STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID PAUL MERRITT,

APPELLANT

APPELLATE CASE NO 2019-000365

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to direct a verdict of acquittal for the charge of throwing of bodily fluids by prisoner on correctional facility employee when the State failed to prove that Appellant threw bodily fluids?

2. Did the trial judge err in instructing the jury that, pursuant to S.C. Code §24-13-470, throwing means to intentionally transfer bodily fluids?

STATEMENT OF THE CASE

In December of 2018, the Lexington County Grand Jury indicted Appellant, David Paul Merritt, for throwing of bodily fluids by prisoner on correctional facility employee, indictment #2018-GS-32-3741. On February 25, 2019, Merritt proceeded to jury trial before the Honorable Frank Addy. Stephen Story and Jason Turnblad represented Merritt at trial. Luke Pincelli and Bradley Pogue prosecuted the case. The jury returned a verdict of guilty and the judge sentenced Merritt to seven (7) years in prison. A timely notice of intent to appeal was served on March 5, 2019. This appeal follows.

STANDARD OF REVIEW

Directed Verdict

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

Jury Instruction

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

FACTS

On May 12, 2018, Appellant Merritt checked in at the Lexington County Detention Center to serve weekend time on a separate charge. (Tr. p. 54, lines 15-18). Merritt has Crohn's Disease and suffers from diarrhea. (Tr. p. 104, line 18 – p. 105, lines 1-19). The State and the Defense stipulated that Merritt has Crohn's Disease. (Tr. p. 165, lines 11-13). As part of the booking procedure at the Lexington County Detention Center, Merritt was to be strip searched by two correctional officers. (Tr. p. 54, lines 18-25). One of the officers who was going to conduct the strip search, Clayton "Tripp" Anderson, testified that Merritt smelled like alcohol. (Tr. p. 72, line 14 – p. 73, lines 1-10). Merritt admitted that prior to coming to the detention center he had two draft beers with his dinner but was not intoxicated, as prohibited by the detention center rules. (Tr. p. 108, lines 16-18; p. 114, lines 17-18; p. 115, lines 11-13). According to Officer Anderson, Merritt became upset when the officer told him he would be placed in confinement because he smelled of alcohol. (Tr. p. 73, lines 11-16). Merritt testified that he became frustrated when the officer was unable to locate Merritt's car keys. (Tr. p. 108, lines 8-15; p. 123, lines 1-14).

The strip search took place in a bathroom. (Tr. p. 73, lines 5-7). Officer Anderson testified that Merritt took his shoes and his pants off but then became upset, sat on the toilet and refused to do anything else. (Tr. p. 75, lines 9-15). Merritt testified that he began to feel like he needed to use the bathroom and sat on the toilet. (Tr. p. 108, lines 21-22). Merritt testified that he told the officers he had Crohn's Disease and needed to go to the bathroom before he had an accident. (Tr. p. 108, lines 22 – 24). Merritt testified that the officers told him he could not use the restroom until he finished changing clothes. (Tr. p. 110, lines 13-15). Officer Anderson claimed that Merritt did not tell the officers he needed to use the bathroom. (Tr. p. 77, lines 21-22).

When Merritt did not comply with orders to get dressed, the officers attempted to handcuff him, a scuffle took place and the officers took Merritt to the floor. (Tr. p. 76, line 10-p. 77, lines 1-16). Officer Anderson testified, "I did a pressure point right here up under his jaw to get him to release his hands so I can secure him in handcuffs." (Tr. p. 91, lines 5-7). Merritt testified that when the officers bent him over and pushed him to the ground, he defecated on himself. (Tr. p. 111, lines 5-25).

Once they had Merritt on the ground, Officer Anderson testified, "My partner told me, he said – like I said, they call me Tripp. He said, Tripp, look at your shirt. I didn't know what happened. He said, Tripp, look at your shirt. I looked at my shirt and I had feces on my shirt from my chest about midway to my stomach." (Tr. p. 78, lines 3-7). Officer Anderson's partner, William Stevens, testified:

> He [Merritt] took his shoes, took his pants off and then he sat down on the toilet refusing to do anything else until we got his keys. We tired to explain to him once we get you dressed out, we'll get your keys. You know, we talked about 10 minutes, you know, didn't go nowhere. That's when MCO Anderson pulled his handcuffs out and was going to attempt to handcuff him. We struggled with him and we took him down to the floor to secure him. Once we got him down to the floor, that's – Mr. Merritt's arms was locked up around his chest, you know, where we couldn't cuff him. And as he went down, his hand come up and that's when he had feces on his hand and put it on MCO Anderson's shirt.

(Tr. p. 56, lines 9-21). Officer Stevens additionally testified, "He was coming down with me, and that's when I seen the hand come out from under him like he was trying to push Tripp off of him, but when he did, he had a handful of feces. (Tr. p. 59, lines 4-7). Officer Stevens testified that at the time he weighed between 390 and 400 pounds. (Tr. p. 64, lines 14-18). Officer Anderson testified that at the time he weighed about 350 pounds. (Tr. p. 89, lines 12-18).

When asked what he was doing with his hands other than holding himself up when he was on the ground, Merritt testified:

> That's it. I just had my hands on the floor. And then when I felt like I was going to lose consciousness from all his weight on me and his arms squeezing me. I felt like, you know, I was going to lose consciousness. That's when I took my left hand and tried to push him in the chest to, you know, create separation where I could breathe. But I went unconscious.

(Tr. p. 112, lines 18-24). Merritt did not recall putting his hands in his underwear and did not recall having feces on his hand. (Tr. p. 112, line 25 – p. 113, lines 1-3). Merritt denied intentionally putting feces on his hand and placing it on Officer Anderson. (Tr. p. 114, lines 3-6).

ARGUMENTS

1. **The trial judge erred in refusing to direct a verdict of acquittal for the charge of throwing of bodily fluids by prisoner on correctional facility employee when the State failed to prove that Appellant threw bodily fluids.**

At the close of the State's case Merritt moved for a directed verdict of acquittal because the State failed to prove that Merritt was an inmate and because there was no evidence of throwing as required by the statute. (Tr. p. 96, line 24 – p. 97, lines 1-9). On appeal Merritt only challenges the failure to direct a verdict of acquittal because the State failed to prove that Merritt threw bodily fluids. The State argued, with regard to the throwing issue, that it was a matter of statutory interpretation and stated, "I believe the general assembly intended to limit any kind of bodily fluid being transferred in any means and chose the word throw rather than list a laundry list of other verbs, Your Honor." (Tr. p. 98, lines 8-12). The judge denied the motion for directed verdict stating:

> If the objective is to protect health, then it would not matter whether the substance is intentionally thrown or it's otherwise intentionally wiped or transferred in some manner from the inmate to the officer.
>
> So reading the statute as a whole, the Court will conclude that, perhaps, the general assembly could have used a more precise word to describe what they're meaning here, but I'm interpreting throw as to mean transfer – transfer, wipe – I guess transfer is probably the best synonym as they intent throw to mean. But your point is well taken, Mr. Story, and the Court, however, will be denying your motion.

(Tr. p. 100, line 13 – p. 101, lines 1-5). The trial judge erred.

S.C. Code §24-13-470 provides:

> (A) An inmate, a detainee, a person taken into custody, or a person under arrest, who attempts to throw or throws body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention

facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years. A sentence under this provision must be served consecutively to any other sentence the inmate is serving. This section shall not prohibit the prosecution of an inmate for a more serious offense if the inmate is determined to be HIV-positive or has another disease that may be transmitted through body fluids.

(B) A person accused of a crime contained in this section may be tested for a blood borne disease within seventy-two hours of the crime if a health care professional believes that exposure to the accused person's body fluid may pose a significant health risk to a victim of the crime.

(C) This section does not apply to a person who is a "patient" as defined in section 44-23-10(3).

The statute prohibits the attempt to throw or throwing of bodily fluids. The State, knowing there was no proof of an attempt to throw or throwing of bodily fluids, argued that the general assembly intended to prohibit the **transfer** of bodily fluids by any means. The judge agreed and, by substituting the word throw for the word transfer, denied the directed verdict motion. The State and the judge impermissibly expanded the statute to include a transfer of bodily fluids.

In State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011), the South Carolina Supreme Court found that the plain language of S.C. Code §24-21-410 provided that a sentence for a conviction for first degree burglary may not be suspended. The Court wrote:

> The cardinal rule of statutory construction is to ascertain and effectuate legislative intent." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). As such, a court must abide by the plain meaning of the words of a statute. Id. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581. " 'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.' " Id. (*quoting* Norman J. Singer, *Sutherland*

> *Statutory Construction* § 46.03 at 94 (5th ed.1992)). Although it is a well-settled principle of statutory construction that penal statutes should be strictly construed against the state and in favor of the defendant, State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991), courts must nevertheless interpret a penal statute that is clear and unambiguous according to its literal meaning. State v. Mills, 360 S.C. 621, 624, 602 S.E.2d 750, 752 (2004).

Jacobs, 393 S.C. at 587, 713 S.E.2d at 622–23. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no need to employ rules of statutory interpretation and the court has no right to look for or impose another meaning. Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995); Brassell, 326 S.C. at 560, 486 S.E.2d at 494. When the terms of a statute are clear, the court must apply those terms according to their literal meaning. Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994)." State v. Morgan, 352 S.C. 359, 366–67, 574 S.E.2d 203, 206–07 (Ct. App. 2002).

The language of §24-13-470 is plain and unambiguous. The rules of statutory interpretation are not needed because the statute conveys a clear and definite meaning. The literal and plain meaning of the statute requires an attempt to throw or throwing. A "transfer' is not prohibited by the statute. The trial judge impermissibly expanded the statute to include a transfer. The transfer that took place in the present case is not prohibited by statute. The trial judge erred in refusing to direct a verdict of acquittal because the State failed to prove an attempted throw or throw.

In State v. Holcomb, 426 S.C. 557, 562, 827 S.E.2d 367, 370 (Ct. App. 2019), the South Carolina Court of Appeals wrote:

> "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011). "When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State." Id.

The State failed to produce evidence of an attempted throw or a throw as required by the statute. Viewing the evidence in the light most favorable to the State, the officer's testimony can only establish that during the scuffle Merritt got feces on his hand and when he pushed against Officer Anderson, the feces transferred from Merritt's hand to Officer Anderson's shirt. As discussed above in the fact section, Officer Stevens testified that, "Once we got him down to the floor, that's – Mr. Merritt's arms was locked up around his chest, you know, where we couldn't cuff him. And as he went down, his hand come up and that's when he had feces on his hand and put it on MCO Anderson's shirt. (Tr. p. 56, lines 17-21). Officer Stevens also testified, "He was coming down with me, and that's when I seen the hand come out from under him like he was trying to push Tripp off of him, but when he did, he had a handful of feces." (Tr. p. 59, lines 4-7). Officer Stevens weighed approximately 400 pounds and Officer Anderson weighed 350 pounds. (Tr. p. 64, lines 14-18; p. 89, lines 12-18). The State and the Defense stipulated that Merritt has Crohn's Disease. (Tr. p. 165, lines 11-13).

While the issue in State v. Curry, 410 S.C. 46, 762 S.E.2d 721 (Ct. App. 2014), involved the failure to charge the jury on guilty but mentally ill, the case provides an example of the correct application of the statute. In Curry the Court described the facts as follows:

> Later that day, Officer Hopkins returned to Curry's cell so it could be cleaned. He reserved Curry's cell for last because there was a strong smell emanating from his cell, which was later discovered to be a result of Curry "stockpiling feces underneath the sink." After he and another officer looked through the flap in the door and determined it was safe to enter, Officer Hopkins stepped inside Curry's cell, but "in a split second, [Curry] had lobbed with his right hand, like pitching a softball, the fecal matter which hit [Officer Hopkins] square in the abdomen, [and] dribbled down and onto [his] right leg."

410 S.C. at 48–49, 762 S.E.2d at 722.

In contrast, in the present case there is no evidence of "stockpiling feces." Importantly in the present case there is no evidence of a lob, like pitching a softball, which would meet the

throwing requirement of §24-13-470. The transfer in the present case does not meet the throwing requirement of the statute. The trial judge erred in refusing to direct a verdict of acquittal.

2. The trial judge erred in instructing the jury that, pursuant to S.C. Code §24-13-470, throwing means to intentionally transfer bodily fluids.

Prior to instructing the jury the judge told the lawyers:

> Just to let you know so they don't get hung up over the explicit statutory verbiage, when it comes to throwing bodily fluids and the instruction on that charge, based on my earlier ruling, the transferring of bodily fluids, intentionally transferring bodily fluids qualifies under the definition of throwing, I'm going to explain that so that they're not confused or otherwise hung up on that particular verbiage.
>
> Of course, the Defendant's objection to that portion of the instruction can be made after I instruct them. But I just wanted to let ya'll know that that was my intention to better define what it is that the legislature intended when they wrote this statute. Perhaps more precisely defined, not that they ever ill define anything.

(Tr. p. 140, line 25 – p. 141, lines 1-13). The judge then instructed the jury, "Under the statute, throwing means to intentionally transfer bodily fluids." (Tr. p. 165, lines 19-21). Appellant renewed the objection following the charge. (Tr. p. 168, lines 5-10). The trial judge erred. As discussed above, when refusing to direct a verdict of acquittal, the judge impermissibly expanded the statute to include a "transfer."

In State v. Jenkins, 408 S.C. 560, 569, 759 S.E.2d 759, 764 (Ct. App. 2014), the South Carolina Court of Appeals wrote:

> "In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (citation omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." Id. at 90–91, 747 S.E.2d at 448. "A jury charge that is substantially correct and covers the law does not require reversal." Id. (citation and quotation marks omitted). "Jury instructions should be considered as a whole, and if as a whole,

> they are free from error, any isolated portions which may be misleading do not constitute reversible error." Id. at 94 n. 8, 747 S.E.2d at 449 n. 8 (citation omitted). "Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Brown, 362 S.C. 258, 261, 607 S.E.2d 93, 95 (Ct.App.2004). "To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." Id. at 262, 607 S.E.2d at 95.

Instructing the jury that throwing means to intentionally transfer is not simply an isolated portion of the charge that may be misleading. The charge is a misstatement of the law. Merritt was charged with **throwing** of bodily fluids by prisoner on correctional facility employee in violation of S.C. Code §24-13-470. The statute provides that:

> An inmate, a detainee, a person taken into custody, or a person under arrest, who **attempts to throw or throws** body fluids including, but not limited to, urine, blood, feces, vomit, saliva, or semen on an employee of a state correctional facility or local detention facility, a state or local law enforcement officer, a visitor of a state correctional facility or local detention facility, or any other person authorized to be present in a state correctional facility or local detention facility in an official capacity is guilty of a felony and, upon conviction, must be imprisoned not more than fifteen years.

(emphasis added). A transfer is not covered by the statute. The charge as a whole fails to cover the correct and current law. The charge is both erroneous and prejudicial to Appellant. As discussed above, the officer's testimony can only establish that during the scuffle Merritt got feces on his hand and when he pushed against Officer Anderson, the feces transferred from Merritt's hand to Officer Anderson's shirt. Again, the State and the Defense stipulated that Merritt had Crohn's Disease. (Tr. p. 165, lines 11-13). The error in expanding the statute to include a transfer compounded by the error in instructing the jury that throwing means to intentionally transfer requires reversal.

CONCLUSION

Based on the above arguments, this Court should reverse the conviction and sentence and remand for entry of a directed verdict of acquittal.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID PAUL MERRITT,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on David Paul Merritt, #362163, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 16th day of October, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of October, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029