No. 17-6251

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KEVIN EUGENE ASHER,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(Hon. Karen K. Caldwell, No. 6:16-cr-00050)

BRIEF FOR THE UNITED STATES AS APPELLEE

ROBERT M. DUNCAN, JR.
United States Attorney

CHARLES P. WISDOM JR.
HYDEE R. HAWKINS
Assistant United States Attorneys
United States Attorney's Office
Eastern District of Kentucky
260 West Vine Street
Suite 300
Lexington, KY 40507
(859) 233-2661

JOHN M. GORE
Acting Assistant Attorney General

THOMAS E. CHANDLER
ELIZABETH NASH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-3412

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendant-appellant's request for oral argument in this case.

JURISDICTIONAL STATEMENT

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The district court entered final judgment against Kevin Asher on October 20, 2017. (Judgment, R. 84,

PageID# 615-621).[1] Asher filed a timely Notice of Appeal on October 23, 2017. (Notice of Appeal, R. 85, PageID# 622). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion or otherwise erred in admitting evidence of Asher's prior use of force and false incident report under Federal Rule of Evidence 404(b).

2. Whether the district court committed plain error in failing to apply a downward adjustment based on Asher's alleged minor role in the offenses.

STATEMENT OF THE CASE

1. Factual Background

a. Charged Conduct—Asher's Assault Of Gary Hill At The Kentucky River Regional Jail And Subsequent False Report

i. On November 16, 2012, Gary Hill was arrested and placed in a detox cell at the Kentucky River Regional Jail. (Transcript, R. 109, PageID# 876-902). When officers denied Hill's request to make a telephone call, he became upset and

[1] Citations to "R. __" refer to documents, by number, on the district court docket sheet. Citations to "PageID# __" refer to the page numbers in the paginated electronic record. Citations to "Br. __" refer to the page numbers in Asher's opening brief. Citations to "Gov't Ex. __" refer to trial exhibits in the Appendix to Brief for United States as Appellee, filed concurrently.

turned on the water faucet in his cell, letting the water run onto the floor. (Transcript, R. 109, PageID# 903-904).

Supervisory Deputy Jailer Damon Hickman responded to Hill's cell with defendant Kevin Asher, who also was a supervisory deputy jailer. (Transcript, R. 109, PageID# 967, 976-977). When Hill refused to turn off the water, Hickman opened the door to the cell and again told Hill to turn off the water. (Transcript, R. 109, PageID# 979-981). Hill, who was yelling, still refused. (Transcript, R. 109, PageID# 981). Hickman and Asher then entered the cell and Hickman turned off the water. (Transcript, R. 109, PageID# 981).

Angry that Hill was shouting and had refused his orders, Hickman punched Hill in the face. (Transcript, R. 109, PageID# 905-906, 982). Hickman admitted that Hill was posing no danger to the deputies and that he punched Hill so hard that he thought he had broken Hill's jaw. (Transcript, R. 109, PageID# 982-984).

The force of Hickman's blow knocked Hill to the ground. (Transcript, R. 109, PageID# 982-984). Although Hill was curled up in the fetal position with his eyes closed, Hickman testified that he and Asher kicked and stomped him. (Transcript, R. 109, PageID# 905-906, 982-985). The beating was so severe that Hill defecated on himself. (Transcript, R. 109, PageID# 907).

When the beating stopped, Hill told Asher and Hickman that he would report the incident and have them fired. (Transcript, R. 109, PageID# 907). Hickman

laughed at Hill for having soiled himself and stuck the insignia on his shirt in Hill's face saying, "We're the law, dawg. We can do what we want." (Transcript, R. 109, PageID# 907-908). Hickman and Asher then took turns taunting Hill and telling him that they could do what they wanted without repercussion. (Transcript, R. 109, PageID# 908). Hickman and Asher told Hill that, even if he did report the incident, they would lie and tell the police that Hill had assaulted them first. (Transcript, R. 109, PageID# 909).

After mocking Hill, Hickman left the cell to retrieve a restraint chair. (Transcript, R. 109, PageID# 909-910). Asher and Hickman picked Hill up and slammed him into the chair, strapping down his arms, legs, and chest. (Transcript, R. 109, PageID# 910, 988). While Hill was unable to move or defend himself and in severe pain, Hickman punched him in the head repeatedly while Asher stood next to Hill and watched. (Transcript, R. 109, PageID# 910). After the beating, Hickman and Asher left Hill in the restraint chair. (Transcript, R. 109, PageID# 912, 989).

Several hours later, Hill woke up on a mat in his cell in extreme pain. (Transcript, R. 109, PageID# 913). He told the deputies repeatedly that he needed medical attention. (Transcript, R. 109, PageID# 913, 990). Asher and Hickman ignored Hill's requests. (Transcript, R. 109, PageID# 990-991). Eventually, Asher pretended to be a doctor, disguising himself by putting on a coat and hat or wig and

speaking in a foreign accent. (Transcript, R. 109, PageID# 992-993). Asher assured Hill that he was a doctor and that Hill did not need medical treatment. (Transcript, R. 109, PageID# 913-915, 993). Asher and Hickman never took Hill to the hospital or to see a doctor. (Transcript, R. 109, PageID# 991-993).

As a result of the assault, Hill suffered severe and permanent injury. After the beating, Hill had severe headaches and bruising and swelling on his face and neck. (Transcript, R. 109, PageID# 921-922; Gov't Exs. 1, 2). Hill also has permanent numbness in his jaw. (Transcript, R. 109, PageID# 922).

ii. Subsequently, Hickman and Asher conferred and decided to lie about the assault so that they would not get into trouble. (Transcript, R. 109, PageID# 995-997). As a result, they wrote false incident reports claiming that Hill was combative to justify the assault. (Transcript, R. 109, PageID# 995-997). Both incident reports stated falsely that after Hickman asked Hill to turn off the water in his cell, Hill took a combative stance, Hickman placed a hand on Hill's chest to protect himself, and then Hill slipped on the wet floor in the cell and fell against the wall. (Transcript, R. 109, PageID# 997, 999-1000, 1002-1003; Gov't Exs. 5, 6). The reports also stated that after Hill fell, he began saying that he wanted to kill himself so Hickman and Asher placed him in the restraint chair. (Transcript, R. 109, PageID# 1000; Gov't Exs. 5, 6).

b. Other-Act Evidence—Asher And Hickman's Prior Assault Of Dustin Turner At The Kentucky River Regional Jail

At trial, the government introduced evidence that, on April 13, 2010, Asher and Hickman assaulted a different inmate at the jail, Dustin Turner, and wrote false incident reports to cover up the incident. (Transcript, R. 110, PageID# 1133-1134). The government introduced this evidence to prove that Asher had the specific intent to deprive Hill of his constitutional rights and write a false report to impede an investigation. (Notice of Intent to Introduce Evidence Pursuant to Rule 404(b), R. 27, PageID# 76-83). Both Hickman and Turner testified about the assault at trial. (Transcript, R. 110, PageID# 1027-1048, 1091-1108).

Before Hickman testified about the Turner assault, the district court instructed the jury that it could only consider the evidence to the extent that it related to Asher's intent to deprive Hill of his rights. (Transcript, R. 110, PageID# 1026-1027). Following the language of the Sixth Circuit's pattern instructions, the court explained that if the jury found that Asher had committed the acts related to Turner, "you can consider the evidence only as it relates to his intent to commit the crimes charged in the indictment. You must not consider it for any other purpose." (Transcript, R. 110, PageID# 1026-1027).

Hickman testified that in April 2010, when Turner was an inmate at the jail, Hickman and Asher entered a detox cell where Turner was strapped to a restraint chair. (Transcript, R. 110, PageID# 1030-1031). Turner, who was intoxicated,

was yelling at the deputies, saying that if he were not restrained, he would fight them. (Transcript, R. 110, PageID# 1031). Although Turner was not posing a threat, Hickman removed him from the restraint chair and punched him in the face. (Transcript, R. 110, PageID# 1031-1033). Turner fell to the ground and Hickman and Asher repeatedly kicked and hit him. (Transcript, R. 110, PageID# 1034-1036). Hickman and Asher then put Turner back in the restraint chair. (Transcript, R. 110, PageID# 1036).

Hickman further testified that he and Asher knew they had used unjustified force and were afraid that they had seriously injured Turner, so they schemed to cover up the assault. (Transcript, R. 110, PageID# 1037-1044). Hickman and Asher decided that they would self-inflict wounds to make it look like their assault of Turner had been justified because Turner had attacked them first. (Transcript, R. 110, PageID# 1037-1039). Hickman hit himself in the face with a shaving cream can and Asher scratched his arms. (Transcript, R. 110, PageID# 1037-1039). Hickman and Asher then called the police to report (falsely) that they had been assaulted by Turner. (Transcript, R. 110, PageID# 1039, 1134-1136).

Hickman testified that after the assault Hickman and Asher each wrote false incident reports. (Transcript, R. 110, PageID# 1040; Gov't Exs. 19, 20). Hickman's report stated that he had let Turner out of the restraint chair because Turner needed to use the restroom. (Transcript, R. 110, PageID# 1041; Gov't Ex.

19). Both reports stated that after Turner got out of the chair, he took off his shirt, threw it at Hickman, and punched Hickman in the face. (Transcript, R. 110, PageID# 1041, 1043; Gov't Exs. 19, 20). As a result, according to the reports, Hickman and Asher had to forcibly restrain Turner and place him back in the restraint chair. (Transcript, R. 110, PageID# 1041-1043; Gov't Exs. 19, 20).

Turner also testified about the assault. Turner stated that he first encountered Hickman and Asher when he was being booked into the jail for driving under the influence. (Transcript, R. 110, PageID# 1092-1093). Turner said that after Hickman and Asher took him to a holding cell, they knocked him to the ground and kicked and punched him. (Transcript, R. 110, PageID# 1094-1096). Hickman and Asher then put Turner in a restraint chair and continued to assault him. (Transcript, R. 110, PageID# 1097-1098).

Turner further testified that when he asked to be let up from the restraint chair so that he could defend himself, Hickman and Asher took him out of the restraint chair and slammed him to the ground. (Transcript, R. 110, PageID# 1098-1099). The force of being slammed to the ground knocked Turner unconscious. (Transcript, R. 110, PageID# 1099).

Turner testified that after he woke up, he begged for medical assistance for at least an hour before he was taken to the hospital. (Transcript, R. 110, PageID# 1100). When the doctor asked Turner how he had sustained his injuries, Asher,

who had accompanied Turner to the hospital, immediately interjected, telling the doctor that Turner had fallen. (Transcript, R. 110, PageID# 1102). As a result of the assault, Turner had bruising on his face, neck, and ribs, and had broken teeth. (Transcript, R. 110, PageID# 1103-1106; Gov't Exs. 14a, 14b, 14c).

At the conclusion of Hickman and Turner's testimony, the court reminded the jury that evidence of the Turner assault could only be used to prove Asher's intent to deprive Hill of his rights and cover up the incident. (Transcript, R. 110, PageID# 1151-1153). The court explained that "the government has to prove specific intent * * * . And if you find that factors into your determination of specific intent, you can use it for that but for nothing else." (Transcript, R. 110, PageID# 1152).

Later during trial, after government witness FBI Agent Christopher Hubbuch made reference to the Turner assault and cover up, the court again instructed the jury on the proper use of the Turner assault evidence. (Transcript, R. 110, PageID# 1196-1198). The court stated that the jury could use the Turner evidence only "to determine if the defendant had the inten[t] in the charged incident." (Transcript, R. 110, PageID# 1197).

2. Procedural History

a. On November 17, 2016, Asher was indicted on two felony counts. (Indictment, R. 1, PageID# 1-4).[2] Count 1 charged Asher with violating 18 U.S.C. 242, which prohibits willful deprivation of constitutional rights under color of law. (Indictment, R. 1, PageID# 2-3).[3] Count 2 charged Asher with violating 18 U.S.C. 1519, which prohibits falsifying a record to impede a Federal investigation. (Indictment, R. 1, PageID# 2-3).[4]

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[2] Hickman also was indicted on charges related to the Hill assault. (Transcript, R. 109, PageID# 969-970). But as part of a plea agreement to an assault charge in a different case, the government agreed to dismiss the indictment related to the Hill assault. (Transcript, R. 109, PageID# 969-970). Hickman was ultimately sentenced to 126 months' imprisonment in the other case. See No. 6:15-cr-00042 (E.D. Ky.), Judgment, R. 240, Page ID# 2254-2260.

[3] Section 242 states in relevant part: "Whoever, under color of any law * * * willfully subjects any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States * * * shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both."

[4] Section 1519 states: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States * * * or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

b. Prior to trial, the government informed Asher that it intended to introduce evidence of Asher's prior assault of Turner. (Notice of Intent to Introduce Evidence Pursuant to Rule 404(b), R. 27, PageID# 68-88). The government explained that the evidence was admissible under Federal Rule of Evidence 404(b) to prove Asher's specific intent to deprive Hill of his rights. (Notice of Intent to Introduce Evidence Pursuant to Rule 404(b), R. 27, PageID# 76-83). Asher objected, and the district court held a hearing, at which Hickman testified about the assault.[5] (Notice of Objection, R. 28, PageID# 89-90; Criminal Minutes-Evidentiary Hearing, R. 35, PageID# 100).

After the hearing, the district court issued a preliminary ruling that the evidence of the Turner assault would be admissible. (Minute Entry Order, R. 41, PageID# 181-190). The district court concluded that there was substantial evidence that the event had occurred; that the government's proposed purpose in introducing the evidence was proper, as Asher had conceded; and that the evidence was not unduly prejudicial. (Minute Entry Order, R. 41, PageID# 181-190).

Three days before trial, Asher filed a motion to clarify the district court's ruling. (Motion for Clarification, R. 49, PageID# 242-243). Asher explained that he did not intend to argue at trial that he used "justifiable force against [Hill], or

[5] Hickman's testimony at the 404(b) hearing was substantially similar to the testimony he gave at Asher's jury trial. (Transcript, R. 37, PageID# 112-138).

that he accidentally kicked or struck [Hill]." (Motion for Clarification, R. 49, PageID# 242). Rather, his theory of defense was that "Hickman is lying when he testifies that Mr. Asher assaulted [Hill]." (Motion for Clarification, R. 49, PageID# 242). Asher asked the court whether this defense theory sufficiently conceded the issue of intent to preclude the government from introducing evidence of the Turner assault. (Motion for Clarification, R. 49, PageID# 242).

The district court addressed this issue at the final pre-trial conference. (Transcript, R. 107, PageID# 748-762). Asher stated that he wanted to stipulate to intent to prevent the government from introducing the Turner evidence. (Transcript, R. 107, PageID# 752). The government responded that such a stipulation would not prevent it from introducing the evidence under Rule 404(b). (Transcript, R. 107, PageID# 753-759). The court deferred ruling on the admissibility of the evidence and stated that the government could not introduce any evidence of the Turner assault without the court's express permission. (Transcript, R. 107, PageID# 760).

c. On the first day of trial, the district court ruled that evidence of the Turner assault was admissible. (Transcript, R. 109, PageID# 944-946; Order, R. 52, PageID# 247-255). The court explained that because the charged crimes—deprivation of constitutional rights and falsification of a record—are specific intent crimes, the government had an affirmative duty to prove intent. (Order, R. 52,

PageID# 248-251). Therefore, the court stated, Asher "cannot prevent the government from introducing evidence by stipulating to the element that the government must prove." (Order, R. 52, PageID# 250).

The court also ruled that the other-act evidence was not unfairly prejudicial under Federal Rule of Evidence 403. (Order, R. 52, PageID# 251-255). The court explained that, by proceeding to trial, Asher was holding "the government to its burden to prove that he assaulted Hill," and the other-act evidence was an important means of proving intent. (Order, R. 52, PageID# 251-254). The court stated that the prior assault and false report entry were "similar in kind and close in time to the charged assault and entry." (Order, R. 52, PageID# 251). The court also stated that the other-act evidence was not so shocking that it might "lure the factfinder" to convict on an improper basis. (Order, R. 52, PageID# 252). This balance would not change, the court concluded, if Asher stipulated to intent because the government has wide latitude to prove its case as it sees fit. (Order, R. 52, PageID# 253-254).

The jury returned guilty verdicts on both counts, finding that Asher had willfully deprived Hill of his constitutional rights and had falsified a document to impede an investigation. (Transcript, R. 111, PageID# 1361; Jury Verdict, R. 58, PageID# 270-272).

d. The initial presentence investigation report (PSR), relying on the guideline applicable for aggravated assault, calculated Hill's total offense level for the two counts as 31. (SEALED PSR, R. 87, PageID# 642-643). The resulting Guidelines range was 108 to 135 months. (SEALED PSR, R. 87, PageID# 642-643, 650). Asher objected to the use of aggravated assault to determine the offense level, as well as to the four-level increase for use of a dangerous weapon and the two-level increase for restraint of the victim. (SEALED PSR, R. 87, PageID# 653-654). Also, Asher specifically requested a downward departure under Sentencing Guidelines § 5K2.10 based on his assertion that Hill's wrongful conduct provoked the offense behavior. (SEALED PSR, R. 87, PageID# 653-654). Asher did not request a downward adjustment under Sentencing Guidelines § 3B1.2 based on his minor role in the offenses.

The district court held a sentencing hearing on October 9, 2017. The court overruled Asher's objections to the PSR and adopted the advisory guidelines range of 108 to 135 months. (Transcript, R. 90, PageID# 673). Asher argued that he should receive a sentence at the bottom of the guidelines range. (Transcript, R. 90, PageID# 676). Noting that Asher's actions were heavily influenced by Hickman, Asher's attorney stated: "I would ask [that] the Court * * * take into account [Asher's] role, *while it was not minimal or minor*, but the big, bad guy who ran things at this jail was Mr. Hickman, and Mr. Asher was certainly under his sway to

some degree." (Transcript, R. 90, PageID# 676 (emphasis added)). The United States agreed that a sentence at the bottom of the guidelines range was appropriate. (Transcript, R. 90, PageID# 688).

The district court sentenced Asher to 108 months' imprisonment on both the Section 242 and Section 1519 counts, to run concurrently. (Transcript, R. 90, PageID# 692). The court noted that while Hickman was the most culpable actor in the series of abuses at the jail, Asher's participation in that conduct was significant: "That Mr. Asher would join in the conduct is shocking. But the fact that as a supervising deputy he would allow it to continue and conspire to cover it up is probably the most troubling aspect of this case." (Transcript, R. 90, PageID# 692).

e. The court entered judgment on October 20, 2017, and Asher filed a timely notice of appeal. (Judgment, R. 84, PageID# 615-621; Notice of Appeal, R. 85, PageID# 622.)

SUMMARY OF ARGUMENT

Asher raises two issues on appeal. Neither has merit.

1. Asher first argues that the district court abused its discretion in admitting, under Federal Rule of Evidence 404(b), evidence of a prior incident where Asher used excessive force against an inmate and wrote a false incident report to cover up the abuse. But the evidence of the prior incident was admitted for a proper purpose: To prove the specific intent elements of Sections 242 and 1519.

Although Asher's brief initially appears to concede that the other-act evidence was offered for a proper purpose, he later suggests that his offer to stipulate to the intent element of each crime negates the proper purpose for which the evidence was introduced. That argument fails because this Court squarely has held that other-act evidence can be admitted to prove specific intent even where the defendant stipulates to intent.

Asher's main contention is that the probative value of the other-act evidence was substantially outweighed by its prejudicial effect. But the district court did not abuse its discretion in concluding that the other-act evidence was highly probative because it was similar in kind and reasonably close in time to the charged conduct and was important evidence of Asher's intent. Contrary to Asher's assertion, his offer to stipulate to the intent element of the charged offenses does not undermine the probative value of the other-act evidence. The government bears the burden of proof on specific intent and is permitted to prove that element through introduction of evidence, regardless of the defendant's stipulation. Moreover, the prejudicial impact of the evidence was minimal because the incident was no more inflammatory (and arguably less so) than the crime for which Asher was charged. Further, the district court minimized the possibility of prejudice by providing the jury with limiting instructions on four occasions that set forth the permissible use of the evidence.

2. Asher also argues that the district court's sentencing determination was procedurally unreasonable because the district court failed to apply a two-level minor-role adjustment under Sentencing Guidelines § 3B1.2. But Asher did not ask the district court to apply the minor-role adjustment. Therefore, this Court reviews the issue for plain error. The district court did not commit plain error because, as the record reflects, Asher played a significant part in the deprivation of Hill's rights and subsequent cover up. For example, there was testimony Asher kicked, stomped, and taunted Hill, helped put Hill in a restraint chair, disguised himself as a doctor and assured Hill that he did not need medical attention, refused to get Hill (real) medical attention despite his severe injuries, and conspired with Hickman to cover up the assault. Indeed, Asher admitted at sentencing his significant role in the abuse.

ARGUMENT

I

THE DISTRICT COURT NEITHER ERRED NOR ABUSED ITS DISCRETION IN ADMITTING EVIDENCE OF ASHER'S PRIOR USE OF FORCE AND FALSE INCIDENT REPORT UNDER FEDERAL RULE OF EVIDENCE 404(b)

A. Standard Of Review

The proper standard of review is unsettled in this Circuit. "This Court generally reviews evidentiary issues for abuse of discretion but there is an 'on-going dispute in this circuit concerning the proper standard of review of Rule

404(b) evidence.'" *United States* v. *LaVictor*, 848 F.3d 428, 444 (6th Cir.) (quoting *United States* v. *Carter*, 779 F.3d 623, 625 (6th Cir. 2015)), cert. denied, 137 S. Ct. 2231 (2017). "Sometimes, this Court will: (1) review for clear error the district court's determination that prior bad acts took place; (2) apply *de novo* review to a district court's determination that the evidence was offered for a permissible purpose; (3) and review for abuse of discretion the determination that the probative value of 404(b) evidence is not substantially outweighed by unfair prejudice" under Federal Rule of Evidence 403. *Id.* at 444-445. "Other times, this Court has applied a single-tier abuse of discretion standard." *Id.* at 445; accord *United States* v. *Ramer*, 883 F.3d 659, 670 (6th Cir. 2018). Regardless of which approach this Court follows under Rule 404(b), the district court's admission of other-act evidence in this case was proper and should be upheld.[6]

Moreover, under Rule 403, "[t]he district court has broad discretion in balancing probative value against prejudicial impact." *United States* v. *Carney*, 387 F.3d 436, 451 (6th Cir. 2004) (quoting *United States* v. *Feinman*, 930 F.2d 495, 499 (6th Cir. 1991)); see *United States* v. *Poulsen*, 655 F.3d 492, 509 (6th Cir. 2011), cert. denied, 565 U.S. 1262 (2012). When evaluating other-act evidence, this Court "look[s] at the evidence in the light most favorable to its proponent,

[6] Some panels of this Court have concluded that the two approaches are not in fact inconsistent. See *United States* v. *Mandoka*, 869 F.3d 448, 456-457 (6th Cir. 2017).

maximizing its probative value and minimizing its prejudicial effect." *LaVictor*, 848 F.3d at 447 (alteration in original) (quoting *United States* v. *Chambers*, 441 F.3d 438, 455 (6th Cir. 2006)). As explained below, the district court acted well within its broad discretion in concluding that this balancing weighed in favor of admission of the other-act evidence.

B. The District Court Correctly Concluded That Evidence Of The Turner Assault And False Report Was Admissible Under Rule 404(b)

The district court did not abuse its discretion or otherwise err in admitting evidence under Rule 404(b) of a prior incident in which Asher intentionally used excessive force against an inmate (Dustin Turner) who posed no threat to him or others and then falsified a report to cover up the assault. See pp. 6-9, *supra* (describing assault). To admit evidence under Rule 404(b), the district court must find that (1) the prior act actually occurred, (2) the evidence is being offered for a permissible purpose, and (3) the probative value is not substantially outweighed by unfair prejudice under Rule 403. *Ramer*, 883 F.3d at 669; *Carter*, 779 F.3d at 625. The court properly concluded that the other-act evidence satisfied all three requirements. (See Minute Entry Order, R. 41, Page ID# 183-190; Order, R. 52, PageID# 247-255).

1. It Is Undisputed That The Prior Acts Occurred

Asher concedes that the evidence supported a finding that the prior acts actually occurred (see Br. 21), and so the first requirement for admissibility is not at issue in this appeal.

2. The Other-Act Evidence Was Introduced For A Proper Purpose

The United States introduced the other-act evidence to help prove that Asher acted with the specific intent required to violate the two statutes charged in the indictment: 18 U.S.C. 242 and 18 U.S.C. 1519. As the district court properly recognized, both statutes are "specific-intent crimes." (Minute Entry Order, R. 41, Page ID# 185). Under Section 242, the government must prove that the defendant acted "willfully," *i.e.*, with the specific intent to deprive a person of his constitutional rights. 18 U.S.C. 242; see also *United States* v. *Epley*, 52 F.3d 571, 576 (6th Cir. 1995). Under Section 1519, the government must prove that the defendant acted with the specific intent to "impede, obstruct, or influence" an investigation. 18 U.S.C. 1519; see also *United States* v. *Kernell*, 667 F.3d 746, 752-753 (6th Cir.), cert. denied, 568 U.S. 826 (2012).

The purpose for which the United States introduced this evidence was undoubtedly proper, a point that Asher appears to concede on appeal. See Br. 21. This Court has held that "where the crime charged is one requiring specific intent, the prosecutor may use 404(b) evidence to prove that the defendant acted with the

specific intent notwithstanding any defense the defendant might raise." *United States* v. *Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994), cert. denied, 513 U.S. 1115 (1995); see also *United States* v. *Hardy*, 643 F.3d 143, 151 (6th Cir.), cert. denied, 565 U.S. 1063 (2011). Some of the language in Asher's brief suggests, however, that his offer to stipulate to intent negated the government's need to prove specific intent, rendering the purpose of the other-act evidence improper. See Br. 24-26. But this Court has squarely rejected that argument: "[P]rior acts evidence may be admissible under [Rule] 404(b) to prove required specific intent, *even if a defendant stipulates to intent*." *United States* v. *Bilderbeck*, 163 F.3d 971, 977-978 (6th Cir.) (emphasis added), cert. denied, 528 U.S. 844 (1999); accord *United States* v. *Lattner*, 385 F.3d 947, 957 (6th Cir. 2004), cert. denied, 543 U.S. 1095 (2005); *United States* v. *Williams*, 238 F.3d 871, 876 (7th Cir.), cert. denied, 532 U.S. 1073 (2001); *United States* v. *Hill*, 249 F.3d 707, 712-713 (8th Cir. 2001); *United States* v. *Crowder*, 141 F.3d 1202, 1209 (D.C. Cir. 1998), cert. denied, 525 U.S. 1149 (1999).

