

1997 WL 458108

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Court of Appeals of Minnesota.

Quy P. NGUYEN, Appellant,

v.

Officer Richard ZIMMERMAN, individually
and as a police officer in the Minneapolis
Police Department, et al., Respondents.

No. C3-96-2551.

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Aug. 12, 1997.

Hennepin County District Court File No. 9515575

Attorneys and Law Firms

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Considered and decided by [TOUSSAINT](#), Presiding Judge, [SHORT](#), Judge, and [SCHULTZ](#), Judge.

Opinion

[SCHULTZ](#), Judge.*

*1 This appeal challenges a jury verdict denying recovery in a case alleging use of excessive force by a police officer. Because evidence presented at trial supports the jury's verdict, we affirm.

FACTS

Quy P. Nguyen was visiting friends in an apartment when police executed a high risk entry search warrant seeking illegal weapons. An Emergency Response Unit (ERU) of the Minneapolis Police Department conducted the search, and

respondent police officer James Scheu was a member of that ERU. Every ERU officer is in uniform during the execution of a high risk entry search warrant.

In the course of the search, Nguyen's nose was bloodied and broken. Conflicting testimony was offered at trial. Nguyen contends that an officer kicked him in the face and the stomach after he had been handcuffed. A witness testifying on Nguyen's behalf stated that the officer who kicked Nguyen was wearing plain clothes. Officer Scheu contends that he was covering the main room of the apartment with his handgun when Nguyen began to reach toward a jacket lying on the floor. In response, Scheu placed his foot on Nguyen's shoulder and neck and pushed him forcefully to the floor. Scheu testified that Nguyen was not handcuffed at the time and that he did not kick Nguyen.

The jury returned a special verdict finding that officer Scheu did not use excessive force on Nguyen during the search. Nguyen appeals the verdict.

DECISION

In reviewing a verdict where the jury has evaluated conflicting evidence, we consider the evidence in a light most favorable to the verdict. *Dang v. St. Paul Ramsey Medical Ctr.*, 490 N.W.2d 653, 659 (Minn.App.1992), review denied (Minn. Dec. 15, 1992). The jury's answer to a special verdict question will be set aside only if it is “perverse and palpably contrary to the evidence.” *Jacobs v. Rosemount Dodge-Winnebago S.*, 310 N.W.2d 71, 76 (Minn.1981). If the jury's special verdict finding can be reconciled under any theory, the verdict will not be overturned. *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 309 (Minn.App.1992), review denied (Minn. Feb. 12, 1993).

The use of excessive force by a police officer constitutes a violation of the Fourth Amendment right to be free from unreasonable seizure and is actionable under Section 1983. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). Whether an officer has used excessive force depends on whether the officer's actions were “objectively reasonable” given the circumstances. *Id.* at 397, 109 S.Ct. at 1872.

Nguyen contends that his nose was broken when a police officer kicked him while he was handcuffed and lying on the floor. We agree that such a kick to the face

under circumstances as alleged by Nguyen would indicate a probable violation of Nguyen's right to be free from unreasonable seizure, and if Nguyen's allegations were uncontroverted by competing evidence, we would find the jury's verdict inexplicable. But the jury was presented with conflicting testimony. It is the duty of the jury, not the appellate court, to evaluate the credibility of witness testimony. *Dick Weatherston's Assoc. Mechanical Servs., Inc. v. Minnesota Mut. Life Ins. Co.*, 257 Minn. 184, 189, 100 N.W.2d 819, 823 (1960).

*2 Officer Scheu testified that he applied force to Nguyen's back and neck, pushing his face into the floor, after Nguyen reached for a jacket lying on the floor. He stated that Nguyen had not yet been handcuffed. At the time, Scheu was covering a number of people with his handgun during the execution of a high risk entry search warrant. Taking the facts as alleged by Scheu, we believe the jury could have determined that the force applied to Nguyen was not excessive under the circumstances.

Nguyen contends that the evidence proves he was handcuffed at the time of the injury because officer Scheu admitted that

plainclothes officers did not enter the apartment until all suspects were handcuffed, and Nguyen's witnesses testified that plainclothes officers were present when Nguyen was kicked. But even if the jury believed the witness testimony, that would not compel a different result. Nguyen's witness testified that Nguyen was kicked by a plainclothes officer. Officer Scheu was in uniform as a member of the police department's ERU. Thus, the jury may have accepted that Nguyen's injuries resulted from a kick while handcuffed, but still concluded that officer Scheu was not the officer who used excessive force.

Because testimony presented at trial is consistent with a theory supporting the jury's finding, the special verdict was not perverse nor palpably contrary to the evidence, and we affirm.

Affirmed.

All Citations

Not Reported in N.W.2d, 1997 WL 458108

Footnotes

- * Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to [Minn. Const. art. VI, § 10](#).