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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GARY GREENE, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B259953 (Los Angeles County Super. Ct. No. BC478655)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank Johnson, Judge. Affirmed.

Akudinobi & Ikonte, Emmanuel C. Akudinobi for Plaintiff and Appellant.

Office of the Los Angeles City Attorney, Michael N. Feuer, City Attorney, Amy Jo Field, Assistant City Attorney, Juliann Anderson, Deputy City Attorney, for Defendant and Respondent City of Los Angeles.

INTRODUCTION

Plaintiff and appellant Gary Greene attempted to cash two checks that totaled over $7,000 at a Bank of America branch. A dispute arose when branch employees refused to cash the checks. A bank employee called the police, and plaintiff was arrested. Plaintiff brought an excessive force action (42 U.S.C. § 1983 et seq.) against defendants and respondents the City of Los Angeles and Los Angeles Police Department Officers David Lin, Jose Avila, and Richmond Afful.[1] The jury returned a verdict for defendants, and plaintiff appeals. He contends the trial court abused its discretion in bifurcating the trial on damages from the trial on liability, in denying his motion for a mistrial, and in ruling on certain evidentiary issues. He further contends the trial court erred in modifying two jury instructions on excessive force. We affirm.

BACKGROUND

Plaintiff testified that he was a recovered drug addict. He had been sober for 10 years, three months. He was a convicted felon, but none of his offenses involved violence. On February 11, 2010, he was in an automobile accident. Plaintiff was injured in the accident and went to the Northridge Hospital emergency room. He suffered torn ligaments in one of his fingers which was placed in a splint. His knee and shoulder also were injured. About two weeks later, his ankle hurt and he went to the Tarzana Hospital. X-rays revealed he had suffered a distal fibular fracture in his ankle.

Plaintiff's car was "totaled" in the accident, and his insurance company adjusted the claim. On February 25, 2010, his insurance company called and told him he could pick up two checks—one for about $7,200 and one for $40. His insurance adjuster told him he could go to a local branch of Bank of America and cash the checks without a problem.

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[1] Plaintiff's action also asserted a malicious prosecution claim against the bank and some of its employees. That claim was resolved in favor of the bank and its employees. (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 925, 935; *Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 457, fn. 1.) Plaintiff dismissed his action with respect to a fourth police officer and judgment was entered in her favor.

Plaintiff went to the Bank of America branch and attempted to cash the checks. He got into a dispute with a bank teller when he tried to cash the larger of the two checks. He then spoke with the teller's supervisor. Over the course of about 40 minutes, he attempted to cash his checks. At some point he said, "I'm getting so upset. You make me feel like I want to kick over that little cardboard kiosk." When he "'couldn't take it any more," he said, "I want to get my checks back. You won't give me my checks back. This is BS. I want my MF checks back. I'm going to file a complaint, write you up.'" He did not threaten to blow up the bank. The bank manager then spoke with plaintiff and told him she would handle everything. He told the bank manager that he would give her all the time she needed and that he would go outside and smoke a cigarette and call his insurance adjuster.

While plaintiff was speaking with his insurance adjuster, the police arrived. Plaintiff approached Lin and said, "Hey, everything's under control. The bank manger's taking care of the transaction." Lin told plaintiff to put out his cigarette, turn off his cell phone, and turn around and place his hands on his car. Plaintiff followed Lin's commands, and Lin searched him.

According to plaintiff, Lin found Codeine and Vicodin in plaintiff's pocket. Lin told plaintiff to put his hands behind his back. Plaintiff said, "Sir, please be careful of the fingers. I was just in an accident. Just take care of the fingers." Plaintiff put his hands behind his back. All of a sudden, he felt a sharp pain going through his hand and fingers. He flinched due to the pain and Lin "squeezed them and bent them back." Plaintiff lost his balance and he was thrown to the ground. While he was on the ground, officers put pressure on his neck, back, and leg.

Plaintiff testified that after he was arrested, he complained to "the officers" about pain in his knee—which had not hurt before the incident—and hand. He did not have a knee sprain when he went to the bank, but did after his encounter with the police. His fingers were throbbing and were "all messed up." At the police station, he said he believed he needed medical attention and he was taken to the infirmary and then to Sherman Oaks Hospital.

Lin testified he received a radio call describing a "male, white, in his fifties, six-two, 300, wearing a black denim jacket, blue jeans" who had threatened to blow up a bank and had threatened employees. The suspect said he was an ex-convict and if no one helped him, he would blow up the bank. The reporting party said that the suspect did not "appear to have [the] means." When Lin arrived at the bank, he saw a man who matched the suspect's description. Lin approached plaintiff, and told him to put down his phone and drop his cigarette. Lin then told plaintiff to turn around and face his car and put his hands behind his back. Plaintiff turned toward the car, but did not put his hands behind his back. Plaintiff then turned around and faced Lin and said that he had not done anything.

Lin again told plaintiff to face the car, and plaintiff complied. Plaintiff did not, however, put his hands behind his back and instead put them on the car's roof. Lin attempted to put plaintiff in handcuffs. He grabbed plaintiff's right wrist and placed it in the small of plaintiff's back and tried to do the same with plaintiff's left wrist. Plaintiff quickly pulled his left wrist away, raised his left arm, and spun towards Lin. Lin pushed plaintiff forward and stepped to the side, thereby avoiding being struck in the head by plaintiff's elbow.

By that time, Afful had arrived and stood to Lin's left. Afful grabbed plaintiff's left arm and wrist. Lin and Afful tried to put plaintiff in handcuffs. Plaintiff resisted. As plaintiff tried to pull his hands away, he lost his balance and stumbled towards Lin and fell to the ground. Lin and Afful supported plaintiff's fall, so plaintiff would not strike the ground with full force. During the encounter, Lin did not put his feet or knees on plaintiff's back, shoulders, or neck.

DISCUSSION

I. Bifurcation

Plaintiff contends that the trial court abused its discretion when it bifurcated the trial on damages from the trial on liability. The trial court acted within its discretion.

A. Background

Pretrial, the trial court said, "It occurs to the court that perhaps this would be a good case to bifurcate. I know that the defense is requesting a bifurcation as to punitive damages. But I'm thinking of bifurcating the case as to liability. I don't think there's any viability to the *Monell*[2]claim, unless the underlying excessive force claim is found by the jury to be valid. And, obviously, we wouldn't get into damages unless that happened. [¶] It would seem to me we could try the liability for the underlying incident pretty quickly. And see what we have to work with thereafter."

The trial court proposed that the liability of the individual officers be tried in a first phase, then the City's liability under *Monell*, *supra*, 436 U.S. 658, and the damages be tried in a second phase. Plaintiff's counsel asked the trial court to explain further how the trial would proceed. Plaintiff's counsel said, "For instance, the plaintiff is entitled to testify as to the initial and extent of injuries he sustained. As one of the underlying issues that have to be resolved by the jury in deciding the nature of force used on him. [¶] Are you now saying in this liability phase that we are not going to be talking about plaintiff's damages? Because that is what is confusing. I need clarity."

The trial court responded, "Yeah, in the liability phase damages would not be relevant. It would be litigated issue of whether there is liability for excessive force."

Plaintiff's counsel stated, "In that case, I will disagree to have the case separated from the liability, and the damages separated. Because in the jury instructions on excessive force is very clear that initial and extent of injury sustained by the suspect or the plaintiff is an issue for the trier of fact in assessing the initial and extent of force used on him. [¶] If you remove that element, necessary element of the excessive force instruction, then the plaintiff would be prejudiced because we have an incomplete instruction. It goes both initial and extent of injury sustained by other officers or the

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2 In *Monell v. New York City Dept. of Social Servs.* (1978) 436 U.S. 658, 691 (*Monell*), the United States Supreme Court held that municipalities can be sued directly for damages resulting from the deprivation of a constitutional right under 42 U.S.C. section 1983, but such an action must be based on a municipal policy or custom that caused the constitutional injury.

plaintiff. [¶] In this case none of the officers sustained injury. Plaintiff is the one that sustained injuries. [¶] So I cannot see how we can determine the liability of the officers in the abstract without going into what is the result of the excessive force. We cannot judge the excessive force in the abstract without showing the injuries and the damages sustained by the plaintiff."

The trial court responded, "Well, there's injuries and there's damages. Damages would encompass economic factors that would have no bearing at all on liability. [¶] I see your point as to the actual alleged physical injury. If, just by way of example—I don't think it has anything to do with this case—if someone broke their leg or had their leg broken allegedly then in theory that might be relevant on the issue of whether the force was excessive or not. The medical bills surrounding that broken leg, the pain and suffering surrounding that broken leg, future medical bills and future pain and suffering, loss of wages, all those things, which are components of damages, would be utterly irrelevant."

Plaintiff's counsel said, "I'm not opposed to what you're suggesting. I just want to make sure we get clarity. Because down the road when we start arguing issues of jury instruction, I don't want to have my hands strapped behind my back, 'Oh, but, counsel, you agreed to this.' So that is why I'm bringing it. [¶] If we can find a way to do it, the medical bills and the billing aside, doctors' testimony, aside, but it's kind of difficult for me. I understand where you're going in terms of the damages. Okay. But I have a reservation on that."

The trial court ordered the trial on damages bifurcated from the trial on liability. It advised the parties that it would try to formulate a clear demarcation between evidence that would and would not be admissible.

Later, when the parties were informing the trial court of the witnesses they expected to call in the first phase of the trial, the only doctor that plaintiff's counsel said he intended to call was Dr. Jason Zee, a radiologist. Defense counsel stated that he understood the first phase of the trial court would end at the point at which the police handcuffed and searched plaintiff. He stated that he also understood there would be no

medical testimony in the first phase, and thus questioned why Dr. Zee would testify in the first phase.

Plaintiff's counsel responded that the extent of plaintiff's injuries was a significant issue in the analysis of the force used on plaintiff. He asked the trial court, in light of defense counsel's remarks, to set the end point of the first trial. Plaintiff's counsel stated, "I believe that [plaintiff's] injuries comes in. And to some extent Dr. Zee will be testifying."

The trial court stated that Dr. Zee's treatment was not relevant to the first phase of the trial. It asked plaintiff's counsel to identify plaintiff's claimed injuries. Plaintiff's counsel responded that plaintiff suffered a dislocated finger, a tear to his meniscus, and a spinal fracture "that required surgery to fuse the C5 through C7. So they did the surgery then repaired the nerves and stuff and put in the hardware. And monitor a period of time to make sure that the hardware was sitting well and that the cervical spine was strengthening the way it should. And that is part of what Dr. Zee will be talking about."

Defense counsel observed that Dr. Zee was a radiologist and, in his experience, radiologists do not opine on causation issues. Plaintiff's counsel stated that Dr. Zee was part of a trauma team that included a neurosurgeon and an orthopedist who "managed him."

The trial court asked plaintiff's counsel for an offer of proof as to Dr. Zee's testimony. Plaintiff counsel said that Dr. Zee would "testify as to what the team does. The team—the trauma team that manage patients like [plaintiff] in terms of his own personal involvement in the management of [plaintiff], in terms of the x-rays, MIL's and CD scans and in that rotation that led to the surgery. Because they are all part of a team, and the doctor who did the actual spinal surgery, Dr. Winer. Like I said, these are people who go through specialist training and ones that finish and move on. And one of the people who is—"

The trial court interjected, "I'm still not understanding. What's he going to testify about?" Plaintiff's counsel responded, "He's going to testify as to the team. How the team works." The trial court said that plaintiff claimed that he suffered certain traumas

that were circumstantial evidence that excessive force had been used, and asked plaintiff's counsel to explain exactly the nature of Dr. Zee's testimony—i.e., would he testify about "[t]he force or about the injuries?"

Plaintiff's counsel said that Dr. Zee would testify about a number of conditions and injuries involving plaintiff's ankle, finger, knee, and neck—some apparently resulting from plaintiff's earlier car accident—that predated plaintiff's interaction with the police at the Bank of America. Each of those conditions or injuries was made worse by plaintiff's interaction with the police. Plaintiff's counsel said plaintiff's neck fracture resulted from the "trauma that was used on him."

The trial court said that plaintiff "would be able to testify about things that he alleges happened to him in connection with this incident." It did not believe that Dr. Zee's testimony would assist the jury in deciding whether any force used against plaintiff was excessive, and expressed its skepticism that as a member of a team of doctors, Dr. Zee could testify about other doctors' thought processes. The trial court excluded Dr. Zee's testimony from the first phase of the trial.

In plaintiff's counsel's opening statement, he began to tell the jury what the evidence would show after plaintiff's arrest. Defense counsel objected that plaintiff's counsel was addressing matters that were beyond the scope of the first phase of the trial. Plaintiff's counsel argued, "His injuries from this is a necessary factor. It doesn't end at the force. I haven't even gone through the necessary elements of the issues at stake in this case. Which is what did the force do to him? And then why the force was excessive." The trial court stated that the liability phase of the trial ended with plaintiff's interaction with the police at the Bank of America. Evidence concerning events at the police station were beyond the liability phase.

After a recess, the trial court restated its ruling on bifurcation. First, "medical testimony" was not relevant to any issue in the liability phase of the trial and, under Evidence Code section 352, any marginal relevance the evidence had would be outweighed by the time it would take to introduce it. Second, plaintiff would be

permitted to testify about "things that happened to him. If he claims to have been injured he could certainly make those statements."

