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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DANIEL GEBREMEDHIN,
Plaintiff and Appellant,

v.

SAN FRANCISCO BAY AREA RAPID
TRANSIT DISTRICT,
Defendant and Respondent.

A131488

(San Francisco City & County
Super. Ct. No. CGC08480937)

Daniel Gebremedhin sued the San Francisco Bay Area Rapid Transit District (BART) for injuries he sustained when a train operator allegedly closed the doors of a train car on his ankle, causing him to fall face forward and injure his back. The jury returned a defense verdict.

Gebremedhin appeals, claiming the court (1) improperly admitted a photograph of another man with his leg stuck in a BART train door and improperly allowed the jury to view a DVD in connection with a reconstruction expert's testimony that showed a man (not Gebremedhin) walking into a BART train from a position similar to that occupied by Gebremedhin before he stepped into the train; and (2) erred in instructing the jury when it inquired during deliberations about the scope of evidence that could be considered in assessing negligence. He also claims juror misconduct was disclosed in jurors' answers to a posttrial questionnaire, which was sent to jurors by Gebremedhin's counsel at the court's direction in lieu of using juror affidavits to support a new trial motion.

We conclude the juror questionnaires could not properly be used to prove either misconduct by the jurors or prejudice from the first two alleged errors because the jurors' answers were inadmissible under Evidence Code section 1150. We also conclude the photograph was properly admitted, the DVD was properly played for the jury, and to the extent the jury was confused about whether it was in evidence Gebremedhin waived any error by failing to request a clarifying instruction. Finally, the jury's consideration of the evidence was properly restricted by the mid-deliberation instruction, and in any case there was no objection to that instruction by Gebremedhin. We therefore affirm.

FACTS

Factual background and trial

On July 8, 2008, Gebremedhin worked as a limousine driver. Sometime between 12:45 p.m. and 1:00 p.m. he received a call from his wife, advising him that the childcare provider had canceled unexpectedly, and asking him to come home and watch their children so that she could go to work that afternoon. Gebremedhin agreed and said he would meet her at the West Oakland BART station in 30 to 40 minutes. They also needed to pick up the children from school, and she needed to get to work. Two of Gebremedhin's three children got off school at 2:20 p.m., and the youngest child's day care ended at 3:00 p.m. His wife was due at work at 3:30 p.m.

Gebremedhin, who was returning from dropping off a client in Napa, drove to South San Francisco to drop off the limousine and got a ride to the San Francisco International Airport (SFO), where he planned to catch BART to the East Bay. He testified he arrived at the SFO BART station platform at about 2:10 p.m. A train sat in the station with its doors closed. The SFO BART station is at the end of the line and trains normally stay there for ten minutes before returning to the East Bay. The doors remain closed during that time.

Gebremedhin testified that he stood on the BART platform for about four to five minutes before the train doors opened. He was one or two feet behind the yellow safety line that runs the length of the platform, at the front of a line of patrons waiting to board the train. He was the first person in line, and when the doors opened he walked onto the

train at a normal pace. He claims the doors closed unexpectedly within 2 to 3 seconds after they opened, catching his right ankle and pitching him face forward onto the floor of the train. He testified and presented medical testimony that he sustained not only a leg injury but a serious and life altering back injury.

When a BART train is parked in a station its doors cannot be closed without being activated by the operator of the train through the pushing of a button on the operator's consol; the doors do not close automatically. BART protocol requires the operator to put her head out of the window and look down the entire length of the train before pushing the button to close the doors, to ensure that no passengers are stepping onto or off of the train. Once the button is pushed to close the doors it is not possible to cancel that command.

BART records show that the train Gebremedhin tried to board was scheduled to leave at 2:24 p.m. At 2:25 a passenger was reported ill. The train did not actually depart until 2:33 p.m.

The operator of the train was Christine Young. Young could not specifically recall whether she did a "look back" on that particular occasion—indeed she claimed to recall virtually nothing about the incident—but she testified that she performs a look back as part of her standard procedure before closing the doors on trains carrying passengers.¹ She never departed from this procedure, never had a call from a patron about an injured passenger, and could not recall ever leaving the cab of the train on the date in question. She was never questioned by BART about the incident.

