

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 26307
Plaintiff-Appellee/Cross-Appellant	:	
	:	Trial Court Case No.07-CR-4895
v.	:	
	:	(Criminal Appeal from
THEODORE W. SMITH, JR.	:	Common Pleas Court)
	:	
Defendant-Appellant/Cross-	:	
Appellee	:	

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OPINION

Rendered on the 25th day of March, 2016.

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HALL, J.

{¶ 1} Theodore Smith appeals his convictions for kidnapping. The State cross-appeals the sentence imposed by the trial court. Finding no error, we affirm.

## I. Background

### *The crime*

{¶ 2} Cassie Davis testified that on November 28, 2007, around 9:00 a.m. Smith woke her up by dragging her by the hair down the hallway of her apartment into the living room. Smith then tossed her on the couch. Davis's 18-month-old son was in his crib screaming, so Davis went to the child's room, with Smith following closely. She picked up her son and sat down. Smith told her to "[f]ix it. Shut him up now." (Trial Tr. 132). Davis said that the child was hungry, so Smith allowed Davis to go into the kitchen and get a bottle. After Davis fed her son, she put him in front of the television to watch cartoons. She sat down, and Smith asked her, " 'Where's Anthony?' " (*Id.* at 133). Davis told Smith that she did not know where Anthony was. Smith then said, " 'Well, Anthony owes me some money.' " (*Id.*). At this point, Davis was "scared out of [her] mind." (*Id.*).

{¶ 3} Davis testified that while she was talking to Smith, he was standing in her living room blocking the front door—the only door to the apartment. Davis reminded Smith that she had talked to Anthony the previous night and gave him Smith's number. Smith said, " 'Well, he's not there. I can't find him. He owes me money. And if I don't get my money from him, I'm going to get it from you.' " (*Id.* at 134). Davis testified that Smith kept threatening her and demanding money from her. At one point Smith said, " 'I should hurt you right now.' " (*Id.* at 143). Davis said, " 'No, no.' " (*Id.*). Smith then said, " 'Well \* \* \* [y]ou better get my money. I want my money.' " (*Id.*).

{¶ 4} Wanting to get to a phone and call 911, Davis lied and told Smith that she worked at Lee's Chicken and had to call there to see about her paycheck. Davis did not have a phone in her apartment. She told Smith that her sister, who lived in a downstairs

apartment, had a phone. Smith told her to go use the phone. Davis grabbed her son and started walking towards the door. But Smith stood in front of her, pointed to the boy, and said, “ ‘You’re not taking him.’ ” (*Id.* at 146). Smith then grabbed Davis’s arm and led her to the couch, where she sat down. Smith went into the kitchen and grabbed a knife. When he came back, Smith held the knife about six inches from her son’s throat and said, “ ‘If you don’t come back with my money, I’m going to hurt him.’ ” (*Id.* at 147).

{¶ 5} Smith led Davis to the door and pushed her out. She ran downstairs to her sister’s apartment and started banging on the door. When her sister opened the door, Davis told her, “ ‘There’s somebody in my apartment. He’s going to hurt [my son].’ ” (Trial Tr. 147). Davis ran to the phone and called 911. Afterwards, she then went back upstairs to her apartment.

{¶ 6} Smith asked Davis where her check was. She told him that she had to go and get it. Davis said that she had to call first and that her sister was on her phone. She asked Smith if she could use his phone. Smith told her that she had to be quick using his phone because he was on a minute phone. As Davis walked to the kitchen, the police burst into the apartment.

{¶ 7} Davis testified that Smith was in her apartment that day for about three hours. And while she was in the apartment Smith was never more than six feet away from her.

