STATE OF MICHIGAN

COURT OF APPEALS

MATTHEW RODGERS, Plaintiff-Appellant,	UNPUBLISHED December 11, 2008
v	No. 280186 Wayne Circuit Court
MICHIGAN STATE TROOPER DAVERSA and MICHIGAN STATE TROOPER THOMPSON, Defendants-Appellees.	LC No. 05-523691-NO

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause of action following a jury trial. We affirm.

Plaintiff filed this action for assault and battery against defendants, two Michigan State Police troopers. Plaintiff alleged that during a routine traffic stop, he was physically assaulted and injured by defendants for no apparent reason. Defendants testified that they stopped plaintiff because he was driving erratically, that plaintiff subsequently refused defendants' requests for plaintiff's drivers' information, that plaintiff then became combative and struck one of the officers, and that plaintiff thereafter aggressively resisted the officers' attempts to place plaintiff under arrest.[1]

On appeal, plaintiff raises three claims of instructional error. Claims of instructional error are reviewed de novo. *Ward v Consolidated Rail Corp*, 472 Mich 77, 83; 693 NW2d 366 (2005). "Jury instructions should not omit material issues, defense, or theories that are supported by the evidence." *Id.* at 83-84. "Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17

[1] Plaintiff's complaint alleged additional claims for false arrest, false imprisonment, and malicious prosecution, but those claims were dismissed before trial and are not at issue on appeal.

(2000). The trial court's determination whether a particular instruction is applicable is a matter of discretion. *Johnson v Corbet*, 423 Mich 304, 326-327; 377 NW2d 713 (1985).

Plaintiff first argues that the first two questions of the jury's verdict form improperly asked the jury to determine whether each defendant "commit[ted] and assault and battery" on plaintiff, rather than asking the jury to determine separately whether there had been an assault or a battery. We disagree. The verdict form was consistent with the "assault and battery" claim alleged in plaintiff's complaint and was consistent with plaintiff's theory of liability argued at trial. The verdict form did not take any issue from the jury's consideration, nor was the jury's role as the trier of fact improperly limited in any way. Accordingly, we find no error.

Plaintiff next argues that the trial court improperly modified M Civ JI 115.09 when, in the context of explaining that an officer may use such force as is reasonably necessary to effect an arrest, "it does not matter what the arrest is for." We disagree. A trial court should instruct the jury in accordance with the Model Civil Jury Instructions on request if they are applicable and accurately state the law, but the court is not precluded from giving "additional instructions on applicable law not covered by the model instructions," so long as they are "concise, understandable, conversational, unslanted, and nonargumentative." MCR 2.516(D)(2) and (4); *Bordeaux v Celotex Corp*, 203 Mich App 158, 169; 511 NW2d 899 (1993).

The trial court instructed the jury in accordance was M Civ JI 115.09 as follows, as modified by the emphasized language:

> Now if a person has knowledge or by the exercise of reasonable care should have knowledge that he is being arrested by a law enforcement officer, it is the duty of that person to refrain from resisting the arrest. And [sic] arresting officer may use such force as is reasonably necessary to affect [sic] an arrest. *It does not matter what the arrest is for.* However, an officer who uses more force than is reasonably necessary to affect [sic] an arrest commits a battery upon the person arrested to the extent the force used was excessive. And of course it is your determination whether or not any force used was reasonable or not. [Emphasis added.]

The trial court gave the modified instruction because, during closing argument, plaintiff's counsel had attempted to minimize the reason for plaintiff's arrest as "just for a traffic enforcement, it wasn't for murder 1 and that somehow that might play in here."

The trial court's instruction was consistent with the applicable law. The instruction accurately informed the jury that when a person is arrested, the question of excessive force is to be determined by whether the officer used more force than was reasonably necessary to effect the arrest, not by the offense for which the person is arrested. The court acted within its discretion in determining that the modified instruction was appropriate in light of plaintiff's closing argument, and the modification was concise, understandable, unslanted, and nonargumentative. It did not require the jury to find any greater or lesser degree of force depending on what the arrest was for. Accordingly, the court did not abuse its discretion in giving the modified instruction.

Lastly, plaintiff argues that the trial court erred in denying his request to give M Civ JI 6.01, which would have enabled the jury to infer that because a videotape of the arrest was not preserved, the jury could infer that this evidence would have been adverse to defendants. We disagree.

"It is well settled that missing evidence gives rise to an adverse presumption only when the complaining party can establish intentional conduct indicating fraud and a desire to destroy evidence and thereby suppress the truth." *Ward*, *supra* at 84. In this case, regardless of whether the videotape could be considered to have been under defendants' control initially, there was no showing that defendants failed to preserve it in bad faith. On the contrary, the testimony at trial indicated that the videotapes were routinely recycled every 30 to 90 days. Plaintiff did not file his complaint until approximately two years after his arrest, and there was no showing that the videotape was timely requested such that it could have been produced. Accordingly, the trial court did not err in denying plaintiff's request to give M Civ JI 6.01.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher