

STATE OF MICHIGAN
COURT OF APPEALS

CLARENCE S. RUSSELL, and TONY L.
THOMPSON,

UNPUBLISHED
April 19, 2012

Plaintiffs-Appellees,

v

No. 301383
Washtenaw Circuit Court
LC No. 08-000098-NO

SHANE P. NOVENCIDO,

Defendant-Appellant,

and

SHAWN C. NOVENCIDO,

Defendant.

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

In this civil assault and battery action, defendant Shane Novencido appeals as of right the trial court's judgment following a bench trial finding him liable for assault and battery against plaintiffs Clarence Russell and Tony Thompson. The trial court found defendant liable to Russell for \$25,000 in actual damages and \$25,000 in exemplary damages; it found defendant liable to Thompson for \$75,000 in actual damages and \$25,000 in exemplary damages. For the reasons stated in this opinion, we affirm.

I. FACTS & PROCEEDINGS

This lawsuit stems from an altercation between defendant and plaintiffs at Fenders Bar and Grill ("Fenders") on December 22, 2006. At trial the evidence showed that Thompson, who is the owner of Fenders, Russell, and Richard Birchmeier were at the bar and the atmosphere in the bar was unremarkable. After the arrival of defendant and his fraternal twin brother, Shawn Novencido, the mood in the bar changed because defendant and his brother and another group in the bar were engaging in verbal exchanges. Thompson intervened by trying to get the two sides to stop, but after the problem continued, he decided to ask defendant and Shawn to leave. Defendant and Shawn agreed to leave, and Thompson followed about three feet behind them as

they left the bar. What happened outside the bar is the subject of the assault and battery claim brought by Thompson and Russell, and the testimony was very inconsistent and contradictory.

Thompson testified that just outside the door that they exited, there is a “stoop,” which is a raised portion of the sidewalk in an alcove area. Thompson did not realize it, but Russell and Birchmeier followed him out and were standing behind him on the stoop. Defendant and Shawn were on the sidewalk, Shawn was to Thompson’s right at a 45-degree angle and defendant was to his left at a 45-degree angle. At that point Thompson was talking to Shawn because he was “easier to deal with.” As he was talking to Shawn, Thompson noticed an arm “coming back” with a clenched fist holding eyeglasses; he also heard Russell “over his left-hand side” say “give him his eyeglasses back.” At that point Thompson realized Russell and Birchmeier followed him outside, and that defendant had reached up and taken Birchmeier’s eyeglasses because Thompson believed it was defendant’s arm and clenched fist with the eyeglasses that he observed.

After realizing what happened, Thompson told Shawn to give him the eyeglasses even though defendant was the person who took the eyeglasses because Shawn was calmer and “easier to deal with” than defendant. Thompson was looking directly at Shawn. Immediately after asking Shawn to give him the eyeglasses, Thompson was struck in the left cheekbone. Thompson testified that the blow came from his left side where defendant was standing. The blow knocked him off his feet and he fell toward the sidewalk, hitting his head on the back of the building as he fell onto his back. Thompson did not see who threw the punch, but presumed it was defendant because he was looking at Shawn and there was no one else around. Thompson was positive that Shawn did not throw the punch.

Thompson testified that he was hit three or four more times when he was on the ground, this time in his right eye. He testified that he was finally able to reach up with his left arm and grab the person hitting him. Thompson grabbed the shirt of the person striking him and pulled the person into his chest; at that point he noted that it was Shawn hitting him while he was on the ground. After that, people came out of the bar, and Shawn escaped by slipping out of his shirt. Thompson did not see defendant, but watched Shawn run across the street to the parking lot.

Thompson testified that the assault and battery occurred very quickly, and he was incredibly surprised by the attack. Thompson was bruised all over, suffered abrasions to the back of his head, needed stitches along his eye line, and sustained an orbital fracture on his left cheekbone. Thompson testified that he was in pain for four or five days, that the stitches were in for about a week, and the discoloration on his face did not fade for five or six weeks. Thompson testified that his injuries affected his ability to celebrate Christmas, and he had to skip some activities that he traditionally would have engaged in. Thompson stayed home from work for about five days, and when he returned he had to continually answer questions about his injuries. He testified that he was really embarrassed about the incident, and that he was worried about how it would impact his teenage daughter. The orbital fracture eventually healed, but he still suffers from double vision when he looks to the left. The double vision is a permanent condition that cannot be fixed.

Russell corroborated Thompson’s testimony about Shawn and defendant’s behavior, and Thompson’s actions in regard to asking them to calm down and eventually to leave. Russell

testified that he followed Thompson out of the bar when defendant and Shawn were leaving, and came outside onto the stoop just after Thompson did. Russell said he was standing behind Thompson, slightly to his left. Russell testified that defendant was almost directly in front of him on the sidewalk, and Shawn was on the sidewalk to his right. Birchmeier also came outside and was standing behind Russell.

Russell testified that he saw defendant reach up and grab Birchmeier's eyeglasses from his face. Russell testified that he told defendant to give the eyeglasses back. In response, defendant hit Russell right between the eyes. Russell testified that it was a really hard hit, and he believed it was with a closed fist. After being hit, Russell ducked down and fell forward into defendant and onto the street.

Russell testified that he had a cut on his face near his nose and left eyebrow, and that Thompson looked "really rough" and had blood all over him. Russell went to the emergency room with his wife and received five stitches inside his cut and seven stitches outside. Russell testified that the doctor cleaned his eye out because he felt like there was some glass in his eye. Russell testified that he was in pain for about three to five days, and that he had discoloration on his face. Russell estimated that he was totally healed after about four or five weeks. Russell had to cancel scheduled family photographs because of his injuries.

Police responded to Fenders as defendant and Shawn were driving away in Shawn's truck. Police followed defendant and Shawn, and observed their truck park behind the Old Shack Bar. The officer approached defendant and Shawn as they were walking away from the truck and toward the entrance to the bar. Defendant and Shawn were questioned and eventually arrested.

Both defendant and Shawn testified during the bench trial, and their account of the night's events differed significantly from plaintiffs' testimony. Both defendant and Shawn testified that they were sitting alone at a table when Jay Birchmeier, Richard Birchmeier's nephew, approached their table and asked Shawn if there was going to be a problem because Jay and Shawn do not get along. Jay testified that someone at defendant's table waved him over, that Shawn asked him if he wanted to fight, and that he clearly informed Shawn that he was not interested in fighting. Both Shawn and defendant testified that Shawn and Jay were exchanging words, but that defendant did not say anything. They both further testified that after Thompson asked them to leave they got up and walked toward the door without causing any problems.

Shawn testified that as he was stepping through the door to leave he was jabbed in his left shoulder, and he fell onto the ground on his knees. Shawn grabbed the legs of the person closest to him, pulled him down, and started punching him in the face. Shawn realized that person was Thompson. Shawn testified that he punched Thompson in the left and right eyes.

Defendant testified that he walked out the door and that when he got to the curb he turned around and saw Thompson push Shawn, who fell onto the ground on all fours. Defendant testified that he tried to go over to Shawn and Thompson, but Russell and Birchmeier blocked his path. Defendant testified that he "pulled" Birchmeier's eyeglasses from his face in order to get around them, and that as he was going around Birchmeier, Russell told him to give back the eyeglasses. Defendant said he pulled his arm back so that Russell could not take the eyeglasses,

and Russell grabbed his shirt collar with his right hand and wrapped his left arm around his waist and pushed him back. Defendant stated that both he and Russell fell onto the street, and he was held down by Russell and Birchmeier. Defendant specifically testified that he never punched Russell or Birchmeier.

Shawn testified that at that point people started to come out of the bar, and that he and defendant fled the scene because they wanted to avoid any further altercations.

Both Shawn and defendant pleaded guilty to assault and battery in connection with the incident. The basis of Shawn's guilty plea was punching Thompson. In making his plea, defendant specifically stated that as he and his brother left the bar they were followed by "three gentlemen" and he "heard a ruckus going on" and turned to see his brother "fighting this one gentleman, and the other two gentlemen were standing in front of me and I physically removed Richard Birchmeier's eyeglasses from his face" and then "a fight broke out between me and the two other gentlemen." Defendant admitted he did not have permission to remove the eyeglasses and that he removed the eyeglasses intentionally.

After the conclusion of the criminal proceedings, plaintiffs filed civil complaints against both Shawn and Defendant. Shawn entered into a consent judgment, and defendant proceeded to a bench trial. After the conclusion of the bench trial, the trial court issued a written opinion and order finding defendant liable to both Thompson and Russell for assault and battery. The trial court awarded actual and exemplary damages to both plaintiffs. Defendant now appeals as of right.

II. THE TRIAL COURT'S FACTUAL FINDINGS

Defendant argues that the trial court made several factual findings that were not supported by the evidence.

We review a trial court's factual findings for clear error. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

This Court's correction of trial court error is limited by MCR 2.613(A), which provides:

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 this action appears to the court inconsistent with substantial justice.

A party must demonstrate prejudice to establish that an error is inconsistent with substantial justice. See *Estate of Jilek v Stockson*, 490 Mich 961, 962; 805 NW2d 852 (2011).

Defendant identifies 19 specific factual findings in the trial court's written opinion that he claims are clearly erroneous. Eleven of the nineteen identified factual findings address facts that pertain to the events occurring inside Fenders that led to Thompson asking defendant and Shawn

to leave, or that address the trial court's interpretation of the criminal proceeding that preceded the filing of this civil action. We have reviewed the record pertaining to these claims and find that all but two of them are without merit. However, we do agree with defendant that two of them were clearly erroneous because there is not sufficient evidence to support the findings. First, defendant argued that the trial court erred when it found that defendant asked Jay Birchmeier if he knew that defendant could "kick his ass." We agree that this factual finding was clearly erroneous because Jay specifically testified that he was talking to Shawn, not defendant, and that Shawn was the person who made that comment.

Second, defendant argues that the trial court erred when it found that defendant and Shawn confronted another bar patron, Andrew Perry, and asked him if he was a "tough guy" and indicated that they could beat him up. The trial court's finding that one of the brothers told Perry he could beat him up was clearly erroneous because Perry testified that he could not remember whether either brother said that to him. Perry indicated that he would "trust" what was written in the police report, and the report reflected that he told police that the brothers told him they could beat him up; however, the report was never entered into evidence and Perry had no independent recollection of the statement. Accordingly, we agree that the trial court's factual finding in this regard was clear error.

Nevertheless, both of the trial court's factual errors are irrelevant to its ultimate determination finding defendant liable for assault and battery of plaintiffs. Whether defendant made a threatening comment to another bar patron has very little to do with whether defendant assaulted or battered Thompson and Russell. Further, Thompson and Russell unequivocally testified to defendant's actions. In light of the specific testimony regarding defendant's actions, these factual errors do not constitute error requiring reversal because it does not appear to this Court to be inconsistent with substantial justice. MCR 2.613(A).

The remaining eight claims of fact-finding error pertain to the events outside the bar. In particular they address the trial court's finding regarding which of the brothers was responsible for inflicting the injuries to Thompson and Russell and whether the identification of defendant as the more aggressive of the two brothers was reliable. Regarding the findings by the trial court that defendant struck the blow that resulted in the injury to Thompson's left eye, and that defendant was also responsible for striking the blow that caused Russell's facial injuries, we note that the two versions of what happened are irreconcilably contradictory and resolution of what happened is dependent on assessing the credibility of the witnesses. In reviewing the trial court's assessment of the credibility of witnesses, this Court recognizes the "special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C); *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 655; 662 NW2d 424 (2003). Considered in light of the deference given to the finder of fact and the trial court's explicit finding that it found defendant's testimony not credible, we conclude that the trial court's factual findings were not clearly erroneous.

Finally, defendant claims that the evidence did not support finding that he was the more aggressive of the two brothers. Contradictory evidence was admitted at trial in regard to this issue. Thompson testified that when he first approached the table that defendant and Shawn were sitting at, the brother with the scraped knuckles told him that they did not want any problems. Thompson also testified that the brother he primarily addressed and conversed with

that night was Shawn, and that Shawn was the calmer brother. Accordingly, Thompson's testimony leads to the inference that Shawn was the brother with the scraped knuckles. In contrast, the responding police officer testified that defendant was the brother who had scraped knuckles. Neither brother testified during trial regarding who had scraped knuckles the night of the incident.

We conclude that the trial court's finding that defendant was the more aggressive brother was not clearly erroneous despite this conflicting testimony. Thompson testified that his identification of defendant as the brother that struck him first and Shawn as the calmer brother was not solely based on a belief that Shawn had scraped knuckles. Thompson also relied on later identifying information regarding which twin was which that he obtained during the criminal proceedings related to the incident. Moreover, the arguably inconsistent statements of Thompson and the responding officer do not render the trial court's conclusion erroneous. The trial court could have decided to give credibility to Thompson's identification of defendant and Shawn. Thompson stated that Shawn was the calmer brother multiple times during his testimony, and only referenced the scraped knuckles once. The trial court also could have determined that the officer made an error, especially in light of the fact that the officer did not actually obtain defendant and Shawn's driver's licenses and identified them based on who they said they were, and because during the trial he had no independent memory of the injuries and had to refer to his police report. Because there was credible evidence that supported the trial court's findings, those findings were not clearly erroneous in this regard.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the trial court clearly erred in finding that plaintiffs proved by a preponderance of the evidence that defendant committed unjustified acts of assault and battery against both plaintiffs.

"When reviewing a claim based on the sufficiency of the evidence in a civil action, this Court examines the evidence in a light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference that can be drawn from the evidence." *Price v Long Realty, Inc.*, 199 Mich App 461, 472; 502 NW2d 337 (1993).

To recover damages for the intentional tort of assault in a civil context, a plaintiff must demonstrate an "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." *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998), quoting *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991). To recover damages for battery, a plaintiff must demonstrate a "willful and harmful or offensive touching of another person which results from an act intended to cause such contact." *Id.* See also *VanVorous v Burmeister*, 262 Mich App 467, 482-483; 687 NW2d 132 (2004).

In a civil proceeding, the burden of proof is on the plaintiff to prove the case by a preponderance of the evidence. See *Children of Chippewa, Ottawa and Potawatamy Tribes v Regents of Univ of Mich.*, 104 Mich App 482, 497; 305 NW2d 522 (1981); *Hoffman v Loud*, 111 Mich 156, 158; 69 NW 231 (1896). Preponderance of the evidence means "such evidence as,

when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests.” *Hoffman*, 111 Mich at 158. Circumstantial evidence is sufficient to prove a claim. See *Johnson v Auto-Owners Ins Group*, 202 Mich App 525, 527; 509 NW2d 538 (1993); *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009).

There was sufficient evidence to demonstrate the elements of assault by a preponderance of the evidence with respect to Thompson based on Thompson’s testimony alone. Thompson testified that defendant hit him in the face with a closed fist so hard that he fell to the ground; this satisfies the requirement of proving use of force by a person toward another. Further, Thompson testified regarding his injuries, and his medical records were admitted into evidence, this satisfied the requirement of injury. Thompson’s testimony that defendant was acting aggressively all night, and that he snatched Birchmeier’s eyeglasses before punching Thompson suggests that circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact were also present. See *Stolberg*, 231 Mich App at 260. The same facts demonstrate that there was a “willful and harmful or offensive touching of another person which results from an act intended to cause such contact.” *Id.* Accordingly, Thompson’s testimony alone is sufficient for a finder of fact to conclude that defendant was guilty of assault and battery with respect to Thompson.

Similarly, Russell’s testimony was sufficient to demonstrate the elements of assault and battery by a preponderance of the evidence. Russell testified that he saw defendant take Birchmeier’s eyeglasses, and that when he asked for them back, defendant hit him with a closed fist in the face causing him to fall into the street. Russell testified regarding his injuries, which were not disputed. This testimony, if believed, was sufficient to demonstrate by a preponderance of the evidence, the elements of assault and battery. *Id.*

Defendant’s arguments on appeal primarily focus on the fact that much of the evidence was circumstantial, or that the evidence could be viewed to suggest some other set of circumstances, especially if defendant’s testimony were believed. However, defendant fails to recognize that this Court views the evidence in the light most favorable to the nonmoving party. *Price*, 199 Mich App at 472. Further, circumstantial evidence is sufficient to support the elements of a claim, *Gayheart*, 285 Mich App at 216, and we defer to the finder of fact’s determinations regarding the credibility of the witnesses, MCR 2.613(C); *Ambis*, 255 Mich App at 655. Accordingly, we conclude that the trial court did not err, and there was sufficient evidence to support its finding that defendant was liable for the assault and battery of both Russell and Thompson.

IV. DAMAGES

Defendant argues that the trial court’s damages awards were clearly erroneous because there was insufficient factual support for the plaintiffs’ claims.

We review a trial court’s award of damages after a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). We will “not set aside a nonjury award merely on the basis of a difference of opinion.” *Id.* (citation and quotation omitted). Clear error exists where the reviewing court is left with a definite and firm conviction

that a mistake has been made after review of the entire record. *Id.* A damage award is not clearly erroneous where the award is within the range of the evidence. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

Actual damages in an assault and battery case may be awarded for “actual physical injury and mental suffering, or sense of outrage and mortification from the humiliating indignity arising from the assault and blow so inflicted.” *Robertson v Hulbert*, 226 Mich 219, 228; 197 NW 505 (1924). The trier of fact has the authority to measure damages for pain and suffering. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). Actual damages and exemplary damages both compensate a plaintiff for “injured feelings”; however, exemplary damages “pick up where actual damages leave off by in effect compensating the plaintiff for injured feelings attributable solely to the egregiousness of defendant’s conduct.” *White v City of Vassar*, 157 Mich App 282, 291; 403 NW2d 124 (1987). “[A]n award of exemplary damages is justifiable only where it is first shown that defendant’s conduct was malicious, or so willful and wanton as to demonstrate a reckless disregard of the plaintiff’s rights.” *Bailey v Graves*, 411 Mich 510, 515; 309 NW2d 166 (1981). See also *Smith v Ely*, 470 Mich 893; 683 NW2d 145 (2004).

Defendant first specifically argues that plaintiffs failed to present evidence that defendant committed any wrongdoing, and accordingly, no actual damages were warranted. This argument is essentially a restatement of defendant’s argument that there was not sufficient evidence to support the trial court’s determination of defendant’s liability to plaintiffs. As discussed *supra*, there was sufficient evidence of defendant’s wrongdoing to support actual damages.

Next defendant argues that the trial court failed to determine the extent of damage caused specifically by defendant’s actions, and instead focused on plaintiffs’ damages from the overall incident which improperly included damages inflicted by Shawn.

Defendant’s argument in regard to Russell fails because there was never any allegation that Shawn caused any of Russell’s injuries; accordingly, there would be no need to allocate damages. Further, the actual damages awarded for Russell’s injuries were supported by the evidence, including Russell’s testimony and his medical records that were submitted to the trial court. A damage award is not clearly erroneous where the award is within the range of the evidence. *Triple E Produce Corp*, 209 Mich App at 177. In light of the record evidence, we conclude that the trial court did not clearly err in its award of \$25,000 in actual damages to Russell.

In regard to Thompson, the trial court specifically found that he suffered a fractured left orbital wall to his left eye, a laceration requiring stitches on the left side of his left eye, severe bruising and discoloration around both eyes, and a contusion to the back of his head. The trial court noted that Thompson suffers from permanent double-vision as a result of the injuries to his left eye. Thompson’s medical records confirm the trial court’s findings, as does Thompson’s trial testimony. The evidence in this case demonstrated that defendant struck Thompson on his left side causing Thompson to fall to the ground. Shawn then punched Thompson in the right eye. Accordingly, the only injury the trial court mentioned that could possibly have been attributed to Shawn was the bruising and discoloration around both eyes because that includes the right eye and the evidence does not suggest that defendant ever struck Thompson’s right side. While the trial court never specifically explained that it was awarding damages only for the

injuries caused by defendant, the trial court's damage award of \$75,000 in actual damages is supported by the evidence of injuries caused by defendant. *Id.* Moreover, there is no indication that the trial court improperly assessed damages against defendant for which Shawn was responsible.¹ Accordingly, we conclude that the trial court did not clearly err in its award of \$75,000 in actual damages to Thompson.

Finally, defendant argues that exemplary damages were not warranted because plaintiffs failed to present any evidence that defendant exhibited malicious, reckless, or wanton behavior.

In this case, the trial court found that exemplary damages were warranted because both plaintiffs suffered "embarrassment, pain, and humiliation, particularly during the Christmas season." The trial court found that defendant's actions "were intentional and malicious" because defendant came to Fenders after getting into a fight earlier and immediately started trying to instigate another fight. The trial court found that defendant "grabbed one elderly gentleman's eyeglasses and hit another elderly gentleman between the eyes knocking him to the ground," after being asked to calm down and then asked to leave Fenders. The trial court also found that defendant "beat" the owner of the bar until bar patrons came out, at which time defendant fled. The trial court concluded that as a result of defendant's "intentional and malicious actions, both elderly gentleman [sic] suffered physical and emotional damage."

We conclude that the trial court's award of exemplary damages was not clearly erroneous. In *McPeak v McPeak*, 233 Mich App 483, 487; 593 NW2d 180 (1999), this Court noted that exemplary damages are justified if the act or conduct complained of was voluntary, and the act inspired feelings of humiliation, outrage, and indignity. *Id.* In this case, both plaintiffs testified to feeling embarrassed and canceling or changing holiday plans as a result of their injuries. Further, the evidence supported the trial court's finding that defendant's actions were malicious and willful, as required for exemplary damages. *Id.* Accordingly, we are not left with a definite and firm conviction that a mistake was made by the trial court.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad

¹ In fact, the trial court file has a writ for garnishment in regard to Shawn in recognition of the damages he owes Thompson resulting from the consent judgment to which the parties agreed. Accordingly, the trial court was clearly aware of which damages Shawn was liable for in contrast to those for which defendant was responsible.