No. 11-50413

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DANIEL MELGOZA,

Defendant-Appellant

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

---

# BRIEF FOR THE UNITED STATES AS APPELLEE

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THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

## STATEMENT REGARDING ORAL ARGUMENT

The United States notes appellant's waiver of oral argument. The United States does not believe oral argument is necessary in this case.

## TABLE OF CONTENTS

**PAGE**

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

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**



**STATUTES:**

**STATUTES (continued):** **PAGE**



**RULES:**

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. On April 21, 2011, the district court entered final judgment. On May 2, 2011, the defendant filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. 1291.

## STATEMENT OF THE ISSUES

1. Whether there was sufficient evidence to sustain the defendant's felony conviction for the use of excessive force under 18 U.S.C. 242.

2. Whether there was sufficient evidence to sustain the defendant's conviction for obstruction of justice under 18 U.S.C. 1519.

3. Whether the district court abused its discretion in its handling of certain jurors' exposure to midtrial publicity.

## STATEMENT OF THE CASE

On November 17, 2009, a federal grand jury returned a four-count indictment charging the defendant, Daniel Melgoza, a detention officer at the Bexar County Detention Center, with "depriving of liberty" and causing bodily injury to two inmates, A.P. (Andrew Perales), and J.S. (Joe Sanchez), in violation of 18 U.S.C. 242, and writing false reports about each incident, in violation of 18 U.S.C. 1519. R.E. 3; R. 16-19.[1]

On December 16, 2010, after a three-day trial, a federal jury acquitted Melgoza of the use of force and false report charges regarding Perales, and convicted Melgoza of the use of force and false report charges regarding Sanchez. R.E. 4; R. 278. On April 21, 2011, defendant was sentenced to 27 months' incarceration for each count to be served concurrently, to be followed by three years of supervised release. R. 1737. Judgment was entered on the same day.

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[1] R.E. __ refers to the Appellant's Record Excerpts by tab. R. __ refers to the page number following the Bate-stamped "USCA5" on documents in the official record on appeal. Gov. Exh. __ refers to the United States' exhibits admitted at trial. Br. __ refers to the page of appellant's opening brief.

R.E. 5; R. 294-299. Defendant filed a timely notice of appeal on May 2, 2011. R.E. 2; R. 315-316.

## STATEMENT OF FACTS

*1. Assault Of Inmate Sanchez*

On December 8, 2004, the defendant, a detention officer at the Bexar County Detention Center (Detention Center), was assigned to Unit CI for the evening shift, 3:00 pm – 11:00 p.m. R. 405, 731, 737, 792. Inmates assigned to CI are permitted to leave their cells and go to one of the unit's two dayrooms, which include couches, tables, a telephone, and a television. R. 366, 467; see R. 768; see Gov. Exh. 3.4-3.6. Sanchez and seven inmates shared one cell, Cell No. 8. R. 574, 581. Sanchez's cell opens to a dayroom and it has a window for inmates to see in to the dayroom. R. 582-583; Gov. Exh. 3.10.

On December 8, 2004, the defendant had an altercation with inmate Andrew Perales in Unit CI.[2] See R. 405-409, 467-475. After Perales was removed from the unit, inmates were required to return to their cells, and Melgoza manually locked each cell door. R. 555, 581, 773-774.

Sanchez complied with Melgoza's instructions to enter his cell. R. 538. As he entered the cell, Sanchez commented to an inmate in the adjoining cell about

[2] This incident was the basis for Counts One and Three of the indictment. The defendant was acquitted of these charges.

Melgoza's actions against Perales. R. 539, 555, 581. The other inmate told Sanchez that Melgoza said he would "beat [Sanchez's] ass." R. 540.

When Melgoza finished placing inmates in their cells, he returned to Sanchez's cell, unlocked the door, and called to Sanchez. R. 541, 560, 582. Sanchez, who was listening to a "walkman" or MP3 player at the time, responded by coming towards Melgoza and standing just inside the doorway of the cell. R. 541, 567. Sanchez had put the MP3 player in his pocket and his hands were empty when he faced Melgoza. R. 541-542, 567-568; see R. 584. Sanchez was approximately 5'5", he weighed 140 pounds, and he had just turned 18 years old. R. 542-543, 584. Due to prior surgery, Sanchez had metal plates installed in his head. R. 545. Melgoza was approximately 5'11" and he weighed 335 pounds. R. 756, 805.

Melgoza asked Sanchez what he had said about him to the other inmate but Sanchez did not respond. R. 561. Melgoza was standing in the dayroom, just outside the cell's doorway. R. 541. Melgoza then "unexpected[ly]" grabbed Sanchez and pulled him out of the cell. R. 541; see R. 561-562. Officer Trevino, who was nearby, testified at trial that he observed Melgoza pull Sanchez out of the cell and the men "struggl[ed]" against each other. R. 689-690. Trevino came over to help bring Sanchez to the ground and did so within a "few seconds" by using

knee strikes against Sanchez. R. 690-691. Melgoza then hit the Code 2 signal. R. 542; see R. 585.

Detention officers have a device attached to their belts that allows them to call for immediate assistance. R. 733; see R. 404. A "Code 2" signal on the device indicates an officer's request for assistance due to an altercation between inmates or between an officer and an inmate. R. 360, 405. In response to this signal, the Special Emergency Response Team (SERT), detention officers in protective riot gear with batons, will arrive in generally 60-90 seconds to quell any disturbance and video-record their actions. R. 359, 406, 638.[3]

Sanchez, who was now lying face-down on the floor, anticipated SERT's imminent arrival and voluntarily raised his hands on his back. R. 543, 563, 691-692, 708. Sanchez was compliant immediately because he saw Melgoza signal Code 2 and he did not want SERT to use any force against him for perceived resistance. R. 542-543, 545, 567. He called out to Melgoza and Trevino that he was no longer resisting. R. 691.

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[3] In addition, in response to a Code 2 signal, computer monitors in the Master Control Room of the Detention Center will change to show a continuous feed of images from several cameras in the general location where the Code 2 signal was reported. R. 402-404, 425-426, 449; see Gov. Exh. 3.12. In 2004, the Center did not retain or record the cameras' images; they only displayed in real time. R. 412. Thus, there is no video recording of Melgoza's actions prior to SERT's arrival.

When Sanchez was on the ground, Trevino kneeled on the floor near Sanchez's buttocks and at one point, with one hand, held Sanchez's wrists on Sanchez's back. R. 563, 691-692, 703. Melgoza was standing next to Sanchez's head. R. 410.

Four witnesses – Sanchez, Corporal Hammock, Officer Trevino, and inmate Joiner – testified that, while Sanchez was compliant on the floor, Melgoza deliberately kicked him in the head and face at least two-to-four times, with force.[4] R. 410-411, 455-457, 544-545, 566, 585, 607, 692-693, 703. Joiner, looking out the window of Cell 8, estimated he saw Melgoza inflict ten kicks. R. 585, 607; see R. 653 (based on witnesses' testimony, FBI Agent Rodriguez estimates Melgoza kicked Sanchez three-to-four times). Melgoza was wearing pointed-toe cowboy boots. R. 411, 457-458. On the video, Hammock saw Melgoza pull his left leg back before he kicked Sanchez in the head. R. 455, 457. Trevino recalled that Melgoza took two steps before his first kick at Sanchez. R. 706. The kicks appeared painful to Joiner and Trevino. R. 585, 693. Trevino did not think that Melgoza was trying to stand on Sanchez's hands, as Melgoza asserts, to make Sanchez release a pen from his hand since Sanchez was not holding a pen. R. 693.

[4] Corporal Hammock, assigned to Master Control, observed Trevino's and Melgoza's actions on the video screens from this point forward. R. 402, 410.

Sanchez did not move while he was on the floor and Melgoza was kicking him other than to turn his face away from Melgoza after the first kick to try and protect his face. R. 545, 566-567, 693, 708-709; see R. 411. Sanchez did not try to get up because of his "fear for the SERT's." R. 545. Sanchez did yell to try to get Melgoza to stop kicking. R. 693. Sanchez felt pain from Melgoza's kicks to his face, head, and ribs. R. 544, 568-569. Melgoza stopped kicking Sanchez before the SERT officers arrived. R. 412, 459.

Trevino, while kneeling right next to Sanchez and Melgoza, unsuccessfully tried to deflect Melgoza's kicks at Sanchez with his right hand. R. 410-411, 458-459, 713. Trevino also tried to pull Sanchez away from Melgoza. R. 411, 459. In addition, Joiner and other inmates banged on the glass window while inside their cell and yelled at Melgoza to try to get Melgoza to stop kicking. R. 585, 591, 695-696; see R. 587-588 (Joiner yelled during the SERT video to record that Melgoza initiated the assault without provocation). No inmate was banging on the window before Melgoza kicked Sanchez. R. 695-696.

Sanchez testified that he never held a pen in his hand nor did he try to stab Melgoza with any item. R. 542, 545; see R. 691 (Trevino testified Sanchez was not holding a pen). In addition, Sanchez testified that he did not chest-bump or initiate physical contact with Melgoza, as asserted by Melgoza. R. 545, 584.

Sanchez was compliant and responded to SERT officers' oral commands when they placed him in handcuffs and leg irons. R. 366; see R. 569. When he was brought to the medical unit, he complained of pain to his face and soreness to his head and his side. R. 571-572, 616-617, 630-631; Gov. Exh. 6. The nurse in the medical unit, Ms. Long, observed and recorded redness to Sanchez's cheek, which would be an indication of an injury, rather than the result of Sanchez lying on the floor. R. 616, 632; see R. 618.[5] Ms. Long also recorded Sanchez's complaints of pain to the right side of his face and soreness at the back of his head. See Gov. Exh. 6.

Less than ten days after the incident, Melgoza told Detective Huron, the officer investigating the Sanchez incident, that he did not know what happened and that he "lost it." R. 863-865.

At trial, Melgoza testified to his version of the altercation with Sanchez. Melgoza stated that immediately after Sanchez and other inmates entered cell No. 8, Sanchez turned around and came back towards Melgoza. R. 776. Melgoza was standing just outside Sanchez's cell, and Sanchez, holding a pen in his right hand, initiated physical contact by giving him (Melgoza) a chest-bump. R. 778-779, 805. Melgoza asserted that Sanchez had taken an aggressive stance. R. 779, see R. 805.

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[5] If an inmate was kicked in the face with cowboy boots, Ms. Long would expect to see redness, bruising, cuts, or broken bones, depending on the force used. R. 636-637.

Melgoza said he then grabbed Sanchez by his shirt, threw Sanchez to the floor, and then hit the duress button for Code 2. R. 779-780. Melgoza asserted that Officer Trevino came down the corridor towards them to assist Melgoza. R. 781. Melgoza claimed that, while Sanchez was lying face down on the floor, Melgoza simultaneously was using his weight to push the cell door closed while inmates were pulling in the opposite direction and he was stepping on Sanchez's right hand, which Sanchez was purportedly swinging wildly and still holding the pen. R. 783-785, 791, 806-807. Melgoza asserted that he was standing on Sanchez's hand because "[he] feared that [Sanchez] would stab" him or Trevino with the pen. R. 786.

*2. Melgoza's False Report*

Detention officers are required to prepare a use-of-force report after every incident in which they use force against an inmate. R. 357, 361; Gov. Exh. 9.1 at 6. Melgoza wrote in his use-of-force report that he "took immediate action to protect myself and Deputy G. Trevino [] from getting stabbed by Inmate Sanchez, Joe D., * * * who had a writing pen in his right hand with closed fist." Gov. Exh. 2. Melgoza asserted that Sanchez initiated contact by a chest-bump, Melgoza grabbed Sanchez and threw him to the floor, and Melgoza "immediately stepped on inmate Sanchez[']s right hand which was next to his face, and still had the pen,

to keep him from stabbing me or Deputy [sic] as he was trying to gain control of inmate." Gov. Exh. 2.

Corporal Hammock and Deputy Trevino testified that Melgoza's report did not accurately describe what happened. R. 417-418, 694; Gov. Exh. 2. Trevino further stated that Melgoza did not take action to protect him (Trevino) from being stabbed. R. 694.

*3. Sentencing*

At sentencing, neither the United States nor Melgoza objected to the Presentence Report (PSR). R. 1735. According to the PSR, Melgoza's offense level of 18 and Criminal History category I resulted in a sentencing range of 27-33 months and two-three years of supervised release. See R. 1736. The district court concluded that the Guidelines were "fair and applicable" to Melgoza and sentenced him to 27 months' incarceration followed by three years of supervised release for each count to run concurrently. R. 1737.

## SUMMARY OF ARGUMENT

1. The evidence supporting the jury's verdict was more than sufficient to support affirmance of Melgoza's conviction under 18 U.S.C. 242. See *United States* v. *Brugman*, 364 F.3d 613, 617-619 (5th Cir.), cert. denied, 543 U.S. 868 (2004). Several witnesses testified that they saw Melgoza kick Sanchez several times in the face and head, with force, when Sanchez was compliant and posed no

threat. As a result of defendant's kicks, Sanchez's right cheek became red, he felt pain in his right cheek, and he felt soreness on his head.

2. Defendant purportedly challenges his conviction under 18 U.S.C. 1519, yet he presents no argument, case citations, or substantive discussion of the facts to establish that the jury's verdict should be reversed. Defendant also failed to challenge the sufficiency of the evidence for this count at trial. By failing to present a substantive argument in his opening brief, and failing to timely raise a challenge at trial, the defendant has waived his opportunity to challenge his conviction. See *Adams Family Trust* v. *John Hancock Life Ins. Co.*, 424 F. App'x 377, 381 & n.2 (5th Cir. 2011); *United States* v. *Herrera*, 313 F.3d 882, 884-885 (5th Cir. 2002) (en banc), cert. denied, 537 U.S. 1242 (2003). Even if considered, there is ample evidence that defendant knowingly prepared a false report regarding his assault on Sanchez, and that this report was intended to impede a potential investigation of this matter, which is within the jurisdiction of the Federal Bureau of Investigation. See *United States* v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008).

3. The district court appropriately addressed information regarding certain jurors' midtrial exposure to a newspaper article that was largely a description of the opening statements at trial. The district court individually questioned the three jurors who either saw the article or heard another juror's comments regarding it. The court dismissed one juror and granted defendant's request for limited voir dire

of these jurors. Given the absence of any prejudicial information in the article, the court's instructions to all jurors regarding media reports, and the jury's acquittal on two counts, the district court did not abuse its discretion in not conducting additional, individual voir dire of the whole jury regarding potential exposure to midtrial publicity. See *United States* v. *Rasco*, 123 F.3d 222, 230 (5th Cir. 1997), cert. denied, 522 U.S. 1083 (1998).

## ARGUMENT

## I

## THE EVIDENCE WAS MORE THAN SUFFICIENT TO ESTABLISH MELGOZA KICKED SANCHEZ AND CAUSED BODILY INJURY

### *A. Standard Of Review*

When a defendant makes an "appropriate motion for judgment of acquittal," this Court will review the evidence to determine if "a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt." *United States* v. *Gonzales*, 436 F.3d 560, 571 (5th Cir.) (citing *United States* v. *Brugman*, 364 F.3d 613, 615 (5th Cir.), cert. denied, 543 U.S. 868 (2004)), cert. denied, 547 U.S. 1139, 547 U.S. 1180, and 549 U.S. 823 (2006). "The court reviews the evidence in the light most favorable to the government with all reasonable inferences and credibility choices to be made in support of the jury's verdict." *Brugman*, 364 F.3d at 615; see *United States* v.

*Harris*, 293 F.3d 863, 869 (5th Cir. 2002) ("we review a jury's finding of guilt under a standard that is highly deferential to the verdict").

The defendant moved for a directed verdict at the close of the government's case, asserting that the government failed to prove bodily injury. R. 715.[6] The district court denied the defendant's motion. R. 716. At the close of the evidence, in response to the court's query, the defendant renewed his motion for a directed verdict "on the same bases" and with the "same argument." R. 936. The district court again denied the motion. R. 936.

*B. Ample Evidence Establishes Melgoza Violated Sanchez's Rights By Kicking Sanchez And Causing Bodily Injury*

An individual violates 18 U.S.C. 242 if he (1) willfully (2) deprives another of a federal right (3) under color of law. *Brugman*, 364 F.3d at 616. In addition, a violation of Section 242 that results in bodily injury is a felony punishable by up to ten years of incarceration. 18 U.S.C. 242; *United States* v. *Williams*, 343 F.3d 423, 431-433 (5th Cir.), cert. denied, 540 U.S. 1093 (2003).

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[6] Melgoza's counsel argued, "[w]e don't feel that the Government has met their burden and we feel that the – the fact that there's no injuries." R. 715. The government responded, with respect to Sanchez, that Melgoza's kicks to Sanchez's face caused pain to his head and face and a mark of redness. R. 715-716. When the court asked defense counsel if there was any rebuttal, counsel responded only, "we feel that it's appropriate to grant our directed verdict." R. 716. The court denied the motion. R. 716.

Defendant summarily contends (Br. 17) that "no evidence presented at trial proved beyond a reasonable doubt that Melgoza kicked and struck inmate Sanchez of which resulted in bodily injury to Sanchez." See Br. 18 (asserts that there is "no direct or physical evidence that Melgoza kicked or struck Sanchez"). [7] It is unclear if Melgoza is challenging the evidence that he in fact kicked Sanchez, or if he is asserting that his kicks did not cause bodily injury. Cf. *Harris*, 293 F.3d at 869. In either instance, Melgoza's assertions are erroneous. In fact, there is overwhelming evidence that Melgoza kicked Sanchez several times in his head and face while Sanchez was lying still on the floor, and Melgoza's kicks caused Sanchez to feel pain and soreness on his head and left a red mark on his cheek.

After Sanchez was brought down to the floor by Officers Trevino and Melgoza, both Sanchez and Officer Trevino stated that Sanchez's hands were raised at his back, and were empty. R. 563, 691-692, 708. Sanchez lay still on the floor, face down, and he repeatedly stated to the officers that he was not resisting. R. 691. Sanchez explained that he wanted to avoid even the *appearance* of resistance because he was afraid that SERT officers would use force against him if he appeared noncompliant when they arrived. R. 542-543, 545, 566-567. Trevino

[7] Defendant has not challenged the sufficiency of the evidence to establish that he acted under color of law or that his actions against Sanchez were willful, two elements of Section 242. See *Brugman*, 346 F.3d at 616 (elements of Section 242 charge).

corroborated Sanchez's testimony by describing Sanchez as compliant when he was on the ground and before he was kicked by Melgoza. R. 691-693. Corporal Hammock, viewing the scene on the video, also confirmed that he did not see Sanchez make any aggressive movements toward the officers. R. 411.

While Trevino was kneeling at Sanchez's side, Melgoza, wearing pointed-toe cowboy boots, was standing next to Sanchez's head. R. 410-411, 692-693. Trevino saw Melgoza kick Sanchez in the head at least two or three times with force. R. 692-693. Corporal Hammock also saw, on the video, Melgoza kick Sanchez deliberately and with force at least three times while Sanchez's hands were at his back. R. 455-457. Joiner, an inmate watching Melgoza and Sanchez through the glass window of Cell No. 8, saw Melgoza kick Sanchez in the face and head multiple times. R. 582-583, 585. Sanchez stated that he felt Melgoza kick at his face and head. R. 544. Sanchez's only movement when he was being kicked was to turn his face away after the first strike so that Melgoza could not make contact again at his cheek (and instead kicked the back of his head). R. 411, 545, 566-567, 693, 708-709. Officer Trevino tried to *protect* Sanchez from Melgoza's kicks by trying to pull Sanchez out of Melgoza's reach, and putting out his hand in vain to block Melgoza's kicks. R. 410-411, 458-459, 713.

Trevino and Joiner believed Melgoza's kicks were painful. R. 585, 693. Immediately after Melgoza's assault, Sanchez told Ms. Long, the detention center

nurse, that he felt pain and soreness on his head and face as a result of Melgoza's strikes. R. 572, 616-617, 630-631; see Gov. Exh. 6. A photograph of Sanchez taken immediately after Melgoza's attack shows redness to his right cheek. Gov. Exh. 4.2. Ms. Long recorded the redness to Sanchez's right cheek as well as Sanchez's complaints of pain and soreness. Gov. Exh. 6. Ms. Long testified at trial that kicking could cause other, more serious injuries besides redness. R. 636-637. However, Nurse Long testified that she would have recorded redness on the medical form only if she believed it was due to the assault, rather than from lying on the floor. R. 632.

Thus, based on the four witnesses' (Trevino, Hammock, Sanchez, and Joiner) testimony, there was ample basis for the jury to conclude that Melgoza kicked Sanchez in the head and face. Moreover, Sanchez's resulting pain, soreness and redness from Melgoza's kicks establish the "bodily injury" element of Section 242. See *Gonzales*, 436 F.3d at 572; *Brugman*, 364 F.3d at 618-619. In *Brugman*, this Court upheld a felony violation of Section 242, notwithstanding the absence of a "visible manifestation of injury," based on the officer's kicks and strikes when the victim was not fleeing or actively resisting, and the victim felt pain and lost his breath when he was hit by the officer.[8] 364 F.3d at 619. Moreover, in *Gonzales*, a

[8] In addition, this Court noted that the victim felt residual pain, and the victim's assertion of pain on impact from the officer's strikes and kicks was

(continued…)

detainee suffered "bodily injury" for felony Section 242 when he was foaming at the mouth, complained of "stinging pain," and his eyes were swollen shut for several hours as a result of an officer's use of pepper spray when the detainee was handcuffed, paralyzed, and lying on the floor of a bus. 436 F.3d at 572.

The pain, soreness, and redness suffered by Sanchez are comparable to, and no less substantial than the pain and brief loss of breath felt by the victim in *Brugman*, 364 F.3d at 618-619. See *Gonzales*, 436 F.3d at 575 (noting that "bodily injury" under 18 U.S.C. 242 may be established with evidence of pain) (citing *United States* v. *Bailey*, 405 F.3d 102, 111 (1st Cir. 2005) (complaints of pain resulting from officer's blows to detainee established bodily injury under 18 U.S.C. 242) and *United States* v. *Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993)); see *United States* v. *Perkins*, 470 F.3d 150, 161 (4th Cir. 2006) (evidence of pain felt by unconscious victim resulting from officer's kicks was one means to establish bodily injury under 18 U.S.C. 242). In addition, a jury may well find, based on common sense, that being kicked in the head with pointed-toe cowboy boots will cause physical pain. Thus, viewed in the light most favorable to the government, Melgoza's kicks to Sanchez, a compliant subject, were an unnecessary use of force that caused bodily injury in violation of

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(…continued)
consistent with a witness's testimony that he heard the victim's "grunting noise" when he was struck by the defendant. *Brugman*, 364 F.3d at 619.

Section 242. See *Perkins*, 470 F.3d at 161; *Gonzales*, 436 F.3d at 572, 575; *Brugman*, 364 F.3d at 617-619.

Melgoza's assertion (Br. 23) that "when the circumstantial evidence is at equipoise * * * a defendant must be acquitted" may be correct, but that was not the situation in this case. Here, there was overwhelming evidence to support the jury's verdict. Here, the "jury simply disbelieved [the defendant] – as it was free to do – and the [direct and] circumstantial evidence supports its conclusion." *United States* v. *Hunt*, 526 F.3d 739, 745 (11th Cir. 2008). Thus, the mere fact that Melgoza presented a different version of events is hardly evidence that equally supports an inference of innocence, and is insufficient grounds to reverse the jury's verdict. See *Brugman*, 364 F.3d at 615 (the jury is "free to choose among reasonable interpretations of the evidence").

In sum, ample evidence supports the jury's verdict that Melgoza violated 18 U.S.C. 242 by kicking Sanchez and causing bodily injury.

## II

## DEFENDANT WAIVED A CHALLENGE TO HIS CONVICTION UNDER 18 U.S.C. 1519; EVEN IF CONSIDERED, AMPLE EVIDENCE SUPPORTS THE CONVICTION

### *A. Standard Of Review*

This Court has held that a defendant who fails to properly raise or brief an issue in an opening brief has waived that issue. See *Adams Family Trust* v. *John*

*Hancock Life Ins. Co.*, 424 F. App'x 377, 381 & n.2 (5th Cir. 2011); *United States* v. *Stalnaker*, 571 F.3d 428, 439-440 (5th Cir. 2009) (failure to fully explain or cite the record or cases to support alleged errors has waived issue based on inadequate briefing); *United States* v. *Gourley*, 168 F.3d 165, 172 n.11 (5th Cir.) (conclusory allegations, without citations to cases or relevant evidentiary rules, renders issues "insusceptible to serious appellate review"), cert. denied, 528 U.S. 824 (1999).

In addition, if a defendant moves for acquittal based on a specific ground, he waives all other grounds not identified. *United States* v. *Herrera*, 313 F.3d 882, 884-885 (5th Cir. 2002) (en banc), cert. denied, 537 U.S. 1242 (2003). Accordingly, after defendant raises a specific motion for acquittal, this Court will only review new challenges to the sufficiency of evidence for a "manifest miscarriage of justice." *United States* v. *Arteaga*, No. 10-30320, 2011 WL 3476608, at *3 (5th Cir. Aug. 9, 2011) (citation omitted), petition for cert. pending, No. 11-7294 (filed Nov. 7, 2011); *United States* v. *Phillips*, 477 F.3d 215, 219 (5th Cir. 2007); *Herrera*, 313 F.3d at 884-885 (sufficiency claims not preserved with a specific motion for judgment of acquittal are reviewed to determine whether "the record is devoid of evidence pointing to guilt") (citing *United States* v. *Delgado*, 256 F.3d 264, 274 (5th Cir. 2001)).

*B. Defendant Waived A Challenge To His Conviction Under 18 U.S.C. 1519*

This Court should reject any belated efforts by Melgoza to challenge the sufficiency of the evidence supporting his conviction under 18 U.S.C. 1519. In his opening brief, Melgoza only barely addressed the evidence regarding this conviction. He asserted (Br. 26-27) that he included truthful and accurate statements in his use-of-force report and that his supervisor accepted his report. Melgoza did not cite any cases or present any argument as to why the government's proof on this count was insufficient. In the absence of a substantive argument, the United States cannot respond, and this Court has an argument that is "insusceptible of serious appellate review." *Gourley*, 168 F.3d at 172 n.11. Accordingly, this Court should rule that defendant has waived any challenge to his conviction under 18 U.S.C. 1519.[9]

As noted, Melgoza's motion for acquittal was based solely on assertions that the government did not prove bodily injury under 18 U.S.C. 242. See p. 13, *supra*. The motion was silent with respect to the evidence to support his conviction under 18 U.S.C. 1519. Accordingly, this Court's review is under the more restrictive standard of whether the "record is devoid of evidence pointing to guilt." See

[9] Similarly, defendant's single-sentence assertion (Br. 27) that his conviction should be reversed because the verdicts are inconsistent should be rejected based on a failure to properly develop the argument. *Adams Family Trust*, 424 F. App'x at 381 & n.2 ("a single, unadorned sentence of argument constitutes inadequate briefing"). In any event, the verdicts are not inconsistent.

*Herrera*, 313 F.3d at 885. Melgoza cannot show that the record is "devoid" of evidence to support his conviction under 18 U.S.C. 1519.

*C. Sufficient Evidence Supports The Jury's Conviction On 18 U.S.C. 1519*

To establish a violation of 18 U.S.C. 1519, the United States was required to prove that Melgoza (1) "knowingly" (2) "falsif[ied], or ma[de] a false entry in [a] record" (3) "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 * * * or in relation to or contemplation of any such matter." 18 U.S.C. 1519; see *United States* v. *Hunt*, 526 F.3d 739, 743 (11th Cir. 2008). Here, the United States proved all of these elements. See *Hunt*, 526 F.3d at 745.

There was ample evidence for the jury to conclude that Melgoza's various statements in his use-of-force report were knowingly false, including his claim that he stepped on Sanchez's hand because Sanchez purportedly was swinging his arm to try and strike Melgoza or Trevino with the pen in his hand. See Gov. Exh. 2; pp. 7-10, *supra*. In addition, two officers present during Melgoza's assault, Trevino and Hammock, read Melgoza's report and testified that it contained false statements. R. 417-418, 694. Trevino specifically rejected Melgoza's statement that his (Melgoza's) actions were necessary to protect him and Trevino from Sanchez's purported efforts to strike them with a pen. R. 694.

Melgoza had a reputation among staff, supervisors, and inmates for being a prolific report writer who prepared disciplinary reports for virtually all inmates' infractions. See R. 717-718, 727, 828, 836, 842. Lieutenant Walker described Melgoza as "very meticulous and very methodical" in his reports. R. 828. This evidence of experience in report writing, coupled with the jury's determination that Melgoza used force against Sanchez, support the jury's conclusion that he knowingly made the false entries on his use-of-force report. See *United States* v. *Yielding*, 657 F.3d 688, 714 (8th Cir. 2011) ("knowingly" refers to the false statement only).

The statute requires that the statement be made to impede an "investigation or proper administration of any matter within" the United States' jurisdiction or "in relation to or contemplation of any such matter or case." 18 U.S.C. 1519.[10] There is no dispute that the Federal Bureau of Investigation (FBI) has jurisdiction to investigate allegations of excessive force by a detention officer, such as Melgoza. See R. 647; see *Yielding*, 657 F.3d at 714 ("It is sufficient that the 'matter' is within the jurisdiction of a federal agency as a factual matter.").

[10] We note that nothing in the statute requires that a federal investigation be ongoing at the time the false statement is made. See *United States* v. *Morris*, 404 F. App'x 916, 917 (5th Cir. 2010). Moreover, the defendant's effort to impede or obstruct an investigation need not be successful to establish a violation. See *Yielding*, 657 F.3d at 712.

Accordingly, there was ample evidence for the jury to conclude that Melgoza prepared a false report with the intention of impeding a potential investigation of this matter, which is within the jurisdiction of the FBI. See *United States* v. *Lanham*, 617 F.3d 873, 887 (6th Cir. 2010) (sufficient evidence of defendant's conduct and role in creating an opportunity for an inmate's rape and assault and the FBI's jurisdiction to investigate a conspiracy to harm the inmate supported conviction for the officer's false statements in an incident report regarding an inmate's cell transfer), cert. denied, 131 S. Ct. 2443 (2011); *Hunt*, 526 F.3d at 745 (sufficient evidence that an officer knowingly made false statements in a police report with intent to impede a potential investigation, and the FBI's jurisdiction to investigate the officer's conduct). Thus, Melgoza cannot establish error, let alone plain error, to reverse his conviction under 18 U.S.C. 1519.

## III

## THE DISTRICT COURT'S LIMITED VOIR DIRE AND INSTRUCTIONS TO THE JURY APPROPRIATELY ADDRESSED CERTAIN JURORS' EXPOSURE TO MIDTRIAL PUBLICITY

Defendant's claim (Br. 28-33) that the district court abused its discretion and denied him an impartial jury due to midtrial publicity is without merit. The district court's individual inquiry of jurors exposed to midtrial publicity and his instructions to the entire jury were appropriate to the circumstances of this case.

*A. Standard Of Review*

It is well established that a district court's determination of whether and how to conduct voir dire based on allegations that jurors have been or may have been exposed to midtrial publicity is reviewed for an abuse of discretion. *United States* v. *McDaniel*, No. 09-11080, 2011 WL 3557099, at *7 (5th Cir. Aug. 12, 2011); *United States* v. *Rasco*, 123 F.3d 222, 230 (5th Cir. 1997); *United States* v. *Bermea*, 30 F.3d 1539, 1556 (5th Cir. 1994), cert. denied, 513 U.S. 1136, and 514 U.S. 1097 (1995).

*B. The District Court's Voir Dire Of Selected Jurors And Instructions To The Jury*

After the jury was empanelled, the district court instructed the panel on their role and expected conduct. R. 327-328. The district court advised the jury of its duty not to conduct any independent research, not to discuss the case prior to deliberations, and not to review media reports regarding this case, including television and newspapers. R. 327-328. The district judge explained to the jurors that he did not know to what extent the local radio and television stations or newspapers would report on this story, but the extent of any such coverage is not "any indication" of the "significance [of] the case." R. 328. The court noted, "[t]his case is extremely important to both sides regardless of any media coverage." R. 328. "If there is any media coverage, you are to ignore that completely." R. 328. At the end of the first and second day of testimony, the court

reminded the jurors about his "instructions," and specifically advised them not to discuss or permit anyone to talk to them about this case. R. 533 (December 13); R. 811 (December 14).

On the third and final day of testimony (December 15), a juror notified the court that another juror had commented on a newspaper article about the case. R. 867. The district court discussed with counsel a proposed course of action; namely, they would separately question the reporting juror and the purportedly offending juror to find out what happened and whether either juror had reached any judgment about this case. R. 867. Both counsel agreed with this procedure. R. 867-868.

The reporting juror, Ms. Barker, stated that she heard another juror, Mr. Saenz, make a comment to jurors in the break room before they began listening to that day's testimony. R. 868-869.[11] Barker recalled that Saenz said that he had read a newspaper article about this case and he commented on the defendant's 23 years of service. R. 870. According to Barker, Saenz's comment was not made to anyone in particular; other jurors were engaged in "lots of little conversations" with each other. R. 870. Barker thought only one other juror heard Saenz's comment and neither of them responded to Saenz. R. 870, 872-873. Barker

[11] Before knowing the exact circumstances or substance of the statement, the district court judge expressed frustration and said, "[d]o we have an empty jail cell up there? Get it ready. I'm serious, this is nonsense." R. 869.

helped identify the other juror for the court. R. 873. She also believed Saenz already had an opinion that the defendant's conduct was "okay." R. 871. Both counsel questioned Barker. See R. 871-873.

When Saenz was questioned, he admitted that he had read an article about the case the previous night (December 14, 2010). R. 874-875. He stated that he asked other jurors generally (rather than during a one-on-one conversation with another juror), whether they saw the newspaper article. R. 877. Those who responded said "no," so he did not comment about it any further. R. 877-878, 880-881. He had made a copy of the article and was carrying it in his pocket. R. 888. The article, published in the San Antonio Express-News on December 14, 2010, was titled, "Ex-Bexar jailer's trial begins in inmate abuse." R. 274; see R. 890. Saenz also said he heard another juror mention that his wife "googled" the case but that juror said he did not read anything or pay attention to her comments. R. 877, 880-881. Finally, Saenz stated that he had formed an opinion about this case prior to the conclusion of the evidence. R. 875, 878-879. While Saenz did not explicitly state his opinion, both counsel believed Saenz favored the defendant. R. 883, 888.

The newspaper article consisted of 12 paragraphs, 11 of which summarized the charges and the opening statements by both counsel. R. 274. The only information in the article that had *not* been heard by the jury during trial was in the final paragraph. See R. 274. That paragraph stated that Melgoza was suspended

and reinstated to his position as a detention officer and that the state declined to bring charges, and it gave the maximum penalty for each charge if convicted. R. 274.

A third juror questioned by the court, Mr. Lothery, denied that his wife "googled" the case. R. 884. He also stated that he had seen the article in the newspaper but he had not read it; he "immediately turned the page." R. 884.

At defendant's request, the court permitted a follow-up inquiry to Barker to determine if there was another juror who heard Saenz's comment who had not yet been questioned. R. 886-887. Barker confirmed the second juror was Lothery. R. 887.

The court stated its preliminary intention to remove Saenz not only because he read the newspaper article and had brought a copy of it with him to court and into the jury room (although he asserted he did not share it), but more importantly, because he stated that he formed an opinion about the case before the trial was completed. R. 887-888. The government agreed that Saenz should be removed. R. 888. The defendant asserted that Saenz should remain a juror because there was no certainty that he formed an absolute opinion. R. 889-890. The court concluded that Saenz should be dismissed for the reasons stated. R. 890.

The defendant moved for a mistrial based on the possibility that Barker would believe that a juror was excused for purportedly leaning in favor of the

defendant. R. 883. The district court denied the motion. R. 883. The defendant did not base his motion on jurors' exposure to midtrial publicity.

At the defendant's request, the district court agreed to bring back Barker and Lothery for further inquiry and instructions. R. 891-894. The court asked the two jurors if they had formed an opinion about this case; both stated they had not. R. 893. Barker further stated that her view of the evidence was not influenced by Saenz's dismissal. R. 893. At this stage, Lothery indicated some confusion as to "what's going on." R. 894.

The court advised the full jury that a juror was dismissed but they were not to "speculate" or consider why he was dismissed. R. 895. The court further explained to the jury that the reasons for the juror's dismissal were not tied to the merits of this case. R. 895. Significantly, the defendant did not request voir dire of any other jurors nor did he request that the jury be given additional instructions. See R. 895-896.

### *C. The District Court's Inquiry And Action In Response To Some Jurors' Exposure To Midtrial Publicity Was Appropriate*

When there is midtrial publicity about a case, a district court must decide whether it needs to conduct some form of voir dire to assess the degree of the jury's exposure to the publicity. See *Rasco*, 123 F.3d at 230. This Court has explained that a district court must "decide at the threshold whether the news accounts are actually prejudicial; whether the jurors were probably exposed to the

publicity; and whether the jurors would be sufficiently influenced by bench instructions alone to disregard the publicity." *Ibid.* (quoting *Gordon* v. *United States*, 438 F.2d 858, 873 (5th Cir.), cert. denied, 404 U.S. 828 (1971)). This assessment "depends on the specific circumstances of the case." *Id.* at 231; see *Bermea*, 30 F.3d at 1557.

Reports that contain factual recitations of the proceedings or evidence presented at trial are not innately prejudicial. See *Rasco*, 123 F.3d at 230; *United States* v. *Martinez-Moncivais*, 14 F.3d 1030, 1037 (5th Cir.), cert. denied, 513 U.S. 816 (1994); *Gordon*, 438 F.2d at 873. This is so because the jury already has heard the material addressed in the media report. See *Martinez-Moncivais*, 14 F.3d at 1037 (article regarding mid-trial absence of coconspirator/codefendant is not prejudicial since the jury already had been advised and instructed on the codefendant's absence by the court).

Defendant asserts (Br. 33) that the district court did not conduct a "meaningful review" of the potential impact of midtrial publicity because the district court did not question each juror. In fact, the district court took appropriate action to investigate the extent of the jury's exposure to midtrial publicity and took effective, corrective action to ensure that the jury remained impartial.

The court's questioning of the juror who reported the misconduct (Barker), the offending juror (Saenz), and the other juror (Lothery) who heard Saenz's

comment was a thorough inquiry into the scope of jurors' exposure to midtrial publicity. See pp. 24-28, *supra*. Based on these jurors' testimony, there was no reason to think that Saenz's comments were heard by any juror other than Barker and Lothery or that any juror besides Saenz read the article. See pp. 24-28, *supra*; *Bermea*, 30 F.3d at 1560. Thus, the district court's individual voir dire was complete based on the disclosures reported.

After deciding to dismiss Saenz, the district court again questioned Barker and Lothery to ensure that they were not influenced by Saenz's conduct or Saenz's dismissal. See R. 893-894. In addition, the district court took appropriate action to ensure the impartiality of all of the jurors by instructing them that a juror was dismissed for reasons unrelated to the merits of the case, and that they should not speculate on the reason for the juror's absence. R. 895-896.

The district court did not abuse its discretion when it chose not to conduct voir dire of the remaining jurors. A district court is not required to conduct individual voir dire when a media report is not innately prejudicial. See *Rasco*, 123 F.3d at 230-231; *Martinez-Moncivais*, 14 F.3d at 1037; *Gordon*, 438 F.2d at 873. The summary of the counsel's opening statements dominated the article, and therefore addressed information that had already been heard by the jury. The brief, additional information regarding Melgoza's reinstatement, the state's declination of charges, and Melgoza's maximum punishment upon conviction was factual,

straightforward, and "devoid of any editorial flavoring."[12] *Gordon*, 438 F.2d at 871. If a defendant cannot establish that the report itself is prejudicial, there is no basis to assess whether potential exposure adversely affected the jury's impartiality. See *Martinez-Moncivais*, 14 F.3d at 1037. Thus, this Court may end its inquiry here.[13]

In two cases where the bulk of the news articles addressed factual information about the trial, this Court ruled that the articles were not so prejudicial that the court's refusal to conduct individual voir dire was an abuse of discretion. See *Rasco*, 123 F.3d at 229-231 (articles predominantly summarized the trial but also identified defendant's two prior convictions, only one of which was known by the jury); *United States* v. *Manzella*, 782 F.2d 533, 543 (5th Cir.) (article primarily addressed trial proceedings but one paragraph discussed defendant's criminal history), cert. denied, 476 U.S. 1123, and 479 U.S. 961 (1986). This Court also has considered other factors, including jury acquittal on some charges, the district court's admonitions to the jury to avoid media reports, and the failure of defendant

[12] Arguably, references to Melgoza's reinstatement and the state's decision not to pursue charges weigh in favor of Melgoza.

[13] In addition, because defendant did not argue the article was "innately prejudicial" in his opening brief, he has waived his right to raise this argument belatedly. *United States* v. *Elashyi*, 554 F.3d 480, 494 n.6 (5th Cir. 2008) (waiver of issue not raised in opening brief), cert. denied, 130 S. Ct. 57, 130 S. Ct. 61, and 130 S. Ct. 363 (2009); Fed. R. App. P. 28(a)(9)(A).

to request individual voir dire by the district court. See *McDaniel*, 2011 WL 3557099, at *8; *Rasco*, 123 F.3d at 229-231; *Bermea*, 30 F.3d at 1557; *Manzella*, 782 F.2d at 543.

Similar factors support the district court's actions here. The text at issue was the last paragraph of a lengthy article, the jury acquitted on two of four charges against Melgoza, the trial court instructed the jury to avoid media reports, and the defendant never asked the district court to conduct voir dire of the other jurors. See *Rasco*, 123 F.3d at 231; *Manzella*, 782 F.2d at 543 (acquittal "belie[s] any likelihood of prejudice"). Yet the defendant had an opportunity to question the three jurors (see R. 871-873, 885, 888), and, in fact, the district court accepted defendant's requests to clarify the identity of the second juror who heard Saenz and to conduct further inquiry of jurors Barker and Lothery. See R. 886-887; cf. *Rasco*, 123 F.3d at 230-231.

The defendant's reliance (Br. 30, 33) on cases addressing pretrial publicity to assert error here is misplaced. The defendant notes correctly the different judicial action that is appropriate to deal with pretrial and midtrial publicity. See Br. 29-30. Moreover, there is no factual basis to support a presumption of prejudice.

Defendant's suggestion (Br. 32) that the district court's remark, in Barker's presence, that the offending juror would be sent to a jail cell may have unduly

influenced Barker's impartiality is without merit. First, this Court recently noted that parenthetical remarks by the district court do not nullify or discredit the court's overall analysis and conclusions that additional voir dire was not warranted and that the jury was not prejudiced by any exposure to a news article. See *McDaniel*, 2011 WL 3557099, at *8. In addition, the district court's statement was made prior to inquiring into the facts (see R. 869), and Barker specifically stated that her assessment would not be influenced by Saenz's dismissal. R. 893.

In sum, the district court's approach in handling certain jurors' midtrial exposure to publicity was fully consistent with the principles set forth by this Court. See *Rasco*, 123 F.3d at 230-231.

## CONCLUSION

The district court's conviction and judgment should be affirmed.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Jennifer Levin Eichhorn
JESSICA DUNSAY SILVER
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

## CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2011, by filing the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, I caused to be served a true and correct copy of the foregoing brief. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

**CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING**

I hereby certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. Rule 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Date: December 1, 2011

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 7909 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Date: December 1, 2011