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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

PHILIP MARKOWITZ, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B275227 (Los Angeles County Super. Ct. No. BC379354)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael P. Linfield, Judge. Affirmed.

Law Offices of Jeffrey A. Cohen, Jeffrey A. Cohen; Marcus, Watanabe & Enowitz, David M. Marcus, and Daniel J. Enowitz for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Michael M. Walsh, Deputy City Attorney for Defendant and Respondent.

INTRODUCTION

After his warrantless arrest in the front yard of his home, appellant Philip Markowitz filed this action against respondents, the City of Los Angeles and several officers of the Los Angeles Police Department (LAPD). An ensuing jury trial resulted in a defense verdict. On appeal, appellant claims that the jury's verdict was predicated on a finding that his arrest was lawful, but that the evidence compelled a contrary finding. He further argues that the trial court abused its discretion by permitting respondents to impeach his expert witness with information from the expert's disciplinary record and by allowing his counsel only 45 minutes for closing argument. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Arrest and Complaint*

In 2007, the respondent officers arrested appellant in the front yard of his home. They did not have a warrant authorizing appellant's arrest within his home. The officers made the arrest at the request of officers from the Pasadena Police Department (PPD), who believed appellant had recently made criminal threats against a woman he had dated.

Appellant subsequently filed suit against respondents.[1] As relevant here, he asserted causes of action for violation of the Tom Bane Civil Rights Act (Civ. Code, § 52.1) (Bane Act)[2] and intentional infliction of emotional distress (IIED). Appellant claimed that his arrest violated his rights under the Fourth Amendment of the United States Constitution and article I, section 13 of the California Constitution, and he alleged that the officers had mistreated him in various ways. The alleged mistreatment included threatening to shoot appellant, entering and searching his home without consent or authority, and keeping him outdoors for about 30 minutes in cold weather while he was in his underwear.

B. *The Trial*

The case went to trial, at which appellant, the respondent officers and multiple other LAPD and PPD officers testified. Appellant and the respondent officers offered starkly different accounts of the circumstances

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[1] Appellant also named PPD and several of its officers as defendants. The trial court granted summary judgment for the Pasadena defendants after concluding there was probable cause for appellant's arrest. This court affirmed on appeal.

[2] The Bane Act provides, in relevant part: "Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with [by threats, intimidation or coercion], may institute and prosecute . . . a civil action for damages . . . ." (Civ. Code, § 52.1, subd. (b).)

surrounding his arrest. Appellant testified in general accord with the allegations in his complaint, while respondents presented testimony that appellant consented to the officers' entry into his yard and home, the officers made no threats against him, and appellant waited outside for only "five to ten minutes" while the officers conducted a "protective sweep" of the house. Appellant also called Timothy Williams, a police-procedure and use-of-force expert, to testify. Williams opined that based on his review of the PPD crime report and other relevant documents, the case presented no exigent circumstances that would have justified the officers' warrantless residential arrest of appellant.

In his closing argument, appellant's counsel argued that appellant's warrantless arrest was unlawful, as no exception to the warrant requirement applied, and that the officers' conduct was "despicable." He asked the jury to award appellant one million dollars. Respondents countered that the arrest was lawful. They argued that the Fourth Amendment did not protect appellant's front yard, that appellant had consented to their entry, and that exigent circumstances justified the warrantless arrest. Respondents additionally argued that "the Bane Act requires an independent violent act or threat of a violent act, separate from the arrest." Finally, respondents asserted that appellant suffered no mistreatment and no harm.

The jury returned a verdict for respondents. Specifically, the verdict form asked: "Did the plaintiff prove

by a preponderance of the evidence that any defendant officer violated the Bane Act?" The jury answered, "No." The verdict form also asked: "Did the plaintiff prove by a preponderance of the evidence that any defendant officer intentionally inflicted emotional distress upon him?" Again, the jury answered, "No."

C. *Appellant's Post-Judgment Motions*

After the jury returned its verdict, appellant moved for judgment notwithstanding the verdict or, alternatively, for a new trial, arguing that the evidence adduced at trial required a finding that his arrest was unlawful. As additional grounds for a new trial, appellant asserted that the trial court had abused its discretion in allowing respondents to impeach Williams with certain information from his disciplinary record, and that the court had not allowed appellant sufficient time for closing argument. The trial court denied the motions and subsequently entered judgment for respondents. This appeal followed.

DISCUSSION

A. *Appellant Has Failed to Demonstrate the Jury Verdict Was Contrary to the Evidence*

Appellant argues that the evidence could not support a finding that his warrantless arrest in the front yard of his

home was lawful.[3] He presupposes that the jury's verdict for respondents was based entirely on such a finding. Where, as here, the party challenging the findings of the trier of fact had the burden of proof at trial, "the question for a reviewing court [is] whether the evidence compels a finding in favor of the appellant as a matter of law." (*In re R.V.* (2015) 61 Cal.4th 181, 218.)

In neither his opening nor reply brief does appellant contend the jury was compelled to find for him on all elements of his claims for violation of the Bane Act and IIED; rather, he maintains that because the jury found his arrest lawful, it "never reached" any other issue. Specifically, in his opening brief's discussion of the Bane Act, appellant states that the "proper" issues at trial were: "1) Whether he was 'wrongfully detained'; and 2) If so, was his wrongful detention 'accompanied by the requisite threats, intimidation, or coercion, independent from the coercion inherent in the wrongful detention itself, that is "deliberate or spiteful."'" (Quoting *Bender v. County of Los Angeles*

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[3] Though he maintains the jury found only that exigent circumstances justified his warrantless arrest, appellant also argues that the evidence did not permit a finding that he consented to the officers' entry into his yard or that he was detained "in public" for purposes of the Fourth Amendment.

(2013) 217 Cal.App.4th 968, 971.) He asserts that "the jury never reached the second issue, because it found that [appellant] was not 'wrongfully detained.'" Appellant does not specifi-cally address the individual elements of his IIED claim but argues that the jury's verdict on this claim, too, was based on a finding that his arrest was lawful.[4] Relying on this premise, he claims an entitlement to a new trial on all remaining issues.

Appellant's arguments assume that the jury found against him only on the issue of the lawfulness of his arrest. However, the verdict form did not ask the jury to adjudicate the lawfulness of appellant's arrest. Rather, it simply asked whether appellant had "prove[n] by a preponderance of the evidence that any defendant officer violated the Bane Act," and whether he had "prove[n] by a preponderance of the evidence that any defendant officer intentionally inflicted

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[4] "The elements of the tort of [IIED] are: '"(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."'" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.)

emotional distress upon him." The jury answered each of these questions in the negative.[5]

"Where no special findings are made, the reviewing court may infer that 'the jury by its general verdict found for respondent on every issue submitted.' [Citation.]" (*Everett v. Everett* (1984) 150 Cal.App.3d 1053, 1063.) "'Where several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence and is unaffected by error . . . .' [Citation.]" (*Bresnahan v. Chrysler Corp.* (1998) 65 Cal.App.4th 1149, 1153.) Accordingly, the question on appeal is not whether the jury might have found in appellant's favor, but whether the evidence compelled a

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[5] In support of his contention that the jury reached only the issue of exigent circumstances, appellant relies solely on the trial court's statements in its order denying appellant's post-trial motions: "The jury clearly concluded that there were exigent circumstances that made the arrest lawful." The court's speculation regarding the basis for the jury's determination is not evidence, and as the defense challenged almost every element of appellant's causes of action, there is no basis in the record to conclude that the jury did not find against appellant on any other issue submitted to it. (See *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 ["Factual assertions on appeal cannot rest solely on citations to the decision of the trial court," as the trial court's statements are not evidence].)

verdict in his favor as a matter of law. (See *ibid*; *In re R.V.*, *supra*, 61 Cal.4th at p. 218.) Thus, to upset the jury's verdict as to either of his causes of action, appellant must establish that the evidence compelled a finding in his favor on every element of that cause of action. (*See Bresnahan v. Chrysler Corp., supra,* at p. 1153.) Appellant does not even attempt to make the required showing. Therefore, he has forfeited any argument in this regard, and his challenge to the jury's verdict is unavailing. (See *Goncharov v. Uber Technologies, Inc.* (2018) 19 Cal.App.5th 1157, 1167, fn. 8 [issue not briefed is forfeited]; *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125 [failure to brief essential element of plaintiff's complaint suffices to affirm judgment for defendant].)

