In the Supreme Court
of the
Mississippi Band of Choctaw Indians

SIAH DENSON **APPELLANT**

vs. **CAUSE NO. SC 2015-04**

MISSISSIPPI BAND OF CHOCTAW INDIANS **APPELLEE**

OPINION AND ORDER

Procedural History

Per Curium

This matter comes before the Court on direct appeal filed by appellant Siah Denson following her March 12, 2015, jury trial and conviction in the Choctaw Criminal Court on a single count of willful and unlawful violation of CTC §3-3-8(1) charging Abuse of a Child as a Class B offense. The charges stemmed from an October 18, 2012, video recorded incident that occurred at or about 9:03 a.m. at the Pearl River Infant and Toddler Center located in the Pearl River Community of the Mississippi Band of Choctaw Indians. Following conviction, the defendant/appellant was sentenced under the provisions of CTC §3-1-3 to 90 days in jail and assessed a fine of $250.00.

Defendant/Appellant, through counsel, timely filed on March 18, 2016, a "MOTION TO [*sic*] RECONSIDERATION OF JUDGMENT AND IN THE ALTERNATIVE FOR A NEW TRIAL." Following no response by the Choctaw Trial Criminal Court within twenty (20) days from the date it was filed, the motion was deemed automatically denied pursuant to Title II's CRCP Rule 23(a). Accordingly, the appellant on April 9, 2015, duly filed her Notice of Appeal to the Choctaw Tribal Supreme Court.

Following briefing by both parties, oral arguments were held before this Court on January 4, 2016, the case was submitted for final consideration, and this Opinion and Order thereby ensues.

Facts Of The Case

The single-count criminal complaint sworn out against defendant/appellant Siah Denson charges Abuse of a Child in violation of CTC § 3-3-8(1), as a Class B misdemeanor. The complaint alleges that at approximately 9:03 a.m. on the 18th day of October, 2012, the

> defendant did willfully and unlawfully commit the following: based on information received and through investigations defendant knowingly placed her foot on the minor child's *.*.* walker to forcefully push off

causing minor child's head to jerk backwards which placed a situation that may have been endangered the minor child's life or health. Incident occurred at Infant & Toddler Center located in Choctaw, MS.

Appellant was an employee at the facility and entrusted with the classroom care of children of infant and toddler age, including the then 15-month-old victim alleged. This particular child was afflicted with Down's syndrome.

The prosecution presented its case in chief through the testimony of five witnesses, together with a six-minute and 23-second video clip from the classroom surveillance camera. The video, discussed in detail further in the opinion, depicts appellant's actions that the prosecution maintains constitute the willful and unlawful criminal commission of child abuse in violation of CTC § 3-3-8(1). Central to their case was the expert witness testimony of Dr. Scott Anthony Benton, a forensic pediatric medical professional familiar with children's disabilities, including Down's syndrome. The more technical aspects of Dr. Benton's expert testimony will be addressed further in the opinion, but for purposes here, he viewed the surveillance video and testified it was possible defendant's actions pushing the child's walker might have endangered the child. This was, he said, because an estimated 10% - 30% of people with Downs's syndrome have a particular vertebral instability which leaves them especially vulnerable to neck injuries that may result in paralysis or even death. He testified Down's patients generally are not permitted to participate in sports until they've had an x-ray of the neck to show that they don't have this condition. These x-ray tests cannot determine if this particular instability is present in a Down's patient before the age of three at the earliest. Conversely, on cross-examination Dr. Benton acknowledged that anywhere from 70% - 90% of Down's patients do not have this special vertebral malformation.

The Director of the Pearl River Early Head Start/Infant and Toddler Center testified that her staff receives periodic training, and that in July 2010 Appellant attended a two-week in-service training. Introduced into evidence as proof of appellant's training was a single-page document showing on July 26, 2010, that appellant attended one three-hour in-service instruction session on the general category of "disability." The Director could not remember what specific disability topics were covered in that session. The Director further testified that an enrollment form introduced into evidence is posted in the classroom for each child and the child's form indicated he had a Down's syndrome condition.

The Center Director testified that on October 18, 2012, an unspecified report was made which prompted the Director and the video custodian together to review classroom video of appellant's location and actions that morning. She testified that although they didn't see what they were expecting based upon the report, they did come upon video showing appellant pushing the child's walker in a possibly inappropriate manner. Walkers were normally not permitted at the Center, but the Director said this walker was nonetheless introduced for this child upon the Early Intervention Program's request and the mother's agreement. The walker's classroom use was to strengthen and sturdy the victim's legs.

The child's mother testified about care instructions she gave appellant upon first arriving at the childcare center. Mother testified on general instructions she gave appellant about the

shampoos, Pampers and wipes she bought and provided for him because of the sensitivity of his skin and his eczema. She also said she told her about the rags she brought for him, and where they were usually put. Finally, she testified that because of him not having that much strength in his head, she explained to appellant how to properly hold it if he drops it to the side, to just don't let it drop too far, and to just hold onto it. The record is silent as to exactly when, and at what age these directions were given, but presumably it was when the child, at 6 months' age, was first enrolled at the center. The incident charged was approximately 8 months later when the child was one year and two months old.

On cross-examination, the Mother was asked if she agreed with Dr. Benton's testimony that walkers were not prudent or a good apparatus for a child to be in. Asked, then, if she would agree the walker should not have been in the classroom, she answered, "At this – I mean, I really can't dispute it. But at the same time, I didn't know." [Trans. Pp. 117-118.]

At the conclusion of the prosecution's case in chief, defendant moved for a directed verdict of acquittal. Defense counsel argued there was insufficient proof on a necessary element of the crime(s) charged because Siah Denson was never sufficiently instructed on the possible dangers of her pushing this toddler with Down's syndrome whenever he was in his walker. The motion was denied.

Siah Denson was the only witness the defense presented. Her testimony was in general effect that she had not received special training in care and handling of Down's syndrome children, and that she did not know, nor did she have any intention to hurt the child by her actions. On cross examination she acknowledged that she did push the walker, but explained that she used her foot to steer it away; she also denied knowing or believing her action had a potential to possibly harm a child with Down's syndrome. She argued that she did not push the walker in a "hard fashion," and that state regulations prohibited having the walker in the classroom and that the walker should never have been put in the classroom in the first place.

At the conclusion of trial proceedings, closing arguments, and defense counsel's renewed motion for a directed verdict denied by the court, the jury returned a verdict of "guilty" on the single count complaint of child abuse. Defendant's March 18, 2016, Motion for Reconsideration of Judgment or in the Alternative for a New Trial was deemed denied without order twenty days thereafter, raising the issues discussed in Part 1 next.

Arguments and Analysis

Part I
Insufficiency of the Evidence
&
Overwhelming Weight of the Evidence

Appellant presents first the "insufficiency of the evidence" argument by way of her motion for a Judgment Notwithstanding the Verdict (JNOV) at the close of the prosecution's case in chief, and the "overwhelming weight of the evidence" issue in requesting a new trial

following the jury's return of a verdict of guilt. Defense counsel claims no rational trier of fact could have possibly found essential elements of the crime were proved beyond a reasonable doubt because the prosecution failed to prove how, or that the appellant knew, or was aware, pushing an infant with Down's syndrome in his walker would place the child in a situation that might have endangered his health or life. Appellant argues the trial court consequently erred when it denied the motion.

Both counsel for the appellant and the appellee were in general accord in citing the "abuse of discretion" and "viewing the evidence in the light most favorable to the prosecution" rules as applicable standards of review whenever determining whether a rational trier of fact could have found the essential elements of the crime to be proven beyond a reasonable doubt. Both are well-recognized review standards in our tribal court system. *See e.g., Mississippi Band of Choctaw Indians v. Henry,* No. 2001-12 (June 13, 2005), citing *Mississippi Band of Choctaw Indians v. John,* No. 2001-12 (July 29, 2003) and *Mississippi Band of Choctaw Indians v. Williamson,* No. 2001-32 (2004). The same holds true for Mississippi's state courts: *see e.g. Dilworth v. State,* 909 So.2d 731 (Miss. 2005), and *Bush v. State,* 895 So.2d 836 (Miss. 2005); and for federal reviews. *United States v. Sanders,* 343 F.3d 511 (5th Cir. 2003).

A motion for JNOV challenges the legal sufficiency of the evidence. *McClain v. State,* 625 So2d 774, 778 (Miss. 1903). In appeals from an overruled motion for JNOV, this Court must review the evidence in the light most favorable to the prosecution. *Id.* We must accept the credible evidence consistent with guilt as true, and we give the prosecution the benefit of all reasonable inferences that may be drawn from the evidence. *Beckum v. State,* 917 So.2d 808, 813 (Miss.Ct.App. 2005). "We are authorized to reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty." *Id.* Appellant charges the Motion for Directed Verdict should have been granted due to an absence of sufficient showing that the Defendant had received adequate training and instruction to where she "ought to have known" her actions "may" have caused serious bodily harm.

On Appellant's Motion for a New Trial, the court views the entire evidence presented and, "[o]nly in 'exceptional cases in which the evidence preponderates heavily against the verdict' should the trial court invade the providence of the jury and grant a new trial. *Amiker v. Drugs for Less, Inc.,* 796 Soo.2d 942, 947 (Miss 2000). Here appellant argues that "[e]ven if the evidence is viewed in a light most favorable to the verdict, the evidence in this case fails to show anything beyond the fact that appellant pushed [*the child*] while he was in the walker."

For purposes of the court's analysis of the case, both issues will be dealt with jointly. In doing so, the court sees two components inherent to these determinations: (1) was there essential proof establishing the defendant knew her pushing the walker might have endangered life or health; and (2) was the actual pushing, itself, sufficiently proven to be inherently dangerous enough so as to support the guilty verdict?

Sufficiency of Defendant's Knowledge
(mens rea)

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.

It is needful first of all to review from the evidence that body of knowledge presented by the prosecution to inform and educate the court and the jury as to why and how defendant's pushing of the walker might have endangered the child's life or health. As to the specialized knowledge or information that the defendant needed to be informed of, that evidence in the prosecution's case came from Dr. Scott Allen Benton, MD, as an expert witness in child abuse and forensic pediatrics. In fully understanding this case and the likely impact on the jury of his testimony, a note of caution is important: "Child abuse prosecutions are unusual in that sometimes medical-opinion testimony provides the only evidence that a wrongful act occurred ***or that the accused committed a wrongful act.*** **(Italics and emphasis added.) See** Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts. 87 Wash.U.L.Rev. 1, 5 (2009)* ("with rare exception, the [shaken baby syndrome] case turns on the testimony of medical experts. Unlike any other category of prosecution, all elements of the crime—*mens rea and actus reus* (which includes both the act itself and causation of the resulting harm)--are proven by the science."). State v. Consaul, 332 P.2d 850, 862 (N.M. 2014).

Dr. Benton testified that his review of the medical records indicated the child had a previous diagnosis of being afflicted with "trisomy 21," better known to the public as "Down's syndrome." Dr. Benton explained that "trisomy 21" or "Down's syndrome" is a chromosome disorder that causes varying problems throughout the bodies of affected children. There are a broad range of possible problems, ranging from issues with the formation of the nervous system, the spinal area vertebral column, ventral septal heart defects, jaw growth malformation, ear infections, and a range of problems with their kidneys, intestines, and digestive tracts. "Other than that," he testified, "they tend to develop like other children, just in a delayed fashion." [Trans. P. 40.]

In some Down's syndrome children, he went on to say, a particular neck instability due to malformation of the first and second neck vertebrae occasionally is present to such an extent that they may slide against each other, damaging that nerve going from the brain to the rest of the body. Dr. Benton said this instability may be found in anywhere from 10% to 30% of Down's patients, and if they do have this instability and if their neck is injured, it may cause paralysis or the inability to control the body, as well as even possible death. He added, "but not every child

has it." [Trans. P. 41] Nevertheless, because that possibility may exist, he said, Down's children are not generally allowed to participate in sports until they have had an x-ray of the neck to ensure they don't have this neck condition.

He did not know whether or not this child had spinal column malformations, but said that the risk was there. [*Id.*] He also explained that the risk of neck instability is not knowable and not tested "until they're at least three years old and some physicians will wait until they're able to play sports." [Trans. P. 52.]

Based on the record, information that Dr. Benton provided to the court and to the jury concerning a 10% - 30% vulnerability for serious neck injury among Down's syndrome patients is highly-particularized, Down's syndrome-specific knowledge and information which is not usually known by the general public. Furthermore, this special susceptibility is not even determinable by a specialized medical professional until an x-ray of a Down's patient's neck has been performed once the child has reached at least three years of age. The record clearly verifies that this information is largely unknown by the average person, for Dr. Benson was asked by defense counsel on cross-examination whether "the common individual who is not [in] a medical school or a medical related field would know a difference between treating a child with Down syndrome versus a child without it?" His reply was, "I think the simplest answer to your question is that generally *there's a time where all of us lack knowledge about Down syndrome.* We either through education or through contact with someone who has it, we become informed about the condition. And that's about the best that I can say." (Italics added for emphasis) [Trans. P. 47.]

The surveillance video introduced in this case shows a very active 14-month-old toddler who moves about the classroom in his walker with remarkable energy, speed, and agility. The average person unaware of the child's Down's syndrome, yet seeing this video, would doubtlessly have no reason to even suspect this child had a 10% - 30% potentiality of being especially susceptible to any nature of neck injury while engaging in such a normal activity as moving about in a walker. Furthermore, Dr. Benton's testimony unequivocally establishes that his explanation about children with Down's syndrome and their possible special vulnerability to that specific vertebral neck malformation is not even discernible by medical professionals until at least the age of three. Further, this vulnerability is information normally unknown even to those persons of close daily contact and general awareness of a child's Down's syndrome. In this case, for example, the mother testified concerning the special dangerousness posed by her child's having a walker in the classroom: "I didn't know." [Trans. P. 118.] To prove the *mens rea* element of the offense of child abuse, then, the prosecution had to prove beyond a reasonable doubt that the defendant knew, but disregarded, a known danger of her moving the walker in the specific instance they charged. In essence, they had to prove when, how, and what particular information and training alerted her to this potential for harm.

In this case, Dr. Benton's expert medical testimony provided the jury the only testimony that appellant's pushing of this child's walker may have been potentially dangerous and may

therefore be a criminal act of intentional or negligent child abuse. The burden of proving beyond a reasonable doubt that defendant/appellant Siah Denson had received identifiable instruction through sufficient in-class training or other Down's specific education to adequately alert her to these special dangers of pushing this child in his walker fell upon the tribal prosecution.

The record does show the defendant did have a general awareness that the child was afflicted with Down's syndrome: she, herself, testified that she immediately recognized his condition and verified as much by getting confirmation of it from another teacher. [Trans. P. 135.] She was also given notice of his general condition by an entry in the enrollment packet form posted in his classroom that indicated the child had the condition known as Down's syndrome. Prosecution testimony by the Center's Director documents as well that on July 26, 2010, the defendant/appellant received instruction in the form of a three-hour in-service training session on the overall subject of "disabilities." The record also reflects, as recounted above, the mother's testimony as to why special care and treatment was required when looking after her Down's syndrome child. The tribal prosecution maintains that these five sources establish beyond a reasonable doubt that the defendant/appellant care provider was in fact put on clear notice as to how and why any pushing whatsoever of the child's walker would be criminally dangerous.

What the prosecution totally failed to prove, however, was at what point in time prior to trial and prior to Dr. Benton's testimony where, when, or how, or if at all, the defendant may or should have become alerted to that 10% - 30% possibility a Down's syndrome child under her care might or might not have a particular neck weakness. After all, Dr. Benson had said, even medical professionals could not detect vertebral malformation at such an early age and, later, only by x-ray examination. Without prior training or education letting defendant/appellant know a neck weakness might possibly exist, and that any manner of pushing him in a walker may make the child vulnerable to serious injury, the prosecution would not be able to prove the defendant's act was done with a criminal intent.

Given the circumstance that special arrangements had been set up for a normally prohibited walker to be provided him in the classroom, the defendant was more likely to have been led to believe to the contrary: that it was okay to push his walker. After all, a physical therapist had recommended to the mother the walker's classroom use; the child's mother and grandmother of the child had both urged that it be allowed in the classroom; and the tribe's Early Intervention Program had specially requested and authorized its use it in the classroom to sturdy his legs. Moreover, as stated before, the surveillance video introduced in this case shows a very active 14-month-old toddler who moves about the classroom in his walker with remarkable energy, speed, and agility.

The prosecution argues the evidence proving that she possessed that specialized knowledge was demonstrated by a July 26 – 29, 2012, in-service training document stating she had a three-hour session on disabilities. That document, they said, was proof sufficient to establish to a legal certainty that she "knew" her action was so dangerous it constituted knowing and intentional criminal wrongdoing. Despite the prosecution's best efforts, they were unable to elicit any supportive testimonial evidence or other information whatsoever verifying that the disability session even made mention of anything relating to any special care and concerns

required for children with Down's syndrome. Furthermore, that in-service training class took place more than a year and a half before that walker was ever put in the classroom: long before any need for specialized training on a specially-introduced walker would have been anticipated. Since walkers had been taken off the market years before and since the presence and use of child walkers in day care centers was prohibited by state regulations, the rhetorical question necessarily arises as to how or why that 3-hour in-service training on disabilities would have included training on how to, or not to control movement of a walker in the classroom. The only rational answer is that it did not.

As previously mentioned, Dr. Benson's highly technical testimony suggesting that 10% - 30% of the Down's population might be particularly vulnerable to any pushing in a walker became known only 2-1/2 years after the incident charged and then only at trial. Even the child's very mother -- who testified she had both a child's bouncer and walker at home for him -- expressed her unawareness of its potential for danger. She testified to as much in court. Referring to Dr. Benson's testimony, defense counsel asked the mother: "And if I told you that he said that walker should not have been there, would you agree with that?" The mother's answer was, "At this – I mean, I really can't dispute it. ***But at the same time, I didn't know."*** **[Trans. P. 118.] (Italics and emphasis added.]** If the mother, herself, was unaware of the special potential for harm by pushing her child in a walker, the evidence presented by the tribal prosecutor could not possibly establish to any legal certainty that defendant "knew" her actions constituted knowing and intentional criminal wrongdoing.

Lastly, at the very close of Dr. Benton's testifying, at rebuttal questioning, the Tribal Prosecutor drove straight to the heart of the questioning on endangerment and the defendant care provider's possible likelihood of knowledge of risk of injury to a Down's syndrome child. This exchange by the prosecution with Dr. Benson goes straight to the state of mind (in legal terms, the *mens rea*) issue the tribe had to establish in order to prove criminal negligence:

> [Question.] Even if a child that has Down's syndrome has not been diagnosed with this instability that you talk about, is the activity that you saw in the video, does it still put the child at risk?
>
> [Answer.] ***The risk is not knowable*** because we don't generally test for this instability until they're at least three years old and some physicians will wait until they're able to play sports. Because, generally, the activities in a home environment you can tell the parent, "Watch the neck. Be careful." And walking and falling is generally not The type of activity that causes injuries.
>
> Again, we don't or wouldn't recommend that a child be placed in an infant walker because it does create different forces, particularly if you shove it or move it, than a child would normally experience just walking or doing things that children do.
> (Italics and emphasis added.) [Trans. Pp. 52-53.]

In summation, all five of the information sources the prosecution argues caused or ought to have caused the Appellant to know of the possible danger of pushing a Down's syndrome child in a walker in any manner whatsoever fails to prove appellant had requisite knowledge and training to put her on legal notice. Hence the *mens rea* element of both "knowing, intentional" child abuse and negligent child abuse were not proven.

Circumstances considered, the Motion for Directed Verdict should have been granted due to absence of any sufficient showing by the tribal prosecutor that the defendant had received sufficient training and instruction to where she "ought to have known" her actions "may" have caused serious bodily harm.

The second of the two components inherent to this determination of whether the Tribe proved appellant "ought to have known" her actions "may" have caused this child serious bodily harm is: (2) whether the actual pushing, itself, was sufficiently proven to be inherently dangerous enough so as to support the guilty verdict? As prefatorily explained above, in legal terms this is referenced as the "*actus reus.*" *Actus reus,* again, is Latin for "guilty act" and there must be an "actus reus" or "criminal act" established by the evidence for there to be a crime. Thus, just as the *mens rea* criminal component treated above, it is also a necessary element of proof to be established beyond a reasonable doubt.

For reasons absolutely inexplicable to this Court and in blatant nonobservance of the Choctaw Rules of Evidence (CRE) Rules 403 and 404, Tribe's Exhibit 3, the classroom surveillance video, was introduced into evidence without objection from the defense. Rather, the prosecutor announced, "counsel opposite and I have agreed for purposes of the display and to save time to present a five-minute segment of this video." [Trans. P. 42.]

The language of CRE Rules 403 and 404 comes from the Federal Rules of Evidence (FRE) that serves as the model for courts of most other judicial systems. The FRE comes accompanied by "Author's Comments" together with illustrative and interpretative case examples. Most applicable is FRE Rule 403, which reads as follows:

> RULE 403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Court finds that the display of the video segments depicting the first, second, fourth, and fifth pushings was *substantially, inter alia,* outweighed by the danger of unfair prejudice, confusion of the issues, and – most especially – misleading the jury. The video portions showing the four other pushes should never have been permitted by the defense counsel to be entered into evidence or shown to the jury without objection, and that failure -- plus the prosecutor's questioning and his arguing during closing about the uncharged pushes -- blatantly mislead the jury, confused the issues, and unfairly prejudiced the defendant to an extent that upholding the jury verdict would "sanction an unconscionable injustice." *Dilworth v. State,* 909 So.2d 731,

737(Miss. 2005); *Bush v. State,* 895 So.2d 836, 844 (Miss. 2005). Moreover, for purposes of this immediate *mens rea* analysis on the single act charged, all focus of the case thereafter resulted in an utter failure to establish any criminal intent or negligence inherent to that one lone act.

The video is a 6-minute, 33 second-long clip. It shows the appellant pushing or shoving the walker five different times: the first three times with her foot and the last two times using her hands. It was actually only the third of these five shoves that the video shows taking place at 9:02:40 a.m. by the video timer on which the criminal child abuse charge necessarily had to have been filed. The circumstances prompting that push are obvious. The young toddler runs into another boy of about his same size sitting on the floor near the room's center. A tussle ensues as the other child grabs and tries to move the walker one direction or the other. The defendant steps over to separate them. In the process, she uses her foot on the walker's base to steer the walker around from the other boy and, once free, to shove his walker about six to eight feet clear of the action. This is the segment directly relevant to the charge and the only one the jury should have been allowed to see. Yet because all focus of the case shifted thereafter so completely to the other acts, the record shows an utter failure to establish any criminal intent or negligence inherent to that one push. Nor does it appear on the video to even be of sufficient force to rise to the *actus reus* level under any circumstance.

The tribal prosecutor argued the video and Dr. Benton's accompanying testimony demonstrates proof evident of that criminal act charged. [T. Pp. 126-127.] "We had a medical professional come in and talk to us and tells us that what he sees in that video could have seriously injured this child or killed this child." *Id.* Ironically, Dr. Benton's testimony only comes closest to identifying specifically only other pushes (not charged) as the "troublesome" ones when he says, "[s]o *at least on two occasions you see where the infant walker is grasped* and then pushed and the child's head whips backwards." Given that each "grasping" he refers to is an act done with one's hands, and only the fourth and fifth longer pushes were the ones done by hand, Dr. Benton was not even testifying as to that 9:03 a.m. push charged. Also, the video portion identified by Dr. Benton as where the "walker is grasped" clearly shows the child's backwards head movements. Yet, in the 9:03 a.m. push charged, backwards movement of the child's head, if any, cannot be made out on the video due to the dark background. By singling out only the instances where the walker is grasped, and excluding the mention of the third push charged at 9:03 a.m., the Tribe's expert did not identify the third push at 9:03 a.m as an endangering force. Therefore, the 9:03 a.m. push charged does not, based on the record, constitute an act sufficient to rise to any level of criminality.

Instead of focusing the jury's attention – *and deliberations* – on the specific act at 9:03 a.m. for which defendant was charged, the prosecution did precisely what CRE Rules 403 and 404 were designed to safeguard against: the prosecution built virtually their entire case of *actus reus* around the five -- or more probably only the other four -- collective pushings of the walker shown on the video. The prosecution used vague, oftentimes collective words or terms such as "this situation," "this activity," "that type of push," "what we saw on that video," "pushing the stroller like that" throughout the trial proceedings. More specifically, the prosecutor directed the attention of the jury to the acts not charged. Examples from the record follow to demonstrate this point:

The redirect examination of the center director:
"but we definitely saw Siah Denson shove the stroller ***more than one time***, didn't we?" [T.P. 88]

The testimony of the investigator:

Q. And what did you see on the video?
A. There was ***one or more cases*** were I saw the defendant either using her foot or her hands to push a walker that had the child in it.
Q. So the minor was ***pushed more than once***?

On cross-examination of the defendant:

Q. * * * you push him ***on more than one occasion***, and ***at least on two occasions you pushed him in a hard fashion***, didn't you? You can't deny it. It's on the video. [T.P. 151]

And in closing arguments to the jury, the prosecutor summarized among particulars he has proven:

"... That Siah Denson pushed [*the child*] while he was in the walker ***multiple times with her hands and feet.*** [T. P. 164]

Again on rebuttal closing arguments, he said, among other things:

"... What we're here about is ***the push*** and what we're here about is whether ***that push or series of pushes endangered*** [*the child's*] life, health or safety." [T. P. 171.]

In summary, and most compelling of all: at no point in the entire criminal proceedings was the jury ever informed that they were to determine appellant Siah Denson's guilt or innocence based solely on that single 9:03 a.m. push in which she was shown using her foot to distance him in his walker from the other child who had grasped the walker while sitting in the middle of the room.

Instead, they did all of the above without highlighting or pinpointing that 9:03 a.m. push as the *actus reus* at the heart of the charge on which they were to determine her guilt or innocence. Without supportive expert testimony specifically identifying that act as one of two pushes "[t]hat is an unwise and unsafe movement for this child," [T. P. 43.] and without clear video evidence from which the viewer can make out against a dark background that "the head whips backwards" by that 9:03 a.m. push with her foot, the prosecution failed to provide proof sufficient to establish the third push was of sufficient force to prove any *actus reus* rising to the level of criminality. Therefore, the directed verdict of acquittal again should have been granted.

Appellant was charged with knowing, intentional **or** criminally negligent abuse of a child under CTC Sec. 3-3-8(1). This is a particularly troublesome criminal statute because it does not

make clear what type or range of actions or activities are made unlawful. Thus, without clear, proper jury instructions, CTC Sec. 3-1-8(1)(1) comes dangerously close to running afoul of the vagueness doctrine. "The vagueness doctrine is based on the principle of fair notice in that no one may be held criminally responsible and subject to criminal sanctions without fair warning as to the nature of the proscribed activity." See *State v. Najera*, 89 N.M. 522, 552; 554 P.2d 983, 983 (CtApp.1976)."

Furthermore, the problems associated with this particular tribal code criminal provision are compounded because of the way its language combines (and therefore confuses) two separate criminal offenses into a single statute. It does so because it criminalizes on the one hand the knowing, intentional abuse of a child by placing the child in a situation that may endanger its life or health. Yet, on the other hand, it separately criminalizes the placement of the child in a situation that may endanger the child's life or health through negligent action(s) or inaction(s).

Within this context and in order to cure the statute's built-in "void for vagueness" wording problem, clarification to the jury of which standard to apply required not less than two jury instructions. One jury instruction should have charged the knowing and intentional commission of child abuse; and, the second jury instruction should have been on the separate charge of negligently causing the child to be placed in a situation that may endanger the child's life or health. These are two separate crimes requiring differing levels of *mens rea.*

Compounding the problem was the reality that at no point in the entire criminal proceedings was the jury even told they were to determine appellant Siah Denson's guilt or innocence solely on that single 9:03 a.m. push, and not on any other or all pushes. Furthermore, the bailiff confirmed to this Court's office that no viewing equipment was made available to the jurors in their deliberation room. Consequently, jurors could not have been able to review the surveillance video another time and pinpoint precisely the 9:03 a.m. push on which they were to determine her guilt or innocence.

The instructions read to the jury stated that they may convict the accused if the tribe proved beyond a reasonable doubt that Siah Denson:

> * * *
>
> On or about the 18th day of October 2012, at approximately 9:03 a.m. * * * knowingly, intentionally ***or*** negligently caused [the victim] to be placed in a situation that may endanger the child's life or health;
>
> * * *
>
> If the Tribe has failed to prove any one or more of the above listed elements of Abuse of Child, Class B beyond a reasonable doubt, then you shall find Siah Denson, "Not Guilty."

> However, if you find that the Tribe has proved each of these elements beyond a reasonable doubt then you shall find Siah Denson "Guilty."

This jury instruction simply does not satisfy the requirement under Rule 19(b) of the CRCP heading "Instructions to Juries." CRCP Rule 19(b) says:

> The jury must render a unanimous verdict of "Guilty," "Not Guilty," or "Not Guilty by Reason of Insanity," or "No Verdict" on ***every charge*** against the defendant. [Emphasis added.]

Since the requirement of CRCP Rule 19(b) was not met, the jury instruction given to the Denson jury panel lead to the defendant's denial of her right of assurance that the guilty verdict was unanimous on either one theory of knowing, intentional child abuse **or** on the other theory of negligent child abuse.

The jury instruction also internally contradicts itself as evidenced by the language in the first quoted paragraph and the language of the last paragraph. Further, it requires the Tribe to prove **each of the three elements** in order to secure a guilty verdict. The last paragraph is also misdirecting because CTC § 3-3-8(1) mandates proof of both of the two elements knowingly and intentionally to secure a conviction for a deliberate act of child abuse, but separately to prove only the negligently element to prove unintentional child abuse. They cannot do both on this single charge. Therefore, again, this Court finds the single jury instruction to be both contradictory and misdirected. Juror confusion or misdirection may stem "from instructions which, through omission or misstatement, fail to provide the juror with an accurate rendition of the relevant law." *Benally*, 2001-NMSC-033, ¶ 12.

Furthermore, the Tribal prosecutor misled the jury to believe that any of the Defendant's actions shown on the video footage could lead to a criminal conviction. The Tribal prosecutor's closing rebuttal comments to the jury invited them to find defendant Siah Denson guilty of committing child abuse by any one act, or any combination of the five acts of pushing the walker. He told the jury:

> And you ask yourselves this: Whether the walker was there or not, what we're here are about is the push and ***what we're here about is whether that push or series of pushes*** endangered [the victim's] life, health or safety. ***That's the decision you've got to make***, and I would submit to you that it did and it does as we sit here today. [T. P. 171.] [Emphasis added.]

This statement was untrue because no jury can base a verdict of guilt on alleged other crimes or other claimed wrongful conduct. A jury must base a verdict of guilt on the specific criminal act(s) alleged in the complaint. That is what CRCP Rules 403 and 404 were meant to guard against – yet they were ignored. The prosecution's closing words, in and of themselves, poisoned

the jurors' minds as to what basis they were to use to determine guilt or innocence. In effect, they were led to believe there were no limitations.

Since this Court has determined that a reasonable juror would have been confused or misdirected by the prosecutors comments and the jury instructions given, our fundamental error analysis requires us to " review the entire record, [which we have already done] placing the jury instructions in the context of the individual facts and circumstances of the case, to determine whether the [d]efendant's conviction was the result of a plain miscarriage of justice." *State v. Sandoval*, 2011-NMSC-022, ¶ 20, 150 N.M. 224, 258 P.3d 1016 (quoting *Barber*, 2004-NMSC-019, ¶ 19). We find a miscarriage of justice exists and we deem it fundamental error. "We will not 'uphold a conviction if an error implicated a fundamental unfairness within the system that would undermine judicial integrity if left unchecked,' " *State v. Rodarte*, 2011-NMCA-067, ¶ 10, 149 N.M. 819, 255 P.3d 397 (quoting *State v. Barber*, 2004-NMSC-019, ¶ 18, 135 N.M. 621, 92 P.3d 633).

We find fundamental error was so replete throughout the lower court proceedings that defendant's conviction was the inevitable result of a plain miscarriage of justice. It also implicates such fundamental unfairness within the criminal justice system that it would undermine the judicial integrity of the court system, if left unchecked. This, the Court will not tolerate.

Conclusion

WHEREFORE, premises considered, the Court hereby orders, adjudges, and decrees that appellant Siah Denson's conviction be and hereby is ordered Reversed and Rendered with prejudice.

So ordered, this the 12th of July, 2016.

Chief Justice

Associate Justice

Associate Justice

CHOCTAW SUPREME COURT
CHOCTAW, MS

CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 12th day of July, 2016 caused to be forwarded by the United States Mail and Hand Delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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