UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

WAKEELAH A. COCROFT, Plaintiff,	)	
v.	)	Civil Action No. 10-CV-40257-TSH
JEREMY SMITH, Defendant.	)	

PLAINTIFF WAKEELAH COCROFT'S MOTION IN OPPOSITION TO DEENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Introduction

Defendant Jeremy Smith's post-trial motion for judgment as a matter of law ("Smith Mot."), should be denied. The jury's verdicts are consistent, the court's evidentiary rulings and jury instructions are sound, and the defendant's reliance on qualified immunity is misplaced. What is more, the defense forfeited many of the objections it now seeks to advance.

On March 26, 2014, a jury found that defendant Smith unlawfully arrested plaintiff Wakeelah Cocroft without probable cause, in violation of 42 U.S.C. § 1983 (Count 1), and that Smith violated the Massachusetts Civil Rights Act (Count 5). The jury also found that Smith neither used excessive force (Count 1), nor arrested or assaulted Cocroft in violation of the First Amendment (Count 2), nor committed a state assault and battery (Count 3). Separately, and without objection by Cocroft, this Court dismissed Cocroft's claim for false arrest (Count 4). Based on its verdicts for Cocroft on Counts 1 and 5, the jury awarded Cocroft $15,000 in compensatory damages, as well as pre-judgment interest on the unlawful seizure claim. Smith now argues that: (1) the § 1983 verdict in Count 1 suffers from an inconsistency with Count 2, as well as evidentiary and instructional errors; (2) the MCRA verdict in Count 5 suffers from other

evidentiary and instructional errors; (3) Smith is entitled to qualified immunity; and (4) Cocroft cannot recover damages.

Those arguments lack merit. They misapprehend the evidence, overlook the absence of objections by Smith, and misapply the governing law.

With respect to the evidence, the defense declines to view the record in the light most favorable to Cocroft. A jury could have found that Smith violated the Fourth Amendment by arresting Cocroft without probable cause and that he violated the MCRA by threatening to arrest Cocroft for protected speech, even if the jury also found that Smith did not actually arrest Cocroft for her speech. Given the trial testimony of Cocroft, Clytheia Mwangi, and Regional Aldridge, together with the surveillance video, the jury could have found:

- At the outset traffic stop, Smith was verbally abusive to Cocroft. Meanwhile, Cocroft merely told Smith that she did not know he wanted her to remain in the car, that he could not speak to her that way, and that she knew her rights. Through threats, intimidation, and coercion—including the threat of arrest—Smith attempted to silence her.

- Smith arrested Cocroft despite lacking probable cause that she was committing a crime. The surveillance video shows (at 7:01:58 to 7:02:02) that Cocroft had begun complying with his request to return to the car before Smith made any move toward arresting her. Nonetheless, he dragged her out of the car without ever asking her to do so.

- A reasonable officer would have known that arresting Cocroft without probable cause, and threatening to arrest her for speech, were unlawful acts.

- The damages award was supported by testimony about emotional and physical injury.

With respect to defense objections, many have been forfeited. Smith did not adequately object to the jury instructions, to the verdict form, or to evidence that a state court entered a verdict of not guilty on the disorderly-conduct charge against Cocroft. Rather than object, Smith suggested—incorrectly—that the state judge's ruling was less valid than an acquittal by a jury.

With respect to the law, as explained below, each of Smith's challenges is fatally flawed. Smith's motion should therefore be denied.

Standard of Review

Judgment as a matter of law is appropriate "if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a); Gibson v. City of Cranston, 37 F.3d 731, 735 (1st Cir. 1994). The jury verdict "must be upheld 'unless the facts and inferences, viewed in the light most favorable to the verdict, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have [returned the verdict].'" Astro-Med, Inc. v. Nihon Kohden America, Inc., 591 F.3d 1, 13 (1st Cir. 2009).

A new trial may be appropriate "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). The court may grant a new trial only where "the verdict, though rationally based on the evidence, was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice." *Id.* While Rule 59 may be "less stringent," a motion for new trial "'should be granted only when 'an error . . . was so grievous as to have rendered the trial unfair.'" Pina v. Morris, No. 09-11800-RWZ, 2013 WL 1283385, at *6 (D. Mass. Mar. 28, 2013).

Argument

I. The jury's verdict on Count 1 should stand.

This Court should reject Smith's various evidentiary and instructional challenges to the jury's finding, on Count 1, that Smith arrested Cocroft without probable cause.

A. The jury's finding that Smith arrested Cocroft in violation of the Fourth Amendment is consistent with its finding that Smith did not arrest her in retaliation for exercising her First Amendment rights.

"[A] facially inconsistent verdict in a civil action—no rare phenomenon—is not an automatic ground for vacating the verdict." Acevedo-Diaz v. Aponte, 1 F.3d 62, 75 n.15 (1st Cir.

1993). In fact, the First Circuit is "reluctant to order a new trial on the basis of inconsistent jury verdicts." Davignon v. Hodgson, 524 F.3d 91, 109 (1st Cir. 2008). Before doing so, a court should "attempt to reconcile the jury's findings, by exegesis if necessary." Id. (internal citation omitted). Thus, a verdict will be upheld if "any jury could have, consistent with its instructions, rendered the challenged verdicts." Id.

Here, the jury's unlawful-seizure verdict (Count 1) is readily reconcilable with its First-Amendment verdict (Count 3). As a threshold matter, the jury instructions and verdict form made it possible for a jury to find that Smith violated the Fourth Amendment by arresting Cocroft without probable cause, as alleged in Count 1, without also finding that Smith arrested Cocroft for speech protected by the First Amendment, as alleged in Count 2. On Count 1, the jury was instructed that the absence of probable cause was a sufficient basis to find that Smith violated a right protected by the Fourth Amendment. See Dkt. #112 (verdict form); Jury Instructions at 14-15. On Count 2, the jury was instructed that the key "question" was whether Smith conducted a "retaliatory arrest based on [Cocroft's] protected speech." Id. at 22. It is manifestly possible for an arrest to occur without probable cause yet not because of protected speech.

And the evidence supported such a finding in this case. The jury may have found that even if Smith did not arrest Cocroft to suppress her speech, he still lacked probable cause to arrest her for disorderly conduct. There was ample evidence at trial to support a finding that Smith lacked probable cause to arrest Cocroft. As Cocroft attempted to pump gas, Smith yelled something like, "didn't I tell you to stay in the car?" Cocroft then returned the gas nozzle, told Smith that she didn't know he was talking to her, and said that he didn't have to speak to her that way. Moreover, before Smith grabbed her, Cocroft sought to comply with Smith's request that she return to the car. Based on this evidence, a reasonable jury could have found that Smith

lacked probable cause to arrest her for any offense. See Dkt. #112; Jury Instructions at 15, 22.

But the jury also could have found, in resolving Count 2, that Cocroft was not arrested in retaliation for protected speech. Jury Instructions at 22. Although there was evidence to support a finding that Cocroft was arrested for that reason, it was not identical to the evidence that Smith lacked probable cause. Thus, the jury's verdicts on Counts 1 and 2 are reconcilable.

B. The admission of evidence of the disorderly conduct acquittal does not require disturbing the verdict on Count 1.

For two reasons, this Court's admission of evidence that a state court judge entered a verdict of not guilty as a matter of law for disorderly conduct does not warrant disturbing the jury's verdict: (1) Smith failed to object at all; and (2) preventing Cocroft from introducing evidence of the disorderly-conduct acquittal, while allowing Smith to introduce evidence of the resisting-arrest conviction, would have unfairly prejudiced Cocroft.

1. Smith forfeited his present argument.

A party seeking to exclude evidence normally must "make a contemporaneous objection to the proof when and as proffered (or be excused from doing so by the trial judge)." Freeman v. Package Machinery Co., 865 F.2d 1331, 1337 (1st Cir. 1988). Thus, parties should "exercise caution" when relying on pretrial motions *in limine* to "preserv[e] claims of error in the admission or exclusion of evidence." Id. Where the party challenging the admission or exclusion of evidence fails to point to "exceptional circumstances" precluding a contemporaneous objection, that party is generally foreclosed from later challenging the evidence on grounds of admissibility. Id. at 1336; see also United States v. Noah, 130 F.3d 490, 496 (1st Cir. 1997) ("It is settled in this circuit that, when the district court tentatively denies a pretrial motion in limine, or temporizes on it, the party objecting to the preliminary in limine determination must renew his objection during the trial, and the failure to do so forfeits any objection."); Allied Int'l, Inc. v.

Int'l Longshoremen's Ass'n, 841 F.2d 32, 39-40 (1st Cir. 1988).

Here, Smith failed to object contemporaneously to the admission of evidence concerning the disposition of the disorderly conduct charge. On February 28, 2014, Smith filed a motion to preclude evidence of the disorderly conduct acquittal. Dkt. #75. Cocroft opposed that motion on March 7, 2014. Dkt. #94. On March 10, during the pretrial hearing, this Court took Smith's motion under advisement, and counsel for both parties said they did not intend to raise the issue during opening arguments. Dkt. #96. On March 18, 2014, this Court denied defendant's motion. Dkt #98. At trial, Smith did not object to the admission of this evidence.

Specifically, on direct examination, Cocroft stated that she was found not guilty of disorderly conduct as a matter of law, and that she was convicted of resisting arrest. Rather than object, Smith tried to exploit the issue on cross-examination. Smith asked Cocroft whether she was found not guilty on the disorderly conduct charge, and further asked Cocroft whether that finding was made by a jury. Smith apparently sought to suggest, misleadingly, that the entry of not guilty by a court is somehow less valid than a finding of not guilty by a jury.

Even so, Cocroft did not mention the disorderly-conduct acquittal during closing argument. Although Smith's motion complains (at p.9) about Cocroft's rebuttal closing—when Cocroft mentioned the "higher standard" applied by the state judge—it neglects to mention that Cocroft did so only in response to Smith's improper closing argument. At closing, Smith argued that Cocroft was not truly acquitted of disorderly conduct because a jury was not permitted to decide the issue. Cocroft mentioned this issue during rebuttal only to correct Smith's attempt to mislead the jury, and once again Smith lodged no objection.

This failure to object cannot be attributed to "exceptional circumstances" because this three-day trial did not present any exceptional circumstances. Freeman, 865 F.2d at 1336.

2. The evidence was properly admitted.

Even if not forfeited, Smith's complaint about evidence of the disorderly-conduct acquittal is misplaced. Smith contends that the acquittal was irrelevant here because the key question was whether Smith had probable cause when he arrested Cocroft, rather than whether the facts at Cocroft's criminal trial proved disorderly conduct beyond a reasonable doubt. See Smith Mot. at 6; Rivera v. Murphy, 979 F.2d 259, 263 (1st Cir. 1992); Goddard v. Kelley, 629 F. Supp. 2d 115, 125 (D. Mass. 2009). That argument fails for three reasons.

First, admitting evidence of the disorderly conduct verdict was necessary to avoid undue prejudice to Cocroft within the meaning of Rule 403 of the Federal Rules of Evidence. Courts may "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] misleading the jury." Fed. R. Evid. 403. Here, admitting evidence of the disorderly-conduct verdict was indeed relevant—because the judge's ruling that there was insufficient evidence to support a conviction tended to rebut Smith's argument that he had probable cause—and necessary to avoid undue prejudice because Smith was permitted to elicit evidence of Cocroft's resisting-arrest conviction. If Smith is correct that the disposition of the disorderly-conduct charge was irrelevant to the question of probable cause here, then the resisting-arrest verdict was equally irrelevant (though the fact of Cocroft's resistance was relevant). See Dkt. #94. Accordingly, permitting the jury to learn that Cocroft was convicted of resisting arrest, without permitting it to learn that she had been acquitted of disorderly conduct, would have been highly prejudicial. It may have left the jury with the false impression that Cocroft had also been convicted of disorderly conduct, or that the resisting arrest conviction was predicated on a state jury's finding that Cocroft had been disorderly. Moreover, the trial evidence concerning the disorderly-conduct acquittal was quite limited, and Cocroft's counsel mentioned

it during rebuttal closing only to rebut Smith's misleading closing argument. Allowing that rebuttal, over no objection by Smith, was completely consistent with Rule 403.

Second, the evidence was properly admitted under Federal Rule of Evidence 611(a), which provides "discretion . . . to apply the rule of completeness to oral statements." United States v. Verdugo, 617 F.3d 565, 579 (1st Cir. 2010). The rule of completeness, codified in Federal Rule of Evidence 106, allows a party "to introduce [the] rest of a fragmentary statement used against it in order to place the excerpt in context." United States v. Simoelli, 237 F.3d 19, 26 (1st Cir. 2001). It applies "where the introduction of limited pieces of information created unfairness or potential for misimpression." Id. at 28. Although Rule 106 itself applies only to writings or recordings, admitting testimonial evidence of the disorderly-conduct acquittal was a proper exercise of this Court's discretion under Rule 611(a). As Cocroft has shown, it would have been unfair to admit evidence of only part of the outcome of the criminal trial.

