ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chester County

Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CRYSTAL NICOLE THOMAS,

APPELLANT

APPELLATE CASE NO. 2012-212561

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court reversibly erred by failing to grant a directed verdict of acquittal on the charge of second degree assault and battery for failing to provide evidence of "moderate bodily injury"?

II. Whether the trial court reversibly erred by failing to suppress an alleged statement by Appellant that she had HIV or AIDS after biting a corrections officer where the bite occurred prior to the alleged statement, and where both Appellant and the corrections officer tested negative?

STATEMENT OF THE CASE

Appellant Crystal Nicole Thomas was indicted by the Chester County grand jury on August 30, 2011, for assault and battery, second degree (A&B 2nd). R. 23, lines 11-14; R. 287 – R. 288 (Indictment). Her case proceeded to trial from April 17th through 18th, 2012, before the Honorable Brooks P. Goldsmith and a jury. Twana Burris (Counsel) represented Appellant, while Julie Hall represented the State. R. 1.

The jury found Appellant guilty as charged. R. 266, lines 21-25. The trial court imposed a sentence of three years incarceration, suspended upon service of one year, followed by two years probation. R. 279, lines 5-14.

STATEMENT OF THE FACTS

Appellant was stopped at a license check point when driving a car on the night of June 23, 2011. She was arrested and taken to jail because her license was suspended at the time. R. 184, line 1—R. 185, line 14; R. 187, lines 3-4.

After arriving at the Chester County Detention Center (CCDC) in the early morning of June 24, 2011, Appellant was placed into a five foot by eight foot holding cell for being uncontrollable during the booking process. R. 57, line 22—R. 58, line 22; R. 90, line 14—R. 91, line 24. About five minutes after Appellant was put in the cell, Officer Donnie Funderburk (Funderburk) noticed that Appellant was lying down, slapping her hands and hitting her head on the floor. Funderburk entered the cell and called for assistance. More officers arrived, including Lieutenant Arthur Wayne Totherow (Totherow). Totherow also called for assistance, and specifically called for officers to bring a restraint chair. R. 50, lines 2-24; R. 92, lines 5-24.

Appellant was handcuffed and placed into the restraint chair by Funderburk and Totherow. Totherow subsequently "dry stunned" Appellant with his taser "for pain compliance" to get her legs strapped into the chair. R. 51, line 10—R. 52, line 17. Throughout the process, Appellant continued to rock back and forth, and to say that she could not breathe and that she was in pain. R. 51, lines 1-3; R. 53, lines 7-12.

Approximately thirty minutes later, Totherow, Funderburk, and others returned to check on Appellant. R. 53, lines 16-20. They removed the handcuffs to move Appellant's hands out from behind her back, and into the straps of the restraint chair. As Totherow put his hand on Appellant's shoulder and leaned over her, his "forearm got close to her mouth and she locked down on [his] arm." R. 54, lines 2-9. At trial, Totherow testified that, after

Appellant bit him, Appellant said "she had AIDS and that she hoped I had it also." R. 55, lines 2-3.[1]

Totherow finished strapping Appellant to the restraint chair and walked to the nurse station in the control room to look at the bite. Totherow testified that the bite mark was bleeding, and that another officer cleansed his arm and wrapped it for him. R. 54, lines 14-23. Deputy Kyle Brandon Cummings (Cummings) also arrived at the scene at CCDC, and took photographs of Totherow's arm. R. 1120, lines 1-19; R. ii (State's Exhibit #3, Photos).

Further, Totherow went to the Chester Regional Medical Center at approximately 3:12 a.m. that morning. R 280 – R. 286 (State's Exhibit #1, Medical Report). The resulting report indicated *inter alia* the following information regarding Totherow's injury:

> (1) under the "CHIEF COMPLAINT" section, that "Patient states symptoms are of mild severity;"
>
> (2) under the "PHYSICAL EXAMINATION" section, that the "bite to mid forearm did not penetrate past dermis, more of an abrasive bite;" and
>
> (3) under the "INSTRUCTIONS" section, that "Prescription(s) written for: Doxycycline 100 mg: one pill by mouth twice a day for 7 (seven) days for infection . . . . Patient advised to use ibuprofen . . . . Patient advised to use acetaminophen.

R 280 – R. 286 (State's Exhibit #1, Medical Report). In short, Totherow was given antibiotics to take orally. R. 82, lines 8-11.

Additionally, pursuant to policy of the facility, Totherow was tested for sexually transmitted diseases, which included a test for HIV, several days after the incident. R. 81,

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[1] Although Funderburk indicated a similar statement occurred, Appellant did not remember ever saying anything about AIDS because, as she said, "I she don't have HIV or AIDS or any other STD for that matter." R. 94, lines 16-17; R. 208, lines 11-22.

line 23—R. 82, line 1. In fact, testimony from Major Billy Wayne Alley, Jr., (Alley) of the Chester County Sheriff's Office, detention division, indicated that Totherow would have been sent for such a test pursuant to policy at the facility even if Appellant had not made the alleged statement that she was HIV positive. R. 149, lines 10-22. Moreover, Alley also had Appellant tested as well. R. 149, lines 1-9. Neither Appellant, nor Totherow were HIV positive. R. 82, lines 20-21; R. 249, lines 19-20.

Prior to the beginning of trial, Counsel moved to suppress any reference to Appellant having AIDS. R. 11, line 15—R. 12, line 25; R. 14, lines 10-19. Specifically, Counsel argued that AIDS is not essential or relevant to the charged offense of A&B 2nd, especially since Appellant did not test positive for HIV. Counsel further asserted that mention of HIV or AIDS would be highly prejudicial by creating an irrational fear or phobia with the jury. R. 14, lines 3-25.

The State opposed, arguing "it was part and parcel of the assault." R. 13, line 2—R. 14, line 7. The trial court stated, "[y]eah, I'm inclined to agree," and invited Counsel to provide further argument. R. 14, lines 8-9. Counsel then argued that Petitioner did not have the present ability to harm Totherow with AIDS. R. 14, lines 10-19. However, the trial court ultimately ruled as follows:

> [B]ut she caused him to believe that—placing him in fear of it. At any rate, that's going to be the ruling of the Court on that issue.

R. 14, lines 20-22. Consequently, in the State's opening statement, it proclaimed the following to the jury:

> You're also going to hear testimony that [Appellant] made statements after she—or as—as or after she was biting [Totherow] that she has HIV. And I will tell you now that later on she was tested and then evidence is going to show

> that she was found to be negative. But the situation is as it's going on and as she's biting him and saying this thing, that's when the assault and battery is occurring. Whatever happens after it is no longer relevant to the charges.

R. 26, lines 15-22.

During trial, the State indeed elicited testimony about Appellant allegedly stating, after she bit Totherow, that she had AIDS. R. 55, lines 2-3; R. 94, lines 16-17. Also, the State repeatedly referred to Appellant's alleged statement regarding AIDS in its closing argument in support of its theory of A&B 2nd. R. 245, lines 14-22; R. 248, lines 19-25; R. 249, line 3—R. 250, line 10; R. 251, line 24—R. 252, line 3; R. 253, lines 3-8; R. 255, lines 1-3. For example, at one point the State told the jury that "the core issue of what happened" was "*her biting him and then saying I have AIDS. That's—That's really all we're dealing with here.*" R. 245, lines 14-16 (emphasis added). Also, when attempting to link this theory to the element of "moderate bodily injury," the State made the following argument to the jury:

> But he was bleeding. And then he's got—you can see the full teeth marks on his arm when you look at it. And when you look at the video, you can see the bandage that's on his arm too.
>
> But moderate bodily injury, we'll go through that for just a second. It did occur or it could have occurred. The statute does define it as you have to have stitches or you have to— you have anesthesia or something. I submit to you in this case it could have occurred. She bit him, she takes what she—what comes after that.
>
> And I would submit to you that she said, I have AIDS. And they have no reason not to believe her at this point. This is a threat. This is an exacerbation, making it worse. And she had that's all the information they had at that point. And at that point was when you determine what charge to make.

> *If she had had AIDS, it would have gotten a lot worse. Thankfully, for her she didn't.* And I would submit that that threat is real.
>
> . . . . .
>
> Why on Earth would Totherow have submitted—he's got to have a blood test to find out if he has AIDS.
>
> And then, I mean, he stated that he still doesn't know. This could lie dormant for seven years. He's got to wonder about it except for the fact she was tested and she did test negative. But they went to the expense and trouble of taking her down to the hospital based on her threat. He went to the trouble and pain, I would submit, of having his blood drawn to be tested himself based on a threat.

R. 249, line 3—R. 250, line 10 (emphasis added).

Finally, Counsel moved for a directed verdict of acquittal at the close of the State's case-in-chief, and again at the close of the defense's case. R. 174, line 3—R. 175, line 16; R. 227, lines 19-23. Specifically, Counsel argued that there was no evidence as to Appellant actually or attempting to injure Totherow under the elements of A&B 2nd. R. 174, line 3—R. 175, line 16. The trial court denied Appellant's motions. R. 175, lines 17-19; R. 227, line 24—R. 228, line 1.

The jury found Appellant guilty of A&B 2nd. R. 266, lines 21-25. Appellant was sentenced to three years incarceration, suspended upon service of one year and followed by two years probation. R. 279, lines 5-14.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred by failing to grant a directed verdict of acquittal on the charge of second degree assault and battery for failing to provide evidence of "moderate bodily injury."

The trial court erred by failing to grant a directed verdict of acquittal in Appellant's trial for A&B 2nd because the State failed to prove the material element of an attempt or actual "moderate bodily injury" by Appellant upon Totherow. First, the record indicates that Appellant never had either HIV or AIDS. Second, the testimony and medical records indicate that Totherow only suffered a bite that bled, but did not even puncture all of the layers of his skin. Further, by the State's own admission, Totherow received no stitches and no anesthesia to treat he bite. Therefore, the State failed to provide any evidence that Appellant either attempted to or actually did inflict "moderate bodily injury" upon Totherow by biting him, or even had the present ability to inflict such an injury.

A trial court must direct á verdict of acquittal when the record does not contain evidence to support every element of the charged offense. See, e.g., State v. Brown, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); State v. Evans, 376 S.C. 421, 424, 656 S.E.2d 782, 783 (Ct. App. 2008) ("A defendant is entitled to a directed verdict when the state fails to produce evidence on a material element of the offense charged."); see also In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). When considering a motion for directed verdict of acquittal, "the trial court is

concerned the existence or non-existence of evidence, not its weight." Brown, 360 S.C. at 586, 602 S.E.2d at 395.

The statute regarding A&B 2nd provides, in pertinent part, as follows:

> (D)(1) 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)(a) (West, Westlaw current through end of 2012 Reg. Sess.) (emphasis added). Additionally, the code defines "moderate bodily injury" as follows:

> (A) For purposes of this section:
>
> (2) "Moderate bodily injury" means 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(A)(2) (West, Westlaw current through end of 2012 Reg. Sess.) (emphasis added). As such, in order for an injury to a person's skin to satisfy the "moderate bodily injury" element of A&B 2nd, that injury must have resulted or could have resulted in penetration requiring surgical repair of a complex nature or treatment using regional or general anesthesia.

In the present case, the State failed to meet its burden of proving this critical element: it failed to prove that moderate bodily injury either resulted or could have resulted from Appellant's bite. First, the actual injury to Totherow falls woefully short of satisfying the statutory definition of "moderate bodily injury." In particular, the evidence shows that

injury to Totherow was literally only skin deep: the medical report specifically stated that the bite "did not penetrate past dermis, more of an abrasive bite." R 280 – R. 286 (State's Exhibit #1, Medical Report). While an abrasion such as this apparently bleeds, it certainly did not require "surgical repair of a complex nature" or "the use of general or regional anesthesia." S.C. Code § 16-3-600(A)(2) (West, Westlaw current through end of 2012 Reg. Sess.). Even the photographs taken by Cummings indicate the bite mark was not severe. R. ii (State's Exhibit #3, Photos). Indeed, even Totherow's own words to the medical staff at the Chester Regional Medical Center indicate the mildness of the injury: "Patient states symptoms are of mild severity." R. 280 – R. 286 (State's Exhibit #1, Medical Report). Finally, Totherow testified, and the State conceded, neither Totherow nor Appellant had AIDS. R. 13, lines 5-9; R. 82, lines 20-21; R. 249, lines 19-20; R. 250, lines 4-7. Accordingly, Totherow's actual injuries fail to meet the "moderate bodily injury" element of A&B 2nd.

Further, contrary to the State's theory of the entire case, the purported statement made by Appellant regarding AIDS does not satisfy the "moderate bodily injury" element of A&B 2nd either because she neither attempted to infect Totherow with AIDS, nor had the present ability to do so. Even assuming, without conceding, that Appellant made the alleged statement in question, it would have been after Totherow was bitten. R. 55, lines 2-3; R. 94, lines 16-17. In other words, the purported statement would have been made after the unlawful touching was complete.

Additionally, the State readily conceded that Appellant never had either HIV or AIDS. R. 13, lines 5-9; R. 82, lines 20-21; R. 249, lines 19-20; R. 250, lines 4-7. In fact, its

closing argument indicates that Totherow does not truly have to be concerned with possible dormancy of HIV in his system specifically because Appellant tested negative:

> And then, I mean, he stated that he still doesn't know. This could lie dormant for seven years. He's got to wonder about it *except for the fact she was tested and she did test negative.*

R. 250, lines 4-7 (emphasis added). Thus, Appellant neither actually infected Totherow with AIDS, nor could she have infected Totherow with AIDS. Succinctly stated, under the specific facts of this case, the State's entire theory—that "[Appellant] bit Totherow, said I have AIDS and it's assault and battery second"—collapses upon itself for failure to prove the distinguishing element of A&B 2nd; that "moderate bodily injury to another person results or moderate bodily injury to another person could have resulted." R. 255,lines 1-3. Accordingly, the trial court erred by refusing to grant Appellant's motion for a directed verdict of acquittal on the charge of A&B 2nd.

Finally, Petitioner was prejudiced by the Court's failure to direct a verdict of acquittal. Appellant was convicted of A&B 2nd by the jury after the offense was improperly submitted to it by the court. Accordingly, Petitioner respectfully requests reversal of her conviction, and remand to the trial court with instructions to direct a verdict of acquittal.

II. The trial court reversibly erred by failing to suppress an alleged statement by Appellant that she had HIV or AIDS after biting a corrections officer where the bite occurred prior to the alleged statement, and where both Appellant and the corrections officer tested negative.

The trial court erred by failing to suppress any mention of HIV or AIDS by the State in Appellant's trial. Even assuming that Appellant made the alleged statement in question, it would have been after Totherow was bitten. In other words, the purported statement would have been made after the unlawful touching was complete. Additionally, the record indicates that Appellant never had either HIV or AIDS. As such, this fact, coupled with the timing of the alleged statement, lead to the indelible conclusion that Appellant had never had the present ability to either attempt or actually inflict "moderate bodily injury" upon Totherow by biting him. Accordingly, Appellant's alleged statement regarding HIV or AIDS was irrelevant to the charge of A&B 2nd. Further, even if such a statement was relevant to some degree, the probative value was substantially outweighed by the danger of unfair prejudice.

"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Assoc. Mgmt. v. E.D. Sauls Constr.Co., 279 S.C. 219, 305 S.E.2d 236 (1983)); see also Rule 401, SCRE (defining relevant evidence). Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." Id. (citing Toole v. Salter, 249 S.C. 354, 154 S.E.2d 434 (1967)); see also Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided . . . . Evidence which is not relevant is not admissible.").

Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 112, 180, 117 S.Ct. 644, 650 (1997); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

"For purposes of the Rule 403 weighing of the probative against the prejudicial, the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other." Id. 519 U.S. at 910, 117 S.Ct. at 655.

In the present case, the trial court erroneously permitted the State to use Appellant's purported statement, after biting Totherow, that she had AIDS. First, under the facts of this particular case, petitioner's alleged statement was not relevant to proving the elements of the charged offense. See Issue I, supra; cf. State v. Deal, 319 S.C. 49, 53, 459 S.E.2d 93, 95 (Ct. App. 1995). Second, it was not relevant to countering a defense argument, such as consensual touching. See, e.g., State v. Chisholm, 395 S.C. 259, 272-73, 717 S.E.2d 614, 620-21 (Ct. App. 2011). Third, the State conceded that Appellant never had either HIV or AIDS. R. 13, lines 5-9; R. 82, lines 20-21; R. 249, lines 19-20; R. 250, lines 4-7. Further, the alleged statement was not made until after the touching occurred. Accordingly, the purported statement was not relevant because it did not tend "to establish or to make more

or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403; see also Rule 401, SCRE.

Moreover, assuming without conceding that the statement was relevant, its probative value was outweighed by its danger of unfair prejudice to the jury. Rule 403, SCRE. As indicated above, the probative value of the statement regarding AIDS was low because Appellant never had either HIV or AIDS; thus, it was an impossibility for her to have infected or attempted to infect Totherow. Yet, the State premised fully half of its case upon this statement: "[Appellant] bit Totherow, said I have AIDS and it's assault and battery second." R. 255, lines 1-3. In other words, half of the State's strategy was to flood the jury with the highly inflammatory and prejudicial notion that Appellant said she had AIDS. To this end, the State fulfilled its goal: it repeatedly brought-up Appellant's alleged statement regarding AIDS from opening statement, through its witnesses in its case-in-chief, and again in its closing argument. R. 26, lines 15-22; R. 55, lines 2-3; R. 94, lines 16-17; R. 245, lines 14-22; R. 248, lines 19-25; R. 249, line 3—R. 250, line 10; R. 251, line 24—R. 252, line 3; R. 253, lines 3-8; R. 255, lines 1-3. Therefore, the prejudicial effect of allowing the State to repeatedly mention the alleged statement regarding AIDS is undeniable; allowing the State to utilize the statement allowed the State "to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief, 519 U.S. at 180, 117 S.Ct. at 650; see also Alexander, 303 S.C. at 382, 401 S.E.2d at 149; Rule 403, SCRE.

Additionally, this error could not be harmless for the same reasons: it infected the entire trial. Accordingly, the trial court's error was not harmless, as it reasonably could have affected the outcome of the trial. See, e.g., State v. Davis, 371 S.C. 170, 181-82, 638 S.E.2d

57, 63 (2006) ("Error is only harmless 'when it could not reasonably have affected the result of the trial.'") (quoting State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)).

CONCLUSION

For the foregoing reasons, Appellant Crystal Thomas respectfully requests reversal of her conviction, and remand for a new trial pursuant to Issues I and II. Appellant further requests for instructions that, upon remand, the trial court enter a directed a verdict of acquittal pursuant to Issue I.

Respectfully submitted,

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of August, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 6, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of August, 2013.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of August, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.