he had received.

Kahn asserts that he did not have "any involvement with Antelope's pill sales" and did not have "any understanding of arrangements Antelope might make on her own with any new patients." Op. Br. at 42–43. But the record evidence shows that he informed Antelope about the amount and price of oxycodone he would sell to new patients, and he explicitly asked her to bring him new pain management patients. Kahn cannot avoid the common-sense conclusion that follows from these facts by using the words

"patient" and "pain management services" instead of "addict" and "drug dealing." *Id.* at 43. The record evidence shows that he directed Antelope to bring in new drug addicts so he could sell drugs to them at a set price. For the same reasons as discussed for Muelhausen and Beland, there is sufficient evidence to show that Antelope was under the managerial control of Kahn for purposes of the CCE conviction.

In sum, the seven individuals discussed above, at a minimum, meet the CCE element that Kahn acted in concert with "five or more other persons." 21 U.S.C. § 848(c)(2)(A). On the record before us, it is apparent that Kahn was dealing oxycodone and other controlled substances using the power of his prescription pad and his authority and status as a medical doctor. Kahn employed Lyn, Nabeel, and Stacy (who included David) in this endeavor, and directed all three to provide prescriptions to patients for payment in his stead. The evidence adduced at trial supports the conclusion that all three knew that patients were receiving prescriptions without medical exams for cash payment – in effect, that Kahn was dealing opioid medication to patients – and that they assisted him willingly in this endeavor and at his direction.

Further, there is more than a mere buyer-seller relationship between Kahn and Muelhausen, Beland, and Antelope. Kahn directed Muelhausen to pick up prescriptions for other patients. Kahn also directly negotiated

with Antelope and Beland about the prescription pricing for the patients they brought into the practice, without even seeing the patients first. Even if Kahn wasn't involved in every oxycodone exchange or didn't know about every patient who these three paid for, the "mere delegation of [his] duties" as the person who wrote the prescriptions is enough to establish a managerial role. *Apodaca*, 843 F.2d at 426. The district court was correct when it found sufficient evidence to support the jury's verdict of guilty for the CCE count.

C

Kahn also challenges the sufficiency of the evidence underlying his conviction on one count for conspiracy to distribute of oxycodone resulting in death under 21 U.S.C. § 841(a) & (b)(1)(C) in connection with the death of his patient, Jessica Burch. For this charge, the Government had to prove beyond a reasonable doubt that: (1) Kahn knowingly, intentionally and unlawfully distributed oxycodone to Jessica Burch; and (2) the oxycodone Kahn distributed to Burch caused her death. 21 U.S.C. § 841(a) & (b)(1)(C). Kahn contests that the Government adduced sufficient evidence to prove that the oxycodone Kahn provided to Burch caused her death. Specifically, he takes issue with the opinion of the Government's expert witness, Dr. Hail, which he challenges as "speculative" and as providing "no[] support" for her finding that Burch died from an oxycodone overdose.

Op. Br. at 44. Kahn's argument mostly attacks Dr. Hail's credibility as an expert and the methodology she used to reach her conclusions, as well as the information he asserts she did not properly consider. *Id.* at 44–48.

At a closer glance, Kahn's argument is simply a repackaged *Daubert* challenge to the admissibility of Dr. Hail's expert testimony. However, a *Daubert* challenge is not properly before this court on appeal because Kahn does not argue for plain error in any of his briefs.

Kahn did not bring a *Daubert* challenge to Dr. Hail's testimony before the district court until his post-trial motions following the close of evidence. *Daubert* challenges that come after the close of evidence, like Kahn's, are untimely, waived, and subject to plain error review on appeal. *Macsenti v. Becker*, 237 F.3d 1223, 1233–34 (10th Cir. 2001); *accord Brooks*, 736 F.3d at 932. Because Kahn does not affirmatively raise a *Daubert* challenge, let alone under plain error, in his appellate briefing, such a challenge will not be considered here. The *Daubert* challenge is waived, but a challenge to the general sufficiency of the evidence underlying Kahn's conviction on this count is not, so we now consider sufficiency.

The evidence presented at trial concerning Jessica Burch's death was that she had filled a prescription for oxycodone that Kahn wrote for her three days prior to her death, including 15-milligram oxycodone pills manufactured by Actavis (green-colored) and that she died with green-

colored crushed pill remnants in her nostrils. Her partner, Anthony Vargas, testified that she normally crushed and snorted her oxycodone pills and that she had passed out face down on their front lawn hours prior to her death. Additionally, there was evidence that Jessica had a history of seizures and had been hospitalized once before to be evaluated for a seizure. Jessica's mother also testified that she had medically died once when she had her gallbladder removed. Dr. Hail was also called by the Government to testify as to her expert opinion on the cause of Jessica's death.

