

09-0462
Manganiello
v. Agostini

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2009

5 (Argued: January 11, 2010 Decided: July 23, 2010)

6 Docket No. 09-0462

7
8 ANTHONY MANGANIELLO,
9 Plaintiff-Appellee,

10 - v. -

11 THE CITY OF NEW YORK, SHAWN ABATE, individually and
12 as a New York City Police Detective, DEREK PARKER,
13 individually and as a New York City Police
14 Detective, HENRY SCOTT, individually and as a New
15 York City Police Lieutenant, ALEX PEREZ, individually
16 and as a New York City Police Officer, MIRIAN NIEVES,
17 individually and as a New York City Police Officer,
18 MICHAEL PHIPPS, individually and as the Commanding
19 Officer of the 43rd Precinct, JOHN MCGOVERN,
20 individually and as a New York City Police Detective
21 Sergeant, ROBERT MARTINEZ, individually and as a New
22 York City Police Officer, GERYL MCCARTHY,
23 individually and as a New York City Police Deputy
24 Inspector,

25 Defendants,

26 LUIS AGOSTINI, individually and as a New York City
27 Police Detective,

28 Defendant-Appellant.
29

30 Before: KEARSE and CABRANES, Circuit Judges, and EATON, Judge*.

31 * Honorable Richard K. Eaton, of the United States Court of
32 International Trade, sitting by designation.

1 Appeal from a judgment of the United States District Court
2 for the Southern District of New York, Harold Baer, Jr., Judge,
3 following a jury verdict awarding plaintiff \$1,426,261 in
4 compensatory damages, plus \$75,000 in punitive damages, on claim
5 brought under 42 U.S.C. § 1983 for malicious prosecution. See
6 Manganiello v. Agostini, No. 07 Civ. 3644, 2008 WL 5159776
7 (S.D.N.Y. Dec. 9, 2008).

8 Affirmed.

9 MICHAEL H. JOSEPH, White Plains, New York
10 (Osorio & Associates, White Plains,
11 New York, on the brief), for
12 Plaintiff-Appellee.

13 VICTORIA SCALZO, Assistant Corporation
14 Counsel, New York, New York (Michael
15 A. Cardozo, Corporation Counsel of the
16 City of New York, Stephen J. McGrath,
17 Amy Okereke, New York, New York, on
18 the brief), for Defendant-Appellant.

19 KEARSE, Circuit Judge:

20 Defendant Luis Agostini, a former detective in the New
21 York City ("City") Police Department ("NYPD"), appeals from a
22 judgment entered in the United States District Court for the
23 Southern District of New York following a jury trial before Harold
24 Baer, Jr., Judge, ordering Agostini to pay plaintiff Anthony
25 Manganiello, who had been acquitted of charges of murder,
26 \$1,426,261 in compensatory damages, \$75,000 in punitive damages,
27 and \$215,037.50 in attorneys' fees, on Manganiello's claim,
28 brought under 42 U.S.C. § 1983, for malicious prosecution. On
29 appeal, Agostini contends principally that the district court

1 should have granted him judgment as a matter of law on the ground
2 (a) that the malicious prosecution claim was foreclosed by the
3 existence--or presumed existence arising from a grand jury
4 indictment--of probable cause for Manganiello's prosecution, or
5 (b) that Agostini is entitled to qualified immunity on the basis
6 that it was objectively reasonable for him to believe that
7 probable cause existed. Alternatively, Agostini contends that he
8 should be granted a new trial because the jury's verdict was
9 excessive or because there were various alleged errors in the
10 district judge's rulings, instructions, questions, and comments at
11 trial. For the reasons that follow, we affirm the judgment of the
12 district court.

13 I. BACKGROUND

14 The present case had its inception in the February 12,
15 2001 fatal shooting of Albert Acosta at the Parkchester South
16 Condominiums (the "Parkchester") in the Bronx, New York. Agostini
17 was the NYPD detective in charge of the murder investigation.
18 Acosta and Manganiello were special patrol officers who had been
19 on duty at the Parkchester on February 12. Manganiello was
20 promptly arrested for the murder but was released less than 24
21 hours later for lack of probable cause. He was rearrested on
22 April 20, 2001, and was tried in 2004 on charges of second-degree
23 murder and other related charges; he was acquitted on all counts.

1 After he was acquitted, Manganiello commenced the present
2 action under 42 U.S.C. § 1983 against Agostini and nine other
3 individuals who at pertinent times were members of NYPD involved
4 in investigating the Acosta murder, as well as against the City,
5 for malicious prosecution. The district court granted summary
6 judgment dismissing Manganiello's claims against the City and five
7 of the individual defendants but allowed his claims against
8 Agostini, NYPD Detective Shawn Abate, and three other defendants
9 to proceed to trial. See Manganiello v. City of New York, No. 07
10 Civ. 3644, 2008 WL 2358922 (S.D.N.Y. June 10, 2008)
11 ("Manganiello I"). At trial, the jury, on a detailed verdict
12 sheet, found that only Agostini and Abate had been proven to have
13 maliciously prosecuted Manganiello. (See Verdict Sheet ¶ 1.) In
14 addition, asked, with respect to each defendant separately,
15 whether Manganiello had

16 proved by a preponderance of the evidence that (A)
17 the Defendant misrepresented the evidence to the
18 prosecutors, or failed to provide the prosecutor with
19 material evidence or information, or gave testimony
20 to the Grand Jury that was false or contained
21 material omissions, and (B) the Defendant knew that
22 he . . . was making a material misrepresentation or
23 omission or giving false testimony,

24 (Verdict Sheet ¶ 2 (emphasis in original)), the jury answered "NO"
25 with respect to Abate and "YES" with respect to Agostini (id.).

26 In light of the jury's findings with respect to Abate, the
27 district court granted a motion to dismiss the claim against him
28 on the ground of qualified immunity. (See Trial Transcript
29 ("Tr.") 839.) Thereafter, in an Opinion and Order dated December
30 9, 2008, Manganiello v. Agostini, No. 07 Civ. 3644, 2008 WL

1 5159776 (S.D.N.Y. Dec. 9, 2008) ("Manganiello II"), the court
2 denied motions by Agostini (1) pursuant to Fed. R. Civ. P. 50 for
3 judgment as a matter of law on the ground of qualified immunity or
4 lack of proof of the elements of a malicious prosecution claim,
5 and (2) in the alternative, pursuant to Fed. R. Civ. P. 59, for a
6 new trial on the ground that the district judge committed various
7 errors during the trial, see Part III below.

8 The following description summarizing the events preceding
9 Manganiello's acquittals--which are described more fully by the
10 district court in Manganiello II, 2008 WL 5159776, at *3-*5--is
11 based on the evidence presented at trial in the present action,
12 taken in the light most favorable to Manganiello as the party
13 against whom Agostini sought judgment as a matter of law.

