No. 15-2409

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

COLIN J. BOONE,

Defendant-Appellant

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

BRIEF OF THE UNITED STATES AS APPELLEE

NICHOLAS A. KLINEFELDT
United States Attorney

KELLY MAHONEY
Assistant United States Attorney
United States Attorney's Office
Southern District of Iowa
110 East Court Ave., Suite 286
Des Moines, Iowa 50309
(515) 473-9312

VANITA GUPTA
Principal Deputy Assistant
Attorney General

SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Colin J. Boone (defendant), a former Des Moines Police Department (DMPD) officer, was convicted of using excessive force against arrestee Orville Hill (Hill), on February 19, 2013, in violation of 18 U.S.C. 242. The evidence established that defendant ran and kicked Hill directly in the face while Hill was lying face-down on the ground and was restrained by three DMPD officers. Officers testified that while Hill had previously resisted their commands, they had Hill under control when defendant kicked Hill. Defendant made several statements after the kick reflecting that he had kicked Hill in the face intentionally.

The primary issue on appeal is whether the district court abused its discretion in admitting similar act evidence pursuant to Federal Rule of Evidence 404(b)(2). That evidence addressed defendant's prior use of excessive force against a compliant arrestee who had previously resisted arrest, and defendant's attempt to conceal that use of force. Defendant also raises challenges to video evidence regarding the Rule 404(b) incident that are waived or relate to evidence that, though admitted at trial, was never played for the jury. Even if considered on the merits, the challenged evidence qualifies as excited utterances or present sense impressions. The United States does not believe oral argument is necessary. If this Court believes oral argument would be helpful, the United States suggests that these issues can be addressed fully with 15 minutes per side or less.

TABLE OF CONTENTS

PAGE

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

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15-2409

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

COLIN J. BOONE,

Defendant-Appellant

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

BRIEF OF THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

This appeal is taken from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. On June 22, 2015, the district court sentenced the defendant and entered final judgment. (Add. 2-7).[1] On

[1] "(DCD __, at p.__)" refers, respectively, to the document recorded on the district court docket sheet and page number. "(Add. __)" refers to the page of appellant's Addendum. "(Br. __)" refers to the pagination set by this Court for appellant's opening brief. "(TR., Vol.__, p.__)" refers, respectively, to the volume and page number of the 2015 trial transcript. "(Rule 404(b) TR., p.__)" refers to the page number of the transcript of the March 6, 2015, hearing to address the

(continued…)

June 29, 2015, defendant filed a timely notice of appeal. DCD 191. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether the district court abused its discretion when it admitted evidence regarding defendant's use of excessive force against another arrestee pursuant to Federal Rule of Evidence 404(b)(2) to prove defendant's intent.

Huddleston v. *United States*, 485 U.S. 681 (1988)

United States v. *Yielding*, 657 F.3d 688 (8th Cir. 2011), cert. denied, 132 S. Ct. 1777 (2012)

United States v. *Franklin*, 250 F.3d 653 (8th Cir.), cert. denied, 534 U.S. 1009 (2001)

United States v. *Brugman*, 364 F.3d 613 (5th Cir.), cert. denied, 543 U.S. 868 (2004)

2. Whether the district court abused its discretion in admitting video trial exhibits that included a victim's exclamations as she was assaulted and comments made in the aftermath of that assault, all of which are admissible as excited utterances, present sense impressions, or then-existing state of mind.

(…continued)
United States' motion to admit evidence pursuant to Federal Rule of Evidence 404(b). "(2014 TR., Vol.__, p.__)" refers, respectively, to the volume and page number of the transcript of defendant's first trial held in October 2014. "(Government Exh. __)" refers to the exhibit admitted at the 2015 trial.

United States v. *Earley*, 657 F.2d 195 (8th Cir. 1981)

United States v. *Bekric*, 785 F.3d 1244 (8th Cir. 2015)

United States v. *Graves*, 756 F.3d 602 (8th Cir. 2014)

3. Whether the district court's errors, if any, were harmless.

United States v. *Jongewaard*, 567 F.3d 336 (8th Cir. 2009), cert. denied, 559 U.S. 941 (2010)

United States v. *Love*, 521 F.3d 1007 (8th Cir. 2008)

STATEMENT OF THE CASE

1. Procedural History

On December 17, 2013, Colin J. Boone (defendant) was charged in a one-count Indictment in the Southern District of Iowa with violating 18 U.S.C. 242 (violation of civil rights under color of law). (DCD 2). On May 29, 2014, the grand jury issued a two-count Superseding Indictment that added a charge that defendant violated 18 U.S.C. 1519 (knowingly making a false entry in a document to impede a federal investigation). (DCD 33). The Superseding Indictment is based on an incident that occurred on February 19, 2013, when defendant, then a Des Moines Police Department (DMPD) officer, used excessive force against Orville Hill (Hill) and later lied about his actions in an Arrest Incident Report with intent to impede an investigation of his conduct. (DCD 33).

Trial began on October 27, 2014, and concluded on November 1, 2014, when the jury acquitted defendant of Count 2 (obstruction) and declared it was unable to reach a unanimous verdict on Count 1 (violation of civil rights). (DCD 85).

In February 2015, in preparation for a retrial on Count 1, the United States filed several pretrial motions, including a Sealed Motion In Limine to Admit 404(b) Evidence. (DCD 119). Defendant filed an opposition. (DCD 131). On March 4, 2015, the district court heard argument on the admissibility of evidence regarding defendant's January 14, 2009, assault of arrestee Ms. Dawn Dooley (Ms. Dooley) at the DMPD station, and concluded a full evidentiary hearing was warranted. (March 4, 2015, TR., p.13, 17, 20-21). The district court held an evidentiary hearing on March 6, 2015 (DCD 206), and at its conclusion, the court ruled that evidence regarding the Dooley assault was admissible. (Rule 404(b) TR., p.95-96). On March 9, 2015, immediately before trial began, defendant raised additional challenges to specific Rule 404(b) evidence. (TR., Vol.1, p.7-12). The district court ruled, *inter alia*, that the United States could introduce at trial video evidence later identified as Government Exhibit 225. (TR., Vol.1, p.11).

Defendant's retrial on Count 1 began on March 9, 2015, and concluded on March 12, 2015. (DCD 152, 155, 159-160). Defendant unsuccessfully moved to dismiss the indictment on grounds of insufficient evidence at the close of the

government's case and defendant's evidence. (TR., Vol.3, p.645; Vol.4, p.828-829). On March 13, 2015, the jury began deliberations and returned a guilty verdict. (TR., Vol. 5, p.882-883). On June 22, 2015, the district court sentenced defendant and entered a judgment that imposed 63 months' incarceration, one year of supervised release, and a $100 assessment. (Add. 2-7; DCD 190 (Sentencing Memorandum Opinion And Order)). On June 29, 2015, defendant filed a timely notice of appeal. (DCD 191).

2. Factual Background: Des Moines Police Officers Respond To An Accident

The evidence at trial established the following:

On February 19, 2013, at approximately 2:30 a.m., DMPD Officers Trudy Simonson and Lindsey Kenkel came upon a one-car accident in Des Moines, Iowa, involving a vehicle that had been driven by Hill. (TR., Vol.1, p.44; Vol.2, p.150, 152; Vol.3, p.416, 448, 484-485). When Officers Simonson and Kenkel approached Hill's minivan, Hill was unresponsive to them and appeared unconscious or asleep. (TR., Vol.2, p.151; Vol.3, p.417-418, 449). Shortly thereafter, DMPD Officers Cody Willis and Tanner Klinge arrived on the scene. (TR., Vol.1, p.43, 45; Vol.3, p.418). When Hill awoke, he began acting "[e]rratically," he did not respond to the officers' commands, and at one point he attempted to drive his minivan. (TR., Vol.1, p.45-46; Vol. 2, p.151-152; Vol.3, p.419-420; see TR., Vol.2, p.166-167).

Officers broke windows of Hill's van with batons, and Officer Willis pulled Hill out of his minivan and "tackled" Hill to the ground. (TR., Vol.1, p.47-48; Vol.3, p.421; see TR., Vol.3, p.486-487 (Willis "hip tossed" Hill to the ground)). Hill's hand hit the ground first as Hill fell to the ground and he then rolled over with Willis on top of him. (TR., Vol.1, p.120-121; see Government Exh. 102b, 102c).[2]

Hill was face-down on the ground and Officer Willis immediately placed his knee in Hill's back and had a "firm grip" on Hill's right arm. (TR., Vol.1, p.48-49; see TR., Vol.1, p.94-95, 117; Vol.3, p.423, 487-488, 499). Officer Klinge went down on Hill's left side on top of Hill's legs. (TR., Vol.1, p.48; Vol.2, p.153-154, Vol.3, p.487-488, 498). Officer Kenkel also knelt down beside Hill, put her knee in Hill's right shoulder, and used her hands to control Hill's right arm. (TR., Vol.2, p.153-154, 169, 171; see TR., Vol.3, p.423 (the three officers were "essentially on top of [Hill]"); 425, 499). Officer Simonson was next to Hill and the other officers but not all the way on the ground. (TR., Vol.3, p.426).

---

[2] DMPD vehicles are equipped with two dashboard cameras (dash cams), one of which records the view in front of the police vehicle. (TR., Vol.1, p.67, 86; Vol.3, p.431-432). Several trial exhibits are the entire videos recorded by dash cams installed on DMPD vehicles that were at the scene of Hill's arrest. (TR., Vol.1, p.67, 86; Vol.3, p.431-432; *e.g.*, Government Exh. 102 (dash cam video from a camera installed on Officer Willis' vehicle)). Certain trial exhibits are unaltered portions of the original video (*e.g.*, 102a and 102b) while other trial exhibits (*e.g.*,102c and 102e) show a slow-motion depiction of a portion of the original video. (See TR., Vol.1, p.120; Vol.2, p.202).

Hill was yelling, and struggling and moving his legs and arms while on the ground but he was not kicking, biting, or hitting the officers. (TR., Vol.1, p.117, 119; Vol.2, p.155, 160; Vol.3, p.425, 499). Given his and the officers' positions, Hill could not reach for an officer's weapon. (TR., Vol.1, p.119; Vol.3, p.476; see TR., Vol.2, p.169; Vol.3, p.425 (Hill's arms were not free to hit anyone)). Hill also was not able to get up off the ground. (TR., Vol.1, p.116; Vol.3, p.425).

3. DMPD Officers Restrain Hill

The officers' goal was to place handcuffs on Hill. (TR., Vol.1, p.49; Vol.2, p.155; Vol.3, p.431; see TR., Vol.3, p.488). The four officers testified that, before defendant's arrival, nothing more than their hands-on force was necessary to continue to control Hill or secure Hill in handcuffs. (TR., Vol.1, p.49, 117; Vol.2, p.155, 161, 185; Vol.3, p.431, 488, 508.) For example, Officer Willis testified that "[t]he physical force that [he] was already exerting" – his knee in Hill's back and holding Hill's arm – was enough to place Hill in handcuffs. (TR., Vol.1, p.49, 117). Willis believed he would have secured Hill in handcuffs within "[a] matter of seconds." (TR., Vol.1, p.52). Moreover, these four officers testified that, before defendant's arrival, it was *not* necessary to use any weapon that they had in their possession – including their baton, pepper spray, flashlight, taser, or gun – in order to continue to restrain Hill. (TR., Vol.1, p.49, 52; Vol.2, p.161, 163-164 (Kenkel put her flashlight back on her belt before grabbing Hill's arm with her hands);

Vol.3, p.423 (Simonson got rid of her taser when she saw the three officers on top of Hill), 429-431, 488, 498; Government Exh. 102b).

4. Defendant's "Straight Kick" Assault Of Hill

Officers Willis, Simonson, and Kenkel testified that while Hill was lying on his stomach on the ground and held by three officers, defendant ran towards Hill and the officers and, without stopping, gave a "running straight kick to [Hill's] face." (TR., Vol.3, p.427; see TR., Vol.1, p.50, 100 (defendant was "running, he continued his momentum and kicked [Hill] in his head"); Vol.2, p.155-157, 174; Vol.3, p.426, 460, 477; Government Exh. 102d, 102e). Hill was not yet in handcuffs. (TR., Vol.2, p.176; Vol.3, p.428). Officers Willis, Simonson, and Kenkel, who were on top of or right next to Hill, had a direct line of sight of defendant's approach and were within two feet of defendant's kick at Hill. (TR., Vol.1, p.50, 79, 123-124; Vol.2, p.155-157, 174, 182; Vol.3, p.426). As defendant ran towards Hill and the officers, he did not say anything: he did not give any warning or command to Hill nor did he speak to any of the officers, such as asking whether they needed assistance. (TR., Vol.1, p.50-51; Vol.2, p.157-158; Vol.3, p.427).

When defendant kicked Hill in the face he was wearing boots and weighed approximately 350 pounds. (TR., Vol.1, p.51, 72; Vol.3, p.479). Defendant's kick landed on Hill's mouth. (TR., Vol.1, p.51, 70; Vol.2, p.185 (Hill's face stopped

defendant's kick); Vol.3, p.427). Defendant's kick did not hit Hill's shoulder, arm, or chest; it hit Hill directly in the face. (TR., Vol.2, p.156). Defendant's kick was not a sideways sweeping motion; it was straight to Hill's mouth. (TR., Vol.3, p.427).[3]

As a result of defendant's kick to Hill's mouth, Hill's head "jarred back" like a "whiplash motion." (TR., Vol.3, p.427-428). Kenkel, who was leaning on Hill at the time of defendant's kick, rocked backwards from the force of defendant's kick and lost her grip on Hill's arm. (TR., Vol.2, p.156-157; TR., Vol.3, p.427-428 (Officer Simonson tried to catch Kenkel from falling over)).

After defendant's kick, Hill had cuts on his face and he started bleeding from his face and mouth. (TR., Vol.1, p.51; Vol.2, p.158; Vol.3, p.429, 434). Two of Hill's teeth were knocked out from the force of defendant's kick. (TR., Vol.1, p.51, 121; Vol.2, p.158; see TR., Vol.3, p.429). When Hill was turned over to face the officers after defendant's kick, there was blood "coming from his face," he was "gurgling" from blood in his throat, and there was "a pool of blood on the ground

[3] Officer Kenkel was "taken aback" and caught "off guard" by defendant's kick to Hill's face. (TR., Vol.2, p.156). Officer Willis was "shocked and surprised" by defendant's kick to Hill's face. (TR., Vol.1, p.67; see TR., Vol.1, p.111). Officer Simonson was "shocked" and "disturbed" by defendant's kick. (TR., Vol.3, p.464). Officers Willis and Simonson, in their capacity as field training officers for, respectively, Officers Klinge and Kenkel, advised the new officers that defendant should not have kicked Hill. (TR., Vol.1, p.59-60, 66; Vol.2, p.166; Vol.3, p.441-442, 466).

* * * [d]irectly under where his mouth was." (TR., Vol.3, p.429; see TR., Vol.2, p.158). None of the officers saw Hill bleed or saw blood on the ground until after defendant's kick to Hill's mouth. (TR., Vol.1, p.121; Vol.2, p.158, 182-183; Vol.3, p.475; see TR., Vol.4, p.768-769 (defendant did not see any blood before he kicked Hill)).

DMPD Officer Ben Idhe called for an ambulance to come to the scene to treat Hill's injuries. (TR., Vol.4, p.713, 782). After defendant's kick, the officers placed handcuffs on Hill. (TR., Vol.3, p.470-472, 489-491).

5. Hill's Injuries

Hill was taken to the local hospital's emergency room. (TR., Vol.2, p.229). Hill "had blood on his face, on quite a bit of him actually." (TR., Vol.2, p.231; Government Exh. 139, 140). Two of his front teeth had been knocked out of his mouth at their roots and a third front tooth needed to be removed because of extensive damage. (TR., Vol.2, p.190, 231, 233). He had a "significant" laceration above his eye that needed six sutures. (TR., Vol.2, p.236-237, see TR., Vol.2, p.189). His nose was swollen and broken. (TR., Vol.2, p.189, 238). Hill's lips were also swollen. (TR., Vol.2, p.231). According to Dr. Holly Healey, the emergency room treating physician, Hill's injuries were caused by "considerable" blunt trauma. (TR., Vol.2, p.229, 233-234). Dr. Healey opined that, to a

reasonable degree of medical certainty, Hill's injuries were "consistent with a kick" given the size of the facial area that was injured. (TR., Vol.2, p.234-235).

6. Defendant's Post-Assault Statements

At the scene and later at the police station, defendant made the following statements to other officers regarding his actions: he told Officers Simonson and Kenkel, "I just tried to knock him [Hill] out." (TR., Vol.3, p.441; see TR., Vol.2, p.165, 179 ("I just meant to knock him [Hill] out a little.")).

Defendant told Officer Idhe that he needed to go back to the police station to write a report because he had kicked Hill in the head. (TR., Vol.2, p.209-210, 225-227). Defendant did *not* state that he kicked Hill in the chest, shoulder, or arm. (TR., Vol.2, p.210).

When defendant returned to the station after the assault, he told his then-fiancé Angela Frye, who was working in dispatch at DMPD, "I just put my boot laces across some guy's face." (TR., Vol.2, p.369-370, 372; see TR., Vol.2, p.399-400). Defendant did not say he *might have* kicked Hill in the face or that he kicked Hill's shoulder or arm. (TR., Vol.2, p.371). Later that night, when defendant and Frye returned to their home, defendant said he took a "ten-foot running start" to kick Hill. (TR., Vol.2, p.372; see TR., Vol.2, p.387). He also said that after his kick, Hill was "spitting teeth out" and "blood gushed everywhere." (TR., Vol.2, p.372; see TR., Vol.2, p.380-381).

Each officer must write an arrest incident report (AIR) to explain his or her actions "outside of normal arrest," including an officer's use of force. (TR., Vol.1, p.56-57). Defendant's AIR stated, "[t]he suspect was trying to push up and I kicked the suspect in the area of the left shoulder." (TR., Vol.1, p.69; see TR., Vol.4, p.733, 799; Government Exh. 105). Defendant did not report in his AIR that he had kicked Hill's face. (TR., Vol.1, p.72; Vol.4, p.733, 799). Defendant reported that Hill had a laceration on his face but he did not report that he caused that injury. (TR., Vol.4, p.800-801).[4]

7. DMPD's And Defendant's Law Enforcement Training

All DMPD police officer candidates must complete DMPD's law enforcement training program, which extends for approximately six months, before serving as a police officer. (TR., Vol.1, p.42, 52; Vol.2, p.204). Defendant attended DMPD's training. (TR., Vol.4, p.658). (Defendant also had attended law enforcement training by the Iowa Department of Public Safety for his law enforcement position with the Iowa Capitol Police, which was prior to defendant joining DMPD. (TR., Vol.4, p.657).) Defendant, like all DMPD officers, received

[4] Officer Willis testified that defendant's AIR was not accurate. (TR., Vol.1, p.69). Both Officers Willis and Simonson separately reported to their supervisors that defendant kicked Hill in his face. (TR., Vol.1, p.65; Vol.3, p.446). Willis found it "very difficult" to report defendant's conduct. (TR., Vol.1, p.65). Officer Simonson also was "extremely uncomfortable" reporting defendant's kick but she did so because "[i]t was the right thing to do." (TR., Vol. 3, p.446-447).

the following training on the use of force: the amount of force they use against an arrestee must be "reasonable." (TR., Vol.1, p.53; Vol. 4, p.787). An assessment of what constitutes "reasonable" force must be based on "[t]he totality of the circumstances," including the degree of threat posed by the arrestee. (TR., Vol.1, p.53; Vol.4, p.747-749). They must constantly reassess the degree to which an arrestee presents a threat because circumstances can change rapidly. (TR., Vol.3, p.424; Vol.4, p.747). An officer may not use force to punish a suspect for his prior conduct. (TR., Vol.3, p.477; Vol.4, p.751). An officer may only use deadly force when an individual poses an immediate threat of death or serious bodily harm to the officer or others. (TR., Vol.1, p.54; Vol.4, p.743). In addition, an individual's face is a "no strike zone[]," that is, an area that should not be struck unless the officer needs to use deadly force. (TR., Vol.1, p.54; see TR., Vol.3, p.469; Vol.4, p.714, 770).

8. Defendant's Version Of The Assault

At trial, defendant testified as follows: as he arrived at the scene, he saw an individual running away from his car and an officer chasing from behind and trying to "tackle" him. (TR., Vol.4, p.699, 701, 707, 758). Defendant lost sight of the officers and individual due to the position of the police transport van. (TR., Vol.4, p.702-704). As defendant came around the front of the police transport van, he saw Hill, face down on the ground with two officers on top of Hill. (TR., Vol.4,

p.704, 759-760). He saw officers struggling with Hill's right arm and hand and Hill's left arm was in a "pushup" position. (TR., Vol.4, p.704). Defendant also testified that he did *not* see Officer Klinge – who was on top of Hill's legs – when he came around the transport van. (TR., Vol.4, p.715-716, 764, 770-771).

As he was crossing in front of the police van, a distance of approximately seven to eight feet, defendant testified that he decided that he needed to do a "sweep kick" of Hill's left arm in order to prevent Hill from pushing himself off the ground. (TR., Vol.4, p.705-706, 711-712, 754-755 (his kick was a conscious decision)). He agreed the goal was to put handcuffs on Hill. (TR., Vol.4, p.762). Defendant asserted that he aimed for and hit Hill's shoulder area between his elbow and shoulder. (TR., Vol.4, p.713, 727). Defendant initially stumbled after his kick and then knelt down and put his knee on Hill's left shoulder. (TR., Vol.4, p.706, 708). Hill was then handcuffed. (TR., Vol.4, p.709). After Hill was handcuffed, defendant stepped on Hill's head to push it back to the ground. (TR., Vol.4, p.773; see Government Exh. 104e).

On direct examination, defendant testified that he had an initial thought that his kick also may have struck Hill's face when he saw blood on Hill's face. (TR., Vol.4, p.727). Defendant thought there was a "50/50" chance that his boot also hit Hill's face (in addition to Hill's shoulder area) when he looked at Hill in the ambulance and saw a cut near Hill's eyebrow. (TR., Vol.4, p.727-728, 730-731).

On cross-examination, defendant conceded that, after he kicked Hill, Hill had "a good amount of blood" on his face and there was a pool of blood on the ground. (TR., Vol.4, p.794). Defendant denied that he knew where the blood was coming from. However, on cross-examination, he also admitted that he did not see any blood on Hill's face when he arrived on the scene, that within minutes of his kick Hill's face was bloody, and that no one else had hit Hill. (TR., Vol.4, p.785-786). Defendant denied that he knew at the accident scene that Hill was missing any teeth. (TR., Vol.4, p.784). Defendant also claimed, "[i]t's never been proven to me" that he kicked Hill in the face. (TR., Vol.4, p.789-790).

Defendant also denied he made certain post-assault statements as described by the fellow officers. (TR., Vol.4, p.729, 801-802 (conversation with Simonson), 736, 738, 755, 804-805 (denies stating he "took a ten-foot running start" to Frye), 802-803 (conversation with Idhe)). Alternatively, defendant testified he did not recall statements to other officers about his kicking of Hill. (TR., Vol.4, p.727 (conversation with Simonson), 739 (comments to Frye about Hill's blood gushing out or teeth knocked out), 804-805 (does not recall or believe he made any comment about knocking out Hill's teeth)). However, defendant admitted the "possibility" that he told Frye, "I put my boot laces across a guy's face." (TR., Vol.4, p.804).

Defendant agreed that deadly force was not warranted during Hill's arrest, that a strike to the head is deadly force, and that intentionally trying to "knock Mr. Hill out" would not have been justified. (TR., Vol.4, p.714, 743, 752-753). Defendant agreed that the amount of force he would have been permitted to use against Hill was the amount of force a reasonable officer would use to get Hill under control in those circumstances. (TR., Vol.4, p.764, 787). Defendant also agreed that Hill's actions in his van (prior to defendant's arrival) were irrelevant to defendant's assessment of the need for force when he arrived on the scene. (TR., Vol.4, p.753).

9. Rule 404(b) Evidence: Defendant's 2009 Assault Of Ms. Dooley

An evidentiary hearing was held March 6, 2015, to address the admissibility of evidence regarding defendant's January 14, 2009, assault of arrestee Ms. Dooley at the DMPD station. (DCD 143, 206). At that hearing, Austin Hill (A.Hill) [5] and DMPD Officer Chris Latcham testified that they witnessed defendant's assault of Ms. Dooley. A.Hill and Officer Latcham's respective testimony at the Rule 404(b) hearing was consistent with – and in many respects identical or nearly identical to – their testimony at trial. (Compare Rule 404(b) TR., p.19-42, with TR., Vol.2, p.251-283 (A.Hill); compare Rule 404(b) TR., p.43-88, with TR., Vol.2, p.291-352

[5] Austin Hill is not related to Orville Hill. (TR., Vol.2, p.251). To avoid confusion, the United States will refer to Austin Hill as A.Hill in its brief. At trial, counsel and witnesses referred to him as Austin.

(Latcham)). The United States also presented video evidence at the 404(b) hearing and at trial (*e.g.*, Government Exhibits 224, 225, and 225a), that was recorded at the DMPD station on January 14, 2009, that corroborated some of A.Hill and Latcham's testimony.[6]

On January 14, 2009, A.Hill was in the DMPD booking room, and more specifically in DMPD's bullpen area for arrestees (the "cage"), on charges of OWI (operating while intoxicated). (Rule 404(b) TR., p.20-23; TR., Vol.2, p.252-253; Government Exh. 224a). While in the bullpen cage, A.Hill heard a woman yelling "[h]elp me," and he looked through the window in the door at the far end of the bullpen. (Rule 404(b) TR., p.22-23; TR., Vol.2, p.253-254). Though the window,

---

[6] The DMPD had audio/video cameras installed in the booking room/ bullpen area and two OWI rooms where officers test an arrestee for his or her blood alcohol level. (Some witnesses referred to these rooms interchangeably as the OWI room, intoxilyzer room, or datamaster room. (TR., Vol.2, p.259).) Government Exhibit 224 is audio/video from the booking room/bullpen area on January 14, 2009, including conversations between defendant and Officer Latcham. Government Exhibits 224a-224f and 225a are identical copies of subparts of Exhibit 224 and 225, respectively. Some excerpts also include identical content; Government Exhibits 224e and 224f are portions of Government Exhibit 224d. Government Exhibit 226 is a transcript of defendant and Latcham's conversations.

There are two OWI rooms at opposite ends of the bullpen area; OWI Room 1 is off-screen and on the other side of the door that is at the far end of the bullpen area shown on Government Exhibit 224c. OWI Room 2 is at the near side of the bullpen hallway that is shown on Government Exhibit 224c. Ms. Dooley was taken to both OWI rooms. There is no video for the first room where she was assaulted by defendant. Government Exhibit 225 (and 225a) is video of Ms. Dooley in OWI Room 2 on January 14, 2009.

A.Hill could see into a nearby OWI Room. (Rule 404(b) TR., p.29-30; TR., Vol.2, p.304-305). A.Hill saw a woman on the floor and the back side of defendant "over her with his shoulders lunging back appearing to assault her." (Rule 404(b) TR., p.23-24, 32; see TR., Vol.2, p.254 (defendant was "hover[ing] over [Ms. Dooley]" with his "shoulders thrusting back")). The woman was yelling as she was being assaulted by defendant. (Rule 404(b) TR., p.23; TR., Vol.2, p.255, 260, 267). A.Hill saw another officer in the room with defendant and Ms. Dooley and that officer "did nothing" as defendant assaulted Ms. Dooley. (Rule 404(b) TR., p.24; TR., Vol.2, p.254-255). Government Exhibit 224a at time-stamp 0:08-0:13 shows A.Hill walking to the door at the end of the bullpen and looking through the door window as a woman's voice is heard off-screen yelling "help me." A.Hill also identified video of Ms. Dooley as the woman who was assaulted, defendant as the assaulter, and Officer Latcham as the second officer in the room. (TR., Vol. 2, p.259).

Officer Latcham testified that when Ms. Dooley had been arrested for OWI on the street earlier that night, she had been resistant to defendant and Latcham, and she had kicked Latcham. (TR., Vol.2, p.296-297). Later, at the station, Ms. Dooley was yelling but she was not "belligerent." (TR., Vol.2, p.298).

Officer Latcham testified that, in OWI Room 1, he watched while defendant used force against Ms. Dooley for ten seconds while Ms. Dooley cried out in pain.

Specifically, Latcham testified that Ms. Dooley was sitting in a chair when defendant grabbed Ms. Dooley's upper arm in an upward motion and held it for ten seconds while she yelled. (Rule 404(b) TR., p.53-54, 75-76; TR., Vol.2, p.300-301, 341). Officer Latcham also corroborated that: (1) A.Hill is shown on the video standing at the door at the end of the bullpen cage and looking through the door window when Ms. Dooley was yelling "help me" as she was assaulted by defendant and (2) that, from A.Hill's vantage point at the window, A.Hill would have been able to see defendant's assault of Ms. Dooley in OWI Room 1. (Rule 404(b) TR., p.53; TR., Vol.2, p.304-305). Latcham believed that defendant needed to do an AIR based on his use of force against Ms. Dooley in OWI Room 1. (Rule 404(b) TR., p.54-55; TR., Vol.2, p.303).

After defendant's assault, Officer Latcham escorted Ms. Dooley through a door and down the red-striped hallway of the booking room to OWI Room 2. (TR., Vol.2, p.292, 294; Government Exh. 224a at time-stamp 4:13, Government Exh. 224c at time-stamp 0:10). (Defendant walked down the same hallway a short time afterwards. (Government Exh. 224c at time-stamp 0:46).) The video of OWI Room 2 shows Ms. Dooley sitting in a chair and crying, whimpering, holding her left arm, and trying to wrap her jacket around her left forearm. (TR., Vol.2, p.295; Government Exh. 225a at time-stamp 0:06-1:36). Latcham testified that Ms. Dooley is crying because defendant had assaulted her. (Rule 404(b) TR., p.48;

TR., Vol.2, p.295, 299, 302-303). On cross-examination, Latcham testified that Ms. Dooley may also have hurt her arm when, while at the scene of her arrest, she slipped on the ice and either Officer Latcham or defendant grabbed her arm as she was falling to the ground. (Rule 404(b) TR., p.78; TR., Vol.2, p.298).

Officer Latcham also testified about two recorded, whispered conversations with defendant after Ms. Dooley was moved to OWI Room 2. (Government Exh. 224d at time-stamp 0:00-1:11, 3:43-4:47, Government Exh. 226).[7] During those conversations, defendant stated that he needed to write a use of force report. (TR., Vol.2, p.308-309, 325; Government Exh. 224d at time-stamp 0:12-0:25). After defendant confirmed with another officer that the bullpen's video camera was turned off (which was incorrect) (Government Exh. 224d at time-stamp 0:33-0:49), defendant shortly thereafter told Officer Latcham his intentions for the content of his force report. (Government Exh. 224d at time-stamp 3:59-4:38, Government Exh. 226, p.2-5). Latcham agreed and responded "[y]eah" when defendant indicated that he intended to write that, when Ms. Dooley was being arrested, she resisted, Officer Latcham grabbed her right arm, she fell, and injured her right shoulder. (TR., Vol.2, p.313-314; Government Exh. 224d at time-stamp 3:59-4:38). On direct examination, Latcham agreed that defendant's characterization

[7] Government Exhibits 224e and 224f are each approximately 1 minute, 30 seconds in length and, respectively, are duplicates of the first and second conversations recorded on Government Exhibit 224d.

was inaccurate and he understood defendant's description was meant for defendant's AIR. (TR., Vol.2, p.313-314).

On cross-examination, Latcham stated that during his recorded conversation with defendant, defendant was discussing the events on the street when Ms. Dooley was arrested and not defendant's actions in OWI Room 1. (TR., Vol.2, p.331). However, on re-direct examination, Latcham again testified that Ms. Dooley was screaming and crying while she was assaulted by defendant in OWI Room 1. (TR., Vol. 2, p.333). Latcham also confirmed his prior testimony that defendant "possibly" punched Ms. Dooley. (TR., Vol.2, p.340). Finally, Latcham admitted that even though he had been named in a 2009 civil suit by Ms. Dooley based on defendant's use of force against her, Latcham admitted for the first time, only days before the trial, that defendant used force against Ms. Dooley. (TR., Vol. 2, p.341-344).

There is no record that defendant prepared an AIR regarding his use of force against Ms. Dooley. (TR., Vol.3, p.519).[8]

[8] At trial, defendant testified that he had no recollection of being in an OWI room with Ms. Dooley and Officer Latcham or grabbing her arm for a ten-second hold while she was yelling in pain and for help. (TR., Vol.4, p.679-680, 813-814). However, defendant also testified that he believed he prepared an AIR report. (TR., Vol.4, p.821). Defendant asserted that his recorded conversations with Latcham concerned his arrest report for Ms. Dooley (which is distinct from an AIR), and his confirmation with Latcham about Ms. Dooley's own actions at the scene of her arrest that caused her pain. (TR., Vol.4, p.820).

At the conclusion of the evidence at the Rule 404(b) hearing, defendant argued that the United States presented insufficient evidence that defendant used unreasonable force against Ms. Dooley to qualify for admission under Rule 404(b), and that the Dooley assault was not sufficiently similar to the charged offense. (Rule 404(b) TR., p.94-96). The district court rejected defendant's claims with the following exchange:

> THE COURT: So I think that's clearly a jury question about, you know, why -- or what the whimpering that Ms. Dooley did or who inflicted the violence when, I think that's up to the jury to determine. I guess you're saying there's two sides to this story?
> MR. SMART: Well, it -- what I'm saying is I'm not sure the evidence is even strong enough to submit to the jury.
> THE COURT: Well, I disagree entirely. I think it's -- you know, to me it certainly rises to the level of something that the jury -- it is a rule of inclusion, and I think this, along with the two incidents from May of 2012 and June of 2012, certainly go to intent, willfulness, so I'm going to admit it.
> MR. SMART: And, Judge, just for the record, I know the court is not going to change its mind, but I would also argue that that incident bears absolutely no similarity to the incident for which Mr. Boone is being charged.
> THE COURT: Now, which incident; this one from January of '09?
> Mr. SMART: The one from January of '09, yes, Your Honor. I would say that they don't bear any similarity.
> THE COURT: Okay.
> MR. SMART: So I'll offer that also.
> THE COURT: No, no, that's fine.

(Rule 404(b) TR., p.95-96).[9]

[9] The United States did not move to admit any other similar act evidence at trial.

On March 9, 2015, immediately before trial, counsel raised additional objections regarding the admissibility of specific evidence regarding the Dooley assault. (TR., Vol.1, p.7-12). Defendant challenged the admissibility of the video of Ms. Dooley in OWI Room 2 (Government Exhibit 225 and excerpts) on grounds that her recorded statements of pain were prejudicial, were testimonial, and raised confrontation clause issues. (TR., Vol.1, p.8-9, 11). Defendant did not raise any challenge to Government Exhibit 224, which includes Ms. Dooley's off-screen comments, "Help me." The district court rejected defendant's challenge to the admissibility of Government Exhibit 225. (TR., Vol.1, p.11).

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in admitting evidence of defendant's use of excessive force against Ms. Dooley pursuant to Federal Rule of Evidence 404(b)(2) as it satisfied this Court's four criteria for admission. *United States* v. *Jongewaard*, 567 F.3d 336, 341 (8th Cir. 2009), cert. denied, 559 U.S. 941 (2010). The United States presented sufficient evidence for a reasonable jury to conclude that defendant assaulted Ms. Dooley and sought to conceal his actions. The charged offense and the Dooley assault are sufficiently similar because in both incidents, defendant used excessive force against an arrestee who previously resisted defendant or other officers but who was not posing any threat at the time of defendant's assault, and he then sought to conceal his use of force. The assault

on Ms. Dooley occurred about four years prior to the charged offense, well within the acceptable range of time for such evidence. Finally, the probative value of the Dooley assault – evidence to prove defendant's intent for the charged offense – outweighed any potential undue prejudice, particularly in light of the district court's limiting jury instruction. *United States* v. *Yielding*, 657 F.3d 688, 701 (8th Cir. 2011), cert. denied, 132 S. Ct. 1777 (2012).

2. Defendant has waived his challenge to the admission of certain video evidence regarding the Dooley assault. Even if considered on the merits, the district court did not abuse its discretion in admitting video evidence that included Ms. Dooley's cries for help while she was assaulted and comments she made in the aftermath of that assault. All of Ms. Dooley's comments fall within the hearsay exceptions for an excited utterance, present sense impression, or then-existing state of mind. See *United States* v. *Graves*, 756 F.3d 602, 604 (8th Cir. 2014); Fed. R. Evid. 803(1)-(3).

3. Given the overwhelming evidence of defendant's guilt, any errors – assuming there were any – were harmless.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR USE OF EXCESSIVE FORCE AND HIS FAILURE TO REPORT SUCH CONDUCT

A. Standard Of Review

This Court reviews a district court's ruling pursuant to Federal Rule of Evidence 404(b) for an abuse of discretion. *United States* v. *Thomas*, 760 F.3d 879, 883 (8th Cir. 2014), cert. denied, 135 S. Ct. 1013 (2015); *United States* v. *Yielding*, 657 F.3d 688, 701 (8th Cir. 2011), cert. denied, 132 S. Ct. 1777 (2012). A district court has "broad discretion in admitting such evidence and will be reversed only if such evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." *Thomas*, 760 F.3d at 883 (citation omitted). "Rule 404(b) is a rule of inclusion." *Ibid.* (quoting *United States* v. *Young*, 753 F.3d 757, 768 (8th Cir. 2014)). "Thus, Rule 404(b) does not exclude evidence of prior bad acts that are probative of the charged crime." *Ibid.* (citation omitted).

B. The District Court Did Not Abuse Its Discretion In Admitting Evidence Of Defendant's 1999 Assault Of Ms. Dooley Under Rule 404(b)

Federal Rule of Evidence 404(b)(1) prohibits evidence of a "crime, wrong, or other act * * * to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However,

Federal Rule of Evidence 404(b)(2) permits the admission of such evidence for a specific purpose, such as proving a "motive, * * * intent, * * * [or the] absence of mistake."

This Court admits evidence under Rule 404(b)(2) when four criteria are met: the evidence is "relevant, is similar in kind and not too remote in time, is sufficiently supported by the evidence, and the potential prejudice does not substantially outweigh the probative value." *Thomas*, 791 F.3d at 894; see *United States* v. *Jongewaard*, 567 F.3d 336, 341 (8th Cir. 2009), cert. denied, 559 U.S. 941 (2010). Defendant asserts (Br. 23-29) that evidence of the Dooley incident was: (1) not sufficiently similar or timely to the charged offense, (2) not established by a preponderance of the evidence, or (3) not substantially more probative than unduly prejudicial. Each claim is without merit.

1. The Court Properly Found That There Was Sufficient Evidence Of Defendant's Assault Of Ms. Dooley And Defendant's Failure To Report Such Conduct To Warrant Admission Under Rule 404(b)

Defendant asserts (Br. 25-28) that the United States presented insufficient evidence to satisfy admission under Rule 404(b) that defendant used excessive force against Ms. Dooley and sought to conceal his action. Not so. Defendant ignores the standard for admissible evidence under Rule 404(b) and the jury's permissible credibility determinations based on the witnesses' testimony.

Under Rule 404(b), evidence is admissible if "a *reasonable jury* could find by a preponderance of the evidence that the defendant committed the prior act." *United States* v. *Winn*, 628 F.3d 432, 436-437 (8th Cir. 2010) (citing *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988)) (emphasis added). Thus, a district court does *not* need to make a preliminary finding that a similar act has occurred before admitting that evidence under Rule 404(b). *Huddleston*, 485 U.S. at 685; *Thomas*, 791 F.3d at 894. Nor does a district court make a credibility determination regarding witnesses who will testify about similar act evidence – as long as a reasonable jury could find the act was committed. *Ibid.*; *United States* v. *Armstrong*, 782 F.3d 1028, 1034 (8th Cir. 2015). Accordingly, this Court has affirmed a district court's admission of evidence under Rule 404(b) notwithstanding a defendant's challenge – as defendant raises here – to the reliability or veracity of witnesses. *Thomas*, 791 F.3d at 894 (rejecting assertions that Rule 404(b) evidence was inadmissible based on a witness's "inconsistent" statements about whether defendant – or someone else – was responsible for the similar act); *Armstrong*, 782 F.3d at 1032-1035 (affirming admission of Rule 404(b) evidence notwithstanding extensive cross-examination of a confidential informant's bias, lack of credibility and "poor reputation for truthfulness").

In his brief (Br. 26-28), defendant characterizes some of the witnesses' testimony at trial in the light most favorable to him and fails to address other

witness testimony. For example, defendant's description of the evidence regarding his assault of Ms. Dooley (Br. 26) challenges A.Hill's credibility and cites DMPD Officer Cornwell's testimony that A.Hill would not have been able to observe defendant's activity in OWI Room 1 through the bullpen door window. Defendant next asserts (Br. 26) that "even assuming" the jury accepted A.Hill's testimony, there was no evidence defendant used excessive force. Finally, defendant asserts (Br. 27) that his subsequent conversations with Officer Latcham addressed the proposed content of defendant's general arrest report, which is different from a use of force report.

For each assertion, defendant ignores critical evidence as well as reasonable factual and credibility determinations the jury could have made based on the preponderance of the evidence. The jury reasonably could have found credible A.Hill's testimony that he saw defendant "hover[]" over Ms. Dooley with defendant's "shoulders thrusting back" as she cried out "[h]elp me." (TR. Vol.2, p.260). Additionally, the jury could have believed Officer Latcham's testimony that: (1) defendant used force on Ms. Dooley for ten seconds while Ms. Dooley cried out in pain and repeatedly yelled for help; (2) Ms. Dooley was not acting in a manner that warranted defendant's use of force – and therefore his force was excessive, and (3) Ms. Dooley's subsequent crying and efforts to support her arm when she was in OWI Room 2 were because of defendant's use of force. See pp.

18-19, *supra*. Defendant also ignores that these witnesses' testimony was corroborated by video, including audio of Ms. Dooley calling out for help; video of Ms. Dooley crying in pain; and video of the defendant and Officer Latcham whispering to each other after confirming (incorrectly, as it turned out) that the video camera was turned off.

A reasonable jury also could certainly have concluded, based on the whispered conversation, that defendant sought and obtained Latcham's acquiescence to a false version of how Ms. Dooley hurt her arm. (See Government Exh. 224d, 224f, 226); p. 20, *supra*. That interpretation and the absence of any AIR report by defendant regarding his assault of Ms. Dooley (TR., Vol.3, p.519) provide ample basis for a jury to conclude, based on a preponderance of the evidence, that defendant sought to cover up his use of force against Ms. Dooley.

The district court fully considered A.Hill and Officer Latcham's testimony before concluding that a reasonable jury could find that defendant used unreasonable force against Ms. Dooley and sought to cover up that action. See p. 21, *supra*. The district court's ruling is consistent with the governing standard and this Court's precedent, and defendant has not shown an abuse of discretion. Cf. *Thomas*, 791 F.3d at 894; *Armstrong*, 782 F.3d at 1034.

2. Defendant's Assault Of Ms. Dooley And His Failure To Report His Conduct Are Sufficiently Similar And Close In Time To The Charged Offense For Admission Under Rule 404(b)

This Court examines a defendant's overall conduct to assess whether another act is sufficiently similar to a charged offense to warrant admission under Rule 404(b). *E.g.*, *Yielding*, 657 F.3d at 701; *United States* v. *Franklin*, 250 F.3d 653, 658 (8th Cir.), cert. denied, 534 U.S. 1009 (2001); *United States* v. *Shoffner*, 71 F.3d 1429, 1431-1433 (8th Cir. 1995). There is no requirement that a prior or subsequent act admitted under Rule 404(b) be identical in all respects to the charged offense. This Court has explained that, "when admitted for the purpose of showing intent, the prior acts need not be duplicates, but must be sufficiently similar to support an inference of criminal intent." *Franklin*, 250 F.3d at 659-660 (quoting *Shoffner*, 71 F.3d at 1432) (admitting evidence of prior drug possession under Rule 404(b) to support charge of intent to distribute drugs); see *Shoffner*, 71 F.3d at 1432 (defendant's role in large-scale cultivation of marijuana and prior conviction for distribution of marijuana were sufficiently similar to charge of conspiracy to distribute marijuana). For example, in *Yielding*, the defendant was charged with violating the Medicare anti-kickback statute by paying bribes to a client's employee in exchange for product orders. 657 F.3d at 697. This Court affirmed admission, under Rule 404(b), of evidence that defendant had stolen from former employers by forging checks and diverting insurance payments for his

personal use. The evidence was properly admitted to prove defendant's knowledge and intent for the charged offense. *Id.* at 699, 702. Moreover, even in instances when the defendant's similar act evidence is nearly identical to the charged offense, this Court has based its decisions affirming admission on the defendant's actions generally rather than the specific acts in common. *Thomas*, 791 F.3d at 892-894 (the charged and similar conduct both "involve[d] the misrepresentation of income to fraudulently obtain loans" when the defendant overstated her income and presented false rental agreements, and recommended the same misrepresentations to another individual).

Other courts of appeals have admitted similar act evidence under Rule 404(b) to prove a defendant law enforcement officer's willfulness or intent to use excessive force when the defendant's overall conduct – rather than each specific act – was sufficiently similar to the charged offense. *E.g.*, *United States* v. *Morris*, 494 F. App'x 574, 584-586 (6th Cir. 2012), cert. denied, 133 S. Ct. 891 (2013); *United States* v. *Brugman*, 364 F.3d 613, 619-620 (5th Cir.), cert. denied, 543 U.S. 868 (2004); *United States* v. *Brown*, 250 F.3d 580, 585-586 (7th Cir. 2001). For example, in *Brugman*, the Fifth Circuit upheld the admission of evidence under Rule 404(b) because the charged offense against the defendant Border Patrol agent and the Rule 404(b) incident, which also involved a defendant's use of unreasonable force to effectuate an arrest, had, overall, "striking similarities" even

though not every aspect of the two assaults was identical. 364 F.3d at 620. For example, in both incidents, the victims initially ran away from defendant and were later caught. *Id.* at 614, 619. Moreover, in both cases, the victims testified they were not resisting, were complying with instructions, and were sitting or lying on the ground when the defendant first kicked or fell on top of each victim and then punched them either in the torso or face. *Id.* at 614-615, 619, 621. In *Brown*, the Seventh Circuit likewise held that Rule 404(b) evidence was sufficiently similar to defendant's charged offense notwithstanding differences in how the defendant used physical force against two victims: in both instances, the defendant police officer, while off-duty, made threats and used force against individuals who defied his orders or authority. 250 F.3d at 583, 585;[10] see *Morris*, 494 F. App'x at 575, 585-586 (Rule 404(b) incident was sufficiently similar to the charged offenses; all incidents involved the defendant's use of his authority as a police officer to conduct a traffic stop, isolate women, and force them to engage in some form of sexual conduct including pulling away their bra).

[10] In the Rule 404(b) incident in *Brown*, defendant pulled a chair away from a woman about to sit down, and after she confronted defendant, he threw her into the wall, threw her to the floor, and choked her. 250 F.3d at 584. The charged offense involved defendant pointing his gun at an individual who refused his commands, punching and kicking the individual on the ground, and threatening to kill the individual if he reported defendant's conduct. *Id.* at 583.

Here, the district court did not abuse its discretion in concluding that defendant's assault of Ms. Dooley and his failure to report such conduct were sufficiently similar to defendant's assault of Hill to warrant admission under Rule 404(b). Cf. *Brugman*, 364 F.3d at 620-621; *Brown*, 250 F.3d at 585. In both instances, defendant used excessive force against arrestees who were restrained or compliant, but who had previously resisted defendant and/or other DMPD officers. Cf. *Brugman*, 364 F.3d at 620-621. Moreover, in both instances defendant attempted to conceal his use of excessive force – either by not reporting his conduct or by providing a false report. See pp. 11-12, 21-22, *supra*.

Defendant claims (Br. 23-24) that the Dooley incident is not sufficiently similar to the charged offense because defendant used his hands against Ms. Dooley, whereas he kicked Hill; because he did not cause as much injury to Ms. Dooley as he did to Hill; and because the "context" of each incident was "dissimilar." These are distinctions without a difference. Defendant's decision to kick Hill and grab and hold Ms. Dooley's arm does not mean that defendant's actions towards Ms. Dooley are not similar and admissible under Rule 404(b). Cf. *Yielding*, 657 F.3d at 697, 699, 702; *Brugman*, 364 F.3d at 620-621. In both instances, defendant used his own strength and body to inflict pain on a compliant or restrained arrestee. Cf. *ibid.* The fact that Hill suffered more extensive injuries than Ms. Dooley is irrelevant to assessing the similarities of defendant's intentional

use of force. Cf. *Morris*, 494 F. App'x at 585-586 (prior incident was sufficiently similar to charged offenses even though degree of forced sexual conduct differed). Finally, defendant's attempt to describe a different "context" that warranted force also is unavailing. Whether defendant's use of force was on the streets or in a room at the police station is not significant. See *Franklin*, 250 F.3d at 660 (separate arrests inside and outside a drug house do not defeat similarity for Rule 404(b)). The context also is the same; in both instances, defendant used unnecessary force against an arrestee who was not contemporaneously resisting his commands.

This Court applies a "reasonableness standard" to assess whether the similar act evidence is sufficiently close in time to the charged event – and four years is well within that standard. *Thomas*, 791 F.3d at 894; *Yielding*, 657 F.3d at 702. As this Court explained, "[t]here is no absolute rule about remoteness in time." *Ibid.* This Court has frequently affirmed the reasonableness of admitting similar act evidence that is five years or more prior to the charged offense. *E.g.*, *United States* v. *Warren*, 788 F.3d 805, 811-812 (8th Cir.) (15 years), cert. denied, No. 15-5982, 2015 WL 5276534 (Oct. 13, 2015); *Yielding*, 657 F.3d at 702 (five to eight years); *Franklin*, 250 F.3d at 659 (five years); *United States* v. *Wint*, 974 F.2d 961, 967 (8th Cir. 1992) (same), cert. denied, 506 U.S. 1062 (1993). In light of this Court's precedent, the district court acted well within its discretion when it admitted

evidence of an incident that occurred four years prior to defendant's assault of Hill. Cf. *Yielding*, 657 F.3d at 702; *Franklin*, 250 F.3d at 659.

Defendant acknowledges (Br. 24-25) that this Court applies a reasonableness standard in assessing the timeliness of an incident that is admissible under Rule 404(b) and that this Court has admitted incidents more than five years old. Defendant, however, claims (Br. 25) that the asserted lack of similarity between the two incidents, defendant's numerous arrests as an officer, and the time span between the incidents "militate[]" against admission of the Dooley assault. This analysis is without merit. As explained above, the circumstances of the two assaults and defendant's deliberate attempt to conceal his actions are similar. Defendant's total number of his arrests is irrelevant to assessing the timeliness or admissibility of the Dooley assault. Accordingly, defendant cannot show that the district court's admission of the Dooley assault based on an asserted lack of similarity or its occurrence four years prior to the charged offense is an abuse of discretion. Cf. *Yielding*, 657 F.3d at 702; *Brugman*, 364 F.3d at 620-621; *Brown*, 250 F.3d at 585.

3. The Probative Value Of Evidence Regarding Defendant's Assault Of Ms. Dooley And The District Court's Limiting Instruction Outweighed Any Potential Undue Prejudice

Defendant's asserts (Br. 28-29) that the undue prejudicial effect of evidence of defendant's assault of Ms. Dooley outweighed its probative value. This claim is without merit.

When, as here, a defendant's intent is an element of the crime, evidence that reflects the defendant's similar state of mind is highly probative and therefore is frequently admitted under Rule 404(b). *Armstrong*, 782 F.3d at 1034; *Yielding*, 657 F.3d at 702; *Brugman*, 364 F.3d at 620. Evidence that defendant used excessive force against Ms. Dooley and sought to cover it up is probative of defendant's intent (*i.e.*, willfulness) to use excessive force against Hill and indirectly rebuts defendant's assertion that he only intentionally kicked at Hill's arm. (TR., Vol.4, p.754-755). Significantly, defendant does not challenge the probative value of this evidence to show defendant's intent for the charged offense – nor can he reasonably do so. Cf. *Yielding*, 657 F.3d at 702; *Armstrong*, 782 F.3d at 1034.

Rule 404(b) protects against undue prejudice by requiring that the evidence be admissible for a specific purpose other than propensity, be established by a preponderance standard, and be sufficiently similar to the charged offense. *Huddleston*, 485 U.S. at 691. Additionally, a court further protects against unfair

prejudice when it gives a proper limiting instruction that identifies the jury's need to find the similar fact(s) by a preponderance of the evidence and if so found, to limit consideration of that evidence for a limited purpose. *Yielding*, 657 F.3d at 702; *Franklin*, 250 F.3d at 659. Where, as here, the district court offers an appropriate limiting instruction, this Court is "reluctant" to find that evidence is unfairly prejudicial. *United States* v. *Williams*, 796 F.3d 951, 960 (8th Cir. 2015).

At this four-day trial, the United States presented four witnesses during part of one afternoon session to testify about defendant's assault of Ms. Dooley; A.Hill and Officer Latcham were the primary witnesses. (TR., Vol.2, p.246-367).[11] The defendant presented one witness regarding this incident (Officer Cornwell, TR., Vol.3, p.523-536), and defendant also testified about it. (TR., Vol.4, p.671-693; see TR., Vol.4, p.806-822). The district court gave a limiting instruction. (DCD 162, at p.10). That instruction advised the jury that it first must consider all of the evidence regarding whether defendant used force against Ms. Dooley and "decid[e] what evidence is more believable," which is a "lower standard than proof beyond a reasonable doubt." (DCD 162, at p.10). If the jury found that that evidence "was

[11] The United States' third witness was Federal Bureau of Investigation Special Agent Justin McNair. McNair addressed (1) defendant's testimony at a post-trial hearing for A.Hill at which defendant denied he harmed Ms. Dooley (TR., Vol.2, p.359-362, 366-367), and (2) the absence of any record of an AIR by defendant regarding Ms. Dooley. (TR., Vol.3, p.519). The local prosecutor for the 2009 OWI charge against A.Hill also testified briefly on a matter relating to A.Hill's credibility. (TR., Vol. 2, p.353-359).

more likely true than not true," it could consider that evidence solely to decide defendant's "intent, knowledge, motive, or absence of mistake" with respect to the charged offense. (DCD 162, at p.10).

Defendant asserts (Br. 29) that evidence of the Dooley assault was a "mini trial" that unfairly prejudiced defendant. However, defendant fails to explain how the 404(b) evidence was unfair or *unduly* prejudicial. *United States* v. *Boesen*, 541 F.3d 838, 849 (8th Cir. 2008) (noting that "evidence is not unfairly prejudicial merely because it tends to prove a defendant's guilt"); cf. *United States* v. *Mohr*, 318 F.3d 613, 619 (4th Cir. 2003) (noting, in an excessive force case against a police officer, that 404(b) evidence was properly admitted because, even though the evidence was "potent[]" and could have "severely damage * * * [the] defense, * * * the legitimate probative force of the evidence" did not cause any "*[u]nfair* prejudice") (last alteration in original and citation omitted). Additionally, defendant's focus on the time spent at trial on the Rule 404(b) evidence as grounds to find prejudice is misplaced. The testimony was not excessive in relation to the overall trial, and defendant's own cross-examination of the witnesses contributed to the total time spent on this evidence.

Defendant's general assertion (Br. 28) that evidence of the Dooley assault "could have 'induc[ed the jury's] decision on a purely emotional basis'" is not grounds to find the district court abused its discretion. (alteration in original and

citation omitted). Defendant ignores the specific jury instruction that advised the jury that it must first conclude that this event occurred, and then it may consider the evidence only for the limited purposes of "intent, knowledge, motive, or absence of mistake." (DCD 162, at p.10). Defendant cannot overcome the presumption that the jury followed this instruction. *United States* v. *Ali*, 799 F.3d 1008, 1024 (8th Cir. 2015) (rejecting challenge that a jury could not follow instructions limiting consideration of evidence pursuant to Rule 404(b) as to one defendant); *United States* v. *Ford*, 726 F.3d 1028, 1033 (8th Cir. 2013), cert. denied, 135 S. Ct. 131 (2014). Accordingly, defendant has failed to show any undue prejudice caused by the admission of the 404(b) evidence, let alone that the probative value of the evidence is outweighed by undue prejudice such that the district court abused its discretion. Cf. *Thomas*, 791 F.3d at 895.

II

THE DISTRICT COURT PROPERLY ADMITTED VIDEO EVIDENCE REGARDING MS. DOOLEY

A. Standard Of Review

Evidentiary challenges that are raised in district court and are pursued on appeal are reviewed for an abuse of discretion. *United States* v. *Graves*, 756 F.3d 602, 604 (8th Cir. 2014). Evidentiary challenges raised for the first time on appeal are reviewed for plain error. *United States* v. *Millard*, 139 F.3d 1200, 1203 (8th Cir.), cert. denied, 525 U.S. 949 (1998); Fed. R. Crim. P. 52(b). If an appellant

addresses a claim only in a "conclusory manner" in an opening brief, the claim is waived. *Koehler* v. *Brody*, 483 F.3d 590, 599 (8th Cir. 2007); see *Ahlberg* v. *Chrysler Corp.*, 481 F.3d 630, 634 (8th Cir. 2007).

B. Defendant's Pretrial And Trial Challenges To Exhibits 224 And 225

Defendant raised few challenges pretrial and at trial to the admission of Government Exhibits 224 and 225, the audio/video recordings from the DMPD bullpen regarding defendant's assault of Ms. Dooley. The excerpts of Government Exhibit 224 that were primarily played for the jury were Ms. Dooley's off-camera cries for help while A.Hill was looking through the window of the door at the end of the bullpen cage (Government Exh. 224a and 224b); Officer Latcham walking Ms. Dooley through the bullpen area from OWI Room 1 to OWI Room 2 followed shortly thereafter by defendant (Government Exh. 224c); and defendant's whispered conversations with Officer Latcham after Ms. Dooley had been taken to OWI Room 2 (Government Exh. 224d). Government Exhibit 225 is approximately 40 minutes of audio/video footage from OWI Room 2 that was taken before and after Ms. Dooley entered the room. Government Exhibit 225a is approximately the first three minutes of Ms. Dooley's arrival in OWI Room 2. Exhibit 225a shows Officer Latcham bringing Ms. Dooley into the room, her continuous crying, complaints of pain, and her efforts to wrap her jacket around her left arm.

First, defendant did *not* challenge pretrial or at trial the admissibility of Government Exhibit 224 with respect to Ms. Dooley's cries for help. As noted, at the Rule 404(b) hearing, defendant challenged the collective admissibility of evidence based on the United States' alleged failure to meet the preponderance standard and the purported lack of similarity between the Dooley assault and the charged offense. (Rule 404(b) TR., p.94-96). The district court rejected defendant's objection. (Rule 404(b) TR., p.95-96); see pp. 21-22, *supra*.

After that hearing and immediately before trial, defendant objected to the introduction of Government Exhibit 225 with respect to Ms. Dooley's crying, comments, and behavior. (TR., Vol.1, p.7-12). Defendant first argued that the video was not relevant, and Ms. Dooley's comments about her pain were testimonial and raised confrontation clause issues. (TR., Vol.1, p.8-9).[12] The United States argued that the video was relevant to prove defendant's assault of Ms. Dooley, and Ms. Dooley's crying and behavior on Exhibit 225 were not testimonial and were present sense impressions. (TR., Vol.1, p.9-10). Defendant then asserted that that Ms. Dooley specifically stated on Exhibit 225 that "[t]hey broke my f * * * ing arm" and "my arm hurts." (TR., Vol. 1, p.11; see Government Exh. 225 at time-stamp 27:40-27:45 ("I think he did break my arm")

[12] Defendant raised additional objections regarding the identification of Ms. Dooley by name and the scope of evidence regarding her settlement of claims against the City of Des Moines, neither of which is at issue in this appeal.

and 33:08 ("officers broke it"); see also, *e.g.*, Government Exh. 225 at time-stamp 27:10-27:12 ("my arm hurts really bad")). The district court held that the video was relevant and Ms. Dooley's statements were not testimonial and therefore the video was admissible. (TR., Vol.1, p.11).

At trial, the United States simultaneously offered for admission Government Exhibits 224, 224a-f, 225, and 225a. (TR., Vol.2, p.249). Defendant challenged the admission of Exhibit 224 "for the reasons previously stated," and asserted that Exhibit 225 contained testimonial content, presented a "confrontation issue, and it's also hearsay." (TR., Vol.2, p.248-249). The district court overruled defendant's objections. (TR., Vol.2, p.249).

C. Defendant's Challenge To Ms. Dooley's Comments On Exhibit 224 Is Waived And Even If Considered, Her Comments Are Admissible Excited Utterances

In his brief, defendant challenges with varying degrees of specificity the admission of video Government Exhibits 224 and 225 (and by extension, Government Exhibits 224a-224f and 225a) to the extent those exhibits include audio recordings of Ms. Dooley's comments. As noted, defendant did not raise any challenge to Government Exhibit 224 before or at trial on this basis. (See TR., Vol.2, p.249). Moreover, defendant's brief (Br. 30-31) includes only summary or conclusory references to Government Exhibit 224. Defendant's current arguments (Br. 30-31) do not address Ms. Dooley's cries in pain or exclamations of "help me"

that are recorded on Government Exhibits 224, 224a, and 224b. Accordingly, defendant has waived his challenge to Exhibit 224 (and excerpts) on the basis of recordings of Ms. Dooley's comments and this Court should deny that challenge. Cf. *Koehler*, 483 F.3d at 599; *Ahlberg*, 481 F.3d at 634.

Even if this claim is considered on the merits under plain error review, Ms. Dooley's cries of pain and her exclamations of "help me" as defendant used force against her for ten continuous seconds clearly qualify as excited utterances under Federal Rule of Evidence 803(2). This hearsay exception applies based on the inherent trustworthiness that derives from the spontaneity of a declarant's comment in response to a startling event – as compared to a calculated or deliberative statement. *Graves*, 756 F.3d at 604-606; Fed. R. Evid. 803(2) Advisory Committee's Note on 1972 Proposed Rule. Thus, this Court has held that a victim's responses to an officer's questions shortly after being shot, a witness's statement shortly after seeing a near-fatal ski accident, and a victim's statement to an officer approximately 30 minutes after being threatened with a shotgun are excited utterances. *Stidum* v. *Trickey*, 881 F.2d 582, 585-586 (8th Cir. 1989), cert. denied, 493 U.S. 1087 (1990); *Brunsting* v. *Lutsen Mountains Corp.*, 601 F.3d 813, 815-819 (8th Cir. 2010); *Graves*, 756 F.3d at 604-606. Given this precedent, no extended argument is needed to conclude that Ms. Dooley's contemporaneous cries for help as defendant used force against her are excited

utterances. Cf. *Graves*, 756 F.3d at 604-605; *Stidum*, 881 F.2d at 585-586; Fed. R. Evid. 803(2).

D. Defendant's Challenge To Ms. Dooley's Comments On Exhibit 225 Is Without Merit

Defendant challenges (Br. 30-32) the admission of Government Exhibit 225 based on Ms. Dooley's comments that unnamed officers were responsible for injuring her arm. To a lesser extent, defendant challenges (Br. 30-32) the admission of Ms. Dooley's other statements regarding her pain on Government Exhibit 225 (some of which are also contained on Government Exhibit 225a, the three-minute excerpt of Government Exhibit 225). Defendant appears to concede (Br. 30) – correctly – that Ms. Dooley's comments about her pain satisfy Federal Rule of Evidence 803(3): "[a] statement of the declarant's then-existing state of mind * * * or physical condition (such as * * * pain)."

While defendant is not specifically challenging these statements of pain, even if considered, all of Ms. Dooley's statements – made within several minutes of the assault – fall within a present sense impression or excited utterance. Fed. R. Evid. 803(1)-(2); *Graves*, 756 F.3d at 605 (victim's statement made 30 minutes after assault qualifies as an excited utterance); *United States* v. *Earley*, 657 F.2d 195, 197-198 (8th Cir. 1981). At the end of Government Exhibit 225a, Ms. Dooley asks for aspirin and water, both of which are denied by an officer off-screen, and then states, "my arm hurts really bad." (Government Exh. 225a at time-stamp

2:58-3:08). These statements are admissible because they are "describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1); cf. *United States* v. *Beck*, 122 F.3d 676, 681-682 (8th Cir. 1997) (officer's testimony regarding informant's statements about the informant's controlled purchases qualify under Rule 803(1) and are "part of a single, continuous event"); *Earley*, 657 F.2d at 197-198 (witness's statement immediately after a phone conversation establishes spontaneity and proximity to an event, which "attests to its trustworthiness" and qualifies as a present sense impression or excited utterance).

In addition, this Court has identified several factors to assess whether a witness remains "under the stress of excitement" of an event such that a later statement qualifies as an excited utterance – and those factors are met here. *Graves*, 756 F.3d at 605. Specifically, Ms. Dooley's crying was continuous for several minutes after defendant's assault, her comments were spontaneous and not in response to any specific question from an officer, and she appeared distraught and in pain at the time of her crying and comments. See also *United States* v. *Jongewaard*, 567 F.3d 336, 338, 342-343 (8th Cir. 2009), cert. denied, 559 U.S. 941 (2010) (a witness's call to a third party to report defendant's threats to kill the third party was admissible as excited utterance); cf. *United States* v. *Marrowbone*, 211 F.3d 452, 455 (8th Cir. 2000) (a victim's statement, made three hours after an

assault and without evidence of the victim's "continuous excitement or stress" from the time of the assault to the statement, does not qualify as an excited utterance).

For the same reasons, Ms. Dooley's statement that officers broke her arm – only present on Government Exhibit 225 – was admissible as a present sense impression under Rule 803(1) or an excited utterance under Rule 803(2).[13] *Graves*, 756 F.3d at 605 (victim's statement made 30 minutes after assault qualifies as an excited utterance); *Earley*, 657 F.2d at 198 (witness's statement immediately after a call qualify as a present sense impression or excited utterance). Defendant has not shown how Ms. Dooley's additional comment is distinguishable from her other contemporaneous assertions of pain and therefore cannot show the district court abused its discretion.

Finally, defendant's passing assertion (Br. 30) that counsel for the United States improperly discussed the evidence of the Dooley assault in rebuttal is without merit.[14] In rebuttal, counsel for the United States answered defense

---

[13] According to the trial transcript, no party played Exhibit 225 at trial. Rather, the parties offered the exhibit into evidence, but played only 225a, which did not contain the objected-to comment.

[14] Although this point is not critical to the government's position, the government notes that defendant incorrectly states (Br. 30) that the challenged statement was part of the United States' closing argument. In fact, the United States' closing did not mention the Dooley assault at all; defendant first raised this

(continued…)

counsel's question, raised during his closing argument, as to what was defendant's "motive." (TR., Vol.4, p.872) ("[W]hile we're talking about motive, here's where I want to talk about that 2009 incident."). United States' counsel also discussed the Dooley assault with respect to defendant's willfulness (*i.e.*, his intent). (TR., Vol. 4, p.876-878). United States' counsel appropriately referred to the strength of the evidence supporting defendant's assault of Ms. Dooley since, consistent with the district court's instructions, the jury had to first conclude that the assault happened before it could consider that evidence to assess "[d]efendant's intent, knowledge, motive, or absence of mistake." (DCD 162, at p.10). Accordingly, counsel's brief references in rebuttal to the Rule 404(b) evidence in the specific context for which it was admitted was entirely appropriate. *United States* v. *Bekric*, 785 F.3d 1244, 1247 (8th Cir. 2015) (counsel's comments about Rule 404(b) evidence to show that defendant's knowledge was permissible); *United States* v. *Gant*, 721 F.3d 505, 510 (8th Cir. 2013) (counsel's comments about Rule 404(b) evidence to show defendant's actions were not accidental were permissible); *United States* v. *Brown*, 702 F.3d 1060, 1065 (8th Cir. 2013) (counsel's argument that prior offenses admitted under Rule 404(b) were relevant to assessing defendant's *modus operandi* were not improper).

(…continued)
topic in his closing argument (TR., Vol.4, p.860-861), and the United States responded in rebuttal.

III

ANY ERRORS IN THE DISTRICT COURT'S EVIDENTIARY RULINGS WERE HARMLESS

A. Standard Of Review

If the Court finds that the district court abused its discretion in an evidentiary ruling, it must then determine whether the error was harmless. "An evidentiary error is harmless when, after reviewing the entire record, we determine that the substantial rights of the defendant were unaffected, and that the error did not influence or had only a slight influence on the verdict." *United States* v. *Love*, 521 F.3d 1007, 1009 (8th Cir. 2008) (citation omitted).

B. Even If The District Court's Evidentiary Rulings Were An Abuse Of Discretion, The Errors Were Harmless

If considered, this Court should reject defendant's assertion (Br. 32) that the district court's purported errors in admitting evidence of the Dooley assault were not harmless and therefore warrant a new trial.[15]

More specifically, defendant asserts (Br. 32) that because evidence of the Dooley assault was not admitted at the first trial when the jury was unable to reach a verdict on Count 1, but that evidence was admitted at the second trial when he

---

[15] For all the reasons stated above (Argument I and II, *supra*), the United States continues to assert that the district court's rulings were not an abuse of discretion – and therefore defendant has not established any error to warrant harmless error review.

was convicted, this evidence "likely had a significant impact on the jury" (and therefore was not harmless).[16] Defendant's analysis is wrong. First, there is no basis to conclude that the difference in verdicts is attributable solely to the 404(b) evidence. The second trial had a different jury, which heard far more extensive cross-examinations of the defendant (TR., Vol.4, p.742-773) and defendant's expert (TR., Vol.3, p.569-639) than did the first jury. (2014 TR., Vol.4, p.713-720 (cross-examination of defendant's expert); 796-799 (cross-examination of defendant)). The second jury also heard more extensive testimony from Angela Frye, defendant's ex-fiancé, regarding defendant's inculpatory admissions to her after the incident, including his statements that he took a "ten-foot running start" before he kicked Hill, and that after he kicked Hill, Hill was spitting out teeth and his "blood gushed everywhere." (TR., Vol.2, p.372, 380). Thus, even if admission of the Rule 404(b) evidence had been error, defendant has failed to show that this evidence influenced the jury's verdict. Accordingly, if any error existed, it was harmless. Cf. *Love*, 521 F.3d at 1009.

Moreover, this Court has frequently held – as it should here – that when the evidence is overwhelming, any assumed evidentiary errors are harmless. *E.g.*, *United States* v. *Jongewaard*, 567 F.3d 336, 343 (8th Cir. 2009), cert. denied, 559

[16] Defendant also casts aspersion on the "notable absence" of Ms. Dooley at trial (Br. 32) yet ignores that he could equally have sought her presence at trial.

U.S. 941 (2010); *United States* v. *Bekric*, 785 F.3d 1244, 1247 (8th Cir. 2015); cf. *United States* v. *Crenshaw*, 359 F.3d 977, 1004 (8th Cir. 2004) (even when district court abused its discretion in admitting evidence under Rule 404(b), and evidence was less than overwhelming, the error was still harmless given this court's precedent, the district court's limiting instruction, and the lack of proof that the improper evidence "infected" the entire trial). Here, there is overwhelming evidence to support the jury's verdict. Four fellow DMPD officers testified that their collective hands-on force was all that was necessary to keep Hill restrained when defendant assaulted Hill. See pp. 7-8, *supra*. Three DMPD officers testified that they had a direct view – within a couple feet – of Hill's "straight kick" directly to Hill's face. See pp. 8-9, *supra*. Officers also testified to defendant's multiple statements that admitted he intentionally kicked Hill: "I took a ten-foot running start," "I just put my boot laces across some guy's face," "I kicked [Hill] in the head," and "I just meant to knock him out a little bit." See pp. 11-12, *supra*. These statements reflect defendant's knowledge, intent, and use of excessive force. In addition, defendant conceded that a kick to Hill's head was deadly force, and deadly force was not warranted. (See TR., Vol.4, p.742-743). Finally, defendant's false and incomplete AIR, prepared in an effort to conceal his actions, further establishes his intent and knowledge that he used excessive force against Hill. See p. 13, *supra*. Given this collective, overwhelming evidence, any errors – assuming

any were established – were harmless. Cf. *Jongewaard*, 547 F.3d at 343; *Bekric*, 785 F.3d at 1247.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

NICHOLAS A. KLINEFELDT
United States Attorney

KELLY MAHONEY
Assistant United States Attorney
United States Attorney's Office
Southern District of Iowa
110 East Court Ave., Suite 286
Des Moines, Iowa 50309
(515) 473-9312

VANITA GUPTA
Principal Deputy Assistant
Attorney General

s/ Jennifer Levin Eichhorn
SHARON M. MCGOWAN
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief Of The United States As Appellee:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 12,146 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); 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 has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

(3) the brief was scanned for viruses using Symantec Endpoint Protection version 12.14112.4156, and it is virus-free.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: November 5, 2015

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2015, I electronically filed the foregoing Brief Of 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 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, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express two-day delivery ten paper copies of the foregoing brief to the Clerk of the Court and two paper copies to counsel for appellant.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney