THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Civil Action No. 2008-CP-27-0529
Appellate Case No. 2012-213115

Derrick Dupont, Appellant,

v.

County of Jasper, Jasper County Sheriff's Office, Ernest Walker, Defendants,

Of Whom the Jasper County Sheriff's Office is the Respondent.

FINAL BRIEF OF APPELLANT

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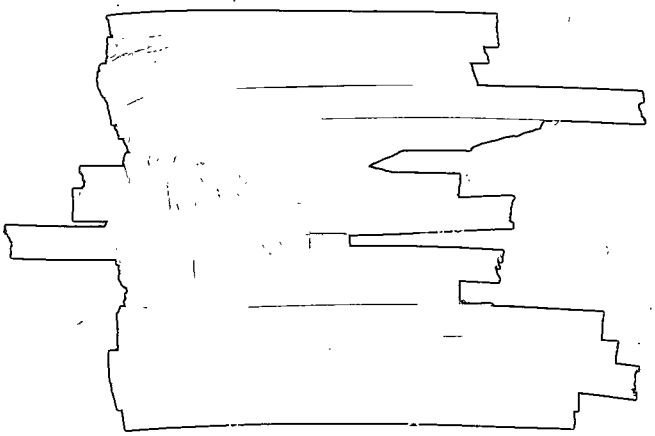

STATEMENT OF THE ISSUES

I. Did the trial court err by charging comparative negligence?

II. Did the trial court err by allowing evidence of a subsequent motor vehicle accident to be presented to the jury where there was no medical evidence the accident contributed to or exacerbated the Appellant's neck injury?

III. Did the trial court err by allowing detailed testimony of Appellant's appearance at a roll call the morning of the incident to be presented to the jury, where the risk of unfair prejudice outweighed any probative value?

STATEMENT OF THE CASE

This is a civil action arising under the laws of the State of South Carolina and is brought pursuant to the South Carolina Tort Claims Act. Derrick Dupont filed an action on August 22, 2008 against Jasper County Sheriff's Department, Jasper County and Deputy Sheriff Ernest Walker for Gross Negligence, Civil Assault, Civil Battery, Negligent Use of Force and Intentional Infliction of Emotional Distress.

This action stemmed from the arrest of Derrick Dupont ("Dupont") by Deputy Sheriff Ernest Walker ("Walker") on February 7, 2007. Dupont alleged Walker caused permanent injury to his neck during the arrest. Walker contends that he did not cause Dupont's injury and that any injuries Dupont suffered were not related to the arrest.

On November 25, 2010, Defendants motioned for an order dismissing the complaint against the County of Jasper and Ernest Walker, pursuant to Rules 8 and 12 of the South Carolina Rules of Civil Procedure and the South Carolina Tort Claims Act. On June 14, 2011, Judge Mullen granted the Motion to Dismiss and allowed Jasper County Sheriff's Office to remain as the sole defendant.

The jury trial began on August 27, 2012 in Jasper County, South Carolina before the Honorable Carmen T. Mullen and lasted until August 30, 2012. On August 30, 2012, the jury

returned a verdict for the Defendant. This verdict was filed with the Jasper County Clerk of Court on September 5, 2012. Dupont served a notice of appeal on September 26, 2012.

STATEMENT OF THE FACTS

On February 7, 2007, Jasper County Sheriff's Office was dispatched to Chippawillow Road in Jasper County, South Carolina regarding a fight in progress. (R. p. 112, lines 22-23.) Upon entering the scene, officers spoke with Robert Mack and Willie Newton who alleged that Derrick Dupont and his wife used their van to run over Newton's motorcycle. Mack and Newton also alleged Dupont attacked them with a knife. (R. p. 114, lines 17-22.) Dupont testified that earlier that day he left his home to attend a roll call hearing in Beaufort. (R. p. 46, lines 6-8.) When he returned home his minor daughters Priscilla Dupont and Alicia Dupont came to him and told him that Mack and Newton were trying to engage the girls in sexual activity. (R. p. 46, lines 11-22.) Dupont testified that he noticed Mack and Newton outside. He then jogged down to where the two were and informed them to leave his kids alone or he would take physical action. (R. p. 47, lines 1-10.) During this confrontation, Dupont's wife drove by. (R. p. 47, line 13.) Dupont's wife stopped her van and proceeded to force Dupont into the vehicle. (R. p. 47, lines 18-20.) The couple then proceeded to drive to Bluffton to run an errand. (R. p. 48, lines 18-21.)

While officers continued to investigate the allegations made by Mack and Newton, a van matching the description provided to officers pulled onto Chippawillow Road. (R. p. 115, lines 13-17.) The van proceeded to turn into the driveway of the Dupont residence (R. p. 116, lines 4-5.) Officers proceeded to search the van for damage to corroborate the occurrence, as well as, the knife, but were unable to find either. (R. p. 118, lines 6-10- p. 128, lines 9-19.) That evening, Dupont was arrested and charged with several offenses in connection with incident. (R. p. 51, lines 11-18.) The charges were later dismissed. (R. p. 130, lines 22-23.) During Dupont's arrest,

Deputy Walker handcuffed him and placed him in the back seat of his patrol car. (R. p. 51, lines 19-22.) Deputy Walker then walked away from the patrol car to speak with James Rivers, a pedestrian, who had arrived on the scene. (R. p. 53, lines 8-17.) Dupont began calling to Deputy Walker to request that he loosen his handcuffs because they were too tight. (R. p. 53, lines 11-12.) When Deputy Walker did not respond, Dupont testified he then kicked the inside of the patrol car door. (R. p. 53, lines 19-20.) At that time, Deputy Walker walked back to the car, opened Dupont's door, placed one hand over Dupont's mouth and one hand behind the back of neck clawing Dupont's face screaming "Don't you spit on me." (R. p. 39, lines 11-20; R. p. 53, lines 20-24) Deputy Walker then leaned Dupont out of the car by his neck and proceeded to shake him. (R.p. 53, line 25-p. 54, line 1.) This incident was witnessed by James Rivers. (R. p. 39, lines 11-20.) Rivers testified that he witnessed the entire event and he never saw Dupont spit on Deputy Walker, nor did he observe spit on Deputy Walker. (R. p. 40, lines 21-p.41, line 2) Deputy Walker testified that he initially entered the back seat to secure a seat belt on Dupont. (R. p. 124, lines 20-25.) In doing so, he testified that Dupont spit on him. (R. p. 125, line 1.) Deputy Walker testified that he asked Dupont not to do that and Dupont responded, "That's the way I talk." (R. p. 125, line 2.) He stated that Dupont spit on him again. (R. p. 125, line 12.) At that point, Deputy Walker testified that he proceeded to place his hands over Dupont's mouth and the base of jaw in order to apply pressure points. (R. p. 125, lines 12-17.) During this application of pressure, Deputy Walker testified that Dupont began "moving and jerking." (R. p. 125, line 17.) He testified that while he did not sling Dupont, the two were moving around together. (R. p. 126, line 16.) He stated that Dupont was struggling in the back seat in an effort to alleviate the pressure being applied. (R. p. 126, lines 16-17.)

Deputy Walker proceeded to take Dupont to the Jasper County Jail where he was booked. (R. p. 55, line 18-p. 56, line 5.) That evening, Dupont saw a nurse on staff at the jail. (R. p. 56, line 10). Dupont informed the nurse about the assault and was given a Motrin for pain. (R. p. 56, lines 12-15.) After learning the proper procedure to request medical attention, Dupont requested to see the nurse again due to continuous pain. (R. p. 56, line 16-p. 57, line 25.) Dupont was released from the Jasper County Jail in early March, and immediately sought treatment at the Emergency Room at Beaufort Memorial Hospital. (R. p. 59, line 16-p. 60, line 2.) There he complained of back and neck pain. (R. p. 60, lines 4-5.) The hospital referred him to Dr. Strohmeyer, an orthopedist for further neck and back treatment. (R. p. 60, lines 7- 20.)

Dupont's first visit with Strohmeyer was on March 14, 2007. (R. p. 100, lines 5-8.) On March 26, 2007, during a follow-up visit, Strohmeyer concluded that Dupont had a kyphae deformity of C2, C3 requiring a discectomy, a large cervical decompression fusion reconstructive operation (R. p. 103, lines 10-21; R. p. 104, lines 8-2; R. p. 109, line 12-p. 110, line 11). On April 7, 2007, Dupont was involved in a minor motor vehicle accident. (R. p. 64, line 15-p. 65, line 3). Dupont sought treatment at the Emergency Department at Beaufort Memorial Hospital, where he was recognized by the nursing staff due to his previous injury with Deputy Walker. (R. p. 65, lines 7-15.) After the emergency room visit, Dupont did not receive any further treatment injuries related to the car accident. (R. p. 66, lines 5-8.) Ironically, Dupont's treating physician Strohmeyer witnessed the accident. (R. p. 65, line 25-p. 66, line 4.) Strohmeyer saw Dupont during a follow up appointment on April 11, 2007. (R. p. 105, line 24.) Strohmeyer testified that he was aware of the motor vehicle accident, but that it did not cause any new damage to Dupont. (R. p. 107, line 20-p. 108, line 1.) Strohmeyer referred Dupont to Dr. Chutkan, a chairman at the Medical College of Georgia (MCG) with experience with deformity

work, for surgery. (R. p. 111, lines 12-19.) Chutkan performed an Anterior Cervical Discectomy and Fusion on Dupont. (R. p. 87, lines 8-17.) Chutkan testified that based on Dupont's history, the incident with the Jasper County Sheriff's Office caused Dupont's injury. (R. p. 88, lines 10-22.)

Dupont testified that he has permanent scars as result of the surgery and has been unable to return to work as a carpenter since the incident with Deputy Walker. (R. p. 66, lines 9-12; R. p. 67, lines:19-21).

ARGUMENT

I. BECAUSE APPELLANT WAS NOT OF HIS OWN FREE WILL AND ACCORD, THE COURT ERRED WHEN IT CHARGED THE JURY WITH COMPARATIVE NEGLIGENCE.

During the trial, Respondent requested the Court charge comparative negligence as a defense to gross negligence. Appellant objected to this charge on the grounds that there was no evidence in the record to support that Dupont was negligent; nor did Dupont owe a duty to Deputy Walker. The question of contributory negligence becomes a question of law for the courts only when the evidence is susceptible to but one reasonable inference. In determining whether a plaintiff is contributory negligent as a matter of law, the evidence must be viewed in the light most favorable to the opposing party. Wallace v. Owens-Illinois, Inc., 300 S.C. 518, 522-523 (Ct. App. 1989).

Dupont testified that while handcuffed in the backseat of the police cruiser, Deputy Walker entered the vehicle and proceeded to use his left hand to "claw" his face, while using his right hand to "claw" the back of his neck. (R. p. 54, lines 4-8.). Dupont further testified that while clutching his neck and face, the Deputy proceeded to "snatch" him to the side and

violently shake him by his neck. (R. p. 54, lines 4-17.) While the assault was taking place, Dupont testified he immediately felt intense pain. (R. p. 54, lines 9-12.) Deputy Walker admitted to placing his hands over Dupont's mouth and on his neck. Deputy Walker testified that when he was attempting to buckle Dupont into the police cruiser to transport him, Dupont spit on him. (R. p. 124, line 20-p. 125, line 1.) Deputy Walker testified that at that point he attempted to restrain Dupont by placing his hand over Dupont's mouth and placing force on his pressure points. (R. p. 125, lines 13-17.) Deputy Walker testified that Dupont began thrashing around as a result of the pressure to his neck. (R. p. 125, line 17; R. p.126 lines 16-17.) Deputy Walker stated thrashing was Dupont's effort to get his [Walker's] hands off of his [Dupont's] neck (R. p. 125, lines 16-17.)

Roy Bedard testified in the case as an expert in the area of law enforcement, as well as, the use of force and police procedures. (R. p. 89, lines 18-20.) Bedard testified that most officers have been spat upon. (R. p. 90, lines 15-16.) He opined that the proper tactic officers should employ in this situation is to place a barrier between the person in custody and the officer, for example closing a door. (R. p. 90, line 23-p. 91, line 13.) Bedard testified that the use of an officer's hand placed over a suspect's mouth is never an acceptable technique and he has never seen it taught. (R. p. 91, lines 21-24; R. p. 92, lines 10-13.) Bedard went on to testify that the neck and head areas of the body are two areas in which law enforcement officers are trained to stay away from due to potential complications. (R. p. 93, lines 2-10; R. p. 93, line 25-p. 94, line 16.) In those police forces that do allow neck restraints, Bedard testified that he had never seen anything to the manner of which was presented or acted upon Derrick Dupont by Deputy Walker. (R. p. 94, lines 17-21.) In fact, Bedard was unable to recognize the technique used by Deputy Walker and found that his actions constituted excessive force as they were unreasonable

given that Dupont was restrained and did not pose a threat. (R. p. 94, line 22-p. 95, line 13; R. p. 94, line 14-p. 264, line 25) He testified that the technique was grossly excessive and would be considered by most deadly force. (R. p. 97, line 20-p. 98, line 12.)

Respondent requested a charge of comparative negligence by arguing that the act of spitting in Deputy Walker's face and thrashing around during the application of pressure made Dupont comparatively negligent in causing his injuries. (R. p. 139, lines 5-13.) Initially the trial judge neglected to find any correlation between spitting and the injuries Dupont sustained. (R. p. 139, lines 15-25) Further, the trial judge initially did not find that any act of struggle by Dupont during the application of pressure points was sufficient to constitute comparative negligence (R. p. 140, lines 2-13.) The trial judge found the issue analogous to a medical malpractice case, which under South Carolina law, a patient cannot be comparatively negligent. (R. p. 157, line 24-p. 158, line 12.) Intense deliberations between the parties and the trial judge ensued on the matter of whether or not to charge comparative negligence. (R. p. 139, line 5-p. 144, line 3; R. p. 152, line 20-p. 160, line 12) The main issue seemed to be whether Dupont could be comparatively negligent if he was in custody and not of his own free will and accord. (R. p. 152, lines 19-23.) Further the discussion centered around what duty Dupont would owe Deputy Walker under these circumstances. (R. p. 159, line 20-p. 160, line 1.)

Dupont's claims are governed by the provisions of the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-10 et. seq. The Act provides for a limited waiver of general sovereign immunity; however, it specifically limits the liability of the State, its agencies, political subdivisions, and other governmental entities in causes of action sounding in tort. The Act contains a nonexclusive list of thirty seven specific exceptions to the limited waiver of immunity. S.C. Code Ann. § 15-78-60 (2005). S.C. Code Ann. § 15-78-60(25) (2005) provides that a

governmental entity is not liable for a loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement or custody of any . . . prisoner [or] inmate . . . of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." Based on this standard of gross negligence coupled with the holding in Berberich v. Jack, 392 S.C. 278 (S.C. 2011), (stating "...under our comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limit to, ordinary negligence gross negligence, and reckless, willful or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage.") the trial judge found it appropriate to charge the jury with comparative negligence.

We find this charge inappropriate for several reasons. Under South Carolina case law, negligence is the failure to use due care, i.e., the degree of care which a person of ordinary prudence and reason would exercise under the same circumstances. Hart v. Doe, 261 S.C. 116, 122 (1973). In order to recover in a negligence action, the plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach. Crolley v. Hutchins, 300 S.C. 355, 356 (Ct. App. 1989). Comparative negligence is lack of ordinary care on the part of a person injured by the negligence of another; if in exercise of ordinary care the plaintiff might have avoided the consequences of defendant's negligence, plaintiff is, in eyes of the law, the author of his own injury. S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171 (Ct. App. 1986). South Carolina abrogated the doctrine of contributory negligence in favor of comparative negligence in which a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. Nelson v. Concrete Supply Co., 303 S.C. 243(1991).

Based on all testimony presented, at the time of the incident Dupont was handcuffed, seated in the backseat of the patrol vehicle and in the custody of the Jasper County Sheriff's Office. In this context, negligence is an inappropriate standard because Dupont owed no duty to Deputy Walker. While arguably a potential duty may exist to follow the lawful instructions of a police officer, there was no testimony that Dupont tried to resist arrest or break free from custody, nor was there any testimony Dupont exhibited any behavior that placed Deputy Walker in any reasonable harm. There was testimony that Dupont allegedly spit on Deputy Walker (R. p. 124, line 25-p. 125, line 1.). According to Deputy Walker's testimony Dupont was in process of yelling and when Deputy Walker asked him not to spit on him again Dupont responded, "that's the way I talk." (R. p. 125, lines 1-4.) Deputy Walker's own testimony takes away any failure by Dupont to use due care. Dupont was yelling when the alleged action occurred and informed the officer the act was unintentional. Moreover, any harm or damage resulting from that act is negated by Deputy Walker then entering the back seat of the patrol car where Dupont was located and proceeding to interact with him. (R. p. 125, lines 9-12) Those in imminent fear or danger of an actor do not then intentionally place themselves in close quarters with that actor. It is important to note that while Dupont was charged with several offenses resulting from his arrest that evening, the offense of battery by spitting was not one of them.(R. p. 130, lines 12-18.) Deputy Walker also testified that he was in complete power from the time of the initial arrest until he continued his transport of Dupont. (R. p. 129, lines 20-24.)

Further it becomes difficult to ascertain how spitting becomes a breach that reaches the threshold of negligence. The trial judge quickly began to compare the instant case to the standard of comparative negligence in a medical malpractice case (R. p. 153, lines 7-17; R. p. 153, line 22-p. 154, line 8; R. p. 157, line 24-p. 158, line 4; R. p. 158, line 8-p. 159, line 8.) In Hawkins v.

Pathology Associates of Greenville, P.A., 330 S.C. 92 (SC App. 1998), the Court held the Patient was not contributory negligent in failing to seek medical attention for continued bleeding she experienced after the birth of her first child and in failing to keep her follow up appointment with the physician. Opposing counsel argued the instant case was more analogous to Beberich, in which the Court found comparative negligence appropriate when despite repeated ignored requests to the Defendant to disable her sprinkler system, Plaintiff continued to use his ladder to work outdoors on the Defendant's windows resulting in him slipping on wet rung and injuring himself. The facts in Beberich are clearly distinguishable from the facts in this case. Unlike the plaintiff in Beberich who was a home repair contractor and understood the risks of continuing his actions, Dupont had no reason to be aware that the act of spitting while talking would result in any physical contact with Deputy Walker. There was no evidence that Dupont was advised that the act of spitting would result in any physical action by the officer.

When the discussion moves to proximate causation, the difficulty in finding comparative negligence escalates. While arguably spitting may have been a negligent act or omission, it did not cause Dupont's injuries. The proximate cause of Dupont's injuries was Deputy Walker. "The defendant may be held liable for anything which appears to have been a natural and probable consequence of his [actions]." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990); Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 245, 391 S.E.2d 546, 548 (1990)."A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's act." Small v. Pioneer Mach., Inc., 329 S.C. 448, 463, 494 S.E.2d 835, 843 (Ct.App.1997).

Opposing counsel argued that Dupont was negligent in thrusting his body while the hands of Deputy Walker were placed over his face and neck. All versions of the event indicate that

handcuffs restrained Dupont at the time the incident occurred (R. p. 123, lines 20-25). Deputy Walker testified he was upset at Dupont regarding the act of spitting and started yelling at Dupont. (R. p. 131, lines 5-16.) Deputy Walker also testified that he used force on Dupont pressure points on the base of the jaw to stop him from spitting.(R. p. 125, lines 13-17; R. p. 126, lines 3-11.) It is ordinary knowledge that the human body's airway is present in the neck. If one is applying force or restraint to the neck area, the human airway can be blocked preventing ability to breathe. Therefore, it is foreseeable and a natural consequence that an ordinary person being restrained by their neck will seek alleviation. This corroborates with Deputy Walker's testimony that Dupont was moving around in an effort to free himself from the effects of Deputy Walker's hands being around his neck. (R. p. 126, lines 16-17.) Testimony presented at trial indicates Dupont was in peril, unable to extricate himself from the peril and subject to the harm from the peril; therefore his actions are explanatory and a proximate cause of Defendant's conduct—not his own.

In the instant case, no evidence was provided to establish the elements of negligence as it relates to the actions of Dupont; therefore the trial court erred by charging the affirmative defense of comparative negligence to the jury.

II. BECAUSE UNFAIR PREJUDICE SUBSTANTIALLY OUTWEIGHED ANY PROBATIVE VALUE, THE COURT ERRED IN ALLOWING EVIDENCE OF APPELLANT'S SUBSEQUENT MOTOR VEHICLE ACCIDENT AND TESTIMONY REGARDING APPELLANT'S APPEARANCE AT A GENERAL SESSIONS ROLL CALL TO BE PRESENTED TO THE JURY.

The trial court allowed evidence pertaining to a subsequent motor vehicle accident, as well as, testimony regarding Dupont's appearance at a General Sessions roll call during the day of the incident in question to be presented to the jury. In doing so, the trial court disregarded

Rule 403 of the South Carolina Rules of Evidence and allowed evidence that was irrelevant and unfairly prejudicial to enter the trial.

Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy...Nonetheless, even when the evidence is show to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded. *See* Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Wiles, 383 S.C. 151, 158, 679 S.E. 2d 172, 176 (2009). To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice. Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 559, 556 S.E.2d 718, 726 (Ct.App.2001). Further, if a party deems testimony to be irrelevant or prejudicial, an objection should be interposed when the testimony is initially offered. State v. Cooper, 212 S.C. 61, 69, 46 S.E.2d 545, 548 (1948). If testimony is received without objection, the motion to strike is then addressed to the sound discretion of the trial court. *Id.* In order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown. Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997).

A. Evidence of a subsequent motor vehicle accident was unfairly prejudicial.

On April 7, 2007, two months after the alleged injury bringing rise to the instant case, Dupont was a passenger in a vehicle involved in a minor collision. He sought prompt treatment for his injuries at the Emergency Department at Beaufort Memorial Hospital in Beaufort, South Carolina. There he complained of a sharp headache, as well as, pain in his neck, shoulders and back. In a pre-trial motion Dupont's counsel moved to have evidence of the automobile accident suppressed. (R. p. 36, line 9-p. 38, line 6.) Counsel argued that Dupont had begun undergoing treatment for a neck injury allegedly sustained during the incident with Jasper County Sheriff's

Office on February 7, 2007 and that no medical records or opinions remotely related the motor vehicle accident to the injuries in the instant case; nor did the motor vehicle accident exacerbate those injuries. The motion was denied because Dupont complained of neck pain at the Emergency Department. (R. p. 37, line 23-p. 38, line 5.)

This evidence was irrelevant in that it did not tend to establish or make more or less probable the matter in controversy-the alleged assault and battery by Deputy Walker. Dupont had been receiving treatment for the alleged neck injuries sustained from that incident since March, a month before the automobile accident. No evidence presented indicated that the automobile accident worsened his previous neck injury nor did the neck injury sustained during the motor vehicle accident lead to any further medical treatment other than the initial emergency room visit. Dupont's treating physician Dr. Strohmeyer testified to a reasonable degree to medical certainty that the motor vehicle accident did not appear to cause any new neurologic damage. (R. p. 107, line 20-p. 108, line 1.) Strohmeyer's medical note from April 11, 2007, in which he saw Dupont during a previously scheduled follow up appointment, indicates the same. (R. p. 210) Further, Dr. Chutkan, another treating physician who actually operated on Dupont, testified to a reasonable degree of medical certainty that the incident with Jasper County Sheriff's Office most probably caused his injuries. (R. p. 88, lines 12-22.)

Allowing this information to be presented to the jury merely because it involved a neck injury is prejudicial. It could unfairly sway or persuade the jury into believing that this accident caused or exacerbated Dupont's alleged injury. Along those same lines, it causes confusion of the issues. While eliciting testimony concerning the accident, opposing counsel questioned Dupont about his visit with Dr. Strohmeyer two days after the accident. (R. p. 75, lines 12-19.) In that line of questioning, opposing counsel infers that the physical therapy Dr. Strohmeyer

ordered was in response to the motor vehicle accident. (R. p. 75, lines 18-19.) An objection was made by Dupont's counsel as to the mischaracterization of the evidence. (R. p. 75, lines 23-24.) This evidence was immaterial, irrelevant and allowed for the jury to be unduly persuaded. Any probative value obtained from this evidence would have been substantially outweighed by prejudice; therefore the trial court erred in denying the Motion to Suppress.

B. Testimony regarding Dupont's appearance at a General Sessions roll call the morning of the incident in regards to an unrelated matter was unfairly prejudicial.

During the morning of February 7, 2007, the date of the incident in question, Dupont made an appearance at a roll call for General Sessions court in Beaufort County, South Carolina. This appearance was required due to charges unrelated to the instant case. During direct examination, Dupont admitted that he appeared at a roll call that morning. (R. p. 46, lines 6-8) During cross examination of Derrick Dupont, defense counsel elicited further testimony about Dupont's appearance at that hearing. (R. p. 68, line 21-p. 69, line 13). The testimony delved into the purpose for Dupont's appearance and the drug charges against him. It also included opposing counsel asserting, "Roll call is where criminal defendants have to go." (R. p. 69, lines 1). Plaintiff's counsel objected to the relevance of this questioning and was overruled. (R. p. 69, lines 2-3).

Dupont contends that nothing concerning his appearance at a roll call the morning of the incident tends to establish or make more or less probable the matter in controversy. The testimony solicited did not pertain to the facts of the alleged assault and battery, nor did it involve facts leading up to the alleged incident. It did not concern any incident in which Dupont inflicted bodily harm upon someone or had resisted arrest. Further, while the Court may have found the evidence to be relevant, the danger of unfair prejudice substantially outweighed its

probative value. The testimony concerning his appearance at roll call was merely to engage the preconceived opinion and/or bias of the jury by appearing to make Dupont seem guilty of other crimes. The danger that the jury would infer present guilt from prior criminal charges should not be ignored. The possibility that jurors would be unduly influenced from this line of questioning should have outweighed any probative value.

Based on the foregoing, Appellant contends the trial court erred in allowing this testimony to be presented to the jury.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the lower court and remand this case for a new trial.

Respectfully submitted,

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September 23, 2013

CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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v.

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

September 23, 2013

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Derrick Dupont, Appellant.

CERTIFICATE OF SERVICE

I, the undersigned, S. Kim Danels, a paralegal at the Law Office of Clifford Bush, III, attorney for Appellant, do hereby certify that on September 23, 2013, I served copies of the **Final Brief of Appellant and Record on Appeal** on the below-listed parties by personally depositing a copy of the same, in the United States Postal Service Mailbox, sufficient first class postage attached, addressed as follows:

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September 23, 2013