No. 17-4046

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MARK COWDEN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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elements of Section 242 that required the jury, first, to determine whether Cowden violated basic elements of the statute and, if so, to determine whether Cowden's use of force resulted in bodily injury. J.A. 460.[3] The government also filed an objection to Cowden's proposed instruction, asserting that it was unnecessary "because the need for a lesser included offense instruction is obviated by the United States' Jury Instruction No. 3, which asks the jury to make a special finding regarding the injury element on Count One [the Section 242 count]." S.A. 1. The government also noted that it had submitted a special verdict form in this regard, and explained that the Section 242 count "is a felony if there was a resulting injury, and a misdemeanor if there was not a resulting injury." S.A. 1-2.

At the charge conference on the last day of trial, Cowden did not raise his proposed jury instruction on lesser included offenses, and the court did not address it. J.A. 1684-1727. Cowden also did not object to the government's proposed Instruction No. 3, despite having the opportunity to do so, and the court gave this instruction to the jury. J.A. 1777-1779, 1785. The court also repeated its limiting

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(…continued)
found that the victim did not suffer "bodily injury." As relevant here, under 18 U.S.C. 242 the maximum sentence is one year unless the government proves that that bodily injury resulted, in which case the maximum sentence is ten years.

[3] The three basic elements of an 18 U.S.C. 242 violation are that the defendant (1) acting under color law; (2) willfully; (3) deprived the victim of a federally protected right.

instruction to the jury on how it may and may not use the Rule 404(b) evidence. J.A. 1772. At the conclusion of the jury instructions, the district court asked the parties if they had any objections not already placed on the record during the charge conference, and both the government and the defense answered they had none. J.A. 1796.

c. On October 17, 2016, the jury returned its verdict. J.A. 1804. Pursuant to the special verdict form, the jury found Cowden guilty on the Section 242 count and, next, determined that his offense resulted in bodily injury to Hamrick. J.A. 1799, 1804. The jury found Cowden not guilty on the Section 1519 count. J.A. 1799-1800, 1804.

The district court sentenced Cowden to 18 months' imprisonment, three years supervised release, a $100 special assessment, and $3044 in restitution to Hamrick. J.A. 1855-1858, 1861-1867. The restitution was for Hamrick's medical expenses incurred in treating his injuries. J.A. 1820; S.A. 22.

Cowden filed a timely notice of appeal. J.A. 1868.

2. Underlying Facts

Viewed in the light most favorable to the government, see *United States* v. *Alerre*, 430 F.3d 681, 693 (4th Cir. 2005), cert. denied, 547 U.S. 1113 (2006), the evidence presented at trial established the following:

a. Hamrick's Arrest And Transport To The HCSO

On January 26, 2015, Hamrick was driving in Hancock County, West Virginia, when he was pulled over by West Virginia State Police Trooper Michael Hoder for speeding and a taillight violation. J.A. 991-992, 1172-1173. Hoder asked Hamrick to exit the vehicle and submit to a field sobriety breathalyzer test. J.A. 995, 1173-1174. Hamrick failed the test, and Hoder placed him under arrest. J.A. 995, 997-998, 1174. But Hamrick resisted being handcuffed. J.A. 964, 995, 998-999, 1023, 1030, 1174, 1183. As a result, Hoder called for backup assistance. J.A. 718, 994-995, 1005, 1008, 1030, 1210-1211, 1297, 1457.

While Hamrick was resisting arrest, a fight ensued. For over ten minutes, Hoder repeatedly tried to take the larger Hamrick down to the ground to subdue him. J.A. 987, 996, 999-1002, 1004, 1007-1008, 1183. Hoder eventually succeeded, handcuffed Hamrick, and picked Hamrick up from off the ground. J.A. 775, 944, 964, 988, 1015-1018, 1020-1024, 1028, 1043, 1174. At that time, Hoder observed blood in the snow, dried blood on Hamrick's nose or cheek, and a "goose egg" on his forehead, but no active bleeding. J.A. 963-964, 987, 1019, 1047, 1051-1052.

Chester County Patrolman Brandon Whittaker arrived at the scene as the fight between Hoder and Hamrick was ending. J.A. 772, 774, 964, 1018. Whittaker then drove Hamrick to the HCSO for processing. J.A. 775, 792, 945,

965, 1466. When Hamrick entered Whittaker's car, he started yelling, but did not offer any further resistance. J.A. 965, 1052. During the short trip to the HCSO, Hamrick did not say anything threatening or act in a physically threatening manner. J.A. 775-776.

Defendant Cowden also responded to Hoder's call for backup, but returned to the HCSO without making it to the arrest scene after HCSO Sergeant Eric Cline—who had arrived at the scene—directed all officers to go back to the HCSO to assist in processing Hamrick. J.A. 720, 1298, 1459, 1465-1467. While waiting at the HCSO for Hamrick to arrive, Cowden commented: "Wait till [Hamrick] gets down here" and "[h]e's not going to act that way with us, this is our house, play by our rules." J.A. 721. HCSO Deputy Jeffrey McIntyre interpreted these statements to mean that if Hamrick got out of line, he would be put back in line. J.A. 721-722. According to McIntyre, Cowden's mood was out of the ordinary and he appeared to be upset by what had happened to Hoder, a fellow law enforcement officer. J.A. 721-722. Although Cowden asserted that he was concerned prior to Hamrick's arrival that Hamrick had the "potential to get very dangerous" based on information about the arrest Cowden claimed to have learned (J.A. 1469, 1544), he admitted—and Hoder confirmed—that Hoder had not told him the details of the fight that had occurred at the arrest scene (J.A. 1050-1051, 1543-1544).

b. Cowden's Use Of Force Against Hamrick At The HCSO

When Hamrick arrived at the parking lot outside the HCSO, his car was met by five officers: Cowden, McIntyre, Hoder, Cline, and HCSO Deputy Dante Jeter. J.A. 945, 1212-1213. Hamrick was still handcuffed behind his back and did not resist or act physically threatening as he was removed from the vehicle. J.A. 722, 777-778, 945, 1213, 1298-1299. He also was not actively bleeding. J.A. 738, 740, 780-781, 966, 1320.[4]

Cowden held Hamrick by the left arm and Cline held Hamrick by the right shoulder as they escorted him to the entrance of the Hancock County courthouse, which houses the HCSO on the second floor. J.A. 722-723, 777, 945, 1299. While they were outside, Hamrick stated that he knew people and that all he needed to do was make a phone call. J.A. 725, 1215-1217, 1301-1302, 1306. None of the officers present, other than Cowden, viewed this statement or anything else Hamrick said at the time to be a threat. J.A. 725, 776, 946, 949, 959, 1214-1215, 1300, 1348-1349.

McIntyre held the courthouse doors open for the escort to enter, and Whittaker, Hoder, and Jeter followed behind. J.A. 722-723, 777, 946, 1216-1217. Hamrick was not physically resisting as he entered the lobby, and Cline never

[4] The district court admitted surveillance videotapes of what happened at the HCSO, both outside and inside the building. J.A. 730-731.

believed that he was losing control of Hamrick. J.A. 723-724, 778, 946, 1217, 1300-1301, 1303. Although McIntyre and Hoder testified that Hamrick continued to maintain the same loud and drunken demeanor he had when he first arrived at the courthouse, neither Cline, McIntyre, nor Hoder believed that Hamrick was a threat at that time, particularly considering that he was handcuffed behind his back and surrounded by six law enforcement officers. J.A. 725-726, 947-948, 1306-1308.

During the escort, Cline asked Cowden whether they would take the elevator or the stairs to the HCSO on the second floor, but Cowden did not respond. J.A. 1308-1309, 1347-1348. Accordingly, neither Cline nor Hamrick knew how Cowden wanted to get the escort upstairs. J.A. 1309, 1347. When the escort entered the ground-floor lobby, Hamrick pulled away from Cowden and Cline and from the direction of the elevator. J.A. 947, 1037-1039, 1219, 1310. Neither Hoder nor Jeter interpreted this move as a threat; Hoder viewed it as "[m]ore or less just being a pain." J.A. 947, 1219. But Cowden responded by pulling Hamrick back toward the elevator and throwing him up against the wall. J.A. 762, 779, 950, 1219, 1310-1311, 1483, 1550.

While Hamrick was pressed up against the wall and not resisting, Cowden pulled Hamrick's head away from the wall and slammed it face-first into the wall. J.A. 780, 950, 1311-1312. Cowden repeated the statement he had made before

Hamrick's arrival that the HCSO was "our house" and that Hamrick had to "play by our rules." J.A. 728-729, 782-783, 1311. According to Cline, Cowden's tone of voice and his use of force indicated that he was losing control. J.A. 1311, 1316. Cowden's conduct left Cline in a "state of shock" and Whittaker feeling "uneasy," with both officers wondering what Hamrick had done to warrant Cowden's forceful response. J.A. 780, 1313.

Cowden then moved Hamrick in front of the elevator and struck him in the back of the head with a closed fist or forearm. J.A. 727, 733, 769, 845, 1234, 1487-1489, 1556, 1558-1559. Although Cowden testified that Hamrick had attempted to head-butt him before the punch (J.A. 1488-1489, 1558-1559), other officers refuted that version of the events (J.A. 733, 770, 898, 1044, 1196-1197). Next, when the elevator doors opened, Cowden grabbed Hamrick by the throat, banged his head into the corner of the elevator, and yelled at him about acting like an idiot and fighting Cowden's officers. J.A. 728, 845, 961-962, 1315, 1491, 1493-1494, 1560-1562. Hoder interpreted Cowden's statements to refer to Hamrick's fight earlier that evening at the scene of the arrest. J.A. 961-962. Cowden's use of force ended when Cline placed one hand between Cowden and Hamrick, and the other hand between Hamrick's head and the wall, and told Cowden, "[B]ack off, I'll take it from here." J.A. 1314-1318; see also J.A. 1378-1379.

Cowden's use of force—in particular, the slamming of Hamrick's head into the wall—inflicted a gash above Hamrick's left eye and a cut above his nose. J.A. 781-782, 1046, 1321. It also caused Hamrick to bleed from his nose and mouth; there was blood on the floor and the walls of the courthouse building and elevator. J.A. 740-742, 745, 781-782, 812-814, 966-968, 972-973, 1046-1047, 1220-1221, 1317, 1320-1323. Hamrick received medical care for his injuries at the HCSO processing room before he was transported to the regional jail. J.A. 742, 969-970, 1175-1176, 1321-1324. Hamrick subsequently received a CT scan and emergency room services at the hospital, incurring a bill of $3044. J.A. 1201; S.A. 22.

Hamrick testified that Cowden's use of force caused him neck and head pain that lasted through his night's stay at the regional jail and for several days after he returned home. J.A. 1176. Hamrick's wife was "devastated" upon seeing him after his release from jail and described his appearance as "caveman-like" with a "very distended forehead," "swollen" eyes, and "distorted" nose. J.A. 1201.

3. The Government's Rule 404(b) Evidence – Cowden's Prior Uses Of Force

Pursuant to Federal Rule of Evidence 404(b), the United States introduced at trial evidence of two prior uses of force by Cowden to establish, for purposes of Section 242, his motive and intent at the time of his repeated use of force against Hamrick. J.A. 1065-1111, 1113-1156. Both incidents occurred less than two years before the Hamrick incident, and involved Cowden's excessive use of force against

individuals who posed no threat to him or to others, but who he perceived to have disrespected him. The government presented this evidence through the testimony of four witnesses, including both victims. The following is a summary of the two incidents:

a. Settle Incident

In June 2014, HCSO Sheriff Ralph Fletcher and HCSO Chief Deputy Art Watson responded to a call of a domestic disturbance at the home of Clayton Settle, a man in his late 60s. J.A. 1113, 1119, 1122-1123. Cowden responded to the same call. J.A. 1114. Cowden entered the house and began talking to Settle in the kitchen. J.A. 1115. According to Settle, Cowden, without warning or provocation, used the rim of his hat to hit Settle in the nose, causing Settle's nose to bleed. J.A. 1115-1116.

Shortly thereafter, Sheriff Fletcher entered the house and observed Cowden yelling at Settle, taking Settle to the ground, and "wrestling with [Settle] rather roughly." J.A. 1125. Settle did not appear to be resisting. J.A. 1125. Fletcher believed that Cowden was being overly aggressive given the significant size, strength, and age differences between the two men. J.A. 1126. Fletcher yelled at Cowden to back off and grabbed Cowden by the upper shoulder to pull him back. J.A. 1126. Cowden initially resisted, but released his grip on Settle once he turned his head and recognized Fletcher. J.A. 1126-1127. Fletcher testified that

Cowden's face "was in a rage" and that Cowden insisted that Settle had attempted to head-butt him—a claim that Fletcher was unable to corroborate. J.A. 1127-1128.

The following day, Fletcher and Watson met with Cowden to discuss what had happened at the Settle home. J.A. 1128. Fletcher testified that he wanted to counsel Cowden that his conduct was unacceptable and that he "needed to get control of his anger." J.A. 1129. When Fletcher mentioned that he did not believe that Settle was a threat at the time Cowden used the force Fletcher observed, Cowden reiterated his claim that Settle had attempted to head-butt him. J.A. 1129.

b. Chrome Nightclub Incident

In February 2013, the HCSO dispatch center received a report that there might be fights after a rap concert at the Chrome Nightclub in Hancock County. J.A. 1083-1084. As a result, HCSO Deputy Patrick Hoder[5] went to the nightclub's parking lot, where he was joined by HCSO Deputy Scott Little. J.A. 1084-1085.

Hoder noticed an escalating argument involving two men and a woman, and he and Little intervened. J.A. 1067, 1085. Hoder and Little told the two men to go to their separate vehicles, and the parties started to comply. J.A. 1086. But one of the individuals—later identified as William Hall—continued to argue, so Hoder

[5] HCSO Deputy Patrick Hoder is one of Cowden's longtime colleagues and the father of Trooper Hoder, the officer who arrested Hamrick. J.A. 940.

and Little returned to the scene and reiterated to Hall that he needed to go to his vehicle. J.A. 1086-1087. Hall started to walk away but then returned to argue with the officers. J.A. 1087. Hoder believed that Hall was not a threat, but was "just being a little bit mouthy." J.A. 1087-1088.

Cowden also arrived on the scene. He either shoved Hall or grabbed him by the shoulder, causing Hall to turn around. J.A. 1067-1068, 1088-1089. According to Hall, Hall may have made contact with Cowden when he turned around, but he put his hands up when he saw that Cowden was a police officer and did not attempt to strike Cowden. J.A. 1068-1069. But Hall subsequently pointed a finger at Cowden, inadvertently touching Cowden's chest, and said: "[Y]ou need to learn to show respect. You need to learn how to talk to somebody." J.A. 1089, 1107-1108.

Cowden responded by shoving Hall into his open minivan and then punching him in the face. J.A. 1069, 1075-1076, 1089-1091. Hoder believed that Hall—who was much smaller than Cowden—did not present a threat that warranted Cowden's level of physical response. J.A. 1089-1091, 1108, 1454.

As Hall attempted to get out of the van, Cowden threw him face-down on the ground. J.A. 1069, 1092. Hall rolled to his side into a fetal position, with both hands covering his face, as Cowden punched Hall in the back of the head. J.A. 1069, 1071, 1094. According to Hoder, Hall did not appear to be resisting. J.A. 1095. Hoder then assisted Cowden in handcuffing Hall. J.A. 1095. Cowden

drove the handcuffed Hall to jail and insisted that Hall had swung at and hit him, which Hall denied. J.A. 1071-1072.

SUMMARY OF THE ARGUMENT

Defendant Cowden raises four issues challenging his conviction and sentence. None has merit.

1. The evidence was sufficient to support the conclusion that Cowden acted "willfully" under 18 U.S.C. 242 when he used excessive force against Hamrick, a pretrial detainee. Willfulness requires proof that he acted with the particular purpose of violating a protected right made definite by the rule of law, or recklessly disregarded the risk that he would do so. The evidence of Cowden's use of excessive force against a non-resisting Hamrick, the comments Cowden made at that time, and the evidence of two prior incidents in which Cowden similarly used excessive force against non-resisting individuals was sufficient for the jury to find that his deprivation of Hamrick's due process rights was willful.

2. The district court did not abuse its discretion in admitting, under Federal Rule of Evidence 404(b), evidence of two prior incidents in which Cowden used excessive force. This evidence was relevant and necessary to show Cowden's specific intent to use excessive force against Hamrick—*i.e.*, that Cowden's deprivation of Hamrick's right to be free from the use of excessive force was willful, an element of the Section 242 offense. The prior incidents were close in

time to Cowden's use of force in this case, and similarly involved his use of force against individuals who posed no threat to him or others but who Cowden believed disrespected him. This evidence also was reliable, as there is no dispute that the prior incidents occurred. Finally, the probative value of this evidence was not substantially outweighed by its prejudicial effect because the incidents were no more sensational or disturbing than the crime with which Cowden was charged and, indeed, were arguably much less so. Moreover, the district court minimized the possibility of prejudice by providing the jury with two limiting instructions setting forth the permissible and impermissible uses of the evidence.

3. The district court did not plainly err in the manner in which it instructed the jury on the elements of a Section 242 offense. The court instructed the jury that it must, first, determine whether Cowden violated Section 242's core elements and then, if so, determine whether his use of force caused bodily harm to Hamrick. The court also used a special verdict form that followed these steps. Cowden did not object to this instruction or the special verdict form. In any event, the jury instruction is consistent with the fundamental principle that the jury must find the defendant guilty of every element of the crime beyond a reasonable doubt, including those elements that affect the sentence. Moreover, the instruction given squarely encompassed Cowden's concern that the jury be able to find him guilty of a misdemeanor, rather than a felony—*i.e.*, that bodily injury did not result. For this

reason, any error in the jury instructions did not affect Cowden's substantial rights. Indeed, he fails to explain how his proposed instruction on lesser included offenses would have allowed the jury to reach a particular result that the instruction the district court gave would not. Likewise, Cowden fails to show a possibility that the jury would have reached a different verdict if instructed to make a single determination of all of the elements of Section 242, including bodily injury.

4. The district court acted within its discretion in ordering restitution for the full amount of Hamrick's medical expenses. Under the Mandatory Victims Restitution Act, restitution to a victim of a crime of violence is mandatory and must cover the full amount of the victim's necessary medical services. The district court correctly concluded that the jury's finding that Cowden caused bodily harm to Hamrick triggered Cowden's obligation to reimburse Hambrick for his CT scan and emergency room bills, and that restitution for the entire amount of these services ($3044) was warranted.

ARGUMENT

I

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

A. Standard Of Review

This Court "review[s] *de novo* the district court's denial of a motion for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal

Procedure." *United States* v. *Green*, 599 F.3d 360, 367 (4th Cir.), cert. denied, 562 U.S. 913 (2010). Where, as here, the defendant's Rule 29 motion is based on the sufficiency of the evidence, this Court is "obliged to sustain a guilty verdict if, viewing the evidence in the light most favorable to the Government, it is supported by 'substantial evidence'"—*i.e.*, "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States* v. *Alerre*, 430 F.3d 681, 693 (4th Cir. 2005) (quoting *United States* v. *Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1151 (1997)), cert. denied, 547 U.S. 1113 (2006). This Court does not "assess witness credibility, and * * * assume[s] that the jury resolved any conflicting evidence in the prosecution's favor." *United States* v. *Jeffers*, 570 F.3d 557, 565 (4th Cir.), cert. denied, 558 U.S. 1033 (2009). "A defendant bringing a sufficiency challenge [thus] bears a heavy burden," and "[r]eversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *United States* v. *Ashley*, 606 F.3d 135, 138-139 (4th Cir.) (citations and internal quotation marks omitted), cert. denied, 562 U.S. 987 (2010).

B. The Evidence Was Sufficient To Establish That Cowden Acted "Willfully" When He Used Excessive Force Against A Pre-Trial Detainee

To prove a violation of Section 242, the government must prove beyond a reasonable doubt that the defendant: (1) willfully; (2) deprived another individual

against him was objectively unreasonable."); *Dilworth* v. *Adams*, 841 F.3d 246, 255 (4th Cir. 2016) (recognizing that, post-*Kingsley*, a district court must evaluate a pretrial detainee's excessive-force claim by considering "whether under the facts and circumstances of th[e] particular case, and from the perspective of a reasonable officer on the scene, the force used against [the detainee] was objectively excessive") (citation and internal quotation marks omitted). Accordingly, to establish willfulness in this case, the jury was required to find that Cowden intended to use more force than was reasonable under the circumstances—*i.e.*, force that violated Hamrick's well-established due rights as a pretrial detainee. See J.A. 1783-1785 (jury instructions on willfulness).[6]

Here, the evidence was more than sufficient to permit the jury to conclude that Cowden acted willfully. It is undisputed that, at all relevant times, Hamrick was handcuffed behind his back and surrounded by six law enforcement officers. Several witnesses testified that Hamrick was not resisting as he entered the ground-floor lobby of the HCSO building. See p. 9, *supra*. Despite Hamrick's non-threatening status, the testimony shows that Cowden: (1) threw Hamrick against the wall in alleged response to Hamrick pulling away from the escort, despite two officers' view that he was not a threat at that time; (2) slammed Hamrick's face into the wall while his body was pressed up against the wall and told him that

[6] Cowden does not challenge the jury instructions on willfulness.

> goal, an officer may not use more force than is objectively reasonable to achieve that goal. An officer may not use force solely to punish, retaliate against, or seek retribution against another person.

J.A. 1780-1781. Cowden did not object to this instruction.

To be sure, this Court has referred to excessive force in this context as force that was intended as punishment. Cowden cites *United States* v. *Cobb*, 905 F.2d 784 (4th Cir. 1990), cert. denied, 498 U.S. 1049 (1991), for that proposition. See Br. 16-17. But that case does not help him. In *Cobb*, this Court upheld a Section 242 jury instruction that did *not* require the jury to find defendants' use of force was punitive. 905 F.2d at 789-790. Although the Court described the right as freedom from excessive force that amounts to punishment, and stated that it would have been appropriate for the district court to instruct the jury that to be excessive the force "must have been intended as punishment," *id.* at 788, it explained that "the punitive intent behind a defendant's use of force may be inferred when the force is not reasonably related to a legitimate non-punitive governmental objective." *Id.* at 789 (citation and internal quotation marks omitted). The Court then held that the instruction at issue passed muster, as it properly directed the jury's attention to factors to consider in determining whether the force used was excessive or unwarranted and "expressly condition[ed] guilt on a finding that the defendants 'willfully and knowingly' acted with a 'specific intent to deprive' [the detainee] of his liberty interest." *Ibid.* Accordingly, the Court in *Cobb* did not

require the jury to have been instructed, and to have expressly found, that defendant acted with the intent to punish. A better reading of the case, therefore, is that an intent to inflict punishment is one way an officer may use excessive force in violation of a pretrial detainee's due process rights.

Indeed, the Supreme Court in *Kingsley* made that point clear. The Court noted that although in prior cases it had stated that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment, a pretrial detainee can prevail by showing that the force was objectively unreasonable. *Kingsley*, 135 S. Ct. at 2473. Post-*Kingsley* decisions of this Court, and of other courts of appeals, do not characterize the right as *requiring* an intent to punish, as opposed to using objectively unreasonable force under the circumstances. See, *e.g.*, *Dilworth*, 841 F.3d at 255; *Miranda-Rivera* v. *Toledo-Dávila*, 813 F.3d 64, 70 (1st Cir. 2016) (*Kingsley* held "that the appropriate standard for a pretrial detainee's Fourteenth Amendment excessive force claim is simply objective reasonableness"); *Davis* v. *White*, 794 F.3d 1008, 1012 (8th Cir. 2015) ("*Kingsley* confirms that we have properly applied the objective reasonableness standard to [pretrial detainee excessive-force] claims.").

In any event, a reasonable jury could have inferred from the evidence that Cowden, in slamming Hamrick against the wall and using other excessive force during the escort, intended to punish Hamrick—or seek retribution—for Hamrick

resisting arrest when he was stopped for traffic violations and fighting with the arresting officer. This is particularly so in light of the comments Cowden made at the HCSO.[7]

II

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ADMITTING EVIDENCE OF COWDEN'S PRIOR USES OF FORCE UNDER FEDERAL RULE OF EVIDENCE 404(b)

A. Standard Of Review

This Court reviews a district court's admission of prior acts under Federal Rule of Evidence 404(b) for abuse of discretion. See, *e.g.*, *United States* v. *Byers*, 649 F.3d 197, 206 (4th Cir.), cert. denied, 565 U.S. 969 (2011).[8] A district court does not abuse its discretion "unless its decision to admit evidence under Rule 404(b) was arbitrary and irrational." *Ibid.* (quoting *United States* v. *Weaver*, 282 F.3d 302, 313 (4th Cir.), cert. denied, 537 U.S. 847 (2002)). The broad leeway

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[7] By tying his argument that the evidence was insufficient to establish willfulness to the description of the underlying right at issue—*i.e.*, that it is the right to be free from excessive force *that amounts to punishment*—Cowden's real beef may be with the jury instruction on the nature of the due process right at issue. But as noted, Cowden did not object to the jury instruction describing the underlying right, and his argument on appeal is solely directed at whether he acted with the intent to inflict punishment. In any event, as discussed above, the jury did not have to find that he intended to use force that amounted to punishment. But, nevertheless, the evidence would support that conclusion.

[8] Cowden provides no support for his assertion (Br. 18) that the standard of review for this issue is de novo rather than the well-settled abuse of discretion standard.

afforded to district courts on evidentiary issues recognizes that "[j]udgments of evidentiary relevance and prejudice are fundamentally a matter of trial management." *United States* v. *Benkahla*, 530 F.3d 300, 309 (4th Cir. 2008), cert. denied, 555 U.S. 1120 (2009).

B. The Testimony About The Settle And Chrome Nightclub Incidents Was Admissible To Establish The Willfulness Element Of Section 242

The district court admitted evidence under Rule 404(b) of two other incidents in which Cowden intentionally used excessive force against individuals who posed no threat to him or to others, but who Cowden perceived had disrespected him. The Settle and Chrome Nightclub incidents are described in detail at pages 13-16, *supra*.

"Rule 404(b) prohibits evidence of other crimes, wrongs, or acts solely to prove a defendant's bad character, but such evidence . . . may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Byers*, 649 F.3d at 206 (citation, internal quotation marks, and brackets omitted). This rule is one "of inclusion, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." *Ibid.* (citation and internal quotation marks omitted). "For prior bad acts to be admissible under Rule 404(b), the proffered evidence * * * must be" (1) "relevant to an issue other than character, such as identity or motive"; (2) "necessary to prove an element of the crime charged, or to

prove context"; and (3) "reliable." *Ibid.* (citations, internal citations, internal quotation marks, and brackets omitted). "In addition, the probative value of the evidence must not be substantially outweighed by its prejudicial effect, which involves a Rule 403 determination." *Ibid.* (citation and internal quotation marks omitted). But even where Rule 404(b) evidence is potentially prejudicial, this Court places great confidence in jury instructions to counter that potential prejudice. See, *e.g.*, *United States* v. *Hodge*, 354 F.3d 305, 312 (4th Cir. 2004) ("Limiting jury instructions explaining the purpose for admitting prior bad acts evidence and advance notice of the intent to introduce such evidence provide additional protection to defendants.").

1. The Rule 404(b) evidence in this case met all of the requirements for admission.

a. First, the evidence was relevant. To satisfy this factor, the other acts evidence "must be sufficiently related to the charged offense." *United States* v. *McBride*, 676 F.3d 385, 397 (4th Cir. 2012) (citation and internal quotation marks omitted). "The more closely that the prior act is related to the charged conduct in time, pattern, or state of mind, the greater the potential relevance of the prior act." *Ibid.* Here, both the Settle and the Chrome Nightclub incidents occurred less than

two years prior to Cowden's use of force against Hamrick, with the former occurring roughly seven months before.[9] See pp. 13-14, *supra*.

Moreover, these incidents, and the incident at issue in this case, are closely related because they all involved Cowden's striking and/or using force against individuals who posed no threat to him or to others, but who Cowden perceived had disrespected him. See *United States* v. *Mohr*, 318 F.3d 613, 618 (4th Cir. 2003). In the Chrome Nightclub incident, William Hall had told Cowden, "[Y]ou need to learn to show respect. You need to learn how to talk to somebody" while pointing a finger at Cowden's chest. J.A. 1089, 1107-1108; see also p. 15, *supra*. In the Settle incident, Clayton Settle "had apparently stood too close and/or too long face-to-face with" Cowden. J.A. 77. In this case, Hamrick had resisted arrest by the son (Trooper Hoder) of a long-time colleague (Deputy Hoder) and had attempted to pull away from an escort. See pp. 7-10, 14 n.5, *supra*.

In this regard, this case is similar to *United States* v. *Brown*, 250 F.3d 580, 585-586 (7th Cir. 2001), where the court held that admission under Rule 404(b) of

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[9] The recentness of these incidents distinguishes this case from *United States* v. *Williams*, 740 F.3d 308 (4th Cir. 2014), cited by Cowden at Br. 22-23 n.3. In *Williams*, this Court held that the district court did not abuse its discretion in excluding the defendant's proffered Rule 404(b) evidence of civil suits alleging police misconduct "from incidents dating back well over a decade ago" that "had minimal probative value to Defendant's criminal case." 740 F.3d at 315.

a prior use of force against a police officer charged with violating Section 242 was not an abuse of discretion. The court stated that:

> Given the government's theory that [the officer] intended to punish people who defied his authority, we believe that the [prior] incident is probative of [the officer's] retaliatory intent to use excessive force whenever his orders are ignored or his authority questioned. The [prior] incident demonstrates more than [the officer's] general propensity for violence.

Id. at 585.

b. Next, the Rule 404(b) evidence was "necessary." *Byers*, 649 F.3d at 206 (citation omitted). To be "necessary," the other acts evidence need not be "critical" to the government's case; rather, this evidence need only be "probative of an essential claim or an element of the offense." *United States* v. *Rooks*, 596 F.3d 204, 211-212 (4th Cir.) (citation omitted), cert. denied, 562 U.S. 864 (2010). The Settle and Chrome Nightclub incidents were probative of an element of the Section 242 offense, namely that Cowden "willfully" deprived Hamrick of the right to be free from the use of excessive force by a law enforcement officer. See pp. 23-24, *supra*. These incidents reflect Cowden's intentional use of excessive force on non-resisting individuals who he perceived to have disrespected him, an intent he expressly denied. Indeed, another officer had to force Cowden to stop using additional force against Settle, and subsequently Cowden's superiors told him that his conduct was unacceptable and that he needed to get control of his anger. See pp. 13-14, *supra*. This evidence suggests that, in this case, Cowden may have

acted "with the particular purpose," *Mohr*, 318 F.3d at 619 (citation and internal quotation marks omitted), of violating Hamrick's right to be free from the use of excessive force.

The incidents also were probative of Cowden's defense that his use of force was justified in response to the threat Hamrick allegedly posed at the HCSO. J.A. 1482-1491, 1550-1562; see also *Mohr*, 318 F.3d at 619 (Rule 404(b) evidence necessary because the defendant disputed that she willfully intended to deprive individual of his constitutional right to be free from the use of excessive force). Cowden testified that he feared being head-butted or kicked when Hamrick initially pulled away from the escort, and that he threw Hamrick into the wall to get Hamrick to stop his resistive behavior. J.A. 1482-1483, 1550-1551. Cowden further stated that he inadvertently pushed Hamrick's face into the wall when he moved Hamrick's head away from him out of fear that Hamrick would head-butt him. J.A. 1484, 1552-1556. Cowden also interpreted Hamrick's head moving back as an attempted head-butt that justified his punch to the back of Hamrick's head. J.A. 1488-1489, 1558-1559. Finally, Cowden testified that he grabbed Hamrick's throat and forced his head into the corner of the elevator to control him. J.A. 1491, 1560-1562. Through this testimony, Cowden "placed his state of mind squarely at issue and rendered his prior use of unreasonable force probative of his intent, knowledge, motive, and absence of mistake." *United States* v. *Boone*, 828

F.3d 705, 711 (8th Cir. 2016) (upholding admission of Rule 404(b) evidence in Section 242 case to establish willfulness), cert. denied, 137 S. Ct. 676 (2017).

c. The Rule 404(b) evidence also was reliable—*i.e.*, the evidence was "sufficient to allow the jury to reasonably conclude that the acts occurred and that the defendant was the actor." *United States* v. *Van Metre*, 150 F.3d 339, 350 (4th Cir. 1998) (citation, internal quotation marks, and brackets omitted). Two eyewitnesses each—including each victim—described the Settle and Chrome Nightclub incidents, and the witnesses were subjected to cross-examination. J.A. 1065-1111, 1113-1156. Indeed, when Cowden took the stand in his own defense, he attempted to minimize, but did not deny, his use of force in these incidents. J.A. 1442-1457.

d. Finally, the probative value of the Rule 404(b) evidence was not substantially outweighed by its prejudicial effect, warranting exclusion under Federal Rule of Evidence 403. The Rule 403 standard is a difficult one for defendants to satisfy: Rule 403 generally does not bar other acts evidence admissible under Rule 404(b) "where such evidence did not involve conduct any more sensational or disturbing than the crimes with which the defendant was charged." *Byers*, 649 F.3d at 210 (citation, internal quotation marks, and brackets omitted). Both the Settle and the Chrome Nightclub incidents fall within this general rule; indeed, Cowden's conduct in this case was, if anything, more

disturbing than his conduct in the Settle or Chrome Nightclub incidents. In contrast to Hamrick, neither Settle nor Hall was handcuffed behind the back and surrounded by six law enforcement officers at the time of Cowden's use of force. It also does not appear from the record that either Settle or Hall sustained physical injuries warranting medical treatment as Hamrick did.

Moreover, the district court minimized the possibility of unfair prejudice from these incidents by giving *two* sets of limiting instructions setting forth the permissible and impermissible uses of the evidence—one set after two witnesses testified and one set as part of the jury instructions prior to deliberation. J.A. 1112-1113, 1772. During the testimony and in its jury instructions, the district court instructed the jury that it "may not consider this evidence [that Cowden committed acts similar to the acts charged in the indictment] in deciding if the defendant committed the acts charged in the indictment." J.A. 1112, 1772. The court then instructed the jury that it:

> may consider this evidence for other very limited purposes, such as to prove the defendant had the state of mind or the intent necessary to commit the crime charged in the indictment, and to prove that the defendant did not commit the crime charged in the indictment by either accident or mistake.

J.A. 1112-1113; accord J.A. 1772. As this Court has recognized, such limiting instructions can abate the possibility of unfair prejudice from Rule 404(b) evidence. *Byers*, 649 F.3d at 210; see also *Boone*, 828 F.3d at 713 (concluding that

the district court's limiting instructions "adequately minimized the danger of any unfair prejudice that may have otherwise arisen" from the Rule 404(b) evidence); *Brown*, 250 F.3d at 585-586 (Rule 404(b) evidence admissible to prove willfulness in Section 242 case; court's limiting instructions that jury should only consider evidence as it related to intent negated risk of unfair prejudice).

2. Cowden's challenges to the admission of these incidents are without merit.

a. First, with respect to the Settle incident, Cowden contends (Br. 27-31) that evidence that he was "overly rough" with Settle had no relation to his state of mind during his use of force against Hamrick, and instead was a "pretext" to paint him as a violent person in violation of Federal Rule of Evidence 404(a)'s prohibition on character evidence. But the government did not seek to introduce this incident as character evidence. Instead, the government sought to introduce, and the district court admitted, the Settle incident as other acts evidence under Rule 404(b) to show Cowden's state of mind. J.A. 164-165, 593-599.[10] Accordingly, Cowden is obligated to address the district court's decision on that ground under this Court's aforementioned four-factor test for admissibility of other-acts evidence. He has failed to do so despite *twice* quoting the test (Br. 20 n.2, 34),

[10] Prior to trial, the United States filed a notice of its intent to use Rule 404(b) evidence. J.A. 164-165. This notice further minimized the possibility that this evidence would have prejudicial effect. See *Hodge*, 354 F.3d at 312.

except for unsupported and undeveloped assertions that this evidence had no probative value (Br. 27) and that the evidence's probative value was "dwarfed" by its prejudicial effect (Br. 32).

Cowden, instead, relies upon this Court's decisions in *United States* v. *Sanders*, 964 F.2d 295 (4th Cir. 1992), and *Smith* v. *Baltimore City Police Department*, 840 F.3d 193 (4th Cir. 2016). Neither case helps his argument. In *Sanders*, this Court held that the district court abused its discretion in admitting evidence of the defendant's prior convictions for assault and possession of contraband under Rule 404(b). 964 F.2d at 298-300. This Court reasoned that these prior convictions would shed no light on the defendant's reason for committing the assault for which he was on trial—which he claimed was self-defense—but would only show his general criminal propensity. *Id.* at 298-299. This Court also concluded that admission of this evidence was not harmless error because the assault prosecution turned largely upon the jury's credibility determinations of the defendant and the victim, and evidence of the former's criminal propensity "obviously ha[d] the capacity to tip the balance in such a swearing contest." *Id.* at 299-300. In *Smith*, a civil case, this Court similarly concluded that the district court committed reversible error in admitting the plaintiff's prior arrests under Rule 404(b) because the "main issues" in her civil rights lawsuit against the police department "hinged on which witness the jury

believed, making the trial a classic he-said, she-said dispute." 840 F.3d at 204-205.

The circumstances that this Court found warranted exclusion of the Rule 404(b) evidence in *Sanders* and *Smith* are absent here. Unlike the prior convictions in *Sanders*, which this Court determined only showed the defendant's general criminal disposition, 964 F.2d at 298-299, the Settle incident was sufficiently similar to Cowden's use of force in this case to suggest that Cowden knew that responding forcefully to a non-threatening individual who he perceives as disrespecting him was wrong, and thus that he acted willfully (see pp. 31-32, *supra*). *Smith* is distinguishable because the jury's verdict in the instant case did not hinge on a credibility determination, and thus the trial was not a "he-said, she-said dispute." See 840 F.3d at 204-205.

Cowden also asserts (Br. 27-28) that the district court impermissibly permitted the government to use the Settle incident to introduce evidence that he was directed to receive anger management counseling. But that evidence is part and parcel of the reason Cowden used excessive force in that incident—*i.e.*, he was angry because he was disrespected—and in the instant case a reasonable jury could have concluded that Cowden used excessive force because he did not like the way in which Hamrick treated his fellow officers. As a result, the evidence was directly

relevant to whether Cowden possessed the requisite intent when he used force against Hamrick.[11]

b. Cowden's challenges to the district court's admission of the Chrome Nightclub incident are equally unpersuasive. First, Cowden argues (Br. 32-35) that Hall's testimony that he was punched by Cowden in response to possibly touching Cowden was not relevant because it demonstrated that, in fact, Cowden's use of force on Hall was not excessive. But Cowden's interpretation of Hall's testimony—*i.e.*, that Hall described a run-of-the-mill arrest in response to his refusal to leave the scene—is inconsistent with the facts that Hall recounted. Hall testified that he put his hands up when he recognized that a police officer (Cowden) had grabbed him, and he did not hit or try to hit Cowden. J.A. 1068-1069, 1075. Hall further stated that Cowden responded by shoving him into his van, punching him in the face, dragging him out of the van on to the ground, and punching him in the back of the head. J.A. 1069, 1071, 1075-1076. Cowden's

[11] For this reason, Cowden's reliance on *United States* v. *Moore*, 375 F.3d 259 (3d Cir. 2004), and *United States* v. *White Plume*, 847 F.3d 624 (8th Cir. 2017), is misplaced. In *Moore*, the Third Circuit held that the district court committed plain error in admitting other acts evidence, including an individual's receipt of anger management counseling, under Rule 404(b) because the evidence had no purpose other than to show defendant was a violent man who was more likely to commit arson and possess a gun illegally. 375 F.3d at 263-265. In *White Plume*, the Eighth Circuit held that prior acts were inadmissible where defendant's state of mind, specifically intent and motive, was not at issue. 847 F.3d at 628-629.

disproportionately forceful response to a non-threatening, and apparently disrespectful, Hall was clearly sufficiently similar to his conduct toward Hamrick to be relevant.

Cowden further contends (Br. 35-36) that Deputy Hoder's testimony concerning Cowden's conduct in the Chrome Nightclub incident was not reliable because it was inconsistent with Hall's testimony in several respects, most notably the number of punches Cowden threw at Hall. To be reliable, however, testimony need only be "sufficient to allow the jury to reasonably conclude that the acts occurred and that the defendant was the actor." *Van Metre*, 150 F.3d at 350 (citation, internal quotation marks, and brackets omitted). Both Hoder and Hall testified that Cowden punched Hall in the face inside the van and punched Hall in the back of the head outside the van. J.A. 1069, 1071, 1075-1076, 1090-1091, 1094. That Cowden punched Hall's face and head in the absence of any threat from Hall was the relevant testimony, not the number of punches Cowden threw.

Next, Cowden contends (Br. 37) that the testimony of both Hall and Deputy Hoder had no nexus to his state of mind during his use of force against Hamrick two years later because there was no evidence that he was questioned about, or sanctioned for, his use of force against Hall. But even absent evidence of such follow-up by the HCSO, the Chrome Nightclub incident was probative because it showed Cowden using excessive force on a non-threatening individual when he

perceived he was disrespected. This incident thus demonstrated Cowden "recklessly disregard[ing] the risk," *Mohr*, 318 F.3d at 619 (citation omitted), that his conduct violated the victim's right to be free from the use of excessive force.

Finally, Cowden asserts (Br. 37-38) that the district court erred in admitting, in connection with the government's Rule 404(b) evidence, a letter Deputy Hoder wrote to his unit supervisor documenting the Chrome Nightclub incident and detailing the events that transpired when he saw Cowden hitting Hall on the back of the head while Hall was lying on the ground. See J.A. 648-649 (the letter); see also J.A. 307, 310-311 (Cowden's motion in limine to exclude letter as hearsay and memorandum of law in support thereof). Cowden argues that the letter was hearsay that was not admissible under the business record exception to the hearsay rule. Cowden provides no support for this argument, which in any event is without merit. The letter was admissible under the business records exception of Federal Rule of Evidence 803(6), which "allows for the introduction of records that are 'kept in the course of a regularly conducted activity of a business.'" *United States* v. *Cone*, 714 F.3d 197, 219 (4th Cir. 2013) (quoting Fed. R. Evid. 803(6)(B)); see also J.A. 747-748, 1097-1098, 1223-1224, 1331-1334 (testimony concerning requirement for such letters).[12] Moreover, because the letter addressed an incident

[12] Prior to trial, Cowden moved to exclude the letter on the ground that it did not satisfy the business records exception of Rule 803(6) or the recorded

(continued…)

secondary to this case, was consistent with Hoder's trial testimony about the Chrome incident, and Hoder was cross-examined about the letter's contents (J.A. 1103-1107), any error by the district court in admitting Deputy Hoder's letter was harmless.

