No. 05-40012

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

RICHARD WYRICK,

Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that the facts and legal arguments are adequately presented in the briefs and record, but does not object to oral argument if this Court believes it would aid the decision-making process.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment in a criminal case. Appellant was convicted and sentenced on one count of violating 18 U.S.C. 242. Final judgment was entered on November 30, 2004, and the defendant filed a timely notice of appeal on December 30, 2004.[1] The district court had jurisdiction pursuant to 18 U.S.C. 3231. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

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[1] On December 28, 2004, the district court granted defendant-appellant's unopposed motion for an extension of time to file a notice of appeal. 1 R. 387.

STATEMENT OF THE ISSUE

Whether there was sufficient evidence that the defendant acted willfully to deprive the victim of his right to be free from unreasonable force within the meaning of 18 U.S.C. 242.

STATEMENT OF THE CASE

On December 19, 2003, a federal grand jury in the Eastern District of Texas returned a two-count indictment charging defendant police officer Richard Wyrick with criminal offenses arising from an assault on James Murray that took place in the early morning hours of July 21, 2003, in Grayson County, Texas. 1 R. 15.[2] Count One charged Officer Wyrick with striking Murray and causing him bodily injury, thereby violating Murray's right to be free from the use of unreasonable force by a person acting under color of law, in violation of 18 U.S.C. 242. 1 R. 15. Count Two charged Officer Wyrick with knowingly making a false entry in his police report with the intent to impede a federal investigation, in violation of 18 U.S.C. 1519. 1 R. 16.

Wyrick was tried before a jury in the Eastern District of Texas from April 26 to April 29, 2004. On April 30, 2004, the jury acquitted Wyrick on Count Two. 1 R. 196. The court declared a mistrial as to Count One after the jury was unable to reach a verdict. Wyrick was retried on Count One from July 12 to July 14, 2004.

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[2] References to "__R.__-__" are to the volume and page number or page range of the record on appeal. References to "Def. Br.__" are to appellant's opening brief in this appeal.

At the close of the government's case, Wyrick moved for a directed verdict, 3 R. (Tr. 388-389), but the court denied his motion, 3 R. (Tr. 393). Wyrick renewed his motion at the close of all evidence, but the court again denied it. 3 R. (Tr. 472). The jury returned a verdict of guilty, 1 R. 365, and Wyrick was sentenced to 57 months' imprisonment, 1 R. 373. Wyrick appeals from his conviction.[3]

STATEMENT OF THE FACTS

In the early morning hours of July 21, 2003, Richard Wyrick, a police officer with the City of Colbert, Oklahoma, noticed a vehicle that appeared to be stopped in the middle of Highway 91 in Cartwright, Oklahoma. 3 R. (Tr. 406, 409). As Wyrick approached in his police car, the driver, later identified as James Murray, placed his car into drive and began heading west along Highway 91. 3 R. (Tr. 410-411). As Wyrick followed Murray, he noticed Murray's car drift off the side of the road slightly before it headed toward the Denison Dam. 3 R. (Tr. 411-412). Wyrick then activated his emergency lights and his in-car camera in preparation for a traffic stop. 3 R. (Tr. 412-413). Murray slowed his vehicle at a normal rate as if he was going to stop, but then braked suddenly. 3 R. (Tr. 414, 416). Murray's vehicle skidded off the road onto the gravel shoulder and came

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[3] In concluding his brief, Wyrick asserts that his "sentence should be reversed." Def. Br. 18. As both parties explicitly waived any "*Blakely* issues" before final judgment, see 1 R. 344-345, the government assumes that this is simply a transcription error and that Wyrick is seeking reversal of his conviction on the grounds stated in his brief. Def. Br. 14-17.

almost to a complete stop. 3 R. (Tr. 416). Murray then accelerated quickly and continued on Highway 91 toward the dam. 3 R. (Tr. 416-417). Wyrick pursued Murray across the dam road at a high rate of speed. 3 R. (Tr. 418-419). The vehicle pursuit continued into the state of Texas, and ended when Murray pulled into the parking lot of a convenience store. 3 R. (Tr. 420, 423).

Murray exited his vehicle and calmly walked into the convenience store while smoking a cigarette. 3 R. (Tr. 239). Wyrick directed Murray to stop, but Murray continued into the store. 3 R. (Tr. 423-424). Wyrick followed. 3 R. (Tr. 425). Ted Allen, the store's employee, testified that when Wyrick entered the store behind Murray, Wyrick appeared to have "an agenda," in that he "looked mad" and "knew what he was [going] to do and he did it." 3 R. (Tr. 254). Derrick Daniels, a customer in the store, testified that Wyrick appeared "angry" as he walked "quickly" toward Murray. 4 R. (Tr. 490). According to Allen, Wyrick then "grabbed [Murray], spun him around, and hit him instantly." 3 R. (Tr. 257). Daniels, who was a "couple feet" from Wyrick and Murray and had a "good view, clear view" of what happened, 4 R. (Tr. 487), testified that Wyrick walked up to Murray, grabbed his wrist, spun him around, and did not hesitate before hitting him in the face. 4 R. (Tr. 487). After he was hit, Murray fell down and Wyrick attempted to handcuff him. 3 R. (Tr. 434). Murray was later taken to the hospital, where an examination revealed a fractured hip. 3 R. (Tr. 288). At the time of the assault, James Murray was 68 years old. 3 R. (Tr. 195). Witnesses described him

as a "frail," "weak," "skinny old man" who looked twenty years older than he was. 3 R. (Tr. 194, 195, 252).

At trial, Wyrick testified that he struck Murray in self defense. Specifically, Wyrick testified that after he grabbed Murray's wrist, Murray "spun around," and "his arm came up beside him" with a raised fist. 3 R. (Tr. 431-432). Wyrick testified that, in response, he "ducked back" before hitting Murray. 3 R. (Tr. 432).

The events that took place in the convenience store were recorded by the store's surveillance camera. 3 R. (Tr. 253). Neither the video, nor the eyewitness testimony, supports Wyrick's version of events. Allen and Daniels both testified that Murray did not throw, or start to throw, a punch at Wyrick. 3 R. (Tr. 255); 4 R. (Tr. 498-499). Wyrick himself admitted, after having seen the video recording of the incident, that Murray "didn't throw a punch." 3 R. (Tr. 469). Allen and Daniels also denied seeing Wyrick dodge a potential punch from Murray. 3 R. (Tr. 255); 4 R. (Tr. 488). Even Wyrick testified that he did not entirely agree with his police report, in which he claimed to have evaded a potential punch from Murray before he struck Murray. 3 R. (Tr. 433).

At numerous points throughout the trial, the jury heard Wyrick admit that his use of force against Murray could be considered, or was in fact, excessive. For example, the government introduced the following exchange from Wyrick's first trial:

> Q. Are you telling us a heel strike to the head would be appropriate with an 85-year-old man that weighs 120 pounds?
> A. No, I'm not.

Q. A closed-fist strike to the head would be appropriate to an 85-year-old man that weighs 120 pounds?
A. I'm not saying it's appropriate at all.
Q. And yet you struck him in the head?
A. Yes.
Q. And you think that that's appropriate?
A. I never said it was appropriate. I just said that's what I did.
Q. Do you think it was inappropriate?
A. After everything has been reviewed, *yes, I think it was inappropriate*.
Q. It was excessive force, wasn't it?
A. At this point, *I believe so.*

3 R. (Tr. 370-371) (emphasis added). Although Wyrick understandably tempered his testimony at his second trial, he nonetheless acknowledged that his actions could reasonably be considered excessive:

Q. So you believe you did use too much force in defending yourself?
A. It could be seen that way, yes.

3 R. (Tr. 465); see also 3 R. (Tr. 467, 469) (twice stating that the force he used "could be viewed as excessive").

Wyrick admitted that he "knew [he] shouldn't have hit" Murray, 3 R. (Tr. 469), and acknowledged that at some point he informed his supervisor that he had "screwed up." 3 R. (Tr. 468, 470). The government provided evidence that Wyrick successfully completed training on how to determine when, and how much, force is necessary in a given situation. 3 R. (Tr. 298-299, 302). Wyrick received practical training in "custody-and-control" tactics, which focused on the skills necessary to make an arrest and to control an individual. 3 R. (Tr. 303). During this training, officers practice various physical control techniques so that they can apply them appropriately in arrest situations. 3 R. (Tr. 306).

Furthermore, like many police officers in Oklahoma, Wyrick received training from, and was certified by, Oklahoma's Counsel on Law Enforcement Education and Training (CLEET).[4] 3 R. (Tr. 293-294). James Tillison, CLEET's General Counsel, testified that officers who attend CLEET receive specific instruction on the use of force. 3 R. (Tr. 302). According to Tillison, officers are taught that "force is excessive when it exceeds the minimal necessary force to stop a threat or to make an arrest." 3 R. (Tr. 303). Officers are also taught how to determine whether any force is required in a given situation. 3 R. (Tr. 302). In Wyrick's own words, he did "pretty well" in his training, finishing "second or third" in his police academy class. 3 R. (Tr. 457).

SUMMARY OF ARGUMENT

Sufficient evidence supports Wyrick's conviction under 18 U.S.C. 242. The evidence established that the defendant willfully used force that was unreasonable under the circumstances. Both eyewitnesses testified that Murray did not pose a physical threat to Wyrick. Both eyewitnesses also testified that Wyrick did not attempt to dodge a potential punch from Murray before Wyrick struck Murray in the face. Wyrick himself admitted that the video recording does not show Murray throwing a punch. Viewed in the light most favorable to the verdict, the evidence

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[4] CLEET does not train officers from the four agencies that conduct their own police academies – Oklahoma City, Tulsa, Norman, and the Oklahoma Highway Patrol. 3 R. (Tr. 293-294).

is sufficient to support the jury's finding that Wyrick acted with the specific intent to deprive Murray of his right to be free from the use of unreasonable force.

ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTION UNDER 18 U.S.C. 242

A. Standard Of Review

In reviewing a claim of insufficient evidence, this Court must consider whether "a rational trier of fact could have found that the evidence establishes the essential elements of the offense beyond a reasonable doubt." *United States* v. *Brugman*, 364 F.3d 613, 615 (5th Cir. 2004). The evidence must be viewed in the light most favorable to the government, and all reasonable inferences and credibility choices are to be made in support of the jury's verdict. *Ibid.* Moreover, the jury may choose among reasonable interpretations of the evidence. *Ibid.* In this manner, this Court "review[s] the jury's finding of guilt under a standard that is highly deferential to the verdict." *United States* v. *Harris*, 293 F.3d 863, 869 (5th Cir.), cert. denied, 537 U.S. 950 (2002).

B. The Evidence Was Sufficient To Support The Jury's Finding That Officer Wyrick Acted With The Specific Intent To Deprive Murray Of His Constitutional Right To Be Free From The Use Of Unreasonable Force

To prove a violation of 18 U.S.C. 242, the jury must find that the defendant acted: 1) willfully; 2) to deprive another of a federal constitutional or statutory right; 3) under color of law. *United States* v. *Williams*, 343 F.3d 423, 431-432 (5th Cir. 2003). "Willfulness," within the meaning of 18 U.S.C. 242, is established by

proof that the defendant acted "in open defiance or in reckless disregard of a constitutional [or statutory] requirement which has been made specific and definite." *Screws* v. *United States*, 325 U.S. 91, 105 (1945).

The willfulness element makes Section 242 a specific-intent crime: The defendant must have specifically intended that the deprivation of rights occur. *United States* v. *Reese*, 2 F.3d 870, 880-881 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994). On appeal, Wyrick argues that the evidence presented at trial suggests only that he was angry with Murray (Def. Br. 13, 16-17), and is thus insufficient to support the jury's finding that he acted with the specific intent to deprive Murray of his constitutional right to be free from the use of unreasonable force (Def. Br. 14-17).

It is well-settled that the Fourth Amendment's protection against unreasonable searches and seizures requires that officers refrain from using excessive force, that is, more force than is reasonably necessary, when effectuating an arrest. *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989). "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them," *Graham*, 490 U.S. at 397, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight," *id.* at 396.

Viewed in the light most favorable to the verdict, the evidence supports the jury's conclusion that Wyrick *willfully* deprived Murray of his constitutional right to be free from excessive force. Wyrick concedes that he struck Murray in the face. 3 R. (Tr. 432, 446). He also admits that he struck him with enough force to knock him to the ground. 3 R. (Tr. 455); Def. Br. 17. And he concedes that he intended to deliver the blow. 3 R. (Tr. 465). He argues only that he used such force to defend himself from an imminent attack by Murray. 3 R. (Tr. 465, 467).

The videotape of the incident and the eyewitness testimony, however, clearly establish that Murray posed no such threat to Wyrick. The jury heard from two eyewitnesses that Murray never attempted to throw a punch at Wyrick. More importantly, neither witness saw Wyrick attempt to evade a punch from Murray. Rather, the witnesses saw Wyrick enter the store quickly, catch up with Murray, grab him by the wrist, and spin him around so fast that Murray had no time to react. 3 R. (Tr. 254-255). According to the eyewitnesses, Wyrick hit Murray – a 68-year old, weak, frail, "skinny old man" who looked to be in his eighties (3 R. (Tr. 194)) – "instantly," without hesitation. 3 R. (Tr. 257). The videotape evidence supports these eyewitness accounts.

Indeed, Wyrick himself admitted that he "knew [he] shouldn't have hit" Murray, 3 R. (Tr. 469), and acknowledged that at some point he informed his supervisor that he had "screwed up," 3 R. (Tr. 468, 470). Moreover, at trial, Wyrick repeatedly acknowledged that his use of force against Murray was, or could reasonably be considered, excessive. 3 R. (Tr. 370-371, 465, 467, 469).

A reviewing court "may not substitute its judgment for that of the jury or make credibility determinations." *Price* v. *City of Charlotte*, 93 F.3d 1241, 1249 (4th Cir. 1996); see also *United States* v. *Millsaps*, 157 F.3d 989, 994 (5th Cir. 1998), cert. denied, 528 U.S. 1054 (1999) ("It is the sole province of the jury, and not within the power of this Court, to weigh conflicting evidence and evaluate the credibility of witnesses."). The jury weighed all the evidence – Wyrick's testimony, that of the eyewitnesses, Wyrick's acknowledgment of what the video evidence depicts, and the evidence with respect to Wyrick's formal training in, and mastery of, defensive tactics – and concluded that, in light of the facts and circumstances, Wyrick intentionally used unreasonable force against Murray. As discussed *supra*, this evidence was more than sufficient to support Wyrick's conviction.

CONCLUSION

For the foregoing reasons, this Court should affirm Wyrick's conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2005, two paper copies and one electronic version in PDF format of the BRIEF FOR THE UNITED STATES AS APPELLEE were served by overnight delivery on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains no more than 2878 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

_____

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Date: June 22, 2005