STATE OF MICHIGAN

COURT OF APPEALS

EDWARD J. TINKHAM,

Plaintiff-Appellee,

v

SAUHAIL HEKMAT SAEED and ADNAN NAMOU,

Defendants-Appellants,

and

BASIM NAIMOU,

Defendant-Appellee.

UNPUBLISHED
March 15, 2002

No. 227754
Macomb Circuit Court
LC No. 97-000684-NO

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

In this assault and battery case, defendants Sauhail Saeed and Adnan Namou ("defendants") appeal as of right from a judgment awarding plaintiff $28,027, inclusive of interest, costs, and attorneys fees, which was entered following a jury verdict in plaintiff's favor. We affirm.

Plaintiff commenced this action and contended that he was assaulted by defendants while he attempted to make a delivery at a strip mall. Defendants, who are part of a family that owns the property and most of the stores in the strip mall, denied plaintiff's contentions and claimed instead that plaintiff was the aggressor and they simply acted in self-defense.

Exemplary Damages

Defendants claim that the court's failure to instruct the jury specifically on the requirements for exemplary damages requires reversal. We reject this argument.

The court instructed the jury regarding damages as follows:

> Now if you decide that the Plaintiff is entitled to damages, it is your duty to determine the amount of money which reasonable [*sic*], fairly and adequately compensates him for each of the elements of damage which you decide has resulted from the willful or intentional touching of the Plaintiff against Plaintiff's will by the Defendants, taking into account the nature and extent of the injuries. You should include each of the following elements of damage which you decide has been sustained by the Plaintiff to the present time, and that would be any physical pain and suffering, swollen jaw, any medical anguish or emotional distress, fright and shock, embarrassment, humiliation and mortification, outrage at the indignity of being assaulted and battered, denial of social pleasures and enjoyment, broken bridge work, chipped tooth, missed time from work and any reasonable expenses of necessary medical care, treatment and services.
>
> You should also include each of the following elements of damage which you decide Plaintiff is reasonably certain to sustain in the future, and that again would be any physical pain and suffering, swollen jaw, any mental anguish or emotional distress, fright and shock, embarrassment, humiliation and mortification, outrage at the indignity of being assaulted and battered, denial of social pleasure and enjoyment, broken bridge work, chipped tooth, missed time from work, any reasonable expenses of necessary medical care, treatment and services.

Because the jury awarded a lump sum award, it is not clear what portion of the damages awarded, if any, is attributable to exemplary damages. Importantly, defendants did not object to the instructions as given, nor did the defendants request different instructions regarding damages. Defendants' failure to object to the trial court's jury instructions, or to seek different instructions, is fatal to their claim of instructional error. MCR 2.516(C) provides as follows:

> A party may assign as error the giving of or failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict. . . stating specifically the matter to which the party objects and the grounds for the objection. (Emphasis added.)

We read this court rule to require a party in a civil case to either state the objection on the record or to request a specific instruction or risk waiving the instructional issue on appeal. Further, while there is language in some of our opinions suggesting that our Court will review instructional error absent objection for "manifest injustice"[1], we interpret our case law to require us to use our appellate review in such a case sparingly. *Hunt v Deming*, 375 Mich 581; 134 NW2d 662 (1965). In *Hunt v Deming*, our Supreme Court made this astute observation regarding the reasons parties must preserve, at trial, objections to jury instructions and the consequences for failing to do so:

> Plaintiffs point to language in prior cases, for example, *Jorgensen v Howland* (1949), 325 Mich 440, in support of their claimed right to assert on

[1] *Jorgensen v Howland*, 325 Mich 440; 38 NW2d 906 (1949).

appeal error in jury instruction notwithstanding their failure timely to object in the trial court. It suffices to note that those cases were decided before the explicit requirement of GCR 1963, 516.2 was promulgated.

> This is not to say that this Court may not, in unusual circumstances, and to prevent manifest injustice, take note of instructions which err with respect to basic and controlling issues in a case even though objection thereto was not made before the jury retired. See 2 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed 1963), p 567. It is to say, however, that the Court will exercise its discretion in this fashion but sparingly. To do otherwise would be to encourage counsel to maintain silence in the face of correctable erroneous instructions, hoarding their objections for use in the event of an unfavorable jury verdict. The course of expeditious justice is furthered by requiring that such objections be made while time yet remains to set the record straight. [*Hunt, supra* at 585 (emphasis added).]

We take, and defendants should have taken, our Supreme Court's admonition in *Hunt v Deming* seriously. We do not regard this case as presenting "unusual circumstances" which would justify overturning a jury award. To do so here "would be to encourage counsel to maintain silence in the face of correctable erroneous instructions." Moreover, in light of the trial court's instructions regarding damages, we conclude that we need not reverse the trial court to prevent "manifest injustice."

Defendants also contend that the trial court abused its discretion when it failed to voir dire the jury on a list of questions that they provided. Because defendants do not cite any authority in support of this issue, we deem this issue abandoned. *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997). In any event, the record discloses that defendants expressed satisfaction with the jury as chosen, thereby waiving this issue. *People v Johnson*, 245 Mich App 243, 254, n 3; 631 NW2d 1 (2001); *People v Acosta*, 16 Mich App 249, 250; 167 NW2d 897 (1969). Like the instructional issue, this issue is waived because defendants simply failed to raise the matter before the trial judge who could have addressed the matter, thereby obviating the necessity of this appeal.[2]

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[2] Defendants also assert that the trial court failed to properly instruct the jury on the law of self-defense and defense of others, in accordance with CJI2d. 7.22. Because defendants did not request specific instruction at trial, and made no request for this instruction, defendant waived this instructional issue for appeal. MCR 2.516(C).

Moreover, were we to review this issue on appeal, we note that jury instructions are to be reviewed in their entirety to determine whether they adequately informed the jury regarding the applicable law. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 459; 633 NW2d 418 (2001). Here, the court instructed the jury that "a person has a right to use reasonable force as may be or reasonably appears to be at the time necessary to protect others from bodily harm in repelling the assault." We conclude that this instruction sufficiently informed the jury that defendants were justified in using force if they had an honest and reasonable belief that force was needed to protect Bassam, though it later turned out that they were wrong. This instruction makes clear that the perspective must be from the person's point of view at the time the person

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Defendants further maintain that the trial court erred in permitting plaintiff to introduce evidence of defendant Saeed's guilty plea. The record shows that plaintiff's questions were directed at eliciting testimony regarding Saeed's prior in-court admission that he assaulted plaintiff. Party admissions are admissible under MRE 801(d)(1)(A) and MRE 801(d)(2)(A). Plaintiff's questions were not directed at eliciting testimony concerning the fact of a conviction. Saeed's unresponsive, volunteered answers to plaintiff's proper questions did not amount to error by the court or plaintiff's attorney. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Additionally, defendants say that the trial court erroneously instructed the jury on future pain and suffering because the evidence did not support such an instruction. We disagree. Plaintiff's wife testified that, although the alleged assault occurred 4-1/2 years earlier, plaintiff remained unable to bite down with his front teeth, and that any hard food, such as apples and the like, must be cut into small pieces so that he can place them in his mouth and chew them with his back teeth. We find this to be sufficient evidence to support the court's instruction on future damages. *Murdock v Higgins*, 208 Mich App 210, 219; 527 NW2d 1 (1994).

Further, defendants allege that the trial court abused its discretion when the court denied defendants' motion for a new trial. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). The record shows that the motion for a new trial was heard by Judge George Montgomery, who was not the presiding judge at trial. Although defendants contend on appeal that Judge Montgomery abused his discretion in denying the motion because he was not familiar with the facts and did not have a transcript of the trial, it is apparent from the record that defendants were aware when they filed their motion that Judge Montgomery would be deciding the motion and that a transcript had not yet been filed. Defendants never objected to Judge Montgomery hearing the motion, nor did they request that a transcript be prepared and reviewed before the motion was decided. Issues not raised in and decided by the trial court are not preserved for appeal. *Spencer v Citizens Insurance Co*, 239 Mich App 291, 310; 608 NW2d 113 (2000). Further, "[a] party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute." *Hilgendorf v St John Hosp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). Because defendants were aware that that Judge Montgomery would be deciding the motion and neither objected nor requested that he delay his decision until after a transcript was prepared, we find it disingenuous for defendants to now complain that Judge Montgomery abused his discretion in deciding the motion. *Hilgendorf, supra*. This issue does not warrant appellate relief. Again, defendants' failure to do their job at trial – their failure to raise objections before the trial judge – is fatal to their appeal.

Defendants also claim that the verdict was against the great weight of the evidence. We disagree. The weight to be accorded a witness' testimony is a matter for the jury to determine. *Forton v Laszar*, 239 Mich App 711, 717; 609 NW2d 850 (2000); *Detroit v Larned Associates*, 199 Mich App 36, 42; 501 NW2d 189 (1993). The jury is also free to credit or discredit any testimony. *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001); *Stallworth v Hazel*, 167 Mich App 345, 351; 421 NW2d 685 (1988). Here, conflicting versions of the events

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uses the force.

were presented to the jury; it was for the jury and not for us to weigh the evidence and determine the credibility of the witnesses. The jury's verdict is not against the great weight of the evidence and our courts are very disinclined to overturn a jury verdict. *Ellsworth v Hotel Corp*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad