

ARKANSAS COURT OF APPEALSDIVISION IV
No. CACR11-505

CARLTON X. RUSSELL

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

OPINION DELIVERED NOVEMBER 16, 2011

APPEAL FROM THE WHITE
COUNTY CIRCUIT COURT,
[NO. CR10-271]HONORABLE ROBERT EDWARDS,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Carlton X. Russell appeals his February 8, 2011 conviction in White County Circuit Court, wherein he was sentenced to 144 months in prison for aggravated assault on an employee of a correctional facility. He argues that the State failed to prove two essential elements of the offense and the trial court erred by denying his motion to dismiss. We disagree and affirm his conviction.

Appellant was charged by information on July 7, 2010, with aggravated assault on an employee of a correctional facility in violation of Arkansas Code Annotated section 5-13-211 (Repl. 2006). It was alleged that appellant threw a cup of urine on two deputies during his incarceration. The State amended the information on November 8, 2010, to include a habitual-offender enhancement. Thereafter, appellant waived his right to a trial by jury, and on February 7, 2011, he was tried before the bench in White County Circuit Court.

Appellant moved for a dismissal of the charges following the State's case-in-chief, arguing that there was insufficient evidence to prove that the substance thrown on the deputies was urine and that the State failed to prove that the action created a potential danger of infection to them. When the trial court denied this motion, the defense rested, stating that it renewed the two points just argued. This motion was also denied.

The trial court found appellant guilty of the offense and sentenced him to 144 months' imprisonment. A timely notice of appeal was filed. In this appeal, appellant contends that the trial court erred in denying his motion to dismiss the charge because the State failed to prove two necessary elements of the offense, namely, that the substance appellant threw was urine and that the substance, if urine, had the potential to cause or carry infection.

A motion to dismiss at a bench trial, like a motion for directed verdict at a jury trial, is considered a challenge to the sufficiency of the evidence. *Stewart v. State*, 2010 Ark. App. 9, ___ S.W.3d ___. When the sufficiency of the evidence is challenged in a criminal conviction, we review the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *Id.* Substantial evidence is evidence that induces the mind to go beyond mere suspicion or conjecture, and that is of sufficient force and character to compel a conclusion one way or the other with reasonable certainty. *Id.*

Arkansas Code Annotated section 5–13–211 provides:

A person commits aggravated assault upon an employee of a correctional facility if, under circumstances manifesting extreme indifference to the personal hygiene of the employee of the correctional facility, the person purposely engages in conduct that creates a potential danger of infection to an employee of any state or local correctional facility while the employee of the state or local correctional facility is engaged in the course of his or her employment by causing the employee of the state or local

correctional facility to come into contact with saliva, blood, urine, feces, seminal fluid, or other bodily fluid by throwing, tossing, or expelling the fluid or material.

Appellant first claims that the State failed to prove that the substance thrown was urine. He contends that the State's only evidence to satisfy this element is the lay-opinion testimony of the two deputies that the substance smelled like urine or ammonia and that it appeared to be yellow-tinted while dangling from one deputy's eyelash. Appellant argues that the thrown substance was never tested to determine its identity and that both deputies testified that water was available to appellant in his cell. One deputy testified that commercial-grade, cleaning-disinfectant solutions were available to appellant as well. Appellant maintains that the evidence submitted by the State failed to be sufficient to prove that the substance was urine.

Second, appellant claims that the State failed to prove that his conduct created a potential danger of infection because the State provided no proof that urine can cause or carry infection. Appellant cites *Foster v. State*, 104 Ark. App. 108, 289 S.W.3d 476 (2008), where this court held as follows:

The requirement of the statute is that the person's conduct "creates a potential danger of infection" to the correctional-facility employee. Mr. Foster's act of purposely expelling his bodily fluid onto the deputy's person satisfied the "potential danger" requirement of the offense.

Id. at 112–13, 289 S.W.3d at 479. Appellant contends that *Foster* creates the presumption that all bodily fluids can cause infections or carry infectious disease. However, he argues that, without any proof that urine can cause or carry infection, there is not sufficient proof that appellant's conduct herein created a potential danger of infection.

The State responds, arguing that substantial evidence supports appellant's conviction. The two deputies testified that, on May 5, 2010, while completing "lock down and lights out procedure" at the White County Detention Center, appellant threw a cup of urine on them. Both deputies testified that the liquid was warm and smelled like urine. One deputy testified that the substance dripping from his eyelash was yellow in color. Weighing the evidence and assessing the credibility of the witnesses are matters for the fact-finder. *Bush v. State*, 90 Ark. App. 373, 206 S.W.3d 268 (2005). Moreover, the fact-finder is entitled to draw upon common sense and experience in reaching its verdict. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). Here, the trial court assessed that the substance was urine based on the testimony of the deputies given during the trial, and the trial court's ruling is affirmed.

The State also argues that the requirement of Arkansas Code Annotated section 5-13-211 is that appellant's conduct created a potential danger of infection, not evidence that the thrown urine actually caused infection. We agree. As in *Foster*, appellant's act of purposely throwing bodily fluid onto the deputies satisfied the "potential danger" requirement of the offense.

Affirmed.

ROBBINS and HOOFMAN, JJ., agree.