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SUMMARY
January 16, 2025

2025COA6

No. 24CA0077, *Bullock v. Brooks* — Remedies — Civil Action for Deprivation of Rights — Peace Officers; Criminal Law — Arrest — Probable Cause; Constitutional Law — Searches and Seizures — Warrantless Search Incident to Arrest

A division of the court of appeals reviews a civil action brought under section 13-21-131(1), C.R.S. 2024, for the deprivation of individual rights as a result of an arrest made without probable cause and, pursuant to that unlawful arrest, a search and seizure without a warrant. The division concludes that the constitutionality of the arrest did not depend on the constitutionality of the ordinances that the arrestee was charged with violating, but instead turned on whether there was probable cause to effect the arrest under the ordinances as written. Thus, the correct question at the heart of the appeal is whether — under the ordinances as they existed at the time of the arrest — the jury could reasonably find

that the arrest was supported by probable cause. Because the jury found that there was probable cause for the arrest, the arrestee's individual rights were not violated for purposes of liability under section 13-21-131(1) irrespective of whether the ordinances were unconstitutionally vague. Accordingly, the division affirms the district court's judgment.

Court of Appeals No. 24CA0077
City and County of Denver District Court No. 22CV32418
Honorable David H. Goldberg, Judge

Isabelle Bullock,

Plaintiff-Appellant,

v.

James Brooks, Adam Paulsen, and Shawn Saunders,

Defendants-Appellees.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE GROVE
Freyre and Lum, JJ., concur

Announced January 16, 2025

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Kerry Tipper, City Attorney, Katherine M. Field, Assistant City Attorney, Kevin Sobczyk, Assistant City Attorney, Kevin McCaffrey, Assistant City Attorney, Denver, Colorado, for Defendants-Appellees

¶ 1 Plaintiff, Isabelle Bullock, appeals the trial court’s judgment entered on a jury verdict in favor of defendants, Denver Police Department (DPD) Officers James Brooks, Adam Paulsen, and Shawn Saunders. Bullock sued Brooks, Paulsen, and Saunders under section 13-21-131(1), C.R.S. 2024, asserting that they violated Bullock’s civil rights by arresting and searching them¹ without probable cause. We affirm.

I. Background

¶ 2 This appeal arises from Bullock’s August 2020 arrest and unsuccessful prosecution, which ended after the Denver City Attorney’s Office dismissed criminal charges that it had filed against Bullock. After the charges were dismissed, Bullock sued Brooks, Paulsen, and Saunders — the officers who arrested Bullock and searched and seized Bullock’s property — alleging that they had violated Bullock’s right to be free from unreasonable search and seizure. *See* § 13-21-131(1) (creating a private right of action against a peace officer “who, under color of law, subjects or causes to be subjected . . . any other person to the deprivation of any

¹ Bullock uses they/them pronouns.

individual rights . . . secured by the bill of rights, article II of the state constitution”).

A. Criminal Proceedings

¶ 3 On the day of Bullock’s arrest, Brooks, Paulsen, and Saunders attended a roll call briefing where they learned of planned protest activity in the vicinity of the DPD headquarters that evening. The officials conducting the briefing informed the officers that the protest had been planned on social media and that posts related to the protest appeared to call for people to bring weapons and attempt to take over police headquarters.

¶ 4 Brooks and Paulsen were assigned to a motorcycle patrol near police headquarters that night with a focus on “obstruction equipment,” which Brooks described as items that “people can use to physically harm officers in a physical confrontation” or that “can be used to stop [police] from successfully clearing a crowd or rendering it safe.” As he patrolled, Brooks saw several people in and around a Jeep parked about a block away from police headquarters handing out shields, helmets, respirator masks, and other similar items. He then witnessed Bullock, wearing black and holding a baseball bat, emerge from some bushes nearby. Bullock

ran across a parking lot, with the bat, toward the Jeep. Bullock alerted the others to the officers' presence, and "[t]here was a rush to get inside the Jeep, load it back up and get in."

¶ 5 As the Jeep drove away, Brooks informed his supervisor, Saunders, of what he had seen. Saunders told Brooks and Paulsen to stop the Jeep and arrest its occupants. The officers conducted a traffic stop, took Bullock and the others into custody, and then searched the Jeep and seized several items, including some that Bullock owned.

¶ 6 The Denver City Attorney's Office, in its role as municipal prosecutor, charged Bullock with violating sections 38-125 and 38-117(b) of the Denver Revised Municipal Code (DRMC). At the time,² DRMC section 38-125 provided as follows:

- (a) It shall be unlawful for any person, other than governmental employees in the performance of their duty, to possess any tool, object, instrument or other article adapted, designed or intended to be used for obstructing the public's ability to freely move about on roadways, sidewalks or any other area to which the public or a substantial group of the public has access or for inhibiting emergency equipment

² These municipal code sections were amended in 2022. We refer to the versions in effect at the time of Bullock's arrest.

from being moved without impediment or delay, with the intent to use the object by itself or in combination with other objects for obstructing the public's ability to freely move about on roadways, sidewalks or into or out of buildings or for inhibiting emergency equipment from being moved without impediment or delay. . . .

- (b) It shall be unlawful for any person to possess any noxious substance, or dangerous or deadly weapon as defined in DRMC section 38-117 with the intent to use the noxious substance or dangerous or deadly weapon for defeating crowd dispersal measures.

¶ 7 DRMC section 38-117(b) stated,

It shall be unlawful for any person, except a law enforcement officer in the performance of duty, to carry, use or wear any dangerous or deadly weapon, including, but not by way of limitation, any pistol, revolver, rifle, shotgun, machine gun, air gun, gas operated gun, spring gun, sling shot, blackjack, nunchaku, brass knuckles or artificial knuckles of any substance whatsoever, or switchblade knife, gravity knife, or any knife having a blade greater than three and one-half (3½) inches in length, or any explosive device, incendiary device or bomb, or any other dangerous or deadly weapon.

¶ 8 Bullock filed a motion to suppress, arguing that the police lacked reasonable suspicion to conduct the traffic stop and that the arrests and subsequent search were unsupported by probable

cause. Bullock also moved to dismiss the charges on the basis that the ordinances were unconstitutionally vague, both facially and as applied. Specifically, Bullock took issue with the fact that, although neither ordinance explicitly applied to baseball bats, the prosecution nonetheless proceeded under the catchall provision of section 38-117(b), which, following an itemized list of prohibited items, expanded the reach of the ordinance to prohibit “any other dangerous or deadly weapon.” Bullock also argued that section 38-125(b) suffered from vagueness problems because it failed to define “crowd dispersal measures.”

¶ 9 The Denver County Court granted Bullock’s motion to suppress. The court found that, based on their observations of the activities in and around the Jeep, Brooks and Paulsen had reasonable, articulable suspicion to conduct an investigatory stop. Specifically, the county court noted that

it was late at night, [the officers’] “roll-call” meeting indicated that some individuals could try to storm the DPD headquarters; [Bullock] was wearing dark clothing, carrying a baseball bat, and one officer observed [Bullock] running; one of the other suspects carried what appeared to be a home made shield; there had been protests and many skirmishes in the area recently; and when the suspects

saw the officers they hurriedly put the items inside the Jeep and drove off.

¶ 10 However, the court concluded that, “under the totality of the circumstances as they existed at the time, the officers lacked probable cause to arrest [Bullock] for violating [section 38-125].” This was so, the county court ruled, because baseball bats were not enumerated in section 38-117(b) and they are “primarily used for recreational activities.” Therefore, the court concluded, Bullock’s bat did not fall within the ordinance’s “any other dangerous or deadly weapon” catchall provision. In the alternative, the court found that Brooks and Paulsen lacked probable cause to believe that Bullock intended to use the baseball bat to defeat crowd dispersal measures.

¶ 11 Based largely on its finding that the officers lacked probable cause to arrest Bullock, the county court also suppressed the fruits of the officers’ search of the Jeep and statements that Bullock made after being taken into custody.

¶ 12 Following the county court’s suppression ruling, the prosecution dismissed the charges.

B. Civil Proceedings

¶ 13 Bullock then filed this lawsuit, alleging that Brooks, Paulsen, and Saunders violated Bullock’s individual rights by arresting them without probable cause and, pursuant to that unlawful arrest, searching and seizing Bullock’s property without a warrant.

¶ 14 Section 13-21-131 creates “a cause of action against peace officers for violations of a plaintiff’s civil rights” guaranteed by the Colorado Constitution. *Puerta v. Newman*, 2023 COA 100, ¶ 1. In many respects it is similar to 42 U.S.C. § 1983, which authorizes a private right of action against a person “who, under color of any statute . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” *See Woodall v. Godfrey*, 2024 COA 42, ¶ 13. But there is at least one key difference between the state and federal statutes: the availability of qualified immunity. In cases brought under 42 U.S.C. § 1983, qualified immunity shields government officials who are performing discretionary, non-ministerial functions “from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known.” *Freedom from Religion Found., Inc. v. Romer*, 921 P.2d 84, 89-90 (Colo. App. 1996). In contrast, under the Colorado statute, “[q]ualified immunity is not a defense to liability.” § 13-21-131(2)(b).³

¶ 15 Several months after filing suit, Bullock filed an amended complaint accompanied by a C.R.C.P. 56(h) motion seeking a determination as a matter of law that their arrest and subsequent search violated their constitutional rights. Bullock asserted that the county court’s suppression order in the criminal proceedings established the unconstitutionality of the arrest and search, and that the defendants should be barred by issue preclusion from contesting, in the civil proceedings, whether Bullock’s constitutional rights were violated. The trial court held a hearing on the matter and denied Bullock’s motion.

³ Under federal law, qualified immunity is not simply a defense, but is instead “*immunity from suit.*” *Moody v. Ungerer*, 885 P.2d 200, 202 (Colo. 1994) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Conversely, for “state law claims under the [Colorado Governmental Immunity Act], when a public employee enjoys qualified immunity, the immunity is only a defense to liability and does not bar suit entirely.” *Gallagher v. Bd. of Trs. for Univ. of N. Colo.*, 54 P.3d 386, 394 (Colo. 2002), *abrogated by Martinez v. Est. of Bleck*, 2016 CO 58.

¶ 16 Bullock also challenged section 38-117(b)'s constitutionality, arguing in summary judgment briefing that the defendants lacked probable cause for an arrest because, based on the county court's "binding" interpretation of the ordinances, the baseball bat was not a "dangerous or deadly weapon." According to Bullock, in interpreting the ordinances, the county court "gave the definition of 'dangerous or deadly weapon' a limiting construction to render the ordinance constitutional" when it would otherwise have been unconstitutionally vague. And in their trial brief, Bullock contended that the trial court would need to address the constitutionality of section 38-117(b) and apply a limiting construction of the catchall provision in the jury instructions. The court denied Bullock's summary judgment motion and, during the trial management conference, rejected Bullock's related arguments, finding that the ordinance was not unconstitutionally vague, either facially or as applied.

¶ 17 The case proceeded to trial. At the close of the evidence, the trial court ruled that the defendants were entitled to a directed verdict on Bullock's claim that the search of the Jeep violated their constitutional rights. The court submitted Bullock's claim that the

arrest was unconstitutional to the jury, which returned a verdict in the defendants' favor. Before submitting the case to the jury, the court denied Bullock's request that it narrowly define the phrase "any other dangerous or deadly weapon" in the jury instructions;⁴ instead it provided an instruction that included only the language of sections 38-125 and 38-117(b).

II. The Ordinance's Constitutionality Had No Bearing on the Existence of Probable Cause

A. Framing the Issues

¶ 18 Bullock focuses primarily on the constitutionality of section 38-117(b) and the effect that the county court's interpretation of it in the criminal case should have had on determining the defendants' liability under section 13-21-131. As we understand it, the essence of Bullock's argument is as follows: (1) the county court implicitly determined that section 38-117(b) is unconstitutionally vague; (2) the trial court in Bullock's civil suit was either required to defer to the county court's implicit determination or deem it conclusive under the doctrine of issue preclusion;

⁴ The proposed instruction stated: "The phrase 'any other dangerous or deadly weapon' has been defined to mean 'an item that was manufactured to cause harm to people or animals.'"

(3) unconstitutional laws are a nullity; (4) any arrest effectuated pursuant to an unconstitutional law is itself unconstitutional; (5) an unconstitutional arrest violates individual rights; (6) because Bullock's arrest under section 38-117(b) violated their individual rights, it established the defendants' liability under section 13-21-131; and (7) because qualified immunity is not a defense under section 13-21-131, Bullock was entitled to judgment as a matter of law on liability, leaving only damages to be determined.

¶ 19 Framing the issues in this way, however, overlooks the fact that the constitutionality of section 38-117(b) had no bearing on whether the defendants violated Bullock's civil rights. Instead, as we explain below, the relevant inquiry for the jury was whether the defendants had probable cause to arrest Bullock under the ordinance as written.

B. Constitutionality and Qualified Immunity

¶ 20 Because we do not accept the premise of Bullock's argument — that, as a matter of law, an arrest under an unconstitutionally vague statute is itself unconstitutional — we need not address Bullock's contentions on appeal concerning the trial court's (1) conclusion that section 38-117(b) is not

unconstitutionally vague; (2) refusal to adopt the county court’s narrow construction of the ordinance; or (3) rejection of Bullock’s argument that issue preclusion prevented relitigating whether the defendants violated Bullock’s individual rights. Indeed, even assuming that Bullock is correct to characterize the county court’s suppression ruling as a declaration that section 38-117(b) was unconstitutionally vague, it does not follow, as Bullock asserts, that their arrest was unconstitutional for lack of probable cause.

¶ 21 To the contrary, the United States Supreme Court has expressly rejected the notion that an arrest under a law that is subsequently declared unconstitutionally vague “undermine[s] the validity of the arrest” or requires the suppression of evidence seized during a search incident to such an arrest. *Michigan v. DeFillippo*, 443 U.S. 31, 38, 40 (1979). This is because peace officers “are charged to enforce laws until and unless they are declared

unconstitutional.”⁵ *Id.* Consistent with this obligation, “[a] prudent officer, in the course of determining whether [an individual has] committed an offense . . . [is not] required to anticipate that a court [will] later hold the ordinance unconstitutional.” *Id.* at 37-38; *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967) (“[A] police officer is not charged with predicting the future course of constitutional law.”). In other words, Bullock cannot establish the defendants’ liability merely by showing that the ordinances in question were unconstitutionally vague. Even if they were, Bullock’s arrest was valid so long as it was supported by probable cause — a factual question that only the jury could resolve.

¶ 22 The General Assembly’s decision to exclude qualified immunity as a defense in actions brought under section 13-21-131 does not

⁵ In *Michigan v. DeFillippo*, 443 U.S. 31 (1979), the Supreme Court recognized a “possible exception” to this general rule where the law in question is “so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.” *Id.* at 38. Bullock did not argue in the trial court that the Denver ordinances at issue were so flagrantly unconstitutional that the defendants should have declined to enforce them under the circumstances, nor did they take that position in their opening brief on appeal. To the extent that Bullock raises such an argument for the first time in their reply brief, we decline to consider it. *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 718 (Colo. App. 2008).

undermine this conclusion. The unavailability of an *immunity* defense does not establish *liability*. Rather, to prevail in a civil rights suit under section 13-21-131, a plaintiff in Bullock’s shoes must still prove that their civil rights were violated in the first place. *Cf. Tucker v. Moeller*, 60 F. App’x 709, 710 (9th Cir. 2003) (holding, without reaching the question of qualified immunity, that “an arrest made with probable cause in reliance upon a statute thereafter declared unconstitutional on its face or as applied is usually valid and will not give rise to an action under § 1983”). To do so here, Bullock needed to prove, by a preponderance of the evidence, that their arrest and the defendants’ subsequent search were unlawful. The jury found that Bullock did not carry this burden, and Bullock does not challenge that finding on appeal.

