

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 **SUMMARY ORDER**

5
6 **RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY**
7 **ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S**
8 **LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER**
9 **PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A**
10 **CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR**
11 **BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY**
12 **ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN**
13 **WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL**
14 **UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS**
15 **PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT**
16 **HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY**
17 **OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT**
18 **DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**
19

20 **At a stated term of the United States Court of Appeals for the Second Circuit, held**
21 **at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of**
22 **New York, on the 13th day of August, two thousand nine.**

23
24 PRESENT:

25 GUIDO CALABRESI,
26 BARRINGTON D. PARKER,
27 REENA RAGGI,
28 *Circuit Judges.*

29
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31 TREMAINE R. CARTER and MICHAEL FRESELLA,

32
33 *Plaintiffs-Appellees,*

34
35 -v.-

No. 08-0193-cv
SUMMARY ORDER

36
37 THE CITY OF YONKERS, P.O. RAYMOND MONTERO,
38 P.O. BRIAN MENTON, P.O. JOHN TRAYNOR,
39 P.O. MICHAEL MUELLER, P.O. ELIZABETH MORALES
40 and P.O. KEITH OLSON,

41
42 *Defendants-Appellants.*
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1 FOR APPELLANTS: Kevin J. Plunkett, DelBello Donnellan Weingarten Wise &
2 Wiederkehr, LLP, White Plains, N.Y. (Frank Rubino, Corporation
3 Counsel, City of Yonkers, *on the brief*)
4

5 FOR APPELLEES: Alan D. Levine, Kew Gardens, N.Y.
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7 Appeal from a judgment of the United States District Court for the Southern District of
8 New York (Smith, *M.J.*).
9

10 UPON DUE CONSIDERATION of this appeal, it is hereby ORDERED, ADJUDGED,
11 AND DECREED that the judgment of the District Court is AFFIRMED.
12

13 Defendants-Appellants P.O. Raymond Montero, P.O. Brian Menton, P.O. Keith Olson,
14 and P.O. John Traynor (collectively “Appellants”) appeal from a judgment of the United States
15 District Court for the Southern District of New York (Smith, *M.J.*) entered after a jury verdict
16 finding in favor of Plaintiffs-Appellees Tremaine R. Carter and Michael Fresella (collectively
17 “Appellees”) on their 42 U.S.C. § 1983 claim alleging unreasonable search and seizure in
18 violation of the Fourth Amendment. We assume the parties’ familiarity with the facts,
19 procedural history, and scope of the issues presented on appeal.

20 Appellants first contend that they were entitled to qualified immunity with respect to
21 their stop and search of Appellees. The District Court reserved the question of qualified
22 immunity with the consent of both parties, but never issued a ruling on the subject. Although
23 we have, in the past, remanded cases where a district court has failed to dispose of an issue of
24 qualified immunity, *see Francis v. Coughlin*, 849 F.2d 778, 780 (2d Cir. 1988), we have
25 declined to follow this rule where, as here, we have an “extensive factual record” at our disposal
26 and “where as a matter of law, defendants would not be entitled to qualified immunity on the
27 facts as alleged by plaintiffs.” *Jones v. Parmley*, 465 F.3d 46, 63 (2d Cir. 2006). Leaving aside
28 the question of whether the jury verdict renders the issue of Appellants’ qualified immunity
29 moot, we conclude that Appellants are not entitled to the defense.

1 On the special verdict form, the jury indicated its findings that Appellants searched
2 Plaintiffs’ car or persons or photographed their faces without consent, and that they “conducted
3 an unreasonable search or seizure by searching [Plaintiffs’] cell phone[s], searching [their]
4 person[s] beyond a pat-down, or by taking photograph[s] of their bod[ies].” We have little
5 difficulty concluding that these findings establish a Fourth Amendment violation. The extensive
6 search of Appellees, their vehicle, and/or their cell phones, along with the
7 photographing—whether alone or in combination—went well beyond what was permissible
8 under a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1, 9 (1968); *see also Michigan v. Summers*, 452
9 U.S. 692, 698-701 (1981) (identifying permissible investigative measures in *Terry* stop context);
10 *United States v. Askew*, 529 F.3d 1119, 1136 (D.C. Cir. 2008); *United States v. Place*, 660 F.2d
11 44, 52 (2d Cir. 1981). The law in this regard was clearly established and it was not objectively
12 reasonable for Appellants to conclude otherwise. In addition, the statement of an anonymous
13 speaker that “There’s guns in that truck,” which Appellants heard as Appellees’ vehicle crossed
14 the intersection near where the speaker was located, did not, as a matter of law, justify the
15 searches and photographing that occurred here. *See Florida v. J.L.*, 529 U.S. 266, 272 (2000).
16 We thus conclude that Appellants are not entitled to qualified immunity. *See Arlio v. Lively*,
17 474 F.3d 46, 51 (2d Cir. 2007).

18 Next, Appellants challenge the District Court’s denial of their motions for judgment as a
19 matter of law pursuant to Federal Rule of Civil Procedure 50. On an appeal “after a jury verdict,
20 we view the facts of the case in the light most favorable to the prevailing party.” *Kosmyinka v.*
21 *Polaris Indus., Inc.*, 462 F.3d 74, 77 (2d Cir. 2006). We set aside a jury verdict only where
22 there is “such a complete absence of evidence supporting the verdict that the jury’s findings
23 could only have been the result of sheer surmise and conjecture, or . . . such an overwhelming

1 amount of evidence in favor of the movant that reasonable and fair minded men could not arrive
2 at a verdict against him.” *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1046 (2d Cir. 1992) (internal
3 quotation marks omitted) (alteration in original). We review the District Court’s denial of
4 Appellants’ Rule 50 motions *de novo*, applying the same standards as those applied by the
5 District Court. *Advance Pharmaceutical, Inc. v. United States*, 391 F.3d 377, 390 (2d Cir.
6 2004).

7 Here, the jury weighed the testimony of the parties and their witnesses, and determined
8 that Appellees had not consented to being searched or photographed. The jury was entitled to
9 credit Appellees’ version of the facts. We see no basis for overturning their verdict. *See Posr v.*
10 *Doherty*, 944 F.2d 91, 96 (2d Cir. 1991).

11 Appellants next argue that the District Court erred in excluding evidence relating to the
12 unavailability and gang affiliation of Appellees’ co-passenger, Dacheau Brown, along with
13 evidence of Appellants’ conversations with Brown. We review a district court’s evidentiary
14 rulings for abuse of discretion. *Arlio*, 474 F.3d at 51. We conclude that the District Court did
15 not abuse its discretion in excluding this evidence, having concluded that the risk of prejudice
16 substantially outweighed the evidence’s probative value. *See Fed. R. Evid.* 403; *see also*
17 *Constantino v. Herzog*, 203 F.3d 164, 173 (2d Cir. 2000). Although the District Court changed
18 its position on this evidence, we find that the court’s subsequent curative instruction eliminated
19 the risk of prejudice. *See United States v. Bermudez*, 529 F.3d 158, 165 (2d Cir. 2008) (holding
20 in a criminal case that defendant was not substantially prejudiced by government’s summation
21 where court issued curative instruction after prejudicial comments).

22 Appellants also contend that the District Court erred in denying their motion for a new
23 trial. We review the court’s denial of Appellants’ motion for a new trial for abuse of discretion.
24 *See Medforms, Inc. v. Healthcare Mgmt. Solutions, Inc.*, 290 F.3d 98, 106 (2d Cir. 2002). A

1 motion for a new trial “ordinarily should not be granted unless the trial court is convinced that
2 the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.”
3 *Id.* (internal quotation marks omitted). Based on the evidence adduced at trial, we see no
4 miscarriage of justice, and thus conclude that the court’s denial of Appellants’ motion for a new
5 trial was not an abuse of discretion.

6 Finally, we review Appellants’ contention that the District Court erred in awarding
7 Appellees \$47,512.50 in attorney’s fees for abuse of discretion. *See Barfield v. N.Y. City Health*
8 *& Hosps. Corp.*, 537 F.3d 132, 151 (2d Cir. 2008). In calculating the reasonable hourly rate for
9 the services Appellees’ counsel rendered, the court considered the range of approved rates for
10 attorneys doing comparable work in the Southern District of New York; Appellees’ limited
11 success before the jury; and the hours counsel reasonably expended on the winning claims. *See*
12 *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 762 (2d Cir. 1998). We conclude that the District
13 Court adequately took into account “*all of the case-specific variables that we . . . have identified*
14 *as relevant to the reasonableness of attorney’s fees in setting a reasonable hourly rate,*” *Arbor*
15 *Hill Concerned Citizens Neighborhood Ass’n v. County of Albany*, 493 F.3d 110, 117 (2d Cir.
16 2007) (emphasis in original), *amended on other grounds by* 522 F.3d 182 (2d Cir. 2007), and
17 that the court’s award of attorney’s fees was well within its discretion. *See, e.g., Kassim v. City*
18 *of Schenectady*, 415 F.3d 246, 256 (2d Cir. 2005).

19 We have considered Appellants’ remaining contentions and conclude that they are
20 without merit.

21 For the foregoing reasons, the judgment of the District Court is hereby **AFFIRMED**.

22
23 FOR THE COURT:
24 Catherine O’Hagan Wolfe, Clerk

25
26 By: _____