14 A. Agostini's Investigation and the Charges Against Manganiello

15 On February 12, 2001, Acosta and Manganiello, on the
16 8 a.m. to 4 p.m. shift, were assigned to patrol, separately, areas
17 in the eastern quadrant of the Parkchester, which included the
18 building at 1700 Metropolitan Avenue ("1700 Metropolitan"). At
19 about 10:15 a.m., the Parkchester security office sent a message
20 over the security radio system stating that there was a "1013"--
21 meaning an "officer down"--in the basement of 1700 Metropolitan.
22 Manganiello, who had been on his way to a diner for a coffee
23 break, raced to the scene, where numerous police cars had already
24 arrived. Manganiello entered the basement and saw the bleeding
25 body of Acosta. When NYPD crime scene investigators arrived,

1 Manganiello left the building, but he was quickly stopped by NYPD
2 Officer Miriam Nieves, who grabbed his hands and started sniffing
3 them. Nieves and other officers asked Manganiello to come to the
4 police station to help with the investigation. Manganiello
5 agreed.

6 Upon arriving at the station, Manganiello was placed in an
7 interrogation room where he was questioned by Agostini. Agostini
8 asked whether Manganiello knew of anyone who had animosity toward
9 Acosta, and Manganiello described an incident in which Acosta had
10 been assaulted by members of the Bloods gang, and another in which
11 local thugs had threatened to shoot Acosta. Agostini then asked
12 whether Manganiello had killed Acosta. Manganiello testified that
13 when he responded that he had had nothing to do with it, Agostini
14 "stands up, pissed off and he's looking at me like a piece of
15 garbage." (Tr. 68.) Agostini then called in two other
16 detectives, and they strip-searched Manganiello--with Agostini
17 even ripping a Band-Aid from Manganiello's finger. Manganiello
18 was photographed, had his hands swabbed, and was placed in a cell.
19 Manganiello had been left wearing only his pants and a tank top,
20 and he asked to have more of his clothes returned because the cell
21 was cold; Agostini just laughed at him.

22 No gunshot residue was found on Manganiello's hands, and
23 Agostini was instructed by his supervisors that there was no
24 probable cause for Manganiello's arrest. Manganiello was released
25 at 5 a.m. the next morning. He was given back his clothing, but

1 Agostini, shoving him toward the exit, refused to allow him to put
2 the laces in his shoes before leaving the station house.

3 Agostini never followed up on the information given to him
4 by Manganiello as to persons who had previously threatened or
5 assaulted Acosta. Nor did he pass that information to the
6 assistant district attorney in charge of the case (the "ADA").

7 Two days after the shooting, however, Agostini met with
8 Terrence Alston, a member of the Bloods gang who had been in jail
9 since some four months before the Acosta shooting but who claimed
10 to have relevant information. Alston told Agostini that
11 Manganiello had tried to hire Alston to kill a Parkchester
12 security guard. (Manganiello testified in the present case that
13 he had never met or spoken with Alston.) Alston also told
14 Agostini that a friend named Johnny Baker had sold Manganiello a
15 .22 caliber gun--the caliber of the gun used to shoot Acosta.
16 When Agostini interviewed Baker, however, Baker credibly told
17 Agostini that Alston had lied. When Agostini confronted Alston
18 about this lie, Alston became angry and told Agostini not to
19 interview witnesses produced by Alston unless Alston was present.
20 Alston promised that if he were released from jail, he would,
21 within four weeks, produce another witness for Agostini. Agostini
22 viewed Alston as "playing games" to get out of jail (Tr. 256
23 (internal quotation marks omitted)), but he testified at trial in
24 the present case that it did not occur to him that Alston might be
25 planning to intimidate prospective witnesses when Alston said

1 Agostini was not to interview them in Alston's absence (see id. at
2 252).

3 Approximately two weeks after the homicide, Agostini
4 received information from a taxi driver who reported overhearing a
5 passenger, Alfred Vasquez, say on a cell phone that Vasquez had
6 seen a security officer get shot and was the only one who had seen
7 the shooter. Agostini located and questioned Vasquez, who said
8 that although he had made such a statement, it was simply a
9 fabrication. Agostini accepted Vasquez's response without making
10 any further inquiries, apparently neither confirming Vasquez's
11 whereabouts at the time of the shooting nor having Vasquez's
12 fingerprints compared against those found at the scene.

13 On March 1, 2001, Agostini created a document that
14 suggested that when Acosta was shot at 1700 Metropolitan,
15 Manganiello was in the building. It is undisputed that, earlier
16 on the morning of the shooting, Manganiello had responded to a
17 call reporting a disturbance in that building. Three members of
18 NYPD, including Officers Eric Rodriguez and [FNU] Ortiz, had also
19 responded. Rodriguez and Ortiz were interviewed, on the night of
20 the shooting, by NYPD Detective Richard E. Martinez, who reported
21 in an NYPD Follow-Up form--known as a "DD5"--that Rodriguez and
22 Ortiz stated that Manganiello left the building with them. In
23 Agostini's March 1 DD5, Agostini said that no one had seen
24 Manganiello leave the building.

25 Some two weeks after Agostini discovered that Alston had
26 lied to him about Johnny Baker, Agostini and Martinez approached

1 one Michael Booth, knowing that Booth was engaged in the unlawful
2 activities of bookmaking and/or loan sharking. Agostini said he
3 had information that a Parkchester security officer had tried to
4 buy a gun from Booth. Booth at first refused to endorse that
5 information; but Agostini and Martinez took him to the police
6 station, searched him, and found a knife and betting slips
7 bearing names and monetary amounts in his pockets. Agostini
8 threatened to report Booth to the NYPD organized crime bureau.
9 Only then did Booth agree to sign a statement to the effect that
10 Manganiello had tried to buy a gun from him. (Manganiello
11 testified at trial in the present case that he had never had such
12 a conversation with Booth.)

13 After Booth signed the statement, the detectives gave him
14 back his knife, and he left the police station. No charges were
15 filed against him; the gambling slips were placed in the Acosta
16 murder case file maintained by Agostini--which later disappeared--
17 and Booth's name was not given to the organized crime bureau.
18 Agostini gave Booth's statement to the ADA, who ultimately called
19 Booth as a witness at the murder trial to testify that Manganiello
20 had tried to buy a gun from him. In the present case, the ADA
21 testified that she had not authorized Agostini or anyone else to
22 withhold criminal charges against Booth in exchange for
23 implicating Manganiello. (See Tr. 638.)

24 With respect to Alston, Agostini testified that he did not
25 note in any of his DD5s his belief that Alston was playing games
26 or that Alston wanted to be present when witnesses Alston

1 produced were interviewed; nor did he mention to the district
2 attorney's office Alston's insistence on being present at such
3 interviews. The ADA, who testified that Agostini did not raise
4 any concerns with her that, in order to get out of jail, Alston
5 was "making up stories" (Tr. 647), arranged for Alston's release
6 from jail "in exchange for his testimony against [Manganiello]"
7 (id.). On April 5, 2001, after his release, Alston produced a
8 teenager, Mark Damon, who told Agostini and the ADA that, in
9 January 2001, Damon had sold Manganiello a gun. (Manganiello
10 testified in the present case that he had not bought a gun from
11 anyone in January 2001 and had never met Damon.) Agostini
12 testified in the present case that he "knew that Alston had
13 provided [him with] false information," and he "didn't know
14 whether [Alston] was believable or not believable." (Id. at 247.)
15 Agostini said, "He gave me false information . . . once, but then
16 he gave me the right information . . . the second time." (Id. at
17 248.)

18 The information given "the second time" also proved to be
19 false. Prior to Manganiello's trial in 2004, Alston died, and
20 Damon recanted his statement that he had sold Manganiello a gun.
21 At trial in the present case, Agostini admitted that Alston had
22 "asked Damon to lie about Anthony Manganiello." (Id. at 330; see
23 also id. at 261 (Damon, in recanting, said "Alston[had] made him
24 say it.") (internal quotation marks omitted).)

25 In the meantime, on April 20, 2001, Manganiello was
26 arrested on a felony complaint signed by Agostini. On May 7,

1 2001, following testimony from Agostini, Alston, and several other
2 witnesses, the grand jury indicted Manganiello on two counts of
3 murder in the second degree and one count each of manslaughter and
4 criminal possession of a weapon.

5 Thereafter, the case file on the Acosta murder
6 disappeared. It had contained, inter alia, handwritten notes by
7 detectives of their interviews, including some that might have
8 contradicted the grand jury testimony of certain witnesses. For
9 example, one such witness was Walter Cobb, a porter at 1700
10 Metropolitan. Before the grand jury, Cobb testified that he was
11 outside the building on the morning of February 12, 2001, when he
12 heard shots, and that "almost immediately" (Tr. 93 (internal
13 quotation marks omitted)), as he was about to unlock the basement
14 door, it "flew open" (id. (internal quotation marks omitted)) and
15 Manganiello came out. That testimony was partially inconsistent
16 with a DD5 prepared by Detective Martinez based on his interview
17 of Cobb, in that Cobb told Martinez he did not have a key for the
18 basement door; and it apparently differed in a more important
19 respect from statements Cobb had made to NYPD Officer Alex Perez
20 shortly after the shooting. Perez had responded to the "officer
21 down" radio call; and after briefly canvassing the basement, he
22 had gone outside and encountered Cobb, who described hearing
23 gunshots. Cobb told Perez he saw Manganiello "five minutes" after
24 hearing the gunshots. (Id. at 521-22.) Perez himself was
25 interviewed that evening by Martinez, and Perez did not tell
26 Martinez that Cobb had seen Manganiello leaving the basement.

1 (See id. at 526-27.) Thus, Martinez testified that according to
2 his DD5 on his interview of Perez, which Martinez gave to Agostini
3 along with his handwritten notes of the interview, "Cobb didn't
4 say anything to Officer Perez about Mr. Manganiello coming out of
5 a basement door." (Id. at 403.)

6 Agostini apparently did not call the discrepancies in
7 Cobb's statements, e.g., as to where and when Cobb first saw
8 Manganiello after the shooting, to the attention of the ADA.
9 Although the ADA testified at trial in the present case that,
10 before calling Cobb to the grand jury, she had been informed
11 "about all of Mr. Cobb's statements" (id. at 622), her prior
12 deposition testimony was that she did not recall being made aware
13 of a number of discrepancies in the statements Cobb made to
14 various officers, including that Cobb originally did not say he
15 saw Manganiello exit the basement seconds after he heard the shots
16 (id. at 623-24).

17 Agostini, as the lead detective on the Acosta homicide,
18 had responsibility for maintaining all the reports and evidence
19 produced during the investigation and securing them for trial.
20 When detectives completed their DD5s, they gave them to Agostini,
21 along with their handwritten notes of their interviews. The notes
22 were to be maintained in the case file in order to preserve the
23 ability of the accused to cross-examine the witnesses at trial.
24 In the present case, the DD5s were photocopied by the district
25 attorney's office, which maintained copies and returned the
26 originals to Agostini. Those originals, along with all of the

1 handwritten notes, the arrest report, the results of the gunshot
2 residue tests, and everything else in the case file (including
3 Booth's incriminating betting slips), disappeared prior to
4 Manganiello's trial.

5 At various times Agostini gave conflicting testimony
6 about, inter alia, where he had stored the case file before it
7 disappeared. In a deposition in the present case, he testified
8 that he had last left the box under his desk; at trial in the
9 present case, he testified he had last left it on top of a locker
10 in the detectives' locker room.

11 In addition, Agostini testified that he had at one point
12 given the entire case file to the ADA. This was contradicted both
13 by Agostini's testimony at a pretrial hearing in the criminal
14 case that he had not given the ADA his handwritten notes, and by
15 the testimony of the ADA at trial in the present case. The ADA
16 testified that she had represented to the trial judge in the
17 criminal case that she never had possession of the homicide case
18 file. When she asked for the file, it had disappeared. The ADA
19 also testified that Agostini did not give her copies of the
20 handwritten interview and investigative notes. Thus, in the
21 criminal case--as in the present case--Manganiello was not able to
22 obtain some of the investigative materials to which he was
23 entitled.

24 One document that was not lost was a note that Agostini
25 had found in a search of Manganiello's locker at the Parkchester.
26 At a pretrial hearing in the criminal case, Agostini testified

1 that Manganiello's note said "I feel like killing somebody." The
2 note actually said, "I pray every day I will never have to kill
3 someone." (Tr. 266-67.)

4 The jury in the criminal case found Manganiello not guilty
5 on all counts.

6 B. The Denial of Agostini's Motion for Judgment as a Matter of Law

7 As indicated above, the jury in the present case, to the
8 extent pertinent to this appeal, found Agostini liable to
9 Manganiello for malicious prosecution and found that Agostini
10 "misrepresented the evidence to the prosecutors, or failed to
11 provide the prosecutor with material evidence or information, or
12 gave testimony to the Grand Jury that was false or contained
13 material omissions, and . . . knew that he . . . was making a
14 material misrepresentation or omission or giving false testimony"
15 (Verdict Sheet ¶ 2 (emphasis in original)). The jury found
16 Manganiello entitled to compensatory damages totaling \$1,426,261.
17 Although the jury found that Abate was responsible for 10 percent
18 of that amount, the district court ruled that Abate was entitled
19 to qualified immunity because the jury found that he either had
20 not made false statements or misrepresentations, etc., or, if he
21 had, that he had not done so knowingly. The court also ruled
22 that, in light of the joint and several liability imposed on
23 joint tortfeasors, Agostini is liable to Manganiello for the
24 entire \$1,426,261.

1 In connection with its initial verdict, the jury was also
2 asked to decide whether punitive damages were appropriate,
3 although not to determine an amount. It responded affirmatively.
4 After Abate was dismissed from the case on the ground of qualified
5 immunity, the jury was reconvened and heard argument on the
6 question of the amount of punitive damages Agostini (in his
7 individual capacity) should pay. It determined that that amount
8 was \$75,000.

9 Following the jury's initial verdict, Agostini had moved
10 for judgment as a matter of law, arguing principally that one
11 element of a claim of malicious prosecution is that probable cause
12 for the prosecution was lacking; that a grand jury indictment
13 creates a presumption that probable cause existed; and that
14 Manganiello failed to present evidence of fraud, perjury, or other
15 misconduct on the part of Agostini that could demonstrate that the
16 grand jury's indictment was the result of bad-faith police conduct
17 sufficient to rebut that presumption. Agostini also argued that
18 Manganiello failed to present sufficient evidence of two other
19 elements of a malicious prosecution claim, i.e., that Agostini was
20 responsible for the initiation of the criminal case or that he had
21 acted with malice. Alternatively, Agostini sought judgment as a
22 matter of law on the ground that he was entitled to qualified
23 immunity.

24 In an exhaustive discussion in Manganiello II, thoroughly
25 annotated with citations to the trial transcript, the district
26 court rejected each of Agostini's contentions and denied the

1 motion. Based principally on the evidence described in Part I.A.
2 above, the court found that "Manganiello provided enough evidence
3 at trial that a reasonable juror could conclude that Agostini
4 . . . failed to make a complete and full statement of facts to the
5 District Attorney, misrepresented or falsified evidence, withheld
6 evidence or otherwise acted in bad faith." Manganiello II, 2008
7 WL 5159776, at *2 (internal quotation marks omitted). The Court
8 concluded that the jury reasonably found that Manganiello had
9 "successfully rebutted the presumption of probable cause that was
10 created by the grand jury indictment." Id. at *5. The district
11 court ruled that that evidence was also sufficient to permit the
12 jury to find that probable cause was actually lacking.

13 The court found that there was likewise sufficient
14 evidence of the other elements of a malicious prosecution claim.
15 It found that "there was enough evidence for the jury to
16 reasonably conclude that Agostini commenced or initiated the
17 criminal prosecution" because he "provided the District Attorney's
18 office with all the information that led to the authorization for
19 Manganiello's arrest" and "signed the felony complaint." Id.
20 at *6. As to malice, the court noted that "'[m]alice may be shown
21 by proving that the prosecution complained of was undertaken from
22 improper or wrongful motives, or in reckless disregard of the
23 rights of the plaintiff,'" id. at *7 (quoting Pinsky v. Duncan, 79
24 F.3d 306, 313 (2d Cir. 1996)). It found that the jury could have
25 found malice on the part of Agostini from the lack of probable
26 cause, see Manganiello II, 2008 WL 5159776, at *7, as well as from

1 Agostini's harsh treatment of Manganiello at the time of his
2 initial arrest and Agostini's evident pique at being instructed to
3 release Manganiello at that time, see id. at *10-*11.

4 With respect to Agostini's motion for judgment as a matter
5 of law on the ground of qualified immunity, the district court
6 again noted the jury's findings that Agostini had misrepresented
7 the evidence to prosecutors, or had withheld material evidence or
8 information from the prosecutor, or had given testimony to the
9 grand jury that was false or materially misleading "and knew that
10 he was making a material misrepresentation or omission or giving
11 false testimony," Manganiello II, 2008 WL 5159776, at *8 (emphasis
12 in original). The court concluded that, in light of these facts,
13 "it would not have been objectively reasonable for Agostini to
14 believe that his actions or omissions" did not violate
15 Manganiello's "clearly established constitutional rights. Put
16 another way, there could be no disagreement among officers of
17 reasonable competence that [Agostini's] conduct was unlawful."
18 Id.

19 Agostini also moved, in the alternative, for a new trial
20 on various grounds. As discussed in Part III below, the district
21 court denied that motion as well.

22 On appeal, Agostini pursues his contentions that he was
23 entitled to judgment as a matter of law on the grounds of
24 qualified immunity or insufficient evidence to prove the claim of
25 malicious prosecution, and, alternatively, that he is entitled to

1 a new trial. For the reasons that follow, we find none of his
2 contentions persuasive.

3 II. THE DENIAL OF JUDGMENT AS A MATTER OF LAW

4 In order to prevail on a § 1983 claim against a state
5 actor for malicious prosecution, a plaintiff must show a violation
6 of his rights under the Fourth Amendment, see, e.g., Murphy v.
7 Lynn, 118 F.3d 938, 944 (2d Cir. 1997), cert. denied, 522 U.S.
8 1115 (1998); Rohman v. New York City Transit Authority, 215 F.3d
9 208, 215 (2d Cir. 2000), and must establish the elements of a
10 malicious prosecution claim under state law, see, e.g., Murphy v.
11 Lynn, 118 F.3d at 944; Russell v. Smith, 68 F.3d 33, 36 (2d Cir.
12 1995); Janetka v. Dabe, 892 F.2d 187, 189 (2d Cir. 1989). To
13 establish a malicious prosecution claim under New York law, a
14 plaintiff must prove "(1) the initiation or continuation of a
15 criminal proceeding against plaintiff; (2) termination of the
16 proceeding in plaintiff's favor; (3) lack of probable cause for
17 commencing the proceeding; and (4) actual malice as a motivation
18 for defendant's actions.'" Murphy v. Lynn, 118 F.3d at 947
19 (quoting Russell v. Smith, 68 F.3d at 36); see Broughton v. State,
20 37 N.Y.2d 451, 457, 373 N.Y.S.2d 87, 94, cert. denied, 423 U.S.
21 929 (1975).

22 In considering a motion for judgment as a matter of law,
23 the district court

24 "must draw all reasonable inferences in favor of the
25 nonmoving party, and it may not make credibility

1 determinations or weigh the evidence
2 Credibility determinations, the weighing of the
3 evidence, and the drawing of legitimate inferences
4 from the facts are jury functions, not those of a
5 judge. . . . Thus, although the court should review
6 the record as a whole, it must disregard all evidence
7 favorable to the moving party that the jury is not
8 required to believe."

9 Zellner v. Summerlin, 494 F.3d 344, 370 (2d Cir. 2007) ("Zellner")
10 (quoting Reeves v. Sanderson Plumbing, 530 U.S. 133, 150-51 (2000)
11 (other internal quotation marks omitted) (emphases in Zellner)).
12 We review a district court's denial of a motion for judgment as a
13 matter of law de novo. "In so doing, we apply the same
14 standard[s] that [are] required of the district court." Zellner,
15 494 F.3d at 371. Under these standards, Agostini plainly was not
16 entitled to judgment as a matter of law.

17 A. Probable Cause

18 Although the existence of probable cause must be
19 determined with reference to the facts of each case, in general
20 "[p]robable cause to arrest exists when the officers have
21 knowledge of, or reasonably trustworthy information as to, facts
22 and circumstances that are sufficient to warrant a person of
23 reasonable caution in the belief that an offense has been or is
24 being committed by the person to be arrested." Zellner, 494 F.3d
25 at 368 (citing, e.g., Dunaway v. New York, 442 U.S. 200, 208 n.9
26 (1979); Wong Sun v. United States, 371 U.S. 471, 479 (1963);
27 Brinegar v. United States, 338 U.S. 160, 175-76 (1949)). Probable
28 cause may also exist where the officer has relied on mistaken
29 information, so long as it was reasonable for him to rely on it.

1 See, e.g., Hill v. California, 401 U.S. 797, 803-04 (1971).
2 However, "the failure to make a further inquiry when a reasonable
3 person would have done so may be evidence of lack of probable
4 cause." Colon v. City of New York, 60 N.Y.2d 78, 82, 468 N.Y.S.2d
5 453, 455 (1983). The existence of probable cause must be
6 determined by reference to the totality of the circumstances.
7 See, e.g., Illinois v. Gates, 462 U.S. 213, 238 (1983).

8 " [T]he existence of probable cause is a complete defense
9 to a claim of malicious prosecution in New York," Savino v. City
10 of New York, 331 F.3d 63, 72 (2d Cir. 2003), and "indictment by a
11 grand jury creates a presumption of probable cause," id. That
12 presumption may be rebutted only "by evidence that the indictment
13 was procured by 'fraud, perjury, the suppression of evidence or
14 other police conduct undertaken in bad faith.'" Id. (quoting
15 Colon v. City of New York, 60 N.Y.2d at 83, 468 N.Y.S.2d at 456).
16 Where there is some indication in the police records that, as to a
17 fact crucial to the existence of probable cause, the arresting
18 officers may have "lied in order to secure an indictment," and "a
19 jury could reasonably find that the indictment was secured through
20 bad faith or perjury," the presumption of probable cause created
21 by the indictment may be overcome. Boyd v. City of New York, 336
22 F.3d 72, 77 (2d Cir. 2003). "Like a prosecutor's knowing use of
23 false evidence to obtain a tainted conviction, a police officer's
24 fabrication and forwarding to prosecutors of known false evidence
25 works an unacceptable 'corruption of the truth-seeking function of
26 the trial process.'" Ricciuti v. N.Y.C. Transit Authority, 124

1 F.3d 123, 130 (2d Cir. 1997) ("Ricciuti") (quoting United States
2 v. Acurs, 427 U.S. 97, 104 (1976)).

3 As set out in Part I above, the jury in the present case
4 found that Agostini had engaged in at least one of those forms of
5 misconduct and had done so knowingly. We see no error in the
6 district court's ruling that there was ample evidence to support
7 the jury's findings. The evidence described above included, for
8 example, Agostini's misrepresentation in one of his DD5s that,
9 after Manganiello responded to a report of a disturbance at 1700
10 Metropolitan on February 12, 2001, prior to the shooting of Acosta
11 in the basement of that building, no one had seen Manganiello
12 leave the building. In fact, a DD5 prepared by Martinez, and
13 given to Agostini as leader of the investigative team, reported
14 that two NYPD officers who had also responded to that disturbance
15 stated that Manganiello left the building with them.

16 In addition, although there was evidence that Manganiello
17 had informed Agostini of two prior instances in which Acosta had
18 been assaulted or threatened by members of the Bloods or by other
19 local thugs, Agostini's DD5 on his interrogation of Manganiello
20 stated that when he asked Manganiello "if anyone he knows has any
21 problems with" Acosta, "Manganiello would not answer."
22 (Plaintiff's Exhibit 33.)

23 Agostini apparently made no effort to follow up on the
24 information Manganiello gave him. The record also indicates that
25 Agostini made only the most superficial and credulous of inquiries
26 of the taxi passenger who had been overheard telling someone he

1 had been present at the shooting and had seen the shooter. And
2 the jury could infer that Agostini coerced a false statement about
3 Manganiello from Booth in exchange for not reporting Booth to the
4 organized crime bureau.

5 Further, it was permissible for the jury, on the evidence
6 before it, to find that Agostini used Alston to inculcate
7 Manganiello with no concern whatever for whether Alston's
8 statements were truthful. It was clear that Agostini promoted
9 Alston to the ADA as a witness against Manganiello despite knowing
10 that Alston had already lied to him about Manganiello at least
11 once; and it was clear that Agostini in his paperwork--some of
12 which was sent to the ADA and would have been subject to discovery
13 by Manganiello prior to the criminal trial--did not mention
14 Agostini's belief that Alston was "playing games." In addition,
15 given Alston's angry criticism of Agostini for interviewing Baker
16 without Alston being present and Alston's insistence that any
17 future alleged witness not be interviewed by Agostini in Alston's
18 absence, the jury was entitled (a) to disbelieve Agostini's
19 testimony that he had no suspicion that Alston was planning to
20 continue fabricating evidence, and (b) to infer that Agostini did
21 not inform the ADA of Alston's insistence because Agostini knew
22 that if the ADA were aware of it she would question the veracity
23 of statements thus procured.

24 In sum, looking at the evidence as a whole, the jury could
25 permissibly infer that Agostini was determined simply to make a
26 case against Manganiello, and that in order to do so Agostini

1 refrained from making inquiry into other possible suspects,
2 ignored evidence that was inconsistent with his belief that
3 Manganiello was guilty, declined to inform the ADA of, or to
4 document, any exculpatory evidence or inconsistencies in the
5 statements of witnesses who agreed to inculcate Manganiello,
6 secured one statement inculcating Manganiello by agreeing not to
7 disclose the witness's known criminal activities to the proper
8 authorities, and included in some of Agostini's own reports
9 supposedly factual statements adverse to Manganiello that were
10 contradicted by persons having first-hand knowledge of the facts.
11 The evidence amply supported the jury's finding that Agostini had
12 engaged in misconduct and supported the conclusions both that the
13 presumption of probable cause created by the grand jury
14 indictment was rebutted and that probable cause was lacking.

15 B. Other Elements of Malicious Prosecution

16 Agostini also contends that he was entitled to judgment as
17 a matter of law on the basis that Manganiello failed to establish
18 that Agostini had caused the initiation or the continuation of the
19 criminal proceeding and failed to establish that Agostini had
20 acted with actual malice. Again, we disagree.

21 To initiate a prosecution, a defendant must do more than
22 report the crime or give testimony. He must "play[] an active
23 role in the prosecution, such as giving advice and encouragement
24 or importuning the authorities to act." Rohman v. New York City
25 Transit Authority, 215 F.3d at 217 (internal quotation marks

1 omitted). A jury may permissibly find that a defendant initiated
2 a prosecution where he "fil[ed] the charges" or "prepar[ed an]
3 alleged false confession and forward[ed] it to prosecutors."
4 Ricciuti, 124 F.3d at 130. Here, there was sufficient evidence
5 from which the jury could infer that Agostini, inter alia,
6 actively elicited inculpatory statements from witnesses such as
7 Alston and Booth, whose veracity in making such statements was
8 circumstantially suspect; that Agostini forwarded those statements
9 to the ADA; that Agostini was in touch with the ADA at least once
10 a week; and that Agostini signed the felony complaint on which
11 Manganiello was ultimately rearrested. This sufficed to satisfy
12 the initiation-or-continuation element.

13 Finally, we also agree with the district court that the
14 evidence was ample to permit an inference that Agostini proceeded
15 against Manganiello with malice. First, "[a] lack of probable
16 cause generally creates an inference of malice." Boyd v. City of
17 New York, 336 F.3d at 78; see, e.g., Ricciuti, 124 F.3d at 131;
18 Lowth v. Town of Cheektowaga, 82 F.3d 563, 573 (2d Cir. 1996).

19 Further,

20 malice may be shown by proving that the prosecution
21 complained of was undertaken from improper or
22 wrongful motives, or in reckless disregard of the
23 rights of the plaintiff.

24 Pinsky v. Duncan, 79 F.3d 306, 313 (2d Cir. 1996) (internal
25 quotation marks omitted); see also Lowth v. Town of Cheektowaga,
26 82 F.3d at 573 (malice may be proven by showing that the
27 prosecutor had "a wrong or improper motive, something other than a

1 desire to see the ends of justice served" (internal quotation
2 marks omitted)).

3 Malice on the part of Agostini could easily be inferred in
4 light of the evidence in the present case of, inter alia,
5 Agostini's apparently myopic focus on Manganiello, to the
6 exclusion of all other suspects; Agostini's otherwise seemingly
7 inexplicable false statements about Manganiello's conduct that
8 were contrary to the reported first-hand knowledge of others;
9 Agostini's willingness to coerce an inculpatory statement from one
10 unwilling person in exchange for not reporting that person's known
11 criminal activities; and his willingness to have Manganiello
12 indicted on the basis of testimony of another person who was known
13 to have lied to Agostini at least once in this very matter and who
14 was evidently willing to intimidate others into falsely providing
15 the evidence Agostini sought. The jury was entitled to find that
16 Agostini's adherence to the view that Alston, in producing Damon,
17 had given Agostini the "right" information (Tr. 248), while
18 Agostini admitted that Alston had "asked Damon to lie about
19 Anthony Manganiello" (id. at 330), was reflective of, in the words
20 of Lowth, "something other than a desire to see the ends of
21 justice served."

22 It was also understandably difficult for the jury to
23 fathom an appropriate explanation for Agostini's
24 misrepresentation, in the course of the criminal proceeding, of
25 the contents of the note he had found in Manganiello's locker. To
26 testify that Manganiello's note stating "I pray every day I will

1 never have to kill someone" instead said "I feel like killing
2 somebody" (Tr. 266-67) cannot be viewed as better than a reckless
3 disregard of Manganiello's rights. Although that statement was
4 made after the initiation of the criminal proceeding, the jury was
5 entitled, especially in light of the other evidence as to
6 Agostini's conduct of the investigation, to view that
7 misrepresentation as indicative of Agostini's state of mind all
8 along.

9 C. Qualified Immunity

10 A government official sued in his individual
11 capacity is entitled to qualified immunity (1) if the
12 conduct attributed to him was not prohibited by
13 federal law, see, e.g., County of Sacramento v.
14 Lewis, 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140
15 L.E.2d 1043 (1998); Siegert v. Gilley, 500 U.S. 226,
16 232, 111 S.Ct. 1789, 114 L.E.2d 277 (1991); or (2)
17 where that conduct was so prohibited, if the
18 plaintiff's right not to be subjected to such conduct
19 by the defendant was not clearly established at the
20 time it occurred, see, e.g., Harlow v. Fitzgerald,
21 457 U.S. 800, 817-19, 102 S.Ct. 2727, 73 L.E.2d 396
22 (1982); or (3) if the defendant's action was
23 "objective[ly] legal[ly] reasonable[] . . . in light
24 of the legal rules that were clearly established at
25 the time it was taken." Anderson v. Creighton, 483
26 U.S. 635, 639 (1987), 107 S.Ct. 3034, 97 L.E.2d 523
27 (internal quotation marks omitted)

28 Munaf v. Metropolitan Transportation Authority, 285 F.3d 201, 210
29 (2d Cir. 2002). Only the third aspect of the qualified immunity
30 doctrine was genuinely at issue in the present case, for
31 "[f]reedom from malicious prosecution is a constitutional right
32 that has long been clearly established." Kinzer v. Jackson, 316
33 F.3d 139, 143 (2d Cir. 2003).

1 "Whether a defendant officer's conduct was objectively
2 reasonable is a mixed question of law and fact." Zellner, 494
3 F.3d at 367. The factfinder must determine any disputed material
4 facts, and on the basis of the facts permissibly found, the court
5 must decide "whether it was objectively reasonable for the officer
6 to believe that his conduct did not violate a clearly established
7 right, i.e., whether officers of reasonable competence could
8 disagree as to the lawfulness of such conduct." Id.

9 Although a mere mistake in the performance of an official
10 duty may not deprive the officer of qualified immunity, the
11 doctrine does not shield performance that either (a) was in
12 violation of clearly established law, or (b) was plainly
13 incompetent. See, e.g., Hunter v. Bryant, 502 U.S. 224, 229
14 (1991) ("The qualified immunity standard 'gives ample room for
15 mistaken judgments' by protecting 'all but the plainly incompetent
16 or those who knowingly violate the law.'" (quoting Malley v.
17 Briggs, 475 U.S. 335, 343, 341 (1986))). With respect to both the
18 legal question and the matter of competence, the officials'
19 actions must be evaluated for objective reasonableness. Thus, the
20 doctrine shields officers from suit for damages if "'a reasonable
21 officer could have believed'" his action "'to be lawful, in light
22 of clearly established law and the information [he] possessed.'" Hunter,
23 502 U.S. at 227 (quoting Anderson v. Creighton, 483 U.S.
24 635, 641 (1987)). That is, "[e]ven if the right at issue was
25 clearly established in certain respects . . . an officer is still
26 entitled to qualified immunity if 'officers of reasonable

1 competence could disagree' on the legality of the action at issue
2 in its particular factual context." Walczyk v. Rio, 496 F.3d 139,
3 154 (2d Cir. 2007) (quoting Malley, 475 U.S. at 341).

4 In the present case, given the jury's findings that
5 Agostini misrepresented the evidence to the prosecutors, or failed
6 to pass on material information, or made statements that were
7 false, and engaged in such misconduct knowingly, and given the
8 ample evidentiary support for those findings, the district court
9 correctly concluded that no reasonable officer could have believed
10 Agostini's actions to be lawful. Agostini's motion for judgment
11 as a matter of law based on qualified immunity was properly
12 denied.

13 III. DENIAL OF THE MOTION FOR A NEW TRIAL

14 Agostini contends that the district court should at least
15 have granted him a new trial, arguing principally that the court
16 (a) erroneously instructed the jury that it was permitted to draw
17 an inference adverse to Agostini as to the contents of the missing
18 criminal case file, (b) inappropriately curtailed defense
19 counsel's summation, (c) failed to find the jury's verdict
20 excessive, and (d) improperly interrupted the questioning of the
21 witnesses and made inappropriate comments during the trial.

22 The district court's denial of a Rule 59 motion for a new
23 trial is reviewed for abuse of discretion. See, e.g., AMW
24 Materials Testing, Inc. v. Town of Babylon, 584 F.3d 436, 456 (2d

1 Cir. 2009). A district court has abused its discretion if it has
2 (1) "based its ruling on an erroneous view of the law," (2) made
3 "a clearly erroneous assessment of the evidence," or (3) "rendered
4 a decision that cannot be located within the range of permissible
5 decisions." Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008)
6 (internal quotation marks omitted). For the reasons that follow,
7 we find no basis for reversal here.

8 A. The Adverse Inference Instruction

9 As discussed in Part I.A. above, the case file in
10 Manganiello's criminal proceeding disappeared prior to his trial
11 and was never found. The court in the present case gave the jury
12 an instruction that stated, in part,

13 [i]f you find that a party could have produced
14 documents or other evidence in this lawsuit, and that
15 such evidence was at one time within that party's
16 control or in his or her custody, and that this
17 evidence would have been relevant in deciding facts
18 in dispute in this lawsuit, you are permitted, but
19 not required, to infer that the evidence, if
20 produced, would have been unfavorable to that party.

21 (Tr. 782-83 (emphasis added).) Agostini contends that this
22 instruction should not have been given, arguing principally that
23 Manganiello did not establish that Agostini had custody or control
24 over the homicide file when it was lost or misplaced, or that
25 Agostini had an obligation to preserve the file at that time, or
26 that the files were destroyed with a culpable state of mind, or
27 that the missing documents were relevant. We disagree.

28 The suggestion that none of the missing documents would
29 have been relevant here is belied by the various discrepancies,

1 discussed in Parts I.A. and II.A. above, among versions of the
2 conduct attributed to Manganiello. For example, the record
3 contains DD5s indicating divergent statements by Cobb, the only
4 witness whose testimony--consistent with most of the DD5 on
5 Martinez's interview of Cobb--placed Manganiello in the basement
6 at the time of the shooting. Yet from Martinez's DD5 on his
7 interview with Perez, it is inferable that Cobb did not tell
8 Perez, the first officer to question him at the scene of the
9 crime, that the basement door had burst open seconds after the
10 shot and that he saw Manganiello emerge from the basement, for it
11 seems inconceivable that Perez would not have included that
12 information when he was interviewed by Martinez. And it seems
13 unlikely that Cobb would have failed to describe such a startling
14 sequence of events to Perez immediately after the incident if the
15 incident was as Cobb eventually described it to the grand jury.
16 The handwritten notes made prior to the preparation of the various
17 DD5s may have contained clarifying information that was not
18 incorporated in the DD5s, including information as to the
19 provenance of the variations in the versions given by Cobb.

20 The contention that Agostini had no obligation to preserve
21 the case file is frivolous. The case file had been committed to
22 his custody as the leader of the investigative team, and Agostini
23 admitted at trial that it was his responsibility to preserve the
24 evidence until the time of trial (see Tr. 235-36; see also id. at
25 612 (similar testimony of the ADA)). Agostini's contention that
26 the case file--which he left under his desk or on top of a

1 locker--was not under his control amounts to no more than an
2 inappropriate attempt to abdicate his responsibility for its
3 preservation. Although Agostini testified at trial that he had
4 removed the case file from a room in which such files were
5 normally kept because that room was being "clean[ed] . . . out"
6 (id. at 242), he gave no reason for not putting the case file in
7 some other safe place--other than his explanation that the papers
8 were in a box, and the box itself was too large to fit into a
9 secure file cabinet (see id. at 241-42; (id. at 242 ("It was just
10 too big of a box.")).

11 In addition to instructing the jury that it could, but was
12 not required to, draw an inference that missing files would have
13 contained information adverse to the party who had and lost them,
14 the court told the jury that

15 [i]n deciding whether to draw this inference,
16 you should consider whether the evidence that was not
17 produced would merely have duplicated other evidence
18 already introduced. You may also consider whether
19 the party has offered a reason for not producing this
20 evidence, and whether that reason was explained to
21 your satisfaction.

22 (Tr. 783.) We see no error or abuse of discretion in the giving
23 of these instructions.

24 B. The Exhibits and the Defense Summation

25 Agostini complains that the district court improperly
26 allowed Manganiello to interrupt the defense summation and
27 prevented defense counsel from making points to the jury with
28 regard to certain DD5s, marked for identification as defendants'

1 exhibits "P-2" and "Z-7." The record reflects an unusual amount
2 of confusion among the parties and the court but reveals no error
3 by the court and no prejudice to Agostini.

4 During the trial, the court had admitted in evidence a
5 number of documents offered by the defendants. Thereafter, in a
6 colloquy not characterized by clarity, defense counsel stated,
7 "your Honor, defendants would just enter into evidence the
8 remaining DD5s which have yet to be entered into evidence, which I
9 can read if your Honor requires" (Tr. 326); the court responded,
10 "We will just get a list later" (*id.* (emphasis added)); and
11 Manganiello's attorney said, "For the record, Judge, we stated the
12 objections that were previously stated" (*id.*). Defense counsel
13 did not, however, supply the court with a list as requested by the
14 court (see id. at 765-66), and "P-2" and "Z-7" were not among the
15 documents shown in the trial transcript to have been admitted in
16 evidence before the commencement of summations.

17 During his summation, defense counsel asked the jury to
18 consider "P-2" and "Z-7," and Manganiello objected on the ground
19 that they had not been admitted in evidence. As asking the jury
20 to consider documents that are not in evidence is improper, the
21 court instructed defense counsel not to refer to "P-2" and "Z-7"
22 and stated that those documents would not be given to the jury
23 unless and until there was a determination that they were
24 admitted in evidence. (See id. at 705-07.)

25 Following the completion of summations, the court
26 determined, in conference with the parties, that in fact it had

1 not admitted "P-2" and "Z-7" during the testimony of any witness,
2 as no witness had mentioned them and they had not been shown to
3 any witness; and it had not admitted them as part of defense
4 counsel's proposed admission of DD5s in bulk because defendants
5 had not submitted to the court the required list of such
6 documents. Nonetheless, given the confusion, the court decided at
7 the post-summation conference to admit "P-2" and "Z-7" in
8 evidence. Accordingly, when the jury asked to see those documents
9 during its deliberations, they were given to the jury.

10 Agostini complains that the court did not also allow
11 defense counsel to reopen his summation to review those documents
12 with the jury. Such a matter is committed to the discretion of
13 the trial court, and we see no abuse of discretion here. "P-2"
14 and "Z-7" apparently had not been admitted in evidence at the time
15 of the summations, and the defense bears some or all of the
16 responsibility for the confusion as to whether they were in
17 evidence and for the fact that they were not. It was well within
18 the court's discretion to decline to allow the defense summation
19 to be reopened.

20 C. The Challenge to the Amount of the Jury's Verdict

21 Agostini contends that the jury's award of \$1,426,261 in
22 compensatory damages was excessive and that the district court
23 should have ordered a remittitur or a new trial. We are
24 unpersuaded, as a jury's damages award may not be set aside unless
25 "the award is so high as to shock the judicial conscience and

1 constitute a denial of justice,'" O'Neill v. Krzeminski, 839 F.2d
2 9, 13 (2d Cir. 1988) (quoting Zarcone v. Perry, 572 F.2d 52, 56
3 (2d Cir. 1978)).

4 The record in the present case included evidence that
5 Manganiello, age 38 at the time of his arrest--and age 42 by the
6 time he was acquitted--had, among other things, been discharged
7 from his job at the Parkchester, been discharged from his part-
8 time job as a state park policeman, and been stripped by the City
9 of his special patrol officer certifications; and he was past the
10 age at which he could reenter the police academy to re-earn such
11 certifications. Further, in the wake of his arrest, Manganiello,
12 who had had no prior history of psychiatric problems, became
13 agoraphobic and subject to frequent panic attacks, dizziness, and
14 nausea. Dr. Rehana Latif, the psychiatrist who treated
15 Manganiello during the seven years between his arrest and the
16 trial in the present case, diagnosed Manganiello with post-
17 traumatic stress disorder and major depression, and she testified
18 that the severe stress caused him to have a chemical imbalance.
19 Dr. Latif testified that the chemical imbalance

20 ha[d] permanently disabled him and his prognosis is
21 poor to fair. (Tr. 679, 680-85.) She further
22 testified that Manganiello is unable to pursue any
23 work because his cognitive functioning, emotions,
24 concentration, understanding and energy levels are
25 too impaired. (Tr. 679, 680, 684.)

26 Manganiello II, 2008 WL 5159776, at *18; see also id. ("Dr. Latif
27 testified that Manganiello suffered from moderate to severe panic
28 attacks, which caused him to be unable to function in any capacity
29 or to work. (Tr. 675-77.)"). Manganiello's "expert economist[]

1 calculated Manganiello's pecuniary losses conservatively."
2 Manganiello II, 2008 WL 5159776, at *19. The economist (a)
3 calculated that Manganiello's lost past earnings amounted to
4 \$377,000; and (b) assuming that Manganiello would have retired at
5 age 61.5, and discounting future lost earnings to present value,
6 calculated Manganiello's lost future earnings to be \$829,000. Id.
7 The court noted that defendants had not presented any evidence to
8 rebut the testimony of either the psychiatrist or the economist.
9 The court noted that "Manganiello was also entitled to recover the
10 \$110,000 in attorneys' fees that he paid for his criminal defense,
11 which he would not have had to pay but for the malicious
12 prosecution." Id.

13 Thus, the court found that the record supported an award
14 of more than \$1,310,000 in pecuniary losses, and that that sum, as
15 well as the remainder of the jury's award, approximately \$116,600,
16 for the wrongful incarceration and humiliation, was

17 in line with the awards in the cases cited by
18 Agostini. See, e.g., Gentile v. County of Suffolk,
19 926 F.2d 142, 153 (2d Cir.1991) (affirming award of
20 \$150,000 for pain and suffering, several days of
21 false imprisonment, psychological trauma, loss of job
22 opportunities and attorneys' fees). See also Papa v.
23 City of New York, 194 A.D.2d 527, 532, 598 N.Y.S.2d
24 558 (N.Y.App.Div.1993) (lost earnings calculated to
25 be over \$3 million in malicious prosecution case).

26 Manganiello II, 2008 WL 5159776, at *19.

27 Given the evidence, we see no error in the district
28 court's conclusion that the jury's verdict was not so large as to
29 shock the judicial conscience.

1 D. Allegedly Prejudicial Comments by the Court

2 Finally, Agostini contends that during the trial, the
3 court made prejudicial comments or asked questions that may have
4 had the effect of bolstering the testimony of witnesses for
5 Manganiello and suggesting to the jury that the court favored the
6 plaintiff's case. A "court must strive for 'that atmosphere of
7 perfect impartiality which is so much to be desired in a judicial
8 proceeding' and must be especially cautious and
9 circumspect in language and conduct during a jury trial." Santa
10 Maria v. Metro-North Commuter R., 81 F.3d 265, 273 (2d Cir. 1996)
11 (quoting Glasser v. United States, 315 U.S. 60, 82 (1942)).
12 "[A]sking numerous and probing questions of witnesses is
13 unquestionably proper," although the "trial judge should limit
14 questioning to inquiries necessary to clarify ambiguities,
15 correct misstatements, or obtain information necessary to make
16 rulings." Shah v. Pan American World Services, Inc., 148 F.3d 84,
17 98 (2d Cir. 1998) (internal quotation marks omitted), cert.
18 denied, 525 U.S. 1142 (1999). Reversal may be appropriate if the
19 judge has expressed his "opinion on an ultimate issue of fact in
20 front of the jury or [has argued] for one of the parties," id.
21 (internal quotation marks omitted). Nonetheless, "[i]n reviewing
22 a challenge to a trial judge's conduct, we determine not whether
23 the trial judge's conduct left something to be desired," but
24 rather, in light of the record as a whole, "whether the judge's
25 behavior was so prejudicial that it denied [a party] a fair, as
26 opposed to a perfect, trial." Id. (internal quotation marks

1 omitted); see, e.g., United States v. Rosa, 11 F.3d 315, 343 (2d
2 Cir. 1993), cert. denied, 511 U.S. 1042 (1994); United States v.
3 Manko, 979 F.2d 900, 905-06 (2d Cir. 1992), cert. denied, 509 U.S.
4 903 (1993).

5 We see no basis for reversal here. Although the court
6 asked questions and made comments, our review of the record
7 persuades us that the court was attempting to gain clarification
8 for the jury and to prevent the trial from becoming bogged down in
9 repetitious or inappropriate advocacy. And the court so informed
10 the jury. In denying Agostini's motion for a new trial on this
11 ground, the district court, after discussing the above principles
12 governing the conduct of a trial judge, noted in part that

13 [a]ll the questions that this Court posed to
14 witnesses were for clarification and due to the fact
15 that, in the case of Agostini, his testimony was
16 frequently contradictory and ambiguous and appeared
17 less than candid and forthcoming. In any event, the
18 jury was thoroughly instructed that they were not to
19 draw any inferences from the Court's questions:

20 I also ask you to draw no inference from
21 the fact that upon occasion I may have asked
22 questions of certain witnesses. Such questions
23 were only intended for clarifications or to
24 expedite matters and certainly were not intended
25 to suggest any opinion on my part as to the
26 verdict you should render or whether any of the
27 witnesses may have been more credible than any
28 other of the witnesses.

29 Manganiello II, 2008 WL 5159776, at *14 (quoting Tr. 772). The
30 court also instructed the jury to draw no inferences from the
31 court's rulings:

32 During the trial, I have been called upon to
33 make rulings on various questions. Those rulings are
34 not evidence and need not be considered by you.
35 Procedural matters are matters of law and, although

