Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-196

APRIL TERM, 2019

State of Vermont v. Ryan McCullough*	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
	}	Criminal Division
	}	
	}	DOCKET NO. 585-12-16 Oscr
		Trial Judge: Michael S. Kupersmith (Ret.)

In the above-entitled cause, the Clerk will enter:

Appellant appeals his conviction by jury of domestic assault. We affirm.

On December 1, 2016, in response to a 911 call by defendant's wife, police arrived at the marital residence. A police officer interviewed the complainant first about the incident that evening and later about other incidents of past abuse. As the result of those interviews, defendant was charged with one count of domestic assault for causing bodily injury to the complainant on December 1, and one count of aggravated domestic assault for attempting to cause serious bodily injury to the complainant during an incident that occurred in August 2016.

At the March 30, 2018 trial, the complainant recanted her reports of defendant's abuse. Regarding the domestic assault charge on which defendant was convicted, the State relied upon the 911 call, in addition to witness testimony. Regarding the aggravated domestic assault charge, the State had only the complainant's report of abuse to support that charge. When the complainant denied any recollection of the abuse at trial, the trial court granted defendant's motion for judgment of acquittal on the aggravated domestic assault charge at the close of evidence. The court denied defendant's post-trial motion for judgment of acquittal on the domestic assault conviction, however, ruling that there was sufficient evidence of bodily injury to support the conviction. The court imposed a sentence of three to twelve months to serve, all suspended except ten days, along with probation conditions.

On appeal, defendant first argues that the evidence was insufficient to support the domestic assault conviction. Specifically, he argues that neither the complainant's 911 call nor her trial testimony was sufficient to establish that she suffered bodily injury as the result of his actions.

When reviewing the court's denial of a motion for judgment of acquittal, like the trial court, "[w]e view the evidence in the light most favorable to the State, excluding any modifying evidence, and determine whether it is sufficient to fairly and reasonably convince a trier of fact that the defendant is guilty beyond a reasonable doubt." State v. Cameron, 2016 VT 134, ¶ 5, 204 Vt. 52 (quotation omitted). "This standard is deferential to the role of the jury—it recognizes that trial and appellate courts should hesitate to place themselves in the position of jurors." State v. Davis, 2018

VT 33, ¶ 14. Accordingly, "courts should grant a judgment of acquittal only when there is no evidence to support a guilty verdict." Cameron, 2016 VT 134, ¶ 5.

Defendant was charged with committing domestic assault by "recklessly" causing the complainant "bodily injury." 13 V.S.A. § 1042. The term bodily injury is defined, for purposes of domestic assault, as "physical pain, illness, or any impairment of physical condition." Id. § 1021(a)(1).

In this case, the jury heard the first forty-four seconds of the complainant's 911 call, which was admitted into evidence under the excited-utterance exception to the hearsay rule. In the recording the complainant sounds upset and is sobbing. When the 911 operator asked the complainant if she was hurt, she responded: "He bent my fingers back, but no, not really." At trial, the officer who interviewed the complainant following the December 1 incident testified, without objection, that she told him "her hand was throbbing." The complainant, despite recanting her allegations of assault, acknowledged in her testimony that during the December 1 incident her finger was "injured," if only "slightly," the same as if she "had hit a wall." Similarly, she further testified: "I recall my fingers hurting slightly, but it's the same pain as if I had hit the wall versus hit my husband's hand." This was more than enough evidence for the jury to conclude that husband's actions caused the complainant bodily injury in the form of physical pain. See State v. Myers, 2011 VT 43, ¶ 41, 190 Vt. 29 (holding officer's testimony that defendant's kick caused him "some discomfort" satisfied § 1021's definition of bodily injury).

Defendant also argues that the trial court erred by ruling that he was not entitled to a self-defense instruction. In moving for the instruction, defense counsel argued that, given the undisputed testimony that the complainant made the first physical contact by swatting defendant's finger away from her face, he was entitled to a self-defense instruction. The trial court denied the motion, stating that there was no evidence defendant acted in self-defense when he bent the complainant's fingers back or squeezed them.

A defendant seeking a self-defense instruction has the initial burden of showing "that (1) he had an honest belief that he faced imminent peril of bodily harm and that (2) the belief was grounded in reason." State v. Albarelli, 2016 VT 119, ¶ 13, 203 Vt. 551. The trial court is obliged to instruct the jury on self-defense only when there is evidence in the record supporting the instruction. Id. ¶ 17. Here, no evidence in the record, including the testimony indicating that the complainant made initial physical contact by swatting defendant's finger from her face, indicates that defendant had a reasonable belief that he faced imminent bodily harm from the complainant's actions.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice