

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

TONY NELSON,

Plaintiff,

vs.

No. CIV 10-0553 JB/DJS

CITY OF ALBUQUERQUE, a political
subdivision of the STATE OF NEW MEXICO,
R.T. JOHNSTON, an Officer of the
Albuquerque Police Department, Individually,
D. HUGHS, an Officer of the Albuquerque
Police Department, Individually,
A. LIMON, an Officer of the Albuquerque
Police Department, Individually,
S. WEIMERSKIRCH, an Officer of the
Albuquerque Police Department, Individually,
and JOHN AND JANE DOES 1-X,
an Officer of the Albuquerque Police Department,
Individually,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Defendants' Rule 50(b) Motion, and Memorandum in Support, Requesting for the Judgment on the Jury Verdict to Stand; to Find Defendants Have Qualified Immunity; and to Enter Judgment as a Matter of Law in Favor of Defendants, filed July 26, 2012 (Doc. 201)("Motion"). The Court held a hearing on June 14, 2013. The primary issues are: (i) whether the Defendants' Motion was timely under rule 50(b) of the Federal Rules of Civil Procedure; (ii) whether the Court may overrule a prior judgment as a matter of law on a rule 50(b) motion; (iii) whether the Defendants properly preserved their qualified immunity argument in their rule 50(b) motion; and (iv) whether the Court may alter the prior judgment in the Plaintiff's favor by construing the Defendants' rule 50(b) motion as a rule 59(e) motion. The Court concludes that: (i) the Defendants' Motion was timely; (ii) rule 50(b) is

an improper vehicle for overturning a judgment as a matter of law; (iii) the Defendants' did not preserve their qualified immunity argument -- regarding whether the law was clearly established -- under rule 50(b); and (iv) the Court may construe the Defendants' rule 50(b) motion as a rule 59(e) motion. Because it can construe the Defendants' rule 50(b) motion as a rule 59(e) motion to alter or amend, it will alter the prior judgment rendered under rule 50(b) in the Plaintiff's favor. Although the facts of this case are disquieting, drawing all inferences in the Defendants' favor, a reasonable jury could have found for the Defendants. Furthermore, because there are no sufficiently analogous cases from the United States Court of Appeals for the Tenth Circuit or the Supreme Court of the United States of America, the Defendants are entitled to qualified immunity. The Court, accordingly, grants the Motion in part and denies it in part.

FACTUAL BACKGROUND

On the morning of March 4, 2009, Tony Nelson, a sixty-two year old American Indian, drank some beers with his friend, Jeffery Patterson, in Patterson's home. See Official Transcript of Trial Proceedings before the Court at 19:12-17 (dated October 24, 2011), filed June 29, 2012 (Doc. 189)("Trial Tr."); id. at 28:18-29:2; id. at 29:17; id. at 30:21-22 id. at 31:9-11 (Hawk, Nelson). After running low on beer, the two argued over whether they should buy more. See Trial Tr. at 32:14-19 (Nelson). The argument became heated and Patterson left his home to call the police. See Trial Tr. at 33:18-19 (Nelson). Patterson returned home, they argued some more, and Patterson left again. See Trial Tr. at 34:10-12 (Nelson). The last thing Nelson remembers from March 4, 2009, was being "dead drunk" and lying down to get some sleep. Trial Tr. at 34:16-35:8 (Hawk, Nelson). See id. at 33:18-19; id. at 34:16-19 (Nelson).

Patterson called the police again and this time reported that Nelson had “threatened [him] with [a] rifle . . . and a knife.” Trial Tr. at 134:16-22 (Hawk, Johnston).¹ Subsequently, forty-seven police personnel, which included seventeen SWAT police team members and eight K-9 officers, arrived at Patterson’s home. See Trial Tr. at 141:19-21; id. at 142:8; id. at 234:15-16 (taken October 25, 2012), filed June 29, 2012 (Doc. 190)(Hawk, Johnston). Someone -- presumably Patterson -- told the police that Nelson had been drinking, and that the rifle with which Nelson had threatened Patterson was either a pellet rifle² or a “308 bolt-action rifle.” Trial Tr. at 131:15-17 (Johnston). See id. at 298:9-10 (Hawk, Johnston). A 308 bolt-action rifle is a “large caliber rifle” that is “devastating in close range and at distance.” Trial Tr. at 77:11-12 (Brown); id. at 243:2 (Johnston). When the police officers arrived at the scene, they did not clarify whether Nelson had threatened Patterson with a pellet rifle or a 308 bolt-action rifle. See Trial Tr. at 132:6-11 (Hawk, Johnston); id. at 243:14-20 (Griffin, Johnston).

The SWAT team arrived with a Bearcat -- an armored police vehicle. See Trial Tr. at 84:16-19 (Brown); id. at 312:11-12 (Hawk, Hughes). At least two officers positioned themselves on roofs nearby with sniper scopes and rifles, and other police personnel established a perimeter around the house with an officer stationed off each corner of it. See Trial Tr. at 78:7-79:5 (Brown, Hawk); id. at 83:8-18 (Brown, Hawk); id. at 144:13-20 (Hawk, Johnston); id. at 455:15-17 (Limon)(taken October 26, 2011), filed June 29, 2012 (Doc. 191). The property was almost entirely enclosed by an eight-foot-tall fence with razor wire at the top. See Trial Tr. at 150:6-151:19 (Hawk, Johnston).

¹Nelson does not appear to recall threatening Patterson with those weapons, but, Nelson did plead guilty to aggravated assault with a deadly weapon. See Trial Tr. at 37:23-38-1 (Hawk, Nelson).

²A pellet rifle is a type of BB gun. See Younger v. City of New York, 480 F. Supp. 2d 723, 728 (S.D.N.Y. 2007)(“A pellet rifle, (*i.e.*, a BB gun).”).

After setting up a perimeter, Defendant Officer Armando Limon called out to Nelson, who was still in the house, to exit the home and walk towards the police team near the driveway. See Trial Tr. at 167:25-168:2 (Hawk, Johnston); id. at 169:4-10 (Hawk, Johnston); id. at 245:14-18 (Griffin, Johnston); id. at 456:11-16 (Hawk, Limon). The police team was positioned behind the Bearcat. See Trial Tr. at 152:3-5 (Johnston). After some time, Nelson appeared in the doorway and motioned for the officers to come toward him; Nelson had a knife in his hand, but at the time, the officers could not tell what Nelson was holding. See Trial Tr. at 172:3-9 (Johnston); id. at 350:3-10 (Hughes); id. at 457:20-23 (Limon). Officer Limon again ordered Nelson to come out, and to turn around. See Trial Tr. at 500:1-4 (Limon). Nelson went back into the house, however, and dropped the knife. Trial Tr. at 171:7-9 (Johnston); id. 172:17-18 (Johnston); id. at 350:12 (Hughes); id. at 457:5-17 (Hawk, Limon). Nelson then exited the house, walking slowly south towards the officers with his “[h]ands to his side.” Trial Tr. at 98:16-17, 20 (Brown). See id. at 170:19-24 (Hawk, Johnston); id. at 352:12-13 (Hughes); id. at 460:14-15 (Limon). Nelson’s hands were empty. See Trial Tr. at 105:19-106:5 (Brown, Hawk); id. at 297:5-9 (Hawk, Johnston). The officer in charge, Defendant Sergeant Robert Johnston did not see Nelson holding a rifle and thought it would be “hard to hide a rifle with the way [Nelson] was dressed.” Trial Tr. at 171:10-14 (Hawk, Johnston). Although he had cleared Nelson’s hands, the SWAT team sniper could not confirm whether Nelson had any weapon in his waistband and also observed that Nelson was “looking around” and “appeared to be attempting to identify the position of other officers around the perimeter, or possibly avenues of escape.” Trial Tr. at 99:19-100:2 (Brown, Griffin). See id. at 99:12-14 (Brown, Griffin).

As Nelson walked down the driveway, the police ordered Nelson several times to raise his hands, but Nelson did not raise them. See Trial Tr. at 258:11-19 (Griffin, Johnston); id. at

495:23-24 (Limon). Officers also heard Nelson speaking or yelling as he approached, but could not understand him. See Trial Tr. at 291:15-18 (Hawk, Johnston); id. at 352:16-19 (Hughes). Officer Limon, however, heard Nelson say: “Get the fuck out of here.” Trial Tr. at 499:3 (Limon). After some time, Nelson stopped at the driveway’s edge, about twenty feet from the officers. See Trial Tr. at 173:14-15 (Hawk, Johnston). He made a motion with his hands, which one officer interpreted as “go-away” and another interpreted as “come to me, come to me.” Trial Tr. at 353:22-354:1 (Hughes); id. at 497:17-18 (Limon).

Nelson then made a motion to turn to his left, towards the north, away from the officers. Trial Tr. at 262:23-263:24 (Griffin, Johnston). Although Officer Limon had ordered Nelson to turn around when he made “initial contact with” Nelson, see Trial Tr. at 500:1-4 (Griffin, Limon), the officers interpreted Nelson’s motion as an attempt to return to the house to retrieve weapons, and Johnston ordered his subordinate, Defendant Officer Daniel Hughes, to “deploy his weapon and ‘[b]ag him,’” Trial Tr. at 176:23-177:2 (Hawk, Johnston). See id. at 177:5-6 (Johnston); id. at 268:1-5 (Johnston)(“[W]e were not going to let him go back in the house . . . [b]ecause there w[ere] deadly weapons in the house.”); id. at 321:19-22 (Hawk, Hughes). Officer Hughes “immediately” fired five “bean bag” rounds from a non-lethal, shotgun-style weapon. Trial Tr. at 354:19-23 (Hughes). See id. at 182:14 (Johnston). Johnston also fired a wooden-baton round from a similar weapon. See Trial Tr. at 185:21-22 (Johnston). Another officer launched a “flash bang” diversionary device to “overwhelm” and “disorient” Nelson. Trial Tr. at 182:15-24 (Hawk, Johnston).³ The officers fired their weapons from a non-lethal range. See Trial Tr. at 271:11-22 (Griffin, Johnston).

³A flash bang, also known as a stun grenade, emits bright light and loud noises upon detonation. See Boyd v. Benton County, 374 F.3d 773, 776 (9th Cir. 2004).

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