No. 02-3608

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARK WHITE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
Honorable James T. Moody

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The appellant's jurisdictional statement is not complete and correct. Therefore, the United States is providing this jurisdictional statement. This is an appeal from a final judgment by the district court in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The defendant Mark White was sentenced, and final judgment was entered, on September 24, 2002 (R. 52).[1] White filed a timely Notice Of Appeal on October 3, 2002 (R. 54). This Court has jurisdiction under 28 U.S.C. 1291.

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[1] R. __" refers to the docket entry on the district court docket sheet. "Br. __" refers to the page of White's opening brief. "Apx __" refers to the page of White's Appendix. "__ Tr. __" refers to the volume and page, respectively, of the trial transcript.

STATEMENT OF THE ISSUES

1. Whether there was sufficient evidence that White, wearing his police badge and firearm, proclaiming during the assault that he "is the * * * police," and filing charges that relate to his position as a police officer, was acting under color of law.

2. Whether the district court abused its discretion in admitting evidence, subject to a limiting instruction, of a prior incident when White used excessive force in the course of his duties as a police officer.

3. Whether the district court abused its discretion in permitting redirect examination on the same issue addressed on cross-examination.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Northern District of Indiana, defendant Mark White was convicted on one count of violating 18 U.S.C. 242. Count One of the indictment charged that White, in his capacity as a police officer of the Gary, Indiana Police Department, willfully assaulted Ms. Brenda Pryor, resulting in bodily injury, and thus depriving her of the right to be free from the intentional use of unreasonable force by one acting under color of law in violation of 18 U.S.C. 242 (Apx 17).[2] White was sentenced to 27 months'

[2] The Indictment included Count Two, which charged White with knowingly possessing a firearm after having been convicted of a misdemeanor crime of domestic violence in Indiana in violation of 18 U.S.C. 922(g)(9). The United States moved to strike Count Two, and the district court granted this motion immediately before trial (1 Tr. 9).

imprisonment, to be followed by three years of supervised release (Apx 3-4). The district court also ordered restitution in the amount of $750.00 to Ms. Pryor (Apx 6).

STATEMENT OF FACTS

White, a Gary, Indiana police officer, worked part time as a security guard at Delilah's Fantasy Dolls Club, a club with strip dancers in Gary, Indiana (2 Tr. 232-233). When at Delilah's, White regularly wore his police officer badge around his neck on a strap in plain view, and his gun, either in a holster or in his belt (1 Tr. 76, 118, 121, 175, 209; 2 Tr. 236-237). On at least two occasions, White wore his Gary police uniform to Delilah's, and he sometimes drove his police car to Delilah's (1 Tr. 118; 2 Tr. 9). It was common knowledge among the employees and patrons that White was a Gary police officer (1 Tr. 209; 2 Tr. 47). White told others he was an officer (1 Tr. 76, 209; 2 Tr. 9). The owner of Delilah's, Andy Androu, hired White because he was a police officer (1 Tr. 170, 173).

Late in the evening of March 15, 2000, Ms. Brenda Pryor, a dancer known as Monet, wanted to leave work early (2 Tr. 10-13). The heel of one shoe had broken while she was dancing and she did not have another pair that she could wear (1 Tr. 211; 2 Tr. 11). She had only been working at Delilah's for a couple of months (2 Tr. 7). It was the practice that dancers were paid cash at the end of the evening by the bartender for the number of dances performed (1 Tr. 183). Ms. Pryor became angry with the bartender, Tracy Mecko, because Ms. Mecko said that, based on instructions from the owner, she could not pay Ms. Pryor then if she left work early

(2 Tr. 12). The two women began arguing and yelling profanities at each other (1 Tr. 211-212; 2 Tr. 12). Tony Taylor, who heard the exchange between Ms. Pryor and Ms. Mecko, did not hear Ms. Pryor threaten to harm Ms. Mecko (1 Tr. 152). After this argument, Ms. Pryor went outside the main room of the club to the foyer (2 Tr. 12). Shortly afterwards, Ms. Pryor returned inside the club, sat at the bar, and drank one or two wine coolers (2 Tr. 13, 39). She again asked for her money, which Ms. Mecko refused to give her (2 Tr. 13). Ms. Pryor returned to the foyer (2 Tr. 13).

The foyer is a small room where patrons enter from the street. It is similar to a reception area; it had some chairs against the wall, a plant and standing ashtray in one corner, and doors for people to enter either the club or office (1 Tr. 80, 88-89; Gov. Exh. 3-6). In the foyer, Ms. Pryor sat and spoke to others in the room about her dispute with Ms. Mecko while she waited for a fellow dancer to finish her shift. Taylor, Damond Kimble, Cheron Hall, and one or two other people were in the foyer at that time (1 Tr. 130, 212; 2 Tr. 12).

White came out to the foyer and asked Ms. Pryor about the situation with Ms. Mecko (2 Tr. 14). That night, White was wearing his badge and he had his gun (1 Tr. 78, 143-144, 164-165; 2 Tr. 11). Some witnesses heard White tell Ms. Pryor that she could not be paid at that time and that she needed to leave (1 Tr. 113, 154, 212). Ms. Pryor was surprised that White was commenting on this topic since she did not consider it his business (2 Tr. 14). Ms. Pryor stood up from her chair, she and White were facing each other, and they began arguing (1 Tr. 113-114,

154). Ms. Pryor and White, both of whom are black, screamed at each other, used profanity, and called each other derogatory names (1 Tr. 114, 154-155). White was approximately 6'3", 350 pounds. Ms. Pryor weighed approximately 200 pounds, and is also tall, approximately 6'1" (1 Tr. 119, 150-151).

While Taylor, Kimble, and Hall did not hear every comment, their descriptions of White's attack on Ms. Pryor are consistent with each other and Ms. Pryor's testimony, and contradict White's version of the events. Kimble, Taylor, and Hall considered themselves friends with White, they knew him much longer than they knew Ms. Pryor (Taylor had known White for over 10 years prior to the incident), and they liked White better than they liked Ms. Pryor (1 Tr. 76-77, 128-129, 210).

As Ms. Pryor was about to leave the club, she said to White, "bye, nigger" (1 Tr. 213; 2 Tr. 15). White asked her to repeat herself, which she did (1 Tr. 213, 2 Tr. 15). White then slapped Ms. Pryor across the face with an open hand, followed by two more open-handed slaps in quick succession (1 Tr. 79, 92, 116, 133, 213; 2 Tr. 16-17). The force of the slap forced one contact out of Ms. Pryor's eye (1 Tr. 213; 2 Tr. 16). Ms. Pryor never fell to the ground after these slaps; she staggered or stepped backwards and continued to yell at White, including saying, "hit me again" (1 Tr. 93, 133-134; 2 Tr. 17). White also kept yelling back at Ms. Pryor, including comments like, "this is what you get [when] [y]ou run your mouth," "[y]ou're not going to cry? [y]ou going to take this?" (1 Tr. 95; 2 Tr. 17). White then punched Pryor in the face with a closed fist two or three times (1 Tr. 79, 117,

133, 215; 2 Tr. 17). Ms. Pryor did not initiate physical contact with White or make any threatening gesture to him before White began hitting her, or at any time during the attack (1 Tr. 94-95, 134, 213-214; 2 Tr. 10, 20). She did not bump up against, strike, punch, or touch White in any manner during the attack (1 Tr. 94, 135; 2 Tr. 10). In addition, neither Taylor nor Kimble heard Ms. Pryor threaten to shoot White or harm anyone else at the club (1 Tr. 94, 136; see 2 Tr. 10-11).

After slapping and punching Ms. Pryor, White grabbed her with one hand by the throat and pushed her, and Ms. Pryor fell back over a chair and landed on the floor (1 Tr. 95, 125, 216; 2 Tr. 19). As she was on the floor, White leaned over and punched Ms. Pryor again (1 Tr. 134, 216). Ms. Hall saw White grab for his gun while he leaned over Ms. Pryor, and Ms. Hall yelled, "No, Mark, no, what are you doing?" (1 Tr. 216; 2 Tr. 19). White did not fully retrieve his weapon. Ms. Pryor, who was trying to get to her cell phone, called out either "somebody call the police" or "I'm going to call the police" (1 Tr. 144-145, 215; 2 Tr. 19). White grabbed the phone from Ms. Pryor, responding, "I am the f–ing police" (1 Tr. 215, 237; 2 Tr. 19; see 1 Tr. 145).

When Ms. Pryor was on the floor, Kimble and Taylor went to her aid (1 Tr. 95, 136). As Ms. Pryor was getting up with their assistance, she took the top of the ashtray in her hand, but she did not raise it towards White (1 Tr. 100, 136). At this point, Ms. Pryor's face was covered in blood as a result of White's blows (1 Tr. 95, 104). Kimble testified that White's strikes and punches were with "tremendous

force" (1 Tr. 79). Kimble then took Ms. Pryor outside, and the police arrived soon afterwards (1 Tr. 100).

Gary Police Officer Evan Eakins went to Delilah's in response to a radio dispatch, and he contacted his supervisor, Sergeant James Bodnar, to come to the scene since Eakins heard that the incident involved a Gary police officer (2 Tr. 64-65-66). When Eakins arrived on the scene, several people were standing outside Delilah's, including one woman who was bleeding from her mouth and yelling (2 Tr. 65). Sergeant Bodnar arrived shortly after him and, soon thereafter, Sergeant Bodnar instructed Eakins to take a statement from Ms. Pryor, which Eakins did (2 Tr. 66-68; Gov. Exh. 12). Ms. Pryor stated that White had assaulted her; White was recorded on Eakin's report as the "suspect" (2 Tr. 68).

Upon his arrival, Sergeant Bodnar went inside Delilah's and spoke with White (2 Tr. 78-79). White told Bodnar that he asked Ms. Pryor to leave the club because of an earlier disturbance (2 Tr. 79). White also said that as Ms. Pryor was about to leave, she "abruptly" turned and moved "aggressive[ly]" towards him, with her hands raised, and he struck her once in self-defense (2 Tr. 79). Sergeant Bodnar spoke briefly again with White after he instructed Eakins to take a statement from Ms. Pryor, and told White that if the events were as White described, White should have Ms. Pryor arrested (2 Tr. 81). It was White's decision to have Ms. Pryor arrested, made with Sergeant Bodnar's advice (2 Tr. 82).

An ambulance took Ms. Pryor to the hospital (2 Tr. 82). She suffered bruises and swelling of her face, a laceration to her lip, and she needed stitches on the inside and outside of her mouth due to a hole created by White's blows (1 Tr. 192-194; Gov. Exh. 10).

Kimble did not intervene earlier to assist Ms. Pryor because, as he explained, "it's not my place. Mark's a police officer" (1 Tr. 96). Taylor similarly testified that he did not come to Ms. Pryor's aid because White "[is] a police officer" (1 Tr. 144).

After White closed up Delilah's, he went to the police station and prepared an arrest report for Ms. Pryor (2 Tr. 255; Gov. Exh. 13). In that report, White identifies himself as the Complainant, the Arresting Officer, the Booking Officer, and the Reporting Officer, either as "Cpl. M. White," "M. White," or "Mark White" with his badge number (Gov. Exh. 13). White's narrative refers to himself as "Cpl. M. White," and states that he told Ms. Pryor she was under arrest (Gov. Exh. 13). The arrest report charges Ms. Pryor with "intimidation[,] resisting law enforcement[,] battery on law enforcement/disorderly conduct" (Gov. Exh. 13).

Based on White's arrest report and orders from Sergeant Bodnar, Officer Tatum and another Gary police officer went to the hospital and placed Ms. Pryor under arrest (2 Tr. 82, 85, 278). Officer Tatum did not know the nature of the charges when he was instructed to arrest Ms. Pryor, nor was he given any specific information about the charges when he called the station on two occasions from the hospital; he was only told that Ms. Pryor should know, or she would find out when

she arrived at the station (2 Tr. 85, 88, 90). Ms. Pryor was taken in handcuffs to the police station, where she was finger-printed, photographed, and booked, and $750 bail was posted for her release (2 Tr. 26, 89).

In addition to the arrest report form, White also prepared two documents entitled "Information" that set forth the charges against Ms. Pryor in greater detail (2 Tr. 279-281; Gov. Exh. 11). The information, akin to an indictment, includes preprinted charges with blank space for an officer to write in details to complete the factual description of the selected charge (Gov. Exh. 11). One document charges Ms. Pryor with intimidation; specifically, "communicat[ing] a threat to [] Cpl. M. White" (2 Tr. 283; Gov. Exh. 11). The second charges Ms. Pryor with disorderly conduct, resisting law enforcement, and battery on a law enforcement officer (2 Tr. 284, 290; Gov. Exh. 11). Specifically, the disorderly conduct charge referred to Ms. Pryor's failure to stop "yelling obscenities" after being "asked to stop by Officer Mark White" (2 Tr. 285; Gov. Exh. 11). Ms. Pryor was also charged with resisting a law enforcement officer by "fighting against Cpl. White while said officer was lawfully engaged in the execution of his duties as an officer" (2 Tr. 288; Gov. Exh. 11). Finally, White charged Ms. Pryor with battery on a law enforcement officer, for "intentionally touch[ing] Cpl. Mark White, a law enforcement officer * * * while the said officer was engaged in the execution of his * * * official duty" (Gov. Exh. 11). This charge is a distinct and more serious a charge than simple battery (2 Tr. 290). All of these charges were subsequently dropped (Gov. Exh. 11).

Later that day, White admitted to Taylor that he had a quick temper, that Ms. Pryor was talking too much, and that she made him very angry (1 Tr. 140-141). In addition, both Kimble and Taylor had seen White drinking vodka and orange juice before he attacked Ms. Pryor (1 Tr. 78, 137-138). When Ms. Hall went to Delilah's later that day, Ms. Mecko commented that Ms. Pryor had initiated the fight with White, and Ms. Hall responded that that was not what happened (1 Tr. 220-221). White later told Ms. Hall that she should stop talking about the incident, and she felt threatened by his comments (1 Tr. 221-222). On September 12, 2000, during a voluntary interview with FBI Agents Anthony Riedlinger and Cziperle, White stated that Ms. Pryor was "mouthy" the night of March 15, 2000, and that he was not going to let her make an example of him (2 Tr. 165-166). When he asked what charges may be filed against him because of this incident, and the agents answered that it could be similar to those filed against other Gary officers (David Brown and Bruce Troxel) who were charged and convicted of a civil rights violation for beating someone, White responded, "even though I arrested her?" (2 Tr. 168).[3]

STANDARDS OF REVIEW

This Court reviews challenges to the sufficiency of the evidence under a "stringent standard of review: if the evidence presented at trial, taken in the light most favorable to the prosecution, can support the jury's conclusion, [defendant's]

[3] Officers Brown and Troxel were convicted of violating 18 U.S.C. 242. See *United States* v. *Brown*, 250 F.3d 580 (7th Cir. 2001).

effort[] must fail." *United States* v. *Fernandez*, 282 F.3d 500, 507 (7th Cir), cert. denied, 123 S. Ct. 580 (2002); see *United States* v. *Gardner*, 238 F.3d 878, 879 (7th Cir. 2001).

This Court reviews challenges to the admissibility of evidence for an abuse of discretion, and the lower court's determination is given "great deference." *United States* v. *Anifowoshe*, 307 F.3d 643, 649 (7th Cir. 2002) (challenge to evidence admitted on redirect examination); *United States* v. *Heath*, 188 F.3d 916, 920 (7th Cir. 1999) (challenge to Rule 404(b) evidence). This Court should ask "whether the district court made a decision that was within the range of options from which we might expect a reasonable trial jurist to choose under the circumstances." *Ibid*. (quoting *United States* v. *Allison*, 120 F.3d 71, 74 (7th Cir.), cert. denied, 522 U.S. 987 (1997)).

SUMMARY OF ARGUMENT

Officer White was acting under color of law when he assaulted Ms. Pryor. When White worked part-time at Delilah's strip club, he presented himself as a police officer by wearing his badge and weapon. During the assault on Ms. Pryor, he identified himself as a police officer, and after the assault, he had Ms. Pryor arrested and he filed several charges against Ms. Pryor that involved his position as a police officer, including resisting arrest and battery against a police officer. In reports filed with the police department, he identified himself as an officer. The fact that White was off-duty at the time he beat Ms. Pryor is not determinative of his status, particularly given these other factors. Cf. *United States* v. *Brown*, 250

F.3d 580, 585 (7th Cir. 2001); *Pickrel* v. *City of Springfield*, 45 F.3d 1115, 1117-1119 (7th Cir. 1995).

The district court did not abuse its discretion in admitting evidence, pursuant to Fed. R. Evid. 404(b), of a prior assault that White committed while on duty as a Gary police officer. Cf. *Brown*, 250 F.3d at 585. The district court correctly found that the two incidents were very similar; White used unnecessary force in response to perceived challenges to his authority. In addition, the prior assault, and the disciplinary action and lawsuit that followed it, gave White notice that the unnecessary use of force was illegal, and are evidence of White's specific intent to violate Ms. Pryor's rights. The district court gave three limiting instructions to the jury, and the court appropriately determined that the probative value of this evidence outweighed any prejudicial value.

A district court has discretion to admit the results of a polygraph examination. *United States* v. *Lea*, 249 F.3d 632, 638-640 (7th Cir. 2001). In addition, a district court has discretion to determine the scope of redirect examination, and it is appropriate to allow redirect on the same subject addressed on cross-examination when the defendant has failed to present all of the relevant facts and circumstances. See *United States* v. *Anifowoshe*, 307 F.3d 643, 649 (7th Cir. 2002); *United States* v. *Touloumis*, 771 F.2d 235, 241 (7th Cir. 1985). Here, White cross-examined FBI Agent Osborne regarding his interview tactics with White. The district court appropriately determined that eliciting on redirect that White was subject to a polygraph examination at the start of Osborne's interview –

and not introducing the results of the test – was highly probative since this testimony provided context to Osborne's interview techniques, and the probative value outweighed any potential prejudice.

ARGUMENT

I

OFFICER WHITE ACTED UNDER COLOR OF LAW WHEN HE ASSAULTED BRENDA PRYOR

White's assertion (Br. 7-9) that there is insufficient evidence to establish that his assault on Ms. Pryor was committed under color of law is without merit. White's own statement, his practice of wearing his police badge and weapon at the club, his wearing his badge and gun the night of the assault, and the arrest report and charges provide more than ample evidence that White's assault was committed under color of law.

18 U.S.C. 242 makes it unlawful for any individual, "under color of any law * * * [to] willfully subject[] any person in any State * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." In *Screws* v. *United States*, 325 U.S. 91, 107-111 (1945), the Supreme Court held that even acts that violate state law and are outside the bounds of a law enforcement officer's lawful authority can be acts committed under color of law. See *West* v. *Atkins*, 487 U.S. 42, 49-50 (1988).

Deciding whether an officer is acting under color of law turns "largely on the nature of the specific acts the police officer performed." *Pickrel* v. *City of*

Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995). It is well established in this Circuit that the mere fact that an officer is off-duty at the time of the alleged offense, or working at another job, does not preclude a finding that the officer was acting under color of law. See *Latuszkin* v. *City of Chicago*, 250 F.3d 502, 505 (7th Cir. 2001) ("finding that [defendant] acted under color of [] law is not foreclosed by [defendant] being off-duty at the time of the" incident); *Pickrel*, 45 F.3d at 1118; *Gibson* v. *City of Chicago*, 910 F.2d 1510, 1517 (7th Cir. 1990); *Greco* v. *Guss*, 775 F.2d 161, 168 (7th Cir. 1985); *Davis* v. *Murphy*, 559 F.2d 1098, 1101 (7th Cir. 1977) (off duty officers who displayed badges and guns, identified themselves as officers and were on duty at all times pursuant to regulations are acting under color of law when they repeatedly called individuals by racial epithets and initiated assaults).

This Court examines an officer's behavior to determine whether the officer has publicized his police affiliation and presented himself as having police authority. See *United States* v. *Brown*, 250 F.3d 580, 585 (7th Cir. 2001); *Pickrel*, 45 F.3d at 1118-1119. The officer's assertion of police authority is frequently established through the officer's appearance – wearing a uniform, displaying a badge and weapon, or other signs of authority. See *Brown*, 250 F.3d at 585, *Pickrel*, 45 F.3d at 1118-1119. This Court also examines how the defendant identifies himself to the victim; that is, as an officer or private employee working security. *Id*. at 1119.

In *Brown*, 250 F.3d at 587, this Court affirmed convictions under 18 U.S.C. 242 in very similar circumstances; a Gary, Indiana police officer, while in uniform, used excessive force against an individual while working a second job as a security guard at a strip club. Brown challenged the introduction of evidence of another incident under Fed. R. Evid. 404(b), which also took place at the club when he was not in uniform. Brown argued that the other incident was not sufficiently similar to the charged offense. *Id*. at 585. This Court examined the defendant's pattern of behavior at the strip club, and concluded that Brown "drew attention to his police authority" and "insured the * * * patrons' [and employees'] awareness of his affiliation" by regularly wearing his police badge around his neck and carrying his police-issued weapon. *Ibid*. The absence of a uniform on the night of the prior incident did not refute the similarity between the assaults because, in both instances, the officer emphasized his police affiliation. *Ibid*.

In *Pickrel*, 45 F.3d at 1117, a police officer worked part time as a security guard for a private company at a McDonald's franchise, and arrested an individual after an altercation at the restaurant. The officer was in uniform, including his badge and weapon, and a marked squad car was parked outside the restaurant. *Ibid*. This Court reversed the lower court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of a complaint under 42 U.S.C. 1983. *Id*. at 1119. This Court held that it was error to conclude that plaintiff had no possibility of proving that the off-duty police officer was acting under color of law. While not on duty, the officer was "displaying signs of state authority and advertising the presence of a state actor,"

which, this Court held, may be enough to establish action under color of law. *Honaker* v. *Smith*, 256 F.3d 477, 485 (7th Cir. 2001) (describing *Pickrel*).

The evidence in this case squarely supports the jury's finding that when White assaulted Ms. Pryor, he was acting under color of law. Several witnesses testified that they knew White was a police officer based on his statements and his regular practice of wearing his police badge and weapon when he worked at Delilah's (see *infra*, p. 3). These same witnesses, friends of White, saw him wearing his badge and carrying his firearm the night he assaulted Ms. Pryor. Taylor and Kimble testified that they did not come to Ms. Pryor's aid while White was punching her "because he was a police officer" (1 Tr. 96, 143-144). When Ms. Pryor called out, asking someone to call the police, White responded, "I am the f–ing police" (1 Tr. 145, 214-215, 237; 2 Tr. 19).

Moreover, the charges that White specified in his arrest report and the Information reflect action allegedly taken against him *as a police officer* during the assault. The charges of disorderly conduct for not following the commands of a police officer, battery on a police officer, and resisting arrest could not be made but for his claimed authority as a police officer.[4] In addition, in these documents,

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[4] White asserts (Br. 9) that "post battery" actions, including his "announcement" that he was a police officer and his arrest of Ms. Pryor are not "conclusive" since the indictment charges White with "striking, beating, and unlawfully assaulting" Ms. Pryor. First, this Court need not determine that these factors alone establish White acted under color of law. Second, White's comment was not "post battery," but in the heat of the assault itself. Moreover, the arrest report and Information were completed soon after the assault, they set forth

(continued...)

White repeatedly referred to himself in his official capacity, either as Cpl. White or by his badge number (See *infra*, p. 8, 9; Gov. Exh. 11, 13). In sum, White clearly made his police affiliation known to others throughout his employment at Delilah's, and he flaunted and abused that authority during his assault on Ms. Pryor and in the filing of charges. Cf. *Brown*, 250 F.3d at 585; *Pickrel*, 45 F.3d at 1118-1119; *Davis*, 559 F.2d at 1101 (off-duty officers who displayed guns, badge, and identified themselves as officers during unprovoked assault were acting under color of law); *United States* v. *Tarpley*, 945 F.2d 806, 808-809 (5th Cir. 1991) (officer who assaulted individual because of his prior affair with the officer's wife acted under color of law; "the air of official authority pervaded the entire incident" when he repeatedly claimed during the assault that he was an officer who could kill the victim with impunity because of his position, he identified another person as an officer and, after the assault, he followed the victim in his police car), cert. denied, 504 U.S. 917 (1992).

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF A PRIOR ASSAULT BY WHITE PURSUANT TO FED. R. EVID. 404(b)

White asserts (Br. 9-11) that the district court abused its discretion in allowing evidence of a prior assault that White committed while on duty as a police

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[4](...continued)
White's claim that he was assaulted while he was acting as an officer, and are material to assessing White's conduct.

officer. The district court, however, appropriately determined that the prior assault was very similar to the charged offense, that this evidence was probative of defendant's specific intent to use unnecessary force, and that its probative value outweighed any potential prejudice.

A. Prior Incident And Trial Court's Ruling

Before trial, the United States notified White of its intent to introduce evidence of three prior bad acts, including an incident involving Ms. Janice Barclay and Ms. Barbara Woods Coleman (R. 17). White filed a motion in limine (R. 18) to bar admission of evidence regarding any prior bad acts and the United States filed a response (R. 36). Immediately before trial, with respect to the Barclay/Coleman incident, the district court ruled, "[t]hat one seems to be a similar type of incident. It's close enough in time. It does go towards intent. Its probative value outweighs any unfair prejudice to the Defendant. * * * It's going to come in" (1 Tr. 5). He added, "the incident is germane to intent" (1 Tr. 7). The district court denied admission of two other prior bad acts proffered by the United States (2 Tr. 64).

On January 20, 1993, White assaulted Ms. Barclay and Ms. Coleman while in uniform and on duty in Gary, Indiana (2 Tr. 97, 99, 122). Ms. Barclay was working at Ms. Coleman's salon when a customer asked for assistance since it appeared that her car was about to be towed from a parking spot on the street (2 Tr. 96-97). Ms. Barclay joined the customer on the street. White and Gary Officer Victor Mobley, both in uniform, were standing next to the customer's car (2 Tr. 98-

99). Ms. Barclay inquired whether everything was all right, and White responded by asking who she was, told her that she was not permitted to be on the street, and advised her to leave the scene and return to the shop (2 Tr. 99). As she began walking away, Ms. Barclay made a disparaging remark in a low voice that she believed could not be heard by others (2 Tr. 100). White immediately tackled her from behind, causing her knees to forcefully hit the sidewalk (2 Tr. 100). White then flipped Barclay over, causing her head to hit a wall, got on top of her, and put his knee into her, which made her whole body "pop" (2 Tr. 100-101). White continued to put his weight on Ms. Barclay, who was not resisting (2 Tr. 101-102). When Ms. Barclay asked Officer Mobley for assistance, he shook his head, simply saying, "Ma'am," and taking no action (2 Tr. 102).

When Ms. Coleman came out to the sidewalk, she asked what was going on and gently touched White on the arm to get his attention (2 Tr. 103). In response, White violently threw Ms. Coleman backwards and handcuffed her (2 Tr.122). White also had Ms. Barclay arrested (2 Tr. 105-106). Throughout the incident, White used profanity and said, among other things, "who the f– you think you are?" (2 Tr. 101-102, 121-123). Ms. Barclay suffered substantial injuries to her right leg and back as a result of the assault (2 Tr. 107-108). Charges filed against Ms. Barclay and Ms. Coleman were subsequently dropped (2 Tr. 106, 125-126).

Because of the Barclay/Coleman incident, the Chief of the Gary Police Department recommended that White be suspended for 30 days (2 Tr. 143, Gov. Exh. 16). The Police Civil Service Commission reduced the suspension to 10 days

(2 Tr. 145; Gov. Exh. 17). Ms. Barclay and Ms. Coleman also filed a civil lawsuit against White and the City of Gary. The parties agreed to a judgment in favor of Ms. Barclay and Ms. Coleman, awarding Ms. Barclay $42,000 in damages, and Ms. Coleman $12,000 (2 Tr. 109).

B. Four-Prong Test Under Rule 404(b)

Fed. R. Evid. 404(b) permits the admission of evidence of other crimes, wrongs, or acts to prove, among other things, intent to commit the crime for which a defendant is charged. This Court has "combined the requirements of Rule 404(b) and Rule 403 to create a four-prong test that governs the admission of prior bad acts evidence." *United States* v. *Asher*, 178 F.3d 486, 492 (7th Cir.), cert. denied, 528 U.S. 944 (1999). Accordingly, evidence of prior crimes may be admitted when the evidence:

> (1) tends to establish a matter at issue other than the defendant's propensity to commit the crime charged; (2) is sufficiently similar and close in time to the matter at issue to be relevant; (3) supports a jury finding that the defendant committed the similar act; and (4) has probative value that substantially outweighs the danger of unfair prejudice.

United States v. *Brown*, 250 F.3d 580, 584 (7th Cir. 2001); see *Asher*, 178 F.3d at 492.

White's challenge (Br. 11) to the court's Rule 404(b) ruling is cursory and unsupported. He recognizes that 18 U.S.C. 242 is a specific intent crime, but he does not concede the Barclay/Coleman assault is probative of intent. He claims that this evidence "merely demonstrates White's general propensity for violence."

Ibid. He further recognizes that the time factor is "not dispositive," but he asserts, without citation, that seven years between the prior bad act and charged offense should weigh against admission. White concedes (*ibid.*) that the third element of the four-prong test is established. Finally, White merely asserts, (*ibid.*), without explanation, that the prejudicial impact of this evidence outweighs any probative value.

C. Application of 4-Part Test

1. Proof Of Issue Other Than Propensity: Intent

18 U.S.C. 242 is a specific intent crime, and the United States must prove that White acted willfully – that is, with specific intent to violate Brenda Pryor's constitutional right not to be unjustifiably assaulted by a police officer. *Screws* v. *United States*, 325 U.S. 91, 101 (1945). As a result, "[i]ntent is automatically at issue," and "the prosecution is entitled to establish it by using admissible evidence of their choosing," including evidence admissible under Fed. R. Evid. 404(b). *Brown*, 250 F.3d at 585-586 (citations omitted); see *United States* v. *Torres*, 977 F.2d 321, 326 (7th Cir. 1992) (evidence of prior threats admissible in witness tampering prosecution to show defendant's intent to retaliate); *United States* v. *Best*, 250 F.3d 1084, 1091 (7th Cir.) (intent to commit drug offenses; cases cited), cert. denied, 122 S. Ct. 279 (2001). This Court has upheld the admissibility of evidence of a police officer's prior assaults in cases involving 18 U.S.C. 242 and similar charges. *Brown*, 250 F.3d at 585; *Wilson* v. *City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993) (in Section 1983 action alleging that defendants tortured

plaintiff to confess to murder, trial court should have admitted two prior occasions in which defendants tortured other suspects), cert. denied, 511 U.S. 1088 (1994); see also *Edwards* v. *Thomas*, 31 F. Supp. 2d 1069, 1074-1075 (N.D. Ill. 1999) (upholding admission of prior, substantiated excessive force complaint against defendant in 1983 action to show intent).

White's 404(b) challenge is similar to the 404(b) challenge that this Court resolved against the defendant in *Brown*, 250 F.3d at 585; see *infra*, p. 15. As noted, in *Brown*, *ibid*., this Court upheld introduction of a prior incident that occurred during off-duty work at the strip club, and concluded the officer generally emphasized his police affiliation even though he did not wear a uniform on the night of the prior assault. The immediate use of unnecessary force in response to comments perceived as challenges to his authority, and similar threats to kill someone in circumstances that posed no threat, established sufficient similarity between the charge and prior bad act, and reflected more than a propensity for violence. *Ibid*. Therefore, the prior assault evidence was probative of specific intent. *Ibid*. The same is true in this case.

Moreover, as a result of White's 10-day suspension by the Gary Police Department for the Barclay/Coleman incident, and the civil suit that resulted in a settlement and payment to Ms. Barclay and Ms. Coleman, White clearly was on notice that the use of unnecessary force was illegal and, more specifically, that force in response to verbal comments is illegal. With that knowledge, White must have specifically intended to act illegally against Ms. Pryor. Cf. *United States* v.

Roe, 210 F.3d 741, 745 (7th Cir. 2000) (past cocaine distribution conspiracy conviction admissible to show defendant's knowledge and intent in narcotics prosecution); *United States* v. *Austin*, 54 F.3d 394, 399-400 (7th Cir. 1995) (defendant's prior settlement agreement with FTC on issues similar to pending charge admissible to show he was on notice that prints he sold were forgeries).

2. Similarity And Sequence In Time

White has not challenged the similarity between the Barclay/Coleman and Pryor assaults, nor can he. In both instances, White used unnecessary force, the force was in response to comments that White considered to be a challenge to his authority as an officer, the use of force was swift and significant, and White charged the victims with battery on an officer and resisting arrest.

The Barclay/Coleman incident occurred seven years before the Pryor assault, which is within the window of prior acts admitted by this Court. See, *e.g.*, *United States* v. *Tringali*, 71 F.3d 1375, 1379 (7th Cir. 1995) (10 year old cocaine trafficking conviction), cert. denied, 519 U.S. 826 (1996); *Roe*, 210 F.3d at 745-746 (7 year old cocaine conspiracy conviction); *United States* v. *Wimberly*, 60 F.3d 281, 285 (7th Cir. 1995) (13 year old molestation of different stepdaughter), cert. denied, 516 U.S. 1063 (1996); *United States* v. *Mounts*, 35 F.3d 1208, 1214-1215 (7th Cir. 1994) (7 year old attempted drug purchase); *United States* v. *Kreiser*, 15 F.3d 635, 640 (7th Cir. 1994) (7 year old drug activity).

3. Proof Of Defendant's Involvement

White concedes (Br. 11) this element, and there is no doubt that White committed the assault against Ms. Barclay and Ms. Coleman.

4. Probative Value Outweighs Prejudice

Finally, the district court determined, appropriately, that the probative value of the Barclay/Coleman incident outweighed any prejudicial impact. Of course, evidence admitted under Rule 404(b) is prejudicial in the sense that it is further proof of guilt; the question is whether it is "unduly prejudicial." See *United States* v. *Curry*, 79 F.3d 1489, 1496-1497 (7th Cir. 1996); *United States* v. *Menzer*, 29 F.3d 1223, 1234 (7th Cir.), cert. denied, 513 U.S. 1002 (1994); Fed. R. Evid. 403. The more probative the evidence, the more a court will tolerate the risk of prejudice. See *Torres*, 977 F.2d at 328. This particular determination is made with great deference since the district court can observe first-hand the evidence and witnesses presented, and can "gauge the likely impact of the evidence in the context of the entire proceeding." *Id*. at 329. The district court's denial of admission of two prior bad acts, and admission of the Barclay/Coleman incident reflects the court's balancing of probative and prejudicial factors as to each incident.

Moreover, any danger of unfair prejudice can be avoided by a limiting instruction. *Ibid*. Here, the jury was instructed that evidence regarding the Barclay/Coleman incident could be considered "only on the question of whether the defendant intended to violate the civil rights of Brenda Pryor. You should

consider this evidence only for this limited purpose" (2 Tr. 94). The district court gave this instruction before Ms. Barclay's testimony (2 Tr. 94), before Ms. Coleman's testimony (2 Tr. 116), and as part of the court's final instructions to the jury (R. 41 (Instruction #11)). In sum, the Barclay/Coleman incident squarely meets this Court's four-prong test for admissibility under Rule 404(b). Accordingly, the district court did not abuse its discretion in admitting this evidence. Cf. *Brown*, 250 F.3d at 585; *Torres*, 977 F.2d at 325-329.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING REDIRECT EXAMINATION ON THE CONTEXT OF WHITE'S INTERVIEW BY THE FBI

White asserts (Br. 11-13) that the district court abused its discretion in allowing the United States to elicit testimony from FBI Agent Richard Osborne on redirect examination that White was subject to a polygraph examination. In fact, the district court appropriately allowed brief inquiry on the existence, and not the results, of a polygraph examination on redirect examination since White opened the door on cross-examination regarding Osborne's interview tactics.

A. Examination Of FBI Agent Osborne

The United States called Osborne as a rebuttal witness to refute White's testimony that he did not tell Osborne that he had been drinking the night of the assault on Ms. Pryor or that he hit Ms. Pryor after he pushed her to the ground (2 Tr. 294, 311). White asserted that Osborne "insinuated" or "insisted" that he had

been drinking, "trying to make" him say that he hit Ms. Pryor when she was on the ground (2 Tr. 294, 311-312).

The United States' queries to Agent Osborne on direct examination were limited (3 Tr. 11-15). Osborne testified that he interviewed White on September 25, 2000, that White's participation was voluntary, and that he specifically informed White that this was a voluntary interview that he could terminate at any time (3 Tr. 11-13). Osborne further testified that although White initially denied that he struck Ms. Pryor after he knocked her to the floor, White admitted later in the interview that he did punch Ms. Pryor after she was on the floor (3 Tr. 15; see 2 Tr. 169). Moreover, after initially denying in the interview that he consumed any alcohol the night of the assault, White admitted that he had been drinking, and that the alcohol "may have" impaired his judgment (3 Tr. 14; see 2 Tr. 169).

On cross-examination, White's counsel asked questions that implied that Osborne had brow-beaten White for six hours until White finally changed his story (3 Tr. 18-19). Osborne stated that the interview lasted approximately six hours (3 Tr. 16, 18). Osborne told White that he did not believe White's initial statement that he did not hit Ms. Pryor after she was on the floor, and he conceded that he asked White about this frequently during the interview (3 Tr. 18-19). Osborne stated that White's confession of drinking and hitting Ms. Pryor after she was on the ground was given "towards the end of the interview," but he did not know exactly when White made these admissions (3 Tr. 17, 19-20).

At a bench conference before initiating redirect examination, the United States informed the court that it wanted to elicit that White was subject to a polygraph examination as part of Osborne's interview (3 Tr. 22). The United States asserted, and the court agreed, that cross-examination made it appear that Osborne unduly brow-beat White and used aggressive interrogation tactics (3 Tr. 22-23). While not seeking to submit the results, the United States proffered that Osborne's interview methods, and his refusal to accept White's initial statements, were because White failed the polygraph examination that immediately preceded the interview. The court concluded that the existence of the polygraph examination was "very probative" and "not unduly prejudicial," since the jury deserved to have Osborne's interview tactics placed in context (3 Tr. 23).

Redirect examination was very limited (3 Tr. 24-25). The government elicited that Osborne was trained as a polygraph examiner, and that the purpose of the interview was to determine whether White had been drinking the night of his assault on Ms. Pryor, and whether he hit her when she was on the floor (3 Tr. 24-25). Osborne stated that White participated in a polygraph examination regarding those and other topics immediately prior to the interview portion, which was the focus of cross-examination (3 Tr. 24-25). On recross, Osborne stated that before he interviewed White, he reviewed an FBI report that summarized a prior interview of White, and Agent Riedlinger had briefed him on the status of the investigation, including testimony from other witnesses that contradicted White's version of events (3 Tr. 26-27).

B. Discussion

This Court has held that a district court receives "considerable deference" on its decisions to admit the *results* of a polygraph examination, and a district court should evaluate the admissibility of such evidence under Rule 403. *United States* v. *Lea*, 249 F.3d 632, 638-640 (7th Cir. 2001); see *United States* v. *Kampiles*, 609 F.2d 1233, 1244 (7th Cir. 1979), cert. denied, 446 U.S. 954 (1980). In addition, a district court has "broad discretion in determining the scope of redirect examination." *United States* v. *Anifowoshe*, 307 F.3d 643, 649 (7th Cir. 2002) (quoting *United States* v. *Touloumis*, 771 F.2d 235, 241 (7th Cir. 1985)). If a defendant opens the door on an issue on cross-examination, he may not assert error when the court allows the government to introduce evidence on the same subject on redirect. *Anifowoshe*, 307 F.3d at 649; *Touloumis*, 771 F.2d at 240-242; *United States* v. *Allain*, 671 F.2d 248, 252 (7th Cir. 1982).

As noted, the district court conducted a Rule 403 balancing test and concluded that the probative value of allowing redirect examination on the existence of the polygraph examination outweighed any prejudicial impact (3 Tr. 23). Cf. *Lea*, 249 F.3d at 639-640.[5] The court's ruling was appropriate given that White, on cross-examination, opened the door to Osborne's interview tactics. The

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[5] Unlike the more difficult balancing necessary to determine whether there is sufficient and reliable evidence on the methodology for a polygraph examination to admit its results, cf. *Lea*, 249 F.3d at 639-640, the district court's assessment here was far more narrow, and limited to assessing the probative and prejudicial impact of evidence about the *existence* of an examination.

district court agreed that a way to give context to Osborne's repeated questions to White was to elicit what preceded that questioning; namely, the polygraph examination. Given the broad deference to a district court's discretionary decision to allow redirect, this Court should not reverse the district court's ruling. Cf. *Anifowoshe*, 307 F.3d at 649; *Touloumis*, 771 F.2d at 241-242; *Kampiles*, 609 F.2d at 1244.[6]

Finally, even if the reference to the polygraph examination is considered unduly prejudicial, it is harmless. Cf. *United States* v. *Brown*, 250 F.3d 580, 586 (7th Cir. 2001); *United States* v. *Thornton*, 197 F.3d 241, 253 (7th Cir. 1999), cert. denied, 529 U.S. 1022 (2000). The admission of evidence is harmless error "when it is clear beyond a reasonable doubt that a rational jury would have convicted defendant[] absent the erroneously admitted evidence." *Brown*, 250 F.3d at 586. Every witness to the assault testified consistent with each other and Ms. Pryor's version of the assault, and contrary to White's version. Significantly, this included testimony from persons who considered themselves to be friends of White, and

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[6] White's suggestion that the court admitted evidence of a "failed" polygraph examination (Br. 11-12 (Heading)), is incorrect. While the jury may infer that the interview proceeded as it did because White failed the polygraph, that inference is not inevitable. On recross, White elicited that Agent Riedlinger told Osborne about the status of the investigation, including other witnesses' testimony that was in substantial contradiction to White's earlier version of events (3 Tr. 26). This information provides an alternative basis for Osborne's skepticism of White's initial responses, rather than the presumed, failed polygraph. White could have passed the polygraph examination, but Osborne could have doubted White's responses given what Osborne knew about contradictory statements from eye witnesses.

who disliked Ms. Pryor. Moreover, the nature and extent of Ms. Pryor's injuries belie White's description. The jury had an opportunity to assess the credibility of White, Ms. Pryor, and the other witnesses. That credibility determination is not dependent on the brief, rebuttal testimony of Agent Osborne. The manner in which White was interviewed by Osborne and any inference that he failed a polygraph examination is not central to the jury's finding of guilt. In sum, there was overwhelming evidence to support the conviction. Cf. *Brown*, 250 F.3d at 586; *Thornton*, 197 F.3d at 253 (harmless error to admit proffer letters that included reference to witnesses' willingness to take a polygraph examination given the lengthy trial and "strong evidence of the defendants' guilt").

CONCLUSION

For the foregoing reasons, White's conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing Brief For The United States As Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,086 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

January 22, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2003, two copies of the foregoing Brief For The United States As Appellee, and a diskette containing same, were served by Federal Express, overnight mail, on:

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