STATE OF MICHIGAN

COURT OF APPEALS

TROY EDDINGS JR.,

Plaintiff-Appellant,

v

TALLEN FLEMING and WALTER SAKOWSKI, Personal Representative of the Estate of CALVIN WESSON, Deceased,

Defendants-Appellees.

UNPUBLISHED
March 23, 2001

No. 214987
Wayne Circuit Court
LC No. 96-621067-NO

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Plaintiff brought this assault and battery action against defendants, Tallen Fleming and Calvin Wesson,[1] for injuries plaintiff sustained during a shooting incident on June 26, 1995.[2] The trial court granted Wesson's motion for a directed verdict and submitted the case against Fleming to the jury. The jury returned a verdict in Fleming's favor, finding that he shot plaintiff in self-defense. The trial court entered judgment in favor of both defendants. Plaintiff appeals as of right. We affirm.

Plaintiff first argues that the trial court erroneously granted Wesson's motion for a directed verdict. This Court reviews de novo a trial court's ruling on a motion for a directed verdict. *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000); *Meagher v Wayne State University*, 222 Mich App 700, 707-708; 565 NW2d 401 (1997).

> In reviewing the trial court's ruling, this Court views the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. A directed verdict is appropriate only when no factual question exists

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[1] Calvin Wesson died approximately two months before trial.

[2] Plaintiff also asserted claims of malicious prosecution, gross negligence, false arrest and false imprisonment. Only plaintiff's assault and battery claim remains at issue on appeal.

> regarding which reasonable minds may differ. [*Thomas, supra* at 643-644 (citations omitted).]

Viewing the evidence in the light most favorable to plaintiff and resolving any conflicts in the evidence in plaintiff's favor, we conclude that plaintiff did present sufficient evidence from which the jury could have concluded that Wesson committed an assault and battery against him.

In *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998), this Court stated the elements for an action alleging assault and battery:

> An assault is 'any intentional unlawful offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact.' This Court defined battery as 'the wilful and harmful or offensive touching of another person which results from an act intended to cause such contact.' [Citations omitted.]

We conclude that the trial court erroneously directed a verdict for Wesson. Plaintiff testified that he saw two guns and that two guns were discharged at him. Plaintiff suffered twelve gunshot wounds, some that were graze wounds and some that were pass-through wounds. Although the treating physician was unable to determine how many times plaintiff had been shot, trial evidence established that Fleming fired his weapon only four times. It is possible that Fleming's four shots caused all of plaintiff's injuries because each bullet could have caused more than one wound, while shell casings and other debris could have caused other wounds. However, the jury could also have interpreted the evidence to find that both Fleming and Wesson fired at plaintiff. This evidence, considered in conjunction with plaintiff's testimony that two men shot at him and that Wesson had threatened to kill him five days before the incident, was sufficient to defeat the motion for a directed verdict on the assault and battery claim against Wesson.

Nevertheless, reversal is not required in light of the jury's verdict that Fleming shot plaintiff in self-defense.

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take his action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

"A claim of self-defense or defense of others first requires that a defendant has acted in response to an assault." *City of Detroit v Smith*, 235 Mich App 235, 238; 597 NW2d 247 (1999). Further, Michigan recognizes the "defense of others" defense. *Sanders v Westin Hotel, Inc*, 172 Mich App 161, 166; 431 NW2d 414 (1988). The jury found that Fleming acted in self-defense when he shot plaintiff. Therefore, the jury necessarily believed defense testimony that plaintiff pointed a gun at Fleming before he fired at plaintiff. Fleming and Wesson sat side by side in a van when the shootings occurred. Therefore, even if the evidence supported a finding that Wesson also fired at plaintiff and caused some of his injuries, Wesson's actions would have been

similarly justified by self-defense or defense of others. In light of the jury's determination that Fleming acted in self-defense, the trial court's directed verdict in Wesson's favor does not require reversal.

Plaintiff next argues that the trial court abused its discretion by refusing to admit samples of his signature into evidence and by refusing to allow plaintiff's counsel to recall him to testify about his signature on his statement to police. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). This Court reviews "decisions regarding the admission of rebuttal testimony for an abuse of discretion." *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994).

During his case in chief, plaintiff testified that he had no memory of making a statement to police. Plaintiff's counsel could have addressed the authenticity of plaintiff's signature on the police statement at that time, but did not. Because the challenge to the authenticity of plaintiff's signature could have been properly admitted during plaintiff's case in chief, the trial court did not abuse its discretion in precluding this evidence as rebuttal. See *Winiemko*, *supra* at 418-419. Furthermore, even if the trial court did err in this regard, we would find that error harmless. Plaintiff's signature was submitted to the jury on discovery documents that were properly admitted. Therefore, the jury had the opportunity to compare plaintiff's signature on those documents to the signature on the statement. Accordingly, plaintiff was not prejudiced by the exclusion of evidence of his signature on his driver's license and social security card and by the trial court's refusal to allow plaintiff to testify in rebuttal. We find no abuse of discretion.

Plaintiff next argues that the trial court abused its discretion in sustaining defense objections to the admission of portions of Dr. Horst's deposition testimony, in which she read from the operative report prepared by another physician. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." MRE 602. In her deposition, Horst indicated that she had no independent recollection of her treatment of plaintiff's injuries. Horst also stated that her chief resident prepared and dictated the operative report. We find no abuse of discretion in the trial court's exclusion of that portion of Horst's testimony where she read from the operative report, of which she had no personal or independent knowledge. See *Van Every v SEMTA*, 142 Mich App 256, 262-265; 369 NW2d 875 (1985); *Citizens Nat'l Bank of Cheboygan v Mayes*, 133 Mich App 808, 812; 350 NW2d 809 (1984). Further, even if the trial court did err in this regard, we would find that error harmless. Plaintiff's hospital records were admitted into evidence in their entirety, including the operative report. Therefore, the jury had the opportunity to review the report at issue.

Finally, plaintiff argues that the trial court abused its discretion in refusing to allow him to amend his witness list to include Jacquetta Ford and in refusing to allow her to testify in rebuttal. "This Court will not disturb a trial court's decision regarding whether to permit a witness to testify, after a party has failed to comply with a deadline for submission of a witness list, absent an abuse of discretion." *Carmack v Macomb Co Community College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). Furthermore, "[t]he scope of rebuttal in civil cases is within

the sound discretion of the trial court." *Taylor v BCBSM*, 205 Mich App 644, 655; 517 NW2d 864 (1994). We find no abuse of discretion.

MCR 2.401(I)(2) governs the filing of witness lists: "[t]he court may order that any witness not listed in accordance with this rule will be prohibited from testifying at trial except upon good cause shown." Plaintiff failed to establish good cause for failing to list Ford as a witness. Ford testified at plaintiff's criminal trial in March, 1996. Plaintiff's trial attorney in the instant case functioned as his defense counsel in that criminal trial. Plaintiff filed his witness list in the instant case on December 11, 1996. He moved to amend his witness list to include Ford in July, 1998, just before trial. We agree with the trial court that plaintiff did not show good cause for failing to include Ford on his witness list.

Furthermore, the trial court did not abuse its discretion in prohibiting Ford from testifying in rebuttal. In *Gillam v Lloyd*, 172 Mich App 563, 584; 432 NW2d 356 (1988), the trial court prohibited the plaintiff from calling a witness in his case in chief who was not listed on the plaintiff's witness list. The plaintiff later attempted to call the witness in rebuttal. Again, the trial court refused to allow the witness to testify because he was not a listed witness. This Court affirmed the trial court's rulings. *Id*. at 584. Similarly, we find no abuse of discretion in the instant case.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage