

No. 22-5442

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

XIAORONG YOU,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Tennessee
District Court No. 2:19-CR-00014 (Hon. J. Ronnie Greer)

ANSWERING BRIEF FOR THE UNITED STATES

FRANCIS M. HAMILTON, III
United States Attorney

KENNETH A. POLITE, JR.
Assistant Attorney General

MAC HEAVENER
Assistant U.S. Attorney
Eastern District of Tennessee

RICHARD W. DOWNING
Deputy Assistant Attorney General

MATTHEW G. OLSEN
Assistant Attorney General
for National Security

MATTHEW R. WALCZEWSKI
JOSEPH PALMER
Computer Crime & Intellectual Property Section
Criminal Division
U.S. Department of Justice
1301 New York Ave, N.W. Suite 600
(202) 353-9402

NICHOLAS O. HUNTER
Trial Attorney
National Security Division

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
STATEMENT REGARDING ORAL ARGUMENT	vii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
I. Procedural History	2
II. Statement of Facts	2
A. BPA-Free Can Coatings	2
B. Chemical Companies Trust You with Their Secret Formulas	3
C. You Receives Chinese Government Funding To Start A BPA-Free Coating Company in China	4
D. You Downloads Trade Secrets from Coke and Eastman Networks.....	7
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
I. The District Court’s Evidentiary Rulings Did Not Deprive You of a Fair Trial	12
A. Background.....	13
B. Standards of Review	17
C. Discussion.....	18

II. The Jury Instructions Correctly Defined the Intent Requirements For Economic Espionage and Trade Secret Theft	25
A. Background.....	26
B. Standard of Review.....	28
C. Discussion.....	30
III. The District Court Did Not Abuse Its Discretion in Rejecting You’s Proposed Instruction on the Economic Espionage Counts.....	39
A. Background.....	39
B. Standard of Review.....	40
C. Discussion.....	41
IV. There Was No Cumulative Error.....	42
V. The District Court Correctly Sentenced You Based on Intended Loss	43
A. The Commentary to Guidelines § 2B1.1 Is Entitled to Deference.....	43
B. The Loss Calculation Was Not Clearly Erroneous	55
CONCLUSION.....	58
CERTIFICATE OF COMPLIANCE.....	59
CERTIFICATE OF SERVICE	60
DESIGNATION OF DISTRICT COURT DOCUMENTS.....	61

TABLE OF AUTHORITIES

Cases

<i>Beckles v. United States</i> , 580 U.S. 256 (2017)	54
<i>Carter v. United States</i> , 530 U.S. 255 (2000).....	33
<i>Flores-Figueroa v. United States</i> ,, 556 U.S. 646 (2009).....	32
<i>Illinois v. Somerville</i> , 410 U.S. 458 (1973)	21
<i>Jones v. United States</i> , 527 U.S. 373 (1999)	28
<i>Kisor v. Wilkie</i> , 139 S. Ct. 2400 (2019).....	12, 47, 50, 51, 53
<i>McKleskey v. Kemp</i> , 481 U.S. 279 (1987).....	13, 22
<i>Mistretta v. United States</i> , 488 U.S. 361 (1989).....	54
<i>Stinson v. United States</i> , 508 U.S. 36 (1992).....	46
<i>United States v. Abdalla</i> , 972 F.3d 838 (6th Cir. 2020)	44
<i>United States v. Augustin</i> , 661 F.3d 1105 (11th Cir. 2011).....	19
<i>United States v. Banks</i> , 55 F.4th 246 (3d Cir. 2022)	50, 51
<i>United States v. Cabrera</i> , 222 F.3d 590 (9th Cir. 2000)	23
<i>United States v. Castleman</i> , 57 U.S. 157 (2014)	54
<i>United States v. Cleveland</i> , 907 F.3d 423 (6th Cir. 2018).....	17
<i>United States v. Coombs</i> , 369 F.3d 925 (6th Cir. 2004).....	18
<i>United States v. Cote</i> , 504 F.3d 682 (7th Cir. 2007)	38
<i>United States v. Cruz</i> , 981 F.2d 659 (2d Cir. 1992)	23
<i>United States v. Doe</i> , 903 F.2d 16 (D.C. Cir. 1990).....	23

United States v. Feola, 420 U.S. 671 (1975) 34

United States v. Fleming, 128 F.3d 285 (6th Cir. 1997)..... 55

United States v. Godofsky, 943 F.3d 1011 (6th Cir. 2019)..... 42

United States v. Howley, 707 F.3d 575 (6th Cir. 2013)..... 45, 55

United States v. Johnson, 581 F.3d 320 (6th Cir. 2009)..... 17

United States v. Jones, 108 F.3d 668 (6th Cir. 1997)..... 17, 35

United States v. Kirschner, 995 F.3d 327 (3d Cir. 2021) 45

United States v. Krumrei,
258 F.3d 535 (6th Cir. 2001) 29-33

United States v. LaVictor, 848 F.3d 428 (6th Cir. 2017)..... 40

United States v. Lively, 852 F.3d 549 (6th Cir. 2015) 28

United States v. Lemus, 847 F.3d 1016 (9th Cir. 2016)..... 21

United States v. Mahbub, 818 F.3d 213 (6th Cir. 2016)..... 29

United States v. Morales, 108 F.3d 1031 (9th Cir. 1997)..... 18

United States v. Nobari, 574 F.3d 1065 (9th Cir. 2009)..... 13

United States v. Phillips, 54 F.4th 374 (6th Cir. 2022) 47, 48, 50, 52, 53

United States v. Polichemi, 219 F.3d 698 (7th Cir. 2000)..... 24

United States v. Presley, 18 F.4th 899 (6th Cir. 2021)..... 45

United States v. Raithatha, 385 F.3d 1013 (6th Cir. 2004) 55

United States v. Ray, 803 F.3d 244 (6th Cir. 2015)..... 28

United States v. Riccardi, 989 F.3d 476 (6th Cir. 2021) 44, 47-49

United States v. Roberts, 2009 WL 5449224
(E.D. Tenn. Nov. 17, 2009) 31, 33

United States v. Rodriguez Cortes, 949 F.2d 532 (1st Cir. 1991) 23

United States v. Russell, 595 F.3d 633 (6th Cir. 2010) 29

United States v. Sababu, 891 F.2d 1308 (7th Cir. 1989) 22

United States v. Soto, 988 F.2d 1548 (10th Cir. 1993) 24

United States v. Underwood, 859 F.3d 386 (6th Cir. 2017) 42

United States v. Volkman, 797 F.3d 377 (6th Cir. 2015) 40

United States v. Vonner, 516 F.3d 382 (6th Cir. 2008) 44

United States v. Vue, 13 F.3d 1206 (8th Cir. 1994) 23

United States v. Williams, 612 F.3d 500 (6th Cir. 2010) 29

United States v. Wimbley, 553 F.3d 455 (6th Cir. 2009) 17

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 32

United States v. Yang, 281 F.3d 534 (6th Cir. 2002) 26, 38

United States v. Zheng, 27 F.4th 1239 (6th Cir. 2022) 20

Statutes

18 U.S.C. § 1291 1

18 U.S.C. § 1343 2

18 U.S.C. § 1831 1, 2, 26, 32, 33, 39, 41

18 U.S.C. § 1832.....	1, 2, 27, 32, 33
18 U.S.C. § 1839.....	1, 27, 39, 41
18 U.S.C. § 3231.....	1
18 U.S.C. 3553.....	46
18 U.S.C. § 3742.....	1
<u>Other Authorities</u>	
Fed. R. Crim. P. 30(d).....	29
Fed. R. Evid. 403.....	17
Fed. R. Evid. 704(b).....	17-19
U.S.S.G. § 1B1.3.....	52
U.S.S.G. § 1B1.7.....	46
U.S.S.G. § 2B1.1.....	44, 48-52, 54, 56
U.S.S.G. § 2F1.1 (1987).....	48, 53
U.S.S.G. App. C, Amendment 617.....	49, 50

STATEMENT REGARDING ORAL ARGUMENT

The government does not oppose oral argument and defers to the Court's determination whether argument would be appropriate and helpful in this case.

STATEMENT OF JURISDICTION

Defendant Xiaorong You appeals from a final judgment of conviction in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231. The court entered judgment on May 13, 2022. R-422, at #7707 (Judgment).¹ You filed a timely notice of appeal on May 23, 2022. R-424, at #7718 (Notice of Appeal). This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF THE ISSUES

1. Whether testimony by two government witnesses about efforts by China's government to acquire foreign technology violated You's right to a fair trial.
2. Whether, on plain-error review, the district court erred by not instructing the jury that, to convict You for economic espionage under 18 U.S.C. § 1831, or trade secret theft under 18 U.S.C. § 1832, the government had to prove that she knew that the information in question met all the requirements of a "trade secret" in 18 U.S.C. § 1839(3).
3. Whether the district court abused its discretion in denying You's proposed instruction on the economic espionage counts.

¹ Record citations are in the following format: R-[docket entry number], at [Page ID #] ([document description]). "Br." refers to the defendant's brief, "App." refers to the defendant's appendix.

4. Whether You has shown any cumulative error warranting a new trial.
5. Whether the district court correctly sentenced You based on intended loss.

STATEMENT OF THE CASE

I. Procedural History

A grand jury in the Eastern District of Tennessee charged You with conspiracy to commit theft of trade secrets (18 U.S.C. § 1832(a)(5)); seven counts of possessing stolen trade secrets (18 U.S.C. § 1832(a)(3)); wire fraud (18 U.S.C. § 1343); conspiracy to commit economic espionage (18 U.S.C. § 1831(a)(5)); and economic espionage (18 U.S.C. § 1831(a)(3)). R-217, at #3012-31 (Superseding Indictment). Following a thirteen-day trial in April 2021, a jury convicted You on all counts. R-422, at #7707-08 (Judgment). The district court sentenced You to 168 months of imprisonment. *Id.*

II. Statement of Facts

A. BPA-Free Can Coatings

Beverage cans are big business. Around 350 billion cans are produced worldwide every year. R-309, at #4112 (Transcript). Beverage cans are lined with a chemical coating to protect the beverage against contamination and flavor loss. *Id.* at #4112-13. For the past half-century, beverage can coatings contained the chemical bisphenol-A (“BPA”). *Id.* at #4132-36. In recent years, however,

concerns arose that BPA might have harmful effects. *Id.* France and California banned BPA, and consumers began demanding BPA-free coatings. *Id.* Chemical companies raced to develop proprietary formulas for effective can coatings that did not contain BPA. *Id.* Developing BPA-free alternatives was a complex, expensive, and time-consuming process. *Id.* at #4110-14, 4130-31.

B. Chemical Companies Trust You with Their Secret Formulas.

From 2012 to 2017, Dr. Xiaorong You, a U.S. citizen originally from the People’s Republic of China (“PRC”), worked as a chemist for the Coca-Cola Company (“Coke”) in Atlanta. *Id.* at #4106-07. Through her work at Coke, You obtained access to secret formulas that six chemical companies had developed for BPA-free can coatings.² *Id.*; R-340, at #5418-22 (Transcript). The companies submitted the formulas to Coke hoping that Coke would approve their coatings for use in Coke’s products. *Id.*; R-343, at #5723 (Transcript).

The six companies spent many years and millions of dollars developing their proprietary formulas. *See* R-366, at #6766 (PSR) (calculating a total cost of \$121 million based on trial testimony). The companies regarded the formulas as valuable trade secrets. R-343, at #5740-41 (Transcript). Accordingly, the companies provided their formulas to Coke subject to non-disclosure agreements

² The six companies were AkzoNobel, BASF, Dow Chemical, PPG Industries, Sherwin-Williams, and ToyoChem. R-366, at #6763 (PSR).

(NDAs) that required Coke to treat the formulas as trade secrets and to protect them from disclosure. *E.g.*, R-309, at #4146-51 (Transcript).

You was one of very few Coke scientists who had access to the companies' secret formulas. R-340, at #5421 (Transcript). She knew the formulas were subject to NDAs, and some of them identified her specifically as one of the only Coke employees authorized to see the information. *E.g.*, R-343, at #5720-21 (Transcript) (Dow granting permission for “Xiaorong ‘Shannon’ You to review the compositional information,” and requiring Coke to “limit this information to named individuals due to its highly confidential nature” and to “ensure each individual is aware of [the NDA]”). In an email to another Coke scientist, You insisted that “no other team members are allowed to be in the room” when she “discuss[ed] compositional data” with the chemical companies because “disclos[ure] to others” at Coke would constitute a “breach of agreement and [Coke] will be sued by coating suppliers.” R-340, at #5435-36 (Transcript). You also received training from Coke on handling confidential information, including information received from other companies. R-341, at #5550-57 (Transcript).

C. You Receives Chinese Government Funding To Start A BPA-Free Coating Company in China.

While working for Coke, You secretly planned to start a company in China to produce BPA-free coatings. You's partner in the new venture was a China-

based chemical company called Weihai Jinhong Group (“WJG”). R-364, at #6520-32 (Transcript).

To support this new venture, You and WJG applied for grants from the PRC government at both the national and provincial levels. R-363, at #6420-37 (Transcript). You’s application for the national grant, known as the “Thousand Talents Program,” emphasized that she would bring the world’s “most advanced” BPA-free coating technology to the new Chinese venture. *Id.* at #6420, #6446; R-342, at #5677-78 (Transcript); App. 129. You asserted that, with this advanced technology, the new company would become “the largest [BPA-free] coating producer in Asia,” and that it would “break” the monopoly on such coatings held by foreign companies. App. 125. You’s grant presentations stressed that the new venture would benefit the PRC government by, among other things, ensuring that Chinese exports would not be blocked by international environmental regulations targeting BPA. R-343, at #5762-63 (Transcript). You also claimed that sponsoring the company would further the government’s “Five Year Plan” and “Made in China 2025” initiatives. R-319, at #4626-27 (Transcript); R-364, at #6610-11 (Transcript).

You traveled to China several times to deliver presentations in support of the grant applications and to continue planning for the new company. R-363, at #6420-24 (Transcript). The Chinese government awarded grants under both the

Thousand Talents and provincial-level programs to You and WJG. *Id.* at #6485-90. The grants provided substantial funding to You and her new BPA-free coating company. R-342, at #5674 (Transcript); R-364, at #6640-41 (Transcript). Neither Coke nor You's subsequent U.S. employer, Eastman Chemical Company, knew that she had received Chinese government grants or that, to obtain those grants, she had promised that she would bring the world's most advanced technology for BPA-free coatings to a new company in China. R-341, at #5598-99 (Transcript); R-337, at #5370-71 (Transcript).

You discussed the new company with her partners in China using the WeChat app. She negotiated an annual salary and a 33% equity stake in the new company. R-364, at #6626, #6640 (Transcript); R-319, at #4619-20 (Transcript). During these discussions, You emphasized the need to keep a "low profile," and to prevent her Thousand Talents award and involvement with WJG from becoming publicly known. R-364, at #6612-16 (Transcript).

You knew that her plan could get her in trouble with the law. *Id.* at #6633-36. You told her partners that she deserved a bigger slice of the pie because she was the one "taking all the risks." *Id.* at #6620-21, #6639. "If anything happens to me," she vented, "the money I've made wouldn't even be enough for the lawyer's fee." *Id.* at #6621.

D. You Downloads Trade Secrets from Coke and Eastman Networks.

Meanwhile, in the summer of 2017, Coke informed You that she would be laid off in sixty days. R-341, at #5617 (Transcript). You began trying to transfer files containing the six chemical companies' BPA-free formulas from Coke's networks to a personally owned hard drive, but Coke's network security protocols blocked the transfer. *Id.* at #5622-34. Eventually, however, You successfully uploaded the files to her personal cloud storage account and then transferred them to her hard drive. *Id.* at #5635-38. As part of her severance agreement with Coke, You certified under oath that she had not kept any confidential information. *Id.* at #5561-66.

You got a new job at Eastman Chemical Company in Tennessee. Like Coke, Eastman trained its employees, including You, on protecting the company's trade secrets. R-337, at #5348-64 (Transcript). After You started working at Eastman, Sherwin-Williams sent Eastman a letter expressing concern that You possessed Sherwin-Williams' trade secrets from her prior employment at Coke. R-336, at #5137-39 (Transcript). Sherwin-Williams asked Eastman to counsel You not to disclose its trade secrets to Eastman or anyone else. *Id.* Eastman did so. *Id.*

Following some disputes between You and coworkers, Eastman decided to fire You. R-319, at #4601-02 (Transcript). Just before the meeting in which she would be terminated, You uploaded files containing Eastman's BPA-free formulas

to her personal cloud storage account. R-363, at #6393-97 (Transcript). She then transferred those files to the same personal hard drive that contained the trade secrets she had stolen from Coke's network. *Id.*

Eastman fired You. R-336, at #5156 (Transcript). Eastman's network administrators detected that You had plugged an external hard drive into Eastman's network. *Id.* at #5253-58. Eastman managers asked You to return any information she had taken. *Id.* at #5153-69. You agreed to give Eastman her hard drive, but she said nothing about her personal cloud account. *Id.* Eastman employees accompanied You to her house, where she retrieved the personal hard drive. *Id.* at #5172-76, 5203-11. When Eastman investigators saw that the hard drive contained trade secrets belonging to Eastman and other chemical companies, they called the FBI. R-365, at #6681 (Transcript).

While the FBI investigated, You moved forward with her plans for her China-based, BPA-free coating company. She continued traveling to China. R-364, at #6543 (Transcript). During one trip, she went with Chinese government officials and WJG executives to Italy to work on a deal with the Italian company Metlac. *Id.* at #6544-45. When You returned to the United States, law enforcement agents stopped her at the airport. R-382, at #7163 (Transcript). You told the agents several lies, including that her travel was for "personal" reasons, that her computer did not contain any technical data related to her work, and that,

in the past, she had only taken work data out of the country with her employer's approval. *Id.* at #7169-78. The agents seized her computer and, after obtaining a warrant, discovered a file containing trade secrets belonging to the chemical companies You had worked with at Coke. *Id.* at #7174-75; R-363, at #6358 (Transcript); R-365, at #6713 (Transcript).

The FBI arrested You in February 2019. The apartment where she was arrested contained very little furniture or clothes. R-382, at #7206 (Transcript). In a kitchen cabinet, agents found a locked suitcase containing Dr. You's passports, other important documents, and approximately \$4,000 worth of various currencies. *Id.* at #7213-15. The agents also found a hard drive with the same trade secrets from the chemical companies. R-363, at #6375 (Transcript). Forensic analysis later revealed that, a week after the airport search, You had renamed the files to remove the names of the companies from which the information had been stolen. *E.g., id.* at #6315-16 (directory called "Akzo" was renamed to "A1"); *see also id.* at #6315-36 (identifying other files renamed in similar fashion). In You's personal cloud storage account, the agents found the same Eastman trade secrets that You had purportedly returned when she had been fired. *Id.* at #6391.

The agents interviewed You. You admitted that she had trade secrets that she was not supposed to have, and that this was a "problem." *Id.* at #6407-08. After the agents confronted You with her communications from WeChat and other

evidence, she admitted that she had planned to form a new company in China, obtain Chinese government grants, and help the country of China. *Id.* at #6418.

SUMMARY OF ARGUMENT

1. The district court did not deprive You of a fair trial by (a) admitting expert testimony about the PRC government's strategy for acquiring foreign technology; or (b) declining to grant a mistrial when the government inadvertently played a brief portion of a deposition that the district court had excluded.

a. The district court did not abuse its discretion in admitting an economics professor's expert opinion that technology experts in China generally supported the PRC government's acquisition of foreign technology at the expense of foreign companies' property rights. His opinion did not violate Federal Rule of Evidence 704(b) because it did not state that You possessed the requisite intent to be found guilty. Nor should the testimony have been excluded under Federal Rule of Evidence 403. The testimony was probative of You's plan to benefit the Chinese government by stealing valuable trade secrets and using them to start a new company in China, and nothing in the testimony was unfairly prejudicial.

b. The district court did not abuse its discretion in concluding that inadvertently played deposition testimony did not warrant the drastic remedy of a mistrial. Although the witness stated that he did not trust the Chinese and referred to their reputation for stealing technology, the district court reasonably concluded

that, in context, the statement referred to the Chinese government. And the district court, which was best positioned to observe the jury's reaction, found that there was minimal if any prejudicial effect from the mistake.

2. You failed to preserve her challenge to the jury instructions' explanation of the intent requirements for economic espionage and trade secret theft. In any event, the instructions correctly defined those requirements under this Court's precedent, which the instructions carefully tracked. And any error did not affect You's substantial rights (and indeed was harmless) in light of the overwhelming evidence that You knew she was stealing trade secrets.

3. The district court did not abuse its discretion in refusing to instruct the jury that proof of You's intent to "benefit" a foreign government or instrumentality required "more than a benefit that might flow simply from doing business in that country." The district court reasonably found no factual basis for that instruction in this case, where the evidence established that You's partner company in China was itself a foreign instrumentality because it was substantially sponsored by the PRC government.

4. The cumulative error doctrine does not apply here because the district court committed no error, much less multiple errors. And even if the court had committed errors, their cumulative effect would not call into doubt the verdict's reliability and the trial's fairness.

5. The district court correctly applied the Sentencing Guidelines commentary authorizing courts to calculate the loss from an offense based on “intended loss.” U.S.S.G. § 2B1.1 cmt. n.3(A). That commentary is entitled to deference under *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Guidelines Section 2B1.1 is susceptible to more than one reasonable interpretation of how the sentencing court should measure “loss.” Applying its expertise, the Sentencing Commission reasonably determined that using “intended loss” is appropriate to ensure that sentences reflect the relative culpability of defendants who intend to commit offenses with significant loss potential but whose schemes are thwarted before those losses are realized. The Commission’s determination is entitled to controlling weight. Finally, the district court’s calculation of the loss amount was supported by trial testimony and was not clearly erroneous.

ARGUMENT

I. The District Court’s Evidentiary Rulings Did Not Deprive You of a Fair Trial.

You challenges (Br. 13-24) two evidentiary rulings: (1) the district court’s admission of an economics professor’s expert testimony related to Chinese technology experts’ perceptions of PRC grant programs like the “Thousand Talents” plan; and (2) the court’s denial of her mistrial motion when the government inadvertently played portions of a deposition in which the witness

stated that he “did not trust the Chinese” because they were “very well known to steal the technology.” You argues that these two rulings deprived her of a fair trial.

The Constitution prohibits racially biased prosecutorial arguments.

McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987). Appeals to prejudice based on ethnicity and national origin are similarly prohibited. *See, e.g., United States v. Nobari*, 574 F.3d 1065, 1073 (9th Cir. 2009). However, as the district court reasonably found, the government never appealed to prejudice in this case, against You or anyone else. And although the government mistakenly played a brief portion of a deposition that the district court had excluded, that statement does not require reversal of the convictions here.

A. Background

1. Naughton

Before trial, the government notified You that it would offer expert testimony from Dr. Barry Naughton, an economics professor at the University of California, San Diego, who specializes in the PRC’s economy. R-284, at #3575 (Opinion & Order). You moved to exclude the testimony. *Id.* The district court held a mid-trial *Daubert* hearing, during which the government proffered Naughton’s testimony. *Id.*

The district court denied the motion. The court found that Naughton’s testimony would help the jury understand the “PRC’s strategies of foreign

technology acquisition,” and the “role official talent programs play in those strategies.” *Id.* at #3579. The court also found that the testimony’s probative value outweighed any risk of unfair prejudice under Rule 403. The court explained that the testimony was probative of whether the alleged offenses benefitted a foreign government and that nothing in Naughton’s testimony was unfairly prejudicial or suggested that the jury’s decision should rest on any improper basis. *Id.* at #3581.

At trial, Naughton described the “enormously high priority” that the PRC government placed on “technology acquisition,” including through grants like the Thousand Talents program. R-342, at #5671 (Transcript). He explained that, while the PRC government would “rather have legally acquired technology,” it was also “interested in acquiring both legally or perhaps gray or even illegally acquired technology in pursuit of [its] objectives.” *Id.* Naughton opined that the “general points of this technology acquisition strategy” were “common knowledge within China” because the government “talk[s] about [it] all the time.” *Id.* at #5672. He explained that the Chinese people were “proud . . . and I think legitimately so” of “China’s ability to catch up to advanced countries.” *Id.* When asked whether “scientists with ties to China would be aware of this overall strategy,” Naughton agreed and said, “I think every educated Chinese person is aware” of it. *Id.* at #5673.

Naughton then described the PRC government’s talent grant programs. He explained that “bring[ing] technology to China that [the applicant] did not own” was not a “disqualifying factor” for obtaining a grant because “in my experience just based on the kinds of people that I speak to, which includes both . . . science policy and technology policy experts and also people in the business community both in China and abroad, the attitude predominantly is China is catching up, the economic interests of the collectivity of we Chinese people is much more important than the property rights of some foreign company.” *Id.* at #5676.

2. *Bocchio*

Before trial, the government sought leave to introduce the video-recorded deposition of Pier Bocchio, an executive of an Italian chemical company called Metlac. R-251, at #3410 (Memorandum Opinion and Order). In his deposition, Bocchio stated that You, together with PRC government officials, had traveled to Italy and unsuccessfully attempted to convince Metlac to help You’s new company produce BPA-free can coatings in China. *Id.* at #3413. The district court found the video admissible. But the court excluded a brief portion in which Bocchio, when asked why his company did not want to have a factory in China, explained, “I didn’t trust the Chinese. Especially they are very well-known to steal the technology. It’s possible.” *Id.* at #3414-15. The district court explained that, although the context showed that Bocchio was explaining “why his company

would not enter the market in China,” his remarks “could be interpreted” as “racially motivated” and a “generalization of a nationality or people as ‘untrustworthy.’” *Id.* The district court found that the risk of unfair prejudice outweighed the statement’s probative value, and the court ordered that it be edited out of the deposition testimony to be played at trial. *Id.* at #3415.

The government prepared an edited video clip. However, at trial, the government inadvertently played the unedited video. When the prosecutor recognized that the excluded portion was being played, he immediately interrupted and tried to block the jury from hearing it. R-385, at #7467-69 (Transcript).

At the ensuing sidebar conference, the government acknowledged its responsibility for the error and apologized. *Id.* at #7467, 7471. The district court found that the statement had been played in violation of the court’s order, but the court denied You’s request for a mistrial. *Id.* at #7469. The court explained that it had excluded Bocchio’s statement because it was concerned that “the race of the defendant was going to become an issue.” *Id.* at #7472. In that context, Bocchio’s statement could have a “possible racial connotation” if he were referring to “an individual person of Chinese descent” rather than to the PRC government. *Id.* at #7470. But having heard the evidence, the district court “no longer ha[d] that concern.” *Id.* at #7471-72. The district court accordingly found: “I think under these circumstances he’s talking about the Chinese government.” *Id.* at #7469-70.

The district court concluded that “the harm is very, very slight” and that “to declare a mistrial” would be “inappropriate.” *Id.* at #7471-72. The district court offered to instruct the jury to disregard the statement, but defense counsel declined. *Id.*

B. Standards of Review

A district court’s evidentiary rulings are reviewed for abuse of discretion. *See United States v. Johnson*, 581 F.3d 320, 326 (6th Cir. 2009). As You concedes (Br. 14), the claim that Naughton’s testimony was inadmissible under Rule 704(b) is reviewed only for plain error. On plain-error review, a defendant must establish (1) error; (2) that was clear or obvious; (3) that affected her substantial rights; and (4) that affected the fairness, integrity, or public reputation of the proceedings. *United States v. Jones*, 108 F.3d 668, 670 (6th Cir. 1997).

This Court “afford[s] great deference” to a district court’s balancing of probative value and risk of unfair prejudice under Rule 403, “giv[ing] the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.” *United States v. Cleveland*, 907 F.3d 423, 436 (6th Cir. 2018) (quotation marks omitted).

The district court’s decision to deny You’s motion for a mistrial is reviewed for abuse of discretion. *See United States v. Wimbley*, 553 F.3d 455, 460 (6th Cir. 2009).

C. Discussion

1. *Naughton's Testimony Was Admissible under Rule 704(b)*

You contends (Br. 16-18) that Naughton's testimony violated Rule 704(b).

There was no error here, plain or otherwise.

Although an expert's opinion generally "is not objectionable just because it embraces an ultimate issue," Fed. R. Evid. 704(a), Rule 704(b) specifies that "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense," Fed. R. Evid. 704(b). That provision "allows expert testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea*, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony." *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997) (en banc); see *United States v. Combs*, 369 F.3d 925, 940 (6th Cir. 2004) (expert cannot "actually refer[] to the intent of the defendant" but can "describe[] in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant, having been caught engaging in more or less the same practices, also possessed the requisite intent") (citation omitted).

Naughton’s testimony did not violate Rule 704(b). He did not “state an opinion” that You herself possessed the requisite *mens rea* to be found guilty. His opinions—that (1) educated people in China were generally aware of the PRC government’s strategy for acquiring foreign technology; and (2) the “prevailing attitude” among “technology policy experts” in China was that China’s economic interests were more important than foreign companies’ property rights—did not directly establish *You*’s awareness or attitude. And even if they did, neither awareness of the PRC strategy nor valuing China’s interests ahead of foreign companies is an element of the offenses. Contrary to *You*’s contention, Rule 704(b) did not bar that testimony simply because the jury could infer, if it wished, that *You* shared the same awareness that Naughton had observed among China-affiliated scientists generally, and that such awareness, in turn, made it more likely that *You* had acted with the intent to benefit a foreign government or instrumentality. *See United States v. Augustin*, 661 F.3d 1105, 1123 (11th Cir. 2011) (per curiam) (Rule 704(b) “does not require the exclusion of expert testimony that supports an obvious inference with respect to the defendant’s state of mind if that testimony does not actually state an opinion on this ultimate issue, and instead leaves this inference for the jury”) (brackets and internal quotation marks omitted). At a minimum, any error was not plain, and *You* cannot establish

an effect on her substantial rights given the overwhelming evidence of her intent to benefit a foreign instrumentality. *See infra*. Part III.

2. *Naughton's Testimony Was Admissible under Rule 403*

The district court was well within its broad discretion to determine that the probative value of Naughton's testimony was not substantially outweighed by the risk of unfair prejudice. As the court found, Naughton's testimony that technology experts in China generally approved of the PRC government's policies for acquiring foreign technology, including through grant programs like Thousand Talents, was probative of the connection between Dr. You's application for those grants and her plan to benefit the PRC government by bringing secret BPA-free formulas to her new venture. It was appropriate and helpful for an expert to address the objectives of the Thousand Talents program and explain why a scientist could win the prestigious award based on a foreign company's technology. *See United States v. Zheng*, 27 F.4th 1239, 1241 (6th Cir. 2022) (noting that the Thousand Talents program "aim[s] to recruit researchers to share developments with the Chinese government"). And, as the district court reasonably found, nothing in Naughton's testimony was unfairly prejudicial or suggested that the jury's decision should rest on any improper basis. R-284, at #3581 (Opinion & Order).

3. *The District Court Properly Denied a Mistrial*

The district court did not abuse its discretion in concluding that Bocchio's inadvertently admitted statement did not warrant the drastic remedy of a mistrial.³ *See Illinois v. Somerville*, 410 U.S. 458, 461-62 (1973) (emphasizing the trial court's "broad discretion" in determining whether to grant a mistrial). First, the government's mistake in playing the wrong version of the deposition was inadvertent, as confirmed by the prosecutor's reaction of trying to prevent the jury from hearing it. Second, the court sustained You's objection and offered to provide a curative instruction, which You declined. *See United States v. Lemus*, 847 F.3d 1016, 1024 (9th Cir. 2016) ("A cautionary instruction from the judge is generally sufficient to cure any prejudice from the introduction of inadmissible evidence, and is the preferred alternative to declaring [a] mistrial when a witness makes inappropriate or prejudicial remarks[.]").

Third, the district court reasonably determined that any prejudice was "very, very slight." R-385, at #7472 (Transcript). As the court explained, a witness's statement that he does not trust Chinese *individuals* as a race- or ethnicity-based generalization would be unfairly prejudicial and inappropriate, but a statement that he did not trust the Chinese *government* to protect his company's intellectual

³ Defense counsel confirmed that no other remedy was requested. R-385, at #7470 (Transcript).

property would not be. The court found that Bocchio's statement, in the context of the trial evidence, was best understood as referring to the government. *Id.* at #7469-70. That finding is supported by the statement's context: Bocchio was describing why he turned down a deal after a meeting with Chinese government officials. The district judge, who sat through the trial and saw the inadvertently played clip, the prosecutor's interruption, and the jurors' reactions, was best positioned to evaluate any prejudicial effect on the jury. *See United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989) (affirming denial of a mistrial following inadvertent submission of excluded evidence to the jury because "[t]he district court will always be in a better position than the appellate judges to assess the probable reactions of jurors").

4. *The Trial Was Fair and Any Error Was Harmless*

You contends (Br. 21-24) that Naughton's and Bocchio's statements were impermissible appeals to racial prejudice that undermined the trial's fairness. As discussed, appeals to prejudice based on race, ethnicity, or national origin are impermissible. *See McCleskey*, 481 U.S. at 309 n.30. But the government never appealed to prejudice in this case. The district court carefully considered Naughton's testimony and reasonably determined that it was not unfairly prejudicial and did not suggest that the jury's decision should rest on any improper basis. And the court reasonably determined that, in context, the inadvertently

played portion of Bocchio’s statement indicated distrust of the Chinese *government* and did not create a risk of inflaming any racial or ethnic prejudices. R-284, at #3581 (Opinion & Order).

The cases You relies on are inapposite. For example, in *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000), testifying police officers made repeated, irrelevant references to Cubans that suggested a propensity for rampant drug-dealing, which had the “effect of putting the . . . Cuban community on trial, rather than sticking to the facts” of the individual defendants’ conduct. *Id.* at 596. The other cases You cites similarly involved irrelevant generalizations about particular nationalities in contexts that invited the jury to infer that members of the disparaged group tended to be involved in drug-smuggling or other crimes. *See, e.g., United States v. Doe*, 903 F.2d 16, 17-28 (D.C. Cir. 1990) (reversing conviction where prosecutor deliberately and repeatedly injected the defendant’s Jamaican ancestry into the trial even though that evidence was irrelevant and highly prejudicial); *United States v. Vue*, 13 F.3d 1206, 1211-13 (8th Cir. 1994) (witness testified regarding the likely involvement in opium smuggling of persons of Hmong descent); *United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992) (witness improperly alleged that an area “inundated with drug dealing” had a “very high Hispanic population”); *United States v. Rodriguez Cortes*, 949 F.2d 532, 541-

42 (1st Cir. 1991) (prosecution introduced evidence of the defendant’s Colombian ethnicity to suggest he was likely associated with other Colombian conspirators).

Here, by contrast, the challenged evidence described practices of the PRC government, in a trial where the defendant’s intent to benefit that government was an element of the offense. Moreover, the government’s case focused on You’s individual conduct rather than appealing to racial or ethnic stereotypes or animus. In light of the trial record, there is no significant likelihood that the challenged statements would have inflamed the jury to decide the case based on prejudice. *See United States v. Soto*, 988 F.2d 1548, 1559-60 (10th Cir. 1993) (reviewing record as a whole and concluding that, despite references to the defendant’s ethnicity, the prosecutor “did not use ethnicity or nationality in an attempt to manipulate the jury”).

Finally, any error does not warrant reversal. As the district court found, any potential prejudice to the defendant was “slight,” R-385, at #7472 (Transcript), in the context of the overwhelming evidence. *See United States v. Polichemi*, 219 F.3d 698, 711 (7th Cir. 2000) (no reversible error where excluded portions of an exhibit were inadvertently provided to the jury because the district court, which was “in the best position to assess whether any prejudice was likely,” appropriately concluded that the excluded information was “trivial in relation to the evidence in this case”). The evidence showed that You was caught three separate times with

the chemical companies' trade secrets on her personal devices. You's grant applications and WeChat communications demonstrated that she deliberately stole the formulas to benefit her new venture in China and the PRC government. *See pp. 4-9, supra.*

You acknowledges that she did not dispute any of these key facts at trial. Her defense was that the formulas were technically not trade secrets because, according to You's expert, a knowledgeable person could recreate the secret formulas by consulting certain patent filings and other public sources. Br. 7-8. Accordingly, even if the challenged testimony could be interpreted as suggesting that You, as a person of Chinese origin, was more likely to steal technology, that would not have affected the outcome because the fact that You stole the BPA-free technology was established by overwhelming, undisputed evidence. In the context of the trial evidence, where the only disputed issue was the technical question whether the stolen formulas could have been derived from public sources, any error in the district court's evidentiary rulings was harmless.

II. The Jury Instructions Correctly Defined the Intent Requirements for Economic Espionage and Trade Secret Theft

You challenges (Br. 25-38) the district court's jury instructions because they did not require proof that the defendant knew that the information she stole met all the legal requirements of a "trade secret." In particular, although the instructions required proof that the defendant knew, among other things, that the information

was “proprietary” and that the owner treated the information as a secret, You contends the instructions were insufficient because they failed to require proof that she knew (1) that the owners had taken “reasonable measures” to protect the information; and (2) that the information was valuable, in part, because it was secret. Because You did not properly preserve this claim below, it is reviewed for plain error. She cannot establish any error, plain or otherwise, because the instructions closely tracked this Court’s precedent. In any event, You cannot show that any error affected her substantial rights because the trial evidence overwhelmingly established her knowledge of both the owners’ “reasonable measures” and the trade secrets’ value.

A. Background

1. The Economic Espionage Act

Congress enacted the Economic Espionage Act (“EEA”) in 1996 “to provide a comprehensive tool for law enforcement personnel to use to fight theft of trade secrets.” *United States v. Yang*, 281 F.3d 534, 543 (6th Cir. 2002). The EEA punishes both (1) “[e]conomic espionage,” which involves trade secret misappropriation with knowledge or intent that it will “benefit any foreign government, foreign instrumentality, or foreign agent,” 18 U.S.C. § 1831; and (2) “[t]heft of trade secrets,” where the trade secret is knowingly converted “to the

economic benefit of anyone other than the owner” with the intent or knowledge that the conversion “will[] injure any owner of that trade secret,” *id.* § 1832.

The EEA defines trade secrets as “all forms and types of financial, business, scientific, technical, economic, or engineering information” where: “(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.” *Id.* § 1839(3).

2. *The District Court’s Instructions*

In explaining the *mens rea* requirements for the trade secret theft counts, the district court instructed the jury that the government was required to prove: (1) that “the defendant knowingly possessed information knowing that it was stolen or obtained or converted without authorization from the owner”; (2) that the defendant “knew the information was proprietary, meaning belonging to someone else who has exclusive rights to it”; and (3) that the defendant “intended to convert the information to the economic benefit of herself or another, knowing or intending that this would injure the owner of the information.” R-436, at #8273-74 (Transcript). The instructions on the economic espionage counts similarly required proof that the defendant “knew the information was proprietary, meaning

belonging to someone else who has exclusive rights to it,” but they also required proof that the defendant acted with “intent to benefit a foreign government or foreign instrumentality.” *Id.* at #8293.

In further explaining the intent elements, the instructions for both the trade secret theft and economic espionage counts noted as follows:

The government must prove beyond a reasonable doubt that the defendant knew the information was proprietary, meaning belonging to someone else who has exclusive rights to it.

The government is not required to prove the defendant . . . knew that all the information met all of the legal requirements of a trade secret as I have defined that term. What the government is required to prove beyond a reasonable doubt is that the defendant knew that the owner treated the information as a secret and the defendant was taking the information without authorization from the owner.

Id. at #8277-78, 8294.

B. Standard of Review

This Court reviews for an abuse of discretion a preserved claim of error in the jury instructions. *United States v. Ray*, 803 F.3d 244, 277 (6th Cir. 2015). The Court evaluates whether “the jury instructions as a whole . . . adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision.” *United States v. Lively*, 852 F.3d 549, 565 (6th Cir. 2017) (citation omitted).

An unpreserved claim of error in the jury instructions is reviewed for plain error. *Jones v. United States*, 527 U.S. 373, 387-88 (1999). “Plain error requires a

finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice.” *United States v. Mahbub*, 818 F.3d 213, 229 (6th Cir. 2016) (citation omitted).

To preserve a claim of error in the jury instructions, a defendant “must inform the court of the specific objection and the grounds for the objection.” Fed. R. Crim. P. 30(d). Plain error review applies when a defendant claims an instruction is erroneous on one ground at trial and then raises a different claim of error on appeal. *United States v. Williams*, 612 F.3d 500, 507 (6th Cir. 2010); *United States v. Russell*, 595 F.3d 633, 643 (6th Cir. 2010).

You contends (Br. 26) that she preserved her current claim by arguing below that the term “proprietary” in the instruction should be replaced with “trade secret.” But You did not argue, as she does on appeal, that the statute required proof she knew of the companies’ reasonable measures and that the information had independent value because it was secret. Rather, You’s objection was that the term “proprietary” was too vague. *See* R-431, at #7969-74 (Transcript). The district court explained that the term “proprietary” and the accompanying explanation were taken from this Court’s decision in *United States v. Krumrei*, 258 F.3d 535 (6th Cir. 2001). *Id.* at #7970-72. You did not dispute, as she does now, that *Krumrei* provides the relevant standard. Instead, she argued that the instruction’s use of “proprietary,” in context, “seems to expand [*Krumrei*’s] definition.” *Id.* at

#7972. When the district court suggested an instruction that removed the term “proprietary” but still limited the requirement to knowledge that “the information belonged to someone else who has exclusive rights to it,” You’s counsel agreed that the court’s suggestion “probably answers our objection.” *Id.* at #7974; *see id.* (“I think it’s easier to just say . . . she thought she was stealing a trade secret, but maybe [the court’s] suggestion works best.”). Thus, You did not preserve below an argument that conviction required proof of knowledge of all the elements of a trade secret, because she agreed to a formulation based on *Krumrei* that did not require such knowledge.

C. Discussion

1. *The Jury Instructions Were Correct, and Any Error Was Not Plain.*

You’s challenge to the jury instructions is foreclosed by this Court’s decision in *Krumrei*. In that case, the defendant worked for a subcontractor that was helping another company develop a process for applying hard coatings to certain surfaces. 258 F.3d at 536. The defendant brought a vagueness challenge to the “reasonable measures” requirement in the definition of a trade secret, arguing that he lacked “notice of any of the security measures taken by” the trade secret owner. *Id.* at 538. This Court rejected that claim. The Court held it was sufficient that the defendant knew the information was “proprietary,” meaning that it was “confidential information to which he had no claim.” *Id.* at 539. The Court then

clarified, “we hold that the defendant need not have been aware of particular security measures taken” by the owner. *Id.* at 539; *see also United States v. Roberts*, No. 03:08-CR-175, 2009 WL 5449224, at *5, *7 (E.D. Tenn. Nov. 17, 2009) (“[A] defendant must know that the information he or she seeks to steal is proprietary, meaning belonging to someone else who has an exclusive right to it, but he does not have to know it meets the statutory definition of a trade secret.”).

Thus, this Court in *Krumrei* squarely held that, to be guilty of trade secret theft, it is sufficient that the defendant “knew the information was proprietary,” and the defendant “need not have been aware of the particular security measures taken by [the owner].” 258 F.3d at 538-39. The district court’s instructions were specifically derived from that language.

You does not dispute that the instructions were consistent with *Krumrei*. Instead, she contends (Br. 33-34) that *Krumrei* does not apply because it involved a vagueness challenge. But in addressing the vagueness issue, this Court analyzed what intent was necessary to violate the statute, and it expressly held that knowledge of the owner’s security measures was not required. The Court clearly stated that the defendant’s knowledge—which did not include “aware[ness] of the particular security measures” —was sufficient to satisfy the statute’s intent requirement. *Id.* at 539. “Regardless of his knowledge of those specific measures,” the Court reiterated, the defendant “clearly was aware that his actions

fell well within the activity proscribed by the statute.” Id. (emphasis added).

You’s argument simply cannot be squared with *Krumrei*.

You relies (Br. 28-30) on Supreme Court decisions interpreting criminal statutes “that introduce[] the elements of a crime with the word ‘knowingly,’” *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009), to argue that “knowingly” in Sections 1831 and 1832 extends to the statutory definition of a “trade secret” as set forth in Section 1839. But the cases You cites do not address the specific statutes at issue here, and therefore *Krumrei* remains controlling.

Moreover, the interpretive principle set forth in those cases does not apply here because the term “knowingly” does not “introduce” the rest of the elements. Instead, both Section 1831 and 1832 introduce the elements with a separate scienter requirement particular to the crime. *See* 18 U.S.C. § 1831 (“Whoever, intending or knowing that the offense will benefit any foreign government [or] foreign instrumentality . . .”); *id.* § 1832 (“Whoever, with intent to convert a trade secret . . . to the benefit of anyone other than the owner thereof, and intending or knowing that the offense will injure any owner . . .”). Given these separate *mens rea* requirements, the presumption in favor of scienter recognized in the Supreme Court’s cases does not support You’s interpretation. That presumption is designed to avoid criminalizing otherwise lawful conduct. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72-73 (1994) (recognizing that the presumption does not

apply to each element of a criminal offense, but to “each of the statutory elements that criminalize otherwise innocent conduct”). No such risk exists under Sections 1831 and 1832 because of the separate, heightened *mens rea* requirements those statutes impose. And because “[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct,’” *see Carter v. United States*, 530 U.S. 255, 269 (2000) (citation omitted), it provides no basis for concluding that “knowingly” extends to all of the statutory requirements of a “trade secret.” A defendant who knows she is taking property that is proprietary to someone else, with intent to injure the owner or to benefit a foreign government, cannot reasonably claim she had innocent intent.

You’s interpretation is also inconsistent with Congress’s purpose in enacting the EEA. *Krumrei* and cases applying it distinguish between an understanding of “trade secrets” encompassing all the statutory definition’s technical elements (which a defendant might not be in a position to know) and knowledge of the key fact that information is “confidential,” or “proprietary,” (which a defendant could be expected to know). *See Krumrei*, 258 F.3d at 539; *Roberts*, 2009 WL 5449224, at *5, *7. Some outsiders who knowingly misappropriate proprietary information, such as a hacker who exploits a vulnerability in a company’s network, might not be aware of the specific measures a company uses to safeguard a trade secret. You’s

interpretation creates a loophole for such persons who steal trade secrets without learning of the specific measures used to safeguard them. *See United States v. Feola*, 420 U.S. 671, 678 (1975) (holding that proof that the defendant knew the victim's status as a federal officer was not required because imposing that scienter requirement would frustrate Congress's purpose in protecting officers).

Finally, even if knowledge of all the elements of the trade secret definition were required, there was no error here because the district court's instructions "substantially covered" the two elements that You claims were missing. *See LaVictor*, 848 F.3d at 453-54. First, the instructions required proof that You knew "that the owner treated the information as a secret." R-436, at #8278 (Transcript). That language effectively requires knowledge of "reasonable measures" because awareness of such measures (such as non-disclosure agreements) is how You knew that the chemical companies treated the information as a secret. Second, the instructions required proof that You intended "to convert the information to the economic benefit of herself or another, knowing or intending that this would injure the owner of the information." *Id.* This language "substantially covers" the "independent economic value" prong. It is difficult to see how You could believe that stealing the formulas would bring economic benefit to herself and injury to the owners if she did not also believe that the information had independent economic value due to its secrecy.

2. *Any Plain Error Does Not Warrant Reversal.*

Even if this Court were to find plain error in the jury instructions, You cannot show any affect on her substantial rights or on the fairness, integrity, or public reputation of judicial proceedings. *See Jones*, 108 F.3d at 670.

