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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

FILED

JAN 30 2006

Court of Appeal - First App. Dist.
DIANA HERBERT

By _____

CLARENCE WILSON,

Plaintiff and Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant and Respondent.

A108468

(San Francisco County Super. Ct. No. 415821)

Clarence Wilson appeals from an adverse civil judgment in an action seeking damages for personal injury. He contends the judgment must be reversed because (1) the defense “proffered” a transcript of an audio tape that had been “tampered with”, (2) the trial court allowed the jury to listen to the tape even though it had not been authenticated properly, and (3) a witness who testified to the authenticity of the tape committed perjury. We will affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant has provided only a partial record so it has been difficult to ascertain the facts of this case. As best as we can tell, on December 17, 2001, two police officers working for the City and County of San Francisco detained appellant mistakenly

believing he resembled a suspect who had just robbed a bank. The officers realized their mistake quickly and released appellant.

One year later, on December 17, 2002, appellant filed a complaint seeking damages for assault and battery¹ against San Francisco and the officers who arrested him.² The case proceeded to a jury trial and resulted in a verdict in favor of San Francisco.

II. DISCUSSION

Appellant raises three issues on appeal, all of which arise out of the same basic facts.

After appellant was arrested, he filed a complaint with the Office of Citizen Complaints (OCC), an organization that investigates allegations of police misconduct. On January 30, 2002, Jessica Cole, who worked as an investigator for the OCC, called appellant on the telephone and questioned him about his encounter with the police. Following established procedure, Cole taped the conversation.

At trial, San Francisco wanted to introduce the tape of Cole's conversation with appellant. Appellant objected arguing that the transcript of the tape showed it had been altered. According to appellant, the transcript included statements he had not made, and the sequence of the conversation was not accurate. The court postponed ruling on appellant's objection and gave San Francisco the opportunity to authenticate the tape.

The following day, James Allen, the director of the OCC and its custodian of records, testified to authenticate the tape. He said that investigators working for the OCC routinely tape their interviews with persons who file complaints. According to Allen, investigators are trained on how to conduct interviews by phone, they use tape machines that work "very well", and once a tape is completed it is put into an envelope and sealed. Allen testified that no one outside of the OCC had access to the tape Cole

¹ The complaint contained two other causes of action. Appellant concedes those causes of action were dismissed through a motion for summary judgment.

² We will refer to the defendants collectively as San Francisco.

had made, that he made a copy of the tape the previous evening, and that the copy was complete and accurate.

Based on Allen's testimony, the court allowed San Francisco to play a portion of Cole's tape to the jury. The court also prepared a transcript of the tape that highlights those portions of the tape that were played.

Appellant now raises three arguments. First he contends the judgment against him must be reversed because the defense "proffered" a transcript of the tape that was "tampered with." We reject this argument because it is based on a false premise: that the transcript reflected a tape that had in fact been altered. The trial court did not make any such finding, and indeed, when the court admitted the tape (and transcript) it impliedly found the tape had not been altered. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) Appellant has not cited any authority that holds or suggests the court was *required* to find the tape had been altered. Absent such authority, we conclude appellant has failed to carry his burden of showing the trial court erred. (*Hughes v. Wheeler* (1888) 76 Cal. 230, 234; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 518, pp. 562-563.)

Second, appellant contends the judgment must be reversed because the trial court erred when it ruled the tape had been authenticated properly. We need not delve into the intricacies of the authentication rule because any possible error on this ground was harmless. To obtain a reversal, an appellant must not only show error, he must show injury from the error. (*Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318; see also 9 Witkin, Cal. Procedure, *supra*, § 409, p. 461.) Appellant has not carried his burden. We do not know precisely what portions of the tape were played for the jury and we do not know how those portions of the tape were relevant to appellant's case. While appellant has argued vaguely that the tape conflicted with the testimony he provided at trial, appellant has not described the nature of that conflict nor has he provided us with a transcript of his testimony. We decline to "guess" how playing the tape might have affected the jury's verdict. Absent cogent argument to the contrary, we must conclude any possible error was harmless.

Third, appellant contends the judgment must be reversed because Allen committed perjury when he testified at trial that he may have listened to the tape when he reviewed the file. This was perjury, appellant contends, because Allen was not working for the OCC when his file was closed.

We see no perjury here. The pertinent aspect of Allen's testimony is as follows:

"Q. So you stated earlier that you listened to the original tape?

"A. That's correct.

"Q. When was this?

"A. Originally? When was the first time I listened to it?

"Q. Yes.

"A. I may have listened to it when I reviewed the file. I don't remember this file.

"Q. When was that?

"A. I don't recall the exact date when it closed. When I close the file, at times I do listen to the tape. That may have been the first time that I listened to it.

"Q. That's what I'm trying to find out. Was it this month or last year, year before last?

"A. I don't have knowledge – I don't have recollection as to when this tape – excuse me, when this file closed. I can't tell you when the first time. I listened to this tape last night.

"Q. Last night?

"A. Yes.

"Q. That wasn't the first time you listened to this tape?

"A. I may have listened to it before. I close about a thousand cases a year, I don't recall each one."

These passages show Allen *did not* state that he listened to the tape prior to closing the file. He testified quite clearly that he did not know if he listened to the tape prior to that point. There is no ground for a perjury allegation.

III. DISPOSITION

The judgment is affirmed.

JONES, P.J.

We concur.

STEVENS, J.

SIMONS, J.