No. 03-2632

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

BRIAN BAILEY,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

MICHAEL J. SULLIVAN
United States Attorney

S. THEODORE MERRITT
Assistant United States Attorney

R. ALEXANDER ACOSTA
Assistant Attorney General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – PHB 5024
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3876

TABLE OF CONTENTS

PAGE

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES: **PAGE**

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

_____

No. 03-2632

UNITED STATES OF AMERICA,

Appellee

v.

BRIAN BAILEY,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742. Defendant was sentenced on November 17, 2003 (App. 111, 1060),[1] and final judgment was entered on November 25, 2003. (App. 111; Doc. 421). The notice of appeal was filed on

[1] This brief uses the following abbreviations: "Add. __" for the page number of the addendum to this brief; "App. __" for the page number of Appellant's appendix; "Br. __" for the page number of Bailey's opening brief; and "Doc. __" for the docket entry number of a document in the district court record.

November 20, 2003 (App. 111; Doc. 423) and is deemed timely under Fed. R. App. P. 4(b)(2).

STATEMENT OF THE ISSUES

1. Whether a conspiracy charge on which defendant was acquitted had a spillover effect on the other counts that was so prejudicial that it denied him a fair trial.

2. Whether the jury instruction on aiding and abetting was plain error.

3. Whether the evidence was sufficient to allow a reasonable jury to find that the victim suffered bodily injury.

4. Whether 18 U.S.C. 1512(b)(3) requires proof that a federal investigation was pending at the time of the defendant's conduct.

5. Whether defendant would be entitled to a new trial on the perjury count if his convictions on the other charges were overturned.

6. Whether the district court clearly erred in finding that the pre-trial detainee whom defendant attacked was a vulnerable victim for purposes of the Sentencing Guidelines.

STATEMENT OF THE CASE

This case arises out of misconduct by several officers of the Nashua Street Jail in Boston. This Court has already decided the appeal of one of the officers

involved in this misconduct. See *United States* v. *Donnelly*, 370 F.3d 87 (1st Cir. 2004).

On May 15, 2001, a superseding indictment was filed charging Defendant-Appellant Brian Bailey and six other officers of the Nashua Street Jail with various federal offenses. (App. 152-186). Count 1 of the indictment charged all seven defendants under 18 U.S.C. 241 with conspiracy to violate the right of inmates not to be deprived of liberty without due process of law. (App. 155-164). The indictment alleged that the object of the conspiracy was "to use unjustified and excessive force to punish and retaliate against pre-trial detainees perceived to be disruptive, disrespectful and/or assaultive towards officers" and that the conspiracy involved writing false reports and giving false and misleading statements to investigators and the grand jury to cover up the unjustified use of force. (App. 155-156). The overt acts listed in Count 1 included five incidents in which inmates were subjected to excessive force and officers falsified reports or took other steps to cover up the attacks. (App. 156-163). Count 1 alleged that Bailey was involved in two of those incidents: the attack on pre-trial detainee Nikolas Dais and, to a lesser extent, the incident involving detainee Leonard Gibson. (App. 160-163). Counts 2 through 15 charged individual defendants with

specific conduct in connection with one or more of these incidents. (App. 164-186).

Brian Bailey was charged in Counts 11, 12, 13, and 14 – all in connection with the Dais incident. (App. 177-184). Count 11 alleged that, while acting under color of law, Bailey "did assault, and aid and abet the assault of, pretrial detainee Nikolas Dais, by punching and slapping him, without any legitimate justification, resulting in bodily injury," thereby willfully depriving Dais of the right "not to be deprived of liberty without due process of law," in violation of 18 U.S.C. 242 and 18 U.S.C. 2. (App. 177). Count 12 charged Bailey and a co-defendant, Anthony Nuzzo, under 18 U.S.C. 371 with conspiring to violate 18 U.S.C. 1512(b)(3) by engaging in "misleading conduct towards other persons, including investigators and employees of the Suffolk County Sheriff's Department, with the intent to hinder, delay and prevent the communication to a law enforcement officer of the United States of information" related to the assault on Dais. (App. 178-179). In Count 13, Bailey and Nuzzo were charged with the substantive violation of Section 1512(b)(3) in connection with their efforts to cover up the Dais incident. (App. 181). Count 14 charged Bailey with perjury under 18 U.S.C. 1623 for lying to a federal grand jury about the Dais incident. (App. 182-184).

Three defendants – Eric Donnelly, Anthony Nuzzo, and Melvin Massucco – pleaded guilty. (App. 71-72, 77-78; Docs. 255-263, 278-280). Donnelly appealed

his sentence to this Court, which affirmed. *Donnelly*, 370 F.3d at 89. The trial of a fourth defendant, Randall Sutherland, was severed. (App. 73; Doc. 270; App. 106).

The three remaining defendants – Bailey, William Benson, and Thomas Bethune – were tried together in March 2003. The jury convicted Bailey on Counts 11, 12, 13, and 14, but acquitted him on Count 1. (App. 96; Add. 1-2; Doc. 322). Benson and Bethune were acquitted on all counts. (*Ibid.*). The district court sentenced Bailey to 41 months in prison, followed by two years of supervised release. (App. 1140-1141).

STATEMENT OF FACTS

1. The Nashua Street Jail is operated by the Suffolk County Sheriff's Department to house pre-trial detainees. (App. 209-210). The Department has a use-of-force policy that was in effect at the times relevant to this case. (App. 215, 1094-1102). The policy provides that officers may use force in the performance of their duties only as "necessary, reasonable and suitable to the confrontation." (App. 1095). It also states that "[u]nder no circumstances shall an officer use or permit the use of excessive force," which is defined as "[f]orce which exceeds reasonable force." (App. 1095). The policy specifically prohibits "the use of force as a method of punishment or revenge." (App. 1095). Officers at the jail are

made aware of this policy as part of their training in the use of force. (App. 878; Add. 4-6, 8-9; Doc. 376 at 4-5). Former officers of the jail, including one of Bailey's co-defendants, testified at trial that they were aware, as a result of this training, that excessive use of force violated federal law. (Add. 5-6, 9; Doc. 376 at 5).

The Department's policy further provides that "[a]ll use of force incidents shall be subject to investigation." (App. 1102). Officers are required to notify their supervisors and to prepare a written report whenever force is used. (App. 1095, 1101-1102).

