

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

VS.

CASE NO. 2:19-CR-20037-001

ANTHONY BOEN

DEFENDANT

**DEFENDANT'S REPLY TO THE UNITED STATES'
RESPONSE TO MOTION FOR ACQUITTAL**

The Defendant, Anthony Boen, respectfully requests that Court grant the Defendant's Motion for Acquittal or a New Trial. The conflicting testimony and the physical impossibility of the some of the allegations require that the Defendant's Motion be granted in the interests of justice.

BACKGROUND

A. Procedural History

A federal grand jury indicted the defendant on November 20, 2019, on three counts of violating 18 U.S.C. § 242. Count One alleged that the defendant repeatedly punched a detainee who was handcuffed and shackled in the backseat of a police vehicle; Count Two charged the defendant with pushing a detainee to the ground and pulling his hair during an interrogation; and Count Three alleged that the defendant slapped a detainee in the head while he was in an area of the Franklin County Jail known as the "shower room." All three counts charged that the defendant's assaults caused bodily injury to his victims. *See* Indictment, Dkt. No. 1. On August 9, 2021, at the conclusion of the trial, the jury convicted defendant Boen on Counts Two and Three and acquitted him on Count One. Two weeks after the verdict, the Defendant filed the instant motion under Federal Rules of Evidence 29 and 33 challenging the sufficiency of the evidence supporting his conviction. *See* Dkt. 90. On September 28, 2021, the Plaintiff filed a Response in

Opposition to the Motion for Acquittal. See Dkt. 100. The Defendant is now filing this Reply to Response.

B. Evidence Presented at Trial

At trial, the jury heard testimony from multiple witnesses, presenting conflicting and often outright contradictory evidence. The evidence refuting the two counts of conviction is summarized below.

1. Count Two – Boen’s Alleged Assault on Brandon English

The jury found Boen guilty on Count Two of the Indictment, which charged him with assaulting detainee Brandon English while he was being interrogated at the Franklin County Jail. The Government had three witnesses in regard to this count; Kevin Hutchinson and Travis Ball, both former Sheriff Deputies, and Brandon English, the alleged victim. The testimony given by each of the three parties was contradictory.

a. Testimony of Kevin Hutchinson

Hutchinson was present at the time of the alleged assault and acted as a witness for the Government. When asked by the Government, Kevin Hutchinson stated, “I stood there. And Anthony started talking, the Sheriff started talking to Brandon about him stealing in the county...” at Tr. At 610. He then went on to state that, “I’m not exactly sure if it was a combination of a push and Brandon leaning back in his chair, but the chair overturns with Brandon in it. He was still in a seated position with his feet up over the chair. And at that point, the Sheriff was kneeling down next to him on his right side on the floor as well.” *Id.* On cross examination, Hutchinson was even more specific. He stated “[w]hen he grabbed him by the shirt, either the – I don’t actually recall how it happened, whether it was two different -- whether it was Brandon jumping back into the seat, or the Sheriff pushing him, or both of them combined. Somehow or another, when he grabbed

his shirt, the chair tipped over with Brandon English in it. And then ended up with Brandon on his back in the chair.” Tr. At 635. He further confirmed he could not definitively state what happened that caused the chair to fall backwards. Tr. at 636.

When discussing any alleged injuries, the Government elicited testimony from Hutchinson that he saw Brandon English rubbing the side of his head. He did not state that Sheriff Boen had pulled at English’s hair or otherwise assaulted him. When questioned specifically on this issue, Hutchinson stated that while Boen may have grabbed English’s hair, he did not pull it or jerk it. Tr. At 637. Finally, Hutchinson testified that Boen set the chair back up for English. Tr. At 638.

b. Testimony of Travis Ball

The next witness for the Government was Travis Ball. When he was asked what happened, he stated that “Sheriff Boen grabbed him by the shirt area, went backwards with him to the floor.” Tr. at 672. Travis Ball was asked specifically if he could see anything and his answer was “[n]ot really. My view was blocked by the desk...” Tr. at 673. He had virtually no evidence to offer as to what happened, aside from the Defendant “grabb[ing] him by the shirt area” and going “backwards with him to the floor.” Noticeably, he did not testify that Sheriff Boen pushed him, threw him or “slammed” him to the floor, which was consistent with the testimony of Hutchinson.

