
IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LADMARALD CATES,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Case No. 2:11-cr-00200-LA-1

The Honorable Judge Lynn Adelman

BRIEF FOR THE UNITED STATES AS APPELLEE

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BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

Pursuant to Circuit Rule 28(b), the United States agrees that the jurisdictional summary in the Appellant's opening brief (Br. 1) is complete and correct.¹

¹ "Doc. __, at __" refers to the document recorded on the district court docket sheet and page number. "Br. __" refers to the Appellant's opening brief by page number. "App. __" refers to the Appellant's Short Appendix by page number.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the Double Jeopardy Clause does not preclude the government from arguing on retrial that, for purposes of the penalty provisions of 18 U.S.C. 242, Cates committed “aggravated sexual abuse” by using force against Iema Lemons to cause her to engage in a sexual act.

2. Whether the district court correctly held that the Double Jeopardy Clause does not preclude the government from arguing on retrial that, for purposes of the penalty provisions of 18 U.S.C. 242, Cates committed “aggravated sexual abuse” by causing Iema Lemons to engage in a sexual act by placing her in fear of death or serious bodily injury.

STATEMENT OF THE CASE

1. Procedural History

a. On September 20, 2011, a federal grand jury in the Eastern District of Wisconsin returned a two-count indictment charging defendant-appellant Ladmarald Cates, a former officer with the Milwaukee Police Department, with violating 18 U.S.C. 242 (deprivation of rights under color of law) (Count 1), and 18 U.S.C. 924(c) (use of a weapon during commission of a crime of violence) (Count 2). Doc. 1; App. 21. These charges arose out of Cates’s sexual assault of Iema Lemons after Cates responded to Lemons’s 911 call. With respect to the Section 242 count (violation of civil rights under color of law), the indictment alleged that Cates’s actions constituted “aggravated sexual abuse” as defined in 18 U.S.C. 2241(a),

which, if found by a jury, would increase the maximum penalty to life in prison.² 18 U.S.C. 2241(a). See Doc. 1, at 1. The indictment also alleged that the assault caused Lemons bodily injury, which, if found by a jury, would increase the maximum penalty from one year to ten years. See App. 21-22; 18 U.S.C. 242.

b. A jury convicted Cates on Count 1 but acquitted him on Count 2. App. 22; Doc. 22, at 1. By special verdict, the jury also found that Cates committed aggravated sexual abuse but found that Lemons did not suffer bodily injury as a result of the assault.³ App. 22. Cates retained a new attorney for his direct appeal, who challenged only the district court's refusal to extend the deadline for post-verdict motions. App. 8. This Court rejected that challenge and affirmed Cates's conviction. *United States v. Cates*, 716 F.3d 445 (2013).

c. Cates filed a petition for collateral relief under 28 U.S.C. 2255 arguing, among other things, that he had received ineffective assistance of counsel during both his trial and direct appeal. App. 8-9. One of Cates's claims was that his attorneys should have challenged the jury instruction on what constitutes

² Section 2241(a) provides that aggravated sexual abuse may be committed in two ways. The first method involves the use of force, and the second method involves the use of threats or fear: "[w]hoever * * * knowingly causes another person to engage in a sexual act—(1) by using force against that person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both." 18 U.S.C. 2241(a).

³ The special verdict did not indicate whether the jury found that Cates committed aggravated sexual abuse by use of force or by use of threats or fear. Doc. 22, at 2.

aggravated sexual abuse under Section 242 (as defined in Section 2241(a)). App. 8-9, 22. The district court denied the petition, and Cates appealed. App. 22.

d. The Seventh Circuit reversed, holding that the district court had instructed the jury incorrectly on the elements of aggravated sexual abuse. App. 7-20. On remand, the district court granted Cates's Section 2255 motion and vacated his conviction. App. 24.

e. On September 25, 2018, a grand jury returned a three-count superseding indictment against Cates. Doc. 104; App. 24. Count 1 again charged Cates under Section 242 with violation of civil rights under color of law, and again alleged that Cates's actions constituted aggravated sexual abuse.⁴ Doc. 104, at 1. Cates moved to dismiss or limit Count 1 of the superseding indictment, arguing that the Double Jeopardy Clause of the Fifth Amendment precluded the government from arguing on retrial that his conduct constituted aggravated sexual abuse. App. 25-26. The district court denied Cates's motion to dismiss on April 11, 2019. App. 33, 39.

f. Cates filed a timely notice of appeal. Doc. 146.

2. *Factual Background*

Set forth below are the facts relevant to the government's allegation at Cates's first trial that Cates's actions in violation of Section 242 constituted aggravated sexual abuse; a summary of this Court's decision on collateral review of the jury instructions on aggravated sexual abuse; and a summary of the district

⁴ Counts 2 and 3 of the superseding indictment charged Cates with perjury and obstruction of justice in connection with a related civil action. Doc. 104, at 2-3. These charges are not at issue here.

court's decision below denying Cates's motion to dismiss the superseding indictment before retrial.

a. The Testimony Of Cates's Victim, Iema Lemons, At Cates's First Trial

Lemons testified at trial as follows.

On July 16, 2010, Lemons, a 19-year-old mother of two, had a physical altercation with a neighbor. Doc. 64, at 34, 36-37. After Lemons returned to her house, the neighbor and others threw bottles and bricks into her home, breaking several windows. Doc. 64, at 37. Lemons called 911. Doc. 64, at 37. Several minutes later, Cates, then a Milwaukee police officer, arrived with his partner, Alvin Hannah. Doc. 64, at 37-38, 82. Lemons recognized Cates because he had pulled her over on two previous occasions. Doc. 64, at 38-39. On the first of these occasions, approximately a year earlier, Cates gave Lemons his personal telephone number and asked her to call him. Doc. 64, at 38-39. Lemons never called him. Doc. 64, at 39.

When Cates arrived at her home on July 16, Lemons was very upset. Doc. 64, at 45. The neighbor had hit her above her eye, leaving a bump, and had ripped out some of her hair extensions. Doc. 64, at 44-45. Cates recognized Lemons from their two previous encounters and asked why she had not called him. Doc. 64, at 39-40. She told the officers about the fight with her neighbor, and Cates suggested that she get her children out of the home because there was broken glass on the floor. Doc. 64, at 40. A relative picked up the children. Doc. 64, at 41.

Around the same time, Officer Hannah arrested Lemons's 15-year-old brother, L.L., who was also at the house, on an outstanding warrant for being missing from a group home. Doc. 64, at 35, 41. Lemons, who had custody of L.L., told the officers that the warrant was a mistake and then left a voicemail for L.L.'s social worker. Doc. 64, at 41-43. Lemons also began looking for her guardianship papers. Doc. 64, at 43. Officer Hannah took L.L. to the squad car and waited there with him. Doc. 64, at 42. Lemons's fiancé, Jermaine Ford, left the house to walk to a nearby store to get cigarettes for Lemons. Doc. 64, at 43-44, 107. With L.L. and Officer Hannah in the squad car and Ford at the store, Lemons and Cates were alone in the home. Doc. 64, at 48-49.

At that time Cates saw a tattoo on Lemons's back that said "Miss Wet Wet." Doc. 64, at 49. Cates asked her what the tattoo meant, and Lemons told him she did not want to talk about it. Doc. 64, at 49. He then asked her, "How wet does it really get?" Doc. 64, at 49. She ignored the question and walked toward the bathroom so that she could show Cates the broken glass. Doc. 64, at 50. Cates remarked that Lemons was not wearing underwear, and Lemons continued to ignore him and try to show him the damage to her house. Doc. 64, at 49-50.

When Ford arrived with the cigarettes, Cates asked him to return to the store to buy Cates and Hannah some bottled water. Doc. 64, at 51-52. Lemons told Cates that she had cold water in the refrigerator, but Cates insisted on bottled water. Doc. 64, at 52. Ford left again, and Cates and Lemons were once more alone in the house. Cates then directed Lemons to the bathroom at the back of the house so that

Cates could see the broken windows. Doc. 64, at 53. During this time, Lemons did not make any sexual comments or advances to Cates or otherwise flirt with him. Doc. 64, at 50-51. She testified that, “[a]ll my windows were busted out, my boyfriend was gone to the store to get me cigarettes, I just had been in a fight, my kids were gone, my brother was in a squad car. Sex or intercourse was the last thing on my mind.” Doc. 64, at 51.

When Lemons arrived at the bathroom, she bent over to pick up a brick from behind the toilet. Doc. 64, at 54. When she turned around, Cates’s pants were open and his penis was exposed. Doc. 64, at 54. Cates then ordered Lemons to give him oral sex, stating, “suck my dick.” Doc. 64, at 55. Lemons was afraid because Cates was “the police,” and because “he had a gun.” Doc. 64, at 56. Cates also was much bigger and stronger than she was and she did not feel that she could physically fight him. Doc. 64, at 56. She testified that “[y]ou have to listen to what the police say” and that it was “[n]ot a smart idea” to fight with the police. Doc. 64, at 56-57. She also testified that she was afraid because Cates had a gun, and “he could kill me and I would never ever get to see my babies. He could say anything.” Doc. 64, at 57. For these reasons, Lemons submitted to Cates’s demand for oral sex. Doc. 64, at 58.

While Lemons submitted to performing oral sex, Cates grabbed her hair and was “yanking [her] head to * * * stick his penis * * * all the way in [her] mouth.” Doc. 64, at 58. He then bent over her and inserted his fingers into her vagina. Doc. 64, at 58-59. After two or three minutes of oral sex, Cates told Lemons

that he was “ready for some pussy.” Doc. 64, at 59. When she did not respond immediately, he repeated the demand “louder and meaner.” Doc. 64, at 98. Lemons did not agree but “let him do what he was gonna do.” Doc. 64, at 60. Ignoring her request that he wear a condom, Cates stepped forward and grabbed Lemons by the neck. Doc. 64, at 60-61. He turned her around and pushed her head down toward the sink. Doc. 64, at 61-62. Cates then let his pants fall down and inserted his penis into her vagina from behind. Doc. 64, at 61-62, 98. Lemons testified that Cates continued to squeeze her neck, that his thrusts into her were “really hard,” and that it “felt like he was ripping [her].” Doc. 64, at 64. She felt pain in her vagina and neck, and she was dizzy. Doc. 64, at 64. After a couple of minutes, Cates ejaculated into the toilet. Doc. 64, at 64.

Lemons pulled up her pants and left the bathroom, then vomited in the dining room. Doc. 64, at 65. At that point, Ford returned with the bottled water, and the social worker returned Lemons’s phone call. Doc. 64, at 66-67. Lemons handed the phone to Officer Hannah, who talked with the social worker and released her brother. Doc. 64, at 67. Lemons then saw her friend, Candice Velez, walking up the street. Doc. 64, at 67, 132. Lemons told Velez that she had been raped. Doc. 64, at 67-68, 70-71, 132. Cates tried to stop her from talking to Velez. Doc. 64, at 134-136. At that point, Lemons saw the neighbors who had broken her windows. Doc. 64, at 68. Lemons then got into an argument with Officer Hannah, because Hannah refused to arrest the neighbors. Doc. 64, at 110-111. L.L. joined the argument, which then escalated, and Officer Hannah again arrested L.L. Doc.

64, at 69-70. Additional officers arrived on the scene, and Lemons was arrested as well, along with her friends, Velez and Kristi Brooks. Doc. 64, at 70-71. Lemons told the officers that she had been raped and asked to go to the hospital, but they did not take her seriously. Doc. 64, at 71-72.

The officers took Lemons to the police station for booking. Doc. 64, at 72. She told officers there that she had been raped and asked to be taken to the hospital. Doc. 64, at 72-73. While Lemons was in an interview room with another officer, Cates came in and asked the other officer to step out so that Cates could talk with Lemons alone. Doc. 64, at 73. The other officer agreed. Doc. 64, at 73. When the two were alone, Cates asked Lemons why she was telling people that Cates had raped her. Doc. 64, at 73-74. She said she did not know, and that she would tell people that it was Officer Hannah who had raped her. Doc. 64, at 74. Lemons testified that she said this because she was handcuffed to a table and did not want Cates to get angry. Doc. 64, at 74. Cates responded that she should just not say anything. Doc. 64, at 74. He told her that nothing would happen to him, that he would only get suspended, and that he had “partners that [would] take care of” Lemons if she continued to claim that he raped her. Doc. 64, at 74. He told her that if she kept quiet, he would help her and her kids move to another house. Doc. 64, at 74, 114.

The other officer then returned to interview Lemons. Doc. 64, at 75. She did not tell him about the rape because she assumed that he and Cates were friends. Doc. 64, at 75. After she was interviewed, officers took Lemons to a jail cell. Doc.

64, at 75. Lemons then vomited four or five more times. Doc. 64, at 75-76. She testified that her stomach, hip, neck, and vagina were hurting. Doc. 64, at 76. Police called the paramedics, who took Lemons to the hospital. Doc. 64, at 76.

At the hospital, Lemons told an intake nurse what Cates had done, which was consistent with her testimony at trial. She told the nurse that Cates repeatedly asked about her tattoo, sent her fiancé to the store for water, demanded oral sex, and then demanded vaginal sex. Doc. 65, at 311-312. She told the nurse that Cates had grabbed her neck, bent her down, and inserted his penis into her. Doc. 65, at 312. She stated she had asked Cates to use a condom but that he had refused. Doc. 65, at 312. She reported sharp vaginal pain, neck pain, and nausea. Doc. 65, at 313. The nurse documented swelling on Lemons's neck, consistent with her claims of being grabbed there. Doc. 65, at 320-321. She also documented that Lemons had red, bloodshot eyes, consistent with having been choked or strangled. Doc. 65, at 320. Lemons told the nurse that Cates had threatened to "make sure his partners get [her]" if she got him suspended. Doc. 65, at 314. The nurse documented that Lemons had told her that she thought Cates was going to kill her. Doc. 65, at 327.

b. Cates's Statements To Investigators And Testimony At His First Trial

When the Milwaukee Police Department's Professional Performance Division (PPD) first interviewed Cates about the incident, he denied having any sexual contact with Lemons on July 16, 2010. Doc. 64, at 182. Instead, he claimed that he had gone on a date with Lemons a year before, and they had had oral and vaginal sex in his car. Doc. 65, at 491. After a break in the interview, Cates changed his

story about the July 16, 2010, incident, claiming Lemons had touched his penis, but again denied having sex with her. Doc. 65, at 490. Cates gave the PPD his uniform pants and underwear for DNA testing. Doc. 65, at 479. The next day, he told the PPD officer that he did not recall if he had sex with Lemons prior to July 16, before finally admitting that the prior sexual encounter was completely fabricated. Doc. 65, at 492-494. He also admitted to having oral and vaginal sex with Lemons on July 16, but claimed that Lemons had initiated the sex. Doc. 64, at 188-190; Doc. 65, at 489-490.

At trial, Cates admitted to having lied to the PPD officer repeatedly about the incident. Doc. 65, at 489-496. He maintained, however, that the sex was consensual. Doc. 65, at 451. Cates testified that after he arrived at Lemons's house on July 16, he and Lemons began flirting. Doc. 65, at 437. He testified that after a few minutes, he told her that he was getting an erection and that she rubbed the front of his pants. Doc. 65, at 437. He testified that Lemons asked to see his penis, and that when he exposed himself, she complimented its appearance and grabbed it. Doc. 65, at 439. He testified that she then began to perform oral sex on him. Doc. 65, at 439. He testified that the two stopped when they heard Ford return with the cigarettes, and that Lemons asked Cates to call her because she "need[ed] some big dick in [her] life." Doc. 65, at 440.

Cates testified that after Ford left to buy Cates some water, Lemons again began performing oral sex on him. Doc. 65, at 442-444. He testified that the two were interrupted yet again when Ford returned with the water. Doc. 65, at 445. At

that point, Cates testified that he went to the bathroom to urinate, and when he was finished, he turned around to see that Lemons had entered the bathroom. Doc. 65, at 446-449. He testified that she again began performing oral sex on him. Doc. 65, at 449. He testified that a few minutes later, he asked if she wanted to have sex, and she said that she did. Doc. 65, at 450. He testified that Lemons then pulled down her pants and bent over the sink, and he started having vaginal sex with her. Doc. 65, at 450-451. He testified that the sex was consensual, and that afterward, Lemons stated, “Now you know what it mean[s], Miss Wet Wet.” Doc. 65, at 451-452.

c. This Court’s Decision Granting Collateral Relief

This Court held that Cates was entitled to collateral relief from his conviction following the first trial, because his attorneys were ineffective in failing to challenge the district court’s jury instructions on aggravated sexual abuse. App. 18, 20. The district court had instructed the jury that, in considering whether Cates violated 18 U.S.C. 242 by committing aggravated sexual abuse by force, “the government need not demonstrate that the defendant used actual violence. * * * The requirement of force may be satisfied by a showing of...the use of threat of harm sufficient to coerce or compel submission by the victim.” App. 17-18. The instruction went on to state that “[f]orce may also be implied from a disparity in coercive power or in size between the defendant and [Lemons].” App. 18.

In rejecting this instruction, this Court first cited the statutory definition of “aggravated sexual abuse” in 18 U.S.C. 2241(a), which requires that a person

“knowingly cause[] another person to engage in a sexual act—(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.” App. 16 (quoting 18 U.S.C. 2241(a)). The Court then explained that under its earlier decision in *United States v. Boyles*, 57 F.3d 535, 544 (7th Cir. 1995), the term “force” in Section 2241(a)(1) requires “the exertion of *physical* power upon another to overcome that individual’s will to resist.” App. 17. The Court held that the jury instruction on aggravated sexual abuse “flatly contradicted the text of § 2241(a)(1)” and its decision in *Boyles* because it “permitted the jurors to find that Cates committed aggravated sexual abuse based on proof of something less than either physical force or a threat or fear of death or serious bodily injury.” App. 18.

The Court then held that prejudice had been established under *Strickland v. Washington*, 466 U.S. 668 (1984), because “there [was] a reasonable probability that a properly instructed jury would have found the evidence insufficient to prove that Cates committed aggravated sexual abuse.” App. 19. In doing so, however, the Court acknowledged that Lemons’s testimony that Cates had squeezed her neck and pushed her head toward a sink, “if credited by a properly instructed jury, *could* support a finding of physical force within the meaning of § 2241(a)(1).” App. 19 (emphasis added). The Court further acknowledged that Lemons’s testimony that Cates had his weapon and that she was afraid that he would use it against her if she resisted “could support a finding of fear of death or serious bodily injury under § 2241(a)(2), which is an alternative basis for a finding of aggravated sexual abuse.”

App. 19. Though the Court opined that such findings were “unlikely,” it expressly recognized that its decision left open those possibilities. App. 19.

d. The District Court’s Decision Denying Cates’s Motion To Dismiss Before Retrial

On remand, the district court vacated Cates’s conviction, and the United States sought to retry Cates. App. 24. The government obtained a superseding indictment, which again charged Cates with violating Section 242, including an allegation that Cates’s conduct constituted aggravated sexual abuse. App. 24. Cates moved to dismiss or limit this count, arguing that the first jury’s finding that he did not cause Lemons bodily injury precludes the government from arguing that he committed aggravated sexual abuse. App. 24, 29.

The district court rejected Cates’s argument and denied the motion, concluding that “the absence of injury does not necessarily equate with the absence of force.” App. 29. The district court found that “[i]t is possible that the jury believed [Lemons’s] claim that Cates grabbed her neck and bent her over to effectuate the assault but given the physical evidence did not accept her contention that he grabbed her hard enough to cause physical injury.” App. 31. The district court further found that, considering “all the circumstances of the encounter, including Cates’s repeated demands for sex, his status as a police officer with a badge and gun, and the size disparity between Cates and [Lemons],” the evidence could support a finding that Lemons reasonably feared for her life. App. 32. Such a finding would satisfy the definition of aggravated sexual abuse under Section 2241(a)(2). The district court also rejected Cates’s argument that such evidence

could not suffice to prove that Cates knowingly put Lemons in fear of death or serious bodily harm. App. 32-33.

SUMMARY OF ARGUMENT

This Court should affirm the district court's denial of Cates's motion to dismiss Count 1 of the Superseding Indictment on double jeopardy grounds.

1. The district court correctly held that the Double Jeopardy Clause does not preclude the government from arguing on retrial that Cates committed aggravated sexual abuse by force under 18 U.S.C. 2241(a)(1). Issue preclusion, a component of the Double Jeopardy Clause, prevents the government from relitigating only issues of ultimate fact that necessarily were decided in a previous acquittal. Here, the jury's finding that Cates did not cause Lemons bodily injury did not, explicitly or implicitly, include a finding that Cates did not use force against her. A rational jury could find that Cates grabbed Lemons's neck and bent her over the sink without squeezing her neck hard enough to injure her. A rational jury also could find that Cates's actions in grabbing Lemons's hair, pushing her head against his penis while she gave him oral sex, forcibly bending Lemons over the sink, and jabbing his penis into her all constituted force sufficient to find aggravated sexual abuse without causing bodily injury.

2. The district court also correctly held that the Double Jeopardy Clause does not bar the government from proving that Cates committed aggravated sexual abuse under Section 2241(a)(2), by causing Lemons to engage in a sexual act by placing her in fear that she would be subjected to death or serious bodily injury.

Cates argues that the evidence adduced at his first trial was insufficient to prove that he knowingly placed Lemons in fear of death or serious bodily injury, and therefore the government is precluded from pursuing that theory on retrial. This argument is incorrect. Though the Double Jeopardy Clause precludes retrial where a reviewing court reverses a conviction due to insufficiency of the evidence, the clause does not preclude retrial where, as here, a conviction is set aside due to an error in the jury instructions. In any case, the government presented sufficient evidence at the first trial for a jury to find that Cates knowingly placed Lemons in fear of death or serious bodily injury.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT THE DOUBLE JEOPARDY CLAUSE DOES NOT PRECLUDE THE GOVERNMENT FROM ARGUING THAT CATES COMMITTED AGGRAVATED SEXUAL ABUSE UNDER SECTION 2241(a)(1) BY USING PHYSICAL FORCE

A. Standard Of Review

This Court reviews a district court's denial of a motion to dismiss an indictment on double jeopardy grounds de novo. *United States v. Faulkner*, 793 F.3d 752, 755 (7th Cir. 2015).

B. The Double Jeopardy Clause Does Not Preclude The Government From Arguing On Retrial That Cates Committed Aggravated Sexual Abuse By Using Force Against Lemons

Section 2241(a)(1) prohibits aggravated sexual abuse, which is defined to include knowingly causing a person to engage in a sexual act "by using force against that other person." 18 U.S.C. 2241(a)(1). In *United States v. Boyles*, 57 F.3d 535,

544 (7th Cir. 1995), this Court held that “force” under the statute means “the exertion of physical power upon another to overcome that individual’s will to resist.” Cates argues that because the jury in his first trial found that he did not cause Lemons bodily injury in addressing a separate sentencing enhancement provision of Section 242, it also must have found that he did not use physical force as required under Section 2241(a)(1). Specifically, Cates argues that the only way the jury could have found that Cates did not cause bodily injury to Lemons is by finding that he did not forcibly grab her neck. Br. 17, 22-28. Thus, Cates argues, the government is precluded from arguing on retrial that Cates committed aggravated sexual abuse by force. Br. 28. The district court correctly rejected this argument.

1. *Issue Preclusion Prevents The Government From Relitigating Only Issues Of Ultimate Fact That Necessarily Were Decided In A Previous Acquittal*

The Double Jeopardy Clause of the Fifth Amendment prevents “any person” from being “subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. Amend. V. The Supreme Court has held that the Double Jeopardy Clause incorporates the common law doctrine of issue preclusion (otherwise known as “collateral estoppel”), to “preclude[] the Government from relitigating any issue that was necessarily decided by a jury’s acquittal in a prior trial.” *Yeager v. United States*, 557 U.S. 110, 119 (2009).

Under this doctrine, a second trial is forbidden if “to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant’s favor in the first trial.” *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018)

(plurality opinion) (citing *Ashe v. Swenson*, 397 U.S. 436 (1970); *Yeager*, 557 U.S. at 119-120). As such, “[a] second trial ‘is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question.’” *Currier*, 138 S. Ct. at 2150 (quoting *Yeager*, 557 U.S. at 133-134 (Alito, J., dissenting)). For a second trial to be forbidden under the Double Jeopardy Clause, the court “must be able to say that ‘it would have been *irrational* for the jury’ in the first trial to acquit without finding in the defendant’s favor on a fact essential to a conviction in the second.” *Currier*, 138 S. Ct. at 2150 (quoting *Yeager*, 557 U.S. at 127) (opinion of Kennedy, J.).

The Supreme Court’s issue preclusion cases illustrate why the doctrine does not preclude government from arguing on retrial that Cates’s actions constituted aggravated sexual assault. In *Ashe*, the defendant was acquitted of robbing one of six men at a poker game. 397 U.S. at 438-439. There was no dispute at trial as to whether the six men had been robbed, but only as to whether the defendant had been one of the robbers. *Id.* at 439, 445. The State then tried the defendant for robbing one of the other poker players. *Id.* at 439. The defendant moved to dismiss based on his previous acquittal. *Ibid.* The district court denied his motion, and he was convicted. *Id.* at 439-440.

After holding that collateral estoppel was “embodied in the Fifth Amendment guarantee against double jeopardy,” *Ashe*, 397 U.S. at 445, the Supreme Court held that the doctrine precluded the State from arguing that the defendant had committed the robbery. The Court explained that collateral estoppel “means simply

that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Id.* at 443. Moreover, the Court explained that “[w]here a previous judgment of acquittal was based upon a general verdict,” collateral estoppel “requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Id.* at 444 (internal quotation marks and citations omitted). Because the “single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers,” and “the jury by its verdict found that he had not,” collateral estoppel precluded the second trial. *Id.* at 445.

Later, in *Yeager*, the Court considered the effect of a previous acquittal on retrial of hung charges. 557 U.S. at 112. The Court held that where a jury acquits on one or more charges and hangs on others, any ultimate finding of fact embodied in the acquittals precludes retrial of that same fact upon retrial of the hung charges. *Id.* at 122. The Court remanded to the court of appeals to determine whether “the jury necessarily resolved in [the defendant]’s favor an issue of ultimate fact that the Government must prove in order to convict him of [the hung charges].” *Id.* at 125.

More recently, in *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 366 (2016), the Court held that issue preclusion did not apply where the same jury had returned an acquittal and a conviction that were inconsistent with one another,

even where the conviction was later overturned on appeal. The Court held that “the problem is that the same jury reached inconsistent results. * * * [The defendants], therefore, cannot establish * * * that the jury in the first proceeding actually decided” the ultimate issue of fact in that case, which was whether defendants violated the federal bribery statute. *Id.* at 364-365 (alteration and citation omitted). Thus, the acquittal did not preclude retrial..

All of these cases recognize that for issue preclusion to apply, the acquittal and the charge on which the government seeks retrial must turn on the same “issue of ultimate fact,” and that “issue of ultimate fact” necessarily must have been decided in the acquittal. *Bravo-Fernandez*, 137 S. Ct. at 356; *Yeager*, 557 U.S. at 121-122; *Ashe*, 397 U.S. at 443-444. This Court consistently has declined to apply issue preclusion where those conditions are not met. For example, in *United States v. Bailin*, 977 F.2d 270, 281 (7th Cir. 1992) (citation omitted), the defendant argued that a previous acquittal for mail fraud precluded the government from later trying him on a “cheating and defrauding” offense. The Court held that for issue preclusion to apply, a defendant must “1) identify specific issues that were relevant to the acquittals; 2) prove that those issues were necessarily decided by the acquittals, * * * and 3) prove that those issues will be ‘ultimate’ in the retrial.” *Ibid.* (internal quotation marks and citation omitted). This Court declined to apply issue preclusion, affirming the district court’s holding that “the defendants did not establish that the acquittals necessarily decided any issue against the government” that would preclude the second prosecution. *Id.* at 282.

Similarly, in *United States v. Salerno*, 108 F.3d 730, 740 (7th Cir.), cert. denied, 521 U.S. 1122 (1997), the defendant argued that the Double Jeopardy Clause should have precluded the government from admitting evidence of offenses for which he previously had been acquitted. In a prior trial, the jury had acquitted the defendant of extorting two specific men. *Id.* at 740-741. The government later charged the defendant with participating in a racketeering enterprise. *Id.* at 741. This Court held that issue preclusion did not apply because the defendant could not “demonstrate that extortion was an ‘ultimate issue’ at his retrial, or that the prior acquittals necessarily determined that the charged enterprise or its racketeering activity did not exist.” *Ibid.* In other words, because “[t]he government * * * was not required to prove that [the defendant] ever extorted [the two individuals]” in the later trial, his guilt or innocence of those extortions “were not ‘ultimate issues’ for issue preclusion purposes.” *Ibid.*

Finally, in *Jacobs v. Marathon County*, 73 F.3d 164, 167 (7th Cir.), cert. denied, 517 U.S. 1251 (1996), the defendant argued that his acquittal in a previous murder trial should bar the State from later trying him for the kidnapping and false imprisonment of one of the murder victims. In that case, four members of a family were found shot to death, and another member of the family, Helen Kunz, was missing. *Id.* at 165. Her body was found nine months later, 18 miles from the family’s home. *Ibid.* A jury acquitted the defendant of five counts of first-degree “murder-party to the crime”. *Ibid.* Four years later, the State again charged the defendant, this time with the kidnapping and false imprisonment of Helen Kunz.

Id. at 166. He moved unsuccessfully to dismiss the indictment, arguing that his acquittal in the first case precluded the State from charging him with abducting Helen Kunz. *Id.* at 166. After exhausting his state appeals, he petitioned for habeas corpus, arguing that in acquitting him of the family's murder, the jury must have determined that he was not involved at all in the crime. *Id.* at 166, 168.

This Court affirmed the district court's denial of the habeas petition. *Jacobs*, 73 F.3d at 169. The Court held that the defendant's "collateral estoppel argument is flawed because it focuses on what the jury *might* have decided in acquitting him of first degree murder, rather than what the jury *must* have decided in order to reach its decision." *Id.* at 168. The Court pointed out that "[c]ollateral estoppel applies only where an issue was *necessarily* decided in a previous proceeding, and it is simply not the case that the question of whether [the defendant] participated in the events [on the day of the murders] was necessarily decided against the State in the [earlier] trial." *Ibid.*

In sum, the Supreme Court and this Court's precedent hold that collateral estoppel applies *only* where an issue that *necessarily* was decided in a previous action is decisive in the later action. As explained below, therefore, collateral estoppel does not preclude the government from arguing on retrial that Cates committed aggravated sexual abuse.

2. *The Jury's Finding That Cates Did Not Cause Lemons Bodily Injury Does Not Preclude A Properly Instructed Jury From Finding That Cates Committed Aggravated Sexual Abuse By Force*

Cates argues (Br. 19-31) that the jury's finding in his first trial that Cates did not cause Lemons bodily injury precludes the government from arguing that Cates committed aggravated sexual abuse by force. To prevail on this argument, Cates must show that the jury in his first trial *necessarily* decided that Cates did not use force to cause Lemons to engage in a sexual act. See *Bravo-Fernandez*, 137 S. Ct. at 363 (the defendant bears the burden of demonstrating that the jury necessarily resolved the issue in his favor). The Supreme Court has held that this test "is a demanding one." *Currier*, 138 S. Ct. at 2150.

Cates cannot satisfy this showing. To be sure, the government will be precluded on retrial from arguing that Cates caused Lemons bodily injury. That "issue of ultimate fact" necessarily was resolved by the jury's special verdict that Cates's actions did not result in bodily injury to Lemons. But force can be proven without any resulting bodily injury. Therefore, the previous jury's finding that Cates did not cause Lemons bodily injury is not dispositive of whether he committed aggravated sexual abuse by force.⁵

⁵ Cates "is not arguing that force always causes bodily injury or that force requires bodily injury." Br. 28. Indeed, courts squarely have held that defendants can be convicted of force-based crimes without resulting injury to their victims. For example, in *Wilkins v. Gaddy*, 559 U.S. 34, 40 (2010) (per curiam), the Supreme Court rejected the argument that to prove an excessive force claim against a correctional officer, an inmate must show that the officer's actions caused him serious injury. The Court explained that "[i]njury and force * * * are only imperfectly correlated, and it is the latter that ultimately counts." *Id.* at 38; see

(continued...)

a. *In Finding That Cates Did Not Cause Lemons Bodily Injury, The Jury Did Not Necessarily Find That Cates Did Not Grab Lemons's Neck*

Cates argues that “the jury could not rationally have reached its verdict [finding no bodily injury] without rejecting Lemons’[s] allegation that Cates forcibly grabbed her neck.” Br. 22. He notes that Lemons testified that Cates choked and strangled her, and that his pressure on her neck caused her a great deal of pain. Br. 23. He argues that “Lemons’[s] testimony, if credited, necessitated a finding that Cates caused her bodily injury.” Br. 23. Thus, Cates argues that “the jury plainly rejected the entirety of [Lemons’s] testimony about Cates forcibly grabbing her neck when it found Cates didn’t cause any injury or pain.” Br. 23.

This argument ignores the fact that a rational jury could have found that Cates did forcibly grab Lemons’s neck but did not assert sufficient pressure to cause her bodily injury. As the district court correctly observed, “[t]here would be nothing irrational about a finding that Cates used force to grab [Lemons]’s neck and bent her over the sink, causing her to engage in intercourse, without causing injury to [her] neck.” App. 30. This is particularly true because the district court instructed the jury that it may “accept or reject the testimony of any witness *in whole or in part*.” App. 31 (quoting Jury Instructions, Doc. 21, at 6) (emphasis added). Thus, the district court concluded that it was “possible that the jury believed [Lemons]’s

(...continued)

also *White v. Hefel*, 875 F.3d 350, 358 (7th Cir. 2017) (explaining that the “key inquiry in an excessive-force case is the amount of force used, not the degree of harm that was inflicted on the victim”).

testimony that Cates grabbed her neck and bent her over to effectuate the assault but given the physical evidence did not accept her contention that he grabbed her hard enough to cause physical injury.” App. 31. Indeed, this Court acknowledged this possibility, stating that Lemons’s testimony that “Cates squeezed her neck and pushed her head toward a sink * * * if credited by a properly instructed jury, could support a finding of physical force within the meaning of § 2241(a)(1).” App. 19.

Though Cates may believe that scenario is highly unlikely, the district court was correct in finding that it would not have been “irrational.” App. 30. “A second trial is not precluded simply because it is unlikely—or even very unlikely—that the original jury acquitted without finding the fact in question.” *Currier*, 138 S. Ct. at 2150 (internal quotation marks and citation omitted); see also *Jacobs*, 73 F.3d at 168 (collateral estoppel argument failed where defendant “focuse[d] on what the jury *might* have decided in acquitting [the defendant in the first trial], rather than what the jury *must* have decided in order to reach its decision”). Accordingly, the government is not precluded from arguing that Cates committed aggravated sexual abuse by grabbing Lemons’s neck.⁶

⁶ In *Bravo-Fernandez*, the Supreme Court considered in dicta a hypothetical where a jury returned inconsistent verdicts but an instructional error in one of the verdicts reconciled the inconsistency. 137 S. Ct. at 364-365. In that case, the Court observed, issue preclusion may apply. *Id.* at 364. Here, as explained above, the jury’s verdicts that Cates committed aggravated sexual abuse but did not cause Lemons bodily injury were not necessarily inconsistent. Thus, contrary to Cates’s assertion (Br. 21-22), this case is not like the hypothetical discussed in *Bravo-Fernandez*.

- b. *Even If The Government Were Foreclosed From Arguing That Cates Forcibly Grabbed Lemons's Neck, There Was Sufficient Evidence At The First Trial For A Jury To Find That Cates Employed Physical Force To Cause Lemons To Engage In A Sexual Act*

Even if the government were precluded from arguing that Cates effected his sexual assault by forcibly grabbing Lemons's neck, the district court was still correct in refusing to dismiss Count 1 because there was additional evidence introduced at Cates's first trial from which a properly instructed jury could find force. Lemons testified that while Cates's penis was in her mouth, Cates grabbed her hair and pulled on her head. Doc. 64, at 58. Cates then physically turned Lemons around, bent her over, and held her head toward the sink. Doc. 64, at 62, 98. He then "jabbed" his penis into her. Doc. 64, at 61, 98.⁷ These actions were sufficient to constitute physical force under Section 2241(a)(1).

Courts have sustained aggravated sexual abuse convictions based on similar evidence. For example, in *United States v. Shaw*, 891 F.3d 441, 445 (3d Cir. 2018), a corrections officer entered the cell of a pretrial detainee, removed her pants, and pressed on her chest so that she was unable to get up, while digitally penetrating her. He then removed his own pants, lay on top of her, and engaged in sexual intercourse with her. *Ibid.* The victim testified that she was unable to move and "felt like she couldn't breathe." *Ibid.* (internal quotation marks and alteration

⁷ The district court acknowledged this other evidence but did not decide whether it would suffice to prove aggravated sexual abuse, because it concluded that the jury could have found that Cates forcibly grabbed Lemons's neck without causing her bodily injury. App. 30 n.7.

omitted). Though the *Shaw* court invalidated the jury instruction on aggravated sexual abuse, *id.* at 451, it affirmed the defendant's conviction, holding that a properly-instructed jury could have found that the defendant committed aggravated sexual abuse based on the evidence, because any force sufficient to overcome or restrain the victim was enough to satisfy the statute. *Id.* at 452, 455; see also *United States v. Archdale*, 229 F.3d 861, 868 (9th Cir. 2000) (finding sufficient physical force to apply aggravated sexual abuse cross-reference at sentencing where defendant moved the victim's head "up and down on his penis" during oral sex); *United States v. Lauck*, 905 F.2d 15, 18 (2d Cir. 1990) (finding it "immaterial" that the defendant did not use a weapon, threaten, injure, or inflict pain upon the victim where the defendant "used force to make sexual contact").

Cates argues that these other incidents – grabbing Lemons's hair, pulling on her head, bending her over, holding her head toward the sink, and "jabbing" his penis into her – could not have been the basis for the jury's finding that Cates used force because the government did not specifically argue in closing that those actions constituted force. Br. 30-31. But whether the prosecutor mentioned a particular instance of force in his closing argument is irrelevant. A jury must base its verdict on the facts in evidence, and Cates cites no authority for his argument that a jury is limited to the evidence or arguments included in a prosecutor's closing arguments.⁸

⁸ In any case, Cates's characterization of the government's closing argument is incorrect. In closing, the government argued that Cates used force when he "shoved [Lemons] down, so hard that she had to grab onto the bathroom sink for support. He then forced himself inside her and raped her from behind." Doc. 88, at (continued...)

Cates also argues that these other incidents could not have been the basis for the first jury's finding of force because they did not "cause[]" the sex act but merely were "incidental" to it. Br. 30-31. This is incorrect. Lemons testified that Cates forcibly turned her around and bent her over so that he could enter her from behind. Doc. 64, at 62. Even without resulting bodily injury, this act constituted physical force that "cause[d]" Lemons "to engage in a sexual act." 18 U.S.C. 2241(a)(1). In addition, Cates's earlier action of grabbing Lemons's hair while she submitted to giving him oral sex and pulling on her head is sufficient for a finding of force under Section 2241(a)(1). See *Archdale*, 229 F.3d at 868.

Because the jury could have found based on the evidence presented at Cates's first trial that he "exert[ed] * * * physical power upon" Lemons sufficient to "overcome [her] will to resist," the Double Jeopardy Clause does not preclude the government from arguing in Cates's retrial that he committed aggravated sexual abuse by force. See *Boyles*, 57 F.3d at 544; App. 17.

(...continued)

6; see also *id.* at 22 ("[H]e forced her over and he raped her."). These descriptions of force do not include any reference to bodily injury.

II

THE DISTRICT COURT CORRECTLY HELD THAT THE DOUBLE JEOPARDY CLAUSE DOES NOT PRECLUDE THE GOVERNMENT FROM ARGUING THAT CATES COMMITTED AGGRAVATED SEXUAL ABUSE UNDER SECTION 2241(a)(2) BY PLACING LEMONS IN FEAR OF DEATH OR SERIOUS BODILY INJURY

A. Standard Of Review

This court reviews a district court's denial of a motion to dismiss an indictment on double jeopardy grounds de novo. *United States v. Faulkner*, 793 F.3d 752, 755 (7th Cir. 2015).

B. The Double Jeopardy Clause Does Not Preclude The Government From Arguing On Retrial That Cates Committed Aggravated Sexual Abuse By Knowingly Placing Lemons In Fear Of Death Or Serious Bodily Injury

1. The Double Jeopardy Clause Does Not Bar The Government From Retrying Cates Because His Conviction Was Vacated Due To Improper Jury Instructions, Not Insufficiency Of The Evidence

A jury also may find that Cates committed aggravated sexual abuse if it finds that he “knowingly” caused Lemons “to engage in a sexual act * * * by threatening [her] or placing [her] in fear that” she would “be subjected to death, serious bodily injury, or kidnapping.” 18 U.S.C. 2241(a)(2). Cates argues (Br. 32-37) that the evidence adduced at the first trial was insufficient to prove that Cates knowingly placed Lemons in fear of death or serious bodily injury, and thus the jury could not have found that he committed aggravated sexual abuse under Section 2241(a)(2). Accordingly, he argues, the Double Jeopardy Clause bars the government on retrial from trying to prove that he committed aggravated sexual assault under that theory. Br. 32. The district court correctly rejected this claim.

Cates essentially is asserting a sufficiency challenge couched in double jeopardy terms. But Cates did not challenge the sufficiency of the evidence to support his conviction in his direct appeal or in his Section 2255 appeal.⁹ As the district court recognized, this argument “reads more like a belated Rule 29 motion than an issue preclusion argument.” App. 31. In Cates’s Section 2255 appeal, this Court held *only* that the jury instructions on aggravated sexual abuse were incorrect. As explained below, because this Court did not rule on the sufficiency of the evidence at Cates’s first trial, Cates cannot assert a double jeopardy argument here.

The Supreme Court squarely has held that the Double Jeopardy Clause “does not preclude the Government’s retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction.” *United States v. Tateo*, 377 U.S. 463, 465 (1964). In *Burks v. United States*, 437 U.S. 1, 6 (1978), the Supreme Court considered whether, where a reviewing court reverses a conviction due to insufficiency of the evidence, the Double Jeopardy Clause bars retrial. The Court held that it did, because it makes no difference for Double Jeopardy purposes “that the *reviewing* court, rather than the trial court, determined the evidence to be insufficient.” *Id.* at 11. The Court reasoned that a reversal on sufficiency grounds

⁹ Although the district court in Cates’s Section 2255 challenge certified for appeal the issue of whether Cates’s appellate counsel was deficient for failing to raise a sufficiency-of-the-evidence challenge, Cates ultimately did not pursue this claim in his collateral relief appeal. See Doc. 18, at 11, *Cates v. United States*, No. 2:14-cv-01092-JPS, 2016 WL 344958 (E.D. Wis. Jan. 27, 2016); Appellant Br., *Cates v. United States*, 882 F.3d 731 (7th Cir. 2018) (No. 16-1778).

“means that the government’s case was so lacking that it should not have even been *submitted* to the jury.” *Id.* at 16. Thus, the Court concluded, “it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.” *Ibid.*

The *Burks* Court, however, went on to distinguish reversals based on insufficiency of the evidence, which preclude retrial, from those based on trial errors, which do not. The Court explained that “reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case.” *Burks*, 437 U.S. at 15. Rather, reversal for trial error “is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, *incorrect instructions*, or prosecutorial misconduct.” *Ibid.* (emphasis added). “When this occurs,” the Court explained, “the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.” *Ibid.*; see also *Tateo*, 377 U.S. at 466 (“It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.”).

Thus, under *Burks*, if this Court in the collateral relief appeal had held that the evidence was insufficient to show that Cates knowingly placed Lemons in fear of

death or serious bodily injury, then the Double Jeopardy Clause would bar the government from retrying him on that theory. But that is not what it did. Rather, it held that the jury instruction on aggravated sexual abuse was erroneous. App. 15 n.1, 20. It is well-established that retrial after reversal because of a flawed jury instruction does not raise double jeopardy concerns, because reversal on such ground does not resolve the “bottom-line question of criminal culpability.” *Evans v. Michigan*, 568 U.S. 313, 324 n.6 (2013) (internal quotation marks and citation omitted). Indeed, the *Burks* Court specifically listed “incorrect instructions” as a type of “trial error” that would not bar retrial. 437 U.S. at 15; see also *United States v. Loniello*, 610 F.3d 488, 494 (7th Cir. 2010) (“Reversal because of an error in the jury instructions may be followed by a new trial without offending the double jeopardy clause. Only a reversal for insufficient evidence forbids a second trial.”), cert. denied, 563 U.S. 929 (2011).

In short, this Court’s order granting collateral relief due to an error in the jury instructions did not resolve the “bottom-line question of criminal culpability” for aggravated sexual abuse. *Evans*, 568 U.S. at 324 n.6 (internal quotation marks and citation omitted). Indeed, this Court specifically acknowledged that Lemons’s testimony that Cates carried his weapon and that she feared he would use it against her “could support a finding of fear of death or serious bodily injury under § 2241(a)(2).” App. 19. That acknowledgment alone forecloses Cates’s argument that retrial on that theory is prohibited here. See *United States v. Borrero*, 771 F.3d 973, 977 (7th Cir. 2014) (Where “[a] properly instructed jury could have convicted

the defendant[] on th[e] record, * * * the Double Jeopardy Clause does not foreclose a new trial.”).

2. *The Evidence Was Sufficient For A Reasonable Jury To Find That Cates Knowingly Placed Lemons In Fear Of Death Or Serious Bodily Injury*

As set forth above, because Cates’s first conviction was vacated because of an error in the jury instructions, and not because of insufficient evidence, Cates cannot base a double jeopardy argument on any alleged insufficiency. But in any case, even if this Court were now to address Cates’s sufficiency argument, the government presented sufficient evidence at the first trial for a jury to find that Cates knowingly placed Lemons in fear of death or serious bodily injury.

Lemons testified that while she and Cates were alone in the house, he repeatedly demanded that she perform oral sex on him. Doc. 64, at 55. While Lemons had Cates’s penis in her mouth, he grabbed her hair and pulled on her head. Doc. 64, at 58. He then told Lemons that he was ready for “some pussy.” Doc. 64, at 59. Lemons testified that when she did not immediately comply, Cates repeated his demand “louder and meaner.” Doc. 64, at 98. Lemons testified that Cates then grabbed her by the neck, turned her around, and bent her over the sink. Doc. 64, at 62. He then continued to squeeze her neck while raping her. Doc. 64, at 60-62, 98. He did all of this while in his official uniform and while wearing a gun. Doc. 64, at 56-57. Lemons testified that she was afraid because Cates “could kill me

and I would never ever get to see my babies. He could say anything.” Doc. 64, at 57.¹⁰

Cates contends that this evidence was insufficient to prove that he “knowingly” placed Lemons in fear of death and serious bodily injury.¹¹ But direct evidence of knowledge is not required; rather, “[a] jury is entitled to infer knowledge from circumstantial evidence.” *United States v. Uriostegui-Estrada*, 86 F.3d 87, 89 (7th Cir. 1996). Lemons’s testimony summarized above, if credited by a jury, is more than sufficient to create an inference that Cates knew that his conduct would cause Lemons to fear that Cates would kill her or seriously injure her if she resisted. Indeed, this Court acknowledged that Lemons’s testimony that “Cates carried his service firearm and she was afraid that he would use it against her if she

¹⁰ Cates argues that to convict him of aggravated sexual abuse under Section 2241(a)(2), a jury must find that his words and actions would cause “an ordinary person” to fear death or serious bodily injury. Br. 35. The “ordinary person” standard is not found in the text of the statute, and the government is not aware of any authority for imposing such a requirement. Rather, the requirement is that the defendant “know[]” that his actions will result in fear of death or bodily harm. 18 U.S.C. 2241(a)(2). In any case, here, a jury could find that a “reasonable” or “ordinary” person in Lemons’s situation would fear death or serious bodily injury.

¹¹ It is unclear whether Cates is arguing that the aggravated sexual abuse statute requires that Cates acted *knowingly*, or that he acted *intentionally*. See Br. 36 (“At the very least, the statute requires that the defendant [acted] knowingly.”) (internal quotation marks omitted); Br. 37 (“[H]ere, there was no evidence that Cates *intended* to place Lemons in such fear.”) (emphasis added). The text of Section 2241(a)(2) requires only that the defendant act *knowingly*, and Cates cites no authority for a specific intent requirement. See also *United States v. Robertson*, 606 F.3d 943, 954 (8th Cir. 2010) (aggravated sexual abuse is a general intent crime, and requires only that the defendant act knowingly), abrogated on other grounds by amendment to Fed. R. Crim. P. 12. As such, liability “requires only proof that the defendant performed the acts that the law forbids, understanding what he was doing.” *Kimani v. Holder*, 695 F.3d 666, 669 (7th Cir. 2012).

resisted * * * could support a finding of fear of death or serious bodily injury.”
App. 19.

For these reasons, the district court correctly rejected Cates’s argument that the Double Jeopardy Clause bars the government from arguing on retrial that Cates committed aggravated sexual abuse by placing Lemons in fear of death or serious bodily injury.

CONCLUSION

This Court should affirm the district court’s order denying Cates’ motion to dismiss or limit Count 1 of the superseding indictment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS
APPELLEE:

1. 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 9670 words.

2. complies with the typeface requirements of Circuit Rule 32(b) and Federal
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s/ Elizabeth P. Hecker
ELIZABETH P. HECKER
Attorney

Date: July 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019, I electronically filed a true and correct copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Seventh 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.

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