III

THE DISTRICT COURT CORRECTLY INSTRUCTED THE JURY ON THE ELEMENTS OF 18 U.S.C. 242

A. Standard Of Review

Federal Rule of Criminal Procedure 30(d) requires that "[a] party who objects to any portion of the [jury] instructions or to a failure to give a requested instruction * * * inform the [district] court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). A party's "[f]ailure to object in accordance with this rule precludes appellate review," except for plain-error review of the party's challenge to an instruction. *Ibid.*; see also Fed. R. Crim. P. 52(b). The party's submission of a proposed instruction to the district court, standing alone, is insufficient to put the

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(…continued)
recollection exception of Federal Rule of Evidence 803(5). J.A. 418. At trial, the district court did not state the basis of its admission of the letter over Cowden's objection. J.A. 1099. A court of appeals may uphold the district court's admission of evidence on any ground supported by the record. See, *e.g.*, *United States* v. *Blechman*, 657 F.3d 1052, 1066 n.14 (10th Cir. 2011).

district court on notice of an objection and preserve the challenge for appeal. See *United States* v. *Nicolaou*, 180 F.3d 565, 569 (4th Cir. 1999).

Although prior to trial Cowden submitted a proposed instruction requesting a lesser included offense instruction on the 18 U.S.C. 242 count, he did not contemporaneously object to the district court's jury instructions. Accordingly, this Court reviews Cowden's challenge to the jury instructions for plain error.[13] "To establish plain error, a defendant has the burden of showing: (1) that an error was made; (2) that the error was plain; and (3) that the error affected his substantial rights." *United States* v. *Carthorne*, 726 F.3d 503, 510 (4th Cir. 2013), cert. denied, 134 S. Ct. 1326 (2014). Even if the defendant satisfies these elements, "the decision to correct the error remains within [this Court's] discretion," which it will exercise "only if the error 'would result in a miscarriage of justice or would otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *Ibid.* (quoting *United States* v. *Whitfield*, 695 F.3d 288, 303 (4th Cir. 2012), cert. denied, 133 S. Ct. 1461 (2013)).

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[13] At least one federal court of appeals has suggested that "a defendant's affirmative approval of a proposed instruction results in waiver" rather than mere forfeiture of his objection, precluding appellate review even for plain error. *United States* v. *Natale*, 719 F.3d 719, 729-731 (7th Cir. 2013), cert. denied, 134 S. Ct. 1875 (2014). This Court need not decide whether such waiver occurred in this case because Cowden cannot show that the district court plainly erred in giving the instruction at issue.

B. The District Court Correctly Instructed The Jury To Determine Whether Cowden Violated Section 242's Basic Offense Before Considering Whether His Use Of Force Resulted In Bodily Injury

1. Cowden submitted proposed jury instructions to the district court, which included a generic "Lesser Included Offenses" instruction (Instruction No. 9). J.A. 440-442. The government proposed an instruction (Instruction No. 3) on the elements of Section 242 that required the jury, first, to determine whether Cowden violated the basic elements of 18 U.S.C. 242, and, if so, to determine whether Cowden's use of force resulted in bodily injury. J.A. 460. The government also filed an objection to Cowden's proposed instruction, asserting that it was unnecessary "because the need for a lesser included offense instruction is obviated by the United States' Jury Instruction No. 3, which asks the jury to make a special finding regarding the injury element on Count One [the Section 242 count]." S.A. 1. The government also noted that it had submitted a special verdict form in this regard and explained that the Section 242 count "is a felony if there was a resulting injury, and a misdemeanor if there was not a resulting injury." S.A. 1-2.

The district court instructed the jury on the Section 242 count in two steps. First, the court instructed the jury that to find Cowden guilty of violating Section 242 the government must prove beyond a reasonable doubt that he (1) acted under color of law; (2) deprived Hamrick of his constitutional right as a pretrial detainee to be free from the use of excessive force; and (3) did so willfully. J.A. 1778. The

court instructed the jury that if it found that each of these elements beyond a reasonable doubt, it should find Cowden guilty of this count; otherwise, it should find him not guilty. J.A. 1778.

The court then instructed the jury that if it found Cowden guilty of the Section 242 count, it must determine whether the government proved beyond a reasonable doubt that Cowden's actions resulted in bodily injury. J.A. 1778-1779. The court instructed the jury that if it found they did, the jury should check the "did" box on the verdict form. J.A. 1779. The court further instructed that if the jury found that Cowden's acts did not result in bodily injury, it should check the "did not" box on the verdict form. J.A. 1779. Cowden did not object to these instructions. The jury's completed special verdict form indicates that the jury found Cowden guilty of violating Section 242 and that his acts caused bodily injury to Hamrick. J.A. 1804.

2. Cowden argues (Br. 38-47) that the district court's two-step jury instruction on the Section 242 count and its related use of a special verdict form deprived him of his constitutional right to have a jury decide guilt or innocence in a single verdict. The district court's instructions, however, were correct. Moreover, the lesser included offense instruction Cowden initially proposed is encompassed in the jury instructions given. Accordingly, Cowden has not shown that was error, much less plain error.

a. The district court's two-step jury instruction in this context was correct. The instruction was consistent with the fundamental principle that the government must prove every element of the crime beyond a reasonable doubt, including those elements that affect the sentence. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000) (facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime that must be proven beyond a reasonable doubt). Moreover, instructing the jury in this manner is common. See, *e.g.*, *United States* v. *Siler*, 734 F.3d 1290, 1292 (11th Cir. 2013) (district court instructed jury to determine defendant's guilt on the charge of assault on a corrections officer, and if it made a guilty determination, to find whether the defendant used a deadly or dangerous weapon), cert. denied, 134 S. Ct. 1563 (2014).

Moreover, it is difficult to see what Cowden is complaining about here. As the government argued below, the jury instruction given permitted the jury to find Cowden guilty of a misdemeanor rather than a felony, and that is what a lesser included offense instruction would have done. Cowden's argument is directed at form over substance.

Cowden's argument (Br. 42-46) that the instructions amounted to the impermissible use of special interrogatories is also baseless. Cowden relies upon *United States* v. *Spock*, 416 F.2d 165 (1st Cir. 1969). In that case, the court held

that submitting ten yes or no "special questions" to the jury relating to defendant's guilt was reversible error because it impinged on the jury's ability to control its verdict. *Id.* at 180-183. But more recent cases, and cases more analogous here, make clear that "there are circumstances where the use of special findings may be necessary, including where a determination of certain facts will be crucial to the sentence." *United States* v. *Hedgepeth*, 434 F.3d 609, 613 (3d Cir.) (citation and internal quotation marks omitted), cert. denied, 547 U.S. 1144 (2006). In *Hedgepeth*, the court stated that where "special findings are necessary for sentencing purposes," a district court may instruct the jury to answer a special interrogatory on a single form after determining a verdict of guilty or not guilty. *Id.* at 613 & n.2. In upholding the use of such a form, the court observed that asking the jury to first determine whether the defendant was guilty before having it consider the special findings "alleviated" the possibility of prejudice because the jury was not "led step-by-step to a guilty verdict." *Id.* at 613.[14]

This Court cited *Hedgepeth* with approval in *United States* v. *Udeozor*, 515 F.3d 260, 271 (4th Cir. 2008). In *Udeozor*, this Court addressed a propriety of a verdict form that requested the jury determine the defendant's guilt on three charged counts, and on the next page asked the jury to answer "yes" or "no" questions regarding three special findings. *Id.* at 270. This Court upheld this

[14] Here, the district used such a special verdict form. See J.A. 1804.

procedure, which included "clear instructions" that the jury not consider the three special findings unless it first found the defendant guilty. *Id.* at 271; cf. *United States* v. *Ramirez-Castillo*, 748 F.3d 205, 214 (4th Cir. 2014) (noting that use of a special verdict form is a matter of district court discretion, but concluding that district court erred in presenting the jury with a special verdict form asking it to make factual findings on two elements the court considered to be in dispute, thereby precluding the jury from making the ultimate conclusion of guilt or innocence). In short, using a special verdict form to ask specific questions relevant to a finding of guilt is one thing; using a special verdict form to determine the applicable sentence *after a finding of guilt* is another.[15]

b. Even if the jury instructions were erroneous, Cowden cannot prove that any error affected his substantial rights. As noted above, Cowden fails to explain how his proposed lesser included offense instruction would have allowed the jury

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[15] For this reason, Cowden's reliance (Br. 46-47) on *United States* v. *Gonzales*, 841 F.3d 339 (5th Cir. 2016), cert. denied, 137 S. Ct. 1237 (2017), is also misplaced. In that case, the court vacated convictions where the jury answered a special interrogatory by selecting a theory of liability that the government conceded was not supported by any evidence. *Id.* at 349-351. The court stated that "[c]ourts consistently vacate convictions when the answers to special interrogatories undermine a finding of guilt the jury made on the general question" of guilty or not guilty. *Id.* at 348. Again, the impermissible use of a special verdict form in *Gonzales* "to clarify an ambiguous verdict," *Hedgepeth*, 434 F.3d at 613 (citation omitted), is readily distinguishable from the use of the special verdict case to determine the applicable sentence after a finding of guilt.

to reach a guilty verdict on a misdemeanor violation of Section 242, but the instruction that the district court gave would not. If the jury had found Cowden guilty of violating Section 242, but that Cowden's use of force did not result in bodily injury to Hamrick, it would have checked the "did not" box on the verdict form and Cowden would have been convicted of a misdemeanor.

For this reason as well, Cowden fails to show any possibility that his proposed instruction would have changed the outcome. The evidence that Cowden's use of force caused Hamrick bodily injury was overwhelming (see p. 50, *infra*), and Cowden does not challenge the jury's finding of bodily injury. In short, there is nothing in the record that suggests that the jury would have reached a different verdict if it were asked to consider the aggravating element of bodily injury concurrently with the elements of the Section 242 basic offense, as Cowden desired. For these reasons, there is no plain error.

IV

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING RESTITUTION FOR THE FULL AMOUNT OF HAMRICK'S MEDICAL EXPENSES

A. Standard Of Review

This Court reviews a district court's restitution order for abuse of discretion. *United States* v. *Harvey*, 532 F.3d 326, 339 (4th Cir. 2008). A district court abuses its discretion when it "acts arbitrarily or irrationally, fails to consider judicially

recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law." *United States* v. *Delfino*, 510 F.3d 468, 470 (4th Cir. 2007), cert. denied, 555 U.S. 812 (2008).

B. The District Court Acted Within Its Discretion In Ordering Restitution For The Full Amount of Hamrick's Medical Expenses

The Mandatory Victims Restitution Act (MVRA) provides that "[n]otwithstanding any other provision of law, when sentencing a defendant convicted of an [applicable] offense * * * , the [district] court *shall* order * * * that the defendant make restitution to the victim of the offense."[16] 18 U.S.C. 3663A(a)(1) (emphasis added). Pursuant to that statute, the probation officer recommended that the district court order Cowden to pay Hamrick $3044 in restitution to cover Hamrick's medical expenses for his bodily injury. J.A. 1820.

At sentencing, Cowden argued that he was not liable for the medical bill that Hamrick submitted because there was no evidence that he, and not Trooper Hoder during the traffic stop and arrest, inflicted the injuries that required the medical care. J.A. 1818-1820. The district court overruled Cowden's objection to the probation officer's recommendation, concluding that the jury, "after hearing all the evidence, did find that there was bodily injury to Mr. Hamrick, which was an essential fact and finding in this case." J.A. 1820. The court also found that the

[16] Cowden does not dispute that the MVRA applies to Section 242, which it does.

amount of restitution the probation officer recommended was appropriate. These expenses were incurred for a CT scan and an emergency room charge several hours after the incident. J.A. 1201; S.A. 22.

Cowden reiterates (Br. 48) his argument that he should not have to pay these medical expenses because he did not cause Hamrick's injuries; rather, Cowden asserts, Hamrick suffered these injuries when he "lost his fight with Trooper Hoder." Cowden also argues (Br. 49)—somewhat contradictorily—that the case should be remanded for resentencing to determine what, if any, injuries he caused, so that any restitution is limited to those injuries. These arguments are baseless. His argument that he did not cause Hamrick's injuries is belied by the testimony of other officers at the scene that Cowden's slam of Hamrick's head into the wall caused cuts and lacerations on Hamrick's face, and evidence that Hamrick was not bleeding when he arrived at the HCSO but was bleeding after Cowden's use of force against him. J.A. 740-742, 745, 781-782, 812-814, 966-968, 972-973, 1046-1047, 1220-1221, 1317, 1320-1323. It is also at odds with the jury's verdict, which specifically found that his actions resulted in bodily injury. J.A. 1804. Therefore, the district court did not abuse its discretion in concluding that the jury's verdict triggered restitution for the medical care for Hamrick's head injuries. J.A. 1820. Pursuant to the MVRA, where, as here, "an offense result[s] in bodily injury to a victim," the court's order of restitution "*shall* require" the defendant to

"pay an amount equal to the cost of necessary medical and related professional services." 18 U.S.C. 3663A(b)(2) (emphasis added).

This Court also need not remand the case to re-determine the proper amount of restitution based on the extent of Hamrick's injuries caused solely by Cowden. Under the MVRA, the government bears the burden of showing by a preponderance of the evidence "the amount of the loss sustained by a victim as a result of the offense." See 18 U.S.C. 3664(e). The government did so here. The restitution amount here is simply for a CT scan and an emergency room fee. J.A. 1820; S.A. 22. The evidence that Cowden bounced Hamrick's head off the wall and hit him in the head, along with the jury's finding of bodily injury, was sufficient to establish that such medical care was appropriate and necessary, regardless of what might have happened to Hamrick at the fight during his arrest. Moreover, in these circumstances, as a practical matter, there is simply no way to determine if Cowden should be responsible for simply a portion of a CT scan and emergency room fee.[17]

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[17] In support of his argument, Cowden cites (Br. 48-49) *United States* v. *Mullins*, 971 F.2d 1138, 1145-1146 (4th Cir. 1992), for a proposition wholly unrelated to restitution—*i.e.*, that a district court may not consider uncharged, insufficiently similar conduct as "relevant conduct" under United States Sentencing Guidelines § 1B1.3(a)(2) for purposes of determining a defendant's offense level and sentencing range. The *Mullins* decision does include a discussion of restitution, but Cowden does not address it, likely because it confirms the correctness of the district court's decision on this issue. The Court stated that an

(continued…)

CONCLUSION

This Court should affirm Cowden's conviction and sentence.

Respectfully submitted,

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(…continued)
order of restitution "must conform to the specific type and amount of award that is authorized by the plain language of the [restitution] statute." *Id.* at 1146-1147. Because, as noted above, the district court's restitution order conformed to the type and amount of award authorized by the MVRA's plain language, it is consistent with *Mullins*.

STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to oral argument if the Court believes it would be helpful.

CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 12,519 words.

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

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Date: June 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

I further certify that one paper copy of the foregoing brief was sent to the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by Federal Express on June 5, 2017.

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