[Cite as *State v. Williams*, 2009-Ohio-5730.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1257

Appellee — Trial Court No. CR08-2152

v.

Isaac M. Williams, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: October 30, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Mark T. Herr, Assistant Prosecuting Attorney, for appellee.

Eric Allen Marks, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal by Isaac M. Williams, Jr., appellant, of the July 17, 2008 judgment of the Lucas County Court of Common Pleas convicting him of the offense of domestic violence, a violation of R.C. 2919.25(A) and (D)(3), a felony of the fourth degree, and sentencing him to a term of imprisonment of 12 months for the offense. The

domestic violence charge was one count of a two-count indictment of Williams. The other count was for the offense of intimidation of a crime victim, a violation of R.C.2921.04(B) and a third degree felony.

{¶ 2} Williams was tried on both counts to a jury in July 2008. The jury returned a guilty verdict on the domestic violence count but acquitted Williams on the intimidation of a victim of crime count. Williams appeals the conviction to this court. He assigns one error on appeal:

{¶ 3} "First Assignment of Error

{¶ 4} "Appellant was denied his right to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 10 of the Ohio Constitution."

{¶ 5} Under this assigned error, Williams argues that he was denied effective assistance of counsel due to the failure of his trial attorney to move for acquittal on the domestic violence charge at trial.

{¶ 6} The evidence at trial disclosed that Heather St. John and Williams had lived together, off and on, for two years. On May 8 and 9, 2008, they resided together at 166 Ravine Park Village in Toledo. Williams is the father of St. John's two children. The parties stipulated at trial that Williams was previously convicted of a domestic violence offense against St. John in Toledo Municipal Court on July 26, 2006.

{¶ 7} During the relevant time period, St. John was a nursing student and attending school. On Wednesday, May 7, 2008, St. John went out to a bar after school

and did not return home until 12:00 noon on the following day. St. John testified that upon her return home, Williams was angry and began to pinch her on her arms, legs and sides throughout the day. She also testified that Williams pulled her hair twice.

{¶ 8} St. John also testified that Williams drove her to school the following morning and instructed her to accept no rides from anyone else home from school. Williams told her that he alone would provide her a ride home. St. John left school with a friend after school. St. John testified that when she telephoned Williams to advise him that she had taken a ride and that she would take care of picking up the children, he became further upset. St. John called police before going home. She testified that she called police because she knew there would be a fight when she arrived home.

{¶ 9} She testified that when she arrived home Williams started pinching her again and grabbed her arm and hair. She testified that Williams grabbed her by the throat "once or twice" before police arrived.

{¶ 10} A responding police officer testified that when he arrived at the Ravine Park Village residence on May 9, 2008, he witnessed Williams and St. John in a heated discussion and saw red marks about the woman's neck and bruises on both arms. He did not witness any physical altercation between the two.

{¶ 11} The two were brought to the police station to permit a police detective to conduct interviews and to investigate the incident further. The detective testified at trial that he saw red marks around St. John's neck and pinch marks on her arms at that time. He also testified that Williams appeared irrational and intoxicated at the station.

{¶ 12} Both appellant and the state agree that the failure of defense trial counsel to move for an acquittal of charges at trial alone does not establish ineffective assistance of counsel as such a motion may be fruitless. *State v. Scott*, 6th Dist. No. S-02-026, 2003-Ohio-2797, ¶ 20; *State v. Jenkins* (Mar. 31, 1998), 6th Dist. No. L-97-1303.

{¶ 13} To establish ineffective assistance of counsel, a criminal defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* (1984), 466 U.S. 668, 687. Prejudice under *Strickland v. Washington* requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 466 U.S. at 694.

{¶ 14} Appellant argues that a Crim.R. 29 motion for an acquittal would not have been fruitless in this case. He claims evidence of physical harm to St. John was lacking. He argues that he suffered actual prejudice, claiming that the failure to move for an acquittal resulted in his conviction on the domestic violence count.

{¶ 15} Crim.R. 29(A) directs a trial court to enter a judgment of acquittal on a charge in an indictment "if the evidence is insufficient to sustain a conviction of such offense or offenses." """[S]ufficiency" is a term of art meaning that legal standard which is applied to determine whether the case may got to the jury or whether the evidence is

legally sufficient to support the jury verdict as a matter of law.' Black's Law Dictionary (6 Ed. 1990) 1433. See, also, Crim.R. 29(A)(motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction). In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 55 O.O. 388, 124 N.E.2d 148." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶ 16} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to 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. The 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 at paragraph two of the syllabus.

{¶ 17} The elements of the offense of domestic violence, a violation of R.C. 2919.25(A) are: "(1) the accused knowingly, (2) caused or attempted to cause (3) physical harm (4) to a family or household member." *State v. Miller* (Feb. 11, 2000), 6th Dist. No. L-99-1003, quoting *State v. Robinette* (1997), 118 Ohio App.3d 450, 456, 693 N.E.2d 305. The terms of R.C. 2919.25(D)(3) enhance the offense to fourth degree felony where the offender has previously pleaded guilty to or had been convicted of the crime of domestic violence.

{¶ 18} The statute "does not require the state to prove the victim has sustained actual injury since the defendant can be convicted of domestic violence for merely *attempting* to cause physical harm * * *." *State v. Nielsen* (1990), 66 Ohio App.3d 609, 612; see *State v. Snyder*, 6th Dist. No. L-07-1424, 2008-Ohio-6537, ¶ 15.

{¶ 19} Here the evidence, if believed, and construed favorably to the prosecution demonstrated that Williams knowingly caused or attempted to cause harm to St. John by pinching her, grabbing her hair, and grabbing her by the throat at a time when St. John was a household member. A prior conviction for domestic violence was stipulated.

{¶ 20} Accordingly we conclude that the evidence was sufficient to sustain a conviction of domestic violence, a violation of R.C. 2919.25(A) and (D)(3). Under such circumstances a Crim.R. 29 motion for an acquittal would have proved fruitless. Trial counsel was not deficient in failing to pursue such a motion and appellant was not denied effective assistance of counsel by the decision not to seek an acquittal at trial. We conclude that appellant's sole assignment of error is not well-taken.

{¶ 21} On consideration whereof, this court finds that substantial justice was done the party complaining. We affirm the judgment of the Lucas County Court of Common Pleas. Appellant is ordered to pay costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Charles D. Abood, J. _____
CONCUR.
JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.