

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 06 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES BAILEY, a single man,

Plaintiff - Appellant,

v.

CHELAN COUNTY, a Municipal Corp.;
et al.,

Defendants - Appellees.

No. 12-35990

D.C. No. 2:11-cv-00461-RHW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, Senior District Judge, Presiding

Argued and Submitted November 4, 2013
Seattle, Washington

Before: SCHROEDER, PAEZ, and BERZON, Circuit Judges.

Plaintiff James Bailey appeals the district court's judgment following a jury verdict in favor of Defendants Mike Lamon and Lee Risdon ("Defendants"), two Chelan County Sheriff deputies. We affirm.

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

1. Bailey argues that the district court erred by failing to give his Proposed Jury Instruction No. 3. The proposed instruction elaborated on the definition of “actively resisting” as that term is used in the excessive force instruction given by the district court. We disagree. There was no error in the district court’s jury instruction on the elements of Bailey’s Fourth Amendment excessive force claim. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); Ninth Circuit Model Jury Instruction No. 9.22. The district court’s instruction allowed Bailey’s counsel to argue her theory of the case. *See Brewer v. City of Napa*, 210 F.3d 1093, 1097 (9th Cir. 2000). The district court therefore did not abuse its discretion in declining to give Bailey’s proposed instruction defining “actively resisting.”

2. Bailey also argues that the district court erred in excluding the testimony of two of his treating physicians, Drs. Wall and Travers. Even assuming that the district court erred or abused its discretion in excluding the doctors’ testimony, the error was harmless. *See Matter of Yagman*, 796 F.2d 1165, 1176 (9th Cir. 1986) *opinion amended on denial of reh’g sub nom. In re Yagman*, 803 F.2d 1085 (9th Cir. 1986). First, there was no dispute that the officers used force to arrest Bailey, and second, the jury’s special verdict found that the officers did not use excessive force.

AFFIRMED.