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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JAMES SMITH, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.	A108308 (San Francisco County Super. Ct. No. 422501)

Plaintiff James Smith sued defendants, the City and County of San Francisco and two of its police officers, Alex Fagan, Jr. and John Broucaret, for assault and battery and civil rights violations. The jury returned special verdicts for defendants. Plaintiff primarily contends that he is entitled to reversal due to attorney and jury misconduct, and due to the trial court's allowing Officer Fagan to invoke the Fifth Amendment outside the jury's presence. We find no merit to plaintiff's arguments save one: there was attorney misconduct, but on the facts of this case the misconduct is not prejudicial. Finding no reversible error, we affirm.

I. PROCEDURAL BACKGROUND & FACTS

Introduction

This case arises from an encounter between plaintiff and Officers Broucaret and Fagan on September 18, 2002. As a result of the encounter plaintiff filed a complaint against the officers and the City and County of San Francisco (City), alleging causes of

action for assault and battery; false arrest/false imprisonment; violation of Civil Code section 51.7 (section 51.7); and violation of Civil Code section 52.1 (section 52.1). Plaintiff alleged that City was liable on these four causes of action on a theory of respondeat superior (Gov. Code, § 815.2). Plaintiff added a fifth cause of action directed against City alone, alleging negligent training, supervision, and discipline of Officers Fagan and Broucaret.

The trial court dismissed the fifth cause of action for negligent training, supervision, and discipline. According to the appellant's opening brief, plaintiff abandoned his false arrest cause of action at trial. The matter was tried to a jury on the causes of action for assault and battery and for violations of section 51.7 and 52.1.

Section 51.7 allows an action for damages based on violence or threats of violence made to a person because of, e.g., his race, ancestry, or national origin or the perception thereof. (Civ. Code, § 51.7, subd. (a).)

Section 52.1 allows an action for damages "[i]f a person . . . whether or not acting under color of law, interferes by threats, intimidation, or coercion, with the exercise or enjoyment by any individual . . . of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state . . . ." (Civ. Code, § 52.1, subd. (a).) This cause of action is based on death threats allegedly made to plaintiff by Officer Fagan. Plaintiff apparently believed the death threats were intended to interfere with his constitutional right of free speech to protest police misconduct.

Statement of Facts

The facts of plaintiff's case come primarily from the trial testimony of Officer Broucaret; Sergeant Vickie Stansberry who was Officer Fagan's supervisor; and plaintiff. As we discuss below, Officer Fagan did not testify but invoked his rights under the Fifth Amendment because of the pending criminal proceeding popularly known as "Fajitagate."

We summarize the testimony of each witness. In doing so, we simply state their version of events without repeated qualifiers such as "the witness testified that." The

testimony is conflicting. What appear to be categorical statements of fact in this opinion may simply be our summarization of a witness' testimony, and are not necessarily intended to be assertions on our part of the true facts of this case.

Officer Broucaret

Officer Broucaret testified for plaintiff as an adverse witness. (Evid. Code, § 776.) On September 18, 2002, he and his partner, Officer Fagan, were patrol officers assigned to Park Station. The officers encountered plaintiff slightly before 7:00 p.m. Just before the encounter two women told Fagan about "some guy" at the corner of Haight and Cole Streets "yelling and screaming and making threats at them." The women did not appear to be injured.

As the officers approached the corner of Haight and Cole, they saw plaintiff holding a can in a brown paper bag. The top of the can was exposed and read "St. Ives," a brand of beer or malt liquor. In Broucaret's words, "So an open container in public, that's good enough for me to take somebody on."

Fagan approached plaintiff and asked him what he was doing on the corner with a beer. Plaintiff "got a little bit loud and said that he was an American Indian, and this was a free country and he could drink wherever he fucking wanted to."[1] Plaintiff tried to drink from the beer can. Fagan grabbed it out of his hands and threw it to the curb. There were "some profanities exchanged." Fagan told plaintiff he was drunk and could be taken to jail, and then to "just calm down and basically get the hell out of here." Broucaret believed Fagan called plaintiff an "asshole."

During this conversation, a MUNI bus came down Haight Street. The officers told plaintiff to get on it. Plaintiff "staggered over to . . . and . . . stumbled up onto the bus." As plaintiff got on the bus he started yelling and screaming at the driver and passengers. He was screaming, "Fuck the police. This is my fucking country. How dare they tell me

[1] A certain four-letter verb for "copulate," of possible Scandinavian origin (see Webster's New Collegiate Dictionary (1977) p. 463, col. 2) appears frequently in the record along with its gerundive and a related noun involving the maternal parent.

to get out of here?" The bus driver shook his head. Broucaret thought the driver did not want plaintiff on his bus.

Fagan followed plaintiff onto the bus. Broucaret stationed himself on the bottom step of the bus by the front door, off to the side. The bus door was right in front of a tree, within arm's reach. Fagan approached plaintiff in the bus aisle, turned him around, bent his arm behind his back, and held him in a "rear wrist control," a type of hold used to "escort somebody out." Plaintiff struggled but Fagan had him under control.

As plaintiff and Fagan approached the front door, plaintiff broke free and fell through the open door. He fell past Broucaret and hit the tree. Plaintiff suffered a wound to the left side of his forehead.

The officers handcuffed plaintiff and called an ambulance. Plaintiff began "cussing and swearing and screaming at passerbys [*sic*]. 'Look at these guys. They're beating me. They beat me,' you know, saying fuck us and everything else." Because of the foot traffic on Haight, the officers took plaintiff around the corner to Cole. Plaintiff was bleeding. He was also under arrest, at least for being drunk in public.[2]

Broucaret may have told plaintiff to "shut the F up" a few times. Fagan and plaintiff exchanged commentary of "Fuck you" and "Fuck you back" until Broucaret got tired of hearing it. Plaintiff spoke more than Fagan, never keeping his mouth shut for more than a second. Plaintiff kept up a "constant barrage" of comments such as "Fucking assholes, you did this to me" and "I'm going to fucking sue you."

Within five minutes, Sergeant Vickie Stansberry arrived on the scene. She walked up and asked what had happened. Broucaret told her plaintiff had fallen off a bus and hit a tree. Plaintiff told Stansberry that Fagan had kicked him in the head. Fagan denied it. Apparently in Stansberry's presence, Fagan said to plaintiff, "Fuck you, you piece of shit."

[2] There are indications plaintiff was also arrested for resisting arrest and battery on police officers, but it is not clear when.

Stansberry, who was in charge, ordered Fagan to move away from the area, farther down Cole Street. Fagan refused because plaintiff had kicked Broucaret in the groin and Fagan was going to his partner's aid.

After plaintiff kicked Broucaret in the groin, Broucaret shoved him with his forearm to put plaintiff on his side so and Fagan could apply a hobble on plaintiff's legs. A hobble is a nylon strap with a locking clip on one side, used to restrain people who are kicking violently.

Broucaret denied hearing Fagan whisper into plaintiff's ear, "I am going to fucking kill you." Broucaret did remember that Stansberry ordered Fagan to leave the scene because he was verbally taunting plaintiff. Broucaret asked Stansberry to let Fagan stay because plaintiff might "keep kicking around." Fagan told Stansberry to "[g]o ahead and write me up" if he disobeyed her order to leave.

The ambulance arrived. It was Broucaret's intent to "849(b)" plaintiff, which meant releasing him with no charges and no further action. He and Fagan planned to release plaintiff into the care of the ambulance crew, who would take plaintiff to the hospital – which would treat plaintiff and release him when he was sober.[3]

Stansberry vetoed the proposal to 849(b) plaintiff, and told Broucaret to accompany plaintiff to the hospital. Broucaret rode with plaintiff to the hospital in the back of the ambulance. Broucaret did not hear Stansberry order Fagan to not go to the hospital.

Fagan arrived at the hospital less than an hour after Broucaret did. Fagan came to the hospital to give Broucaret a ride. In the hospital treatment room, plaintiff – with another chorus of "Fuck you" – spit in Fagan's face after plaintiff's restraints were

[3] Broucaret testified the police department "rarely" charged and jailed persons arrested for drunk in public, but simply held them in the drunk tank and released them when sober. "[I]f we arrested every person for being intoxicated in public, I don't think there would be any room in the jails for anybody else."

removed.[4] Fagan went back to Park Station, cleaned up, and returned to the hospital, apparently on Stansberry's orders, to arrest plaintiff for violating Penal Code section 148. Fagan and Broucaret and other officers transported plaintiff to the jail.

Sergeant Stansberry

Sergeant Stansberry testified as a witness for plaintiff. In September 2002 she was a patrol sergeant at Park Station. Her primary duties and responsibilities involved supervising patrol officers. On September 18, she worked the swing shift from 3:00 p.m. to 1:00 a.m. Patrolmen Fagan and Broucaret were partners and were under her supervision and within her chain of command.

At about 7:00 p.m., while in her patrol car, Sergeant Stansberry heard Fagan and Broucaret make a radio call for an ambulance from the corner of Haight and Cole. She heard them report that a man who was drunk had fallen into a tree. She went to assist.

When she arrived she saw plaintiff handcuffed and sitting on the ground on Cole Street. Plaintiff said to Stansberry, "He kicked me in the head." Broucaret was standing next to plaintiff. Fagan was "pacing around" plaintiff.

Stansberry asked Broucaret what had happened to plaintiff. Broucaret replied that plaintiff "had been drunk and combative on the bus and he had to be escorted off by a bent wrist [hold] and that [plaintiff] had fallen into a tree and injured his head."

At that point Fagan and plaintiff "exchanged insults." Plaintiff said to Fagan, "Fuck you." Fagan replied, "Fuck you, you piece of shit." Both men were excited and very angry. Plaintiff, who had blood on his face and forehead, continued to say, "He kicked me in the head." Stansberry asked Fagan to move away from plaintiff.

Stansberry asked Fagan to move away because she was trying to talk to plaintiff and calm him down, but Fagan "was taunting him and getting him more excited." Fagan and plaintiff again exchanged the phrase, "Fuck you." At one point Stansberry saw Fagan lean over and heard him say to plaintiff, "I'm going to fucking kill you."

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[4] On cross-examination, plaintiff could not recall splitting into Fagan's face at the hospital.

Stansberry asked Fagan three times to move away. He did not. Fagan and plaintiff continued to exchange the phrase, "Fuck you." The situation was so volatile, and Fagan was so excited, that Stansberry called for a lieutenant to assist her.

Stansberry noticed Broucaret had his foot on plaintiff's leg. Broucaret said this was because plaintiff had kicked him. Stansberry told him to remove his foot – whereupon plaintiff again kicked Broucaret. Fagan placed a hobble, the nylon device with a metal clip, around plaintiff's ankles. At around this time Broucaret struck plaintiff in the shoulder and head area with his closed hand and his forearm. Broucaret told Stansberry "he was using a distracting method to gain control of the suspect." More insults were exchanged between Fagan and plaintiff.

Stansberry again ordered Fagan to move away from plaintiff. He refused, saying "What are you going to do? Write me up? Go ahead, write me up." She again called for a lieutenant. The ambulance arrived and plaintiff was placed in the ambulance.

Broucaret told Stansberry he wanted to "849(b)" plaintiff. Stansberry said no because the patrolmen had told her plaintiff had committed a crime (presumably, kicking Broucaret).

Stansberry told Fagan not to go to the hospital with plaintiff, because "he seemed to be riling [plaintiff] up and taunting him." She told Fagan to stay with her. She asked Fagan several times to get into her patrol car. Fagan told her she had embarrassed him in front of his partner. He spoke "over [her]" and "very loudly." Fagan also said, "If this were the '70s, I could have kicked that guy's ass today and sent him on his way like he deserved. I have a problem with authority."

Stansberry drove Fagan to his patrol car and told him to go back to Park Station, not to the hospital. She later learned that Fagan had gone to the hospital. He called her and told her plaintiff had spit in his face at the hospital.

On September 19, 2002, the day after the incident, Sergeant Stansberry wrote a memo to Captain Daniel Lawson, Commanding Officer of Park Station. The first three pages are a narrative description of the September 18 incident. The last two pages involve past incidents of Fagan's disobedience of supervisors, lack of respect for

supervisors and the public, and lack of anger management. During her testimony, Stansberry was allowed to refresh her recollection from the first three pages only. On a prior motion in limine, the trial court had excluded any references to the prior-incident section of the memo. The memorandum was excluded from evidence at trial.

Plaintiff

Plaintiff testified. He is Native American, half Sioux and half Creek. He spent a year in the Delancey Street program in late 2001 and 2002, being treated for "[b]ehavior modification" unrelated to alcohol. He admitted he was an alcoholic. At the time of the incident of September 18, 2002 he was taking substance abuse classes. He had a prior felony conviction for receiving stolen property.

On September 18 his substance abuse class lasted until 1:00 p.m., after which he spent the afternoon at his mother's house. In the early evening he left the house with his friend Caesar and drove to the Haight in Caesar's Jeep Cherokee. Caesar dropped him off at Haight and Cole, saying he was going to pick up his girlfriend and then come back and get plaintiff.

Plaintiff "hung out" for a few minutes, and then bought a beer, which he called a "211", a brand of malt liquor. He hung out at the corner of Haight and Cole for a minute, then spoke to Caesar on his cell phone. Caesar told him he was on his way back, and to find a parking space. Plaintiff tried to hold a parking space on Cole between Waller and Haight, apparently by sitting on the curb. He had not opened his beer.

Two women drove up and wanted to park. He told them he was saving the space, but "they didn't even care." Plaintiff got upset and "exchanged words" with the women. Plaintiff "probably" used profanity and was "[n]ot really" being "polite and gentlemanly." The women parked and left.

Plaintiff opened his beer and took one sip of it, and walked to the corner of Haight and Cole. Two uniformed police officers, one of whom plaintiff identified in court as Fagan, came up to him. Fagan asked him, "What the fuck are you doing?" and told him, "You're a long way from the Mission District." Thinking the officers were concerned he was drinking a beer in public, plaintiff poured the beer out onto the street.

Plaintiff gave the officers his ID at their request. The officer with Fagan – presumably Broucaret – ran plaintiff's name through a record check. Meanwhile, Fagan "just started talking crazy." He asked plaintiff what he was doing in "my 'hood,'" again saying plaintiff was "a long way from the Mission District." He accused plaintiff of selling heroin. He called plaintiff a "fucking Mexican" and a "wetback." Plaintiff is not Hispanic.[5]

Plaintiff asked Fagan why he was bothering him, and Fagan told him to "shut the fuck up." Plaintiff replied, "Fuck you." Fagan "just started talking a lot of shit, talking crazy. [¶] . . . [¶] He told me that he's the law, that he'll bury me, and that I'm a long way from the Mission District and that I'm in his neighborhood."

A bus came down Haight. The officers told plaintiff to leave. An officer, presumably Fagan, told plaintiff "to get the fuck out of here." Plaintiff walked toward the bus stop, which was five or 10 feet away, and Fagan kicked him in the back. Plaintiff and Fagan exchanged the phrase "Fuck you." Plaintiff stumbled onto the bus as Fagan was grabbing him. Plaintiff ran toward the back of the bus as Fagan "chas[ed]" him on board.

Fagan grabbed plaintiff's left arm, put it behind his back, grabbed him by the neck, pushed him toward the front of the bus, and "threw [him] off the bus." More "F-words" were exchanged during this process. Fagan shoved plaintiff off the bus, and he fell on his face and chest on the concrete sidewalk. He started bleeding from his mouth, nose, and forehead. He was maybe two or three feet from the tree and never struck it.[6]

The officers shouted that plaintiff was resisting arrest and started to handcuff him. Fagan started kicking him "in the head." Fagan punched plaintiff repeatedly in the back

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[5] In his testimony as an adverse witness, Broucaret said Fagan may have called plaintiff an "asshole," but did not refer to him in any racial manner. Specifically, Fagan did not refer to plaintiff as a Mexican or a wetback, and did not tell him to "go to … the Mission District where he belongs."

[6] The bus driver testified that he did *not* pull up at the bus stop so that the front door of the bus would open up right into the tree.

of the head and called him "a motherfucker and fucking Mexican." Plaintiff responded, "Fuck you." Fagan told plaintiff "he had a bullet with my name on it and he was going to bury me and kill me, he's the law."

Fagan and the other officer dragged plaintiff up Cole Street. "[T]here was a lot of cursing going on." Sergeant Stansberry arrived and plaintiff told her, "He kicked me in the head." In front of Stansberry, Fagan told plaintiff he was going to kill him. The ambulance came. Fagan kept screaming and hitting plaintiff.

Plaintiff was placed in the ambulance and handcuffed to a gurney. Broucaret told him the officers were going to cite him. Plaintiff "was cussing, fuck you this, fuck you that." Broucaret came with plaintiff in the ambulance. When they arrived at the hospital, Fagan was "right there" when the doors opened, threw plaintiff off the gurney onto concrete, and started punching him again and telling him to "shut the fuck up."

In a treatment room in the hospital, plaintiff was "trying to kick" because an officer, presumably Fagan, kept hitting him. Fagan became more upset when plaintiff made a phone call, called plaintiff a "motherfucker," and continued to beat him.

Plaintiff was placed in a paddy wagon where he was beaten some more. The wagon stopped near Duboce and Potrero, where two officers got out and argued about leaving plaintiff "dead on the street." Fagan came back in the wagon and kicked him a few times in the stomach. The wagon drove to the Hall of Justice at 850 Bryant. He eventually was returned to the hospital.

On cross-examination, plaintiff confirmed he was an alcoholic who "get[s] upset sometimes" when he drinks. His Delancey Street behavior modification program involved his tendency to get upset easily. He "[s]ometimes" had problems with anger or having an "attitude" when he drank. The substance abuse classes he was taking on September 18, 2002 involved alcohol abuse.

Plaintiff claimed the only alcohol he had consumed on September 18 was one sip of his malt liquor. But a member of the ambulance crew testified plaintiff exuded a strong odor of alcohol. And the hospital emergency room nurse assigned to screen patients detected an order of alcohol from plaintiff.

Plaintiff stipulated that he "is an alcoholic who has a propensity for violence when he drinks." He also stipulated he "suffers no residual physical harm, including scarring or other physical injury"; "has no claim for future medical damages"; and "suffers no emotional distress damages or non-economic damages related to the present or future fear or anxiety of police officers, except for Alex Fagan[,] Jr." The jury was instructed on these stipulations.

Defense Case

The record is less than clear, but it appears the defense case consisted largely of vigorous cross-examination of Sergeant Stansberry and plaintiff. Broucaret was recalled as a defense witness and essentially reaffirmed his testimony as an adverse witness for plaintiff. He added that he thought plaintiff had been drinking when he and Fagan first encountered him. He again denied that Fagan had threatened to kill plaintiff. He did not see Fagan "strike, punch, kick, or assault" plaintiff. The only time a police officer struck plaintiff was the blow Broucaret delivered with his hand and forearm. As noted, other evidence showed that Broucaret delivered that blow to distract plaintiff so the officers could control him and hobble his feet.

The bus driver testified that plaintiff staggered onto the bus, banged the fare box, and said "motherfucker." Fagan and plaintiff walked off the bus, and Fagan did not push plaintiff.

Neither the paramedic who accompanied plaintiff on the ambulance nor the emergency room screening nurse saw anyone beat plaintiff, and the defense presented medical testimony that his injuries were not consistent with the repeated beatings to which he testified.

The Jury Verdicts

The jury returned three special verdicts. In Special Verdict 1, the jury found the officers did not commit a battery on plaintiff: by a vote of 12 to 0 regarding Officer Broucaret, and by a vote of 9 to 3 regarding Officer Fagan.

In Special Verdict 2, the jury found by a vote of 12 to 0 that Officer Broucaret did not violate section 51.7 because he did not threaten or commit violent acts against plaintiff. The jury found by a vote of 9 to 3 that Officer Fagan did threaten or commit violent acts against plaintiff, but unanimously found Fagan did not violate section 51.7 because his violent conduct was not motivated by his perception of plaintiff's race, ancestry or national origin.

In Special Verdict 3, the jury unanimously found that neither officer violated section 52.1 because they did not "interfere with or attempt to interfere with [plaintiff's] [c]onstitutional right of free speech to protest police misconduct by threatening or committing violent acts[.]"

The trial court entered judgment for defendants on all three causes of action.

II. DISCUSSION

Plaintiff contends the trial court erred by allowing Officer Fagan to invoke the Fifth Amendment outside the presence of the jury. He also contends that attorney misconduct and jury misconduct mandate reversal of the defense judgment. We disagree. Fagan was not required to invoke the Fifth Amendment in the jury's presence. We find attorney misconduct but find that it is not prejudicial error. We find no jury misconduct.

Fagan's Invocation of His Fifth Amendment Privilege

Plaintiff wanted to call Fagan, as well as Broucaret, as an adverse witness. But Fagan indicated his intent to invoke his Fifth Amendment privilege against self-incrimination, because of the pending criminal proceeding popularly known as "Fajitagate."

Plaintiff asked the court to require Fagan to take the witness stand and invoke his privilege in front of the jury. The court denied this request, and allowed Fagan to take the stand outside the jury's presence and invoke the Fifth Amendment, refusing on that ground to answer any questions of plaintiff's counsel. The court stated that it would instruct the jury with CACI No. 216. To that end, the court instructed the jury as follows:

"Alex Fagan has exercised his legal right not to testify in this matter. Do not draw any conclusions from the exercise of this right or let it affect any of your decisions in this case. A party may exercise this right freely and without fear of penalty."

Plaintiff contends this process was error, and that he was entitled to force Fagan to invoke his Fifth Amendment privilege in front of the jury. Plaintiff is incorrect.

If a witness invokes his Fifth Amendment privilege, "neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding." (Evid. Code, § 913, subd. (a).)

Because the jury may not draw any inference from the invocation of the privilege, a party does not have the right to require the witness to take the stand before the jury and invoke the privilege. (*People v. Holloway* (2004) 33 Cal.4th 96, 130-132 (*Holloway*); *People v. Frierson* (1991) 53 Cal.3d 730, 743.) "No purpose is served…by forcing a witness to exercise the privilege on the stand in the jury's presence, for…the court would then be 'required, on request, to instruct the jury not to draw the very inference [the party calling the witness] sought to present to the jury. [Citation.]' " (*Holloway* at p. 131, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 442.)

Plaintiff's reliance on *In re Scott* (2003) 29 Cal.4th 783 (*Scott*) is misplaced. Plaintiff argues that *Scott* supports his claim that Fagan was required to take the stand and invoke the privilege in front of the jury. But *Scott* simply delineates the general distinction between criminal and civil cases in the Fifth Amendment context: a criminal defendant may refuse to take the stand at all, while a civil party or witness does not have a privilege not to be called as a witness but must take the stand to invoke the Fifth Amendment. (*Scott* at p. 815.) But the issue here is not whether or not Fagan had to take

the stand, but *whether he had to take the stand in the jury's presence*. The case law cited in the preceding paragraph controls this question.[7]

The trial court correctly allowed Fagan to invoke his Fifth Amendment privilege outside the jury's presence.[8]

Attorney Misconduct

This case was vigorously litigated with frequent objections, energetic and seemingly emotional argument, and occasional lapses of trial decorum. Plaintiff claims that counsel for defendants, San Francisco Deputy City Attorney Sean F. Connolly, committed several instances of prejudicial attorney misconduct.

Specifically, plaintiff claims that Connolly (1) improperly commented to the jury on Fagan's invocation of his Fifth Amendment privilege, (2) improperly commented on plaintiff's prior bad acts in violation of a ruling on a motion in limine, and (3) personally attacked the motives and character of plaintiff, his counsel, and one of his witnesses. We note that the respondent's brief does not deny that these comments and attacks constitute misconduct. Rather, defendants argue that any error was harmless.

We first set forth the portions of the record which plaintiff claims show attorney misconduct, italicizing the specific language emphasized by plaintiff, and conclude that misconduct occurred. We then conclude the misconduct was harmless error on the facts and record of this case – although we find Connolly's conduct fell well below accepted standards of courtroom behavior and decorum.

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[7] And *Scott*, being a habeas proceeding, did not involve a jury and thus does not discuss the issue now before us.

[8] Plaintiff briefly argues he should have been allowed to put to the jury the transcript of Fagan's deposition, in which he repeatedly invoked the Fifth Amendment privilege to counsel's dozens of questions. This would have been an impermissible end run around the controlling case law.

Reference to Fagan's Invocation of His Fifth Amendment Privilege

In closing argument to the jury, Connolly referred to Fagan's invocation of his privilege – in clear violation of Evidence Code section 913, subdivision (a). The following transpired:

"MR. CONNOLLY: …[¶] There are a lot of things I want to say to you, but I think the one thing I have to do is be completely candid with you about this case and about Alex Fagan.

"We all know who Alex Fagan is. We all know that. Everybody knows that. We discussed it. We discussed it in chambers. Whether or not you read about it in the press at any point, it has leaked into your consciousness somehow.

"And you know as well as I do that you may have an opinion about Alex Fagan, and you all know about Fajita-Gate, and you all know that he's standing trial –

MR. SAFIRE [plaintiff's attorney]: I'm going to object, Your Honor.

"THE COURT: The objection is sustained. Mr. Connolly, now, you want to be very careful what you say here. This is closing argument.

"MR. CONNOLLY: *And you all know that he was forced to claim the Fifth Amendment.*

"MR. SAFIRE: Your Honor, I object.

"MR. CONNOLLY: They've been instructed on that.

"MR. SAFIRE: No, Your Honor. That's totally inappropriate. We're not to comment on that.

"THE COURT: You're going to have to approach on this. I'll give you additional time, Mr. Connolly. I just want to do this real quickly here."

(Italics added.)

After an unreported sidebar conference, argument resumed:

"MR. CONNOLLY: *And you know that he invoked his right not to give testimony in this case because of Fajita-Gate….*" (Italics added.)

Later, toward the end of his closing argument, Connolly referred to plaintiff's absences from the trial and then commented:

"MR. CONNOLLY: Yet Alex Fagan, the one guy who has the most to lose here, along with John Broucaret, appears every day dutifully. *And the irony, of course, is not lost on me that Alex Fagan can't testify, but I assure you he wants to.*" (Italics added.)

As we noted above, Connolly's comment on Fagan's invocation of his Fifth Amendment privilege was a clear violation of Evidence Code section 913, subdivision (a). While we have found no civil cases citing such a comment as attorney misconduct – and the parties do not provide us with any – we look to criminal cases for guidance. It is clearly inappropriate for counsel to comment on a defendant's invocation of the privilege. (See, e.g., *Griffin v. California* (1965) 380 U.S. 609, 615; *People v. Brown* (1988) 45 Cal.3d 1247, 1260-1261.)

Given the rule of these cases and the clear statutory ban on Connolly's comment on the privilege, we readily conclude the comment was attorney misconduct – especially since defendants do not argue otherwise.

Comment on Plaintiff's Character and Prior Bad Acts

The trial court granted a motion in limine to exclude any reference to plaintiff's prior bad acts.

Arrests or Other Police Contacts

Connolly began his cross-examination of plaintiff by referring to his absences from the trial. Connolly told plaintiff, "We've missed you most court days." An objection to this remark was sustained. Then the following transpired:

"MR. CONNOLLY: Q. You haven't been here every day, have you?

"A. No.

"Q. In fact, you haven't been here most days during this lawsuit; is that right?

"A. No.

"Q. Is that right?

"A. Yes.

"Q. And you're the one that brought this lawsuit against these two gentlemen; right?

"A. Yes.

"Q. You're seeking damages from them?

"A. Yes.

"Q. You hired lawyers to file a complaint against them; right?

"A. Yes.

"Q. And your testimony is that you don't want to come to court because you're scared of them?

"A. Yes.

"Q. And the days that you missed court were because you were scared to come to court?

"A. Yes.

"Q. Last Thursday – "

At this point plaintiff's attorneys objected. The court held a sidebar conference and sustained the objection, instructing Connolly to "proceed along the lines discussed at sidebar." The cross-examination continued:

"MR. CONNOLLY: Q. Where were you last Thursday in the morning while we were picking a jury?

"MR. SCOTT [Plaintiff's attorney]: Objection. Irrelevant.

"MR. SAFIRE: Objection.

"THE COURT: Sustained. Mr. Connolly, you need to proceed along – I don't want any further questions along the lines we discussed at sidebar.

"MR. CONNOLLY: Q. It's true, Mr. Smith, there are other reasons you don't make it to court?

"MR. SCOTT: Objection. Contempt. Move for contempt."

The court then held a reported conference in chambers. Connolly said he was trying to show that plaintiff missed court the previous Thursday because he had been re-arrested for drunk in public after he broke a window at the hotel where he lived. Safire and Connolly then disputed the facts of the incident. At one point Connolly asked Safire

how he knew what happened: "Were you drinking with [plaintiff] at the hotel?" He also accused Safire of having "his facts all ass backwards."

Connolly was trying to inject the Thursday arrest in to impeach plaintiff's testimony on direct that plaintiff did not come to court because he was afraid of the police. The trial court ruled the Thursday arrest to be irrelevant and prejudicial, and resolved the matter by striking plaintiff's testimony on direct about his reasons for avoiding court.

Interestingly, Connolly stated in the chambers conference that he was going to bring in plaintiff's contacts with police, despite the motion in limine. He complained that information about Fagan was leaked to the press, such that he (Connolly) was "on an unlevel playing field" and was "not getting a fair trial."

After the conference, and despite the court's ruling striking that portion of Smith's testimony which would otherwise entitle Connolly to ask about other reasons for missing court, Connolly asked plaintiff if he missed court on Thursday because he was drunk. The court sustained an objection. Connolly asked plaintiff how many times he had been arrested in the last six months. The trial court sustained an objection and admonished Connolly to avoid that topic. Then Connolly asked plaintiff how many times he had been arrested. The court sustained an objection, held a sidebar, and directed Connolly to proceed to another area of questioning.

Alleged Drunken Admissions to Hospitals

Later in his cross-examination Connolly persisted in trying to bring in matters prejudicial to plaintiff and extraneous to the incident sued upon:

"Q. Isn't it true on August 28th, 2003 –

"MR. SCOTT: Objection, irrelevant. [¶] . . . [¶]

"MR. CONNOLLY: I haven't asked the question yet.

"Q. – claiming that you were robbed and –

"THE COURT: Everyone needs to stop and approach for a sidebar."

After the unreported sidebar conference, the court sustained the objection on grounds of irrelevancy and Evidence Code section 352.

Connolly's cross-examination continued:

"MR. CONNOLLY: In August of 2003 you sustained a busted lip, swollen –

"MR. SAFIRE: Objection, objection.

"MR. SCOTT: Objection.

"MR. CONNOLLY: I'm just asking whether he sustained it.

"MR. SAFIRE: Objection, Your Honor.

"THE COURT: Mr. Connolly, please, the objection was sustained at sidebar, so you may not ask about that at this time."

"MR. CONNOLLY: Q. Okay. On that same date you were admitted to San Francisco General Hospital –

"MR. SCOTT: Objection.

"MR. CONNOLLY: Q. – drunk –

"THE COURT: I'm sorry, Mr. Connolly. The objection is sustained.

"MR. SAFIRE: Look what he's doing here, Judge.

"MR. SCOTT: Trying to create a mistrial?[9]

"THE COURT: The objection is sustained, Mr. Connolly. You can't go into that. That's not relevant.

"The issues involve what occurred as to what has been claimed here. That's what's involved, members of the jury.

"MR. CONNOLLY: Q. Thirty days before that, you went to San Francisco General Hospital –

"MR. SCOTT : Objection, Your Honor.

"MR. CONNOLLY: Q. – with a complaint of being assaulted –

"MR. SCOTT: Move for contempt.

"MR. SAFIRE: Objection, Your Honor. He continues to speak to the jury.

"THE COURT: Mr. Connolly, the objection –

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[9] Plaintiff's AOB claims that Connolly tried to create a mistrial because his request to stay the civil trial pending the Fajitagate trial was denied.

"MR. CONNOLLY: Your Honor, this is a different incident we're talking about now –

"MR. SAFIRE: There he goes. There he goes.

"MR. CONNOLLY: -- where the same injury is claimed.

"MR. SAFIRE: Objection, Your Honor. He's publishing hearsay to the jury.

"THE COURT: Mr. Connolly, you may not ask him about matters that don't relate to this incident for reasons I've explained to you at sidebar, and you may not argue it in front of me at this time or ask further questions about it at this time. That's the ruling.

"MR. CONNOLLY: Q. Mr. Smith?

"A. Yeah.

"Q. February 10th of 2003 –

"MR. SAFIRE: Objection, Your Honor.

"MR. CONNOLLY: Q. – you went to San Francisco General Hospital drunk, claiming you were kicked in the face by –

"MR. SAFIRE: Objection. He's doing this in violation of the Court's order.

"THE COURT: Mr. Connolly, you can't ask any more questions about other matters that don't involve this. Do not ask.

"MR. CONNOLLY: I'm asking about his claimed injuries.

"MR. SCOTT: Your Honor, I move for contempt.

"THE COURT: Mr. Connolly, don't ask any more questions about other incidents. No other questions.

"MR. CONNOLLY: I'm not asking about other incidents. I'm asking about injuries sustained as a result of other incidents.

"THE COURT: No more questions, Mr. Connolly, about the matters we discussed.

"MR. CONNOLLY: What are you going to allow me to ask, then?

"MR. SAFIRE: Objection, Your Honor.

"THE COURT: Mr. Connolly, if you have no more questions – you're a very able lawyer. So you can ask questions, if you want. If you don't have any others, you don't have to ask them.

"MR. CONNOLLY: For the record, I have 24 –

"MR. SCOTT: Objection.

"MR. SAFIRE: Objection, Your Honor. This is [*sic*: "should be"?] outside the presence of the jury. He continues to do it, Your Honor, to create a mistrial. He won't stop talking.

"THE COURT: Mr. Connolly, we're going to actually have you approach the bench, and I'll need the court reporter."

The court then took its noon recess, admonishing the jury that "the only thing that counts is the evidence. That's the only thing that counts. So if I sustain an objection, members of the jury, you are to disregard whatever the question was. It's not evidence, and it can't be considered by you in any way. That's the rule."

Closing Argument

During closing argument, Connolly referred to plaintiff's stipulation that he was a violent person who drinks. Connolly then commented that police officers had to deal with "the criminal element" every day. Then the following transpired:

"MR. CONNOLLY: And the reality is [plaintiff] – and we know this – is a criminal. *He's a violent criminal.* And the police officers on this date –

"MR. SAFIRE: Objection, Your Honor. There's no evidence of that.

"MR. CONNOLLY: Well, he's a convicted felon, and that was stipulated to.[10]

"THE COURT: Sustained. Members of the jury – what counts is the evidence, members of the jury. You're the judges of the evidence and the instructions.

[10] Plaintiff's felony conviction was for receiving stolen property, which is not a violent crime.

"MR. CONNOLLY: I thought I heard [plaintiff] testify under oath that he'd been convicted of a felony *and that there was other evidence that leaked in that he had had a lot of contact with the system*.

"MR. SAFIRE: Objection, Your Honor.

"THE COURT: Objection sustained.

"MR. CONNOLLY: *And that he had a history of –*

"MR. SAFIRE: Objection.

"MR. CONNOLLY: -- *lots of admissions to the hospital.*

"MR. SAFIRE: Objection, Your Honor.

"THE COURT: Mr. Connolly, the objection is sustained. Please do not make further remarks along those lines. What the evidence is, there's been evidence introduced. It's not what you're saying it is."

(Italics added.)

Shortly thereafter, Connolly referred to the testimony of one of the women who encountered plaintiff over the parking space. Connolly argued plaintiff was vulgar and verbally assaultive, so that the woman "did what most of us would do. Avoid the man because he's dangerous, avoid the man because he is a problem, avoid the man because he's the kind of guy when you walk down the street and see, if you make eye contact with him, if you bump into him, if you remark on his appearance or his conduct, *he is going to hurt you. He is going to gratuitously inflict violence on you.*" (Italics added.)

Mr. Safire objected, saying "There's no evidence of that." The trial judge sustained the objection, admonishing the jury that they were "the judges of the evidence."

It is misconduct for counsel to elicit inadmissible testimony. (*People v. Ledesma* (1987) 43 Cal.3d 171, 239-240.) Here Connolly, in blatant disregard of the ruling on the motion in limine and repeated admonitions of the court, flagrantly persisted in eliciting testimony regarding plaintiff's prior bad acts. He also referred to those bad acts in his closing argument. This was misconduct.

It is also misconduct to "argue facts not justified by the record…." (*Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747.) In his closing argument, Connolly characterized

plaintiff as a "violent criminal" based on his felony conviction – when plaintiff had only been convicted of the non-violent felony of receiving stolen property.[11] Connolly also argued that plaintiff would gratuitously inflict violence on someone just for making eye contact and the like. There was no evidence of that. These arguments constitute misconduct – and again, defendants do not contend to the contrary.[12]

Improper Personal Attacks

As we interpret plaintiff's arguments, he cites four instances of alleged personal attacks on the motives and character of plaintiff, his attorneys, and one of his witnesses, Sergeant Stansberry.

1. On cross-examination of plaintiff, Connolly asked plaintiff if he hired Mr. Safire when "Mr. Safire came to you with a little deal." An objection to this question was sustained.

2. In closing argument, Connolly suggested the civil rights claims against defendants were, as plaintiff puts it in his opening brief, an "afterthought." "…Mr. Scott stood up here and said this is a case about assault, this is a case about battery, this is a case about false arrest, this is a case about negligent supervision and several other things . . . . [¶] Now this is a civil rights case, according to Mr. Safire….[¶] Mr. Safire wants you to pick and choose the facts."

[11] Plaintiff did stipulate he had "a propensity for violence when he drinks." That is not necessarily the same as being a "violent criminal." At oral argument, defendants pointed out that the combination of plaintiff's stipulation, and his felony conviction – albeit for a nonviolent crime – makes him violent and a criminal, and therefore a "violent criminal." That may or may not be an apt observation, but in closing argument Connolly called plaintiff a "violent criminal" in the context of his felony conviction and numerous contacts with the criminal justice system – not the stipulation.

[12] Plaintiff refers to another instance of misconduct, involving reference to excluded portions of the Stansberry memo, for the first time in his reply brief. Accordingly, this instance of misconduct will not be considered.

3. In closing argument, Connolly suggested that plaintiff or his counsel only pursued the civil rights claim to make money, and that plaintiff lacked the courage to come to court. The following transpired:

"MR. CONNOLLY: …There's just two things (sic) I want to leave you with. One – three things. This is not a civil rights case. A civil rights case, and the reason that plaintiff is making – *putting all his eggs in that basket is because that's how he lines his pockets.* That's not about –

"MR. SAFIRE: Objection, Your Honor. That's totally improper.

"THE COURT: The objection is sustained.

"MR. CONNOLLY: That's not about [plaintiff]. *This case started as an assault and battery case, and now we've learned plaintiff has stipulated away punitive damages, stipulated away future medical damages, and stipulated away future scarring, stipulated away this idea that he was scared by the police.*

"Mr. Scott stood up here at the beginning and talked about how [plaintiff] is a proud man. His pride is what, you know, had a role in this whole thing. And we haven't seen [plaintiff] in here except for two or three days.

"MR. SAFIRE: Objection, Your Honor.

"THE COURT: Objection sustained.

"MR. CONNOLLY: The man brings a lawsuit against these two police officers, jeopardizing their careers, subjecting them to public scrutiny, subjecting them to the stigma of having been sued and having to answer to their colleagues and their friends and their family about their conduct, and *he doesn't have the courage—*

"MR. SAFIRE: Objection, Your Honor.

"MR. CONNOLLY: *— to come to court*.

"THE COURT: Mr. Connolly, the objection is sustained.

"Members of the jury, you are to disregard Mr. Connolly's remark. Disregard it."

(Italics added.)

4. Plaintiff cites a portion of Connelly's closing argument in which Connelly noted that Sergeant Stansberry returned to the witness stand after courtroom breaks and

"start[ed] throwing in these gratuitous remarks about Alex Fagan, which [was] by design . . . ." Connolly implied Stansberry only did so after meetings in the hallway and a conference room with plaintiff's attorneys. Objections to the argument were sustained.

It is misconduct to make personal attacks on the character or motives of the adverse party, his counsel, or his witnesses. (See, e.g., *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1246; *Stone v. Foster* (1980) 106 Cal.App.3d 334, 355.) Here Connolly did make such attacks, although they do not rise to the level of vilifying someone or calling him derogatory names. (Cf. *Love v. Wolf* (1964) 226 Cal.App.2d 378, 391 [counsel referred to opposing counsel as "idiot" and "a laughing hyena," and called his objections "asinine" and "hogwash"].) In light of defendant's failure to argue otherwise, we will consider Connolly's remarks misconduct.

It remains to determine whether the attorney misconduct in this case amounts to prejudicial error. We conclude that it does not for the following reasons.

A judgment may not be set aside in the absence of prejudicial error, i.e., error that results in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800 (*Cassim*). Whether error is prejudicial, and thus reversible, is determined under the circumstances of each individual case. (*Cassim* at p. 800.)

Attorney misconduct in civil cases is governed by the *Watson* standard of harmless error (*People v. Watson* (1956) 46 Cal.2d 818, 836) – that is, we may not reverse a civil judgment for attorney misconduct unless it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the misconduct. (*Cassim, supra*, 33 Cal.4th at pp. 800-802, 805.)

The misconduct in this case is egregious but not reversible. A review of the record demonstrates that plaintiff's case was weak. He admitted he was an alcoholic who became violent when he drank. The stipulation was read to the jury. There was substantial evidence plaintiff had been drinking at the time of the incident. There was substantial evidence he was verbally and physically violent with Officers Fagan and Broucaret.

As he all but conceded at oral argument, plaintiff was the only witness who supported his three causes of action. No witness supported his battery claim of repeated blows by the police, and the medical evidence was uncontroverted that plaintiff's injuries were inconsistent with the repeated blows he claims to have suffered. Plaintiff's post-arrest photographs, which are in the record, do not support his claim of repeated beatings. Neutral witnesses such as the bus driver, ambulance personnel, and the emergency room nurse disputed plaintiff's version of what happened. The bus driver testified Fagan walked plaintiff off the bus and did not push him.

Neither the emergency room screening nurse nor the ambulance paramedic who took plaintiff to the hospital saw anyone beat plaintiff. This further undercut plaintiff's unsupported claim that Fagan beat him as he was taken off the ambulance and inside the hospital.

Plaintiff's case is further weakened by stipulations during trial. He stipulated away any claim for residual physical harm, including scarring and physical injury. He stipulated away any claim for future medical damages. He stipulated he suffered no claim for emotional distress damages or non-economic damages regarding present or future fear of police officers, except Fagan. These stipulations were read to the jury. This is not the litigation position of a man who suffered serious beating at the hands of police officers.

With regard to plaintiff's section 51.7 claim, only plaintiff provided evidence that Fagan threatened him because of his race, ancestry or national origin. With regard to plaintiff's section 52.1 claim, there was virtually no evidence the officers interfered with plaintiff's right to freedom of speech to protest police misconduct. At oral argument, plaintiff claimed that Sergeant Stansberry's testimony supported his section 52.1 claim. When she arrived on the scene plaintiff told her, "He kicked me in the head." A short time later Fagan told plaintiff, "I am going to fucking kill you." Plaintiff argues this threat interfered with his right of free speech, i.e., to complain of police brutality. But plaintiff had *already* complained to Stansberry. And we see no evidence the threat impeded plaintiff from complaining after the incident.

Attorney misconduct is generally cured by appropriate instructions and admonitions to the jury. (See *Cassim, supra*, 33 Cal.4th at pp. 803-805; *People v. Farnam* (2002) 28 Cal.4th 107, 167.) Connolly's inappropriate reference to Fagan's Fifth Amendment privilege was rendered harmless by the instruction to the jury that they may make no inference based thereon. Connolly's attempts to elicit inadmissible evidence, and evidence not supported by the record, was rendered harmless by the trial court's repeated admonitions to the jurors to disregard Connolly's remarks and that, as jurors, they were the judges of the evidence. In addition, the jurors were formally instructed at the conclusion of the trial that they were the judges of the evidence. The court also instructed the jury with CACI 5003, which told them the arguments, questions and statements of counsel are not evidence.

Thus, the jurors were repeatedly told to disregard the inadmissible evidence and the personal attacks on plaintiff. So instructed, they weighed the evidence and disbelieved plaintiff's version of events – which found little, if any corroboration in anything beyond plaintiff's testimony.

Moreover, an experienced trial judge, who was in the best position to assess the impact of counsel's misconduct on the jury in the context of the entire case, denied a motion for a new trial.

We do not condone Connolly's misconduct. It was utterly unprofessional, and unworthy of an officer of the court. But in this case it did not lead to prejudicial, reversible error.

Jury Misconduct

In a declaration submitted in support of plaintiff's motion for a new trial, juror Ahern stated that:

"3. During deliberations at the very beginning, members of the jury were discussing [p]laintiff's civil rights claim. *The jury felt that the civil rights claim was not pursued at the beginning of the case. Plaintiff's civil rights claim was denied and a couple members of the jury believed that it was designed to line the pockets of the attorneys, amongst other things.* [Italics added.]

"4. The attorney for the City, Mr. Connolly[,] argued that [the] civil rights claim was a second thought designed to 'line the pockets' of the attorneys.

"5. The jury discussed [p]laintiff's prior contacts with the police at times throughout the deliberations."

Plaintiff claims this portion of the Ahern declaration shows juror misconduct. He argues that Connolly's "line the pockets" argument and his inappropriate references to plaintiff's police contacts influenced the jury to return verdicts in favor of the defense.

We note at the outset that the italicized sentences in paragraph 3 of the Ahern declaration are inadmissible. Declarations of jurors must be limited to "overt acts, objectively ascertainable" (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349-350), and may not show the effect of any alleged improper influence on the thought processes of the jury or a juror's vote. (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418-419.)[13]

Thus, the Ahern declaration is reduced to three items: (A) the jurors discussed the civil rights claims at the beginning of deliberations; (B) *Connolly argued* that the claims were only to "line the pockets" of plaintiff's counsel; and (C) the jurors discussed plaintiff's prior contacts with the police "at times" during the deliberations.

Only (C) can possibly be a root of jury misconduct.

In opposition to the new trial motion, defendants presented the declarations of jurors Zylstra, Walker, and Janese. Walker and Janese declared that the jurors did not discuss plaintiff's prior police contacts during deliberations. Juror Zylstra did not recall any such discussion.

Juror Zylstra also declared: "Throughout the deliberations, whenever a juror mentioned an issue that was not part of the evidence that [the trial court] told us we could consider, we all agreed not to consider this issue and we moved on. Jurors either nodded

[13] Defendants moved to strike the two sentences in their opposition to the motion for new trial. Apparently, the trial court did not rule on the motion to strike when denying the new trial motion. Defendants raised the admissibility issue below and we will not consider the inadmissible material.

their heads or verbalized their agreement that certain evidence had been stricken from the record."

On this record, the single sentence of (C) in the Ahern declaration does not show juror misconduct. References to remarks or comments or discussions that purportedly emanated from deliberating jurors must be presented *in their context* in order to show any misconduct. (See *Tillery v. Richland* (1984) 158 Cal.App.3d 957, 975-976.) Here, Ahern says only that the jury discussed plaintiff's prior police contacts "at times." The declaration does not shed light on the context and the extent of the remarks. The jurors could have "discussed" the contacts, i.e., mentioned them, only to agree – as Zylstra declares – that they would *not* consider them in reaching a verdict. Given the opposing declarations, the lack of context, and the fact that the trial court found no grounds to grant a new trial on jury misconduct, we must conclude there was no abuse of discretion in denying the motion for no trial.

Conclusion

We find no error except for attorney misconduct. That error is not prejudicial. Plaintiff was not denied a fair trial on his claims against defendants.[14]

III. DISPOSITION

The judgment is affirmed.

_____
Marchiano, P.J.

We concur:

_____
Stein, J.

_____
Swager, J.

[14] Plaintiff also contends the trial court erred by dismissing his fifth cause of action for negligent supervision, training, and discipline. But he presents no pertinent authority to support his contention. In any case, given the fact that we are affirming the jury's determination that the officers committed no torts against plaintiff, the issue of negligent supervision is moot.