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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ESTATE OF CESAR RODRIGUEZ
et al.,

Plaintiffs and Respondents,

v.

CITY OF LONG BEACH et al.,

Defendants and Appellants.

B330817

(Los Angeles County
Super. Ct. No. 20STCV16225)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Gregory W. Alarcon, Judge. Reversed.

Horvitz & Levy, John F. Querio, Scott P. Dixler; Dawn
McIntosh, City Attorney, Matthew M. Peters and Nicholas
Masero, Deputy City Attorneys, for Defendants and Appellants.

Law Office of Gerald Philip Peters, Gerald P. Peters;
Casillas & Associates, Arnolando Casillas, Daniel Gillette and
Leonel Mojica for Plaintiffs and Respondents.

Plaintiffs and respondents are the Estate of Cesar Rodriguez and Rosa Moreno, Cesar Rodriguez's mother. Defendants and appellants are the City of Long Beach and Officer Martin Ron, a Long Beach police officer. On August 29, 2017, Officer Ron searched Rodriguez incident to an arrest. The search occurred on the platform of a passenger train, more than three feet from the edge of the platform. Rodriguez moved forward during the search, was hit by a train, and died from the resulting injuries. Following a jury trial on a single cause of action for negligence, the jury found Officer Ron negligent and found Ron's negligence caused Rodriguez's death. The trial court entered judgment in the amount of \$12,270,000 in favor of plaintiffs.

We reverse the judgment. The trial court prejudicially erred in rejecting a negligence per se instruction requested by defendants that would have informed the jury how to assess Rodriguez's comparative negligence, if any, based on evidence he attempted to escape Officer Ron's custody. We, however, reject defendants' argument they are entitled to judgment as a matter of law. Finally, given our disposition requiring a new trial, we decline to consider defendants' arguments that plaintiffs' counsel committed prejudicial misconduct during closing argument and that the damages award was excessive.

FACTUAL BACKGROUND¹

1. *Cesar Rodriguez dies after being hit by a train*

On August 29, 2017, a passenger train hit Cesar Antonio Rodriguez killing him. In the 15 minutes prior to his death, Rodriguez exited a Blue Line train at the Wardlow Station after failing to pay the transit fee, and Officer Ron searched him incident to Rodriguez's arrest. It is undisputed that Officer Ron had probable cause to arrest Rodriguez and that it was proper for Ron to conduct a standing modified search (described below).

According to plaintiffs, Officer Ron conducted the search "three feet, eight inches" from the edge of the train platform.² During the search, Rodriguez moved forward towards the tracks. According to plaintiffs, "Rodriguez did not move forward until Ron removed a 'Tap card' or 'debit card' from Rodriguez's back pocket" After moving forward, Rodriguez fell to the ground, and was pinned between the train and the platform. Rodriguez's waist was dangling over the edge of the platform when he was struck by the train.

2. *Officer Ron's testimony*

In August 2017, Officer Ron worked as a police officer for the City of Long Beach. On August 29, 2017, Officer Ron's assignment was to ride the trains, check for criminal activity, and assist the "ticket takers." Ivan Acevedo, a Metro security officer,

¹ We summarize only the liability portion of trial. Because we do not address defendants' argument that the damage award was excessive, we do not summarize the damages portion of trial.

² The platform at the Wardlow station was 15 feet, four inches wide and 328 feet long.

worked alongside Ron on August 29, 2017, and Acevedo identified Rodriguez as a passenger who did not pay his fare. The “people that [*sic*] were identified as not having paid the fare [were] told to get off the train at the next stop.” After Rodriguez exited from the train at the Wardlow station, Officer Ron learned Rodriguez was not carrying a California identification card. Officer Ron asked Rodriguez his name, and Rodriguez first said “Rodri” and later said “Anthony Rodriguez.” Officer Ron checked with dispatch and found no match for Anthony Rodriguez and the date of birth Rodriguez provided.

Ron arrested Rodriguez for fare evasion and giving a false name and then searched Rodriguez using a standing modified search, which is a technique used after detaining a suspect. Ron believed he had chosen a safe place for the search.

At the outset of the search, Ron asked Rodriguez to stand up and place his hands behind his head. Ron asked Rodriguez to spread his feet. According to Ron, he took Rodriguez off balance by pushing his hips forward. Ron asked Rodriguez if he had any weapons and Rodriguez responded he had a knife in his pant pocket. Ron pulled a bindle from one of Rodriguez’s pockets and Ron believed the bindle contained methamphetamine. Ron then pulled a card from another pocket, and that’s “when he [Rodriguez] lunged away.” Ron testified Rodriguez movement was sudden and forceful. When Rodriguez lunged forward Ron also moved forward. Both fell to the ground. Ron tried to pull Rodriguez back but there was insufficient time before a train hit Rodriguez.

Ron wrote a report after the incident in which he stated Rodriguez was attempting to resist arrest. Specifically, Ron wrote: “ ‘As I was looking at the card, I felt the suspect pull

away” In his report, Ron stated Rodriguez “ ‘pulled away so forcibly’ ” that Rodriguez caused Ron to fall. Ron testified he believed Rodriguez was attempting to escape but he did not write that in his report.

When asked by plaintiffs’ counsel, “Did it ever occur to you that a person standing that close to the edge, off balance, teetering, as you were holding them would be afraid or startled by being in that position so close to where a train was coming,” Ron responded Rodriguez was not teetering and was only slightly off balance. Plaintiffs’ counsel then asked, “So you knew that you were holding somebody off balance, the edge of a train, and that that person could be startled for any reason, he would react reflexively” to which Ron responded, “It’s possible.”

3. *Eyewitness testimony*

Jessica Ramirez, a person cited for failing to pay the train fare at the same time as Rodriguez, testified she saw Ron find a “package” in Rodriguez’s pocket. According to Ramirez, Rodriguez tried to run away from Ron. Ramirez further testified Rodriguez made a “quick movement” to “jump towards” “the train tracks.” Ramirez testified, “[T]he cop tried his best to, like, save” Rodriguez. Ramirez did not see both Rodriguez and Ron fall to the ground. She acknowledged she observed events only through her “side eye” and fainted when she “saw everything happen real close to” her.

Ivan Acevedo, the fare inspector working alongside Ron, testified that to write a citation for fare evasion, the fare inspector would need the person’s name, date of birth, and

address.³ Ron asked Rodriguez more than once for that information. According to Acevedo, while Ron was searching Rodriguez, Rodriguez “ ‘lunge[d] . . . towards the edge of the platform pulling Officer Ron with him.’ ” Both Rodriguez and Ron fell to the ground. Rodriguez used his arms to push himself towards the edge of the platform.

Shortly after the incident, Acevedo reported, “ ‘ “Rodriguez leaned forward at his waist and lunged forward in an attempt to escape.” ’ ” “ ‘ “While Officer Ron attempted to pull Rodriguez to the center of the platform, Rodriguez desperately uses his arms and legs to resist Officer Ron’s efforts.” ’ ” Acevedo reported Rodriguez appeared to move away from Ron intentionally.

Sarahi Zacarias testified that on August 29, 2017, she worked as a fare inspector. She carried a device that by checking the passenger’s TAP card,⁴ allowed her to determine which passengers paid their fares. Whoever did not pay the fare would be asked to exit the train and would be issued a citation. Through her “peripheral view,” Zacarias saw Rodriguez interact with Officer Ron. Zacarias saw Officer Ron try to pull Rodriguez away from the train tracks after they both fell. When plaintiffs’ counsel asked Zacarias if she “notice[d] anything in particular about Mr. Rodriguez when [she] saw him on the train,” Zacarias answered, “He looked like a transient,” and was “dirty.”

³ The parties agreed to read Acevedo’s deposition testimony to the jury.

⁴ According to defense counsel, a TAP card is a “transit access pass.” Also according to defense counsel, a TAP card may be scanned to determine whether a passenger has paid his or her fare.

4. *Plaintiffs' experts*

Plaintiff's expert, Jeffrey Noble, a 28-year veteran of the Irvine police force, testified as plaintiffs' expert. Noble told the jury he was an expert witness in well-known cases involving Tamir Rice and Phalindo Castillo, and was retained by the prosecution in the George Floyd case but did not testify in that case. Noble testified that Rodriguez's case did not involve use of force.

Noble described the standing modified search as follows: "[I]t's a technique where, if you have a compliant subject and you want to search the person for weapons and you're going to make an arrest or you have them lawfully detained, that you would ask the person to turn his back toward you, to interlace his fingers behind his head, to spread his feet. [¶] And then the officer would approach in and grasp his fingers with one hand and use their off hand to force their [the detained person's] hips forward, so now they're in an off-balance position because they've spread their feet and they're also leaning back."

According to Noble, Officer Ron appropriately detained and appropriately arrested Rodriguez. Noble, however, opined that conducting a standing modified search "so close to the edge of the platform was unreasonable" and was the "cause" of Rodriguez's death. Noble answered affirmatively when asked whether in his opinion, "conducting the search where it happened caused Cesar Rodriguez's death."

Noble further testified, "[W]hen you put somebody in a standing modified, by definition you're putting them into an unbalance[d] position." According to Noble, Officer Ron could have moved "a few more feet away from the edge" of the platform. According to Noble, Ron's decision to conduct a standing modified

search was reasonable except for the location where the search was conducted. Noble explained that an unbalanced person could accidentally fall. Noble stated, “[P]eople fall” and “[p]eople resist” and “[p]eople respond to being taken off balance.”

Noble testified that a properly conducted standing modified search does not take a suspect off balance to the point where the suspect feels like he or she is going to fall. When asked, “In disrupting the individual’s balance, are you taking this individual off balance to the point where he or she feels like they’re going to fall,” Noble responded, “Not to that point . . . but they are off balance. . . . [B]ut they’re being held by the officer so you don’t feel like you’re going to fall” If a standing modified search is performed correctly, the person being search would not be “teetering.”

According to Noble, there was no evidence Ron failed to perform the search consistent with police standards. Noble acknowledged Rodriguez “may have been trying” to resist. Noble also acknowledged, “[T]here’s no materials that says [*sic*] he lost his balance.”

Noble testified if Rodriguez’s intention were to escape, he would have committed a crime. Noble, however, did not know whether Rodriguez intended to escape; Noble only knew Rodriguez moved his body forward. Noble added when Rodriguez “pulled away,” “that’s when he was impacted by the train.”

Noble testified police officers are not required to select the safest location but opined Officer Ron could have, and should have performed the standing modified search at the center of the train platform or off the platform.

Police Officer Paul Gallo, a lieutenant in the Long Beach police force, testified for plaintiff. He stated an officer has a duty

to take reasonable measures to protect a person in custody. Officers are trained that a person in custody may become uncooperative, and it is the officer's responsibility to make sure the environment is safe for both the officer and individual in custody. Gallo testified it was not common for a person to resist being taken into custody. Gallo further testified a police officer should anticipate danger to the officer as well as the person being arrested. Specifically, he told the jury, "[W]e would want to perform our duties of arrest and control, searches, things like that in a manner that would be safe, not just for the officer, but also for the person that we're interacting with." Gallo answered affirmatively when plaintiffs' counsel queried, "[Y]ou want to emphasize a reverence for life and you want to make sure that everybody goes home safe . . . not only the suspect, but the officer"

Gallo told the jury the purpose of a search is to look for weapons. With a standing modified search, "You want the officer to be balanced and the subject to be slightly off balance in the event that there was some type of an assault on the officer." Gallo testified, "Being off balance the way we train it in the Academy is to give an officer . . . an advantage, because when you put the person slightly off balance, if they were to want to attack the officer, they would typically first have to regain their balance and their footing to then commit the possible assault." The police department's written standards refer to taking a subject off balance when conducting a standing modified search. Finally, Gallo opined that if the standing modified search were performed correctly, the person being searched would not teeter nor be in danger of falling. The suspect remains "standing upright" during the standing modified search.

5. *Defense expert*

Edward Flosi, a 27-year veteran of the City of San Jose police force, testified that the area Ron chose to search Rodriguez was at least three feet from the train and was safe for the search. Flosi also opined Ron had lawfully detained Rodriguez and had probable cause to arrest him.

Flosi told the jury police officers learn how to imbalance a person slightly during a standing modified search. According to Flosi, “You don’t want the person so imbalanced that they are trying to regain their balance and that could be misconstrued, if you will, as some kind of resistance. So you just slightly imbalance them so that they would have to regain their balance before they could do anything like try to turn and fight or try to escape.” Flosi testified Officer Ron’s search was “within the guidelines of the standing modified search.” Flosi also testified there was no evidence Officer Ron took Rodriguez too far off balance. Flosi stated Rodriguez “suddenly pulled forward” and there was nothing to suggest Rodriguez’s action was involuntary. Flosi described Rodriguez’s actions as “consistent with an effort to escape custody from Officer Ron.”

Flosi further opined it was not reasonably foreseeable Rodriguez would have moved toward the train. He told the jury Rodriguez’s moving forward when Ron was searching was consistent with an effort to resist arrest.

During cross-examination Flosi acknowledged, “If a person is taken too far off balance and they feel like they may fall, then it’s an innate response to try to reset your balance so that you don’t fall. Nobody likes to fall, so they want to try to prevent that from happening.” Flosi further testified a person could have a “physiological response to standing too close to a moving train.”

Flosi did not testify Rodriguez was taken too far off balance or that he had a physiological response to standing approximately three and a half feet from the train.

PROCEDURAL BACKGROUND

We detail the proceedings below to give context to the parties' arguments on appeal.

The only claim before the trial court was for wrongful death. A federal court had previously found in defendants' favor as to plaintiffs' claims of excessive force and battery. Prior to trial, plaintiffs represented they would "not offer any evidence or seek to establish that Cesar Rodriguez was wrongfully or illegally detained. They also represented they would not offer evidence to establish that Cesar Rodriguez's arrest lacked probable cause. The trial court granted a motion in limine to exclude evidence inconsistent with the federal court's finding of no excessive force or lack of probable cause to arrest Rodriguez.

1. Second amended complaint

The second amended complaint contained a single cause of action for negligence/wrongful death. Plaintiffs alleged that in August 2017, Rodriguez was 23 years old and was pronounced dead at the Long Beach Memorial Medical Center. According to the second amended complaint, Ron "pushed or otherwise took Cesar Rodriguez to the ground on the train platform." Plaintiffs alleged, "Ron intentionally threw or otherwise forcefully brought Cesar Rodriguez to the edge of the train platform causing the lower half of Cesar Rodriguez's body to extend into the path of the oncoming train." Plaintiffs averred the City of Long Beach was vicariously liable for Ron's wrongful acts.

2. Defendant's answer to the second amended complaint

In their answer, defendants denied all allegations and asserted several affirmative defenses. Defendants alleged, "Any and all alleged happenings and events, damages and injuries, if any there were, were proximately caused and contributed to by the negligence of Plaintiff." Defendants asserted as an affirmative defense: "All defendants are immune from liability by virtue of California Government Code [sections] 818, 818.2, 818.4, 818.6, 818.8, 844.6, 845.2, 845.6, 821.6, 820.4 and 820.2." (Italics omitted.) Defendants also asserted immunity pursuant to section 815. Defendants averred, "Any and all of the damages or injuries sustained by Plaintiff was caused by the active, primary negligence of Plaintiff and Decedent, as compared to the passive, secondary negligence of any Defendant" Defendants further averred, "[T]he Decedent was negligent, or committed a crime, and that said negligence and/or criminal conduct contributed to their damages, if any. Recovery herein is therefore barred to the degree of that negligence and/or criminal conduct." Defendants also claimed, "Decedent knew, or should have known, that he was being detained, investigated, or questioned by a peace officer, and had the duty to refrain from using force to resist such arrest, detention, investigation, or questioning."

3. Trial

The parties stipulated to bifurcation of the trial of liability and damages.

Defendants requested a negligence per se instruction based on Penal Code section 836.6, subdivision (b), which plaintiffs opposed. Penal Code section 836.6, subdivision (b) provides: "It

is unlawful for any person who has been lawfully arrested by any peace officer and who knows, or by the exercise of reasonable care should have known, that he or she has been so arrested, to thereafter escape or attempt to escape from that peace officer.” The trial court initially agreed to give the instruction. The court then did not give the instruction because it believed escaping is not a tort, and therefore it could not constitute negligence.

After the close of evidence, defendants moved for a directed verdict arguing that under Government Code section 845.8, neither the City of Long Beach nor Officer Ron could be liable because Rodriguez was attempting to escape. Plaintiffs opposed the oral motion for a directed verdict and argued whether Rodriguez was trying to escape was a triable issue of fact. Section 845.8 immunizes public entities and public officials from liability for injuries caused by an escaping or resisting arrestee.

After denying the motion for a directed verdict, the trial court instructed the jury as follows on negligence: “The Estate of Cesar Rodriguez and Rosa Moreno claim that they were harmed by Martin Ron’s negligence. To establish this claim, the Estate of Cesar Rodriguez and Rosa Moreno must prove all of the following: one, that Martin Ron was negligent; two, that Cesar Rodriguez died; and three, that Martin Ron’s negligence was a substantial factor in causing Cesar Rodriguez’s death. [¶]

Negligence: The failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fail to do something that a reasonably careful person would do in the same situation. You must decide how a reasonably careful person would have acted in Martin Ron’s

situation. [¶] Martin Ron and the City of Long Beach claim that Cesar Rodriguez's own negligence contributed to his death. To succeed on this claim, Martin Ron and the City of Long Beach must prove both of the following: One, that Cesar Rodriguez was negligent; and two, that Cesar Rodriguez's negligence was the substantial factor in causing his death."

4. Jury verdict and judgment

The jury found Martin Ron was negligent and his negligence was a substantial factor in causing Cesar Rodriguez's death. The jury found Rodriguez was not negligent. The jury awarded plaintiffs \$6,000 in economic damages and \$12,264,000 in noneconomic damages.

The court entered judgment in the amount of \$12,270,000.

5. Defendants' motions for new trial or remittitur and for judgment notwithstanding the verdict

Defendants moved for a new trial arguing the verdict was excessive. In support of its motion, defendants made several arguments: (1) the jury panel was biased; (2) expert Jeffrey Noble offered opinions on matters beyond his expertise; (3) the verdict was not supported by substantial evidence; (4) the court erroneously failed to instruct the jury on negligence per se; (5) the court should have amended the verdict form "after Plaintiffs argued matters previously excluded from evidence," including claims of unlawful detention, false arrest, and use of force; (6) plaintiffs' counsel committed misconduct during closing argument "when he rescinded a concession of fact vital to

Defendants' case";⁵ and (7) the noneconomic damages were excessive. Defendants also filed a motion for judgment notwithstanding the verdict arguing they are immune from liability pursuant to Government Code section 845.8 and there was insufficient evidence that Officer Ron caused Rodriguez's death. Instead, the evidence demonstrated Rodriguez was negligent per se and that negligence was the sole cause of his death.

6. Plaintiffs opposed the motions

Plaintiffs opposed the motions for a new trial and for judgment notwithstanding the verdict. Plaintiffs' overarching theory was that the jury had already determined Rodriguez was not resisting arrest or attempting to escape when it allocated no liability to him on the verdict form. Plaintiffs asserted Cesar was "attempting to regain his balance" not resist arrest. Plaintiffs also asserted Rodriguez "react[ed] in fear or panic when put so close to the edge of the platform in the presence of an oncoming train."

7. The trial court denied defendants' motions

The trial court denied defendants' motions and defendants timely appealed from the judgment and the order denying the motion for judgment notwithstanding the verdict.

⁵ Defendants argued that in opposing counsel's opening statement, plaintiffs' counsel conceded Officer Ron found a bundle of methamphetamine on Mr. Rodriguez and then improperly withdrew that concession.

DISCUSSION

We begin with defendants' argument that as a matter of law, they are immune from liability because Rodriguez was escaping or resisting arrest. Accordingly, defendants contend, we should reverse and order that judgment be entered in their favor. We then address defendants' argument that the trial court prejudicially erred in denying their request for a negligence per se instruction. Because we agree with defendants' argument that failure to instruct the jury on negligence per se was prejudicial error, we do not address defendants' claim that plaintiffs' counsel's misconduct during closing argument so inflamed the jury's passion as to taint the verdict. We, however, provide guidance as to proper closing argument on remand. In the final section of our Discussion, we identify plaintiffs' remaining arguments, none of which assists in resolving the challenges defendants make on appeal. Because we reverse the judgment, we do not address defendants' claim that the jury's award of damages was excessive.

**A. Assuming Defendants Preserved the Issue,
Defendants Do Not Show That as a Matter of Law,
They Are Entitled To Immunity Under Government
Code Section 845.8**

Defendants argue Government Code section 845.8 (section 845.8) bars plaintiffs' wrongful death claim *as a matter of law* because section 845.8 immunizes public entities and public officials from liability for injuries caused by an escaping or resisting arrestee. Section 845.8 provides in pertinent part: "Neither a public entity nor a public employee is liable for" any injury caused by "[a]n escaping or escaped arrested person" or

“[a] person resisting arrest.” (§ 845.8, subds. (b)(2) & (b)(3).) Plaintiffs argue defendants forfeited claiming immunity under section 845.8 because defendants did not reference section 845.8 in their answer.

It is true, as our high court recognized in *Quigley v. Garden Valley Fire Protection Dist.* (2019) 7 Cal.5th 798, that governmental immunities generally are affirmative defenses that do not deprive courts of fundamental jurisdiction and thus can be forfeited. (*Id.* at p. 815.) What allegations short of expressly alleging section 845.8 are sufficient to prevent forfeiture is a nuanced issue. (*Quigley*, at pp. 815–816 [remanding to the Court of Appeal whether an omnibus allegation of all statutory immunities constituted sufficient notice to preclude forfeiture of immunity under a specific statute].) We need not decide whether defendants’ allegations of immunity and Rodriguez’s negligence would be sufficient notice of a claim of section 845.8 immunity because we reject on the merits, defendants’ claim that section 848.5 immunity entitled them to judgment as a matter of law.

The premise of Defendants’ argument is “Rodriguez caused his fatal injury by resisting arrest and trying to escape.” (Boldface omitted.) The jury, however, was never asked to make a finding as to whether Rodriguez was resisting arrest or trying to escape. Resisting arrest, as defined in Penal Code section 148, subdivision (a)(1), is a general intent crime requiring willful resistance. (Pen. Code, § 148, subd. (a)(1); *In re Amanda A.* (2015) 242 Cal.App.4th 537, 546; *People v. Serna* (2025) 109 Cal.App.5th 563, 570, 577 [noting “‘willfully’” means intentional as opposed to accidental conduct].) Attempted escape is a specific intent crime requiring specific intent to escape. (See *People v. Bailey* (2012) 54 Cal.4th 740, 748.) Defendants cite no

authority that this court may decide *as a matter of law* that Rodriguez acted willfully in resisting arrest or with the specific intent to escape custody. We therefore reject defendants' claim based on section 848.5 immunity that they were entitled to judgment in their favor. We express no opinion on whether defendants can successfully pursue an immunity defense at retrial.

B. The Trial Court Prejudicially Erred In Failing To Instruct on Negligence Per Se Instruction

Defendants argue the evidence supported that Rodriguez was attempting to escape and, therefore, the trial court erred in not instructing the jury that such conduct would be negligence per se. The City requested the following instruction: "California Penal Code Section 836.6(b) states that '[i]t is unlawful for any person who has been lawfully arrested by any peace officer and who knows, or by the exercise of reasonable care should have known, that he or she has been so arrested, to thereafter escape or attempt to escape from that peace officer.' [¶] If Defendants prove [¶] 1. That Cesar Rodriguez violated this law and [¶] 2. That the violation was a substantial factor in bringing about the harm, then you must find that Cesar Rodriguez was negligent. [¶] If you find that Cesar Rodriguez did not violate this law or that the violation was not a substantial factor in bringing about his death, then you must still decide whether Cesar Rodriguez was negligent in light of the other instructions."⁶

⁶ Plaintiffs' assertion that defendants did not request an instruction on the elements of Penal Code section 836.6, subdivision (b) is thus incorrect.

At oral argument, plaintiffs conceded the trial court erred in refusing the requested negligence per se instruction. They argue instead that the error was not prejudicial. We disagree.

1. *The jury did not decide whether Rodriguez resisted arrest or attempted to escape when it allocated no fault to Rodriguez*

Plaintiffs argue, “The jury, in determining Officer Ron was solely at fault, rejected the City’s claim that Rodriguez resisted arrest or attempted to escape which is the sole basis” for invoking negligence per se. (Boldface & some capitalization omitted.) Accordingly, the failure to give defendants’ requested negligence per se instruction was not prejudicial.

The instruction on negligence did not inform the jury in deciding whether Rodriguez was comparatively negligent, that the jury had to determine whether Rodriguez violated a statute prohibiting persons in custody from escaping. As quoted above, the trial court instructed the jury: “A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fail to do something that a reasonably careful person would do in the same situation. You must decide how a reasonably careful person would have acted in Martin Ron’s situation.” Because the jury was not instructed that Rodriguez was negligent if he was attempting to escape, the jury verdict finding that Rodriguez was not negligent does not also show the jury found Rodriguez was not attempting to escape.

2. *Plaintiffs do not show the city had to request an instruction on excuse*

Plaintiffs also argue, “The City’s proposed negligence per se instructions were erroneous since they did not instruct the jury to determine whether, if Rodriguez was negligent, his negligence was excused.” (Boldface & some capitalization omitted.)

If plaintiffs believed Rodriguez was escaping but had an excuse to escape, they could have requested an instruction to that effect. Plaintiffs offer no authority supporting their contention defendants were required to request an excuse instruction. Plaintiffs, moreover, identify *no* evidence that Rodriguez’s attempt to escape would be somehow excused and thus, no support for giving an excuse instruction.

3. *The failure to give a negligence per se instruction prejudiced defendants*

Instructional error requires reversal when it is reasonably probable the appellant would have received a more favorable verdict in the absence of the instructional error. (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1248–1249.) Defendants were prejudiced from the trial court’s refusal to instruct the jury on negligence per se. As defendants argue, the percipient witnesses uniformly testified Rodriguez was attempting to escape. The jury, however, was not informed that if it found Rodriguez was attempting to escape, Rodriguez would be negligent.⁷ The absence of that instruction disabled the jury

⁷ As noted in the preceding section, plaintiffs provided no evidence to support excuse and also provide no evidence to support justification.

from properly evaluating whether Rodriguez was comparatively at fault for his death. We conclude it was therefore reasonably probable defendants would have obtained a more favorable verdict had the court instructed the jury on negligence per se.

C. Guidance on Remand

Defendants argue plaintiffs' attorney committed misconduct during closing argument by emphasizing "facts" that were not in evidence and by inflammatory references to the George Floyd case, all calculated to prejudice the jury's consideration of this case. Plaintiffs dismiss defendants' argument as a " 'tempest in a teapot' " and "untethered to facts."

We do not address this challenge given our reversal for instructional error. Lest our restraint be interpreted as condoning counsel's sharp practices during his closing argument and to assist on remand, we emphasize that closing arguments should be tethered to the evidence presented at trial and should not "pander to the prejudice, passion or sympathy of the jury." (*Martinez v. Department of Transportation* (2015) 238 Cal.App.4th 559, 566.) For example, suggestions during plaintiffs' closing that Ron lacked probable cause to arrest were improper because prior to trial, plaintiffs' counsel represented he would present no evidence that Ron lacked probable cause to arrest. Suggestions that Ron used excessive force were also improper because the federal district court entered summary judgment against plaintiffs on their excessive force claim. Arguments comparing this case to the criminal trial of officers involved in the death of George Floyd were improper because the jury was required to consider the evidence in this case, not evidence in another case, especially one as notorious as the George Floyd murder.

D. Plaintiffs' Remaining Arguments Do Not Compel Affirming the Judgment

Plaintiffs argue defendants forfeited their challenge to a directed verdict by failing to make any argument about it on appeal. Defendants do not challenge the trial court's denial of their motion for a directed verdict, and therefore we do not address plaintiffs' forfeiture claim further. Plaintiffs also offer no theory as to how the denial of the directed verdict affects any issue defendants raise on appeal.

Plaintiffs argue an appellate court cannot reweigh evidence. Plaintiffs fail to explain how that proposition is relevant to this appeal. We have not reweighed evidence. We conclude as a matter of law, that the trial court prejudicially erred in failing to give a critical instruction.

Plaintiffs argue their "burden of proof was only to produce evidence demonstrating it was more likely than not the City was responsible for Cesar Rodriguez's death." (Boldface & some capitalization omitted.) Plaintiffs fail to explain how this argument is relevant to the errors defendants are asserting on appeal.

Plaintiffs argue, "The City's opening brief violates the fundamental rule that, when arguing the judgment is not supported by substantial evidence, the brief must set forth all material evidence, not just favorable evidence." (Boldface & some capitalization omitted.) Defendants, however, do not argue on appeal that the judgment is not supported by substantial evidence but instead, that the trial court's instructional error was so prejudicial as to require reversal.

Plaintiffs argue defendants do not have a viable argument that the jury was biased because they did not provide excerpts of

voir dire or argue the court erred. Defendants do not argue jury bias on appeal.

Plaintiffs argue, “The City and its witnesses play word games to diminish the effect of a standing modified search on a detained person’s balance.” (Boldface & some capitalization omitted.) Plaintiffs do not explain how this is relevant to the issues on appeal.

Finally, we fail to discern the relevance of plaintiffs’ argument that other cases exist in which a detainee fell because the detainee was off-balance. Assuming *arguendo* plaintiffs have accurately described other cases, any such other cases do not bear on whether in this case, the trial court erred in refusing to instruct the jury on negligence *per se*.

DISPOSITION

The judgment is reversed. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, Acting P. J.

We concur:

WEINGART, J.

M. KIM, J.