

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Case No. 2011-2178

Appellee,

Appeal No. C-1000637

-vs-

Trial No. B-0903495

JULIAN STEELE

Appellant

**APPEAL FROM THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO**

**MEMORANDUM OF APPELLANT
IN SUPPORT OF JURISDICTION**

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TABLE OF CONTENTS

	PAGE
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTIONS.....	1
STATEMENT OF THE CASE AND FACTS.....	1
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	4
<u>PROPOSITION OF LAW NO. I</u> : Police officers are not subject to criminal prosecution for acts that are related to their duties as police officers	4
<u>PROPOSITION OF LAW NO. II</u> : The crime of abduction as set forth in Ohio Revised Code Section 2905.02 does not apply to police officers when they make an arrest.....	4
<u>PROPOSITION OF LAW NO. III</u> : The crime of intimidation as set forth in Ohio Revised Code Section 2931.03 (B) does not apply to police officers when they interview or interrogate a suspect.....	4
<u>PROPOSITION OF LAW NO. IV</u> : The conviction is against the manifest weight of the evidence.....	6
<u>PROPOSITION OF LAW NO. V</u> : There is a violation of the Due Process Clause and the Confrontation Clause of the Constitution when the trial court allows the state to bring up new matters on re-direct examination and prohibits the defendant from cross-examining the witness on those new matters.....	8
CONCLUSION.....	9
PROOF OF SERVICE.....	10
APPENDIX	
Opinion of the Hamilton County Court of Appeals (October 28, 2011)	1
Judgment Entry of the Hamilton County Court of Appeals (October 28, 2011).....	11

**EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A
SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case is of great personal interest to police officers that risks their lives in their efforts to solve violent crimes, and the public that also has an interest in living in safe communities. The First Appellate District Court believes that this case presents a difficult challenge of balancing the realities of police investigations, police discretionary authority, and the legal safeguards that are afforded to every citizen. These competing interests also raise important constitutional issues as well.

Police officer Julian Steele was the lead detective, investigating a series of robberies in the Northside area of Cincinnati, Ohio. The latest robbery occurred in the early morning hours of May 5, 2009, just after midnight. An unidentified witness saw two black males get into a blue Cadillac that was being driven by another black male. The witness followed the vehicle, got the license plate number and called that information in to the police.

Police investigation led to the identification of the owner of the vehicle and three black males that were connected to the vehicle. The vehicle was owned by Alicia Maxton. She was the mother of Ramone Maxton and Lamont Green. Anthony AJ Griffin also lived with them, and the three teens attended the same high school.

On May 6, Detective Steele and his partner, Calvin Mathis went to the high school to question the teens about the most recent robbery and the other robberies. None of them were at school that day. The officers considered their absence to be very suspicious because from their experience, perpetrators missed work or school after committing criminal offenses in an effort to lay low for a while.

The officers returned to the school the next day with uniformed officers to take all three to the district for questioning. Ramone Maxton and AJ Griffin confessed to the crimes after questioning, and they were arrested. Lamont Green did not confess, and he was released.

Detective Steele was indicted and found guilty by a jury of two counts of abduction (R.C. § 2905.02) with gun specifications for taking Ramone Maxton from the high school to the police station for questioning, and for taking Ramone from the police station to the juvenile detention center after he confessed. Steele was also indicted and found guilty by a jury of intimidation (R.C. § 2931.03 (B)) with gun specifications relating to the interview/interrogation of the teen suspect that confessed. Steele was found not guilty of all the other counts in the indictment. Steele was not indicted for arresting Lamont Green or AJ Griffin.

STATEMENT OF THE CASE AND FACTS

Julian Steele was found guilty by a jury of abduction in violation of R.C. § 2905.02(A)(1) (Count 1), abduction in violation of R.C. § 2905.02(A)(2) (Count 2), and intimidation in violation of R.C. § 2921.03(A) (Count 3), all with gun specifications.

He was sentenced to four years in prison on Count 1 and a merged one year on each of the gun specifications for a total of five years in prison. Steele was sentenced to five years of probation on Counts 2 and 3, to be served after the prison sentence. The trial court issued a stay of execution on the sentence and imposed an appellate bond.

On appeal, the First District Appellate Court reversed the abduction convictions due to improper jury instructions and ordered a new trial. The appellate court affirmed the conviction for intimidation, but reversed and vacated the attached gun specification.

FACTS: In May of 2009, Detective Steele was investigating a series of robberies that were occurring in Northside. On May 5, 2009 at approximately 12:40 a.m., two people were

robbed when they were assaulted and property was taken from them. An unidentified witness saw two suspects get into a blue Cadillac that was being driven by another male black. The witness followed the blue Cadillac, got the license plate number and gave that information to the police. (T.P. 360-361, 388-391)

The vehicle was owned by Alicia Maxton, and there were three male blacks that were connected to the vehicle: her 17 year old son Ramone Maxton, her 16 year old son Lamont Green, and a 17 year old named AJ Griffin. They all lived together in Bahama Terrace, which was a housing community that was a mile or so north of the community where the robberies were taking place. (T.P. 378, 660, 644, 645, 673)

Between May 5 and May 6, 2009, Steele viewed photos of the three teens, and attempted to contact the victims. He decided to interview the three teens based upon the license plate information, the general descriptions of the offenders and the vehicle, and the vehicle leaving the scene and traveling in the direction of Bahama Terrace, along with the information that three black males were involved in the robberies. (T.P. 434-451)

On May 6, Steele and Mathis went to the high school to talk to the teens, but they were all absent from school. Their absence from school the day after the robbery was suspicious to the detectives because in their experience, it is normal behavior for perpetrators to miss work or school after committing a crime in an effort to lay low for a while. (T.P. 378, 423, 425-427, 429)

On May 7, Steele and Mathis went back to the school with uniformed officers. All three teens were handcuffed by a uniformed officer, put into police cruisers, and taken to the district to be questioned about the robberies in Northside. (T.P. 429, 393)

After arriving at the district, the handcuffs were removed and Steele interrogated all three of them. Lamont, who did not confess, was released. Ramone confessed to the robberies and was

arrested. AJ Griffin confessed to the robbery and was arrested too. Ramone and AJ implicated each other. (T.P. 650, 654, 696-723, 448, 398, 953-954)

On May 19, Bob Randolph, an investigator for the prosecutor's office, secretly taped a conversation with Steele about Ramone's arrest. They had known each other for twenty years. Randolph's purpose was to question Steele about allegations that Steele arrested Ramone even though he knew Ramone was innocent. Steele told Randolph that it was not until he did more follow-up in the investigation that he felt that Ramone gave a false confession. (T.P. 917-921, State's Exhibit 16)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: Police officers are not subject to criminal prosecution for acts that are related to their duties as police officers.

PROPOSITION OF LAW NO. II: The crime of abduction as set forth in Ohio Revised Code Section 2905.02 does not apply to police officers when they make an arrest.

PROPOSITION OF LAW NO. III: The crime of intimidation as set forth in Ohio Revised Code Section 2931.03 (B) does not apply to police officers when they interview or interrogate a suspect.

[ARGUED TOGETHER]

This is a case of first impression. There is no other case on record in Ohio where the state has indicted a police officer for abduction and intimidation that are premised on the allegation that the officer made a warrantless arrest without probable cause. If the conviction is affirmed, law enforcement officers in Ohio are subject to criminal prosecutions if it is alleged that they exceeded their discretion by making an arrest in the absence of probable cause or reasonable suspicion.

Section 2901.04(A) of the Revised Code states in relevant part, "[S]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and

liberally construed in favor of the accused.” In this case, the accused was a police officer that was performing his job duties as a police officer.

Section 2935.03(B)(1) of the Revised Code gave Steele the authority to arrest Ramone, Lamont and AJ Griffin. It states in relevant part:

When there is reasonable ground to believe that an offense of violence, ... has been committed within the limits of the political subdivision, ... in which the peace officer is ... employed, ... a peace officer ... may arrest and detain until a warrant can be obtained any person who the peace officer has reasonable cause to believe is guilty of the violation.

In addition, Steele had authority to question Ramone while he was in custody because Ramone had been given the proper Miranda Warnings. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602. Therefore, Steele cannot be criminally charged for his conduct because the conduct related to his authority to arrest and engage in custodial interrogation.

Steele was improperly convicted of offenses that were never intended to apply to police officers that were performing their job duties. The state over reached its authority in applying the abduction and intimidation statutes in this manner. The decision to make an arrest is a discretionary to the arresting officer, and custodial interrogations are inherently intimidating. As a result, the convictions should be reversed.

If we accept the state’s theory in this case (i.e. police officers that arrest without probable cause are guilty of criminal activity), police officers in Ohio are subject to a felony indictment with gun specs every time they make an arrest. Criminalizing officers for making an arrest without “reasonable suspicion” or “probable cause” is an extremely slippery slope without an end in sight. Are magistrates who issue warrants that are subsequently ruled to lack probable subject to criminal charges?

This slippery slope could lead to unintended consequences for everyone who uses discretion in determining whether or not probable cause exists. If police officers are subject to criminal prosecution, so should prosecutors that indict cases in the absence of probable cause. If a judge denies a motion to suppress based on a lack of probable cause that an appeals court decides should have been granted; should the judge be subject to prosecution? And what about appellate court judges that are overturned on appeal by an even higher court; should they also be subjected to criminal prosecution?

The criminal system is already designed to deal with police officers that proceed against defendants in cases that lack the requisite probable cause or reasonable suspicion to arrest through the exclusionary rule. See *Weeks v. United States* (1914), 232 U.S. 383, 34 S. Ct. 341. In the case that was brought against Ramone, the system worked the way it was designed to work. He was released after a prosecutor determined that there was an absence of probable cause to arrest him. He also has the ability to pursue a civil action in state or federal court. As a result, police officers should not be targeted for criminal prosecution if they make an arrest without probable cause. The convictions should be reversed and the defendant discharged.

PROPOSITION OF LAW NO. IV: The conviction is against the manifest weight of the evidence.

A conviction based on insufficient evidence violates the Due Process Clause of the Ohio and United States Constitutions. *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068; *Jackson v. Virginia*; *Taylor v. Kentucky* (1978), 436 U.S. 478, 98 S.Ct. 1930; Section 16, Art. I, Ohio Constitution; *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132. The verdict should be reversed if the court finds that reasonable minds could not reach the conclusion reached by the trier of facts. *State v. Jenks* (1991) 61 Ohio St.3d 259, 273, 574 N.E.2d 492 citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781. To reverse a conviction because of insufficient

evidence, it must be determined as a matter of law, after viewing the evidence in a light most favorable to the prosecution, that a rational trier of fact could not have found the essential elements of the crime proved beyond a reasonable doubt. *Jenks*, paragraph two of the syllabus.

The statutory language for Abduction is as follows:

No person, without privilege to do so, shall knowingly do any of the following:... (1) By force or threat, remove another from the place where the other person is found; (2) By force or threat, restrain the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear;

R.C. § 2905.02 (A) (1) (2). According to the state, Steele violated the statute by taking Maxton from school to the police station. (T.P. 1028) Steele, however, was performing his police duties at the time. Therefore, Steele had the privilege to arrest and detain anyone that *he* had “reasonable cause to believe [was] guilty” of the robberies. R.C. § 2935.03 (B)(1). Steele made the decision to arrest Maxton, Green and Griffin after they fit the general description of the suspects, and were connected to the vehicle leaving the scene of a violent robbery, and none of them showed up to school on the day after the robbery. Moreover, inexplicably, the state did not charge Steele for the same conduct with respect to Green and Griffin. Thus, the abduction conviction pursuant to R.C. § 2905.02 (A)(1) should be reversed.

According to the state, Steele violated the abduction statute by having Ramone booked into a detention facility. (T.P. 1029) Steele, however, was performing his duties as a police officer in arresting someone that confessed to being involved in violent robberies. Thus, Steele had the authority, the privilege and the obligation to lock him up. Steele locked AJ Griffin up for the same reason. Steele released Lamont Griffin when he professed innocence. As such, Steele’s actions were consistent with his privilege, authority and obligation as a police officer. Therefore, the second abduction conviction should also be reversed.

The statutory language for Intimidation is as follows:

No person, knowingly and by force, by unlawful threat of harm to any person or property, or by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner, shall attempt to influence, intimidate, or hinder a public servant*, party official, or witness in the discharge of the person's duty.

R.C. § 2921.03(A). According to the state, Steel was guilty of intimidation because Maxton was intimidated when he was arrested and incarcerated. (T.P. 1030-1031) This statute does not apply to Steele because he was performing his duties as a police officer. Therefore, he had the authority to arrest and charge Ramone Maxton with a crime after his confession. If arrest and incarceration supports the offense of intimidation, every police officer in Ohio is potentially subject to criminal prosecution for intimidation whenever they make an arrest and charge someone with a crime. Thus, the intimidation conviction should be reversed.

Finally, the state failed to establish that Steele was guilty of possessing a firearm or having a firearm while committing the alleged offenses because there was no testimony or any other evidence that Steele had an operable weapon on May 7, 2009. (T.P. 683) Consequently, the gun specifications attached to the abduction counts should be reversed and the defendant discharged.

PROPOSITION OF LAW NO. V: There is a violation of the Due Process Clause and the Confrontation Clause of the Constitution when the trial court allows the state to bring up new matters on re-direct examination and prohibits the defendant from cross-examining the witness on those new matters.

The defendant is entitled to present a defense and to confront witnesses against him. *Holmes v. South Carolina* (2006) 547 U.S. 319, 126 S.Ct. 1727; *Crane v. Kentucky* (1986) 476 U.S. 683, 106 S.Ct. 2142; *United States v. Payne* (2006) 437 F.3d 540 (6th Cir.) The trial court allowed the state to re-direct Detective Mathis on matters that were not brought up on cross-

examination and failed to allow the defense to re-cross on the new matters. The new matter brought up for the first time on redirect were (1) Mathis' interview with the prosecutor investigator Mac Brown (2) whether Steele had probable cause to take Ramone from school to the district (3) information that Mathis received from a Violent Crime Squad officer and (4) a description of Ramone's confession. (T.P. 552-588) The trial court's failure to allow the defense to re-cross a state witness violated the Due Process and Confrontation Clauses of the Constitution. As a result, the conviction should be reversed and a new trial granted.

CONCLUSION

This case contains issues of first impression that should be reviewed by this Court. If these convictions stand, they will have a detrimental impact on the safety of citizens in Ohio due to the chilling effect on police officer in making warrantless arrests. It also addressed fundamental constitutional and criminal law issues. Therefore, the defendant requests that this Court accept jurisdiction over this matter.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by Regular U.S. Mail to Daniel J. Breyer, 123 North 3rd Street, Batavia, OH 43103 on this 22nd day of March, 2012.

A handwritten signature in cursive script that reads "Gloria L. Smith". The signature is written in black ink and is positioned above a horizontal line.

Gloria L. Smith, 0061231

Attorney for

Appendix

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO, : APPEAL NO. C-100637
Plaintiff-Appellee, : TRIAL NO. B-0903495
vs. : *OPINION.*
JULIAN STEELE, : PRESENTED TO THE CLERK
Defendant-Appellant. : OF COURTS FOR FILING
OCT 28 2011

COURT OF APPEALS

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: October 28, 2011

Don White, Clermont County Prosecuting Attorney, and *Daniel J. Breyer*, Special Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Gloria L. Smith, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.



Per Curiam.

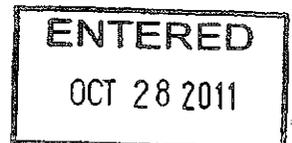
{¶1} This case presents an issue of first impression: what is the proper jury instruction concerning “privilege” when a police officer is charged with abduction arising from an alleged abuse of the power to arrest? That question also presents a difficult challenge to the court to balance the realities of police investigation and the inherent decision making that accompanies it with the legal safeguards afforded each citizen.

Facts

{¶2} In the course of investigating a series of robberies, defendant-appellant detective Julian Steele arrested seventeen-year-old Jerome Maxton and interrogated him. Steele later charged Maxton. As a result of the charges, Maxton was incarcerated in a juvenile detention facility pending further action on his case. Nine days later, Maxton was released at the direction of an assistant Hamilton County prosecuting attorney.

{¶3} A subsequent investigation revealed that Steele may have arrested Maxton, coerced a false confession from him, and incarcerated him in order to compel Maxton’s mother’s cooperation with the investigation. There was evidence that Steele believed that Alicia Maxton, Maxton’s mother, had been involved in the robberies or knew who had been involved, and that Steele thought that Alicia would supply information to exonerate her son. There were also allegations that Steele had forced sexual relations with Alicia, promising her that he would help to secure Maxton’s release from juvenile detention.

{¶4} Following the investigation, the grand jury indicted Steele on charges of abduction, intimidation, extortion, rape, and sexual battery. The case was tried to



a jury. Steele claimed he was innocent of all charges. He argued that the arrest was legal based on the facts known to him at the time. He also contended that he had not coerced a false confession from Maxton, and that therefore the complaint and Maxton's subsequent incarceration were valid, as well. Finally, Maxton argued that his sexual relations with Alicia Maxton were consensual.

{¶5} The jury found Steele guilty of two counts of abduction and one count of intimidation, each with an accompanying firearm specification, and acquitted him on all other charges. The trial court sentenced Steele to five years' incarceration and five years' community control. For the following reasons, we affirm in part, reverse in part, and remand this case for further proceedings.

The Contested Jury Instruction

{¶6} Steele's fourth assignment of error is dispositive of a number of issues in this case. In it, he alleges that the court's jury instruction on the abduction counts was erroneous. Because defense counsel did not object to these instructions, we review Steele's argument using a plain-error analysis.¹

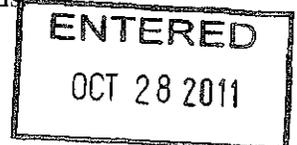
{¶7} A trial court must give the jury all relevant instructions that are necessary for the jury to weigh the evidence and to discharge its duty as the fact-finder.² And while the trial court has discretion in fashioning the jury's charge, the charge must accurately reflect the law.³

{¶8} In pertinent part, the abduction statute provides that "[n]o person, *without privilege to do so* shall knowingly * * * (1) By force or threat, remove another from the place where the other person is found; (2) By force or threat,

¹ See Crim.R. 52(B).

² *State v. Comen* (1990), 50 Ohio St.3d 206, 553 N.E.2d 640, paragraph two of the syllabus.

³ See *id.*; see, also, *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443.



restrain the liberty of another person under circumstances that * * * places the other person in fear [emphasis added].”⁴

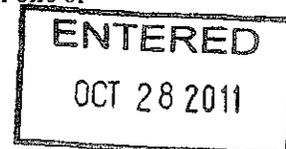
{¶9} Here, the trial court instructed the jury that “privilege” was “an immunity, license, or right conferred by law * * * or arising out of status, position, office or relationship * * *.” The jury was further instructed that when an “arrest is without a judicial order or probable cause to arrest, it is an illegal arrest.” The jury was told that probable to arrest exists “when an officer has knowledge of existing facts and circumstances which would warrant a prudent police officer in believing that a crime was committed and that the person to be arrested has committed the crime.” In essence, the jury was instructed that an officer loses the privilege to arrest when the arrest is made without probable cause.

{¶10} Steele claims that this instruction was incorrect because the abduction statute should not apply to police officers since other remedies exist to deter police misconduct. We reject Steele’s argument based on the plain language of the statute.⁵ There is no exemption for police officers in R.C. 2905.02. And there is no legal precedent to support the contention that the availability of other remedies is a defense to criminal prosecution. While enforcing the law, the police must also obey it.

{¶11} The state urges the court to affirm the instruction. For the following reasons, we reject the state’s position, as well.

⁴ R.C. 2905.02(A)(1) and (A)(2).

⁵ See *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 1996-Ohio-291, 660 N.E.2d 463; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105-106, 304 N.E.2d 378; *Carter v. Youngstown* (1946), 146 Ohio St. 203, 65 N.E.2d 63, paragraph one of the syllabus.



Privilege and Legislative Intent

{¶12} Determining whether the jury was instructed correctly turns on the meaning of “privilege” in R.C. 2902.05 as it pertains to the power to arrest. “Privilege” is defined as “an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.”⁶

{¶13} A police officer’s right to arrest without a warrant is conferred by statute,⁷ and is curtailed by the Fourth Amendment. In construing the meaning of this “privilege” within the abduction statute, we must give “effect to the legislature’s intention.”⁸ We note that the legislature “will not be presumed to have intended to enact a law producing unreasonable or absurd consequences.”⁹ It is the court’s duty to construe the statute, if possible, to avoid such a result.¹⁰

{¶14} Because probable-cause determinations are far from clear cut, we do not believe that the legislature intended a police officer to be guilty of abduction anytime an arrest is made without probable cause. Whether probable cause existed in a given case may not be finally adjudicated until years after the fact with the aid of lawyers, judges, and hindsight. The volume of Fourth Amendment jurisprudence attests to this fact. Given the complexities sometimes involved in a probable-cause determination, and the obvious chilling effect that the threat of criminal indictment would have on effective police work, the trial court’s instruction about when an officer loses his privilege to arrest creates an unreasonable result. We therefore find

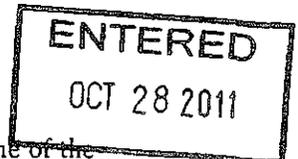
⁶ R.C. 2901.01(12).

⁷ See Crim.R. 2(J); R.C. 2935.03.

⁸ See *Carter*, supra.

⁹ *State ex rel. Cooper v. Savord* (1950), 153 Ohio St. 367, 92 N.E.2d 390, paragraph one of the syllabus; see, also, *State v. Nickles* (1953), 159 Ohio St. 353, 112 N.E.2d 531, paragraph one of the syllabus.

¹⁰ *Savord*, supra.



the state's position to be without merit. The jury instruction should have been more narrowly tailored.

The Parameters of the Privilege to Arrest

{¶15} The question of when a police officer should be held personally responsible for an improper arrest has been litigated in the context of civil-rights claims. In this regard, the United States Supreme Court has recognized the same concerns that we must balance here—"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."¹¹ We therefore turn to Section 1983¹² case law for guidance.

{¶16} For a wrongful-arrest claim to succeed under Section 1983, a plaintiff must prove that the arresting officer lacked probable cause.¹³ But even in the absence of probable cause, officers who "reasonably but mistakenly conclude that probable cause is present" are immune from suit.¹⁴ This doctrine, known as "qualified immunity" acknowledges that "reasonable mistakes can be made as to the legal constraints on particular police conduct" and should not be penalized.¹⁵ Qualified immunity "shields an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law."¹⁶

{¶17} We are persuaded by these cases to the extent that they acknowledge that a police officer should not be penalized for reasonable mistakes. But we do not

¹¹ *Pearson v. Callahan* (2009), 555 U.S. 223, 231, 129 S.Ct. 808.

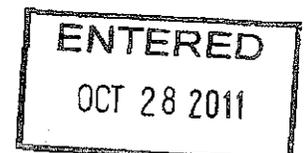
¹² Section 1983, Title 42, U.S. Code.

¹³ *Miller v. Sanilac Cnty.* (C.A.6, 2010), 606 F.3d 240, 250; *Brooks v. Rothe* (C.A.6, 2009), 577 F.3d 701, 706, quoting *Fridley v. Horrighs* (C.A.6, 2002), 291 F.3d 867, 872.

¹⁴ *Hunter v. Bryant* (1991), 502 U.S. 224, 227, 112 S.Ct. 534, citing *Anderson v. Creighton* (1987), 483 U.S. 635, 641, 107 S.Ct. 3034; see, also, *Harris v. Bornhorst* (C.A.6, 2008), 513 F.3d 503, 511.

¹⁵ *Everson v. Leis* (C.A.6, 2009), 556 F.3d 484, 494 (citations omitted).

¹⁶ *Pearson*, *supra*.



adopt the test for “qualified immunity” discussed in the cases cited above because this test is an objective test. This court has already determined that “the existence, nature and scope of a privilege claimed in any particular instance depend on the circumstances surrounding the actor, matters primarily within the grasp of the actor himself.”¹⁷ So, a more subjective test is mandated.¹⁸ The question literally becomes, in the vernacular, “what did the officer know and when did he or she know it?”

The Proper Jury Instruction

{¶18} The jury in this criminal case should have been instructed that a police officer loses the privilege to arrest when that officer knows, at the time of the arrest, that the person to be arrested had not committed the crime or that no crime had been committed.

{¶19} Thus, criminal liability for abduction is predicated on the element of the officer’s knowledge that he or she had no probable cause to make the arrest. This standard reaffirms the long standing rule that a good-faith mistake by an officer is not enough to cause a loss of the privilege anticipated by the statute and restated in the Section 1983 cases cited above.¹⁹

The Error was Plain Error

{¶20} In *State v. Barnes*,²⁰ the Ohio Supreme Court set forth a three prong test for the invocation of the plain-error rule. First, there must be an error.²¹ Second, the error must be “obvious.”²² And third, the error must have affected a

¹⁷ *State v. Gordon* (1983), 9 Ohio App.3d 184, 186, 458 N.E.2d 1277.

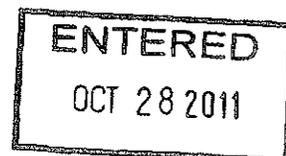
¹⁸ See *Morissette v. United States* (1952), 342 U.S. 246, 250-252, 72 S.Ct. 240.

¹⁹ Cf. *United States v. Leon* (1984), 468 U.S. 897, 906, 104 S.Ct. 3405.

²⁰ 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240.

²¹ *Id.*

²² *Id.*



substantial right—meaning that the error must have affected the outcome of the trial.²³

{¶21} We have already determined that there was an error in the jury instruction. The erroneous instruction was “obvious” to the extent that the instruction criminalized the reasonable exercise of police power. And this error affected Steele’s due-process rights.²⁴ It relieved the state of its burden to prove all elements of abduction beyond a reasonable doubt.²⁵ Because Steele’s defense centered on the reasonableness of his actions at the time that he had allegedly abducted Maxton, the error in the instruction was sufficient to have affected the outcome of the trial.

{¶22} In our discretion, we find that invocation of the plain-error rule is necessary in this case to avoid a manifest miscarriage of justice.²⁶ Steele’s fourth assignment of error is therefore sustained. His abduction convictions are reversed, and the counts are remanded for further proceedings.²⁷

Weight and Sufficiency

{¶23} In Steele’s first and second assignments of error, he claims that his convictions were based on insufficient evidence and were against the manifest weight of the evidence. These assignments of error are moot insofar as they contest the jury’s verdict regarding the abduction counts. We therefore decline to address them.²⁸ As to the firearm specifications that accompanied the abduction counts,

²³ Id.

²⁴ See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶97.

²⁵ Id.

²⁶ See *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 448 N.E.2d 452; *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804

²⁷ See *State v. Duncan*, 154 Ohio App.3d 254, 2003-Ohio-4695, 796 N.E.2d 1006 (double jeopardy does not bar retrial where reversal premised on erroneous jury instructions).

²⁸ See App.R. 12(A)(1)(c).



Steele is correct that the state failed to prove that he had had a firearm on or about his person when he had allegedly abducted Maxton. The state produced absolutely no evidence to this effect. But since specifications are penalty enhancements, and not criminal offenses, jeopardy does not attach and the state may proceed with prosecuting Steele for the firearm specifications on remand.²⁹

Intimidation

{¶24} Steele also claims that his intimidation conviction and accompanying firearm specification must be reversed. R.C. 2931.03(B), the intimidation statute, provides that no person, “by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner, shall attempt to influence, intimidate, or hinder a * * * witness in the discharge of the person's duty.”

{¶25} The state presented evidence that, to compel Alicia's cooperation, Steele had filed a complaint against Maxton based on a confession that Steele knew was false. At trial, Maxton testified that he had not been involved in the robberies and that he had confessed only because Steele told him that, if he did not, his mother would be arrested and his siblings sent to a foster home. Maxton testified that Steele had told him what to say when he confessed. Finally, the state presented evidence that Steele had admitted that he had not believed that Maxton had been involved in the robberies before obtaining Maxton's confession.

{¶26} Viewing the evidence in a light most favorable to the prosecution, we find that the state proved all elements of the intimidation charge beyond a

²⁹ *State v. Ford* 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, paragraph one of the syllabus.



reasonable doubt.³⁰ And although Steele presented a version of events that would have exonerated him, there is no indication that the jury “lost its way” in believing the state’s version of events instead of Steele’s.³¹ Steele’s intimidation conviction is therefore affirmed. The accompanying firearm specification, however, is reversed. The state presented no evidence that Steele had had an “operable firearm on or about his person” when he committed this offense. Unlike the firearm specifications that accompanied the abduction counts, however, this firearm specification must be vacated. It cannot be re-tried because it existed only as a penalty enhancement to the intimidation charge that we have affirmed.³² Steele’s first and second assignments of error are therefore overruled in part and affirmed in part.

{¶27} His remaining assignments of error are moot.

Conclusion

{¶28} Steele’s abduction convictions are reversed and those counts are remanded to the trial court for a new trial, or for other proceedings consistent with law and this opinion. Steele’s intimidation conviction is affirmed, but the accompanying firearm specification is hereby vacated, and the cause is remanded to the trial court with instructions to enter a sentencing order consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

SUNDERMANN, P.J., HENDON and CUNNINGHAM, JJ.

Please Note:

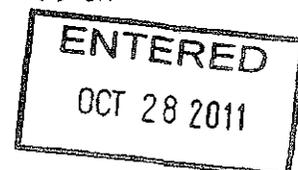
The court has recorded its own entry on the date of the release of this opinion.

³⁰ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

³¹ *State v. Thompkins* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983),

20 Ohio App.3d 172, 175, 485 N.E.2d 717.

³² See *Ford*, supra.



Appendix

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

JULIAN STEELE,

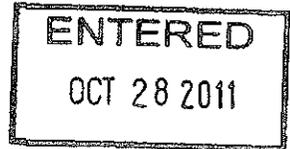
Defendant-Appellant.

: APPEAL NO. C-100637
: TRIAL NO. B-0903495

: JUDGMENT ENTRY.
:



D95141162



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The Court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on October 28, 2011 per Order of the Court.

By: _____

[Handwritten Signature]
AET/MB

Presiding Judge