# APPENDIX A: Unmarked Cases

294 Ga. App. 1

**ELLISON**

**v.**

**PETERSON**

Court of Appeals of Georgia.

November 13, 2008.

BLACKBURN, Presiding Judge.

In a tort suit based on allegedly violent behavior by a manager at a Burger King restaurant, Sharon Ellison, pro se, appeals the grant of summary judgment to Janet Peterson, the restaurant manager, contending that material issues of fact precluded summary judgment. Because Ellison's verified complaint and deposition testimony created genuine issues of material fact as to the potential liability of the manager, summary judgment as to her was not proper on all claims. Accordingly, we reverse.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56(c). A de novo standard of review applies to an appeal from a grant of summary judgment, and we view the evidence, and all reasonable conclusions and inferences drawn from it, in the light most favorable to the nonmovant. Matjoulis v. Integon Gen. Ins. Corp. [1]

So viewed, the record shows that in January 2007, Ellison entered a neighborhood Burger King restaurant and waited by a cash register to order. After a period of time passed without her order being taken, Ellison said, "Hi, is anybody going to welcome me to Burger King? Somebody going to please take my order?" An employee turned and explained that the staff was busy with other customers' orders and offered to take her order. According to Ellison's deposition and verified complaint, the manager on duty then walked out from behind the counter and asked, "Why is it every time you come into the restaurant, you have to make a noise?" Ellison averred that the manager "put her hands around my neck in a semi head lock position ... and start[ed] shaking like three times or whatever. Then [the manager] turned loose and said, `Are you all right now?'" The employees asked if Ellison was ready to order, and Ellison uneventfully ordered a grilled chicken salad, which she was served.

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Based on this exchange, Ellison filed a verified complaint against the manager, seeking damages for battery. This defendant successfully moved for summary judgment, giving rise to this appeal.

**Summary judgment as to the restaurant manager.**

Ellison's complaint essentially makes claims against the manager for battery. In a generic order, the trial court granted summary judgment to the manager. However, as Ellison has presented evidence supporting her allegation of battery, and as the manager has not shown why she should prevail as a matter of law, we must reverse the trial court's judgment as to the battery claim against the manager.

**Battery**. Ellison's verified complaint and deposition testimony allege that the manager "placed [Ellison] in a semi head lock position[,] and began shaking ... while still locked around the neck and head area approx[imately] [t]hree times while asking, `Is everything ok now?'" As this case arises on appeal from a grant of summary judgment, we must view this evidence and all reasonable inferences and conclusions drawn from it in the light most favorable to the nonmovant, Ellison. See Matjoulis v. Integon Gen. Ins. Corp., supra, 226 Ga.App. at 459(1), 486 S.E.2d 684. Ellison "is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. The evidence must be construed most favorably to [her], and the trial court must give [her] the benefit of all favorable inferences that may be drawn from the evidence." Smith v. Sandersville Production Credit Assn.[3] Further, our role as an appellate court prohibits us from evaluating the credibility of factual allegations contained in Ellison's verified complaint and deposition testimony, even in light of an affidavit by the manager which directly contradicts Ellison's account. See Miller v. Douglas[4] ("[i]n motions for summary judgment, this court cannot consider the credibility of witnesses or their affidavits and a jury must resolve the question and the conflicts in the evidence which it produces").

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When properly viewed in this light, Ellison's allegations give rise to a genuine issue as to whether the manager committed a battery.

In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable. Generally speaking, an "unlawful" touching is one which is "offensive," and an "offensive" touching is one which proceeds from anger, rudeness, or lust. The test... is what would be offensive to an ordinary person not unduly sensitive as to his dignity.

(Citations and punctuation omitted.) Newsome v. Cooper-Wiss, Inc.[5] "A cause of action for ... battery can be supported by even minimal touching." Darnell v. Houston County Bd. of Ed.[6]

"This Court has repeatedly held in battery cases that the unwanted touching itself constitutes the injury to the plaintiff." Vasquez v. Smith.[7] Given the relatively low threshold required to prove battery, we must conclude that Ellison has created a factual issue as to whether a battery occurred. To hold otherwise here would run contrary to this precedent and to our mandate to view all evidence in the light most favorable to Ellison as the nonmoving party. Accordingly, the trial court erred in granting summary judgment to the manager.

In sum, we reverse the grant of summary judgment to Peterson as to battery.

*Judgment affirmed in part and reversed in part, and case remanded.*

[1] Matjoulis v. Integon Gen. Ins. Corp., 226 Ga. App. 459(1), 486 S.E.2d 684 (1997).

[2] Todd v. Byrd, 283 Ga.App. 37, 38(1), 640 S.E.2d 652 (2006) (whole court).

[3] Smith v. Sandersville Production Credit Assn., 229 Ga. 65, 66, 189 S.E.2d 432 (1972).

[4] Miller v. Douglas, 235 Ga. 222, 223, 219 S.E.2d 144 (1975).

[5] Newsome v. Cooper-Wiss, Inc., 179 Ga.App. 670, 672(1), 347 S.E.2d 619 (1986).

[6] Darnell v. Houston County Bd. of Ed., 234 Ga.App. 488, 490(1), 506 S.E.2d 385 (1998).

[7] Vasquez v. Smith, 259 Ga.App. 1, 576 S.E.2d 59 (2003).

Modified for Educational Use

268 Ga. App. 1

**EVERETT**

**v.**

**GOODLOE**

Court of Appeals of Georgia.

July 15, 2004.

MIKELL, Judge.

Donna Everett appeals the trial court’s grant of summary judgment to her former employer, John D. Goodloe, Jr., on her claim of battery. We affirm.

On appeal of the grant of summary judgment, this court applies a de novo review of the evidence to determine whether any question of material fact exists. Summary judgment is appropriate where the moving party can show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. OCGA § 9–11–56(c). A defendant meets this burden by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff’s case.... All of the other disputes of fact are rendered immaterial.[1](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.40ew0vw)

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The record in this case shows that from 1989 to 2000, Goodloe, a licensed real estate broker, owned a hotel in the Bahamas called the Abaco Inn. Appellant was employed as Goodloe’s part-time personal secretary from January 1998, to October 1999. Prior to becoming Goodloe’s employee, Everett dated Goodloe during the summer and fall of 1997. In October 1997, Goodloe ended the relationship and asked Everett not to call him. He asserted that he loved Everett, but, because they shared no intimacy, he could not continue the relationship. Goodloe did request that Everett keep him abreast of the progress of her book, in which he had invested $25,000. On December 3, 1997, Everett e-mailed Goodloe that she was searching for a part-time job, and he hired her as a personal secretary.

During Everett’s employment with Goodloe, she maintains that she was sexually harassed, both mentally and physically, after refusing Goodloe’s sexual advances. Also during that time, Everett maintains that she found a buyer for the Abaco Inn and that Goodloe agreed to pay her a fee for her assistance, which he failed to do in retaliation for her refusal to have a more intimate relationship with him. Everett filed this action, alleging battery. Conversely, appellees contend that this lawsuit arose because Everett was not paid a commission from the sale of Noble Island, and not because Goodloe sexually harassed Everett. Goodloe filed a motion for summary judgment as to Everett’s claim, which was granted. Everett appeals the grant of Goodloe’s motion.

 Everett contends that the trial court erred by granting Goodloe summary judgment on her claim for battery.

Everett deposed that the first assault occurred in early 1998, when Goodloe grabbed her breasts, pressed up against her, and smashed his face and teeth into her mouth, causing it to bleed. Everett thought that the battery occurred because Goodloe was angry that Everett treated him like a friend, as opposed to a boyfriend, while they were out with friends on January 31, 1998, but she was not certain that this particular event preceded the assault. When shown an e-mail message that she sent to Goodloe the next day in which she indicated that she had a “good time last night,” Everett again stated that the attack followed the January dinner date and explained that she ignored most of Goodloe’s conduct because she needed her job.

Everett deposed that there were two batteries in May 1998, and that she began to fear Goodloe’s anger, which typically followed her rejection of his sexual advances. She stated that the last incident occurred in September 1998 when Goodloe lunged at her and grabbed her legs. She deposed that she rejected him and that he fired her, only to rehire her the next morning.

In addition to Everett’s deposition testimony, also considered on summary judgment were several other e-mail messages between Goodloe and Everett and excerpts from Everett’s journal, which she called the “Morning Pages.”[15](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.2koq656) Everett deposed that the Morning Pages was not a diary per se, but simply notations of “whatever crept into my mind at the moment” and that she did not lie about events in the Morning Pages.

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On April 6, 1998, Everett e-mailed Goodloe that he had offended her with his sarcasm about her work experience, that she expected him to treat her with the same courtesy and respect that she afforded him, and that she “did not see any room at all [in their relationship] for that sort of thing.” On July 8 and 21, 1998, she signs other e-mail messages, “Love, Donna.” On September 18, 1998, she writes in her journal,

I’ve sought this situation—used my “power” to ingratiate myself to John so that I could survive.... Should I borrow the money from John today? Yes ... I can use the money.... He comes out in those shorts like he did in that bathrobe-here I am looking gorgeous.... At least I’ve gotten rid of that sucking on my lip kiss. I hated it. Why do I want them totally under my spell? It’s the only way I feel safe.... The weight is heavy as shown by this relationship with John. He even said now that this has happened again (he blames it on both [sic] our drinking) and maybe it is, I lose my inhibitions and he sees my distaste.... I release my emotional attachment to John.

In an e-mail to Goodloe dated November 23, 1998, Everett writes,

Just a short note to tell you what’s been on my mind. I’m not angry anymore, John. The day all the boxes of Rena’s things were moved,[16](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.zu0gcz) I thought about you and your life and her life and the anger just went away.... And to make a long story short ... it just completed the whole healing process. I forgave you entirely for what I considered your wrongs toward me.... What all this means is that I am your friend, and I know you’re mine. I miss your dear company and hope that you will be comfortable in renewing our friendship on a friendship basis. If you can do that, then you and Linda or whomever, and I and whomever (have been trying to go on some dates) can actually go to dinner and enjoy one another’s company. But either way, the main thing I wanted you to know ... is that I’m not angry at you anymore.... With love, Donna Jean.

Under *Prophecy Corp. v. Charles Rossignol, Inc.,*[17](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.3jtnz0s) a party/witness’ testimony “is to be construed ... against him when ... self-contradictory.”[18](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.1yyy98l) On summary judgment, the trial judge decides whether the testimony is contradictory, and if so, whether the witness has offered a reasonable explanation for the contradiction.[19](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.4iylrwe)

“[T]he act of intentionally causing actual physical harm to another is civilly actionable as a battery.... It is the intent to make either harmful *or* insulting or provoking contact with another which renders one civilly liable for a battery.”[21](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.1d96cc0) The test as to whether a battery has occurred “ ‘ “is what would be offensive to an ordinary person not unduly sensitive as to his dignity.” ’ ”[22](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.3x8tuzt)

 In her brief, Everett explains that she did not mention the attacks in her e-mail messages or other writings because she feared losing her job. It does not appear, however, that Everett was so fearful of losing her job that she refrained from chastising Goodloe for other conduct that she felt was inappropriate. For example, she e-mailed him that she would not tolerate his insulting comments. Since Everett’s deposition testimony about her contact with Goodloe contradicts her writings to Goodloe and in her journal, under *Prophecy,* we construe her testimony against her and affirm the grant of summary judgment to Goodloe on her claims for assault and battery.[23](https://docs.google.com/document/d/1ntaVEHaqO9Ygz1IzbIGcIejGqivhnTqXU_ob-tVq8wI/edit#bookmark=id.2ce457m)

*Judgment affirmed.*

Modified for Educational Use

110 Ga. App. 1

**Wesley GREENFIELD**

**v.**

**T.L. CUNARD**

Oct. 16, 1964.

*Syllabus by the Court*

Any act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery.

Wesley Greenfield sued Colonial Stores, Inc., seeking to recover damages allegedly inflicted upon him by the defendant’s servants. The petition shows the following facts:

The plaintiff entered the defendant’s store, purchased several articles, and paid for them. He then departed from the premises, proceeding immediately to a Jacobs Drug Store located adjacent to defendant’s store. ‘After plaintiff had stepped a few feet into the said Jacobs Drug Store the doors through which the plaintiff had just entered burst open, two men in green jackets and later identified as T. L. Cunard and H. L. Speights, managers and acting as agents and employees of defendant, acting within the scope of their duties and about the business of said defendant *grabbed the plaintiff by his arms and pulled them behind his back in a swift and pain producing manner*. One of the managers, namely T. L. Cunard, the manager of the meat department of the defendant, shouted in a loud boisterous manner, ‘I want our meat that you have in your coat.’’ This demand was repeated. There were present and within hearing distance a number of customers and employees of the drug store. ‘Plaintiff informed said managers that he had paid for all the merchandise which he had with him; nevertheless, said managers contended, in the presence of the other persons present, that plaintiff had hidden some meat under his coat and was endeavoring to conceal and avoid making payment for it, which contention conveyed and was intended to convey the meaning that your plaintiff was a cheat, swindler, and thief and was endeavoring to cheat, swindle, steal and defraud defendant, in violation of the criminal statutes and laws of the State of Georgia. \* \* \* Whereupon plaintiff proceeded to unbutton his overcoat and sport coat and showed the managers of the defendant that he had nothing on him which belonged to the defendant.’

The trial judge entered a judgment sustaining the motion to dismiss. The plaintiff excepts to these judgments striking the amendment and dismissing his petition.

BELL, Presiding Judge.

There are allegations which are sufficient to keep him in court, for he has alleged a cause of action for battery. See the preceding factual summation for the allegations which obviously are sufficient to state a cause of action for assault and battery within the following rules: ‘\* \* \* where all the apparent circumstances, reasonably viewed, are such as to lead a person reasonably to apprehend a violent injury from the unlawful act of another, there is an assault.’ Quaker City Life Ins. Co. v. Sutson, 102 Ga.App. 53, 56(1), 115 S.E.2d 699, 702. ‘Any act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery.’ Brown v. State, 57 Ga.App. 864, 867, 197 S.E. 82, 84.

*The judgment dismissing the petition is reversed.*

Modified for Educational Use

178 Ga. App. 1

**HARVEY**

**v.**

**SPEIGHT.**

Court of Appeals of Georgia.

April 9, 1986.

BANKE, Chief Judge.

The appellee sued the appellant, Harvey, to recover damages for battery. A jury awarded him $2,500 in compensatory damages and $30,000 in punitive damages. In this appeal, the appellant enumerates as error the denial of its motion for a directed verdict with regard to battery.

Acting upon information that someone had just stolen several cartons of cigarettes from the store, the appellant stepped outside and approached the appellee, who had himself walked out of the store only moments earlier. The appellant was followed by several other persons whom the appellee testified he assumed were also store employees. Upon being asked by the appellant if he had anything that did not belong to him, the appellee answered, “No, ... do you want to see ...” He then briefly held the sides of his jacket open and let them close, at which point the manager parted the jacket with his hands to see if anything was concealed there. Simultaneously, the appellee pointed to another person in the immediate vicinity and said, “I think that is the man you are looking for.” The appellant then left the appellee to pursue this other person.

The appellee testified that the appellant had not been rude to him but stated that he did not consider the appellant’s conduct in looking inside his jacket as courteous. He admitted that he had invited this search and that the manager had not cursed him nor spoken loudly to him; however, he testified that he felt the manager was angry because of the look in his eyes and the fact that several people had followed the manager out of the store. At trial, the appellee testified that the entire encounter had lasted about 45 seconds, whereas during an earlier deposition he had testified that the encounter lasted between 15 and 30 seconds.

The appellee admitted that any touching of his person had been invited by him; and such invitation is inconsistent with the tort of assault and battery. See *Crowley v. Ford Motor Credit Co.,* 168 Ga.App. 162(1), 308 S.E.2d 417 (1983); OCGA § 51–11–2. The evidence was consequently insufficient to support any recovery, and it follows that the trial court erred in denying the appellant’s motion for directed verdict.

*Judgment reversed.*

Modified for Educational Use

193 Ga. App. 1

**HENDRICKS et al.**

**v.**

**HARPER**

Court of Appeals of Georgia.

Decided October 23, 1989.

CARLEY, Chief Judge.

Appellant-plaintiffs Mr. and Mrs. Bobby Hendricks filed suit against appellee-defendant Mr. Raymond Harper, a Southern Bell employee. The complaint alleged the commission of a battery against Mr. Hendricks, in that Mr. Harper had "wrongfully, willfully, and intentionally tricked and induced [Mr. Hendricks] to place a telephone receiver to his right ear which [receiver] had, at the time, a high frequency/high intensity tone being transmitted over the line at the direction and under the control of [Southern Bell], acting by and through its agent and employee [Mr. Harper]." For this alleged battery, appellant Mr. Hendricks sought compensatory and punitive damages and Mrs. Hendricks sought compensatory damages for loss of consortium.

The case was tried before a jury and a verdict in favor of appellee was returned. Appellants appeal from the judgment that was entered by the trial court on the jury's verdict.

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In its charge to the jury, the trial court gave several of appellee’s requested instructions which were to the effect that his liability for the alleged battery would be dependent upon an actual intent on the part of Mr. Harper to hurt or to cause physical harm to Mr. Hendricks. The trial court consequently refused to give appellants' requested instruction which was to the effect that a battery could have been committed by Mr. Harper either by his intentionally making physical contact of an insulting or provoking nature with the person of Mr. Hendricks or by his intentionally causing physical harm to Mr. Hendricks. The giving of appellee’s requested instructions and the refusal to give appellants' requested instruction are enumerated as error.

Clearly, the act of intentionally causing actual physical harm to another is civilly actionable as a battery. See generally Security Life Ins. Co. v. Newsome, 122 Ga. App. 137 (1) (176 SE2d 463) (1970). However, the intent to cause actual physical harm to another is not absolutely essential to the viability of a civil action for battery. "In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable." (Emphasis supplied.) Mims v. Boland, 110 Ga. App. 477-478 (1) (a) (4) (138 SE2d 902) (1964). See also Newsome v. Cooper-Wiss, Inc., 179 Ga. App. 670, 672 (1) (347 SE2d 619) (1986); F. W. Woolworth Co. v. Loggins, 115 Ga. App. 557 (1) (155 SE2d 462) (1967). Greenfield v. Colonial Stores, 110 Ga. App. 572, 574 (1) (139 SE2d 403) (1964); Interstate Life &c. Co. v. Brewer, 56 Ga. App. 599, 605 (1) (193 SE 458) (1937). "Any unlawful touching of a person's body, although no actual physical hurt may ensue therefrom, yet, since it violates a personal right, constitutes a physical injury to that person. [Cits.] The unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance." (Emphasis supplied.) Christy Bros. Circus v. Turnage, 38 Ga. App. 581 (2) (144 SE 680) (1928). "Any act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery. If the circumstances of the occasion be not such as the law would permit an inference that the battery proceeded from anger, the jury may nevertheless be authorized to conclude, considering its nature and the circumstances, that it resulted from a lack of proper respect for the person on whom the contact was made. Contact proceeding from rudeness is as offensive and harmful as that which proceeds from anger or lust, and in law constitutes an assault and battery." (Emphasis supplied.) Brown v. State, 57 Ga. App. 864, 867-868 (2) (197 SE 82) (1938).

An actionable battery may be accomplished by an unauthorized caress as well as by an unauthorized blow. See generally Yarbrough v. State, 17 Ga. App. 828 (88 SE 710) (1916). It is the intent to make either harmful or insulting or provoking contact with another which renders one civilly liable for a battery. Interstate Life &c. Co. v. Brewer, supra at 606-607 (1). Accordingly, appellees' liability was not dependent upon Mr. Harper's intent to cause actual physical harm to Mr. Hendricks. Appellees' liability could equally be premised upon Mr. Harper's mere intent to make contact of an insulting or provoking nature with Mr. Hendricks. The question of whether Mr. Harper acted with any other intent — whether wantonly, willfully or maliciously — goes to the issue of the damages that are recoverable by appellants and not to the issue of appellees' liability for the act itself. "A physical injury done to another shall give a right of action to the injured party, whatever may be the intention of the person causing the injury, unless he is justified under some rule of law. However, intention shall be considered in the assessment of damages." OCGA § 51-1-13. Thus, if in addition to intending to make contact of either a harmful or an insulting or provoking nature with Mr. Hendricks, Mr. Harper also acted wantonly, willfully or maliciously, appellees may be liable for punitive as well as compensatory damages. See OCGA § 51-12-5. It follows that the trial court erred in giving appellees' requested charges and erred in failing to give appellants' requested charge.

*The judgment is reversed and a new trial must be held.*

Modified for Educational Use

208 Ga. App. 1

**HOUSTON et al.**

**v.**

**HOLLEY**

Court of Appeals of Georgia.

Feb. 23, 1993.

ANDREWS, Judge.

John Houston, Jr., a minor, through his parents and guardians, appeals the judgment entered on a jury verdict for defendant Holley, John’s teacher when he was two years old.

Viewed in favor of the jury’s verdict, the evidence was that John was a low birth weight baby whose mother suffered from toxemia during the last month of her pregnancy. At the age of six weeks, John was enrolled in the infant program at Kinder–Care.

Defendant Holley had worked for Kinder–Care since 1979, starting as a teacher’s aide and becoming the teacher for the toddlers. In early 1986, John was in her toddler class for a month or two until she was transferred to teach the two-year-old class. At the age of two, John joined this class. John was a very demanding child who became aggressive with other children, sometimes spitting and hitting them. He also was extremely active and disruptive of class and was difficult to calm. The policy of Kinder–Care was that spanking was not allowed, but the use of “time-out” was. The child could be separated from the other children, usually by being placed in a chair in a corner. The child was always to be within the sight of the teacher and able to see the other children.

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As John became more aggressive and demanding, he was being placed in time-out. Holley attempted to use the standard time-out procedure of a chair in a corner, but John’s actions made this unfeasible. In one corner, he played in the water fountain and in another he ran outside through the nearby door. When Holley attempted to talk to him concerning his behavior as he sat in the chair, he would kick, hit, spit, and scream at her, which caused the remaining ten or eleven two-year-olds to gather to see what was happening. In an effort to control John and cause as little disruption as possible to the rest of the children, in late January 1988 Holley began to use the bathroom between the two-year-old room and the infants’ room for time-out. She would place John in a chair immediately inside the bathroom door. Then, she would lean against the water fountain outside the door to the bathroom, hold the door open with her foot so that John could not pinch his fingers in it and could see and listen to her, and attempt to calm him down. She did not completely close the door and the lights remained on. From this position, she could both talk to John and observe the remainder of the class. Occasionally, when Mrs. Houston would come to pick John up, he would be in the bathroom and she did not question Holley about this.

Because of the layout of the center, Moore, the director, could hear any disruptions. She was aware of Holley’s use of time-out with John and had heard him crying once when he was placed in time-out. In three months, she may have seen this on three occasions. She was not concerned about the procedure because John was safe and being observed and was in view of other teachers in the center.

John sometimes suffered nightmares during his naps and was afraid of loud noises and strangers. Mr. Houston disciplined John with a belt and, according to John, had spanked him with a book before.

In May 1988, John was placed in the three-year-old class with another teacher with the hope that placing him in a larger room with older children would help his behavior. He was improving when his parents removed him from Kinder–Care.

Mrs. Houston said she was aware of this use of the bathroom because she had been contacted by Campbell and Leverette, two former employees of the center. Campbell worked there in 1987 and was terminated for leaving her class in the middle of the day. Leverette was hired in January 1988 and terminated in July 1988 because she asked another teacher to spank a child for her. Campbell’s testimony concerning John being shut in the bathroom was, at best, equivocal and she acknowledged that she never reported any alleged misconduct by Holley to anyone at the center. While Leverette did testify that John would be placed in the bathroom and Holley would turn off the light and shut the door, placing her foot against it, she acknowledged that, from her vantage point in another classroom, she could not see into the bathroom and that the door may have been open.

After leaving Kinder–Care, John was placed in La Petite, another day care center, which refused to continue to keep him after 30 days. His parents took him to see a counselor who referred them to Dr. Hazard, a clinical psychologist. She evaluated John, including administering psychological tests, in December 1988. She also spoke to his teacher at Children’s World which he was then attending. They reported a very short attention span and need for extra attention. Dr. Hazard diagnosed John as suffering from Attention Deficit Hyperactivity Disorder and attributed his behavior problems to that. She recommended medication, which the parents rejected.

While John was attending public kindergarten in Georgia, his parents refused referral to the school support team for evaluation. After moving to Texas and entering first grade, John was suspended because he attempted to poke another child in the eye with a pencil.

John received no counseling or treatment for a year and then was seen by another clinical psychologist, Dr. Ude, beginning in the fall of 1990 and continuing through April 1991. Dr. Ude was aware of the incidents at Kinder–Care but was not advised by the parents of the other day care problems. He did not conduct any testing, but concluded after interviewing John once in October 1990 that the child suffered from Post Traumatic Stress Disorder which he attributed to the trauma suffered from the time-out procedure.

John, who was seven at the time of the trial in February 1992, testified that he could not presently remember being shut in the bathroom.

Suit was filed in July 1990 alleging battery. The Houstons complain of the granting of defendants’ motion for directed verdict on their count alleging assault and battery.

“ ‘ “In the interest of one’s right of inviolability of one’s person, any unlawful touching is a physical injury to the person and is actionable (as a battery).” (Cits.)’ *Newsome v. Cooper–Wiss, Inc.,* 179 Ga.App. 670, 672(1), 347 S.E.2d 619 (1986).” *Haile v. Pittman,* 194 Ga.App. 105, 106(3), 389 S.E.2d 564 (1989).

There was no evidence here of any touching other than that which had been contracted for when the Houstons placed their infant in the care of Kinder–Care. The use of time-out as a disciplinary tool was within the guidelines of Kinder–Care and was so used with John. There was no error in the grant of the directed verdict on this count.

*Judgment affirmed.*

Modified for Educational Use

330 Ga. App. 1

**KOHLER et al.**

**v.**

**VAN PETEGHEM et al.**

Court of Appeals of Georgia.

November 6, 2014.

BARNES, Presiding Judge.

This case involves a dispute between next-door neighbors that began with a drainage dispute but escalated to allegations of battery including an allegation that the plaintiff husband intentionally spat on the face of the defendant wife during an argument. During the ensuing jury trial, the trial court directed a verdict in favor of the defendant wife on her battery counterclaim based on the spitting incident. The jury subsequently returned a verdict in favor of the defendants on all of the remaining claims and counterclaims, and the trial court entered judgment accordingly.

On appeal from the denial of their motion for a new trial, the plaintiffs argue that the trial court erred by directing a verdict in favor of the defendant wife on her battery counterclaim and in its charge to the jury on that counterclaim because the evidence was in dispute as to whether the spitting incident was intentional.

Because the evidence did not demand a finding that the spitting incident was intentional, we conclude that the trial court erred by directing a verdict to the defendant wife on her battery counterclaim. Consequently, we reverse the trial court's grant of the defendant wife's motion for a directed verdict on her battery counterclaim and remand for a new trial solely on that counterclaim. We affirm the judgment in all other respects.

1

The record reflects that Steven and Elizabeth Kohler live next door to Dirk and Mia Francesca Van Peteghem in the Grand Cascades Subdivision in Forsyth County. Both properties extend all the way to the Chattahoochee River, although the finished backyards do not extend that far. When it rains, culverts along the street carry water from several homes in the subdivision into a large drainage pipe that runs underground along the property line between the Kohlers' and Van Peteghems' properties. The drainage pipe ends in the woods behind the two properties and empties water there whenever it rains. The Van Peteghems' property is at a higher elevation than the Kohlers' property; indeed, the Kohlers' property is at the lowest point in that area of the neighborhood. It is undisputed that there is a serious drainage problem in the back portion of the Kohlers' property; the dispute between the parties concerns the cause of that problem.

On August 9, 2010, the Kohlers filed their complaint in the present action against the Van Peteghems, alleging that the Van Peteghems had performed backyard landscaping work that redirected the flow of water from their property onto the Kohlers' property whenever it rained. According to the Kohlers, the redirected flow of water had caused extensive erosion and siltation problems.

On September 13, 2010, the Van Peteghems filed their answer, denying that their backyard landscaping work caused any redirection in the flow of water onto the Kohlers' property. According to the Van Peteghems, the erosion and siltation problems on the Kohlers' property preexisted the landscaping work and were the result of runoff from the drainage pipe and from the fact that the Kohlers' property is downhill from the other properties in that area of the neighborhood. The Van Peteghems also asserted battery.

On December 10, 2012, the parties proceeded with the trial, which lasted several days. Mrs. Kohler was the sole witness to testify on behalf of the Kohlers during their case-in-chief. After the Kohlers rested their case, the Van Peteghems moved for a directed verdict on the MRPA claim. The trial court granted the Van Peteghems' motion and dismissed the Kohlers' MRPA claim.

The Van Peteghems then presented their case-in-chief. Among other things, Mrs. Van Peteghem testified regarding an incident in her front yard in which Mr. Kohler stood in her face screaming at her and his spit landed on her face.

After the Van Peteghems presented their case-in-chief, they moved for a directed verdict on Mrs. Van Peteghem's battery counterclaim against Mr. Kohler. The trial court granted the Van Peteghems' motion for a directed verdict and later instructed the jury that Mr. "Kohler's action of spitting on Mrs.... Van Peteghem constituted a battery under the laws of Georgia," but that it was up to the jury to determine any harm she had suffered and the amount of damages that should be awarded to her, if any.

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Following its deliberations on the remaining claims and counterclaims, the jury returned a verdict in favor of the Van Peteghems on the Kohlers' nuisance claim and in favor of the Van Peteghems on all of their counterclaims. The jury awarded $250,500 in damages to the Van Peteghems, with the damages broken down by claim in a special verdict form. The trial court thereafter entered final judgment and denied the Kohlers' motion for a new trial, resulting in this appeal.

The Kohlers contend that the trial court erred by directing a verdict in favor of the Van Peteghems on the battery counterclaim. According to the Kohlers, the jury would have been authorized to find from the testimony that errant spittle landed on Mrs. Van Peteghem when Mr. Kohler was screaming at her and that he did not actually intend to spit on her. The Kohlers thus contend that the evidence did not demand a finding that Mr. Kohler committed the intentional tort of battery when his spit landed on Mrs. Van Peteghem. We agree.

The touching of another without her consent, even if minimal, constitutes a battery. See Lawson v. Bloodsworth, 313 Ga.App. 616, 618, 722 S.E.2d 358 (2012); King v. Dodge County Hosp. Auth., 274 Ga. App. 44, 45, 616 S.E.2d 835 (2005). Moreover, the "unlawful touching of a person's body is actionable even if the unlawful touching is indirect, as by throwing an object or substance at the person." (Citation omitted.) Lawson, 313 Ga.App. at 618, 722 S.E.2d 358. Nevertheless, unauthorized touching alone is not enough; battery is an intentional tort, and "[i]t is the intent to make either harmful or insulting or provoking contact with another which renders one civilly liable for a battery." (Emphasis omitted.) Hendricks v. Southern Bell Tel. & Tel. Co., 193 Ga.App. 264, 265(1), 387 S.E.2d 593 (1989). If the tortfeasor acts with the belief that such unauthorized contact is substantially certain to result from his actions, that too can constitute the requisite intent to prove battery. See generally Reeves v. Bridges, 248 Ga. 600, 603, 284 S.E.2d 416 (1981) (discussing intent necessary to prove an intentional tort); Charles R. Adams III, Ga. Law of Torts § 2:1 (2013-2014 ed.) (same). "Intent is a question of fact for jury resolution and may be proven by circumstantial evidence, by conduct, demeanor, motive, and all other circumstances." (Citation and punctuation omitted.) Stack-Thorpe v. State, 270 Ga.App. 796, 805(7), 608 S.E.2d 289 (2004). See Regents of Univ. Sys. of Ga. v. Blanton, 49 Ga.App. 602(1)(a), 176 S.E. 673 (1934) (noting that "the question of intent is peculiarly within the province of the jury").

In the present case, Mr. Kohler did not testify regarding the spitting incident. In contrast, Mrs. Van Peteghem testified that on the day in question, she was standing outside with a county inspector and the president of the neighborhood homeowners' association when Mr. Kohler approached and began yelling at all of them about the landscaping work and how it was damaging his property. Mrs. Van Peteghem testified that Mr. Kohler "just kept going on and on and on in my face." She then testified as follows:

COUNSEL: Did he spit on you in the process?

MRS. VAN PETEGHEM: Not the first time he was doing it. And I asked him to step back at least three times. And I kept saying—literally my belly was touching his belly. And I said, please, step back. I'm pregnant, please step back. I don't know where any of this is coming from. I really want to try to work—I don't know what you are talking about....

COUNSEL: Did spit land on you in this process?

MRS. VAN PETEGHEM: The third time... when he didn't step back. And then he spit on me.

COUNSEL: Where did it land?

MRS. VAN PETEGHEM: On my face....

COUNSEL: Okay. Had you asked him more than once to back up?

MRS. VAN PETEGHEM: I asked him three separate times, please, back up.

COUNSEL: Did he on any of those occasions backup when you asked him?

MRS. VAN PETEGHEM: The first time he step[ped] once, but then as soon as he started talking it was right back in my face.

COUNSEL: Were you scared?

MRS. VAN PETEGHEM: I—yes, I was scared....

COUNSEL: Was he raising his voice when he did it? ...

MRS. VAN PETEGHEM: He was shouting, veins bulging, red in the face. I could feel his breath on my face. And just enraged.... And he's a big guy and in my face just frothing at the mouth and spitting on me. His hot breath on my face. Shouting that I destroyed the forest....

The individual who was the president of the neighborhood homeowners' association at the time the landscaping work was performed in the Van Peteghems' backyard, and who was present at the time and location of the alleged spitting incident, also testified at trial. He testified that on that day, Mr. Kohler "was very agitated" over the landscaping work and walked into a circle of people standing outside that included himself, the county inspector, and Mrs. Van Peteghem. The former president further testified that while standing in the circle of people, Mr. Kohler was "expressing his point of view" and pointed his finger at Mrs. Van Peteghem. However, the former president testified that "there [were] a number of people there during this discussion" and "[i]t wasn't like Mr. Kohler was one-on-one against [Mrs.] Van Peteghem."

Based on this record, the trial court erred in granting a directed verdict to the Van Peteghems on the battery counterclaim. To "spit" on someone simply means to eject saliva from the mouth, see http://www.merriam-webster.com/dictionary/spit, and it can be intentional or unintentional. See Sutton v. Tacoma Sch. Dist. No. 10, 180 Wash. App. 859, 324 P.3d 763, 767 (2014) (noting that "saliva may accidentally escape the mouth when someone is yelling in the face of another person"); Engle v. Bosco, No. CV054006996S, 2006 WL 2773603, at \*4, 2006 Conn. Super. LEXIS 2792, at \*10 (no action for battery where "errant spittle landed on plaintiff" as the defendant was yelling at the plaintiff). Based on the entirety of Mrs. Van Peteghem's testimony about her encounter with Mr. Kohler, it is somewhat ambiguous whether Mr. Kohler intended to spit in her face during the heated encounter, or whether errant spit accidentally landed on her face as he yelled at her. Either inference could have been drawn by the jury. Furthermore, the testimony of the former president of the homeowners' association, construed in the light most favorable to the Kohlers, could have led the jury to find that Mr. Kohler was not "one-on-one against" Mrs. Van Peteghem but instead was heatedly "expressing his point of view" among a circle of people standing in the street, which would call into question whether the spitting was intentional. Accordingly, because the evidence and all reasonable inferences drawn from it did not demand a finding that Mr. Kohler intentionally spat on Mrs. Van Peteghem and thus committed a battery, the trial court erred in granting the motion. See Continental Maritime Svcs., 275 Ga.App. at 534, 621 S.E.2d 775.

The Van Peteghems argue, however, that the trial court's grant of the motion for directed verdict on the battery counterclaim should be affirmed under the "right for any reason" rule because there was other uncontroverted evidence to support the court's determination that a battery had occurred. See generally Sims v. G.T. Architecture Contractors Corp., 292 Ga.App. 94, 96(1), n. 6, 663 S.E.2d 797 (2008) ("If a judgment entered pursuant to the granting of a directed verdict is right for any reason, it will be affirmed.") (citation and punctuation omitted). Specifically, the Van Peteghems contend that the evidence undisputedly showed that Mr. Kohler physically touched Mrs. Van Peteghem with his body during the spitting incident. It is certainly true that Mrs. Van Peteghem's testimony would support such a conclusion. But, as previously noted, the former president of the homeowners' association testified that "there [were] a number of people there during this discussion" and "[i]t wasn't like Mr. Kohler was one-on-one against [Mrs.] Van Peteghem," which, when construed in favor of the Kohlers, could have been construed by the jury as a denial that any one-on-one physical contact occurred between Mr. Kohler and Mrs. Van Peteghem during the incident.

For these reasons, we conclude that there was at least some evidence in the record from which the jury could have found that Mr. Kohler accidentally spat on Mrs. Van Peteghem and never physically touched her during the encounter. A trial court should grant a motion for directed verdict "only where the evidence is truly clear, palpable and undisputed." Service Merchandise v. Jackson, 221 Ga.App. 897, 898-899(1), 473 S.E.2d 209 (1996). Hence, "if there is any evidence to support the case of the non-moving party, a directed verdict must be reversed." (Footnote omitted.) Franklin v. Augusta Dodge, 287 Ga.App. 818, 652 S.E.2d 862 (2007). We therefore must reverse the trial court's grant of the Van Peteghems' motion for a directed verdict on the battery counterclaim against Mr. Kohler and remand for a new trial on that specific claim.

The Kohlers also argue that the trial court erred in charging the jury that Mr. "Kohler's action of spitting on Mrs.... Van Peteghem constituted a battery under the laws of Georgia."

We agree with the Kohlers that the trial court's jury charge was erroneous and that they are entitled to a new trial on the Van Peteghems' battery counterclaim for the reasons we articulated supra in Division 1.

*Judgment affirmed in part and reversed in part, and case remanded with instruction.*

Modified for Educational Use

313 Ga. App. 1

**LAWSON**

**v.**

**BLOODSWORTH.**

Court of Appeals of Georgia.

January 18, 2012.

ELLINGTON, Chief Judge.

Rakeen Lawson brought this action in the Superior Court of Wilcox County for assault and battery against Clint Bloodsworth, alleging that Bloodsworth, who was his high school history teacher, deliberately and maliciously threw a chair at him. Following a hearing, the trial court granted Bloodsworth's motion for summary judgment, and Lawson appeals. For the reasons explained below, we reverse.

Viewed in this light, the record shows the following. During class on May 11, 2010, Bloodsworth became suspicious that Lawson had copied an assignment from a student in an earlier class and directed Lawson to go out into the hallway. As Lawson walked away from Bloodsworth and toward the door, Bloodsworth threw or pushed a chair toward Lawson, saying, "You're going to need this," or words to that effect. Lawson deposed that the chair hit him in the back of the leg, although he was not physically injured. According to Lawson, Bloodsworth then screamed in his face, "acting furious." Lawson was embarrassed by this incident and afterward felt he was the object of other students' ridicule because a teacher had thrown a chair at him. Bloodsworth deposed that, as Lawson was leaving the classroom, he tried to make the chair slide toward Lawson and unintentionally made it take "a bad bounce" in his direction and that the chair "just barely nicked him, if [it touched him] at all."

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The trial court determined that it was undisputed that Bloodsworth did not intentionally try to hit Lawson and that Lawson was not physically injured. The trial court ruled that, "[s]ince there was no physical injury, [Lawson] has no cause of action." On appeal, Lawson contends that there is evidence in the record that Bloodsworth committed an intentional tort and, therefore, he is not precluded in his recovery of damages for his resulting mental pain and suffering. We agree.

A cause of action for battery will lie for any unlawful touching, that is, a touching of the plaintiff's person, even if minimal, which is offensive. Ellison v. Burger King Corp., 294 Ga.App. 814, 816-817(2)(a), 670 S.E.2d 469 (2008). "[A]n offensive touching is one which proceeds from anger, rudeness, or lust. The test is what would be offensive to an ordinary person not unduly sensitive as to his dignity." (Citation and punctuation omitted.) Id. See also Interstate Life, etc., Co. v. Brewer, 56 Ga.App. 599, 607, 193 S.E. 458 (1937) (An unlawful touching of a person's body is actionable even if the unlawful touching is indirect, as by throwing an object or substance at the person.).

In this case, Lawson's deposition testimony provides evidence that a furious Bloodsworth intentionally threw the chair at him, that the chair hit his leg, and that Bloodsworth's conduct caused him to suffer the emotional pain of humiliation. Thus, the facts are disputed regarding whether the chair physically touched Lawson and whether Bloodsworth pushed the chair toward him with a tortious, rather than an innocent, intent.

Given the relatively low threshold required to prove battery, we must conclude that [Lawson] has created a factual issue as to whether a battery occurred. To hold otherwise here would run contrary to [controlling] precedent and to our mandate to view all evidence in the light most favorable to [Lawson] as the nonmoving party.

Ellison v. Burger King Corp., 294 Ga.App. at 817(2)(a), 670 S.E.2d 469.

For the foregoing reasons, the trial court erred in granting summary judgment to Bloodsworth.

*Judgment reversed.*

Modified for Educational Use

209 Ga. App. 1

**RICHARDSON**

**v.**

**HENNLY**

Court of Appeals of Georgia.

July 15, 1993.

 SMITH, Judge.

Bonnie Richardson filed suit in three counts against her former co-worker, J.R. Hennly, Jr., against whom she alleged claims of battery. Henley moved for summary judgment, and Hennly’s motion was granted as to the claim of battery. Richardson appeals from the grant of partial summary judgment to Hennly.

The record reveals that Richardson had been working as a receptionist at First Federal for a number of years when Hennly, an administrative officer, began working at her branch. Richardson’s work station was in the lobby of First Federal, and Hennly worked in an office approximately 30 feet from her desk. Hennly had been a pipe smoker for a number of years, and continued to smoke his pipe at work. Richardson immediately began to have difficulty with Hennly’s pipe smoke, to which she apparently had an allergic reaction that caused nausea, stomach pain, loss of appetite, loss of weight, headaches, and anxiety. She discussed this problem with her superiors, and several air cleaners were purchased, which were placed in the interior of Hennly’s office and adjacent to his door. For a time Hennly switched to cigarettes, which did not bother Richardson as much, but he resumed smoking his pipe, stating that he wished to avoid becoming addicted to cigarettes. Richardson was twice hospitalized because of her adverse reactions. Shortly after Richardson returned to work from her second hospitalization her employment was terminated, primarily for excessive absenteeism.

In opposition to the motion for summary judgment Richardson presented medical evidence attributing her adverse reactions to the pipe smoke. This evidence was not rebutted. It is uncontroverted that Hennly was aware of Richardson’s adverse reactions to his pipe smoke and that she was twice hospitalized. The evidence is in conflict regarding whether Hennly ever smoked anywhere at work other than in his office; whether he intentionally smoked around Richardson to annoy her; and whether he made teasing or offensive remarks regarding his smoking.

Hennly moved for summary judgment as to Richardson’s claim of battery on the ground that pipe smoke is an immaterial substance incapable of battering another. Richardson maintains the trial court erred by granting partial summary judgment to Hennly on this claim.

 Our courts have recognized an interest in the inviolability of one’s person and, along with most other jurisdictions, have followed the common law rule that any unlawful touching is actionable as a battery. *Haile v. Pittman,* 194 Ga.App. 105, 106(3), 389 S.E.2d 564 (1989). In Georgia, a civil battery claim may be brought pursuant to OCGA § 51–1–13 or § 51–1–14. See generally *Joiner v. Lee,* 197 Ga.App. 754, 756(1), 399 S.E.2d 516 (1990). Such a cause of action will lie even in the absence of direct physical contact between the actor and the injured party: “ ‘The unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance.’... [Cit.]”[1](https://docs.google.com/document/d/1wpYihj-ypwXe_3Kl-X5CYkhIcgCN0gRmZLJhbIxVISA/edit#bookmark=id.2grqrue) *Hendricks v. Harper,* 193 Ga.App. 264, 265, 387 S.E.2d 593 (1989).

“It is no longer important that the contact is not brought about by a direct application of force such as a blow, and (if other elements of the cause of action ... are satisfied) it is enough that the defendant sets a force in motion which ultimately produces the result.” Prosser & Keeton, The Law of Torts § 9, p. 40 (5th ed. 1984).

We note that Richardson has not alleged that *any* or *all* smoke with which she came into contact would constitute battery. Instead, she has alleged that Hennly, knowing it would cause her to suffer an injurious reaction, intentionally and deliberately directed his pipe smoke at her *in order* to injure her or with conscious disregard of the knowledge that it would do so. We decline to hold that this allegation must fail as a matter of law. We are not prepared to accept Hennly’s argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly. Pipe smoke is visible; it is detectable through the senses and may be ingested or inhaled. It is capable of “touching” or making contact with one’s person in a number of ways. Since no other element of the tort has been conclusively negated, Hennly has not shown as a matter of law that he is entitled to judgment. We conclude, therefore, that the trial court erred in granting summary judgment in favor of Hennly on the battery claim.

*Judgment reversed.*

Modified for Educational Use

220 Ga. App. 1

**ROSE**

**v.**

**BRACISZEWSKI**

Court of Appeals of Georgia.

October 13, 2009.

TALBOT, presiding judge

In this battery suit, plaintiff Helga Rose appeals the trial court's order granting defendants’ motions for summary judgment and denying Rose's motion to amend her complaint. Because we conclude that the trial court properly dismissed Rose's claim for battery and properly denied her motion to amend, we affirm.

**I. Basic Facts and Procedural History**

The parties in this case are all neighbors within Hamburg Township. Rose moved into the neighborhood in 2001 and her home sits to the immediate north of a lot owned by defendants Terry and Katherine Braciszewski. Terry and Katherine built a pole barn on this lot, but their home sits on a second lot directly west and across the street from the lot with their pole barn. In September of 2005, defendants Michael Sinacola and Theresa Brawdy moved into their home, which sits on a lot directly south of the lot with the Braciszewskis' pole barn.

Before moving into her home, Rose was unaware that Hamburg Township permitted property owners to burn leaves and other yard waste. The township amended Ordinance No. 40 in 2003 to limit the burning of leaf and yard waste to the months of April and November. Under Ordinance No. 38, the township also prohibited the “keeping, maintaining, accumulating or storage of ... [r]emnants of wood, ... accumulations of ... branches, leaves or yard clippings ... with the exception of managed compost piles.”

In September of 2001, Rose approached Terry Braciszewski and asked him to stop burning leaves and yard waste because the smoke was entering her dining room. Thereafter, Rose reported several leaf fires started by defendants to the township fire department: three in November 2005, two in April 2006, and one in April 2007. On some of these occasions, Rose reported smoke in her house. Rose indicated that she reported other incidents, but there were apparently no incident reports for these complaints.

Rose also stated that, starting in 2004, the Braciszewskis began running the cars in their pole barn for one to two hours at a time about two to three times per year. Rose claimed that the exhaust emissions from these cars entered her property.

In January 2005 or 2006, Rose attended a township board meeting and complained about the leaf burning. The township supervisor investigated with the fire department and told Rose that burnings were “neighborly burning[s].” Rose understood that to mean that the township would permit the burnings.

Rose sued defendants in June 2007. In her complaint, Rose alleged that defendants' open burnings caused smoke, fumes and debris to envelope her home and damage her property and her health and that Terry Braciszewski's running of his old cars for long periods of time caused emissions of smoke and fumes to drift upon her property damaging her property and her health. Rose alleged that these actions constituted assault and battery. Rose requested a preliminary injunction prohibiting defendants from conducting open burnings and from running their cars for long periods of time until the case was heard, a permanent injunction to enjoin defendants from conducting open burnings and from running their cars for long periods of time, and damages.

The trial court heard argument on Rose's motion for a preliminary injunction in August 2007. At the hearing, Rose informed the trial court that the burnings occur in April and November. The trial court noted that Ordinance No. 40D allows such burning. Rose argued that defendants' burnings were not in compliance with the ordinance and that the smoke was permanently damaging her health. Defendants argued that Rose's motion for injunctive relief should be denied because she could not prove the elements of battery. They also noted that there was no proof that their burnings caused Rose's health problems and that they must burn their leaves and debris two times each year in order to comply with Ordinance No. 38. The trial court denied Rose's motion because it was “very skeptical about the likelihood of the success on the merits” and it did not “see the irreparable harm.” The trial court also determined that the balancing of factors favored defendants.

In December 2007, the Braciszewskis moved for dismissal of Rose's claims. In January 2008, Sinacola and Brawdy also moved for summary judgment.

After a hearing on defendants' motions for summary judgment, the trial court dismissed Rose's battery claim because Rose failed to prove the requisite intent. The trial court also denied Rose's motion to amend the complaint as futile.

Rose moved for reconsideration, but the trial court denied the motion. This appeal followed.

**II. Summary Judgment**

Rose also argues that the trial court erred in granting defendants' motions for summary disposition. We review de novo a trial court's ruling on a motion for summary disposition. *Waltz v Wyse*, 469 Ga. 642, 647, 677 S.E.2d 813 (2004). Summary judgment may be granted if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co.*, 451 Ga. 358, 362, 547 S.E.2d 314 (1996). A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing all the evidence in the light most favorable to the nonmovant. *Allison v AEW Capital Mgt. LLP*, 481 Ga. 419, 424, 751 S.E.2d 8 (2008).

**III. Battery Claim**

Rose also argues that summary disposition should not have been granted on her battery claim.

In order to establish claims of battery, a plaintiff must demonstrate that the defendant had the requisite intent. *Mitchell v Daly*, 133 Ga.App. 414, 426–427, 350 S.E.2d 772 (1984); *Espinoza v Thomas*, 189 Ga.App. 110, 119; 472 S.E.2d 16 (1991). The intent necessary to make out a battery is the intent to cause a harmful or offensive contact with another person, or knowing, with substantial certainty, *Boumelhem v BIC Corp*, 211 Ga.App. 175, 184, 535 S.E.2d 574 (1995). “[T]he intent necessary to make out a tortious assault is either an intent to commit a battery or an intent to create in the victim a reasonable fear or apprehension of an immediate battery.” *Mitchell*, 133 Ga.App. at 427.

Viewing the evidence in the light most favorable to Rose, there was insufficient evidence to show that defendants acted with the requisite intent. Although it is clear that defendants intended to set the fires and start the automobiles allegedly giving rise to Rose's health complaints, there is no evidence that the defendants took those actions with the intent to cause the smoke or fumes to come into contact with Rose or with the knowledge that their actions were substantially certain to cause such contact. *Boumelhem*, 211 Ga.App. at 184.  Specifically, there was no evidence that defendants took steps to increase the likelihood that the smoke and fumes would come into contact with Rose or that the conditions prevalent on the properties was such that defendants had to know that the smoke and fumes were substantially certain to come into contact with her. Further, given the vagaries of wind and weather, defendants' actions in starting the fires and automobiles alone cannot be said to be proof of the requisite intent. Even when the prevailing winds might have given notice that the smoke and fumes would travel in the general direction of Rose's property, there is no evidence that defendants were substantially certain that the smoke and fumes would not pass over Rose—assuming defendants knew of her presence—or that Rose would not otherwise be safe from the smoke and fumes. Likewise, for the same reason, any apprehension that Rose might have had concerning the potential for contact as a result of these activities cannot be said to be reasonable. *Mitchell*, 133 Ga.App. at 427.

Rose failed to present evidence from which the trier-of-fact could find the requisite intent to support either an assault or a battery claim. The trial court did not err in dismissing Rose's battery claim on this basis.

Modified for Educational Use

259 Ga. App. 1

**VASQUEZ**

**v.**

**SMITH.**

Court of Appeals of Georgia.

January 3, 2003.

MIKELL, Judge.

Edna M. Vasquez filed the underlying action for battery against her co-worker, Jacqueline Elaine Smith. The trial court granted summary judgment in favor of Smith, and Vasquez appeals. For reasons explained below, we reverse the judgment of the trial court.

To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the non-moving party, warrant judgment as a matter of law. OCGA § 9-11-56(c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case.... Our review of an appeal from summary judgment is de novo.

So viewed, the record shows that Vasquez and Smith were employed by Intermedia Communications, Inc. According to Vasquez, in March 2000, Smith became upset when she discovered that Vasquez held the title of senior customer service manager. Smith deposed that she spoke with a supervisor, a human resources representative, and the vice president of Intermedia to inquire why she had not been considered for the position. Vasquez testified that she and Smith saw each other once or twice a week in the course of their employment and that they had a contentious relationship. Vasquez described hostile behavior by Smith, including an incident in June 2000, when Smith drove a car within four inches of Vasquez while she was walking through the parking deck.

Vasquez alleged that Smith battered her on five different occasions. First, according to Vasquez, on October 17, 2000, she and Smith happened to be in the mail room at the same time. Vasquez deposed that when she attempted to leave, Smith blocked her path and "quickly and forcefully slammed her body into mine." Vasquez was thrown off balance and struck a countertop. She testified that the incident caused "a great deal of pain" to her feet and her right hip and that she took pain medication as a result. Smith gave a different account and deposed that their arms "brushed up against each other" as the two women were exiting the mail room and that they exchanged words. Smith described the exchange as follows: "[Vasquez] said watch it and I said you watch it. And she said you're so rude. And I said your momma. That's it."

According to Vasquez, the second incident occurred on October 31, 2000, when a number of employees were gathered in a conference room for a staff meeting. Vasquez was talking to a co-worker, Amy O'Connor, at the entrance to the conference room when Smith slammed into her from behind. Vasquez testified that she lost her balance and was thrown forward, causing foot pain for which she took medication.[1] O'Connor deposed that she was facing Smith at the time and witnessed her forcefully slam into Vasquez from behind. O'Connor further testified that there was sufficient room in the doorway for Smith to walk through without touching Vasquez; that Vasquez was thrown forward by the blow; that Smith kept walking and did not acknowledge running into her co-worker; and that Smith's conduct appeared to be intentional. Contrary to Vasquez's and O'Connor's testimony, Smith deposed that she unintentionally "brushed up against [Vasquez's] arm" as she passed through the doorway.

Vasquez alleged that the third battery took place on November 14, 2000, before the weekly staff meeting. Vasquez was seated at the conference table when Smith walked by and slammed her body against the back of Vasquez's chair. According to Vasquez, Smith also made contact with her right shoulder. Vasquez deposed that the force of the blow caused her chest to hit the table, resulting in skin discoloration. She took ibuprofen for the pain. Other people were able to walk by without touching her chair, Vasquez testified. Smith testified that she merely touched Vasquez's chair as she walked through the room. According to Vasquez, the fourth and fifth batteries took place at the November 21 and 28 staff meetings when Smith engaged in conduct nearly identical to her behavior on November 14. Vasquez testified that she suffered from a "constant nervous stomach" as a result of the five batteries and that stress caused by Smith's behavior had affected her job performance.

Smith was given a written warning by her supervisor on November 29, 2000. In a section entitled "Professional Behavior," the warning stated that "[y]our conflicts with peers and management have evolved to outbursts and physical confrontation." Smith was informed that "[b]ehaving in a threatening and insubordinate manner towards ... co-workers ... will not be tolerated."

The record reveals that Smith was arrested for the simple battery of Vasquez and that she pleaded nolo contendere to the charge. There is no documentation of the criminal action in the record; however, Smith's deposition testimony indicates that it was disposed of after November 2000.

After Vasquez filed the underlying civil action, Smith moved for summary judgment on the grounds that there was no evidence that she intentionally touched Vasquez or that Vasquez was injured by her conduct. The trial court granted the motion. On appeal, Vasquez argues that the court erred in finding that no genuine issues of material fact exist. We agree.

This Court has repeatedly held in battery cases that the unwanted touching itself constitutes the injury to the plaintiff. Darnell v. Houston County Bd. of Ed., 234 Ga.App. 488, 490(1), 506 S.E.2d 385 (1998) ("[a] cause of action for assault and battery can be supported by even minimal touching"); Jarrett v. Butts, 190 Ga.App. 703, 705(4), 379 S.E.2d 583 (1989) (evidence that the defendant touched the plaintiff's wrists and hair was sufficient to withstand a motion for summary judgment). In Brown v. Super Discount Markets, supra at 176, 477 S.E.2d 839, we held that "any unlawful touching of a person's body, even though no physical injury ensues, violates a personal right and constitutes a physical injury to that person." (Citation omitted.) In that case, we reversed a grant of summary judgment on an assault and battery claim because there was evidence that the defendant, a security employee, grabbed one plaintiff's arm and shoved the other plaintiff while apprehending them for allegedly shoplifting. Id. We reasoned that

[a]ny act of physical violence (and the law will not draw a line between different degrees of violence), inflicted on the person of another, which is not necessary, is not privileged, and which constitutes a harmful or offensive contact, constitutes an assault and battery. (Cit.) Greenfield v. Colonial Stores, 110 Ga.App. 572, 574-575(1), 139 S.E.2d 403 (1964).

3

(Punctuation omitted.) Id., citing Kemp v. Rouse-Atlanta, Inc., 207 Ga.App. 876, 880(3), 429 S.E.2d 264 (1993).

In Newsome v. Cooper-Wiss, Inc., 179 Ga. App. 670, 347 S.E.2d 619 (1986), we outlined a test for conduct giving rise to an actionable claim for battery: "In the interest of one's right of inviolability of one's person, any unlawful touching is a physical injury to the person and is actionable." Mims v. Boland, 110 Ga.App. 477[-478](1)(a)(4), 138 S.E.2d 902 (1964). See generally OCGA § 51-1-13. Generally speaking, an "unlawful" touching is one which is "offensive," and an "offensive" touching is one which proceeds from anger, rudeness, or lust. [Cits.] The test, according to Professor Prosser, "is what would be offensive to an ordinary person not unduly sensitive as to his dignity." Prosser, Law of Torts, § 9, p. 37 (4th ed.1971). Accord Restatement of Torts, 2d, § 19. Id. at 672(1), 347 S.E.2d 619.

Based on the above cited cases, we conclude that a jury question exists as to whether Smith's conduct constituted a battery. At a minimum, the deposition testimony of Vasquez and O'Connor raise factual issues regarding whether Smith's conduct constituted an offensive touching and whether it was intentional. That Smith gave such differing accounts of the events at issue demonstrates that the relevant facts are in dispute.

Smith argues that Vasquez's claim fails because she has not demonstrated actual physical injury; however, such a showing is not required to support a claim for battery, which is an intentional tort. Hendricks v. Southern Bell Tel. &c. Co., 193 Ga.App. 264, 265(1), 387 S.E.2d 593 (1989). See Ketchup v. Howard, 247 Ga.App. 54, 56(1), 543 S.E.2d 371 (2000). The cases cited by Smith in support of her argument that proof of injury was required involve negligence actions and are therefore distinguishable from the case at bar.

*Judgment reversed*

Modified for Educational Use

169 Ga.App. 571

BANKS

v.

The STATE.

No. 67447.

|

Court of Appeals of Georgia

Jan. 4, 1984.

Defendant appeals his conviction of aggravated assault on a police officer in violation of OCGA § 16–5–21 (Code Ann. § 26–1302). *Held*: Defendant was indicted for three counts of aggravated assault by striking with a ceramic statue. The wife was the alleged victim of count 1, a Mrs. Benton the victim of count 2, and the police officer the victim of count 3. The jury's verdict acquitted defendant of the assault on the wife and found him guilty of the lesser offense of simple assault on Mrs. Benton, and guilty of aggravated assault on the police officer. Before sentencing the state entered a nolle prosequi on count 2 and defendant was sentenced on count 3 only.

Defendant argues that the guilty findings of simple assault on one victim and aggravated assault on the other by use of the same means, striking with the ceramic statue, is necessarily inconsistent because the same means could not be considered an offensive instrument as to one victim and not to the other. We do not agree.

A ceramic statue is not per se an offensive or deadly instrument, just as many other things are not. “The term offensive instrument as used in Code Ann. § 26–1902 [now OCGA § 16–8–41] includes not only instruments which are offensive per se (such as firearms loaded with live ammunition), but also other instrumentalities not normally considered to be offensive instruments per se which may be found by a jury to be likely to produce death or great bodily injury depending onthe manner and means of their use.” Meminger v. State*,* 160 Ga.App. 509(2), 287 S.E.2d 296, reversed on other grounds 249 Ga. 561, 292 S.E.2d 681.

“[W]hether the instrument used constitutes a deadly (or offensive) instrument is properly for the jury's determination.” Quarles v. State*,* 130 Ga.App. 756(2), 757, 204 S.E.2d 467.

From the evidence the jury could have found that the ceramic statue was not used against Mrs. Benton in a manner likely to produce death or great bodily injury, but was so used on the police officer. That being so there was no inconsistency between the verdicts on counts 2 and 3. “Where evidence is consistent with two different explanations, one of which will sustain the verdict and one render it inconsistent, this court will infer that the jury adopted that explanation consistent with its findings. [Cits.]” Fullwood v. State*,* 128 Ga.App. 772(2), 773, 197 S.E.2d 858.

Judgment affirmed.

SOGNIER and POPE, JJ., concur.

Modified for Educational Use

320 Ga.App. 6

BRAZIEL

v.

The STATE.

No. A12A2172.

|

Court of Appeals of Georgia

Feb. 26, 2013.

Ernest Lee Braziel was indicted for aggravated assault on a peace officer. After a jury trial, Braziel was found guilty of aggravated assault on a peace officer. Braziel filed a motion for new trial and, following a hearing, the trial court denied the motion. It is from that order that he now appeals, contending that the evidence was insufficient to sustain the aggravated assault on a peace officer conviction, and that the trial court erred in its charge on aggravated assault. Following our review, we affirm.

After a defendant has been convicted, “we view the evidence in the light most favorable to the jury's verdict, and the defendant no longer enjoys the presumption of innocence.” Powell v. State*,* 310 Ga.App. 144, 712 S.E.2d 139 (2011). Moreover, we “do not weigh the evidence or determine witness credibility, but only determine if the evidence was sufficient for a rational trier of fact to find the defendant guilty of the charged offense beyond a reasonable doubt.” (Footnote omitted.) Id.

So viewed, the evidence shows that several officers with the Dade County Sheriff's office went to Braziel's grandparents' home where he lived to serve him with a felony arrest warrant. After Braziel was handcuffed, an officer conducted a pat-down search and discovered a bottle with the prescription label removed that contained pills that were later identified as alprazolam, a schedule IV controlled substance. Braziel struggled with the deputy as he was led out of the house, then “threw his head back and head butted [the deputy] in the mouth and ... [tried] to get away from [him].” As the deputy and Braziel continued to struggle, the deputy heard Braziel say “sic him boy, get him, sic him.” The deputy “took [Braziel] to the ground” to control him until he could get additional help with the arrest. As he held Braziel on the ground, the deputy felt a sharp pain and saw that Braziel's pit bull had “locked down” on his leg. The deputy hit the dog repeatedly with his flashlight as Braziel continued to “holler[ ] sic him boy, bite him.” As the deputy continued to hit the dog, it eventually released its grip, and Braziel's grandfather grabbed the dog and pulled it back.

As the officers restrained Braziel and put him in a patrol car for transport, he continued with a profanity-laden tirade, and spit in the face of another deputy. Braziel also bragged about his dog attacking the deputy. The deputy testified about the wounds to his leg caused by the dog attack. He described areas where puncture wounds had “hit the bone” and another area where because “the meat was gone, they couldn't sew it all the way up, so I still have a hole there.”

In three enumerations of error, Braziel challenges the sufficiency of the evidence to sustain his conviction for aggravated assault premised on the attack from the dog. He contends that the evidence did not show that he caused the dog to attack the officer and that other factors, including the other officers, patrol cars, and a K–9 dog at the scene could have provoked the dog to attack the officer.

“A person commits the offense of aggravated assault when he assaults ... [w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.” OCGA § 16–5–21(a)(2). The use of a dog can be considered use of an offensive instrument. Michael v. State*,* 160 Ga.App. 48(1), 286 S.E.2d 314 (1981).1 The officer who was assaulted testified that Braziel yelled to his dog “sic him boy, bite him” before the dog attacked the officer. Another deputy testified that the dog had been aggressive in past encounters at Braziel's home, but that “Braziel ha[d] usually called it off.” Despite Braziel's contentions otherwise, this evidence was sufficient to authorize the jury's finding that appellant was guilty of aggravated assault on a law enforcement officer beyond a reasonable doubt. See Perkins v. State*,* 197 Ga.App. 577, 580(3), 398 S.E.2d 702 (1990).

Judgment affirmed.

McFADDEN and McMILLIAN, JJ., concur.

**Footnote**

1. Braziel was indicted for aggravated assault on a peace officer by knowingly making “an assault upon the person of ... a peace officer, with a dog, an instrument which when used offensively against a person is likely to result in serious bodily injury, by commanding said dog to attack said officer while said officer was engaged in the performance of his official duties.”

Modified for Educational Use

297 Ga.App. 880

CRANE

v.

The STATE.

No. A09A1038.

|

Court of Appeals of Georgia

May 14, 2009.

Following a jury trial, Ronnie Lamar Crane was convicted on one count of aggravated assault.1 He appeals his convictions and the denial of his motion for new trial, challenging the sufficiency of the evidence. For the reasons set forth below, we affirm. “On appeal from a criminal conviction, the evidence must be construed in a light most favorable to the verdict, and [Crane] no longer enjoys a presumption of innocence.” (Punctuation omitted.) Dennis v. State.2 In evaluating the sufficiency of the evidence to support a conviction, we do not weigh the evidence or determine witness credibility, but only determine whether a rational trier of fact could have found the defendant guilty of the charged offenses beyond a reasonable doubt. Jackson v. Virginia.3

So viewed, the record shows that after 29 years of marriage, Crane and his ex-wife were divorced in August 2006. Pursuant to the divorce decree, Crane's ex-wife had custody of the couple's two minor children and received ownership and possession of the home in which they had previously lived together. Shortly after their divorce, Crane's ex-wife obtained a permanent restraining order against Crane, which included a provision prohibiting Crane from coming onto her property. Despite the restraining order, several months later, Crane's ex-wife began allowing Crane to visit their children at her father's nearby home. She later permitted him onto her property in order to pick up the children and also allowed him to visit with them outside of her home. However, after Crane began using the visitation as a means of harassing her, his ex-wife told him that he was no longer permitted near the home for any purpose.

On September 9, 2007, shortly after the ex-wife had stopped Crane's visits with their children, the ex-wife's father went to her home to check on it. As he arrived, he saw Crane coming down the steps from the home's back deck and told him that he was not supposed to be on the property. Crane began yelling about his right to be on the property and walked toward the father while holding a claw hammer in one hand and a screwdriver in the other. Fearing that Crane was going to strike him with the hammer, the father grabbed a baseball bat from his vehicle and hit Crane in the arm as he approached. A brief struggle ensued, which ended when Crane grabbed the bat and hurried down the driveway away from the property and toward his vehicle. The father then called the police, but Crane left before they arrived. A few hours later, the ex-wife's brother also went to her home to check on it. Upon his arrival, he saw Crane's vehicle at the end of the driveway and saw Crane exit the vehicle, carrying a hunting bow. At the same time, the ex-wife returned home from work and also saw Crane carrying the hunting bow. Together, she and her brother flagged down a city police officer, who detained Crane until a county officer arrived and arrested him.

Crane was indicted on one count of aggravated assault on his ex-wife's brother and one count of aggravated assault on his ex-wife's father. He was tried and found guilty on the aggravated assault count that related to the confrontation with his ex-wife's father, but was acquitted on the other count. Thereafter, Crane filed a motion for new trial, which the trial court denied. This appeal followed.

Crane contends that the evidence was insufficient to support his conviction of aggravated assault on his ex-wife's father. We disagree.

“A person commits the offense of aggravated assault when he or she assaults ... [w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury....” OCGA § 16–5–21(a)(2). “[A] hammer can be considered an offensive instrument for purposes of an aggravated assault charge.” In the Interest of C.B.4 See Gough v. State;5 Curtis v. State.6

In this matter, the evidence showed that Crane confronted his ex-wife's father while holding a claw hammer and that the father defended himself with a baseball bat based on his fear that Crane was going to strike him. Crane argues that he had no intention of hitting his ex-wife's father with the hammer and that the father attacked him. However,

[a]lthough [Crane] seeks to portray the [father] as the aggressor, it was the jury's duty to resolve any conflicts in the evidence and to assess and determine the credibility of the witnesses. Obviously, the jury in this case opted to believe the [father] and apparently resolved any conflicts in the testimony adversely to [Crane].

(Citation omitted.) Knox v. State.7 Furthermore, “[i]t is the victim's reasonable apprehension of injury from an assault by an offensive instrument that establishes the crime of aggravated assault, not the assailant's intent to injure.” (Punctuation omitted.) Bostic v. State.8 Accordingly, the evidence was sufficient to allow the jury to find Crane guilty of aggravated assault beyond a reasonable doubt. See Brigman v. State.9

Judgment affirmed.

ADAMS and DOYLE, JJ., concur.

**Footnotes**

1. OCGA § 16–5–21(a)(2).
2. Dennis v. State*,* 294 Ga.App. 171, 669 S.E.2d 187 (2008).
3. Jackson v. Virginia*,* 443 U.S. 307, 319(III)(B), 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).
4. In the Interest of C.B., 288 Ga.App. 752, 753, 655 S.E.2d 342 (2007).
5. Gough v. State*,* 236 Ga.App. 568, 569(1), 512 S.E.2d 682 (1999).
6. Curtis v. State*,* 168 Ga.App. 7, 8(5), 308 S.E.2d 31 (1983).
7. Knox v. State*,* 254 Ga.App. 870, 872, 564 S.E.2d 225 (2002).
8. Bostic v. State*,* 289 Ga.App. 195, 197, 656 S.E.2d 546 (2008).
9. Brigman v. State*,* 282 Ga.App. 481, 484(1), 639 S.E.2d 359 (2006).

Modified for Educational Use

285 Ga. 308

DASHER

v.

The STATE.

Lewis

v.

The State.

Nos. S09A0221, S09A0631.

|

Supreme Court of Georgia

April 28, 2009.

Appellants Quinton Dasher and Wesley Tyrone Lewis were convicted of the felony murder [predicated on aggravated assault] of Jimmy D. Burke in Toombs County.1 On appeal, each appellant takes issue with the sufficiency of the evidence of aggravated assault.

The State presented evidence that the victim cashed his weekly paycheck at 4:12 p.m. the day before he was found dead, and left the bank with over $340. That evening he took a taxi to a neighborhood in Lyons, Georgia, where he was found dead the next morning and his wallet emptied of cash. From “drag marks” and blood drops, it appeared his body had been dragged across a dirt lane from the apartment occupied by appellant Dasher to the site where it was found. The forensic pathologist who performed the autopsy testified the victim had suffered extensive abrasions and bruising about the face and head that “most probably” were the result of having been punched, and the mixture of bruising and scraping exhibited by the victim's body was “very characteristic” of having been kicked repeatedly with shod feet. The cause of death was a sub-arachnoid hemorrhage due to a torn vertebral artery caused by a blow to the head that turned the head violently. The forensic pathologist testified that kicking the victim would provide the force required to rapidly jerk the head so as to tear the artery at the base of the brain.

Appellants contend the evidence presented by the State was insufficient to support the jury's conclusion that appellants committed an aggravated assault on Jimmy Burke. We disagree. The State presented evidence that appellants repeatedly struck the victim about his face and head, causing him to lose consciousness and eventually die. OCGA § 16– 5–21(a)(2) criminalizes an assault made with the offensive use of any object that “actually does result in serious bodily injury....” There was evidence that the victim suffered serious bodily injury as the likely result of repeated punches and kicks to his head. The jury was instructed that it was to decide whether the hands and feet of the defendants constituted offensive instruments likely to cause serious bodily injury, and that the jury could infer the “serious injury-producing character of the instrument in question from the nature and the extent of the injury,” along with all the facts and circumstances.

Appellants maintain they could only be convicted of violating OCGA § 16–5–21(a)(2) using shod feet as offensive instruments and, citing Williams v. State*,* 127 Ga.App. 386, 388, 193 S.E.2d 633 (1972), argue that the case against them fails because the State failed to present detailed evidence of the footwear worn, e.g., whether it was a shoe or boot, its size, weight, construction, and the manner in which it was used. “Hands and fists may be offensive instruments depending upon the circumstances, including the extent of the victim's injuries.” Wright v. State*,* 211 Ga.App. 474(1), 440 S.E.2d 27 (1993). “Although fists and feet are not considered offensive instruments . . . they may be found to be an offensive instrument by the jury depending on the manner and means of their use, the wounds inflicted, etc....” (Punctuation omitted.) Kirby v. State*,* 145 Ga.App. 813(4), 245 S.E.2d 43 (1978). The jury was authorized to conclude that appellants' hands and feet were used as offensive instruments and we cannot hold, as a matter of law, that the hands and feet used to inflict injuries upon the victim were not offensive instruments. Id.

Judgments affirmed.

All the Justices concur.

# Footnotes

1 The victim died on March 12, 2005, and appellants were arrested the same day. In December 2005, the Toombs County grand jury returned a true bill of indictment charging appellants with the malice murder, felony murder (aggravated assault), and robbery of the victim. The trial took place November 20–22, 2006, and resulted in appellants' acquittal of the malice murder and robbery charges and their convictions of the felony murder charge. Appellants were sentenced to life imprisonment on the felony murder conviction on November 22, 2006. Dasher's motion for new trial, timely filed on December 4, 2006, and amended February 22, 2008, was the subject of a hearing on July 17, 2008, and was denied September 4, 2008. Dasher's notice of appeal was timely filed September 25, 2008, and the appeal was docketed in this Court on October 21, 2008. Lewis filed a motion for new trial on December 1, 2006, and filed an amended motion on December 17, 2007. The motion was heard on July 16, 2008, and was denied September 4, 2008. A timely notice of appeal was filed on September 30, 2008. Both appeals were submitted for decision on the briefs.

Modified for Educational Use

250 Ga.App. 185

DURRANCE

v.

The STATE.

No. A01A0828.

|

Court of Appeals of Georgia

April 24, 2001.

Johnny Durrance was charged in a nine-count indictment, including three counts of aggravated assault (Counts 2, 4, and 8). The jury returned a guilty verdict on all counts. Durrance was then sentenced to serve fifteen years for each of the three aggravated assaults. This appeal followed the denial of Durrance's motion for new trial. Finding no reversible error, we affirm.

Durrance challenges the sufficiency of the evidence to support his convictions of aggravated assault. On appeal of a criminal conviction, we view the evidence in the light most favorable to support the verdict, and the defendant is no longer entitled to a presumption of innocence. We do not weigh the evidence or decide witness credibility, but simply determine whether the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of the crimes charged.1 Conflicts in the testimony of the witnesses are a matter of credibility for the jury to resolve. As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the state's case, the jury's verdict will be upheld.2

So viewed, the evidence shows that on July 9, 1999, Linda Givens called 911 to summon assistance to the home she shared with Durrance. The two had gotten into an argument, and Durrance, who was drunk, had slapped Givens twice. Givens also testified that Durrance had inadvertently set the bed on fire. Two Ware County deputy sheriffs, Sergeant Juan C. Spencer and Jimmy Clark, responded to the domestic disturbance call. Durrance left before they arrived. While the officers were conducting their investigation, Durrance drove by the house, and Clark, followed by Sgt. Spencer, gave chase. The deputies radioed for additional officers and pursued Durrance. Deputies Danny Fullard and Tommy Allen and Georgia State Patrol Troopers Jeffrey A. Thomas and Mike Walker joined in the pursuit.

Sgt. Spencer and Deputy Clark, who were following each other, testified that when Durrance reached the Emerson Park area, Durrance turned around and sped toward them in their lane of traffic, forcing the officers to drive their patrol cars off the road and into a ditch to avoid being hit by Durrance. The deputies recovered their vehicles and continued their pursuit.

Deputy Fullard testified that during the high-speed chase, Durrance turned his truck around and Fullard tried to block him in. Durrance accelerated directly toward Fullard, who testified that he had to throw his car in reverse to get out of Durrance's way. Trooper Walker testified that the officers tried to stop Durrance's truck by using a maneuver called the precision immobilization technique, but Durrance struck Walker's vehicle and accelerated. Finally, Durrance wrecked his truck and ran. Walker apprehended Durrance and arrested him.

Durrance testified that he never intended to strike the officers' vehicles; rather, he was merely trying to flee. Durrance thus contends that the state failed to prove beyond a reasonable doubt that he had a specific intent to injure the officers, and he enumerates as error the trial court's denial of his motion for a directed verdict.

Our standard of review for the denial of a motion for a directed verdict of acquittal is the same as our standard for reviewing the sufficiency of the evidence to support a conviction. We view the evidence in the light most favorable to the jury's verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Contrary to Durrance's argument, the state was required to prove only a general intent to injure.3 Pursuant to OCGA § 16–5–21(a)(2), an assault becomes aggravated when it is committed “with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.” Aggravated assault committed by means of a deadly weapon or offensive instrument, unlike aggravated assault committed with the intent to murder, rape, or rob, does not require a specific criminal intent.4 Although an automobile is not per se a deadly weapon or offensive instrument, it may become one depending on the manner and means by which the vehicle is used.5 The question of whether an automobile has been used in such a manner so as to constitute a deadly or offensive weapon is one for the jury to resolve.6

The evidence in the instant case, including Durrance's own testimony that he had crossed the centerline and was speeding, was sufficient to enable any rational trier of fact to find beyond a reasonable doubt that he possessed the requisite criminal intent to commit aggravated assault.7

Judgment affirmed.

BLACKBURN, C.J., and POPE, P.J., concur.

# Footnotes

1. Horne v. State, 237 Ga.App. 844–845(1), 517 S.E.2d 74 (1999).
2. Ringo v. State, 236 Ga.App. 38, 39, 510 S.E.2d 893 (1999).
3. Cline v. State, 199 Ga.App. 532, 533–534, 405 S.E.2d 524 (1991).
4. Id. at 533, 405 S.E.2d 524.
5. Blalock v. State, 165 Ga.App. 269, 270, 299 S.E.2d 753 (1983).
6. Banks v. State, 169 Ga.App. 571, 572, 314 S.E.2d 235 (1984); Quarles v. State, 130 Ga.App. 756(2), 204 S.E.2d 467 (1974).
7. Cline, supra. See also Anderson v. State, 254 Ga. 470, 472(2), 330 S.E.2d 592 (1985); Reynolds v. State, 234 Ga.App. 884, 885–886(1)(b), 508 S.E.2d 674 (1998).

Modified for Educational Use

174 Ga.App. 444

HAMBRICK

v.

The STATE.

No. 69698.

|

Court of Appeals of Georgia

April 2, 1985.

In this appeal from conviction and sentence for aggravated assault, there was evidence as follows, appellant Hambrick went to the residence of his wife's elderly stepgrandfather, John Arrington, and identified himself to the nearly blind Arrington as another of Arrington's grandsons. Arrington knew the sound of Hambrick's voice, was not deceived, and knew all along that the visitor was Hambrick. Arrington permitted Hambrick to come and remain to chat with him.

Shortly before, Hambrick had come to the house and induced Arrington's wife to leave so that the old man would be alone. When Hambrick saw her leave, he returned. Arrington customarily kept his money in snuff cans tied around his neck with stockings. Hambrick tried to pull the snuff cans off but was unsuccessful so he took the pocket knife already in his hand and cut them loose. When Arrington put his hand up to neck to try to stop Hambrick, the victim's finger was cut.

Appellant challenges the nature and role of the pocket knife as an offensive instrument. The term “offensive instrument” includes not only instruments which are offensive per se, such as firearms loaded with live ammunition. It also embraces other instrumentalities not normally considered to be offensive instruments in and of themselves but which may be found by a jury to be likely to produce death or great bodily injury depending on the manner and means of their use. Meminger v. State, 160 Ga.App. 509, 287 S.E.2d 296 (1981), rev'd on other grounds, 249 Ga. 561, 292 S.E.2d 681 (1982), vacated, 163 Ga.App. 338, 295 S.E.2d 235 (1982).

The knife in this case, though rather small and of a type suitable for carrying in the pocket, was arguably capable of inflicting the types of injuries which generally can be produced by knives, including death or great bodily injury. Whether or not the pocket knife in question constituted a deadly (or offensive) weapon was properly for the jury's determination. See Quarles v. State, 130 Ga.App. 756(2), 757, 204 S.E.2d 467 (1974); Banks v. State, 169 Ga.App. 571, 572, 314 S.E.2d 235 (1984).

From the evidence, the jury could have found that the knife was used against the elderly victim in a manner likely to produce death or great bodily injury. Furthermore, there was evidence that Hambrick did use the knife directly, to take the money from the victim's person.

We next consider Hambrick's conviction for aggravated assault. A person commits such offense when he assaults with intent to rob or with a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury. OCGA § 16–5–21. A person assaults when he either attempts to commit a violent injury to the person of another or commits an act which places another in reasonable apprehension of immediately receiving a violent injury. OCGA § 16–5–20. The court so charged.

Here again, appellant argues a lack of intent and the innocuous nature of the knife in question. For the reasons given above, we find this to be without merit.

Judgment affirmed.

DEEN, P.J., and POPE, J., concur.

Modified for Educational Use

191 Ga.App. 499

LaPANN

v.

The STATE.

No. A89A0293.

|

Court of Appeals of Georgia

May 9, 1989.

Frank LaPann was convicted at a bench trial of aggravated assault and cruelty to a child. The trial court treated the cruelty as having merged with the aggravated assault and imposed sentence for the assault as confinement for three years but suspended upon payment of a $700 fine. LaPann brings this appeal on the general ground of insufficiency of the evidence.

The evidence shows that the victim of the aggravated assault and cruelty counts, LaPann's 17–year–old adopted daughter, together with her sister, worked at a fast food restaurant. The victim and her older sister, aged 18, told their parents they were going to their place of work, and would be working late. The parents decided to go and eat supper with their children only to discover that the two girls did not report for work. (Actually the victim did work a later shift but was not at the restaurant when the parents arrived. The older sister did not report for work at all.) The parents spent several hours unsuccessfully looking for the two girls. Both parents sat up most of the night waiting for the girls to return home.

They eventually returned home at about 5:00 a.m. The parents were very upset and concerned about the whereabouts and safety of their daughters. The two young women sat down and attempted to convince their parents they had been at work. After about 30 minutes of heated discussion, the appellant reached over and removed a piece of firewood from a kindling box approximately 16 inches long, three-quarters of an inch wide, and one and one-half inches thick. While the victim was still seated, he struck her once or twice on the leg, once around the shoulder and when he sought to strike her again on the back or shoulder, she threw up her arm in defense. The blow apparently glanced off her arm, and she was struck on the top, back, part of her head. A gash resulted that was approximately three-sixteenths to one-half inch deep and about one and one-half inches long and required ten sutures to close. The evidence further indicated that each time the young woman was struck, a bruise resulted. The victim testified that her father drew back for each blow and delivered it with force. Appellant weighs about 235 pounds. Appellant denied intending to do more than impose disciplinary punishment. The daughter testified that she considered the beating as nothing more than justifiable punishment and characterized her head wound as her fault and only an accident.

A person commits aggravated assault when he assaults with any object, device, or instrument which, when used offensively against another, is likely to or actually does result in serious bodily injury. Miller v. State*,* 174 Ga.App. 703, 331 S.E.2d 616. What constitutes an offensive instrument capable of doing serious damage to the victim of an assault depends not necessarily on the nature of the object itself but on its capacity and the manner of its use, to inflict serious bodily harm. See Gabler v. State*,* 177 Ga.App. 3, 338 S.E.2d 469.

Whether the injuries sustained and the implement used to inflict those injuries amounted to an aggravated assault are questions particularly within the province of the trier of fact. Watts v. State*,* 239 Ga. 725, 727, 238 S.E.2d 894. After the trier of fact has rendered a judgment of guilty and appellant seeks to overturn that judgment on the general grounds, the only question presented to an appellate court is whether there is evidence sufficient to convince a rational trier of fact beyond reasonable doubt of guilt. Jackson v. Virginia*,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Viewing the evidence in a light most favorable to the judgment of guilt which was rendered (see Ridley v. State*,* 236 Ga. 147, 223 S.E.2d 131), we are satisfied that the judgment of the trial court had ample support and should be affirmed. See Jones v. State*,* 141 Ga.App. 17, 18, 232 S.E.2d 365.

Judgment affirmed.

DEEN, P.J., and BENHAM, J., concur.

Modified for Educational Use

303 Ga.App. 871

REESE

v.

The STATE.

No. A10A0437.

|

Court of Appeals of Georgia

April 29, 2010.

Terry Junior Reese challenges the sufficiency of the evidence underlying his conviction for aggravated assault upon a peace officer. The indictment alleged that Reese assaulted an officer “with an object, to wit: a bottle, which, when used offensively against another person is likely to result in serious bodily injury, by confronting said [officer] with said bottle.” Reese specifically argues that the state failed to prove that the bottle at issue constituted an “object ... which, when used offensively against a person, is likely to or actually does result in serious bodily injury,” as contemplated by the aggravated assault statute.1 Because Reese has demonstrated no merit in this argument, we affirm.

When an appellant challenges the sufficiency of the evidence to support his conviction, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”2

So viewed, the evidence adduced at the jury trial showed that, on May 28, 2005, a deputy sheriff arrived at Reese's residence in response to a domestic violence dispatch. Reese's wife was visibly upset when she came to the front door. She granted the officer permission to enter the home, but Reese, who was near the door and holding a 12–ounce bottle of beer, protested loudly enough for the officer to hear, “Hell, no, I pay the rent here. I say who comes in and who don't.” When the officer stepped inside, Reese approached the doorway, threw the beer bottle at the officer, tackled that officer back outside and to the ground, then briefly wrestled with another officer who had arrived as backup. Reese was quickly subdued and arrested.

An investigator with the sheriff's office was summoned to the scene. When he arrived, he found broken glass at the entryway of the residence. He observed beer bottles scattered on the floor inside the residence, as well as wet markings on inside doors. According to the investigator, the wet markings were consistent with beer bottles having been thrown about. The investigator also found that a beer bottle had been broken, apparently against a utility room door near the kitchen.

Reese argues that the state failed to show that he had used the bottle offensively; he claims that the state adduced no probative evidence regarding the weight and construction of the bottle, including whether the bottle was glass, plastic, or any other material; Reese also points out that there was no evidence that the officer was injured by the bottle itself. Where, as here, the defendant has assaulted the victim with an object which is not per se a deadly weapon, the jury may nevertheless find the object to be an instrument that is likely to result in serious bodily injury depending on the manner and means of the object's use, as well as any wounds inflicted and other evidence of the capabilities of the instrument.3 “Examples of normally non-offensive nondeadly objects which have been used in a manner as to support convictions of armed robbery or aggravated assault are: a beer bottle, a ceramic statue, a pocketknife, fists, and even a pillow and sheets.”4

Viewed in the light most favorable to the prosecution, the evidence allowed for a finding that Reese, reacting to the officer's entry into his residence despite having heard his vehement objection, approached the doorway and threw at the officer from a short distance a 12–ounce glass bottle with sufficient force that the bottle shattered upon impact. Given the circumstances underlying this case, the jury was authorized to conclude that Reese used a bottle offensively against the officer in a manner likely to have resulted in serious bodily injury.5 Reese's claim that the officer was not injured by the bottle itself is unavailing. As set forth above, the aggravated assault statute proscribes using against a person any object, device, or instrument in an offensive manner that is “likely to *or* actually does result in serious bodily injury.”6

Judgment affirmed.

MILLER, C.J., and JOHNSON, J., concur.

**Footnotes**

1. See OCGA § 16–5–21(a)(2).
2. Jackson v. Virginia, 443 U.S. 307, 319(III)(B), 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in original).
3. Ellison v. State*,* 288 Ga.App. 404, 405, 654 S.E.2d 223 (2007).
4. Livery v. State*,* 233 Ga.App. 882, 884(1), 506 S.E.2d 165 (1998) (citations and punctuation omitted).
5. See Chancey v. State*,* 258 Ga.App. 319–320(1), 574 S.E.2d 383 (2002) (finding evidence sufficient, where the appellant had swung long chain over his head while moving toward an officer, despite appellant's claim that he had no intention of hurting officer); see generally Maiorano v. State*,* 294 Ga.App. 726, 727–728(1), 669 S.E.2d 678 (2008) (finding evidence sufficient, where the appellant had used beer bottle to strike victim from behind, and the resulting cut on victim's head required stitches).
6. OCGA § 16–5–21(a)(2) (emphasis supplied); see Chancey*,* supra.

Modified for Educational Use

137 Ga.App. 548

J. A. TALLEY, Jr.

v.

The STATE.

No. 51569.

|

Court of Appeals of Georgia, Division No. 2

Jan. 23, 1976.

Appellant was convicted of aggravated assault and sentenced to a total of 50 years in the penitentiary. In his appeal, he enumerates an error on general grounds.

Appellant contends that the evidence is insufficient generally as to the aggravated assault count. The transcript shows that on the night of July 12, 1975, a 12-year-old girl was spending the night with her 76-year-old grandfather in his house in LaGrange. She testified that in the early morning hours of July 13 she was awakened by a noise and saw a black male hitting her grandfather on the head with a lamp. When the assailant saw the girl, he demanded money and a pistol. She replied they had neither, at which time he attempted to remove a watch from the wrist of her grandfather. When the grandfather resisted, the assailant began to stab him with a knife. The assailant then left. The girl immediately called the police, and was able later to identify the appellant as the assailant by means of a photograph and at a line-up. The grandfather could not identify the assailant but did identify his watch when it was shown to him by policemen. The watch had been recovered by the police from a pawn shop where it had been pawned by appellant. Appellant testified that he had been out drinking on the night of the 12th and was at a friend's house asleep during the early morning when the crimes were actually committed. He stated that he had bought the watch from a stranger during the night of the 12th and had pawned it a day or two later when he became short of cash.

It is appellant's contention that the above evidence is insufficient to show the commission of aggravated assault because the lamp was not shown to have been used as an offensive instrument. While the appellant's alibi and explanation of how he happened to have the watch may warrant the jury's consideration, they do not require the jury to find in his favor where they have no reasonable doubt of his guilt.

As to the conviction of aggravated assault, the evidence is sufficient to show that the lamp was used as an offensive instrument. Appellant was charged with assaulting the grandfather ‘with a lamp, an offensive instrument in the manner used . . .’ A lamp is not, per se, an offensive instrument within the meaning of Ga.L.1968, pp. 1249, 1280 (Code Ann. s 26-1302). It was, therefore, incumbent on the state to show the circumstances of its use by appellant which made it an offensive instrument. See, e.g., Williams v. State, 127 Ga.App. 386(1, 2), 193 S.E.2d 633. In this respect, the state's case was weak, though not fatally so. The state did not introduce the lamp into evidence. Nor was the jury informed of the lamp's size, weight or sharpness nor the number of blows struck, the degree of force used, or what portion of the lamp inflicted the wounds. The absence of such evidence resulted in reversal in the Williams case, supra, where shoes were allegedly used as an offensive instrument. Here, however, the testimony of the girl who saw the appellant “hitting him (the grandfather) on the head with the lamp,” plus the medical testimony and photographs of severe lacerations (“The ear was torn completely in two (sic) in two places.”) and bruises were sufficient indication of the severity of the blows to show the lamp was used as an offensive instrument. See Quarles v. State, 130 Ga.App. 756, 204 S.E.2d 467.

Judgment affirmed.

PANNELL, P.J., and EVANS, J., concur.

Modified for Educational Use

358 Ga.App. 329

TYSON

v.

The STATE

A20A1662

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Court of Appeals of Georgia

February 5, 2021

Following a jury trial, Eugene Donald Tyson was convicted of aggravated assault. Tyson now appeals from the denial of his motion for a new trial, arguing that the evidence was insufficient to sustain his conviction. For reasons explained more fully below, we find no error and affirm.

“On appeal from a criminal conviction, the defendant is no longer entitled to a presumption of innocence and we therefore construe the evidence in the light most favorable to the jury's guilty verdict.” (Citation and punctuation omitted.) Maddox v. State, 346 Ga. App. 674, 675, 816 S.E.2d 796 (2018). So viewed, the record shows that a police officer responded to a 911 call about a potential assault at a local storage facility. When she arrived at the scene, the officer found the victim, who was approximately seven months pregnant, with visible injuries to her face and neck. The victim's injuries were significant enough that the officer called an ambulance and, after examining the victim at the scene, EMTs transported her to the hospital for treatment.

When interviewed by the officer, the victim identified Tyson as her assailant and explained that Tyson was both her boyfriend and the father of her unborn child. The victim also reported that she and Tyson began fighting when, after picking up the victim's prescribed pain medication from the pharmacy, she refused to share the pills with Tyson. As the couple was driving, they approached the storage facility, and Tyson pushed the victim out of his truck and threw the victim's belongings after her. Tyson then exited the truck, chased the victim with a baseball bat, and kicked her in the stomach.

Based on her interview of the victim and two eyewitnesses, the officer obtained a warrant for Tyson's arrest, and Tyson was subsequently indicted on two counts of aggravated assault.1 At trial, in addition to the testimony of the responding officer, the State also presented the testimony of the victim and two eyewitnesses to the incident. During her testimony, the victim identified Tyson as her assailant, but stated that because of her drug use, she did not remember very much about the assault, which had occurred five years earlier.2 The victim testified, however, that her memory of the incident would have been clear on the day the assault happened, and she indicated that she had no reason to doubt any of the facts she related to the responding officer. Moreover, the victim could recall that she was pregnant at the time and that her obstetrician had prescribed hydrocodone for the victim's back pain. The victim also remembered that she and Tyson were fighting, both physically and verbally, as Tyson drove them on the day in question. She described the physical fighting as “violent,” and she remembered that she was seen at a hospital.

The first eyewitness worked as an office assistant at the storage facility. On the day in question, she noticed a truck driven by Tyson pull into the facility's parking lot going “kind of fast,” and then brake abruptly. She watched as a visibly pregnant woman exited the truck, and it looked to her as though the woman had been pushed from the vehicle. Tyson and the woman appeared to be fighting and, after the woman fell to the ground, the man “was just kind of beating,” “throwing punches at,” and kicking her. When Tyson left the victim to get back in the truck, the woman also attempted to return to the vehicle. Before she could do so, however, Tyson drove out of the parking lot and then turned back into the lot, with the woman hanging onto the truck's door the entire time. After the truck re-entered the parking lot, Tyson exited the vehicle, resumed hitting the woman, and kicked her in the stomach. The eyewitness also saw Tyson hit the woman with a baseball bat. She speculated that the attack on the woman lasted for a few minutes and during that time, Tyson was “just beating the tar out of” the victim. According to the eyewitness, she remembered the incident well, because “it was the worst thing” she had ever seen, and during the attack she wondered whether the victim “[was] going to die.”

During the early part of the assault, the first eyewitness called 911, and after the attack ended, she took the victim into her office to wait for the police. At that time, the eyewitness observed that the victim had injuries to her face and she also saw blood coming down the victim's legs that appeared to be coming from “between her legs.” The second eyewitness corroborated many of the facts testified to by the police officer and the first eyewitness.

Based on the foregoing evidence, the jury found Tyson guilty of committing aggravated assault with his hands and feet (Count 1), but acquitted him of committing aggravated assault with a baseball bat (Count 2). The trial court entered judgment on the jury's verdict, and Tyson's attorney filed a motion for a new trial in which Tyson asserted that the evidence was insufficient tosustain his conviction.

Tyson contends that the evidence was insufficient to sustain his conviction for aggravated assault (Count 1). With respect to this claim of error,

the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. In determining that question, we consider the inferences that can be logically derived from the evidence presented at trial. As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, the jury's verdict will be upheld.

(Citation and punctuation omitted.) Wade v. State, 305 Ga. App. 819, 821, 701 S.E.2d 214 (2010).

To convict Tyson of aggravated assault, the State was first required to prove that Tyson committed an assault – i.e., that he “[a]ttempt[ed] to commit a violent injury to [the victim] or ... commit[ted] an act which place[d] [the victim] in reasonable apprehension of immediately receiving a violent injury.” OCGA § 16-5-20 (a). And to prove an aggravated assault, the State was required to show that Tyson committed the assault “[w]ith a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury[.]” OCGA § 16-5-21 (a) (2). Here, Tyson was charged with committing aggravated assault against the victim by using his hands and feet to push, strike, and kick the victim in an attempt to inflict a violent injury on her. Tyson contends that the State failed to prove the aggravated nature of the assault, because it failed to show that his hands and feet constituted offensive instruments. We disagree.

Although hands and feet are not offensive instruments per se, they can become offensive instruments when used to strike another person. In the Interest of T. W., 280 Ga. App. 693, 694, 634 S.E.2d 854 (2006). Whether hands and feet constituted offensive instruments in a particular case is a question for the jury. Goodrum v. State, 335 Ga. App. 831, 832 (1), 783 S.E.2d 354 (2016). And to prove that hands and feet qualified as offensive instrument, the State may rely on evidence of the circumstances surrounding the assault, including the way in which the hands and feet were used and any injury suffered by the victim. See Jones v. State, 294 Ga. App. 564, 566 (1), 669 S.E.2d 505 (2008). The State, however, is not required to prove that the victim sustained a serious injury. Rather, it need only prove that given the way in which the defendant's hands and feet were used against the victim, she was likely to receive “serious bodily injury[.]” OCGA § 16-5-21 (a) (2). See also Watson v. State, 301 Ga. App. 824, 826, 689 S.E.2d 104 (2009) (to prove aggravated assault “the State was only required to show that [the object used against the victim] was likely to result in serious bodily injury, not that it actually caused such injury”).

In this case, the first eyewitness testified that Tyson used his hands and feet to “beat the tar out of the victim,” the victim, she described the incident as one of the worst things she had ever witnessed, and explained that the attack was so vicious, she wondered if the victim would survive it. Additionally, the victim herself described the argument she had with Tyson that day as involving violent, physical contact, and she reported to police that Tyson pushed her from his truck, chased her, and kicked her in the stomach. Moreover, the evidence showed that Tyson's use of his hands and feet against the victim resulted in the victim sustaining visible injuries to her head and face. The victim also sustained some type of injury that caused her to bleed down both of her legs, and her injuries were severe enough that trained medical personnel determined the victim needed examination and treatment at a hospital. Despite Tyson's arguments to the contrary, we find that this evidence supports the jury's conclusion that Tyson used his hands and feet as offensive instruments in assaulting the victim. See In the Interest of Q. S., 310 Ga. App. 70, 75 (1) (b), 712 S.E.2d 99 (2011) (defendant's aggravated assault conviction was supported by evidence showing that defendant used her hands to grab the victim's hair, pull her down, and slam the victim's head on the ground, and the defendant thereafter used her feet to kick the victim; as a result, the victim's lips and nose were bloodied, her face was bruised and swollen, she complained of headaches and dizziness, and she received treatment at the hospital for injuries); Scott v. State, 243 Ga. App. 383, 385 (1) (d), 532 S.E.2d 141 (2000) (evidence showing that the defendant “beat the victim about the head and face with his hands is sufficient to authorize the jury's verdict that [the defendant] is guilty, beyond a reasonable doubt, of aggravated assault”).

Judgment affirmed.

Dillard, P. J., and Rickman, P. J., concur.

# Footnotes

1. Count 1 of the indictment charged Tyson with aggravated assault by using his hands and feet as offensive instruments to intentionally push, strike, and kick the victim in an attempt to commit a violent injury. Count 2 charged Tyson with aggravated assault by brandishing a baseball bat at the victim.
2. According to the victim, at the time of the assault, both she and Tyson were taking methamphetamine and “pills.”

Modified for Educational Use

325 Ga.App. 51

WEAVER

v.

The STATE.

No. A13A1610.

|

Court of Appeals of Georgia

Nov. 20, 2013.

Michael David Weaver, also known as Michael Carothers, pled guilty to one count of aggravated assault for spraying another man with pepper spray. Over two weeks later, Weaver filed a pro se motion to withdraw his guilty plea. The trial court denied Weaver's motion, and he now appeals, arguing that an insufficient factual basis exists for his plea because the State's proffer failed to show that pepper spray is either an offensive instrument or an object, device, or instrument likely to cause serious bodily injury under OCGA § 16–5– 21(a)(2). We disagree and affirm.

“[A] ruling on a motion to withdraw a guilty plea lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of that discretion.” (Citation and footnote omitted.) Sheffield v. State*,* 270 Ga.App. 576, 576– 577(1), 607 S.E.2d 205 (2004). Uniform Superior Court Rule (USCR) 33.9 provides: “Notwithstanding the acceptance of a plea of guilty, the judgment should not be entered upon such plea without such inquiry on the record as may satisfy the judge that there is a factual basis for the plea.”

At the plea hearing, the State explained that the evidence would show that as the victim and his friend walked toward their homes, Weaver, who was sitting in his vehicle, called the victim to come up to the vehicle. When the victim approached, Weaver sprayed him “directly in the face with mace.” The victim “felt like his face was melting,” the spray burned his eyes and temporarily blinded him, so that his friend had to help him as he stumbled to his home three or four blocks away. The victim remained in a “great deal of pain” after his arrival home and throughout his return to the scene of the incident with his mother to talk to the police.

Weaver argues that the factual basis proffered by the State was insufficient to establish the foundation for the plea because “[t]he act of merely spraying pepper spray into the face of an adult from a foot away as charged here is not a means likely to cause serious bodily injury.” We disagree.

As both parties correctly acknowledge, a specific definition of “serious bodily injury” has not been provided by statute or case law in Georgia. Instead, “[w]hether an offensive instrument is ... one likely to cause serious bodily injury is a question for the jury, which may consider all the circumstances surrounding the instrument and the manner in which it was used. [Cits.]” Harwell v. State*,* 270 Ga. 765, 767–768(1), 512 S.E.2d 892 (1999). These circumstances include “the manner and means of the object's use, as well as any wounds inflicted and other evidence of the capabilities of the instrument.” (Citation and footnote omitted.) Reese v. State*,* 303 Ga.App. 871, 872, 695 S.E.2d 326 (2010). This court has previously held that a bruise provides evidence that an instrument was likely to cause serious bodily injury. See Reynolds v. State*,* 294 Ga.App. 213, 217(1)(c), 668 S.E.2d 846 (2008) (bruises caused by wooden plank); Hernandez v. State*,* 274 Ga.App. 390, 617 S.E.2d 630 (2005) (welt or bruise caused by branch sufficient to support finding of “likely to result in serious bodily injury”).

In Harwell v. State*,* 231 Ga.App. 154, 497 S.E.2d 672 (1998), this court concluded:

We must give some credit to the jury for common sense, for knowing that a stun gun used in the manner it was used in this case is not an “object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.” It was not used to beat him over the head, for example.

Id. at 157(3)(f), 497 S.E.2d 672. The Georgia Supreme Court, in reversing our decision, however, found that the use of a stun gun to administer a temporary shock presented a jury question on the issue of whether the offensive use was likely to result in serious bodily injury. 270 Ga. at 767–768(1), 512 S.E.2d 892.

Here, the State's proffer showed that the victim suffered a burning sensation in his eyes and face, was in a great deal of pain, and was temporarily blinded. The trial court did not abuse its discretion by concluding that this evidence supported a guilty plea to aggravated assault based upon the use of “any object, device or instrument which, when used offensively against a person, is likely to ... result in serious bodily injury.” OCGA § 16–5–21(a)(2). Cases from other jurisdictions support this conclusion. See, e.g., United States v. Mosley, 635 F.3d 859, 864(II) (6th Cir.2011) (concluding after scientific and physiological analysis that “the use of pepper spray, a device chosen for self-defense precisely because it injures and incapacitates attackers, ‘presents a serious potential risk of physical injury to another’ when used offensively” under federal sentencing guidelines); State v. Harris, 966 So.2d 773, 778–779 (La.App.2007) (concluding that pepper spray caused “serious bodily injury,” reasoning that “[i]t was not necessary for the spray to produce permanent injuries, but simply to produce ‘extreme physical pain,’ and that degree of pain was evident by the testimony of the [victims]”).

We therefore affirm the trial court's denial of Weaver's motion to withdraw his guilty plea.

Judgment affirmed.

DOYLE, P.J., and McFADDEN, J., concur.