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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

BONGSANG YEO,

Plaintiff and Appellant,

v.

PARK DAE GAM NE, INC.,

Defendant and Respondent.

B291363

(Los Angeles County
Super. Ct. No. BC638377)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Daniel Murphy, Judge. Affirmed in part and dismissed in part.

Law Offices of Peter Beck and Peter Beck; Law Offices of Joseph S. Socher and Joseph S. Socher for Plaintiff and Appellant.

Park Law and Daniel M. Park for Defendant and Respondent.

INTRODUCTION

Appellant Bongsang Yeo (Yeo) brought an action against his employer Park Dae Gam Ne, Inc. (Park) to recover unpaid overtime pay. Yeo contended Park should have classified him as a nonexempt employee because he spent more than 50 percent of his work hours performing nonexempt tasks. After trial, the jury found Yeo was exempt from overtime pay because the “executive exemption” applied to him. Yeo argues: 1) the judgment is not supported by substantial evidence; 2) the trial court erred in denying his motion for judgment notwithstanding the verdict (JNOV); 3) the trial court erred in denying his motion for a new trial; and finally 4) the trial court erred in refusing to instruct the jury about “working supervisors” and the irrelevancy of “job titles”, resulting in prejudice to Yeo. For reasons we shall explain, we find the judgment is supported by substantial evidence; we dismiss the appeal from the denial of the JNOV motion, affirm the denial of a new trial, and find there was no instructional error.

FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Civil Action

Yeo worked at Park’s Korean barbeque restaurant in Los Angeles, from August 2004 until August 2016.

On October 26, 2016, Yeo filed a civil complaint for unpaid wages against Park, asserting that Park misclassified him as an exempt employee, depriving him of overtime pay he would have otherwise received as a nonexempt employee. He alleged violations of the Labor Code and the applicable Industrial Welfare Commission’s (IWC) wage order for, among other things, failure to pay overtime. In his prayer for relief, Yeo requested

payment of earned wages, overtime compensation, and other damages according to proof in an amount no less than \$350,000.

On December 23, 2016, Park filed its answer to Yeo's complaint, denying every allegation and raising 34 affirmative defenses. Park contended Yeo was properly classified as an executive employee exempt from overtime compensation.

B. *Evidence at Trial*

A jury trial was held from April 25 to 30, 2018.

The relevant testimony is summarized below.

Yeo: Yeo worked at Park's restaurant from August 2004 until August 2016 when he was fired. Yeo was given the job title "head chef" or "room leader" from Park; he had the highest ranking job title in the kitchen. He received a monthly salary of \$7,500 since the year 2010.

From 2013 until 2016, Yeo worked six days a week. Park did not require Yeo to record his hours of work. He generally worked "during the weekdays, 11:00 a.m. to 12:00 midnight. And during the weekends, 11:00 [a.m.] to 2:00 a.m. the following day." For the past three years, Yeo worked a minimum of "approximately 76 to 80 hours" per week.

Yeo's "number one job duty" at the restaurant was to "cut meat"; on the average day, he spent approximately six hours cutting meats. Yeo's "second job duty" at the restaurant was to prepare side dishes, such as kimchi; he spent "about two hours" on the average day preparing side dishes. He spent another two or three hours cooking non-side dishes. Besides butchering and cooking, Yeo marinated meat, washed dishes, cleaned the refrigerator, and organized boxes. He estimated he spent one hour per day cleaning. Yeo trained other kitchen workers about 20 or 30 minutes per day.

Yeo took approximately 10 smoking breaks a day, each one lasting five to 10 minutes. Approximately two or three times a week, Yeo would drink an alcoholic beverage either by himself or with others “around the time the workers were all finished” or “when [he] was having a meal.” When he had the “dangerous job” of butchering meat, he would not drink until after the “business is over for the day.”

According to Yeo, he had three managers and/or supervisors—Rihyun Park, Taejun An, and Ji Won Pang. His managers asked Yeo to train new employees, give work instructions, and provide “information about a person’s performance level.” Yeo was asked not only to prepare the menu but also to cook and serve what was listed on the menu when “there is . . . a reservation for a group of customers.” Yeo occasionally would “have someone working under [him]” assist him with marinating meat; another employee, Roberto, would also cut the meat. However, Yeo was “the only one with a special skill necessary to prepare these dishes after 10:00 [p.m.]”

Jenee Y. Kim: Kim is the president of Park’s restaurant. In 2016, the three managers of Park’s restaurant were Yeo, Taejun An, and Rihyun Park; Yeo was the kitchen manager and executive chef, and was the highest in the hierarchy. He was in charge of the meat department. He would teach the front of the house, direct the waiters and waitresses, and work in the kitchen as a cook. He would instruct Taejun An to fix things in the kitchen.

Yeo would spend “about an hour” per day butchering meat. Yeo worked less than eight hours per day.

Rihyun Park: Rihyun is the marketing manager and worked approximately 60 hours a week at the restaurant. The highest level person in the hierarchy of the whole restaurant was Jenee Kim, followed by Yeo. Yeo was “not a butcher”; he was the “general executive chef” and “general kitchen manager.” Parts of Yeo’s job included managing, cooking, and butchering meat. Yeo would report to Rihyun when things broke down in the kitchen and needed repair. Yeo had “raised his voice” toward Rihyun in the kitchen about fixing things quickly.

Rihyun did not know Yeo’s exact hours of work at the restaurant. Rihyun did not give orders to Yeo because he was Rihyun’s “superior.”

Taejun (T.J.) An: T.J. was the general manager of the restaurant. Yeo was higher than T.J. in the hierarchy of the restaurant. Yeo would tell T.J. to purchase goods and place ads in the newspaper. Yeo was a butcher and would also cook in the kitchen. If Yeo came across “a problem he wasn’t happy with in the hall, he would call the managers and instruct them to do this and that.” Yeo “was our superior” and “we had to listen to him.”

Soohyun Kim: Soohyun worked as a cook at Park’s restaurant from 2011 until 2016. In 2016, the managers of the restaurant were Rihyun Park, T.J. An, and Ji Won Pang. Yeo was the “room leader” and would cook, cut meat, prepare side dishes, clean, and organize things. Yeo would spend 50 percent of his work time butchering, 20 percent of the time cooking, and 10 percent of the time making side dishes.

Yeo would direct Soohyun because he was a superior in charge of Soohyun’s work. Soohyun would usually work until 10:00 p.m. and Yeo would still be at the restaurant when Soohyun left.

Soon Jung Mim (Mrs. Yeo): Mrs. Yeo has been married to Yeo since 2013. Yeo worked on the meat, prepared side dishes, and cooked. Yeo left home for work at 10:00 a.m. and typically never came home before 12:30 a.m. on weekdays or before 2:30 a.m. on weekends.

Jose Castellon: Castellon had been employed by Park for almost eight years and was currently a waiter. Castellon did not know Yeo by name; he was introduced to Castellon as the “maestro” and Castellon referred to him as “chef” the entire time he worked at Park’s restaurant.

Yeo would “prepare everything, check everything.” Yeo gave “the orders for all the other people.” On at least two occasions, Yeo ordered Castellon to go home; this, despite the fact that Castellon “do[es]n’t work in the kitchen.” Yeo has also ordered Castellon to clean or throw away things. Castellon never saw Yeo clean; “[h]e don’t clean, he’s a chef.”

Yeo sometimes left work for two to three hours and came back “a little buzzed.” Yeo would also drink inside the kitchen at nighttime—“one section [of the kitchen] is only the meat” and “[t]hat’s his section. He be there most of the time. He drink there.” Sometimes he drank while he was cutting the meat.

Castellon never complained about Yeo because “he’s the chef. I mean, he do whatever he want.” (*Sic.*) Castellon did not complain to his manager T.J. An about Yeo because “[t]he chef is over Mr. An” and Mr. An was “not going to do anything.”

Cruz Isaias Etec: Etec, a cook at Park’s restaurant, referred to Yeo as the “maestro” because Yeo had asked him to. Yeo was “the boss of the kitchen” and “would decide everything in the kitchen,” including what foods to prepare. He would direct Etec and the other cooks. Yeo never came and helped Etec cook,

never cleaned, and did not stay and help Etec and the other cooks close down the restaurant. Etec never noticed a set schedule for Yeo because he would show up at different times in the morning; “[s]ometimes he wouldn’t show up until 12:00.” Etec has seen Yeo drinking while in the kitchen.

Abraham Franco Tala: Tala had been employed by Park for seven years and was currently the rice-maker. He described Yeo as the “maestro” who “gave orders to the people in the kitchen.” Yeo would teach the workers how to prepare the food, would sometimes cut meat, and would give orders to the cooks. Tala never saw Yeo clean, but saw him order other people to clean. Yeo would show up to the restaurant whenever he wanted.

C. *Jury Instructions*

At the conclusion of the testimony, the court instructed the jury with CACI 2720 in determining whether the “executive exemption” applied to Yeo. Yeo requested that the trial court give two special jury instructions to further explain for the jury the executive exemption. The trial court, however, did not provide the jury with either of those instructions.

D. *Verdict and Judgment*

On April 30, 2018, the jury returned a verdict in favor of Park and against Yeo. The jury found Yeo was an employee exempt from payment of overtime compensation from October 26, 2013 to October 2016 under the executive exemption. Having found Yeo exempt, the jury did not reach the issue of damages.

On May 15, 2018, judgment was entered in favor of Park.

E. *Yeo's Motions for New Trial and for Judgment
Notwithstanding the Verdict*

On June 8, 2018, Yeo filed a JNOV motion and motion for a new trial. Yeo argued the judgment had to be set aside and a new judgment entered in his favor because “the evidence received at trial [was] insufficient as a matter of law to support the jury’s verdict.” Yeo argued a new trial was warranted because irregularities in the proceedings materially affected Yeo’s substantial rights and prevented a fair trial. Yeo also argued a new trial should be granted because the evidence was insufficient to justify the decision. Park opposed both motions.

On June 29, 2018, the trial court heard and denied both motions. The court found: “[A] reasonable trier of fact could find that [Yeo] performed executive duties more than half of the time. The evidence was overwhelming that [Yeo] was in charge of the kitchen and that [he] exercised independent judgment and had complete control of the kitchen by setting the work schedule of others, supervising and directing the work of others, and checking the quality of the meals. [Yeo] even gave orders and directions to employees that were not part of the kitchen staff. Based upon the record[,] the court cannot conclude that the jury should have reached a different verdict.”

As to irregularities allegedly caused because Park’s counsel referred to Yeo as “chef” and “maestro” during the trial, the court held: Park’s reference to Yeo as “chef” and “maestro” during trial did not amount to irregularity that materially affected Yeo’s substantial rights. “While title alone is insufficient to establish the exempt status of an employee, the title ‘chef’ or ‘maestro’ is evidence that [Yeo] had control over the kitchen.” Yeo’s attempt to portray himself as “merely a nonexempt cook was strongly

rebutted” by testimony from Park’s employees who referred to him as “maestro” and who testified about the “executive duties” that Yeo performed. Similarly, “evidence that [Yeo] was allowed to drink in the kitchen is evidence that [he] was an exempt executive who could do activities that other employees were not permitted to engage in.” Lastly, as “it was established that cutting meat can be dangerous,” it could be inferred from Yeo’s drinking in the kitchen that he “did not cut meat as often as he claimed.”

Yeo timely filed his notice of appeal.

DISCUSSION

A. *Substantial Evidence Supports the Judgment*

Yeo argues Park failed to demonstrate that the executive exemption applies to him, because Park did not provide sufficient evidence that Yeo was “primarily engaged” in managerial duties, i.e., whether he spent more than 50 percent of his work time engaged in such duties. Accordingly, Yeo contends substantial evidence does not support the judgment, warranting reversal. We disagree.

1. Applicable Law

California’s Labor Code mandates overtime pay for employees who work in excess of eight hours in any one work day or in excess of 40 hours in any one work week, unless an exemption applies. (Lab. Code, §§ 510 and 515.) One such exemption is set out in the IWC’s wage order No. 5-2001 (wage order 5), which governs the “Public Housekeeping Industry,” a category that includes restaurants. (Cal. Code Regs., tit. 8, § 11050, subd. 2(P).) Wage order 5 exempts “persons employed in . . . executive . . . capacities” (*id.*, subd. 1(B)) from receiving an

overtime rate of compensation. A person employed in an executive capacity means any employee: (1) whose duties and responsibilities involve the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof; (2) who customarily and regularly directs the work of two or more other employees therein; (3) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; (4) who customarily and regularly exercises discretion and independent judgment; (5) who is primarily engaged in duties which meet the test of the exemption; and (6) earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. (*Id.*, subd. 1(B)(1)(a)-(f).)

The term “primarily” is defined in wage order 5 as “more than one-half of the employee’s work time.” (Cal. Code Regs., tit. 8, § 11050, subd. 2(O).) The regulations “takes a purely quantitative approach, focusing exclusively” on the percentage of time an employee spends performing exempt duties. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 797 (*Ramirez*).) Duties must be categorized as either “‘exempt’ or ‘nonexempt’ based on the primary purpose for which” the employee undertakes them (*Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 826 (*Heyen*)); the regulation thus does not recognize “hybrid” activities that have both exempt and nonexempt aspects (*id.* at p. 822). Exempt work “shall include . . . all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually

performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered in determining whether the employee satisfies this requirement.” (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(1)(e).)

A determination of whether “all of the elements of the exemption have been established is a fact-intensive inquiry. The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee.” (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014–1015.) “No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. ‘A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations.’” (*Id.* at p. 1015.)

Exemptions from wage-related protections under the Labor Code are narrowly construed against the employer, who has the burden to establish all criteria/elements of the executive exemption for it to apply as an affirmative defense. (*Ramirez, supra*, 20 Cal.4th at pp. 794–795; *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 374–375.) “Statutory provisions regulating wages that are enacted to protect employees are liberally construed with ‘an eye to promoting such protection.’” (*Heyen, supra*, 216 Cal.App.4th at p. 817.)

2. Standard of Review

Appellate review of a trial court's determination that an employee was properly classified as exempt from statutory overtime requirements involves a mixed question of law and fact. (*Ramirez, supra*, 20 Cal.4th at p. 794.) "The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra*, 216 Cal.App.4th at p. 817.)

Whether an employee meets the elements of the exemption is a question of fact and is thus reviewed pursuant to the substantial evidence rule. (*Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal.App.4th 555, 561.) Accordingly, "our authority begins and ends with a determination whether, on the entire record, there is any substantial evidence—that is, of ‘ponderable legal significance,’ reasonable, credible and of solid value—contradicted or uncontradicted, which will support the judgment. As long as there is such evidence, we must affirm." (*Ibid.*) Moreover, the reviewing court must consider the evidence in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference and resolving conflicts in support of the judgment. (*Ibid.*) "While substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations]." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 (*Kuhn*).)

3. Analysis

Yeo challenges the sufficiency of the evidence supporting the judgment. Specifically, he contends only that Park "never

presented substantial evidence supporting element (5)” of the exemption—i.e., that Yeo was “primarily engaged” in performing exempt tasks.¹ Yeo emphasizes that Park did not specify the percentage of time each day that Yeo spent performing executive and/or managerial duties, and failed to “rebut the quantitative evidence presented by [Yeo] regarding how much time he spent on exempt vs. non-exempt duties.”

Yeo argues his testimony and that of Soohyun Kim established he “spent 80% of his time butchering, cooking and preparing side dishes,” whereas Park “relied on general characterizations of [Yeo’s] job, his place in the hierarchy and the fact that he directed other employees.” Yeo argues none of the general characterizations of his duties and position at the restaurant addressed the quantitative question of the actual amount of time Yeo spent on exempt tasks, as opposed to nonexempt.

That Park did not separately and specifically identify how much time Yeo spent on each exempt versus nonexempt activity does not mean Park failed to carry its burden to show Yeo was primarily engaged in duties that met the test for the executive exemption. The trier of fact may draw “reasonable inferences from the witnesses’ testimony and other evidence that established how [Yeo] spent the majority of [his] time.” (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 445.)

¹ Yeo does not raise the insufficiency of the evidence as to the other elements of the executive exemption. We thus treat them as conceded or waived. (*Nieto v. Fresno Beverage Co., Inc.* (2019) 33 Cal.App.5th 274, 285; *Ivanoff v. Bank of America, N.A.* (2017) 9 Cal.App.5th 719, 729, fn. 1.)

Witness testimony established Yeo was the room leader, in charge of the kitchen and meat department. He would direct the front of the house and instruct other managers to fix things in the kitchen and place ads in the newspaper for him. Yeo would “prepare everything, check everything” and gave orders to other employees and managers. He never cleaned and did not stay late to help the other cooks close down the restaurant. Although the testimony offered by Yeo and Soohyun Kim contradicts the testimony offered by the other witnesses in terms of whether Yeo performed executive duties more than half the time, we are tasked with viewing the record in the light most favorable to the judgment and to search for evidence—contradicted or uncontradicted—that would support the judgment. We thus infer from the record before us (see *Kuhn, supra*, 22 Cal.App.4th at pp. 1632–1633) that a trier of fact could find the testimony offered by witnesses Jenee Kim, Rihyun Park, T.J. An, Jose Castellon, Crus Etec, and Abraham Tala established that Yeo spent more than 50 percent of his work time performing executive duties.

The employer’s realistic expectations about the employee’s job is relevant to the “primarily engaged” inquiry as well. (Cal. Code Regs., tit. 8, § 11050, subd. 1(B)(1)(e).) Here, Park’s president—Jenee Y. Kim—testified Yeo was the kitchen manager and executive chef, was in charge of the meat department, would teach the front of the house and direct the waiters/waitresses, and was the highest in the hierarchy of the other managers. We find Kim’s testimony demonstrated her “realistic expectations” about Yeo’s position and duties and support the conclusion that he was primarily engaged in executive and managerial duties.

Based on the record before us, we find substantial evidence supports the judgment.

B. *The Order Denying Yeo's JNOV Motion*

We lack jurisdiction to consider Yeo's challenge to the trial court's order denying his JNOV motion because Yeo failed to appeal from that order.

Yeo's notice of appeal filed July 13, 2018 states his appeal is from the judgment entered on May 15, 2018; he checked the box indicating the appeal is from the "judgment after jury trial." Yeo did not check the box indicating that he is also appealing from an "order or judgment under Code of Civil Procedure, § 904.1(a)(3)–(13)," which—via subdivision (a)(4)—authorizes appeals from "an order . . . denying a motion for judgment notwithstanding the verdict." Yeo did not check the "Other" box on the notice of appeal or otherwise identify his appeal as being from any judgment/order other than the judgment after jury trial. Nor did Yeo file a subsequent notice of appeal to indicate he was appealing from the trial court's order denying his JNOV motion.

An order denying a party's JNOV motion is an appealable order. (Code Civ. Proc., § 904.1, subd. (a)(4).) If an order is appealable, an aggrieved party must file a timely notice of appeal from the order to obtain appellate review. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) "A notice of appeal from a judgment alone does not encompass other judgments and separately appealable orders." (*Ibid.*) " "[W]here several judgments and/or orders occurring close in time are separately appealable . . . , each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal." ' [Citations.] The policy of liberally construing a notice of appeal

in favor of its sufficiency (Cal. Rules of Court, rule 8.100(a)(2)) does not apply if the notice is so specific it cannot be read as reaching a judgment or order not mentioned at all.” (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173 (*Filbin*).)

Here, although Yeo filed his notice of appeal after the court’s denial of his JNOV motion, he failed to indicate anywhere on the notice that he is also appealing from that order. However, as we are obligated to “liberally construe” the notice of appeal—in that the notice of appeal is deemed “sufficient if it identifies the particular judgment or order being appealed” (see Cal. Rules of Court, rule 8.100(a)(2))—we turn to the Civil Case Information Sheet filed by Yeo on August 2, 2018 for further clarity as to which orders Yeo was attempting to appeal.

The Civil Case Information Sheet specified that the appeal is from the May 15, 2018 judgment after jury trial, a copy of which was attached. Nowhere in Yeo’s Civil Case Information Sheet did he indicate that he is also appealing from the court’s June 29, 2018 order denying his JNOV motion, nor did he attach a copy of the order to his notice of appeal or Civil Case Information Sheet. California Rules of Court, rule 8.100(a)(2)), requiring liberal construction of a notice of appeal, cannot apply where there is a clear intention to appeal from only one of two separately appealable judgments/orders. (*Filbin, supra*, 211 Cal.App.4th at p. 173; *Colony Hill v. Ghamaty* (2006) 143 Cal.App.4th 1156, 1172.)

“The taking of an appeal is not merely a procedural step, but is jurisdictional, and where no appeal is taken from an appealable order, a reviewing court has no discretion to review its merits; *the court must disregard all issues concerning the order on its own motion even if no objection has been made.*” (*Berge v.*

International Harvester Co. (1983) 142 Cal.App.3d 152, 158, italics added.) We conclude we have no jurisdiction to consider Yeo's challenge to the order denying his JNOV motion and that portion of his appeal is dismissed.

C. *The Order Denying Yeo's Motion for New Trial*

Yeo contends the trial court erroneously denied his motion for a new trial because the jury's verdict is not supported by sufficient evidence. Yeo similarly purports to appeal from the trial court's denial of his new trial motion even though he did not specify his intent to appeal from that order in his notice of appeal.

However, unlike an order denying a JNOV motion, an order denying a motion for a new trial is *not* independently or separately appealable under Code of Civil Procedure section 904.1, and "may be reviewed only on appeal from the underlying judgment." (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19; Code Civ. Proc., § 906 [providing, upon an appeal pursuant to § 904.1 or 904.2, the appellate court may review "on any appeal from the judgment, any order on motion for a new trial"].) We conclude we have jurisdiction to review the merits of Yeo's new trial argument and proceed accordingly.

Code of Civil Procedure section 657 states, in relevant part: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision . . . unless after weighing the evidence[,] the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision." (Code Civ. Proc., § 657.)

“‘An order denying a motion for new trial will not be set aside unless there was an abuse of discretion that resulted in prejudicial error.’ [Citation.] We accord great deference to the trial court’s exercise of its wide discretion in ruling on a motion for a new trial. [Citation.] In reviewing an order denying a motion for a new trial, we review the entire record, including the evidence, and independently determine whether any error was prejudicial.” (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1018.) “An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court’s decision exceeds the bounds of reason and results in a miscarriage of justice.” (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.)

As set forth in section A of the Discussion, we find substantial evidence supports the judgment; the trial court did not err, let alone prejudicially err, when it found it “cannot conclude that the jury should have reached a different verdict” based upon its review of the record. There was no abuse of discretion.

D. *Jury Instructions*

The trial court instructed the jury on the executive employee exemption with CACI 2720. CACI 2720 was given in this form:

Park claims that it is not required to pay Yeo for overtime because Yeo is an executive employee. Yeo is exempt from overtime pay requirements as an executive if Park proves all of the following: (1) Yeo’s duties and responsibilities involve management of Park’s business or

of a customarily recognized department or subdivision of the business; (2) Yeo customarily and regularly directs the work of two or more employees; (3) Yeo has the authority to hire or fire employees, or his suggestions as to hiring or firing and as to advancement and promotion or other changes in status are given particular weight; (4) Yeo customarily and regularly exercises discretion and independent judgment; (5) Yeo performs executive duties more than half of the time; and (6) Yeo's monthly salary is at least twice the state minimum wage for full time employment.

In determining whether Yeo performs executive duties more than half of the time, the most important consideration is how he actually spends his time. But also consider whether Yeo's practice differs from Park's realistic expectations of how Yeo should spend his time and the realistic requirements of the job.

Each of Yeo's activities is either an exempt or a nonexempt activity depending on the primary purpose for which he undertook it at that time. Times spent on an activity is either exempt or nonexempt, not both.

Yeo argues he "was prejudiced by the trial court's refusal to instruct the jury" on two more detailed instructions: "that (1) the title given to an employee is irrelevant to the question of whether or not the employee is exempt; and (2) that a working supervisor or foreman is *not* exempt if he or she actually spends the majority of his or her time performing duties related to the actual production of the workplace (in this case cooking and preparing food) rather than executive or managerial tasks." Yeo contends

the requested instructions were necessary to avoid jury confusion and that the trial court's refusal to do so was prejudicial error.

1. Applicable Law and Standard of Review

“A party is entitled to an instruction on each theory of the case that is supported by the pleadings and substantial evidence if the party requests a proper instruction. [Citations.] A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomprehensible to the average juror, and ordinarily has no duty to modify a proposed instruction. [Citations.] A court may refuse a proposed instruction if other instructions given adequately cover the legal point.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 684–685.) An erroneous refusal to instruct the jury is not grounds for reversal unless it is probable that the error prejudicially affected the verdict. (*Id.* at p. 685.) In determining whether an error of instructional omission was prejudicial, we shall evaluate (1) the state of the evidence and any degree of conflict in the evidence on critical issue, (2) the effect of other instructions in remedying the error, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. (*Ibid.*; *Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1045.) Appellant has the burden of establishing that the instructional error was prejudicial and resulted in a miscarriage of justice. (*Evans*, at p. 1045; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 476.)

2. Analysis

Yeo argues he was entitled to this special jury instruction:

Job Titles Not Determinative: “A job title alone is insufficient to establish the exempt status of an employee.

The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part. [¶] Exemption depends upon what an employee actually does on the job. [¶] No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. [¶] Exemption must be based on how an employee actually spends his or her time, not on an idealized job description.”

The language in the requested instruction is taken, in part, from section 541.2 of title 29 of the Code of Federal Regulations and from California case law. However, the “mere fact that language in a proposed jury instruction comes from case authority does not qualify it as a proper instruction.” (*Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 526.)

Yeo contends the “testimony, questioning and argument about titles led to confusion about the appropriate test to apply and distracted the jury from the proper quantitative test required by California law.” Nothing in the record shows any jury confusion about the appropriate test to apply. In fact, CACI 2720 specified that in “determining whether [Yeo] performs executive duties more than half of the time, *the most important consideration is how he actually spends his time.*” (Italics added.) CACI 2720 also specified that a determination of whether Yeo's activities were exempt or nonexempt “depend[s] on the primary purpose for which he undertook [the activity] at that time.” Thus, Yeo's requested instruction is superfluous. We are not convinced that the trial court's failure to give this proposed instruction prejudiced Yeo.

Yeo also proposed a special instruction about “working supervisors” to avoid jury confusion about how to determine the exempt status of an employee who concededly was a supervisor. This is the proposed instruction:

Working Supervisor: “Working supervisor is a supervisor who regularly performs ‘production’ work or other work which is unrelated or only remotely related to his supervisory activities. If a working supervisor performs work of the same nature as that performed by the supervisor’s subordinates, such work must be counted as nonexempt work.”

Again, nothing in the record demonstrates that the jury was confused as to how to determine the exemption status of an employee. As noted, CACI 2720 specified what the jury should consider in determining whether the activities Yeo performed are exempt or nonexempt. Moreover, the court had provided the jury with another special instruction requested by Yeo, which defined managerial duties. We find the given instructions fully and properly advised the jury how to evaluate Yeo’s activities as exempt or nonexempt. There was no prejudicial error.

DISPOSITION

The judgment and post-trial orders are affirmed, except Yeo's challenge to the denial of his motion for judgment notwithstanding the verdict is dismissed for lack of jurisdiction. Respondent Park is awarded costs on appeal.

STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.