

[Cite as *State v. Dunbar*, 2010-Ohio-239.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92262

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LANG DUNBAR

DEFENDANT-APPELLANT

JUDGMENT.

REVERSED, CONVICTION
AND SENTENCE VACATED,
APPELLANT DISCHARGED

Cuyahoga County Court of Common Pleas
Case No. CR-460794

BEFORE: Blackmon, P.J., Boyle, J., and Jones, J.

RELEASED: January 28, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Lang Dunbar appeals his conviction and sentence and assigns the following errors for our review:

“I. It was plain error under Crim.R. 52 to not instruct the jury on the lesser included offense of Unlawful Restraint,[sic] and counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution in failing to request a jury instruction for unlawful restraint.”

“II. The evidence is insufficient under the federal Constitution to convict the appellant.”

“III. The conviction is against the manifest weight of the evidence.”

“IV. The appellant’s sentence of five years incarceration violates Due Process under the federal Constitution.”

“V. Trial counsel was ineffective under the federal Constitution when he failed to object to ‘other acts’ evidence improperly admitted into evidence.”

“VI. Counsel was ineffective under the federal Constitution when he failed to disqualify the trial judge who had previously been reversed by this court in this case.”

“VII. The cumulative errors deprived the appellant of Due Process in violation of the Fourteenth Amendment of the federal Constitution.”

{¶ 2} Having reviewed the record and pertinent law, we vacate Dunbar’s conviction and sentence, and he is discharged. The apposite facts follow.

{¶ 3} On November 7, 2004, Dunbar struck Davida Vassar, his live-in fiancée, (“Vassar”) multiple times in the face and head with a closed fist, causing

her to fall to the floor. Dunbar began to grab at her and twist her legs. While Vassar was lying in a fetal position on the floor, Dunbar kicked her several times. The parties' two minor children were present and witnessed the incident. After the incident, Dunbar became immediately remorseful, told Vassar he had snapped, and instructed her not to leave the house or answer the door.

{¶ 4} On November 20, 2004, Vassar filed a complaint against Dunbar with the Cleveland Police Department, and Dunbar was subsequently charged with domestic violence. On December 7, 2004, Dunbar entered a plea of no contest in the Cleveland Municipal Court to the domestic violence charge and was sentenced to 180 days in the Cleveland Workhouse.

{¶ 5} On January 7, 2005, while Dunbar was serving his sentence for the domestic violence conviction, the Cuyahoga County Grand Jury indicted him on three counts of abduction and one count of domestic violence, arising from the same November 7, 2004 incident.

{¶ 6} At his arraignment, Dunbar pleaded not guilty to the charges, and several pretrials followed. At a plea hearing on May 9, 2005, the state outlined a negotiated plea agreement to the trial court. Pursuant to the agreement, the state indicated that in exchange for Dunbar pleading guilty to one count of a felony-three abduction, the state had agreed to recommend to the trial court that the remaining three counts of the indictment be nolle. In addition, in exchange

for Dunbar's guilty plea, the state had agreed to recommend that Dunbar receive community control sanctions, rather than a prison sentence.

{¶ 7} However, Dunbar refused to enter into the plea and the state moved the trial court for a continuance. On June 13, 2005, at a second plea hearing, the state informed the trial court that in exchange for a plea to one count of abduction, it had agreed to a term of community control sanctions or probation. Dunbar withdrew his former plea of not guilty and entered a plea of guilty to one count of abduction pursuant to the negotiated agreement.

{¶ 8} The trial court deferred sentencing and ordered Dunbar not to have any contact with Vassar, placed him on a \$10,000 personal bond, and ordered him to submit to a presentence investigation report. On July 12, 2005, the trial court sentenced Dunbar to two years in prison, placed him on postrelease control for three years, which included drug counseling and testing. Dunbar appealed the trial court's decision.

{¶ 9} In a decision released on June 28, 2007, we reversed Dunbar's conviction and remanded the case to the trial court.¹ We concluded that the trial court had failed to either forewarn Dunbar of the potential for prison at the plea hearing or give him an opportunity to withdraw his plea at the sentencing hearing.

¹*State v. Dunbar*, Cuyahoga App. No. 87317, 2007-Ohio-3261.

Jury Trial

{¶ 10} On September 29, 2008, after Dunbar had been in prison for more than two years, a jury trial commenced. At the trial, the state presented the testimony of four witnesses including the victim, who had remarried; her married name is Davida Moore (“Moore”).

{¶ 11} Moore testified that she met Dunbar in 1998. At the time they met, Dunbar had a substance abuse problem and Moore got him into a recovery program, and attended meetings with him, but Dunbar eventually left the program. Moore and Dunbar had two children and lived together until November 2004.

{¶ 12} Moore testified that the day before the November 2004 incident, she had given Dunbar \$25 to purchase a toy for their daughter’s birthday. The following day, Dunbar returned home without a toy and without the money. An argument erupted, which led to Dunbar punching, kicking, and pulling Moore’s hair.

{¶ 13} Moore testified that Dunbar immediately became remorseful, began crying, and indicated that he had “snapped.” Moore stated that Dunbar told her not to leave the house, not to call anyone, and not to answer the door. Moore testified that over the next four or five days, Dunbar was in and out of the house, repeatedly apologized to her, and was not violent towards her or the children.

{¶ 14} Moore testified that she did answer the door when Dunbar's father stopped over. Moore stated that she told Dunbar's father that his son had beaten her and she was going to leave him. Moore stated that Dunbar's father agreed that she should leave his son.

{¶ 15} Moore further testified that she could not recall whether Dunbar made any threats to her on the day of the incident or in the days immediately after the incident. Moore testified about threats Dunbar had made prior to the day of the incident and prior to the four or five days after the incident. Moore testified about an incident that took place in Columbus, Ohio in 2002, wherein Dunbar threatened her with a knife.

{¶ 16} The jury found Dunbar guilty of one count of abduction and acquitted him of the remaining two counts. The trial court then sentenced Dunbar to a five-year prison term and three-years of postrelease control.

Insufficient Evidence

{¶ 17} We begin with the second assigned error, which we find dispositive of the instant appeal. In the second assigned error, Dunbar argues the evidence was insufficient to convict him of abduction. We agree.

{¶ 18} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*:²

²(1978), 55 Ohio St.2d 261, syllabus.

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”³

{¶ 19} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,⁴ in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

³See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

⁴(1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 20} In the instant case, the jury found Dunbar guilty of abduction in violation of R.C. 2905.02(A)(2), which states in pertinent part as follows:

**“(A) No person, without privilege to do so, shall knowingly do any of the following:
* * ***

(2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear.”⁵

{¶ 21} Preliminarily, we note that the indictment leading to Dunbar’s conviction charged that the abduction took place between November 7, 2004 through November 15, 2004, the days following the domestic violence incident. In addition, as previously noted, Dunbar pleaded no contest to the domestic violence charge in Cleveland Municipal Court and was found guilty; he was sentenced accordingly.

{¶ 22} At trial, Moore testified that after the domestic violence incident, Dunbar told her not to leave the house or answer the door. Moore testified about the time period subsequent to the incident as follows:

“Q. Why did he tell you not to leave the house, not to answer the door?

A. Because of the way my face looked.”⁶

“* * *

⁵ *State v. Sanders*, 3rd Dist. No. 1-09-01, 2009-Ohio-5437.

⁶Tr. 245.

“Q. * * * Did you ever leave the house?

“A. Yes.

Q. When did you first leave the house?

A. I think it was maybe four or five days later I took the kids to day care.

Q. You hadn’t left the house the entire time?

A. No.

Q. Four or five days later, what is the interaction like between you and Mr. Dunbar for these four or five days?

A. He keeps telling me he’s sorry and that he just snapped.

Q. Is he ever violent towards you during these four or five days?

A. Not anymore, no.

Q. Did you feel that you could leave the house?

A. I left the house to take them to the day care, yes, but by that time my injuries had cleared up.”⁷

“* * *

“Q. Well, describe what’s going on between the two of you, yourself and the Defendant during that period of time, the 8th and the 12th?

A. I’m not really talking to him and he just keeps apologizing and saying that he snapped.”⁸

⁷Tr. 252.

⁸Tr. 253.

{¶ 23} A review of the above testimony relating specifically to the time period following the domestic violence incident fails to establish that Dunbar restrained Moore of her liberty by force or threat of force. Moore testified that during the relevant time period, Dunbar never threatened her, was not violent toward her, but instead, repeatedly apologized for the incident.

{¶ 24} Force is defined as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.”⁹ During the relevant time period, Dunbar’s behavior is contrary to the definition of force necessary to satisfy this element of abduction. Since the record is devoid of any evidence that Dunbar restrained Moore’s liberty by force during the relevant time period, then there was insufficient evidence to convict Dunbar of abduction.

{¶ 25} Further, Moore testified that during the relevant time period, Dunbar left the house several times, for extended periods of time, and there was no evidence that Dunbar locked Moore in the house each time he left. Thus, Moore had the opportunity to leave or to summon help because Dunbar was not present.¹⁰ On one of Dunbar’s absences, Moore answered the door when

⁹*State v. Muniz*, Cuyahoga App. Nos. 85156 and 85157, 2005-Ohio-3580; R.C. 2901.01(A)(1).

¹⁰See *State v. Carpenter*, Cuyahoga App. No. 91769, 2009-Ohio-3593.

Dunbar's father visited. Moore related that she told Dunbar's father of the domestic violence incident and he agreed that she should leave Dunbar.

{¶ 26} Finally, Moore testified that she eventually left the house after her injuries subsided. Moore did not indicate what prompted her to leave the house when she eventually did, but the record is devoid of any evidence that outside intervention was necessary to effect her leaving. Based on Moore's own testimony, a rational person could conclude that she was free to move about, had numerous opportunities to leave, and could have summoned help during the time period under consideration, if she was in fear of physical harm.

{¶ 27} We are mindful that Moore testified at length about previous threats and other incidents of domestic violence, which occurred more than two years prior to the subject incident. However, her behavior during the relevant time period does not indicate that she was paralyzed by fear of Dunbar's reprisals or that he made any reference to past threats or made new threats.

{¶ 28} As previously stated, Dunbar was not always present during the relevant time period. Instead, Dunbar was absent from the house for long stretches of time each day, which would have given Moore the opportunity to escape or summon help if she was afraid that physical harm was imminent.

{¶ 29} Moore also answered the door and complained to Dunbar's father about the incident, which also indicates the absence of fear of Dunbar's reprisal. Moore not only answered the door, but opened it for Dunbar's father, an

individual, who the average person could conclude would tell his son that he had stopped by his house and spoke with Moore about the incident.

{¶ 30} Consequently, after reviewing the evidence in a light most favorable to the State, specifically the evidence relating to the five days following the incident, which was the subject of the indictment, we find that the evidence fails to support the conviction for abduction. Accordingly, we sustain the second assigned error.

{¶ 31} Our resolution of the second assigned error renders the remaining errors moot.¹¹

Judgment reversed, conviction and sentence vacated, and appellant is ordered discharged.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

¹¹App.R. 12(A)(1)(C).

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR