No. 22-4178

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EVERETT LEE MAYNARD

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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JURISDICTIONAL STATEMENT

This appeal is taken from the entry of a judgment in a criminal case in the Southern District of West Virginia. JA566-573.[1] The district court had jurisdiction under 18 U.S.C. 3231. The court entered judgment on March 17, 2022. JA567. Defendant-appellant Everett Lee Maynard filed a timely notice of appeal. JA574. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

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[1] "JA__" refers to the page number of the Joint Appendix filed with the defendant-appellant's brief.

STATEMENT OF THE ISSUES

Maynard is a former police officer with the Logan Police Department in Logan, West Virginia, who was charged under 18 U.S.C. 242 for using excessive force against an arrestee in his custody. Maynard proceeded to trial and was convicted. The district court imposed a prison sentence of 108 months. There are two issues on appeal:

1. Whether the district court's order requiring everyone in the courtroom to wear face masks covering their mouths and noses at all times during trial in order to protect against the public health risk of the COVID-19 pandemic violated Maynard's Sixth Amendment right to confront the witnesses against him.

2. Whether the district court committed any procedural error in applying the five-level "serious bodily injury" enhancement under Sentencing Guidelines § 2A2.2(b)(3)(B) or the two-level "obstruction of justice" enhancement under Sentencing Guidelines § 3C1.1 when calculating Maynard's Guidelines sentence.

STATEMENT OF THE CASE

Maynard's conviction and sentence arise out of his assault of R.W., who was in his custody at the Logan Police Department. This appeal involves a Confrontation Clause challenge to a district court order requiring testifying

witnesses to wear facemasks[2] and a procedural challenge to the calculation of Maynard's Guidelines sentence.

1. Factual Background

a. Maynard's Assault Of R.W.

On October 16, 2020, defendant-appellant Maynard and Officer Andrew Bias arrested R.W. for public intoxication and an outstanding warrant. JA122-125. While in the small booking room at the Logan Police Department, R.W. repeatedly asked the officers to make a call about the warrant. JA577, at 19:11:44-19:12:57.[3] Bias refused and yelled and cursed at R.W. to "shut the f[] up." JA577, at 19:11:44-19:12:57. When R.W. asked again, Bias stood up in a threatening manner, and Maynard warned R.W., "Don't make demands, partner." JA577, at 19:13:09-19:13:17; JA135-136. Bias then put on his black, hard shell gloves and

[2] No courts of appeals have yet addressed whether requiring testifying witnesses to wear face masks during the COVID-19 pandemic violates the Confrontation Clause. This issue is currently pending before this Court in *United States* v. *Vladimirov*, No. 22-4049 (briefing completed), although the disposition in that case would not necessarily control the outcome here. See note 4, *infra*.

[3] "JA577, at _____" refers to Government's Exhibit 2 and the internal time-stamp on the exhibit. Exhibit 2 includes side-by-side video footage from the two cameras in the Logan Police Department, including enhanced audio. JA68-69.

stood over R.W., telling R.W., "This is your last f[]ing warning to shut the f[] up." JA577, at 19:13:29; JA134-135.

R.W. also asked to use the bathroom, but Bias angrily refused. JA577, at 19:24:16-19:26:20. When R.W. persisted in his requests, Bias quickly stood up to stand over R.W. again, screaming for him to "shut the f[] up" and threatening him that "This ain't Cabell County * * * , it's f[]ing Logan." JA577, at 19:25:49-19:26:00.

Maynard then offered to take R.W. to the bathroom. JA577, at 19:26:52. He uncuffed R.W. and directed him across the booking room. JA577, at 19:26:52-19:27:38. After R.W. entered the bathroom, Maynard said to Bias, "Tonight's the night—oh, ain't nothing funny." JA577, at 19:27:47-19:27:56. Next, Maynard put on his black, hard knuckle gloves, looked directly into the camera, and raised his middle finger. JA468; see also JA138-139; JA577, at 19:28:01-19:28:03. Meanwhile, Bias exited to the hallway just outside of the office. JA126.

Maynard stepped into the bathroom with R.W., beyond the camera's view, and screamed at R.W. to finish. JA577, at 19:28:18-19:28:20. Maynard then stood in the door frame to the bathroom and yelled, "Hey remember I said you didn't get to make demands of me?" JA577, at 19:29:30-19:29:32. He continued to yell at R.W. about "mak[ing] demands" as he again entered the bathroom. JA577, at 19:29:32-19:29:51. Loud noises sounding like "fighting" or "punches being

thrown" emanated from the bathroom, while Maynard screamed at R.W., "Do you remember it?" JA577, at 19:29:39-19:29:54; see also JA126, JA143-144. Hearing this commotion, Bias thought that Maynard was punching R.W. in the bathroom. JA142-144. He was not concerned that R.W. was attacking Maynard, given that R.W. was intoxicated and was "too small" and "too weak." JA142-144.

Maynard then repeatedly yelled at R.W. to "get the f[] up" and dragged R.W.'s limp body out of the bathroom, dropping him on the floor and back into the camera's view. JA577, at 19:29:51-19:29:58. R.W. remained on the floor while Maynard screamed, "you were big and brave just a minute ago." JA577, at 19:29:58-19:30:02; JA470. Maynard picked up R.W. under the armpits, put his hands behind R.W.'s head in a full nelson-style hold, and carried him across the room while again screaming about "making demands." JA577, at 19:30:02-19:30:09; see also JA80; JA241. Then Maynard aggressively rammed R.W. head-first into the door frame and dropped him on the floor. JA577, at 19:30:07-19:30:09; JA126; JA145-146.

While R.W. remained limp on the floor, Maynard stood over R.W. and continued yelling at him. JA577, at 19:30:09-19:30:17; JA127, 149. Bias, who had seen Maynard "run" R.W. "into the corner of the door frame," thought that Maynard may have killed R.W. as a pool of blood formed by his body. JA126-127. Maynard then said to Bias, "Call an ambulance. I went too * * * far," and

Bias complied. JA577, at 19:30:22-19:30:25; JA127-128; JA149-150. Neither officer rendered aid to R.W. while waiting for the ambulance to arrive. JA577, at 19:30:09-19:37:43; see also JA76; JA150-151.

b. The Aftermath Of The Assault

As Maynard waited for the ambulance to arrive, he called Logan Police Chief Paul Clemens and said, "[I] really screwed up this time. I think I've hurt him bad or I may have killed him." JA62-63; see also JA89-90; JA152. Bias separately called Chief Clemens to tell him that Maynard rammed R.W. into the door frame and that he thought Maynard had killed him. JA155.

When first responders arrived, Maynard told them that R.W. "fell." JA153; JA111. As Bias left to follow R.W. to the hospital, Maynard said to him, "Motherfuckers want to talk shit until they're laying in a puddle of their own blood." JA160. After R.W. was taken away, a large amount of blood remained on the floor of the hallway, and Maynard began to clean up blood around the booking room and inside the bathroom. JA472; JA474; JA476; JA577, at 19:50:45-19:53:50, 20:09:35-20:35:18.

At the hospital, doctors treated R.W. for a broken nose, lacerations to his upper head, and a scapula fracture. JA198-199; JA578-602. R.W. was discharged back to police custody with his arm in a sling, stitches in his head, and a broken nose. JA79; JA81-84. Maynard showed no signs of injury and sought no medical

treatment, and he remained at the police department until Chief Clemens drove him home later than night. JA79; JA110-112.

After watching the recordings of the incident, Chief Clemens suspended Maynard. JA79; JA111-112; JA117. The West Virginia State Police and the FBI investigated the incident, and Chief Clemens also conducted an internal investigation. JA85. Chief Clemens subsequently fired Maynard for violating the department's policies and procedures based on his assault of R.W. JA88.

2. Procedural History

A grand jury charged Maynard with one count of willfully depriving R.W. of his constitutional right to be free from the use of unreasonable force by a law enforcement officer in violation of 18 U.S.C. 242, with bodily injury resulting (JA10), and the case proceeded to trial.

a. Maynard's Pretrial Motion To Lift An Order Requiring Face Masks

Citing the increased rate of COVID-19 infections in the Southern District of West Virginia, Chief Judge Thomas E. Johnston issued General Order #13 in August 2021 directing "all persons seeking entry into any courthouse" to wear face masks in "common areas." JA21. The order also required face masks to "be worn by all participants during in-court proceedings unless otherwise directed by the presiding judge." JA21.

Just before Maynard's November 2021 trial began, the district court issued an order consistent with General Order #13, requiring all persons, including court personnel, security, litigants, witnesses, and spectators, to wear "a face covering or mask, which covers both the wearer's nose and mouth, at all times" while in the courtroom. JA12. The order also established guidelines to "prevent the unnecessary handling of exhibits." JA12. As relevant here, Maynard sought relief from this order, arguing that it violated his Sixth Amendment right to confrontation and impeded cross-examination to require counsel and witnesses to wear face masks. JA14-17. Maynard argued that the use of clear face shields by counsel and witnesses while speaking could accomplish the goals of the court's order without infringing on his right to confrontation. JA16-17.

The court denied Maynard's request. JA20-24. The court found that the wearing of masks was consistent with current district-wide orders regarding masking in common areas of the courthouse and was necessary to promote public safety. JA20-21. The court explained that West Virginia "continue[d] to experience significant spread of the novel coronavirus," that community transmission rates in Kanawha County, where the federal courthouse in Charleston is located, were "high," and that the CDC currently recommended that "even fully vaccinated people in an area with high community transmission wear a mask indoors in public places." JA20.

The court further explained that face shields "have not proven as effective as masks that cover the nose and mouth and seal around the wearer's face," and noted that "people have become accustomed to conversing with masks * * * , reducing any risk that jurors * * * will have difficulty assessing the demeanor of witnesses." JA23-24. To the extent that defendant's right to confrontation encompasses the ability to "see a witness's full facial expressions," the court stated, face masks impinge on that right only to a "slight extent," while requiring face masks "is justified by important public policy interests to protect the health and safety of those in the courthouse while allowing court functions to proceed during a pandemic." JA24.

b. Evidence At Trial

During a three-day trial, the government elicited testimony from Chief Clemens and Officer Bias regarding Maynard's assault of R.W. and introduced video footage from inside the booking room and the adjacent hallway, as described above. See pp. 3-7, *supra*. Clemens and Bias also testified that Maynard's use of force against R.W. was not justified and violated their police academy training and the Logan Police Department's policies on the use of force. JA56-60, 80-81, 90, 120-121, 142-144, 147-148. The government also introduced medical evidence

about the extent of R.W.'s injuries when he presented to the emergency room and the treatment he required. JA193-205; JA578-602.

In his defense, Maynard testified that he tripped and accidentally rammed R.W. into the door frame when he fell. JA250-253. Maynard acknowledged that he received use of force training and was familiar with the use of force policies about which Clemens and Bias had testified. JA263-266. He also admitted that the "full nelson" style hold he had used on R.W. was not an appropriate way to pick up and move R.W. JA241-242. Maynard also called R.W. as a witness, but he did not clearly recall the assault, as well as some first responders who did not witness the assault. JA310-358; JA379-388.

After less than an hour of deliberation, the jury returned a guilty verdict. JA451; JA518.

c. Sentencing And Appeal

The United States Probation Office prepared a presentence investigation report (PSR). JA603-624. Given Maynard's conviction under 18 U.S.C. 242, the PSR used Sentencing Guidelines § 2H1.1(a)(1) to calculate his base offense level as 14 based on the underlying offense of aggravated assault in Sentencing Guideline § 2A2.2(a). JA607.

Among other adjustments, and as contested on appeal, the PSR then increased Maynard's base offense level by five levels under Sentencing Guidelines

§ 2A2.2(b)(3)(B) for his infliction of serious bodily injury, and by two levels under Sentencing Guidelines § 2C1.1 for his obstruction of justice. JA608. After factoring in all adjustments, most of which Maynard did not contest, the PSR calculated Maynard's total offense level to be 31. JA607-609. At a criminal history category of I, his recommended Guidelines sentence was 108-135 months' imprisonment. JA613. In light of the applicable ten-year statutory maximum under 18 U.S.C. 242, the PSR reduced his recommended prison sentence to 108-120 months. JA613.

Maynard objected to the five-level adjustment for serious bodily injury, but he did not contest the two-level adjustment for obstruction of justice. JA622-624. As to the former, he argued that R.W. "did not suffer any protracted impairment of a function of a bodily member" and "did not require surgery, hospitalization or physical rehabilitation" and that, at most, three levels should apply for infliction of bodily injury. JA623. The Probation Office rejected Maynard's objection, finding that R.W. suffered serious bodily injury, as evidenced by his "emergency medical treatment at a hospital" and "seven staples in his scalp." JA623-624.

At sentencing, the district court rejected Maynard's renewed objection to the upward adjustment for serious bodily injury. JA527-530; JA536-538. The court found that R.W. "was knocked unconscious and was bleeding profusely from his head," which ultimately required "emergency medical treatment, including seven

staples to his scalp." JA528. The court further found that R.W. "suffered a broken nose that resulted in a referral to a specialist for reconstruction." JA528. The court concluded that R.W. suffered serious bodily injury within the meaning of the Guidelines because his "injuries would have caused extreme physical pain" and because "he needed to be taken to the hospital in an ambulance for treatment." JA529; JA536-537.

The court also reviewed the other aspects of the PSR, further finding, as relevant here, that the two-level upward adjustment for obstruction of justice was warranted based on Maynard's trial testimony "claiming that [he] tripped and fell with the victim and that the incident was accidental," which the court described as "perjury." JA537. This echoed the PSR's statements that Maynard's testimony was a "willful attempt to obstruct or impeded the administration of justice with respect to the prosecution" of his Section 242 offense, that his obstructive conduct "related to the relevant conduct of [that] offense," and that "perjury" is a type of obstructive conduct under the commentary to Sentencing Guidelines § 3C1.1. JA608. As with the PSR, Maynard did not object to the court's application of the adjustment. JA534.

Consistent with the PSR, the court calculated Maynard's recommended sentence to be 108-120 months' imprisonment and, after considering the sentencing factors in 18 U.S.C. 3553(a), imposed a prison term of 108 months.

JA538-548, 567-568. Maynard filed a timely notice of appeal from the entry of final judgment. JA566-573; JA574-575.

SUMMARY OF THE ARGUMENT

1. This Court should affirm Maynard's conviction because the district court's order requiring witnesses to wear face masks in light of the COVID-19 pandemic did not violate his Sixth Amendment right to confrontation. To be sure, the Confrontation Clause guarantees a right to face-to-face confrontation. But this right is not absolute. When both the denial of such confrontation is necessary to the public interest and when the reliability of the witnesses' testimony is otherwise assured, there is no constitutional violation.

Here, the district court's masking requirement clearly served the important purpose of protecting those at trial from the risks of contracting COVID-19. Although face masks obscured witnesses' mouths and noses, the court's order did not hinder the other elements of confrontation, including cross-examination, and only slightly impinged on the jury's ability to observe the witnesses' demeanor. This Court should affirm Maynard's conviction because there was no violation of his Sixth Amendment right under the circumstances. In any event, even if it was error to deny Maynard's request for speaking counsel and witnesses to wear clear face shields instead of masks, such error would be harmless given the

overwhelming weight of the evidence at trial, including audio-video footage of Maynard's assault.

2. This Court should also affirm Maynard's 108-month sentence because the district court committed no procedural error when it applied upward adjustments for serious bodily injury and obstruction of justice. The district court properly found that based on the extent of R.W.'s injuries, as well as the emergency treatment he received at the hospital, Maynard had inflicted serious bodily injury for purposes of applying a five-level enhancement under Sentencing Guidelines § 2A2.2(b)(3)(B). And Maynard did not even object below to the obstruction of justice enhancement. The court did not err, let alone plainly so, by finding that Maynard's testimony that his assault of R.W. was an accident constituted obstructive conduct, *i.e.* perjury, within the meaning of Sentencing Guidelines § 3C1.1. For these reasons, the court correctly calculated Maynard's sentencing range under the Sentencing Guidelines, and in the absence of any such procedural error, this Court should affirm his sentence.

ARGUMENT

I

THE DISTRICT COURT'S ORDER REQUIRING WITNESSES TO WEAR FACE MASKS DURING THE COVID-19 PANDEMIC DID NOT VIOLATE MAYNARD'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

A. Standard Of Review

This Court reviews alleged Confrontation Clause violations de novo. *United States* v. *Mouzone*, 687 F.3d 207, 213 (4th Cir. 2012), cert. denied, 568 U.S. 1110 (2013). Confrontation Clause violations are also reviewed for harmless error. *Ibid.*

B. The Requirement That Testifying Witnesses Must Wear Face Masks Did Not Violate The Confrontation Clause

The Confrontation Clause of the Sixth Amendment "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). The "central concern" of the right to confrontation is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland* v. *Craig*, 497 U.S. 836, 844-845 (1990). To achieve this purpose, the right to confrontation includes several elements: face-to-face "presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id.* at 846. However, this right must be "interpreted in the context of the necessities of trial and the adversar[ial] process." *Id.* at 850.

For this reason, the Supreme Court has held that the element of face-to-face confrontation is not "absolute"—it "may be satisfied absent a physical, face-to-face confrontation at trial" when the "denial of such confrontation is necessary to further an important public policy" and when "the reliability of the testimony is otherwise assured." *Id.* at 850.

As an initial matter, Maynard argues that requiring testifying witnesses to wear face masks "deprived [him] of his constitutional right to have the jury fully judge the credibility of witnesses." Br. 20. Thus, this is not a challenge to the element of confrontation that requires face-to-face/physical presence, which was fully preserved at trial, but only to the element of the jury's ability to observe the witnesses' demeanor. But curtailments to this element of confrontation may be similarly evaluated under *Craig* and do not give rise to constitutional concerns here.

The district court's masking requirement did not violate Maynard's Confrontation Clause rights because the requirement served an important public policy and the reliability of the witnesses' testimony was otherwise assured. JA20-24. First, it is undisputed that the masking requirement served an important public policy interest. As Maynard acknowledges, the COVID-19 pandemic has posed an "unprecedented challenge[]" in determining "how to conduct jury trials without endangering public health and safety." Br. 17 (quoting *United States* v. *Olsen*, 21

F.4th 1036, 1040 (9th Cir. 2022)). In the United States alone, there have been more than 88 million cases of individuals contracting COVID-19 and more than one million deaths. WHO Coronavirus (COVID-19) Dashboard, World Health Organization (July 22, 2022), https://COVID19.who.int. Maynard does not dispute the seriousness of the pandemic or that it persisted during his trial. See Br. 17. Indeed, at the time of his trial, there was a district-wide order in place requiring all persons in the courthouse to wear face masks in common areas, including courtrooms, subject only to modification by the presiding judge. JA21. The district court's masking requirement was an appropriate exercise of its discretion to manage its courtroom, consistent with district-wide practices and CDC guidance, in order to protect the health and safety of all trial participants.[4]

Second, the reliability of the testimony of the government's witnesses was otherwise assured based on the other elements of confrontation. For example, in *Craig*, the Court found that allowing a child witness to testify via closed circuit television would not violate the Confrontation Clause because this procedure preserved the elements of oath, cross-examination, and observation of demeanor. 497 U.S. at 851-852. Here, the government's witnesses were face-to-face with

[4] Whether the denial is necessary to further an important public policy is a "case-specific" inquiry. *Craig*, 497 U.S. at 855. For this reason, any outcome in *United States* v. *Vladimirov*, No. 22-4049 (4th Cir.), see note 2, *supra*, would not squarely decide the outcome here (and vice versa).

Maynard, under oath, and subject to cross-examination. To be sure, jurors could not see the witnesses' mouths or noses beneath their masks in order to see their "full facial expressions." JA24. But even this element of observing demeanor was preserved to a significant extent because, as the district court explained, the jury still could readily "assess tone, unusual pauses, shifting or squirming, eye contact, and body language to evaluate demeanor and credibility." JA24. The court also noted that, by the time of Maynard's trial, which was more than 18 months into the pandemic, people had "become accustomed to conversing with masks," thereby "reducing any risk that jurors * * * will have any difficulty assessing the demeanor of witnesses." JA23-24. The court properly concluded that any impingement on Maynard's right to confrontation was "slight" at best, and did not outweigh the significant public safety interest supporting the court's order and enabling proceedings to go forward even during a "high" transmission period. JA20, 24.

Such a conclusion comports with Supreme Court precedent holding that the admission at trial of testimonial hearsay does not violate the Confrontation Clause if the witness is unavailable and there was a prior opportunity for cross-examination. *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004). In such circumstances, the jury has *no* opportunity to assess the demeanor of the witness at all. As a result, the fact that the jury could not *completely* observe the demeanor of

the government's witnesses here, who were subject to cross-examination in the jury's presence, does not alone amount to a Confrontation Clause violation.

Maynard cites various instances in which witnesses in other districts wore face shields in trials that occurred during that pandemic, and one case where a court expressly concluded that requiring testifying witnesses to wear face masks violates the Confrontation Clause. Br. 20-21 (citing *United States* v. *Thompson*, 543 F. Supp. 3d 1156, 1164 (D.N.M. 2021)). However, many district courts have concluded, as the district court did here, that the wearing of face masks has only a minor impact on observing demeanor, and thus, does not violate the Confrontation Clause. *E.g.*, *United States* v. *Holder*, No. 18-cr-00381, 2021 WL 4427254, at *9 (D. Colo. Sept. 27, 2021); *United States* v. *Clemons*, No. 19-0438, 2020 WL 6485087, at *2-3 (D. Md. Nov. 4, 2020); *United States* v. *James*, No. 19-08019, 2020 WL 6081501, at *2 (D. Ariz. Oct. 15, 2020); *United States* v. *Crittenden*, No. 4:20-cr-7, 2020 WL 4917733, at *7 (M.D. Ga. Aug. 21, 2020). And even before the pandemic, courts found no constitutional violation simply because the jury lacked an unfettered view of witnesses' full facial expressions. See, *e.g.*, *United States* v. *de Jesus-Castaneda*, 705 F.3d 1117, 1119 (9th Cir. 2013) (finding no violation where witness wore fake mustache and wig); *Morales* v. *Artuz*, 281 F.3d 55, 56 (2d Cir.) (allowing a witness to testify wearing dark sunglasses was not contrary to clearly established law under the Confrontation Clause), cert. denied,

537 U.S. 836 (2002); *United States* v. *Miah*, No. 21-110, 2022 WL 5605088, at *4-5 (W.D. Pa. Nov. 29, 2021) (upholding "light disguises" including face mask for confidential informant witnesses).

For all of these reasons, the district court's masking requirement did not violate Maynard's Confrontation Clause rights.

C. Any Error Arising Out Of The District Court's Masking Requirement Was Harmless Beyond A Reasonable Doubt

Even if the particular masking requirement in this case were to have violated the Confrontation Clause, any error would be harmless in light of the overwhelming evidence of Maynard's guilt. Under the harmless error standard, this Court will not reverse "an otherwise valid conviction" where it concludes, based "on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); *United States* v. *Holness*, 706 F.3d 579, 588 (4th Cir.), cert. denied, 571 U.S. 867 (2013).

Here, any error was harmless beyond a reasonable doubt because the district court's order requiring face masks did not have any effect on the strength of the government's case against Maynard. Even if removal of the face masks would have given the jury some reason to question the credibility of the government's witnesses—and Maynard does not even seek to explain how this would be so—it would not have changed the outcome at trial. The jury's verdict is amply supported by the video evidence presented at trial and the government's other

exhibits (see JA467-481; JA578-602), all of which corroborated the prosecution witnesses' testimony, and by Maynard's own admissions about appropriate uses of force (JA241-242; JA263-266).

On the video, the jurors saw Maynard putting on his hard-shell gloves and brazenly giving his middle finger to the booking-room camera just before stepping into the bathroom with R.W. They heard Maynard screaming at R.W. about making demands and loud thuds coming from inside the bathroom. They saw Maynard drag R.W. out of the bathroom before yelling for him to get up and further dragging him across the room in a full nelson-style hold. From two separate camera angles, they saw Maynard aggressively ram R.W. into the door frame headfirst and drop him to the floor, leaving him in a pool of his own blood. And they saw first responders arrive to transport R.W. to the emergency room while Maynard cleaned up blood from both the booking room and bathroom.

The jurors could also observe that R.W. was half the size of Maynard, intoxicated, and displayed no threatening behavior, even after Maynard removed his handcuffs. They never heard Maynard call to Bias for backup because he thought R.W. posed a threat of violence or could not be subdued.[5] Instead, they saw R.W. slumped on the ground before Maynard aggressively picked him up—in

[5] Maynard also admitted that he never asked for help or told any other officer that R.W. threatened him. JA277-280.

a hold that Maynard admitted was inappropriate—and slammed his head into the door frame across the room. They saw and heard nothing that could justify the degree of force Maynard used. And they heard Maynard admit that he was trained on use of force policies, that the use of force is not appropriate to punish someone, and that only the least amount of force necessary is permissible.

The evidence clearly establishes beyond a reasonable doubt that Maynard willfully used unreasonable force against R.W. while he was on duty, causing R.W. bodily injury. Thus, any alleged error is harmless.

II

THE DISTRICT COURT CORRECTLY CALCULATED MAYNARD'S SENTENCE UNDER THE SENTENCING GUIDELINES

A. Standard Of Review

This Court reviews a criminal sentence only to determine whether it is reasonable. *United States* v. *Strieper*, 666 F.3d 288, 292 (4th Cir. 2012). This review "ensures that the district court committed no significant procedural error," including by "improperly calculating" a defendant's Guidelines range. *Ibid.* (quoting *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). When reviewing a preserved objection to the calculation of the Guidelines range, this Court reviews the district court's "factual findings for clear error" and "legal conclusions de novo." *Ibid.*

An unpreserved objection to the calculation of the sentencing range is subject to plain error review. *United States* v. *Lynn*, 592 F.3d 572, 577 (4th Cir. 2010). To obtain a reversal under such review, "(1) there must be error; (2) the error must be plain, meaning obvious or clear under current law; and (3) the error must affect substantial rights." *United States* v. *Knight*, 606 F.3d 171, 176 (4th Cir. 2010) (quoting *United States* v. *Wallace*, 515 F.3d 327, 332 (4th Cir. 2008)). Even if the defendant meets this heavy burden, this court may reverse the error only if it "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 176-178 (quoting *United States* v. *Massenburg*, 564 F.3d 337, 343 (4th Cir. 2009)).

B. The District Court Correctly Applied Upward Adjustments In Calculating Maynard's Sentence

Maynard disputes (Br. 22-31) two upward adjustments that the district court (and the PSR) applied to his base offense level: (1) five levels under Sentencing Guidelines § 2A2.2(b)(3)(B) for inflicting serious bodily injury; and (2) two levels under Sentencing Guidelines § 3C1.1 for obstruction of justice. Maynard concedes (Br. 22) that his challenge to the latter is subject only to plain error review. For the reasons explained below, this Court should reject Maynard's arguments that the district court erred at sentencing.

1. The District Court Properly Applied An Upward Adjustment For Serious Bodily Injury Under Section 2A2.2(b)(3)

The district court properly concluded that a five-level adjustment for serious bodily injury was warranted under Sentencing Guidelines § 2A2.2(b)(3). Maynard agrees for sentencing purposes that he caused R.W. bodily injury but argues that the court should have, at most, applied a three-level adjustment under Section 2A2.2(b)(3), and not the five levels it applied for "serious bodily injury." Br. 28, 31. Maynard can show no clear error in the court's factual findings or any misapplication of the law that warrants reversal.

a. As relevant here, "[s]erious bodily injury" is defined as "injury involving extreme physical pain or the protracted impairment of a * * * bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." Sentencing Guidelines § 1B1.1, comment. (n.1(M)). The district court found that R.W. sustained serious bodily injury because he was "knocked unconscious, required emergency medical care, received seven staples to his scalp, [and] had a broken nose for which a doctor recommended a specialist." JA536-537; see also JA529-530. During his visit to the emergency room, R.W. also complained of a headache and pain to his face and scalp, which he described as burning and aching. JA200; JA582-583. Based on this evidence, the court properly inferred that R.W.'s injuries "would have caused extreme physical pain." JA528-529.

This Court has found that an inference of extreme physical pain can arise from even less severe injuries than those suffered by R.W. In *United States* v. *Saint Louis*, for example, this Court ruled that such an inference was appropriate based on injuries of a broken blood vessel in the eye and bleeding from the arm and nose, none of which required emergency medical intervention. 889 F.3d 145, 158 (4th Cir.), cert. denied, 139 S. Ct. 269, and 139 S. Ct. 270 (2018). That R.W.'s multiple injuries would have caused extreme pain is a matter of "common sense," and not clearly erroneous. *United States* v. *Flores*, 974 F.3d 763, 765-766 (6th Cir. 2020) (affirming district court's "common sense" finding of extreme pain based on the nature of the injuries). Certainly, the enhancement must apply to injuries severe enough to render R.W. unconscious and in a pool of blood, especially where he later describes being in pain at the hospital.

The district court also correctly concluded that R.W. sustained serious bodily injury because he suffered injuries "requiring medical intervention," *i.e.*, emergency transport and emergency medical treatment. JA528. R.W. received medical treatment in the emergency room, including seven staples to close his scalp, after being transported by ambulance. See JA528-529; JA536-537. Courts have interpreted injuries "requiring medical intervention" to include injuries treated with stitches or staples to close a wound. *E.g.*, *United States* v. *Adams*, 996 F.3d 514, 525 (8th Cir. 2021) (involving injury requiring two and half hours of a

hospitalization and stitches); *Flores*, 974 F.3d at 766 (involving injury requiring two-layers of sutures); *United States* v. *Clay*, 90 F. App'x 931, 933 (6th Cir. 2004) (involving injury requiring hospital-administered sutures); *United States* v. *Corbin*, 972 F.2d 271, 272 (9th Cir. 1992) (injury requiring sutures). R.W.'s broken nose also required medical intervention. Indeed, he was referred to a maxillofacial surgeon, which common sense would suggest means that "surgery" was indicated for proper healing. JA528-529; JA536-537; see also JA199; JA203.

b. Maynard does not dispute the court's factual findings regarding the extent and nature of R.W.'s injuries. Br. 28-29. Instead, he argues that the court erred by inferring that R.W.'s injuries caused "extreme physical pain" and that including the adjustment was therefore error because this was the "sole basis" for its application. Br. 29 (citation omitted). Maynard is wrong on both points.

First, the court did not apply the adjustment on the sole basis that R.W.'s injuries caused extreme physical pain. After reciting the complete definition under the Guidelines, the court stated that R.W.'s injuries "meet that standard." JA529. The court then explained that its conclusion rested upon its findings *both* that R.W.'s injuries "would have caused extreme physical pain *and* he needed to be taken to the hospital in an ambulance." JA529 (emphasis added). For this reason, the court's application of the adjustment at least rests on both "extreme physical pain" and "medical intervention," the second of which Maynard simply ignores.

Thus, even if the court erred in making its inference of extreme physical pain, and it did not, the application of the adjustment would still be appropriate because R.W.'s injuries required medical intervention.

Second, the court did not clearly err by inferring that R.W.'s injuries would have caused him extreme physical pain. Maynard contends that the court erred because there is a lack of direct evidence of Maynard's "pain level" in the record. Br. 29-30. But this Court has not required specific evidence regarding a victim's level of pain beyond evidence of the nature and extent of his injuries to affirm a finding of "extreme physical pain." See *Saint Louis*, 889 F.3d at 158 (citation omitted) (affirming finding without specific evidence regarding the victim's level of pain). Nor does the Sixth Circuit's decision in *Flores* command a different result, as Maynard suggests (Br. 30). In affirming a finding of extreme physical pain, the Sixth Circuit found, but did not require, that testimony about the victim's level of pain corroborated that district court's common-sense inference. *Flores*, 974 F.3d at 765-766.

Maynard also argues that R.W.'s medical records from his hospital visit undermine the district court's finding of extreme physical pain. Br. 30-31. Not so. It is true that R.W. indicated at the hospital that his pain did not "radiate," and he received only over-the-counter pain medications. See Br. 30 (citation omitted). But these facts are not conclusive as to whether he suffered extreme pain,

particularly here, where audio-video footage earlier showed Maynard rendering R.W. unconscious and, in Bias's mind, on the verge of death.[6] Indeed, when Maynard called Chief Clemens after the incident, he said, "I may have killed him." JA62-63. Moreover, R.W.'s medical records indicate several failed efforts to obtain relevant information from him. See, *e.g.*, JA582 (noting R.W. "respond[s] to some questions but refuses to answer" others). In fact, the records suggest that R.W. may have been asked about his level of pain but provided no answer. JA583. Simply put, R.W.'s medical records do not show that the district court erred, clearly or otherwise, while other evidence amply supports the court's finding that R.W. would have suffered extreme physical pain.

2. The District Court Did Not Plainly Err In Applying An Upward Adjustment For Obstruction Of Justice Under Section 3C1.1

The district court also correctly concluded that the upward adjustment for obstruction of justice under Sentencing Guidelines § 3C1.1 applied based on its finding that Maynard provided false testimony at trial. Because Maynard did not

[6] That the hospital treated R.W. with over-the-counter pain medications likely has more to do with the fact that he was intoxicated at the time of his treatment, rather than his level of pain, given the potential interactions between alcohol and prescription-only pain medications. See JA581 (discharge note warning patients not to drink alcohol while taking narcotic medications); see also JA82 (Clemens describing R.W. as still "really drunk" after he returned from the hospital).

object to this enhancement, this Court reviews only for plain error. Maynard cannot show that the district court committed any error, let alone plain error.

a. A two-level increase for obstruction of justice applies when "the defendant willfully obstructed or impeded" "the administration of justice with respect to * * * the prosecution * * * of the instant offense of conviction, and (2) the obstructive conduct related to * * * the defendant's offense of conviction and any relevant conduct." Sentencing Guidelines § 3C1.1. Application Note 4 to this guideline provides a non-exhaustive list of examples of covered conduct, including committing perjury. Sentencing Guidelines § 3C1.1, comment. (n.4(B)).

This Court has routinely affirmed applications of the obstruction enhancement to a defendant's false testimony at trial regarding the offense of conviction. *E.g.*, *United States* v. *Gondres-Medrano*, 3 F.4th 708, 721 (4th Cir. 2022); *United States* v. *Qazah*, 810 F.3d 879, 891 (4th Cir. 2015), cert. denied, 578 U.S. 1016 (2016); *United States* v. *Gibson*, 834 F. App'x 786, 788-789 (4th Cir. 2020). The enhancement may apply to perjury where the district court finds that the defendant "(1) gave false testimony, (2) concerning a material matter, (3) with the willful intent to deceive." *Qazah*, 810 F.3d at 891.

Maynard does not contest (see Br. 22-27) the district court's perjury finding, which the district court made based on Maynard's testimony that he "tripped and fell with [R.W.] and that the incident was accidental" (JA537; JA608). The

relevant factual findings in the PSR, which Maynard did not contest and which the court adopted, support the conclusion that Maynard's testimony was knowingly false—indeed, calculated to avoid his conviction—and related to the material issue of whether he used "unreasonable force." JA606. The weight of the evidence at trial, including the "surveillance footage," which showed Maynard carrying R.W. in a full nelson and ramming his head into the doorframe, "criticiz[ing R.W.] after he fell to the floor," and "fail[ing] to render aid * * * at any point during the incident," contradicted Maynard's testimony as patently false. JA606; see also JA537. Based on these facts, the PSR concluded that "defendant's trial testimony was a willful attempt to obstruct or impede the administration of justice with respect to the prosecution of the instant offense of conviction, and his obstructive conduct related to the relevant conduct of the offense of conviction." JA608. The district court did not err, let alone plainly err, in applying the two-level adjustment.

b. Maynard argues that the court plainly erred because "perjury" appears only in the commentary to Section 3C1.1 and improperly expands the scope of the obstruction of justice enhancement. Br. 25-26. In particular, he argues that because perjury does not satisfy the elements for the federal offense of obstruction of justice, the plain meaning of "obstruction" in Section 3C1.1 cannot include perjury. Br. 25-26. Maynard is wrong.

To be sure, this Court has recognized that "an obstruction of justice *prosecution* cannot rest solely on the allegation or proof of perjury." *United States* v. *Grubb*, 11 F.3d 426, 437 (4th Cir. 1993) (citing *In re Michael*, 326 U.S. 224 (1945) and *Ex parte Hudgings*, 249 U.S. 389 (1919)) (emphasis added). But the Supreme Court, in dicta, has stated that this same conclusion does not readily apply to the obstruction of justice enhancement under the Sentencing Guidelines. See *United States* v. *Dunnigan*, 507 U.S. 87, 93-94 (1993). In *Dunnigan*, the Court observed that *In re Michael* and *Ex parte Hudgings* interpreted the meaning of "obstruction of justice" in the context of a federal criminal contempt statute, the purpose of which was to "protect the administration of justice against immediate interruption." *Id*. at 93-94 (citations omitted). Because "the ordinary task of trial courts is to sift true from false testimony," the Court explained, simple perjury is "an expected part" of the administration of justice, and therefore, not an interruption rising to the level of obstruction on its own. *Ibid.*

By contrast, in the context of determining an "appropriate" punishment, the Court explained that "perjury is of obvious relevance" because it "reflects on a defendant's criminal history," his "willingness to accept the commands of the law and the authority of the court," and on his "character in general." *Dunnigan*, 507 U.S. at 94. For this reason, the Court concluded that the "meaning ascribed to the

phrase 'obstruction of justice'" as a criminal offense "would not be a reason for rejecting" application of the obstruction enhancement to perjury. *Ibid.*

Furthermore, Maynard's proposed reading of the obstruction of justice enhancement would otherwise conflict with this Court's precedent. Not only has this Court routinely affirmed applications of the enhancement to findings of perjury, see page 29, *supra*, it also has held that the enhancement correctly applied to conduct that fell short of fully satisfying the elements of perjury. See *United States* v. *Andrews*, 808 F.3d 964, 969-970 (4th Cir. 2015), cert. denied, 577 U.S. 1199 (2016). In *Andrews*, as here, the "extensive evidence" against the defendant supported the district court's finding that alibi testimony that two witnesses gave on the defendant's behalf at trial was "patently false." *Ibid.* The district court applied the enhancement because the defendant allowed the testimony to proceed despite knowing it was false. *Id.* at 967. Yet, the court made no finding that the defendant had procured the false testimony, which would have been required to establish the elements of perjury. *Id.* at 969. This Court affirmed, reasoning that the findings the district court had made went to "the very essence of § 3C1.1—the willful obstruction of justice." *Ibid.*

If conduct falling short of, but approaching, suborning perjury goes to the "very essence" of the obstruction of justice enhancement, then so too must Maynard's patently false testimony here. In light of both *Dunnigan* and this

Court's precedent, the district court did not err, plainly or otherwise, in applying Section 3C1.1's obstruction adjustment when calculating Maynard's recommended sentence.

CONCLUSION

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

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that this appeal can be resolved on the briefs but does not object to oral argument if it would aid this Court's review.

CERTFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 7,110 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

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