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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES
OF AMERICA,
Plaintiff–Appellee,
v.
JASON BRANUM,
aka Jason Johnson,
Defendant–Appellant.

No. 16-50472
D.C. No. 2:13-cr-00573-
GW-2
MEMORANDUM*
(Filed Feb. 13, 2018)

UNITED STATES
OF AMERICA,
Plaintiff–Appellee,
v.
BRYAN BRUNSTING,
Defendant–Appellant.

No. 16-50473
D.C. No. 2:13-cr-00573-
GW-1

Appeals from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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Submitted February 7, 2018**
Pasadena, California

Before: GRABER and HURWITZ, Circuit Judges, and
KORMAN,*** District Judge.

Jason Branum and Bryan Brunsting, former Los Angeles County Sheriff's Department deputies, were convicted of various offenses after illegally beating and pepper-spraying an inmate. More specifically, they were convicted of conspiring to deprive the inmate of his civil rights, 18 U.S.C. § 241; actually depriving the inmate of his civil rights, *id.* § 242; and making a false entry in a record, *id.* § 1519. We affirm their convictions.

1. Branum and Brunsting's main argument is that the government's key witness, the third guard who participated in the beating, was not credible. But it is settled that "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa v. United States*, 385 U.S. 293, 311 (1966). Thus, on appeal,

the evidence must be viewed in the light most favorable to the government; and . . . the reviewing court must respect the exclusive

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

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province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict.

United States v. Ramos, 558 F.2d 545, 546 (9th Cir. 1977). Indeed, we have refused to overrule a jury's finding that an accomplice was credible even though he was a felon whose story was inconsistent and at times "somewhat bizarre." *Lyda v. United States*, 321 F.2d 788, 793–95 (9th Cir. 1963). The alleged questions about the witness's consistency here—whether medical records that generally reflect a beating were supportive enough, whether the inmate was kicked in the groin, which guard tackled him, what happened with a particular door—are nowhere near what it would take for us to hold that the evidence was insufficient for a rational jury to have found the appellants guilty beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

2. Branum and Brunsting also argue that the jury should have been provided with a form specifying which of the inmate's rights they conspired against and which record they falsified. They contend that without a special form, it is unclear whether the jury unanimously agreed on the same right and the same record, or, if the jury did, whether there was sufficient evidence to do so. These arguments fail. First, we presume that the jury followed the unanimity instructions it was given. See *Richardson v. Marsh*, 481 U.S. 200,

206 (1987) (noting “the almost invariable assumption of the law that jurors follow their instructions”). Second, there was sufficient evidence here for the jury to agree on any of the predicate rights and records between which the appellants parse. Third, even if there had been insufficient evidence of a conspiracy as to a particular right or of falsification of a particular record, we would assume that the jury convicted with respect to predicates for which there was sufficient evidence. See *Griffin v. United States*, 502 U.S. 46, 47–48, 56–57 (1991) (upholding a general verdict convicting the defendant of conspiracy to defraud two government agencies, even though there was insufficient evidence of a conspiracy to defraud one of the agencies).

3. Finally, because Branum and Brunsting are white and the victim is black, they claim that “negative media nationally and locally reinforced in [the venire] panel’s mind the notion that there was a significant and on-going problem with regard to Caucasian officers attacking African-American individuals, and an additional problem with regard to beatings at Los Angeles County Jail facilities.” Appellants argue that against this backdrop their trial should have been delayed—although they never explain until when. Passing over the fact that the appellants never moved for a change of venue, our review confirms that there was no abuse of discretion. See *Ainsworth v. Calderon*, 138 F.3d 787, 795–96 (9th Cir. 1998) (discussing prejudice for purposes of changing trial venue); *United States v. Collins*, 109 F.3d 1413, 1416–17 (9th Cir. 1997) (same).

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The appellants object primarily to general news, not coverage specific to the case. *See Ainsworth*, 138 F.3d at 795. Moreover, the most serious comments to which the appellants object were made by prospective jurors who were not empaneled. The seated jurors affirmed that they would decide the case fairly.

AFFIRMED.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES
OF AMERICA,
Plaintiff–Appellee,
v.
JASON BRANUM,
aka Jason Johnson,
Defendant–Appellant.

No. 16-50472
D.C. No. 2:13-cr-00573-
GW-2
ORDER
(Filed Mar. 16, 2018)

UNITED STATES
OF AMERICA,
Plaintiff–Appellee,
v.
BRYAN BRUNSTING,
Defendant–Appellant.

No. 16-50473
D.C. No. 2:13-cr-00573-
GW-1

Before: GRABER and HURWITZ, Circuit Judges, and
KORMAN,* District Judge.

The panel has voted to deny panel rehearing.
Judges Graber and Hurwitz have voted to deny rehear-
ing en banc, and Judge Korman has so recommended.

* The Honorable Edward R. Korman, United States District
Judge for the Eastern District of New York, sitting by designa-
tion.

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The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and rehearing en banc, filed February 21, 2018, is DENIED.

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U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. section 241:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured

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to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured –

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. 242:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under

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this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. section 1519:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES	)	USCA No. 16-50472
OF AMERICA,	)	USDC No. 2:13-CR-
	)	573-GW
Plaintiff/Appellee	)	(Central District
v.	)	of California)
JASON BRANUM,	)	
	)	
Defendant/Appellant	)	
	)	
	)	
	)	

APPELLANT'S OPENING BRIEF
ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE, GEORGE H. WU,
JUDGE PRESIDING

(Filed May 17, 2017)

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* * *

[5] **STATEMENT OF FACTS**

A. PORSCHA SINGH

Porscha Singh testified that on March 22, 2010 she was a Custody Assistant [CA] in the Twin Towers Jail Facility operated by the Sheriff's Department. RT 5-10-2016, p. 232²; ER 14, p. 19.³

She acknowledged that she was testifying under a grant of immunity, after having claimed to have lied to Internal Affairs about the event. Id at 233, 267; ER 14, p. 20, 34.

The alleged victim, Jones, was a pretrial detainee on the floor where she worked. Id at 235; ER 14, p. 21. That floor held inmates that were mentally disturbed, whom she described as schizophrenic and hearing voices. Id at 236; ER 14, p. 22. She acknowledged that such inmates can be aggressive, and are unpredictable. RT 5-12-2016, p. 16; ER 15, p. 3.

One of Singh's jobs was to monitor inmate visits. On that date, she had a number of inmates who reported through the inmate visiting area for visits, but she noticed that there was one extra inmate. RT 5-10-2016 at 252-253; ER 14, p. 23-24. When she questioned the inmates over the intercom to obtain their identity and [6] booking numbers, she heard one individual state "Fuck that bitch". Id at 253; ER 14, p. 24. She identified that inmate as Jones.

² RT 5-10-2016 refers to a reporter's transcript of that date.

³ ER 14, p. 19 refers to Excerpt of Record, Tab 14, page 9.

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Singh claimed that deputy Sather came to the booth, and that she obtained his keys for access to the visiting room area. RT 5-10-2016 at 253; ER 14, p. 24. She acknowledged that she had never worked with Sather before, and this version of the story was denied by Sather. RT 5-12-2016, at 173-174; ER 15, p. 45-46; Id at 142-143; ER 15, p. 30-31.

According to Singh, she then went to approach Jones despite the fact that she weighed 135 pounds and he was over 6 feet tall and weighed probably a hundred pounds more than she did. RT 5-12-2016 at 72; ER 15, p. 9.

Singh testified that she opened the visiting door with Sather's keys [RT 5-10-2016 at 254; ER 14, p. 25] despite the fact that there was a window in the door through which she could have made an identification of his wristband. RT 5-12-2016 at 71; ER 15, p. 8.

She then claims that she confronted him by asking him "What the fuck is your problem?". RT 5-10-2016 at 254; ER 14, p. 25.

Singh claims that she then returned to the booth and yelled to "someone" outside the booth that someone should "check the motherfucker in visiting". RT 5-10-2016 at 255; ER 14, p. 26. She in fact told the FBI that she yelled this to [7] Deputies Lozano and Curbelo, who were monitoring pill distribution [pill call] outside the booth. RT 5-12-2016 at 34; ER 15, p. 4.

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Singh claims that Johnson [Branum]⁴ came into the booth, and said he would handle it, and that no one “disrespects his booth CA”. RT 5-10-2016 at 257, 258; ER 14, p. 27, 28.

Singh then claims to have seen three deputies, Branum, Brunsting, and Sather in the company of Jones outside the visiting room. RT 5-10-2016 at 259; ER 14, p. 29. In fact, according to Sather’s testimony, he and Lozano were right behind Jones, Brunsting was behind them, and Branum was at the rear. RT 5-12-2016, at 208-209; ER 15, p. 70-71.

At trial, however, Singh indicated she could not recall who was escorting Jones. RT 5-10-2016 at 261; ER 14, p. 30.

Jones entered what was called the “interconnect hallway”, which connected two units on that floor. She acknowledged that this hallway was a potentially busy area that contained jail personnel, nurses, psychologists, and psychiatrists. RT 5-12-2016 at 42; ER 15, p. 5. She could not see into that hallway from her position in the booth. RT 5-10-2016 at 262; ER 14, p. 31.

[8] She then heard a commotion with some noise and the rattling of keys, and claimed she heard Branum state “nobody disrespects my CA”. RT 5-10-2016 at 263; ER 14, p. 32.

She acknowledged, however, she only remembered this statement after having conversations with

⁴ Johnson changed his name to Branum to honor his birth father.

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government agents. RT 5-12-2016 at 81; ER 15, p. 10. And, she only testified to it in front of the Grand Jury after being asked a leading question. Id at 82; ER 15, p. 11. She also acknowledged that, at the time, the intercom system was so weak that to be heard, an individual would have to speak right into the intercom. RT 5-12-2016, p. 7; ER 15, p. 2.

Ultimately, she heard a “415 call”, which was a call that there a disturbance in progress. After that, according to her, Curbelo and Lozano responded to the interconnect hallway. RT 5-10-2016 at 264; ER 14, p. 33. As indicated previously, however, Sather indicated that Lozano was not only with him, but in fact was the first deputy in the hallway after Jones. RT 5-12-2016, at 208; ER 15, p. 70.

After calm was restored, deputies returned to the booth. Singh then left.

She claimed to the FBI that the deputies told her to leave the booth, while she testified at trial that a senior officer told her to do so. RT 5-12-2016 at 43, 44; ER 15, p. 6, 7.

[9] **B. JOSHUA SATHER**

Joshua Sather testified that he attended the Los Angeles County Sheriff’s Department Academy (RT 5-12-2016, p. 114; ER 15, p. 12). After graduating, he was assigned in March 2010 to the Twin Towers Correctional Facility. Id at 116; ER 15, p. 13.

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Several days after being assigned there, he was transferred to Location 161, which housed inmates who were under mental observation. At that location his training officer was Bryan Brunsting. Id at 117-118; ER 15, p. 14-15.

A few days after arriving, on March 22, 2010, he was tasked to assist in the search of one of the other floors. Id at 120; ER 15, p. 16. He was contacted by Deputy Brunsting to return to Location 161, which he did.

He proceeded through an interconnect hallway, which connected two units, and testified that he saw Deputies Brunsting, Lozano, and Johnson outside the inmate visiting door. Id at 122-123; ER 15, p. 17-18.

However, he was unable to identify Appellant Johnson [Branum]. Id at 120; ER 15, p. 16.

Brunsting informed him that there was an inmate in visiting who was not supposed to be there, and Sather testified to the jury that he was told by Brunsting that they were going to “teach him a lesson”. Id at 124; ER 15, p. 19.

[10] When interviewed by Internal Affairs, he told them he could not remember the exact words used. Id at 245; ER 15, p. 73.

When interviewed by Captain Ward, who was the chief officer at the Twin Towers, he stated that Brunsting had said that they were going to “take care of it”. Id at 177, 245; ER 15, p. 47, 73. In an interview with Ward, he said he did not think anything of that comment. Id. Also, in his interview with Ward, which

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was several days after the event, he mentioned nothing about supposedly “teaching a lesson”. Id at 178; ER 15, p. 48.

He testified that he didn’t think anything of the teaching a lesson comment until after the entire event. Id at 179; ER 15, p. 49. Nonetheless, he testified that he ultimately hit Jones, because they were “teaching him a lesson”. Id at 210; ER 15, p. 72.

Sather was clear that no one said that they wanted him to hit Jones. Id at 179; ER 15, p. 49.

Sather had seen Jones earlier in the day when he had refused medical treatment. Id at 124; ER 15, p. 19.

Sather testified that both the visiting room door and the door to the interconnect hallway were open. However, he acknowledged that he could not remember whether he closed the door when he walked through it. Id at 180; ER [11] 15, p. 50. He testified that the inmate was “directed” into the hallway. Id at 125; ER 15, p. 20.

Sather described the fact that the inmate, Jones, was first, behind him was Deputy Lozano, behind him was Sather, and behind Sather, somewhere, were Brunsting and Johnson. Id at 209; ER 15, p. 71.

According to Sather, Jones entered the hallway, and then said “I’m gonna get my ass kicked” and ran. Id at 126; ER 15, p. 21. At the time that Jones said this, only Sather and Lozano were in the hallway. Id.

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Lozano and Sather then tackled Jones. Id at 127, 209; ER 15, p. 22, 71. He acknowledged that no one told him to tackle Jones. Id at 182; ER 15, p. 51. Sather also acknowledged that when interviewed by Captain Ward, he stated that he did not tackle Jones. Id at 182-183; ER 15, p. 51-52.

Sather then struck Jones in the leg and the lower rib cage. Id at 184; ER 15, p. 53. He did not tell Ward this. Id at 249; ER 15, p. 74. He stated, as indicated above, that the reason he hit Jones was “because we were teaching him a lesson”, although he also testified that the phrase meant nothing to him at the time. Id at 179; ER 15, p. 49.

Sather testified that Jones was neither swinging his arms nor kicking his legs. Id at 129; ER 15, p. 23. Nonetheless, Sather was holding his legs. He testified [12] that he did not know why he was holding his legs. Id at 200; ER 15, p. 63. However, he had previously indicated that he stood up because Jones was “no longer fighting”. He acknowledged that this meant he had previously been fighting. Id at 201; ER 15, p. 64.

When interviewed by Internal Affairs Bureau [IAB], he told the officer [Flores] that he did not know if Jones had tried to hit Brunsting. Id at 198; ER 15, p. 61. Sather also admitted that Jones might have been swinging without his being able to see. Id at 194, 195; ER 15, p. 57, 58. He testified that he did not know if Jones was swinging. Id at 195; ER 15, p. 58.

Sather testified that after he stood up, he observed Brunsting and Johnson “striking the inmate”. RT at

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130; ER 15, p. 24. He gave no definition of what these strikes amounted to, or even how many he observed.

However, he added then that Brunsting spread Jones legs and kicked him in his private parts. Id at 130; ER 15, p. 24.

He acknowledged that he told the FBI, when interviewed, that another deputy had done the kicking. Id at 251; ER 15, p. 75. He also acknowledged that he told the Grand Jury he doesn't know who kicked the inmate. Id at 252-253; ER 15, p. 76-77.

[13] When he spoke to Captain Ward, he made no mention whatsoever, of the kick to the groin, despite the fact it was the most serious blow he claimed was inflicted. Id at 188; ER 15, p. 54. He acknowledged that the inmate said nothing when he was supposedly kicked in the groin. Id at 189; ER 15, p. 55. He acknowledged that he told the Grand Jury he couldn't remember who kicked the individual in the groin. Id at 192; ER 15, p. 56.

