IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE,	)	
	)	
Appellee,	)	Case No. CA-17-006
	)	(TC CR17-132)
v.	)	
	)	
GARCIA, JONATHAN,	)	OPINION AND ORDER
	)	
Appellant.	)	

I. Procedural Posture

On March 18, 2017, Appellant Jonathan Garcia was charged by Complaint with: Count 1- Assault and Battery on a Tribal Official; Count 2- Liquor Violation; and Count 3- Possession, Manufacture, Delivery, and Advertisement of Drug Paraphernalia. The factual basis for Count 1 was that Appellant spit at Officer Tapia. Prior to trial, Appellant moved to dismiss Count 1, arguing that spitting did not constitute battery under the applicable section of the Criminal Code. Appellant's motion to dismiss was denied. Also prior to trial, the Tribe provided noticed of its intent to introduce "other acts" evidence. Appellant's motion to preclude introduction of the same was denied. The matter proceeded to jury trial, and Appellant's motion for directed verdict was denied. At trial, Appellant was convicted of Counts 1 and 3 and acquitted of Count 2. Appellant sought review of the trial court's decisions to deny the motion to dismiss Count 1, to deny the motion for directed verdict regarding Count 1 and to admit other acts evidence.

II. Motion to Dismiss/for Directed Verdict

Title 4, Chapter 1, Subchapter C, Section 140 of the Tribal Code is entitled "Assault & Battery on a Tribal Official," and provides in relevant part, that:

(A) Any person who shall
  (1) willfully strike any tribal official including police officers, or otherwise inflict bodily injury, or who shall by offering violence cause another to harm himself; or
  (2) willfully attempt to commit battery upon a tribal official or police officer by force or violence or any unlawful act, threat, or menacing conduct which causes the tribal official or police officer to reasonably believe that

he/she is in danger of receiving an immediate battery, shall be guilty of an offense.

4 PYTC § 1-140.

Prior to trial, Appellant moved to dismiss Count 1, arguing that an attempt to spit on Officer Tapia did not meet the Code's definition of Assault and Battery on a Tribal Official. On appeal, the Tribe agreed that there was no willful strike and no bodily injury under Section 140(A)(1). Instead, the Tribe argued that spitting was an attempt to strike the officer, which constituted an attempt to commit battery or an act that caused the officer to believe he/she was in danger of receiving an immediate battery under Section 140(A)(2).

The Tribe relies on cases from the First, Seventh and Ninth Federal Courts of Appeals that hold spitting is an offensive touching that constitutes assault. However, pursuant to Section 150(A)- Battery, "Any person who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering violence cause another to harm him[self] shall be deemed guilty of an offense." As evidenced by the battery definition in Section 150, despite the title, as written, Section 140 only includes battery and is not so broad as the other assault definitions cited by the Tribe. The spit did not actually contact the officer, and there is no definition making that an offense under Section 140.

The trial court denied Appellant's motion to dismiss Count 1, based on allegations that Appellant was Hepatitis C positive, and reasoning that spitting on the officer could have been an attempt to cause bodily injury. At trial, after the Tribe rested, Appellant moved for a directed verdict on Count 1, arguing that there was no evidence submitted at trial regarding Appellant's Hepatitis C status and no evidence regarding whether spitting could transmit Hepatitis C. On appeal, the Tribe agreed that Appellant was correct regarding the evidence, or lack thereof, presented at trial.

Because the conduct at issue does not meet the Code's definition of Assault and Battery on a Tribal Official, Appellant's motion to dismiss Count 1 should have been granted. Similarly, Appellant's motion for directed verdict as to Count 1 should have been granted. Therefore, the conviction as to Count 1 is overturned.

III. Other Acts Evidence

At trial, the Tribe introduced evidence of a separate incident in which Appellant was alleged to have spit at a detention officer. On appeal, the Tribe argued that the proffered evidence was admissible for purposes of proving intent. However, the other act occurred subsequent to the charged conduct, so the probative value is limited, and any probative value was outweighed by its prejudicial effect. Admission of the evidence regarding this unrelated incident was the improper use of character evidence to prove conformity therewith. Although not necessarily related to the allegations regarding drug paraphernalia in Count 3, it is unknown whether the improper character evidence

influenced the jury's verdict with respect to Count 3. Therefore, Appellant is granted a new trial on Count 3.

IT IS SO ORDERED this 31st day of May, 2018.

Hon. Robert Blaeser

Hon. Rebecca Plevel

Interim Chief Justice Robert J. Miller, concurring in part, and dissenting in part.

I concur with my fellow Justices that the admission of the other acts evidence requires that the conviction under count 1 be overturned.

I write separately to respectfully dissent, however, from the majority's opinion that Appellant's conduct "does not meet the Code's definition of Assault and Battery on a Tribal Official" under 4 PYTC § 1-150 and 4 PYTC § 1-140(A)(2).

In contrast, I believe that Appellant's attempt to spit on a tribal police officer meets the code's definition of the offense of battery. Under 4 PYTC § 1-150 a battery is to "willfully strike another person." Code section 4 PYTC § 1-140(A)(2) defines the offense of Assault and Battery on a Tribal Official as being to "willfully attempt to commit battery upon a tribal official or police officer . . . ." Appellant did willfully attempt to strike and thus commit battery on the officer by attempting to strike the officer with spit.

Hon. Robert Miller

No. CA-17-006

Pascua Yaqui Tribe Court of Appeals

Pascua Yaqui Tribe, Appellee

v.

Johnathan Garcia, Appellant.

For the Office of the Prosecutor: Oscar J. Flores, Jr., 7777 S. Camino Huivisim Bldg. A, 2nd Floor, Tucson, AZ 85757

For the Public Defender: Melissa L. Acosta, 7474 S. Camino de Oeste Tucson, AZ 85757

Order Regarding Oral Argument

Pursuant to 3 PYTC § 2-3-180, sixty (60) minutes of oral argument will be held in this appeal on May 10, 2018 at 11 a.m. in Courtroom 3.

So **ORDERED** this 10th day of April, 2018.

Robert J. Miller
Interim Chief Justice
Pascua Yaqui Court of Appeals

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. GARCIA, JONATHAN, Appellant.	APPELLATE CASE NO. CA-17-006 PASCUA YAQUI TRIBAL COURT NO. CR-17-132 ORAL ARGUMENT REQUESTED

APPELLANT'S REPLY BRIEF

William R. Soland
PYT Bar No. 10266
PASCUA YAQUI PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Tribal Authority

Federal Authority

I. INTRODUCTION

Appellant, Jonathan Garcia, hereby Replies to Appellee Tribe's Response Brief in this matter. Appellee's Response exhibits a pattern of side-stepping the primary points raised by the Opening Brief, and fails to engage on a number of issues. Appellant therefore respectfully requests that Oral Argument on this matter be scheduled with a three-judge panel pursuant to 3 PYTC § 2-3-180. Alternatively, Appellant requests this Court issue a ruling overturning the Trial Court's Judgment and Orders on the issues raised in the Opening Brief.

II. ARGUMENT

In the Opening Brief, Mr. Garcia argued as follows: (A) that his Motion for Directed Verdict on Count One of the Complaint should have been granted because Appellee produced no evidence of an essential element of the offense; (B) that his Motion to Dismiss for Lack of Probable Cause should have been granted because the Complaint did not allege a striking, or an attempt to cause injury; and (C) that evidence of other bad acts should have been precluded at trial. Appellee's Response does not directly refute these arguments. As a result, the Opening Brief and the Response appear to be two ships, passing in the night. Below is Appellant's attempt to remedy this situation.

A. MR. GARCIA'S MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN GRANTED BECAUSE TRIBE FAILED TO PRODUCE ANY EVIDENCE OF THE ALLEGED HEPATITIS C DIAGNOSIS THAT FORMED THE BASIS FOR THE TRIAL COURT'S FINDING OF PROBABLE CAUSE.

Previously, Appellant argued that the Trial Court erred in denying the Motion for Directed Verdict, because no evidence was presented at trial regarding Mr. Garcia's alleged Hepatitis C diagnosis. This was critical because the Trial Court, as discussed in the Opening Brief, based its finding of probable cause on evidence presented outside of trial that Ofc. Tapia feared injury due to Mr. Garcia's alleged illness. Appellee's Response goes into great detail regarding the issue of substantial evidence but never addresses or refutes this main point of appellant's argument. In its ruling on Mr. Garcia's Motion to Dismiss, the honorable trial court found that "...there is a factual basis for this allegation due to the officer's personal knowledge of Mr. Garcia's medical condition of being infected Hepatitis C, and the officer provided the particularized and objective basis for suspecting the defendant committed an offense of assault and battery on a tribal official[1]." Absolutely no evidence of Mr. Garcia's Hepatitis C status, or lack thereof, was introduced at Trial. Appellee does not refute this or address it in any way.

---

[1] Opening Brief, Citing Record at 12

While Appellee is correct that, in a ruling on a motion for a directed verdict, "the court should not substitute its own determination of the credibility of witnesses, the weight of the evidence, and the reasonable inferences to be drawn for that of the jury[2]," here there was absolutely no evidence presented at trial to support the factual basis of the offense. It is clear from the Honorable Trial Court's denial of Mr. Garcia's Motion to Dismiss that Mr. Garcia's Hepatitis C status was the basis for the Trial Court's denial. No evidence on this point was submitted by Appellee at trial. Appellee has therefore not provided "more than a scintilla" of proof, and has not provided proof that "reasonable persons could accept as adequate and sufficient" of this essential element of the offense[3]. Instead there is "a complete absence of probative facts to support a conviction[4]."

Without any evidence of Mr. Garcia's Hepatitis C status, the jury could not have properly found that Mr. Garcia committed Assault & Battery on a Tribal Official, since the Trial Court previously found that the factual basis for this charge hinged on Mr. Garcia's Hepatitis C status. Not only was there no evidence of Mr. Garcia's medical condition discussed at trial, there was no evidence presented by Appellee that Ofc. Tapia had any knowledge of the condition, or that it caused Ofc. Tapia to fear he would receive an injury. Because Appellee failed to present any

---

[2] Appellee's Response, citing *U.S. v. Mariani*, 725, F.2d 862, 865 (2nd Cir. 1984).
[3] *See*, Id, citing *State v. Mathers*, 165 Ariz. 64, 67 (Ariz. 1990).
[4] *See*, Id, citing *State v. Sabalos*, 178 Ariz. 420, 974 (Ariz. App. 1994) (quoting *Mathers*, 165 ARiz. At 67).

evidence of a fact that formed the basis for an essential element of the Offense, Appellant's conviction for Count 1, Assault & Battery on a Tribal Official, should be overturned.

B. MR. GARCIA'S MOTION TO DISMISS FOR LACK OF PROBABLE CAUSE SHOULD HAVE BEEN GRANTED, AS SPITTING NEITHER CONSTITUTES A "STRIKING" OR AN "ATTEMPT TO CAUSE INJURY."

In Opening, Appellant argued that spitting did not meet the plain language definition of striking, nor did it constitute otherwise attempting to cause injury pursuant to the Code. Appellant argued that federal authority cited by Appellee when this issue was argued to the Trial Court was inapplicable. That federal authority interpreted a federal assault statute, which is not at issue here, and which differs substantially from the definition of Assault & Battery pursuant to the Tribal Code. In Response, Appellee cites to the same federal authority previously refuted by Appellant. Appellant hereby reasserts that while spitting may be an "unwanted touching," it is not a battery under the definition in the Tribal Code, and Mr. Garcia's Motion to Dismiss should have been granted. Spitting is neither a "striking," nor an "attempt to cause injury."

1. STRIKING

Appellant argued that an attempted spitting was not an attempted battery under the Code because it was not a "striking" by any reasonable definition. Appellee does not address Mr. Garcia's arguments regarding the definition of Assault & Battery on a Tribal Official pursuant to

the Tribal Code[5]. Instead, Tribe cites the same three cases already discussed in Mr. Garcia's Opening Brief, which interpret the same Federal assault statute that is not applicable here, and which adhere to a common law "offensive touching" standard that has not been adopted by this jurisdiction. As Apellee notes, "the Tribal Court is not bound by the decisions of foreign jurisdictions,[6]" and Apellee gives no indication why these decisions from foreign jurisdictions should be applicable here. Nor does Apellee indicate how "striking" should be defined, or why Mr. Garcia's definition should not be adopted. A spitting is not an attempt to "hit sharply, as with the hand, the fist, or a weapon[7]." As noted in the Opening Brief, the Trial Court did not find that spitting constituted a striking, but rather that it constituted an attempt to cause injury, based on Ofc. Tapia's knowledge of Mr. Garcia's Hepatits C status, discussed above.

2. INJURY

It is Mr. Garcia's position that "striking" in the Code's definition of Battery is an example of a way in which a defendant may "otherwise inflict bodily injury." For this reason, Appellant argued that Mr. Garcia's conduct was not a battery, since it was not an attempt to inflict injury. Tribe argues that there is no need to prove that an injury was intended, "because 4

---

[5] See generally, Appellee's Response, pages 6-7.
[6] Id, page 7.
[7] Opening Brief, page 8, citing The American Heritage College Dictionary, 3rd Ed, page 1344 (1993).

PYTC § 1-150(A) is written in the disjunctive[8]." To the contrary, the Code's definition of Battery is written in such a way as to make "strike" an example of "otherwise inflict bodily injury." The lack of a serial comma between "to strike" and "or otherwise inflict bodily injury" clearly indicates this is one phrase, not two separate activities[9]. Additionally, Appellant's argument here is at odds with the Trial Court's decision finding probable cause, since, as discussed above, the Trial Court found probable cause based on an attempt to cause injury.

Mr. Garcia's Motion to Dismiss should have been granted, as Mr. Garcia's actions, though they may have constituted an "offensive touching" under common law, do not constitute an attempt to cause injury. Even if Apellee is correct that "striking" is meant to be separate from "attempt to cause injury," they have not indicated how a spitting constitutes a "striking."

C. THE TRIAL COURT'S RULINGS ADMITTING EVIDENCE OF OTHER BAD ACTS EVIDENCE WAS IN ERROR.

Appellant argued that evidence of a subsequent incident of spitting involving Mr. Garcia was not relevant, and should have been precluded at trial. Additionally, this evidence was

---

[8] Appellee's Response, page 7 (footnote removed). Appellee notes, correctly, that while Mr. Garcia was charged under 4 PYTC § 1-140 (A) (2), that section refers back to the Tribal Codes' definition of Battery, under 4 PYTC § 1-150 (A).

[9] See *O'Connor v. Oakhurst Diary*, 851 F.3d 69 (1st Cir. 2017), holding that the lack of a serial comma meant that employees' activities did not fall under an exemption from overtime requirements.

needlessly cumulative, and likely caused undue prejudice. Appellee argues in Response that this evidence was submitted to prove intent, and that it was not unduly prejudicial. In doing so, Appellee ignores the issues raised in the Opening Brief that address exactly these points.

1. INTENT

Appellee does not argue that the subsequent spitting incident was offered to prove absence of mistake or accident here, apparently accepting Appellee's contention that this was not at issue at trial. Instead, they argue that this evidence was offered to prove intent[10]. While this has been Appellee's consistent position throughout these proceedings, they have provided no explanation on how a subsequent action of spitting proves intent. Appellant does not discuss the *San Martin* standard, that "evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent[11]." Nor does Appellee explain why this Court should disregard the 9th Circuit's ruling in *Bettencourt*, that "[a] showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time[12]."

---

[10] *See* Appellee's Response, pages 8-9.
[11] Opening Brief, citing *U.S. v San Martin*, 505 F.2d 918, 923 (5th Cir. 1974)
[12] Id, citing *U.S. v. Bettencourt*, 615 F.2d 214, 217 (9th Cir. 1980).

Appellee cites *U.S. v. Castillo* to argue that "[u]nless the evidence of other acts only tends to prove propensity, it is admissible[13]." Appellee's reading of *Castillo* is overbroad, and in conflict with the black letter law of the Pascua Yaqui Rules of Evidence Rule 8, which state that character evidence is presumptively inadmissible. Nor does Appellee make any effort to reconcile *Castillo* with *San Martin* or *Bettencourt*.

Under a reasonable reading of *Castillo*, the evidence of the subsequent spitting incident should not have been admitted, since *Bettencourt* and *San Martin* make clear that evidence of a separate assault, or any other crime involving "intent of the moment" is not probative of intent for the offense charged. The evidence of the other spitting incident is not probative of intent or any other element of the offense charged, and therefore fails to meet the first part of the four-part *Hardrick* test cited by Appellant[14]. Therefore, this evidence "only tends to prove propensity," and nothing else. It fails the *Castillo* test. As Appellee notes, relevance of "other act" evidence is reviewed de novo[15]. The subsequent incident was not relevant, and should not have been admitted.

---

[13] Appellee's Response, citing *U.S. v. Castillo,* 181 F.3d 1129, 1134 (9th Cir. 1999).
[14] Id, page 9, citing *U.S. v. Hardrick*, 766 F.3d 1051, 1055 (9th Cir. 2014)(quoting *U.S. v. Ramirez-Robles*, 386 F.3d 1234, 1242 (9th Cir. 2004).
[15] Id, page 9, citing *U.S. v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999).

2. UNFAIR PREJUDICE

In Appellant's Opening Brief, he stated that "repeatedly offering evidence to the Jury of an unrelated incident of spitting was needlessly cumulative, may have confused the jury, caused undue delay, wasted time, and caused unfair prejudice to the jury far in excess of any probative value[16]." Apellee, in Response, confirms this is the proper standard[17]. Although Appellee cites *State v. Schurz*, for the well-worn axiom that all relevant evidence is adverse to the opponent[18], they do not engage in any explanation of why the evidence in this case is not unduly prejudicial. Indeed, Appellee merely claims that it "is not unduly prejudicial" with no explanation.

As Mr. Garcia noted previously, "[f]irmly rooted in our jurisprudence is the proposition that evidence of other crimes of the defendant is ordinarily inadmissible in a criminal trial... because the minds of jurors could be influenced against the accused to a degree out of proportion to the probative value of the evidence[19]." Appellee offers no explanation for why this should not be the case here, except to state, simply, that it isn't.

