

[Cite as *State v. Dove*, 2015-Ohio-2761.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101809

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ERIC DOVE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED AS MODIFIED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-582449-A

BEFORE: Kilbane, P.J., McCormack, J., and Boyle, J.

RELEASED AND JOURNALIZED: July 9, 2015

ATTORNEY FOR APPELLANT

Joseph V. Pagano
P.O. Box 16869
Rocky River, Ohio 44116

ATTORNEYS FOR APPELLEE

Timothy J. McGinty
Cuyahoga County Prosecutor
Fallon Radigan
Brian R. Radigan
Assistant County Prosecutors
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Eric Dove (“Dove”), appeals from his conviction for kidnapping with a sexual motivation specification, a first-degree felony.

{¶2} Having reviewed the record and the controlling case law, we modify Dove’s conviction to second-degree felony kidnapping and remand the case for resentencing.

{¶3} On February 28, 2014, Dove was indicted in connection with recently reported allegations that he sexually abused D.H., a former babysitter for his children, on September 4, 2011. The three-count indictment charged Dove with rape; kidnapping of an individual who was less than 18 years old, with a sexual motivation specification; and intimidation of a crime victim.

{¶4} On June 5, 2014, which was prior to trial, the state of Ohio (“State”) filed a notice of intent to use other acts evidence pursuant to Evid.R. 404(B), in order to introduce evidence concerning events surrounding Dove’s 2003 conviction for unlawful sexual contact with S.C., a minor. This 2003 conviction resulted in Dove’s classification as a sexually oriented offender. The trial court deferred ruling on this motion until trial.

{¶5} The matter proceeded to a jury trial on June 11, 2014. D.H., who was 18 years old by the time of trial, testified that her cousin, Sharray, is married to Dove. Sharray and Dove have a three-year-old daughter together, and Sharray has four other children. D.H. testified that she and Sharray were very close, but she did not interact very much with Dove. D.H. babysat for Sharray’s children two or three nights per

month. She generally slept at Sharray's house on these nights so that she did not have to walk home.

{¶6} D.H. testified that on September 3, 2011, when she was 15 years old, she went to the home of Sharray and Dove to babysit the youngest child, who was approximately two or three months old. On this evening, Sharray and Dove were going to a nightclub to celebrate Sharray's birthday. The child fell asleep after midnight, and D.H. eventually put her in a bassinet in Sharray and Dove's bedroom on the second floor.

D.H. then watched television in their room until they returned home, which was about 2:00 or 3:00 a.m.

{¶7} D.H. testified that Dove "had to help [Sharray] up the stairs because she was so drunk. After that, she was just passed out on the bed[.]" At that point, D.H. went to the basement to go to sleep. D.H. testified that she was dressed in sweatpants and a T-shirt, and was watching television in the basement, when Dove came down to the basement and said that he would pick out a movie for her to watch. They began to watch the movie together. Dove then moved over to her side of the couch, grabbed her arms, and pushed her up against the arm of the couch. D.H. told Dove to get off of her and tried to shove him away. D.H. then testified:

[H]e put his arm into my back to pull my sweatpants down a little bit. And when they weren't — he didn't get them all the way down. He couldn't get them all the way down. But the way my legs — one of my legs were on the — off the couch and one of them were on the couch from me trying to get up, and that's when it happened. * * *
He tried to have sex with me. He put his penis inside me.

{¶8} D.H. further testified that as she told Dove to get off of her, Sharray called out to him from the kitchen, so he ran upstairs. D.H. stated that she did not call out to Sharray during the incident because she “wouldn’t have heard anything.” The next morning, D.H. asked Sharray to drive her home. Sharray, in turn, asked Dove to drive her home. According to D.H., during the ride home, Dove threatened to kill her if she told anyone what had happened. D.H. stated that following this incident, she never babysat for Sharray again, but she did go to her home on one or two other occasions.

{¶9} D.H. next stated that on April 17, 2013, Sharray called her and asked her to speak with her 14-year-old daughter, K.M., regarding “some inappropriate things that she’s been doing.” D.H. was permitted to testify that in this conversation, K.M. told D.H. that Dove had been having sex with her in the basement. At that point, D.H. then told Sharray about the events that she experienced during the early morning hours of September 4, 2011. Sharray and K.M. arrived at D.H.’s home a short time later. Sharray then brought D.H. to the Maple Heights police station to make a police report. Following that day, however, D.H. and Sharray no longer spoke to each other, but Sharray and Dove are still together. D.H. admitted that she does not like Dove and that she does not think that he belongs with Sharray because she has observed him mentally abuse her.

{¶10} Sharray was advised through counsel of her right to refuse to testify against Dove, then testified on behalf of the state. Sharray contradicted D.H.’s testimony as to several points. According to Sharray, D.H. was watching three of her children and not, as D.H. had testified, just the youngest child. Sharray also stated that she and Dove

were not intoxicated when they returned home from their night out on September 3, 2011.

When they got home, they ate something and then cleaned up. Dove went downstairs to the first floor to get Sharray's cell phone charger. Sharray and Dove then went to sleep in their second-floor bedroom. Sharray awoke in the middle of the night, and Dove was not in their bed. Sharray went downstairs and found him at the kitchen sink, getting something to drink. According to Sharray, D.H. continued to come to their house after that evening.

{¶11} With regard to the events of April 17, 2013, Sharray testified that D.H. happened to call while K.M. was being reprimanded for inappropriately using her cell phone. D.H. spoke with K.M., and then begged Sharray to come to her house. When Sharray arrived at D.H.'s house, D.H. told her that Dove had raped her on the night of Sharray's birthday, and Sharray insisted on taking D.H. to the police station. According to Sharray, neither D.H. nor her mother wanted to speak with the police, but D.H. eventually agreed to go with her. There were no allegations concerning K.M., and K.M. did not speak with the police. Finally, Sharray acknowledged that Dove had called her on March 5, 2013, from the Richland Correctional Institution. In this call, which was recorded, Sharray argued with Dove. She questioned his manhood, and he told her to ask her cousin about his penis. Sharray explained that the call was the result of her rocky four-year marriage to Dove. Sharray stated that both she and Dove are mentally abusive and say things simply to hurt one another.

{¶12} Maple Heights Police Detective Gerald Prusha (“Detective Prusha”) testified that he investigated this matter after D.H. made a police report. During his investigation, he contacted the Cuyahoga County Department of Children and Family Services (“CCDCFS”), but learned that CCDCFS declined to investigate because there was no further contact between Dove and D.H. Detective Prusha spoke with D.H. He also learned from Sharray that Dove had made a telephone call from the Richland Correctional Institution to her on March 5, 2013, which was recorded. The call, which contains Dove’s statement “ask your cousin [about my penis]” was played for the jury.

{¶13} Proceeding to the subject of the state’s Evid.R. 404(B) motion, the trial court determined that the state could introduce evidence concerning Dove’s 2003 conviction for unlawful sexual contact with a minor, which resulted in Dove’s classification as a sexually oriented offender. S.C.’s mother testified that her family lived in the same apartment complex as Dove. On September 8, 2002, at approximately 2:00 a.m., S.C.’s mother noticed that her daughter’s bedroom door was closed so she went into her daughter’s room to check on her. The mother observed that Dove was performing oral sex on S.C., who was then 12 years old. The mother screamed Dove’s name, and he dove out the window and fled. At that point, S.C. awoke and appeared to be in shock.

{¶14} Dove elected to present evidence in his defense. His neighbor, Levora Jones, testified that on September 4, 2011, after the incident, D.H. arrived at Dove’s home

and asked to see the young child. Jones was certain of the date based upon her purchase of airline tickets.

{¶15} K.M. testified that during her April 17, 2013 telephone call with D.H., D.H. repeatedly asked whether Dove had inappropriately touched her. She repeatedly said that he had not. Eventually, she and D.H. both agreed to fabricate false accusations against Dove because they do not like him. According to their agreement to make up the false accusations, D.H. agreed to allege that Dove raped her on the night of the birthday party, and K.M. agreed to allege that he raped her at her grandmother's house. K.M. stated that she went along with D.H.'s plan, even though Dove had never done so. During the investigation into D.H.'s claim, however, K.M. told the detective that D.H. "made up a story on [Dove]."

{¶16} D.M., Sharray's 12-year-old son, testified that on the night Sharray and Dove went out to celebrate Sharray's birthday, D.H. slept in K.M.'s bedroom on the first floor, and not in the basement. During the middle of the night, Sharray called out for Dove, then found him in the kitchen getting something to drink. D.M. also testified that D.H. continued to come to their home after that particular night.

{¶17} The jury returned a guilty verdict on the kidnapping charge and the sexual motivation specification, but acquitted Dove of the remaining charges. On July 21, 2014, the trial court sentenced Dove to three years of imprisonment and five years of postrelease control.

{¶18} Dove now appeals, assigning five errors for our review. For the sake of convenience, the assignments of error shall be addressed out of order where appropriate.

Assignment of Error One

The trial court erred in admitting “other acts” evidence of a prior conviction which had not been timely disclosed to the defense prior to trial which denied appellant a fair trial and denied due process of law guaranteed by the [Fifth] and [Fourteenth] Amendments, U.S. Const[itution] and Sections 10 and 16, Art[icle] I, Ohio Const[itution].

Assignment of Error Two

Appellant’s conviction was not supported by sufficient evidence and trial court erred by denying his motions for acquittal.

Assignment of Error Three

The trial court committed plain error in not instructing the jury on the mitigating factors with respect to kidnapping contained in R.C. 2905.01(C) or Appellant’s Sixth Amendment Constitutional Rights were violated where mitigating instructions were not requested.

Assignment of Error Four

The conviction was against the manifest weight of the evidence.

Assignment of Error Five

Throughout trial irrelevant evidence was introduced and testimony was solicited that Appellant was incarcerated on unrelated matters[,] which resulted in unfair prejudice to appellant and deprived him of his constitutional right to due process and a fair trial guaranteed by the [Fifth] and [Fourteenth] Amendments, U.S. Constitution, and Sections 10 and 16, Article I, Ohio Constitution.

Other Acts

{¶19} In the first assignment of error, Dove argues that the trial court erred in allowing the state to present “other acts” evidence regarding his 2003 conviction for unlawful sexual contact with a minor. He also complains that the state did not provide reasonable advance notice of its intention to present evidence of the 2003 incident at trial since the defense learned of it only five days prior to trial. In his fifth assignment of error, Dove complains that the state’s witnesses impermissibly revealed that Dove was incarcerated on unrelated matters on March 5, 2013 (in connection with the recorded phone call), and again from January 2014 to June 2014 (in connection with evidence from the telephone log of calls made to Sharray).

{¶20} We note that “decisions regarding the admissibility of other-acts evidence under Evid.R. 404(B) are evidentiary determinations that rest within the sound discretion of the trial court.” *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, syllabus. “Appeals of such decisions are considered by an appellate court under an abuse-of-discretion standard of review.” *Id.*

{¶21} A “hallmark of the American criminal justice system is the principle that ‘proof that the accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused’s propensity or inclination to commit crime.’” *In re C.T.*, 2013-Ohio-2458, 991 N.E.2d 1171, ¶ 5 (8th Dist.), quoting *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975).

{¶22} Under the Ohio Rules of Evidence, evidence of “other crimes, wrongs, or acts” is not admissible to prove a defendant’s character as to criminal propensity. Pursuant to Evid.R. 404(B), such evidence is inadmissible to prove “the character of a person in order to show action in conformity therewith.” However, the rule permits such evidence to be introduced for other purposes, such as for “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Evid.R. 404(B).

{¶23} Similarly, under R.C. 2945.59:

In any criminal case in which the defendant’s motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant’s scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

{¶24} In *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 19, the Ohio Supreme Court established a three-part test for determining whether “other acts” evidence should be admitted. In that case, the defendant was indicted for sexually abusing a 14-year-old boy that he was mentoring at his church. At trial, the state moved to admit evidence concerning defendant’s previous interactions with another

student that defendant coached. The state argued that the “other acts” evidence demonstrated a “course of conduct constituting a common plan, demonstrated a distinct pattern of sexual conduct constituting a modus operandi, and, by reasonable inference, tended to prove Williams’s intent to achieve sexual gratification with teenage males.” *Id.* at ¶ 5. On direct appeal, this court determined that the other acts evidence could not be admitted to show Williams’s “scheme, plan, or system,” because (1) the other act occurred more than a decade ago and, therefore, did not form the background of the crime at issue, and (2) identity was not at issue in the case. *State v. Williams*, 195 Ohio App.3d 807, 2011-Ohio-5650, 961 N.E.2d 1203 (8th Dist.).

{¶25} The Ohio Supreme Court reversed, holding the admissibility of “scheme, plan, or system” evidence is not limited to only those two situations. Rather, the court explained that Evid.R. 404(B) affords the trial court broad discretion regarding the admission of other acts evidence. The court adopted the following three-part test for determining whether other acts evidence should be admitted:

The first step is to consider whether the other acts evidence is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Evid.R. 401.

The next step is to consider whether evidence of the other crimes, wrongs, or acts is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B). The third step is to consider whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice. *See* Evid.R 403.

Williams, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 20.

{¶26} Applying this test, the *Williams* court determined that the “other acts” evidence was relevant because it tended to show the defendant’s motive, as well as his plan of targeting, mentoring, grooming, and abusing teenage boys, which could corroborate J.H.’s testimony. *Id.* at ¶ 22. The court further concluded that the “other acts evidence” was also relevant regarding whether the defendant’s intent was sexual gratification. As to the second step in the analysis, the Ohio Supreme Court held that the state did not offer the evidence of the previous conduct to show that the new abuse allegations were in conformity with Williams’s character, and that two limiting instructions to that effect were also provided, which the jury was presumed to have followed. As to the third part of the analysis, the court held that the probative value of the other acts evidence was not substantially outweighed by the danger of unfair prejudice. Under this three-step analysis, the court concluded that Evid.R. 404(B) permitted the admission of evidence regarding Williams’s prior crime because it helped to prove motive, preparation, and plan on the part of Williams, and the prejudicial effect did not substantially outweigh the probative value of that evidence. *Id.* at ¶ 24.

Prior Unlawful Sexual Contact With A Minor

{¶27} Applying the foregoing to Dove’s 2003 conviction for unlawful sexual contact with a minor, we note that under the first step of the *Williams* analysis, the other acts evidence is marginally relevant to making a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Although the state insists that the evidence was probative of the issue of identity, in this

matter, Dove's identity was never a question. Rather, the essential question was whether the incident that D.H. described actually occurred. Considering probative value as set forth in *Williams*, i.e., proof of motive, preparation, and plan, we conclude that it is somewhat probative of whether Dove targeted a young girl who was asleep, and was also somewhat probative of Dove's sexual motivation in this circumstance.

{¶28} As to the second step of the *Williams* analysis, the evidence was ostensibly not offered to show that Dove acted in conformity with this past offense, but was offered for its legitimate probative value. In any event, the trial court immediately instructed the jury following the mother's testimony as follows:

[I]f you find the evidence that the defendant previously committed a sexual offense is true, you may consider this testimony for the purpose of insight, whether it proves the defendant's motive or his intent or purpose to commit the offense charged in this trial. The evidence cannot be considered for any other purpose.

(Tr. 199.)

{¶29} The trial court also gave a limiting instruction in its final charge to the jury and instructed that this evidence could not be considered to prove Dove's character or that he acted in conformity with that character. (Tr. 273.) The jury is presumed to have followed both instructions. See *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168, 656 N.E.2d 623. Accordingly, although we find this to be an extremely close case, in light of the limiting instruction, the probative value of this evidence was not outweighed by the danger of unfair prejudice. Therefore, we cannot conclude that the trial court abused its discretion in admitting this evidence.

March 5, 2013 Incarceration

{¶30} With regard to the admission of Dove's phone call to Sharray from the Richland Correctional Institution, we again conclude that the statement is of limited probative value because Dove does not specifically admit that he had nonconsensual sex with D.H. In addition, the statement was made during an argument, and in the course of an extremely volatile relationship. In any event, in light of the trial court's cautionary instructions regarding the proper consideration of this evidence, we cannot say that the probative value of this evidence was outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting this evidence.

January to June 2014 Incarceration

{¶31} As to the evidence that Dove was incarcerated from January 2014 to June 2014, we conclude that the probative value of this evidence was marginal at best, and it presented a great danger of unfair prejudice or misleading the jury under Evid.R. 403(A).

Overall, however, given the unique facts of this particular matter, we cannot say that this evidence tainted the outcome of the trial in light of the cautionary instruction given and because it was consistent with the theory of the defense, i.e., that the volatile and combative relationship between Sharray and Dove motivated K.M. and D.H. to fabricate the false allegations against him. In any event, we conclude that the trial court's cautionary instructions regarding the proper consideration of this evidence lessened the prejudicial effect, and we cannot say that the probative value of this evidence was

outweighed by the danger of unfair prejudice. The trial court did not abuse its discretion in admitting this evidence.

Reasonable Notice

{¶32} Evid.R 404 was amended in 2012 to require the proponent of “other acts” evidence to provide the opponent with reasonable notice “in advance of trial, or during trial if the court excuses pretrial notice on good cause shown * * *.” One week in advance of trial is generally considered sufficient notice. *See United States v. Corsmeier*, S.D. Ohio No. 1:06-CR-00076, 2007 U.S. Dist. LEXIS 87215 (Nov. 27, 2007).

{¶33} In this matter, the state submitted its notice of intent to use other acts evidence on June 5, 2014, and the matter proceeded to trial on June 11, 2014, which was less than one week later. This notice was unreasonable. However, because the Evid.R. 404(B) matter pertained to Dove’s prior 2011 conviction, which is a matter of public record, we conclude that the untimely disclosure was not prejudicial.

{¶34} For all of the foregoing reasons, although we find this to be an extremely close case, the first and fifth assignments of error are overruled.

Sufficiency of the Evidence

{¶35} In the second assignment of error, Dove challenges the sufficiency of the evidence. An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial and 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. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶36} In this matter, Dove was convicted of kidnapping in violation of R.C. 2905.01(A)(4), which provides:

(A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:

* * *

(4) To engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will[.]

{¶37} "R.C. 2905.01(A)(4) requires only that the restraint or removal occur for the purpose of nonconsensual sexual activity, *not that sexual activity actually take place.*"

State v. Davis, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 196. (Emphasis sic.)

See also State v. Fischer, 8th Dist. Cuyahoga No. 75222, 1999 Ohio App. LEXIS 5568 (Nov. 24, 1999).

{¶38} Pursuant to R.C. 2941.147 and 2971.01, a sexual motivation specification requires the state to show that the underlying offense was committed with "a purpose to gratify the sexual needs or desires of the offender."

{¶39} In this matter, the state’s evidence demonstrated that after D.H. got ready for bed and was watching television in the basement, Dove came downstairs. He then went over to where she was sitting on the couch, grabbed her arms and pushed her into the end of the couch. She struggled against him and told him to get off of her, but he nonetheless continued to grab her, then lowered her sweatpants. Although D.H. testified that Dove raped her, the jury acquitted Dove of the rape charge. Nonetheless, the jury concluded, based upon its finding of guilt on the sexual motivation specification, that Dove had restrained D.H. for the purpose of engaging in sexual activity with her. Viewing this evidence in a light most favorable to the state, we conclude that the record demonstrates, and a rational trier of fact could conclude beyond a reasonable doubt, that Dove forcibly restrained D.H. against her will for the purpose of engaging in sexual conduct with her. The kidnapping conviction and the sexual motivation specification are supported by sufficient evidence.

{¶40} This assignment of error is therefore without merit.

Weight of the Evidence

{¶41} In the fourth assignment of error, Dove argues that his conviction is against the manifest weight of the evidence. Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence. *Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. The *Thompkins* court stated:

Weight of the evidence concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief.*” (Emphasis added.) *Black’s [Law Dictionary 1594 (6 Ed.1990)]*.

When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. [Quoting *Tibbs v. Florida*, 457 U.S. 31, 45, 102 S. Ct. 2211, 2220, 72 L.Ed.2d 652 (1982)]. *See also State v. Martin* (1983), 20 Ohio App.3d 172, 175, * * *, 485 N.E.2d 717, 720-721 (“The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.”).

Id.

{¶42} In this matter, the state presented testimony from D.H. regarding the events that occurred three years earlier, after Sharray and Dove returned home from celebrating Sharray's birthday. D.H. testified that she had gone to the basement where she was going to sleep and was watching television. D.H. testified that Dove forcibly restrained her arms and pushed her against the end of the couch as she struggled and told him to get off of her. She further testified that he grabbed her from behind, lowered her sweatpants, and engaged in nonconsensual sex with her. According to D.H.'s testimony, "[Dove] tried to have sex with me. He put his penis inside me." She told Dove to get off of her, and just then Sharray called out to him from the kitchen, so he ran upstairs. D.H. stated that she did not call out to Sharray during the incident because Sharray "wouldn't have heard anything." She went to sleep in the basement, and then remained in the home until the next afternoon. She asked Sharray to drive her home and ultimately accepted a ride from Dove. Testimony provided by others who were in the house clearly indicated that at some point after Sharray and Dove went to bed, Dove left the bedroom and was later found by Sharray in the kitchen. Other testimony indicated that K.M. and D.H. agreed to fabricate allegations against Dove because they did not like him. Viewing the record as a whole, we cannot say that the jury lost its way in convicting Dove of the offense of kidnapping in violation of R.C. 2905.01(A)(4) and the sexual motivation specification as defined in R.C. 2941.147.

{¶43} A violation of R.C. 2905.01(A)(4) is a first-degree felony, except when the offender releases the victim in a safe place unharmed. R.C. 2905.01(C)(1). In that instance, the violation of R.C. 2905.01(A)(4) would be a second-degree felony. R.C. 2905.01(C)(1). This court has held a first-degree kidnapping conviction to be against the manifest weight of the evidence where the evidence showed that the victim was unharmed. *State v. Fisher*, 8th Dist. Cuyahoga No. 101365, 2015-Ohio-597, ¶ 35, citing *State v. Won Banks*, 8th Dist. Cuyahoga No. 91992, 2009-Ohio-4229, ¶ 23. *See also State v. Butler*, 8th Dist. Cuyahoga No. 89755, 2008-Ohio-1924 (“the evidence supported only a second degree kidnapping conviction where the defendant robbed his victims of their belongings in a parking lot at knife-point but released them unharmed.”); *State v. Taogaga*, 8th Dist. Cuyahoga No. 75055, 1999 Ohio App. LEXIS 5682 (Dec. 2, 1999) (“defendant convicted of second-degree felony kidnapping where nine people were held hostage at gunpoint while the residence was ransacked in a search for money.”)

{¶44} Relying on *State v. Wright*, 2013-Ohio-1424, 990 N.E.2d 615 (7th Dist.), the *Fisher* court stated:

In *State v. Wright*, * * * the court explained the meaning of “release of the victim” and “leaving the victim unharmed” as follows:

As to the release of the victim, it must be by the defendant’s act, not by the victim seizing an opportunity to escape. *See State v. Bettem*, 7th Dist. No. 96-BA-39, 1999 Ohio App. LEXIS 142, 1999 WL 35296 (Jan. 15, 1999) (concluding that defendant failed to establish that he released his victims because the evidence demonstrated the victims escaped through a window “by their own efforts”); *State v. Carson*, 10th Dist. No. 98AP-784, 1999 Ohio App. LEXIS 1795, 1999 WL 236095 (Apr. 22, 1999) (concluding that defendant left the victims “free and unrestrained,” and therefore released them, when he fled the scene). * * *

As to leaving the victim “unharm[ed],” psychological harm is not considered. For instance in *State v. Henderson*, 10th Dist. No. 85AP-830, 1986 Ohio App. LEXIS 6317, 1986 WL 4366 (Apr. 8, 1986), the court concluded that the fact that the victim may be terrorized does not necessarily mean the victim was harmed. And it has been held that even where the defendant fires a gun as a warning shot, the victim is not “harm[ed].” *State v. Steverson*, 10th Dist. No. 97AP11-1466, 1998 Ohio App. LEXIS 4288, 1998 WL 634949 (Sept. 15, 1998).

* * *

After reviewing the evidence in this case, we find plain error on the part of the trial court in convicting Fisher of first-degree felony kidnapping. When Fisher left Lucas at his mother’s house, which was a safe place, he left him “free and unrestrained.” Moreover, Fisher left Lucas completely unharmed. Accordingly, the evidence unequivocally established that Fisher left Lucas in a safe place unharmed. And thus, we find that the outcome of the proceedings would have been different had the trial court considered the mitigating circumstances under R.C. 2905.01(C)(1).

Because we find, however, that the evidence supports a felony-two kidnapping conviction, we modify Fisher’s felony-one kidnapping conviction to a felony-two kidnapping conviction. *See State v. Reddy*, 192 Ohio App.3d 108, 2010-Ohio-5759, 948 N.E.2d 454, ¶ 35 (8th Dist.) (appellate court has authority to modify a conviction to a lesser included offense supported by the record, rather than ordering an acquittal or a new trial). Even though we are not dealing with a lesser included offense in this case, this same rationale applies.

Id. at ¶ 35-37.

{¶45} In the instant matter, as in *Wright*, *Reddy*, and *Fisher*, we likewise conclude that the evidence supports a felony-two kidnapping conviction. The manifest weight of

the evidence presented in this matter indicates that Dove left D.H. in a safe place unharmed, within the meaning of R.C. 2905.01(C)(1). The manifest weight of the evidence demonstrated that after Dove went upstairs, D.H. remained in the basement of her close family member, Sharray. D.H. was free, unrestrained, and unharmed for the remainder of the night. She was able to sleep, remained safe throughout the rest of her stay, and was then driven home.

{¶46} Therefore, after completing our manifest weight of the evidence review, we modify Dove's conviction to a violation of second-degree kidnapping.

Release of Victim in a Safe Place Unharmed Instruction

{¶47} In the third assignment of error, Dove argues that the trial court erred in failing to instruct the jury on the mitigating factors with respect to kidnapping contained in R.C. 2905.051(C) and that his trial counsel was ineffective in failing to request this instruction.

{¶48} In light of our modification of Dove's conviction to a second-degree felony kidnapping, this assignment of error is moot. App.R. 12(A)(1)(c).

{¶49} Judgment is affirmed as modified. We remand the matter to the trial court to reflect that Dove was convicted of second-degree felony kidnapping and to resentence Dove for that offense.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed as modified, any bail pending appeal is terminated.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

TIM McCORMACK, J., and
MARY J. BOYLE, J., CONCUR