No. 09-3540

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Michael R. Mejia,
Plaintiff-Appellant,

v.

Cook County, Illinois, et al.,
Defendants-Appellees.

Appeal From The United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 1:06-cv-06214
The Honorable Judge Joan Humphrey Lefkow

REPLY BRIEF OF PLAINTIFF-APPELLANT MICHAEL R. MEJIA

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In its abbreviated, post-hoc treatment of the threshold legal issue in this case, the state again advances the same incorrect legal standard that it presented to the district court, which ultimately led that court to erroneously deny Mr. Mejia's Rule 59 motion. First, the state incorrectly asserts that the district court must exclude evidence from the jury as defying physical laws or facts before it may grant a new trial on weight-of-the-evidence grounds. (Appellee Br. 25.) Second, the state improperly argues that the district court should have construed the facts in the light most favorable to the defendants, in spite of countervailing law. (Appellee Br. 25-26.) Third, the state misreads both Mejia's opening brief and the *Latino* decision's discussion of issue complexity in failing to refute Mejia's argument that the district court accorded undue deference to the jury's verdict.

Although the state spends the bulk of its brief arguing the facts and evidence, its efforts ultimately expose both the inconsistencies within its case and the fundamental unfairness to Mr. Mejia from the defense's tactics at trial. The district court's conclusions that the defendants' testimonies were "barely plausible" in the context of the severity of Mr. Mejia's injuries, (A. 8), and that "[t]he weight of the evidence is that the defendants used excessive force on Mejia," (A. 13), would have led to a new trial under the proper legal standards.

I. The state continually glosses over the law to justify the district court's erroneous denial of Mr. Mejia's new-trial motion.

A. The state conflates the standard for removal of evidence from the jury with the standard for Rule 59 new-trial motions based on weight of the evidence.

Removing evidence from the jury is not the *sine qua non* for a plaintiff to win a new trial under Rule 59. In fact, this Court has cautioned that courts should not confuse these wholly independent inquiries. *See, e.g.*, *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999) (noting that "the question of admissibility must be separated from that of weight") (quoting *United States v. Morales,* 902 F.2d 604, 608 (7th Cir. 1990)); *see also id.* at 657-58 ("even where the evidence was properly admitted, the court in reviewing a motion for a new trial must consider the weight of the evidence, and must grant a new trial if that evidence 'preponderates heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand'") (quoting *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989)). Ignoring this guidance, the state initially suggested this erroneous formulation to the district court (R-274 at 7) (claiming that "the judge can only grant a new trial where facts testified to are physically impossible") and renews it here, (Appellee Br. 25) (stating that "[t]he District Court reasoned that because it could not find that defendants'

evidence defied physical facts or laws, the jury may have believed defendants' testimony and that Mejia's resulting injuries were not the result of excessive force"). But the state's approach answers only half the question for, as this Court recognized in *Washington*, a trial court must *separately* determine whether the weight of the evidence shocks the conscience. 184 F.3d at 658. As such, the district court erred in applying the wrong standard when deciding Mr. Mejia's motion. (A. 13) (incorrectly stating that it could "not set aside the jury's verdict unless the testimony [was] such that reasonable persons could not believe it").

B. The state improperly grafts the no-reasonable-person standard onto the district court's duty to neutrally assess the facts in a Rule 59 motion in order to garner a more favorable review of the facts in the defendants' favor.

The district court construed three of the case's most critical facts in favor of the defendants in denying Mr. Mejia's new-trial motion. (*See* A. 13) ("[i]f the jury believed that Mejia swung at the officers, *and* if they believed that the officers handled him roughly in taking him down, *and* if they believed the injuries were in fact minor, they could have inferred that the force was not excessive") (emphasis added). As discussed in the opening brief, this compound supposition contradicts the weight of authority, which states that district courts should view

evidence in a neutral light when considering Rule 59 motions. (*See* Appellant Br. 24-27); *see also Latino v. Kaizer*, 58 F.3d 310, 315 (7th Cir. 1995) (acknowledging that trial courts do "act to evaluate and weigh the evidence" and bear "responsibility for the result no less than the jury"); 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2806 (2d ed. 1995 & Supp. 2010) [hereinafter WRIGHT, MILLER & KANE]).

