IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2103

Summary Calendar

FAVIS CLAY MARTIN,

Plaintiff-Appellant,

v.

D.B. McELVANEY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-84-2176)

(August 1, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Favis Clay Martin brought suit under 42 U.S.C. § 1983 alleging a violation of his Eighth Amendment rights and under Texas law alleging claims of battery and intentional infliction of emotional distress. Named as defendants were D.B. McElvaney and Ernest Dixon, employees of the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID). After a jury trial,

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

the jury rendered its verdict in favor of the defendants on all of Martin's claims, and the district court entered judgment accordingly. Martin now appeals the district court's entry of judgment only with respect to his Eighth Amendment claim. We reverse the judgment of the district court with respect to Martin's Eighth Amendment claim.

I.

On May 14, 1984, Favis Clay Martin filed suit in the United States District Court for the Southern District of Texas against D.B. McElvaney and Ernest Dixon, a captain and a sergeant, respectively, at the TDCJ-ID. Also named as defendants were W.D. White, Walker County Sheriff; Byron Bush, Walker County Deputy Sheriff; and Frank Blazek, Walker County District Attorney. In his complaint, Martin alleged that McElvaney and Dixon had violated his civil rights under 42 U.S.C. § 1983 by applying excessive use of force against him in violation of the Eighth Amendment's proscription against cruel and unusual punishment. Further, he contended that White and Bush failed to conduct a thorough investigation into this use of force and that Blazek failed to secure an indictment against McElvaney and Dixon. He also alleged pendent state law claims for battery and the intentional infliction of emotional distress.

Martin alleged that McElvaney and Dixon had attacked and beat him because he had testified on behalf of another inmate, Eroy Brown, who had been charged with the capital murder of a warden and another prison official, but who had asserted self-

defense as a defense to the murder charge. The district court dismissed Martin's claims against White, Bush, and Blazek as frivolous under 28 U.S.C. § 1915(d). However, Martin's case against McElvaney and Dixon was tried by a jury in December 1991.

At trial, Martin testified that on January 6, 1983, he testified on behalf of an inmate named Henry Stiehl at a disciplinary hearing at which McElvaney presided. He stated that after he had handed McElvaney his statement and asked McElvaney to read it into the record, McElvaney became upset by the contents of the statement and turned the tape recorder, which was being used to record the hearing, on and off several times. According to Martin, McElvaney then accused him "off the record" of being a liar for Stiehl, a liar in the Brown case, and a troublemaker before sending him back to his cell in administrative segregation.

Martin also testified that approximately an hour later, during "count,"[1] Dixon came to Martin's cell and escorted Martin to McElvaney's office. He stated that once in the office, McElvaney directed him to empty his pockets onto the desk and that he complied with McElvaney's directive. According to Martin, McElvaney immediately swept the items off the desk and onto the floor, stating "Get that crap off my desk." Martin testified that when he bent over to try to pick up the items, Dixon placed his foot on the back of Martin's hand, and McElvaney

[1] "Count" is daily time during which the inmates are locked in their cells and the guards count the prisoners to be sure that none has escaped.

grabbed Martin by his hair and hit him in the face while calling him a liar and a troublemaker. Martin stated that Dixon then started kicking him in the back. Martin was then taken back to his cell.

As a result of this alleged thrashing, Martin said that he suffered swollen eyes, a bruised nose, and a split lip and that he was bruised along his back and side. He also stated that when he tried to obtain medical attention for his injuries, his requests were ignored and that because he was in administrative segregation, he was unable to walk to the infirmary to obtain treatment.

Two inmates testified at trial that after Martin was returned to his cell, he looked beaten. Additionally, Richard Ira Gunderson, another inmate, testified that he had been summoned to McElvaney's office on January 10, 1983, and asked that he do McElvaney a favor and "jump on" Martin. Gunderson testified that McElvaney offered to give Gunderson his "good time" back and to make a favorable parole recommendation on his behalf if he would attack Martin. Gunderson stated that he considered McElvaney's proposal but decided against it.

McElvaney, on the other hand, testified that he did not remember Martin's being in his office during "count" time on January 6, 1983, and firmly denied all of McElvaney's allegations as to what took place. He unequivocally stated that "the incident . . . never happened, he was not in my office under those circumstances." Further, Dixon testified that although he

probably escorted Martin to McElvaney's office at some point in early January 1983, he could have done so to permit Martin to receive his legal mail or to interview him regarding disciplinary cases in which he was involved. He also testified that he did not recall ever using any force on Martin and that he believed that the inmates who had testified that Martin was returned to his cell looking beaten did not "accurately reflect what had occurred."

