2d Civ. No. B176525

STATE OF CALIFORNIA

COURT OF APPEAL

SECOND APPELLATE DISTRICT

DIVISION TWO

ABRAHAM SANTANA,

Plaintiff and Appellant,

vs.

COUNTY OF LOS ANGELES, et al.,

Defendants and Respondents.

Appeal from the Los Angeles Superior Court
Honorable Paul G. Flynn, Judge Presiding
Los Angeles Superior Court Case No. SC068137

RESPONDENTS' BRIEF

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INTRODUCTION

On a Fourth of July weekend, plaintiff and appellant Abraham Santana and five other young men went cruising in two cars. After Deputy Sheriff Brian Nelson pulled over the first car on Sunset Boulevard in Los Angeles, the second car returned and pulled up behind him. Santana and the two other occupants exited. Santana darted around the parking lot, repeatedly ignored the deputy's requests to approach, swore at him and tried to hit him. Then he fled and tripped, injuring himself. He was arrested and prosecuted for obstructing an officer.

Santana sued the County of Los Angeles, Deputy Nelson, and Paul Thomas Dillon, a neutral witness who confirmed Deputy Nelson's account of the incident. Santana alleged civil rights violations under 42 U.S.C. section 1983 and related state claims. He did not attend the trial and did not testify. After the trial court directed a verdict against him on some claims, the jury returned a verdict against him on the remaining claims. Santana appealed. As to the County and Deputy Nelson, his contentions are meritless.

First, Santana asserts the trial court erred in denying him a directed verdict and judgment notwithstanding the verdict on the portion of his section 1983 claim alleging that Deputy Nelson violated his Fourth Amendment rights by asking him to approach and arresting him. As the trial court found, there was substantial evidence establishing that Deputy Nelson acted both lawfully and constitutionally.

Second, Santana claims the trial court erroneously admitted evidence of his negative post-incident conduct. The evidence was properly admitted because it was relevant to disprove Santana's claims for damages.

Third, Santana asserts the trial court erroneously excluded personnel complaints against Deputy Nelson, which purportedly supported Santana's *Monell*[1] and negligent supervision claims against the County. The evidence was properly excluded because it was irrelevant and unduly time-consuming and prejudicial. Moreover, Santana has failed to show that exclusion of the evidence prejudiced his case.

Finally, Santana asserts that various remarks and acts by the trial judge constituted misconduct. Santana waived the issue by failing to raise it during the trial, when the judge had an opportunity to stop the purported misconduct and cure any potential prejudice. Moreover, the judge's remarks and actions did not constitute misconduct, and Santana has failed to show prejudice.

For all these reasons, the judgment should be affirmed.

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[1] *Monell v. Department of Social Services of the City of New York* (1978) 436 U.S. 658, 690-692 [98 S.Ct. 2018, 2035-2036, 56 L.Ed.2d 611].

STATEMENT OF THE CASE AND RELEVANT FACTS

A. The Incident.

Late in the evening on July 3, 1999, plaintiff and appellant Abraham Santana (Santana) and five other young men went cruising in Los Angeles. Santana's brother, Enrique Santana (Enrique) drove a pickup truck with Jonathan Martinez and Ernie Flores as passengers; Daniel Chaidez, with Juan Del Campo and Santana as passengers, drove a Volkswagen bug. (3 RT 233-234, 262, 304, 306, 308; 5 RT 546-547; 6 RT 827, 829.)[2]

Around midnight, Deputy Nelson pulled over the truck on Sunset Boulevard for expired registration.[3] They stopped in front of Miyagi's, a busy sushi restaurant, blocking the driveway. (3 RT 235, 251; 4 RT 437; 5 RT 708, 718, 721-722; 6 RT 829, 872-875, 888; ER 38, 92-94.) At Nelson's request, the youths produced their driver's licenses but could not produce the truck's registration. (3 RT 236-238, 240; 4 RT 432, 438; 6 RT 831; ER 38.) Nelson noted that none of the names matched the truck's registered owner and two youths were violating curfew. Concerned the truck might be stolen, Nelson asked the youths to exit and place their hands on the hood of his radio car. (3 RT 240-241; 4 RT 438-441, 450; 6 RT 835.) Then, from the car, he called for backup while searching the truck for

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[2] "RT" refers to the Reporter's Transcript. "ER" refers to the appendix filed by Santana, which he has entitled "Excerpts of Record." "RA" refers to the Respondents' Appendix filed by the County and Nelson with this brief.

[3] At trial, Santana argued that the registration was current. (2 RT 182; 5 RT 581-583; 7 RT 1008.) But defendants presented evidence to the contrary. (6 RT 888-892, 1017; see 4 RT 440-441; 5 RT 571-573, 584-587; 6 RT 848-849, 872-875.)

proof of ownership, and checked the youths' names for warrants. (4 RT 452, 458; 6 RT 875; ER 38.)

Meanwhile, the Volkswagen bug pulled up behind him and Santana and Chaidez exited. (3 RT 242-244, 247; 4 RT 462, 464; 6 RT 836-837; ER 38.) Chaidez, who was angry and cursing, approached the youths on the hood and talked to them. (4 RT 463, 470-471, 475; ER 38-39, 93.) Santana went into the parking lot and took a position between two parked cars, 10 to 15 feet from Nelson. (4 RT 403, 462, 471-472, 483-485; 758-760, 764; ER 39.)

Nelson exited the radio car, told Chaidez to put his hands on the trunk, then put him in the backseat. (3 RT 245-246, 265, 312; 4 RT 403, 474; 5 RT 552; 6 RT 836; ER 39.) Then he asked Santana to approach him. Santana said "no" and moved further into the parking lot, where he darted around, keeping his distance and watching Nelson. (4 RT 462, 464, 472, 478-479, 481, 483-487, 489; 6 RT 757-764; ER 39.) He was agitated and cursed repeatedly at Nelson. (6 RT 750-758.) Meanwhile, the Volkswagen's third occupant, Del Campo, exited and approached Nelson. Nelson told him to place his hands on the radio car's trunk. (4 RT 467, 487; ER 39.)

Santana then approached Nelson, stopping a few feet away from him. Nelson extended his arm, motioned and told Santana to come to him. Santana replied, "This is fucked up. I didn't do anything wrong," and asked for the deputy's name. (3 RT 322; 4 RT 404-407, 476, 486, 489-494; 6 RT 757; ER 39; see 6 RT 763; ER 94.) Then he struck at Nelson's outstretched hand and fled into the crowd. (6 RT 764-765, 768-769, 775, 789; ER 39, 94-95.)

Nelson pursued Santana and put his hand on Santana's shoulder; Santana tried to pull away, tripped, and fell, hitting his knees and hands and

ending up on his chest. (4 RT 497, 504-505, 512, 515; 6 RT 768-772, 775; ER 40, 95-96.) Nelson went down with him, straddled him and handcuffed him. (4 RT 516; 6 RT 772-773, 877-878; ER 40, 96.) Other deputies arrived and escorted Santana out. (4 RT 524.)

Santana was arrested for obstructing a police officer in violation of Penal Code section 148. (ER 37.)

B. The Investigation.

Because Santana had struck at Nelson and they had gone to the ground, Nelson called his supervisor, Sergeant Walker, to report a possible use of force. (4 RT 528; 5 RT 592-593; 6 RT 860-861, 863-864; ER 40.) At the scene, in response to Sergeant Walker's inquiry, Santana said he was not injured, and Walker did not see any injuries. (4 RT 528; 5 RT 641, 650; RA 165.) Sergeant Walker told the other deputies to look for witnesses and shouted into the crowd soliciting witnesses, but no one stepped forward. (5 RT 598, 599, 601.) Based on Nelson's account, Sergeant Walker determined that Nelson's actions were appropriate. (5 RT 643.)

At the station, Sergeant Walker interviewed Santana, who again denied being injured and said nothing about inappropriate behavior by any deputy. (5 RT 642, 648, 659; RA 165.)

After his release, Santana sought medical care and told the examining physician the deputies had injured him. (4 RT 345; ER 29, 33-35.) The physician reported Santana's statement to the Sheriff's Department, and a Lakewood sergeant interviewed Santana. (5 RT 649.) Santana also filed a personnel complaint. (6 RT 880; RA 171.) In response, West Hollywood Station's Lieutenant Reed instructed Sergeant Walker to investigate. (5 RT 593, 598, 604, 649; RA 165-166.)

In an interview by Sergeant Walker four days after the incident (5 RT 604, 704-705, 707; ER 92-102; RA 166), Paul Thomas Dillon, Miyagi's manager and part owner, confirmed Nelson's account, stating that Santana struck at Nelson and tripped, causing his own injuries. Dillon also told Walker that Nelson did not hit, kick, or verbally abuse Santana, nor did he witness any inappropriate activity by any deputy. (5 RT 605, 609; ER 94-96, 100-101; RA 166.) Based on this account, Sergeant Walker again determined that Nelson's actions were appropriate. (5 RT 630; RA 165.)

C. The Lawsuit And Trial.

Santana was prosecuted in two criminal trials (4 RT 347, 351, 361-363; 4 RT 446; 7 RT 898, 931, 936, 939, 942, 949), both of which ended in hung juries. (3 RT 224.) He then sued the County of Los Angeles, Deputy Nelson, and Dillon, alleging civil rights violations under 42 U.S.C. section 1983 and related state claims. (ER 1.) Santana failed to appear for trial, even though defendants tried to compel him to appear and testify by serving notice on his attorney under Code of Civil Procedure section 1987(b). (2 RT 2, 15; 3 RT 207-209; 7 RT 952; RA 136-137.)[4]

The court directed a verdict for the County on Santana's *Monell* and negligent employment claims on the ground that there was insufficient evidence to support them. (7 RT 974, 980; RA 142.) The court also

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[4] The record shows that Santana was in Mexico and had no intention of appearing for trial because there was a warrant out for his arrest, although the jury was not made aware of this circumstance. (2 RT 2, 15; 3 RT 208; RA 3-4.)

granted a directed verdict for Dillon on all claims. (7 RT 969; RA 142; see also 7 RT 953-967.)

The case proceeded to the jury on the following theories of liability against Nelson and, under respondeat superior, the County: (1) violation of civil rights under section 1983 (Nelson only), (2) assault and battery, (3) false arrest, and (4) intentional infliction of emotional distress. (7 RT 959-962, 980; see ER 1.) The jury returned an 11-1 verdict for Nelson and the County, finding that Nelson did not (1) violate Santana's constitutional rights, (2) batter him, (3) falsely arrest him, or (4) intentionally inflict emotional distress on him. (7 RT 1047-1052; RA 140-141.)

The court denied Santana's motion for a new trial and judgment notwithstanding the verdict. (7 RT 1062.)

Judgment was entered on April 8, 2004. (RA 139.) Santana appealed. (RA 138.)

LEGAL DISCUSSION

I. THE TRIAL COURT PROPERLY DENIED SANTANA'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE SUBSTANTIAL EVIDENCE ESTABLISHED THAT DEPUTY NELSON'S ACTIONS DID NOT VIOLATE THE FOURTH AMENDMENT.

After both sides rested at trial, the court denied Santana's motion for a directed verdict against Deputy Nelson on the portion of his section 1983 claim alleging that Nelson violated the Fourth Amendment by asking him to approach and arresting him.[5] (7 RT 973.) The court later denied Santana's motion for judgment notwithstanding the verdict on the same claim. (7 RT 1062.) Santana contends these rulings were erroneous, asserting that both the request to approach and the arrest were unconstitutional. (AOB 51-52.)

On appeal from the trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict, the appellate court "must . . . view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor. . . ." (*Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th

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[5] 42 U.S.C. section 1983 provides that anyone who, under color of state law, deprives another person of a right secured by the United States Constitution shall be civilly liable to that person. The statute does not confer any substantive rights, but provides a remedy for violation of constitutionally protected rights articulated elsewhere – here, the Fourth Amendment. (*Chapman v. Houston Welfare Rights Organization* (1979) 441 U.S. 600, 617-618 [99 S.Ct. 1905, 1916, 60 L.Ed.2d 508].)

1115, 1137-1138 [judgment notwithstanding the verdict], disapproved on another ground in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15; *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 750-751 [same standard applies for directed verdict].) If "there is *any* substantial evidence, contradicted or uncontradicted, supporting the jury's conclusion," the trial court's denial of the motion must be affirmed. (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722, 730, emphasis added.) In other words, it is Santana's burden to show there is *no* substantial evidence to support the jury's finding that Deputy Nelson did not violate his constitutional rights.

As explained next, because the evidence was in conflict and there was substantial evidence that Deputy Nelson's actions did not violate the Fourth Amendment, the court properly denied Santana's motions for a directed verdict and judgment notwithstanding the verdict.

A. Substantial Evidence Establishes That Deputy Nelson Acted Lawfully In Asking Santana To Approach.

Santana contends that, when Deputy Nelson asked him to approach, Nelson intended to pat him down – thereby violating his Fourth Amendment rights. (AOB 51-54.) Wrong.

1. Deputy Nelson did not "seize" Santana under the Fourth Amendment because Santana did not comply with the requests to approach.

Not all police contacts trigger Fourth Amendment scrutiny. (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; *Florida v. Bostick* (1991) 501 U.S. 429, 434 [111 S.Ct. 2382, 2386, 115 L.Ed.2d 389].) A detention or "seizure" may violate the Fourth Amendment *only* "when an officer intentionally applies hands-on, physical restraint to a suspect" *or* "initiates a show of authority to which a reasonable innocent person would feel compelled to submit . . . and *to which the suspect actually does submit* . . . for reasons that are solely related to the official show of authority." (*People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1367, 1372, citations omitted, emphasis added; *California v. Hodari D.* (1991) 499 U.S. 621, 626 [111 S.Ct. 1547, 1550, 113 L.Ed.2d 690]; *Florida v. Bostick, supra*, 501 U.S. at pp. 436-437.)

Hodari D., supra, is instructive. There, the United States Supreme Court held there was no seizure under the Fourth Amendment where defendant fled upon seeing a police car, was chased by two officers and was almost caught when he discarded illegal drugs. (499 U.S. at p. 623.) Rather, the suspect was not seized until the officer tackled him a moment later. (*Id.* at p. 629.) The court explained that, even assuming that "[the officer's] pursuit . . . constituted a 'show of authority' enjoining [defendant] to halt, since [defendant] did not comply with that injunction he was not seized until he was tackled." (*Id.* at p. 629.)

Here, after Santana exited the Volkswagen, Deputy Nelson asked him to approach. Santana said "no" and walked away. (ER 39; 4 RT 481, 483-484; see 6 RT 761-762.) Nelson and Dillon testified that, when

Santana finally approached and Nelson again asked him to come over, Santana swore at Nelson, struck at him, and fled. (ER 39, 94-95; 4 RT 489-492; 6 RT 764-765, 768-769, 775, 789; 7 RT 923-925.)

Santana takes exception to Deputy Nelson's request that he approach under the assumption that Nelson *intended* to pat him down. But Nelson's intention is irrelevant. If he did not actually restrain Santana with physical force or a show of authority, there can be no seizure under the Fourth Amendment. Deputy Nelson did not "seize" Santana by merely asking him to approach, particularly where there was evidence that Santana did not comply.

In short, there was substantial evidence that Nelson did not "seize" Santana and, therefore, did not violate his Fourth Amendment rights. (*Hodari D., supra*, 499 U.S. at pp. 626, 629.) Thus, the trial court properly denied Santana's motions for a directed verdict and for judgment notwithstanding the verdict.

2. Even if Deputy Nelson "seized" Santana by asking him to approach, the detention was reasonable under the Fourth Amendment.

The Fourth Amendment prohibits only "unreasonable" searches and seizures. (*People v. Souza* (1994) 9 Cal.4th 224, 229; *Terry v. Ohio* (1968) 392 U.S. 1, 8-9, 21-22, 27 [88 S.Ct. 1868, 1873, 1879-1880, 1883, 20 L.Ed.2d 889].) A detention or investigative stop is "reasonable" – and, therefore, does not violate the Fourth Amendment – "when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza,*

supra, 9 Cal.4th at p. 231; *Illinois v. Wardlow* (2000) 528 U.S. 119, 123 [120 S.Ct. 673, 676, 145 L.Ed.2d 570.) The officer need not be certain as to the precise nature of the criminal activity he suspects, nor does the "possibility of an innocent explanation . . . deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct." (*People v. Leyba* (1981) 29 Cal.3d 591, 599; *In re Tony C.* (1978) 21 Cal.3d 888, 892.) Furtive or evasive conduct may support reasonable suspicion. (*Wardlow, supra*, 528 U.S. at p. 124; *Florida v. Rodriguez* (1984) 469 U.S. 1, 6 [105 S.Ct. 308, 311, 83 L.Ed.2d 165].)

Thus, in *People v. Leyba, supra*, the California Supreme Court held that an officer had reasonable suspicion to detain a car's occupants where he observed, late at night in a high-crime area, two cars blinking their headlights as if signaling and then following each other – even though he had no idea whether illegal activity, or what kind of illegal activity, might be taking place. (29 Cal.3d at pp. 595, 598-600; see also *People v. Foranyic* (1998) 64 Cal.App.4th 186, 189-190 [officer had reasonable suspicion to detain and question suspect carrying an ax on a bicycle at 3 a.m.]; *People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1229-1230 [officer had reasonable suspicion to detain where, investigating report of possible prowler in a commercial area after hours, he found people in a parked car who refused to provide identification and continued talking to each other in a language he couldn't understand].)

The circumstances of this case provided ample justification for Deputy Nelson to detain Santana. Santana had interrupted a traffic stop that now included six young men – two of whom were angry and cursing – who might have stolen a truck. (3 RT 236-238, 240-244, 247; 4 RT 403, 432, 437-441, 450, 462-464, 466-467, 470-472, 475, 482-485, 487; 6 RT 756, 758-760, 764, 831, 835-837; 888; ER 38-39, 93.) He refused Nelson's

requests to approach, darted around the parking lot while cursing and keeping an eye on Nelson, then suddenly began to approach while one of his hands was hidden, and again swore at Nelson. (3 RT 247, 316, 320, 322; 4 RT 406-407, 458, 462, 464, 472, 478-479, 481, 483-487, 489-490, 492-494; 6 RT 750-764; ER 39.) Nelson could reasonably have suspected that he had helped steal the truck, might be planning to help his friends escape detention or arrest, or might attack Nelson – which is what Nelson testified he was thinking. (4 RT 431, 451, 472, 476-477, 481-482, 484-485, 490; see also 7 RT 923-925.)

It is undisputed that Nelson did not actually pat down Santana, but he certainly had grounds to do so. An officer may pat down a suspect to check for weapons if "he has reason to believe that he is dealing with an armed and dangerous individual," even if he is "not . . . absolutely certain that the individual is armed." (*Terry v. Ohio, supra*, 392 U.S. at pp. 24, 27; *People v. Castaneda, supra*, 35 Cal.App.4th at pp. 1229-1230 [officer reasonably patted burglary suspect for weapons, "fearing for his own safety because he was alone with two detainees"]; see also *People v. Superior Court (Bowden)* (1976) 65 Cal.App.3d 511, 522 [officers "may take reasonable steps to protect themselves from violence" during investigative detentions].)

Here, as just discussed, Deputy Nelson was alone with six possible car thieves and a suspect whose actions suggested he might be about to attack him. Thus, Nelson had reasonable grounds to pat down Santana. Moreover, contrary to Santana's contention, Nelson did not "admit[] he had no belief . . . Mr. Santana was armed or dangerous." (AOB 53.) Rather, he said that he could see only one of Santana's hands, he didn't know if Santana had a weapon, and Santana "could get to a weapon in less than a second." (4 RT 481-482, 493.)

In short, there was substantial evidence that Deputy Nelson acted reasonably in asking Santana to approach. The trial court, therefore, properly denied Santana's motions for a directed verdict and judgment notwithstanding the verdict.

B. Substantial Evidence Establishes That Deputy Nelson Properly Arrested Santana.

A police officer may arrest a suspect without a warrant if he has probable cause to believe the person has committed a crime in his presence. (Penal Code, § 836; *Beck v. State of Ohio* (1964) 379 U.S. 89, 91 [85 S.Ct. 223, 225, 13 L.Ed.2d 142].) Under Penal Code section 148, anyone who "willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge" his duties commits a crime. Physical acts such as hitting or struggling with an officer or running away violate this section. (*In re Joe R.* (1970) 12 Cal.App.3d 80, 86 disapproved on another ground in *In re Robert G.* (1982) 31 Cal.3d 437, 445; *People v. Powell* (1950) 99 Cal.App.2d 178, 182; *People v. Bugg* (1947) 79 Cal.App.2d 174, 175-176; *People v. Allen* (1980) 109 Cal.App.3d 981, 985-986.) This is so even if the suspect purports to resist an *unlawful* detention. (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 331-333 & fn. 3 [no right to forcibly resist a detention, lawful or unlawful.) Verbal or other conduct that delays an officer in performing his duties also violates the section. (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329-1330.)

Here, there was substantial evidence that Santana delayed Nelson's traffic stop, struck at him, and fled, as explained in detail above, thus violating Penal Code section 148. (3 RT 242-244, 247; 4 RT 403, 462, 464,

466, 471-472, 478-479, 481-487, 489; 6 RT 750-765, 768-769, 775, 789, 836-837; 7 RT 923-925; ER 38, 39, 94-95.) This conduct justified the arrest.[6]

Under the circumstances, there was no basis for the trial court to have granted Santana's motions for directed verdict and judgment notwithstanding the verdict on his section 1983 claim.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF SANTANA'S POST-INCIDENT CONDUCT TO DISPROVE HIS CLAIMS FOR DAMAGES.

Santana contends the trial court erred in allowing defendants to question his mother, Linda Santana (Linda), regarding his arrests, altercation, and drug use following the Miyagi's incident. (AOB 40-42.) Santana is wrong.

A trial court's rulings on admissibility of evidence are reviewed for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) Unless otherwise provided by statute, "all relevant evidence is admissible." (Evid. Code, § 351.) The trial court has "wide discretion" to determine relevance. (*People v. Sanders* (1995) 11 Cal.4th 475, 512.) Although the Evidence Code prohibits admission of evidence of character traits or specific instances of a person's conduct to attack credibility or "to prove his or her conduct on a specified occasion," it does *not* prohibit

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[6] Santana contends a suspect cannot be detained or arrested for failing to comply with an officer's request, cursing at an officer, or demanding that an officer identify himself. (AOB 54-57.) Because Santana was not arrested for these reasons, this argument must be rejected.

admission of such evidence for other purposes. (Evid. Code, §§ 1101, 786, 787.)

Santana sought damages for emotional distress. (ER 9, 21; RA 96, 98, 101, 106.) As proof, Linda testified on direct examination that Santana was "stressed" and paranoid and had trouble sleeping as a result of the Miyagi's incident, and that these problems continued to bother him long after the second criminal trial ended in March 2001. (4 RT 347-350, 361, 363.)

On cross-examination, the court allowed defendants to ask Linda about Santana's subsequent arrests for possessing marijuana and carrying firearms and ammunition, a fight in which he was knocked unconscious and a car ran over his foot, and medical care he obtained for alcohol and drug use. (4 RT 366-372.)[7] This questioning was relevant to rebut Linda's testimony on direct regarding Santana's emotional distress, by showing that it resulted from subsequent incidents rather than the Miyagi's incident. (See 4 RT 367 ["Isn't it correct that the reason [Santana] was paranoid is because he was arrested subsequently for various different charges?"].)[8] The court properly exercised its discretion in admitting the evidence.

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[7] Contrary to Santana's assertion, the court did not allow defendants to question Linda about whether Santana's brother Enrique had been arrested, but limited the questioning to *Santana's* arrests. (AOB 40; 4 RT 367-368.) Furthermore, although defendants asked, without objection, whether Santana had been involved in a fight with "some other gang members," Linda did not, as Santana suggests, testify that the fight involved gangs. (AOB 40; 4 RT 367.)

[8] Although Santana's arrests for drug and firearm possession in 2002 and 2003 occurred some time after the second criminal trial ended, they were nonetheless relevant because Linda testified that the Miyagi's incident continued to bother Santana and he never returned to his normal self after the second criminal trial. (4 RT 361, 363, 366.)

(*DePalma v. Westland Software House* (1990) 225 Cal.App.3d 1534, 1538; *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1334-1335 [evidence of a party's other acts are admissible when relevant to prove some fact other than his disposition to act in a particular manner].)

Santana's reliance on *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, is misplaced. (AOB 41-42.) There, the court held it was error to admit evidence of witnesses' prior arrests to attack their credibility on the theory they were biased against the police. (*Id.* at pp. 589-593.) Here, defendants introduced Santana's arrests, fight, and drug use to show that his damages were not what he claimed – not to attack his credibility. The evidence was properly admitted for this purpose.

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING EVIDENCE OF PAST COMPLAINTS AGAINST DEPUTY NELSON.

Santana contends the trial court erred in excluding evidence of prior personnel complaints against Deputy Nelson, which he claims supported his negligent supervision and *Monell* claims against the County. (AOB 30-31.) As discussed below, this contention must be rejected, both because the issue is moot and because the trial court properly excluded the evidence.

A. If This Court Affirms As To The Section 1983 Claim Against Deputy Nelson, The Issue Is Moot.

A municipality cannot be held vicariously liable under 42 U.S.C. section 1983 for its employee's acts. (*Monell v. Department of Social Services of City of New York* (1978) 436 U.S. 658, 690-692 [98 S.Ct. 2018,

2035-2036, 56 L.Ed.2d 611].) However, it can be held liable for its own policies or well-settled and widespread customs that cause the employee to violate a person's constitutional rights. (*Ibid.*) Because such a claim requires a constitutional violation, a municipality cannot be held liable under section 1983 "based on the actions of one of its [police] officers when in fact [a] jury has concluded that the officer inflicted no constitutional harm." (*City of Los Angeles v. Heller* (1986) 475 U.S. 796, 799 [106 S.Ct. 1571, 1573, 89 L.Ed.2d 806]; *Grazier v. City of Philadelphia* (3d Cir. 2003) 328 F.3d 120, 124; *Swink v. City of Pagedale* (8th Cir. 1987) 810 F.2d 791, 794-795.) Additionally, an employer cannot be held liable for negligent supervision of an employee who did nothing wrong. (See *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.)

The jury's verdict exonerated Nelson on all claims, and the special verdict explicitly found he did not violate Santana's constitutional rights. (RA 140-141.) Thus, if this court affirms as to Nelson, the County cannot be held liable on either the *Monell* claim or the claim for negligent supervision, rendering the court's exclusion of evidence on those claims academic.

B. In Any Event, The Trial Court Properly Excluded The Evidence.

A trial court has "wide discretion" in determining relevance (*People v. Sanders, supra*, 11 Cal.4th 475, 512) and in excluding evidence as unduly time-consuming or prejudicial under Evidence Code section 352. (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1038; *Akers v. Miller* (1998) 68 Cal.App.4th 1143, 1147.) The exclusion of evidence must

be sustained if proper on any ground – even if the trial court relied on an improper ground. (*Philip Chang & Sons Associates v. La Casa Novato* (1986) 177 Cal.App.3d 159, 173.)

Here, the trial court properly excluded prior complaints against Deputy Nelson because Santana failed to make a sufficient offer of proof and the evidence was irrelevant and unduly time-consuming and prejudicial.

1. Santana's offer of proof was insufficient.

An appellant waives any claim of error from exclusion of evidence by failing to make a valid offer of proof. (*Pugh v. See's Candies, Inc.* (1988) 203 Cal.App.3d 743, 758; *Aguayo v. Crompton & Knowles Corp., supra*, 183 Cal.App.3d at p. 1038; Evid. Code, § 354.) To enable the reviewing court to assess error and prejudice, the offer of proof must be specific. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) It must describe precisely the substance of the evidence – including the witness's name and the content of the answer to be elicited – as well as its purpose and relevance. (Evid. Code, § 354; *In re Mark C.* (1992) 7 Cal.App.4th 433, 445; *Semsch v. Henry Mayo Newhall Memorial Hospital* (1985) 171 Cal.App.3d 162, 167-168; *People v. Sperl* (1976) 54 Cal.App.3d 640, 657 [appellate court will not speculate that defendant's "vague and nebulous" offer of proof would produce evidence to support his defense]; *People v. Schmies, supra*, 44 Cal.App. at p. 53 [offer of proof "must set forth the actual *evidence* to be produced and not merely the facts or issues to be addressed and argued" (emphasis added)].)

Santana contends the trial court improperly excluded (1) evidence of personnel complaints and lawsuits against Nelson by seven named witnesses, and (2) Nelson's Personnel Performance Index (PPI). (AOB

30-31.) But Santana's offer of proof was not this specific. Counsel didn't say he wanted to introduce Deputy Nelson's PPI; apparently he wanted to introduce only complaints *not* reflected there. (6 RT 819-820.) Nor did he say he wanted to call seven witnesses to testify about the prior complaints against Nelson, let alone identify them by name and describe the substance of their testimony. Rather, he apparently wanted to introduce this evidence solely through Nelson's testimony, by asking him about prior complaints against him. (6 RT 819-820.) Thus, Santana has waived any claim that the court erred in excluding the subject evidence. (*In re Mark C., supra*, 7 Cal.App.4th at p. 444 [offer of proof stating that expert would testify on "some 33 standardized tests that were conducted," without describing them in any detail, waived consideration of error on appeal]; *Semsch v. Henry Mayo Newhall Memorial Hospital, supra*, 171 Cal.App.3d at p. 168 [offer of proof giving witnesses' names and testimony's purpose but not "the precise testimony to be offered" was inadequate]; *United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282, 293-294 [offer of proof stating facts to be proved but not specific testimony was inadequate].)

2. Additionally, the evidence of prior complaints against Nelson was irrelevant.

Santana contends the proffered evidence was relevant to show the County knew Deputy Nelson had a propensity for improper conduct but failed to take appropriate action. (AOB 28, 30-31.) However, at best, the proffered evidence showed only that complaints were *made*. Without any evidence that the County knew or should have known the complaints were *valid* – i.e., evidence the complaints were substantiated or the County failed

to investigate them adequately – the proffered evidence was not probative of the County's knowledge.

Evidence of unsubstantiated complaints, without more, cannot establish a municipality's knowledge of conduct requiring it to act. (See *Rogers v. City of Little Rock, Arkansas* (8th Cir. 1998) 152 F.3d 790, 799-800 [prior complaints alone could not establish that city "was aware of a pattern of misconduct and responded inappropriately to it"; "[t]here must also be some showing that the complaints had merit"]; *Brooks v. Scheib* (11th Cir. 1987) 813 F.2d 1191, 1192-1193 [evidence of ten complaints, without evidence they had merit, amounted to "no evidence that city officials were aware of past police misconduct"]; *Mariani v. City of Pittsburgh* (W.D. Penn. 1986) 624 F.Supp. 506, 511-512 [prior complaints for which officers were not disciplined, without evidence of action taken on those complaints, couldn't show that municipality tacitly condoned police brutality; "we can not [sic] assume that each complaint filed . . . presents a valid allegation of police misconduct"]; *Kinan v. City of Brockton* (1st Cir. 1989) 876 F.2d 1029, 1034 [trial court properly excluded evidence of prior lawsuits settled before verdict].)[9] Nor can the mere number of complaints filed establish the employer's knowledge or deliberate indifference. (*Strauss v. City of Chicago* (7th Cir. 1985) 760 F.2d 765, 768-769 ["the number of complaints filed, without more, indicates nothing. People may

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[9] See also *Ott v. City of Mobile* (S.D. Ala. 2001) 169 F.Supp.2d 1301, 1310 ["no evidence" city officials were aware of police misconduct where plaintiff never demonstrated past complaints had merit]; *Lewis v. Board of Sedgwick County Commissioners* (D. Kan. 2001) 140 F.Supp.2d 1125, 1138 [similar facts]; *East v. City of Chicago* (N.D. Ill. 1989) 719 F.Supp. 683, 692 [allegation that lawsuits were filed could not support *Monell* claim; "a *filed* case is not necessarily a meritorious one"].

file a complaint for many reasons, or for no reason at all"]; *Ott v. City of Mobile, supra*, 169 F.Supp.2d at p. 1311.)

Here, Santana's proffered evidence that Deputy Nelson had six or seven prior personnel complaints, including two lawsuits, was irrelevant to his *Monell* claim without any evidence the complaints were valid or the County inadequately investigated them. Santana's offer of proof included no such evidence. Thus, the offer of proof was insufficient to establish relevance. (See *Pugh v. See's Candies, Inc., supra*, 203 Cal.App.3d at p. 758; *Aguayo v. Crompton & Knowles Corp., supra*, 183 Cal.App.3d at pp. 1038-1039.)

For the same reason, the evidence was irrelevant to Santana's negligent supervision claim, which required Santana to prove the County breached its duty to use reasonable care. (*Mendoza v. City of Los Angeles, supra*, 66 Cal.App.4th at p. 1339; *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1210-1211.) According to Santana, the proffered evidence was relevant to show the County negligently failed to supervise and control Santana even though it knew Nelson had a propensity for violence and dishonesty. (AOB 28.) Again, the proffered evidence fails to establish what Santana needed to establish: Without evidence that the complaints had merit, they fail to establish that Nelson had a history of violent and dishonest behavior or that the County was aware of it. (See *Pugh v. See's Candies, Inc., supra*, 203 Cal.App.3d at p. 758; *Aguayo v. Crompton & Knowles Corp., supra*, 183 Cal.App.3d at p. 1038; Evid. Code, § 403.)

3. Nelson's PPI was irrelevant.

Santana also contends the trial court erred in excluding Deputy Nelson's PPI.[10] (AOB 30-32; ER 90-91.) Because Santana's offer of proof didn't tell the court he intended to introduce the PPI, that contention is waived.[11] (6 RT 819-820; *In re Mark C., supra*, 7 Cal.App.4th at p. 444.)

In any event, the PPI information was irrelevant, as we now explain.

- *1990 suspension for "disorderly conduct," and operational vehicle investigations in 1993 and 1999 in which Nelson was reprimanded for operating vehicles negligently.* (ER 90.)

Santana contends the PPI was relevant to prove the County knew Nelson had a propensity for violence and dishonesty but failed to take appropriate action, thereby causing Nelson to injure Santana. (AOB 28, 30-31.) But the County's knowledge that Nelson was disciplined for "disorderly conduct" and operating vehicles negligently has no bearing on Santana's injury because the incidents are dissimilar. Thus, any failure by the County to prevent such conduct cannot have caused *Santana's* injury, and these prior incidents are irrelevant. (See *Harris v. City of Kansas City, Kansas* (D. Kan. 1988) 703 F.Supp. 1455, 1459 [*Monell* claim; complaints not alleging excessive force could not establish failure to discipline officers

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[10] During discovery, the trial court reviewed Deputy Nelson's personnel file, including the PPI, and correctly determined that only three personnel complaints – complaints dated May 16 and November 27, 1998, and Santana's – were relevant. (ER 89.) The court allowed Santana to introduce these complaints at trial. (6 RT 822.)

[11] Before trial, Santana mentioned that he intended to introduce evidence of complaints reflected on the PPI. The court told him that, before doing so, he must make an offer of proof. (2 RT 9-11.) He never did so. (See 6 RT 819-820.)

for excessive force]; *Plambeck v. Stone* (N.D. Ill. 1986) 662 F.Supp. 298, 302 [*Monell* claim; "plaintiffs must allege a pattern of previous, *similar* unconstitutional acts" (emphasis added); improper arrest not similar to excessive force]; *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054-1055 [for negligent hiring, training or supervision claim, plaintiff must allege employer knew or should have known employee previously engaged in *similar* conduct]; *People v. Memro* (1985) 38 Cal.3d 658, 685 [where defendant claimed coerced confession, complaints of excessive force not involving coercive questioning techniques were irrelevant].)

- *Two civil claims denied in 1997 and 1998, and a civil lawsuit filed in 1998 and still active.* (ER 90.)

As discussed above, the mere fact that claims or lawsuits were *filed*, without evidence they were substantiated or the County inadequately investigated them, is irrelevant. (E.g., *Kinan v. City of Brockton, supra*, 876 F.2d at p. 1034 [trial court properly excluded evidence of prior lawsuits settled before verdict]; *East v. City of Chicago, supra*, 719 F.Supp. at p. 692 [allegation that lawsuits were filed could not support *Monell* claim].)

- *Eight uses of force between 1994 and 1999.* (ER 90-91.)

An officer is not prohibited from using force; he is only prohibited from using "excessive force." (*Graham v. Connor* (1989) 490 U.S. 386, 395-397 [109 S.Ct. 1865, 187-1872, 104 L.Ed.2d 443].) Indeed, Deputy Nelson and Sergeant Walker explained at trial that deputies were required to report *any* use of force to their supervisors. (5 RT 592-593, 861, 863.) Thus, the mere fact that Nelson used force on several occasions does not tend to show that the force was "excessive" or that the County had notice of any misconduct (which would imply use of "excessive force"). Thus, the trial court properly determined this information was irrelevant.

- *Nine personnel complaints between 1995 and 1999.* (ER 91.)

Two of these complaints, dated May 15 and November 26, 1998, refer to complaints the trial court allowed Santana to use at trial. (6 RT 822; RA 167, 169; see ER 89.) The other complaints were for "discourtesy" or unspecified "other" reasons.[12] These complaints were irrelevant because, as discussed above, they were not similar to Santana's incident, and the mere fact the complaints were made, without more, doesn't show the County had notice that Nelson had dangerous propensities that would cause him to injure Santana.

In short, the trial court properly excluded Santana's proffered evidence because it was irrelevant.

4. The evidence was also unduly time-consuming and prejudicial.

Evidence Code section 352 gives the trial court broad discretion to exclude even relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 581; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) Moreover, the court may do so *sua sponte*. (*Gherman v. Colburn*, *supra*, 72 Cal.App.3d at p. 581.)

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[12] Contrary to Santana's contention, the PPI does *not* show "a total of 9 claims for damages stemming from intentional . . . misconduct on Nelson's part between 1996 and 2002," "18 separate reported uses of force between 8/7/94 and 2/28/02," and "20 personnel complaints for willful misconduct between 10/03/95 and 11/30/01." (AOB 31.)

The trial court's exclusion of evidence was based in part on section 352 considerations. In ruling that Santana could introduce only three personnel complaints, the court said: "I am not going to turn this into a wild goose chase where a whole bunch of evidence is presented just in an effort to smear. . . . Now, I've got to have control of this thing. You got out of control. And I am not going to let it get out of control."[13] (6 RT 822; see also 2 RT 10-11.) Thus, the court was concerned the proffered evidence would be unduly prejudicial and time-consuming.

The court's ruling was well within its discretion. As discussed above, the proffered evidence was irrelevant, or at most marginally relevant. Yet that evidence was likely to "smear" Deputy Nelson and confuse the issues by suggesting that he was a bad person. It was also likely to result in time-consuming "mini-trials" over whether the complaints were valid, since defendants likely would want to rebut the evidence by presenting evidence the complaints were unsubstantiated. (Cf. *Kinan v. City of Brockton, supra*, 876 F.2d at p. 1034 [introducing prior lawsuits against officer "would inevitably result in trying those cases . . . before the jury," resulting in confusion and undue time consumption].)

Andrews v. City and County of San Francisco (1988) 205 Cal.App.3d 938, *Beck v. City of Pittsburgh* (3d Cir. 1996) 89 F.3d 966, and *Fletcher v. O'Donnell* (3d Cir. 1989) 867 F.2d 791, cited by Santana, do not compel a different result. (AOB 33-34.) In *Andrews*, exclusion of an officer's prior misconduct on section 352 grounds was error because the evidence was highly relevant – indeed, critical – to establish the officer's

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[13] The remark about counsel getting "out of control" referred to the previous day's events, in which counsel had repeatedly ignored the court's efforts to put time limits on his examination of Dillon. (See section IV.D.2, *infra*.)

intent and to impeach his testimony. (*Andrews, supra*, 205 Cal.App.3d at pp. 945-947.) Here, on the other hand, the evidence was only marginally relevant to Santana's *Monell* and negligent supervision claims against the County.[14] In *Beck*, the trial court erred in granting judgment as a matter of law in favor of defendant city where plaintiff presented not only evidence of prior complaints, but also extensive evidence of the city's procedures for investigating those complaints – far more than Santana even offered in this case. (*Beck, supra*, 89 F.3d at pp. 968-970, 973-975.) And in *Fletcher*, there was evidence that, though at least one complaint was reported to the Mayor and the Chief of Police, the city failed to investigate in any manner. (*Fletcher, supra*, 867 F.2d at p. 794.)

Contrary to Santana's contention, the trial court did not exclude the evidence on the grounds that it was developed outside *Pitchess* discovery, but on the grounds that it was irrelevant and unduly time-consuming and prejudicial. (AOB 31-33; see 2 RT 11; 6 RT 822.) Moreover, as Santana notes, *Pitchess* procedure concerns discovery and not admissibility. (AOB 33; see *Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 390, 393-400 [describing *Pitchess* discovery procedure].) Santana does not dispute that California's rules regarding admission or exclusion of evidence based on relevance or undue time consumption and prejudice are neutral

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[14] Santana also claims the evidence "was probative of why Nelson would cover over his nameplate." (AOB 31.) Of course, Nelson denied covering his nameplate and the verdict suggests the jury believed him, making plaintiff's argument moot. (4 RT 527; RA 140-141.) However, even assuming otherwise, there was no error. Assuming the excluded evidence suggested Nelson had a reason to cover his nameplate (i.e., because he did not want another complaint filed against him), that subjective reasoning alone does not establish what the County knew or whether any prior complaints against Nelson had merit. Therefore, while possibly probative of Nelson's motivation in covering his nameplate, the evidence is *not* probative of Santana's claims against the County.

procedural rules that govern in state actions involving federal claims. (See *Showalter v. Western Pacific R. R. Co.* (1940) 16 Cal.2d 460, 464-465; *Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1413-1414 & fn. 4; *Hayman v. Sitmar Cruises, Inc.* (1993) 14 Cal.App.4th 1499, 1506.) Since there is no discovery dispute at issue here, Santana's discussion of *Pitchess* rules and whether federal law preempts them in the discovery context is inapposite. (AOB 32-39.)

In sum, Santana has not shown any basis for reversing the judgment based on exclusion of evidence.

C. The Directed Verdict For The County Must Be Affirmed Because Santana Has Not Shown That Exclusion Of The Evidence Prejudiced His Case.

Even if the trial court had erred in excluding evidence of complaints against Deputy Nelson, the judgment would still have to affirmed. An appellant who asserts erroneous exclusion of evidence must show the error was prejudicial and resulted in a "miscarriage of justice" – in other words, absent the error, it is "reasonably probable" the result would have been more favorable to him. (California Constitution, article VI, §13; *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 254-255.) To do so, he must "[spell] out in his brief" exactly how the error prejudiced his case. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106; *In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337.)

Santana contends the trial court could not have granted a directed verdict for the County if it had admitted evidence of prior complaints against Nelson. (AOB 32, 39.) This is incorrect.

First, even if the trial court erred in failing to admit the complaints, Santana has not shown any prejudice because the jury exonerated Nelson, as explained above. The County cannot be held liable on a *Monell* or negligent supervision theory if the officer did nothing wrong. *(City of Los Angeles v. Heller*, *supra*, 475 U.S. at p. 799; *Mendoza v. City of Los Angeles*, *supra*, 66 Cal.App.4th at p. 1339.)

Second, to prevail against a public entity on a section 1983 claim, a plaintiff must show that the municipality adopted a formal policy or acquiesced in a "permanent and well settled" custom that resulted in a violation of his constitutional rights. (*Monell v. Department of Social Services of City of New York*, *supra*, 436 U.S. at pp. 690-691, 694.) When a plaintiff attempts to prove a custom of failing to act – such as a failure to adequately train, discipline or investigate – he must show "deliberate indifference" on the part of the municipality. (See *City of Canton v. Harris* (1989) 489 U.S. 378, 388 [109 S.Ct. 1197, 1204, 103 L.Ed.2d 412]; *Bryant v. Whalen* (N.D. Ill. 1991) 759 F.Supp. 410, 422-423; *Blair v. City of Cleveland* (N.D. Ohio 2000) 148 F.Supp.2d 894, 910.) Here, Santana has not even attempted to show that the proffered evidence would have established that the County failed to adequately train or discipline its employees or investigate claims against them, let alone that the County did so with "deliberate indifference" to its citizens' constitutional rights. (See *Brooks v. Scheib*, *supra*, 813 F.2d at pp. 1192-1193 [evidence of ten complaints, without evidence they had merit, was "no evidence that city officials were aware of past police misconduct" and did not show deliberate indifference].)

Santana also failed to show that if the County had adequately investigated prior claims against Nelson, it "would have resulted in [the officer] being disciplined." (*Id.* at p. 1195.) In fact, the evidence

affirmatively showed an adequate investigation – indeed, two separate investigations – of the incident by Sergeant Walker, which did not result in discipline. (4 RT 528; 5 RT 605, 609, 641-642, 648, 650, 659; ER 40, 94-96, 100-101; RA 163-166.)

In short, Santana has not met his burden of establishing prejudice as a result of any error in excluding evidence at trial. Accordingly, the judgment against him must be affirmed.

IV. THE TRIAL JUDGE DID NOT COMMIT PREJUDICIAL MISCONDUCT.

Santana contends the trial judge committed misconduct in numerous ways, including: (1) making comments outside the presence of the jury about how his counsel was trying the case; (2) questioning witnesses on the witness stand; (3) attempting to expedite the trial; and (4) putting his feet on the bench. (AOB 12-28.) As we now explain, there was no reversible error.

A. To Obtain Reversal Of The Judgment, Santana Must Show Prejudice.

Relying on various federal cases, Santana contends that prejudice is presumed from judicial misconduct. (AOB 12-13, 27.) But under California law, an appellant seeking reversal based on judicial misconduct must affirmatively show the asserted misconduct was prejudicial and resulted in a "miscarriage of justice" – in other words, absent the misconduct, it is "reasonably probable" the result would have been more favorable to him. (*Newman v. First California Co.* (1975) 47 Cal.App.3d

60, 68; *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 84; *People v. Johnson* (1935) 11 Cal.App.2d 22, 24; *Schrader Iron Works, Inc. v. Lee* (1972) 26 Cal.App.3d 621, 640.) The requirement that an appellant show prejudice is a neutral rule of appellate procedure that applies to *all* state court actions, including those with federal claims under 42 U.S.C. section 1983. (See *Johnson v. Fankell* (1997) 520 U.S. 911, 921-923 & fn. 13 [117 S.Ct. 1800, 1806-1807, 138 L.Ed.2d 108] [state appellate procedure applies to section 1983 claims in state court]; see also *Schlessinger v. Holland America, N.V.* (2004) 120 Cal.App.4th 552, 558 fn. 3 [state rules defining standard of appellate review apply to federal claims in state courts].) Thus, Santana must show actual prejudice, which he has not done.

B. The Trial Court's Comments And Rulings Outside The Jury's Presence Do Not Support Reversal.

Santana contends the trial court made a number of improper remarks outside the jury's presence concerning counsel's intention to try the case without his client present. Specifically, Santana contends the trial judge (1) expressed displeasure and said counsel was wasting the court's time (AOB 13-14); (2) told counsel he needed an affidavit showing Santana's brother Enrique was unavailable because he was overseas for military service (AOB 14); and (3) granted a motion to serve notice on Santana to attend trial on shortened time even though Santana was in Mexico evading an arrest warrant (AOB 15-16).

First, Santana has waived any error by failing to object or move for a mistrial after the purported misconduct occurred. (*People v. Hines* (1997) 15 Cal.4th 997, 1040-1041 [judicial misconduct issue waived by failure to object]; *Gimbel v. Laramie, supra*, 181 Cal.App.2d at p. 85 [error waived

by failure to move for mistrial]; see also *Schrader Iron Works, Inc. v. Lee, supra*, 26 Cal.App.3d at pp. 621, 641.)

Second, the judge's remarks and rulings were neither misconduct nor prejudicial. A trial judge does not commit prejudicial misconduct by expressing his personal opinion of a case outside the jury's presence, as long as he intends to try the case according to legal principles. (*People v. Rigney* (1961) 55 Cal.2d 236, 242-244 [judge stated in chambers he did not believe defendant's testimony and would not "let the jury swallow it"]; *Weil v. Weil* (1951) 37 Cal.2d 770, 776 [judge's statement that he didn't believe in separate maintenance for short marriages was simply a personal opinion and didn't "evidence an unwillingness to try defendant's case according to law"]; *Schrader Iron Works, Inc. v. Lee, supra*, 26 Cal.App.3d at p. 639 [judge's comments that defendants didn't have a defense and, that the title company should pay claims like this one, and repeated derogatory references to title companies, were not misconduct, where he allowed defendants to present their defenses at trial], at pp. 640-641 [no prejudicial misconduct where judge expressed doubt concerning credibility of Chinese witnesses based on personal experience, but didn't rely on that experience in judging witnesses' credibility].)

Here, although in chambers the judge expressed frustration with Santana's counsel for proceeding without Santana, nothing suggests that he intended to ignore the law or that his personal opinion prejudiced Santana's case.[15] (Cf. *People v. Rigney, supra*, 55 Cal.2d at p. 243 ["It is immaterial

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[15] For example, Santana complains that the court lost its temper with his counsel in chambers, telling him to "stop it" and threatening to "tell the jury why he [Santana] is in Mexico if you want to go that far." (AOB 13.) However, the record shows that the court not only did *not* tell the jury where Santana was, but expressed concern that the jury would wonder why (continued...)

that the judge did not believe defendant's evidence" as long as he followed the law]; *Weil v. Weil, supra*, 37 Cal.2d at pp. 782-783 ["[t]he judge's remarks would constitute prejudicial misconduct only if his announced intention to grant plaintiff a divorce were contrary to the facts of the case as he had decided them"].) The judge's remarks did not dissuade Santana from continuing, and they could not have affected the verdict because the jury did not hear them. (Cf. *People v. Rigney, supra*, 55 Cal.2d at p. 242-244 [judge's remarks outside the jury's presence, which did not induce defendant to abandon defenses, were not prejudicial misconduct].)

Nor did the court commit misconduct by granting, before opening statements, defendants' motion to shorten time to serve notice in lieu of a subpoena to compel Santana's attendance at trial under Code of Civil Procedure section 1987(b).[16] (AOB 15-16; RA 136-137; 3 RT 207-209.) While admitting it was within the trial court's discretion to grant the motion, Santana nevertheless contends the ruling "smacks of retribution against Santana's counsel for insisting on a trial without the plaintiff." (AOB 16.) He contends that the defendants could have served the notice earlier, thus obviating the need for the order shortening time, and that

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15 (...continued)
Santana was absent, and ordered defense counsel not to "bring up the fact that [Santana] is a fugitive running from law enforcement." (2 RT 14-15.)

As another example, Santana complains that, when his counsel said he intended to rely on Enrique Santana's prior testimony because he was serving overseas in the military, the court required an affidavit from the military to that effect. (AOB 14; 2 RT 5.) But this requirement cannot have prejudiced Santana's case because Enrique testified at trial. (6 RT 826.)

16 Section 1987(b) states that service of a trial subpoena on a party is not required if notice is served on the party's attorney "at least 10 days before the time required for attendance unless the court prescribes a shorter time." (Code Civ. Proc., § 1987(b).)

defense counsel "exploited" the court's order by "resting without calling a single witness" because Santana was not present in court. (AOB 15-16.)

This argument must be rejected. First, Santana makes it sound like there were no witnesses testifying on behalf of the defense – which was absolutely untrue. What happened was that plaintiff's counsel called all of the defense witnesses first and defense counsel were able to examine their witnesses at that time. (4 RT 416; 5 RT 588, 659; 6 RT 888-893.) Second, the defense rested because they were unable to call Santana to testify – not because the trial court granted defendants' motion for an order shortening time. (7 RT 952.) The record reveals that Santana was hiding in Mexico and did not show up for the trial because he would be arrested if he did so. (2 RT 2, 15.) There is no evidence that his fears of arrest would have been allayed and that he would have attended the trial if defendants had not obtained an order shortening time. Even though Santana's counsel had told the court Santana "might show up," there is no evidence that his appearance depended on *when* the subpoena was issued. Moreover, there was no evidence that his counsel had had any contact with him for months or was capable of procuring his attendance even on 10 days' notice. (See 3 RT 208; RA 3-4.) Finally, since the jury didn't know about the notice to attend trial, it could not have prejudiced Santana's case.

In short, the trial court's remarks and rulings outside the jury's presence do not reflect any misconduct.

C. The Trial Court's Efforts To Clarify Witnesses' Testimony Did Not Constitute Prejudicial Misconduct.

Santana contends the judge committed misconduct by questioning four witnesses on the witness stand. (AOB 18-21.) However, Santana

never objected to the judge's questions during the trial; thus, the judge had no opportunity to cure any potential prejudice by admonishing or instructing the jury to disregard the questions. (*Estate of Golden* (1935) 4 Cal.2d 300, 311.) Santana's failure to object in the trial court operates as a waiver of any error on appeal. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 269.)

Moreover, the judge's questions were proper. "A trial judge may examine witnesses to elicit or clarify testimony" (*People v. Rigney, supra*, 55 Cal.2d at p. 241) and has "considerable latitude" when doing so (*People v. Raviart, supra*, 93 Cal.App.4th at p. 270). Indeed, the judge has a "*duty* . . . to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible." (*Ibid.*, emphasis added.) Moreover, "[i]t is immaterial that the judge [does] not believe [a party's] evidence or even that his purpose [in questioning the witnesses is] to induce the jury not to believe it so long as he [seeks] to accomplish that purpose by getting the truth established according to the governing rules of law." (*Rigney, supra*, 55 Cal.2d at p. 243 [no misconduct where trial judge questioned defense expert "at great length" concerning defendant's alleged amnesia because the judge did not believe the defendant had amnesia]; see also *Raviart, supra*, 93 Cal.App.4th at pp. 270-271 [judge did not commit misconduct by examining half of 40 witnesses, mostly for the prosecution, where questions sought to clarify testimony and fully develop pertinent facts].)

Here, the judge's questions were proper efforts to develop and clarify the testimony of several witnesses. For example, when Jonathan Martinez testified that "about six" deputies rushed Santana and touched him while he was on the ground (3 RT 241, 252), the court asked, "You saw that?" to which Martinez replied, "Yes, I saw that." (3 RT 252.) Santana contends this was misconduct. (AOB 18.) But the question was proper to

clarify that Martinez actually saw – and had not merely been told or merely guessed – that all six deputies touched Santana.[17]

Similarly, when Santana's brother, Enrique, testified about having been beaten by some police officers at an earlier time, the trial judge asked him what kind of physical injuries he had suffered and whether he had to go to the hospital – to which Enrique answered, "No." (6 RT 858.) Santana's contention that the jury inferred from the court's questions "skepticism . . . adversely reflecting on Enrique's credibility" (AOB 19-20) is pure speculation. Nothing in the questions implied skepticism, and they were proper to develop Enrique's testimony.

When Juan Del Campo was testifying, Santana's counsel asked him if Santana had cursed at Nelson – specifically, whether Santana had said, "'This is fucked up.'" (3 RT 321-322.) Del Campo said only that it "sounds familiar." This prompted the court to ask, "Did you hear it or not?" – an attempt to learn whether Del Campo heard Santana curse. When Del Campo said he "heard it," the court again asked for clarification: "He used the words 'fucked up'?" But Del Campo did not recall. The court then asked him what he actually heard, and he answered, "I heard him say, 'This is messed up.'" (3 RT 321-322.) Contrary to Santana's contention (AOB 20), the court's questions were proper and necessary to clarify what Del Campo heard. Interestingly, the outcome of the exchange did not help

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[17] Santana also complains about the court's questions about Martinez's rank in the military and clarification of his duties on the ship. (AOB 19; 3 RT 275-276.) But as the judge pointed out, he was interested because he himself had served in the military and was curious about the ship and Martinez's duties, and never intended to make derogatory remarks about anyone in uniform. (7 RT 1057-1058.)

the defense, whose position was that Santana had cursed at Nelson – so it is difficult to see how the court's questioning hurt Santana.[18]

Santana also takes exception with the trial court's questioning of his mother, Linda Santana. (AOB 21.) When Linda testified that her son had trouble sleeping during his second criminal trial, the court questioned her regarding how she knew this – whether she had actually seen him get up in the middle of the night – and she indicated that she did. (4 RT 360.) This time, the court was responding to an objection by the defense, to the effect that Linda was not a percipient witness to her son's sleeplessness. The court's questions satisfied the court that she was a percipient witness and defendants' objection was overruled. (*Ibid.*) Again, the court's questions actually assisted Santana's case on this point.

Also during her testimony, Linda referred to "that false imprisonment when [Santana] got thrown in jail." (4 RT 363.) The trial court admonished the jury that the witness's reference to "false imprisonment" was improper because it was a legal conclusion. (*Ibid.*) Santana argues the trial court's admonition told the jury that his "false imprisonment" claim was improper. (AOB 21.) Santana is wrong on two counts. First, the admonition was proper. "False imprisonment" *is* a legal conclusion and only the trier of fact is permitted to draw such conclusions, depending on what it finds the facts to be. (See *People v. Torres* (1995) 33 Cal.App.4th 37, 47-48.) Second, Santana did not bring a claim for false

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[18] Santana also criticizes the trial judge for questioning Del Campo about his friendship with Santana, asking Del Campo how long it had been since he had last spoken with his friend. (AOB 20.) There was nothing improper about the court's question. In fact, Del Campo had not seen Santana in almost a year. (4 RT 411.) It is unclear why Santana believes this reflected any skepticism by the court. It appears that Santana disliked the answer Del Campo gave more than he disliked the court's questions – but that doesn't turn the questions into misconduct.

imprisonment, only false *arrest* (ER 1, 17) – and the court properly instructed the jury on false arrest, including damages for that claim. (RA 92, 101, 140.)

In short, the judge's questions to some of the witnesses were proper efforts to clarify their testimony and did not amount to misconduct, prejudicial or otherwise.

D. The Court's Efforts To Manage And Expedite The Trial Did Not Constitute Prejudicial Misconduct.

Santana claims the judge committed prejudicial misconduct by expressing impatience concerning the trial's pace and (1) reprimanding counsel for being late and giving the jurors a flippant excuse, and (2) trying to move the trial forward. (AOB 15-18, 23.)

Again, Santana has waived any error from these incidents because he never objected, moved for a mistrial, or requested a curative admonition or jury instruction. (*People v. Hines, supra*, 15 Cal.4th at pp. 1040-1041; *People v. Chong* (1999) 76 Cal.App.4th 232, 242-243; *Gimbel v. Laramie* (1960) 181 Cal.App.2d 77, 85.) But, in any case, the court's actions were proper efforts to manage and expedite the trial and did not constitute prejudicial misconduct.

A trial court has inherent power to exercise reasonable control over a trial. (See Code Civ. Proc., § 128(a), subds. (1)-(4) and § 1209(a)(1), (5); *Hays v. Superior Court* (1940) 16 Cal.2d 260, 264.) A trial judge should not "be unduly or unreasonably hampered in his control and conduct of the trial." (*Estate of Dupont* (1943) 60 Cal.App.2d 276, 290.) This power includes wide latitude in limiting the time and manner of examining witnesses. (Evid. Code, § 765; *People v. Ducu* (1991) 226 Cal.App.3d

1412, 1415.) It also allows the court to reprimand counsel, in front of the jury if necessary, to enforce compliance with its orders and protect the court's integrity. (*People v. Chong, supra*, 76 Cal.App.4th at pp. 243-244; *People v. Jones* (1962) 207 Cal.App.2d 415, 421-422 [court properly admonished counsel to confine questioning to pertinent matters or else terminate the examination]; cf. *Estate of Dupont, supra*, 60 Cal.App.2d at pp. 289-290 [no prejudicial error in admonishing counsel not to interrupt witnesses].)

Indeed, since "judges are human" (*Martin v. Pacific Gas & Electric Co.* (1962) 204 Cal.App.2d 316, 325), it is not misconduct for a judge to express impatience when counsel's trial tactics frustrate his efforts to expedite the trial. Parties should not "confuse hostility to the plaintiffs' case with . . . pardonable judicial displeasure with the conduct of appellants' counsel" for repeatedly making improper comments despite court's admonition to counsel to desist. (*Id.* at pp. 324-325; *Germ v. City and County of San Francisco* (1950) 99 Cal.App.2d 404, 415-416 [no misconduct where judge spoke discourteously and lost his temper in response to counsel's unduly long, repetitive witness examinations].)

Here, as explained next, the court's comments and reprimands to counsel were simply efforts to exercise reasonable control over the courtroom and to expedite a trial that counsel's trial tactics stretched out longer than necessary.

1. Reprimand to counsel for being late.

Santana contends the trial court erred in commenting on counsel's excuse for being late to trial on the second day. (AOB 14-15.) Prior to counsel's arrival, the court apologized profusely to the jury for the delay

and then, when counsel arrived, the court again apologized for keeping the jury waiting. (2 RT 141-142.) Counsel said, "I apologize to all of you for not being here when I was supposed to be. *Other courts, other counties.*" (2 RT 143, emphasis added.) It was in response to the italicized remark that the court said, "That is your problem, not ours" (*ibid.*), as the court later explained outside the jury's presence:

> I don't know what to do, Mr. Beck. I mean, you tell these jurors you have got other courts that are more important than this court. That is why you are late. That is outrageous. That is just outrageous.
>
> Just say you were late. Just tell them you were late or sorry.

(2 RT 165-166.) This was truly a problem of counsel's own making: He apparently had an appearance in another court, in another county, on the second day of this trial and he did not bother to tell the court about it. (RT 166 [the court: "Why didn't you let us know yesterday? We could have called them [the jury] in at 11 o'clock"].) Furthermore, his glib statement in front of the jury ("other courts, other counties") was disrespectful to the court, other counsel and the jurors, as the trial court correctly pointed out. As explained in *People v. Chong, supra*, 76 Cal.App.4th at p. 244:

> To allow an attorney to engage in unprofessional conduct before the jury without a prompt and strong response from the court undermines the judicial process. If, without rebuke, an attorney does not show proper respect for the judge and the proceedings, how can a juror be expected to do so?

Under the circumstances, the trial court's comment to counsel was not improper.

2. Moving the trial forward.

Santana also complains that the trial judge made improper remarks during voir dire (AOB 15), during redirect examination of Linda Santana (AOB 16-17), and during redirect examination of Dillon (AOB 22). According to Santana, the judge rushed his counsel through all three events, which Santana reads as an improper siding with the defense. (AOB 22, 24-25.)[19]

Even a cursory review of the record reveals the flaw in Santana's argument: The trial judge did nothing wrong. For example, when a prospective juror told plaintiff's counsel that he would "[p]robably not" question an instruction by a policeman, counsel persisted in asking *why* the juror would "not question it if you felt it was wrong?" (2 RT 150.) This was clearly argumentative, and the trial judge properly called it such and asked counsel – who had already been questioning the juror at length (2 RT 145-149) – to "finish it up" (2 RT 150).

With respect to the witnesses, Santana's counsel had already questioned Linda Santana at length on direct examination about eleven photographs of her son's injuries. (4 RT 351-359.) The photographs were admitted into evidence, published to the jury and displayed via some sort of

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[19] Santana also contends the court committed misconduct by threatening, outside the jury's presence, to declare a mistrial if counsel did not finish his case quickly. (AOB 17-18.) This contention must be rejected for the simple reason that the court's conduct away from the jury could not possibly have prejudiced Santana. His claim of misconduct is based on the assertion that the jury may have gotten the wrong impression about his case – but he does not explain how the jury could have gotten *any* impression from things that occurred or were said *outside* its presence, nor has he made any valid claims that the court's remarks outside the jury's presence in any way affected counsel's presentation of the evidence.

monitor. (RA 145-162; 4 RT 354-355, 383.) Then, on redirect examination, counsel again displayed the photos on the monitor and questioned the witness for more details about the images. (4 RT 384.) Finally, the court interjected, "All right. Let's go. You are killing us with these pictures. Let's go." (*Ibid.*)

Clearly, in the context of what was happening, the court was expressing a legitimate concern that counsel was, in effect, beating a dead horse – going over testimony that he had already elicited from the same witness – and was unnecessarily repetitively displaying the photographs to the jury in the courtroom. The jury would have access to the photographs in the jury room. The trial court did not err in commenting that, essentially, enough was enough.[20]

Santana's assertion that the judge "kept pressing [Linda] to get off the damages issue" (AOB 17; 4 RT 384) is simply wrong. In fact, the court allowed Santana to examine Linda on damages at length on direct and again on redirect without hindrance (4 RT 343-363, 384-386, 389) and only told counsel to move on when he began to belabor the injury photos.

Santana contends that the trial judge improperly remarked during Dillon's testimony that counsel was "really taking it to the extreme," that the court "[did not] know where [counsel was] going" and was "going to stop" counsel after another hour (6 RT 779; AOB 22), and then continued

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[20] Santana also takes exception to the court's interjection of an objection during the examination of Linda Santana with the photographs. Counsel told the witness to "look at the monitor real close" and asked if she could "tell if that is in a state of healing?" (4 RT 384.) The court interjected, "That calls for a . . . medical conclusion." (4 RT 383.) The court was right; the witness was not an expert medical witness. Nevertheless, the witness was subsequently allowed to testify that the injury in the photograph looked "different" when she saw it because "[i]t was already healing." (*Ibid.*) There was no error.

to request that counsel "keep it rolling" (6 RT 790; AOB 22) and asked counsel to "wind it up" and ask his "last question" (6 RT 795, AOB 23). Santana contends that these, and other similar remarks by the judge, improperly looked to the jury like the court was attempting to "shield Dillon from impeachment" and to "champion" him. (AOB 22.) Nothing could be further from the truth.

By the time Dillon was called to testify (5 RT 704), Santana's counsel had already established a pattern of dragging out witness examinations and ignoring the court's attempts to curtail repetitive and redundant questions. For example, after counsel examined Deputy Nelson for almost a full day and another morning, the court noted that counsel was repeating himself and reading lengthy passages of prior testimony that had no bearing on the issues. (4 RT 521-522.) During his examination of Sergeant Walker, Santana's counsel told the court he would finish his examination in half an hour. (5 RT 631.) Nevertheless, he continued for another hour, prompting the court again to ask him to finish up. (5 RT 654.)

Outside the presence of the jury, the judge repeatedly asked counsel if he couldn't "shorten this up," noting that the jurors also were apparently growing weary of the repetition. (4 RT 542-543; see also 5 RT 656.) Later, in fact, the court indicated that the jurors *were* inquiring about the length of the trial and whether they were "on track timewise." (5 RT 609.)

Santana finally called Dillon to the witness stand on Tuesday, March 9, after one juror had indicated that he had to leave by Thursday. (5 RT 674.) Dillon's examination began with a number of irrelevant questions and consumed over 100 transcript pages. (5 RT 704, 6 RT 817.) The examination began with a host of questions concerning the size and position of the crowd congregating in the parking lot of Dillon's restaurant

(5 RT 724-728) and continued for fifty pages with repetitive and confusing questions with no apparent point. (5 RT 724; 6 RT 779.) Counsel repeatedly tried to "impeach" Dillon with long passages of his previous trial testimony, but most of this evidence was semantic. (6 RT 740-742, 743-751, 753, 762, 765, 775, 792, 795-797, 800-801, 811, 813-814.)[21]

Finally, after a lengthy and incomprehensible exchange, in which counsel questioned Dillon on whether in his previous trial testimony (at the criminal trial) he had pointed to an orange cone versus a tree or bush, the court asked how long counsel intended to continue with the witness. (6 RT 777-779.) It was at this point, when counsel replied "at least an hour" (6 RT 779) that the judge lost his temper, saying:

> Oh, shit. Wait a second, ladies and gentlemen. I apologize. Once in awhile I lose my temper, and I say things, and I apologize. But this is really taking it to the extreme. Okay? And I don't know where you are going. But I will give you one hour, and then I'm going to stop you.

(*Ibid*; AOB 22.) Several times after this, the court again told counsel to move things along and eventually told counsel to ask his "last question." (6 RT 795, 798-799.) But even then, counsel refused to comply and continued his examination. (6 RT 795-798.)

In context, it is clear there was no misconduct. A trial judge has "wide latitude . . . to impose reasonable limits on . . . cross-examination" based on concerns such as "interrogation that is repetitive or only marginally relevant." (*People v. Ducu*, *supra*, 226 Cal.App.3d at p. 1415;

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[21] For example, counsel questioned Dillon about the exact curse words Santana had used during the incident (6 RT 754-755) and attempted to distinguish between "darting" and "rapid movement." (6 RT 758.) He also badgered Dillon about whether Santana ran "in a circular motion" or in a rough "triangle." (6 RT 774.)

East Bay Mun. Utility Dist. v. Kieffer (1929) 99 Cal.App. 240, 261, disapproved on another ground in *County of San Diego v. Miller* (1975) 13 Cal.3d 684, 693.) The trial court has "a clear duty to supervise the conduct of the trial to the end that it may not be unduly protracted and that other litigants too may have their day in court." (*Dollinger v. San Gabriel Lanes* (1962) 205 Cal.App.2d 705, 710.)

Thus, a trial judge does not commit misconduct by limiting cross-examination, even if it does so over objection or admonishes counsel in front of the jury. For example, in *People v. Jones*, *supra*, 207 Cal.App.2d at p. 421, it was not misconduct for the trial judge to tell counsel: "You'd better choose very pertinent questions and ask them in a hurry, because I think we've gone far enough . . . . You are not getting anywhere." Similarly, in *Germ v. City and County of San Francisco*, *supra*, 99 Cal.App.2d at pp. 415-416, there was no judicial misconduct, even though the trial judge "spoke heatedly, was discourteous, intemperate, and failed to exhibit that judicial demeanor expected of judges," and even though defense counsel "bore the brunt of this petulance more often than other counsel." This is particularly true where the court's attempts to expedite the trial are thwarted by "counsel's conduct in extending the trial by unduly lengthy and repetitious cross-examination of the witnesses." (*Id.* at p. 416.)

Here, the court's comments – even if, in some places, a little harsh – were not unwarranted and, at all times, reflected an effort to promote judicial economy and show consideration to the jurors in the face of

plaintiff's counsel's inefficient and ineffective examination of witnesses, as well as his refusal to heed the court's time limits.[22] The record demonstrates that the court was legitimately frustrated with counsel's conduct. Moreover, the record shows that on many occasions the court expressed impatience with *defense* counsel as well. (See, e.g., 4 RT 355, 370, 371, 379, 398; 5 RT 655, 658-659, 664, 747.)

Courts have broad discretion to prevent trials "from degenerating into nitpicking wars of attrition over collateral . . . issues." (*People v. Ayala* (2000) 24 Cal.4th 243, 282.) Despite the court's efforts to curtail counsel's examinations, setting time limits that were more than reasonable, plaintiff's counsel continued to badger witnesses with "nitpicking" details that were ultimately irrelevant and collateral. (See, e.g., 6 RT 791-823; ER 92-102.)

Santana also suggests that the judge's apologies to the jurors that things had never before "gotten so far out of hand" and that he had "never faced the same conduct on the part of the bar" reflected the judge's opinion that Dillon should not have been impeached. (AOB 24; 6 RT 816.) Nonsense. Again, taken in context, the court's comments are unremarkable. The record reveals that the judge was referring to an argument between Santana's counsel and Dillon's counsel. (6 RT 814-816.) The apology was clearly a criticism of counsel's conduct and an apology for the circus atmosphere into which the trial had degenerated, not a comment on Dillon's testimony or presence in the lawsuit.

Finally, it is Santana's burden, as the appellant, to show prejudice from any error by "spelling out in his brief exactly how the error caused a miscarriage of justice." (*Paterno v. State of California, supra*,

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[22] Indeed, the court found counsel in contempt (outside the jury's presence) at one point (6 RT 798-799), but even that did not hinder his conduct. (6 RT 799-817.)

74 Cal.App.4th at p. 106.) Santana's only argument on prejudice is that the court's comments may have given the jury the impression that Dillon should not have been impeached or even sued. (AOB 24-25.) This is speculation. Nothing in the court's comments reflects a bias toward Dillon. Indeed, the court allowed counsel's attempts to impeach Dillon for over a hundred pages. (5 RT 704; 6 RT 817.)

More important for the other defendants, Santana has not explained how the jury's possible impression with respect to whether Dillon should or should not have been sued in any way prejudiced Santana's case against the County and Deputy Nelson. Santana has not shown that, absent the purported misconduct, it is "reasonably probable" that the jury would have returned a verdict in his favor and against the County and Deputy Nelson. (*Newman v. First California Co.* (1975) 47 Cal.App.3d 60, 68.) Santana has not shown that, without the court's remarks, the jury was more likely to believe his witnesses – who were his brother and three friends, all of whom were likely to be biased towards him and, having been detained with him by Deputy Nelson, were likely to harbor negative sentiments about this incident and about the police – than the County's witnesses (which included the only neutral witness, Dillon). (See *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1071 ["since (respondent's) version of the facts was confirmed by the only neutral witness, it is likely that the jury resolved the conflict in critical issues in (respondent's) favor"].)

E. Santana's Assertion That The Judge Put His Feet On The Bench Does Not Support Reversal.

Santana contends the trial judge put his feet on the bench while Santana's witnesses were testifying – conduct that Santana interprets as

disrespect for his case. (AOB 26.) It is extremely unlikely that the jury interpreted the court's conduct in the same way. In any case, the court's conduct is not reflected in the reporter's transcript, and Santana failed to file an affidavit with his new trial motion explaining when the conduct occurred or when counsel became aware of it.[23] Because the record does not reflect exactly when this may have occurred, it is impossible for this court to evaluate Santana's concern. (See, e.g., *Newman v. Los Angeles Transit Lines* (1953) 120 Cal.App.2d 685, 693-694 [no reversible error where record didn't show that the judge allowed jurors to sleep during the trial, or that counsel was unaware of the purported misconduct until after the trial]; *Green v. County of Merced* (1944) 62 Cal.App.2d 570, 572 [new trial cannot be granted where misconduct does not appear in reporter's transcript or in affidavit filed with new trial motion]; cf. *Gimbel v. Laramie, supra*, 181 Cal.App.2d at pp. 82-83 [party moving for new trial must submit affidavit showing he was unaware of misconduct and could not have discovered it by exercising "reasonable diligence"]; *Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 103 [party seeking new trial based on juror misconduct must present affidavits showing he was not aware of the misconduct until after the verdict].)

More important, Santana's failure to object during the trial effectively waives the issue on appeal. (*People v. Hines, supra*, 15 Cal.4th at pp. 1040-1041; *People v. Chong, supra*, 76 Cal.App.4th at pp. 242-243.)

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[23] Santana argued that some of the jurors called the judge's conduct to his attorney's attention after the trial. (7 RT 1059.) This argument is no substitute for an affidavit; and, in any event, if the judge's conduct in putting his feet on the bench was so obnoxious that it prejudiced Santana's case, counsel himself would have noticed – he shouldn't have needed the jurors to tell him it was objectionable. (See *Gimbel v. Laramie, supra*, 181 Cal.App.2d at pp. 82-83.)

If counsel had raised the issue when it happened, the trial judge could have cured the problem at that point, avoiding the need for a retrial. (See, e.g., *Horn v. Atchison Topeka & Santa Fe Railway Co.* (1964) 61 Cal.2d 602, 610; *Estate of Golden, supra*, (1935) 4 Cal.2d at p. 311.) Instead, Santana raised the issue for the first time in his new trial motion. (RA 121.) As the trial judge explained at the hearing on that motion, he periodically stretched his legs on the bench because he had a knee problem, had done it for "hundreds of trials" and tried to be discreet about it, and if counsel had told him it was a problem, he would have stopped doing it. (7 RT 1058-1059.)

CONCLUSION

Santana has shown no ground for reversal of the judgment against him. The trial court properly denied his motions for directed verdict and judgment notwithstanding the verdict against Deputy Nelson on the section 1983 claim because there was substantial evidence to support the verdict for Nelson. The court properly admitted evidence of Santana's post-incident conduct to disprove damages.

The trial court also properly exercised its discretion in excluding personnel complaints against Nelson because they were irrelevant and unduly time-consuming and prejudicial. There is no evidence of judicial misconduct. And Santana has utterly failed to show that any error, on any ground, was prejudicial to his case.

For these reasons, the judgment should be affirmed.

Dated: September 21, 2005

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

Pursuant to California Rules of Court, rule 14(c)(1), I certify that this brief contains **13,732** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: September 21, 2005

Lillie Hsu