Nos. 01-2893/2894/3032

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

DEAN BATES, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
OF THE VIRGIN ISLANDS, DIVISION OF SAINT CROIX

BRIEF FOR THE UNITED STATES AS APPELLEE

DAVID ATKINSON
United States Attorney

ST. CLAIR THEODORE
Assistant United States Attorney
1108 King Street, Suite 201
Christiansted, St. Croix 00820-4951

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
TOVAH R. CALDERÓN
Attorneys
United States Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Appellate Section, PHB 5001
Washington, D.C. 20530
(202) 514-4142

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would be helpful to the Court, especially in light of the complex procedural and factual history of the case.

CITATIONS TO THE RECORD AND APPELLANTS' BRIEFS

Joint Appendix of Ronald Pickard	Pick. J.A.
Joint Appendix of Dean Bates	Bates J.A.
Joint Appendix of Renaldo Philbert	Phil. J.A.
Brief of Ronald Pickard	Pick. Br.
Brief of Dean Bates	Bates Br.
Brief of Renaldo Philbert	Phil. Br.

CROSS REFERENCE INDEX

Pursuant to Third Circuit L.R.A. 28.2, the arguments presented in the consolidated Brief of the United States as Appellee respond to the questions and arguments presented by Appellants on the following pages:

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JURISDICTIONAL STATEMENT

A federal grand jury charged the defendants in a forty-one count indictment with violating various laws of the United States and the Virgin Islands. The district court had jurisdiction pursuant to 18 U.S.C. 3231 and 48 U.S.C. 1612. The defendants were convicted on July 26, 2000. They filed timely notices of appeal from final judgments entered on July 5, 2001. This Court has jurisdiction to review the district court's judgment pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether joinder of defendants and offenses was proper and, if so, whether the district court's denial of the defendants' pretrial motions for severance constituted reversible error.
2. Whether the defendants are entitled to reversal of their convictions based on claims of prosecutorial misconduct.
3. Whether the evidence was sufficient to support the convictions of each of the defendants.

STATEMENT OF THE CASE

On February 17, 2000, a second superseding indictment containing forty-one counts wasfiled in the District of the Virgin Islands (Division of SaintCroix) charging the defendants, Ronald Pickard, Dean Bates, and Renaldo Philbert, with violating various federal and local criminal statutes, including 18 U.S.C. 241 (conspiracy against rights), 18 U.S.C. 242 (deprivation of rights under color of law), 18 U.S.C. 924(c) (use of a firearm during a crime of violence), 14 V.I. Code Ann. § 703(1) (oppression), and 14 V.I. Code Ann. § 297(2) (assault in the third

degree) (Pick. J.A. 24-65).[1] Prior to the trial, each of the defendants filed a motion for severance of defendants and/or counts (Pick. J.A. 2665, 2670-2671; Bates J.A. 73-86; Phil. J.A. 83-90). The motion submitted by Pickard and Bates was denied on the grounds that the charges were "intertwined" and that they "failed to establish that joint trial w[ould] result in substantial prejudice and a manifestly unfair trial" (Pick. J.A. 2668). The district court denied Philbert's motion because he failed to "present[] any substantive argument as to why a joint trial w[ould] present any extraordinary prejudice * * * or would result in a 'manifestly unfair trial'" (Phil. J.A. 94).

The defendants were therefore tried together before a jury.[2] The trial commenced on July 5, 2000, and lasted approximately three weeks. At the end of the government's case-in-chief, the defendants moved for judgment of acquittal (Pick. J.A. 1555-1604). The district court denied the defendants' motions as to all counts except Count 1, 0 holding that the government had failed to prove the existence of an agreement in order to establish a conspiracy in violation of 18 U.S.C. 241 (Pick. J.A. 1604-1606). The defendants, at that time, did not renew any of their pretrial motions; nor did they move for a mistrial on any ground. Accordingly, the case proceeded on the remaining substantive counts.

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[1] The indictment also charged Victor Suarez, but he was not convicted on any count (Pick. J.A. 58-63, 2609).

[2] The Honorable Raymond L. Finch, Chief Judge, presiding.

The jury found Pickard guilty on Counts 2, 15, 16-19, and 40 (Pick. J.A. 2607-2608). Bates was also found guilty on Counts 16-19, and Philbert was found guilty on Counts 24-26 (Pick. J.A. 2608-2609). Count 2 charged Pickard with depriving Cora Mannix of her right to be secure in her person and free from the use of unreasonable force by striking her with his hands and feet while she was handcuffed, thereby causing bodily injury, in violation of 18 U.S.C. 242 (Pick. J.A. 26). Count 15 charged Pickard with depriving Alvarez Smith of his right to be secure in his person and free from unreasonable searches and seizures by choking him, thereby causing bodily injury, in violation of 18 U.S.C. 242 (Pick. J.A. 39). Counts 16-19 charged Pickard and Bates with depriving Christopher Jacobs of his right to be secure in his person and free from unreasonable searches and seizures by pointing a dangerous weapon, a firearm, in his face, in violation of 18 U.S.C. 242, 18 U.S.C. 924(c), 14 V.I. Code Ann. § 703(1), and 14 V.I. Code Ann. § 297(2) (Pick. J.A. 40-43). Count 40 charged Pickard with depriving Jose Felix of his right to be secure in his person and free from the use of unreasonable force by choking and hitting him, thereby inflicting serious bodily injury, in violation of 18 U.S.C. 242 (Pick. J.A. 64). Counts 24-26 charged Philbert with depriving Onochukwa Nosakhena[3] of his right to be secure in his person and free

[3] Mr. Nosakhena's name is misspelled as "Nosokhere" in the indictment (Compare Pick. J.A. 48-50 with Phil. J.A. 197). It is also misspelled in the briefs submitted by opposing counsel, as well as in various places in the trial transcripts. This brief, however, will refer to him correctly as "Nosakhena."

from the use of unreasonable force by punching and kicking him, thereby inflicting serious bodily injury, in violation of 18 U.S.C. 242, 14 V.I. Code Ann. § 703(1), and 14 V.I. Code Ann. § 297(4) (Pick. J.A. 48-50).

After the trial, the defendants moved for a judgment of acquittal or, in the alternative, for a new trial on the grounds that the evidence presented at trial was insufficient to establish the elements of the offenses charged and that the verdict was against the weight of the evidence (Pick. J.A. 76-84; Bates J.A. 558-566; Phil. J.A. 96-107). In addition, Pickard and Bates argued that they were prejudiced by comments made by the prosecutor during his rebuttal closing argument (Pick. J.A. 84-88; Bates J.A. 569-570). The district court denied the motions, holding that the evidence was sufficient and that the existence of conflicting, differing, or contradictory testimony does not entitle any defendant to judgment of acquittal or a new trial because it is within the province of the jurors to weigh all of the evidence and to determine from it the guilt or innocence of the accused (Pick. J.A. 76-77; Bates J.A. 636-640; Phil. J.A. 162-165). The district court further held that, although the AUSA made certain remarks that were "over-zealous" during closing arguments, the remarks were not, when taken in the context of the trial as a whole, sufficiently prejudicial to deprive the defendants of their right to a fair trial (Pick. J.A. 85-86; Bates J.A. 641-643).

On July 5, 2001, the district court sentenced Pickard to consecutive terms of fifty months imprisonment on Counts 2, 15, 16, and 40, and five years imprisonment on Count 17 (Pick. J.A. 99). Pickard was further sentenced to three

years probation upon his release from prison, and fined $2,000.00 (Pick. J.A. 100-101). Bates received consecutive sentences of twenty months and five years imprisonment on Counts 16 and 17, and concurrent sentences of one year and five years imprisonment on Counts 18 and 19 (Bates Br. 3). He was further fined $2,000.00 and sentenced to a term of three years probation upon release. Philbert was sentenced to a term of twenty-four months imprisonment on Count 24, which was to run concurrently with two terms of one year each on Counts 25 and 26. He was further ordered to pay a fine of $500.00 and sentenced to three years probation upon release (Phil. J.A. 43-56).

STATEMENT OF FACTS

The defendants worked as Virgin Islands Police Officers on the island of Saint Croix from 1994, the year they graduated from the police academy, until their arrest in 2000 (Pick. J.A. 2063; Phil. J.A. 252). While students at the academy, the defendants were instructed that members of the Virgin Islands Police Department were prohibited from using "more physical force than that which is absolutely necessary to accomplish a proper police purpose" (Pick. J.A. 288, 292). Specifically, they were taught to never use choke-holds because of their lethal nature (Pick. J.A. 301-302).[4] They were further instructed that the sole purpose of a firearm is to kill. Accordingly, they were trained to never remove their firearms

[4] A "choke-hold" is the placement of one's forearm and the application of pressure to a person's throat, thereby shutting off the esophagus (Pick. J.A. 301).

from their holsters unless they felt that their lives, or the life of a citizen, was in imminent danger (Pick. J.A. 304).

During the short period that they worked as police officers, the defendants committed the following illegal acts:

A. ***The Cora Mannix Incident (Count 2)***

From late 1995 until about the middle of 1996, Cora Mannix lived as a homeless person in Christiansted (Pick. J.A. 829). During that period, Mannix often encountered Pickard on the street in Christiansted. On about three occasions, Pickard approached Mannix on his bicycle and asked her repeatedly if she knew Philomena (Pick. J.A. 832-836). Pickard was referring to Philomena White, another homeless individual, whom Pickard had previously threatened to kill (Pick. J.A. 785-786). Because Mannix knew Philomena, she understood these comments to be harassing (Pick. J.A. 834-835).

On April 17, 1996, Mannix took the bus from Christiansted to Frederiksted to inquire about her welfare benefits at the Human Services Office. After leaving the office, Mannix proceeded down the sidewalk of the main street in Frederiksted and encountered Pickard on his bicycle (Pick. J.A. 837, 839). Upon noticing Mannix, Pickard approached her and rode up next to her on the sidewalk (Pick. J.A. 838-839). He continued to ride parallel at a very close distance to her as she walked (Pick. J.A. 839). At that moment, Mannix spat on the ground in the opposite direction from where Pickard was riding (Pick. J.A. 840-841). Pickard told Mannix that if she had spat on him, he would have beaten her up (Pick. J.A.

841). Pickard then grabbed Mannix by her clothes and placed her under arrest. Pickard did not tell Mannix why she was being arrested (Pick. J.A. 842).

Once at the police station, Pickard handcuffed Mannix and began to poke and slap her. Afterwards, Pickard transported Mannix to police headquarters (Pick. J.A. 843). Upon arriving, Pickard dragged Mannix out of the vehicle into the parking lot and hit her in the face with a black object numerous times (Pick. J.A. 844-845). Pickard then took Mannix into a small room inside headquarters and beat her repeatedly. Pickard slapped, kicked, and hit Mannix with the black object (Pick. J.A. 845-846). Mannix begged Pickard to stop and asked him why he always mentioned Philomena to her. Pickard formed a pistol with his hands and pointed his fingers at Mannix's forehead while making gunshot sounds and told Mannix to keep her mouth shut or else she would be "next" (Pick. J.A. 846-847).

B. ***The Alvarez Smith Incident (Count 15)***

On May 20, 1998, Alvarez Smith was playing pool and having a drink at Magna's Bar in Frederiksted. While sitting at the bar, former Virgin Islands Senator John Bell came in and attempted to order a drink. When the bartender ignored Bell, Smith tried to help (Pick. J.A. 1077-1078, 1124). A verbal dispute ensued between Smith and a man who was being intimate with the bartender. The man asked Smith to leave the bar several times and threatened him with a weapon (Pick. J.A. 1078-1079, 1116-1117). When Smith refused to leave, the man called the police. Soon thereafter, Pickard arrived on the scene and told Smith that he

had to leave the bar because he didn't belong there (Pick. J.A. 1110, 1117-1118). Smith responded by asking why he needed to leave (Pick. J.A. 1079, 1110, 1119). Pickard told Smith that he was under arrest and then called for back-up (Pick. J.A. 1079, 1110-1111). Pickard then placed a choke-hold on Smith (Pick. J.A. 1080, 1111, 1121). While squeezing Smith's neck between his arms, Pickard threw Smith to the ground (Pick. J.A. 1081, 1111). Pickard wrestled Smith on the ground for several minutes while choking him. Smith, believing that Pickard was going to kill him, begged to be let loose, but Pickard did not let go of Smith until the other officers arrived (Pick. J.A. 1082-1083, 1112-1113). Smith did not resist or fight back (Pick. J.A. 1083, 1086, 1113). Pickard placed Smith under arrest (Pick. J.A. 1083).

C. *The Christopher Jacobs Incident (Counts 16-19)*

Shortly after 9:00 p.m. on September 30, 1998, a vehicle slowly drove up to the apartment building where fourteen-year-old Christopher Jacobs resided with his older sister, Leoncita Condell (Pick. J.A. 903-905, 951). The vehicle stopped in the middle of the street in front of the building (Pick. J.A. 909, 913, 951). Soon thereafter, Jacobs and Suelis Escobar, a friend of Jacobs and Condell, went out to purchase a soda from the vending machine at a nearby fire station (Pick. J.A. 912-913, 949-950, 975). As soon as they exited the apartment building, Pickard and Bates rushed from the vehicle and approached them (Pick. J.A. 914, 951, 977). Pickard and Bates, who were both armed, identified themselves as police officers

and yelled, "Where's the f**king laser?" (Pick. J.A. 919, 952, 954, 956).[5] Pickard and Bates then pointed their guns at Jacobs, one in his back and the other in his side near the rib area (Pick. J.A. 916, 952-953, 977). Jacobs responded by saying that he did not know what a laser was, and that he did not have one. One of the officers then told Jacobs that if he didn't tell them where the laser was, he would blow his "mother-f**king head off in front of his f**king house" (Pick. J.A. 922, 956, 977). Pickard pointed the gun at Jacobs's head (Pick. J.A. 957, 989). Bates then demanded that Jacobs empty his pockets and pat himself down to demonstrate that he did not have a laser. Jacobs complied, and pulled from his pocket a hair pick and an empty candy wrapper (Pick. J.A. 961-962, 978-979).

During this time Condell, who had been observing the incident from the balcony of her apartment on the second floor, came outside to see what was going on. Pickard and Bates told Condell to "shut the f**k up" and to get her "sweaty ass upstairs" (Pick. J.A. 918-919, 921-923, 956). Several minutes later, another vehicle arrived on the scene and pulled up behind the vehicle which Pickard and Bates had abandoned in the middle of the street. At that moment, Pickard and Bates left Jacobs, returned to their vehicle, and drove away (Pick. J.A. 923, 957, 982). Jacobs and Escobar proceeded to the fire station to buy a soda (Pick. J.A.

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[5] Pickard testified that while driving by the apartment building, he observed a red laser beam coming from the second floor balcony. According to Pickard, a laser "is used for a firearm to target, to set your target on where you want to shoot, or who you plan to shoot" (Pick. J.A. 2075).

925, 957). Meanwhile, Pickard and Bates drove around the block and slowly passed by the building again. Inside their vehicle, Pickard and Bates were laughing and cursing. Through their open windows, they exchanged cross words with Condell, who by then had returned to the upstairs balcony (Pick. J.A. 924-925).

D. *The Jose Felix Incident (Count 40)*

On August 17, 1996, Jose Felix was a customer at Hondo's Night Club and Pickard was outside of the night club, assigned to crowd control (Pick. J.A. 547, 2097).[6] At approximately 2:00 a.m., Felix exited the club with a friend. While standing near the top of the steps leading up to the entrance of Hondo's, Pickard approached Felix from behind and placed a choke-hold on him. Pickard then spun Felix around and dragged him down the stairway (Pick. J.A. 549-551, 554-555, 614). While dragging him, Pickard slammed Felix's head into a wall (Pick. J.A. 556). Once at the bottom of the stairs, Pickard handcuffed Felix and then hit him on the back of the neck, causing Felix to fall to the ground (J.A. 557, 615). Pickard and several other officers then proceeded to beat Felix for about ten to fifteen minutes (Pick. J.A. 558, 614, 655). During this time, Pickard sat on Felix's back in order to keep him on the ground and said to him, "Mother f**ker, I'm

[6] Felix is Pickard's former brother-in-law (Pick. J.A. 548).

going to kill you" and "Do you know who is PFL?" (Pick. J.A. 559-560).[7] Pickard continued to box, choke, and vigorously punch and kick Felix (Pick. J.A. 560, 656-657). Pickard and the other officers also struck Felix with a police club and walkie-talkies (Pick. J.A. 565, 567). Pickard continued to grab and punch Felix as he placed Felix in a police vehicle (Pick. J.A. 559, 615-616). Felix did not resist at any point (Pick. J.A. 560, 616, 656).

As a result of this beating, Felix was hospitalized for three and a half days (Pick. J.A. 561). His injuries included jaw traumas, a concussion, bruising of his eyes, throat, chest, hands, head, neck, arms, forehead, and back, a cut to the eyebrow area, and three cuts to the head (Pick. J.A. 561-567). It took Felix about two and a half years to fully recover from these injuries (Pick. J.A. 561). As a result of being choked and hit in the throat, Felix is no longer able to use his voice to speak as loudly and as clearly as he previously could (Pick. J.A. 561-562). After this incident, Pickard continued to intimidate and threaten Felix by making gun signals with his hands whenever he would see him (Pick. J.A. 569).

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[7] The term "PFL" stands for "Pickard Fine Line of Clothing" as well as "Primos for Life" (Pick. J.A. 374). "Primos" was the term that Pickard and others used to refer to a group of "special" individuals who were all fellow police officers and included Philbert and Bates (Pick. J.A. 315-316, 368-369, 411-413, 477, 497, 536-538). The United States alleged at trial that membership in this group enabled the defendants to participate in a civil rights conspiracy against various individuals, such as homeless people and persons not from Saint Croix, between 1995 and 1999 (J.A. 24-26, 368-379).

E. ***The Onochukwa Nosakhena Incident (Counts 24-26)***

In the evening of April 19, 1999, Onochukwa Nosakhena entered Milagrosa's Bar in Christiansted, where Bates and Philbert, dressed in plainclothes, were playing pool. When Nosakhena positioned himself near the pool table to watch the game, Philbert asked him to leave (Phil. J.A. 198-199, 244). When Nosakhena refused, Philbert and Bates grabbed Nosakhena and forced him out of the bar. Because the defendants did not identify themselves as a police officers, even after Nosakhena asked them for identification, Nosakhena resisted (Phil. J.A. 199-201).

Once outside of the bar, Nosakhena was pushed to the ground. Philbert then climbed on top of him and punched him in the face and on the body repeatedly (Phil. J.A. 201; Pick. J.A. 1056-1057).[8] At some point during the beating, Juan Antonio Garcia, a vocational teacher and contractor who was having a drink in the bar next door to Milagrosa's, came outside in response to the commotion and saw Philbert punching Nosakhena. At no point during the beating did Nosakhena resist (Pick. J.A. 1059-1060). When Garcia learned that the men beating Nosakhena were police officers, Garcia told Philbert that he was going to call Internal Affairs. At that moment, Philbert stopped punching Nosakhena and

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[8] Nosakhena testified that while Philbert was on top of him and punching him, Bates was standing to the side and kicking him (Phil J.A. 202). Although Bates was also charged in Counts 24-26 for his participation in this incident, he was not found guilty because the jury was hung (Pick. J.A. 2608).

ordered Bates to call for a unit. Meanwhile, Philbert continued to sit on top of Nosakhena in a straddle position with his arms wrapped tightly around Nosakhena's neck (Pick. J.A. 1058).

The incident lasted about five minutes (Phil. J.A. 202). Soon thereafter, uniformed officers arrived on the scene in a police vehicle. Philbert handcuffed and arrested Nosakhena (Phil. J.A. 203, 264). Later that night, Nosakhena went to the emergency room to be treated for his injuries (Phil. J.A. 207-208). Nosakhena was never prosecuted in connection with this incident (Phil. J.A. 204).

SUMMARY OF THE ARGUMENT

1. Joinder of both defendants and offenses was proper under Federal Rule of Criminal Procedure 8. Because the indictment charged more than one defendant in at least some of the same counts, the "same act or transaction" standard of Rule 8(b) is satisfied. Moreover, joinder was proper because Count 1 charged all of the defendants with conspiracy and alleged as overt acts in furtherance of that conspiracy the remaining substantive counts of the indictment. Because the court looks to the indictment to determine whether joinder was proper, and not to the subsequent proof adduced at trial, it is irrelevant that the conspiracy charge was later dismissed.

The district court did not abuse its discretion in denying the defendants' pretrial motions for severance under Federal Rule of Criminal Procedure 14. The defendants did not demonstrate to the court that there was a serious risk that a joint trial would prejudice them. The desire of Pickard and Bates to call Philbert as a

witness in the Christopher Jacobs incident was insufficient grounds to sever them, as there was no guarantee that Philbert's assertion of his Fifth Amendment rights would be extinguished by separate trials. Moreover, the testimony they sought from Philbert was provided by Pickard. In any event, the defendants have not established clear and substantial prejudice resulting in a manifestly unfair trial. Pickard and Philbert's claims of prejudicial spillover lack merit because, given the clear and organized fashion in which the government's case was presented, there is no indication that the jury was unable to compartmentalize the evidence as it pertained to each offense and each defendant. Finally, the district court carefully instructed the jury as to the manner in which the evidence could be considered, thereby neutralizing any potential prejudice.

2. The district court did not abuse its discretion in denying the defendants' motions for a new trial based on the prosecutor's remarks about the Virgin Islands Police Department and public safety. The remarks, when taken in the context of the trial as a whole, were not sufficiently prejudicial to have deprived Pickard and Bates of their right to a fair trial. The remarks were made during the government's rebuttal closing argument and occupied only a moment in a two-and-a-half week trial. Moreover, when the defendants sought curative instructions, the district court immediately granted their request and provided the jury with a very specific instruction, crafted in part by counsel for Pickard. Finally, the government's evidence against both Pickard and Bates was strong. Under these circumstances,

the district court's denial of their request for a new trial did not amount to an abuse of discretion, and Pickard is not entitled to have his convictions vacated.

The prosecutor's remarks about the Christopher Jacobs incident did not constitute plain error. Any prejudice resulting from these remarks was neutralized by curative jury instructions and the overwhelming evidence presented by the government. Moreover, the remarks were insignificant in the context of the trial as a whole. Finally, there was nothing improper about the government's repeated references to Philomena White throughout the trial, given that they were elicited during relevant witness testimony and made during permissible summation of the evidence. Any doubts about the propriety of such remarks is resolved by the fact that the district court, out of an abundance of caution, provided the jury with a curative instruction.

3. The evidence was sufficient to support the convictions of Pickard, Bates, and Philbert. The defendants are not entitled to reversal of their convictions merely because the evidence was at times inconsistent, or because the testimony of government witnesses conflicted with that of defense witnesses.

ARGUMENT

I. JOINDER OF DEFENDANTS AND OFFENSES WAS PROPER AND THE DISTRICT COURT'S DENIAL OF THE DEFENDANTS' PRETRIAL MOTIONS FOR SEVERANCE DID NOT CONSTITUTE REVERSIBLE ERROR

A. *Standard Of Review*

The joinder of two or more defendants or two or more counts against a single defendant under Federal Rule of Criminal Procedure 8 ("Rule 8") is reviewed *de novo*. *United States* v. *Thornton*, 1 F.3d 149, 152 (3d Cir.), cert. denied, 510 U.S. 982 (1993). A district court's denial of a motion for severance under Federal Rule of Criminal Procedure 14 ("Rule 14") is reviewed for abuse of discretion. *Ibid.* If an abuse of discretion is found, "reversal is not required absent clear and substantial prejudice resulting in a manifestly unfair trial." *United States* v. *Hart*, 273 F.3d 363, 370 (3d Cir. 2001) (internal citations and quotation marks omitted); see also *United States* v. *De Peri*, 778 F.2d 963, 984 (3d Cir. 1985), cert. denied, 475 U.S. 1110 (1986) ("[This Court's] scope of review of the [district] court's denial of a motion for severance is limited.").

B. *Joinder Of Defendants And Offenses Was Proper Under Rule 8*

Under Rule 8, two or more defendants may be charged together if they "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." Fed. R. Crim. P. 8(b). Similarly, two or more

offenses may be joined against a single defendant if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a). Where the stricter "same act or transaction" standard for joinder of defendants under Rule 8(b) is met, the more permissive standard for joinder of offenses under Rule 8(a) is also satisfied. *United States* v. *McGill*, 964 F.2d 222, 241 (3d Cir.), cert. denied, 506 U.S. 1023 (1992).

"In determining whether two offenses or defendants were properly joined, the reviewing court must look to the indictment and not the subsequent proof adduced at trial." *Ibid.* (citation omitted). The indictment filed against the defendants in this case contained forty-one counts. In twelve of those counts, more than one defendant was charged with committing a particular act. For example, in Counts 16, 17, 18, and 19, Pickard was charged together with Bates in the Christopher Jacobs incident (Pick. J.A. 40-43). Similarly, Bates was charged along with Philbert in Counts 24, 25, and 26 for their participation in the Onochukwa Nosakhena incident (Pick. J.A. 48-50). Pickard and Bates were again charged together in Counts 29, 30, 31, and 34 (Pick. J.A. 53-55, 58).[9] The indictment, therefore, alleged that the defendants participated in some of the same

[9] Counts 29-31 charged Pickard and Bates with raping Carey L. Mathis and Count 34 charged them, along with co-defendant Victor Suarez, with using intimidation and threats to influence, delay, and prevent the grand jury testimony of Carmello Soto (Pick. J.A. 53-55, 58).

acts or transactions. See *United States* v. *Rickey*, 457 F.2d 1027, 1029 (3d Cir.), cert. denied, 409 U.S. 863 (1972) (explaining that defendants are alleged to have participated in the "same act or transaction" under Rule 8(b) where they are jointly indicted on any one count).

Joinder of defendants is especially proper "whe[re] an indictment 'charge[s] all the defendants with one overall count of conspiracy.'" *Thornton*, 1 F.3d at 152-153 (quoting *United States* v. *Lane*, 474 U.S. 438, 447 (1986)). In *Thornton*, the defendants were convicted on charges alleging conspiracy to distribute drugs over a six-year period. Specifically, the government alleged that the defendants were members of a criminal organization known as "JBM," which sold and distributed large amounts of cocaine and heroin in the Philadelphia area. *Id.* at 151-152. On appeal, this Court held that the single overarching conspiracy count was sufficient grounds for joinder. *Id.* at 153. The fact that "the indictment alleged as overt acts in furtherance of the conspiracy the substantive acts with which the[] defendants were charged" especially warranted a joint trial for the purpose of judicial economy. *Ibid.*

Furthermore, this Court rejected Thornton's argument that he should not have been joined with the other defendants because the government failed to prove his continuing participation in the conspiracy after a certain date. *Ibid.* Because the indictment alleged that Thornton had participated in the conspiracy through its conclusion, the fact that the government's evidence at trial was insufficient to prove his participation in all of the alleged acts was irrelevant. As this Court

stated, "joinder would not be improper merely because a defendant did not participate in every act alleged in furtherance of the overarching conspiracy." *Ibid.* (citations omitted).

Like the defendants in *Thornton*, Pickard, Bates, and Philbert were charged with participation in a single overarching conspiracy spanning several years (Pick. J.A. 24). At trial, the government alleged that they were members of a group of Virgin Islands Police Officers called the "Primos" which routinely used excessive force against citizens, particularly homeless people and persons who were not from Saint Croix (Pick. J.A. 368-379, 411-413). As in *Thornton*, the indictment in this case alleged as overt acts in furtherance of the conspiracy the substantive acts with which the defendants were charged (Pick. J.A. 26).[10] The fact that the district court granted the defendants' motions for judgment of acquittal with respect to the conspiracy charge is irrelevant since this Court "'must look to the indictment and not the subsequent proof adduced at trial.'" *Thornton*, 1 F.3d at 153 (quoting *McGill*, 964 F.2d at 241). Because the indictment charged the defendants with conspiracy, and because more than one defendant was charged in several of the substantive counts, thereby satisfying the "same act or transaction" standard of

[10] Count 1 of the indictment states that "[t]he Grand Jury charges that in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the defendants did commit in the District of the Virgin Islands the following overt acts alleged in Counts 2 thru 26 and 34 thru 41 of the indictment" (Pick. J.A. 26).