And, the medical reports prepared following the incident, indicate that Jones made no complains [sic], whatsoever, of any injury which would have been related to a kick to the groin. Exhibit 4-7; ER 10-13. In fact, his only complaints of pain from being struck were in the area Sather hit him. Id.

He testified that, at some point, Jones was pepper-sprayed by Johnson. Id at 151; ER 15, p. 35. Although he also said he was not aware of it, he did acknowledge that the use of pepper-spray was the minimum

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reaction to avoid the use of force, and that he was taught this at the Academy. Id at 210; ER 15, p. 72.

Sather testified that following the incident, the deputies determined to go to the booth to “get their stories straight”. Id at 132; ER 15, p. 26. He acknowledged, however, that he told the FBI that a senior officer told everyone to go to the booth. Id at 258; ER 15, p. 79.

[14] Sather indicated that he was assigned to write the report of the incident, which he acknowledged was normal for the trainee to do. Id at 203; ER 15, p. 65.

He wrote the report the next day, and gave several drafts to Brunsting, who returned them because the style was bad. RT 5-12-2016 at 134, 135, 260-261; ER 15, p. 27-28, 80-81. He said that Brunsting gave him his report as an example and allegedly told him to copy portions of it. Id at 135; ER 15, p. 28. He acknowledged that he knew that all of the reports would be reviewed by superiors. Id at 204; ER 15, p. 66.

In the report he indicates that Johnson told Jones that he didn’t have a visit. Id at 143; ER 15, p. 31. He acknowledged that that statement could have been made before he arrived on scene. Id at 205; ER 15, p. 67.

The report also indicates that Johnson, after the visitor’s door was open, told Jones to return to his cell. Id at 144; ER 15, p. 32. He said that was not true. Id at 145; ER 15, p. 33. However, when questioned about that portion of the report before the Grand Jury he said

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it was true, and then 6 lines later said it was not. Id at 207-208; ER 15, p. 69-70.

The report indicated that Jones, upon entering the hallway said “fuck you” and attempted to hit him. Id at 147; ER 15, p. 34. He stated this was not true. Id. The claim of an attempted punch by Jones *does not appear in Johnson’s report*.

[15] Johnson’s report indicates that he was still standing at the area of the visitor’s door at the time that the deputies and Jones entered the interconnect hallway. This is consistent with Sather’s description of the order of the procession. Johnson goes on to say that he heard someone verbally telling Jones to stop.

Sather acknowledged he told IAB that someone had said “stop fighting”. Id at 254; ER 15, p. 78. Sather also indicated he interviewed an independent witness who said he heard someone yell “stop resisting” Id at 141; ER 15, p. 29.

Johnson’s report indicates that Jones was resisting, and as indicated previously, Sather indicated he could not tell, particularly while he was on the ground holding Jones’ legs, whether Jones was attempting to hit others or was swinging his arms. Id at 195-199; ER 15, p. 58-62.

Sather indicated that the incident in question bothered him to the point that he decided to resign, and went to speak with Lieutenant Sachs, and told her he was resigning for family reasons, which he testified was a lie. Id at 159, 161; ER 15, p. 37, 39.

He then spoke to his uncle, who was a detective in the Sheriff's Department, who persuaded him to call Sachs and to hold up the resignation. Id at 160; ER 15, p. 38. He went for several days with his uncle and his father to Las Vegas, and [16] then when he returned, nonetheless call [sic] Sachs to resign again. Id at 161; ER 15, p. 39. Again, he said he lied and said it was family reasons. Id.

During this period of time, he was called by Captain Ward who asked him if there was anything related to work, and he told him no. Id at 167; ER 15, p. 42.

He later had an in-person meeting with Captain Ward, at his uncle's suggestion, and "told him about" the incident. Id at 162-163; ER 15, p. 40-41.

Sather testified that, when speaking to Captain Ward, and every time thereafter that he spoke to anyone about this event, his purpose was to tell the truth, the whole truth and nothing but the truth. Id at 169; ER 15, p. 43. From that point forward, everything was honest and true. Id at 170; ER 15, 44. This was because he felt he failed himself and was determined to tell the truth. Id at 169; ER 15, p. 43.

C. STEVEN SATHER

Steven Sather testified he is a detective with the Los Angeles Sheriff's Department, and that Joshua Sather is his nephew. RT 5-13-2016 at 120-121; ER 16, p. 3-4. He spoke to Joshua about joining the LASD and urged him to do so. Id at 123; ER 16, p. 6.

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[17] In March 2010, he said that Joshua called and was upset about an incident that occurred at Twin Towers. Id at 126; ER 16, p. 9. Joshua allegedly told him about an incident in which he did something bad in the visiting area and claimed Brunsting had told him “we need to take care of this guy”. According to Detective Sather, Joshua interpreted this as meaning they had to escort him back to where he was housed. Id at 132; ER 16, p. 13.

The detective testified that Jones, in the hallway stated that “you guys gonna kick my ass” and that “they” used force. Joshua supposedly told his uncle that someone kicked the inmate in the groin. Id at 135; ER 16, p. 14.

The detective told Sather to do the right thing, and encouraged him to stay in the department. Id at 136, 138; ER 16, p. 15, 16.

After coming back from a trip to Las Vegas, the detective called Joshua at the Twin Towers and was told he was not there. The detective went to the Twin Towers and asked to speak to his training officer. Id at 139; ER 16, p. 17. When Brunsting appeared, the detective called him a “stupid fuck” and that he was “going to kick his ass”. Id at 141; ER 16, p. 18. He said Brunsting’s comments were only “yes sir”.

Following that, the detective told Joshua he needed to come clean. Id at 143; ER 16, p. 19.

* * *

[18] **DEFENSE CASE**

ELISABETH SACHS

Elisabeth Sachs testified that she is a Lieutenant with the Los Angeles Sheriff's Department. On March 22, 2010 she was the Watch Commander at the Twin [19] Towers Facility. RT 5-13-2016, at 220; ER 16, p. 29. She was, as a result, in charge of general operations. Id.

She customarily reviews use of force reports, which are prepared regarding such conduct. Id at 221; ER 16, p. 30. The reports generally go to a Sargent, Supervisor, a Lieutenant, a Captain, and then a Division Commander. Id at 222; ER 16, p. 31.

She acknowledged that use of force is allowed, and that there are levels of the use of force. She testified that OC spray is issued regularly to the deputies. Id at 223; ER 16, p. 32.

She testified that she was contacted by Joshua Sather who indicated he wanted to resign because of family issues. Id at 224-225; ER 16, p. 33-34. She asked him specifically if it involved anything at work, and he said it did not. Id at 226; ER 16, p. 35. There was no mention of excessive force. Id at 227; ER 16, p. 36. Sather called later and asked to hold the resignation. Id at 228; ER 16, p. 37.

Sometime later, she had contact with Steven Sather, a detective, and told him that Joshua had resigned and was no longer at the facility. Id at 230-231; ER 16, p. 38-39.

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[20] Several days after the incident, Joshua did not show up for work, and she called to find out why. At that time, Joshua said again that he wanted to resign. Id at 234; ER 16, p. 40.

The reasons that he gave were family problems, specifically that his younger brother was in trouble with the law and needed guidance. Id at 238; ER 16, p. 41.

She further testified that there is nothing improper with deputies discussing an incident before meeting with their supervisor. Id at 241; ER 16, p. 42. She also stated there was nothing improper in their going into a booth to discuss the incident. Id at 242; ER 16, p. 43.

Further, she testified it was not unusual to assign the report writing to a trainee so he could learn how to do it. Id at 243; ER 16, p. 44.

She further acknowledged that the interconnect hallway doors are often left open. Id at 245; ER 16, p. 45.

* * *

[23] It must be remembered that Sather offered excuses for his statements to Lieutenant Sachs, and in his telephone call with Captain Ward, claiming that he didn't want to be a "snitch". RT 5-12-2016, at 160; ER 15, p. 38. But, according to him, once he returned to speak in person with Captain Ward, he had made the decision to clear his conscience, and tell the truth, the whole truth, and nothing but the truth. Id at 169; ER

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15, p. 43. Nonetheless, his lies continued unabated thereafter.

Some of the examples of these inconsistencies are as follows:

1. Sather testified that he came from another unit, and entered the unit in question through the interconnect hallway and the interconnect hallway doorway. He acknowledged, however, that he could not remember whether he closed the door when he walked through it. RT 5-12-2016 at 180; ER 15, p. 50. This is significant, because leaving the door open gave the inmate the opportunity to move down the hallway on his own.

2. According to Sather, when he arrived, Deputy Brunsting told him that there was an inmate who was not supposed to be in visiting and that they were going to go “teach him a lesson”. Id at 124; ER 15, p. 19. When later interviewed by Internal Affairs, he told them he could not remember the exact words used. Id [24] at 245; ER 15, p. 73. When interviewed by Captain Ward, he stated that Brunsting had said that they were going to “take care of it”. Id at 245; ER 15, p. 73.

In the interview with Ward, he said he did not think anything of that comment. Id. Also in his interview with Ward, which was several days after the event, he mentioned nothing about supposedly “teaching a lesson”. Id at 178; ER 15, p. 48. He testified that he didn’t think anything of the teaching a lesson comment until after the entire event. Id at 179; ER 15, p. 49. Nonetheless, he testified to the jury that he

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ultimately hit Jones, because they were “teaching him a lesson”. Id at 127; ER 15, p. 22. He was clear that no one had said they wanted him to hit Jones. Id at 179; ER 15, p. 49.

3. Sather testified that he and Deputy Lozano tackled Jones. Id at 127, 209; ER 15, p. 22, 71. He admitted that no one told him to do so. Id at 182; ER 15, p. 51. When he was interviewed by Captain Ward, and telling the whole truth, supposedly, he told Captain Ward he did not tackle Jones. Id at 182-183; ER 15, p. 51-52.

4. Sather testified that Jones was not struggling while he was on the ground. Nevertheless, Sather was holding his legs, and testified that he did not know why he was holding his legs. Id at 200; ER 15, p. 63. However, he previously indicated that he stood up because Jones was “no longer fighting” and acknowledged that [25] this meant he had previously been fighting. Id at 201; ER 15, p. 64. When interviewed by IAB, he stated he did not know if Jones had tried to hit Brunsting. Id at 198; ER 15, p. 61. He also admitted that Jones might have been swinging without his being able to see. Id at 194, 195; ER 15, p. 57, 58. He testified he did not know if Jones was swinging. Id at 195; ER 15, p. 58.

5. When asked whether he saw the deputies hit Jones, he said no because he had “tunnel vision”, and later limited that testimony to while he and Jones were on the ground.

6. He claims that after he stood, he saw Brunsting spread Jones’ legs and kick him in his private

parts. Id at 130; ER 15, p. 24. He acknowledged, however, he had told the FBI, when interviewed, that another Deputy had done the kicking. Id at 251; ER 15, p. 75. He also acknowledged he told the Grand Jury he didn't know who kicked the inmate. Id at 252; ER 15, p. 76. When he spoke to Captain Ward, he made no mention whatsoever of the kick to the groin, despite the fact that it was the most serious blow he claimed was inflicted. Id at 188; ER 15, p. 54. He acknowledged the inmate said nothing when he was supposedly kicked in the groin. Id at 189; ER 15, p. 55. He acknowledged that he told the Grand Jury he couldn't remember who kicked the individual in the groin. Id at 192; ER 15, p. 56.

[26] And, the medical reports prepared following the incident indicate that Jones made no complaints, whatsoever, of any injury which would have been related to the kick to the groin. See Exhibits 4-7; ER 10-13. If [sic] fact, his only complaints of pain from being struck were in the areas Sather hit him. Id. Sather admitted that after he tackled Jones, he repeatedly hit him in his ribs and upper legs. RT 5-12-2016, at 127; ER 15, p. 22.

After he stood up, Sather claims he saw Brunsting and Johnson "striking the inmate". Id at 130; ER 15, p. 24. He gave no definition of what these strikes amounted to, nor how they were allegedly inflicted. In fact, he was unable to identify Branum in the courtroom. Id at 120; ER 15, p. 16.

7. Sather testified that following the incident the deputies decided to go to the booth to “get their stories straight”, but acknowledged that he told the FBI that a senior officer told everyone to go to the booth. *Id.* at 258; ER 15, p. 79.⁶

Among other things, Sather claims that Jones was directed into the interconnect hallway. It is clear, however, that the order of the individuals into the hallway was Jones first, and behind him, in order, Lozano, Sather, Brunsting, and Branum. *Id.* at 209; ER 15, p. 71. It is not clear who could have directed the inmate [27] into the interconnect hallway other than Sather and Lozano. He simply does not identify the person who did so.

C. SATHER’S TESTIMONY IS INSUFFICIENT TO SUPPORT A CRIMINAL CONVICTION

The standard for judging the sufficiency of evidence following a conviction is 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.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Tertrou*, 742 F.2d 538, 540 (9th Cir. 1984).

Tertrou recognized that, at some point, the testimony of a witness would be “so incredible” as to cause the court to “depart from the rule that determining the

⁶ Other inconsistencies will be referred to below.

credibility of witnesses is a matter for the jury.” Id. at 541. For this proposition, the court cites *Lyda v. United States*, 321 F.2d 788 (9th Cir. 1963).

Lyda is quite instructive.

In that case, the court considered the testimony of McCarter. The court acknowledged that McCarter was “an accomplice” and as such he had “a ‘built-in’ untrustworthiness.” 321 F.2d at 794. The same is true of Sather.

[28] The court concluded that the inconsistencies in his story would not require reversal so long as his testimony was not ‘incredible or unsubstantial on its [sic] face.’” Id. at 795.

But the court went on to state:

“Obviously there comes a point when the witness’ qualifications are so shoddy that a verdict of acquittal should have been directed.”

In *United States v. Williams*, 547 F.3d 1187 (9th Cir. 2008) the court considered the question of insufficient evidence based upon inconsistent testimony of a prosecution witness. Significantly, the court did not reject the argument that such inconsistencies could result in an acquittal, but rather noted that, in that case, there was other evidence to prove the defendants’ participation in the conspiracy charged. Id. at 1196.

Also, it is important that, in this case, we are not dealing with the credibility of the testimony of two or more witnesses, who contradict one another. However,

even in such a circumstance, in which there are conflicting witnesses, there comes a point in which the testimony is too unbelievable to sustain a conviction.

In *United States v. Ramirez-Chilel*, 289 F.3d 744 (11th Cir. 2002), the court considered that specific circumstance.

* * *

[41] IV.

THE FAILURE TO GRANT A CONTINUANCE REQUESTED DURING JURY SELECTION DEPRIVED THE APPELLANTS OF DUE PROCESS OF LAW

During the voir dire of the jury issues concerning the massive amount of publicity surrounding the Los Angeles Sheriff's Department, and allegations of misconduct and mistreatment of inmates at the County Jail arose again and again.

At the same time, it is clear that there has been substantial media coverage of allegations concerning attacks on African-American individuals by Caucasian officers.

In this case, the two stories coalesced, because it involved an alleged assault on an African-American inmate by two Caucasian officers at an [sic] Los Angeles County Jail facility. In addition, issues concerning alleged assault on individuals with mental disabilities also came into play.

These circumstances led the defense, on two occasions, to make a motion for continuance of the trial, because it appeared that the jury panel was fatally infected. ER 5. These motions were denied.

Some examples of the prospective jurors' comments include the following:

[42] Juror #32 indicated that he had two friends working at the Twin Towers, and concluded that there was corruption "in the system". This led him to believe that the police were trying to be "above the law". RT 5-10-2016 at 97-98; ER 14, p. 1-2.

