IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Caron Nazario,	)	
Plaintiff,	)	
v.	)	Civil Action No. 2:21-cv-00169
	)	
Joe Gutierrez, et. al.	)	
Defendants.	)	

PLAINTIFF CARON NAZARIO'S REPLY BRIEF
TO DEFENDANT CROCKER'S OPPOTION TO JNOV AND NEW TRIAL UNDER RULE 50 AND 59 MOTION

Comes now the plaintiff by counsel and in reply to defendant Crocker's opposition to the motion for a judgment notwithstanding the verdict and/or a new trial pursuant to F.R.C.P. 50 and 59 motion for as follows. Defendant Gutierrez has not yet opposed this motion.

1. **The jury failed to follow the law and the jury instructions**.

Defendant Crocker claims Lt. Nazario is relying "heavily on speculation" and that there "is no evidence that the jury failed to follow the law and the jury instructions." **Doc 247 Page 4 of 17 Page ID # 4948**. Defendant Crocker attempts to support its argument by the following assertions: (a) that assault, battery and false imprisonment are separate state law claims; (b) that the claim that Lt. Nazario assumes that the assault gave him carte blanche authority to ignore and refuse commands from that point forward; (c) that Lt. Nazario is assuming the assault is the statements "ride the lighting" or "you should be"; (d) that both officers holstered their weapons and used verbal commands and "hands-on" tactics to remove Lt. Nazario from the vehicle making his continued resistance "unreasonable"; (e) that a reasonable jury could believe that the threat of the taser and that Lt. Nazario's refusal to exit after the taser was holstered was unreasonable justifying the use of pepper spray and hands on; and (f) and finally that some unidentified statement at the end of the traffic stop after the pepper spray and beating constituted

the assault, concluding that we simply don't know what actions constituted the assault which the jury found. The error of this protest is set out below.

By simply walking through the possibilities, each of Defendant Crocker's arguments objectively fails. Although Defendant Crocker does not raise the point, Lt. Nazario has made it clear, the jury is presumed to have followed the law. *Burgess v. Balt. Police Dep't*, 300 F. Supp. 3d 696, 712 (D. Md. 2018) citing *Nguyen v. Arce*, 34 F. App'x. 879, 883-84 (4th Cir. 2002)("jurors are presumed to follow the law"). The presumption is rebutted.

The backdrop to the analysis begins with Jury Instruction 41 and the Verdict. In pertinent part the instruction. "If, during the course of an otherwise lawful arrest, a law enforcement officer uses unreasonable force, such unreasonable force is an assault if it does not touch the citizen, and it is battery if it does. However, assault and battery are not mutually exclusive. Under these circumstances [of a law enforcement officer - Gutierrez using unreasonable force], a person [in this case Lt. Nazario] may use reasonable force to resist the arrest and unreasonable force by an [sic] law enforcement officer."

Finding an assault – the court must ask objectively what were the actions that could have triggered this finding and then what was Lt. Nazario authorized to do and what impact would that have on the following actions of the officers. The officers would necessarily be acting unreasonably in an attempt to quelch Lt. Nazario's legally authorized resistance by use of reasonable force.

In reverse order the evidence shows that Lt. Nazario's authorized resistance was the least amount of force possible – passive. The court ruled as much. **Doc 114 Page 21 of 40 PageID# 2315**.[1]

Objectively, the court should examine the possibilities for action and/or threats by Gutierrez which the jury found to have been the unreasonable use of force without a touching to constitute an assault.

Possibility No. 1 - The pointing of Gutierrez' firearm at Lt. Nazario, then Lt. Nazario may decline to get out of the car. If so, then the further threats of "riding the lightning", the confirmation of Lt. Nazario's reasonable fear, the spraying of Lt. Nazario in the face with pepper spray, the hands-on, the knee strikes and shoving him to the ground like a dog and the handcuffs are all unreasonable force in contravention of Lt. Nazario's right to resist the unreasonable force which the jury found to have existed.

Possibility No. 2 - The threats of "riding the lightning" and the confirmation of Lt. Nazario's reasonable fear with "yeah, you better be" directed at Lt. Nazario, then Lt. Nazario may decline to get out of the car. If so, then the further action of the spraying Lt. Nazario in the face with pepper spray, the hands-on, the knee strikes and shoving him to the ground like a dog and the handcuffs are all unreasonable force in contravention of Lt. Nazario's right to resist the unreasonable force which the jury found to have existed.

Possibility No 3 – The pointing by Gutierrez of the taser at Lt. Nazario, then Lt. Nazario may decline to get out of the car. If so, then the further action of the spraying Lt. Nazario in the face with pepper spray, the hands-on, the knee strikes and shoving him to the ground like a dog

[1] "Plaintiff did refuse lawful orders to exit the vehicle, but he was not actively fleeing and did not engage in active resistance." The court ruled on cross-motions for summary judgment under the microscope and weight of the video-evidence.

and the handcuffs are all unreasonable force in contravention of Lt. Nazario's right to resist the unreasonable force which the jury found to have existed.

Possibility No 4 – The pointing by Gutierrez of the pepper spray at his face, then Lt. Nazario may decline to get out of the car. If so, then the further action of the spraying Lt. Nazario in the face with pepper spray, the hands-on, the knee strikes and shoving him to the ground like a dog and the handcuffs are all unreasonable force in contravention of Lt. Nazario's right to resist the unreasonable force which the jury found to have existed.

Possibility No. 5 – Some unreasonable use of force by way of some unspecified threat after Lt. Nazario had been sprayed in the face with pepper spray, the hands-on, the knee strikes and shoving him to the ground like a dog and the handcuffs, then Lt. Nazario may resist using reasonable force.

Addressing each of the scenarios, in reverse order.

Possibility No. 5. Here, defendant Crocker cannot support their speculation with anything from the evidence upon which jury could conclude the determination of an assault was based without a finding of false imprisonment. The court should decline the invitation of defendant Crocker to engage in outright speculation without any evidence whatsoever to support it.

Possibility No. 4. If the assault was the pepper spray pointed at Lt. Nazario then Instruction 41 statement of the law shows that Lt. Nazario may resist, and the spray would constitute a battery, together with the continuing actions of Gutierrez and defendant Crocker going hands on.

Possibility No 3. If Gutierrez pointing of the taser at Lt. Nazario was the assault, then Instruction 41 statement of the law shows that Lt. Nazario may resist with reasonable force, i.e,

by declining to exit the vehicle with his hands raised in the air. Defendant Crocker argues that upon the holstering of the taser the jury could conclude that Lt. Nazario's right to resist thus ended and therefore the threat of pepper spray, the spraying of the pepper spray, the hands on and beating him with knee strikes and forcing him to the ground like a dog and handcuffs and detention was all reasonable. The law of this case is in the instructions together with Jury Instruction 41, which did not instruct the jury that Lt. Nazario's right to resist the unreasonable force ends when the act constituting the assault ends. Instruction No 39 defined assault – "An assault is any threatening act that puts another individual in reasonable fear of imminent physical injury." Having found that Gutierrez engaged in that act, Lt. Nazario's right to resist was triggered. The instruction does not say or require that "An assault is a continuing threatening action that puts another individual in reasonable fear of imminent physical injury." Defendant Crocker's argument thus fails.

Possibility No. 1 and 2. Defendant Crocker's argument for these possibilities suffer the same way that their argument failed on Possibility 3.

So, contrary to defendant Crocker's claim that Lt. Nazario relies heavily on speculation and that there is no evidence that the jury failed to follow the law and the jury instructions, the only objective conclusion based upon the facts in this case when coupled with the jury's unanimous finding of the assault is that they failed to follow the law and instructions of this case. The instructions made it clear that Lt. Nazario did not have "carte blanche authority" in resistance, the instruction provides for reasonable use of force --- in this case, a reasonable person cannot find that passive resistance was excessive force—Lt. Nazario's resistance was without force and therefore a jury could not find that he used unreasonable force. The

presumption that jurors are presumed to follow the law is conclusively and objectively rebutted. A new trial must be granted to prevent a miscarriage of justice.

2. <u>The jury verdict is based upon false evidence</u>.

Defendant Crocker concedes that it is undisputed that the Diagnostic and Statistical Manual of Mental Disorders – 5th Edition ("DSM-5") is the "gold standard." Defendant Crocker suggests that Dr. Keyhill Sheorn's addition of untested junk science additional criteria to the DSM-5 that she added to support her false claim that Lt. Nazario did not have PTSD, General Anxiety Disorder or Panic Disorder because he did not meet the criteria is not false evidence under oath. Poppycock. Once again, the court should examine this objectively --- if Lt. Nazario objectively met each of the recognized criteria in the "gold standard" DSM-5, then Dr. Keyhill Sheorn's untested junk science additional criteria will not defeat the fact that Lt. Nazario met the accepted standard criteria for PTSD, General Anxiety Disorder and Panic Disorder. Flat out, defendant together with Dr. Keyhill Sheorn intentionally and knowingly presented false evidence to the jury upon which the verdict rests. Dr. Keyhill Sheorn's 30 years and diagnosing and treating "tens of thousands of patients"[2] does not give her the right to substitute her untested junk science against the tested and statistical based accepted science set out in the gold standard DSM-5 and then tell the jury that this junk is part of the **<u>standard</u>** for diagnosis. The fact that an expert witness was "subject to a thorough and extensive examination" does not overcome the harm and prevent the miscarriage of justice. *Nease v. Ford Motor Co*., 848 F.3d 219, 231 (4th Cir. 2017) citing *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 593 (1993). Consistent with the gatekeeping function of the court and to prevent a miscarriage of justice a new trial should be granted. -

[2] Even this self-aggrandizing testimony is suspect.

Defendant attempts to overcome his burden of showing that the false statement did not affect the outcome of the case, *Persinger v Norfolk Western Ry. Co.*, 920 F2d 1185, 1189 (4th Cir. 1990) by misdirecting the court to what they claimed was conflict in the data used by Lt. Nazario's experts. **Doc 247, Page 7 of 17 PageID 4951**. The minor variances in disclosures by Lt. Nazario to the two mental health experts that collaborated and consulted each other is not the sort of evidence that defendant may overcome his burden especially when the defense expert's testimony was knowingly and intentionally false.

Defendant Crocker's arguments with regard to Brandon Tatum fail to address the problem that his testimony and opinions were merely his own, untested and not based upon any statistical evidence or peer reviewed studies. It is only in conjunction with the other more significant defects that Brandon Tatum's testimony should be considered in granting a new trial to prevent a miscarriage of justice. Similarly, the improper arguments of defense counsel while jury Instruction No. 4 diminishes its impact is part of the larger picture adding one more straw upon the camels back till the back of justice was broken. A new trial is necessary to prevent a miscarriage of justice.

3. <u>The verdict is against the clear weight of the evidence</u>.

The verdict in this case is shockingly against the clear weight of the evidence. The defendants' own admissions showed that driving to the well-lit BP station was not the problem – "happens a lot" but 80% of the time it is minorities. The video tapes from the bodycams and Lt. Nazario's mobile phone shows shocking behavior by law enforcement and excessive use of force by both defendants Gutierrez and Crocker. Lt. Nazario's passive resistance of staying in the vehicle against the backdrop of conflicting commands objectively impossible to comply with at

the same time is authorized by the law and as instructed by the instructions. The verdict is even more shocking, and a miscarriage of justice.

Defendant is still hanging on to their theory that being deployed to Washington proves he was not injured by this incident was rebutted when Lt. Col Reinhold testified unequivocally. Defendants with a death-grip hang on to Jury Instruction Nos 5 and 8 – that the jury is the judge of the evidence. But under that argument, there would never be a new trial granted to prevent a miscarriage of justice; instances like this are the reason that FRCP 50 and 59 exist.

4. A new trial is necessary to prevent a miscarriage of justice.

The jury verdict in this case would confirm the convictions of many disenfranchised citizens of this country that are convinced the judicial system does not work and that the only path to change is violence in the streets. Lt. Nazario freely committed to serving this country to "support and defend the Constitution of the United States against all enemies, foreign and domestic…" The verdict has shocked the nation and is a miscarriage of justice in fact and as a matter of law. A new trial is necessary to prevent that miscarriage of justice.

The nation has seen enough outcry on the streets from citizens who have found little hope that the system actually works - to prevent a miscarriage of justice this verdict must be set aside, and a new trial granted.

January 27, 2023

Respectfully submitted,

By: /s/ Thomas H. Roberts, Esq.
Counsel

Jonathan M. Arthur, Esq. VSB # 86323
j.arthur@robertslaw.org
Thomas H. Roberts, Esq. VSB # 26014
tom.roberts@robertslaw.org
Andrew T. Bodoh, Esq. VSB # 80143

andrew.bodoh@robertslaw.org
Thomas H. Roberts & Associates, P.C.
105 South 1st Street
Richmond, VA 23219
(804) 991-2002 (Direct)
(804) 783-2000 (Firm)
(804) 783-2105 (Fax)
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed with the Court's CM/ECF system, which caused a Notice of Electronic Filing to be emailed to the following:

John B. Mumford, Jr. (VSB No. 38764)
Coreen A. Silverman (VSB No. 43873)
HANCOCK DANIEL & JOHNSON, P.C.
4701 Cox Road, Suite 400
Glen Allen, Virginia 23060
Tel: (804) 967-9604
Fax: (804) 967-9888
jmumford@hancockdaniel.com
csilverman@hancockdaniel.com
Counsel for Defendant Joe Gutierrez

Robert L. Samuel, Jr. (VSB No. 18605)
Richard H. Matthews (VSB No. 16318)
Anne C. Lahren (VSB No. 73125)
Bryan S. Peeples (VSB No. 93709)
PENDER & COWARD
222 Central Park Avenue, Suite 400
Virginia Beach, Virginia 23462
Tel: (757) 490-6293
Fax: (757) 502-7370
rsamuel@pendercoward.com
rmatthew@pendercoward.com
alahren@pendercoward.com
bpeeples@pendercoward.com
Counsel for Defendant Daniel Crocker

This the 27th day of January 2023

By: /s/ Thomas H. Roberts, Esq.
Counsel