

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

<b>STATE OF OHIO</b>	:	<b>NO. 2011-2075</b>
Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
<b>JULIAN STEELE</b>	:	Court of Appeals Case Number C-100637
Appellee	:	

**MERIT BRIEF OF APPELLANT, STATE OF OHIO**

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## STATEMENT OF FACTS

Julian Steele was indicted by the Hamilton Grand Jury on May 26, 2009, for ten counts including Abduction, Intimidation, Extortion, Rape, and Sexual Battery. Prior to trial, the State of Ohio dismissed Count 6 (Extortion), Count 7 (Extortion), and Count 9 (Rape). The State also amended Counts 3 and 5 (Intimidation) to correct a clerical error.

After several continuances, the matter proceeded to trial on August 16, 2010. On August 24, 2010, the jury returned verdicts of guilty as charged on count 1, Abduction, in violation of R.C. 2905.02(A)(1) with a gun specification, Count 2, Abduction, in violation of R.C. 2905.02(A)(2) with a gun specification, and Count 3, Intimidation, in violation of R.C. 2921.03(B). Julian Steele was acquitted on the remaining counts.

Julian Steele was sentenced on September 8, 2010. He received four years in prison on Count 1, with an additional year for the gun specification. He was placed on five years community control on Counts 2 and 3, with a potential prison sentence of ten years if he should violate that sanction. He was given an appeal bond on September 10<sup>th</sup>.

On appeal, the First District Court of Appeals reversed the two abduction counts because of a supposedly flawed jury charge, and ordered a new trial on those counts.

The State then filed a Notice of Appeal and Memorandum in Support with this Court on December 12, 2011. On March 7, 2012, this Court accepted the State's appeal for review on the merits.

**FACTS:** In April and May of 2009, there was a series of four robberies involving six victims in the Northside area of Cincinnati, Ohio. The first robbery took place on April 22, 2009, involving victims William Long and Gabriel Duttlinger. The two suspects were described as male blacks. One was described as six feet tall; the other was not clearly seen. The victims saw a gun. The two suspects fled the scene in an older model maroon vehicle. The victims

indicated they could possibly identify one of the perpetrators if they saw them again. (State's Exhibit 1A, Transcript Pages 366-378.)

The second robbery took place on April 24, 2009. The sole victim was Anthony Barrett. Barrett was robbed at knifepoint by a male black of unknown height and weight. Barrett did indicate that he would be able to identify his assailant. The robber fled the scene in a newer model Cadillac. (State's Exhibit 1B, T.P. 380-384)

The next robbery took place on May 3, 2009. On that date, the victim Todd Bronnert was robbed by two unknown persons wearing masks. Both suspects were described as six feet tall. A firearm was used. (State's Exhibit 1C, T.P. 385-387)

The final incident took place on May 5, 2009. Kirk Froehlich and Timothy McElfresh were robbed several minutes apart by two individuals armed with a handgun. Shortly after the robberies, a citizen in Northside spotted an older model blue Cadillac driving suspiciously in the neighborhood. He wrote down the license number of this car and provided it to the police. (State's Exhibit 1D, T.P. 388-391.)

These robberies were assigned for investigation to P.O. Julian Steele, the defendant in this case. Steele determined that the license plate recorded sometime after the May 5<sup>th</sup> robbery was attached to a 1989 Cadillac owned by Alicia Maxton. He determined that she had several children living in her home, Ramone Maxton, who was 5'7" tall and weighed 195 pounds, Lamont Green, and Anthony Griffin. He determined that these children all went to Riverside Academy on River Road. He obtained pictures of the three boys. He never showed these pictures to any of the victims of the crime, even those who said they could identify their assailants. Other than being male blacks, there was nothing in the information gathered during the investigation that pointed to any of these three boys, including Ramone Maxton, as being responsible for any of these crimes. (T.P. 378, 381, 387, 391)

On May 7, 2009, the defendant, Julian Steele, removed Ramone Maxton from Riverside Academy on River Road, and transported him to the District 5 police station on Ludlow Avenue. This removal was accomplished by force as Ramone was handcuffed and placed in the back of a locked, marked police cruiser with a cage separating the front and back seats. Ramone's request to loosen the handcuffs because they were too tight and causing pain was ignored. (T.P. 683) Steele instructed school personnel not to tell his mother that Ramone had been removed. (T.P. 480) Steele, and police officers acting on his direction, were all armed.

Once at the police station, and prior to any advice regarding his Miranda rights, Steele subjected Ramone to an interrogation regarding any involvement he might have in the above-described Northside robberies. Ramone repeatedly denied any involvement in any of them. (T.P. 685) Steele described Ramone's denials as "strong". (Transcript of Steele statement P. 41) Steele left Ramone confined in an interview room and turned his attention to Anthony Griffin who had also been arrested. Anthony admitted his involvement in some of the robberies but insisted Ramone Maxton was not present at any time. (Statement Transcript P. 23-25)

Steele then returned to Ramone Maxton and informed him that Anthony Griffin had implicated him in the robberies. He then told Ramone that if he didn't confess to the robberies, his mother would be locked up and his siblings placed in foster care. (T.P. 686, S.T.P. 25) Ramone then agreed to give a statement. He knew nothing about the robberies but was told what to say by Steele. (T.P. 687) Following this statement, Ramone was formally charged with six separate robberies and locked up in Juvenile Detention for the next nine days.

Steele knew Ramone Maxton was not guilty when he initially locked him up and throughout the nine days he sat in detention. He had no evidence other than the forced confession. He told Cincinnati Police Officer Bob Randolph that he believed Ramone gave him a false confession because of the pressure he put on him, with threats to lock up his mother. (S.T.P.

7, 25, T.P. 482-483) He told Alicia Maxton and Cornelia Jones the following day, May 8<sup>th</sup>, that he thought Ramone was innocent. (T.P. 624-625, 794). He told Assistant Prosecutor Megan Shanahan that he knew Ramone Maxton was innocent when he locked him up, but that he locked him up to force his mother to cooperate. (T.P. 484, 487, 525) For the nine days he was locked up, Ramone cried out of fear, read the bible, and prayed. (T.P. 689-690)

Although Steele informed Ramone's mother, Alicia Maxton, that her son was innocent, he explained that there was a "process" involved in getting him out of detention. (T.P. 794) Over the next several days he put that "process" in motion. It consisted primarily in his getting Alicia Maxton back to his crash pad for drinks and sexual activity. (T.P. 795-820)

On May 15, 2009, Alicia Maxton and Julian Steele appeared before the Hamilton County Grand Jury. On that date, after hearing Steele admit that he always believed Ramone was innocent, Assistant Prosecutor Megan Shanahan caused Ramone to be released from detention. On May 26, 2009, Steele was indicted for his actions throughout this investigation.

Trial commenced on August 16, 2010. After all the evidence had been presented, and prior to closing argument, the Court had discussions in chambers regarding proposed jury instructions. At the conclusion of those discussions, the Court made accommodations to the parties regarding the instructions and provided them in final form to counsel. Defense counsel indicated on the record that he found the instructions proper and appropriate, incorporating all the changes discussed in chambers. Defense counsel specifically accepted the instruction on "arrest". (T.P. 1021-1022)

At the conclusion of final arguments, the Court instructed the jury. Included in the instructions, by agreement of counsel, were definitions of "privilege", "arrest", probable cause" and "reasonable grounds". At the conclusion of the instructions, defense counsel indicated that

he had no objections thereto. (T.P. 1205-1206) Defendant was found guilty on several counts as described previously.

### ARGUMENT

**PROPOSITION OF LAW I: In instructing a jury on a crime, which contains among its elements the concept of “privilege” or lack thereof, the definition of “privilege” contained in Ohio Revised Code section 2901.01(A)(12) is proper and sufficient.**

Julian Steele was convicted of Abduction in violation of R.C. sections 2905.02(A)(1) and 2905.02(A)(2). The jury determined that “without privilege to do so” Steele knowingly, by force or threat, removed another from where the other person was found (Count 1) and restrained the other person’s liberty under circumstances that placed the other person in great fear (Count 2).

The First District Court of Appeals reversed these convictions on the basis of the trial court giving an improper jury instruction concerning “privilege”. The trial court defined the term “privilege” during the final instructions to the jury (T.p. 1177), and used the exact language contained in Ohio Revised Code section 2901.01(A)(12) and included in Volume 4 of the Ohio Jury Instructions. The defendant did not object to this charge at trial and did not even identify the trial court’s instructions on “privilege” as an assignment of error in his appellate brief.

