LEXSEE 1996 OHIO APP LEXIS 1118

STATE OF OHIO, Plaintiff-Appellee, v. CARLTON DANIEL WAGSTER, Defendant-Appellant.

APPEAL No. C-950584

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

1996 Ohio App. LEXIS 1118

March 27, 1996, Date of Judgment Entry on Appeal
March 27, 1996, Filed

NOTICE:

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PRIOR HISTORY: Criminal Appeal From: Hamilton County Municipal Court. TRIAL NO. C-95 CRB-11823.

DISPOSITION: Judgment Appealed From is: Reversed and Appellant Discharged

HEADNOTES

CRIMINAL MISCELLANEOUS

SYLLABUS

The trial court erred in convicting a father of domestic violence in violation of R.C. 2919.25(A), because under all the facts and circumstances of the case, the discipline administered by the father to his daughter was proper and reasonable (father flipped back of his hand against child's face, using his fingertips and catching child's mouth, while child was screaming and "out of control"). (With dissent.)

COUNSEL: Joseph T. Deters, Prosecuting Attorney, No. 0012084, and Ronald W. Springman, Jr., Esq., No. 0041413, 914 Main Street, Suite 500, Cincinnati, Ohio 45202, for Plaintiff-Appellee.

Klaine, Wiley, Hoffmann & Meurer, Joyce Ann Campbell, Esq., No. 0019399, and Matthew S. Parrish, Esq., No. 0063465, 105 East Fourth Street, Suite 1850, Cincinnati, Ohio 45202, for Defendant-Appellant.

JUDGES: [*2] DOAN, P.J. PAINTER, J., CONCURS. HILDEBRANDT, J., DISSENTS.

OPINION BY: DOAN

OPINION

DECISION.

DOAN, P.J.

Appellant was convicted in a bench trial before the Hamilton County Municipal Court of domestic violence in violation of R.C. 2919.25(A). We have *sua sponte* removed this case from the accelerated calendar and placed it on the court's regular calendar.

On April 7, 1995, Rhonda Dillow, the mother and custodial parent of the alleged victim, Kera Wagster, initiated the complaint which alleged that appellant

"knowingly caused physical harm to Rhonda Dillow, child." The complaint was amended at trial to reflect the name Kera Wagster instead of Rhonda Dillow, in order to conform with the underlying affidavit of Rhonda Dillow, which stated in pertinent part:

> Kera was visiting her father for the weekend. It was Sunday afternoon, 5:00 p.m. April 2. Kera had gotton [*sic*] mad, stomped upstairs because of her stepmother [Mary Wagster]. Carl, Kera's father followed upstairs behind Kera, said some things and then back handed Kera in the mouth and busted her lip.

The facts of this case are essentially undisputed. On April 2, 1995, twelve-year-old Kera was spending [*3] the weekend at the home of appellant, her natural father, and her stepmother. Kera became angry when her stepmother insisted that the audio tapes that Kera was recording on the tape player be put away in alphabetical order. Kera "stomped" up the stairs, went into her sister's room, and slammed the door. Kera began to scream at her sister about her stepmother. When appellant heard the commotion he went upstairs to talk to Kera, who screamed at him. Kera's sister testified that Kera was out of control. Appellant slapped Kera with the back of his hand in order to calm her down so that she would stop screaming. Kera's sister stated that appellant did not take a full swing at Kera, but rather used the tips of his fingers from short range. After appellant left the room, Kera discovered that the skin under her inner lip had lodged between two crooked teeth. The skin broke as Kera dislodged it and she experienced minimal bleeding. Her sister absorbed the blood in a wet towel. Shortly thereafter, Kera went downstairs and sat on appellant's lap. They made up and everyone proceeded to eat dinner. Kera did not complain of any injury, nor did she mention the bleeding or request any medical attention. [*4] After dinner, Kera's stepmother drove her to her natural mother's home without incident. Kera did not complain about any injury. Kera testified that her lip later turned blue and was swollen for about two days, but there was no necessity to seek medical attention.

Five days later, which coincided with her fifteen-year-old noncustodial daughter's visit to her, Rhonda Dillow initiated the complaint. Appellant was charged with and convicted of domestic violence in violation of R.C. 2919.25(A). During appellant's trial, the trial court stated on the record:

> What I don't want to do, and what I suspect might be afoot in this case, is to do anything that would give one party a better chance in a domestic relations action. That's the last thing in the world that this court should do or wants to do.

(T.p. 43-44.)

Appellant raises four assignments of error for our review. We will first address the second assignment. Appellant's second assignment of error, alleging that the trial court improperly allowed the prosecution to amend the complaint immediately prior to trial by changing the name of the alleged victim from the mother's name to that of the child, is overruled. [*5] Crim.R. 7(D) allows amendment of a criminal complaint at any time so long as the accused is not misled or prejudiced. Both the complaint and the affidavit stated that the victim was a child. The affidavit underlying the complaint stated the correct name of the alleged child victim. It is clear from the record that appellant was not misled or prejudiced by the amendment.

Appellant's first, third and fourth assignments of error will be considered together. They allege that: (1) the trial court erred "by analyzing this case of parental discipline under the domestic violence statute * * * without regard to the requisite mental state;" (2) the trial court erred in overruling appellant's Crim.R. 29 motion for acquittal; and (3) appellant's conviction was against the manifest weight of the evidence.

R.C. 2919.25 provides in pertinent part:

> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
>
> (E) As used in this section * * * :
>
> (1) "Family or household member" means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(ii) * * * a child [*6] of the offender.

