[Cite as *State v. Simmers*, 2009-Ohio-6723.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	W. Scott Gwin, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 AP 04 0017
	:	
	:	
RONALD R. SIMMERS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Tuscarawas County Court of Common Pleas Case No. 2008 CR 10 0282
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 16, 2009

APPEARANCES:

For Plaintiff-Appellee

MICHAEL J. ERNEST
Assistant County Prosecutor
For Tuscarawas County
125 East High Avenue
New Philadelphia, Ohio 44663

For Defendant-Appellant

GERALD A. LATANICH
Public Defender
153 North Broadway
New Philadelphia, Ohio 44663

Edwards, J.

{¶1} Appellant, Ronald Simmers, appeals a judgment of the Tuscarawas County Common Pleas Court convicting him of one count of domestic violence (R.C. 2919.25). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} In October of 2008, appellant and Debbie Contini resided together in a home in Dover where Contini previously lived with her ex-husband. Contini and appellant had dated for about 3 ½ years and lived together for about three years.

{¶3} On October 10, 2008, Contini returned home at about 3:45 p.m. from her job as a STNA at a nursing home. When she entered the home she noticed a liquid on the dining room floor and was not sure if it was beer or vomit. She asked appellant if he threw up on the floor, or was beer on the floor. Appellant appeared to have been drinking and there were beer cans and bottles around the house.

{¶4} Appellant began yelling at Contini, calling her "no good," slut, and whore. Contini got a rag from the kitchen and began to clean the floor. Appellant continued yelling at her, telling her his brother saw her at a bar.

{¶5} Contini went into the kitchen to get a different rag to clean the floor. Appellant followed her into the kitchen, continuing to yell at her. She asked appellant three times to leave the home. When she turned to go back to the dining room to finish cleaning the floor, appellant pushed her shoulder. She "flew into the dining room." Tr. 79. She slipped and fell on her butt, knocking several pictures off a table. Contini was afraid.

{¶6} Contini grabbed her cell phone and went outside to call the police. Appellant came out and asked her if she was calling the cops. When she replied that she was calling the cops, he put on his boots and left.

{¶7} Seth Lurie of the Dover Police Department responded to the call. When he arrived he saw Contini, who he knew from previous calls, standing in the driveway crying. Appellant was not present at the home. Lurie observed "tall boy" beer cans lined up in the trash can and liquid on the floor. A short time later Lurie spotted appellant standing in a yard talking to another man. When Lurie confronted appellant about the incident with Contini, appellant was very intoxicated. Lurie could smell alcohol on appellant's breath and appellant could barely stand up. Appellant could not formulate a sentence, and according to Lurie was "whining at me rather than actually talking to me." Tr. 98. Lurie placed appellant under arrest.

{¶8} Appellant was indicted by the Tuscarawas County Grand Jury with one count of domestic violence with a specification of a previous conviction of domestic violence, elevating the charge to a fourth degree felony. Prior to trial, the court granted appellant's motion to exclude evidence of his prior conviction, holding that the prior conviction could not be used to enhance the misdemeanor domestic violence to felony domestic violence. The case proceeded to jury trial in the Tuscarawas County Common Pleas Court.

{¶9} At the time of trial, when asked if her relationship with appellant had ended, Contini responded, "He comes over and we talk and, but I don't know, I just, I just wanted to be treated good." Tr. 81. She testified that appellant continued to try to

reconcile with her, but she wants to "find somebody that's going to treat [her] right." Tr. 83.

{¶10} Appellant was convicted as charged. The court sentenced appellant to six months incarceration with all but 30 days suspended, and he was placed on probation for two years. Appellant assigns three errors on appeal:

{¶11} "I. THE CONVICTION FOR DOMESTIC VIOLENCE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE DUE TO THE ACT OF PUSHING THE SHOULDER OF THE VICTIM NOT BEING AN ACT THAT WOULD CAUSE THE APPELLANT TO BELIEVE HE WAS GOING TO HARM OR ATTEMPT TO CAUSE PHYSICAL HARM.

{¶12} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED THE APPELLANT'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT WHEN IT FAILED TO GIVE PROPER JURY INSTRUCTION ON THE ISSUE OF NOT ALL CONTACT BETWEEN PARTIES WILL CONSTITUTE DOMESTIC VIOLENCE.

{¶13} "III. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF KNOWINGLY COMMITTING OR ATTEMPTING TO COMMIT PHYSICAL HARM TO A FAMILY OR HOUSEHOLD MEMBER."

I

{¶14} In his first assignment of error, appellant argues the judgment is against the manifest weight of the evidence.

{¶15} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire

record, 'weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶16} The State argues that appellant's argument that his conviction is against the manifest weight of the evidence is "puzzling" because appellant did not present any evidence in his defense, and without any evidence presented in his defense, it is impossible for a reviewing court to determine that appellant's evidence is more persuasive. However, this Court's standard of review allows us to consider the credibility of witnesses and weigh the evidence as a thirteenth juror. *Thompkins*, supra. We, therefore, find that appellant can raise a manifest weight claim even though he failed to present evidence on his behalf and the victim's testimony of the incident is unrebutted.

{¶17} R.C. 2919.25(A) defines domestic violence:

{¶18} "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶19} Appellant argues that pushing Contini's shoulder was not an act that would cause her to believe he was going to cause her physical harm. He also argues that he did not cause her physical harm, and the "attempt to cause physical harm" language cannot apply because his conduct was complete but was unsuccessful in

causing her physical harm. He further argues that the evidence did not prove that he acted knowingly.

{¶20} Appellant relies on *State v. Dotson*, Columbiana App. No. 05 CO 28, 2006-Ohio-1093. In that case, the only evidence regarding the element of physical harm was offered in the form of testimony by the investigating officer who took a written statement from the victim. In this statement, the victim told the officer that the defendant pushed her, drug her out of the house and threatened the children. The court of appeals found the conviction was not supported by sufficient evidence because there was no evidence that the defendant caused or attempted to cause physical harm to the victim or their children. "Pushing or pulling a person, without evidence of anything more, is simply not enough to justify a conviction for domestic violence under this particular section of the code." Id. at ¶13. The court went on to note that if the victim and the children took the stand without recanting and gave a more detailed description of the nature of the pushing or dragging, there might be evidence of physical harm or that she was "forcefully drug by a limb or by her hair or in some other violent manner." Id. at ¶14. A push could be "nothing more than a nudge or it could be as violent as knocking someone across the room." Id. The court held that it could not assume the worst without hearing testimony that describes something worse. Id.

{¶21} In the instant case, Contini testified to something more than a "nudge." According to Contini, appellant was yelling at her, calling her "no good," slut and whore at the time he pushed her. She testified that she "flew into the dining room," and knocked several pictures off a table.

{¶22} Appellant's argument regarding the "attempt to commit physical harm language" in the statute ignores the fact that an action can be a completed act rather than an attempted act, while still being an attempt to cause physical harm that is not successful in causing physical harm. Contini testified that she was afraid and immediately grabbed her cell phone and went outside to call the police. From the testimony presented by Contini, we cannot find that the jury lost its way in finding that appellant knowingly attempted to cause physical harm to her when he pushed her. The judgment is not against the manifest weight of the evidence.

{¶23} The first assignment of error is overruled.

II

{¶24} Appellant argues that the court erred in failing to give the following requested instruction to the jury, based on *Dotson*, supra: "Pushing or pulling a person, without evidence of anything more, is simply not enough to justify a conviction for domestic violence."

{¶25} Generally, a trial court must provide the jury with all instructions that are relevant and necessary to weigh the evidence and discharge their duties as the fact finders. *State v. Joy*, 74 Ohio St.3d 178, 181, 1995-Ohio-259, 657 N.E.2d 503, citing *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus. If a requested instruction contains a correct, pertinent statement of the law and is appropriate to the facts, the instruction must be included, at least in substance. *State v. Nelson* (1973), 36 Ohio St.2d 79, 303 N.E.2d 865, overruled on other grounds, 1 Ohio St.3d 19, 437 N.E.2d 583, paragraph one of the syllabus. However, the corollary of this maxim is true. It is well established that the trial court will not instruct the jury where

there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 348 N.E.2d 135; *Murphy v. Carrollton Manufacturing Co*. (1991), 61 Ohio St.3d 585, 591, 575 N.E. 2d 828, 832. "In reviewing the record to ascertain the presence of sufficient evidence to support the giving of an instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 275 N.E.2d 340, at syllabus; *Murphy v. Carrollton Manufacturing Co*., supra; *State v. Coleman*, 6th Dist. No. S-02-41, 2005-Ohio-318 at paragraph 12; See also, *State v. Robbins* (1979), 58 Ohio St.2d 74, 80, 388 N.E.2d 755, quoting *State v. Melchior* (1978), 56 Ohio St.2d 15, 381 N.E.2d 195, paragraph one of the syllabus.

{¶26} In order to establish that a failure to give a requested jury instruction is reversible error, the appellant must show that the court's refusal to give the requested instruction was an abuse of discretion and that he suffered prejudice as a result. *State v. Sunderman,* Stark App. No. 2006-CA-00321, 2008-Ohio-3465, ¶22. An abuse of discretion connotes more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶27} The trial judge instructed the jury in pertinent part as follows on the elements of domestic violence:

{¶28} "The defendant is charged with domestic violence. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 10th day of October, 2008 and in Tuscarawas County, Ohio, the defendant knowingly caused or attempted to cause physical harm to a family or household member.

{¶29} "Knowingly, a person acts knowingly regardless of his purpose when he is aware that his conduct will probably cause a certain result or be of a certain nature. A person had knowledge of circumstances when he is aware that such circumstances probably exist.

{¶30} "The state charges that the act of the defendant caused or attempted to cause physical harm to Deborah Contini. Cause is an essential element of the offense. Cause is an act or failure to act, which in a natural and continuous sequence, directly produces the physical harm to the person and without which, it would not have occurred.

{¶31} "Attempt, a criminal attempt is when one purposely does anything that is an act constituting a substantial step in the course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the act of his criminal purpose." Tr. 123.

{¶32} The court's instruction was a correct statement of the law. The instruction requested by appellant was based on an incomplete statement of the law as set forth in *Dotson*, supra. As discussed in assignment of error one, in *Dotson* there was evidence that the victim was pushed and pulled but no evidence as to the details of the encounter. Thus, the court's statement concerning evidence of pushing and pulling alone being insufficient to constitute domestic violence was not a statement of law defining the crime, but rather was a commentary on the evidence in that specific case where the evidence did not set forth specific facts concerning the incident. The Seventh District Court of Appeals later clarified its holding in *Dotson*, stating that the evidence in *Dotson* was insufficient because the only evidence was a report of pushing and pulling

which could be as little as a nudge or as much as knocking a person across the room, and no evidence was produced to specify what kind of physical contact occurred. *State v. Pallai*, Mahoning App. No. 07 MA 198, 2008-Ohio-6635, ¶24. Appellant's assertion that *Dotson* stands for the proposition that pushing or pulling without evidence of more can not constitute domestic violence is not a correct statement of the law as applied in every case. Accordingly, the court did not abuse its discretion in refusing to give the requested instruction which did not correctly state the law. The court properly instructed the jury on the legal definition of domestic violence.

{¶33} The second assignment of error is overruled.

III

{¶34} In his third assignment of error, appellant argues that the evidence is insufficient to support his conviction. He argues that the evidence was insufficient to prove that he acted knowingly because it was impossible for him to have known that the act of pushing Contini could cause physical harm. He also argues that his act was not an attempt to cause physical harm because the act was completed when she fell on her butt, and the act did not actually cause physical harm. He argues that the act of pushing Contini in and of itself does not demonstrate an attempt to cause physical harm to her.

{¶35} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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 251, paragraph two of the syllabus.

{¶36} The State presented evidence that appellant was angry and yelling at Contini, calling her names. While he continued to call her names, he pushed her shoulder, causing her to fall, knocking pictures off a table. Contini testified that she was scared during the encounter. From this evidence a rational trier of fact could find that appellant knowingly attempted to cause physical harm to Contini. As discussed in the first assignment of error, appellant could attempt to cause physical harm while completing the act of pushing her and causing her to fall. From all the evidence presented concerning the circumstances surrounding the encounter between appellant and Contini, a rational trier of fact could find that appellant knowingly attempted to cause physical harm to Contini.

{¶37} The third assignment of error is overruled.

{¶38} The judgment of the Tuscarawas County Common Pleas Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Delaney, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES

JAE/r0814

[Cite as *State v. Simmers*, 2009-Ohio-6723.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RONALD R. SIMMERS	:	
Defendant-Appellant	:	CASE NO. 2009 AP 04 0017

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court of Common Pleas is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/W. Scott Gwin

s/Patricia A. Delaney

JUDGES