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U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRACY WATSON; THOMAS  
WATSON,

Plaintiffs - Appellants,

v.

CITY OF HUNTINGTON BEACH,

Defendant,

and

BRUCE MURPHY, #0213, individually  
and as Peace Officer, e/s/a William  
Murphy; SCOTT WINKS, #1028,  
individually and as Peace Officer; DOUG  
MARTIN, #1046, individually and as  
Peace Officer,

Defendants - Appellees.

No. 06-55235

D.C. No. CV-04-00141-DOC

MEMORANDUM \*

Appeal from the United States District Court  
for the Central District of California  
David O. Carter, District Judge, Presiding

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Argued and Submitted November 6, 2007  
Pasadena, California

Before: B. FLETCHER, REINHARDT, and RYMER, Circuit Judges.

Following their arrest and prosecution for violation of California Penal Code section 148(a)(1) (“section 148”),<sup>1</sup> plaintiffs Tracy and Thomas Watson (“Plaintiffs”) brought a civil rights action under 42 U.S.C. § 1983 against several police officers and the City of Huntington Beach (“Defendants”), claiming unlawful arrest, excessive force, and several other causes of action under federal and state law. On December 28, 2005, a jury returned a verdict for Defendants on all claims. On appeal, Plaintiffs contend that the district court incorrectly instructed the jury on unlawful arrest and excessive force.<sup>2</sup> Because we are not persuaded that the court’s instructions were incorrect or that any error was not harmless, we affirm.

First, Plaintiffs contend that the district court erred by failing to instruct the jury that the burden of proving probable cause, which is a defense to a claim of

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<sup>1</sup>This section makes it a misdemeanor to “willfully resist[], delay[], or obstruct[] any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment.” Cal. Penal Code § 148(a)(1) (2007).

<sup>2</sup>Because Plaintiffs challenge the court’s instructions as misstatements of law, we review those instructions de novo. *See Gilbrook v. City of Westminster*, 177 F.3d 839, 860 (9th Cir. 1999).

unlawful arrest, rested on Defendants. But Plaintiffs misconstrue the law. As we explained in *Dubner v. City and County of San Francisco*, once a plaintiff makes a prima facie case of unlawful arrest by showing that the arrest was conducted without a valid warrant, the burden of production shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. 266 F.3d 959, 965 (9th Cir. 2001). However, it is the plaintiff who has the ultimate burden of proof (or burden of persuasion) on the issue of unlawful arrest. *Id.* Once the defendant meets his burden of production, the question whether the arresting officers in fact had probable cause is submitted to the jury, *see Gilker v. Baker*, 576 F.2d 245, 247 (9th Cir. 1978), and the plaintiff must prove by a preponderance of the evidence that the arresting officers lacked probable cause.

Here, Defendants met their burden of production by providing at least some evidence that the arresting officers had probable cause to believe that Tracy Watson, by effectively disobeying repeated orders to move back,<sup>3</sup> had delayed or obstructed them in their arrest of Thomas Watson, in violation of section 148. Accordingly, the question whether the arresting officers had probable cause was

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<sup>3</sup>It is undisputed that Officers Martin and Winks repeatedly ordered Tracy Watson to move back, and that while Tracy Watson would initially take a step backwards, she would promptly step forward again. In the context of this case, we can construe such actions only as a failure to obey the police orders.

properly submitted to the jury, and the district court correctly instructed the jury that Plaintiffs bore the burden of proof.

Second, Plaintiffs contend that the district court misstated the law in instructing the jury that it should conclude that the arresting officers had probable cause if it found that “Tracy Watson refused repeated requests by Officers Martin and/or Winks to step back while they were effecting the arrest of Thomas Watson, and that Officers Martin and Winks were interrupted or delayed in their efforts to arrest Thomas Watson by reason of Tracy Watson’s refusal to step back.” Specifically, Plaintiffs argue that the court erred in failing to instruct the jury that section 148 is not violated by (1) failing to respond with alacrity to police orders or (2) temporarily distracting a police officer in the exercise of his duty.

While Plaintiffs are correct in stating that failure to respond with alacrity to police orders does not constitute a violation of section 148, *see In re Muhammed C.*, 116 Cal. Rptr. 2d 21, 24 (Cal. Ct. App. 2002) (citing *People v. Quiroga*, 20 Cal. Rptr. 446, 448 (Cal. Ct. App. 1993)), they were not entitled to have this point of law included in the jury instruction because there was no foundation in the evidence for a finding that Tracy Watson failed to respond with alacrity to police orders. *See Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002) (“A party is entitled to an instruction about his or her theory of the case if it is supported by law

*and* has foundation in the evidence.” (emphasis added)). The undisputed fact that Tracy Watson initially complied with each order to step back but promptly stepped forward again demonstrates that she did not fail to respond with alacrity to police orders but rather, like the plaintiff in *Muhammed C.*, “acknowledged the officers’ orders” and “affirmatively responded to the police orders with defiance.” 116 Cal. Rptr. 2d at 24.

We are also not persuaded that the district court was required to instruct the jury that temporarily distracting a police officer does not violate section 148. The court in *Muhammed C.* referred to this point as “simply an interpretation of the evidence,” 116 Cal. Rptr. 2d at 24, and the court’s actual instruction left Plaintiffs with ample room to argue to the jury that it should interpret the evidence of Tracy Watson’s actions as not rising to the level of interrupting or delaying Officers Martin and Winks in their arrest of Thomas Watson. *See Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000) (holding that jury instruction provided plaintiff “with ample room to argue his theory of the case to the jury”).

Moreover, even if the court did err in failing to give Plaintiffs’ proposed instruction, such error was more probably than not harmless. *See Dang v. Cross*, 422 F.3d 800, 811 (9th Cir. 2005) (“An error in instructing the jury in a civil case requires reversal unless the error is more probably than not harmless.” (internal

citation and quotation marks omitted)). The proposed instruction refers only to what constitutes a violation of section 148 but says nothing about what facts would support a finding that probable cause existed. We have explained that probable cause exists when “under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.” *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (internal citation and quotation marks omitted). Even if the jury had been given Plaintiffs’ proposed instruction and had found that Tracy Watson only temporarily distracted Officers Martin and Winks, it is more probable than not that the jury would still have found that the arresting officers had probable cause to believe that Tracy Watson had violated section 148, considering that the line between temporarily distracting an officer and interrupting or delaying that officer is a particularly fine one.

Third, Plaintiffs contend that the district court erred by failing to include in its instructions on excessive force two additional instructions: (1) that “statements by an officer that he fears for his safety or the safety of others is not enough” to support a finding that use of force was reasonable because “there must be objective factors to justify such a concern”; and (2) that “if a warning that force will be used

is feasible, a warning should be given and the failure to give such a warning is a factor to be considered” in the reasonableness calculus.

As to the first, Plaintiffs were not entitled to the proposed instruction because the court’s actual instructions, as a whole, fairly and correctly covered the substance of the applicable law. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001). Specifically, the court’s instructions that reasonableness of the use of force “must be judged objectively from the information available at the time” and that the jury could consider “whether the plaintiff posed a reasonable threat to the safety of the officers or others” made it sufficiently clear to the jury that Officer Murphy’s stated concern for the safety of his colleagues would not support a finding that his use of force was reasonable without objective factors justifying his concern. Indeed, a court is not required to incorporate a proposition of law suggested by counsel where, as here, the instructions as given allowed the jury to determine intelligently the issues presented. *See Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381, 1398 (9th Cir. 1984).

In any event, any error by the district court was more probably than not harmless. *See Dang*, 422 F.3d at 811. At trial, Officer Murphy testified that prior to his arrival at the scene he had received information suggesting that the Watsons might have been involved in an episode of domestic violence, and had later heard

over the radio that police officers were fighting with a subject. Officer Murphy further testified that when he arrived at the scene he heard Officer Winks and Tracy Watson yelling at each other, and observed Tracy Watson standing close to Officers Martin and Winks with her arms extended towards them. Accordingly, even if the court had given Plaintiffs' proposed instruction, the jury would more probably than not have found that Officer Murphy's stated concern for the safety of his colleagues was justified by objective factors.

Plaintiffs were also not entitled to the second proposed instruction concerning the failure to give a warning because that instruction misstated the law by failing to explain that the jury should consider such failure only if the use of force might have resulted in serious injury. *See United States v. George*, 420 F.3d 991, 1000 (9th Cir. 2005) (explaining that a party is not entitled to a jury instruction that misstates the law). In our opinion in *Deorle v. Rutherford*, on which Plaintiffs based their proposed instruction, we held that a warning should be given, and that failure to do so is a factor to be considered, "if the use of force may result in *serious injury*." 272 F.3d 1272, 1284 (9th Cir. 2001) (emphasis added). That holding was based on our finding that firing a lead-filled "beanbag round" could cause serious injury or death, as demonstrated by the fact that it had caused the plaintiff to lose an eye and have lead shot implanted in his skull. *See id.* at

1275, 1279 n.13. Plaintiffs have cited no cases indicating that a failure to give a warning should always be considered in the reasonableness calculus, regardless of what type of force is used. In this case, it was at least a question for the jury whether Officer Murphy's conduct towards Tracy Watson constituted use of force that might result in serious injury, and Plaintiffs' proposed instruction misstated the law by failing to include the "serious injury" qualifier.

In any event, Plaintiffs were not entitled to their proposed instruction because the court's actual instructions left them with ample room to argue to the jury that it should take into consideration Officer Murphy's failure to give a warning. *See Brewer*, 210 F.3d at 1097. Indeed, we have upheld as adequate the very instruction given here – that “[i]n deciding whether excessive force was used, you should consider the totality of the circumstances at the time” – despite requests for more detailed instructions addressing the specific factors to be considered in the reasonableness calculus. *See id.*

For the foregoing reasons, we reject Plaintiffs' challenges to the district court's unlawful arrest and excessive force instructions, and affirm the judgment.

**AFFIRMED.**