No. 20-2402

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TRAVIS HEWITT,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AS APPELLEE

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

TOVAH R. CALDERON
ALISA C. PHILO
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2424

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellant Travis Hewitt and three other officers at the Jackson County Detention Center assaulted James Ramirez, a pretrial detainee, in retribution for an earlier incident. A federal jury convicted Hewitt of conspiring to deprive Ramirez of his civil rights under 18 U.S.C. 241, and of depriving Ramirez of his civil rights under 18 U.S.C. 242. The district court imposed a sentence of 45 months' imprisonment, well below the applicable Guidelines range of 87 to 108 months' imprisonment.

On appeal, Hewitt challenges the sufficiency of the evidence for both of his convictions and the reasonableness of his sentence. These arguments lack merit. There was more than sufficient evidence for the jury to find that Hewitt and his co-conspirators agreed to assault Ramirez, and to reject Hewitt's factual claim that he did not participate in the assault. The district court did not abuse its discretion in imposing its sentence, which varied downwards significantly, even if not to the degree that Hewitt sought. This Court should affirm.

Because the issues presented on appeal are straightforward, the United States does not believe that oral argument is necessary.

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BRIEF FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This appeal is from the entry of final judgment in a criminal case in the Western District of Missouri. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Travis Hewitt on July 9, 2020. Add., p. 3.[1] The next day, Hewitt filed a timely notice of appeal. DCD 243. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

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[1] "Add., p. __" refers to page numbers in the addendum filed with Hewitt's opening brief. "Br., p. __" refers to page numbers in Hewitt's opening brief. "DCD __, at p. __" refers to records on the district court docket by docket number

(continued…)

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the evidence at trial was sufficient for the jury to convict Hewitt of (a) conspiring to deprive Ramirez, a pretrial detainee, of his civil rights in violation of 18 U.S.C. 241, and (b) depriving Ramirez of his civil rights in violation of 18 U.S.C. 242.

a. Conspiracy Against Rights

United States v. *Winston*, 456 F.3d 861 (8th Cir. 2006)

United States v. *Scott*, 979 F.3d 986 (2d Cir. 2020)

United States v. *Gonzalez*, 906 F.3d 784 (9th Cir. 2018)

b. Deprivation of Rights

United States v. *Blakeney*, 876 F.3d 1126 (8th Cir. 2017)

2. Whether Hewitt's sentence of 45 months, well below the applicable Guidelines range, was substantively reasonable.

United States v. *Torres-Ojeda*, 829 F.3d 1027 (8th Cir. 2016)

United States v. *Brunken*, 581 F.3d 635 (8th Cir. 2009)

(…continued)
and ECF pagination. "TR., Vol. __, p. __" refers to the trial transcript by volume and page number. "PSR, p. __" refers to page numbers in the Presentence Investigation Report. "Sent., p. __" refers to page numbers in the sentencing transcript. "Government Exh. __, p. __" refers to the exhibit labels attached in the district court proceedings.

STATEMENT OF THE CASE

1. Factual Background

This case arises from the unjustified use of force by Hewitt and three other corrections officers against James Ramirez, a pretrial detainee at the Jackson County Detention Center (JCDC). As set forth below, Hewitt and the other officers sought to punish Ramirez for an altercation that he had with a female officer while he was suffering from alcohol withdrawal. Acting on this motive, two of the officers moved Ramirez from his cell in the medical housing unit to a large holding cell without surveillance cameras. There, Hewitt and the other officers took turns assaulting Ramirez, leaving him with traumatic injuries.

a. Hewitt And The Other Officers Believe Ramirez Should Be Punished For An Altercation With A Female Officer In The Medical Housing Unit

On July 2, 2015, Ramirez was admitted to JCDC in advance of a hearing on an alleged probation violation. TR., Vol. 2, pp. 314, 324. Because he was suffering from alcohol withdrawal, he was placed in the medical housing unit on the second floor where staff could monitor his status and provide him with medication. TR., Vol. 2, pp. 322, 324-325.

Ramirez, who was "confused," "disoriented," and "unaware of where he was at," attempted to leave the medical housing unit around 7 p.m. on July 4. TR., Vol. 2, pp. 154-155, 238, 253. The corrections officer stationed in the medical housing

unit, Irene Haines, struggled with Ramirez before radioing for help from other officers. TR., Vol. 1, p. 47; TR., Vol. 2, p. 439; TR., Vol. 4, p. 973; see also Government Exh. 1. Referred to as a "code one officer involved," this radio call meant that "an officer needs assistance immediately." TR., Vol. 2, p. 239.

Hewitt and another corrections officer, Dakota Pearce, were on the fourth floor when they heard the radio call. TR., Vol. 2, p. 434; TR., Vol. 4, p. 969. They immediately went to assist in the medical housing unit on the second floor. TR., Vol. 2, p. 436; TR., Vol. 4, p. 971. Hewitt got Ramirez to the ground, and Pearce put handcuffs on him. TR., Vol. 2, pp. 439, 443; TR., Vol. 4, p. 974. Other officers, including Shavon Brown and Katie Milton, did not assist but observed from the doorway of the medical housing unit. TR., Vol. 1, pp. 60, 64; TR., Vol. 2, pp. 241-242.

While Ramirez lay on the floor in handcuffs, Pearce punched him "more than once" in the side with a closed fist "out of anger" because Ramirez had been fighting with female staff. TR., Vol. 2, pp. 444-445. Pearce also saw Hewitt "punch[] Mr. Ramirez in the face at least three times" with a closed fist. TR., Vol. 2, pp. 445-446. Brown saw Hewitt hit Ramirez in the face "[m]ultiple" times with "[s]hort, close jabs" (TR., Vol. 1, pp. 66-67), and Milton saw Hewitt "deliver[] approximately five blows to [Ramirez]'s face" in "[s]hort, backhanded hits" (TR., Vol. 2, pp. 245-246).

Hewitt admitted that he hit Ramirez in "three rapid strikes," but claimed it was in response to Ramirez biting him. TR., Vol. 4, pp. 1031-1032; see also TR., Vol. 4, p. 978. According to Hewitt, Ramirez bit him on the webbing of his hand when his "hand wound up on Mr. Ramirez's face." TR., Vol. 4, pp. 977-978. Hewitt "proceed[ed] to back hand, more or less slap [Ramirez] in the mouth region" in "three rapid succession blows." TR., Vol. 4, pp. 978, 989-990. He wrote in his report of the incident that he had used "suppressive force" in response to being bitten. TR., Vol. 4, pp. 992, 994; see also Government Exh. 10, at p. 1.

The Control Emergency Response Team (CERT) arrived minutes later. TR., Vol. 2, pp. 276, 447-448; TR., Vol. 3, p. 783. Jen-I Pulos and Terrance Dooley, two officers on the CERT Team, took Ramirez to a nearby holding cell to be medically evaluated. TR., Vol. 2, p. 448; TR., Vol. 3, p. 786. Usually, "[n]ine times out of [ten]," inmates who are involved in a code one incident with an officer are put in a restraint chair as "[a] form of punishment" to "think about what * * * he or she has done" and to "calm down." TR., Vol. 1, p. 50; TR., Vol. 2, p. 451; TR., Vol. 3, p. 788. In this instance, however, Ramirez was not medically cleared for the restraint chair. TR., Vol. 2, pp. 338-340.

Afterwards, when the offices were on a break outside on the smoke porch on the first floor, they vented their frustration with the decision not to punish Ramirez. See TR., Vol. 2, p. 249; TR., Vol. 3, pp. 790-791. While "[e]verybody was pretty

upset about it," Hewitt seemed the most upset. TR., Vol. 2, p. 454. Hewitt said, "I don't care what you do, you don't put your hands on a female" and "bragg[ed]" that Ramirez's "mouth doesn't feel too good after that." TR., Vol. 2, p. 250; see also TR., Vol. 4, pp. 1004, 1055. Hewitt "said that he was happy that he had got his licks in." TR., Vol. 3, p. 791.

b. Hewitt And The Other Officers Assault Ramirez In A Holding Cell In Retribution For The Earlier Incident

A few hours later, around 9:30 p.m., Pearce asked Hewitt to accompany him to Ramirez's cell to deliver medications, referred to as a "med pass." TR., Vol. 2, pp. 458, 461-462; TR., Vol. 4, p. 997. This interaction was uneventful. See TR., Vol. 4, pp. 1001-1002. As they left, however, Pearce and Hewitt discussed a comb they claimed to have seen in Ramirez's cell that had been altered into a weapon, called a shank. See TR., Vol. 2, pp. 467-468. Hewitt was "very adamant about going and getting it and not wanting to get the lieutenant involved." TR., Vol. 2, pp. 468-469. While Pearce took care of other duties, he saw Hewitt talking with Pulos, Dooley, and Brown at the desk on the second floor. See TR., Vol. 2, p. 473. When Pearce briefly stopped by the desk, he heard Hewitt tell Brown that they would retrieve the shank. See TR., Vol. 2, pp. 475-476; see also TR., Vol. 1, p. 125.

Shortly thereafter, around 10:30 p.m., Pulos and Dooley went to Ramirez's cell in the medical housing unit, ostensibly because of the shank that Hewitt and

Pearce had allegedly seen in the cell.[2] TR., Vol. 3, pp. 799-800, 805. They "detain[ed] [Ramirez] on the floor of his cell," and "put him in wrist restraints and leg restraints." TR., Vol. 3, p. 804; see also Government Exh. 3 (10:30–10:35 p.m.). Choosing a path with fewer cameras, they walked Ramirez to a large holding cell without surveillance cameras on the second floor. TR., Vol. 3, pp. 807-808. They expected "[t]o inflict pain and to threaten him and to let him know he's not going to harm another officer." TR., Vol. 3, p. 808.

Once inside the holding cell, Pulos put Ramirez on the floor with his hands behind his back, still handcuffed. TR., Vol. 3, pp. 808-809. Using his full weight, Pulos put his knee into Ramirez's back twice "[t]o inflict pain and to let him know to never do this again to another officer." TR., Vol. 3, p. 811. Ramirez made "[a] grunting sound" as if he "lost his breath or something." TR., Vol. 3, p. 810.

Pulos got up and "Dooley proceed[ed] to take his turn." TR., Vol. 3, p. 812. "He sa[id], '[n]ow it's time for me to get my licks in,'" and he punched Ramirez twice in the face with full force. TR., Vol. 3, pp. 812-813.

When Hewitt came in, he said, "[y]ou think that was bad, * * * ain't nothing happened yet." TR., Vol. 3, p. 813. Hewitt yelled at Ramirez, "[y]ou're

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[2] Pulos testified that he and Dooley learned of the alleged shank from Pearce. See TR., Vol. 3, p. 799. It remains undisputed, however, that the alleged shank that Hewitt and Pearce claim that they saw served as the basis for Pulos and Dooley to return to Ramirez's cell. See TR., Vol. 3, p. 799-800.

not going to fucking do anything like this," and "[y]ou got away with not going in the restraint chair." TR., Vol. 3, pp. 813-814. Hewitt "punche[d] [Ramirez] in the face, and then he proceed[ed] to * * * kick [Ramirez] in his back." TR., Vol. 3, p. 814.

When Pearce arrived, Hewitt and Pulos were in the cell with Ramirez while Dooley was outside the cell door.[3] TR., Vol. 2, pp. 477-478, 482. Pearce saw Ramirez "laying on the ground," "look[ing] like he had just been kicked in the face." TR., Vol. 2, p. 479. He told other officers who were nearby to go away and he went inside. TR., Vol. 2, pp. 479-480, 485-486. Ramirez was on the floor of the cell, restrained and apologizing. TR., Vol. 2, pp. 482, 484, 488. Pulos kneed Ramirez in the back, Pearce stepped on his ankle, and then Hewitt "picked Inmate Ramirez up by his jumpsuit and threw him against the wall." TR., Vol. 2, p. 489.

Just outside, sitting at the desk next to the large holding cell, Brown heard Hewitt, Pulos, and Dooley in the cell talking in an "angry" tone and "heard a thump against the wall." TR., Vol. 1, pp. 93, 95-96. When she got up to leave, she

[3] There are some inconsistencies in the record about the exact roles of Pearce and Dooley during the assault. Pulos testified that "Hewitt walk[ed] into the cell along with * * * Pearce, but Pearce was more of like a lookout." TR., Vol. 3, p. 813; see also TR., Vol. 3, p. 817. Pearce testified that he arrived slightly later and joined Pulos and Hewitt in the cell while Dooley stood guard. TR., Vol. 2, pp. 477-478, 482. Both agreed, however, that Hewitt actively participated in the assault. See TR., Vol. 2, p. 489; TR., Vol. 3, p. 814.

could see in a mirror that Ramirez "was definitely getting hit." TR., Vol. 1, p. 97; see also TR., Vol. 2, pp. 185-186.

Afterwards, Hewitt warned Pulos and Pearce to stay quiet. He told Pulos: "If you fucking say anything about this, I will kill you." TR., Vol. 3, p. 818. And Hewitt told Pearce that "[he] was next" if he said anything. TR., Vol. 2, p. 496.

c. Ramirez Is Transported To The Hospital Where His Traumatic Injuries Are Discovered

Around 3:30 a.m. the next morning, nurses decided to send Ramirez to the hospital "[b]ecause his vital signs were outside of the normal range with some of what he was experiencing." TR., Vol. 2, pp. 347-348; see also TR., Vol. 3, p. 733. Unaware of the assault, the nurses ascribed his worsening condition to an increase in alcohol withdrawal and recommended hospitalization to rule out alcohol delirium. TR., Vol. 2, pp. 348-350.

Dr. Adam Stuppy, an emergency medicine resident at Truman Medical Center, treated Ramirez. TR., Vol. 2, p. 401. Although Dr. Stuppy "expect[ed] to be treating a gentleman for alcohol withdrawal," he was instead "faced with a gentleman who had obviously suffered some * * * traumatic injuries." TR., Vol. 2, p. 414. Dr. Stuppy diagnosed Ramirez with facial contusions (bruising to the face), pulmonary contusion (bruising of the lung), pneumothorax (punctured lung), hemothorax (internal bleeding), multiple rib fractures, thoracic spine injury as well as multiple spinal fractures, and a wrist fracture. TR., Vol. 2, pp. 407-409, 415;

see also TR., Vol. 4, pp. 943-944. Dr. Stuppy testified that Ramirez's injuries were "consistent with blunt force trauma" and could have been life threatening. TR., Vol. 2, p. 416.

2. Procedural History

a. On April 18, 2017, a federal grand jury returned a four-count indictment against Hewitt, Pearce, Dooley, and Pulos. DCD 1. With respect to the assault in the large holding cell, the indictment charged all four defendants with conspiring to deprive Ramirez of his civil rights, in violation of 18 U.S.C. 241 (Count 1), and of depriving Ramirez of his civil rights, in violation of 18 U.S.C. 242 (Count 2). DCD 1, at pp. 1-4. With respect to the earlier altercation in the medical housing unit, the indictment charged Hewitt and Pearce of depriving Ramirez of his civil rights, in violation of 18 U.S.C. 242 (Count 3), and Hewitt alone of making a false entry in a document with the intent to impede, obstruct, and influence the investigation and proper administration of that matter, in violation of 18 U.S.C. 1519 (Count 4). DCD 1, at pp. 4-5.

Pulos and Pearce pleaded guilty before trial. Pulos pleaded guilty to depriving Ramirez of his civil rights under color of law, in violation of 18 U.S.C. 242 (Count 2). DCD 160. Pearce pleaded guilty to conspiring to deprive Ramirez of his civil rights, in violation of 18 U.S.C. 241 (Count 1). DCD 170.

Hewitt and Dooley pleaded not guilty and were tried before a jury. The government presented testimony from 15 witnesses, including Pulos and Pearce. See TR., Vol. 1, p. 3; TR., Vol. 2, p. 149; TR., Vol. 3, p. 504; TR., Vol. 4, p. 866. Hewitt testified in his own defense. See TR., Vol. 4, p. 866. The defendants moved for judgments of acquittal after the government rested and again after the defense rested, but the district court denied the motions and submitted the case to the jury. See TR., Vol. 4, pp. 951, 1066-1067.

The jury returned its verdict on October 4, 2019. DCD 188. The jury found Hewitt and Dooley guilty of conspiracy against rights (Count 1) and deprivation of rights (Count 2). DCD 188, at pp. 1-2 (Hewitt); DCD 187, at pp. 1-2 (Dooley). The jury acquitted Hewitt of the remaining counts relating to the earlier incident in the medical housing unit. See DCD 188, at pp. 3-4.

b. The Probation Office calculated Hewitt's Sentencing Guidelines range to be 108 to 120 months' imprisonment.[4] PSR, p. 13. After sustaining an objection

[4] Using the 2018 Guidelines Manual, the Probation Office calculated the total offense level to be 31. PSR, pp. 9-10. This calculation was based on a base offense level of 19, a six-level increase because the offense was committed under color of law, a two-level increase because the defendant knew or should have known that the victim was vulnerable, a two-level increase because the victim was physically restrained, and a two-level increase for obstruction of justice. PSR, pp. 9-10. With a criminal history category of I and a total offense level of 31, the Guidelines range was 108 to 135 months. PSR, p. 13. Because of the statutory maximum, the upper limit was reduced to 120 months. PSR, p. 13.

to the adjustment for obstruction of justice (which reduced the total offense level to 29), the district court adjusted the range to 87 to 108 months' imprisonment. Sent., pp. 8-9. Hewitt asked for time served or, in the alternative, a sentence no longer than the 36 months that the court had imposed on Dooley.[5] Sent., p. 10. The government asked the court to impose a Guidelines sentence. Sent., p. 11.

At the sentencing hearing, Hewitt objected to information included in the presentence report relating to the first incident in the medical housing unit for which he had been acquitted. Sent., pp. 2, 6. The court denied the objection, explaining: "I think that it's proper to have that in the presentence report, but none of the matters that relate to the charges for which Mr. Hewitt was acquitted are matters that I take into consideration at all in terms of fashioning an appropriate sentence." Sent., p. 6; see also Sent., pp. 2-3. Rather, the court explained, "[t]he reality of it is Mr. Hewitt was convicted of really an egregious offense against Mr. Ramirez * * * and the offense that he was found guilty of is really the significance of my sentencing consideration." Sent., p. 5.

For this offense, the court noted that this was "a horrendous act" against "an extremely vulnerable individual * * * whose safety and care was entrusted to [Hewitt] as an officer in the Jackson County jail." Sent., p. 14. "[T]he evidence

[5] Pearce and Pulos, who pleaded guilty, received lower sentences. The court sentenced Pulos to 30 months' imprisonment on Count 2 (DCD 238), and Pearce to 24 months' imprisonment on Count 1 (DCD 230).

was that Mr. Ramirez probably wouldn't have survived if somebody else didn't intervene on his behalf." Sent., pp. 14-15. Rather than protect Ramirez, "[i]t was [Hewitt] that hurt him." Sent., p. 15.

The court found that, as compared to Dooley, "[Hewitt's] behavior was more extreme and contributed in a more serious way to the injury that Mr. Ramirez suffered than that of Mr. Dooley." Sent., p. 15. "Not that anyone who was involved in this system didn't commit a serious crime, but [Hewitt's] behavior was worse." Sent., p. 15. The court concluded that "[Hewitt] w[as] more responsible for the injuries that were suffered by Mr. Ramirez." Sent., p. 15.

The court "t[ook] into consideration all of the sentencing factors set forth under 18 U.S.C. Section 3553," but specifically mentioned "[Hewitt's] history and characteristics, the seriousness of the offense, the need to promote respect for the law with the sentence imposed and provide just punishment, afford adequate deterrence to criminal conduct, and there's a more compelling need to deter others from similar kind of conduct." Sent., pp. 15-16. Ultimately, the court varied downwards to 45 months, sentencing Hewitt to nine more months than Dooley. Sent., pp. 15-16; cf. Add., p. 4; DCD 233, at p. 2.

SUMMARY OF ARGUMENT

This Court should affirm Hewitt's convictions and sentence. The evidence was more than sufficient to support the jury's verdict, and his challenge to the reasonableness of his below-Guidelines sentence lacks merit.

1. Hewitt was convicted of conspiring to deprive Ramirez of his civil rights and depriving Ramirez of his civil rights, in violation of 18 U.S.C. 241 and 242. Both convictions are amply supported by the record.

a. Hewitt challenges his conspiracy conviction under Section 241, arguing that the co-conspirators never reached an agreement to assault Ramirez. Br., pp. 12-20. This Court has made clear, however, that direct evidence of an explicit agreement is not necessary to prove a conspiracy. Instead, the government can establish a conspiracy based on circumstantial evidence of a tacit agreement.

Sufficient evidence existed in this case for a reasonable jury to find that Hewitt reached an agreement with his co-conspirators to assault Ramirez, a pretrial detainee in their custody, in retribution for an earlier altercation that Ramirez had with a female corrections officer. Pearce and Pulos testified that the co-conspirators all expressed frustration with the decision not to punish Ramirez for the earlier incident. Pearce testified that Hewitt spoke to Pulos and Dooley about returning to Ramirez's cell to retrieve a shank that Hewitt claimed to have seen there. Pulos testified that he and Dooley then moved Ramirez from his cell in the

medical housing unit to a large holding cell without surveillance cameras with the intent "to inflict pain." TR., Vol. 3, p. 808. Once in the holding cell, the officers took turns assaulting Ramirez. Although the details varied slightly, both Pulos and Pearce testified that Hewitt actively participated in the assault and then sought to cover up the group's actions. The jury could have found that Hewitt conspired with Pulos and Dooley before the assault, or that he tacitly joined the conspiracy when he took part in the collective beating.

b. Hewitt also challenges his conviction for depriving Ramirez of his civil rights under Section 242, arguing that "he did not participate in the second incident at all." Br., p. 21. This argument consists of a pure factual disagreement with the jury's assessment of the witnesses' credibility and the evidence's probity. See Br., pp. 21-24. While Hewitt maintains his innocence, there is more than sufficient evidence to support the jury's contrary determination. Indeed, Hewitt's co-conspirators, Pulos and Pearce, both testified that he actively participated in the assault, and another officer, Brown, also testified that she saw Hewitt on the second floor in the large holding cell where Ramirez was "getting hit." TR., Vol. 1, pp. 91, 97.

2. Hewitt's below-Guidelines sentence of 45 months was substantively reasonable. This Court has been clear that "[w]here a district court has sentenced a defendant below the advisory guideline range, 'it is nearly inconceivable that the

court abused its discretion in not varying downwards still further.'" *United States* v. *Torres-Ojeda*, 829 F.3d 1027, 1030 (8th Cir. 2016) (citation omitted). The district court's decision in this case to sentence Hewitt to 45 months – 42 months lower than the bottom of the Guidelines range – did not constitute an abuse of discretion. Hewitt argues that the nine-month disparity between his sentence and Dooley's sentence lacks a basis in the record and that the district court improperly relied on his acquitted conduct. Br., pp. 25-27. Not so. The district court made clear that the acquitted conduct played no role in its decision and that it based Hewitt's sentence on testimony that Hewitt's role in the assault for which they were both convicted was more egregious than Dooley's.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO CONVICT HEWITT OF CONSPIRACY AGAINST CIVIL RIGHTS AND DEPRIVATION OF CIVIL RIGHTS

A. Standard Of Review

This Court "review[s] de novo the sufficiency of the evidence to sustain a conviction, viewing the evidence in a light most favorable to the verdict and accepting all reasonable inferences supporting the verdict." *United States* v. *Colton*, 742 F.3d 345, 348 (8th Cir. 2014) (per curiam). The Court must affirm "[i]f there is an interpretation of the evidence that would allow a reasonable-

minded jury to find the defendant guilty beyond a reasonable doubt." *United States* v. *Blakeney*, 876 F.3d 1126, 1131 (8th Cir. 2017) (citation omitted), cert. denied, 139 S. Ct. 98 (2018). "Reversal is not appropriate '[e]ven where the evidence rationally supports two conflicting hypotheses.'" *Ibid.* (citation omitted). Rather, reversal "is required 'only if no reasonable jury could have found guilt beyond a reasonable doubt.'" *Ibid.* (citation omitted). Because of this "strict" standard, *Colton*, 742 F.3d at 348 (citation omitted), "[a] defendant challenging the sufficiency of the evidence 'confronts a high hurdle,'" *United States* v. *Bell*, 477 F.3d 607, 614 (8th Cir. 2007) (citation omitted).

B. Sufficient Evidence Supported Hewitt's Conviction Under 18 U.S.C. 241 For Conspiracy To Deprive Ramirez Of His Civil Rights

Hewitt argues that insufficient evidence supported his Count 1 conviction under 18 U.S.C. 241. Br., pp. 12-20. This statute makes it unlawful for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. 241. As with any criminal conspiracy statute, the government must prove "an agreement to commit an unlawful act." *United States* v. *Jimenez Recio*, 537 U.S. 270, 274 (2003) (citation omitted); *Blakeney*, 876 F.3d at 1131. Hewitt challenges on appeal only the existence of such an agreement (Br., p. 15), but the record supports the jury's

determination that the officers agreed to violently assault Ramirez in retribution for the previous altercation with a female officer.

This Court has been clear that "[d]irect evidence of an explicit agreement is not necessary to prove a conspiracy." *United States* v. *Winston*, 456 F.3d 861, 866 (8th Cir. 2006). "The agreement may be a tacit understanding rather than a formal, explicit agreement." *United States* v. *May*, 476 F.3d 638, 641 (8th Cir. 2007). This tacit agreement "may be, and often will be, inferred from circumstantial evidence." *Winston*, 456 F.3d at 866 (citation omitted).

As other circuits have recognized, this principle applies with equal force to Section 241 conspiracies. See, *e.g.*, *United States* v. *Scott*, 979 F.3d 986, 990 (2d Cir. 2020); *United States* v. *Gonzalez*, 906 F.3d 784, 792 (9th Cir. 2018), cert. denied, 139 S. Ct. 1568 and 140 S. Ct. 159 (2019); *United States* v. *Robinson*, 813 F.3d 251, 256 (6th Cir. 2016); *United States* v. *McQueen*, 727 F.3d 1144, 1153 (11th Cir. 2013); *United States* v. *Cortés-Cabán*, 691 F.3d 1, 13-15 (1st Cir. 2012), cert. denied, 569 U.S. 1019 (2013); *United States* v. *Davis*, 810 F.2d 474, 477 (5th Cir. 1987). Thus, for a Section 241 conviction, "a tacit agreement will suffice," which "may be inferred from the conspirators' conduct as well as other circumstantial evidence." *Gonzalez*, 906 F.3d at 792 (citations omitted).

1. Hewitt seems to acknowledge that evidence of an agreement can be inferred from circumstantial evidence (Br., pp. 12-13), but nevertheless faults the

government's witnesses for failing to testify that he ever explicitly discussed assaulting Ramirez (see Br., pp. 16-20). Again, however, "[d]irect evidence of an explicit agreement is not necessary." *Winston*, 456 F.3d at 866. Relying primarily on the testimony of two of Hewitt's co-conspirators, Pearce and Pulos, the government proved the existence of an agreement either before or during the collective beating of Ramirez in the holding cell.

The evidence established that all four officers were frustrated with the decision not to punish Ramirez for his earlier altercation with a female officer. Pearce testified that he was "upset" with the decision. TR., Vol. 2, p. 452. Pulos described himself as "angry." TR., Vol. 3, pp. 789-791. Pulos testified that Dooley was "pissed that Inmate Ramirez did not go in the restraint chair, as I was." TR., Vol. 3, p. 802. While "[e]verybody was pretty upset about it," Pearce characterized Hewitt as "upset the most." TR., Vol. 2, p. 454. Even Hewitt testified that "[i]t's possible" that he said, "[Ramirez] should know something about putting his hand[s] on a woman." TR., Vol. 4, p. 1004.

Pearce testified that, after he and Hewitt saw the alleged shank in Ramirez's cell in the medical housing unit, Hewitt wanted to go back and get it without the involvement of a supervisor. TR., Vol. 2, pp. 468-469. Shortly thereafter, Pearce saw Hewitt talking with Pulos, Dooley, and Brown. TR., Vol. 2, p. 473. Pearce testified that, when Brown mentioned retrieving the shank, Hewitt responded:

"Fuck that, Brown. We got it." TR., Vol. 2, pp. 475-476. Pulos testified that he and Dooley went to remove Ramirez from his cell specifically because of the alleged shank. TR., Vol. 3, pp. 799-800.

Pulos testified that he and Dooley had a clear intent "to inflict pain" after they removed Ramirez from his cell in the medical housing unit. TR., Vol. 3, p. 808. "[F]rom when we left to when we went all the way around to the holding cell, we were continuously threatening him and cussing at him and letting him know he's not going to fucking touch another female officer." TR., Vol. 3, p. 808.

Pulos testified that, once at the holding cell, he assaulted Ramirez with Dooley and Hewitt while Pearce acted as more of a lookout. See TR., Vol. 3, pp. 809-814. Specifically, Pulos testified that he kneed Ramirez in the back twice and then Dooley "proceed[ed] to take his turn" by punching Ramirez twice in the face. TR., Vol. 3, pp. 809-810, 812. When Hewitt entered the cell, he said, "[y]ou think that was bad, * * * ain't nothing happened yet." TR., Vol. 3, p. 813. Pulos testified that Hewitt punched Ramirez in the face and then kicked him in the back. TR., Vol. 3, p. 814.

Pearce testified that, after he arrived at the holding cell, he assaulted Ramirez with Pulos and Hewitt while Dooley blocked the door. See TR., Vol. 2, pp. 488-489. Specifically, Pearce testified that he looked around Dooley when he arrived, saw Ramirez "laying on the ground" in the large holding cell with Pulos

and Hewitt, sent the nearby probationary officers away, and joined the others in the cell. TR., Vol. 2, pp. 479, 482, 485-486. Pearce testified that Pulos kneed Ramirez in the back, he stepped on Ramirez's ankle, and Hewitt "picked Inmate Ramirez up by his jumpsuit and threw him against the wall." TR., Vol. 2, pp. 488-489.

This testimony was corroborated by Brown. She testified that she saw Ramirez at the large holding cell with all four of the defendants. TR., Vol. 1, p. 90. She saw Hewitt, Pulos, and Dooley enter the cell with Ramirez in handcuffs while Pearce stayed outside. TR., Vol. 1, pp. 90-92. She heard them talking in "angry" tones and then "heard a thump against the wall." TR., Vol. 1, pp. 93, 95-96. She testified that she saw Ramirez "getting hit," though she could not specify by whom. TR., Vol. 1, p. 97; see also TR., Vol. 2, p. 186.

Both Pulos and Pearce testified that Hewitt attempted to cover-up the group's actions after the assault. Pulos testified that, when he tried to leave the cell, Hewitt warned him: "If you fucking say anything about this, I will kill you." TR., Vol. 3, pp. 817-818. Pearce testified that Hewitt and Pulos later told him that he "was next" if he "sa[id] anything about it." TR., Vol. 2, p. 496.

2. As the government argued in closing, based on this testimony, the jury could find an agreement formed either before or during the assault in the holding cell to punish Ramirez for the earlier altercation. See TR., Vol. 5, pp. 1100-1101.

Before the assault, the jury could find an agreement based on Pearce's testimony that he "witnessed Hewitt, Dooley and Pulos talking on the second floor, moments before Pearce later came up and saw the assault in progress." TR., Vol. 5, p. 1100. Indeed, Pearce heard Hewitt, Dooley, and Pulos talking about the alleged shank that provided the basis for Dooley and Pulos to return to Ramirez's cell. See TR., Vol. 2, pp. 475-476; TR., Vol. 3, pp. 799-800. Once there, they then removed Ramirez from his cell in the medical housing unit and placed him in a large holding cell without surveillance cameras with the intent "to inflict pain." TR., Vol. 3, p. 808. During the assault, the jury could find that Hewitt tacitly joined the conspiracy based on the evidence that "the defendants are all in the cell and they're beating Mr. Ramirez and it's ongoing." TR., Vol. 5, pp. 1100-1101. In other words, the "collective beating" was evidence of a tacit agreement "in and of itself." TR., Vol. 5, p. 1101.

Two recent cases in other circuits have affirmed Section 241 convictions based solely on evidence of a collective beating. First, in *Scott*, the Second Circuit affirmed the Section 241 conviction of two correctional officers who assaulted an inmate. 979 F.3d at 988-989. The Second Circuit explicitly "reject[ed] Defendants' contention that there must be an extended period of premeditation or a distinct verbal agreement prior to the impetus of the assault." *Id.* at 990. Although the first punch "may have been spontaneous, the evidence at trial revealed that the

other officers acted in concert and purposefully joined the assault." *Ibid.* One defendant forced the victim to the ground, the other defendant ordered probationary officers removed from the area, and the group restrained and beat the victim. See *id.* at 990-991. "Although no one action on its own is necessarily sufficient," the Second Circuit found that "the evidence here demonstrates that the group consciously colluded for at least a couple minutes to deprive [the victim] of his civil rights." *Id.* at 991. As a result, the court "ha[d] no hesitation in finding that there was sufficient proof for the jury to conclude that [the defendants] entered into a tacit agreement with each other and the other officers to assault [the victim]." *Ibid.*

Second, in *Gonzalez,* the Ninth Circuit affirmed the Section 241 conviction of officers who assaulted a visitor at a county jail. 906 F.3d at 788. The Ninth Circuit recognized that "[n]one of the officers involved in the beating ever said to each other, 'Let's get together and use excessive force against [the victim].'" *Id.* at 792. Nevertheless, the Ninth Circuit held that "there was more than sufficient evidence of a tacit agreement to do just that." *Ibid.* To reach this conclusion, the Ninth Circuit looked to circumstantial evidence, including that "[t]he officers shared a common motive" to punish the victim; "[t]hey acted together to achieve that objective by repeatedly punching and kicking him"; and "they huddled

together afterward to come up with an agreed-upon story that would justify their actions." *Ibid.*

Here, too, this Court should affirm Hewitt's Section 241 conviction given the evidence that he agreed with the other officers to assault Ramirez in retribution for the earlier altercation with a female officer. Pulos's testimony was clear that he and Dooley moved Ramirez from his cell in the medical housing unit to the large holding cell without surveillances cameras "[t]o inflict pain" in retribution for the earlier altercation. TR., Vol. 3, p. 808. The jury could have found that Hewitt reached an agreement with them before the assault based on evidence that they spoke shortly beforehand about the alleged shank that provided the basis for Pulos and Dooley to return to Ramirez's cell. Or, like in *Scott* and *Gonzalez*, the jury could have found that Hewitt tacitly joined the conspiracy based on the evidence that (1) Hewitt shared the group's motivation to punish Ramirez; (2) Hewitt took his turn beating Ramirez in the large holding cell; and (3) Hewitt sought to cover up the group's actions afterwards. The jury thus had sufficient evidence to find beyond a reasonable doubt that the officers conspired to assault Ramirez together.

C. Sufficient Evidence Supported Hewitt's Conviction Under 18 U.S.C. 242 For Deprivation Of Rights Under Color Of Law

Hewitt also argues that insufficient evidence supported his Count 2 conviction under 18 U.S.C. 242. Br., pp. 21-24. This statute makes unlawful "the deprivation of any rights, privileges, or immunities secured or protected by the

Constitution or laws of the United States" by any person, acting under color of law. 18 U.S.C. 242. To secure a conviction under Section 242, "the [g]overnment must prove that a defendant 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." *Blakeney*, 876 F.3d at 1132 (internal quotation marks and citation omitted). Hewitt challenges no specific element but instead argues, based primarily on his own testimony, that "he did not participate in the second incident at all." Br., p. 21. The jury, however, heard and rejected this exact argument.

Hewitt asserts, as he did before the jury, that he did not return to the second floor after he and Pearce delivered medications to Ramirez. Br., p. 21. Rather, Hewitt claims, he went to the smoke porch, then to his station on the fourth floor, and stayed there the rest of his shift. Br., p. 21. To support this timeline, Hewitt relies on Defendant's Exhibit 502, which is a log of when officers scanned badges at card readers to move through the facility on the night of the assault. Br., p. 23; Add., pp. 8-15; see also TR., Vol. 2, p. 215. When a badge is scanned, the card reader records the officer's name, number, and location (such as an entryway or elevator). TR., Vol. 2, p. 215. However, if there is more than one officer at any location, only one officer needs to scan his or her badge. TR., Vol. 1, p. 142; TR., Vol. 2, p. 215. "[I]f," for example, "five people were in the elevator, only one person needs to swipe." TR., Vol. 2, p. 228.

On Defendant's Exhibit 502, Hewitt highlights three records. Br., p. 23. First, at 10:24:20 p.m., there is a record of Hewitt accessing the JCDC Secured Perimeter Staff Exit. Add., p. 12. Second, at 10:32:03 p.m., there is a record of Hewitt accessing Elevator Two. Add., p. 11. And third, twenty seconds later at 10:32:23 p.m., there is a record of Hewitt accessing Elevator Two again. Add., p. 11. Hewitt claims that the first swipe is "when he went to smoke," the second swipe is when "he went to get on the elevator" but was delayed by his supervisor, and the third swipe is when he "went back to the elevator to return to his station, the [fourth] floor." Br., p. 23. Thus, according to Hewitt, he was not on the second floor where the assault occurred and could not have participated in it.

The jury weighed and rejected this exact argument and evidence. Indeed, Defendant's Exhibit 502 was one of the exhibits that the jury specifically requested when deliberating. TR., Vol. 5, p. 1155. Based on its verdict, the jury found Hewitt's testimony not credible and was unconvinced by Defendant's Exhibit 502, which proves nothing about whether Hewitt went elsewhere with another officer or about where Hewitt went when he took the elevator at 10:32 p.m. Quite simply, "[t]he jury was not required to accept [the defendant]'s theory of the case or his explanation of the evidence presented against him." *United States* v. *Mann*, 701 F.3d 274, 299 (8th Cir. 2012), cert. denied, 571 U.S. 973 (2013).

Moreover, the jury heard ample evidence contradicting Hewitt's testimony, including the testimony of Brown and two of Hewitt's co-conspirators, Pearce and Pulos. As detailed above, all three testified that Hewitt assaulted Ramirez in the large holding cell on the second floor. Pulos testified that he saw Hewitt punch and kick Ramirez. TR., Vol. 3, p. 814. Pearce testified that he saw Hewitt "pick[] Inmate Ramirez up by his jumpsuit and thr[o]w him against the wall." TR., Vol. 2, p. 489. And Brown testified that she saw Hewitt on the second floor, in the large holding cell with Ramirez where he was "getting hit." TR., Vol. 1, pp. 90-91, 97; see also TR., Vol. 2, p. 190 (expressing no doubt about who she saw). Although there were minor inconsistences across their recollection of events, "[t]he jury has the sole responsibility to resolve conflicts or contradictions in testimony, and credibility determinations are resolved in favor of the verdict." *United States* v. *Aldridge*, 664 F.3d 705, 715 (8th Cir. 2011) (citation omitted).

In total, the evidence was more than sufficient for "a reasonable-minded jury to find the defendant guilty beyond a reasonable doubt." *Blakeney*, 876 F.3d at 1131 (citation omitted). This Court should affirm Hewitt's Section 242 conviction and reject his invitation to relitigate the jury's verdict.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED HEWITT TO A BELOW-GUIDELINES SENTENCE OF 45 MONTHS

A. Standard Of Review

This Court reviews the reasonableness of a district court's sentencing decision under "a deferential abuse-of-discretion standard." *Gall* v. *United States*, 552 U.S. 38, 41 (2007); *United States* v. *Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc). "An abuse of discretion occurs 'if a sentencing court fails to consider a relevant factor [under 18 U.S.C. 3553] that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case.'" *United States* v. *Fiorito*, 640 F.3d 338, 352 (8th Cir. 2011) (quoting *United States* v. *Haack*, 403 F.3d 997, 1004 (8th Cir. 2005)), cert. denied, 565 U.S. 1246 (2012).

B. Hewitt's 45-Month Sentence Was Substantively Reasonable

The district court calculated Hewitt's applicable Guidelines range to be 87 to 108 months. Sent., p. 9. After "taking into consideration all of the sentencing factors set forth under 18 U.S.C. Section 3553," the district court varied downwards to impose a sentence of 45 months. Sent., pp. 15-16. Hewitt does not

dispute the calculation of the Guidelines range, but argues that this sentence was substantively unreasonable because the court did not vary downwards to a greater extent. Br., pp. 25-27. As this Court has explained, "[w]here a district court has sentenced a defendant below the advisory guidelines range, 'it is nearly inconceivable that the court abused its discretion in not varying downwards still further.'" *United States* v. *Torres-Ojeda*, 829 F.3d 1027, 1030 (8th Cir. 2016) (citation omitted).

Hewitt nevertheless contests the nine-month sentencing disparity between his sentence of 45 months and Dooley's sentence of 36 months. See Br., p. 25. One of the factors listed in 18 U.S.C. 3553 is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. 3553(a)(6). The district court properly considered this factor and concluded that Hewitt bore more responsibility:

> It was you that hurt him and your conduct was more egregious. Your behavior was more extreme and contributed in a more serious way to the injury that Mr. Ramirez suffered than that of Mr. Dooley. Not that anyone who was involved in this system didn't commit a serious crime, but your behavior was worse. You were more responsible for the injuries that were suffered by Mr. Ramirez.

Sent., p. 15.

Hewitt claims that this conclusion has no basis in the record. See Br., pp. 26-27. According to Hewitt, "[i]t is unclear how [his] behavior was worse or how

he contributed to [Ramirez]'s injuries [more] than Mr. Dooley." Br., p. 26. Hewitt assumes that the district court must have "improperly use[d] [his] involvement in the first incident [*i.e.*, the altercation in the medical housing unit] against him to find him more responsible than his co-defendant Dooley, despite the fact that he was acquitted of these charges." Br., p. 25.[6]

To the contrary, the district court stated that Hewitt's actions in the first incident, for which he was acquitted, had no impact on the sentencing decision. When Hewitt objected to the inclusion of information relating to the first incident in the presentence report, the district court explained, "I think that it's proper to have that in the presentence report, but none of the matters that relate to the charges for which Mr. Hewitt was acquitted are matters that I take into consideration at all in terms of fashioning an appropriate sentence." Sent., p. 6; see also Sent., pp. 2-3 ("I know that Mr. Hewitt was found not guilty of any criminal action in relation to those matters, and none of that has any impact on my sentencing considerations."). Instead, the district court focused on the

[6] To be clear, consideration of the first incident would not have been improper if the district court found the relevant facts at sentencing by a preponderance of the evidence. See *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006). But this Court need not consider the issue because Hewitt is simply incorrect that acquitted conduct played any role in the district court's sentencing decision.

"horrendous" and "egregious" assault for which Hewitt was convicted. See Sent., pp. 5, 14.

The evidence at trial supported the district court's assessment. Pearce testified that Dooley was "[s]tanding in the doorway" of the cell while Hewitt "picked Inmate Ramirez up by his jumpsuit and threw him against the wall." TR., Vol. 2, p. 489. Pulos testified that, while Dooley punched Ramirez in the face twice (TR., Vol. 3, pp. 812, 851-852), Hewitt punched Ramirez in the face twice and then kicked him in his back (TR., Vol. 3, pp. 814, 853-854). Both Pearce and Pulos testified that Hewitt—not Dooley—threatened the co-conspirators to cover up the assault afterwards. TR., Vol. 2, p. 496; TR., Vol. 3, pp. 817-818, 820.

Hewitt may disagree with the district court about his respective culpability, but that is not a basis for concluding that his sentence was substantively unreasonable. See *United States* v. *Brunken*, 581 F.3d 635, 638 (8th Cir. 2009), cert. denied, 562 U.S. 949 (2010); see also *United States* v. *Watson*, 480 F.3d 1175, 1178 (8th Cir.), cert. denied, 552 U.S. 927 (2007) (affirming higher sentence for "more culpable" co-defendant). This is particularly true where, as here, the court substantially varied downward from the minimum Guidelines range of 87 months' imprisonment to impose a sentence of 45 months' imprisonment. This Court should affirm Hewitt's sentence.

CONCLUSION

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

Respectfully submitted,

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

s/ Alisa C. Philo
TOVAH R. CALDERON
ALISA C. PHILO
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-2424
Alisa.Philo@usdoj.gov

CERTIFICATE OF COMPLIANCE

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

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 7855 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font;

(3) complies with Local Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Windows Defender (Version1.2.3412.0) and is virus-free according to that program.

s/ Alisa C. Philo
ALISA C. PHILO
Attorney

Date: December 9, 2020

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2020, I filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, which will send notice to all counsel of record by electronic mail. All participants in this case are registered CM/ECF users.

I further certify that on December 11, 2020, I filed ten paper copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by Federal Express, next-day mail; and I served one paper copy of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE to the following counsel of record pursuant to Local Rule 28A(d):

Angela L. Williams
4049 Pennsylvania Ave., Suite 201
Kansas City, MO 64111

s/ Alisa C. Philo
ALISA C. PHILO
Attorney