No. 02-1888

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

GLEN JACKSON,

Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES

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SUMMARY OF THE CASE

This case involves the conviction of defendant Glen Jackson, a former correctional officer at the Arkansas Department of Correction, for violating 18 U.S.C. 242 and 2 by willfully beating a handcuffed inmate, causing him bodily injury. Defendant was sentenced to 108 months imprisonment. In his opening brief, defendant challenges his conviction by arguing that the district court abused its discretion by permitting the government to cross-examine defendant on the facts surrounding a prior conviction for attempted murder. Defendant had implied on direct that he was wrongly convicted because the state where the shooting occurred did not have a self-defense law. Defendant argues that the cross-examination evidence was inadmissible under Fed. R. Evid. 404(b).

The district court, however, did not admit the cross-examination testimony under Rule 404(b). The court permitted the cross-examination for the purpose of impeaching defendant's testimony on direct. The cross-examination was properly admitted because it was germane to defendant's testimony on direct, and explicitly contradicted defendant's suggestions that he acted in self-defense. The evidence is also admissible under Fed. R. Evid. Rule 608(b) because it bore on defendant's truthfulness, and under Rule 609 to attack defendant's credibility. Even if the district court erred in admitting the cross-examination testimony, such error was harmless because there was overwhelming evidence to support the conviction.

The United States does not oppose defendant's request for oral argument, but believes that this case can be decided by this Court on the briefs.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a judgment of conviction and sentence under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. The district court sentenced defendant on March 22, 2002, and entered final judgment on March 26, 2002 (R. 136, 138).[1/] Defendant filed a notice of appeal on April 4, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

[1/] "R.__" refers to the docket entries on the district court's docket sheet. "Tr. (date) at __" refers to the date and page number of the proceedings held before the district court judge. "U.S. Exh. __" refers to the United States' trial exhibits. "Def. Exh. __" refers to the defendant's trial exhibits. "Br. __" refers to pages in the defendant's brief.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by permitting the government to cross-examine defendant on the facts surrounding a prior conviction for attempted murder in order to impeach defendant's direct testimony.

United States v. *Amahia*, 825 F.2d 177 (8th Cir. 1987).

STATEMENT OF THE CASE

A. *Proceedings Below*

Defendant Glen Jackson, a former correctional officer at the Cummins Unit of the Arkansas Department of Correction, was indicted by a federal grand jury on February 7, 2001, along with five other correctional officers (R. 1).[2/] Defendant Jackson was indicted on Counts 1 and 4 of a four-count indictment (R. 1). Count 1 charged defendant with conspiring to injure, oppress and threaten Michael Lenz, an inmate in the Arkansas Department of Correction, while acting under color of law, in violation of 18 U.S.C. 241 (R. 1). Count 4 charged defendant with willfully assaulting inmate Lenz, who was handcuffed behind his back, by striking, punching, kicking and beating him, resulting in bodily injury, in violation of 18 U.S.C. 242 and 2 (R. 1). The United States moved to dismiss Count 1 of the indictment against defendant, and that motion was granted on October 23, 2001 (R. 101). The other defendants entered into plea agreements with the government, and were subsequently sentenced by the district court (R. 79 (Oct. 5, 2001) (Bell); R. 89

[2/] The other defendants charged in the indictment were Kenneth Bell, Charlie Wade, Jr., Percy Sergeant, Jr., Loren Burrer, and Neica Lee Threet (R. 1).

(Oct. 12, 2001) (Wade); R. 87 (Oct. 12, 2001) (Sergeant); R. 85 (Oct. 12, 2001) (Burrer); R. 107 (Oct. 26, 2001) (Threet)).

B. *Evidentiary Ruling*

A five-day trial was held between October 29 and November 5, 2001. During the trial, defendant took the stand to testify on his own behalf. During direct examination, defense counsel questioned defendant Jackson about his February 2000, criminal conviction. The questioning went as follows (Tr. 11/1/01 at 698-699):

Q. And I guess you know what we're here about today, don't you Glen?
A. Yes, sir.
Q. Before we get into what your knowledge of this incident is, have you ever been in trouble before, Glen?
A. Yes, sir.
Q. What kind of – tell the jury what kind of trouble you've been into.
A. I went to the penitentiary in 2000. I was convicted of criminal attempt of capital murder. Went to the penitentiary for six years, served 20 months, and I was paroled out.
Q. It's my understanding that criminal attempt of capital murder is a class A felony. Is that your understanding?
A. Yes, sir.
Q. And the sentence range is what? Do you know?
A. From 6 to 30 years.
Q. And you got the minimum sentence?
A. There's no self-defense law in Arkansas.
Q. Pardon?
A. There's no self-defense. Ark – the law in Arkansas. So the jury seen to give me six years.
Q. And you went and did your time, didn't you?
A. Yes, sir.

During a break in direct examination, a discussion was held between counsel and the district court judge at which government counsel requested permission to cross-examine defendant on the facts surrounding his prior conviction for

attempted murder. The government argued that defendant's statement that there was "no self-defense under Arkansas law, suggest[ed] to the jury that somehow there was justification for what [defendant] did" (Tr. 11/1/01 at 708). Defense counsel argued that the cross-examination should be limited to defendant's knowledge of whether there is a self-defense statute in Arkansas (Tr. 11/1/01 at 708-709). The district court ruled that defendant could be cross-examined on the facts surrounding the prior conviction pursuant to Fed. R. Evid. 608, but that no extrinsic evidence could be introduced (Tr. 11/1/01 at 709).

During cross-examination defendant Jackson was questioned as follows (Tr. 11/1/01 at 716-719):

Q. Mr. Jackson, you testified, or in your direct examination, that you were convicted of criminal attempted murder; is that correct?
A. Yes, sir.
Q. And that was a conviction that occurred on February 22nd, 2000?
A. Yes, sir.
Q. And you testified that at the time you were convicted of this offense, you did not know that – anything about – you didn't know that – about self-de– that there was no self-defense available under Arkansas law?
A. I said there was no self-defense. Yes, sir, I said that.
Q. That there was no self-defense available under Arkansas law?
A. Yes. I said there ain't no self-defense in Arkansas, yes, sir.
Q. Now, you – worked as a correctional officer?
A. Yes, sir.
Q. And you received training as a correctional officer with respect to use of force?
A. Exactly, yes, sir.
Q. And so you learned about when it is appropriate to use – to use force –
A. Yes, sir.

* * *

Q. And so you understood that, as a correctional officer within an institution, you would have used force if you were confronting [a] situation that threatened your life?
A. Yes, sir.

Q. And that would be self-defense, isn't it?
A. Yes, sir is.
Q. And that's something that would have been provided to you as a right under Arkansas law?
A. Yes, sir.
Q. Now, did you go to trial in that – in this incident?
A. Yes, I did, sir.
Q. And you were convicted at the trial?
A. I was convicted and served my time, yes, sir.
Q. And at this trial, the State of Arkansas presented evidence; is that correct?
A. Yes, sir.
Q. And as part of that evidence, they introduced witness testimony?
A. Yes, sir.
Q. And isn't it true that it was the out – that the government there alleged that you had followed someone after a dispute in your car, followed that individual, and then cut that individual off the road? Is that what they were alleging?
A. Yes, sir.
Q. And they further alleged that when that individual came out of the car, you shot at him; isn't that right?
A. Yes, sir.
Q. And, in fact, there was witness testimony during this trial that after that individual was shot, you shot that individual and he fell to the ground, that you shot that individual twice as that individual was on the ground; isn't that correct?
A. That's the – yes, sir.
Q. That was the testimony that was elicited –
A. Yes, sir.
Q. – at that trial?
A. Yes, sir.

Defense counsel objected to the cross-examination (Tr. 11/1/01 at 719). The district court again ruled that the cross-examination was permissible under Rule 608, and that the probative value of the evidence outweighed substantially any prejudicial effect (Tr. 11/1/01 at 719-720). The district court informed defense counsel that the court would give the jury an instruction on the appropriate use of other crimes evidence under Rule 404(b) if defense counsel provided such an

instruction (Tr. 11/1/01 at 720).

At the conclusion of trial, defense counsel did not provide to the district court a proposed instruction on the jury's use of other crimes evidence under Rule 404(b). Consequently, no such instruction was given to the jury.

C. *Verdict and Sentencing*

On November 5, 2001, the jury found defendant Jackson guilty on Count 4 of the indictment (Tr. 11/5/01 at 854). On March 22, 2002, defendant was sentenced to 108 months imprisonment, three years of supervised release, and ordered to pay a special assessment in the amount of $100 (R. 138).

STATEMENT OF FACTS

1. Defendant Glen Jackson had been employed as a correctional officer at the Cummins Unit of the Arkansas Department of Correction (ADC) since 1995 and completed basic correctional officer training at the ADC Training Academy which is required for employment (U.S. Exh. 11; Tr. 10/31/01 at 498). Upon successful completion of training, defendant took an oath to properly discharge his duties as an employee at ADC (U.S. Ex. 12; Tr. 10/30/01 at 68-69), and on February 25, 1997, acknowledged that he completed training with respect to the appropriate use of force as set out by ADC Regulation 409 and ADC Administrative Directive 97-01 (U.S. Exh. 5; Tr. 10/30/01 at 65-66). Administrative Directive 97-01 (effective Jan. 17, 1997) sets out the procedures for use of force and states that nondeadly force "may be used when necessary in order to restrain, maintain or regain control of an inmate" (U.S. Exh. 10 at 1). Pursuant

to the directive, correctional officers are trained that the "level of force used by staff shall be directly related to the amount of force used by the inmate," and that "[f]orce shall not be used as a means of punishment" (U.S. Exh. 10 at 2; see also Tr. 10/30/01 at 76; Tr. 10/31/01 at 500-504).

Departmental regulations require that all employees of the Department of Correction report all incidents involving use of force against inmates on an incident report, which is Form 005 (U.S. Exh. 10; see, e.g., Def. Exh. 7). The form requires the preparer to list all employees involved in the incident and provide a narrative of every essential element of what happened (Tr. 10/31/01 at 507; see also Def. Exh. 7). The regulations state that "[e]very employee who uses or observes force being used against any person shall complete an incident report" and that the "[f]ailure to fully document any such occurrence may result in disciplinary action against the employee" (U.S. Exh. 10 at 4; Tr. 10/30/01 at 76; Tr. 10/31/01 at 438).

Correctional officers having knowledge of inmate misconduct may file disciplinary charges against the inmate (Tr. 10/30/01 at 73, 177). The disciplinary charges are heard by a hearing officer who determines the guilt of the inmate and the appropriate sanction (Tr. 10/30/01 at 73, 177).

2. Defendant Jackson was on duty as a correctional officer in the East Building of the Cummins Unit of ADC on January 24, 1998 (U.S. Exh. 3). The Cummins unit has three wings: the east, south and north wings (U.S. Exh. 13). Within the wings are two four-man cells, and the remainder are two-man cells (Tr. 10/30/01 at 60). The control center is located at the center of the building's three

wings (U.S. Exhs. 7 & 13; Tr. 10/30/01 at 60-61). Correctional officers in the East Building work 12-hour shifts, and there are a lieutenant and sergeant on duty at all times to supervise activities in the building (Tr. 10/30/01 at 57). Defendant Jackson was on duty on January 24, 1998, and he was assigned to serve as a search and escort officer during the night shift from 6 p.m. to 6 a.m. the following morning (U.S. Exh. 3). As the search and escort officer for the East Building, Jackson was responsible for searching the jail cells in the building during his shift, and escorting inmates to wherever they needed to go, including going from one wing of the building to another (Tr. 10/30/01 at 161-162; Tr. 10/31/01 at 417). Lieutenant Kenneth Bell and Sergeant Charles Wade were supervising officers during Jackson's shift that night (Tr. 10/31/01 at 415-418).

At about 9 p.m. that night, an inmate in cell two of the east wing of the East Building began throwing water out of the toilet (Tr. 10/31/01 at 511). There were four inmates in cell two, including inmate Michael Lenz (Tr. 10/31/01 at 511). Correctional officer Louis Seamster, who was also on the night shift with Jackson, was surveying the east wing and saw water on the floor of cell two (Tr. 10/30/01 at 162-164). When the inmate did not stop bailing out the water, Seamster sought assistance from Lt. Bell, Sgt. Wade, and Officers Jackson, Williams, and Rosenbaum and returned to the cell (Tr. 10/30/01 at 103-105, 164-165, 228-229; Tr. 10/31/01 at 418, 511-512). The officers told the inmate to stop bailing water out of the toilet, but the inmate refused and made vulgar remarks to the officers (Tr. 10/30/01 at 165-166; Tr. 10/31/01 at 420). Inmate Lenz testified that he had been

doing exercises prior to the incident; when the officers returned to the cell Lenz stood up with only his boxer shorts and slippers on, still holding a mattress on his arm (Tr. 10/31/01 at 514).

Wade told Jackson to go and get the handcuffs (Tr. 10/30/01 at 166). Jackson returned with the handcuffs and possibly the keys to the cell (Tr. 10/31/01 at 325). Three of the inmates complied with the officer's request that they put their hands through tray opening in the cell door so that their hands could be cuffed prior to their removal from the cell (Tr. 10/30/01 at 107, 166-167). Inmate Lenz, however, refused to comply (Tr. 10/30/01 at 230-231; Tr. 10/31/01 at 512-513).

Lt. Bell sprayed capstun into the cell one or two times (Tr. 10/30/01 at 107, 230; Tr. 10/31/01 at 421-423, 515). Capstun is an aerosol spray that can incapacitate an inmate; the spray can make a person's eyes tear and burns the throat (Tr. 10/30/01 at 104-105, 167). Then an officer gave Lt. Bell the "shock stick" and he showed it to Lenz (Tr. 10/30/01 at 105). A shock stick is an electronic stun device that spurts an electrical current out of the end when the trigger is pulled (Tr. 10/30/01 at 77-78; U.S. Exh. 2). Prison policy is that the shock stick be used only when an inmate is aggressive and, usually, in possession of a weapon (Tr. 10/30/01 at 78). While Lenz was still standing with the mattress, another inmate was coughing and having difficulty breathing because of the capstun that had been sprayed into the cell (Tr. 10/31/01 at 515). Lenz then dropped the mattress and put his hands through the tray slot so that officers could put handcuffs on him (Tr. 10/30/01 at 108, 231; Tr. 10/31/01 at 515). The officers opened the cell door and

took all of the the inmates out (Tr. 10/30/01 at 108). Three inmates were taken to a day room pursuant to Lt. Bell's orders (Tr. 10/30/01 at 108). Inmate Lenz was escorted off the east wing by Jackson and Wade, and taken towards the captain's office; Lenz was "quiet" and "did not resist" Jackson and Wade (Tr. 10/30/01 at 130-131, 169, 235, 264; Tr. 10/31/01 at 423).

As Lt. Bell, Sgt. Wade, Officers Seamster, Jackson and Rosenbaum passed the control room that is at the center of the East Building's horseshoe (U.S. Exh. 7; Tr. 10/31/01 at 326-328), Lenz purportedly made a comment to Sgt. Wade (Tr. 10/30/01 at 170). Witnesses testified that Wade hit Lenz causing him to fall against the glass wall of the control room (Tr. 10/30/01 at 170, 233; Tr. 10/31/01 at 518, 643, 668). Sgt. Wade told Lenz to get up off the floor, and Jackson and Wade each grabbed Lenz's arms and lifted him to his feet (Tr. 10/30/01 at 110). Lenz was taken into the captain's office with Lt. Bell, Sgt. Wade, and Officers Seamster and Jackson, while Officers Rosenbaum and Williams waited outside the door (Tr. 10/30/01 at 111-112, 171-172, 237, 274-276; Tr. 10/31/01 at 328, 429, 519-521). Rosenbaum testified that based on "past experiences" he knew "there was a possible chance that [Lenz] was going to get roughed up" (Tr. 10/30/01 at 113; see also Tr. 10/30/01 at 237 (Williams) ("I had prior experience with going into the [captain's] office with inmates, and I didn't want to witness nothing like that.")).

As the officers closed the door, Lt. Bell put a glove on his hand and began swinging his fist at Lenz (Tr. 10/30/01 at 171). Sgt. Wade struck Lenz in the face and jaw, knocking him to the floor (Tr. 10/30/01 at 172; Tr. 10/31/01 at 524).

Defendant Jackson punched Lenz in the ribs, causing Lenz to arch over (Tr. 10/30/01 at 172; Tr. 10/31/01 at 431). Inmate Lenz testified that Jackson stomped on him and kicked him (Tr. 10/31/01 at 524-525, 571-572), and that other officers repeatedly stomped all over his body (Tr. 10/31/01 at 527-528). Defendant Jackson straightened Lenz back up, and Seamster punched Lenz in the stomach (Tr. 10/30/01 at 172, 190). Lt. Bell then swung his fist at Lenz while Jackson and Seamster stood behind Lenz (Tr. 10/30/01 at 172). Lenz pleaded with the officers to "[p]lease just stop. It won't never happen again" (Tr. 10/31/01 at 525). Lenz testified that during the beating he "didn't know if they was going to kill [him] or not" (Tr. 10/31/01 at 526). Lt. Bell approached Lenz with the shock stick, placed the stick in the back of Lenz's neck and pulled the trigger, shocking Lenz with the electrical current running between the stick's two prongs (Tr. 10/30/01 at 172; Tr. 10/31/01 at 431; Tr. 10/31/01 at 525-526). Lenz's body began vibrating, and the officers could hear the stick clicking (Tr. 10/30/01 at 173; Tr. 10/31/01 at 432). Lt. Bell ran the shock stick slowly down Lenz's back, onto his buttocks, and underneath to his testicles for a few seconds (Tr. 10/30/01 at 173).

Throughout the beating, Lenz did not act violently or aggressively towards the officers, and made no threatening gestures or comments (Tr. 10/30/01 at 175). While Rosenbaum waited outside, he could hear thumping and slapping noises, and Lenz saying "stop, that hurts * * * [followed by] crying noises" (Tr. 10/30/01 at 114). When Lenz came out of the captain's office, he was slouching over with red marks on his body, and crying (Tr. 10/30/01 at 114; Tr. 10/31/01 at 330). Lenz

testified that at the end of the beating he could not close his jaw, that he had "knots all over [his] ribs," and that he "couldn't breathe" (Tr. 10/31/01 at 530).

Officers Jackson and Seamster took Lenz into a "quiet cell" on the south wing of the East Building (Tr. 10/30/01 at 175, 240, 262; Tr. 10/31/01 at 331, 394, 433; see also U.S. Exh. 15). "Quiet cells" are single cells in the south wing that are reserved for death row inmates and those inmates who need behavior control (Tr. 10/30/01 at 174). The cells have no flushing toilet or tap water (Tr. 10/30/01 at 174). The supervising officers did not give Jackson and Seamster any instructions with respect to giving Lenz medical treatment (Tr. 10/30/01 at 176). Lt. Bell told them not to do anything for Lenz that night, even though under prison procedures inmates who are sprayed with capstun are required to be offered a shower and medical attention since the capstun burns the skin (Tr. 10/30/01 at 176-177; see also Tr. 10/30/01 at 239). Inmate Lenz was put in a quiet cell by himself without any blankets (Tr. 10/31/01 at 530). He lay in the cell shivering, and the capstun caused his skin and eyes to continue to burn (Tr. 10/31/01 at 530). Lenz received a meal at 4:30 a.m. the morning following the beating, but he did not eat anything (Tr. 10/30/01 at 242-243; Tr. 10/31/01 at 400). Officer Williams instructed the day shift officer not to give Lenz medical treatment because they did not want the nurse to see him (Tr. 10/30/01 at 244).

Later that night, after the beating, Lt. Bell, Sgt. Wade and officers Seamster, Jackson, Williams, and correctional officer Willie Dodd were in the control center talking about what happened with Lenz (Tr. 10/30/01 at 178, 248). Jackson talked

and joked about Wade pushing Lenz's face onto the floor (Tr. 10/30/01 at 121). Jackson "made light" of what happened to Lenz, bragged about kicking Lenz, and imitated Lenz by "vibrating" like he did when the shock stick was pressed against his backside (Tr. 10/30/01 at 179; Tr. 10/31/01 at 435). Officer Dodd testified that Jackson commented to the other officers that he "got some licks in on" Lenz (Tr. 10/31/01 at 335).

3. During the days following the assault, Lenz's jaw and ribs hurt him, and he became very pale (Tr. 10/30/01 at 123-124). Inmate Lenz filed a grievance on January 30, 1998, complaining about a dislocated jaw and cracked rib (Tr. 10/31/01 at 537; U.S. Exh. 8). Sgt. Wade agreed to permit Officer Rosenbaum to take Lenz to the infirmary, but as Rosenbaum and Lenz passed the control center Wade warned Lenz to keep his mouth shut (Tr. 10/30/01 at 125). Lenz responded "yes, sir" (Tr. 10/30/01 at 125). When Inmate Lenz spoke with the nurse, he complained about having a dislocated jaw (U.S. Exh. 4; Tr. 10/30/01 at 297). The nurse determined that Lenz did not have a dislocated jaw, but gave him medicine for the pain (Tr. 10/30/01 at 298-299).

Inmate Lenz filed another grievance on February 6, 1998, and stated that he was "pepper sprayed, handcuffed, shocked with a stinger and beat up while cuffed behind [his] back" (U.S. Exh. 9). Inmate Lenz testified that the February 6 grievance was not complete because an attachment was missing that gave a description of the incident, the number and name of officers present at the incident, and a description of those officers whose names he did not know (Tr. 10/31/01 at

538-541, 569-570). On another visit to the infirmary on February 16, 1998, inmate Lenz complained of pain in his ears and head, possibly a symptom of a jaw injury from the January 24th altercation, and was recommended for further evaluations by a doctor (U.S. Exh. 4; Tr. 10/30/01 at 303).

4. On January 24, 1998, Lt. Bell prepared an incident report (Form 005) on the Lenz incident (Def. Exh. 7; Tr. 10/30/01 at 193). The report's description did not include the details of Lenz being assaulted in the captain's office by Lt. Bell, Sgt. Wade, and Officers Seamster and Jackson (Tr. 10/30/01 at 180; Tr. 10/31/01 at 438-439, 485-486). The report included only Lt. Bell, Sgt. Wade, and Officer Seamster as employees involved in the incident; Officer Jackson's name was not included in the description of the incident as is required by prison rules (Def. Exh. 7; Tr. 10/30/01 at 180-181; Tr. 10/31/01 at 439). Lt. Bell and Officer Seamster testified that when an officer's name is not included in an incident report, that officer is not required to submit a report corroborating the disruptive conduct by the inmate (Tr. 10/30/01 at 181). Lt. Bell testified that having few officers listed in an incident report creates less paperwork and makes it easier to cover up misconduct by correctional officers (Tr. 10/31/01 at 440, 480-484).

When the officers involved in the Lenz incident were first contacted by state and federal officials investigating the Lenz beating, they either denied knowledge or were not truthful as to their knowledge of the incident (Tr. 10/30/01 at 126 (Rosenbaum); Tr. 10/30/01 at 219 (Seamster); Tr. 10/30/01 at 265 (Williams); Tr. 10/31/01 at 335-336 (Dodd); Tr. 10/31/01 at 439 (Bell)). Officers testified at trial

that they wanted to protect other officers from getting into trouble (Tr. 10/30/01 at 219 (Seamster); Tr. 10/30/01 at 265 (Williams)).

SUMMARY OF ARGUMENT

Defendant challenges his conviction by arguing that the district court abused its discretion by permitting the government to cross-examine defendant on the facts surrounding a prior conviction for attempted murder. Defendant had implied on direct that he was wrongly convicted because the state where the shooting occurred did not have a self-defense law. Defendant argues that the cross-examination evidence was inadmissible under Fed. R. Evid. 404(b).

The district court, however, did not admit the cross-examination testimony under Rule 404(b). The court permitted the cross-examination for the purpose of impeaching defendant's testimony on direct. The cross-examination was properly admitted because it was germane to defendant's testimony on direct, and explicitly contradicted defendant's suggestions that he acted in self-defense. The evidence is also admissible under Fed. R. Evid. 608(b), which permits witnesses to be cross-examined on specific instances of conduct that are probative of their truthfulness. In addition, the evidence was admissible under Fed. R. Evid. 609, which provides that a prior conviction can be used to attack the credibility of a defendant who testifies at trial. Even if the district court erred in admitting the cross-examination testimony, such error was harmless because there was overwhelming evidence to support the conviction.

STANDARD OF REVIEW

The district court's decision to permit defendant to be cross-examined on the facts supporting defendant's prior conviction, and admitting that evidence, should be reviewed for abuse of discretion. *United States* v. *Amahia*, 825 F.2d 177, 180-181 (8th Cir. 1987).

ARGUMENT

THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION IN PERMITTING THE PROSECUTOR TO CROSS-EXAMINE DEFENDANT ON FACTS SURROUNDING DEFENDANT'S PRIOR CONVICTION

Defendant argues (Br. 17) that the district court abused its discretion in permitting the government to cross-examine defendant about the facts surrounding his prior conviction, and failed to analyze whether such evidence was admissible under Fed. R. Evid. 404(b). Defendant, however, misunderstands the basis for the district court's admission of the cross-examination testimony. The district court was not required to engage in Rule 404(b) analysis because defendant's cross-examination testimony was not admitted pursuant to Rule 404(b). The cross-examination was permitted for the purpose of impeaching defendant's credibility by demonstrating that his testimony on direct examination was not truthful. The evidence elicited by the cross-examination is admissible since it falls within the scope of defendant's direct testimony and is probative of defendant's truthfulness pursuant to Rules 608(b) and 609.

A. Defendant's cross-examination testimony as to the facts surrounding his prior conviction is admissible because it falls squarely within the scope of his direct and was admitted for the purpose of impeaching that direct testimony. "Cross-examination is the principal means by which the credibility of the witness and the truth of the testimony are verified, and therefore must be accorded great respect." *United States* v. *Wood*, 834 F.2d 1382, 1384 (8th Cir. 1987), citing *Davis* v. *Alaska*, 415 U.S. 308, 319 (1974). While cross-examination is "limited to the subject matter of the direct examination and matters affecting the credibility of the witness" (Fed. R. Evid. 611(b)), this Court has stated that it can embrace "any matter germane to direct examination, qualifying or destroying it, or tending to elucidate, modify, explain, contradict or rebut testimony given by the witness." *Villanueva* v. *Leininger*, 707 F.2d 1007, 1010 (8th Cir. 1983); see also *United States* v. *Burch*, 153 F.3d 1140, 1144 (10th Cir. 1998). Courts generally give counsel "wide latitude in the cross-examination of witnesses in areas affecting credibility." *United States* v. *Pfeiffer*, 539 F.2d 668, 671 (8th Cir. 1976); *Wood*, 834 F.2d at 1384.

During direct examination, defendant Jackson testified about a shooting incident which led to a felony conviction for attempted murder (see p. 3, *supra*). When defendant was asked by his attorney about his sentence for that conviction, defendant responded that "there is no self-defense law in Arkansas" so "the jury seen to give [him] six years" (see p. 3, *supra*). On cross-examination, the government inquired about the facts surrounding the prior conviction in order to discredit defendant's assertion on direct that he was justified in shooting his victim

and that he was convicted only because there was no self-defense law in the State of Arkansas where the shooting occurred (see pp. 4-5, *supra*; Tr. 708, 716-719). The evidence that came out on cross-examination was that defendant had a dispute with his victim, followed the victim in his car, cut him off the road, shot the victim when the victim got out of his car, and then shot him a second time while the victim was lying on the ground (see pp. 4-5, *supra*). The district court did not abuse its discretion by permitting the government to cross-examine defendant on the facts which led to defendant Jackson's prior conviction. This evidence was germane to his direct testimony and explicitly contradicted defendant's suggestions on direct that he could have been acting in self-defense when he shot his victim.

Moreover, as the district court correctly indicated in denying defendant's objection to the cross-examination testimony, defendant "opened it up in his direct examination when he said that there was no self-defense" law and thus the jury had to convict him (see p. 21, *infra*; Tr. 719). See, *e.g.*, *United States* v. *Hill*, 91 F.3d 1064, 1071 (8th Cir. 1996) (defendant's counsel "opened the door" to prosecutor's cross-examination regarding defense witness' drug abuse by asking on direct whether certain loans made to defense witness by the accused were used to purchase drugs); *United States* v. *Escobar*, 50 F.3d 1414, 1423-1424 (8th Cir. 1995) (where witness testified that his motive for traveling was to visit his brother, it was proper to elicit on cross-examination that his brother was in prison and witness was not on approved visitor list). When a witness "deni[es] guilt of [a] prior conviction, a more detailed cross-examination is permissible." *Amahia*, 825

F.2d at 180; *United States* v. *Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977); *United States* v. *Burkett*, 821 F.2d 1306, 1310 (8th Cir. 1987); *United States* v. *Kimberlin*, 805 F.2d 210, 234 (7th Cir. 1986); *United States* v. *Barnes*, 622 F.2d 107, 109 (5th Cir. 1980).

For example in *Amahia*, *supra*, this Court held that the government was properly permitted to inquire as to the facts surrounding defendant's prior felony convictions involving insurance fraud, after defendant testified that he had gotten into a little bit of trouble in state court where he had pled guilty to some theft charges on the advice of his "agent" and on the assurance that defendant would receive probation. 825 F.2d at 179. The defendant in *Amahia* further testified that he pled guilty because of pressures of school and work outside school. *Id.* at 179-180. This Court held that the cross-examination was permissible because of defendant's attempt on direct to "explain away the effect of the conviction, or to minimize his guilt." *Id.* at 180. See also *Wolf*, 561 F.2d at 1381 (defendant properly cross-examined on facts surrounding prior conviction by government after testifying on direct that the conviction for making false claims to the federal government rested on his inability to afford defending the charges and because he entered into a plea agreement in which the other counts would be dismissed if he pled guilty to one count). Under the circumstances of this case, the district court did not abuse its discretion in permitting the government to explore the details of the prior conviction where defendant Jackson suggested on direct that he was acting in self-defense.

B. In admitting the evidence of facts surrounding defendant's prior conviction, the district court cited Rule 608(b) (Tr. 11/1/01 at 709). The evidence is admissible under that rule and under Rule 609.

After direct examination of defendant by his counsel, government counsel sought permission from the district court to cross-examine defendant on the circumstances surrounding the prior conviction. Outside the presence of the jury, government counsel stated as follows (Tr. 11/1/01 at 708):

> MR. HO-GONZALEZ: Mr. Jackson, your Honor, in response to Mr. West's question with re – regarding his conviction, made reference to self-defense, that there was no self-defense under Arkansas law, suggesting to this jury that somehow there was justification for what he did. I would submit to the Court, your Honor, that he has opened up a window for us – for us to ask at least some questions with respect to the particular incident. Because, in fact, your Honor, the facts that we know with respect to the incident, clearly indicate that when this gentleman shot the victim, the victim was on the ground. And he shot him twice. And he was observed by the police officer as he was doing that, clearly, contrary to what he's trying to suggest to this jury. And by leaving that out there without providing some context with respect to his conviction, your Honor, I think that would prejudice the government.

The district court permitted the cross-examination, stating as follows (Tr. 11/1/01 at 709):

> THE COURT: * * * I am not going to let them bring in any extrinsic evidence * * * But the witness will have to tell the truth, but you will have to – I mean, you can cross-examine him based on things you know, in good faith. But you're not going to be able to bring in another witness or introduce evidence that is collateral or extrinsic under Rule 608(b). Is that the rule? I can't remember the rule. I know it's 608. And you just have to take the witness's answers, if you understand what I'm saying.

After the district court denied defendant's objection, government counsel proceeded to cross-examine defendant on the facts surrounding the prior conviction

(pp. 4-5, *supra*). Defendant's counsel again objected, and the district court stated:

> THE COURT: He opened it up. He opened it up in his direct examination when he said that there was no self-defense. Now, my ruling remains the same, just as when Mr. Lenz started mouthing off about how he never really should have been convicted, I let you probe with respect to – with respect to what he had said.
>
> MR. WEST: * * * he said three words, there's no self defense, four words * * *
>
> THE COURT: Well, that opened it up to cross-examination in this. And I find that the probative value is not that outweighed substantially by the prejudicial [effect] * * *

(Tr. 11/01/01 at 719-720).

1. Under Rule 608(b), the court may, in its discretion, allow cross-examination of specific instances of conduct of a witness that is probative of the truthfulness of that witness. See *United States* v. *Daniele*, 886 F.2d 1046, 1054 (8th Cir. 1989). Rule 608(b) reads as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

"In determining the extent of cross-examination allowed under Rule 608, the trial court generally balances each question's relevance to honesty and veracity with its prejudicial impact." *Daniele*, 886 F.2d at 1054; *Amahia*, 825 F.2d at 180-181.

The cross-examination evidence is admissible under Rule 608(b) because it is probative of defendant's truthfulness. *Daniele*, 886 F.2d at 1054. The testimony

elicited by the government bore directly on defendant Jackson's credibility, which became questionable when he asserted that he had acted in self-defense. The facts elicited on cross-examination – that defendant followed his victim in his car, and shot him twice (including once when the victim was lying on the ground) – discredit defendant's assertions on direct that he acted in self-defense when he shot his victim.

2. The evidence of facts surrounding defendant Jackson's prior conviction is also admissible under Fed. R. Evid. 609. As it relates to witnesses accused of a crime, Rule 609(a) reads:

> * * * evidence that an accused has been convicted of [a felony] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused * * *

This Court has held that, under Rule 609, a prior conviction can be used to "attack the credibility of a defendant who chooses to testify." *United States* v. *Riley*, 684 F.2d 542, 545 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); *United States* v. *Beeks*, 224 F.3d 741, 745-746 n.3 (8th Cir. 2000); *United States* v. *Valencia*, 61 F.3d 616, 619 (8th Cir. 1995). As with Rule 608, Rule 609 evidence "has to do with the accused's ability to tell the truth when testifying on his or her own behalf." *Valencia*, 61 F.3d at 619. The defendant's credibility may be attacked "by establishing both the fact and nature of [defendant's] prior conviction." *United States* v. *Moore*, 735 F.2d 289, 293 (8th Cir. 1984). In this case, defendant Jackson was properly cross-examined by the government "in an effort to clarify the facts of the prior conviction and impeach his direct testimony." *Valencia*, 61 F.3d at 619.

C. Defendant argues (Br. 17) that the cross-examination evidence was inadmissible under Fed. R. Evid. 404(b). Defendant's argument, however, is without merit because the district court did not admit the evidence under Rule 404(b).

Under Rule 404(b), evidence of other crimes may be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial." The government did not seek to admit evidence of defendant's conviction in its case-in-chief for any purpose. The government's purpose in cross-examining defendant about the underlying facts of his prior conviction was to challenge the credibility of his testimony on direct examination by impeaching his assertion that he was wrongly convicted because he was acting in self-defense (see p. 20, *supra*).

The district court thus permitted the cross-examination of defendant for impeachment purposes. Because the evidence was admitted to impeach defendant's testimony on direct, Rule 404(b) has no application. See, *e.g.*, *United States* v. *Burch*, 153 F.3d 1140, 1143-1144 (10th Cir. 1998) (defendant mistakenly believed that evidence was admitted under Rule 404(b), but court of appeals clarified that the evidence was admitted as "relevant cross-examination" to impeach defendant's credibility); see also *United States* v. *Rackley*, 986 F.2d 1357,

1363 (10th Cir.) (the "government did not offer the evidence for any of the purposes covered by Rule 404(b) * * * but rather to impeach credibility"), cert. denied, 510 U.S. 860 (1993). The district court thus had no obligation to engage in Rule 404(b) analysis since the cross-examination testimony was not admitted to prove motive or intent, but rather for purposes of impeachment.

