No. 05-11051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RUBEN OMAR RUIZ,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary in this case, but will of course participate if the Court believes that oral argument would assist it.

TABLE OF CONTENTS

PAGE

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

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

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES:

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment on August 15, 2005. E.R.2 at 406-409.[1] Defendant Ruiz filed a timely notice of appeal on August 22, 2005. E.R.2 at 410; Fed. R. App. P. 4(b)(1). This Court has jurisdiction under 28 U.S.C. 1291.

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[1] "E.R.1" and "E.R.2" refer to Volume 1 and Volume 2 of the Electronic Record prepared by the clerk of the district court clerk. "Trl. Tr. Vol. __" refers to the volumes of the trial transcripts. "GX" and "DX" refers to the government's and defendant's exhibits respectively.

STATEMENT OF THE ISSUES

1. Whether sufficient evidence supports the jury's verdict.

2. Whether the district court abused its discretion in charging the jury regarding the elements of 18 U.S.C. 242.

STATEMENT OF THE CASE

This appeal arises out of a federal criminal prosecution of a police officer for using excessive force during an arrest. On September 21, 2004, a grand jury in the Northern District of Texas returned an indictment against defendant Ruben Omar Ruiz, an officer with the Fort Worth, Texas, police department, charging him with a single felony count of violating 18 U.S.C. 242 for, under color of law, depriving the arrestee of his Fourth Amendment right to be free from unreasonable seizures, which deprivation resulted in bodily injury. E.R.1 at 1. The case was tried to a jury from April 11 to 13, 2005, and the jury returned a guilty verdict on April 14, 2005. E.R.2 at 343. The district court sentenced Ruiz to 27 months' imprisonment and 2 years' supervised release. E.R.2 at 406-409.

STATEMENT OF FACTS

1. Offense Conduct

This case arose out of a high-speed chase that involved police officers from two jurisdictions. In the early morning hours of September 13, 2000, Officer Clyde Broadus of the Forest Hill (Texas) Police Department, while parked in his

patrol car, saw a Chevy Blazer that was speeding and had no operable tail lights. Trl. Tr. Vol. 2 at 80-81. Officer Broadus pursued the Blazer. The driver, David Harold Davis, Jr., pulled over and stopped, but after Officer Broadus exited his car, Davis sped away. Broadus then resumed pursuit. Trl. Tr. Vol. 2 at 81. The pursuit was joined by the two other Forest Hill officers on duty: Sergeant Dan Dennis and Officer Steven Yancey. Trl. Tr. Vol. 2 at 53, 82, 121 & 134. Officer Yancey had a micro-cassette recorder with him, which he turned on when he joined the pursuit and had on during the entire pursuit. Trl. Tr. Vol. 2 at 32-33. The pursuit reached speeds in excess of 100 miles per hour. Trl. Tr. Vol. 2 at 48.

When the pursuit left Forest Hill and entered Fort Worth, it was joined by officers of the Fort Worth Police Department, including Fort Worth's helicopter, Air One. Trl. Tr. Vol. 2 at 6, 82. In one Fort Worth patrol car were Officers Charles Hubbard and Brent Ladd, and in the other was defendant Ruiz. Trl. Tr. Vol. 3 at 7, 56-58. Air One was piloted that night by Jay Dixon, and Officer John Good was the flight officer. With Air One's camera, Officer Good videotaped the pursuit and ensuing arrest. Trl. Tr. Vol. 1 at 123-125, 131.

When the pursuit neared the border of Fort Worth and Arlington, the Fort Worth supervisors ordered the Forth Worth officers to discontinue, although Air One was directed to continue its support of the Forest Hill officers. Trl. Tr. Vol. 1 at 127-128; Vol. 3 at 9. Officers Hubbard and Ladd at first obeyed the order to

discontinue, but they decided to drive to a position to be ready if the chase moved back into Fort Worth. Trl. Tr. Vol. 3 at 10. Within a few minutes, the pursuit crossed back in front of Hubbard and Ladd. When they saw the other Fort Worth unit was still in the pursuit, they rejoined. Trl. Tr. Vol. 3 at 10-11, 59-60.[2]

The pursuit ended when Davis entered a cul-de-sac in a residential area. Trl. Tr. Vol. 2 at 8, 10, 84; Vol. 3 at 11. In attempting to exit the cul-de-sac, Davis tried to make a U-turn through some of the front yards, but spun the Blazer, and it came to a stop facing Officer Broadus's car. Trl. Tr. Vol. 2 at 8, 10-11, 84. Officer Broadus exited his car, drew his weapon, and directed Davis to show him his hands and to turn off the Blazer's engine. Trl. Tr. Vol. 2 at 84. Davis was moving around in the vehicle, and Officer Broadus could not see his hands. Trl. Tr. Vol. 2 at 84. Officer Yancey, however, saw Davis put his hands out of the window. Trl. Tr. Vol. 2 at 11.

Sergeant Dennis stopped his car at the end of the cul-de-sac because he heard on the radio that Davis was trying to go through the yards to get out. Trl. Tr. Vol. 2 at 124. When he heard Davis had stopped, he drove into the mouth of the cul-de-sac and got out of his car. Trl. Tr. Vol. 2 at 124. Hubbard and Ladd also stopped their car at the entrance of the cul-de-sac, and once they saw the Blazer

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[2] Because Hubbard disobeyed the order to discontinue the pursuit, he was suspended for 16 days without pay. Trl. Tr. Vol. 3 at 35.

come to a stop, they approached it on foot. Trl. Tr. Vol. 3 at 12. Ruiz went to the passenger side of the Blazer and opened the door. Trl. Tr. Vol. 2 at 23-24.

As Hubbard and Ladd approached the Blazer, they saw Ruiz on the passenger side. Trl. Tr. Vol. 3 at 12-13. Hubbard and Ladd could see Davis's hands clearly, and he had no weapon. Trl. Tr. Vol. 3 at 13, 63. Ladd heard Davis say that he was scared. Trl. Tr. Vol. 3 at 63. Hubbard opened the Blazer door, and then he and Ladd pulled Davis out. Trl. Tr. Vol. 2 at 12; Vol. 3 at 13, 63. Hubbard and Ladd each had one of Davis's arms and put him on the ground face down; Hubbard believed that Davis hit the ground chest first. Trl. Tr. Vol. 3 at 14. When on the ground, Davis's hands were under his body. Trl. Tr. Vol. 3 at 14.

Officer Yancey struggled to holster his weapon before he joined the two officers working to restrain Davis. Trl. Tr. Vol. 2 at 14, 24. Officer Broadus saw that the Blazer was starting to roll back, so he entered it and put on the brake or put it in park. Trl. Tr. Vol. 2 at 13, 86, 93.

Ruiz did not join the officers working to restrain Davis. He walked up to Davis and, from the left side, delivered a kick, knee strike, and then another kick to the area of Davis's head. Trl. Tr. Vol. 1 at 139; Vol. 2 at 25, 94, 130; Vol. 3 at 21-22.

After stopping the Blazer, Officer Broadus took out his handcuffs, and went down on one knee at Davis's legs. Trl. Tr. Vol. 2 at 86, 94-95. Sergeant Dennis

ran up and grabbed Davis's feet. Trl. Tr. Vol. 2 at 18, 125. Davis was flailing and kicking and moving his shoulders after he was taken to the ground, but once Sergeant Dennis got to Davis's legs, he stopped kicking. Trl. Tr. Vol. 2 at 14, 55, 126. Davis was moving his head from side to side. Trl. Tr. Vol. 2 at 86. Officers Hubbard and Yancey were on Davis's right side and Officers Ladd and Broadus were on his left side trying to get his hands behind his back so that he could be handcuffed. Trl. Tr. Vol. 2 at 15, 87; Vol. 3 at 16. Although Davis was "hollering" and making a lot of noise, he did not verbally threaten the officers. Trl. Tr. Vol. 2 at 19, 87-88. During the struggle, Davis screamed "Oh, God, help me God, ow, ow." Trl. Tr. Vol. 2 at 19. After Ruiz had kicked and struck Davis, and while the officers were working to get Davis's hands out from under him so that he could be handcuffed, Ruiz circled the group. Ruiz did not assist the other officers. Trl. Tr. Vol. 2 at 95-96.[3]

Officer Hubbard used two open-hand palm strikes against the side of Davis's head in the area of his ear in an attempt to distract him, and possibly cause him to move his hand up to deflect the blows. Because that technique was unsuccessful, Hubbard stopped and resumed pulling Davis's arm to get it out from under him.

