No. 02-60519

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN L. WILLIAMS, JR.,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose oral argument.

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STATEMENT OF JURISDICTION

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 John L. Williams, Jr. was sentenced on October 7, 2002, and the district court entered final judgment on October 17, 2002 (1 R. 172-176/RE 13-17).[1] Williams filed a

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[1] "__ R. __" refers, respectively, to the volume and page number of the record on appeal. When available, corresponding cites are noted by a front-slash (/). "RE __" refers to the entry in Williams's Record Excerpts. "2d Supp. Rec." refers to the supplemental record materials submitted by the United States, and accepted by this Court on April 3, 2003.

timely Notice Of Appeal on June 18, 2002 (RE 8).[2] This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether a violation of 18 U.S.C. 242, including the use of excessive force, constitutes a "crime of violence" under 18 U.S.C. 924(c)(3).

2. Whether the district court erred in admitting lay opinion testimony from law enforcement officers on whether Williams used reasonable force against Hall.

3. Whether the district court committed harmless error when it permitted cross-examination of the defendant on whether government witnesses were liars.

4. Whether the district court abused its discretion in allowing intrinsic evidence, and evidence admissible under Rule 404(a)(1), regarding Williams's misconduct in a prior police position to show Hall's fear of Williams.

5. Whether the district court abused its discretion in permitting rebuttal closing argument that fairly responded to Williams's closing argument, and accurately addressed the terms of a co-defendant's plea agreement.

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[2] Although the copy provided in Williams's Record Excerpts is date-stamped by the district court clerk's office, the original record does not include the Notice of Appeal.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Southern District of Mississippi, defendant John L. Williams, Jr. was convicted of violating 18 U.S.C. 242 and 18 U.S.C. 924(c)(1)(A)(iii). Specifically, Williams was convicted of Count 1, which charged Williams with violating 18 U.S.C. 242 on September 4, 1998, by willfully assaulting Adam Hall under color of law by shooting Hall, thereby depriving Hall of his right to be free of the unreasonable use of force (1 R. 1, 116). Williams also was convicted of Count 2, which charged that Williams used a firearm in the commission of a crime of violence, namely, the assault described in Count 1 (1 R. 1-2, 116). Williams was sentenced to 18 months imprisonment for Count 1 and 120 months for Count 2, to be served consecutively, followed by concurrent terms of three years of supervised release (1 R. 173-174/RE 14-15).

Robert Earl Barfield, a co-defendant, pled guilty to Count 3, which charged that he violated 18 U.S.C. 242 on September 4, 1998, by willfully assaulting Adam Hall under color of law by kicking him, including after Hall was placed in handcuffs, thereby depriving Hall of his right to be free of the unreasonable use of force (1 R. 2; 2d Supp. Rec. (Plea Agreement)). After considering Barfield's cooperation, including Barfield's testimony in this case, the district court sentenced Barfield to six months of home detention, followed by three years of supervised release (RE 39-43).

STATEMENT OF FACTS

Defendant John L. Williams, Jr. and several other law enforcement officers pursued Adam Hall during a car chase through Sharkey County, Mississippi, on September 4, 1998. When Hall could no longer drive due to a flat tire, he tried to avoid the police by running through a bean field that abutted the highway. After Hall was stopped in the bean field by Anguilla Chief of Police Claude Billings, and he was standing motionless with his arms raised in the air and with his fingers spread, the defendant, who was behind Hall, shot Hall in the back.

On September 4, 1998, Hall was driving his wife Betty Hall's truck, with her as a passenger, on Highway 61 in Sharkey County (3 R. 118, 120, 212-214). Hall drove past the defendant, who was parked on the side of Highway 61 in a marked sheriff's car near the Panther Burn community (3 R. 120, 215). Williams pulled out on to the highway, followed Hall for several miles, and then turned on his blue lights to signal Hall to stop (3 R. 121, 215). Hall pulled over to the side of the road (3 R. 121, 216). Williams approached Hall's truck on the driver's side, and he had a brief exchange with Hall about whether Hall was driving with a license (3 R. 123, 216-217). Hall obeyed Williams's instruction to get out of the truck and the two men returned to Williams's car (3 R. 124, 217). In the police car, in response to Williams's inquiry, Hall stated that he did not possess any drugs, and he gave Williams his social security number (3 R. 219). Williams called the Sheriff's Department office over the radio to check the status of Hall's license (4 R. 524).

Williams and Hall got out of the car and, at Williams's instruction, Hall placed his hands on the hood of the patrol car (3 R. 125, 220). Williams frisked Hall and put his hands in Hall's pockets; Hall only had loose change (3 R. 220; see 3 R. 126). Hall had a cell phone clipped to his belt in plain view (3 R. 220-221). Hall did not hear the dispatcher report over the radio that Hall's license had been suspended (3 R. 256, 258; 4 R. 524).[3] After being frisked, and when Williams started to reach for his handcuffs, Hall turned around, said "hold on," and asked Williams why he was stopped and what was going on (3 R. 126, 221). Williams did not say why he stopped Hall nor did he tell Hall that he was under arrest (3 R. 126-127, 222, 260). While holding Hall's arm, Williams told Hall that he would "pop" Hall, and Hall responded, "well, do what you got to do" (3 R. 222-223, 263). Hall then called out to his wife by name and he began walking back to his truck, with Williams at his side (3 R. 127, 158, 222).

Hall had called out to his wife after Williams had said he would "pop" Hall to ensure that she was watching what Williams was doing. Hall was afraid of Williams because he had heard that Williams had shot someone when Williams was an officer for the Hollandale Police Department, a neighboring jurisdiction, and he had heard that Williams had planted drugs on persons to falsely accuse them of possession of narcotics (3 R. 230, 292-294).

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[3] Hall did not learn that his driver's license was suspended until several days after the incident (3 R. 258).

Hall got in his truck, buckled his seat belt, and released the emergency brake (3 R. 128-129). Williams did not respond to Hall or Mrs. Hall's repeated questions about what was happening after Hall got back in the truck (3 R. 128-129, 159, 223-224). Williams never told Hall that he was under arrest or could not leave the scene (3 R. 160). As Hall bent over to release the brake, Williams pulled out and sprayed mace, which hit the back of Hall's head and the side of Mrs. Hall's face (3 R. 129). Hall did not strike Williams, try to hit Williams with the truck door, or otherwise endanger Williams at any time prior to or when Hall pulled away (3 R. 223-224, 260, 295). Williams was not in front of Hall's truck as Hall started to leave the scene and Williams did not fall to the ground to be partially under Hall's truck (3 R. 295-296). Once Hall pulled away and he hit the highway pavement, Hall sped quickly away (3 R. 225). Williams ran back to his car and the chase began (3 R. 225).

Hall conceded that he drove fast, and at times recklessly, through the small town of Anguilla, and back and forth on Highway 61 (3 R. 291). The car chase encompassed about ten miles, and lasted for approximately 15 minutes (4 R. 349, 443-444). Shortly after leaving the initial stop with Williams, Hall, with Williams in pursuit, sped past the home of Claude Billings, Anguilla's Chief of Police (3 R. 226; 4 R. 439). Billings joined in the chase (3 R. 227; 4 R. 441). In response to radio calls for assistance, Sharkey County Chief Deputy Sheriff William Cooper and Sharkey County Deputy Sheriff Robert Barfield also joined the chase in separate patrol cars (3 R. 35-36; 4 R. 340). Although the officers had car lights

flashing and tried to stop Hall along Highway 61, Hall did not stop and evaded police (3 R. 38-39; 4 R. 345-346, 442, 473).

At one point, Hall turned off of Highway 61 to change directions and he pulled into an area parallel to Highway 61, near railroad tracks and the Cameta Gin (3 R. 41, 227-228). Cooper was parked at that location and he was outside of his car (3 R. 41, 227). Cooper had his gun drawn and pointed at Hall, and he demanded that Hall stop, saying "stop that car before I blow your * * * f__ing head off" (3 R. 41, 134, 175, 229-230). Hall stopped the truck about six feet away from Cooper (3 R. 228). Hall repeatedly said in reply that he wanted to talk to Jake, referring to Jake Cartlidge, the Sheriff of Sharkey County, who was out of town that afternoon (3 R. 43, 107, 133, 229; 4 R. 351-352). He wanted to talk to Cartlidge because of his fear of what Williams might do (3 R. 295). Hall also was frightened by Cooper pointing the gun and threatening to shoot Hall. Hall started to leave the scene and return to Highway 61, but he could not speed away because of a nearby stop sign (3 R. 231).

As Hall was leaving the scene, Cooper shot at Mrs. Hall's truck (3 R. 45, 234). Barfield and Williams, who had pulled alongside Highway 61 near Cooper and Hall's location, also fired shots at Mrs. Hall's truck as Hall pulled away from Cooper (3 R. 45-46, 234, 274; 4 R. 353- 355). Barfield was shooting in order to disable the truck, not to harm Hall (4 R. 354). Three bullet holes were later found in the truck: one was behind the tailgate; one in the truck's cab, which almost struck Mrs. Hall; and one by the gas tank (3 R. 136, 234-235). Hall returned to

Highway 61 and was heading towards Anguilla with Williams and Barfield in pursuit, followed by Billings and Cooper (3 R. 46; 4 R. 358-359, 362). Hall was able to drive less than a mile from the area where he spoke to Cooper because a bullet had punctured a rear tire (3 R. 232; 4 R. 358).

A soybean field with plants approximately two-feet tall abutted the highway where Hall had stopped (3 R. 139, 233). Because shots were fired at him, Hall immediately jumped out of the truck and started running quickly across the bean field (3 R. 47, 233, 236). When Hall got out of the truck, he headed straight for the bean field; he did not turn around or go back to retrieve anything from the truck (3 R. 46, 138, 236; 4 R. 308, 364). Williams and Barfield stopped their cars right near where Hall stopped and began chasing Hall in the bean field (3 R. 141-142; 4 R. 310-311; 4 R. 358-359). Billings drove past where Hall had stopped and turned off the highway on to a turn row along the side of the bean field in order to cut off Hall's run from the opposite direction (3 R. 237; 4 R. 362-363, 452).

While running through the bean field, Hall never reached into his pockets or bent over into the fields to throw or drop something on the ground (3 R. 248-249, 279). Hall did not have anything in his pockets other than loose change (3 R. 248). His arms were swinging at his side as he ran (3 R. 279). He did not have a gun or any other weapon (3 R. 248-249). As Barfield chased Hall through the bean field, Hall never turned back to face Barfield and Williams (4 R. 377). Barfield never saw Hall make any gesture with his hands toward his waistband, or make any gesture besides raising his hands in the air (4 R. 377).

Billings got out of his car with his rifle and Hall was running towards him (3 R. 237; 4 R. 453). As Hall got closer, Billings raised his rifle, pointed it at Hall, and told Hall to stop and raise his hands, which Hall did (3 R. 237-238; 4 R. 453-454; see 4 R. 309). Billings testified that Hall faced him the entire time he was running in the bean field, and Hall never turned to look back or in another direction (4 R. 453, 480). While Billings pointed his gun at Hall, he never intended to shoot Hall because " the threat level never got that high" (4 R. 455). Hall trusted Billings so he came to a "complete stop" facing Billings, raising his arms and hands in the air above his head with his fingers spread (3 R. 238-239; 4 R. 454-455). Hall had not looked back so he did not know anyone was behind him (3 R. 239; 4 R. 454-455).

When Cooper had pulled his car into the turn row on the side of the bean field near where Billings had stopped, he saw Billings pointing his rifle at Hall. Cooper saw that Hall was motionless with his arms and hands raised and fingers spread, and Barfield and Williams were approaching Hall from the rear (3 R. 53, 56). To Cooper, the situation appeared to be "under control" so he turned around to go back to Hall's truck, where Mrs. Hall was (3 R. 56, see 3 R. 89). Cooper considered Hall to be dangerous when they were at the Cameta Gin because Hall was driving a car, but he did not think Hall was a danger to others when he was running in the bean field (3 R. 101-102).

As they were running, Williams asked Barfield for his weapon, which Barfield gave to Williams (4 R. 369). Barfield, like all deputies, was issued a 9

mm Glock firearm, Model #17 (3 R. 65; 4 R. 355-356; Gov. Exh. 59A, 59B). After Hall had stopped and raised his hands, Williams dropped down to ready himself and he shot Hall (4 R. 369-370). Hall, Barfield, and Chief Billings testified that while Hall was motionless and facing Billings, with his arms and hands still raised above his head, Hall was shot in his right shoulder by Williams from behind (3 R. 239-241, 296; 4 R. 366-371, 454-455; Gov. Exh. 46A (or 46C)). Allen Windom, a citizen who observed the chase in the bean field from Highway 61, also testified that Hall was standing still with his arms and hands raised above his head when he was shot (4 R. 301, 308, 312).

Barfield stopped running when Williams shot Hall because he did not want to be in the line of fire (4 R. 371). Similarly, Billings laid down on the ground after shots were fired because he was in the line of fire (4 R. 455-456).

When Billings got up, Hall was on his knees but his hands remained held in the air above his head (4 R. 456). On Billings' instruction, Hall laid down on the ground (3 R. 242; 4 R. 456; see 4 R. 372). Billings continued to approach Hall from in front of him and Barfield reached Hall from behind (3 R. 242-243; 4 R. 373). At no time after he fired the gun did Williams shout or give any warning to Billings or Barfield about Hall possessing a weapon (4 R. 457).

Barfield was "mad" and "angry" at the situation and he kicked Hall approximately twice, placed handcuffs on Hall, and then kicked Hall two more times (3 R. 243; 4 R. 375, 458). Hall asked Barfield why he was kicking him, and Barfield responded, "because you put us through all this sh__" (3 R. 244).

Williams went back to Cooper and the police cars on the side of the road and stated that they needed an ambulance because "[w]ell, I had to shoot [Hall]" (3 R. 58). Billings and Barfield also called to Cooper for assistance, and Cooper got in his car and drove into the bean field to pick up Hall (3 R. 61; 4 R. 376, 461). Billings and Barfield helped Hall get to Cooper's car because Hall was "stumbling, couldn't breathe," and he could not walk on his own (4 R. 461-462). When Cooper frisked Hall, Cooper found only loose change in his pockets and a cell phone clipped to Hall's belt (3 R. 62). Cooper did not find any drugs or weapon on Hall's person or in the truck (3 R. 62-63).

Cooper transported Hall to a local hospital in Rolling Fork where a doctor inserted a tube into Hall's chest to ensure that his lung did not collapse (3 R. 61). Hall was then airlifted to University Medical Center in Jackson, Mississippi, where he was hospitalized for three days (3 R. 61, 202-203, 244-245, 247, Gov. Exh. 46D). The bullet remains in Hall's back (3 R. 247). Hall was never charged with any crime based on the events of September 4, 1998 (3 R. 249). While he was on probation at that time, he was not disciplined based on his actions that day (3 R. 291).

After the incident, Cooper placed Williams on suspension with pay (3 R. 63-64). While Sheriff Cartlidge initially intended to fire Williams because of this incident, he agreed to Williams's resignation (3 R. 110, 114). When Cartlidge asked Williams why he shot Hall, Williams responded that "he was tired of chasing him [Hall] and tired of fooling with him [Hall]" (3 R. 111). When Barfield asked

Williams why he shot Hall, Williams stated it was because Hall assaulted him on Highway 61 (4 R. 378).

Significant portions of Williams's testimony, particularly his descriptions of Hall's allegedly threatening acts, conflict with Williams's prior written statements, Hall's testimony, and that of every other officer and witness who observed Hall. First, Williams's trial testimony included details that were not included in his prior written statements, including Williams's claim that Hall had bent down and turned back towards him (Williams) in a threatening manner immediately prior to being shot, and that Barfield stopped during the chase in order to look for something that Hall allegedly threw to the ground.

Second, Williams is the only witness who testified that after Hall left his truck to start running to the bean field, Hall returned to grab something from the truck and then again turned to run to the field. Cooper (3 R. 46-47), Barfield (4 R. 364), Billings (4 R. 452), and Windom (4 R. 308) saw Hall get out of the truck and immediately start running through the bean field; they did not see Hall change directions to go back to the truck to retrieve something.

Moreover, Williams is the only witness to describe a threatening downward and turning motion by Hall immediately before he shot Hall (4 R. 544-545; cf. 4 R. 453-454). Hall, Billings, Barfield, and Windom testified that Hall was still, facing Billings and with his back to Williams, with his arms up and fingers spread, at the time Hall was shot (see *infra*, page 9).

STANDARDS OF REVIEW

Questions of law, including issues of statutory interpretation, are reviewed *de novo*. *United States* v. *Jennings*, 195 F.3d 795, 797 (5th Cir. 1999), cert. denied, 530 U.S. 1245 (2000). However, if raised for the first time on appeal, the issue is reviewed for plain error. See *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997).

Similarly, the standard of review of evidentiary rulings when the challenge is raised for the first time on appeal is plain error. *United States* v. *Greenwood*, 974 F.2d 1449, 1462 (5th Cir. 1992), cert. denied, 508 U.S. 915 (1993); see *United States* v. *Salter*, 241 F.3d 392, 394 n.2 (5th Cir. 2001) (failure to raise sentencing challenge based on specific Guideline provision in district court limits review to plain error on appeal). The standard of review of evidentiary rulings when a timely objection is raised at trial is abuse of discretion. *United States* v. *Parsee*, 178 F.3d 374, 379 (5th Cir.), cert. denied, 528 U.S. 988 (1999); *United States* v. *Coleman*, 78 F.3d 154, 156 (5th Cir.) (abuse of discretion standard to review admissibility of intrinsic or extrinsic evidence), cert. denied, 519 U.S. 891 (1996).

SUMMARY OF ARGUMENT

A felony violation of 18 U.S.C. 242, and in particular using excessive force in violation of Section 242, qualifies as a crime of violence under either definition of 18 U.S.C. 924(c)(3). When, as here, a penalty enhancement such as bodily injury is alleged, 18 U.S.C. 924(c)(3)(A) is satisfied. In addition, violating Section 242, and particularly violations such as this alleging excessive force, satisfy the

elements of 18 U.S.C. 924(c)(3)(B). Cf. *United States* v. *Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991), aff'd en banc on other grounds, 968 F.2d 433 (1992), cert. denied, 507 U.S. 962 (1993).

Testimony by three law enforcement officers who were at the scene of the shooting that the circumstances did not warrant Williams's use of deadly force was properly admitted. Since the officers testified as lay witnesses, they were not subject to the restriction of Fed. R. Evid. 704(b), and they could give an opinion on an ultimate fact. Cf. *United States* v. *Juvenile Male*, 864 F.2d 641, 647-648 (9th Cir. 1988); *United States* v. *Bankston*, 182 F.3d 296, 312 (5th Cir. 1999) (affirming admission of opinion testimony by FBI agent and Louisiana State police officer on "ultimate issue[s] of fact"), cert. granted in part on other grounds, *Goodson* v. *United States*, 531 U.S. 987 (2000). Given Williams's failure to raise this issue below, he cannot show plain error or that the integrity of the proceedings was affected by this testimony. Cf. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997).

While the United States erred in a brief portion of its cross-examination of Williams during which Williams was asked whether other witnesses were lying, the error is harmless. Cf. *United States* v. *Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996). The jurors were given detailed instructions that they were to determine each witness's credibility. In addition, there was minimal if any impact from these questions since the jury's need to choose between the contradictory versions of the events by Williams and the government witnesses was evident. Finally, given the

ample evidence of guilt and the limited questioning on this topic, this error does not affect the integrity of the jury's verdict.

The district court did not abuse its discretion in admitting limited evidence to show Hall's fear of Williams, which was based on Williams's prior misconduct and was the reason for Hall's flight from Williams, since this evidence was inextricably intertwined to the charged offense, refutes Williams's defense that he was responding to Hall's aggressive actions, and is necessary to tell the full story about the crime. Cf. *United States* v. *Gonzalez*, No. 02-30617, 2003 WL 1878559, at *3 (5th Cir. Apr. 16, 2003). Moreover, given Williams's assertions that Hall was engaged in drug activity, the district court did not abuse its discretion in allowing the United States to present very minimal testimony on this same issue under Fed. R. Evid. 404(a)(1) and 403. Even if an abuse of discretion, the extremely limited nature of this testimony in light of the extensive, corroborative testimony to support Williams's use of excessive force does not constitute reversible error.

The United States' comments during rebuttal closing argument regarding co-defendant Barfield's plea agreement accurately described its terms and Barfield's expectations under the agreement, and were appropriate responses to Williams's attacks on Barfield's credibility. Cf. *United States* v. *Binker*, 795 F.2d 1218, 1223-1224 (5th Cir. 1986), cert. denied, 479 U.S. 1085 (1987). Moreover, the United States did not improperly vouch for Barfield's credibility when it asked

Barfield to address the timing of his initial admissions to the United States and his plea agreement. Cf. *ibid*.

ARGUMENT

I

A VIOLATION OF 18 U.S.C. 242 AND THE USE OF EXCESSIVE FORCE ARE CRIMES OF VIOLENCE UNDER 18 U.S.C. 924(c)(3)

Williams asserts (Br. 17-18) that since "neither threats nor violence is a necessary ingredient of a Section 242 offense," it does not constitute a "crime of violence" under 18 U.S.C. 924(c)(3), and the court therefore erred in finding him guilty of Count 2. Williams's claim, which is subject to review for plain error since it is raised for the first time on appeal, is without merit. First, because Williams is specifically charged with violating Hall's rights to be free of unreasonable force, Section 924(c)(3)(A) is satisfied. Second, because a violation of someone's civil rights under Section 242 "involves a substantial risk that physical force * * * may be used" against the person, and bodily harm was alleged, Williams was convicted properly under Count 2 pursuant to Section 924(c)(3)(B). *United States* v. *Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991), aff'd en banc on other grounds, 968 F.2d 433 (1992), cert. denied, 507 U.S. 962 (1993).

A. Charges And Statutory Provisions

Count 1 charged Williams with willfully assaulting Hall while acting under color of law by "shooting Hall with a firearm, resulting in bodily injury, which deprived Hall of his due process right, among other things, to be free from the

unreasonable use of force," in violation of 18 U.S.C. 242 (1 R. 1). 18 U.S.C. 242 prohibits, *inter alia*, any person from acting "under color of law" to "willfully subject[] any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution." Count 2 charged that Williams "willfully discharge[d] a firearm during and in relation to a crime of violence * * *, that is, Deprivation of Rights under Color of Law, as charged in Count 1 of the indictment, in violation of Section 924(c)(1)(A)(iii), Title 18, United States Code." (1 R. 1-2).

18 U.S.C. 924(c)(1)(A)(iii) imposes a mandatory ten year minimum sentence for any person who, "during and in relation to any crime of violence * * * uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm," and the firearm is discharged. Under 18 U.S.C. 924(c)(3), a "'crime of violence' means an offense that is a felony and -

> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

B. Section 242 Qualifies As A Crime Of Violence Under Sec. 924(c)(3)(A) When Enhanced Penalties Are Alleged

Section 242 sets forth a graduated punishment scheme for felony violations depending on the acts committed, the manner in which the acts are committed, or the resulting injury. If "bodily injury results from the acts committed," or if the acts include the "use, attempted use, or threatened use of a dangerous weapon,

explosives, or fire," the defendant shall be imprisoned for not more than ten years. 18 U.S.C. 242. If death results from the acts committed, or if such acts include the commission of other violent crimes, such as aggravated sexual abuse, attempt to kidnap, or attempt to kill, the defendant may be fined, subject to life imprisonment, or death. *Ibid*. Because the factors that support enhanced penalties encompass or can only be accomplished by "the use, attempted use, or threatened use of physical force against the person" and are elements of the crime, Section 924(c)(3)(A)'s requirement is satisfied when these elements are alleged. Cf. *United States* v. *Harris*, 293 F.3d 863, 870 (5th Cir.) (jury instructions for Sec. 242 violation charging use of excessive force properly identified use of dangerous weapon or bodily injury as elements), cert. denied, 123 S. Ct. 395 (2002).

Alternatively, if the Court determined that the offense in issue was not Section 242 with the penalty enhancements, generally, but the particular constitutional violation alleged here, that is, the use of unreasonable force, violence is clearly an element of proof. As set forth in the jury instructions, the government was required to prove that Williams 1) acted under color of law; 2) deprived Hall of his right to be free of unreasonable force; 3) acted willfully, that is, intending to deprive Hall of his right; and 4) caused Hall to suffer bodily injury as a result of Williams's conduct (1 R. 103). The instructions explained that unreasonable force is used "without a legitimate law enforcement purpose, or physical force which [sic] unreasonably exceeds the need for the use of force" (1 R. 105). Accordingly, because the use of force is an element of proof of the crime, Section 924(c)(3)(A)

is satisfied. Cf. *United States* v. *Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (42 U.S.C. 3631 is a predicate "crime of violence" under 924(c)(3) given instruction that required jury to find that defendant's conduct involved the "use or attempted use of fire" to interfere with housing rights), cert. denied, 529 U.S. 1089 (2000); see *Harris*, 293 F.3d at 870.

C. Section 242 Qualifies Here As A Crime Of Violence Under Sec. 924(c)(3)(B)

Subparts (A) and (B) of 924(c)(3) impose independent and different criteria on what constitutes a crime of violence. See *United States* v. *Cruz*, 805 F.2d 1464, 1469 (11th Cir. 1986), cert. denied, 481 U.S. 1006 (1987).[4] This Court has held that 924(c)(3)(B) "requires merely that the predicate crime create a substantial risk of the possible use of force." *Greer*, 939 F.2d at 1099 (conspiracy to violate civil rights, 18 U.S.C. 241, is a crime of violence; quoting *Cruz*, 805 F.2d at 1469). Moreover, "the use of the terms 'may' and 'substantial risk' * * * emphasizes Congress' determination that violence need not be a necessary ingredient of the underlying predicate offense." *Cruz*, 805 F.2d at 1469. There need only be a "strong possibility of violence" to constitute a crime of violence under Section 924.

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[4] As the Eleventh Circuit explained in *Cruz*, 805 F.2d at 1469:

> if violence were a necessary ingredient under [Section 924(c)(3)(B)], then [Section 924(c)(3)(A)] would be redundant. Crimes of violence with force as an element of their commission are explicitly covered by [Section 924(c)(3)(A)]. * * * A proper statutory interpretation cannot give [Section 924(c)(3)(B)] the exact same meaning as [Section 924(c)(3)(A)].

United States v. *Jennings*, 195 F.3d 795, 798 (5th Cir. 1999), cert. denied, 530 U.S. 1245 (2000).

This Court examines the "inherent nature" or underlying characteristics of an offense, rather than the specific factual circumstances supporting defendant's conviction, to determine whether the crime is one of violence. *Ibid*. (possession of an unregistered pipe bomb "by its very nature, creates a substantial risk of violence" since, among other things, there are no non-violent, sporting, or lawful uses of such bombs); see also *United States* v. *Chapa-Garza*, 243 F.3d 921, 924 (5th Cir. 2001) (in evaluating what constitutes a crime of violence under 18 U.S.C. 16, this Court takes a "categorical approach" in assessing whether "a particular defined offense, in the abstract," is a crime of violence).[5] In *United States* v. *Contreras*, 950 F.2d 232, 240 (5th Cir. 1991), cert. denied, 504 U.S. 941 (1992), this Court affirmed a conviction under 924(c) that was based on a predicate offense of Section 242. While Contreras's claim focused on whether there was sufficient evidence to show that the firearm was "used" in relation to the Section 242 charge, this Court also summarily rejected his claim that violating Section 242, which specifically alleged sexual assault, was not a "crime of violence." *Id*. at 241 n.11.

[5] 18 U.S.C. 16(b) and 3142(f)(1)(A) define a "crime of violence" in virtually identical terms to 924(c)(3)(B). Courts interpreting these provisions have relied on cases interpreting one provision to support the analysis of a second statute. See, *e.g.*, *United States* v. *Mitchell*, 23 F.3d 1, 3 (1st Cir. 1994).

Violations of a person's civil rights under Section 242, by "their nature," generally include the "substantial risk" of the use of force. Cf. *Jennings*, 195 F.3d at 798; *Contreras*, 950 F.2d at 241 n.11. Prosecutions under Section 242 frequently, but not always, allege the use of excessive force in violation of the Fourth, Eighth, or Fourteenth Amendment. See, *e.g.*, *Harris*, 293 F.3d at 869-870; *United States* v. *Brown*, 250 F.3d 580 (7th Cir. 2001) (conviction for 924(c) and 242 violation for use of excessive force). The possibility that certain violations under Section 242 may not involve the use of force does not negate the conclusion that, by its nature, this is a crime of violence. Cf. *Greer*, 939 F.2d at 1099.

Alternatively, if this Court examines the 242 charge in relation to the specific constitutional violation alleged in the indictment, *i.e.*, the use of unreasonable force, this too, "by its nature," involves the use of force and violence. Section 242 encompasses a wide array of offenses. Like 18 U.S.C. 1952, which prohibits, *inter alia*, interstate travel in support of racketeering, the exact nature of the offense may not be readily apparent, yet it can be gleaned from the indictment. See *United States* v. *Rodriguez-Duberney*, No. 02-20713, 2003 WL 1505935, at *1 (5th Cir. Mar. 25, 2003) (no error to examine indictment to ensure prior conviction under Travel Act involved underlying drug trafficking offense for purposes of sentencing enhancement). Just as "the elements of a § 1952 offense are somewhat determined by the type of racketeering enterprise being aided," *ibid.*, so too are the specific elements of a Section 242 violation determined by the constitutional or statutory right that is violated. To examine the indictment for the narrow purpose of

identifying the specific offense charged is not akin to evaluating the "nature of the offense" by reliance on "the facts specific to [Williams's] case." *Jennings*, 195 F.3d at 797. In sum, Williams cannot show plain error by the district court in his conviction under Count 2, and therefore his claim must fail.

II

THE DISTRICT COURT PROPERLY ADMITTED LAY OPINION TESTIMONY BY OFFICERS THAT WILLIAMS'S SHOOTING OF HALL WAS NOT REASONABLE

Williams asserts (Br. 18-24) that the district court's admission of opinion testimony by Chief Billings, Chief Deputy Cooper, and Deputy Barfield violated Fed. R. of Evid. 704(b)'s prohibition of expert opinion testimony regarding a defendant's intent when mental state is an element of the crime charged. Williams's claim is misguided and should be rejected. First, Williams failed to challenge the admissibility of this testimony under Rule 704 at trial, and he cannot show its admission is plain error. In addition, the officers did not testify as experts and, therefore, they are not subject to the restriction of Rule 704(b). Instead, the officers' testimony was offered and properly admitted as lay opinion testimony under Fed. R. Evid. 701, and as such, their opinions were admissible under Rule 704(a).

A. Testimony, Objections, And District Court Rulings

Chief Billings and Deputy Barfield stated that Hall was stopped, facing Chief Billings, with his arms and hands raised above his head immediately before Williams shot Hall (4 R. 366-371, 454-455). Chief Deputy Cooper testified that he

saw Hall in the same position described by Billings and Barfield, and that the situation was under control. Shortly after Cooper had left the position where he could see Hall, Williams told Cooper that he had shot Hall (3 R. 53, 56, 58). Based either solely on their observations of Hall in the bean field, or their respective observations and training and experience, all three officers testified that Williams's shooting of Hall was an unreasonable and unnecessary use of force (3 R. 58-59, 100-103; 4 R. 368-369, 381-384, 468-469).

Williams objected to only some of the challenged opinion testimony at trial, and he never specifically asserted that the challenged testimony was inadmissible under Rule 704. For example, Williams objected to the United States asking Barfield whether he thought the situation in the bean field could have been handled differently (4 R. 382), and he objected to the United States' leading questions on whether Hall was endangering others or posed a threat to the officers in the bean field (4 R. 383). Williams, however, did not object when Barfield was asked specifically whether shooting Hall in the bean field was reasonable (4 R. 381, 383-384). Moreover, earlier in his testimony, the United States asked Barfield, without objection, why he did not shoot Hall in the bean field, and Barfield replied that it "wasn't necessary" (4 R. 368-369).

When the United States asked Cooper if it was reasonable that Hall was shot, based on what he saw, Williams objected on grounds that an opinion would be based on speculation since Cooper had left the field just before Williams actually shot Hall (3 R. 59). The district court instructed the United States to rephrase the

question, which was asked again without substantive modification and without further objection (3 R. 58-59). On redirect, the United States again asked Cooper whether he thought it was "necessary" for Williams to shoot Hall and Williams's objection focused on the foundation for the question, and the type of evidence that supports the use of deadly force (3 R. 100-103). The district court overruled the objections (3 R. 102-103).

Finally, Williams raised a general, timely objection to questions posed to Chief Billings regarding his opinion on the need for deadly force, and it was overruled by the court (4 R. 468-469).

It was only after Billings' testimony was completed that the district court, *sua sponte* – and not Williams – inquired whether Billings' opinion testimony was admissible under the 2000 amendment to Rule 701 (4 R. 481-491). The district court did not recall the United States' query verbatim, nor did it ask the court reporter to read it back (4 R. 485). As a means to resolve any possible issue, the court suggested the following scenario: that the United States repeat its question to Billings on whether he thought Williams's shooting was reasonable, it would sustain an objection, tell the jury to disregard Billings' prior answer, and allow the United States to rephrase the question (4 R. 482, 484-485). The United States agreed to this approach (4 R. 485).

For the first time, however, Williams's counsel objected specifically to questioning Billings on whether he believed it was reasonable for Williams to use deadly force. Williams asserted that Billings was testifying to an ultimate fact to

be determined by the jury, and that Billings did not see all of Hall's movements (4 R. 488). Given this objection, the district court stated, "let's let the record show, and it does show, that you made an objection to the question" (4 R. 488). Williams's counsel also raised concerns that allowing the United States to repeat or modify its question to Billings would emphasize a point to Williams's detriment (4 R. 489). After further consultation, Williams's counsel reiterated their concern that asking Billings again for his opinion would be harmful to their client and that they preferred that there be no further questioning on this issue (4 R. 491). The district court accepted Williams's request (4 R. 491; see 4 R. 494-497).[6]

Notwithstanding the bench conference after Billings' testimony was completed and the district court's statement that Williams objected to Billings' opinion, Williams did not raise a timely objection or object on the basis of Rule 704 when Barfield, Cooper, or Billings were asked to give their opinions. Accordingly, these challenges should be reviewed for plain error. See *United States* v. *Greenwood*, 974 F.2d 1449, 1462 (5th Cir. 1992) (objection on appeal based on Rule 404(b) subject to plain error review when objection at trial based on relevancy), cert. denied, 508 U.S. 915 (1993). To establish plain error, a defendant must show (1) an error, (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); see *United*

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[6] By omission, appellant's brief (at 20) grossly mischaracterizes counsels' statements and the basis for the court's ruling during this conference.

States v. *Olano*, 507 U.S. 725 (1993). Williams's claim does not satisfy any of the elements of plain error, let alone all four criteria.

B. Rule 704(b) Does Not Apply Since The Witnesses Were Not Experts

Rule 704 addresses the parameters of lay and expert testimony; 704(a) permits lay opinion testimony on a variety of issues including "an ultimate issue to be decided by the trier of fact." Rule 704(b) bars *expert* opinion testimony on whether a "defendant did or did not have the mental state or condition constituting an element of the crime charged." The Advisory Committee Notes on Rule 704 explain that this Rule abolishes the previous, "unduly restrictive" limitation against witnesses expressing opinions upon "ultimate issues." Lay opinions are admissible if they are "helpful to the trier of fact," and not a "waste[] of time" under Rule 403. *Ibid*.

Williams's assertion that the admission of the officers' opinion testimony regarding unnecessary use of deadly force against Hall violates Rule 704(b) is erroneous and reflects a misunderstanding of the nature of the officers' testimony. The officers were not proffered or admitted as expert witnesses and, therefore, their opinions are not subject to the limitation of Rule 704(b). Rule 704(b) imposes a specific limitation on expert witnesses that is not imposed on lay witnesses under 704(a). *United States* v. *Juvenile Male*, 864 F.2d 641, 647-648 (9th Cir. 1988) (affirmed admission of the victim's lay opinion testimony under 701 regarding defendant's intent to commit bodily harm based on the defendant's actions, and affirmed the refusal to admit an expert medical witness's opinion on whether the

defendant had requisite intent under Rule 704(b)). Consistent with the plain language of Rules 701 and 704(a), this Court and others have recognized that a lay witness may testify on an "ultimate issue" of fact, and in some instances, a defendant's intent. See *United States* v. *Bogan*, 267 F.3d 614, 619-620 (7th Cir. 2001) (affirming lay opinion testimony on defendant's intent for charges of intent to commit murder); *United States* v. *Bankston*, 182 F.3d 296, 312 (5th Cir. 1999) (affirming admission of opinion testimony by FBI agent and Louisiana State police officer on "ultimate issue of fact"), cert. granted in part on other grounds, *Goodson* v. *United States*, 531 U.S. 987 (2000); see also *Soden* v. *Freightliner Corp.*, 714 F.2d 498, 510-512 (5th Cir. 1983) (witness with extensive experience on truck repairs had "specialized knowledge" to give lay opinion under Rule 701 on cause of damage and flawed design in product liability case).

Defendant's citations (Br. at 22-23) to cases that bar *expert* opinion testimony on whether a defendant properly used reasonable or excessive force are inapposite. Cf. *Hygh* v. *Jacobs*, 961 F.2d 359, 363-364 (2d Cir. 1992); *United States* v. *Schatzle*, 901 F.2d 252 (2d Cir. 1990). Two significant facts distinguish these cases: here, 1) the officers were giving lay opinions that 2) were based, in large part, on their personal observations of the crime. In contrast, the witnesses in *Hygh* and *Schatzle* were qualified as experts, and they were offering an opinion that was not based on personal observation, but only on an understanding of the events as described by the defendant. In sum, Rule 704(b)'s prohibition on experts

testifying to legal conclusions was not triggered here, and thus, this case is unlike the circumstances of *Hygh* and *Schatzle*.[7]

C. No Plain Error Or Prejudice

Even if this Court were to find error in admitting this testimony, Williams cannot show that the court's admission of this testimony was "plain" error; that is, obvious or contrary to clearly established law. Cf. *Johnson*, 520 U.S. at 461, 465; *United States* v. *Miranda*, 248 F.3d 434, 441 (5th Cir.) (affirming admission of opinion testimony by law enforcement officer about the meaning of code words used in recorded conversations about drug trafficking), cert. denied, 534 U.S. 980 (2001); *United States* v. *Darland*, 659 F.2d 70, 72 (5th Cir. 1981) (experienced law enforcement officer may give lay opinion under Rule 701 on why fingerprints were not found), cert. denied, 454 U.S. 1157 (1982). Moreover, Williams cannot identify how his rights were substantially affected, or how he was prejudiced, by the admission of opinion testimony. Cf. *United States* v. *Tinoco*, 304 F.3d 1088, 1119-1120 (11th Cir. 2002) (even if error to permit officer's lay opinion testimony on market value of narcotics, defendant cannot show actual prejudice from failure

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[7] Given general references to the prejudicial effect of this testimony (Br. 24), it is unclear whether Williams is asserting, for the first time, that admission of this testimony violated Rule 403. The probative value of testimony by fellow officers present at the scene is self-evident. Williams has not and cannot show that this evidence is unduly prejudicial under Rule 403, and that the district court committed plain error in its discretionary decision to admit this testimony.

to identify witness as expert affected ability to present a complete defense), cert. denied, 123 S. Ct. 1484 (2003).

Finally, even if this Court were to find plain error that substantially affected Williams's rights, there is no basis for this Court to hold that it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467. An error subject to plain error review is "remedied only 'in the most exceptional cases.'" *United States* v. *Johnston*, 127 F.3d 380, 392-393 (5th Cir. 1997) (prosecutor's deliberate question to witness to elicit response regarding defendant's prior conviction, was "irrelevant and prejudicial," and "improper[], " yet did not warrant reversal under plain error standard), cert. denied, 522 U.S. 1152 (1998). The jury's verdict was based on overwhelming evidence that Hall was motionless, with his back to Williams, and with his hands raised over his head when Williams shot Hall. Contrary to Williams's claim, other officers testified that the decision of whether to shoot Hall was *not* a "close" case (3 R. 103; 4 R. 468-469). All of the other law enforcement officers present in the bean field contradicted Williams's version and stated that Hall's actions in the bean field were not life-threatening. Given the ample evidence to support the jury's verdict, Williams cannot show how this brief opinion testimony substantially affected the integrity of the jury's verdict.

III

THE CROSS-EXAMINATION OF WILLIAMS DOES NOT CONSTITUTE REVERSIBLE ERROR

Williams asserts that cross-examination that asked him if other witnesses were liars and closing argument referring to this testimony constitutes reversible error. While the United States concedes that this examination and comment are improper, this conduct does not support reversal.

The United States is aware of only two cases where this Court has discussed the lawfulness of asking a witness whether another witness's testimony is a lie. In *United States* v. *Johnston*, 127 F.3d 380, 389 (5th Cir. 1997), cert. denied, 522 U.S. 1152 (1998), this Court stated that asking a law enforcement agent to opine on whether an unindicted co-conspirator was lying due to conflicting testimony is "not relevant" since it is the "jury's obligation to determine the credibility" of witnesses. In *United States* v. *Thomas*, 246 F.3d 438, 439 n.1 (5th Cir. 2001), this Court noted that asking a defendant to answer whether prosecution witnesses were lying constituted "misconduct" that was "real and inexcusable," but not reversible error.

Here, the United States cross-examined Williams extensively and exposed significant inconsistencies between his testimony and prior statements, and testimony by the government's witnesses. (4 R. 556-592; 5 R. 594-609). At the end of his cross-examination, the United States asked Williams if the other law enforcement officers and witnesses were lying when they said that Williams shot

Hall in the back (5 R. 607-609, 623).[8] Williams responded that these witnesses were lying. When later asked whether Cartlidge was lying, Williams responded that the jury could make that decision, and that all of the government witnesses had "some kind of miscommunication, had some kind of conduct." (5 R. 623). During closing argument, the United States reminded the jury that Williams said that the government witnesses were lying, without any stated reason for doing so (5 R. 663).

The United States recognizes that this Court views such questioning as improper, yet here, this brief cross-examination is harmless. Cf. *Thomas*, 246 F.3d at 438, 439 n.1; *United States* v. *Boyd*, 54 F.3d 868, 870-872 (D.C. Cir. 1995) (improper cross-examination and vouching during closing argument did not require reversal since the jury was instructed that arguments by counsel were not evidence, and challenged statements of "minimal importance" overall). Here, the court's instructions extensively addressed the jury's role in being the trier of fact and assessing the credibility of each witness (1 R. 93-97). Moreover, the jury was instructed that counsel's statements are not evidence (1 R. 90). There is no indication that the brief questioning on cross-examination was a substitute for the jury's own assessment.

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[8] The United States notes that Williams objected only once, after the third time the United States asked Williams whether another witness was lying. The district court overruled Williams's objections, noting the "wide latitude" afforded cross-examination (5 R. 608).

In addition, the challenged questions addressed what was already evident; that Williams's version directly contradicted the recollections of the other officers and witnesses, and that only one version could be true. As the First Circuit noted in similar circumstances, asking whether another witness was lying when the contradiction between the two witnesses's testimony was "obvious," "score[s] the government, at most, rhetorical points. We cannot say that these few largely rhetorical questions from the prosecutor affected at all the outcome of the trial." *United States* v. *Sullivan*, 85 F.3d 743, 750 (1st Cir. 1996).

In closing, the United States highlighted various aspects of Williams's testimony that was not credible, including Williams's assertion that all of the government witnesses were lying. Noting this aspect of Williams's testimony does not, as he asserts (Br. 29), reflect its significance in the jury's verdict or "estop[]" any argument that the United States' reference was harmless.

Finally, while this case was dependent on credibility determinations, the evidence supporting guilt was overwhelming. There was ample testimony from multiple witnesses that corroborated each others' testimony, and was contrary to Williams's version of the events. The challenged testimony and comment at closing were brief and there is no indication that it overwhelmed the jury, or that the jury failed to fulfill their function of assessing the witnesses.

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE RELEVANT TO THE VICTIM'S STATE OF MIND

Williams broadly asserts (Br. 31-34) that the prejudicial impact of why Hall feared Williams – because he heard that Williams had shot someone else and planted drugs on others when Williams was a police officer in another jurisdiction – outweighed any probative value since Hall's state of mind is not relevant. This claim is without merit. The district court appropriately determined that limited testimony regarding Hall's knowledge of Williams's alleged, prior misconduct was relevant to explain Hall's fear of Williams and Hall's actions. This testimony also refuted Williams's assertion that he shot Hall because of Hall's allegedly aggressive actions since Hall's fear would cause Hall to avoid any action that could trigger a violent reaction by Williams. Moreover, the district court approved the United States presenting limited evidence regarding Williams alleged drug activities only after Williams opened the door to such testimony. The probative value of this evidence outweighs the danger of unfair prejudice and, contrary to Williams's assertion, the court was not required to make specific findings on the record. Finally, any error in admission would be harmless given the brief attention paid to this evidence, the court's limiting instruction, and Williams's failure to request any additional instruction.

A. Procedural History And District Court Rulings

Williams filed a motion in limine to bar reference to a prior shooting he committed when he was a police officer in the neighboring jurisdiction of Hollandale (1 R. 72-73). Williams asserted generally that the prejudicial impact would outweigh any probative value (1 R. 72; 3 R. 8/RE 21). During the pretrial bench conference, the United States asserted that Hall had heard (and so stated in a prior statement to the Mississippi Highway Patrol), that when Williams was a Hollandale police officer, he shot a man named Sammy Pam in the back, and planted drugs on people he stopped (3 R. 5-6/RE 18-19). The United States stated that this information was relevant to assess Hall's state of mind and to justify his fleeing police, and that it was not being proffered for admission under Rule 404(b) (*Ibid.*). Williams conceded that Hall would be able to say that he was afraid of the defendant, but he strongly objected to any reference that the prior shooting was in the back (3 R. 7/RE 20; 3 R. 285-286).

The district court ruled that the United States could elicit testimony that Hall had heard of a prior shooting incident involving Williams, and refer to it in its opening statement. The district court barred any reference to a shooting "in the back," and warned the government not to unduly emphasize this point (3 R. 10/RE 23).[9] The district court also stated that it would give a limiting instruction that this

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[9] During opening argument, the United States asserted that Hall was "attempting to get away from the defendant because he was afraid of the

(continued...)

testimony is admissible only to show the victim's state of mind (3 R. 9-10/RE 22-23).

Hall testified that his efforts to get away from the officers at different times was because he was "frightened" by them (3 R. 230). He drove away from Williams when he was first stopped "because I knowed he had shot a guy in Hollandale named Sammy Pam" (3 R. 230). He was frightened of Deputy Chief Cooper when Cooper pointed the gun at Hall when he was in the driver's seat, and Cooper threatened to "blow [his] * * * [expletive] head off" if he did not stop the truck (3 R. 230). The district court did not give a limiting instruction after this explanation, nor did Williams request one.

The United States asserted that, pursuant to Fed. R. Evid. 404(a)(1), that Williams's cross-examination of Hall opened the door to testimony on Williams's illegal drug activity (3 R. 284-288). Williams's cross-examination of Hall suggested that Williams found crack cocaine in Hall's pants pocket; that Hall wanted to talk to Sheriff Cartlidge, and the Sheriff was previously convicted for drug charges; and that Hall attempted to throw away drugs while he was running in the bean field (3 R. 284; see 3 R. 259, 273, 277). Because of Williams's tactics, the United States claimed that it could present evidence that Hall was afraid of

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[9](...continued)
defendant," (3 R. 22), and this fear was because Hall had "heard and believed that the defendant had shot another man when he was a police officer employed by the Hollandale police department shortly before this happened" (3 R. 26).

Williams (3 R. 284-285) because Williams had planted drugs on other persons when he was an officer in Hollandale.

The court agreed with the United States and held that Hall "should be allowed to testify as to why he was running, whatever it is" (3 R. 287). The court, however, limited the testimony to Hall's explanation, and without details on what someone else told him about Williams (3 R. 287). During redirect, Hall testified that he was running away from Williams because he was afraid Williams would "throw down drugs on [me] when [he was] stopped," (3 R. 293); that is, he feared Williams would plant drugs on him (3 R. 292). Hall also confirmed (with the court's approval), that he previously testified that another reason he was afraid of Williams was because Williams had shot someone in Hollandale (3 R. 294).

At the close of the United States' redirect of Hall, the district court instructed the jury that Hall's testimony regarding why he feared Williams was not to be considered as "any evidence whatsoever regarding the guilt of this defendant for the crime for which he has been charged. In other words, the fact that Mr. Hall had fear of what the defendant may have wanted to do is not evidence of the guilt of the defendant for the crime for which he has been indicted" (3 R. 297). The jury indicated that it understood the court's instruction (3 R. 297-298). Williams did not object to the court's instruction or ask for any additional instruction on that issue at that time.

The United States only vaguely referred to these facts during its closing argument. After acknowledging that Hall was not a model citizen, counsel stated,

"[b]ut you do have to ask yourself what was it that made him run in the first place?" (5 R. 653-654).

B. Testimony Regarding The Hollandale Shooting Was Properly Admitted

Williams's claim that the evidence regarding the Hollandale shooting is inadmissible under Fed. R. Evid. 404(b) is misplaced; this evidence was not admitted pursuant to that Rule. Evidence is "intrinsic to the offense charged * * * 'if it was inextricably intertwined with the evidence regarding the charged offense or if it is necessary to complete the story of the crime of the trial.'" *United States* v. *Gonzalez*, No. 02-30617, 2003 WL 1878559, at *3 (5th Cir. Apr. 16, 2003) (use of firearm during undercover drug sale, even if not part of charged offense, is inextricably intertwined, and part of the story of the crime); see *United States* v. *Stovall*, 825 F.2d 817, 825 n.10 (5th Cir.) (additional facts that address nature of relationship among codefendants and events immediately before and after fraudulent loan is admissible inextricably intertwined evidence), amended on other grounds, 833 F.2d 526 (5th Cir. 1987). Evidence that is "'inextricably intertwined' with the evidence used to prove the crime charged is not 'extrinsic' evidence under Rule 404(b)." *United States* v. *Griffin*, 324 F.3d 330, 360 (5th Cir. 2003).

Intrinsic evidence is admissible, as is all evidence, subject to the balancing required under Fed. R. Evid. 403. See *ibid*. This Court will give broad deference to the district court's determination. See *United States* v. *Morgan*, 117 F.3d 849, 861 (5th Cir.) (no abuse of discretion in admitting evidence of co-conspirator holding gun to head of undercover agent during drug purchase), cert. denied, 522

U.S. 987, 1035 (1997); *Stovall*, 825 F.2d at 825 n.10 (no abuse of discretion in admitting evidence despite implications that defendant was engaged in insurance fraud). Even if there is some "doubt" as to whether intrinsic evidence is "necessary" to the government's case, this Court will not find an abuse of discretion in its admission. *Gonzalez*, 2003 WL 1878559, at *3 (given favorable pretrial ruling, questionable need for officer's testimony that he knew the defendant was lying based on the results of a computer check made during the traffic stop).

Here, the district court appropriately admitted evidence of why Hall feared Williams because this evidence explained Hall's flight, was necessary to provide a complete picture of the events surrounding the chase and the subsequent shooting, and refuted suggestions that Hall was a fleeing felon. Cf. *Ibid.*; *Morgan*, 117 F.3d at 861. Williams asserted that he was endangered because of Hall's threatening actions throughout the chase, including Hall's alleged assault during the initial car stop and his speedy departure from that location when Williams was allegedly partly under the truck (4 R. 527, 529), and most significantly, by Hall's alleged crouch and abrupt turn towards Williams immediately before Williams shot him (4 R. 543-545; 5 R. 598-599). Hall's testimony about his fear of Williams not only explains Hall's fleeing actions but refutes Williams's allegations of aggressive action. Aggressive or abrupt action is the kind of movement that Hall would avoid since such action could provoke or goad the very conduct he feared – a shooting by Williams. Accordingly, it is well within the court's discretion to permit testimony

regarding Hall's fear of Williams. Cf. *Gonzalez*, 2003 WL 1878559, at *3; *Morgan*, 117 F.3d at 861.

In addition, Williams's claims (Br. 15, 34) that this evidence caused "unfair prejudice" because of the "close resemblance" between the Hollandale shooting and the charged offense is without merit. First, William's repeated assertions (Br. 15, 29, 30) that the United States submitted evidence that the Hollandale victim was a "drug dealer" is simply incorrect. No testimony about the Hollandale shooting identifies the victim, Sammy Pam, as a drug dealer (See 3 R. 230, 294). Moreover, based on the court's instructions, there was no testimony that Pam was shot in the back, as was Hall (3 R. 10/RE 23). In fact, Hall gave no substantive details about the Hollandale shooting since the purpose and substance of Hall's testimony addressed his fear based on hearing about that shooting. The district court's limitations on the extent to which evidence of Williams's prior misconduct could be admitted reflects its balance of the probative value of this testimony and minimization of any potential prejudice. Cf. *United States* v. *Benton*, 637 F.2d 1052, 1057 (5th Cir. 1981) (prejudice can be reduced by manner in which evidence is admitted and cautionary instruction). Moreover, this Court has recognized that a prior incident that is very similar to the charged offense simultaneously increases its probative value *and* its potential for prejudice, but such similarity does not bar its admission. *United States* v. *Hernandez-Guevara*, 162 F.3d 863 (5th Cir. 1998) (no abuse of discretion in admitting evidence of prior alien smuggling activities

under Rule 404(b) to show absence of mistake for current alien smuggling charge), cert. denied, 526 U.S. 1059 (1999).

Contrary to Williams's criticism, because this is intrinsic evidence, and not extrinsic evidence subject to Rule 404(b), the district court is not required to make the findings applicable to Rule 404(b). See *Morgan*, 117 F.3d 861; cf. *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (two step analysis under Rule 404(b); determine evidence relevant to issue other than character or propensity, and determine that probative value outweighs undue prejudice), cert. denied, 440 U.S. 920 (1979). Second, as this Court noted in *Morgan*, 117 F.3d at 861, even if *Beechum* applied, the district court is not required to make findings on the record of probative value and prejudicial impact when the defendant did not ask for such findings. Cf. *United States* v. *Robinson*, 700 F.2d 205, 213 (5th Cir. 1983). Finally, the district court instructed the jury after Hall's redirect examination that Hall's testimony regarding why he was afraid of Williams was not relevant to determining Williams's guilt for the charged offense (3 R. 297). Williams never asked for an additional or modified instruction. This Court has noted that limiting instructions weigh in favor of affirming the admission of evidence under Rule 403. See *Stovall*, 825 F.2d at 825 n.10.

C. Testimony Regarding Williams's Planting Drugs Was Properly Admitted

Pursuant to Fed. R. Evid. 404(a)(1), if the defendant introduces evidence regarding the victim's character or character trait to prove action in conformity with that trait, the United States may introduce evidence regarding the defendant's

same character trait. The evidence of the character trait must be "relevant to the offense charged." *United States* v. *John*, 309 F.3d 298, 303 (5th Cir. 2002); see *United States* v. *Han*, 230 F.3d 560, 564 (2d Cir. 2000). The 2000 Advisory Committee Note to Rule 404 explains that this amendment "is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim."

Here, the district court properly concluded that because Williams asserted that Hall was engaged in illegal drug activity, including possession of drugs when he was being pursued by Williams, the United States could elicit testimony regarding Williams's alleged illegal drug activity (3 R. 287); Rule 404(a)(1). The district court also prudently barred hearsay evidence on what others told Hall (3 R. 287), and it instructed the jury that this evidence was not admissible to prove Williams's guilt for the charged offense (3 R. 297). Given the deference owed the district court's determination of admissibility, the minimal testimony on this subject, and the limiting instruction, the district court did not abuse its discretion. Cf. *Han*, 230 F.3d at 564 (harmless error for court to bar defendant's introduction of evidence of his good character and unwillingness to exploit others to refute government's allegations of criminal intent for charge of traveling in interstate commerce to engage in sexual conduct with person under 18 years).

D. Any Error In Admitting Testimony On Hall's Fears of Williams Is Harmless

Even if the admission of testimony regarding Hall's two fears of Williams is considered an abuse of discretion, this testimony does not warrant reversal.

Williams's assertion (Br. 34) that this limited testimony reflects Williams's "propensity to shoot[] others and plant[] evidence" overstates both the substance of the evidence and the attention given to this testimony. First, there is minimal testimony on this topic. Hall only was asked a few questions regarding why he feared Williams (3 R. 230, 292-294). In addition, Hall's fears were not specifically addressed during closing, but only vaguely referenced (5 R. 653-654). Moreover, the district court gave a limiting instruction after Hall's testimony (3 R. 297), and Williams never asked for an additional or modified instruction. Given these factors, Williams cannot show that he was prejudiced by this circumscribed testimony. Cf. *United States* v. *Prati*, 861 F.2d 82, 86-87 (5th Cir. 1988) (no plain error when 404(b) evidence admitted without any specific limiting instruction other than that defendant was not on trial for conduct not alleged in the indictment).

V

THE UNITED STATES' REDIRECT AND REBUTTAL CLOSING ON CO-DEFENDANT BARFIELD'S PLEA AGREEMENT DO NOT ESTABLISH PROSECUTORIAL MISCONDUCT OR IMPROPER VOUCHING

Williams asserts (Br. 37-40) that the United States violated his due process rights by knowingly making false statements regarding co-defendant Barfield's possible sentence during closing argument and improperly vouching for Barfield's credibility during redirect and closing argument. These claims are without merit. First, the challenged portions of the United States' rebuttal closing responded to Williams's closing argument and accurately addressed the terms of Barfield's plea agreement. Moreover, counsel's questions on redirect and comments at closing

addressed the procedural history regarding Barfield's contacts with the government and his plea agreement; there were no inferences that counsel knew more about defendant's guilt, or Barfield's honesty, than was presented to the jury. Finally, even if considered prejudicial, none of these comments affect Williams's substantial rights to warrant a new trial.

A. Government Counsel Did Not Make Knowingly False Statements

A defendant's due process rights are violated if the government withholds evidence favorable to the accused that is material to a determination of his guilt or punishment. *United States* v. *Agurs*, 427 U.S. 97 (1976); *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). This violation can include withholding evidence relevant to assessing a witness's credibility, such as an agreement with the United States to forego prosecution in return for the witness testifying on behalf of the government. *Giglio* v. *United States*, 405 U.S. 150, 154-155 (1972). Reversible error occurs only when there is a reasonable likelihood that the false statements or testimony, or withheld evidence, could have affected the jury's verdict. See *Agurs*, 427 U.S. at 103, 113; *Giglio*, 405 U.S. at 154-155.

During closing argument, Williams gave particular attention to attacking the credibility of Deputy Barfield. Williams argued that Barfield changed his version of the events to accuse Williams for his own benefit, and that Barfield now had a strong incentive to lie: to gain "his freedom" through a deal with the government. Specifically, Williams asserted:

> [Mr. Barfield is] the man who for almost 3 ½ years, every time he got the opportunity to tell about it, said Adam Hall * * * in the soybean field, put his hands in his pockets. Then lo and behold, in December of 2001, almost 3 ½ years later, Robert Barfield got a Christmas present. You know what it was? Robert Barfield got him a deal. Let me tell you why. Oh, all he had to do was come in and testify against Billy Williams and cooperate, and we'll take care of him.
>
> > Did he have a reason to testify as he did? You bet he did. You bet he had a reason. He's looking after Robert because he knows he's going to be taken care of. * * * That's bought testimony. It's bought and paid for with leniency from your government.

(Closing Argument, 2d Supp. Rec. at 14; see Closing Argument, 2d Supp. Rec. at 8).

In rebuttal closing, the United States responded that Barfield testified he agreed to tell the truth to the government prior to any agreement with the United States. In addition, Barfield's deal was not without consequence; under the parties' proposal, he would serve at least 5 months' imprisonment. Specifically, government counsel stated:

> I would first note that Barfield is only one of three officers. I would secondly note that you had the opportunity to observe him. You saw him. You saw him coming in here and telling the truth, just as he told the truth to the government before he received any promise whatsoever. As he told you, he came in to talk to the government without there being any promise on the table at all as to what kind of sentence he would receive.
>
> And oh what a deal he got. Because he got sucked into what happened on that day, and he did do something wrong, and he came in and accepted responsibility for it, ooh, what a deal he got. He's going to jail, ladies and gentleman. He is going to jail. There is no chance for him to not go to jail, and - -

(5 R. 661-662).

At this point, Williams objected, asserting that it is the province of the court, and not the jury, to impose a sentence (5 R. 662). The court overruled the objection stating, "Well, it's final argument, and I think there's a reasonable underpinning for what she says" (5 R. 662). Counsel for the United States continued:

> *He told you that what his understanding of what that plea agreement was* and what his deal was, was that he can go to jail still for up to two years, absolutely will go for at least five months. Somewhere in between there. It will be up to the court. What a deal. Did he get any other benefit out of coming in here and lying? Any other evidence that he has any motivation to lie? None. Absolutely none.

(5 R. 662) (emphasis added).

Williams's reliance on *Napue* v. *Illinois*, 360 U.S. 264 (1959), *Giglio*, *Agurs,* and other cases cited (Br. 37-38) is misplaced because they are inapposite to the circumstances here. The cited cases concern the deliberate withholding of information favorable to the defense, or the knowing allowance and failure to correct false testimony at trial. See, *e.g.*, *Giglio*, 405 U.S. at 151-152; *United States* v. *Bigeleisen*, 625 F.2d 203 (8th Cir. 1980) (failure to correct false testimony on terms of deal with the government and inappropriate comments at closing, including reference to facts not in the record, warrant reversal). Here, however, the government did not make false statements during its rebuttal closing.

To refute the claim that Barfield's deal had no substantive consequences, the United States stated that, under the terms of the plea agreement, Barfield hoped to receive a sentence of five months' imprisonment in return for his cooperation.

Counsel did not forecast or guarantee a specific sentence, but focused on the terms of the plea. Overruling Williams's objection reflects the district court's view that the challenged argument focused on the terms of the plea agreement and Barfield's expectation under that agreement. Simply because the district court, after Williams's trial, exercised its discretion to depart downwards and not imprison Barfield does not render the government's statement a knowingly false statement. These circumstances are not the same as the knowing allowance or presentation of false testimony. Cf. *Bigeleisen*, 625 F.2d at 206 (failure to correct testimony that does not acknowledge terms of agreement as partial motive for cooperation).

B. The Government Did Not Improperly Vouch For Barfield's Credibility

The government engages in improper vouching when argument or questions "'might reasonably have led the jury to believe that the prosecutor possessed extrinsic evidence, not presented to the jury, that convinced the prosecutor of the defendant's guilt.'" *United States* v. *Binker*, 795 F.2d 1218, 1223 (5th Cir. 1986) (quoting *United States* v. *Leslie*, 759 F.2d 366, 378 (5th Cir. 1985), rev'd on other grounds, 783 F.2d 541, 542 n.1 (5th Cir. 1986), vacated, 479 U.S. 1074 (1987)), cert. denied, 479 U.S. 1085 (1987). In closing arguments, counsel may "analyz[e], evaluat[e], and apply[]" the evidence, but may not give his or her personal opinion on a witness's credibility. *Id*. at 1224. When a defendant attacks a witness's credibility, and suggests the witness is lying in order to get the plea agreement, the government may "make a fair response in rebuttal," and may assert that the witness is giving truthful testimony *because* of that plea agreement. *Ibid*. (cases cited).

Noting how a plea agreement may give the witness a motive to testify truthfully, which is permissible, is different than expressing a personal view on the witness's veracity, or suggesting that the government has additional, unidentified evidence to verify the witness's version of the events. See *id*. at 1225.

Williams asserts that the government impermissibly vouched for Barfield's credibility in its redirect examination and closing argument. The challenged redirect is as follows:

> Q: At the time that you first spoke with the government and gave a truthful account of what happened that day, did you have any promise in hand about what was going to happen to you?
> A: No, ma'am, I didn't.
> Q: The plea agreement was something that was worked out between yourself and your attorney and the government at what point in time?
> A: It was – I can't exactly – It was – I can't recall exactly what date.
> Q: Was it before you told us the truth about what happened or after you told us the truth about what happened?
> A: It was – It was after I told the truth.

(4 R. 424).

The government's questions address the *timing* of Barfield's first contact with the government in relation to his negotiation of the plea agreement. These questions respond to Williams's cross-examination of Barfield, which focused on the recommendation for a reduced sentence under the agreement, and Barfield's multiple, prior statements that contradicted his trial testimony. These few questions did not include any personal opinion or reference to extrinsic support of Barfield's honesty. Cf. *Binker*, 795 F.2d at 1224. Moreover, the challenged portion of rebuttal argues in support of Barfield's honesty based on Barfield's own

statements; that he did not have any promise or agreement on a potential lesser sentence when he told the federal government the truth.[10] They do not reflect additional facts not in the record or counsel's personal opinion.

C. Even If Considered Error, Comments Made During Rebuttal Closing Argument Did Not Affect Williams's Substantial Rights To Warrant Reversal

This Court follows a two-step analysis for claims of prosecutorial misconduct, including allegations of improper statements made during closing argument. See *United States* v. *Gamez-Gonzalez*, 319 F.3d 695, 701 (5th Cir. 2003); *United States* v. *Wise*, 221 F.3d 140, 152 (5th Cir. 2000), cert. denied, 532 U.S. 959 (2001). First, the Court must decide whether the statement is in fact improper. If so, the Court considers whether the statement affected the defendant's substantial rights by assessing three factors: 1) the "magnitude of the statement's prejudice"; 2) the affect of any cautionary instruction given, and 3) the "strength of the evidence of the defendant's guilt." *Id*. at 153. Counsel has broad latitude in closing argument, and this Court defers to a district court's determination of whether argument is prejudicial. *United States* v. *Virgen-Moreno*, 265 F.3d 276 (5th Cir. 2001), cert. denied, 534 U.S. 1095 (2002). A defendant bears a "substantial burden" to establish reversible error. *Id*. at 290.

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[10] "You saw him. You saw him coming in here and telling the truth, just as he told the truth to the government before he received any promise whatsoever. As he told you, he came in to talk to the government without there being any promise on the table at all as to what kind of sentence he would receive." (5 R. 661-662).

The magnitude of prejudice caused by challenged comments is assessed in the context of the entire trial and with consideration to the speaker's intended effect. *Wise*, 221 F.3d at 153. In *Wise*, *id*. at 152, counsel improperly referred to the Oklahoma City bombing in rebuttal closing after the district court previously barred such reference. Without excusing the impropriety, this Court noted the aggressive advocacy by both parties and concluded the comment did not overshadow arguments made before and after that comment. *Id*. at 153; see *Gamez-Gonzales*, 319 F.3d at 701 (government counsel "inappropriate[ly]" referred to the defense "blow[ing] as much smoke towards the jury box as they can," and explained that "smoke" referred to the defense theory of the case); *Virgen-Moreno*, 265 F.3d 291-292 (rebuttal comments could be evaluated as responsive to defendant's closing argument that government failed to produce certain evidence, and not as a comment on defendant's failure to call a witness).

Improper statements do not substantially prejudice the defendant when the jury is instructed that comments by counsel are not evidence, and that they are to reach a verdict based on the evidence and without sympathy. *Gamez-Gonzales*, 319 F.3d at 701; *Wise*, 221 F.3d at 153. Finally, where the evidence is strong and "multifaceted," the harm by an improper statement does not rise to reversible error. *Gamez-Gonzales*, 319 F.3d at 701; *Wise*, 221 F.3d at 153; see *United States* v. *Martinez*, 894 F.2d 1445, 1450-1451 (5th Cir.) (strong evidence of guilt outweighs "inappropriate, inflammatory, and unprofessional" statements even in absence of curative instruction), cert. denied, 498 U.S. 942 (1990).

Government counsel's comments during rebuttal and the challenged redirect examination are not of sufficient magnitude to be a source of undue prejudice. Cf. *Wise*, 221 F.3d at 153. Moreover, Williams's assertion (Br. 36) that Barfield was the government's most significant witness, and therefore any improper statement concerning him must be reversible rather than harmless error, overstates Barfield's role. Certainly, Barfield was an important witness. There were, however, several significant witnesses, including Chief Billings and Deputy Chief Cooper. These other officers testified without any controversy or plea agreement and because of that, they likely were more influential to the jury in finding Williams guilty than Barfield. Moreover, the court gave detailed instructions to the jury that argument by counsel is not evidence (1 R. 90); it is their obligation to assess each witness's credibility (1 R. 93-95); and additional considerations apply in evaluating the credibility of Barfield's testimony because he is a co-defendant with a plea agreement (1 R. 96). Finally, the evidence of guilt is ample; several eyewitnesses provided nearly identical descriptions of Hall's motionless stance, with hands raised over his head, before Williams shot him from behind. Accordingly, Williams has not shown, and cannot show, how the United States' rebuttal closing or challenged redirect examination of Barfield constitutes reversible error.

CONCLUSION

For the above reasons, this Court should affirm Williams's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2002, 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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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). This brief contains 13, 530 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

May 9, 2003

_____
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