The fact remains that allegations of spitting create a visceral reaction in many people: a reaction of disgust. Unnecessarily cumulative evidence from multiple witnesses regarding unrelated incidents of spitting should have been excluded at trial to prevent such unduly

---

[16] Opening Brief, page 18.
[17] Appellee's Response, citing Federal Rules of Evidence 403 and *U.S. v. Boise*, 916 F.2d 497, 402-03 (9th Cir. 1990).
[18] Id, citing *State v. Schurz*, 176 Ariz. 46, 52 (Ariz. 1993)
[19] Opening Brief, page 18, citing *U.S. v. Jamar*, 561 F.2d 1103, 1106 (4th Cir. 1977).

prejudicial material reaching the jury. Although Apellant does not admit the evidence was relevant (see above), even if it was, it's probative value was miniscule compared with this evidence's tendency to cause undue prejudice.

For this reason, since the subsequent conduct was not relevant to prove intent, since it was submitted only to prove propensity, and since any probative value the subsequent act may have had was vastly outweighed by its tendency to cause undue prejudice, Appellant asks this Court to find that the Trial Court abused its discretion in admitting the evidence of subsequent bad acts. Furthermore, Appellant asks that the convictions on Counts 1 and 3 be overturned, or, in the alternative, that a new trial be granted with any subsequent or prior incidents of spitting excluded.

III. CONLCUSION

For the foregoing reasons, Mr. Garcia requests that this Court overturn his convictions on Count 1 on the grounds that the Trial Court erred in denying his Motion to Dismiss, and his Motion for Directed Verdict. The allegations in the Complaint were not an Assault & Battery on a Tribal Official pursuant to the Code. Even if they were, Tribe failed to produce any evidence of an essential element at trial: there was no evidence presented that Mr. Garcia was Hepatitis C positive, or that Ofc. Tapia knew about it, and therefore no evidence of the alleged attempt to cause injury that formed the basis of the Trial Court's denial of the Motion to Dismiss.

Additionally, Mr. Garcia requests that the convictions on Counts 1 and 3 be overturned due to the Trial Court's error in admitting improper propensity evidence, or else that a new trial be granted on these counts[20] in which the propensity evidence is excluded.Appellant respectfully requests that Oral Argument on this matter be scheduled with a three-judge panel pursuant to 3 PYTC § 2-3-180. This Appeal is now at issue.

Respectfully submitted this 2nd the Nov, 2017 by:

William R. Soland,

Deputy Public Defender

[20] Or Count: if this Court overturns the conviction on Count 1, only Count 3 would require a new trial, since Mr. Garcia was acquitted of Count 2.

CERTIFICATE OF SERVICE

I hereby certify that Mr. Garcia's Appellant Brief was delivered electronically this date to:

Linda Imonode-Skemer
Linda.Imonode@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

Simon Stanley
Simon.Stanley@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Mr. Garcia's Appellant Brief was delivered this date to:

Oscar Flores
Oscar.Flores@pascuayaqui-nsn.gov
Chief Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

Kendrick Wilson
Kendrick.Wilson@pascuayaqui-nsn.gov
Deputy Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 2nd day of Nov, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7777 S. CAMINO HUIVISIM
BLDG. A, 2ND FLOOR
TUCSON, ARIZONA 85757
(520) 879-6251

Kendrick Wilson
Deputy Prosecutor

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION, ARIZONA

PASCUA YAQUI TRIBE, Plaintiff/Appellee vs. GARCIA, JONATHAN Defendant/Appellant	**APPEALS CASE NO: CA-17-006** **TRIBAL COURT NO: CR-17-132** **APPELLEE'S RESPONSE BRIEF**

COMES NOW, the Pascua Yaqui Tribe by and through the Pascua Yaqui Chief Prosecutor, OSCAR J. FLORES, and the undersigned Deputy Prosecutor, KENDRICK WILSON, and hereby respectfully submits the following Response Brief.

Respectfully submitted this 8th day of November, 2017.

KENDRICK WILSON
Deputy Prosecutor
Kendrick.Wilson@pascuayaqui-nsn.gov

Original filed with the
Clerk of the Pascua Yaqui Court of Appeals

On:

Copy Mailed/Delivered to:

Honorable Judge Melvin Stoof
Pascua Yaqui Tribal Court

William Soland
Office of Public Defender
Attorney for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FACTS:

On March 18, 2017, Defendant/Appellant, Jonathan Garcia, was charged with Count One, Assault and Battery on a Tribal Official; Count Two, Liquor Violation and Count Three, Possession, Manufacture, Delivery, and Advertisement of Drug Paraphernalia. *PYT v. Jonathan Garcia* Pascua Yaqui Trial Court Record, hereinafter "Record," p. 389. For Count One, Defendant/Appellant was alleged to have spat on Officer Tapia. *Id.* Following a jury trial, Defendant/Appellant was convicted of Counts One and Three and acquitted of Count Two. Record at p. 4.

Prior to trial, the Tribe provided notice of its intent to introduce "other acts" evidence pursuant to 3 PYTC R. Evid. 8 and Fed. R. Evid. 404 (b). The specific "other acts" evidence included a prior incident when Defendant/Appellant was alleged to have spit on a nurse at Saint Mary's Hospital and a subsequent incident when Defendant/Appellant was alleged to have spit on a detention officer while he was being detained in this matter. Record at p. 342-43. Defendant/Appellant objected and the Tribe also filed an affirmative motion to introduce "other acts" evidence. Record at p. 112-120, 192-95. The Tribal Court ultimately allowed the Tribe to present "other acts" evidence for the purpose of showing intent as well as showing absence of mistake or accident should those defenses be raised. Record at p. 5-6. Only the act of spitting on the detention officer was admitted at trial. Jury Trial Part 3, 32:40-40:13.

Defendant/Appellant also filed a motion to dismiss Count One prior to trial, alleging that spitting did not constitute a battery as contemplated by 4 PYTC § 1-140 (A)(2). Record at p. 207-211. The Tribal Court ultimately denied Defendant's Motion to Dismiss and the subsequent Motion for Directed Verdict after the Tribe rested at trial. Record at p. 5-6. Defendant/Appellant now files this appeal arguing that the Tribal

Court erred in failing to dismiss Count One and in failing to grant his Motion for Directed Verdict and in admitting "other act" evidence. Record at p. 1. For the following reasons, Defendant/Appellant's appeal should be denied.

ARGUMENT:

I. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION TO DISMISS.

Defendant/Appellant claims that because the Tribe did not prove Officer Tapia reasonably believed he was in danger of receiving an immediate battery, the Tribe cannot prove probable cause exists to support the prosecution of the Defendant. Defendant is incorrect, however, as the First Circuit, Seventh Circuit, and Ninth Circuit Federal Courts of Appeals have all held that spitting constitutes an assault under three different federal statutes. The Ninth Circuit has held that intentionally spitting on another person is an offensive touching that rises to the level of simple assault under the theory of assault as an attempted or completed battery. *United States v. Lewellyn,* 481 F.3d 695, 699 (9th Cir. 2007). The Seventh Circuit held under a battery theory of a federal statute, the "defendant willfully causes, by spitting, an offensive touching" which was sufficient to constitute an assault. *United States v. Masel,* 563 F.2d 322, 323-24 (7th Cir. 1977). The First Circuit held that spitting in the face of a mail carrier constituted an assault on a federal officer. *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974).[1]

[1] Although none of the federal statutes analyzed by federal courts include the additional element requiring the victim to reasonably believe he or she was in danger of receiving immediate battery, in this case there was sufficient information in the affidavit and presented at trial to demonstrate that the Officer was aware he could be spit on by the Defendant/Appellant.

The Officer became aware he could be spit on the first time the Defendant/Appellant spit at the plastic guard behind the driver seat. This prompted the Officer to drive away to ***immediately*** transport the Defendant to Detention (emphasis added). Therefore, the Officer was placed in reasonable apprehension the moment the Defendant first spit at the plastic guard. Both at trial and at the pretrial motion hearing, the Tribe asserted that its theory of the case was that spitting constituted striking for the purposes of battery under the Tribal Code. Second Pretrial Conference, 16:52-18:25. Indeed, the Tribal Court is not bound by the decisions of foreign jurisdictions. Furthermore, because 4 PYTC § 1-150 (A)[2] is written in the disjunctive, the Tribe was not required to prove that injury would have resulted. *Id.* ("Any person who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering violence cause another to harm him shall be deemed guilty of an offense"). As such, the Tribal Court correctly denied Defendant/Appellant's Motion to Dismiss and the Tribal Court's ruling should be upheld.

II. THE TRIAL COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

Defendant/Appellant is correct that in order for a case to proceed past a motion for a directed verdict, substantial evidence of the Defendant's guilt must have been presented by the prosecution. However, he is mistaken that substantial evidence was not presented at trial. "A directed verdict of acquittal is appropriate ***only*** where there is no 'substantial evidence' to support each element of the offense." *State v. Sabalos*, 178 Ariz. 420, 422, 974 P.2d 977, 979 (Ariz. App. 1994) (emphasis added); *PYT v.*

---

[2] While Defendant/Appellant was charged with Assault and Battery on a Tribal Official under 4 PYTC § 1-140 (A) (2), that section refers to "attempt[ing] to commit a battery," which is defined in 4 PYTC § 1-150 (A).

Miranda, CA-08-015 p.22 (Ct. App. 2009), ("[W]hile decisions of the Arizona . . . [c]ourts are not controlling authority in this Court, they are highly persuasive."). Substantial evidence is defined as more than a scintilla and proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of the Defendant's guilt beyond a reasonable doubt." *State v. Mathers,* 165 Ariz. 64, 67, 796 P.2d 866, 869 (Ariz. 1990). Indeed, "[u]nless there is 'a complete absence of probative facts to support a conviction,' a [motion for a directed verdict] should be denied, and if the record reveals the presence of facts from which a reasonable jury could infer guilt beyond a reasonable doubt [it is an abuse of discretion to grant a motion for a directed verdict]." *Sabalos*, 178 Ariz. at 422, 974 P.2d at 979, *quoting Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

In this case, the Court correctly noted that the Tribe had, in fact, presented substantial evidence that Officer Tapia reasonably believed that Defendant was going to spit on him. Indeed, in ruling on a motion for a directed verdict, "the court should not substitute its own determination of the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. Mariani*, 725 F.2d 862, 865 (2nd Cir. 1984). Consequently, Defendant/Appellant's motion for a directed verdict was properly denied and the Tribal Court's ruling should not be disturbed.

III. THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S OTHER ACTS UNDER 3 PYT R. EVID. 8 AND FED. R. EVID 404 (B).

Evidence of other bad acts may be admissible against a criminal defendant to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of

mistake, or lack of accident." Fed. R. Evid. 404. The Ninth Circuit has repeatedly recognized that Rule 404(b) is a rule of inclusion. *E.g., United States v. Cherer*, 513 F.3d 1150, 1157 (9th Cir. 2008); *United States v. Castillo*, 181 F.3d 1129, 1134 (9th Cir. 1999). "Unless the evidence of other acts ***only*** tends to prove propensity, it is admissible." *Castillo*, 181 F.3d at 1134 (emphasis added); *United States v. Jackson*, 84 F.3d 1154, 1159 (9th Cir. 1996). A trial court's decision to admit "other acts" evidence is reviewed for an abuse of discretion. *United States v. Ramos-Atondo*, 732 F.3d 1113, 1121 (9th Cir. 2013).

"Other act" evidence is admissible under Rule 404(b): (1) if it proves a material element of the offense for which defendant is now charged, (2) if admitted to prove intent, is similar to the offense charged, (3) is based on sufficient evidence, and (4) it is not too remote in time. *United States v. Hardrick,* 766 F.3d 1051, 1055 (9th Cir. 2014) (quoting *United States v. Ramirez-Robles,* 386 F.3d 1234, 1242 (9th Cir. 2004)). If this four-part test is met, the evidence is admissible unless its prejudicial impact substantially outweighs its probative value. *Hardrick,* 766 F.3d at 1044; Fed. R. Evid. 403.

In this case, Defendant/Appellant's subsequent conduct directed toward the detention officer meets each element of the four-part test for admissibility. Although the relevance of "other act" evidence is reviewed de novo[3], the relevance in this case is clear as Defendant's intent is an element of the count for which he was charged. Unlike absence of mistake or accident, knowledge and intent are always material issues simply because the prosecution has to prove them and this burden of proof is unaffected by

---

[3] *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999).

Defendant's choice of defense. *United States v. Mayans*, 17 F.3d 1174, 1182 (9th Cir. 1994). Although Defendant's subsequent conduct involved an assault on a different officer, "[i]ndeed '[a] much greater degree of similarity between the charged crime and the uncharged crime is required when the evidence of the other crime is introduced to prove identity than when it is introduced to prove a state of mind.'" *United States v. Luna*, 21 F.3d 874, 878 n.1 (9th Cir. 1994) *quoting United States v. Myers*, 550 F.2d 1036, 1045 (5th Cir. 1977). Defendant's intent to "willfully strike" a tribal official is an element that the Tribe had to prove pursuant to 4 PYTC § 1-150(A) and (B). The fact that Defendant spit on another law enforcement officer close in time to the conduct for which he was charged and convicted shows that he intended to engage in such conduct. "Unless the evidence of other acts ***only*** tends to prove propensity, it is admissible." *Castillo*, 181 F.3d at 1134 (emphasis added). In this case, the Defendant/Appellant's subsequent behavior showed not only a later assault, but the identical ***method*** of assault. As such, the subsequent incident of spitting on a detention officer was properly admitted to prove Defendant's intent and knowledge.

If the 404(b) evidence is offered for a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403. *Huddleston v. United States*, 485 U.S. 681, 688 (1988). More specifically, the evidence must be relevant under Federal Rule of Evidence 402, then an assessment under Federal Rule of Evidence 403 must be completed to determine whether the probative value of the similar acts evidence is "substantially outweighed by its potential for unfair prejudice," and finally, "the trial court shall, upon request, instruct the jury that the similar acts

evidence is to be considered only for the proper purpose for which it was admitted" under Federal Rule of Evidence 105. *Huddleston,* 485 U.S. at 691-92.

Rules 401 and 402 establish the broad principle that relevant evidence is admissible. Relevant evidence is defined as being relevant "if it has any tendency to make a fact more or less probable than it would be without the evidence, and the fact is of consequence in determining the action." Fed. R. Evid. 401. Once relevance is established, the trial court should admit the evidence unless its prejudicial impact substantially outweighs its probative value. *See United States v. Boise,* 916 F.2d 497, 502-03 (9th Cir. 1990). Although relevant evidence is generally admissible, Rule 403 provides the court may exclude relevant evidence "if its probative value is substantially outweighed by . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

In this case, the evidence is relevant and is not unduly prejudicial. Indeed, ". . . not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (Ariz. 1993). The fact that Defendant/Appellant spit on a corrections officer demonstrated an intended method of assault, which, although perhaps undesirable, is not unduly prejudicial.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that Defendant/Appellant's appeal be denied and the Tribal Court's conviction and sentence be affirmed.

RESPECTFULLY submitted this 8th day of November, 2017.

KENDRICK WILSON
Deputy Prosecutor
Kendrick.Wilson@pascuayaqui-nsn.gov

PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
Tucson, AZ 85757
(520) 883-5013

William R. Soland
PYT Bar No. 10266

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. GARCIA, JONATHAN, Appellant.	APPELLATE CASE NO. CA-17-006 PASCUA YAQUI TRIBAL COURT NO. CR-17-132 **NOTICE OF ERATTA**

COMES NOW Appellant, Jonathan Garcia, and notifies the Honorable Court of the following error on Appellant's Notice of Appeal: An incorrect name for the Appellant appeared on Page one of the Notice, in the first line. Appellant asks that the attached Amended Notice of Appeal be substituted in the Record.

RESPECTFULLY REQUESTED this 9th day of Oct, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that Mr. Garcia's Appellant Brief was delivered electronically this date to:

Simon Stanley
Simon.Stanley@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Mr. Garcia's Appellant Brief was delivered this date to:

Kendrick Wilson
Kendrick.Wilson@pascuayaqui-nsn.gov
Deputy Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 9th day of Oct, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

PASCUA YAQUI PUBLIC DEFENDER
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

William R. Soland
Office of the Public Defender
Attorney for Appellant
PYT Bar No. 10266

PASCUA YAQUI TRIBAL COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellee, vs. GARCIA, JONATHAN, Defendant/Appellant.	Court of Appeals Case No.: Tribal Court Case No.: CR-17-132 **AMENDED NOTICE OF APPEAL**

COMES NOW the Appellant, JONATHAN GARCIA, by and through counsel, pursuant to 3 PYTC § 2-3-90(A), 3 PYTC § 2-3-90(B), 3 PYTC § 2-3-100(B)(1) and 3 PYTC § 2-3-100(B)(4) of the Pascua Yaqui Tribe Rules of Appellate Procedure, and respectfully files a Notice of Appeal in the Pascua Yaqui Tribal Appellate Court from the Order entered in this action by the Pascua Yaqui Tribal Court on June 14, 2017. Appellant is appealing the Trial Court's denial of Defendant's written Motion to Preclude evidence of prior bad acts as well as Trial Court's granting of Tribe's written Motion to Admit other bad acts evidence, as well as the Trial court's denial of Defendant's oral objections to introduction of other bad acts at trial, and the Court's judgment of conviction regarding Counts one and three.

A copy of the Pascua Yaqui Tribal Court's Order is attached hereto as required by 3 PYTC § 2-3-90(A)(1), Pascua Yaqui Rules of Appellate Procedure.

The Appellant further respectfully requests that this Honorable Court enter an order directing the Clerk of the Pascua Yaqui Tribal Court to prepare and submit the record within thirty (30) days.

RESPECTFULLY SUBMITTED this 17th day of Oct, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

Original of the foregoing delivered to PYT Court and filed:

Copy of the foregoing provided to PYT Prosecutor by:

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivism
Tucson, AZ 85757

and that one copy of the Notice of Appeal was delivered this date to:

Pascua Yaqui Tribal Court
7777 S. Camino Huivism
Tucson, AZ 85757

and that one copy of the Notice of Appeal was delivered this date to:

Deputy Prosecutor Kendrick Wilson
Office of the Prosecutor of the Pascua Yaqui Tribe
7777 S. Camino Huivism
Tucson, AZ 85757

RESPECTFULLY SUBMITTED this 9th day of Oct, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. GARCIA, JONATHAN, Appellant.	APPELLATE CASE NO. CA-17-006 PASCUA YAQUI TRIBAL COURT NO. CR-17-132 ORAL ARGUMENT REQUESTED

APPELLANT BRIEF

William R. Soland
PYT Bar No. 10266
PASCUA YAQUI PUBLIC DEFENDER
7474 South Camino de Oeste
Tucson, AZ 85757
(520) 883-5013

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Tribal Authority

Federal Authority

Arizona Authority

STATEMENT OF THE FACTS AND PROCEEDINGS

On March 18, 2017, a Criminal Complaint was filed against the Appellant, Jonathan Garcia, for an incident alleged to have occurred the previous day. [*PYT v. Jonathan Garcia*, Pascua Yaqui Trial Court Record, document 94, hereinafter "Record at "94"]. Mr. Garcia was charged with Count One (1), Assault and Battery on a Tribal Official in violation of 4 PYTC § 1-140(A)(2), Count Two (2), Liquor Violation, in violation of 4 PYTC § 1-640(C), Count Three (3), Possession, Manufacture, Delivery and Advertisement Drug Paraphernalia, in violation of 4 PYTC § 1-790(A). [*Id.*] The factual basis for the criminal charge of Assault & Battery of a Tribal Official was provided "to wit: Defendant spat at Ofc. Christopher Tapia through an open metal grate while in a police vehicle." [*Id*]. The same factual basis was read aloud to the jury at the commencement of trial on June 13, 2017.

On March 28th, 2017, the Arraignment Proceedings were held, at which time Mr. Garcia entered his pleas of Not Guilty. [Record at 88] Mr. Garcia was ordered held on a $500 cash bond which he was not able to pay. [*Id.*] He was subsequently held in custody until trial.

On April 28th, 2017, Mr. Garcia through counsel filed his request for a jury trial. On that same date, the Honorable Pascua Yaqui Tribal Court issued an order granting the request for a jury trial. [Record at 79]

On May 17, 2017, Mr. Garcia through counsel filed a Motion to Dismiss as to Count One: Assault and Battery on a Tribal Official [Record at 27], and a Motion to Preclude Introduction of Defendant's Prior Bad Acts[1]. [Record at 29] Tribe Responded to Defendant's Motions to Dismiss

[1] Defendant's Motion to Preclude was filed regarding prior convictions disclosed by Tribe on April 7, 2017. [Record at 84] Tribe notified the Court of its intent to Use Specific Incidents of Conduct on April 24, 2017. [Record at 81] These prior convictions were not introduced at trial, but Defendant's Motion to Preclude and Tribe's subsequent Response were incorporated by reference into the arguments surrounding subsequent bad acts, which were

and to Preclude on May 30, 2017, and concurrently filed a Motion to Admit Specific Evidence, and a Second Notice of Intent to Use Specific Instance of Conduct. [Record at 28, 24, 23 and 62, respectively]

The Honorable Trial Court set hearings on these issues by orders dated June 5, 2017. [Record at 36 and 37] Defendant, through counsel, file his Response to Tribe's Motion to Admit on June 8, 2017. [Record at 14] Defendant also filed, through counsel, his Reply regarding his own Motion to Preclude and Motion to Dismiss on June 2, 2017. [Record at 18 and 19]

At hearing on June 9, 2017 and by minute order on June 12, 2017, the honorable trial court heard Defendant's Motion to Dismiss, Tribe's Motion to Admit, and Defendant's Motion to Preclude (among other issues). [Record at 12] The Court denied both of Defendant's Motions and Granted Tribe's Motion. [*Id.*] At Trial, Defendant objected to the introduction of the subsequent bad acts that Tribe had sought to admit pursuant to its Motion to Admit, and objected again when Tribe sought to put on multiple witnesses to testify to the same uncharged conduct. [Audio-visual record or proceedings, Jury Trial Part 3 at 00:29:50 – 00:32:18, and again at 00:35:34 – 00:36:55]. As the Court had already ruled on this issue, Defendant's objections were overruled. Court did issue limiting instructions regarding other acts evidence in the Jury Instructions. [*See* Record at 49. The Jury Instructions themselves are included in the record but not given a specific number in the Index]

At Trial on June 14, 2017, Defendant moved for directed verdict on counts 1, 2, and 3 of the Complaint. This motion was denied. [Audio-visual recording of Jury Trial, Part 5 at 00:23:56-

---

introduced at trial. Therefore, these Motions, Responses and Replies are referenced here for the sake of completeness.

00:27:06]. Defendant was found guilty of Counts 1 and 3 [Record at 4]. Subsequently, this appeal was filed. [Record at 1]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN DENYING MR. GARCIA'S MOTION TO DISMISS COUNT ONE, ASSAULT AND BATTERY ON A TRIBAL OFFICIAL, WHERE DEFENDANT WAS NOT ALLEGED TO HAVE ATTEMPTED TO CAUSE INJURY TO THE OFFICER NAMED AS THE VICTIM IN THE COMPLAINT.

II. WHETHER THE TRIAL COURT ERRED IN DENYING MR. GARCIA'S MOTION FOR DIRECTED VERDICT ON COUNT ONE, WHERE TRIBE PRODUCED NO EVIDENCE OF INJURY AT TRIAL.

III. WHETHER THE TRIAL COURT ERRED IN GRANTING TRIBE'S MOTION TO ADMIT OTHER BAD ACTS EVIDENCE.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING MR. GARCIA'S MOTION TO DISMISS COUNT ONE, ASSAULT AND BATTERY ON A TRIBAL OFFICIAL, WHERE DEFENDANT WAS NOT ALLEGED TO HAVE ATTEMPTED TO CAUSE INJURY TO THE OFFICER NAMED AS THE VICTIM IN THE COMPLAINT.

The alleged conduct in the Complaint, Count One, an attempt to spit on Ofc. Tapia, did not meet the code's definition of Assault and Battery on a Tribal Official. Pursuant to 4 PYTC § 1-150(A) ~ Battery, "[a]ny person who shall willfully strike another person or otherwise inflict bodily injury, or who shall by offering violence cause another to harm him[self] shall be deemed guilty of an offense."

The Code is silent on the definition of the term "to strike". The American Heritage College Dictionary defines "strike" as "[t]o hit sharply, as with the hand, the fist, or a weapon." The American Heritage College Dictionary, 3rd Ed, page 1344 (1993). The only additional information contained in the Code regarding the definition of "to strike" is that it must be an attempt to inflict bodily injury: as defined in the code, a Battery requires that a person "strike… or otherwise inflict bodily injury." The use of the term "or otherwise inflict bodily injury" indicates that the word "to strike" is meant as an example of a means of inflicting bodily injury. Strike, therefore, is presumed to be a method of causing bodily injury.

In charging the complaint, the Tribe specified that Mr. Garcia was accused of a "willfully attempt[ing] to commit battery on" Ofc. Tapia "by force, violence, any unlawful act, threat, or menacing conduct causing" Ofc. Tapia "to reasonably believe he/she was in danger of *receiving immediate battery*, to wit: Defendant spat at Ofc. Christopher Tapia through an open metal grate while in the police vehicle." [Record at 94, emphasis added]

It was therefore Tribe's burden to show that Mr. Garcia caused Ofc. Tapia to "reasonably believe" he was "in danger of receiving immediate battery…." To prove that Ofc. Tapia reasonably believed he was in danger of receiving an immediate battery, the Tribe must show that Ofc. Tapia reasonably believed Mr. Garcia would "willfully… inflict bodily injury."

Mr. Garcia clearly could not have placed Officer Tapia in reasonable apprehension of an immediate striking, as the Affidavit itself indicates there was a barrier between Ofc. Tapia and Mr. Garcia that would have prevented Mr. Garcia from "hit[ting] [Ofc. Tapia] sharply, as with the hand, the fist, or a weapon." There was no assertion whatsoever that Ofc. Tapia believed that Jonathan's conduct would cause him any injury. For these reasons, Defendant's Motion to Dismiss Count One should have been granted.

A. STANDARD OF REVIEW

The Pascua Yaqui Constitution and Pascua Yaqui Judicial Titles and Codes are silent regarding the standards of review to be applied by the Pascua Yaqui Court of Appeals. Questions of law are subject to *de novo* review on appeal. *Pascua Yaqui Tribe v. Alma Soto*, CA-06-010, at 8 (2007); *United States v. Semler*, 883 F.2d 832, 833 (9th Cir. 1989).

B. BATTERY UNDER THE TRIBAL CODE

In seeking to shoehorn Mr. Garcia's conduct into the statute under which he had been charged, Tribe cited three cases from different jurisdictions to show that spitting could constitute an assault. [Record at 28] In doing so, Tribe attempted to apply a federal definition of assault that has adopted a common law definition of battery. Tribe argued that state and federal authority is highly persuasive, and this is true when the they interpret law that reflects Tribal law. If the

federal authority cited is interpreting statutory language or common law definitions that do not exist here, that authority is not relevant, let alone persuasive.

At the second pre-trial conference in this matter, Tribe explicitly stated that their theory of the case was not that there was an attempt to injure Ofc. Tapia. [Audio-visual recording of proceedings at second pre-trial conference, June 9, 2017 at 00:16:45 – 00:17:01]. The title of the alleged offense notwithstanding, an Assault and Battery on a Tribal Official is not an assault pursuant to our code. An Assault and Battery on a Tribal Official is either a battery or an attempted battery, where the victim is a Tribal Official. The cases cited by Tribe each interpret federal assault statutes that are not at issue here, and apply a common law standard of battery that requires only an offensive touching. *See: US v. Lewellyn*, 481 F.3d 695, 699 (9th Cir. 2007); *US v. Masel*, 563 F.2d 322, 323-24 (7th Cir. 1977); *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974).

Specifically, each case holds that an actual or attempted battery can be an assault, and that spitting meets this definition. However, neither *Lewellyn*, nor *Masel*, nor *Frizzi* cites to a federal battery statute, and it appears that none exists. Instead all three cases incorporate a common law definition of "battery." *See*: *US v. Lewellyn*, 481 F.3d at 699 "At common law, battery did not require intent to injure, only that the offensive touching was willful;" *US v. Masel*, 563 F.2d at 324 "The instruction did, of course, require the government to prove that defendant willfully caused, by spitting, an offensive touching. We think this is an adequate statement;" *US v. Frizzi*, 491 F.2d at 1232, "Although minor, it is an application of force to the body of the victim, a bodily contact intentionally highly offensive."

The Pascua Yaqui Tribal Court may, of course, look to outside jurisdictions when Tribal law is silent. That is not the case here. The Tribal Code includes a specific definition of battery

that does not mirror either the common law definition or the federal assault statutes interpreted by the cases that Tribe cites. The Tribe's burden was to establish that Mr. Garcia either attempted to or did willfully "strike or otherwise inflict bodily injury to Ofc. Tapia." In this context, as discussed above, the striking must be an attempt to "inflict bodily injury." Spitting may be an "offensive touching," but that is not the standard under our law, and spitting does not constitute an attempt to cause bodily injury.

Tribe's Complaint and affidavit failed to establish probable cause that an attempt to cause injury occurred. Count One of the Complaint should have been dismissed prior to trial.

II. THE TRIAL COURT ERRED IN DENYING MR. GARCIA'S MOTION FOR DIRECTED VERDICT ON COUNT ONE, ASSAULT AND BATTERY ON A TRIBAL OFFICIAL, WHERE TRIBE FAILED TO PRODUCE EVIDENCE AT TRIAL TO SUPPORT AN ATTEMPT TO CAUSE INJURY.

The facts and arguments in the previous section are relevant to this argument as well, and are incorporated by reference here as though fully set out herein.

The Trial Court denied the Defendant's Motion to Dismiss because of allegations – raised only at the Probable Cause hearing – that Mr. Garcia was Hepatitis C positive, which the Court found could have indicated an attempt to cause injury. [Record at 12] The Court specifically found in its Second Pre-Trial Order that "...there is a factual basis for this allegation due to the officer's personal knowledge of Mr. Garcia's medical condition of being infected Hepatitis C, and the officer provided the particularized and objective basis for suspecting the defendant committed an offense of assault and battery on a tribal official." [*Id.*] However, no evidence was submitted at trial regarding Mr. Garcia's Hepatitis C status. Similarly, there was no evidence

presented by Tribe regarding how Hepatitis C is transmitted, whether spitting is a potential vector for transmission of Hepatitis C, or whether Ofc. Tapia was concerned he might be exposed to Hepatitis C. Therefore, the Jury could not have found that Mr. Garcia was Hepatitis C positive, nor could they have drawn the subsequent conclusion that Mr. Garcia was somehow trying to injur Ofc. Tapia by spreading the disease. Tribe produced no evidence of an element that formed the basis of the Court's decision to deny Defendant's Motion to Dismiss. For these reasons, the Court should have granted Defendant's Motion for Directed Verdict as to Count one. Its failure to do so was reversible error.

Because the trial court based its ruling that probable cause for count one existed on the basis of Mr. Garcia's Hepatitis C diagnosis, and because Tribe failed to produce any evidence of this at Trial, Defendant's Motion for Directed Verdict should have been granted.

III. THE TRIAL COURT ERRED IN GRANTING TRIBE'S MOTION TO ADMIT OTHER BAD ACTS EVIDENCE.

At Trial, Tribe introduced two witnesses, both detention officers, who testified to a separate, unrelated incident in which Mr. Garcia was alleged to have spit at a detention officer. This testimony was admitted over Mr. Garcia's objection, Tribe's Motion to Admit having previously been granted by the Trial Court. This testimony should have been precluded because it was not relevant, and was unduly prejudicial to Mr. Garcia.

Although there appears to be no case law from this Court interpreting 3 PYTC R. Evid. 8(B), both the Federal Rules of Evidence and the Arizona Rules of Evidence have nearly identical rules, both numbered 404(b), and there are cases that interpret these rules. The Arizona Supreme Court has laid out a clear standard for the introduction of "other-act evidence":

> When the State seeks to admit evidence of other acts of the defendant, it must prove by clear and convincing evidence that the defendant committed the other acts; they must be offered for a proper purpose; they must be relevant; and, consistent with Rule 403, their probative value must not be substantially outweighed by the danger of unfair prejudice. *State v. Goudeau*, 239 Ariz. 421, 450, (July 5, 2016), citing *State v. Hausner*, 230 Ariz. 60, (July 11, 2012) (internal citations omitted).

Generally speaking, prior conduct is not permissible to prove that a defendant acted in conformity therewith. *See,* 3 PYTC R. Evid. 8(A); Fed. R. Evid. 404(A), Ariz. R. Evid. 404(A). "We have repeatedly noted that the general rule is 'just and wise' in order to avoid the enormous danger of prejudice to the defendant that the evidence of prior crimes creates, and we have recently cautioned that 'exceptions to that principle, each of which has been carved out to serve a limited prosecutorial and judicial purpose, should not be permitted to swallow the rule.'" *United States v. San Martin*, 505 F.2d 918, 921 (5th Cir. 1974) (internal citations omitted).

Tribe introduced evidence that Mr. Garcia spat on a detention officer. This evidence was presumptively inadmissible as prohibited propensity evidence. It was therefore Tribe's burden to show that the other acts were committed by clear and convincing evidence, that they were offered for a proper purpose, that they were relevant, and that their probative value was not substantially outweighed by the danger of unfair prejudice. Defendant maintains that Tribe failed to meet these requirements, and that Tribe's Motion should have been denied as to admission of said evidence. This evidence should have been excluded at trail, and substantially prejudiced the jury against Mr. Garcia. Defendant's convictions on Counts 1 and 3 should be overturned, or a new trial granted on those counts in which the propensity evidence is excluded.

A. STANDARD OF REVIEW

The trial court's decision to admit other acts evidence is reviewed for abuse of discretion, but whether evidence is directly relevant to the crime charged or relevant only to "other crimes" is reviewed de novo. *United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir. 1999) citing *United States v. Jackson*, 84 F.3d 1154, 1158–59 (9th Cir.1996). Whether evidence falls within the scope of Rule 404(b) is reviewed de novo. *Id*, citing *United States v. Arambula–Ruiz*, 987 F.2d 599, 602 (9th Cir.1993).

RELEVANCE

It is well established that evidence which is not relevant is not admissible. 3 PYTC R. Evid. 6(C). Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action, more probable or less probable than it would be without the evidence. 3 PYTC R. Evid. 6(A). The actions of Mr. Garcia taken subsequent to his arrest in this case were simply not relevant to the issues presented in this case. The subsequent conduct of Mr. Garcia simply has no bearing on whether or not the allegations in this case are true.

Tribe produced testimony at trial that Mr. Garcia spat on a detention officer on May 19, 2017. This conduct is irrelevant to the allegations in this case. The fact that Mr. Garcia was later alleged to have spat on or at a detention officer does not make it "more probable" that he spat at or attempted to spit at Ofc. Tapia on March 17, 2017. Introducing this other behavior inappropriately put Mr. Garcia in jeopardy of being found guilty in this case based on subsequent conduct. For this reason, the introduction of Defendant's alleged subsequent conduct should have been precluded.

B. PROPER PURPOSE

Because other acts evidence is presumed to be inadmissible, it was Tribe's burden to show that such acts were submitted for a proper purpose. These acts should have been precluded as they were merely a means of making the jury believe that Mr. Garcia is a "bad person" or that he has a "propensity" for spitting. Tribe purported to offer the evidence to show intent and absence of mistake or accident. This interpretation is contrary to law and Tribe's request should have been denied.

1. INTENT

Tribe argued that the proffered evidence was necessary to prove Mr. Garcia's intent. However, prior assaultive behavior is not indicative of intent. The 9th Circuit has found that "[a] showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time." *United States v. Bettencourt*, 614 F.2d 214, 217 (9th Cir. 1980). In *Bettencourt,* the 9th Circuit cited *United States v. San Martin*, which held that "prior crimes involving deliberate and carefully premeditated intent— such as fraud and forgery— are far more likely to have probative value with respect to later acts than prior crimes involving a quickly and spontaneously formed intent— such as assault in the case before us." 505 F.2d 918, 923 (5th Cir. 1974). "The evidence of prior crimes involving intent of the moment are hardly ever probative of later acts involving similarly split-second intent." *Id.*

In its Motion to Admit the subsequent bad acts, Tribe inappropriately relied on *United States v. Hinton* for the position that evidence of prior assaultive behavior was indicative of intent. [See Record at 23, citing *Hinton* 31 F.3d 817, 822 (9th Cir. 1994)] This is a misreading of *Hinton*, which distinguishes itself from cases such as Mr. Garcia's:

> In *Bettencourt* we instructed that "[a] showing of intent to assault on an earlier occasion proves little, if anything, about an intent to assault at some later time." *Id.* at 217, *citing United States v. San Martin,* 505 F.2d 918 (5th Cir.1974) (distinguishing between prior crimes involving "deliberately and carefully premeditated intent" and those involving a "quickly and spontaneously formed intent—such as assault", less readily transferrable between separate events). We deem this limitation inapplicable where, as here and in *Lewis*—and in contrast to *Bettencourt* and *San Martin*—the charged and prior conduct were part of a pattern of abuse involving the same victim and, as discussed below, similar *modus operandi. Id.* citing *United States v. Bettencourt,* 614 F.2d 214 (9th Cir.1980).

Mr. Garcia's case is much more like the case of *Bettencourt*, which the 9th Circuit's *Hinton* opinion distinguishes itself from. The subsequent conduct and the charged conduct did not involve "deliberately and carefully premeditated intent," but rather "quickly and spontaneously formed intent." In *Hinton*, the 9th Circuit found a "pattern of abuse involving the same victim and… similar *modus operandi." Id.* No "long-entertained plan or desire" or "pattern of abuse involving the same victim" is indicated in Mr. Garcia's case, or in either the prior or subsequent incidents. Instead, in each of these incidents, it appears that Mr. Garcia is accused of acting with "quickly and spontaneously formed intent" which is not transferable between separate events.

Because the subsequent actions introduced at trial did not involve "deliberately and carefully premeditated intent," this evidence should not have been admitted at trial.

2. ABSENCE OF MISTAKE OR ACCIDENT

The incident that Tribe introduced should not have been admitted to show absence of mistake or accident because Defendant had not placed mistake or accident into question when the evidence was introduced as part of Tribe's case in chief. Evidence of other bad acts is only relevant to show absence of mistake or accident if this is placed into issue by a defendant. This is

clear even from the authority cited by Tribe in its Motion to Admit, specifically *United States v. Shillingstad*, which states that "[t]he offenses were relevant to the element of Shillingstad's intent and whether White Bull's injuries resulted from an accident, matters that the defense put in issue when Shillingstad testified that White Bull sustained injuries when she accidentally hit her head on a plate and fell on a concrete floor after losing her balance." 632 F.3d 1031, 1035 (8th Cir. 2011).

Arizona has adopted similar analysis. In *State v. Henderson*, the Arizona Court of Appeals, Division 1, reviewed the absence of mistake or accident exception and found that it did not apply because mistake and accident had not been placed at issue. *State v. Henderson,* 116 Ariz. 310 (Ct. App. 1977). The same court later reviewed the issue again in *State v. Stein* in 1987. Stein had placed accident or mistake into question by denying he knew where certain illegal drugs found in his house came from, who owned them, or how he had gotten them, while admitting to possessing other illegal drugs in his house. *State v. Stein*, 153 Ariz. 235, 239, (Ct. App. 1987) "According to the defendant," the Arizona Court wrote, "the heroin was not his but must have been mistakenly sent to him by some unknown person. We find that the trial court could have properly permitted the state to introduce evidence of the marijuana and the methamphetamine in a separate trial on the heroin charges in order to prove absence of mistake." *Id.*

Mr. Garcia did not testify in this matter, and made no claim that his actions toward Ofc. Tapia were a mistake or accident. While there was some testimony regarding the fact that Mr. Garcia is prone to seizures, this occurred only during the cross examination of Ofc. Valenzuela. [Audio-visual record or proceedings, Jury Trial Part 3 at 00:38:58 – 00:39:39] As previously noted, Ofc. Valenzuela testified over Mr. Garcia's objection. Tribe cannot retroactively use

questions raised on cross examination of their second propensity witness to justify their propensity witnesses testifying in the first place. No other evidence introduced at trial indicated that Mr. Garcia had claimed accident or mistake.

C. UNFAIR PREJUDICE

The tendency of the evidence Tribe introduced to cause unfair prejudice greatly outweighed any probative value that evidence may have had. This is a case involving an accusation of spitting at a police officer. No complicated plan, specialized knowledge, or special intent was required for Tribe to prove their case. On the other hand, repeatedly offering evidence to the Jury of an unrelated incident of spitting was needlessly cumulative, may have confused the jury, caused undue delay, wasted time, and caused unfair prejudice to the jury far in excess of any probative value.

Pursuant to 3 PYTC R. Evid. 7, "[e]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or it will unduly delay, waste time or be a needless presentation of cumulative evidence." Similar rules have been interpreted by United States courts. In *United States v. Jamar*, the 4th Circuit wrote that "[f]irmly rooted in our jurisprudence is the proposition that evidence of other crimes of the defendant is ordinarily inadmissible in a criminal trial, except in limited circumstances and for limited purposes, because the minds of jurors could be influenced against the accused to a degree out of proportion to the probative value of the evidence. *United States v. Jamar*, 561 F.2d 1103, 1106 (4th Cir. 1977). Similarly, in *United States v. San Martin*, the 5th Circuit held that "[i]t is essential that the general rule announced so long ago in Weiss and recently reaffirmed in Broadway and other cases be carefully observed. Although prior offenses may be valuable, and sometimes essential, to prove intent or design, the danger of their prejudicial effect

is so great that all of the prerequisites must be met and the balancing test completely satisfied before they may be admitted safely into evidence. There is no talismanic effect to the words 'intent' or 'design,' and prior offenses must be carefully analyzed beyond the mere assertion of these codewords before the offenses are admitted into evidence lest the trial of fact devolve into a battle of innuendo." *United States v. San Martin*, 505 F.2d 918, 923 (5th Cir. 1974). A similar result is reached in Arizona, where in *State v. Goudeau*, the Arizona Supreme Court held that "[w]hen the State seeks to admit evidence of other acts of the defendant… their probative value must not be substantially outweighed by the danger of unfair prejudice." *State v. Goudeau*, 239 Ariz. 421, 450 (July 5, 2016)

Tribe introduced testimony of an unrelated incident in which Mr. Garcia spat on someone. That incident was not probative of the allegations in this case, but did create an image in the mind of the jury of a person who is a "known spitter," who had a reputation and propensity for spitting. This is an improper use of character evidence to prove conformity therewith, prohibited by 3 PYTC R. Evid. 8(A). Claiming, as Tribe does, that it somehow goes to intent or absence of mistake or accident would be, as the 5th Circuit stated in *San Martin*, allowing the exceptions to swallow the rule. 505 F.2d at 921. The evidence should have been excluded at trial, and its admission represents an abuse of discretion on the part of the trial court. Defendant's convictions on Counts 1 and 3 should be overturned, or a new trial granted on those counts in which the propensity evidence is excluded.

CONCLUSION

Count One of the Complaint did not state as its factual basis allegations that met the Code's definition of an Assault and Battery on a Tribal Official. This Count should have been dismissed prior to trial. The trial court's ruling that the allegation of spitting on a police officer was an attempt to cause physical injury due to allegations that Mr. Garcia was Hepatitis C positive made Mr. Garcia's medical status an essential element of Tribe's case in chief. However, no evidence on this fact was introduced by Tribe at trial. For this reason, Mr. Garcia's Motions to Dismiss and for Directed Verdict should have been granted as to Count One. Defendant asks that the Trial Court's judgment of guilt as to Count One should be reversed.

Additionally, the Trial Court committed abuse of discretion in permitting improper propensity evidence at trial. For this reason, Mr. Garcia's convictions on Counts One and Three should be reversed, or, in the alternative, he should be granted a new trial on these counts where the propensity evidence is precluded.

Wherefore, Mr. Garcia respectfully requests that the Honorable Pascua Yaqui Tribal Court's ruling convicting Mr. Garcia of Counts 1 and 3 be reversed. Alternatively, Mr. Garcia requests a new trial be granted. Mr. Garcia requests that Oral Argument on these issues.

Respectfully submitted this 9th the Oct, 2017 by:

William R. Soland,

Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that Mr. Garcia's Appellant Brief was delivered electronically this date to:

Linda Imonode-Skemer
Linda.Imonode@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

Simon Stanley
Simon.Stanley@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Mr. Garcia's Appellant Brief was delivered this date to:

Kendrick Wilson
Kendrick.Wilson@pascuayaqui-nsn.gov
Deputy Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 9th day of October, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

PASCUA YAQUI PUBLIC DEFENDER
7474 S. Camino de Oeste
Tucson, AZ 85757
(520) 883-5013

William R. Soland
PYT Bar No. 10266

IN THE PASCUA YAQUI COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Appellee, vs. GARCIA, JONATHAN, Appellant.	APPELLATE CASE NO. CA-17-006 PASCUA YAQUI TRIBAL COURT NO. CR-17-132 **UNOPOSED MOTION FOR EXTENSION OF OPENING BRIEF**

COMES NOW Appellant, by and through counsel undersigned and, pursuant to 3 PYTC § 2-3-70(B) requests the Honorable Court grant an extension of the deadline for filing Appellant's opening brief in this matter, as Appellant requires more time for preparation of the transcript of proceedings.

Appellant has contacted Deputy Prosecutor Kendrick Wilson, counsel for Appellee, who states Appellee has no objection to this extension. Pursuant to 3 PYTC § 2-3-70(B), "[t]he time for doing any act provided for in these rules, or by order of the appellate court, or by any applicable law, may be shortened or extended upon stipulation of the parties and filed with the

appellate court, or upon written motion for good cause shown…." As the parties have agreed to the extension, Appellant respectfully requests that the Court grant the extension as stipulated.

RESPECTFULLY REQUESTED this 8th day of Sept, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland

Deputy Public Defender

CERTIFICATE OF SERVICE

I hereby certify that Mr. Garcia's Appellant Brief was delivered electronically this date to:

Simon Stanley
Simon.Stanley@pascuayaqui-nsn.gov
Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7474 South Camino de Oeste
Tucson, AZ 85757

and that one (1) copy of Mr. Garcia's Appellant Brief was delivered this date to:

Kendrick Wilson
Kendrick.Wilson@pascuayaqui-nsn.gov
Deputy Prosecutor
Office of the Prosecutor of the Pascua Yaqui Tribe
7474 South Camino de Oeste
Tucson, AZ 85757

DATED this 8th day of Sept, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

PASCUA YAQUI PUBLIC DEFENDER
4725 W. Calle Tetakusim, Building B
Tucson, AZ 85757
(520) 883-5013

William R. Soland
Office of the Public Defender
Attorney for Appellant
PYT Bar No. 10266

PASCUA YAQUI TRIBAL COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, Plaintiff/Appellee, vs. GARCIA, JONATHAN, Defendant/Appellant.	Court of Appeals Case No.: Tribal Court Case No.: CR-17-132 **NOTICE OF APPEAL**

COMES NOW the Appellant, FRANK JAIMEZ, by and through counsel, pursuant to 3 PYTC § 2-3-90(A), 3 PYTC § 2-3-90(B), 3 PYTC § 2-3-100(B)(1) and 3 PYTC § 2-3-100(B)(4) of the Pascua Yaqui Tribe Rules of Appellate Procedure, and respectfully files a Notice of Appeal in the Pascua Yaqui Tribal Appellate Court from the Order entered in this action by the Pascua Yaqui Tribal Court on June 14, 2017. Appellant is appealing the Trial Court's denial of Defendant's written Motion to Preclude evidence of prior bad acts as well as Trial Court's granting of Tribe's written Motion to Admit other bad acts evidence, as well as the Trial court's denial of Defendant's oral objections to introduction of other bad acts at trial, and the Court's judgment of conviction regarding Counts one and three.

A copy of the Pascua Yaqui Tribal Court's Order is attached hereto as required by 3 PYTC § 2-3-90(A)(1), Pascua Yaqui Rules of Appellate Procedure.

The Appellant further respectfully requests that this Honorable Court enter an order directing the Clerk of the Pascua Yaqui Tribal Court to prepare and submit the record within thirty (30) days.

RESPECTFULLY SUBMITTED this 18th day of July, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

Original of the foregoing delivered to PYT Court and filed:

Copy of the foregoing provided to PYT Prosecutor by:

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the Notice of Appeal was delivered this date to:

Clerk of the Court of Appeals
Pascua Yaqui Court of Appeals
7777 S. Camino Huivism
Tucson, AZ 85757

and that one copy of the Notice of Appeal was delivered this date to:

Pascua Yaqui Tribal Court
7777 S. Camino Huivism
Tucson, AZ 85757

and that one copy of the Notice of Appeal was delivered this date to:

Deputy Prosecutor Kendrick Wilson
Office of the Prosecutor of the Pascua Yaqui Tribe
7777 S. Camino Huivism
Tucson, AZ 85757

RESPECTFULLY SUBMITTED this 18th day of July, 2017.

PASCUA YAQUI PUBLIC DEFENDER

William R. Soland
Deputy Public Defender

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE, PLAINTIFF, vs. GARCIA, JONATHAN DEFENDANT.	)	CASE NO. CR-17-132 JUDGMENT AND SENTENCING ORDER AND ACQUITTAL FOR COUNT TWO

The defendant, Jonathan Garcia, after a jury trial, was found guilty of Count One, Assault and Battery on a Tribal Official, and Count Three, Possession, Manufacture, Delivery, and Advertisement Drug paraphernalia, and not guilty as to Count Two, Liquor Violation. Appearing for the Tribe was Kendrick Wilson, and William Soland for the defendant. The defendant, guilty of count one and three, objected to the Tribe's request for a pre-sentence report and asked that he be sentenced immediately, because he has been jailed for 89 days, and did not want to be detained on bond pending a pre-sentence report request by the Tribe. Because the pre-sentence report is discretionary, the court denied the Tribe's motion for a presentence report and later sentencing hearing, and it granted the defendant's request for immediate sentencing. The Tribe recommended 180 days jail for Count One, with credit for 89 days already served, leaving a remainder of 91 days, and 30 days for Count Three, with the 30 days running concurrently with count one, and with credit for 30 days served. The Tribe did not object to the defendant's request to commute $200.00 court costs.

IT IS ORDERED that the defendant, Jonathan Garcia, having been found guilty beyond a reasonable doubt for Count One, Assault and Battery on a Tribal Official, and Count Three, Possession, Manufacture, Delivery, and Advertisement Drug paraphernalia, shall be sentenced as follows: Count One, 180 days jail, with credit for 89 days already served, leaving a remainder of 91 days, to be served immediately; Count Three, 30 days jail with credit for 30 days already served, to run concurrently with Count One above. $200.00 court costs shall be commuted.

IT IS ORDERED that the defendant shall be returned to the Pascua Yaqui detention facility on September 12, 2017, where he may serve the last day of his sentence, and he shall be released from Pascua Yaqui Detention on September 13, 2017 at 8:00 a.m..

IT IS FURTHER ORDERED that a Judgment of Acquittal be entered for the defendant, as to the alleged offense Count Two, Liquor Violation.

SO ORDERED THIS 14th DAY OF JUNE, 2017.

Associate Judge, Pascua Yaqui Tribal Court

cc: Date 6-14-17
✓ Tribe ✓ Defendant/Attorney ___ Detention
Clerk

IN THE PASCUA YAQUI TRIBAL COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

PASCUA YAQUI TRIBE Plaintiff, Vs. GARCIA, JONATHAN Defendant.	CASE NO. CR-17-132 SECOND PRE-TRIAL HEARING ORDER

On June 9, 2017, the defendant, in custody, did not appear, and his presence was waived by his attorney, William R. Soland, for a pre-trial conference and Kendrick Wilson appeared for the Tribe.

The court reviewed the briefs, heard argument, and held a hearing on the motion to dismiss for lack of probable cause. The court finds probable cause as to all three allegations, and based on officer Tapia's testimony as to Count One, that he had placed the defendant in the rear seat of his panel, the defendant was told to stop spitting, but he failed to do so, the officer saw the defendant accumulating saliva in his mouth, the defendant tried to spit at the officer through the open part of a grate separating the officer's front seat with the rear of the panel, and the officer moved out of his panel to avoid the defendant from spitting on him, there is a factual basis for the allegation due to the officer's personal knowledge of Mr. Garcia's medical condition of being infected Hepatitis C, and the officer provided the particularized and objective basis for suspecting the defendant committed an offense of assault and battery on a tribal official.

The court denies the defendant's motion to preclude prior convictions of the defendant, and it grants the Tribe's motion to admit specific acts based on the prior acts of defendant of spitting at his victim 7 years earlier in a similar crime may be admissible to prove a material element of the crime currently charged, the action shows similarity between past and presently charged conduct, based on sufficient evidence and is not too remote in time.

The Court grants the Tribe's petition for physical evidence, because the slightly intrusive procedure is reasonable and the need for public safety and health concerns outweighs the defendant's right to privacy. The court should order that the defendant undergo a blood

draw, for public safety issues to ensure that he is not contagious with Hepatitis C, and for the ongoing safety of officers and staff who have come into contact with him. 3 PYTC § 2-2-390, PYT v Anthony Valenzuela, Case, NO. 08-113, Pascua Yaqui Court of Appeals.

The court should deny the defendant's request to preclude the defendant's medical confidential medical history, because the medical status is relevant to the allegations and has probative value as to defendant's intent that outweighs any prejudicial effect, his condition was properly disclosed to officer Tapia, (the defendant himself disclosed his condition in a medical form he completed), and such information may be disclosed to officers transporting or coming into contact with a defendant with such a medical condition. 45 CFR § 164.512(k)(5), & (k)5(1)(D). The medical condition may also be used to refute accident or mistake as a defense.

IT IS ORDERED that the defendant's request to preclude prior medical history is denied, the motion to dismiss Count 1 for lack of probable cause is denied. The Tribe's motion to introduce prior bad acts shall be granted. The motion for physical characteristics shall be granted, and the defendant's counsel shall be notified when the blood draw takes place.

SO ORDERED THIS 9th DAY OF JUNE, 2017.

Judge, Pascua Yaqui Tribal Court

Cc: Date: 6-12-17

✓ Tribe ✓ Defendant ✓ Counsel

Clerk