
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

FORT PECK ASSINIBOINE AND SIOUX
TRIBES

Plaintiff/Appellee

Appeal No. 206

vs.

Dinette "Dee" First,
Defendant/Appellant

THIS APPEAL is from a jury verdict entered on January 26, 1994, in which Dinette First, Defendant, was found guilty of Simple Assault in the Fort Peck Tribal Court, Poplar, Montana, before the Honorable A.T. Stafne, Chief Judge.

APPEARING FOR THE PLAINTIFF/APPELLEE, Fort Peck Tribes: Marvin Youpee, Tribal Prosecutor; P.O. Box 1027 Poplar, Montana 52925

ARGUED: May 13, 1994

DECIDED: May 13, 1994, from the bench with opinion pending.

UNANIMOUS OPINION by Chief Justice Beaudry and Associate Justice Schuster, Associate Justice Melbourne not sitting. Chief Justice Beaudry writing for the Court.

HELD: The conviction of Simple Assault, by Dinette "Dee" First, Defendant, is Affirmed.

FACTS

The salient facts in this case indicated that on October 31, 1993, five juvenile boys ages fourteen through seventeen were walking along F street across from the Cenex station in Poplar, Montana. One or more of the boys looked across the street at the defendant, who was sitting in her vehicle with her brother. One of the victims testified that when he looked at the defendant he saw her get out of her vehicle and pull out a gun and point it at the juveniles; at that point one of the juveniles exclaimed, "she's got a gun!" The juveniles then ran down an alley behind TJ's. It is undisputed that the defendant

along with her brother chased the juveniles in hot pursuit. There is testimony that the defendant's brother, Thomas, caught one of the juveniles and hit him with a bat.

There is testimony that there may have never been a gun; that fact is heavily disputed. There is no physical evidence of record indicating the actual presence of a gun during the time of the assault. Testimony also indicated that the bat may have been mistaken for a gun. It is clear from the testimony that the juveniles were under the impression and believed that the Defendant had a gun and were fearful of being shot by a gun.

ISSUE

The first issue before the Court is whether the jury made a determination of fact based on substantial evidence.

RULE OF LAW

The applicable rule of law pertaining to this issue is Title I, C.C.O.J., Section 202:

Jurisdiction of the Court of Appeals.

The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal prosecution to establish a prima facie case of simple assault it must prove that:

- 1) The defendant attempted by physical menace to
- 2) Put another in fear of serious bodily harm...

The defendant argues that:

"...the Tribe did not present any credible evidence that:

- (a) she ever had a gun in her possession on October 31, 1993;
- (b) she ever pointed a gun at any of the five (5) juvenile males."

See defendant's Appellate Brief page 2.

Defendant's argument is not on point. In light of the definition of simple assault under the tribal code, the issue is not whether there was a gun present, but rather; whether the victims were placed in fear of serious bodily harm by physical menace? Placing another in fear of serious bodily harm by physical menace can certainly be accomplished outside of the use of gun or any other deadly weapon. The

testimony of the juvenile victims in this case shows that each of the victims was placed in fear or serious bodily harm which was exhibited by the fact that each ran in haste away from the defendant. The physical menace in this case is demonstrated by the fact that the defendant pursued the victims.

It is clear from the testimony of James Long, one of the juvenile victims that he believed the defendant had a gun and pointed the gun at him and at others with his group. He testified that he and the others ran and were chased by the Defendant. James Long's testimony of belief of the presence of a gun establishes fear and his testimony of the pursuit establishes physical menace.

Josh Wettlin testified that when he saw the defendant across the street:

" [that] somebody was passing something out of the car and then, I didn't see anything... and then they said. . . she had a gun,... then I kind of got scared and I took off. It was just scary when they said that." Trial transcript, page 21.

Josh Wettlin further testified that he was scared that she might have a gun and that she might shoot him. Transcript page 22. On cross examination Josh testified that he did not see a gun but that the defendant was pointing something around and someone said "she has a gun." Transcript page 23. Josh Wettlin's testimony that he was scared and that he "took off" establishes fear. At trial Harold Boyd's testimony was consistent with Josh Wettlins.

Frank Hapa testified that he didn't see anything, but he heard that she pulled a gun. Eric Craft testified that he ran because he heard she had a gun. He further testified that he was scared and that someone chased him down and hit him with a bat. Here too the testimony of Frank Hare and Eric Craft go to the fact of fear and physical menace.

The defense asserts that the prosecution failed to carry the burden of proof that the defendant was guilty- beyond a reasonable doubt- of the crime of simple assault. The defendant pins its argument on the fact that the defendant did not have a gun at the time of altercation. See Appellant's brief, page 7. In review of the Court transcript it is clear that the jury could have found reasonable doubt as to the existence of a gun. However, that fact is irrelevant and immaterial in establishing a prima facie case of simple assault.

In this jurisdiction assault is defined and committed in varying degrees, Aggravated Assault, a felony and Simple Assault, a class A Misdemeanor are defined in the Fort Peck Tribal Code of Justice, under two separate and distinct code sections and only Aggravated Assault envisions the use of a deadly weapon. See Title III, C.C.O.J., Sec. 213 (b) wherein Aggregated Assault is defined as:

"whoever
(a)
(b) intentionally causes bodily injury to another
with a deadly weapon..."

Simple Assault as defined in Title III C.C.O.J. Sec. 215 (c), (the code section the defendant/appellant was convicted of violating), does not require the element of use of a deadly weapon in order to establish a prima facie case that simple assault was committed. Section 215 (c) , is set forth above.

The only logical conclusion here is that a jury under the facts presented could not find the defendant guilty beyond a reasonable doubt of Aggravated Assault, because the evidence is not sufficient to merit a prima facie showing. However, taking these facts as presented to the jury into consideration there is no other conclusion that reasonable minds could reach but to ascertain that all the elements of Simple Assault, as defined in the tribal code are present and a conviction of Simple Assault must be handed down.

IT IS NOW WHEREFORE THE OPINION OF THE COURT THAT:

1. The jury made a determination of fact based on substantial evidence and for this reason the Fort Peck Court of Appeals is precluded from overturning that jury determination.

2. As to the question of law: Whether the prosecution made a prima facie showing that Simple Assault was committed. This Court concludes that all the elements necessary to establish a prima facie case of Simple Assault, as defined in the Tribal Code, are present herein. By reason of fact and law the jury's verdict is hereby **AFFIRMED**.

Dated this _____ day of _____, 1994.

BY THE COURT OF APPEALS:

Gary M. Beaudry, Chief Justice

Gerald M. Schuster, Associate Justice,
concur.
