No. 18-5989

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

WILLIAM DUKES, JR.,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not object to defendant-appellant's request for oral argument.

JURISDICTIONAL STATEMENT

This appeal is from the district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231, and entered final judgment against defendant William Dukes, Jr., on September 17, 2018.

(Judgment, R. 77, PageID# 758-765).[1] Dukes filed a timely notice of appeal on September 18, 2018. (Notice of Appeal, R. 79, PageID# 770). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

Defendant Dukes was convicted of violating 18 U.S.C. 242 for depriving Jeffrey Littlepage of the constitutional right be free from unreasonable seizure when Dukes arrested Littlepage for allegedly making harassing communications in violation of Kentucky law. According to Dukes, Littlepage made harassing communications when he made several telephone calls to various law enforcement offices concerning how to file a complaint against Dukes for Dukes' treatment of him during a traffic stop. Dukes raises two issues on appeal:

1. Whether the district court abused its discretion in admitting expert testimony that Dukes received training as a police officer concerning the elements of harassing communication under Kentucky state law, and that, in the expert's opinion, Littlepage's telephone calls were for a legitimate purpose and therefore did not constitute harassing communication.

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[1] "R. __" refers to the docket entry number of documents filed in the district court. "PageID# __" indicates the page number in the paginated electronic record. "Br. __" refers to the page number of Dukes' opening brief. Citations to "Gov't Ex. __" refer to trial exhibits admitted at trial. Gov't Ex. 10A is included in the Appendix to Brief for the United States (App.), filed concurrently. All other government exhibits cited in this brief are recordings of telephone calls and are contained on the CD filed concurrently with this brief.

2. Whether the evidence was sufficient to support Dukes' conviction under 18 U.S.C. 242 for arresting Littlepage without probable cause.

STATEMENT OF THE CASE

1. Procedural History

On June 8, 2017, a federal grand jury in the Western District of Kentucky returned a three-count indictment against defendant-appellant William Dukes, Jr., then a police officer in Providence, Kentucky. (Indictment, R. 1, PageID# 1-7). Count 1 charged Dukes with violating 18 U.S.C. 242 by willfully depriving a person of the Fourth Amendment right to be free from unreasonable seizures. (Indictment, R. 1, PageID# 1).[2] Count 2 alleged that Dukes willfully deprived a person of the First Amendment right to engage in free speech and to petition the government for redress of grievances. (Indictment, R. 1, PageID# 1-2). Both of these counts alleged that bodily injury resulted or that Dukes used a dangerous weapon in the commission of the offenses. (Indictment, R. 1, PageID# 1-2). Count 3 charged Dukes with violating 18 U.S.C. 1519 for knowingly falsifying documents with the intent to obstruct a matter within the jurisdiction of the FBI. (Indictment, R. 1, PageID# 2-3). These charges stemmed from Dukes' warrantless

[2] Section 242 makes it unlawful when an individual "under color of any law * * * willfully subjects any person * * * to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 18 U.S.C. 242.

arrest of Jeffrey Littlepage for the Kentucky state offense of harassing communication after Littlepage had made several calls to various law enforcement agencies seeking information on how he could file a complaint against Dukes.

At trial, the government presented the testimony of an expert witness, Thomas Szurlinski, an attorney and former police chief who provided legal training at the Kentucky Department of Criminal Justice Training that Dukes attended while Dukes was with the Providence Police Department. (Trial Transcript (Tr.), R. 53, PageID# 223-225; Tr., R. 67, PageID# 551, 573). Szurlinski testified that when Dukes attended his class in August 2015, Szurlinski covered the three elements for harassing communication under Ky. Rev. Stat. (K.R.S.) § 525.080 (2018), which include: (1) the person engaging in the communication had an intent to harass, annoy, alarm, or intimidate the recipient of the communication; (2) the recipient was in fact alarmed or annoyed; and (3) the communication had no legitimate purpose. (Tr., R. 53, PageID# 234-235). Over Dukes' objection, the court allowed Szurlinski to testify that, based on his review of the recordings of Littlepage's telephone calls and Dukes' arrest reports, Dukes' arrest of Littlepage for harassing communication was inconsistent with Dukes' training on Kentucky law because Littlepage's telephone calls were made for a legitimate purpose and therefore did not meet the definition of harassing communication. (Tr., R. 53, PageID# 244-246 (Thomas Szurlinski)). The district

court specifically instructed the jury that it may consider this evidence only to determine if Dukes acted "willfully," as required by 18 U.S.C. 242, and "should not consider that evidence in determining whether [Dukes'] actions violated the Constitution in the first instance." (Tr., R. 85, PageID# 1307-1309; Jury Instructions, R. 45, PageID# 187).[3]

On June 15, 2018, the jury convicted Dukes on Count 1 (willful deprivation of the right to be free from unreasonable seizures) and acquitted him on Counts 2 and 3. (Jury Verdict, R. 46, PageID#202-204; Tr., R. 85, PageID# 1325). Subsequently, Dukes filed a motion for an acquittal or, alternatively, for a new trial. (Motion for Acquittal, R. 58, PageID# 314-321). Dukes challenged the admissibility of Szurlinski's testimony, but only to the extent Szurlinski testified that under Kentucky law an officer can make an arrest for a misdemeanor only when the offense is committed in the officer's presence. (Memorandum Opinion and Order, R. 63, PageID# 373-379). The court denied the motion, concluding that

[3] A second expert witness, Michael Schwendeman, also testified for the government. Schwendeman, an attorney, taught training courses on constitutional procedures, including search and seizure requirements, at the Kentucky Department of Criminal Justice Training. (Tr., R. 55, PageID# 275-276, 281-282). Dukes attended these classes in 2008 and 2015. (Tr., R. 55, PageID# 281). Schwendeman principally testified that the arrest was not consistent with the training that he provided Dukes concerning warrantless arrests for misdemeanor offenses. (Tr., R. 55, PageID# 293, 295-296; Tr., R. 56, PageID# 306-307). Dukes did not object to Schwendeman's testimony, and does not challenge its admission in this appeal.

the testimony was not misleading and that the jury instructions "clarified that any evidence of Dukes having violated a Kentucky statute while arresting Littlepage could only inform the jury's decision on whether he acted willfully." (Memorandum Opinion and Order, R. 63, PageID# 376-377). The court also found that sufficient evidence supported Dukes' conviction. (Memorandum Opinion and Order, R. 63, PageID# 377-378).

The district court sentenced Dukes to 42 months in prison. (Sentencing Hearing Transcript, R. 86, PageID# 1367). Dukes appealed, challenging only his conviction. Br. 7.

2. Facts

Viewed in the light most favorable to the government, see *United States* v. *Clay*, 667 F.3d 689, 693 (6th Cir. 2012), the evidence establishes the following:

a. On May 25, 2016, Dukes, then an officer with the Providence Police Department in Webster County, Kentucky, made a traffic stop on Barnhill Road in Hopkins County, Kentucky. (Tr., R. 66, PageID# 415, 418-419). Dukes directed the driver, Littlepage, to get out of his car, and then patted him down. (Tr., R. 82, PageID# 999-1000, 1004-1005). According to another officer at the scene, during the pat down Dukes "goosed" Littlepage—*i.e.*, Dukes ran his hand up the inside of Littlepage's legs and hit his genitals with a "hard[] bump" that caused Littlepage to "flinch[]." (Tr., R. 83, PageID# 1251). Littlepage testified that Dukes "hit" him

"in [his] privates" and on his back during the pat down even though he had earlier told Dukes that he had a bad back. (Tr., R. 82, PageID# 1006).

Although Dukes did not charge or issue a ticket to Littlepage, he threatened Littlepage before allowing him to drive away. (Tr., R. 82, PageID# 1009-1010). Dukes told Littlepage: "You're not coming down this road anymore [and] [i]f you come back, you'll answer to me." (Tr., R. 82, PageID# 1008). Dukes also told another person at the scene that Littlepage "ain't coming back here because if he does, I'll" (Tr., R. 67, PageID# 594) "fix [him] good" (Tr., R. 82, PageID# 1009). At trial, Dukes admitted that even though he told Littlepage, "Don't come back here," Dukes had no authority to make an arrest in Hopkins County or to tell Littlepage not to travel on a public road. (Tr., R. 67, PageID# 594-596, 598).

b. Littlepage was upset about his encounter with Dukes. (Tr., R. 82, PageID# 1010). He believed that Dukes had "no reason" to "hit" him during the pat down, and he was concerned about Dukes' "threat[]" warning him not to drive on Barnhill Road, particularly because Littlepage had promised to pick up his friend the next day and would need to drive on that road. (Tr., R. 82, PageID# 1010-1011). Consequently, Littlepage decided to file a complaint against Dukes. (Tr., R. 82, PageID# 1012). He ended up making four calls to various law enforcement agencies concerning filing a complaint.

Littlepage first called the Providence Police Department, where Dukes worked, to file a complaint against Dukes. (Tr., R. 82, PageID# 1013). The dispatcher, Tammy Wilson, told Littlepage that he could file his complaint the next day with the police chief. She then transferred him to the officer on duty that night, who happened to be Dukes. (Tr., R. 67, PageID# 535-536). Dukes told Littlepage that he could come into the police station to file a complaint "next week" and then "hung up" on him. (Tr., R. 66, PageID# 431; Tr., R. 67, PageID# 532-533, 536). Both Wilson and Dukes, as well as Littlepage, testified that the purpose of Littlepage's call was to file a complaint against Dukes as a result of the earlier traffic stop. (Tr., R. 67, PageID# 535; Tr., R. 81, PageID# 950; Tr., R. 82, PageID# 1013). The jury heard a recording of this call, which lasted 39 seconds. (Tr., R. 67, PageID# 527; Tr., R. 81, PageID# 989 (Gov't Ex. 2A (recording))).

Because Wilson and Dukes gave conflicting information about when he could file a complaint, and Littlepage wanted to keep his promise to pick up his friend the next day, Littlepage called the Providence Police Department back for clarification. (Tr., R. 67, PageID# 536-537; Tr., R. 82, PageID# 1014-1015). Dukes answered this second call. (Tr., R. 81, PageID# 954). After Littlepage asked if Dukes was the officer he had just spoken to, Dukes cut him off and threatened to arrest him for harassing communication. (Tr., R. 67, PageID# 538). When Littlepage asked to speak to the police chief, Dukes told him to come into

the police station "next week" and again threatened to arrest him. (Tr., R. 67, PageID# 538). The jury heard a recording of this call, which lasted 28 seconds. (Tr., R. 67, PageID# 527; Tr., R. 82, PageID# 1071 (Gov't Ex. 2B (recording))).

Littlepage did not call the Providence Police Department again because of Dukes' threats, even though he never intended to harass anyone and did not think he did anything wrong by calling the police station. (Tr., R. 82, PageID# 1015-1016). Instead, he called the Webster County Sheriff's Department for assistance with filing his complaint. (Tr., R. 82, PageID# 1017; Tr., R. 82, PageID# 1071 (Gov't Ex. 2C (recording))). The dispatcher told him that he could file a complaint with either the Providence police chief or Webster County sheriff. (Leslie Thompson Dep. 6, R. 90-1, PageID# 1417).[4] The dispatcher testified that she thought Littlepage's call was for the legitimate purpose of inquiring how to file a complaint against a police officer, and did not find his calls harassing, annoying, or intimidating. (Leslie Thompson Dep. 6-7, R. 90-1, PageID# 1417).

Littlepage also wanted information about whether he could drive on Barnhill Road to pick up his friend the next day. (Tr., R. 82, PageID# 1018-1019). So, shortly after midnight, he called the Kentucky State Police. (Tr., R. 82, PageID# 1019, 1076). The dispatcher told Littlepage that he could complain to the mayor

[4] Leslie Thompson's deposition testimony was read to the jury during the government's case in chief. (Tr., R. 83, PageID# 1129).

about Dukes. (Tr., R. 82, PageID# 1077 (Stephanie Martin); Tr., R. 82, PageID# 1020; Tr., R. 82, PageID# 1071 (Gov't Ex. 2D (recording))). The Kentucky State Police dispatcher also testified that she thought Littlepage's call was for the legitimate purpose of inquiring how to file a complaint against a police officer, and did not find his calls harassing, annoying, or intimidating. (Tr., R. 82, PageID# 1076-1077 (Stephanie Martin)).[5]

c. Subsequently, the Kentucky State Police dispatcher called the Providence Police Department, where Dukes worked, and told Wilson that Littlepage had called the state police to complain about Dukes. (Tr., R. 82, PageID# 1078-1081). Wilson relayed this information to Dukes, and Dukes directed Wilson to call Littlepage and lure him to the police station to be arrested for harassing communication by telling him that a supervisor was in the station to take his complaint. (Tr., R. 81, PageID# 961; Tr., R. 67, PageID# 576). He also instructed Wilson not to tell Littlepage that Dukes was at the station. (Tr., R. 81, PageID# 962; Tr., R. 67, PageID# 576).

Littlepage suspected that Wilson's call was a "trap" and did not agree to come down to the police station; instead, he asked if the supervisor could come to

[5] Littlepage later called the Kentucky State Police a second time to request the department's crisis hotline number. (Tr., R. 82, PageID# 1020, 1095 (Tracy Winters); Tr., R. 82, PageID# 1071 (Gov't Ex. 2E (recording))). The dispatcher testified that this call, seeking the crisis hotline number, had a legitimate purpose. (Tr., R. 82, PageID# 1095 (Tracy Winters)).

his house. (Tr., R. 82, PageID# 1024-1025). Wilson responded that the supervisor could not. (Tr., R. 82, PageID# 1024-1025). Nevertheless, upon her request, Littlepage gave Wilson his address "for the log" after he got her to confirm that "nobody [was] going to come down here and harass * * * or arrest" him. (Tr., R. 81, PageID# 966; Tr., R. 82, PageID# 1025). He then went to bed. (Tr., R. 82, PageID# 1025).

d. Dukes was "annoyed" that Littlepage had called the Providence Police Department a second time after Dukes told him that he could file his complaint "next week," and decided after that second call that he would arrest Littlepage for harassing communication. (Tr., R. 66, PageID# 432; Tr., R. 67, PageID# 481, 501, 527, 536, 539-540, 587). At trial, Dukes acknowledged that the second call was the entire basis for claiming that he had probable cause to arrest Littlepage. (Tr., R. 67, PageID# 545, 549, 559). He also testified that he knew the elements for harassing communication and even had confirmed them by looking them up on his telephone the same night he arrested Littlepage. (Tr., R. 66, PageID# 432; Tr., R. 67, PageID# 530).

Dukes further testified that he knew Littlepage called for the legitimate purpose of filing a complaint against him, and that he could not arrest someone simply for filing a complaint against a police officer or disagreeing with a police officer. (Tr., R. 67, PageID# 521, 535, 539-540, 542-545, 547-548, 600). Dukes

also admitted that he exceeded his authority by telling Littlepage not to drive on a public road, and that that portion of Littlepage's complaint against him was legitimate. (Tr., R. 67, PageID# 601-602). Dukes acknowledged that the reason he wanted to arrest Littlepage was to prevent him from making additional calls about filing a complaint against him. (Tr., R. 67, PageID# 548-549).

e. Dukes drove to Littlepage's home outside of Providence to arrest him. (Tr., R. 67, PageID# 550, 555). Dukes did not have an arrest warrant, although he knew that, under Kentucky law, officers must generally issue a citation for misdemeanor offenses like harassing communication rather than making an arrest, barring certain exceptions. (Tr., R. 67, PageID# 551, 554). Dukes believed that an exception applied, *i.e.*, that arresting a suspect for harassing communication was permissible if the suspect failed to follow an officer's reasonable instruction. (Tr., R. 67, PageID# 554). But, in his testimony, Dukes was unable to identify any instructions that Littlepage failed to follow in either of his telephone calls to the Providence Police Department. (Tr., R. 67, PageID# 554-556). Indeed, Dukes conceded that Littlepage could not have complied that night with Dukes' instruction to file his complaint "next week," and that Littlepage did comply with Dukes' order not to call the Providence Police Department again after his second call. (Tr., R. 67, PageID# 538, 555-556, 578).

Dukes arrived at Littlepage's home at approximately 1 a.m. and banged on the door. (Tr., R. 66, PageID# 436; Tr., R. 82, PageID# 1026). When Littlepage came to the door, Dukes told him that he was under arrest for harassing communication. (Tr., R. 82, PageID# 1026). Littlepage responded that he was not "going to go to jail for something [he] didn't do," and turned away. (Tr., R. 66, PageID# 438; Tr., R. 82, PageID# 1026). Dukes then entered the home without Littlepage's consent. (Tr., R. 67, PageID# 558-559; Tr., R. 82, PageID# 1030). Littlepage asked Dukes for his supervisor's name and tried to call 911, but Dukes knocked the phone out of his hands and ordered him to get on the ground. (Tr., R. 67, PageID# 564; Tr., R. 82, PageID# 1032). Littlepage did not comply because he did not want to give Dukes the opportunity to hurt him. (Tr., R. 82, PageID# 1032).

A fight ensued. (Tr., R. 82, PageID# 1030-1032). During this time, even though Littlepage did not threaten Dukes and did not have a weapon, Dukes shot Littlepage twice with his taser, used pepper spray on him, punched him in the nose, and then struck him multiple times with his baton. (Tr., R. 66, PageID# 439-449, 488, 564-565; Tr., R. 82, PageID# 1030-1031). Ultimately, Dukes handcuffed Littlepage. (Tr., R. 83, PageID# 1156). After an ambulance arrived, Dukes told the emergency medical technician that he had not been in a "good fight like this in

a long time." (Tr., R. 83, PageID# 1156; see also Leslie Thompson Dep. 9, R. 90-1, PageID# 1418).

While Littlepage was in the hospital, Dukes issued a citation to Littlepage for harassing communication and other charges. (Tr., R. 67, PageID# 469-482). The county attorney for Webster County ultimately dismissed these charges, and contacted the Kentucky Attorney General's Office about Dukes' conduct in arresting Littlepage. (Tr., R. 83, PageID# 1192, 1196-1197). The attorney general's office referred this matter to the United States Attorney's Office and triggered the federal investigation resulting in Dukes' indictment. (Tr., R. 83, PageID# 1192).

SUMMARY OF ARGUMENT

This Court should affirm Dukes' conviction on Count 1 for violating 18 U.S.C. 242 in connection with Dukes' unlawful arrest of Littlepage.

1. Dukes argues (Br. 26-31) that the district court abused its discretion in permitting Szurlinski to testify that Littlepage's telephone calls had a legitimate purpose and did not constitute harassing communications under Kentucky law, and that Dukes therefore lacked justification to arrest Littlepage on this basis. He asserts (Br. 27) that this testimony was impermissibly directed at "ultimate issues" that had to be decided by the jury. This argument is not correct—it ignores the

context of the testimony and the limited purpose for which it was admitted. In any event, any error was harmless.

To prove a violation of Section 242 the government was required to show that Dukes acted "willfully," *i.e.*, that he acted voluntarily and with the specific intent to do something the law forbids. In this case, the willfulness requirement means that the government had to show that Dukes acted in open defiance or reckless disregard of Littlepage's right to be free from unreasonable seizure.

Szurlinski's testimony, as the jury instructions made clear, was expressly admitted for this limited purpose. Szurlinski testified about the training he provided Dukes on the elements of harassing communication, including that the calls must not have been for a legitimate purpose. Szurlinski further explained that, in his view, Littlepage's telephone calls were for a legitimate purpose, and that Dukes' arrest of Littlepage for harassing communication was inconsistent with that training and Kentucky law because the telephone calls were made for a legitimate purpose. In so testifying, Szurlinski did not offer any legal conclusions that "invade[d] the province of the court to determine the applicable law and to instruct the jury as to that law." See *Torres* v. *County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985). Rather, he offered evidence relating to the willfulness element of a Section 242 offense—whether Dukes knew that he lacked justification to make a warrantless arrest of Littlepage for harassing communication. Indeed, the

court specifically instructed the jury that it could *not* consider evidence of Dukes' training on the elements of harassing communication or the testimony about Kentucky state law to determine whether Dukes seized Littlepage in violation of his constitutional rights.

Even if the Court were to find that admission of Szurlinski's testimony was error, it was harmless. Dukes' own testimony confirmed much of Szurlinski's testimony. Dukes testified that: (1) he was aware of the required elements for harassing communication; (2) he agreed that citizens have a right to complain about law enforcement officers; and (3) Littlepage called the Providence Police Department to seek information about filing a complaint against Dukes related to the traffic stop. In fact, Dukes conceded that he exceeded his authority by ordering Littlepage not to drive on a public road, and that that part of Littlepage's complaint was legitimate. Furthermore, although Dukes asserts that he was justified in arresting, rather than citing, Littlepage for the misdemeanor offense of harassing communication because Littlepage failed to follow his instructions, he was unable to identify any instruction that Littlepage did not follow prior to Dukes' decision to arrest Littlepage. Thus, based on Dukes' own testimony, any error associated with admitting Szurlinski's testimony could not have materially affected the verdict and was harmless. See *United States* v. *Pritchett*, 749 F.3d 417, 433 (6th Cir.), cert. denied, 135 S. Ct. 196 (2014).

2. The evidence was more than sufficient to support Dukes' conviction on Count 1. Dukes contends that there was insufficient evidence for the jury's finding that he lacked probable cause to arrest Littlepage for harassing communication, and therefore violated Littlepage's constitutional right to be free from unreasonable seizures. But one of the required elements for harassing communication under Kentucky law is that the communication has no legitimate purpose. Multiple witnesses, including Dukes, testified that Littlepage's telephone calls to the Providence Police Department, Webster County Sheriff's Department, and Kentucky State Police had a legitimate purpose because he was seeking information about filing a complaint against Dukes. This evidence provided an ample basis to support the conclusion that Littlepage's calls did not meet the requirements for harassing communication, and therefore that Dukes lacked probable cause to arrest Littlepage. Accordingly, the evidence supported the jury's verdict and the Court should affirm Dukes' conviction.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE GOVERNMENT'S EXPERT TESTIMONY

A. Standard Of Review

This Court reviews the district court's determination to admit expert testimony for abuse of discretion. *United States* v. *Rios*, 830 F.3d 403, 413 (6th

Cir. 2016), cert. denied, 137 S. Ct. 1120 (2017) and 138 S. Ct. 2701 (2018). The evidentiary admission must be upheld unless the district court "base[d] its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *United States* v. *Volkman*, 797 F.3d 377, 388 (6th Cir.) (citing *Best* v. *Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 176 (6th Cir. 2009)), cert. denied, 136 S. Ct. 348 (2015).

B. The District Court Did Not Abuse Its Discretion In Admitting The Testimony Of The Government's Expert Witness For The Limited Purpose Of Establishing Willfulness

Dukes principally asserts (Br. 19, 26-31) that he was deprived of a fair trial because the district court allowed the government's expert witness, Thomas Szurlinski, to express an opinion on whether Littlepage's telephone calls constituted "harassing communication" that would have provided a justification for an arrest under Kentucky law. According to Dukes, "this testimony and * * * legal opinion went directly to the ultimate issues" that were to be decided at trial and that were within the province of the court and the jury. Br. 27. Dukes' argument is not correct. The district court did not abuse its discretion in admitting Szurlinski's testimony for the limited purpose of establishing the willfulness element of 18 U.S.C. 242.

1. The district court instructed the jury that to find Dukes guilty of violating Section 242 in Count 1, the government needed to prove that Dukes: (1) acted

under color of law; (2) "deprived * * * Littlepage of his right to be free from an unreasonable seizure, including the right not to be seized without probable cause"; and (3) acted willfully. (Tr., R. 85, PageID# 1300). "[W]illfully" in Section 242 is defined as having the specific intent to deprive a person of a recognized federal right. See *United States* v. *O'Dell*, 462 F.2d 224, 227 (6th Cir. 1972). Put another way, to act willfully means to act in open defiance or reckless disregard of the victim's federal rights. See *Screws* v. *United States*, 325 U.S. 91, 105 (1945). Accordingly, one of the elements of the Section 242 offense that the government was required to prove was that Dukes arrested Littlepage knowing, or in reckless disregard of the fact, that he did not have probable cause to do so.

To this end, Szurlinski testified that Dukes attended Szurlinski's legal class at the Kentucky Department of Criminal Justice Training. (Tr., R. 53, PageID# 234; see also Tr., R. 67, PageID# 551). In that class, Szurlinski covered the elements for establishing the offense of harassing communication under K.R.S. § 525.080: (1) the person who engages in the communication has an intent to harass, annoy, alarm, or intimidate the recipient of the communication; (2) the recipient is in fact alarmed or annoyed; and (3) the communication has no legitimate purpose. (Tr., R. 53, PageID# 235). Szurlinski testified that, based on reviewing the recordings of Littlepage's telephone calls and Dukes' arrest reports, his opinion was that Littlepage's calls had the legitimate purpose of seeking information about

filing a complaint against Dukes and whether he could drive on Barnhill Road to pick up his friend. (Tr., R. 53, PageID# 244-246). As a result, Szurlinski testified that he did not see any justification for arresting Littlepage for harassing communication based on these calls and that Dukes' actions were not consistent with the training Szurlinski provided him. (Tr., R. 53, PageID# 246). In short, the gravamen of Szurlinski's testimony was that Dukes was aware of the requirements for the offense of harassing communication from his training, yet arrested Littlepage even though Littlepage's calls did not satisfy the third element (communication lacks a legitimate purpose) of the offense.

The district court specifically instructed the jury that this testimony "has been admitted for a limited purpose" and "[y]ou may use it only to determine whether the defendant acted willfully." (Tr., R. 85, PageID# 1307-1308; see also Jury Instructions, R. 45, PageID# 187). The court further instructed the jury:

> It is, of course, wholly up to you to determine whether [Dukes] violated any rule or acted in contravention of his training. If you find that he acted in contravention of policies or training, then I caution you that not every instance of inappropriate behavior on the part of a police officer rises to the level of a federal constitutional violation. * * * For this reason, proof that the defendant violated department policy or acted contrary to training is relevant to your determination of *willfulness*, but it does not necessarily prove that [Dukes] violated * * * Littlepage's constitutional rights.
>
> In other words, if you determine that [Dukes] * * * acted contrary to his training, you should consider that evidence only in determining whether [Dukes] acted *willfully*. You should not consider

> that evidence in determining whether [Dukes'] actions violated the Constitution in the first instance.

(Tr., R. 85, PageID# 1307-1308 (emphasis added); see also Jury Instructions, R. 45, PageID# 187).

In addition, the district court instructed the jury:

> It is, of course, wholly up to you to decide whether [Dukes] violated Kentucky law in making an arrest of * * * Littlepage for the misdemeanor offense of harassing communications. As before, however, I caution you that not every violation of state law by a police officer rises to the level of a federal constitutional violation. * * * For this reason, proof that [Dukes] violated a state law may be relevant to your determination of *willfulness*, but it does not necessarily prove that [Dukes] violated Littlepage's constitutional rights.
>
> In other words, if you determine that [Dukes] violated the law with respect to misdemeanor arrests, you should consider that evidence only in determining whether [Dukes] acted *willfully*. You should not consider that evidence in determining whether [Dukes'] actions violated the Constitution in the first instance.

(Tr., R. 85, PageID# 1308-1309 (emphasis added); see also Jury Instructions, R. 45, PageID# 188).

Accordingly, Szurlinski's testimony was properly admitted as relevant evidence that Dukes knew that he did not have probable cause to arrest Littlepage, *i.e.*, that he acted *willfully* in arresting Littlepage in violation of Littlepage's constitutional rights. See *United States* v. *Rodella*, 804 F.3d 1317, 1338 (10th Cir. 2015) (district court did not abuse its discretion in admitting evidence of defendant's training to show willfulness), cert. denied, 137 S. Ct. 37 (2016).

2. Dukes argues that Szurlinski's testimony constituted impermissible testimony on "ultimate issues." See Br. 27-29. Federal Rule of Evidence 704(a) provides that opinion testimony otherwise admissible is "not objectionable just because it embraces an ultimate issue" to be decided by the trier of fact. Fed. R. Evid. 704(a). This rule "remove[s] the proscription against opinion on 'ultimate issues'" and "shift[s] the focus to whether the testimony is 'otherwise admissible.'" *Torres* v. *County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) (citation omitted). As discussed above, Szurlinski's testimony was admissible for the limited purpose of satisfying the element of willfulness.

In any event, Szurlinski did not offer any opinions on the ultimate issues in this case. To convict, the jury had to conclude that Dukes deprived Littlepage of his federal constitutional right to be free from an unreasonable seizure and that Dukes did so willfully. 18 U.S.C. 242. Szurlinski never testified that Dukes did either. Indeed, Szurlinski did not testify that Dukes violated Littlepage's Fourth Amendment rights or offer any legal opinion or legal conclusions on a question of federal law. At most, Szurlinski testified that, based on his review of recordings of Littlepage's calls and Dukes' arrest reports, that there was no justification under Kentucky law for arresting Littlepage for harassing communication. (Tr., R. 53, PageID# 244-246). This is distinct from the ultimate issues that the jury had to decide to convict Dukes under Section 242.

Moreover, this Court has made clear that expert testimony on legal issues is problematic "only if 'the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular.'" *Volkman*, 797 F.3d 388 (quoting *Torres*, 758 F.2d at 151). In *Volkman*, for example, the defendant was convicted for prescribing narcotics to addicts and individuals with physical, mental, and psychological frailties. *Id.* at 382. This Court found no error in allowing the government's expert to testify that the defendant's prescriptions were not written for any "legitimate medical purpose"—a term that the Court characterized as a "*legal* question." *Id.* at 389. The Court rejected the defendant's argument that "this type of testimony constituted an improper legal conclusion." *Id.* at 388-390. According to the Court, the expert witnesses "merely provided opinions suggesting that [defendant] had no legitimate medical purpose for issuing a particular prescription to a specific patient." *Id.* at 389.

Likewise, in *United States* v. *Winkle*, 477 F.3d 407, 416-417 (6th Cir. 2007), the Court approved expert testimony that a bank-fraud defendant had engaged in a "check kite." Rejecting the defendant's argument that the expert offered "ultimate opinion testimony" that "resulted in an unfair and highly prejudicial message to the jury regarding [defendant's] guilt," the Court emphasized that the government's witness had not stated "that he thought [the defendant] was guilty of any crime,"

but had "merely offered an opinion regarding what the facts alleged added up to." *Id.* at 416-417. That was equally true of Szurlinski's testimony. See also *United States* v. *Glover*, 265 F.3d 337, 344-345 (6th Cir. 2001) (affirming admissibility of expert testimony that a car was manufactured in Japan based on its vehicle identification number and had traveled in foreign commerce where an essential element of the crime was the movement of the vehicle in interstate or foreign commerce), cert. denied, 534 U.S. 1145 and 535 U.S. 1003 (2002); *Berry* v. *City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (expert testimony may state "opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue"), cert. denied, 513 U.S. 1111 (1995).

Here, Szurlinski's testimony did not use any terms that have a "separate, distinct and specialized meaning in the law" that is different from the colloquial meaning, and therefore is not inappropriate on that basis. *Torres*, 758 F.2d at 151 (If the "terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular, * * * exclusion is appropriate."); see also *United States* v. *Nixon*, 694 F.3d 623, 632 (6th Cir. 2012) (quoting *United States* v. *Sheffey*, 57 F.3d 1419, 1426 (6th Cir. 1995)) (If the testimony does not involve terms with a specialized legal meaning, "then the witness may answer it over the objection that it calls for a legal conclusion.").

Indeed, contrary to Dukes' assertion (Br. 30) that Szurlinski gave a "legal conclusion that Dukes had no probable cause to charge Littlepage with [h]arassing [c]ommunications," Szurlinski never once mentioned "probable cause" or used the term "willfully." And none of his testimony used language that tracked any of the language of 18 U.S.C. 242. Cf. *Torres*, 758 F.2d at 151 (question that tracked the language of the applicable statute making it unlawful to "discriminate" called for an improper legal conclusion because term "discrimination" has a specialized meaning in the law). In fact, Dukes concedes (Br. 28-29) that the harassing communications statute (K.R.S. § 525.080) does not contain any "specialized or technical terms."

Accordingly, Szurlinski's testimony presented none of the problems associated with testimony using terms with specialized legal meaning. Such testimony is discouraged because the witness may suggest erroneous legal standards to the jury, *Torres*, 758 F.2d at 150, or effectively opine on the "overarching question of guilt or innocence, *Volkman*, 797 F.3d at 388, and therefore usurp the roles of the court and the jury. That was not the case here.

Finally, this Court has approved of exactly the kind of opinion testimony that Dukes opposes. See *Torres*, 758 F.2d at 151. As the Court emphasized in *Torres*, testimony in response to a "carefully phrased question" eliciting testimony that contains legal elements without resulting in an improper legal conclusion is

admissible. *Ibid.* By contrast, the objectionable question presented in *Torres*, an employment discrimination case, was whether the plaintiff "had been discriminated against because of her national origin." *Ibid.* The Court explained that the term "discrimination" has a specialized meaning in the law. *Ibid.* The Court further explained that counsel could have conveyed the same point, without asking for a legal conclusion, by asking the witness if she believed that national origin "motivated" the hiring decision. *Ibid.*

As noted above, the government did not ask Szurlinski if probable cause existed or if the arrest violated Littlepage's federal constitutional rights. Instead, the government asked Szurlinski questions concerning Dukes' basis for arresting Littlepage that were phrased in terms of his understanding of Kentucky law from the training that he provided Dukes and his review of Littlepage's calls and Dukes' arrest reports. (Tr., R. 53, PageID# 246; Tr., R. 54, PageID# 271). Thus, Szurlinski was testifying about whether Dukes' conduct was consistent with what he was taught in training (which assisted the jury in deciding whether Dukes acted willfully). And, as discussed above, the jury instructions made clear that the jury was *not* to consider Szurlinski's testimony in determining whether Dukes' "actions violated the [federal] Constitution"; rather, Szurlinski's testimony was expressly

limited to the jury's consideration of whether Duke acted willfully. (Jury Instructions, R. 45, PageID# 187-188; Tr., R. 85, PageID# 1308-1309).[6]

3. Dukes' other arguments are baseless. He asserts (Br. 29-30) that Szurlinski misled the jury by stating that only hang-up calls constitute harassing communication while any call where "one merely speaks * * * must be for a legitimate purpose." Dukes, however, mischaracterizes Szurlinski's testimony. The exchange that Dukes highlights contains Szurlinski's comments about Government Exhibit 10A, which shows that harassing communication includes hang-up calls. (Tr., R. 81, PageID# 991 (Gov't Ex. 10A (power point slide)); see also App. 1). Szurlinski simply explained that regardless of whether a call is a hang-up or someone is speaking, the call must have no legitimate purpose to

[6] The government attempted to ensure that the province of the court was protected by requesting that the court instruct the jury prior to Szurlinski's testimony that it is the court's task to instruct the jury on the law and the jury should "*not* to consider the testimony * * * in determining what the law is." (Government's Proposed Jury Instructions, R. 28, PageID# 89). The proposed instruction also instructed the jury on the elements for harassing communication under Kentucky law. (Government's Proposed Jury Instructions, R. 28, PageID# 90). The government made clear at the pretrial conference that this instruction was for Dukes' benefit and to avoid "imping[ing] on the Court's function in terms of being the sole advisor of the jury when it comes to the law," which is precisely the argument that Dukes now makes in his appeal. (Pretrial Conference Transcript, R. 88, PageID# 1396). Dukes, however, opposed the court giving this instruction. (Pretrial Conference Transcript, R. 88, PageID# 1396-1397, 1401). At the beginning of trial, the government again raised this issue, but Dukes confirmed that he "prefer[red] for the Court not to give [this] instruction." (Tr., R. 81, PageID# 794).

qualify as harassing communication. (Tr., R. 53, PageID# 235). Nothing about that testimony was misleading.

Dukes also suggests (Br. 30) that Szurlinski's testimony lacked a sufficient basis because Szurlinski relied only on a review of Dukes' arrest reports and recordings of Littlepage's calls and failed to speak to Dukes or others who were "present when the alleged offenses occurred." Dukes contends (Br. 30) that Szurlinski should have considered the "totality of the circumstances" and determined what Dukes knew prior to Littlepage's arrest in order to opine about whether Dukes had probable cause to arrest Littlepage for harassing communication. This argument again misinterprets Szurlinski's testimony. As discussed above, the crux of Szurlinski's testimony—and the only purpose that the jury could consider his testimony—was to support a finding of willfulness under Section 242, not to show whether Dukes had probable cause to arrest Littlepage for harassing communication. (Tr., R. 85, PageID# 1307-1308).

C. Any Error In Admitting Szurlinski's Testimony Is Harmless

Even if the Court were to conclude that an error occurred, it would be harmless. Any evidentiary error is harmless if the government can "show by a preponderance of evidence that the error did not materially affect the verdict." *United States* v. *Kilpatrick*, 798 F.3d 365, 378 (6th Cir.) (emphasis omitted), cert. denied 136 S. Ct. 700 (2015) and 136 S. Ct. 2507 (2016).

Much of Szurlinski's testimony was separately confirmed by Dukes himself at trial. First, Dukes testified that he knew the elements for harassing communication. (Tr., R. 67, PageID# 530). He testified that he even looked them up on his telephone at the time. (Tr., R. 66, PageID# 432). Second, Dukes admitted that Littlepage had a legitimate purpose in calling the Providence Police Department. (Tr., R. 67, PageID# 521, 535, 539-540, 542-545, 547-548, 600). He testified that he decided to arrest Littlepage based on this second call even though he knew that Littlepage called for the legitimate purpose of filing a complaint against him, and that he could not arrest someone simply for filing a complaint against a police officer or disagreeing with a police officer. (Tr., R. 67, PageID# 521, 535, 539-540, 542-545, 547-548, 600). Third, Dukes conceded that he exceeded his authority by ordering Littlepage not to drive on a public road, and that that portion of Littlepage's complaint against him was legitimate. (Tr., R. 67, PageID# 601-602). Fourth, Dukes admitted that the reason he wanted to arrest Littlepage was to prevent him from making additional calls about filing a complaint against him. (Tr., R. 67, PageID# 548-549). Finally, although Dukes testified that he was justified in arresting, rather than citing, Littlepage for harassing communication because Littlepage failed to follow his reasonable instructions, he was unable to identify any instructions that Littlepage failed to

follow prior to Dukes' decision to arrest Littlepage. (Tr., R. 67, PageID# 554-556).

Based on Dukes' own testimony, any error associated with admitting Szurlinski's testimony did not materially affect the verdict and therefore was harmless. See *United States* v. *Pritchett*, 749 F.3d 417, 433 (6th Cir.), cert. denied, 135 S. Ct. 196 (2014).

II

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

A. Standard Of Review

This Court reviews de novo a district court's denial of a motion for judgment of acquittal based on the insufficiency of the evidence. *United States* v. *Clay*, 667 F.3d 689, 693 (6th Cir. 2012). The Court examines the evidence in the light most favorable to the government and draws all inferences in the government's favor in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States* v. *Torres-Ramos*, 536 F.3d 542, 556 (6th Cir.), cert. denied, 555 U.S. 1088 (2008). A defendant challenging the sufficiency of the evidence "bears a very heavy burden." *United States* v. *Davis*, 397 F.3d 340, 344 (6th Cir. 2005).

B. Ample Evidence Supported Dukes' Conviction

To prove a violation of Section 242, the government must prove beyond a reasonable doubt that the defendant: (1) willfully; (2) deprived another individual of a federal right; (3) while acting under color of law. 18 U.S.C. 242; see also *United States* v. *Lanier*, 520 U.S. 259, 264 (1997). In order to prove a felony, the government also must prove that bodily injury resulted or that a dangerous weapon was used during the commission of the offense. 18 U.S.C. 242. Here, Dukes was charged in Count 1 with depriving Littlepage of his constitutional right to be free from unreasonable seizure by arresting Littlepage for making harassing communications, knowing that he did not have probable cause to believe that Littlepage had committed that crime. (Indictment, R. 1, PageID# 1). On appeal, Dukes challenges only the jury's finding that he unlawfully seized Littlepage. He asserts that the evidence shows that he had probable cause to make the arrest because Littlepage's second telephone call met the elements of harassing communication. Br. 34.

1. It is well settled that an arrest without probable cause violates the Fourth Amendment. See *Donovan* v. *Thames*, 105 F.3d 291, 297-298 (6th Cir. 1997). Probable cause is "reasonable grounds for belief, supported by less than prima facie proof but more than a suspicion." *United States* v. *McClain*, 444 F.3d 556, 562 (6th Cir. 2005), cert. denied, 549 U.S. 1030 (2006). To determine whether an

arresting officer had probable cause to arrest a plaintiff, the Court must consider the "totality of the circumstances" and whether the "facts and circumstances" of which the arresting officer "had knowledge at the moment of the arrest [would justify] a prudent person . . . in believing . . . that the [arrested person] had committed . . . an offense." *Sykes* v. *Anderson*, 625 F.3d 294, 306 (6th Cir. 2010) (internal quotation marks, alteration, and citation omitted). Thus, the question is whether a reasonable officer in Dukes' position would believe that Littlepage had committed the offense of harassing communication. To determine whether a reasonable officer would believe that he lacked probable cause, the Court must look at the information possessed by Dukes at the time. See *Harris* v. *Bornhorst*, 513 F.3d 503, 511-512 (6th Cir.), cert. denied, 554 U.S. 903 (2008).

Viewing the evidence in the light most favorable to the government, the evidence was more than sufficient to permit the jury to conclude that Dukes lacked probable cause to arrest Littlepage for harassing communications. Indeed, Dukes' own testimony at trial establishes that he had no probable cause for the arrest.

One of the required elements for harassing communication is that the communication must have no legitimate purpose. K.R.S. § 525.080. But Dukes testified that Littlepage's calls had a legitimate purpose of seeking information to file a complaint against him. Dukes specifically testified that: (1) he was aware that communications could not qualify as "harassing" under Kentucky law if they

had a legitimate purpose (Tr., R. 66, PageID# 432; Tr., R. 67, PageID# 530); (2) citizens have a right to make complaints against law enforcement officers (Tr., R. 67, PageID# 521, 600); and (3) Littlepage made it clear in his calls to Providence Police Department that he was calling to file a complaint about him related to the earlier traffic stop (Tr., R. 67, PageID# 535, 539, 540, 542-543, 547-548). Furthermore, Dukes acknowledged that citizens have a right to complain that a police officer exceeded his authority and that Littlepage's complaint about Dukes' order that Littlepage not drive on Barnhill Road, a public thoroughfare, was a legitimate complaint. (Tr., R. 67, PageID# 600-602). This testimony alone—*i.e.*, Dukes' acknowledgement that Littlepage had a legitimate purpose for calling the Providence Police Department—sufficiently supported the jury's finding that Dukes did not have probable cause to arrest Littlepage for harassing communication.

2. Dukes contends (Br. 35-36) that the Court should consider Littlepage's other calls to the Webster County Sheriff's Department and the Kentucky State Police to determine whether he had probable cause to arrest Littlepage for harassing communication, and suggests that these calls support the conclusion that he did, in fact, have probable cause for the arrest. (Cf. Tr., R. 67, PageID#524, 529). But this argument ignores that, under Kentucky law, only calls for which Dukes was present can serve as the basis for his probable cause determination. See

K.R.S. § 431.005(1)(d) (2018) ("A peace officer may make an arrest: [w]ithout a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his or her presence."). It also ignores evidence that none of the other calls was harassing.

Even if the Court considers all four calls that Littlepage made to the various law enforcement agencies, they do not undermine the jury's verdict that Dukes lacked probable cause to arrest Littlepage. At trial, the jury heard recordings of Littlepage's four calls to the law enforcement agencies and heard firsthand that the purpose of his calls was to seek information about how to file a complaint against Dukes. (Tr., R. 81, PageID# 989 (Gov't Ex. 2A (recording of Littlepage's first call to Providence Police Department)); Tr., R. 82, PageID# 1071 (Gov't Ex. 2B (recording of Littlepage's second call to Providence Police Department)); Tr., R. 82, PageID# 1071(Gov't Ex. 2C (recording of Littlepage's call to Webster County Sheriff's Department)); Tr., R. 82, PageID# 1071 (Gov't Ex. 2D (recording of Littlepage's first call to Kentucky State Police))).[7]

Significantly, multiple witnesses, including Dukes, testified that these calls—seeking information about filing a complaint against a law enforcement

[7] The jury also heard a recording of Littlepage's second call to the Kentucky State Police where he requested the crisis hotline number. (Tr., R. 82, PageID# 1071 (Gov't Ex. 2E) (recording))).

officer—had a legitimate purpose. (Tr., R. 67, PageID# 521, 535, 539-540, 542-545, 547-548, 600 (Dukes); Tr., R. 82, PageID# 1076-1077 (Kentucky State Police dispatcher, Stephanie Martin); Leslie Thompson Dep. 6-7, R. 90-1, PageID# 1417) (Webster County Sheriff's Department dispatcher)).[8]

Indeed, when the Kentucky State Police dispatcher, Stephanie Martin, called the Providence Police Department dispatcher, Tammy Wilson, about Littlepage's calls, Wilson asked her if she wanted Providence Police Department to do anything about Littlepage's calls. (Tr., R. 82, PageID# 1081-1082 (Martin)). Martin declined and "told her that we did not have any complaints about Mr. Littlepage." (Tr., R. 82, PageID# 1081-1082 (Martin); see also Tr., R. 82, PageID# 1097 (Winters)). The Webster County Sheriff's Department dispatcher, Leslie Thompson, similarly testified that she did not ask the Providence Police Department to charge Littlepage with harassing communication. (Leslie Thompson Dep. 10, R. 90-1, PageID# 1418; see also Tr., R. 82, PageID# 1108, 1111 (Karen Haynes (Webster County Sheriff's Department dispatcher))).

Further, Dukes never asked any of the dispatchers who spoke to Littlepage if they found his calls harassing or annoying. (Tr., R. 81, PageID# 958; Tr., R. 82, PageID# 1098). The record shows that they did not. (Tr., R. 81, PageID# 953,

[8] The dispatcher who answered Littlepage's second call to the Kentucky State Police similarly testified that asking for the crisis hotline number was a legitimate purpose for the call. (Tr., R. 82, PageID# 1095 (Tracy Winters)).

959-960, 982 (Tammy Wilson); Tr., R. 82, PageID# 1076-1077, 1082 (Martin); Tr., R. 82, PageID# 1095, 1105 (Winters); Tr., R. 82, PageID# 1111 (Haynes (referring to Thompson)); Leslie Thompson Dep. 6-7, R. 90-1, PageID# 1417)).

3. Finally, Dukes suggests (Br. 35-36) that the jury verdict rested at least in part on Thomas Szurlinski's expert testimony, and that if that evidence were to be excluded (as Dukes argues it should have been), a reasonable jury could not have concluded that he lacked probable cause to arrest Littlepage. But, as discussed above, Szurlinski's testimony was properly admitted only as evidence of willfulness, not probable cause. In any event, regardless of Szurlinski's testimony, the other evidence presented at trial—including Dukes' own testimony—fully supported the jury's verdict that Dukes violated Littlepage's constitutional rights when he arrested him for violating Kentucky's harassing communication statute.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedures 32(a)(7)(B) because it contains 8395 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it was prepared using Microsoft Office Word in a proportionally spaced typeface (Times New Roman) in 14-point font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Date: March 11, 2019

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, 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/ Teresa Kwong
TERESA KWONG
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ADDENDUM DESIGNATING DISTRICT COURT DOCUMENTS

Appellee United States designates the following documents from the electronic record in the district court:

Record Entry Number	Description	PageID# Range
1	Indictment	1-7
28	Government's Proposed Jury Instructions	88-124
45	Jury Instructions	174-201
46	Jury Verdict	202-204
53	Trial transcript (Thomas Szurlinski testimony, Vol. 1)	222-249
54	Trial transcript (Thomas Szurlinski testimony, Vol. 2)	250-273
55	Trial transcript (Michael Schwendeman testimony, Vol. 1)	274-297
56	Trial transcript (Michael Schwendeman testimony, Vol. 2)	298-308
58	Memorandum of Law in Support of Motion for a Directed Verdict and Judgment of Acquittal or in the Alternative Motion for a New Trial	314-321
59	Government's Reply to Defendant's Motion for Judgment of Acquittal or, in the Alternative, for New Trial	334-342
61	Defendant's Response to Government's Reply to Defendant's Motion for	348-352

	Judgment of Acquittal or in the Alternative New Trial	
63	Memorandum Opinion and Order	371-379
66	Trial transcript (William K. Dukes, Jr., testimony, Vol. 1)	408-461
67	Trial transcript (William K. Dukes, Jr., testimony, Vol. 2)	462-611
77	Judgment and Commitment Order	758-765
79	Notice of Appeal	770
81	Trial transcript (Vol. 1, June 11, 2018)	774-993
82	Trial transcript (Vol. 2, June 12, 2018)	994-1126
83	Trial transcript (Vol. 3, June 13, 2018)	1127-1266
84	Trial transcript (Vol. 4, June 14, 2018)	1267-1289
85	Trial transcript (Vol. 5, June 15, 2018)	1290-1333
86	Sentencing Hearing Transcript	1334-1371
88	Pretrial Conference Transcript	1375-1410
90-1	Leslie Thompson Deposition Transcript	1414-1423