[Cite as *In re R.A.M.*, 2010-Ohio-4198.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

IN THE MATTER OF: R.A.M., II, DELINQUENT CHILD.	**:** **:**	**O P I N I O N** **CASE NO. 2010-L-011**

Appeal from the Court of Common Pleas, Juvenile Division, Case No. 2009 DL 00531.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Appellee the state of Ohio).

R. Paul LaPlante, Lake County Public Defender, and *Joseph Hada*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Appellant R.A.M., II).

TIMOTHY P. CANNON, J.

{¶1} Appellant, R.A.M., II,[1] appeals his adjudication as a delinquent child for his commission of one count of assault, a violation of R.C. 2903.13(A). The assault in this matter was a felony of the fifth degree if committed by an adult, as the victim in this matter is a school teacher and the incident occurred in school, as prescribed by R.C. 2903.13(C)(2)(e). For the reasons stated herein, we affirm the judgment of the trial court.

1. This court will refer to all minors by their initials.

{¶2} Appellant was a student at Fairport Harbor High School in Fairport Harbor, Lake County, Ohio, at the time of the incident. His teacher, Ms. Joy Wiersma, was taking attendance in her second-period reading class, when she observed two students missing, one being appellant. As Ms. Wiersma began instructing, she heard noises from behind. Appellant exited the storage closet and hit Ms. Wiersma two times in the buttocks with a chapter book. Explaining the incident, Ms. Wiersma stated that "[i]t was definitely a hit, a hit. It was boom, boom." Ms. Wiersma testified that while she did not suffer any injury, the strikes to her buttocks were delivered with force.

{¶3} Ms. Wiersma further stated that she sent appellant to the principal's office. While waiting in the principal's office, appellant called Ms. Wiersma a "rapist." Later that day, in front of other students, appellant again called Ms. Wiersma a "rapist."

{¶4} Appellant's classmate, J.M., also testified. J.M. stated that appellant was hiding in the cabinet behind Ms. Wiersma. J.M. observed appellant hit Ms. Wiersma two times with a chapter book in the buttocks area.

{¶5} A trial was conducted before the magistrate on August 14, 2009. The magistrate determined that the state of Ohio had met its burden of proof, and the complaint was found to be true. The magistrate's decision stated:

{¶6} "There is no requirement that the Juvenile actually injure Ms. Wiersma. There is no requirement that the Juvenile intended to injure Ms. Wiersma. The plain reading of the statute demonstrates that the Juvenile must only be aware that his conduct will probably cause a certain result, i.e. swinging an object toward a person is likely to cause the object to come into contact with the person. Additionally, the

Juvenile can cause or attempt to cause physical harm and physical harm is defined as any injury, no matter its gravity or duration."

{¶7} Appellant filed objections to the magistrate's decision on August 28, 2009 and October 16, 2009. The trial court overruled appellant's objections and adopted the magistrate's decision dated August 14, 2009.

{¶8} Appellant assigns one assignment of error for our review:

{¶9} "The trial court erred to the prejudice of the delinquent child-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A)."

{¶10} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Juv.R. 29(A). When determining whether there is sufficient evidence presented to sustain an adjudication, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶11} Appellant was charged with assault, in violation of R.C. 2903.13(A), which provides:

{¶12} "No person shall knowingly cause or attempt to cause physical harm to another ***[.]"

{¶13} Appellant first argues that the state did not present sufficient evidence to satisfy the mens rea element. Under the Ohio Revised Code, a person acts knowingly, "regardless of his purpose, when he is aware that his conduct will probably cause a

certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that circumstances probably exist." R.C. 2901.22(B).

{¶14} Although appellant argues that his classmate offered evidence at the hearing that he was "trying to be funny," the statute does not consider appellant's purpose. Appellant's classmate testified that he saw appellant strike Ms. Wiersma two times with a chapter book. Appellant's actions were knowing, as appellant must have been aware that his conduct, i.e., hitting Ms. Wiersma with a book two times on her buttocks, could result in injury. See *State v. Smith*, 10th Dist. No. 08AP-736, 2009-Ohio-2166, at ¶38. Upon viewing the evidence presented at trial in a light most favorable to the state, we find it supports a finding that appellant possessed the requisite mental state necessary for the adjudication.

{¶15} Appellant next argues that the state failed to prove the element of physical harm.

{¶16} "'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶17} In *State v. Lesho* (Oct. 23, 1998), 11th Dist. No. 97-T-0161, 1998 Ohio App. LEXIS 5021, at *15-16, this court addressed the element of physical harm with respect to the appellant's conviction of domestic violence. In *Lesho*, the appellant argued that the "altercation did not leave any noticeable markings on [the victim's] neck." Id. at *15. This court noted that the "definition of physical harm is broad enough to encompass any physiological impairment, 'regardless of its gravity or duration.'" Id. at *16. This court further reasoned that the state did not have to prove that the victim

"sustained any actual injury," as the appellant could be convicted for "merely attempting to cause physical harm." Id. at *17.

{¶18} To support an assault conviction, impact is not required. *State v. Smith*, 2009-Ohio-2166, at ¶38, citing *State v. Cossack*, 7th Dist. No. 03-MA-263, 2005-Ohio-965, at ¶82-83; *State v. James* (June 30, 1982), 12th Dist. No. 81-07-0058, 1982 Ohio App. LEXIS 13966. "Rather, R.C. 2903.13(A) also prohibits a knowing attempt to cause physical harm." Id. (Affirming the appellant's conviction for assault when the appellant swung at a police officer, but the police officer was not sure if the appellant struck him.)

{¶19} In the instant case, Ms. Wiersma testified that appellant struck her two times in the buttocks area. She further stated that it was uncomfortable, that she had been struck with force, and that "she definitely knew" the incident had occurred. Viewing this evidence in a light most favorable to the state, and in light of the clear definition of physical harm set forth in R.C. 2901.01(A)(3), we find that, under the facts of this case (that is, appellant striking Ms. Wiersma, a teacher, with a book two times in the buttocks area during school hours), there is sufficient evidence to constitute the physical harm element under R.C. 2903.13(A).

{¶20} We find that appellant's adjudication is supported by the sufficiency of the evidence. Accordingly, the juvenile court did not err by adjudicating appellant delinquent for committing assault. Appellant's sole assignment of error is without merit.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶21} I respectfully dissent.

{¶22} In affirming the judgment of the trial court, the majority finds that appellant's conviction for assault is supported by the sufficiency of the evidence and that the trial court did not err in denying his motion for acquittal made pursuant to Crim.R. 29(A). I disagree.

{¶23} With regard to a Crim.R. 29 motion, in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Supreme Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." Id. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, at ¶18.

{¶24} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

{¶25} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the [trier of fact], while 'manifest weight' contests the believability of the evidence presented.

{¶26} ""(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference [sic] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶27} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a *** verdict where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶28} "*** [A] reviewing court must look to the evidence presented *** to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at 8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶29} In the present case, appellant is challenging his conviction for assault pursuant to R.C. 2903.13(A), a felony of the fifth degree, as the victim is a school teacher and the incident occurred in school, as prescribed by R.C. 2903.13(C)(2)(e).

{¶30} R.C. 2903.13(A), the assault statute, provides: "No person shall knowingly cause or attempt to cause physical harm to another or to another's unborn."

{¶31} R.C. 2901.01(A)(3) states: "'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶32} R.C. 2901.22(B) provides: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶33} Here, testimony by a fellow student reveals that appellant was attempting to pull a prank on the teacher. Appellant was "messing around," trying to be funny, and people were laughing. Appellant, by no means, was trying to hurt his teacher. The book at issue was small, soft-covered, and flimsy. According to the teacher, she did not suffer any injury, had no physical manifestation of any physical harm, was not uncomfortable, endured no pain, and carried on with normal classroom activities following the incident. When asked on direct examination whether she suffered any injury as a result of being hit by appellant, the teacher replied, "No, I did not." On cross-examination, the teacher was asked if she had any scratches, bruises, and broken bones, to which she responded, "No." She was asked if she went to the hospital after the incident and she replied, "No." The teacher was also asked whether it was uncomfortable when she was hit and if she were in pain and she said, "No."

{¶34} This writer believes that the majority is confusing civil battery, which requires only an offensive touching, with criminal assault. There is no evidence of any pain or discomfort suffered by the teacher. The contact in this matter does not equate to physical harm under R.C. 2901.01(A)(3). In addition, appellant did not act "knowingly," and thus, did not have the mens rea required for criminal assault pursuant to R.C. 2903.13(A).

{¶35} Because appellant's conviction for assault is not supported by the sufficiency of the evidence, I believe the trial court erred in denying his motion for acquittal made pursuant to Crim.R. 29(A).

{¶36} For the foregoing reasons, I dissent.