Nos. 18-10772-AA, 18-11314

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

MICHAEL BROWN,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

JOHN M. GORE
Acting Assistant Attorney General

THOMAS E. CHANDLER
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115
Chris.Wang@usdoj.gov

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 - 26.1-3 and 27-1(a)(9), counsel for appellee-cross-appellant United States hereby certifies that defendant-appellant's Certificate of Interested Persons filed on July 6, 2018, is a complete list of the persons and entities who may have an interest in the outcome of this case except for the following individual omitted from that list:

Mace, Nicole, Counsel for Co-Defendant

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: September 20, 2018

STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to defendant's request for oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CITATIONS

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

GUIDELINES:

RULES:

RULES (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 18-10772-AA, 18-11314

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant

v.

MICHAEL BROWN,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT

STATEMENT OF JURISDICTION

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 court entered final judgment against defendant Brown on February 28, 2018. Doc. 293.[1] On that same day, Brown filed a timely notice of appeal from the court's judgment and its

---

[1] This brief uses the following abbreviations: "Doc. __, at __" refers to the document number assigned on the district court's docket sheet, "GX __" refers to government exhibits admitted at trial, and "Br. __" refers to page numbers in Brown's opening brief filed with this Court.

denial of his post-trial motions for acquittal and for a new trial. Doc. 295. On March 29, 2018, the government filed a timely notice of a cross-appeal of Brown's sentence. Doc. 317. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742(b).

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports Brown's conviction for using excessive force in violation of 18 U.S.C. 242.

2. Whether the district court abused its discretion in denying Brown's motion for a new trial on his Section 242 conviction based on the weight of the evidence.

3. Whether, in determining Brown's Sentencing Guidelines range, the district court erred in declining to use aggravated assault as the underlying offense for his Section 242 conviction. (Cross-appeal)

STATEMENT OF THE CASE

1. Procedural History

In October 2017, defendant Michael Brown, a police officer with the Boynton Beach Police Department (BBPD), was charged in a superseding indictment—along with two of his fellow officers, Justin Harris and Ronald Ryan, and his supervising sergeant, Philip Antico—on several counts arising out of the subordinate officers' use of force against a passenger in a car during a traffic stop.

Doc. 81. The indictment charged Brown and his fellow officers with assaulting the passenger with punches, kicks, and a taser, resulting in bodily injury, thereby depriving the passenger of his right to be free from unreasonable seizure, in violation of 18 U.S.C. 242.[2] Doc. 81, at 2 (Count 1). The indictment also charged Brown with using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(i); and two counts of falsification of records for making false entries in his Officer Report on the incident, in violation of 18 U.S.C. 1519. Doc. 81, at 3-4, 6 (Counts 2, 3, and 6, respectively).

A jury found Brown guilty of violating Sections 242 and 924(c)(1)(A)(i), but acquitted him of the two counts of falsifying records. Doc. 161. He moved the district court for a judgment of acquittal and for a new trial. Doc. 190-191, 193. The district court denied Brown's motion for a judgment of acquittal as to the

---

[2] Section 242 provides, in relevant part, that:

> 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.

18 U.S.C. 242.

Section 242 count, but granted it as to the Section 924(c)(1)(A)(i) count. Doc. 249. The court denied Brown's motion for a new trial. Doc. 280.

At sentencing, the district court rejected the government's argument that, when calculating Brown's Sentencing Guidelines range, it should use aggravated assault as the underlying offense based on Brown's unlawful use of a taser against the passively resisting passenger. Doc. 278. Use of aggravated assault as the underlying offense would have resulted in a Sentencing Guidelines range of 70 to 87 months' imprisonment. Doc. 256, at 18. Instead, the court applied the base offense level for use or threat of force against a person, resulting in a Sentencing Guidelines range of 21 to 27 months' imprisonment. Doc. 305, at 9, 17. Granting a downward variance, the court sentenced Brown to three years' probation. Doc. 293; Doc. 330, at 4, 66-67.

Brown has appealed his conviction, and the government has cross-appealed his sentence. Doc. 295, 317.[3]

[3] Harris and Ryan were charged with violating 18 U.S.C. 242 and 1519 in connection with their use of force against the passenger and their filing of Officer Reports about the incident. They were tried with Brown and acquitted of all charges. Antico was tried separately and convicted of obstruction of justice in violation of 18 U.S.C. 1512(b)(3). He has filed a separate appeal of his conviction (No. 18-10972). The government has also cross-appealed Antico's sentence in that case (No. 18-11447). Both cross-appeals raise the same issue, *i.e.*, whether the district court erred in declining to use aggravated assault as the underlying offense in calculating the defendant's Sentencing Guidelines range.

2. Statement Of The Facts

a. Brown's Use Of Force Against J.B.

During the early morning hours of August 20, 2014, a BBPD officer attempted to perform a traffic stop. Doc. 305, at 4. The driver of the vehicle did not stop, but drove away, striking and injuring a police officer in the process. Doc. 305, at 4. A high-speed chase involving several BBPD police officers ensued. Doc. 305, at 4. Eventually, defendant Brown, a BBPD officer, forced the car to stop. Doc. 305, at 4-5. Brown pulled alongside the car, and Brown and officers from other patrol cars approached the vehicle. Doc. 305, at 5. In addition to the driver, the vehicle contained a front-seat passenger, J.B. Doc. 305, at 4.

Brown approached the vehicle with his gun drawn. Doc. 305, at 5. He opened the front passenger door, immediately kicked J.B., then used his hand to strike J.B. repeatedly without giving J.B. any opportunity to comply with his verbal commands. Doc. 305, at 5; Doc. 324, at 103-105. Two other BBPD officers, Justin Harris and Ronald Ryan, also reached into the vehicle and struck J.B. Doc. 305, at 5. Then, while J.B. was still in the car, Brown deployed his taser against J.B., twice pulling the trigger and ejecting the taser's probes. Doc. 305, at 5; Doc. 329, at 41, 44, 97, 118. Brown's attorney conceded that his client believed that the probes had struck and penetrated J.B.'s chest and right leg. Doc. 329, at 40, 42, 97, 118. As a result of the assault, J.B. sustained visible scrapes,

lacerations, and bruises to his face. Doc. 305, at 5. He also suffered puncture wounds from taser probes. Doc. 305, at 5. During this time, a Palm Beach County Sheriff's Office (PBSO) helicopter flying overhead recorded the officers' actions. Doc. 305, at 5.

After the incident, but before he became aware of the video, Brown submitted and validated as complete an Officer Report on his use of force using the BBPD's electronic report writing system. Doc. 305, at 5. The narrative portion of Brown's Officer Report stated that he deployed his taser in response to J.B.'s refusal to obey loud verbal commands to exit the vehicle, but did not indicate that he had struck or kicked J.B. Doc. 211-1, at 122-123 (GX 8d); Doc. 305, at 5, 7. Several days later, Brown joined BBPD sergeant Philip Antico, his direct supervisor, to view the PBSO helicopter video of the incident. Doc. 305, at 6. After watching the video, Brown changed his Officer Report to include that he struck J.B. several times with a closed fist after J.B. refused to comply with loud verbal commands to place his hands on the dashboard, and used a taser after J.B. still refused to comply. Doc. 211-1, at 117-122 (GX 8d); Doc. 305, at 7. Brown again omitted that he kicked J.B. Doc. 211-1, at 117-122 (GX 8d); Doc. 324, at 137.

b. Brown's Post-Trial Motions

i. In November 2017, after the jury convicted him of violating 18 U.S.C. 242 and 924(c)(1)(A)(i) in connection with his use of force against J.B., Brown moved the district court for a judgment of acquittal. Doc. 190-191. With regard to Section 242, Brown argued that the government's evidence consisted solely of a videotape of the incident and the testimony of one officer, Patrick Monteith, and was insufficient for a jury to find beyond a reasonable doubt that he used unreasonable force or that he acted willfully. Doc. 191, at 2-3. The government responded that it had introduced several other pieces of evidence, including Brown's own admissions in his Officer Reports, that showed that he kicked, struck, and tased a victim who offered no more than passive resistance. Doc. 214, at 3-4. The government further argued that Brown's professional training taught him that his use of force was objectively unreasonable under the circumstances, and that his failure to disclose fully the extent of his use of force in his Officer Report evinced consciousness of guilt and willfulness. Doc. 214, at 4-5.

The district court denied Brown's motion for judgment of acquittal as to his Section 242 conviction.[4] Doc. 249. The court concluded that the evidence viewed

[4] The district court granted Brown's motion for judgment of acquittal as to his Section 924(c)(1)(A)(i) conviction. Doc. 249, at 4-16. The government is not appealing this ruling.

in the light most favorable to the government was sufficient for a reasonable jury to find that Brown's use of "hard force,"[5] including punches and kicks, was unreasonable when faced with passive resistance.[6] Doc. 249, at 3. The court also concluded that a reasonable jury could determine that Brown's failure to disclose the extent of his use of force in his Officer Report, and his violation of departmental policy regarding excessive force, demonstrated consciousness of guilt and willfulness. Doc. 249, at 3-4 (citing *United States* v. *Rodella*, 804 F.3d 1317, 1338 (10th Cir. 2015), cert. denied, 137 S. Ct. 37 (2016)).

ii. Brown also moved the district court for a new trial on his Section 242 conviction, asserting that the jury's verdict was against "the weight of the evidence." Doc. 193, at 1. He also filed a supplement to his new-trial motion, stating that he became aware of newly discovered evidence—an enhanced helicopter video showing him reholstering his gun before striking J.B.—that was

[5] Sedrick Aiken, the government's use-of-force expert, testified that "hard force" includes use of a taser, baton, bean bag from a bean bag shotgun, and closed-fist punches to the soft tissue areas of the body. Doc. 324, at 80-81. These techniques are appropriate if the suspect actively resists—*i.e.*, flails around, kicks arms and legs, takes flight, or takes a fighting stance toward the officer. Doc. 324, at 47-48.

[6] In a different order, the district court found that the sequence of Brown's use of force was that he kicked, punched, and then tased J.B. Doc. 289, at 5.

not shown to the jury. Doc. 243.[7] Brown acknowledged that this video did not provide an independent basis for a new trial under Federal Rule of Criminal Procedure 33(b)(1), but argued that the court should nevertheless consider the video in deciding whether to grant his motion in "the interests of justice." Doc. 246. The government responded that Brown could not rely on the enhanced video in his motion for a new trial because he failed to introduced the video at trial, and that, in any event, the video does not support his position that he reholstered his gun before striking J.B. Doc. 254, at 2-4.

The district court denied Brown's motion for a new trial. Doc. 280. First, the court concluded that in deciding the motion, it was limited to evaluating the record evidence, which did not include the enhanced video. Doc. 280, at 4. On the merits, the court observed that the government charged Brown with violating Section 242 through several means other than striking J.B. with a gun in his hand, and that the weight of the evidence did not "preponderate[] heavily against a finding" that Brown used unreasonable force through one of those other means.

---

[7] Brown apparently made this argument because the indictment charged, and the government argued at trial, that Brown and his co-defendants assaulted J.B. by "repeatedly striking J.B. with a closed fist, *a hand clasping a firearm*, feet, and knees, and by electroshocking J.B. with an X26 Taser, a dangerous weapon." Doc. 81, at 2 (emphasis added). As discussed below, in this appeal the government argues that the evidence was sufficient to establish that Brown used excessive force by kicking, punching, and tasing J.B. (*i.e.*, not by striking J.B. with a hand clasping a firearm).

Doc. 280, at 4-5. The court also explained that in its order denying Brown's motion for a judgment of acquittal on the Section 242 count, it determined that the government "presented sufficient evidence both of willfulness and of the unreasonableness of Officer Brown's actions." Doc. 280, at 5. Accordingly, the court concluded that "[t]his is not the exceptional case where the weight of the evidence preponderates *heavily* against the verdict." Doc. 280, at 6 (internal quotation marks and alteration omitted).

c. The District Court's Sentencing Determinations

i. Brown's Presentence Investigation Report (PSR) after his Section 924(c)(1)(A)(i) acquittal calculated a total offense level of 27 for his Section 242 conviction. The PSR reasoned, in relevant part, as follows:

- The applicable guideline for a violation of 18 U.S.C. 242 is Sentencing Guidelines § 2H1.1 (Offenses Involving Individual Rights).

- Section 2H1.1 provides, as relevant here, that the base offense level is "the offense level from the offense guideline applicable to any underlying offense." Sentencing Guidelines § 2H1.1(a)(1).

- The PSR determined that the underlying offense was "Aggravated Assault," Sentencing Guidelines § 2A2.2, which provides a base offense level of 14.

Doc. 256, at 9-10. The PSR then added four levels because a dangerous weapon was "otherwise used," Sentencing Guidelines § 2A2.2(b)(2)(B); three levels for bodily injury, Sentencing Guidelines § 2A2.2(b)(3)(A); and six levels for acting

under color of law, Sentencing Guidelines § 2H1.1(b)(1). Doc. 256, at 10. Under a criminal history I, Brown's resulting Sentencing Guidelines range was 70 to 87 months' imprisonment. See Doc. 256, at 18.

Brown objected to using aggravated assault as the underlying offense. Doc. 234. He argued that the indictment alleged numerous ways in which he used force against J.B., some of which did not involve the use of a dangerous weapon, and the jury did not specify which of those ways formed the basis for its verdict. Doc. 234, at 5. He also noted that the jury did not find that he intended to cause bodily injury and that the definition of bodily injury under Section 242 is much broader than the definition in the Application Notes to the aggravated assault guideline.[8] Doc. 234, at 5. Brown asserted that the guideline most applicable to his offense was not subsection (a)(1) of 2H1.1 but, rather, subsection (a)(3), which provides a base offense level of 10 if, among other things, the offense involved "the use or threat of force against a person." Doc. 234, at 4-5. Brown argued that, under this

[8] The Eleventh Circuit has defined bodily injury for purposes of Section 242 by using the common definition of the term that exists elsewhere in the United States Code: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." *United States* v. *Myers*, 972 F.2d 1566, 1572-1573 (11th Cir. 1992) (citing 18 U.S.C. 831(f)(4), 1365(g)(4), 1515(a)(5), and 1864(d)(2)), cert. denied, 507 U.S. 2017 (1993). For purposes of the aggravated assault guideline, bodily injury is defined as "any significant injury; *e.g.*, an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." Sentencing Guidelines § 1B1.1, comment. (n.1(B)).

calculation, his applicable sentencing range was 21 to 27 months' imprisonment. Doc. 234, at 5.

The government responded that a taser is a dangerous weapon for purposes of the guideline, and that Brown's intent to cause bodily injury can be inferred from his actions. Doc. 241, at 9. The government also asserted that a defendant's intent to cause bodily injury is measured objectively, *i.e.*, what someone in the victim's position might reasonably conclude from the assailant's conduct, and not by the actor's subjective motivation. Doc. 241, at 10 (citing *United States* v. *Velasco*, 855 F.3d 691, 693 (5th Cir. 2017)).

After a hearing (Doc. 273), the district court issued an order concluding that Brown's underlying conduct for sentencing purposes was not aggravated assault. Doc. 278. The district court determined there was insufficient evidence to find that "Brown's intent in using the Taser was to cause bodily injury, rather than to gain control over J.B." Doc. 278, at 17. Despite evidence that J.B. sustained taser puncture wounds, the court also found that there was no evidence that Brown's taser actually electroshocked J.B., given the absence of evidence of penetration marks on J.B.'s right leg and chest, the spots Brown reported his taser probes struck J.B.'s body. Doc. 278 at 16-17. Further, the court suggested that Brown may have been mistaken that his taser actually deployed because the sound may have been inaudible due to ambient outdoor noise. Doc. 278, at 17.

ii. On February 27, 2018, the district court sentenced Brown on the Section 242 charge. Doc. 330. Given the court's conclusion that Brown's conduct did not satisfy the aggravated assault guideline, the Probation Office recalculated Brown's total offense level by starting with a base offense level of 10 for his use of force against the victim (Sentencing Guidelines § 2H1.1(a)(3)(A)), and adding six levels for acting under color of law (Sentencing Guidelines § 2H1.1(b)(1)). Doc. 305, at 9-10. Based on a total offense level of 16, Brown's recommended Guidelines range was 21 to 27 months' imprisonment. Doc. 330, at 4. The court imposed a non-custodial sentence of three years' probation. Doc. 330, at 66-67; see generally Doc. 330, at 45-66 (summarizing the parties' arguments and applying the Section 3553(a) factors).

On February 28, 2018, Brown filed a timely notice of appeal of his conviction and the denial of his post-trial motions. Doc. 295. On April 4, 2018, the government filed a timely notice of cross-appeal of Brown's non-custodial sentence. Doc. 317.

SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to support Brown's conviction for violating 18 U.S.C. 242. Brown's argument that the evidence fails to support two elements of the offense—use of excessive force and willfulness—is not correct. First, the evidence showed that Brown kicked, punched, and tased J.B. in response

to J.B.'s passive resistance to arrest. Because J.B. did not try to escape, and did not endanger Brown or the other officers on the scene, a jury could reasonably conclude that Brown's use of violent, physical force was objectively unreasonable.

Second, the evidence was sufficient to establish willfulness. Willfulness requires proof that Brown acted with the specific intent to deprive J.B. of a federal right made definite by decision or other rule of law, or in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. The evidence at trial showed that Brown intentionally assaulted and battered the victim, knew department policy prohibited the use of excessive force and had received training in the proper use of force, and attempted to conceal his conduct by omitting a true and full description of his force from his Officer Report after the incident. This evidence was more than sufficient for the jury to find that his deprivation of J.B.'s constitutional right to be free of excessive force was willful.

2. The district court did not abuse its discretion in denying Brown's motion for a new trial on his Section 242 conviction based on the weight of the evidence. Motions for a new trial based on the weight of the evidence are not favored, and are generally limited to "exceptional cases" where the credibility of a government's witness has been impeached and its case has uncertainties and discrepancies. Here, the government presented significant, and largely

uncontroverted, evidence that Brown used "hard force" against a passively resisting J.B. in violation of BBPD policies of which he was aware, and that he subsequently attempted to conceal his conduct by omitting a true and full account of the force from his Officer Report on the incident.

Brown relies heavily on the fact that his two co-defendants were acquitted of violating Section 242. But the mere fact that the jury acquitted Brown's co-defendants falls far short of satisfying Brown's burden to show that he is entitled to a new trial. The evidence shows that Brown was more culpable than his acquitted co-defendants; in any event, verdicts against co-defendants are irrelevant to the issue of whether the evidence supporting the defendant's conviction is sufficiently weak to warrant a new trial. Accordingly, the evidence did not preponderate heavily against the jury's verdict that Brown was guilty of violating 18 U.S.C. 242, such that it would be a miscarriage of justice to let the verdict stand.

3. Cross-Appeal. The district court erred in declining to use aggravated assault as the underlying offense in calculating Brown's Sentencing Guidelines range for his Section 242 conviction. Section 2H1.1 of the Sentencing Guidelines, the applicable guideline for a Section 242 conviction, requires a sentencing court to apply the offense level of any underlying offense. In this case, the underlying offense was Brown's assault of J.B., including his use of a taser. Under Sentencing Guidelines § 2A2.2, an aggravated assault is "a felonious assault that

involved * * * a dangerous weapon with intent to cause bodily injury (*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1). The government proved by a preponderance of the evidence that Brown's assault constituted an aggravated assault, *i.e.*, that Brown had the objective intent to cause J.B. bodily injury when he shot J.B. with the taser probes.

The district court erred in concluding that Brown's corresponding intent to gain control over J.B. precluded a finding that he had the intent to cause J.B. bodily injury. These two motives are not mutually exclusive. The court also erred in viewing the issue of whether Brown's taser actually electroshocked J.B. as relevant to this inquiry. For these reasons, this Court should vacate Brown's sentence and remand for resentencing using aggravated assault as the underlying offense.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN BROWN'S CONVICTION FOR VIOLATING 18 U.S.C. 242

A. Standard Of Review

This Court reviews *de novo* challenges to the sufficiency of the evidence. *United States* v. *Reeves*, 742 F.3d 487, 497 (11th Cir. 2014). In so doing, the Court "view[s] the evidence in a light most favorable to the jury verdict and draw[s] all inferences in its favor." *Ibid.* The Court is "obliged to affirm the conviction[] if a

reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Ibid.*

B. The Evidence Was Sufficient To Establish That Brown Used Excessive Force Against J.B. And Did So Willfully

To establish that a defendant violated 18 U.S.C. 242, the government must prove beyond a reasonable doubt that he "acted (1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *United States* v. *House*, 684 F.3d 1173, 1198 (11th Cir. 2012) (internal quotation marks and citation omitted), cert. denied, 568 U.S. 1249 (2013). Where, as here, the defendant is a police officer charged with using excessive force in making an arrest, the constitutional right deprived is the Fourth Amendment right to be free from unreasonable seizures. See *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). Whether the defendant officer violated this right is a function of "whether the officer[']s] actions are 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation." *Id.* at 397.

Brown argues that the evidence failed to establish two elements of a Section 242 violation: that he deprived J.B. of his Fourth Amendment right to be free from

objectively unreasonable force, and that he did so willfully.[9] Neither argument is persuasive. Viewing the evidence in the light most favorable to the verdict, a reasonable jury could easily conclude that Brown willfully deprived J.B. of his constitutional right to be free from excessive force.

1. Brown's Use Of Force Against J.B. Was Objectively Unreasonable

a. First, the evidence was more than sufficient to establish that Brown's use of force against J.B. was objectively unreasonable. "Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal quotation marks and citations omitted). In making this determination, this Court "weigh[s] the quantum of force employed against the severity of the crime at issue; whether the suspect poses an immediate threat to the safety of the officers or others; and whether the suspect actively resisted arrest or attempted to evade arrest by flight." *Dukes* v. *Deaton*, 852 F.3d 1035, 1042 (11th Cir.) (internal quotation marks and citation omitted), cert. denied, 138 S. Ct. 72 (2017). "More force is appropriate for a more serious offense and less force is appropriate for a less serious one." *Salvato* v.

[9] Brown does not dispute that he acted under color of law as a BBPD officer. Br. 20.

Miley, 790 F.3d 1286, 1293 (11th Cir. 2015) (internal quotation marks, citation, and alteration omitted).

Application of the above factors to the facts, viewed in the light most favorable to the verdict, establishes that Brown used excessive force against J.B. Brown does not dispute that he kicked, struck, and twice tased J.B. Brown acknowledged in *all versions* of his Officer Report that he used force in response to nothing more than J.B.'s failure to comply with loud verbal commands—either to exit the vehicle or place his hands on the dashboard. See Doc. 211-1, at 117-123 (GX 8d). Brown did not give J.B. the opportunity to comply with these commands before initiating force. Doc. 324, at 103-105. BBPD Sergeant Sedrick Aiken, the government's use-of-force expert, testified that J.B.'s conduct as described by Brown constituted "passive resistance" for which BBPD policy did not permit the "hard force" Brown employed to gain J.B.'s compliance. Doc. 324, at 79-81, 116-119; see *United States* v. *Myers*, 972 F.2d 1566, 1574 (11th Cir. 1992) ("In determining whether a defendant in an excessive force case has acted 'reasonably,' it is proper to look to the existence of police regulations."), cert. denied, 507 U.S. 1017 (1993). Because J.B. did not attempt to escape, and his relatively minor "crime" of resisting arrest without violence did not pose an "immediate threat" to the safety of Brown or the other officers on the scene, *Dukes*, 852 F.3d at 1042, a jury could conclude that Brown's responsive use of hard force was not objectively

reasonable under the circumstances. See, *e.g.*, *Stephens* v. *DeGiovanni*, 852 F.3d 1298, 1321-1324 (11th Cir. 2017) (officer's forceful striking of motorist in chest and twisting of his hand and fingers was excessive force where motorist was charged with misdemeanors, posed no threat to the safety of officer or others, and did not attempt to flee the scene); *Brown* v. *City of Golden Valley*, 574 F.3d 491, 496-498 (8th Cir. 2009) (reasonable jury could conclude that officer's tasing of automobile passenger violated her Fourth Amendment rights where passenger disobeyed officer's command to hang up her cell phone but posed a minimal safety threat and was not actively resisting arrest or attempting to flee).

b. Brown's central argument is that J.B. exhibited *active* resistance, not passive resistance, and therefore his use of force was objectively reasonable. This argument is without merit.

Brown asserts that the totality of the circumstances confronting him when he used force against J.B. included J.B. and his companions' intentional running over of a police officer, leading police officers on a high-speed chase, and intentional ramming Brown's vehicle while attempting to resist arrest. Br. 29-30; see also Br. 25-26. Brown suggests that this conduct is attributable to J.B., and therefore J.B. was an active resister. But this argument is not correct. Brown had no reason to believe that J.B., as the passenger, had anything to do with the manner in which the vehicle was driven. See *Golden Valley*, 574 F.3d at 497; Doc. 325, at 32-33

(Aiken testimony that under BBPD policy, officers may not use force against a passenger based on the actions of the driver, but instead must treat the passenger based on his and only his behavior). Thus, J.B.'s offense was, at most, the misdemeanor offense of resisting arrest without violence (see Doc. 211-1, at 56-57 (GX 6)), and the only relevant conduct confronting Brown at the time he used force was J.B.'s ignoring of loud verbal commands. J.B.'s passive, non-threatening resistance did not warrant Brown's kicking, punching, and tasing him in response.

Brown supports his argument by suggesting (Br. 29-30) that absent his use of "hard force," the standoff with J.B. would have continued indefinitely. But a police officer faced with a passively resisting suspect does not have the choice between either using hard force and using no force. Instead, the Fourth Amendment requires that the officer use force that is "'objectively reasonable' in light of the facts and circumstances confronting" him. *Graham*, 490 U.S. at 397. Sergeant Aiken testified that BBPD policy incorporates this constitutional standard and authorizes an officer faced with passive resistance like J.B.'s to use "soft control" techniques, like pressure points and escort procedures, to gain control. Doc. 324, at 80-81, 116-118. A reasonable jury could therefore conclude that Brown's bypassing of these techniques in favor of hard force was objectively unreasonable. See, *e.g.*, *Phillips* v. *Community Ins. Corp.*, 678 F.3d 513, 525 (7th

Cir. 2012) (noting that while officers were entitled to use force to remove driver who refused commands to exit vehicle, "we have never suggested that any level of force is permissible to extinguish such a threat"); *Bryan* v. *MacPherson*, 630 F.3d 805, 830 (9th Cir. 2010) ("Even purely passive resistance can support the use of some force, but the level of force an individual's resistance will support is dependent on the factual circumstances underlying that resistance."); *Shreve* v. *Jessamine Cty. Fiscal Court*, 453 F.3d 681, 687 (6th Cir. 2006) (deputies' interest in ending suspect's passive resistance "justified their alleged use of pressure point submissions and the placing of a knee across [her] back to prevent her from wriggling free," but not repeatedly striking her in the head and neck area with a stick and jumping up and down her back with a knee).

Finally, Brown's incomplete and out-of-context citation (Br. 27, 30) of BBPD Officer Patrick Monteith's testimony does not support his contention that J.B. engaged in active resistance that warranted Brown's responsive use of hard force. Brown cites Monteith's testimony that when Monteith arrived at the arrest scene, J.B. was "being moved" by the officers and "kept jerking in and out of the vehicle" and, in response, Monteith pulled out his baton. Doc. 322, at 220-221. Brown's interpretation of this testimony as evidence that J.B. actively resisted arrest is belied by Monteith's subsequent testimony, which Brown fails to cite, that J.B. was wearing a seatbelt at the time Monteith witnessed him moving back and

forth and could not exit the vehicle even if he wanted to. Doc. 322, at 223. Indeed, Sergeant Aiken testified that an individual in J.B.'s situation is engaged in passive, not active, resistance. Doc. 325, at 30-31. Therefore, Monteith's testimony, viewed as a whole and in the light most favorable to the verdict, establishes that J.B. engaged in at most passive resistance. Indeed, that is the *only* logical conclusion to draw in light of Aiken's testimony, as well as Brown's Officer Report on the incident, which stated that Brown used force in response to J.B.'s failure to comply with loud verbal commands.

2. Brown Acted Willfully In Using Excessive Force Against J.B.

a. The evidence was also sufficient to establish that Brown acted *willfully* in using excessive force against J.B. To act "willfully" means that the defendant "act[ed] with 'a specific intent to deprive a person of a federal right made definite by decision or other rule of law,' or 'in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite.'" *House*, 684 F.3d at 1199-1200 (quoting *Screws* v. *United States*, 325 U.S. 91, 103, 105 (1945)). Section 242 thus applies when the defendant understands that he is unjustifiably invading a legally protected interest, or acts in reckless disregard of the law. But the defendant need not have been "thinking in constitutional terms," as long as his "aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." *Screws*, 325 U.S. at 106. In

other words, the defendant must "intend[] to accomplish that which the Constitution forbids." *United States* v. *Koon*, 34 F.3d 1416, 1449 (9th Cir. 1994), rev'd in part on other grounds, 518 U.S. 81 (1996). In determining "a defendant's intent, the defendant's subsequent conduct may be considered if it supports a reasonable inference as to his prior intent." *House*, 684 F.3d at 1200 (internal quotation marks, citation, and alteration omitted).

The government's evidence, viewed in the light most favorable to the verdict, was more than sufficient to permit the jury to conclude that Brown acted willfully. Brown intentionally assaulted and battered J.B. while J.B. was sitting in the car and restrained with a seatbelt. In his initial Officer Report following the incident, Brown stated that he twice deployed a taser against J.B. in response to J.B.'s failure to follow loud verbal commands to exit the vehicle, but he omitted that he kicked and punched J.B. before using the taser. See Doc. 211-1, at 122-123 (GX 8d). It was only after viewing the helicopter video of the incident that Brown changed his Officer Report to admit that he also struck J.B. several times with a closed fist after J.B. refused to comply with loud verbal commands to place his hands on the dashboard, and deployed a taser after J.B. still refused to comply. See Doc. 211-1, at 117-122 (GX 8d). But Brown still omitted that he kicked J.B. See Doc. 211-1, at 117-123 (GX 8d); Doc. 324, at 137. A jury could view Brown's failure to report the true and full extent of the force he used against J.B. as an

attempt to minimize his use of force, and thus as evidence that his conduct was willful. See *House*, 684 F.3d at 1202 (officer's "attempt[] to conceal his actions by making false statements in his incident reports" supported jury's finding that he acted willfully when he seized motorists in violation of the Fourth Amendment).

Brown's training in the use of force also supports the jury's finding of willfulness. Sergeant Aiken testified that Brown received training on the lawful use of force in March 2014, five months before the incident. Doc. 324, at 88-91; see Doc. 211-2, at 23 (GX 21a), 33 (GX 21d). Despite knowing that it was appropriate to use soft control techniques when confronted by passive resistance to arrest, such as J.B.'s, Brown chose to use hard force—punches, kicks, and a taser—to gain J.B.'s compliance. The jury could therefore have viewed Brown's prior training as evidence that his conduct was willful. See *United States* v. *Rodella*, 804 F.3d 1317, 1338 (10th Cir. 2015) (holding that evidence of training defendant police officer received on pursuit of suspect vehicles was relevant to show he acted willfully in unlawfully arresting victim and subjecting victim to excessive force), cert. denied, 137 S. Ct. 37 (2016).

b. Brown asserts that neither his Officer Reports nor his training in the use of force supports the jury's finding of willfulness. First, he asserts that he did indicate on his Use Of Force Report—a separate report from the Officer Report—that he used punches, kicks, and a taser against J.B., and that his failure also to

mention those uses of force in his Officer Report was at worst a violation of BBPD policy and "scrivener's error" that did not evince willfulness. Br. 32-33. Because a Use Of Force Report, unlike an Officer Report, does not include a detailed description of the amount and circumstances of the force the officer used, its probative value as to whether this force was reasonable or excessive—and thus, whether the officer is trying to conceal unlawful conduct—is minimal.[10] Moreover, Brown neglects to mention in this argument (although he does so in his factual summary) that in completing his Use Of Force Report he also checked the box indicating that J.B. "[r]esisted by physically or actively refusing to submit to restraint." Doc. 211-1, at 140 (GX 9a). As we noted above, the evidence viewed in the light most favorable to the verdict does not support Brown's claim that J.B. actively resisted arrest. See pp. 18-23, *supra*. By falsely suggesting that his use of force against J.B. was a justified response to J.B.'s active resistance, Brown's Use

[10] A Use Of Force Report is a document generated from a Word template with check boxes for an officer to indicate what type of force he used against a suspect; there is no place on the form to write a narrative detailing the force used. See Doc. 322, at 95; Doc. 323, at 49-51, 170-171, 234; Doc. 324, at 6-8. It is a BBPD internal document that is used to compile use-of-force statistics and for training purposes. See Doc. 322, at 124; Doc. 323, at 49-50. By contrast, the Officer Report is a narrative in which the officer is supposed to describe in detail the events that occurred, the force he used, and why he used it. See Doc. 322, at 96-97; Doc. 323, at 49-50, 171-172. The Officer Report is part of the BBPD records management system and is a public record that goes to the State Attorney's Office for prosecution purposes. See Doc. 322, at 95; Doc. 323, at 50-51.

Of Force Report supports rather than undermines the jury's finding of willfulness. See *House*, 684 F.3d at 1202.

Further, Brown contends (Br. 33) that the jury's acquittal of Harris and Ryan of the Section 242 charges against them "speaks volumes to this point" because they submitted similarly deficient Officer Reports. But it is well-settled that "jury verdicts are insulated from review on the ground that they are inconsistent." *United States* v. *Mitchell*, 146 F.3d 1338, 1344 (11th Cir.) (internal quotation marks, citation, and alteration omitted), cert. denied, 525 U.S. 1031 (1998). Indeed, Brown subsequently concedes in his opening brief (addressing the denial of his motion for a new trial) that inconsistencies in the jury's verdicts do not mandate his acquittal on the Section 242 count. See p. 31, *infra*.

Brown also asserts that his training on the use of force did not support the jury's finding of willfulness because, unlike the police officer in *Rodella*, there was no evidence that he failed to follow that training or that his actions were impermissible under BBPD policies. Br. 33-35. In fact, there was ample evidence in this case that Brown failed to follow BBPD policies regarding the appropriate uses of soft and hard force, which incorporate the Fourth Amendment's "objective reasonableness" standard. See Doc. 324, at 79-81, 116-119 (Aiken testimony). Rather than address this evidence, Brown observes (Br. 34-35) that Officer Ryan received the same training, also administered hard force, and yet was acquitted of

the charges against him. Brown asserts (Br. 35) that this result "necessarily means that [the jury] found that Ryan's use of hard force was appropriate to [J.B.'s] active resistance and that the training received was followed." But "inquiry into the jury's thought processes" is an inappropriate judicial task, and *Ryan's* acquittal is irrelevant to the issue of whether the evidence supporting *Brown's* conviction was sufficient. *Mitchell*, 146 F.3d at 1344.

Finally, Brown asserts that the jury was instructed that willfulness requires that he acted with "the specific intent to do something that has at its heart a 'bad purpose,'" but that the government failed to present "direct evidence of a bad purpose" in the form of evidence of animus, slurs, retaliation, or retribution. Br. 32 (citation omitted).[11] To the extent that Brown implies that the government was required to show he had some *morally* bad purpose, beyond the "bad purpose" to violate the law, he is mistaken. Although the Supreme Court has described "a 'willful' act" in the criminal context "[a]s one undertaken with a 'bad purpose,'" the Court also made clear that "in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan* v. *United States*, 524 U.S. 184, 191-92 (1998)

[11] The district court instructed the jury that "[t]he word 'willfully' means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is with the bad purpose to disobey or disregard the law." Doc. 155, at 20.

(internal quotation marks and citation omitted). Under this standard, the defendant's animosity (or lack thereof) toward the victim is irrelevant. The jury instruction here fully comported with this standard. Accordingly, the willfulness element was satisfied here by evidence that Brown knew department policy prohibited the use of excessive force and had received training in the proper use of force, and attempted to conceal his conduct by omitting a true and full description of his force from his Officer Report after the incident.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING BROWN'S MOTION FOR A NEW TRIAL ON HIS SECTION 242 CONVICTION BASED ON THE WEIGHT OF THE EVIDENCE

A. Standard Of Review

This Court reviews for abuse of discretion a district court's denial of a defendant's motion for a new trial based on the weight of the evidence. See *United States* v. *Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). Granting such a motion is "not favored," and is reserved for "really exceptional cases." *Id.* at 1313 (internal quotation marks and citation omitted). For this reason, a "court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Id.* at 1312-1313. Instead, "[t]he evidence must preponderate heavily against the verdict, such that it would be a miscarriage of

justice to let the verdict stand." *Id.* at 1313; accord *United States* v. *Hernandez*, 433 F.3d 1328, 1335 (11th Cir. 2005), cert. denied, 547 U.S. 1047 (2006).

B. The Evidence Fully Supports The Jury's Verdict That Brown Was Guilty Of Violating 18 U.S.C. 242

Brown asks this Court to reverse the district court's denial of his motion for a new trial. The crux of Brown's motion is that the evidence does not support the verdict. But this is not one of those "exceptional cases" in which the trial court should have interfered with the jury's factual findings to prevent a miscarriage of justice. *Martinez*, 763 F.2d at 1313.[12]

This Court has recognized that a grant of a new trial based on the weight of the evidence is generally limited to circumstances "where the credibility of the government's witnesses had been impeached and the government's case had been marked by uncertainties and discrepancies." *Martinez*, 763 F.2d at 1313.[13] That did not occur here. The government presented significant, and largely

---

[12] Because the Federal Rule of Criminal Procedure 29 (acquittal) and Federal Rule of Criminal Procedure 33 (new trial) standards are not identical, a district court may grant a new trial based on the weight of the evidence where the evidence was sufficient for conviction in the "rare" case "in which the evidence of guilt although legally sufficient is thin and marked by uncertainties and discrepancies." *Butcher* v. *United States*, 368 F.3d 1290, 1297 n.4 (11th Cir. 2004) (internal quotation marks and citation omitted).

[13] Recent decisions of this Court, although unpublished, make clear that *Martinez* remains the standard in this Court. See, *e.g.*, *United States* v. *Coleman*, 710 F. App'x 414, 417 (11th Cir. 2017); *United States* v. *Brooks*, 647 F. App'x 988, 993 (11th Cir.), cert. denied, 137 S. Ct. 165 (2016).

uncontroverted, evidence that Brown used violent force against a passively resisting J.B. in violation of BBPD policies of which he was aware, and that he subsequently attempted to conceal his conduct by omitting a true and full account of the force from his Officer Report on the incident. See pp. 16-29, *supra*. Because this evidence amply supported the jury's verdict that Brown was guilty of violating 18 U.S.C. 242, the district court did not clearly abuse its discretion in concluding that the evidence did not preponderate heavily against the jury's verdict such that it would be a miscarriage of justice to let the verdict stand. See *United States* v. *Cox*, 995 F.2d 1041, 1045-1046 (11th Cir. 1993); *Martinez*, 763 F.2d at 1313-1314.

On appeal, Brown fails to point to any instance where the credibility of any of the government's witnesses had been impeached or to any uncertainties and discrepancies in its case. Instead, his challenge to the district court's denial of a new trial rests solely on the alleged inconsistency between his conviction and the jury's acquittals of his co-defendants Harris and Ryan, who he claims engaged in the same conduct. Br. 35-42. Brown concedes, as he must, that inconsistencies in the jury's verdicts do not mandate his acquittal on the Section 242 count. Nevertheless, he contends that "extraordinary circumstances" exist here and his conviction constitutes a miscarriage of justice that warrants a new trial. Br. 38-40.

No such circumstances exist here. First, Brown states that Aiken, after viewing the enhanced video of the incident at sentencing, changed his view of the evidence and stated that he believed that Brown had holstered his weapon before striking J.B. Brown asserts that this "recantation of critical testimony about the single factual allegation which set [Brown's] actions apart from his acquitted co-defendants" makes this case "extraordinary." Br. 39-40, 42. The district court correctly determined, however, that it could not consider the enhanced video in deciding Brown's motion for a new trial because the video was not introduced at trial. See Doc. 280, at 4; *Martinez*, 763 F.2d at 1312-1313 (presuming that a district court takes into account only the evidence that was before the jury in determining whether it would be a miscarriage of justice to let the verdict stand). Brown does not argue otherwise. Indeed, there is a separate procedure and standard for a motion for a new trial on the ground of newly discovered evidence. See Fed. R. Crim. P. 33(b)(1); *United States* v. *Thompson*, 422 F.3d 1285, 1294 (11th Cir. 2005). By his own acknowledgment, Brown did not avail himself of this procedure and standard. For these reasons, this Court should also disregard his references to the enhanced video.

Even if this Court considers Aiken's testimony about the enhanced video, it would not make a difference in this case. The factual predicate of Brown's argument—that "[t]he sole factor which set [Brown's] actions apart from the

[actions] of his acquitted co-defendants was the Government's argument that he held a gun in his hand when administering hard force to [J.B.] in response to his resistance" (Br. 39)—is incorrect. The record evidence indicates that Brown was the first officer to use force against J.B., and initiated force without giving J.B. an opportunity to comply with his verbal commands. Doc. 305, at 5; Doc. 324, at 103-105. Although all three officers struck J.B. while he was in the car passively resisting arrest, Brown was the only officer who also kicked J.B. and successfully deployed a taser against him during that time. Doc. 305, at 5. As the district court concluded, Brown's *total* use of hard force in response to J.B.'s passive resistance, and the circumstances of that force, justified his conviction on the Section 242 charge regardless of whether he had a gun in his hand when he punched J.B. See Doc. 280, at 5 ("The Court does not find that the weight of the evidence preponderates heavily against a finding that Officer Brown used unreasonable force through means other than punching J.B. with a gun in his hand."). Reweighing the evidence and setting aside this conviction because his less culpable co-defendants were acquitted would not be a "reasonable" result, much less a correction of a miscarriage of justice. *Martinez*, 763 F.2d at 1312-1313.

In any event, even if the evidence against Brown was identical to the evidence against Harris and Ryan, this case would not be the "rare" one warranting the relief of a new trial. *Butcher* v. *United States*, 368 F.3d 1290, 1297 n.4 (11th

Cir. 2004). Brown cites no authority showing that the jury's conviction of a defendant and acquittal of similarly situated co-defendants charged with the same crime alone proves a miscarriage of justice warranting a new trial. Indeed, because the government "is precluded from challenging the acquittal[s], it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course." *United States* v. *Powell*, 469 U.S. 57, 65 (1984) (rejecting argument that conviction must be vacated on ground of inconsistency of verdicts). Accordingly, this Court's precedents involving new-trial motions make no mention of verdicts against *co-defendants*; instead, the case law focuses on the *defendant*, who must show that the government's case against him is weak and "marked by uncertainties and discrepancies." *Butcher*, 368 F.3d at 1297 n.4; *Martinez*, 763 F.2d at 1313. Because Brown does not argue, much less show, that the government's evidence was deficient in this way, his claim for a new trial must fail.[14]

---

[14] Brown's citation (Br. 38-39, 41-42) to conspiracy cases does not help him, as they merely reiterate and apply well-settled precedent on the evidence necessary to uphold a jury's verdict against sufficiency and new-trial challenges. In *United States* v. *Brito*, 721 F.2d 743 (11th Cir. 1983), this Court observed that "inconsistent verdicts in conspiracy cases can be analytically troubling," requiring that "this Court * * * give particular attention to its review of the sufficiency of the evidence." *Id.* at 749-750. But the *Brito* Court then noted that its only task in reviewing a conspiracy conviction against a sufficiency challenge was "to determin[e] whether the evidence, viewed in the light most favorable to the government, permitted reasonable jurors to have found guilt beyond a reasonable

(continued…)

III

THE DISTRICT COURT ERRED IN DECLINING TO USE AGGRAVATED ASSAULT AS THE UNDERLYING OFFENSE TO CALCULATE BROWN'S SENTENCING GUIDELINES RANGE FOR HIS SECTION 242 CONVICTION (CROSS-APPEAL)

A. Standard Of Review

"If a district court improperly calculates the appropriate sentencing guidelines range, the court commits procedural error." *United States* v. *Hill*, 783 F.3d 842, 844 (11th Cir. 2015). "This Court reviews the district court's interpretation and application of the guidelines to factual findings *de novo*." *Ibid.* "When the district court's application of sentencing guidelines to facts involves primarily a legal decision, such as the interpretation of a statutory term, less deference is due to the district court than when the determination is primarily factual." *United States* v. *Williams*, 340 F.3d 1231, 1239 (11th Cir. 2003) (citation omitted).

(…continued)
doubt." *Id.* at 750. In *United States* v. *Walden*, 393 F. Supp. 2d 1324 (S.D. Fla. 2005), the district court applied *Martinez* and *Cox* and ordered a new trial on defendant's conviction for conspiracy to steal cocaine, despite denying his motion for judgment of acquittal, where the government's only evidence of the defendant's intent was a single post-arrest statement and its case was "based on uncertainties and compound inferences." *Id.* at 1337-1340. The government's case here did not have the weaknesses the *Walden* court found dispositive.

B. The District Court Erred In Declining To Use Aggravated Assault As The Underlying Offense In Sentencing Brown

In calculating Brown's Sentencing Guidelines range under Section 2H1.1, the applicable guideline for a violation of 18 U.S.C. 242, the district court rejected the PSR's use of aggravated assault as the underlying offense. Doc. 278, at 15-17. Sentencing Guidelines § 2A2.2 defines aggravated assault as "a felonious assault that involved * * * a dangerous weapon *with intent to cause bodily injury* (*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added). The district court concluded that there was insufficient evidence to find that "Brown's intent in using the Taser was to cause bodily injury, rather than to gain control over J.B." Doc. 278, at 17. But in reaching this conclusion, the court relied on an erroneous understanding of the "intent to cause bodily injury" standard. An intent to gain control and an intent to cause bodily injury are not mutually exclusive motives. Accordingly, because the district court did not apply the correct standard for "intent to cause bodily injury," and the government proved by a preponderance of the evidence that Brown deployed his taser against J.B. with that intent, this Court should vacate his sentence and remand for resentencing using aggravated assault as the underlying offense.

1. Brown was found guilty of using excessive force against J.B. in violation of 18 U.S.C. 242 (deprivation of rights under color of law). Section 2H1.1 of the

Sentencing Guidelines (Offenses Involving Individual Rights), the guideline applicable to Section 242 convictions, provides that the base offense level is "the offense level from the offense guideline applicable to any underlying offense." Sentencing Guidelines § 2H1.1(a)(1). The PSR determined that the underlying offense for the Section 242 violation is aggravated assault, Section 2A2.2, based on Brown's use of a taser against J.B. Doc. 256, at 10.

Section 2A2.2 defines aggravated assault, as relevant here, as "a felonious assault that involved * * * a dangerous weapon *with intent to cause bodily injury* (*i.e.*, not merely to frighten) with that weapon." Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added).[15] The evidence presented at trial and the sentencing hearing established, by a preponderance of the evidence, that Brown's actions satisfied that standard.

First, a defendant's intent to cause bodily injury is determined objectively and may be determined from the surrounding circumstances, including by considering "what someone in the victim's position might reasonably conclude from the assailant's conduct." *United States* v. *Velasco*, 855 F.3d 691, 693 (5th

[15] As a threshold matter, there is no dispute that when Brown shot J.B. with a taser, he used a "dangerous weapon." Brown acknowledged that a taser satisfies the applicable definition (see Doc. 278, at 15), and case law supports this concession. See, *e.g.*, *United States* v. *Quiver*, 805 F.3d 1269, 1271 & n.1, 1272 (10th Cir. 2015) (explaining that a taser is a dangerous weapon capable of inflicting serious bodily injury for purposes of Sentencing Guidelines § 2A2.2(b)(2)).

Cir. 2017); accord *United States* v. *Carroll*, 3 F.3d 98, 100 & n.4 (4th Cir. 1993) (for purposes of the aggravated assault guideline of Section 2A2.2, "intent to do bodily harm must 'be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude'") (quoting *United States* v. *Perez*, 897 F.2d 751, 753 (5th Cir.), cert. denied, 498 U.S. 865 (1990)). Decisions of this Court are consistent with this analysis. For example, in *United States* v. *Park*, 988 F.2d 107, 110 (11th Cir.), cert. denied, 510 U.S. 882 (1993), this Court applied an older version of Section 2A2.2 and rejected defendant's claim that he did not intend to harm victims whom he threatened with a metal pipe. This Court explained that the district court was not required to believe defendant's testimony in the face of contrary evidence, which included one victim's statement that she feared for her life. See *ibid.*

Moreover, in *United States* v. *Guilbert*, 692 F.2d 1340 (11th Cir. 1982), cert. denied, 460 U.S. 1016 (1983), this Court concluded that the "intent to do bodily harm" element of the federal assault-with-a-dangerous-weapon statute, 18 U.S.C. 113, is measured objectively. In that case, the Court explained that the intent to do bodily harm "'is not to be measured by the secret motive of the actor, or some undisclosed purpose merely to frighten, not to hurt,' but rather 'is to be judged objectively from the visible conduct of the actor and what one in the position of the victim might reasonably conclude.'" *Id.* at 1344 (quoting *Shaffer* v. *United States*,

308 F.2d 654, 655 (5th Cir. 1962), cert. denied, 373 U.S. 939 (1963)); see also *Perez*, 897 F.2d at 753 (applying *Shaffer* objective test to judge intent for Section 2A2.2's definition of aggravated assault with a dangerous weapon).

Under this standard, the evidence supports the conclusion that Brown intended to cause bodily injury by tasing J.B. After the vehicle containing J.B. finally stopped at the end of a high speed chase, Brown walked up to the front passenger side of the car, opened the door, and kicked and hit J.B. without giving him the opportunity to comply with loud verbal commands. Then, contrary to BBPD policy,[16] Brown deployed his taser on a passively resisting victim by twice pulling the trigger and releasing the taser's probes. A taser is *designed* to cause bodily injury and incapacitate its target, and therefore there is no reason to fire a taser *other than* to bring about incapacitation through bodily injury. See *Rodriguez* v. *County of L.A.*, 891 F.3d 776, 796 (9th Cir. 2018) ("taser is a 'painful and dangerous device'") (citation omitted); see also *Bryan* v. *MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010) (explaining that pain from a taser "is intense, is felt throughout the body, and is administered by effectively commandeering the victim's muscles and nerves," and that "[b]eyond the experience of pain, tasers result in 'immobilization, disorientation, loss of balance, and weakness,' even after

[16] Aiken testified that BBPD policy limits an officer's taser use to responding to a suspect's active resistance, *i.e.*, flailing arms and legs, tensing muscles, or taking a fighting stance toward the officer. Doc. 324, at 78-80.

the electrical current has ended") (citation omitted); *Abbott* v. *Sangamon Cty., Ill.*, 705 F.3d 706, 726 (7th Cir. 2013) (collecting cases that have "recognized the intense pain inflicted by a taser").

It is also undisputed that Brown knowingly deployed the taser and that he believed that the taser's probes had struck and penetrated J.B.'s body. Doc. 305, at 5; Doc. 329, at 40-44, 97, 118. The evidence therefore establishes that Brown did not use the taser merely to "frighten" J.B. by threatening to use hard force against him; after all, J.B. had already been physically assaulted by Brown (and other officers). Rather, in deploying the taser by twice squeezing the trigger and releasing the probes, Brown intended to cause bodily injury to J.B., as that is the foreseeable and ordinary result of such action. See *Cavanaugh* v. *Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) (explaining that a taser causes "temporary paralysis and excruciating pain," and that their use "unquestionably 'seizes' the victim in an abrupt and violent manner"); *Velasco*, 855 F.3d at 694; see also *United States* v. *Serrata*, 425 F.3d 886, 909-910 (10th Cir. 2005) (rejecting argument that correctional officer kicked inmate to gain control and therefore did not have intent to cause bodily injury where inmate was kicked in the head while he was on the ground).

2. In reaching the contrary conclusion, the district court relied on an erroneous legal understanding of the "intent to cause bodily injury" standard. The

court ruled that the government failed to show that "Brown's intent in using the Taser was to cause bodily injury, *rather than* to gain control over J.B." Doc. 278, at 17 (emphasis added). But those two motives are not mutually exclusive, and the district court did not cite any authority to the contrary.

In this case, Brown intended to achieve J.B.'s compliance by causing him bodily injury *through* the firing of the taser. Indeed, one of the reasons why a defendant (whether he is a law-enforcement officer or not) might use force against another person is because such force will injure and incapacitate the victim, and thereby render him or her subject to the defendant's control. To be sure, in the context of use of force by law enforcement, an officer's intentional use of physical force—even that which will foreseeably result in bodily injury to the target—is lawful if that use of force is reasonable under the circumstances. See, *e.g.*, *Draper* v. *Reynolds*, 369 F.3d 1270, 1278 (11th Cir.) (asserting that "being struck by a taser gun is an unpleasant experience" but holding officer's use of taser against non-compliant driver was reasonable under the circumstances and therefore officer was not liable under 42 U.S.C. 1983, the civil counterpart to 18 U.S.C. 242), cert. denied, 543 U.S. 988 (2004). Here, however, the jury found beyond a reasonable doubt that Brown's use of force against J.B.—even *if* that force was intended to control J.B.—was *unlawful*. See Doc. 161. More importantly, and contrary to the district court's reasoning, Brown's attempt to gain control of J.B. through physical

force does not negate Brown's intent to cause bodily harm to do so. See *United States* v. *Brown*, 250 F.3d 580, 586 (7th Cir. 2001) (upholding convictions under 18 U.S.C. 242 where defendants used "disproportionate force" to compel the victim's compliance).

The district court buttressed its conclusion that Brown did not act with the intent to cause bodily injury by stating that "there was no evidence that [Brown's] taser actually electroshocked J.B." Doc. 278, at 16. The district court clearly erred in making this finding. First, a preponderance of the evidence supports a finding that Brown did, in fact, electroshock J.B. Brown's own Officer Report indicated that his taser struck J.B. (Doc. 211-1, at 117-123 (GX 8d)), as did Officer Ryan's Officer Report (Doc. 211-1, at 124-129 (GX 8f)). And the court's speculation (which was unsupported by any evidence introduced at trial) that Brown might have been mistaken, given the presence of "ambient noise" (Doc. 278, at 17 (citation omitted)), does not outweigh the government's evidence to the contrary and Brown's and Ryan's own statements.

In any event, even if there was any doubt whether Brown had actually shocked J.B., that doubt would not disprove that Brown committed aggravated assault. Application Note 1 to the guideline defines aggravated assault as "a felonious assault that *involved* * * * a dangerous weapon with *intent to cause bodily injury*." Sentencing Guidelines § 2A2.2, comment. (n.1) (emphasis added).

Under that definition, it suffices if there is an intent to cause bodily injury, even if such injury does not actually occur.[17]

Case law makes this distinction clear. In *United States* v. *Quiver*, 805 F.3d 1269 (10th Cir. 2015), the Tenth Circuit explained that "[u]nder th[is] guideline, an assaulter's using a dangerous weapon *in any fashion* unleashes an unacceptable risk that death or serious bodily injury might follow. Its four levels apply *whether or not* any bodily injury ensues." *Id.* at 1272 (emphasis added) (rejecting argument that taser must be used in a way that is capable of causing death or serious bodily injury for Section 2A2.2(b)(2)(B) to apply). Likewise, in *United States* v. *Dayea*, 32 F.3d 1377, 1380 (9th Cir. 1994), the court explained that "use of a dangerous weapon" requires only use "for the purpose of injuring or threatening to injure" (emphasis omitted). Indeed, when a defendant's use of a dangerous weapon actually causes bodily injury, Sentencing Guidelines § 2A2.2(b)(3) provides extra punishment depending on that injury's severity. See *Quiver*, 805 F.3d at 1272 (Sentencing Guidelines § 2A2.2(b)(2)(B)'s "four levels apply whether or not any bodily injury ensues. When assaulters do in fact cause bodily injuries with

[17] By contrast, the district court's observation might be relevant if Brown claimed that he *brandished* the taser to frighten J.B. and it accidently discharged. In that scenario, the alleged absence of evidence that the taser actually electroshocked J.B. might tend to corroborate Brown's story. But Brown has never argued that he merely brandished the taser. Rather, he asserted in his Officer Report that he *did* shock J.B., and has never contended that that was not the intended result of his actions.

dangerous weapons, the assaulters receive *extra* punishment under § 2A2.2(b)(3) based upon the severity of the bodily injury."). Therefore, whether Brown's taser actually electroshocked J.B. has no bearing on Section 2A2.2's applicability to Brown's use of that dangerous weapon.

3. In sum, the district court erred in rejecting the PSR's recommendation to use aggravated assault as the underlying offense when calculating Brown's recommended sentencing range for his Section 242 conviction. Using aggravated assault as the underlying offense, Brown's total offense level would be 27, resulting in a Sentencing Guidelines range of 70 to 87 months' imprisonment, as reflected in his PSR (compared to the 21 to 27 months guideline range the district court used). Doc. 256, at 10, 18. The case should return to the district court for resentencing under this new Guidelines range.

CONCLUSION

This Court should affirm Brown's conviction. This Court should vacate Brown's sentence and remand the case to the district court with instructions to recalculate his Sentencing Guidelines range using aggravated assault as the underlying offense for his Section 242 conviction.

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General

s/ Christopher C. Wang
THOMAS E. CHANDLER
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115
Chris.Wang@usdoj.gov

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 28.1(e)(2)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 10,776 words.

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5), and the type style requirements of Federal Rules 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/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: September 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE-CROSS-APPELLANT with the United States Court of Appeals for the Eleventh 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.

I further certify that seven paper copies of the foregoing brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney