IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

SAMUEL PAZ, A SINGLE MAN,
Plaintiff/Appellee/Cross-Appellant,

v.

CITY OF TUCSON, A MUNICIPAL CORPORATION,
Defendant/Appellant/Cross-Appellee.

No. 2 CA-CV 2019-0209
Filed December 18, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20152622
The Honorable Charles V. Harrington, Judge

AFFIRMED

COUNSEL

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Counsel for Plaintiff/Appellee/Cross-Appellant

Tucson City Attorney's Office
Michael G. Rankin, Tucson City Attorney
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MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

E C K E R S T R O M, Judge:

¶1 The City of Tucson appeals the trial court's order granting Samuel Paz a new trial. Paz cross-appeals the court's denial of his motion for judgment as a matter of law on the City's affirmative defense of justification. For the reasons that follow, we affirm both rulings.

Factual and Procedural Background

¶2 The essential facts of the incident that led to the underlying lawsuit are not in dispute. One afternoon in June 2014, three officers from the Tucson Police Department were sent to check on Paz's welfare. He appeared to be intoxicated, had relieved himself in public, was nude from the waist down, had been seen flailing his arms about, and was pacing in a downtown alleyway near a public park and a middle school. When the officers arrived, Paz did not make any hostile movements toward them or engage in any combative behavior. The officers attempted to detain him without using physical force, but Paz pushed one of them and ran away yelling for help. The officers pursued and took him to the ground. Paz suffered first- and second-degree burns to his body and face from being held down on the hot asphalt while the officers handcuffed him.

¶3 In June 2015, Paz sued the City. He alleged the officers should have been able to determine from his behavior at the time of the incident that he was "having an acute psychiatric episode" and had been negligent in their interactions with him. Paz further alleged that, as a result of the negligence of these and other City officials: he suffered extreme pain; has permanent scarring on his face, arms, and legs; has incurred and may incur further medical bills as a result of the burns; and continues to suffer emotional distress. Paz later amended his complaint to add allegations of assault and battery.

¶4 Before trial, the court granted summary judgment in favor of the City on Paz's negligence claims. The only remaining issues were the assault and battery allegations against the officers, whether their use of

force was justified under A.R.S. § 13-409, and what damages Paz suffered as a result of the incident.

¶5 On the fourth day of trial, the City conceded that the officers' conduct constituted several assaults and batteries but argued the jury had to determine whether the conduct was justified. Paz then moved for judgment as a matter of law on the City's affirmative defense of justification, arguing the City had failed to prove one of the required elements. The court denied the motion, finding that whether the state had proven the elements of § 13-409 was a question for the jury. The jury ultimately returned a seven-to-one verdict in favor of the City. Judgment was entered in September 2019.

¶6 Paz then renewed his motion for judgment as a matter of law and moved for a new trial. After a hearing, the trial court concluded that the proceedings had been "replete with irregularities, some of which were unfairly prejudicial to [Paz]," and granted him a new trial. The City appealed. Paz then cross-appealed, challenging, *inter alia*, the denial of his motion for judgment as a matter of law on the City's justification defense. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(a).

Grant of New Trial

¶7 The City contends the trial court erred in granting Paz a new trial. "A trial judge has broad discretion to grant or deny a new trial," and we will not overturn an order granting one "absent a clear abuse of discretion." *State Farm Fire & Cas. Co. v. Brown*, 183 Ariz. 518, 521 (App. 1995). The City has not satisfied its burden of showing such abuse here. *See Liberatore v. Thompson*, 157 Ariz. 612, 619 (App. 1988) (challenger's "burden to show clear abuse of discretion").

¶8 All the reasons the trial court articulated for the grant of a new trial relate to a preliminary drug screening test conducted on Paz's urine after he had been transported to the hospital on the day of the incident. The test indicated that drugs were present in Paz's system, but it did not provide a quantitative amount of any drugs present, nor did it indicate when the drugs had been ingested or whether they were present at a level sufficient to affect Paz's behavior.

¶9 Before trial, the parties filed dueling motions *in limine* in which they clashed over the relevance and admissibility of the results of the drug screening and related evidence. The trial court had not ruled on the admissibility of the drug-related evidence by the start of trial. And it expressly cautioned the City that such evidence was "not something that

should be brought up unless and until you get permission from the Court," reiterating that "before we get into those areas, I need you to bring the issue up with the Court so we can figure out where we are, whether you really do want to get that stuff in and whether it's admissible or not, okay?"

¶10 Nevertheless, during its cross-examination of Paz, the City raised the issue of the drug screening without seeking permission from the trial court to do so. Paz immediately objected, and the court called a recess. Paz argued the City had violated the court's specific direction to get permission before bringing up the drug screening. The judge agreed, reiterating that he had not decided whether the evidence should be admitted, which was why he "wanted to be approached and at least have the opportunity to make that decision." After an extensive discussion with the parties, the court ruled that the City would be permitted to continue discussing the issue of the drug screening test, despite the court's "serious reservations about its reliability," but only after further direct testimony from Paz regarding his history of mental illness, his psychiatric diagnoses, and whether he had been suffering an acute psychiatric episode at the time of the incident, all of which the court had previously precluded.

¶11 The trial court initially granted Paz's motion for a new trial because "the police officers were not aware [of the results of the drug screening] at the time of the salient events," the "reliability and causal connection" of the test were "not established by expert testimony," and the test "was used in such a way to unduly prejudice [Paz], even with the Court's limiting instruction."[1] Two days later, after reviewing the relevant hearing transcript, the court issued an addendum to add "another basis" for granting a new trial: that the City's counsel had raised the issue of the drug screening at trial without first seeking permission to do so, as the court had repeatedly directed.[2]

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[1]The trial court expressly rejected as grounds for granting a new trial certain other arguments raised in Paz's motion.

[2]Rule 59(i), Ariz. R. Civ. P., requires any order granting a new trial to specify with particularity the grounds therefor. "A ground for new trial is stated with sufficient particularity when the reviewing court is provided 'an adequately detailed idea of the specific factor or factors which prompted the trial judge to exercise his discretion on this ground.'" *Liberatore*, 157 Ariz. at 617 (quoting *Brooks v. De La Cruz*, 12 Ariz. App. 591, 593 (1970)). The City does not dispute that this requirement was met here. Because the trial court in this case "state[d] its grounds with adequate specificity, this

¶12 "The *grant* of a new trial is typically more deferentially reviewed than the *denial* of new trial," in part because "we recognize that trial judges disfavor new trial motions and will generally grant them only with great caution." *Liberatore*, 157 Ariz. at 620. Where, as here, the trial court articulated more than one reason for granting a new trial, only one need be correct for us to uphold the ruling. *Martinez v. Schneider Enters., Inc.*, 178 Ariz. 346, 349 (App. 1994) ("This Court will not disturb a trial court's new trial order if it is justified by any of the grounds cited in the order.").

¶13 The City contends its "failure to get permission before bringing up the drug screen test is not a basis to grant Paz a new trial" because: (a) there was no clear order that the City violated; (b) any violation was not deliberate; and (c) "Paz was not unduly prejudiced when the drug screen test was first raised without permission." All of these arguments fail.

¶14 The City argues the transcript referenced by the trial court does not clearly evince an order requiring the City to approach the bench for permission before raising the issue of the drug screening, claiming "it is understandable why there may have been some confusion about what counsel was ordered to get permission about." But "[w]hether we might have granted a new trial on this record is not our standard of review," *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, ¶ 92 (App. 2012), and we cannot conclude that the court's determination is unsupported by the record. To the contrary, substantial evidence supports the court's finding—based not only on its own recollection, but also a conversation memorialized in a transcript—that it had repeatedly stated its order, which the City then violated. *See Varco, Inc. v. UNS Elec., Inc.*, 242 Ariz. 166, ¶ 15 (App. 2017).

¶15 Moreover, counsel's violation of a trial court order need not be deliberate to merit granting a new trial. *See Liberatore*, 157 Ariz. at 621-22. Even when a party may have misunderstood the order, a new trial may be appropriate. *See id.* ("[A]n attorney should not enter the danger zone uncertain of his [or her] ground. Any doubt whether an order *in limine* reaches an intended line of evidence or comment should be aired and resolved in advance.").

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court may not reverse unless a clear abuse of discretion is shown." *Id.* at 617.

¶16 A new trial in these circumstances is only appropriate if the trial court finds that the violation caused prejudice. *See id.* at 620-21; *see also Grant v. Ariz. Pub. Serv. Co.*, 133 Ariz. 434, *supp. op.*, 133 Ariz. 453, 454 (1982) (in exercising discretion to grant or deny motion for new trial on ground of misconduct, trial court "must decide whether the misconduct has materially affected the rights of the aggrieved party"). But the trial court here found Paz had been prejudiced. And, we defer to that finding "unless the record clearly establishes that the trial court was incorrect." *Grant*, *supp. op.*, 133 Ariz. at 455. When the record before us "could justify either a conclusion of prejudice or no prejudice . . . the trial court's discretionary finding must be affirmed." *Id.* at 456-57.

¶17 The City contends "Paz was not unduly prejudiced by the City bringing up the drug test, or even by the admission of the results." It claims Paz suffered no prejudice "when the jury merely heard a drug screen test existed" because the results of the test were not presented until later, "well after Paz told the jury he took 'whatever [drug] was available' that day" in place of his medications. The City further argues that Paz's "recollection of that day and his self-reported drug use during his second direct examination was most likely more prejudicial than the drug screen evidence." But that second direct examination only occurred because of the City's violation of the court's order, and the argument is wholly speculative.

¶18 "The trial judge is in the best position to assess prejudice because he has 'had the unique opportunity to hear the testimony and argument, observe its effect on the jury, and determine through his observations that the trial ha[s] been unfairly compromised,'" whereas "'we have only a cold record, which does not convey voice emphasis or inflection, or allow us to observe the jury and its reactions.'" *Varco*, 242 Ariz. 166, ¶ 20 (alteration in *Varco*) (quoting *Cal X-Tra*, 229 Ariz. 377, ¶ 92). We have no basis to conclude that the trial court in this case abused its discretion in finding the City's violation of its order prejudiced Paz.

¶19 Thus, the City's violation of the trial court's repeated order not to raise the issue of the drug screening without first approaching the bench for permission was sufficient basis for the grant of a new trial. We need not consider the City's challenges to the other bases articulated by the court.[3] *Crowe v. Miller*, 27 Ariz. App. 453, 455 (1976) ("well-established that

[3]In particular, the City argues the drug screening test was "properly admitted" based on the evidence Paz himself presented and despite the fact that the City brought up the evidence without getting permission to do so.

where more than one basis is given by the trial court as foundation for its granting a new trial, it only takes one to be correct for the appellate court to uphold the trial court's action").

Denial of Judgment as a Matter of Law

¶20 Paz contends the trial court erred in denying his motion under Rule 50, Ariz. R. Civ. P., for judgment as a matter of law on the City's justification defense. Arguing he was entitled to such a judgment due to an alleged failure by the City to prove one element of its affirmative defense, he urges us to remand this matter "for a determination of damages caused by the admitted assaults."

¶21 We review *de novo* whether the trial court should have granted Paz's Rule 50 motion for judgment as a matter of law, viewing the facts and all reasonable inferences in the light most favorable to the City. *See Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 25 (App. 2008). Such a judgment "should only be granted" if the evidence in support of a claim or defense "would not allow reasonable people to agree with the conclusions" of the proponent of that claim or defense. *Id.* We will affirm the trial court's denial of a Rule 50 motion if any substantial evidence could lead reasonable jurors to find in the opponent's favor. *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, ¶ 6 (App. 2011).

¶22 In civil cases, justification under § 13-409 is an affirmative defense, which the defendant must prove by a preponderance of the evidence. *See Ryan v. Napier*, 245 Ariz. 54, ¶¶ 1, 46 (2018). Thus, the City bore the burden of establishing that its officers' use of physical force to detain Paz was justified because: (a) reasonable people would believe the detention to be lawful, § 13-409(3); (b) reasonable people would believe that force was immediately necessary to effect the detention, § 13-409(1); and (c) the officers made the purpose of the detention known to Paz or, if they did not do so, they believed either that the purpose of the detention was "otherwise known" to Paz or could not reasonably be made known to him, § 13-409(2).

¶23 Paz's cross-appeal focuses on the last of these elements,[4] which he claims the City failed to prove. It is undisputed that the officers

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The City asks us to find the drug screening test properly admitted and used at trial and to reverse the trial court's grant of a new trial.

[4]Paz contends the trial court erred in applying this formulation of the element, taken from the statute, rather than the Revised Arizona Jury

did not inform Paz of the purpose of the detention they sought to effectuate.[5] The pertinent question becomes whether the City provided substantial evidence that the officers believed either that such purpose was "otherwise known" to Paz or could not reasonably have been made known to him.

¶24 Paz argues the City never presented any evidence of such belief. But the trial court correctly concluded that the officers' beliefs were a question for the jury, and direct testimony from the officers on that issue was unnecessary for the third element of justification to be satisfied. *See City of Tucson v. Holliday*, 3 Ariz. App. 10, 16 (1966) ("The subjective state of a person's mind is usually proved by circumstantial evidence.").

¶25 As the City argued in opposition to Paz's motion, the evidence was sufficient to allow reasonable jurors to conclude that the officers believed either: (a) that Paz—who had relieved himself in public and was nude from the waist down next to a school—knew why he was being detained without being told; or (b) that the purpose of the detention could not reasonably be made known to him, because he was nonresponsive and incoherent. Thus, viewed in the light most favorable to the City, the evidence was sufficient to allow reasonable people to agree that the officers' use of force was justified, *A Tumbling-T Ranches v. Flood*

Instructions ("RAJI") Intentional Tort Instruction 9 because the parties had stipulated to and tried the entire case based on the RAJI. But we agree with the trial court that, insofar as a RAJI is inconsistent with the statute from which it is derived, the statute controls. *See, e.g.*, *County of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶ 48 (App. 2010) ("[T]he RAJI is not binding authority."); *Mora v. Phx. Indem. Ins. Co.*, 196 Ariz. 315, n.4 (App. 1999) ("[A]lthough based on case law or statute, the RAJIs are not the law."). Moreover, the remedy Paz seeks for the court's alleged error in "failing to instruct the jury pursuant to the law regarding justification stipulated to by the parties, submitted by both parties[,] and provided to the jury in the preliminary instruction" is a new trial, which he has already been granted.

[5]The jury heard testimony that the officers sought to detain Paz for the safety of the officers, Paz himself, and "everybody else." The officer who decided to detain Paz also testified that it was "improper conduct" for Paz to be partially nude next to a school, and that it was Paz's "breaking the law"—including his being "naked in a downtown area" and failing to comply with officer commands—that prompted the detention.

Control Dist. of Maricopa Cty., 222 Ariz. 515, ¶ 14 (App. 2009), and Paz's Rule 50 motion was properly denied.

Disposition

¶26 For the foregoing reasons, we affirm the rulings of the trial court.