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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ISAIAH SALVADOR ZEPEDA,
a minor, etc.,

Plaintiff and Appellant,

v.

COUNTY OF LOS ANGELES,
et al.,

Defendants and
Respondents.

B271489

(Los Angeles County
Super. Ct. No. BC450200)

APPEAL from a judgment of the Superior Court of the
County of Los Angeles, Malcolm H. Mackey, Judge. Affirmed.

Jay S. Bloom for Plaintiff and Appellant.

Hurrell Cantrall, Thomas C. Hurrell and Melinda Cantrall
for Defendants and Respondents County of Los Angeles, Joseph
Manfree and Hugo Ramos.

Isaiah Salvador Zepeda, through his guardian ad litem, sued the County of Los Angeles and Los Angeles County Sheriff's Deputies Hugo Ramos and Joseph Manfree (collectively the County) for wrongful death/excessive force after the deputies shot and killed his father, Salvador Zepeda, Jr. In a special verdict in favor of the County, the jury found the deputies' use of lethal force was not unreasonable under the circumstances. On appeal Isaiah¹ contends the trial court made several erroneous and prejudicial evidentiary rulings and defense counsel committed prejudicial misconduct during closing argument. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Encounter Between Salvador and Sheriff's Deputies

On November 30, 2008 at 2:00 a.m. Deputies Ramos and Manfree responded to a complaint of shots fired in a residential neighborhood in East Los Angeles, an area known by law enforcement to be territory claimed by the Lopez Maravilla criminal street gang. While driving a marked patrol vehicle with the lights and siren off and the brake lights deactivated to facilitate some element of surprise, Ramos noticed "a silhouetted figure" running toward the intersection of Folsom Street and Humphreys Boulevard. Ramos alerted Manfree and stopped the patrol car on an angle about 30 feet from this figure, subsequently identified as Salvador. Ramos immediately activated his spotlight to illuminate Salvador as he and Manfree unholstered their weapons and took cover behind the patrol car's open doors. What happened next was disputed at trial.

¹ Because Isaiah and Salvador share the same surname, we refer to them by their first names for clarity.

2. *The Evidence at Trial*²

a. *The County's evidence*

Deputies Ramos and Manfree testified that they had no time to identify themselves. As soon as they shined the spotlight on Salvador, he pulled what appeared to be a semiautomatic firearm from his waistband and pointed it at the deputies, both of whom immediately fired their weapons in self-defense. Salvador's gun was later determined to be a black BB gun that closely resembled a Mac-10 semiautomatic firearm. The BB gun was tested for fingerprints; none was found. The County also introduced testimony that it was common for fingerprints not to be found during forensic tests because the gun material was not conducive to recovering prints.

Detective Donna Cheek worked in the sheriff's department's homicide bureau and investigated deputy-involved shootings as part of her regular duties. Cheek testified she was notified of the shooting soon after it occurred and immediately went to the scene to investigate. She and her colleagues also interviewed the deputies and other witnesses, reviewed crime scene photographs and prepared an investigative report. Asked whether she had reached any conclusion and pursued any action

² This is the second time this case has been before us. We previously reversed summary judgment in favor of the County on Isaiah's claims for violation of Salvador's federal civil rights (42 U.S.C. § 1983), government tort/failure to summon medical care (Gov. Code, § 845.6) and battery/excessive force. (See *Zepeda v. County of Los Angeles* (Jul. 28, 2014, B246719) [nonpub. opn.].) By the time the case was given to the jury for deliberation, only the excessive force cause of action remained at issue.

following her investigation of the deputies' conduct, Cheek testified, "Our conclusion was that there was no further action to be taken on this case. The investigation was concluded. The District Attorneys had made their conclusion and that assisted us in making our conclusions that there would be no further action." The County also asked, "Was there any indication to you during the course of your investigation that the gun was planted at the scene?" Cheek responded, "No."

James Katapodis, a retired 35-year veteran of the Los Angeles Police Department, provided expert testimony that police officers responding to a shots-fired call are trained to turn off their headlights to both locate and then monitor the suspect until it is safe to make an arrest. When a suspect is found, it is reasonable and consistent with officer training to illuminate the suspect with a spotlight; it is not considered a provocative tactic. Katapodis also explained police officers are trained not to take time to identify themselves or admonish the suspect to drop the weapon if it appears the suspect is armed and prepared to shoot: "If they point a weapon at you and they are going to shoot you, by the time you get out 'drop the weapon' you are going to be shot about four or five times." Presented with a hypothetical set of facts closely resembling the version of events presented by the County, Katapodis opined the deputies' actions were necessary, appropriate and consistent with officer training.

b. *Isaiah's evidence*

Isaiah's theory of the case was that, after realizing Salvador had been unarmed, the deputies planted the BB gun to make it appear the shooting was justified. Jennie Martinez Bravo, who lived in the neighborhood where the shooting occurred, testified she ran outside after hearing gunshots and

saw Salvador lying in the street. Bravo did not see a gun near Salvador's body. She went inside her house briefly to retrieve a sweater. When Bravo returned outside, she saw a gun on the cement. She was certain the gun had not been there earlier. On cross-examination Bravo acknowledged Salvador had been a neighbor and an acquaintance whom she knew and liked. During her recorded interview with sheriff's deputies the night of the shooting, Bravo failed to say anything about the sudden appearance of the gun. At trial Bravo could not explain the reason for her omission of any statement about the gun or why a crime scene photograph showed the gun on the grass next to the curb line, not on the cement as she had repeatedly testified.

Salvador's former girlfriend (who had been pregnant with Isaiah when Salvador was killed) and his mother (Isaiah's grandmother) testified they had never seen the BB gun in the house or in Salvador's possession and he had never mentioned it.

Isaiah also argued the deputies had created a dangerous situation by shining their spotlight on Salvador without identifying themselves as police officers. Roger Alma Clark, a retired 27-year veteran of the Los Angeles County Sheriff's Department, testified as an expert on proper law enforcement standards and practices. Clark explained police are trained to identify themselves and warn a suspect—"stop or I will shoot"—whenever possible before using lethal force. Clark agreed with Katapodis that it would have been reasonable for the deputies to fire their weapons in self-defense if Salvador had pulled out the realistic looking BB gun in the manner testified to by Deputies Ramos and Manfree. However, he added, the deputies could have announced themselves by activating the patrol car's lights simultaneously with their spotlight without taking any

additional time. Using the blinding spotlight alone, Clark opined, could cause a suspect to panic and draw a weapon to scare a perceived assailant, unaware that it was law enforcement behind the spotlight.

3. *The Jury's Verdict*

The jury returned a special verdict specifically finding neither Ramos nor Manfree had used unreasonable force against Salvador.

DISCUSSION

1. *The Trial Court's Evidentiary Rulings Do Not Compel Reversal*

Prior to trial the court granted the County's motions in limine to exclude evidence of (1) a prior civil complaint made against Deputy Ramos involving his actions while on duty; (2) statements made by a witness to police the night of the shooting; and (3) evidence relating to Ramos's nonviolent character and lack of criminal record or familiarity with guns or gangs. Isaiah contends each of these rulings was erroneous and prejudicial.

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1120; see *Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 268-269 ["[a]s rulings on the admissibility of evidence, [motions in limine] are subject to review on appeal for abuse of discretion"].) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) We may reverse a judgment for the erroneous exclusion of evidence only upon a showing the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354; *People v.*

Koontz (2002) 27 Cal.4th 1041, 1091; *People v. Hansel* (1992) 1 Cal.4th 1211, 1223.)

- a. *Isaiah has forfeited his contention the court erred in excluding evidence of a prior civil complaint against Ramos for misconduct*

In response to Isaiah's discovery request pursuant to Evidence Code section 1043 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, the County disclosed a citizen complaint made by Jeffrey Robles. According to Isaiah, Robles was prepared to testify at trial that Deputy Ramos had pulled him and his companion over, pointed his gun at them and threatened to "blow [Robles's] head off" if he moved.³ Ramos then handcuffed Robles and his companion and ransacked their car looking for drugs. After finding no contraband, he let them go without a citation.

Isaiah contends Robles's proffered testimony would have shown Detective Ramos was "a hot head" with a tendency to overreact to situations, as he purportedly did here by shooting an unarmed man; and the court erred in excluding it as inadmissible character evidence under Evidence Code section 1101. Whatever merit Isaiah's contention regarding the evidence's relevance may have, the court excluded it under Evidence Code section 352, finding the Robles incident was dissimilar and any marginal

³ Although the record does not indicate when the Robles incident took place, its disclosure as part of discovery under Evidence Code section 1045 suggests that encounter occurred not more than five years before Salvador's death. (Evid. Code, § 1045, subd. (b)(1) [court shall exclude from disclosure under this section "[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought"].)

relevance was substantially outweighed by its prejudicial effect and tendency to confuse the issues. On appeal Isaiah does not address the court's Evidence Code section 352 ruling at all. Consequently, he has forfeited that contention. (See *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [issue not raised on appeal deemed forfeited]; *Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 171 [failure to address court's alternate ruling under Evidence Code section 352 results in forfeiture of that issue on appeal].)

b. *The court's ruling prohibiting Isaiah from referring to an excluded hearsay statement to challenge the basis of Detective Cheek's testimony, if error at all, was harmless*

George Sandoval claimed to have witnessed the shooting. In a recorded interview with law enforcement officers four hours after the shooting, Sandoval stated Deputies Ramos and/or Manfree had shouted freeze; Salvador raised his hands and assumed a nonthreatening posture; and the deputies shot him. (Sandoval did not mention whether Salvador had had a gun or whether the weapon had been planted). Sandoval subsequently disappeared, and Isaiah was unable to locate him despite use of a subpoena. The trial court granted the County's motion in limine to exclude any reference to Sandoval's statement, ruling the statement was inadmissible hearsay that did not satisfy a statutory exception to the hearsay rule.⁴ Subsequently, the court

⁴ In the first appeal we held Sandoval's transcribed interview, submitted by Isaiah with his opposition to the County's summary judgment motion, was inadmissible hearsay. (See *Zepeda v. County of Los Angeles*, *supra*, B246719.) Although the County and the trial court cited our decision as law of the

ruled Isaiah could not ask Detective Cheek on cross-examination whether she had considered Sandoval's statement when concluding no action was to be taken against Ramos and Manfree.

Isaiah does not challenge the court's ruling on the motion in limine. Rather, he contends that, by asking Detective Cheek on direct examination to opine on the propriety of the shooting, the County opened the door to questions whether she had considered Sandoval's statement in reaching her conclusion. Accordingly, he argues, the court's ruling prohibiting him from pursuing that line of inquiry was error. (See *People v. Townsel* (2016) 63 Cal.4th 25, 56 [“[i]t is common practice to challenge an expert by inquiring in good faith about relevant information, including hearsay, which he may have overlooked or ignored”].)

At the threshold, Detective Cheek did not testify as an expert nor did the County ask her to opine as one at trial. Rather, Cheek's direct examination was limited to questions about her own investigation, whether there was evidence that the gun had been planted and whether she had recommended disciplinary actions against the deputies.⁵ To be sure, in

case, the trial court also ruled independently that the evidence was inadmissible hearsay.

⁵ Detective Cheek's testimony provided the historic explanation for the Sheriff's Department's decision not to discipline Ramos or Manfree. She did not offer an expert opinion on the reasonableness of their actions. Accordingly, Isaiah's additional argument that the court should have excluded her testimony because she was not included on the County's list of expert witnesses, as required by Code of Civil Procedure section 2034.260, necessarily fails.

challenging the thoroughness of Cheek's investigation, Isaiah could have, without quoting Sandoval's hearsay statement, inquired whether Cheek had discovered anything during her investigation that was inconsistent with her no-action-necessary conclusion and, if so, how she reconciled that information with her ultimate view of the incident. (See Evid. Code, § 780 ["[e]xcept as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony"].) He did not pursue that line of inquiry, even though nothing in the court's hearsay ruling foreclosed it.

Moreover, even if Sandoval's hearsay statement had been admitted for the narrow purpose of challenging Detective Cheek's investigative conclusion, the jury would necessarily have been admonished not to consider that statement for the truth of the matter asserted. (Evid. Code, § 1200, subd. (b); see CACI No. 206.) Considering that limitation and the record as a whole, it is not reasonably probable that Isaiah would have obtained a more favorable result had Isaiah been permitted to question Cheek on this point. (Code Civ. Proc., § 475 [civil judgment not reversible unless appellant demonstrates prejudicial error by showing different result would have been probable had error not occurred].)

c. Salvador's lack of criminal background or experience with gangs and guns was improper character evidence

Isaiah contends the court erred in granting the County's motion in limine to exclude evidence of Salvador's lack of criminal record and his inexperience and unfamiliarity with guns or gangs. However, that proposed evidence, explicitly offered by

Isaiah to show Salvador's character (he was neither a criminal nor a gang member) and conduct in conformity with that character (he had not drawn a gun on the deputies) was properly excluded as inadmissible character evidence. (See Evid. Code, § 1101, subd. (a) ["Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion"]; *People v. Leon* (2015) 61 Cal.4th 569, 597; see also *Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 923-924 [Evidence Code section 1101 excludes evidence of character to prove conduct in a civil case because it is of slight probative value, potentially highly prejudicial, tends to distract the trier of fact from the main question of what actually happened and may result in confusion of issues and require extended collateral inquiry]; Cal. Law Revision Com. com., 29B pt. 3B West's Ann Evid. Code (2009 ed.) foll. § 1101, p. 221, par. 2 [same].)

Citing Evidence Code section 1105, Isaiah contends evidence of his lack of involvement with guns or gangs or the criminal justice system was admissible as habit or custom. (See Evid. Code, § 1105 ["[a]ny otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom"].) Contrary to Isaiah's contention, general evidence of Salvador's noncriminal background or lack of gang membership was not evidence of a consistent response to a repeated situation. (See *People v. Memro* (1985) 38 Cal.3d 658, 682, fn. 22 ["[h]abit" means a person's regular or consistent response to a repeated situation[;] "[c]ustom" means the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an

individual”]; overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2; see, e.g., *People v. Tully* (2012) 54 Cal.4th 952, 1020 [evidence that victim regularly slept in flannel pajamas was relevant and admissible as habit evidence to show that defendant had forced the victim to remove her pajamas].) Rather, it was character evidence designed to show he lacked any propensity for criminal behavior. The court did not err in excluding it. (See *Bowen v. Ryan*, *supra*, 163 Cal.App.4th at p. 926 “[i]mproper character evidence does not become admissible simply by citing to section 1105 and claiming actions in accordance with a custom or habit”].)

Isaiah also contends the court’s in limine ruling was overbroad because it prevented him from inquiring whether Salvador had owned “any” guns. Evidence that Salvador had never owned a gun, he argues, was not propensity evidence, but directly material to whether the gun found at the scene was Salvador’s or was planted. The trial court agreed with that distinction and permitted Isaiah to inquire at trial whether the gun found at the scene belonged to Salvador. In response, both Salvador’s mother and girlfriend testified the gun was not his; they had never seen it in the house; and neither had seen him with it or heard him mention it. We need not decide whether the court’s ruling prohibiting Isaiah from asking whether Salvador had owned “any” guns as opposed to “this” gun was error. Because the court permitted Isaiah to ask about the BB gun, the only gun at issue, its ruling, even if unduly restrictive, did not result in a miscarriage of justice.

*2. Defense Counsel's Remark During Closing Argument,
Even If Improper, Was Not Prejudicial*

During closing argument the County's attorney, commenting on Isaiah's expert's testimony, stated, "[Clark] said Mr. Zepeda may not have realized that he was dealing with the police, implying that some gang member in the community is going to be accosting him or assaulting him. Well, again, exercising your common sense—and most of us don't have experience in gangs—but I haven't heard and I can't even fathom a gang member shining a spotlight in a rival's face. I think they have other techniques they use besides that." Isaiah's counsel objected to the term "rival," observing there was no evidence to support an inference Salvador was a gang member. Although the court overruled the objection, it admonished the jury, "This is argument of counsel and remember, arguments of counsel are not evidence. The evidence is what you heard and this is to help guide you."

Isaiah's counsel began his rebuttal closing argument by addressing the County attorney's use of the term "rival." "Members of the jury, I just want to say at the beginning that there is no evidence at all, zero, that Salvador Zepeda was a member of any gang and to call him a rival to a gang member is totally out of line; [it] is to attempt to manipulate you and it is something that is absolutely not true."

Isaiah contends the use of the term "rival" unfairly implied to the jury that Salvador was a gang member. Even assuming the remark were susceptible to the inference Isaiah posits, the court immediately admonished the jury that counsel's remark was not evidence and that they were to remain guided solely by the evidence; and Isaiah's counsel reminded the jury there was no evidence Salvador was a gang member. While it certainly would

have been commendable for the County's attorney also to make clear that there was no evidence Salvador was a gang member and that it was not his intention to imply otherwise, viewing the record as a whole, including the court's curative instructions (see *People v. Jackson* (2016) 1 Cal.5th 269, 353 [absent some indication to the contrary, reviewing court presumes jury followed trial court's instructions]), it is not reasonably probable Isaiah would have received a more favorable judgment had the single, fleeting remark not been made. (Cf. *People v. Huggins* (2006) 38 Cal.4th 175, 206-208 [prosecutor's isolated and fleeting biblical remark was de minimus and did not prejudice defendant]; see generally *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801 [reversal in civil case for attorney misconduct during closing argument appropriate only when reasonably probable a more favorable verdict would have been reached absent the misconduct].)

3. *Isaiah's Remaining Arguments Concerning Individual and Cumulative Error Are Also Without Merit*

During direct examination of Deputy Ramos, the County's attorney asked, "Is it difficult living with the fact that you shot and killed another human being?" The court overruled Isaiah's relevance objection and instructed Ramos to limit his answer to yes or no. Ramos tearfully answered "yes."

Isaiah contends the question was irrelevant, and Deputy Ramos's emotional response, prejudicial, if not in the abstract, then at least when considered together with the court's ruling excluding the Robles evidence and the County's implication during closing argument that Salvador was a gang member. In cumulative effect, he argues, those rulings and counsel's statement enabled the County to portray Deputy Ramos as a

level-headed and emotionally sensitive law enforcement officer forced to defend himself against a gang member, rather than as an overly aggressive and emotionally insensitive officer who, consistent with past behavior, acted impulsively and recklessly when confronting an unarmed individual.

The court's narrow ruling permitting Deputy Ramos to provide a yes-or-no answer to how he felt about the shooting that was the subject of the litigation was not so unreasonable as to fall outside the court's broad discretion on such matters. As for the court's other rulings that have been properly preserved and raised on appeal, none of them, whether considered separately or together, compels reversal.

DISPOSITION

The judgment is affirmed. The County and Deputies Ramos and Manfree are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

BENSINGER, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.