First, the evidence that You knew the trade secret owners had taken “reasonable measures” to protect their information was overwhelming. *See pp. 3-4, 7-9, supra*. She knew that the companies protected their trade secrets through NDAs, some of which identified her specifically. You prevented other Coke scientists from seeing the chemical companies’ information, explaining that the information was covered by NDAs and that Coke would be sued if she shared it. She also knew that the companies used periodic training and face-to-face counseling (because she had been the recipient of both from Coke and Eastman) to ensure that employees understood the procedures for protecting trade secrets and the serious potential consequences of violating those procedures. She signed agreements with both Coke and Eastman certifying that, upon termination, she had not taken any confidential information with her. She also knew that there were network security protocols to prevent unauthorized downloading of confidential information because those tools had blocked some of her attempts to download trade secrets. You was also aware that one of the companies (Sherwin-Williams) had asked Eastman’s attorneys to specifically warn You against disclosing their

trade secrets. She also knew that Eastman employees went to her house to retrieve her hard drive when they found out that she had downloaded Eastman's information. And You admitted to the FBI that she had "trade secrets" on her computer. You did not dispute any of those facts, which established overwhelmingly that she knew the companies had taken reasonable measures to safeguard their secrets.

The evidence also established overwhelmingly that You knew the information was valuable because it was secret. *See pp. 3-9, supra.* In her Thousand Talents application, You herself touted the value and uniqueness of the BPA-free coating technology that she would bring to the new venture. Her plan to create a new company in China only made sense if the technology she brought was both valuable and not publicly available. The jury heard testimony from knowledgeable experts that access to the secret formulas would be valuable to a competitor in developing its own BPA-free formula. *E.g., R-340, at #5422 (Transcript).* There can be no doubt that You, with long experience in the field, would have shared that same understanding. *See id. at #5422-25 (testimony from senior scientist at Coke that everyone involved with the BPA-free project, including You, would have known that the technology was valuable, that it had been expensive to develop, and that the owners would be harmed by disclosure).*

In sum, based on the trial evidence, any rational jury would have found that You knew that the information she stole constituted trade secrets.

You contends (Br. 35-36) that the alleged error affected the verdict because she “contested the trade secret status” of the information she stole “through the testimony of expert witness J.D. Harriman.” But Harriman’s opinion addressed whether the information was in fact a trade secret, not You’s intent.⁴ Moreover, the jury necessarily rejected Harriman’s opinion because it convicted You of all the substantive trade secret counts, each of which required proof that the information underlying that count was in fact a trade secret. Finally, You’s argument is contradicted by her own actions. If she had believed that the companies’ formulas were publicly available, there would have been no need for her to run the risks of clandestinely downloading them from her employers’ networks.

In addition, the jury instructions on the conspiracy counts further establish that any error did not affect You’s substantial rights and does not otherwise warrant reversing her convictions. Those instructions explained that “the government is not required to prove that the information that the defendant

⁴ Harriman, a lawyer with no expertise in chemistry, opined that the formulas could be reverse engineered from patent filings and other publicly available sources. R-377, at #7058-60 (Transcript). His opinion was contradicted by experienced experts from the victim chemical companies. *E.g.*, R-309, at #4223 (Transcript).

intended to convert was in fact a trade secret. What is required for Count One is proof beyond a reasonable doubt that the defendant intended to convert information that *she believed to be a trade secret.*” R-436, at #8272, 8292 (Transcript) (emphasis added). By convicting on that count, the jury found that You believed that the information she conspired to steal was a “trade secret.”

You contends (Br. 34 n.9) that this instruction “has no bearing here” because “the defense did not assert an impossibility defense.” That is incorrect. The “impossibility” instruction applies where the defendant argues that the information she conspired to steal was not, in fact, a trade secret (making the object of the conspiracy impossible), and that is what the defense argued. *See, e.g.*, Br. 35 (“Dr. You contested the trade secret status of the information at issue”). And, contrary to You’s argument (Br. 34 n.9), an instruction requiring that the defendant “believe” the information was a trade secret is sufficient to establish the defendant’s “knowledge” in the context of an inchoate offense. *See United States v. Yang*, 281 F.3d 534, 543-44 (6th Cir. 2002) (the fact that the defendants “believed that the information . . . was trade secrets” established that they “intended to commit the crime” of conspiracy to steal trade secrets); *United States v. Cote*, 504 F.3d 682, 688 (7th Cir. 2007) (“In a criminal attempt, a defendant who believes certain requisite facts to be true has the necessary intent for a crime requiring the *mens rea* of ‘knowledge.’”). Accordingly, the conspiracy instructions

establish that the jury found, consistent with the overwhelming evidence, that You intended to steal information constituting a trade secret. For all of these reasons, any error in the jury instructions was harmless and, in any event, did not affect You’s substantial rights or the fairness, integrity, or public reputation of the proceedings.

III. The District Court Did Not Abuse Its Discretion in Rejecting You’s Proposed Instruction on the Economic Espionage Counts

You contends (Br. 38-41) that the district court abused its discretion in refusing to instruct the jury that proof of her intent to “benefit” a foreign government or instrumentality required “more than a benefit that might flow simply from doing business in that country.” The district court acted within its discretion because the refusal to give that instruction made no difference to You’s defense.

A. Background

Section 1831 requires that the defendant knew or intended that the offense would “benefit any foreign government, foreign instrumentality, or foreign agent.” A “foreign instrumentality” includes “any . . . business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government.” 18 U.S.C. § 1839(1).

You asked the district court to instruct the jury that a benefit to a foreign government or instrumentality is “more than a benefit that might flow simply from

doing business in that country.” R-383, at #7342 (Transcript). The district court declined. The court explained that, in the case from which You derived that language, the evidence indicated that the information was simply being provided to a private foreign corporation. *Id.* at #7344-45. Here, by contrast, the evidence established “considerable entanglement between the Weihai Jinhong Group and the Chinese government,” including that the “alleged coconspirators . . . were relying on funding from the Chinese government to get this new corporation up and running.” *Id.* The district court concluded that, given the evidence presented at trial, the proposed instruction was not warranted, although the court did not preclude You from arguing this point to the jury. *Id.*

B. Standard of Review

This Court reviews for an abuse of discretion a district court’s decision not to give a requested jury instruction. *United States v. LaVictor*, 848 F.3d 428, 453-54 (6th Cir. 2017). A refusal to give a requested instruction is an abuse of discretion only if the proposed instruction is “(1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concerns a point so important in the trial that the failure to give it substantially impairs the defendant’s defense.” *United States v. Volkman*, 797 F.3d 377, 385 (6th Cir. 2015).

C. Discussion

The district court did not abuse its discretion in rejecting You's proposed instruction. The court correctly concluded that You's instruction was not warranted by the trial evidence, and that refusing to give it would not substantially impair You's defense. As the court concluded, the evidence showed that You was not simply benefiting a private foreign company. R-383, at #7343 (Transcript). The Weihai Jinhong Group and its joint venture with You were funded by the Chinese government grants that You applied for and obtained. R-363, at #6485-90 (Transcript). Those entities were therefore "foreign instrumentalities" under Section 1831. *See* 18 U.S.C. § 1839(1) (defining "foreign instrumentality" to include business entities that are "substantially . . . sponsored . . . by a foreign government"). As the court found, there was also evidence of "considerable entanglement" between WJG and the Chinese government, *see* R-383, at #7344-45 (Transcript), including the fact that Chinese officials approved the co-conspirators' business decisions and accompanied You when she went to Italy to negotiate with Metlac. *See* R-342, at #5688-91 (Transcript). Thus, any benefits that You intended to provide to WJG and the joint venture constituted benefits to a "foreign instrumentality."

Contrary to You's argument (Br. 40-41), her grant applications promised benefits beyond mere tax revenue. For example, You claimed that her new venture

would further the government’s “Five Year Plan” and “Made in China 2025” initiatives and that it would prevent Chinese exports from being blocked by international environmental regulations. R-319, at #4626-27 (Transcript); R-343, at #5762-63 (Transcript). Given this evidence, it was well within the district court’s discretion to decline an instruction that applies only where the evidence of an intended benefit to the foreign government is limited to simply supporting a private company located in the foreign country.

Finally, even if the court abused its discretion, any error was harmless in light of the overwhelming evidence that the entities You intended to benefit were “foreign instrumentalities” that were “substantially . . . sponsored” by both national and provincial governments in China. *See United States v. Godofsky*, 943 F.3d 1011, 1029 n.3 (6th Cir. 2019) (noting that omission of a defense instruction can be harmless if it did not contribute to the guilty verdict).

IV. There Was No Cumulative Error.

You argues (Br. 41) that the errors alleged in Issues I through III constitute cumulative error. “To prevail under cumulative-error analysis, a defendant must show that the combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair.” *United States v. Underwood*, 859 F.3d 386, 395 (6th Cir. 2017) (internal quotation marks omitted). But “the accumulation of non-errors cannot collectively amount to a violation of due

process.” *Id.* As explained above, the district court did not commit any errors, so there are none to accumulate. And even if You could show more than one error (or non-reversible plain error), she could not show that the trial was fundamentally unfair considering the overwhelming evidence of her guilt.

V. The District Court Correctly Sentenced You Based on Intended Loss.

Contrary to You’s claims (Br. 42-53), the district court correctly applied the Sentencing Guidelines commentary on intended loss, and the district court’s loss calculation was supported by the evidence.

A. The Commentary to Guidelines § 2B1.1 Is Entitled to Deference

1. Factual Background

Before sentencing, the Probation Office determined that You’s Sentencing Guidelines offense level was 41, which included a 24-level enhancement under Guideline Section 2B1.1(b)(1) because the intended loss from her trade secret theft was between 65 million and 150 million dollars. *See* R-366, at #6766-68 (PSR). The Probation Office based that calculation on trial testimony about the victim companies’ costs in developing the coatings. You objected on the ground that the government had failed to prove any amount of intended loss. R-420, at #7696-97 (Sentencing Opinion). The government argued for an estimated loss amount based on the \$220 million in taxes (as a proxy for anticipated profits) that You estimated her new Chinese entity would pay. *Id.* The district court rejected all these

approaches. *Id.* at #7701-05. The court instead calculated an intended loss amount by estimating the anticipated profits the entity expected to realize by using the stolen trade secrets to monopolize the market for providing BPA-free coatings to Chinese-owned can-makers. *Id.* The court's calculation resulted in an intended loss amount of \$121.8 million. *Id.* at #7704. The district court accordingly adopted the Probation Office's offense level of 41, including the 24-level enhancement for intended loss between \$65 million and \$150 million. R-427, at #7829-30 (Sentencing Transcript). That resulted in an advisory Guidelines range of 324 to 405 months of imprisonment. *Id.* The court varied downward from the Guidelines range and imposed a sentence of 168 months of imprisonment. *Id.* at #7906-07.

2. *Standard of Review*

When reviewing a district court's calculation of a defendant's advisory Guidelines range, this Court reviews legal issues de novo and factual findings for clear error. *See United States v. Abdalla*, 972 F.3d 838, 850 (6th Cir. 2020).

Whether the district court erred in relying on Guidelines commentary presents a question of law that, if properly preserved, this Court reviews de novo. *See United States v. Riccardi*, 989 F.3d 476, 481 (6th Cir. 2021).

You did not preserve her claim that the district court erred by relying on the commentary to Section 2B1.1. *See United States v. Vonner*, 516 F.3d 382, 385

(6th Cir. 2008) (unpreserved claims of procedural error at sentencing are reviewed for plain error). You contends (Br. 43) that she raised this claim in her sentencing memorandum by noting that “it is possible” that the commentary’s inclusion of intended loss “sweeps more broadly than the plain text of the Guideline.” R-400, at #7557 (Sentencing Memorandum) ((quoting *United States v. Kirschner*, 995 F.3d 327, 333 (3d Cir. 2021))). But You did not otherwise claim that the commentary was invalid or dispute that intended loss is an appropriate way to measure “loss.” A drive-by reference to the “possib[ility]” that the commentary might be broader than the Guideline, unaccompanied by an argument that the commentary is invalid or a request that the district court disregard it, is insufficient to preserve the claim You raises now. A defendant must “inform the court and opposing counsel of the ruling [s]he want[ed] the court to make and the ground for so doing.” *United States v. Rashad*, 396 F.3d 398, 401 (D.C. Cir. 2005). That requirement is particularly salient here because You’s claim, if accepted, would overthrow decades of this Court’s precedents on intended loss. *See, e.g., United States v. Howley*, 707 F.3d 575, 582-83 (6th Cir. 2013). In these circumstances, You’s passing remark was too vague to alert the district court to the substance of that claim. *See United States v. Presley*, 18 F.4th 899, 904 (6th Cir. 2021) (a defendant must “object with that reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection”).

Unsurprisingly, the district court did not interpret You’s memorandum as challenging the commentary’s validity and did not decide the issue. *See* R-420, at #7698 n.1 (Sentencing Opinion). You’s forfeited claim is subject to plain-error review. *Id.*

3. *Legal Background*

The Sentencing Guidelines “contain[] text of three varieties”: (1) “a guideline provision itself,” (2) a policy statement, and (3) commentary. *Stinson v. United States* 508 U.S. 36, 40-41 (1992). The commentary may “interpret [a] guideline or explain how it is to be applied.” U.S.S.G. § 1B1.7; *see Stinson*, 508 U.S. at 41-43. The Sentencing Commission, Congress, and the Supreme Court have all stated that district courts must consider any applicable commentary in imposing a sentence. *See* U.S.S.G. § 1B1.7; 18 U.S.C. § 3553(b)(1); *Stinson*, 508 U.S. at 44-45.

In *Stinson*, the Supreme Court held that Guidelines commentary “is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.” 508 U.S. at 38. The Court explained that the administrative-law principle now known as *Auer* deference applies to the Guidelines commentary. *Id.* at 44-45. That principle requires courts to give “controlling weight” to an agency’s interpretation of its own

regulation unless it is “plainly erroneous or inconsistent with the regulation.” *Id.* at 44-45.

In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), the Supreme Court clarified the circumstances requiring deference to an agency’s interpretation of its regulations. First, the regulation must be “genuinely ambiguous” after a court “exhaust[s] all the ‘traditional tools’ of construction,” including analyzing the regulation’s “text, structure, history, and purpose.” *Id.* at 2415. Second, if the regulation remains ambiguous, the agency’s reading must be “reasonable” and “come within the zone of ambiguity the court has identified.” *Id.* at 2416. Third, the court must independently determine “whether the character and context of the agency interpretation entitles it to controlling weight.” *Id.* This means that the interpretation must be “actually made by the agency,” it must “implicate [the agency’s] substantive expertise,” and it “must reflect fair and considered judgment.” *Id.* at 2416-17.

This Court has held that *Kisor* now “provide[s] the framework” for “determining whether to defer to the Guidelines commentary.” *United States v. Phillips*, 54 F.4th 374, 379 (6th Cir. 2022) (quoting *Riccardi*, 989 F.3d at 484-85). Applying that framework, this Court in *Riccardi* concluded that commentary automatically requiring a \$500 minimum loss amount for each gift card a defendant stole was not entitled to deference. 989 F.3d at 486-89. The Court

initially found that the term “loss” in Guideline Section 2B1.1(b)(1) “can mean different things in different contexts.” *Id.* at 486. But the Court determined that, even if “loss” is ambiguous, “the commentary’s \$500 minimum loss amount for gift cards [did] not fall ‘within the zone of [any] ambiguity.’” *Id.* More recently, in *Phillips*, this Court deferred to commentary instructing courts to equate one video to 75 visual “images” when applying an enhancement for child pornography offenses involving more than 600 “images.” 54 F.4th at 380-86. The Court explained that the term “image” was “genuinely ambiguous” as applied to videos, that the commentary’s 75:1 rule fell within the zone of that ambiguity, and that the rule had the “character and context” of an interpretation entitled to “controlling weight.” *Id.*

4. *The Commentary to Guidelines § 2B1.1*

For a range of economic-type offenses, including theft and fraud crimes, the Sentencing Guidelines direct courts to “increase the offense level in incremental amounts based on the ‘loss’ from the offense.” *Riccardi*, 989 F.3d at 481. Since the first edition in 1987, the Guidelines have recognized both actual and “intended” loss. *See* U.S.S.G. § 2F1.1(b)(1) (1987) (providing for an increased offense level in fraud offenses based on “estimated, probable or intended loss”).

In the current Guidelines, the seriousness of economic crimes is principally measured by the amount of “loss.” U.S.S.G. § 2B1.1. The Guideline itself does

not define that term. But the accompanying commentary explains that, subject to various rules and exceptions, “loss” is “the greater of actual loss or intended loss.” *Id.* cmt. n.3(A). “Actual loss” means “the reasonably foreseeable pecuniary harm that resulted from the offense.” *Id.* cmt. n.3(A)(i). “Intended loss” is defined as “the pecuniary harm that the defendant purposely sought to inflict,” including “intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).” *Id.* cmt. n.3(A)(ii).

The current Guidelines approach to “intended loss” arises from a November 2001 revision in which the Commission promulgated a “new definition of loss applicable to offenses previously sentenced under [several different guideline sections].” U.S.S.G. App. C, Vol. II, at 176 (Amend. 617). The new commentary resolved circuit conflicts over prior definitions of “loss” while “retain[ing] the core rule that loss is the greater of actual and intended loss.” *Id.* The Commission did so because in “cases in which intended loss is greater than actual loss, the intended loss is a more appropriate initial measure of the culpability of the offender.” *Id.*

5. *The Commentary Reasonably Defines the Ambiguous Guideline Term “Loss”*

The definition of “loss” in Section 2B1.1 is ambiguous. In *Riccardi*, the Court canvassed multiple dictionaries and concluded that there was no singular definition of “loss,” which could mean “different things in different contexts.” 989

F.3d at 486. This demonstrates, at a minimum, that “the interpretive question” of how to define loss “has no single right answer,” *Kisor*, 139 S. Ct. at 2415, leaving ambiguity for the Commission to resolve.

Relying on the Third Circuit’s recent decision in *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022), You contends that dictionary definitions of “loss” generally refer to *actual* destruction of value, and therefore “loss” is not genuinely ambiguous with respect to whether “intended loss” can be considered. But the Third Circuit’s narrow focus on dictionary definitions fails to account for the specific context and purpose of the Guidelines’ use of that term. *See Phillips*, 54 F.4th at 382-83 (recognizing that, under *Kisor*, courts “*must* carefully consider the structure, history, and purpose of the Guideline” because “dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of . . . legal language”) (internal quotation marks omitted).

The Sentencing Guidelines use “loss” in a specialized sense. The purpose of estimating “loss” is to assess “the seriousness of the offense and the defendant’s relative culpability.” U.S.S.G. § 2B1.1 cmt. (background); *see id.* App. C Supp., at 104-05 (Amend. 793) (noting “the Commission’s belief that intended loss is an important factor” because it focuses “specifically on the defendant’s culpability”); *id.* App. C, Vol. II, at 177 (Amend. 617) (same). Given this purpose, using

intended loss makes sense because a defendant whose criminal design is foiled by vigilant law enforcement or alert victims is no less culpable than a defendant who succeeds. Thus, regardless of dictionary usages, the meaning of “loss” in a context that is designed to reflect the defendant’s culpability reasonably includes losses that the defendant intended, even if those losses never occurred.⁵

For these same reasons, the Commission’s commentary falls “within the bounds of reasonable interpretation” of Guidelines Section 2B1.1. *Kisor*, 139 S. Ct. at 2416. As the Commission found, economic crime statutes generally “cover a broad range of conduct with extreme variation in severity.” U.S.S.G. § 2B1.1 cmt. (background). The Commission accordingly uses loss amount as a “principal factor” in determining the appropriate offense level according to the “defendant’s relative culpability.” *Id.* In these circumstances, the Commission reasonably defined “loss” to mean “the greater of intended loss or actual loss,” as it has since the Guidelines were first issued, in order to align the offense level according to the loss the defendant intended to inflict.

