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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BYFORD PETER WHITTINGHAM, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B276441 Los Angeles County Super. Ct. No. BC542732

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Law Offices of John A. Schlaff and John A. Schlaff for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, Wendy Shapero and Shaun Dabby Jacobs, Deputy City Attorneys for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Byford Peter Whittingham (plaintiff), a captain in the Los Angeles Police Department (LAPD), sued defendant and respondent the City of Los Angeles (City) claiming he had not been promoted due to retaliation for his participation in an internal affairs investigation and for votes he cast not to terminate the employment of LAPD officers in several LAPD Board of Rights proceedings—votes that were purportedly contrary to the wishes of then-LAPD Chief of Police Charles Beck. The jury found for the City on both plaintiff's causes of action, one for workplace retaliation under the Fair Employment and Housing Act (Gov. Code, § 12940 et seq.) (FEHA) and the other for whistleblower retaliation (Lab. Code, § 1102.5).

Plaintiff contends the trial court erred in excluding evidence that two other LAPD captains suffered similar retaliation after they too cast votes contrary to Chief Beck's purported wishes in Board of Rights proceedings. Although we agree with plaintiff that, as a general matter, such evidence (often termed "me too" evidence) may be admissible to show an employer's motive for an employment action, we conclude the evidence proffered here was properly excluded because the other captains' experiences were not sufficiently similar to plaintiff's experience. Plaintiff also argues the court erred in denying his motion for new trial on the grounds of jury and attorney misconduct. We conclude plaintiff's assertions of juror misconduct are not supported by any admissible evidence. We also conclude plaintiff fails to present a cognizable argument concerning attorney misconduct. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Although the court conducted an eight-day jury trial, relatively few facts are necessary to understand our decision.

Plaintiff joined the LAPD in 1988 and consistently worked his way up the ranks. In 2008, after 20 years with the LAPD, plaintiff was promoted to the rank of Captain I.

Plaintiff filed the present lawsuit in 2014 because he had not yet been promoted to Captain II or Captain III, which he alleged was due to retaliation for actions he had taken between 2008 and 2014. First, in 2011 and 2012, plaintiff sat on two Board of Rights[1] panels and voted not to terminate the employment of the officers involved—a decision plaintiff believed was contrary to the wishes of then-Chief Beck.[2] That conduct formed the basis of plaintiff's claim of whistleblower retaliation under Labor Code section 1102.5. Second, in 2013, plaintiff complained about another LAPD captain after observing her making decisions he perceived to be motivated by race. That conduct formed the basis of plaintiff's claim of workplace retaliation in violation of FEHA.

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[1] A Board of Rights hearing is an administrative proceeding at which evidence concerning allegations of serious misconduct by an LAPD officer is presented to and considered by a panel of three people—two LAPD officers and one civilian. According to the City's charter, the Chief of Police cannot terminate an officer's employment unless a Board of Rights panel makes that recommendation after hearing evidence on the charges.

[2] Chief Beck testified at trial and denied he had ever pressured an officer sitting on a Board of Rights to recommend terminating the employment of accused officers.

At trial, plaintiff testified that 54 officers with the rank of Captain I were promoted to Captain II or Captain III between 2010 and 2014, and despite his excellent qualifications and experience, plaintiff was passed over in favor of less-qualified candidates. Two months after he filed his complaint in the present case, plaintiff was promoted to Captain II. Plaintiff maintained, however, that he should have been promoted to Captain III at that time.

Witnesses for the City acknowledged plaintiff had an excellent service record and possessed many strengths that would serve him well as Captain II or III. But those witnesses almost universally acknowledged plaintiff's interpersonal skills needed improvement and impacted his advancement to some extent.

The jury found in favor of the City on both plaintiff's claims and the court entered judgment accordingly. Plaintiff then filed a motion for new trial, arguing the verdict was not supported by substantial evidence, the jurors committed misconduct and were biased against plaintiff, defense counsel committed misconduct by misrepresenting the record during closing argument, and the court erred in excluding evidence plaintiff wanted to offer concerning other LAPD captains who suffered similar retaliation in the workplace. The trial court denied the motion and this timely appeal followed.

DISCUSSION

Plaintiff asserts the court erred in three respects. First, he contends the court erred in excluding "me too" evidence by a current LAPD captain and a retired LAPD captain. Second, plaintiff argues the court erred in denying his motion for new trial on the grounds of substantial irregularity of the proceedings, namely juror misconduct. Third, plaintiff claims the judgment

should be reversed due to attorney misconduct. None of these contentions has merit.

1. The court properly excluded "me too" evidence that was not sufficiently similar to plaintiff's allegations.

1.1. Standard of Review and the Appellant's Burden on Appeal

Trial court rulings on the admissibility of evidence, whether in limine or during trial, are generally reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 196–197 ["On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion"].) "The trial court's authority is particularly broad 'with respect to rulings that turn on the relevance of the proffered evidence.' " (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 296 (*McCoy*).) " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.]" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) Moreover, "[t]he trial court's error in excluding evidence is grounds for reversing a judgment only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480; see Evid. Code, § 354; Code Civ. Proc., § 475.)

To determine whether there was an abuse of discretion in the exclusion or admission of evidence, we must consider the context in which the rulings were made. And if we find an abuse

of discretion, we next consider whether there was sufficient prejudice such that "a different result would have been probable" in the absence of such error. (Code Civ. Proc., § 475.) To accomplish these tasks, we must have a fair understanding of the evidence presented at trial. In other words, we cannot determine whether the court abused its discretion or assess whether the error was prejudicial without knowing the material facts presented to the jury. It is the appellant's duty to provide us with a full and fair statement of those facts. (Cal. Rules of Court, rule 8.204(a)(2)(C) [the appellant's opening brief must "[p]rovide a summary of the significant facts limited to matters in the record"].)

Plaintiff's opening brief is seriously deficient in this regard. It selectively presents only the evidence most favorable to plaintiff, without mentioning the substantial evidence supporting the verdict. Other courts have disparaged this ineffective strategy due to the increased burden it places on overburdened courts: "We regret that appellant's briefs have not been straightforward in their presentation of pertinent details in the record, and that appellant's arguments were fashioned on language taken out of context or on interpretations of language that could not reasonably be made by anyone who had carefully read this record. We also question the effectiveness of such an appellate strategy in light of the increasing caseload of the appellate court and the strain on the state budget caused by such appeals." (*Californians for Safe Prescriptions v. California State Bd. of Pharmacy* (1993) 19 Cal.App.4th 1136, 1156.)

In a similar vein, another court stated: "The defendant devotes the first forty pages of his brief to a general statement of the case, stating the evidence, not in the light most favorable to

the plaintiff, but in the light most favorable to him, presenting his facts in an argumentative manner and as if they were true regardless of the findings of the trial court, omitting from such statement circumstances detrimental to the defendant and circumstances favorable to the plaintiff, presenting facts and circumstances which are favorable to him which are not in evidence, but which the court had refused to admit. He could not have taken greater license if he were making an argument to the jury after the evidence was closed. This is not good practice on appeal." (*Bones v. Fusco* (1937) 21 Cal.App.2d 476, 479.)

We share these frustrations in the present case, where plaintiff's statement of facts reads more like an argument and fails to discuss, or even mention, much of the evidence presented by the City. And we note, as other courts have, such tactics negatively impact not only the respondent in the case under review but also litigants in other cases. As the court said in *Haynes v. Gwynn* (1967) 248 Cal.App.2d 149, 151, "If and when we are required to perform tasks which are properly those of appellants' counsel, we necessarily relegate farther into the background appeals waiting their turn to be decided. It is unfair to litigants thus affected that we do this."

In sum, even though plaintiff does not challenge the sufficiency of the evidence, it is impossible without a fair and accurate statement of material facts to determine (1) whether the trial court abused its discretion in excluding or admitting certain evidence and, if so, (2) whether the errors caused prejudice sufficient for a reversal. Having said this, however, we will not dispose of plaintiff's argument on the basis of waiver, though we would be justified in doing so.

1.2. "Me too" evidence may be admissible and relevant to prove an employer's state of mind in an employment retaliation case if the evidence is sufficiently similar to a plaintiff's allegations of retaliation.

"[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action. (*Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814–815; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [adopting the title VII (Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.) burden-shifting analysis of *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802–805].) Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation. (*Ibid.*)" (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042.)

Courts developed this burden-shifting process because they have recognized "it is often difficult to produce direct evidence of an employer's discriminatory intent when the employer takes a negative action against an employee or prospective employee … ." (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 754.) In *Johnson*, for example, a former employee alleged she was fired because she was pregnant.

(*Id*. at p. 747.) In opposition to the employer's summary judgment motion, the plaintiff submitted declarations by three former employees who, like plaintiff, were fired within days or weeks of informing their supervisor (who also supervised the plaintiff) they were pregnant. (*Id*. at pp. 761–763.) Citing Evidence Code section 1101, subdivision (b), the Court of Appeal concluded the declarations were admissible as evidence of the employer's discriminatory motive and intent.[3] (*Id*. at pp. 759–767.) In addition, the court stated "as a matter of law that the 'me too' evidence presented by plaintiff in the instant case is per se admissible under both relevance and Evidence Code section 352 standards. The evidence sets out factual scenarios related by former employees of defendant that are sufficiently similar to the one presented by plaintiff concerning her own discharge by defendant, and the probative value of the evidence clearly outweighs any prejudice that would be suffered by defendant by its admission." (*Id*. at p. 767.) Subsequent cases are in accord. (See, e.g., *Pantoja v. Anton* (2011) 198 Cal.App.4th 87 [reversing judgment for employer in harassment case based on erroneous exclusion of "me too" evidence under Evidence Code section 352].)

In *McCoy*, the Court of Appeal emphasized the question of admissibility of "me too" evidence is highly claim- and fact-specific. (*McCoy*, *supra*, 216 Cal.App.4th at p. 297 [noting that

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[3] *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, is distinguishable. There, the Court of Appeal held in a sexual harassment case that evidence of harassment of persons other than the plaintiff was not admissible under Evidence Code section 1101, subdivision (a), as evidence the alleged harassers had a propensity to harass women. The court did not consider whether the evidence might be admissible under subdivision (b) of Evidence Code section 1101.

"determining whether such claims are sufficiently similar to constitute relevant evidence is inherently fact intensive"].) There, the plaintiff filed a suit under FEHA against her former employer alleging, as pertinent here, she was retaliated against in her workplace after she and others filed a federal lawsuit against her employer. (*Id.* at pp. 289–291.) Prior to trial, and in response to the employer's motions in limine, the trial court excluded evidence of plaintiff's co-worker's racially derogatory remarks, evidence that other women had been subjected to sexual harassment, and evidence that other employees involved in the federal lawsuit had also been the subject of retaliation by co-workers. (*Id.* at p. 291.) The court found the evidence was irrelevant to the plaintiff's retaliation claim and, under Evidence Code section 352, found the evidence was unduly prejudicial and likely to lead to the confusion of the issues. (*Id.* at p. 296.) Although the jury found in the plaintiff's favor, the trial court granted the employer's motion for judgment notwithstanding the verdict, in part because the court found the verdict was not supported by substantial evidence. (*Id.* at p. 292.)

On appeal, the plaintiff argued the trial court erred by excluding evidence of derogatory remarks made by a co-worker about other women, sexually offensive conduct and sexual harassment of other women, and retaliation against other participants in the prior federal lawsuit. (*McCoy*, *supra*, 216 Cal.App.4th at p. 295.) With respect to the first two categories, the Court of Appeal concluded the court did not abuse its discretion by excluding the evidence. Specifically, the court noted plaintiff was allowed to present evidence of retaliation, i.e., that co-workers "screamed at her, ignored her, shunned her, excluded her and gave her confusing or inadequate instruction … .

However, … evidence of stray comments made about other women … would be excluded under Evidence Code section 352 because 'it leaves the impression that this is a sexual harassment case.' " (*Id.* at p. 296.) In other words, the excluded evidence did not relate to "sufficiently similar" circumstances because plaintiff alleged retaliation relating to the federal lawsuit, not sexual harassment.

But the Court of Appeal held the trial court erred in excluding evidence of retaliation against two other employees who also participated in the federal lawsuit. The court noted that "[g]enerally, the relevance of evidence of discrimination or harassment by defendants against nonparties is 'fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.' " (*McCoy*, *supra*, 216 Cal.App.4th at pp. 296–297.) And although the trial court properly excluded "evidence of discrimination and harassment based on race and gender [because it had] little relation to the surviving retaliation claim," the same could not be said for evidence that other women who participated in the federal lawsuit also suffered retaliation similar to the conduct alleged by the plaintiff. The court concluded, "[b]ecause intent is an element in an unlawful retaliation claim, evidence that a defendant intentionally retaliated against other employees for the same conduct engaged in by the plaintiff would be relevant." (*Id.* at p. 297.) In other words, evidence of retaliation against similarly-situated employees (i.e., those employees who also participated in the federal lawsuit) could be relevant and used to demonstrate the intent of the employer concerning retaliation against the plaintiff. But evidence of other unlawful conduct, such as sexual

harassment or racially derogatory remarks, was not "sufficiently similar" to plaintiff's allegations to require its admission.

1.3. Additional facts regarding evidence of alleged retaliation directed to other LAPD officers.

Prior to trial, the City filed a motion in limine seeking to exclude evidence of alleged retaliation directed at other LAPD officers who, like plaintiff, did not recommend terminating the employment of accused officers at Board of Rights proceedings. Citing Evidence Code sections 350, 352, and 1101, subdivision (a),[4] the City argued such "me too" evidence should be excluded as improper character evidence and as more prejudicial than probative. Counsel for the City also argued Captain Lillian Carranza's action against the City alleged gender discrimination as well as retaliation, which would create additional confusion for the jury. Plaintiff opposed the motion citing Evidence Code section 1101, subdivision (b),[5] arguing generally—and without

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[4] Evidence Code section 1101, subdivision (a), provides: "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 (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

[5] Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

identifying any specific witnesses or anticipated testimony—that "me too" evidence would be relevant and admissible to prove his employer's retaliatory motive and intent. At the subsequent hearing, however, plaintiff explicitly limited his argument to the testimony of Captain Carranza.

The court granted the motion in limine, noting that introducing evidence of other captains' experience would essentially require mini-trials that would be misleading and confusing to the jury, and would also bring in issues not pertinent to plaintiff's case.

During trial, plaintiff again sought to offer "me too" evidence, this time through the testimony of Steven Ruiz, a Lieutenant II with the LAPD who also claimed he was retaliated against after sitting on a Board of Rights and reaching a decision purportedly contrary to the Chief's recommendation. The court conducted a hearing under Evidence Code section 402 and subsequently permitted Lieutenant Ruiz to testify that after he rendered a decision contrary to the Chief's recommendation he was confronted by a more senior officer about his decision. Lieutenant Ruiz stated the senior officer seemed annoyed with him as well as his Board of Rights decision. The officer also advised Lieutenant Ruiz that he and Chief Beck were "disappointed in [him] and [his] decision." Lieutenant Ruiz believed he was sent to "remedial training" in retaliation for that decision.

Captain Carranza also testified at trial, but for limited impeachment purposes. She stated she sat on a Board of Rights and voted against the recommendation of Chief Beck, after which the same senior officer who met with Lieutenant Ruiz requested a meeting with her. The meeting never occurred, however.

Plaintiff's counsel did not attempt to question Captain Carranza about any retaliation she may have suffered as a result of her Board of Rights decision.

Subsequently, in his new trial motion, plaintiff argued the court erred in excluding all "me too" evidence. In support of the motion, plaintiff submitted declarations by Captain Carranza and retired Captain Joel Justice, both of whom stated they deviated from Chief Beck's recommendations when sitting on a Board of Rights. Captain Carranza claimed that following her Board of Rights decision, she was repeatedly denied promotions from Captain I to Captain II or Captain III, even when she was the most qualified candidate. And Captain Justice indicated that following his Board of Rights decision, he was not promoted from Captain to Commander even though he was plainly more qualified than several other candidates who were promoted to Commander at the time.

1.4. Plaintiff's proffered "me too" evidence was not sufficiently similar to plaintiff's situation.

Based on the cases discussed, *ante*, plaintiff contends the court erred in excluding "me too" evidence from Captain Carranza and Captain Justice.[6] We disagree.

As an initial matter, we note plaintiff submitted detailed declarations from Captain Carranza and Captain Justice in

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[6] Plaintiff's opening brief suggests additional witnesses suffered similar retaliation. But the record contains no information about those witnesses or the content of whatever testimony plaintiff intended to elicit from them. Accordingly, we limit our analysis to the testimony of Captain Carranza and Captain Justice, who submitted declarations explaining their specific situations.

support of his motion for new trial. But he did not proffer this evidence when the court was first presented with the question of admissibility of that evidence—namely, in support of his opposition to the City's motion in limine to exclude "me too" evidence. Instead, plaintiff opposed the motion on purely legal grounds without naming any potential witnesses or specifying what testimony they might offer. This strategy did not assist the court, particularly in light of the fact that plaintiff asked the court to "conduct a fact-based inquiry into how closely these witnesses' experiences resemble that of Plaintiff." Holding back those details, only to bring them out in support of a motion for new trial, is the type of gamesmanship that impedes the orderly administration of justice.

We also note the court did not exclude all "me too" evidence, as plaintiff suggests. When plaintiff sought to offer "me too" testimony by Lieutenant Ruiz, the court properly held a hearing under Evidence Code section 402 to determine whether his circumstances were sufficiently similar to plaintiff's such that his testimony would be relevant. And the court ultimately allowed Lieutenant Ruiz to testify regarding his retaliation claim because it found his situation was sufficiently similar to plaintiff's.

With respect to Captain Carranza's testimony, we agree with the trial court's conclusion that plaintiff waived the issue. The court predicated its decision to exclude Captain Carranza's testimony on the mistaken belief that her case against the City included a gender discrimination claim, thus rendering her situation different than plaintiff's. And although it was the City, rather than plaintiff, that so advised the court, plaintiff's counsel did not correct the matter at the hearing on the motion in limine.

This point is significant because plaintiff's counsel was also representing Captain Carranza in her suit against the City and knew she had not asserted a gender discrimination claim. Counsel could have, and should have, immediately advised the court of the City's inaccuracy, rather than waiting to bring the matter to the court's attention in plaintiff's motion for new trial.[7]

Finally, with regard to Captain Justice, we agree with the court that his experience was not sufficiently similar to plaintiff's to require its admission. Captain Justice stated he was not promoted from Captain to Commander, and later was demoted from Captain III to Captain I, purportedly in retaliation for his Board of Rights decision. Because the promotion to Commander is determined through an entirely different process than the promotion from Captain I to Captain II or III, the circumstances of Captain Justice's failure to be promoted were not sufficiently similar to plaintiff's experience. And there was no evidence plaintiff was ever demoted for any reason, which presents an additional distinction between plaintiff's case and Captain Justice's experience.

Plaintiff also seems to suggest the court erred in failing to conduct a hearing to assess the admissibility of "me too" evidence. We reject this argument because, as noted, the court conducted a hearing on the motion in limine (where plaintiff did not proffer any testimony for the court's consideration) and also conducted a hearing under Evidence Code section 402 during trial before ruling on the admissibility of Lieutenant Ruiz's testimony.

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[7] Counsel's unsworn assertion that "[t]his was a fact which Appellant's counsel would only realize to be true after the trial in this matter," contained in a footnote in plaintiff's opening brief, is not supported by any citation to the record on appeal.

In sum, we see no error in the court's exclusion of "me too" testimony by Captain Carranza and Captain Justice.

2. The court properly concluded no juror misconduct occurred.

Plaintiff also contends the court erred in denying his new trial motion on the ground of juror misconduct. None of his assertions has merit.

" 'When a party seeks a new trial based upon jury misconduct, a court must undertake a three-step inquiry. The court must first determine whether the affidavits supporting the motion are admissible. (See Evid. Code, § 1150, subd. (a).) If the evidence is admissible, the court must then consider whether the facts establish misconduct. [Citation.] Finally, assuming misconduct, the court must determine whether the misconduct was prejudicial. [Citations.] A trial court has broad discretion in ruling on each of these questions and its rulings will not be disturbed absent a clear abuse of discretion. [Citation.]' [Citation.]" (*People v. Bryant* (2011) 191 Cal.App.4th 1457, 1467.)

"Section 1150 of the Evidence Code, as interpreted by *People v. Hutchinson* (1969) 71 Cal.2d 342, permits juror misconduct to be established by juror affidavit, so long as the declaration consists of proof of overt acts, objectively ascertainable. Proof relating to the subjective reasoning process of any individual juror is not admissible and cannot be so considered." (*Tramell v. McDonnell Douglas Corp*. (1984) 163 Cal.App.3d 157, 171–172.) "This limitation prevents one juror from upsetting a verdict of the whole jury by impugning his own or his fellow jurors' mental processes or reasons for assent or dissent. The only improper influences that may be proved under section 1150 to impeach a verdict, therefore, are those open to

sight, hearing, and the other senses and thus subject to corroboration." (*Hutchinson,* at p. 350.)

Plaintiff contends several types of juror misconduct occurred in this case: Juror No. 7 violated her duty to deliberate with the other jurors and to follow the court's instructions "due to insufficient knowledge of English," Juror No. 7 relied on an improper translation by Juror No. 4, a group of five jurors conducted separate deliberations in Spanish, and Juror Nos. 3 and 5 were biased against plaintiff due to his socio-economic status and concealed that bias during voir dire. In support of these claims, plaintiff submitted a declaration from Juror No. 11 with his new trial motion. In opposition to the motion for new trial, the City submitted a declaration from Juror No. 4. We briefly address each of these claims.

Regarding plaintiff's complaint that Juror No. 7 did not have a sufficient command of English to participate in deliberations, we agree with the trial court's finding that plaintiff waived the issue. During voir dire, Juror No. 7 disclosed her knowledge of English was limited. When responding to one of counsel's questions, she began her answer by stating, "I'm okay. Properly, I hope you understand my English. I don't speak." Juror No. 7 went on to answer counsel's question at length and share an experience relating to the LAPD. The subsequent exchange with counsel made plain the juror was not fluent in English, but she was able to convey her ideas to some extent. Neither side, however, conducted a further voir dire of Juror No. 7 regarding her ability to speak English, challenged her for cause due to her lack of fluency in English, or used a peremptory challenge to remove her from the panel. By accepting Juror No. 7 on the panel with full knowledge of her limited command of

English, plaintiff waived the right to challenge the jury's verdict on that basis. (Accord, *People v. Hill* (1992) 3 Cal.4th 959, 985, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 ["[A] defendant's objection to a juror's competency, first made after trial, is belated and not cognizable on appeal"]; *People v. Moreno* (2011) 192 Cal.App.4th 692, 706.)

Plaintiff next claims Juror No. 7 relied on an improper translation by Juror No. 4, citing *People v. Cabrera* (1991) 230 Cal.App.3d 300, 302–304 (*Cabrera*). In *Cabrera*, the defendant testified on his own behalf in Spanish and his testimony was translated into English. (*Id.* at p. 302.) During deliberations, some of the Spanish-speaking jurors disagreed with certain aspects of the official translation and at least one of the Spanish-speaking jurors shared her own translation of certain words used by the defendant with the other jurors. (*Ibid.*) The Court of Appeal held the juror committed misconduct by ignoring the official translation and providing an alternate translation to the other jurors. (*Id.* at pp. 303–304.) The court analogized the incident to cases in which a juror commits misconduct by consulting a dictionary or gathering evidence about the case from an outside source and bringing it into the jury room. (*Id.* at p. 303.)

Cabrera is inapposite here. In describing the purported "translation" relied upon by Juror No. 7, Juror No. 11 stated Juror No. 7 often said she did not understand the questions on the jury verdict form because they were in English, at which point Juror No. 4 would speak to her in Spanish. Juror No. 11 went on, "Immediately thereafter, I observed Juror No. 7 exclaim 'ooooh' and nod her head every time, indicating she understood." Even assuming Juror No. 4 was translating the questions on the

verdict form from English to Spanish for Juror No. 7's benefit, we see no misconduct in his doing so. Plaintiff cites no authority, and we are aware of none, indicating jurors commit misconduct simply by speaking in their native (non-English) language in the jury room.

In a similar vein, plaintiff argues a group of five jurors committed misconduct by conducting separate deliberations in Spanish. Plaintiff cites *Griesel v. Dart Industries, Inc*. (1979) 23 Cal.3d 578,[8] for the proposition that a party has a constitutional right to a verdict arrived at " 'through deliberations which are the common experience of all' " jurors. But *Griesel* is easily distinguished from the present case, as it concerned the duty of jurors to begin deliberations anew after a juror is discharged and an alternate juror substituted in after deliberations were already underway. (*Id*. at pp. 583–584.) No such substitution occurred in the present case.

In any event, we conclude, as the trial court did, no admissible evidence supports the factual assertion that a group of jurors deliberated separate and apart from the other jurors. As noted, plaintiff submitted a declaration by Juror No. 11 in support of his motion for new trial. On this issue, Juror No. 11 stated that while serving as a juror, she witnessed Juror Nos. 1, 4, 6, 7, and 12 speaking in Spanish. She also attested Juror No. 4 spoke in Spanish extensively during deliberations on Questions 6 through 9 on the verdict form. On the basis of these observations, plaintiff asserts the five Spanish-speaking jurors improperly deliberated separate and apart from the rest of the jurors.

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[8] Overruled on an unrelated point by *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4.

Two facts vitiate plaintiff's argument. First, by her own admission, Juror No. 11 does not speak Spanish. Accordingly, she cannot know the content of conversations taking place in Spanish during deliberations. Second, Juror No. 4 attested the Spanish-speaking jurors did *not* deliberate in Spanish: "While we may have spoken in Spanish here or there, saying hello, or being polite, we did not deliberate in Spanish. I made a point to tell all the jurors that we should deliberate in English to respect the jurors that do not speak Spanish." Further, Juror No. 4 stated that "[a]long with all other members of the jury, [he] explored all aspects of the … testimony and evidence in English."

Finally, plaintiff contends Juror Nos. 3 and 5 expressed prejudice against him during deliberations based on his socio-economic status, and concealed such bias during voir dire. The basis of these related claims is, again, the declaration of Juror No. 11, who stated, "During the deliberations, Juror Nos. 3 and 5 each stated words to the effect that 'his salary is already high, what more money does he want?' concerning Plaintiff."

" ' "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution." ' (*People v. Galloway* [(1927)] 202 Cal. 81, 92.)" (*Grobeson v. City of Los Angeles* (2010) 190 Cal.App.4th 778, 793 (*Grobeson*); see also Evid. Code, § 1150 [addressing admissibility of statements made, conduct, conditions, or events "likely to have influenced the verdict improperly" to challenge validity of verdict].) However, isolated or fleeting comments during deliberations are generally insufficient to establish bias to the point that one can say a juror prejudged the case or decided the case based on bias rather than the evidence.

In *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, for example, a suit by black plaintiffs against police officers, a juror stated during deliberations, " 'I wonder how long these lawyers shopped to get this black judge.' " (*Id.* at p. 991.) The Court of Appeal concluded that without additional information, such as other indications of bias or more detail about the manner and tone in which the statement was made, it would require unwarranted speculation to conclude the statement was indicative of concealed bias which prevented the juror from giving plaintiffs a fair trial. (*Id.* at p. 995.) The court concluded, based on the particular circumstances of that case, the statement at issue was likely a momentary expression of pique with the judge occasioned by events which occurred at trial, rather than a pervasive bias against black people. (*Ibid.*)

Similarly, the Court of Appeal in *Tillery v. Richland* (1984) 158 Cal.App.3d 957, concluded passing statements during deliberations failed to establish bias. There, a widower brought an action against a physician alleging, inter alia, the wrongful death of his wife. Affidavits submitted after trial established several jurors made comments during deliberations such as, " 'why should he get anything when I make less than $6,000 a year,' " " '[he'll] blow the money in Las Vegas,' " the doctor " 'is a decent and good man who saved other people's lives,' " and that to make an award would "leave a permanent black mark" against the doctor. (*Id.* at p. 972.) The court stated, however, because the statements were taken out of context, it was purely speculative to assume that they indicated bias that had been intentionally concealed during voir dire. (*Id.* at pp. 975–976.)

These two cases, and others, support the trial court's conclusion that passing statements by two jurors in the present case failed to establish juror bias and misconduct.

The only case cited by plaintiff in support of this argument, *Grobeson*, *supra*, 190 Cal.App.4th at p. 778, is distinguishable. There, a juror committed misconduct in the form of bias, as evidenced by her statement, " 'I made up my mind during trial.' " (*Id.* at pp. 790–791.) But unlike the comments at issue here, that juror statement plainly demonstrated she prejudged the case before hearing all the evidence. Here, by contrast, there is no indication Juror Nos. 3 and 5 made up their minds before hearing all the evidence, or that they based their decision on plaintiff's socio-economic status rather than the evidence in this case.

In sum, we reject plaintiff's contention that juror misconduct occurred in this case.

3. Plaintiff fails to demonstrate prejudicial attorney misconduct.

The final few sentences of plaintiff's opening brief, set forth under the heading "Attorney Misrepresentation," read as follows:

"Finally, the misconduct and misrepresentations of Defense trial counsel at oral argument warrant reversal. There is no question that Defense trial counsel out-and-out misrepresented the Critical Interrogatory, nor is there any serious question that Appellant was prejudiced thereby. Except for that misrepresentation, there was neither any purported or actual fact before the jury which would have supported their answer to Question No. 1 at [record cite to verdict]—and that answer made it impossible for Appellant to prevail on his first cause of action. The prejudice therefrom is self-evident."

As we have already noted plaintiff's failure to adhere to basic principles of appellate practice, we will not belabor the point here. Instead, we simply note that "an appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that lack adequate legal discussion will be deemed forfeited. (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.) In short, an appellant must demonstrate prejudicial or reversible error based on sufficient legal argument supported by citation to an adequate record. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.)

Plaintiff's discussion of his attorney misconduct claim lacks citation to any legal authority and his sole record citation—to the jury's verdict—is plainly inadequate to facilitate our review. We conclude plaintiff forfeited this argument and decline to consider it.

DISPOSITION

The judgment is affirmed. Respondent City of Los Angeles shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.