No. 06-1699

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

JODY RAY MILLER,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

WAN J. KIM
Assistant Attorney General

GREGORY B. FRIEL
CHRISTOPHER C. WANG
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115

SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellant Jody Ray Miller, a supervisor at the Craighead County Detention Facility at the time of the charged offenses, appeals from a judgment of felony conviction on two counts of violating 18 U.S.C. 242. Miller was tried and convicted of willfully assaulting prisoner Climmie Jones (Count One) and pretrial detainee Terry O'Neil (Count Two) while working at the jail, thus willfully depriving Jones and O'Neil of their constitutional rights. Miller challenges (1) the sufficiency of the evidence to support his conviction of depriving Jones of his rights, (2) the district court's admission of O'Neil's medical records into evidence, and (3) the court's admission of Chief Jailer Kaye Harris's testimony about statements Jailer Chris McFarlin made to her regarding his false report on the use of force against O'Neil.

The United States believes that oral argument is unnecessary because this case involves the application of well-established principles of law and because the facts and legal arguments are adequately presented in the briefs and record.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on February 28, 2006. Defendant filed a timely notice of appeal on March 9, 2006. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the evidence, viewed in the light most favorable to the government, supports the jury's finding that defendant-appellant Jody Miller violated the Eighth Amendment rights of inmate Climmie Jones.

Hudson v. *McMillian*, 503 U.S. 1 (1992)

McLaurin v. *Prater*, 30 F.3d 982 (8th Cir. 1994)

Howard v. *Barnett*, 21 F.3d 868 (8th Cir. 1994)

2. Whether the district court abused its discretion in admitting into evidence the medical records of victim Terry O'Neil.

United States v. *Wipf*, 397 F.3d 677 (8th Cir.), cert. denied, 126 S. Ct. 64 (2005)

Bucci v. *Essex Ins. Co.*, 393 F.3d 285 (1st Cir. 2005)

United States v. *Wright*, 340 F.3d 724 (8th Cir. 2003)

United States v. *Iron Shell*, 633 F.2d 77 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981)

3. Whether the district court abused its discretion in admitting Chief Jailer Kaye Harris's testimony about statements that Jailer Chris McFarlin made to her regarding his false report on the use of force against O'Neil.

United States v. *Looking Cloud*, 419 F.3d 781 (8th Cir. 2005)

United States v. *Figueroa*, 976 F.2d 1446 (1st Cir. 1992), cert. denied, 507 U.S. 943 (1993)

United States v. *Payne*, 944 F.2d 1458 (9th Cir. 1991), cert. denied, 503 U.S. 975 (1992)

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

STATEMENT OF THE CASE

On August 4, 2004, a federal grand jury returned a four-count indictment against defendant-appellant Jody Ray Miller, a supervisor at the Craighead County Detention Facility in Craighead County, Arkansas, and David Gann, a jailer at that

facility, alleging that they engaged in criminal conduct in their capacity as jailers. Appellee's Addendum (A.A.) 1-5. Count One of the indictment charged that on March 29, 2004, Miller, while acting under color of state law, willfully struck, kicked, and stomped Climmie Jones, a prisoner at the Detention Facility, resulting in bodily injury, thus willfully depriving Jones of his right guaranteed by the Constitution and laws of the United States to be free from cruel and unusual punishment, in violation of 18 U.S.C. 242. A.A. 1. Count Two charged that on April 1, 2004, Miller and Gann, while acting under color of state law, willfully kicked Terry O'Neil, a detainee at the Detention Facility, resulting in bodily injury, thus willfully depriving O'Neil of his right guaranteed by the Constitution and laws of the United States to be free from unreasonable force, in violation of 18 U.S.C. 242. A.A. 2-3. Count Three charged that Miller and Gann knowingly made a false entry in an inmate incident report regarding the assault of O'Neil, with the intent to impede, obstruct and influence an FBI investigation, in violation of 18 U.S.C. 1519. A.A. 4. Count Four charged that Miller knowingly and willfully made material false statements in the course of an FBI investigation of the assault of O'Neil, in violation of 18 U.S.C. 1001. A.A. 4-5.

The United States subsequently dismissed Counts Two and Three of the indictment with respect to Gann, who pled guilty to a state charge of filing a false report of a crime in relation to the O'Neil incident and agreed to provide truthful testimony for the government in its case against Miller. Trial Transcripts (Tr.) 345-347. Accordingly, on January 4, 2006, the indictment was redacted to remove

Gann's name. A.A. 6-12. On the same day, Miller's jury trial began in the United States District Court for the Eastern District of Arkansas before the Honorable James M. Moody. On January 9, 2006, the jury returned a verdict convicting Miller on Counts One and Two and acquitting him on Counts Three and Four. Tr. 638. At the sentencing hearing on February 24, 2006, the court sentenced Miller to 78 months' imprisonment on each count of conviction, to be served concurrently, and three years of supervised release, and ordered him to pay a $200 special assessment. Appellant's Addendum A1-A6.

STATEMENT OF FACTS

1. Miller's Authority

At the time of the offenses at issue, defendant Miller was a supervisor at the Craighead County Detention Facility. Tr. 471, 511. In that capacity, he supervised 11 to 12 jailers, also known as detention officers, including Arlen Whitley, Matt Whitley, Chris McFarlin, Josh Foster, and David Gann. Tr. 109, 234, 262, 302, 329, 472, 515-516. Miller, in turn, was supervised by Chief Jailer Kaye Harris. Tr. 407.

2. Miller's Use Of Force Against Jones

On March 29, 2004, Climmie Jones was incarcerated in the Craighead County Detention Facility, serving a sentence for failing to pay several traffic tickets. Tr. 461, 467. On that date, Miller was on duty as the officer in charge (OIC) night supervisor for the shift that ran from 7 p.m. the previous evening to 7 a.m. Tr. 96, 137, 347, 515. At approximately 6 a.m. that day, Jailer Arlen Whitley

removed Jones from his cell after Jones made disrespectful statements toward Whitley and gestures indicating that he wanted to fight. Tr. 57-58, 81. Whitley handcuffed Jones behind the back and began taking Jones to the detoxification (detox) unit to "cool off." Tr. 58-59. At some point during the walk to the detox unit, Whitley encountered Miller and Gann, who helped Whitley pick Jones up off the ground after Jones fell down in an attempt to engage in passive-type resistance. Tr. 60, 83, 349, 366. Miller and Gann then accompanied Whitley in escorting Jones to the detox room. Tr. 60, 84, 111, 138, 251, 282, 349, 366, 464. Upon their arrival in the detox room, Whitley pinned Jones against the wall and gave him a speech about being disrespectful. Tr. 65, 87-88, 112, 128-129, 140, 251, 283, 350, 367. Whitley then let Jones go and began to remove Jones's handcuffs. Tr. 65.

As Jones's handcuffs were being removed, defendant Miller hit Jones in the left side of his head with a closed fist, causing Jones to fall to the ground. Tr. 66, 86, 140, 252, 283-284, 350-351, 367. Jailer Josh Foster, who was in the detox room as well, testified at trial that the punch was hard enough to inflict pain. Tr. 284. By all eyewitness accounts, Whitley had control of the situation at the time of the punch, and Jones was not being combative or physically threatening any of the jailers. Tr. 66-67, 141-142, 252, 284, 351. While Jones was lying on the ground, still being non-combative, Jailer Matt Whitley kneeled over him and finished removing his handcuffs. Tr. 67, 253, 351. Miller — who was wearing cowboy boots (Tr. 115, 351-352) — then stood on top of Jones while grabbing bars on a

window in the detox room, and began kicking and stomping Jones in the upper body. Tr. 67-68, 100, 113-115, 253, 284-285, 351, 468. Gann testified at trial that these stomps and kicks were forceful enough to cause injury. Tr. 351. After seeing Miller stomp Jones, Foster began kicking Jones in the upper leg. Tr. 66, 284-285. As the officers left the detox room following the assault, Miller called Jones, who is African-American, a "nigger." Tr. 116, 254, 468.

Jones suffered injuries as a result of the assault. Foster testified that Jones sustained a busted lip from the assault. Tr. 285. Gann testified that Miller's punch and stomps bloodied Jones's lip and caused him to hold his left arm, and that he overheard Jones crying in the detox room. Tr. 352-353. Jailer Vickie Bryan and Jailer Duncan Brown both testified that Jones was limping following the assault, and Brown added that Jones told him that his leg was hurting. Tr. 116, 129, 147. Brown also testified that Jones requested medical attention for his injuries. Tr. 147. Jones himself testified that he sustained pain and a split lip from the assault. Tr. 468-469.

After the assault, Miller told Arlen Whitley to write a "good report" on the incident, which Whitley interpreted to mean a report that omitted any mention that Miller kicked and stomped Jones and hit him while he was handcuffed. Tr. 68-69, 93-94, 98. Whitley obliged and filed a report omitting this information about Miller's use of force, explaining at trial that he lied because Miller was the shift supervisor and would read the report. Tr. 70. Miller told the other jailers that they did not have to write a report on the Jones incident because he and Whitley would

"take care of the situation" — *i.e.*, write the required report. Tr. 286, 292, 353. Miller acknowledged that he did not write a report about this incident, claiming that he was tired at the end of a two-day shift and that Chief Jailer Kaye Harris gave him permission to delay writing a report — a claim Harris flatly denied. Tr. 482-483, 555.

3. Miller's Use Of Force Against O'Neil

In the early morning hours of April 1, 2004, Miller again was on duty at the Craighead County Detention Facility as the OIC night supervisor. Tr. 235, 270, 329-330. While on duty at that time, Miller learned that police officers had been involved in an altercation with Terry O'Neil and his girlfriend, and that the latter two individuals were being transported to the jail. Tr. 485-487. Miller ordered numerous officers to meet the arrestees as they arrived at the jail at approximately 3 a.m. Tr. 163, 177, 236, 267, 303-304, 330, 361. At Miller's direction, Jailers Matt Whitley and Josh Foster removed O'Neil from the police car and escorted him to a nearby detox holding cell to cool off. Tr. 118, 164, 237, 239-240, 268, 270, 305, 331. O'Neil was handcuffed behind his back and cursing as he walked down the hallway, but was neither physically resisting nor being physically combative toward the officers. Tr. 119, 164, 238-239, 256-257, 269-270, 306, 331, 358-359. Miller and Gann also entered the detox cell, followed shortly thereafter by Jailer Chris McFarlin. Tr. 240, 271, 307, 331-332. Once in the detox room, Whitley ordered O'Neil to his knees so that he could remove his handcuffs. O'Neil complied with the order. Tr. 240, 271, 332.

Whitley had difficulty reaching the keyhole of O'Neil's handcuffs, and placed O'Neil stomach-down on the ground so that he and McFarlin could remove the handcuffs. Tr. 240-241, 309, 332. As soon as O'Neil was on his stomach, defendant Miller — who was wearing cowboy boots (Tr. 167, 273, 309, 334) — and Foster began repeatedly kicking O'Neil about the head and upper body with great force.[1] Tr. 166-168, 174, 242-244, 273, 275, 309-311, 333-334. Foster and McFarlin testified that Miller's kicks were sufficient to cause pain, and Gann likewise testified that the kicks were sufficiently forceful to cause injury. Tr. 275, 310, 333. These individuals, and Matt Whitley, also testified that Miller had no legitimate law enforcement reason to kick O'Neil. Tr. 244, 273, 313, 337. During the assault, O'Neil was handcuffed behind the back and was neither resisting nor being combative. Tr. 166, 169, 244, 273-274, 310, 334-335. O'Neil pleaded for the kicking to stop, to which Miller replied, "I bet you won't ever f*** with the police anymore, and I bet you'll never hit a cop again" (Tr. 310-311) — an apparent reference to O'Neil's earlier altercation with the police at the arrest scene. At the conclusion of the assault, another jailer stunned O'Neil in the back of the legs with a Taser. Tr. 246, 276, 311-312, 335.

Whitley and McFarlin finished uncuffing O'Neil and placed him in a restraint chair. Tr. 246-247, 276, 312, 336. At this point, the injuries O'Neil

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[1] Foster waived indictment and pled guilty to one count of violating 18 U.S.C. 242 for his role in the assault of O'Neil, and to one count of violating 18 U.S.C. 1519 for writing a false report about the O'Neil incident. Tr. 264-265.

sustained as a result of the kicks were evident, most notably a reddish purple face and a left eye that was severely bruised and swollen shut. Tr. 122, 169-170, 202, 247, 277, 312. The officers who subdued O'Neil at the arrest scene arrived at the detox tank shortly thereafter and inquired about O'Neil's condition, to which Miller responded that O'Neil had the injuries when he entered the jail. Tr. 202, 212, 227, 500. These officers vigorously denied Miller's claim and further testified that O'Neil would not have been admitted to the jail had his left eye been in that state upon arrival. Tr. 170-171, 179, 202, 212, 216, 227-228, 230. Their position was supported by several other officers at the arrest scene, who testified that they got a good look at O'Neil's face and observed that O'Neil did not have any apparent injuries to his face or left eye at that time, and by Foster, who testified that those injuries were not present when O'Neil was admitted to the jail. Tr. 157, 159, 277, 558-560, 565-567.

Following the O'Neil incident, Miller summoned the officers present and told them that the official story would be that O'Neil became combative after the handcuffs were removed, and fell and struck his left eye on a ledge in the detox room. Tr. 314-315, 337. Miller also told the officers to hold off writing reports about the O'Neil incident, although writing such reports immediately following the use of force on an inmate was the common practice. Tr. 247, 337.

O'Neil was transported to the hospital at Miller's request. Tr. 169, 203, 336, 498-499. On the way to the hospital, O'Neil was overheard moaning and appeared

to be in pain. Tr. 172. One of the officers who arrested O'Neil saw him at the hospital and testified that O'Neil appeared to be in pain. Tr. 203.

Craighead County Detention Facility Administrator Norris Watkins and Chief Jailer Kaye Harris arrived at the jail the morning after the O'Neil incident, and were told by Miller that O'Neil was beaten at the scene of the arrest. Tr. 394-395, 410, 416. Watkins and Harris then ordered the jailers involved to write reports on what happened to O'Neil. Tr. 338, 398, 403, 410, 503. Miller submitted a report stating that O'Neil was never struck in the face, that O'Neil was acting in a combative manner, and that the jailers used the least amount of force necessary to control O'Neil. Tr. 400-401, 550. Miller also ordered the jailers under his supervision to write a "good report" on the O'Neil incident. Tr. 279, 325. Following this direction, Foster, Gann, Matt Whitley, and McFarlin all filed reports that stated that the use of force against O'Neil was justified because O'Neil was combative and resisting the jailers when he entered the detox room. Tr. 248-249, 278-280, 325, 340.

About one month later, a Federal Bureau of Investigation (FBI) agent interviewed Miller about the O'Neil incident. Tr. 435. During the interview, Miller told the FBI agent that O'Neil was struggling and kicking when he entered the detox room and that he (Miller) kicked O'Neil one time in the stomach and one time in the leg in order to get him to stop fighting with the jailers. Tr. 436-437, 540, 552.

SUMMARY OF ARGUMENT

This Court should affirm Miller's conviction on Counts One and Two of the indictment. On appeal, Miller challenges (1) the sufficiency of the evidence to support his conviction of depriving Jones of his rights under color of law, (2) the district court's admission of O'Neil's medical records into evidence, and (3) the court's admission of Chief Jailer Kaye Harris's testimony about statements Jailer Chris McFarlin made to her regarding his false report on the use of force against O'Neil. Argument One affects only Count One of the indictment. Arguments Two and Three affect only Count Two of the indictment. All of Miller's arguments are meritless.

1. The evidence, viewed in the light most favorable to the government, was sufficient to prove beyond a reasonable doubt that Miller used force against inmate Climmie Jones maliciously and sadistically to cause harm, and thus violated Jones's Eighth Amendment right to be free of cruel and unusual punishment. The evidence shows that Miller punched Jones in the face, knocking him to the ground while Jones was handcuffed, and then kicked and stomped Jones while he was lying on the ground. At the time, Jones was neither being combative nor physically threatening any of the jailers. The evidence also demonstrates that Jones sustained pain and a split lip as a result of the assault. Miller argues that the absence of serious injury to Jones precludes the jury's finding that Miller acted maliciously and sadistically for the purpose of causing harm. It is well-settled

under the Supreme Court's and this Court's precedents, however, that a showing of serious injury is not necessary to establish an Eighth Amendment violation.

2. The district court did not abuse its discretion in admitting Terry O'Neil's medical records. Those records were admissible under Federal Rule of Evidence 803(4) because they were pertinent to medical diagnosis and treatment. Contrary to Miller's contention, the medical records did not contain statements identifying the individuals who assaulted O'Neil, but only statements describing the physical contacts that led to his injuries and the locations of those physical contacts. Nor did the medical records pose a danger of unfair prejudice warranting exclusion under Federal Rule of Evidence 403. The records were consistent with the testimony of several individuals that O'Neil was beaten by Miller and another jailer and that he sustained physical injury as a result.

3. The district court did not abuse its discretion in admitting Chief Jailer Kaye Harris's testimony that Chris McFarlin told her that he had filed a false report on the O'Neil incident. Contrary to Miller's contention, the district court did not admit Harris's testimony under the excited-utterance exception to the hearsay rule. Instead, the court admitted the evidence as non-hearsay to explain the effect of McFarlin's statements on Harris, rather than for the truth of whether McFarlin filed a false report. The court gave the jury a limiting instruction making clear the limited purpose for which McFarlin's statements were being admitted.

McFarlin's statements possessed probative value because they led Harris to confront Miller about McFarlin's allegations. That confrontation was relevant to

explain the context of Miller's response to Harris that there were no cameras in the detox cell so they "couldn't prove a damn thing." Tr. 417. Miller's response, in turn, was probative as evidence of his consciousness of guilt.

Harris's testimony did not pose a danger of unfair prejudice warranting exclusion under Federal Rule of Evidence 403 because McFarlin had already testified at trial that he told Harris that he had written a false report.

ARGUMENT

I

THE EVIDENCE WAS MORE THAN SUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT-APPELLANT JODY MILLER VIOLATED INMATE CLIMMIE JONES'S EIGHTH AMENDMENT RIGHTS

Miller argues that his conviction on Count One, depriving Climmie Jones of his constitutional rights under color of law, should be overturned for insufficiency of proof.[2] Specifically, Miller contends (Br. 2-3) that his attack on Jones did not rise to the level of an Eighth Amendment violation because Jones sustained only minor physical injuries during the assault. Miller's argument is meritless. Supreme Court precedent and this Circuit's caselaw make clear that a showing of

[2] At the close of the government's case, Miller moved for a judgment of acquittal. Tr. 454-457. The district court denied the motion, noting with respect to Counts One and Two, that "giving the government the favorable inferences at this point, there's certainly evidence that excessive force was used far beyond what was required to restrain either of these individuals." Tr. 457-458. At the close of Miller's case, the court considered his motion renewed, with the same ruling. Tr. 553.

serious physical injury is not required in order to establish an Eighth Amendment violation.

A. Standard Of Review

This Court reviews *de novo* the sufficiency of the evidence to sustain a criminal conviction. *United States* v. *Chapman*, 356 F.3d 843, 847 (8th Cir. 2004). In reviewing the sufficiency of the evidence, this Court "must view the evidence 'in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict.'" *United States* v. *Abfalter*, 340 F.3d 646, 654-655 (8th Cir. 2003) (quoting *United States* v. *Erdman*, 953 F.2d 387, 389 (8th Cir.), cert. denied, 505 U.S. 1211 (1992)), cert. denied, 540 U.S. 1134 (2004). "Th[is] standard of review is * * * a strict one, and a jury's verdict will not be lightly overturned." *United States* v. *Parker*, 364 F.3d 934, 943 (8th Cir. 2004). Reversal is warranted "only if *no reasonable jury* could have found the defendant guilty beyond a reasonable doubt." *United States* v. *Vazquez-Garcia*, 340 F.3d 632, 636 (8th Cir. 2003) (emphasis added), cert. denied, 540 U.S. 1168 (2004).

B. The Evidence Viewed In The Light Most Favorable To The Government Establishes That Miller Acted Maliciously And Sadistically To Harm Jones

Because Jones was a convicted inmate when he was assaulted by O'Neil, he is protected by the Eighth Amendment's prohibition against "cruel and unusual" punishment. See *Bell* v. *Wolfish*, 441 U.S. 520, 535 n.16 (1979). The Supreme Court has held that "the unnecessary and wanton infliction of pain" constitutes

"cruel and unusual punishment." *Hudson* v. *McMillian*, 503 U.S. 1, 5 (1992) (internal quotation marks omitted). "When the alleged constitutional violation is that prison officials have used excessive force, 'the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or *maliciously and sadistically* to cause harm.'" *Howard* v. *Barnett*, 21 F.3d 868, 871 (8th Cir. 1994) (quoting *Hudson*, 503 U.S. at 7). "Factors relevant to this determination include the threat the officials reasonably perceived, the need for the use of force, the efforts made to minimize the force used, the relationship between the need for using force and the amount of force used, and the degree of injury inflicted." *Ibid.* (citing *Hudson*, 503 U.S. at 7 and *Whitley* v. *Albers*, 475 U.S. 312, 321 (1986)).

Viewed in the light most favorable to the government, the evidence is more than sufficient to establish that Miller acted maliciously and sadistically to cause harm to Jones. Four jailers testified that they witnessed Miller strike Jones in the face and knock him to the ground, and follow up the punch with several kicks and stomps to Jones's body while Jones was lying on the ground. Tr. 66-68, 86, 100, 252-253, 283-285, 350-351, 367, 468. All these witnesses testified that when attacked by Miller, Jones was neither being combative nor physically threatening any of the jailers. Tr. 66-67, 141-142, 252, 284, 351. Indeed, several of the witnesses testified that Jones was still handcuffed when Miller punched him in the face. Tr. 66, 86, 252, 350-351. A reasonable jury could conclude from this overwhelming evidence that Miller "was not acting to protect himself or others or

to otherwise serve any legitimate penological interest," and thus, his punching, kicking, and stomping of Jones exceeded the force justified under the circumstances. See *McLaurin* v. *Prater*, 30 F.3d 982, 984 (8th Cir. 1994). Two of the witnesses and Jones himself testified that Jones suffered a split lip as a result of Miller's assault, and Jones added that the assault inflicted pain. Tr. 285, 353, 468-469. Because a reasonable jury could infer from the evidence that Miller acted "maliciously and sadistically to cause harm" to Jones and not for any legitimate purpose, this evidence was more than sufficient to sustain the jury's finding that Miller violated Jones's Eighth Amendment right to be free of cruel and unusual punishment. See *Hudson*, 503 U.S. at 7.

Miller's argument that serious physical injury is required to establish an Eighth Amendment violation is contrary to both Supreme Court and Eighth Circuit precedent. In *Hudson*, the Supreme Court held that force need not result in "serious injury" to constitute cruel and unusual punishment. 503 U.S. at 4, 9-10. This Court's precedents likewise reject Miller's attempt to read into the "maliciously and sadistically" standard the requirement of serious injury. In *Howard*, this Court noted that whether force used against a prisoner constitutes an Eighth Amendment violation "turns on 'whether force was applied . . . maliciously and sadistically to cause harm,' not on whether a serious injury resulted from that force." 21 F.3d at 872 (quoting *Hudson*, 503 U.S. at 6). Accordingly, this Court reasoned, "force that is excessive within the meaning of the Eighth Amendment is compensable if it causes the prisoner actual injury, even if the injury is not of great

significance." *Id.* at 873. Similarly, in *McLaurin*, this Court found that an inmate's pain alone, absent debilitating or permanent injury, was sufficient to sustain his Eighth Amendment claim where the official inflicting the pain "acted solely and purposely to harm [the inmate] and not out of a good-faith effort to restore or maintain discipline or order." 30 F.3d at 984.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING VICTIM TERRY O'NEIL'S MEDICAL RECORDS INTO EVIDENCE

Miller argues (Br. 3-6) with regard to Count Two that the district court erred in permitting the government to introduce Terry O'Neil's medical records under Federal Rule of Evidence 803(4). Specifically, Miller asserts that the medical records contain inadmissible and self-serving hearsay statements by O'Neil identifying Miller and his fellow jailers as the individuals who assaulted him. Because this argument misstates the information contained in the medical records, it is without merit.

A. Standard Of Review

This Court reviews a district court's evidentiary rulings for abuse of discretion "and will reverse only when an improper evidentiary ruling affects the substantial rights of the defendant or when * * * the error has had more than a slight influence on a verdict." *United States* v. *Gregg*, 451 F.3d 930, 933 (8th Cir. 2006). This Court accords "great deference" to a district court's determination that the probative value of relevant evidence is not substantially outweighed by the

danger of unfair prejudice under Federal Rule of Evidence 403 "and will reverse only for a clear abuse of discretion." *United States* v. *Kime*, 99 F.3d 870, 878 (8th Cir. 1996).

B. Background

During trial, outside the presence of the jury, the government sought to introduce into evidence O'Neil's medical records, which documented his stay in the hospital following the assault. Tr. 429. These medical records contain a physician's notes indicating that O'Neil "states he was 'beaten up' tonight once at his home and once at the jail. He states he was beaten, kicked and electrocuted and hurts everywhere but especially left eye[.]" A.A. 13. Similarly, the medical records include a registered nurse's notes mentioning that O'Neil "states [he] has been hit and stomped and shocked" and indicating that O'Neil felt "pain all over but worse to left eye, left eye swollen[.]" A.A. 14.

Defense counsel objected on the grounds that O'Neil's statement that he was beaten at home and at the jail was hearsay and that its prejudicial effect greatly outweighed its probative value. Tr. 429. The court overruled defense counsel's objection regarding prejudice because "there's been abundant testimony about Mr. O'Neil receiving blows while he was in the jail," and the medical records are "certainly consistent with all of the other evidence in the case." Tr. 430. The court also held that the records fell within the exception to the hearsay rule as statements admissible for the purposes of medical diagnosis or treatment under Federal Rule

of Evidence 803(4). Tr. 430. Accordingly, the court received the medical records into evidence as Government Exhibit 20. Tr. 432-433.

C. O'Neil's Medical Records Were Admissible Under Federal Rule Of Evidence 803(4) As Statements Pertinent To Medical Diagnosis Or Treatment

Federal Rule of Evidence 803(4) provides that the following are not excluded by the hearsay rule: "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." For a statement to be admissible under Rule 803(4), two criteria must be satisfied: (1) "the declarant's motive in making the statement must be for 'purposes of medical diagnosis or treatment,'" and (2) "the content of the statement must be 'pertinent' such that it is the kind of statement reasonably relied upon by health care providers in treatment or diagnosis." *United States* v. *Wright*, 340 F.3d 724, 732 (8th Cir. 2003). Statements concerning what happened to an individual are generally pertinent to diagnosis and treatment while statements identifying the party responsible for that individual's injuries or condition "would seldom, if ever" be pertinent. *United States* v. *Iron Shell*, 633 F.2d 77, 84 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

Miller acknowledges (Br. 5) that O'Neil's statements in the medical records that he was injured as a result of the blows to his face are admissible, but contends that the records contain "statements of identity and fault" that are inadmissible

hearsay because they were not pertinent to diagnosis and treatment. Miller's opening brief does not specifically identify the statements in the medical records that he finds objectionable. In the district court, Miller complained only about the portions of the records that stated that O'Neil was beaten at home and at the jail. Tr. 429. Because this statement does not identify which individual or group of persons assaulted O'Neil, Miller is incorrect in asserting that the medical records contain "statements of identity and fault." Instead, a review of the medical records indicates that O'Neil merely described what happened to him that resulted in his injuries. A.A. 13 (stating he was "beaten, kicked and electrocuted"), A.A. 14 (stating that he was "hit and stomped and shocked"). These statements are pertinent to medical diagnosis and treatment, and the district court did not abuse its discretion in admitting them under Rule 803(4). See *Iron Shell*, 633 F.2d at 84; *Bucci* v. *Essex Ins. Co.*, 393 F.3d 285, 298-299 (1st Cir. 2005) (district court did not abuse its discretion in admitting under Rule 803(4) statements in medical records describing specific contacts that caused individual's injuries).

In addition, the district court did not clearly abuse its discretion in determining that the records did not pose a danger of unfair prejudice warranting exclusion under Federal Rule of Evidence 403. As the district court held, the statements in the medical records were "consistent" with the "abundant testimony" in the record that O'Neil was beaten at the jail. Tr. 430. A total of five eyewitnesses to the use of force against O'Neil — four jailers and a police officer — testified that O'Neil was struck, kicked, and stomped, and suffered injury as a

result. Tr. 166-168, 174, 242-244, 247, 273, 275, 277, 309-312, 333-334. It is notable that Miller does not challenge any of this testimony on appeal.

Moreover, when the district court overruled Miller's objection to the admission of O'Neil's medical records on hearsay grounds, Miller had the responsibility of requesting redaction of any specific objectionable statements. See *Engebretsen* v. *Fairchild Aircraft Corp.*, 21 F.3d 721, 731 (6th Cir. 1994). By failing to request a redaction, Miller forfeited the opportunity to exclude those portions of the medical records that he found objectionable. See *ibid.*

Even assuming, *arguendo*, that the district court erred in admitting O'Neil's medical records, such error was harmless and does not warrant reversal. For the same reasons the district court gave in overruling defense counsel's objection to admission of the medical records on prejudice grounds — that they are consistent with the other "abundant" evidence in the record that O'Neil was attacked and injured at the jail — the records did not affect Miller's substantial rights or have more than a slight influence on the jury's verdict. See *United States* v. *Wipf*, 397 F.3d 677, 682 (8th Cir.) (any error in admitting medical records under Rule 803(4) was harmless because statements contained therein were cumulative of trial testimony), cert. denied, 126 S. Ct. 64 (2005); *Wright*, 340 F.3d at 733 (same).

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING CHIEF JAILER KAYE HARRIS'S TESTIMONY ABOUT STATEMENTS JAILER CHRIS MCFARLIN MADE TO HER REGARDING HIS FALSE REPORT ON THE O'NEIL INCIDENT

Finally, Miller argues with regard to Count Two that the district court erred in allowing Chief Jailer Kaye Harris to testify about statements Jailer Chris McFarlin made to her regarding his false report on the O'Neil incident. Miller contends (Br. 6-10) that these statements were hearsay that did not qualify as "excited utterances" admissible under Federal Rule of Evidence 803(2) and that allowing the jury to hear these statements greatly prejudiced his defense. Because this argument misstates the grounds on which the district court admitted the statements in question, it is without merit. The district court properly admitted these statements as non-hearsay.

A. Standard Of Review

The standard of review is abuse of discretion. See pp. 17-18, *supra*.

B. Background

McFarlin testified at trial that he witnessed Miller kick O'Neil without a legitimate law enforcement reason to do so. Tr. 309-313. Like Miller and the other witnesses, McFarlin initially filed a report that stated that O'Neil was resisting the officers in the detox tank and that omitted any mention of the officers striking O'Neil in the head. Tr. 317. McFarlin testified at trial that he subsequently recanted his account of the O'Neil incident to Chief Jailer Harris and

filed an amendment to his report in which he described Foster and Miller kicking O'Neil in the face. Tr. 317-319.

After McFarlin completed his trial testimony, the United States called Harris as a witness. She testified that she found Chris McFarlin crying the morning following the assault of O'Neil, and asked him what was wrong. Tr. 413. Government counsel then asked Harris to describe McFarlin's response. Tr. 413. Defense counsel objected, and government counsel initially responded that the statement was admissible under the excited-utterance exception to the hearsay rule. Tr. 413. The court sustained defense counsel's objection. Tr. 413.

Following a bench conference, government counsel stated that the United States was seeking to admit McFarlin's statement for its effect on Harris, not for the truth of the matter asserted. Tr. 413-414. The court found that McFarlin's statement would not prejudice Miller, because McFarlin had already testified that he wrote a false report. Tr. 414-415. The court immediately instructed the jury that Harris was asked a question about what McFarlin told her with respect to a report he had written, and that the jury should consider Harris's answer "only for the purpose of her being informed of what Mr. McFarlin did, not for the truth of whether Mr. McFarlin did or did not write a false report." Tr. 415. Harris then testified that McFarlin told her that he did not tell the truth and that there was more to the story on the O'Neil incident than what he had included in his report. Tr. 415-416. As a result of McFarlin's statements, Harris confronted Miller about

McFarlin's charge. In response, Miller told Harris that there were no cameras in the detox cell so they "couldn't prove a damn thing." Tr. 416-417.

C. Harris's Testimony About McFarlin's Statements Concerning His False Report Was Admissible Non-Hearsay

Miller argues that the district court erred in admitting as excited utterances Harris's testimony about statements McFarlin made to her regarding his submission of a false report on the O'Neil incident. Contrary to Miller's assertion, the district court did *not* admit the testimony under the excited-utterance exception of Federal Rule of Evidence 803(2). Instead, the court *sustained* defense counsel's objection to the government's attempt to admit this testimony under the excited-utterance exception to the hearsay rule. Tr. 413.

After sustaining defense counsel's objection, the court accepted government counsel's fallback argument that Harris's testimony about McFarlin's statements should be admitted for their effect on Harris, not for the truth of the matter asserted. Tr. 413-415. The court immediately instructed the jury that it was not to consider McFarlin's statements for the truth of whether he filed a false report, but only for the fact that Harris was informed of what McFarlin claimed to have done. Tr. 415. Because Harris's testimony was not admitted for the truth of the matters asserted by McFarlin, and the jury was so instructed, Harris's testimony was not hearsay. See Fed. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). The district court's admission of

McFarlin's statements for their effect on Harris was entirely proper and not an abuse of discretion. See, *e.g.*, *United States* v. *Payne*, 944 F.2d 1458, 1472 (9th Cir. 1991) (statement introduced to show effect on listener properly treated as non-hearsay), cert. denied, 503 U.S. 975 (1992).

Contrary to Miller's contention otherwise (Br. 9), McFarlin's non-hearsay statements had considerable probative value. After McFarlin told Harris that he filed a false report, Harris confronted Miller about McFarlin's charge, and Miller responded that there were no cameras in the detox cell so they "couldn't prove a damn thing." Tr. 416-417. Miller's statements to Harris were relevant evidence of Miller's consciousness of guilt. See *United States* v. *Amahia*, 825 F.2d 177, 181 (8th Cir. 1987) (testimony about an individual's conversation with another person was properly admitted as non-hearsay to explain the effect of the conversation on the individual's actions); *United States* v. *Looking Cloud*, 419 F.3d 781, 787-788 (8th Cir. 2005) (rumor that individual was a government informant was properly admitted as non-hearsay to help the jury understand the context of her murder by defendant).

In addition, the district court did not clearly abuse its discretion in determining that Harris's testimony did not pose a danger of unfair prejudice warranting exclusion under Federal Rule of Evidence 403. Prior to Harris's testimony, McFarlin had already testified at trial that he initially submitted a false report about the O'Neil incident, that he later admitted to Harris that the report was false, and that he then filed an amendment to the report in which he described

Foster and Miller kicking O'Neil in the face. Tr. 317-319. On appeal, Miller does not challenge the admissibility of McFarlin's trial testimony. Because Harris's testimony was largely duplicative of McFarlin's unchallenged testimony, adding only the minor detail that McFarlin was crying when he told Harris that he had lied in his initial report, the risk of prejudice was minimal. See *United States* v. *Figueroa*, 976 F.2d 1446, 1458 (1st Cir. 1992) (non-hearsay testimony did not pose risk of unfair prejudice requiring exclusion, in part because such testimony was corroborated by other evidence "making it far less likely that the jury was unfairly influenced to credit the out-of-court statements"), cert. denied, 507 U.S. 943 (1993).

Even assuming, *arguendo*, that the district court erred in admitting Harris's testimony, such error was harmless and does not warrant reversal. Because McFarlin had already testified at trial that he had filed a false report regarding the O'Neil incident, Harris's testimony did not affect Miller's substantial rights or have more than a slight effect on the jury's verdict. See *Figueroa*, 976 F.2d at 1458-1459.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

WAN J. KIM
Assistant Attorney General

GREGORY B. FRIEL
CHRISTOPHER C. WANG
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-9115

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 6,589 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I also certify that the electronic version of this brief is an exact copy of what has been submitted to the Court in written form. I further certify that this electronic copy has been scanned with the most recent version of Trend Micro Office Scan Corporate Edition (version 6.5) and is virus-free.

_____

CHRISTOPHER C. WANG
Attorney

Date: October 10, 2006

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE were served by first-class mail, to each of the following counsel of record:

Craig Lambert, Esq.
319 President Clinton Avenue
Suite 205
Little Rock, AR 72201

Richard Hughes, Esq.
400 West Capitol Avenue
Little Rock, AR 72201

I further certify that on October 10, 2006, an electronic copy on disk and ten hard copies of the BRIEF FOR THE UNITED STATES AS APPELLEE were transmitted to the Court.

_____
CHRISTOPHER C. WANG
Attorney