Asher's reliance on *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975) (see Br. 24-25), is unavailing because that decision does not support his challenge to the admission of the Rule 404(b) evidence. In *Ring*, as this Court subsequently explained, the Court stated that "other acts evidence is not admissible to prove intent unless the defendant places intent in issue or intent is not inferable from

proof of the criminal act itself." *Johnson*, 27 F.3d at 1911. The defendant in *Ring* was charged with "knowingly" mailing threatening letters in violation of 18 U.S.C. 876(c). *Ring*, 513 F.2d at 1003 & n.1. The Court held that evidence of his prior threats was not admissible to establish intent because "if the act of mailing were proven, intent would not be at issue because of the nature of the crime." *Id.* at 1009. In other words, as the court explained in *Johnson*, the Court in *Ring* distinguished between cases where intent may naturally be inferred from the charged conduct and cases where a specific intent, separate from the underlying prohibited conduct, is an element of the crime charged. *Johnson*, 27 F.3d at 1192. *Ring* simply does not apply where, as here, the United States must prove that the defendant acted with *specific intent*. See *ibid.*

3. The Danger Of Undue Prejudice Did Not Substantially Outweigh The Probative Value Of The Other-Act Evidence

Asher's primary argument is that the district court abused its discretion by concluding that the danger of undue prejudice did not outweigh the probative value of the prior-act evidence. This argument fails.

The final consideration for the admission of evidence under Rule 404(b) is whether, under Rule 403, the probative value of the evidence is "substantially outweighed" by "unfair prejudice." Fed. R. Evid. 403; see *Ramer*, 883 F.3d at 669. Unfair prejudice means "the undue tendency to suggest a decision based on improper considerations; it does not mean the damage to a defendant's case that

results from legitimate probative force of the evidence." *Bilderbeck*, 163 F.3d at 978; see also *Chambers*, 441 F.3d at 456 ("Evidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial pursuant to Rule 403." (citation omitted)). Indeed, "[a] defendant is not afforded the right to be free of all prejudicial evidence, merely evidence that is unfairly prejudicial to the extent that it outweighs its probative value." *United States* v. *Gibbs*, 797 F.3d 416, 423 (6th Cir. 2015).

a. The other-act evidence involving the attack on Turner was highly probative of Asher's specific intent to deprive Hill of his constitutional rights and falsify his incident report because the incident was similar in kind and occurred in reasonably close proximity to the charged conduct. See *Carney*, 387 F.3d at 451; *Hardy*, 643 F.3d at 151; (Order, R. 52, PageID# 251-252). In both incidents, Asher and Hickman assaulted a recently arrested inmate who refused to follow orders or was acting disruptively, placed the inmate in a restraint chair, and conspired to cover up the misconduct. Indeed, other-act evidence that is "markedly similar" to evidence of the charged acts has "enhance[d]" probative value. *United States* v. *Seymour*, 468 F.3d 378, 385 (6th Cir. 2006). And the assaults took place two and a half years apart, well within the reasonable proximity contemplated by this Court. See *United States* v. *Matthews*, 440 F.3d 818, 830 (6th Cir.), cert. denied, 547 U.S. 1186 (2006), *abrogated on other grounds by*

General Elec. Co. v. *Joiner*, 522 U.S. 136 (1997); *United States* v. *Jones*, 403 F.3d 817, 821 (6th Cir. 2005); *United States* v. *Ismail*, 756 F.2d 1253, 1260 (6th Cir. 1985).

The other-act evidence also was highly probative because it was particularly important to proving a key element of the government's case. (Order, R. 52, PageID# 251-252). "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988). Here, there was no direct evidence of Asher's intent. The government's primary evidence of Asher's intent was Hickman's testimony. But Hickman could speak only indirectly to Asher's intent and Asher had attacked Hickman's credibility, claiming that he was testifying to curry favor with the government to get leniency in his own case. (Transcript, R. 110, PageID# 1068, 1074-1076; Transcript, R. 111, PageID# 1334). Thus, the other-act evidence played an important role in establishing Asher's intent to deprive Hill of his rights. See *United States* v. *Myers*, 123 F.3d 350, 363 (6th Cir.) (explaining that another factor in the Rule 403 balancing is the availability of other means of proof, which could reduce the need for other-act evidence), cert. denied, 522 U.S. 1020 (1997). Although Asher asserts that the government did not need the other-act evidence because "[t]he

government had plenty of other proof bearing on Asher's intent to commit the charged offenses," he fails to identify that evidence. Br. 24.

Relying on *United States* v. *Miller*, 673 F.3d 688 (7th Cir. 2012), Asher argues that the other-act evidence lacks any probative value because it was introduced solely for the purpose of proving his propensity and not for the purpose of proving intent. See Br. 27-28. This argument fails. In *Miller*, the Seventh Circuit held that other-act evidence of a prior similar drug dealing conviction was not probative of intent because there was no conceivable relationship between the prior drug charge and the charged drug crime other than luring the jury into an improper propensity inference. 673 F.3d at 699-700. But here there is a direct relationship between the other-act evidence and proving Asher's intent. That Asher attempted to cover up a nearly identical assault in the past shows that he knew that type of conduct was wrong.[7] Knowing that this conduct was wrong in the past suggests that Asher knew that identical conduct, *i.e.*, assaulting Hill, also was wrong. Acting with knowledge that his conduct was wrong is relevant to whether Asher acted willfully, *i.e.*, with the specific intent to deprive Hill of his constitutional rights when he used force against him.

[7] At trial, Hickman admitted that he and Asher had hit and scratched themselves and written false reports after the Turner assault because they did not know how "to explain why we did what we did" and "[s]o we wouldn't get in trouble." (Transcript, R. 110, PageID# 1037, 1044).

