No. 24-5602

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TANNER M. ABBOTT,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that this appeal can be resolved without oral argument. The facts and legal arguments are adequately presented in the briefs and record, and the issues presented on appeal are straightforward. The United States will appear for oral argument if this Court concludes that argument would be helpful.

STATEMENT OF JURISDICTION

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Tanner M. Abbott on June 21, 2024. (Judgment, R.97, Page ID # 766). Abbott filed a timely notice of appeal on July 1, 2024. (Notice of Appeal, R.99, Page ID # 774). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

A jury convicted defendant-appellant Abbott of six federal crimes arising from arrests he conducted as a sheriff's deputy in Boyle County, Kentucky. The jury convicted Abbott of three counts of depriving individuals of their right to be free from excessive force, in violation of 18 U.S.C. 242; one count of depriving an individual of his right to be free from an unreasonable search, in violation of 18 U.S.C. 242; one

count of conspiracy to falsify a police report, in violation of 18 U.S.C. 371; and one count of falsifying a police report, in violation of 18 U.S.C. 1519; while acquitting Abbott on a fourth excessive-force count under 18 U.S.C. 242. Abbott raises the following issues on appeal:

1. Whether Abbott's counts were properly joined under Federal Rule of Criminal Procedure 8(a);

2. Whether the district court abused its discretion by denying Abbott's motion to sever his counts for separate trials under Federal Rule of Criminal Procedure 14(a); and

3. Whether the district court abused its discretion by admitting evidence of Abbott's other acts—namely, force he used or threatened to use against arrestees on other occasions—to prove that his charged conduct was willful.

STATEMENT OF THE CASE

A. Factual Background

Before his termination in September 2021, Abbott was a deputy in the Boyle County Sheriff's Office (BCSO), based in Danville, Kentucky. (Transcript (Tr.) Day 3, R.120, Page ID # 1676; Tr. Day 4, R.121, Page

ID # 1719). Abbott's conduct in four incidents in early 2021 led to the convictions now at issue.

1. Abbott's use of force against J.C.

On April 28, 2021, Abbott followed J.C.'s vehicle, suspecting him of involvement in drug activity. (Tr. Day 4, R.121, Page ID # 1871-1873). When Abbott put on his police lights, J.C. fled, and Abbott chased after him, joined by officers from other agencies. (*Id.* at Page ID # 1874-1877). A collision brought J.C. to a halt, and Abbott went to cuff and arrest J.C. (*Id.* at Page ID # 1879).

An officer at the scene, Josh Gibson, testified that Abbott was walking a "handcuffed and compliant" J.C. to his patrol vehicle when Abbott delivered "a pretty significant punch to the left side" of J.C.'s face. (Tr. Day 1, R.117, Page ID # 1063-1064). Gibson felt "shock" because he was trained that "you don't hit an apprehended suspect that's handcuffed if they're being compliant." (*Id.* at Page ID # 1064).

Abbott testified that J.C. spat on him, so he "punched [J.C.] to try to end that aggression right then and there." (Tr. Day 4, R.121, Page ID # 1880). But he did not report the spitting or the punch at the time. (*Id.* at Page ID # 1920-1921). At trial, J.C. denied spitting on Abbott,

and he was not charged with any offense for spitting on an officer. (Tr. Day 1, R.117, Page ID # 1118-1119). Gibson likewise did not see J.C. spit on Abbott or hear Abbott say anything about J.C. spitting on him. (*Id.* at Page ID # 1065-1066).

2. Abbott's use of force against W.W.

On February 2, 2021, Abbott and another BCSO deputy, Braydon Hopper, stopped W.W. after observing an informant buy drugs from him. (Tr. Day 2, R.118, Page ID # 1279-1281). After Abbott's K-9 alerted on W.W.'s vehicle, Abbott had W.W. get out and began to search him. (*Id.* at Page ID # 1215-1216). When Abbott detected a meth pipe concealed in W.W.'s groin area, W.W. "got smart and asked [Abbott] was he gay or something." (*Id.* at Page ID # 1216-1217, 1223-1224, 1283; Tr. Day 4, R.121, Page ID # 1850).

Abbott told W.W. to "get up against the car" and put his hands behind his back to be cuffed. (Tr. Day 2, R.118, Page ID # 1218). Abbott then claimed W.W. was resisting. (*Ibid.*). Abbott had W.W.'s left hand cuffed, and he was pulling on W.W.'s right arm to cuff it too when W.W. turned towards Abbott to say something. (*Id.* at Page ID # 1184-1185, 1218-1219). Hopper was standing nearby and could have

helped Abbott finish cuffing W.W. (*Id.* at Page ID # 1218-1219, 1283). Instead, Abbott "sucker-punched" W.W. in the face. (*Id.* at Page ID # 1219).

Abbott testified that he punched W.W. because W.W. turned towards him in "an aggressive manner" with "his elbow up" and was not "following any lawful orders." (Tr. Day 4, R.121, Page ID # 1852-1854). Abbott had Hopper produce an arrest report stating that W.W. made an "aggressive advancement towards Deputy Abbott." (Tr. Day 2, R.118, Page ID # 1303). But Hopper disavowed that statement at trial, testifying that he included the "aggressive advancement" claim in his report at Abbott's behest so that Abbott would not "[g]et in trouble." (*Id.* at Page ID # 1304). W.W. denied making any aggressive movements, and Hopper denied seeing any, as did Joshua White, W.W.'s brother, who was present at the scene. (*Id.* at Page ID # 1181, 1220, 1304).

3. Abbott's warrantless search of B.T.

On March 31, 2021, Abbott and Hopper went to a hotel to see B.T., whom Abbott suspected of involvement in drug activity. (Tr. Day 2, R.118, Page ID # 1306-1307). Their knock on B.T.'s hotel room door

went unanswered, so Abbott obtained a key from the hotel's owner by claiming to have a warrant he did not actually have. (*Id.* at Page ID # 1308, 1310, 1405). Despite lacking a search or arrest warrant, Abbott used the key to open B.T.'s door, but it was latched from the inside. (*Id.* at Page ID # 1307, 1310, 1405). B.T. came out to the hallway, where Hopper patted him down, while Abbott went in and started searching B.T.'s room. (*Id.* at Page ID # 1311-1315). Abbott did not ask B.T. for consent, and B.T. did not give it, instead objecting to Abbott's search. (*Id.* at Page ID # 1313; Tr. Day 3, R.120, Page ID # 1441-1442, 1499).

Abbott's search included opening bags and drawers, and he eventually found two hidden bags of methamphetamine. (Tr. Day 2, R.118, Page ID # 1316-1318). He grabbed B.T. to cuff him, slamming him into the wall as he did so. (*Id.* at Page ID # 1319). Later, he wrote a citation stating that B.T. gave him consent to search the room. (*Id.* at Page ID # 1323-1324).

4. Abbott's use of force against D.N. and C.B.

On January 20, 2021, Abbott stopped a vehicle driven by D.N., thinking D.N. was driving erratically. (Tr. Day 4, R.121, Page ID # 1820-1822). Seeing the police lights, D.N. dropped a vape pen on the

floor, and as he tried to locate it, he accidentally drove into a ditch. (Tr. Day 3, R.120, Page ID # 1513, 1581-1582).

Abbott came to D.N.'s window and accused him and his passenger, C.B., of being drunk. (Tr. Day 3, R.120, Page ID # 1516, 1583-1584). D.N. recognized Abbott, because D.N. had participated in the BCSO Explorer Program for high school students interested in law enforcement careers. (*Id.* at Page ID # 1577, 1583). D.N. denied that he was drunk and asked for Abbott's supervisor. (*Id.* at Page ID # 1517-1518, 1585-1586). At this, Abbott tried to pull open D.N.'s car door, struck D.N. in the face "two or three times, and then unbuckled his seatbelt and threw him out on the ground." (*Id.* at Page ID # 1518, 1588-1590). Abbott's strikes were "extremely painful," "[t]he most force [D.N.] ever felt in [his] life." (*Id.* at Page ID # 1591).

As Abbott continued to hit D.N., C.B. got out of the car and yelled at Abbott to stop. (Tr. Day 3, R.120, Page ID # 1519-1520). Abbott then elbowed C.B. in the face, breaking his glasses. (*Id.* at Page ID # 1522-1523). Abbott's elbow to C.B.'s face "hurt really bad," leaving him feeling "really fuzzy." (*Id.* at Page ID # 1527). And his blows to D.N.'s face caused bone fractures in three places. (*Id.* at Page ID # 1591-1593;

Tr. Day 4, R.121, Page ID # 1722). The strikes were severe enough that D.N.'s next clear memory after Abbott struck him was leaving the jail the next morning. (Tr. Day 3, R.120, Page ID # 1591-1592).

Abbott denied reaching into D.N.'s car to punch him and unbuckle his seat belt. (Tr. Day 4, R.121, Page ID # 1823). In his telling, D.N. refused field sobriety tests and then "stiffened up" when Abbott went to cuff him, so Abbott "took him to the ground so [he] could gain control." (*Id.* at Page ID # 1824-1825). Abbott said he struck D.N. only then, because D.N. was trying to kick at him. (*Id.* at Page ID # 1830-1831). Abbott claimed that C.B. then "started charging at [him]," so he "took [C.B.] to the ground as well," which is what caused C.B.'s glasses to break. (*Id.* at Page ID # 1825-1828).

Body camera footage after the incident captured Abbott laughing and showing off his hand, which he had used to strike D.N. (Tr. Day 3, R.120, Page ID # 1638-1639). Abbott also bragged in subsequent text messages that he "[j]ust broke [his] hand and someone's face, LOL," causing "[t]hree facial fractures with one punch, LOL." (Tr. Day 4, R.121, Page ID # 1729, 1732).

B. Procedural Background

1. In October 2023, a federal grand jury in the Eastern District of Kentucky returned a seven-count indictment against Abbott. (Indictment, R.1, Page ID # 1-7). Count 1 charged Abbott under 18 U.S.C. 242 with willfully depriving J.C. of his "right to be free from a law enforcement officer's use of unreasonable force during an arrest," specifically "punch[ing] J.C. in the head without legal justification." (*Id.* at Page ID # 1).

Count 2 stated the same charge under 18 U.S.C. 242 as to Abbott "punch[ing] W.W. in the head without legal justification." (Indictment, R.1, Page ID # 2). Count 3 charged Abbott under 18 U.S.C. 371 with conspiring to knowingly falsify a record with the intent to impede or obstruct an investigation, in violation of 18 U.S.C. 1519, by directing his co-conspirator—Braydon Hopper—to falsely record in the arrest citation "that W.W., while being arrested, had advanced toward [Abbott] aggressively." (*Id.* at Page ID # 2-3).

Count 4 charged Abbott under 18 U.S.C. 242 with willfully depriving B.T. of the right "to be free from unreasonable searches," by searching B.T.'s hotel room "without a valid search warrant or any

other legal justification." (Indictment, R.1, Page ID # 3-4). Count 5 charged Abbott under 18 U.S.C. 1519 with falsifying an arrest citation by stating that "B.T. had given [Abbott] consent to search his hotel room" when B.T. had never provided consent. (*Id.* at Page ID # 4). Count 6 charged Abbott under 18 U.S.C. 242 with willfully depriving B.T. of his right to be free from unreasonable force by causing his "head and body to forcibly collide with a wall, without lawful justification." (*Id.* at Page ID # 5).

Finally, Count 7 charged Abbott under 18 U.S.C. 242 with willfully depriving D.N. and C.B. of their right to be free from unreasonable force because he "punched and struck [them] without lawful justification." (Indictment, R.1, Page ID # 5).[1]

2. Before trial, Abbott moved to sever the counts in his indictment into four separate trials. (Motion to Sever, R.14-1, Page ID # 47). He argued that his counts were improperly joined under Federal Rule of Criminal Procedure 8(a) because they arose from separate incidents in

[1] A superseding indictment altered certain date and location details but stated the same charges. (Superseding Indictment, R.28, Page ID # 125-131).

different circumstances. (*Id.* at Page ID # 52). Abbott also argued that, even if the counts could be joined, the court should sever them under Federal Rule of Criminal Procedure 14(a) to avoid unduly prejudicing him. (*Id.* at Page ID # 54). He maintained that a combined trial would make it harder to present a different defense on different counts—for example, contending that he used justified force in one incident but did not use force at all in another. (*Ibid.*). Abbott also claimed he would face unfair prejudice on each count from the admission of the other bad acts into evidence, contrary to Federal Rule of Evidence 403. (*Id.* at Page ID # 55-56).[2]

The district court denied Abbott's motion. (Order Denying Severance, R.35, Page ID # 153). The court explained that Rule 8(a) permits joinder when charges are "of the same or similar character." (*Ibid.* (quoting Fed. R. Crim. P. 8(a)). The court explained that this requirement was satisfied here because, for each incident, the

[2] Abbott later revised his request to three separate trials, arguing that Counts 2 and 3 should be combined with Counts 4, 5, and 6 for trial because Braydon Hopper was present at both incidents underlying those counts and would testify about both. (Reply in Support of Motion to Sever, R.34, Page ID # 145). Thus, Abbott believed he could advantageously attack Hopper's credibility in a single trial. (*Ibid.*).

indictment charged Abbott with depriving a person of the right to be free from unreasonable force during an arrest, in violation of 18 U.S.C. 242. (*Id.* at Page ID # 155-156). Additionally, the court explained that two of the four incidents involved falsifying arrest citations. (*Id.* at Page ID # 156). Moreover, the court found it relevant that Abbott was charged with carrying out wrongful acts in a similar manner, over the same short period, in the same general location. (*Id.* at Page ID # 156).

The court also rejected Abbott's argument for severance under Rule 14(a), holding that he failed to identify "compelling, specific, and actual prejudice," as the rule requires. (Order Denying Severance, R.35, Page ID # 156-157 (quoting *Thomas v. United States*, 849 F.3d 669, 675 (6th Cir. 2017)). The court found that Abbott's different defenses as to the various incidents were not "mutually antagonistic," so the jury would be able to compartmentalize them. (*Id.* at Page ID # 157 (quoting *United States v. Zafiro*, 506 U.S. 534, 538 (1993)).

Finally, the district court held that, even assuming it conducted separate trials for the charges arising from each incident, Abbott had failed to identify any authority that would have barred the admission of his other charged conduct as other-acts evidence under Federal Rule of

Evidence 404(b). (Order Denying Severance, R.35, Page ID # 158-159). His lone authority, *United States v. Asher*, 910 F.3d 854 (6th Cir. 2018), identified Rule 403 error under distinguishable circumstances.

3. Before trial, the United States gave notice of its intent to present other acts as evidence proving Abbott's willfulness in committing the charged offenses and disproving that his conduct reflected non-criminal states of mind, such as mistake or accident. (U.S. Other-Acts Notice, R.46, Page ID # 206).

The proposed evidence included six text message conversations on occasions other than the charged acts, in which Abbott conveyed his willingness to use excessive force and violate the rights of arrestees. For instance, after a vehicle chase in April 2020 that ended with a BCSO deputy colliding with the fleeing driver, Abbott texted another deputy that "we beat the fuck out of him lol." (U.S. Other-Acts Notice, R.46, Page ID # 206-207). In April 2021—in between the charged incidents with W.W. and J.C.—Abbott texted BSCO deputies a picture of himself in tactical gear with the caption, "Time to violate rights!" (*Id.* at Page ID # 210).

The proposed evidence also included three uncharged acts, to which witnesses would testify. First, J.C. would testify that Abbott used excessive force against him in June 2020, ten months before the conduct charged in Count 1. (U.S. Other-Acts Notice, R.46, Page ID # 207). J.C. would testify that he fled at low speed from Abbott's attempted traffic stop, after which Abbott "threw [J.C.] forcefully to the ground, grabbed him by the hair, and unnecessarily slammed his head into the pavement several times, despite J.C. offering no resistance beforehand." (*Ibid.*).

Second, Joshua White, W.W.'s brother, would testify that Abbott pulled him over and searched his car a few weeks before the incident giving rise to Counts 2 and 3. (U.S. Other-Acts Notice, R.46, Page ID # 208). When White told Abbott he was worried that Abbott would shoot him, Abbott responded, "Don't worry, I won't shoot you, I'll just beat your ass." (*Ibid.*).

Third, B.T., the victim in Counts 4, 5, and 6, would testify about what happened after Abbott arrested him. (U.S. Other-Acts Notice, R.46, Page ID # 209). As Abbott drove B.T. to jail, B.T. made "insulting remarks." (*Ibid.*). In response, Abbott "twice accelerated his patrol car

to high speeds and then braked suddenly, causing the handcuffed B.T. to lurch forward into the bars of the car's prisoner transport compartment." (*Ibid.*).

Abbott moved unsuccessfully to exclude the text messages and other-acts testimony. (Defendant's Motion in Limine, R.57, Page ID # 291-302). The district court explained that "federal courts around the country routinely admit evidence of prior excessive force incidents to prove intent in cases under 18 U.S.C. § 242." (Order on Motions in Limine, R.67, Page ID # 341, 350). The three other acts to which J.C., Joshua White, and B.T. would testify, the court held, were "probative of Abbott's intent" and close in time to the charged offenses, making them "the type of 404(b) evidence that is routinely admitted in § 242 cases to prove intent (willfulness)." (*Id.* at Page ID # 355).

At trial, the district court had J.C., Joshua White, and B.T. each testify outside the presence of the jury first, with Abbott able to cross-examine them. (Tr. Day 1, R.117, Page ID # 1098-1107 (J.C.); Tr. Day 2, R.118, Page ID # 1163-1172 (White), 1414-1427 (B.T.)). This let the court ascertain whether there was sufficient evidence that the three

other acts actually occurred, discern a proper Rule 404(b) purpose for the testimony, and engage in Rule 403 balancing.

Each witness eventually gave their other-act testimony to the jury. *See* pp. 35-36, *infra*. Each time, the court delivered a limiting instruction that the jury should consider the other act only as to Abbott's "intent and willfulness" and not for any other purpose. (Tr. Day 1, R.117, Page ID # 1132-1133 (J.C.); Tr. Day 2, R.118, Page ID # 1207-1208 (White); Tr. Day 3, R.120, Page ID # 1490 (B.T.)). The court further instructed that Abbott was on trial only for the charged offenses, which would each need to be proved beyond a reasonable doubt. (Tr. Day 1, R.117, Page ID # 1132-1133 (J.C.); Tr. Day 2, R.118, Page ID # 1207-1208 (White); Tr. Day 3, R.120, Page ID # 1490 (B.T.)).

4. The five-day trial took place from February 26 to March 4, 2024, with testimony from 21 witnesses, including the victims, numerous law enforcement eyewitnesses to Abbott's conduct, and Abbott himself. (Tr. Day 1, R.117, Page ID # 1011, 1160; Tr. Day 2, R.118, Page ID # 1162, 1429; Tr. Day 3, R.120, Page ID # 1437, 1715; Tr. Day 4, R.121, Page ID # 1717, 1983; Tr. Day 5, R.122, Page ID # 1985, 2015). Abbott moved unsuccessfully for acquittal after the close of

both the United States' case and his own. (Tr. Day 4, R.121, Page ID # 1778-1783; Tr. Day 5, R.122, Page ID # 2000-2002). Abbott did not renew his motion for severance before the jury returned its verdict.

The jury convicted Abbott of all counts except Count 6, the charge regarding his force against B.T. (Verdict, R.78, Page ID # 431-432). Afterwards, he moved unsuccessfully for a new trial, raising (among other issues) the sufficiency of the evidence and the denial of severance. (Order Denying New-Trial Motion, R.86, Page ID # 640).

5. The district court later sentenced Abbott to 110 months of imprisonment. (Judgment, R.97, Page ID # 766-767). Abbott's appeal timely followed. (Notice of Appeal, R.99, Page ID #774).

SUMMARY OF ARGUMENT

This Court should affirm Abbott's convictions.

1. The district court did not err by permitting the joinder of Abbott's counts for a single trial. Federal Rule of Criminal Procedure 8(a) allows joinder when charges are "of the same or similar character." Abbott's four excessive-force charges and his illegal-search charge had a similar character because each alleged that Abbott willfully deprived a person of a constitutional right while acting under color of law in

violation of 18 U.S.C. 242. His other two charges were similar because both involved falsifying police records to conceal his misconduct.

Abbott's severance request under Federal Rule of Criminal Procedure 14(a) is waived because he did not renew it at the close of evidence but before the jury's verdict. His severance request would fail anyway because he cannot show clear, specific prejudice from the joinder of his counts in a single trial. Abbott's ability to present a meaningful defense was not impeded, and he has not demonstrated that any evidence that was admitted would not have been admitted if his charges had been severed for separate trials. Any error of joinder or severance would be harmless in any event, given the district court's careful limiting instructions and the robust evidence of Abbott's guilt.

2. The district court did not abuse its discretion under Federal Rule of Evidence 404(b) by admitting evidence of Abbott's other uncharged acts to prove that he committed his offenses willfully. The willfulness element of 18 U.S.C. 242 requires proving the defendant's specific intent to violate the victim's constitutional rights, and courts in such cases routinely approve the use of other-acts evidence, such as assaults or threats, to prove that specific intent.

Abbott challenges the admission of testimony by J.C. that Abbott beat him on a previous occasion, testimony by Joshua White that Abbott threatened to "beat [his] ass" during a traffic stop, and testimony by B.T. that Abbott drove dangerously with B.T. in the back seat of his police vehicle. All of this testimony satisfied the three-part test for the admissibility of Rule 404(b) evidence. The district court properly ascertained that there was sufficient evidence that these alleged other acts in fact occurred. It also was highly probative of Abbott's willfulness, which he disputed at trial by trying to justify his charged conduct. And this testimony's significant probative value was not substantially outweighed by the risk of unfair prejudice under Federal Rule of Evidence 403, which the district court alleviated by giving the jury timely and appropriate limiting instructions.

ARGUMENT

I. The district court did not err by denying Abbott's motion to sever.

Rules 8 and 14 of the Federal Rules of Criminal Procedure govern the joinder and severance of offenses. Rule 8(a) permits joinder of charges that are "of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a

common scheme or plan." Fed. R. Crim. P. 8(a). Rule 14 provides that a court may order separate trials if the "joinder of offenses . . . appears to prejudice a defendant or the government." Fed. R. Crim. P. 14(a).

Misjoinder under Rule 8 is a question of law reviewed de novo. *United States v. Deitz*, 577 F.3d 672, 692 (6th Cir. 2009). But misjoinder of charges leads to reversal only for errors that were not harmless. *United States v. Cody*, 498 F.3d 582, 587 (6th Cir. 2007). Denial of a Rule 14 motion for severance is reviewed for abuse of discretion. *United States v. Howell*, 17 F.4th 673, 686 (6th Cir. 2021).

A. The district court properly joined Abbott's charges for trial under Rule 8(a).

1. The district court did not err by joining Abbott's charges for a single trial. "[J]oint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'" *United States v. Lane*, 474 U.S. 438, 449 (1986) (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968)). Rule 8(a) is "permissive," and it is construed "broadly to 'promote the goals of trial convenience and judicial efficiency.'" *United States v. Graham*, 275 F.3d 490, 512 (6th Cir. 2001) (quoting *United States v. Wirsing*, 719 F.2d 859, 862 (6th Cir. 1983)). "[J]udicial efficiency" is "'the

predominant consideration' in assessing the propriety of joinder." *United States v. Chavis*, 296 F.3d 450, 460 (6th Cir. 2002) (quoting *United States v. Swift*, 809 F.2d 320, 322 (6th Cir. 1987)). "Whether joinder was proper under Rule 8(a) is determined by the allegations on the face of the indictment." *United States v. Locklear*, 631 F.3d 364, 368 (6th Cir. 2011) (quoting *Chavis*, 296 F.3d at 456).

Joinder under Rule 8(a)'s "same or similar character" prong "explicitly permit[s]" joinder of "unrelated" offenses arising from different incidents. *Chavis*, 296 F.3d at 460-461. To illustrate, *Chavis* relied on *United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), in which a defendant was properly charged in a single indictment for separate drug transactions that took place on different days. *See id.* at 6. Although the sales in *Reynolds* gave rise to charges under different statutes, joinder was proper because "all four counts involved illegal possession and sale of narcotics." *Chavis*, 296 F.3d at 460.

Likewise, this Court has applied Rule 8(a)'s "same or similar character" prong to uphold: the joinder of two counts charging violations of the same arson offense, where the defendant owned both burned properties and they were burned in a similar fashion, *United*

States v. Hang Le-Thy Tran, 433 F.3d 472, 477-478 (6th Cir. 2006); the joinder of various charges that all "involved the same underlying conduct—the theft of government funds associated with federal income taxes," *United States v. Stinson*, 761 F. App'x 527, 529 (6th Cir. 2021) (per curiam) (alteration and internal quotation marks omitted); and the joinder of sex-trafficking offenses arising from two episodes, despite the offenses occurring two years apart, in different states, and with minors as victims in one instance but not the other, *United States v. Bryant*, 654 F. App'x 807, 814-815 (6th Cir. 2016) (per curiam).

2. The district court correctly upheld the joinder of Abbott's charges. To start, it is undisputed that Counts 2 and 3 were properly joined under Rule 8(a)'s "same act or transaction" prong—namely, the W.W. incident. Similarly, Counts 4, 5, and 6 were properly joined as arising from the B.T. incident.

As the district court correctly explained, Counts 1, 2, 4, 6, and 7—the four excessive-force charges and the illegal-search charge—were "all of a similar nature" because they "[e]ach alleged that Abbott willfully deprived a person of a constitutional right while acting under color of law in violation of 18 U.S.C. § 242." (Order Denying New-Trial Motion,

R.86, Page ID # 643). Four of these were particularly similar in that they "alleged the unreasonable use of force during arrests." (*Ibid.*). The two other counts—the false-record offenses charged in Counts 3 and 5—"arose from Abbott's efforts to cover up the crimes alleged in Counts 2 and 4, respectively." (*Ibid.*). Moreover, all seven charges were for conduct occurring in a short span, from January to April 2021. *See Hang Le-Thy Tran*, 433 F.3d at 477-478 (upholding joinder where arsons were 18 months apart); *Bryant*, 654 F. App'x at 814 (upholding joinder where sex-trafficking conduct occurred two years apart).

Although Rule 8(a)'s joinder analysis entails a "face-of-the-indictment test," *Locklear*, 631 F.3d at 368, the facts adduced at trial bore out the similar character of Abbott's offenses. Repeatedly, Abbott used excessive force against non-resistant arrestees to secure their compliance, assert his authority, and express his apparent frustration with them: J.C. for refusing to stop when Abbott signaled with his lights; W.W. for insulting Abbott; and D.N. for asking to speak with Abbott's supervisor. *See* pp. 3-7, *supra.*

Consequently, there was extensive witness overlap. For instance, Abbott himself acknowledges (Br. 16) that BCSO deputy Braydon

Hopper gave eyewitness testimony about both the W.W. and B.T. incidents, so his testimony was critical to Counts 2 through 6. BCSO's Chief Deputy, Chris Stratton, testified about use-of-force and reporting practices for the office, from which Abbott's charged conduct deviated. (Tr. Day 3, R.120, Page ID # 1674, 1676-1693). The FBI case agent, Chelsea Holliday, testified about Abbott's text messages, which were germane evidence of Abbott's willfulness for each charged incident. (Tr. Day 4, R.121, Page ID # 1720, 1723-1748). The combined trial permitted Abbott himself to explain his view of use-of-force principles in one go and efficiently relate that understanding to each of his charges. (*Id.* at Page ID # 1813-1819).[3]

3. On appeal, Abbott does not squarely explain how his charges were dissimilar in character. His contention (Br. 15) that the counts

[3] Abbott undercut his Rule 8(a) argument in district court by revising his request from four separate trials—one per incident—to three trials, based on the involvement of Braydon Hopper in both the W.W. and B.T. incidents. (Reply in Support of Motion to Sever, R.34, Page ID # 145). Abbott's request tacitly conceded the permissibility under Rule 8(a) of joining his charges related to W.W. with his charges related to B.T. If those charges were similar enough for joinder, so were the charges from the other two incidents, which all involved Abbott's unreasonable force under color of law.

"involved separate incidents that occurred at different places, at different times, and involved different victims" might be pertinent if joinder rested on Rule 8(a)'s "same act or transaction" prong, but it poses no problem under Rule 8(a)'s "same or similar character" prong. *See, e.g.*, *Hang Le-Thy Tran*, 433 F.3d at 477-478 (arson of different buildings); *Bryant*, 654 F. App'x at 814-815 (sex trafficking in different times and places).

Abbott maintains that proof of the different counts varied significantly, so joinder did not yield meaningful "savings in time and money" at trial. Br. 15-16 (quoting *Chavis*, 296 F.3d at 460). He points to particularities of the force he used in each incident, the different witnesses testifying on each incident, and the varying value of testifying in his own defense about each incident. *Ibid.* These considerations are immaterial under Rule 8(a)'s "face-of-the-indictment test." *Locklear*, 631 F.3d at 368. None of these points establishes the dissimilar *character* of his charges under Rule 8(a)'s "permissive," indictment-focused joinder analysis. *See Graham*, 275 F.3d at 512 (citation omitted).

In any case, Abbott's attempt to dispute the time savings at trial is unfounded. Witnesses with testimony relevant to multiple incidents were able to testify once, such as Hopper, Stratton, Holliday, and Abbott himself. *See* pp. 23-24, *supra*. Likewise, all evidence bearing on Abbott's willfulness in violating constitutional rights, such as his numerous text messages and other uncharged acts, could be presented a single time.

Finally, Abbott relies on *Chavis* (Br. 16), but the district court explained why *Chavis* is readily distinguishable. (Order Denying Severance, R.35, Page ID # 155-156). In *Chavis*, the defendant was charged with "entirely distinct offense[s]": causing another to make a false statement to a federal firearms dealer in a 1997 incident; and unlawfully possessing cocaine base with intent to distribute in a 1999 incident. *See* 296 F.3d at 458. Here, by contrast, Abbott was charged under the same statutes for comparable conduct over a short period. That similarity made joinder appropriate.

B. The district court did not abuse its discretion by denying Abbott's motion to sever under Rule 14(a).

"The resolution of a Rule 14 motion is left to the sound discretion of the trial court and will not be disturbed absent an abuse of that

discretion." *Hang Le-Thy Tran*, 433 F.3d at 478. "To prevail on a request for severance the defendant must show compelling, specific, and actual prejudice." *Thomas v. United States*, 849 F.3d 669, 675 (6th Cir. 2017). "The movant must prove that joinder would compromise a specific trial right or prevent the jury from making a reliable judgment about guilt or innocence." *Hang Le-Thy Tran*, 433 F.3d at 478.

1. As an initial matter, Abbott waived his severance request under Rule 14(a) by not renewing it at the close of evidence, before the jury's verdict. This Court frequently has found waiver in such circumstances. *See, e.g.*, *United States v. Sherrill*, 972 F.3d 752, 762 (6th Cir. 2020); *United States v. Harris*, 293 F.3d 970, 975 (6th Cir. 2002); *United States v. Hudson*, 53 F.3d 744, 747 (6th Cir. 1995); *Swift*, 809 F.2d at 323.

Although Abbott addressed severance in his post-verdict motion for new trial, avoiding waiver requires renewing the motion before the jury's verdict. *See United States v. Allen*, 160 F.3d 1096, 1106-1107 (6th Cir. 1998) (finding waiver despite post-verdict motion on severance). Requiring a pre-verdict motion "prevents a defendant from deliberately

failing to make a meritorious motion to wait and see what verdict the jury returns." *Hudson*, 53 F.3d at 747.

2. When a defendant has waived a severance request, this Court sometimes has "declined to review the issue at all." *See Sherrill*, 972 F.3d at 762 (collecting cases). The other approach—review for plain error—would be no more availing for Abbott. "Under that analysis, defendants must show: '(1) error; (2) that was plain; (3) that affected a substantial right and that seriously affected the fairness, integrity, or public reputation of the judicial proceedings.'" *Ibid.* (quoting *United States v. Fields*, 763 F.3d 443, 456 (6th Cir. 2014)).

Abbott fails at the first step, because he has failed to show that the district court erred, much less plainly, in denying his motion to sever under Rule 14(a). As the district court correctly explained, "[t]o prevail on a request for severance the defendant must show compelling, specific, and actual prejudice." (Order Denying Severance, R.35, Page ID # 157 (quoting *Thomas*, 849 F.3d at 675)). Abbott has failed to demonstrate any prejudice resulting from the denial of severance.

Abbott contends (Br. 18) that joinder undermined the jury's "ability to compartmentalize the evidence of the four incidents involving

seven counts and five victims." He also claims (Br. 18-19) that separate trials would have better enabled him to present differing defenses on the various excessive-force charges—that force was "justified" in one instance but "not used at all" in another.

These contentions lack merit. "[D]efendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro v. United States*, 506 U.S. 534, 540 (1993). For severance based on jury confusion, merely making the "conclusory statement that the joinder of the counts 'affected' the jury's ability to render a fair and impartial verdict does not suffice to show substantial prejudice." *Hang Le-Thy Tran*, 433 F.3d at 478. A defendant cannot just gesture at "the complexity of the evidence alone" to establish jury confusion. *United States v. Abegunde*, 841 F. App'x 867, 874 (6th Cir. 2021). A defendant instead "must explain how and why th[e] evidence would 'mislead and confuse the jury in the absence of a separate trial.'" *Ibid.* (quoting *Fields*, 763 F.3d at 458).

The difference in the defenses Abbott mentions—between force that was justified and force that never happened—is simple enough to understand. Indeed, Abbott's jury distinguished between his various

uses of force, acquitting him of Count 6, his alleged excessive force against B.T. Acquittal on a count undercuts the claim that a defendant suffered prejudice from denial of his severance motion. *See Deitz*, 577 F.3d at 692 ("Here, where the jury convicted Deitz on Count 1 but chose to acquit him on Count 2, and acquitted Heckman altogether, the jury's verdict demonstrates that it made an individualized determination of each defendant's guilt as to each count."); *United States v. Cope*, 312 F.3d 757, 781 (6th Cir. 2002) (finding no prejudice because acquittal on one set of charges made "clear that the jury was able to consider each count separately").

Next, Abbott claims prejudice (Br. 19-21) from the admission of his other, uncharged acts into evidence. As explained in the next section, the district court did not abuse its discretion by admitting the three other acts he disputes. *See* pp. 36-43, *infra.* On the present question of prejudice under Rule 14(a), Abbott fails to show that joinder enabled the admission of evidence that would not otherwise have been admissible in separate trials. The other-acts testimony of J.C., White, and B.T. each were admissible as Rule 404(b) evidence of Abbott's willfulness, so they would have been admissible even if the district

court conducted separate trials. The same would be true of the conduct underlying each of his charges here.

In support of his severance argument (Br. 19-21), Abbott cites *United States v. Asher*, 910 F.3d 854 (6th Cir. 2018), but *Asher* addressed only the admission of other-acts evidence, not severance. As explained below, *Asher*'s dissimilar circumstances make it inapplicable to the other-acts evidence in this case. *See* pp. 42-43, *infra*. It has nothing to add on severance. Thus, *Asher* does not help Abbott show the compelling, specific, actual prejudice that Rule 14(a) requires.

3. Finally, any error the district court may have made by denying severance was harmless. The district court delivered Sixth Circuit Pattern Jury Instruction 2.01A on the need to consider the evidence and find guilt beyond a reasonable doubt separately for each offense.[4]

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[4] Instruction 2.01A reads:

> The defendant has been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

(Order Denying New-Trial Motion, R.86, Page ID # 646). Such instructions "suffice[] to cure any possibility of prejudice." *Zafiro*, 506 U.S. at 541. "Error based on misjoinder is almost always harmless where, as here, the trial court issues a careful limiting instruction to the jury on the issue of possible prejudice resulting from the joinder." *Cody*, 498 F.3d at 587 (citing *Chavis*, 296 F.3d at 461); *see also Howell*, 17 F.4th at 686-687 (holding any joinder error was harmless given district court's separate-evidence instructions).

The jury's acquittal of Abbott on Count 6 confirms that it was able to evaluate each count on its own merits, as the district court instructed it to do. *See Cody*, 498 F.3d at 588 (holding that jury's decision to acquit on one count supported harmlessness determination); *Chavis*, 296 F.3d at 462 (same).

> Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any of the other charges.

(Order Denying New-Trial Motion, R.86, Page ID # 646).

II. The district court did not abuse its discretion by admitting Abbott's other acts under Rule 404(b) to show the willfulness of his charged conduct.

1. Abbott was charged with five counts of violating 18 U.S.C. 242, which prohibits "willfully," under color of law, depriving anyone of rights secured by the Constitution. The willfulness element "requires the government to show that [the defendant] had the *specific intent* to deprive [the victim] of a right under the Constitution." *United States v. Epley*, 52 F.3d 571, 576 (6th Cir. 1995) (emphasis added) (citing *Screws v. United States*, 325 U.S. 91, 104 (1945)). The charges here rested on Abbott's willful violations of the Fourth Amendment's protection against unreasonable searches and seizures, including the prohibition of excessive force during an arrest. *See Graham v. Connor*, 490 U.S. 386, 394-395 (1989).

Federal Rule of Evidence 404(b) permits the use of a defendant's "other crime, wrong, or act" to prove facts such as his "motive, opportunity, [or] intent," provided the act is not used to prove the defendant's "character" to show that he "acted in accordance" with that character in committing the charged offense. Fed. R. Evid. 404(b)(1)-(2). Where, as here, the government has "the affirmative duty to prove

that the underlying prohibited act was done with a specific criminal intent, other acts evidence may be introduced under Rule 404(b)." *United States v. Johnson*, 27 F.3d 1186, 1192 (6th Cir. 1994). Indeed, "[i]n prosecuting specific intent crimes, prior acts evidence may often be the only method of proving intent." *Ibid.*; *see also Huddleston v. United States*, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to . . . the actor's state of mind."); *see, e.g.*, *United States v. Trujillo*, 376 F.3d 593, 605 (6th Cir. 2004) (upholding use of other-acts evidence to prove specific-intent element of drug offense).

Consistent with these principles, courts routinely have upheld the use of other-acts evidence—such as assaults and threats—to prove the defendant's willfulness in excessive-force cases under 18 U.S.C. 242. *See, e.g.*, *United States v. Cowden*, 882 F.3d 464, 470-473 (4th Cir. 2018) (affirming admission of officer's "use of force on two prior occasions during other criminal investigations"); *United States v. Boone*, 828 F.3d 705, 710-712 (8th Cir. 2016) (affirming admission of officer's prior assault against arrestee); *United States v. Rodella*, 804 F.3d 1317, 1333-1335 (10th Cir. 2015) (affirming admission of sheriff's prior aggressive,

threatening behavior); *United States v. Brugman*, 364 F.3d 613, 620-622 (5th Cir. 2004) (affirming admission of Border Patrol officer's subsequent beating of other migrant); *United States v. Mohr*, 318 F.3d 613, 617-621 (4th Cir. 2003) (affirming admission of K-9 officer's subsequent acts of "intentional misuse of a police dog").

2. Abbott challenges the admission of testimony by J.C., Joshua White, and B.T. about three of Abbott's other acts. First, J.C. testified about his low-speed car chase with Abbott in June 2020, ten months before the events in Count 1. (Tr. Day 1, R.117, Page ID # 1110-1111, 1121). When the chase ended, Abbott "jerked" J.C. out of his vehicle, "threw [him] to the ground," "grabbed [his] head and started beating it on the asphalt saying, 'Quit resisting. Quit resisting.'" (*Id.* at Page ID # 1111). J.C.'s evidence included a picture of him "with blood all over," taken shortly after the beating. (*Id.* at Page ID # 1114).

Second, Joshua White, brother of W.W., testified that Abbott stopped him "[c]lose to a month before" the events in Counts 2 and 3. (Tr. Day 2, R.118, Page ID # 1176). Abbott wanted White to get out so Abbott could search the vehicle, and when White expressed worry that

Abbott might shoot him, Abbott responded, "You ain't got to worry about that. I'm going to beat your ass." (*Id.* at Page ID # 1177-1178).

Third, B.T. testified that, after arresting him, Abbott put him in the secure back seat of his police vehicle and drove him to the jail. (Tr. Day 3, R.120, Page ID # 1445). After B.T. insulted Abbott, Abbott "hit the gas," sped up "real fast," and then "slammed on the brakes." (*Id.* at Page ID # 1446). Because B.T.'s hands were cuffed behind his back, this "guarantee[d] that [B.T.] hit the fence face first." (*Id.* at Page ID # 1446-1447). Abbott then did it again "even faster." (*Ibid.*).

3. Evidence of a defendant's other acts must satisfy a three-part test: (1) "whether there is sufficient evidence that the other act in question actually occurred"; (2) "whether the evidence of the other act is probative of a material issue other than character"; and (3) "whether the probative value of the evidence is substantially outweighed by its potential prejudicial effect" under Federal Rule of Evidence 403. *United States v. Dunnican*, 961 F.3d 859, 874 (6th Cir. 2020) (quoting *United States v. Yu Qin*, 688 F.3d 257, 262 (6th Cir. 2012)).

The other-acts testimony of J.C., White, and B.T. satisfied this test. First, there is "sufficient evidence" as long as "the jury could

reasonably find" by a preponderance of evidence that the alleged other act actually occurred. *Huddleston*, 485 U.S. at 690. The district court ascertained there was sufficient evidence by having each witness testify first outside the presence of the jury. (Tr. Day 1, R.117, Page ID # 1098-1107 (J.C.); Tr. Day 2, R.118, Page ID # 1163-1172 (White), 1414-1427 (B.T.)). Abbott had the opportunity to cross-examine, but he pressed no questions tending to show the alleged acts never occurred at all. (Tr. Day 1, R.117, Page ID # 1104 (J.C.); Tr. Day 2, R.118, Page ID # 1166-1169 (White), 1418-1420 (B.T.)).

Second, the other acts related by J.C., White, and B.T. were probative of Abbott's willfulness, a material issue for each 18 U.S.C. 242 charge. A defendant puts his willfulness in dispute by offering exculpatory justifications for his conduct. *See, e.g.*, *Brugman*, 364 F.3d at 620 (holding defendant put willfulness at issue by claiming that "his intent was to use reasonable force to subdue [the victim]"); *Mohr*, 318 F.3d at 619 (holding defendant put willfulness at issue by "testif[ying] that she released [her police] dog on [the victim] based on her training and her view that it was reasonable and justified given her perception that [the victim] was attempting to flee").

Abbott disputed his willfulness by attempting to justify or excuse his uses of force. Abbott began by opining on how use-of-force standards, as he understood them, applied to each incident. (Tr. Day 4, R.121, Page ID # 1815-1819). He then offered exculpatory versions of each incident. On Count 1, Abbott testified he punched J.C. for trying to spit on him. (*Id.* at Page ID # 1880). On Count 2, he testified he punched W.W. for making an aggressive move towards him and resisting being cuffed. (*Id.* at Page ID # 1852-1854). On Count 6—the acquitted count—he testified he pushed B.T. into the wall to help with cuffing him. (*Id.* at Page ID # 1869-1870). And on Count 7, he claimed that he struck D.N. to prevent D.N. kicking him and that he "took [C.B.] to the ground" after C.B. charged at him. (*Id.* at Page ID # 1826-1831). The other-acts evidence was probative of Abbott's willingness to use excessive force against noncombative detainees, and it showed that, contrary to his own claims, he did not use force in the charged incidents merely to counter resistance.

Third, the district court appropriately ruled that the risk of unfair prejudice did not substantially outweigh the probative value of this evidence under Rule 403. (Tr. Day 1, R.117, Page ID # 1107 (J.C.); Tr.

Day 2, R.118, Page ID # 1172 (White), 1427 (B.T.)). To review this ruling, "this [C]ourt looks 'at the evidence in a light most favorable to its proponent'"—here, the government—"'maximizing its probative value and minimizing its prejudicial effect.'" *United States v. Allen*, 619 F.3d 518, 525 (6th Cir. 2010) (quoting *United States v. Perry*, 438 F.3d 642, 648 (6th Cir. 2006)).

The other acts related by J.C., White, and B.T. were highly probative given Abbott's denial that he acted willfully in the charged incidents. Any prejudice to Abbott was not unfair, because beating J.C., threatening White, and abusing B.T. demonstrated Abbott's willingness to employ unconstitutionally excessive force. *See Mohr*, 318 F.3d at 619 ("[*U*]*nfair* prejudice under Rule 403 does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence." (quoting 2 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 404.21[3][b] (Joseph M. McLaughlin ed., 2d ed. 2002))). Moreover, each witness's testimony about the other act was relatively brief, and the district court issued a proper limiting instruction afterwards. (Tr. Day 1, R.117, Page ID # 1132-1133 (J.C.);

Tr. Day 2, R.118, Page ID # 1207-1208 (White); Tr. Day 3, R.120, Page ID # 1490 (B.T.)).

These considerations suffice to rule out unfair prejudice. *See United States v. White*, 543 F. App'x 563, 569 (6th Cir. 2013) (finding no Rule 403 error "[b]ased on the limiting instruction and the brevity of the testimony offered"); *Cowden*, 882 F.3d at 473 (finding no Rule 403 error based on prior acts' significant probative value for willfulness and court's limiting instruction); *Boone*, 828 F.3d at 713 (same); *Rodella*, 804 F.3d at 1334-1335 (same); *Brugman*, 364 F.3d at 620-621 (same).

4. Abbott's arguments against the admission of the other-acts testimony of J.C., White, and B.T. lack merit. Regarding J.C.'s testimony about the June 2020 incident, Abbott claims (Br. 25) there was insufficient evidence because J.C.'s testimony was "uncorroborated." But J.C.'s testimony included a picture of himself bloodied by the encounter with Abbott. (Tr. Day 1, R.117, Page ID # 1114). Abbott himself texted that picture to a co-worker shortly after the encounter, describing it as "an ass-whooping." (*Id.* at Page ID # 1142-1146). This is more than sufficient evidence for the jury to conclude the June 2020 incident occurred as J.C. described it.

Otherwise, Abbott argues (Br. 25) only that J.C.'s testimony "had little to do with establishing intent or willfulness" and simply "demonstrated that [Abbott] was a bad man." Abbott also brushes off (Br. 25) the district court's limiting instructions as doing "little if anything to overcome the prejudice" from J.C.'s testimony. Abbott does not acknowledge the extensive precedent upholding the use of other acts to show willfulness in 18 U.S.C. 242 prosecutions, particularly when coupled with limiting instructions. Given that, his conclusory assertions fail to show the district court abused its discretion.

Regarding White's testimony that Abbott threatened him, Abbott suggests (Br. 27) that White had credibility problems, so his testimony was insufficient evidence that the threat occurred. This was not a basis for the district court to exclude White's testimony. Applying the sufficient-evidence threshold for other acts, the district court does not "weigh[] credibility." *Huddleston*, 485 U.S. at 690. The court decides only "whether *the jury* could reasonably find" the act occurred. *Ibid.* (emphasis added). Abbott was able to explore White's supposed credibility problems through cross-examination. (Tr. Day 2, R.118,

Page ID # 1203). Notably, when Abbott testified, he could have rebutted White's story, but he did not.

Otherwise, Abbott reiterates (Br. 27) his conclusory claims that White's other-act testimony was "unrelated" to proving willfulness and was instead "offered to show [his] character." These assertions fail as to White for the same reasons they fail as to J.C.

Regarding B.T.'s testimony that Abbott sped up and abruptly braked to throw B.T. around in the back seat of his police vehicle, Abbott's sole argument (Br. 29) concerns B.T.'s credibility. This argument overlooks that courts do not weigh credibility in the sufficient-evidence analysis, as explained. *See Huddleston*, 485 U.S. at 690. Credibility can be attacked on cross-examination, as Abbott did here. (Tr. Day 3, R.120, Page ID # 1469-1491). The district court thus did not abuse its discretion in admitting B.T.'s testimony. Any error as to B.T.'s testimony would be harmless in any event, given that the jury acquitted Abbott of using excessive force against B.T.

5. Finally, Abbott relies (Br. 19-21) on *United States v. Asher*, 910 F.3d 854 (6th Cir. 2018), but *Asher*'s dissimilar circumstances make it inapplicable here. The defendant was a jail guard charged with

sadistically beating an inmate and covering it up. *Id.* at 857-858. To demonstrate the defendant's willfulness, the prosecution sought to admit evidence that the defendant severely beat another inmate once before. *Id.* at 858-859. To keep out this evidence, the defendant was willing to stipulate that he had the requisite intent for the charged offense. *Id.* at 859. His defense instead would be that he did not actually participate in the charged beating as alleged. *Ibid.* That meant the prior beating "had only incremental probative value," which this Court held was substantially outweighed by the prejudice of admitting the inflammatory prior act under Rule 403. *Id.* at 863.

Here, by contrast, disputing willfulness was core to Abbott's defense. *Asher* does not cast doubt on the propriety of using other acts to prove willfulness when the defendant has put his willfulness at issue. As *Asher* acknowledged, "[e]vidence showing that a defendant formed a particular intent on a prior occasion may provide insight into his state of mind when he committed the charged offense." 910 F.3d at 860.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 8715 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b). This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Century Schoolbook 14-point font using Microsoft Word for Microsoft 365.

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Date: April 28, 2025

CERTIFICATE OF SERVICE

On April 28, 2025, I filed this brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Matthew N. Drecun
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ADDENDUM

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Document Description	Record Entry Number	Page ID # Range
Indictment	R. 1	1-7
Motion to Sever	R. 14 & 14-1	47-58
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Reply in Support of Motion to Sever	R. 34	145-152
Order Denying Severance	R. 35	153-160
U.S. Other-Acts Notice	R. 46	206-213
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