Third, admitting the evidence was justified by Smith's improper effort to argue that Cocroft was truly guilty of disorderly conduct. Federal courts must give "full faith and credit" to state court judgments. 28 U.S.C. § 1738. This mandate "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerge." Cruz v. Melecio, 204 F.3d 14, 18 (1st Cir. 2000) (internal citation omitted). In Massachusetts, a party may preclude an opponent, or a party in privity with the opponent, from relitigating an issue that was decided against that same opponent in a criminal case. United States v. Perez-Perez, 72 F.3d 224, 226 (1st Cir. 1995). To be in privity, "the action must have been 'so closely related to the interest of the party to be fairly considered to have had his day in court.'" United States v. Bonilla Romero, 836 F.2d 39, 43 (1st Cir. 1987) (citing In re Gottheiner, 703 F.2d 1136 (9th Cir. 1983)). Here, a state judge found that

no rational jury could have found Cocroft guilty of disorderly conduct. Smith's attempts to rebut that finding supported this Court's decision to admit evidence about it.

C. This Court properly declined Smith's requested instructions on probable cause and interference with a police officer

Smith argues that this Court improperly refused his requested instructions on probable cause and on interfering with an officer. Refusing a party's instructions warrants setting the verdict aside only where "the requested instruction was (1) correct as a matter of substantive law, (2) not substantially incorporated into the charge as rendered, and (3) integral to an important part of the case." Davignon, 524 F.3d at 108 (citing White v. New Hampshire Dep't of Corr., 221 F.3d 254, 263 (1st Cir. 2000)). Even in criminal cases, "'so long as the charge sufficiently conveys the defendant's theory, it need not parrot the exact language that the defendant prefers.'" Id. at 109 (citing United States v. McGill, 953 F.2d 10, 12 (1st Cir. 1992) (internal citation omitted)). This principle applies equally to civil cases. Id. Here, there was no error.

1. Smith's arguments have not been preserved.

Smith failed to preserve his current complaints about the jury instructions. Where the requesting party fails to raise an objection after the jury charge has been given, that party must establish plain error. See O'Rourke v. City of Providence, 235 F.3d 713, 736 (1st Cir. 2001); Sanchez-Lopez v. Fuentes-Pujols, 375 F.3d 121, 133-35 (1st Cir. 2004). Plain error requires a showing that the improper jury instructions "affected substantial rights" and "resulted in a miscarriage of justice or has undermined the integrity of the judicial process." Id. (citing Drohan v. Vaughn, 176 F.3d 17, 21 (1st Cir. 1999) (internal citations omitted)). In civil matters, finding plain error with regard to jury instructions is "rare indeed"; it "require[s] among other things, that the instruction be clearly incorrect." Contour Design, Inc. v. Chance Mold Steel Co., Ltd., 693 F.3d 102, 112 (1st Cir. 2012); see also Gray v. Genlyte Group, Inc., 289 F.3d 128, 134 (1st Cir.

2002) (noting that "plain error is 'confined to the exceptional case.'").

On February 28, 2014, Smith requested an instruction under Goddard regarding the relationship between an acquittal and probable cause, (Dkt. #76 at 14), and an instruction on the common law offense of interfering with a police officer. (Dkt. #76 at 29). On March 7, 2014 Cocroft filed a motion to strike Smith's requested instruction on interfering with a police officer. This Court took Cocroft's motion to strike under advisement on March 10, 2014, (Dkt. #96), and during the pretrial hearing indicated that it would use each party's requests to "cobble together" the instructions at trial. This Court charged the jury on March 26, 2014, after which Smith and Cocroft approached side bar to discuss the instructions. Not once during that discussion did Smith complain that the Court had omitted his requested instruction regarding the relationship between an acquittal and probable cause. Nor did Smith object to the omission of instructions on interfering with a police officer. Because Smith failed to preserve these challenges, the alleged instructional errors must be reviewed for plain error. See Sanchez-Lopez, 375 F.3d at 133-35.

2. This Court properly instructed the jury on probable cause.

This Court's instruction on probable cause was not erroneous because it correctly stated the law and substantially incorporated Smith's requested instruction. The Court instructed that:

> "An arrest is 'reasonable' only if the defendant police officer had 'probable cause' to believe the arrest was justified by law. Probable cause exists if the facts and circumstances known to the defendant are sufficient to warrant a reasonable police officer in believing that the plaintiff had committed or was committing a crime. The defendant police officer need not have acted with malice or intent to deprive the plaintiff of her rights for there to be an unlawful seizure in violation of the Fourth Amendment"

Jury Instructions at 15-16.

This instruction sufficiently conveyed Smith's requests—spread out over eleven different proposed instructions on probable cause—that court communicate both the quantum of evidence required for probable cause and the fact that probable cause is assessed from the facts known to

the officer at the time of arrest. See Smith Mot. at 10-11 (citing Dkt. #76 at 14, 15, 24). Particularly given the sprawling nature of Smith's proposed instructions, this Court appropriately distilled them into an instruction that probable cause requires only a "reasonable" belief that a crime occurred, and that the reasonableness of the officer's belief hinges only on "the facts and circumstances known to the defendant." Jury Instructions at 15-16.

Even if this Court's failure to give Smith's requested instructions was erroneous, he cannot establish plain error for two reasons. First, Smith cannot show harm to his "substantial rights," O'Rourke, 235 F.3d at 736, because the error did not "affect the outcome of the district court proceedings." United States v. Padilla, 415 F.3d 211, 220 (1st Cir. 2005). Cocroft never argued to the jury in this case that Cocroft's criminal trial established the absence of probable cause. And Smith testified that, following Cocroft's arrest, a clerk magistrate found that Smith had probable cause to arrest Cocroft for disorderly conduct. It is therefore highly unlikely that the jury's verdict for Cocroft on Count 1 rested on a mistaken view that the entry of not guilty on the disorderly-conduct charged established that Smith lacked probable cause.

Second, Smith cannot show that the error "resulted in a miscarriage of justice" or "undermined the integrity of the judicial process." O'Rourke, 235 F.3d at 736. If anything undermined the integrity of this case, it was Smith's improper argument at closing. Smith argued that the jury in the criminal case never got a chance to decide the disorderly conduct issue. This distortion of the criminal trial suggested that the state had introduced sufficient evidence to convict Cocroft of disorderly conduct, when in fact it had done no such thing.

3. This Court properly declined to instruct on interference with a police officer.

This Court did not err in declining to charge the jury on common law offense of interference with a police officer because it is not an offense that has been established by

Massachusetts practice. Although Smith claims that this crime has been incorporated into Massachusetts General Law c. 279, § 5, and c. 268, § 13B, that is not so.

Under General Law c. 279 § 5, courts may establish penalties for offenses that have been established by "usage and practice in the commonwealth." Here, Smith has not shown "usage and practice" of the common law offense of interference with a police officer. Smith's proposed jury instructions cited no cases on this offense, Dkt. #76 at 29, and his post-trial motion cites 19th-century cases that do not mention "interference" with a police officer. Smith Mot. at 12-13. There appears to be one Massachusetts state decision involving a conviction for interfering with a police officer, but it is an unpublished decision coming after the events of this case. Commonwealth v. Shave, 81 Mass. App. Ct. 1131 (2012). This sparse case law does not establish a practice regarding this crime, nor offer definitive guidance on its elements.

Meanwhile, Smith never requested an instruction on Mass. G.L. c. 268, § 13B—the state witness-intimidation law—and for good reason. See Dkt. #76 at 29. Although the law proscribes certain acts that "threaten," "mislead," "intimidate," or "harass" a police officer, Cocroft did not plausibly do those things. For example, the statute defines "harass" to require an act that "seriously alarms or annoys such person or persons and would cause a reasonable person to suffer substantial emotional distress." The evidence at trial would not have supported on instruction on that offense even if Smith had requested one.

II. The jury's verdict on Count 5 should stand.

The jury had a legally sufficient evidentiary basis to find that Smith violated the MCRA when he initially threatened to arrest Cocroft's in order to suppress her speech. Thus, the verdict in favor of Cocroft on the MCRA claim should stand.

A. The MCRA claim is viable as a matter of law.

Beyond repeating his flawed arguments on Count 1, which Cocroft has addressed, Smith's sole argument about the "viability" of Cocroft's MCRA claim is that it "must have been [based on] false arrest, which is not a viable basis for an MCRA claim in this case." Smith Mot. at 17. This argument overlooks that the jury could have found that Smith violated the MCRA before arresting Cocroft, when he attempted to silence her by threats, intimidation, and coercion.

The MCRA requires a plaintiff to prove three elements: "(1) her exercise or enjoyment of rights secured by the Constitution or laws of either the United States or the Commonwealth (2) have been interfered with or attempted to be interfered with, and (3) that the interference or attempted interference was by threats, intimidation or coercion." Lloyd v. Burt, No. 13-30011-KPN., 2014 WL 545541, at *2 (D. Mass. Feb. 7, 2014) (citing Sietins v. Joseph, 238 F. Supp. 2d 366, 376 (D. Mass. 2003)).[1] The MCRA is limited "to situations where the derogation of secured rights occurs by threats, intimidation, or coercion." Bally v. Northeastern University, 403 Mass. 713, 718 (1988). "[A] direct violation of civil rights is not, without a showing of coercive behavior, actionable." Britton v. Maloney, 901 F. Supp. 444, 453 (D. Mass 1995). Instead, the plaintiff must show that the defendant violated her rights to establish some "further purpose." See Longval v. Commissioner of Correction, 404 Mass. 325, 333 (1989).

Here, consistent with the jury's ruling for Cocroft on the Fourth Amendment seizure issue in Count 1, and consistent with its ruling for Smith on the First Amendment retaliatory arrest issue in Count 2, the evidence supported a finding for Cocroft on the MCRA claim in Count 5. The jury could have found that Smith's pre-arrest conduct amounted to threats,

[1] Under the MCRA, threat "involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." Lloyd, 2014 WL 545541, at *3. Intimidation means "putting in fear for the purpose of compelling or deterring conduct." Id. And coercion means using "force, either physical or moral . . . to constrain [someone] do against his will something he would not otherwise have done." Id.

intimidation, and coercion that attempted to interfere, or did interfere, with protected speech. Such a finding would have been consistent with the jury's finding, in Count 2, that Smith's initial threat to arrest did not ultimately result in the suppression of Cocroft's speech or a violation of her First Amendment Rights.

For starters, the evidence supported a finding that Smith at least attempted to interfere with Cocroft's protected speech by threats, intimidation, or coercion. See Lloyd, 2014 WL 545541, at *2. At the outset of the encounter, Smith was verbally abusive to Cocroft because she was asserting her rights. When he noticed Cocroft preparing to pump gas, Smith yelled something like, "didn't I tell you to say in the car." In response, Cocroft told Smith that she did not know he was talking to her, and informed him that he did not have to talk to her in that way, and that she had rights. Continuing to yell, Smith told Cocroft that if she did not stop talking and return to the car that he would arrest her. A jury could have found that such pre-arrest conduct constituted threats, intimidation, and coercion in violation of the MCRA because it violated, or attempted to violate, a "secured right[]" to freedom of speech. See Bally, 403 Mass. at 718.

Such a finding would have been entirely consistent with the jury's verdict for Smith on Count 2. The jury was instructed that Count 2 hinged on the question whether Cocroft "was subject to retaliatory arrest based on her protected speech." Jury Instructions at 22. Those instructions narrowed the First Amendment claim to the issue of retaliatory arrest, and it is an "almost invariable assumption of the law that jurors follow their instructions." Richardson v. Marsh, 481 U.S. 200, 206 (1987); see also United States v. Freeman, 208 F.3d 332, 344 (1st Cir. 2000). Consistent with those instructions, the jury could have found that Smith did not arrest Cocroft in retaliation for her speech, as alleged in Count 2, even if he previously violated the MCRA, as alleged in Count 5.

B. The Court's MCRA instructions were correct.

This Court's instructions on the MCRA do not warrant any relief for Smith. Smith argues that the jury should have been instructed that neither an arrest nor a threat to arrest can rise to the level of an MCRA violation. Smith Mot. at 15-16. As a threshold matter, Smith preserved only one of these requests at trial—i.e., a request that the jury be instructed that an arrest alone does not violate the MCRA. A refusal to give that instruction is reviewed for harmless error, Davignon, 524 F.3d at 108, but any failure by the Court to instruct on the threat of arrest should be reviewed only for plain error. Suboh v. Borgioli, 298 F. Supp. 2d 192, 200 (2004).

Any failure by this Court to give Smith's requested MCRA instruction with respect to arrest alone was not erroneous. Smith's requested instruction—i.e., that mere arrest cannot violate the MCRA—was "substantially incorporated into the charge as rendered." Davignon, 524 F.3d at 108. This Court instructed that to recover under the MCRA "the plaintiff must prove by a preponderance of the evidence that the interference or attempted interference with the secured right involved an actual or potential physical confrontation accompanied by the threat of harm." Instructions at 29. Thus, the jury was told that an "actual or potential physical confrontation," such as an arrest, is not enough without an accompanying "threat of harm." A jury following those instructions could not have found in Cocroft's favor on Count 5 based on the arrest.

Smith's newly minted argument—that a threat of arrest cannot violate the MCRA—is simply wrong, and so failing to instruct a jury to that effect could not amount to plain error. See Davignon, 524 F.3d at 108 (a requested instruction must be "correct as a matter of substantive law" to warrant reversal). A threat to arrest someone for engaging in protected speech absolutely violates the MCRA. See Tortora v. Inspector of Bldgs. Of Tewksbury, 668 N.E.2d 876, 878 (Mass. Ct. App. 1996). If Smith means to argue that the threat to make a lawful arrest does not

violate the MCRA, that sentiment was substantially incorporated into this instruction: "If the defendant's words could reasonably be understood only to express an intention to use lawful means to hinder the plaintiff, those words would not be a threat, intimidation, or coercion actionable under the Massachusetts Civil Rights Act." Jury Instructions at 30.

III. Smith is not entitled to qualified immunity.

Smith is not entitled to qualified immunity. When assessing qualified immunity after a jury verdict, courts view the evidence "in the light most hospitable to the party that prevailed at trial." Iacobucci v. Boulter, 193 F.3d 14, 23 (1st Cir. 1999). As this Court has noted, a defendant is entitled to qualified immunity if "'their conduct does not violate clearly established statutory or constructional rights of which a reasonable person would have known.'" Dkt. #48 at 10 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity hinges on a two-part inquiry. Courts "first ask 'whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right.'" Haley v. City of Boston, 657 F.3d 39, 47 (1st Cir. 2011) (quoting Pearson v. Callahan, 555 U.S. 223, 232 (2009)). If so, courts "then ask 'whether the right at issue was "clearly established" at the time of defendant's alleged misconduct.'" Id. (quoting Pearson, 555 U.S. at 232); Maldonado v. Fontanes, 568 F.3d 263, 269 (1st Cir. 2009). This Court has now denied two attempts by Smith to rely on qualified immunity—at summary judgment and at the close of Cocroft's evidence—and should now do so again.

A. Smith is not entitled to qualified immunity on the unlawful seizure claim.

Smith is not entitled to qualified immunity on Count 1 because (1) viewing the evidence in a the light most favorable to Cocroft, a jury could have found that she was arrested without probable cause, in violation of the Fourth Amendment; (2) the right not to be arrested without probable cause was clearly established before December 2007.

First, the evidence at trial supported a finding that Smith violated the Fourth Amendment by arresting Cocroft without probable cause, as alleged in Count 1. As explained above and in Cocroft's prior submissions, see Dkt. #106, the evidence amply supports a finding that Smith lacked probable cause of any crime when he initiated the arrest, and the evidence is entirely consistent with the jury's finding that Smith did not arrest Cocroft in retaliation for her protected speech. For example, both Cocroft and Mwangi testified, and the surveillance video proves (at 7:01:58 to 7:02:02), that Cocroft sought to comply with Smith's order by attempting to get into the car before Smith grabbed her. Smith, however, arrested her anyway. That arrest was completely unjustified, even if it was not based on Cocroft's speech.

Nor does the fact that Cocroft was prosecuted for disorderly conduct establish probable cause. See Smith Mot. at 21. The prosecution was evidently based entirely on Smith's allegations, and the jury in this case was entitled to disbelieve them. Similarly, Smith's discussion of Commonwealth v. Bosk, 29 Mass. App. Ct. 904 (1990), is irrelevant. Id. at 8. Bosk stands for the narrow proposition that Massachusetts courts "have upheld disorderly conduct arrests where a refusal to obey police orders created a safety threat." Abraham v. Nagle, 116 F.3d 11, 14 (1st Cir. 1997); see Dkt. #106. There was no evidence of such a threat here.[2]

Second, the pertinent Fourth Amendment right in Count 1—the right not to be arrested without probable cause—was clearly established at the time of the incident. See Vargas-Badillo v. Diaz-Torrez, 114 F.3d 3, 4 (1997). At summary judgment, this Court concluded that, "taking the facts in the light most favorable to Cocroft, a reasonable officer would have known that this conduct violated her rights." Dkt. 48 at 11. The same conclusion applies now because the evidence at trial supported the facts on which Cocroft relied at summary judgment.

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[2] Similarly, Smith's reliance on Reichle v. Howards, 132 S.Ct. 2088 (2012), is misguided. That decision is relevant only in cases involving a finding that the arresting officer had probable cause.

B. Smith is also not entitled to qualified immunity on the MCRA claim.

The MCRA and 42 U.S.C. §1983 are "parallel statutes involving similar analyses," so they share similar qualified immunity analyses. See Kelley v. LaForce, 288 F.3d 1, 10 (1st Cir. 2002) (citing Duarte v. Healy, 405 Mass. 43, 47-48 (1989)). Smith is not entitled to qualified immunity on Count 5 because (1) a jury could have found that Smith's pre-arrest conduct violated the MCRA by amounting to threats, intimidation, and coercion that interfered with, or attempted to interfere with, protected expression; and (2) the right to be free of such threats, intimidation, and coercion was clearly established before December 2007.

IV. The jury's damages award should be upheld.

Smith's challenges to the damages award fail for three reasons. First, to state a valid § 1983 claim against Smith in his individual capacity, Cocroft was not required to use the words "individual capacity" in her complaint. Second, Smith failed to preserve his challenge to the jury verdict form and cannot prove that the verdict form was plainly erroneous. Third, Cocroft proved damages arising from Smith's violation of the Fourth Amendment and the MCRA.

A. Cocroft sued Smith in his personal capacity.

Joining a "multitude of circuits," the First Circuit has declined to adopt a bright-line rule requiring a plaintiff to explicitly use the words 'individual capacity' in § 1983 personal capacity damages claims. Powell v. Alexander, 391 F.3d 1, 22 (1st Cir. 2004). Instead, the court uses a "course of proceedings" test that looks to "the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims of qualified immunity." Id. No single factor is dispositive. Id.

That test strongly favors a conclusion that Cocroft sued Smith in his individual capacity. Although the complaint did not use the specific words "individual capacity," it named Smith

when demanding "money damages from a Worcester police officer, Defendant Jeremy Smith." Dkt. #1 at 1, 11. The complaint did not make reference to the culpability of the defendant in his official role, nor of the culpability of the Worcester Police Department. Last, Smith's answer has asserted qualified immunity in his answer, which is applicable only to persons being sued in their individual capacities. See Powell, 391 F.3d at 22. Thus, Cocroft is entitled to damages because her complaint made clear that she was suing Smith under § 1983 in his individual capacity.

B. The verdict form's single blank for damages is not erroneous.

Where a defendant fails to object to the verdict form in a civil rights action, he forfeits "any claims in connection [that item]." Figueroa-Torres v. Toledo-Davila, 232 F.3d 270, 272 (1st Cir. 2000). Generally, judges are afforded "wide discretion to determine the form of verdicts." Commonwealth v. Eakin, 685 N.E.2d 1195, 1200 (Mass. App. Ct. 1997). Here, Smith failed to contemporaneously object to the use of a single blank on the jury verdict form, and as a result forfeited his present challenge. Figueroa-Torres, 232 F.3d at 272. Even if Smith could challenge the form now, in light of district court judges' wide discretion to determine the form of verdicts, Smith could not meet heavy burden of proving that the verdict forms were plainly erroneous. See Transamerica Premier Ins. Co. v. Ober, 107 F.3d 925, 933 (1st Cir. 1997) (finding no plain error where singular blank "did not hinder. . . jury from make the relevant finding as to damages.").

C. Cocroft adequately proved damages.

The evidence, supports the jury's calculation of $15,000 in damages for to compensate Cocroft for physical and emotional injuries caused by Smith's unlawful arrest and by his violation of the MCRA. A plaintiff may recover compensatory damages under § 1983 where the constitutional deprivation resulted in an actual and provable injury. Carey v. Piphus, 435 U.S. 247, 255 (1978). "The Court implicitly has recognized the applicability of this principle to

actions under § 1983 by stating that damages are available under that section for actions 'found . . . . to have been violative of constitutional rights and to have caused compensable injury.'" Id. (citing Codd v. Velger, 429 U.S. 624, 630-31 (1977) (Brennan J., dissenting)). A plaintiff need not present expert testimony about her emotional distress as a result of a violation of her civil rights in order to recover compensatory damages. Mendez-Matos v. municipality of Guaynabo, 557 F.3d 36, 47 (1st Cir. 2009); see also Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 237 (1st Cir. 2006) (citing Bailey v. Runyon, 220 F.d 879, 881 (8th Cir. 2000) (noting that "'[m]edical or other expert evidence is not required to prove emotional distress'" and that '[a] plaintiff's own testimony, along with the circumstances of a particular case, can suffice'")).

Given those principles, there was ample proof of damages in this case. There was little dispute that Cocroft suffered physical and emotional injuries result of Smith's conduct. Cocroft and her husband testified that she suffered substantial mental pain and suffering; they said that Cocroft was in shock, incredibly "shaken up," and suffered crying spells. A jury could have found that such suffering—caused by Smith's pre-arrest threats, intimidation, and coercion, and by his initiation of an unlawful arrest—supported an award of $15,000. But there was also physical injury, including shoulder pain and abrasions. A reasonable jury could have found that Smith's initiation of an arrest proximately caused at least some of Cocroft's physical pain.

The absence of medical bills or expert testimony does not change that fact. See Mendez-Matos, 557 F.3d at 47. People who lack resources, like Cocroft, often suffer physical and emotional pain without adequate treatment. That does not mean the pain is imaginary.

Conclusion

For the foregoing reasons, Smith's motion should be denied.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent via facsimile transmission and first-class mail to those indicated as non-registered participants on DATE.

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