No. 11-3143

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN E. GRAY,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLEE

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LEGISLATIVE HISTORY:

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STATEMENT REGARDING ORAL ARGUMENT

The government requests oral argument.

JURISDICTIONAL STATEMENT

This is an appeal from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant on January 31, 2011 (R. 284, Judgment),[1] and

[1] Citations to "R. __" refer to documents, by number, in the district court record. Citations to "GX __" refer to government exhibits admitted at trial and (continued…)

defendant filed a timely notice of appeal on February 9, 2011 (R. 285, Notice of Appeal). This Court has jurisdiction under 28 U.S.C. 1291.

GOVERNMENT'S STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in refusing to give defendant's requested jury instruction as to the obstruction counts, where the requested instruction was an incorrect statement of the law.

2. Whether the district court abused its discretion in denying defendant's objection to an instruction that correctly permitted the jury to convict defendant of falsifying a document without reaching unanimity on the particular means of falsifying the document.

3. Whether the district court correctly calculated defendant's offense level for sentencing purposes.

4. Whether sufficient evidence supported defendant's conviction on Count 2.

STATEMENT OF THE CASE

On April 14, 2009, a federal grand jury returned a twelve-count indictment charging defendant John Gray and three of his co-workers at the Lucas County

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(…continued)
included in the government's appendix. Citations to "Gray Br. __" refer to pages in appellant's opening brief.

Sheriff's Office with various federal offenses relating to the use of force against a pretrial detainee, the detainee's subsequent death, and the resultant cover-up of Gray's and his co-workers' actions. (R. 2, Indictment). The indictment alleged that defendant, a Sergeant with the Lucas County Sheriff's Office, "assaulted and strangled" Carlton Benton, a pretrial detainee, and then failed to obtain needed medical care and treatment for him – actions which ultimately resulted in bodily injury and death, in violation of 18 U.S.C. 242 (Counts 1 and 2). Jay Schmeltz, a Deputy Sheriff, was charged with striking Benton in the booking area of the jail, resulting in bodily injury to Benton, in violation of 18 U.S.C. 242 (Count 3). The indictment further charged Gray and Schmeltz each with falsifying two official reports relating to the use of force against Benton, in violation of 18 U.S.C. 1519 (Counts 4 and 5 (Gray) and Counts 6 and 7 (Schmeltz)), and charged James Telb, the Lucas County Sheriff, and Robert McBroom, a Lucas County Sheriff's Office Internal Affairs investigator, with misprision of a felony, in violation of 18 U.S.C. 4 and 2 (Count 8). The indictment also charged each defendant with one count of making a false statement to a special agent of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001 (Count 9 (Gray), Count 10 (Telb), Count 11 (Schmeltz), and Count 12 (McBroom)).

All four defendants pleaded not guilty to the charges and proceeded to a jury trial. The jury convicted defendant Gray of depriving Benton of his rights under

color of law, resulting in bodily injury, as charged in Count 2, but specifically found that Gray's actions did not result in Benton's death. (R. 256, Verdict). The jury also convicted Gray on two counts of falsifying a document; he was acquitted on Counts 1 and 9. (R. 256, Verdict). The jury convicted Schmeltz on Count 6 and acquitted him on Counts 3, 7 and 11 (R. 256, Verdict). The jury acquitted Telb and McBroom on all counts. (R. 256, Verdict). The district court sentenced Gray to a term of imprisonment of 36 months, and a term of supervised release of two years. (R. 284, Judgment). The district court ordered Gray to pay a special assessment of $300. (R. 284, Judgment). Gray filed a timely notice of appeal on February 9, 2011. (R. 285, Notice of Appeal).

STATEMENT OF FACTS

On May 28, 2004, Carlton Benton, a pretrial detainee housed at the jail in the Lucas County Sheriff's Office (LCSO), was taken from the jail and admitted to St. Vincent's Hospital after suffering seizures. (R. 301, Tr. p. 117 (stipulation); R. 274, Tr. p. 193 (Beisser)). Two days later, on May 30, two LCSO sheriff's deputies, Patrick Mangold and Jay Schmeltz, were sent to St. Vincent's Hospital to relieve the sheriff's deputies who were guarding Benton. (R. 297, Tr. pp. 9-10, 18-19 (Mangold)). When Mangold and Schmeltz arrived at the hospital, Benton was restrained in the Intensive Care Unit with leg irons and handcuffs. (R. 297, Tr. pp. 9-10, 18-19 (Mangold)).

That same day, doctors at the hospital decided to discharge Benton. (R. 274, Tr. pp. 193-194 (Beisser)). The officers at the hospital struggled with Benton while attempting to remove him from his hospital bed and move him into a wheelchair. (R. 297, Tr. pp. 20-23, 31 (Mangold)). Benton was eventually secured in leg irons, which permitted Benton to make only "very short, unbalanced steps" (R. 297, Tr. pp. 24, 28 (Mangold)), handcuffs and a belly chain, which ran around his waist and prevented his hands from extending up, down, or out (R. 297, Tr. pp. 26-27 (Mangold)). While restrained in this manner, Benton did not pose a threat to anyone at the hospital. (R. 297, Tr. p. 30 (Mangold)).

The sheriff's deputies transported Benton from the hospital to a waiting LCSO van without difficulty, and made the ten-minute trip back to the jail without incident. (R. 297, Tr. pp. 32-33 (Mangold)). John Gray, the Sergeant overseeing the booking area of the jail, directed William Ginn, a Corrections Officer, and Daniel Hannon, a Deputy Sheriff, to help transport Benton into the booking area. (R. 298, Tr. pp. 6-7 (Ginn), 85-86, 89 (Hannon)). Benton was verbally uncooperative when exiting the van, but was not considered a threat. (R. 298, Tr. pp. 11-12 (Ginn), 91-93 (Hannon)). The officers transporting Benton, which included Gray, were able to escort Benton into the booking area without incident. (R. 298, Tr. pp. 13-14 (Ginn), 93 (Hannon)).

Once in the booking area, Schmeltz "shoved" Benton. (R. 298, Tr. pp. 15 (Ginn), 233 (Edwards)). Benton was unable to break his fall, given the restraints (R. 298, Tr. pp. 15-16 (Ginn), 104 (Hannon), 169-170 (Farias), 233 (Edwards)), and he landed on the floor after hitting his head against the wall and falling onto some chairs (R. 298, Tr. pp. 15-16 (Ginn), 170 (Farias), 233-234 (Edwards)). According to witnesses present in the booking area, there was no law enforcement purpose for shoving Benton. (R. 297, Tr. p. 43 (Mangold); R. 298, pp. 16 (Ginn), 103 (Hannon)). In addition to multiple witnesses who saw Schmeltz shove Benton (R. 298, Tr. pp. 15 (Ginn), 233 (Edwards)), video from a camera set up in the booking area clearly showed Schmeltz pushing Benton (R. 297, Tr. pp. 38-42 (Mangold); R. 298, Tr. pp. 100-102 (Hannon), 171 (Farias)).

Schmeltz picked up Benton from the floor and, along with Gray, Mangold, Ginn, Hannon, and Deputy Sheriff Jeff Pauwels, escorted Benton a short distance to an elevator to take him to a medical unit on the second floor of the jail. (R. 297, Tr. pp. 42-45 (Mangold); R. 298, Tr. pp. 17 (Ginn), 107 (Hannon)). Benton was speaking incoherently on the elevator ride up to the second floor. (R. 297, Tr. p. 46 (Mangold)). Once on the second floor, the officers were joined by Officer Justin Jones. (R. 297, Tr. p. 47 (Mangold); R. 298, Tr. p. 189 (Jones)). All seven officers, including Gray, then escorted Benton, who remained shackled, into a

medical cell. (R. 297, Tr. pp. 47-49 (Mangold); R. 298, Tr. pp. 17-18 (Ginn), 107-108 (Hannon)).

Once inside the medical cell, officers placed Benton on the bed, face down. (R. 297, Tr. p. 53 (Mangold); R. 298, Tr. pp. 19 (Ginn), 191 (Jones)). Officers attempted to remove Benton's restraints, but Benton began to struggle, making it difficult. (R. 297, Tr. p. 54 (Mangold); R. 298, Tr. pp. 20 (Ginn), 113 (Hannon)). At no time did Benton pose a physical threat to the officers. (R. 297, Tr. p. 55 (Mangold); R. 298, Tr. pp. 20 (Ginn), 117 (Hannon)). Mangold started to back out of the cell to allow Benton some time to calm down before trying again to remove his restraints. (R. 297, Tr. pp. 55-56 (Mangold)). Gray, meanwhile, said "I got this" (R. 297, Tr. p. 56 (Mangold)), and placed Benton into a carotid artery restraint hold or sleeper hold[2] (R. 297, Tr. p. 56 (Mangold); R. 298, Tr. pp. 23

[2] A carotid artery restraint hold, commonly referred to as a sleeper hold, is a hold sometimes used by law enforcement officers to gain a person's compliance. (R. 273, Tr. p. 48 (Luettke)). An officer places his forearm across one side of a subject's neck, and his bicep across the other; the inside of the officer's elbow protects the subject's airway. (R. 273, Tr. pp. 48 (Luettke), 136 (Reedy)). The officer then applies pressure to both sides of the subject's neck, restricting the blood flow to the brain. (R. 273, Tr. pp. 48 (Luettke), 136 (Reedy)). When done correctly, the subject is rendered unconscious in about six seconds and there is no detectable injury to the neck. (R. 273, Tr. pp. 140-142 (Reedy)). On the LCSO's use of force continuum, a sleeper hold is located one level below deadly force. (R. 273, Tr. pp. 53-55 (Luettke)). A sleeper hold is often referred to, incorrectly, as a "choke hold." (R. 273, Tr. p. 137 (Reedy)). A choke hold occurs when an officer places his or her forearm across a subject's throat to collapse that person's airway,

(continued…)

(Ginn), 110 (Hannon), 192 (Jones)). Within a few seconds of applying the sleeper hold, Benton's body became limp. (R. 297, Tr. p. 58 (Mangold); R. 298, Tr. pp. 25 (Ginn), 118 (Hannon)). A few seconds after that, Benton began "to gasp for air making choking sounds." (R. 297, Tr. p. 58 (Mangold)). Mangold told Gray to stop (R. 297, Tr. p. 60 (Mangold); R. 298, Tr. p. 196 (Jones); R. 275, Tr. p. 197 (Russ)), but Gray maintained his hold around Benton's neck, even after Benton became "limp and still" (R. 297, Tr. pp. 60-61 (Mangold); R. 298, Tr. p. 197 (Jones)).

While Benton lay motionless on the bed, and with Gray still holding Benton around the neck, the officers removed Benton's restraints. (R. 297, Tr. pp. 61-62 (Mangold); R. 298, Tr. pp. 117-118 (Hannon)). Gray told the officers in the cell to leave. (R. 298, Tr. pp. 25 (Ginn), 115, 117 (Hannon), 197 (Jones)). As the officers left the medical cell, Benton remained motionless on the bed (R. 297, Tr. pp. 60-61 (Mangold); R. 298, Tr. pp. 24 (Ginn), 115 (Hannon), 197, 214 (Jones)) and Gray was still holding Benton around the neck (R. 297, Tr. pp. 62-63 (Mangold); R. 298, Tr. pp. 25-26 (Ginn), 117 (Hannon)). Gray was the last officer to leave the room. (R. 298, Tr. p. 119 (Hannon)).

(…continued)
causing easily detectable injuries to the person's neck. (R. 273, Tr. pp. 137-138 (Reedy)).

The officers passed a nurse's station as they left the medical cell, but none of the officers told the nurse on duty that Benton was unconscious. (R. 297, Tr. pp. 65 (Mangold), 180 (Sylvester); R. 298, Tr. pp. 27 (Ginn), 120 (Hannon), 198 (Jones)).

The medical officer on duty shut the door to Benton's cell after all the officers left. (R. 297, Tr. pp. 148, 154 (Coleman)). She looked through the window in the door and noticed Benton lying on his stomach. (R. 297, Tr. p. 153 (Coleman)). None of the officers said anything to her about Benton's condition, so she began her rounds. (R. 297, Tr. pp. 155-156 (Coleman)). When she returned to Benton's cell about 15-20 minutes later, he was lying in the same position as before and did not respond to her knock on the door. (R. 297, Tr. pp. 158-159 (Coleman); R. 298, Tr. p. 215 (Jones)). She and other officers entered Benton's room, checked his pulse, determined he was not breathing, and began CPR. (R. 297, Tr. p. 160 (Coleman); R. 298, Tr. p. 200 (Jones)). An ambulance was called, and Benton was returned to the hospital. (R. 297, Tr. p. 160 (Coleman)). Benton never regained consciousness, and died two days later on June 1, 2004. (R. 274, Tr. p. 194 (Beisser)).

Per LCSO policy, any officer who uses force against an inmate, or witnesses another officer use force against an inmate, is required to write a report documenting the circumstances surrounding the use of force. (R. 273, Tr. pp. 26-

30, 32-33, 52 (Luettke); R. 274, Tr. pp. 30-31 (Keller); R. 297, Tr. pp. 65-66 (Mangold); R. 299, Tr. p. 33 (Rogers)). Corrections officers are required to document this information in a corrections officer report. (R. 273, Tr. p. 34 (Luettke)). These official reports are supposed to include as much detail as possible to provide the reader with a clear understanding of why force was used in a particular situation, the type of force used, and the disposition of the inmate following the use of force. (R. 297, Tr. pp. 13-14 (Mangold); R. 273, Tr. pp. 26-28 (Luettke)). The reports should be detailed enough that a supervisor or administrator should not have to ask a lot of follow up questions to know what happened during an incident. (R. 274, Tr. p. 150 (Keller)).

A critical incident report is different from a corrections officer report. It is used to advise the jail's upper management of a significant event that occurs at the jail. (R. 273, Tr. p. 35 (Luettke)). Certain use of force situations, such as if an inmate was injured and required hospital treatment, or if the inmate was seriously injured or killed, are required to be documented in a critical incident report. (R. 273, Tr. p. 37 (Luettke)). These reports should include a narrative of the event, and should explain the type of force techniques used and an explanation of why those techniques were applied. (R. 273, Tr. pp. 37-38 (Luettke)).

Following the incident in the medical cell, officers Mangold, Ginn, Hannon, and Schmeltz completed corrections officer reports. (R. 297, Tr. p. 68 (Mangold);

R. 298, Tr. pp. 29 (Ginn), 121 (Hannon); see also GX 313, Mangold report; GX 307, Ginn report; GX 310, Hannon report; GX 318, 5/30/2004 Schmeltz report; GX 319, 6/1/2004 Schmeltz report). Mangold was directed to write a report that covered only the incident at the hospital (R. 297, Tr. pp. 68-69 (Mangold)); as such, Mangold's report does not include information about the incident in the medical cell (R. 297, Tr. p. 71 (Mangold); GX 313, Mangold report). Neither Ginn's nor Hannon's report includes Gray's or Schmeltz's use of force against Benton. (R. 298, Tr. pp. 29-30 (Ginn), 123 (Hannon); GX 307, Ginn report; GX 310, Hannon report). In fact, Ginn and Hannon reached an understanding about what they were going to include and exclude from their reports. (R. 298, Tr. pp. 82 (Ginn), 124 (Hannon)). Ginn excluded information about Gray's use of force and Benton's condition because Ginn was "scared and afraid" about including that information in a report that Gray, his supervisor, would ultimately review. (R. 298, Tr. p. 27 (Ginn)). Similarly, Hannon excluded the incident that occurred in the medical cell because he did not want to get Gray in trouble. (R. 298, Tr. pp. 123-124 (Hannon)). Ginn did not include Schmeltz's use of force against Benton because he was afraid of what the other officers would think if he included it in his report. (R. 298, Tr. p. 30 (Ginn)). Hannon excluded the booking incident because he assumed it was available for review on the booking camera. (R. 298, Tr. p. 123 (Hannon)).

Schmeltz prepared two corrections officer reports; neither included his own use of force against Benton, Gray's use of a sleeper hold against Benton inside the medical cell, or the fact that Gray had rendered Benton unconscious with the sleeper hold. (GX 318, 5/30/2004 Schmeltz report; GX 319, 6/1/2004 Schmeltz report).

Gray prepared two reports. His first, a critical incident report, was prepared on May 30, 2004. (R. 273, Tr. pp. 38-40 (Luettke); GX 308, 5/30/2004 Gray report). His second, a Shift Commander and Floor Supervisor Report, was prepared on June 1, 2004. (GX 309, 6/1/2004 Gray report). Neither included Schmeltz's use of force against Benton in the booking area, Gray's use of a sleeper hold against Benton inside the medical cell, or the fact that Benton was rendered unconscious by the sleeper hold. (GX 308, 5/30/2004 Gray report; GX 309, 6/1/2004 Gray report).

According to numerous witnesses, failing to document Gray's and Schmeltz's use of force in the reports rendered the reports inaccurate and untruthful. (R. 274, Tr. pp. 27, 31, 150-151 (Keller); R. 297, Tr. p. 71 (Mangold); R. 273, Tr. pp. 96-97 (Luettke); R. 298, Tr. pp. 29-30, 81-82 (Ginn), 123-125 (Hannon); R. 299, Tr. pp. 30-31 (Rogers)). Moreover, witnesses who were in the medical cell indicated there was no law enforcement purpose for placing Benton in a sleeper hold because Benton, who was restrained in leg irons, handcuffs and a

belly chain, was not posing a physical threat to anyone inside the room. (R. 297, Tr. pp. 57-58 (Mangold); R. 298, Tr. pp. 26 (Ginn), 115-116 (Hannon), 199, 204 (Jones)). The officers' reports, which indicated that a minimum amount of force was used against Benton in the medical cell, gave the jail administrator who reviewed them no indication that Benton's critical condition following his release from the hospital was related to anything that occurred at the jail. (R. 274, Tr. pp. 11-13 (Keller)). After Benton died, the jail administrator turned over all of the reports (*i.e.*, corrections officer's reports, critical incident reports, and shift commander's reports) to the coroner's investigator for use during the autopsy. (R. 274, Tr. pp. 20-22 (Keller)). Whenever an inmate dies in custody, the coroner's office needs – and expects – to receive details of any force used against that inmate and any other information about the circumstances surrounding an inmate's death so that the coroner can make an accurate determination of the cause and manner of death. (R. 274, Tr. pp. 183-185 (Beisser)).

The deputy coroner, Dr. Cynthia Beisser, conducted an autopsy of Benton on June 2, 2004. (R. 274, Tr. pp. 160-161, 196 (Beisser)). Beisser initially ruled that Benton died a natural death from a seizure disorder, in association with his use of a particular medication. (R. 274, Tr. p. 223 (Beisser)). Beisser made this determination without knowing that Benton had been subjected to a sleeper hold or that he had been rendered unconscious by the hold. (R. 274, Tr. pp. 213-214, 219-

220 (Beisser); see also R. 278, Tr. p. 168 (Patrick)). Forensic pathologists testified that they need that type of information to make an accurate determination of the cause and manner of death, because the physical evidence available from an autopsy would rarely show that a sleeper hold had been used. (R. 274, Tr. pp. 208, 235 (Beisser); Tr. 278, Tr. pp. 168, 174 (Patrick); R. 273, Tr. pp. 141, 243-244 (Reedy)).

On June 23, 2004, Robert McBroom, an Internal Affairs investigator and one of Gray's co-defendants, interviewed Gray about the incident in the medical cell. (R. 275, Tr. pp. 176-177 (Russ)). Gray denied applying pressure to Benton's neck. (R. 275, Tr. p. 180 (Russ)). The day after his interview with McBroom, Gray applied to retire. (R. 275, Tr. p. 218 (Russ)).

Four years later, in 2008, the Lucas County Sheriff's Office began an investigation into the events that occurred inside the medical cell. (R. 275, Tr. pp. 12-16, 21 (Woodruff)). The FBI eventually became involved, and Gray was interviewed by Special Agent Brian Russ on July 14, 2008. (R. 275, Tr. pp. 121, 189 (Russ)). Gray specifically denied using a sleeper hold on Benton and denied rendering him unconscious. (R. 275, Tr. pp. 195-196 (Russ)). Gray did admit, however, that he heard Benton making gurgling sounds, and that he should have notified the nurse to that effect because it was his responsibility to do so. (R. 275, Tr. pp. 196-197, 199 (Russ)).

Agent Russ interviewed Gray again on October 30, 2008. (R. 275, Tr. p. 199 (Russ)). Gray again denied using a sleeper hold on Benton and again denied rendering him unconscious. (R. 275, Tr. p. 208 (Russ)). When Agent Russ confronted Gray with contrary information that Russ had gathered during his investigation, Gray admitted using a sleeper hold on Benton but continued to deny that he had rendered Benton unconscious. (R. 275, Tr. pp. 208-209 (Russ)). After additional discussion, Gray finally admitted that he rendered Benton unconscious as a result of applying the sleeper hold. (R. 275, Tr. p. 209 (Russ)).

This same information was eventually relayed to Beisser, the deputy coroner. (R. 274, Tr. p. 234 (Beisser)). Beisser noted that this was "the key piece of information that [the office] need[ed] to tell * * * what happened." (R. 274, Tr. pp. 234-235 (Beisser)). After conducting a further investigation, and after Dr. James Patrick, the coroner, conducted an independent investigation, the coroner's office concluded that Benton actually died from anoxic encephalopathy (*i.e.*, lack of oxygen to the brain) following the application of a sleeper hold; the death was ruled a homicide. (R. 274, Tr. pp. 231-236 (Beisser); R. 278, Tr. pp. 144-145 (Beisser), 185, 189-191 (Patrick)). The new coroner's verdict was issued in March of 2010. (R. 274, Tr. p. 239 (Beisser); R. 278, Tr. p. 191 (Patrick)).

SUMMARY OF ARGUMENT

1. The evidence was more than sufficient to support Gray's conviction on Count 2. Gray admitted applying a sleeper hold to Benton and rendering him unconscious. Multiple witnesses testified that a correctional officer is required to seek medical attention for an inmate if an officer uses force against the inmate, and that an officer must certainly seek medical attention if the inmate is rendered unconscious as a result. By failing to do so, Gray's actions demonstrated a clear disregard for Benton's immediate medical needs.

2. The district court correctly rejected Gray's proposed instruction that would have required the jury to find a nexus between Gray's actions in falsifying his reports and knowledge of a potential federal investigation. The Supreme Court has previously held that the language "within the jurisdiction of an agency of the United States" is a jurisdictional requirement, and not a fact of which a defendant must be subjectively aware. Moreover, the legislative history of 18 U.S.C. 1519 makes clear that Congress intended the statute to apply broadly, and did not intend for a defendant's criminal liability to depend upon his knowledge of, or intent to obstruct, a federal investigation. The only court of appeals to have directly considered the issue agrees that the government is *not* required to prove a link between a defendant's conduct and his knowledge of a federal investigation.

3. Gray was not entitled to a special unanimity instruction because the unanimity instruction the district court gave the jury, which was consistent with this Circuit's pattern jury instructions, was correct. In the violation charged here, 18 U.S.C. 1519 prohibits falsifying documents. The jury was instructed that it must unanimously find that Gray knowingly falsified his reports, but it need not unanimously agree on the material omissions contained in the reports that rendered the overall report false. Here, each omission of a material fact in a report is simply a means of falsifying a document. A jury must therefore unanimously agree upon the element of the offense – the defendant falsified a document – but need not unanimously agree upon the specific *means* of satisfying the element. Under Supreme Court and this Court's precedents, Gray's argument should be rejected.

Even assuming the district court was required to provide a special unanimity instruction, Gray cannot show that he was prejudiced by the instruction given. The evidence at trial overwhelmingly supports a finding that he omitted the three statements set forth in the indictment, and that any of those omissions would support a conviction under the count charged.

4. The district court correctly calculated Gray's total offense level. First, this Court's case law supports the application of a two-level enhancement to a defendant's base offense level where, as here, a victim was restrained during an assault. Second, the enhancements for substantially interfering with the

administration of justice and altering an essential or especially probative record are fully supported by Gray's actions. Immediately after the assault in the medical cell, Gray falsified two official reports and lied about his actions to the Internal Affairs investigator. These actions caused the coroner's office to make its determination on the cause and manner of Benton's death without complete and accurate information, and thwarted a potential investigation into the circumstances surrounding Benton's death. Once the actual circumstances inside the medical cell were made known to the coroner's office, it changed its original determination of the cause and manner of Benton's death. Finally, any error in applying these enhancements were harmless, as they did not affect the overall calculation of Gray's total offense level, or his below-Guidelines sentence.

ARGUMENT

I

THE EVIDENCE WAS MORE THAN SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION ON COUNT 2

A. Standard Of Review

Where, as here, a defendant has preserved a motion for a judgment of acquittal, "the critical inquiry * * * [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 318 (1979). This Court, however, does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a

reasonable doubt." *Id.* at 318-319. Rather, this Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Craft*, 495 F.3d 259, 263 (6th Cir.), cert. denied, 552 U.S. 1052 (2007). In making this determination, "every reasonable inference from the evidence must be drawn in the government's favor." *United States* v. *Woods*, 877 F.2d 477, 479 (6th Cir. 1989). "The evidence," however, "need not exclude every logical hypothesis other than guilt." *Ibid.*

B. Discussion

The evidence presented at trial was more than sufficient to support the jury's verdict that Gray was guilty on Count 2. Under Section 242, "[w]hoever, under color of any law * * * willfully subjects any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States" violates federal law. 18 U.S.C. 242. Here, Gray was charged in Count 2 with acting with deliberate indifference to Benton's serious medical needs and failing to obtain necessary medical care and treatment for him. (R. 2, Indictment). The evidence more than supports the jury's finding.

Pretrial detainees have a constitutional right under the Due Process clause "not to have their serious medical needs met with deliberate indifference on the part of confining officials." *United States* v. *Gonzales*, 436 F.3d 560, 573 (5th

Cir.), cert. denied, 547 U.S. 1139, 547 U.S. 1180, 547 U.S. 823 (2006). A defendant acts with deliberate indifference where he has "subjective knowledge of a substantial risk of serious harm to a pretrial detainee," and responds with "deliberate indifference to that risk." *Ibid.* (citation omitted). Thus, a jury may find a correctional officer guilty of violating a pretrial detainee's constitutional rights where "the official knows of and disregards an excessive risk to inmate health or safety." *United States* v. *Lanham*, 617 F.3d 873, 885 (6th Cir.) (citation omitted), cert. denied, 131 S. Ct. 2443 (2011); see also *Watkins* v. *City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001) (establishing deliberate indifference "requires [proof] that the defendant[] knew of and disregarded a substantial risk of serious harm to [victim's] health and safety").

Gray argues (Gray Br. 33-35) that the evidence did not support the jury's finding that he was deliberately indifferent to Benton's medical needs because: (1) it could be assumed Benton was in good health, having been released from the hospital; (2) Benton's ability to struggle both at the hospital and in the medical cell indicated he was in good health; (3) Benton was placed in the medical cell on suicide watch, not because he was in poor physical health; and (4) no one on the nursing staff took it upon herself to check on Benton after he was admitted to the medical cell. These arguments might have some force *had Gray not applied a sleeper hold to Benton and rendered him unconscious after placing him in the*

medical cell. As it stands, these arguments have absolutely no merit and should be rejected.

Multiple witnesses testified that a correctional officer is required to seek medical attention any time force is used against an inmate at the jail. (R. 273, Tr. pp. 29-30, 33 (Luettke); R. 274, Tr. p. 33 (Keller); R. 297, Tr. pp. 65-66 (Mangold); R. 299, Tr. p. 33 (Rogers)). Gray therefore knew he was required to seek medical attention for Benton after applying the sleeper hold. Moreover, one of the forensic pathologists testified that any time the neck is compressed, death may result. For that reason, a person should be monitored after a sleeper hold is applied. (R. 273, p. 141 (Reedy); see also R. 301, Tr. p. 80 (Russ)). A correctional officer inside the medical unit went so far as to urge Gray to stop applying the sleeper hold after Benton became limp, but Gray did not lessen his hold. (R. 297, Tr. p. 60 (Mangold); R. 298, Tr. pp. 196-197 (Jones); R. 275, Tr. p. 197 (Russ)). Finally, everyone who was inside the medical unit that day and who testified at trial described Benton as either unconscious or motionless when the officers left the medical cell. (R. 297, Tr. pp. 62-63 (Mangold); R. 298, Tr. pp. 25, 82 (Ginn), 118 (Hannon), 197, 215 (Jones)). At that point, Benton's condition clearly warranted medical attention. (R. 273, Tr. pp. 32, 101 (Luettke); R. 274, Tr. pp. 33, 149 (Keller) (an officer would need to seek medical attention if an inmate was knocked unconscious); R. 297, Tr. pp. 66 (Mangold), 156 (Coleman) (explaining

that had she known Benton had lost consciousness, she would have contacted a nurse to check on Benton's condition); 183 (Sylvester) (nurse explaining that she would have attended to Benton had Gray told her of his condition); R. 299, Tr. pp. 30-31 (Rogers). Indeed, Gray even admitted to Agent Russ that he should have reported to a nurse that Mr. Benton was gurgling while Gray was holding him, and this was *before* Gray finally admitted that he had rendered Benton unconscious. (R. 275, Tr. p. 199 (Russ)). Thus, even if one accepted Gray's argument that Benton was assumed to be in good physical health before he entered the medical cell – an argument that is unsupported by the record evidence, see, *e.g.*, R. 297, Tr. pp. 174, 187 (director of medical services for LCSO testifying that she and a nurse were "shocked" that Benton was returned to the jail given his earlier condition) – the argument fails. Gray's condition immediately before he entered the medical cell is irrelevant. It is what Gray did *inside* the medical cell, and what he failed to do *afterwards*, that plainly establishes he was deliberately indifferent to Benton's serious medical needs.

II

THE DISTRICT COURT'S JURY INSTRUCTION REGARDING THE OBSTRUCTION COUNTS WAS CORRECT

A. Standard Of Review

This Court reviews a district court's denial of a defendant's proposed jury instruction for abuse of discretion. *United States* v. *Hart*, 635 F.3d 850, 854 (6th

Cir. 2011). The instructions are viewed "as a whole to determine if they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision." *United States* v. *Blackwell*, 459 F.3d 739, 764 (6th Cir. 2006) (citation omitted), cert. denied, 549 U.S. 1211 (2007). This Court will reverse a trial court's decision not to give a requested jury instruction "only if the instruction is (1) correct, (2) not substantially covered by the actual jury charge, and (3) so important that failure to give it substantially impairs [the] defendant's defense." *United States* v. *Heath*, 525 F.3d 451, 456 (6th Cir. 2008) (citation omitted).

B. Discussion

The district court did not abuse its discretion in refusing to give the jury defendant's proposed jury instruction on Counts 4 and 5 (obstruction). As Gray notes in his brief (Gray Br. 11-12), defense counsel proposed an instruction that would have required the jury to find "a connection between the false entry in a record or document and the intent to impede, obstruct or influence an investigation or proper administration of a matter within the jurisdiction of an agency of the United States or in relation to or contemplation of any such matter or case matter within the jurisdiction of an agency of the United States." (R. 244, Proposed Jury Instructions of John E. Gray, p. 16).

Rejecting Gray's request, the district court instead instructed the jury that, before it could find the defendant guilty on Counts 4 and 5, it must find that the government proved that Gray (1) "knowingly falsified or made a false entry in a record or document"; (2) "the record or document related to a matter within the jurisdiction of a federal agency"; and (3) that he did so intending "to impede, obstruct or influence the investigation of a matter within the agency's jurisdiction." (R. 277, Tr. pp. 30-31). This instruction was a correct statement of the law. Defendant's requested instruction, on the other hand, misstates what the government must prove to establish a violation of 18 U.S.C. 1519.

Section 1519 of Title 18 penalizes anyone who "knowingly * * * makes a false entry in any record * * * with the intent to impede, obstruct, or influence the investigation * * * of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519. The plain language of the statute does not require the government to prove the defendant intended to obstruct a *federal investigation*; rather, the statute requires it to prove that the defendant intended to impede an investigation in "*any matter*" that happens to be within the federal government's jurisdiction. 18 U.S.C. 1519 (emphasis added).

The Supreme Court has interpreted the phrase "within the jurisdiction of any department or agency of the United States" as a jurisdictional requirement, rather than a fact of which a defendant must be subjectively aware. In *United States* v.

Yermian, 468 U.S. 63 (1984), the Court addressed whether knowledge of federal-agency jurisdiction was required for conviction under 18 U.S.C. 1001, which at the time provided that "[w]hoever, *in any matter within the jurisdiction of any department or agency of the United States* knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations * * * shall be fined." *Id.* at 68 (emphasis added). The Court concluded that the emphasized phrase was "a jurisdictional requirement," whose "primary purpose" was "to identify the factor that makes the false statement an appropriate subject for federal concern," and that the statute "unambiguously dispenses with any requirement" that the government prove that false statements "were made with actual knowledge of federal agency jurisdiction." *Id.* at 68-70.

The Court explained that this conclusion would be "equally clear" if – as is the case with Section 1519 – the "jurisdictional language * * * appeared as a separate phrase at the end of the description of the prohibited conduct." *Yermian*, 468 U.S. at 69 n.6. The predecessor to Section 1001, which prohibited "knowingly and willfully" making "any false or fraudulent statements or representations, * * * in any matter within the jurisdiction of any department or agency of the United States," *ibid.*, was worded nearly identically to the current Section 1519. The Court stated that the "most natural reading of this version of [Section 1001] also establishes that 'knowingly and willfully' applies only to the making of false or

fraudulent statements and not to the predicate facts for federal jurisdiction." *Ibid.*; see *United States* v. *Feola*, 420 U.S. 671, 676-686 (1975) (knowledge that victim is federal officer not required for conviction of assaulting federal officer in violation of 18 U.S.C. 111).

There is no reason why Section 1519 should be interpreted differently, or why Congress would have expected it to be. Section 1519 was enacted nearly 20 years after *Yermian*. See Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800 (2002). "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and that it expect[ed] its enactments to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (citation and alterations omitted). Congress's adoption in Section 1519 of language and structure similar to that of Section 1001 (and its predecessor) accordingly demonstrates that Congress intended a similar interpretation.