In addition, the term “loss” should be construed in light of the general principles that govern the offense level determination. Those principles require

⁵ The Third Circuit acknowledged that, “in context, ‘loss’ could mean . . . actual or intended loss,” *see Banks*, 55 F.4th at 258, but it provided no reason why the term could not reasonably have that meaning in the context of Section 2B1.1.

that the defendant’s offense level “shall be determined” based on “all harm that resulted” from the defendant’s criminal acts, as well as “all harm that was *the object* of such acts.” U.S.S.G. § 1B1.3 (emphasis added). Under that directive, the offense level should be determined based on intended as well as actual loss.

You’s interpretation would lead to huge disparities in the treatment of defendants with similar culpability, based solely on the happenstance of whether their scheme was thwarted in time to prevent actual losses. For example, under You’s reading, a defendant who unsuccessfully executes a billion-dollar fraud scheme would face a Guidelines range as low as zero to six months of imprisonment, while a defendant whose scheme succeeded would receive a minimum recommended sentence of eight to ten years. *See* U.S.S.G. § 2B1.1(a)(1), (b)(1) (providing a base offense level of 7 for an offense with no loss, and a 30-level enhancement for a loss of more than \$550 million). In this context, where the purpose of the “loss” factor is to treat defendants of similar culpability in a similar way, an interpretation that leads to such disproportionate results cannot be the *only* reasonable interpretation of the ambiguous term “loss.”

This analysis is consistent with this Court’s decision in *Phillips*. In that case, the Court rejected a literal interpretation of “image” that would define each “frame” within a video as a separate “image,” thereby equating the number of images in a video with the number of frames it contains. *Phillips*, 54 F.4th at 382-

84. Such a definition, the Court reasoned, “would mean that videos are disproportionately counted as compared to still images.” *Id.* at 383. The Court explained that “defining ‘images’ to mean ‘frames’ is untenable” because it would treat “an offender who had 100 photographs” of multiple victims more leniently than an offender who had “a single 30-second video depicting a single victim.” *Id.* The Court rejected this result as “totally unmoored from the goal of differentiating penalties based on the amount of child pornography,” and accordingly deferred to the Guidelines commentary (which counted each video as 75 “images”) as a “reasonable,” if non-literal, interpretation of a Guideline term that was designed to treat defendants of similar culpability in a proportionate way. *Id.*

This Court should defer to the Commentary’s interpretation of “loss” for the same reason. Counting only actual losses would leave the Guideline analysis, like the “images equals frames” approach rejected in *Phillips*, “totally unmoored from the goal of differentiating penalties” for economic crimes based on the defendant’s relative culpability. *Id.*

Finally, the character and context of the Commission’s loss definition entitles it to controlling weight. This definition unquestionably reflects the Commission’s “authoritative” and “official” position. *Kisor*, 139 S. Ct. at 2416. Indeed, it has been included in the Guidelines since their inception. *See* U.S.S.G. § 2F1.1 (1987). The commentary also implicates the Commission’s substantive

expertise in “[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders.” *Mistretta v. United States*, 488 U.S. 361, 379 (1989). And the commentary reflects the Commission’s “fair and considered judgement,” not an ad hoc position of convenience for litigation advantage. *Kisor*, 139 S. Ct. at 2417-18.

You’s reliance on the rule of lenity is misplaced. The rule of lenity “only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the [provision].” *United States v. Castleman*, 572 U.S. 157, 172-73 (2014). As discussed above, the text, context, purpose, and history all confirm that the definition of “loss” as used in the Guideline Section 2B1.1(b)(1) is best understood as including intended losses. There is no need to resort to the rule of lenity here.

In any event, the Supreme Court’s decision that vagueness challenges cannot be made to the advisory Sentencing Guidelines, *see Beckles v. United States*, 580 U.S. 256, 266-67 (2017), casts serious doubt on whether the rule of lenity even applies to the Guidelines. Like the due process vagueness doctrine, the rule of lenity derives from concerns of fair warning and avoiding arbitrary enforcement that do not apply to the advisory Sentencing Guidelines. *Beckles*, 580 U.S. at 265; *see, e.g., United States v. Gordon*, 852 F.3d 126, 130 n.4 (1st Cir. 2017) (“[A]s is

now clear from *Beckles*, . . . concerns about statutory vagueness, which underlie the rule of lenity, do not give rise to similar concerns regarding the Guidelines.”).

B. The Loss Calculation Was Not Clearly Erroneous.

In determining the loss, a sentencing court “need only make a reasonable estimate, given the available information.” *United States v. Raithatha*, 385 F.3d 1013, 1024 (6th Cir. 2004); *see Howley*, 707 F.3d at 582 (noting that “determining the value of a trade secret” is “no easy task”). A district court “need not be exacting,” and the Guidelines permit estimating loss “within broad ranges.” *Howley*, 707 F.3d at 583. A defendant challenging the calculation must show that it is “outside the universe of acceptable computations.” *United States v. Fleming*, 128 F.3d 285, 287 (6th Cir. 1997).

The district court’s calculation was not clearly erroneous. The district court carefully considered different approaches for calculating loss, under the principles this Court has established for calculating loss in trade secret cases. R-420, at #7697-7701 (Sentencing Opinion) (quoting *Howley*, 707 F.3d at 583). The court’s calculation was supported by testimony from a senior manager at Akzo-Nobel on the size of the market for BPA-free coatings in China. *Id.* at #7702-03. You complains (Br. 52-53) that these calculations relied on assumptions and projections, but such assumptions are inevitable in projecting future financial results. And You does not explain why the district court’s assumptions were

unreasonable. Nor does she recognize that the court's calculations were intended to be "conservative" and favorable to You (such as the assumption that the market for BPA-free coatings would not grow in future years). *Id.* at #7703-04.

You argues that the district court erroneously based its calculation of anticipated *profits* on an estimate of the company's *revenues*, which failed to account for the company's costs. But it was not unreasonable to assume that marginal costs would be relatively insignificant in this context, where the market was monopolistic and the companies had already incurred millions of dollars in developing the intellectual property underlying the formulas. Moreover, because the district court's loss amount of \$121.8 million would have to be reduced to below \$65 million to affect the sentencing range, any reasonable reduction to account for marginal costs would have made no difference.

Finally, any error was harmless because the record supports alternative loss calculations that result in the same or a higher offense level. In this case, there are a range of reasonable conclusions the district court might have reached. Those include the Probation Office's method, which calculated a \$121 million loss based on trial testimony estimating the costs to the companies of developing the technology. *See* U.S.S.G. § 2B1.1 cmt. n.3(C)(ii) (approving use of "the cost of developing [the] information" to estimate loss in trade secret context). The district court also could have adopted the government's calculation of a \$220 million loss,

which was based on You's own estimate of anticipated profits that she submitted to the PRC government. *See* R-420, at #7696-97 (Sentencing Opinion). But You's contention that the intended loss was zero is untenable, given the evidence that she stole trade secrets developed at tremendous expense by seven victim companies, set up her own company in China, and declared her intent to use that technology to generate profits that she measured in the hundreds of millions of dollars.

CONCLUSION

For the foregoing reasons, this Court should affirm You's convictions and sentence.

Respectfully submitted,

FRANCIS M. HAMILTON, III
United States Attorney

KENNETH A. POLITE, JR.
Assistant Attorney General

MAC HEAVENER
Assistant U.S. Attorney
Eastern District of Tennessee

RICHARD W. DOWNING
Deputy Assistant Attorney General

MATTHEW G. OLSEN
Assistant Attorney General
for National Security

s/ Joseph Palmer
JOSEPH PALMER
Computer Crime & Intellectual Property Section
Criminal Division
U.S. Department of Justice
1301 New York Ave, N.W. Suite 600
(202) 353-9402

NICHOLAS O. HUNTER
Trial Attorney
National Security Division

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

I hereby certify that the foregoing brief complies with the 13,000-word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 12,918 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Dated: February 15, 2023.

/s/ Joseph Palmer
Joseph Palmer
Attorney for the United States

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February 2023, a copy of the foregoing Answering Brief for the United States was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Joseph Palmer

Joseph Palmer

Attorney for the United States

DESIGNATION OF DISTRICT COURT DOCUMENTS

The government designates the following documents from the district court record:

DESCRIPTION OF ENTRY	RECORD ENTRY NO.	PAGE ID RANGE
Indictment	3	3-16
Superseding Indictment	217	3012-3031
Deposition	241-1	3264-3286
Deposition	241-2	3287-3334
Notice of Expert Testimony	249	3373-3407
Order	251	3410-3416
Memorandum Opinion and Order	284	3574-3583
Transcript	309	4096-4235
Transcript	311	4280-4343
Transcript	314	4347-4452
Transcript	315	4453-4538
Transcript	319	4575-4694
Transcript	336	5110-5336
Transcript	337	5337-5389
Transcript	338	5389-5407
Transcript	340	5410-5465
Transcript	341	5465-5652
Transcript	342	5653-5700
Transcript	343	5701-5786
Transcript	363	6280-6500
Transcript	364	6501-6675
Transcript	365	6676-6758
Presentence Report	366	6759-6780
Transcript	377	6948-7147
Transcript	382	7155-7337
Transcript	383	7338-7402
Transcript	384	7403-7442
Transcript	385	7463-7482

Gov't Objections to PSR	392	7493-7518
Defendant's Sentencing Memorandum	400	7552-7607
Presentence Report – Addendum	408	7624-7628
Sentencing Opinion	420	7696-7705
Judgment	422	7707-7713
Notice of Appeal	424	7718
Sentencing Transcript	426	7722-7824
Sentencing Transcript	427	7825-7913
Transcript	431	7921-8010
Transcript	432	8011-8192
Transcript	435	8213-8243
Transcript	436	8244-8310