c. Testimony of Brandon English

English testified that officers took him to a windowless office in the jail and placed him in a chair. Inside the room, Boen sat next to English while Detective Travis Ball sat behind a desk. Tr. at 647. English claimed that, Boen “grabbed me by my chest and slammed me down on the floor.” *Id.* at 648. English was specifically asked, “[w]hile he was yelling at you after you were on the ground, was he doing anything else to you at that point?” *Id.* at 648. English stated “No, he

was just holding me down.” *Id.* at 648. The testimony regarding being thrown to the floor is in direct contradiction to the two other Government witnesses.

The Government then asked English if he “lost any hair in the incident,” to which he testified “I lost a substantial amount of hair, I would say.” *Id.* at 648. This is clearly contradictory testimony. There was no prior testimony of Boen pulling English’s hair at any point. English plainly stated that the Defendant did nothing aside from hold him down, yet claims to have also lost hair. Though English did testify that he lost hair, he never testified or stated that any action of Anthony Boen caused him to lose hair. He did not testify that his hair was pulled and only stated such at the Government’s prompting.

When asked about whether he picked himself up after the alleged assault, English stated “No. I picked myself up.” *Id.* at 657, which is also contradictory as to what was testified by other witnesses.

2. Count Two – Boen’s Alleged Assault on Zachary Greene

The jury found Boen guilty on Count Three of the Indictment, which charged him with assaulting detainee Zachary Greene while he was being held at the Franklin County Jail. The Government had several alleged witnesses in regard to this count and much like the previous charge, the testimony given by each of the three parties was contradictory; so much so that they Government has now alleged that the evidence proved that an assault occurred multiple times, something that was purely the Government’s theory and was not supported by testimony and in fact directly refuted by witness testimony, particularly that of Scout Ingram Tr. at 1014. Furthermore, Dalton Miller, a Government witness who testified that he had arrived before the Sheriff specifically testified that he did not see the Sheriff go to Greene’s cell earlier in the night. Tr. at 897.

a. Testimony of Travis Ball

The Government's first witness to this alleged assault was Travis Ball. Initially, it should be noted that he admitted to drinking that night and Marshall Elmore, a trustee at the jail who interacted with Ball that night confirmed that he was intoxicated. Tr. At 997. Furthermore, Ball stated that the call came at the beginning of the dinner and that it took "two and half to three hours" Tr. at 697, to return to the jail, testimony which was wholly refuted by Scout Ingram who said that the call came at the end of the dinner. Tr. at 1010.

In describing the alleged assault, Ball testified that Sheriff Boen struck Greene but he didn't know how many times and he just wandered off to the kitchen. Tr. at 707, 777. He further testified that he did not see any injuries to Greene, though several other witnesses saw the injuries from Greene's altercation first hand. *Id.* He then backtracked and said he saw "blood around his mouth area, or what looked like blood." *Id.* The fact that Zachary Greene had a bloody lip prior to the arrival of the Sheriff was support by two of the Government witnesses; Dakota Cowans. Tr. at 834 & 839 and Dalton Miller Tr. at 897.

As to the physical positioning of Zachary Greene, Travis Ball testified, and confirmed on cross examination that Zachary Greene's head was propped up against the back wall of the cell against the metal door. Tr. at 760. Ball confirmed that room was approximately five feet deep, with a three-foot bench and at least enough room for a door to open. Tr. at 763. He was also specifically asked "[a]nd [Boen] never went in the room?" to which Ball responded "[we]ll, he leaned into the room." Tr. at 763. This testimony was directly contradicted by Dakota Cowans, an eyewitness and Government witness was asked "[d]id you ever see Sheriff Boen lean into the shower room?" to which he replied, "No, sir." Tr. at 838. Furthermore, Dakota Cowans

emphatically stated that if one had their head against the back wall it would be impossible to hit someone in the head if you were standing in the doorway. Tr. at 842.

b. Testimony of Dalton Miller

Dalton Miller was a Government witness who claims to have witnessed an assault on Zachary Greene. The problem with his testimony is that literally no one else recalls seeing him at the Sheriff's Department that night. Scout Ingram specifically testified that she never saw him in direct contradiction of his testimony. Tr. at 1014.

Dalton Miller testified that no part of an inmate's body would even reach outside of the shower room unless they are extremely tall. Tr. at 888. It was established that Zachary Greene was lying down and had his head against the door by Travis Ball and Dalton Miller confirmed that Zachary Greene was "in the back right corner, sitting down." Tr. at 909. In describing the alleged assault by the Sheriff, Miller specifically testified that "he leaned in towards Zach Greene." Tr. at 898.

ARGUMENT

A. The Government did not present sufficient evidence to show that Sheriff Boen acted willfully to deprive Brandon English of a right by using excessive force or that any injury was caused.

It is clear that upon looking at the transcript of the witness testimony that the only thing any witness knew for sure was that the chair that Brandon English was in flipped over while Sheriff Boen was holding his shirt. That is the only fact which all witnesses clearly agreed to. Neither Travis Ball nor Kevin Hutcinson testified that they saw Boen push him over, nor that Boen did any other act to cause any injury. The only evidence presented as to any injury was the self-serving testimony of Brandon English.

Taken in the light most favorable to the verdict, this evidence establishes only that Brandon English fell over in his chair or at worst that the actions of Sheriff Boen inadvertently caused the chair to fall backwards. In either event, this does not show that Sheriff Boen acted willfully to deprive Brandon English of any right. It was the Government's burden of proof to show beyond a reasonable doubt that Sheriff Boen acted willfully in using excessive force. Under either of the two possible scenarios, the willful element cannot be met.

Furthermore, as to the injury element, the Government relied wholly upon the "physical pain" element of a physical injury. However, they simply asked the jury to infer there was an injury. Brandon English never testified that he was in pain. They asked the jury to infer that because Hutchinson saw Brandon English rubbing the side of his head, that he was in pain. Asking for an inference based on what a witness assumed someone felt is not meeting any burden of proof, much less that which the Government had to prove.

B. The Government did not present sufficient evidence to show that Sheriff Boen acted willfully to deprive Zachary English of a right by using excessive force or that any injury was caused.

It is a long established "general rule that a verdict cannot be based on evidence which cannot possibly be true, is inherently, unbelievable, or is opposed to natural laws. 32 C.J.S., Evidence § 1042, pp. 1125-1126; 20 Am.Jur., Evidence § 1183, pp. 1033-1034. Where undisputed physical facts are entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff, the physical facts must control. No jury can be allowed to return a verdict based upon oral testimony which is flatly opposed to physical facts, the existence of which is incontrovertibly established." *Wood v. United States*, 342 F.2d 708 (8th Cir. 1965), citing *Stolte v. Larkin*, 110 F.2d 226, 229 (8th Cir. 1940).

There is no way that the Government could establish that Sheriff Boen could have even reached Zachary Greene, much less actually struck him or caused any injury because it goes against physical facts. The testimony that was elicited was that the room was at a minimum four-foot deep, likely five foot deep. There was absolutely no testimony that Sheriff Boen ever entered the room and in fact, multiple witnesses used the term, “leaned” into the room. Contrary to the Government’s assertions in their reply, there was testimony on this issue. It certainly does not take an expert witness to understand that six-foot-tall man does not have four- to five-foot-long arms. This is simply common sense. The only way that a jury could have determined that Sheriff Boen struck Zachary Greene is if they ignored physical facts which were incontrovertibly established.

Obviously, if Sheriff Boen never struck Zachary Greene, then he could not have received an injury. However, even assuming arguendo, that Sheriff Boen could have somehow struck Zachary Greene, there was no testimony from any witness whatsoever, as to any injury or pain which was inflicted. All of the witnesses confirmed that any injuries which Greene may have acquired were present before the Sheriff arrived at the jail.

WHEREFORE, PREMISES CONSIDERED, Defendant prays the Court grant the Defendant’s Motion and all other relief that he is otherwise entitled to as a matter of law.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to the following:

Brandon Carter
Brandon.T.Carter@usdoj.gov

Michael Songer
Michael.songer@usdoj.gov

I hereby certify that on this 21st day of October, 2021, I presented the foregoing to the Clerk of the Court for filing using the CM/ECF system, and I mailed the documents by United States Postal Service to the following non CM/ECF participants:

None

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