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United States Court of Appeals
for the Fifth Circuit

No. 21-10159

CONSTANCE WESTFALL,

Plaintiff—Appellant,

versus

JOSE LUNA, SOUTHLAKE POLICE DEPARTMENT OFFICER, IN HIS INDIVIDUAL CAPACITY; NATHANIEL ANDERSON, SOUTHLAKE POLICE DEPARTMENT OFFICER, IN HIS INDIVIDUAL CAPACITY; VENESSA TREVINO, SOUTHLAKE POLICE DEPARTMENT OFFICER, IN HER INDIVIDUAL CAPACITY,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
No. 4:15-CV-874

(Filed Aug. 12, 2022)

Before DENNIS, SOUTHWICK, and WILSON, *Circuit Judges*.

PER CURIAM:*

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is GRANTED. *See* 5TH CIR. R. 35 I.O.P.

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED. *See* FED. R. APP. P. 35; 5TH CIR. R. 35. Our prior panel opinion, *Westfall v. Luna*, No. 21-10159, 2022 WL 797410 (5th Cir. Mar. 15, 2022) (unpublished), is WITHDRAWN and the following opinion is SUBSTITUTED therefor:

Following a dispute between Southlake Police Department (the "Department") officers and the Westfall family at the Westfall's residence, Constance Westfall ("Constance" or "Westfall") filed suit in the Northern District of Texas, bringing claims against several defendants connected with the Department. The district court initially granted summary judgment in favor of all defendants on all claims and determined that Officers Trevino, Anderson, and Luna, the defendants at issue in this appeal, were entitled to qualified immunity. However, on appeal this court remanded Westfall's claims against Trevino, Anderson, and Luna to the district court for trial, holding that there existed three genuine disputes of material fact which precluded summary judgment, including, as relevant here, whether a reasonable officer could conclude that the "'knock and talk'" nature of the encounter affected the consent that was allegedly given. *Westfall v. Luna*, 903 F.3d 534, 545 (5th Cir. 2018) (*Westfall I*). Accordingly, on remand, the parties tried their case before a jury. After presentation of evidence and argument, the jury found that none of the defendants had violated the Constitution in any of the manners alleged by Westfall.

Westfall filed a motion for judgment as a matter of law and a motion for new trial. The district court denied those motions, reasoning that legally sufficient evidence existed to support the jury's verdict and that Westfall failed to show that any harmful error had occurred which would entitle her to a new trial. Westfall now appeals.

I. Background

At approximately 1:54 a.m. on January 11, 2014, the Southlake Police Department received a call reporting a trespass. Officer Trevino responded and was told by the complainant that two teenage boys, including a boy identified by name who lived next door ("WW"), had entered her home without permission. The complainant said that the boy had been looking for a "grinder," which Trevino understood to mean a marijuana grinder. The complainant's boyfriend told Trevino that the boys went into a residence next door (the "Westfall residence"). While waiting for backup, Trevino observed multiple juveniles in a lit room upstairs in the Westfall residence. Officer Anderson arrived shortly after and was briefed by Trevino about the juveniles seen in the Westfall residence.

At approximately 2:15 a.m., Trevino and Anderson knocked on the front door of the Westfall residence. Constance Westfall ("Constance" or "Westfall") opened the door. Trevino identified herself and disclosed that WW entered someone's house without permission. Constance responded that she had been asleep,

explained that WW was her son, and asked what the Officers wanted from him. Anderson asked Constance to check if WW was home. Constance nodded her head but then either "closed" or "slammed" the door. Anderson looked through a glass window, saw Constance retreat toward the master bedroom (rather than go upstairs to fetch WW), and told Trevino, "she [is] going to get back in bed." Trevino testified that she suspected that Constance was not going to get her son.

After approximately four minutes, Constance did not come back to the door, so Anderson instructed Trevino to knock again. Trevino knocked more forcefully this time. Anderson testified that the purpose of this more forceful knock was to "get" Constance's "attention" so that she would "come back." The Officers still did not get a response.

Trevino notified dispatch that Constance "wasn't coming back to the door" and instructed dispatch to call the Westfall residence. Dispatch called the residence twice. Someone answered the first call, but immediately hung up. The second call was answered by WW, who was told by dispatch to go to the door. Around this time, Corporal Luna ("Luna") had arrived, approached the front door of the residence, and knocked directly onto the glass of the door (instead of the wooden frame). Luna testified that, because of the size of the Westfalls' house, "we do knock a little louder than most." Eventually, WW, another teenage boy, and Monte Westfall ("Monte"), Constance's husband, exited the house. They were later joined by a third boy. It was 44 degrees outside, and Trevino and Anderson began

questioning the three minor boys. During the questioning, Trevino and Anderson smelled marijuana from the boys and asked them about the presence of marijuana.

While the officers were questioning the boys, Constance exited her house. Anderson accused Constance of slamming the door in his face and told Trevino that he would not speak to Constance anymore because she "hung up in 911's face." Constance said she did not slam the door, but rather closed it because it was cold outside. She twice asked the officers to come inside, saying that she was legally blind without her glasses and could not see who was "out there," but the officers declined. Eventually, the boys admitted to the officers that there was marijuana in the Westfall residence. Anderson explained to Monte that the officers knew there were illegal drugs in the house and that, with Monte's permission, the officers would go upstairs and confiscate it. Anderson suggested that one of the boys take them to the drugs upstairs. Monte nodded his head in agreement and Constance said, "[WW], you go get it." WW entered the house first, followed by Monte, who was followed by Anderson.

Anderson testified that, as he approached the door, Constance "abruptly walked at [him] in an aggressive manner at a fast pace." Anderson warned her to not "walk up on" him. Constance responded, "I'll do what I want!" Luna intervened, instructed Constance to get back, and warned her that she would be put in handcuffs if she did not "stop." Trevino and Luna both told Constance that she would be arrested for interfering with police duties and needed to calm down. According

to defendants, Constance replied, "You've got to be kidding. I'm the one who said you could go up there."[1] Luna then "brought [Constance] to the ground."

During the few minutes that Constance was pinned, Anderson was in the Westfall residence and retrieved a metal tin containing about 2.5 grams of marijuana from inside of the house. Then, Luna and Trevino handcuffed Constance and placed her in a police car. She was charged with interference with public duties under Texas Penal Code § 38.15, though the charges were ultimately dropped.[2]

Westfall brought various claims under 42 U.S.C. § 1983. The only claim relevant to this appeal is her false arrest claim. In *Westfall I*, our court reversed a grant of summary judgment in favor of the officers and held that the merits of Westfall's false arrest claim depend on whether the officers believed they had valid consent to enter the Westfall residence to confiscate the marijuana. If they did not have valid consent, then they were not performing a duty or exercising authority "imposed or granted by law," so any interference with their search by Constance could not have violated

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[1] The parties disputed whether Constance said, "I'm the one who said you could go up there" or "I don't want you people to go up there." However, it is not contested on appeal that the jury could have found that she uttered the former statement.

[2] Texas Penal Code § 38.15(a) provides: "A person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with . . . (1) a peace officer while the peace officer is performing a duty or exercising authority imposed or granted by law."

Texas Penal Law § 38.15. *See Westfall I*, 903 F.3d at 544-46.

On remand, the case was tried before a jury, which returned a verdict for the defendant officers. The district court denied Westfall's motions for judgment as a matter of law and for a new trial. This appeal followed.

II. Standard of Review

"We review de novo the district court's denial of a motion for judgment as a matter of law, applying the same standards as the district court." *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013) (citing *Ill. Cent. R.R. Co. v. Guy*, 682 F.3d 381, 392-93 (5th Cir. 2012)). Judgment as a matter of law is proper if "a party has been fully heard on an issue during a jury trial and . . . a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). "[W]e view all evidence and draw all reasonable inferences in the light most favorable to the verdict." *Pineda v. United Parcel Service, Inc.*, 360 F.3d 483, 486 (5th Cir. 2004) (citing *Thomas v. Tex. Dept. of Crim. Just.*, 220 F.3d 389, 392 (5th Cir. 2000)). The moving party can prevail only "[i]f the facts and inferences point so strongly and overwhelmingly in favor of the moving party that the reviewing court believes that reasonable jurors could not have arrived at a contrary verdict[.]" *Poliner v. Tex. Health Sys.*, 537 F.3d 368, 376 (5th Cir. 2008) (internal quotation marks omitted) (quoting *Dixon v. Wal-Mart Stores, Inc.*, 330 F.3d 311, 313-14 (5th Cir. 2003)). "After

a jury trial, our standard of review is 'especially deferential.'" *Brown v. Suddith*, 675 F.3d 472, 477 (5th Cir. 2012) (quoting *Brown v. Bryan Cnty., Okla.*, 219 F.3d 450, 456 (5th Cir. 2000)).

We review the denial of a motion for a new trial under an "abuse of discretion standard." *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016). "The district court abuses its discretion by denying a new trial only when there is an 'absolute absence of evidence to support the jury's verdict.'" *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 676 (5th Cir. 2016) (internal quotation marks omitted) (quoting *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013)). "If the evidence is legally sufficient, we must find that the district court did not abuse its discretion in denying a motion for new trial." *Id.* (citing *Cobb v. Rowan Cos., Inc.*, 919 F.2d 1089, 1090 (5th Cir. 1991).

III. Discussion

A.

Westfall argues that defendants failed to present sufficient evidence to support a finding that Anderson's entry and removal of the tin with marijuana from the house was lawful; thus, she argues, there was insufficient evidence to support the jury's verdict, and the district court erred in denying her motion for judgment as a matter of law. However, Westfall does not dispute on appeal that there was sufficient evidence for a jury to find that the officers obtained voluntary consent from both herself (when she told WW to "go get it") and

Monte (when he nodded and went into the house after Anderson requested to go inside to collect the marijuana). Thus, the lawfulness of the officers' search depends on two remaining questions: (1) whether "[t]he officers' knock-and-talk conduct" was "unreasonable," and, if so, (2) whether the subsequent consent obtained from the Westfalls was an "independent act of free will" sufficiently attenuated from an unlawful knock-and-talk. *Westfall I*, 903 F.3d at 545.

"We have recognized the knock-and-talk strategy as 'a reasonable investigative tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity.'" *Id.* (quoting *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001)). "We have held, however, that 'the purpose of a "knock and talk" is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose is to make an investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants' consent to search.'" *Id.* (cleaned up) (quoting *United States v. Gomez-Moreno*, 479 F.3d 350, 355 (5th Cir. 2007), *overruled on other grounds by Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L.Ed.2d 865 (2011)). "When no one answers the door despite knocking, 'officers should end the "knock and talk" and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance.'" *Id.* (cleaned up) (quoting *Gomez-Moreno*, 479 F.3d at 356).

Contrary to Westfall's argument, the lateness of the hour did not render the officers' knock-and-talk

unlawful *per se.* Although a 2:15 a.m. knock on one's door will usually transgress background social norms, this case involved a 911 call alleging trespass; the trespassers were believed to be in the Westfall residence; and the officers visually observed youths in a lit room upstairs, indicating that they were not asleep. Under the circumstances, a reasonably respectful officer might have found it necessary to knock on the Westfalls' door, even at this late hour. *See United States v. Staggers*, 961 F.3d 745, 759 (5th Cir. 2020) ("That the officers arrived in the early morning does not necessarily render the knock-and-talk coercive or unreasonable").

Furthermore, during the officers' initial encounter with Constance, Constance nodded in apparent agreement when they asked her to check on her son, but closed the door on them without further discussion and was seen to retreat to her bedroom. Given these mixed signals, it may have been reasonable for the officers to attempt to re-establish contact with her so that they could clarify whether she intended to comply. The situation had not yet ripened into one where Constance made her lack of consent clear, and Constance's nodding could have been interpreted as a tentative license for the police to remain at the front door. Arguably, a jury could find that it was reasonable for Trevino to knock a second time, and for the police to place one call into the residence. *See Gomez-Moreno*, 479 F.3d at 356 (noting that, after awaiting a response to their initial knock at the front door, the officers "might have then knocked on the back door or the door to the back

house"). But Trevino's second knock went unanswered, and the first dispatch call to the Westfall residence was hung up on.

Arguably, at that point, the occupants' continued silence "amounted to a refusal . . . to answer the door." *See United States v. Jerez*, 108 F.3d 684, 691 (7th Cir. 1997). But even if we were to agree that the officers' further activities—Luna's knocking on the glass pane of the door and dispatch's second call to the Westfall residence—crossed the line from investigative inquiry into an unreasonable knock and talk, it would not entitle Westfall to judgment as a matter of law. For there remains the question of whether a rational jury could find that Mr. and Ms. Westfalls' subsequent consents were "independent act[s] of free will." *Westfall I*, 903 F.3d at 545.

To determine whether consent is an "independent act of free will," we consider (1) "[t]he temporal proximity" of the violation, (2) "the presence of intervening circumstances," and (3) "the purpose and flagrancy of the official misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-604 (1975). This inquiry is analytically distinct from whether the consent was voluntary. *See United States v. Chavez-Villareal*, 3 F.3d 124, 127-28 (5th Cir. 1993). Although *Brown* was not a knock-and-talk case, our precedents have repeatedly cited and applied this three-factor test as authoritative in determining whether a person's statements have been purged of the taint of an unlawful knock-and-talk. *See United States v. Cooke*, 674 F.3d 491, 496-96 (5th Cir. 2012) (applying "a *Brown* analysis" to determine whether defendant's

mother's "consent attenuated any Fourth Amendment violation" following officers' attempt to "conduct a 'knock and talk'"); *United States v. Hernandez*, 670 F.3d 616, 621, 623 (5th Cir. 2012) (holding that the district court should have considered "the temporal proximity," "the presence of intervening circumstances," and "the purpose and flagrancy of the official misconduct" to determine whether defendant's "admission was untainted" by "the officers' conduct during their knock-and-talk") (cleaned up) (citing *Brown*, 422 U.S. at 603); *see also Westfall I*, 903 F.3d at 545-46 (citing *Hernandez*'s application of *Brown*'s "three-factor test" and holding that the district court should "consider this argument . . . on remand" to determine "whether Westfall's alleged consent [after the knock-and-talk] was an independent act of free will").

After instructing the jury on the three *Brown* factors, the district court further charged the jury:

> You may consider situations such as when the officers are rude; the officers are accusatory; the officers make demands rather than requests such as by their tone of voice, volume, and authoritative manner; the officers threaten or yell; the officers keep individuals exposed to the cold; the officers threaten to get a warrant and detain the residents outside all night while a warrant is obtained; and the officers merely demonstrate their dominance over the individuals.

The court also properly instructed the jury that the burden was on the officers to prove that the consent

they obtained was an independent act of free will. Westfall does not argue on appeal that these instructions misstated the law or were otherwise prejudicial.

As to the first *Brown* factor, it is undisputed that the consents granted by Mr. and Ms. Westfall were close in time to the knock-and-talk. But this factor alone is not "determinative." *United States v. Macias*, 658 F.3d 509, 523 (5th Cir. 2011).

The second factor presents a trickier question. We have indicated that where there is no evidence of coercive police tactics, and the person from whom consent is sought is adequately informed of the right to refuse consent, these factors constitute intervening circumstances sufficient to purge the taint of an unreasonable detention. *United States v. Kelley*, 981 F.2d 1464, 1471-72 (5th Cir. 1993). But we have also distinguished *Kelley* where the officer had already "made known his suspicions about narcotics," for in such cases it might appear to the consenting party that refusal would be "pointless." *Chavez-Villareal*, 3 F.3d at 128. Such was the case here; Anderson arguably informed Monte of his right to deny consent by requesting entry "with your permission," but only after he made known to the Westfalls that the officers knew there were illegal drugs inside. Nevertheless, we cannot say that this precluded the jury as a matter of law from finding intervening circumstances. As we stated in *United States v. Richard*, 994 F.2d 244 (5th Cir. 1993), *abrogated on other grounds by United States v. Aguirre*, 664 F.3d 606 (5th Cir. 2011), this determination depends, to an extent, on the "atmosphere" of the interaction between

the officers and the consenting party. *Richard*, 994 F.2d at 252. There, we cited the Tenth Circuit's holding in *United States v. Mendoza-Salgado*, 964 F.2d 993, 1013 (10th Cir. 1992), in which the Court held that a woman who was present when her husband was arrested had validly consented to a search of her home "after a short time had passed and all had calmed down." *Richard*, 994 F.2d at 252; *see Mendoza-Salgado*, 964 F.2d at 1000 (agents testified the wife "appeared 'calm, quiet, observing, listening, friendly and cooperative,' insisted she knew nothing about cocaine and said, 'go ahead and search' ") (brackets omitted). In the present case, there is at least some evidence of a changed atmosphere: the knocks and calls had undisputedly ended; Constance corrected the officers when they alleged she "slammed" the door; and Constance, unprompted, twice invited the officers to come inside (which they initially declined to do). While these few lines of dialogue might not be sufficient on their own to show a sufficient cooling of temperatures to purge the taint of an unlawful seizure, *cf. Mendoza-Salgado*, 964 F.2d at 1000, 1012-13, we note as well that the jury was in the best position to assess the overall rapport between the officers and the Westfalls, having listened to audio recordings of their exchanges (which are not in the record on appeal). As just noted, the jury was instructed to consider such factors as whether the officers were "rude," their "tone of voice," and whether they "threaten[ed] or yell[ed]." Because we are limited to a cold transcript, we are reluctant to place our own impression of the encounter above what the jury might have perceived.

As to the third factor, a rational jury could have found that the officers' conduct, even if it potentially amounted to an unlawful knock-and-talk, was not flagrant. As we reaffirmed in *Cooke*—another knock-and-talk case—the flagrancy (or lack thereof) of the violation is the "most important" factor. 674 F.3d at 496. *Cooke* held that because (1) "the purpose of [the officers' entry] was to conduct a 'knock and talk' (a common and legitimate police practice)," (2) the curtilage of the defendant's residence was "difficult and nuanced," and (3) the police did not "use coercive or deceptive tactics . . . or fail to adequately inform [the consenting party] of her rights," the officers' arguable intrusion on the defendant's curtilage was "technical at best and certainly not flagrant." *Id.* at 496, *see id.* at 492-93. Thus, the Court, applying a "*Brown* analysis," held that the consent the officers received "attenuated any alleged Fourth Amendment violation" flowing from the " 'knock and talk.' " *Id.* at 495-96.

Similarly, a jury could find that the officers' conduct here did not rise to the level of flagrant misconduct. As noted above, a jury could at least find that the officers had initial license to knock on the Westfalls' door in response to a trespassing complaint. And, viewing the facts in the light most favorable to the verdict, Constance's assent when asked to "check" on WW indicated that the officers possessed some license to remain at her front door, wait for her return, and, when she did not do so, attempt to re-establish contact in a limited and respectful manner. The line was crossed, if at all, *after* Constance failed to come back to the door,

and only by the cumulative effect of Trevino's and Luna's further knocking and the dispatching of two calls into the Westfall residence. Regardless of whether all, some, or none of these further acts were lawful, a jury could find that they were neither significant nor willful intrusions. Identifying the exact point at which the officers should have given up and retreated is "difficult and nuanced," as in *Cooke*, 674 F.3d at 496. Moreover, there was no physical restraint of the Westfalls during the knock-and-talk or at the time consent was given; at least some of the house's occupants were already awake during and immediately prior to the knock-and-talk; and the officers neither used nor threatened violence to rouse the Westfall family from their home. *Cf. Hernandez*, 670 F.3d at 618, 623 (finding knock-and-talk was "egregious," under *Brown* analysis, where officers "had their weapons drawn" and "one of the officers broke the glass pane of the screen door with a baton"). With regard to the volume of the officers' knocking, a jury could have credited Luna's testimony that it was necessitated by the size of the Westfalls' home. It is also significant that Luna knocked on the Westfalls' door unprompted by the other officers, and that when he did so he may not have been fully aware of their prior efforts to reach the house's occupants.

Weighing the three factors, the jury could therefore have concluded that Mr. and Ms. Westfalls' consents were independent acts of free will. In coming to this determination, we cannot overemphasize the importance of our standard of review. As long as "there is

more than a scintilla of evidence to support the jury's verdict," the verdict must stand. *Arismendez v. Nightingale Home Health Care, Inc.*, 493 F.3d 602, 609 (5th Cir. 2007). Westfall has not shown that the verdict was so lacking in evidentiary support as to entitle her to judgment as a matter of law.

B.

Westfall argues separately that the district court violated the mandate rule. "The mandate rule requires a district court on remand to effect [this Court's] mandate and to do nothing else." *Gen. Univ. Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Castillo*, 179 F.3d 321, 329 (5th Cir. 1999), *rev'd on other grounds by Castillo v. United States*, 530 U.S. 120 (2000)).

The basis for Westfall's mandate-rule argument is that the district court (1) allowed the officers to testify that their conduct was not a "knock and talk" and instead recharacterize it as an "active investigation," and (2) allowed defense counsel to repeat this argument to the jury at summation. Westfall notes that upon receipt of a jury note asking for clarification of the law governing an "active investigation," the district court referred the jury back to their original instructions.

Notwithstanding Westfall's attempt to shoehorn her argument into the "mandate rule," we review it for what it is: a basic evidentiary objection to the testimony and arguments the defense was allowed to make

to the jury. "[W]e reverse judgments for improper evidentiary rulings only when a challenged ruling affects a party's substantial rights." *DIJO, Inc. v. Hilton Hotels Corp.*, 351 F.3d 679, 687 (5th Cir. 2003); *see also Bufford v. Rowan Co., Inc.*, 994 F.2d 155, 157 n.1 (5th Cir. 1993) ("Improper comments from the bench or by counsel will not warrant a reversal unless they so permeate the proceedings that they impair substantial rights and cast doubt on the jury's verdict."); *Longoria by Longoria v. Wilson*, 730 F.2d 300, 305 (5th Cir. 1984).

Westfall argues that, because the evidence cannot support a defense verdict, the jury must have been misled by the improper evidence and argument. But as we have already noted above, the properly-admitted evidence could support a defense verdict, so this argument is unavailing.

Moreover, Westfall does not dispute that the jury charge accurately stated the law and that further confusion (if any) could have been cleared up with an additional instruction. As the record makes clear, the district court gave counsel an opportunity to request such an instruction when it received the jury note asking about "active investigation[s]." Asked by the court whether it should "tell the jury that they have all of the information that they need in the jury charge and the evidence that has been presented to them," Westfall's counsel initially said, "yes." Counsel then stated that the court "could potentially address" the "active investigation" issue, but did not specifically request such an instruction or object when the court referred the jury to the original charge. *See Russell v. Plano*

Bank & Trust, 130 F.3d 715, 720 n.2 (5th Cir. 1997) (noting that Federal Rule of Civil Procedure 51 requires a party to "make a formal, on-the-record objection" and "state clearly the grounds for their objection"). Therefore, any argument that the district court's curative efforts were inadequate in this case must fail. *See Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 771 (5th Cir. 1986) ("By acquiescing in the court's corrective charge, defendant got a chance to see the verdict and then seek to overturn it. Because of the district court's curative instructions, and because defendant chose to gamble on the verdict, we find that the district court correctly denied defendant's motion for new trial") (internal quotation marks and citation omitted).

IV. Conclusion

For these reasons, we AFFIRM.

United States Court of Appeals
for the Fifth Circuit

No. 21-10159

CONSTANCE WESTFALL,

Plaintiff—Appellant,

versus

JOSE LUNA, SOUTHLAKE POLICE DEPARTMENT OFFICER, IN HIS INDIVIDUAL CAPACITY; NATHANIEL ANDERSON, SOUTHLAKE POLICE DEPARTMENT OFFICER, IN HIS INDIVIDUAL CAPACITY; VENESSA TREVINO, SOUTHLAKE POLICE DEPARTMENT OFFICER, IN HER INDIVIDUAL CAPACITY,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:15-CV-874

(Filed Mar. 15, 2022)

Before DENNIS, SOUTHWICK, and WILSON, *Circuit Judges*.

PER CURIAM:*

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not

Following a dispute between Southlake Police Department (the "Department") officers and the Westfall family at the Westfall's residence, Constance Westfall ("Westfall") filed suit in the Northern District of Texas, bringing claims against several defendants connected with the Department. The district court initially granted summary judgment in favor of all defendants on all claims and determined that Officers Trevino, Anderson, and Luna, the defendants at issue in this appeal, were entitled to qualified immunity. However, on appeal this court remanded Westfall's claims against Trevino, Anderson, and Luna back to the district court for trial, holding that there existed three genuine disputes of material fact which precluded summary judgement: (1) whether a reasonable officer could have concluded that they were performing a duty or exercising lawful authority when they entered and searched Westfall's home, (2) whether Westfall posed an immediate threat to the officers, and (3) whether Westfall actively refused to comply with the officers' instructions and efforts to restrain her. *Westfall v. Luna*, 903 F.3d 534, 542-52 (5th Cir. 2018) (*Westfall 1*). Accordingly, on remand the parties tried their case before a jury. After presentation of argument and evidence, the jury found that none of the defendants had violated the Constitution in any of the manners alleged by Westfall. Westfall filed a motion for judgment as a matter of law and a motion for new trial. The district court denied those motions, reasoning that

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precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

legally sufficient evidence existed to support the jury's verdict and that Westfall failed to show that any harmful error had occurred which would entitle her to a new trial. Westfall now appeals.

I. Background

Late one night in January of 2014, the Southlake Police Department received a call reporting a trespass. The call was from a young woman who reported that two teenage boys, one later identified as William Westfall ("William"), had entered her home without permission. The boys had been looking for a marijuana grinder. After she told them to leave, the boys left the home and walked toward the house next door (the "Westfall residence").

Shortly thereafter, Officer Trevino ("Trevino") and Officer Anderson ("Anderson") arrived and knocked on the front door of the Westfall residence. Constance Westfall opened the door and Trevino identified herself, asked for William, and disclosed the allegations the caller had made against William. Westfall responded by explaining that William was her son and that his best friend lived in the house next door. Trevino asked Westfall to go get her son. Westfall closed the door, turned around, and returned to her room. She began looking for her glasses because she is legally blind without them. The Southlake Police Department dispatcher called the Westfall residence and told William to meet the officers outside. William and another

teenage boy exited the Westfall residence, with a third boy joining them soon afterwards.

Trevino and Anderson began questioning the three minor boys outside. During the questioning, Trevino allegedly smelled marijuana on William's hands and asked the boys about the presence of marijuana. At that point, Westfall exited her house. While outside, Westfall complained about her inability to see the officers without her glasses and, in response to accusations that she had slammed the door in their faces, explained that she had only closed the door when the police first arrived because it was cold outside.

Following this exchange, the officers stopped addressing Westfall, despite her repeated requests that they identify themselves, and continued to question the minor boys. Eventually, the boys admitted to the officers that there was marijuana in the Westfall residence. Luna then stated that the officers could either wait for a search warrant or one of the boys could go into the Westfall residence and retrieve the marijuana. Anderson explained to Monte Westfall ("Monte"), Westfall's husband, that there was marijuana in the Westfall residence and that, with Monte's permission, the officers would go upstairs and confiscate it. Anderson suggested that one of the boys take them to the marijuana upstairs. Westfall then said, "William, go get it."

William went inside the Westfall residence. Anderson told Monte to also go inside, and Anderson followed them. As Westfall turned to follow them into her house, Luna approached her and told her, "You are not going

anywhere. You slammed the door in our face." Westfall explained that she did not slam the door in his face, told Luna she was going into her house, and reached for the doorknob of the front door. Then, according to Westfall, Luna "body-slammed" her to the ground, injuring her. According to defendants, Westfall began to follow Anderson, Monte, and William into her house when Anderson stopped her and told her she had to stay outside with the other officers. Defendants claim that Westfall insisted on going inside, and Anderson replied that she was not going to "walk up on [him]" and that he had already given her instructions to stay outside. Luna and Trevino asked Westfall to calm down and "get back over here." Westfall continued to protest,[1] then began to follow Anderson into the home, approaching him from behind "aggressively[.]" It was only then, according to defendants, that Luna "brought [Westfall] to the ground." Luna also testified that "when I spun [Westfall] around, we fell to the ground." Westfall landed on the corner of the brick porch on her right side. Luna and Trevino then held Westfall on the ground for about five minutes.

During the few minutes that Westfall was pinned, Anderson was in the Westfall residence and retrieved a metal tin containing about 2.5 grams of marijuana from inside of the house. Anderson, Monte, and William returned outside. Then, Luna and Trevino handcuffed Westfall and placed her in a police car. A

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[1] The parties dispute whether Westfall said, "I don't want you people to go up there" or "I'm the one who said you people could go up there." *See Westfall*, 903 F.3d at 546.

Southlake police officer took Westfall to the hospital. There, hospital staff noted that Westfall had numerous abrasions and bruises, bloody urine, high blood pressure, and an increased heart rate.

Westfall was released from the hospital, taken to the Keller Police Department, and released on bail later that morning. She was charged with interference with public duties under Texas Penal Code section 38.15, though the charges were ultimately dropped. An MRI later revealed that Westfall suffered from a herniation to the L5-S1 level of her lumbar, for which Westfall has received therapy and injections.

II. Standard of Review

We "review de novo the district court's denial of a motion for judgment as a matter of law, applying the same standards as the district court." *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013) (citing *Ill. Cent. R.R. Co. v. Guy*, 682 F.3d 381, 392-93 (5th Cir. 2012)). Judgment as a matter of law is proper if "a party has been fully heard on an issue during a jury trial and . . . a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). The moving party can prevail only "i][f the facts and inferences point so strongly and overwhelmingly in favor of the moving party that the reviewing court believes that reasonable jurors could not have arrived at a contrary verdict[.]" *Poliner v. Texas Health Sys.*, 537 F.3d 368, 376 (5th Cir. 2008) (internal quotation marks omitted) (quoting

Dixon v. Wal-Mart Stores, Inc., 330 F.3d 311, 313-14 (5th Cir. 2003)). "We credit the non-moving defendant's evidence and 'disregard all evidence favorable to [the plaintiff] that the jury is not required to believe.'" *Brown v. Sudduth*, 675 F.3d 472, 477 (5th Cir. 2012) (quoting *Coffel v. Stryker Corp.*, 284 F.3d 625, 631 (5th Cir. 2002)). "After a jury trial, our standard of review is 'especially deferential.'" *Id.* (quoting *Brown v. Bryan Cnty., Okla.*, 219 F.3d 450, 456 (5th Cir. 2000)).

We review the denial of a motion for a new trial under an abuse of discretion standard. *Olibas v. Barclay*, 838 F.3d 442, 448 (5th Cir. 2016). "The district court abuses its discretion by denying a new trial only when there is an 'absolute absence of evidence to support the jury's verdict.'" *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 676 (5th Cir. 2016) (internal quotation marks omitted) (quoting *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 881 (5th Cir. 2013)). "If the evidence is legally sufficient, we must find that the district court did not abuse its discretion in denying a motion for new trial." *Id.* (citing *Cobb v. Rowan Cos., Inc.*, 919 F.2d 1089, 1090 (5th Cir. 1991). We have held that it is "far easier" to show that a district court should have granted a motion for judgment as a matter of law than it is to show a district court abused its discretion by not granting a new trial. *See Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 269 (5th Cir. 1998).

III. Discussion

A. Motion for Judgment as a Matter of Law

A district court may enter judgment as a matter of law (JMOL) at the close of trial "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *See James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) (internal quotation marks omitted) (quoting FED. R. CIV. P. 50(a)). "[Rule 50] allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000) (quoting 9a CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521, at 240 (2d ed. 1995)). "[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n.6 (1962)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inference from the facts are jury functions, not those of a judge." *Id.* at 150-51 (internal quotation marks omitted) (quoting *Liberty Lobby*, 477 U.S. at

255). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151. We have explained that we

> "will reject a verdict in those instances when, despite considering all the evidence in the light and with all reasonable inference most favorable to the verdict, we find no evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial discretion could arrive at the same conclusion."

Polanco v. City of Austin, 78 F.3d 968, 974 (5th Cir. 1996) (quoting *Thrash v. State Farm Fire & Cas. Co.*, 992 F.2d 1354, 1356 (5th Cir. 1993)).

Westfall argues that defendants failed to present any evidence to support a finding that their search of the Westfall residence was lawful; thus, she argues, there was insufficient evidence to support the jury's verdict, and the district court erred in denying her motion for JMOL. Instead, she asserts that the district court violated the mandate of this court in its opinion remanding the case for trial by allowing defendants to state at trial that their visit to the residence was not a "knock-and-talk" but rather an "active investigation." She claims that the mandate of this court on remand included a finding that the visit was in fact a knock-and-talk. Thus, she claims that defendants' arguments that their search of the Westfall residence was lawful as part of an active investigation are inapposite to the actual question: whether the search was lawful

subsequent to a lawful knock-and-talk investigation. Westfall asserts that the undisputed evidence shows that the encounter was an unlawful knock-and-talk, and thus that the search was unlawful. As a result, she argues that the jury's verdict, misled as it was by this new argument, constituted jury nullification, and that the district court should have granted her motion for JMOL. Because we disagree that the district court violated this court's mandate by refusing to constrain defendants to the argument that their encounter with the Westfalls was a knock-and-talk, we affirm.

i. The Mandate Rule

A corollary to the law-of-the-case doctrine is the "mandate rule." *Kapche v. City of San Antonio*, 304 F.3d 493, 496 (5th Cir. 2002). Under the mandate rule, a district court must "'implement both the letter and the spirit of the [appellate court's] mandate.' and may not disregard the 'explicit directives' of that court." *Id.* (quoting *United States v. Becerra*, 155 F.3d 740, 753 (5th Cir. 1998) (*abrogation on other grounds recognized in United States v. Farias*, 481 F.3d 289, 291 (5th Cir. 2007)). Put another way: "The mandate rule requires a district court on remand to effect [this court's] mandate and to do nothing else." *Gen. Univ. Sys., Inc. v. HAL, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (internal quotation marks omitted) (quoting *United States v. Castillo*, 179 F.3d 321, 329 (5th Cir. 1999) (*rev'd on other grounds by Castillo v. United States*, 530 U.S. 120 (2000)). The mandate rule "compels compliance on remand with the dictates of a superior court and

forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Id.* (quoting *United States v. Castillo*, 179 F.3d at 329). An issue is tacitly decided only when its disposition is a "necessary predicate[ ] to the ability to address the issue or issues specifically discussed" in the appellate court's opinion. *The Office of Thrift Supervision v. Felt (In re Felt)*, 255 F.3d 220, 225 (5th Cir. 2001). When a case reaches this court for the second time, we review de novo whether any of the district court's actions on remand from the prior appeal were foreclosed by the mandate rule. *Id.* at 227.

ii. Knock-and-Talks

In *Westfall 1*, this court held that multiple genuine issues of material fact precluded summary judgment. 903 F.3d at 539. We held that one of those material issues, as is relevant here, was whether a reasonable officer could have concluded that they were performing a duty or exercising lawful authority when they entered and searched Westfall's home. *Id.* at 546-47 The district court granted summary judgment on this issue to defendants, finding that it had been reasonable for the officers to conclude that they had been given valid consent before conducting their search of the Westfall residence. We explained that the " 'knock and talk' nature of the officers' initial interaction with Westfall puts into question their ability to have obtained valid consent." *Westfall*, 903 F.3d at 545.

We have recognized the knock-and-talk strategy as "a reasonable investigative tool when officers seek

to gain an occupant's consent to search or when officers reasonably suspect criminal activity." *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001). But "[t]he purpose of a 'knock and talk' is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose . . . is to make investigatory inquiry or, if officers reasonably suspect criminal activity, to gain the occupants' consent to search." *United States v. Gomez-Moreno*, 479 F.3d 350, 355 (5th Cir. 2007) (*overruled on other grounds by Kentucky v. King*, 563 U.S. 452 (2011)). When no one answers the door despite knocking, "officers should . . . end[ ] the 'knock and talk' and change[ ] their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance." *Id.* at 356. Where officers continue an illegal search or seizure, any consent given after that fact is invalid, unless it was an independent act of free will. *Id.* at 357.

Under this analysis, we found in *Westfall 1* that "given the fact that [the officers] went to her home at 2:00 a.m., continued to knock on Westfall's door after she closed it, called her home repeatedly, looked through the windows of her home, and walked around her property, even after she closed the door, [this] may have been an unreasonable search that rendered any subsequent consent invalid." *Westfall*, 903 F.3d at 545 (footnotes removed) (citing *United States v. Hernandez*, 392 F. App'x 350, 351-53 (5th Cir. 2010) (holding that "[t]he district court should have acknowledged that the officers' knock-and-talk conduct was an unreasonable search" and that there was no valid consent where the

woman who allegedly gave consent did not initially answer the door, and the officers then circled her trailer, banged on doors and windows, shouted that they were present, and broke the glass pane of her door before she answered it). We stated: "If the district court determines that the officers' search was unreasonable for this reason, it would then need to consider whether Westfall's alleged consent was an independent act of free will. The district court did not consider this argument and should do so on remand." *Id.* at 545-46 (internal citations removed).

But despite Westfall's arguments, *Westfall 1* did not *hold* that the officers' encounter with Westfall was in fact a knock-and-talk. At that point, the case had reached this court as an appeal of a grant of summary judgment to defendants. Thus, as it must when reviewing summary judgment orders, the court in that opinion "accept[ed] all well-pleaded facts as true and view[ed] th[e] facts in the light most favorable to the plaintiff[]." *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)). The court thus accepted as true the presentation of the encounter in question as a knock-and-talk. It did not rule that its rendition of the facts, presented in the light most favorable to Westfall, mandated the district court to limit defendants to arguing based on that set of facts at trial. The categorization of this encounter as a knock-and-talk was not part of this court's mandate on remand, and the district court thus did not err in allowing

defendants to testify that their encounter with Westfall was part of an active investigation.

iii. Sufficiency of the Evidence

Having determined that the district court did not violate this court's mandate on remand, it is clear that the district court did not err in denying Westfall's motion for JMOL. Where an issue has been resolved by a jury, the moving party can prevail on a motion for JMOL only "[i]f the facts and inferences point so strongly and overwhelmingly in favor of the moving party that the reviewing court believes that reasonable jurors could not have arrived at a contrary verdict[.]" *Poliner*, 537 F.3d at 376 (5th Cir. 2008) (internal quotation marks omitted) (quoting *Dixon*, 330 F.3d at 313-14. It is not the role of this court to judge the credibility or weight of the evidence; in fact, we must disregard all evidence in favor of the moving party that the jury is not required to believe. *Reeves*, 530 U.S. at 151. Here, the jury found that defendants had not violated any of Westfall's constitutional rights. As the district court explained in its order denying Westfall's motion for JMOL,

> [a]t a minimum, the jury heard testimony that in response to Officer Anderson's request to enter the home with somebody else who knew where the marijuana was, Westfall responded "William, go get it." In context, the jury was permitted to draw an inference that Westfall was consenting to an officer entering the home with William to retrieve the marijuana.

> Further, Westfall's statement that she didn't "want you people to go up there," while she walked towards Anderson in an "aggressive manner" could have plausibly been disregarded by the jury because of the competing interpretation of the statement, that Westfall said she was "the one who said you could up there," which would indicate valid consent.

Thus, the district court held that legally sufficient evidence existed to support the jury's verdict on the ground that a reasonable officer could have believed that he had consent to conduct the search. We agree.

B. Motion for a New Trial

As we have determined that there was a legally sufficient evidentiary basis for a reasonable jury to have entered a verdict for defendants, Westfall cannot show that there is an absolute absence of evidence to support the jury's verdict. Thus, she has failed to show that the district court abused its discretion in denying her motion for a new trial.

IV. Conclusion

For the foregoing reasons, we AFFIRM.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

CONSTANCE WESTFALL,	§	Civil Action No.
Plaintiff,	§	4:15-cv-00874-O
	§	
v.	§	
JOSE LUNA, et al.,	§	
	§	
Defendants.	§	

ORDER

(Filed Jan. 30, 2021)

Before the Court are Plaintiff's Renewed Motion for Judgment as a Matter of Law (ECF No. 351), filed September 8, 2020; Defendant's Response (ECF No. 363), filed September 29, 2020; Plaintiff's Reply in Support of Judgment as a Matter of Law (ECF No. 364), filed October 13, 2020; Plaintiff's Motion for New Trial (ECF No. 352), filed September 8, 2020; Defendant's Response (ECF No. 362), filed September, 29, 2020; Plaintiff's Reply in Support of New Trial (ECF No. 365), filed October 13, 2020; Defendant's Motion for Attorney's Fees (ECF No. 348), filed August 25, 2020; Plaintiff's Response (ECF No. 353), and Defendant's Reply in Support of Attorney's Fees (ECF No. 356), After reviewing the briefing, the relevant facts, and applicable law, the Court **DENIES** Plaintiff's Motion for Judgment as a Matter of Law, **DENIES** Plaintiff's Motion for New Trial, and **DENIES** Defendant's Motion for Attorney's Fees.

I. BACKGROUND[1]

This civil rights case arises from a conflict between Southlake Police Department officers and the Westfall family at the Westfall's residence in 2014. In the middle of the night in January of 2014, the Southlake Police Department received a call reporting a trespass. The call was from a young woman. She reported that two teenage boys, one later identified as William Westfall ("William"), had entered her home without permission. She told the boys that they did not have permission to be in the house, and the boys left and walked toward the house next door. The caller was the older sister of one of William's friends who lived there. According to the caller, the boys were looking for a marijuana grinder but returned to the Westfall residence after she told them to leave.

Shortly thereafter, Officer Trevino ("Trevino") and Officer Anderson ("Anderson") arrived. Anderson and Trevino then went to, and knocked on the front door of, the house the boys returned to[2] (the "Westfall residence"). Plaintiff Constance Westfall ("Westfall") opened the door and Trevino identified herself, asked for William, and disclosed the allegations against William. Westfall responded by explaining that William is her son and that his best friend lived in the house next

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[1] Unless otherwise indicated, these background facts are adapted from the Fifth Circuit's opinion on the interlocutory appeal of summary judgment entered in this case. *Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018).

[2] The house belonged to Constance Westfall and her husband, Monte Westfall ("Monte").

door. Trevino asked Westfall to go get her son. Westfall closed the door, turned around, and returned to her room. She began looking for her glasses because she is legally blind without them.

After this initial encounter, the Southlake Police Department dispatcher called Westfall's home phone number. Monte answered the call, believed it was a prank call, and hung up. Meanwhile, Officer Luna ("Luna") arrived at the Westfall residence and began knocking on the door. The dispatcher called the house phone number again. William answered. The dispatcher told William to meet the officers outside.

William and another teenage boy exited the Westfall residence, with a third boy joining them soon afterwards. Trevino and Anderson began questioning the three minor boys outside. Trial Transcript of Officer Anderson pg. 266-285, ECF No. 359. During the questioning, Trevino allegedly smelled marijuana on William's hands and asked the boys about the presence of marijuana *Id.* Then, Westfall exited the Westfall residence, wearing boots and a coat over her nightgown. *Id.* While outside, Westfall complained about her inability to see the officers without her glasses and, in response to accusations that she had slammed the door in their faces, explained that she had only closed the door when the police first arrived because it was cold outside. Following this exchange, the officers stopped addressing Westfall, despite her repeated requests that they identify themselves, and continued to question the minor boys. A short while later, when Westfall spoke in response to a question by Trevino directed at

the boys, Luna again instructed Westfall to stop talking.

Eventually, the boys admitted to the officers that there was marijuana in the Westfall residence. Trial Transcript of Officer Anderson pg. 266-285, ECF No. 359. Luna then stated that the officers could either wait for a search warrant or one of the boys could go into the Westfall residence and retrieve the marijuana. *Id.* Addressing Monte Westfall, Anderson explained to him that there was marijuana in the Westfall residence and that, with Monte's permission, the officers would go upstairs and confiscate it. *Id.* Anderson suggested that one of the boys take them to the marijuana upstairs. Westfall then said, "William, go get it." William went inside the Westfall residence. *Id.* Officer Anderson told Monte to also go inside, and Officer Anderson followed them. *Id.*

As Westfall turned to follow them into her house, Luna approached her and told her, "You are not going anywhere. You slammed the door in our face." *Id.* Westfall explained that she did not slam the door in his face, told Luna she was going into her house, and reached for the doorknob of the front door. Transcript of Defendant Anderson's Testimony pgs. 275-287, ECF No. 359. Then, according to Westfall, Luna "body-slammed" her to the ground, injuring her.

According to Defendants, Westfall began to follow Anderson, Monte, and William into her house when Anderson stopped her and told her she had to stay outside with the other officers. Trial Transcript of

Defendant Anderson's Testimony pgs. 275-287, ECF No. 359. Defendants claim that Westfall insisted on going inside, and Anderson replied that she was not going to "walk up on [him]" and that he had already given her instructions to stay outside. Luna and Trevino asked Westfall to calm down and "get back over here." *Id.* Westfall continued to protest, saying, "Let me go, I don't want you people to go up there,[3] and "stop telling me to calm down." *Id.*

Then, Westfall "began to pursue" Anderson into the home, approaching him from behind "at a fast pace and in an aggressive manner." *Id.* It was only then, according to Defendants, that Luna "brought [Westfall] to the ground." *Id.* Luna also testified that "when I spun [Westfall] around, we fell to the ground". *Id.* at 43. Westfall landed on the corner of the brick porch on her back. *Id.* Luna and Trevino then held Westfall on the ground for about five minutes. During the few minutes that Westfall was pinned, Anderson was in the Westfall residence and retrieved a metal tin containing about 2.5 grams of marijuana from inside of the house. Anderson, Monte, and William returned outside. Then, Luna and Trevino handcuffed Westfall and placed her in a police car.

A Southlake police officer took Westfall to the hospital. There, hospital staff noted that Westfall had numerous abrasions and bruises, bloody urine, high blood

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[3] The parties dispute whether Westfall said, "I don't want you people to go up there" or "I'm the one who said you people could go up there." Def.s' Resp. JMOL 19, ECF No. 363; *see also Westfall*, 903 F.3d at 546.

pressure, and an increased heart rate. Westfall was released from the hospital, taken to the Keller Police Department, and released on bail later that morning. She was charged with interference with public duties under Texas Penal Code section 38.15, though the charges were ultimately dropped. An MRI later revealed that Westfall suffered from a herniation to the L5-S1 level of her lumbar, for which Westfall has received therapy and injections.

Westfall filed this suit bringing several claims against several defendants. Complaint, ECF No. 1. This Court granted summary judgment in favor of all defendants on all claims, and as it relates Trevino, Anderson, and Luna, determined they were entitled to qualified immunity. Order, ECF No. 99. Plaintiff appealed and upon review, the Fifth Circuit remanded her claims against Trevino, Anderson, and Luna for trial. Opinion, ECF No. 133. The Fifth Circuit held that three genuine factual disputes existed against them: (1) whether a reasonable officer could have concluded that they were performing a duty or exercising lawful authority when they entered and searched Westfall's home, (2) whether Westfall posed an immediate threat to them, and (3) whether Westfall actively refused to comply with their instructions and efforts to restrain her. *Id*. Accordingly, on remand, these parties tried their case to a jury. After presentation of argument and evidence, the jury found that none of the Defendants violated the Constitution in any of the manners alleged by Plaintiff. The Court thereafter entered judgment on the verdict. Defendants filed a motion for

attorney's fees, and Plaintiff filed her renewed motion for judgment as a matter of law and a motion for new trial. The motions are now ripe for the Court's review.

II. LEGAL STANDARDS

A. Rule 50 Judgment as a Matter of Law

Rule 50 of the Federal Rules of Civil Procedure governs motions for judgment as a matter of law ("JMOL") in jury trials. *See* Fed. R. Civ. P. 50; *see also Weisgram v. Marley Co.*, 528 U.S. 440, 448-49 (2000). The court may enter JMOL at the close of trial "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.'" *See James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009) (alteration in original) (quoting Fed. R. Civ. P. 50(a)). "[Rule 50] allows the trial court to remove cases or issues from the jury's consideration 'when the facts are sufficiently clear that the law requires a particular result.'" *Weisgram*, 528 U.S. at 448 (quoting 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2521, at 240 (2d ed. 1995)). "If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b).

"[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record." *Reeves v. Sanderson Plumbing Prods.,*

Inc., 530 U.S. 133, 150 (2000). "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Id.* (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-55 (1990)). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inference from the facts are jury functions, not those of a judge." *Id.* at 150-51 (quotation marks omitted). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* at 151.

Rule 50 serves the dual purposes of "enabl[ing] the trial court to re-examine the question of evidentiary insufficiency as a matter of law if the jury returns a verdict contrary to the movant, and to alert the opposing party to the insufficiency before the case is submitted to the jury, thereby affording it an opportunity to cure any defects in proof should the motion have merit." *Hinojosa v. City of Terrell*, 834 F.2d 1223, 1228 (5th Cir. 1988).

An error is plain if it was clear and obvious and affected substantial rights. *United States v. Munoz*, 150 F.3d 401, 413 (5th Cir. 1998). If the nonmovant presents any evidence to support the jury verdict, the verdict will not be disturbed *Paris v. Dallas Airmotive*, 2002 WL 188435, at *2 (N.D. Tex. 2002) (Lindsay, J.) ("Having recalled and considered the evidence produced at trial, the court determines that some evidence exists to support the verdict reached by the jury on [non-movant's claims]."). In other words, if the record

is not devoid of evidence to support the jury's verdict, the verdict stands.

B. Motion for a New Trial

Under Rule 59, a court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. (a)(1)(A). While this rule does not enumerate specific grounds for granting a new trial, the Fifth Circuit has found that a new trial is appropriate where (1) the verdict is against the weight of the evidence, (2) the amount of damages awarded is excessive, or (3) the trial was unfair or marred by prejudicial error. *Seidman v. Am. Airlines, Inc.*, 923 F.2d 1134, 1140 (5th Cir. 1991). When a motion for new trial is based on insufficiency of the evidence, a stringent standard applies, and the motion should be granted only if the verdict "is against the great weight of the evidence, or it is quite clear that the jury has reached a seriously erroneous result." *International Ins. v. RSR Corp.*, 426 F.3d 281, 300 (5th Cir. 2005). "The burden of showing harmful error rests on the party seeking the new trial." *Del Rio Distrib., Inc. v. Adolph Coors Co.*, 589 F.2d 176, 179 n.3 (5th Cir. 1979).

III. ANALYSIS

A. Plaintiff is Not Entitled to Judgment as a Matter of Law

Plaintiff asserts she is entitled to judgment as a matter of law on five grounds: (1) Defendants

performed an unreasonable search, (2) Defendants violated knock and talk rules, (3) Defendants falsely arrested Plaintiff, (4) Luna used excessive force, and (5) Defendants are not entitled to qualified immunity. Therefore, the Court must consider whether legally sufficient evidence exists to support the jury's verdict in favor of the Defendants on all five grounds. In doing so, the Court must review all evidence in the record in the light most favorable to the verdict, must draw all inferences in favor of the non-movant, and must not invade the province of the jury by seeking to weigh the evidence. *See Reeves*, 530 U.S. at 150 (citing *Lytle*, 494 U.S. at 554-55). The relevant question is not whether some evidence exists to support the Plaintiff's position, but whether *no evidence* exists to support the jury's verdict in favor of Defendants. *Id.* The Court addresses each ground in turn.

1. Unreasonable Search

Plaintiff argues that "Defendants must demonstrate . . . that the warrantless search was conducted pursuant to one of the well-delineated exceptions to the Fourth Amendment" but that Defendants "failed to produce a scintilla of evidence at trial to meet their burden. Instead, Defendants merely claimed they were pursuing an 'active investigation,' which is not one of the carefully delineated exceptions to the warrant requirement." Pl.'s Mot. JMOL 11, ECF No. 351. Defendants argue that the Fifth Circuit remanded this case for trial because "given the facts surrounding the initial interaction with Plaintiff, the ability of

[Defendants] to gain valid consent is put into question" and "when viewed in a light most favorable to Plaintiff, there may have been an unreasonable search." Defs.' Resp. JMOL 11, ECF No. 363. The jury found that Defendants did not violate the Constitution.

At trial, Luna testified that he twice informed the Westfalls along with the children who were outside, "We can do it one or two ways. We can be out here forever and then we'll go type a search warrant and then we'll go search it, or you can just tell us where [the marijuana is] at and bring it out and bring it – put it right here." Trial Transcript Volume 3 pgs. 35-36, ECF No. 359. Officer Anderson then explained to the Westfalls that, "we know that there are illegal drugs upstairs in the house. With your permission and with one of the kids who knows where it is, we need to go upstairs and confiscate those drugs." *Id.* at 37. Immediately following Officer Anderson's explanation, Westfall instructed her son, "William, go get it." *Id.* at 38. Officer Anderson, Monte, and William then went into the house to retrieve the marijuana. *Id.* Westfall continued to protest, saying, "Let me go, I don't want you people to go up there,"[4] and "stop telling me to calm down." *Id.* Then, Westfall "began to pursue" Anderson into the home, approaching him from behind "at a fast pace and in an aggressive manner." Moments later, Westfall was restrained by Luna, taken to the ground, and held there

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[4] The parties dispute whether Westfall said, "I don't want you people to go up there" or "I'm the one who said you people could go up there." Def.s' Resp. JMOL 19, ECF No. 363; see also *Westfall*, 903 F.3d at 546.

as she attempted to go into the home. *Id.* at 46. While Luna was holding Westfall on the ground, Luna mentioned he would restrain Westfall with handcuffs if she did not stop resisting. *Id.* At this point, Anderson was already in the home with Monte and William retrieving the marijuana.

Interactions between the officers and Westfall were recorded on the officer's body cameras. Due to the varying interpretation of the audio recording and transcripts, the parties dispute whether Westfall consented, and if she did, if it was revoked. On appeal, the Fifth Circuit said that the varying interpretations highlighted the issue of revoked consent. Specifically, the parties dispute whether Westfall said "I'm the one who said you people could go up there" or "I do not want you people to go up there" while she was being restrained by Luna as Anderson entered the home with William and Monte. *Westfall*, 903 F.3d at 546. On appeal the Fifth Circuit stated that "[i]f a transcription could be created that includes Westfall saying she did not want the officers 'to go up there,' and Defendants could find it reliable enough to quote it in their recitation of the facts, then surely a reasonable jury could conclude that Westfall said it." *Id.* At trial, the jury heard the audio recording, read transcripts created by different individuals, and heard live testimony from each of the Westfalls and the Officers. The jury was instructed that the officers needed consent to search the Westfall residence and based on its verdict, necessarily concluded the officers received it.

It is not the role of this Court to judge the credibility or weight of the evidence; in fact, the Court must disregard all evidence in favor of the moving party that the jury is not required to believe. *Reeves*, 530 U.S. at 151. At a minimum, the jury heard testimony that in response to Officer Anderson's request to enter the home with somebody else who knew where the marijuana was, Westfall responded "William, go get it." In context, the jury was permitted to draw an inference that Westfall was consenting to an officer entering the home with William to retrieve the marijuana. Further, Westfall's statement that she didn't "want you people to go up there," while she walked towards Anderson in an "aggressive manner" could have plausibly been disregarded by the jury because of the competing interpretation of the statement, that Westfall said she was "the one who said you could up there," which would indicate valid consent. Finding that legally sufficient evidence exists to support the verdict on the ground that the search was not unreasonable because Defendants obtained consent from Westfall, and it was not revoked, the verdict is upheld and the motion for judgment as a matter of law on unreasonable search grounds is **DENIED**.

2. Knock and Talk

Additionally, Plaintiff argues that Defendants failed to prove compliance with the Fifth Circuit's "knock and talk" standard to show justification for their actions. The Fifth Circuit has recognized the "knock and talk" strategy as a reasonable investigative

tool when officers seek to gain an occupant's consent to search or when officers reasonably suspect criminal activity. *See United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001). Defendants argue that the officers came to the Westfall residence to investigate the criminal trespass complaint, but the encounter developed into an investigation of a drug offense when they learned, and the minors informed them, that there was marijuana in the Westfall residence. Defs.' Resp. JMOL 10, ECF No. 363. Defendants assert that Westfall gave consent within the confines of a "knock and talk" and did not use the guise of an "active investigation" to violate Plaintiff's constitutional rights. *Id.*

Plaintiff asserts that Defendants violated "knock and talk" by staying at the residence after the first "knock" when Defendant Trevino initially identified herself as a police officer and asked Plaintiff if William was inside the home. However, at trial, Plaintiff testified that after this initial encounter with Defendant Trevino, and she learned of her son's alleged criminal trespass, when Defendant Trevino asked her to get her son, she nodded and shut the door "because it was very cold out-side." Constance Westfall Direct Examination, Trial Transcript Volume 1 at 129, ECF No. 357. After waiting for a few minutes and observing Plaintiff return to her room through the windows, Defendants knocked again and called the residence. *Id.* Plaintiff testified that she went to her room to retrieve her glasses and go to the restroom. Constance Westfall Direct Examination, Trial Transcript Volume 1 at 130, ECF No. 357.

The second knock and phone calls, Plaintiff argues, are actions beyond the scope of a knock and talk because Plaintiff closed the door in an effort to end the conversation. Defendants argue that because Westfall nodded in reaction to Defendant Trevino's request to speak with William, "the [] Defendants, as any private citizen would do, waited outside the home. However, the [] Defendants, saw Plaintiff return to her bedroom after telling them she would retrieve her son. Knowing Plaintiff had been awoken from sleep and seemed confused, the [] Defendants knocked again and called the residence." Resp. JMOL 17, ECF No. 363. Plaintiff did not testify that she did not intend to return outside with William, but rather testified that she was only looking for her glasses, grabbing a coat, and preparing to speak to the officers again because she still had questions about the alleged criminal trespass. Constance Westfall Direct Examination, Trial Transcript Volume 1 at 131, ECF No. 357 ("My primary concern then is for the boys and that I need to go out there even though I can't find my glasses."). Plaintiff then realized that her son, her son's friend, and Monte Westfall were already outside speaking to the officers about whether there was marijuana in the home. *Id.* Once the officers learned there was marijuana in the home, based on William's admission, the officers then asked for consent to search the home, which is permitted under "knock and talk" jurisprudence.

Plaintiff then argues that "Defendant's only exchange, or request for consent, was made by Defendant Anderson to Mr. Westfall. Defendant Anderson said

'Are you the father? Do you live here?' before he marched [Monte] into the home." Pl.'s Mot. JMOL 30, ECF No. 351. This is an over-simplification of Defendants' case because Monte's acquiescence was not the only alleged ground for consent. As discussed above, there is evidence in the record supporting a finding of unrevoked consent by Westfall. Specifically, Officer Luna testified that Officer Anderson explained to Constance and Monte Westfall that, "we know that there are illegal drugs upstairs in the house. With your permission and with one of the kids who knows where it is, we need to go upstairs and confiscate those drugs." Officer Luna testified that immediately following Officer Anderson's explanation, Plaintiff Westfall instructed her son, William, go get it.'" Trial Transcript Volume 2 pg. 265, ECF No. 358.

In viewing the evidence in the light most favorable to the verdict, a reasonable jury could conclude that Defendants did not violate the knock and talk standards, and received consent from Westfall to enter the home after explaining to her that an officer *and* "one of the kids who knows where it is" needed to retrieve the marijuana. Her direction to William to go could reasonably be understood to mean that William *and* Anderson were authorized to go get the marijuana. This interaction is within the overall confines of a "knock and talk." As discussed in the previous section, there is evidence in the record that supports a finding of unrevoked consent from Westfall, and such consent was received within the confines of "knock and talk" jurisprudence. Therefore, there is sufficient evidence in

the record to support the verdict in favor of Defendants on this ground and Plaintiff's motion for judgment as a matter of law must be **DENIED**.

3. Excessive Force

Plaintiff argues that "the trial revealed no genuine issue of material fact for the jury to determine" on her excessive force claim against Defendant Luna. Plaintiff alleges that the jury only needed to resolve whether the force Defendant Luna used was objectively unreasonable. Pl.'s JMOL 12, ECF No. 351 (citing *Westfall*, 903 F.3d at 547). Because "Plaintiff committed no crime, Plaintiff had offered minimal resistance during the five-minute attack according to Defendant Luna's own testimony, and she did not pose a threat to Defendant Anderson," Westfall argues Luna's actions were objectively unreasonable. *Id.* at 22-23. The force she describes asserts that Defendant Luna "threw [her] to the bricks of her front porch. . . ." *Id.* at 16.

Defendant Luna argues that "[i]t was proven at trial that Plaintiff's injuries were not as severe as she claimed" and that any technique used to restrain Plaintiff was a soft-hand technique that did not outweigh the need. Defs.' Resp. 25, ECF No. 363. Defendants argue, therefore, that "Plaintiff failed to carry her burden that no reasonable officer could believe they were using objectively reasonable force." *Id.* at 28. To prevail on an excessive force claim, a Plaintiff must show that "(1) an injury . . . (2) resulted directly and only from the use of force that was excessive to the

need and that (3) the force used was objectively unreasonable." *Peterson v. City of Fort Worth*, 588 F.3d 838, 846 (5th Cir. 2009) (quoting *Ballard v. Burton*, 444 F.3d 391, 402 (5th Cir. 2006)). Plaintiff argues that her injury is the direct result of objectively unreasonable force that was clearly excessive to the need. Pl.'s JMOL 12, ECF No. 351. Reasonableness is an objective standard viewed from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Plaintiff introduced evidence from her retained expert, Mr. Noble, that the actions of the Defendants fell outside of generally accepted police policies based on his review of the record, therefore, they were objectively unreasonable. Trial Transcript Volume 2 pg. 21-28, ECF No. 358. However, on cross-examination, he testified that it would not be unusual to have an officer go with a juvenile to find contraband, that Westfall failed to heed the verbal directives of the officers, and that it was generally accepted practice for one officer to use soft hand techniques to prevent Westfall from committing battery on another officer in order to deescalate the situation. *Id.* at 57-70.

Beyond the expert's opinions, Luna testified that he approached Westfall and placed his hands on her to keep her from following too close to Anderson and in doing so their legs were tangled up and they fell. Trial Transcript Volume 3 pg. 45, ECF No. 43 ("So because when I spun her around, we fell to the ground . . . "). Westfall's complaint is that Luna is liable because he "body slammed" her and threw her to the ground.

There is no allegation that his restraining her by placing his hands on her to stop her constituted *excessive* force. And that her claim is that taking her to the ground was excessive, i.e. body slam or throwing her to the ground, the jury was entitled to believe Luna's testimony that happened accidentally, and not through the application of excessive force.[5] Southlake police officers testified that the force used was reasonable under the circumstances, and the internal investigation did not find fault against any of the officers. Therefore, some evidence exists to show that the force used was objectively reasonable. Accordingly, Plaintiff's Motion for Judgment as a Matter of Law on her excessive force claim must be **DENIED**.

4. False Arrest

Plaintiff argues that "[u]nder the Fifth Circuit's mandate, because Defendants' search of the home was unreasonable, as discussed immediately above, Defendants lacked probable cause to arrest Plaintiff for interference with public duties under Section 38. 15 of the Texas Penal Code." Pl.'s Mot. JMOL 12, ECF No. 351. Plaintiff's argument for false arrest is dependent on her success on her unreasonable search, knock and talk, and excessive force claims. For the reasons stated

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[5] *See* Compl. 19, ECF 1 "Luna willfully and maliciously threw Plaintiff to the ground, despite having no basis to do so; Luna then jumped onto Plaintiff's body, needlessly smothering her torso; Luna and Trevino needlessly continued to smother Plaintiff for several minutes; and the force used by Luna was recklessly excessive and caused Plaintiff bodily injury."

above, there is legally sufficient evidence to support the jury's verdict on the search, knock and talk, and excessive force claims, accordingly, as framed by Plaintiff, the false arrest claim must also fail. Plaintiff's motion for judgment as a matter of law on her false arrest claim is **DENIED**.

5. Qualified Immunity

As a threshold matter, Plaintiff has not established that she is entitled to judgment as a matter of law on any of the underlying constitutional complaints. Accordingly, her argument that Defendants are not entitled to qualified immunity fails. However, Plaintiff maintains that the Fifth Circuit's determination that the officers were not entitled to qualified immunity at the summary judgment phase forecloses a finding of qualified immunity at trial. Pl.'s JMOL. 9, ECF No. 351. Plaintiff, argues that the Court "failed to follow the Fifth Circuit's mandate" for the applicable qualified immunity standard. Pl.'s JMOL. 9, ECF No. 351. According to the Plaintiff, "the Fifth Circuit's mandate provides that Defendants were not entitled to qualified immunity on summary judgment," and that Plaintiff is entitled to judgment as a matter of law because the "Defendants' stated reliance at trial upon an 'active investigation' is an admission that Defendants are not entitled to qualified immunity because they are plainly incompetent or knowingly violate the law." Pl.'s Mot. 10, ECF No. 351.

The law-of-the-case doctrine establishes that "an issue of law decided on appeal may not be reexamined by the district court on remand or by the appellate court on a subsequent appeal." *Coleman v. United States*, 799 F. App'x 227, 229 (5th Cir. 2020). A corollary of the law-of-thecase doctrine is the mandate rule, which prohibits a district court on remand from reexamining an issue of law or fact previously decided on appeal and not resubmitted to the trial court on remand." *Id.* (citing *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006)). The reach of these related doctrines extends only to matters decided expressly or by necessary implication. *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001).

Here, Plaintiff seems to argue that they are entitled to judgment as a matter of law on qualified immunity on one of two grounds: (1) the Fifth Circuit's opinion compels a holding that Defendants are not entitled to qualified immunity on remand or (2) the Fifth Circuit's recitation of the facts foreclosed a finding at trial of the reasonableness Defendants' actions. Pl.'s Mot. 10, ECF No. 351. The Court disagrees in both respects. Defendants were permitted to advance arguments about the reasonableness of their actions because the Fifth Circuit did not hold that Defendants *could not* be granted qualified immunity, but rather held that a genuine issue of material fact existed, thus summary judgment on the issue was inappropriate. *Westfall*, 903 F.3d at 545. On remand, the jury did not reach the issue of qualified immunity because the jury found that the Defendants did not violate the

Constitution in the first instance. *See* Jury Charge, ECF No. 344. This finding alone supports a conclusion that a reasonable officer could believe Defendants' actions were lawful.

Additionally, Defendants presented evidence that the Internal Affairs investigation for Southlake Police Department exonerated the officers of the excessive use of force, illegal search, and false arrest accusations. Trial Transcript Volume 3 pg. 74, ECF No. 359. Other Southlake police officers also testified that the actions the Officers took were typical. *Id.* Further, Plaintiff's police expert testified that some of the actions taken by the officers were generally accepted police practices, while other actions would not be "unusual" practices employed by police officers during altercations. Trial Transcript Volume 2 pg. 21-28, ECF No. 358.

Accordingly, the fact issue identified by the Fifth Circuit was "whether a reasonable officer could have concluded that police officers were performing a duty or exercising lawful authority when they entered and searched Westfall's home." *See Westfall*, 903 F.3d at 545. The foregoing is some evidence that would support a finding of qualified immunity in the officers' favor. Because Plaintiff has not established an underlying constitutional violation her argument fails, and even had the jury found a violation, Plaintiff has not established that no reasonable officer could have concluded that the police officers acted unreasonably, the Court therefore **DENIES** Plaintiff's motion for judgment as a matter of law on qualified immunity grounds.

B. Plaintiff is Not Entitled to a New Trial

Plaintiff asserts entitlement to a new trial on three grounds: (1) the Court's denial of a motion in limine, (2) the jury instruction on consent, and (3) the alleged lack of accommodation for Plaintiff's back injury. "When a movant requests a new trial 'based on the submission of prejudicial information to the jury, the district court must decide whether the error is harmless by assessing whether the error did not influence the jury, or had but very slight effect.'" *Hacker v. Cain*, 759 F. App'x 212, 219 (5th Cir. 2018). "The major policy underlying the harmless error rule is to preserve judgments and avoid waste of time. Discarding a jury verdict is extremely wasteful. Requiring a district judge to examine more evidence and re-evaluate his decision is not nearly so prodigal." *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519-20 (5th Cir. 1981). "The burden of showing harmful error rests on the party seeking the new trial." *Del Rio Distrib.*, 589 F.2d at 179 n.3.

1. Motion in Limine No. 9

Plaintiff argues that she is entitled to new trial because "the Court improperly denied Plaintiff's motion in limine No. 9 and allowed Defendants to argue for jury nullification in violation of the Fifth Circuit's mandate." Pl.'s Mot. New Trial 4, ECF No. 352. Motion in Limine No. 9 asked the Court to preclude Defendants from "offering any testimony, evidence, or argument referencing or suggesting an improper

characterization of the law regarding the search of a home under the Fourth Amendment." Pl.'s Mot. Limine 8, ECF No. 293. Specifically, Plaintiff asked the Court to preclude Defendants from arguing that they were conducting an active investigation, because Plaintiff asserted that the jury could perceive an active investigation as constitutional authority under the Fourth Amendment. *Id.* at 10. Plaintiff characterized other statements subject to the motion as improper characterizations of the law. However, many of the statements Plaintiff sought to limit fall directly within the fact questions that were submitted to the jury for resolution.[6] *See id.* Accordingly, the Court denied Motion in Limine No. 9 to allow each party to argue facts about the reasonableness (or unreasonableness) of Defendants' actions.

Plaintiff claims that the denial of this motion was error and that such error was harmful at trial. Pl's Mot. New Trial 5, ECF No. 352. Specifically, Plaintiff argues that Defendants' argument that they were conducting an active investigation caused the jury to return a verdict that is unsupported by law. *Id.* Plaintiff further argues that "throughout the trial, the Court did not inform the jury that there was no such thing as an 'active investigation' police authority." *Id.* Plaintiff argues that a jury note reveals that the jury may have based its verdict on a theory of an "active

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[6] For example, Plaintiff moved to limine the following statements: "Defendants had Plaintiff's consent," "Defendants could smell marijuana coming from the window," and "Defendants were just doing their job". Pl's Mot. Limine 8, ECF No. 293

investigation" that would have hypothetically permitted Defendants to violate Plaintiff's constitutional rights without any legal basis. Pl's Reply 3, ECF No. 352.

During deliberations, the jury sent a note to the Court asking whether "[d]uring an **active investigation** are instructions given by police officers considered [an exercise] of authority granted by law?" Jury Note #1, ECF No. 343 (emphasis added). At trial, Defendants introduced evidence supporting their position that they obtained voluntary consent from Westfall to enter the Westfall residence. Defendant Luna testified that this was an "active investigation" because it was an "in progress call" and a "criminal trespass investigation," so Defendants were called to the scene, arrived, and investigated the criminal trespass complaint within a short period of time. *See* Trial Transcript of Defendant Luna's Testimony pg. 68, ECF No. 359. Officer Anderson also testified that this was an "active investigation" because the officers were responding to a "call in progress" and the suspects of the criminal trespass had been identified. Trial Transcript of Officer Anderson pg. 266, ECF No. 359. This testimony is proper context and permissible.

Defendants argue, however, that although the "active investigation" is what brought Defendants to Plaintiff's home. Defendants renounce the Plaintiff's premise that Defendants intentionally violated constitutional rights on this basis. Defs.' Resp. 6, ECF No. 362 ("The Southlake Defendants testified that they were conducting an active investigation upon their

arrival at the Westfall residence, however, never did they testify that their investigation allowed them to violate Plaintiff's Fourth Amendment rights.")

As it relates to Plaintiff's assertion that the jury note evidences the improper use of this testimony during deliberations, Defendants argue that Plaintiff did not "request any instruction to the jury in response to the note other than to follow the instructions as they were written." *Id.* Specifically, the Court asked counsel whether there should be any further instruction to the jury in response to this note. Trial Transcript: Volume 5 pgs. 4-5, ECF No. 361. Counsel for both parties responded that the jury had all the information they need in the jury charge. *Id.* Plaintiff's counsel further responded that "this idea of the active investigation. . . . will then create kind of a third tier" or ground for the jury to find that the Defendants did not violate Plaintiff's constitutional rights. *Id.* However, Plaintiff's counsel did not request additional instructions and receded to his position that the jury was charged with the relevant legal standards and should be directed to base their conclusion on the charge. *Id.*

This was certainly a reasonable choice by Plaintiff as the jury charge instructed: "A warrantless search of Plaintiff Westfall's home is presumed unreasonable unless [Defendants] obtained Plaintiff's consent to search her home . . . or conducted a valid 'knock and talk.'" Jury Charge 6. The next page tracked the Circuit's instructions on how a knock and talk is properly carried out. Nowhere in the charge is the jury permitted to find for Defendants on the basis of an active

investigation. Accordingly, the Court instructed the jury to consider the jury charge, recall the evidence that was presented, and do their best to comply with the instructions in the charge. *Id.* Shortly after, the jury returned a unanimous verdict for the Defendants on the ground that none of the Defendants violated any of Plaintiff's constitutional rights.[7]

It is a long-standing principle that a jury is presumed to follow its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). Unless the instructions are insufficient, *United States v. McDaniel*, 436 F. App'x 399 (5th Cir. 2011), or the instruction requires the jury "to act with a measure of dispassion and exactitude well beyond mortal capabilities," *United States v. McCarter*, 316 F.3d 536, 539 (5th Cir. 2002), the jury is presumed to have followed the instructions. Here, counsel for both parties agreed that the jury charge fully and accurately instructed the jury with the appropriate grounds for reaching a verdict.

Even assuming *arguendo* that it was error for the Court to deny Plaintiff's motion in limine, Plaintiff fails to show that such error was harmful. It is Plaintiff's best guess that the jury must have found in favor of Defendants on the ground that an "active investigation" permitted willful ignorance of the Constitution

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[7] The jury charge was granulated on Question 1 as to each Defendant and each potential constitutional violation. The jury answered "no" to each subpart. Accordingly, the jury did not complete the rest of the verdict form. *See* Jury Charge, ECF No. 344.

because of her asserted entitlement to judgment as a matter of law on all other plausible grounds.[8] However, the jury is presumed to have followed the instructions, and apart from speculating that this testimony may have *potentially* skewed the jury, Plaintiff has not carried her burden to show a new trial is warranted on this ground. Accordingly, the motion for new trial on this basis is **DENIED**.

2. Jury Instruction on Consent

Plaintiff contends that the Court failed to properly instruct the jury on consent,[9] therefore, the jury's

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[8] As described above, Plaintiff's Motion for Judgment as a Matter of Law is denied on all grounds. Therefore, those arguments do not support her position that an "active investigation" theory is the only way the jury could have found for Defendants.

[9] Plaintiff states that the Fifth Circuit mandated this Court to consider *only* whether consent was an independent act of free will. However, that was not the only mandate given. The Fifth Circuit articulated necessary consecutive steps to take in the analysis, one of the steps being the independent act of free will test. In relevant part, the Fifth Circuit said,

> "[t]he officers' knock-and-talk conduct here, given the fact that they went to her home at 2:00 a.m., continued to knock on Westfall's door after she closed it, called her home repeatedly, looked through the windows of her home, and walked around her property, even after she closed the door, *may have been* an unreasonable search that rendered any subsequent consent invalid. *See*, *e.g.*, *United States v. Hernandez*, 392 F. App'x 350, 351-53 (5th Cir. 2010) (holding that "[t]he district court should have acknowledged that the officers' knock-and-talk conduct was an unreasonable search" and that there was no valid consent where the woman who allegedly gave consent did not initially answer the door, and the

verdict could only be based on an erroneous understanding of the constitutional framework. Pl.'s Mot. New Trial 6, ECF No. 352. Plaintiff argues that the Court erred in instructing the jury that "consent" is measured by a totality of the circumstances[10] "rather than" whether consent was an independent act of free will. Pl.'s Mot. New Trial 6, ECF No. 352. Plaintiff urges that the proper test for consent has three parts: (1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. *See United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002). Defendants respond that "Plaintiff is arguing for the inclusion of an instruction that was already included in the [ ] Jury Charge." Defs.' Response 6-7, ECF No. 362. Defendants are correct.

> officers then circled her trailer, banged on doors and windows, shouted that they were present, and broke the glass pane of her door before she answered it). If the district court determines that the officers' search was unreasonable for this reason, it would then need to consider whether West-fall's alleged consent was an independent act of free will. *See*, *e.g.*, *United States v. Hernandez*, 279 F.3d 302, 307 (5th Cir. 2002) (outlining the three-factor test). The district court did not consider this argument and should do so on remand.

Westfall, 903 F.3d at 545-46 (emphasis added). The jury charge followed this direction.

[10] Plaintiff refers to the 6-part test articulated in *United States v. Cooper*, 43 F.3d 140, (5th Cir. 1995), as the "totality of the circumstances" test. This test was included in the charge on the page prior to the independent act of free will test that Plaintiff claims the Court failed to include. Pl.'s Mot. New Trial 6, ECF No. 352.

The Fifth Circuit determined that on summary judgment that there were fact issues on whether the officers obtained effective consent when they initially arrived and made contact with Plaintiff. And if it concluded they did not, the officers would need to show that any subsequent consent would need to be an act of free will. The Court did not instruct the jury on one of these tests over the other. Instead, the Court instructed the jury on the factors to consider to determine if consent was voluntary and then that:

> If you find that the knock and talk was invalid, then any consent by Plaintiff Westfall must be an independent act of free will. Where there is coercion, there cannot be consent. There are three factors to consider in determining whether consent to search is an independent act of free will: (1) the temporal proximity of the officer's illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial officer misconduct.

Jury Charge 6-7, ECF No. 344.

Plaintiff cites *Hernandez* for the proposition that consent is measured by a three-factor test analyzing whether consent was an independent act of free will. *Hernandez*, 279 F.3d at 307. The threshold question for the jury was whether the initial consent was valid, and if not, whether any subsequent consent was an independent act of free will. *Id.* When a person gives consent to search, that consent "may, but does not necessarily, dissipate the taint" of a prior Fourth

Amendment violation. *United States v. Chavez-Villarreal*, 3 F.3d 124, 127 (5th Cir. 1993). The admissibility of the challenged evidence "turns on a two-pronged inquiry: 1) whether the consent was voluntarily given; and 2) whether the consent was an independent act of free will." *Jones*, 234 F.3d at 242 (citing *Chavez-Villarreal*, 3 F.3d at 127). The first prong of this inquiry "focuses on coercion, the second on causal connection with the constitutional violation." *Chavez-Villarreal*, 3 F.3d at 127. The Court followed the Fifth Circuit's precedent by instructing the jury to determine whether initial consent was voluntarily given *and* if it was not, but subsequent consent was provided, then whether that subsequent consent was an independent act of free will. *See Chavez-Villarreal*, 3 F.3d at 127. Plaintiff failed to carry her burden to show that the Court erred by including both tests in the jury charge, and even if it was error, Plaintiff failed to show that it was harmful. Accordingly, the motion for new trial on this ground is **DENIED**.

3. Plaintiff's Back Injury

Plaintiff claims that the Court prejudiced her by commenting on Plaintiff standing up during cross-examination and excusing the jury so that the Court could clarify the "misunderstanding." Pl.'s Mot. New Trial 8, ECF No. 352. During direct examination. Plaintiff stood up to testify with demonstrative evidence with the Court's permission. Trial Transcript Volume 1 pg. 180, ECF No. 357. When direct examination concluded, the Court announced a recess for lunch.

Id. When the proceedings continued after lunch, Plaintiff stood up *immediately* upon beginning cross-examination, and the Court dismissed the jury to speak with counsel. *Id.* The record reflects the following interaction:

> THE COURT: Ladies and gentlemen, this may make the case go longer, but we will give her as long as she needs to get herself comfortable.
>
> (Jury out.)
>
> THE COURT: Let me know when she is comfortable. Ma'am – Ma'am, go do whatever you need to do to get comfortable.
>
> MR. SCHMIDT: Your Honor, may I mention just one thing?
>
> THE COURT: I'm sorry?
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> MR. SCHMIDT: May I mention just one thing, Your Honor? Right before she testified, I stood right here and I said, "Your Honor, there may be some time where she needs to stand up. Is that okay with you," and you said that's fine. She did not –
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> THE COURT: Not one time and we just took an hour break.
>
> MR. SCHMIDT: Your Honor, I –
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> THE COURT: And the first few minutes on cross-examination she is standing up. Take your time. If we need to recess for the day, we can recess for the day. We will tell the jury this

is going to be a lot longer. But you need to get yourself comfortable so that we can make this case go efficiently and normal. That's all. So let me know how we're going to proceed after you've had a chance to talk to her.

MR. MELSHEIMER: Your Honor – Might we have a moment. Your Honor? And I –

THE COURT: You can have as long as you need with her.

MR. SCHMIDT: I understand, Your Honor. Respectfully, she did get up during her direct examination.

THE COURT: She got up to testify.

MR. MELSHEIMER: And she stood for a fair amount of time.

THE COURT: She got up to testify with demonstrative evidence.

MR. MELSHEIMER: Understood, Your Honor. She was still standing. Your Honor, if I can just have a moment, we will make sure the case is going very soon.

THE COURT: Yeah. Take your time.

MR. MELSHEIMER: So, Your Honor, I think we've got our – I think we're fine.

THE COURT: Let's take a few minutes and let her get comfortable before we start again.

MR. MELSHEIMER: But, Your Honor, I just – This is not a stunt and I just want – The Court, you don't know me well. I would not be

> involved in presenting a stunt. So – We're going to manage this and get the case moving consistent with what she needs to do. But I certainly don't want the Court to think that we're doing anything other than presenting the evidence fairly. Your Honor, we're ready to go forward.

Trial Transcript Volume 1 pgs. 178-180, ECF No. 357.

Plaintiff maintains that this interaction during trial was harmful error. The Court disagrees. The interaction was an administrative discussion about how to accommodate Plaintiff in the most effective way without the accommodation appearing to be a stunt, which Plaintiff's counsel seemed to agree with at the time of trial. *See* Trial Transcript 181, ECF No. 357 (Mr. Melsheimer stated "[t]his is not a stunt and I just want – the Court, you don't know me well. I would not be involved in presenting a stunt. So – we're going to manage this and get this case moving consistent with what she needs to do."). For the remainder of trial, Plaintiff did not request a break to accommodate for her back injury.

A district judge in a jury trial is "governor of the trial for purposes of assuring its proper conduct and of determining questions of law." *Quercia v. United States*, 289 U.S. 466, 469 (1933). He has the right and the duty to comment on the evidence to ensure a fair trial. *Id.*; *see also Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 585 (5th Cir. 1985). The district court judge is also "obliged to act when necessary to ensure that the trial is properly conducted and not subject to delay." *Dartez*

v. Fibreboard Corp., 765 F.2d 456, 471 (5th Cir. 1985). "The trial judge must, of course, exercise these powers in a reasonable manner by maintaining his objectivity and neutrality." *Dartez*, 765 F.2d at 471; *see also Cranberg, v. Consumers Union of U.S., Inc.*, 756 F.2d 382, 391 (5th Cir. 1985). The trial court's conduct is measured against a "standard of fairness and impartiality." *In re P & E Boat Rentals, Inc.*, 872 F.2d 642, 653 (5th Cir. 1989) (quoting *Cranberg*, 756 F.2d at 391). "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial. Ultimately the motion involves the sound discretion of the trial court." *Streber v. Hunter*, 221 F.3d 701, 736 (5th Cir. 2000) (quoting *Sibley v. Lemaire*, 184 F.3d 481, 487 (5th Cir. 1999)).

Plaintiff has not alleged that the Court acted unreasonably in its quest to conduct trial properly and without delay. The Court was willing to accommodate Plaintiff's injury, but the Court was unwilling to provide Plaintiff with unlimited discretion as to when she would be seated or when she would stand during her testimony. Without more, Plaintiff fails to meet her burden to show that it was error to instruct Plaintiff's counsel that the Court would rather take a break, if needed, than allow Plaintiff to stand up periodically during her testimony in front of the jury. Plaintiff also fails to show that if that instruction was error, that such an error prejudiced Plaintiff in a manner that

warrants a new trial. Accordingly, Plaintiffs Motion for New Trial on this basis is **DENIED**.

C. Defendants Are Not Entitled to Attorney's Fees

Defendants move for attorney's fees under 42 U.S.C. § 1988(b) because this is an action to enforce a provision under 42 U.S.C. § 1983. Defs.' Mot. Attorney's Fees 1, ECF No. 348. A prevailing party may be entitled to attorney's fees if the fees are specifically provided for by contract, statute, or equity. *Buckhannon, Bd. & Care Home, Inc. v. West Va. Dept. of H&HR*, 532 U.S. 598, 602 (2001). In an action or proceeding to enforce a provision of 42 U.S.C. § 1983, the Court has discretion to allow the prevailing party reasonable attorney's fees as part of the party's costs. *See* 42 U.S.C. § 1988(b). A defendant can be a prevailing party if the court finds that a plaintiff's suit was frivolous, unreasonable, or without foundation. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a [civil rights] case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."). "The fact that the Plaintiff ultimately loses the case is not enough to justify an award of attorney's fees to the defendant." *Swiney v. Texas*, No. SA-06-CA-0941 FB, 2008 WL 2713756 at *2, 2008 U.S. Dist. LEXIS 51522 at *5 (W.D. Tex. 2008). When determining whether a claim is frivolous, unreasonable, or groundless, a court should

consider, "[w]hether the Plaintiff established a *prima facie* case, whether the defendant offered to settle,[11] and whether the court dismissed the case or held a full trial." *Id.* (footnote not in original).

Defendants cite *Myers* to support their motion. Defs.' Mot. Attorney's Fees 5, ECF No. 348. "Myers offered no evidence at trial that Calhoun violated any of her rights and admitted that Calhoun obtained her consent to search her vehicle. Moreover, she put on no evidence that the stop of her vehicle violated the Fourth Amendment. She offered no evidence implicating the City of West Monroe." *Myers v. City of W. Monroe*, 211 F.3d 289, 293 (5th Cir. 2000). This absence of evidence is not the case here. Instead, during trial Westfall offered evidence that the officers violated her rights, but the officers contested this evidence and convinced the jury to find in their favor. The Court finds that, although unsuccessful in winning the verdict, Westfall presented evidence supporting her allegations unlike the plaintiff in *Myers*.

Defendants argue that Plaintiff failed to establish a prima facia case against the officers while Plaintiff argues that, although she eventually lost the verdict, a full trial on the merits, the five-year-long procedural history of this case, and the evidence presented at trial shows that these claims were not meritless. Defs.' Mot. Attorney's Fees 1, ECF No. 348; Pl.'s Response 4, ECF

[11] It is undisputed that settlement negotiations during this period were unsuccessful. Defendants' offer was too low, and Plaintiff's demand was too high. Defs.' Mot. Attorney's Fees 5, ECF No. 348.

No. 353. The parties disputed the merits of this case over the course of five years. The Fifth Circuit heard an interlocutory appeal and d remanded claims that required a trial. This alone establishes Plaintiff's claims were not frivolous, unreasonable, or without foundation. Given the foregoing, the Court **DENIES** Defendants' Motion for Attorney's Fees.

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Plaintiff's Motion for Judgment as a Matter of Law (ECF No. 351), **DENIES** Plaintiff's Motion for New Trial (ECF No. 352), and **DENIES** Defendants' Motion for Attorney's Fees (ECF No. 348).

SO ORDERED on this 30th day of January, 2021.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 21-10159

CONSTANCE WESTFALL,

Plaintiff—Appellant,

versus

JOSE LUNA, *Southlake Police Department Officer, In His Individual Capacity*; NATHANIEL ANDERSON, *Southlake Police Department Officer, In His Individual Capacity*; VENESSA TREVINO, *Southlake Police Department Officer, In Her Individual Capacity*,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:15-CV-874

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 23, 2023)

Before DENNIS, SOUTHWICK, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc

(FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

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* Judge Haynes did not participate in the consideration of the rehearing en banc.