[Cite as *State v. Oliveira*, 2015-Ohio-2652.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 14AP-501
v.	:	(C.P.C. No. 13CR-11-5965)
Reinaldo V. Oliveira,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2015

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, Reinaldo V. Oliveira, appeals from a judgment of conviction entered by the Franklin County Court of Common Pleas. For the following reasons, we reverse that judgment and remand the matter for a new trial.

I. Factual and Procedural Background

{¶ 2} On November 8, 2013, a Franklin County Grand Jury indicted appellant with two counts of kidnapping in violation of R.C. 2905.01. Both charges are first-degree felonies. The charges arose out of two separate incidents involving appellant and his girlfriend, Ines Pontes. Count One involved an incident that occurred on the night of October 29, 2013 and extended into the following morning of October 30, 2013. Count

Two involved facts that occurred later in the day on October 30, 2013. Appellant entered a not guilty plea to the charges and proceeded to a jury trial.

{¶ 3} Appellant and Ines Pontes have three children together and, at the time of these events, lived together with those children. Appellant had just moved back from Pennsylvania after Pontes told him that she wanted to leave him. On October 29, 2013, Pontes left the house to run errands. While out, she saw a friend and began to talk to him in a parking lot. Shortly thereafter, appellant drove into the parking lot.[1] He approached Pontes, grabbed her by the arm and put her into his car. He drove them back to their house.

{¶ 4} Once inside the house, appellant took Pontes into a bedroom and threatened her with a gun. He wanted to know who the man was that she was talking to in the parking lot. Pontes told him that the man was just a friend. Appellant also hit the back of her head with his hands and took her into a bathroom and threatened her again. After this went on for some time, Pontes asked him to stop so she could take care of the children. Appellant agreed and let her out of the bathroom. Pontes took care of the children and eventually she and appellant went to sleep together in their bedroom. The next morning, appellant drove to get Pontes' car from the parking lot where they had left it the night before. Appellant gave Pontes the keys and they both left to go to work.

{¶ 5} Later that day, October 30, 2013, Pontes called the police to have them come to the house. She was in the process of packing her belongings so that she and her children could leave the house. Appellant returned before the police arrived and was upset to see Pontes packing. He told her that he wanted her to stay and be a family. The police then arrived and knocked on the door. Appellant would not let Pontes open the door. She yelled for the police, so appellant took her down to the basement. The police heard a yell and were moving toward a sliding glass door in the back of the house as Pontes emerged from the basement near the sliding door. Appellant was following her up the stairs. Either Pontes or appellant opened the door and let the officers inside. Appellant was then placed under arrest.

{¶ 6} The jury found appellant guilty of the first count of kidnapping but not guilty of the second count. The trial court sentenced him accordingly.

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[1] It appears that appellant had been tracking Pontes' location with her phone's GPS. (Tr. 112.)

II. The Appeal

{¶ 7} Appellant appeals and assigns the following errors:

> [1.] The trial court erred when it failed to vacate the defendant's conviction when it discovered that the alleged victim of the kidnapping offense had paid the defense attorney to represent the defendant or, at a minimum, to hold a hearing to determine whether a conflict of interest existed.
>
> [2.] The trial court erred when it allowed the state to admit, over objection, a box of ammunition, which had no relevance to the case and was never linked to the defendant but was admitted as nothing more than bad act evidence used to improperly imply that the defendant was a bad or dangerous person. The trial court further erred when it allowed the state to elicit from the complainant that she was still scared of the defendant for the same purposes.
>
> [3.] The trial court erred when it refused the defendant's request to instruct the jury on the mitigating factor reducing kidnapping to a felony of the second degree if the victim is released in a safe place unharmed, thereby derpriving the defendant of his right to a jury determination of this issue.
>
> [4.] The trial court erred when it prohibited the defendant from cross-examining the state's only material witness on the reasons or motivations the witness had for accusing him. This violated the defendant's constitutional rights to confront and cross-examine the witness and his constitutional rights to due process, a fair trial and to present favorable evidence on his behalf.
>
> [5.] The trial court erred when it failed to record the foreign language testimony and the bench conferences as required by law.
>
> [6.] The trial court erred when it failed to comply with the mandatory provision of R.C. 2929.18(A)(2) to assess the "amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court."

A. Appellant's Third Assignment of Error–The Kidnapping Jury Instruction

{¶ 8} Because it is dispositive, we first address appellant's third assignment of error, in which appellant contends that the trial court erred by failing to provide to the jury an instruction on the second-degree felony form of kidnapping. We agree.

{¶ 9} A trial court must give all instructions which are "relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Joy*, 74 Ohio St.3d 178, 181 (1995), citing *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. "When reviewing a trial court's jury instruction, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction was an abuse of discretion under the facts and circumstances of the case." *State v. Gover*, 10th Dist. No. 05AP-1034, 2006-Ohio-4338, ¶ 22, citing *State v. Wolons*, 44 Ohio St.3d 64, 68 (1989).

{¶ 10} Appellant was indicted for two counts of kidnapping in violation of R.C. 2905.01. Those charges are felonies of the first degree but can be reduced to felonies of the second degree if the defendant "releases the victim in a safe place unharmed." R.C. 2905.01(C). The release of a victim unharmed and in a safe place is not an element of the offense that the state must prove. Instead, it is similar to an affirmative defense which the accused must prove. *State v. Sanders*, 92 Ohio St.3d 245, 265 (2001); *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶ 233. Appellant requested a jury instruction that addressed this issue but the trial court refused to give the instruction.[2]

{¶ 11} The Supreme Court of Ohio has held that in order for a defendant to properly raise an affirmative defense, " 'evidence of a nature and quality sufficient to raise the issue must be introduced, from whatever source the evidence may come.' " *State v. Melchior*, 56 Ohio St.2d 15, 20 (1978), quoting *State v. Robinson*, 47 Ohio St.2d 103, 111-12 (1976); *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, ¶ 72. Evidence is sufficient to raise an affirmative defense when such evidence, if believed, would raise a question in the minds of reasonable jurors concerning the existence of such issue. *Melchior* at paragraph one of the syllabus. When such evidence exists, a trial court should

[2] Accordingly, we reject the state's claim that appellant forfeited this issue absent plain error. Regardless, even if appellant had forfeited the issue, this court and others have found that the failure to provide this instruction constitutes plain error when it is warranted by the evidence presented. *State v. Carson*, 10th Dist. No. 98AP-784 (Apr. 22, 1999); *State v. Fisher*, 8th Dist. No. 101365, 2015-Ohio-597, ¶ 35, citing *State v. Carroll*, 8th Dist. No. 93938, 2010-Ohio-6013, ¶ 14.

provide a requested jury instruction on an affirmative defense. *State v. Thompson*, 10th Dist. No. 08AP-956, 2009-Ohio-3552, ¶ 26.

{¶ 12} Therefore, we must review all of the evidence regarding the conduct that supported the kidnapping conviction to determine whether that evidence warranted a second-degree felony instruction. *State v. Fisher*, 8th Dist. No. 101365, 2015-Ohio-597, ¶ 35 (mitigating fact of release of victim in safe place and unharmed may be raised by state's evidence). In order to be entitled to the instruction, there must have been sufficient evidence that, if believed, would raise a question in the minds of reasonable jurors regarding whether appellant released Pontes unharmed and in a safe place.

1. Did Appellant Release Pontes in a Safe Place?

{¶ 13} The release of a kidnapping victim must be by the defendant's act, not by the victim escaping. *State v. Wright*, 7th Dist. No. 11-MA-14, 2013-Ohio-1424, ¶ 20. Here, Pontes testified that appellant gave her the keys to her car and left her to go to work the morning following the events that are the basis for the Count One conviction. At that point, she was free and unrestrained to go wherever she wanted. *Id.* (victim released when defendant told her to go outside to his truck); *State v. Carson*, 10th Dist. No. 98AP-784 (Apr. 22, 1999) (robbery victims "free and unrestrained" when gunmen fled the area). This evidence would allow reasonable minds to consider whether appellant released her in a safe place.

2. Did Appellant Release her in a Safe Place Unharmed?

{¶ 14} Pontes testified that after appellant took her from the parking lot and drove her home, he threatened her with a gun and hit her in the back of the head with his hands, which hurt. However, Pontes had no visible injuries from this conduct.[3] Other than this statement, Pontes did not testify that she suffered any other physical symptom that could be characterized as an injury resulting from this conduct. Threatening a victim, even with a gun, does not necessarily mean that the victim was harmed for purposes of R.C. 2905.01(C). *Wright* at ¶ 21, citing *State v. Henderson*, 10th Dist. No. 85AP-830 (Apr. 8, 1986) ("[t]he fact that a victim may be terrorized does not necessarily mean that the victim was harmed" because psychological harm is not considered). Moreover, the act of

[3] There was evidence that Pontes suffered physical harm (a scratch on her lip) that occurred in connection with the incident that was the basis for Count Two. Appellant was acquitted of Count Two.

hitting and choking a victim may not necessarily mean the victim was "harmed," as contemplated by R.C. 2905.01(C), where there is no evidence of resulting physical injuries. *Id.*

{¶ 15} After a review of the evidence, we conclude that sufficient evidence existed that would allow reasonable minds to consider whether appellant released Pontes unharmed and in a safe place. Accordingly, the trial court erred by not instructing the jury as to the second-degree felony form of kidnapping. We sustain appellant's third assignment of error.

III. Conclusion

{¶ 16} Having sustained appellant's third assignment of error, we reverse the judgment of the Franklin County Court of Common Pleas and remand the matter for a new trial. This disposition renders appellant's other assignments of error moot.

Judgment reversed; cause remanded with instructions.

SADLER and BRUNNER, JJ., concur.