Despite appellant's forfeiture of his challenge on appeal, we nevertheless invited the parties to file concurrent supplemental briefs addressing whether the evidence permitted jury findings: (1) that any wrongful detention of appellant was not accompanied by threats, intimidation or coercion independent of the coercion inherent in the wrongful detention itself; and (2) that appellant failed to prove the elements of his claim for intentional infliction of emotional distress. Appellant's supplemental brief is unresponsive.

As to his claim under the Bane Act, appellant advances a new legal argument. Citing *Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766, he contends he was not required to establish independent threats,

intimidation or coercion at trial, but only that the officers had a "'specific intent'" to deprive him of his right to be free from an unlawful arrest. Appellant never made this argument below, and it is contrary to appellant's own argument in his opening brief. We therefore decline to consider it. (See *People v. Punzalan* (2003) 112 Cal.App.4th 1307, 1312 [A supplemental brief is "not the place . . . to try to reframe the issues on appeal"]; *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 944 [Court of Appeal will not entertain a theory of the case raised for the first time in a supplemental appellate brief]; *Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal.App.4th 740, 777 [abstaining from consideration of arguments not raised in opening brief is "even more appropriate" when the argument is raised for the first time in a supplemental brief].)

As to his IIED claim, appellant simply asserts that the evidence "supports a finding" in his favor. As noted above, that is not the test. To prevail on appeal, appellant must show that the evidence compelled a finding in his favor as a matter of law. (See *In re R.V.*, *supra*, 61 Cal.4th at p. 218.) Because he does not attempt to make this showing, appellant fails to establish reversible error in the jury's verdict.

B. *Allowing Williams's Impeachment with Information from His Disciplinary Record Was Not Reversible Error*

1. *Background*

Appellant claims the trial court abused its discretion in permitting respondents to cross-examine Williams, his expert witness, about a disciplinary incident, without complying with the discovery and disclosure procedures in Penal Code section 832.7 and Evidence Code section 1043.[6] Shortly before his testimony, Williams informed appellant that respondents' counsel had recently impeached him in another case by questioning him about a disciplinary action taken against him 33 years earlier, when Williams was a police officer. Appellant then moved to preclude respondents from questioning Williams about this disciplinary matter, arguing that it would violate the statutory procedures for discovery and disclosure of officer disciplinary records. After the trial court denied his motion, appellant chose to discuss the disciplinary action in his direct examination of Williams.

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[6] Penal Code 832.7 prohibits the disclosure of peace officers' personnel records in criminal or civil proceedings "except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen. Code § 832.7, subd. (a).) Among other requirements for discovery or disclosure of such records, Evidence Code section 1043 demands the filing of a written motion along with affidavits showing good cause for the discovery or disclosure. (Evid. Code § 1043, subds. (a) & (b)(3).)

Williams testified that in 1983, he was suspended for 30 days because he had failed to document an interview with an abused minor. As a result of Williams's failure to document the interview, the minor was returned to his home and was later "reinjured." Williams explained that the incident was a "teaching moment" for him, and that he had "turned a negative into a positive," as the incident had taught him to be thorough in his work, and he was able to share his experience with his subordinates. In response to respondents' questions on cross-examination, Williams denied that he was suspended for failing to "take a situation seriously enough," and explained that it was not his decision to return the child to his parents.

In closing argument, respondents suggested that in the disciplinary incident, Williams "played down the seriousness of that crime just as he played down the seriousness of this one," and highlighted that he was a paid expert. In his rebuttal, appellant argued that Williams's testimony that there were no exigent circumstances was "unrebutted." In his motion for a new trial following the verdict, appellant argued that the trial court had abused its discretion in allowing respondents to question Williams about the disciplinary incident. The court denied the motion, noting, among other things, that "[t]he cross-examination on this matter took up but a few questions, and was but a minor issue in the overall cross-examination of Mr. Williams."

2. *Analysis*

On appeal, appellant reasserts that the trial court abused its discretion in allowing respondents to question Williams about the disciplinary incident without first complying with the prescribed statutory procedures. We review the trial court's ruling for abuse of discretion. (See *People v. Davis* (1995) 10 Cal.4th 463, 530 [whether party may impeach expert by cross-examining him about item not in evidence reviewed for abuse of discretion].) "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. [Citations.]" (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) A miscarriage of justice results only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Even assuming error in permitting questioning about the disciplinary matter, the court's ruling did not result in a manifest miscarriage of justice. The impeachment information here involved a single incident occurring 33 years before Williams's testimony. Appellant blunted any impact the incident might have had on the jury by eliciting Williams's version about it in his direct examination. Williams testified that he had "turned a negative into a positive," and that the incident had taught him to be thorough in his work. Additionally, as the trial court noted,

the disciplinary matter was a minor issue in Williams's cross-examination. Further, neither party appeared to attach much significance to Williams's conclusory testimony about the absence of exigent circumstances. In closing argument, respondents only briefly mentioned Williams's testimony, and appellant made only a passing reference to it in his rebuttal. In view of the relatively minor role Williams's testimony played at trial, and the disciplinary incident's limited potential effect on its reliability in the eyes of the jury, we conclude any error in allowing Williams's impeachment was harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119 [any error was harmless where challenged evidence had "relatively minor significance"].)

C. *The Trial Court Did Not Abuse Its Discretion in Limiting Closing Argument to 45 Minutes Per Side*

Appellant claims the trial court abused its discretion by not allowing him sufficient time for closing argument. Prior to trial, the court informed each side that it would have 45 minutes for closing argument. The court advised appellant that he could divide his time between the main part of his argument and his rebuttal however he wished. In his motion for a new trial, appellant argued that the trial court had not given him enough time for closing argument. The court denied the motion, noting that each side received the same amount of time for closing and that appellant did not claim surprise or unfairness.

On appeal, appellant contends that 45 minutes was an insufficient period of time for closing argument after a four-day trial. While he claims that he "informed [the trial court] in chambers prior to closing arguments that he needed more than 45 minutes," appellant cites nothing in support of that assertion, and our review of the record reveals no objection to the limitation until appellant moved for a new trial. Appellant has therefore forfeited the issue. (See *People v. Mejia* (2012) 211 Cal.App.4th 586, 634, fn. 8 [failure to object below constitutes forfeiture]; *People v. Williams* (1997) 16 Cal.4th 153, 254 [arguments in a motion for a new trial may not substitute for a timely objection].)

Nor would appellant's claim succeed on the merits. "Trial courts have broad discretion to control the duration and scope of closing arguments. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 147; accord, *People v. Fairchild* (1967) 254 Cal.App.2d 831, 841 ["the time limited for argument is in the trial judge's discretion and his determination of the proper allotment will seldom be disturbed on appeal"].) The trial court did not abuse its discretion by allotting each side 45 minutes for closing argument after a trial that included about three days of testimony. (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2018) ¶ 13:29 [counsel should normally request "at least 30 minutes to argue a 3-4 day trial"].)

Appellant argues that as a result of the court's time limit, he lacked sufficient time "to rebut all of the

misstatements of law made by counsel for [respondents] in her closing argument." As noted, however, both sides were allotted the same amount of time for argument, and the court allowed appellant to divide his time between his main argument and rebuttal as he wished. In short, appellant cannot establish reversible error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

MICON, J.*

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