

Case No. 11-5284

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ROY L. DENTON,
Plaintiff - Appellee

v.

STEVE RIEVLEY, in his individual capacity
Defendant - Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

BRIEF OF THE APPELLEE
STEVE RIEVLEY
Oral Argument Waived

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Contents.	ii
Table of Authorities	iii
Statement of Subject Matter and Appeal Jurisdiction.. . . .	1
Statement of the Issues Presented.	3
Statement of the Case.	4
Statement of the Facts	6
Summary of the Argument	12
Legal Argument:	
I. The jury’s verdict was proper in finding for Officer Rievley on Mr. Denton’s unlawful search and seizure claim and thus the District Court properly denied Mr. Denton’s Federal Rules of Civil Procedure Rule 50 motions.	
II. The District Court’s jury instruction regarding “common authority” was proper.	
III. The District Court did not improperly intimidate Mr. Denton into ceasing his cross-examination of a witness.	
Conclusion	36
Certificate of Service	38
Certificate of Compliance	39

TABLE OF AUTHORITIES

CASES

PAGE

Alsobrook v. UPS Ground Freight, Inc.,
 352 F. App'x. 1, 2 (6th Cir. 2009)
cert. denied, 130 S. Ct. 1699, 176 L. Ed. 2d 182 (U.S. 2010). 27

Arban v. W. Pub. Corp.,
 345 F.3d 390, 404 (6th Cir. 2003).. 28

Barnes v. Owens-Corning Fiberglas Corp.,
 201 F.3d 815, 822 (6th Cir. 2000).. 28, 32

Bath & Body Works v. Luzier Personalized Cosmetics,
 76 F.3d 743, 750 (6th Cir.1996). 27

Denton v. Rievley,
 353 F. App'x. 1, 7 (6th Cir. 2009).. 24, 26

Ewolski v. City of Brunswick,
 287 F. 3d 492, 501 (6th Cir. 2002).. 22, 23, 24

Fisher v. Ford Motor Co.,
 224 F.3d 570, 574 (6th Cir. 2000).. 16, 27

Georgia v. Randolph,
 547 U.S. 103, 126 S. Ct. 1515, 1517, 164 L. Ed. 2d 208 (2006), 18, 19, 20, 21, 30, 31

Haines v. Kerner,
 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972).. 36

Harlow v. Fitzgerald,
 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).. 25

Illinois v. Rodriguez,
 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148.. 17, 21

Johnson v. Weaver,
248 F. App'x. 694, 697 (6th Cir. 2007)..... 18

Jones v. Consolidated Rail Corp.,
800 F.2d 590, 592 (6th Cir.1986). 28, 32

Jones v. Federated Fin. Reserve Corp.,
144 F.3d 961, 966 (6th Cir.1998). 28

K & T Enterprises, Inc. v. Zurich Ins. Co.,
97 F.3d 171, 176 (6th Cir. 1996)..... 16

McMillan v. Castro,
405 F.3d 405, 409 (6th Cir. 2005)..... 32, 33, 34, 35

Moore v. KUKA Welding Sys. & Robot Corp.,
171 F.3d 1073, 1078 (6th Cir. 1999). 12, 17

Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.,
174 F.3d 801, 805 (6th Cir.1999). 32

Paschal v. Flagstar Bank,
297, F.3d 431, 433-434 (6th Cir. 2002). 33

Pearson v. Callahan,
555 U.S. 223, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). 25

Phelps v. Yale Security, Inc.,
986 F.2d 1020, 1023 (6th Cir.),
cert. denied, 510 U.S. 861, 114 S.Ct. 175, 126 L.Ed.2d 135 (1993). 16

Pray v. Sandusky,
49 F.3d 1154, 1158 (6th Cir.1995). 26

Roberts ex rel. Johnson v. Galen of Virginia, Inc.,
325 F.3d 776, 787 (6th Cir. 2003)..... 14, 28

S.E.C. v. Conaway,
698 F. Supp. 2d 771, 808-09 (E.D. Mich. 2010). 14, 28

Shamaeizadeh v. Cunigan,
338 F.3d 535, 548 (6th Cir. 2003). 22

Taylor v. TECO Barge Line, Inc.,
517 F.3d 372, 387 (6th Cir. 2008).. 31

United States v. Henderson,
536 F.3d 776 (7th Cir. 2008). 20, 21

United States v. Matlock,
415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974). 17, 21

United States v. Stokely,
- - - F. Supp. 2d - - -, 2010 WL 3087409 at *23 (E.D. Tenn. Aug. 5, 2010). 20

Wehr v. Ryan's Family Steak Houses, Inc.,
49 F.3d 1150, 1152 (6th Cir.1995). 16

Wells v. New Cherokee Corp.,
58 F.3d 233, 237 (6th Cir. 1995). 26

Williams ex rel. Hart v. Paint Valley Local Sch. Dist.,
400 F.3d 360, 365-66 (6th Cir. 2005). 27, 28

York v. King,
182 F.3d 920 (6th Cir. 1999).. 26

STATUTES

28 U.S.C. § 1331. 1

28 U.S.C. § 1343. 1

28 U.S.C. § 1367. 1

42 U.S.C. § 1983. 1, 4

42 U.S.C. § 1988. 1, 4

RULES

Fed. R. Civ. P. 51..... 5, 16, 25, 26

6th Cir. R. 28..... 6

STATEMENT OF SUBJECT MATTER
AND APPEAL JURISDICTION

Roy Denton and his son, Dustin Denton filed suit against Dayton City Police Officer Steve Rievley alleging, pursuant to 42 U.S.C. 1983 and 1988, an unlawful search and seizure, a violation of due process, an unlawful use of excessive force by person acting under state law, false arrest and false imprisonment. (R.1, Complaint, pp.7-9). Plaintiffs also alleged that Officer Rievley assaulted Roy Denton. (R.1, Complaint, p. 10). Jurisdiction for the federal claims was based upon 28 U.S.C. §§ 1331, 1343, and 1367 and jurisdiction for the state claims was based upon 28 U.S.C. § 1367.

This matter was initially tried before a jury from April 12, 2010 through April 13, 2010 and resulted in a mistrial. (R. 87, Minute Entry; 88, Minute Entry). The matter was retried beginning on August 23, 2010. (R.134, Minute Entry). The jury returned a verdict for the Defendant on August 25, 2010. (R.138, Jury Verdict). A final judgment was entered on August 27, 2010. (R. 140, Judgment).

On September 17, 2010, the Plaintiff/Appellant, Roy L. Denton, filed what was entitled “Plaintiff Roy L. Denton’s Motion for *Judgment Non Obstante Veredicto* (JNOV) or in the Alterative, Motion for A New Trial¹. (R.153, Motion for Judgment

¹Mr. Denton also filed a motion for an order of contempt against Steve Rievley and subsequently a motion for an expedited hearing. (R. 152, Motion for Order of Contempt; R. 164, Motion for Expedited Evidentiary Hearing). It appears that Mr. Denton has not appealed the denial of these motions.

JNOV or in the alternative, Motion for New Trial by Roy L. Denton). This motion was denied by the District Court via an order filed on February 11, 2011, with the reasons for said denial having been provided by separate Memorandum filed that same date. (R. 172, Order; R. 171, Memorandum).

Mr. Denton filed a notice of appeal on March 7, 2011. (R. 174, Notice of Appeal).

STATEMENT OF ISSUES PRESENTED²

- I. The jury's verdict was proper in finding for Officer Rievley on Mr. Denton's unlawful search and seizure claim and thus the District Court properly denied Mr. Denton's Federal Rules of Civil Procedure Rule 50 motions.
- II. The District Court's jury instruction regarding "common authority" was proper.
- III. The District Court did not improperly intimidate Mr. Denton into ceasing his cross-examination of a witness.

²Although Mr. Denton noted six issues for review in his appellate brief, and subsequently briefed four issues, Officer Rievley asserts that the three issues noted herein cover all issues noted and/or briefed by Mr. Denton.

STATEMENT OF CASE

This matter initially originated when Roy L. Denton and his son, Dustin B. Denton filed a Complaint on September 6, 2007. (R. 1, Complaint). In the original Complaint, Mr. Denton and his son alleged that Officer Steve Rievley committed constitutional violations against them, actionable under 42 U.S.C § 1983 and 1988. (R.1, Complaint, p. 1). These violations were allegedly for unlawful arrest, due process violation, excessive force, false arrest, and common law assault. (R.1, Complaint, pp. 7-10). On March 28, 2008, Mr. Denton filed an Amended Complaint alleging the same causes of actions, but in this Amended Complaint, Dustin B. Denton was dropped from the lawsuit. (R. 13, Amended Complaint).

This case was initially tried before a jury from April 12, 2010 through April 13, 2010. (R.87, Minute Entry; R.88, Minute Entry). This trial resulted in a mistrial. (R.88, Minute Entry). The matter was retried beginning on August 23, 2010. (R.134, Minute Entry). At the second trial, only two claims were presented to the jury. These claims were (1) whether Officer Rievley was liable to Mr. Denton for arresting him inside his home and, (2) whether Officer Rievley was liable to Mr. Denton for an alleged unlawful search and seizure inside Mr. Denton's home. (R.138, Jury Verdict). The jury returned a verdict for the Officer Rievley on August 25, 2010 on both issues. (R. 138, Jury Verdict).

On September 17, 2010, the Plaintiff/Appellant, Roy L. Denton, filed what was entitled "Plaintiff Roy L. Denton's Motion for *Judgment Non Obstante Veredicto* (JNOV) or in the Alterative, Motion for A New Trial. (R.153, Motion for Judgment JNOV or in the alternative, Motion for New Trial by Roy L. Denton). This motion was denied by the District Court via an order filed on February 11, 2011, with the reasons for said denial having been provided by separate Memorandum filed that same date. (R. 172, Order; R. 171, Memorandum).

Mr. Denton filed a notice of appeal on March 7, 2011. (R. 174, Notice of Appeal). Although it is difficult to ascertain exactly what issues Mr. Denton is appealing, Mr. Denton made clear that he is not appealing the jury's verdict as to his unlawful arrest claim. (Appellant's Brief, p. 3).

STATEMENT OF FACTS³

Initially, Officer Rievley generally objects to the Plaintiff's statement of facts for two reasons. One, Mr. Denton often cites the record from the first trial as support for his factual summary. For example, on page two of his brief, Mr. Denton cites (apparently as support for the first two paragraphs of his factual summary) "R. 122, Tr. Jury Trial 4/12/10, pp. 1-81." As it is the verdict of the second trial that is now on appeal, such citations to the first trial are improper.

Second, Mr. Denton notes numerous facts in his summary but often fails to cite to the record on such. For example, the last paragraph of page two of Mr. Denton's brief, which continues on to page three, contains no citation to the record at all.

Although pro se parties are generally given some leeway in the submission of appellate briefs, Rule 28 of the Sixth Circuit Rules requires that "A brief must direct the court to those parts of the record to which the brief refers." Mr. Denton has failed to properly cite to the appropriate record and his failure to do so has added to Officer Rievley's difficulty in responding thereto. Officer Rievley respectfully requests that those portions of Mr. Denton's brief that cite to the first trial, as well as those portions that do not contain any citation to the record, should be stricken.

³As Mr. Denton has only appealed on issues related to the jury's finding regarding his unlawful search and seizure claim, the facts noted herein relate primarily to this one claim.

As to the facts that gave rise to this matter, on the date in question, Officer Rievley received a call on his radio to respond to the local jail due to a subject having come into the jail saying he had been assaulted. (R. 166, Direct Examination of Steve Rievley, p. 5, ll. 7-12). Upon arrival at the jail, Officer Rievley spoke with the complainant, Brandon Denton (“Brandon”)⁴. (R. 166, Direct Examination of Steve Rievley, p. 6, ll. 6-8. Brandon is Roy Denton’s son. (R. 166, p. 7, l. 17). Brandon stated that he and Dustin Denton (“Dustin”), his brother, had argued and that ultimately Dustin had assaulted him. (R. 166, Direct Examination of Steve Rievley, p. 7, ll. 15-16). Brandon further told Officer Rievley that this had upset Roy Denton, who grabbed Brandon’s neck, strangled him and made him leave the property. (R. 166, Direct Examination of Steve Rievley, p. 7, ll. 17-19). Brandon told Officer Rievley that his eyeglasses had been broken during the assault and that they were still at the Denton residence. (R. 166, Direct Examination of Steve Rievley, p. 7, ll. 19-21)

When Officer Rievley first encountered Brandon at the jail Brandon had been crying, was out of breath and “was scared to death.” (R. 166, Direct Examination of Steve Rievley, p. 7, ll. 22-25). Officer Rievley also observed a large abrasion on Brandon’s forehead, redness on both arms, red marks on the bottom of his neck and

⁴Due to their being three persons with the surname “Denton” involved in this matter, counsel will refer to Roy Denton’s two sons by their respective first names, “Dustin” and “Brandon” for clarity.

another red mark below his chin (also on his neck). (R. 166, Direct Examination of Steve Rievley, p. 8, ll. 6-10). In an attempt to confirm Brandon's story, Officer Rievley contacted one of Brandon's co-workers, who advised Officer Rievley that she had taken Brandon home around midnight and that at that time she had not seen any red marks, abrasions or similar injuries on Brandon. (R. 166, Direct Examination of Steve Rievley, p. 8, ll. 15-25 and p. 9, ll. 1-5).

Officer Rievley, along with three other officers, then went to the home of Mr. Denton. (R. 166, Direct Examination of Steve Rievley, p. 14, ll. 22-24). Officer Rievley took the lead once the officers arrived at the scene. (R. 166, Direct Examination of Steve Rievley, p. 15, ll. 8-9). As Officer Rievley got out of his car, he saw Mr. Denton inside the residence walking toward the door of his house. (R. 166, Direct Examination of Steve Rievley, p. 15, ll. 15-18). As Officer Rievley approached the house, Mr. Denton walked out of the house. (R. 166, Direct Examination of Steve Rievley, p. 16, ll. 9-10). Officer Rievley then asked Mr. Denton what had happened with Mr. Denton's son Brandon, to which Mr. Denton responded "I don't have a son named Brandon." (R. 166, Direct Examination of Steve Rievley, p. 17, ll. 7-11). At some point during this encounter Mr. Denton told Officer Rievley something to the effect of "You don't have a warrant. Get off my property." (R. 166, Direct Examination of Steve Rievley, p. 18, ll. 18-20).

As the above dialogue was taking place, Officer Rievley saw Brandon's broken eyeglasses on the front porch. (R. 166, Direct Examination of Steve Rievley, p. 17, ll. 12-13). Officer Rievley further observed that Mr. Denton appeared to be intoxicated and that he smelled alcohol on Mr. Denton's person. (R. 166, Direct Examination of Steve Rievley, p. 19, ll. 18-24). During this confrontation, although Mr. Denton was not physically uncooperative, Officer Rievley testified that he was very argumentative. (R. 166, Direct Examination of Steve Rievley, p. 20, ll. 18-20).

Officer Rievley ultimately placed Mr. Denton under arrest for domestic assault. (R. 166, Direct Examination of Steve Rievley, p. 21, ll. 10 - 11). Officer Rievley handcuffed Mr. Denton and then, with the help of Officer James Woody, placed him into a patrol car. (R. 166, Direct Examination of Steve Rievley, p. 22, ll. 15-17). Officer Woody transported Mr. Denton to the jail while Officer Rievley remained at the Denton residence. (R. 166, Direct Examination of Steve Rievley, p. 22, ll. 12-17).

Subsequently, Deputy Gerald Brewer, another officer at the scene entered Mr. Denton's home and walked down the hallway. (R. 166, Direct Examination of Steve Rievley, p. 22, ll. 20-22). Officer Rievley testified that he did not know why Deputy Brewer entered the home or what he had seen. (R. 166, Direct Examination of Steve Rievley, p. 22, ll. 23-24). Nonetheless, this concerned Officer Rievley because he had information that there was another suspect in the home who was reportedly intoxicated and that there were weapons in the home. (R. 166, Direct Examination

of Steve Rievley, p. 23, ll. 2-7). Due to his concern for Deputy Brewer's safety, Officer Rievley followed him into Mr. Denton's home. (R. 166, Direct Examination of Steve Rievley, p. 24, ll. 20-25).

After entering the home, Officer Rievley observed Dustin on his knees "going into a duffel bag." (R. 166, Direct Examination of Steve Rievley, p. 25, ll. 1-3). Despite being given verbal commands to stop going through the bag, Dustin continued to do so. (R. 166, Direct Examination of Steve Rievley, p. 25, ll. 12-16). Due to Dusty's failure to comply with the verbal commands, Officer Rievley drew his weapon. (R. 166, Direct Examination of Steve Rievley, p. 25, ll. 22-25). Only then did Dustin cease going through the duffle bag. (R. 166, Direct Examination of Steve Rievley, p. 26, ll. 6-7). Officer Rievley thereafter handcuffed Dustin and walked him to the front of the house. (R. 166, Direct Examination of Steve Rievley, p. 26, ll. 8-11).

Subsequently, Officer Rievley called the jail to speak with Brandon because he had told Officer Rievley that he had some personal items in the residence that he needed. (R. 166, Direct Examination of Rievley, p. 26, ll. 18-25). After describing the items and telling Officer Rievley where in the home they were located, Officer Rievley retrieved those items. (R. 166, Direct Examination of Steve Rievley, p. 26, ll. 18-25 and p. 27, ll. 1-6). Officer Rievley did not go into any other area of the home other than where Brandon advised him his things were located and did not

remove any other items from the home. (R. 166, Direct Examination of Steve Rievley, p. 27, ll. 7-15). Subsequently, Officer Rievley locked the door to the home and transported Dustin to the jail. (R. 166, Direct Examination of Steve Rievley, p. 27, ll. 23-25 and p. 28, ll. 1-5).

As to why he retrieved Brandon's things from inside the home, Officer Rievley testified that it was his understanding that Brandon lived at the residence with his father. (R. 166, Direct Examination of Steve Rievley, p. 28, ll. 9-12). This was based, at least in part, on the fact that Brandon had specifically told him that he lived with his father. (R. 166, Direct Examination of Steve Rievley, p. 28, ll. 13-17). Officer Rievley further testified that Brandon had listed his father's address as his address on his statement regarding the assault. (R. 166, Direct Examination of Steve Rievley, p. 30, ll. 21-25 and p. 31, ll. 3-10). Officer Rievley testified that there was no doubt in his mind that he had Brandon's permission to remove his belongings from the home. (R. 166, Direct Examination of Steve Rievley, p. 28, ll. 18-21).

SUMMARY OF ARGUMENT

This matter was tried before a jury during which Mr. Denton represented himself pro se. The only two claims presented to the jury were whether Officer Rievley falsely arrested Mr. Denton inside his home and whether Officer Rievley committed an unlawful search and seizure of the Denton residence. (R. 138, Jury Verdict). The jury returned a verdict in favor of Officer Rievley on both claims. (R. 138, Jury Verdict). Mr. Denton has only appealed the jury's verdict as to his claim of unlawful search and seizure. (Appellant's Brief, p. 3). As such, the issues involved herein pertain only to this claim.

Although it is not entirely clear from Mr. Denton's brief, it appears that his primary issue for appeal is that the verdict should be set aside (and thus that the District Court's failure to grant his Rule 50 motions was improper) due to the fact that, given the evidence as presented, no reasonable juror could have found for Officer Rievley on Mr. Denton's unlawful search and seizure claim. However, in order for Mr. Denton to show that the jury's verdict should be overturned, Mr. Denton must show "that no reasonable juror could have found for the nonmoving party." *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078 (6th Cir. 1999). Despite Mr. Denton's contention otherwise, the record shows that there was ample proof from which a jury could find for Officer Rievley.

The evidence reveals that Officer Rievley entered Mr. Denton's home lawfully as he had permission to do so, or at least reasonably believed he had such permission, from Mr. Denton's son, Brandon. This permission was given in conjunction with Brandon's request that Officer Rievley retrieve certain of his personal items from the residence. Also, as noted by the District Court, when Officer Rievley first entered the home, there existed at the time exigent circumstances, namely the safety of another officer. Lastly, and in relation to the above, a jury could have certainly found that Officer Rievley acted reasonably given the law and facts as they existed at the pertinent time and thus that Officer Rievley was entitled to qualified immunity.

Relatedly, and intertwined with Mr. Denton's general claim regarding the sufficiency of the evidence, Mr. Denton appears to assert two distinct errors of the District Court. One, that the District Court provided improper or incomplete jury instructions and, two, that the District Court intimidated Mr. Denton, which caused him to prematurely cease his questioning of his son Brandon and possibly tainted the jury against him.

As to the first of Mr. Denton's assignments of error, the improper jury charge, Mr. Denton alleges that the District Court failed to properly instruct the jury regarding the concept of "common authority." However, Mr. Denton cannot show that he properly submitted an appropriate charge regarding "common authority" or that he properly objected to the charge as provided by the Court. Regardless of such,

the charge was proper. Further, even if Mr. Denton could show that the charge was not as complete as he would have liked, he cannot show that such, as a whole, was “confusing, misleading and prejudicial.” *S.E.C. v. Conaway*, 698 F. Supp. 2d 771, 808-09 (E.D. Mich. 2010), citing *Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 787 (6th Cir. 2003).

Lastly, regarding Mr. Denton’s allegation that the District Court improperly intimidated him in front of the jury, the record simply does not establish such. The record shows that the District Court treated Mr. Denton with patience and considerable leniency. As to the specific incident complained about by Mr. Denton, the record shows that Mr. Denton was talking over the District Court, which the District Court appropriately admonished.

In sum, the record reflects that a reasonable jury could have, and in fact did, find for the Defendant, Steve Rievley on Mr. Denton’s unlawful search and seizure claim. The record further shows that there was no reversible error committed in this matter and that the jury’s verdict in favor of the Defendant should be affirmed.

ARGUMENT⁵

I. The jury's verdict was proper in finding for Officer Rievley on Mr. Denton's unlawful search and seizure claim and thus the District Court properly denied Mr. Denton's Federal Rules of Civil Procedure Rule 50 motions.

This matter was tried before a jury on August 23, 2010 through August 25, 2010. (R. 134 - 136, Minute Entries). Ultimately, the jury rendered a verdict for the Defendant, Steve Rievley, on Mr. Denton's claim for false arrest and on his claim of unlawful search and seizure. (R. 138, Jury Verdict). On September 17, 2010, Mr. Denton filed a motion entitled "Plaintiff Roy L. Denton's Motion for *Judgment Non Obstante Veredicto* (JNOV) or in the Alterative, Motion for A New Trial"⁶. (R.153, Motion for Judgment JNOV or in the alternative, Motion for New Trial by Roy L. Denton).

⁵At the outset, Officer Rievley would note that while counsel believes that the issues raised by Mr. Denton have been adequately responded to herein, Mr. Denton's brief is at times difficult to follow. Further, although Mr. Denton notes on page two of his brief six issues for review, Mr. Denton only briefs four issues. Of these four, the first two are iterations on Mr. Denton's general claim that a reasonable jury could not have found for Officer Rievley on his unlawful search and seizure claim.

⁶Mr. Denton also filed a motion for an order of contempt against Steve Rievley and subsequently a motion for an expedited hearing. (R. 152, Motion for order of Contempt against the defendant or in the alternative motion for extraordinary relief; R. 164, Motion for Expedited Evidentiary Hearing and to grant or deny plaintiff's Motion JNOV as to re 153, 152 by Roy L. Denton). It appears that Mr. Denton has not appealed the denial of these motions.

Although Mr. Denton included as an issue for appeal on the form provided for pro se appellants that the District Court erred in denying his motion JNOV⁷ and in denying his motion for new trial, Mr. Denton has not specifically briefed these issues, although such are intertwined in the issues Mr. Denton does brief. Thus, out of an abundance of caution, Officer Rievley herein would show that the jury's verdict was proper, and thus that the District Court's denial of Mr. Denton's post-trial motions was proper.

Since the District Court's denial of Mr. Denton's Rule 50 motion involves a question of law, this Court should review such de novo. *Fisher v. Ford Motor Co.*, 224 F.3d 570, 574 (6th Cir. 2000). As this matter is based upon federal question jurisdiction, the standard of review is as follows:

In a federal question case, the standard of review for a Rule 50 motion based on sufficiency of the evidence is identical to that used by the district court. The evidence should not be weighed. The credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury. Instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant. *Wehr v. Ryan's Family Steak Houses, Inc.*, 49 F.3d 1150, 1152 (6th Cir.1995); *Phelps v. Yale Security, Inc.*, 986 F.2d 1020, 1023 (6th Cir.), *cert. denied*, 510 U.S. 861, 114 S.Ct. 175, 126 L.Ed.2d 135 (1993).

⁷Although Mr. Denton styled his motion as a Motion for JNOV, such appears to be a Rule 50 motion pursuant to the Federal Rules of Civil Procedure.

K & T Enterprises, Inc. v. Zurich Ins. Co., 97 F.3d 171, 176 (6th Cir. 1996). In other words, “Judgment as a matter of law is appropriate only when there is a complete absence of fact to support the verdict, so that no reasonable juror could have found for the nonmoving party.” *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073, 1078 (6th Cir. 1999). With such in mind, the record shows that the jury verdict was proper and that the District Court properly denied Mr. Denton’s motion for judgment as a matter of law.

Common Authority

The Fourth Amendment to the United States Constitution guarantees a person’s right to be free from unreasonable searches and seizures. U.S. Const. Amend. IV. However, as stated in *Georgia v. Randolph*, 547 U.S. 103, 126 S. Ct. 1515, 1517, 164 L. Ed. 2d 208 (2006):

The Fourth Amendment recognizes a valid warrantless entry and search of a premises when the police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, and no present co-tenant objects. *Matlock, supra*, at 170, 94 S.Ct. 988; *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148.

Such “common authority” searches are valid even if it is later determined that the consenting party did not have common authority over the premises so long as the officer reasonably believed the consenting person had such authority. *Rodriguez*, at

497 U.S. 189, 110 S.Ct. 2801. As to such a reasonable belief, “An objective standard applies, and the search is valid if the officers reasonably could conclude from the facts available to them that the third party had authority to consent to the search.”

Johnson v. Weaver, 248 F. App'x. 694, 697 (6th Cir. 2007).

In the present matter, the record shows clearly that Officer Rievley had a reasonable belief that Brandon Denton had “common authority” over the home in question. Officer Rievley testified he always thought that Brandon lived at the Denton residence and that Brandon Denton specifically told him that he lived at the home. (R. 166, Direct Examination of Steve Rievley, p. 26, ll. 20-21; p. 28, ll. 13-17). Brandon Denton noted on his written statement that he lived at the same address as his father. (R. 166, Direct Examination of Steve Rievley, p. 30, ll. 21-25 and p. 31, ll. 1-10). Officer Rievley’s belief that Brandon lived at the home was apparently well-founded as he found Brandon’s personal items in the home where Brandon said they were located. (R. 166, Direct Examination of Steve Rievley, p. 27, ll. 2-6). Officer Rievley also testified that there was no doubt in his mind that he had Brandon’s permission to remove his belongings from the Denton family home. (R. 166, Direct Examination of Steve Rievley, p. 28, ll. 18-21).

Although Mr. Denton claims that pursuant to the Supreme Court’s holding in *Randolph*, his failure to consent rendered any consent given by Brandon to be null,

Mr. Denton misconstrues the applicable jurisprudence and his reliance on *Randolph* is misplaced. In *Randolph*, the Supreme Court held that when one with authority over the residence *is present* and objects, such trumps the consent given by another person with common authority. However, the Supreme Court notes, specifically:

[I]f a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not part of the threshold colloquy, loses out. Such formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when no fellow occupant is on hand, the other according dispositive weight to the fellow occupant's expressed contrary indication. Pp. 1527-1528.

Randolph, at 547 U.S. 105; 126 S. Ct. at 1518. At the pertinent time, Mr. Denton was not present at the home as he had been arrested on a charge of domestic assault. Thus, in Mr. Denton's absence, the consent given by Brandon Denton, whom Officer Rievley reasonably believed had authority to provide such consent, was valid. Further, no evidence was presented to the jury to establish that Mr. Denton was arrested to avoid a possible objection from him regarding consent to enter the residence.

There is also no showing in the record that Mr. Denton actually refused Officer Rievley consent to enter the home. Officer Rievley testified that the only statement

given by Mr. Denton as to the police presence on his property was his statement to the effect, “You don’t have a warrant. Get off my property.” (R. 166, Direct Examination of Steve Rievley, p. 18, ll. 18-20). However, from the record it appears this statement was made generally after the officers arrived, not in response to any request for consent to search the home. As noted by the District Court, in order for one occupant’s refusal to consent to search to trump the consent of another with common authority over the premises, that “refusal must be [] plain.” (R. 171, Memorandum, p. 13), citing *United States v. Stokely*, --- F. Supp. 2d ---, 2010 WL 3087409 at *23 (E.D. Tenn. Aug. 5, 2010).

Even if any alleged refusal of consent on the part of Mr. Denton was made plain to Officer Rievley, such does not render invalid Brandon’s consent once Mr. Denton was no longer on the premises consciously objecting to the search. As noted by the District Court, citing *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008), the opinion in *Randolph* does not create a rule of continuing objection. (R. 171, Memorandum, p. 15) (but also noting that the law is not settled on this issue).

In the *Henderson* case, the Court frames the issue as follows:

Among the questions left unanswered by *Randolph* is the one presented here: Does a refusal of consent by a “present and objecting” resident remain effective to bar the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer “present and objecting”?

Henderson, 536 F.3d at 781. In that case, the police officers arrived at the scene pursuant to a domestic relations call. While the officers were speaking with the victim (the defendant's wife), her teenage son arrived and provided the officers with a key to the residence. The officers used the key to gain entry into the residence, where they were confronted with the defendant who stated "[g]et the [expletive] out of my house." *Henderson* 536 F.3d at 777-78. The Court considered this a refusal of consent to search. The Defendant was subsequently arrested. Thereafter, his wife consented to a search, during which the officers found contraband for which the defendant was ultimately charged.

The Court, after discussing a split among the 8th and 9th Circuits, upheld the search and noted:

Our conclusion, like the Eighth Circuit's, implements *Randolph's* limiting language and the Court's stated intent to maintain the vitality of *Matlock* and *Rodriguez*. Absent exigent circumstances, a warrantless search of a home based on a cotenant's consent is unreasonable in the face of a present tenant's express objection. Once the tenant leaves, however, social expectations shift, and the tenant assumes the risk that a cotenant may allow the police to enter even knowing that the tenant would object or continue to object if present. Both presence *and* objection by the tenant are required to render a consent search unreasonable as to him.

Henderson, 536 F.3d at 785.

In the present matter, there were clearly facts for which the jury could find that Brandon Denton gave consent to the extremely limited search and that Officer Rievley reasonably relied upon this consent.

Exigent Circumstances⁸

The record reflects that there were exigent circumstances during the occurrence in question, which in addition to the “common authority” doctrine, would have justified the warrantless entry of Officer Rievley into the home of Mr. Denton. As pointed out by the District Court, warrantless entries are permitted under exigent circumstances wherein “there are real and immediate and serious consequences that would certainly occur were a police officer to postpone action to get a warrant.” (R. 171, Memorandum, p. 11)(citing *Shamaeizadeh v. Cunigan*, 338 F.3d 535, 548 (6th Cir. 2003) (citing *Ewolski v. City of Brunswick*, 287 F. 3d 492, 501 (6th Cir. 2002)). Also as noted by the District Court, there are three types of circumstances that typically constitute exigent circumstances:

⁸The second section of Mr. Denton’s brief deals with what Mr. Denton refers to as the District Court’s error in determining an issue for the first time. However, it appears that what Mr. Denton is actually arguing is that the District Court was incorrect in relying on the “exigent circumstances” or “ cursory safety check” exception to warrantless searches and seizures. Officer Rievley acknowledges that the jury charges did not address this exception, although such did not affect the ultimate outcome of the trial nor should the absence of such an instruction result in the overturning of the jury’s verdict.

“(1) when the officers were in hot pursuit of a fleeing suspect; (2) when the suspect represented an immediate threat to the arresting officers and public; [and] (3) when immediate police action was necessary to prevent the destruction of vital evidence or thwart the escape of known criminals.” (Citation omitted).

(R. 171, Memorandum, p.11), citing *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002).

In the present matter, the record shows that Officer Rievley initially entered the residence due to his concern for a fellow officer who entered the residence before he did. Officer Rievley’s testimony is as follows:

Q. All right. Now, during this period of time did anything else occur that caught your attention?

A. Yeah. I saw Deputy Brewer actually enter the house and walk down a hallway, which is kind of a straight line from the door. You just make a straight line down into the hallway. Of course I had no idea what he had seen or what actually had taken place. I just knew obviously he had seen something. He wouldn’t just simply stroll into a house without a reason.

Q. Was that a concern to you?

A. Yeah. Absolutely.

Q. Why so?

- A. Well, we knew there was another subject that was reportedly drunk. And with the weapons in the house, I had no idea what was about to take place.

(R. 166, Direct Testimony of Steve Rievley, p. 22, ll. 18-25 and p. 23, ll. 1-7). Further, as noted by the District Court, Officer Rievley, based on information provided to him, had reason to suspect that a short time prior to the officers' arrival a heated argument had taken place, violence had occurred and alcohol had been consumed. (R. 166, Direct Examination of Steve Rievley, p. 7, ll. 15-21 and p. 24, ll. 2-5). Officer Rievley also had reason to suspect that weapons were located in the home. (R.166, Direct Examination of Steve Rievley, p. 24, ll. 6-12). As further support for Officer Rievley's actions, after he entered the home he found Dustin searching through a duffle bag, which was clearly suspicious activity.

Given these facts, Officer Rievley could have reasonably suspected that Dustin "represented an immediate threat to the arresting officers and public" such that entering the home in support to assist another officer was warranted. *Ewolski* 287 F.3d at 501.

Qualified Immunity

It is also important to note the doctrine of qualified immunity in this matter and its potential effect on the jury. The instruction provided to the regarding qualified immunity reads as follows:

You must consider whether the defendant's conduct was objectively reasonable in light of the legal rules clearly established at the time of the incident in issue. If defendant's conduct was objectively reasonable, then defendant is not liable.

(R. 177, p. 14, ll. 4-8).

Generally, the doctrine of qualified immunity:

protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009).

Further, "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, at 129 S. Ct. 815 (citations omitted).

As to the standard, this Court has noted:

"The standard is one of objective reasonableness, analyzing claims of immunity on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendant[s] position could have believed that his conduct was lawful, in light of clearly established law and the information he possessed."

Denton v. Rievley, 353 F. App'x. 1, 4 (6th Cir. 2009), citing *Pray v. Sandusky*, 49 F.3d 1154, 1158 (6th Cir.1995).

It is important to note that at this juncture the issue for the Court is not whether qualified immunity is appropriate, but whether the jury verdict was proper in light of

qualified immunity. As noted above, judgment as a matter of law, “should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant.” *K & T Enterprises, Inc.*, 97 F.3d at 176. In the present matter, a reasonable jury could have certainly found that Officer Rievley “believed that his conduct was lawful, in light of the clearly established law and the information he possessed.” *Denton*, 353 F. App’x at 4.

For the reasons above, Officer Rievley asserts that the findings of the jury, even if the issue of exigent circumstances is removed from the equation, were proper. Thus, Officer Rievley asserts that the jury verdict, and the decision of the District Court to deny Mr. Denton’s Rule 50 motions, should be affirmed⁹.

II. The District Court’s instruction regarding “common authority” was proper.

⁹Although Mr. Denton does not raise such as a specific issue, Mr. Denton, at p. 28 of his brief, requests this Honorable Court to remand this case to the District Court for an evidentiary hearing regarding certain testimony of Officer Rievley, which Mr. Denton contends was perjury. Mr. Denton’s general allegation appears to be that certain telephone records reveal that Officer Rievley did not contact Brandon on the night in question, contrary to what Officer Rievley testified to. Unfortunately, Mr. Denton was unable to introduce those records due to his lack of knowledge regarding admissibility and authenticity. However, as noted by the District Court at page five of its Memorandum, despite Mr. Denton’s being unable to introduce the records he contends establish that Officer Rievley testified untruthfully, he used those records on cross-examination and at least made the jury aware of such. (R. 171, Memorandum). Apparently the jury simply disregarded such. In any event, it is well-settled that “credibility and factual determinations are properly left for the jury to resolve.” *York v. King*, 182 F.3d 920 (6th Cir. 1999), citing *Wells v. New Cherokee Corp.*, 58 F.3d 233, 237 (6th Cir. 1995).

Initially, Officer Rievley would note that although Mr. Denton presented proposed jury charges prior to the first trial in this matter (R. No. 86), there is no indication that he did so prior to the second trial. Further, a review of the jury charge conference reveals that Mr. Denton did not ask to change the wording of the “common authority” charge, or to have the charge he proposed before the first trial (R. 86) inserted. As the District Court noted, at page sixteen of its Memorandum, Mr. Denton’s objection to the Court’s “common authority” instruction was not an objection to the wording of such, but rather that the instruction should be removed in its entirety. (R.171, Memorandum, p. 16, fn 4; R. 176, pp. 7-12). As such, Mr. Denton failed to properly object to the jury charge in question.

When a charge is not properly objected to, the standard of review for such is “plain error.” See *Alsobrook v. UPS Ground Freight, Inc.*, 352 F. App'x. 1, 2 (6th Cir. 2009) *cert. denied*, 130 S. Ct. 1699, 176 L. Ed. 2d 182 (U.S. 2010), citing Fed.R.Civ.P. 51(d)(2); *Bath & Body Works v. Luzier Personalized Cosmetics*, 76 F.3d 743, 750 (6th Cir.1996). Upon a “plain error” review, the Court must “examine the proceedings in their entirety in the light of the proofs at trial, to determine whether the errors affected substantial rights.” *Alsobrook*, 352 F. App'x. at 3 (citations omitted).

Should this Honorable Court find that the jury instructions were properly objected to, which Officer Rievley denies, “Appeals as to specific jury instructions,

however, that were not given by the district court are reviewed for abuse of discretion.” *Paint Valley Local Sch. Dist.*, 400 F.3d at 365-66. Generally, jury instructions are to be “reviewed as a whole and that an issue as to instructions is a question of law that is reviewed *de novo*.” *Williams ex rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 365-66 (6th Cir. 2005), citing *Fisher v. Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir.2000). Further:

On appeal, the task of the court is not to read the instructions word for word to find an erroneous word or phrase, but rather to “review the instructions ‘as a whole in order to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision.’ ”

Paint Valley Local Sch. Dist., 400 F.3d at 365-66 (citations omitted). In order to reverse a judgment on the basis of improper jury instructions, it must be found that “the instructions, when viewed as a whole, were confusing, misleading and prejudicial.” *S.E.C. v. Conaway*, 698 F. Supp. 2d 771, 808-09 (E.D. Mich. 2010), citing *Roberts*, 325 F.3d at 787.

Further, as noted by the District Court, “A party is not entitled to a new trial based upon alleged deficiencies in the jury instructions unless the instructions, taken as a whole, are misleading or give an inadequate understanding of the law.” (R. 171, Memorandum, p. 16), citing *Arban v. W. Pub. Corp.*, 345 F.3d 390, 404 (6th Cir.

2003), citing *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 966 (6th Cir.1998). As to the duty of this Honorable Court, such:

is to ‘review jury instructions as a whole to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision.’

Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 822 (6th Cir. 2000), citing *Jones v. Consolidated Rail Corp.*, 800 F.2d 590, 592 (6th Cir.1986).

A review of the jury charge at issue reveals that it was proper, especially when taken in light of the instructions as a whole. The charge regarding “common authority” reads as follows:

A police officer may obtain consent to conduct a search either from the individual whose property is searched or from a third party who possesses common authority over that property. Common authority exists whenever a third party is entitled, for most purposes, to joint access or control of the property being searched. To possess common authority, it is not necessary that the third party to have an actual ownership interest in the property being searched. In addition, even if it is later determined the third party did not in fact possess common authority over the property being searched, the search of that property does not violate the Fourth Amendment if the police officer reasonably believed the third party had common authority.

On this claim you must first decide whether defendant proved by a preponderance of the evidence Brandon Denton gave him consent to search plaintiff's home. If you find defendant has not proven this, then you have found defendant violated plaintiff's constitutional rights. If you find defendant has proven this, you must next decide whether the defendant proved by a preponderance of the evidence defendant had a reasonable belief that Brandon Denton had common authority over

plaintiff's home. If you find defendant has proven this, then you have found defendant did not violate plaintiff's constitutional rights on this claim. If, however, you find defendant has not proven by a preponderance of the evidence it was reasonable, then you have found defendant violated plaintiff's constitutional rights.

While it is true that the charge does not delve into the nuances of the continually evolving "common authority" law (see section I, *supra*), the charge as given is an accurate statement of the rule of common authority, especially as applied to the facts of this matter.

From his brief, it appears that Mr. Denton is asserting that the contested charge should have included language from the *Randolph* matter. However, such language does not accurately fit the facts of this matter for two reasons. The first is that Mr. Denton, although he initially told the officers, "You don't have a warrant. Get off my property," did not specifically refuse the officers consent to search his residence. (R. 166, Direct Examination of Steve Rievley, p. 18, ll. 18-20).

Second, at the time of the entry into the residence, the record reflects that Mr. Denton had already been arrested and thus could not have refused consent to search the residence. As discussed *supra*, herein, as to any potential objection of Mr. Denton, the Supreme Court's language in *Randolph* is on point. As the Supreme Court stated, "If that potential objector is 'nearby but not invited to take part in the threshold colloquy,' on the other hand, that potential objector 'loses out,' and the

search will be deemed valid.” *Randolph*, at 547 U.S. 105; 126 S. Ct. at 1518. Thus, although Mr. Denton might have wanted to refuse, since he was not present, his objection was invalid in the face of the consent of another with common authority.

Also, although it is undisputed that Mr. Denton’s absence was due to his being arrested, as the Supreme Court noted in *Randolph*:

So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance specifically to avoid a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when no fellow occupant is on hand, the other according dispositive weight to the fellow occupant's expressed contrary indication.

Randolph, at 547 U.S. 122; 126 S. Ct. at 1527. In the current matter, the record reflects that Mr. Denton was arrested due to domestic violence charges, not so that he could be removed from the premises in order for Officer Rievley to gain permission to enter the residence. Further, Officer Rievley would note that the record reflects that he did not conduct an extensive search of Mr. Denton’s residence but merely obtained those personal items that were requested by Brandon. (R. 166, Direct Examination of Steve Rievley, p. 27, ll. 2-13). Had Mr. Denton’s arrest been a pretext for a search of his residence, Officer Rievley could have taken advantage of his gaining entry into the home. The evidence shows that this did not happen.

Also notable is the fact that the charge submitted by Mr. Denton at the first trial was not a correct statement of the law. (R. 86). Mr. Denton acknowledges that his

proposed charge “may have been a rather vague instruction.” Appellant’s Brief, p.

20. As noted in *Taylor v. TECO Barge Line, Inc.*, 517 F.3d 372, 387 (6th Cir. 2008):

A district court's refusal to give a jury instruction constitutes reversible error if (1) the omitted instruction is a correct statement of the law, (2) the instruction is not substantially covered by other delivered charges, and (3) the failure to give the instruction impairs the requesting party's theory of the case.”

(Citation omitted). In this matter, the requested instruction was not a correct statement of the law, was substantially covered by other included charges and did not impair Mr. Denton’s theory of the case. As such, it was properly excluded by the District Court.

In sum, the charge given by the District Court, especially in light of the charges as a whole and the evidence in the record, “adequately inform[ed] the jury of the relevant considerations and provide[d] a basis in law for aiding the jury in reaching its decision.” *Barnes*, 201 F.3d at 822, citing *Jones*, 800 F.2d at 592. As such, there is no reversible error in the District Court’s charge.

III. The District Court did not improperly intimidate Mr. Denton into ceasing his cross-examination of a witness.

A district court’s conduct during a trial should be reviewed “for an abuse of discretion.” *McMillan v. Castro*, 405 F.3d 405, 409 (6th Cir. 2005), citing *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805 (6th Cir.1999).

As to a district court's abuse of discretion, such is defined as "a definite and firm conviction that the trial court committed a clear error of judgment." *Paschal v. Flagstar Bank*, 297, F.3d 431, 433-434 (6th Cir. 2002).

The record shows that the District Court did not commit any abuse of discretion in its conducting of the trial, especially pertaining to its treatment of Mr. Denton. In fact, the record reflects that the District Court treated Mr. Denton fairly throughout the proceedings. Although Mr. Denton alleges that the District Court intimidated him such that he felt forced to discontinue the examination of his son Brandon, the record reflects that the Court allowed Mr. Denton considerable leeway in said examination, even overruling objections of defense counsel.

From a review of the pertinent portion of the record, Mr. Denton's issue appears to arise at pages 5-6 of the rebuttal testimony of Brandon Denton. (R. 168, Testimony of Brandon Scott Denton, p. 5-6) Although it is difficult to determine the context with the record as it stands, beginning at page five, line eighteen, the record reflects that Mr. Denton was arguing with counsel and, ultimately, began speaking over the Trial Court. The Trial Court simply advised Mr. Denton, "that's going to be the last time. You know what I mean?" (R. 168, Testimony of Brandon Scott Denton, p. 5, ll. 23-24). The Court proceeded to advise Mr. Denton that there could be consequences to such occurring again. (R. 168, Testimony of Brandon Scott Denton, p. 6, ll. 1-10). Notably, however, the Trial Court again overruled the

objection of counsel for Mr. Rievley and allowed Mr. Denton to continue his examination. (R. 168, Testimony of Brandon Scott Denton, p. 6, ll. 6-10). Although Mr. Denton may have felt intimidated, the record reflects that the District Court was admonishing Mr. Denton for talking over the Court, not for any improper cross-examination. Further, although Mr. Denton avers that he was too intimidated to continue his examination, it appears that Mr. Denton obtained the information from Brandon that he was attempting to obtain.

In *McMillan*, the plaintiff filed suit against her employer, alleging violations of Title VII and the Equal Pay Act. *McMillan*, 405 F.3d at 407. The District Court submitted the Title VII claim to the jury, which found for the defendant. The district court found for the defendant on plaintiff's Equal Pay Act claim and did not submit such to the jury. The plaintiff appealed on the grounds that the district court abused its discretion by questioning her in a "hostile an biased manner" and that the district court erroneously instructed the jury regarding the term "similarly situated." *McMillan*, 405 F.3d at 407-408.

This Court in *McMillan* noted that the plaintiff pointed to "several pages" in the trial transcript "where the district court extensively questioned her regarding the facts of her claims, and specific instances where the district court appeared less-than-cordial." *McMillan*, 405 F.3d at 409. As to specific examples, the Appellate court noted as follows:

For example, the district court cut McMillan's answers short on occasion, asserting that it was merely asking "a simple question." The district court also questioned whether it and McMillan were "speaking the same language," ended a line of questioning with "[t]hat's it? That's your case?," and once suggested that McMillan's attorney had "keyed" her in on an answer. The morning following McMillan's testimony, her counsel moved for a mistrial based on the district court's "onerous interrogatories." McMillan asserted that the district court "move[d] into the role of an advocate rather than the Judge." The district court responded that "[s]he wouldn't answer my question," told counsel that "[i]t's a matter of interpretation, isn't it?" and overruled McMillan's motion.

McMillan, 405 F.3d at 409. Although the Court in *McMillan* found that the District Court's tone toward the plaintiff "bordered on condescending," this Honorable Court ultimately held that the District Court's actions "did not rise to the level of demonstrating hostility or bias" and found "that the district court did not abuse its discretion." *McMillan*, 405 F.3d at 412.

In the present case the record reflects that the District Court's behavior was fair and even-handed to Mr. Denton, a pro se party, and did not in any way rise to the level of conduct noted in the *McMillan* case. In fact, while Mr. Denton was cross-examining Officer Rievley, the Defendant, the Court stated the following:

When Mr. Denton first brought this case, we had a long discussion about the problems that pro se plaintiffs have in bringing their own cases. He was advised to get an attorney. And he's done a remarkable job on his own, but I think it's pretty apparent to him now that there are some things that he is at a disadvantage, and one of the things is rules of evidence and asking questions. But that was his

choice.

(R. 142, Cross Examination of Steve Rievley, p. 25, ll. 13-20).

Although pro se litigants are generally granted some leeway in legal proceedings, such leeway cannot trump a court's ability to control the trial and to control decorum in its courtroom. See e.g. *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595, 30 L.Ed.2d 652 (1972) (holding that pleadings by pro se parties should be held to less stringent standards than those prepared by lawyers). The record in this case shows that the District Court was more than fair, and lenient, with Mr. Denton and thus committed no reversible error.

CONCLUSION

The record shows that a reasonable jury could certainly have found for Officer Rievley in this matter and thus that the Trial Court's denial of the Plaintiff's Rule 50 motions was correct. Further, there was no reversible error in either the jury charges or in the Trial Court's treatment of Mr. Denton. As such, the decision of the jury and Trial Court should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2011, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

This the 6th day of May, 2011.

Robinson, Smith & Wells

By: s/Keith H. Grant

cc: Roy L. Denton
120 6th Avenue
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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type limitations of these Rules.

1. Exclusive of the exempted portions in FRAP 32(a)(7)(B)(i) and (iii), the brief contains 8931 words in its entirety.
2. The brief has been prepared in 14-point Times New Roman typeface using WordPerfect.
3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.
4. The undersigned understands a material misrepresentation in completing this certificate of the FRAP 32(a)(7)(B)(C) and Sixth Circuit Rule 32(a), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

s /Keith H. Grant