Rule 8(b), joinder of both defendants and offenses was proper. *McGill*, 964 F.2d at 241.

Philbert, however, contends that joinder was improper because "there is no 'common thread' which links the acts described in the indictment to all four defendants" (Phil. Br. 10-11).[11] Philbert's argument is two-fold: First, he claims that the conspiracy charge is insufficient to "create a link" between him and the other defendants. Second, he asserts that "[t]he factual allegations of [C]ounts 24, 25, and 26 create no link between Philbert and the other [c]o-defendants" (Phil. Br. 11). Philbert's argument lacks merit on both grounds.

The first argument must be rejected because, as explained, this Court has held that a single overarching conspiracy count in an indictment is sufficient grounds for joinder. *Thornton*, 1 F.3d at 153. Philbert's reliance on *United States* v. *McLain*, 823 F.2d 1457, 1466 (11th Cir. 1987), is misplaced. In that case, the Eleventh Circuit held that the joinder of two separate conspiracy counts–not the joinder of defendants and offenses connected to a single overarching conspiracy–was improper. *McLain* is therefore distinguishable. Philbert's second point, that Counts 24, 25, and 26 fail to link him to the other defendants, is simply incorrect because Philbert was charged in these counts along with Bates (Pick.

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[11] Pickard and Bates do not raise misjoinder as an issue on this appeal. Pickard, however, argues that the district court abused its discretion in denying severance on the ground that the conspiracy count was an improper basis for joinder (Pick. Br. 25-28).

J.A. 48-50). Thus, Philbert is alleged to have participated in the "same act or transaction" as one of his co-defendants. *Rickey*, 457 F.2d at 1029. Accordingly, joinder was proper under Rule 8.

C. *The District Court Did Not Abuse Its Discretion In Denying The Defendants' Pretrial Motions For Severance Under Rule 14 And The Defendants Were Not Prejudiced By A Joint Trial*

Even where joinder is proper under Rule 8, a district court may sever defendants or order a separate trial of counts under Rule 14 "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or defendants in an indictment." Fed. R. Crim. P. 14. However, "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of relief to be granted, if any, to the district court's sound discretion." *Zafiro* v. *United States*, 506 U.S. 534, 538-539 (1993). Accordingly, when a defendant challenges a district court's denial of a pretrial motion for severance under Rule 14, the reviewing court must ask: (1) whether the district court abused its discretion based on the record before it at the time it ruled; and (2) whether the defendant was prejudiced by the order denying severance. *United States* v. *Sandini*, 888 F.2d 300, 305 (3d Cir. 1989), cert. denied, 494 U.S. 1089 (1990). Thus, "even with an abuse of discretion, reversal is not required absent 'clear and substantial prejudice' resulting in a manifestly unfair trial." *Hart*, 273 F.3d at 370 (citation omitted).

In exercising its discretion, "a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable

judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. "The trial judge is best situated to weigh possible prejudice to the defendant against interests of judicial economy." *United States* v. *Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981) (citations omitted). In establishing an abuse of discretion, a defendant faces "a heavy burden." *Ibid.* "Mere allegations of prejudice are not enough; and it is not sufficient simply to establish that severance would improve the defendant's chance of acquittal." *Ibid.* (citations omitted).

Pickard and Bates argue that the district court abused its discretion because they demonstrated that they would be prejudiced by their inability to call Philbert as a witness in the Christopher Jacobs incident. Pickard argues that Philbert was needed to challenge the credibility of government witnesses who identified Bates as the other officer (Pick. Br. 28), and Bates argues that Philbert was needed to provide exculpatory testimony (Bates Br. 11-13).[12] Philbert's attorney, however, asserted Philbert's Fifth Amendment right against self-incrimination and counseled Philbert against testifying about the Christopher Jacobs incident (Bates J.A. 640).

The denial of severance is appropriate where it is "unrealistic to believe that the co-defendant would not invoke his Fifth Amendment privilege * * *. Bare assertions that co-defendants will testify are insufficient." *United States* v. *Boscia*,

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[12] Bates's defense to the Christopher Jacobs incident was misidentification. He claimed that Philbert was present with Pickard on the night of the incident and that he was not there (Bates J.A. 682-684).

573 F.2d 827, 832 (3d Cir.), cert. denied, 436 U.S. 911 (1978) (citations omitted). As the district court pointed out, there was no indication that Philbert's assertion of this right would have been extinguished by separate trials (Bates J.A. 640-641). Indeed, even Bates acknowledged in his second pretrial motion for reconsideration of his motion for severance that because Philbert would have been implicated in the incident, he was "an unlikely witness" for the defense (Bates J.A. 123). For this reason, Bates argued in his motion that severance was warranted because Pickard's testimony–not Philbert's–was needed to exculpate him (Bates J.A. 123). Pickard, however, testified at trial and stated that Philbert, not Bates, was present during the Christopher Jacobs incident. Because the information sought by Pickard and Bates was therefore provided by Pickard's testimony, their claims of prejudice resulting from their inability to call Philbert as a witness are clearly without merit. Accordingly, severance on this ground was not warranted. *Zafiro*, 506 U.S. at 540 (It is well settled that "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials.").

Even if the district court did not abuse its discretion, Pickard and Philbert argue that they are entitled to a new trial because the joinder of offenses and defendants created prejudicial "spillover" resulting primarily from the government's introduction of evidence of the alleged conspiracy (Pick. Br. 26-29; Phil. Br. 12-13). Claims of spillover are reviewed by asking "whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence." *De*

Peri, 778 F.2d at 984. Pickard and Philbert assert that because "[t]he instant case is [] huge" (Pick. Br. 29), and because Philbert was convicted "of all the substantive offenses which with [sic] he was charged [(Counts 24, 25, and 26)]" (Phil. Br. 12-13), the jury must not have been able to compartmentalize the evidence as it pertained to each offense and each defendant. This argument is without merit.

The evidence in the instant case was presented in a clear and organized fashion. For example, the government grouped witnesses together according to the acts to which they testified. Moreover, none of the government's witnesses testified about more than one incident. There is no indication that the jury had any difficulty in segregating and considering the relatively simple facts pertaining to the distinct counts and different defendants. Indeed, the fact that the jury convicted Philbert but not Bates on Counts 24, 25, and 26 suggests that the jury was able to separately assess the evidence as to each defendant. Finally, Pickard's spillover argument is undermined by the fact, which he concedes, that the bulk of the charges in the indictment were filed against him. As such, he cannot realistically argue that the jury found him guilty "by association" with his co-defendants.

Furthermore, Pickard and Philbert's claims of prejudicial spillover must be rejected because the district court carefully instructed the jury as to the manner in which the evidence was to be considered. The jury was instructed:

> Each count of the indictment charges a separate offense, and each count, and the evidence pertaining to it[] [s]hould be considered separately. The fact that you may find a defendant guilty or not guilty of one of the counts charged should not control your verdict as to any other count charged or any other defendant charged in the same count.
>
> * * * * *
>
> Also, the indictment contains a total of 31 counts, and, at this stage, I say to you that I dismissed earlier the count of conspiracy so that you should not be concerned with that count.
>
> Each count charges one or more defendants with a different crime. There are four differen[t] defendants on trial [] before you. *You must, as a matter of law, consider each count of the indictment and each defendant's involvement in each count separately, and [] must return a separate verdict on each defendant for each count in which he is charged* (Pick. J.A. 2426-2427 (emphasis added)).

"Absent a clear showing that the jury was unable to follow these instructions, prejudice cannot be established." *Reicherter*, 647 F.2d at 400. Pickard and Philbert do not argue that the jury was unable to follow the district court's charge. Accordingly, their claims of prejudicial spillover in this case are speculative and therefore without merit.[13] *De Peri*, 778 F.2d at 985.

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[13] Similarly, Pickard's argument that he was prejudiced by evidence that he threatened to kill Philomena White, an overt act alleged in the indictment to be in furtherance of the conspiracy, is also without merit because, as discussed below, the judge provided a specific curative instruction to the jury. See Part II.D, *infra*.

II. THE DEFENDANTS ARE NOT ENTITLED TO REVERSAL OF THEIR CONVICTIONS BASED ON CLAIMS OF PROSECUTORIAL MISCONDUCT

A. *Standard Of Review*

The district court's denial of a motion for a mistrial arising out of alleged prosecutorial misconduct is reviewed for an abuse of discretion. *United States* v. *Retos*, 25 F.3d 1220, 1224 (3d Cir. 1994). However, a defendant's conviction will not be vacated unless "the prosecutor's remarks, taken in the context of the trial as a whole, were sufficiently prejudicial to have deprived the defendant of his right to a fair trial." *Ibid.* (internal quotation marks and citation omitted). When a prosecutor's allegedly improper remarks are not accompanied by a contemporaneous objection from opposing counsel, the district court's failure to order a new trial based on those remarks is reviewed for plain error. *United States* v. *DiPasquale*, 740 F.2d 1282, 1296 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985). Where this standard of review applies, the defendants can prevail "only by establishing that the prosecutor's misstep was so egregious as to 'undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.'" *United States* v. *Colletti*, 984 F.2d 1339, 1344 (3d Cir. 1992) (citations omitted).

B. *The Prosecutor's Comments About The Virgin Islands Police Department And Public Safety, When Taken In The Context Of The Trial As A Whole, Were Not Sufficiently Prejudicial To Have Deprived The Defendants Of Their Right To A Fair Trial*

The prosecutor in this case began his rebuttal closing argument by telling the jury, "[y]ou understand from the evidence presented there is a serious problem

with the Virgin Islands Police Department, there's no question about that. *But your focus upon which you have to decide is based on [how] the evidence presented only relates to these four officers at this point in time*" (Bates J.A. 525 (emphasis added)). Pickard and Bates nevertheless argue that several later remarks made by the prosecutor were improper and required a new trial (Pick. Br. 17-22; Bates Br. 16-19).

Specifically, they contend that the prosecutor inappropriately suggested to the jury, at two different times during his rebuttal closing argument, that it should consider the effect that its decision will have on the Virgin Islands Police Department and public safety. In the first instance, the prosecutor told the jury, *inter alia*, that it "may not realize how monumental the decision is because it's going to have repercussions from this day forward with the Virgin Islands Police Department, with the Virgin Islands [G]overnment, because it's going to have an effect on training, funding all these things" (Bates J.A. 526). The prosecutor went on to tell the jury that it was up to them to protect the community and make a change (Bates J.A. 526-527). These comments were made without objection from opposing counsel. The second instance of prosecutorial misconduct alleged by the defendants occurred at the very end of the government's rebuttal closing argument, in which the prosecutor told the jury that it was "going to be the voice of the community" and that it should ask itself "what guarantee [does it] have that the behavior of the members of the Virgin Islands Police Department is going to be stopped at this point in time?" (Bates J.A. 545-546). This time, counsel for

Pickard made an objection, which the district court sustained. The prosecutor nevertheless continued and concluded his argument by saying, "[t]he question you have to decide, and based on the decisions you make today, is what kind of police department do you want after today?" (Bates J.A. 547).

After the prosecutor sat down, counsel for Pickard approached the bench and said:

> Your Honor, I want to indicate to the Court I think at this point that the prosecutor's rebuttal about somehow curing the problems of Public Safety by finding these young men guilty is totally inappropriate. And I would ask for a curative instruction as a minor, or a mistrial, because there's no way, whether this jury finds them guilty or not guilty, that's going to have an affect to [sic] Public Safety (Bates J.A. 552).

At that point, counsel for Bates joined in the objection (Bates J.A. 553). The court agreed to provide a curative instruction to the jury, and requested from Pickard's attorney suggestions on how it should instruct. Counsel for Pickard responded:

> Your Honor, I think the Court should make it even clearer. Their decision rendering a verdict of guilty or not guilty should in no way take the impact it should have on Public Safety and their problems or lack of problems.
>
> * * * * *
>
> They should have no take on it, and to think that could somehow come into play because of arguments he's used I'm asking the Court to make it clear to them that it will not come to play (Bates J.A. 554).

In response, the judge provided the following curative instruction to the jury immediately following closing arguments:

> Ladies and gentlemen, in reaching your decision and your verdict as to each count, please remember that you are to consider only the

> evidence that has been accepted into evidence and that has been presented to you, and you should not take into account what effect that decision will have on the department of police or public safety in general. You are here only to decide on the guilt or innocence of the accused (Bates J.A. 555-556).

Despite having received the exact jury instruction that he requested, Pickard filed a post-conviction motion for a new trial on the ground that the prosecutor's comments resulted in substantial prejudice (Pick. J.A. 84-88).[14] The district court denied the motion and held, "[b]ecause the remarks by the prosecutor were limited to a small segment of the two and a half week trial, because curative instructions were given, and because the case against Defendant Pickard was strong, this Court finds that even if the prosecutor[']s statements were in error, the error was harmless because there was no substantial prejudice to Pickard" (Pick. J.A. 88). Indeed, this Court has held that "[i]n determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction." *United States* v. *Zehrbach*, 47 F.3d 1252, 1265 (3d Cir. 1994), cert. denied, 514 U.S. 1067 (1995). Moreover, "the Supreme Court has emphasized 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 11 (1985)).

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[14] Although Bates also filed a motion, he did not argue that these comments were grounds for granting a new trial (Bates J.A. 569-570).

This case is analogous to *United States* v. *Homer*, 545 F.2d 864 (3d Cir. 1976), cert. denied, 431 U.S. 954 (1977), in which the defendant, a public official, appealed the district court's denial of his motion for a new trial based on the following comment made by the prosecutor during closing argument:

> Now this is a sensitive and important case, as Mr. Greenfield (defense counsel) told you, in more than one way. It is an important case because people are watching. There is a precedent going to be set here. People will want to know if they are going to be free from these oppressive tactics we have seen.
>
> We ask you to find the defendant guilty on all counts in the indictment, and by doing that, you will get a message across to all other people who would seek to use the power of their office to abuse it, if you will, under color of official right in instilling fear in business, that we are not going to stand for it, that the citizens and taxpayers are not going to stand for it, it has to stop now.

Id. at 867. This Court acknowledged that "the prosecutor's remarks were rash and inappropriate," but held that they did not constitute prejudicial error. *Id.* at 867-868. This Court explained:

> Our awareness of the nature of opening and closing arguments in an adversary proceeding and our concern for judicial administration preclude us from setting aside a verdict and ordering a new trial every time an advocate is verbally indiscreet unless his remarks are obviously prejudicial. In recent years this court has found prosecutorial conduct improper but not prejudicial in a number of cases.

Id. at 868 (citations omitted). In affirming the district court's judgment, this Court emphasized that the "prosecutor's questionable comment constituted two small paragraphs in the sixty pages of his closing argument," that the prosecutor "previously cautioned the jury not to consider his remarks as evidence," and that

"the remarks were not so shocking as to suggest to the defense that it seek curative instructions immediately." *Ibid.* Finally, this Court placed significant reliance on the fact that the trial judge, "in response to the defendant's subsequent complaint, * * * admonished the jury that they should determine the issues of fact 'without bias or prejudice or sympathy as to any party.'" *Ibid.*

All of these factors are present in the instant case. The prosecutor's remarks about the Virgin Islands Police Department and public safety were made during rebuttal, and did not pervade the government's principle closing argument. Moreover, as the district court pointed out, the remarks "were limited to a small segment of the two and a half week trial" (Pick. J.A. 88). Additionally, the prosecutor opened his rebuttal closing argument by instructing the jury that they should focus not on the problems of the Virgin Islands Police Department, but rather only on the evidence as it relates to the defendants (Bates J.A. 525). Furthermore, the prosecutor's remarks were not "so shocking" so as to suggest to the defendants that they seek curative instructions immediately. Indeed, the first remark was unaccompanied by a contemporaneous objection from any opposing counsel. The second remark was only objected to initially by counsel for Pickard, and no defense attorney sought a curative instruction until after the prosecutor sat down. Finally, and most importantly, the district court instructed the jury exactly as Pickard's attorney suggested, that is, to consider only the evidence and to not consider the effect of its decision on the Virgin Islands Police Department or public safety generally (Bates J.A. 555-556). Under these circumstances, the

prosecutor's comments cannot be said to have been "sufficiently prejudicial to have deprived the defendant[s] of [their] right to a fair trial." *Retos*, 25 F.3d at 1224; see also *DiPasquale*, 740 F.2d at 1297 (finding no prejudice where the prosecutor's comments "were limited to one instance in the course of a three week trial" and where "the court issued curative instructions").

C. *The Prosecutor's Remarks Regarding The Christopher Jacobs Incident Were Not So Egregious As To Undermine The Fundamental Fairness Of The Trial And Contribute To A Miscarriage Of Justice*

Bates challenges two other remarks made by the prosecutor during his rebuttal closing argument about the Christopher Jacobs incident. The first remark concerned Philbert's testimony and the second remark, made immediately following the first one, involved a reference to double jeopardy (Bates J.A. 537-539). Bates's attorney failed to make a contemporaneous objection to either remark. As such, this Court reviews these alleged instances of prosecutorial misconduct for plain error. *DiPasquale*, 740 F.2d at 1296. In order to have his convictions reversed, Bates must show that the remarks were "so egregious as to 'undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.'" *Colletti*, 984 F.2d at 1344 (citations omitted). Under this standard, Bates cannot prevail.

First, Bates challenges the prosecutor's remark that "Philbert was not asked any questions on [the Christopher Jacobs incident], was not asked any questions regarding that at all. That too speaks volumes, because he was not there" (Bates

J.A. 538).[15] Bates argues that the prosecutor's comment constituted improper "burden-shifting" since his theory at trial was that Philbert, not Bates, was with Pickard on the night of the incident (Bates Br. 14). While it is true that "the prosecution may not comment on a defendant's failure to testify and may not improperly suggest that the defendant has the burden to produce evidence," *United States* v. *Balter*, 91 F.3d 427, 441 (3d Cir.), cert. denied, 519 U.S. 1011 (1996) (citations omitted), the prosecutor did not do either with respect to Bates. Because the prosecutor's remark only involved Philbert's Fifth Amendment right against self-incrimination, Bates has no standing to raise a claim of prosecutorial misconduct. See, *e.g.*, *United States* v. *Partin*, 601 F.2d 1000, 1005-1006 (9th Cir. 1979), cert. denied, 446 U.S. 964 (1980) (holding that a defendant lacks standing to request a new trial based on prosecutorial misconduct involving the rights of his co-defendant).

However, even if Bates had standing to challenge the prosecutor's comment regarding Philbert's testimony, any prejudicial effect was neutralized by the district court's jury instructions and overcome by the strength of the government's evidence. *Zehrbach*, 47 F.3d at 1267 (finding no prejudice in light of the court's

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[15] The prosecutor first stated that Bates did not testify regarding the Christopher Jacobs incident. At that time, Bates's attorney objected, since Bates did not testify at trial (Bates J.A. 537-538). The objection was sustained, and the prosecutor corrected himself by saying that it was Philbert, not Bates, who testified and that during his testimony he was not asked any questions regarding the Christopher Jacobs incident (Bates J.A. 538). At that time, only counsel for Philbert, not Bates, objected. Again, the objection was sustained (Bates J.A. 538).

curative instructions and the government's substantial evidence). The judge instructed the jury that the government "has the burden of proving every issue, including identity, beyond a reasonable doubt" (Pick. J.A. 2378), and that the defendants have a constitutional right not to testify, call witnesses, or produce evidence (Pick. J.A. 2385-2386). In addition, the jury was specifically instructed not to draw any inferences from the fact that Bates did not testify (Pick. J.A. 2385-2386). Finally, the government presented overwhelming identification evidence at trial. Jacobs identified Bates, not Philbert, from a photo array the day after he was assaulted, and all three eyewitnesses identified the two men again in the courtroom (Pick. J.A. 917-918, 954-955, 976-977, 2232). Only Bates's co-defendant, Pickard, testified that Bates was not there (Pick. J.A. 2074).

Second, Bates challenges the prosecutor's comment to the jury that if it believes Pickard that Philbert, not Bates, was with him on the night of the Christopher Jacobs incident and that, as a result, Philbert is subsequently prosecuted and found guilty, then "Bates can't be prosecuted because somebody has already been found guilty at the time. It's called double jeopardy. You can't be prosecuted for the same crime" (Bates J.A. 538). Although his attorney did not make a contemporaneous objection, Bates raised this issue in his motion for a new trial (Bates J.A. 569-570). In its order denying Bates's motion, the district court acknowledged that the prosecutor's remark was "not a clear or correct statement of the law and w[as] made in an attempt to bolster the Government's case regarding Bates's identification" (Bates J.A. 642). However, the court pointed out that it had

instructed the jury that "[u]nder our system, the Court, represented by the presiding judge, is, for the purposes of the trial, the final arbiter of all questions of law, and, the jury, in its deliberations, will be governed by the law as given to it by the Court and not by counsel" (Bates J.A. 643). Additionally, the court emphasized the strength of the government's identification evidence, discussed above. Moreover, the remark about double jeopardy was made in the same breath as the remark regarding Philbert's testimony. Together, these comments "occupied only a moment of the two and a half week trial" (Bates J.A. 643), and only occurred during the rebuttal portion of the government's closing argument.

For all of these reasons, neither of the remarks made by the prosecutor regarding the Christopher Jacobs incident was "so egregious as to 'undermine the fundamental fairness of the trial and contribute to a miscarriage of justice.'" *Colletti*, 984 F.2d at 1344 (citations omitted). Accordingly, Bates's convictions must be affirmed. *Ibid.* (finding no plain error where prosecutor's improper argument occurred during rebuttal, thereby occupying an insignificant moment in the context of the trial, and where the jury was properly charged and the government presented very strong evidence).

D. *The Prosecutor's References To Philomena White Were Proper*

Count 1 of the indictment, charging the defendants with conspiracy, alleged as an overt act in furtherance of the conspiracy that in October 1995, Pickard threatened to murder Philomena White (Pick. J.A. 26). Philomena, however, died before the defendants were prosecuted and was therefore unavailable to testify

(Pick. J.A. 2618). Nonetheless, Corporal Michael Freeman testified during the government's case-in-chief that he heard Pickard say to Philomena on the street, "You don't know me. I'll shoot your mother scunt [sic]" (Pick. J.A. 786). Two other witnesses, Cora Mannix and Winston Tutein, testified that Pickard verbally threatened them by referring to Philomena. Mannix testified that while Pickard was beating her, Pickard said, "keep [your] mouth shut, or else [you'll] be next" (Pick. J.A. 846). She further testified that Pickard, who was referring to Philomena, made this threat while forming the shape of a gun with his hands and pointing his fingers at her forehead (Pick. J.A. 846-847). Similarly, Tutein testified that Pickard, after punching him twice in the stomach, pulled his gun out and said, "I'll shoot you. You want what happened to Philomena [to] happen to you? I'm the hit man in town. * * * " (Pick. J.A. 877). Counsel for Pickard did not object to any of this testimony. Pickard now argues that he was improperly prejudiced by these references to Philomena and is therefore entitled to reversal of his convictions (Pick. Br. 11-17).

Relevant evidence is generally admissible. Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Count 1 of the indictment alleged, *inter alia*, that the defendants conspired to "injure, *threaten*, oppress, and intimidate persons residing and visiting on St. Croix" (Pick. J.A. 25 (emphasis added)). In furtherance of this conspiracy, Count 1 specifically

alleged that Pickard threatened to murder Philomena White and that the defendants committed the acts charged in Counts 2-26 and 34-41 of the indictment (Pick. J.A. 26). Counts 2 and 7 of the indictment charged Pickard with using unreasonable force against Mannix and Tutein, respectively (Pick. J.A. 26, 31).

The testimony of Freeman, Mannix, and Tutein was relevant to both the conspiracy charge of Count 1 as well as to the substantive civil rights charges of Counts 2 and 7. Freeman's testimony established the overt act alleged in Count 1 and also provided context for Pickard's remarks about Philomena to Mannix and Tutein. In turn, the testimony of Mannix and Tutein was probative of Pickard's intent to deprive them of their right to be secure in their persons and free from the use of unreasonable force. Freeman's testimony was therefore necessary in order for the jury to understand why Pickard's remarks about Philomena to Mannix and Tutein were threatening or harassing. Pickard, who did not object to the admissibility of this testimony during the trial, does not deny its probative value. Instead, he argues that the references to Philomena during the witnesses' testimony rose to the level of prosecutorial misconduct. However, there is nothing improper about a prosecutor eliciting relevant testimony to prove the facts of the conduct alleged in the indictment. The fact that the district court later dismissed the conspiracy charge is irrelevant, since the testimony of Mannix and Tutein was admitted during the government's case-in-chief, prior to the defendants' motions for judgment of acquittal. Accordingly, the contested references to Philomena during government witness testimony do not constitute plain error.

Pickard also contends that references to Philomena in the government's opening statement and rebuttal closing argument were improper. During his opening statement, the prosecutor told the jury that it "will hear testimony concerning Philomena White, where Pickard and Philomena White had an ongoing battle, confrontations out on the street. And this one particular day Pickard in the presence of another Virgin Islands Police Officer makes the threat that he's going to kill her" (Pick. J.A. 236-237). Next, the prosecutor told the jury that Mannix would testify that Pickard threatened her by referring to Philomena and saying, "[y]ou'll be next" (Pick. J.A. 238). In his rebuttal closing argument, the prosecutor summarized the evidence as follows:

> Also Pickard threatened Mr. Tutein referring to Ms. Philamena [sic] White. When he referred to Philamena White he said I could kill you, talking to Mr. Tutein. * * * Another homeless person, Ms. Cora Mannix. She told you that Pickard punched her while in the police station and at the same time pointing to her with a finger saying he could kill her. Threatened her and again made reference to Philamena White.
>
> Why is that important? Because we know Philamena White is someone the defendant also threatened, and you heard that from Michael Freeman, threatened to kill her. That's what the defendant does. As a police officer he was going around threatening to kill people (Pick. J.A. 2453).

This Court has held that "if an opening statement is an objective summary of evidence the government reasonably expects to produce, a subsequent failure in proof will not necessarily result in a mistrial." *Retos*, 25 F.3d at 1226 (internal quotation marks and citation omitted). Moreover, "[t]he prosecutor is entitled to considerable latitude in summation to argue the evidence and any reasonable

inferences that can be drawn from that evidence." *United States* v. *Werme*, 939 F.2d 108, 117 (3d Cir. 1991), cert. denied, 502 U.S. 1092 (1992) (citation omitted). The prosecutor's opening statement in this case was an objective summary of the evidence. Pickard claims that the government failed to proffer sufficient evidence to support the prosecutor's opening remarks about Philomena. However, given the subsequent testimony of Freeman and Mannix, Pickard's argument lacks merit. Additionally, the government's rebuttal closing argument was a fair and objective characterization of the evidence, which Pickard does not dispute.

The crux of Pickard's argument is that the jury may have inferred from the prosecutor's opening and closing remarks and the testimony presented during the trial that he murdered Philomena, an act which is not charged in the indictment. Pickard claims that the prejudicial effect of such an inference warrants a new trial. However, at the beginning of the government's case-in-chief, the district court, out of an abundance of caution, instructed the jury as follows:

> I caution you that during the course of our opening statements, counsel for the government may have said to you that Philomena White was murdered by Mr. Pickard. You are instructed, you are advised to disregard that comment, if it was made.[16] Mr. Pickard is not charged with murdering Philomena White (Pick. J.A. 314).

This Court has repeatedly held that such curative instructions are sufficient to neutralize prejudice. *E.g.*, *United States* v. *Leftwich*, 461 F.2d 586, 590 (3d Cir.),

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[16] As explained above, such a comment was not actually made during the government's opening statement.

cert. denied, 409 U.S. 915 (1972). In sum, the prosecutor's opening and closing remarks about Philomena were proper in light of the evidence, there was no failure of proof, and the district court gave the jury a very specific curative instruction. Under these circumstances, the prosecutor's remarks do not constitute plain error warranting reversal of Pickard's convictions. *Retos*, 25 F.3d at 1226.

III. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTIONS OF PICKARD, BATES, AND PHILBERT

A. *Standard Of Review*

"This [C]ourt's standard of review of a denial of a motion for acquittal on the ground of insufficiency of evidence is narrow." *Government of the Virgin Islands* v. *Williams*, 739 F.2d 936, 940 (3d Cir. 1984). The defendant seeking reversal of his conviction on such a ground has "a very heavy burden," *United States* v. *Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995), since the evidence is reviewed "in the light most favorable to the government as verdict winner. [This Court] must affirm the convictions if a rational trier of fact could have found [the] defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence." *United States* v. *Applewhaite*, 195 F.3d 679, 684 (3d Cir. 1999) (citations and internal quotation marks omitted).

B. *The Evidence Was Sufficient To Support Pickard's Convictions On Counts 2, 15, 16-19, And 40*

Pickard was convicted of violating 18 U.S.C. 242 ("Section 242") for his conduct toward Cora Mannix, Alvarez Smith, Christopher Jacobs, and Jose Felix. Section 242 makes it a crime for a person acting under color of law to willfully

deprive a person of a right or privilege protected by the Constitution or laws of the United States. 18 U.S.C. 242; *United States* v. *Lanier*, 520 U.S. 259, 264 (1997). Counts 2, 15, 16, and 40 of the indictment alleged that Pickard deprived each of the named victims of the right to be secure in their persons and free from unreasonable force or unreasonable searches and seizures (Pick. J.A. 26, 39, 40, 64).

Pickard argues that the government failed to prove the use of unreasonable force in each of the four incidents (Pick. Br. 30-47). He does not argue that the government failed to introduce evidence of the elements of a violation. Instead, his primary contention is that the testimony presented by the government conflicted with that of defense witnesses on several occasions. This argument cannot prevail, as this Court has held:

> [I]t is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. Even where the different parts of a witness' testimony are inconsistent, it is for the jury to reconcile the conflicting statements and determine which shall prevail. * * * But even those cases in which the court has been permitted to invade the jury's exclusive province of determining credibility, the justification appears to be based on the determination that the inconsistencies and contradictions of the witness' testimony are so glaring that no fair minded man could balance it and find it true, and that, accordingly, no factual dispute remains over which reasonable men could differ.

United States v. *Barber*, 442 F.2d 517, 522 (3d Cir.), cert. denied, 404 U.S. 958 (1971) (internal quotation marks and citations omitted). Given these principles,

the evidence was sufficient to support the jury's verdict of guilty beyond a reasonable doubt on each of the counts discussed below.

1. Count 2: Cora Mannix

Mannix testified that while she was walking down the street in Frederiksted, Pickard approached her on his bicycle. As he was riding next to her, Mannix spat on the ground. Pickard placed her under arrest, but never informed her of the charges. She was taken to the police station where she was handcuffed. From there, Pickard and another officer transported her to police headquarters, where, in the parking lot, Pickard hit her in the head and face with a black object. Pickard then placed her in a small room inside headquarters where he beat, kicked, slapped, and poked her with a black stick while she was still handcuffed. Mannix further testified that Pickard threatened to kill her by referring to Philomena while making his hand into the shape of a gun and pointing it at her forehead (Pick. J.A. 837-847). Oakland Benta, a former training officer for the Virgin Islands Police Department, testified that while a student at the police academy, Pickard was instructed that officers were prohibited from using "more physical force than that which is absolutely necessary to accomplish a proper police purpose" (Pick. J.A. 286, 288, 292).

Pickard, however, argues that this evidence was insufficient to support a verdict of guilty because it was contradicted by his own testimony, during which he denied ever beating or threatening Mannix (Pick. Br. 32, Pick. J.A. 2065). He also emphasizes that Dr. Olaf Hendricks, who testified on Pickard's behalf, stated

that Mannix may have been under the influence of drugs and alcohol around the time of the incident, thereby casting doubt on Mannix's credibility (Pick. Br. 32-33). The jury, however, chose to believe Mannix and not Pickard and Mannix's testimony is sufficient to support the conviction since "all issues of credibility within the province of the jury must be viewed in the light most favorable to the government." *United States* v. *Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990), cert. denied, 498 U.S. 982 (1991).

2. Count 15: Alvarez Smith

Pickard argues that the "evidence surrounding the events of the Smith incident is so inconsistent, contradictory, conflicting, and insubstantial that no reasonable persons could find Appellant guilty beyond a reasonable doubt" (Pick. Br. 35). In support of this contention, Pickard points to a number of trivial inconsistencies regarding Smith's behavior at Magna's Bar prior to Pickard's arrival, none of which is relevant to what occurred after Pickard arrived (Pick. Br. 35-36).[17] Pickard, however, concedes that Smith's testimony establishes that Pickard approached him from behind and grabbed him around the neck, and the testimony of both Smith and former Virgin Islands Senator John Bell established that Pickard "took Smith down to the ground in a neck lock without any

[17] For example, Pickard points out that Smith's testimony during cross-examination that he did not make a derogatory comment to the bartender was contradicted by defense witness Rexford Daniel's testimony that he did (Pick. Br. 36). However, whether or not Smith made a derogatory comment to the bartender is totally irrelevant to whether Pickard used unreasonable force against Smith.

provocation or resistance from Smith" (Pick. Br. 37; Pick. J.A. 1080-1083, 1111-1112). Furthermore, it was established that Pickard was instructed as a new recruit that members of the Virgin Islands Police Department were forbidden from using choke-holds because of their lethal nature (Pick. J.A. 300-301).

Although this evidence alone is sufficient to support a conviction on Count 15, Pickard contends that the testimony of defense witnesses contradicted the testimony of the government witnesses and that since more people testified on his behalf than on behalf of the government, the evidence was insufficient for a jury to determine guilt beyond a reasonable doubt (Pick. Br. 38). Again, this argument must fail, since it is well-settled that, in reviewing a sufficiency of the evidence claim on appeal, this Court "neither weigh[s] evidence nor judge[s] the credibility of witnesses. These are matters for the jury." *United States* v. *Greenlee*, 517 F.2d 899, 903 (3d Cir.), cert. denied, 423 U.S. 985 (1975).

3. Counts 16-19: Christopher Jacobs

Pickard concedes that the testimony of government eyewitnesses Jacobs, Condell, and Escobar established that Pickard and "the other officer" aimed guns at Jacobs while screaming and cursing, and that "the guns actually made physical contact with Jacob[s]'s person" (Pick. Br. 39; Pick. J.A. 916, 962, 988). All three eyewitnesses further testified that the officers searched Jacobs and that Jacobs was not carrying a laser (Pick. J.A. 920, 954, 978). Additionally, Benta testified for the government that Pickard was instructed in the police academy that the sole purpose of a firearm is to kill, and was trained to never remove his firearm from

his holster unless he felt that his life, or the life of a citizen, was in imminent danger (Pick. J.A. 286, 304).

Although this evidence is sufficient to support a conviction on Counts 16-19, Pickard attacks the witnesses' credibility as to whether he and the other officer had their guns drawn and points out that his own testimony contradicted the testimony of the government witnesses (Pick. Br. 41). Again, Pickard's argument lacks merit since this Court has repeatedly held that "[c]redibility determinations are for the jury." *United States* v. *Jannotti*, 673 F.2d 578, 598 (3d Cir.), cert. denied, 457 U.S. 1106 (1992); see also *Greenlee*, 517 F.2d at 903.

4. Count 40: Jose Felix

Felix testified that, without provocation, Pickard placed a choke-hold on him at the top of the steps leading up to the entrance of Hondo's Night Club, spun him around, dragged him down the stairway, and slammed his head into a wall. Once at the bottom of the stairs, Pickard handcuffed Felix and vigorously beat him on the ground for about ten to fifteen minutes while shouting threats, including, "Mother f**ker, I'm going to kill you." Pickard also struck Felix, who did not fight back or resist arrest, with various hard objects (Pick. J.A. 550-560). Felix's testimony was corroborated by that of Andrew Hector, a Virgin Islands Police Officer who responded to the scene, and Melvin Forbes, the security guard on duty at Hondo's that night (Pick. J.A. 613-616, 655-657). Felix testified that after the incident, he was hospitalized for three and a half days, and that it took him about two and a half years to fully recover. His injuries included jaw traumas, a

concussion, bruising of his eyes, throat, chest, hands, head, neck, arms, forehead, and back, a cut to the eyebrow area, and three cuts to the head (Pick. J.A. 561-567).

Pickard argues that this evidence was insufficient to convict him because there were minor inconsistencies in the testimony of each of the government witnesses, and that their testimony conflicted with that of defense witnesses (Pick. Br. 41-47). For example, although all of the witnesses placed Felix and Pickard on or near the stairs leading up to the front entrance of Hondo's, Pickard contends that because many of them testified to seeing Felix and Pickard at different locations along the stairway, the evidence was too "confusing" for the jury to find him guilty on Count 40 (Pick. Br. 40). Given that each of the witnesses arrived on the scene at different times, it is hardly surprising that many of them caught different glimpses of Pickard and Felix as Pickard dragged Felix down the stairway. The variations in testimony are more complementary than they are inconsistent. However, even if the testimony could be properly characterized as inconsistent, it was nonetheless sufficient to support Pickard's conviction. It is well-settled that "[t]he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt." *Williams*, 739 F.2d at 940 (internal quotation marks and citation omitted).

C. *The Evidence Was Sufficient To Support Bates's Convictions On Counts 16-19*

Counts 16-19 of the indictment charged Bates for his participation in the Christopher Jacobs incident. Bates specifically challenges the sufficiency of the evidence with respect to Count 16, alleging a violation of 18 U.S.C. 242 (deprivation of rights under color of law) and Count 18, alleging a violation of 14 V.I. Code Ann. § 703(1) (oppression).[18] As explained above, see Part III.A.3, *supra*, the government's evidence established that Pickard and another officer stopped and searched Christopher Jacobs, who was not carrying a laser or any other sort of weapon, while aiming their firearms at Jacobs's face and body. The evidence further established, through the eyewitness testimony of Jacobs, Condell, and Escobar, that Bates was "the other officer" present with Pickard on the night of the incident (Pick. J.A. 917-918, 954-955, 976-977, 2232).

Bates, however, contends that this identification evidence was insufficient to support his convictions because it was contradicted by defense witness Daria Byron (Bates Br. 21). Byron, an Internal Affairs Agent who did not witness the incident, testified that based on her interview with Pickard, she concluded in her internal investigations report that Philbert was "the other officer" (Pick. J.A. 2223, 2227). Byron admitted on cross-examination, however, that the day after the

[18] "Oppression" is committed whenever a public officer arrests or detains any person against his will "without a regular process or other lawful authority." 14 V.I. Code Ann. § 703(1).

incident, Jacobs identified Bates from a photo array which contained pictures of both Bates and Philbert (Pick. J.A. 2237). It was clearly within the province of the jury to believe the government's strong eyewitness identification evidence over the testimony of Byron. *Greenlee*, 517 F.2d at 903.

Bates also argues that the evidence is insufficient to support his conviction on Count 16, alleging a violation of 18 U.S.C. 242, because the government failed to produce sufficient evidence establishing the element of "wilfulness" (Bates Br. 22-23). However, Oakland Benta, a former training officer for the Virgin Islands Police Department, testified that Bates was instructed as a new recruit in the academy that the sole purpose of a firearm is to kill. Accordingly, Bates was trained to never remove his firearm from his holster unless he felt that his life, or the life of a citizen, was in imminent danger (Pick. J.A. 286, 288, 304). The district court instructed the jury that "an act is done wilfully if it is done voluntarily and intentionally, and with the specific intent to do something which the law forbids; that is, with an intent to violate a protected right" (Bates J.A. 450). It is well-established that "such specific intent may be inferred from circumstantial evidence." *United States* v. *Dise*, 763 F.2d 586, 592 (3d Cir.), cert. denied, 474 U.S. 982 (1985) (citing *Screws* v. *United States*, 325 U.S. 91, 106 (1945)). Accordingly, the court further instructed:

> Knowledge and intent exist in the mind. Since it is not possible to look into a person's mind to see what went on, what he was thinking, you must take into consideration all of the facts and circumstances shown by the evidence, and determine from all of the facts and circumstances whether the requisite knowledge and intent were

> present at the time in question. *Knowledge and may be inferred from all the surrounding circumstances.*
>
> You may infer, that a person ordinarily intends all the natural and probable consequences of an act knowingly done. In other words, you may infer that a defendant intended all the consequences that a person, standing in like circumstances and possessing like knowledge, should have expected to result from his acts knowingly done (Bates J.A. 450-451 (emphasis added)).

Bates does not challenge the validity of these jury instructions. The jury, as the fact-finding body, was charged with weighing the evidence and drawing all reasonable inferences. *Barber*, 442 F.2d at 522. Given the strong eyewitness testimony that Bates pointed his gun at Jacobs while cursing at him and ordering him to empty his pockets, the jury could have reasonably inferred that Bates was acting wilfully to deprive Jacobs of a constitutional right to be secure in his person and free from unreasonable searches and seizures. The evidence, viewed in the light most favorable to the government, was therefore sufficient to convict Bates on Count 16.

Finally, Bates argues that the evidence was insufficient to convict him on Count 18 because, based on Pickard's testimony that he saw Jacobs with a laser, the evidence showed that the defendants had legal authority as police officers to respond to possibly illegal activity (Bates Br. 23-24). All three of the government's witnesses testified that Jacobs did not have a laser. Because it is within the province of the jury to weigh evidence and judge the credibility witnesses, *Greenlee*, 517 F.2d at 903, Bates's conviction on Count 18 must be affirmed.

D. *The Evidence Was Sufficient To Support Philbert's Convictions On Counts 24-25*

Counts 24-25 of the indictment charged Philbert with using unreasonable force against Onochukwa Nosakhena. Nosakhena testified that Philbert forcibly removed him from Milagrosa's Bar (Phil. J.A. 199-201). Once outside, Philbert straddled him on the ground while punching him in the face for several minutes. Philbert then restrained Nosakhena in a neck-hold as he waited for police back-up (Phil. J.A. 201). Once his fellow officers arrived in a police vehicle, Philbert handcuffed Nosakhena and placed him under arrest (Phil. J.A. 203, 264). These facts were corroborated by the testimony of Juan Antonio Garcia, an eyewitness to the beating (Pick. J.A. 1056-1058). Later that night, Nosakhena sought treatment for his injuries from a hospital emergency room (Phil. J.A. 207-208).

Philbert argues that the evidence was insufficient to convict him on Counts 24 and 25 because it failed to establish that he was acting "under color of law," as required under 18 U.S.C. 242 (deprivation of rights under color of law) and 14 V.I. Code Ann. § 703(1) (oppression). In support of this argument, Philbert points out that he entered Milgrosa's Bar "in a civilian capacity," he did not identify himself as a police officer, he never told Nosakhena that he was under arrest, and there are no facts showing that Nosakhena was "not free to leave" (Phil. Br. 18). However, the fact that Philbert was off duty at the time of the incident is not controlling. As the district court instructed the jury:

> [C]olor of law does not depend on the actual duty status of the defendant at the time of the incident charged, but means acting under pretense of law as well as under actual legal authority.
>
> * * * If the law enforcement officer, whether off-duty or on-duty misuses the power invested in him by the law, to deprive someone of his or her rights, the officer's misconduct is still under color of law, even if the law forbids what he has done.
>
> * * * * *
>
> Consequently, I charge you that if you find a defendant was a police officer with the Virgin Islands Police Department and acted or purported to act as a police officer when he committed the acts charged in [Count 24] of the indictment, you may find that he was acting under color of law (Bates J.A. 445-446).

Philbert does not challenge these instructions. The evidence that Philbert forcibly removed Nosakhena from the bar and then beat him for the purpose of arresting him was sufficient for the jury to conclude that Philbert was acting as a police officer. Moreover, under no circumstance would somebody who is being straddled, punched in the face, restrained in a neck-hold, handcuffed, and placed in a police vehicle reasonably believe that he was "free to leave." Accordingly, the evidence was sufficient to prove beyond a reasonable doubt that Philbert was acting "under color of law."

Finally, Philbert argues that the evidence was insufficient to support his conviction on Count 26 because the government did not establish that Philbert used a weapon. Count 26 alleges that Philbert assaulted Nosakhena with "[his] hands and feet and inflicted serious bodily injury upon [him]" in violation of 14 V.I. Code Ann. § 297(4) (Pick. J.A. 50). The statute at issue provides:

> Whoever, under circumstances not amounting to an assault in the first or second degree–* * *
>
> (4) assaults another and inflicts serious bodily injury upon the person assaulted; * * *
>
> shall be fined not less than $500 and not more than $3,000 or imprisoned not more than 5 years or both.

14 V.I. Code Ann. § 297(4). Neither the indictment nor the statute requires proof of use of a weapon. Philbert's argument is therefore without merit. Accordingly, his convictions must be affirmed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Respectfully Submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

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JESSICA DUNSAY SILVER
TOVAH R. CALDERÓN
Attorneys
U.S. Department of Justice
Civil Rights Division
950 Pennsylvania Avenue, NW
Appellate Section, PHB 5102
Washington, DC 20530
(202) 514-4142

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the attached Brief for the United States as Appellee is proportionally spaced, has a typeface of 14 points, and contains 13,856 words.

_____
TOVAH R. CALDERON
Attorney

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Brief of the United States as Appellee were sent by first class mail on March 19, 2002, to the following counsel of record:

George W. Cannon, Jr., Esq.
Law Offices of George W. Cannon, Jr.
70 & 70-A (115) Queen Street
Frederiksted, St. Croix
USVI, 00840

Patricia Schrader-Cooke, Esq.
Office of Federal Public Defender
P.O. Box 3450
Christiansted, St. Croix
USVI, 00822

Jomo Meade, Esq.
112 Queen Cross Street
Frederiksted, St. Croix
USVI, 00840

I further certify that on March 19, 2002, ten copies of the same brief were sent by first class mail to the Third Circuit's clerk's office for filing. An additional copy was also filed with the clerk's office in the District of the Virgin Islands, Saint Croix Division.

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TOVAH R. CALDERÓN
Attorney