In response, the state perpetuates this wrong rule by once again inserting the evidence-exclusion standard where it does not belong. In its brief below, the state instructed the district court that it "must view the evidence in the light most favorable to the Defendants . . . and must uphold the jury's verdict if it is supported by a reasonable basis in the record." (R-274 at 2.) The state repeats this error here. (Appellee Br. 26) (stating that the "court's reference to 'reasonable persons' is taken from the plain language of *Latino's* text"). But *Latino* in that context was discussing the removal of testimony from the jury, *not* the proper way to view the facts when weighing them for a Rule 59 decision. *See* 58 F.3d at 315.

By accepting the state's flawed formulation and applying the no-reasonable-person evidentiary standard to the facts, the district court effectively weighed them as it would have for a Rule 50 judgment as a matter of law ("JMOL"), a significant departure from a proper neutral

framing. Although Mr. Mejia detailed the "recurrent tendency" of lower courts to make this mistake when considering Rule 59 motions, (*see* Appellant Br. 25-26) (quoting 11 WRIGHT, MILLER & KANE § 2806), that analysis goes untouched in the state's brief.

C. An excessive-force claim stemming from a prison strip search is so much more legally complex than the arrest for ticket scalping at issue in *Latino* that the district court erred in according the jury verdict undue deference.

In response to a three-page explanation of how both case law from the Seventh and Eleventh Circuits and the leading federal practice treatise show that Mr. Mejia's case is distinguishable from *Latino*, the state offers a lone, unattributed paragraph in response. (Appellee Br. 25) (describing Mr. Mejia's position as "unsupported"). This response ignores the *Latino* court's unwavering mandate that the amount of deference due a jury decision is inversely related to the case's complexity. *See* 58 F.3d at 314 (citing cases); *see also* 11 WRIGHT, MILLER & KANE § 2806 (discussing cases that advance this line of reasoning). The *Latino* Court distinguished cases involving "complicated legal concepts," from the simple ticket scalping issue in that case, which many jurors would have personally experienced. 58 F.3d at 316.

The state explicitly admits that the district court chose to give the jury verdict "greater deference," and justifies that result because the state finds the facts muddled. (Appellee Br. 25.) But the facts were not muddled in the district court's estimation, (*see* A. 13) ("[t]he weight of the evidence is that the defendants used excessive force on Mejia"), and the state ignores the heightened complexity of the legal issues surrounding the proper escalation of force during a strip-search altercation at a maximum-security prison. Excessive-force claims in this context are outside the jurors' common understanding, unlike the ticket–scalping at issue in *Latino*. (*See* Appellant Br. 33-35.) Therefore, the district court should have given the jury verdict *less* deference than the court did in *Latino*.

II. The salient facts show that Mr. Mejia's trial and the resulting verdict were a miscarriage of justice.

The state devotes the first ten pages of its argument to a discussion of why the facts preponderated in the officers' favor. (Appellee Br. 13-23.) Yet it ignores that the district court found exactly the opposite. (A. 13) ("[t]he weight of the evidence is that the defendants used excessive force on Mejia"). The manifest injustices stemming from the officers' "barely plausible" and inconsistent accounts, (A. 9), combined with the numerous strategic transgressions by the defense at trial, (A. 12), amply support a reversal here.

First, the evidence supports a reversal. The state repeatedly points out minor inconsistencies in the plaintiffs' case in an attempt to divert attention from the fatal problems in its own. (*See* Appellee Br. §IB1a.) For example, the state emphasizes as a major inconsistency that two witnesses did not agree on precisely where and how many times Mejia's head was slammed into the wall. (Appellee Br. 19-21.) But the state ignores that all four plaintiff witnesses testified consistently on the dispositive facts: that officers, unprovoked, injured Mr. Mejia in a way that was both excessive under 42 U.S.C. § 1983 and contrary to prison regulations. (*See* A. 48:1-6; A. 85:12-16; A. 87:6-8; R-308, Oct. 22, 2008 Trial Tr. at 333:9-12; *see also* A. 85:12–A. 90:8; R-308, Oct. 22, 2008 Trial Tr. at 334-336; A. 88:20-21; A. 73:6-8; A. 104:14-15; 105:13-15; A. 97:13-16; A. 98:12-14 (Lieutenant Johnson testifying that a prisoner's head is off-limits to guards when using force).)[1]

In contrast to these examples, the state's case below and its brief on appeal are plagued by major, fundamental inconsistencies: the state

[1] Expert Martin testified at trial that he had "reviewed thousands of reports where inmates are taken off their feet and [do] not sustain any injuries or an isolated injury or [even] a couple injuries. [He'd] never seen [the] extent of injuries [suffered by Mr. Mejia and Mr. Rutledge] from what was described as uneventful modest take-down." (R-310, Oct. 27, 2008 Trial Tr. at 794:1-5.) Mr. Martin testified that "in a typical takedown, more often than not you will, have no injuries. Occasionally you'll have a bump, hit on the head first or that type of thing. You will not have a pattern set of injuries over various parts of the body and opposite sides of the body in a modest quick takedown. I have not seen it in my career." (R-310, Oct. 27, 2008 Trial Tr. at 788:11-16.)

could not decide whether any force was used against Mr. Mejia, whether he sustained injuries, and whether there was any rationale for the guards to take him down. (*See, e.g.,* A. 13); *compare* A. 112:16-25 (Officer Scott testifying that he noticed that Mr. Mejia had cuts and blood on his face) *with* A. 111:22-25 (Officer Scott testifying that he did not push Mr. Mejia to the ground with enough force for him to "bruise his eye or forehead"), A. 102:21-24 (Officer Lanier testifying that he saw no injuries on Mr. Mejia right after the incident) and Appellee Br. 18 (stating that "Mejia's physical appearance showed such a significant lack of injuries"); *compare also* Appellee Br. 4 (stating that Mejia's "refusal to comply with Scott's orders" created a dangerous situation that could incite a riot) *with* Appellee Br. 18-19 (stating that it "strongly contradicts logic and reason that officers . . . would attack a sickly Mejia for failing to comply with orders expeditiously").)

The state also claims that the evidence shows "collusion," (Appellee Br. 19), between Mr. Mejia and former co-plaintiff Mr. Rutledge. Mr. Rutledge openly acknowledged that he and Mejia jointly worked on their grievances during their days in segregation[2] together

[2] The officers' version of events is further undermined by the punishment Mejia received. He spent only six days in segregation after the incident, which is substantially less than the standard punishment of twenty-five to twenty-nine days that would have been given to a prisoner for initiating violence against a guard. (A.63:18-20; A. 183; R-317: 3/1998 Cook County Department of Corrections - Rules and Regulations for Detainees). Had Mejia truly swung at the guards, one would have expected the state to

following the incident. (R-307, Oct. 21, 2008 Trial Tr. at 203:6-9.) (Mr. Rutledge testifying that Mr. Mejia helped him fill out his form because he "wasn't familiar with the procedures to do it the right way"). Further, the state fails to explain how Mr. Santiago and Mr. Barney, the other two inmate witnesses who testified at trial, delivered nearly identical reports as Mr. Mejia and Mr. Rutledge despite having no contact with either in the wake of the incident. (A. 74:12-14; A. 90:3-7.) In fact, the evidence shows that if any collusion occurred, it was on the officers' part and resulted from the pervasive "code of silence" in the prison. (A. 146; A. 149.) Steve Martin, an expert on the use-of-force, testified at trial that "[t]here's some degree of collusion" in the incident reports written by the involved guards "because there's some exact, precise duplicating language in the two reports." (R-310, Oct. 27, 2008 Trial Tr. at 797:3-9.) He added that the "[p]aucity of information in the reports" and internal affair's lack of serious attention on the matter was consistent with a "code of silence" that has taken hold at the Cook County jail. (R-310, Oct. 27, 2008 Trial Tr. at 806:3-25; 807:1-19.) Mr. Martin's expertise in the use-of-force, his thirty-five years' experience in correctional administration, and his review of more than 1000 similar incidents were never disputed at trial. (A. 139-40; A. 142; A. 145.)

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produce the disciplinary reports officers claimed they filed against Mejia or, at a minimum, the punishment to reflect the prison's rules.

Second, as noted in Mr. Mejia's opening brief, (Appellant Br. 28-29), defense counsel's repeated violations of the district court's rulings *in limine* contributed to the miscarriage of justice in this case and were prejudicial to Mr. Mejia.[3] *See* 11 WRIGHT, MILLER & KANE § 2803. The district court granted Mr. Mejia's motions *in limine* to exclude any reference to his prior criminal record and gang membership because it was concerned about unfair depictions of Mr. Mejia. (A. 28; A. 35:13-16.) Defense counsel, however, "stepped over the line in several instances" in violation of the *in limine* motions, a fact the district court recognized. (A. 12.) This type of transgression is exactly what this Court has found to be extremely prejudicial. *See, e.g., Wiedemann v. Galiano,* 722 F.2d 335, 337 (7th Cir. 1983) ("[t]he misconduct of counsel or a party justifies a new trial where that misconduct prejudiced the adverse party."); *see also Hillard v. Hargraves*, 197 F.R.D. 358, 360 (N.D. Ill. 2000) (holding in a comparable § 1983 use-of-force-in-a-prison case that the government's errors in attempting to color the defendant as a dangerous criminal were "extremely prejudicial, particularly in a case . . . where the primary question for the jury to decide was what led to defendants' use of force on [the plaintiff] and whether that force was excessive"). Particularly

[3] Contrary to the state's suggestion, Mejia's argument that his trial was tainted by defense counsel tactics was supported by both facts and authority and was not the mere one-line "afterthought" argument that courts have deemed waived. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

egregious was defense counsel's repeated efforts to reference or imply Mr. Mejia's gang affiliation, an approach that the state apparently endorses on appeal. (*See* Appellee Br. 9 n.2) (inexplicably highlighting Mr. Mejia's facial tattoos in the photographs taken to document his injuries). This Court should reverse because the district court explicitly found the weight of the evidence against the jury verdict. (A. 13.) The gaping holes in the defendants' account, the officers' inconsistent testimony and incident reports, and the undisputed yet unexplained injuries that Mr. Mejia suffered, combined with defense counsel's prejudicial tactics at trial only buttress the conclusion that this jury verdict shocks the conscience.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's order and grant Mr. Mejia's motion for a new trial or, alternatively, remand to the district court for application of the appropriate legal standard.

Respectfully Submitted,

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Certificate of Service

I, the undersigned, counsel for Michael R. Mejia hereby certify that I served two copies of this reply brief and one digital copy of the brief by placing them in an envelope with sufficient postage affixed and directed to the person named below at the address indicated, and depositing that envelope in the United States mail box located at 375 East Chicago Ave., Chicago, Illinois on February 1, 2011.

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Certificate of Compliance with Circuit Rule 31(E)

I, the undersigned, counsel for the Plaintiff-Appellant, Michael R. Mejia, hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), a version of this reply brief in non-scanned PDF format.

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Certificate of Compliance with Fed. R. App. P. 32(A)(7)

I, the undersigned, counsel for the Plaintiff-Appellant, Michael R. Mejia, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 2,656 words.

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