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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ROBERT LEROY STODDARD, Jr., Defendant - Appellant.	No. 10-10124 D.C. No. 4:09-cr-00918-CKJ-BPV-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Cindy K. Jorgenson, District Judge, Presiding

Argued and Submitted December 9, 2010
San Francisco, California

Before: REINHARDT, HAWKINS, and N.R. SMITH, Circuit Judges.

Robert Leroy Stoddard, Jr. ("Stoddard") appeals his conviction for felony assault on a federal officer involving physical contact under 18 U.S.C. § 111(a)(1), arguing that the conduct at issue, intentionally spitting on a federal corrections officer engaged in his official duties, amounts only to a simple assault punishable by a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

maximum of one year's imprisonment, rather than a felony punishable by a maximum of eight years' imprisonment, because: (1) the government failed to prove actual physical contact between Stoddard and the officer; and (2) spitting is a mere simple assault offense under Ninth Circuit precedent. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

A. Statutory Text

The current version of § 111, under which Stoddard was convicted, creates three separate offenses: (1) misdemeanor simple assault and (2) felony assault involving physical contact or intent to commit another felony, both included under § 111(a); and (3) felony assault involving a deadly or dangerous weapon or bodily injury, included under § 111(b). 18 U.S.C. § 111; *accord United States v. Rivera-Alonzo*, 584 F.3d 829, 833 & n.2 (9th Cir. 2009). Congress's original goal in enacting § 111 "was to give 'maximum protection to federal officers[,]'" *United States v. Sommerstedt*, 752 F.2d 1494, 1497 (9th Cir. 1985) (emphasis added) (quoting *United States v. Feola*, 420 U.S. 671, 684 (1975)), from "the wrongful use of *any* force directed against them[,]" *id.*

Section 111(a) was amended as part of the Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 208(b), 121 Stat. 2534, 2538 (2008). Prior to amendment, § 111(a) included the current misdemeanor simple assault offense and a

felony offense subject to a maximum of eight years' imprisonment in "all other cases" not constituting simple assault or assault with a weapon or bodily injury under § 111(b). 18 U.S.C. § 111 (effective through Jan. 6, 2008).

However, as amended, § 111(a)(1) clearly dictates "that the line between misdemeanors and felonies is drawn at physical contact or acting with the intent to commit another crime[.]" *United States v. Williams*, 602 F.3d 313, 317 (5th Cir. 2010); *see also* 8 U.S.C. § 111(a)(1); *United States v. Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008). Thus, while the amended statute does not define simple assault, it clarifies that for the purposes of § 111, an "assault, coupled with the presence of physical contact . . . is *not* simple[,]" and "[u]nder § 111(a), as amended, assaults are treated as felonies" as long as they involve physical contact or intent to commit another felony. *Chapman*, 528 F.3d at 1219 (internal citations omitted) (emphasis added). As such, *any* forcible assault against a federal officer involving physical contact, committed without the use of a dangerous weapon and not resulting in bodily injury, is a felony assault under § 111(a). *Rivera-Alonzo*, 584 F.3d at 833 & n.2.

B. Physical Contact

Stoddard nonetheless argues that spitting does not rise to the level of a felony assault involving physical contact because it does not involve body-to-body touching. However, the plain statutory text does not require such contact; it merely requires

"physical contact." 18 U.S.C. § 111(a). *Cf. United States v. Ramirez*, 233 F.3d 318, 322 (5th Cir. 2000) (interpreting former § 111(a) "all other cases" assault provision to mean that "[*a*]*ny physical contact* [ ] by which a person 'forcibly assaults . . .' a federal officer in the performance of his duties but which does not involve a deadly weapon or bodily injury, falls into the" felony provision of subsection (a) (partial emphasis added)).

Further, as Stoddard concedes, spitting constitutes an offensive touching amounting to a common law battery where the spit makes contact with the victim. *See United States v. Lewellyn*, 481 F.3d 695, 699 (9th Cir. 2007) ("[I]ntentionally spitting in another person's face easily falls within the scope of an offensive touching."); *United States v. Masel*, 563 F.2d 322, 323-24 (7th Cir. 1977) (finding spitting an offensive touching because "[i]t is ancient doctrine that intentional spitting upon another person is battery."); *United States v. Frizzi*, 491 F.2d 1231, 1232 (1st Cir. 1974) (spitting is "a bodily contact intentionally highly offensive," and therefore qualified as a "forcible assault, or more exactly, a battery" amounting to a felony offense under former version of § 111). Stoddard points to no authority, and the court finds none, distinguishing between "physical contact" and "offensive touching."

Additionally, other circuits, interpreting the pre-amendment "in all other cases" assault provision consistently with § 111(a)'s post-amendment language, have

determined that throwing bodily fluids or excrement onto a federal officer constitutes felony assault involving physical contact, rather than simple assault involving no bodily contact or touching, under an identical theory of assault as an attempted or completed battery. *See United States v. Martinez*, 486 F.3d 1239, 1245-46 (11th Cir. 2007) (spraying urine on federal corrections officer involved actual physical contact not resulting in bodily injury and not involving a deadly weapon, and therefore fell under § 111(a)'s felony assault provision, rather than its simple assault provision); *Ramirez*, 233 F.3d at 321-22 ("By hurling [a] urine-feces mixture onto Officer Griffin, Ramirez committed an assault *which involved physical contact*, but not a deadly weapon or bodily harm." (emphasis added)). Indeed, the Fifth Circuit noted that throwing human waste onto a corrections officer was "the very sort of physical but non-injurious assault contemplated by the 'all other cases' provision" of the pre-amendment § 111, which it construed to require physical contact like the current § 111(a). *Ramirez*, 233 F.3d at 322.

Spitting, like throwing urine or other bodily fluids, involves the type of non-injurious physical contact contemplated by § 111(a)'s felony provision. As such, Stoddard's spitting conduct amounted to a completed battery, which amply supported his conviction for an assault involving physical contact under this court's adoption of the common law theory of assault as an attempted battery. *Cf. Lewellyn*, 481 F.3d at

697-98 (Since "an assault is attempted battery . . . proof of a battery will support conviction of an assault" (internal quotations omitted)).

C. Spitting Is Not Confined to Simple Assault

Despite having conceded that spitting amounts to an offensive touching, Stoddard argues that this court's decision in *Lewellyn* definitively categorized spitting as a misdemeanor simple assault, rather than a felony assault.

In *Lewellyn*, we found that the defendant's actions in intentionally spitting on a patient at a VA hospital amounted to a simple assault under 18 U.S.C. § 113(a)(5), a statute similar and related to § 111. 481 F.3d at 696-99. However, we did not hold that spitting may *only* be classified as a simple battery. Lewellyn was only charged with simple battery, *id.* at 696, and § 113 did not contain any intermediate felony assault offense between simple assault and assault involving a deadly or dangerous weapon. As such, it does not appear that Lewellyn could have been charged under any of the statute's other assault offenses sections. *See* 18 U.S.C. § 113(a)(5). Thus, *Lewellyn*'s holding was narrow and does not constrain our analysis here: the court merely determined that spitting was *sufficient* to sustain a conviction for simple assault under a theory of assault as an attempted battery. 481 F.3d at 698-99.

It is undisputed that Stoddard intended to and did spit at a federal officer engaged in his official duties, and that the spit actually hit the officer in the face.

Accordingly, Stoddard committed a forcible assault resulting in actual physical contact, *see* 18 U.S.C. § 111(a)(1), and the uncontested evidence sufficed to sustain the conviction, *see Lewellyn*, 481 F.3d at 698-99.

AFFIRMED.