

used unreasonable force against Joseph Mott?" The jury answered in the negative.

Plaintiff timely moved for a new trial under Fed. R. Civ. P. 59(a), based on two independent grounds. Plaintiff alleges that (1) a written statement prepared by a police investigator, which contained certain statements made by Officer Ralston to a supervisor on the scene the night of the incident that were later reported by the supervisor to the police investigator, should have been admitted as substantive evidence, and that (2) the Court's charge, which made reference to arrest when the concept of arrest was not relevant to the case, confused the jury.

For the reasons that follow, Plaintiff's motion is denied.

II. STANDARD OF REVIEW FOR A MOTION FOR A NEW TRIAL

Rule 59 provides that when a case has been tried to a jury, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The Supreme Court has stated that a motion for a new trial may be "bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and [it] may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." Montgomery Ward & Co. v.

Duncan, 311 U.S. 243, 251 (1940); see also Wright & Miller, Federal Practice and Procedure § 2805 (1995) (enumerating several grounds for a new trial).

Plaintiff's allegations here, that there was an erroneous evidentiary ruling and an erroneous jury charge, are proper grounds for a new trial. Bhaya v. Westinghouse Elec. Corp., 922 F.2d 184, 187 (3d Cir. 1990); Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 922 (3d Cir. 1986).

In deciding a Rule 59 motion, a trial court undertakes a two-step inquiry. First, the Court determines whether there was error. Second, the Court looks to Fed. R. Civ. P. 61 and decides whether any error was so prejudicial as to be "inconsistent with substantial justice." Goodman v. Pa. Turnpike Comm'n, 293 F.3d 655, 676 (3d Cir. 2002); Farra v. Stanley-Bostich, Inc., 838 F. Supp. 1021, 1026 (E.D. Pa. 1993). The burden of showing harmful error rests on the movant. Wright & Miller § 2803, at 47.

III. Discussion

A. Evidentiary Ruling

Shortly after Officer Ralston shot Mr. Mott, Sergeant Collins Miles, one of Officer Ralston's superiors, arrived on the scene. Officer Ralston proceeded to described to Sergeant Miles the events leading to the shooting in the alley; Sergeant Miles did not reduce Officer Ralston's statement to writing. As

required under the Philadelphia Police Department's regulations, Sergeant Miles then took possession of Officer Ralston's gun clip and transported Officer Ralston to the Police Department's Internal Affairs Division (IAD) for further investigation.

A few hours later, Sergeant Miles was interviewed by Sergeant John Prendergast, the IAD officer formally charged with investigating the incident. During the course of the interview, Sergeant Miles told Sergeant Prendergast what Officer Ralston had told him while in the alley earlier that night. Sergeant Prendergast prepared a verbatim or nearly verbatim report of his interview with Sergeant Miles, which contained Sergeant Miles's statement as to what Officer Ralston had told him earlier that night. Both Sergeant Prendergast and Sergeant Miles signed the document. (Hereinafter, this document will be referred to as the "Prendergast Report.")

At trial, after testifying for several minutes from his memory of that night, Sergeant Miles stated that he could not fully recall what Officer Ralston told him in the alley about what had transpired. Plaintiff's counsel then sought to refresh Sergeant Miles's memory with the Prendergast Report.² Based on his refreshed recollection, Sergeant Miles then testified about

² Counsel for Plaintiff offered the Sergeant Miles the Prendergast Report to "help your recollection." Tr. 9/12/05 at 14. In fact, Sergeant Miles had reviewed the report before taking the stand. Id. at 12.

what Officer Ralston had told him at the scene the night of the incident.³

In addition to the refreshed recollection, Plaintiff sought to introduce the Prendergast Report. Ultimately, the Court admitted it into evidence over the objection of Defendant.⁴ Tr. 9/14/05 at 108.

During the charge conference, Plaintiff asked the Court to charge the jury that:

[A]ny statement that was used to refresh a witnesses [sic] recollection or which was adopted by a witness as a recording of his past recollection may be considered by you as substantive evidence.

Pl.'s Proposed Amended Jury Charge ¶ 25 (doc. no. 65).

The Court declined to adopt Plaintiff's proposed charge on this point. Instead, the Court proceeded to instruct the jury as follows:

Earlier statements of a witness who was not a party . . . were not admitted in evidence to prove that the contents of those statements are true. You may consider

³ At times, counsel for Plaintiff had Sergeant Miles testify almost directly from the Prendergast Report. See, e.g., Tr. 9/12/05 at 17 (Q: "[I]t is the very next sentence after the sentence we just did."); id. (Q: "[Y]ou skipped the sentence that says this male jumped into a black Camry.").

⁴ The Court now recognizes that admission of the Prendergast Report into evidence, even as non-substantive evidence, was error, albeit in Plaintiff's favor. The report supported Plaintiff's case, and the jury had the report during its deliberations. Indeed, during closing arguments counsel for Plaintiff suggested to the jury that it compare Sergeant Miles's testimony with the Prendergast Report and put more stock in the report. Tr. 9/15/05 at 42-45.

the earlier statements in such a case only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness. One relevant and important exception to the rule is of that of the testimony of a party. Therefore the statement of Officer Ralston may be considered by you as substantive evidence because he is a party in this case.

Tr. 9/15/05 at 101-02.

Plaintiff now argues that by refusing to adopt the proposed instruction the Court denied Plaintiff the ability to argue that the statement by Officer Ralston to Sergeant Miles, contained in the Prendergast Report, could be considered by the jury as substantive evidence.

The Court disagrees. Plaintiff has mistakenly collapsed the analysis of the admissibility of a party statement (the statement by Officer Ralston to Sergeant Miles) with the admissibility of a writing containing an out-of-court statement by a non-party declarant (the statement by Sergeant Miles to Sergeant Prendergast).

As to the former, there is no question that the statement by Officer Ralston to Sergeant Miles the night of the incident is an admission by a party opponent and thus admissible. See Fed. R. Evid. 801(d)(1). In fact, Sergeant Miles testified extensively about Officer Ralston's statement at trial. Tr. 9/12/05 at 3-14.⁵

⁵ The Court instructed the jury that this statement was to be treated as substantive evidence. See Tr. 9/15/05 at 102

As to the latter, what Sergeant Miles told Sergeant Prendergast (and which was memorialized in the Prendergast Report), is hearsay, and thus not admissible unless it fits within an exception to the hearsay rule. See Fed. R. Evid. 801(c).

At trial and in post-trial motions, Plaintiff sought to treat the Prendergast Report as substantive evidence under a variety of exceptions to the hearsay rule. These efforts are unavailing.

First, Plaintiff sought to introduce the Prendergast Report under the rule for present recollection refreshed, Fed. R. Evid. 612. Tr. 9/14/05 at 106-07. Rule 612 is not a hearsay exception; rather, it sets out the procedure for refreshing a witness's memory. The only portion of the Rule dealing with admissibility of a writing used to refresh a witness's recollection states that the "adverse party is entitled . . . to introduce in evidence those portions [of the writing used to a refresh a witness's memory] which relate to the testimony of the witness."

Second, Plaintiff relied on Rule 803(5). The Rule provides that if a witness has insufficient recollection to testify fully and accurately, "a record adopted by the witness when the matter

("[T]he statement of Officer Ralston may be considered by you as substantive evidence because he is a party in this case.").

was fresh in the witness'[s] memory . . . may be read into evidence." Again, the writing "may not itself be received as an exhibit unless offered by the adverse party." Here, once his recollection was refreshed, Sergeant Miles testified fully and accurately.

Although Plaintiff was the party who relied on the Prendergast Report to refresh a witness's memory and who offered it as substantive evidence, Plaintiff maintains, both here and at trial, that Plaintiff is the "adverse party," see Tr. 8/22/06 at 4 ("[W]e were the adverse party"), and thus was entitled to introduce the Prendergast Report as substantive evidence under these Rules. This is simply wrong.

Plaintiff misunderstands the meaning of the term "adverse party" in the context of Rules 612 and 803(5). Under these Rules, the "proponent" is the party offering the evidence (in this case, Plaintiff). The adverse party is the party against whom the evidence is being offered (in this case, Defendant). Simply put, the term has to do with the party seeking to introduce the evidence (the proponent) and the party against whom the evidence is being offered (the adverse party).⁶ Under these Rules, Plaintiff was not the adverse party.

⁶ By analogy, Rule 807, the residual hearsay exception, states that "a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance" Fed. R. Evid. 807 (emphasis added).

Therefore, the Prendergast Report was not admissible as substantive evidence of what Officer Ralston told Sergeant Miles on the night of the incident. There was no error in treating the Prendergast Report as non-substantive evidence.⁷

B. Jury Charge

Plaintiff claims that because the concept of arrest was never mentioned during the trial the Court's charge confused the jury (and prejudiced Plaintiff) by suggesting in the charge that Mr. Mott was being arrested at the time of the shooting.⁸ While it is true that the Court used the term "arrest" several times during the charge, the use of the term, under these circumstances, certainly did not confuse the jury.

The Court instructed the jury on the "specific legal claims involved in th[e] case." Tr. 9/15/05 at 104. The jury instruction was modeled on O'Malley, Grenig & Lee, Federal Jury Practice and Instructions § 165.23 (Excessive Force) (2001),

⁷ Even if there was error, it was harmless given that the jury had the Prendergast Report during its deliberations and that Plaintiff's counsel referenced the report during closing arguments. Therefore, any error did not "affect the substantial rights of the part[y]," and the verdict was not "inconsistent with substantial justice." Fed. R. Evid. 61.

⁸ The parties' accounts of what exactly transpired in that alley are somewhat contradictory. While Officer Ralston may not have been attempting to arrest Mr. Mott at the moment he shot him, Officer Ralston was almost assuredly trying to seize or otherwise stop Mr. Mott from fleeing the scene.

which itself relied upon the Supreme Court opinion in Graham v. Connor, 490 U.S. 386 (1989).⁹

The Court explained to the jury that Plaintiff alleged that Officer Ralston violated Mr. Mott's Fourth and Fourteenth Amendment rights to be free from unreasonable use of force by someone acting under color of state law. The Court placed the excessive force claim in the context of an arrest.¹⁰ For example, the Court told the jury that "every person has the constitutional right not to be subjected to unreasonable force while being arrested" and that the burden is on Plaintiff to establish that Officer Ralston used "unreasonable force during the course of Joseph Mott's arrest." Tr. 9/15/05 at 106-07. The Court then explained, in detail, the standard for prevailing on an excessive force claim. Id. at 107-09.

Finally, the Court explicitly charged the jury to consider the instructions as a whole, "not to single out any one instruction." Id. at 94. The verdict sheet asked the jury to

⁹ The notes to the model jury instruction explain that Graham applies to "all claims that law enforcement officers have used excessive force in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen." O'Malley, Grenig & Lee § 165.23.

¹⁰ As Plaintiff points out, this particular excessive force case, unlike most others, did not involve an "arrest." Nevertheless, the legal standard of excessive force is necessarily intertwined with that of arrest; one glance at the notes to the model jury instruction (or indeed at Graham) demonstrates that nearly all excessive force claims arise in the context of an arrest. O'Malley, Grenig & Lee § 165.23.

answer a single pointed question: "Has Plaintiff Monserrata Alicea proven by a preponderance of the evidence that Defendant Robert Ralston used unreasonable force against Joseph Mott? Yes, no." Id. at 116-17.

Under these circumstances, while the concept of arrest was not an issue at trial, the jury most likely would have ignored any reference to "arrest." Cf. Sloman v. Tadlock, 21 F.3d 1462, 1471 (9th Cir. 1994) (holding that providing the jury with a correct instruction (on a First Amendment violation) as well as an extraneous instruction (on an excessive force claim) "is hardly prejudicial [error], as the jury no doubt understood that [the excessive force instruction] was irrelevant because no allegations of excessive force were ever made by [the plaintiff].").

An unhappy litigant cannot point to a few misspoken words or irrelevant concepts amongst a half-hour otherwise correct jury charge as his basis for a new trial. The Third Circuit is quite clear that jury instructions are to be evaluated as a whole. See James v. Continental Ins. Co., 424 F.2d 1064, 1065 (3d Cir. 1970) (per curium) ("[T]he language of the charge is for the trial court to determine. If, from the entire charge, it appears that the jury has been fairly and adequately instructed . . . then the requirements of the law are satisfied." (emphasis added)).

Viewed as a whole, it is most unlikely that the jury was

confused and thus, there was no prejudicial error in using the term "arrest" in the jury charge.

IV. CONCLUSION

Plaintiff's motion for a new trial is denied. The Prendergast Report was not entitled to substantive weight, and the Court did not err in instructing the jury as such. The Court's mention of arrest in its charge to the jury did not confuse the jury.

An appropriate Order follows.