Similarly, Juror #15 felt that there was a [sic] "abuse of force" and an abuse of authority in the system. Id at 105; ER 14, p. 4.

Several jurors referred to the Baca investigation. Id at 104, 105-106, 107; ER 14, p. 3, 4-5, 6. These included Juror #14, #3, #7, #34, and #22.

Jurors indicated they had heard about these issues on the news. Id at 107; ER 14, p. 6. This led to speculation as to whether this case was related to the Baca investigation. Id at 108; ER 14, p. 7.

When asked what was the first thing that came into their head when the case was described by the Court, responses included wondering if it was related to Baca [Id at 104; ER 14, p. 3]; "use of excessive force"; that there are way [sic] to do things "by the book" [Id at 106; ER 14, p. 5]; and abuse of force [Id at 107; ER 14, p. 6].

Perspective jurors referred to hearing about ACLU lawsuits regarding the use of excessive force. Id at 117;

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ER 14, p. 10. Individuals who had friends or [43] relatives who were in custody referred to use of force stories. Id at 114, 115, 118; ER 14, p. 8, 9, 11.

The race of the alleged victim versus that of the Appellants was raised. Id at 145; ER 14, p. 12. Statements such as “I don’t believe in the system or the cops” were made. Id at 154; ER 14, p. 13.

Reference to negative comments regarding the subject matter on social media about law enforcement were referred to. Id at 166; ER 14, p. 14.

A conclusion that the system was “not working” and that something was “wrong with the training” was made. Id at 170; ER 14, p. 15.

A statement that force should never be used against an individual who is mentally ill was made. Id at 172; ER 14, p. 16.

In general, it seems clear that the negative media nationally and locally reenforced in this panel’s mind the notion that there was a significant and on-going problem with regard to Caucasian officers attacking African-American individuals, and an additional problem with regard to beatings at Los Angeles County Jail facilities.

The result, of course, is that a jury predisposed to convict officers existed in this case. Consequently, the failure to grant a continuance was error.

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USCA No. 16-50472
USCA No. 16-50473
USDC No. 2:13-CR-573-GW
(Central District of California)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BRYAN BRUNSTING,
Defendant-Appellant.

APPELLANT'S OPENING BRIEF

(Filed May 24, 2017)

Appeal from the United States District Court
For The Central District of California
Hon. George Wu District Judge, Presiding

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* * *

STATEMENT OF FACTS

A. Background

The offenses for which Appellant was convicted arise out of a March 22, 2010 incident of the excessive use of force against inmate Phillip Jones, a pretrial detainee at the Twin Towers Correctional Facility (“TTCF”). TTCF is part of the Los Angeles County Jail and houses most of the jail’s mentally ill and often dangerous inmates. ER vol. III, 3, p. 236 [Dkt. 191: RT 236].

In 2010, Brunsting was a Training Officer tasked with training recent graduates from the LASD Academy assigned to work at TTCF. On March 22, 2010, Brunsting was assigned as the training officer for Joshua Sather,⁴ a 23 year-old deputy trainee who graduated from the Academy in February 2010. ER vol. II, 2, p. 11, 118]; [Dkt. 193: RT 11,118]. Shortly after Sather started working at TTCF, he was assigned to Module 161, a floor that is specifically known for housing mental observation inmates. ER vol. II, 2, p. 118; [Dkt. 193: RT 118]. According to Custody Assistant Porsha Singh, who was assigned to module 161 at TTCF, the inmates in this module were often schizophrenic, tended to hear voices, and could be aggressive and unpredictable. ER vol. III, 3, p. 236; [Dkt. 191: RT [7] 236]. She further testified that she had witnessed

⁴ Joshua Sather was a former deputy sheriff trainee who was provided a non-target letter by the government, the day before he testified at the Grand Jury. ER vol. II, 2, p. 224-25; [Dkt. 193: RT 163; 224-25].

inmates in the module attack deputies. ER vol. II, 2, p. 16; [Dkt. 193: RT 16].

B. The Incident

On March 22, 2010, Sather together with Appellants Brunsting and Branum were assigned to work on the sixth floor at TTCF. Specifically, Branum and Sather were assigned to Module 161 and Brunsting was assigned to Module 162. ER vol. II, 2, p. 99; [Dkt. 193: RT 99]. Both modules are on the same floor. *Id.* Sather was 9 days into his assignment at TTCF and on his third day working with Brunsting as his training officer. ER vol. II, 2, p. 118; [Dkt. 193: RT 118].

The incident involves a use of force by Appellant and other deputies against inmate Jones in the interconnect hallway between modules 161 and 162. As testified to at trial, the interconnect hallway was a busy area, used on a daily basis by jail personnel, nurses, social workers, psychologists, and psychiatrists walking between modules 161 and 162. ER vol. II, 2, p.41-43; [Dkt. 193: RT 41-43]. A nurse's station is located right inside the interconnect door. ER vol. II, 2, p.42; [Dkt. 193: RT 42].

The issue at trial was whether the force was justified and whether the supplemental report prepared by Brunsting was true.⁵

⁵ Brunsting's Supplemental Report, indicates in relevant part, that Jones failed to follow orders to go back to his cell and instead headed into the interconnect hallway. Sather and Brunsting

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[8] That day, Custody Assistant Porsha Singh was working inside the control booth of module 161.⁶ ER vol. III, 3, p. 231-32, 251-52; [Dkt. 191: RT 231-32, 251-52]. Singh was in charge of calling out visiting passes for the A/B/C pods and obtaining an accurate count of which inmates were in the visiting areas. ER vol. III, 3, p. 252; ER vol. II, 2, p. 6-7; [Dkt. 191: RT 252; Dkt. 193: RT 6-7]. At the time, there were up to 200 mental observation inmates in the module. ER vol. II, 2, p. 13-14; [Dkt. 193: RT 13-14]. That morning she noticed that the inmate count was off, as there were more inmates inside the visiting area than visitor passes. ER vol. III, 3, p. 252; ER vol. II, 2, p. 13; [Dkt. 191: RT 252; Dkt. 193: RT 13]. When she questioned the inmates over the intercom to obtain their identity and booking number, only one inmate did not identify himself. ER vol. III, 3, p. 253; ER vol. II, 2, p. 8, 33; [Dkt. 191: RT 253; Dkt. 193: RT 8, 33]. As Singh listened into the intercom she heard an inmate say, “Fuck that bitch.” ER vol. III, 3,

followed, telling Jones he was going the wrong way and needed to go back to his cell. According to Brunsting’s report, Jones attempted to swing at Sather. Force was used in response. Brunsting reports that he punched the inmate twice in the face; pepper spray was deployed by Branum (Johnson) and the inmate was handcuffed by Sather. Following that, Jones was taken to the clinic where he was treated for his injuries. ER vol. IV, 11.

⁶ Porsha Singh testified on May 10, 2016 and May 12, 2016 for the government under a grant of immunity. ER vol. III, 3, p. 233; [Dkt. 191: RT 233]. She was provided immunity despite having lied to Internal Affairs about the incident. ER vol. III, 3, p. 267; ER vol. II, 2, p. 38-39, 49; [Dkt. 191: RT 267; Dkt. 193: RT 38-39, 49].

p. 252-53; [9] [Dkt. 191: RT 252-53]. That inmate was Phillip Jones. ER vol. III, 3, p. 253; [Dkt. 191: RT 253].

Singh testified that she asked Sather to come to the control booth where she obtained his keys for access to the visiting area.⁷ *Id.* She acknowledged that she had never worked with Sather before this day. ER vol. III, 3, p. 254; [Dkt. 191: RT 254]. According to Singh, she used Sather's keys to open the visiting door where she then confronted inmate Jones; an inmate she acknowledged who weighed double her weight and stood over 6 feet tall. ER vol. II, 2, p. 20, 72; [Dkt. 193: RT 20, 72]. According to Singh she asked "What the fuck was his problem and why was he being disrespectful . . ." ER vol. III, 3, p. 254; [Dkt. 191: RT 254]. After confronting Jones, Singh described his demeanor as hostile and agitated.⁸ ER vol. II, 2, p. 73; [Dkt. 193: RT 73]. Singh indicated that given Jones' attitude, she felt that a situation could develop where he could assault her or other inmates. ER vol. II, 2, p. 54-55; [Dkt. 193: RT 54-55]. She thus closed the visiting room door, gave Sather back his keys,⁹ and returned to the control booth. *Id.* She then yelled out from the control booth window to "whoever was out there" that "someone"

⁷ Sather denies going to the control booth and giving his keys to Singh. ER vol. II, 2, p. 173-74; [Dkt. 193: RT 173-74].

⁸ Sather had encountered inmate Jones earlier that day in the clinic, declining a medical visit. ER vol. II, 2, p. 124, 242; [Dkt. 193: RT 124, 242].

⁹ Sather denies this version of events. ER vol. II, 2, p. 173-74; [Dkt. 193: RT 173-74].

needed to “go check that motherfucker in visiting because he had a bad attitude.” ER vol.

* * *

[15] **C. Medical Records**

At trial, the Government introduced into evidence medical reports regarding examinations of inmate Jones immediately after the use of force on March 22, 2010, and two days later, on March 24, 2010. ER vol. V, 15, p. 1-5. An “Inmate Injury Report” from March 22, 2010 prepared approximately an hour after the event states, “no physical injuries observed.” ER vol. V, 15, p. 1. That same day, an “Inmate Medical Documentation” report was generated that states in pertinent part “PT has no complains” [sic] and that the alleged victim was “in no visible distress.” ER vol. V, 15, p. 2-3. There was “no swelling or bruises observed.” ER vol. V, 15, p. 1-2. Consistent with the use of pepper spray, the inmate’s face was washed with Bioshield. ER vol. V, 15, p. 1-2.

[16] The follow-up examination done on March 24, 2010 also indicates that there are no bruises or swelling observed. ER vol. V, 15, p. 4-5. A second “Inmate Medical Documentation” report was generated after the follow-up examination that mentions some pain in the ribs, but that the rib showed “no bruises or redness or swelling.”¹⁹ ER vol. V, 15, p. 5. None of the medical

¹⁹ Sather testified that it was he who punched inmate Jones in the ribcage. ER vol. II, 2, p. 127; [Dkt. 193: RT 127].

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documentation makes mention of any complaints of pain to the groin area. ER vol. V, 15, p. 1-5.

* * *
