No. 13-6125

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHRISTOPHER BRIAN EATON,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES AS APPELLEE

JOCELYN SAMUELS
Acting Assistant Attorney General

MARK L. GROSS
ERIN H. FLYNN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-5361
Erin.Flynn@usdoj.gov

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STATEMENT REGARDING ORAL ARGUMENT

The government requests oral argument.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this criminal matter under 18 U.S.C. 3231. The court entered final judgment against defendant Eaton on August 9, 2013. (Judgment, R. 231, PageID# 2097-2102). Eaton filed a timely notice of appeal on August 20, 2013. (Notice of Appeal, R. 234, PageID# 2111-2112). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the evidence presented was sufficient to support Eaton's convictions for witness tampering under 18 U.S.C. 1512(b)(3).

2. Whether the district court plainly erred by failing to instruct the jury on 18 U.S.C. 1512(e), which sets forth an affirmative defense to witness tampering.

3. Whether the district court plainly erred by failing to provide the jury with a special unanimity instruction with respect to Count 5.

4. Whether the prosecutor's statements on rebuttal were improper, flagrant, and so prejudicial so as to render Eaton's trial fundamentally unfair.

5. Whether the cumulative effect of the claimed errors violated Eaton's due process right to a fair trial.

STATEMENT OF THE CASE

1. Procedural History

This case arises out of allegations of excessive force by law enforcement officers who arrested Billy Randall Stinnett on February 24, 2010. (Second Superseding Indictment, R. 154, PageID# 867-879). The excessive-force allegations concerned four officers of the Barren County Sheriff's Office: (1) defendant-appellant Chris Eaton, then-Sheriff of Barren County; (2) Eric Guffey, an officer on the Barren-Edmonson County Drug Task Force; (3) Aaron Bennett, a Deputy Sheriff; and (4) Adam Minor, also a Deputy Sheriff. (Second Superseding

Indictment, R. 154, PageID# 867-868). The case further involves Eaton's attempts to press a false story upon Minor and another deputy sheriff, Steve Runyon, in order to justify to federal authorities Stinnett's assault and related injuries. (Second Superseding Indictment, R. 154, PageID# 869-870).

On November 14, 2012, a federal grand jury returned a 13-count second superseding indictment charging the officers with various federal offenses. (Second Superseding Indictment, R. 154, PageID# 867-879). Eaton was charged with eight crimes: three counts of violating 18 U.S.C. 242 (deprivation of rights under color of law); two counts of violating 18 U.S.C. 1512(b)(3) (witness tampering); two counts of violating 18 U.S.C. 1519 (falsification of a document and destruction of a record, document, or tangible object); and one count of violating 18 U.S.C. 1001 (making a false statement). (Second Superseding Indictment, R. 154, PageID# 868-872, 874-875).

The same indictment charged Guffey with two counts of violating 18 U.S.C. 242 and two counts of violating 18 U.S.C. 1001. Bennett was charged with one count of violating 18 U.S.C. 242 and one count of violating 18 U.S.C. 1001. Minor was charged with one count of violating 18 U.S.C. 242 and one count of violating 18 U.S.C. 1001. (Second Superseding Indictment, R. 154, PageID# 868-869, 872-874).

After a nine-day jury trial, Eaton was convicted of both counts of witness tampering. (Verdict Form, R. 196, PageID# 1139). The jury acquitted him of the other charges. (Verdict Form, R. 196, PageID# 1138-1140).[1] Eaton filed a renewed motion for judgment of acquittal or for a new trial. (Mot. for Judgment of Acquittal or a New Trial, R. 201, PageID# 1169-1198). The district court denied the motion in its entirety. (Mem. Op. & Order, R. 214, PageID# 1857-1869).

At sentencing, the court calculated Eaton's Guidelines sentencing range to be 46-57 months, but imposed a non-Guidelines sentence of 18 months' imprisonment and two years' supervised release. (Tr., R. 243, Page ID# 2318-2371; Judgment, R. 231, PageID# 2097-2102). Eaton timely appealed. (Notice of Appeal, R. 234, PageID# 2111-2112). Eaton is released pending appeal pursuant to 18 U.S.C. 3143(b)(1). (Mem. Op. & Order, R. 245, PageID# 2375-2380).

2. Statement Of Facts

a. The FBI Receives A Complaint Alleging Excessive Force

On February 24, 2010, three law enforcement agencies—the Barren County's Sheriff's Office, the Glasgow Police Department, and the Kentucky State

[1] Bennett and Guffey also went to trial and were acquitted on all charges. (Verdict Form, R. 196, PageID# 1141-1143). Before trial, Minor pleaded guilty to Count 8 of the Superseding Indictment, which charged him with making false statements that neither he nor anyone else struck Stinnett while he was handcuffed. (Plea Agreement, R. 71, PageID# 220; Superseding Indictment, R. 26, PageID# 74). Minor was sentenced to two years' probation. (Judgment, R. 230, PageID# 2092-2096).

Police— pursued Stinnett in an hour-long car chase based on reports of reckless driving. (Minor Tr., R. 209, PageID# 1444-1448; Barton Tr., R. 202, PageID# 1204). Stinnett led officers on the chase because he had a methamphetamine lab in his van. (Stinnett Tr., R. 249, PageID# 2387, 2456-2457). While attempting to avoid a police roadblock, Stinnett crashed into property belonging to Calvary Baptist Church, in Glasgow, Kentucky. (Minor Tr., R. 209, PageID# 1448, 1502-1503; Stinnett Tr., R. 249, PageID# 2388-2390). Stinnett attempted to flee on foot, and ran down a dead-end alleyway on the property. (Stinnett Tr., R. 249, PageID# 2390-2393).

Four officers followed Stinnett. (Minor Tr., R. 209, PageID# 1456-1460). It is undisputed that the officers used force in effectuating Stinnett's arrest. Defendant Eaton, then-Sheriff of Barren County, was the first officer to reach Stinnett. (Stinnett Tr., R. 249, PageID# 2393). He struck Stinnett multiple times with his baton, at least once on the head. (Stinnett Tr., R. 249, PageID# 2395-2396, 2399-2404; Brown Tr., R. 252, PageID# 2892-2893; Eaton Report, Def. App. 7).[2] Eric Guffey arrived next, followed by Aaron Bennett and Adam Minor. (Minor Tr., R. 209, PageID# 1456-1460; Lafferty Tr., R. 256, PageID# 3197; Eaton and Minor Reports, Def. App. 5, 7; Bennett and Guffey Reports, R. 258-2 & 258-3, PageID# 3300-3301). Approximately three minutes passed from the time

[2] Citations to "Def. App. __" refer to the appendix attached to Eaton's brief.

Stinnett crashed until the officers radioed that they had him in custody. (Minor Tr., R. 209, PageID# 1503).

Unbeknownst to the officers, three teenagers watched the arrest from an upstairs classroom in the church. (Billingsley, R. 249, PageID# 2569-2570). Two of the teens told their father that the officers beat Stinnett while he was handcuffed. (Billingsley Tr., R. 249, PageID# 2570-2572; Brown Tr., R. 251, PageID# 2810). The next week, the father shared the account with a member of the Glasgow Police Department. (Billingsley, R. 249, PageID# 2572-2573, 2586). The Glasgow Police Department promptly notified the FBI, which in turn contacted the father. (Billingsley, R. 249, PageID# 2575; Brown Tr., R. 251, PageID# 2807, 2810).

On March 4, 2010, the FBI initiated its investigation into the officers' alleged misconduct. Agent Mike Brown interviewed Stinnett in jail. (Brown Tr., R. 251, PageID# 2810; Stinnett Tr., R. 249, PageID# 2475-2476). He took pictures of Stinnett's head injury, which required nine staples, and of bruises to Stinnett's thighs, left arm, left elbow, right calf, and the area behind Stinnett's ear. (Brown Tr., R. 251, PageID# 2810-2813, 2854-2856). Stinnett said the injuries were from "the beating," including from when Eaton repeatedly struck him with a baton and Bennett punched him in the head. (Stinnett Tr., R. 249, PageID# 2477-2481).

That same day, Agent Brown went to the Barren County Sheriff's Office to meet with Sheriff Eaton. (Brown Tr., R. 251, PageID# 2813-2814). Agent Brown informed Eaton that the FBI was investigating an excessive-force complaint related to Stinnett's arrest. (Brown Tr., R. 251, PageID# 2814). Agent Brown requested a copy of the Sheriff Department's use-of-force policy, as well as any videos, pictures, use-of-force reports, or other reports related to Stinnett's arrest. (Brown Tr., R. 251, PageID# 2814, 2856-2859). Agent Brown assumed that, consistent with standard practice, because Stinnett went to the hospital, the officers would have prepared use-of-force reports that documented his injuries and the level of force used. (Brown Tr., R. 251, PageID# 2859; Minor Tr., R. 209, PageID# 1443). Eaton informed Agent Brown that no such reports had been completed. (Brown Tr., R. 251, PageID# 2814). Agent Brown asked Eaton to have the officers provide reports explaining why they used a certain level of force and how Stinnett was injured. (Brown Tr., R. 251, PageID# 2814-2815, 2857-2859).

b. Eaton Directs Runyon And Minor To Prepare False Reports

On March 4, 2010, the same day Eaton met with Agent Brown, Eaton sought out Steve Runyon. Runyon testified at trial that he was not present in the alleyway during Stinnett's arrest and did not visit or inspect the arrest scene at any time that day. (Runyon Tr., R. 211, PageID# 1744-1746, 1748-1749).

Eaton found Runyon at the gym. (Runyon Tr., R. 211, PageID# 1750-1751). Runyon testified that Eaton told him that the FBI had been at his office that afternoon regarding excessive-force allegations related to Stinnett's arrest and that Eaton needed to speak with Runyon. (Runyon Tr., R. 211, PageID# 1751, 1755). Runyon said Eaton told him Eaton needed Runyon to write a report. (Runyon Tr., R. 211, PageID# 1751, 1755).

Runyon testified that Eaton wanted Runyon to tell the FBI that Runyon had observed a knife belonging to Stinnett on the ground at the arrest scene, even though, according to Runyon, Eaton knew Runyon was not involved in the arrest, was unfamiliar with the scene, and had not observed the location of the knife. (Runyon Tr., R. 211, PageID# 1751-1753, 1765, 1812). Runyon further testified that Eaton got aggravated when Runyon responded, "Chris, I didn't see no knife on the ground. * * * Chris, you know I didn't see it. I don't even know what the scene looks like." (Runyon Tr., R. 211, PageID# 1753). Runyon testified that Eaton then drove Runyon from the gym to the arrest scene, and started walking around, pointing things out about the scene, and telling Runyon where the knife was supposedly found. (Runyon Tr., R. 211, PageID# 1754).

Runyon testified that Eaton's efforts to pressure him to provide a false account made him so "nauseated" that he thought he "was going to throw up." (Runyon Tr., R. 211, PageID# 1754). Runyon was afraid to ask Eaton why he

needed him to say that he saw the knife at the arrest scene, but he "knew something was wrong." (Runyon Tr., R. 211, PageID# 1830). Runyon testified that he felt he had no choice but to comply with Eaton's request. (Runyon Tr., R. 211, PageID# 1755). Eaton and Runyon were life-long friends, and Eaton had been grooming Runyon to be the next sheriff. (Runyon Tr., R. 211, PageID# 1752-1753). Runyon explained that disagreeing with Eaton could cost him his job. (Runyon Tr., R. 211, PageID# 1766-1768, 1772-1773).

Runyon wrote a report consistent with Eaton's suggestions. (Runyon Tr., R. 211, PageID# 1754-1760). Eaton told Runyon what to include in the report, proofread its contents, and collected it from Runyon. (Runyon Tr., R. 211, PageID# 1759, 1764-1765, 1804). Runyon testified that he included false information in his report stating that he and Eaton "walked back to the upper side of the fellowship hall where the altercation occurred" and "[t]here was a gray metal type knife found lying on the ground which Stinnett claimed." (Runyon Tr., R. 211, PageID# 1756-1757, 1759, 1765, 1771-1772, 1788-1789; Runyon Report, Def. App. 8). Eaton also prepared a written report. Eaton wrote that, on the day of the arrest, he "asked Runyon to go back to the spot where the altercation occurred" because "I wanted to see what the object was in [Stinnett's] hand. On the ground near the wall of the church was a gray knife that was not open." (Eaton Report, Def. App. 7).

Adam Minor, a deputy sheriff who was present in the alleyway for Stinnett's arrest, also testified that Eaton directed him to prepare a false report for the FBI. Minor testified that, about a week after Stinnett's arrest, he received a call from Rusty Anderson, a detective with the sheriff's office. (Minor Tr., R. 209, PageID# 1509). Anderson told Minor that the FBI was investigating Stinnett's arrest, and instructed Minor to come in and complete a report for submission to the FBI. (Minor Tr., R. 209, PageID# 1509). Minor had not previously been asked to complete a use-of-force report regarding Stinnett's arrest, even though standard police practice normally would have required such a report. (Minor Tr., R. 209, PageID# 1510-1511). Minor testified that Eaton never had the deputies prepare use-of-force reports, because, in Eaton's view, "the more reports you write, the more you could get hemmed up." (Minor Tr., R. 210, PageID# 1534-1535).

Minor testified that he completed his report at the Sheriff's Department under Eaton's direct observation. (Minor Tr., R. 209, PageID# 1511-1512). Aaron Bennett, another deputy who was also involved in Stinnett's arrest and instructed to prepare a report, was also present. (Minor Tr., R. 210, PageID# 1526). Minor testified that before he and Bennett started drafting their reports, Eaton told them that they should include that Stinnett was armed with a knife, resisted arrest, and disregarded repeated verbal commands. (Minor Tr., R. 209, PageID# 1512, 1526).

Minor testified that he drafted a report, which Eaton reviewed. (Minor Tr., R. 209, PageID# 1512). Minor further testified that Eaton told Minor to make additions, to include that the officers gave verbal commands to Stinnett, that Stinnett was non-combative after being handcuffed, and that Eaton showed Stinnett a knife and asked if it was his. (Minor Tr., R. 209, PageID# 1513). Minor followed Eaton's instructions. (Minor Tr., R. 209, PageID# 1514-1516; Minor Report, Def. App. 5).

Minor testified that the things Eaton told him to include in his report for the FBI were false. (Minor Tr., R. 210, PageID# 1525-1526, 1530). He stated that he included the false information "[b]ecause Chris Eaton told me to." (Minor Tr., R. 210, PageID# 1536). Minor testified that if he refused Eaton's orders, he would have been fired and faced difficulty getting another job in Barren County because of Eaton's political connections. (Minor Tr., R. 210, PageID# 1537-1540). Minor explained that Eaton wanted him to prepare a false report in order to "cover up what we had done" from "[t]he FBI." (Minor Tr., R. 210, PageID# 1535-1536). Minor testified that he gave the same false account to the FBI when Agent Brown interviewed him a month later after receiving the officers' reports. (Minor Tr., R. 210, PageID# 1536; Brown Tr., R. 251, PageID# 2868). Minor also stated that he testified to a false version of the facts in three different state-court proceedings regarding Stinnett's drug-related and other charges. (Minor Tr., R. 210, PageID#

1537, 1568-1578). Minor knew that he was providing this false state-court testimony under oath, but did so because Eaton "told [him] to." (Minor Tr., R. 210, PageID# 1537, 1723).

The jury also heard Minor's testimony about his actual recovery of the knife. Minor testified that, as he escorted Stinnett from the scene and passed Eaton's vehicle, Minor asked Stinnett if he had any weapons on him. (Minor Tr., R. 209, PageID# 1483). Stinnett responded yes, and Minor sat him on the ground to search him. (Minor Tr., R. 209, PageID# 1483). Minor testified that Stinnett said he had a knife clipped to the inside of his front pocket. (Minor Tr., R. 209, PageID# 1483). Minor testified that, at that moment, Eaton reached down and pulled a closed knife from a visible clip on Stinnett's pocket. (Minor Tr., R. 209, PageID# 1483-1485; Minor Tr., R. 210, PageID# 1529). At trial, Stinnett confirmed Minor's account of when and where the officers recovered his knife. (Stinnett Tr., R. 249, PageID# 2417-2418). The jury also saw a picture showing Stinnett on the ground near Eaton's cruiser, with Minor and Eaton next to him. (Photograph, R. 258-1, PageID# 3299). Stinnett testified that he never pulled a knife on Eaton, even though Stinnett acknowledged having a knife in his pocket. (Stinnett Tr., R. 249, PageID# 2407, 2420, 2422). Stinnett testified that he did not pull out the knife when cornered in the alleyway because he did not want the officers to shoot him. (Stinnett Tr., R. 249, PageID# 2422).

c. Eaton's Efforts Are Exposed

In April 2010, FBI Agent Brown received written reports from Eaton, Minor, Bennett, and Guffey. (Brown Tr., R. 251, PageID# 2815). At that time, Agent Brown decided to interview the officers because aspects of their reports contradicted one another. (Brown Tr., R. 251, PageID# 2822). The reports also contradicted the eyewitness accounts from the church (Brown Tr., R. 251, PageID# 2815, 2822-2823), as well as Stinnett's version of the assault (Stinnett Tr., R. 249, PageID# 2393-2408, 2481). In addition, both Eaton and Bennett stated in their reports that Eaton screamed on the radio that Stinnett had a weapon. (Eaton Report, Def. App. 7; Bennett Report, R. 258-2, PageID# 3300). Agent Brown testified that when he reviewed the radio communications, he did not hear any such call. (Brown Tr., R. 251, PageID# 2829).

On April 20, 2010, Agent Brown and FBI Agent David McClelland interviewed Eaton, Bennett, Minor, and Guffey at the Sheriff's Department.[3] (Brown Tr., R. 251, PageID# 2824-2841; McClelland Tr., R. 251, PageID# 2665). Eaton's interview statements were consistent with his report. (McClelland Tr., R.

[3] The agents also interviewed Ron Lafferty, an officer with the Barren-Edmonson Drug Task Force, who helped process the arrest scene. (Brown Tr., R. 252, PageID# 2909). Agent Brown received Runyon's report on September 14, 2010. (Runyon Tr., R. 211, PageID# 1804). Runyon declined to speak with the FBI, and later was subpoenaed to testify before the grand jury. (Runyon Tr., R. 211, PageID# 1760-1763, 1793-1796).

251, PageID# 2666-2667, 2691-2697, 2766; Brown Tr., R. 251, PageID# 2824-2829; Eaton Report, Def. App. 7). Minor, Bennett, and Guffey also provided statements consistent with their reports. (McClelland Tr., R. 251, PageID# 2699-2717; Brown Tr., R. 251, PageID# 2831-2836, 2868; Minor Tr., R. 210, PageID# 1536; Minor Report, Def. App. 5; Bennett and Guffey Reports, R. 258-2 & 258-3, PageID# 3300-3301).

In February 2011, Runyon appeared before the grand jury after being subpoenaed. (Runyon Tr., R. 211, PageID# 1762-1763). At trial, Runyon testified that he falsely had stated to the grand jury that Eaton had neither assisted Runyon with nor told him what to put into his report, that Eaton had not directed Runyon to include the statement about the knife, and that Runyon's report was accurate. (Runyon Tr., R. 211, PageID# 1763-1766, 1805-1814). He also stated at trial that he never told the grand jury about Eaton bringing him back to the scene of Stinnett's arrest. (Runyon Tr., R. 211, PageID# 1806-1807). Before both the grand jury and at trial, Runyon testified that he did not observe the knife on the ground at the arrest scene. (Runyon Tr., R. 211, PageID# 1771, 1806, 1810). At trial, Runyon further testified that Eaton told him what to include in his report, including the false information about the knife, and approved Runyon's report. (Runyon Tr., R. 211, PageID# 1764-1766).

At trial, Runyon also testified about the immense stress he felt in connection with his grand-jury appearance. (Runyon Tr., R. 211, PageID# 1771, 1774-1775). He testified that the day prior to his testimony, a close family member died. (Runyon Tr., R. 211, PageID# 1774). Runyon further testified that he did not trust federal authorities, was afraid of Eaton, and knew that what Eaton wanted him to do was wrong. (Runyon Tr., R. 211, PageID# 1771, 1774-1775). Runyon stated that, prior to appearing before the grand jury, he felt as though his job had been threatened when Eaton made comments about the economy being bad and how Runyon was "close to retirement [and] had a lot to lose." (Runyon Tr., R. 211, PageID# 1772-1773). Runyon testified that these conversations with Eaton generally ended with Runyon requesting to stay in his job until Runyon was eligible to retire. (Runyon Tr., R. 211, PageID# 1773). Runyon attributed the additional information he provided at trial but did not mention to the grand jury—*i.e.*, the information about returning to the arrest scene—to this stress. (Runyon Tr., R. 211, PageID# 1821).

Runyon testified that, after appearing before the grand jury, Eaton repeatedly called him to ask what he said. (Runyon Tr., R. 211, PageID# 1769-1770). When Runyon refused to tell him, Runyon described how he would never forget Eaton getting angry and responding, "You dropped me in. Go ahead, tell me. You dropped me in." (Runyon Tr., R. 211, PageID# 1769). The jury heard how

Runyon thought "there goes my job," and explained to Eaton that he could not risk lying and going to jail for him. (Runyon Tr., R. 211, PageID# 1769-1770).

On February 15, 2012, a federal grand jury indicted Eaton, Minor, Bennett, and Guffey on excessive force and obstruction of justice charges. (Indictment, R. 1, PageID# 1-12). At trial, Runyon testified that, after the officers were indicted, he generally felt shunned at work and no longer was assigned to the department's special details. (Runyon Tr., R. 211, PageID# 1767-1768, 1776). Runyon testified that Eaton had gone so far as to send another employee home for speaking with him. (Runyon Tr., R. 211, PageID# 1767-1768). Runyon stated that he simply tried to hold onto his job until he could retire with 20 years of service. (Runyon Tr., R. 211, PageID# 1766-1767, 1770, 1773). Runyon testified that, upon doing so in February 2013, he retired. (Runyon Tr., R. 211, PageID# 1767, 1776).

At trial, Minor testified that, the day after he was indicted, he reached out to the government to try to secure a plea agreement. (Brown Tr., R. 251, PageID# 2844, 2868; Minor Tr., R. 210, PageID# 1546, 1582-1586). Although Minor did not know that there were eyewitnesses to the assault, or that one of the witnesses had identified him as having assaulted Stinnett while handcuffed, Minor implicated himself in Stinnett's assault and provided an account of the arrest to federal authorities in three separate meetings. (Minor Tr., R. 209, PageID# 1546-1547, 1585-1586, 1719-1721; Brown Tr., R. 251, PageID# 2846).

At trial, Minor testified to the terms of his plea agreement, and stated that he hoped he would receive a sentence of probation in exchange for providing truthful testimony. (Minor Tr., R. 210, PageID# 1549-1551, 1588-1590, 1677-1685). He also confirmed the inconsistencies between his trial testimony, his FBI report and interview, and his state-court testimony, explaining that, in accordance with Eaton's instructions, he lied in his report and statement to the FBI and in state court. (Minor Tr., R. 210, PageID# 1563-1578, 1609-1614, 1627-1631, 1723).

SUMMARY OF ARGUMENT

1. Sufficient evidence supported the jury's guilty verdict on both witness tampering charges. Based on the evidence presented, any rational trier of fact could reasonably conclude that, in directing Steve Runyon and Adam Minor to include false information in their written reports to the FBI, Eaton, as charged, knowingly corruptly persuaded both deputy sheriffs, or attempted to do so, with the intent to prevent the communication to the FBI of information related to the possible commission of a federal offense. Eaton had ample opportunity at trial to question both officers about any discrepancies between their pre-trial statements and trial testimony. It was within the province of the jury to credit both Runyon and Minor's testimony. Moreover, the false account Eaton directed both men to provide undoubtedly related to the possible commission of a federal offense.

2. The court did not plainly err in failing to instruct the jury on the affirmative defense set forth in 18 U.S.C. 1512(e). Eaton did not ask for the instruction at trial and did not present any evidence or direct the district court to any evidence that his actions consisted solely of lawful conduct undertaken for the sole purpose of encouraging Runyon and Minor to tell the truth. Moreover, because the district court properly instructed the jury on the required elements of an offense under Section 1512(b)(3), Eaton cannot establish that he was prejudiced by the omitted instruction.

3. The court did not plainly err in failing to provide a special unanimity instruction on Count 5. Eaton did not challenge Count 5 as duplicitous before trial, and did not request an augmented unanimity instruction. Count 5 charged only a single offense of witness tampering, *i.e.*, that Eaton knowingly corruptly persuaded Minor, or attempted to do so, with the intent to prevent the communication to the FBI of information relating to the possible commission of a federal offense. The jury need only agree unanimously that the government proved the three elements of a Section 1512(b)(3) violation beyond a reasonable doubt. It did not have to agree on the way in which Eaton committed the offense. The court properly instructed the jury by providing it with this Circuit's pattern instruction on jury unanimity.

4. The prosecutor's comments on rebuttal were not improper. The remarks were a response to the factual theories advanced in Eaton's closing argument, not a comment on Eaton's failure to testify. Nor were the comments flagrant. Given the limited and non-prejudicial nature of the comments in the context of the full trial, they did not impinge upon Eaton's right to a fair trial and do not warrant a reversal.

5. Eaton received a fair trial. Eaton has not demonstrated any error, let alone multiple errors, and cannot satisfy his heavy burden of establishing that the combined effect of the claimed errors rendered his trial fundamentally unfair.

ARGUMENT

I

SUFFICIENT EVIDENCE SUPPORTED BOTH OF EATON'S CONVICTIONS FOR WITNESS TAMPERING[4]

A. Standard Of Review

This Court reviews the sufficiency of the evidence *de novo* to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Mathis*, 738 F.3d 719, 735 (6th Cir. 2013) (citation omitted). This Court reviews the denial of a Rule 29 motion raising

[4] We respond in this section both to Eaton's sufficiency challenge, as well as to the related issue of "[w]hether the 'information' relating to the possible commission of a federal offense must be 'material' in order to sustain a conviction * * * under [Section] 1512(b)(3)" (Def. Br. 2, 40-46). See pp. 31-36, *infra*.

a sufficiency challenge under the same standard. *Ibid.* On review, this Court "may not reweigh the evidence, reevaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Ibid.* In order to prevail on a sufficiency challenge, a defendant must show that the government failed to prove he committed the elements of the offense beyond a reasonable doubt and thus bears a heavy burden. *United States* v. *Carson*, 560 F.3d 566, 580 (6th Cir. 2009).

B. Sufficient Evidence Supported The Jury's Verdict Finding Eaton Guilty Of Two Violations Of Witness Tampering Under Section 1512(b)(3)

The jury convicted Eaton of two counts of witness tampering, in violation of 18 U.S.C. 1512(b)(3). To prove a violation of Section 1512(b)(3), the government had to show that Eaton (1) knowingly used intimidation, threatened, or corruptly persuaded another person, or attempted to do so, (2) with the intent to hinder, delay or prevent the communication of information to a federal official, (3) relating to the commission or possible commission of a federal offense. See 18 U.S.C. 1512(b)(3); *Carson*, 560 F.3d at 580; *United States* v. *Miller*, 531 F.3d 340, 351 (6th Cir. 2008).

Although this Court has not directly addressed the "corruptly persuades" language of Section 1512(b)(3), other courts of appeals have held that it covers action "done voluntarily and intentionally to bring about false or misleading testimony or to prevent testimony with the hope or expectation of some benefit to the defendant or another person," *United States* v. *Weiss*, 630 F.3d 1263, 1273

(10th Cir. 2010), as well as "non-coercive attempts by a target of a criminal investigation to tamper with prospective witnesses," *United States* v. *Davis*, 380 F.3d 183, 196 (4th Cir. 2004) (citation and emphasis omitted). This includes attempts "to *persuade* someone to provide *false* information to federal investigators." *United States* v. *Farrell*, 126 F.3d 484, 488 (3d Cir. 1997). See *United States* v. *Khatami*, 280 F.3d 907, 911-913 (9th Cir. 2002) (discussing this first element of Section 1512(b)(3) and collecting cases from various circuit courts).

This Court has explained that the second element of Section 1512(b)(3)—a defendant's "intent to hinder, delay, or prevent the communication of information to a federal official"—does not require specific intent to mislead federal officials, but only a likelihood that the false information will be transferred to a federal agent. See *Carson*, 560 F.3d at 580; cf. *Fowler* v. *United States*, 131 S. Ct. 2045, 2050-2052 (2011) (parallel language in Section 1512(a)(1)(C) requires the government to show a reasonable likelihood that a relevant communication would have been made to a federal officer). This is so because federal jurisdiction under Section 1512(b)(3) is premised on "the federal interest of protecting the integrity of *potential* federal investigations by ensuring that transfers of information to federal law enforcement officers and judges relating to the possible commission of federal offenses be truthful and unimpeded." *Carson*, 560 F.3d at 581 (citation omitted).

As another court of appeals has explained, "[i]t is the integrity of the process * * * that Congress was seeking to protect in enacting § 1512." See *United States* v. *Applewhaite*, 195 F.3d 679, 688 (3d Cir. 1999).

As for the final element of an offense under Section 1512(b)(3), the provision criminalizes the interference of "communication to a law enforcement officer * * * of information relating to the commission or *possible commission* of a Federal offense." 18 U.S.C. 1512(b)(3) (emphasis added). Based on this express language, courts of appeals have consistently held that Section 1512(b)(3) does not require a defendant to be convicted of an underlying federal offense in order to be guilty of witness tampering. See *United States* v. *Baldyga*, 233 F.3d 674, 681 (1st Cir. 2000); see also, *e.g.*, *United States* v. *Ronda*, 455 F.3d 1273, 1290 (11th Cir. 2006) ("The fabrication of evidence to mislead federal investigators violates § 1512(b)(3) whether or not the potential federal investigation would have uncovered sufficient evidence to prove that a federal crime was actually committed."); *Applewhaite*, 195 F.3d at 687-688 ("When the government charges a defendant with violating federal law, but fails to prove [his] guilt, a communication about that prosecution or investigation is clearly one that concerns a 'possible' violation of federal law."); *United States* v. *Cobb*, 905 F.2d 784, 790 (4th Cir. 1990) ("[T]he plain language of the statute makes clear that, as a general rule, proof of an actual commission of a federal offense is not a necessary prerequisite to, or an essential

element of, the crime."). Accordingly, "the dispositive issue is the federal character of the investigation, not guilty verdicts on any federal offenses that may be charged." *Baldyga*, 233 F.3d at 681.

Here, the district court properly instructed the jury on the three elements of witness tampering. (Jury Instructions, R. 195, PageID# 1112). Given the evidence presented at trial, any rational juror could have found beyond a reasonable doubt that Eaton knowingly corruptly persuaded Runyon and Minor, or attempted to do so, with the intent to prevent the communication to the FBI of information relating to the possible commission of a federal offense.

1. Sufficient Evidence Supported Eaton's Conviction On Count 4

Count 4 alleged Eaton violated Section 1512(b)(3) by "direct[ing] and suggest[ing]" that Steve Runyon:

> write a report stating that [Runyon] had witnessed or observed a knife on the ground in the area where defendant [Eaton] and his deputies had physically confronted [Stinnett] when, in truth and in fact, defendant [Eaton] knew full well that [Runyon] had made no such observation regarding the location and recovery of a knife.

(Second Superseding Indictment, R. 154, PageID# 870). As the district court concluded when it denied Eaton's post-trial motion, sufficient evidence supported Eaton's conviction on this count. (Mem. Op. & Order, R. 214, PageID# 1859-1861).

At trial, Runyon testified that he had limited involvement in Stinnett's arrest, arriving to the scene after Stinnett was in custody and Eaton was walking toward the street. (Runyon Tr., R. 211, PageID# 1743-1746). Runyon also confirmed that he did not inspect the actual arrest scene that day. (Runyon Tr., R. 211, PageID# 1748-1749). Runyon testified that Eaton approached him immediately after becoming aware of the FBI's investigation into Stinnett's arrest and related injuries. (Runyon Tr., R. 211, PageID# 1751). Runyon stated that Eaton wanted him to say that he had seen Stinnett's pocket knife on the ground at the arrest scene, even though Eaton knew Runyon was not involved in the arrest, was unfamiliar with the scene, and had not observed the location of the knife. (Runyon Tr., R. 211, PageID# 1751-1753, 1765, 1812). Runyon described how Eaton drove him to the arrest scene and proceeded to point out where the knife supposedly was found. (Runyon Tr., R. 211, PageID# 1753-1754, 1822). Runyon further testified that he was afraid to ask Eaton why Eaton needed a report from him (Runyon Tr., R. 211, PageID# 1755), but Runyon "knew something was wrong." (Runyon Tr., R. 211, PageID# 1830). Runyon also described the personal and professional pressures he was under to comply with Eaton's instructions. (Runyon Tr., R. 211, PageID# 1752-1753, 1755, 1766-1768, 1772-1773).

Runyon testified that Eaton told him what false information to include in his report for the FBI. (Runyon Tr., R. 211, PageID# 1759, 1764-1765, 1804).

Runyon's report stated that, on the day of Stinnett's arrest, he and Eaton "walked back to the upper side of the fellowship hall where the altercation occurred" and "[t]here was a gray metal type knife found lying on the ground which Stinnett claimed." (Runyon Tr., R. 211, PageID# 1756-1757, 1759, 1765, 1771-1772; Runyon Report, Def. App. 8). Runyon confirmed at trial that Eaton specifically directed him to include this false information. (Runyon Tr., R. 211, PageID# 1758-1759, 1788-1789). Consistent with Runyon's report—and contrary to Eaton's suggestion that his own report "*made no mention of a knife*" (Def. Br. 17)—Eaton reported that, on the day of the arrest, he "asked Runyon to go back to the spot where the altercation occurred" because "I wanted to see what the object was in [Stinnett's] hand. On the ground near the wall of the church was a gray knife that was not open." (Eaton Report, Def. App. 7).

Based on the government's evidence, any rational trier of fact could have found beyond a reasonable doubt that Eaton, with an improper purpose, knowingly persuaded Runyon to include false information in his report to the FBI, or tried to do so, with the intent to prevent the communication to the FBI of information related to the possible violation of Stinnett's right to be free from excessive force. See 18 U.S.C. 242 (Deprivation of Rights Under Color of Law). A juror reasonably could infer that Eaton, acutely aware of the FBI's investigation into the officers' use of force, knowingly directed Runyon to include false information in

his report in order to make the amount of force the officers used, and Stinnett's related injuries, appear justified. (Runyon Tr., R. 211, PageID# 1830).

Eaton argues (Def. Br. 20, 35) that the jury could not convict him on witness tampering as to Runyon, because Runyon's testimony at trial differed from the account in his report and his statements to the grand jury. But Eaton had ample opportunity to cross-examine Runyon about the discrepancies between his grand jury testimony and testimony at trial. He also was able to challenge Runyon at trial about the explanations Runyon provided for his changed testimony.

Runyon testified at length about how he feared for his job but also felt conflicted over providing information to federal agents he was not sure he could trust. (Runyon Tr., R. 211, PageID# 1752-1753, 1760-1762, 1770-1773, 1776, 1792-1796). Runyon stated that he was not completely truthful when he testified before the grand jury. (Runyon Tr., R. 211, PageID# 1762-1766, 1805-1810, 1814). Runyon also testified that he was under immense stress when he appeared before the grand jury (Runyon Tr., R. 211, PageID# 1774-1775), and he attributed any additional information he testified to at trial but did not mention to the grand jury to this stress. (Runyon Tr., R. 211, PageID# 1821).

The jury also heard compelling testimony from Runyon regarding Eaton's behavior toward him. Runyon testified that Eaton repeatedly called him after his grand-jury testimony to ask Runyon what he had said. (Runyon Tr., R. 211,

PageID# 1769-1770). Runyon further testified that when he refused to answer Eaton, he would never forget Eaton getting angry and responding, "You dropped me in. Go ahead, tell me. You dropped me in." (Runyon Tr., R. 211, PageID# 1769). The jury heard how Runyon thought "there goes my job" and explained to Eaton that he could not risk lying and going to jail for him. (Runyon Tr., R. 211, PageID# 1769-1770). Runyon also described how, despite worrying about his employment and feeling shunned at work, he simply tried to hold onto his job until he could retire in February 2013. (Runyon Tr., R. 211, PageID# 1766-1768, 1773, 1776).

It was within the jury's province to credit Runyon's testimony. See *United States* v. *Washington*, 702 F.3d 886, 891 (6th Cir. 2012) ("All reasonable inferences and resolutions of credibility are made in the jury's favor."); *United States* v. *Beverly*, 369 F.3d 516, 532 (6th Cir. 2004) ("[D]etermining the credibility of witnesses is a task for the jury, not this court."). The jury, equipped with copies of the reports the officers submitted to the FBI, compelling testimony from Runyon, and reasonable explanations for what Runyon had said at which points in time and why, obviously credited Runyon's testimony and convicted Eaton. Because Eaton raises no valid basis on which to disturb the jury's verdict, his conviction on Count 4 should be affirmed.

2. Sufficient Evidence Supported Eaton's Conviction On Count 5

Count 5 alleged Eaton violated Section 1512(b)(3) by "direct[ing] and suggest[ing]" that Adam Minor:

> (1) conceal from local authorities and the FBI truthful information relating to an unreasonable use of force against [Stinnett] by * * * officers involved in [his] arrest * * *, and (2) provide false information to local authorities and the FBI stating that [Stinnett] had pulled a knife on defendant [Eaton] * * * when, in truth and in fact, defendant [Eaton] knew full well that (1) [Eaton] and other officers had used unreasonable force against [Stinnett] * * * and (2) [Stinnett] had not pulled a knife on defendant [Eaton] during his arrest and had not dropped a knife at the scene of his arrest, but rather, defendant [Eaton] pulled the knife from one of [Stinnett's] pockets after [Stinnett] had been escorted away from the arrest scene.

(Second Superseding Indictment, R. 154, PageID# 870-871). As the district court concluded when it denied Eaton's post-trial motion, sufficient evidence supported Eaton's conviction on Count 5. (Mem. Op. & Order, R. 214, PageID# 1859-1861).

At trial, Minor testified that he was called into work to provide a report for the FBI in connection with its investigation into Stinnett's assault. (Minor Tr., R. 209, PageID# 1509). Minor testified that Eaton thus far had not directed the deputies to prepare any use-of-force reports related to Stinnett's arrest. (Minor Tr., R. 209, PageID# 1510-1511). The jury heard from Minor about how he completed his report for the FBI under Eaton's direct observation. (Minor Tr., R. 209, PageID# 1511-1512). Minor explained that Eaton directed him to include false information about Stinnett pulling a knife on Eaton and dropping it at the arrest

scene in order to make the officers' use of force, and Stinnett's related injuries, appear justified. (Minor Tr., R. 210, PageID# 1525-1526, 1530, 1535-1536). Just as with Runyon's testimony, the jury heard from Minor that Eaton reviewed and proofread Minor's report. (Minor Tr., R. 209, PageID# 1512).

Minor acknowledged that he gave false testimony in state court by withholding truthful information regarding Stinnett's assault and falsely testifying that Stinnett had a knife in his hand when the officers first confronted him. (Minor Tr., R. 210, PageID# 1537, 1568-1578). Minor testified that he provided this false testimony at Eaton's direction. (Minor Tr., R. 210, PageID# 1537, 1723). Minor explained that if he did not comply with Eaton's instructions, he would have been fired and, because of Eaton's political connections, faced difficulty finding another job in Barren County. (Minor Tr., R. 210, PageID# 1537-1540).

Minor also provided information to the jury regarding the actual recovery of Stinnett's knife that contradicted the written reports that Eaton had Runyon and Minor prepare for the FBI. Specifically, Minor testified that the officers became aware of Stinnett's pocket knife only after Stinnett told Minor that he had a closed knife clipped inside the pocket of his pants. (Minor Tr., R. 209, PageID# 1483). At trial, Stinnett confirmed that Minor and Eaton recovered the knife from Stinnett's pants pocket while he was handcuffed and on the ground near Eaton's vehicle. (Stinnett Tr., R. 249, PageID# 2417-2418). The government also

presented the jury with a photograph from the scene consistent with Stinnett and Minor's accounts. (Photograph, R. 258-1, PageID# 3299).