The legislative history confirms this interpretation. The Senate report accompanying the relevant legislation indicates that the intent and federal-agency jurisdiction requirements are separate. The report explained that, under Section 1519, "[d]estroying or falsifying documents to obstruct any of [various] types of matters or investigations, *which in fact are proved to be within the jurisdiction of any federal agency* are covered by this statute." S. Rep. No. 146, 107th Cong., 2d

Sess. 15 (2002) (emphasis added); see *id.* at 14 ("Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, *and such matter is within the jurisdiction of an agency of the United States*.") (emphasis added).

Senator Patrick Leahy, who authored the legislation, ensured that the legislative history reflected Congress's intent to separate the defendant's intent to obstruct from the requirement that a matter be within federal-agency jurisdiction. 148 Cong. Rec. S7418-S7419 (daily ed. July 26, 2002). "The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant." *Id.* at S7419. "Rather, the intent required is the intent to obstruct, not some level of knowledge about the agency processes [or] the precise nature of the agency [or] court's jurisdiction." *Ibid.*; see *id.* at S7418 ("[T]his section would create a new 20-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, *as a factual matter*, within the jurisdiction of any federal agency or any bankruptcy.") (emphasis added).

In support of his argument, defendant relies heavily (Gray Br. 11-15) upon Supreme Court decisions interpreting *other* obstruction statutes – *not* 18 U.S.C.

1519. See, *e.g.*, *United States* v. *Aguilar*, 515 U.S. 593, 599-601 (1995) (holding, in 18 U.S.C. 1503[3] prosecution, the government must prove that defendant knew of, or at least anticipated, a pending judicial proceeding and intended to obstruct it, and that defendant's actions were related in time, causation or logic with the judicial proceeding); *Arthur Andersen* v. *United States*, 544 U.S. 696, 707-708 (2005) (extending reasoning in *Aguilar* to 18 U.S.C. 1512(b)(2)[4] prosecution, and holding that government was required to establish nexus between defendant's attempts to corruptly persuade another person to destroy documents and a pending or foreseeable official proceeding); *Fowler* v. *United States*, 131 S. Ct. 2045 (2011) (holding in 18 U.S.C. 1512(a)(1)(C)[5] prosecution government must show reasonable likelihood that a relevant communication would have been made to a federal officer); cf. *Flores-Figueroa* v. *United States*, 129 S. Ct. 1886, 1888 (2009)

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[3] Section 1503 of Title 18 punishes any person who "corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede" the "due administration of justice." 18 U.S.C. 1503.

[4] Section 1512(b)(2) of Title 18 punishes anyone who "corruptly persuades another person * * * with intent to * * * cause or induce any person to" obstruct an official proceeding. 18 U.S.C. 1512(b)(2).

[5] Section 1512(a)(1)(C) of Title 18 punishes anyone who "kills or attempts to kill another person, with intent to * * * prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole or release pending judicial proceedings." 18 U.S.C. 1512(a)(1)(C).

(holding in identity theft prosecution that defendant must know that means of identification transferred, possessed or used belonged to another person). These statutes, however, are textually distinct from 18 U.S.C. 1519. The obstruction statutes at issue in *Aguilar*, *Arthur Andersen*, and *Fowler*, for example, focus on conduct or communications affecting the "due administration of justice," "official proceeding[s]," and "the commission * * * of a Federal offense." See 18 U.S.C. 1503; 18 U.S.C. 1512(b)(2); 18 U.S.C. 1512(a)(1)(C). Section 1519 of Title 18, however, focuses upon obstruction related to "*any matter* within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519 (emphasis added). As explained above, Congress intended 18 U.S.C. 1519 to apply broadly: "[T]he current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected"; Congress therefore declared that Section 1519 was "meant to accomplish those ends." S. Rep. No. 146, 107th Cong., 2d Sess. 14 (2002).

The only court of appeals to have expressly addressed this issue agrees that Section 1519 does *not* require the government to prove a link between a defendant's conduct and knowledge of an official proceeding. Relying upon the plain language of the statute and its legislative history, the Second Circuit recently "decline[d] to read any such nexus requirement into the text of § 1519." *United States* v. *Gray (Kirby)*, No. 10-1266, 2011 WL 1585076, at *6 (2d Cir. Feb. 25,

2011); see also *id.* at *7 ("By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."). See also *United States* v. *Ionia Mgmt. S.A.*, 526 F. Supp. 2d 319, 329 (D. Conn. 2007) ("In comparison to other obstruction statutes, § 1519 by its terms does not require the defendant to be aware of a federal proceeding, or even that a proceeding be pending."). The Eleventh Circuit, moreover, has held under plain error review that it was not error to instruct the jury that the government was not required to prove that the defendant knew his conduct would obstruct a federal investigation, provided the government proved that the investigation the defendant intended to obstruct did, in fact, concern a matter within the jurisdiction of an agency of the United States. *United States* v. *Fontenot*, 611 F.3d 734, 736-738 (11th Cir. 2010), cert. denied, 131 S. Ct. 1601 (2011).

Gray also argues (Gray Br. 15-17) that the possibility of a federal investigation was too remote at the time he wrote his reports to support his conviction under the statute. This same argument was flatly rejected by the Second Circuit in *Gray (Kirby)*. "[Section] 1519," the court held, "does not require the existence or likelihood of a federal investigation." *Gray (Kirby)*, 2011 WL 1585076, at *7. See also *United States* v. *Lanham*, 617 F.3d 873, 887 (6th Cir. 2010) (rejecting argument that there must be an ongoing on imminent investigation at the time reports were falsified; concluding instead that statute requires only that

falsification be done "in relation to or contemplation of any" such investigation), cert. denied, 131 S. Ct. 2443 (2011); *United States* v. *Kun Yun Jho*, 465 F. Supp. 2d 618, 636 (E.D. Tex. 2006) ("[I]mposing a requirement that the matter develop into a formal investigation ignores the plain meaning of [Section 1519] and the legislative history."), rev'd on other grounds, 534 F.3d 398 (5th Cir. 2008).

Had the district court instructed the jury as Gray requested, the jury would have received an instruction contrary to the plain language of the statute, Congressional intent, persuasive Supreme Court authority (see *Yermian*, *supra*), and relevant case law (see *Gray (Kirby)*, *Fontenot*, *Lanham*, *supra*). The district court, therefore, did not abuse its discretion in rejecting Gray's proposed instruction.

III

DEFENDANT WAS NOT ENTITLED TO A SPECIAL UNANIMITY INSTRUCTION

A. Standard Of Review

See II.A., *supra*.

B. Discussion

Defendant argues (Gray Br. 18-23) that the district court abused its discretion when it failed to provide the jury with a requested specific unanimity instruction relating to Counts 4 and 5. Gray reasons (Gray Br. 18-20) that the unanimity instruction actually given confused the jury, and risked a verdict that did

not reflect jury unanimity as to the specific false statement charged in Counts 4 and 5. Gray's argument must be rejected.

Section 1519 of Title 18 penalizes any person who

> knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.

18 U.S.C. 1519 (emphasis added). It is clear from the plain language of the statute that Congress intended to criminalize the creation of a *false document*, however that is achieved, and not every individual *false statement* contained in a single falsified document.[6] The government therefore charged Gray with creating two separate false documents, each containing three material omissions.

To establish that Gray violated Section 1519, the government had to prove each of the following elements beyond a reasonable doubt:

(1) Gray knowingly falsified or made a false entry in a record or document;

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[6] In cases where the focus of a criminal prosecution *is* on a defendant's individual false statements, it may be appropriate either to charge the individual false statements in separate counts, see *e.g.*, 18 U.S.C. 1001(a)(2) (prohibiting the making of false statements during a federal investigation); see also *United States* v. *Dedman*, 527 F.3d 577, 600 n.10 (6th Cir. 2008) (suggesting, in *dicta*, that separately alleged false statements should be charged separately under 18 U.S.C. 1001(a)(2)), cert. denied, 129 S. Ct. 2379 (2009), or to require the jury to reach unanimity as to which statement was false where multiple false statements are set forth in a single count of violating 18 U.S.C. 1001(a)(2), *United States* v. *Algee*, 599 F.3d 506, 514-515 (6th Cir. 2010).

(2) the record or document related to a matter within the jurisdiction of a federal agency; and,

(3) Gray falsified or made a false entry in the record or document intending to impede, obstruct, or influence the investigation of a matter within the agency's jurisdiction.

United States v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). The government here alleged that Gray committed the first element of the offense – falsifying a document – in more than one way. Specifically, the government alleged that Gray knowingly falsified his two reports by various *means* (*e.g.*, omitting his assault on Benton, omitting Benton's condition following the assault, and omitting Schmeltz's assault on Benton). (R. 2, Indictment). The various means of satisfying a single element in a criminal statute, however, do not themselves constitute separate offenses or elements that a jury must agree upon unanimously.[7]

[7] To have charged each falsehood/omission as a separate offense in this case could have rendered the indictment multiplicitous. An indictment is multiplicitous, and implicates the double jeopardy clause, where it charges a single criminal offense in multiple counts. *United States* v. *Hart*, 70 F.3d 854, 859 (6th Cir. 1995), cert. denied, 517 U.S. 1127 (1996). The Ninth Circuit, for example, has held that a defendant may only be charged with a single violation of 18 U.S.C. 1001(a)(2), which prohibits making materially false, fictitious or fraudulent statements in a matter within the jurisdiction of the United States, even where a defendant makes multiple, but identical, false statements on different occasions. *United States* v. *Stewart*, 420 F.3d 1007, 1013-1014 (9th Cir. 2005); see also *United States* v. *Sue*, 586 F.2d 70, 71 (8th Cir. 1978) (making multiple false representations in a single document to a lending institution constitutes one offense under 18 U.S.C. 1014; indictment that charged falsehoods contained in separate paragraphs in single document as separate offenses was multiplicitous).

The jury, therefore, was not required to agree unanimously on *how*, precisely, the document was falsified; rather, the jury had to agree unanimously only that the document *was*, in fact, falsified, and was done knowingly and with the intent to obstruct an investigation of any matter within the jurisdiction of an agency of the United States.

In *Schad* v. *Arizona*, 501 U.S. 624 (1991), a majority of the Supreme Court held that jurors need not agree on the particular means or mode of committing an element of a crime. The Court was reviewing a conviction for murder under a state statute that designated as first-degree murder any killing that was premeditated or committed during the commission of a felony. The prosecution advanced both theories, and the trial court gave a general unanimity instruction without requiring the jury to agree on a single theory of first-degree murder. *Id.* at 629. The defendant argued on appeal that his conviction unconstitutionally deprived him of a right to be convicted by a unanimous jury. *Id.* at 630. The Court rejected that argument. "We have never suggested," a plurality of the Court explained, "that in returning general verdicts * * * the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." *Id.* at 631. The plurality noted that "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line." *Id.* at 631-632. Justice Scalia, concurring in the judgment, also observed that "it has

long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.* at 649 (Scalia, J., concurring); see also *Richardson* v. *United States*, 526 U.S. 813, 817 (1999) (explaining that the "jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime"). Thus, the district court followed established Supreme Court precedent when it instructed the jury that it must unanimously agree that Gray violated the statute in at least one of the ways set forth in the statute, but it "need not agree that the same way has been proved." [8] (R. 277, Tr. p. 32).

Moreover, the district court's instruction was consistent with this Court's pattern jury instruction, "8.03B Unanimity Not Required – Means." This instruction is appropriate where, as here, "the indictment alleges that the defendant committed a single element of an offense in more than one way." 8.03B Unanimity Not Required – Means, Note.

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[8] Defendant's reliance (Gray Br. 20-23) upon *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988), to support his argument that a specific unanimity instruction was required is misplaced. In *Duncan*, this Court applied a "distinct conceptual groupings" approach in holding that a jury must unanimously agree upon the particular false statements contained in a falsified tax return. *Id.* at 1113. The Supreme Court in *Schad*, however, *rejected* the "distinct conceptual groupings" approach. 501 U.S. at 635.

Other courts have applied a similar approach in similar situations. For example, in *United States* v. *Bellrichard*, 62 F.3d 1046 (8th Cir. 1995), cert. denied, 517 U.S. 1137 (1996), the defendant was charged with 24 counts of mailing threatening communications based on 24 mailings sent to a district judge and prosecutor. The jury, during its deliberations, asked the trial judge whether all members of the jury had "to all agree on the same threatening sentence in the letter" before finding the defendant guilty, or whether they could find the defendant guilty even if individual jurors disagreed on which parts of the letter were threatening provided all jurors found some part of the letter threatening. *Id.* at 1049. The district court instructed the jury that it

> must unanimously find beyond a reasonable doubt that the letter which you are considering contains a threat as defined in the Court's instructions. While you may disagree as to various parts of the language used, nonetheless you must consider the letter as a whole, since the whole letter is the result of the sum of its parts.

Ibid. The defendant argued on appeal that the district court's instruction violated his Sixth Amendment right to a unanimous verdict. *Ibid.*

The Eighth Circuit rejected the defendant's argument. *Bellrichard*, 62 F.3d at 1049 ("In returning general verdicts, different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.") (citations and internal quotation omitted). The court of appeals reasoned that the district court's instruction was consistent with the language of the statute, which

criminalized the mailing of threatening communications. Accepting the defendant's argument, the court explained, would require the court to interpret the statute as criminalizing "isolated phrases or words contained in a communication, rather than * * * the communication as a whole." *Ibid.* The court of appeals acknowledged that jurors "may have disagreed as to which portions of particular letters were threatening," but explained that it had "no reason to believe that the jury did not unanimously agree on the ultimate factual issue, which was whether each [communication]" violated the statute. *Id.* at 1050; see also *United States* v. *McCormick*, 72 F.3d 1404, 1409 (9th Cir. 1995) (jury consensus on particular false statement contained in falsified passport application not necessary, in prosecution under 18 U.S.C. 1542).

That same reasoning applies here. Section 1519 does not criminalize "isolated phrases or words contained in a communication"; it criminalizes the creation of a falsified "communication as a whole." *Bellrichard*, 62 F.3d at 1049. Thus, the jury must unanimously agree that the defendant knowingly falsified *a record or document*. It need not agree unanimously upon the precise *means* used to falsify the document. *Schad*, 501 U.S. at 631-632. For this reason, Gray's argument (Gray Br. 22-23) that it was entirely possible that some jurors based their decisions on one particular omission and other jurors based their decisions on other omissions is irrelevant because the jury unanimously agreed that Gray falsified a

document in violation of 18 U.S.C. 1519. See *Schad*, 501 U.S. at 631-632; *Bellrichard*, 62 F.3d at 1049.

Gray also argues (Gray Br. 22) that, had juror unanimity been required, he would likely have been acquitted because his *co-defendants* were acquitted on various charges. This argument fails. First, as explained above, jury unanimity was not required. Second, Schmeltz's acquittal on Count 3 (deprivation of rights under color of law, in violation of 18 U.S.C. 242) has no bearing on Gray's convictions for knowingly failing to document Schmeltz's use of force. To establish a felony violation of Section 242, the government must prove, among other things, that the victim suffered bodily injury. *United States* v. *Lanham*, 617 F.3d 873, 885 (6th Cir.) (citation omitted), cert. denied, 131 S. Ct. 2443 (2011). Schmeltz's acquittal on the Section 242 charge could reflect the jury's determination that the government failed to present sufficient evidence that Benton suffered injury from Schmeltz's use of force. The evidence, however, made clear that Schmeltz used force on Benton, and that officers who witnessed such use of force were required to report it. Similarly, Telb's and McBroom's acquittal on Count 8 (misprision of a felony, in violation of 18 U.S.C. 4) has no bearing on Gray's convictions for knowingly failing to document his and Schmeltz's use of force and Benton's condition following Gray's use of force. To establish a violation of 18 U.S.C. 4, the government must prove, among other things, that the

defendant had knowledge that a principal committed a felony and that the defendant took affirmative steps to conceal the felony. *United States* v. *Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988). The jury's decision to acquit Telb and McBroom of this count could reflect the jury's determination that the government failed to prove that Telb and McBroom knew of Gray's felonious assault on Benton. That decision, however, has no bearing on the jury's determination that Gray committed the underlying felony.

Finally, even assuming the district court abused its discretion in instructing the jury that it need not reach unanimity on the means by which Gray falsified his two reports, Gray cannot establish prejudice from the error. The jury was presented with overwhelming evidence that Gray omitted three material statements from his May 30, 2004, Critical Incident Report (Count 4), and his June 1, 2004, Shift Commander and Floor Supervisor Report (Count 5). First, multiple witnesses testified that they saw Gray use the sleeper hold on Benton. (R. 297, Tr. p. 56 (Mangold); R. 298, Tr. pp. 23 (Ginn), 110-111 (Hannon)). Second, those same witnesses testified that Benton became limp and motionless after Gray applied the sleeper hold (R. 297, Tr. p. 58 (Mangold); R. 298, Tr. pp. 25 (Ginn), 118 (Hannon)), and that he remained that way when Gray ordered the officers from the medical cell (R. 297, Tr. pp. 60-61 (Mangold); R. 298, Tr. pp. 24 (Ginn), 115 (Hannon)). Third, multiple witnesses who were with Gray in the booking area

testified that they saw Schmeltz shove Benton in the booking area. (R. 298, Tr. pp. 15 (Ginn), 233 (Edwards)). Others testified that they saw video of the incident, which clearly showed Schmeltz shoving Benton. (R. 274, Tr. p. 46 (Keller); R. 297, Tr. pp. 38-42 (Mangold); R. 298, Tr. pp. 100-102 (Hannon), 171 (Farias)). This same video was played for the jury at trial. (R. 297, Tr. p. 41). Finally, the jury heard testimony that officers are supposed to include in their reports any force they use or force they witness others use (R. 273, Tr. pp. 26-34, 52 (Luetkke); R. 274, Tr. pp. 30-31 (Keller); R. 297, Tr. p. 14 (Mangold); R. 298, Tr. pp. 11 (Ginn), 90 (Hannon)), and that failing to document Gray's and Schmeltz's use of force in their reports rendered the reports inaccurate and untruthful (R. 274, Tr. pp. 27, 31, 150-151 (Keller); R. 297, Tr. pp. 71 (Mangold); R. 273, Tr. pp. 96-97 (Luettke); R. 298, Tr. pp. 81-82 (Ginn), 123-125 (Hannon)).

This evidence was more than sufficient to support a conviction based upon any of the three omissions. In other words, a jury could easily conclude that Gray knowingly falsified his reports by failing to include any, some, or all of the three omissions set forth in the indictment. Cf. *United States* v. *Thomas*, 74 F.3d 701, 712-713 (6th Cir.) (in case charging computer transfer of obscene computer files, where each obscenity count listed more than one computer file, no plain error where facts were such that it was "unlikely that the jury would have had any

trouble reaching unanimity" on at least one of the files included in each of the counts), cert. denied, 519 U.S. 820 (1996).

IV

THE DISTRICT COURT CORRECTLY CALCULATED DEFENDANT'S OFFENSE LEVEL FOR SENTENCING

A. Standard Of Review

This Court reviews a district court's sentencing determination for an abuse of discretion. *United States* v. *Hall*, 632 F.3d 331, 335 (6th Cir. 2011). A district court abuses its discretion if it imposes a sentence that is either procedurally or substantively unreasonable.[9] *Gall* v. *United States*, 552 U.S. 38, 51 (2007). A sentence is considered procedurally unreasonable if, in imposing it, the district court "fails to calculate or improperly calculates the Guidelines range, treats the Guidelines as mandatory, fails to consider the 18 U.S.C. § 3553(a) sentencing factors, selects a sentence based upon erroneous facts, or fails to adequately explain its chosen sentence and its deviation, if any, from the Guidelines range." *Hall*, 632 F.3d at 335.

[9] Gray is not challenging the substantive reasonableness of his below-Guidelines sentence.

B. Discussion

1. Probation Office's Sentencing Calculations

Gray's adjusted offense level for Count 2 was 20. The Probation Office began with a base offense level of 12 because the Sentencing Guidelines direct that an underlying civil rights offense, such as a violation of 18 U.S.C. 242, corresponds to a base offense level of 12 where two or more participants are involved. U.S.S.G. 2H1.1(a)(2). The Probation Office added six levels because the underlying offense was committed under color of law, U.S.S.G. 2H1.1(b)(1), and two additional levels because the victim was restrained during the commission of the underlying civil rights offense. U.S.S.G. 3A1.3. Gray's resulting adjusted offense level was therefore 20.

With respect to Counts 4 and 5, the Probation Office began with a base offense level of 14 because that is the offense level for a violation of 18 U.S.C. 1519. U.S.S.G. 2J1.2. The Probation Office added three levels because defendant's obstructive conduct substantially interfered with the administration of justice, U.S.S.G. 2J1.2(b)(2), and an additional two levels because defendant's obstructive conduct constituted an Alteration of an Especially Probative Record (*i.e.*, the coroner's report). U.S.S.G. 2J1.2(b)(3)(B). The adjusted offense level for Counts 4 and 5 was therefore 19.

Given a two point, multiple-count adjustment added to defendant's highest adjusted offense level pursuant to Section 3D1.4, defendant's total offense level was 22. This offense level corresponded to an advisory Guidelines sentence of 41 to 51 months' imprisonment.

Defendant objected to the two-level enhancement pursuant to Section 3A1.3, the three-level enhancement pursuant to Section 2J1.2(b)(2), and the two-level enhancement pursuant to Section 2J1.2(b)(3)(B).

2. Defendant's Sentencing

At a sentencing hearing on January 28, 2011, the district court overruled Gray's objections to the enhancements set forth in the presentence report. (R. 306, Tr. pp. 3-4).[10] The district court then considered the sentencing factors set forth in 18 U.S.C. 3553(a) and sentenced Gray to a below-Guidelines sentence of 36 months' imprisonment. (R. 306, Tr. pp. 14-16; R. 284, Judgment). In reaching Gray's ultimate sentence, the district court commented upon Gray's lack of criminal history and his years of public service. (R. 306, Tr. pp. 15-16).

3. The District Court's Sentence Was Procedurally Reasonable

The district court did not abuse its discretion in sentencing Gray to a below-Guidelines sentence of 36 months' imprisonment. The enhancements pursuant to

[10] The district court expressed "doubts" about the enhancement pursuant to Section 2J1.2(b)(3)(B), but noted that "it will not impact either way in the sentence" the court intended to impose. (R. 306, Tr. p. 4).

Sections 3A1.3, 2J1.2(b)(2) and 2J1.2(b)(3)(B) were correctly applied and fully supported by the record.

a. U.S.S.G. 3A1.3 Enhancement

A two-level enhancement applies when "a victim was physically restrained in the course of the offense." U.S.S.G. 3A1.3. In *United States* v. *Clayton*, 172 F.3d 347, 353 (5th Cir. 1999), the Fifth Circuit held that the plain language of the Guideline makes clear that it applies even in situations where the victim is lawfully restrained, and explained that "the physical restraint of a victim during an assault is an aggravating factor that intensifies the willfulness, the inexcusableness and reprehensibleness of the crime and hence increases the culpability of the defendant."

This Court addressed a similar situation in *United States* v. *Carson*, 560 F.3d 566 (6th Cir. 2008), cert. denied, 130 S. Ct. 1048 (2010). The victim in *Carson* was pulled from his vehicle following a traffic stop, thrown to the ground, and then assaulted by several officers. *Id.* at 570-571. The district court refused to apply the enhancement because the court viewed it as "piling on" given that "there was an ongoing arrest" and "some restraint was appropriate." *Id.* at 588. In rejecting the district court's reasoning, this Court explained that "*Clayton* sets out the appropriate interpretation of" the restraint-of-victim enhancement and held that it was legal error to conclude that the enhancement did not apply in situations where

the victim was lawfully restrained. *Ibid.* This Court observed that the district court's factual findings in *Carson* were "cursory," but did not remand for further findings because the district court erroneously applied a separate, off-setting enhancement and, given that the "errors * * * cancel each other out," a "[r]emand would * * * serve no purpose." *Id.* at 588.

The district court here correctly applied the Section 3A1.3 enhancement when calculating Gray's offense level for Count 2. *Carson*, 560 F.3d at 588-589; *Clayton*, 172 F.3d at 353. Gray questions (Gray Br. 24-26) to what offense this enhancement applies, and suggests that it cannot apply to Count 2 because the jury "implicitly rejected any link between Mr. Gray and any assault on Mr. Benton" through its finding that Gray's actions did not result in Mr. Benton's death. This suggestion is unsound. As Gray recognizes (Gray Br. 25), a district court may rely on acquitted conduct when applying enhancements to a defendant's offense level under the Sentencing Guidelines. *United States* v. *White*, 551 F.3d 381, 382-385 (6th Cir. 2008) (en banc), cert. denied, 129 S. Ct. 2071 (2009); see also U.S.S.G. 1B1.3(a). The district court was therefore free to consider the totality of Gray's actions in the medical cell when calculating Gray's offense level.

Gray nonetheless argues (Gray Br. 25) that the facts supporting the Section 3A1.3 enhancement were not established by a preponderance of the evidence. *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007). This argument is

easily rejected. The evidence overwhelmingly supported a finding that Benton was fully restrained in handcuffs, leg irons and a belly chain when Gray applied the sleeper hold. (R. 297, Tr. pp. 57-58 (Mangold); R. 298, Tr. pp. 26 (Ginn), 115-116 (Hannon), 199, 204 (Jones)). Indeed, witnesses testified that they did not remove Benton's restraints until *after* Benton had become motionless and limp from the sleeper hold. (R. 297, Tr. pp. 61-62 (Mangold); R. 298, Tr. pp. 117-118 (Hannon)). This evidence easily supports the district court's finding that a two-level enhancement pursuant to Section 3A1.3 was warranted.

b. U.S.S.G. 2J1.2(b)(2) Enhancement

The district court correctly applied a three-level enhancement pursuant to Section 2J1.2(b)(2) because Gray's obstructive conduct substantially interfered with the administration of justice. Gray argues (Gray Br. 27-30) that the enhancement does not apply given his acquittals on Counts 1, 9 and 11, and because there was no proof of unnecessary expenditures of substantial government resources. These arguments have no merit.

First, as mentioned above, the district court may consider acquitted conduct when enhancing a defendant's offense level under the Guidelines. *White*, 551 F.3d at 382. Gray's argument that his acquittals render the enhancement inapplicable should therefore be rejected. Second, the Guidelines do not limit a finding of a "substantial interference with the administration of justice" to unnecessary

government expenditures. Far from it. The Guidelines state that the list of other factors warranting the enhancement "includes" a "premature or improper termination of a felony investigation" or a judicial determination based upon "false evidence." U.S.S.G. 2J1.2, Application Note 1. The use of the term "includes" in the application note "clearly indicates that the subsequent listing of acts warranting this enhancement is not exclusive," and that other similar acts – apart from those resulting in unnecessary expenditures – could serve as the basis for such an enhancement. *United States* v. *Amer*, 110 F.3d 873, 885 (2d Cir.), cert. denied, 522 U.S. 904 (1997).

Here, Gray's obstructive conduct resulted in a "premature or improper termination of a felony investigation." U.S.S.G. 2J1.2, Application Note 1. The coroner's office received Gray's (and the other officers') incomplete and inaccurate reports shortly after Benton's death. (R. 274, Tr. pp. 20-22 (Keller)). These reports did not indicate that Gray had used a sleeper hold on Benton, or that Benton had been rendered unconscious by the sleeper hold, and thus would not give anyone reading the reports the impression that Benton's critical condition was related to anything that occurred at the jail. (R. 274, Tr. pp. 11-13 (Keller)). Several forensic pathologists testified that having accurate and complete information about the circumstances surrounding a victim's death is vital to making an accurate determination of the cause and manner of death. (R. 274, Tr.

p. 235 (Beisser) ("[K]nowing what happened is key to this whole cause and manner of death."); R. 278, Tr. p. 168 (Patrick); R. 273, Tr. p. 244 (Reedy)).

The coroner's office, however, did not receive complete and accurate information about the events immediately preceding Benton's death until 2010 – *six years* after the incident in the medical unit. (R. 274, Tr. 234 (Beisser)). The deputy coroner testified this type of information would have been important to have back in 2004 (R. 274, Tr. pp. 234-235 (Beisser)), and that had she been provided that information in 2004, she would have conducted her autopsy differently (R. 274, Tr. p. 209 (Beisser); see also R. 278, Tr. p. 234 (Patrick) ("[I]t certainly is much easier to do an investigation when you have all the information to begin with.")). More importantly, had the deputy coroner received complete and accurate information in 2004, she obviously would have reached a different conclusion. We know this, of course, because once the coroner's office received accurate information about what occurred in the medical cell, the coroner's office changed the manner of death from natural causes to homicide. (R. 274, Tr. p. 239 (Beisser); see also R. 278, Tr. pp. 144 ("[O]nce all the facts of the case were given to us, it was clear that there was a purposeful action * * * which directly caused the death of Mr. Benton.") (Beisser), 191 (Patrick)). Had the coroner's office reached this conclusion in 2004, a felony investigation would have no doubt been conducted. As it happened, an investigation was not initiated until four years after

Benton's death. (R. 275, R. pp. 12-16, 20-21 (Woodruff)). Gray's actions of initially denying the use of the sleeper hold and falsifying reports that informed the coroner's office's inaccurate conclusion about the cause of Benton's death "prevented proper legal proceedings from occurring," and therefore support the enhancement. *Amer*, 110 F.3d at 885.

The record also supports a finding that Gray's actions did, in fact, cause unnecessary expenditures of substantial government resources. The federal investigation that commenced in 2008 was hampered by the passage of time and fading memories. Had the truth underlying Benton's death been known in 2004 and formed the basis of a state investigation and prosecution, any federal interest in the case may have been vindicated, making the federal investigation and prosecution unnecessary. Instead, the federal government was required to interview witnesses multiple times, and needed to reconstitute the medical evidence gathered in 2004 and have that evidence re-examined. These actions certainly "forced the government to expend substantial additional resources which otherwise would have been unnecessary." *United States* v. *Leung*, 360 F.3d 62, 67 (2d Cir. 2004); see also *United States* v. *Atkins*, 29 F.3d 267, 268 (7th Cir. 1994) (calling additional witnesses before grand jury constitutes substantial expenditure); *United States* v. *Butt*, 955 F.2d 77, 88 (1st Cir. 1992) (locating corroborating

witnesses and immunizing witnesses who otherwise could have been prosecuted constitutes substantial interference).

Finally, any error by the district court in applying this enhancement was harmless. The Probation Office calculated Gray's adjusted offense level for the substantive civil rights charge (Count 2) separately from his adjusted offense level for the obstruction charges (Counts 4 and 5). The substantive civil rights offense resulted in a higher adjusted offense level (*i.e.*, 20) than that for the obstruction offenses (*i.e.*, 19). Gray's total offense level of 22 resulted from the addition of two levels pursuant to Section 3D1.4 (multiple counts). If the Section 2J1.2(b)(2) enhancement were not applicable to the obstruction counts calculation, Gray's adjusted offense level would still be increased by two levels under the Guidelines to a total offense level of 22. See U.S.S.G. 3D1.4(a). In any event, the district court sentenced Gray *below* the advisory Guidelines range of 41-51 months' imprisonment. The Section 2J1.2(b)(2) enhancement thus had no effect on Gray's ultimate sentence.

c. U.S.S.G. 2J1.2(b)(3)(B) Enhancement

The district court correctly applied a two-level enhancement pursuant to U.S.S.G. 2J1.2(b)(3)(B) because Gray's obstructive conduct involved the alteration of an essential record. Gray argues (Gray Br. 31-32) that the enhancement does not apply because the coroner's initial determination of Benton's cause of death

was correct, other information was available to the coroner in 2004 that supported the coroner's 2010 revised cause of death determination, and the jury found that Gray's actions did not result in Benton's death. These arguments should be rejected.

First, three forensic pathologists (including the deputy coroner who performed the autopsy in 2004 and the coroner who independently reviewed the 2004 report in 2010) testified that they require complete and accurate information about the circumstances surrounding a person's death to make an accurate determination on the cause and manner of death. Gray's obstructive conduct, both in his reports and his initial interviews, prevented the coroner's office from receiving the information necessary for it to perform its job. Had the coroner's office received complete and accurate information in 2004, its determination of the manner and cause of Benton's death would have been different. Indeed, the coroner's office changed its initial determination after receiving accurate information about the circumstances surrounding Benton's death – specifically, the fact that Benton had been placed in a sleeper hold and had been rendered unconscious as a result.

Second, the fact that other information may have existed in 2004 that would have enabled the coroner's office to conduct an accurate determination (had they received it) is irrelevant. The fact remains that had Gray been truthful about what

happened in either his initial interviews or his reports, the coroner's determination in 2004 would have been different.

Third, the jury's determination that Gray's actions did not result in Benton's death is of little consequence. As previously noted, a district court may rely on acquitted conduct when applying enhancements to a defendant's offense level under the Sentencing Guidelines. *White*, 551 F.3d at 382; see also U.S.S.G. 1B1.3(a).

Finally, as with the Section 2J1.2(b)(2) enhancement, the Section 2J1.2(b)(3)(B) enhancement had no effect on Gray's below-Guidelines sentence. See II.B.3.b., *supra*. It is true that if this Court finds that *both* Section 2J1.2 enhancements were unwarranted, Gray's total offense level would have been 21 instead of 22. See U.S.S.G. 3D1.4(b) (counting as one-half unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level, and directing the total offense level to be increased by one point instead of two). A total offense level of 21, however, corresponds to an advisory Guidelines range of 37-46 months' imprisonment. This range is *still* greater than the 36 months' imprisonment the district court imposed. Gray cannot establish that he was prejudiced by error, if any, in the district court's sentencing calculations.

CONCLUSION

For the reasons stated, this Court should affirm defendant's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,525 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/Angela M. Miller
ANGELA M. MILLER
Attorney

Dated: June 30, 2011

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court using the CM/ECF system on June 30, 2011.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Angela M. Miller
ANGELA M. MILLER
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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry Number	Title
2	Indictment
244	Proposed Jury Instructions of John E. Gray
256	Verdict
273	11/3/10 Transcript
274	11/5/10 Transcript
275	11/11/10 Transcript
277	11/30/10 Transcript
278	11/9/10 Transcript
284	Judgment
285	Notice of Appeal
297	11/2/10 Transcript
298	11/4/10 Transcript
299	11/10/10 Transcript
301	11/17/10 Transcript
306	1/28/11 Transcript