Nos. 01-50081, 01-50163

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/
Cross-Appellant

v.

JACK A. GESTON,

Defendant-Appellant/
Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE AND CROSS-APPELLANT

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STATEMENT OF JURISDICTION AND BAIL STATUS

This is an appeal from a final judgment by the district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The defendant, Jack A. Geston, was sentenced on January 26, 2001, and the district court entered a

final judgment and commitment order on February 1, 2001 (R. 57/RE 539-543).[1] Geston filed a timely Notice Of Appeal on February 2, 2001, pursuant to Fed. R. App. P. 4(b)(1)(A) (R.59/RE 544). The United States filed a timely Notice Of Cross-Appeal on March 5, 2001, pursuant to Fed. R. App. P. 4(b)(1)(B)(ii) (R. 63/SRE 215). This Court has jurisdiction pursuant to 28 U.S.C. 1291. Geston is on bond pending appeal.

STATEMENT OF THE ISSUES

1. Whether government counsel knowingly used false or erroneous testimony of witnesses.

2. Whether brief cross-examination of two witnesses (other than the defendant) about other witnesses' contrary testimony constitutes error that warrants reversal, under either the plain error or harmless error standards.

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[1] "R. __" refers to the entries on the district court docket sheet. "RE __" refers to the page of Appellant's Record Excerpts. "SRE __" refers to the page of the United States' Supplemental Record Excerpts. "Br. __" refers to defendant-appellant's opening brief. "I/L Tr. __" refers to the page of the transcript for the hearing held on motions in limine on May 2, 2000. "Tr2:__:__" refers to the transcript of the second trial, volume number, and page number. "S. Tr. __" refers to the page of the transcript of the sentencing hearing held January 26, 2001. Other transcripts are identified by date of the hearing. Where appropriate, joint citations are made to the pleadings or transcripts and RE or SRE, separated by a front-slash (/). For completeness and ease of reference, some text in the RE is also included in the SRE. We cite only to the SRE when transcript pages are in the RE and SRE.

3. Whether the district court erred or abused its discretion in denying the admission of specific acts of unrelated confrontations involving the victim pursuant to Fed. R. Evid. 404(a) and 608(b).

4. Whether the district court misapplied United States Sentencing Guideline 2H1.1(b) when it refused to adjust upwards by six levels for action under color of law or by a public official given that the defendant, a Department of Defense police officer, was convicted under 18 U.S.C. 242.

STATEMENT OF THE CASE

A. Proceedings And Disposition Below

The defendant Jack Alan Geston was indicted by a grand jury on December 14, 1999, for violating 18 U.S.C. 242, deprivation of civil rights through the intentional use of unreasonable force under color of law (Count 1), and 18 U.S.C. 113(a)(3) and (6), assault with a dangerous weapon (a baton) with intent to do bodily harm, and assault resulting in serious bodily injury, within the special maritime and territorial jurisdiction of the United States (Count 2) (R.1/RE 1-2). The Indictment charged Geston, while acting as a Department of Defense police officer, with assaulting Jose Hernandez, III, on November 25, 1997, while on board the U.S.S. Rentz, which was docked at the Naval Station in San Diego, California.

The first trial, held in July 2000, ended in a mistrial due to a hung jury (7/20/2000 Tr. 4-5; 7/21/2000 Tr. 3/SRE 16). A second trial was held in September and October, 2000, and encompassed approximately five days of witness testimony. Four witnesses who testified at the second trial did not testify at the first trial: Dr. Brian Blackbourne, on behalf of the United States; Roy Staten and FBI Agent Jeffrey N. Thurman, on behalf of the defendant; and Geston himself. The jury found Geston guilty of the intentional use of unreasonable force under color of law (18 U.S.C. 242) and assault with a dangerous weapon with intent to do bodily harm (18 U.S.C. 113(a)(3)), but the jury found Geston not guilty of assault with a dangerous weapon with intent to cause serious bodily injury (18 U.S.C. 113(a)(6)).

B. Evidentiary Rulings

Prior to the first trial, Geston moved to admit evidence of two bad acts of Hernandez under Fed. R. Evid. 404. (R. 16-18/RE 3-15). The first incident occurred in Mazatlan, Mexico, date unknown, where it is alleged that Hernandez fought a hotel security employee while under the influence of alcohol (I/L Tr. 25-26/SRE 6-7). Hernandez reported the incident to his superiors and stated that, in defending himself against an attack by the hotel guard who was using a flashlight

or baton, he severely injured the guard (I/L Tr. 26/SRE 7). The second incident, a confrontation on the U.S.S. Rentz with a fellow seaman, happened after the assault by Geston, although it was known to the parties prior to trial (I/L Tr. 31/SRE 12).

On May 2, 1999, District Court Judge Keep held a hearing on this and other motions. Relying primarily on *United States* v. *Keiser*, 57 F.3d 847 (9th Cir.), cert. denied, 516 U.S. 1029 (1995), the court ruled that evidence of two unrelated incidents involving Hernandez were not admissible because, under Rule 404(a)(2), specific act evidence cannot be used to prove his asserted propensity or disposition to act violently (I/L Tr. 25-32/SRE 6-13). Moreover, because Hernandez reported the Mazatlan incident to his supervisor, the court stated that this incident does not adversely "affect[] his credibility," (I/L Tr. 27/SRE 8), or bear upon his truthfulness under Fed. R. Evid. 608 (I/L Tr. 30, 31/SRE 11, 12). The court also ruled that the evidence was not admissible under Rule 404(b) because it is "not relevant to a material element of the crimes for which the Defendant is charged and that Defendant has not stated a permissible purpose for the introduction under 404(b)" (I/L Tr. 28-29/SRE 9-10). On several occasions, the court stated that the admissibility of prior acts could be revisited during trial for impeachment if

Hernandez's character were put in issue during his direct testimony (I/L Tr. 22, 25, 27-28, 30, 32/SRE 3, 6, 8-9, 11, 13).

After the mistrial, Judge Keep stated that the same evidentiary rulings made in the first trial would apply to the second trial (7/21/2000 Tr. 3/SRE 16). Geston first challenged the court's evidentiary ruling at the conclusion of the second trial in his written motion for a new trial (R. 43, 44/RE 484-506). In denying that motion, Judge Whelan, who presided over the second trial, stated that Judge Keep did not err in excluding this evidence (S. Tr. 2/RE 513).

C. Defendant's Motion For New Trial Based On Alleged Prosecutorial Misconduct

After closing arguments and immediately prior to the district court giving jury instructions, the defendant notified the court that he would be filing a motion for acquittal under Fed. R. Crim. P. 29, and a motion for mistrial based on prosecutorial misconduct (Tr2:VII:916-917/SRE 158-159). Defense counsel stated:

> [b]asically, I don't want to tie up the jury out in the hallway any longer than necessary, so I'd like to make a brief outline of my two motions, and perhaps the Court would provide me with the opportunity to expand upon those after the court instructs the jury.
>
> Basically, the first motion is a Rule 29 motion on the status of the evidence. And the second motion is more extensive. It's a motion for

> a mistrial based upon prosecutorial misconduct. And that's more of an extensive presentation, Your Honor. And, like I said, I don't want to tie up the jury.

(Tr2:VII:916-917/SRE 158-159).

The court accepted the defendant's offer to argue the merits of the motion for mistrial after jury instructions (Tr2:VII:917/SRE 159). In summary, Geston asserted that counsel for the United States engaged in prosecutorial misconduct through its cross-examination of Officer Garrett, by eliciting "perjured" testimony of two witnesses as to whether Officer Garrett used a wooden or metal baton during the struggle with Hernandez, and by improper comments during closing argument (Tr2:VII:942-944). In place of a written motion, counsel submitted Exhibit U, which consisted of various documents relating to the transfer of custody of the metal batons turned in by Geston and Officer Garrett and a DNA analysis performed by the FBI of blood stains on the batons. The results of the DNA tests were inconclusive on whether the blood was Hernandez's.

The next day, immediately after the jury returned its verdict, the district court denied the motion for mistrial from the bench (Tr2:VIII:964-974/SRE 164-174). The court noted that the various witnesses who testified about whether Officer Garrett had a wooden or metal, retractable baton (Lt. Sims, Officer Carr,

Officer Garrett, and Agent Thurman) all did so without objection by defense counsel (Tr2:VIII:966-970/SRE 166-170). In fact, the court noted that this issue was first raised *by defense counsel* on cross-examination of Lt. Sims. The district court also noted that both parties had possession of the DNA analysis of blood stains on the batons and chose not to introduce it (Tr2:VIII:964-965/SRE 164-165). Finally, the court concluded that the United States' references in closing arguments to Garrett's type of baton were minimal and were made without objection (Tr2:VIII:971-972/SRE 171-172).

The court also concluded that whether Officer Garrett had a wooden or metal baton was "a collateral matter and irrelevant to the guilt or innocence of the defendant" (Tr2:VIII:973-974/SRE 173-174). It stated that the defendant made a tactical decision on what information should be presented to the jury, and his failure to timely object to witness examination about the baton precluded his effort to now seek a mistrial (Tr2:VIII:974/SRE 174). The court concluded, "I don't find that there was any misconduct by the Government. If there was error, it was invited error, and, in my opinion, it was harmless beyond a reasonable doubt" (Tr2:VIII:974/SRE 174).

Geston filed a motion for new trial alleging prosecutorial misconduct and erroneous evidentiary rulings under Rule 404 (R. 43, 44/RE 484-511). Immediately prior to sentencing, the court denied the motion in a ruling from the bench (S. Tr. 2-3, 6-8/SRE 189-190, 193-195). The court reiterated that while Officer Garrett was aggressively cross-examined on various issues, including what type of baton he used, the defense first raised the issue of Garrett's baton through its cross-examination of Lt. Sims (S. Tr. 3, 6-7/SRE 190, 193-194). In addition to failing to properly object to questions or argument on this issue, the defense made tactical decisions by waiting until after jury instructions to raise the issue of prosecutorial misconduct, and, thus, foreclosed any corrective action (S. Tr. 7-8/SRE 194-195). The court concluded that Geston could not now secure a mistrial given its failure to raise the issue of alleged misconduct in a timely manner (S. Tr. 8/SRE 195).

D. Sentencing

The district court sentenced Geston on January 26, 2001, rejecting certain recommendations made by the probation officer, and overruling objections by the United States and the defendant (S. Tr. 10-26/SRE 197-213). Finding Geston had a total offense level of 15 and a Criminal History Category of I, the district court

sentenced Geston to 18 months' imprisonment for each count – the lowest end of the applicable Guideline range – to be served concurrently, followed by three years of supervised release (R. 57/RE 539-543; S. Tr. 24-25/SRE 211-212).

The sole issue on cross-appeal is the district court's calculation of the sentence for Count I (violation of 18 U.S.C. 242), due to its failure to apply U.S.S.G. 2H1.1(b), which imposes a six-level enhancement for action under color of law or by a public official.[2] The United States argued in its Sentencing Memorandum and during the sentencing hearing that the base offense level should be assessed pursuant to U.S.S.G. 2H1.1, and not 2A1.1; and that U.S.S.G. 2H1.1(b) was triggered because Geston was a public official and he acted under color of law (R. 53/SRE 175; S. Tr. 15/SRE 202).

Pursuant to U.S.S.G. 3D1.3(a) and 3D1.2(a), Geston's conviction under 18 U.S.C. 113(a)(3) and 242 should be grouped together and assessed at the highest offense level. Under U.S.S.G. 2H1.1, Offenses Involving Individual Rights, there are several means to assess a base offense level. See U.S.S.G. 2H1.1(a)(1)-(4). In this case, U.S.S.G. 2H1.1(a)(1) establishes the highest level, which looks to the

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[2] Given the limited scope of the challenge to the sentence, the United States has not addressed every aspect of the court's rulings or all of the objections raised by the parties.

base offense level for the underlying offense – aggravated assault – including specific offense characteristics, cross references, and special instructions. See U.S.S.G. 2H1.1 comment (n.1). Thus, while the underlying conduct of aggravated assault is considered for both 2A2.2 and 2H1.1, the United States asserted that the total base offense level is greater under 2H1.1 because of the enhancement under 2H1.1(b).

At the sentencing hearing, the court preliminarily concluded that the six-level adjustment under 2H1.1(b) would not be applied because "that was actually an element of Count One, which was deprivation of rights under color of authority" (S. Tr. 11/SRE 198). After the United States objected and asserted that U.S.S.G. 2H1.1(b) was triggered and required (S. Tr. 15/SRE 202), the court refused to apply this provision. The court did not believe this enhancement was "justified" or appropriate because he did not think Geston's actions were sufficiently egregious to warrant a higher sentence (S. Tr. 20-21/SRE 207-208).

The district court continued Geston's status on bond pending appeal (S. Tr. 10/SRE 197). Judgement was entered on February 1, 2001 (R. 57/RE 539-543).

STATEMENT OF THE FACTS

In the late evening of November 25, 1997, Geston, a Department of Defense (DOD) Police Officer assigned to the Naval Station in San Diego, California, arrested Jose Hernandez, III, then a Navy sailor, for driving while intoxicated and under-age drinking (Tr2:I:31, 129; Tr2:V:734). DOD Officer William Garrett was Geston's partner that evening (Tr2:V:733). Hernandez was assigned to the U.S.S. Rentz, which was docked in San Diego (Tr2:I:24-25). Hernandez, as well as three officers who observed him at different stages of the arrest and booking procedures (Officers Carr and Capers and Lt. Sims), testified that Hernandez cooperated with Geston and other officers throughout his arrest, including the administration of field sobriety tests, being handcuffed and transported to the DOD police station, the administration of a breathalyzer test, and transport to the U.S.S. Rentz. (Tr2:I:31, 33, 183; Tr2:II:255-257, 350-351; Tr2:IV:546).

Pursuant to DOD procedures, once an arrest of Navy personnel is completed, the individual is returned to his assigned ship. When Officers Geston and Garrett arrived with Hernandez at the U.S.S. Rentz, Officer Garrett stood next to Hernandez while Geston walked to the Officer of Deck podium several feet away in order to complete paperwork with Navy Petty Officer Holden for Hernandez's

transfer of custody (Tr2:I:129, 133; Tr2:V:735-736). Officer Garrett removed the handcuffs from Hernandez and Hernandez was free to leave (Tr2:VI:741, 766-767, 771, 773-774).

While Hernandez was walking past Geston and towards a passageway entrance that leads to the interior of the ship, Hernandez made a derogatory remark to Geston saying "stupid fat f—." (Tr2:I:40, 132). Hernandez kept walking but Geston, upon hearing the comment, immediately charged at Hernandez by going around the podium and in front of Petty Officer Holden (Tr2:I:132, 135-136). Without warning, Geston entered the passageway and pushed Hernandez from behind into the bulkhead (Tr2:I:41-42, 105-106, 132, 135-136; see Tr2:I:153). Geston hit Hernandez in the face, Hernandez then grabbed Geston, and they fell to the deck in the passageway (Tr2:I:42-43; see Tr2:I:136). Hernandez felt that he was hit in the head with a hard object and he responded by punching back at Geston (Tr2:I:43-44). Hernandez was struck once again and he fell to the floor, with Geston on top of him. (Tr2:I:45).

Hernandez weighed approximately 161 pounds and Geston weighed approximately 250 pounds at the time of this incident (Tr2:I:182; Tr2:II:371; Tr2:III:520). During much of this assault, Geston straddled and sat atop Hernandez

at his mid-section by keeping his (Geston's) knees on the deck (Tr2:I:139, 187). With Hernandez beneath him, Geston used his baton to hit Hernandez at least twice in the ribs with side strikes, and once in Hernandez's head with an overhead strike (Tr2:I:140-141, 191, 195, 197-198). Hernandez suffered a severe cut to his head and bled excessively (Tr2:I:43, 140; Tr2:II:287). Officer Garrett also entered the fray in the passageway and Navy Officers Holden and Hamblin saw him strike Hernandez twice in the ribs with his baton (Tr2:I:141, 150, 196). It is against DOD policy to strike an individual in the head or ribs because of the potential for serious injury (Tr2:II:295-296, 298; Tr2:VI:800).

At one point when Geston was straddling Hernandez, Geston held his baton with a hand at each end and pressed the baton against Hernandez's chest and throat, making it extremely difficult for Hernandez to breathe (Tr2:I:46, 106, 189-191, 198; see Tr2:VI:797). Witnesses described Hernandez as making gurgling noises or mumbling and having trouble breathing (Tr2:I:191; Tr2:II:268-270; Tr2:VI:797). At some point, Hernandez was rolled over to his stomach and Geston pressed his face against the deck (Tr2:I:48-49). In the midst of the assault, Geston made a radio call for assistance and DOD Lt. Sims (Geston's supervisor) and Officer Raftis arrived at the U.S.S. Rentz while Geston was still fighting

Hernandez (Tr2:II:259, 261). Raftis applied leg restraints to Hernandez (Tr2:III:459).

At another point, Lt. Sims and Petty Officer Hamblin testified, Geston pressed one knee against Hernandez's back, near the base of his neck (Tr2:I:203; Tr2:II:261). When Hernandez was lying face down on the deck, bleeding from his head, handcuffed, legs shackled, and Officer Raftis was holding Hernandez's legs, Geston stood with both feet on Hernandez's back (Tr2:II:291; Tr2:III:481; Tr2:VI:793; see Tr2:I:203). Lt. Sims stated that Geston "was jumping up and down with his feet not leaving [Hernandez's] back but staying on him but maintaining the pressure." (Tr2:II:272). Lt. Sims, Officer Garrett, and Petty Officer Hamblin testified that Geston did not need to be on Hernandez's back in order to restrain Hernandez (Tr2:II:274; Tr2:VI:795-796, 806). Officer Raftis also testified to the grand jury that Geston did not need to stand on Hernandez's back (Tr2:III:479-481).

Lt. Sims described Geston's behavior as "totally out of control" (Tr2:II:270). Lt. Sims instructed Geston to get off Hernandez, and Geston gave Hernandez a "backward kick" as he stepped off of his back (Tr2:II:274; Tr2:III:465; see Tr2:II:360-361). Lt. Sims and Petty Officer Holden described Geston as

"adrenalized," "pacing" the deck, "very excited," and "emotionally out of control" immediately after the fight with Hernandez (Tr2:I:146; Tr2:II:275, 396). Officer Sears testified that upon Geston's return to the DOD police station from the U.S.S. Rentz, Geston "brag[ged]" about winning this assault and showed off his baton with blood on it (Tr2:II:396-397, 400). Garrett also stated that Geston made a comment akin to "teaching Hernandez a lesson" during this conversation with Sears (Tr2:VI:788).

Hernandez was taken off the U.S.S. Rentz in a stretcher and brought to the Naval hospital (Tr2:I:59). Navy Officers Holden and Hamblin and DOD Officer Carr described seeing a small pool of blood in the passageway where Hernandez had been (Tr2:I:152, 210; Tr2:II:358). As described by Hernandez and Dr. Peter Woodson, the emergency physician at the Naval hospital who treated Hernandez, Hernandez suffered a head laceration and cuts and bruises to his back, face, chest, neck, and wrist (Tr2:I:56-57; Tr2:III:407-408, 411-417; Gov. Exhs. 6, 11, 15). Hernandez's head wound, which was approximately three centimeters long, needed three staples to close it (Tr2:III:411, 418).

In addition, a large bruise that was shaped by the impression of the boot print from Geston's boot was visible on Hernandez's back (Gov. Exh. 11; Tr2:III:433-

436, 445). Dr. Brian Blackbourne, a forensic pathologist, testified that "some force or violence," and not merely "general" or "steady" pressure, was necessary to cause the boot print bruise on Hernandez's back (Tr2:III:430, 435-436). He also believed that this injury could have been caused by bouncing on Hernandez's back without removing one's feet (Tr2:III:436). Petty Officer Holden, Officer Carr, and DOD Officer Capers, who took Geston to the hospital after the incident, described Geston as having only minor cuts and abrasions (Tr2:I:152; Tr2:II:362; Tr2:IV:546-547).

On the U.S.S. Rentz, Geston unequivocally denied to Lt. Sims that he used his baton at any point during this incident (Tr2:II:278, 282, 333, 369). Geston also told Officer Carr on the Rentz that Hernandez received his head wound from the "nonskid" deck (Tr2:II:362). Geston only later admitted to Lt. Sims, at the DOD police station, that he used his baton, and that he may have hit Hernandez in the head (Tr2:II:286-287, 333). When asked by Officer Carr, Garrett denied using his baton, although Carr saw the baton Garrett was holding had blood on it (Tr2:VI:834-835).

At the DOD police station, several hours after the incident, Lt. Sims asked Officers Geston and Garrett to submit their batons (Tr2:II:289). The inventory

custody log, which includes Lt. Sims' signature, records two metal, retractable batons (Tr2:II:327-328). Lt. Sims recalled, however, that Officer Garrett was issued a wooden baton at that time (Tr2:II:324-325). Officer Carr also testified that he saw Officer Garrett on the U.S.S. Rentz holding a wooden baton (Tr2:II:369-370). Officer Garrett testified that upon returning to the DOD police station, he went to the men's room by himself to wash off his baton (Tr2:VI:756).

SUMMARY OF ARGUMENT

Geston's assertions of prosecutorial misconduct based on witness testimony, the United States' cross-examination of two witnesses, and closing arguments are without merit. First, Geston did not make timely objections to almost every claim now asserted. Accordingly, these issues are reviewed for plain error. See *United States* v. *Sanchez*, 176 F.3d 1214, 1218 (9th Cir. 1999).

Conflicting evidence was presented by several witnesses on a matter collateral to Geston's guilt: whether Officer Garrett used a wooden or metal, retractable baton in the confrontation with Hernandez. Government counsel did not elicit or use false or knowingly incorrect testimony. Geston has provided no proof that two witnesses provided false testimony, as opposed to their best recollections on this issue. Moreover, Geston invited the very testimony now challenged by

initiating the topic through his cross-examination of a government witness. Because of the contradictory evidence, the United States' brief comments on this topic during closing, to which the defendant made no objection, were proper. Even if the challenged testimony and arguments are considered improper, there is no showing they substantially affected the jury's verdict to warrant a new trial. Cf. *United States* v. *Garcia-Guizar*, 160 F.3d 511, 521 (9th Cir. 1998).

In addition, the United States did not commit reversible error by asking a Naval and DOD officer to comment on the veracity of testimony by other Naval and DOD officers. Cf. *United States* v. *Boyd*, 54 F.3d 868, 870-872 (D.C. Cir. 1995). This cross-examination was minimal in the context of the entire trial and was not unduly prejudicial to Geston. Accordingly, these queries, even if error, were harmless. Cf. *ibid*.

The district court's ruling that barred introduction of specific, unrelated confrontations involving the victim is consistent with this Circuit's precedent. See *United States* v. *Keiser*, 57 F.3d 847 (9th Cir.), cert. denied, 516 U.S. 1029 (1995). By not seeking to introduce this evidence at trial, Geston did not preserve this issue for appeal. Cf. *United States* v. *Wood*, 943 F.2d 1048, 1055 (9th Cir. 1991). Whether reviewed for plain error or abuse of discretion, this claim fails. Specific

acts are not admissible to prove propensity for violence under Fed. R. Evid. 404(a)(2) and 405. See *Keiser*, 57 F.3d at 855. Moreover, prior assaults, unlike fraudulent conduct, are not indicative of truthfulness to satisfy Fed. R. Evid. 608(b). Cf. *United States* v. *Munoz*, 233 F.3d 1117, 1135 (9th Cir. 2000).

Finally, the district court erred in denying a six-level enhancement pursuant to U.S.S.G. 2H1.1(b). This enhancement is mandatory when one of two independent factors exists, and both are present here: Geston acted under color of law and he was a public official. Cf. *United States* v. *Jeter*, 236 F.3d 1032 (9th Cir. 2001); *United States* v. *Winters*, 174 F.3d 478, 486 (5th Cir.), cert. denied, 528 U.S. 969 (1999).

ARGUMENT

I
GOVERNMENT COUNSEL DID NOT KNOWINGLY USE FALSE OR ERRONEOUS TESTIMONY OF WITNESSES

A. Standard Of Review

Geston asserts that this Court should grant a new trial based on prosecutorial misconduct and an erroneous evidentiary ruling. Because Geston did not timely object to many of these asserted errors, those allegations should be reviewed for plain error. *United States* v. *Sanchez*, 176 F.3d 1214, 1218 (9th Cir. 1999).

Accordingly, the defendant must show (1) an error occurred; (2) the error was plain, that is, "obvious" or "clear"; and (3) the error affects substantial rights, including affecting the outcome of the proceedings. *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993); see *United States* v. *Baron*, 94 F.3d 1312, 1316 (9th Cir.), cert. denied, 519 U.S. 1047 (1996). A conviction should be reversed only if these three elements are satisfied and the court also determines, in its discretion, that the "error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (internal quotations omitted); see *Baron*, 94 F.3d at 1316; *United States* v. *Cristophe*, 833 F.2d 1296, 1301 (9th Cir. 1987) ("[R]eversal is warranted only if it is more probable than not that the misconduct materially affected the verdict."). Alleged prosecutorial misconduct must be reviewed in the context of the entire trial. See *United States* v. *Cabrera*, 201 F.3d 1243, 1246 (9th Cir. 2000).

When the defendant raises a timely objection to alleged prosecutorial misconduct, the misconduct is reviewed for harmless error. See *Cabrera*, 201 F.3d at 1246; *Sanchez*, 176 F.3d at 1218. The denial of a motion for a new trial based on prejudicial misconduct, when timely objections are made, is reviewed for abuse of discretion. See *McClaran* v. *Plastic Indus., Inc.*, 97 F.3d 347, 359-360 (9th Cir.

1996) (affirmed denial of motion for new trial, despite objection to misconduct, since counsel did not request evidence be stricken or propose curative instruction, and absence of prejudice).

Specifically, Geston did not object to the asserted 'false' testimony during trial or the allegedly improper comments during closing and rebuttal argument about the type of baton Officer Garrett used. Moreover, Geston *initiated* questioning on the very topic now challenged. Given Geston's failure to timely object, review of these claims is limited to plain error.[6] See *United States* v. *Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995).

B. Discussion

Geston asserts (Br. 39-43, 48-49) that Lt. Sims' and Officer Carr's testimony that they recalled that Officer Garrett had a wooden baton, and not a metal, retractable baton, was deliberately false and known to the United States to be incorrect. In addition, Geston asserts that government counsel not only failed to take corrective action as required, but highlighted this false testimony through cross-examination of Officer Garrett, rebuttal testimony by Officer Carr, and

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[6] While the defendant initially asserted that the standard of review is abuse of discretion (Br. 37-38), the defendant later concedes that he did not object to Lt. Sim's and Officer Carr's testimony (Br. 60) and, therefore, the issue is reviewed for plain error (Br. 57-61).

comments made in closing arguments, and that this action substantially influenced the jury's verdict. In fact, there was conflicting testimony on this issue, and no showing of deliberate falsehood or mistake. Geston cannot now benefit from reversal when he made tactical decisions that precluded any contemporaneous correction of the asserted violations. Moreover, Geston cannot show plain error or that the testimony or conduct of the government substantially affected the jury's verdict.

1. Given The Disputed Evidence On Officer Garrett's Baton, Government Counsel Did Not Elicit Or Use False Or Knowingly Incorrect Testimony

Geston's assertion that Lt. Sims and Officer Carr provided deliberately false testimony when they recalled that Officer Garrett had a wooden baton is incorrect and should be rejected. In effect, Geston charges that Lt. Sims and Officer Carr committed perjury. To establish perjury, the defendant must show that a witness gave "false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake or faulty memory." *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993).

While Lt. Sims' and Officer Carr's recollection is contrary to Garrett's testimony that he used a metal baton, Geston has not shown deliberate deception on

the part of Lt. Sims or Officer Carr, or that Sims' or Carr's testimony was anything but their best recollection about the type of baton Officer Garrett used against Hernandez. Lt. Sims rationally explained that he believed Officer Garrett had a wooden baton because Garrett was not yet in training and Lt. Sims did not believe there were enough metal batons to be assigned to all officers at that time (Tr2:II:324/SRE 22). Lt. Carr simply recalled that, on the U.S.S. Rentz, he observed Officer Garrett with a wooden baton with blood on it (Tr2:II:369-370/SRE 26-27; Tr2:VI:834-835/SRE 92-93). The district court correctly noted that a witness's faulty recollection, if so, is not the same as perjured testimony (S. Tr. 2/SRE 189). See *Dunnigan*, 507 U.S. at 94.

Geston also erroneously asserts (Br. 42) that a custody receipt for two metal batons, Agent Thurman's testimony, and the DNA analysis of the batons inexorably lead to the conclusion that Officer Garrett used a metal baton, and that Lt. Sims' and Carr's testimony is, therefore, knowingly incorrect. Geston, however, fails to recognize other testimony that raises questions about the type of baton Garrett used against Hernandez.

In addition to the testimony of Lt. Sims and Officer Carr described above, Lt. Sims did not collect batons from Officers Garrett and Geston until several hours

after the incident (Tr2:II:289/SRE 21). Garrett also testified that after the incident, he returned to the DOD police station and went into the bathroom, by himself, to clean off his baton (Tr2:VI:756/SRE 38). While Agent Thurman testified that the FBI took custody from NCIS of a metal baton with Officer Garrett's name on it, he could not confirm that the FBI had the actual baton Officer Garrett had used against Hernandez (Tr2:VI:812-814/SRE 89-91). Moreover, the DNA analysis is inconclusive on whether Hernandez was the source of blood found on Garrett's baton (Tr2:VIII:964-965/SRE 164-165). There also is no conclusive evidence of whether the blood identified was there originally, or transferred to that baton accidentally or otherwise. Thus, the different recollections of witnesses, the passage of time between the incident and custody of the batons, and other inconsistencies in Officer Garrett's testimony raise a legitimate question as to whether, accidentally or otherwise, Officer Garrett submitted the same baton he used against Hernandez on the U.S.S. Rentz. This is not an instance where government counsel were clearly aware of either false or erroneous testimony that required affirmative steps to correct the record. Cf. *United States* v. *LaPage*, 231 F.3d 488 (9th Cir. 2000).

2. Failure To Object In A Timely Manner Limits Review, At Best, To Plain Error

Geston failed to make a timely objection to direct testimony by Officer Carr and cross-examination of Officer Garrett about the type of baton Officer Garrett had the night of the incident (Tr2:II:369-370/SRE 26-27; Tr2:VI:759-760/SRE 40-41; Tr2:VIII:966-970/SRE 166-170).[7] While defendant raised several objections to government counsel's closing arguments (Tr2:VI:857, 858, 861/SRE 113, 114, 117), he did not object when counsel for the United States addressed Officer Garrett's testimony about his baton (Tr2:VI:876/SRE 132). Moreover, the defendant *initiated* the testimony about the type of baton Officer Garrett had used in his cross-examination of Lt. Sims (Tr2:VIII:965/SRE 165; Tr2:II:324-325, 327-328/SRE 22-25), and *introduced additional* testimony through FBI Agent Thurman (Tr2:VI:812-813/SRE 89-90). Finally, the defendant waited until *after jury instructions* were given to substantively address the issue of prosecutorial

[7] Geston made other objections to the cross-examination of Garrett; there was no objection to counsel for the United States challenging Officer Garrett about whether he used a wooden or metal baton against Hernandez.

misconduct, and thereby foreclosed corrective action by the court (Tr2:VII:916-917/SRE 158-159; S. Tr. 7-8/SRE 194-195).[8]

Thus, the district court properly concluded that, given defendant's tactical decisions that prevented any contemporaneous correction of asserted error, he cannot secure a new trial (Tr2:VIII:974/SRE 174; S. Tr. 8/SRE 195). See *Guam* v. *Alvarez*, 763 F.2d 1036, 1037-1038 (9th Cir. 1985) (despite plain error with jury instruction *requested* by the defendant, no indication of improper influence on jury's verdict to establish exceptional circumstance for reversal). When a defendant "invite[s]" the asserted error for tactical reasons, those errors are even "less worthy of consideration than those where the defendant merely fails to object," and a court will only reverse in "exceptional situations." *Id*. at 1038-1039. Assertions of attorney misconduct should be raised before jury deliberations in order that a court may "examine the alleged prejudice and to admonish * * * counsel or issue a curative instruction, if warranted." *Kaiser Steel Corp.* v. *Frank Coluccio Constr. Co*., 785 F.2d 656, 658 (9th Cir. 1986); see *Kehr* v. *Smith Barney*

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[8] Immediately prior to the court giving the jury instructions for deliberations, Geston notified the district court that he had a motion for mistrial based on prosecutorial misconduct (Tr2:VII:916-917/SRE 158-159). The court accepted *Geston's* offer to argue the merits of this motion after jury instructions since counsel informed the court that he did not want to delay the jury (Tr2:VII:916-917/SRE 158-159).

Harris Upham & Co.,, 736 F.2d 1283, 1286 (9th Cir. 1984) (affirmed denial of motion for new trial under abuse of discretion standard, despite improper comments in opening and closing arguments, due, in part, because comments were "isolated, rather than persistent" and counsel failed to timely object).

3. There Is No Plain Error In Testimony Or Argument On Garrett's Baton

Geston has not established any error, let alone plain error, in witness examination or argument on Garrett's type of baton to warrant reversal. To be plain, the error must be "obvious" or "clear." *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Defendant's allegations simply do not meet the standard of violating a clearly established rule of procedure or law, as compared to action well within the bounds of permissible direct and cross-examination and argument. See *United States* v. *Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995) (by the defendant opening the door on a given topic, there is no plain error in allowing the government's questioning on the same topic).

In addition, Geston's reliance on *United States* v. *LaPage*, 231 F.3d 488, 490 (9th Cir. 2000), and *United States* v. *Young*, 17 F.3d 1201 (9th Cir. 1994), is misplaced. During a third trial in *LaPage*, 231 F.3d at 490, this Court found that the prosecutor knowingly elicited critical testimony from a witness that was

directly contrary to the witness's prior testimony, and an effort to deny his prior inability to identify a key witness. In *Young*, 17 F.3d at 1202, an officer testified that notebooks on drug sales were found in a deliberate hiding place in the defendant's vehicle. Another agent testified post-trial, however, that she actually found the notebooks in a bag in plain view, not in a hiding place, and that she so informed the prosecutor. See *id*. at 1202-1203. Whether or not counsel knew the original testimony was false, this Court concluded that the new evidence refuted a significant piece of testimony in a close case, and warranted a new trial. See *id*. at 1204.

The facts and circumstances of *LaPage* and *Young* are simply not present here. First, unlike *LaPage*, 231 F.3d at 490, Geston has not alleged that Lt. Sims or Officer Carr's testimony at the second trial was in direct conflict with their respective testimony at the first trial. Second, unlike *LaPage* and *Young*, 17 F.3d at 1204, where the challenged testimony was critical to finding the defendant guilty, the kind of baton Officer Garrett used was not essential or fundamental to the jury's decision that Officer *Geston* used excessive force against Hernandez, but was "a collateral matter" (Tr2:VIII:973-974/SRE 173-174). Third, there is no unequivocal evidence that refutes the allegedly "false" testimony.

Geston's suggestion (Br. 45) that Officer Carr's rebuttal testimony exacerbated this issue is incorrect. On rebuttal, Officer Carr was asked very few questions, and they addressed Officer Garrett's denial of using his baton and Carr's observation of blood on Garrett's baton (Tr2:VI:834-835/SRE 92-93). Officer Carr was not asked, nor did he respond with any comment, about whether Officer Garrett had a metal or wooden baton (Tr2:VI:834-835/SRE 92-93). Defendant's complaint appears to be that Carr's recollection of Officer Garrett's denial of using his baton conflicts with Garrett's testimony.

In addition, there was no "clear" or "obvious" error based on comments made during closing argument. Cf. *Olano*, 507 U.S. at 734. First, during the United States' extensive closing argument and rebuttal, counsel addressed Officer Garrett's testimony only briefly, and summarized the multiple topics that Garrett sought to minimize or alter during his direct testimony that were adverse to Officer Geston, but which he retracted during cross-examination – including Geston's gloating comments to fellow DOD officers after the assault and Geston's unnecessary use of force in stepping on top of Hernandez (Tr2:VI:874-876, 894/SRE 130-132, 136). The trial court correctly concluded that the United States' comments during closing and rebuttal arguments on the type of baton Officer

Garrett used were minimal; the topic encompassed 10 lines of text of the transcript for a closing argument that extended for almost one hour and 20 minutes, and in rebuttal, this issue took only 3 lines of text (Tr2:VIII:971-972/SRE 171-172).[9] During these arguments, counsel for the United States legitimately argued the evidence and inferences that can be drawn from that evidence; they did not inject personal opinion or engage in improper, personal attacks. See *United States* v. *Cabrera*, 201 F.3d 1243, 1250 (9th Cir. 2000) (counsel properly argued inferences from evidence to show defendant's deliberate concealment and may express doubt as to veracity through implication).

Finally, counsel for both parties had copies of the FBI laboratory report that analyzed DNA samples from blood found on the batons. As the district court noted, the test results were inconclusive on identifying Hernandez as the source of blood, and both counsel made a calculated decision not to submit this as evidence (Tr2:VIII:964-965/SRE 164-165). Geston should not succeed in now asserting (Br. 53-54) that the United States had a greater obligation to introduce this document

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[9] The excerpts of closing argument contained in defendant's brief (Br. 46-48) are not complete with respect to the United States' comments about Officer Garrett's testimony. The United States refers this Court to Tr2:VI:839-878, 893-914/SRE 95-134, 135-156 for the complete closing and rebuttal arguments, and Tr2:874-876, 894/SRE 130-132, 136 for the entire portion of closing argument and rebuttal that refers to Officer Garrett.

than he when he had the same opportunity, and also chose not to introduce the report. Cf. *United States* v. *Lazarus*, 425 F.2d 638, 641 (9th Cir.) ("Counsel cannot thus withhold objection to testimony and thereafter seek a mistrial based upon its introduction"), cert. denied, 400 U.S. 869 (1970). In *Lazarus*, the defendant was previously aware of the text of a transcript read by a government witness at trial and he had objected successfully to the introduction of certain portions of the transcript. He failed to object prior to or immediately after the transcript's introduction but moved for a mistrial because of certain, unchallenged portions of text. This Court affirmed the district court's denial of the motion for mistrial. See *ibid*.

4. There Was No Resulting Prejudice

There was no prejudice to Geston since the challenged cross-examination and comments during closing argument did not affect the outcome of the proceedings. Cf. *Olano*, 507 U.S. at 737-740 (plain error of allowing jury alternates did not have prejudicial impact on deliberations); *United States* v. *Garcia-Guizar*, 160 F.3d 511, 520-521 (9th Cir. 1998) (calling a witness a "liar" and another witness's evidence as "compelling" during closing argument is improper vouching but does not establish plain error to warrant reversal).

The district court properly concluded that the complete testimony on this issue was very limited: Lt. Sims on cross-examination *by the defendant*; Officer Carr on direct by the United States; Officer Garrett on cross-examination by the United States; and Agent Thurman on direct *by the defendant* and cross-examination by the United States (Tr2:VIII:964-970/SRE 164-170). Geston has made no showing that this minimal testimony, including cross-examination of Officer Garrett on this one topic, substantially affected the jury's verdict. There simply is no basis for Geston's claim (Br. 56) that, "[i[f the jury believed that defense witness Garrett was lying, it is likely that the jurors viewed the testimony of the remaining defense witnesses with doubt or disbelief."

In addition, the district court found that the few comments by counsel during closing argument were not the primary focus of the government's case (Tr2:VIII:971-972/SRE 171-172). See *Anheuser-Busch, Inc.* v. *Natural Beverage Distribs.*, 69 F.3d 337, 346 (9th Cir. 1995) (the district court is in a "superior position to gauge the prejudicial impact of counsel's conduct during the trial"); *Kehr* v. *Smith Barney Harris Upham & Co.,* 736 F.2d 1283, 1286 (9th Cir. 1984) (affirmed district court, which is in better position to assess whether improper comments during opening and closing arguments were harmless); cf. *United States*

v. *Sarno*, 73 F.3d 1470, 1496-1497 (9th Cir. 1995) (characterizing defendants' testimony as "lies" does not constitute plain error that warrants reversal), cert. denied, 518 U.S. 1020 (1996).

Finally, even if this Court considers this testimony and these few comments improper, they are not "serious enough to undermine" the convictions. Cf. *United States* v. *Lopez*, 575 F.2d 681, 684-685 (9th Cir. 1978) (plain error by government in commenting on defendant's failure to explain shooting during closing argument was harmless due, in part, to independent evidence of topic and defendant raising issue on cross-examination).

5. The Error, If Any, Did Not Seriously Affect The Fairness, Integrity, Or Public Reputation Of The Judicial Proceedings

Even if there was error, it did not rise to the level of "seriously affecting the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. The type of baton used by Officer Garrett is tangential to the jury's assessment of Officer Geston's guilt. In addition, there was sufficient, independent, credible evidence from multiple witnesses to support the conviction of Officer Geston. Thus, the minimal testimony and argument regarding Officer Garrett's baton did not substantially affect the integrity of the trial. Cf. *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (asserted error has no serious effect on

fairness or integrity of proceedings when substantial, independent evidence supports verdict).

II
THE UNITED STATES' CROSS EXAMINATION OF WITNESSES WAS NOT PLAIN ERROR AND THERE IS NO SUBSTANTIAL PREJUDICE TO WARRANT RETRIAL

A. Standard Of Review

Since Geston did not object to each instance of asserted, improper questioning, (*e.g.*, Tr2:III:510, 511/SRE 30, 31), some violations are reviewed under the plain error standard. See *United States* v. *Sanchez*, 176 F.3d 1214, 1218 (9th Cir. 1999). If the defendant objects on one basis at trial and challenges on alternative grounds on appeal, review also is limited to plain error. See *United States* v. *Pino-Noriega*, 189 F.3d 1089, 1097 (9th Cir. 1997), cert. denied, 528 U.S. 989 (1999). When the defendant timely objects to alleged prosecutorial misconduct, this Court reviews for harmless error. See *Sanchez*, 176 F.3d at 1218.

B. Discussion

Geston asserts (Br. 62-76) that the United States committed prosecutorial misconduct by asking Petty Officer Groot and Officer Garrett whether other witnesses, fellow Navy or DOD officers, were lying in their testimony. Excerpts contained in defendant's brief (Br. 66-67) are incomplete and fail to place the

United States' inquiry in its full context. Geston has failed to establish plain error or error that substantially affected the fairness of the trial or verdict. Moreover, even if we assume some, limited error, it was harmless.

1. Cross-Examination Of Officer Groot

The challenged portion of the cross examination of Petty Officer Groot included questions about whether he knew that Petty Officer Holden's testimony about Officer Geston's and Hernandez's positions during the assault was contrary to his and, given those differences, whether he believed Officer Holden was lying. The challenged testimony proceeded as follows:

> Q: Are you aware that Petty Officer Holden testified that Officer Geston gave him the form 629 that evening?
> A: No, sir.
> Q: You're not aware of that?
> A: No, Sir.
> Q: If officer – if Petty Officer Holden said that it was Officer Geston who gave him the form 629 at the podium, would Petty Officer Holden be lying?
> Objection: Relevancy, asked and answered.
> Overruled: You can answer that.
> Q: Would Petty Officer Holden be lying?
> A: No, Sir. (Tr2:III:510/SRE 30).

After Petty Officer Groot responded that he was not aware that Petty Officer Holden testified that Hernandez was in a different location when the fight began, the following exchange occurred:

Q: If Petty Officer Holden testified to that effect, would he be lying?
A: I believe not.
Q: So then you are mistaken when you said that Hernandez was over at the brown podium as opposed to over by this pole. In fact, you don't even remember where he was; isn't that correct?
Objection, argumentative.
Overruled. You can answer that.
Q: You don't remember where Seaman Hernandez was that evening, do you.
A: I believe he was around the podium area.
Q: But if Petty Officer Holden said he was over by the pole, would he be lying?
Objection, asked and answered.
Sustained. That's arguing with him, Mr. Jones. (Tr2:III:511/SRE 31).

Significantly, on re-direct examination, defendant's counsel asked Petty Officer Groot the following question:

Q: You're not saying that he's (Petty Officer Holden) lying; you're just saying that you have a disagreement with him as to what happened, right?
A: I believe he remembers a little differently than I do. (Tr2:III:515-516/SRE 32-33).

Thus, for each allegedly improper question, Geston either failed to object, or objected on a different ground than now asserted on appeal (*e.g.*, relevancy, asked and answered, Tr2:III:510/SRE 30; asked and answered, Tr2:III:511/SRE 31). Geston only objected once to a question as argumentative, but that question focused on whether the witness "remembers" the defendant's location

(Tr2:III:511/SRE 31). The court sustained one objection as "argumentative" after an objection that a question had been asked and answered (Tr2:III:511/SRE 31). Accordingly, the challenge to Officer Groot's cross-examination should be reviewed for plain error.

2. Cross-Examination Of Officer Garrett

The majority of the challenged portion of the cross-examination of Officer Garrett ask him if he would change his testimony about Hernandez's or Geston's positions or actions if he knew that Naval or other DOD officers had testified contrary to him, or if the other officers were mistaken in their respective testimony. Given the broad scope of Officer Garrett's direct testimony, on cross-examination, the United States asked Officer Garrett about the testimony of Lt. Sims (DOD), Officer Carr (DOD), Officer Raftis (DOD), Petty Officer Holden (Navy), and Petty Officer Groot (Navy). Some follow-up questions asked Officer Garrett whether he believed these witnesses were lying.[10] The defendant does not make any

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[10] Many of the excerpts in appellant's brief (Br. 70-74) are incomplete by failing to note when objections are made, the court's rulings on those objections, and Officer Garrett's responses. Given the length of the challenged portions of Officer Garrett's cross-examination, the text is not included in the United States' brief. The United States notes that the entire cross-examination of Officer Garrett encompasses 49 pages (Tr2:VI:758-807), which is set forth at SRE 39-88. For the full text of the challenged cross-examination, the United States refers this Court to:

(continued...)

distinction between these types of questions.

In all of Officer Garrett's responses, he states either that other witnesses are giving their opinion or testifying to their best recollection; that he believes others are mistaken, but not lying; that he cannot opine whether others are mistaken; or that the contrary testimony does not change his opinion about the course of events (Tr2:VI:769, 780, 782, 802/SRE 50, 61, 63).

3. The Error, If Any, Was Not Plain

Asking a witness whether he would change his opinion based on another's testimony is appropriate cross-examination. Cf. *United States* v. *Jenkins*, 884 F.2d 433, 435 (9th Cir.) (district court has "considerable discretion as to what evidence they admit, * * * exclude, and how and what questions may be asked provided a fair trial is had"), cert. denied, 493 U.S. 1005 (1989). Counsel is not asking a witness to comment on another's testimony, but testing the strength of the witness' own recollection and convictions for his or her own testimony.

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[10](...continued)
Tr2:VI:760-761, 769-770, 774-775, 780-782, 798-799, 801-802/SRE 41-42, 50-51, 55-56, 61-63, 74-80, 82-83.

In *United States* v. *Sanchez*, 176 F.3d 1214, 1220 (1999), this Circuit concluded that the prosecutor committed error in asking the defendant if he believed a federal law enforcement officer had lied in his testimony, but it did not decide whether this constituted plain error. Other courts have expressed particular concern and found plain error when the government's cross-examination forces a defendant to comment on the veracity of a law enforcement officer's testimony. See, *e.g.*, *United States* v. *Boyd,* 54 F.3d 868, 870-872 (D.C. Cir. 1995); *United States* v. *Richter*, 826 F.2d 206, 207-209 (2d Cir. 1987). This Court, however, has not decided if cross-examination of a witness other than the defendant about whether another witness is lying constitutes error, or plain error. In addition, this Court has not decided whether asking one witness if another witness is *mistaken* due to conflicting testimony is error, or plain error. Here, Petty Officer Groot was asked whether a fellow Naval officer, Petty Officer Holden, was lying or mistaken. Officer Garrett also was asked to comment on the accuracy or truthfulness of Navy and DOD officers. As discussed above, Officer Garrett's responses were that other witnesses were stating their recollections.

4. There Was No Resulting Prejudice

Even assuming some of the challenged questions directed at Officer Garrett and Petty Officer Groot constitute error, these queries did not materially affect the jury's conviction of Officer Geston, and therefore did not "substantially affect" his rights to receive a new trial under either the standard for harmless error or plain error. *United States* v. *Olano*, 507 U.S.725, 734 (1993) (same standard for "affect substantial rights" under Rule 52(a) (harmless error) and (b) (plain error), except for which party bears burden of proof).

In *Sanchez*, 176 F.3d at 1220, this Circuit did not decide whether the questioning alone "affected Sanchez's substantial rights" to warrant reversal since there were other grounds for reversal.[11] Other courts that conclude retrial is necessary have done so not only because of improper cross-examination, but because that error is compounded by other prejudicial conduct. For example, in *Richter*, 826 F.2d at 207-209, the Second Circuit found sufficient prejudice from plain error to warrant retrial because the defendant was forced to address whether an FBI agent was lying and, during closing argument, the United States commented

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[11] The United States notes that several of defendant's citations (Br. 63, 64) do not distinguish between this Court's conclusions in *Sanchez*, 176 F.3d at 1218-1220, and opinions from other circuits that are cited in *Sanchez*.

on the FBI agents' motives and "deliberately misquot[ed]" the defendant's testimony.

Even multiple errors, however, do not always warrant reversal. See *Boyd,* 54 F.3d at 870-872; see also *Olano*, 507 U.S. at 734 (court's discretion to determine if reversal is required). In *Boyd*, 54 F.3d at 870-872, the D.C. Circuit concluded that the government committed plain error in cross-examining a defendant about whether law enforcement agents were "making this [their testimony] up," *and* vouching for the credibility of the agents during closing argument based on evidence not in the record.[12] The error, however, did not require reversal given, in part, that the jury was instructed that arguments by counsel were not evidence, and the statements in issue were of "minimal importance" overall. *Ibid.*

Assuming a small number of questions to Petty Officer Groot and Officer Garrett were improper, there is no showing of prejudice to warrant reversal. Cf. *Boyd*, 54 F.3d at 870-872. First, the challenged cross-examination of Petty Officer Groot and Officer Garrett was minimal with respect not only to the witnesses'

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[12] The *Boyd* court found "error" in the cross-examination, *id*. at 871, and assessed whether reversal was warranted under the plain error standard. The court did not, however, specifically conclude that the error was "plain" since it concluded there was insufficient prejudice from this error. See *id*. at 872.

complete cross-examination, but the trial as a whole. See *United States* v. *Cristophe*, 833 F.2d 1296, 1300 (9th Cir. 1987) (review alleged misconduct in context of entire trial).

Second, Geston grossly exaggerates the prejudice, if any, that resulted from Petty Officer Groot's challenged cross-examination. There is simply no basis for Geston's bald assertion (Br. 75) that "[i]f Officer Groot was not forced to tell the jury that Officer Holden was a liar, his testimony would have carried more weight and a different jury verdict would have resulted." Moreover, on re-direct, defendant's counsel specifically addressed the challenged testimony by asking Petty Officer Groot whether the inconsistencies in his and Officer Holden's testimony were the result of different recollections or if one witness was lying, and Officer Groot responded that it was different recollections. (Tr2:III:515-516/SRE 32-33). Simply because Officer Groot was the sole witness (besides Officer Geston) who testified that Hernandez initiated the altercation does not render his cross-examination any more consequential. In fact, given Officer Groot's multiple concessions that he did not recall significant details, it is unclear what benefit his testimony could provide Officer Geston (Tr2:III:505, 524, 525, 528/SRE 29, 34, 35, 36).

Geston also asserts (Br. 75) that this was a "close" case that hinged on witness credibility, and relies on the district court's erroneous statement that the only difference between the first and second trial was the cross-examination of Officer Garrett. Officer Garrett's cross-examination was not the sole difference between the first and second trial; four new witnesses testified at the second trial, and most significantly, Geston himself. While witness credibility was critical to the jury's verdict, there was ample testimony from multiple Navy and DOD witnesses that corroborated one another and was contrary to Geston's version of events. In addition, Officer Garrett was cross-examined on numerous issues. Geston cannot show how this challenged cross-examination was unduly influential, particularly when other testimony by Garrett was highly damaging to him, including Garrett's testimony that Officer Geston used excessive force when he stood on Hernandez's back.

Finally, the jury was instructed that it was their recollection of the testimony, rather than that of counsel, that should prevail; that it was their obligation to assess witnesses' credibility; and that questions and argument by counsel are not evidence (Tr2:VI:838/SRE 94; Tr2:VII:926-928/SRE 160-162). This court should assume that the jury follows instructions given by the court. See *Olano*, 507 U.S. at 740

("[It is] the almost invariable assumption of the law that jurors follow their instructions"; citing *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987)). Thus, in the context of the trial as a whole, the challenged questions, even if some were improper, were harmless. Cf. *Boyd*, 54 F.3d at 870-872.

5. The Error, If Any, Did Not Seriously Affect The Fairness, Integrity, Or Public Reputation Of The Judicial Proceedings

Here, Geston failed to timely object to the vast majority of questions that are now challenged, and did not substantively assert prosecutorial misconduct until it was too late for the district court to take curative action. Given those calculated, tactical decisions, Geston should not be given a new opportunity for a new trial, particularly when he fails to show any error has materially affected the jury's verdict. The challenged cross-examination concerned witnesses other than the defendant. The jury assessed the credibility of all of the witnesses and had ample evidence to support the verdict. Cf. *Johnson* v. *United States*, 520 U.S. 461, 469-470 (1997). Thus, there is no basis to conclude that the asserted errors affected the fairness or integrity of the trial or the jury's verdict.

III
THE DISTRICT COURT DID NOT ERR IN BARRING SPECIFIC EVIDENCE OF UNRELATED CONFRONTATIONS INVOLVING THE VICTIM

A. Standard Of Review

If the Court concludes that Geston waived his opportunity to cross-examine Hernandez about unrelated confrontations pursuant to Fed. R. Evid. 608, either because he failed to preserve the matter at trial or because he is asserting objections on grounds different than at trial, the matter is reviewed for plain error. See *United States* v. *Pino-Noriega*, 189 F.3d 1089, 1097 (9th Cir. 1997), cert. denied, 528 U.S. 989 (1999); *United States* v. *Newman*, 6 F.3d 623, 629 (9th Cir. 1993); *United States* v. *Wood*, 943 F.2d 1048, 1054 (9th Cir. 1991). Timely objections to evidentiary rulings are generally reviewed for an abuse of discretion. See *Pino-Noriega*, 189 F.3d at 1097; *United States* v. *Hernandez*, 109 F.3d 1450, 1452 (9th Cir. 1997); *United States* v. *Scott*, 74 F.3d 175, 177 (9th Cir.), cert. denied, 519 U.S. 846 (1996). Geston's Sixth Amendment challenge is reviewed de novo, although the district court has broad discretion to determine the scope of witness examination and cross-examination. See *United States* v. *Jenkins*, 884 F.2d 433, 435 (9th Cir.), cert. denied, 493 U.S. 1005 (1989).

B. Discussion

On appeal, Geston asserts (Br. 79-82) that the district court's denial of his opportunity to cross-examine Hernandez about two specific, unrelated assaults violates Fed. R. Evid. 608(b) because these incidents reflect Hernandez's credibility. Geston also asserts he was improperly restricted in cross-examining Hernandez about his bias and motivations in violation of the Confrontation Clause of the Sixth Amendment. First, Geston did not preserve this issue on appeal given his failure to follow the district court's instruction that counsel should seek a ruling during trial on whether he could cross-examine Hernandez about specific incidents (I/L Tr. 25/SRE 6). In addition, despite the court's discussion of inadmissibility under Rule 608 in its ruling, Geston originally did not seek admission under that Rule, as he does now. Moreover, there is no merit to these assertions. The prior assaults do not reflect Hernandez's credibility and counsel had a full opportunity to cross-examine Hernandez with respect to personal bias.

1. Geston Waived His Opportunity To Impeach Hernandez On Prior Incidents And He Has Not Shown Plain Error

Geston filed a motion *in limine* to address, *inter alia*, the admissibility of evidence under Fed. R. Evid. 404 regarding two, unrelated confrontations involving Hernandez; one incident in Mazatlan, Mexico and a second involving a seaman on

the U.S.S. Rentz.[13] In summary, the district court ruled that other act evidence is not admissible to prove propensity for violence under Rule 404(a)(2); Geston failed to show a permissible basis for admission under Rule 404(b); and the evidence reflects on Hernandez's propensity for violence, not his truthfulness or credibility for admission under Rule 608 (I/L Tr. 27-32/SRE 8-13). See *United States* v. *Keiser*, 57 F.3d 847, 853-857 (9th Cir.), cert. denied, 516 U.S. 1029 (1995).

Significantly, the court repeatedly advised counsel during the pre-trial motions hearing that the admissibility of these other acts could be revisited during trial if there were other bases to admit the evidence. For example, cross-examination may be permitted if Hernandez's character was put in issue, or other testimony opened the door to impeachment on his veracity (I/L Tr. 22, 25, 27-28, 30, 32/SRE 3, 6, 8-9, 11, 13). The court stated:

> I would say this goes across the board to Mr. Geston and Mr. Hernandez, because their records are very similar and my rulings are going to be very similar as we go through this – that if either counsel believes the door has been opened by something else [to warrant introduction or cross-

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[13] Geston asserted below that Hernandez's confrontations with a hotel security guard in Mazatlan, Mexico and with a fellow crewman on the U.S.S. Rentz were admissible pursuant to Rule 404(b) and Rule 404(a)(2), respectively (RE 11-13).

> examination], get a ruling from me. I mean, there may be something else, but get a ruling first.

(I/L Tr. 25/SRE 6).[14]

A party need not raise a contemporaneous objection at the time evidence is admitted at trial in order to preserve the matter for appeal if the court's prior ruling is "explicit and definitive." *United States* v. *Wood*, 943 F.2d 1048, 1055 (9th Cir. 1991) (quoting *Palmerin* v. *City of Riverside*, 794 F.2d 1409 (9th Cir. 1986) (given definitive ruling on motion in limine, objection at trial not necessary to reserve for appeal)). Here, however, the district court was explicit in informing counsel that its advance ruling did not cover all scenarios, and that it was not issuing an all-encompassing, "definitive" ruling that barred any possible inquiry or admission. Cf. *Wood*, 943 F.2d at 1054-1055. Thus, in order to preserve this issue on appeal, Geston needed to seek the court's permission to allow cross-examination on these other assaults at the time counsel believed this cross-examination was relevant. Cf. *ibid*. Geston, however, did not seek any ruling from the court during cross-examination in order to impeach Hernandez with respect to the Mazatlan or Rentz

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[14] The United States also sought to introduce prior bad acts of Geston under Fed. R. Evid. 404. Because the district court conducted the same analysis of both motions, the transcript refers to the United States' and Geston's motions. The United States is not challenging this district court ruling.

confrontations after Hernandez disagreed with others' view of his reputation for violence when intoxicated (Tr2:I:84-85/SRE 18-19).

Given Geston's failure to seek permission for cross-examination in a timely manner, the matter is reviewed for plain error.[15] See *Wood*, 943 F.2d at 1054. Similarly, because Geston now asserts admissibility under Rule 608 rather than Rule 404, as argued below, the matter is reviewed for plain error. See *Pino-Noriega*, 189 F.3d at 1097. Geston cannot meet that standard. Geston cannot show how the district court's ruling reflects error that is clear or obvious, or how this minor limitation on the scope of examination unfairly prejudiced him. Geston had ample opportunity to cross-examine Hernandez. In addition, he cannot establish that the court's ruling, which could have been revisited had he timely objected, interfered with the overall fairness of the proceedings. The jury's verdict rested on consideration of all of the testimony and this limited, additional cross-examination would not have changed the jury's verdict.

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[15] After the mistrial, the district court stated that the same evidentiary rulings that applied to the first trial would apply to the second trial (7/21/2000 Tr. 3/SRE 16). Geston did not seek relief or reconsideration of this ruling prior to the second trial. Geston did not challenge this ruling until his post-trial motion for a new trial (R. 43). The defendant vaguely asserts (Br. 79) that he "challenged this ruling with the district court judge that presided over Geston's second trial," without citation.

2. The Other Act Evidence Does Not Reflect Truthfulness And, Therefore, Does Not Satisfy Rule 608(b)

Even if this Court concluded that Geston preserved this objection on appeal, and this claim is reviewed for abuse of discretion, Geston's claim must fail. Perhaps in recognition of his inability to show that the district court's rulings on Rule 404 are flawed, Geston has shifted his focus on appeal to address admissibility under Rule 608. This effort, however, is equally without merit. Courts have wide discretion to determine the admissibility of evidence pursuant to Rule 404 and 608, and the district court's ruling is consistent with this Circuit's precedent. See *Keiser*, 57 F.3d at 853-857; cf. *United States* v. *Munoz*, 233 F.3d 1117, 1135 (9th Cir. 2000).

The court correctly stated the "[d]efendant cannot use Hernandez's prior act here as evidence that Defendant is to be believed; that is, that he's more credible than Hernandez" based on the theory that since Hernandez was involved in the other fight, he must be lying about the facts of this fight with Geston (I/L Tr. 29/SRE 10; see I/L Tr. 26-27/SRE 7-8). Cf. *United States* v. *Bettencourt*, 614 F.2d 214, 217 (9th Cir. 1980) ("[a] showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time") (citation omitted). Consistent with this Court's precedent and Rule 405, character evidence

that is admissible under Rule 404(a)(2) may only be submitted through reputation or opinion, not specific acts as proffered here. See *Keiser*, 57 F.3d at 855.

Moreover, the district court correctly rejected Geston's assertion that the unrelated confrontations reflect his truthfulness within the meaning of Fed. R. Evid. 608 (I/L Tr. 30, 31/SRE 11, 12). Unlike evidence of fraudulent conduct, Hernandez's other, unrelated confrontations do not reflect on his credibility or truthfulness, and thus are inadmissible under Rule 608(b). Cf. *Munoz*, 235 F.3d at 1135 (evidence of prior fraud probative of truthfulness); *United States* v. *Gay*, 967 F.2d 322, 328 (9th Cir.) (same), cert. denied, 506 U.S. 929 (1992); McLaughlin, 4 *Weinstein's Federal Evidence*, Sec. 608.22[2][a] (2d ed. 2001) ("violent crimes do not usually reflect the witness's truthfulness"; cases cited). The conduct itself must reflect veracity, and physical confrontations do not. Accordingly, the district court did not abuse its discretion in denying admission of unrelated confrontations.

3. Geston's Confrontation Rights Were Not Violated

Finally, Geston's conclusory assertion (Br. 81) that his rights under the Sixth Amendment were violated because he was barred from presenting evidence of Hernandez's bias and motivations should be rejected. The Sixth Amendment right to cross-examine witnesses "is not unlimited," and a trial court retains "wide

discretion" to set limits. *United States* v. *Payne*, 944 F.2d 1458, 1469 (9th Cir. 1991) (cross-examination allowed on defendant's prior discipline of witness, not facts underlying disciplinary action), cert. denied, 503 U.S. 975 (1992). A defendant's constitutional rights to cross-examination are fulfilled even if it is not conducted in the exact manner desired. See *United States* v. *Jenkins*, 884 F.2d 433, 438 (9th Cir.) (no violation of Confrontation Clause by court's instruction barring use of the words "duress" or "coercion," yet allowing full examination of the pressures and circumstances influencing offense conduct), cert. denied, 493 U.S. 1005 (1989). Finally, this Court has "found in the past that a trial court's limitation of cross-examination on an unrelated prior incident, where its purpose is to attack the general credibility of the witness, does not rise to the level of a constitutional violation of the defendant's confrontation rights." *Payne*, 944 F.2d at 1469 (citing *Hughes* v. *Raines*, 641 F.2d 790, 793 (9th Cir. 1981)).

Geston has not shown how the jury was deprived of "sufficient information to appraise the bias[es]" in order to show a violation of his Sixth Amendment rights. *Jenkins*, 994 F.2d at 436. In fact, Geston extensively cross-examined Hernandez about his actions prior to the assault (including under-age drinking), his statements and behavior during the assault, and his conduct immediately afterwards

at the hospital (Tr2:1:69-101, 110-112). Geston also fails to show how cross-examination about two, unrelated confrontations with others reflects Hernandez's bias or motivations in the confrontation with Geston. Given that Hernandez was a victim of Geston's assault, his personal interest and viewpoint were self-evident. Accordingly, Geston's Sixth Amendment claim must fail. See *Payne*, 944 F.2d at 1469.

IV
GESTON CANNOT ACHIEVE ON CUMULATIVE ERROR WHAT HAS NOT BEEN PROVEN AS INDIVIDUAL ERROR

Geston argues (Br. 82-85) that even if the asserted errors do not individually warrant reversal, their cumulative effect does. The cumulative error doctrine, however, does not apply when the court concludes that no individual error has occurred. See *United States* v. *Gutierrez*, 995 F.2d 169, 173 (9th Cir. 1993). Moreover, "marginal" or harmless errors, if found in any instances, do not collectively become "so prejudicial" as to warrant reversal. *United States* v. *Karterman*, 60 F.3d 576, 579-580 (9th Cir. 1995). As discussed above, the district court's rulings were proper.

V
THE DISTRICT COURT ERRED IN REFUSING TO ADJUST GESTON'S OFFENSE LEVEL UPWARDS TO ACCOUNT FOR ACTION UNDER COLOR OF LAW AND BY A PUBLIC OFFICIAL PURSUANT TO U.S.S.G. 2H1.1(b) (Cross-Appeal)

A. Standard Of Review

The district court's interpretation of the U.S. Sentencing Guidelines is reviewed de novo. *United States* v. *Jeter*, 236 F.3d 1032, 1034 (9th Cir. 2001) . The district court's factual findings are reviewed for clear error, and its application of the Guidelines to the facts are reviewed for an abuse of discretion. See *ibid*.

B. Discussion

The district court's failure to include an upward adjustment for action under color of law or Geston's status as a public official pursuant to U.S. Sentencing Guideline (U.S.S.G. or Guideline) 2H1.1(b) contradicts the plain language of the Guideline. This provision requires a six-level increase if either factor – action under color of law or by a public official – is present, and a court does not have the discretion to deny its application.

U.S.S.G. 2H1.1, Offenses Involving Individual Rights, applies to a conviction under 18 U.S.C. 242. In this case, U.S.S.G. 2H1.1(a)(1) sets forth the measure for the highest base offense level, which is the base offense level for the

underlying offense. It was agreed that the underlying offense is aggravated assault, which has a base offense level of 15. See U.S.S.G. 2H1.1(a)(1); 2A2.2(a). The court correctly added a four-level enhancement for use of a dangerous weapon under U.S.S.G. 2A2.2(b)(2)(B) and a two-level enhancement for bodily injury, U.S.S.G. 2A2.2(b)(3)(A), for a base offense level of 21.

However, the offense level of 21 does not complete the analysis under 2H1.1. Once the base figure is determined under 2H1.1(a), the court must evaluate whether either specific offense characteristic set forth in U.S.S.G. 2H1.1(b) applies. U.S.S.G. 2H1.1(b) provides:

> [i]f (A) the defendant was a public official at the time of the offense; or (B) the offense was committed under color of law, increase by **6** levels.

The plain language of U.S.S.G. 2H1.1(b) imposes a six-level enhancement if action is committed either under color of law or by a public official. There is no caveat or exception to application of this provision. Because Geston acted under color of law and he was a "public official" at the time he assaulted Hernandez, the six-level enhancement of 2H1.1(b) should have been applied. Accordingly, Geston's base offense level should be 27 pursuant to U.S.S.G. 2H1.1 (and before other adjustments).

Absent specific exceptions, a court must apply the enhancement factors as set forth in the Guidelines. Cf. *United States* v. *Jeter*, 236 F.3d 1032, 1035 (9th Cir. 2001) (error for court to award one-level downward adjustment for acceptance of responsibility when Guideline requires two- or three-level adjustment); *United States* v. *Luca*, 183 F.3d 1018, 1023 (9th Cir. 1999) (enhancement for obstruction of justice under U.S.S.G. 3C1.1 is mandatory if elements of Guideline are established); *United States* v. *Ancheta*, 38 F.3d 1114, 1117-1118 (9th Cir. 1994) (text of 3C1.1 is "mandatory, not discretionary"). Mandatory factors may not be rejected at the discretion of the court. See *ibid*.

The district court did not believe Geston's actions, and their consequences, warranted a sentence associated with the higher offense level.

> I don't believe that a six-level upward adjustment for assault under color of authority under the facts of this case is justified.
>
> I guess, Mr. McNally [co-trial counsel for the United States], the bottom line is I don't think the Government's request of ten years in jail for the conduct I heard in the trial is justified. Obviously you can raise that issue on appeal also and let the appellate court tell me if I'm wrong. I just don't feel comfortable giving anywhere near the 120-month range recommended by the Government.

(S. Tr. 20-21/SRE 207-208).

The district court, however, does not have discretionary authority to decline the enhancement. Cf. *Ancheta*, 38 F.3d at 1118. Identical to the mandatory text of U.S.S.G. 3C1.1, 2H1.1 directs the court to "increase by 6 levels" if certain facts are established. By identifying specific offense characteristics in U.S.S.G. 2H1.1(b), the *Commission* determined that a violation of civil rights under color of law or by a public official, *i.e.*, by a person who may be specially tasked with protecting such rights, is more egregious and warrants greater punishment than the same offense committed by a private citizen. Cf. *United States* v. *Winters*, 174 F.3d 478, 486 (5th Cir.) (Commission imposes higher sentence by identifying aggravating factors for action under color of law and abuse of the public trust under U.S.S.G. 3B1.3), cert. denied, 528 U.S. 969 (1999). The enhancement was mandated by the Guidelines and the district court erred in not applying it. Cf. *Ancheta*, 38 F.3d at 1118.

CONCLUSION

For the foregoing reasons, appellant's conviction should be affirmed.

This court, however, should order a limited remand on sentencing with instructions that the district court increase the current total offense level by six points.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related case pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief is proportionally spaced, has a typeface of 14 points, and contains 12,357 words.

July 31, 2001

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Jennifer Levin

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief For The United States As Appellee And Cross-Appellant and one copy of United States' Supplemental Record Excerpts were served, via first-class mail, postage prepaid, on the following counsel, this 31st day of July, 2001:

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