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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TINA KAYE HOWELL, Plaintiff/Appellee, v. DONALD RAY PALMER, Defendant/Appellant.	2 CA-CV 2008-0163 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20072099

Honorable Deborah Bernini, Judge
Honorable Stephen C. Villarreal, Judge

AFFIRMED

Tina Kaye Howell — Tucson
In Propria Persona

Donald Ray Palmer — Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 After a bench trial, the trial court found appellant Donald Palmer liable for the assault and battery of appellee Tina Howell. It awarded her compensatory and punitive damages in the amount of $225,000.[1] The court also found Palmer had validly transferred to his mother by quitclaim deed his half-interest in real property he owned jointly with Howell, and it ordered the property partitioned by sale. On appeal, Palmer argues the court erred when it denied several of his pretrial motions and his motion for new trial. He also argues there was insufficient evidence that he committed assault and battery. For the following reasons, we affirm the judgment.

¶2 Palmer and Howell purchased a home together in 2001 and lived together sporadically until Howell moved out permanently in 2003. In December 2004, after an argument, Palmer shot Howell several times in the face, neck, and arm, causing serious injuries. As a result of that incident, Palmer was arrested, charged, and convicted of attempted first-degree murder, drive-by shooting, and aggravated assault.

¶3 In 2007, Howell filed a civil action against Palmer for assault and battery based on the shooting incident and requested partition of the real property the two held in common. Upon discovering Palmer had transferred his interest in the property to his mother, Howell amended her complaint to include a claim against Palmer and his mother for fraudulent

[1]Although the court expressly found Palmer had "assaulted" Howell, its finding that she had "suffered serious, permanent injuries as a result" constituted a finding of battery.

transfer and joined Palmer's mother as a defendant on the claim for partition.[2] After a two-day trial, the court found Palmer had validly transferred his interest in the property to his mother and had not intended to hinder, delay, or defraud Howell by doing so. The court further ordered the division and sale of the property held in common by Howell and Palmer's mother, and it ordered Palmer to pay Howell $225,000 in compensatory and punitive damages for assault and battery. This appeal followed.

SEPARATE TRIALS

¶4 Palmer argues the trial court erred when it denied his motion to hold separate trials on the assault-and-battery and property claims.[3] He contends the prejudice he suffered was demonstrated by the court's "effort to hurry [him] along, not allowing him to complete his cross-examination of [Howell]." He also argues he "might have [suffered] or did" suffer undue prejudice because the claims were unrelated.

¶5 Rule 42(b), Ariz. R. Civ. P., permits a court to order separate trials for different claims "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy." We will not disturb a trial court's ruling denying a motion for separate trials absent an abuse of the court's discretion. *McElhanon v. Hing*, 151

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[2]Palmer's mother, Velma Glenn, is not a party to this appeal.

[3]In a related argument, Palmer argues the trial court erred when it denied his "motion for determination of interest" in the property pursuant to A.R.S. § 12-1213 without first having held a hearing. But the court held a two-day trial before it determined whether Palmer had an interest in the house. He has not explained, nor can we fathom, how that trial failed to satisfy the hearing requirement of § 12-1213.

Ariz. 386, 397, 728 P.2d 256, 267 (App. 1985), *vacated in part on other grounds*, 151 Ariz. 403, 728 P.2d 273 (1986). In general, "the separation of issues for trial is not to be routinely ordered." *Cota v. Harley Davidson*, 141 Ariz. 7, 11, 684 P.2d 888, 892 (App. 1984).

¶6 The fact that claims are not directly related does not necessarily make trying them together prejudicial. *E.g., Marvin Johnson, P.C. v. Myers*, 184 Ariz. 98, 102, 907 P.2d 67, 71 (1995) (finding no error in consolidation of probate matter and civil action related to probate assets). The risk of prejudice and confusion of issues is especially low when a court, rather than a jury, acts as the finder of fact. *State v. Arellano*, 213 Ariz. 474, n.5, 143 P.3d 1015, 1021 n.5 (2006). Moreover, the court's ultimate ruling in his favor on the property issues effectively dispels any suggestion that the court was biased against Palmer based on the assault-related evidence.

¶7 Further, we find no support for Palmer's contention that the trial court unnecessarily limited his cross-examination because the issues were tried together. A trial court has broad discretion over the management of a case. *In re Estate of Newman*, 219 Ariz. 260, ¶ 61, 196 P.3d 863, 877-78 (App. 2008). Thus, it "may impose reasonable time limits on the trial proceedings or portions thereof" as part of its duty to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence." Ariz. R. Evid. 611(a). Palmer has not explained what evidence he was unable to present as a result of the court's limiting his cross-examination of Howell, nor has he shown any reason to believe the court's ruling would have been different had the issues been separately tried.

¶8 Because Palmer has not established that he suffered prejudice as a result of the claims' being tried together and because we can find no support in the record for this proposition, we conclude the trial court did not abuse its discretion in denying Palmer's motion for separate trials.

POSTPONEMENT OF TRIAL

¶9 Palmer argues the trial court erred when it denied his motion to continue the trial so he could subpoena his witnesses. We review a trial court's denial of a requested continuance for an abuse of discretion. *Bills v. Ariz. State Bd. of Educ.*, 169 Ariz. 366, 369, 819 P.2d 952, 955 (App. 1991). Rule 38.1(h), Ariz. R. Civ. P., provides that, once a trial date has been set, a trial shall not be postponed "except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law." Rule 38.1(i) further provides that, "if the ground for the application [for postponement] is the want of testimony," the moving party must file an affidavit showing that the testimony is material "and that the party has used due diligence to procure such testimony, stating such diligence and the cause of failure to procure such testimony, if known, and that such testimony cannot be obtained from any other source."

¶10 Palmer utterly failed to comply with Rule 38.1 in moving for a continuance. He filed no affidavit, did not explain how the testimony was material, and did not show that he had been diligent in attempting to obtain the testimony. On that basis alone, the trial court did not abuse its discretion in denying his motion. *See City of Tucson v. O'Rielly Motor Co.*,

64 Ariz. 240, 250, 168 P.2d 245, 252 (1946). Even had Palmer complied with the rule, however, the court did not abuse its discretion by refusing to postpone the trial when Palmer's need for a postponement was occasioned by his own failure to properly subpoena the witnesses. *See Kreisman v. Thomas*, 12 Ariz. App. 215, 221-22, 469 P.2d 107, 113-14 (1970) (no abuse of discretion in denying continuance when sole ground for motion plaintiff's own failure to prepare case adequately); *see also State v. Ahumada*, 25 Ariz. App. 247, 248, 542 P.2d 828, 829 (1975) (finding abuse of discretion in denying continuance when defendant "diligent in insuring attendance by his witnesses and subpoenaed his brother" but brother failed to appear on second day of trial).

¶11 Palmer asserts his incarceration prevented him from properly issuing and serving subpoenas on his potential witnesses but fails to explain how the provisions of Rule 45, Ariz. R. Civ. P., the rule governing subpoenas, prevent an incarcerated person from complying with the rule. *See Lee v. State*, 218 Ariz. 235, ¶ 33, 182 P.3d 1169, 1176 (2008) (McGregor, C.J., dissenting) (recognizing exception to filing rule for pro se inmates only for petition for review, petition for post-conviction relief, and notice of appeal); *cf. Lewis v. Casey*, 518 U.S. 343, 354 (1996) (in guaranteeing inmates meaningful access to courts, state need not "enable the prisoner to discover grievances, and to litigate effectively once in court") (emphasis omitted).

¶12 Here, the trial court assisted Palmer by contacting his two witnesses to determine whether they had received the subpoenas, by questioning the one prospective

witness who voluntarily appeared in court about whether he had received a subpoena, by informing Palmer he could still properly subpoena his witnesses while trial was proceeding, and by pointing out that Palmer's mother or a friend could assist in that process. And, although Palmer asserts his incarceration made it impossible for him to have followed the court's suggestion to attempt to subpoena the witnesses during trial, he does not explain how being incarcerated prevented him from properly subpoenaing the witnesses before trial began.

¶13 Palmer also contends one of his witnesses was properly subpoenaed but simply "elected not to appear" in court to testify and the other never accepted service of the subpoena. As proof, he attached to his motion for new trial a copy of a certified mail receipt showing an item addressed to one of the witnesses was received by a different person at the witness's place of employment. He also attached a copy of an envelope that was apparently sent by certified mail to the other witness but not signed for as received. But this evidence does not show that Palmer correctly served the subpoenas or complied with Rule 45 concerning the contents of the subpoenas. *See, e.g.*, Ariz. R. Civ. P. 45(b) (service of subpoena effected by delivering copy to person and "tendering to that person the fees for one day's attendance [at trial] and the mileage allowed by law"). The trial court considered the motion for new trial and summarily denied it. We defer to the court's determination of the appropriate weight to give the evidence Palmer provided of his diligence, *see Premier Fin. Servs. v. Citibank (Ariz.)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995), and we find

no abuse of discretion in its denial of the motion for new trial. *See Erickson v. Waller*, 116 Ariz. 476, 479, 569 P.2d 1374, 1377 (App. 1977).

INSUFFICIENT EVIDENCE

¶14 Palmer argues Howell presented no evidence "that her injuries w[ere] a result of the assault or if [Palmer] did it." To prove a civil claim for battery, a plaintiff must show "the defendant intentionally caused a harmful or offensive contact with the plaintiff to occur." *Johnson v. Pankratz*, 196 Ariz. 621, ¶ 6, 2 P.3d 1266, 1268 (App. 2000); Restatement (Second) of Torts § 13 (1965).[4] The plaintiff must establish each of the elements by a preponderance of the evidence. *Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, ¶ 11, 93 P.3d 486, 491 (2004).

¶15 Here, Howell testified that she had been in her car one morning in December 2004, having a disagreement with Palmer on her cellular telephone, when she noticed Palmer's car—a teal-colored Chrysler—traveling behind her. After a while, she noticed he had pulled his vehicle alongside hers so that they were driving next to each other. When she looked over again, he was pointing a gun at her. She then heard a "loud bang," her window shattered, and she lost control of her car, striking a telephone pole. She saw Palmer backing his vehicle up, and she "positioned [her]self on the passenger side of the floor and . . . just put [her] hand over [her] head." Palmer then "came over to the driver's

[4]As a civil cause of action, assault shares the elements of battery but does not require that the harmful or offensive contact have actually occurred. *See* Restatement § 21.

side of [her] door and . . . just started shooting inside the car." Howell felt something hit her in the face and on the elbow and wrist. She managed to get out of the car and lie down in the dirt. She testified Palmer then "ran back over to [her] and he lifted up [her] left arm, and then he said[, ']F her[,'] and ran back to [his] car." Howell stated that she recognized Palmer's car as it was leaving the scene and that she had not lost consciousness during the incident. She then testified in detail about the injuries she had sustained and how those injuries had affected her since the incident.

¶16 Palmer essentially argues that Howell presented insufficient evidence to prove assault and battery because of inconsistencies in her testimony between the criminal trial, direct examination, and cross-examination, and because her testimony was the only evidence presented to support the claim. But we "must view the evidence in a light most favorable to supporting the trial court's judgment." *Premier Fin. Servs.*, 185 Ariz. at 85, 912 P.2d at 1314. And an appellate court will not invade the province of the trier of fact by reweighing the evidence and redetermining the credibility of the witnesses. *Id.* Furthermore, a victim's testimony can constitute sufficient proof to support a criminal conviction beyond a reasonable doubt. *See, e.g., State v. Jones*, 188 Ariz. 534, 543, 937 P.2d 1182, 1191 (App. 1996) (victim's testimony about dates of assaults sufficient to sustain convictions). Accordingly, Howell's testimony supplied sufficient evidence to permit the court to find the elements of assault and battery, and Howell's resulting damages, proven by a preponderance, and we find no error.

MOTION FOR NEW TRIAL

¶17 Finally, Palmer argues the court erred in denying his motion for a new trial. We review the denial of a motion for a new trial for an abuse of discretion. *Boatman v. Samaritan Health Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990). A trial court abuses its discretion when it acts arbitrarily or inequitably, makes a decision unsupported by the facts, or misapplies the law. *City of Phoenix v. Geyler*, 144 Ariz. 323, 328-29, 697 P.2d 1073, 1078-79 (1985).

¶18 Palmer moved for a new trial under Rule 59(a)(1) and (8), Ariz. R. Civ. P. The relevant portions of that rule state:

> A verdict, decision or judgment may be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting that party's rights:
>
> > 1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial.
> >
> > . . . .
> >
> > 8. That the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

¶19 Palmer alleges the trial court's decision was irregular because, he contends, the court treated Howell more favorably.[5] Specifically, he contends the court granted her a

[5]Palmer has no standing to challenge the portion of the judgment relating to the partition of the real property because he transferred his interest in that property to his mother.

preliminary injunction hearing but denied his requested hearing and granted her a continuance but denied his motion to continue. However, we presume a trial judge is "free of bias and prejudice." *State v. Hurley*, 197 Ariz. 400, ¶ 24, 4 P.3d 455, 459 (App. 2000). And Palmer has presented no evidence to overcome that presumption.

¶20 First, we have already concluded that Palmer, by virtue of having had a bench trial, received the full benefits of the hearing he claims he was denied by the court. Moreover, as noted above, Palmer utterly failed to comply with Rule 38.1 in moving for a continuance; a trial court is not biased simply because it insists litigants follow the court's procedural rules. *See In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975) ("Bias and prejudice mean[] a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants."). Furthermore, the trial court presumably found Palmer credible on the issue of his intentions regarding the quitclaim deed, demonstrating the court's lack of bias against Palmer. Ultimately, Palmer has pointed to nothing other than the court's rulings in the case to demonstrate prejudice, and those do not provide ground for a new trial. *See Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977) ("[T]he bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case."); *see also*

See Ariz. R. Civ. App. P. 1 (only "aggrieved party" has standing to appeal judgment); *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, ¶ 7, 210 P.3d 1275, 1279 (App. 2009) (aggrieved party is one with "direct, substantial, and immediate" interest that "would be prejudiced by the judgment or benefitted by reversal of the judgment" and whose "legal right or . . . pecuniary interest has been directly affected").

Standage v. Standage, 147 Ariz. 473, 482, 711 P.2d 612, 621 (App. 1985) (applying same considerations in reviewing motion for new trial based on judicial bias as in reviewing pretrial motion for change of judge).

¶21 As for Palmer's claim that the judgment is contrary to the evidence, we have already determined there was sufficient evidence to prove assault and battery. *See* Ariz. R. Civ. P. 59(c)(4) (when deciding motion for new trial claiming judgment contrary to evidence, trial court reviews sufficiency of evidence). The trial court did not abuse its discretion in denying Palmer's motion for a new trial.

¶22 We affirm the trial court's judgment in favor of Howell.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge