NOT FOR PUBLICATION

FILED

JAN 10 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HWA SUNG SIM,

Plaintiff-Appellant,

v.

MONICA DURAN, Correctional Officer; JOHAL, Doctor; PATEL, Doctor,

Defendants-Appellees,

and

FIGUEROA, Correctional Lieutenant; J. BRIDGES, CCPOA Representative; MASI, Correctional Officer; S. HANZEL, Correctional Officer; B. CHAMBERS, Correctional Officer; J. SILVA, Correctional Officer; J. STEGALL, Correctional Officer; DE LA CRUZ, Registered Nurse; GARZA, Sergeant; VENEGAS, Sergeant; ARELLANO, Correctional Officer; AYALA, Correctional Officer; ACEVES; FRUDDEN; TOWLE; POST; M. DURAN,

Defendants.

No. 19-17291

D.C. No. 1:16-cv-01051-SAB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Stanley Albert Boone, Magistrate Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Argued and Submitted November 17, 2022
San Francisco, California

Before: S.R. THOMAS, BENNETT, and SUNG, Circuit Judges.

Plaintiff Hwa Sung Sim is a former state prisoner who was confined at Wasco State Prison. In 2014, Sim was a bystander during a prison altercation, but, while seated some distance from the participants, was injured by a rubber sponge round fired by defendant Correctional Officer Duran. Over the next few months, Sim was treated by defendants Drs. Patel and Johal, physicians employed by the California Department of Corrections and Rehabilitation. Sim sued Duran, Dr. Patel, and Dr. Johal under 42 U.S.C. § 1983. He claims Officer Duran used excessive force and intentionally fired her weapon at him during the incident. He claims Drs. Patel and Johal were deliberately indifferent to his medical needs in their treatment of him.

Sim appeals the district court's grant of summary judgment to Drs. Patel and Johal. He also appeals rulings the district court made before and during the trial that resulted in a jury verdict for Officer Duran. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. We review a grant of summary judgment de novo. *Nunez v. Duncan*, 591 F.3d 1217, 1222 (9th Cir. 2010). A movant is entitled to summary judgment if he shows that there is "no genuine issue as to any material fact and [he] is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Lemire v. Cal. Dept. of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (cleaned up). "We view the evidence . . . in the light most favorable to the non-moving party and draw all reasonable inferences in favor of that party." *Nunez*, 591 F.3d at 1222–23 (internal quotation marks and citation omitted).

Under the Eighth Amendment, "[t]he government has an obligation to provide medical care for those whom it punishes by incarceration," and cannot be deliberately indifferent to the medical needs of its prisoners. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). Our test for deliberate indifference is two-pronged: "First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotation marks and citation omitted). "The second prong requires showing: '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.'" *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (quoting *Jett*, 439 F.3d at 1096).

Dr. Patel cannot be held liable for the nursing staff's alleged failure to conduct the checks of Sim he ordered because § 1983 imposes no vicarious liability. *Lemire*, 726 F.3d at 1074. Even if Dr. Patel knew that the nursing checks he had ordered were not carried out, or we view Sim's claim as being about Dr. Patel's direct responsibility, "[m]ere 'indifference,' 'negligence,' or 'medical malpractice' will not support" a deliberate-indifference cause of action. *Broughton v. Cutter Lab'ys*, 622 F.2d 458, 460 (9th Cir. 1980) (quoting *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976)).

Drs. Patel and Johal's direct care following Sim's injury also does not rise to the level of deliberate indifference. The undisputed facts show that on the day of Sim's injury, Dr. Patel clinically evaluated Sim, assessed him as having a scalp laceration, and ordered his transport to a nearby hospital. Upon Sim's return from the hospital, Dr. Patel reviewed his discharge instructions and ordered antibiotics and painkillers; instructed nursing staff to check on Sim periodically; and ordered a follow-up exam with a physician, additional topical antibiotics for Sim's surgical staples, and neurology checks. In the following weeks, Dr. Patel ordered Sim's transport to the hospital again; placed multiple requests for CT scans; ordered medication for him on different occasions; and ordered that Sim should be provided limited duty, low bunk, and low-tier housing accommodations. Meanwhile, Dr. Johal ordered and adjusted medications; ordered follow-up

appointments; ordered laboratory tests; and requested consulting with neurologists, a psychologist, and an optometrist.

Sim argues that the district court "improperly disregarded the opinions of Dr. Zardouz," his medical expert. But as the district court correctly found, Dr. Zardouz "does not attribute any fault to the specific treatment provided by" either doctor, or "identify any different course of treatment that would have been appropriate." Even if Dr. Zardouz had so opined, that would not matter here given the undisputed facts. "A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference." *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014). Sim would have to show that Drs. Patel and Johal's chosen course of treatment was "medically unacceptable" under the circumstances. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004) (citation omitted). But neither Sim's briefing—below or on appeal—nor Dr. Zardouz's opinions allege anything approaching that high bar.

Finally, we disagree with Sim's contention that the district court did not adequately weigh Drs. Patel and Johal's alleged statements accusing Sim of malingering. Since "verbal harassment generally does not violate the Eighth Amendment," *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), these

statements are only relevant to the doctors' alleged "ulterior motive and failure to take" Sim's condition seriously. But as the district court noted, we look not only to what the doctors supposedly said, but also to what they actually did. And Drs. Patel and Johal were not deliberately indifferent to Sim's serious medical needs.

2. A trial court's decision to exclude expert evidence is reviewed for abuse of discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999). Even if there is evidentiary error, "[a] party seeking reversal . . . must show that the error was prejudicial, and that the verdict was 'more probably than not' affected as a result." *Boyd v. City & Cnty. of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009) (citation omitted).

But here, we review the district court's decision to admit Lt. Prentice's testimony for plain error, because the court's ruling on Sim's motion in limine was provisional, not definitive, and Sim failed to re-raise the issue during trial. *United States v. Tamman*, 782 F.3d 543, 552 n.2 (9th Cir. 2015) (citing *United States v. Bishop*, 291 F.3d 1100, 1108 (9th Cir. 2002)). "Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights." *United States v. Hammons*, 558 F.3d 1100, 1103 (9th Cir. 2009) (internal quotation marks omitted) (quoting *United States v. Ameline*, 409 F.3d 1073, 1078 (en banc)). And even once that test is met, relief is available only if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

On appeal, Sim's only objection to Lt. Prentice's testimony is that he was allowed to opine as to the possibility of a ricochet from the type of round that Officer Duran fired. Lt. Prentice relied on his experience as a correctional officer, his experience with the 40-millimeter launcher used by Officer Duran, and his simulated re-creation of the incident. The district court did not err in admitting the testimony, much less plainly err.

3. The district court also did not abuse its discretion in limiting testimony from Roger Clark, Sim's expert. Clark did not conduct any forensic analysis or scene reconstruction; was only trained in a 37-millimeter launcher and not in a 40-millimeter launcher; and had no experience with the particular rubber sponge round fired by Officer Duran. An expert may not base his opinion on speculation or conjecture. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 144–46 (1997). The district court acted well within its discretion in excluding the opinions at issue.

4. Sim contends that the district court precluded him from presenting evidence of a "code of silence" between police officers that would demonstrate their bias or prejudice. But Sim points to no ruling on this issue we can review. Sim proffered no code-of-silence question, testimony, or evidence, and the district court excluded none.

AFFIRMED.