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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DONALD RAY MYLES II, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES et al., Defendants and Respondents.	B198174 (Los Angeles County Super. Ct. No. BC344600)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf M. Treu, Judge. Affirmed.

Noel & Associates and Ian Noel for Plaintiff and Appellant.

Office of the County Counsel, Raymond G. Fortner, Jr., County Counsel, Dennis M. Gonzales, Deputy County Counsel; Greines, Martin, Stein & Richland, Martin Stein and Barbara S. Perry for Defendants and Respondents.

* * * * * *

Plaintiff and appellant Donald Ray Myles II appeals from a judgment the trial court entered in favor of defendants and respondents the County of Los Angeles (County), the Los Angeles County Sheriff's Department (Sheriff's Department) and Los Angeles County Sheriff's Deputies Paul Schuerger (Deputy Schuerger) and Armando Orellana (Deputy Orellana) (sometimes collectively defendants) after granting their motion for nonsuit. Appellant contends that the trial court abused its discretion in denying him a continuance before trial. He also contends that the trial erred in granting the nonsuit because he presented substantial evidence supporting the imposition of liability against the County and that he should have been permitted to reopen his case to cure any evidentiary deficiencies.

We affirm. Appellant has failed to provide an adequate record to meet his burden to show any abuse of discretion in denying his continuance request. Moreover, his failure to present any evidence identifying the sheriff's deputies who allegedly shot him was fatal to his claims against the County and the individuals. Finally, appellant's stipulating to the trial court's hearing the motion for nonsuit on the basis of the evidence he presented precludes him from contending that he should have been permitted to offer additional evidence.

FACTUAL AND PROCEDURAL BACKGROUND

The Shooting Incident.

On May 26, 2005, at approximately 10:30 p.m., Brandon Jackson, a long-time acquaintance of appellant's, saw appellant across the street near the intersection of 127th Street and Avalon Boulevard having a conversation with a neighbor known as "Auntie Honey." Jackson was not paying particular attention to appellant, but rather, saw him only peripherally. Appellant had been in the same location for a few minutes earlier that afternoon. As appellant was standing on the sidewalk late that evening and had begun to cross the street toward Jackson, a car with bright lights approached. Jackson saw that appellant's hands were "free swinging" and not in his pockets. He neither saw appellant with a gun nor saw appellant make any aggressive gestures. At the time,

Jackson did not realize it was a police car that had approached. He heard "put your hands up" and "freeze" and simultaneously heard shots fired. Jackson saw that appellant had put up his hands at about ear height and had turned around clockwise to the right in response to the commands. He then heard appellant scream and saw him sitting on the ground. At least one bullet hit appellant in the right part of his chest. Individuals who Jackson then saw were law enforcement officers approached appellant carefully; at least one deputy still had his gun drawn and aimed at appellant.

Jackson was then taken to a police station and, after being told he had been a witness to a Sheriff's Department shooting, gave a recorded statement about the incident. As part of that statement, Jackson said that he only heard the shots and did not see any shots being fired. Jackson also said during that statement that appellant's hands were inside a front sweater pocket at some point before he was shot.

Jackson used to be a member of the same gang as appellant, but left that aspect of his life behind when he started his own family. Jackson was on parole at the time he observed appellant being shot. Initially he had been placed on probation for possession of cocaine base for sale, but his probation was revoked and he was sentenced to state prison after being arrested for armed robbery. Although Jackson had many contacts with law enforcement during the past 10 years, he had never had contact with either Deputy Schuerger or Deputy Orellana. He did think that Deputy Schuerger's face was familiar, but could not identify him beyond that.

Appellant's fiancé visited appellant in the hospital the morning after he was shot and saw he was in pain. She helped care for him after he returned home from his three-day hospital stay.

Steve Villarreal, M.D., examined appellant in February 2006; he recommended therapy for the pain of which appellant complained at the wound site and consultation with a psychologist or psychiatrist for appellant's posttraumatic stress disorder symptoms. During the examination appellant indicated to Dr. Villarreal that the sheriff's deputies thought he had a gun.

The Pleadings and Trial.

In August 2005, appellant submitted a claim to the County which was rejected on September 1, 2005. In December 2005, appellant filed his complaint against the County and the Sheriff's Department alleging causes of action for violation of Title 42 United States Code section 1983, assault and battery, false arrest and imprisonment, negligence, conspiracy, and negligent and intentional infliction of emotional distress. The County answered, generally and specifically denying the allegations and asserting multiple affirmative defenses. In July 2006, appellant amended his complaint to add Deputies Schuerger and Orellana as Doe defendants. The County thereafter filed an amended answer, which added a demand for a jury trial, and Deputies Schuerger and Orellana filed a joint answer denying liability.

At a July 10, 2006 case management conference, the trial court set the matter for trial on January 23, 2007. Appellant filed an ex parte application on January 8, 2007 seeking a four-day continuance of the trial date on the ground that he was incarcerated as a result of a parole violation and would not be released until January 27, 2007. Defendants opposed the application on the grounds that they were ready to proceed to trial with their expert and percipient witnesses and that counsel was starting other trials in February 2007 that would occupy his time until May 2007. Following a hearing on January 8, 2007, the trial court denied the application with prejudice for the reasons as stated during the hearing. Appellant thereafter filed a petition for writ of mandate on January 17, 2007 (case No. B196133), which was summarily denied on January 18, 2007.

Jury selection commenced on January 24, 2007 and the jury heard preliminary instructions, appellant's opening statement and witness testimony on January 25, 2007. When trial resumed on the afternoon of January 26, 2007, appellant's scheduled witnesses did not appear. Although defendants were ready to proceed, they did not wish to call witnesses until moving for nonsuit on the issue of liability. But defendants acknowledged they could not move for nonsuit until appellant rested. Because the remaining witness would testify only as to damages, appellant stipulated that no further evidence would be adduced and opposed the motion on the basis of evidence already

submitted. Accordingly, out of the presence of the jury, defendants moved for nonsuit on the grounds that there was no evidence identifying the sheriff's deputies involved in the case and no evidence supporting the requisite elements of appellant's multiple causes of action.

Addressing each cause of action independently, the trial court granted the motion in its entirety. It found no evidence to support the fifth cause of action for conspiracy or the sixth cause of action for negligent infliction of emotional distress. With respect to the issue of identification, appellant conceded that the only basis for imposing liability against the County would be the actions of the two deputies on the night in question. Appellant further conceded that it would be a "difficult proposition to even attempt to continue with the case" against the County if the trial court granted the motion for nonsuit with respect to Officers Schuerger and Orellana. The trial court ruled that "[t]he current state of the evidence is that there has been no identification of Officers—or deputies Paul Schuerger and Armando Orellana. As to them, all causes of action are dismissed." Given that ruling, the trial court further found it would be impossible to proceed with the remaining causes of action against the County, since the actions of those deputies were alleged to have been the basis for the County's derivative liability. The trial court thereafter entered judgment in favor of defendants and this appeal followed.[1]

DISCUSSION

Appellant challenges the trial court's denial of his request to continue the trial date and its granting the motion for nonsuit. We find no merit to either contention.

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[1] We have granted defendants' request to take judicial notice of pleadings and orders relating to the May 2007 dismissal of appellant's appeal for his failure to pay the filing fee and the June 2007 reinstatement thereof.

I. The Trial Court Acted Within Its Discretion in Denying Appellant's Continuance Request.

We review the trial court's decision to grant or deny a continuance for an abuse of discretion. (*Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.) "The trial court's exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court. [Citation.] A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse thereof appearing in the record. [Citation.] The burden rests on the complaining party to demonstrate from the record that such an abuse has occurred. [Citation.]" (*Ibid*.; accord, *Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170–171.)

Appellant contends that the trial court abused its discretion in denying his continuance request, as he would have been the best person to identify the deputies present at the shooting. The minute order for the January 8, 2007 hearing on the continuance request states that appellant's request was denied "with prejudice, for the reasons as stated and incorporated . . . by reference." But the "stated" reasons for the denial are not included as part of the record on appeal because appellant failed to designate the reporter's transcript from the continuance hearing.[2]

"The party seeking to challenge an order on appeal has the burden to provide an adequate record to assess error. [Citation.] Where the party fails to furnish an adequate record of the challenged proceedings, his claim on appeal must be resolved against him. [Citations.]" (*Rancho Santa Fe Assn. v. Dolan-King* (2004) 115 Cal.App.4th 28, 46; see also *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 858–859, fn. 13 [failure to designate reporter's transcript of full trial on

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[2] The designation request originally filed by appellant's counsel did include a reporter's transcript of the January 8, 2007 proceedings. As noted earlier, however, that appeal was dismissed and the designation that appellant filed in pro per in connection with this court's order permitting a late filing did not include that hearing.

the merits precluded appellate review of damages award, as "[t]he party asserting errors at trial has the burden to properly present his case and to designate an adequate record"].) Here, appellant not only failed to designate the reporter's transcript of the hearing on his continuance request, but also failed to make any request to augment the record to include the reporter's transcript of the hearing—even after making the denial of the continuance request one of two key arguments on appeal. (See *In re Debra S.* (1982) 135 Cal.App.3d 378, 384 [parent in dependency proceedings could not meet burden to show error at jurisdictional hearing by means of an adequate record where she neither requested a transcript of the hearing nor made a motion to augment or correct the record either before or after filing her opening brief].) Moreover, appellant did not ask us to take judicial notice of the petition for writ of mandate he filed following the denial of his continuance request; indeed, he makes no reference to that proceeding in his opening brief.

Under these circumstances, we are guided by *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412. There, the court affirmed an order denying a motion requesting recordation of an abstract of judgment on the ground that the defendants could not meet their burden to show any error having failed to request a reporter's transcript of the hearing on the motion. (*Id*. at p. 1416.) Citing the well established principle that a trial court's order is presumed correct, together with the corollary principle that "'if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed,'" the court stated: "So long as such possible grounds may exist for the trial court to have denied defendants' motion in the exercise of its discretion, defendants have not sustained their burden as appellants to demonstrate error, thus overcoming the presumption of correctness attending the order denying their motion." (*Ibid*.) Likewise, by not requesting the preparation of a reporter's transcript of the hearing, appellant has failed to meet his burden to overcome the principle that we must presume the trial court's order correct.

Even setting aside our reliance on this general principle, we would find no basis for reversal of the order denying the continuance on the record before us. This situation is unlike that in the sole case upon which appellant relies, *Whalen v. Superior Court*

(1960) 184 Cal.App.2d 598. There, the appellate court found that the trial court abused its discretion in denying a defendant's motion to continue trial where the defendant had been commissioned to serve overseas in the United States Naval Reserve and the plaintiff did not object to the continuance. (*Id*. at pp. 600–601.) Here, in sharp contrast, appellant's incarceration was the basis of a contested continuance request. As the *Whalen* court noted, "[t]he unavoidable absence of a party does not necessarily compel the court to grant a continuance." (*Id*. at p. 600.)

Moreover, the record does not show that appellant suffered any prejudice from the denial. (See *Fisher v. Larsen* (1982) 138 Cal.App.3d 627, 649 [appellant who requested continuance must demonstrate prejudice from trial court's denial of request].) Appellant challenges the denial on the ground that he was the only person who could have identified the officers involved in the shooting. But appellant did not assert this reason as the basis for his continuance request, arguing only that he would be a "key witness" at trial. More importantly, when appellant's final witness failed to appear on the afternoon of January 26, 2007, appellant's counsel never argued that appellant could supply the missing identification testimony the following day, which was his scheduled release date. Nor did appellant's counsel attempt to call Deputies Schuerger and Orellana as witnesses to resolve the identification issue, even though they had already been present in court. Instead, appellant's counsel stipulated that the trial court could adjudicate the motion for nonsuit and argued that the circumstantial evidence was sufficient for the jury to infer that Deputies Schuerger and Orellana were involved in the shooting. Appellant's conduct at the conclusion of his case—not appellant's absence—rendered appellant unable to establish the deputies' identification. For this reason, appellant failed to establish any prejudice from the denial of his continuance request.

II. The Trial Court Properly Granted the Motion for Nonsuit.

The trial court granted the motion for nonsuit on the primary ground that there was no evidence identifying Deputies Schuerger or Orellana as being involved in the shooting incident giving rise to liability against the County and the deputies. As explained in

Nally v. Grace Community Church (1988) 47 Cal.3d 278, 291: "A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor. [Citation.] 'In determining whether plaintiff's evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded. The court must give "to the plaintiff['s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff['s] favor."' [Citation.] A mere 'scintilla of evidence' does not create a conflict for the jury's resolution; 'there must be *substantial evidence* to create the necessary conflict.' [Citation.]" (Accord, *Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal.App.4th 635, 639.) We apply the same standard on review: "In reviewing a grant of nonsuit, we are 'guided by the same rule requiring evaluation of the evidence in the light most favorable to the plaintiff.' [Citation.] We will not sustain the judgment '"unless interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law."' [Citations.]" (*Nally v. Grace Community Church, supra,* at p. 291.)

Preliminarily, we reject appellant's argument that he should have been permitted a reasonable opportunity to present additional evidence to cure any evidentiary deficiencies raised in the motion for nonsuit. This argument is contrary to the position he took below, stipulating that he would present no further evidence and that the motion for nonsuit could be based on the current state of the evidence. It is well established that "an appellant waives his right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal. [Citations.]" (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) The court in *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180 explained the basis for this principle: "'An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been

but was not presented to the lower court by some appropriate method . . . . The circumstances may involve such intentional acts or acquiescence as to be appropriately classified under the headings of estoppel or waiver . . . . Often, however, the explanation is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.' [Citation.]" (*Id.* at pp. 184–185, fn. 1.) Given appellant's position below, he is precluded from arguing on appeal that he should have been permitted to present additional evidence.

Alternatively, appellant contends that the evidence he presented was sufficient to enable the jury to find Deputy Schuerger individually liable for the shooting and to impose vicarious liability on the County. Again we disagree. Jackson testified that, at the time of the shooting, the car that had approached appellant had its bright headlights on and for that reason he did not recognize it as a law enforcement vehicle. Also at the time of the shooting, Jackson had not realized the Sheriff's Department was involved. He testified that when he was taken to the police station after the shooting, "I was told that I was a material witness in a—in a shooting, basically. But it was the sheriff's department—shooting with the sheriff's department. I knew—I kind of knew after that that it was the sheriffs, but before I didn't know." Further, Jackson was unable to identify Officer Schuerger as being present at the shooting. Jackson testified that he could not recall ever having contact with either Deputy Schuerger or Deputy Orellana. In answer to the question of whether he had any independent recollection of seeing either deputy before the previous day in court, Jackson offered the only testimony regarding his recognition of Deputy Schuerger, stating that "the face [of Deputy Schuerger] is familiar, the bald Caucasian guy. But other than that, I couldn't be just dead on, no."

In the absence of any evidence placing Deputy Schuerger or Deputy Orellana in the vicinity of appellant's shooting, Jackson's testimony that Deputy Schuerger's face was "familiar" was inadequate to subject those individuals to liability. (See *Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1605–1606 [nonsuit properly granted on claim alleging a conspiracy to violate the plaintiff's civil rights where the only evidence connecting the defendants to the alleged conspiracy was their inaction in allowing the

plaintiff's government claim to be litigated]; *Fairfield v. Hamilton* (1962) 206 Cal.App.2d 594, 600–601 [nonsuit properly granted on conspiracy claim against a particular defendant where there was neither evidence from which the jury could have inferred any agreement between the defendant and others alleged to have participated in unlawful actions nor evidence of direct participation by the defendant in the unlawful actions].) Jackson's testimony constituted nothing more than a "mere scintilla" of identification evidence; it did not amount to substantial evidence necessary to enable the case to go to a jury. (See *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 480.)

The absence of evidence that Deputies Schuerger and Orellana were involved in appellant's shooting likewise supported the trial court's grant of nonsuit on appellant's claims against the County. The only basis for imposing liability against the County was through the acts of its employees. (See *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127 [explaining that while the California Tort Claims Act provides "when the act or omission of the public employee occurs in the scope of employment the public entity will be vicariously liable for the injury [citation], the Act contains *no* provision similarly providing that a *public entity* generally is liable for its own conduct or omission to the same extent as a private person or entity"].) Thus, because he did not offer any evidence sufficient to demonstrate that one of the County's employees was liable, appellant failed to offer substantial evidence supporting the imposition of liability against the County.

The circumstances here are remarkably similar to those in *Calderon v. Dispatch Trucking Co.* (1968) 268 Cal.App.2d 217. There, the plaintiff was a passenger in an ambulance which was hit by a truck. Both the plaintiff and the ambulance driver testified at trial that they could not identify the truck driver, but that the truck was similar in color and characteristics to a number of trucks that were carrying dirt from a nearby construction site and bore the name of the defendant trucking company. (*Id.* at pp. 219–221.) Affirming a grant of nonsuit, the court described the evidentiary shortcomings in the plaintiff's case: "[P]laintiff made no offer or attempt to establish agency or permissive use upon the part of the driver of the truck. There is no evidence to identify the truck involved in the accident, or the owner or the driver of it, or to establish agency,

employment or permissive use with respect to the vehicle. None of the vehicles at the 'center' was identified as the one involved in the accident. Plaintiff made no showing of the identity and location of the jobsite referred to as the music center, the presence or absence of other similar activities elsewhere in the area, the existence or nonexistence of some contract for dirt removal by the defendant, whether defendant in fact owned a truck or a fleet of trucks, whether defendant's truck or trucks were being used exclusively or otherwise on a project in the area, whether defendant had trucks uniform in color and design, whether the colors were factory originated or peculiar to an owner and so on." (*Id*. at pp. 221–222.) By the same token, appellant did not attempt to establish whether the vehicle that approached him belonged to the Sheriff's Department, whether the occupants were Sheriff's Department employees, whether they were on duty at the time of the incident or any other facts that could have supported the imposition of vicarious liability against the County.

Accordingly, the trial court properly concluded that the absence of evidence demonstrating that Deputies Schuerger and Orellana were involved in appellant's shooting mandated the granting of the County's motion for nonsuit.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
DOI TODD

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