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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HERIBERTO ARELLANO,

Plaintiff and Respondent,

v.

JOHN VO,

Defendant and Appellant.

G048486

(Super. Ct. No. 00116989)

O P I N I O N

Appeal from a judgment and post judgment order of the Superior Court of Orange County, Craig L. Griffin, Judge. Affirmed.

Gilbert & Nguyen and Jonathan T. Nguyen for Defendant and Appellant.

Lavi & Ebrahimian, N. Nick Ebrahimian and Jordan D. Bello for Plaintiff and Respondent.

Heriberto Arellano (Arellano) sued Castle Valet Car Wash (Castle) and its owner, John Vo, for state and federal labor wage code violations, including the failure to pay the minimum wage and overtime. A jury determined Vo willfully failed to pay \$13,921 in overtime wages from January 8, 2006, to January 18, 2008. The court then held Vo liable for an additional \$13,921 in liquidated damages. It also awarded Arellano \$242,412 for attorney fees.

On appeal, Vo alleges the jury's findings were not supported by substantial evidence and the court erred when it allowed Arellano's counsel to show the jury a visual aid containing his calculation of Arellano's damages during closing argument. In addition, Vo challenges the attorney fee award. Finding all his contentions lack merit, we affirm the judgment and attorney fee award.

I

For 25 years Arellano worked at a car wash in Westminster, California that changed ownership several times. Relevant to this case, in 2002 Vo and two partners owned the car wash. In 2005 Vo's partners abandoned their interests in the business. The car wash closed at the end of 2008.

Arellano stopped working at the car wash on January 13, 2008. On August 21, 2008, Arellano filed a claim with the labor board alleging he worked 12 hours a day, seven days a week in 2007. Arellano calculated he was owed \$16,800 in unpaid wages. The case was dismissed. In January 2009 Arellano filed an action in superior court against Castle seeking unpaid wages and overtime. In March 2009 he filed a first amended complaint (FAC) adding Vo as a defendant. He alleged Vo was Castle's sole shareholder and corporate officer and was liable for unpaid federal overtime and minimum wages.

In 2010 the trial court held a bifurcated trial on the narrow issue of whether Vo was an employer as defined by the federal Fair Labor Standard Act (FLSA). After

considering evidence and testimony, the trial court ruled Vo was not Arellano's employer under the FLSA and dismissed him from the lawsuit. The parties stipulated to a judgment against Castle to facilitate an appeal. This court reversed the judgment on the grounds there were material issues of fact regarding Vo's level of involvement in the business and with the employees. (*Arellano v. Vo* (March 7, 2012, G044393) [nonpub. opn.] We determined a jury must decide the factual question of whether Vo was an employer. (*Ibid.*)

The jury trial was held in early 2013. Vo did not produce any time records relating to the hours Arellano worked during his employment. He testified Arellano was paid a salary of \$350 a week. The paycheck stubs did not show the number of hours Arellano worked. Vo testified the car wash was open from 8 a.m. to 6 p.m., seven days a week. The only days the car wash was closed was when it rained and the holidays of Thanksgiving, Christmas, and New Years.

Arellano testified the car wash was generally open to the public seven days a week for 10 hours from 8 a.m. to 6 p.m. and during the summer would stay open one hour longer until 7 p.m. Arellano testified he worked 12-hour days as a manager from 7 a.m. to 7 p.m., and sometimes worked additional hours when other tasks needed to be done such as welding and soldering. Arellano testified he did not have time to eat lunch.

Arellano testified about the type of work he performed. He stated that in the morning he arrived early to open the door, turn off the alarm, take out the hoses and vacuums, wash the towels and perform other tasks needed to operate the car wash. After the car wash closed to the public, Arellano stated he would clean up the equipment and trash, oil the car wash machine motors, and wash the floors. Before closing the doors and setting the alarm, he would often wait for the cashier to count the money and put it in the safe.

In early 2006, Arellano recalled working six days a week. However, for the last few months of 2006, and all of 2007, Arellano said he worked seven days a week for

the same weekly pay of \$350. He explained this additional work was imposed as punishment after it was discovered he took three or four water bottles without permission.

In addition to his duties at the car wash, Arellano stated he was asked to use Vo's wife's car several times a week to pick up Vo's daughter from school located in Fullerton. He estimated it took approximately one hour to drive to the school, depending on traffic.

Arellano testified he and other car wash employees were also asked to clean the construction worksite at Vo's home. This occurred on rainy days or during car wash hours. They did not receive additional compensation for this work.