Defense counsel asked for clarification, stating he believed medical testimony was not part of the first phase of the trial and he was not prepared to address causation. Thus, defense counsel stated, he was not going to have nurses or doctors who treated plaintiff testify in the first phase of the trial. The trial court responded, "Treatment is irrelevant in this phase. He can say that he had an injury to whatever portion of his body he can say. He cannot testify medically that he had a subluxation or a meniscus tear or any medical testimony. He can state that he had certain injuries to various portions of his body. I'm talking about a very limited amount of testimony. We're not talking about treatment. We're not talking about diagnosis, just that he claims to be injured on certain parts of his body."

Plaintiff's counsel argued that courts in excessive force cases had held that the reasonableness of force "must be analyzed against the drop back of the injury in question." The jury would be asked if the force was reasonable, and would have to analyze the nature and extent of plaintiff's injuries to decide reasonableness. Plaintiff could not testify about his injuries in the abstract. The trial court said that plaintiff's counsel was addressing an issue that had been addressed at least a couple of times before and upon which the trial court had ruled. It stated that it understood that plaintiff's counsel disagreed with its ruling, but it was time to move on with the trial.

Plaintiff's counsel resumed his opening statement, and drew an objection when he said that plaintiff would testify that he complained of pain when taken to the police station. The trial court ruled that plaintiff's counsel could say what plaintiff would testify. Nevertheless, plaintiff's counsel asked for a sidebar conference to clarify what he would be permitted to say so that his opening statement was not interrupted by further objections.

The trial court said, "He may testify that he suffered injuries to various portions of his body and what those portions of body were. He may not testify about a medical

diagnosis or treatment that he received. He may testify about injuries that he may have received to various portions of his body in non[] medical terms."

Plaintiff's counsel asked, "If he suffered an injury and went to hospital as a result of that he can testify to that?" The trial court responded, "For instance, he could say that he felt an injury to his finger. He can say that he felt an injury to his knee. He may not say he had a subluxation. He may not say he had a meniscus tear. Those would be two examples of things he could say."

After further discussion of the trial court's bifurcation ruling, the trial court said that plaintiff's medical treatment "certainly goes to damages. I don't see how it goes to liability." Plaintiff's counsel again objected that the trial court was hindering his presentation of plaintiff's case by limiting the evidence on the extent of the injuries that plaintiff suffered, a factor the jury properly could use to determine whether the force used was excessive. The trial court responded that it would not further discuss the issue with plaintiff's counsel.

B. Standard of Review

A trial court has broad discretion to order bifurcation in the interest of justice and we will not disturb its discretion on appeal absent a manifest abuse of that discretion. (*Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.* (2002) 100 Cal.App.4th 193, 205; *Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 504; *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.)

C. Application of Relevant Principles

Code of Civil Procedure section 598[3] provides for the bifurcation of issues at trial in the interest of economy and efficiency. "Its objective is avoidance of the waste of time

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[3] Code of Civil Procedure section 598 provides, in relevant part, "The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order, no later than the close of pretrial conference in cases in which

and money caused by the unnecessary trial of damage questions in cases where the liability issue is resolved against the plaintiff." (*Horton v. Jones* (1972) 26 Cal.App.3d 952, 955.) Bifurcation also "prevents possible prejudice to a defendant where a jury might look past liability to compensate a plaintiff through sympathy for his or her damages." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 12:414, p. 12(1)-76).)

In a civil rights case claiming excessive force under 42 U.S.C. section 1983, """the nature and quality of the intrusion on the individual's Fourth Amendment interests""" is balanced against the "governmental interests at stake." (*Martin v. Heideman* (6th Cir. 1997) 106 F.3d 1308, 1312 (*Martin*), quoting *Graham v. Connor* (1989) 490 U.S. 386, 396.) The "'nature and quality of the intrusion' must include consideration of the severity of any injury inflicted." (*Martin, supra,* 106 F.3d at p. 1312; *Smith v. City of Fontana* (9th Cir. 1987) 818 F.2d 1411, 1416 ["Where a victim of a seizure alleges that officers unreasonably employed excessive force under the circumstances in order to detain or subdue her, the 'reasonableness of force should be analyzed in light of such factors as the requirements for the officers' safety, the motivation for the arrest [or detention], and the extent of the injury inflicted.' [Citation.]"], overruled on another ground by *Hodgers-Durgin v. de la Vina* (9th Cir. 1999) 199 F.3d 1037, 1040, fn. 1.)

In *Martin, supra,* 106 F.3d 1308, the district court bifurcated the trial into issues of liability and damages, and then "purported to limit the plaintiff's presentation of medical proof to evidence probative of liability." (*Id.* at p. 1311.) On appeal, the plaintiff challenged the evidence exclusion and bifurcation rulings. The court of appeals held the district court abused its discretion in limiting evidence of the severity of the plaintiff's injury to evidence collected immediately after the incident, thus ignoring the fact that an injury's severity may not be immediately apparent. As an example, the court of appeals

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such pretrial conference is to be held, or, in other cases, no later than 30 days before the trial date, that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case, except for special defenses which may be tried first pursuant to Sections 597 and 597.5. The court, on its own motion, may make such an order at any time."

stated that "an apparently sprained or bruised leg that does not seem to warrant immediate treatment might later reveal fractures indicative of a more severe blow. Such evidence would clearly be relevant to establish the amount of force used." (*Id.* at p. 1312.) It also held that "because the extent of the plaintiff's damages was relevant to the question of liability, the district court abused its discretion by bifurcating the trial." (*Ibid.*)

Plaintiff contends that he "faced a worse fate than the plaintiff in *Martin*[*, supra,* 106 F.3d 1308]. Here, he could not even testify to the nature and extent of his injuries post arrest. He could not bring in his treating physician to testify as to the subluxation of his fingers, his meniscal tear, . . . and the surgery to repair the fracture. The only evidence he was allowed to present was that he was injured: the who, how, and why, were excluded."

The trial court's order bifurcating the trial on damages from the trial on liability, standing alone, was within the trial court's discretion. (*Horton v. Jones, supra,* 26 Cal.App.3d at pp. 954-955; Code Civ. Proc., § 598.) If, however, that bifurcation order had had the effect of preventing plaintiff from introducing medical testimony that would have demonstrated the severity or extent of his injuries and thus have helped him establish that the officers used excessive force, the bifurcation order would have been an abuse of discretion. (*Martin, supra,* 106 F.3d at pp. 1311-1312; see *Smith v. City of Fontana, supra,* 818 F.2d at p. 1416.)

The bifurcation order did not have that effect in this case, however. The trial court at one point recognized that some testimony about injuries could be relevant to liability—"if someone broke their leg or had their leg broken allegedly then in theory that might be relevant on the issue of whether the force was excessive or not." The trial court focused on obtaining from plaintiff's counsel a proffer as to what medical testimony he wished to offer. Plaintiff did not proffer a treating physician. Rather, the only doctor plaintiff proposed to call at trial whose testimony was excluded from the liability phase was Dr. Zee. Dr. Zee's testimony, based on plaintiff's counsel's proffer, would not have addressed the severity or extent of plaintiff's injuries. Dr. Zee was not plaintiff's treating

physician, he was a radiologist and only a part of a "team" that included a neurosurgeon and an orthopedist—presumably plaintiff's treating physicians. In plaintiff's most direct response to the trial court's request for a proffer, he stated that Dr. Zee would "testify as to the team. How the team works." Based on the proffer provided by plaintiff's counsel, the trial court was within its discretion in excluding Dr. Zee's testimony from the liability phase, and the trial court did not abuse its discretion in bifurcating the trial on damages from the trial on liability.

II. Motion for a Mistrial

Plaintiff claims that the trial court abused its discretion when it denied his motion for a mistrial following defense counsel's opening statement. The trial court properly denied plaintiff's motion.

A. Background

After defense counsel concluded his opening statement, and before plaintiff's counsel called his first witness, plaintiff's counsel asked the trial court for a sidebar conference. He said, "I may not be the smartest guy but there's one thing that I know when I see it. What we're about to get into now will be an exercise in futility. I've listened to [defense counsel's] opening statement. The missing factor in my opening statement is the nature and extent of force used on [plaintiff]. You said, 'Sit down.' You can't talk about this. You can't talk about that. Based on what I've observed, I've heard, I don't believe that this case should be going forward because it would be a waste of the court's time and the jurors' time, in all candor."

The trial court asked plaintiff's counsel what he wanted the trial court to do. Plaintiff's counsel asked the trial court "to declare a mistrial because of some of the stuff that has gone on. One, plaintiff cannot effectively present his case the way it's called. I've heard his opening statement. But if you insist that we go forward I cannot say, oh, I'm not going to call a witness or this. But I cannot present evidence in an excessive force case without talking about the force that was used, the injuries that resulted from

the force and give the jurors the foundation to see whether those injuries and the force were used lead to excessive force or not. I can't be more explicit. But I'm willing to indulge the court in going through this exercise. But I know the outcome based on his opening statement. I said I'll keep my patience and listen and see what he's going to say. Shut up. Nothing was done to him. We took him into custody. End of story. Jurors go in there and see whether or not the officers did anything wrong by taking him into custody. It's not what excessive force is all about. This is not an unlawful arrest. This is excessive force. That's all I got to say and I want to put it on the record. Now I'm ready." The trial court denied the motion for a mistrial.

B. Standard of Review

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. (*Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1248; *Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 679 (*Blumenthal*).)

C. Application of Relevant Principles

"The fundamental idea of a mistrial is that some *error* has occurred which is too serious to be corrected, and therefore the trial must be terminated, so that proceedings can begin again." (*Blumenthal, supra,* 137 Cal.App.4th at p. 678.) The California Supreme Court "has narrowly defined the grounds for *grants* of mistrials, but has emphasized the deferential abuse of discretion standard in ruling on *denials* of motions for mistrial: 'A trial court should *grant* a mistrial *only* when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling *denying* a mistrial.' [Citations.]" (*Id.* at p. 679, fn. omitted.)

The basis for plaintiff's mistrial motion was the trial court's ruling on the bifurcation issue. He argues, "[T]he trial court's bifurcation of the issue of causation and harm from a determination of whether the officers are liable for using excessive force on [plaintiff], denied him his right to a fair trial and substantial justice. Because of the

bifurcation, it was clear that [plaintiff]'s right to a fair trial has been irreparably damaged."

We held above that the trial court did not err in ordering bifurcation. Accordingly, the trial court's bifurcation order did not irreparably damage plaintiff's chances of receiving a fair trial, and the trial court did not abuse its discretion in denying plaintiff's motion for a mistrial. (*Pope v. Babick, supra,* 229 Cal.App.4th at p. 1248; *Blumenthal, supra,* 137 Cal.App.4th at pp. 678-679.)

III. Evidentiary Rulings

Plaintiff contends that the trial court abused its discretion in failing to take judicial notice of Peace Officers Standards and Training (POST) materials and in excluding from trial the POST materials, an "adult detention log," and the fact that he had been acquitted in a prosecution for his alleged threat to blow up the Bank of America branch. The trial court did not abuse its discretion.

A. Standards of Review

We review a trial court's ruling on a request for judicial notice for an abuse of discretion. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264, disapproved on another ground by *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 939, fn. 13.) Likewise, we review a trial court's ruling on the admissibility of evidence for an abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 201; *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.)

B. Application of Relevant Principles

1. The POST Materials

Prior to trial, plaintiff requested the trial court to take judicial notice of the "Learning Domains put out by the California Commission on Peace Officers Standards and Training, as it pertains to the basic training and qualification of peace officers in the

State of California." He contended Evidence Code section 452[4] authorized the trial court to take judicial notice of a resolution of the Legislature or a fact or proposition that was not reasonably subject to dispute and capable of immediate and accurate determination by resort to resources of reasonably indisputable accuracy.

Initially, during Officer Lin's cross-examination, the trial court ruled that a POST manual was inadmissible hearsay and not something it could judicially notice. Ultimately, however, after both sides rested their cases, the trial court ruled that although it could not take judicial notice of certain pages from the POST manual, "between all the various questions of various witnesses in this case it seems like the substance of it was discussed and made known to the jurors. So I think sufficient foundation has been laid for its admission."

Plaintiff contends that the trial court abused its discretion by not taking judicial notice of the POST materials and by barring him from using the materials in his "cross-

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[4] Evidence Code section 452 provides:

"Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

"(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

"(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

"(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

"(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

"(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

"(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

"(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

"(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

examination" of Lin. He contends that "[b]ecause of the ban, [he] could not effectively cross-examine Nuttal[**5**] on the use of force report. Neither could he effectively cross-examine Afful on the arrest report etc."**6**

Plaintiff fails to demonstrate how the trial court's claimed errors resulted in prejudice. A "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. ([Evid. Code,] § 354 ['[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice']; Code Civ. Proc., § 475 ['[n]o judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed]; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [232 Cal.Rptr. 528, 728 P.2d 1163]; see *City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 51-52 [115 Cal.Rptr.2d 151] [prejudice will not be presumed; burden rests with party claiming error to demonstrate not only error, but also a resulting miscarriage of justice].)" (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480, omitting a footnote that stated that article VI, section 13 of the California Constitution also requires an appellant to demonstrate prejudice, in addition to error in the trial court proceedings].) Plaintiff does not explain how his "cross-examination" of Lin, Nuttal, and Afful would have been different and

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5 Los Angeles Police Sergeant Jeffrey Nuttal responded to the Bank of America as a supervisor.

6 Plaintiff called Lin, Nuttal, and Afful in his case-in-chief.

thus how the outcome of his trial would have been different had he been able to use the POST materials in "cross-examining" Lin, Nuttal, and Afful. Because plaintiff has not established prejudice by the trial court's denial of judicial notice and exclusion of the POST materials his argument fails. (*Zhou v. Unisource Worldwide, supra,* 157 Cal.App.4th at p. 1480.)

2. The Adult Detention Log

Los Angeles Police Department Sergeant Catherine Riggs testified that she was the watch commander at the 21st Division on February 25, 2010. In that capacity, she signed in plaintiff on an adult detention log when he was brought to the station. With respect to a question on the adult detention log about whether plaintiff was "sick, ill, or injured," plaintiff's counsel asked Riggs if the word "injured" was circled. Defense counsel objected that Riggs's recordation of plaintiff's claim that he was injured was hearsay. The trial court agreed and excluded the adult detention log. Later, Riggs testified that plaintiff "received medical treatment based on his complaint of injury."

Plaintiff claims that the trial court erred in excluding the adult detention log because it was admissible under the business records exception to the hearsay rule in Evidence Code sections 1270[7] and 1271.[8] He argues, "The trial court's refusal to admit the adult detention log into evidence during the cross-examination of Sgt. Riggs and its

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[7] Evidence Code section 1270 provides, "As used in this article, 'a business' includes every kind of business, governmental activity, profession, occupation, calling, or operation of institutions, whether carried on for profit or not."

[8] Evidence Code section 1271 provides:

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of a business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

other evidentiary rulings regarding the log, is consistent with its mind frame of precluding [him] from introducing evidence of the nature and extent of his injuries."

Even if the adult detention log was a business record and the trial court erred in excluding it, any such error was harmless. The purpose for which plaintiff sought to introduce the adult detention log was to show that the word "injured" was circled on the adult detention log's question, "Are you sick, ill, or injured?" That is, to show plaintiff complained that he was injured when he was taken to the police station. That information, however, was presented to the jury when Riggs testified that plaintiff "received medical treatment based on his complaint of injury." Accordingly, plaintiff has failed to demonstrate he suffered prejudice from the exclusion of the adult detention log from his trial. (*Zhou v. Unisource Worldwide, supra,* 157 Cal.App.4th at p. 1480.)

3. Plaintiff's Acquittal Testimony

Plaintiff's counsel asked plaintiff on direct examination, "When you were at Bank of America on that day, the 25th of February, 2010, did you threaten anybody that you were going to blow up the bank?" Plaintiff responded, "No, I did not." Plaintiff's counsel asked, "As a matter of fact, you were tried criminally for trying to blow up the bank?"[9] Plaintiff responded, "Yes, I was." Defense counsel objected. Before the trial court could rule on the objection, plaintiff stated, "I was found innocent and exonerated—" The trial court sustained defense counsel's objection on relevance grounds. Defense counsel moved to strike, and the trial court granted the motion and instructed the jury to disregard plaintiff's testimony.

Plaintiff argues that the trial court abused its discretion in excluding his acquittal testimony because defendants did not assert a legal basis for their objection, he testified truthfully about his acquittal, and his testimony was relevant as it addressed the issue of his veracity as "[n]othing can vouchsafe [his] testimony that he had not been convicted of

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9 Presumably, plaintiff was prosecuted for threatening to blow up the bank and not for trying to blow up the bank. That is, we presume that plaintiff was prosecuted for making a criminal threat under Penal Code section 422, subdivision (a).

any felony involving force more than the fact that he was found innocent of the very felonious act that he was accused of which led to the use of excessive force on him."

Only relevant evidence is admissible. (Evid. Code, § 350.) "Relevant evidence" is evidence that has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts [in the case] . . . . [Citations.]' [Citation.]" (*People v. Bivert* (2011) 52 Cal.4th 96, 116-117.)

Plaintiff's testimony that he was acquitted in the criminal threats prosecution was not relevant to any issue in this case. Whether plaintiff actually made threats in the bank to blow up the bank was not relevant to the central issue in this case—whether the officers who responded to a report that plaintiff had threatened to blow up the bank used excessive force in their interaction with plaintiff. (*Bivert, supra,* 52 Cal.4th at pp. 116-117.) Moreover, that plaintiff was acquitted in a case in which the charged felony offense did not involve the alleged use of force would not support the claim that plaintiff had never been convicted of a felony that did involve force. (*Ibid.*) Accordingly, the trial court did not abuse its discretion in striking plaintiff's testimony.

IV. Jury Instructions

Plaintiff contends that the trial court erred in modifying CACI No. 3000 ("Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)") and CACI No. 3020[10] ("Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)") by removing the elements of harm and causation from each instruction.[11] The trial court did

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[10] The relevant instruction in the record is identified as CACI No. 3001. At the time of plaintiff's trial, CACI No. 3001 had been renumbered CACI No. 3020.

[11] At the end of his argument, without supporting authority, plaintiff asserts, "On a related note, the trial court also erred in refusing to give [plaintiff]'s CACI 204 pattern instructions as requested by [plaintiff]. That too, prejudiced him." Plaintiff has forfeited

not err in modifying CACI Nos. 3000 and 3020 so they were consistent with its bifurcation order and, in any event, plaintiff benefited from the modifications.

A. Background

In discussing jury instructions, the trial court said that the fourth and fifth elements in CACI Nos. 3000 and 3020—the harm and causation elements—were not proper based on the trial court's prior rulings—i.e., its bifurcation order. Defendant offered a modified version of CACI No. 3020, Special Instruction No. 16. The trial court declined to instruct with plaintiff's special instruction.

The trial court instructed the jury with CACI No. 3000 as follows:

"[Plaintiff] claims that David Lin, Richmond Afful and Jose Avila Avila [*sic*] violated his civil rights. To establish this claim, [plaintiff] must prove all of the following:

"1. That David Lin, Richmond Afful and Jose Avila intentionally used force;

"2. That David Lin, Richmond Afful and Jose Avila were acting or purporting to act in the performance of their official duties; and

"3. That David Lin, Richmond Afful and Jose Avila's conduct violated [plaintiff]'s right to be free from use of unreasonable force."

The trial court excised from the standard CACI No. 3000 instruction the harm and causation elements, i.e.:

"4. That [name of plaintiff] was harmed; and

"5. That [name of defendant]'s [insert wrongful act] was a substantial factor in causing [name of plaintiff]'s harm."

The trial court instructed the jury with CACI No. 3020 as follows:

"[Plaintiff] claims that David Lin, Richmond Afful and Jose Avila used excessive force in detaining him. To establish this claim, [plaintiff] must prove all of the following:

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review of this issue. (*Perlin v. Fountain View Management, Inc.* (2008) 163 Cal.App.4th 657, 667, fn. 11 ["plaintiffs' one-sentence, perfunctory request for retrial of the causation issue that cites no supporting authority constitutes a forfeiture of the issue"].)

"1. That David Lin, Richmond Afful and Jose Avila used force in detaining [plaintiff];

"2. That the force used by David Lin, Richmond Afful and Jose Avila was excessive; and

"3. That David Lin, Richmond Afful and Jose Avila was acting in the performance of his/her official duties.

"Force is not excessive if it is reasonably necessary under the circumstances to detain a person. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, the following:

"(a) The seriousness of the crime at issue;

"(b) Whether [plaintiff] reasonably appeared to pose an immediate threat to the safety of David Lin, Richmond Afful and Jose Avila or others; and

"(c) Whether [plaintiff] reasonably appeared to be actively resisting or attempting to avoid detention."

The trial court excised from the standard CACI No. 3020 instruction the harm and causation elements, i.e.:[12]

"4. That [name of plaintiff] was harmed; and

"5. That [name of defendant]'s use of excessive force was a substantial factor in causing [name of plaintiff]'s harm."

B. Standard of Review

"The propriety of jury instructions is a question of law that we review de novo. [Citation.]" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.)

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[12] The trial court modified CACI No. 3020 in other ways. Plaintiff does not contend these other modifications were error.

C. Application of Relevant Principles

"'If an instruction is found to be erroneous, reversal is required only when "it appears probable that the improper instruction misled the jury and affected [its] verdict. [Citation.]" [Citation.]' [Citation.] In determining whether a jury was likely misled, the court must also evaluate '"(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled." [Citation.]' [Citation.]" (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263.)

Plaintiff contends his proposed Special Instruction No. 16 accurately stated the factors the jury was to consider in deciding the officers' liability for excessive force. Instead, however, the trial court instructed with versions of CACI Nos. 3000 and 3020 that it modified to remove the harm and causation elements. Plaintiff contends that he was prejudiced by the modified instructions. He does not contend the trial court erred in failing to instruct the jury with his proposed Special Instruction No. 16.

We held above that the trial court did not abuse its discretion in bifurcating the trial on damages from the trial on liability. Thus, the trial court did not err in modifying CACI Nos. 3000 and 3020 so they were consistent with its bifurcation order. Moreover, the trial court's excision of the fourth and fifth elements from CACI Nos. 3000 and 3020 necessarily made plaintiff's task of proving liability easier, not harder. That is, plaintiff had two fewer elements he had to prove to the jury to establish the officers' liability. Accordingly, the trial court's modifications of the challenged instructions did not prejudice plaintiff.

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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