No. 127538

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LANCE M. DAVIDSON, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 5-19-0217. There on appeal from the Circuit Court of the Fourth Judicial Circuit, Montgomery County, Illinois, No. 18-CF-78. Honorable James Roberts, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

The plain language of the phrase "contact of an insulting or provoking nature with an individual" requires the State to prove that the individual contacted was insulted or provoked. As the evidence failed to prove that Officer Stitt was insulted or provoked by the contact made by Lance Davidson, his conviction for aggravated battery should be reversed.

Lance Davidson was convicted of aggravated battery to a correctional institution employee for making "contact of an insulting or provoking nature." (C. 24 V1); 720 ILCS 5/12-3(a) (West 2018). Davidson argues that the battery statute requires the State to prove that the victim of the battery was subjectively insulted or provoked and, without such evidence, the State failed to prove Davidson guilty, while the State maintains that the statute merely requires proof that a reasonable person could have been insulted or provoked and it met that burden. The plain language of the battery statute and the bulk of the cases agree that "when a defendant is accused of battery or domestic battery (insulting or provoking contact), the State must prove that the defendant's physical contact was insulting or provoking to the victim, not to some third party. [Citations omitted]." *People v. Ward*, 2021 IL App (2d) 190243, ¶ 50. Here, the State failed to prove that Officer Stitt was subjectively insulted or provoked, so this Court should reverse Davidson's conviction for aggravated battery.

The Plain Language of the Statute Requires the State to Prove That the Person Contacted Was Insulted or Provoked

The State argues that both the structure and language of the battery statute support its position. (State's Brief at 9–12). According to the State, the bodily harm section, 720 ILCS 5/12-3(a)(1), is written in terms of the result of a defendant's actions, while the insulting or provoking section, 720 ILCS 5/12-3(a)(2), is written in terms of the nature of the defendant's actions. (St. Br. 10). The State focuses on the word "nature" in the statute to support its argument that it is the conduct itself that determines whether it was insulting or provoking. (St. Br. 9).

According to the State, "whether the fundamental characteristic of contact is to insult or provoke is an objective inquiry, independent of the effect of the contact on a specific victim." (St. Br. 9). The State claims this conclusion is supported by the definition of battery at common law, which deemed contact "offensive" "when it would offend a reasonable person's sense of dignity." (St. Br. 9).

While that may have been true at common law, the State's position ignores that the battery statute at issue was specifically drafted to differ from common law. In *Ward*, the second district appellate court explained that the Committee Comments demonstrate that the legislature recognized that "[t]raditionally, any unlawful touching of another constituted a battery," but wrote this statute "to limit the traditional 'barest touching[,]' which does not cover bodily harm[,] to one of 'an insulting or provoking nature.'" *Ward*, 2021 IL App (2d) 190243, ¶ 53 (citing 720 ILCS Ann. 5/12-3, Committee Comments -1961, at 250 (Smith-Hurd 1993)). Where our legislature specifically wrote the statute to differ from the common law, the State's reliance on the common law interpretation is misplaced and should be rejected. In addition, the State's resort to legislative history is out of place here. The language of the battery statute is clear and unambiguous. "When the language of a statute is clear and unambiguous, we must apply it as written, without resort to legislative history or other extrinsic sources to determine legislative intent." *Policemen's Benevolent Labor Comm. v. City of Sparta*, 2020 IL 125508, ¶ 15. Accordingly, as the court held in *Ward*, "The State's argument that it is not required to prove that defendant's physical contact caused [the person contacted] to be 'insulted' or 'provoked' is inconsistent with the plain language of the statute." 2021 IL App (2d) 190243, ¶ 53.

By contrast, Davidson's brief emphasized that the battery statute is written in terms of the effect of defendant's conduct on "an individual" in support of his position that the statute requires proof that that "individual" was actually insulted or provoked. (Appellant's Brief at 11–12). Importantly, this reading of the statute is supported by case law. In his opening brief,

Davidson noted that the court in *DeRosario* stated, "the statute's plain language defines the offense in terms of contact that insults or provokes the victim." *People v. DeRosario*, 397 Ill. App. 3d 332, 334 (2nd Dist. 2009). The State accuses Davidson of truncating this quotation to change the meaning of it. (St. Br. 20). While the quotation in the brief was only part of the sentence that the court had used, the meaning of the sentence was not changed when viewed in context. The court was simply pointing out that the "insulting or provoking contact" section does not require proof that the victim was injured. *DeRosario*, 397 Ill. App. 3d at 334. That does not change the court's analysis that, when dealing with the "insulting or provoking" section, "the statute's plain language defines the offense in terms of contact that insults or provokes the victim." *Id.*

Indeed, "[e]very district in our state has consistently held that, when a defendant is accused of battery or domestic battery (insulting or provoking contact), the State must prove that the defendant's physical contact was insulting or provoking to the victim, not to some third party. [Citations omitted]." *Ward*, 2021 IL App (2d) 190243, ¶ 50; *People v. Green*, 2011 IL App (2d) 091123, ¶ 23 (stating that "[t]he domestic battery statute's plain language defines the offense in terms of contact that insults or provokes the victim."). Accordingly, this Court should agree that the plain language of the statute requires that the victim was subjectively insulted or provoked.

Nearly Every Case Construing the Phrase "Insulting or Provoking" Agrees That the Statute Requires Evidence That the Person Contacted Was Insulted or Provoked by the Contact

In his opening brief, Davidson examined the case law that has developed around the issue of "insulting or provoking" contact. (App. Br. 13–18). The analysis of these cases is consistent with the analysis performed by the second district appellate court in *Ward*, which concluded, "Every district in our state has consistently held that, when a defendant is accused of battery or domestic battery (insulting or provoking contact), the State must prove that the

defendant's physical contact was insulting or provoking to the victim, not to some third party. [Citations omitted]." *Ward*, 2021 IL App (2d) 190243, ¶ 50; *see Green*, 2011 IL App (2d) 091123, ¶ 23 (stating that "[t]he domestic battery statute's plain language defines the offense in terms of contact that insults or provokes the victim.").

Though Davidson's position is supported by nearly every case that has weighed in on the subject, the State disagrees. The State focuses on the word "nature" in the statute to support its argument that it is the conduct itself, irrespective of its effect on the victim, that determines whether it was insulting or provoking. (St. Br. 9). According to the State, "whether the fundamental characteristic of contact is to insult or provoke is an objective inquiry, independent of the effect of the contact on a specific victim." (St. Br. 9). The State is wrong.

If the State's position is correct and it is only the "nature" of the contact that matters, then courts would not look at the factual context in which the contact occurred. *See Ward*, 2021 IL App (2d) 190243, ¶ 52 (explaining that if whether something is insulting or provoking contact depends only on the "type of contact," "we would not look to the context, the relationship of the parties, and the reaction of the victim at the time."). The "nature" or "fundamental or essential characteristics" of something does not change based on factual context. (St. Br. 9). Thus, the fact that it is widely accepted that courts look to the factual context itself to determine whether contact is insulting or provoking demonstrates that the courts have rejected the State's position because they are not merely looking at the "nature" of the contact. *See, e.g., People v. d'Avis*, 250 Ill. App. 3d 649, 651 (1st Dist. 1993) ("a particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs. In other words, what may be an innocent touching in one instance, may be interpreted quite differently in a different set of circumstances."); *DeRosario*, 397 Ill. App. 3d at 334 (holding that the parties' relationship provided important context in determining that the contact was insulting or provoking); *People v. Dunker*, 217 Ill. App. 3d 410, 415 (4th Dist. 1991) (holding that victim's

reaction of crying after being poked in the chest by defendant while he used profanity "was sufficient evidence for the jury to conclude [the victim] was insulted or provoked by defendant's touching."). Indeed, even in *Williams*, the Court did not look solely at the "nature" of the contact–a kick–but viewed it in the context of the defendant kicking the victim in the head while the victim was unconscious. *People v. Williams*, 2020 IL App (4th) 180554, ¶¶ 50–51. Thus, even the State's most helpful case did not apply the analysis the State is urging. (St. Br. 15–17). If the question of whether a contact is insulting or provoking depends on the factual context in which it occurs, then it is not the "nature" of the contact that decides the answer.

The State contends that its position is supported by *People v. Meor*, where this Court held that "the State of Illinois has deemed an act of sexual penetration that falls within the criminal sexual abuse statute, including the act of sexual penetration at issue here, to be inherently insulting as a matter of law." *People v. Meor*, 233 Ill. 2d 465, 471 (2009); (St. Br. 12–13). However, *Meor* does not support the State's position that courts should only look to the contact to determine if it was insulting or provoking. First, the court did not say that sexual penetration is, by its nature, insulting or provoking. Rather, the court explained that sexual penetration, "within certain age limits and with applicable age differences" constitutes criminal conduct and that criminal conduct, as a matter of law, "is necessarily insulting or offensive" as a matter of public policy. *Meor*, 233 Ill. 2d at 471. Even in that situation, this Court looked beyond the mere conduct (sexual penetration) and examined the factual context of the conduct (ages of those involved) to determine whether it was insulting or provoking. Second, this Court reached this conclusion not because sexual penetration is insulting or provoking by its nature, but because making physical contact with someone in such a way that constitutes criminal conduct "is necessarily insulting or offensive." *Id.* At face value, *Meor* stands for the proposition that where the physical contact is made in a way that is itself criminal conduct, then that conduct "is necessarily insulting or offensive." But, where the underlying contact is not itself criminal

conduct, *Meor* offers limited guidance. Importantly, *Meor* is an exception to the general rule in the unique situation where the underlying contact is itself criminal conduct. *Meor* is not helpful in this case because, unlike criminal sexual penetration, shoving someone is not itself criminal conduct.

The weakness of the State's position is further demonstrated by the fact that even though, "[f]or hundreds of years, the common law has regarded deliberate spitting on someone as a battery," *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55, a contact like spitting has not been held to be "insulting or provoking" by its "nature." The courts have explained that, "we can envision contexts in which a defendant's spitting might not constitute insulting or provoking behavior. [*People v. Peck*, 260 Ill. App. 3d 812, 814–15 (4th Dist. 1994)]. We also can envision contexts in which spitting on someone would be insulting or provoking." *Wrencher*, 2011 IL App (4th) 080619, ¶¶ 54–55. Thus, even a contact like spitting, which has been recognized as a basis for battery for over a century, has never been held to be "insulting or provoking" by its "nature." Indeed, the State has not identified any types of contact that are "insulting or provoking" by their "nature," regardless of factual context. The State has also not cited to any cases where a court has held that particular types of contact are "insulting or provoking" by their "nature." And the State has not cited a single case that looked solely at the "nature" of the contact to determine whether it was "contact of an insulting or provoking nature."

The State asserts the court in *People v. d'Avis* conducted its analysis consistent with the State's interpretation of the statute. (St. Br. 18–19). The State is wrong. The court did not look only at the contact, but looked to the factual context in which the contact occurred. *d'Avis*, 250 Ill. App. 3d at 650–51. Notably, in *d'Avis*, the appellate court pointed out that it was the State that argued "that a particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs." *Id.* at 651. Ultimately, the court affirmed the trial court's finding that the "noninsulting medical procedure" became an insulting and

provoking contact based on the context in which it occurred. *Id.* Again, the fact that context determined whether the contact was insulting or provoking means it is not merely the "nature" of the contact that is to be considered and the State's position fails.

The State argues that the correctness of its interpretation is demonstrated by *People v. Williams*, 2020 IL App (4th) 180554. (St. Br. 16–17). According to the State, requiring subjective evidence that the victim was insulted or provoked means there could never be a conviction in a case with an unconscious victim. (St. Br. 17). That is simply not true. As stated above, while the State has to present some evidence that the victim was insulted or provoked, Davidson has never argued that this may *only* come in the form of testimony from the victim of how they felt at the instant of the contact. For example, in addition to presenting the evidence of the factual context in which the incident occurred, which can give rise to an inference that the victim was insulted or provoked, there is no reason why the prosecution could not have asked the victim in *Williams* how he felt when he was informed that he had been kicked while he was unconscious. This is not an onerous burden on the State. In short, Davidson's interpretation will not prevent a conviction in a case with an unconscious victim like *Williams* and the State's argument should be rejected.

The Legislative Purpose of the Battery Statute Is Better Served by Looking to the Factual Context to Determine Whether Contact Insulted or Provoked the Victim

The State argues that Davidson's position of requiring proof that the victim was insulted or provoked "would thwart the statute's intended effect of protecting victims from conduct that is, by its *nature*, insulting or provoking." (St. Br. 13) (emphasis in original). According to the State, requiring proof that the victim was insulted or provoked "thwarts the domestic battery statute's legislative goal of prosecuting abusers." (St. Br. 13). The State supports this argument by pointing to *Ward*, where the appellate court held that the State failed to prove that the victim was insulted or provoked. (St. Br. 13–14); *Ward*, 2021 IL App (2d) 190243, ¶¶ 48, 50–59, 65, 67, 80. The State apparently believes *Ward* was a miscarriage of justice because

"Ward's conduct towards his wife, which was deemed insulting by bystanders, officers on the scene, and a jury, went unpunished." (St. Br. 14). What this ignores, however, is that his wife specifically testified that she was not insulted or provoked. (St. Br. 13–14); *Id.* In *Ward*, where the wife did not consider herself a victim and did not consider her husband an abuser, she was not a vulnerable victim in need of protection from this statute.

Moreover, the State's argument that Davidson's approach would thwart the legislative goal of prosecuting batterers is based on a flawed premise. The State insists, "By adopting a rule that limits domestic violence convictions to circumstances where the victim displays an emotional reaction when the abusive conduct occurs or admits such a reaction on the stand at trial, the subjective effect approach is [] inconsistent with the legislature's intent." (St. Br. 15). This blatantly misrepresents Davidsons's argument. Davidson has never argued that the State must present evidence of the victim's "emotional reaction" to the contact at the time the contact was made in order to sustain a conviction.

Rather, Davidson's argument echoes the holding in *Ward* that, while "a victim does not have to testify that he or she was insulted or provoked by a defendant's physical contact, there must be evidence presented from which a trier of fact could logically infer that the victim was insulted or provoked." *Ward*, 2021 IL App (2d) 190243, ¶ 56. (App. Br. 10, 18, 20, 23). In order to determine whether a victim was insulted or provoked, the trier of fact is to evaluate the factual context in which the contact occurred, including the relationship of the parties and the victim's reaction at the time. *See, e.g., d'Avis*, 250 Ill. App. 3d at 651 ("a particular physical contact may be deemed insulting or provoking based upon the factual context in which it occurs. In other words, what may be an innocent touching in one instance, may be interpreted quite differently in a different set of circumstances."); *DeRosario*, 397 Ill. App. 3d at 334 (holding that the parties' relationship provided important context in determining that the contact was insulting or provoking); *Dunker*, 217 Ill. App. 3d at 415 (holding that victim's reaction of

crying after being poked in the chest by defendant while he used profanity "was sufficient evidence for the jury to conclude [the victim] was insulted or provoked by defendant's touching."). Testimony about the victim's reaction to the contact, if any, is to be taken into consideration, but is not required for a conviction. Contrary to the State's assertion, requiring proof that the victim was subjectively insulted or provoked is not going to make it unduly difficult to convict abusers.

Importantly, the State's position of looking only at the "nature" of the contact will result in acquittals for people who have actually victimized someone, unlike the defendant in *Ward*. For example, following the State's position would result in an acquittal in a case like *d'Avis*, despite the obviously problematic behavior by the physician. According to the State, because the contact itself–the consensual rectal examination–was not insulting or provoking, Mr. d'Avis would not be guilty under the statute even though the factual context demonstrates that the person contacted was insulted or provoked by the contact. *d'Avis*, 250 Ill. App. 3d at 651. Similarly, the defendant in *DeRosario* would also have been acquitted if the State's position were followed because the contact itself–touching the victim's back with his knee–was not itself insulting or provoking, even though the factual context of the case established that the victim was insulted or provoked. *DeRosario*, 397 Ill. App. 3d at 334–35. The State's position leads to absurd results as it fails to protect those who were actually victimized and in need of protection from the law.

In sum, Davidson urges this Court to follow the analysis in *Ward*, which held that "a defendant cannot be found guilty of battery based on 'physical contact of an insulting or provoking nature with an individual' without some form of proof that the victim was insulted or provoked." *Ward*, 2021 IL App (2d) 190243, ¶ 53.

The Evidence Failed to Prove Davidson Made "Contact of an Insulting or Provoking Nature" Where There Was No Evidence That Officer Stitt Was Insulted or Provoked

As established above, to convict Davidson of aggravated battery in this case, the State was required to prove that Officer Stitt was actually insulted or provoked. *Ward*, 2021 IL App (2d) 190243, ¶¶ 50, 53. The State argues that the evidence was sufficient to support a conviction because "a rational finder of fact could conclude beyond a reasonable doubt that the contact between defendant and Stitt was of an insulting or provoking nature." (St. Br. 23).

As discussed in more detail in the opening brief, (App. Br. 19–23), the evidence failed to show that Officer Stitt was subjectively insulted or provoked. Stitt knew that Davidson was upset by what had occurred earlier in court. (R. 399). Stitt testified that he believed Davidson's behavior of running around the room to avoid Stitt was a result of not wanting to go on lock down. (R. 399). As Stitt was attempting to restrain Davidson to put him on lock down, Davidson "pushed [him] back a little bit," but Stitt did not fall over and Stitt immediately spun Davidson around, locked his arms to his side, and took him to his cell. (R. 389). The only evidence about Stitt's reaction to the contact is that he was "pushed back a little bit" but that did not stop him from being able to immediately restrain Davidson and place him in his cell, and he did not feel the need to check for marks or bruises. In addition, Stitt testified that placing inmates on lock down was one of his normal duties as a correctional officer. (R. 387–88). There is no evidence that Stitt was upset, offended, or angry following the push. Rather, the evidence demonstrates that Stitt's reaction to the contact was to simply perform a routine task that is part of his normal duties as a correctional officer. This does not give rise to an inference that he was insulted or provoked by the contact. Accordingly, because the evidence failed to establish that Officer Stitt was personally insulted or provoked by the contact, Lance Davidson's conviction should be reversed outright.

CONCLUSION

For the foregoing reasons, Lance M. Davidson, Defendant-Appellant, respectfully requests that this Court reverse his conviction for aggravated battery outright.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is eleven pages.

/s/Karl H. Mundt
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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 4, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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