[Cite as *State v. Fisher*, 2015-Ohio-597.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101365

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WARD F. FISHER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-581630-A

BEFORE: Boyle, J., Celebrezze, A.J., and Jones, J.

RELEASED AND JOURNALIZED: February 19, 2015

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MARY J. BOYLE, J.:

{¶1} Defendant-appellant, Ward Fisher, appeals his convictions. He raises three assignments of error for our review:

> 1. The trial court lacked jurisdiction to conduct a bench trial because the defendant's jury waiver was not properly executed.
>
> 2. The trial court erred by convicting the defendant of a felony of the first degree contrary to law.
>
> 3. The defendant's conviction was against the manifest weight of the evidence.

{¶2} Finding merit to his second assignment of error, we reverse and remand to correct the judgment as modified by this court.

Procedural History and Factual Background

{¶3} In January 2014, Fisher was indicted on five counts: aggravated burglary in violation of R.C. 2911.11(A)(2); aggravated robbery in violation of R.C. 2911.01(A)(1); felonious assault in violation of R.C. 2903.11(A)(2); kidnapping in violation of R.C. 2905.01(A)(2); and having a weapon while under a disability in violation of R.C. 2923.13(A)(2). All of the counts, except for the weapons disability, contained one- and three-year firearm specifications, as well as notice of prior conviction and repeat violent offender specifications. Fisher pleaded not guilty to all counts.

{¶4} Fisher waived his right to a jury trial (facts regarding the waiver will be set forth within Fisher's first assignment of error), and the case proceeded to a bench trial where the following facts were presented.

{¶5} Robert Lucas testified that he lived with his mother, who was disabled, in Cleveland, Ohio. He also testified that he visited his mother every day because she needed

assistance. Either way, he was at his mother's home on November 12, 2013, with his five-year-old niece and his mother. Lucas testified that he and his niece were sitting on the couch watching a movie, while his mother was upstairs in her bedroom. Lucas heard a knock at the door; it was Fisher. Lucas opened the door and let Fisher in because he had known Fisher his whole life. Lucas said that he and Fisher grew up together. Lucas thought of Fisher as family.

{¶6} Lucas and Fisher "chatted for a minute," and then Lucas received a text message. Lucas looked at the text, and when he put his phone away he said that Fisher was pointing a "9 millimeter gun, highpoint" at him. Lucas said that at first he thought Fisher was just showing him the gun, but then Fisher told Lucas to "give him [his] money." Lucas told Fisher that he did not have any money. At that point, Fisher reached into Lucas's pocket and took Lucas's cell phone.

{¶7} Fisher then led Lucas into the kitchen, still pointing the gun at Lucas. Fisher continued to ask Lucas where the money was. Lucas told Fisher that it was in the cabinet. Lucas testified that there was $400 in the cabinet that he had recently received from "the Judge * * * when [he] got stabbed." Fisher took Lucas's $400. Fisher then found the "the house gun" that was in the cabinet, a "22 automatic" gun. Fisher asked Lucas if the gun worked; Lucas responded that it did. Fisher then pointed the "22" at Lucas's leg and pulled the trigger, but the gun was not loaded. Lucas thought at that point that Fisher was going to kill him. Fisher then put the "22" in his pocket and pointed the 9 mm at Lucas, asking him where more money was. Lucas told Fisher that he did not have anything else to give him. Fisher then pointed the 9 mm at Lucas's leg and told Lucas that if he did not give him more money, he was going to shoot him. Lucas told Fisher again that he did not have any more money. Lucas, afraid that he was going

to die, told Fisher that if he left, Lucas would not call police. Fisher threatened Lucas that if he caused any trouble, he would be back. Fisher then left, holding the 9 mm gun on Lucas until he was out of the house.

{¶8} Lucas testified that he locked the door, grabbed his niece, and went upstairs to use his mother's phone. Lucas told police what happened and where he thought Fisher might be. Lucas later identified Fisher in a photo array.

{¶9} Lucas stated that he got a new phone later, with the same phone number. He received a call from Fisher's cousin, "Marquita." He did not answer it, but she left a voicemail. The voicemail was played in court. Marquita told Lucas that she was relaying a message from Fisher. Marquita said that Fisher wanted Lucas to know that Fisher understood where Lucas was coming from, but Fisher did not want Lucas to go to court or to press charges and that Fisher would give Lucas his money back. Marquita further told Lucas in the voicemail that Fisher said that he would give the money to Marquita to give to Lucas.

{¶10} When the state rested, Fisher moved for a Crim.R. 29 acquittal, which the trial court denied.

{¶11} Fisher presented two witnesses on his behalf, his friend, Lynata Gypson, and himself. Gypson testified that Fisher was at her house on the night of November 12, 2013. Gypson identified photos of Fisher sitting on her couch that were taken with her cell phone. The photos are dated November 12, 2013, but there is no time on the photo. Gypson said that Fisher got to her house that night around 5:45 p.m. She did not remember what time he left, but said that he was still there when the news came on at 10:00 p.m.

{¶12} Fisher testified that when he got out of prison in August 2013, Lucas was supposed to help him financially. Lucas was supposed to "front some marijuana" to Fisher to sell and

then Fisher would give Lucas $500 about two weeks later, after Fisher sold the marijuana. Fisher said that Lucas gave him "a half pound" of marijuana in late September or early October. But Fisher testified that he never gave Lucas the money, so Lucas began calling Fisher, asking for his money.

{¶13} Fisher denied being at Lucas's mother's home on the evening of November 12, 2013. Fisher said that he was on the "west side." Fisher stated that he took the "selfie" photo of himself and his friend sitting on Gypson's couch with Gypson's cell phone on November 12, 2013.

{¶14} Fisher testified that he did contact his cousin, "Kita," to ask her to call Lucas and tell Lucas that he would give him the money that he owed him for the marijuana.

{¶15} Fisher rested and renewed his Crim.R. 29 motion, which the trial court again denied.

{¶16} The trial court found Fisher guilty of all counts with the specifications. At sentencing, the trial court merged the aggravated robbery and kidnapping convictions, and selected to proceed on the aggravated robbery count because the state had "no preference." The trial court also merged all firearm specifications, and sentenced Fisher to three years for the firearm specifications, to be served prior to and consecutive to the base counts. The trial court then sentenced Fisher to three years for aggravated burglary, three years for aggravated robbery, three years for felonious assault, two years for having a weapon while under a disability, all to be served concurrent to each other, but consecutive to three years for the firearm specifications, for a total of six years in prison. It is from this judgment that Fisher appeals.

Jury Waiver

{¶17} In his first assignment of error, Fisher argues that his jury waiver was not valid because it did not satisfy the "in open court" requirement of R.C. 2945.05 and, thus, the trial court lacked jurisdiction to conduct a bench trial. Fisher acknowledges that the trial court did question him about his jury waiver, but he maintains that the questions the trial court asked "were not adequate to meet the requirement that a jury waiver be made in open court."

{¶18} A criminal defendant's right to a jury trial is guaranteed in the Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 10, Article I, of the Ohio Constitution. *State v. Burnside*, 186 Ohio App.3d 733, 2010-Ohio-1235, 930 N.E.2d 372, ¶ 45 (2d Dist.). Regarding serious offenses, an accused may not be deprived of this right unless it is knowingly, intelligently, and voluntarily waived. *See Duncan v. Louisiana*, 391 U.S. 145, 154, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); R.C. 2945.05; Crim.R. 23(A).

{¶19} Crim.R. 23(A) provides:

> In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.

{¶20} R.C. 2945.05 provides:

> In all criminal cases pending in courts of record in this state, the defendant may waive a trial by jury and be tried by the court without a jury. Such waiver by a defendant, shall be in writing, signed by the defendant, and filed in said cause and made a part of the record thereof. It shall be entitled in the court and cause, and in substance as follows: "I * * *, defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by a Judge of the Court in which the said cause may be pending. I fully understand that under the laws of this state, I have a constitutional right to a trial by jury."

> Such waiver of trial by jury must be made in open court after the defendant has been arraigned and has had opportunity to consult with counsel. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

{¶21} Under the plain language of Section 2945.05, the entirety of a defendant's jury trial waiver must be in writing. R.C. 2945.05; *State v. Lomax*, 114 Ohio St.3d 350, 2007-Ohio-4277, 872 N.E.2d 279, _ 9. The Ohio Supreme Court explained that "to be valid, a waiver [under Section 2945.05] must meet five conditions. It must be (1) in writing, (2) signed by the defendant, (3) filed, (4) made part of the record, and (5) made in open court." *Id.* "Absent strict compliance with the requirements of R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury." *State v. Pless*, 74 Ohio St.3d 333, 658 N.E.2d 766 (1996), paragraph one of the syllabus.

{¶22} Fisher argues that this case is analogous to *Lomax*, where the Supreme Court held that the "in open court" requirement was not met. In *Lomax*, the trial transcript only contained one reference to a jury waiver: "Since there's going to be a jury waiver, does the State care to make an opening statement at this time?" *Id*. at ¶ 45. The Ohio Supreme Court noted that the trial court did not address Lomax and have him acknowledge that he was waiving his right to a jury trial. Further, the Ohio Supreme Court recognized that the phrase "since there's going to be a jury waiver" implied that the waiver had not yet occurred at the commencement of the trial. *Id*. at ¶ 47. Therefore, the court held that the "in open court" requirement was not satisfied. *Id*.

{¶23} In *Lomax*, however, the Supreme Court made clear: "We do not mandate magic words, or a prolonged colloquy, but simply what Ohio law intends — that a defendant while in the courtroom and in the presence of counsel, if any, acknowledge to the trial court that the

defendant wishes to waive the right to a jury trial." *Id.* at ¶ 48. The Supreme Court concluded:

> We therefore hold that a waiver of the right to a trial by jury must not only be made in writing, signed by the defendant, and filed as a part of the record, but must also be made in open court. To satisfy the "in open court" requirement in R.C. 2945.05, there must be some evidence in the record that the defendant while in the courtroom and in the presence of counsel, if any, acknowledged the jury waiver to the trial court.

Lomax at ¶ 49.

{¶24} In this case, the trial court stated on the record in open court, with appellant and counsel present that, "the defendant has indicated to the Court that he wishes to proceed to a bench trial and he has executed a waiver here today. So, I just need to ask you a few questions, okay?" Fisher responded "Mm-hmm." *Id*. The court then stated, "you understand you have the right to have the facts tried to a jury of 12 or to the court. You have elected to have me be the ruler of law and trier of facts." Fisher then responded, "yes." The court then asked, "did anybody threaten you or promise you anything in exchange for the waiver." Fisher responded, "No." The court further inquired if Fisher was satisfied with his counsel's representation and the defendant responded that he was. The court then recessed until the signed waiver of jury trial had been filed with the clerk.

{¶25} The facts here are not analogous to *Lomax*, as Fisher contends. The trial court's colloquy in this case satisfied the "open court" requirement.

{¶26} Fisher's first assignment of error is overruled.

<u>First- or Second-Degree Kidnapping</u>

{¶27} In his second assignment of error, Fisher argues that the trial court erred when it found him guilty of first-degree felony kidnapping because the evidence established that he should have only been convicted of second-degree felony kidnapping.

{¶28} R.C. 2905.01(A)(2) states that no person by force or threat "shall remove another from the place where the other person is found or restrain the liberty of the person" to facilitate the commission of any felony. A violation of R.C. 2905.01(A)(2) 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 (A)(2) would be a second-degree felony. R.C. 2905.01(C)(1).

{¶29} The state cites to *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), in support of its argument that a "jury instruction" on a lesser included offense is only required where "the evidence presented at trial would reasonably support both acquittal on the crime charged and conviction upon the lesser included offense." But the state's argument is entirely misplaced. Second-degree felony kidnapping is not a lesser included offense of the first-degree felony kidnapping.

{¶30} The release of a victim unharmed is not an element of the kidnapping. *State v. Sanders*, 92 Ohio St.3d 245, 265, 750 N.E.2d 90 (2001). And there is no requirement on the part of the state to allege or establish that the defendant failed to release the victim in a safe place unharmed in order to prove that the defendant is guilty of kidnapping. *State v. Leslie*, 14 Ohio App.3d 343, 345, 471 N.E.2d 503 (2d Dist.1984). Instead, the defendant must plead and prove it and, thus, it is in the nature of an affirmative defense. *Sanders* at 265.

{¶31} In *State v. Cornute*, 64 Ohio App.2d 199, 412 N.E.2d 416 (10th Dist.1979), the court explained:

> Release unharmed in a safe place is a mitigating circumstance similar to extreme emotional stress as described in R. C. 2903.03(A), which mitigates a defendant's criminal culpability from murder to voluntary manslaughter. The Supreme Court of Ohio has stated that the burden is upon the defendant to produce evidence of the mitigating circumstance of extreme emotional stress as only the defendant will gain by showing its existence. *See State v. Muscatello* (1978), 55 Ohio St.2d 201. The same principle applies to the mitigating circumstance of releasing the victim unharmed in a safe place.

Id. at 201.

{¶32} In a jury trial, if a defendant "puts forth any evidence tending to establish that the victim was released in a safe place unharmed, the court is required to submit the issue to the jury under proper instructions." *Leslie* at 345. But there was a bench trial in this case. As such, there were no jury instructions, but the trial court is expected to know the law. *State v. Bays*, 87 Ohio St.3d 15, 26-27, 716 N.E.2d 1126 (1999).

{¶33} Fisher did not raise this issue below (his "story" was that he was not even at the victim's home on the night of the robbery). Accordingly, he has waived all but plain error. To prevail on a claim governed by the plain error standard, an appellant must demonstrate that the trial outcome would have clearly been different but for the alleged error. *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996).

{¶34} This court has found plain error in a situation where a defendant did not request a jury instruction on a second-degree felony kidnapping but the evidence warranted such instruction. *State v. Carroll*, 8th Dist. Cuyahoga No. 93938, 2010-Ohio-6013. In coming to that conclusion, we reasoned that while the defendant did not introduce evidence that the victim was released in a safe place unharmed, the state's evidence could be used to establish such an affirmative defense. *Id*. at ¶ 15. In *Carroll*, the witnesses who testified at trial stated that the defendant threatened to hurt them, however, none of the witnesses avowed that he actually

inflicted any harm upon them. *Id*. They indicated that once the events were over, the defendant fled. *Id*.

{¶35} This court has also held that a first-degree kidnapping conviction was against the manifest weight of the evidence where the evidence showed that the victim was unharmed. *State v. Banks*, 8th Dist. Cuyahoga No. 91992, 2009-Ohio-4229, ¶ 23 (citing to *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," and *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").

{¶36} In *State v. Wright*, 7th Dist. Mahoning No. 11-MA-14, 2013-Ohio-1424, 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 "unharmed," 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 "harmed." *State v. Steverson*, 10th Dist. No. 97AP11-1466, 1998 Ohio App. LEXIS 4288, 1998 WL 634949 (Sept. 15, 1998).

Wright at ¶ 20-21.

{¶37} 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).

{¶38} 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.

{¶39} Fisher's second assignment of error is sustained.

Manifest Weight of the Evidence

{¶40} In his final assignment of error, Fisher argues that his convictions were against the manifest weight of the evidence.

{¶41} Unlike sufficiency of the evidence, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id.*, citing *State v. Robinson*, 162 Ohio St. 486, 487, 124 N.E.2d 148 (1955).

{¶42} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror." *Id.* In doing so, it must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "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." *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id*.

{¶43} Fisher argues that "other than the victim's statements," there is no evidence to convict him. Thus, Fisher acknowledges that there was sufficient evidence to convict him, but he claims that because the victim was not credible, his convictions were against the manifest weight of the evidence. The trial court, however, believed the victim over Fisher, as it was free to do. Although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the factfinder's determination of the witnesses' credibility. *In re S.H.*, 8th Dist. Cuyahoga No. 100529, 2014-Ohio-2770, ¶ 27, citing *State v. Chandler*, 10th Dist. Franklin No. 05AP-415, 2006-Ohio-2070, ¶ 9.

{¶44} Although Fisher's assignment of error only states that he is challenging the weight of the evidence, he also argues that there was not sufficient evidence to prove the firearm specification under R.C. 2941.145 because he claims that there was "no evidence that a weapon was ever discharged during this crime." But the state does not have to prove that he discharged a firearm to establish this specification. It had to present evidence that the "offender had a

firearm on or about the offender's person or under the offender's control while committing the offense and displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." R.C. 2941.145. The state did that here. The victim testified that Fisher pointed a gun at him the entire time during the robbery.

{¶45} Finally, Fisher argues that there was no physical evidence to convict him. But physical evidence is not required. *State v. Martin*, 8th Dist. Cuyahoga No. 90722, 2008-Ohio-5263, ¶ 42; *State v. Paramore*, 1st Dist. Hamilton No. C-960799, 1997 Ohio App. LEXIS 4178 (Sept. 19, 1997). Again, the victim's testimony was enough to establish that Fisher pointed a gun at the victim, demanded the victim's money, attempted to shoot the victim with the victim's gun, and took the victim's money, cell phone, and gun.

{¶46} After review, we cannot say that the trial court, as the factfinder, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

{¶47} Fisher's third assignment of error is overruled.

{¶48} Judgment reversed and remanded. Upon remand, trial court is instructed to correct the judgment entry to reflect that Fisher was convicted of second-degree felony kidnapping, not first-degree felony kidnapping. We note, however, that because the trial court properly merged the kidnapping and aggravated robbery convictions, it will not need to resentence Fisher.

It is ordered that appellant recover from appellee 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.

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

MARY J. BOYLE, JUDGE

FRANK D. CELEBREZZE, JR., A.J., CONCURS;
LARRY A. JONES, SR., J., CONCURS IN PART AND DISSENTS IN PART (SEE SEPARATE OPINION)

LARRY A. JONES, SR., J., CONCURRING IN PART AND DISSENTING IN PART:

{¶49} Respectfully, I concur in part and dissent in part. While I agree that the first and third assignments of error should be overruled, I also would overrule the second assignment of error and affirm the judgment of the trial court.

{¶50} The majority finds plain error with the trial court's decision to convict Fisher of first-degree kidnapping based on its theory that the state's evidence established that Fisher left Lucas in a safe place and unharmed. I disagree. I do not believe the evidence can overcome the high threshold of plain error given the facts of this case.

{¶51} Lucas testified that Fisher tried to shoot him with a loaded gun, and pulled the trigger, but the gun did not go off. Fisher eventually left Lucas's mother's house but threatened that if Lucas brought any "trouble" or "conflict" to Fisher's grandmother's house, that he (Fisher) "would be back."

{¶52} Lucas testified that Fisher took his phone and the "house" gun with him. Lucas was frightened enough to remove his mother, who required constant medical care and was on oxygen, from the house because he did not think it was safe for her to be there. The trial court found that Fisher tried to prevent Lucas from pursuing charges against Fisher by threatening him

on the day of the robbery and by trying to pay him off, made efforts to prevent Lucas's testimony about the offense via the threat made on the day of the robbery and through Fisher's later conduct, as evidenced by the jail tape in which Fisher was recorded telling another person he wanted Lucas paid money in exchange for an agreement not to testify against Fisher.

{¶53} As the majority points out, Fisher failed to set forth any evidence that he left Lucas in a safe place, unharmed; instead, Fisher argued he was not the perpetrator. Therefore, we solely have the state's evidence to rely on when determining whether the trial court committed plain error in failing to find that Fisher left Lucas in a safe place, unharmed. Based on the facts of this case, I would not find that any error rises to the level of plain error and would, therefore, affirm the trial court's judgment.