No. 20-5219

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JAMES EAKES,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE

RUSSELL M. COLEMAN
United States Attorney

MADISON T. SEWELL
Assistant United States Attorney
United States Attorney's Office
Western District of Kentucky
241 East Main Street, Suite 305
Bowling Green, KY 42101
(270) 243-4398

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

ERIN H. FLYNN
JUNIS L. BALDON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1806

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendant-appellant's request for oral argument if it would aid this Court's review.

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JURISDICTIONAL STATEMENT

This appeal is from the district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231, and entered final judgment against defendant James Eakes on February 10, 2020. (Judgment, R. 76, PageID# 515-522).[1] Eakes filed a timely notice of appeal four days later, and an

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[1] "R. ___, at ___" refers to the document number assigned on the district court's docket sheet. "PageID# ___" indicates the page number in the paginated electronic record. "Br. ___" refers to the page number of Eakes's opening brief. "GX __" refers to government exhibits admitted at trial. GX 2-5 are included in

(continued...)

amended notice of appeal on February 21, 2020. (Notice of Appeal, R. 78, PageID# 527-528; Amended Notice of Appeal, R. 80, PageID# 532-533). This Court has jurisdiction under 28 U.S.C. 1291.

INTRODUCTION AND STATEMENT OF THE ISSUE

Defendant James Eakes, a former deputy jailer at the Fulton County Detention Center in Hickman, Kentucky, was convicted of violating 18 U.S.C. 242 for willfully depriving inmate Lias Beard of the Eighth Amendment right to be free from cruel and unusual punishment and, more specifically, his right not to be subjected to the use of excessive force. Eakes repeatedly tased Beard after Beard complained of suicidal thoughts and sought assistance from another deputy jailer. At trial, Eakes argued that he tased Beard as a compliance and disciplinary measure, a defense flatly contradicted by body camera footage and Eakes's use-of-force training. This appeal presents the following question:

Whether the district court's decision to limit Eakes's cross-examination of a deputy jailer who witnessed Eakes's use of force, concerning allegations of misconduct by the deputy jailer while employed at the detention center, plainly violated Eakes's Sixth Amendment rights and affected the outcome at trial.

(...continued)
the Appendix to Brief for the United States, filed concurrently. GX 1 is a video recording of the tasing incident, and a CD/DVD has been mailed separately to the Court. For references to GX 1, the United States includes the relevant time stamp.

STATEMENT OF THE CASE

1. Factual Background

a. On August 14, 2016, Lias Beard, an inmate in solitary confinement at the Fulton County Detention Center, informed deputy jailer Amber Morgan that he was contemplating suicide. (Testimony of Morgan, R. 52, PageID# 305; Testimony of Beard, R. 53, PageID# 354-355, 360-361, 373; Body Camera Video, GX 1, 07:00-07:04). Morgan, in turn, radioed Eakes, a deputy jailer and maintenance supervisor, for assistance in administering the facility's suicide protocol, which required removing Beard's personal belongings and placing him into a suicide smock. (Testimony of Morgan, R. 52, PageID# 306-307, 312-314; Testimony of Beard, R. 53, PageID# 355; Transcript, R. 83, PageID# 730). While Morgan went to retrieve the smock, Debra Hopkins, another deputy jailer, arrived to assist Morgan with Beard. (Body Camera Video, GX 1, 06:57-07:30). Hopkins was wearing a body camera that captured much of what happened next. (Body Camera Video, GX 1, 06:57-07:30).

Shortly thereafter, Eakes arrived at Beard's cell and immediately drew his taser and aimed it at Beard while ordering Beard to strip down and put on the smock. (Testimony of Morgan, R. 52, PageID# 308-309; Body Camera Video, GX 1, 08:11-08:49). Morgan stood behind Eakes holding the cell door open where she could see both Eakes and Beard. (Body Camera Video, GX 1, 08:11-14:40;

Testimony of Morgan, R. 52, PageID# 310; Testimony of Beard, R. 53, PageID# 358). From the doorway, Eakes told Beard that he would "bust [Beard's] ass," and ordered Beard to "get dressed now." (Body Camera Video, GX 1, 08:30-08:35; Testimony of Beard, R. 53, PageID# 358). Beard replied that he "didn't do nothing" and followed Eakes's command. (Body Camera Video, GX 1, 08:30-10:11; Testimony of Morgan, R. 52, PageID# 316). Eakes then entered Beard's cell and yelled, "You do what I tell you to do. I ain't going to put up with your shit. Get that on or I'll pop your ass right now, buddy." (Body Camera Video, GX 1, 08:30-08:40; Testimony of Beard, R. 53, PageID# 310).

Beard, now naked in his cell, complained that he had done nothing except tell Morgan that he "had suicidal thoughts." (Body Camera Video, GX 1, 08:47-08:58; Testimony of Beard, R. 53, PageID# 358-359). Beard added that it was not "right" that he was "butt naked in front of [the two female deputy jailers, Morgan and Hopkins]," and for Eakes to "put the taser on [him]." (Body Camera Video, GX 1, 09:07-09:20; Testimony of Beard, R. 53, PageID# 358-359). Beard gave Eakes his clothing and stated that he planned to file a grievance with the Kentucky Department of Corrections concerning Eakes's conduct. (Body Camera Video, GX 1, 09:40-09:55; Testimony of Morgan, R. 52, PageID# 311; Testimony of Beard, R. 53, PageID# 359). Eakes replied that he "[didn't] care," and said "I'll do whatever I want to when I want to whether you like it." (Body Camera Video, GX

1, 09:40-09:55; Testimony of Morgan, R. 52, PageID# 315). Eakes and Beard further exchanged words as Beard put on his suicide smock but otherwise kept his hands on his head. (Body Camera Video, GX 1, 10:00-10:45; Testimony of Morgan, R. 52, PageID# 315-316).

Morgan noticed that Beard still had his socks on and told Eakes that Beard needed to remove them under the suicide protocol. (Body Camera Video, GX 1, 10:15-10:45; Testimony of Morgan, R. 52, PageID# 316-317). When Eakes ordered Beard to remove his socks, Beard tossed his socks to Eakes and placed his hands back on top of his head. (Body Camera Video, GX 1, 10:15-10:45; Testimony of Morgan, R. 52, PageID# 319-320). Eakes accused Beard of throwing his socks and again threatened "to bust [Beard's] ass." (Body Camera Video, GX 1, 10:45-10:50; Testimony of Morgan, R. 52, PageID# 319-320). After Beard replied that he "just dropped them," Eakes told Beard, "Boy, I tell you, that's your last warning. You understand? * * * You don't throw shit at me. I don't give a damn what you are, but you don't throw nothing at me." (Body Camera Video, GX 1, 10:45-11:05). At some point during this exchange, Eakes threatened Beard by placing an undeployed taser on Beard's temple. (Testimony of Beard, R. 53, PageID# 359-360). Beard responded by saying that he would have Eakes investigated for threatening him with a taser despite his compliance with Eakes's commands. (Body Camera Video, GX 1, 11:55-12:15).

Once Beard was in the suicide smock and all personal items had been removed from his cell, Eakes left Beard's cell and closed the steel door behind him, which automatically locked. (Body Camera Video, GX 1, 12:10-12:30; Testimony of Morgan, R. 52, PageID# 320-321; Testimony of Beard, R. 53, PageID# 360). Beard, who was battling "a dark, deep depression at the time," was "miserable," "upset," and embarrassed by having to stand naked in front of Morgan and Hopkins. (Testimony of Beard, R. 53, PageID# 358, 364, 360). Frustrated, he called Eakes a "motherfucker." (Body Camera Video, GX 1, 12:18-12:22; Testimony of Beard, R. 53, PageID# 360). Eakes immediately motioned to have the detention center's control room reopen Beard's cell door. (Body Camera Video, GX 1, 12:19-12:25; Testimony of Morgan, R. 52, PageID# 321). Hopkins warned Eakes that she "[didn't] want [Eakes] to end up in trouble." (Body Camera Video, GX 1, 12:30-12:35). Yet as soon as the control room unlocked the door, Eakes barged into the cell and tased Beard, shooting up to 50,000 volts of electricity through Beard's body. (Body Camera Video, GX 1, 12:33-12:37; Testimony of Morgan, R. 52, PageID# 321; Testimony of Beard, R. 53, PageID# 362; Transcript, R. 83, PageID# 673, 703-704). Beard's body went limp against the wall of his cell and slid down to the floor. (Testimony of Beard, R. 53, PageID# 362).

Eakes stood over Beard yelling, "How do you like it now? How do you like it? Go ahead and cuss me one more time. Why don't you? How do you like it? How do you like it, son? Don't you ever cuss me again. Do you understand me?" (Body Camera Video, GX 1, 12:36-12:54). Eakes and Beard exchanged words, and Eakes tased Beard again, this time by direct contact through the taser's "drive-stun" mode, which caused Beard to scream and curl up against the wall of his cell. (Body Camera Video, GX 1, 12:54-13:27; Transcript, R. 83, PageID# 707). After the second tasing, Eakes yelled at Beard, "Don't cuss me again." (Body Camera Video, GX 1, 13:37-13:42). Beard again cursed at Eakes, and Eakes then stunned Beard a third time, causing Beard to further scream and curl up against the wall. (Body Camera Video, GX 1, 13:55-14:03; Testimony of Morgan, R. 52, PageID# 324; Transcript, R. 83, PageID# 708). Standing over Beard, Eakes yelled, "Now you calm down. Do you understand me? That's your last time." (Body Camera Video, GX 1, 14:00-14:07; Testimony of Morgan, R. 52, PageID# 325). Beard again cursed at Eakes for tasing him for "no goddamn reason." (Body Camera Video, GX 1, 14:11-14:15).

At that point, Hopkins said, "We've gotta get Jim [Eakes] out of there," and both Hopkins and Morgan urged Eakes to leave the cell. (Body Camera Video, GX 1, 14:23-14:35; Testimony of Morgan, R. 52, PageID# 324-325; Testimony of Beard, R. 53, PageID# 364). Eakes left the cell and closed the cell door behind

him. (Body Camera Video, GX 1, 14:36-14:41). As he left the area, Eakes said, "I don't play that shit. You know what I'm saying? You don't cuss me or them guards or nothing." (Body Camera Video, GX 1, 14:45-14:53).

b. Shortly thereafter, the FBI viewed the video and audio from Hopkins's body camera and opened an investigation into Eakes's conduct. (Transcript, R. 83, PageID# 735-736). During the course of the investigation, Eakes twice met with the FBI voluntarily. (Transcript, R. 83, PageID# 541, 728-729, 735-736). In his first interview, Eakes told the FBI that he tased Beard after Beard threatened Morgan and Hopkins. (Transcript, R. 83, PageID# 731). He also told the FBI that he tased Beard because Beard threw socks at him, and suggested that he tased Beard a second time when Beard became physically aggressive. (Transcript, R. 83, PageID# 732-733).

In his second interview, Eakes claimed that he only tased Beard once from a distance after Beard threatened to fight him, threatened to kill Morgan and Hopkins, and "aggressively threw some socks at [him]." (Transcript, R. 83, PageID# 736-739). When the FBI told Eakes that it had body camera footage that contradicted his account, Eakes responded that if there was video of what happened, then his actions were "wrong." (Transcript, R. 83, PageID# 740-742).

2. Procedural Background

a. On August 14, 2018, a federal grand jury in the Western District of Kentucky returned a one-count indictment against Eakes for tasing Beard. (Indictment, R. 1, PageID# 1-4). The indictment charged Eakes with using a dangerous weapon to willfully deprive Beard of the Eighth Amendment right to be free from cruel and unusual punishment in violation of 18 U.S.C. 242.[2] (Indictment, R. 1, PageID# 1).

b. Before trial, the government filed a motion to bar Eakes from questioning Morgan, a government witness and eyewitness to Eakes's conduct, on cross-examination concerning the fact that she was twice terminated (and then re-employed) as an employee of the detention center and had several misdemeanor convictions. (Consolidated Motion in Limine, R. 20, PageID# 50, 52, 54-55). The government argued under Federal Rules of Evidence 401 and 403 that such testimony was both irrelevant to the Section 242 charge against Eakes and unduly prejudicial. (Consolidated Motion in Limine, R. 20, PageID# 52).

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[2] Section 242 makes criminally liable "[w]hoever, under color of any law * * * willfully subjects any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242. "[I]f bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon," the person is subject to up to ten years' imprisonment. 18 U.S.C. 242.

In particular, the government argued that it would seek testimony from Morgan only about her personal observations and reactions as an eyewitness to Eakes's tasing of Beard. (Consolidated Motion in Limine, R. 20, PageID #54-55). The government conceded that Federal Rule of Evidence 608(b)(1) permits cross-examination of a witness with respect to prior specific conduct if the conduct is probative of truthfulness or untruthfulness, but argued that Morgan's terminations and misdemeanor convictions were probative of neither. (Consolidated Motion in Limine, R. 20, PageID# 54-55). The government argued that both at the time Morgan was terminated and during the FBI's investigation, Morgan had admitted to the misconduct that led to her terminations and misdemeanor convictions, but that none of her misconduct involved a dishonest act or false statement. (Consolidated Motion in Limine, R. 20, PageID# 54-55) (citing *Johnson* v. *Baker*, No. 1:08cv38, 2009 U.S. Dist. LEXIS 99080, at *23 (W.D. Ky. Oct. 22, 2009)).

Eakes responded that "[a]ny conduct which bears on truthfulness is relevant," and that Morgan's "personnel history" at the detention center "may also be [an] appropriate inquiry" because "it could impact her motive to testify for the United States." (Response to Consolidated Motion in Limine, R. 22, PageID# 69). Yet Eakes argued that the "best course" for the district court "at [that] point would be to wait and see how [the] trial testimony develop[ed] before ruling on this issue." (Response to Consolidated Motion in Limine, R. 22, PageID# 69).

c. The district court granted the government's motion to exclude testimony related to Morgan's terminations, noting that the court "enjoys broad discretion when it decides questions of relevance and possible prejudice." (Memorandum Opinion and Order, R. 25, PageID# 75-76, 79-80, 84) (citing *Tompkin* v. *Philip Morris USA, Inc.*, 362 F.3d 882, 897 (6th Cir. 2004)). The court agreed with the government that there "[was] no evidence here to suggest that Morgan's previous misconduct involved lying or other conduct that is probative of untruthfulness." (Memorandum Opinion and Order, R. 25, PageID# 79). Thus, the court excluded testimony regarding Morgan's terminations and misdemeanor convictions.

The court further ruled that "[i]f Eakes wishe[d] to cross-examine Morgan regarding specific conduct that is probative of truthfulness or untruthfulness, he shall first approach the bench and explain why such evidence is admissible under Federal Rule of Evidence 608(b)(1)." (Memorandum Opinion and Order, R. 25, PageID# 79-80). In addition, the court ruled that, to the extent Eakes had argued that he should be permitted to inquire into Morgan's terminations to prove motive under Rule 404(b), the use of "motive" in Rule 404(b) "does not refer to a motive to testify falsely." (Memorandum Opinion and Order, R. 25, PageID# 79-80 n.2).

d. At trial, the jury saw and heard footage from Hopkins's body camera showing the verbal exchanges between Eakes and Beard and Eakes repeatedly tasing Beard. (Body Camera Video, GX 1). The jury also heard from Beard, who

described the incident from his perspective as the victim, and Morgan, who described the incident from her perspective as an eyewitness. (Testimony of Morgan, R. 52, PageID# 296-352; Testimony of Beard, R. 53, PageID# 353-379). Morgan also testified that, based on the use-of-force training deputy jailers at the detention center received, Eakes's tasing of Beard was inappropriate and an excessive use of force. (Testimony of Morgan, R. 52, PageID# 321-323, 349-352). The government also presented an expert witness who testified that, in his opinion as a training instructor with the Kentucky Department of Corrections, Eakes's conduct was inconsistent with the use-of-force training deputy jailers received. (Transcript, R. 83, PageID# 663-671, 678-693, 716-717).[3]

As relevant here, defense counsel cross-examined Morgan extensively on an incident report in which she suggested that Eakes's use of force had been justified. (Testimony of Morgan, R. 52, PageID# 335-336). Morgan explained that she

[3] Further witness testimony confirmed that Eakes's actions violated the detention center's written and unwritten taser policies prohibiting deputy jailers from tasing inmates for cursing or as a form of punishment. (Testimony of Morgan, R. 52, PageID# 349-350; Testimony of Easley, R. 54, PageID# 393-396, 400-402; Testimony of Little, R. 55, PageID# 426; Transcript, R. 83, PageID# 683, 688). The government also moved into evidence: Eakes's use-of-force training records (Eakes Training Schedule, GX 4, App. 9-11; Eakes Use of Force Training, GX 5, App. 12-15); the detention center's written taser policy (Taser Policy and Procedure, GX 2, App. 1-7); and Eakes's signed acknowledgement of that policy (Eakes Acknowledgment of Fulton County Detention Center Policy and Procedure Manual, GX 3, App. 8). The government also introduced as an admission of guilt Eakes's statement to the FBI that if there was video of the incident, then his actions were "wrong." (Transcript, R. 83, PageID# 571-572, 738-742).

wrote that in the incident report because she was a member of "team jailer," "did not want to feel like * * * [she] was taking [Beard's] side," and thought that she "was supposed to be on [Eakes's] side." (Testimony of Morgan, R. 52, PageID# 336). When defense counsel asked why she was now testifying that the tasing was an excessive use of force, she explained that she "felt like [Eakes] was wrong," but that he would have been upset with her if she had written "the truth as to what happened" on the incident report. (Testimony of Morgan, R. 52, PageID# 336).

Defense counsel also pressed Morgan on whether the FBI had raised the possibility of pursuing a potential criminal investigation against her with respect to this or any other incident at the detention center, and whether that had any bearing on her testimony. Morgan responded that while the FBI raised the possibility that she could have been charged in connection with Beard's tasing, it did not threaten to charge her for the tasing or any other incident during her time as a deputy jailer. (Testimony of Morgan, R. 52, PageID# 336-337). She also stated that, even though the FBI never suggested she would face charges, she felt she had to tell the truth because there was a video of the incident and the FBI could charge her for lying. (Testimony of Morgan, R. 52, PageID# 337, 342-343).

Defense counsel then questioned Morgan on why she no longer worked at the detention center. (Testimony of Morgan, R. 52, PageID# 338-339). Morgan replied that she had quit because her brother was ill, and not because of any

pressure to resign. (Testimony of Morgan, R. 52, PageID# 338-339). At that point, the government called for a bench conference to ask the court to remind defense counsel that the court already had excluded testimony related to Morgan's terminations and misdemeanor convictions to ensure that defense counsel's questioning would not go into those issues. (Transcript, R. 52, PageID# 338-339).

At the bench conference, defense counsel argued that Morgan had been accused of stealing an inmate's property and that testimony related to that incident was probative of her truthfulness. (Transcript, R. 52, PageID# 338-342). Counsel also argued that the jury should hear testimony about additional allegations that Morgan had smuggled drugs and contraband to inmates while employed at the detention center, which he asserted led to her termination as a deputy jailer. (Transcript, R. 52, PageID# 338, 341). Counsel asserted that the jury should hear testimony about whether the FBI knew of those allegations and used them as "leverage" to obtain Morgan's testimony. (Transcript, R. 52, PageID# 341). The government responded that because nothing in Morgan's personnel file supported the theft and drug smuggling allegations, and because any other misconduct leading to her terminations had been addressed by the motion in limine ruling, testimony related to those issues should be excluded. (Transcript, R. 52, PageID# 338-342).

The court noted that the allegations against Morgan were unclear, but ruled that defense counsel could ask Morgan "whether or not the government promised they would not prosecute her on any other types of charges if she testified a certain way." (Transcript, R. 52, PageID# 342). The court, however, declined to allow defense counsel to explore the specifics of other incidents, including the circumstances surrounding Morgan's terminations. (Transcript, R. 52, PageID# 342). Defense counsel did not object to the limitation, and agreed to "stay away" from the details of the allegations and Morgan's terminations in his questioning. (Transcript, R. 52, PageID# 342). When defense counsel asked Morgan whether the FBI used the allegations and circumstances of her terminations against her to induce her to change her testimony, she replied that it had not and that she had told the FBI the truth about Eakes's conduct when first asked about it. (Testimony of Morgan, R. 52, PageID# 342-343).

After a two-day trial, the jury convicted Eakes under Section 242 and further found his offense included the use, attempted use, or threatened use of a dangerous weapon. (Jury Verdict Form, R. 37, PageID# 244-245; Judgment, R. 76, PageID# 515-522).

e. Eakes filed post-trial motions for judgment of acquittal, or in the alternative, for a new trial (Motion for Judgment of Acquittal, R. 47, PageID# 264-269; Amended Motion for Judgment of Acquittal, R. 60, PageID# 460-465), which

the district court denied (Memorandum Opinion and Order, R. 62, PageID# 471-479). Notably, Eakes did not raise any arguments regarding the district court's limitations on his cross-examination of Morgan.

f. The district court sentenced Eakes to 48 months' imprisonment and entered judgment on February 10, 2020. (Judgment, R. 76, PageID# 515-522). Eakes timely filed a notice of appeal four days later, and an amended notice of appeal on February 21, 2020. (Notice of Appeal, R. 78, PageID# 527-528; Amended Notice of Appeal, R. 80, PageID# 532-533).

SUMMARY OF ARGUMENT

This Court should affirm Eakes's conviction for violating Section 242 in connection with his unlawful tasing of Beard. Eakes argues for the first time on appeal (Br. 14-17) that the district court violated his rights under the Sixth Amendment's Confrontation Clause by improperly limiting his cross-examination of Morgan into allegations that she engaged in theft and smuggled drugs and contraband to inmates while employed as a deputy jailer. He argues that without detailed cross-examination into those allegations, the jury could not fully assess Morgan's motive for testifying and whether the FBI used those allegations to pressure Morgan to testify against Eakes. Because Eakes did not object on Confrontation Clause grounds at trial, and because his arguments at trial citing the

evidentiary rules did not preserve his constitutional claim, this Court reviews the district court's ruling for plain error.

Because the district court committed no error, let alone plain error, when it allowed Eakes to cross-examine Morgan on the allegations within appropriate bounds and consistent with its broad discretion under the Confrontation Clause, Eakes's challenge fails. This Court and others have held that a district court may exclude testimony regarding allegations of criminal activity by a witness unrelated to the charged conduct based on relevance and prejudice grounds without violating the Constitution where specific testimony as to the allegations is irrelevant to the charged conduct or highly prejudicial with little probative value. Here, the district court permitted Eakes to question Morgan generally about other possible criminal charges in order to explore her potential bias and any motive to testify untruthfully. And Eakes cross-examined Morgan extensively on communications she had with the FBI. At the same time, the district court appropriately declined to permit Eakes to raise the specific details of the allegations against Morgan that had nothing to do with the charged conduct or any use of excessive force by her, thereby avoiding a highly prejudicial, confusing, and distracting mini-trial.

Moreover, even if the district court did err by limiting Eakes's cross-examination of Morgan, the error did not affect Eakes's substantial rights in light of the entirety of the trial record supporting a guilty verdict. For the same reason,

assuming Eakes preserved his constitutional challenge, any error by the district court in limiting Eakes's cross-examination of Morgan was harmless because the evidence of Eakes's guilt was overwhelming.

ARGUMENT

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR BY LIMITING EAKES'S CROSS-EXAMINATION OF MORGAN BASED ON CONSIDERATIONS OF RELEVANCE, PREJUDICE, AND JURY CONFUSION

A. Standard Of Review

Eakes did not invoke the Sixth Amendment or Confrontation Clause at trial concerning the scope of his cross-examination of Morgan, nor did he raise such challenge in his pretrial and post-trial motions. While this Court does not require a defendant to use exact terms such as "Sixth Amendment" or "Confrontation Clause" to preserve a constitutional error, it does require that a defendant object with a "reasonable degree of specificity which would have adequately apprised the trial court of the true basis for his objection." *United States* v. *Bostic*, 371 F.3d 865, 871 (6th Cir. 2004). In this case, the district court construed Eakes's arguments concerning his cross-examination of Morgan as raising arguments under the evidentiary rules, not the Constitution. (Memorandum Opinion and Order, R. 25, PageID# 74-85; Memorandum Opinion and Order, R. 62, PageID# 471-479). Eakes had an opportunity to further clarify his positions before the district court and to seek reconsideration of the district court's rulings, but he did neither.

Accordingly, because Eakes did not adequately preserve his Confrontation Clause claim, and because his arguments based on the evidentiary rules did not adequately inform the district court of a potential constitutional error, this Court reviews the only issue he raises on appeal for plain error. Fed. R. Crim. P. 52(b); *United States* v. *Collins*, 799 F.3d 554, 584-585 (6th Cir.) (applying plain-error review to an unpreserved Confrontation Clause challenge), cert. denied, 136 S. Ct. 601 (2015); *United States* v. *Hadley*, 431 F.3d 484, 498 & n.8 (6th Cir. 2005) (same), cert. denied, 549 U.S. 828 (2006).

On plain-error review, Eakes bears the heavy burden of showing: "(1) error, (2) that is plain, and (3) that affects substantial rights." *Collins*, 799 F.3d at 576 (citation omitted). An error is plain if it is "clear or obvious," and it affects "substantial rights" only if it "affected the outcome of the district court proceedings." *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citation omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if [] the error seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Collins*, 799 F.3d at 576 (alteration in original; citation omitted); see also *Puckett*, 556 U.S. at 135.

Alternatively, even if Eakes preserved his constitutional claim below, any error is reviewed for harmlessness. Fed. R. Crim. P. 52(a); *Delaware* v. *Van*

Arsdall, 475 U.S. 673, 681 (1986) (applying harmless error review to a Confrontation Clause challenge). Similar to the third prong of plain-error review, an error is harmless "if the record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error." *United States* v. *Mack*, 729 F.3d 594, 603 (6th Cir. 2013), cert. denied, 571 U.S. 1223 (2014).

B. The District Court Did Not Commit Plain Error By Limiting Eakes's Cross-Examination Of Morgan

1. The District Court's Limitations On Cross-Examination Were Not Error, Let Alone "Clear Or Obvious" Error

Eakes argues for the first time on appeal (Br. 14-17) that the district court's decision to limit cross-examination of Morgan violated the Confrontation Clause because without knowledge of the "seriousness of the allegations against Morgan," the jury could not "fully appreciate" the FBI's use of those allegations to pressure Morgan to change her story and testify for the prosecution. Eakes further argues (Br. 17) that the jury had "no other information with which [it] could consider Morgan's bias," and that Eakes's interest in cross-examining Morgan on the issue of bias outweighs any interest of the government. This argument not only ignores the trial record, but also fundamentally misconstrues the cross-examination rights afforded to Eakes under the Confrontation Clause.

a. The Confrontation Clause "guarantees a criminal defendant the right to be confronted with the witnesses against him." *Collins*, 799 F.3d at 585 (citation and internal quotation marks omitted). The Supreme Court repeatedly has held, however, that the Confrontation Clause does not enable a defendant's unfettered cross-examination of witnesses, even in the context of exploring a witness' motive for testifying or character for truthfulness or untruthfulness. See *e.g.*, *Van Arsdall*, 475 U.S. at 678-679; *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974). Rather, courts can use their discretion in applying well-established rules of evidence to exclude evidence that is repetitive, only marginally relevant, unduly prejudicial, or confusing to the jury without violating the Constitution. See *Holmes* v. *South Carolina*, 547 U.S. 319, 326-327 (2006); *United States* v. *Reichert*, 747 F.3d 445, 453-454 (6th Cir. 2014) (holding that a trial court may exclude testimony under the Sixth and Fourteenth Amendments where the testimony has "only marginal relevance" to the issues at trial).

In *Davis*, for example, the Court recognized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 415 U.S. at 316-317. Yet the Court was careful to explain that cross-examination is always subject "to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation." *Id*. at 316. In *Van Arsdall*, the Court further clarified the scope of the Confrontation

Clause and the role of trial courts in policing cross-examination, explaining that the Confrontation Clause provides criminal defendants "the opportunity of cross-examination," which includes the opportunity to explore a witness' motivation for testifying. 475 U.S. at 678 (emphasis and citation omitted). But the Court noted that defendants do not have the right to cross-examine witnesses "in whatever way, and to whatever extent * * * defense [counsel] might wish." *Id*. at 679 (citation omitted). Rather, the district court "retain[s] wide latitude" under the Confrontation Clause to "impose reasonable limits on * * * cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Ibid.*

Consistent with *Davis* and *Van Arsdall*, this Court has held that while exposing a witness' motivation for testifying remains "an important part of the right guaranteed by the Confrontation Clause," defendants "do not have a constitutional right to impeach witnesses endlessly, even for bias." *United States* v. *Hayes*, 218 F.3d 615, 621 (6th Cir. 2000) (citing *Van Arsdall*, 475 U.S. at 679). This Court has similarly recognized that the Confrontation Clause does not guarantee a criminal defendant the right to cross-examine a witness on the specifics of allegations of criminal conduct that are unsubstantiated, and therefore

highly prejudicial, and that have little to do with the charged conduct. See *Rogers* v. *Kerns*, 485 F. App'x 24 (6th Cir.), cert. denied, 568 U.S. 1033) (2012).

For example, in *Rogers*, the defendant, a convicted murderer, argued that the trial court violated the Confrontation Clause when it refused to allow cross-examination into a government witness's alleged history of burglary and theft. This Court explained that "[t]he line of questioning defense counsel sought to pursue concerned unsubstantiated allegations" of criminal behavior, and that such questioning "cannot be considered an * * * appropriate cross-examination designed to show a prototypical form of bias, the preclusion of which gives rise to a Confrontation Clause violation." 485 F. App'x at 29 (citation omitted). This Court observed that allowing "a wholesale inquiry" into the witness' alleged criminal activity was "directly contrary" to *Van Arsdall*'s holding that the Confrontation Clause guarantees the opportunity for cross-examination, but not any type of cross-examination the defendant wants. *Id.* at 30; see also, *e.g.*, *United States* v. *Twomey*, 806 F.2d 1136, 1138-1139 (1st Cir. 1986) (affirming, under *Van Arsdall*, a district court's decision to restrict defendant's inquiry into an allegation that a government witness was involved in two murders and referring to the proffered evidence as "highly prejudicial and of little probative value" where defendant was accused of obstruction of justice); *United States* v. *Atwell*, 766 F.2d 416, 420 (10th Cir. 1985) (stating Federal Rule of Evidence 608(b) is subject to

Rule 403 balancing and that evidence may be excluded without violating a defendant's confrontation rights).

b. Here, the district court did not plainly err by exercising its "wide latitude" under *Van Arsdall* to limit Eakes's cross-examination of Morgan concerning other allegations that she had engaged in misconduct while employed as a deputy jailer. First, as the government noted at trial, there was no proof in Morgan's personnel file that she ever actually engaged in theft or provided drugs to inmates while employed as a deputy jailer. (Transcript, R. 52, PageID# 338-342). Indeed, the district court recognized that the allegations against Morgan were "not so clear," and that for purposes of cross-examination, "being accused of something and doing it are two different things." (Transcript, R. 52, PageID# 339, 342). Thus, because the theft and drug smuggling allegations against Morgan were undocumented and, at most, nothing more than rumors at the detention center, they were not legitimate areas of inquiry for cross-examination, even if they would have been somehow relevant to bias and untruthfulness. In these circumstances, the district court properly exercised its discretion under well-established federal rules to ensure that irrelevant, unduly prejudicial, and confusing testimony was not introduced at trial. See, *e.g.*, *Holmes*, 547 U.S. at 326-327.

Second, and more fundamentally, the Confrontation Clause guaranteed Eakes only the opportunity of cross-examination into bias and motive, which he

received, not the opportunity to launch into a mini-trial by asking specific and unduly prejudicial questions about Morgan's possible criminal exposure on allegations that were neither documented in her personnel file nor relevant to Eakes's use of excessive force. Here, Eakes had the opportunity, as he concedes (Br. 14), to cross-examine Morgan extensively on the nature of her discussions with the FBI and any possible criminal exposure, just not on the specifics of the allegations.[4] Thus, the district court's ruling imposing limitations on cross-examination was not "error," let alone "clear or obvious" error, under plain-error review. *Puckett*, 556 U.S. at 135.

c. Eakes argues that the jury did not have enough information to assess Morgan's motivation to testify, citing *Boggs* v. *Collins*, 226 F.3d 728 (6th Cir. 2000), cert. denied, 532 U.S. 913 (2001). See Br. 15-17. In *Boggs*, this Court explained that when evaluating Confrontation Clause challenges to a trial court's decision to limit cross-examination, "a reviewing court must assess whether the jury had enough information * * * to assess the defense theory of bias or improper motive." 226 F.3d at 739. Here, Eakes was able to cross-examine

[4] Further, even as to any substantiated allegations of misconduct that led to Morgan's earlier terminations as a deputy jailer, the district court found that the misconduct did not involve lying and was not otherwise probative of Morgan's truthfulness. (Memorandum Opinion and Order, R. 25, PageID# 79-80). Eakes does not challenge that finding on appeal, nor was he seeking to ask Morgan about her "prior criminal convictions" or "disciplinary record at work." Br. 14.

Morgan at length about her discussions with the FBI, the impact they had on her testimony, and why her testimony differed from the incident report in which she wrote that Eakes used an appropriate amount of force in tasing Beard.

In particular, Morgan testified that the FBI raised with her allegations that she had engaged in criminal activity while a deputy jailer, and she testified as to the effect of those discussions, if any, on her testimony. (Testimony of Morgan, R. 52, PageID# 342-344). She further testified that the FBI told her to tell the truth, and that she felt that if she did not tell the truth, she would be prosecuted for lying to the FBI, although the FBI itself did not threaten to prosecute her. (Testimony of Morgan, R. 52, PageID# 337, 343-344). Morgan also testified that while the FBI raised the allegations of criminal activity in their discussions, they did not cause her to change her version of events, and that she decided to tell the FBI the truth "when they first asked [her] about [the incident]." (Testimony of Morgan, R. 52, PageID# 342-343). Finally, Morgan explained why she initially wrote that Eakes did not use excessive force in her incident report, but later changed her story when questioned by the FBI. (Testimony of Morgan, R. 52, PageID# 336-338).

Thus, the district court's limitations on Eakes's cross-examination of Morgan did not run afoul of *Boggs*. Because Eakes's cross-examination sufficiently enabled him to explore any bias or improper motive, the district court did not have to allow further cross-examination into the specifics of the allegations

of criminal activity by Morgan. When asked, Morgan directly refuted the notion that the FBI used any such allegations to pressure her to change her testimony to be more favorable to the government. (Testimony of Morgan, R. 52, PageID# 336-343). Indeed, permitting defense counsel to inquire about Morgan's alleged theft from inmates or alleged smuggling at the detention center would have introduced a highly prejudicial mini-trial into the proceedings and needlessly confused the jury. See *Jordan* v. *Warden, Lebanon Corr. Inst.*, 675 F.3d 586, 595 (6th Cir. 2012) (noting that under the Confrontation Clause trial courts have an interest in limiting cross-examination based on "the probative or material value of the evidence toward the issues at trial" and to prevent "minitrials on collateral issues").

In sum, based on the entirety of Morgan's testimony, the jury could have inferred that she decided to change her testimony and be truthful because she had always thought Eakes's conduct was improper and no longer believed it was necessary to support Eakes as a fellow deputy jailer. The jury heard extensive testimony related to Morgan's motive to testify, and her testimony undercut Eakes's theory of bias or improper motive. The Confrontation Clause did not guarantee that Eakes would get the answers he wanted from Morgan, and it did not require the district court to allow any more cross-examination than it did. See, *e.g.*, *Dorsey* v. *Parke*, 872 F.2d 163, 167 (6th Cir.) (finding that the trial court did not violate the Confrontation Clause when cross-examination on a witness' mental

capacity was "permitted in part and barred in part"), cert. denied, 493 U.S. 831 (1989); *Couturier* v. *Vasbinder*, 385 F. App'x 509, 515 (6th Cir. 2010) (holding that a trial court's decision to bar cross-examination on certain issues was "questionable," but that the limitations did not violate the Confrontation Clause where the jury could assess the defense theory without the testimony).

2. The District Court's Ruling Did Not Affect Eakes's Substantial Rights And, In All Events, Any Error Was Harmless

Even if the district court committed plain error in limiting Eakes's cross-examination of Morgan, the error did not affect Eakes's substantial rights because Morgan's further testimony on cross-examination would not have changed the verdict. See *Mack*, 729 F.3d at 607 (citation omitted) (noting that the third prong of plain-error review "is akin to the harmless error analysis employed in preserved error cases"). For the same reasons that any unpreserved error did not affect Eakes's substantial rights, it would be harmless beyond a reasonable doubt even if Eakes had preserved his Confrontation Clause challenge. See *Hayes*, 218 F.3d at 623.

This Court has explained that when reviewing Confrontation Clause violations for reversible error, the reviewing court considers "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and, of course, the overall strength of the prosecution's case." *Holland* v. *Rivard*, 800 F.3d 224, 243 (6th Cir. 2015) (citation omitted), cert. denied, 136 S. Ct. 1384 (2016). Here, those considerations all support the conclusion that even if there were any error in the permitted scope of Eakes's cross-examination, it did not affect his substantial rights.

While Morgan provided an eyewitness account of Eakes's conduct, she was far from a "tiebreaker" witness or a witness whose testimony was "crucial" to the government's case. *Vasquez* v. *Jones*, 496 F.3d 564, 576 (6th Cir. 2007). Even if the jury decided to disregard the testimony of Morgan because she lacked credibility, it still had ample evidence upon which to find Eakes guilty of violating Section 242.

First, the jury viewed body camera footage of the incident multiple times at trial, which included audio of the verbal exchanges between Eakes and Beard. (Body Camera Video, GX 1). Eakes did not argue that the video was an inaccurate depiction of the incident. Nor did he contend that the video was incomplete or otherwise ambiguous. Thus, the jury could have relied solely on what they saw and heard on the video to conclude that Eakes's use of force was unreasonable. See *Hayes*, 218 F.3d at 622 (unpreserved error by trial court in barring defendant from asking impeachment questions did not affect defendant's substantial rights—and if preserved, was harmless—because even if the jury disregarded all of the

witness' testimony, the evidence against the defendant included a tape recording of him admitting to criminal activity).

Second, Beard provided a firsthand account of Eakes's conduct. Eakes did not challenge Beard's account of the incident. Instead, he spent much of cross-examination attacking Beard's demeanor on the stand, his past conduct at the detention center, and the likelihood he would file a civil lawsuit against Eakes. (Testimony of Beard, R. 53, PageID# 365-375). Moreover, during direct examination of two defense witnesses, Eakes did not advance an alternative narrative that contradicted Beard's recollection of events. Rather, Eakes used those direct examinations to attack Morgan's credibility, discuss Eakes's reputation at the detention center among staff and inmates, and review the training deputy jailers received on tasers and the use of force. (Testimony of Easley, R. 54, PageID# 381-386; Testimony of Little, R. 55, PageID# 410-414). As a result of those tactical decisions, Eakes left the jury with Beard's uncontradicted account of the incident, and that account was largely consistent with the body camera footage.

Third, the jury heard testimony from the government's expert witness that under the use-of-force training Eakes received, tasing Beard was inappropriate. (Transcript, R. 83, PageID# 663-671, 678-692, 716-717). Other witnesses, including two other deputy jailers who testified for the defense, also confirmed that the tasing was inconsistent with their use-of-force training and the detention

center's written and unwritten taser policies. (Testimony of Morgan, R. 52, PageID# 322, 349-350; Testimony of Easley, R. 54, PageID# 393-396, 400-402; Testimony of Little, R. 55, PageID# 426; Transcript, R. 83, PageID# 683, 688).

Finally, the jury heard testimony that after initially trying to mislead the FBI about the tasing in multiple interviews, Eakes admitted that his actions were "wrong" if they were captured on video. (Transcript, R. 83, PageID# 731, 738-742; Body Camera Video, GX 1). Eakes did not challenge that testimony as inaccurate, and did not assert that his admission was involuntary. Based on that admission and the entirety of the testimony presented at trial, any error associated with limiting cross-examination of Morgan would not have affected the outcome at trial.

CONCLUSION

Because the district court committed no error, and because—based on the body camera footage of the incident, Eakes's own admission, and the entirety of the testimony and evidence presented at trial—any error associated with limiting cross-examination of Morgan would not have affected the outcome at trial, this Court should affirm the district court's judgment.

Respectfully submitted,

RUSSELL M. COLEMAN
United States Attorney

MADISON T. SEWELL
Assistant United States Attorney
United States Attorney's Office
Western District of Kentucky
241 East Main Street, Suite 305
Bowling Green, KY 42101
(270) 243-4398

ERIC S. DREIBAND
Assistant Attorney General

ALEXANDER V. MAUGERI
Deputy Assistant Attorney General

s/ Junis L. Baldon
ERIN H. FLYNN
JUNIS L. BALDON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-1806

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation and typeface requirements imposed by Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(c)(1). This brief contains 7236 words of proportionally spaced text, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f). The typeface is Times New Roman, 14-point font.

s/ Junis L. Baldon
Junis L. Baldon
Attorney

Date: September 16, 2020

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2020, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that participants in this case who are registered CM/ECF users will receive service by the appellate CM/ECF system.

s/ Junis L. Baldon
JUNIS L. BALDON
Attorney

ADDENDUM

ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
1	Indictment	1-4
20	Consolidated Motion in Limine	50-63
22	Response to Consolidated Motion in Limine	67-70
25	Memorandum Opinion and Order	74-85
37	Jury Verdict Form	244-245
47	Motion for Judgment of Acquittal or New Trial	264-269
48	Response to Motion for Judgment of Acquittal or New Trial	270-276
52	Testimony of Amber Morgan	296-352
53	Testimony of Lias Beard	353-379
54	Testimony of Stacey Easley	380-408
55	Testimony of Ava Little	409-430
60	Amended Motion for Judgment of Acquittal or New Trial	460-465

Record Entry Number	Description	PageID# Range
62	Memorandum Opinion and Order	471-479
76	Judgment	515-522
78	Notice of Appeal	527-528
80	Amended Notice of Appeal	532-533
83	Transcript of Jury Trial, Vol. 1	539-747
84	Transcript of Jury Trial, Vol. 2	748-812