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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALBERT HUGHES, Plaintiff and Appellant, v. ALLEN HUGHES et al., Defendants and Respondents.	B168913 (Los Angeles County Super. Ct. No. BC272277)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elihu Berle, Judge. Affirmed.

Law Offices of Michael A. Weiss and Michael A. Weiss for Plaintiff and Appellant.

Morris Polich & Purdy, Richard H. Nakamura, Michael P. West, and Pamela A. Hill for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, the only parts of this opinion certified for publication are the Introduction, Factual and Procedural Background, the first paragraph under Discussion, part IV.C. and the Disposition.

INTRODUCTION

A Vanity Fair magazine article quoted defendant and respondent Albert Hughes, Jr.,[1] as saying, "Our dad's a pimp." A USA Today article quoted defendant and respondent Allen Hughes, Albert Jr.'s twin brother, as saying their father "dabbled in the pimptorial arts." The Hughes brothers maintained the statements were true. Their father, plaintiff and appellant Albert Hughes, Sr., sued Albert Jr. and Allen for defamation, claiming the statements were false. A jury found that the Hughes brothers did not make defamatory statements.

On appeal, Albert Sr. raises numerous claims of error, including error in the special verdict, insufficiency of the evidence, errors in the jury instructions, and errors in rulings on discovery motions and motions in limine. In the published portion of this opinion, we discuss Albert Sr.'s contention that the statement, "Our dad's a pimp," connotes a present, rather than a past, fact, and therefore Albert Jr., in order to establish truth as a defense, had to prove his father was acting as a pimp at the time the allegedly defamatory statement was made. Albert Sr. claims that the evidence of alleged pimping activity years earlier was irrelevant and was insufficient to support the defense of truth and that the jury should have been instructed that the defense of truth could only be established by evidence that he was engaging in pimping activity at the time the statements were made. We hold that the evidence of past activity was relevant and sufficient to establish a defense of truth and that the trial court did not err in not giving such an instruction.

In the unpublished portion of this opinion, we discuss Albert Sr.'s other contentions on appeal, as to which we hold that there was either no error or that Albert Sr. has forfeited or abandoned the issues. We therefore affirm the judgment.

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[1] Because the parties share the same surname, we refer to them as Albert Sr. (or plaintiff), Aida, Albert Jr., and Allen. Albert Jr. and Allen sometimes are collectively referred to as the Hughes brothers.

FACTUAL AND PROCEDURAL BACKGROUND

Albert Sr.'s statements to the Hughes brothers

Albert Sr. married Aida in 1970, and Albert Jr. and Allen were born in April 1972. Albert Sr. and Aida divorced in approximately 1976, and the Hughes brothers lived primarily with their mother, although they did stay with or visit their father at times.

According to the Hughes brothers, their father told them he was a pimp.[2] They said Albert Sr. told them in 1985 he was a pimp from about 1978 to 1981. They testified that in a second conversation in 1987 during a trip to Detroit, their father had a "heart to heart," "coming clean" conversation with them in which he "opened up to us about his life, and . . . he explained to us the truth. He told us that he was a pimp at one time." Albert Sr. told the Hughes brothers that Cherry Morton, Toni, and Sherry, women the Hughes brothers knew during their childhood, were prostitutes.

Other family members, including the Hughes brothers' half-sister, their uncles, and a cousin told Allen his father was a pimp. Terrance Morton, Albert Sr.'s son with Cherry Morton, also testified his father was a pimp. Albert Sr. denied he was a pimp.

The statements in Vanity Fair and USA Today

The Hughes brothers began directing music videos professionally when they were 19 years old. They eventually became motion picture producers. In connection with an upcoming motion picture, Veronica Webb, a friend of the Hughes brothers, told them she wanted to interview them. During a telephone conversation with her, Albert Jr. said that

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[2] Under California law, "any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person, is guilty of pimping, a felony." (Pen. Code, § 266h.) The dictionary definition of pimp is a man who solicits clients for a prostitute. (Merriam-Webster Online Dictionary (2004, www.Merriam-Webster.com.).)

a producer stole an idea from him and his brother and that when the Hughes brothers tried to contact the producer, the producer threatened to have them investigated. They told their agent to tell the producer "to put the private investigator on us. We have nothing to fear. Our life is an open book. My father was a pimp and my mother is a lesbian."

Vanity Fair published Ms. Webb's article in October 2001. The article contained the following quote, " 'We wanted to send a message that we're not hood filmmakers. We can do other films,' says Allen. 'Our mother is a lesbian. Our dad's a pimp,' says Albert. They both agree: 'We're interested in the underclass.' " In addition to the Vanity Fair article, an article in USA Today quoted Allen as saying his father "dabbled in the pimptorial arts." Allen admitted making the statement in 1995. He said that although he made it "in jest," it was true. The USA Today article was not produced at trial, and a purported computer copy of it was not admitted in evidence.

The lawsuit

Albert Sr. filed a complaint for defamation against the Hughes brothers and Conde Nast.[3] By special verdict, the jury answered "no" to the question, "Did defendant Albert Hughes make a defamatory statement about the plaintiff?" The jury answered "no" to the identical question as to Allen Hughes.

Plaintiff moved for a new trial on the grounds the evidence was undisputed that the Hughes brothers made the defamatory statements to the media, the evidence in support of the verdict was insufficient, the judgment was inconsistent with the special verdict, the trial court incorrectly answered a jury question, and jury confusion resulted from the instructions and special verdict form. The motion was denied, and this appeal followed.

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[3] Conde Nast, Vanity Fair's publisher, settled the lawsuit and is not a party to this appeal.

DISCUSSION

Albert Sr.'s opening brief consists of 101 separately numbered paragraphs each containing one or more claimed errors. The paragraphs are grouped under five headings: Special Verdict Unsupported By Concession; No Evidence of Pimping; Unfair Trial; Defective Jury Instructions; and Injunctive Relief. We address plaintiff's various claims of error, which, as discussed below, have largely been forfeited or abandoned.

[The portions of this opinion that follow (parts I.-IV.B.) are deleted from publication.]

I. The special verdict

Defendants conceded they made the statements at issue; their defense was truth. Based on that concession, plaintiff argues on appeal the issue was "removed from controversy" and the special verdict " 'must be dropped from the record' and that any legal conclusion by Judge Berle not in sync with the conceded fact is plain error of law and fact." There was no error.

Special verdict, question no. 1 asked, "Did defendant Albert Hughes make a defamatory statement about the plaintiff?" Question no. 7 asked, "Did defendant Allen Hughes make a defamatory statement about the plaintiff?" Plaintiff's counsel, Michael Weiss, initialed the special verdict before it went to the jury. But after the jury rendered its verdict, he objected. He said, "I think this is not acceptable, your Honor. Did he make a defamatory statement? I mean, of course, he made a defamatory statement. You instructed on its face it is defamatory. I don't think they understood the instructions. It is not acceptable. [¶] The Court: Are you serious? [¶] Mr. Weiss: I am very serious. Did he make a defamatory statement? You instructed them that he made the defamatory statement. It was defamatory. [¶] . . . [¶] The Court. It was defamatory on its face, but if the jury finds that the statement is true, it is not defamatory. [¶] Mr. Weiss: They did not find it is true. There is nothing on this statement that says it is true. [¶] The Court: Anything else you wish to tell me? [¶] Mr. Weiss. That is all."

Defendants' concession they made the statements was not a concession the statements were defamatory. Instead, their defense throughout the case was the statements were true, and hence they were not defamatory. (See generally *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 648 ["Truth is, of course, an *absolute* defense to any libel action"].) The jury, with plaintiff's counsel's consent, was so instructed. And, by answering "no" to the special verdict, the jury found that the statements were not defamatory. Neither law nor the concession compelled the jury to find otherwise.

II. Sufficiency of the evidence

We reject plaintiff's contention that there was insufficient evidence to support the judgment. Under the substantial evidence standard of review, " ' "the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact." ' [Citations.] ' "[W]e have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." ' [Citations.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766.) "The testimony of one witness worthy of belief is sufficient to prove any fact." (BAJI No. 2.01.)[4]

Here, three people testified plaintiff was a pimp. Both Albert Jr. and Allen testified their father told them he was a pimp. Terrance Morton testified his father was a pimp. This evidence, by itself, was sufficient to support the jury's verdict. We discuss in section IV.C. that evidence of past activities as a pimp supports truth as a defense to the statements.

Nonetheless, plaintiff cites numerous cases (e.g., *People v. Maita* (1984) 157 Cal.App.3d 309, 319) as examples of what evidence has been found to be sufficient evidence of pimping. Those cases, however, are criminal cases involving the criminal

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[4] The jury was instructed with BAJI No. 2.01.

beyond a reasonable doubt burden of proof. This civil action involves the preponderance of the evidence burden of proof. "[I]t has long been settled that in civil cases even a criminal act may be proved by a preponderance of the evidence." (*Liodas v. Sahadi* (1977) 19 Cal.3d 278, 290, fn. 8.) In accordance with the applicable burden of proof, the jury was properly instructed "the defendant has the burden of proving, by a preponderance of the evidence, all of the facts necessary to establish truth as an absolute defense to a claim for defamation. Preponderance of the evidence means evidence that has more convincing force than that opposed to it. . . ." Indeed, during a discussion concerning how to instruct the jury on the crime of pimping, the trial court stated that "[w]e are not getting into the burden of proof in a criminal case." Plaintiff's counsel replied, "Correct."

III. Unfair Trial

Referring primarily to the trial court's orders on motions in limine and other evidentiary rulings, plaintiff contends the trial was unfair. As we discuss below, plaintiff has either largely forfeited or abandoned these arguments on appeal, or the record reveals no error.

A. Motions in limine[5]

Plaintiff challenges the procedure the trial court used to hear the motions in limine and its orders on motions in limine Nos. 1, 3, 4, 6, 7, 8, 9, and 10. The record on appeal only contains motions in limine Nos. 1-5 and 13. To show error, the "plaintiff must affirmatively show error by an adequate record. [Citations.] Error is never presumed. It is incumbent on the plaintiff to make it affirmatively appear that error was committed by the trial court. [Citations.]" (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712 (*Rossiter*); accord, *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *Ballard v. Uribe*

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[5] Only defendants filed motions in limine.

(1986) 41 Cal.3d 564, 574-575.) Plaintiff's failure to provide an adequate record therefore forfeits appellate review as to motions in limine Nos. 7, 8, 9, and 10. As to the orders we review, we do so under the abuse of discretion standard of review. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.)

1. *Procedural issue regarding the motions in limine*

The trial court heard the motions in limine on the first day of trial. In doing so, the trial court did not, contrary to plaintiff's assertion, violate any Rules of Court, local rules or the Code of Civil Procedure. A trial court has discretion to determine the timing of the filing of motions in limine. (Cal. Rules of Court, rule 312(d).) Moreover, plaintiff has not shown how the mere timing of the hearing date on the motions prejudiced him.[6]

The trial court also did not "violate[] standard in limine motion practice by placing the burden of proof" on the responding party. Plaintiff's citations to the record do not support this contention. Instead, they merely reflect the trial court's inquiries as to why the motions should not be granted.

2. *Motion in limine No. 1*

The trial court granted defendants' motion in limine to exclude evidence of their sexual preferences. When the trial court asked if there was a reason he should not grant the motion, plaintiff's counsel replied there "is no reason that I could see." Plaintiff therefore may not now contend on appeal the trial court was "unfair due to lack of discussion and opportunity for oral argument" when he agreed, in effect, that the motion should be granted.

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6 Plaintiff similarly has not shown how requiring the parties to file joint trial documents and failing to require the parties to submit the proposed special verdict at the final status conference prejudiced him.

3. *Motion in limine No. 4*

Defendants moved for a protective order to prevent plaintiff's counsel from asking them questions at their depositions about their residential addresses and their relationship with their children and current and former girlfriends. Defendants also moved in limine to preclude such evidence. The trial court granted the protective order and the motions in limine. Plaintiff contends these orders denied him the opportunity to discover defendants' reputation within the community for honesty.

Plaintiff, however, has not provided the trial court's ruling on the protective order and the reporter's transcript from that hearing. We therefore do not address whether the court abused its discretion in connection with these orders. Instead, we presume the orders are correct. (*Rossiter, supra,* 88 Cal.App.3d at p. 712.)

4. *Motions in limine Nos. 3 and 6*[7]

During Allen's deposition, plaintiff's counsel asked whether his films included music promoting hatred of White people. Defendants thereafter filed motion in limine No. 3 to exclude their views regarding race. Plaintiff's counsel argued defendants' views were relevant to punitive damages. The trial court then said the issue related to motion in limine No. 6 to bifurcate issues of liability and damages from punitive damages, and the trial court proceeded to address bifurcation. The court suggested bifurcating "the trial and defamation as to the first phase and if the jury finds that plaintiff was defamed and that plaintiff was damaged, then we have a second phase to determine whether the defendants engaged in conduct which was malicious, oppressive, or despicable conduct or fraudulent with respect to defamation, and if so, how it would assess any claim of punitive damages." Mr. Weiss, plaintiff's counsel, responded that it sounded "okay," but

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[7] Plaintiff did not include motion in limine No. 6 to bifurcate issues of liability and damages from punitive damages in the record. Nonetheless, because motion in limine No. 6 is relevant to motion in limine No. 3, which is in the record, we address the bifurcation order.

expressed a concern it would lengthen the trial. The trial court said it would clear the jury for 8-to-10 days and that the second phase would proceed immediately after the first phase. Mr. Weiss again said that "is acceptable to plaintiff."

Plaintiff cannot now claim the bifurcation order rendered the trial unfair because it "eliminated all evidence on intent and reckless disregard." " 'Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal' on appeal. [Citation.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) This is the doctrine of invited error. (*Ibid.*) Here, plaintiff invited or forfeited any claimed error by agreeing to the bifurcation.

Moreover, the bifurcation order did not result in the error of which plaintiff complains, i.e., the elimination of evidence of intent and reckless disregard of whether the matter was false. The trial court said plaintiff could argue "something is despicable" or was malicious conduct. Plaintiff did make those arguments. He asked Allen if he believed calling his father a pimp would cause his father "shame, mortification, grief, depression, and even worse that it would result in his attempt to commit suicide" and whether he thought it would exacerbate his father's bipolar condition. In closing argument, plaintiff's counsel argued that making "a statement that your father is a pimp in jest is despicable conduct." He also said that Allen's statement about his father was a "nasty, tasteless lie" made to promote his movie.

5. *Limitation of cross-examination*

Neither the trial court's orders on the motions in limine nor its discovery orders limiting the questions plaintiff could ask at defendants' depositions and limiting his access to a defense witness deprived plaintiff of any right to cross-examine witnesses or of free speech. The trial court did not improperly curtail cross-examination. Instead, it restricted—properly—the admission of prejudicial, confusing, and irrelevant evidence. Defendants' sexual orientation; how they make their motion pictures; their use of drugs, if any, to fantasize; and their choice of music in their motion pictures were irrelevant at the first phase of trial.

Nor was plaintiff limited in his cross-examination by virtue of the protective order the trial court granted limiting his access to a defense witness, Terrance Morton. Prior to trial, plaintiff left a voicemail message for the witness. In his message, plaintiff made statements that could be interpreted as threatening.[8] The trial court granted defendants' motion for a protective order to prohibit plaintiff from contacting the witness unless Mr. Morton wanted to have contact with plaintiff. Mr. Morton expressly stated at the motion hearing he did not want to have contact with his father. Moreover, he had the option of refusing to speak to his father even in the absence of the protective order.

B. Additional evidentiary issues

Terrance Morton testified he had a prior drug conviction. But it was his understanding that if he successfully completed a drug program the conviction would be expunged. Plaintiff now attacks that testimony as an incompetent opinion under Evidence Code section 788. Plaintiff did not object to the testimony, and therefore he has forfeited the right to challenge its admission on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

Plaintiff also complains the trial court failed to take judicial notice of the true meaning of the statements "Our dad's a pimp" and he "dabbled in the pimptorial arts."[9] The true meaning of these words or statements is not a fact or proposition of generalized

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[8] For example, he said, "Now I'm telling you, if you try to harm me, I'm telling you that you are going to have trouble from the Federal government. And we are definitely going to let these people know that you need . . . that you are supposed to be on medication, my friend. . . ."

[9] He also argues that the trial court's refusal to take judicial notice of the true meaning of the statements was especially egregious because the trial court told an *alternate* juror who was having trouble with "languages" that he or she could not look at a dictionary. This instruction was not error, and plaintiff has not shown that this alternate juror participated in the verdict or did not understand the proceedings.

knowledge so universally known it cannot reasonably be the subject of dispute. (Evid. Code, § 451, subd. (f).)

At the same time plaintiff contends the true meaning of the statements are subject to judicial notice, he argues it was necessary to have an expert witness explain the meaning of the phrase "to turn a woman out." Plaintiff never designated an expert to explain this phrase, and, moreover, Allen did explain its meaning (to treat a woman well and then to abuse her). Plaintiff also admitted he used the phrase in a letter he wrote to Aida, the twins' mother.

Plaintiff cites to examples of alleged improper impeachment of a witness on a collateral matter. For example, on cross-examination, defense counsel asked plaintiff if "it was his testimony that the sole cause of your failed marriage" was the publication of the statement their dad "dabbled in the pimptorial arts." Plaintiff replied, "Yes, sir," and defense counsel then asked whether his wife's allegation he assaulted her contributed to the failed marriage. These questions were proper impeachment, as they went to a matter directly at issue—damages—not a collateral one.

We have also examined those portions of the reporters transcript plaintiff claims are "full of irrelevant evidence." Plaintiff did not object to the questions on *any* ground, including relevancy, and therefore he has forfeited this argument on appeal. (*In re S.B., supra,* 32 Cal.4th at p. 1293, fn. 2.)

C. Judicial bias

Plaintiff cites to claimed examples of the trial court's "partisanship," including the trial court sustaining its own objection. The trial court once interrupted plaintiff's counsel's cross-examination of Allen by saying the question "sounds like an argument. Do you want to ask a specific question?" In so asking, the trial court did not demonstrate any partisanship. Instead, it was merely controlling the proceedings, as it has the statutory authority to do. (Evid. Code, § 765, subd. (a).) Our review of the entire record reveals no discourteous and disparaging remarks to plaintiff's counsel that discredited his

case or created the impression it allied itself with the defense. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.)

IV. Jury instructions

At the outset of the trial court's and the parties' discussion regarding jury instructions, plaintiff's counsel said that, aside from an instruction on pimping, "I believe we have agreement" on all other instructions. At the conclusion of the discussions concerning the jury instructions, the trial court asked, "Aside from objections which have already been stated on the record, are there any other objections to any instructions we discussed?" Plaintiff's counsel replied "No, sir." He again replied "No" when the trial court asked if anyone had "any additional instructions which anyone wants to offer?"

Notwithstanding his consent to the proposed instructions, plaintiff generally contends the jury should have been instructed on, among other things, the statute of limitations on the crime of pimping; the prima facie elements of pimping; that confessions require corroborating evidence; that if they "had a reasonable doubt using the preponderance of the evidence test as a guidepost, as to whether [plaintiff] is or was a pimp, that they could not find he was a pimp"; 25-year-old evidence is not admissible and is irrelevant; his credibility could not be impaired by cross-examination on collateral matters; and what is relevant evidence. Plaintiff does not cite to the record to show he requested instructions on these issues. Instead, these issues are largely addressed by jury instructions to which plaintiff agreed or did not object (e.g., BAJI Nos. 2.01, 2.20, 2.06, 2.43, 2.60, 7.02, 7.02.1, 7.04.1, 7.09,[10] 7.10, 7.10.1, 7.11, 14.65). As to those instructions, plaintiff has forfeited any issues on appeal.

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[10] Plaintiff's counsel initially objected to BAJI No. 7.09. But after the trial court went over the instruction, plaintiff did not renew his objection. Plaintiff also did not object to an additional instruction the trial court drafted ("If you find that defendant defamed plaintiff and it was reasonably foreseeable that the defamation would be repeated by another party, the jury may consider damage caused by such repetition").

And as to instructions plaintiff requested—for example CALJIC No. 10.70 regarding the elements of pimping—he invited or forfeited any claimed error. (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1653 ["The doctrine of invited error bars an appellant from attacking a verdict that resulted from a jury instruction given at the appellant's request"].)

Therefore, the only issues we address are the trial court's refusal to instruct the jury with CALJIC No. 2.01 and its response to a jury question. We also address *post* what appears to be plaintiff's contention the jury should have been instructed that the statement, "Our dad's a pimp," connoted a present fact, thereby requiring proof that plaintiff was pimping at the time the statement was made.

A. CALJIC No. 2.01 and BAJI No. 2.25

Plaintiff requested the jury be instructed with CALJIC No. 2.01 regarding the sufficiency of circumstantial evidence. Noting that this is not a criminal case involving confessions of a crime, the trial court correctly refused to give the instruction. The trial court then asked whether plaintiff wanted BAJI No. 2.25[11] to be given. After initially stating he wanted the court to give the instruction, plaintiff's counsel said he did not want it given because it was plaintiff's position he did not make an admission. The following colloquy then occurred: "[Mr. Weiss:] . . . my plaintiff did not admit that he made this statement and so . . . I don't want 2.25 because he did not admit that he made that statement. Someone else is sticking it in his mouth, your Honor. This is not an admission that my client made. [The Court:] I won't go into a discussion of what an

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Indeed, plaintiff's counsel said the trial court "hit it right on the head. . . . I couldn't have said it better."

[11] BAJI No. 2.25 states: "A statement made by a party before trial that has a tendency to prove or disprove any material fact in this action and which is against that party's interest is an admission. Evidence of an oral admission not made under oath should be viewed with caution."

admission is. An admission is a statement of interest. But if you don't want it, I won't give it. [Mr. Weiss:] I don't want it. [The Court:] I want a clear record of this. If you want, I will give BAJI 2.25. Plaintiff is telling me you don't want 2.25; is that right? [Mr. Weiss:] Yes, I don't want it. . . . [The Court:] 2.25 is not going to be given."

Plaintiff therefore made a tactical decision not to have the jury instructed with BAJI No. 2.25. Neither we nor plaintiff may now question that decision. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686; *Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) Plaintiff nonetheless argues it was error for the trial court not to instruct the jury sua sponte on BAJI No. 2.25. It did not have such a sua sponte duty. (*Mesecher, supra,* at p. 1686 ["whereas in criminal cases a court has strong sua sponte duties to instruct the jury on a wide variety of subjects, a court in a civil case has no parallel responsibilities"].) Moreover, if there was any error, then plaintiff invited it. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501 ["It is settled that where a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal"].)

B. The jury's note

The jury asked the following question during deliberations: "In jury instruction 7.07, we are told that defamation requires that the statement was false. However, we the jury, would like to know whether the fact that we believe that Al Sr. told his sons and that they, the boys, truly believed he was a pimp is enough to negate the fact that there was defamation, even if we do not necessarily believe Al Sr. truly was a pimp." Plaintiff's counsel requested the trial court to respond "No" to the question because "a belief in the truth" is not enough to establish the truth defense. The trial court proposed rereading BAJI No. 7.04.1, and plaintiff's counsel requested that if the trial court was going to reread that instruction instead of responding "no" to the question, then that the court also

reread BAJI No. 7.07. The trial court reread BAJI Nos. 7.04.1[12] and 7.07[13] to the jury. Forty minutes later, the jury returned with its verdict. Neither counsel requested the jury be polled.

When plaintiff raised the trial court's response to the jury question in his post-trial motions, the trial court stated, "The question could not have been answered 'yes' or 'no' because it depended on what the jury found as facts, and that is if the jury believed that the defendants' conduct was not negligent or reckless and that defendants justifiably relied on the plaintiff's statement. The answer could have been 'yes' if the jury believed that conduct was reckless or negligent. Perhaps the lesser could have been known if the defendants were not justified and relied on a statement made by plaintiff. It depends, really, on what the jury found to be the facts. That's why the court read the entire jury instruction 7.04.01 and also 7.07 with regard to applicable law on the defamation."

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12 BAJI No. 7.04.1, as given, provides: "The essential elements of a claim for defamation by libel or slander upon which plaintiff has the burden of proof by a preponderance of the evidence are: [¶] One, the defendants by writing or orally made a defamatory statement about the plaintiff; [¶] Two, the defendant published the defamatory statement; [¶] Three, the defendant knew the statement was false and defamed plaintiff, or published the statement in reckless disregard of whether the matter was false and defamed plaintiff; or acted negligently in failing to learn whether the matter published was false and defamed plaintiff. [¶] Reckless disregard for whether the matter was false and defamed plaintiff means that the defendant actually had serious doubts about the truthfulness of the statement at the time of the publication. [¶] A defendant acts negligently if he does not act reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it. [¶] In determining whether the defendant's conduct was reasonable you should consider: [¶] One, the time element; [¶] Two, the nature of the interest that the defendant was seeking to promote by publishing the communication; and [¶] Three, the extent of the injury to the plaintiff's reputation or sensibility that would be produced if the communication proves to be false."

13 BAJI No. 7.07, as given, provides: "An essential element of defamation by libel or slander is that the statement published was false. Consequently, if the statement was, in fact true, there can be no defamation, regardless of defendant's motivation. [¶] The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish that the statement is true."

We find no error in the trial court's response to the jury's question. The jury's question was sufficiently ambiguous that a simple "yes" or "no" response would have been misleading and would not necessarily have answered the question correctly under the law. The jury's question is ambiguous as to whether the jury was saying it did or did not believe that defendants "truly believed" their father was a pimp. Assuming the jury was asking what happens if defendants "truly believed" their father was a pimp, then the jury still had to determine whether defendants published the statement in reckless disregard of whether it was false or acted negligently in failing to learn whether it was false. (BAJI No. 7.04.1.) The trial court therefore acted appropriately by choosing to respond to the question by rereading BAJI Nos. 7.04.1 and 7.07, instructions to which the parties had previously agreed. (*Ramona Manor Convalescent Hospital v. Care Enterprises* (1986) 177 Cal.App.3d 1120, 1136-1137 [it is not error to reread correct instructions in response to a jury's question].)

[The portion of this opinion that follows (part IV.C.) is to be published.]

C. Statement of past fact

The parties agree the statement, "Our dad's a pimp," if false, would be defamatory. Plaintiff, Albert Sr., denies he ever told the Hughes brothers he had engaged in pimping activities, but asserts that even if he had, evidence of his past activities could not be used to support the truth of the statement in question. He says there is no evidence that he *is* a pimp. He raises this point by arguing that the evidence of his alleged statement to the Hughes brothers about conduct decades earlier (a) was inadmissible as remote and irrelevant, (b) could not support a determination of truth of the statement "Our dad's a pimp," and (c) required the trial court to instruct the jury that "Our dad's a pimp" refers to a present, rather than past, fact. The record does not reflect that plaintiff requested such an instruction or objected to the evidence he now states is irrelevant, and therefore he forfeited his claims of error as to the instruction and admission of evidence. Nevertheless, because each of plaintiff's arguments referred to in this section relates to

the issue of whether the evidence of past pimping activity can establish the truth of the statement "Our dad's a pimp," we discuss that issue.

"Defamation is effected by either of the following: [¶] (a) Libel; [¶] (b) Slander." (Civ. Code, § 44.) To constitute libel or slander, the published statement must be false. (Civ. Code, §§ 45, 46.) To establish the defense of truth—i.e., that the statement is not false—defendants do not have to prove the "literal truth" of the statement at issue. (*Emde v. San Joaquin County Central Labor Council* (1943) 23 Cal.2d 146, 160.)[14] "[S]o long as the imputation is substantially true so as to justify the 'gist or sting' of the remark" the truth defense is established. (*Ibid.; Campanelli v. Regents of University of California* (1996) 44 Cal.App.4th 572, 582; see 1 Sack on Defamation: Libel, Slander and Related Problems (3d ed. 2004), § 3.7, pp. 3-16-3-21; Smolla, *supra,* §§ 5:14-5:17, pp. 5-19-5-24.2.)

The United States Supreme Court said, "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. [Citations.] It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if [he or] she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' [Citations.] . . . Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' [Citations.] Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth

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14 Following *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, there is some question over whether the plaintiff or defendant has the burden to establish truth in a case not involving a public figure or public matter. (See 1 Smolla, Law of Defamation (2d ed. 1997-2004), § 5:13, pp. 5-12-5-19 (Smolla) [suggesting plaintiff should have the burden of proof].)

would have produced.' [Citations.]" (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 516-517.)

Whether a statement is true or substantially true may depend upon how the statement is understood. So long as the statement "Our dad's a pimp" can reasonably be understood to mean that plaintiff had at one time engaged in pimping activity, it was for the jury to determine if that is how the statement should be understood. (See *Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 643, 651 [if a statement can reasonably have been understood to make a defamatory charge—a legal issue—"it is for the trier of fact to determine if the readers did so understand it"]; *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608; Rest.2d Torts, § 614.) Also, the issue of whether a statement is true or substantially true is normally considered to be a factual one. (*Shumate v. Johnson Publishing Co.* (1956) 139 Cal.App.2d 121, 132; *D.A.R.E. America v. Rolling Stone Magazine* (C.D. Cal. 2000) 101 F.Supp.2d 1270, 1288; *Maheu v. Hughes Tool Co.* (9th Cir. 1977) 569 F.2d 459, 465; *Lundell Manufacturing Company v. American Broadcasting Companies* (8th Cir. 1996) 98 F.3d 351, 358.)

Here, the jury, in finding the statement "Our dad's a pimp" not to be defamatory, may have understood the statement to mean that plaintiff had engaged in such activities in the past or that the statement is substantially true as a result of the past activities. The communication "[o]ur dad's a pimp" could reasonably be understood as meaning that he had at one time engaged in that activity. And a fact finder could reasonably conclude that the "gist or sting" of the remark does not necessarily depend on when the plaintiff was a pimp. For example, if one had engaged in criminal acts in the past, that might support the assertion that the person is a criminal. There is support for this proposition.

For example, the Restatement Second of Torts states in section 581A, comment c, as follows: "If the defamatory statement is a specific allegation of the commission of a particular crime, the statement is true if the plaintiff did commit that crime. If the accusation is general and implies the commission of unspecified misconduct of a particular type, the statement is true if the plaintiff committed any misconduct of that type. Thus a charge that another is an embezzler is true if he committed a single act of

embezzlement. However, if the charge is one of persistent misconduct, the committing of a single instance of that conduct is not enough unless the instance is such as to imply its repetition. Thus, a charge that a woman is a prostitute is not made true by the committing of a single act of unchastity.[15] A statement may be a characterization of the person about whom it is made that expresses the maker's unfavorable judgment upon undisclosed conduct of the other. If this unfavorable comment implies the existence of facts that justify the terms in which he has described the person of whom he spoke, it is the truth of these facts that is to be determined. (See § 566.)" (See Smolla, *supra,* § 5:22, pp. 5-33-534; see also Muraghan, "*Ave* Defamation, *Atque Vale* Libel and Slander" (1976) 6 Balt. L.Rev. 28, 40 ["consider the case of a plaintiff objecting to the defendant's accusation that the plaintiff is a thief. It is well established that, although the charge is general, proof of a single instance of larceny will establish the truth thereof"].)

Guccione v. Hustler Magazine, Inc. (2d Cir. 1986) 800 F.2d 298 (*Guccione*) dealt with the issue of whether in a defamation action, past conduct of a plaintiff can establish the truth of a statement about the plaintiff that is expressed in the present tense. Although the facts in *Guccione* are different than those here, the discussion in that case is not incompatible with our conclusion.

In *Guccione, supra,* 800 F.2d 298, a publisher published an article that included the language, " 'Considering he is married and also has a live-in girlfriend. . . .' " In fact, Guccione had divorced his wife four years before the article was published. The plaintiff, a rival publisher, contended that "because the statement was phrased in the present tense it accused him of committing adultery at the very time the statement was printed" (*id.* at p. 301), and therefore it was false because he was divorced at the time the statement was made. The court said there was no evidence from which the statement "may fairly be read to mean that the marriage and the cohabitation existed simultaneously *only* at a

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15 See *Rutherford v. Paddock* (Mass. 1902) 62 N.E. 381 (Holmes, C.J.) [proof of prior acts of unchastity of plaintiff does not establish truth that she is a whore].

moment or brief interval just prior to the article's publication. The statement can be read to mean only that the marriage and the cohabitation existed simultaneously throughout an undefined span of time that included the period immediately prior to publication." (*Id.* at p. 302.) The court concluded, "On this reading, the undisputed facts established the defense of substantial truth as a matter of law." (*Ibid.*)[16]

The court in *Guccione, supra,* 800 F.2d at pages 303-304, stated, "This is not to suggest that every person guilty of even a single episode of marital infidelity has no recourse if, years after the fact, he is accused in print of currently committing adultery. However, the undisputed facts of this case—the extremely long duration of Guccione's adulterous conduct, which he made no attempt to conceal from the general public, and the relatively short period of time since his divorce—make it fair to say that calling Guccione an 'adulterer' in 1983 was substantially true. Of course, 'former long-time adulterer' would have been more precise. But on the facts of this case, to require such a level of accuracy is unreasonable. The article labels Guccione an adulterer. The average reader would understand that term to include a man who unabashedly committed adultery for thirteen of the last seventeen years and whose adulterous behavior ended only because his wife ultimately divorced him. Where, as here, 'the truth is so near to the facts as published that fine and shaded distinctions must be drawn and words pressed out of their ordinary usage to sustain a charge of libel, no legal harm has been done.' [Citation.]"

In the instant case, the proximity of the conduct to the publication is farther than in *Guccione, supra,* 800 F.2d 298. Nevertheless, the discussion in *Guccione* suggests the court recognized that a statement that one is an adulterer does not have to be read as referring to the person's conduct at the time of publication and that the past adulterous conduct can make the statement substantially true. Also, the court suggested that how to read the statement was a question of fact, although in that case, the court said that the

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16 The court also relied upon the concept that a plaintiff can be "libel-proof." (*Guccione, supra,* 800 F.2d at p. 303.)

evidence was such that the only fair reading of the statement could be determined as a matter of law. In the instant case, how distant and how pervasive the pimping activities were are factors for the fact finder to consider on the question of whether the imputation was substantially true as to justify the "gist or sting" of the remark. [17]

Because the past activities can support a conclusion that the statement in question is substantially true, evidence of those activities was relevant and admissible, and the trial court did not err by not instructing the jury that the statement, "Our dad's a pimp," refers to a present fact. Although disputed, there was substantial evidence that plaintiff had engaged in pimping. There being substantial evidence of that disputed fact, the jury verdict must be affirmed. (See *Khawar v. Globe Internat., Inc.* (1998) 19 Cal.4th 254, 264.)

[The portions of this opinion that follows (parts V.-VII.) are deleted from publication.]

V. Injunctive relief

Plaintiff's complaint prayed for injunctive relief "to prohibit all defendants from republishing the statement 'Our Dad's a pimp' or anything like it." Defendants moved to strike the prayer for injunctive relief. The trial court denied the motion. Plaintiff's appeal of a ruling favorable to him is meritless.

VI. Abandonment of issues

To the extent plaintiff raises any additional arguments that are inadequately supported by law, fact, citations to the record, and argument, we need not, and do not, address them. " 'The reviewing court is not required to make an independent, unassisted

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[17] Contrary to plaintiff's suggestion, privacy principles (Cal. Const. art. I, § 1; *Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529) do not impact the effect of truth in a defamation action. (2 Harper et al., The Law of Torts (1986) § 5.20, p. 165.) Truth remains an absolute defense to a defamation action.

study of the record in search of error or grounds to support the judgment. It is entitled to assistance of counsel. Accordingly, every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.) When an appellant raises a point "but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; see also *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284 [conclusory discussions that fail to cite authority in support are deemed abandoned].)

By virtue of his failure to cite to the record objections he made, plaintiff has abandoned such arguments as defendants' and Terrance Morton's expert and lay opinions were inadmissible and defense counsel "violated the rule against taking random shots at reputation."

VII. Plaintiff's motions on appeal

Plaintiff's motion for judicial notice of the plain English meaning of the statements "Our dad's a pimp" and "dabbled in pimptorial arts" is denied. We do, however, refer to the Penal Code and dictionary definitions.[18]

Plaintiff's motion to augment the record on appeal is denied.

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[18] See footnote 2, *ante*, page 3.

[The remainder of this opinion is to be published.]

DISPOSITION

The judgment is affirmed. Respondents are to recover their costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P.J.

ARMSTRONG, J.