The Supreme Court of Ohio addressed the issue of parental discipline under R.C. 2919.25(A) in *State v. Suchomski* (1991), 58 Ohio St. 3d 74, 567 N.E.2d 1304. Suchomski was charged with domestic violence in violation of R.C. 2919.25(A). He filed a motion to dismiss the indictment on the basis that the statute was unconstitutionally vague and overbroad. Suchomski argued that charging him under the domestic violence statute would sanction punishment of a parent who uses corporal punishment to discipline a child.

Based upon the facts as set forth in the state's memorandum in opposition to Suchomski's motion to dismiss the indictment, the Ohio Supreme Court held that allegations that Suchomski came home intoxicated, pulled his sleeping children from their beds, punched his eight-year-old son in the stomach, repeatedly pounded his son's head against the wall and bloodied his son's lip were sufficient to charge a criminal offense under R.C. 2919.25(A) and to apprise Suchomski of each and every element of the offense. Therefore, the court held, the indictment should not have been dismissed. [1] The court stated:

1 The *Suchomski* court also held that R.C. 2919.25(A) does not conflict with R.C. 2919.22, the child endangering statute.

[*7]

Nothing in R.C. 2919.25(A) prevents a parent from properly disciplining his or her child. The only prohibition is that a parent may not cause "physical harm" as that term is defined in R.C. 2901.01(C). "Physical harm" is defined as "any injury[.]" "Injury" is defined in Black's Law Dictionary (6 Ed.1990) 785, as " * * * the invasion of any *legally protected interest* of another." (Emphasis added.) A child does not have any legally protected interest which is invaded by proper and reasonable parental discipline. Therefore, pursuant to *Suchomski*, a parent may use corporal punishment as a method of discipline without violating R.C. 2919.25(A) as long as the discipline is proper and reasonable under the circumstances. See *State v. Hicks* (1993), 88 Ohio App. 3d 515, 624 N.E.2d 332 (parent cannot be found guilty of violating R.C. 2919.25[A] if he was engaged in reasonable and proper parental discipline); *State v. Dunlap* (Aug. 21, 1995), 1995 Ohio App. LEXIS 4231, Licking App. No. 95-CA-2, unreported (proper and reasonable parental discipline is an affirmative defense to a charge of domestic violence under R.C. 2919.25[A]); *Lorain v. Prudoff*

(Dec. [*8] 21, 1994), 1994 Ohio App. LEXIS 5790, Lorain App. No. 93CA005684, unreported.

In the case *sub judice*, the testimony showed that Kera was screaming and out of control because she was angry that her stepmother had corrected her. Appellant flipped the back of his hand against Kera's face with his fingertips, catching her mouth. Appellant stated that he only wanted to calm Kera down. He left the room after the incident. Kera's injury was caused by the skin under her lip lodging between her teeth. Minimal bleeding occurred when she dislodged the skin. She did not require any medical attention. Appellant and Kera subsequently made up and ate dinner together.

Appellant, the father of five children, had never hit Kera before, and he had no history of domestic violence. The trial court stated, "I will admit it's not the most egregious case of domestic violence this court has seen." [2] Further, the trial court acknowledged that the domestic violence charges instigated by Rhonda Dillow could have been related to maneuvering to gain a favorable position in a domestic relations action.

2 Appellant's conduct certainly does not rise to the level exhibited in the following cases: *State v. Suchomski*, *supra* (intoxicated defendant pulled his sleeping children from bed, punched his eight-year-old son, repeatedly pounded his son's head against the wall and bloodied his son's lip); *State v. Hicks*, *supra* (defendant slapped child on the back eight times, hard enough to leave marks visible one week later); *Lorain v. Prudoff*, *supra* (defendant struck fourteen-year-old girl's head with a telephone and punched her); *State v.*

Dickson (Oct. 13, 1993), Holmes App. No. CA-478, unreported (defendant kicked a three-year-old child in the lower back hard enough to cause the child to fly through the air three to five feet and hit the child hard enough to leave "welted hand prints" and a bruise); *State v. McClure* (June 7, 1993), Greene App. No. 92-CA-0078, unreported (defendant threw child over couch, hit and kicked her as she lay on the floor until she had difficulty breathing, chased her outside, threw her onto the ground, pounded her head into the ground and dragged her back into the house); *State v. Dennison* (Apr. 13, 1992), 1992 Ohio App. LEXIS 1928, Clermont App. No. CA91-09-073, unreported (defendant beat stepson with a fly swatter, causing welts and bleeding); *Galion v. Martin* (Dec. 12, 1991), 1991 Ohio App. LEXIS 6092, Crawford App. No. 3-91-6, unreported (defendant struck stepson on face with open hand so hard that force of blow knocked child into an archway, cutting and bruising his face).

[*9] Taking into account all the facts and circumstances in this particular case, we hold that the discipline administered by appellant to Kera was proper and reasonable. Appellant's first, third and fourth assignments of error are sustained.

The judgment of the trial court is reversed, and appellant is discharged.

PAINTER, J., CONCURS.

HILDEBRANDT, J., DISSENTS.

DISSENT BY: HILDEBRANDT

DISSENT

HILDEBRANDT, J., DISSENTING.

I would affirm the judgment of the trial court convicting appellant of domestic violence in violation of R.C. 2919.25. The trial court found that appellant's discipline of his daughter under the circumstances of this case was improper and unreasonable. Because this finding was supported by sufficient and competent evidence, this court cannot substitute its judgment for that of the trial court. I, therefore, respectfully dissent.