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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BERLAN LYNELL DICEY

Plaintiff,

No. CIV S-06-0482 KJN (TEMP) P

vs.

S. PICKENS, et al.

Defendants.

ORDER

_____ /

Plaintiff is a state prisoner proceeding through counsel with an action under 42 U.S.C. § 1983. On December 2, 2010, a jury returned a unanimous verdict for all four defendants. The court entered judgment pursuant to the verdict on December 6, 2010. On January 3, 2011, plaintiff, acting through counsel, moved for a new trial (“Motion”). (Dkt. 123.) The court heard the motion on April 7, 2011.

Plaintiff invokes Federal Rule of Civil Procedure 59(a), arguing a new trial is necessary to prevent a miscarriage of justice. Plaintiff points to defense counsel’s statement in closing argument that “plaintiff has nothing to lose here, nothing [and] [t]hese [defendants] have everything to lose.” Defense counsel would repeat the “everything to lose” line a few moments later and add, referring to defendants, “[t]heir job is important.”

Plaintiff’s counsel did not object to any of these statements when defense counsel

1 made them, although they did object at other points during the defense’s closing argument.
2 Plaintiff’s counsel did not request a curative instruction. Plaintiff’s counsel did not move for a
3 mistrial after closing argument. They have not moved for a judgment notwithstanding the
4 verdict.

5 Plaintiff argues that the statements at closing argument undermined the fairness
6 and integrity of the proceedings because: (1) they contravene the law prohibiting counsel from
7 introducing evidence of the financial implications of a judgment against defendant; (2) they were
8 not relevant to any issue at trial; (3) they were not based on any evidence received at trial and are
9 untrue; (4) they were made to appeal to the sympathies and prejudice of the jury. (Motion, p. 7.)

10 A new trial is warranted in a civil case where attorney misconduct “sufficiently
11 permeate[d] [the] entire proceeding to provide conviction that the jury was influenced by passion
12 and prejudice in reaching its verdict.” Settlegood v. Portland Pub. Schs., 371 F.3d 503, 516-17
13 (9th Cir. 2004). This is a steep standard of severe prejudice and is even more difficult to meet
14 when the complaining party failed to object at trial:

15 The federal courts erect a “high threshold” to claims of improper
16 closing arguments in civil cases raised for the first time after trial.
17 Kaiser Steel Corp. v. Frank Coluccio Constr. Co., 785 656, 658 (9th
18 Cir. 1986). The rationale for this high threshold is two-fold. First,
19 raising an objection after the closing argument and before the jury
20 begins deliberations “permits the judge to examine the alleged
prejudice and to admonish counsel or issue a curative instruction, if
warranted.” Id. ... The second rationale stems from the court’s
concern that allowing a party to wait to raise error until after a
negative verdict encourages that party to sit silent in the face of
claimed error.

21 Hemmings v. Tidyman’s, Inc., 285 F.3d 1174, 1193 (9th Cir. 2002). This high threshold requires
22 the complaining party to show “plain or fundamental error ” warranting a new trial. The “plain
23 error” standard requires showing all of four elements: (1) an error that was (2) plain or obvious
24 and was (3) prejudicial or affected substantial rights such that (4) review is necessary to prevent a
25 miscarriage of justice. Settlegood, 371 F.3d at 518. “Plain error is a rare species in civil
26 litigation, encompassing only those errors that reach the pinnacle of fault envisioned by the

1 standard...” Hemmings, 285 F.3d at 1193.

2 Plain or fundamental error arising from attorney misconduct is rare where the
3 alleged misconduct was isolated to a statement in closing argument, even when the statement
4 itself is found to have been improper. In Kehr v. Smith Barney, 736 F.2d 1283, 1286 (9th Cir.
5 1984), the Ninth Circuit declined to order a new trial because counsel’s several “improper”
6 statements were “isolated [to argument] rather than persistent.” In Cooper v. Firestone Tire &
7 Rubber Co., 945 F.2d 1103, 1107 (9th Cir. 1991), the Ninth Circuit declined to grant a new trial
8 where “the alleged misconduct occurred only in the argument phase of the trial[,] most of
9 counsel’s comments were not objected to at trial, and appellants did not move for a mistrial at the
10 end of the argument.”

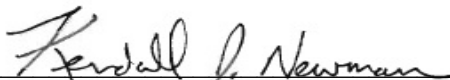
11 A court assessing the prejudicial and “permeating” nature of improper statements
12 by counsel should look to “the totality of the circumstances and weigh such factors as the nature
13 of the comments, their frequency, their possible relevancy to the real issues before the jury, the
14 manner in which the parties and the court treated the comments, the strength of the case, and the
15 verdict itself.” Hemmings, 285 F.3d at 1193 (internal quotations and citation omitted). Thus, the
16 remedy of a new trial to cure attorney misconduct in argument is “available only in
17 ‘extraordinary cases.’” Id. (citation omitted).

18 In light of the above-cited authority, defense counsel’s statement that the
19 defendants had “everything to lose,” twice stated near the end of closing argument, to which
20 plaintiff’s counsel did not object or contest with a motion for mistrial, can only justify a new trial
21 if it capped off the most extreme circumstances of cumulative prejudice—and this assumes that
22 the statement was as egregiously improper as plaintiff argues it was. Defendants plausibly
23 respond that their counsel was only commenting on the credibility of the parties, but the court
24 need not accept or reject that interpretation. Even accepting plaintiff’s interpretation *arguendo*,
25 plaintiff’s motion falls well short of showing counsel’s statements “sufficiently permeate[d] [the]
26 entire proceeding to provide conviction that the jury was influenced by passion and prejudice in

1 reaching its verdict.” Settlegood, 371 F.3d at 516-17. To the ultimate point, plaintiff has not
2 shown any cumulative prejudice here: the weight of his evidence, the sole jury instruction of
3 which plaintiff now complains (but to which his counsel did not object at trial), and the
4 circumstances of his counsel’s appointment before trial do not add up to render the allegedly
5 offending closing statements an extraordinary instance of attorney misconduct. Therefore, the
6 remedy of a new trial is not available.

7 Accordingly, IT IS HEREBY ORDERED that the motion for a new trial (Docket
8 No. 123) is denied.

9 DATED: April 15, 2011

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11 
12 KENDALL J. NEWMAN
13 UNITED STATES MAGISTRATE JUDGE

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