

[Cite as *State v. Shepherd*, 2016-Ohio-931.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102951

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDRAOSS SHEPHERD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-14-587845A, CR-14-588857-A, and CR-14-589846-B

BEFORE: E.T. Gallagher, J., Keough, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: March 10, 2016

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Andraoss Shepherd (“Shepherd”), appeals from his felonious assault and kidnapping convictions following a jury trial. He raises the following six assignments of error for review:

1. The trial court erred in allowing appellant to be convicted when he did not receive effective assistance of counsel.
2. The trial court erred in allowing appellant to be convicted when there was an improper “flight instruction.”
3. The trial court erred in allowing appellant to be convicted of kidnapping when it is inconsistent with the not guilty verdict as to the aggravated robbery charges.
4. The conviction for felonious assault in Count 3 was against the sufficiency of the evidence.
5. The trial court erred in failing to reverse guilty verdicts when they were against the manifest weight of the evidence.
6. The trial court erred in failing to amend the conviction of kidnapping to the second degree.

{¶2} After careful review of the record and relevant case law, we affirm Shepherd’s convictions.

I. Procedural and Factual History

{¶3} In October 2014, Shepherd and his codefendant, Jordan Shepherd (“Jordan”) (collectively “the defendants”), were named in a nine-count indictment in Cuyahoga C.P. No. CR-14-589846-B. Shepherd was charged with two counts of aggravated robbery in violation of R.C. 2911.01(A)(1), with one-and three-year firearm specifications (Counts 1 and 5), two counts of aggravated robbery in violation of R.C. 2911.01(A)(3), with

one-and three-year firearm specifications (Counts 2 and 6), two counts of felonious assault in violation of R.C. 2903.11(A)(2), with one-and three-year firearm specifications (Counts 3 and 7), and two counts of kidnapping in violation of R.C. 2905.01(A)(2), with one-and three-year firearm specifications (Counts 4 and 8).¹

{¶4} In March 2015, the matter proceeded to a jury trial where the following facts were adduced.

{¶5} Iyad Sharaf (“Sharaf”), the owner of Live Clothing, testified that in May 2014, he arrived at his store shortly after 11:00 a.m. to open for the day with his employee, Jermaine Anderson (“Anderson”). The defendants entered the store at approximately 11:15 a.m. and were assisted by Anderson as they collected merchandise for purchase.

{¶6} Sharaf testified that the defendants had shopped in the store in the past, but never purchased more than one or two items on their previous visits to the store. On this occasion, however, the defendants began to select large quantities of the most expensive clothes in the store, totaling approximately \$1,500 in value. Sharaf and Anderson testified that the amount of merchandise the defendants were purchasing was unusual and suspicious. Anderson explained that he did not believe the defendants were going to rob them, but was concerned they were going to “snatch and run” or commit credit card fraud.

¹ The remaining count charged Jordan with having a weapon while under disability.

{¶7} Once the defendants selected their clothing, Sharaf informed them that a credit card would not be an acceptable form of payment. At that time, the defendants left the store to obtain money from a nearby ATM machine. Approximately 15 to 20 seconds later, the defendants returned to the store and Sharaf immediately noticed that Shepherd had a gun in his pocket. Sharaf approached Shepherd and stated, “if that’s a gun, you need to leave.” Anderson testified that the defendants acted like they were going to leave the store when Shepherd suddenly turned around, pulled out his gun, and stated “you know what it is.” Sharaf and Anderson testified that they understood Shepherd’s statement meant that he was robbing the store.

{¶8} During his direct examination, Sharaf testified that he initially felt “restrained by [Shepherd’s] gun,” but then attempted to wrestle the gun away from Shepherd. As Sharaf and Shepherd “tussled” over the gun, Anderson retrieved his own gun from behind the counter and told Shepherd to lay down his gun. At that time, the defendants fled the store, and Anderson pursued Shepherd on foot. Anderson testified that as he was in pursuit, Shepherd “pointed [his gun] at me and I heard a shot, boom, that’s when I [return fire] back at him, boom.” When Anderson realized he would not be able to catch Shepherd, he started to chase Jordan. However, Anderson stopped chasing Jordan when he heard a second gun shot and determined the risk was “not worth it.”

{¶9} Shortly thereafter, the police responded to the scene and conducted a thorough investigation, speaking with Sharaf and Anderson. During the course of their investigation, detectives lifted Jordan’s fingerprint from the glass counter inside the store

and discovered a grey-knit hat containing Shepherd's DNA. Subsequently, the detectives separately presented Sharaf and Anderson with photo lineups. Anderson identified Shepherd and Jordan as the perpetrators. Sharaf did not identify Jordan but identified Shepherd as the person that pulled a gun on him inside the store.

{¶10} At the close of the state's case, the trial court granted Shepherd's Crim.R. 29 motion for acquittal with respect to the kidnapping of Anderson, as charged in Count 8 of the indictment. At the conclusion of trial, Shepherd was found not guilty of aggravated robbery as charged in Counts 1, 2, 5, and 6 of the indictment. However, the jury found him guilty of both counts of felonious assault with firearm specifications, as charged in Counts 3 and 7 of the indictment, and the remaining count of kidnapping with firearm specifications, as charged in Count 4 of the indictment.

{¶11} At sentencing, the trial court imposed a nine-year prison term in Case No. CR-14-589846-B, which was ordered to run consecutively to an aggregate seven-year prison term imposed in two unrelated felony indictments, for a total prison sentence of 16 years.

II. Law and Analysis

A. Ineffective Assistance of Counsel

{¶12} In his first assignment of error, Shepherd argues he received ineffective assistance of counsel "when trial counsel faile[ed] to object or move for a mistrial upon witness misconduct."

{¶13} The test for ineffective assistance of counsel requires a defendant to prove “(1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced the defendant.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In reviewing a claim of ineffective assistance of counsel, we examine whether counsel’s acts or omissions “were outside the wide range of professionally competent assistance” and “recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690. To establish the second element, the defendant must demonstrate that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* at 686.

{¶14} In this case, Shepherd’s ineffective assistance of counsel claim challenges defense counsel’s performance during the following exchange, which took place at the conclusion of Anderson’s direct examination:

PROSECUTOR: Thank you, Your Honor. Nothing further.

ANDERSON: Can I say something?

PROSECUTOR: No.

ANDERSON: I just don’t understand. Why did you do it? For clothes?
No money. Nothing.

COURT: Mr. Anderson, hold on. Hang on. We have to go by the rules here. The rules are that you get to answer the questions that are asked. Okay?

ANDERSON: See, they could have took my son from me.

THE COURT: Hold on a second. Do you play any sports?

* * *

THE COURT: All right. You understand the concept of rules, there's rules in sports?

ANDERSON: I apologize. It's just that —

THE COURT: I understand.

ANDERSON: It just hurt me, because the dude just messed —

THE COURT: All right. We got rules, Mr. Anderson.

ANDERSON: I apologize.

THE COURT: I accept your apology. We have rules we got to play by, and you got to follow the rules. Okay? Thanks. [Defense counsel], you may inquire.

{¶15} Shepherd maintains that Anderson's unsolicited statements were highly prejudicial and inflammatory in nature. Thus, Shepherd contends that defense counsel was ineffective for (1) failing to object to this prejudicial testimony, and (2) failing to request a mistrial. We disagree.

{¶16} While Anderson's comments were improper, the trial court took the necessary steps to prevent Anderson from further expressing his unsolicited thoughts and opinions on the defendant's conduct. The transcript reflects that the court admonished Anderson and explained to him that his personal comments were not permitted and would not be further tolerated. Given the court's immediate response, we are unable to conclude that defense counsel's performance was deficient for not objecting to Anderson's statements. *See State v. Pawlak*, 8th Dist. Cuyahoga No. 99555,

2014-Ohio-2175, ¶ 82 (“Failing to object to irrelevant and prejudicial testimony may sometimes be viewed as tactical.”); *State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831 (1988) (“Failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.”).

{¶17} Similarly, Shepherd has failed to establish that a mistrial would have been granted had it been requested. A defendant alleging ineffective assistance of counsel because his attorney failed to move for a mistrial must establish that the trial court probably would have or should have declared a mistrial. *State v. Seiber*, 56 Ohio St.3d 4, 12, 564 N.E.2d 408 (1990), citing *State v. Scott*, 26 Ohio St.3d 92, 95-96, 497 N.E.2d 55 (1986). A mistrial should not be ordered in a criminal case merely because some error or irregularity has occurred. *State v. Jones*, 10th Dist. Franklin No. 12AP-1091, 2014-Ohio-674, ¶ 19, citing *State v. Reynolds*, 49 Ohio App.3d 27, 550 N.E.2d 490 (2d Dist.1988). It is an extreme remedy and is only appropriate when the substantial rights of the accused or prosecution are adversely affected, and a fair trial is no longer possible. *Illinois v. Somerville*, 410 U.S. 458, 462-463, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶18} In this case, we do not find that Shepherd’s substantial rights were adversely affected. While Anderson’s comments were made in violation of the court’s rules, the extent of the interruption was brief, and there is no indication that the nature of the statements rendered Shepherd’s trial unfair. Accordingly, we are unable to conclude that defense counsel’s performance was deficient for failing to request a mistrial.

{¶19} Shepherd’s first assignment of error is overruled.

B. Flight Instruction

{¶20} In his second assignment of error, Shepherd argues the trial court erred in providing a flight instruction over defense counsel's objection.

{¶21} A trial court enjoys discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, ¶ 72.

{¶22} In this case, the trial court gave the following instruction to the jury on flight:

You are instructed that the fact that the Defendant and/or Defendants fled the scene does not raise a presumption of guilt, but it may tend to indicate the Defendants' consciousness of guilt.

If you find that the facts do not support that the Defendant or Defendants fled from the scene, or if you find that some other motive prompted the Defendant or Defendants' conduct, or if you are unable to decide what the Defendant or Defendants' motivation was, then you should not consider this evidence for any purpose.

However, if you find that the facts support that the Defendant and/or Defendants engaged in such conduct, and if you decide that the Defendant or Defendants were motivated by a consciousness of guilt, you may consider that evidence in deciding whether the Defendant or Defendants are guilty of the crimes charged.

(Tr. 600-601.)

{¶23} "Flight from justice may be indicative of a consciousness of guilt." *State v. Santiago*, 8th Dist. Cuyahoga No. 95516, 2011-Ohio-3058, ¶ 30, citing *State v. Taylor*, 78 Ohio St.3d 15, 27, 676 N.E.2d 82 (1997). However, the "mere departure from the scene of the crime is not to be confused with deliberate flight from the area in which the

suspect is normally to be found.” *Id.*, quoting *State v. Norwood*, 11th Dist. Lake Nos. 96-L-089 and 96-L-090, 1997 Ohio App. LEXIS 4420 (Sept. 30, 1997). As this court has held, “the defendant’s conduct of leaving the scene of the crime does not warrant a flight instruction where there is no evidence of deliberate flight in the sense of evading police.” See *State v. Dunn*, 8th Dist. Cuyahoga No. 101648, 2015-Ohio-3138, ¶ 53, citing *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014-Ohio-3583, ¶ 48 and *State v. Johnson*, 8th Dist. Cuyahoga No. 99715, 2014-Ohio-2638, ¶ 110. Thus, it must be clear that the defendant took affirmative steps to avoid detection and apprehension beyond simply not remaining at the scene of the crime. *Dunn* at ¶ 52.

{¶24} As in *Dunn*, *Jackson*, and *Johnson*, we find that the facts of this case did not warrant a flight instruction. In our view, Shepherd’s act of fleeing the scene was not deliberate flight in the sense of evading police and detection. Instead, the testimony presented at trial indicated that the defendants fled the clothing store because Sharaf and Anderson thwarted their robbery attempt and because Anderson had a gun pointed at them. Moreover, there was no evidence presented that Shepherd fled to a location where he could not be located or that he evaded police once detected. Accordingly, we find the trial court abused its discretion by instructing the jury on flight.

{¶25} Despite the court’s error, we cannot say, nor has Shepherd demonstrated, that the error was prejudicial. “A reviewing court may not reverse a conviction in a criminal case due to jury instructions unless it is clear that the jury instructions constituted prejudicial error.” *State v. McKibbin*, 1st Dist. Hamilton No. C-010145,

2002-Ohio-2041, ¶ 27, citing *State v. Adams*, 62 Ohio St.2d 151, 154, 404 N.E.2d 144 (1980). In order to determine whether an erroneous jury instruction was prejudicial, a reviewing court must examine the jury instructions as a whole. *State v. Harry*, 12th Dist. Butler No. CA2008-01-013, 2008-Ohio-6380, ¶ 36, citing *State v. Van Gundy*, 64 Ohio St.3d 230, 233-234, 594 N.E.2d 604 (1992) (“A jury instruction constitutes prejudicial error where it results in a manifest miscarriage of justice.”). *State v. Hancock*, 12th Dist. Warren No. CA2007-03-042, 2008-Ohio-5419, ¶ 13. Conversely, “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.” Crim.R. 52(A).

{¶26} Under the totality of the circumstances, we cannot say that the trial court’s instruction on flight was prejudicial, such that a manifest miscarriage of justice occurred.

The instruction given, although improper, allowed the jury to make its own conclusions on flight and permitted the jury to consider other circumstances impacting the defendant’s motive to leave to store, including the defensive actions of Sharaf and Anderson. Accordingly, we conclude the instruction was harmless beyond a reasonable doubt.

{¶27} Shepherd’s second assignment of error is overruled.

C. Inconsistent Verdict

{¶28} In his third assignment of error, Shepherd argues his kidnapping conviction is inconsistent with his not guilty verdict as to the predicate aggravated robbery charges.

{¶29} Courts have held that consistency between verdicts on separate counts of an indictment is unnecessary. *State v. Thomas*, 9th Dist. Summit Nos. 22990 and 22991,

2006-Ohio-4241, ¶ 15. In *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), the United States Supreme Court explained that:

[I]nconsistent verdicts — even verdicts that acquit on a predicate offense while convicting on the compound offense — should not necessarily be interpreted as a windfall to the government at the defendant’s expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

Id. at 65.

{¶30} The Ohio Supreme Court has reiterated this principle, explaining that “a verdict that convicts a defendant of one crime and acquits him of another, when the first crime requires proof of the second, may not be disturbed merely because the two findings are irreconcilable.” *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 81. Therefore, a “conviction will generally be upheld irrespective of its rational incompatibility with [an] acquittal [on a separate count].” *State v. Whitlock*, 9th Dist. Summit No. 16997, 1995 Ohio App. LEXIS 3820, *2 (Aug. 30, 1995); *see also Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *Powell* at 65.

{¶31} After reviewing the law on inconsistent verdicts, we are unable to find reversible error where the jury found Shepherd guilty of kidnapping, but not guilty of aggravated robbery. As we stated, consistency between verdicts on separate counts is unnecessary. *See Lyndhurst v. Smith*, 8th Dist. Cuyahoga No. 101019, 2015-Ohio-2512.

{¶32} Shepherd’s third assignment of error is overruled.

D. Sufficiency and Manifest Weight of the Evidence

{¶33} In his fourth and fifth assignments of error, Shepherd argues his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence.

1. Standard of Review

{¶34} When an appellate court reviews a record upon a sufficiency challenge, “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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶35} Unlike a claim involving sufficiency of the evidence, when reviewing a challenge to the manifest weight of the evidence, this 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 trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). Reversing a conviction as being against the manifest weight of the evidence is reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id.* It is not the function of an appellate court to substitute its judgment for that of the trier of fact. *Jenks* at 279; *State v. Schultz*, 8th Dist. Cuyahoga Nos. 102306 and 102307, 2015-Ohio-3909, ¶ 35.

2. Felonious Assault — R.C. 2903.11(A)(2)

{¶36} In this case, Shepherd was found guilty of two counts of felonious assault in violation of R.C. 2903.11(A)(2), which provides, in relevant part, “[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.” As stated in his indictment, each of Shepherd’s felonious assault convictions correlated to conduct separately committed against Sharaf and Anderson.

{¶37} “A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” R.C. 2901.22(B).

{¶38} In challenging the sufficiency of the evidence supporting his felonious assault conviction against Sharaf, Shepherd contends that the state failed to produce evidence that he knowingly (1) caused or attempted to cause physical harm to Sharaf, or (2) caused harm by means of a firearm.

{¶39} Shepherd, relying on *State v. Brooks*, 44 Ohio St.3d 185, 542 N.E.2d 636 (1989), argues that while there was testimony that he pointed a gun at Sharaf, there was no evidence to suggest that he intended to cause Sharaf harm with a gun. We disagree.

{¶40} In *Brooks*, the Ohio Supreme Court, addressed “whether the pointing of a deadly weapon is an ‘attempt to cause physical harm’ to another by means of a deadly weapon as encompassed in the definition of ‘felonious assault.’” *Id.* at 189. In *Brooks*,

the defendant was involved in a “heated conversation” with a barmaid, which resulted in the defendant pointing a handgun at the woman’s face and stating, “B****, I will kill you.” *Id.* at 187. The Ohio Supreme Court upheld Brooks’s felonious assault conviction based upon the totality of the circumstances. However, the court went on to hold that, “[t]he act of pointing a deadly weapon at another, without additional evidence regarding the actor’s intention, is insufficient to convict a defendant of the offense of ‘felonious assault’ as defined by R.C. 2903.11(A)(2).” *Id.* at the syllabus.

{¶41} In *State v. Green*, 58 Ohio St.3d 239, 569 N.E.2d 1038 (1991), the Ohio Supreme Court reviewed its decision in *Brooks* and explained “[i]t can be readily gleaned from our holding in *Brooks* * * * that the additional evidence needed to uphold a felonious assault charge could include verbal threats as perceived by a reasonable person under the circumstances.” *Id.* at 241. Therefore, “the act of pointing a deadly weapon at another, coupled with a threat, indicates an intention to use such weapon, and is sufficient evidence to convict a defendant of the offense of felonious assault” as defined by R.C. 2903.11(A)(2). *State v. Thompkins*, 8th Dist. Cuyahoga No. 99467, 2013-Ohio-4793, ¶ 15.

{¶42} In this case, Sharaf and Anderson each testified that Shepherd pulled out a firearm from his pocket, pointed it at Sharaf and stated “you know what this is.” Sharaf testified that he took Shepherd’s statement to mean that Shepherd was going to rob the store. Under the totality of these circumstances, we find that Shepherd’s act of pointing the gun at Sharaf, coupled with his statement, “you know what this is,” could be

perceived by a reasonable person as a verbal threat that indicated Shepherd's intention to use the firearm if Sharaf did not comply with his demands. Viewing this evidence in a light most favorable to the state, a juror could reasonably find that Shepherd knowingly attempted to cause Sharaf physical harm.

{¶43} Similarly, we find that Shepherd's felonious assault conviction against Anderson was supported by sufficient evidence. At trial, Anderson testified that as Shepherd ran out of the store and across the street, "he pointed [his gun] at me and I heard a shot, boom[.]" In our view, testimony that Shepherd fired his weapon at Anderson as he ran was sufficient to establish the elements of R.C. 2903.11(A)(2).

3. Kidnapping — R.C. 2905.01(A)(2)

{¶44} Shepherd was further found guilty of the kidnapping of Sharaf in violation of R.C. 2905.01(A)(2), which provides, in relevant part:

(A) No person, by force, threat, or deception * * * 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:

* * *

(2) To facilitate the commission of any felony or flight thereafter;

* * *.

{¶45} In challenging the evidence supporting his kidnapping conviction, Shepherd broadly argues that "[Sharaf] was not kidnapped." We disagree. This court has previously defined the phrase "restrain the liberty of the other person" as "limit[ing] one's freedom of movement in any fashion for any period of time.'" *State v. Woodson*,

8th Dist. Cuyahoga No. 95852, 2011-Ohio-2796, ¶ 13, quoting *State v. Wingfield*, 8th Dist. Cuyahoga No. 69229, 1996 Ohio App. LEXIS 867, * 6 (Mar. 7, 1996); *see also State v. Walker*, 9th Dist. Medina No. 2750-M, 1998 Ohio App. LEXIS 4067, * 5 (Sept. 2, 1998) (restraint of liberty involves placing the victim in the offender’s power and beyond immediate help, even though temporarily, and does not require prolonged detainment.). At trial, Sharaf specifically testified that when Shepherd pointed a gun at him, he felt “restrained over the gun” in the moments before he attempted to take the weapon away from Shepherd. From this evidence, a rational trier of fact could find that Shepherd, through the use of force or threat of force, temporarily restrained the liberty of Sharaf to facilitate the commission of a felony.²

{¶46} Based on the foregoing, we conclude there was sufficient evidence to support each of Shepherd’s convictions.

{¶47} Moreover, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against Shepherd’s convictions. In challenging the weight of the evidence, Shepherd reiterates his sufficiency arguments and does not dispute the jury’s resolution of conflicts in evidence. Therefore, we conclude there is

² As discussed in Shepherd’s third assignment of error, the fact that Shepherd was found not guilty of the predicate aggravated robbery charges did not preclude the jury from finding that Shepherd violated R.C. 2905.01(A)(2). *See State v. Lowe*, 8th Dist. Cuyahoga No. 99176, 2013-Ohio-3913, ¶ 15 (“[R.C. 2905.01(A)(2)] only requires that the restraint occur to facilitate a felony or flight thereafter. It does not require there be a conviction of another felony.”).

nothing in the record to suggest the trier of fact lost its way such that Shepherd's convictions constituted a "manifest miscarriage of justice."

{¶48} Accordingly, Shepherd's convictions were not against the manifest weight of the evidence.

{¶49} Shepherd's fourth and fifth assignments of error are overruled.

E. Kidnapping — Safe Place Unharmful

{¶50} In his sixth assignment of error, Shepherd alternatively argues that if his kidnapping conviction is not reversed, it should be amended to a felony of the second degree "since Sharaf was released in a safe place unharmed."

{¶51} 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).

{¶52} 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, therefore, it is in the nature of an affirmative defense. *Sanders* at 265.

{¶53} In this case, Shepherd did not present any evidence at trial indicating that Sharaf was released in a safe place unharmed. Instead, ample evidence was provided by the state that Sharaf suffered minor injuries to his hand as a result of Shepherd's conduct.

{¶54} For the foregoing reasons, Shepherd has not set forth a sufficient basis to amend his kidnapping conviction to a felony of the second degree.

III. Conclusion

{¶55} Defense counsel was not ineffective for failing to object to witness testimony or for failing to request a mistrial. Further, while the facts did not support the trial court's flight instruction, the error was harmless beyond a reasonable doubt. Shepherd's felonious assault and kidnapping convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Finally, there is no evidence in the record to suggest Shepherd released the victim in a safe place unharmed.

{¶56} Judgment affirmed.

It is ordered that appellee recover from appellant 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.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR