No. 22-5814

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY GLENN BEAN,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that oral argument is necessary given the straightforward nature of the issues on appeal.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This appeal is from the final judgment in a criminal case in the Eastern District of Tennessee. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant-appellant Anthony Glenn Bean on August 29, 2022. (Judgment, R. 176, PageID# 2072-2073).[1] Bean filed a

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[1] "R. ___" refers to the document number assigned on the district court's docket sheet for case number 4:19-cr-00020-TRM-CHS-1. "PageID# ___" indicates the page number in the paginated electronic record for case number 4:19-cr-00020-TRM-CHS-1. "Br. ___" refers to the page number of Bean's opening brief.

timely notice of appeal on September 12, 2022. (Notice of Appeal, R. 178, PageID# 2083). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court committed plain error in admitting arrestee C.G.'s testimony at trial.

2. Whether the district court committed error, plain or otherwise, in refusing at trial to admit two out-of-court video recordings of arrestee F.M. as inadmissible hearsay.

3. Whether sufficient evidence supports a finding that Bean's closed-fist punches to F.M.'s face resulted in bodily injury under 18 U.S.C. 242.

4. Whether sufficient evidence supports a finding that Bean used unreasonable force against C.G., in violation of 18 U.S.C. 242, when, on two separate occasions, he punched C.G. in the face with a closed fist, while C.G. was handcuffed behind his back and posed no threat.

STATEMENT OF THE CASE

This case arises from Anthony Glenn Bean's abuse of his law enforcement authority by unnecessarily assaulting arrestees who were restrained and posed no threat. In relevant part, the district court convicted Bean of three counts of willfully depriving two victims, F.M. and C.G., of their constitutional rights—

specifically, their constitutional right to be free from the use of unreasonable force—while acting under color of law, in violation of 18 U.S.C. 242.

On appeal, Bean challenges various evidentiary rulings and the sufficiency of the evidence supporting his convictions.

1. Procedural Background

On July 24, 2019, a federal grand jury in the Eastern District of Tennessee charged Bean with four counts of deprivation of rights under color of law in violation of 18 U.S.C. 242. (Indictment, R. 1, PageID# 1-3). Specifically, Counts 1 and 2 charged Bean, while Chief Deputy of the Grundy County Sheriff's Office (GCSO), with violating F.M.'s civil rights by willfully using unreasonable force two separate times during F.M.'s arrest in December 2017, resulting in bodily injury to F.M. (Indictment, R. 1, PageID# 1-2).[2] And Counts 4 and 5 charged Bean, while Chief of the Tracy City Police Department (TCPD), with violating C.G.'s civil rights by willfully using unreasonable force two separate times during C.G.'s arrest in August 2014, resulting in bodily injury to C.G. (Indictment, R. 1, PageID# 2-3).

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[2] Count 3 charged Bean's son, Anthony Doyle Franklin Bean (T.J. Bean), while acting as a GCSO sergeant, with also violating F.M.'s civil rights by using unreasonable force during the arrest. (Indictment, R. 1, PageID# 2; Transcript (Tr.), R. 144, PageID# 1033). The district court found him not guilty of that count. (Verdict, R. 153, PageID# 1797).

Defendants jointly moved the district court for a bench trial. (Motion, R. 50, PageID# 214-215). Before the start of trial, the court questioned Bean, advised him of his rights, and, after finding that Bean voluntarily, knowingly, and intelligently waived his right to a jury trial, granted his motion. (Tr., R. 144, PageID# 895-900). The parties also notified the court under Federal Rule of Criminal Procedure 23 that they did not intend to request written findings of fact and conclusions of law. (Rule 23 Notice, R. 129, PageID# 726-727).

The district court conducted a three-day bench trial, beginning on June 16, 2021. The court convicted Bean on Counts 1, 4, and 5 (Verdict, R. 153, PageID# 1796-1797), and sentenced him to 72 months' imprisonment, two years of supervised release, and 150 hours of community service (Tr., R. 190, PageID# 2397-2398; Judgment, R. 176, PageID# 2073-2074, 2076). Bean timely appealed. (Notice of Appeal, R. 178, PageID# 2083).

2. Factual Background

Bean, while acting as either a Chief or Chief Deputy law enforcement officer, punched with a closed fist two different arrestees, F.M. and C.G., both of whom were under law enforcement control and posed no threat at the time. Both F.M. and C.G. suffered pain and bodily injury from those assaults. Viewed "in the light most favorable to the government," United States v. Callahan, 801 F.3d 606,

621-622 (6th Cir. 2015), cert. denied, 577 U.S. 1227 (2016), the evidence at trial established the following:

a. Bean Punched Arrestee F.M. Several Times In The Face With A Closed Fist (Count 1)

1. On December 30, 2017, officers from multiple agencies, including the GCSO and Sequatchie County Sheriff's Office (SCSO), engaged in a vehicle pursuit of F.M., who was suspected of drunk driving. (Tr., R. 145, PageID# 1269-1272, 1318-1320, 1364-1365). The officers chased F.M. to the top of Daus Mountain Road, near the county line between Grundy and Sequatchie Counties (Tr., R. 144, PageID# 997, 1095; Tr., R. 145, PageID# 1177), where F.M. hit a ditch, lost control of his vehicle, and collided with defendant Bean's police cruiser parked on the side of the road with its blue lights on. (Tr., R. 145, PageID# 1274-1275). Bean, then the GCSO Chief Deputy, had responded to the scene using his police radio call number and arrived with his wife, who was not a law enforcement officer, in his vehicle. (Tr., R. 144, PageID# 1053, 1113; Tr., R. 145, PageID# 1268, 1372-1373; Tr., R. 146, PageID# 1582-1586).

SCSO Deputy Jacob Kilgore was the lead officer in pursuit. (Tr., R. 145, PageID# 1272, 1290). He stepped out of his cruiser, pulled his weapon, and ordered F.M. out of his car. (Tr., R. 145, PageID# 1275). F.M. did not immediately comply, and Kilgore, with assistance from other officers, pulled F.M. out of the car through the open driver's side window because the door would not

open. (Tr., R. 145, PageID# 1275-1277, 1294). The officers placed F.M., who appeared to be "impaired," on the ground, where he was compliant. (Tr., R. 145, PageID# 1276-1277).

Just a few seconds later, while F.M. was lying compliant on the ground, surrounded by other officers, Bean approached F.M., angrily said, "You almost killed me and my fucking wife," and suddenly punched F.M. with a closed fist four to five times in the face. (Tr., R. 145, PageID# 1277-1279, 1294, 1296-1298, 1304). F.M. made "impaired sounds" as Bean punched him. (Tr., R. 145, PageID# 1278). Kilgore was "shocked": He did not perceive any threat by F.M. requiring Bean's use of force. (Tr., R. 145, PageID# 1278-1279). Only after Bean punched F.M. in the face did F.M. begin to "roll around." (Tr., R. 145, PageID# 1279-1280). Kilgore then used palm-heel strikes and knee strikes—compliance techniques on which he had been trained—to get F.M. to comply and place him in handcuffs. (Tr., R. 145, PageID# 1280-1281). Deputy Kilgore later reported to his supervisor that he saw Bean punch F.M. in the head. (Tr., R. 145, PageID# 1285-1286). This assault formed the basis for Count 1.

2. SCSO Deputy Brian Henegar arrived as the other officers were attempting to handcuff F.M. (Tr., R. 145, PageID# 1369). Henegar joined them and used palm-heel strikes, which are also trained techniques, to get F.M. to comply. (Tr., R. 145, PageID# 1369-1370). After the officers handcuffed F.M.,

Henegar and another officer stood F.M. up and walked him over to the hood of a police cruiser to search him. (Tr., R. 145, PageID# 1370). According to Henegar, Bean then pushed F.M. onto the hood of the police cruiser and struck him two or three times in the head and face with a closed fist. (Tr., R. 145, PageID# 1371-1375). Henegar's account formed the basis for Count 2.[3]

GCSO Deputies Michael Strope and Tyler Tinsley arrived four to six minutes after the crash and did not see Bean's interaction with F.M. (Tr., R. 144, PageID# 1092-1095, 1137; Tr., R. 145, PageID# 1171-1172, 1200). Tinsley assisted other officers in initially placing F.M. in the backseat of Tinsley's cruiser for transport. (Tr., R. 144, PageID# 1100-1101, 1146-1147). Sometime "after the accident occurred," GCSO Officer Randy Wildes also may have appeared, though the testimony on whether or when Wildes arrived was conflicting. (Tr., R. 146, PageID# 1563, 1565, 1576); see also pp. 18-19, *infra*.

3. An ambulance arrived to transport F.M. and Bean, who had injured his ribs in the crash and his hand from beating F.M., to the hospital. (Tr., R. 144, PageID# 1104, 1106; Tr., R. 145, PageID# 1284, 1325-1326, 1332-1333, 1379-1380, 1422, 1425). In the ambulance, Bean held up his hand to Henegar, who noticed that "it looked like bruising and -- and redness and purplish." (Tr., R. 145,

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[3] Because the district court acquitted Bean on Count 2, this brief does not describe this alleged assault in detail here.

PageID# 1380). Kilgore also saw Bean in the ambulance with an injured hand. (Tr., R. 145, PageID# 1284). At the hospital, Strope noticed that Bean had a "swollen hand." (Tr., R. 144, PageID# 1105-1106). Emergency room physician Dr. Michael Stafford treated Bean that night for a fracture of the fifth metacarpal bone in his right hand—the bone attached to the pinky finger. (Tr., R. 145, PageID# 1349-1352). This injury is commonly known as a "boxer's fracture" because it often results from hitting other people or objects with a closed fist. (Tr., R. 145, PageID# 1353).

Meanwhile, in the ambulance, Strope heard F.M. complain about the "left side of his eye," which was "swollen up" and "had blood coming down through." (Tr., R. 144, PageID# 1105). At the hospital, Tinsley saw F.M.'s face was "extremely swollen, * * * black and purple, had bruising all over, and his eyes were swollen shut." (Tr., R. 144, PageID# 1154). Dr. Stafford diagnosed F.M. as suffering from a large hematoma—a blood clot underneath the skin—on the right side of his face. (Tr., R. 145, PageID# 1353-1356). Dr. Stafford transferred F.M. to another hospital after he and another physician determined that F.M. required a hospital with a neurology practice in the event he developed brain bleeding or other problems. (Tr., R. 145, PageID# 1355-1356). Later, when F.M. was taken to jail, GCSO Corrections Officer Tasha Wideman saw F.M. "bruised up * * * [a]round the facial area." (Tr., R. 145, PageID# 1212-1213, 1216). Wideman also

heard Bean and T.J. Bean talking about how "they had * * * roughed [F.M.] up, beat him up." (Tr., R. 145, PageID# 1218).

At trial, F.M., who had suffered a stroke and heart attacks sometime after these events, testified that he remembered being assaulted by officers from three counties, including Grundy County, and he recalled the pain he had experienced, but not who hit him or other details. (Tr., R. 145, PageID# 1497, 1519, 1542).

Later, in 2018, Tennessee Peace Officer Standards and Training (POST) Commission Assistant Director Dexter Mines had a "friendly conversation" with Bean and noticed that Bean's hand was injured and asked about it. (Tr., R. 145, PageID# 1443-1445, 1450). Bean told Mines that he injured his hand having to "fight [a] guy" after a vehicle pursuit that he joined. (Tr., R. 145, PageID# 1443-1445, 1450).

b. On Two Separate Occasions, Bean Punched Arrestee C.G. In The Face With A Closed Fist (Counts 4 And 5)

1. On August 10, 2014, several officers, including Bean, responded to a call for backup from TCPD Officer Matt Kilgore on a two-lane road in the Grundy Lakes area of Grundy County. (Tr., R. 144, PageID# 936, 938, 942-943, 973, 997, 1043, 1051). C.G. had been involved in a hit-and-run accident and, after driving off, his car became disabled on the road, blocking a lane of traffic. (Tr., R. 144, PageID# 938, 976, 1008, 1050). C.G.'s then-girlfriend Stacey Jones was a passenger in his car. (Tr., R. 144, PageID# 996-997).

Tennessee State Parks Ranger Park Greer was among the first officers to arrive. (Tr., R. 144, PageID# 932-933, 937, 952). Greer saw Officer Kilgore's vehicle parked 15 to 20 feet behind C.G.'s vehicle. (Tr., R. 144, PageID# 938). Kilgore was standing behind his open driver's side door, holding his taser out in front of him in C.G.'s direction; taser wires lay on the ground. (Tr., R. 144, PageID# 937-938, 940, 957, 959). C.G. appeared "seemingly agitated" and intoxicated, although he was not "lunging or violent or anything." (Tr., R. 144, PageID# 938-939). Greer "made eye contact" with Kilgore, "[s]o he knew that [Greer] was there," and then went to direct traffic. (Tr., R. 144, PageID# 939). At this point, Greer did not believe that Kilgore needed his assistance; he did not see C.G. attack or try to run from Kilgore. (Tr., R. 144, PageID# 940-941). C.G. was handcuffed with his hands behind his back. (Tr., R. 144, PageID# 941, 943, 1000-1001). And although C.G. was "swaying," he appeared to be "under control." (Tr., R. 144, PageID# 942-943).

Soon after, Bean, then the Chief of the TCPD and highest-ranking officer on the scene, arrived in civilian clothes with a woman in an unmarked or personal vehicle. (Tr., R. 144, PageID# 942-943, 1020, 1053, 1069, 1110). That woman was Bean's wife, Felisha Bean, who was not a law enforcement officer. (Tr., R. 144, PageID# 1053). While C.G. was standing "handcuffed with his hands behind his back," Bean "walked up" and heard C.G. say something "derogatory" or "a bad

statement" directed at the woman who had been in the car. (Tr., R. 144, PageID# 943-944, 964, 1001-1002). Immediately after, Bean punched C.G. with a closed fist in the face. (Tr., R. 144, PageID# 944, 1001-1002). Bean neither issued commands nor asked for help before punching C.G. (Tr., R. 144, PageID# 944). Instead, as Bean punched C.G., Bean said words to the effect of "Don't say that against [her]," or, in an "upset" voice, "That's my wife you're talking about." (Tr., R. 144, PageID# 945, 1001-1003). C.G. fell to the ground. (Tr., R. 144, PageID# 945).

Ranger Greer saw no reason for Bean to punch C.G. (Tr., R. 144, PageID# 945-946, 965). C.G. had no weapons on him. (Tr., R. 144, PageID# 963). He did not try to attack, move or act aggressively toward, or flee from Bean; nor did C.G. pose a significant threat to anyone at the scene. (Tr., R. 144, PageID# 945-946, 965, 969, 1002, 1011, 1036-1037). Greer told three supervisors about seeing Bean punch C.G. (Tr., R. 144, PageID# 949). He did not include this use of force in his written incident report because he was a new ranger who had not yet been trained on report-writing and "didn't know if [he] should put it in or not." (Tr., R. 144, PageID# 950-951). This assault formed the basis for Count 4.

2. GCSO K-9 Officer Brandon King arrived later, followed by Tennessee State Parks Ranger Jason Reynolds, "the last one to arrive on the scene." (Tr., R. 144, PageID# 972, 974, 976, 981, 1045, 1052). At that point, C.G. was

"handcuffed behind his back" and loaded into Officer Kilgore's patrol car. (Tr., R. 144, PageID# 1054). C.G. was not physically fighting with officers or trying to flee from officers at that point, although C.G. was "mouthy." (Tr., R. 144, PageID# 1054). King noticed that C.G. had been pepper-sprayed and so told Kilgore, "Hey, man, you might need to roll the windows down on your patrol car * * * [and] give him a little bit of air." (Tr., R. 144, PageID# 1055-1056). Kilgore then "rolled his window down." (Tr., R. 144, PageID# 1056).

As Deputy King recalled, "[a]fter the window was down, [C.G.] stuck his head out the window" and, as Felisha Bean walked toward the patrol car, "said 'Who is this whore?'" (Tr., R. 144, PageID# 1056). Ranger Reynolds heard a male voice coming from the rear of the patrol car. (Tr., R. 144, PageID# 977). King recalled Felisha Bean "just kind of laughed and went on," but Bean said, "'You ain't going to talk to my wife that way,' and then hit [C.G.] * * * [w]ith a closed fist," through the open window. (Tr., R. 144, PageID# 1056-1057). King saw Bean's punch land on C.G.'s "facial area." (Tr., R. 144, PageID# 1057). Reynolds, for his part, "saw Tony Bean lunging[—]or punching into an open window of the rear of a patrol vehicle." (Tr., R. 144, PageID# 974, 978). After the punch, C.G. "fell back in the patrol car." (Tr., R. 144, PageID# 1058). At some point, Officer David Keith Cox from the Marion County Sheriff's Office also drove by and arrived at the scene. (Tr., R. 144, PageID# 1042-1043). He saw

C.G. sitting handcuffed in the backseat of the vehicle with "mucus, some blood, and * * * mace coming off" of his face. (Tr., R. 144, PageID# 1044).

Ranger Reynolds recollected that, before this second assault, C.G. was inside "in the back of the vehicle" and already subdued. (Tr., R. 144, PageID# 992). Deputy King recalled "[t]here was no threat. [C.G.] was just running his mouth like normal arrestees do." (Tr., R. 144, PageID# 1057). And Reynolds corroborated that C.G. was not trying to get out of the car or kick at the windows. (Tr., R. 144, PageID# 981, 990). King further believed "there was no * * * need for any force or anything like that" and "once the handcuffs are on, the threat's pretty much eliminated at that point." (Tr., R. 144, PageID# 1054, 1057). He thought to himself, "that ain't kind of right." (Tr., R. 144, PageID# 1057). Because Reynolds was the second park ranger on scene, after Greer, he did not write a written report, but he told his wife that he was bothered by what he had seen Bean do. (Tr., R. 144, PageID# 979). This second assault formed the basis for Count 5.

3. Later, at the jail, C.G.'s face was "red," perhaps from being punched or pepper-sprayed. (Tr., R. 144, PageID# 1058). As C.G. recounted, he had a "bruise" and "soreness" as a result of Bean punching him. (Tr., R. 144, PageID# 1037). Deputy King told his supervisor, the GCSO Sheriff, that he had seen Bean

punch C.G., and the Sheriff responded "that he would handle it." (Tr., R. 144, PageID# 1059).

Several weeks later, Deputy King saw Bean at court. (Tr., R. 144, PageID# 1060). King saw Bean "rubbing his hand" and asked, "You all right Chief?" (Tr., R. 144, PageID# 1060). Bean responded, "My hand's hurting where I hit a guy." (Tr., R. 144, PageID# 1060). King also asked Bean about his "class ring" he often wore. (Tr., R. 144, PageID# 1060). Bean responded, "I broke it." (Tr., R. 144, PageID# 1060). Based on his observations at the scene of C.G.'s arrest and the timing of Bean's comments, King believed that Bean was talking about "the [C.G.] incident." (Tr., R. 144, PageID# 1060).

4. As C.G. testified at trial, he was intoxicated at the time of the crash. (Tr., R. 144, PageID# 995, 998, 1000). C.G. did not remember many details regarding the events (Tr., R. 144, PageID# 1000, 1003-1004), but he recalled that after he called Bean's wife "a whore" and while his hands were cuffed behind his back, Bean struck him with "a closed fist" under the chin (Tr., R. 144, PageID# 1000-1002). C.G. could remember being punched only once and that when he "was punched, [he] was at the back of the car." (Tr., R. 144, PageID# 1003, 1016, 1018). C.G. had a "bruise" and "soreness" in his chin as a result of Bean punching him. (Tr., R. 144, PageID# 1037).

During cross-examination, C.G. testified that he spoke with his girlfriend Stacey Jones afterwards about the events. (Tr., R. 144, PageID# 1021). Jones told C.G. what she saw, and their conversations helped refresh C.G.'s recollection. (Tr., R. 144, PageID# 1021-1023, 1034). Bean did not object to C.G.'s testimony.

3. Trial Proceedings

a. During the three-day bench trial, the government presented evidence from 13 witnesses in its case-in-chief—seven witnesses testified about the incident involving F.M., five testified regarding the incident involving C.G., and an expert witness, Tennessee Law Enforcement Training Academy trainer Travis Robinson, testified about use-of-force training for law enforcement officers. (See Tr., R. 144, PageID# 932-1162; Tr., R. 145, PageID# 1170-1451). The defense called four witnesses, including F.M. (See Tr., R. 145, PageID# 1474-1543; Tr., R. 146, PageID# 1548-1595).

After the government presented its case, Bean moved for judgment of acquittal on all four counts against him. (Tr., R. 145, PageID# 1452). The district court denied the motion. (See Tr., R. 145, PageID# 1473-1474). Bean then proceeded to present his case.

b. As relevant here, during Bean's examination of his first two witnesses, GCSO Corrections Officer Stephanie Sweeton and F.M., Bean sought to admit two separate video recordings of conversations with F.M. The first was a recording

Sweeton made of a conversation she had with F.M. (Sweeton Recording) that took place at the Grundy County jail on August 22, 2019, more than a year and a half after Bean assaulted F.M. (Tr., R. 145, PageID# 1482). The second recording was of a conversation between F.M. and Bean (Custodial Interrogation Recording) that took place on August 10, 2018, almost nine months after the incident, in an interrogation room at the Grundy County jail while F.M. was in Bean's custody. (Brief, R. 147, PageID# 1703). Bean sought to introduce these recordings to show F.M.'s alleged statements that Bean had done nothing wrong to him. (Tr., R. 145, PageID# 1492, 1513-1515, 1520-1521, 1526, 1533-1534).

Bean's counsel first attempted to introduce the Sweeton Recording during his direct examination of Sweeton. (Tr., R. 145, PageID# 1475). Government counsel objected based on hearsay. (Tr., R. 145, PageID# 1475). Bean's counsel offered the recording under Federal Rules of Evidence 804(b)(3) and 807, the statements against interest and residual hearsay exceptions respectively, but did not offer the recording either as evidence of a prior inconsistent statement under Rule 613(b) or as a recorded recollection under Rule 803(5). (See Tr., R. 145, PageID# 1476-1492). After questioning Bean's counsel about why the recording was trustworthy, the district court sustained the government's objection. (Tr., R. 145, PageID# 1491-1492).

Bean next called F.M. as a witness and asked if he remembered the conversations with Sweeton or Bean. (Tr., R. 145, PageID# 1497-1498). F.M. recalled neither conversation and explained that he had a stroke and some heart attacks since the incident and did not "remember a whole lot of talk." (Tr., R. 145, PageID# 1497-1498). During the discussion among the parties' counsel and the district court that followed, Bean's counsel offered the recordings under various hearsay exceptions but not under either Rules 613(b) or 803(5). (See Tr., R. 145, PageID# 1499-1539). Counsel for co-defendant T.J. Bean, however, suggested that both recordings could be admitted as a recorded recollection under Rule 803(5). (Tr., R. 145, PageID# 1526-1527). The government maintained its objection that the recordings were inadmissible hearsay. (Tr., R. 145, PageID# 1499, 1504, 1533, 1537). The court did not admit the recordings into evidence but allowed Bean to play portions of the Custodial Interrogation Recording for F.M. to refresh his recollection. (See Tr., R. 145, PageID# 1520-1539). F.M. testified that the recording did not refresh his recollection. (See Tr., R. 145, PageID# 1540).

c. Bean then presented his last two witnesses, Officers Matt Kilgore and Randy Wildes.

Bean elicited testimony from Officer Kilgore, who had been present during the entire C.G. incident, that he could not "recall" seeing Bean strike C.G. (Tr., R. 146, PageID# 1549-1550, 1552, 1555, 1557, 1560). But Kilgore admitted that he

previously may have told other people he saw Bean strike C.G. (Tr., R. 146, PageID# 1555, 1560-1562). Kilgore believed that if he had seen Bean hit C.G., he may have blocked out that memory "due to stress." (Tr., R. 146, PageID# 1560-1562). He also testified that he saw Bean near C.G., at which point Kilgore "looked away" and "took the opportunity to catch [his] breath." (Tr., R. 146, PageID# 1549, 1558-1560). And the next time he looked, C.G. was on the ground while Bean was standing next to him. (Tr., R. 146, PageID# 1560). Kilgore also heard Bean later "said something to the effect if he punched [C.G.] for calling [his wife a name], that he would have to own up to it." (Tr., R. 146, PageID# 1561).

Finally, Bean sought to establish from Officer Wildes's testimony that Wildes stayed with Bean during the entire F.M. incident and did not see Bean strike F.M. (See Tr., R. 146, PageID# 1567). During cross-examination, however, Wildes clarified that he did not know what happened at the scene before he arrived; Bean could have already punched F.M. before Wildes got there. (Tr., R. 146, PageID# 1576, 1589). He also shared that he failed to tell the FBI prior to trial that he was present for any part of the F.M. arrest, even though he had spoken with the FBI about Bean multiple times, he knew the FBI was investigating F.M.'s arrest, he knew that Bean was eventually charged with federal crimes, and he had spoken with defense investigators about F.M.'s arrest. (Tr., R. 146, PageID# 1576-1577). Moreover, throughout the trial, other officers at the scene testified that they

did not recall seeing Wildes there. (See Tr., R. 144, PageID# 1106, 1132; Tr., R. 145, PageID# 1200).

d. During closing arguments, Bean's counsel, although he had not objected during C.G.'s testimony, mentioned that had the parties had a jury trial, he would have asked the jury not to consider C.G.'s testimony because it was based on "his conversations with his girlfriend, which is unreliable and cannot be considered, it's not a personal basis." (Tr., R. 145, PageID# 1468).

e. Following the close of evidence, the district court ordered the parties to submit post-trial briefs addressing, among other things, "the admissibility of the recorded statements of [F.M.]." (Order, R. 140, PageID# 767-768). In his brief, Bean's counsel offered no new arguments for admitting the recordings, though T.J. Bean's counsel raised Rules 803(5) and 807 as bases for admitting them. (See Post-trial Brief, R. 148, PageID# 1718-1720; Post-trial Brief, R. 149, PageID# 1760).

After reviewing the briefs, the district court issued an order explaining that although the court "did not admit the statements as evidence during trial, it permitted counsel to proffer the recording and use the recording to attempt to refresh [F.M.]'s recollection." (Order, R. 151, PageID# 1793; see also Tr., R. 145, PageID# 1520-1541). Referring to the Custodial Interrogation Recording, the court elaborated that it "heard the recorded statements, which, for the most part,

bordered on inaudible, even though it did not admit the statements in evidence during trial." (Order, R. 151, PageID# 1793). Lastly, the court emphasized that it "need not resolve whether the recorded statements are admissible in evidence, because the recording, regardless of its admissibility, has no impact on the Court's decision as to whether Tony and T.J. Bean are guilty of the crimes charged." (Order, R. 151, PageID# 1793-1794).

f. On January 28, 2022, the district court read its verdict, convicting Bean on three counts of deprivation of rights under color of law—Counts 1, 4, and 5—and acquitting Bean on Count 2 and T.J. Bean on Count 3. (Minute Entry, R. 152, PageID# 1795; Verdict, R. 153, PageID# 1796-1797).

Bean soon after filed a renewed motion for judgment of acquittal and, in the alternative, for a new trial. (Motion, R. 156, PageID# 1824-1846). The district court issued an order denying the motion. (Order, R. 163, PageID# 1923-1934). In denying the motion for judgment of acquittal, the court found that a rational trier of fact could find, based on the evidence, that Bean willfully, and under color of law, deprived F.M. and C.G. of their constitutional rights by using excessive force, resulting in bodily injury. (Order, R. 163, PageID# 1926-1928).

As relevant here, the district court also rejected Bean's argument for a new trial on the ground that C.G.'s testimony included inadmissible hearsay—*i.e.*, statements by his then-girlfriend Stacey Jones. (See Order, R. 163, PageID# 1931-

1932). The court explained that Bean did not demonstrate that C.G.'s testimony "included out-of-court statements made by Jones to prove the truth of any matter asserted." (Order, R. 163, PageID# 1931). The court emphasized, however, that it "took [C.G.]'s admission that he did not remember all of the details of his arrest due to his intoxication into consideration in assessing his credibility and evaluating his testimony." (Order, R. 163, PageID# 1931-1932).

4. Sentencing Proceedings

After trial and before sentencing, the U.S. Probation Office prepared an initial Presentence Investigation Report (PSR, R. 166, PageID# 1945-1974) and then a Revised Presentence Investigation Report (PSR) after considering submissions by the parties (PSR, R. 174, PageID# 2041-2070).

For Count 1, involving Bean's assault on F.M., the Probation Office relied on Sentencing Guidelines § 2H1.1(a)(1) to calculate a base offense level of 14, based on the underlying offense of aggravated assault in Sentencing Guidelines § 2A2.2(a). (PSR, R. 174, PageID# 2055-2056). The PSR added five levels for Bean's infliction of serious bodily injury, under Sentencing Guidelines § 2A2.2(b)(3)(B). (PSR, R. 174, PageID# 2055-2056). The PSR added six levels under Sentencing Guidelines § 2H1.1(b)(1) because Bean was a public official at the time of the offense, arriving at an adjusted offense level of 25. (PSR, R. 174, PageID# 2056). Grouping the multiple offenses under Sentencing Guidelines

§ 3D1.4, the PSR added 1 level and calculated a total offense level of 26. (PSR, R. 174, PageID# 2057). Based on that offense level and with Bean's criminal history falling within Category I, the PSR calculated an advisory guidelines imprisonment range of 63 to 78 months. (PSR, R. 174, PageID# 2064).

Bean objected to the five-level upward adjustment for serious bodily injury, contending that "it is impossible to determine whether the force used by [Bean] caused serious bodily injury." (Objections, R. 168, PageID# 1980). The Probation Office rejected that objection, finding that "[w]hile [F.M.] may have been injured in the wreck, Mr. Bean punching him in the face four to five times likely furthered any injuries he might have had, causing him to be transferred to a hospital with neurological support for monitoring." (Addendum to the PSR, R. 173, PageID# 2039).

At sentencing, the district court considered and rejected Bean's renewed objection to the serious-bodily-injury upward adjustment. (Tr., R. 190, PageID# 2318-2344). The court explained that "Bean hit [F.M.] hard enough to fracture his hand" and that the court "does not hesitate to find that a blow or blows of such force were likely to have caused serious bodily injury, in other words, bodily injury that resulted in [F.M.]'s hospitalization, as contemplated in Section 1B1.1(M) of the guidelines." (Tr., R. 190, PageID# 2344).

The district court adopted the PSR's guidelines calculations. (Tr., R. 190, PageID# 2345). The court declined to vary downward from the guidelines range and imposed a within-guidelines sentence of 72 months' imprisonment on each of the three counts, to run concurrently; two years of supervised release; and 150 hours of community service. (Tr., R. 190, PageID# 2397-2398).

SUMMARY OF ARGUMENT

This Court should affirm Bean's convictions on Counts 1, 4, and 5 for depriving arrestees F.M. and C.G. of their Fourth Amendment rights to be free from the use of unreasonable force by a law enforcement officer. Bean's challenges to various evidentiary rulings and the sufficiency of the evidence supporting his convictions lack merit.

1. The district court did not commit plain error in admitting C.G.'s testimony at trial. Bean did not object contemporaneously to C.G.'s testimony but nevertheless argues that it constituted inadmissible hearsay because C.G. supposedly relied on out-of-court statements made by his then-girlfriend to recall details of Bean's assault against him. Not so. C.G. admitted at trial that, even though he did not recall everything, he did remember Bean punching him in the face while he was handcuffed. Thus, the court did not commit plain error. Moreover, admission of that evidence did not affect Bean's substantial rights, as overwhelming, independent evidence supports the finding that Bean, on two

occasions, punched C.G. with a closed fist, even though C.G. was handcuffed and posed no threat.

2. The district court also did not commit error, plain or otherwise, in refusing to admit the video recordings of F.M. at trial. Bean argues that the Sweeton Recording and the Custodial Interrogation Recording are admissible as extrinsic evidence of prior inconsistent statements under Rule 613(b) or as recorded recollections under Rule 803(5). But F.M., who was called as a witness by Bean, made no inconsistent statement at trial that could be impeached under Rule 613(b) with these recordings. F.M. testified at trial that he did not remember who hit him or anything that was said during the two recordings. And, as for Rule 803(5), the recordings are inadmissible as recorded recollections because F.M. did not attest that the recordings were made at a time when the matter was fresh in F.M.'s mind and that his statements were accurate when made; moreover, the recordings lack the required indicia of trustworthiness. Regardless, even if the district court erred in refusing to admit the recordings, that error did not affect Bean's substantial rights and was harmless. The court made clear in a subsequent order that the recordings, regardless of admissibility, had no impact on the court's determination of Bean's guilt.

3. Sufficient evidence established that Bean's assault on F.M. (Count 1) resulted in bodily injury to F.M. under 18 U.S.C. 242. "Bodily injury" under

Section 242 includes any pain or physical injury. The evidence at trial established that Bean punched F.M. four or five times in the face with a closed fist. As a result, F.M. made "impaired sounds" and began to "roll around." Officers witnessed F.M. complaining about his eye, which was swollen and bloody. And F.M. suffered from a large hematoma—a blood clot underneath his skin. Bean hit F.M. so hard that he suffered a "boxer's fracture," which normally results from hitting people or objects with a closed fist. A rational trier of fact could readily find that Bean's closed-fist punches to F.M.'s face resulted in pain or physical injury.

4. The evidence at trial also was sufficient to prove that, on two separate occasions, Bean used objectively unreasonable force against C.G. in violation of his rights under 18 U.S.C. 242 (Counts 4 and 5). Witness testimony established that, first, Bean walked up to C.G., while C.G. had his hands cuffed behind his back and posed no threat, and punched C.G. in the face in response to C.G.'s derogatory statement about Bean's wife; and second, that once C.G. was seated, handcuffed and compliant in Officer Kilgore's patrol car, Bean punched C.G. in the face again through the car's open window. The district court thus properly found that Bean, at two separate times, applied unreasonable force against C.G. under 18 U.S.C. 242.

ARGUMENT

I

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN ADMITTING C.G.'S TESTIMONY

A. Standard Of Review

This Court generally reviews evidentiary rulings for an abuse of discretion. *United States* v. *Schreane*, 331 F.3d 548, 564 (6th Cir.), cert. denied, 540 U.S 973 (2003). And it "reviews *de novo* the district court's conclusion that th[e] proffered evidence was not inadmissible hearsay." *United States* v. *Laster*, 258 F.3d 525, 529 (6th Cir. 2001), cert. denied, 534 U.S. 1151 (2002). But when a party fails to object contemporaneously to the evidence at trial, then this Court reviews the admissibility of hearsay statements for plain error. *United States* v. *Ford*, 761 F.3d 641, 652-653 (6th Cir.), cert. denied, 574 U.S. 1054 (2014); *United States* v. *Chambers*, 441 F.3d 438, 455 (6th Cir. 2006); see also Fed. R. Crim. P. 52(b).

Here, Bean did not object to C.G.'s testimony at trial as based on hearsay. (See Tr., R. 144, PageID# 993-1042). Instead, Bean cites his closing argument at trial, where his counsel mentioned that if the cases had been tried before a jury, he "would have asked the jury to not consider -- to strike all -- everything with my last question with [C.G.], because [C.G.'s] recollection of what led up to the assault came through his conversations with his girlfriend, which is unreliable and cannot be considered, it's not a personal basis." (Tr., R. 145, PageID# 1468); see

Br. 27. That does not suffice. "[A] defendant must *contemporaneously* object to the *introduction* of evidence or forfeit his or her claim." *Ford*, 761 F.3d at 653 (emphasis added); see also *Puckett* v. *United States*, 556 U.S. 129, 134 (2009) (explaining that the contemporaneous-objection rule "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them"). Because Bean did not object to C.G.'s testimony when it was given, the district court's admission of C.G.'s testimony may be reviewed only for plain error. *Ford*, 761 F.3d at 653.

On plain-error review, Bean bears the heavy burden of showing: "(1) error, (2) that is plain, and (3) that affects substantial rights." *United States* v. *Arnold*, 486 F.3d 177, 194 (6th Cir. 2007) (en banc) (quoting *United States* v. *Cotton*, 535 U.S. 625 (2002)), cert. denied, 552 U.S. 1103 (2008). An error is plain if it is "clear or obvious," and it affects "substantial rights" only if it "affect[s] the outcome of the district court proceedings." *Puckett*, 556 U.S. at 135 (citation omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if [ ] the error seriously affected the fairness, integrity or public reputation of the judicial proceedings." *United States* v. *Collins*, 799 F.3d 554, 576 (6th Cir.) (alteration in original; citation omitted), cert. denied, 577 U.S. 1037 (2015). In other words, Bean must show "'a reasonable probability that, but for the error,' the outcome of the proceeding would

have been different." *Molina-Martinez* v. *United States*, 578 U.S. 189, 194 (2016) (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 76, 82-83 (2004)).

B. C.G.'s Testimony Was Not Inadmissible Hearsay And, In Any Event, Its Admission Did Not Affect Bean's Substantial Rights

Bean asserts that because C.G.'s recollection of the events was hazy due to his intoxication, he must have based his testimony on what his then-girlfriend Stacey Jones—a passenger in the car—told him after the fact. Br. 29. In other words, Bean argues that C.G.'s testimony was actually based on Jones's out-of-court statements offered for the truth of the matter asserted—that Bean assaulted C.G.—and therefore was inadmissible hearsay. Not so.

C.G.'s testimony that Bean assaulted him was not hearsay; thus, the district court was right to reject this argument in Bean's motion for a new trial. (Order, R. 163, PageID# 1931). In fact, even though C.G. admitted at trial that he did not remember everything, he testified specifically that he did remember Bean punching him in the face while he was handcuffed. (See Tr., R. 144, PageID# 1001-1002, 1039). C.G. also testified that he was certain that he did not run toward Bean before he was punched. (Tr., R. 144, PageID# 1036-1037).

Thus, the unpublished cases on which Bean relies (Br. 28), where a witness has absolutely no memory of an event, do not apply. See *Wysong* v. *City of Heath*, 260 F. App'x 848, 850-851 (6th Cir. 2008) (affirming summary judgment where facts were undisputed because plaintiff "had *no conscious memory* of what

happened and *could not affirm or deny any of his actions while on the ground*"); *Woods* v. *Jefferson Cnty. Fiscal Ct.*, No. 3:01CV-210, 2003 WL 145213, at *5 (W.D. Ky. Jan. 8, 2003) (determining that a witness having "no memory of events" precluded consideration of that witness's testimony); see also *Perrien* v. *Towles*, No. 1:05CV928, 2006 WL 1515663, at *2-8 (N.D. Ohio May 30, 2006) (granting summary judgment in favor of defendants based on independent evidence, separate from plaintiff's inability to recall the incident at issue). The district court did not err—much less plainly err—in admitting C.G.'s testimony.

Even if the district court had plainly erred, the error did not affect Bean's substantial rights. Contrary to Bean's suggestion (Br. 29), the outcome of this case would have been the same. See *Molina-Martinez*, 578 U.S. at 194. The court emphasized that it took C.G.'s "admission that he did not remember all of the details of his arrest due to his intoxication into consideration in assessing his credibility and evaluating his testimony." (Order, R. 163, PageID# 1931-1932). Moreover, the evidence—which included the testimony of three law enforcement officers who saw Bean punch C.G. and a fourth officer who saw injuries consistent with closed-fist punches—was overwhelming that Bean, on two occasions, punched C.G. with a closed fist, even though C.G. was handcuffed and posed no threat. See *United States* v. *Young*, 470 U.S. 1, 19-20 (1985) (finding that the prosecutor's erroneous statements at trial, to which no contemporaneous objections

were made, were not unfairly prejudicial, where there was "overwhelming evidence" of defendant's guilt); see pp. 47-52, *infra*.

II

THE DISTRICT COURT DID NOT COMMIT ERROR, PLAIN OR OTHERWISE, IN REFUSING TO ADMIT AT TRIAL THE OUT-OF COURT VIDEO RECORDINGS OF F.M.

A. Standard Of Review

"In reviewing a trial court's evidentiary determinations, this court reviews de novo the court's conclusions of law, e.g., the decision that certain evidence constitutes hearsay, and reviews for clear error the court's factual determinations that underpin its legal conclusions." *United States* v. *Reed*, 167 F.3d 984, 987 (6th Cir.) (citing *United States* v. *Branham*, 97 F.3d 835, 851 (6th Cir. 1996), and *United States* v. *Clark*, 18 F.3d 1337, 1341 (6th Cir.), cert. denied, 513 U.S. 852 (1994)), cert. denied, 528 U.S. 297 (1999). But when a party fails to offer a specific argument for admitting evidence before the district court and then raises that argument on appeal, then this Court "reviews th[at] contention under a plain error standard." *Id.* at 988-989; *United States* v. *Evans*, 883 F.2d 496, 499 (6th Cir. 1989) ("The 'plain error' rule also applies to a case, such as this, in which a party objects to [an evidentiary determination] on specific grounds in the trial court, but on appeal the party asserts new grounds challenging [that determination].").

On appeal, Bean challenges the district court's failure to admit the Sweeton Recording and the Custodial Interrogation Recording under Federal Rules of Evidence 613(b) ("Extrinsic Evidence of a Prior Inconsistent Statement[s]") or 803(5) ("Recorded Recollection"). Br. 29-33. The standard of review depends on the basis for admissibility.

First, the plain-error standard applies to the admissibility of both recordings under Rule 613(b). At trial, Bean did not cite Rule 613(b) as a basis for admitting either recording; nor did he attempt to impeach F.M. with inconsistent statements from those recordings. (See Tr., R. 145, PageID# 1520-1540).

Second, this Court should review the district court's legal determinations as to the two recordings' admissibility under Rule 803(5) de novo and the factual findings underpinning those determinations for clear error. *Reed*, 167 F.3d at 987. Bean's counsel did not offer either recording under Rule 803(5). Counsel for T.J. Bean, however, cited Rule 803(5) as a basis for admitting the recordings, even though he maintained that the statements "are of little if any material value to defendant T.J. Bean." (Post-trial Brief, R. 148, PageID# 1719-1720; see also Tr., R. 145, PageID# 1526-1528). This Court has held that one defendant may preserve an argument for another. See *United States* v. *Baker*, 458 F.3d 513, 517-518 (6th Cir. 2006).

The standard for plain-error review is described above. See pp. 26-28, *supra*. Separately, even if this Court rules that the district court erred in refusing to admit the Sweeton Recording or the Custodial Interrogation Recording under Rule 803(5), that error is reviewed for harmlessness. Fed. R. Crim. P. 52(a); *United States* v. *LaVictor*, 848 F.3d 428, 448 (6th Cir.), cert. denied, 137 S. Ct. 2231 (2017). Similar to the third prong of plain-error review, an error is harmless "if the record evidence of guilt is overwhelming, eliminating any fair assurance that the conviction was substantially swayed by the error." *United States* v. *Mack*, 729 F.3d 594, 603 (6th Cir. 2013) (citation omitted), cert. denied, 571 U.S. 1223 (2014).

B. The Recordings Of F.M. Were Inadmissible Hearsay And, In Any Event, Any Error Did Not Affect Bean's Substantial Rights And Was Harmless

Bean challenges the district court's refusal to admit the Sweeton Recording and the Custodial Interrogation Recording. The Sweeton Recording captured a conversation between F.M. and GCSO Corrections Officer Sweeton that took place at the Grundy County jail on August 22, 2019, more than a year and a half after Bean assaulted F.M. (Tr., R. 145, PageID# 1482). The Custodial Interrogation Recording captured a conversation between F.M. and Bean that took place on August 10, 2018, almost nine months after the incident, in an interrogation room at the Grundy County jail while F.M. was in Bean's custody. (Brief, R. 147, PageID# 1703; Tr., R. 145, PageID# 1535; Tr., R. 146, PageID# 1597-1598).

Bean challenges the district court's refusal to admit these recordings for the substance contained therein—F.M.'s alleged statements that Bean had done nothing wrong to F.M. Br. 30-33. Because both recordings contain F.M.'s out-of-court statements offered for the truth of the matter asserted, they are hearsay. See Fed. R. Evid. 801(c)(2). Bean nevertheless argues that the recordings are admissible as prior inconsistent statements to impeach F.M. under Rule 613(b) or as an exception to hearsay as a recorded recollection under Rule 803(5). Neither rule applies.

1. The Recordings Were Not Prior Inconsistent Statements Under Rule 613(b)

Bean cannot show that the district court plainly erred when it did not admit the two recordings as prior inconsistent statements under Rule 613(b). Rule 613(b) provides that "[e]xtrinsic evidence of a witness's prior inconsistent statement[s] is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." Fed. R. Evid. 613(b). The recordings are inadmissible under Rule 613(b) for two principal reasons.

First, F.M., called as a witness by Bean, testified at trial that because of a stroke and several heart attacks, he did not remember much, including who had hit him. (Tr., R. 145, PageID# 1497, 1519, 1542). Thus, Bean has shown no inconsistency between F.M.'s testimony at trial and any statements he allegedly

made in the recordings. See *United States* v. *Hale*, 422 U.S. 171, 176 (1975) (emphasizing that to use prior inconsistent statements to impeach the credibility of a witness, "the court must be persuaded that the statements are indeed inconsistent"); *United States* v. *Hoffman*, 62 F.3d 1418, at *2 (6th Cir. 1995) (Tbl) ("In order for a statement to fall within the scope of Rule 613(b), the statement must in fact be inconsistent.").

Second, Bean did not recall the recorded conversations he had with Bean and Sweeton. (See Tr., R. 145, PageID# 1497-1498). Bean's counsel specifically asked F.M. whether he previously made the statement "Bean has not done anything to me." (Tr., R. 145, PageID# 1503). But F.M. could not explain or deny that statement because, as he mentioned repeatedly, he did not remember making it. (Tr., R. 145, PageID# 1503-1505). F.M. could not remember or further explain or deny the statement even after the district court allowed Bean to play portions of the Custodial Interrogation Recording in an attempt to refresh F.M.'s recollection. (Tr., R. 145, PageID# 1533-1540).

F.M.'s inability to explain or deny the statements in the recordings preclude their admissibility as prior inconsistent statements under Rule 613(b). See *United States* v. *Davis*, No. 93-5984, 1994 WL 362061, at *3 (6th Cir. July 12) (recognizing that proof of a prior inconsistent statement may be elicited by extrinsic evidence only if the witness denies having made the statement), cert.

denied, 512 U.S. 1008 (1994); see also *United States* v. *Soundingsides*, 820 F.2d 1232, 1240 (10th Cir. 1987) ("Where the witness does not deny making a prior inconsistent statement, there is clearly no rationale for the introduction of a prior 'inconsistent' statement.") (internal quotation marks omitted) (quoting *United States* v. *Balliviero*, 708 F.2d 934, 939-940 (5th Cir.), cert. denied, 464 U.S. 939 (1983)). Bean nevertheless cites this statement from F.M. at trial: "I just know I tried to outrun the law, they drug me out of the car, and that's the last thing I remember, I got kicked in the head and everything." Br. 30 (quoting Tr., R. 145, PageID# 1517). But Bean fails to explain how the recordings are inconsistent with that statement and thus could be used to impeach F.M. And, again, F.M. could neither explain nor deny his statements in the recordings given his inability to remember them.

Thus, the district court did not plainly err in not admitting the recordings under Rule 613(b).

2. The Recordings Were Inadmissible As Recorded Recollections Under Rule 803(5)

Bean's arguments that the recordings were admissible as recorded recollections under Rule 803(5) fare no better. Rule 803(5) provides a hearsay exception for a record that "(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge." Fed. R. Evid. 803(5); see also *United States* v. *Porter*, 986 F.2d 1014, 1016-1017 (6th Cir.), cert. denied, 510 U.S. 933 (1993). "The touchstone for admission of evidence as an exception to the hearsay rule has been the existence of circumstances which attest to its trustworthiness." *Id.* at 1017 (quoting *United States* v. *Williams*, 571 F.2d 344, 349 (6th Cir.), cert. denied, 439 U.S. 841 (1978)). Accordingly, this Court has held that district courts must find "sufficient indicia of trustworthiness to admit portions" of a statement as a past recollection recorded. *Ibid.*

The recordings are inadmissible under Rule 803(5) because F.M. did not attest that they were made at a time when the matter was fresh in his mind and that they were accurate when made. Importantly, the statements also lack the required indicia of trustworthiness.

a. First, the recordings are inadmissible under Rule 803(5) because they were not made at a time when the matter was fresh in F.M.'s memory. See Fed. R. Evid. 803(5)(B). The Custodial Interrogation Recording took place on August 10, 2018, almost *nine months* after the incident where Bean assaulted F.M. (See Brief, R. 147, PageID# 1703). And the Sweeton Recording took place more than *one year* after that, on August 22, 2019. (Tr., R. 145, PageID# 1482).

This Court has generally found a statement admissible as a recorded recollection only where the witness testified that at the time of the recording the

events were fresh in his mind and that it was a true and accurate statement at the time. See, *e.g.*, *Williams*, 571 F.2d at 348 (finding a statement made six months after an incident to be fresh because the witness "testified unequivocally that his conversations * * * were fresh in his mind at the time he signed the statement and that it was a true and accurate statement at the time"); *United States* v. *Smith*, 197 F.3d 225, 231 (6th Cir. 1999) (affirming a district court's admission of a statement made 15 months after the events described as a past recollection recorded where the witness testified "that she intended to give a truthful and careful statement to [the detective]" at the time of the statement and testified "that she did not and would not have lied"); see also *United States* v. *Lewis*, 954 F.2d 1386, 1394 (7th Cir. 1992) (affirming admission of a past recollection recorded where the witness testified that "the matter was 'fresher' in his mind at the interview than at trial" and that he told the truth in the past statement) (citation omitted).

Here, Bean laid no foundation for admitting either recording as a recorded recollection. There is thus no sufficient basis for concluding either that F.M. had knowledge about the matters he discussed at the time of the recordings or that the recordings reflected F.M.'s knowledge correctly.

b. In addition, neither the Custodial Interrogation Recording nor Sweeton Recording are trustworthy. Quite the contrary: as the district court pointed out at

trial, the circumstances surrounding the recordings provide several indicia of *untrustworthiness*. (See Tr., R. 145, PageID# 1480, 1484, 1522-1525). During both recordings, F.M. was being held at the Grundy County Jail and the GCSO was responsible for his basic needs, including feeding him, making sure he could use the bathroom, and protecting him from other inmates. (Tr., R. 145, PageID# 1480, 1525-1526). F.M.'s statements captured in the Custodial Interrogation Recording, in particular, were given in a strikingly coercive environment. Specifically, the recording was taken while Bean, the very individual who assaulted F.M., interrogated F.M. in a jail interrogation room. (Tr., R. 145, PageID# 1535). As the court rhetorically asked in probing whether the recording was trustworthy—"Does anybody on earth have more leverage over [F.M.] than the sheriff's department and Tony Bean in those circumstances?" (Tr., R. 145, PageID# 1526); cf. *United States* v. *Brown*, 557 F.2d 541, 548 (6th Cir. 1977) (analyzing voluntariness of a confession and considering as a factor the fact that one of the interrogating officers struck the defendant).

Finally, the overwhelming, independent evidence of Bean's assault on F.M. further undermines the trustworthiness of any custodial recordings that suggest otherwise.[4]

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[4] Bean nevertheless argues that F.M.'s statements in the recordings were corroborated by yet a third statement when Bean's investigators interviewed F.M.

3. *Any Error, Plain Or Otherwise, In Refusing To Admit The Recordings Did Not Affect Bean's Substantial Rights Or Was Harmless*

The Sweeton Recording and Custodial Interrogation Recording were not admissible at trial under either Rule 613(b) or Rule 803(5). But even if the district court plainly erred in refusing to admit either recording under Rule 613(b), that decision did not affect Bean's substantial rights or "affect[] the outcome of the district court proceedings"—for purposes of plain-error review. See *Puckett*, 556 U.S. at 135 (citation omitted). Nor did any error in refusing to admit either recording under Rule 803(5) "substantially sway[]" his conviction. *Mack*, 729 F.3d at 603 (citation omitted). The district court heard parts of the Custodial Interrogation Recording, which it found "for the most part, bordered on inaudible." (Order, R. 151, PageID# 1793). And the court made clear that, "the recording, regardless of its admissibility, has no impact on the Court's decision as to whether * * * Bean [is] guilty of the crimes charged." (Order, R. 151, PageID# 1793-1794).

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while he was not under GCSO control. Br. 33 (citing Motion, R. 156, PageID# 1851). Thus, Bean contends, the transcript of this third statement provides "significant circumstantial guarantees of trustworthiness and should have been admitted." Br. 33. But Bean did not offer this transcript at trial. And even if he had, the same reasons that the video recordings are inadmissible under Rule 613(b) and 803(5) would apply here. Specifically, there is no reason to believe that F.M.'s additional statement to Bean's investigators is any more trustworthy than the prior recordings when it was taken while F.M. was incarcerated and by investigators who made clear to F.M. that they were retained by Bean, the Chief Deputy who beat him. (See Response, R. 157, PageID# 1878-1879).

Accordingly, given the overwhelming evidence that Bean assaulted F.M., any error by the district court in failing to admit either recording under Rules 613(b) or 803(5), did not affect Bean's substantial rights and was harmless. *Puckett*, 556 U.S. at 135; *Mack*, 729 F.3d at 603.

III

SUFFICIENT EVIDENCE ESTABLISHES THAT BEAN'S ASSAULT ON F.M. RESULTED IN BODILY INJURY TO F.M. UNDER 18 U.S.C. 242 (COUNT 1)

A. Standard Of Review

This Court reviews *de novo* "a district court's denial of a motion for judgment of acquittal based on the sufficiency of the evidence." *United States* v. *Callahan*, 801 F.3d 606, 616 (6th Cir. 2015), cert. denied, 577 U.S. 1227 (2016). The Court must "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." *Ibid.* (citation and internal quotation marks omitted). "[C]ircumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt." *United States* v. *Peters*, 15 F.3d 540, 544 (6th Cir.) (internal quotation marks omitted) (quoting *United States* v. *Ellzey*, 874 F.2d 324, 328 (6th Cir. 1989)), cert. denied, 513 U.S. 883 (1994). This Court also does not "reweigh the evidence, reevaluate the credibility of witnesses, or substitute [its]

judgment for that of the jury," and a defendant claiming insufficient evidence thus bears "a very heavy burden." *Callahan*, 801 F.3d at 616 (citation omitted).

B. Sufficient Evidence Supports A Finding That Bean's Assault On F.M. Resulted In Bodily Injury

Bean argues that the record fails to establish that F.M. suffered bodily injury because of Bean's actions. Br. 34-35. His argument is wanting.

1. Under Section 242, any person who, under color of law, willfully deprives a person of constitutional rights may be incarcerated for up to one year. 18 U.S.C. 242. If "bodily injury results" from the violation, the defendant may be incarcerated for up to ten years. *Ibid.* "Bodily injury" is not defined under 18 U.S.C. 242, but four other provisions of Title 18 contain nearly identical definitions of the phrase for purposes of other criminal prohibitions. See 18 U.S.C. 831(g)(5), 1365(h)(4), 1515(a)(5), 1864(d)(2); see also *United States* v. *Wilson*, 344 F. App'x 134, 142 (6th Cir. 2009) (recognizing that several circuits have defined "bodily injury" under 18 U.S.C. 242 identically to the other provisions of Title 18 and citing *United States* v. *Gonzales*, 436 F.3d 560, 575 (5th Cir.), cert. denied, 547 U.S. 1139, 547 U.S. 1180, and 549 U.S. 823 (2006); *United States* v. *Bailey*, 405 F.3d 102, 111 (1st Cir. 2005); *United States* v. *Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), cert. denied, 507 U.S. 1017 (1993)). These statutes define "bodily injury" to mean "a cut, abrasion, bruise, burn, or disfigurement"; "physical pain"; "illness"; "impairment of a function of a bodily member, organ, or mental

faculty"; or "any other injury to the body, no matter how temporary." *E.g.*, 18 U.S.C. 831(g)(5).

The evidence at trial, viewed in the light most favorable to the government, amply established that F.M. "suffered physical injury *or* physical pain, both of which qualify as 'bodily injury' for purposes of § 242." *Wilson*, 344 F. App'x at 142. As Deputy Jacob Kilgore testified and the district court credited, Bean punched F.M. four or five times in the face with a closed fist, while F.M. was lying face down on the ground. (Order, R. 163, PageID# 1926-1927; Tr., R. 145, PageID# 1277-1279, 1294, 1297, 1304). Kilgore attested that F.M. made "impaired sounds" as Bean punched him and F.M. began to "roll around" thereafter. (Tr., R. 145, PageID# 1278-1280). Corroborating Kilgore's testimony, F.M. testified that, although he was not certain which law enforcement officers beat him, he did believe that Grundy County participated in the assault and that he experienced pain as a result of the force used. (Tr., R. 145, PageID# 1519, 1542).

Other witnesses, as the district court explained, saw first-hand F.M.'s injuries as a result of Bean's assault. (Order, R. 163, PageID# 1927). Deputy Strope testified that, while with F.M. in the ambulance on the way to the hospital, he noticed F.M. complaining about the "left side of his eye," which was "swollen up" and "had blood coming down through." (Tr., R. 144, PageID# 1105). Deputy Tinsley attested that, at the hospital, he noticed that F.M.'s face was "extremely

swollen, * * * black and purple, had bruising all over, and his eyes were swollen shut." (Tr., R. 144, PageID# 1154). And Dr. Stafford, F.M.'s treating physician, testified that F.M. complained of pain and suffered from a large hematoma—a blood clot underneath the skin—on one side of the face. (Tr., R. 145, PageID# 1353-1356). He further stated that, as a result, he transferred F.M. to another hospital once he and another physician determined that a hospital with a neurology practice should care for F.M. in the event he developed brain bleeding or other problems. (Tr., R. 145, PageID# 1355-1356).

All these witnesses saw first-hand F.M. with physical injuries and acting in a way that demonstrated he was in pain. Indeed, this Court can readily conclude, based on the testimony that Bean repeatedly punched F.M. in the head with a closed fist, that, at the very least, Bean's assault caused F.M. physical pain. See, *e.g.*, *United States* v. *Coughlin*, 609 F. App'x 659, 660-661 (1st Cir. 2015) (holding that a jury that heard evidence that an officer-defendant "hit the victim * * * could infer that the recipient of such blows suffers at least some temporary physical pain" sufficient to satisfy the bodily injury element of 18 U.S.C. 242).

Not only did the evidence directly establish F.M.'s bodily injury, but Bean hit F.M. so hard that he broke his *own* hand. Dr. Stafford attested that he treated Bean on the night of F.M.'s arrest for a fracture of the fifth metacarpal bone in his right hand, which is the bone attached to the pinky finger. (Tr., R. 145, PageID#

1350-1352). Dr. Stafford further testified that this injury is commonly known as a "boxer's fracture" because it often results from hitting other people or objects with a closed fist. (Tr., R. 145, PageID# 1353). That Bean suffered this fracture from punching F.M. was further corroborated by testimony from POST Commission Assistant Director Mines that Bean admitted in 2018 (after F.M.'s arrest) that he injured his hand having to "fight [a] guy" after a vehicle pursuit. (Tr., R. 145, PageID# 1444-1445, 1450). Bean's injury to his own hand only adds to the overwhelming evidence that F.M. experienced physical injury and pain, thereby establishing the "bodily injury" element of 18 U.S.C. 242.

2. Bean nevertheless urges this Court to reweigh the evidence and reevaluate the witnesses' credibility. Br. 33-37. His primary argument in challenging the bodily-injury element is that the evidence at trial shows that *other* events caused F.M.'s and Bean's injuries. The argument has no merit.

Bean first argues that his medical records show that he made statements to medical personnel that "he broke his hand because he tried to punch the window to break it to get out of his truck" during the accident. Br. 36 (citing Tr., R. 145, PageID# 1359-1360). But as Bean correctly points out, although his counsel asked Dr. Stafford about Bean's medical records, the records were not admitted into evidence. Br. 36. (See Tr., R. 145, PageID# 1358-1360). Nor could Bean's self-serving, out-of-court statement have been admitted under any hearsay exception.

See Fed. R. Evid. 801(d)(2); *Stalbosky* v. *Belew*, 205 F.3d 890, 894 (6th Cir. 2000) (finding "a party's statement is admissible as non-hearsay only if it is offered against that party"); *United States* v. *Ortega*, 203 F.3d 675, 682 (9th Cir. 2000) ("The self-inculpatory statements, when offered by the government, are admissions by a party-opponent and therefore not hearsay, but the non-self-inculpatory statements are inadmissible hearsay.") (citation omitted). And even Bean's own witness, Deputy Wildes, testified that he did not see Bean trapped in his vehicle. (Tr., R. 146, PageID# 1569).

Bean nevertheless contends that the car crash or Deputy Henegar's use of force could have caused F.M.'s injuries. Br. 37. But the government need not prove that Bean's use of force was the sole cause of F.M.'s injuries; all that is required is that there is sufficient evidence—which there is—that Bean's use of force resulted in bodily injury, which includes physical pain. See *Wilson*, 344 F. App'x at 144; *United States* v. *Boen*, 59 F.4th 983, 995 (8th Cir. 2023) (affirming 18 U.S.C. 242 conviction even where victim's injuries may also have been attributable to an earlier altercation, because "ample evidence" supported a finding that defendant's multiple strikes caused physical pain); *United States* v. *Harris*, 293 F.3d 863, 870-871 & n.6 (5th Cir.) (finding "evidence was clearly sufficient to show bodily injury" even where "trial testimony [gave] equal or nearly equal circumstantial support to the theory that [the victim's] head laceration and

hematoma was caused by [victim's] banging his head against surfaces in the car"), cert. denied, 537 U.S. 950 (2002); see also pp. 41-44, *supra*. Thus, the evidence presented at trial was sufficient to support the district court's finding that Bean's use of force against F.M. resulted in bodily injury.

3. Bean also challenges in passing the district court's determination that F.M. suffered "serious bodily injury" for "sentencing purposes." Br. 34. Other than this one reference, Bean does not mention sentencing again. Bean thus waives any challenge to his sentence (including to the calculation of his adjusted offense level). *United States* v. *Phinazee*, 515 F.3d 511, 520 (6th Cir.) (explaining that "issues adverted to on appeal in a perfunctory manner unaccompanied by some effort at developed argument are deemed waived") (citation and internal quotation marks omitted), cert. denied, 555 U.S. 1038 (2008); *United States* v. *Layne*, 192 F.3d 556, 566-567 (6th Cir. 1999) (same), cert. denied, 529 U.S. 1029 (2000); see also, *e.g.*, *United States* v. *Mick*, 263 F.3d 553, 567 (6th Cir. 2001) (deeming the defendant's constitutional challenge waived because it was summarily raised without any accompanying argument).

But even if this Court reviews Bean's sentence, it should affirm. The district court properly found at sentencing that Bean inflicted serious bodily injury on F.M., warranting application of a five-level upward adjustment to Bean's base offense level for Count 1. As the court explained, "Bean hit [F.M.] hard enough to

fracture his hand" and "it does not hesitate to find that a blow or blows of such force were likely to have caused serious bodily injury, in other words, bodily injury that resulted in [F.M.]'s hospitalization, as contemplated in Section 1B1.1(M) of the guidelines." (Tr., R. 190, PageID# 2344).[5]

IV

SUFFICIENT EVIDENCE ESTABLISHES THAT BEAN USED OBJECTIVELY UNREASONABLE FORCE AGAINST C.G. UNDER 18 U.S.C. 242 (COUNTS 4 AND 5)

A. Standard Of Review

The applicable standard of review for a sufficiency-of-the-evidence challenge is provided above. See pp. 40-41, *supra*.

B. Sufficient Evidence Supports A Finding That Bean Used Objectively Unreasonable Force Against C.G. In Violation of C.G.'s Rights

Bean argues that his use of force against C.G.—what he calls "a single punch on two occasions by an unarmed officer, based off instinctive reactions"—was objectively reasonable in light of the totality of the circumstances. Br. 41. The record proves otherwise.

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[5] Section 1B1.1's Application Notes define "[s]erious bodily injury," in relevant part, as "injury involving extreme physical pain or the protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation." Sentencing Guidelines § 1B1.1, comment. (n.1(M)).

1. The Fourth Amendment of the Constitution protects the right of individuals to be free from the use of unreasonable force during an arrest, even when the arrest is otherwise reasonable. *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). An officer's use of force violates "the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001). Unreasonable force is thus physical force that exceeds the objective need for such force. See *Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985).

The Fourth Amendment's "test of reasonableness * * * requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 394, 396-397 (citation omitted). Relevant here, force against a handcuffed or compliant arrestee who poses little to no threat and is not trying to flee is unreasonable. See, *e.g.*, *Burgess* v. *Fischer*, 735 F.3d 462, 470, 474-475 (6th Cir. 2013) (emphasizing that "there is no need for any force when a detainee is handcuffed, non-threatening, and not trying to flee" and finding that officers used excessive force in response to pretrial detainee who made offensive comments) (citing *McDowell* v. *Rogers*, 863 F.2d 1302, 1307 (6th Cir. 1988)). And "the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law." *Baker* v. *City of*

Hamilton, 471 F.3d 601, 607 (6th Cir. 2006); see also *Morrison* v. *Board of Trs. of Green Twp.*, 583 F.3d 394, 404-405 (6th Cir. 2009).

Law enforcement officers also cannot use force solely to punish. See, *e.g.*, *Baker*, 471 F.3d at 607 (6th Cir. 2006) (recognizing that the officer's statement to the victim—"that's for running from me"—was evidence that the officer's use of force was unreasonable because it demonstrated that "the purpose of th[e] hit was not to subdue [the victim], but rather to punish him"). And they cannot use force in response to only verbal provocation. *Kennedy* v. *City of Villa Hills*, 635 F.3d 210, 216 (6th Cir. 2011) ("[T]he First Amendment requires that police officers tolerate coarse criticism."); *Pigram ex rel. Pigram* v. *Chaudoin*, 199 F. App'x 509, 513-514 (6th Cir. 2006) (holding officer's slap of handcuffed victim, because the victim had a "smart-ass mouth," served no law enforcement objective and thus was unreasonable under the Fourth Amendment). In fact, Tennessee Law Enforcement Training Academy trainer Travis Robinson testified specifically that officers are trained that they may not use force because they are angry, an arrestee called them a name, or they want to punish the arrestee. (Tr., R. 145, PageID# 1226, 1231-1232).

Ample evidence in the record supports the district court's finding that Bean willfully, and under color of law, deprived C.G. of his constitutional rights by using objectively unreasonable force against C.G. on two occasions, as charged in

Counts 4 and 5. The first occurred before officers placed C.G. in the back of the police vehicle. Ranger Greer testified that, while C.G. was standing "handcuffed with his hands behind his back," Bean "walked up" to C.G. and threw "a punch" at him after C.G. said something "derogatory" about Bean's wife, knocking C.G. to the ground. (Tr., R. 144, PageID# 943-944, 964-965). Greer further testified that Bean neither issued commands nor asked for help before punching C.G. (Tr., R. 144, PageID# 944). And he also attested that C.G., who was unarmed, did not try to attack, move towards, or flee from Bean, nor did C.G. pose a significant threat to anyone at the scene or provide any reason for Bean to punch C.G. (Tr., R. 144, PageID# 945-946, 963-964, 969).

C.G. corroborated Greer's testimony by attesting that, during his arrest, while standing next to a patrol car with his hands cuffed "[b]ehind [his] back," Bean hit him with "[a] closed fist" in the chin, even though C.G. had not moved toward Bean or acted "aggressive" toward him. (Tr., R. 144, PageID# 1000-1003, 1011). Thus, as the district court found in denying Bean's motion for judgment of acquittal on Count 4, Greer's testimony, consistent with C.G.'s account, was sufficient to establish that while C.G. was restrained and posed no threat, Bean used unreasonable force against C.G. by striking him in the face with a closed fist. (Order, R. 163, PageID# 1927-1928); see *Burgess*, 735 F.3d at 470; *Baker*, 471 F.3d at 607.

The evidence also shows that Bean again used unreasonable force when he punched C.G. as he was sitting restrained in the back of the police cruiser. Deputy King testified that Bean punched "[C.G.] * * * [w]ith a closed fist" through the open window of the cruiser, even though C.G. posed "no threat." (Tr., R. 144, PageID# 1056-1057). He further attested that "there was no * * * need for force or anything like that" and that "once the handcuffs are on, the threat's pretty much eliminated at that point." (Tr., R. 144, PageID# 1054, 1057). And King recalled thinking to himself "that ain't kind of right." (Tr., R. 144, PageID# 1057). Ranger Reynolds separately attested that he saw "Bean lunging * * * or punching into an open window of the rear of a patrol vehicle" where C.G. was sitting, already subdued. (Tr., R. 144, PageID# 974, 978, 992). He also testified that he later told his wife he was bothered by what he had seen Bean do. (Tr., R. 144, PageID# 979). Accordingly, the evidence shows that, on this second occasion, C.G. was restrained and posed no threat to Bean at the time Bean punched C.G.'s face with a closed fist; thus, Bean's use of force was unnecessary and unreasonable during the second assault. See *Burgess*, 735 F.3d at 470, 474-475; *Baker*, 471 F.3d at 607.

The record is also clear that Bean used unreasonable force against C.G. not because of any potential threat C.G. posed to him but to punish C.G. Several witnesses testified specifically that Bean berated C.G. for insulting Bean's wife as he punched C.G. Ranger Greer attested that, during the first assault, as Bean

punched C.G., Bean said words to the effect of "Don't say that against [her]." (See Tr., R. 144, PageID# 945). Deputy King separately attested that, during the second assault, Bean said, "'You ain't going to talk to my wife that way,' and then hit [C.G.] * * * [w]ith a closed fist" through the open window. (Tr., R. 144, PageID# 1056-1057). And C.G. testified that he recalled at some point, after he "made * * * a bad statement towards her way," Bean said in an "upset" voice, "That's my wife" or "That's my wife you're talking about," and "struck" C.G. (Tr., R. 144, PageID# 1001-1003). See *Burgess*, 735 F.3d at 470 (finding that takedown of handcuffed pretrial detainee who made offensive comments to officers constituted excessive force); *Pigram*, 199 F. App'x at 513-514 (similar).

In sum, construing the evidence in the government's favor, *Callahan*, 801 F.3d at 616, the district court correctly denied Bean's motion for judgment of acquittal on Counts 4 and 5, reaffirming that Bean used excessive and unreasonable force against C.G., who was handcuffed and posed no threat, by punching him with a closed fist at two separate times. (Order, R. 163, PageID# 1927-1928); see *Burgess*, 735 F.3d at 470, 474-475; *Baker*, 471 F.3d at 607.

2. Bean argues that his use of force was warranted given the circumstances. But his arguments are unpersuasive.

As to the first assault against C.G., Bean argues that C.G. "was involved in a hit and run from which he evaded police, resisted arrest, and was highly

intoxicated and belligerent." Br. 39. Bean also claims that he used force to subdue C.G. as C.G. was approaching Bean "while yelling, screaming, and resisting." Br. 38-39. But Bean cites no evidence to support his characterization of C.G.'s behavior *at the time* Bean used force. In fact, Ranger Greer witnessed the assault and testified that C.G. posed no threat to Bean when Bean punched him in the face with a closed fist. (Tr., R. 144, PageID# 945-946, 963-964, 969); see also *Morrison*, 583 F.3d at 404-405 ("[O]nce the detainee ceases to pose a threat to the safety of the officers or others, the legitimate government interest in the application of significant force dissipates."); *Landis* v. *Baker*, 297 F. App'x 453, 461 (6th Cir. 2008) ("[T]he fact that a certain degree of force may have been justified earlier in the encounter to restrain the suspect does not mean that such force still was justified once the suspect had been restrained.").

As to the second assault, Bean argues that his closed-fist punch to C.G.'s face, while C.G. was handcuffed and sitting in the back of a police vehicle, was warranted because C.G. was acting "belligerently" and "hanging halfway out of the vehicle." Br. 40. But no other officer at the scene testified that C.G. posed a threat or was acting in a way that justified Bean punching C.G. with a closed fist while C.G. was handcuffed and sitting in the back of the police vehicle.

In fact, the only case Bean cites for support—*Schliewe* v. *Toro*, 138 F. App'x 715 (6th Cir. 2005)—is unpublished and inapposite. Br. 40. In *Schliewe*,

this Court held that an officer's punch to an arrestee's chin was reasonable because the arrestee, who was not handcuffed, "was attempting an escape from the holding area of the police station and resisted the officers' attempts to subdue him." 138 F. App'x at 718, 722. This Court further emphasized that "[t]he officers had never been confronted with an individual attempting to enter the communications room from the holding area" and that the officer who punched the arrestee "reacted instinctively to [his] attempted escape." *Id.* at 722. No comparable facts exist here.

First, Bean attempts to argue that, like *Schliewe*, C.G. "attempted escape or posed a threat to the safety of others." Br. 40. But Bean cites no record evidence showing that C.G. was attempting to escape arrest when Bean punched him through the car window. Unlike *Schliewe*, C.G. was already handcuffed and, during the second assault, sitting in the back of a patrol vehicle at the time Bean punched him in the face. (See Tr., R. 144, PageID# 941, 1000-1001, 1054). And Bean fails to explain how C.G. could have escaped by pushing his entire body out of a partially open window while handcuffed behind his back and surrounded by officers.

Thus, the evidence presented at trial was sufficient to support the district court's finding that, for Counts 4 and 5, Bean used objectively unreasonable force against C.G.

CONCLUSION

For the foregoing reasons, this Court should affirm the 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 Procedure 32(a)(7)(B) because it contains 12,964 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/ Natasha N. Babazadeh
Natasha N. Babazadeh
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Date: April 28, 2023

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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ADDENDUM

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	1-3
50	Motion	214-215
129	Rule 23 Notice	726-727
140	Order	767-768
144	Transcript (Trial Day 1)	895-1162
145	Transcript (Trial Day 2)	1170-1542
146	Transcript (Trial Day 3)	1547-1595
147	Brief	1703
148	Brief	1718-1720
149	Trial Brief	1760
151	Order	1793-1794
152	Minute Entry	1795
153	Verdict	1796-1797
156	Motion	1824-1851
157	Response	1878-1879
163	Order	1923-1934
166	PSR	1945-1974
168	Objections	1980
173	Addendum to PSR	2039
174	PSR (Revised)	2041-2070
176	Judgment	2072-2076
178	Notice of Appeal	2083
190	Transcript (Sentencing)	2315-2398