Rasanen v. Brown Doc. 202621087

12-680-cv
Rasanen ex rel. Estate of Rasanen v. Brown

REENA RAGGI, *Circuit Judge*, *dissenting*:

A panel majority concludes that there must be a new trial of plaintiff's Fourth Amendment excessive force claim against New York State Trooper Daniel Brown because the district court failed to give the following instruction: "[T]he use of force highly likely to have deadly effects is unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others." Ante at **[16]**. The majority acknowledges that plaintiff never requested such a charge at the initial charge conference or prior to a supplemental charge pertaining specifically to deadly force. Nevertheless, it concludes that such an instruction is so clearly mandated by Supreme Court and circuit precedent that its omission here was plain error. See Fed. R. Civ. P. 51(d)(2). I disagree and, therefore, respectfully dissent.[1]

1. Waiver

To begin, it is by no means clear to me that we should review the purported charging omission even for plain error. Before the district court, plaintiff did not simply fail to object to the jury charge on the ground identified by the panel majority. Rather, it endorsed the district court's excessive force charge as "evenly balanced in instructing as to the nature of excessive force" and "sufficient" for that purpose. Trial Tr. 2313. As we have observed,

[1] I do, however, join the majority in rejecting plaintiff's contentions with regard to its negligence claim, the timing of the search leading to the fatal shooting, and the weight of the evidence. See ante at **[6-7]**.

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"[s]uch endorsement" of a charge—even in a criminal case—"might well be deemed a true waiver" of any subsequent challenge, "negating even plain error review." United States v. Hertular, 562 F.3d 433, 444 (2d Cir. 2009) (collecting cases).

2. Plain Error

Even absent true waiver, however, I do not think this case manifests plain error. The legal standard for plain error is well known:

> [A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

United States v. Marcus, 130 S. Ct. 2159, 2164 (2010) (alterations and internal quotation marks omitted); see Fed. R. Civ. P. 51 Advisory Committee Note to 2003 Amendments (noting that plain error language in Civil Rule 51(d)(2) is "borrowed from Criminal Rule 52" in order to capture decisions at law recognizing that unpreserved charging errors warrant appellate review only in "exceptional circumstances"). Plaintiff here fails to satisfy these requirements.

a. No Clear or Obvious Error

(1) *Garner* and *O'Bert* Do Not Clearly Establish a Charging Requirement for Deadly Force Cases

Plaintiff cannot satisfy the first two requirements of plain error because no controlling precedent clearly mandates that a district court charge a jury that a precondition to the use of "force highly likely to have deadly effects is . . . probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others." Ante at **[16]**; see Henderson v. United States, 133 S. Ct. 1121, 1127 (2013) (recognizing plain error to require "authoritative legal decision" on subject); United States v. Youngs, 687 F.3d 56, 59 (2d Cir. 2012) ("To be plain, an error of the district court must be obviously wrong in light of existing law" (internal quotation marks omitted)).[2]

In concluding otherwise, the panel majority derives such a charging requirement from the Supreme Court's statement in Tennessee v. Garner, 471 U.S. 1 (1985), that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force," id. at 11. See ante at **[14-15]**. Earlier in Garner, the Supreme Court had cast this conclusion more restrictively, stating that, in attempting to apprehend an "apparently

[2] Our concern on plain error review is not whether a district court might ever reference such probable cause—or the facts demonstrating such probable cause—in charging a jury considering an excessive force claim. Rather, we properly consider only whether such a charge is mandated by clearly established law.

unarmed suspected felon," deadly force "may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." 471 U.S. at 3. We echoed the latter formulation when referencing Garner in O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d 29 (2d Cir. 2003). There, we stated: "It is not objectively reasonable for an officer to use deadly force to apprehend a suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Id. at 36.

To the extent such language might be construed to establish a "precondition" for the use of deadly force, the Supreme Court has since ruled to the contrary in Scott v. Harris, 550 U.S. 372 (2007). "Garner did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" Id. at 382. Scott counseled that "[w]hether or not [an officer's] actions constitute[] application of 'deadly force,' all that matters is whether [his] actions were reasonable." Id. (emphasis added) (disclaiming existence of "easy-to-apply legal test in the Fourth Amendment context," and concluding that, in any given case, court must "slosh . . . through the factbound morass of 'reasonableness'"). Following Scott, two of our sister circuits have rejected challenges to jury charges in deadly force cases that relied only on "the general rubric of reasonableness." Noel v. Artson, 641 F.3d 580, 587 (4th Cir. 2011); see Acosta v. Hill, 504 F.3d 1323, 1324 (9th Cir. 2007) (concluding that requirement of "deadly force instruction" in addition to

"excessive force instruction based on the Fourth Amendment's reasonableness standard" was "explicitly contradict[ed]" by and "clearly irreconcilable with" Scott (internal quotation marks omitted)). In reaching a different conclusion here, the majority creates an unwarranted circuit split.

Further undermining the suggestion that Garner and O'Bert clearly established a charging requirement for excessive force cases is the fact that neither case references probable cause in discussing how juries should be instructed to consider Fourth Amendment challenges to the use of deadly force. Indeed, Garner arose in the context of a bench trial. See 471 U.S. at 5. At issue was the constitutionality of a policy that allowed police to use deadly force to prevent the escape of any felony suspect. See id. The Supreme Court ruled that policy unconstitutional on its face, and because the only proffered justification for the particular application of deadly force was to prevent escape, the Court's decision of law left no question of fact to be tried. See id. at 21. At issue in O'Bert was the denial of summary judgment to a defendant who invoked qualified immunity to prevent his case from going before a jury. In affirming the denial, this court did not suggest that the officer's version of events, in which he professed himself to be confronting resistance from an armed suspect, raised any probable cause issue for trial. Rather, trial was necessary because the plaintiff disputed the officer's account, and "[o]n plaintiff's version of the facts, in which [the officer] shot to kill O'Bert while knowing that O'Bert was unarmed, it is obvious that no reasonable

officer would have believed that the use of deadly force was necessary." O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d at 40.

In context, then, the references to probable cause in Garner and O'Bert seem directed more at courts than at juries, providing guidance as to which excessive force cases can be decided as a matter of law and which require plenary trial. In other circumstances where the Supreme Court has identified burdens of production and persuasion that inform a district court's identification of cases that should proceed to trial, we have observed that a jury "does not need to be lectured on the concepts that guide a judge in determining whether a case should go to the jury." Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 118 (2d Cir. 2000) (concluding that juries considering employment discrimination claims should not be charged by reference to McDonnell Douglas framework). The same reasoning applied here further prevents us from identifying any clearly established and, therefore, plain charging error in this case.

Indeed, that conclusion is only reinforced by precedent generally cautioning against the practice of using decisional language to charge juries in the absence of clear indications that a reviewing court so intends. See Renz v. Grey Adver., Inc., 135 F.3d 217, 223 (2d Cir. 1997) (observing that juries can be misled when trial judges import into jury charges language employed by appellate courts to guide judges); accord Gordon v. N.Y.C. Bd. of Educ., 232 F.3d at 118; see also 9C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2556 (3d ed. 2008) (stating that it "is not helpful" to juries for trial

courts "to take quotations from the opinions of appellate courts, never intended to be used as instructions to juries, and [to] make these a part of the charge"). This caution is particularly warranted with respect to a concept such as probable cause for at least two reasons. First, a jury "acts only as a fact-finder," Gordon v. N.Y.C. Bd. of Educ., 232 F.3d at 118, and once any disputed facts are resolved, probable cause is a question of law, see Walczyk v. Rio, 496 F.3d 139, 157 (2d Cir. 2007). Thus, even where a question of probable cause is relevant to a jury's resolution of a civil claim—and not simply a gateway for identifying cases that warrant trial—a district court may well decide not to present it to the jury but to ask only that the jury decide the existence of those facts that would establish probable cause. See Walczyk v. Rio, 496 F.3d at 157 (collecting cases); cf. Lore v. City of Syracuse, 670 F.3d 127, 162 (2d Cir. 2012) (identifying error in district court's "having the jury decide the ultimate legal question" of qualified immunity "[i]n light of its factual findings"). Second, the charge that the majority purports to derive from Garner and O'Bert—i.e., that deadly force to effectuate an arrest is impermissible "unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others"—risks confusing juries as to the burden of proof, which in excessive force cases rests only with the plaintiff. See Nimely v. City of New York, 414 F.3d 381, 390 (2d Cir. 2005); Davis v. Rodriguez, 364 F.3d 424, 431 (2d Cir. 2004); see also Miller v. Taylor, 877 F.2d 469, 470 (6th Cir. 1989) (rejecting claim that burden of proof

shifts to defendant in deadly force cases); Edwards v. City of Philadelphia, 860 F.2d 568, 572 (3d Cir. 1988) (same).[3]

In this case, as in O'Bert, there was no question that Rasanen's excessive force claim had to proceed to the jury. Brown claimed that he shot Rasanen while struggling to regain control of his own gun after Rasanen had lunged at the officer and Brown felt his gun pointed against him. Such a scenario plainly demonstrated "probable cause to believe that the suspect pose[d] a threat of serious physical harm." Tennessee v. Garner, 471 U.S. at 11; see generally Florida v. Harris, 133 S. Ct. 1050, 1055 (2013) (describing probable cause as "practical," "common-sensical," "all-things considered" standard for assessing probabilities in particular factual context); Illinois v. Gates, 462 U.S. 213, 231–32, 238 (1983) (recognizing probable cause as "fluid" standard that does not demand "hard certainties" but only the sort of "fair probability" on which "reasonable and prudent men, not legal technicians, act"). Plaintiff never contended otherwise. Instead, it maintained that forensic evidence and inconsistencies in witnesses' accounts showed that Brown had concocted the gun-struggle story and, in fact, had unnecessarily shot and killed an unarmed man. If the jury were to accept plaintiff's version, then "no reasonable officer would have believed that the

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[3] On this appeal, plaintiff does not challenge the district court's charging it with the burden of proof on excessive force. See Appellant's Br. 2 (arguing that trial evidence "far surpassed [plaintiff]'s burden of proof").

use of deadly force was necessary." O'Bert ex rel. Estate of O'Bert v. Vargo, 331 F.3d at 441.

The district court properly focused the jury on this determinative factual dispute. First, the court correctly charged the general Fourth Amendment principle that "[w]hether or not the force used in conducting the search was unnecessary, unreasonable and violent is an issue to be determined by you in light of all the surrounding circumstances, on the basis of that degree of force a reasonable and prudent police officer would have applied in effecting the search under the circumstances disclosed in this case." Trial Tr. 2507, 2566. But then the trial court told the jury that it "must determine" what "actually occurred," specifically, "whether the plaintiff proved that on May 17, 2002, the decedent, an unarmed man, was shot and killed unnecessarily by defendant Daniel Brown or whether the shooting occurred during the course of his attacking the police officer and trying to turn his gun against him as the defendant contends." Id. at 2508, 2567–68. This disjunctive statement of the parties' positions was sufficient to ensure that, if the jury returned a verdict for Brown, it did so consistent with the Fourth Amendment standard of reasonableness discussed in Garner and Scott. Indeed, as previously observed, plaintiff's counsel professed this charge to be "evenly balanced" and "sufficient" to instruct the jury on the "nature" and "definition of excessive force under Section 1983 and the Fourth Amendment." Id. at 2313.

In nevertheless insisting that Garner and O'Bert support a finding of plain error here, the majority attempts to cabin Scott to its facts. It submits that even if Scott, a case where

deadly force was administered by a motor vehicle, does not require a "probable cause" instruction in all deadly force cases, such an instruction is still required when the agent of deadly force is a firearm. See ante at **[15-16]**. The majority cannot, however, claim that Scott itself makes such a conclusion plain. Indeed, Scott's emphasis on the "particular situation" in which "a particular type" of deadly force was used in Garner precludes lumping all shooting cases together. The shooting of a fleeing suspect in the back as he tried to run away from the police, as in Garner, is hardly the same "particular situation" as the shooting of a suspect who lunges toward the officer and turns his gun against him. This distinction signals caution in the application of "rigid preconditions" for determining reasonableness in deadly force cases generally, even those involving shootings. Scott v. Harris, 550 U.S. at 382.

Indeed, far from distinguishing among deadly force cases, Scott instructs that a single legal standard applies to all excessive force cases, deadly or otherwise: "Whether or not [an officer's] actions constitute[] application of 'deadly force,' all that matters is whether [his] actions were reasonable." Id. This is a "factbound" determination that requires "'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" Id. (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

(2) *Terranova* Does Not Clearly Establish a Charging Requirement for Deadly Force Shooting Cases

The majority maintains that, even if Scott does not plainly establish the need to charge a probable cause precondition for the use of deadly force in police shooting cases, our own precedent, specifically Terranova v. New York, 676 F.3d 305 (2d Cir. 2012), does. See ante at **[24]** (stating that "whatever doubts Scott might have raised about the necessity and appropriateness of a Garner/O'Bert charge in the context of a deadly shooting were put to rest by Terranova"). It is no mean feat for the majority to reach such a conclusion from Terranova, a case that rejected an argument that a district court had erred when, after Scott, it refused to supplement its jury charge on the objective reasonableness standard of the Fourth Amendment with a requested instruction as to Garner's preconditions for the use of deadly force. See Terranova v. New York, 676 F.3d at 308–09. The majority nevertheless derives a requirement to charge a probable cause precondition in deadly force shooting cases from the fact that Terranova, like Scott, involved vehicles, and that this court therein stated: "We therefore conclude that, absent evidence of the use of force highly likely to have deadly effects, as in Garner, a jury instruction regarding justifications for the use of deadly force is inappropriate, and the usual instructions regarding the use of excessive force are adequate." Id. at 309. The majority explains that the phrase "absent evidence of the use of force highly likely to have deadly effects" is "a strong negative pregnant," ante at **[16]**—apparently so strong as to establish as the controlling law in this circuit that

> in situations (such as those present in Garner, O'Bert, and the case before us) where there is official use of force highly likely to have deadly effects, a jury instruction regarding justifications for the use of deadly force is required, and

> the usual (less specific) instructions regarding the use of excessive force are not adequate. In such circumstances, the jury must be instructed consistent with Garner and O'Bert, that the use of force highly likely to have deadly effects is unreasonable unless the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others.

Id. (emphasis in original). The conclusion does not bear close scrutiny.

First, as courts have long recognized, "negative pregnants" are hardly reliable indicators of either law or fact. See Brooks v. Kyler, 204 F.3d 102, 108 (3d Cir. 2000) ("[D]rawing instruction from Supreme Court passages through the use of the negative pregnant is risky and unsatisfactory."); United States v. Pilot Petroleum Assocs., Inc., 122 F.R.D. 422, 423 n.1 (E.D.N.Y. 1988) (McLaughlin, J.) (observing that "vice . . . known as the negative pregnant" has been "source of judicial irritation [since] before Columbus discovered America," and citing to authority from reign of Henry VI); see also Cool v. United States, 409 U.S. 100, 108 (1972) (Rehnquist, J., joined by Burger, C.J., and Blackmun, J., dissenting) (criticizing reversal on ground that instruction contained negative pregnant as "smack[ing] more of scholastic jurisprudence" than of "commonsense" appellate review). That alone is reason not to recognize a negative pregnant as the source of established law supporting a finding of plain error.

Second, what Terranova stated in the sentence at issue was that, in the circumstances of that case, absent "force highly likely to have deadly effects," a special instruction on justification for deadly force was "inappropriate." 676 F.3d at 309. At best, the attached

negative pregnant leaves open a possibility that, in other circumstances, where the use of force is highly likely to have deadly effects, such a justification instruction might be appropriate. But see Capitol Records, Inc. v. Naxos of Am., Inc., 372 F.3d 471, 480 (2d Cir. 2004) (noting "logical fallacy of assuming that the inverse of a proposition is true" (citing Raymond J. McCall, Basic Logic 125–26 (2d ed. 1952)). In any event, there is a very long distance in the law between what may be appropriate as a matter of judicial charging discretion and what is constitutionally required—a distance too long, I think, to allow for the identification of a plain charging error here.

Third, even if Terranova's negative pregnant could be stretched to the point of establishing a charging requirement for excessive force shooting cases, such a pronouncement would be dictum, as it was unnecessary to decide the case at hand. See Baraket v. Holder, 632 F.3d 56, 59 (2d Cir. 2011) (stating that what "distinguishes holding from dictum" is "whether resolution of the question is necessary for the decision of the case" (citing Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996)); see also Cohens v. Virginia, 19 U.S. 264, 399–400 (1821) (Marshall, C.J.) (contrasting "question actually before the Court," which is "investigated with care, and considered in its full extent," with other cited, but "seldom completely investigated," principles). Such dictum cannot establish law and,

therefore, does not support a finding of plain error. See, e.g., United States v. Whren, 111 F.3d 956, 960–61 (D.C. Cir. 1997).[4]

In sum, Garner, O'Bert, Scott, and Terranova do not make it clear and obvious that juries in all excessive force shooting cases must be charged that there is a probable cause precondition to the use of deadly force. Thus, the district court's asserted failure to give such a charge in this case cannot be deemed plain error.

b. Effect on Substantial Rights

The third element of plain error, an adverse effect on a party's substantial rights, generally requires a reasonable probability that the error affected the outcome of the proceeding. See United States v. Marcus, 130 S. Ct. at 2164. Plaintiff cannot make this showing because the excessive force claim here turned on a dispute of fact: Brown claimed that he shot Rasanen in the course of a struggle, while plaintiff claimed that the struggle story was concocted. Plaintiff never suggested that, even if there had been a struggle, it would have been unreasonable for Brown to have shot Rasanen. See Trial Tr. 2470 (arguing on rebuttal summation that Brown invented "false story" about struggle because, otherwise, there would have been "no good reason" to have used deadly force). Because a suspect's

[4] Indeed, further undermining the suggestion that Terranova can be construed to "establish" a different Garner rule for shooting cases is its own reliance on a shooting case, Penley v. Eslinger, 605 F.3d 843 (11th Cir. 2010), for the conclusion that none of the Garner "'conditions are prerequisites to the lawful application of deadly force,'" Terranova v. New York, 676 F.3d at 309 (quoting Penley v. Eslinger, 605 F.3d at 850).

decision to run directly at an armed officer in close quarters undoubtedly demonstrates probable cause for a reasonable officer to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others, plaintiff cannot show that the omission of a Garner-derived deadly force charge in this case had any effect on the outcome of the trial.

In concluding otherwise, the majority points to the district court's instruction telling the jury to "consider the facts and circumstances as you find them to be, including how this confrontation actually occurred and whether the decedent was resisting and was threatening to reach the gun of the defendant." Id. at 2509, 2567–68. The majority hypothesizes that the word "including" might have misled the jury into thinking that the existence of a struggle for the gun was simply one factor to consider in its deliberations, and not the sole justification advanced for Brown's use of deadly force. I disagree. The point of the quoted language was to instruct the jury that their ultimate determination of reasonableness required them to consider all facts and circumstances. See Scott v. Harris, 550 U.S. at 383 (referencing "factbound" nature of reasonableness inquiry). The district court had already made clear to the jury that, in deciding what "actually occurred," the parties were disputing two possible scenarios. Thus, the jury had to "determine whether the plaintiff proved that on May 17, 2002, the decedent, an unarmed man, was shot and killed unnecessarily by defendant Daniel Brown or whether the shooting occurred during the course of his attacking the police officer and trying to turn his gun against him, as the defendant contends." Id. at 2508, 2567–68.

When the "including" reference is placed in the context of a charge that thus ascribed a specific justification argument to Brown that satisfied Garner, see Crigger v. Fahnestock & Co., 443 F.3d 230, 235–36 (2d Cir. 2006), I think it clear that any Garner charging omission was necessarily harmless.

Nor am I persuaded to reach a different conclusion from the majority's suggestion that the challenged charge afforded the jury "not two options, but three." Ante at **[20]**. The majority highlights sections of the charge instructing that the reasonableness of the use of deadly force "must be judged from the perspective of a reasonable police officer on the scene rather than the 20/20 vision of hindsight," Trial Tr. 2508, 2551, and that reasonableness allows for the fact that officers must often make "split-second judgments in circumstances that are sometimes tense, uncertain, dangerous and rapidly evolving about the amount of force that is necessary in a particular situation," id. at 2509; see id. at 2551. The majority submits that when the disjunctive scenario instruction is viewed together with these, the jury could find

> (a) that the shooting was unnecessary, and therefore . . . excessive . . . ; (b) that the shooting was necessary—i.e. that it took place in the context of Rasanen's trying to turn Brown's gun against him; or (c) that the shooting seemed necessary—i.e. that Rasanen was not trying to turn Brown's gun against him, but that Trooper Brown, making split-second decisions without the benefit of hindsight, nonetheless acted reasonably under the circumstances.

Ante at **[20]** (emphasis in original). The majority concludes that the "fatal defect is that the jury did not know, because it was not told, that it could properly place the shooting in this

last category only if it found that the Garner/O'Bert requirements (dealing with fear of serious physical harm) were also met." Id. (emphasis in original). I cannot agree.

There is no plausible view of the record that would allow the jury to reach either the second or third posited conclusion without finding that Brown reasonably believed he was engaged in a struggle for control of his gun. In the second scenario, Brown's belief would have been correct; the third scenario admits the possibility of reasonable mistake. That difference is irrelevant to the probable cause requirement urged by the majority. See Texas v. Brown, 460 U.S. 730, 742 (1983) (explaining that probable cause does not demand that officer's good-faith belief "be correct or more likely true than false"); see also Penley v. Eslinger, 605 F.3d 843, 853 (11th Cir. 2010) (affirming judgment for officers on claim that they used excessive force by shooting student waving toy gun).

The majority further submits that, even if the jury found that Rasanen actually tried to gain control over Brown's gun, a jury could conclude that the shooting was excessive because "[o]ne can imagine a scenario in which the suspect is so small and weak, and the officer so large and powerful, that even the suspect's attempt to seize the officer's gun would not justify the officer in slaying the suspect." Ante at **[20 n.7]** The majority does well to characterize this scenario as "extremely unlikely." Id. A discharged bullet's homicidal potential does not, after all, depend on the physical size of the person pulling the trigger. In any event, I think that the majority here conflates the questions of probable cause and reasonableness. See generally Davis v. Little, 851 F.2d 605, 607–08 (2d Cir. 1988)

(distinguishing concepts). If the jury found, as its verdict suggests it did, that it was objectively reasonable for Brown to think that Rasanen had engaged him in a struggle in which the control of his firearm was at stake, then any difference in size between the two men would not be enough for plaintiff to show that a "reasonable and prudent" officer in such a struggle could not have thought that there was at least a "fair probability" that he faced a serious threat of physical harm. Illinois v. Gates, 462 U.S. at 231–32, 238. Whether other circumstances might nevertheless permit a jury to conclude that the use of deadly force was excessive even in the face of such a probable threat depends on a balancing of the competing individual and government interests that inform reasonableness. See Scott v. Harris, 550 U.S. at 383–84. That balancing is not our concern here. The evidence, viewed in the light most favorable to the jury verdict, was sufficient to support a finding of reasonableness. To the extent we consider only whether the district court's failure to supplement its reasonableness charge with a probable cause instruction affected the outcome of the case, I am satisfied by a jury verdict that necessarily found facts satisfying probable cause that there was no prejudice.[5]

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[5] Insofar as plaintiff's counsel submitted a post-verdict affidavit recounting jurors' purported misunderstanding as to excessive force in their deliberations, plaintiff expressly disavows reliance on these alleged conversations on appeal, a course compelled by Fed. R. Evid. 606(b) (precluding inquiry into jury deliberations).

c. Fairness, Integrity, and Public Reputation of Judicial Proceedings

Because I identify no clear or obvious error in the district court's failure to give a Garner-based deadly force instruction, and because I, in any event, identify no prejudice to plaintiff therefrom, I necessarily conclude that the fairness, integrity, or public reputation of judicial proceedings would not be called into question by allowing the challenged judgment to stand.

In sum, because plaintiff fails to satisfy any of the requirements for plain error, I respectfully dissent from the majority decision to vacate judgment and order retrial in this case.