The jury also heard testimony from Inocencio Pulido-Garcia (Pulido), a former car wash employee. He stated he usually arrived at the car wash at 7:30 a.m. and at times was there as early as 6 a.m. He said "they" would make him work before he clocked in at 8 a.m. He worked every day it did not rain. He would finish work around 7 p.m. Pulido stated he usually worked 11 hours a day and he was never paid for overtime. When he arrived at work, he would see Arellano was already working to set up the car wash. After work he and Arellano would sometimes go drink alcohol in a shed near the car wash. Pulido testified that when Vo took over the car wash, he held a meeting and told the employees he could not afford to pay overtime wages.¹

The last witness to testify for Arellano was Adriel Flores, another former employee. He was not present at trial, but portions of his videotaped deposition were read at trial. The transcript was not included in our record. However, during closing argument counsel summarized the testimony and Vo does not dispute the accuracy of this summary. Flores testified he worked between 10 and 11 hours a day, seven days a week.

¹ Our record does not contain all Pulido's trial testimony. Vo omitted the direct examination testimony. Consequently, Pulido's testimony about Vo's meeting is based on statements made by counsel in closing argument summarizing Pulido's testimony. The factual accuracy of counsel's summary of the testimony was not disputed by Vo below or on appeal, and therefore, we include it.

Flores also stated Arellano worked more hours than he did because Flores saw Arellano in the morning working when he arrived, and Arellano remained working after Flores went home.

During closing argument, Arellano's counsel displayed a visual aid showing his calculation of damages. He asked the jury to find Arellano worked 5,049 hours of overtime January 8, 2006, to January 18, 2008 (a two-year time frame).

The jury determined Arellano was owed 1,629 overtime hours for the two years. It awarded him \$13,921. The trial court determined Vo failed to establish a good faith defense to his failure to pay overtime and awarded an additional \$13,921 in liquidated damages. Vo's counsel stated he was thinking about filing a new trial motion but never did. On March 14, 2013, the court entered a final judgment awarding damages "plus attorney[] fees in an amount to be determined subsequently and recoverable costs."

A few months later, Arellano filed a motion for attorney fees, supported by billing records. The court granted the motion, awarding \$242,412.

Vo filed an appeal from the judgment entered March 14, 2013. The opening brief challenges the attorney fee award, but Vo failed to include the motion and supporting documents as part of the record on appeal.

II

A. Challenges to the Sufficiency of the Evidence

Vo raises two related sufficiency of the evidence allegations: (1) the record does not support [Arellano's] overtime allegations; and (2) there was insufficient evidence to support the jury's award of damages. Both contentions are based on the perceived lack of direct evidence of unpaid overtime. Vo asserts the case rested entirely upon Arellano's testimony that merely contained self-serving "approximations, guesses and estimates" of time worked. Vo maintained Flores's testimony was also uncertain and full of "guesses and approximations." Absent from Vo's argument is any analysis of

Pulido's testimony or explanation as to why the record contains only a partial transcript of Pulido's testimony.

In addition, Vo contends the theory Arellano worked 12 hours a day, seven days a week, was directly contradicted by evidence Arellano took lunch breaks and the car wash was closed on rainy days and some holidays. And finally, Vo asserts Arellano's testimony lacked credibility because there was evidence he drank alcohol after work and he stole items from the car wash. Based on the record before us, we find no reason to reverse the jury's verdict or the court's judgment.

i. Relevant Case Law

There is a large body of case authority, including a Supreme Court opinion discussing the framework to analyze claims for unpaid work when an employer's records are incomplete. Noticeably absent from Vo's briefs is any discussion of this relevant authority.

“‘[W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a . . . difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.’

[Citations.]” (*Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727 (*Hernandez*).)

The *Hernandez* court explained an employee’s proof as to the amount and extent of unpaid work need only be ““approximate.”” (*Hernandez, supra*, 199 Cal.App.3d at p. 727.) *Hernandez* involved a claim for unpaid overtime. The employer-maintained time cards for the relevant period had been falsified, and the trial court found the employee’s after-the-fact estimate of hours worked was not believable. (*Id.* at pp. 724-725.) The trial court entered judgment for the employer, contending that any damages calculation would thus be “guesswork.” (*Id.* at pp. 727-728.) The appellate court reversed, instructing, “where the employer has failed to keep records required by statute, the consequences for such failure should fall on the employer, not the employee. In such a situation, imprecise evidence by the employee can provide a sufficient basis for damages. [Citations.]” (*Id.* at p. 727.) Accordingly, “[i]t is the trier of fact’s duty to draw whatever reasonable inferences it can from the employee’s evidence where the employer cannot provide accurate information. [Citations.]” (*Id.* at p. 728; see *Reeves v. International Tel. and Tel. Corp.* (9th Cir. 1980) 616 F.2d 1342, 1346, 1351-1352 [compensating employee for 60 hours per week, an approximation based in part on employee’s rough estimate that he worked 74.5 hours per week].)

ii. Analysis

In this case, the record contains evidence Arellano usually worked six or seven days a week at the car wash and received one paycheck of \$350 per week. It was undisputed the car wash was open more than 40 hours a week. Indeed, it was generally open 70 hours a week (10 hours a day, seven days a week). Vo characterized Arellano as a manager and it was undisputed the car wash managers had responsibilities during normal operating hours. Arellano and two witnesses with personal knowledge provided evidence Arellano worked before the car wash opened and after it closed at least six days a week. Arellano testified that for the last 14 months of employment, he worked seven days a week. Arellano also testified he sometimes stayed longer to perform welding jobs.

From the above evidence, it was reasonable to infer Arellano worked between 10 to 12 hours most days.

Because Vo failed to keep the records required by statute, the above evidence satisfied the employee's burden of proving he worked *more* than eight hours a day and more than 40 hours a week, and therefore, he performed work for which he was improperly compensated. Contrary to Vo's contention on appeal, it was appropriate for Arellano to provide proof as to the amount and extent of unpaid work using approximations and reasonable inferences. (*Hernandez, supra*, 199 Cal.App.3d at p. 727.) The burden then shifted to the employer, Vo, to come forward with evidence to negate the inferences to be drawn from Arellano's evidence. Vo did not do this.

Vo provided little evidence to negate the reasonable inference Arellano performed unpaid overtime work. Vo's evidence car wash workers generally did not work holidays or when it rained was directly countered by evidence the car wash employees worked on some of those days at the construction site at Vo's home. Vo asserted there was evidence Arellano sometimes ate lunch at work, however, a one-hour lunch break only adjusts the amount of overtime owed when there is a reasonable inference Arellano worked between two to three hours overtime each day. Vo's contention Arellano's testimony should be discounted because his character was impeached with evidence of theft and drinking alcohol completely ignores the fact there were two other witnesses who testified about Arellano's time working at the car wash. Vo's failure to provide this court with the direct examination of Pulido or the deposition transcript of Flores is highly suspect. To prevail on a substantial evidence challenge, Vo was required to lay out the evidence against him and show why it is lacking. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) It is not good enough to only discuss and rely on the favorable evidence as proof he should have won.

In addition, Vo's challenge to the sufficiency of the evidence fails because he does not address the jury's verdict. He asserts the record does not support Arellano's

overtime allegations. The two are not the same thing. In its special verdict, the jury determined Arellano *did not work* as many overtime hours as he estimated. Arellano asked the jury to award overtime wages for 5,049 hours. The jury reduced this approximation, awarding damages for only 1,629 overtime hours. Our review is limited to whether there is substantial evidence to support the jury's verdict, not Arellano's total estimate.

The special verdict asked the jury to separately calculate overtime hours worked from (1) January 8, 2006, to January 7, 2007 (52 weeks); and (2) from January 8, 2007, to January 18, 2008 (53 weeks). For the 2006/2007 time period, the jury awarded 728 hours, which calculates to an average of 14 hours overtime per week. The jury awarded a different amount for the 2007/2008 time period. It calculated Arellano worked a total of 901 overtime hours (an average of 17 hours per week). It is reasonable to infer the jury took into account evidence of holidays, rainy days, and issues raised about Arellano's credibility when it rejected Arellano's estimation of over 5,000 overtime hours.

It is not our role to reweigh the evidence and reassess the credibility of the witnesses. Under the substantial evidence standard of review, we do not reweigh evidence or resolve evidentiary conflicts. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on another issue.) Instead, under the applicable law, we view the evidence in the light most favorable to Arellano, the prevailing party, and give that evidence the benefit of every reasonable inference. (*Ibid.*) Moreover, the testimony of one witness may constitute substantial evidence (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614), and the testimony of Arellano, Flores, and Pulido was sufficient evidence to support the jury's finding Arellano performed overtime work for which he was not compensated.

Vo also attacks the jury's award of damages on the basis there was no direct proof of the number of overtime hours. Vo asserts there is no evidence to support

the finding of exactly 1,629 hours. We direct his counsel to review the body of case law discussed above. When the employer cannot provide accurate information, the employee's proof need only be approximate. "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information. [Citations.]" (*Hernandez, supra*, 199 Cal.App.3d at p. 728.) Given the undisputed evidence the car wash was open a minimum of 10 hours a day, 70 hours a week, and Arellano normally worked full days six to seven days a week, we find ample support for the jury's determination Arellano worked (1) at least 14 hours overtime per week from January 2006 to January 2007, and (2) at least 17 hours overtime per week from January 2007 to January 2008. We conclude ample evidence supports the jury's calculation of 1,629 unpaid overtime hours.

B. Challenge to a Visual Aid

Vo asserts the court erred by allowing Arellano's counsel to publish a "summary of damages" document during closing argument. He complains the evidence of unpaid wages was "approximations" and "estimates" but the spreadsheet contained specific and concise calculations. Vo asserts his counsel was not given sufficient time to meaningfully review the document before closing argument. He also asserts the error was prejudicial because the jury was not presented with any other "concrete evidence of any hours of overtime worked." He explains the spreadsheet gave the jury invalid grounds to award overtime damages. We disagree.

First, Vo waived any error by failing to properly state a ground for objection at trial or request an admonishment at trial. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 800 (*Grimshaw*) ["having failed to object below, it was incumbent upon [defendant] to demonstrate that the claimed improprieties were such that a prompt objection and admonition to the jury would not have corrected the error"].) The reporter's transcript shows that when Vo's counsel realized Arellano's counsel was going to use visual aids demonstrating damages, he stated "objection" and asked if there could

be a side bar discussion. Out of the presence of the jury, Arellano's counsel explained he had to wait until Arellano's testimony concluded before creating the visual aid. The court gave Vo's counsel an opportunity to review the summary. The court asked, "It's just your damage calculations; right?" Arellano's counsel agreed. The court then changed the subject and discussed another matter with the parties. The court took a break, stating, "Just go ahead and share. And I'll be back in a few minutes." After the break, the jury returned and Arellano's counsel used the visual aid in his closing argument without any objection from Vo. Vo's counsel did not ask for additional time to review the visual aid. We deem the argument waived.

Moreover, Vo's challenge on appeal fails on the merits. "Counsel have wide latitude in deciding what to include and to exclude in oral argument, and particularly in deciding what to emphasize. [Citations.]" (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2013) ¶ 13:42, p. 13-9 (hereafter Wegner).) "Counsel are entitled to state their views as to what the evidence shows and the conclusions to be drawn therefrom [citation]. 'Opposing counsel cannot complain if the reasoning be faulty and the deductions illogical, as such matters are ultimately for the consideration of the jury.' [Citations.] Moreover, "Counsel may argue based on facts in evidence *and on reasonable inferences* [citation] that may be drawn therefrom: '[I]t is the privilege of an attorney to draw any inference with respect to the facts or the credibility of witnesses of which the evidence is reasonably susceptible.' [Citations.]" (*Id.* at ¶ 13:43; see also *Grimshaw, supra*, 119 Cal.App.3d at p. 800.)

"Although the matter is discretionary, most courts also permit counsel to use in closing argument visual aids (diagrams, graphs, charts, overhead transparencies, etc.) *not* admitted into evidence . . . as illustrations of counsel's argument or of evidence in the record or instructions that will be given." (Wegner, *supra*, ¶ 13:365, p. 13-82.) As stated above, Vo's lack of records permitted Arellano to establish his hours by estimating and reasonable inferences from the evidence. Arellano's counsel was permitted to use

visual aid to illustrate plaintiff's theory of what the evidence at trial proved. As such, the visual aid cannot be characterized as new evidence, and it did not misstate or rely on matters not in evidence. Based on our record (which does not contain a copy of the visual aid) it cannot be said the court's abused its discretion to permit counsel to a summary of the evidence to help the jury understand the plaintiff's theory of the case.

C. Challenge to Attorney Fee Award

Vo does not challenge the amount awarded on the grounds the hours worked on the case were unreasonable or unsupported by the billing statements. For this reason, it does not matter that he did not include a copy of the attorney fee motion or supporting documents in the appellate record. Vo's argument concerning the fee award is entirely dependent on him prevailing on the other issues on appeal attacking the jury's verdict. Having concluded there is no reason to disturb the jury's verdict or the court's judgment, the attorney fee issue is moot.

III

The judgment and post judgment order are affirmed. Arellano shall recover his costs and attorney fees on appeal in an amount to be determined by the trial court.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

FYBEL, J.