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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PATRICK WAYNE SOLOMON,

Plaintiff,

v.

OFFICER J. HERMINGHAUS,

Defendant.

No. 2:13-cv-00115-GEB-CKD

ORDER ON MOTIONS IN LIMINE*

Each party moves in limine for an order precluding the admission of certain evidence at trial.¹ Each motion is addressed below.

A. Plaintiff's Motion

Plaintiff seeks to exclude "[e]vidence of [his] criminal history," arguing:

it is not relevant to the only issue for trial[,] which is whether Defendant used excessive force in the course of arresting Plaintiff. At the time of the arrest, Defendant had no knowledge of Plaintiff's prior criminal history[,] . . . he knew [only] that Plaintiff had previously been an inmate in the local jail

(Pl.'s Mot. in Limine ("MIL") 1:27, 3:8-24, ECF No. 73.)

* These motions are suitable for decision without oral argument.

¹ In light of the parties' representations concerning the timing of Plaintiff's counsel's decision to continue as counsel through trial, the Court reaches each motion in limine even though they were filed after the deadline prescribed in the Final Pretrial Order.

1 Plaintiff further argues evidence of his criminal history should
2 be excluded under Federal Rules of Evidence ("Rules") 403 and
3 404(b).

4 Defendant rejoins that Plaintiff's prior criminal
5 convictions "are relevant to rebut Plaintiff's claim that he was
6 not resisting, but instead simply attempting to ask [Officer
7 Herminghaus] a question." (Def.'s Opp'n 2:23-3:2, ECF No. 76.)

8 Defendant argues:

9 a Plaintiff's criminal history is highly
10 relevant and totally admissible in a case
11 such as this where an officer's perception of
12 resistance just prior to the application of
13 force is in dispute and evidence of prior
14 criminal convictions makes the officer's
15 perception more probable.

16 (Id. at 3:5-9 (citing Boyd v. S.F., 576 F.3d 938, 944-45 (9th
17 Cir. 2009)). Defendant further counters that Plaintiff's past
18 felony convictions are relevant to his lost earning capacity
19 claim, are admissible under Rule 609 "to attack Plaintiff's
20 character for truthfulness," and are admissible under Rule
21 404(b)(2) "to demonstrate [Plaintiff's bias,] intent[,] and
22 absence of mistake in this instance." (Id. at 3:23-28, 4:3-7,
23 4:24-5:9.)

24 This motion lacks the preciseness required for an in
25 limine ruling.

26 **B. Defendant's Motions**

27 **Motion in Limine No. 1**

28 Defendant seeks to exclude "[e]vidence of Plaintiff's
acquittal or any other aspect of [his] underlying [state]
criminal trial[,]" in which he was charged with battery on a
correctional officer and resisting arrest. (Def.'s MIL No. 1

1 1:26-27, ECF No. 66; see also Pls.' Trial Brief 3:3-9, ECF No. 64
2 (describing Plaintiff's criminal charges).) Defendant argues:
3 "the results of Plaintiff's underlying criminal case (i.e.
4 acquittal) are simply not relevant to the sole [excessive force
5 claim] remaining for trial[,] and any reference to such a
6 disposition would be unduly prejudicial and misleading to the
7 jury." (Id. at 3:16-19.) Defendant contends:

8 It has long been held that "evidence of an
9 acquittal is not generally admissible in a
10 subsequent civil action between the same
11 parties since it constitutes a negative sort
of conclusion lodged in a finding of failure
of the prosecution to sustain the burden of
proof beyond a reasonable doubt."

12 (Id. at 3:22-26 (quoting Borunda v. Richmond, 885 F.2d 1384, 1387
13 (9th Cir. 1988)).)

14 Plaintiff counters that his acquittal is "directly
15 relevant to the issue of excessive use of force . . . because
16 whether Plaintiff was found to have resisted arrest is a relevant
17 factor to the reasonableness inquiry regarding the use of force."
18 (Pl.'s Opp'n 2:15-17, 3:8-10, ECF No. 77.) Plaintiff also rejoins
19 the acquittal is relevant to the issue of damages "because
20 Plaintiff incurred attorney fees and cost[s] to defend the charge
21 of resisting arrest[, and i]f the force used against him is found
22 to be excessive, he should be allowed to recover his damages of
23 attorney's fees expended to defend the criminal trial that
24 resulted in acquittal." (Id. at 2:18-22.) Plaintiff asserts:

25 If the jury determines that the amount of
26 force used by Defendant was objectively
27 unreasonable under the totality of the
28 circumstances, then it would invalidate the
arrest. It would have prevented the
prosecution of the Plaintiff, because a
conviction for resisting arrest under §

1 148(a) (1) may be lawfully obtained only if
2 the officers do not use excessive force in
3 the course of making that arrest. Smith v.
4 City of Hemet, 394 F.3d [689,] 696 (9th Cir.
5 2005). Plaintiff should therefore have the
6 opportunity to prove any damages related to
7 defending that prosecution.

8 (Id. at 4:4-11.)

9 Plaintiff further counters that "to leave the issue
10 uncertain of whether Plaintiff was convicted of resisting arrest
11 would cause [Plaintiff] undue prejudice." (Id. at 2:17-18.)

12 Plaintiff argues:

13 Defendant has indicated . . . he will be
14 requesting a special jury instruction to
15 inform the jury that Defendant had probable
16 cause for the arrest to seek to avoid
17 prejudice to Defendant due to uncertainty of
18 the outcome of the criminal matter. Likewise,
19 to leave the issue uncertain of whether
20 Plaintiff was convicted of resisting arrest
21 or acquitted would cause undue prejudice to
22 the Plaintiff. The jury can be informed that
23 Defendant had probable cause for arrest, but
24 that issue is separate and apart from, and
25 has no bearing on the fact that Plaintiff was
26 acquitted of resisting arrest. The jury
27 should be informed of both.

28 (Id. at 3:12-18.)

Defendant replies that Plaintiff's argument concerning
the acquittal's relevance to damages fails since the "Court has
already ruled that the arrest of Plaintiff was supported by
probable cause." (Def.'s Reply 1:27-2:8, ECF No. 79.) Defendant
argues:

Plaintiff attempts to mitigate the
ruling of Borunda v. Richmond . . . by
suggesting that the district court allowed
the underlying acquittal for the limited
purpose of showing damages in the form of
attorney's fees. While this may be true (with
a limiting instruction), the big difference
between Borunda and the instant case is that
the plaintiff in Borunda retained a false

1 arrest claim - as noted above, Plaintiff in
2 the instant case does not. Thus, the Ninth
3 Circuit's overriding holding of Borunda is
 that acquittals in underlying criminal cases
 are inadmissible in a subsequent civil case.

4 (Id. at 3:3-10.) Defendant further replies that he has "no
5 intention of introducing evidence that Plaintiff was charged with
6 'resisting arrest' in addition to the 'battery on a correctional
7 officer' which led to his arrest." (Id. at 2:4-6.) Defendant
8 contends the "Court has ruled that Officer Herminghaus had
9 probable cause to arrest Plaintiff . . . and that's all the jury
10 needs to know." (Id. at 2:15-16.)

11 Plaintiff has not shown that his acquittal is relevant
12 to damages on his excessive force claim, and assuming arguendo
13 its admission is relevant to the use of force issue, any
14 "probative value is substantially outweighed by a danger of . . .
15 unfair prejudice . . . [and/or] misleading the jury." Fed. R.
16 Evid. 403. "Evidence of an acquittal is not generally admissible
17 in a subsequent civil action between the same parties since it
18 constitutes a 'negative sort of conclusion lodged in a finding of
19 failure of the prosecution to sustain the burden of proof beyond
20 a reasonable doubt.'" Borunda, 885 F.2d at 1387 (quoting S. Gard,
21 2 Jones on Evidence, § 12:25, p. 391 (6th ed. 1972)); see also
22 Mullins v. City of Philadelphia, 287 F. App'x 201, 203-04 (3rd
23 Cir. 2008) ("The standards of proof in the criminal case and in
24 this civil case are different.") (affirming denial of the
25 plaintiff's motion to admit evidence of his acquittal in
26 subsequent civil rights action).

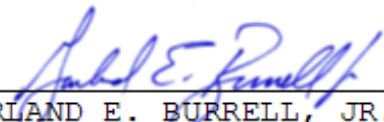
27 In light of Defendant's Rule 403 arguments, this motion
28 is granted.

1 Plaintiff will be available for
2 testimony at trial to authenticate that he is
3 the one in the photos. He can substantiate
4 when and where the photos were taken, and who
5 they were taken by. Plaintiff can
6 authenticate that the photo is what he claims
7 it to be, a bracket on a shelf at the time
8 the photo was taken. Additionally, Defendant
9 has the store manager on his witness list.
10 The manager can testify as to whether
11 brackets like the one in the photo were used
12 on the shelves and whether there have been
13 ones like it on the isle where Plaintiff was
14 arrested. The photo is circumstantial
15 evidence of what caused the injury. The jury
16 is free to assign weight to that evidence as
17 the trier of fact.

18 (Id. at 2:18-27.) Plaintiff further rejoins that he "will provide
19 the emergency room treating physician as a witness who can
20 establish the nature of the injury and the type of object that
21 may have caused the injury." (Id. at 3:9-10.)

22 A sufficient factual context has not been presented for
23 an in limine ruling on this motion.

24 Dated: January 13, 2015

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GARLAND E. BURRELL, JR.
Senior United States District Judge