After Gebremedhin fell, other passengers assisted him into a seat on the train. One of the passengers, a nurse, noted that Gebremedhin was sweating profusely and asked if he was a diabetic. Someone used the intercom to alert the train operator. The train door reopened. Gebremedhin claimed that Young came back to the train car and looked

¹ Gebremedhin points out that Young worked most of the time in the Pittsburg train yard, where trains are taken for repair or service and passengers are not present. Gebremedhin infers from this that Young may have forgotten to do a "look back" on the date of his fall.

inside. Someone helped him off the train, either another passenger or (according to Gebremedhin) two BART employees. They positioned him so that he was sitting on the train platform with his back leaning against a pillar.

BART operations supervisor Anna Contreras found him there and asked if he was okay. He told Contreras he hurt his ankle boarding the train but said he was okay and she should not call for medical assistance. She ultimately did call paramedics, however, because Gebremedhin could not stand on his ankle. A BART police officer also talked to Gebremedhin and wrote a report about the incident.

Initially Gebrmedhin reported pain only in his ankle. In the ambulance on the way to the hospital, and at the hospital, Gebremedhin began to report back pain as well. He was ultimately diagnosed with an annular tear and herniated disc.

Gebremedhin pursued exclusively a theory of operator negligence at trial; he claimed the train operator failed to ensure that all patrons cleared the doors before pushing the door close button. BART presented uncontested evidence that the train car's doors had functioned normally that day. BART also adduced testimony that it transported more than 107 million riders in 2008 and only seven claims were filed alleging injuries while boarding.

BART built its defense around the fact that Gebremedhin was late for meeting his wife and was in a hurry when he arrived at the BART station. Though it presented no eyewitnesses, BART's theory was that Gebremedhin had tried to rush onto the train as the doors were closing; that is why he was sweating and that is how his ankle was caught in the door.

In support of its defense BART called David Strohl, a BART engineer, who testified that once the close door button is pushed, the doors of a train take two to two and one-half seconds to close. It also called an expert in mechanical engineering, Dean Ahlberg,² who testified that Gebremedhin's version of the events could not have occurred because a person standing one to two feet behind the yellow safety line would have had

² He is referred to as Dean Dahlberg in some portions of respondent's briefs.

time to safely clear the doors in two to two and one-half seconds, even if the operator had pushed the door close button as soon as the doors opened.

As a demonstrative aid to his testimony, Ahlberg had taken a staged photograph intended to depict a man in the position in which Gebremedhin found himself at the time of his fall. Specifically, the photo, admitted in evidence as exhibit 508, showed a man with his right ankle stuck between the door panels of a BART train, standing upright in the interior of the train. The man in the photograph was Strohl. The photograph was taken at the Hayward train yard, not at a BART platform.

Ahlberg had also created a short DVD showing Strohl entering a BART train at the Colma BART station platform. The train was stopped at the platform, and Strohl stood one to two feet behind the yellow safety line, where Gebremedhin said he had been standing before entering the train. The DVD showed four attempts by Strohl to enter the train as the door close button was pushed. In each scenario, Strohl cleared the doors before they closed while moving forward at a normal walking pace.

BART sought to introduce the accident reconstruction DVD into evidence and requested that it be shown to the jury. After conferring with counsel, the court allowed the jury to view the DVD accompanied by Ahlberg's narration. At the conclusion of Ahlberg's testimony, outside the presence of the jury, the court excluded the DVD from evidence, considering it merely a demonstrative aid to Ahlberg's testimony.

In addition to evidence concerning the cause of the accident itself, Gebremedhin's counsel elicited testimony about BART's response, including that BART did not hold the train to obtain passenger names or inspect the car, did not investigate whether any DVD captured the event, did not take down the names of passengers who shouted to the station agent about the event, and did not even interview Young about the incident. In closing argument, Gebremedhin's counsel focused at length on these matters, which he referred to as a "coverup" by BART.

BART's counsel argued that Gebremedhin, in a hurry to meet his wife and pick up his children, must have tried to enter the train after the doors had started to close. That is the only way, he argued, the train door could have entrapped Gebremedhin's ankle. He

urged the jury to focus on the facts surrounding the fall: whether Young negligently failed to do a “look back” before closing the train doors, or whether Gebremedhin, rushing to meet his wife, tried to board the train after the doors began to close.

The jury’s deliberation and verdict

The jury began deliberating on November 1, 2010. A special verdict form had been prepared which contained six questions, the first being: “Was the defendant San Francisco Bay Area Rapid Transit District, through its employee Christine Young, negligent?” Question no. 2 dealt with causation, no. 3 with damages, and nos. 4 through 6 with contributory negligence. The jury was instructed not to move on to question no. 2 unless a nine-member majority answered “yes” to question no. 1.

On November 2, the jury sent to the court request no. 1, asking for a read back of testimony by certain witnesses, as well as asking for the “video.” No response was made about the DVD.

On November 3, 2010, the jury sent request no. 4³ that, in addition to requesting a read back of portions of the testimony, asked about the DVD again: “Is the video not available?” Again, no response was given with respect to the DVD.

On November 4, 2010, the jury requested clarification whether nine members had to agree that BART was negligent before moving on the question no. 2 on causation.

Later that afternoon the jury sent another request, which asked about the special verdict form: “In question 1 is the negligence limited to Christine Young pushing the button and not doing a look back?” After conferring with counsel, the judge responded: “all actions or failures to act by Christine Young on the day and at the time of the incident which may have caused Gebremedhin’s fall should be considered.”

Within two minutes thereafter the jury reached a verdict, voting nine to three in favor of BART on question no. 1. Judgment was entered for defendant on December 6, 2010.

³ Request no. 2 asked for a read back of specific portions of Young’s testimony. Request no. 3 was for a longer lunch break.

Posttrial motions

On December 22, 2010, Gebremedhin filed a motion for judgment notwithstanding the verdict or, alternatively, for a new trial. On the same date he filed an ex parte application to extend time to serve and file juror affidavits, appearing in support of the application on December 27, 2010. At that hearing the court explained that attorney-drafted affidavits were sometimes unreliable and instructed Gebremedhin's counsel to draft a list of questions that he wished to ask the jurors. Counsel was ordered to submit the questionnaire to BART's attorney for review and input before mailing it to the jurors. The court further instructed that the jurors' response to the questionnaires (under penalty of perjury), rather than attorney-drafted affidavits, be submitted in support of the motion for a new trial.

Gebremedhin obtained questionnaire responses from six jurors. Those responses were attached to the memorandum in support of the motion for a new trial. BART objected to the use of the questionnaire responses in lieu of affidavits, and also argued that the questionnaire responses were inadmissible under Evidence Code section 1150. The responses themselves will be discussed in more detail below.

On February 4, 2011, the court denied Gebremedhin's motions for new trial and judgment notwithstanding the verdict. On March 3, 2011, Gebremedhin filed his notice of appeal.

DISCUSSION

I. Admitting the photograph and allowing the jury to view the DVD during Ahlberg's testimony

Gebremedhin's first claim of error is that the court allowed Ahlberg to use demonstrative evidence to illustrate his testimony. Specifically, Gebremedhin objects to the admission of the photograph depicting Strohl with his ankle stuck in a BART train's door and to the use before the jury of the accident reconstruction DVD. Preliminarily, we note that only the photograph was admitted in evidence; the court allowed the jury to view the DVD during Ahlberg's testimony but did not admit it in evidence.

We review the admission or use of such evidence at trial under an abuse of discretion standard. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1111; *Smalley v. Baty* (2005) 128 Cal.App.4th 977, 984; *People v. Skinner* (1954) 123 Cal.App.2d 741, 751-752.) Such an abuse is shown only if the court's ruling exceeded the bounds of reason. (*Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762.)

A. Photograph

We find no error in the admission of the photograph. It was clear from Ahlberg's testimony, and from the photograph itself, that Gebremedhin was not pictured in the photograph and that the position of Strohl's body in the photograph did not accurately replicate that of Gebremedhin at the time of his fall in that Strohl was standing upright in the photo, not falling down. The point of the photograph was, in Ahlberg's words, "an attempt to recreate that moment when the doors according to [Gebremedhin's] testimony had trapped his leg." Thus, the photograph was intended to approximate Gebremedhin's position after his leg was caught in the door, but before he fell. Ahlberg said it was based on Gebremedhin's deposition testimony.

BART argues Gebremedhin's objection, made off the record, was inadequate to preserve the issue for appeal. Gebremedhin's counsel also reminded the jury in closing argument that the photograph was "staged."

We need not decide the issue, for even addressing the argument on the merits, we find no error. Demonstration or reconstruction evidence may be admitted if (1) it is relevant, (2) its conditions and those existing at the time of the alleged occurrence are shown to be substantially similar, and (3) the evidence will not consume undue time or confuse or mislead the jury. (*DiRosario v. Havens* (1987) 196 Cal.App.3d 1224, 1231; *Endicott v. Nissan Motor Corp.* (1977) 73 Cal.App.3d 917, 930.) Gebremedhin does not challenge the first or third condition, but claims BART failed to lay a proper foundation as to the second condition, namely that the photograph and the actual scene were "substantially similar." Since BART offered the evidence, it had the burden of proving

the foundational requirements. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387-1388; *People v. Bonin* (1989) 47 Cal.3d 808, 847.)

Referring to the photograph as “experimental” evidence, Gebremedhin argues that BART bore the burden of showing the conditions at the time the photograph was taken were “substantially identical” to those at the time of his fall. (*People v. Bonin, supra*, 47 Cal.3d at p. 847.) BART argues that the photograph must be a correct and accurate reproduction of the site or object depicted; it need not be an exact reproduction of the actual site of the event. (*Anello v. Southern Pacific Co.*(1959) 174 Cal.App.2d 317, 322-323.)

Gebremedhin points out that the photograph was taken in the Hayward train yard, as opposed to at the SFO BART station platform, where the actual event transpired. But the photograph depicts the interior of a BART train with a man’s leg stuck in the door. The jury was in no way misled and the evidence was not inflammatory. (Cf. *People v. Rivera* (2011) 201 Cal.App.4th 353, 360-361, 363-367 [demonstration of strangulation].) Ahlberg explained that the photograph was taken at the Hayward train yard. Since the point of the photograph was to illustrate an approximation of Gebremedhin’s position at the moment his foot was caught in the train’s doors, any differences in the background of the photograph showing any part of the exterior setting where the train was stopped would seem to be irrelevant. Gebremedhin has failed to explain why dissimilarities in the two backgrounds would be significant.

Ahlberg also testified that the photograph depicted Strohl, not Gebremedhin. This must have been obvious to the jury. But Gebremedhin complains that there was no foundation laid that he and Strohl were of the same stature and build. It is not clear to us how a person’s stature would affect his appearance as his leg became trapped in a closing BART door. Even now, Gebremedhin fails to explain how any difference in their statures could have affected the jury’s verdict. Such a failure is reason enough to reject Gebremedhin’s argument. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963; *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 81-82.) More important, the jury was able to observe Gebremedhin throughout the trial, and

Strohl was also a witness. Thus, the jurors could make their own observations as to the relative size of the two men and how it might have affected the weight given to the photograph.

Finally, the photograph depicts Strohl's right toe touching the ground as his ankle remains stuck in the door. Gebremedhin argues there was no evidence indicating his toe was touching the ground when his ankle became trapped in the train door. This point was explored on cross-examination.

Gebremehdin further argues that exhibit 508 does not show the subject in a falling position. True, but it takes little imagination to believe a person could be thrown off balance and fall as a result of having one's ankle stuck in a train door. Ahlberg did not use the photograph to suggest that getting his foot caught in the door did not cause Gebremedhin's fall or that a more careful person would not have fallen. BART's counsel did not refer to the photograph at all in closing argument.

Again, the jury was in no way misled. Ahlberg himself testified the photograph was "staged." And the court, too, told the jury the photograph was "staged": "Ladies and gentlemen, I'm going to let this picture in but you are not to consider it as a reenactment or a direct event of what happened what Gebremedhin alleges happened that particular day because it's staged. But it is, I'm letting it in to sort of, to, upon which the following [Ahlberg's] testimony is going to be based. All right? It doesn't depict the actual event[,] clearly. You're not to use it. I'm sure there will be lots of cross-examination on the actual picture but go ahead."

Although the court's comment may not have clarified the photograph's use to the degree that Gebremedhin now insists was necessary, he made no objection to the court's explanation and asked for no further clarification. To the extent the court's remarks were confusing, they tended to tell the jury to make no use of the photograph whatsoever. Any confusion was not prejudicial to Gebremedhin.

We find there was no abuse of discretion in the court's determination that the scene depicted was sufficiently similar to the scene preceding Gebremedhin's fall to

warrant admission of the photograph. And even if we were to assume error we would find no prejudice. (Cal. Const., art. VI, § 13.)

B. DVD

Allowing the jury to view the DVD marked as exhibit 514 during Ahlberg's testimony was in essence a ruling that it was a proper demonstrative aid to the jury's understanding of the testimony. Such use may properly be made of an exhibit even if it is not admitted in evidence. (*People v. Cossey* (1950) 97 Cal.App.2d 101, 112; *St. George v. Superior Court* (1949) 93 Cal.App.2d 815, 816.)

We note first that Gebremedhin's counsel did not object to having the DVD played for the jury. When the subject came up he said he did not know whether he objected because he had never seen the DVD before.⁴ The court then excused the jurors and allowed counsel to view the DVD outside the jury's presence. After viewing it Gebremedhin's counsel complained that no timing device was depicted on the DVD but made no specific objection. It was then played for the jury.

Gebremedhin at times argues his position as if the DVD had been admitted into evidence; it was not, but the jurors were allowed to view it during Ahlberg's testimony as a demonstrative aid to help them understand his work and conclusions in reconstructing the scene of Gebremedhin's fall. As Ahlberg explained, he designed his reconstruction of the scene by using Gebremedhin's deposition testimony that (1) he was standing one to two feet behind the yellow safety strip when the train car doors opened, (2) he entered the train car at a normal walking speed, and (3) the train car doors closed on his right ankle before he could clear the doors. To recreate the event Ahlberg had Strohl stand in the same location, walk forward at a normal pace, and enter the train car.

Ahlberg recorded Strohl in four different scenarios. Each of the four scenarios began with the train doors opening. In the first two scenarios Strohl stood two feet

⁴ According to defense counsel's representation, Ahlberg had been disclosed in discovery as a retained expert, but Gebremedhin's counsel did not take his deposition. This apparently accounts for the fact that Gebremedhin's counsel had not seen the video before trial.

behind the yellow strip. In the first scene the train operator was instructed to press the door close button when he or she saw Strohl take his first step toward the open train doors. In the second attempt the close door button was pushed as soon as Strohl began to lift his foot to step forward. The third and fourth scenarios repeated this procedure starting from one foot behind the yellow line. In each scenario Strohl cleared the entry without having his leg caught in the doors.

In determining admissibility of a DVD, the court was required to determine whether (1) it was a reasonable representation of that which it is alleged to portray; and (2) the use of the DVD would assist the jurors in their determination of the facts, and would not mislead them. (*DiRosario v. Havens, supra*, 196 Cal.App.3d at pp. 1232-1233.)

Gebremedhin points out that the DVD was taken at the Colma BART station instead of the SFO BART station. He again mentions a difference in stature between Strohl and himself. He claims the speed at which the train doors in the DVD closed was not in evidence (meaning that a stopwatch or other timing device was not shown in the DVD). And he notes the lack of evidence that Strohl was walking at the same pace as Gebremedhin walked on the date of his injury.

There can be little question that Ahlberg's testimony about his findings was made more understandable by this visual aid. The foundation laid for use of the DVD was sufficient to overcome Gebremedhin's present criticisms. Ahlberg testified that he made the DVD at the Colma station. Strohl, a BART engineer, also explained to the jury that BART doors require two to two and one-half seconds to close once the close door button is pushed. Gebremedhin did not claim that the doors on the car he tried to enter were functioning abnormally on the date in question. And Gebremedhin himself testified that he was standing one to two feet behind the yellow safety strip when he began his entry onto the train.

Gebremedhin fails to explain how any differences in station or stature would have affected the verdict. To the extent there were flaws in the DVD that might have made a difference to the result, Gebremedhin's counsel was free to exploit such weaknesses

through the testimony of a different expert⁵ or in closing argument. Instead he chose to explore its weaknesses through cross-examination alone. The defects now pointed out by Gebremedhin went to the weight to be accorded the DVD, not to the propriety of its use as a demonstrative aid. “[W]e must assume that the jurors were intelligent people and that they understood and took into account the differences identified . . . on appeal.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1115.) We find no abuse of discretion in the trial court’s rulings.

Gebremedhin further complains that the ruling that the DVD was not independently admissible was made outside the jury’s presence, and it is not clear that the jury was ever informed that the DVD was not in evidence. Gebremedhin’s counsel did nothing to ensure that the jury was so informed.

Indeed, when the jury made its mid-deliberation request to see the DVD, Gebremedhin did not ask that it be admonished that the DVD was not in evidence, nor did he request an instruction similar to CACI No. 5020, which reads: “During the trial, materials have been shown to you to [help explain testimony or other evidence in the case/[specify other purpose]]. [Some of these materials have been admitted into evidence, and you will be able to review them during your deliberations.] [¶] Other materials have also been shown to you during the trial, but they have not been admitted into evidence.] You will not be able to review them during your deliberations because they are not themselves evidence or proof of any facts. You may, however, consider the testimony given in connection with those materials.”

In fairness, it is not surprising that Gebremedhin’s counsel did not request such a pattern instruction; it was not included in CACI until December 2011, more than a year after the trial. Still, the principles underlying the CACI instruction were certainly available at the time of trial (*People v. Cossey, supra*, 97 Cal.App.2d at p. 112; *St. George v. Superior Court, supra*, 93 Cal.App.2d at p. 816), or a simple answer to the

⁵ This may have been difficult given that Gebremedhin’s attorney had not seen the video before it was used at trial.

jury's request explaining that the DVD was not in evidence could have alleviated any misunderstanding. Gebremedhin's counsel did not request any instruction in response to the jury's request but now complains that the use of the DVD during Ahlberg's testimony was demonstrably prejudicial based on the jury questionnaires collected in connection with the new trial motion.

One of the questions asked in the posttrial questionnaire was, "Did you consider in your deliberations the defense's DVD of the opening and closing of the train doors with the BART representative acting as surrogate for a boarding passenger?" Three jurors (juror nos. 2, 4 and 6) responded affirmatively. Two of those jurors had voted in favor of Gebremedhin on the negligence issue. One juror expressly acknowledged that the DVD "was not submitted as evidence . . . ," which tends to show that the jury *was* informed the DVD had been excluded.⁶

Gebremedhin's reliance on the questionnaires brings us to the question whether the jurors' responses were admissible on a new trial motion. The answer is no. Evidence Code section 1150 provides as follows: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

Under that section a juror's declaration that states what he or she considered during deliberations would constitute evidence of his or her thought processes, which would make it inadmissible, whereas a statement regarding words or conduct of other

⁶ Juror No. 9's answers to posttrial questionnaire strongly suggest the jury was aware the video was not admitted in evidence. While we may not consider the responses for purposes of impeaching the verdict, we find this particular response useful in clarifying an ambiguity in the record.

jurors or conditions or events that occurred during deliberations would be admissible. In other words, juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are not admissible to the extent they describe the effect of any event on a juror's subjective reasoning process. (*Bell v. Beyerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124-1125; *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1683-1684.)

Under Evidence Code section 1150 it appears the jurors' responses to the question about whether they considered the DVD cannot be credited to impeach the verdict. Therefore we will not consider those answers in determining whether the court erred in its handling of the DVD exhibit or whether any such error was prejudicial.

II. The court's instruction during deliberations as to what conduct could be considered in assessing negligence

On November 4, 2010, the jury sent a final question about the special verdict form: "In question 1 is the negligence limited to Christine Young pushing the button and not doing a look back?" After initially consulting counsel via email, the court proposed to tell the jury it should consider "all actions or failures to act by Christine Young on the day and at the time of the incident." Gebremedhin's counsel expressly agreed with the court's proposed response; BART objected and urged the court to give the jury a simple "yes" answer. BART argued that the jury was looking for clarification from the court as to which conduct was at issue.

On November 4 at 3:21 p.m. the court sent an email to the parties' counsel proposing to instruct the jury: "all actions or failures to act by Christine Young on the day and at the time of the incident which may have caused [Gebremedhin's] fall should be considered." At 3:29 p.m. BART sent an email raising a concern that the reference to causation might "impinge upon the next question" of causation: "The issue in the first question is conduct, not cause." The court sent an email at 3:32 p.m. saying it disagreed because the response used the words "may have." Gebremedhin never objected to the

court's proposed response. At 3:33:59 p.m., less than two minutes after the court's response to BART's email, the jury returned its verdict for defendant.⁷

Any error in the court's instruction was waived by Gebremedhin's failure to object at trial. His attorneys agreed with the court's original wording of its intended instruction and never voiced an objection to the ultimate wording, which was similar. This constituted a waiver of the issue on appeal. (Evid. Code, § 353.) "A failure to object to civil jury instructions will not be deemed a waiver where the instruction is prejudicially erroneous as given, that is which is an incorrect statement of the law." (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 760.) On the other hand, a jury instruction which is incomplete or too general must be accompanied by an objection or qualifying instruction to avoid the doctrine of waiver. (*Ibid.*, citing *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9.) The complaint about the instruction in this case falls within the latter category.

On the merits, Gebremedhin argues that the mid-deliberation instruction restricted the evidence upon which the jury might have premised a finding of negligence. Yet, nowhere does he identify any specific evidence that the jury was prevented from considering that would have been relevant in assessing BART's negligence in causing Gebremedhin's fall. We, too, perceive no substantial probative evidence on the negligence issue that was removed from the jury's consideration.

Gebremedhin also argues that the instruction was erroneous because it conflated the concepts of conduct and causation. BART itself raised this issue at the time the instruction was proposed by the court. The court concluded the words "may have" made

⁷As BART points out, the record does not affirmatively reflect whether the court actually gave the proposed response to the jury before the verdict was reached. It is the appellant's burden to present us with a reviewable record. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1452.) It is true, however, that two jurors' responses to the questionnaire strongly suggest the instruction was given. While we will not consider the content of the questionnaires for purposes of impeaching the verdict (Evid. Code, § 1150), we will consider the responses insofar as they clarify a point otherwise left ambiguous in the record, namely that the instruction was in fact given to the jury.

the instruction unobjectionable because the jury was being instructed to consider any evidence could possibly have caused his fall, not that it must be convinced that the conduct actually did cause the fall. The court therefore overruled the objection, we think correctly.

When the mid-deliberation instruction spoke about whether Young’s conduct “may have caused [Gebremedhin’s] fall,” it was not referring to the cause of Gebremedhin’s *injuries* but to the cause of his *fall*. It thereby limited the jury’s consideration of evidence to those theories of negligence that contributed to the occurrence of the event, which was appropriate, since Gebremedhin presented so much evidence about potential negligence in investigating the event and preserving evidence. Such postfall evidence, BART argues, was not relevant to BART’s alleged negligence in trapping Gebremedhin’s foot in the closing door, and the jury needed clarification on the relevance of such evidence.⁸

Finally, for the reasons previously stated, we will not consider juror no. 9’s comments on the questionnaire to the effect that there were a “second and third possible uncontested cause of injury to Mr. Gebremedhin’s back—his physical removal from the train and abandonment on the platform Further, it removed all of Ms. Young’s secondary negligent actions and those of Ms. Contreras” The “secondary negligent actions” were properly removed from the jury’s consideration on question no. 1. (See fn. 8, *ante*.) At the hearing on the new trial motion, the court itself noted that the juror’s theory that the removal of Gebremedhin from the train contributed to his injuries was “pure speculation.” Gebremedhin’s counsel agreed.

This juror did say that his verdict was affected by the instruction, but unless the instruction was wrong there would be no cause for concern. Since we conclude the instruction was not erroneous, and since we find it improper in any case to rely upon the

⁸ Juror no. 9’s questionnaire response suggested that postfall negligence could have contributed to Gebremedhin’s injuries. He pointed specifically to the possibility that BART employees who carried Gebremedhin off the train could have caused his back injury. There was no medical evidence, however, to support such a theory.

juror declarations insofar as they reveal jurors' mental processes, we would not find reversible error even if Gebremedhin had not waived the issue, which he has done.

Another response by juror no. 9 upon which Gebremedhin relies was: "It is my opinion Judge Tsenin's ruling limiting our deliberations to Question 1 before moving on to Question 2, then later in our deliberations incorrectly tying Question 1 to Question 2, these manipulations ultimately resulted in the jury having to ignore relevant presented facts and delivering a false verdict."

And finally, juror no. 6 wrote that she "felt it was appropriate to consider whether Ms. Young's lack of precision in recalling times schedules and her exact whereabouts prior to boarding the train might imply that she was running late and therefore was rushed. I also believed that other actions or inaction on the part of Ms. Young or other BART personnel could [were allowed to?] influence my evaluations of the BART testimony concerning the events leading up to and occurring at the time of the incident." It is unclear whether this juror was expressing confusion about the instructions (as Gebremedhin now contends) or whether she simply expressed disagreement with the law. Whatever its meaning, it reflects mental processes of the juror and the manner in which she either considered the evidence or thought it ought to be considered. The juror's comments simply cannot be used to impeach the verdict. And in any case, this juror voted in favor of Gebremedhin on the issue of negligence, so it would be difficult to derive from her questionnaire response that the allegedly improper instruction affected her verdict.

III. Juror misconduct

A. Burden of proof

Both Gebremedhin and BART requested that the jury be given CACI nos. 200 and 400, which instructed that Gebremedhin was required to prove negligence by a "more likely than not" standard and specifically that the "beyond a reasonable doubt" standard did *not* apply.⁹ Despite those instructions, Gebremedhin complains that three jurors who

⁹ CACI no. 200 reads as follows:

returned the questionnaire (juror nos. 2, 4, and 12) indicated they thought he was to be held to a higher burden of proof than the preponderance standard. One of the three had voted in favor of Gebremedhin on special verdict no. 1.

We first observe that the question was poorly phrased: “Did you feel that Daniel Gebremedhin’s burden of proof of the negligence of Christine Young needed to be greater than ‘more likely than not’?” It is unclear whether the jurors were being asked for their understanding of the instructions actually given, their opinion about the fairness or correctness of the law or the instructions, or their overall sense that Gebremehdin’s burden of proof had somehow been elevated through the court’s instructions. Asking jurors what they “feel” a burden of proof “needed” to be is at best ambiguous.¹⁰ Jurors were not asked whether they actually held Gebremedhin to a higher burden of proof on the negligence issue.

But even if the question had been phrased more felicitously, we would decline to consider the jurors’ questionnaires for purposes of impeaching the verdict. The question called for, and the responses indicated, jurors’ mental processes, not overt conduct or happenings during deliberations. (Evid. Code, § 1150.) Whatever the answers to the

“A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as ‘the burden of proof.’

“After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.

“In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.”

CACI no. 400 informed the jury that Gebremedhin bore the burden of proving that defendant was negligent.

¹⁰ BART’s counsel evidently complained to Gebremedhin’s counsel about this language but the questionnaire did not incorporate BART’s proposed changes.

questions might mean, they were inadmissible.¹¹ (*Bell v. Beyerische Motoren Werke Aktiengesellschaft, supra*, 181 Cal.App.4th at pp. 1124-1125 [juror declarations inadmissible where they said they did not understand the meaning of the phrase “potential risk” in the instructions]; *Mesecher v. County of San Diego, supra*, 9 Cal.App.4th at pp. 1683-1684 [juror declarations stating they construed “battery” too broadly in deliberating, in violation of court’s instruction, were inadmissible]; *Cove, Inc. v. Mora* (1985) 172 Cal.App.3d 97, 100-103 [juror declarations saying they awarded damages on nonexistent legal theory not admissible].)

¹¹ Gebremedhin explains in his reply brief that the questionnaire was really only appropriately used as a data collection device and argues he should have been allowed to take the answers and reformulate them into properly admissible attorney-drafted affidavits. He does not specify what those affidavits would have said or how he would have remedied the problem that the jurors were recounting their own mental processes.

Gebremedhin claims Code of Civil Procedure section 658 gives him the right to file juror affidavits without being limited to the questionnaire responses. That section provides: “When the application [for a new trial] is made for a cause mentioned in the first, second, third and fourth subdivisions of Section 657, it must be made upon affidavits; otherwise it must be made on the minutes of the court.” Any claim of error in the questionnaire procedures dictated by the court was waived by failure to raise it in the court below and by failure to raise it in his opening brief. (E.g., *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.)

Moreover, Code of Civil Procedure section 658 appears to require statements under oath to support certain issues raised by a new trial motion, rather than resolving them on briefing alone. It would not seem to have as its purpose giving litigants a legally enforceable “right” to present attorney-drafted affidavits, as opposed to some other form of declaration under oath.

B. Questionnaire answers inconsistent with the verdict

Finally, Gebremedhin claims the jury’s special verdict no. 1 was inconsistent with two jurors’ answers to question no. 12 on the juror questionnaire (juror nos. 4 and 9) because the verdict was that there was no negligence, yet two jurors responded to question no. 12 that they believed Young was negligent. Special verdict no. 1 asked: “Was the defendant San Francisco Bay Area Rapid Transit District, through its employee Christine Young, negligent?” Question no. 12 on the questionnaire asked “Did you feel that Ms. Young was negligent in her performance, or failure to perform, her duties as operator of the BART train?”

Again, the evidence was inadmissible to impeach the verdict under Evidence Code section 1150. In addition, the special verdict, in light of the court’s clarifying instructions, restricted the question of negligence to any conduct or omission that “may have caused [Gebremedhin’s] fall.” To the extent the jurors believed Young was negligent in some other respect that did not lead to Gebremedhin’s fall—such as allowing him to be removed from the train by others than medically-trained personnel, not requesting that the train be taken out of service, or not collecting the names of witnesses—such negligence was irrelevant to the initial question of liability under the court’s ruling. As noted above, we find no fault with the instruction, and any error in so limiting the evidence bearing on negligence was waived by Gebremedhin’s failure to object. We cannot consider the questionnaire answers, and even if we did, we would not find them inconsistent with the special verdict.

DISPOSITION

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.