#### *The charged offenses*

{¶ 8} Smith was indicted on one count of kidnapping with purpose to terrorize or to inflict serious physical harm, in violation of R.C. 2905.01(A)(3) (Count I); one count of kidnapping to facilitate the offense of aggravated robbery, in violation of R.C. 2905.01(A)(2) (Count II); one count of aggravated robbery with a deadly weapon, in

violation of R.C. 2913.01(K) and 2911.01(A)(1) (Count III); and one count of kidnapping of a person under the age of thirteen with purpose to hold for ransom or as a shield or hostage, in violation of R.C. 2905.01(A)(1) (Count IV).

*Smith's original trial and appeal*

{¶ 9} Following a jury trial, Smith was convicted on Counts I and IV and on Count II's lesser-included offense of unlawful restraint. He was found not guilty on the indicted kidnapping charge in Count II and the charge in Count III. Smith was sentenced to a total of 15 years in prison. On appeal, we reversed his convictions because there had been a violation of his constitutional right to confront one of the witnesses against him. *State v. Smith*, 2d Dist. Montgomery No. 22926, 2010-Ohio-745.

*Smith's second trial and appeal*

{¶ 10} Following a second jury trial, Smith was again convicted on Counts I and IV and on Count II's lesser-included offense. He was again sentenced to 15 years in prison. On appeal, Smith's appointed counsel filed a brief under *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), stating that he could find no potential assignments of error having arguable merit. We agreed and affirmed. *State v. Smith*, 2d Dist. Montgomery No. 24402, 2012-Ohio-734.

*Smith's reopened appeal*

{¶ 11} Smith moved to reopen his second appeal under App.R. 26(B), arguing that his prior appellate counsel was ineffective for not raising certain assignments of error having potential merit. We agreed and reopened the appeal. We then reversed his convictions because the trial court erroneously excluded a prospective juror. *State v. Smith*, 2d Dist. Montgomery No. 24402, 2013-Ohio-1586.

*Smith's third trial and current appeal*

{¶ 12} The third time around, only Counts I and IV were tried to a jury. And a different judge presided over the case. The jury found Smith guilty on both counts, and the trial court imposed two concurrent 8-year prison terms.

{¶ 13} Smith appealed, and the State cross-appealed. Smith's appointed appellate counsel filed a brief under *Anders* stating that he could find no potential assignments of error having arguable merit, and Smith filed a brief pro se. We appointed new appellate counsel, who filed a merit brief.

**II. Analysis**

{¶ 14} Smith presents one assignment of error, challenging his convictions on double-jeopardy grounds. The State presents one cross-assignment of error, challenging the sentence imposed as unsupported by the record.

**A. Double jeopardy**

{¶ 15} The sole assignment of error alleges that Smith's convictions violate the Double Jeopardy clauses of U.S. Constitution and the Ohio Constitution.

{¶ 16} The Fifth Amendment guarantee against double jeopardy "consist[s] of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *N. Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). But "the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error

in the proceedings leading to conviction.”<sup>1</sup> (Citations omitted.) *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

{¶ 17} The Double Jeopardy Clause encompasses the doctrine of collateral estoppel, under limited circumstances. In *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the U.S. Supreme Court held that “the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury’s acquittal in a prior trial.” *Yeager v. United States*, 557 U.S. 110, 119, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009). The Court explained that “ ‘when an issue of ultimate fact has once been determined by a valid and final judgment’ of acquittal, it ‘cannot again be litigated’ in a second trial for a separate offense.” *Id.*, quoting *Ashe* at 443. The Supreme Court of Ohio has adopted this concept. *State v. Thomas*, 61 Ohio St.2d 254, 400 N.E.2d 897 (1980), paragraph four of the syllabus (holding that “successive prosecutions [are] barred in certain circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first”). The Ohio Supreme Court has said that “a person may not be subjected to multiple prosecutions when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct.” *Id.* at 261. To determine what a jury “necessarily decided” when a previous acquittal is based on a general verdict, a court should “examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its

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<sup>1</sup> An exception exists if “a defendant’s conviction is reversed \* \* \* on the sole ground that the evidence was insufficient to sustain the jury’s verdict.” (Citations omitted.) *Lockhart v. Nelson*, 488 U.S. 33, 39, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988), citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). But this exception does not apply here, because none of Smith’s convictions was ever reversed on sufficiency grounds.

verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” *Ashe* at 444.

{¶ 18} Here, Smith contends that he should not have been retried on the kidnapping charges because they are the same offenses as the kidnapping charge that he was acquitted of.

{¶ 19} The conduct prohibited by the kidnapping statute is “remov[ing] another from the place where the other person is found or restrain[ing] the liberty of the other person” “by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means.” R.C. 2905.01(A). To be guilty of kidnapping, one must engage in this prohibited conduct with one of the six purposes listed in the statute. Relevant here are the first three purposes:

- (1) To hold for ransom, or as a shield or hostage;
- (2) To facilitate the commission of any felony or flight thereafter;
- (3) To terrorize, or to inflict serious physical harm on the victim or another.

R.C. 2905.01(A). Count I alleges that Smith’s purpose in restraining Davis’s liberty was to terrorize her. Count II alleges that his purpose in restraining Davis’s liberty was to facilitate the commission of aggravated robbery. And Count IV alleges that Smith’s purpose in restraining Davis’s son’s liberty was to hold him for ransom or as a shield or hostage. The jury in the first trial found Smith not guilty of Count II. But that jury and two subsequent juries found him guilty of Counts I and IV.

{¶ 20} The prosecutions for Counts I and IV do not require relitigating any factual issue that the jury “necessarily decided” in Smith’s favor when it found him not guilty of Count II. By finding him not guilty of Count II, the jury did not necessarily decide that Smith

did not engage in the prohibited conduct (restraining Davis's liberty). Rather, the jury "necessarily decided" only that Smith's purpose in engaging in the prohibited conduct was other than to facilitate the commission of aggravated robbery. In other words, the jury could reasonably have grounded its verdicts solely on the issue of Smith's purpose. The jury found that Smith restrained Davis's liberty and that his purpose in doing so was to terrorize her (Count I), but not to facilitate the commission of aggravated robbery (Count II). And the jury found that Smith restrained Davis's son's liberty and that his purpose in doing so was to hold him for ransom or as a shield or hostage (Count IV).

{¶ 21} The prosecution for Counts I and IV did not require relitigating an issue that was necessarily decided by the jury's prior acquittal on Count II. Neither Count I nor Count IV charges the same offense as Count II. Therefore Smith's double-jeopardy protections were not violated.

{¶ 22} Appellant's sole assignment of error is overruled.

### **B. The sentence**

{¶ 23} The State's cross-assignment of error alleges that the trial court erred by sentencing Smith to only 8 years in prison. The State argues that the record in this case calls for a longer sentence.

{¶ 24} When reviewing felony sentences, we use the standard of review set forth in R.C. 2953.08(G)(2). *State v. Rodeffer*, 2013-Ohio-5759, 5 N.E.3d 1069, ¶ 29 (2d Dist.). R.C. 2953.08(G)(2) provides that "[t]he appellate court may increase, reduce, or otherwise modify a sentence that is appealed \* \* \* or may vacate the sentence and remand the matter to the sentencing court for resentencing." The appellate court may take any of these actions if it "clearly and convincingly" finds either of the following:



(a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;

(b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2). See also *State v. Marcum*, Ohio Sup. Ct. Slip Opinion No. 2016-Ohio-1002. “ ‘This is an extremely deferential standard of review.’ ” *Rodeffer* at ¶ 31, quoting *State v. Venes*, 2013-Ohio-1891, 992 N.E.2d 453, ¶ 8 (8th Dist.).

{¶ 25} “[A] sentence is not contrary to law when the trial court imposes a sentence within the statutory range, after expressly stating that it had considered the purposes and principles of sentencing set forth in R.C. 2929.11, as well as the factors in R.C. 2929.12.” *Id.* at ¶ 32, citing *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 18. R.C. 2929.11 provides in part that a felony sentence “shall be reasonably calculated to achieve the two overriding purposes of felony sentencing set forth in division (A) of this section, commensurate with and not demeaning to the seriousness of the offender’s conduct and its impact upon the victim.” R.C. 2929.11(B). In determining how best to comply with R.C. 2929.11, a court must consider the seriousness and recidivism factors in R.C. 2929.12. Two sets of factors relate to the seriousness of an offender’s conduct. One indicates that “the offender’s conduct is more serious than conduct normally constituting the offense,” R.C. 2929.12(B), and the other indicates that “the offender’s conduct is less serious than conduct normally constituting the offense,” R.C. 2929.12(C). Another two sets of factors relate to the likelihood of the offender’s recidivism. One indicates that “the offender is likely to commit future crimes,” R.C. 2929.12(D), and the

other indicates that “the offender is not likely to commit future crimes,” R.C. 2929.12(E).

**{¶ 26}** The State argues here that, based on the record, the seriousness factors show that Smith’s conduct was more serious than conduct normally constituting the offense and that the recidivism factors indicate a strong likelihood that Smith will reoffend when released from prison. The State says that the trial court’s 8-year sentence demeans the seriousness of Smith’s crimes.

**{¶ 27}** The trial court here expressly stated that it had considered the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. As to the seriousness factors, the court noted that “some of the more serious factors do apply in this case. There was a minor who was held hostage. Fortunately no one was actually injured, but two people were held hostage for a significant number of hours. I believe it would indicate a more serious factor.” (Sentencing Tr. 410). And about the recidivism factors, the court said that “some of the more serious factors do apply. Mr. Smith has five prior convictions as an adult with regard to misdemeanors and \* \* \* [s]ix prior convictions as an adult felony wise.” (*Id.*).

**{¶ 28}** The State objected to the sentence, arguing that Smith should be sentenced to 15 years, as he had been twice before. The court then explained why it believed that 8 years is appropriate:

\* \* \* I think an eight year sentence is very serious. The Court heard the testimony. It’s not—it’s a serious offense, but on the total variety of cases and the—you know, we—we don’t look at this in isolation. In fact, there was no—no injury here, other than maybe—and I don’t diminish this psychological, but an eight year sentence is—is more than mid-range on

the case. It's really a one transaction in occurrence. It's not allied because you do have the two separate.

So, we're—we're sentencing to more than mid-range and also, the fact is that this is the first time that Mr. Smith has got a violent offense.

Now there was this assault, which I—which it must—which, you know, generally, assault's a misdemeanor. I don't know what this one out of Franklin County, but that was almost 20 years ago. The other offenses are drug offenses. So, it—and so the Court—this is the—these are the first high-level felonies that this man has been convicted of and I certainly think it's terrible what Mr. Smith did, absolutely. And I'm not saying there's any doubt at all about his guilt. He clearly is, but I think the sentence is not unreasonable.

(*Id.* at 414-415). We note too that the sentencing judge this time was not the same as the judge who sentenced Smith the previous two times.

**{¶ 29}** The imposed sentence is not clearly and convincingly contrary to law. The statutory range for a first-degree felony is three to eleven years in prison. R.C. 2929.14(A)(1). And the trial court expressly stated that it had considered the purposes and principles of sentencing in R.C. 2929.11 and the seriousness and recidivism factors in R.C. 2929.12. After reviewing the record, we cannot say that the record clearly and convincingly fails to support the trial court's findings.

**{¶ 30}** The cross-assignment of error is overruled.

### **III. Conclusion**

**{¶ 31}** We have overruled both Smith's assignment of error and the State's cross-

assignment of error. The trial court's judgment is therefore affirmed.

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FAIN, J., and FROELICH, J., concur.

Copies mailed to:

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