No. 11-10494

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHRISTINE LILLIE THINN,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF BAIL / DETENTION STATUS

Defendant Christine Lillie Thinn was sentenced on September 26, 2011, to six months' imprisonment, to be followed by 180 days of home confinement with electronic monitoring as part of her one year of supervised release. Pursuant to Circuit Rule 28-2.4, I state that, according to the Federal Bureau of Prisons (BOP) inmate locator database, as of June 4, 2012, the defendant is no longer in BOP custody. Upon information and belief, the defendant is serving the home confinement portion of her sentence.

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STATEMENT OF JURISDICTION

This is a direct appeal from a district court's final judgment in a criminal case. The district court, which had jurisdiction under 18 U.S.C. 3231, entered its judgment on September 27, 2011. E.R. 5-7.[1] Defendant Christine Lillie Thinn

[1] Citations to "E.R. ___" refer to the page number in the excerpts of record the defendant submitted with her opening brief. Citations to "S.E.R. ___" refer to the page number in the supplemental excerpts of record the United States submitted with its responsive brief. Citations to "Def. Br. ___" refer to the page number in the defendant's opening brief.

filed a timely notice of appeal on September 28, 2011. E.R. 8-9; Fed. R. App. P. 4(b)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court plainly erred when it permitted percipient law enforcement witnesses to testify regarding their first-hand observations and the circumstances surrounding the defendant's use of force against the victim.

2. Whether the district court abused its discretion when it limited evidence of the victim's specific instances of prior misconduct to evidence that was relevant and probative and that would not result in confusion or undue delay.

STATEMENT OF THE CASE

This is a civil rights case in which the defendant, a former Senior Police Officer with the Navajo Police Department (NPD), was convicted on one count of deprivation of rights under color of law based upon her having kicked and stomped on a handcuffed arrestee in her custody. E.R. 1, 3. On August 10, 2010, a grand jury sitting in the District of Arizona returned an indictment charging the defendant with deprivation of rights under color of law, in violation of 18 U.S.C. 242 (Count One), and assault with a dangerous weapon committed within Indian Country, in violation of 18 U.S.C. 113(a)(3) and 1153 (Count Three).[2] E.R. 1-2. The

[2] The dangerous weapons charged in Count Three of the indictment were the defendant's shod feet. E.R. 2. Both the defendant and the victim are members

(continued…)

indictment also charged co-defendant Phillip Bedonie, Jr., a former NPD Sergeant, with deprivation of rights under color of law by failing to prevent the defendant from assaulting the victim, in violation of 18 U.S.C. 242 (Count Two).[3] E.R. 1-2.

The defendant pleaded not guilty and elected to proceed to trial. E.R. 532. On the morning of the first day of trial, the defendant and the United States reached an agreement pursuant to which the defendant would plead guilty to a misdemeanor 18 U.S.C. 242 offense and agree to not work in law enforcement. E.R. 44-45. The district court rejected this plea agreement because the parties had not adhered to the court's plea deadline. E.R. 53-56.

On June 29, 2011, the jury found the defendant guilty of deprivation of rights under color of law; however, the jury also found that the offense did not involve a dangerous weapon or result in bodily injury to the victim, making it a misdemeanor conviction. E.R. 3, 491; 18 U.S.C. 242. The defendant was acquitted on the assault with a dangerous weapon charge. E.R. 3, 491. The jury acquitted Bedonie. E.R. 4, 492.

(…continued)
of the Navajo Nation and the assault alleged in Count Three occurred within the territory of the Navajo Nation. E.R. 2, 185.

[3] At the time of the incident, the defendant and Bedonie were legally married, although separated. E.R. 401; S.E.R 105.

On September 27, 2011, the district court sentenced the defendant to a split sentence of six months' imprisonment, to be followed by 180 days of home confinement with electronic monitoring as part of the defendant's one year of supervised release. E.R. 5-7, 522-524. The defendant filed a timely notice of appeal on September 28, 2011. E.R. 8-9. On June 4, 2012, the defendant completed her period of imprisonment in BOP custody and she is believed to be serving the home confinement portion of her sentence.[4]

STATEMENT OF THE FACTS

1. Offense Conduct

In the early morning hours of January 1, 2009, NPD Officer Keith Lane responded to a family dispute in Gap, Arizona. E.R. 148-149. Apparently, a man named Newton Charlie had hit the front door of his grandmother's house with an axe. E.R. 149; S.E.R. 28-29. When Lane arrived at the residence at approximately 2:00 a.m., he encountered Charlie's uncle, an elderly female, and Charlie, whom the family had tied up with baling twine. E.R. 149-150; S.E.R. 27. Lane handcuffed Charlie, untied him, and called for an ambulance because Charlie had a cut on his arm that was bleeding. E.R. 150-151. Lane was told that Charlie had

[4] See BOP Inmate Locator search results, available at http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch&needingMoreList=false&FirstName=Christine&Middle=&LastName=Thinn&Race=I&Sex=F&Age=&x=67&y=16 (last visited on June 11, 2012); E.R. 5-7, 522-524.

been injured when his girlfriend's sister stabbed him. S.E.R. 28. Lane then placed the unresisting Charlie into his police car and began driving to Tuba City. E.R. 151-153. Lane did not believe there was any need to use force because Charlie was injured and compliant. E.R. 154.

En route to Tuba City, Lane met up with the ambulance that had been dispatched. E.R. 152-153. At the request of the emergency medical technicians (EMTs), Lane unhandcuffed Charlie and transferred him to the ambulance for transport to Tuba City Medical Center. E.R. 153-154. Lane told the EMTs that Charlie could get violent. E.R. 166-167; S.E.R. 30-31. Lane followed the ambulance to Tuba City, but then was dispatched on another call. E.R. 155. The ambulance continued on to the hospital without a police escort or any officer to watch over Charlie. E.R. 155. Sometime later, dispatch informed Lane that Charlie had walked out of the hospital and said that he was going back to Gap for revenge. E.R. 155, 167.

Charlie denied that he returned to Gap because he wanted revenge. E.R. 212; S.E.R. 79-80. According to Charlie, after he was treated, he waited approximately an hour for the police to come to the hospital and when they did not arrive, he walked to his aunt's house. E.R. 188-189; S.E.R. 89, 94. Sometime later, Charlie asked his aunt to take him back to Gap because he wanted to go to

sleep. E.R. 189-190, 212; S.E.R. 75. Charlie testified that as soon as he got home, he went to bed. S.E.R. 76, 90.

Later that morning, at 5:11 a.m., the defendant, a Senior Police Officer with NPD K-9 unit, and Albert Clark, an acting Sergeant with that unit, arrived at the same residence in Gap in response to a call of a house fire.[5] E.R. 79-82, 92, 97, 362; S.E.R. 16-17. A few minutes after they arrived, the defendant reported to dispatch that there was a small propane bottle on fire in the attic that was emitting smoke. E.R. 82, 369.

Once the fire department arrived, a man told the officers that his nephew, Charlie, had started the fire and that Charlie had threatened his grandmother with an axe. E.R. 102; S.E.R. 6. Charlie's uncle also told the defendant and Clark that Charlie had escaped from police custody earlier that day. S.E.R. 7. Both Clark and the defendant had heard radio transmissions regarding an incident involving an axe and a person leaving police custody. E.R. 363-364, 366; S.E.R. 13-14.

Charlie's uncle asked that the officers take Charlie into custody and then escorted the officers to the house next door. E.R. 102-103, 190; S.E.R. 7-8. Clark placed Charlie in handcuffs because he had escaped police custody earlier that day. E.R. 104-105. Charlie believed that he was being arrested for arson. S.E.R. 87.

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[5] Clark was referred to as "Deputy Clark" at times during his testimony, presumably because at the time of the trial he was employed as a sheriff's deputy with Apache County. E.R. 88, 93.

Charlie pulled and twisted away from Clark, but the only force Clark used was to hold Charlie while the defendant handcuffed him. E.R. 105; S.E.R. 9. Charlie did not strike or attempt to strike either of the officers. E.R. 106.

Clark took Charlie outside and placed him in the defendant's police vehicle. E.R. 106. Charlie was twisting, pulling, and verbally threatening his family and the officers. E.R. 108-109. Charlie testified that earlier in the evening, before he was arrested and went to the hospital, he had consumed three or four 40-ounce bottles of malt liquor. E.R. 212; S.E.R. 87. According to Charlie, he was still somewhat under the influence of alcohol when he was arrested a second time that morning. S.E.R. 92. Clark did not feel threatened by Charlie and only used enough force to guide him into the back seat of the vehicle. E.R. 109-111.

The officers then drove back to Tuba City in their separate vehicles with Clark following the defendant. E.R. 114, 376, 380. The 20-mile trip from Gap to Tuba City took about 30 minutes. E.R. 98-99, 114. The officers spoke to each other on their cellular telephones for 16 minutes during the trip and sent each other text messages.[6] E.R. 114-117. At no point did the defendant ask for assistance nor did Clark hear anything that caused him to worry about the defendant's safety. E.R. 115, 117. En route to Tuba City, Clark learned that the jail was not accepting

[6] Clark and the defendant were dating at the time of the incident. E.R. 121, 366.

any more prisoners. This prompted Clark to contact NPD Sergeant Darrell Sombrero and a prosecutor, so that the jail would make room for the new arrestee. E.R. 124.

Charlie testified that after the defendant got off her cellular telephone, she began to argue with him. E.R. 195-196. Charlie and the defendant yelled and cursed at each other, and the defendant said something about her younger brother, Fabian Thinn. E.R. 158-159, 195-196; S.E.R. 132. A few months earlier in November 2008, NPD Officer Fabian Thinn, had attempted to arrest Charlie for public intoxication. E.R. 196-197, 213, 397. Charlie ran from Fabian Thinn, who chased after Charlie, but tripped and fell and may have sprained his ankle while in pursuit. E.R. 197-198; S.E.R. 148-149. Another officer apprehended Charlie. E.R. 198. When Fabian Thinn caught up to them, he hit Charlie repeatedly and also hit him in the head with a set of handcuffs. E.R. 198; S.E.R. 149. As a result, Charlie needed stitches in his head. E.R. 199. Ultimately, other officers separated Fabian Thinn and Charlie and placed Charlie under arrest. E.R. 198-199. During Charlie's apprehension, Fabian Thinn may have dropped his gun on the ground near Charlie. E.R. 213; S.E.R. 132, 146. Fabian Thinn claimed to have hit Charlie to prevent him from getting the weapon he had dropped. S.E.R. 149.

During trial, the defendant acknowledged was she not "pleased" that her brother had been hurt during this incident with Charlie. S.E.R. 135. Clark also

testified that the defendant told him that she was upset the day they arrested Charlie because Charlie had been stalking her and had hurt her brother during a previous altercation. S.E.R. 4-5. The defendant felt like nothing had been done about Charlie and that he had gotten away with hurting her brother. S.E.R. 4-5, 19-20.

When the defendant arrived at the Tuba City jail, she parked her vehicle and she and Charlie continued to yell and curse at each other. E.R. 201-202. Tensions were high and the defendant appeared to be angry. E.R. 201-202. The defendant told Charlie, among other things, "[m]y brother said that you were threatening him," "[m]an, you're fucked up threatening my brother," and "I'm going to get you for threatening and shit." S.E.R. 96, 98. The defendant admitted that she yelled at Charlie and that she was "a little bit upset." E.R. 384; S.E.R. 133.

Charlie testified that the defendant opened the back door of her vehicle and pepper sprayed him in his face and then closed the vehicle door so that Charlie was trapped inside the arrestee compartment with the pepper spray. E.R. 202-203; S.E.R. 111, 136-137. The defendant put on her gloves and, without any warning, pulled Charlie out of the vehicle and threw him to the ground as she said, "I will teach you not to fuck with this man." E.R. 203; S.E.R. 81-84, 98, 112. The defendant then began hitting Charlie. E.R. 203-204; S.E.R. 84. Charlie felt strikes all over his body. E.R. 204. Charlie did not hit, kick, spit on, or otherwise resist

the defendant. S.E.R. 82-84. Charlie testified that he began to have difficulty breathing; he felt a choking sensation and mucus was coming out of his mouth. E.R. 204; S.E.R. 85. As he lay on the ground, he was trying to move around so that he could breathe.[7] E.R. 205.

Seconds after the defendant pulled Charlie from her vehicle, Bedonie approached them. S.E.R. 113, 115, 117-118, 120. Bedonie initially ran towards the defendant, but slowed down as he got closer. S.E.R. 138, 150-151. Bedonie told the defendant, "I got him." E.R. 422, 430; S.E.R. 134. He then told Charlie to remain on his stomach and placed his foot on Charlie's back to keep Charlie face down on the ground. E.R. 119-120; S.E.R. 122, 139-142.

Moments later, Clark arrived and he parked his vehicle directly behind that of the defendant. S.E.R. 10, 124-125, 127. Clark remained seated in his vehicle, where he saw Charlie lying face-down on the ground while the defendant kicked and hit him. E.R. 118-119; S.E.R. 124-125, 127. Specifically, Clark saw the defendant kick Charlie twice in the side of his torso and strike his head with her

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[7] The defendant's version of events, which the jury rejected, was that she pepper sprayed Charlie and removed him from her vehicle because he was hitting his head and kicking his legs inside her vehicle. E.R. 381, 383-384; S.E.R. 112-114. The defendant claimed that she and Charlie fell to the ground, where he got a hold of her leg and twisted her back down to the ground. S.E.R. 116. The defendant acknowledged that she kicked Charlie, but she claimed to have done so because she was scared and she wanted Charlie to stay on the ground. S.E.R. 120-123. The defendant denied having punched Charlie. E.R. 386; S.E.R. 127.

hand. E.R. 118-119, 135-136. Clark did not see Charlie engage in any behavior that would have made a strike to his head necessary. E.R. 118-119. In fact, Clark saw no action on the part of Charlie; he was just yelling. E.R. 119-120. Clark did not get out of his vehicle to assist the defendant because he did not think she needed any assistance. S.E.R. 18.

At some point, the defendant radioed dispatch about her use of pepper spray. E.R. 85-86; S.E.R. 111-112. Lane and Senior Police Officer Eric Dodson heard the defendant's radio call and hurried over to the Tuba City police department to lend assistance. E.R. 156, 172-174. Less than two minutes after Clark arrived, Lane and Dodson pulled into the police station parking lot, which was immediately adjacent to the jail. E.R. 156-157, 174, 386; S.E.R. 124. When they arrived, Lane and Dodson realized that there was no reason to hurry because Charlie was under control and there was no need for assistance. E.R. 156-157, 174, 176; S.E.R. 38, 45. The defendant was kneeling on top of Charlie, who lay face-down on the gravel-covered ground with his hands cuffed behind his back. E.R. 157, 174-175, 177. It appeared that Charlie had been pepper sprayed because his face was an orange-ish color, he was gasping for air, and he was moaning and moving his face around. E.R. 160-161, 177. He was not actively resisting. E.R. 176; S.E.R. 67.

As the officers walked towards the defendant, Bedonie, and Charlie, Lane saw the defendant punch Charlie in the head as she said something about her

brother. E.R. 157-160. Lane initially testified that he was unsure if the defendant's blow made contact with Charlie, although he later referred to defendant's use of force as a punch. E.R. 157, 159-160. Dodson observed the defendant attempt to punch Charlie in the face, but he said he was unsure if the defendant made contact with Charlie. E.R. 174-175; S.E.R. 66.

Lane and Dodson began talking to the defendant and Bedonie about what a busy night it had been. E.R. 159; S.E.R. 58. As the officers talked, Charlie tried to roll over onto his back; each time he tried to do so, Bedonie used his foot to push Charlie back onto his belly. E.R. 160, 180-181. To Lane, it appeared that Charlie was trying to roll onto his back so that he could breath. E.R. 161. Dodson believed that Charlie's motions were consistent with those of a person who had been pepper sprayed, not someone who was resisting the police. S.E.R. 72.

Lane did not see Charlie act aggressively or violently in any way outside the jail and he did not observe anything that would have called for force to be used. E.R. 164; S.E.R. 40. Lane was uncomfortable with the defendant's and Bedonie's treatment of Charlie, but he did not say anything because he was new to NPD. S.E.R. 31-32. Based on what he observed outside the jail, Lane did not believe that there was any legitimate law enforcement purpose for the defendant's actions towards Charlie. S.E.R. 40.

Dodson also observed that Charlie was not resisting and did not appear to be out of control. E.R. 176; S.E.R. 68. Dodson did not observe anything that would have called for any additional force beyond placing Charlie in handcuffs and deploying pepper spray. E.R. 176; S.E.R. 46. Based on what he saw, Dodson did not think that there was any reason for the defendant to have attempted to punch Charlie. E.R. 181.

Sergeant Sombrero arrived soon thereafter and saw Charlie lying on the ground. E.R. 124, 261. Sombrero did not think that Charlie should be on the ground, but should have been inside a police vehicle or inside the jail. E.R. 262. After speaking with Clark, Sombrero decided that they would book Charlie and directed Bedonie to take Charlie inside the jail. E.R. 261-262. Bedonie then picked Charlie up by the back of his waistband and dragged him into the jail. E.R. 162; S.E.R. 48, 144-145. Dodson came to assist so that Charlie's head and face would not drag on the ground. E.R. 162-163, 245; S.E.R. 48, 69.

After Charlie was taken into the jail, Sombrero spoke with Lane and Dodson about what they had observed. E.R. 182; S.E.R. 22. Dodson told Sombrero that he did not think that the force he had observed should have been used. E.R. 182. Sombrero told Lane and Dodson to write witness statements to document what they had seen. E.R. 182. Sombrero also instructed Lane that he could intervene if

he saw more senior officers doing something he thought was inappropriate. S.E.R. 22.

Later that morning, Charlie requested medical attention while he was at the Tuba City jail. E.R. 223. One of the corrections officers, Georgina Jackson, observed that Charlie had a laceration on his arm, which was swollen and appeared to require medical attention, so Jackson called for a medical unit. E.R. 224. As the EMTs examined Charlie, he told Jackson that "the cops" had "kicked [his] ass" outside the jail. E.R. 224-225. This statement prompted Jackson to review the jail surveillance video to see if anything had been recorded. E.R. 225-226. Jackson found video recordings that depicted a portion of the defendant's assault on Charlie. The video recordings depicted, among other things, the defendant pulling Charlie out of her vehicle (E.R. 239), Charlie lying on the ground (S.E.R. 99, 101), and the defendant kicking and stomping on him (E.R. 240, 260, 343).

Jackson saved the video recordings to her personal thumb drive and two separate computers at the jail because she thought that what she saw on the video was wrong. E.R. 226-229. Jackson also spoke to her supervisor about the incident, who directed her to write a report. E.R. 228. Jackson was later informed that copies of the video that she had saved to the jail computers could not be located, which prompted her to supply the copy she had saved to her personal thumb drive. E.R. 232-233.

2. Rulings On Evidentiary Issues

a. On June 6, 2011, the defendant moved *in limine* to exclude the testimony of "multiple witnesses to give expert opinions." S.E.R. 167; see also S.E.R. 180-186 (United States' opposition). The district court addressed this motion at the final pre-trial conference. S.E.R. 156-165. The court noted that the identified witnesses were "percipient witnesses that may be allowed to give lay opinions in order to understand their evidence" (S.E.R. 157), but reserved ruling on the motion (S.E.R. 162). By way of general guidance, the court instructed the parties that the admissibility of the testimony would be governed by Federal Rule of Evidence 701, pursuant to which the witnesses would be able to describe the conduct they observed and offer opinions that would be helpful to their testimony and that did not draw upon specialized knowledge. S.E.R. 162-163. On June 20, 2011, the district court issued a written order denying the defendant's motion without prejudice because it could not "be decided out of context of the actual testimony to be given." S.E.R. 187.

At trial, Clark, Lane, and Dodson testified regarding their first-hand observations on January 1, 2009. Clark and Dodson had not seen the video recording of the incident and testified based on their personal knowledge. E.R. 123, 134; S.E.R. 46. Lane acknowledged that he had seen the video recording of the incident (E.R. 164); however, he was neither questioned about the video

recording, nor was it played during his testimony (E.R. 144-167; S.E.R. 21-41). Lane testified as to his perception of the defendant's actions and the surrounding circumstances. E.R. 157-160. The defendant did not object to any of the testimony from Clark, Lane, and Dodson about their first-hand observations.

Clark, Lane, and Dodson also testified about their NPD training concerning the use of force and treatment of persons in custody – the same training the defendant received. E.R. 88-89, 91-92, 144-147, 168-171; S.E.R. 107-108. Clark, Lane, and Dodson relayed their understanding, based upon their NPD training, of the levels of force and the circumstances in which it is permissible to use force. E.R. 89-91, 145-147, 169-171; S.E.R. 42-44. Clark testified that a strike to someone's head is permitted only in defense of the officer's or someone else's life; that is, when it is a deadly force situation. E.R. 118. Lane testified that an NPD officer may only use force for a legitimate law enforcement purpose and not because an officer is angry at a person. E.R. 145-146; S.E.R. 39. Dodson testified that an officer may only use the force necessary to control the person and until there is no active resistance. S.E.R. 68. This testimony regarding the officers' use of force training was admitted almost entirely without objection. In fact, the defendant herself testified as to her training with regard to the circumstances under which force may be used. S.E.R. 107-108. The defendant objected only to the

question whether an officer may use force because the officer is angry. E.R. 145-146. This objection was overruled. E.R. 146.

On cross-examination, the defendant's attorney asked Clark a series of hypothetical questions regarding the use of force (over the United States' objection), which called for Clark to express an opinion regarding the reasonableness or unreasonableness of a particular hypothetical action.[8] E.R. 129-131; S.E.R. 15. Ultimately, the district court sustained the United States' objection on the ground that Clark had offered lay, not expert testimony. E.R. 131-132.

Although the defendant's attorney believed that Clark had opined on the reasonableness of the defendant's use of force (E.R. 131-132), no such opinion was offered through Clark or any other government witness. Clark related his understanding of when a strike to the head is permitted and that, based on his first-hand observations, Charlie did not engage in any behavior that would have permitted such a strike. E.R. 118-119. Lane testified that he did not observe anything that would have called for the defendant to have used force against Charlie, and that he did not see any legitimate law enforcement purpose for the defendant's actions. E.R. 164; S.E.R. 40. Dodson testified that he did not observe

[8] The defendant's attorney also asked a series of hypothetical questions of Lane regarding the use of pepper spray and an officer's responsibilities vis-à-vis the arrestee after discharging pepper spray. S.E.R. 24-26. The use of Oleoresin Capsicum spray (pepper spray) was not a basis for the defendant's Section 242 conviction. E.R. 1; S.E.R. 154-155.

anything that would have called for additional force beyond placing Charlie in handcuffs and pepper spraying him, and that he did not think there was any reason for the defendant to have attempted to punch Charlie. E.R. 176, 181; S.E.R. 46.

The defendant did not object to this testimony from Clark, Lane, or Dodson other than a question as to whether Lane saw "any legitimate law enforcement purpose for what Defendant Thinn did to Newton Charlie." E.R. 164, 181; S.E.R. 21-22, 39-40, 46. The basis of the defendant's objection was that the question, which was posed on re-direct, was beyond the scope of the witness's testimony. S.E.R. 39. The district court sustained the objection because the question was unclear. The defendant failed to object to the re-phrased question: "Based on what you observed outside the jail, was there any legitimate law enforcement purpose for what you saw Defendant Thinn do to Newton Charlie when he was lying on the ground, handcuffed behind his back?" to which Lane responded, "No." S.E.R. 40.

b. The defendant filed a motion on June 9, 2011, to admit pursuant to Federal Rule of Evidence 404(b) evidence of the November 2008 incident involving Charlie and the defendant's brother and evidence that Charlie used an axe to enter his grandmother's home, was arrested, and escaped police custody before the defendant's assault of Charlie. S.E.R. 168-179. At the final pre-trial conference, the district court discussed this motion with the parties, but reserved

ruling.[9] E.R. 21-22, 26-27, 29. On June 21, 2011, the first day of trial, the district court ruled that it would allow evidence of what the defendants heard over the radio on the day of the incident. E.R. 36. The district court ruled that because the United States intended to offer evidence of the November 2008 incident, it would allow the defendants to put in reasonable evidence and cross-examine government witnesses, provided that such evidence could be presented efficiently and would not result in a collateral trial. E.R. 40-41.

Consistent with this ruling, the district court struck comments by Bedonie's attorney during his opening statement and closing argument that described Charlie as a "known commodity" and that relayed information about Charlie that was not known by the defendant or Bedonie at the time of Charlie's arrest because they were improper character evidence, irrelevant, and confusing. E.R. 63-68, 70-73, 476-481. During trial, the district court also excluded evidence of Charlie's argument with a relative before his first arrest on January 1, 2009 (E.R. 73); questions as to whether Charlie had, in fact, started the house fire (S.E.R. 77);

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[9] At the final pre-trial conference, the district court indicated that it would allow evidence of what the defendant and other officers had heard over the radio regarding Charlie as probative of the defendant's state of mind, even though the proffered evidence was attenuated from the conduct at issue and of limited probative value. E.R. 21, 26, 29. The district court indicated that it would exclude any direct testimony or collateral evidence about the underlying events themselves as extraneous, risking confusion, and presenting a waste of time. E.R. 21-22, 26-27, 29.

testimony regarding Charlie's alleged possession of narcotics at the time of his second arrest on January 2009 (S.E.R. 91); and evidence of negative information Dodson had been given about Charlie and threatening statements Charlie allegedly made during the November 2008 incident, since neither the defendant nor Bedonie knew of this information (E.R. 218-222; S.E.R. 57). The district court also limited extrinsic evidence about the November 2008 incident to the testimony of Charlie and Fabian Thinn. E.R. 213-217.

The district court admitted evidence that Charlie had been convicted of a felony offense of driving under the influence of alcohol (E.R. 185); that in November 2008, Charlie was arrested for public intoxication, fled the police, may have fought with and injured NPD Officer Fabian Thinn, and may have tried to get Fabian Thinn's gun (E.R. 196-198, 213, 397; S.E.R. 146, 148-149); that the defendant told Clark that Charlie had been stalking her and had hurt her brother during the November 2008 incident (S.E.R. 4-5); that on January 1, 2009, Charlie may have threatened his grandmother, hit the front door of her house with an axe, started a fire at her house (E.R. 102, 149; S.E.R. 6, 28-29); that Charlie escaped police custody and may have returned to Gap for revenge (E.R. 155, 167; S.E.R. 7), and was arrested for disorderly conduct and fighting with his family, escaping police custody, and possibly arson (E.R. 104-105; S.E.R. 39, 87); and that in approximately February 2010, Charlie got a tattoo on his chest that reads "fuck the

cops" to reflect his feelings about law enforcement as a result of the incident involving the defendant (E.R. 208-209, 217; S.E.R. 73-74, 86).

SUMMARY OF THE ARGUMENT

The district court did not plainly err in admitting the testimony of Clark, Lane, and Dodson, who were percipient witnesses to the defendant's use of force against Charlie. These officers properly testified as to the conduct and demeanor of the defendant and Charlie based on their first-hand observations. As this Court has recognized, such testimony was not opinion testimony; it was merely testimony based on personal knowledge that was relevant to a contested fact. Consistent with the holdings of this Court and the Fourth and Eleventh Circuits, Clark, Lane, and Dodson offered lay opinions on whether they saw any need for the defendant to use force against Charlie when he was lying face-down on the ground, unresisting, and struggling to breath due to the effects of pepper spray. Such lay opinion testimony was rationally related to the witnesses' perception, was helpful to the jury in deciding whether the defendant willfully used unreasonable force against Charlie, and did not draw upon any scientific, technical, or specialized skill. The defendant's claims that these officers offered expert opinions on an ultimate issue based on having reviewed a video recording of the incident after-the-fact is factually and legally ill-founded. Clark, Lane, and Dodson testified based on their personal knowledge of the events at issue and their

testimony did not tell the jury what verdict to reach. There was no error, much less plain error, in admitting their testimony at trial.

The district court did not abuse its discretion by limiting evidence of the specific instances of Charlie's alleged misconduct. The district court acted well within its discretion when it limited other acts evidence to events that the defendant and Bedonie knew of or had heard about and by limiting the extrinsic evidence. The Federal Rules of Evidence impose strict limitations on the admissibility of specific acts evidence. The district court adhered to these rules and properly exercised its discretion to limit evidence that was of limited probative value and that would have resulted in confusion and undue delay. The defendant's contention that the excluded evidence was necessary to prove her state of mind, the reasonableness of her conduct, and the victim's intent is without merit. Evidence of Charlie's alleged acts that the defendant did not know about was not probative of her state of mind or the reasonableness of the force she used; it was irrelevant and improper propensity evidence. Charlie's state of mind was irrelevant to the issue of whether the defendant willfully used unreasonable force against him. In any event, any error in excluding some of this evidence was harmless, given the abundance of specific acts evidence that was admitted at trial and the overwhelming evidence of the defendant's guilt.

ARGUMENT

I

THE DISTRICT COURT DID NOT PLAINLY ERR WHEN IT ALLOWED PERCIPIENT POLICE OFFICER WITNESSES TO TESTIFY ABOUT THEIR FIRST-HAND KNOWLEDGE AND OBSERVATIONS

The defendant first contends that the district court erred by allowing the United States to introduce expert testimony on an ultimate issue through lay witnesses. Def. Br. 3, 9-10, 32-33. That is to say, the defendant claims, incorrectly, that the district court improperly allowed percipient law enforcement witnesses, Clark, Lane, and Dodson, to offer expert opinions on the reasonableness of the defendant's force based only on their review of the video recording of the defendant's assault. Def. Br. 36-37. The defendant's contention is both factually and legally erroneous.

A. Standard Of Review

As an initial matter, the defendant failed to preserve this issue for review on appeal. The defendant's motion *in limine* was denied without prejudice because the district court could not rule on the issue without having the context of the witnesses' testimony. S.E.R. 187. The defendant failed to preserve this issue for appeal at trial by renewing her motion or objecting to the testimony she now claims is error. Fed. R. Evid. 103(a); *United States* v. *Tisor*, 96 F.3d 370, 376 (9th Cir. 1996) (deciding that where a motion *in limine* is denied without prejudice,

defendant failed to preserve his claim when he did not renew his objection during trial), cert. denied, 519 U.S. 1140 (1997); *United States* v. *Archdale*, 229 F.3d 861, 965 (9th Cir. 2000) (holding that the mere filing of a motion *in limine* with "an explicit and definitive ruling by the district court" does not preserve an issue for appeal). This issue is therefore subject to plain error review. *United States* v. *Orm Hieng*, No. 09-10401, 2012 WL 1655934, at *1 (9th Cir. May 11, 2012).

On plain error review, the defendant is not entitled to relief unless she can demonstrate that: (1) there was an error; (2) the error was plain; that is, it was "clear or obvious, rather than subject to reasonable dispute"; and (3) the error affected the defendant's substantial rights, which ordinarily means it "affected the outcome of the district court proceedings." *Orm Hieng*, 2012 WL 1655934, at *1 (quoting *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010)); *United States* v. *Zalapa*, 509 F.3d 1060, 1064 (9th Cir. 2007). "If these three conditions of the plain error test are met, an appellate court may exercise its discretion to notice a forfeited error that (4) 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States* v. *Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc) (quoting *United States* v. *Cotton*, 535 U.S. 625, 631 (2002)).

B. A Witness May Provide Lay Testimony And Opinions Based On Personal And Particularized Knowledge If It Helps The Jury Decide A Fact In Issue And Does Not Require Scientific, Technical, Or Specialized Knowledge

It is axiomatic that a witness may offer lay testimony if he has personal knowledge of the matter that is the subject of his testimony. Fed. R. Evid. 602, 701. A lay witness may also offer an opinion, provided that the opinion is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[10] Fed. R. Evid. 701. Lay opinions encompass testimony that, among other things, "relat[es] to the appearance of persons or things, * * * the manner of conduct, competency of a person, * * * and an endless number of items that cannot be described factually in words apart from inferences." Fed. R. Evid. 701, Advisory Committee Notes, 2000 Amendments (quoting *Asplundh Mfg. Div.* v. *Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995) (bracketed text altered)).

A lay opinion may be based on particularized knowledge. It is proper, for example, for "the owner * * * of a business to testify to the value or projected

[10] Rule 702 provides, in pertinent part, that a witness may testify as an expert by giving an opinion or other testimony if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

profits of the business" and for "lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established." Fed. R. Evid. 701, Advisory Committee Notes, 2000 Amendments. "Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge." *Ibid.* Thus, a witness may offer lay testimony and opinion on a fact in issue when it is based on his personal knowledge and helpful to the jury – even if such testimony or opinion draws upon knowledge particular to that witness.

This Court has allowed witnesses to offer lay opinions that draw on perception and particularized knowledge. For example, this Court has approved of a 911 operator and paramedic testifying that the defendant appeared to be feigning grief after he poisoned his wife. *United States* v. *Meling*, 47 F.3d 1546, 1556-1557 (9th Cir.), cert. denied, 516 U.S. 843 (1995). This Court has allowed law enforcement officers to provide lay opinions on a broad range of subjects, including a defendant's identity, *e.g.*, *United States* v. *Beck*, 418 F.3d 1008, 1013-1015 (9th Cir. 2005); a defendant's ambiguous statements, a defendant's conduct, and that the defendant's activities matched the usual criminal *modus operandi*, *e.g.*, *United States* v. *Simas*, 937 F.2d 459, 464-465 (9th Cir. 1991) (collecting cases); that a defendant's behavior was not consistent with the officer's previous observations of a person having a seizure, *United States* v. *Rodriguez-Rangel*, 344

F. App'x 410, 411 (9th Cir. 2009) (unpublished); and that a defendant was attempting to avoid surveillance, *United States* v. *Stewart*, 770 F.2d 825, 831 (9th Cir. 1985), cert. denied, 474 U.S. 1103 (1986).

This Court does not, however, permit conclusory characterizations based upon a law enforcement officer's training and experience. Testimony of an officer's observations and the implications of those observations, *e.g.*, the defendant's conduct was suspicious, are proper lay testimony. *United States* v. *Figueroa-Lopez*, 125 F.3d 1241, 1245-1246 (9th Cir. 1997), cert. denied, 523 U.S. 1131 (1998). But the conclusion that a defendant's behavior, use of code words, and the quantity and purity of his cocaine were consistent with "an experienced narcotics trafficker" is not. *Ibid.*

The key distinction between an officer's lay and expert testimony is whether the testimony encompasses perceptions, the corresponding inferences and implications of those perceptions, and knowledge the officer garnered during the particular investigation, or whether the testimony draws upon the officer's scientific, technical, or specialized expertise. See *Figueroa-Lopez*, 125 F.3d at 1246; accord *United States* v. *Valdivia*, No. 08-1547, 2012 WL 1699887, at *14 (1st Cir. May 16, 2012) (DEA agent's testimony that drug traffickers often try to disguise their cell phone by using someone else's name was proper lay opinion because it required no scientific or technical expertise); *United States* v. *Christian*,

673 F.3d 702, 709 (7th Cir. 2012) (law enforcement testimony regarding training, observations, and state of mind as they approached the defendant was proper lay testimony); *United States* v. *Jayyousi*, 657 F.3d 1085, 1103-1104 (11th Cir. 2011) (FBI agent offered proper lay opinion when he testified to the meaning of code words on telephone intercepts because the knowledge he gained during the investigation allowed him to perceive information that the jury could not have readily discerned), petitions for cert. pending, Nos. 11-1194, 11-1198, and 11-9672 (filed Apr. 2, 2012); *United States* v. *Rollins*, 544 F.3d 820, 830-833 (7th Cir. 2008) (DEA agent's testimony regarding his "impressions" of intercepted telephone calls was a proper lay opinion as it was based upon his personal, extensive experience with the particular drug organization and not any specialized knowledge gained from his law enforcement background), cert. denied, 130 S. Ct. 3343 (2010); *United States* v. *Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (police officers' testimony regarding modifications to a shotgun was proper lay testimony because it was "merely descriptive" and was based on "common sense or the officer's past experience formed from firsthand observation").

C. An Officer's Testimony Regarding His Observations And Impressions Of A Defendant's Use Of Force In A Civil Rights Case, Including Whether There Was Any Justification For The Force, Is Proper Lay Testimony

This Court has expressly approved the admission of law enforcement testimony and lay opinion regarding a defendant's use of force in the context of a

civil rights case. In *United States* v. *Koon*, the appeal arising from the federal prosecution of the police officers involved in the Rodney King beating, this Court addressed the issue of lay opinions in the context of a witness police officer's testimony. 34 F.3d 1416, 1426, 1429-1430 (9th Cir. 1994), aff'd in part and rev'd in part on other grounds, 518 U.S. 81 (1996). This Court rejected the defendants' contention that testimony from a percipient police officer witness that, among other things, "the [defendants] continued to strike King with the baton when he was neither aggressive nor combative"; that the officer "couldn't see or understand what justified the [defendants'] behavior"; and that one of the defendants was "out of control," were improper lay opinions. *Id.* at 1426, 1430.

This Court first held that "[m]any of the statements about which [defendants] complain are simply not opinions." *Id.* at 1430. It is clear then that "straightforward physical descriptions" of "other officer's actions" are not subject to Rule 701; such testimony is simply evidence of facts at issue based on the witness's personal knowledge. *Ibid*; accord Fed. R. Evid. 401, 602. Likewise, this Court found no error in admitting testimony that was motivated by the witness's opinion, *e.g.*, that the officer had gone to the police station to report a use of force because he believed that the force was wrong. *Koon*, 34 F.3d at 1430. As this Court aptly observed, "[a]ctions are usually motivated by opinions or beliefs, but testimony about the actions is clearly not for that reason inadmissible." *Ibid.* In

fact, the testimony of one defendant was rife with descriptions of the actions he took based upon the opinions he had formed about the victim's behavior. *Ibid.*

Finally, this Court held that the witness officer's opinion testimony was properly admitted pursuant to Rule 701 because it was "rationally based on his first-hand observations * * * [and] was helpful in determining factual issues central to the case." *Koon*, 34 F.3d at 1430. Such testimony, including evidence that one of the defendants was "out of control," did not embrace an ultimate issue or merely tell the jury what result to reach. *Ibid.* The key issue in the case was whether the defendants had "willfully used unreasonable force" against the victim, and the witness's testimony assisted the jury in resolving that issue. *Ibid.*

This Court's decision in *Koon* is consistent with that of other circuits reviewing 18 U.S.C. 242 convictions. The Fourth Circuit held in *United States* v. *Perkins*, that the district court had properly admitted the testimony of two police officers who were eyewitnesses to the defendant's use of force. 470 F.3d 150, 156 (4th Cir. 2006). These officers testified as to their departmental training on the use of force and their first-hand observations of the defendant kicking the victim, who was lying on the ground in handcuffs. *Id.* at 152-153, 156. These officers testified that there was no law enforcement reason for the defendant's kicks to the victim, that there was no reason for the kicks, that the kicks were not necessary, and that other use of force techniques would have been more appropriate. *Id.* at 153.

The Fourth Circuit held that this was proper lay opinion testimony because it was "based on their contemporaneous perceptions" and the officers' "observations were 'common enough and require[d] such a limited amount of expertise . . . that they can, indeed, be deemed lay witness opinion[s].'" *Perkins*, 470 F.3d at 156 (brackets in original) (quoting *United States* v. *VonWillie*, 59 F.3d 922, 929 (9th Cir. 1995)). On the other hand, the Fourth Circuit ruled that testimony from non-percipient witnesses regarding the "reasonableness" of the defendant's actions "crossed the line between Rule 701 and 702." *Ibid.* This testimony drew upon "hypothetical questions based on second-hand accounts, making the[ ] testimony similar, if not indistinguishable, from the properly qualified *expert* testimony admitted at [ ] trial." *Ibid.*

In *United States* v. *Myers*, the Eleventh Circuit held that lay opinion testimony from a police officer was properly admitted even though it drew, in part, on his law enforcement experience. 972 F.2d 1566, 1577 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993). Specifically, the *Myers* court ruled that a police lieutenant was properly allowed to offer his opinion – based upon his personal perception of the victim and his nineteen years on the police force – that the burn marks on the victim's back were consistent with marks that a stun gun would cause. *Ibid.*; see also *United States* v. *Novaton*, 271 F.3d 968, 1008-1009 (11th Cir. 2001) ("a witness does not fall outside of Rule 701 simply because his or her

'rational[ ] ... perception' is based in part on the witness' past experiences")

(brackets in original) (quoting Fed. R. Evid. 701), cert. denied, 535 U.S. 1120, 537 U.S. 850, 537 U.S. 858, and 537 U.S. 1031 (2002).

D. The District Court Properly Admitted The Officers' Testimony

The law enforcement testimony the United States offered in this case fits comfortably within these parameters. Clark, Lane, and Dodson were percipient witnesses who the district court properly allowed to testify as to their first-hand observations of the conduct and demeanor of the defendant and Charlie.[11] As this

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[11] The defendant's assertion (Def. Br. 5, 37) that these witnesses testified based upon their viewing of the video recording of the defendant's assault is simply inaccurate. Clark, Lane, and Dodson testified based on their personal knowledge, not their review of the video recording. In fact, Clark and Dodson never saw the video. Although Lane acknowledged that he had seen the video recording, he was not asked any questions concerning the video and the video was not played during his testimony.

The fact that these officers arrived at the jail after the defendant does not diminish their role as percipient witnesses. Rarely does a witness view an entire crime from beginning to end. What is more, the defendant could (and did) point out any limits in their perception due to their time of arrival and tenure with NPD on cross-examination. S.E.R. 26; see also S.E.R. 11-12, 34, 56, 58-63 (cross-examination by counsel for Bedonie).

To the extent that the defendant challenges Sombrero's testimony regarding the content of the video recording (which is not mentioned in her opening brief), this testimony was also proper. See *United States* v. *Begay*, 42 F.3d 486, 502-503 (9th Cir. 1994), cert. denied, 516 U.S. 826 (1995) (holding that there was no abuse of discretion to admit the lay testimony of an NPD officer, who identified individuals and narrated the events depicted on a video recording, because he had personal knowledge as to the contents of the video based on his extensive review

(continued…)

Court made clear in *Koon*, such testimony is not opinion testimony at all. 34 F.3d at 1430. There was no error, much less plan error, for the district court to admit testimony that the defendant kicked and punched Charlie as she said something about her brother, while Charlie lay face down on the gravel-covered ground with his hands cuffed behind his back, unresisting, and gasping for air. Nor was it error to admit testimony that the officers did not think the defendant needed assistance; that Charlie appeared to be under control; and that they did not see Charlie actively resisting or acting aggressively or violently. Clark, Lane, and Dodson were eyewitnesses to a crime and the district court properly allowed them to relay to the jury their observations regarding the circumstances surrounding that crime. See *Perkins*, 470 F.3d at 156; *Koon*, 34 F.3d at 1430.

Testimony regarding the law enforcement witnesses' actions that were motivated by their opinions of the defendant's conduct also falls outside Rule 701. *Koon*, 34 F.3d at 1430. This Court expressly declined to adopt "a rule barring testimony about actions which are motivated by opinions." *Ibid.* Therefore, the district court properly admitted testimony that Lane was uncomfortable with what he saw, but he did not say anything because he was new to NPD; that Sombrero told Lane and Dodson to write a report after Dodson told Sombrero that he thought

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(…continued)
of the video and because his testimony was helpful to the jury in evaluating the video recording).

what he had seen was wrong; and that Jackson saved copies of the video recording of the defendant's assault onto a thumb drive and two computers because she thought what she had seen on the video was wrong. This testimony was admissible because it merely related to the witnesses' actions or inactions based on their opinions. In contrast, the district court excluded direct testimony of a witness's opinion, sustaining an objection to a question that called for Dodson to testify as to whether he thought Bedonie's actions were "wrong." E.R. 179-180; S.E.R. 53-55.

Contrary to the defendant's representations (Def. Br. 3, 13, 36), at no time did Clark, Lane, or Dodson opine on the reasonableness of the defendant's use of force. The only witness who offered such an opinion was the expert tendered by the defendant herself. E.R. 438-439. Instead, Clark, Lane, and Dodson properly testified that they did not see Charlie engage in any behavior that would have called for the defendant to have punched Charlie in the head or to have used any additional force against him. This is precisely the type of lay opinion testimony that this Court approved of in *Koon*, 34 F.3d at 1430. This testimony was rationally based on the officers' perception and helpful to the jury in determining the ultimate issue of whether the defendant willfully used unreasonable force against Charlie. *Ibid.*

The fact that earlier in their testimony the officers described the use of force training they received as NPD officers and that Lane testified that he did not

believe that there was any legitimate law enforcement purpose for the defendant's use of force does not alter this analysis. *Perkins*, 470 F.3d at 156; *Myers*, 972 F.2d at 1577. Although the officers' opinions may have been informed by their law enforcement background, nothing about their opinions that it was unnecessary to use force against a compliant, handcuffed arrestee as he lay on the ground struggling to breathe required technical, scientific, or specialized skill. Such an assessment required only first-hand observation and common sense. See *Perkins*, 470 F.3d at 156; *VonWillie*, 59 F.3d at 929; see also *Kopf* v. *Skyrm*, 993 F.2d 374, 378 (4th Cir. 1993) (discussing the civil analogue of 18 U.S.C. 242).

In sum, the district court did not plainly err in admitting the testimony of percipient law enforcement witnesses regarding their training, observations, and opinions regarding the defendant's use of force.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT LIMITED OTHER ACTS EVIDENCE CONCERNING THE VICTIM TO ONLY THAT EVIDENCE THAT WAS RELEVANT AND PROBATIVE AND THAT WOULD NOT RESULT IN CONFUSION OR UNDUE DELAY

The defendant also claims that the district court abused its discretion by limiting her ability to introduce "404(b)" evidence regarding the victim, which she claims was relevant to her state of mind, the reasonableness of her conduct, and to the victim's intent. Def. Br. 3-4, 10, 33-34. This contention is without merit. The district court was well within its discretion when it limited evidence of the victim's

specific instances of misconduct to exclude irrelevant and improper propensity evidence and to avoid confusion and undue delay.

A. Standard Of Review

The district court's evidentiary rulings that are preserved for appeal are reviewed for abuse of discretion. *United States* v. *Orm Hieng*, No. 09-10401, 2012 WL 1655934, at *1 (9th Cir. May 11, 2012); *United States* v. *Soulard*, 730 F.2d 1292, 1296 (9th Cir. 1984) (collecting cases). Under this standard of review, this Court will examine whether the district court considered the relevant factors and whether it made a clear error in judgment. *E.g.*, *United States* v. *Harris*, 792 F.2d 866, 868 (9th Cir. 1986). "Evidentiary rulings will be reversed for abuse of discretion only if such nonconstitutional error more likely than not affected the verdict." *United States* v. *Corona*, 34 F.3d 876, 882 (9th Cir. 1994).

B. The Federal Rules Of Evidence Strictly Limit Evidence Of Specific Instances Of Misconduct

Evidence of specific instances of misconduct is subject to strict limitations on admissibility set forth in the Federal Rules of Evidence. Rule 404(b) permits evidence of specific instances of conduct *only* when such evidence is offered to prove a person's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R. Evid. 404(b). But such evidence "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R.

Evid. 404(b)(1); see also *Hynes* v. *Coughlin*, 79 F.3d 285, 291-292 (2d Cir. 1996) (holding that it was an abuse of discretion to admit an inmate's disciplinary record because it was improperly used to suggest that the victim in an excessive force case had an "assaultive character" and a "propensity for violence"); *Lataille* v. *Ponte*, 754 F.2d 33, 37 (1st Cir. 1985) (holding that it was reversible error to admit the victim's prison disciplinary record, which was not probative of his knowledge, motive, or opportunity and was offered only "for the purpose of showing that [the victim] was a violent person and that he, therefore, must have been the aggressor and precipitated the assault").

What is more, Rules 401 and 402 limit the admissibility to only evidence that is probative of a fact of consequence in the case. Fed. R. Evid. 401-402. Even if relevant, Rule 403 authorizes a trial court to exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; see also *United States* v. *Cruz-Garcia*, 344 F.3d 951, 956 n.4 (9th Cir. 2003); *United States* v. *Keiser*, 57 F.3d 847, 855 n.17 (9th Cir.), cert. denied, 516 U.S. 1029 (1995). A court may properly limit or exclude evidence of a victim's prior conduct under Rule 403 to avoid undue delay, confusion, and a collateral trial on unrelated issues. See, *e.g.*, *United States* v. *Ramos*, 537 F.3d 439, 455-456 (5th Cir. 2008)

(affirming the exclusion of evidence of a police shooting victim's alleged involvement in a drug trafficking incident because of the limited relevance and probative value of the evidence and the risk of unfair prejudice, confusion, and delay that would result from a mini-trial on a collateral issue), cert. denied, 129 S. Ct. 1615 (2009).

C. The District Court Did Not Abuse Its Discretion By Limiting Evidence Of Specific Instances Of The Victim's Alleged Misconduct

The district court properly limited evidence of Charlie's alleged prior misconduct to ensure that only relevant evidence probative of a fact in issue was admitted and to avoid confusion, undue delay, and impermissible propensity evidence. Specifically, the district court excluded testimony regarding Charlie's allegedly threatening conduct, statements that the defendant and Bedonie did not know about, and some evidence of Charlie's conduct on January 1, 2009, including details of his argument with a relative, whether he had, in fact, started the house fire, and whether he was in possession of narcotics. The district court also limited extrinsic evidence about the November 2008 incident to the testimony of Charlie and Fabian Thinn and did not allow a third witness to testify concerning events that occurred months before the conduct at issue in this case. Finally, the district court struck comments by Bedonie's attorney during his opening statement and closing argument that described Charlie as a "known commodity" and that relayed information about Charlie that was not known by the defendant or Bedonie at the

time of Charlie's arrest because they were improper character evidence, irrelevant, and confusing.

The district court admitted evidence that Charlie had a felony conviction and a graphic, anti-police tattoo on his chest. The district court permitted evidence of Charlie's misconduct in November 2008, when he fled from the police, was arrested, and may have fought with, assaulted, or hurt a police officer. The court also admitted evidence that Charlie may have been stalking the defendant. The district court admitted exhaustive evidence of Charlie's alleged misconduct on January 1, 2009, including the fact that he drank three to four 40-ounce bottles of malt liquor, was involved in a family argument, may have threatened his grandmother with an axe, was tied up by his family members with baling twine, escaped police custody, may have gone back to Gap for revenge, may have started a fire at his family's house, may have been arrested for arson, and yelled and cursed at the defendant during transport. The district court also admitted evidence that Lane told the EMTs that Charlie could get violent and that Charlie's uncle wanted the police to take Charlie into custody. The jury had a clear picture of Charlie's prior conduct and nevertheless convicted the defendant of having willfully used unreasonable force against him.

The district court allowed into evidence essentially all of the conduct that was the subject of the defendant's motion. See S.E.R. 168-179 (moving to admit

pursuant to Rule 404(b) evidence of the November 2008 incident, and evidence that on January 1, 2009, Charlie used an axe to enter his grandmother's house, was arrested, and escaped police custody). In fact, as set forth above, the district court admitted far more evidence regarding Charlie's conduct on January 1, 2009, than the defendant had requested in her motion. S.E.R. 168-179.

The district court also admitted evidence of the November 2008 incident involving Charlie and Fabian Thinn. The district court even permitted extrinsic evidence on this issue, permitting Fabian Thinn to testify as to the 2008 events. In its discretion, the district court limited this extrinsic evidence to avoid what would amount to a collateral trial. The district court was well within its discretion when it did not allow the defendant to call yet another witness to testify about the November 2008 incident (E.R. 213-216) and when it limited cross-examination of statements that Charlie allegedly made to other officers on another date (E.R. 218-222). See *Ramos*, 537 F.3d at 455-456 (affirming exclusion of the victim's other acts evidence to avoid a mini-trial on collateral issues); *United States* v. *Serrata*, 425 F.3d 886, 901-905 (10th Cir. 2005) (finding no error to limit cross-examination or exclude extrinsic evidence concerning the victim's convictions for resisting arrest and aggravated assault on an officer because it was too remote to be relevant, too prejudicial, and could have constituted impermissible propensity evidence).

The district court also properly limited evidence of Charlie's prior conduct to that which the defendant and Bedonie knew of or had heard about. The defendant claims (Def. Br. 3-4, 10, 40-42) that the excluded evidence prevented her from establishing her state of mind and the reasonableness of her conduct. But if the defendant did not know about Charlie's prior misconduct, it could not possibly have affected her assessment of the situation and whether it was necessary for her to use force. Admission of information the defendant gained about the victim after-the-fact would be improper because:

> When a jury measures the objective reasonableness of an officer's action, it must stand in *his* shoes and judge the reasonableness of his actions based upon the information he possessed and the judgment he exercised in responding to that situation.
>
> Knowledge of facts and circumstances gained after the fact * * * has no place in the * * * jury's proper post-hoc analysis of the reasonableness of the actor's judgment.

Sherrod v. *Berry*, 856 F.2d 802, 804-805 (7th Cir. 1988) (en banc). Accordingly, courts have routinely excluded evidence of the victim's prior conduct about which a defendant officer was unaware. See, *e.g.*, *Hynes*, 79 F.3d at 291 (holding that the prison guards' claim that the victim's "disciplinary record was relevant to show the reasonableness of their actions is insupportable because they did not present evidence that, at the pertinent time, they were aware of [his] disciplinary record"); *Lataille*, 754 F.2d at 37 (ruling that the victim's violent prison disciplinary history

could not "have had any impact on defendants' state of mind" since the record was "devoid of any evidence that the defendants knew or knew of" the victim).

The defendant also contends that the excluded evidence prevented her from establishing Charlie's intent "in asserting an aggressive posture" (Def. Br. 4) and "to offer resistance with respect to the commands of the officers" (Def. Br. 41). The defendant overlooks the fact that it is the victim's actions during the arrest, not his intent, that is relevant. A Section 242 charge involving excessive force against an arrestee in violation of the Fourth Amendment requires proof that the defendant, acting under color of law, willfully used unreasonable force against the victim. 18 U.S.C. 242; *Graham* v. *Connor*, 490 U.S. 386, 393, 394-397 (1989). The proper focus of this inquiry is on the victim's and the defendant's actions, at the time of the incident – whether it was reasonable, given the victim's actions, for the defendant to punch, kick, and stomp on him. The victim's prior conflict with law enforcement has little, if any, bearing on the reasonableness of the defendant's use of force in this case. "At issue is the objective reasonableness of [the defendant's] actions * * * not the *victim's* reasons" for his behavior. *Palmquist* v. *Selvik*, 111 F.3d 1332, 1341 (7th Cir. 1997). As the Tenth Circuit has explained, "If, as witnesses testified, the defendant[ ] beat and kicked [the victim] while he was on the ground with his hands behind his back, his state of mind is irrelevant, as the force would have been excessive regardless of [victim's] subjective state of mind."

Serrata, 425 F.3d at 905; accord *Hynes*, 79 F.3d at 290-291; *Senra* v. *Cunningham*, 9 F.3d 168, 172 (1st Cir. 1993).

For this reason, this Court and other courts have affirmed the exclusion of evidence of specific instances of a victim's prior violent conduct in civil rights cases. See, *e.g.*, *United States* v. *Geston*, 299 F.3d 1130, 1137-1138 (9th Cir. 2002) (finding no abuse of discretion to exclude evidence of the victim's allegedly violent behavior after drinking alcohol on two prior occasions); *Tyler* v. *White*, 811 F.2d 1204, 1206 (8th Cir. 1987) (affirming exclusion of evidence that the victim was allegedly transferred to another prison for carrying brass knuckles); *Selvik*, 111 F.3d at 1341 (ruling that evidence that the victim wanted to commit "suicide by police" did not "make the existence of any fact material to the 'objective reasonableness' test more or less probable").

D. Any Error In The District Court's Ruling Was Harmless

Any error in the district court's ruling on evidence of Charlie's alleged prior conduct was harmless in light of the abundance of negative information about Charlie that was admitted at trial. The jury's verdict is supported by overwhelming evidence of the defendant's guilt, including three police officers who saw her use unnecessary force and a video recording that captured her pepper spraying Charlie, pulling him from the vehicle, and then kicking and stomping on him.

In sum, the district court did not abuse its discretion in limiting evidence of Charlie's prior conduct to that evidence which was relevant, probative, and that would not result in confusion, undue delay, or impermissible propensity evidence.

CONCLUSION

For the reasons stated herein, this Court should affirm the defendant's conviction.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The United States is not aware of any related cases, as described in Local Rule 28-2.6, that are pending in this Court.

s/ Erin Aslan
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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. 32(a)(7)(C), that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 10,710 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Word 2007, 14-point Times New Roman font.

s/ Erin Aslan
ERIN ASLAN
Attorney

Date: June 11, 2012

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2012, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that the following counsel of record for the defendant-appellant will be served via the appellate CM/ECF system:

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