[Cite as *State v. Kellum*, 2009-Ohio-6743.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-03-081
	:	O P I N I O N
- vs -	:	12/21/2009
CHRIS KELLUM,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 09CRB00021-A

Mary K. Dudley, Hamilton City Prosecutor, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Michael P. Masana, 220 South Monument Avenue, Hamilton, Ohio 45011-2836, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Chris Kellum, appeals his conviction for domestic violence in the Hamilton Municipal Court. We affirm the trial court's decision.

{¶2} On January 1, 2009 at approximately 4:30 a.m., the police were dispatched to the home of appellant and his then "live-in girlfriend" and mother of his children, Kendra Edisky, after she called 9-1-1. In the witness statement form composed that morning, Edisky wrote the following: "We had both been drinking. We came home he started calling me names. I went down stairs layed [sic.] on the couch.

He started poking me in my cheek. I told him to stop. I got up. He slapped me, I slapped him back. He grabbed me [and] shoved me into the wall. I called 911." Edisky also responded affirmatively to the police officer's question of whether she feared for her safety if appellant came back.

{¶3} At appellant's February 18, 2009 trial, Edisky, now appellant's fiancé, took the stand on direct examination and stated their argument became physical when he "poked [her] in the face." Edisky testified that she pushed appellant, he pushed her back and then she slapped him. However, Edisky also responded affirmatively to the state's question of whether her recollections of the events were more accurate that morning. After reading the witness statement aloud to the trial court, Edisky denied appellant slapped her stating it was only "poking in the cheek;" although she confirmed that he did push her into the living room wall. Edisky also testified she called the police because she wanted appellant to leave.

{¶4} On cross-examination Edisky asserted that she was not harmed that evening, nor was she threatened in such a manner to place her in fear of harm. Edisky described the "poking" as, "[h]e would took [sic.] his finger and just kind of turned my face;" but reiterated that his actions did not make her fear for her safety. Edisky explained the slap she wrote about in her statement as, "I took him with his four fingers. [sic.] He pushed my face. That's what I was taking as a slap." Edisky also depicted appellant's "slap" as "less" than the slap she gave his face. In addition, Edisky testified that appellant did not push her into a wall, instead he pushed her away from him and she "fell back into the wall." Edisky continued to respond in the negative to questions of whether she was hurt or in fear of being hurt or harmed during the altercation, and stated she did not have any bruises, nor was she struck in any way. Edisky explained that her "yes" response in the witness statement to being in fear for her safety was

because she was "mad" at appellant and wanted him to leave. On redirect examination Edisky stated that she called the police because she wanted appellant to leave so they both could "cool down," she was not in fear, and she did not believe the argument would have escalated.

{¶5} Appellant first testified that neither he nor Edisky usually drink alcohol. He admitted that he placed his hands on her face, but described it as an attempt to get her to look at him. Appellant stated Edisky slapped him, he pushed her back and as he was walking away she threatened to contact the police. Appellant said he then told Edisky, "good, call them. I didn't do anything," and walked outside.

{¶6} Appellant denied slapping Edisky, although he admitted to pushing her away from him after she smacked/slapped him, which caused him to fall back over a shoe rack. Appellant testified that he was not attempting to hurt Edisky that morning and believed his words and the names he called her were more hurtful than any of his actions. On cross-examination appellant explained that the argument concerned the condition of the house and its lack of cleanliness/tidiness. Appellant reiterated that he put his hands on her face to make her look at him, although he was uncertain how many times this occurred. Appellant stated Edisky slapped him because of the names he was calling her and he pushed her away from him in order to leave the argument. Appellant stated the altercation took place in a narrow hallway, so when he pushed her she only fell a "good foot and a half."

{¶7} After closing arguments the trial court observed the charges were serious as domestic violence is a misdemeanor in the first degree. The trial court stated that it considered the elements of the statute and found Edisky was a family/household member and that there was physical contact. In addition, the trial court found that the element "cause or attempt to cause physical harm" was satisfied because appellant

slapped Edisky. Although the trial court noted that Edisky's story had changed, the court found that the most compelling evidence was the witness statement she wrote on January 1, 2009 and her testimony at trial that she remembered the event of that morning better at that time. In addition, the trial court stated that the push and the poking also would have caused some physical harm.

{¶8} After finding appellant guilty, the trial court fined appellant $300 plus costs; and sentenced appellant to thirty days, which were stayed pending completion of an anger management class and alcohol treatment program if necessary. Appellant filed a timely appeal raising a single assignment of error.

{¶9} Prior to addressing appellant's argument we note that appellee, city of Hamilton/state of Ohio failed to file an appellate brief in this case. Therefore, "pursuant to App.R. 18(C), this court may accept appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably support such action." *State v. Campbell*, Butler App. No. CA2007-12-313, 2008-Ohio-5542, fn. 1.

{¶10} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FOUND A VIOLATION OF SECTION §2919.25 AND FOUND HIM GUILTY OF DOMESTIC VIOLENCE."

{¶11} In his sole assignment of error, appellant argues there was insufficient evidence to convict him of violating R.C. 2919.25(A), because the state failed to prove each element of the crime.[1] We do not agree.

{¶12} "[A] [trial] court shall not order an entry of judgment of acquittal if the

1. The judgment entry states appellant is guilty of violating R.C. 2919.25, and does not identify which subsection of the domestic violence statute applies to appellant's conviction. We find that the record implies a violation of R.C. 2919.25(A), as the trial court referred to the violation as being a misdemeanor of the first degree, and both the state and the court referred to the elements in subsection A of the statute. See *State v. Craft*, 181 Ohio App.3d 150, 2009-Ohio-675, ¶37-39; *State v. Daniel*, Franklin App Nos. 05AP-564 and 05AP-683, 2006-Ohio-4627, ¶57-60.

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." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, paragraph one of the syllabus. See, also, Crim.R. 29.

{¶13} Because sufficiency of the evidence is a question of law, an appellate court need only determine there was legally sufficient evidence to sustain the guilty verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. As such, a reviewing court must "examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 260, 273 (superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355). The focus of our inquiry is: "after viewing the evidence in a light most favorable to the state, whether any rationale trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶14} R.C. 2919.25(A) states, "[n]o person shall knowingly cause or attempt to cause physical harm to a family member or household member." Appellant argues that the state failed to show appellant "knowingly or recklessly performed an act that harmed the victim."[2] Appellant further contends that the "required harm may be actual physical harm or the creation of a belief that imminent physical harm will occur;" without which, there cannot be a violation of the domestic violence statute. Because he did not harm Edisky, nor cause her fear from harm, appellant maintains that he should not have been convicted of domestic violence.

2. Appellant's brief presents arguments against all three subsections to the statute, which we presume is based on the fact that the trial court failed to indicate which subsection appellant violated in the court's judgment entry. As we have already determined the violation was for R.C. 2919.25(A), we will tailor our response accordingly and not address those arguments related to subsections R.C. 2919.25(B) or (C) which require elements of recklessness and belief of imminent harm, respectively.

{¶15} "The elements of the crime of domestic violence (R.C. 2919.25[A]) are that a charged defendant must have knowingly caused, or attempted to cause, physical harm to a family or household member." *State v. Suchomski* (1991), 58 Ohio St.3d 74, 74. R.C.2901.01(A)(3) defines "[p]hysical harm to persons" as "*any injury*, illness, or other physiological impairment, *regardless of its gravity or duration*." (Emphasis added.) "The foregoing definition clearly mandates that *any* injury may constitute physical harm and that the gravity or duration of the injury is not a factor for consideration." (Emphasis sic.) *State v. Bowens* (Aug. 3, 1998), Clermont App. No. CA98-01-009, at 6, citing *State v. Goble* (1983), 5 Ohio App.3d 197, 199. Moreover, "'[i]njury' is defined in Black's Law Dictionary (6 Ed.1990) 785, as '* * * [t]he invasion of any *legally protected interest* of another.'" (Emphasis sic.) *Suchomski* at 75.

{¶16} "One does not have to cause serious injury to be guilty of domestic violence." *State v. Blonski* (1997), 125 Ohio App.3d 103, 114. Indeed, "[a] defendant may be found guilty of domestic violence even if the victim sustains only minor injuries, or sustains no injury at all." Id., citing *State v. Nielsen* (1990), 66 Ohio App.3d 609, 612, 585. Thus, "[a]ny harm is sufficient," so long as the state presents evidence that the offender caused physical harm to the victim through his/her actions. *Blonski* at 114. See, also, *State v. Conliff* (1978), 61 Ohio App. 2d 185, 196 (Whiteside, J., concurring in part and dissenting in part) (finding the "temporary discomfort necessarily inherent as the result of being struck on the head and shoulder by a [banana cream] pie is sufficient to constitute * * * physical harm"); *State v. Dobbs* (June 10, 1996), Highland App. No. 95 CA 875, 1996 WL 325911, at *3 (physical harm found where wife hit husband with a dinner plate); *State v. Hustead* (1992), 83 Ohio App.3d 809, 811-12 (finding physical harm where nurse slapped patient's face but did not cause any head movement or outward sign of injury); *City of Columbus v. Bonner* (July 21, 1981), Franklin App. No.

81AP-161, 1981 WL 3356, at *1-2 (finding physical harm where appellant pulled camera, on a strap, from around the victim's neck); *In re C.W.*, Butler App. No. CA2004-12-312, 2005-Ohio-3905,¶32 (physical harm found where red mark appeared on victim's cheek after she was pushed out of the way, although she did not remember receiving the mark); *State v. Robinson* (Sept. 30, 1985), Stark App. No. CA-6649, 1985 WL 6513, (physical harm found where employee threw urine on a co-worker).

{¶17} Examining the evidence in a light most favorable to the state, we find a rationale trier of fact could find that the essential element of "cause or attempt to cause physical harm" was proven beyond a reasonable doubt. Both parties testified that appellant "poked" and pushed Edisky. In addition, Edisky wrote in her witness statement, composed on the morning of the confrontation, that appellant slapped her; and by her own admission stated that her memory of the events was better that morning. Although we recognize that Edisky testified that she was neither harmed, nor in fear of harm, and appellant testified that he was not trying to harm Edisky; appellant's actions towards Edisky do fall within the broadly worded definition of R.C. 2901.01(A)(3) and satisfy the "cause or attempt to cause physical harm" element required by R.C. 2919.25(A). Therefore, appellant's assignment of error is overruled.

{¶18} Judgment affirmed.

YOUNG and RINGLAND, JJ., concur.