Dr. Hail is a medical doctor who testified for the Government as an expert in emergency medicine and medical toxicology, with no objection from Kahn during trial. Dr. Hail testified to her opinion regarding the cause of death of Jessica Burch, specifically that she "would not have died but for oxycodone." Aplt. App. XVII at 219. In doing so, she ruled out traumatic (*e.g.*, gunshot wound) and natural causes of death. The primary circumstances that led Dr. Hail to conclude that Jessica died of an oxycodone overdose were that Jessica was a "young, healthy person who was known to abuse her . . . medications," that Jessica had a habit of "crush[ing] up . . . oxycodone and snort[ing] it," that there was "green powder present in her nose," and the description of her behavior "the night before she died." *Id.* at 221.

By his telling, Kahn's counsel conducted an "aggressive and thorough" cross examination of Dr. Hail where, among other things, he challenged Dr. Hail with Jessica's medical records that indicated a history of a stomach cancer diagnosis and a stroke. Op. Br. at 23. Dr. Hail testified that although this history appeared in the medical records, there was no indication that a doctor diagnosed Jessica with stomach cancer and there was no evidence that Jessica ever had a stroke. In fact, a physician had written in Jessica's records that "Jessica Burch continually reports that she has stomach cancer . . . [but] we have never found her to have anything other than chronic abdominal pain, drug-seeking behavior, and constipation," and the medical records also indicated that Jessica's history of strokes was self-reported only. Aplt. App. XVII at 297–98. Dr. Hail also testified that Jessica's medical records indicated one prior episode where Jessica was taken to Western Arizona Medical Center for a seizure, but that the medical records indicated that Jessica's behavior was "combative" and "inconsistent with what one would observe . . . in somebody with a seizure disorder." *Id.* at 221–23. Dr. Hail thus ruled any seizure disorder out as a possibility for causing Jessica's death.

On appeal, Kahn asserts that Dr. Hail's opinion was "speculative" because it assumed that Jessica was "young and healthy with no significant underlying medical history." Op. Br. at 44 (alterations and quotation

omitted). He asserts that Jessica did, in fact, have significant underlying medical history, including seizures, a stroke, and a cancer diagnosis, any of which could have been a cause of Jessica's death. To the extent Kahn asks us to weigh the trial evidence or assess Dr. Hail's credibility as a witness outside of *Daubert* gatekeeping, that is an improper task for a reviewing court. *See United States v. Moya*, 5 F.4th 1168, 1187–88 (10th Cir. 2021). The jury had the benefit of hearing Kahn's cross-examination of Dr. Hail as to the issues he raises on appeal and found that Burch died because of the oxycodone that Kahn prescribed her. On this record, there is no justification or reason to disturb the jury's verdict on this count.

D

Finally, Kahn argues that the medical regulation that covers the proper purposes for prescribing controlled substances, 21 C.F.R. § 1304.06, should have no bearing on criminal liability under the drug distribution counts he faced, charged under 21 U.S.C. § 841(a)(1). Kahn was convicted of ten drug distribution counts, which prohibit, "[e]*xcept as authorized* . . . [,] any person knowingly or intentionally" from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (emphasis added). Section 1306.04(a) is a regulation "defining the scope of a doctor's prescribing authority. . . by reference to objective criteria such as

'legitimate medical purpose' and 'usual course' of 'professional practice.'" *Ruan*, 597 U.S. at 467 (quoting regulation). Kahn's argument is that, under the plain text of § 841, "a DEA-registered prescriber is *authorized* to issue prescriptions . . . and cannot be prosecuted under that subsection," and thus the scope of his prescribing authority under § 1306.04 is legally irrelevant. Op. Br. at 55. And since Kahn was a DEA-registered prescriber, as his argument goes, his convictions are per se invalid.

The problem for Kahn is that the Supreme Court has already decided this issue decades ago. In *United States v. Moore*, the Supreme Court held that physicians registered under the Controlled Substances Act "can be prosecuted under § 841 when their activities fall outside the usual course of professional practice." 423 U.S. 122, 124 (1975). And, as stated earlier, in *Ruan v. United States*, the Supreme Court noted that § 1306.04 could help the Government "prove knowledge of a lack of authorization through circumstantial evidence . . . by reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" 597 U.S. at 467 (quoting regulation). Kahn argues that *Moore* was wrongly decided, but this court must follow Supreme Court precedent and reject his argument.

AFFIRMED.