Defendant also argues (Br. 22) that the district court failed to give a limiting instruction to the jury as to the use of the cross-examination testimony under Rule 404(b). The district court, however, did not state that it would give a limiting instruction on Rule 404(b) evidence. After denying defendant's second objection to the government's cross-examination of defendant on the facts surrounding the prior conviction (pp. 20-21, *supra*), the district court gave defense counsel the *option* of submitting a Rule 404(b) instruction that the court could read to the jury prior to deliberations (Tr. 11/1/01 at 719-720).[3/] The court stated (Tr. 11/1/01 at 720): "Now if you want to give me a 404(b) instruction, I will. (Inaudible) he

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[3/] A typical Rule 404(b) instruction reads as follows:

> You [have heard] evidence that the defendant [describe evidence as to the prior conviction]. You may not use this evidence to decide whether defendant carried out the acts involved in the crime charged in the indictment. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced that the defendant did carry out the acts involved in the crime charged in the indictment, then you may use this evidence to decide [describe purpose under 404(b) for what evidence has been submitted.].

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Prepared by the Judicial Committee on Model Jury Instructions for the Eighth Circuit (2000 ed.).

might have committed this offense for which he's been convicted and stuck to it, I'll give it." Defendant, however, failed to submit such an instruction as directed by the court.

"[F]ailure to propose specific jury instructions or to object to instructions before they are given to the jury generally constitutes a waiver of the right to appeal [those instructions]." *Boyd* v. *Minnesota*, 274 F.3d 497, 501 (8th Cir. 2001); *Kehoe* v. *Anheuser Busch, Inc.*, 96 F.3d 1095, 1104 (8th Cir. 1996). The "failure to give an instruction * * * warrant[s] a new trial only if it is error affecting substantial rights, the error is plain, and the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Caviness* v. *Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1220 (8th Cir. 1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 736 (1993)). Defendant's failure to propose a Rule 404(b) instruction constitutes a waiver of the issue on appeal, and the absence of such an instruction is not reversible error because, again, the cross-examination testimony was not admitted under Rule 404(b). In any event, the evidence in this case was more than sufficient to support defendant's conviction (see p. 25-26, *infra*), so the lack of a Rule 404(b) instruction in this case could not have "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." See, *e.g.*, *Kehoe*, 96 F.3d at 1105 (internal quotations and citation omitted).

D. Even if the district court erred in admitting the cross-examination testimony, any such error was harmless because there was overwhelming evidence to support the conviction.

This Court "will uphold a conviction when, viewing the evidence in the light most favorable to the verdict, a reasonable jury could conclude that the defendant was guilty beyond a reasonable doubt." *United States* v. *Echols*, 144 F.3d 584, 585 (8th Cir. 1998). Defendant testified on direct that he did not know anything about inmate Lenz's beating (Tr. 11/1/01 at 705-706; 713-714). The government, however, presented six witnesses who saw and/or participated in inmate Lenz's beating. These witnesses – five of whom were correctional officers in the East Building of the Cummins Unit – testified that defendant Jackson was at the scene of the beating and that Jackson participated in the assault (See Tr. 10/30/01 at 109-115 (Rosenbaum); Tr. 10/30/01 at 164-165, 171-174 (Seamster); Tr. 238-240 (Williams); Tr. 10/31/01 at 325-328 (Dodd); Tr. 10/31/01 at 424-433 (Bell)). The victim testified that defendant Jackson participated in the assault by taking Lenz into the captain's office, kicking him along with the other correctional officers, and watching while Lenz was electrocuted with the shock stick (Tr. 10/31/01 at 520, 525-528 (Lenz)). The five correctional officers who participated in, or knew about, the assault testified further that defendant Jackson joined them later in the evening after the beating when they joked about having assaulted Lenz (Tr. 10/30/01 at 117-121 (Rosenbaum); Tr. 10/30/01 at 178 (Seamster); Tr. 10/30/01 at 248 (Williams); Tr. 10/31/01 at 334-335 (Dodd); Tr. 10/31/01 at 434-435 (Bell). Even though there was some conflicting evidence presented by these witnesses with respect to whether the shock stick was administered to Lenz in the hallway or only in the captain's office, who struck Lenz on the head in the hallway and/or the

captain's office, or precisely when Lenz was taken to the infirmary after the assault, "we must presume that the jury resolved any conflicting inferences in favor of the prosecution." *Gibbs* v. *Kemna*, 192 F.3d 1173, 1176 (8th Cir. 1999), cert. denied, 531 U.S. 846 (2000); *United States* v. *Anderson*, 78 F.3d 420, 423 (8th Cir. 1996) ("It is for the jury to resolve conflicting testimony and determine witness credibility").

CONCLUSION

The district court's judgement of conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(C). The brief was prepared using WordPerfect 9.0 and contains 7,404 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2002, two copies of the Brief for the United States and one 3 ½" disk containing the brief's text, scanned for viruses and determined to be virus free, were served by regular mail, postage prepaid, to the following counsel:

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