No. 05-4798

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

MICHAEL ROBERT PERKINS,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

Defendant's jurisdictional statements are accurate.

STATEMENT OF THE ISSUES

1. Whether the district court committed reversible error in admitting the lay and expert testimony of law enforcement officers on the reasonableness of defendant-appellant Perkins's use of force against Koonce.

2. Whether the evidence, viewed in the light most favorable to the government, supports the jury's finding that defendant-appellant Perkins caused "bodily injury" to Koonce, and thus, Perkins's felony conviction for depriving Koonce of his rights under color of law pursuant to 18 U.S.C. 242.

STATEMENT OF THE CASE

Defendant-appellant Michael Robert Perkins appeals from a July 19, 2005 judgment of felony conviction in the United States District Court for the Eastern District of Virginia for violating 18 U.S.C. 242. J.A. 704. Perkins was convicted by a jury of kicking and causing bodily harm to Lamont Koonce, thus willfully depriving Koonce of his right guaranteed by the Constitution and laws of the United States to be free from unreasonable force. Perkins was sentenced to a term of imprisonment of 51 months, followed by three years of supervised release. J.A. 705-706.

STATEMENT OF FACTS

1. Perkins's Use Of Force Against Koonce

Shortly before midnight on October 13, 2003, Petersburg, Virginia police officers Michael Tweedy and David House observed a car traveling with no lights on and damage to its front end on the right hand side. J.A. 229. Tweedy and House followed the car, pulled it over, and approached the driver to ticket him for the headlight damage. J.A. 229-232. After the officers escorted the driver, Lamont Koonce, out of his car, Koonce broke loose from the officers' hold and fled on foot. J.A. 234-235. After a lengthy chase involving both officers, Officer Tweedy caught Koonce and forced him face down on the ground, with both of Koonce's arms pinned underneath his body. J.A. 236-241, 274-275.

When Officer House arrived on the scene, Officer Tweedy was straddling Koonce's body to control him and was attempting to get one of Koonce's arms out

from underneath him. J.A. 241, 274, 299. Tweedy jumped up off Koonce, and Officer House went to Koonce's left side to try to handcuff Koonce. J.A. 241, 275, 299. House attempted to remove Koonce's left arm from underneath his body, and received some resistance. J.A. 242. When Koonce finally released his left arm, he grabbed House's ankle. J.A. 242. At this point, House struck Koonce with a closed fist twice in the arm and once in the underarm to try to free Koonce's arm, but Koonce still refused to give House his arm. J.A. 242-244, 280-281. Tweedy then forcefully stomped on Koonce's head three times. J.A. 244, 247, 276. Koonce continued to resist, and Tweedy again forcefully stomped on Koonce's head two or three more times. J.A. 247, 277.

After the second round of stompings by Officer Tweedy, Koonce said, "All right, man, all right," and House was able to pull Koonce's left arm out from under him. J.A. 248, 278. Tweedy then made a radio call stating that he had a "10-95" — code for subject in custody. J.A. 249, 478. Sergeant John Waldron, who supervised the patrol squad, responded by making a "10-65" radio call for backup. J.A. 250, 476-477. At this point, House had gotten Koonce's left hand in a handcuff, and believed that he and Tweedy did not need assistance. J.A. 250, 282. House radioed Waldron that the situation was under control, to which Waldron responded by telling all officers to disregard the code. J.A. 252-253, 478.

Officer Benjamin Fisher heard Tweedy's call and arrived at the scene soon thereafter. J.A. 251, 356. Upon seeing blood on Koonce's face and arm, and House kneeling on top of Koonce, Fisher "felt uncomfortable and basically didn't

want to be there." J.A. 361-362. According to House, Fisher was "kind of shocked" by the scene and "basically just stood there." J.A. 251. Although Koonce would not give House his hand, he was motionless, and House believed that Koonce would not be able to get up and get away. J.A. 254, 255, 300.

Because House did not have control over Koonce's right arm, he felt that Koonce was not yet in "full custody," and accordingly requested that Officer Fisher assist him in getting Koonce's right arm out from under him. J.A. 282-283, 300, 404. Koonce remained motionless as Fisher put on rubber gloves to assist in handcuffing Koonce. J.A. 368-369. In House's opinion, Koonce was not "going anywhere." J.A. 300. Similarly, Fisher believed that House had Koonce under control. J.A. 403. Nevertheless, Tweedy then came over, kicked Koonce two or three times in the side, and stomped on Koonce's head three more times. J.A. 254, 369-371, 395-396, 403. By the conclusion of Tweedy's stompings, Koonce was no longer resisting, by House's assessment. J.A. 303.

Within moments of Tweedy's third round of stompings, the defendant, Michael Perkins, arrived on the scene. J.A. 255, 287-288, 372-373. Perkins, who was off duty at the time, ran up to Koonce and delivered a running kick in Koonce's side. J.A. 258, 288, 372-373, 380. Perkins then kicked Koonce a second time, with slightly less force. J.A. 288, 372-373, 381. Immediately after Perkins's second kick, Tweedy approached Koonce and stomped on Koonce's head two more times, before Perkins grabbed Tweedy and pulled him away. J.A. 260, 289, 375, 401-402, 411-412. Officer Fisher then pulled Koonce's right arm

from under him and assisted House in handcuffing Koonce. J.A. 261, 284, 300, 375-376.

Koonce sustained numerous life-threatening injuries from the beating, including multiple skull fractures, extension facial fractures, bleeding in and contusions on the brain, a pneumothorax (puncture) to his right lung, and a contusion on his left lung. J.A. 429-430, 434, 440. When admitted as a trauma patient to the Southside Regional Medical Center at approximately 12:30 a.m., he was unconscious and unresponsive, and remained that way for the duration of his stay. J.A. 321, 333-334. At the hospital, Koonce was tested on the Glasgow Coma scale; he received a score of "1" for mental status, indicating that he did not open his eyes, a "1" for verbal response, indicating that he was not speaking, and a "3" for motor response, indicating that he moved away in response to pain. J.A. 328-330, 443. Due to the severity of his injuries, Koonce was transferred to the Medical College of Virginia (MCV) around 3:15 in the morning. J.A. 334-335, 428-429. Dr. Jamal Farran, the emergency room attending physician at MCV on duty when Koonce arrived, testified that the likely cause of Koonce's collapsed lung was blunt force trauma. J.A. 435-439. Dr. Farran also confirmed Koonce's Glasgow Coma Test, and affirmed that an individual can be unconscious yet still react to painful stimuli. J.A. 443.

Perkins was indicted on November 16, 2004, for violating 18 U.S.C. 242. J.A. 14. The indictment charged that on or about October 13, 2003, Perkins, while acting under state law as an officer with the Petersburg Bureau Police Department,

kicked and caused bodily injury to Lamont Koonce, thus willfully depriving Koonce of his right guaranteed by the Constitution and laws of the United States to be free from unreasonable force.[1] J.A. 14. The case proceeded to a jury trial in the United States District Court for the Eastern District of Virginia before the Honorable James R. Spencer on February 15, 2005.

2. Lay And Expert Opinion Testimony On Reasonableness Of Perkins's Actions That Government Adduced At Trial

At trial, the government adduced from both lay and expert witnesses opinion testimony on the reasonableness of Perkins's use of force against Koonce in light of their training, experience, and knowledge of police department policies. Officer House testified regarding the police department policies and training he received regarding defensive tactics and the use of force. J.A. 223-225. House subsequently demonstrated on a use-of-force dummy the kick that he witnessed Perkins deliver to Koonce. J.A. 258. Defense counsel objected on the grounds of ultimate issue to government counsel's subsequent question that "based on the

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[1] The same indictment charged that on or about October 13, 2003, Tweedy, while acting under state law as an officer with the Petersburg Bureau Police Department, kicked and stomped Lamont Koonce, causing bodily injury, thus willfully depriving Koonce of his right guaranteed by the Constitution and laws of the United States to be free from unreasonable force under 18 U.S.C. 242. J.A. 13. The indictment also charged that Tweedy violated 18 U.S.C. 1519 by falsely alleging in a police report that Koonce was combative, and that Tweedy used only the reasonable force necessary to subdue Koonce, while omitting in the report any mention of the assault he and other officers committed. J.A. 14. Tweedy pleaded guilty to the first count, and was sentenced by the district court to a term of imprisonment of 108 months, followed by three years of supervised release. J.A. 6, 9.

assessment of the situation, based on your experience, * * * did you see any law enforcement reason for those kicks?" J.A. 258-259. The district court overruled the objection and House answered in the negative. House went on to elaborate that the manner in which Perkins kicked Koonce was not a way of controlling a subject that he learned in his training and was not a training technique for controlling a suspect in Petersburg. J.A. 259. On re-direct examination, House again testified that kicking a suspect in the torso was not an appropriate technique that he learned in his training. J.A. 300-302. Defense counsel did not object to any of this testimony.

The government also adduced extensive testimony from Officer Fisher regarding the training he received on the appropriate use of force prior to the events at issue. J.A. 341-350. Fisher also testified that he witnessed Perkins run up and kick Koonce, and demonstrated the kick on the use-of-force dummy. J.A. 373, 380. In response to government counsel's question whether "[b]ased on your training and experience and the assessment of the scene, were the defendant's kicks to Mr. Koonce reasonable?," Fisher answered, "No." J.A. 376. He also testified that the kicks, in his opinion, were not necessary, and that there were other compliance techniques he was trained to use that were appropriate. J.A. 376. On re-direct examination, Fisher testified that based upon his training, the guidelines in the training manual, and his view of the situation, Perkins did not use a reasonable amount of force. J.A. 416. Defense counsel did not object to any of this testimony.

The government also called Corporal Stan Allen, a defensive tactics instructor at Crater Academy and Perkins's defensive tactics instructor. After establishing what Allen taught in his training class regarding techniques to control suspects and appropriate uses of force (J.A. 552-570), government counsel asked, "[W]ould it have been appropriate based on the training that you taught the defendant's class for an individual to run up and kick, deliver a hard kick into the side of the individual lying on the ground?" J.A. 571. Allen replied, "Not unless he [the defendant] was armed with a weapon and w[as] threatening the officer." J.A. 571. In response to counsel's subsequent query as to how he would characterize a hard kick with boots to a motionless individual who had one arm handcuffed, Allen testified that such an action "is definitely deadly force, because you could rupture an organ kicking with a foot like that." J.A. 572-573. Counsel then asked whether reasonable officers could disagree about whether or not that was an appropriate tactic to use, to which defense counsel made a general objection. J.A. 573. The district court overruled the objection, and Allen responded in the negative, explaining, "I don't know of any police officers in my experience that would accept that as a reasonable thing to do." J.A. 573.

The government also called Sergeant Philip Jones, a community liaison officer for the Petersburg Police Department, to testify. Without objection from defense counsel, James testified that "based on [his] training and experience," it is not appropriate to kick a subject lying on the ground who is in the process of being handcuffed, and that reasonable officers on the Petersburg Police Department

would not disagree about that opinion. J.A. 591-592. Along similar lines, Sergeant Waldron, a defense witness, testified that the General Orders of the Petersburg Police Department required officers to employ only the "amount of force that is reasonable and necessary to effect an arrest or assume control of a situation" and that kicking a motionless person on the ground was not "reasonable" within the meaning of this General Order. J.A. 614. Again, defense counsel registered no objection to this testimony.

Finally, the government called to the stand Inspector Carter Burnett, the training coordinator for the Petersburg Police Department. After testifying regarding the classes he taught in controlling suspects and defensive tactics, Burnett was qualified as a use-of-force expert. J.A. 498-505. In relevant part, Burnett testified that he saw no legitimate reason for Perkins to kick Koonce, that he saw no law enforcement reason for Perkins's action, and that based upon his training and the courses he has taught, he "ha[s] never seen a system that teaches police officers to kick anybody unless it is a deadly force situation." J.A. 526. In response to government counsel's various hypotheticals mirroring the situation in this case — suspect face down on the ground, left arm cuffed, not giving up his right arm but not moving — Burnett repeatedly testified that it was inappropriate for an officer to kick the suspect and described other techniques that could be used to get the suspect to comply. J.A. 526-529. On re-direct examination, Burnett testified that reasonable officers would not disagree that kicking a suspect who is lying on the ground with one hand cuffed is not a legitimate use of force and that it

was not appropriate to kick that person to get him under control. J.A. 541-542. Defense counsel's sole objection during this testimony was to government counsel's use of the term "legitimate" in her question to Burnett on direct examination. J.A. 525.

3. Perkins's Rule 29 Motion For Acquittal

At the conclusion of the government's case, Perkins moved under Rule 29 of the Federal Rules of Criminal Procedure for acquittal on the ground that the government failed to show that the blows Perkins inflicted on Koonce caused bodily injury within the meaning of 18 U.S.C. 242, and therefore, the offense was a misdemeanor rather than a felony. J.A. 602-603. The court denied the motion, explaining that "[u]nder the case law, * * * just the kicking alone, the infliction of pain, is a bodily injury." J.A. 603. After the defense rested, Perkins reurged the Rule 29 motion on the ground that even though the infliction of pain is sufficient, there was no evidence that Koonce felt any pain because he was unconscious. J.A. 619; see J.A. 603. The court denied the motion again because the only evidence in the record of Koonce's level of consciousness — the Glasgow Coma Test administered at the hospital — indicated that Koonce felt pain and moved away when it was inflicted. J.A. 619. The case proceeded to the jury, which returned a guilty verdict. J.A. 704.

SUMMARY OF ARGUMENT

Neither the evidentiary-error nor the sufficiency-of-the-evidence argument Perkins presents warrants reversal of the judgment of felony conviction under 18

U.S.C. 242. With regard to the former, Perkins failed to make a timely and specific objection to the testimony he now claims should have been excluded. This Court, therefore, is limited to reviewing the admission of this testimony for plain error. The district court did not abuse its discretion, much less commit plain error, in admitting lay and expert opinion testimony on the reasonableness of Perkins's use of force because this testimony was framed in the context of prevailing standards in law enforcement. Even assuming, *arguendo*, that the district court's error was plain, such error did not affect substantial rights or seriously affect the fairness, integrity or public reputation of judicial proceedings. Finally, viewing the evidence in the light most favorable to the government, a rational trier of fact could find that Perkins caused bodily injury to Koonce, and thus, that he is guilty of a felony violation of 18 U.S.C. 242.

STANDARDS OF REVIEW

1. This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States* v. *Leftenant*, 341 F.3d 338, 342 (4th Cir. 2003), cert. denied, 540 U.S. 1166, 124 S. Ct. 1183, 157 L.Ed.2d 1215 (2004). An abuse of discretion occurs only if the ruling was arbitrary or irrational. *United States* v. *Achiekwelu*, 112 F.3d 747, 753 (4th Cir.), cert. denied, 522 U.S. 901 (1997). A party must make a timely and specific objection to an alleged evidentiary error to preserve its challenge for this Court's review. Fed. R. Evid. 103(a)(1). If it does not, this Court reviews for plain error. *United States* v. *Chin*, 83 F.3d 83, 87 (4th Cir. 1996).

2. This Court reviews the district court's decision to deny a motion for judgment of acquittal *de novo*. *United States* v. *Romer*, 148 F.3d 359, 364 (4th Cir. 1998), cert. denied, 525 U.S. 1141 (1999). Where, as here, the motion is based upon insufficient evidence, this Court must uphold a jury's verdict of conviction if the evidence, viewed in the light most favorable to the government, is sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). In evaluating the evidence, this Court may not weigh the evidence or assess the credibility of the witnesses, but rather must assume that the jury resolved all contradictions in the testimony in favor of the government. *Romer*, 148 F.3d at 364.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR IN ADMITTING THE LAY AND EXPERT OPINION OF LAW ENFORCEMENT OFFICERS ON THE REASONABLENESS OF DEFENDANT-APPELLANT PERKINS'S USE OF FORCE

Perkins's primary argument on appeal is that the district court committed reversible error when it allowed lay and expert opinion on the reasonableness of his use of force. As threshold matter, Perkins asserts (Br. 11-14) that the government introduced expert opinion testimony in the guise of lay opinion testimony, in violation of Rule 701 of the Federal Rules of Evidence and Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure. Perkins then argues (Br.

14-20) that this testimony improperly rendered opinions on legal matters reserved to the jury. Neither of these points has any merit.

Perkins's first contention (Br. 11) is that Officers House and Fisher, Sergeants Jones and Waldron, and Inspector Allen were improperly allowed to offer expert opinion testimony based upon specialized knowledge and training on the reasonableness of Perkins's use of force without first being disclosed as expert witnesses under Federal Rule of Criminal Procedure 16(a)(1)(G). The record is clear, however, that Perkins failed to preserve this contention by not objecting to the testimony of the aforementioned witnesses on the ground that it constituted expert testimony. See Fed. R. Evid. 103(a)(1) (stating that no error may be predicated on a ruling admitting evidence unless "a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context"); *United States* v. *Pino-Noriega*, 189 F.3d 1089, 1097 (9th Cir.) (concluding that objections that testimony was speculative failed to preserve objection that testimony was improper opinion testimony by a lay witness), cert. denied, 528 U.S. 989 (1999). Because Perkins failed to so object, this Court reviews the district court's admission of the testimony for plain error. See *United States* v. *Chin*, 83 F.3d 83, 87 (4th Cir. 1996). Under the plain-error standard, this court may consider a claim not raised below if (1) there is an error; (2) the error is plain; (3) the error affects substantial rights; and (4) the court determines, after examining the particulars of the case, that the error "seriously affect[s] the fairness, integrity or public reputation of

judicial proceedings." *United States* v. *Olano*, 507 U.S. 725, 732 (1993) (construing the requirements of Fed. R. Crim. P. 52(b)).

Rule 701 of the Federal Rules of Evidence limits opinion testimony by lay witnesses "to those opinions or inferences which are * * * (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702," which addresses the admissibility of testimony by expert witnesses. Fed. R. Evid. 701; see *Certain Underwriters at Lloyd's, London* v. *Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) ("A critical distinction between Rule 701 and Rule 702 testimony is that an expert witness 'must possess some specialized knowledge or skill or education that is not in the possession of the jurors.'") (quoting Redden & Saltzburg, Federal Rules of Evidence Manual 225 (1975)). The Advisory Committee Notes to Rule 701 explain that subsection (c) was added "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 advisory committee's note on 2000 amendment. The Advisory Committee Notes further observe that "[t]he amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*" and that "it is possible for the same witness to provide both lay and expert testimony in a single case." *Ibid.*

Neither the Supreme Court nor this Court has spoken on the issue of whether the post-amendment Rule 701 permits a law enforcement officer to offer lay opinion testimony based upon his experience. In these circumstances,

"decisions by other circuit courts of appeals are pertinent to the question of whether an error is plain." *United States* v. *Neal*, 101 F.3d 993, 998 (4th Cir. 1996). In *United States* v. *Ayala-Pizarro*, 407 F.3d 25 (1st Cir.), cert. denied, 74 U.S.L.W. 3209 (2005), a case interpreting the post-amendment Rule 701, the First Circuit observed that "the line between expert testimony under Fed. R. Evid. 702 . . . and lay opinion testimony under Fed. R. Evid. 701 . . . is not easy to draw" and concluded that a police officer's testimony regarding neighborhood drug points fell on the permissible side of the line because it was based upon the "particularized knowledge" he gained from policing the neighborhood in question. *Id.* at 28. Similarly, in *Tampa Bay Shipbuilding & Repair Co.* v. *Cedar Shipping Co.*, 320 F.3d 1213 (11th Cir. 2004), another case interpreting the post-amendment Rule 701, the Eleventh Circuit held that the district court did not abuse its discretion in admitting testimony by lay witnesses "based upon their particularized knowledge garnered from years of experience within the field." *Id.* at 1223; cf. *United States* v. *Tinoco*, 304 F.3d 1088, 1119 (11th Cir. 2002) (holding that district court did not abuse its discretion under pre-amendment Rule 701 in admitting police officer's testimony regarding vessel based upon his personal observation and past experiences), cert. denied, 538 U.S. 909 (2003).

In this case, the government adduced testimony from lay witnesses that based upon their prior experience, training, and knowledge of police department policies, Perkins's use of force was unreasonable. See, *e.g.*, J.A. 258-259, 376, 573, 591-592, 614. This testimony is in line with the testimony that the First and

Eleventh Circuits determined to be permissible lay opinion testimony under the post-amendment Rule 701, and accordingly, the district court did not commit plain error in admitting it. The sole case that Perkins cites in support of his argument that the lay witness testimony in this case was improper expert testimony — *United States* v. *Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997), cert. denied, 523 U.S. 1131 (1998) — warrants little consideration by this Court because it is a pre-amendment case that is flatly contradicted by a subsequent Eleventh Circuit case. See *United States* v. *Novaton*, 271 F.3d 968, 1007-1009 (11th Cir. 2001) (citing *Figueroa-Lopez* and finding no abuse of discretion to allow police officers to offer lay opinion testimony "based on their perceptions and on their experience as police officers about the meaning of code words employed by" drug traffickers), cert. denied, 535 U.S. 1120 (2002). As this Court has observed, "we do not see how an error can be plain error when the Supreme Court and this court have not spoken on the subject, and the authority in other circuit courts is split." *Neal*, 101 F.3d at 998 (quoting *United States* v. *Alli-Balogun*, 72 F.3d 9, 12 (2d Cir. 1995)).

No more persuasive is Perkins's second evidentiary argument (Br. 14-20) — that the district court abused its discretion in allowing the witnesses to testify to legal conclusions. Once again, the record demonstrates that Perkins failed to make a timely and specific objection on these grounds at any point in the testimony he

now claims is improper, thus failing to preserve the challenge for appeal.[2] See Fed. R. Evid. 103(a)(1); *United States* v. *Pettigrew*, 77 F.3d 1500, 1516 (5th Cir. 1996) (holding that challenge to expert witness's testimony on grounds of legal conclusion was not preserved where defendant made no objection during entire course of direct examination that witness's testimony constituted impermissible legal conclusion). Accordingly, this Court should review the district court's admission of the expert and lay opinion testimony in this case for plain error.[3] See *Chin*, 83 F.3d at 87.

There is no abuse of discretion, much less plain error, here. Rule 701 of the Federal Rules of Evidence provides, in relevant part, that opinion testimony by a lay witness is admissible if "helpful to * * * the determination of a fact in issue." Fed. R. Evid. 701. Similarly, Federal Rule of Evidence 702 permits an expert to proffer opinion testimony if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. If testimony is "otherwise admissible" under these rules, it "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R.

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[2] Perkins arguably preserved a singular challenge on the grounds of legal conclusion with his objection (J.A. 259) on the grounds of "ultimate issue" to a question government counsel asked of House. This Court need not determine whether this objection was properly preserved because, as shown below, the district court did not commit error, much less plain error.

[3] Inspector Burnett testified as an expert in the use of force. Officers House and Fisher, Sergeants Jones and Waldron, and Inspector Allen offered lay testimony.

Evid. 704(a). Opinion testimony that embraces an ultimate issue is excludable, however, if it "merely states a legal conclusion," because such testimony "is less likely to assist the jury in its determination," in contravention of Rules 701 and 702. *United States* v. *Barile*, 286 F.3d 749, 760 (4th Cir. 2002); Fed. R. Evid. 704 advisory committee's notes ("Under Rule 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.").

The opinion testimony in this case easily satisfies the requirement of helpfulness to the trier of fact under Rules 701 and 702. *Kopf* v. *Skyrm*, 993 F.2d 374 (4th Cir. 1993), makes this clear in the Rule 702 context. In *Kopf*, a 42 U.S.C. 1983 case alleging excessive force by defendant police officers, this Court found expert testimony similar to the testimony at issue in this case admissible in the context of Rule 702. After holding that the admissibility of opinion testimony should be determined on a case-by-case basis, this Court concluded that the district court abused its discretion in excluding expert testimony on whether the officers' use of police dogs and slapjacks (clubs) was unreasonable.[4] *Id.* at 379. In relevant part, this Court noted that although "[a] club and the damage it can

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[4] This Court also observed that "[t]he subject matter of Rule 702 testimony need not be arcane or even especially difficult to comprehend," *id.* at 377, belying Perkins's apparent argument (Br. 18-19) that *Kopf* limits admissible opinion testimony in excessive force cases to "specialized knowledge on obscure skills."

cause when it strikes a person's head are easily understood by most laymen," the expert "should clearly have been permitted to testify as to the prevailing standard of conduct for the use of slapjacks." *Ibid.* Likewise, although the damage that a kick to the torso of a prone suspect can cause is "easily understood by most laymen," the prevailing standards in law enforcement regarding kicking suspects is the proper subject of opinion testimony. Because the lodestar of admissibility is whether the testimony "would assist the jury," *ibid.* — the standard incorporated in both Rules 701 and 702 — the principle the *Kopf* Court enunciated applies equally to the lay and expert opinion testimony in this case on the prevailing standards in law enforcement.

Kopf left open the issue of whether the witness could testify as to the ultimate issue of whether an officer's use of force was reasonable after testifying about prevailing standards in law enforcement. 993 F.2d at 379 n.3. Where, as here, the record demonstrates that the witnesses testified regarding official police department procedures and the training on the appropriate use of force they either received or gave, and went on to testify on the reasonableness of the officer's use of force in this context, this Court's sister circuits have answered this question in the affirmative. See *Zuchel* v. *City & County of Denver*, 997 F.2d 730, 742-743 (10th Cir. 1993) (no error in allowing expert in police training, tactics, and the use of deadly force to testify that police officer's use of deadly force was inappropriate "based on his understanding of generally accepted police custom and practice in Colorado and throughout the United States"); *United States* v. *Myers*, 972 F.2d

1566, 1577-1578 (11th Cir. 1992) (no abuse of discretion in admitting lay opinion testimony that defendant police officer's use of stun gun on suspect was not reasonable where lay witness "properly framed his opinion in accordance with prevailing police standards"), cert denied, 507 U.S. 1017 (1993); cf. *Ludwig* v. *Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) ("Although these police department guidelines do not create a constitutional right, they are relevant to the analysis of constitutionally excessive force.") (internal citation and quotation marks omitted); *Scott* v. *Henrich*, 39 F.3d 912, 916 (9th Cir. 1994) (observing that police procedures are admissible if they are germane to the reasonableness inquiry in an excessive force claim), cert. denied, 515 U.S. 1159 (1995). Consistent with Rule 701 and 702's emphasis on helpfulness to the trier of fact, these cases do not distinguish between lay and expert testimony, and indeed, the opinion testimony of Officers House and Fisher on the reasonableness of the actions they personally witnessed should have been helpful to the jury. Accordingly, the district court did not abuse its discretion in favor of admissibility in this case.

The cases Perkins cites (Br. 15-18) in support of this argument are all readily distinguishable. In both *Hygh* v. *Jacobs*, 961 F.2d 359 (2d Cir. 1992), and *Burger* v. *Mays*, 176 F.R.D. 153 (E.D. Pa. 1997), the sustained objection was to opinion testimony without a clear link to prevailing police standards. In both *Peterson* v. *City of Plymouth*, 60 F.3d 469 (8th Cir. 1995), and *Southern Pine Helicopters, Inc.* v. *Phoenix Aviation Managers, Inc.*, 320 F.3d 838 (8th Cir. 2003), the objected-to testimony offered merely a patent legal conclusion. See *Peterson*, 60 F.3d at 475

(holding inadmissible expert testimony that officers' conduct comported with the "standards under the Fourth Amendment"); *Southern Pine*, 320 F.3d at 841 (holding inadmissible expert testimony on whether federal law was contravened). And *McCloughan* v. *City of Springfield*, 208 F.R.D. 236 (C.D. Ill. 2002), is factually inapposite, because, in contrast with this case, "most of the crucial facts [we]re in dispute," and expert testimony on whether the police officers followed proper procedure would impermissibly allow the expert to "make and relay credibility findings to the jury regarding the witnesses' testimony." *Id.* at 239.

Even if this Court were to find error in admitting this testimony, Perkins cannot show that the district court's admission of this testimony was "plain" error; that is, obvious or contrary to clearly established law. Cf. *Johnson* v. *United States*, 520 U.S. 461, 465 (1997); *United States* v. *Miranda*, 248 F.3d 434, 441 (5th Cir.) (affirming admission of opinion testimony by law enforcement officer about the meaning of code words used in recorded conversations about drug trafficking), cert. denied, 534 U.S. 980 (2001); *United States* v. *Darland*, 659 F.2d 70, 72 (5th Cir. 1981) (experienced law enforcement officer may give lay opinion under Rule 701 on why fingerprints were not found), cert. denied, 454 U.S. 1157 (1982). As we have seen, in *Kopf*, this Court left open the question whether a witness could testify whether an officer's force is reasonable. 993 F.2d at 379 n.3. Thus, it cannot be *plain* error to allow such testimony.

Moreover, Perkins cannot identify how his rights were substantially affected, or how he was prejudiced, by the admission of opinion testimony. Cf. *Tinoco*, 304

F.3d at 1119-1120 (even if error to permit officer's lay opinion testimony on market value of narcotics, defendant cannot show actual prejudice from failure to identify witness as expert affected ability to present a complete defense).

Finally, even if this Court were to find plain error that substantially affected Perkins's rights, there is no basis for this Court to hold that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467. An error subject to plain error review is "remedied only 'in the most exceptional cases.'" *United States* v. *Johnson*, 127 F.3d 380, 392-393 (5th Cir. 1997) (prosecutor's deliberate question to witness to elicit response regarding defendant's prior conviction, was "irrelevant and prejudicial," and "improper[]," yet did not warrant reversal under plain error standard), cert. denied, 522 U.S. 1152 (1998). The jury's verdict was based upon undisputed evidence that without first surveying the scene and without provocation, Perkins ran up to Koonce, who was lying motionless on the ground with one hand in a handcuff, and delivered a running kick to Koonce's side. Perkins then kicked Koonce a second time. The government's medical witness, Dr. Farran, testified that Koonce sustained a collapsed lung from his beating. Given the ample evidence to support the jury's verdict, Perkins cannot show how the lay and expert testimony substantially affected the integrity of the jury's verdict.[5] See *United States* v. *Mackins*, 315 F.3d

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[5] In any event, the district court specifically instructed the jury that it was not required to believe the testimony of any witness and should consider all the circumstances surrounding the testimony of a given witness (J.A. 678-679), that in

(continued...)

399, 408 (4th Cir.) (fourth prong of *Olano* test not satisfied when evidence against defendants was "overwhelming" and "essentially uncontroverted"), cert. denied, 538 U.S. 1045 (2003).

II

THE EVIDENCE VIEWED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT SUPPORTS THE JURY'S FINDING THAT DEFENDANT-APPELLANT PERKINS CAUSED "BODILY INJURY" TO KOONCE, AND THUS, PERKINS'S FELONY CONVICTION FOR VIOLATING 18 U.S.C. 242

Perkins also argues (Br. 20-22) that the evidence of bodily injury was insufficient as a matter of law to uphold his felony conviction under 18 U.S.C. 242 because the government's medical expert, Dr. Farran, was not able to conclusively determine whether Perkins's kicks caused the pneumothorax to Koonce's right lung, and because the Glasgow Coma Test failed to show that Koonce experienced pain at the time of Perkins's kicks. Neither of these points warrants reversal of the judgment of conviction.

A felony conviction under Section 242 of Title 18 requires proof that the

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[5](...continued)
determining whether Perkins used unreasonable force, it should consider all the circumstances of the case from the point of view of an ordinary and reasonable police officer on the scene (J.A. 683), and that it need not accept an opinion merely because an expert has expressed it (J.A. 687).

defendant "willfully subject[ed] [a] person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, * * * if bodily injury results [from such deprivation]." 18 U.S.C. 242. Although Section 242 does not define "bodily injury," several other provisions of Title 18 define it as "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of [a/the] function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary." See 18 U.S.C. 831(f)(5), 1365(h)(4), 1515(a)(5), 1864(d)(2). At least two federal circuit courts apply this definition in Section 242 cases, and there is no reason for this Court not to do likewise. See *United States* v. *Bailey*, 405 F.3d 102, 111 (1st Cir. 2005); *United States* v. *Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). Because this definition is phrased in the disjunctive, to uphold the district court's judgment against a sufficiency-of-the-evidence challenge, this Court need only find that the evidence, viewed in the light most favorable to the government, could lead a rational trier of fact to find either that Perkins caused injury to Koonce *or* that Perkins caused Koonce to experience physical pain.

This standard is easily satisfied in this case. First, with regard to bodily injury, Dr. Farran acknowledged (J.A. 447-448) that it was possible for a ventilation such as one performed on Koonce or a fall like the one he experienced during his chase to cause a pneumothorax, but also testified (J.A. 438-439) that "blunt force trauma" was the likely cause of Koonce's collapsed lung. The mere

fact that Farran was unable to eliminate other possible causes of the pneumothorax or state with certainty whether Tweedy's kicks or Perkins's kicks caused the pneumothorax (J.A. 448) is not grounds to overturn the jury's verdict. See *United States* v. *Wilson*, 118 F.3d 228, 234 (4th Cir. 1997) ("[I]f the evidence supports different, reasonable interpretations, the jury decides which interpretation to believe."); *United States* v. *McFarland*, 116 F.3d 316, 317 (8th Cir.) (holding that to be sufficient to sustain a jury's verdict, the evidence need not eliminate every possibility of innocence), cert. denied, 522 U.S. 961 (1997). And because the only evidence of whether Koonce was able to experience pain at the time of Perkins's kicks was the Glasgow Coma Test administered at the hospital, which indicated that he moved away in response to pain, and Dr. Farran's testimony that an unconscious person can react to painful stimuli, a rational trier of fact could find that the physical pain component of the bodily injury definition was satisfied.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of felony conviction of defendant-appellant Perkins for violating 18 U.S.C. 242.

Respectfully submitted,

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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 6,523 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: October 21, 2005

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2005, 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:

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