In returning its verdict, the jury answered the following special interrogatories in the negative for each of McElvaney and Dixon:

> Do you find from a preponderance of the evidence that [the] Defendant . . . deprived the Plaintiff . . . of his constitutional right to be free from cruel and unusual punishment while incarcerated in the [TDCJ-ID]?
>
> Do you find from a preponderance of the evidence that [the] Defendant . . . committed battery against [the] Plaintiff on or about January 6, 1983?
>
> Do you find from a preponderance of the evidence that [the] Defendant intentionally inflicted severe emotional distress upon [the] Plaintiff . . . ?

The district court then issued its judgment in accordance with the jury verdict and ordered that Martin take nothing from McElvaney and Dixon. Martin now appeals the judgment of the district court only with respect to his Eighth Amendment claim.

II.

A.

Martin argues that the trial court's instruction to the jury with respect to his Eighth Amendment claim included an unconstitutional requirement that Martin demonstrate significant

injury to prove a violation of his Eighth Amendment rights. The jury instruction on Martin's claim reads in pertinent part:

> In order for the Plaintiff to establish that a given Defendant violated Plaintiff's Eighth Amendment rights, Plaintiff must prove each of the following four elements by a preponderance of the evidence:
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> (1) that the Defendant's actions caused a significant injury to the Plaintiff, that
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> (2) resulted directly and only from a use of force that was clearly excessive to the need, the excessiveness of which was
>
> (3) objectively unreasonable, and
>
> (4) that the Defendant's actions constituted an unnecessary and wanton infliction of pain.
>
> If the Plaintiff fails to prove any one of these elements, you must find for the Defendants.

Martin contends that such an instruction, which clearly requires a finding for the defendant if no significant injury is found, is not harmless error under Hudson v. McMillian, 112 S. Ct. 995 (1992).

We afford trial judges great latitude in fashioning jury instructions, and we ignore technical imperfections. FDIC v. Mijalis, 15 F.3d 1314, 1318 (5th Cir. 1994); Bender v. Brumley, 1 F.3d 271, 276 (5th Cir. 1993). Nonetheless, the trial court must "'instruct the jurors, fully and correctly, on the applicable law of the case, and . . . guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth.'" Bender, 1 F.3d at 276 (quoting 9 CHARLES A. WRIGHT & KENNETH A. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 2556 (1971)). A challenged instruction is deemed

erroneous whenever "'the charge as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" Mijalis, 15 F.3d at 1318 (quoting Bender, 1 F.3d at 276). However, "even if the jury instructions were erroneous, we will not reverse if we determine, based on the entire record, that the challenged instruction could not have affected the outcome of the case." Id.; see Bender, 1 F.3d at 276-77.

In the instant case, the district court gleaned its instruction almost verbatim from the factors enunciated in Huguet v. Barnett, 900 F.2d 838, 841 (5th Cir. 1990), which was the controlling law in Eighth Amendment excessive-use-of-force cases at the time the instant case was tried.[2] However, the district court itself on the record raised the propriety of its instruction on the "significant injury" factor at the charge conference, expressing concern on the state of the law in the wake of the Supreme Court's decision in Wilson v. Seiter, 111 S. Ct. 2321 (1991), as that decision might affect the "significant injury" requirement in an Eighth Amendment excessive-use-of-force

[2] Prior to Huguet, the standard established in Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981), represented the controlling law in this circuit. According to Shillingford, a prison official's action was redressable under § 1983 if that action "caused severe injuries, was grossly disproportionate to the need for action under the circumstances[,] and was inspired by malice rather than mere carelessness or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience." Id. at 265 (emphasis added). Shillingford was the controlling law at the time Martin's alleged injury occurred.

case.[3] See Industrial Dev. Bd. of Section, Alabama v. Fuqua Indus., 523 F.2d 1226, 1238 (5th Cir. 1975) (explaining that when an appellate court is sure that the trial court was informed of the potential error in a jury instruction, it may reverse on the basis of that instruction to which there was no formal objection). Martin's attorney also objected to the charge as drafted before the charge was read to the jury on the ground that it was inconsistent with the provisions of Wilson.

Further, Hudson was pending in the Supreme Court when the instant case was tried. In Hudson, the Court squarely addressed the issue of "whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury." Hudson, 112 S. Ct. at 997. The Court determined that "the core judicial inquiry [should be] . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Id. at 999 (citing Whitley v. Albers, 475 U.S. 312, 322 (1986)). The Court rejected any requirement of "significant injury" on the ground that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated[,]

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[3] In Wilson, the Court, in discussing an Eighth Amendment challenge to conditions of confinement, stated that it did "not agree with [the] suggestion that the 'wantonness' of conduct depend[ed] upon its effect upon the prisoner." Wilson, 111 S. Ct. at 2326. Hence, the district court in the instant case identified Wilson as signalling a problem with the "significant injury" requirement in an Eighth Amendment challenge to use of force.

. . . whether or not significant injury is evident." Id. at 1000 (citation omitted).

This court applied Hudson to a case which was tried while Hudson was pending and in which the jury was charged that proof of significant injury was necessary to support the plaintiff's excessive-use-of-force claim. See Bender, 1 F.3d at 277-279. In Bender, the plaintiff had filed a federal excessive-use-of-force claim under § 1983 and a state excessive use-of-force claim under Louisiana tort law. Id. at 274. The district court gave an instruction on the federal claim that was similar to that which the court gave in the instant case,[4] and the jury determined that the defendants were not liable to the plaintiff on either the federal or the state claim. Id. at 278.

On appeal, we held that the instruction given on the federal claim was not harmless error. Id. at 278. In so doing, we rejected the defendants' argument that any error was harmless

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[4] In Bender, the district court had instructed the jury on the federal excessive-use-of-force claim as follows:

> In order to prove that the defendants used excessive force, Mr. Bender must prove by a preponderance of the evidence:
> 1. a significant injury, which
> 2. resulted directly and only from the use of force that was clearly excessive to the need; the excessiveness of which was
> 3. objectively unreasonable.
>
> If Bender fails to prove any of these elements, you must find for the defendants. These three elements are objective focusing on the injury, the amount of force used, and the amount of force necessary.
>
> To determine whether a "significant injury" has been inflicted, you must consider only the injuries resulting directly from the constitutional wrong. There can be a constitutional violation only if a significant injury resulted from the officer's use of excessive force.

because the jury had also rejected Bender's state law excessive-use-of-force claim, for which the court had instructed the jury that significant injury was not a necessary element. Id. at 279. We stated that "[a]ffirming the state component [was] an unsound basis upon which to deny automatically Bender's federal claim, where the error occurred," and we explained:

> Although the relevant objective factors [of excessive-force claims] are similar under both [the state and federal] schemes, . . . they are not so identical for us to conclude that a decision absolving the officers under [state] law mandates a parallel finding of "no excessive force" under § 1983. Simply put, the differencesSQthough admittedly slightSQextend beyond whether "significant injury" is used as a predicate to liability.

Id. We then concluded that "[b]ecause we [were] left in 'grave doubt' whether the trial court's erroneous instruction exerted 'substantial influence' over the outcome of the case, the jury's decision on Bender's § 1983 claims [could not] stand." Id.

In the instant case, the jury's decision absolving McElvaney and Dixon under the state law battery claim does not mandate a similar finding on a properly submitted Eighth Amendment excessive-use-of-force claim. As in Bender, the differences between the jury's instruction on the state law battery claimSQwhich merely stated that battery is "any intentional use of force upon the person of another"SQand on the federal excessive-use-of-force claim clearly "extend beyond whether 'significant injury' is used as a predicate to liability." Hence, based on the reasoning in Bender, the error in the district court's jury submission on Martin's Eighth Amendment

claim was not harmless error.[5] We therefore reverse the district court's judgment with respect to Martin's Eighth Amendment claim against McElvaney and Dixon and remand for a new trial.[6]

B.

Martin also argues on appeal that in the face of testimonial evidence from inmate Gunderson that Gunderson had been solicited by McElvaney to "jump on" or "beat up" Martin, the district court's refusal to submit "a separate claim and a separate instruction [on this evidence] was harmful error." With respect to Martin's argument that the submission of a separate "claim" was warranted, we note that when the district court made it clear

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[5] We also note that in their brief, McElvaney and Dixon do not in any way rebut Martin's argument concerning the error in the district court's instruction and seemingly concede the remand of this claim to the district court for a new trial.

[6] Martin also argues on appeal that the district court committed error which was not harmless by submitting, over his attorney's objection, an instruction to the jury with respect to his excessive-use-of-force claim that reads in pertinent part:

> If you find that the Defendants applied force . . . in a good faith effort to maintain or restore discipline then for you to find that the Defendants acted in a "wanton" manner in violation of the Eighth Amendment you must then find that the Defendants acted in a malicious and sadistic manner for the very purpose of causing harm. However, if no such emergency existed, all that need be shown to rise to a level of wantonness is a showing of deliberate indifference on the part of the Defendants.

Martin asserts that because McElvaney and Dixon never brought forth any evidence tending to prove that their actions were taken in "a good faith effort to maintain or restore discipline" and instead consistently asserted that the events Martin alleged never occurred, no evidence in the record supports the submission of these instructions. Because we have already determined that Martin's Eighth Amendment claim should be remanded to the district court for a new trial, we need not address whether, after a review of the record as a whole, this "challenged instruction could have affected the outcome of the case." See Mijalis, 15 F.3d at 318.

to Martin's attorney that Gunderson had testified that he had not accepted McElvaney's alleged offer and that the court "didn't realize there was a separate claim" being made for the attempt to procure Gunderson to inflict harm on Martin, counsel responded: "I think it's not a separate claim. It is evidence to support the same claims that we have, which is that Inmate Martin was subjected to a violation of Section 1983 and his constitutional rights while he was in prison . . . . It's certainly relevant to the emotional distress claim" (emphasis added). Hence, Martin's "newly found" argument on appeal that the district court erred in refusing to submit a separate "claim" is without merit.

We also conclude that Martin was not entitled to an additional specific instruction on Gunderson's testimony with respect to his Eighth Amendment claim. The sum of the evidence at trial showed that McElvaney had solicited Gunderson on one occasion to do harm to Martin and that Gunderson told Martin (1) about the solicitation and (2) that he had decided not to "take McElvaney up" on his offer. Although we do not decide that threats of harm can never rise to the level of an Eighth Amendment violation, the evidence in this case concerning "threats" made to Martin was not such that a specific instruction to the effect that these threats constituted an Eighth Amendment violation was warranted. See Lamar v. Steele, 698 F.2d 1286, 1286 (5th Cir.) (explaining that "mere words" or "idle threats" alone are not enough to support a § 1983 cause of action), cert. denied, 464 U.S. 821 (1983); see also Pittsley v. Warish, 927

F.2d 3, 7 (1st Cir. 1991) (determining that fear or emotional injury which results solely from idle threats is generally not sufficient to constitute a violation of a constitutional right); Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) (concluding that threats causing fear for plaintiff's life was not an actual infringement of a constitutional right and thus not actionable under § 1983). Therefore, the district court did not err in refusing Martin's request for a specific instruction.

C.

McElvaney and Dixon argue that remanding Martin's Eighth Amendment claim would be futile because they are entitled to qualified immunity. They thus assert that because of the futility of remand, the district court's judgment should be affirmed.[7]

Qualified immunity is an affirmative defense which must be pleaded and proved. Cronen v. Texas Dept. of Human Servs., 977 F.2d 934, 939 (5th Cir. 1992); see Adams v. Gunnell, 729 F.2d 362, 371 (5th Cir. 1984). In their answer to Martin's complaint, McElvaney and Dixon stated that they were "immune from a suit of damages under various theories of immunity." McElvaney and Dixon did not seek dismissal or summary judgment on qualified immunity grounds and never urged or argued their alleged qualified

[7] We note that the futility of remand is their only argument on appeal. As we explained earlier, McElvaney and Dixon do not rebut in any way Martin's argument that the district court committed harmful error by instructing the jury as it did on Martin's Eighth Amendment claim and seemingly concede the remand of this claim to the district court for a new trial.

immunity to the district court so that the district court could assess their entitlement to this defense.[8] Unsurprisingly, the district court made no ruling whatsoever on the qualified immunity issue. Because we believe that McElvaney and Dixon's entitlement to qualified immunity was not effectively pleaded and proven in the district court, we decline to address this issue on appeal and leave it for the district court to decide in the first instance, particularly inasmuch as the resolution of this question may well rest on factual determinations. See Lane v. Griffin, 834 F.2d 403, 408 (4th Cir. 1987) (remanding a § 1983 claim to the district court for a new trial because of an erroneous jury instruction and instructing the district court to confront the qualified immunity issue, which the district court had previously failed to address, before conducting the new trial); cf. Brown v. United States, 851 F.2d 615, 620 (3d Cir. 1988) (explaining that because the district court did not address the question of qualified immunity, it would be inappropriate to decide the question on appealsQalthough the appellate court had the power to do sosQeven if the record provided a sufficient basis for its resolution).

III.

For the foregoing reasons, we REVERSE the district court's judgment with respect to Martin's Eighth Amendment claim against McElvaney and Dixon and REMAND for a new trial.

[8] In their brief, McElvaney and Dixon do not argue that they effectively raised the issue of qualified immunity below or that the district court failed to address or rule on it.