STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County
The Honorable Brooks P. Goldsmith, Circuit Court Judge
Appellate Case No. 2012-212561

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

CRYSTAL NICOLE THOMAS,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

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II. **The trial judge properly permitted testimony about the statement Appellant made to the officer immediately after she bit him because this testimony was part of the *res gestae* of the crime and because it was highly relevant to show Appellant's intent and to rebut her contention that the bite was accidentally inflicted in the course of an alleged panic attack.**

STATEMENT OF THE CASE

Appellant was indicted in Chester County in August 2011 for assault and battery in the second degree pursuant to S.C. Code § 16-3-600. On April 17-18, 2012, Appellant proceeded to trial before the Honorable Brooks P. Goldsmith and the jury found her guilty. Judge Goldsmith sentenced Appellant to three years, suspended upon service of one year of active time and two years of probation. A timely notice of appeal was served and filed.

ARGUMENT

Background Facts

Appellant stopped at a license checkpoint on June 24, 2011 in Chester County and was subsequently arrested for driving under suspension. (R. p. 213-14). Officer Totherow was on duty at the detention center when Appellant arrived around midnight. (R. p. 71-73). Appellant began acting out and generally "making a scene," so officers placed her in a restraint chair for her own safety. (R. p. 73-76). At some point thereafter officers decided to remove Appellant's handcuffs from behind her back, and Officer Totherow assisted. (R. p. 76-77). During this process, Appellant once again started struggling with the officers, and when Officer Totherow's forearm came close to her mouth, she "locked down" on his arm "pretty good," biting him. (R. p. 77; p. 95-96). Immediately after releasing his arm, Appellant stated that she "had AIDS" and hoped he now had it also. (R. p. 77-78; see also p. 117, lines 16-17; p. 126, lines 1-5).

Officer Totherow testified that after the bite, he noticed his arm was "bleeding pretty good." (R. p. 77). He testified that Appellant's "teeth went through the layers of skin." (R. p. 96, lines 3-6). Officer Cummings, who photographed the injury, observed that Officer Totherow's skin was broken. (R. p. 135, lines 19-24; p. 142-44). Officer Totherow went to the emergency room to have the bite checked out, and although it turned out that stitches were not required, the doctor applied a topical ointment and gave him a tetanus shot and a course of antibiotics.[1] (R. p. 96; p. 104-105; p. 147-48). In addition, because of Appellant's threat of transmission of the AIDS virus, Officer Totherow was tested for HIV. (R. p. 104-105). The test came back negative. (R. p. 105,

[1] Officer Totherow's medical records were introduced into evidence as State's Exhibit #1. (See R. p. 147-50). One of the records indicated that Officer Totherow had a "bite to mid-forearm" and that the bite "did not penetrate past dermis" and was "more of an abrasive bite." (R. p. 150, lines 17-23).

lines 14-24). Appellant was tested for HIV as well and her test was also negative. (R. p. 49, lines 17-19; p. 175).

Appellant's defense at trial was that she was having a panic attack that night and did not remember biting Officer Totherow, did not intend to bite him, and did not make any comment about having AIDS. (See R. p. 237, lines 3-18; p. 214-239; see also p. 51-55; p. 260-71).

I. The directed verdict argument raised on appeal is not preserved for appellate review because this argument was not made to the trial judge below. However, even if the issue had been preserved, the trial judge properly denied Appellant's directed verdict motion because sufficient evidence was presented supporting Appellant's guilt on the charge of assault and battery in the second degree.

Appellant argues on appeal that the State failed to provide evidence of "moderate bodily injury" as required by the applicable statute. This argument is not preserved for appellate review. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). An appellant is limited to the arguments he makes at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000); see also Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("Issue preservation rules are

designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (citation omitted).

At the close of the State's case, Appellant made a motion for directed verdict, stating as follows:

> Understanding that the Court would be concerned with existence or non-existence of evidence, its weight, it is our position that – understanding that the elements of assault and battery, second, is whether or not Crystal Thomas injured or attempted to injure Officer Totherow or threatened to actually cause harm to Officer Totherow, it remains – it is our position and remains our position that there is not any evidence of this. Officer Totherow – well, of course, there was testimony from Officer Totherow, who indicated that Crystal Thomas did actually bite him. And then Officer Funderburk – in that she was conscious of what she was doing. And Officer Funderburk did actually testify that she latched on. But both of these officers indicated that they were not certainly sure as to, I guess, what was going on at that time. Officer Totherow specifically stated that his arm slipped, but then it also ended up in her mouth, and then that's when she specifically bit him. It is our position, of course, that there is not any evidence as to Crystal Thomas actually harming, or threatening to harm or injure Officer Totherow in this particular case. And we would ask for a directed verdict in this case. (R. p. 200, line 17 – p. 201, line 16).

The trial judge responded, "All right. I understand the argument, but I believe there is sufficient evidence for this matter to be sent to the jury." (R. p. 201, lines 17-19).

Since Appellant's only argument below in support of her directed verdict motion was a general argument that there was "not any evidence" that Appellant harmed or threatened to harm or injure the officer, the issue raised on appeal regarding the State's failure to establish the "moderate bodily injury" element is clearly unpreserved for review.[2] See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."); State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998) ("A

[2] Appellant also did not *specifically* renew her directed verdict motion at the close of all the evidence. (See R. p. 256-57). See State v. Rosemond, 348 S.C. 621, 627-28, 560 S.E.2d 636, 639-40 (Ct. App. 2002).

defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below.") (citation omitted) *aff'd on other grounds,* 337 S.C. 617, 524 S.E.2d 837 (1999) (citation omitted); State v. Adams, 332 S.C. 139, 144-145, 504 S.E.2d 124, 126-27 (Ct. App. 1998) (argument regarding denial of directed verdict was not preserved for review where the precise issue was not raised below); see also In re McCracken, 346 S.C. 87, 92-93, 551 S.E.2d 235, 238 (2001) (citation omitted) (where appellant made only a general directed verdict motion at trial, stating "'I think [the State has] failed to meet their burden of proof beyond a reasonable doubt,'" nothing was preserved for appellate review). Therefore, this Court must dismiss the directed verdict issue on error preservation grounds. Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. at 330, 730 S.E.2d at 285 (when an issue is clearly unpreserved, the appellate court should follow longstanding precedent and resolve the issue on preservation grounds).

Even if the issue had been properly preserved, the State submits that Appellant's directed verdict motion was properly denied. S.C. Code § 16-3-600(D)(1) states that "[a] person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and . . . (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted." S.C. Code § 16-3-600(D)(1). Section (A)(2) of the statute defines "moderate bodily injury" as "physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia."

S.C. Code § 16-3-600, which went into effect in June 2010, codified assault and battery offenses, which were formerly established under the common law, and created different degrees of "assault and battery." The subsection creating the offense of "assault and battery in the second degree" criminalizes conduct that would have constituted "assault and battery" under the common law in addition to conduct that would have constituted only "assault" under the common law. Further, although the statute added some new elements into the offense of assault and battery (for example, the specific definition of "moderate bodily injury"), the statute retained some elements from the common-law definitions of "assault and battery" and "assault." At common law, "assault" was generally defined as an attempted battery or an unlawful attempt or offer to commit a violent injury upon another person, coupled with the "present ability" to complete the attempt or offer by committing a battery. State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). However, our Supreme Court recognized in Sutton that an assault can also occur when, by words and conduct, a person intentionally creates a *reasonable apprehension* of bodily harm. Id. at 398, 532 S.E.2d at 285-86. Under this definition, an assault can occur "even though the defendant *does not have the ability to complete a battery* and/or there is not an attempted battery." Id. at 398, 532 S.E.2d at 286 (emphasis added).

Since the new crime of assault and battery in the second degree retains the "present ability" language when it references an assault ("offers or attempts to injure another person with the *present ability* to do so"), it is appropriate to also retain the Sutton definition of assault and find that an assault can occur even where the defendant does not actually have the present ability to complete the intended bodily harm as long as the defendant intentionally creates a reasonable apprehension of the bodily harm.

In Appellant's case, there are two theories under which Appellant could be found guilty of assault and battery in the second degree. First, under the rationale just discussed above using the Sutton definition of assault, Appellant would be guilty if she offered or attempted to injure another person with the present ability to do so, or if she offered or attempted to injure another person and in doing so created a reasonable apprehension that the intended injury would occur, and where moderate bodily injury to another person results or could have resulted. See S.C. Code § 16-3-600(A)(2) & (D)(1)(a); see Sutton at 398, 532 S.E.2d at 285-86. Here, the evidence presented at trial supported that Appellant offered to injure Officer Totherow by giving him the AIDS virus through biting him on the arm, and in doing so she created a reasonable apprehension on the part of Officer Totherow that he would contract the AIDS virus and "moderate bodily injury" could thereby have resulted. See S.C. Code § 16-3-600(A)(2) (defining "moderate bodily injury" as "physical injury requiring treatment to an organ system of the body other than the skin, muscles, and connective tissues of the body, except when there is penetration of the skin, muscles, and connective tissues that require surgical repair of a complex nature or when treatment of the injuries requires the use of regional or general anesthesia").

Appellant could also be found guilty of assault and battery in the second degree under a second theory. Officer Totherow testified that Appellant "locked down" on his arm "pretty good" when she bit him and that as soon as she released his arm she stated that she "had AIDS" and hoped he now had it also. (R. p. 77-78). The fact that Appellant stated she had AIDS and hoped Officer Totherow had it too indicated that Appellant intended not a superficial bite, but a bite that would be deep enough to cause a virus such as the AIDS virus to be transmitted from the saliva in her mouth to the blood in Officer Totherow's arm. Thus, there was evidence that Appellant "unlawfully

injure[d] another person" and that "moderate bodily injury" "could have resulted" because a bite of the severity intended by Appellant could have easily penetrated Officer Totherow's skin to a greater depth and required "surgical repair of a complex nature" or the "use of regional or general anesthesia" in the treatment of the wound. See S.C. Code § 16-3-600(A)(2) & (D)(1)(a).

Accordingly, because sufficient evidence was presented, under two different theories of guilt, supporting that Appellant committed assault and battery in the second degree, Appellant's directed verdict motion was properly denied.[3] See State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.").

II. The trial judge properly permitted testimony about the statement Appellant made to the officer immediately after she bit him because this testimony was part of the *res gestae* of the crime and because it was highly relevant to show Appellant's intent and to rebut her contention that the bite was accidentally inflicted in the course of an alleged panic attack.

Appellant argues that the trial judge erred in admitting the statement she made immediately after biting Officer Totherow because the statement was not relevant and because the probative value of admitting the statement was substantially outweighed by the danger of unfair prejudice. To the contrary, the trial judge properly admitted Appellant's statement that she "had AIDS" and hoped the officer had it too. First, Appellant's statement was clearly part of the *res gestae* of the offense since it was made

[3] Assuming the issue were preserved for review, and assuming this Court were to find that the State failed to establish the element of "moderate bodily injury," as Appellant contends, the State submits that the most appropriate remedy would be a remand for sentencing on the lesser-included offense of assault and battery in the third degree pursuant to State v. Brandt, 393 S.C. 526, 548-49, 713 S.E.2d 591, 603 (2011). See S.C. Code § 16-3-600(E).

almost contemporaneously with the bite and was "part and parcel" of the crime. (See R. p. 13, line 2 – p. 14, line 7). See State v. Gilmore, 396 S.C. 72, 82-83, 719 S.E.2d 688, 694 (Ct. App. 2011); State v. Gagum, 328 S.C. 560, 565, 492 S.E.2d 822, 824 (Ct. App. 1997); see also Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003).

Second, the statement was extremely probative and relevant because it illustrated that the bite had been intentional and illustrated the severity of the bite intended by Appellant. See *supra*, p. 6-9. In that vein, the statement was also relevant to rebut Appellant's contention that the bite was accidentally inflicted in the course of her panic attack. (See R. p. 237, lines 3-18; p. 214-239; see also p. 51-55; p. 260-71). Finally, Rule 403, SCRE, did not prohibit admission of the statement because the probative value of the statement was not substantially outweighed by the danger of unfair prejudice. Contrary to Appellant's argument, the mere mention of AIDS is not "highly inflammatory" or *unfairly* "prejudicial," and regardless, any possible prejudice was removed because the State told the jury up front that Appellant did not in fact have AIDS and introduced evidence to that effect. (See R. p. 13-14; p. 49, lines 15-21; p. 105, lines 14-24; p. 174, line 22 – p. 175, line 22; see also p. 237, lines 11-18; p. 265, lines 18-19; p. 278, lines 19-20).

For all of the above reasons, the trial judge did not err in admitting the statement Appellant made immediately after biting Officer Totherow. See State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (an appellate court will not reverse a trial judge's decision to admit or exclude evidence absent a clear prejudicial abuse of the trial judge's broad discretion in evidentiary matters); State v. Collins, 398 S.C. 197, 209, 727 S.E.2d 751, 757 (Ct. App. 2012) (trial judges have "particularly wide discretion" in ruling on the comparative probative value and potential prejudicial effect of evidence); State v.

Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citation omitted); State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("unfair" prejudice does not mean damage to a defendant's case that results from the legitimate probative force of evidence).

CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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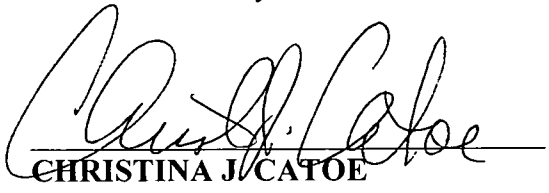

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