UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HAROLD ANTHONY FUNK,

Plaintiff,

v.

TOWN OF PARADISE, et al.,

Defendants.

No. 2:09-cv-01000-MCE-CKD

MEMORANDUM AND ORDER

Presently before the Court is Plaintiff Harold Anthony Funk's ("Plaintiff") Motion for New Trial ("Motion") (ECF No. 114), which Defendants Town of Paradise, Police Chief Gerald Carrigan, and Officers Robert Pickering and Timothy Cooper ("Defendants") timely opposed. For the following reasons, Plaintiff's Motion is DENIED.[1]

BACKGROUND

Plaintiff initiated this action against Defendants alleging causes of action for excessive force, supervisory liability, conspiracy to commit civil rights violations, and various violations of California law.

[1] Because oral argument would not be of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local R. 230(g).

According to Plaintiff, he was detained without probable cause for resisting arrest in violation of California Penal Code § 148 and he suffered injuries as a result of the officers' use of excessive force. No pretrial motions were filed and thus, at the time of the final pretrial conference, all causes of action remained to be tried. Over the course of this litigation, the parties have estimated they would require three to five days to try those claims. See ECF No. 11 at 5. However, in the parties' Joint Final Pretrial Statement, Defendants advised the Court of their intent to move for bifurcation of the Fourth Amendment issue at the upcoming conference and estimated it should take no more than two days to try that claim by itself. ECF No. 79 at 22-23. In that statement, the parties also stipulated that certain facts, including the fact that Plaintiff had been acquitted in state court, were undisputed. Id. at 2-5. The parties' expressly disagreed, however, about the relevance of those facts. Id. at 2.

At the final pretrial conference, Defendants argued that the bulk of the causes of action in the complaint were essentially derivative of Plaintiff's Fourth Amendment claim against Officers Pickering and Cooper. See ECF No. 84 at 5. Given the derivative nature of those claims, along with time limitations imposed by the Court's highly impacted trial calendar, the Court bifurcated the case so that only Plaintiff's Fourth Amendment claim was to be litigated during an initial first phase trial that would take no more than three days. Id. at 41. At this time, the Court also ordered further briefing on the question of whether evidence of Plaintiff's state court acquittal should be admitted on the issue of Plaintiff's damages. Id. at 19-21.

The parties timely submitted their additional briefing, and trial commenced on October 21, 2013. Prior to selecting the jury, the Court issued its ruling that evidence that Plaintiff had been acquitted in state court would be excluded unless Plaintiff could rebut the presumption that the prosecutor had acted independently in filing criminal charges.

Plaintiff proceeded to put on his case and, on the second day of trial, called to testify his purported expert, Mr. Thomas Streed.

During the course of Defendants' voir dire of Mr. Streed, the following exchange occurred:

> Q. Okay. And did you review Mr. Funk's testimony?
>
> A. Yes, sir.
>
> Q. I don't see that listed on the report that you reviewed Mr. Funk's testimony. When did you review his testimony? Was it after you prepared this report?
>
> A. It probably was.
>
> Q. So you've done additional work since you've prepared this report?
>
> A. That's correct. This report was written about three years ago.

ECF No. 108 at 21. Given the witness's admission that he had performed additional work since preparing his report, defense counsel argued at sidebar that, among other things, his cross-examination would be "faulted or flawed" since Mr. Streed had reviewed additional information subsequent to disclosing his report. Id. at 22. Plaintiff's counsel conceded that his expert had reviewed additional materials but argued that the pertinent inquiry was whether those materials had changed Mr. Streed's testimony. Id. The Court made clear to Plaintiff's counsel that he was "not following the rules." Id. The Court then ordered Defendant's counsel to continue his voir dire in open court:

> Q. Mr. Streed, other than reviewing Mr. Funk's testimony, have you reviewed anything else that's not listed on your report?
>
> A. Nothing that comes to mind. There may be something, but it doesn't strike me immediately.
>
> MR. THORN: Move to exclude Mr. Streed as a witness in the case.
>
> THE COURT: Would you ask him specifically more about what documents? Just keep asking a little bit more.
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> Q. BY MR. THORN: You reviewed Mr. Funk's deposition transcript?
>
> A. Yes, as I recall.
>
> Q. And that was after you prepared your report?

A. Yes.

Q. And that's the reason it's not listed on your report?

A. Correct.

Q. And there may be other documents that you reviewed, but you don't recall what they are?

A. That's a possibility.

Id. at 23-24.

At that point, Defense counsel moved to exclude the witness, but before ruling, the Court permitted Plaintiff's counsel one additional opportunity to question Mr. Streed:

Q. Well, why did you feel the need to look at data after you prepared your report that you didn't list in your report?

A. Because I couldn't magically look at it and determine whether or not it might have an impact upon my opinions.

Q. Why didn't you think it was important to review the plaintiff's testimony before you did a report?

A. I didn't have the plaintiff's testimony. It was provided to me subsequent to that.

Q. Did you ask for it?

A. I don't recall. I may have.

Id. at 24-25. At that point, the Court granted Defendants' motion to exclude the witness.

Plaintiff rested his case during the afternoon of the second day of trial, at which time Defendants brought a Motion for Judgment as a Matter of Law under Rule 50. The Court denied that Motion, and Defendants proceeded to put on their defense with Officer Pickering taking the stand first. After conferring with counsel, the Court advised the jury that the third day of trial would consist of approximately an hour and a half of testimony.

Officer Pickering's direct examination carried over into the following day, after which Plaintiff's counsel cross-examined him, eventually concluding, "That's all I have." ECF No. 112 at 45. Plaintiff was recalled to the stand for a brief period of time, and then Defendants called their final witness, Officer Cooper. Officer Cooper's direct examination covered approximately nine pages of the trial transcript. Id. at 55-63.

He was then subject to a proportionate cross-examination before the Court terminated the proceedings, finding that the probative value of any further questioning was substantially outweighed by considerations of undue delay and the needless presentation of cumulative evidence. Id. at 63-69.

The jury was instructed that afternoon, sent to deliberate, and returned with a defense verdict the following morning. Now before the Court is Plaintiff's Motion for New Trial.

STANDARD

Under Rule 59(a), the court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). For example, the Court may grant a new trial if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the court, a miscarriage of justice." Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814, 818–819 (9th Cir.2001) (citation omitted). However, "[u]nless justice requires otherwise, no error in admitting or excluding evidence--or any other error by the court or a party--is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order." Fed. R. Civ. P. 61. "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Id.

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ANALYSIS

Plaintiff sets forth four arguments in support of his Motion for New Trial. First, he argues the Court committed three separate legal errors by impermissibly: (1) limiting Plaintiff's ability to cross-examine Defendants; (2) excluding Plaintiff's police practices expert; and (3) modifying the Pretrial Scheduling Order on the eve of trial to preclude evidence of Plaintiff's state court acquittal. Plaintiff further contends that the jury's verdict was against the weight of the evidence because his detention was not supported by the requisite probable cause. Plaintiff's arguments are without merit.

A. No Legal Error Warrants a New Trial

1. Reasonable Limits on Cross-Examination

Plaintiff's first argument is that he was "denied the right to full and complete cross-examination of Defendants." Mot., ECF No. 115 at 2. More specifically, Plaintiff argues that the Court limited him to thirty-seven minutes to cross-examine Officer Pickering and six minutes to examine Officer Cooper. Id. at 3. Plaintiff's primary complaint appears to be that "[v]irtually no time was allotted for Plaintiff to develop his cross-examination of Cooper in order to expose his inconsistent previous testimony." Id. at 4.

First, the Court has great discretion to set reasonable time limits on trial proceedings. Navellier v. Sletten, 262 F.3d 923, 941 (9th Cir. 2001). Moreover, in this case, the parties themselves estimated that a trial on all claims would take three to five days. The Court bifurcated the case, however, and, even though the trial proceeded on only one claim, the Court nonetheless still permitted Plaintiff three days – a timeframe in which the parties had stipulated they could try the entire case – to try that one cause of action. Plaintiff offers no argument as to why this three-day timeframe was insufficient or why he could not have altered his own trial strategy to ensure he would have sufficient time to question Defendants.

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Indeed, Plaintiff could have called Defendants in his case-in-chief, thus permitting him more time in which to examine them. Instead, Plaintiff made the strategic decision to call other witnesses in lieu of the officers. The decision to call those additional witnesses, thereby truncating the amount of time in which Defendants could present their case and thus the amount of time available for Plaintiff to conduct his cross, was Plaintiff's alone, and it is one with which he will have to live.

Regardless, the record is clear that Plaintiff was not forced to terminate his examination of Officer Pickering. To the contrary, Plaintiff's counsel voluntarily concluded his examination, acknowledging, "that's all I have." ECF No. 112 at 45. Plaintiff cannot now complain that he was cut off when his counsel admitted at trial that he had no further questions and unilaterally ceased his examination.

As to Officer Cooper, the Court's termination of Plaintiff's cross was necessary to "prevent delay or avoid cumulative evidence." United States v. Gomez, 846 F.2d 557, 559 (9th Cir. 1988). Contrary to Plaintiff's current contention, the Court terminated his cross-examination of Officer Cooper not just because time had run out, but also pursuant to Federal Rule of Evidence 403. The Court reasoned:

> With respect to terminating the cross-examination, terminating all evidence, I'm going to make a finding at this point in time that based upon what I've heard this morning, I'm going to make a 403 objection on this. And although relevant, the evidence may be excluded if its probative value is substantially outweighed by the danger of prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
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> The evidence that was being presented today had been asked and answered on many, many occasions on numerous times. Furthermore, the questions that were being asked were calling for legal conclusions that the witness could not ever give. The ultimate conclusions that are going to be given are those made by the jury. There's been nothing else that's been added to any testimony today in the first hour and a half that has not already been presented. It was cumulative, and it was wasting time that we do not have. And I explained to you yesterday we would be ending at 10:30 this morning. So that is all that I'm saying.

ECF No. 112 at 69.

The Court acted well within its discretion in determining the additional testimony was cumulative and resulting in a waste of resources, and Plaintiff has not shown otherwise.

To that end, Plaintiff has also failed to show in his instant Motion how his cross-examination of Officer Cooper would have put anything new before the Court. More specifically, the instant Motion is rejected because there is nothing before the Court to show how, assuming the Court erred in terminating Plaintiff's cross, such error was anything other than harmless. Plaintiff never made an offer of proof as to what additional testimony he hoped to elicit from either Officer Cooper or Officer Pickering, and, as Defendants point out in their Opposition, the evidence in this case was overwhelming. See Opp'n, ECF No. 122 at 9 (noting that Plaintiff knew someone was chasing him when he fled the scene and another witness testified Plaintiff was running when officers commanded that he stop). This Court stands by its observation that

> I've heard all the evidence that's going to be presented in this case. I've heard the arguments for Rule 50. And my assessment of looking at the evidence at this point in time is that it appears that the officers were properly where they should have been at the time. It appears that they did everything appropriately, by shining the light, looking for what could have been ongoing criminal activity. That a command was given to the plaintiff to stop. There was identification by the Paradise Police Department. There was clearly running involved. There was clearly not a stop by the plaintiff. He continued to run or skip, or whatever you want to call it. But whatever it is, he didn't comply with a lawful order at the time, and he went into the bathroom. And the fact that he did not comply with the officers' demands and commands would make everything that happened from that point forward to be reasonable. That's what happens when you run and you resist.

ECF No. 113 at 7. In sum, especially given the great weight of the evidence supporting the jury's verdict, Plaintiff has failed to show any prejudice as a result of any error by this Court in terminating the trial proceedings. His motion for a new trial on this basis is DENIED.

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2. Exclusion of Plaintiff's Expert Witness

Plaintiff also contends the Court erred as a matter of law when it excluded Plaintiff's expert witness, Mr. Sneed. According to Plaintiff, "[t]he District Court sanction of totally excluding any testimony by Plaintiff's highly qualified expert was not due to any failure on Plaintiff's part to comply with Rule 26 or disobedience of any court order." Mot., ECF No. 115 at 4. That is incorrect.

When Plaintiff disclosed his expert, he was required to provide Defendants with a copy of Mr. Sneed's written report as well. See Fed. R. Civ. P. 26(a)(2)(B) ("Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony."). That report was required to contain, among other things, "a complete statement of all opinions the witness will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." Id. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

In this case, according to the parties, Plaintiff timely provided Defendants with a copy of Mr. Sneed's report. However, subsequent to that disclosure, Plaintiff provided Mr. Sneed with additional data, including the transcript of his own deposition, which Mr. Sneed then reviewed. Mr. Sneed testified that he may have been provided additional information as well. Plaintiff provides no justification for providing additional information to his expert post-disclosure, nor does Plaintiff explain how permitting the expert to review his deposition testimony after preparation of the report was either substantially justified or harmless. As a consequence, the Court did not err in excluding his witness.

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Moreover, even if Plaintiff had sufficiently shown in his current Motion that his prior failure to adequately disclose his expert was justified, "[a] new trial is [still] only warranted when an erroneous evidentiary ruling 'substantially prejudiced' a party." Ruvalcaba v. City of Los Angeles, 64 F.3d 1323, 1328 (9th Cir. 1995) (internal citations omitted). Plaintiff has not shown that his inability to call a police practices expert prejudiced him in the slightest. The scenario presented to the jury was not beyond the purview of a lay person. To the contrary, there was substantial evidence that Plaintiff was running or jogging away from the officers, that he ignored their commands to stop, and that he resisted arrest while inside the bathroom. While Plaintiff argues that the jurors could have been "misled by viewing various forms of entertainment depictions of police at work in reality shows, made for TV dramas and video games, all of which share a common element – excessive force and violence," that argument is speculative at best. Mot., ECF No. 115 at 4. Moreover, the Court is confident that it was not swayed by such media and it further finds that the jury was also capable of separating fact from faction. Plaintiff's Motion is DENIED on this basis as well.

3. Exclusion of Evidence of Plaintiff's Acquittal in State Court

Plaintiff next argues that the Court improperly modified the Final Pretrial Order to prevent Plaintiff from introducing evidence of his acquittal in the state court criminal proceedings when the parties had stipulated to a number of undisputed facts pertaining to that case which were incorporated into the Court's Order. Plaintiff's theory was that Defendants should be liable for damages he sustained as a result of being tried criminally (e.g., missing work to attend trial, hiring a lawyer to defend him against the state charges, etc.) and that this Court erred as a matter of law by excluding that evidence. Each of Plaintiff's arguments is rejected.

First and foremost, the Court did not modify the Pretrial Order as to the undisputed nature of the stipulated facts. The parties made clear that although the fact, for example, that Plaintiff had been acquitted was undisputed, its relevance in this case was hotly contested. Accordingly, the Pretrial Order simply reflects a number of facts

that, if relevant, need not be decided by the jury. It nonetheless remained for the Court to determine relevancy.

Regardless, Plaintiff cannot claim surprise at the exclusion of this evidence because, at the final pretrial conference, the Court ordered supplemental briefing by both parties on this very issue. The parties were thus on notice that the evidence might not be admitted.

Moreover, exclusion of the fact that Plaintiff was acquitted in state court was appropriate under circuit precedent. Evidence that Plaintiff was harmed by being subjected to a state court criminal trial is only relevant if he can show that the Defendant Officers caused those damages. However, "[t]here is a rebuttable presumption that a prosecutor exercises independent judgment regarding the existence of probable cause in filing a complaint." Smiddy v. Varney, 803 F.2d 1469, 1471 (9th Cir. 1986). "Unless overcome . . . the presumption insulates the arresting officers from liability for harm suffered after the prosecutor initiated formal prosecution." Id. "The presumption can be overcome, for example, by evidence that the officers knowingly submitted false information or pressured the prosecutor to act contrary to her independent judgment." Id. In this case, Plaintiff offered no evidence to overcome the presumption that the prosecutor exercised his or her independent judgment. To the contrary, it became clear during counsels' arguments prior to jury selection that the only evidence Plaintiff intended to offer was his own testimony, which, given his lack of personal knowledge regarding the prosecutor's decision making, would have been entirely speculative.

Finally, the evidence Plaintiff would have had this Court admit is entirely irrelevant because it goes only to the extent of damages. Since the jury in this case determined that there was probable cause for officers to have detained Plaintiff, and it consequently follows that officers were not liable to Plaintiff for any damages, no further inquiry is required. Stated another way, Plaintiff cannot show how he was prejudiced by the Court's decision to limit damages-related evidence when the jury found he was not entitled to any damages at all.

Because exclusion of the evidence was proper, and because, regardless, Plaintiff cannot show how his rights were substantially prejudiced, his Motion is DENIED.

B. The Verdict Was Against the Clear Weight of the Evidence

Plaintiff's last argument is that the "Defendant officers lacked probable cause to sweep Plaintiff into their investigation of taggers." Mot., ECF No. 115 at 9. This appears to be an argument that the jury's verdict was against the weight of the evidence.

The court must apply a stringent standard to Plaintiff's argument that the verdict reached cannot be reconciled with the weight of the evidence. Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1347 (9th Cir.1984). A motion for new trial may be granted on this ground only if the verdict is against the "great weight" of the evidence or if "it is quite clear that the jury has reached a seriously erroneous result." Id.; see also Venegas v. Wagner, 831 F.2d 1514, 1519 (9th Cir.1987). It would amount to an abuse of discretion on the part of the court to grant a new trial on any lesser showing, and the court cannot extend relief simply because it would have arrived at a different verdict. Silver Sage Partners, 251 F.3d 814 at 818-19.

The Court finds that Plaintiff has not presented a compelling argument for granting the extraordinary remedy sought. In the Court's view, there was sufficient evidence from which the jury could have reached its conclusion that Plaintiff's arrest was supported by probable cause. Contrary to Plaintiff's argument in his current Motion, Plaintiff was not detained on suspicion of tagging. Rather, he was detained pursuant to California Penal Code § 148(a)(1), which provides that "[e]very person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment" is subject to criminal liability. As the Court stated on the record before the parties, and repeated above, this Court found credible all testimony pointing to the fact that Plaintiff ran from officers and failed to heed their warnings to stop. That is all that is required to establish the requisite cause for an arrest under Section 148.

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Based on its verdict, the members of the jury agreed with the Court. To this end, the jury's determination that Plaintiff's detention was supported by probable cause is not contrary to the overwhelming weight of the evidence. Plaintiff's Motion is DENIED on this basis as well.

CONCLUSION

For the reasons just stated, Defendant's Motion for New Trial (ECF No. 114) is DENIED.

IT IS SO ORDERED.

Dated: February 17, 2014

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT