No. 00-40242

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

WILTON DAVID WALLACE,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe this appeal raises novel legal issues that require oral argument.

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STATEMENT OF JURISDICTION

The district court's jurisdiction is based upon 18 U.S.C. 3231. After sentencing Wilton David Wallace on February 22, 2000, the court entered the judgment on February 28, 2000 (R1-240-247).[1] Wallace timely filed a notice of appeal on February 22, 2000 (R2-249). This Court has jurisdiction under 28 U.S.C.

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[1] References to "R__-__-__" are to the volume number and page number or page range of the record on appeal.

1291 and 18 U.S.C. 3742(a).

STATEMENT OF ISSUES

1. Whether the district court's refusal to give Wallace's proposed jury instruction concerning a good faith use of force defense is reversible error.

2. Whether the district court erred in admitting evidence of Wallace's prior conviction for violation of 18 U.S.C. 242.

3. Whether the district court abused its discretion by denying Wallace's motion for recusal.

4. Whether Wallace was denied effective assistance of counsel.

STATEMENT OF THE CASE

This case arises from a September 18, 1996, search of inmate cellblocks at the Brazoria County Detention Center by the Brazoria County Sheriff's Department and Capital Correctional Resources, Inc. (CCRI), which was leasing space at the detention facility to house inmates from Missouri at the time of the search. On July 27, 1998, four of the participants in that operation — appellant-defendant Wilton David Wallace, who worked as a jailer for CCRI, and three members of the Brazoria County Sheriff's Department — were indicted for

violating 18 U.S.C. 2 and 242 (R1-2).[2] Specifically, the indictment charged that the defendants, while acting under color of state law, willfully assaulted one of the inmates, Toby Hawthorne, during the September 18 search and, thereby, deprived him of his Eighth Amendment right not to be subjected to cruel and unusual punishment and that they aided and abetted each other in carrying out that assault (R1-2).

At trial, the government relied primarily on a videotape of the search as well as the testimony of Sheriff's Department officials and Hawthorne himself to show that Wallace kicked Hawthorne near his head and then kicked him in the groin even though Hawthorne was complying with the officers' directions (R8-414-417; R9-523, 528-531, 586, 594-595, 601-602, 632; R12-1239). Wallace's defense was that he lost his balance and accidentally stepped on Hawthorne (R18-45-55). His expert witness, Terry Pelz, also testified that, based on his review of the videotape and not from any discussion with Wallace, it appeared that Wallace was merely off-balance and never kicked Hawthorne in the head or groin (R19-19-20, 26-31; see also Pelz Tr. at 3 (attached at Addendum)).

Once jury deliberations commenced on October 7, 1999, the district court

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[2] One of the co-defendants, Lester Arnold, pleaded guilty to a misdemeanor violation of 18 U.S.C. 242 on the first day of trial (R7-47).

judge held a bench conference with Wallace's attorney, Assistant Federal Public Defender Richard Ely, and government counsel to raise for the first time the possibility that Wallace, Pelz, and Ely conspired to commit and suborn perjury (to the extent that Wallace's defense was based entirely on Pelz's viewing of the videotape) (R22-3). The judge acknowledged, however, that he "could be all wrong about all of this" and advised Ely to consider the implications if such a conspiracy exists and to consider the implications for Wallace before speaking to Wallace about this matter (R22-4).

The court conducted additional hearings on October 8, 1999, to further discuss this issue with government counsel and Assistant Federal Public Defender H. Michael Sokolow. At the first hearing, Sokolow agreed to speak with Ely and Wallace about the court's concerns and to ascertain whether Wallace wanted new counsel (R24-31-32). Later that day, Wallace stated on the record that he understood that there may be a conflict of interest between him and Ely (R24-35) and that he may retain new counsel from outside of the Federal Public Defender Office (R24-36), but he wanted to retain Sokolow as counsel for the rest of the trial and waived any conflict of interest between himself and the Federal Public Defender Office (R24-36-38). Sokolow, in turn, informed the court that Ely was to

remain at the counsel table to assist Sokolow with the facts in the case (R24-38).

On October 9, 1999, the jury found Wallace not guilty of a felony violation of 18 U.S.C. 242 (R2-191), but guilty of the lesser included misdemeanor violation of 18 U.S.C. 242 that did not require a showing that Wallace inflicted bodily injury on Hawthorne (R2-190). The jury acquitted one of the co-defendants (R2-157; R14-1463), but could not reach a verdict as to the remaining co-defendant (R2-157; R14-1462).

Wallace subsequently filed a motion for new trial, judgment of acquittal, appointment of new counsel, and recusal of the district court judge (R2-Doc. 117). The court denied this motion on October 25, 1999 (R2-Doc. 128). After appointing new counsel for Wallace on November 22, 1999 (R2-217), the court sentenced Wallace to 12 months incarceration to run concurrently with his 46 month prison term imposed in an unrelated case that is presently on appeal in this Court (Case No. 00-40243) (R2-246). Wallace filed a timely notice of appeal on February 25, 2000 (R2-249).

STATEMENT OF THE FACTS

In 1996, the State of Missouri contracted with Brazoria County, Texas, to

lease bed space at the Brazoria County Detention Center to house inmates convicted in Missouri (R12-1292). Brazoria County then arranged for Capital Correctional Resources, Inc. (CCRI) to operate the portion of the detention center housing the Missouri inmates (R10-800-801). Although the guards in this section of the facility worked for CCRI, the Sheriff of Brazoria County deputized each of them — including Wilton David Wallace, who worked for CCRI as a lieutenant (R18-25) — and commissioned them as jailers, pursuant to the rules of the Texas Jail Standard Commission (R10-800-801, 838; R12-1289; R18-21). The Sheriff's Department, moreover, retained ultimate authority over the CCRI portion of the detention center, and the CCRI jailers were obligated to follow the Sheriff's Department's rules and policies (R10-820, 835-836).

Soon after the first Missouri inmates arrived at the detention center on September 16, 1996 (R9-504; R18-29), CCRI personnel requested the Sheriff's Department's assistance in searching the inmates' cellblocks for drugs and weapons and to make the inmates more obedient through officer presence (R8-348-349, 371; R9-689; R10-789). On September 18, 1996, the Sheriff's Department responded by sending a four-member emergency response team (ERT) and a dog handler to the CCRI area (R8-344-346). When the team arrived, CCRI personnel

directed the team to enter five different cellblocks to control and search the inmates while CCRI employees searched the cell areas (R8-368, 378, 392-393, 401, 420, 486, 489; R9-640, 661-662, 670-671, 689; R10-764, 789, 836). The ERT directed the inmates, as part of the operation, to lay down on the floor and then crawl out of the cellblock as CCRI teams searched each cell area (see, *e.g.*, R8-371, 381).

Wallace finished his shift as the ERT arrived at the facility so he decided to see if he could assist the ERT (R12-1237, R18-37-38). Although he did not know why the ERT was there (R12-1236), he participated in the operation by stepping on one inmate's back to force him to lay face down (R8-388) and by kicking another inmate, Toby Hawthorne, in the head and neck area and in the groin as Hawthorne was crawling out of his cell and down the hallway, as ordered by the ERT (R8-414-417; R9-523, 528-531, 555-556, 586, 594-595, 601-602, 632; R12-1239). Wallace did so even though Sheriff's Department officers at the scene had the situation under control (R8-369, 373, 375-376, 378-379, 381-386, 389-393, 396, 398, 400-402, 405-407, 409, 412, 418, 420, 427; R10-792, 795, 804; R12-1304) and there was no reason for him to assault Hawthorne (R8-371; R10-787-789; R12-1305-1307). Indeed, Wallace himself testified that the atmosphere in the CCRI area was

not a "riot" situation (R12-1235) and that Hawthorne was not aggressive or resistant to him (R12-1239). All this was captured on the Sheriff's Department's videotape, the accuracy of which was not challenged at trial (R8-419).

In the end, the ERT and CCRI employees found only the butt of a cigarette that was never tested to confirm that it was marijuana (R8-385; R12-1300-1301) and did not find any weapons (R8-387, 402, 427; R10-790). And despite Wallace's testimony that he believed Hawthorne posed a safety threat (R18-42, 52-53, 56; cf. R12-1256-1258, 1260-1261), neither Wallace nor any member of the Sheriff's Department or CCRI ever formally disciplined Hawthorne for alleged aggressive behavior on September 18, 1996 (R12-1239).

SUMMARY OF ARGUMENT

Although this response has consolidated Wallace's five issues on appeal into four issues, each of Wallace's asserted grounds for reversal lacks merit. First, he contends that the district court abused its discretion by refusing to give his proposed good faith jury instruction. This claim fails because the instructions given by the court substantially covered his good faith defense and, in any event, Wallace had wide latitude to testify and argue his defense to the jury.

Wallace next claims that the district court erred by admitting evidence of his

prior conviction under the same statute for a similar use of unnecessary force against an inmate. But since it was Wallace who first introduced this evidence at trial, he cannot now be heard to object. The court did not err in admitting evidence of this prior conviction under Federal Rule of Evidence 404(b). In any event, the best that Wallace can hope to show is that if it were error at all, it was invited error and, therefore, not ground for reversal. Alternatively, if the court considers the admission of such evidence for plain error, Wallace cannot prevail because he cannot show that this evidence compromised his substantial rights or the integrity of his trial. That is particularly so in light of the limiting instruction, which Wallace requested and the court gave, that the jury could consider the prior conviction evidence only for determining intent and absence of mistake.

Wallace's final claims on appeal contend that he is entitled to a new trial due to certain comments made by the district court at an in-chambers conference after the jury began its deliberations. On the basis of the evidence at trial, the judge had expressed his concern about the possibility that Wallace, his attorney, and expert witness had conspired to commit and suborn perjury. Wallace asserts that the court's comments alone were grounds for the judge to recuse himself and for appointment of new counsel. The judge's comments, however, merely reflected

his opinion of the evidence at the end of the trial and informed counsel of the possibility of perjury committed in the trial. As for his attorney's supposed conflict of interest, Wallace explicitly waived any potential conflict and stated on the record that he wanted the Federal Public Defender Office to continue to represent him for the remainder of the trial. In the end, despite Wallace's abundant allegations of problems with the judge and a conflict of interest with his attorney, his claims fail because he cannot cite a single statement by the court that a reasonable person would find had created an appearance of bias; nor can he show any adverse actions by his counsel related to the alleged conflict of interest.

Accordingly, no basis exists for reversal and Wallace's conviction should be affirmed.

ARGUMENT

I

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS AND MENTAL STATE REQUIRED FOR PROVING WALLACE'S CHARGED OFFENSE

Section 242 prohibits the willful deprivation of "any rights, privileges, or immunities secured or protected by the Constitution" while acting under the "color of any law." 18 U.S.C. 242. In this appeal, Wallace contends (Br. 8-12) that good

faith is a defense to this specific intent crime and that the district court erred in failing to give his requested instruction on his good faith defense. His proposed instruction stated that "[f]orce is not cruel and unusual in violation of the Eighth Amendment if it was applied in a good-faith effort to maintain order or restore discipline" (R2-139). The district court declined to give Wallace's requested instruction, finding instead that the instructions as a whole set forth the state of mind requirement for a violation of Section 242 (R2-142; R12-1331-1332; R13-1340-1341).

This Court reviews a district court's refusal to include a requested instruction in the jury charge for an abuse of discretion, *United States* v. *Dixon*, 185 F.3d 393, 402 (5th Cir. 1999), recognizing that the district court is "afforded substantia latitude in formulating its instructions." *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995). Assuming that good faith is a defense to a Section 242 charge based on an Eighth Amendment violation, see *Hudson* v. *McMillian*, 503 U.S. 1, 6-7 (1992) (whether prison officials inflicted cruel and unusual punishment in violation of the Eighth Amendment and 42 U.S.C. 1983 turns on whether officials applied force in good faith to maintain order), the district court's refusal to give Wallace's requested instruction is not reversible error

because Wallace cannot show that (1) his requested instruction was not substantially covered in the charge given to the jury and (2) the omission of the instruction seriously impaired his ability to present his defense. See *United States* v. *Upton*, 91 F.3d 677, 683 (5th Cir. 1996), cert. denied, 520 U.S. 1228 (1997).

Contrary to Wallace's contention, the district court sufficiently instructed the jury that it must acquit if it finds that Wallace acted in good faith. Specifically, the court instructed the jury that if it found that the defendant "used force on Toby Hawthorne, then [the jury] should determine whether that force was excessive and objectively unreasonable, in that the force was an unnecessary and wanton infliction of pain" (R2-166). And, pursuant to the jury charge, the jury should consider, among other factors, "the threat reasonably perceived by the officers" in making this determination (R2-166). The court further instructed the jury that, in order to find a violation of 18 U.S.C. 242, the jury must find that Wallace acted "willfully" and with the specific intent "to act in a way which amounts to the unnecessary and wanton infliction of pain" (R2-165).

Although the jury charge did not use the words "good faith," the district court did not abuse its discretion in refusing to give Wallace's requested instruction because the court's jury charge substantially covered the good faith defense by

instructing the jury as to the elements of a Section 242 violation, including the requisite specific intent for the offense. See, *e.g.*, *United States* v. *Daniel*, 957 F.2d 162, 170 (5th Cir. 1992) (no abuse of discretion for failing to instruct as to good faith defense where jury was properly instructed on the elements of conspiracy and the requisite mental state); *United States* v. *Gunter*, 876 F.2d 1113, 1119-1120 (5th Cir.) (good faith instruction not required where offense could not be agreed to by mistake and where jury was properly instructed on the requisite mental state), cert. denied, 493 U.S. 871 (1989); *United States* v. *Luffred*, 911 F.2d 1011, 1016 (5th Cir. 1990) ("When the court instructs the jury as to the government's burden of proving that the defendant's conduct was willful and then properly defines that term, it adequately conveys the concept of the good faith defense.").

Indeed, the district court's definition of willfulness and specific intent in the jury charge is virtually identical to the definitions approved in this Circuit as sufficient to obviate a need for an express good faith instruction. See, *e.g.*, *United States* v. *Rochester*, 898 F.2d 971, 978-979 (5th Cir. 1990) (no abuse of discretion for not giving a good faith instruction where court defined willfulness as "voluntarily and purposely, with specific intent to disobey or disregard the law");

Upton, 91 F.3d at 683 (same); *United States* v. *Giraldi*, 86 F.3d 1368, 1376 (5th Cir. 1996) (same); *United States* v. *St. Gelais*, 952 F.2d 90, 93-94 (5th Cir.) (same), cert. denied, 506 U.S. 965 (1992); *Gunter*, 876 F.2d at 1119 (same).

Moreover, because Wallace's primary defense was that he acted in good faith when he stepped on Hawthorne's head (R18-47-48, 54-55) and when he nudged Hawthorne down the hallway by bumping into the inside of Hawthorne's leg (R12-1272; R18-52, 54-55), a good faith instruction would have been redundant in light of the specific intent instruction given by the court. See *United States* v. *Chenault*, 844 F.2d 1124, 1130 (5th Cir. 1988).

Wallace's citation to *United States* v. *Burroughs*, 876 F.2d 366 (5th Cir. 1989), is inapposite. The district court's failure to give a good faith instruction in *Burroughs* was an abuse of discretion because the court erroneously treated the drug offense at issue as a general intent crime and failed to properly instruct the jury as to the requisite specific intent for the charged offense. *Id*. at 368-369. In contrast, where a specific intent instruction is given as in this case, a "finding of specific intent * * * categorically excludes a finding of good faith" and obviates the need for expressly instructing as to good faith. *Rochester*, 898 F.2d at 979.

Not only did the jury charge substantially cover Wallace's good faith

defense, but Wallace also had the opportunity to fully present his defense to the jury. For instance, Wallace testified extensively that he accidentally stepped on Hawthorne (R18-45-55) and merely nudged him with his foot (R12-1272), but he never intended to kick Hawthorne in either the head or groin (R18-50, 54-56). His expert witness provided similar testimony (R19-19-20, 26-31), while his attorney argued in both his opening and closing arguments that Wallace had lost his balance when he stepped on Hawthorne (R8-322-324; R23-3-4). The point of these statements was to show that Wallace acted in good faith toward Hawthorne.

Hence, viewing "the record as a whole," the district court's refusal to give Wallace's requested good faith instructions clearly did not "thwart" Wallace's presentation of his defense to the jury and, consequently, does not constitute an abuse of discretion. See *Rochester*, 898 F.2d at 979 (failure to give good faith instruction was not reversible error where the court instructed the jury as to the elements and requisite mental state of the charged offense and the defendant was able to testify and argue his defense to the jury); accord *Upton*, 91 F.3d at 683; *Storm*, 36 F.3d at 1295; *Daniel*, 957 F.2d at 170; *St. Gelais*, 952 F.2d at 94; *Gunter*, 876 F.2d at 1119; *United States* v. *Lavergne*, 805 F.2d 517, 523 (5th Cir. 1986).

II

ADMISSION OF THE EVIDENCE OF WALLACE'S PRIOR CONVICTION IS NOT REVERSIBLE ERROR

Wallace argues (Br. 12-16) that the district court erred in admitting evidence of his 1987 conviction for physically abusing an inmate in violation of 18 U.S.C. 242. But this point of error was not properly preserved. Before trial commenced, Wallace raised the issue of his prior conviction (R7-8) and the district court indicated that it believed that evidence of the prior conviction was admissible to prove intent but reserved judgment on the admissibility question, inviting argument during trial (R7-9-10). At trial, Wallace's counsel, on cross-examination, asked Charles Wagner, the Chief Deputy of the Brazoria County Sheriff's Department, if he was aware of Wallace's prior misdemeanor conviction for violating an inmate's civil rights (R10-838). Thereafter, when the government presented evidence of Wallace's prior conviction through its next witness, Wallace did not object (R10-854-856).

By introducing evidence of his prior conviction to the jury first, Wallace has waived any objection to the admission of the evidence. See *Ohler* v. *United States*, 120 S. Ct. 1851, 1853 (2000) (defendant who first introduces evidence of her prior conviction during her direct examination waives any objection to admission of such

evidence). Indeed, it is well-settled that when evidence is admitted due to the defendant's actions, "the defense cannot later object to such 'invited error.'" *United States* v. *Raymer*, 876 F.2d 383, 388 (5th Cir.) (defendant could not complain about prosecutor's reference to inadmissible evidence that the defense had already presented to the jury), cert. denied, 493 U.S. 870 (1989); see also *United States* v. *Archer*, 733 F.2d 354, 361 (5th Cir.) (defendant waived objection to evidence concerning her prior check kiting activity when her attorney opened the door to such testimony by asking a witness on cross-examination about the defendant's reputation for honesty), cert. denied, 469 U.S. 861 (1984).

Even if the Court considers Wallace's objection on appeal for plain error, Wallace cannot prevail. See *United States* v. *Gray*, 626 F.2d 494, 501 n.2 (5th Cir.) (invited error doctrine bars reversal for plain errors), cert. denied, 449 U.S. 1038 (1980); see also *United States* v. *Fulford*, 980 F.2d 1110, 1116 (7th Cir. 1992) ("It is well-settled that where error is invited, not even plain error permits reversal."). Under the plain error standard, errors are subject to review only where the defendant shows that the errors are obvious, clear, or readily apparent and that they affected the defendant's substantial rights. See *United States* v. *Olano*, 507 U.S. 725, 731-735 (1993); *United States* v. *Clayton*, 172 F.3d 347, 351 (5th Cir.

1999). If the defendant satisfies these requirements, the appellate court has discretion to correct the error, but only if the error is so obvious that failure of the district court to notice it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Calverley*, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), cert. denied, 513 U.S. 1196 (1995), abrogated in part by *Johnson* v. *United States*, 520 U.S. 461 (1997). This case does not present such error.

Here, Wallace cannot show that admission of his prior conviction evidence was an error that affected his substantial rights. Under this Circuit's seminal case on the admissibility of evidence of extrinsic offenses, *United States* v. *Beechum*, 582 F.2d 898, 911 (1978), cert. denied, 440 U.S. 920 (1979), evidence of a prior conviction is admissible under Rule 404(b) to prove, *inter alia*, intent and absence of mistake if the evidence is relevant to an issue apart from the defendant's character and its probative value is not substantially outweighed by the danger of unfair prejudice, confusion, or the other proscriptions in Federal Rule of Evidence 403.

Wallace does not dispute that evidence of a prior conviction for an identical specific intent offense is admissible under Rule 404(b) to show specific intent in a

subsequent case. He argues instead (Br. 15-16) that, unlike crimes involving a premeditated intent, the specific intent for assault is a "spontaneously formed intent" and, consequently, evidence of his prior assault conviction was not probative of intent to commit an assault in the future and was admitted only to show bad character. Contrary to Wallace's assertion, however, *United States* v. *San Martin*, 505 F.2d 918, 923 (5th Cir. 1974), does not hold that evidence of prior convictions for assault is never admissible. *San Martin* indeed states that "evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent," but it does not stand for the proposition that all assaults are such crimes. *Ibid*. Here, Wallace's assault did not involve spontaneously formed intent. Wallace himself testified that Hawthorne was not acting aggressively toward him (R12-1239) and it was not a riot situation (R12-1235). Thus, Wallace's intent to kick Hawthorne was not the kind of "split-second intent" that was discussed in *San Martin*. This is particularly true with respect to the time when Wallace "follow[ed]" Hawthorne down the hall and kicked him in the groin purportedly to get Hawthorne to continue moving down the hallway (R12-1272-1274).

In addition, Wallace's reliance on *San Martin* is misplaced because that

decision predates Rule 404(b), which took effect on July 1, 1975, and this Court's decision in *Beechum*. Tellingly, no subsequent case in this Circuit has distinguished between "premeditated" and "spontaneous" intent for purposes of Rule 404(b).[3] Moreover, the cases cited in *San Martin* and in Wallace's brief (Br. 28-29) for this proposition (*e.g.*, *Hurst* v. *United States*, 337 F.2d 678, 681 (5th Cir. 1964), and *Railton* v. *United States*, 127 F.2d 691, 693 (5th Cir. 1942)) are irrelevant because intent was not at issue in those cases.

Even if the distinction made in *San Martin* applies to the Rule 404(b) context, Wallace does not prevail. In that case, the government sought to admit the defendant's prior two convictions for resisting arrest and one conviction for assault and battery on a uniformed military personnel to show that the defendant intended to assault an FBI agent when he turned to escape the officer's hold from behind and struck the officer in the shoulder with his arm or elbow. 505 F.2d at 920-923. The

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[3] Although *United States* v. *Bettencourt*, 614 F.2d 214, 217-218 (9th Cir. 1980), addressed evidence of a prior assault under Rule 404(b), that case does not support Wallace's position. Significantly, in determining that the evidence of a prior arrest for assault was not admissible, the court stated that that evidence was not probative of the defendant's specific intent with respect to the charged offense because, *inter alia*, the defendant was never prosecuted or convicted following his arrest and, therefore, his state of mind in the prior incident was never proven. *Ibid*. The court nonetheless held that the admission of this evidence was harmless error. *Id*. at 219.

Court held that the evidence was inadmissible because it was not clear that the prior offenses included specific intent as a material element, the two prior crimes for resisting arrest were committed while the defendant was a minor and thus too remote in time, and the third conviction was too remote in that it was not "similar in nature and in its material elements to have clearly probative value with respect to the intent of the accused at the time of the offense charged." *Id*. at 922-923.

Wallace's 1987 conviction does not suffer from the same remoteness problems as in *San Martin*. Wallace's prior conviction is virtually identical in nature to the offense charged here and required proof of the same material elements (both incidents involve physically abusing an inmate in violation of his right to be free from cruel and unusual punishment). Because Wallace had used unjustifiable force before, evidence of the prior conviction was probative of Wallace's specific intent to use unjustifiable force when he kicked Hawthorne and showed that Wallace's conduct here was not a mistake or accident.

Wallace also cannot assert that the prior conviction is too remote in time. As stated in *United States* v. *Hernandez-Guevara*, 162 F.3d 863, 872 (5th Cir. 1998), cert. denied, 526 U.S. 1059 (1999), "[t]he age of a prior conviction has never been held to be a per se bar to its use under Rule 404." In fact, this Court has upheld

admission of evidence of similar crimes even older than Wallace's 1987 conviction to show intent. See *id*. at 873 (admission of eighteen-year-old crime was not an abuse of discretion); *United States* v. *Chavez*, 119 F.3d 342, 346-347 (5th Cir.) (admission of fifteen-year-old conviction was proper under Rule 404(b)), cert. denied, 522 U.S. 1021 (1997).

Aside from the above differences, the district court in this case, unlike in *San Martin*, gave a limiting instruction to cure any risk of prejudice to Wallace. The court even adopted Wallace's proposed language (R2-140) to make clear to the jury that it could consider the evidence of the prior conviction, if indeed it was considered at all, for the limited purpose of showing "whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment" and "whether the defendant committed the act for which he is on trial by accident or mistake" (R2-177; R13-1429). By giving a proper limiting instruction, the district court cured any danger that the prior conviction would be considered for any improper purpose. See *United States* v. *Gordon*, 780 F.2d 1165, 1174 (5th Cir. 1986) (improper admission of extrinsic act evidence may be cured by limiting instruction).

Furthermore, in light of the record as a whole, admission of the prior

conviction evidence had no substantial influence on the jury's decision to convict. The government did not provide any detailed testimony regarding the prior conviction and mentioned it only once after Wallace raised the matter (R10-854-856). In contrast, the videotape of the September 18, 1996, search clearly showed Wallace kicking Hawthorne even though Hawthorne and the situation were under control (R8-369, 378, 392-393, 401, 420-425; R10-789; R12-1235, 1239) and did not warrant the use of force exhibited by Wallace on the videotape. Thus, as in *United States* v. *Gadison*, 8 F.3d 186, 192 (5th Cir. 1993), where the government presented strong circumstantial evidence establishing the defendant's membership in the charged conspiracy to distribute drugs in addition to the evidence of the defendant's prior drug offense conviction, the admission of the prior conviction evidence here "added little to the government's case" and any potential undue prejudice was minimal due to the court's limiting instruction.

Accordingly, even if the district court erred in admitting the prior conviction evidence (which we do not believe it did), Wallace cannot show that admission of the evidence compromised his substantial rights — let alone that it affected the fairness, integrity, or reputation of his trial. Absent such a showing, no remedy is available. See *Clayton*, 172 F.3d at 352 (even assuming that the district court

committed plain error in charging the jury, the appellate court need not exercise its discretion to correct the error because defendant failed to show how the error affected the integrity of his trial); *United States* v. *Sneed*, 63 F.3d 381, 390 (5th Cir. 1995) (although district court erred in not making explicit findings regarding losses attributable to defendants in calculating their sentence terms, error was not plain because defendants failed to show how the error affected their sentences), cert. denied, 516 U.S. 1048 (1996).

III

NO BASIS EXISTS FOR RECUSAL OF THE DISTRICT COURT JUDGE

Wallace contends (Br. 17-19) that the district court judge should have recused himself pursuant to 28 U.S.C. 455(a), which provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Wallace argues on appeal (Br. 18-19) that recusal is warranted solely based on the district judge's comments at the October 8, 1999, in-chambers conference. At that time, the judge informed government counsel and an attorney from the Federal Public Defender Office, which represented Wallace at trial, of his concerns that Wallace, his trial counsel, and expert witness may have conspired to commit and suborn perjury.

The comments at issue arose as a result of testimony toward the end of the trial. On October 6, 1999, Wallace testified that he stepped on Hawthorne because he tripped (R18-45-55). His testimony was followed by that of his use-of-force expert witness, Terry Pelz, who testified that, based on his review of the videotape of the September 18, 1996, events, it did not appear to him that Wallace kicked Hawthorne in the head (R19-19). Wallace's attorney, Assistant Federal Public Defender Richard Ely, specifically asked Pelz whether on the videotape "it appears that Mr. Wallace is knocked off balance when inmate Hawthorne crawls around the door frame," to which Pelz responded, "I believe when I viewed the videotape, I brought that to your attention" (R19-19).

Following this exchange, the government pursued this point in cross-examination of Pelz:

> Q. As a matter of fact, you were the one that suggested to Ely that maybe it appeared that Wallace was off balance; isn't that correct?
>
> A. After my many reviews of it, yes.
>
> Q. That's the way it appeared to you?
>
> A. That's my expert opinion.
>
> Q. And you suggested that to him as a possible defense that he could use; isn't that right?

A. I said, "Mr. Ely, look at what is happening here; look at how the legs are being" —

* * *

Q. You suggested that to Mr. Ely as a possible defense that they could use; isn't that right?

A. No. I told Mr. Ely that this is what I see on the tape.

Q. And that wasn't anything you got from Mr. Wallace, was it —

A. Absolutely —

Q. — that he was off balance?

A. No.

(Pelz Tr. at 3 (attached at Addendum)). Thereafter, Wallace's counsel argued in closing that the jury should not believe the "Government['s] insinuation" that the defense "paid an expert to perjure himself" (R23-3), while the government argued in rebuttal that Pelz himself testified that "he is the one that told [defense counsel] about" his observation that Wallace tripped (R13-1420). The judge, however, did not comment on this issue in front of the jury except to overrule Ely's objection to government's rebuttal statement regarding Pelz's testimony (R13-1420).

Only after the jury started deliberating did the judge conduct a bench conference with Ely and government counsel, where he stated for the first time that he did "not want to accuse [Ely] or anyone else of anything improper," but if Pelz

"testified truthfully, what he suggests is that there has been a conspiracy between [Ely, Wallace,] and him to suborn perjury" (R22-3). The judge further stated that he "could be all wrong about all of this"; he just wanted to inform counsel about his concerns and asked Ely to review the transcript of Pelz's testimony, consider the implications if such a conspiracy exists, and advise the court how he wanted to proceed (R22-4). Lastly, the court cautioned Ely that he should consider the implications for Wallace before speaking to Wallace about the suborning perjury issue (R22-4).

On the following day, October 8, 1999, while the jury was deliberating, the court held an in-chambers conference with government counsel and Assistant Federal Public Defender H. Michael Sokolow (R24-2). Sokolow had requested the conference to discuss how the Federal Public Defender Office should address their conflict of interest resulting from the suborning perjury allegation; Sokolow was under the mistaken impression that the court had ordered Ely not to tell Wallace about this issue (R24-2, 4-5). In response, the judge explained that he did not prohibit Ely from discussing the matter with Wallace, but that he merely advised Ely to think about how best to proceed before involving Wallace (R24-9, 18, 31). The court then described to Sokolow, who was not present at the earlier hearing,

the basis for its concerns about perjury. Contrary to Wallace's assertions, none of the court's statements at this conference justifies recusal.

This Court reviews a denial of a motion to recuse for an abuse of discretion. See *United States* v. *Bremers*, 195 F.3d 221, 226 (1999). Recusal may be required under Section 455(a) if "a reasonable person, knowing the relevant facts, would expect that [the judge] knew of circumstances creating an appearance of partiality" even if no actual partiality exists. *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988); *Bremers*, 195 F.3d at 226. But recusal may not be based on "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings * * * unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky* v. *United States*, 510 U.S. 540, 555 (1994). "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Ibid.* Moreover, "expressions of impatience, dissatisfaction, annoyance, and even anger" do not establish an appearance of bias. *Id.* at 555-556.

Here, because the district judge's comments were based on Wallace's expert witness's testimony at trial, recusal is proper only if the statements at issue can be

characterized as deep-seated favoritism or antagonism that made the trial unfair. The record, however, clearly reveals that the neither characterization is appropriate. See *United States* v. *Jordan*, 49 F.3d 152, 157 (5th Cir. 1995) (courts must analyze the "unique facts and circumstances" of the particular Section 455(a) claim at issue, rather than compare the case at hand to similar "situations considered in prior jurisprudence").

After presiding over the entire trial, it is entirely proper for the judge to have formed an opinion about the evidence at trial and even about the defendant. See *Liteky*, 510 U.S. at 550-551; *Garcia* v. *Woman's Hosp.*, 143 F.3d 227, 230 (5th Cir. 1998) (on remand, judge's comments regarding plaintiff's "ability to prove her case were perhaps unflattering, but reflected only the district judge's considered opinion upon having viewed the evidence and law in this case" and were not grounds for recusal). It is the judge's informed opinion of the evidence presented at trial that Wallace challenges here. For example, as support for his argument that the court created an appearance of bias, Wallace asserts (Br. 17) that "the judge suggested in the middle of trial that Appellant change his plea to guilty and 'go home.'" This statement is incorrect in several respects. First, the statement occurred at the October 8, 1999, hearing, and not in the middle of trial. Second, the

judge referred to pleading guilty in the context of discussing different possible scenarios for resolving the suborning perjury issue — *i.e.*,Wallace could plead guilty or, if the trial continues, the court would be obligated to investigate further to ascertain whether there was any impropriety that would compromise the integrity of the trial (R24-13-14). He was not telling Wallace to plead guilty, as implied by Wallace. Taken in context, it is plain that the judge was merely stating his opinion and concerns about the trial evidence (and did not hold a deep-seated belief that Wallace, Ely, and Pelz had in fact committed any wrongdoing).

At bottom, nothing stated by the judge could be interpreted by a reasonable person as showing that the court was convinced that Wallace had conspired to suborn perjury (though it would not be grounds for recusal even if the court held that opinion based on the trial evidence) or that the court would disregard any credible evidence by Wallace. See *Liteky*, 510 U.S. at 551 ("Impartiality is not gullibility. Disinterestedness does not mean child-like innocence."); *Garcia*, 143 F.3d at 230 (no basis for recusal where "judge's comments did not indicate that he would ignore probative value" of plaintiff's evidence).

To the contrary, the judge characterized the matter as "*potentially* a conspiracy to submit and to suborn perjury," which indicates that he did not have

his mind made up about Wallace (R24-8 (emphasis added)). The judge's impartiality was also evident in the way that he qualified his statements by saying "if we are to believe what the expert witness had to say" (R24-9) and generally referred back to the actual testimony by Pelz when giving his opinion of the evidence (R24-10, 14, 26-27). And far from being biased against Wallace, the judge tried to avoid any undue prejudice to Wallace by purposely not mentioning his concerns in front of the jury (R24-27) and was fully aware that even the appearance of bias would affect the integrity of the trial (R24-13). He even stated so (R24-13), as quoted in Wallace's brief, but ultimately (and correctly) decided that his performance of his judicial duties by sharing his concerns about Pelz's evidence did not warrant recusal (R2-Doc. 128).

Wallace appears to argue (Br. 18-19) that the very fact that the judge "accused" him of conspiring to suborn perjury creates an impression of bias mandating recusal. The record shows, however, that the judge was merely "bring[ing] it to [counsel's] attention" (R24-16). By doing so, the court was simply investigating a potential problem that was relevant to the credibility of Wallace and his expert witness. See *Securacomm Consulting, Inc.* v. *Securacom Inc.*, Nos. 95-5393, 96-3247, 99-5326, 2000 WL 1177428, at *5 (3d Cir. Aug. 21, 2000) (court's

questioning at trial was relevant to the witness's credibility and did not create appearance of bias to support recusal); see also *United States* v. *Howard*, 218 F.3d 556, 566 (6th Cir. 2000) (no basis for recusal where defendant failed to show "that the district judge manifested a clear inability to render fair judgment" by stating, outside the presence of the jury, that the testimony against defendant was "highly credible"). Indeed, the court stated that its purpose in raising this issue was to resolve what it perceived to be a potential problem that could have jeopardized the efficacy of Wallace's trial (R24-10-11). Decisions related to trial administration like this one by the court to resolve a potential problem that arose during trial can hardly be grounds for recusal. See *Liteky*, 510 U.S. at 556 (stating that "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel and to witnesses" do not support recusal).

Nor could the court's comments at the end of the trial after the jury had commenced deliberations be the basis for recusal. As the Fifth Circuit stated in *United States* v. *Wade*, 931 F.2d 300, 304-305, cert. denied, 502 U.S. 888 (1991), the district court's "ill-advised" comments near the end of trial do not support recusal where the court was fair and impartial toward defendant during trial. Similarly, Wallace does not — and cannot — cite to any evidence of bias or

appearance of bias by the court during the trial itself. Thus, no grounds exist for recusal. See *Pollard* v. *E.I. DuPont de Nemours Co.*, 213 F.3d 933, 944 (6th Cir. 2000) (court's remarks at the close of defendant's trial did not warrant recusal "absen[t] any evidence that the district court was unfair in his dealings with the defense during the course of the trial").

IV

THE DISTRICT COURT DID NOT ERR IN DENYING WALLACE'S REQUEST FOR NEW COUNSEL

A criminal defendant has the right to effective assistance of counsel, which "includes the right to representation free from a conflict of interest." *United States* v. *Greig*, 967 F.2d 1018, 1021 (5th Cir. 1992). Ordinarily, to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense to the extent that the result would have been different. See *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). Where, as here, the defendant alleges that a conflict of interest existed between him and his counsel, however, the Supreme Court applies a separate two-part test to the claim. *Id*. at 692. This test provides that prejudice is

presumed "only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Ibid*. (quoting *Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1980)). Under this standard, the Court reviews legal questions *de novo* and questions of fact for clear error. See *United States* v. *Hoskins*, 910 F.2d 309, 310 (5th Cir. 1990).

Wallace contends (Br. 19-21) that his claim qualifies for a presumption of prejudice because both his attorneys at trial, Assistant Federal Public Defenders Richard Ely and H. Michael Sokolow, were burdened by an actual conflict of interest. According to Wallace (Br. 19), a conflict arose between him and Ely once the court disclosed its concerns that Wallace, Ely, and Terry Pelz may have conspired to commit and suborn perjury. Because this conflict implicated the entire Federal Public Defender Office, he argues the substitution of Ely with Sokolow did not cure the conflict. He further contends (Br. 21) that his waiver of any supposed conflict of interest was invalid, not because it was not a knowing and intelligent waiver, but because "it came while the jury was deliberating."

Even assuming that a conflict arose between Wallace and Ely once the court

communicated its concerns toward the end of the trial and Wallace's waiver of a conflict between himself and the Federal Public Defender Office was, for whatever reason, invalid, Wallace's claim still fails because he has not carried his burden of showing that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler*, 446 U.S. at 350; see also *United States* v. *Abner*, 825 F.2d 835, 843-844 (5th Cir. 1987) (to establish "adverse effects," defendant must identify specific instances where attorney's performance was allegedly compromised). Whatever conflict there may have been did not exist before the court made known its concerns about a possibility of a conspiracy to suborn perjury after the jury had begun deliberating. Prior to that, Ely had no reason to defend himself. Thus, Wallace would have to show that he was adversely affected during jury deliberations and the announcement of the verdict. This he does not do. Wallace fails to identify on appeal any instance where the alleged conflict of interest could have possibly adversely affected his attorney's performance as they awaited the jury's verdict.

Wallace appears to be implying (Br. 20 n.6) that the district court's subsequent appointment of new counsel for purposes of sentencing one month after the conclusion of trial (R2-217) proves that he was entitled to new counsel at the

trial. This is wrong. Appointment of counsel for proceedings *after trial* does not demonstrate that there was cause to replace counsel *at trial*. Without more, prejudice cannot be presumed, see *Greig*, 967 F.2d at 1024 (stating that "existence of an actual conflict does not warrant setting aside the conviction in a criminal proceeding if the error had no 'adverse effect'" on counsel's performance), and the district court did not err in denying Wallace's request for new counsel.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment against Wallace.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2000, two copies of the foregoing Brief For The United States As Appellee and a diskette containing the body of the brief were served by first-class mail, postage prepaid, on:

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