19-0783-cr(L)
United States v. Gatto et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2019

(Argued: March 13, 2020 Decided: January 15, 2021)

Docket Nos. 19-0783-cr; 19-0786-cr; 19-0788-cr

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES GATTO, aka Jim, MERL CODE, CHRISTIAN DAWKINS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

LYNCH AND CHIN, *Circuit Judges*, and ENGELMAYER, *District Judge*.*

* Judge Paul A. Engelmayer, of the United States District Court for the Southern District of New York, sitting by designation.

Consolidated appeals from judgments of the United States District Court for the Southern District of New York (Kaplan, *J.*), convicting defendants-appellants of wire fraud and conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1343, 1349. The government alleged that defendants-appellants engaged in a scheme to defraud universities of athletic-based financial aid when they made secret cash payments to the families of college basketball recruits, thereby rendering the recruits ineligible to play for the universities. On appeal, defendants-appellants contend that there was insufficient evidence to sustain their wire fraud convictions. Additionally, they challenge several of the district court's evidentiary rulings as well as portions of its instructions to the jury.

AFFIRMED.

Judge LYNCH CONCURS IN PART and DISSENTS IN PART in a separate opinion.

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CHIN, *Circuit Judge*:

In this case, defendants-appellants James Gatto, Merl Code, and Christian Dawkins ("Defendants") were convicted of engaging in a scheme to defraud three universities by paying tens of thousands of dollars to the families of high school basketball players to induce them to attend the universities, which were sponsored by Adidas, the sports apparel company, and covering up the payments so that the recruits could certify to the universities that they had complied with rules of the National Collegiate Athletic Association (the "NCAA") barring student-athletes and recruits from being paid.

At trial, Defendants admitted that they engaged in the scheme and broke NCAA rules, but argued that what they did was not criminal. On appeal, they contend that the government failed to prove that they intended to defraud the universities -- North Carolina State University ("N.C. State"), the University of Kansas ("Kansas"), and the University of Louisville ("Louisville") (collectively, the "Universities") -- and that their intent instead was to help the Universities by bringing them top recruits to ensure winning basketball programs. They contend that, "in the real world, . . . universities engage in an all-out arms race to recruit the best talent, motivated by the tens of millions of dollars that can be earned each year by a successful men's basketball program," Appellants' Br. at 98 (internal quotation marks omitted), and that they "broke NCAA rules out of a genuine desire to see the Universities' basketball teams succeed," Appellants' Br. at 96. They argue that under-the-table payments to student-athletes are widespread in college sports, and that, indeed, many college coaches are aware of and endorse the practice. And they argue, as they did in their opening statements at trial, that "[t]he kids on the court, . . . the ones whose blood, sweat and tears is making this game a billion dollar industry, they are not allowed to earn a dime." App'x at 107.

We have no doubt that a successful men's basketball program is a major source of revenue at certain major universities, but we need not be drawn into the debate over the extent to which college sports is a business.[1] Instead, our task is to determine whether the government proved beyond a reasonable doubt that Defendants knowingly and intentionally engaged in a scheme, through the use of wires, to defraud the Universities of property, *i.e.*, financial aid that they could have given to other students. We conclude that the government did. We also reject Defendants' arguments that the district court abused its discretion in its evidentiary rulings and committed reversible error in its instructions to the jury. Accordingly, we affirm.

BACKGROUND

On appeal from a conviction following a jury trial, the "facts are drawn from the trial evidence and described in the light most favorable to the government." *United States v. Wilson*, 709 F.3d 84, 85 (2d Cir. 2013).

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[1] We are mindful of the fair concerns raised in this respect by Judge Lynch in his separate opinion. Nonetheless, as he acknowledges, this case is not the proper vehicle for resolving the longstanding, controversial debate over whether college athletes should be paid. For a history of that debate, *see generally* W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 Vand. J. Ent. & Tech. 211 (2006) (outlining the origins and early controversies of NCAA amateurism); Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 Va. Sports & Ent. L.J. 226 (2004) (discussing the desirability and feasibility of paying student-athletes); *see also* Alfred Dennis Mathewson, *The Eligibility Paradox*, 7 Jeffrey S. Moorad Sports L.J. 83, 86 n.11-12 (2000) (citing scholarship against and in support of amateurism in the NCAA).

I. *The Landscape*

The NCAA is a private organization that oversees collegiate sports in America. It promulgates rules that its member universities must follow, among which is the requirement that all student-athletes must remain amateurs to be eligible to compete for their schools. This means that the student-athletes -- and their families -- may not accept payments of any form for the student-athletes' playing or agreeing to play their sport. This rule extends from the time when the student-athletes are still in high school and are being recruited to play at the collegiate level.

There are, however, exceptions. Colleges are permitted, for example, to offer athletic-based aid to a certain number of student-athletes, to cover tuition, room, and board. And the schools themselves are permitted to enter into sponsorship agreements with sports apparel brands, which allow them to provide their student-athletes with clothing and footwear that they receive from their corporate sponsors. Essentially, these sponsorship agreements are marketing deals. Major sports apparel brands, including Adidas, Nike, and Under Armour, enter into such contracts to promote their brands. Under these agreements, student-athletes must wear the brand of the company their school has partnered with when they compete for their school -- that is, at practice and during games.

II. ***The Scheme***

Gatto was Adidas's director of global sports marketing for basketball. He managed the sports marketing budget, and part of his job entailed overseeing the relationship that Adidas had with various schools, including N.C. State, Kansas, and Louisville. This included helping to ensure the success of the sponsorship agreements Adidas signed with the Universities pursuant to which Adidas paid the Universities for the right to provide their NCAA sports teams with Adidas apparel.

Gatto worked with Code and Thomas Joseph Gassnola, both Adidas consultants. He also worked informally with Dawkins, an aspiring sports agent, and Munish Sood, a financial advisor. Together, these men paid the families of top-tier high school basketball recruits -- including Dennis Smith Jr., Billy Preston, and Brian Bowen Jr. (collectively, the "Recruits") -- to entice those players to enroll at one of the Universities. This activity violated NCAA rules, and if the NCAA were to discover the payments, the players would not be permitted to play in games and the Universities would be subject to penalties.

As a result, Defendants and those who assisted them concealed these payments by falsifying Adidas invoices to make it seem as though the payments were going to youth basketball teams affiliated with the Amateur Athletic Union ("AAU"), a non-profit, multi-sport organization that, among other things, facilitates youth basketball tournaments. In reality, the money was being funneled through AAU teams with which some Defendants were affiliated to the families of top basketball prospects. In addition to creating fake expense reports to mask these payments, Defendants used phones that were not registered in their names while communicating with the Recruits' families.

Per the NCAA bylaws, every member institution must certify that its prospective student-athletes are amateurs and thus eligible to compete. Consequently, the Universities required all their recruits to sign paperwork attesting that they were aware of and in compliance with the NCAA bylaws. By signing the certifications, the recruits affirmed, among other things, that they had not used their "athletics skill (directly or indirectly) for pay in any form in that sport." App'x at 780. A recruit's athletic-based aid was contingent upon his certifying his eligibility. Those in charge of compliance at the Universities explained that they would have never awarded athletic-based aid to the Recruits had they known they were ineligible to compete, and the head coaches' contracts required the coaches to be stewards of the NCAA rules and report any suspected violations.

A. ***N.C. State***

Smith verbally committed to play basketball for N.C. State in September 2015. At the time, he was one of the top recruits in North Carolina, but, according to Gassnola, there were rumors that he was going to change his mind about which college he would attend. To ensure that Smith enrolled at N.C. State, Gassnola gave the Smith family $40,000 in the Fall 2015. He was reimbursed by Adidas via Gatto, who filed false invoices to facilitate the repayment. Shortly after the Smith family received the $40,000 payment, Smith signed forms enrolling at N.C. State indicating that he was compliant with the NCAA eligibility rules. He played one season at N.C. State before being selected as the ninth overall pick in the 2017 NBA Draft.

B. ***Kansas***

Preston verbally committed to play for Kansas in Fall 2016. After Preston committed, however, Gassnola heard that the Preston family was accepting money from sports agents and financial advisors, thereby putting

Preston's eligibility in jeopardy. Because, according to Gassnola, he thought that he was better-equipped to prevent illicit payments from being discovered, Gassnola arranged to pay the Preston family to stop them from taking money from others and preserve Preston's NCAA eligibility. With Gatto's permission, Gassnola paid the Preston family around $50,000. Gassnola paid the money and then, with the help of Gatto, submitted false AAU expense reports to Adidas for reimbursement. In November 2016, Preston signed forms indicating that he was compliant with the NCAA eligibility rules. His ineligibility, however, was discovered, and he never played for Kansas.

C. *Louisville*

Bowen committed to play for Louisville in May 2017. Around the same time, Bowen's family agreed to accept $100,000 from Adidas, to be paid in four installments. These payments were to be funneled through an AAU program with which Code was affiliated. On June 1, 2017 and June 9, 2017, Bowen signed forms accepting athletic-based aid and indicating that he was compliant with the NCAA eligibility rules. Around a month later, on July 13, 2017, Bowen's father was paid the first installment of $25,000. Defendants were arrested before any other payments were made, and Bowen, whom Louisville decided to withhold from competition, withdrew from Louisville after one semester to play professional basketball.

III. *Procedural History*

Defendants were charged in a superseding indictment filed on August 14, 2018 with wire fraud and conspiracy to commit wire fraud for the role they played in recruiting Smith, Preston, and Bowen. Trial began on October 1, 2018. Defendants objected to certain of the district court's evidentiary rulings as well as to portions of its instructions to the jury. On October 24, 2018, the jury found Defendants guilty of wire fraud and conspiracy to commit wire fraud. On January 17, 2019, the district court issued an opinion explaining some of its evidentiary rulings. Defendants were sentenced in March 2019 -- Gatto principally to nine months' imprisonment and Code and Dawkins principally to six months' imprisonment each. The district court also ordered Defendants to pay restitution to the Universities for their actual losses in awarding athletic scholarships to the Recruits.

This appeal followed.

DISCUSSION

On appeal, Defendants raise three principal arguments: (1) there was insufficient evidence to sustain their wire fraud and conspiracy to commit wire fraud convictions; (2) the district court abused its discretion in excluding evidence; and (3) the district court erroneously instructed the jury. We address these issues in turn.

I. *Sufficiency of the Evidence*

A. *Applicable Law*

"We review the sufficiency of the evidence *de novo*." *United States v. Anderson*, 747 F.3d 51, 59 (2d Cir. 2014). A defendant "bears a heavy burden" when he tries to "overturn a jury verdict on sufficiency grounds," as we draw all reasonable inferences in the government's favor and defer to the jury when there are "competing inferences." *Id.* at 59-60 (internal quotation marks omitted). A challenge to the sufficiency of the evidence fails if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To convict a defendant of wire fraud, the government must prove beyond a reasonable doubt: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the . . . wires to further the scheme." *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015); *see also* 18 U.S.C. § 1343. Here, the parties do not dispute the third element.[2]

As to the "scheme to defraud" element, there must be "proof that defendants possessed a fraudulent intent." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987). Accordingly, defendants must either intend to harm their victim or contemplate that their victim may be harmed. *Id.* ("Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent."). Although as a general matter "contemplate" can mean either "to think about" or "to have in view as a purpose," we have clarified that only the latter definition comports with the "fraudulent intent" requirement for conviction. *United States v. Gabriel*, 125 F.3d 89, 97 (2d Cir. 1997). This distinction often "poses no additional obstacle for the government" because "fraudulent intent may be inferred from the scheme itself" if "the necessary result of the actor's scheme is to

[2] Indeed, Defendants were recorded discussing the scheme over the phone, and they emailed about creating invoices to facilitate the payments. Moreover, at least two of the payments were wired to Preston.

injure others." *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (internal quotation marks omitted). Further, "[i]ntent may be proven through circumstantial evidence, including by showing that [a] defendant made misrepresentations to the victim(s) with knowledge that the statements were false." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999); *see also United States v. MacPherson*, 424 F.3d 183, 189-90 (2d Cir. 2005).

As to the "object of the scheme" element, a defendant need not literally obtain money or property -- in the sense of putting money into his own pocket -- to violate the wire fraud statute. *See Porcelli v. United States*, 404 F.3d 157, 162-63 (2d Cir. 2005) (finding it was sufficient to convict defendant of wire fraud where the tax scheme involved him *keeping* money he already had by virtue of his not paying taxes); *see also United States v. Males*, 459 F.3d 154, 158 (2d Cir. 2006). And because individuals have the right to control their property, depriving the victim of "economic information it would consider valuable in deciding how to use its assets" satisfies the object-of-the-scheme element. *United States v. Finazzo*, 850 F.3d 94, 111 (2d Cir. 2017). Still, as the Supreme Court recently noted, "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Kelly v. United States*, 140

S. Ct. 1565, 1573 (2020). Loss to the victim "must play more than some bit part in a scheme: It must be an object of the fraud." *Id.* (internal quotation marks omitted).

B. ***Application***

Defendants argue that they "were convicted of a fraud they did not know about." Appellants' Br. at 42. In other words, they contend that there was no scheme to defraud because Defendants did not know that false representations would be made to the Universities. Defendants also argue that even if there were such a scheme, the government failed to prove that the Universities' athletic-based aid was an object of that scheme. We disagree in both respects.[3]

1. ***Scheme to Defraud***

Defendants have not shown that the government failed to present enough evidence for "*any* rational trier of fact," *Jackson*, 443 U.S. at 319, to find, beyond a reasonable doubt, that there was a scheme to defraud, *see* 18

[3] The government contends that Defendants did not argue in their Rule 29 motion before the district court that they lacked knowledge that any certifications -- much less false certifications -- would be made, and therefore we should review their challenge for plain error. We need not resolve this issue, as Defendants' argument fails even under the less exacting *de novo* standard.

U.S.C. § 1343. Although Defendants are correct that the government did not provide direct evidence that proved Defendants knew the Recruits had to sign eligibility certifications to earn athletic-based aid, the government did present enough circumstantial evidence for the jury to have reached that conclusion. *See Guadagna*, 183 F.3d at 129 (noting that circumstantial evidence that "show[s] . . . defendant made misrepresentations to the victim(s) with knowledge that the statements were false" may prove intent); *see also United States v. Quattrone*, 441 F.3d 153, 169 (2d Cir. 2016) ("[C]ourts . . . may not reject a jury verdict simply because it rests even wholly on circumstantial evidence.").

First, Defendants were sophisticated actors who were involved in all aspects of top-tier basketball in America, including the amateur grassroots leagues, college basketball programs, and the NBA. Gatto was the head of global sports marketing for Adidas, one of the top sports apparel companies in the world, and he was in charge of Adidas's entire basketball marketing budget. Code worked for Nike, another top apparel company, for fourteen years where he cultivated relationships with grassroots, high school, and college basketball programs before he began consulting for Adidas. And Dawkins spent time working for a sports agency recruiting NBA prospects. The jury was therefore presented with evidence of Defendants' proximity to -- and involvement in -- all things basketball.

Second, Defendants went to great lengths to prevent both Adidas and the Universities from discovering that they were paying the Recruits' families. Defendants worked together to disguise their funneling of tens of thousands of dollars to the Recruits' families to induce the Recruits to enroll at Adidas-sponsored schools. Indeed, Defendants had to lie to Adidas to get reimbursed for these secretive payments, as those in charge of the budget at Adidas knew the payments violated both "NCAA regulation and Adidas policy" and would not have signed off on them had they known the truth. Supp. App'x at 311. Their furtive behavior indicates that they knew their actions were wrong. When coupled with their sophistication, it was reasonable for the jury to infer they knew the Recruits had to deceive the Universities about their eligibility.

Third, Defendants' co-conspirators admitted on wiretaps that their conduct violated NCAA rules. Gassnola, who worked directly under Gatto, explained to the jury that had the Universities learned that Smith's family had been paid, he "would have been deemed ineligible" and "would never have played [at N.C. State]." App'x at 283-84. Sood, another co-conspirator, stated that he knew that giving money to NCAA athletes was not permitted under NCAA rules and could have led to those players losing their scholarships. Even if the co-conspirators' knowledge could not be imputed to Defendants, it is nevertheless circumstantial evidence the jury was permitted to consider. *See United States v. Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993).

Fourth, Code and Dawkins acknowledged that Bowen had to sign an NCAA form for his commitment to Louisville to be complete. And Dawkins was recorded on a wiretap discussing the need to avoid a paper trail "because some of it is whatever you want to call it, illegal, against NCAA rules, or whatever." Supp. App'x at 47. Accordingly, these statements, together with Defendants' sophistication, steps taken to conceal their actions, and co-conspirators' statements, surely show that Defendants knew that the Recruits had to sign eligibility forms to compete in the NCAA, and constituted sufficient evidence for the jury to find that Defendants knew a materially false representation had to be made for the scheme to succeed. *See United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006).

2. *Object of Scheme*

Similarly, the jury was also presented with enough evidence for a rational trier of fact to find that the Universities' athletic-based aid was "an object" of their scheme. *See Kelly*, 140 S. Ct. at 1573; *see also* 18 U.S.C. § 1343. In *Kelly*, better known as the "Bridgegate" case, state officials devised a scheme to punish the mayor of Fort Lee, New Jersey, for declining to endorse the incumbent New Jersey governor in his reelection bid. *Kelly*, 140 S. Ct. at 1568. To do so, politically appointed Port Authority officials closed traffic lanes that led from Fort Lee to the George Washington Bridge for four days under the guise that they were conducting a traffic study. *Id.* The study, however, was a sham; no official was interested in the data it produced. *Id.* at 1570. The government charged the officials with property fraud, arguing that they commandeered the traffic lanes and deprived the state of property by paying extra wages to perpetuate the scheme. *Id.* at 1571-72. The officials who did not plead guilty went to trial and were convicted, *id.* at 1571, but the Supreme Court overturned their convictions, *id.* at 1574.

The unanimous *Kelly* Court found that property was not an object of the scheme. *Id.* at 1572. It explained that the traffic study was a "sham," intended only to cover up the defendants' misconduct and the additional wages were "implementation costs" that only became necessary because an additional toll booth operator was needed after the original plan was altered to avoid traffic accidents. *Id.* at 1574. Because the officials' only goal was political retaliation -- to create a headache for the Fort Lee mayor -- and the officials were indifferent about the unintended additional costs of carrying out the plan, they were not guilty of property fraud. *Id.* The *Kelly* Court held that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id*. at 1573.

This case is different from *Kelly*.[4] Here, the loss of property -- the Universities' funds set aside for financial aid -- was at the heart of Defendants' scheme. Their original plan included inducing the Universities to give the Recruits financial aid by concealing from the Universities the payments made to the Recruits' families in fear that if they were discovered the Recruits would not

[4] In *Kelly*, the Court explained that "a scheme to alter . . . a regulatory choice is not one to appropriate . . . property." 140 S. Ct. at 1572. Because the defendants in *Kelly* made a regulatory decision regarding lane usage, there was no fraudulent obtainment of property, especially because any loss to the victim was only incidental to the object of the scheme. *Id.* at 1573. Here, Defendants did not make any regulatory decisions in transmitting and concealing payments to the Recruits' families. Thus, the Court's holding in *Kelly* that the regulatory decisions were not punishable under a property fraud theory is inapposite to the case at hand.

be permitted to compete. Importantly, the scheme depended on the Universities awarding ineligible student-athletes athletic-based aid; without the aid, the recruits would have gone elsewhere. And if the Recruits' ineligibility had been discovered by the schools, the scheme would have failed. After all, the Recruits would have never been permitted to play in the NCAA for Adidas-sponsored schools, defeating the purpose of the payments and potentially derailing the Recruits' professional careers.[5]

Defendants have asserted that they intended to "assist the Universities' recruiting efforts" by luring the best basketball players to Adidas-sponsored schools to better market their brand. Appellants' Supp. Br. at 6. Defendants may have had multiple objectives, but property need only be "*an* object" of their scheme, *Kelly*, 140 S. Ct. at 1572 (emphasis added), not the sole or primary goal. Unlike in *Kelly*, where there was a sham study and additional wages were paid only after the original plan was scaled back due to safety

[5] Indeed, Bowen and Preston never played for Louisville and Kansas, respectively. Moreover, each has struggled to find playing time in the NBA. Bowen has only played 29 minutes for the NBA's Indiana Pacers and has spent most of his professional career playing for the team's minor-league affiliate, the Fort Wayne Mad Ants. Preston has never appeared in an NBA game and has only played for the minor-league affiliates of the NBA's Cleveland Cavaliers, New Orleans Pelicans, and Dallas Mavericks.

concerns, *id.* at 1574, here, depriving Universities of athletic-based aid was at the *center* of the plan.

Finally, the evidence, construed in the government's favor, showed that Defendants deprived the Universities of information that would have helped them decide whether to award the Recruits athletic-based aid. This deprivation was enough to support a wire fraud conviction. *See Finazzo*, 850 F.3d at 111. As discussed above, hiding the Recruits' ineligibility was essential to Defendants' scheme -- had the Universities known the Recruits were ineligible, they would not have offered them athletic-based aid or roster spots on their basketball teams. Similarly, it was reasonable for the jury to find that Defendants knew the Recruits had to misrepresent their eligibility to deceive the Universities into giving them athletic-based aid. Thus, it is evident that Defendants' scheme facilitated the withholding of valuable information that would have caused the Universities not to dispense with their property. *See United States v. Lebedev*, 932 F.3d 40, 48-49 (2d Cir. 2019). Accordingly, we conclude that the jury rationally found that Defendants committed wire fraud.

II. *Evidentiary Rulings*

We review a district court's evidentiary rulings for abuse of discretion, *United States v. McDermott*, 245 F.3d 133, 140 (2d Cir. 2001), and such rulings will only be overturned if they are "arbitrary and irrational," *United States v. White*, 692 F.3d 235, 244 (2d Cir. 2012). "Even if a decision was manifestly erroneous, we will affirm if the error was harmless." *United States v. Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (citations and internal quotation marks omitted). An "error is harmless if it is highly probable that it did not contribute to the verdict." *United States v. Gomez*, 617 F.3d 88, 95 (2d Cir. 2010).

Defendants argue that the district court erroneously excluded expert testimony and other evidence relevant to their defense. We address these issues in turn.

A. *Expert Testimony*

The district court's determination whether to admit expert testimony is guided by Fed. R. Evid. 702. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589-95 (1993). Generally, an expert may be permitted to testify if he is qualified, reliable, and helpful. *See* Fed. R. Evid. 702. Of course, courts must also determine whether the proffered evidence is relevant, *see* Fed. R. Evid. 401, 402, and, if so, whether its probative value is substantially outweighed by the danger of unfair prejudice, Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."). Thus, although an expert may otherwise be qualified to testify, the district court can nevertheless exclude his testimony if it finds the testimony would be unfairly prejudicial. *United States v. Dukagjini*, 326 F.3d 45, 51-52 (2d Cir. 2003) ("Of course, expert testimony, like other forms of evidence, 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.'" (quoting Fed. R. Evid. 403)). Although "a trial judge is given broad discretion to weigh these competing interests," this "does not mean immunity from accountability." *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983). On appeal, we "must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *Id.*

Defendants sought to call an expert witness to discuss the myriad of benefits -- both quantitative and qualitative -- that a successful men's basketball program bestows upon a university. Defendants argue that this testimony would have proven that they intended to help, not harm, the schools when they paid the Recruits' families to entice the Recruits to attend Adidas-sponsored schools. But the district court did not permit the expert to testify.

First, it found that the expert's testimony would not have been helpful because it was based on a study conducted in preparation for litigation and therefore "would have shed no light on [D]efendants' states of mind at the time the crimes allegedly were committed." S. App'x at 47-48. Second, the district court found, "[i]n any case," S. App'x at 48, that the information the expert would have presented was substantially more prejudicial than probative. It noted that allowing the expert to testify could have invited improper acquittals by enticing the jury to base its decision on the perceived unreasonableness or unfairness of the NCAA's amateurism rules. The district court explained how permitting the expert to testify would have introduced an improper defense -- that Defendants were not guilty of wire fraud because they believed the Universities would ultimately benefit from their actions.

We agree with the lower court's ruling, which was neither arbitrary nor irrational. Even if we assume Defendants' expert's testimony would have been helpful, it was substantially more prejudicial than probative. No doubt, universities stand to profit if their men's basketball programs are successful. It is even possible, as Defendants' expert would have suggested, that a cost-benefit analysis would reveal that universities come out net-positive when they commit recruiting violations. But this does not help Defendants. The law is clear: a defendant cannot negate the fraud he committed by wishing that everything works out for his victim in the end. *Calderon*, 944 F.3d 72, 90 (2d Cir. 2019) ("[T]he fact that the defendant believes (rightly or wrongly) that he will 'ultimately' be able to work things out so that the victim suffers no loss is no excuse for the real and immediate loss contemplated to result from defendant's fraudulent conduct.") (quoting *United States v. Rossomando*, 144 F.3d 197, 201 (2d Cir. 1998)); *see also United States v. Ferguson*, 676 F.3d 260, 280 (2d Cir. 2011). That the Universities might have ultimately benefitted monetarily from having top tier recruits would not have changed whether Defendants were guilty of wire fraud, and the evidence might have clouded the issue for the jury. Accordingly, the district court did not abuse its discretion.

B. *Other Evidentiary Challenges*

Defendants also challenge several other evidentiary rulings. None of their arguments have merit.

1. *Phone Calls*

Defendants sought to admit the contents of several recorded phone calls.[6] In one of those calls, Code and Dawkins discussed a high school basketball recruit not involved in this case. In that conversation, which the district court excluded, the two noted that the recruit's family was asking a school for money in exchange for their son's commitment to play for that school's basketball team. Code and Dawkins discussed how it was worthwhile for the school to meet those demands because it stood to profit substantially from that player. Although the district court did not clearly explain its reasoning, there are at least two acceptable reasons for it to have excluded the call. First, assuming, as Defendants argue, that the information from the call fit within the state of mind hearsay exception, *see* Fed. R. Evid. 803(3), it was not unreasonable for the district court to determine that the call -- which did not concern any of the recruits in this case and involved conduct that occurred *after* the payments alleged in the indictment were made -- was irrelevant. Second, admitting this phone call could have led the jury down the impermissible road of considering

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[6] The recordings and transcripts of certain phone calls were sealed, and the parties filed both sealed and redacted briefs and appendices. These records are unsealed to the extent, and only to the extent, the phone calls are discussed in this opinion and the separate opinion.

the wisdom of the NCAA's amateurism rules instead of the actions of Defendants. Accordingly, the district court did not abuse its discretion in excluding this call.

Defendants also take issue with the district court's exclusion of other phone calls in which various NCAA coaches purportedly encouraged Defendants to violate the amateurism rules. Defendants contend that this evidence proved they were doing "what the Universities wanted and expected their corporate apparel sponsors to do." Appellants' Br. at 114.[7] They also argue that the calls would have contradicted the testimony of Gassnola, one of the government's cooperating witnesses. The district court, however, found the prejudicial effect of these calls to substantially outweigh their probative value, and it did not admit them. This was not an abuse of discretion.

First, at least one coach on these calls worked at a school not involved in this case, and therefore his discussion of practices elsewhere had little relevance here. Second, to the extent the calls were relevant, allowing such testimony could have confused the jury, as it would have required the jury to

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[7] Defendants cite a 2018 report by the Commission on College Basketball, "Report and Recommendations to Address the Issues Facing Collegiate Basketball," which noted that "[e]veryone knows what's been going on." App'x at 1531.

learn about individuals not involved in the case. Third, even if we accept that coaches encouraged NCAA recruiting violations -- there was testimony, for example, that Pitino, Louisville's coach, needed "[p]lausible deniability," App'x at 640 -- that the coaches asked Defendants to pay the Recruits' families was *not* a defense unless, as we discuss further below, the coaches were unconflicted and acting in good faith on behalf of their Universities, *see D'Amato*, 39 F.3d at 1257-58. In addition, a closer examination of the calls Defendants sought to admit further refutes this argument. When the topic of compensating recruits came up, for example, one coach said: "I have got to shut my door." D. Ct. Dkt. No. 259 at 28. That this coach did not want to have a conversation about violating NCAA rules with his door open indicates that his school did not condone such behavior. Another coach said he kept his relationship with Dawkins "off the book," which the jury reasonably could have understood to mean off the record. D. Ct. Dkt. No. 259 at 31. Thus, this evidence is of limited utility to the extent it supposedly proves that Defendants believed they were doing what the Universities here wanted, as it cuts against any argument that the coaches were unconflicted and acting in good faith. *See D'Amato*, 39 F.3d at 1257-58. Accordingly, the district court did not abuse its discretion in excluding the evidence.

We also disagree that admitting the phone calls would have called into question Gassnola's veracity. Gassnola testified that he would not have told a University that he had paid a recruit's family member because "[t]hey wouldn't have liked [that] very much." App'x at 293. Defendants argue that the phone calls in which various coaches solicited this sort of help would have contradicted this testimony. We are not persuaded. The evidence Defendants sought to admit -- phone calls that Gassnola was *not* a part of -- consisted of coaches speaking guardedly about NCAA violations because they knew what they were doing was wrong. It is wholly consistent that Gassnola would have refrained from discussing the payments with University personnel. Flaunting such violations to the Universities, after all, would have put their compliance departments in difficult situations. Thus, we are not persuaded that Defendants' cross-examination of Gassnola was inhibited because the district court excluded the phone calls, and we conclude that the district court did not abuse its discretion in excluding the phone calls.[8]

[8] In his partial dissent, Judge Lynch presents thoughtful and substantial arguments in favor of reaching evidentiary outcomes different from those reached by the district court with respect to certain of the phone calls as well as certain of the recruiting violations discussed in the next section. While his concerns certainly give us pause, we believe that the district court did not abuse its broad discretion in ruling on these difficult and close evidentiary questions.

2. ***Recruiting Violations***

Defendants also sought to present evidence of Louisville's previous recruiting infractions "to demonstrate that . . . Louisville had a history of violating NCAA rules in order to recruit talented athletes, and thus, [Defendants] had no reason to think they were defrauding Louisville by doing the same." Appellants' Br. at 117. In particular, Defendants wanted the jury to learn that Louisville was sanctioned for providing recruits who visited Louisville with exotic dancers and prostitutes. Importantly, Defendants sought to introduce an NCAA Committee on Infractions ("COI") decision that found, *inter alia*, that Louisville committed recruiting violations by providing impermissible benefits to prospective players. As the district court noted, the COI decision is "somebody's opinion of what the facts were." App'x at 153. Accordingly, the decision itself was not a fact, and it therefore could not be admitted into evidence by a University compliance officer who was not involved in the investigation. The district court also excluded the evidence under Rule 403. Again, this was not an abuse of discretion.

Notably, Defendants stipulated with the government that Louisville previously violated NCAA rules and was sanctioned because of it. This permitted Defendants to argue -- as two of them did in summation -- that they did not think they were defrauding the Universities by committing recruiting violations because Louisville itself had previously disregarded NCAA rules. Indeed, this is why they sought to admit the violations in the first place. That the district court did not allow the intricate details of high school recruits being provided escorts and prostitutes to distract the jury from the scheme at issue in the case was not an abuse of discretion.

3. *Compliance Witnesses*

Defendants also sought to admit evidence to challenge the Universities' compliance officers' collective testimony that they were diligent stewards of NCAA rules. In essence, Defendants wanted to demonstrate that the Universities took "calculated risk[s]" when they awarded athletic-based aid to ineligible recruits. Appellants' Br. at 122. To a large extent, Defendants reassert the same reason for why their expert should have been allowed to testify. Because we have already rejected this argument above, we write only to address whether the district court abused its discretion in refusing to allow cross-examination about certain NCAA guidelines. We conclude it did not.

On cross-examination, Defendants were not permitted to question the compliance officers about specific instances in which student-athletes who competed for the Universities were temporarily deemed ineligible and then readmitted to play under the NCAA reinstatement guidelines. According to Defendants, ineligible student-athletes who did not know that their families accepted improper benefits may be reinstated to their teams after serving suspensions. Because these penalties are temporary and unencumbering, as the argument goes, the Universities were willing to risk getting caught because the reward outweighed the risk. The district court found that the evidence was beyond the scope of direct examination, not relevant, and substantially more prejudicial than probative. We agree.

A trial court "is accorded broad discretion in controlling the scope and extent of cross-examination." *United States v. James*, 712 F.3d 79, 103 (2d Cir. 2013) (internal quotation marks omitted). We recognize that it is "unrealistic to expect that direct examination and cross-examination will be perfectly congruent," and we have noted that "[t]he latter need only be reasonably related to the former." *United States v. Caracappa*, 614 F.3d 30, 43 (2d Cir. 2010).

Here, on direct examination, the government discussed the NCAA reinstatement guidelines in reference to the sanctions a university could face. It did not discuss how a student-athlete who has been deemed ineligible goes about getting reinstated or the penalties such student-athlete might face. It was not an abuse of the district court's broad discretion to prevent Defendants from asking questions about specific instances in which student-athletes not involved in this case were deemed ineligible and eventually reinstated. Moreover, this line of questioning would have confused the jury and distracted it from the issue in the case: whether Defendants withheld valuable information from the Universities to defraud them of athletic-based aid. Indeed, Defendants' entire argument that the Universities took calculated risks by signing ineligible student-athletes because the penalty for doing so was meager is not responsive to the prosecution's theory that Defendants *concealed* the Recruits' ineligibility from the Universities. Thus, to the extent that Universities weighed the consequences of issuing athletic-based aid to ineligible recruits, Defendants prevented them from doing so here by misrepresenting that Bowen, Preston, and Smith were in compliance with NCAA rules.[9]

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[9] Defendants' remaining argument that they were improperly barred from introducing a portion of the NCAA rulebook is without merit. Even assuming the district court erred by not

III. *Jury Instructions*

"We review *de novo* a district court's jury instruction," *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015), "and will vacate a conviction for an erroneous charge unless the error was harmless," *United States v. Nouri*, 711 F.3d 129, 138 (2d Cir. 2013). If, however, "a defendant fails to make a timely objection, we review the instruction for plain error." *Id*. A jury charge is adequate if "taken as a whole, [it] is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it." *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 280 (2d Cir. 2016); *see also United States v. Dyer*, 922 F.2d 105, 107 (2d Cir. 1990) ("[A] jury charge must be viewed as a whole and in the context of the entire trial."). "A jury instruction is erroneous if it either fails adequately to inform the jury of the law or misleads the jury as to the correct legal standard." *United States v. George*, 779 F.3d 113, 117 (2d Cir. 2015).

Defendants argue that the district court erroneously instructed the jury on: (1) conscious avoidance; (2) the meaning of "obtain" in 18 U.S.C. § 1343; (3) the "right to control"; and (4) the requisite intent. We address these issues in turn.

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admitting the evidence during cross-examination, any such error was harmless, as Defendants' argument relied on a flawed, selective reading of the rulebook.

A. *Conscious Avoidance*

The doctrine of conscious avoidance (*i.e.*, "willful blindness") prevents defendants from avoiding criminal liability by "deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances" and that, if known, would render them guilty of a crime. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). This doctrine has two requirements: "(1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 769.

A conscious avoidance jury charge "permits a jury to find that a defendant had culpable knowledge of a fact when the evidence shows that the defendant intentionally avoided confirming the fact." *United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011). Such a charge may be given when (1) the defendant claims to lack "some specific aspect of knowledge required for conviction" and (2) there is enough evidence for "a rational juror [to] reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Fofanah*, 765 F.3d 141, 144-45 (2d Cir. 2014). The instruction "permits a finding of knowledge even where there is no evidence that the defendant possessed actual knowledge." *United States v. Ferrarini*, 219 F.3d 145, 154 (2d Cir. 2000). When a defendant challenges the factual basis for a jury's finding of conscious avoidance, he is essentially challenging the sufficiency of the evidence and therefore "bears a heavy burden." *See United States v. Aina-Marshall*, 336 F.3d 167, 171 (2d Cir. 2003).

In pertinent part, the district court here explained that the jury "may find that a defendant acted with the necessary knowledge as to particular facts on the basis that the defendant consciously avoided learning those facts by deliberately closing his eyes to what otherwise would have been clear." App'x at 450. The court was clear that because Defendants denied that they knew the Recruits had to sign eligibility certifications, the jury could find that it was Defendants' "consci[ous] intention" -- as compared to their "carelessness or negligence" -- to remain ignorant of facts to "escape the consequences of criminal law." App'x at 451. Importantly, the court noted that a conscious avoidance argument "is not a substitute for proof. It is simply another fact you may consider in deciding what the defendant knew." App'x at 451.

Defendants raise several arguments for why the conscious avoidance jury instruction was erroneous. None is persuasive. First, Defendants argue that that the government failed to show that Defendants deliberately avoided confirming the facts, and therefore the conscious avoidance charge should not have been given. While it is true that conscious avoidance requires more than a reckless or negligent disregard of the facts, *see Glob.-Tech Appliances*, 563 U.S. at 769-70, the government met its burden here. As discussed in detail above, the jury heard ample evidence demonstrating that Defendants knew the Recruits had to misrepresent their eligibility for the scheme to succeed. Moreover, the district court's charge accurately instructed the jury on the law, and the jury reasonably concluded Defendants consciously avoided learning of the eligibility forms.

Next, Defendants contend that it was impossible for them to have consciously avoided learning that the Recruits had to sign eligibility forms for the scheme to succeed because the forms were completed after the payments were made. This argument is unavailing. We have previously rejected the proposition that "a conscious avoidance instruction is only appropriate where the crime includes knowledge of *an existing* fact as an element." *United States v. Gurary*, 860 F.2d 521, 526 (2d Cir. 1988) (emphasis added). Rather, such a charge is appropriate when there is "proof of notice of high probability" that future conduct will occur. *Id.* at 527. Although the charge may be inappropriate in certain one-off crimes where at best the jury is left to speculate what the defendant may have foreseen happening, *but see Ferguson*, 676 F.3d at 279 (conscious avoidance charge was permissible where "parameters of the deal were developed over a number of months, and there were numerous forward-looking meetings, emails, and negotiations"), it is a permissible charge when defendants' repeated conduct makes it all-the-more likely that they remained willfully blind. *Gurary*, 860 F.2d at 527. Here, Defendants were involved in at least three schemes that spanned several years.[10] Accordingly, the charge was appropriate.

Third, Defendants argue that the district court gave two inconsistent charges, asking the jury to find that Defendants consciously avoided a fact while also willfully causing a result. There is no inconsistency here. Willful causation is a form of secondary liability where an actor can be found guilty of a crime if he purposefully caused another to act criminally. *See United States v. Nolan*, 136 F.3d 265, 272 (2d Cir. 1998); 18 U.S.C. § 2(b) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against

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10 The indictment also mentioned a similar scheme at the University of Miami, and there was evidence presented at trial that indicated at least one other recruit's legal guardian was paid for that recruit to commit to Kansas.

the United States, is punishable as a principal."). The district court's instruction as to conscious avoidance permitted the jury to impute *knowledge* onto Defendants. The willful causation charge, conversely, permitted the jury to impute a third party's *actions* onto Defendants. Here, it allowed the jury to attribute the Recruits' false statements to Defendants, who both persuaded the Recruits to sign on with the Universities and rendered them ineligible by violating NCAA rules. These two charges are compatible. In any event, even assuming the district court committed error, any such error was harmless, as the jury could have found that Defendants had actual knowledge that false representations would be made to the Universities. *See Ferrarini*, 219 F.3d at 154 ("[A]n erroneously given conscious avoidance instruction constitutes harmless error if the jury was charged on actual knowledge and there was overwhelming evidence to support a finding that the defendant instead possessed *actual* knowledge of the fact at issue." (internal quotation marks omitted)).

B. *"Obtain"*

A defendant is guilty of wire fraud if he "devises or intends to devise any scheme or artifice to defraud, or for *obtaining* money or property by means of false or fraudulent pretenses, representations, or promises" and uses wires to further that scheme. 18 U.S.C. § 1343 (emphasis added). Defendants argue that a plain reading of the statute makes it clear that the law requires that property or money be obtained *by* the defendant *from* the victim, and the district court erred by not making this clear to the jury. We are not persuaded.

The district court instructed the jury, in relevant part, that Defendants had to have made or caused another to make a false statement that involved a "material fact . . . that would reasonably be expected to influence, or that is capable of influencing, the decision of the [Universities to award the Recruits athletic-based aid]." App'x at 441. It made clear that Defendants did not need to profit from the fraud; they did, however, need to "contemplate[] depriving the victim . . . of money or property," App'x at 443. Indeed, the court was explicit: "[A] victim can be deprived of money or property . . . when it is deprived of the ability to make an informed economic decision about what to do with its money or property." App'x at 444. This instruction, as noted above, accurately explains the law. *See United States v. Carlo*, 507 F.3d 799 (2d Cir. 2007) ("Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the [wire fraud] statute[] include the interest of a victim in controlling his or her own assets.").

First, Defendants rely on two canons of statutory interpretation -- that courts are bound by what the text of a statute says and that courts must apply the ordinary meaning of the words in a statute. They contend that the words "obtaining" and "defraud" in § 1343 unambiguously mean that a defendant must personally obtain property from the victim to be convicted of wire fraud. This interpretation conflicts with our Court's precedent. As noted above, we have held that the wire fraud statute is violated when the defendant prevents the victim from making an informed economic decision about the victim's property, regardless of who ultimately benefits from the victim's property. *See Finazzo*, 850 F.3d at 111 (approving a jury instruction that explained that "the right to control one's assets is injured when a victim is deprived of potentially valuable economic information it would consider valuable in deciding how to use its assets") (internal quotation marks omitted); *see also Binday*, 804 F.3d at 581 (approving a jury instruction that explained that "a person can also be deprived of money or property when he is deprived of the ability to make an informed economic decision about what to do with his money or property"). Indeed, a defendant "does not need to literally obtain money or property to violate the [wire or mail fraud] statute[s]." *Porcelli*, 404 F.3d at 162 (internal quotation marks omitted); *see also Males*, 459 F.3d at 158 (same).

Further, Section 1343 punishes the individual who devises the scheme. 18 U.S.C. § 1343 ("*Whoever, having devised or intending to devise any scheme or artifice to defraud*, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . " is guilty of wire fraud. (emphasis added)). What matters, therefore, is that there was a scheme to defraud a victim of money or property. By the plain language of the statute, the identity of the ultimate beneficiary is not dispositive and the plain meaning of the word "obtain" is sufficiently capacious to encompass schemes by defendants to obtain money for the benefit of a favored third party. *See United States v. Johnson*, 945 F.3d 606, 610-11 (2d Cir. 2019) (affirming a bank executive's wire fraud conviction when his misrepresentations caused the victim to confer a benefit on the bank rather than himself). Thus, a victim's loss need not flow directly *to* the defendant for the defendant to be guilty of wire fraud. *See United States v. Calderon*, 944 F.3d at 88-90 (holding that a wire fraud scheme contemplated actual harm to the victims when modifications to bills of lading exposed banks "to risk of default or non-reimbursement" from foreign correspondent banks and increased the risk the government would not reimburse the victim banks if a foreign bank defaulted).

Second, Defendants rely on case law. They contend that Supreme Court precedent and several out-of-circuit cases also require that the defendant personally obtain the victim's property. Not so. Although, as discussed above, obtaining the victim's property must be "an object of the fraud," *Kelly*, 140 S. Ct. at 1573, there is no precedent mandating that the victim's property flow directly to the defendant. Nor should there be. Surely a defendant would be guilty of fraud if he deceived a victim into providing money or property to the defendant's relative, friend, or favorite charity, rather than directly to the defendant himself. Such an act would come within the plain meaning of the statute: the deception would be for the purpose of obtaining money or property from the victim for a person of defendant's choosing.

Defendants also misread *Carpenter v. United States*, 484 U.S. 19 (1987), claiming that it stands for the proposition that a defendant must obtain property from the victim. The language Defendants quote, however, is the Court reiterating an argument made by one of the parties -- it is *not* the Court's holding.

Compare Appellants' Br. at 63 ("[A]fter *McNally*, the requirement that the defendant 'obtain . . . money or property from the [victim]' is a 'necessary element' of wire fraud."); *with Carpenter*, 484 U.S. at 25 ("Petitioners assert that . . . they did not obtain any 'money or property' from the [victim], which is a necessary element of the crime under our decision last Term in [*McNally*]."). Indeed, the Court in *Carpenter* explains that the property fraud statutes "reach *any* scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Carpenter*, 484 U.S. at 27 (emphasis added). Once again, there is no requirement that the property flow to the defendant.

Nor are we bound or persuaded by the out-of-circuit precedent that Defendants cite. We address only the case on which Defendants most heavily rely. In *United States v. Walters*, the Seventh Circuit explained that "[l]osses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement" for property fraud. 997 F.2d 1219, 1227 (7th Cir. 1993). We do not quarrel with this rule, which was recently reaffirmed by the Supreme Court. *See Kelly*, 140 S. Ct. at 1573. The facts of *Walters*, however, are distinguishable.

Norby Walters was an aspiring sports agent who gave NCAA student-athletes cars and money with the hope that they would retain him as their agent when they turned professional. *Walters*, 997 F.2d at 1221. This, of course, violated the NCAA's amateurism rules. *Id.* The Seventh Circuit noted that because "[t]he athletes' pro prospects depended on successful completion of their collegiate careers," *id.*, it could "assume that Walters knew that the universities would ask [the] athletes to verify that they were eligible to compete as amateurs," *id.* at 1222, and Walters "promised to lie to the universities" about the payments if asked, *id.* at 1221.

The *Walters* Court acknowledged that the case was close: "Everything . . . turns on matters of degree. Did the schemers foresee that the mails would be used? Did the mailing advance the success of the scheme? Which parts of a scheme are 'essential'? Such questions lack obviously right answers." *Id.* at 1222. Ultimately, the Court found that Walters did not "conceive[] a scheme in which mailings played a role." *Id.* In other words, Walters did not satisfy a critical element of the mail fraud statute: he did not intend to mail anything. *Id.* ("For all Walters cared, the [eligibility] forms could sit forever in cartons. Movement to someplace else was irrelevant."). Here, the equivalent element in the wire fraud statute is the use of wires, which Defendants do not -- and cannot -- dispute. Accordingly, Defendants' reliance on *Walters* is misplaced, and, for the reasons noted above, the district court did not err in its instructions on the meaning of "obtain."

C. *Right to Control*

Because one has a right to control one's property, "a wire fraud charge under a right-to-control theory can be predicated on a showing that the defendant, through the withholding or inaccurate reporting of information that could impact on economic decisions, deprived some person or entity of potentially valuable economic information." *Lebedev*, 932 F.3d at 48 (internal quotation marks and alterations omitted); *see also Finazzo*, 850 F.3d at 111 ("[M]isrepresentations or non–disclosure of information cannot support a [wire fraud] conviction under the 'right to control' theory unless those misrepresentations or non–disclosures can or do result in tangible economic harm."). In other words, as discussed above, depriving a victim of "potentially valuable economic information it would consider valuable in deciding how to use its assets" prevents the victim from exercising its right to control its property and can therefore support a wire fraud conviction. *Finazzo*, 850 F.3d at 111.

Defendants' "right to control" argument is essentially a refashioning of its "obtain" arguments, which we have addressed above. Here, Defendants argue that "the Universities' ability to make an informed economic decision about scholarships is not property, because it is not an interest that holds any independent economic value." Appellants' Br. at 71 (internal quotation marks omitted). Accordingly, they contend that the district court erred when it instructed the jury on the right-to-control theory.[11] They challenge the following portion of the district court's instruction:

> [A] victim can be deprived of money or property also when it is deprived of the ability to make an informed economic decision about what to do with its money or property -- in other words, when it is deprived of the right to control the use of its assets. I instruct you that a victim's loss of the right to control the use of its assets constitutes deprivation of money or property if, and only if, the scheme could have caused or did cause tangible economic harm to the victim.

App'x at 444.

There is no doubt that the Universities' scholarship money is a property interest with independent economic value. First, and most obviously,

[11] Defendants objected to the "right to control" jury instruction given by the district court in a pre-trial filing, but they did not renew this objection at the charge conference. We need not determine whether this affects the standard of review, as Defendants' argument fails either way.

the Universities awarded tuition, room, and board to the Recruits. Without these awards, the Recruits would have had to pay tens of thousands of dollars to attend the schools. Second, there are a finite number of athletic-based scholarships that each University can award. Thus, giving a scholarship to one student necessarily precludes another student from receiving that same scholarship. And because the Universities would not have awarded the Recruits this aid had they known the Recruits were ineligible to compete, withholding that information is a quintessential example of depriving a victim of its right to control its assets. Accordingly, the district court's instructions accurately reflected the law, and it therefore did not err in this respect. *See Finazzo*, 850 F.3d at 111.

D. *Intent*

As discussed above, a defendant must act with fraudulent intent to be convicted of wire fraud. Thus, if the victim -- or an agent authorized to act on behalf of the victim -- gives permission to the defendant to act in the manner at issue, the defendant cannot be found guilty of wire fraud. *See United States v. Bonanno*, 430 F.2d 1060, 1064, 1064 n.5 (2d Cir. 1970) (noting that use of others' credit cards "*without permission*" constituted evidence of "intent to mislead" in a mail fraud conviction) (emphasis added). An agent can either have actual authority to act, which is when the agent receives "explicit permission from the principal to act on its behalf," *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading Inc.*, 697 F.3d 59, 71 (2d Cir. 2012), or apparent authority to act, which is when an agent has the ability to bind the principal to transactions with third parties because representations that the principal made to the third party make it reasonable for the third party to believe the agent has such an ability, *United States v. Int'l Bhd. of Teamsters,* 986 F.2d 15, 20 (2d Cir. 1993). "It is the law in this circuit, as well as generally, that customarily only the representation *of the principal to the third party* can create apparent authority, not the representation of the agent alone." *Id.* (emphasis added).

Certain corporate agents, however, inherently have apparent authority to represent their principals, even if the principal does not make a specific representation to the third party. *See D'Amato*, 39 F.3d at 1258. For there to be apparent authority in such a circumstance, two elements must be met: (1) the principal is making a lawful decision to conceal the relationship with the agent and (2) the agent is acting in good faith and not profiting from the decision. *Id.*

Defendants argue that they did not have the requisite fraudulent intent because their scheme was designed to *help* the Universities recruit top-tier players. Indeed, they argue that the men's basketball coaches asked them to make payments to the Recruits' families. Accordingly, Defendants take issue with the district court's jury instruction on intent, which they contend should have made clear that the jury could acquit if it found that Defendants believed the men's basketball coaches had the apparent authority to instruct them to violate NCAA rules. Contrary to Defendants' arguments, the district court did just that.

As an introduction to the concept of agency law, the district court instructed the jury as follows:

> Each of the alleged victims and intended victims of the crimes charged in the indictment is a university. Universities, of course, are not human beings. They can think or act only through their agents -- that is to say, their officers, their employees, and their other authorized representatives. So, the knowledge, the intentions, the statements, and the actions of a university officer, employee, or other representative -- and that includes basketball coaches -- are considered to be those of the university to the extent, but only to the extent, that the officer, employee, or other representative is, first of all, acting within the scope of the authority of that officer, agent, or representative and, second of all, without any purpose to profit

> personally or otherwise benefit him or herself in a manner that is not fully aligned with the interests of the university.

App'x at 438-39.

Defendants characterize this as an actual authority jury instruction. We disagree. As the district court noted, the words "actual authority" do not appear anywhere in this instruction. While this alone is not dispositive, the context in which the instruction was given is. *See Garnett*, 838 F.3d at 280 (A jury charge is adequate if "taken as a whole, [it] is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it"). Here, the district court was introducing the concept of agency law to the jury. Its instruction accurately explained how the Universities had to act through their agents, which it made clear included the men's basketball coaches. This was a crucial explanation that set up the court's apparent authority instruction, which it gave shortly thereafter. In relevant part, the district court instructed the jury as follows:

> Now, as to certain of the universities, one or more of the defendants contends that they lacked intent to defraud because they acted in good faith at the request of one or more university basketball coaches. An individual who does not work for a university and who engages in (otherwise legal) conduct to mislead the university lacks

> an intent to defraud the university if three things are true: First, he or she was acting at the request of an agent of the alleged victim university; second, the agent had apparent authority to make that request; and, third, the agent appeared to be unconflicted and acting in good faith for the benefit of the victim university and not to serve his or her own interests in a manner that was not fully aligned with the interests of the university.

App'x at 447. The district court went on to explain each of the three prongs in detail.

Defendants contend that the district court's instruction was unnecessarily complex and legally incorrect. Again, we disagree. The thrust of Defendants' argument is that the district court misapplied *D'Amato*, a case where a lawyer (D'Amato) was hired by a vice president of a corporation to lobby D'Amato's brother, a United States senator. *D'Amato*, 39 F.3d at 1252-53. But the district court's jury instructions accurately explained the apparent authority rule from *D'Amato*. From a legal standpoint, this alone ends the inquiry, as the jury instruction neither "fail[ed to] adequately . . . inform the jury of the law [n]or misle[d] the jury as to the correct legal standard." *George*, 779 F.3d at 117. Defendants' argument that they were merely following coaches' instructions when they paid the Recruits' families also misunderstands *D'Amato*. Even assuming that the Universities' coaches encouraged Defendants to pay Recruits' families to steer the Recruits toward their basketball programs -- indeed, Defendants discussed giving Pitino "[p]lausible deniability," App'x at 640 -- Defendants would have had to have believed that the coaches were acting in good faith. In other words, if we analogize the head coaches to corporate agents, *D'Amato* teaches that Defendants would have had to believe that the coaches' commands were made in good faith to carry out the principals' (*i.e.*, the Universities') objectives. *See D'Amato*, 39 F.3d at 1258 (explaining that a party may "follow[] the instructions of an appropriate corporate agent who appears to be unconflicted and acting in good faith"). On this record, the jury could have reasonably found that this was not the case.

The jury was shown the head coaches' contracts, which required them to ensure their players were eligible to compete and provided incentives if their teams had successful seasons. Defendants were sophisticated actors in the world of college sports, as discussed in detail above, who surely were generally aware of the coaches' obligations to comply with NCAA rules and likely knew there were financial incentives tied to their teams' successes. Thus, any argument that Defendants believed the coaches were acting in good faith by violating their contracts to secure top talent is unreasonable.

Moreover, there is no indication that the Universities condoned surreptitiously paying Recruits' families to entice Recruits to play for their basketball teams. *Int'l Bhd. of Teamsters*, 986 F.2d at 20 ("It is the law in this circuit, as well as generally, that customarily only the representation *of the principal to the third party* can create apparent authority, not the representation of the agent alone." (emphasis added)). Instead, there is evidence to the contrary -- compliance officers from the Universities testified about the harsh NCAA sanctions their institutions would face if such activity occurred and was discovered. In any event, there is also no indication that the coaches ever instructed Defendants to conceal the payments. In *D'Amato*, the corporate agent was forthright about the need to create false reports and funnel the payments through D'Amato's law partner. 39 F.3d at 1254-55. This -- along with the fact that payments were repeatedly approved by others who worked at the corporation, *id.* at 1253-54, 1261 -- made it plausible that D'Amato believed this was business-as-usual and approved by the corporation. Here, by contrast, Defendants themselves took these precautions, which shows that they knew what they were doing was against the Universities' wishes. As Dawkins stated in a recorded phone call, "I would never tell Rick anything like this because I don't want to put him in jeopardy." Supp. App'x at 142. These actions belie the notion that the activity was approved by the Universities.

Because the district court's jury instruction accurately reflected the law on apparent authority, it did not err.[12]

CONCLUSION

At trial, Defendants argued that their intent was not to harm but to help the Universities, and they also sought to offer evidence that they were not the only individuals who have paid high school basketball recruits to attend certain universities. The ends, however, do not justify the means,[13] and that others are engaging in improper behavior does not make it lawful. *See Gonnella*

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12 We are also unpersuaded by Defendants' dual intent argument, as it is commonplace for individuals to have more than one motive for acting. *See United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014) ("It is commonplace that the law recognizes that there may be multiple motives for human behavior; thus, a specific intent need not be the actor's sole, or even primary, purpose."). That the district court's jury instruction reflected this notion in no way foreclosed Defendants' good-faith defense. Such an argument ignores the jury instruction as a whole, which explained that "good faith on the part of a defendant that you are considering is a complete defense to the charge of wire fraud." App'x at 446.

13 Long ago, Judge Medina referred to "the false but seductive doctrine that the end justifies the means," adding that the doctrine "has never taken lodgment in American jurisprudence; and I hope it never will." *United States v. Morgan*, 118 F. Supp. 621, 634 (S.D.N.Y. 1953).

v. S.E.C., 954 F.3d 536, 549 (2d Cir. 2020) ("[T]he fact that behavior is common does not mean it is not fraud."); *see also Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 274 (3d Cir. 1998) (en banc) ("Even a universal industry practice may still be fraudulent.").

Defendants concede that they broke the NCAA rules, but contend that they did not act criminally. But "the essence of fraud is misrepresentation, made with the intent to induce another person to take action 'without the relevant facts necessary to make an informed . . . decision.'" *United States v, Rutigliano*, 887 F.3d 98, 109 (2d Cir. 2018) (quoting *United States v. Binday*, 804 F.3d at 579). Fraud involves "a departure from fundamental honesty, moral uprightness, or fair play," *United States v. Ragosta*, 970 F.2d 1085, 1090 (2d Cir. 1992) (quoting *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987)), and depriving one of property through "dishonest methods or schemes" or "trick, deceit, chicane or overreaching," *Id.* (internal quotation marks omitted). Here, as the jury could have reasonably found, Defendants deprived the Universities of property -- athletic-based aid that they could have awarded to students who were eligible to play -- by breaking NCAA rules and depriving the Universities of relevant information through fundamentally dishonest means.

For the foregoing reasons, the judgments of the district court are **AFFIRMED**.