Officers' reports regarding use of force are forwarded to the Sheriff's Investigation Division (SID), which investigates matters relating to safety and security in the jail. (App. 1102, 1167-1169). SID initiates investigations whenever such reports involve allegations of officer misconduct, including use of excessive force. (App. 1168-1169). Mark Kulik, a former SID investigator, testified at trial that if SID found that an officer intentionally used excessive force against a detainee, that information would be turned over to prosecutors and the matter "could go to a federal court." (App. 1217; App. 1173-1174, 1202). Officers testified at trial they were aware that the results of an SID investigation

could lead to the criminal prosecution of guards who used excessive force against inmates. (App. 219, 707-708).

2. Brian Bailey began working as a guard at the Nashua Street Jail in July 1998 (App. 759-760). His duties included the care, custody, and control of inmates. (App. 761-763). At the beginning of his employment, Bailey received 10 days of training on the jail's regulations, including instruction on the use of force. (App. 211-212, 759-760). He later attended the Department's training academy and completed that training in June 1999. (App. 760).

At trial, Bailey testified that he had received a copy of the Department's use-of-force policy and that he knew it permitted only the use of "force which is necessary in a given situation," and that the use of "anything more than necessary force was excessive force." (App. 878). Bailey also admitted that he understood that use of excessive force against an inmate was a crime and a violation of constitutional rights. (App. 878-881).

3. On September 24, 1999, Bailey was assigned to work as an officer in the jail's psychiatric unit. (App. 467-468, 471, 783-784). Officer Michael Ross also was assigned to that unit. (App. 466-468, 711).

At that time, Nikolas Dais was a pre-trial detainee housed in the psychiatric unit. He was on suicide watch. (App. 468, 617-618, 784, 885, 911). In

accordance with jail policy, Dais was stripped naked and had no clothing, blankets, or sheets that he might use to kill himself. (App. 468, 618, 621). At most, he was permitted to wear only a paper "johnny," which is similar to a paper hospital gown. (App. 618, 911). Dais was locked in a cell about 5 feet wide by 7 feet in length. (App. 619). Unlike other inmates housed in the psychiatric unit, Dais was not allowed to leave his cell, even to eat dinner. (App. 761, 786-787, 858-859, 884-885; see App. 416-417, 422, 732). Instead, Dais's meals were given to him through a slot in his cell door. (App. 627, 786-787).

The unit was chilly that day, and Dais asked for a blanket. (App. 468-469, 620-621). When Officer Ross told Dais that he could not have a blanket, Dais started screaming, yelling, swearing, and punching and kicking his cell door. (App. 469-470, 620-622, 700, 713, 786, 788-789, 808-809). Dais continued this commotion for about the next three hours. (App. 470, 621, 700, 786).

According to Officer Ross's testimony, at about 4 p.m. that day, Bailey told Ross that "he had enough with Inmate Dais and that he was going to bang him out." (App. 471). Ross told Bailey to wait – that "it wasn't the time to do it yet." (App. 471).

Bailey left the unit to go to dinner at about 5:30 p.m. (App. 472, 622). While at dinner, he saw a long-time friend and fellow officer, Paul Davis, who was

a member of the Sheriff's Emergency Response Team (SERT). (App. 257-258, 320, 342, 765). The function of the SERT team was to respond to emergencies throughout the jail, such as fights between inmates, assaults on officers, and medical emergencies. (App. 219-220). The SERT team could be summoned to a unit through use of a "man-down" alarm. (App. 220). Officer Davis testified at trial that, during the dinner break, Bailey told him that he was having a problem with an inmate and that Davis might hear his alarm go off later. (App. 258, 342).

Officer Ross had also "had enough of" Dais. (App. 472, 623). Ross testified at trial that he and Bailey planned "to go in [Dais's] room and slap him around." (App. 472). Before they did so, they fabricated a story to cover up their actions. (App. 472-473, 627-628). Initially, they planned to report that Dais had made a mess in his cell, that they entered the cell to clean it up, and that Dais then attacked them. (App. 473, 627). Both Ross and Bailey acknowledged at trial that entering Dais's cell under these circumstances was forbidden by jail regulations, and that Dais, in fact, did nothing to justify the use of any force against him. (App. 472-473, 475, 477, 479, 791, 807, 816).

At 6:30 p.m., Officer Brian Murphy came to relieve Ross so that he could go to dinner. (App. 628, 712). Ross notified Murphy of his and Bailey's plan to

go into the cell. (App. 473-474, 629, 714). Murphy told Ross that he wanted no part of it, and that they had "better write a good report." (App. 473-474, 715).

Ross and Bailey then put on gloves and entered Dais's cell. (App. 474, 628-630). Ross approached Dais, yelled at him to keep his mouth shut, and then started slapping Dais's face. (App. 474, 630, 633-635, 681, 798). Ross continued slapping Dais and then hit him several times with "knee strikes" (App. 474, 633-638, 798-799), which involve "driv[ing] your knee into his thigh giving him a charley horse." (App. 636). At the same time, Bailey punched Dais several times in the ribs and shoulder with closed fists. (App. 474-475, 638). As he was being struck, Dais started crying and complained that his back was hurting. (App. 475, 638). At trial, Ross acknowledged that the assault on Dais was an excessive use of force. (App. 520-522). Dais did not attack the officers, make any threatening gestures, raise his fists, or otherwise suggest that he might assault Ross or Bailey. (App. 475, 486-487). Nor did Dais engage in any other behavior to justify the force used against him. (App. 473, 477). Dais did not fight back during the assault by the officers, but resisted being handcuffed. (App. 474). The SERT team, including Officer Davis and Deputy Anthony Nuzzo, arrived on the scene and placed Dais in a restraint chair inside his cell. (App. 259-260, 351, 475-476, 639, 718-720, 801, 803). While in the chair, Dais was crying and complaining

that his back hurt. (App. 478). Later that night, Bailey told Officer Davis that he and Ross had gone into Dais's cell and "beat the fuck out of him." (App. 263).

At trial, Bailey denied striking Dais. (App. 799-803, 827-829). But he acknowledged that he accompanied Ross into Dais's cell and that Ross had struck Dais. (App. 791-792, 798-799, 829, 894). Bailey described Ross as "out of control." (App. 805). Bailey also conceded that the attack on Dais was "an unjustified use of excessive force." (App. 841).

4. Bailey and Ross submitted false reports regarding this incident. (App. 478-480, 484-487). Shortly after the attack on Dais, Bailey consulted Deputy Nuzzo, who told Bailey that the story that he and Ross went into Dais's cell to clean up trash was not good enough. (App. 478-480). Nuzzo advised Bailey that he should report that he and Ross went into the cell because of a medical emergency, and that Dais jumped up and assaulted them. (App. 261, 478-479, 806-807, 930-931). After consulting each other, Bailey and Ross agreed to, and ultimately did, include this false version of the incident in their reports. (App. 275-276, 478-487, 752, 816, 909, 911, 1329-1330). At trial, Bailey admitted that he lied in his reports about the Dais incident "[t]o cover-up for Officer Ross and myself." (App. 807, 810, 814-816, 834, 841, 852, 903-904, 913).

Shortly after their assault on Dais, Bailey and Ross became aware that SID was conducting an investigation of the incident. They consulted each other and agreed that they would adhere to the false story contained in their reports. (App. 487-488). As agreed, Bailey and Ross lied during their interviews with SID. (App. 488, 490-491).

Officer Murphy acknowledged at trial that, after consulting with Bailey, he also filed a false report and lied to SID to cover up the Dais incident. (App. 720-727, 736-737, 739; see also App. 910). Murphy testified that he was aware that the results of an SID investigation could lead to prosecution of an officer at either the state or federal level. (App. 707-708).

The SID investigation of the Dais incident was conducted by Mark Kulik. (App. 1176-1178; App. 490-491,720-722, 737). Based on his interviews with the officers, a review of their reports, and the medical information, Kulik determined that the officers had done nothing wrong. (App. 1177-1178). Kulik's report, which included the officers' false reports, was obtained by the Federal Bureau of Investigation (FBI) in connection with its investigation of the Nashua Street Jail. (App. 1225-1229; App. 1178, 1329-1331).

5. On October 17, 2000, Bailey testified before a federal grand jury about the Dais incident. (App. 837-838, 1332-1337). At the outset of his grand jury

appearance, Bailey was advised by the prosecutor that he could be prosecuted for perjury if he knowingly made a false statement to the grand jury. (App. 916, 918-919). Bailey understood that he was under oath during his grand jury testimony. (App. 917-918). Bailey then falsely testified before the grand jury that he entered Dais's cell because he thought Dais was having a seizure, that Dais jumped up and attacked him, and that no one ever struck Dais during the incident. (App. 916-917, 1332-1337).

At trial, Bailey admitted that he had lied to the federal grand jury about the Dais incident to protect himself and Officer Ross and acknowledged that those falsehoods did not occur by accident or mistake. (App. 917-920, 922; App. 823-829). In Bailey's words, "I perjured myself." (App. 932).

6. With regard to the conspiracy alleged in Count 1, the prosecution presented evidence at trial that two lieutenants at the jail – Eric Donnelly and Randall Sutherland – permitted, condoned, and sometimes instructed officers under their supervision to unjustifiably punch, kick, and otherwise assault pre-trial detainees. (App. 221-224, 230, 254-256, 323, 339-340, 362-365, 406-407, 425-427, 455, 458-459, 463, 548, 585). The government's evidence included the trial testimony of officers who admitted engaging in such misconduct. Those officers testified that there was an unwritten understanding among certain supervisors and

guards that "excessive force" was to be used as punishment for detainees who were disruptive or disrespectful. (App. 221-224, 235, 322-323, 340, 366, 401-404, 426-427, 451-452, 455, 463, 504, 554, 585). The government also introduced evidence that as part of this unwritten agreement, officers at the jail (including Bailey) agreed to write false reports, withhold truthful information, and give false and misleading statements to SID and the grand jury to cover up the truth about the co-conspirator's unlawful assaults on pre-trial detainees. (App. 224-226, 238-247, 256-257, 261, 289-290, 292-294, 322-323, 335-336, 339, 365-368, 407-408, 443-444, 459, 464-465, 478-488, 490-491, 530-532, 537-538, 551, 584-585, 589, 722-727, 739).

SUMMARY OF ARGUMENT

This Court should affirm Bailey's conviction and sentence.

1. The district court did not abuse its discretion in denying Bailey's motion for a new trial based on the alleged spillover effect of the conspiracy charge on which he was acquitted. This Court has rejected spillover arguments similar to Bailey's, and it is well-settled that even though some spillover may occur from one count to another, that potential is present whenever multiple counts or defendants are joined in the same trial and is not, standing alone, unduly prejudicial. In this case, there was little risk of prejudicial spillover. The evidence against Bailey on

the other counts was quite strong, the judge instructed the jury that it must consider the conspiracy count separately from the others, and the jury's verdict – in which Bailey's two co-defendants were acquitted on all charges – strongly suggests that jurors followed the instructions.

2. The jury instruction on aiding and abetting was not plain error. Bailey challenges a small portion of the instruction in which the district court defined willful participation to include "the specific intent to do something that the law requires to be done." That instruction is nearly identical to language that this Court and other circuits have approved and tracks verbatim a commonly-used standard instruction on aiding and abetting. When read in its entirety, the aiding and abetting instruction would not suggest to the jury that a mere "failure to act without more" is sufficient to convict the defendant under 18 U.S.C. 242. Even if the evidence in this case were insufficient to justify the aiding and abetting instruction given by the district court, Bailey's conviction under Section 242 must be upheld because ample evidence supported his conviction on the alternative theory that he personally attacked the pre-trial detainee.

3. The evidence was sufficient to allow a rational jury to find, beyond a reasonable doubt, that the victim suffered bodily injury. After the attack, Bailey admitted to another officer that he and Ross "beat the fuck out of" the victim.

Bailey punched the victim's ribs and shoulder several times with closed fists, while Officer Ross repeatedly drove his knee into the victim's thigh. During the attack, the victim started crying and said that his back hurt, and he continued crying and complaining about back pain even after the attack ended. It was reasonable for the jury to infer from this evidence that the attack on the inmate caused bodily injury.

4. The obstruction of justice statute under which Bailey was convicted – 18 U.S.C. 1512(b)(3) – does not require proof that a federal investigation was pending at the time of the defendant's conduct. Several courts of appeals have so held, and this Court's decision in *United States* v. *Baldyga*, 233 F.3d 674 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001), supports the same conclusion. Section 1512(b)(3) does not mention an "investigation." Rather, it focuses on the intent to hinder, delay, or prevent the communication of information about a possible federal offense to a federal law enforcement officer. A person can intend to impede such communication even if a federal investigation is neither pending nor imminent. Indeed, a defendant may interfere with such communication because he wants to ensure that no investigation will ever be launched.

5. Contrary to Bailey's argument, he would not be entitled to a new trial on the perjury charge even if his convictions on the other counts were overturned.

His argument about prejudicial spillover is particularly meritless with regard to the perjury count because Bailey admitted at trial that he had lied to the federal grand jury. In Bailey's own words, "I perjured myself."

6. Finally, the district court did not clearly err in finding that the pre-trial detainee whom Bailey and Officer Ross attacked was a "vulnerable victim" for purposes of the Sentencing Guidelines. The detainee was on suicide watch, was emotionally agitated, was kept virtually naked despite the chilly temperature, was confined to his cell and not allowed out even to eat, and was beaten up in the confines of a small cell with no opportunity to flee or seek assistance from others. In combination, these facts amply support the district court's finding that the victim was vulnerable.

ARGUMENT

I

THE ALLEGED SPILLOVER EFFECT OF THE CONSPIRACY CHARGE ON WHICH BAILEY WAS ACQUITTED DID NOT DEPRIVE HIM OF A FAIR TRIAL ON THE OTHER COUNTS

Bailey claims (Br. 15-20, 42) that the evidence relating to the conspiracy charge in Count 1, on which he was acquitted, had an impermissible spillover effect that unfairly prejudiced the jury against him on the other counts. He contends that this alleged prejudice entitles him to a new trial on Counts 11-14.

Bailey made the same argument in his unsuccessful motion for a new trial. (App. 1144). The district court's denial of a motion for a new trial is reviewed only for "manifest abuse of discretion." *United States* v. *Mooney*, 315 F.3d 54, 61 (1st Cir. 2002). No such abuse of discretion occurred here.

This Court has rejected "spillover" arguments strikingly similar to Bailey's. In *United States* v. *Freeman*, 208 F.3d 332 (1st Cir. 2000), the Court concluded that a conspiracy charge, on which the defendant had been acquitted, did not impermissibly taint the defendant's trial on the other counts. The defendant complained that the government used the conspiracy charge to characterize him as "a drunk, a violent man, a shakedown artist, a philanderer, an adulterer, and a rouge [*sic*] cop." *Id.* at 344. Although acknowledging that this evidence might have some spillover effect, the Court explained that "[t]his potential exists whenever multiple counts or defendants are joined in a single trial," and emphasized that the "possibility that a jury may think worse of the defendant because multiple related offenses are tried together is not, standing alone, grounds for a mistrial." *Id.* at 345. This Court rejected a similar spillover argument in *United States* v. *Rehal*, 940 F.2d 1, 4 (1st Cir. 1991). Bailey's argument fares no better.

As in *Freeman* and *Rehal*, the United States was justified in bringing the conspiracy charge in this case, even though the jury ultimately rejected it. Three of Bailey's alleged co-conspirators pleaded guilty to the conspiracy alleged in Count 1, and the government presented abundant evidence at trial that a conspiracy existed and that Bailey was linked to it. See 13-14, *supra*. This evidence certainly justified submitting the conspiracy count to the jury.

At any rate, the risk of spillover prejudice was slight. The evidence against Bailey on Counts 11-14 was quite strong. Bailey admitted at trial that he had lied to the grand jury and filed false reports to protect himself and Officer Ross, and Ross testified that he and Bailey had attacked Dais without justification and had plotted to cover up the offense by lying to investigators. In addition, the district court minimized the risk of prejudice by instructing the jury:

> You must give separate consideration to each separate charge against a defendant. That is, you must consider each count separately, weighing separately the evidence as it bears upon the charge in that count. Unless I tell you otherwise in these instructions, any finding as to one count is not a factor as to any other count.
>
> * * *
>
> The conspiracy alleged in count one is an offense separate from all the other offenses charged in the indictment and must be considered by you separately from the other offenses that may be charged against a defendant.

(App. 1115-1116, 1122). Jurors are presumed to follow such instructions, *Freeman*, 208 F.3d at 345, and the verdict in this case suggests that they did so. Although the two co-defendants who were tried with Bailey – Bethune and Benson – also were charged with conspiracy under Count 1 (App. 155), both were acquitted on all counts, including those alleging violations of 18 U.S.C. 242. A verdict that distinguishes between different charges and different defendants is strong evidence that the jury "properly compartmentalized the evidence as to the various counts and separately considered defendant's guilt as to each and every one." *Rehal*, 940 F.2d at 4. Under these circumstances, the district court did not abuse its broad discretion in denying Bailey's motion for a new trial.

II

THE JURY INSTRUCTION ON AIDING AND ABETTING WAS NOT PLAIN ERROR

On appeal, Bailey argues (Br. 16, 20-29) that the aiding and abetting instruction suggested to the jury that it could convict him under 18 U.S.C. 242 simply for failing to stop Officer Michael Ross from attacking detainee Nikolas Dais. That is not a fair reading of the instruction, when considered as a whole. (See App. 1125-1127). At any rate, Bailey failed to preserve this objection below, and thus this Court should review the instruction only for plain error. The district

court did not err, much less commit plain error, in instructing the jury on aiding and abetting.

A. The Standard Of Review Is Plain Error

After giving the jury charge at the end of trial, the district court offered counsel an opportunity to object to the instructions before the jury retired to deliberate. At that point, the following exchange occurred between Bailey's attorney and the district judge:

> MR. SLAVITT [Bailey's counsel]: The other one I would like to object to is I don't believe in this case that the objection about standing by when the law allows you to use – to act is appropriate in the context of Mr. Bailey under aiding and abetting. We did discuss that questioned [*sic*], I believe.
>
> THE COURT: Yes.
>
> MR. SLAVITT: So I'll incorporate that discussion, just press the objection.[2]

(Add. 15; Doc. 440 at 57). Bailey's counsel said nothing else at that time about aiding and abetting.

---

[2] It is unclear what previous discussion Bailey's attorney was referencing. He did not object at the charge conference to the proposed instructions on aiding and abetting. (See App. 1249-1319). Nor did Bailey's counsel submit any instructions on aiding and abetting. Although he objected to the prosecutor's explanation of aiding and abetting during closing arguments, he did not object at that point to the instruction itself. (App. 964-965).

These cryptic comments are insufficient to preserve the objection under Rule 30(d) of the Federal Rules of Criminal Procedure. To satisfy that rule, a party must object after the judge gives the charge but before the jury retires, and must state the objection and the grounds for it in *specific* terms. *United States* v. *Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996). These requirements apply even if, prior to the jury charge, the defendant had specifically objected to the same instruction. *United States* v. *Callipari*, 368 F.3d 22, 41 (1st Cir. 2004); *Arthurs*, 73 F.3d at 448. Rule 30 is not satisfied "by a post-charge attempt to incorporate by reference earlier arguments." *Ibid.* Not only were the post-charge comments of Bailey's attorney impermissibly vague, but they also appeared to object to language that did not appear in the instruction. Bailey's counsel seemed to be saying that the instruction should not refer to "standing by when the law *allows* you * * * to act." (Add. 15; Doc. 440 at 57 (emphasis added)). The instruction actually referred to a failure "to do something the law *requires* to be done" (App. 1126 (emphasis added)) – a very different concept.

Because the objection was not properly preserved, the jury instruction can be reviewed only for plain error. See *Arthurs*, 73 F.3d at 448. Thus, Bailey "bears the burden of showing that the district court committed '(1) an error, (2) that is plain, and (3) that affects substantial rights.'" *United States* v. *Donnelly*,

370 F.3d 87, 92 (1st Cir. 2004). Even if Bailey establishes plain error, he then "must demonstrate that the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (internal quotation marks omitted). Bailey has not made any of these showings.

B. The Aiding And Abetting Instruction Correctly Stated The Law

On appeal, Bailey challenges one sentence out of a seven-paragraph instruction (App. 1125-1127) on aiding and abetting:

> Participation in a crime is willful if action is taken voluntarily and intentionally, or, in the case of a failure to act, with the specific intent to fail to do something that the law requires to be done.

(App. 1126). This language, however, is nearly identical to the definition of willful participation contained in a jury instruction that this Court upheld in the context of a conspiracy charge. See *United States* v. *Monteiro*, 871 F.2d 204, 208 (1st Cir.) ("To act or participate willfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with the specific intent to *fail to do something the law requires to be done*") (emphasis added), cert. denied, 493 U.S. 833 (1989).[3] Moreover, the passage to which Bailey objects appears verbatim in a widely used standard instruction on aiding and

---

[3] *Monteiro* is relevant because this Court has relied on aiding and abetting caselaw in construing the requirements for a conspiracy. See *United States* v. *Rivera-Rosario*, 300 F.3d 1, 12 & n.12 (1st Cir. 2002).

abetting, see 1 L. Sand, *et al.*, *Modern Federal Jury Instructions*, Instr. 11-2 (2003), and closely tracks the language approved by other circuits in explaining aiding and abetting. See *United States* v. *Brown*, 151 F.3d 476, 486 (6th Cir.), cert. denied, 525 U.S. 1026 (1998); *United States* v. *McKnight*, 799 F.2d 443, 446 (8th Cir. 1986); *United States* v. *Wright*, 742 F.2d 1215, 1221-1222 & n.2 (9th Cir. 1984), overruled on other grounds, *United States* v. *Powell*, 469 U.S. 57 (1984); *United States* v. *Sanfilippo*, 581 F.2d 1152, 1154 & n.2 (5th Cir. 1978).

In addition, this Court has recognized that, for purposes of aiding and abetting, willful participation can take the form of either acts or omissions. In *United States* v. *Southard*, 700 F.2d 1 (1st Cir.), cert. denied, 464 U.S. 823 (1983), the Court upheld a jury instruction on aiding and abetting that included language describing willful participation as "willfully seek[ing] by some act * * * or some *omission* * * * to make the criminal venture succeed." *Id.* at 15 & n.13 (emphasis added).

As Bailey points out (Br. 22), this Court has sometimes referred to "affirmative participation" in describing the elements of aiding and abetting. See, *e.g.*, *United States* v. *Indelicato*, 611 F.2d 376, 385 (1st Cir. 1979). But "affirmative participation" is just another way of explaining that the defendant must "associate[] himself in some way with the crime," "have some interest in the

criminal venture," and seek "to help make the crime succeed." (App. 1126). The district court not only made each of these points in its jury instructions, but it also provided added protection for Bailey by emphasizing to the jury that

> mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere acquiescence by a defendant in the criminal conduct of others is not sufficient to establish aiding and abetting.

(App. 1126).

The district court did *not* instruct the jury that Bailey had a legal duty to intervene to stop another officer from using excessive force against a pre-trial detainee. Although such an instruction would have been permissible,[4] the United States neither requested such an instruction nor pursued that theory at trial. The government's primary theory was that Bailey *personally* punched Dais. (App. 950-951, 953, 958, 1000-1001). Although the United States argued in the alternative that Bailey could be criminally liable even if he did not strike Dais, the example the prosecutor gave was "[g]oing into a locked cell for no legitimate reason, knowing that force was going to be used and then assisting the other

---

[4] "It is settled in this Circuit that an officer may be liable for failing to intervene in appropriate circumstances to protect a detainee from the excessive use of force by a fellow officer." *Wilson* v. *Town of Mendon*, 294 F.3d 1, 14 (1st Cir. 2002) (civil action under 42 U.S.C. 1983); see *United States* v. *Reese*, 2 F.3d 870, 887-890 (9th Cir. 1993) (recognizing this principle in prosecution under 18 U.S.C. 242), cert. denied, 510 U.S. 1094 (1994).

attacker, whether holding him down or really just emboldening them by preventing the inmate from defending himself." (App. 962). That scenario hardly describes a "failure to act without more." (Br. 2, 16).[5]

C. Bailey's Conviction Under Section 242 Must Be Sustained Because The Evidence Was Sufficient To Find Him Guilty As A Principal

Bailey argues (Br. 26-29) that even if the court's aiding and abetting instruction were appropriate in some cases, the evidence was insufficient to justify the instruction in this case. That argument is foreclosed by *United States* v. *Collazo-Aponte*, 216 F.3d 163 (1st Cir. 2000), vacated on other grounds, 532 U.S. 1036 (2001). In that case, the trial judge had instructed the jury that it could consider one of the charges under two alternative theories: aiding and abetting and co-conspirator liability. *Id.* at 197. The defendant argued that the evidence was insufficient to support the aiding and abetting theory and thus his conviction must be reversed. This Court rejected that argument, explaining that "it is settled that where there is insufficient evidence with respect to one theory of liability, the jury's verdict is presumed to rest on the theory that the evidence supported." *Ibid.*,

---

[5] Although the prosecutor noted during closing argument that Bailey was responsible for the care of inmates, that comment was simply a rebuttal to the defense theme that Bailey was just doing his job when he entered Dais's cell with Officer Ross. See App. 952 ("[H]is job is the care and the custody of inmates. His job is not to aid and abet the use of excessive force * * *.").

citing *Griffin* v. *United States*, 502 U.S. 46, 59 (1991). See also *United States* v. *Dreamer*, 88 F.3d 655, 658 (8th Cir. 1996) (even if evidence were insufficient to support the aiding and abetting instruction, conviction was upheld because the evidence was sufficient to find defendant guilty on another theory).

In the present case, the district court instructed the jury that it could convict Bailey under Section 242 under either of two alternative theories: (1) that he personally engaged in the excessive use of force against Dais or (2) that he aided and abetted another person who used such force against Dais. (App. 1123, 1125). Bailey does not dispute that the evidence is sufficient to support his conviction under Section 242 for personally using excessive force against Dais. (See Br. 28 n.5). The United States produced abundant evidence that Bailey personally punched Dais several times during the assault and that it was Bailey who initially proposed attacking Dais. See pp. 8-11, *supra*. Therefore, even if the evidence in this case were insufficient to justify the aiding and abetting instruction given by the district court, Bailey's conviction under Section 242 must be upheld because ample evidence supported his conviction on the alternative theory that he personally attacked Dais.

III

THE EVIDENCE WAS SUFFICIENT TO PROVE THAT NIKOLAS DAIS SUFFERED BODILY INJURY

A felony conviction under 18 U.S.C. 242 requires proof that the victim suffered bodily injury. The district court instructed the jury on the bodily injury requirement (App. 1123, 1125), and Bailey did not object to those instructions either during the charge conference (App. 1249-1319) or after the jury charge. (Add. 14-17; Doc. 440 at 56-59).[6]

On appeal, Bailey argues (Br. 29-33) that the evidence was insufficient to prove that Nikolas Dais suffered bodily injury. A criminal defendant who challenges the sufficiency of the evidence "bear[s] a heavy burden" on appeal. *United States* v. *Woodward*, 149 F.3d 46, 56 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999). In considering such a challenge, this Court reviews "all the evidence, direct and circumstantial, in the light most favorable to the prosecution, drawing all reasonable inferences consistent with the verdict, and avoiding

---

[6] He thus failed to preserve an objection to the instructions under Fed. R. Crim. P. 30. See pp. 20-23, *supra*. In his summary of argument, Bailey contends, without explanation, that the district court "did not accurately instruct" the jury on bodily injury (Br. 16). Because Bailey has not developed that argument in his brief, he has waived it on appeal. See *United States* v. *Sanchez*, 354 F.3d 70, 80 n.4 (1st Cir.), cert. denied, 124 S. Ct. 2189 (2004). At any rate, the jury instruction on bodily injury was correct. See *United States* v. *Myers*, 972 F.2d 1566, 1572-1573 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993).

credibility judgments, to determine whether a rational jury could have found the defendant guilty beyond a reasonable doubt." *United States* v. *Baltas*, 236 F.3d 27, 35 (1st Cir.), cert. denied, 532 U.S. 1030 (2001). Bailey cannot prevail under this highly deferential standard of review.

The evidence in this case was sufficient to allow the jury to infer that Dais suffered bodily injury. In describing the attack to another officer, Bailey said that he and Ross had gone into Dais's cell and "beat the fuck out of him." (App. 263). Bailey punched Dais several times in the ribs and shoulder with closed fists, while Ross repeatedly used "knee strikes" against Dais – a maneuver that Ross described as "driv[ing] your knee into his thigh giving him a charley horse." (App. 636). Indeed, Bailey testified that Ross "got out of control." (App. 805). During the attack, Dais started crying and complained that his back was hurting, and he continued crying and complaining about back pain after the assault. (App. 475, 478, 638).

There is every reason to believe that the jury took special care in weighing this evidence. The jury instructions focused attention on the importance of deciding whether or not Dais suffered bodily injury. The judge gave a lesser-included-offense instruction that allowed a misdemeanor conviction under 18 U.S.C. 242 if the jury found that the excessive force did not inflict bodily injury on

Dais. (Add. 11-12; Doc. 440 at 38-39). That option was also listed on the verdict form. (Add. 2; Doc. 322 at 2). With their attention thus focused squarely on the issue, the jurors found that Dais did, in fact, suffer bodily injury. The evidence in this case, when viewed in the light most favorable to the prosecution, amply supports the jury's finding.

IV

18 U.S.C. 1512(b)(3) DOES NOT REQUIRE THAT A FEDERAL INVESTIGATION BE PENDING AT THE TIME OF THE DEFENDANT'S MISLEADING CONDUCT

Bailey was convicted of violating, and conspiring to violate, 18 U.S.C. 1512(b)(3), which provides that:

> Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to –
>
> * * *
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. 1512(b)(3). Bailey argues (Br. 17, 33-41) that this provision requires that a federal investigation be pending at the time the defendant engages in the misleading conduct. According to Bailey, "[w]hile a defendant need not know of the existence of such an investigation, it must, in fact, exist contemporaneously with the actions complained of." (Br. 17).

Bailey's proposed interpretation cannot be squared with the language of Section 1512(b)(3), which does not even mention an "investigation." A person can intend to hinder, delay, or prevent the communication of information about a possible federal offense to a federal law enforcement officer, even if a federal investigation is neither pending nor imminent. Indeed, a defendant may interfere with such communication because he wants to ensure that no investigation will ever be launched.

Several courts of appeals have thus properly concluded that proof of an ongoing federal investigation is unnecessary under Section 1512(b)(3) or the analogous language of 18 U.S.C. 1512(a)(1)(C).[7] See *United States* v. *Veal*, 153 F.3d 1233, 1250 (11th Cir. 1998) ("By its wording, § 1512(b)(3) does not depend

---

[7] That provision prohibits killing or attempting to kill another person with intent to "prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings." 18 U.S.C. 1512(a)(1)(C).

on the existence or imminency of a federal case or investigation but rather on the *possible* existence of a federal crime and a defendant's intention to thwart an inquiry into that crime."), cert. denied, 526 U.S. 1147 (1999); *United States* v. *Romero*, 54 F.3d 56, 62 (2d Cir. 1995) (same conclusion under § 1512(a)(1)(C)), cert. denied, 517 U.S. 1149 (1996); accord *United States* v. *Perry*, 335 F.3d 316, 322 n.9 (4th Cir. 2003), cert. denied, 124 S. Ct. 1408 (2004); *United States* v. *Stansfield*, 171 F.3d 806, 816-817 & n.8 (3d Cir. 1999); *United States* v. *Causey*, 185 F.3d 407, 421-422 (5th Cir. 1999), cert. denied, 530 U.S. 1277 (2000).[8]

---

[8] Although Bailey cites several cases to try to support his argument (Br. 35-41), not one of those decisions holds that a pending federal investigation is a prerequisite for a violation of Section 1512(b)(3). Indeed, the Fifth Circuit's decision in *Causey*, on which Bailey relies (Br. 36-37), actually refutes his contention that a federal investigation must be pending at the time of the defendant's conduct. The defendants in *Causey* had argued that they could not be convicted under 18 U.S.C. 1512(a)(1)(C) because the victim's "internal complaint to local police had not been reported to federal law enforcement and was not yet a ripe civil rights complaint." *Causey*, 185 F.3d at 421. The Fifth Circuit rejected that rationale, explaining that "this lack of 'ripeness' is not controlling," because "'[a]n official proceeding need not be pending or about to be instituted at the time of the offense.'" *Id.* at 422.

Bailey's reliance (Br. 38-39) on this Court's decision in *United States* v. *Frankhauser*, 80 F.3d 641 (1st Cir. 1996), is also puzzling. That case involved a different provision of the statute – 18 U.S.C. 1512(b)(2)(B), which prohibits corruptly persuading another person to destroy or conceal objects with intent to impair their availability for use in an "official proceeding." If anything, *Frankhauser* undermines Bailey's argument because it makes clear that "an official proceeding need not be pending or about to be instituted at the time of the corrupt

(continued...)

This Court's decision in *United States* v. *Baldyga*, 233 F.3d 674 (1st Cir. 2000), cert. denied, 534 U.S. 871 (2001), also supports the conclusion that a federal investigation need not be pending or imminent at the time of the alleged obstruction. In that case, the defendant was prosecuted under 18 U.S.C. 1512(b)(3) after he pulled a gun on a police informant and then disabled a listening device the informant was wearing. The defendant argued that his conviction could not be sustained because, at the time of the incident, there were no federal authorities monitoring the listening device. This Court disagreed, concluding that "§ 1512 does not require that the witness's communication with federal officers be as imminent as [defendant] suggests." *Baldyga*, 233 F.3d at 680. Instead, the Court held that the proper focus was whether such communication might "*eventually* occur with federal officials." *Ibid.* (emphasis added). In reaching that conclusion, this Court relied heavily on the Eleventh Circuit's decision in *Veal*, which held that a federal investigation need not be pending or imminent at the time of the defendant's conduct. See 153 F.3d at 1250.

Bailey argues, however, that *Baldyga* supports his position because it contains this sentence: "'All that § 1512(b)(3) requires is that the government

---

[8](...continued)
persuasion." 80 F.3d at 651.

establish that the defendants had the intent to influence an investigation that happened to be federal.'" 233 F.3d at 681, quoting *United States* v. *Applewhaite*, 195 F.3d 679, 687 (3d Cir. 1999). But Bailey has taken that sentence out of context. In the portion of the *Baldyga* opinion in which that sentence appears, this Court was not addressing whether a federal investigation had to be in existence but, instead, was explaining that the defendant's state of mind need not "include an awareness of the possible involvement of federal officials." 233 F.3d at 680.

Bailey also suggests (Br. 38) that his reading of the statute is bolstered by 18 U.S.C. 1512(f)(1),[9] which states that for purposes of Section 1512, "an official proceeding need not be pending or about to be instituted at the time of the offense." Bailey appears to argue (Br. 38) that the absence of the word "investigation" in this provision indicates that Congress intended to require that a federal investigation be ongoing at the time of the defendant's misleading conduct. The key flaw in Bailey's logic is that Section 1512(b)(3) does not refer to an "investigation"; indeed, the word "investigation" does not appear anywhere in Section 1512. Some portions of Section 1512 do refer, however, to "official

[9] Bailey cites 18 U.S.C. 1512(e)(1), but the provision to which he refers is now codified at 18 U.S.C. 1512(f)(1).

proceeding[s]," thus explaining why Congress mentioned that term but not the word "investigation" in 18 U.S.C. 1512(f)(1).

Finally, Bailey argues (Br. 34-35) that he did not violate Section 1512 because the officials in the Sheriff's Investigation Division (SID), to whom Bailey submitted false information, are not "law enforcement officers" under 18 U.S.C. 1515. That section provides that, for purposes of Section 1512, "law enforcement officers" must be federal officers or persons "authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant." 18 U.S.C. 1515(a)(4). We are not arguing that SID officials were acting as "law enforcement officers," as that term is defined in the statute, at the time of the obstruction. The provision under which Bailey was convicted prohibits engaging in misleading conduct toward "another person" with the intent to hinder, delay, or prevent the communication of information about a possible federal offense to a federal law enforcement officer. 18 U.S.C. 1512(b)(3). The term "another person" is unrestricted, and thus necessarily includes state or local investigators who served as the "conduit for relaying false and misleading information imparted to them by [a defendant] to federal authorities." *Veal*, 153 F.3d at 1253. As this Court made clear in *Baldyga*, the key question is not whether the information in question would flow directly to federal law

enforcement officials but, rather, whether such information might *eventually* be communicated to federal officials. 233 F.3d at 680.[10]

V

BAILEY IS NOT ENTITLED TO A NEW TRIAL ON THE PERJURY COUNT

Bailey argues (Br. 42) that if this Court were to reverse his convictions on Counts 11, 12, and 13, he would be entitled to a new trial on the perjury charge in Count 14 because of the alleged spillover effect that the other counts had on that charge. Bailey's spillover argument is meritless for the reasons explained in Argument I of this brief. See pp. 17-20, *supra*. The argument is especially frivolous with regard to his perjury conviction. Bailey was charged in Count 14 with lying to a federal grand jury about the attack on Nikolas Dais. (App. 182-

---

[10] Bailey asserts, in passing, that "the government has failed to make out a prima facie case as to the intent portion of the statute." (Br. 34). Because he has not developed that argument in his brief, it is waived on appeal. See *Sanchez*, 354 F.3d at 80 n.4. At any rate, the government presented sufficient evidence to satisfy the intent requirement of Section 1512. That evidence would allow a reasonable jury to infer that Bailey lied to SID investigators, at least in part, to ensure that they would never reveal to law enforcement officers that he had used excessive force against Dais. See pp. 5-7, 11-12, *supra*. The intent to prevent communication with such law enforcement officers need not have been Bailey's only motive in deceiving SID. See *United States* v. *Emery*, 186 F.3d 921, 925 (8th Cir. 1999) (evidence is sufficient when "at least some part of a defendant's motive * * * was to halt" the disclosure of information to law enforcement officers), cert. denied, 528 U.S. 1130 (2000); *United States* v. *Bell*, 113 F.3d 1345, 1350 (3d Cir.) (same), cert. denied, 522 U.S. 984 (1997).

185). At trial, Bailey took the stand and admitted that he had, in fact, lied to the grand jury. (App. 824, 917-920, 932). In Bailey's own words, "I perjured myself." (App. 932).

VI

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT NIKOLAS DAIS WAS A VULNERABLE VICTIM

Bailey challenges the district court's finding that Nikolas Dais, the victim of the Section 242 violation, was a "vulnerable victim" under Section 3A1.1(b)(1) of the Sentencing Guidelines. (Br. 42-43). A district judge's factual finding that a victim is vulnerable is reviewed for clear error. *United States* v. *Donnelly*, 370 F.3d 87, 91, 94 (1st Cir. 2004). No such error occurred here.

The Sentencing Guidelines authorize a two-level adjustment in the offense level if the defendant "knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. 3A1.1(b)(1). After the district court imposed that adjustment (App. 1027), Bailey's offense level was 22 (App. 1079), which produced a sentencing range of 41 to 51 months. See U.S.S.G. Ch. 5, Pt. A (Nov. 1998) (table).[11] The court sentenced Bailey to a 41-month term of imprisonment. (App. 1081). Without the adjustment, Bailey's offense level would have been 20,

---

[11] The district court applied the version of the Guidelines in effect at the time of the offense. (App. 1015).

which has a sentencing range of 33 to 41 months. See U.S.S.G. Ch. 5, Pt. A (table). Thus, even without the vulnerable-victim adjustment, the district court could have imposed the same sentence of 41 months.

Under the Guidelines, a "vulnerable victim" is someone who is "unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct." U.S.S.G. 3A1.1, Application Note 2. The vulnerable victim guideline is "primarily concerned with the impaired capacity of the victim to detect or prevent the crime, rather than the quantity of harm suffered by the victim." *Donnelly*, 370 F.3d at 92.

In deciding that the two-level adjustment was warranted, the district court found that

> Mr. Dais was an especially vulnerable victim. He was on suicide watch, which means that the prison had determined that he was a danger to himself or to others. They had taken his clothes, and he was not allowed out of his cell to get his food.

(App. 1027). The district judge further found that there was a relationship between Dais's vulnerability and the attack, explaining that "one of the reasons * * * there was an assault on this fellow is because he's in this cell nearly naked and crying out for a blanket." (App. 1020).

The evidence amply supports the district court's finding of vulnerability. Most significantly, Dais was on suicide watch in the psychiatric unit. (App. 468, 617-618, 784, 885, 911). It is reasonable to infer that a detainee who may be contemplating suicide will be less capable than the typical person of controlling emotional outbursts that would irritate the prison guards. That inference is particularly reasonable in Dais's case since he continued screaming and kicking his cell door for nearly three hours after he was denied a blanket. (App. 468-470, 620-622, 700, 713, 786, 788-789, 808-809). Moreover, Dais's repeated demands for a blanket, which triggered a chain of events that culminated in his beating, were related to his status as a suicide risk. Because he was on suicide watch, he was kept virtually naked, thus making him more susceptible than other inmates to the chilly temperatures in the jail that day and thus more likely to cry out for a blanket. (See App. 468-469, 618, 620-621, 911).

This case is thus analogous to *Donnelly*, in which this Court upheld a finding that a pre-trial detainee with Tourette's Syndrome, who was attacked in the Nashua Street Jail by two of Bailey's co-defendants, was a vulnerable victim for purposes of the Sentencing Guidelines. This Court reasoned that the detainee was particularly susceptible to attack because his Tourette's Syndrome, which triggered an outburst that culminated in his beating, "impaired his capacity to

prevent the behavior which would lead to the assault" by the prison guards. *Donnelly*, 370 F.3d at 94.

Being on suicide watch also made Dais a more attractive target because it reduced the likelihood that the unlawful use of force would be discovered. Unlike other inmates, including those in the psychiatric unit, Dais was kept locked in his cell and was not allowed out even to eat dinner. (App. 627, 761, 786-787, 858-859, 884-885; see App. 416-417, 422, 732). This isolation would likely limit Dais's opportunities to tell others about the attack. In addition, an officer could reasonably believe that investigators might consider accusations from Dais less believable than those from other inmates, given Dais's emotional state.

Dais's custodial status, in combination with the nature of the assault, also supports the finding of vulnerability. The attack took place in a small cell that was only 5 feet wide by 7 feet in length. (App. 619). Dais had nowhere to go to escape his attackers and had no one to turn to for help during the assault. Other courts of appeals have upheld vulnerable-victim enhancements under analogous circumstances. See *United States* v. *Lambright*, 320 F.3d 517, 519 (5th Cir. 2003) (victim assaulted by guard inside his locked cell); *United States* v. *Hershkowitz*, 968 F.2d 1503 (2d Cir. 1992) (victim assaulted in a detention facility, in the custody of, and surrounded by, four guards).

Bailey contends, however, that the district court "made no particularized inquiry into Mr. Dais' situation" (Br. 43) and, instead, based the finding of vulnerability solely on the fact that Dais was a prisoner in the psychiatric unit at the jail. That assertion is belied by the record. In making its finding, the district court focused on Dais's particular situation, emphasizing that he was on suicide watch, was kept virtually naked, was not allowed out of his cell even to eat, and was crying out for a blanket. (App. 1020, 1027). Based on this particularized inquiry, the district court found that Dais was a vulnerable victim. That finding is not clearly erroneous.

CONCLUSION

This Court should affirm Bailey's conviction and sentence.

Respectfully submitted,

MICHAEL J. SULLIVAN
United States Attorney

S. THEODORE MERRITT
Assistant United States Attorney

R. ALEXANDER ACOSTA
Assistant Attorney General

_____
JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – PHB 5024
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3876

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 9,528 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____
GREGORY B. FRIEL
Attorney

Date: July 16, 2004

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2004, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, postage prepaid, on:

Evan Slavitt, Esq.
Richard P. O'Neil, Esq.
Bodoff & Slavitt LLP
225 Friend Street, 7th Floor
Boston, MA 02114-1812
(counsel for defendant-appellant Brian Bailey)

_____
GREGORY B. FRIEL
Attorney

ADDENDUM

TABLE OF CONTENTS