Tellingly, unlike the testimony Minor provided, the jury never heard any evidence substantiating Eaton's version of the facts placing the knife at the arrest scene. Eaton wrote in his report that, when he first confronted Stinnett, Stinnett "appeared to [have] a weapon" in his right hand. (Eaton Report, Def. App. 7). Eaton further wrote that, once Stinnett was under arrest, he "asked Deputy Runyon to go back to the spot where the altercation occurred" because he "wanted to see what the object was in [Stinnett's] hand. On the ground near the wall of the church was a gray knife that was not open." (Eaton Report, Def. App. 7). The jury knew from Runyon, however, that Runyon neither inspected the arrest scene nor recovered a knife. Even Ron Lafferty, one of the defense witnesses, could not say who supposedly found the knife in the alleyway, despite including in a report that the knife was found on the ground near where the officers had confronted Stinnett. (Lafferty Tr., R. 256, PageID# 3211). Indeed, Lafferty disclaimed having any personal knowledge related to the knife. (Lafferty Tr., R. 256, PageID# 3211).

Eaton again argues (Def. Br. 24) as to Count 5 that the jury could not convict him based on the testimony of an "admitted perjurer[ ]." But Eaton had ample opportunity to challenge Minor's testimony, including by presenting information about the non-custodial sentence Minor hoped to secure in exchange for providing

testimony against the other officers. The jury was entitled to credit Minor's testimony, as well as the explanations he provided for why his accounts of Stinnett's arrest and Eaton's role in covering up the assault varied. Cf. *Washington*, 702 F.3d at 891; *Beverly*, 369 F.3d at 532. Based on all of the evidence presented, including the copies of the written reports the officers submitted to the FBI, any rational trier of fact could have concluded beyond a reasonable doubt that Eaton knowingly sought to have Minor provide false information to the FBI and false testimony in state court in order to thwart the FBI's investigation into whether the officers used excessive force during Stinnett's arrest. Because sufficient evidence supported the jury's verdict, Eaton's conviction on Count 5 should be affirmed.

3. Eaton's Corrupt Actions Hindered The Communication Of Information To The FBI Relating To The Possible Commission Of A Federal Offense

Eaton argues (Def. Br. 40-46) that he cannot be criminally liable for witness tampering under either count because any information about the location and recovery of a knife was immaterial to whether the officers assaulted Stinnett while he was handcuffed. But Eaton concedes, as he must, that Section 1512(b)(3) criminalizes the corrupt interference with the communication to federal authorities of any information related to the commission *or possible commission* of a federal offense. (Def. Br. 41-42). Section 1512(b)(3) "protect[s] the integrity of *potential*

federal investigations by ensuring that transfers of information to federal law enforcement officers * * * [are] truthful and unimpeded," *Carson*, 560 F.3d at 581. A conviction under Section 1512(b)(3) for witness tampering does not depend on the ultimate crime with which a defendant is charged or for which he is convicted.

The investigation in this case focused on the circumstances of Stinnett's arrest, including the level of force the officers used, the justification for such force, and any explanation for Stinnett's injuries. Contrary to Eaton's characterization (Def. Br. 42-43), the federal investigation was never limited solely to what occurred once Stinnett was handcuffed. As the district court noted in denying Eaton's post-trial motion, the government's evidence addressed Eaton's use of force both before and after Stinnett was handcuffed. (Mem. Op. & Order, R. 214, PageID# 1862). Indeed, Agent Brown testified that when he met with Eaton to inform him of his investigation, he requested any and all information related to the officers' physical confrontation with Stinnett. (Brown Tr., R. 251, PageID# 2813-2815, 2856-2859). Because no reports yet existed, Agent Brown asked Eaton to have the officers involved complete reports indicating how Stinnett's injuries occurred. (Brown Tr., R. 251, PageID# 2814-2815, 2857-2859).

Because the federal investigation concerned what occurred once the officers confronted Stinnett, and whether their use of force was appropriate, any and all information related to Stinnett's arrest was relevant to a potential violation of

Stinnett's constitutional rights. See 18 U.S.C. 242 (Deprivation of Rights Under Color of Law). This included information on whether Stinnett was armed, had threatened officers, or had resisted arrest, including whether he possessed and brandished a knife. As the Barren County Sheriff, Eaton would have known the importance of any such information when he directed Minor and Runyon to lie in their reports to the FBI. Cf., *e.g.*, *United States* v. *Byrne*, 435 F.3d 16, 20, 25-26 (1st Cir. 2006) (affirming Section 1512(b)(3) violations, based on officers' testimony that their sergeant directly or impliedly asked them to lie or withhold information in contemplation of a likely federal investigation into arrestee's assault, which he knew could be a criminal civil rights violation); *United States* v. *Guadalupe*, 402 F.3d 409, 411, 413-415 (3d Cir. 2005) (affirming Section 1512(b)(3) violation where deputy warden with years of experience instructed officer to make misstatements in her memo and during an internal investigation into other officers' assault of prison inmate). Indeed, the reports the officers completed—which chronicle their interactions with Stinnett from their arrival on the scene through his transport to the hospital (Minor and Eaton Reports, Def. App. 5, 7; Bennett and Guffey Reports, R. 258-2 & 258-3, PageID# 3300-3301)—undermine Eaton's attempt to now limit the FBI's investigation only to what occurred once Stinnett was handcuffed.

Eaton's reliance (Def. Br. 44) on *Arthur Andersen, LLP* v. *United States*, 544 U.S. 696 (2005), is misplaced. That case involved a prosecution for document destruction under 18 U.S.C. 1512(b)(2), which criminalizes the corrupt persuasion of another with intent to cause or induce that person to take any number of steps (*e.g.*, withholding records, destroying documents, or evading legal process) with respect to an "official proceeding." The Court thus addressed "what it means to 'knowingly . . . corruptly persuad[e]' another person 'with intent to . . . cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding.'" *Arthur Andersen*, 544 U.S. at 703.

The Court determined that "knowingly . . . corruptly persuad[es]" applies "[o]nly [to] persons conscious of wrongdoing," thereby limiting the reach of Section 1512(b) to "only those with the level of culpability" usually required for criminal liability. *Arthur Andersen*, 544 U.S. at 706. Thus, the Court found the jury had been improperly instructed that "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty." *Ibid.* That instruction, the Court explained, "failed to convey the requisite consciousness of wrongdoing" and "diluted the meaning of 'corruptly' so that it covered innocent conduct." *Ibid.* But the jury in this case received no such instruction. Rather, the court instructed that to "'corruptly persuade' means to corrupt another person by persuading him to violate a legal duty, to accomplish an

unlawful end or unlawful result, or to accomplish some otherwise lawful end or lawful result in an unlawful manner." (Jury Instructions, R. 195, PageID# 1112).

The Court in *Arthur Andersen* next addressed whether the jury had to find "*any* nexus between the 'persua[sion]' to destroy documents and any particular proceeding." 544 U.S. at 707 (brackets in original). In holding that a defendant had to at least foresee a proceeding in order to violate Sections 1512(b)(2)(A) and (B), the Court stated that "[a] 'knowingly . . . corrup[t] persuade[r]' cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents *might be material*." *Id.* at 707-708 (brackets in original; emphasis added). Based on this language, Eaton argues (Def. Br. 44) that the false or misleading information provided to or withheld from investigators "must be 'material'" to the federal investigation in order to constitute a violation of Section 1512(b)(3). In other words, Eaton argues (Def. Br. 45) "a knowingly corrupt persuader cannot be someone who persuades others to provide or withhold information" that is "*immaterial*."

Eaton errs for three reasons. First, the language Eaton relies upon addressed only the extent to which a federal nexus must exist under Section 1512(b)(2). This Court has rejected attempts to apply that portion of *Arthur Andersen* to

prosecutions under Section 1512(b)(3). See *Carson*, 560 F.3d at 581-582.[5] Second, Eaton misreads this language from *Arthur Andersen* to impose a "materiality" requirement; if anything, it supports only that a "knowingly corrupt persuader" includes someone who persuades another to provide false information in contemplation of a federal investigation in which that information "*might be material*." 544 U.S. at 708 (emphasis added). Finally, as already explained, any information regarding what actually occurred during Stinnett's arrest undoubtedly pertained to the FBI's investigation into the possible use of excessive force.

Thus, regardless of whatever significance, if any, *Arthur Andersen* has for Section 1512(b)(3) prosecutions, Eaton's reliance on the case is clearly inapposite. Unlike in *Arthur Andersen*, Eaton not only had in contemplation a federal investigation in which information about the knife "*might be material*," he had actual knowledge of the FBI's investigation into a possible civil rights violation. Any information regarding whether Stinnett brandished a knife, including the location and recovery of a knife, was certainly relevant to the FBI's inquiry into whether the amount of force the officers used was justified and could account for Stinnett's injuries. Accordingly, Eaton's argument fails.

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[5] See also, *e.g.*, *United States* v. *Tyler*, 732 F.3d 241, 248-250 (3d Cir. 2013) (differentiating between Section 1512's "investigation-related provisions" and "'official proceeding' provisions" and limiting *Arthur Andersen*'s nexus requirement to the latter); *Ronda*, 455 F.3d at 1288 (*Arthur Andersen*'s nexus requirement inapplicable to Section 1512(b)(3)); *Byrne*, 435 F.3d at 23-25 (same).

II

THE COURT DID NOT PLAINLY ERR IN FAILING TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE IN SECTION 1512(e)

A. Standard Of Review

Where a defendant challenges the district court's failure to issue a jury instruction he did not request at trial, this Court reviews only for plain error. See *United States* v. *Stewart*, 729 F.3d 517, 530 (6th Cir. 2013); *United States* v. *Al-Cholan*, 610 F.3d 945, 950 (6th Cir. 2010). "In the context of challenges to jury instructions, plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *Stewart*, 729 F.3d at 530 (citation omitted); see also *United States* v. *Miller*, 734 F.3d 530, 538 (6th Cir. 2013). "[A]n improper jury instruction will rarely justify reversal of a criminal conviction when no objection has been made at trial, . . . and an omitted or incomplete instruction is even less likely to justify reversal, since such an instruction is not as prejudicial as a misstatement of the law." *Miller*, 734 F.3d at 538 (citation omitted).[6]

[6] Eaton argues that, because the district court stated in its denial of his post-trial motion that it would not have given an instruction under 18 U.S.C. 1512(e) even if it had been requested, this Court reviews for abuse of discretion. (Def. Br. 37). Eaton relies on *United States* v. *Roth*, 628 F.3d 827 (6th Cir. 2011), but this Court reviewed for abuse of discretion in *Roth* only because the defendant had requested (and the district court rejected) an affirmative-defense instruction at trial. See *id.* at 831, 833.

B. The Court Did Not Plainly Err In Failing To Instruct The Jury As To Any Affirmative Defense Available Under 18 U.S.C. 1512(e)

Section 1512(e) provides for an affirmative defense to witness tampering as follows:

> In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

18 U.S.C. 1512(e). Thus, Section 1512(e) requires a defendant to show both lawful conduct and truth-seeking intent. Another court of appeals has described Section 1512(e)'s language as providing for a defense against a charge of witness tampering where the defendant "simply had good intentions." *United States* v. *Johnson*, 459 F.3d 990, 997 (9th Cir. 2006); see also *United States* v. *Arias*, 253 F.3d 453, 457 n.4 (9th Cir. 2001) (the defense was "intended to exempt judicial officers who lawfully remind witnesses or defendants of their oath to give true testimony, although the statutory language itself is not so limited").

At trial, Eaton neither raised the affirmative defense available under Section 1512(e) nor requested that the court instruct the jury as to the provision. Yet Eaton argues (Def. Br. 38-40) that the district court should have provided such an instruction *sua sponte*, because the jury reasonably could have concluded that

Eaton did not intend to "knowingly corruptly persuade" Minor and Runyon, but instead sought only to encourage them to tell the truth.[7]

Section 1512(e) places the burden of proof by a preponderance of the evidence on the defendant. As the district court explained in its order denying Eaton's post-trial motion, Eaton "did not present any evidence or direct the Court to any evidence that would support this affirmative defense. The only evidence presented on this issue came from Runyon and Minor who both testified that Eaton encouraged them to lie." (Mem. Op. & Order, R. 214, PageID# 1866). In other words, the court determined that Eaton did not point to any facts that would make his otherwise illegal conduct lawful. Indeed, Eaton's argument that he merely sought to encourage Minor and Runyon to convey truthful information in their reports to the FBI is belied by the record. See pp. 7-16, *supra*. There is no factual basis for Eaton's argument that any contact he had with Minor or Runyon—or the pressure they felt to conform to his story for fear of losing their jobs—was for the sole purpose of encouraging them to give truthful information to the FBI.

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[7] Eaton also argues (Def. Br. 38) that the instruction should have been given because there was no evidence from other officers that Eaton attempted to influence their reports. But that argument goes to whether Eaton did anything other than request reports (and thus to Eaton's sufficiency challenge), not to whether Eaton lawfully approached Minor and Runyon solely to encourage them to tell the truth. If Eaton's argument is that he requested reports but that Minor and Runyon lied about any conversations regarding those reports (Tr., R. 253, PageID# 3058-3063), there is no factual basis for giving an instruction on Section 1512(e).

Eaton argues (Def. Br. 39-40) that the split jury verdict shows that the instruction was "critical," because the jury must have understood Section 1512(b)(3) to mean that anything he said to the officers about the content of their reports constituted witness tampering. But simply because the jury did not convict the officers on the force-related charges beyond a reasonable doubt does not mean that it could not find that Eaton attempted to cover up or improve the appearance of whatever occurred in the alleyway that day. Moreover, even though Eaton has failed to show that he would have been entitled to an instruction on Section 1512(e) even if he had requested it at trial, the actual instructions provided to the jury confirm the lack of prejudice in this case.

The court instructed the jury that to find Eaton guilty of witness tampering, the government must have shown the following elements beyond a reasonable doubt: (1) that Eaton "knowingly intimidated, threatened, or corruptly persuaded" Runyon or Minor, or attempted to do so; (2) that Eaton "acted with the intent to hinder, delay, or prevent the communication to federal law enforcement officers of information"; and (3) that the information "related to the commission or possible commission of a federal offense." (Jury Instructions, R. 195, PageID# 1112). The court further instructed the jury that to "corruptly persuade" means to "corrupt another person by persuading him to violate a legal duty, to accomplish an unlawful end or unlawful result, or to accomplish some otherwise lawful end or

lawful result in an unlawful manner." (Jury Instructions, R. 195, PageID# 1112). A reasonable juror would not have understood the instructions the court actually provided on Section 1512(b)(3) to mean that the jury should return a guilty verdict where Eaton lawfully approached or communicated with either Minor or Runyon to encourage him to tell the truth. Accordingly, the instructions were not "so clearly wrong as to produce a grave miscarriage of justice," *Miller*, 734 F.3d at 538, and there was no plain error.

III

THE COURT DID NOT PLAINLY ERR IN FAILING TO PROVIDE A SPECIAL UNANIMITY INSTRUCTION AS TO COUNT 5

A. Standard Of Review

Where a defendant fails to request a special unanimity instruction below, as is the case here, this Court reviews only for plain error. *Miller*, 734 F.3d at 538; see *United States* v. *Kakos*, 483 F.3d 441, 444-445 (6th Cir. 2007) (explaining that where a defendant fails to challenge an allegedly duplicitous indictment before trial, and then fails to object to the jury instructions as inadequate to correct any harm resulting from the duplicitous count, the plain-error standard applies).[8]

[8] Eaton incorrectly argues that, because he raised this issue in his post-trial motion, de novo review applies. (Def. Br. 47). For such review to apply, Eaton first had to request the instruction at trial—when the court could have provided the instruction to the jury—not post-trial. See *United States* v. *Boyd*, 640 F.3d 657, 666 (6th Cir. 2010) ("[S]ince Boyd did not raise this argument until *after trial*, we

(continued . . .)

Under the plain error standard, this Court considers "whether the instructions, when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice." *Miller*, 734 F.3d at 538.

B. The Court Did Not Plainly Err When It Failed To Issue A Special Unanimity Instruction As To Count 5

Although he did not request such an instruction at trial, Eaton now argues (Def. Br. 22, 46-49) that the district court was required to issue a special unanimity instruction as to Count 5, because a juror could find that he persuaded Minor either to (1) conceal that the officers subjected Stinnett to unreasonable force, or (2) provide false information that Stinnett pulled a knife on Eaton even though Eaton pulled the knife from Stinnett's pocket after he was arrested. Eaton argues (Def. Br. 47) that Count 5 therefore was duplicitous in that it charged him with two offenses in a single count. Eaton is incorrect as a matter of law.

It is well-established that an indictment may allege that a defendant committed an offense "by one or more specified means," Fed. R. Crim. P. 7(c), and that jurors need not agree unanimously on the particular means or method by

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(. . . continued)
review only for plain error." (emphasis added)); see also *United States* v. *Damra*, 621 F.3d 474, 484, 500-503 (6th Cir. 2010); *United States* v. *Dedman*, 527 F.3d 577, 600 (6th Cir. 2008). Indeed, the case Eaton relies upon for de novo review supports reviewing for plain error. See *United States* v. *Damrah*, 412 F.3d 618, 622-623 (6th Cir. 2005) (applying de novo review only because the district court assumed duplicity without deciding the issue and provided an augmented unanimity instruction to the jury to cure any possible harm).

which an element of the crime is satisfied. In *Schad* v. *Arizona*, 501 U.S. 624, 627 (1991), for example, the Supreme Court examined a state-murder statute that designated as first-degree murder any killing that was premeditated or committed during the commission of a felony. The State advanced both theories of murder, and the trial court gave a general unanimity instruction that did not require the jury to agree on a single theory of first-degree murder, *i.e.*, the precise manner in which the murder was committed. See *id.* at 629. On appeal, the defendant argued that his conviction was unconstitutional, because the jury was not instructed that it had to agree on one of the alternative theories presented. See *id.* at 630.

The Court rejected the argument, with the plurality first pointing to the "long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed." *Schad*, 501 U.S. at 631. It explained that the Court had "never suggested that in returning general verdicts * * * the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." *Ibid.* It further noted that "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line," and reaffirmed that "there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Id.* at 631-632 (citation omitted). The plurality distinguished between facts that

constitute an element of the crime and those that are mere means of proving the requisite *mens rea* or *actus reus*. See *id.* at 632, 639.[9] Justice Scalia, concurring in the judgment, observed that "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.* at 649 (Scalia, J., concurring).

In *Richardson* v. *United States*, 526 U.S. 813, 817 (1999), the Court again distinguished the factual elements of a crime from the means used to commit those elements. The Court reiterated that "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Ibid.*

Consistent with Supreme Court precedent, this Court has stated that whether jury unanimity is required on a particular issue mandates "a commonsense determination of a subject statute's application and purpose in light of traditional notions of due process and fundamental fairness." *United States* v. *Gray*, 692 F.3d 514, 520 (6th Cir. 2012) (citation omitted). It has further instructed that "[o]nly a general unanimity instruction is required even where an indictment count provides

[9] The plurality also rejected the approach of some courts of appeals, including this Court's approach in *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988), that looked to whether a count included acts within two or more "distinct conceptual groupings" to determine if it consisted of separate offenses and violated the right to a unanimous verdict. See *Schad*, 501 U.S. at 633-635.

multiple factual bases under which a conviction could rest." *Miller*, 734 F.3d at 538-539 (citation omitted); see *United States* v. *Algee*, 599 F.3d 506, 514 (6th Cir. 2010) ("[A] single count that presents more than one potential basis for conviction does not automatically require a unanimity instruction." (citation omitted)).[10] Thus, this Court repeatedly has rejected claims that a district court erred in failing to provide an augmented unanimity instruction where the government set forth multiple factual bases in support of the alleged crime. See, *e.g.*, *Miller*, 734 F.3d at 538-539 (no plain error in failing to provide augmented instruction where six different makings of a false statement formed basis for 18 U.S.C. 1014 violation); *Gray*, 692 F.3d at 520 (no such instruction required because "it is the falsification [of a report], not the means by which the falsification is achieved, that is an element of 18 U.S.C. § 1519"); *United States* v. *Schmeltz*, 667 F.3d 685, 687-688 (6th Cir. 2011) (same); *United States* v. *Hart*, 635 F.3d 850, 856 (6th Cir. 2011) (jurors did not have to unanimously agree on the specific means of violating 18 U.S.C. 2422(b)); *United States* v. *DeJohn*, 368 F.3d 533, 540-542 (6th Cir. 2004) (such instruction unnecessary because specific firearm possessed is a means used

[10] This Court has recognized that an augmented unanimity instruction might be necessary where the nature of the evidence is exceptionally complex, there is a variance between the indictment and the proof at trial, or there is a tangible indication of jury confusion. See *Miller*, 734 F.3d at 538-539; 6th Cir. Pattern Criminal Jury Instructions 8.03 Commentary & 8.03A Commentary (2013). None of these circumstances exist here, and Eaton does not argue otherwise.

to satisfy the element of "any firearm" and not itself an element of 18 U.S.C. 922(g)); *United States* v. *Davis*, 306 F.3d 398, 413-414 (6th Cir. 2002) (no such instruction required as to which of several affirmative acts constituted aiding and abetting).

The result should be no different in this case. Here, the government had to prove three elements beyond a reasonable doubt to establish a violation of Section 1512(b)(3). See pp. 20-23, *supra*. In Count 5, the government alleged that Eaton committed the first element—Eaton's knowingly corrupt persuasion of Minor—in more than one way. Specifically, the government alleged that Eaton "directed and suggested" that Minor:

> "(1) conceal from local authorities and the FBI truthful information relating to an unreasonable use of force against [Stinnett] * * * on February 24, 2010," even though Eaton knew that "[he] and other officers had used unreasonable force against [Stinnett] during his arrest"; and
>
> "(2) provide false information to local authorities and the FBI stating that [Stinnett] had pulled a knife on defendant [Eaton] during [Stinnett's] arrest on February 24, 2010," even though Eaton knew that "[Stinnett] had not pulled a knife on defendant [Eaton] during his arrest and had not dropped a knife at the scene of his arrest, but rather, defendant [Eaton] pulled the knife from one of [Stinnett's] pockets after [Stinnett] had been escorted away from the arrest scene."

(Second Superseding Indictment, R. 154, PageID# 870-871). Count 5 thus presented two ways in which Eaton sought to advance a false account of Stinnett's arrest in order to make his use of force appear justified. Although the count listed

two aspects of Eaton's knowing attempt to corruptly persuade Minor and thereby prevent the communication of truthful information to the FBI, it consisted of only a single offense of witness tampering. That Minor then promulgated Eaton's story in state court and in his report and statement to the FBI did not transform this single offense into separate violations of Section 1512(b)(3).[11]

Requiring jury unanimity only as to a defendant's knowingly corrupt conduct (the first element of the offense), and not as to the individual acts a defendant engaged in to accomplish that purpose (the specific means), is appropriate in light of Section 1512(b)(3)'s language, application, and purpose. Cf. *Gray*, 692 F.3d at 520. Section 1512(b)(3) protects the integrity of potential federal investigations by ensuring that transfers of information to federal authorities are truthful and unimpeded. See *Carson*, 560 F.3d at 581. The purpose of Section 1512, more broadly, is "to enhance and protect the necessary role of

[11] Because Section 1512(b)(3) concerns *the defendant's* conduct and intent, the proper inquiry is not what Minor knew as of the time of his state-court testimony on March 5, 2010 (cf. Def. Br. 13-14, 49), but instead whether there was a reasonable likelihood of a federal investigation when Eaton directed Minor to lie. Cf. *Carson*, 560 F.3d at 580; *Fowler*, 131 S. Ct. at 2050-2052. The FBI requested reports from Eaton on March 4, 2010, the day before the state-court hearing; Eaton thus had direct knowledge of the FBI's investigation when he directed Minor to lie. Regardless, Minor testified that he became aware of the investigation, and drafted his report, on the Thursday of the week following Stinnett's arrest, or March 4, 2010. (Minor Tr., R. 210, PageID# 1553-1556).

* * * witnesses in the criminal justice process." Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2(b)(1), 96 Stat. 1248. Because witness tampering can consist of ongoing pressure on an individual falsely to advance the defendant's interest, it is unsurprising that the government would rely on several individual acts, and even evidence from different points in time, to show a violation of Section 1512(b)(3). But these individual acts, however many, are not independent elements of Section 1512(b)(3) for which jury unanimity is required; rather, they are a means of establishing the requisite conduct and intent necessary for a conviction.

Accordingly, the jury need only agree unanimously that the government proved beyond a reasonable doubt that Eaton did, in fact, knowingly corruptly persuade Minor, or attempt to do so, with the intent to prevent the communication of information to the FBI relating to the commission of a possible federal offense. The jury did not need to agree on the precise facts establishing each element of the crime. Thus, the district court correctly provided the jury with this Circuit's general instruction for a unanimous verdict. (Jury Instructions, R. 195, PageID# 1135); see 6th Cir. Pattern Criminal Jury Instructions 8.03 (2013).[12] Because Eaton cannot establish any error, let alone plain error, his argument fails.

[12] Indeed, had the court given any additional instruction, it should not have been an augmented unanimity instruction, as Eaton argues, but this Circuit's

(continued . . .)

IV

THE PROSECUTION'S STATEMENTS ON REBUTTAL DO NOT WARRANT REVERSAL

A. Standard Of Review

Claims of prosecutorial misconduct are mixed questions of law and fact that are reviewed de novo. See *United States* v. *Lawrence*, 735 F.3d 385, 432 (6th Cir. 2013).

This Court uses a two-step test to determine whether a prosecutor's comments warrant reversal. *Lawrence*, 735 F.3d at 431. First, the Court must determine whether the comments were improper. *Ibid.* If improper, this Court then must determine whether the comments were so flagrant as to warrant reversal. *Ibid.* In examining flagrancy, this Court considers: (1) whether the statements tended to mislead the jury or prejudice the defendant; (2) whether the statements were isolated or among a series of improper statements; (3) whether the statements were deliberately or accidentally before the jury; and (4) the total strength of the evidence against the accused. *Id.* at 432. This Court examines the prosecutor's comments within the context of the trial to determine whether such comments

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pattern jury instruction "Unanimity Not Required – Means." 6th Cir. Pattern Criminal Jury Instructions 8.03B (2013). Such an instruction is appropriate where "the indictment alleges that the defendant committed a single element of an offense in more than one way." 8.03B Note; see also 8.03B Commentary (discussing *Schad*, *Richardson*, and this Court's application of those cases to various statutes).

amounted to prejudicial error, *i.e.*, whether they rendered the trial fundamentally unfair. See *id.* at 431-432; *United States* v. *Carter*, 236 F.3d 777, 783 (6th Cir. 2001).

B. The Prosecutor's Comments Were Neither Improper Nor Flagrant And Do Not Warrant Reversal

Eaton argues that the prosecution twice improperly referenced the fact that he and the other defendants did not testify. (Def. Br. 52). Because the comments were not improper, and were not flagrant even if improper, Eaton's claim fails.

In particular, Eaton challenges (Def. Br. 52-53) the following statements:

> [Defendants' use-of-force expert Alex Payne is] a pretty important witness in this case and the defendants are trying to distract you from the actual issue in this case. He * * * agreed that if * * * [Stinnett] was on the ground, he was handcuffed and he was beaten with batons and kicks and punches, then there's an unreasonable use of force, absolutely. * * *
>
> But you got to ask yourself why are the defendants asking him if the force defendants used was justified *if none of the defendants said they used any force on him?* They asked [their expert] several questions about whether or not they could use knee strikes to knee [Stinnett] in the sides and in the legs, whether or not they can apply pressure to the back of his head * * * and whether or not those types of strikes, which would be justified, would cause injuries consistent with what the pictures showed Stinnett suffered. *But you got to ask yourself why are they asking him those questions if none of them came forward and said that's what they actually did?* There's been no evidence that they were delivering knee strikes to him to get him to comply so they could put handcuffs on him. There's been no evidence that they * * * were driving their hands or their fingers into the back of his head so that they could * * * get handcuffs on him, there's been no evidence of that *so why are they asking their use of force expert these questions?*

(Tr., R. 254, PageID# 3162-3163) (emphasis added). Eaton's counsel objected, and when the attorneys approached, the court stated, "You think he's commenting on their right to remain silent[,]" to which defense counsel responded yes. (Tr., R. 254, PageID# 3164). The prosecutor explained that he "was referring to their statements that came in through their reports," to which the court responded, "[b]ut we're clear that you're referring to their statements * * * [b]ecause it was really close." (Tr., R. 254, PageID# 3164). Eaton moved for a mistrial, which the court denied. (Tr., R. 254, PageID# 3164).

The prosecutor then attempted to clarify:

> Ladies and gentlemen, just so it's clear what I was referring to about the defendant[s'] statements is what they reported in their reports. *Because all we know what the defendants have said about what happened to the victim comes through their written reports*, which is going to come into evidence, and the[ir] statements [to the FBI].

(Tr., R. 254, PageID# 3165) (emphasis added). Counsel again objected. When the attorneys approached, the court said, "[y]ou wanted him to try to clear it up. At least, I did. I'm going to overrule your motion. If you ask for another mistrial, I'm overruling that too." (Tr., R. 254, PageID# 3165-3166). The court likewise rejected Eaton's post-trial claim of reversible error. (Mem. Op. & Order, R. 214, PageID# 1867-1868).

The prosecutor's remarks were not improper because they were not a comment on Eaton's failure to testify. This Court has recognized that a prosecutor

is given "wide latitude" during closing argument and that any challenged remarks are evaluated in the context of the entire trial. See *Lawrence*, 735 F.3d at 431. It is clear that a prosecutor may not comment on a defendant's decision not to testify as substantive evidence of guilt. See *Griffin* v. *California*, 380 U.S. 609 (1965); *Wilson* v. *United States*, 149 U.S. 60 (1893); *United States* v. *Wells*, 623 F.3d 332, 338 (6th Cir. 2010). But a prosecutor can make a fair response to a claim made by the defendant or his counsel. See *United States* v. *Robinson*, 485 U.S. 25, 31-34 (1988); *Lawrence*, 735 F.3d at 433-434; *Carter*, 236 F.3d at 783.

Here, the defense characterized Stinnett's assault as the officers' attempt to gain control over a fleeing felon who largely injured himself in the crash and any subsequent struggle he engaged in with the officers. In so doing, counsel relied on Alex Payne's expert testimony regarding appropriate techniques an officer can employ to control an aggressive or non-compliant subject. (Tr., R. 253, PageID# 3043-3045, 3048-3050, 3053-3057, 3072; Tr., R. 254, PageID# 3124-3125, 3135-3137, 3143). During rebuttal, the prosecutor urged the jury to focus on the government's evidence of what occurred once Stinnett was handcuffed. (Tr., R. 254, PageID# 3147-3163, 3166-3169). The prosecutor also challenged the defendants' argument that they had used only that level of force necessary to bring Stinnett under control, pointing out that they had never actually claimed in their reports that they used the techniques their expert discussed, or struck Stinnett over

his entire body, in order to subdue Stinnett (Tr., R. 254, PageID# 3153-3154, 3163-3166). In so doing, the prosecutor responded to Eaton's closing argument regarding Stinnett's assault and related bodily injuries while properly commenting on the entirety of the evidence before the jury. Cf. *Robinson*, 485 U.S. at 28-29, 31-32; *United States* v. *Forrest*, 402 F.3d 678, 686 (6th Cir. 2005) (comments made in response to defendant's factual theories not improper). Because the prosecutor was commenting on the inconsistencies between defendants' factual theories and the evidence, and not on defendants' silence at trial, the comments were not improper.

Even if the prosecutor's comments were improper, they were not flagrant. The statements did not mislead the jury or prejudice the defendant. When examined in context, the jury would not "naturally and necessarily" interpret the statements as a comment on Eaton's failure to testify; rather, an "equally plausible" explanation, as the prosecutor actually stated, is that the prosecutor was referring to defendants' written reports. *Wells*, 623 F.3d at 339; see also *Beverly*, 369 F.3d at 543-544 (statement "why Mr. Crockett did what he did, only he can answer," viewed in context, not a comment on failure to testify). In fact, the prosecutor in this case had earlier on rebuttal explained without objection that there were two versions of the events that the jury had to choose between: one presented through the government witnesses, and another captured in what defendants stated to the

FBI and included in their written reports, which the jury would have an opportunity to examine more closely during deliberations. (Tr., R. 254, PageID# 3153-3154). Thus, the jury could be expected to understand the later comments as again referring to defendants' written reports and what weight to assign Alex Payne's testimony.

Indeed, the lack of any prejudice to Eaton is confirmed by the jury's acquittal on the assault-related charges. The prosecutor's comments were directed at defense counsels' reliance on Alex Payne's expert testimony to argue that defendants' use of force was justified. The prosecutor argued in response that the jury should focus on what the defendants actually had said about the encounter in their written reports and statements to the FBI, which differed from the hypothetical scenarios presented to the expert witness. Thus, if any improper comments were made, they were raised only in reference to whether Stinnett had been unlawfully assaulted. If the jury indeed interpreted the comments as referring to Eaton's failure to testify, Eaton's acquittal on the assault-related charges undermines his claim of prejudice. Moreover, the jury instructions neutralized any possible prejudice from the claimed error. The court instructed the jury that a defendant "has an absolute right not to testify or present evidence," and that his failure to do so "cannot be considered by you in any way." (Jury Instructions, R. 195, PageID# 1105).

The other flagrancy factors also favor the prosecution. The comments were isolated remarks made within the context of a nine-day trial and a much broader closing argument summarizing the government's evidence in support of a conviction on each count. (Tr., R. 253, PageID# 3000-3026; Tr., R. 254, PageID# 3146-3182). The comments comprise approximately one page of the sixty-four pages of transcripts that constitute the government's complete closing argument. (Tr., R. 253, PageID# 3000-3026; Tr., R. 254, PageID# 3146-3182). Nor were the remarks extensive. They related only to defendants' unreasonable use of force, and specifically the testimony of Alex Payne. (Tr., R. 254, PageID# 3162-3163). Finally, the evidence against Eaton with respect to the witness tampering charges—which Eaton and the government addressed separately from the assault charges (Tr., R. 253, PageID# 3016-3020, 3058-3065)—was strong. See Argument I, *supra*. Although the district court stated in its denial of Eaton's post-trial motion that, assuming the comments were improper, they were not accidental, it found that the comments were not flagrant under the remaining factors and did not warrant reversal. (Mem. Op. & Order, R. 214, PageID# 1867-1868). Thus, there was not prejudicial error.

V

THE CUMULATIVE EFFECT OF THE CLAIMED ERRORS DOES NOT AMOUNT TO A DUE PROCESS VIOLATION

A. Standard Of Review

To prevail under a cumulative-error analysis, a defendant "must show that the combined effect of the individually harmless errors was so prejudicial as to render his trial fundamentally unfair." *United States* v. *Warman*, 578 F.3d 320, 348-349 (6th Cir. 2009) (citation omitted). Because cumulative-error analysis looks only at actual errors, the accumulation of non-errors cannot collectively amount to a due process violation. See *United States* v. *Wheaton*, 517 F.3d 350, 372 (6th Cir. 2008); *Campbell* v. *United States*, 364 F.3d 727, 736 (6th Cir. 2004).

B. The Combined Effect Of The Claimed Errors Did Not Render Eaton's Trial Fundamentally Unfair

Eaton argues (Def. Br. 55-56) that his convictions should be vacated because the cumulative effect of the claimed errors deprived him of his right to a fair trial. In appropriate cases, the combined effect of errors that are harmless by themselves can be so prejudicial that they give rise to a due process violation; such an effect, however, is necessarily predicated on the existence of trial errors. See *United States* v. *Adams*, 722 F.3d 788, 832 (6th Cir. 2013); *United States* v. *Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004). Moreover, a trial need not be perfect to withstand a

due process challenge. See *United States* v. *Hernandez*, 227 F.3d 686, 697 (6th Cir. 2000).

For the reasons explained, Eaton has failed to establish that any of the issues he raises on appeal constitute trial errors. Even if Eaton were able to demonstrate a single, non-reversible error, there could be no cumulative effect from additional, non-existent errors. See *Wheaton*, 517 F.3d at 372. Moreover, in the unlikely event this Court were to determine that there were multiple errors at trial, no combination of the errors Eaton claims could leave this Court with the "distinct impression" that Eaton did not receive a fair trial.[13] *United States* v. *Parker*, 997 F.2d 219, 221 (6th Cir. 1993). Thus, Eaton's final argument likewise fails.

[13] This Court has not determined whether and how plain errors are to be factored into cumulative-error analyses. See *Adams*, 722 F.3d at 833 n.38. As this Court noted in *Warman*, some circuits combine all non-reversible errors into the same analysis, while other circuits separately review any cumulative plain errors. See *Warman*, 578 F.3d at 349 n.4. Regardless of whether this Court decides to consider harmless and plain errors together or separately, and how this Court factors each type of error into the analysis if considered together, see, *e.g.*, *United States* v. *Caraway*, 534 F.3d 1290, 1302-1303 (10th Cir. 2008), Eaton's claim fails.

CONCLUSION

For the reasons stated above, Eaton's convictions on Counts 4 and 5 should be affirmed.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Erin H. Flynn
MARK L. GROSS
ERIN H. FLYNN
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-5361
Erin.Flynn@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation and typeface requirements imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(a)(5). The brief was prepared using Microsoft Office Word 2007 and contains 13,908 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Date: March 4, 2014

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, I electronically filed the foregoing Brief for the United States as Appellee with the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry No.	Description of the District Court Document		"PageID#" Range
1	Indictment		1-12
26	Superseding Indictment		68-79
71	Plea Agreement as to Adam Minor		220-224
154	Second Superseding Indictment		867-879
195	Jury Instructions		1101-1137
196	Verdict Form		1138-1143
201	Mot. for Judgment of Acquittal or a New Trial		1169-1198
205	Opp'n to Mot. for Judgment of Acquittal or a New Trial		1358-1385
206	Reply to Mot. for Judgment of Acquittal or a New Trial		1410-1419
214	Mem. Op. and Order Denying Post-Trial Motions		1857-1869
230	Judgment as to Adam Minor		2092-2096
231	Judgment as to Christopher Eaton		2097-2102
234	Notice of Appeal		2111-2112
245	Mem. Op. and Order Granting Release Pending Appeal		2375-2380
258	Notice of Filing of Exhibits for Appeal Purposes		3297-3298
258-1	Trial Exhibit 5G, Photograph		3299
258-2	Trial Exhibit 29, Bennett Report		3300
258-3	Trial Exhibit 30, Guffey Report		3301
	Transcripts	**(Witness)**	
209	Trial Transcript, 4/30/2013	(Adam Minor)	1437-1518
210	Trial Transcript, 5/1/2013	(Adam Minor)	1519-1739
202	Trial Transcript, 5/1/2013	(Jessie Barton)	1201-1273
249	Trial Transcript, 5/2/2013	(Billy Randall Stinnett) (Kelly Billingsley)	2384-2591 2567-2590
211	Trial Transcript, 5/3/2013	(Steve Runyon)	1740-1837
251	Trial Transcript, 5/6/2013	(David McClelland) (Michael Brown)	2664-2806 2807-2874
252	Trial Transcript, 5/7/2013	(Michael Brown) Def.'s Motion for Acquittal	2878-2973 2974-2985
256	Trial Transcript, 5/7/2013	(Ron Lafferty)	3187-3293
222	Trial Transcript, 5/8/2013	(Alex Payne)	1952-2012
253	Trial Transcript, 5/8/2013	Gov't Closing Argument Eaton's Closing Argument	3000-3026 3027-3078
254	Trial Transcript, 5/9/2013	Gov't Rebuttal Argument	3145-3182
243	Sentencing Hr'g Transcript, 8/1/2013		2318-2371