¶ 23 In sum, the constitutionality of Bullock’s arrest did not depend on the constitutionality of the ordinances that Bullock was charged with violating, but instead turned on whether there was probable cause to effect the arrest under the ordinances as written. Thus, the correct question at the heart of this appeal is whether — under the ordinances as they existed at the time of Bullock’s arrest — the jury could reasonably find that Bullock’s arrest was supported by

probable cause. Because it did, Bullock’s individual rights were not violated, without regard to whether the ordinances were unconstitutionally vague.

III. Evidence Admitted at Trial

¶ 24 Bullock contends that the trial court erred by admitting evidence that did not bear on whether the defendants had probable cause to arrest them. We disagree.

A. Standard of Review and Applicable Law

¶ 25 Trial courts have broad discretion when determining the admissibility of evidence based on relevance, probative value, and prejudicial impact. *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010). A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it misapplies the law. *HMLL LLC v. MJM Holdings Ltd.*, 2024 COA 85, ¶ 17.

¶ 26 Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” CRE 401. Irrelevant evidence is inadmissible. CRE 402. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,

confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. CRE 403.

¶ 27 Under CRE 403, trial courts have “broad discretion in balancing the probative value of the evidence against the danger of unfair prejudice.” *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995). We will not disturb the trial court’s ruling absent an abuse of this discretion. *Id.* Because CRE 403 strongly favors admissibility of relevant evidence, we afford the evidence its maximum reasonable probative value and minimum unfairly prejudicial effect. *Id.*

B. Procedural History

¶ 28 Before trial, Bullock filed a motion in limine that sought, among other things, to exclude “[e]vidence of other protest activity on dates other than [the date of Bullock’s arrest].” The trial court ruled that “[p]rotest [o]r conduct outside of the City and County of Denver” would not be admitted at trial, but it did not explicitly rule on whether evidence about previous protests within Denver would be admissible. At trial, over Bullock’s counsel’s objections, the court admitted substantial amounts of testimony from the defendants about what they had personally experienced during the

protests in the weeks leading up to Bullock’s arrest. With one minor exception that we discuss below, the court adhered to its ruling excluding protestor conduct outside Denver.

C. Additional Facts

¶ 29 The testimony touching on other protest activity in Denver discussed how, during nighttime protests, protesters brought clothing and gear that differed from the clothing and gear brought to daytime protests. Brooks testified that, at night, “[p]eople were matching our capability, our equipment as well, shields, helmets, bats, batons, bolt cutters to cut handcuffs.” Asked what he saw protesters use to defeat DPD crowd dispersal tactics, Brooks listed “[u]mbrellas, shields, helmets, gas masks.” Brooks also alleged that protesters used “[b]ats, batons, hammers, [and] metal pipes” as “striking weapon[s].” He specifically recounted protestors carrying baseball bats “for the purpose of being used as an impact weapon . . . [a]gainst police during violent confrontations.”

¶ 30 In response to Bullock’s counsel’s relevance objections to this testimony, the trial court ruled that the defendants’ recent experiences with Denver protests shed light on “what an objective and/or reasonable police officer would have thought on the night of

the event.” Thus, the court found, the defendants’ testimony about their own observations of, and interactions with, recent protest activity was “clearly relevant and material under [CRE] 401 and 402, [and] not outweighed by [CRE] 403.”

¶ 31 As mentioned above, despite the court’s earlier order excluding evidence of protest activity outside Denver, it admitted one piece of testimony referencing recent actions by protestors in Portland, Oregon. While discussing the details of the roll call intelligence briefing, Paulsen described social media posts from a group called “Give Em Hell” that was “directing people to bring weapons and be prepared to destroy things” and stating on social media that “it’s Portland time.” The significance of the latter phrase, per Saunders, was that there had recently been “a takeover at the Portland Police Department so that means they’re going to try to do the same to our department.” In response to an objection from Bullock’s counsel, the defendants’ counsel informed the court that “every officer was advised about [the call to action from ‘Give Em Hell’] before they went out [the night of Bullock’s arrest].” And, Brooks testified, officers were told during this roll call briefing that their focus that night was on “go[ing] after individuals in that crowd that were

armed with the criteria fulfilled by [DRMC section 38-125]” because they “didn’t want the crowd getting bigger in number and size and strength.”

¶ 32 The trial court gave the following explanation for its decision to permit references to the Portland protests:

I didn’t want a referendum on the Black Lives Matter movement, what happened with George Floyd or those other events. To the extent, and I was unaware, that a police department had been taken over in Portland and that was at or about this time and that was a concern for DPD, it is directly related. So I have allowed it because I believe it’s relevant and material, not outweighed by prejudicial value, and that is something that was of concern. They were briefed on it and [it was] one of the reasons for the stop.

And I think whether that’s a reasonably objective person and/or a reasonably objective police officer, that is information that a person would want to know and should be known.

And so that’s why I have allowed that specific information. I don’t want any of the other things.

D. Analysis

¶ 33 As an initial matter, we note that some of the evidentiary arguments that Bullock presents on appeal are unpreserved. To the extent that Bullock argues the defendants’ testimony about

earlier protests in Denver or the reference to “Portland time” should have been excluded under CRE 403 due to unfair prejudice, our examination of the record reveals that their arguments on appeal differ from the objections raised and explanations offered in the trial court. Accordingly, because arguments raised for the first time on appeal are not preserved, *see Keith v. Kinney*, 140 P.3d 141, 153 (Colo. App. 2005), we do not address whether the court’s admission of this testimony ran afoul of CRE 403. Likewise, because they raised it for the first time in the reply brief, we decline to address Bullock’s argument that the defendants’ testimony about their personal experiences in recent protests amounted to inadmissible propensity evidence that should have been excluded under CRE 404(b). *See Flagstaff Enters. Constr. Inc. v. Snow*, 908 P.2d 1183, 1185 (Colo. App. 1995).

¶ 34 This leaves only Bullock’s contention that, under CRE 401 and 402, the evidence pertaining to previous Denver protests and the takeover of the police station in Portland was irrelevant and therefore inadmissible. As the trial court explained, the defendants’ descriptions of previous protest activity were admitted for the purpose of determining “what an objective and/or reasonable police

officer would have thought on the night of the event.” The evidence about events in Portland was admitted for the same purpose and to demonstrate what risks DPD expected and sought to prevent on the night of Bullock’s arrest. These purposes directly serve the objectively reasonable inquiry used to determine the presence of probable cause. Because evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,” CRE 401, the evidence that Bullock challenges on appeal was relevant and therefore admissible.

IV. Directed Verdict

¶ 35 Finally, Bullock contends, the defendants concede, and we agree that the trial court erred by entering a directed verdict on Bullock’s unconstitutional search claim. We conclude, however, that reversal is not required.

¶ 36 The constitutionality of the defendants’ search depended on the validity of the arrest that preceded it. *See People v. Lewis*, 975 P.2d 160, 170 (Colo. 1999) (“[T]he right to conduct a search incident to arrest only applies following a lawful arrest.”). But, as we have already discussed, whether Bullock’s arrest was lawful depended on

the existence of probable cause, a question that the trial court properly submitted to the jury. And because the existence of probable cause was a jury question, it was error for the court to direct a verdict on an issue that depended on the jury's answer.

¶ 37 That said, the defendants contend and Bullock concedes that the trial court's error cannot have prejudiced Bullock if the jury's finding that the defendants had probable cause to effect the arrest is allowed to stand. We have already concluded that the trial court did not err by submitting the question of probable cause to the jury, and Bullock does not argue on appeal that the evidence was insufficient to support the jury's finding. Thus, the trial court's erroneous entry of a directed verdict was harmless.

V. Disposition

¶ 38 We affirm the trial court's judgment.

JUDGE FREYRE and JUDGE LUM concur.