IN THE SUPREME COURT
of the
MISSISSIPPI BAND OF CHOCTAW INDIANS

MALLORY L. WILSON **APPELLANT**

vs. **CAUSE NO. SC 2014-09**

MISSISSIPPI BAND OF CHOCTAW INDIANS **APPELLEE**

PROCEEDINGS BELOW

(Per Curium) This matter comes before the Court on direct appeal filed by Appellant Mallory Wilson following her October 2, 2014, jury trial and conviction in the Choctaw Criminal Court cause number 2014-436 alleging one (1) count of Battery, a violation of Choctaw Tribal Code § 3-3-3, and a Class B offense.

Appellant was originally charged in four separate cause numbers: two alleging Abuse of a Child on two different toddlers under CTC § 3-3-8 by taking saliva from a sick child and putting it in another child's mouth, and two alleging Battery pursuant to CTC § 3-3-3 by pinching two different toddlers. All charges were alleged to have taken place at the Infant and Toddler Facility located in the Pearl River Community of the Mississippi Band of Choctaw Indians from a period beginning November/December, 2013, into January, 2014.

At the close of prosecution's case in chief, both counts of Abuse of a Child [Cause Nos. 2014-453 & 2014-454] and one Battery count [Cause No. 2014-455] were dismissed by the trial court. The defense then called the defendant to testify as its single witness. The tribe presented no rebuttal witnesses. Following jury deliberations, the panel returned a verdict of "Guilty" on that single remaining battery count [Cause No. 2014-456]. Immediately following conviction, the Defendant/Appellant was sentenced under the provisions of CTC § 3-1-3 to three months in detention and assessed a fine of $250.00.

Defendant/Appellant, through counsel, duly filed on October 7, 2014, a "NOTICE OF APPEAL" pursuant to CTC § 7-1-3. Additionally, included in the Notice of Appeal was a request under the provisions of CTC § 7-1-5(2) & (3) for immediate release on bond from detention pending appeal. That same date this Court issued its Order to Release Defendant from Incarceration and Appellant has remained at liberty pending this appeal's outcome.

Following briefing by both parties, oral arguments were held before this Court on July 28, 2016, and the case was submitted for final consideration. This Opinion and Order of the Court thereby ensues.

Factual Background

The record reflects that all charges in this case seemingly stemmed from a series of back-and-forth accusations of misconduct by at least three Pearl River Infant and Toddler Facility child care workers, seemingly each against one or more of the others. The record is incomplete as to how many workers were criminally charged, as well as the number and the specifics of each criminal accusation lodged against those formally charged.

Tina Routh, Director of the Department of Early Childhood, testified first for the tribe. Her testimony established that the daycare facilities overseen by her were licensed and operated under state regulations that, among other things, prohibited corporal punishment. The Director also testified that workers received training in relation to state operating regulations. Despite hearsay objections, the prosecution elicited testimony to the effect that the Director received allegations against Mallory Wilson, then a daycare center worker, and conducted an internal investigation leading to her termination. On cross-examination the Director testified she had no firsthand knowledge defendant pinched or put saliva of a sick child in another child's mouth.

Appellant's co-worker April Bell testified next for the tribe and acknowledged her testimony against appellant was being given after being allowed to plead to a single lesser offense of disorderly conduct in lieu of her previously pending battery charges. Ms. Bell testified that she saw appellant pinch a child to whom she was related in what April Bell thought was a playful manner.

At the conclusion of Ms. Bell's testimony, a bench conference was held outside the presence of the jury. The record is unclear, but it appeared that defense counsel learned that a member of the jury was employed by the Tribal Head Start Child Care which department was under Director Tina Routh. The defense counsel made a motion for a mistrial, but instead, the court excused the juror in question and an alternate juror was seated.

Following discussion, the tribe called two more witnesses before resting its case in chief, neither of whom provided testimony of direct, first-hand knowledge of the allegations and charges brought against defendant/appellant.

Defense counsel then argued for a directed verdict of acquittal on all four pending charges. The trial court granted the directed verdict of acquittal on both child abuse cases [Cause Nos. 2014-453 & 2014-454] and on one of the two battery charges [Cause No. 2014-455] against defendant. Only this instant battery case [Cause No. 2014-456] was allowed to

go forward; however, when the jury was called back in, the jury was not informed that all other charges against Ms. Wilson had been dismissed.

The single witness presented by the defense was the defendant herself. Her basic testimony on direct examination was that she was terminated, administratively appealed only to the second of the three levels of proceedings, and that she did in fact pinch in a playful manner one enrolled child who was also a close relative of hers. On cross-examination she again answered that she pinched, but only in a playful manner. Over defense objection the prosecutor asked her about particulars of her administrative hearing and grounds for termination, asking a number of nuanced questions about other claims of misconduct by her, including those that were the subject of her other previously dismissed charges, and she was asked similar questions about misconduct by other workers whom she failed to report.

It was only immediately before closing arguments that the court informed the jurors it had earlier dismissed all charges but one battery.

Arguments and Analysis

Appellant argues her conviction of battery against a minor child should be reversed and rendered, or, in the alternative, reversed and remanded for a new trial on either, or both, of two bases: (*i*) the prosecution's use of a day care policy and procedure to claim a criminally unlawful application of force giving rise to a battery, and (*ii*) the lower court's having improperly allowed questioning regarding charges which had been dismissed. [See, Appellant's Br. at 8]. For the reasons and analysis set forth following, we need only address the first issue.

The standard of review in this criminal matter is whether "in light of the evidence as a whole, no reasonable, hypothetical juror could find, beyond a reasonable doubt, that Defendant was guilty." *Mississippi Band of Choctaw Indian v. Henry,* No. 2003 (June 13, 2005) (citations omitted). Further, a reversal of a criminal conviction is warranted "if the findings of fact are not supported by substantial evidence in the record or if a conclusion regarding applicable law is clearly erroneous." *Mississippi Band of Choctaw Indians v. Williamson,* No. 2001-32 (2004).

In response to Appellant's argument that the prosecution used a violation of the day care's policy to show proof of a criminal violation, Appellee argues that "[t]he Jury's verdict was based on their belief that the pinching of the minor child was unlawful." [Appellee's Br. at 11.] Therefore, the question before the Court is whether or not the day care policy and the evidentiary role it played in the jury's determining criminal culpability was legally justifiable.

The tribal battery statute under which Appellant was charged, CTC § 3-3-3, says:

> §3-3-3 Battery
> Any person who shall unlawfully strike or apply force to another person or otherwise inflict any bodily injury or who shall by offering violence cause another to harm himself shall be guilty of battery.
> Battery is a Class B offense.

The Appellee seemingly argues that the relevant portion of CTC § 3-3-3 definition reads that "Any person who shall * * * apply force to another person * * * shall be guilty of battery." As such, the Appellee states that the statute is clearly a general intent crime relying on a similar definition of battery in a LA statute in which the 5th Circuit Court found aggravated battery to be a general intent crime. (See, *United States v. Hernandez-Rodriquez,* 788 F.3d 193, 198 (5th Cir. 2015)). "[T]o establish general intent, the State need only make a showing that 'the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act.'" *United States v. Hernandez-Rodriquez,* 788 F.3d 193, 198 (5th Cir. 2015) (discussing the intent required to prove the use of force with a dangerous weapon). Therefore the only "criminal intent necessary to sustain a conviction is shown by the very doing of the acts which have been declared criminal." *Id.* Further, Appellee maintains that the only intent required by the statute was Appellant's conduct because the crime does not require the infliction of any bodily injury. (See, *Id.*). The Court disagrees with Appellees reading of the CTC § 3-3-3 statute.

The relevant portion of the definition of battery under CTC § 3-3-3 is actually "[a]ny person who shall *unlawfully* * * * apply force to another person * * * shall be guilty of battery." (emphasis added) There are two required elements to prove the crime of battery in this case: (1) the application of force, and (2) an unlawful act upon another person.

Also, in the case now before this court the "conduct consequences as reasonably certain to result from" Mallory Wilson's act, a playful pinch, simply does not rise to the level of criminal culpability in and of itself. (The conduct consequences likely to result from pinching a small child playfully, common experience shows, is that the child will likely giggle and squirm in amusement.) The language of the tribal battery statute simply does not prescriptively encompass and criminalize a playful pinch, particularly of one of a relative relationship.

Appellee's theory of prosecution seems to be that what actually made Mallory Wilson's act a violation of the tribe's battery statute was that it took place in a day care facility. The Tribe must maintain their day care operations in compliance with regulations

governing licensure of child care facilities issued by the Mississippi State Department of Health, and the prosecution claimed the policies and procedures prohibited, among other things, any form of pinching of a child. Appellee argued before this Court that the witness testimony from Tina Routh, the department director of the Department of Early Education, was proof proper and sufficient to establish what the regulations were. The Appellee did not enter into evidence the actual Mississippi State Department of Health policies and procedures referenced in the record.

Examining first Department Director Routh's testimony regarding the regulation's content and then her conclusions drawn in relation to these regulations, we turn first to the transcript. It reads in relevant part as follows:

Q. Is the day care licensed?
A. Yes.
Q. Who issues a license to the day care?
A. The State of Mississippi.
Q. As part of that license, is the daycare required to follow any procedures?
A. Yes. There is state regulations you have to follow.
Q. Do any of those regulations and procedures deal with the care of children?
A. Yes, sir.
Q. What are the policies or regulations about corporal punishment?
A. There is no corporal punishment (unintelligible).
Q. Okay. What are different examples of corporal punishment that are - - that sometimes, in a school environment?
A. Spanking, any type of slapping of the hand, slapping of the bottom, thumping on the head, pulling of hair or anything that causes a child (unintelligible).
Q. Okay. So all those things are - -would fall under different categories of corporal punishment?
A. Yes.
Q. As the daycare worker in one of the facilities, are they privy to any training?
A. Yes, sir. They're required to get 15 hours a year.
Q. Okay. What are some types of training that the workers go through?

A. Appropriate discipline, stress management, child development, interaction, lesson (unintelligible) activities. The list goes on and on.
Q. Okay. Are they taught to or receive training about corporal punishment?
A. Yes, sir.
Q. Are they reviewed or do they discuss these different procedures and policies that have to be followed?
A. Yes, sir.
Q. Okay. Would it be fair to say daycare workers are aware that corporal punishment could include pinching or touching a child not particularly (unintelligible)?
A. Yes.
Q. Is there any situation that makes it okay to put your hands on another person's child?
A. No.
Q. Do you make the daycare workers aware of that?
A. Yes.

[Transcript pages 9 – 11.]

It is unclear from the record why the Appellee did not provide the policies during the course of the trial. When questioned at oral argument as to why he did not choose to introduce an actual, true printed copy of the regulation instead of doing so through the center director's testimony, which was clearly hearsay, Appellee stated that he chose not do so out of concern that the defense counsel might object to its admission. [38:20]

The Court questions the veracity of Appellee's answer given that the Choctaw Tribal Code has a simple, straightforward evidentiary provision by which the introduction of a copy of the state Regulations Governing Licensure of Child Care Facilities could have been readily introduced into evidence. This is found under Title VI – Choctaw Rules of Civil Procedure's under Chapter 3 of the Rules of Evidence wherein Article IX on Authentication and Identification says:

> Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> * * *
>
> (e) Official Publications. Books pamphlets, or other publications purporting to be issued by public authority.

Further, Appellee's rationale for not introducing the actual day care policies shows either an unawareness, or a deliberate disregard and avoidance of compliance with Choctaw Rules of Evidence (CRE) Rule 201 governing judicial notice of adjudicative acts. Rule 201 reads:

> **ARTICLE II □ JUDICIAL NOTICE**
> **RULE 201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS**
>
> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts. **(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either** (1) generally known within the territorial jurisdiction of the trial court or **(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.** (c) When Discretionary. A court may take judicial notice, whether requested or not. **(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information. (e) Opportunity to be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed.** In the absence of prior notification, the request may be made after judicial notice has been taken. (f) **Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.** (g) Instructing Jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed. (Emphasis added.)

The Regulations Governing Licensure of Childcare Facilities promulgated by the Mississippi Department of Health unquestionably satisfy CRE Rule 201(b)(2) requirement that it be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." To do so, one need only access the internet at http://msdh.ms.gov/msdhsite/_static/resources/78.pdf where they may open a file that contains a complete copy of the Regulations Governing Licensure of Child Care Facilities in printable format. Then if defense counsel wishes to object, Rule 201(e) makes allowance for that, for it reads, "(e) Opportunity to be Heard. A party is entitled upon timely request to

an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."

Nevertheless, the Court in conformity with the Rule 201(c)'s judicial notice provisions hereby exercises its powers to now take judicial notice of Mississippi State Department of Health regulatory Rule 1.14.1 quoted below. This Court may take this action under Rule 201(f) governing "Time of Taking Notice" which states that, "Judicial notice may be taken at any stage of the proceeding." Judicial notice may be taken at any time, including on appeal. *See, e.g., United States v. Burch, 169 F.3d 666, 667 (10th Cir. 1999); Green v. Warden, U.S. penitentiary, 699 F.2d 364, 369 (7th Cir. 1983). See also City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155, 172 (4th Cir. 2002)* (appeals court can take judicial notice of proposed rule published in Federal Register even if the proposed rule was not called to the attention of the trial court); *Poindexter v. United States, 777 F.2d 231, 236 (5th Cir. 1985)* (appeals court is required to take judicial notice of information contained in agency regulations).

Regulations Governing Licensure of Child Care Facilities
Subchapter 14: DISCIPLINE AND GUIDANCE

Rule 1.14.1 Prohibited Behavior: The following behaviors are prohibited by anyone (i.e., parent, caregiver, or child) in all child care settings:

1. Corporal punishment, including hitting, spanking, beating, shaking, pinching, biting, ***and other measures that produce physical pain.***

[Italics and emphasis added.]

The actual, true printed copy of the regulation is a significant and substantive variation by omission to what the testimony of the department director said it to be. A reading of the full Rule 1.14.1's provisions together with the complete trial record, the briefs, arguments of counsel, and testimony show that Mallory Wilson did not violate the day care regulations. Mallory Wilson's playful pinch was not a "measure" that produced physical pain; neither was it an administration of corporal punishment; consequently, it was not a violation of daycare regulations. Nowhere does the trial record suggest otherwise.

It is uncontroverted that that Appellant pinched the minor in question. However, a review of the trial record provides no evidence remotely suggesting that the pinch Mallory Wilson gave her young relative was anything other than a mere playful action done in a harmless manner, resulting in no apparent pain or injury, or even the slightest protest by the young child relative. The prosecution's own eye witness, day care co-worker April Bell, testified that she thought it was a harmlessly playful pinch. Mallory Wilson herself took the stand and testified that it was a playful pinch. She maintained no less than five times that it

was playful when undergoing cross-examination by the prosecutor. No evidence or testimony provided to the contrary. Further, nothing in the statutory language by itself remotely suggests a playful pinch is a crime. Neither could it without a showing that it was done in a criminally culpable state of mind or manner.

This court recently wrote in the case captioned *Siah Denson vs. Mississippi Band of Choctaw Indians,* Cause No. SC 2015 – 04, July 12, 2016:

> A fundamental precept of criminal law is that all crimes consist of two basic parts – *a mens rea,* which is a mental causation of a resulting harm, and an *actus reus,* which is the act itself that results in a criminal law violation. Both are requisite elements to be established by the prosecution's presentation of proof required by the legal standards constituting both parts on each charge. The nature and form of each statutory violation charged itself determines what level of mens rea *and* actus reus is required, and both may vary to one extent or another depending on the governing law's classification. *Id.* p. 5.

Therefore, the only evidence and testimony presented by Appellee to support the criminal charge of battery was the fact that Mallory Wilson playfully pinched the minor in question. Going back now to what we wrote in the *Siah Denson* case, neither of the two fundamental precepts of criminal law of battery were proven: not the *mens rea,* which is a mental causation of a resulting harm, nor the *actus reus,* which is the act itself that results in a criminal law violation. Since both are requisite elements to be established by the prosecution's presentation of proof required by the legal standards constituting both parts on each charge, defendant's motion for a directed verdict of acquittal at the close of the prosecution's case in chief should have been granted at that time. The same holds true for defense counsel's post-trial motions. The lower court not having done so, we hereby reverse the jury verdict of guilt and the case is rendered.

CONCLUSION

This case serves as an unfortunate reminder of the critically important purpose that abidance to the Choctaw Rules of Evidence plays in the tribal court system of administering criminal justice. Both the adherence and the enforcement of evidentiary laws are a shared obligation of all counsel and of the court, as shown here, for good reason. Had the evidentiary rules and procedures been followed from the earliest pretrial preparation stage and a hard copy printout of the cover page and page 73 wherein Rule 1.14.1 of the Mississippi State Department of Health's Regulations Governing Licensure of Child Care Facilities been procured and submitted for judicial notice in the manner prescribed by CRE

Rule 201, the jury would not have been misled into believing that the playful pinching of the child relative was proven unlawful by a violation of the daycare rule.

Circumstances considered, this Court finds the tribal prosecution failed to prove the requisite elements of the offense charged. Accordingly, the Court orders, adjudges, and decrees that the jury verdict of guilt be reversed and the case rendered.

SO ORDERED, this the 19th day of December, 2016.

Chief Justice

Associate Justice

Associate Justice

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the ~~29~~ 30th day of December, 2016 caused to be forwarded by the United States Mail and/or Hand Delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

Hon. Kevin Brady
Choctaw Legal Defense
Choctaw, Mississippi 39350
(Hand Delivery)

Hon. Kevin Payne, Special Prosecutor
Mississippi Band of Choctaw Indians
Attorney General's Office
Choctaw, Mississippi 39350
(Hand Delivery)

Hon. Timothy L. Taylor
Choctaw Tribal Court
Choctaw, Mississippi 39350
(Hand Delivery)

Hon. Peggy Gibson
Choctaw Tribal Court
Choctaw, Mississippi 39350
(Hand Delivery)

Jane Charles, Clerk of Court
Choctaw Tribal Supreme Court

THE mockingbird FOUNDATION

GRANT AGREEMENT FORM
$4,000 Grant announced June 1, 2016, to
Tucker Elementary School
PHiladelphia, MS

In order for us to process your grant payment, you must sign the agreement below and return it to The Mockingbird Foundation, c/o Ellis Godard, 12407 Willow Grove Court, Moorpark, CA 93021

By signing and returning this letter, you acknowledge and accept, on behalf of the undersigned organization, the following conditions:

I. Terms of the Grant:

A. The grantee shall return any grant funds not used for the purpose for which the grant was made unless the grantee has obtained the Foundation's prior written approval of an alternative use of the grant funds.

B. When the grant funds are fully expended, you must submit a report which will: (1) briefly describe in narrative fashion what was achieved with the grant funds; and (2) provide a full financial accounting of the grant.
   1. The **narrative report** should briefly **(no more than four pages)** summarize how the grant was used and the results that were achieved. The report will be used to evaluate and provide an overview of your work to our board.
   2. The **financial report** should be as detailed as possible and include the following:
      a. A comparison of budgeted versus actual expenses as they relate *specifically to our grant.*
      b. A statement indicating if all grant funds were expended for the purposes of the grant.
      c. An explanation of any variations from the budget submitted with your original application.

II. Indemnification.

The grantee shall indemnify and hold the Foundation harmless from and against all third party claims, liabilities, suits, demands, damages, losses, judgments, fines, penalties, interest, expenses and costs (including reasonable attorneys' fees and disbursements) which result from any breach of grantee's representations and warranties made in relation to this Agreement or from the [negligent] acts or omissions of grantee, its directors, officers, employees, consultants, and agents relating to grant activities conducted pursuant to this Agreement.

III. Certification of Tax and Public Charity Status

Before disbursing the funds, we will need a copy of the letter from the Internal Revenue Service determining that your organization is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code and classified as a public charity under Section 509(a).

Further, you certify that the undersigned organization has received no notice from the Internal Revenue Service stating or proposing that:

1. Your organization is not tax-exempt under Section 501(c)(3); or
2. Your organization is not eligible to receive deductible charitable contributions; or
3. Your organization is a private foundation or has failed to establish that you are not a private foundation; or
4. There has been no change in the grantee organization's tax exempt status.

In the event that you do receive such a notice at any time, please inform us immediately.

Accepted and agreed to:

Tucker Elementary School - MS Band of Choctaw Indians
Organization

Dane Comby
Signature

6-15-16
Date

Dane Comby
Name

Music Teacher
Title

Mockingbird Foundation Grant

Chip Parker

Sun 6/12/2016 10:30 AM

To:Chip Parker <bozakaxel@gmail.com>;

Dear Grantees-

My name is Chip Parker and I am a volunteer for the Mockingbird Foundation, assisting with their media relations.

First off, congratulations on being selected to receive a grant from one of the most competitive grant making processes in the nation! It is truly a testament to the value of your programs.

If you need any information about the Mockingbird Foundation for your own press outreach, please don't hesitate to contact me. Additionally, if you do not have someone working for your organization in a communications capacity and need some assistance with a press release, please let me know.

Wishing you all the best with your programs, and once again, congratulations!

Sincerely,
Chip Parker
Volunteer Media Director
The Mockingbird Foundation
(c) 631-741-1201