Asher also argues that, even if the government had a proper purpose for introducing the other-act evidence, the district court erred because it failed to consider whether his proposed stipulation to intent rendered that other-act evidence substantially less probative. See Br. 25-29. This argument is baseless. The district court expressly considered whether a stipulation to intent would change the Rule 403 balancing test. It concluded that it would not. (Order, R. 52, PageID# 253-255). The court stated that the "calculus does not change even if Asher chooses not to put intent at issue" because the other-act evidence is probative of specific intent and "[b]y pleading not guilty to the government's charges, Asher has put the government to its burden of proof." (Order, R. 52, PageID# 253). Indeed, where the government has to prove an element of a charged crime, it can "prove its case by evidence of its own choice, or, more exactly, * * * a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief* v. *United States*, 519 U.S. 172, 186-187 (1997); see *Hill*, 249 F.3d at 713 (holding that stipulation to intent did not remove probative value of prior-act evidence because evidentiary account of prior acts "can accomplish what no set of abstract statements ever could" (citation omitted)); *Crowder*, 141 F.3d at 1210 (stipulating to intent is not decisive in a Rule 403 balancing).

Asher cites *United States* v. *Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc), to support his argument that a stipulation to intent strips the other-act evidence of its probative value. See Br. 28. But *Gomez* does not help him. In *Gomez*, the Seventh Circuit held that intent always is at issue in cases involving specific-intent crimes and rejected any suggestion that there is "a generally applicable rule that other-act evidence may not be admitted unless the defendant 'meaningfully dispute[s]' the non-propensity issue for which the evidence is offered." 763 F.3d at 859 (alteration in original) (quoting *United States* v. *Richards*, 719 F.3d 746, 759 (7th Cir. 2013)). Moreover, while the court said that the "degree to which the non-propensity issue actually is contested" is relevant to its probative value, it recognized that the Supreme Court in *Old Chief* "specifically endorsed" the rule that the government is "entitled to prove its case free from any defendant's option to stipulate the evidence away." *Ibid.* (quoting *Old Chief*, 519 U.S. at 189). Thus, *Gomez* suggests only that the district court is free to consider the impact of a stipulation on the Rule 403 balancing test. *Id.* at 860. The district court did so here.

b. The district court did not abuse its broad discretion in concluding that any prejudicial impact of the other-act evidence was minimal. First, this Court has recognized that evidence is unlikely to "inflame[] the jurors' passions and motivate[] them to convict on an improper basis" where, as here, the other-act

evidence is not significantly more inflammatory or shocking than the charged conduct itself. *United States* v. *Mandoka*, 869 F.3d 448, 459 (6th Cir. 2017); see *United States* v. *Rios*, 830 F.3d 403, 424 (6th Cir. 2016), cert. denied, 137 S. Ct. 1120 (2017). Here, by the time the jury heard evidence of the Turner assault, it already had heard evidence of the brutal and unprovoked attack on Hill. And Asher's conduct in the Hill assault was at least as shocking as his conduct in the Turner assault. Like his actions during the Turner assault, Asher viciously assaulted Hill when Hill posed no threat to the deputies. Moreover, when it was clear that Hill was in severe pain and had suffered significant injuries, Asher refused to get medical attention for Hill. And while Asher scratched his arms to bolster his claims of self-defense after the Turner assault, he similarly tried to cover up the Hill assault by pretending to be a doctor, refusing to get medical care for Hill, and conspiring with Hickman to write false reports. In short, Asher's contention that the Turner evidence was "worse than the charged conduct" and "must have pushed the jury to decide the case on the forbidden basis of Asher's propensity" is belied by the record. Br. 23.

Moreover, the district court went to great lengths to minimize the possibility of unfair prejudice from the other-act evidence by giving *four* sets of limiting instructions, including the Sixth Circuit pattern limiting instruction.

This Court has recognized that using jury instructions to clarify that the jury can use other-act evidence only for proper purposes can blunt the prejudicial impact of the evidence. See *United States* v. *Ayoub*, 498 F.3d 532, 548 (6th Cir. 2007), cert. denied, 555 U.S. 830 (2008); *Bilderbeck*, 163 F.3d at 978; *Mandoka*, 869 F.3d at 460. Further, this Court has explained that a proper limiting instruction in the context of Rule 404(b) should identify "the specific factor named in the rule that is relied upon to justify admission of the other acts evidence, explain why the factor is material, and warn the jurors against using the evidence to draw" improper inferences. *United States* v. *Bell*, 516 F.3d 432, 441 (6th Cir. 2008) (quoting *Johnson*, 27 F.3d at 1194). The district court's four limiting instructions fully comported with these principles and minimized the possibility that the jury would use the evidence improperly.

The district court orally instructed the jury three times that evidence of the Turner assault could be considered only for purposes of proving Asher's intent to commit the charged crimes and not for any other purpose. See pp. 6-9, *supra*. On two of those occasions, the district court gave the Sixth Circuit's pattern jury instruction, explaining that the jury "can consider the evidence only as it relates to [Asher's] intent to commit the crimes charged in the indictment. You must not consider it for any other purpose." (Transcript, R. 110, PageID# 1026-1027, 1197-1198); see Sixth Cir. Pattern Jury Instruction 7.13. The third time, the district

court gave a substantially similar instruction, reminding the jury that "the government has to prove specific intent * * * . And if you find that factors into your determination of specific intent, you can use it for that but for nothing else." (Transcript, R. 110, PageID# 1152). The court also instructed the jury a fourth time in the written instructions given to the jury prior to deliberation. (Jury Instructions, R. 60, PageID# 301). That instruction also matched the Sixth Circuit's pattern jury instruction.

Asher contends, however, that the limiting instructions were not specific enough to adequately inform the jury of the proper use of the other-act evidence. See Br. 29-34. He argues that the district court should have specified that the other-act evidence could not be used "to infer that Asher was a man of bad character who acted the same way in the charged case." Br. 32. But the district court did instruct the jury—repeatedly—that it could not use the other-act evidence for any purpose other than proving Asher's specific intent. The court was not required to specifically say that the jury could not use the evidence to draw an impermissible character inference. See, *e.g.*, *United States* v. *Thompson*, 690 F. App'x 302, 309 (6th Cir. 2017). Asher also suggests that the instructions should have "define[d] the specific mental state required for the particular offense" rather than using the words "specific intent" or "intent." Br. 33-34. But the district court did instruct the jury that it had to find that Asher acted willfully, meaning that he

acted "voluntarily, intentionally, and with the specific intent to do something that the law forbids." (Jury Instructions, R. 60, PageID# 293). And the court explained that the other-act evidence was admitted for the proper purpose of proving intent. Nothing more is required. See, *e.g.*, *Thompson*, 690 F. App'x at 309; *Ayoub*, 498 F.3d at 548.

II

THE DISTRICT COURT DID NOT PLAINLY ERR BY FAILING TO GRANT A TWO-LEVEL DOWNWARD ADJUSTMENT IN ASHER'S OFFENSE LEVEL

A. Standard Of Review

This Court ordinarily reviews the procedural steps that the district court took in reaching its sentence for abuse of discretion. *United States* v. *Taylor*, 800 F.3d 701, 713 (6th Cir. 2015). But where, as here, "a party has failed to object to a procedural defect at sentencing," this Court's review is for plain error. *Ibid.* To prevail under plain-error review, a defendant must show that there is (1) an error, "(2) that was obvious or clear, (3) that affected * * * substantial rights, and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States* v. *Al-Maliki*, 787 F.3d 784, 791 (6th Cir.) (quoting *United States* v. *Vonner*, 516 F.3d 382, 386 (6th Cir. 2008) (en banc)), cert. denied, 136 S. Ct. 204 (2015).

B. Asher Has Not Demonstrated That The District Court Erred, Much Less Plainly Erred

Asher contends that the district court committed procedural error by failing to decrease his offense level by two levels under Sentencing Guidelines § 3B1.2(b), because, he argues, he played a minor role in the Hill assault. See Br. 35-39. But he failed to make this argument before the district court. Indeed, at sentencing Asher's counsel asked the court to take into account the fact that Hickman held sway over Asher but conceded that Asher's role "was not minimal or minor." (Transcript, R. 90, PageID# 676). Review, therefore, is for plain error.

Asher cannot show that the district court erred, let alone plainly erred. Sentencing Guidelines § 3B1.2(b) provides that a defendant's offense level may be decreased by two levels "[i]f the defendant was a minor participant in any criminal activity." U.S.S.G. § 3B1.2(b). The district court may apply the minor role adjustment only if the defendant is "'less culpable than most other participants' and 'substantially less culpable than the average participant.'" *United States* v. *Lanham*, 617 F.3d 873, 888 (6th Cir. 2010) (quoting *United States* v. *Lloyd*, 10 F.3d 1197, 1220 (6th Cir. 1993)), cert. denied, 563 U.S. 1002 (2011). "[A] defendant whose role has 'importance in the overall scheme' for which he is being held accountable is not a minor participant within the meaning of § 3B1.2." *United States* v. *Salas*, 455 F.3d 637, 643 (6th Cir. 2006) (quoting *United States* v. *Salgado*, 250 F.3d 438, 458 (6th Cir. 2001)). Accordingly, a defendant must prove

by a preponderance of the evidence "that he played a relatively minor role in conduct for which he was held accountable." *United States* v. *Skinner*, 690 F.3d 772, 783 (6th Cir. 2012) (quoting *United States* v. *Sheafe*, 69 F. App'x 268, 270 (6th Cir. 2003)), cert. denied, 570 U.S. 919 (2013).

A downward adjustment was not warranted here because Asher was a significant participant in the Hill assault. At sentencing, Asher admitted that he did not play a minor role in the assault. (Transcript, R. 90, PageID# 676). Asher's admission was consistent with the evidence, which showed that he kicked and stomped Hill while he was on the ground, taunted Hill while he was severely injured, helped Hickman put Hill in a restraint chair, refused to get medical care for Hill and then pretended to be a doctor to stop Hill from asking for help, and schemed with Hickman to write false incident reports to cover up the abuse. See pp. 2-5, *supra*. Thus, the district court did not err in failing to adjust downward Asher's offense level.

CONCLUSION

This Court should affirm the defendant's convictions and sentence.

Respectfully submitted,

ROBERT M. DUNCAN, JR.
United States Attorney

CHARLES P. WISDOM JR.
HYDEE R. HAWKINS
Assistant United States Attorneys
United States Attorney's Office
Eastern District of Kentucky
260 West Vine Street
Suite 300
Lexington, KY 40507
(859) 233-2661

JOHN M. GORE
Acting Assistant Attorney General

s/ Elizabeth Nash
THOMAS E. CHANDLER
ELIZABETH NASH
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-3412

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 7,805 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in Times New Roman, 14-point font.

s/ Elizabeth Nash
ELIZABETH NASH
Attorney

Date: May 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Elizabeth Nash
ELIZABETH NASH
Attorney

ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
1	Indictment	1-4
27	Notice of Intent to Introduce Evidence	68-88
28	Notice of Objection	89-91
35	Criminal Minutes	100
37	Transcript	102-165
41	Minute Entry Order	181-190
49	Motion for Clarification	242-244
52	Order	247-259
58	Jury Verdict	270-272
60	Jury Instructions	277-312
72	Gov't Resp. to Sentencing Objections	559-576
84	Judgment	615-621
85	Notice of Appeal	622-623
87	SEALED PSR	634-657
90	Transcript	663-700
107	Transcript	747-772
109	Transcript	844-1011
110	Transcript	1012-1273
111	Transcript	1274-1370