[Cite as *State v. Hamrick*, 2017-Ohio-323.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	
	:	Case No. 16CA16
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
IAN K. HAMRICK,	:	
	:	
Defendant-Appellant.	:	**Released: 01/12/17**

APPEARANCES:

Steven H. Eckstein, Washington Court House, Ohio, for Appellant.

Paul G. Bertram, III, Marietta City Law Director, and Jessica Browning, Marietta City Assistant Law Director, Marietta, Ohio, for Appellee.

McFarland, J.

{¶1} This is an appeal from a Marietta Municipal Court judgment convicting Appellant of domestic violence, in violation of R.C. 2919.25(A), after he was found guilty by a jury. On appeal, Appellant contends that the trial court erred in not giving the lesser-included offense jury instruction that he requested. However, because we find Appellant inflicted physical harm upon the victim, the jury could not have reasonably convicted him of disorderly conduct, rather than domestic violence. Thus, we overrule

Appellant's sole assignment of error. Accordingly, the judgment of the trial court is affirmed.

FACTS

{¶2} A complaint was filed in the Marietta Municipal Court on January 2, 2016 charging Appellant, Ian K. Hamrick, with domestic violence in violation of R.C. 2919.25(A), a first degree misdemeanor. The affidavit of Sergeant Bryan K. Reeder attached to the complaint stated that he responded to a call on January 1, 2016 at the residence of Appellant and his wife, the victim herein, in reference to a domestic dispute. Sergeant Reeder stated in the affidavit that upon arrival he initially spoke with Appellant, who explained that he and his wife had been arguing all day, but that there had been no physical altercation. Reeder stated Appellant had claimed, however, that the victim, earlier in the evening, had pointed "an old bolt action .22 caliber rifle" at him.

{¶3} The affidavit by Reeder also stated the victim told him that she and Appellant had been arguing all day and that Appellant had assaulted her several times. Reeder's affidavit stated the victim informed him Appellant had pushed her head against the wall and struck the right side of her ear, kicked her in the stomach and kicked her in the legs, and had thrown water in her face. Reeder's affidavit stated that he observed redness on the victim's

right ear and some bruising on the victim's lower left leg at the time of the report. The affidavit further stated Appellant was arrested that night.

{¶4} Appellant denied the charges and the matter proceeded to a jury trial. Prior to trial, Appellant filed a request with the court requesting a jury instruction of disorderly conduct, which was ultimately denied. At trial, the State presented several witnesses including Sergeant Richard Hayes, Deputy Jeremiah McConnell, Sergeant Bryan Reeder, and the victim. Sergeant Hayes testified he was the dispatcher on the evening in question and received the victim's 911 call. He related the call placed by the victim in which she reported Appellant was hitting her, kicking her and had turned the electricity off. He further testified that the victim was crying during the call. Deputy McConnell testified that he responded to the call on the night in question and spoke with Appellant upon arrival. He testified that Appellant told him he had been in a verbal dispute with the victim, and that he had hit her in the head because she pointed a gun at him, specifically a .22 long rifle sitting in the corner of the living room. He clarified after listening to a recording of the taped conversation with Appellant that Appellant stated he threw a glass of water at the victim, which hit her in the head. He further testified Appellant seemed disoriented and that he could tell he had been drinking.

{¶5} Sergeant Reeder also testified. He testified in accordance with the statements contained in his affidavit, and also stated that after he located the gun in the house described by Appellant that he did not believe Appellant's version of the events. He stated that the gun the victim allegedly pointed at Appellant was covered in dust and cobwebs and didn't appear to have been handled for some time. Importantly, Reeder testified that the victim was crying and shaking, and that he observed "a little bit of redness on her * * * right ear[,]" "a couple of scratches on her neck[,]" and "some slight bruising on her left shin." He testified that he took photographs of the victim's injuries and those photographs were entered into evidence.

{¶6} The victim also testified. She testified that she and her husband, Appellant, were in a fight that became physical. Pertinent to the issue before us, the victim testified that at one point during the argument, Appellant took her by the throat and kicked the chair she was sitting on out from beneath her, causing her to fall in the floor. She stated that during different periods of the day Appellant kicked her, choked her, grabbed her skull and shook it up against the wall, creasing her right ear against the corner of the wall, causing her to believe her ear was actually bleeding or gone. She testified when he threw water in her face, she called 911.

{¶7} Appellant testified in his own defense. He testified that the argument was "a very nasty argument," but that he did not hurt her or touch her in any way. He testified that he did not actually throw a glass of water at the victim, but that he only threw the water on her. He stated he did that because she was pointing a gun at him.

{¶8} After hearing the evidence, the jury found Appellant guilty of domestic violence, as charged in the complaint. Appellant was convicted and sentenced by entry dated April 21, 2016. It is from this judgment that Appellant now brings his appeal, setting forth one assignment of error for our review.

ASSIGNMENT OF ERROR

"I. THE TRIAL COURT ERRED IN NOT GIVING THE LESSER INCLUDED OFFENSE JURY INSTRUCTION REQUESTED BY DEFENDANT-APPELLANT."

LEGAL ANALYSIS

{¶9} In his sole assignment of error, Appellant contends that the trial court erred in not giving the lesser-included offense jury instruction of disorderly conduct which Appellant requested. Appellant argues that the evidence, when viewed in a light most favorable to him, supported the lesser-included offense instruction. The State disagrees, arguing that because there was evidence that Appellant inflicted physical harm upon the

victim, the jury could not have convicted Appellant of disorderly conduct instead of domestic violence. For the following reasons, we agree with the State.

{¶10} "When the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser-included offense." *State v. Maynard*, 4th Dist. Washington No. 10CA43, 2012-Ohio-786; quoting Crim.R. 31(C). *See also* R.C. 2945.74.

{¶11} In reviewing a trial court's decision regarding whether to give a jury instruction on a lesser included offense, we employ a two-tiered analysis. *Maynard, supra,* at ¶ 26. First, we must determine whether the offense for which the instruction is requested is a lesser included offense of the charged offense. *Id.* (Citation omitted). *State v. Smith*, 4th Dist. Scioto No. 09CA3321, 2010-Ohio-5953, ¶ 23. A criminal offense may be a lesser-included offense of another if (1) the offense carries a lesser penalty than the other; (2) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (3) some element of the greater offense is not required to prove the commission of the lesser offense. *State v. Barnes*, 94 Ohio St.3d

21, 26-27, 759 N.E.2d 1240 (2002); citing *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988), paragraph three of the syllabus.

{¶12} Once it is determined that a charge constitutes a lesser-included offense of another charged offense, we then examine whether the record contains evidentiary support upon which a jury could reasonably acquit the defendant of the greater offense and convict him on the lesser offense. *Maynard, supra,* at ¶ 28. The trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on the lesser-included offense, and we will not reverse that determination absent an abuse of discretion. *Maynard, supra*; citing *Smith, supra,* at ¶ 24. An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Maynard, supra,* at ¶ 29, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶13} As noted by the State, this Court has previously determined that disorderly conduct is a lesser-included offense of domestic violence. *State v. Maynard* at ¶ 27; citing *State v. Berry*, 12th Dist. Warren No. CA2006-11-133, 2007-Ohio-7082, ¶ 18 (noting the disagreement whether disorderly conduct is a lesser-included offense of domestic violence under R.C. 2919.25(A)). Appellant, like Maynard, was convicted of domestic

violence in violation of R.C. 2919.25(A). R.C. 2929.15(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." We noted in *Maynard* that "the definition of domestic violence is very similar to the assault language in R.C. 2903.13(A), which provides that '[n]o person shall knowingly cause or attempt to cause physical harm to another or to another's unborn.' " *Id.* We further noted in *Maynard* that we "have repeatedly held that disorderly conduct is a lesser-included offense of assault." *Id.*; citing *State v. Breidenbach*, 4th Dist. Athens No. 10CA10, 2010-Ohio-4335, ¶ 19 (internal citations omitted). Thus, we determined in *Maynard* that "because of the similarities between the domestic-violence statute and the assault statute, we once again find that disorderly conduct is a lesser-included offense of domestic violence under R.C. 2919.25(A)." *Maynard* at ¶ 27; citing *State v. Wilhelm*, 4th Dist. Ross No. 95CA2123, 1996 WL 447957, *4, FN 4 (Aug. 5, 1996).

{¶14} As set forth above, Appellant argues that the evidence, when viewed in a light most favorable to him, supported the lesser-included offense instruction of disorderly conduct. Disorderly conduct occurs when a person recklessly causes inconvenience, annoyance or alarm by engaging in a fighting, violent, or turbulent behavior or by creating a condition that is physically offensive or presents a risk of physical harm. *See* R.C.

2917.11(A)(1) and (5). Appellant more specifically argues that viewing the evidence in a light most favorable to him, and thus excluding from the jury's consideration the victim's testimony, all the jury was left with was Appellant's admission that he threw water in the victim's face, which should have warranted an instruction on the lesser-included offense of disorderly conduct.

{¶15} However, as noted by the State, in making this argument Appellant ignores the testimony of Sergeant Reeder regarding his observations of the victim's injuries on the night in question, as well as the photographs that were entered into evidence demonstrating injuries that were consistent with the victim's version of events. Specifically, and as described above, the photographs show redness on the victim's ear and bruising on her leg. In addition to that, Sergeant Reeder testified he observed scratches on the victim's neck. Thus, aside from the victim's testimony at trial, Sergeant Reeder's testimony and the photos constitute evidence of the victim's injuries. Admittedly, the injuries appear to be slight, at least based upon a review of the photos. However, as we noted in *Maynard*, " '[e]ven a minor injury * * * constitutes physical harm for purposes of the domestic violence statute[.]' " *Maynard* at ¶ 30; citing *State v. Marrero*, 10th Dist. Franklin No. 10AP-344, 2011-Ohio-1390, ¶ 72. Therefore, because there was

evidence of physical harm, even viewing the evidence in a light most favorable to Appellant, the jury could not have reasonably convicted him of disorderly conduct instead of domestic violence.

{¶16} Thus, we find that the trial court did not abuse its discretion by declining to instruct the jury on disorderly conduct. Accordingly, Appellant's sole assignment of error is overruled and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Marietta Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court,

BY: ____________________________________
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.