[3] Sergeant Dennis stated that Ruiz's circling around looked like he was looking for openings. Trl. Tr. Vol. 2 at 134.

Trl. Tr. Vol. 3 at 35.[4] Davis's right arm came free first, and Hubbard held it in place behind Davis's back. Trl. Tr. Vol. 3 at 16. Ruiz did not do anything to help the officers cuff Davis. Trl. Tr. Vol. 3 at 17.

After one handcuff had been put on Davis's wrist, Ruiz walked up to Davis, and, from the right side, kicked him in the head. Trl. Tr. Vol. 2 at 26, 88-89, 96, 114, 131. It was approximately 30 seconds from the time Davis was placed on the ground to the time that the officers got the second handcuff on him. See Trl. Tr. Vol. 1 at 139. After the second handcuff was put on Davis, all the officers stood up, and Davis just lay on the ground. Trl. Tr. Vol. 2 at 20, 27, 90; Vol. 3 at 17. Ruiz then stepped on Davis's head with the entire weight of his body. Trl. Tr. Vol. 2 at 27-28, 96-97, 132.[5] Officer Broadus saw Ruiz step on Davis's head, and Broadus "hollered" at Ruiz, who walked to his patrol car and drove off, as did the other two Fort Worth officers, Hubbard and Ladd. Trl. Tr. Vol. 2 at 30, 90-91, 127; Vol. 3 at 18.[6]

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[4] Officer Yancey stated that he remembered seeing an officer use two punches to Davis's upper arm, which he believed had caused Davis's arm to come free. Trl. Tr. Vol. 2 at 64-65. No other officer testified to punching Davis's arm, so Officer Yancey may have confused the two open palm strikes to Davis's ear for punches to his upper arm.

[5] Officer Yancey did not see the step because he was attempting to call on his handheld radio, which did not work. Trl. Tr. Vol. 2 at 28. Sergeant Dennis did not see the step because he had turned away from Davis. Trl. Tr. Vol. 2 at 132.

[6] Officers Broadus and Yancey testified that it was unusual for the Fort Worth

(continued...)

When Officer Broadus turned Davis over, he saw blood coming from Davis's head and saw blood around his face. Broadus called for medical assistance. Trl. Tr. Vol. 2 at 97. Davis was then placed in the back of Officer Broadus's car. Trl. Tr. Vol. 2 at 31. Davis had blood coming out of his mouth and on his clothes. Trl. Tr. Vol. 2 at 31, 119. There was also a lot of blood on the ground where Davis had been. Trl. Tr. Vol. 2 at 31. Yancey and Broadus both said to Sergeant Dennis, "We didn't do that," indicating the blood, because they knew it would be an issue that Davis had been injured. Trl. Tr. Vol. 2 at 31, 128. Yancey asked Davis if he needed medical attention and Davis said that he did. Trl. Tr. Vol. 2 at 32.

Paramedic Michael Erwin treated Davis at the scene. Trl. Tr. Vol. 3 at 69. Davis complained that he had pain in his forehead and jaw, a bloody lip, pain to the right side of his neck and to his knee. Trl. Tr. Vol. 3 at 69-70. Davis told Erwin that he had been hit or kicked at least six times during the arrest. Trl. Tr. Vol. 3 at 71. Davis was cooperative and articulate, and Erwin did not think that Davis was high on drugs. Trl. Tr. Vol. 3 at 71. Davis had a hematoma to his "right temple area," which was like "a small goose egg," and there was a small cut near the hematoma. Trl. Tr. Vol. 3 at 72-73. Davis told Erwin that his jaw hurt when he

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[6](...continued)
officers simply to leave, because they should have identified themselves and provided statements for the reports. Trl. Tr. Vol. 2 at 30, 91.

spoke. Trl. Tr. Vol. 3 at 72. Davis also had an abrasion on his right shoulder. Trl. Tr. Vol. 3 at 75. Erwin recommended that Davis be seen in a hospital due to possible injuries to the neck and jaw. Trl. Tr. Vol. 3 at 74. Davis was then taken to Forest Hill jail to be booked. Trl. Tr. Vol. 2 at 99. When he arrived at the jail, Davis complained of being in pain, so the officers called the paramedics to look at him, and afterwards they had Davis transported to the hospital. Trl. Tr. Vol. 2 at 99.

In the meantime, Air One flew directly back to the heliport, and Officer Good discussed with pilot Jay Dixon Good's suspicion that Fort Worth officers had been involved in the arrest at the cul-de-sac. Trl. Tr. Vol. 1 at 134, 143. During the pursuit, Officer Good had recognized Ruiz's voice over the radio as one of the pursuing Fort Worth officers. Trl. Tr. Vol. 1 at 126. Officer Good removed the videotape once they returned to the heliport so it would be preserved. Trl. Tr. Vol. 1 at 135. While he was doing that, Ruiz called him. They discussed the pursuit and Ruiz thanked Officer Good for his role in the pursuit. Trl. Tr. Vol. 1 at 135-136. Ruiz then said to Good: "Thanks for not snitching me off." Trl. Tr. Vol. 1 at 136. This upset Good, who responded: "Ruben, it's not an issue of snitching you off or not. There's a tape made of all these pursuits." Trl. Tr. Vol. 1 at 136. Ruiz then responded something like "all right, man" and ended the call. Trl. Tr. Vol. 1 at 136-137. Because the monitor through which Officer Good observed the

pursuit and arrest was so small, he was at the time unaware of Ruiz's use of force against Davis, and his initial thought was that Ruiz was referring to his involvement in an unauthorized pursuit. Trl. Tr. Vol. 1 at 145-147. After Officer Good watched the videotape, it raised "red flags" for him regarding the use of force. Trl. Tr. Vol. 1 at 147-148.

2. Evidence At Trial

The audiotape and videotape of the pursuit and arrest were introduced into evidence.[7] In addition to testimony describing the events of the September 13, 2000, pursuit and arrest, the officers who had been at the scene testified about the extent of force used by Ruiz against Davis. They testified that kicks or knee strikes to the head are considered deadly force. Trl. Tr. Vol. 2 at 100-101, 133. Fort Worth officers are trained that deadly force is justified only when an officer is faced with an immediate threat of death or serious bodily injury, Trl. Tr. Vol. 3 at 25-26; see also Trl. Tr. Vol. 2 at 133-134. The officers did not see Davis do anything during the struggle that was a threat of serious bodily injury or death. Trl. Tr. Vol. 2 at 45, 131; Vol. 3 at 18, 54. Indeed, the officers did not see Davis kick or strike anyone, Trl. Tr. Vol. 2 at 17, 43 (Yancey); Vol. 3 at 15 (Hubbard), nor did they see Davis with a weapon or see or hear him threaten anyone, Trl. Tr. Vol. 2 at

[7] See Trl. Tr. Vol. 2 at 33-34 (GX 23 (tape); GX 29 (enhanced audio CD); GX 33 (government's transcript)); Trl. Tr. Vol. 2 at 46-47 (DX 26 (complete audio tape); DX 27 (defendant's transcript)).

38-39 & 43 (Yancey); Vol. 2 at 83-84 (Broadus); Vol. 3 at 16 (Hubbard); Vol. 3 at 64 (Ladd).

Officer Yancey testified that Davis engaged in passive resistance, meaning that he was not allowing himself to be handcuffed, but he was not striking anyone. Trl. Tr. Vol. 2 at 20.[8] He testified that the force needed to restrain Davis was holding him on the ground and forcing his arms into the handcuffs. Trl. Tr. Vol. 2 at 20. Officer Yancey testified that they would have been able to place the handcuffs on Davis without the kick he saw Ruiz deliver from the right side. Trl. Tr. Vol. 2 at 20, 26, 89.

The government introduced a police exam that Ruiz took in 1991 regarding the use of a baton. Trl. Tr. Vol. 3 at 28 (GX 20). In response to the question why strikes to the head should be avoided, Ruiz answered "heavy bleeding" and "can cause death." Trl. Tr. Vol. 3 at 29. In response to a question requiring him to discuss excessive force, Ruiz indicated that intentional excessive force included an officer inflicting pain or injury to the subject for the purpose of deriving pleasure. Trl. Tr. Vol. 3 at 29.

The government also introduced evidence that two years earlier Ruiz had been suspended for using "excessive force during [an] arrest, despite only minimal resistance by the [driver]." GX 28 at 3. On August 15, 1998, Ruiz was involved in

[8] Officer Ladd stated that he believed that Davis was actively resisting. Trl. Tr. Vol. 3 at 66-67.

a high speed pursuit, which ended when the suspects stopped their car. Trl. Tr. Vol. 3 at 77, 81. The passenger fled from the vehicle after it stopped and he was chased by other officers while the driver remained in the car. Trl. Tr. Vol. 3 at 84. Ruiz shattered the car's window, then reached into the car and tried to pull the driver out. Trl. Tr. Vol. 3 at 84-85. He struck the driver's upper torso with a baton or flashlight. Trl. Tr. Vol. 3 at 85. Ruiz pulled the driver's body up to his waist through the window, and then struck the driver on the head with the baton or flashlight three times. Trl. Tr. Vol. 3 at 86-88. The other officer on the scene testified that the driver did nothing to threaten Ruiz. Trl. Tr. Vol. 3 at 88. Ruiz wrote a report for his lieutenant after the incident stating that the driver had injured his head on the windshield or steering wheel. Trl. Tr. Vol. 3 at 92. Because of this incident, Ruiz was indefinitely suspended, pending his right to appeal through the grievance process. GX 28.[9]

SUMMARY OF ARGUMENT

1. Ruiz was convicted of, under color of law, willfully depriving David Davis of his Fourth Amendment right to be free from unreasonable seizures, which resulted in bodily injury. Sufficient evidence supports his conviction. Ruiz does not challenge the sufficiency of the evidence showing that he acted willfully or that he acted under color of law. He does challenge the sufficiency of the evidence

[9] The record does not show the length of Ruiz's suspension.

showing that he used unreasonable force and that his conduct resulted in bodily injury to Davis. There was sufficient evidence to support the jury's verdict on both these elements.

a. The evidence showed that Ruiz directed excessive force at the area of Davis's head three times: (1) When the other officers were initially struggling to handcuff Davis, Ruiz delivered two kicks and a knee strike to Davis's head. (2) After the other officers had gotten one handcuff on Davis, Ruiz kicked Davis in the head again. And (3) after the other officers got the second handcuff on Davis and he was still lying on the ground, Ruiz stepped on Davis's head with the full weight of his body. Ruiz argues that the initial kicks and knee strike were legitimate, but the testimony at trial refutes this argument: The other officers testified that Davis did nothing to justify the use of this level of force, and that such force was not necessary to take Davis into custody. As to the subsequent kick, Ruiz argues that the evidence does not show that it occurred. But the jury observed the actions on the videotape and two officers testified they saw the kick when it happened. Ruiz concedes that his stepping on Davis's head when he was already restrained was unreasonable force.

b. Similarly, sufficient evidence established that Ruiz's unreasonable force resulted in bodily injury to Davis. The evidence showed that Davis suffered significant injuries, including a hematoma and cut on his right temple, a bloody lip,

and continuing pain in his forehead, neck, and jaw. There was considerable blood on the ground and on Davis's face and clothing. Davis complained to the paramedic on the scene that he had been hit or kicked at least six times and Davis was treated on the scene by a paramedic and later taken to the hospital. While the other officers put Davis on the ground and struggled to get his hands in handcuffs, Ruiz was the only one who kicked Davis and stepped on his head. One of the officers on the scene testified that the injuries visible on Davis's head and face were consistent with the kick that he saw Ruiz deliver to Davis's head. A reasonable construction of the evidence is that Ruiz's use of excessive force caused head injuries to Davis. Thus sufficient evidence supports the jury's verdict.

2. Ruiz argues that the district court abused its discretion in instructing the jury. He argues that the court's willfulness instruction was inadequate. He also argues that the district court abused its discretion by refusing to give two requested instructions regarding injury, and six requested instructions regarding unreasonable force. The district court's instructions correctly and clearly explained the elements of the offense to the jury and were not misleading. Further, the instructions given substantially covered all the relevant instructions requested by Ruiz, and the district court's refusal to give the requested instructions did not substantially impair Ruiz in arguing his defense. Accordingly, there was thus no abuse of discretion.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTS THE JURY'S VERDICT

A. Standard Of Review

At the close of the evidence, Ruiz moved for judgment of acquittal under Rule 29, Federal Rules of Criminal Procedure. Trl. Tr. Vol. 3 at 111-112. This Court reviews *de novo* the legal sufficiency of the evidence presented to the jury. See *United States* v. *Loe*, 262 F.3d 427, 432 (5th Cir. 2001), cert. denied, 534 U.S. 1134 (2002). Direct and circumstantial evidence are given equal weight. *United States* v. *Dien Duc Huynh*, 246 F.3d 734, 742 (5th Cir. 2001). The evidence is legally sufficient 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.) (internal quotation marks omitted), cert. denied, 126 S.Ct. 2045 (2006). This Court "review[s] the evidence in the light most favorable to the government with all reasonable inferences and credibility choices made in support of the jury verdict." *Ibid*. "If the evidence tends to give nearly equal circumstantial support to either guilt or innocence then reversal is required." *Ibid.* But this "standard does not require that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with

every conclusion except that of guilt * * *[.] A jury is free to choose among reasonable constructions of the evidence." *Loe*, 262 F.3d at 432.

B. The Elements Of The Offense

18 U.S.C. 242 proscribes action taken "under color of any law [that] * * * willfully subjects any person * * * to the deprivation of any rights * * * secured or protected by the Constitution or laws of the United States." Thus, for all violations of Section 242, the government must prove that the defendant acted "(1) willfully and (2) under color of law (3) to deprive a person of rights protected by the Constitution or laws of the United States." *United States* v. *Lanier*, 520 U.S. 259, 264 (1997) (internal quotation marks omitted). When such action "results in bodily injury," the offense is a felony punishable by up to ten years' imprisonment. See 18 U.S.C. 242; *United States* v. *Williams*, 343 F.3d 423, 431-432 (5th Cir.), cert. denied, 540 U.S. 1093 (2003).

Ruiz was charged with depriving Davis of his right under the Fourth Amendment to be free from "unreasonable * * * seizures." In *United States* v. *Brugman*, this Court stated that, to prove a Fourth Amendment violation for use of excessive force, the government must prove: "(1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." 364 F.3d 613, 616

(5th Cir.) (quoting *Williams* v. *Bramer*, 180 F.3d 699, 703 (5th Cir. 1996)), cert. denied, 543 U.S. 868 (2004)).

With respect to "bodily injury," this Court also held that "it is unnecessary for the jury to find that the victim suffered significant injury. The government need only show that the victim suffered some injury although this requires proof of more than de minimis injury." *Brugman*, 364 F.3d at 618 (internal quotation marks omitted). This Court explained that in determining whether an injury is more than "de minimis," the Court

> look[s] to the context in which that force was deployed. The amount of injury necessary to satisfy [this Court's] requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances. What constitutes an injury in an excessive force claim is therefore subjective – it is defined entirely by the context in which the injury arises.

Brugman, 364 F.3d at 618 (internal quotation omitted) (quoting *Bramer*, 180 F.3d at 703-704 (5th Cir. 1996)).

C. There Is Sufficient Evidence To Support The Jury's Verdict That Ruiz Used Objectively Excessive Force That Caused More Than De Minimis Injury

Ruiz does not challenge on appeal the sufficiency of the evidence supporting the jury's finding that he acted willfully or that he acted under color of law. Ruiz challenges the sufficiency of the evidence supporting his conviction on two grounds. He claims that the evidence shows that the only objectively excessive force he used against Davis was stepping on his head after he was handcuffed (Br.

30-36), and claims (Br. 24-29) that the government failed to prove that any injuries Davis suffered resulted from Ruiz's use of excessive force. Ruiz is wrong on both points.

1. The Evidence Showed That Ruiz's Use of Force Was Clearly Excessive To The Need And Objectively Unreasonable

Ruiz used force directed at the area of Davis's head three times. First, he delivered the kick, knee-strike, and kick from the left side during the initial part of the struggle. Second, Ruiz delivered a kick from the right side after one handcuff had been put on Davis. Third, Ruiz stepped on Davis's head after he was handcuffed and laying on the pavement. Ruiz concedes that the initial kicks and knee strike and his stepping on Davis's head occurred. He disputes that he kicked Davis after one handcuff had been placed on him. Ruiz concedes that his stepping on Davis's head was objectively unreasonable, but argues that the other uses of force were legitimate and reasonable. We address the use of force to the head generally, then each of the strikes in chronological order.

a. Ruiz's Kicks And Strike To Davis's Head Were Not Justified By Anything Davis Did

The testimony of the other officers involved in restraining Davis established that Ruiz's use of force was clearly excessive to what was needed to restrain Davis. The Supreme Court has held that under the Fourth Amendment, the amount of force reasonably necessary is to be judged from the perspective of a reasonable

officer on the scene. *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). The other officers testified that Ruiz's kicks and knee strike to Davis's head rose to the level of deadly force, and that nothing Davis was doing justified that use of deadly force.

Officer Hubbard testified that Fort Worth officers receive training on the use of force at the police academy and also receive a 40-hour instructional course every other year. Trl. Tr. Vol. 3 at 23. He also testified that under the Fort Worth general orders regarding use of force, "deadly force" is defined as "force which, by its very nature, creates a substantial risk of causing death or serious bodily injury regardless of whether death or injury occurs." Trl. Tr. Vol. 3 at 23-24; GX 21. "Intermediate force," the level of force below "deadly force," is used to meet an actively resisting subject who presents a physical threat to the safety of the officer or others. Trl. Tr. Vol. 3 at 24-25. At the "intermediate force" level, however, kicks and knee strikes to the head are prohibited. Trl. Tr. Vol. 3 at 25. Hubbard testified that under the general orders, "deadly force" is authorized only when it is necessary for officers to protect themselves from an immediate threat of death or serious bodily injury. Trl. Tr. Vol. 3 at 26.

Sergeant Dennis similarly testified that he had received training on the use of force, and that he understood that a kick or knee strike to the head is considered deadly force because it is likely to cause serious bodily injury or death. Trl. Tr.

Vol. 2 at 133. He also testified that deadly force can be used only when faced with a threat of death or serious bodily injury. Trl. Tr. Vol. 2 at 133-134.[10]

The officers' testimony showed that Ruiz's use of force was clearly excessive. Nothing Davis did during the struggle was a threat of serious bodily injury or death that would justify the use of deadly force, Trl. Tr. Vol. 2 at 131 (Dennis); Vol. 3 at 18 (Hubbard), including his merely having his hands under body, Trl. Tr. Vol. 2 at 45 (Yancey); Vol. 3 at 54 (Hubbard). Officer Yancey testified that Davis was engaged in passive resistance, meaning that he was not allowing himself to be detained, but he was not striking anyone. Trl. Tr. Vol. 2 at 20; see Trl. Tr. Vol. 2 at 17, 43 (Yancey); Vol. 3 at 15 (Hubbard) (Davis not kicking or striking anyone). Nor did Davis have a weapon or otherwise threaten anyone. Trl. Tr. Vol. 2 at 38-39 & 43 (Yancey); Vol. 2 at 83-84 (Broadus); Vol. 3 at 16 (Hubbard); Vol. 3 at 64 (Ladd).[11]

The jury in this case was entitled to credit the officers' testimony, which was not contradicted by any other evidence, and conclude that Ruiz's use of force was

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[10] Officer Broadus testified that he had received training on the use of force, and stated that in his training he had learned not to kick or knee someone in the head. Trl. Tr. Vol. 2 at 100-101. He stated that a kick to the head would be "unnecessary force," which could inflict serious bodily injury and possibly death. Trl. Tr. Vol. 2 at 101.

[11] Even if Davis had been actively resisting and posing a physical threat to the officers, under the Fort Worth use of force guidelines, that would have only justified Ruiz in using "intermediate force," and under that level, kicks and strikes to the head are prohibited. Trl. Tr. Vol. 3 at 24-25.

clearly excessive. Cf. *Brugman*, 364 F.3d at 617-618 (there was sufficient evidence to sustain the conviction where the testimony of the other officers on the scene demonstrated that the victim's conduct did not justify the level of force used).

b. Ruiz's Initial Kick, Knee-Strike, And Kick To Davis's Head Were Clearly Excessive And Objectively Unreasonable

Ruiz argues (Br. 32-33) that the initial kick, knee-strike, and kick to Davis's head area were not "objectively unreasonable" because there was "clearly a legitimate law enforcement purpose for this force." As discussed in the prior section, however, the evidence showed that there was no justification for the kicks and knee strike to Davis's head area. Indeed, Officer Yancey testified regarding the amount of force actually needed to restrain Davis: holding him on the ground and forcing his arms into the handcuffs. Trl. Tr. Vol. 2 at 20. Nothing in this Court's decisions in *Bramer*, 180 F.3d at 703-704, and *Brugman*, 364 F.3d at 618, upon which Ruiz relies, support Ruiz's proposition that the kicks and knee strike were legitimate uses force.[12]

[12] Ruiz claims (Br. 32) that the Fort Worth use of force guidelines "give arguable support" for using the kick, knee-strike, and kick. That is incorrect. Officer Hubbard stated that an officer could use a strike or kick for distraction purposes, Trl. Tr. Vol. 3 at 51, but he did not testify that an officer could use kicks or strikes *to the head* — which are considered deadly force under the Fort Worth guidelines — as a "distraction."

c. Sufficient Evidence Shows That Ruiz Kicked Davis In The Head From The Right Side And That That Use Of Force Was Objectively Unreasonable

As to the kick that Ruiz delivered to Davis's head area from the right side after one handcuff had been put on Davis, Ruiz argues (Br. 33-34) that the evidence does not support the conclusion that that kick occurred or, if it did, it was objectively unreasonable. There was ample evidence of that kick. Although it occurred at a time when Air One's camera was shaking and cannot be seen on the videotape as clearly as Ruiz's other uses of force, it can be seen more clearly in the portion of the videotape that shows the arrest in slow motion. In any event, two officers testified that they remembered seeing the kick when it occurred.

Officer Broadus remembered seeing the kick land in the area of Davis's head. Trl. Tr. Vol. 2 at 88-89. Officer Yancey remembered this blow as a knee strike, but when he watched the videotape, he concluded that he had seen a kick rather than a knee strike. Trl. Tr. Vol. 2 at 26, 89. Although Sergeant Dennis did not see the kick when it happened, when he reviewed the videotape, he stated that it appeared that Ruiz stepped with his left foot and kicked with his right foot to Davis's head. Trl. Tr. Vol. 2 at 131. Again, the jury was free to credit this testimony as well as reaching its own conclusions regarding what the videotape depicts. *Loe*, 262 F.3d at 432 ("A jury is free to choose among reasonable

constructions of the evidence."); *Gonzales*, 436 F.3d at 571 ("We do not second guess the jury's credibility determination here.").

Ruiz also argues (Br. 34) that "[i]f he put his foot on Davis's head in order to hold it down * * * then that could very well [have been] a legitimate law enforcement use of force." There was no evidence in the record to show that Ruiz only put his foot on Davis's head rather than kicking him at that time. Ruiz does not argue that it would have been reasonable to kick Davis in the head area after one handcuff had been placed on him.

d. Ruiz's Stepping On Davis's Head After He Was Restrained Was Objectively Unreasonable

Ruiz concedes (Br. 34) that his stepping on Davis's head was excessive force. When this step occurred, Davis was handcuffed, not resisting, not threatening any of the officers, nor doing anything else to justify this use of force. In such situations, nearly any force will be excessive. See *Ikerd* v. *Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

* * * * *

Substantial evidence showed that the force Ruiz used against Davis was clearly excessive to the need and objectively unreasonable and so violated Davis's Fourth Amendment rights.

2. Sufficient Evidence Showed That Ruiz's Excessive Force Caused Injuries That Were More Than De Minimis

Ruiz argues (Br. 26-29) that the evidence did not show that Davis's injuries were caused by Ruiz's use of excessive force rather than by the actions of other officers' or Davis himself, and that there was no evidence showing that Davis felt any pain from anything that Ruiz did. That argument ignores the evidence. The government proved that Davis suffered significant injuries. Further, the evidence showed that repeated blows to Davis's head were the most likely causes of Davis's injuries.

Ruiz does not argue that Davis's injuries were *de minimis*, and they certainly were not. At the scene, Davis complained to the paramedic regarding a bloody lip and pain in his forehead, jaw, the right side of his neck, and his knee. Trl. Tr. Vol. 3 at 69-70. He had a hematoma and cut on his right temple, an abrasion on his right shoulder, and scratches near his eye. Trl. Tr. Vol. 2 at 44-45, 100; Vol. 3 at 72-73, 75; GX 22 (photograph of Davis after he returned from the hospital). At the scene, blood was coming from Davis's head and mouth, and there was a lot of blood on the ground where Davis had been lying. Trl. Tr. Vol. 2 at 31, 119, 128. These types of evidence were certainly more than *de minimis* in the context of the force needed to restrain Davis. See *Brugman*, 364 F.3d at 619 (injury more than *de minimis* where the officer's kick to the alien's chest, which was excessive, caused the alien to feel pain and lose his breath, and he felt residual pain for approximately

three days); *Gonzales*, 436 F.3d at 572 (evidence was sufficient to show more than a *de minimis* injury where the defendants' spraying the victim with pepper spray caused his mouth to "foam[]," caused "stinging pain," and caused his eyes to be swollen shut for three hours).

While Ruiz argues (Br. 29) that his conviction must be reversed because the circumstantial evidence more strongly supports the conclusion that something other than his excessive force caused Davis's injuries, the record does not support that argument. This Court has held that "[i]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, a defendant is entitled to a judgment of acquittal." *United States* v. *Brown*, 186 F.3d 661, 664 (5th Cir. 1999) (internal quotation marks omitted). The evidence in this case shows that Ruiz's repeated blows to Davis's head are the most likely cause of his numerous head injuries, and that the other causes simply cannot explain all of Davis's injuries. Contrary to Ruiz's argument, the circumstantial evidence in this case is far from being in equipose.

Ruiz kicked Davis in the head three times, delivered a knee-strike to his head, and stepped on Davis's head with the full weight of his body. In contrast, the other officers took Davis to the ground one time, delivered two open-palm strikes to the side of his head, and struggled with him to get his arms behind his back so

that he could be handcuffed. Davis himself flailed on the ground and moved his head from side to side. While the record shows that some of Davis's injuries might have been caused by something other than Ruiz's use of excessive force, it does not show that all his injuries could have been, nor that it was more likely that they were. Officer Yancey stated that the injuries visible on Davis's face were consistent with the kick that Yancey saw Ruiz deliver to Davis's head area. See Trl. Tr. Vol. 2 at 45. Yancey agreed that he had seen "a variety of blows to Mr. Davis that were capable of causing pain." Trl. Tr. Vol. 2 at 78-79.

Ruiz notes (Br. 27) that the struggle with Davis took place on pavement that caused three officers to skin their knees. As noted above, Davis also had a hurt knee, an abrasion on his shoulder, and scratches on his face. The government agrees that it is possible that these injuries may have been caused by struggling on the pavement. (Indeed, because Ruiz's blows were all directed at Davis's head area, it would seem unlikely that the blows caused Davis's knee injury.) But the abrasive pavement does not explain the rest of Davis's significant injuries. Nor could those injuries be explained by the two open-palm strikes that Officer Hubbard delivered to the side of Davis's head: Hubbard stated that the two open-palm strikes did not cause Davis to bleed as far as he was aware, Trl. Tr. Vol. 3 at 35, and Davis did not complain about pain in his ear area or the side of his head.

Ruiz also argues (Br. 27) that Officers Hubbard and Ladd could have caused "the visible injuries on Davis's face * * * by slamming Davis face-first into the pavement." Ruiz overstates the evidence on this point. Counsel for Ruiz tried to get Officer Hubbard to agree that he and Officer Ladd threw Davis to the pavement, but Hubbard would only state that he put Davis on the ground. Trl. Tr. Vol. 3 at 44. Ladd also testified that they put Davis on the ground. Trl. Tr. Vol. 3 at 64. Officer Yancey, on the other hand, testified that it was "fair" to state that Davis was thrown to the ground by the Fort Worth officers but he did not elaborate on that answer. Trl. Tr. Vol. 2 at 55. According to Hubbard, he and Ladd took Davis to the ground holding his arms, and they all hit the ground at about the same time. Trl. Tr. Vol. 3 at 45. While Hubbard stated that Davis "could have hit his face" on the pavement, he believed that Davis had hit the pavement chest first. Trl. Tr. Vol. 3 at 14, 45.

During the cross examination of Officer Hubbard, Ruiz's counsel asked: "[W]e have a scrape right here, and we have some road rash here. Don't you think that could have been caused when y'all slammed him on the ground?" Trl. Tr. Vol. 3 at 45. Hubbard responded: "Absolutely." Trl. Tr. Vol. 3 at 45. It is unclear from the record what precisely counsel was referring to when he indicated a "scrape" and "road rash." But it is clear from the record that the question did not ask Hubbard whether he thought the hematoma and cut on Davis's temple, his

bloody lip, or the pain he felt in his forehead, neck, and jaw were caused by "slamming him on the ground." Hubbard's testimony, therefore, does not contradict Yancey's testimony that the injuries visible on Davis were consistent with the kick delivered by Ruiz.

Even if the evidence showed that it was more likely that Davis hit the pavement face first than that he hit it chest first, Davis only hit the pavement one time, yet he suffered multiple injuries in his head area, including a hematoma and cut to his temple, a bloody lip, and pain in his forehead, neck, and jaw. Moreover, Davis did not have an injured nose although he did have a bloody lip — something which appears unlikely if he had in fact hit the pavement face first. Ruiz cannot credibly argue, therefore, that being taken to the pavement one time was more likely the cause of up to seven injuries to Davis's head area than Ruiz's repeated blows and his standing on Davis's head. Indeed, Officer Yancey's testimony showed that the kick Ruiz delivered to the right side of Davis's head area was a substantial blow: Yancey testified that he felt the blow and that he heard a thump. See Trl. Tr. Vol. 2 at 19.

Thus, the conclusion that Ruiz's repeated blows to Davis's head area and his standing on Davis's head caused Davis "some injury" is a "reasonable construction[] of the evidence," which is sufficient to sustain the conviction. See *Loe*, 262 F.3d at 432. Indeed, to accept Ruiz's argument, this Court would have to

conclude that the *only* reasonable construction of the evidence is that Ruiz's repeated blows to Davis's head area caused him *no* injury, while being taken to the ground chest first and flailing on the pavement caused all of the injuries to his head area. That is not a reasonable construction of the evidence, let alone the only reasonable construction.

The substantial evidence that Davis suffered pain from Ruiz's use of force is additional evidence that Ruiz's conduct resulted in bodily injury to Davis. While Ruiz argues (Br. 28) that "there was no evidence that [Davis] felt pain as a result of anything that Ruiz did," there was in fact overwhelming evidence that Davis felt pain from Ruiz's excessive force. As noted above, Davis complained to the paramedic at the scene about the pain from his injuries, and continued to complain when he was taken to jail. Also, Davis told the paramedic that he had been struck at least six times during the arrest. Trl. Tr. Vol. 3 at 71. This is direct evidence that Davis felt the blows that Ruiz delivered. The fact that Ruiz stepped on Davis's head with the full weight of his body, which can be seen from the videotape, at a time when Davis was indisputably conscious, is additional circumstantial evidence that Ruiz suffered "some injury" from this excessive force.

The audiotape made by Officer Yancey, which was played for the jury, is also direct evidence that Davis suffered pain from Ruiz's stepping on his head. Ruiz concedes that this action was objectively unreasonable. After Davis was

handcuffed, Officer Yancey tried to report on his handheld radio that Davis was in custody, and it was at this time that Ruiz stepped on Davis's head. Trl. Tr. Vol. 2 at 28. The audiotape shows that, at that time, Davis was moaning and pleading. GX 29 (processed audiotape on CD); GX 33 at 5 (government's transcript). The transcript of the audiotape records that before Yancey called in, Davis was crying "Agh! . . . Alright! Alright. . . . No. Please. Agh!" GX 33 at 5. And after Yancey called in, Davis continued to moan and said "please . . . please . . . no . . . no . . . wait, wait . . . please no . . . I'm not gonna fight." GX 33 at 5.[13]

* * * * *

There was sufficient evidence for the jury to conclude that Ruiz's excessive force caused "some injury" to Davis that was more than *de minimis*. The evidence, therefore, was sufficient to sustain the conviction.

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[13] Ruiz also argues (Br. 28) that Davis's drug use affected his ability to feel pain. Davis told Officer Broadus after his arrest that he had injected methamphetamine approximately one or two hours before. Trl. Tr. Vol. 2 at 108. Although Officer Yancey believed than Davis had a higher than normal tolerance to pain that night, Trl. Tr. Vol. 2 at 77, Ruiz concedes (Br. 28), that "Davis presumably felt pain," and, as discussed above, the evidence shows that in fact Davis did feel the pain from his injuries.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN INSTRUCTING THE JURY ON THE ELEMENTS OF THE OFFENSE

A. Standard Of Review

Because Ruiz preserved his challenges to the district court's jury charge, this Court reviews the district court's refusal to give Ruiz's requested jury charges for an abuse of discretion. *United States* v. *Cain*, 440 F.3d 672, 674 (5th Cir. 2006). "The district court retains substantial latitude in formulating its jury charge, and [this Court] will reverse only if the requested instruction is substantially correct; was not substantially covered by the charge as a whole; and if the omission of the requested instruction seriously impaired the defendant's ability to present a given defense." *Ibid.* (internal quotation marks and citation omitted). Similarly, Ruiz's challenge to the particular instruction given is also reviewed for an abuse of discretion. *United States* v. *Haas*, 171 F.3d 259, 267 (5th Cir. 1999). This Court will find reversible error in the district court's instruction only where "the jury charge, as a whole, misled the jury as to the elements of the offense." *Ibid.* (quoting *United States* v. *Devoll*, 39 F.3d 575, 579 (5th Cir. 1994)).

B. The District Court Did Not Abuse Its Discretion In Instructing The Jury

Ruiz challenges (Br. 38-50) the district court's refusal to give eight of Ruiz's requested jury charges. He also challenges (Br. 50-55) the phrasing of the district court's instruction regarding the element of willfulness. We first address the argument regarding the willfulness instruction.

1. The District Court's Willfulness Instruction Was Not An Abuse Of Discretion Because The Charge Included The Language That Ruiz Requested

As discussed above, Section 242 requires that the deprivation of rights be "willful," which is an essential element of the offense. See *United States* v. *Lanier*, 520 U.S. 259, 264 (1997). The Supreme Court discussed the willfulness element in *Screws* v. *United States*, 325 U.S. 91, 101 (1945), explaining that "when used in a criminal statute, [willful] generally means an act done with a bad purpose. In that event something more is required than the doing of the act proscribed by the statute. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." (Internal quotation marks and citations omitted). In *United States* v. *Kerley*, 643 F.2d 299, 303 (5th Cir. 1981), this Court reversed the defendant's conviction where the district court had not informed the jury that willfulness was an essential element of the offense, and although the district court had defined willfully as something done intentionally and knowingly, the court "did not instruct the jury that willfulness means an act which is done with

a bad purpose or an evil motive." (Citing *Screws*). While Ruiz argues (Br 54-55) that the district court's willfulness instruction was erroneous under *Kerley*, that argument is without merit.

In this case, the district court in fact used the precise phrase "bad purpose and evil motive," as this Court requires, when explaining the willfulness element to the jury: "I instruct you that an act is done willfully if it is done voluntarily and intentionally, and with the specific intent to do something that the law forbids; that is, with a bad purpose or evil motive either to disobey or disregard the law." Trl. Tr. Vol. 4 at 19-20. Ruiz's entire complaint is that the district court used this phrase when explaining at length the meaning of the element of willfulness — the explanation of that element is slightly more than a page of transcript, see Trl. Tr. Vol. 4 at 19-21 — rather than, as is done in this Court's model instruction (see Fifth Circuit 2001 Criminal Pattern Jury Charge 2.18), when the four elements of a Section 242 violation are set out. Ruiz cites no case, and the government is aware of none, that would suggest that a district court would exceed its "substantial latitude" in fashioning the jury charge by putting a particular phrase in one part of the explanation of an element rather than another.

On the contrary, in *United States* v. *Williams*, 132 F.3d 1055, 1062 (5th Cir. 1998), this Court held there was no abuse of discretion where the district court's instruction was "substantially the same" as the Fifth Circuit pattern instruction and

the defendant's proffered instruction. And in *United States* v. *Rodriguez*, 132 F.3d 208, 214 (5th Cir. 1997), this Court held that there was no abuse of discretion in the district court's refusal to repeat the mens rea instruction in the context of a conspiracy charge where it had been "properly addressed elsewhere in the jury charge." Necessarily then it was not an abuse of discretion for the district court in this case to not repeat this phrase when it was already properly addressed in the *same* charge.

This Court requires that jury instructions be examined "as a whole," not as individual sentences. See *Haas*, 171 F.3d at 267. The court's instruction certainly did not "[mislead] the jury as to the elements of the offense." *Ibid.* Indeed, Ruiz argues (Br. 55) only that the instruction "watered down" the willfulness element. It is not unusual for a court to give a short description of the elements of a criminal violation, and then go into some or all of the elements in greater detail. If anything, this approach puts more focus on the willfulness requirement. Ruiz's argument is without merit.[14]

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[14] Additionally, this Court has held that when reviewing challenges to jury instructions, the Court will review not only the jury charges as a whole, but also the arguments made to the jury. *United States* v. *Tovias-Marroquin*, 218 F.3d 455, 457 (5th Cir.), cert. denied, 531 U.S. 1058 (2000). Here, in both the government's and defendant's closing arguments, the parties described the willfulness element in terms of bad purpose and evil motive. See Trl. Tr. Vol. 4 at 29-30 (gov't closing argument) ("The judge just defined what willfulness is to you. He defined that the government has to prove that the defendant acted with the specific intent to do something the law forbids, that is, with a bad purpose, with evil motive either to

(continued...)

2. The District Court Did Not Abuse Its Discretion By Refusing To Give Ruiz's Requested Instruction Regarding Injury

Ruiz argues (Br. 38-42) that the district court abused its discretion by refusing to include two statements from his proposed instruction No. 9. The district court did not abuse its broad discretion.

a. De Minimis Injury

Ruiz argues (Br. 38-41) that the district court abused its discretion by declining to give the part of his requested jury charge regarding "*de minimis*" injury. The requested charge would have informed the jury that

> [t]he government need only show that the complainant suffered "some" injury although this requires proof of more than "de minimis injury." In determining whether an injury is more than de minimis you must look to the context in which the force was deployed. The amount of injury necessary to satisfy the requirement of "some injury" and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances. What constitutes an injury in this case is therefore subjective — it is defined entirely by the context in which the injury, if any, arose.

E.R.2 at 301. This instruction was a close paraphrase of this Court's decision in *United States* v. *Brugman,* 364 F.3d 613, 618 (5th Cir.), cert. denied, 543 U.S. 868 (2004).

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[14](...continued)
disobey or disregard the law."); Trl. Tr. Vol. 4 at 40 (defendant's closing) ("willfully, with bad purpose, evil motive"). These arguments certainly focused the jury's attention on the phrase bad purpose and evil motive, as Ruiz desired.

The district court charged the jury as follows regarding injury: "With regard to the fourth element, bodily injury, the indictment charges that the defendant's acts resulted in bodily injury to David Davis, Jr. You are instructed that bodily injury means any injury to the body. Bodily injury may or may not be accompanied by physical pain." Trl. Tr. Vol. 4 at 21. The district court did not abuse its discretion in refusing to charge the jury using the language from *Brugman*, as Ruiz requested, because the instruction was substantially covered in the charge as a whole and the omitted language did not substantially impair Ruiz's ability to argue his defense.

This Court has recognized "the difficulties a district court faces when trying to craft a jury charge which can be easily understood by a lay juror while properly and thoroughly explaining complex points of law." *United States* v. *Peterson*, 101 F.3d 375, 383 (5th Cir. 1996), cert. denied, 520 U.S. 1161 (1997). This Court's *Brugman* decision applied the "some injury" requirement of a Fourth Amendment violation to the element of "bodily injury" under Section 242. As this Court noted in *United States* v. *Gonzales*, 436 F.3d 560, 572 (5th Cir.), cert. denied, 126 S. Ct. 2045 (2006), the same inquiry is relevant both to whether a constitutional violation occurred and to whether that violation resulted in bodily injury under Section 242. The district court was not required to give two separate injury instructions — one

with respect to the Fourth Amendment and one for Section 242 — since the requirements overlap. See *Rodriguez*, 132 F.3d at 214.

Further, the term "*de minimis*" is legal terminology that is unlikely ever to be helpful to a lay jury unless there is a further charge explaining what it means. Ruiz's proposed instruction does not explain to the jury what level of injury would have satisfied the constitutional requirement of "some injury" in this case. Cf. *Haas*, 171 F.3d at 267 (Court noted in the context of "complex regulatory law," that "[d]istrict courts must be given added discretion when they distill the essential concepts from legal jargon"). Accordingly, the district court did not abuse its discretion in declining to give this proposed instruction to the jury

In any event, this was not a case that required the court or jury to consider whether the victim's injuries were so minor they fell below the legal standard. As discussed above, Davis suffered significant injuries including a hematoma and cut on his temple, a bloody lip, and continuing pain in his forehead, neck and jaw. The district court tailored its instructions to the evidence. Trl. Tr. Vol. 3 at 110 ("[w]e can't prepare a charge until all the evidence is in, and only then can we know how to tailor the charge to meet the evidence that's been presented"). This Court has upheld a district court's decision to "choose to draft a shorter charge on [the requested defense] which was carefully tailored to fit the facts of this particular case." *Peterson*, 101 F.3d at 383. Therefore, in light of the evidence

presented in this case, the district court's decision not to include any instruction regarding legally insignificant injuries was not an abuse of discretion.

Ruiz notes (Br. 40) that "[i]t was obvious that [his] defense at trial depended heavily on whether Davis was injured as a result of Ruiz' conduct." While that is a fair assessment of Ruiz's defense below, Ruiz is wrong to assert that the district court's refusal to give his requested *de minimis* injury instruction impaired his ability to present this defense. Ruiz argued below, as he argues on appeal, that the other officers or Davis himself caused his injuries. See, *e.g.*, Trl. Tr. Vol. 4 at 40 ("Every injury is consistent with him being slammed down on the street after being dragged out of the truck."). Ruiz was able to effectively argue his defense to the jury, and there was no abuse of the district court's discretion. Cf. *United States* v. *Wise*, 221 F.3d 140, 156-157 (5th Cir. 2000) (no abuse of discretion where, although district court properly refused to give *any* charge regarding spoilation of evidence, that did not deprive the defendants of the "opportunity to attack the mishandling of the evidence").

b. "Direct And Only" Causation

Ruiz also complains (Br. 41) that the district court did not give the part of his proposed charge No. 9 stating that the jury had to find that Davis's injuries "resulted directly and only from" the excessive force. E.R.2 at 295. Again, Ruiz took this language from this Court's decision in *Brugman*, 364 F.3d at 618. Ruiz

argues (Br. 41) that the district court's "charge did not address causation of Davis' injury at all much less with the specific requirement that it have been caused directly and only by Ruiz's actions." That argument ignores the clear statement in the district court's instructions that, to convict, the jury must find "*that the defendant's conduct resulted in bodily injury to the victim*." Trl. Tr. Vol. 4 at 17 (emphasis added).

The district court's instruction on this issue is substantially the same as this Court's pattern instruction, except that "resulted in bodily injury" was substituted for the pattern instruction's "died as a result." See Fifth Circuit 2001 Criminal Pattern Jury Instruction 2.18 (for 18 U.S.C. 242) ("[*Fourth:* That ___ died as a result of defendant's conduct."]). The district court's instructions regarding unreasonable force and bodily injury did not permit the jury to convict Ruiz merely by finding that Davis had suffered an injury from Ruiz's use of *reasonable* force. That is precisely the purpose of this Court's "directly and only" standard.

The language cited in Ruiz's proposed jury instruction originated in this Court's decision in *Johnson* v. *Morel*, 876 F.2d 477, 479-480 (5th Cir. 1989) (per curiam) (en banc), abrogated on other grounds, *Harper* v. *Harris County, Tex.*, 21 F.3d 597 (5th Cir. 1994) (eliminating "significant injury" requirement). This Court explained:

> To determine whether a constitutionally actionable "significant injury" has been inflicted, *the court must consider only the injuries*

> *resulting directly from the constitutional wrong*. There can be a constitutional violation only if significant injuries resulted from the officer's use of excessive force. Injuries which result from, for example, an officer's justified use of force to overcome resistance to arrest do not implicate constitutionally protected interests. An arrest is inevitably an unpleasant experience. An officer's use of excessive force does not give constitutional import to injuries that would have occurred absent the excessiveness of the force, or to minor harms. Nor can transient distress constitute a significant injury.

Ibid. (emphasis added and omitted). The clear import of that decision is that injuries — even serious injuries — caused by the use of reasonable force are not illegal and that where some of the force used was reasonable, an officer cannot be punished for injuries resulting from the reasonable force. Here, the district court's instructions did not permit the jury to convict Ruiz by finding that Davis had suffered an injury from the use of reasonable force.

Ruiz's defense below, as well as his argument in this Court, was that the evidence showed that the actions of the other officers or Davis himself caused the injuries rather than Ruiz's actions. The parties' arguments below presented the jury with the question whether there was a reasonable doubt that Ruiz's unnecessary force caused Davis's injuries, and Ruiz tried to create that doubt by pointing to other possible causes. The jury obviously rejected Ruiz's construction of the evidence, but that does not show that Ruiz was substantially impaired in arguing his defense.

3. The District Court Did Not Abuse Its Discretion By Refusing To Give Ruiz's Requested Instructions Regarding Unreasonable Force

Ruiz argues (Br. 42-50) that the district court abused its discretion by refusing to give six different proposed charges, each of which was a quotation or close paraphrase of language taken from different court opinions addressing unreasonable force. The district court did not abuse its discretion because the instructions were irrelevant to the facts of this case, substantially covered by other instructions, or their omission did not substantially impair Ruiz's defense.

a. Requested Instructions No. 2 (Right To Use Force) And No. 8 (A Certain Amount Of Force Is Reasonable)

Ruiz's requested charge No. 2, E.R.2 at 294, stated: "The right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Ruiz correctly notes (Br. 45) that this is a close paraphrase of language from *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). Similarly, Ruiz's requested charge No. 8 is a quotation of this Court's opinion in *Ikerd* v. *Blair*, 101 F.3d 430, 434 (5th Cir. 1996). That requested charge would have informed the jury that: "A certain amount of force is obviously reasonable when a police officer arrests a dangerous, fleeing suspect. On the other hand, the use of nearly any amount of force may result in a constitutional violation when a suspect poses no threat to the officer's safety or that of others, and the

suspect does not otherwise initiate action that would indicate to a reasonably prudent police officer that the use of force is justified." E.R.2 at 300.

The right to use some force was not disputed in this case. See Trl. Tr. Vol. 4 at 25 (gov't closing) ("of course a police officer is permitted to use force in certain situations, and the government's not disputing that"). As discussed above, the testimony of the other officers showed that each used force in restraining Davis. And the district court's charge regarding unreasonable force makes clear that legitimate force may be used. See, e.g., Trl. Tr. Vol. 4 at 18 (reasonableness of force is determined by all the circumstances "on the basis of that degree of force a reasonable and prudent officer would have applied").

Also, the first part of Ruiz's requested instruction No. 8 is irrelevant to the facts of this case because when Ruiz used excessive force, Davis was on the ground, not fleeing. The second part of the language is relevant only to Ruiz's stepping on Davis's head, which Ruiz concedes was not a legitimate use of force. It is unclear how Ruiz thinks that part of the instruction could have helped him.

While Ruiz argues (Br. 50) that the refused instructions "went to the very heart of Ruiz' defense," Ruiz does not assert any argument that he was unable to make because of the refused instruction. He has not shown, therefore, how the district court could have abused its discretion by failing to include an instruction about issues that were not in dispute or were irrelevant to this case.

b. Requested Instructions No. 4 (Objective Standard), No. 6 (20/20 Hindsight), and No. 7 (Split-Second Decisions)

These three requested instructions also involved quotes from cases that discussed some of the factors that can be relevant to determining whether force was objectively unreasonable. Ruiz has not shown that the district court abused its discretion in refusing these instructions.

Ruiz's requested charge No. 4 was a close paraphrase of language from this Court's opinion in *Brugman*, 364 F.3d at 616, that whether force is reasonable is measured by an "objective standard" based on "the facts and circumstances confronting him." The district court's charge made clear that the reasonableness of the force used was to be measured by what a reasonable and prudent officer would have done based on all the circumstances. See, e.g., Trl. Tr. Vol. 4 at 18 (reasonableness of force is determined by all the circumstances "on the basis of that degree of force a reasonable and prudent officer would have applied"); Trl. Tr. Vol. 4 at 19 ("you should consider all the circumstances of the case from the point of view of an ordinary and reasonable officer on the scene").

Ruiz's requested instruction listed some of the specific circumstances that this Court had identified in *Brugman*: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." E.R.2 at 296. The district court did not abuse its discretion in refusing this

requested instruction because the charge already indicated that "all circumstances" could be considered. Moreover, the refusal to give these specific examples in no way precluded Ruiz from arguing that the circumstances of this case justified his use of force. See, e.g., Trl. Tr. Vol. 4 at 37-38 (describing the seriousness of Davis's illegal conduct); Trl. Tr. Vol. 4 at 39 (comparing Ruiz's kicks to Hubbard's palm strikes); Trl. Tr. Vol. 4 at 40 (challenging government's assertions that Davis did not fight or threaten the officers).

Similarly, Ruiz's requested charge No. 6 would have informed the jury that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." E.R. 2 at 298. Ruiz correctly notes (Br. 46-47) that this is another quote from *Graham*, 490 U.S. at 396. Again, this language was substantially covered by the district court's charge, which informed the jury that "you should consider all the circumstances of the case from the point of view of an ordinary and reasonable officer on the scene." Trl. Tr. Vol. 4 at 19. While the language referring to 20/20 vision of hindsight is a nice rhetorical flourish, defense counsel's closing argument emphasized the nearly four-and-one-half years between the incident and the trial and encouraged the jury not to second guess Ruiz's decision. See, e.g., Trl. Tr. Vol. 4 at 39 ("That's the problem with going back four and a half

years later on an adrenaline saturated event and picking it apart with a fine tooth comb").

Ruiz's requested charge No. 7 is another quote from *Graham*, 490 U.S. at 396-397. The requested charge would have informed the jury that: "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." E.R.2 at 299. Again, the district court's charge informed the jury that it had to determine whether Ruiz's use of force was unreasonable based on all the circumstances from the point of view of a reasonable prudent officer on the scene. Trl. Tr. Vol. 4 at 17-19. The jury heard extensive testimony from the other officers about what they perceived during the struggle with Davis. And the government's closing mentioned the issue of officers' making split-second decisions. Trl. Tr. Vol. 4 at 30 ("Are the defendant's actions to be excused because they were split-second decisions?").

Ruiz has not shown that refusing these instructions was an abuse of discretion. The jury was instructed that it had to determine reasonableness based on all the circumstances from the view of a reasonable officer on the scene, and Ruiz was fully able to argue that the circumstances of this case showed his use of force was legitimate.

c. Requested Instruction No. 5 (Push or Shove)

Ruiz's requested charge No. 5, E.R.2 at 297, would have informed the jury that "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Ruiz correctly notes (Br. 46) that this is a quotation from *Graham*, 490 U.S. at 396. It is not entirely clear from Ruiz's argument in this Court how he believes he would have used this instruction in his argument to the jury. The Supreme Court discussed this language, which is a quotation from an opinion written by Judge Friendly, see 490 U.S. at 396 (quoting *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (5th Cir.), cert. denied, 414 U.S. 1033 (1973)), in the context of the need to analyze the reasonableness of a use of force from the perspective of a reasonable officer on the scene. If Ruiz would have relied on this instruction for that point, then, as discussed above, the instructions given by the district court already covered that issue.

If, on the other hand, Ruiz's argument is that he would have relied on this quote to argue to the jury that his use of force against Davis was *de minimis* and therefore not constitutionally cognizable, that is, emphasizing the "push or shove" aspect of the quoted language, such an argument would have been unsupported by the evidence. This case involved Ruiz's repeatedly kicking Davis's head, which is considered deadly force, and Ruiz's stepping on Davis's head with the full weight of his body. Thus, the force used by Ruiz was significant. Although such minor

uses of force as a push or shove might not be constitutionally cognizable, the evidence of Ruiz's significant use of force in this case made that issue irrelevant. The district court, therefore, did not abuse its discretion in refusing to give this instruction to the jury.

CONCLUSION

The Court should affirm Ruiz's conviction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2006, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, along with a computer disk containing an electronic version of the brief, were served by Federal Express, next business day delivery, on:

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I further certify that, on the same date, copies of the United States' brief were sent by Federal Express, next business day delivery, to the Clerk of the United States Court of Appeals for the Fifth Circuit.

_____
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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 11,977 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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July 19, 2006