The Court of Appeals criticized the trial court’s instruction by commenting that although the trial court has discretion in fashioning the jury’s charge, “. . . the charge must accurately reflect the law.” Again, the trial court’s instruction on “privilege” mirrored the statute and OJI. It has been given innumerable times in abduction cases throughout the State of Ohio without objection or concern. However, in this case, the First District Court of Appeals found this definition unacceptable. And, while the appellate court acknowledges that “there is no exemption for police officers in R.C. 2905.02,” it then goes to great length to discuss why police officers should be treated differently. It is the State of Ohio’s contention that the definition of

“privilege” as given was adequate and that the defendant’s occupation should have had no effect on the enforcement of the statute.

The Court of Appeals turned to Section 1983 case law for guidance. They maintain that in wrongful-arrest claims police officers are immune from suit if they “reasonably but mistakenly conclude that probable cause is present.” The relevance of this doctrine in the instant case, where Julian Steele repeatedly announced that he knew Ramone Maxton was innocent, is questionable. However, a review of the cases cited by the Court of Appeals offers no support for Julian Steele’s position in this case.

*Pearson v. Callahan* (2009), 555 U.S. 223, 129 S.Ct. 808, makes it clear that qualified immunity protects police officers from liability only insofar as their conduct does not violate clearly established constitutional rights of which a reasonable person could have known. No one could reasonably contend that arresting a person known to be innocent is not a known violation of a constitutional right. The immunity available to a mistaken police officer applies only where clearly established law does not show the seizure violated the Fourth Amendment. Such is not the case here. Steele could not have reasonably believed that arresting an innocent person complied with the law.

*Hunter v. Bryant* (1991), 502 U.S. 224, 112 S.Ct. 534, makes it clear that qualified immunity in §1983 cases is a matter of law that should be determined by the court, not a question of fact for the jury. Furthermore, the Supreme Court points out that qualified immunity does not protect “the plainly incompetent or those who knowingly violate the law.” *Hunter, supra*, at 229 (emphasis added).

After pointing out that the §1983 cases make clear that a police officer should not be penalized for reasonable mistakes, failing to address the fact that there was nothing reasonable or mistaken about Steele’s actions in the instant case, the Court of Appeals then rejects the

objective test of those cases in favor of some unknown subjective test. They point out that the scope of a privilege claimed in any particular instance depends on matters primarily within the grasp of the defendant himself, citing *State v. Gordon* (1983), 9 Ohio App.3d 184, 458 N.E.2d 1277, in which the First District suggested that the issue of privilege was an affirmative defense for the defendant to establish. Julian Steele certainly did nothing to establish any privilege in the instant case.

Julian Steele chose to arrest Ramone Maxton and incarcerate him for nine days not because he reasonably or unreasonably believed Ramone had committed a crime, but because he wanted to use Ramone to get to his mother. Steele bragged about “using his mojo” to get grand juries to indict people on less than probable cause. His disregard of the law and constitutions is patently obvious. The First District Court of Appeals has now sanctioned this dangerous and offensive behavior.

### CONCLUSION

The State requests this Court to reinstate appellee’s convictions.

Respectfully submitted,

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Counsel for Appellant, State of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief of Plaintiff-Appellant, State of Ohio, was sent by ordinary U.S. mail to counsel of record for appellee, Gloria L. Smith, The Gloria L. Smith Law Office LLC, 2783 Martin Road, #215, Dublin, Ohio 43017, on this 25<sup>th</sup> day of April, 2012.

Daniel J. Breyer/per WSJ  
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Appendix

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 11-2075
Plaintiff-Appellant	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
JULIAN STEELE	:	Court of Appeals Case Number C-100637
Defendant-Appellee	:	

NOTICE OF APPEAL OF PLAINTIFF-APPELLANT  
STATE OF OHIO

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COUNSEL FOR DEFENDANT-APPELLEE, JULIAN STEELE

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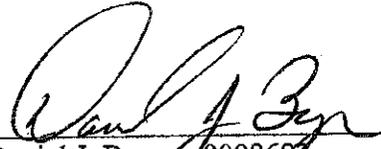
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IN THE  
SUPREME COURT OF OHIO

STATE OF OHIO : NO.  
Plaintiff-Appellant :  
vs. : NOTICE OF APPEAL OF  
JULIAN STEELE : PLAINTIFF-APPELLANT,  
 : STATE OF OHIO  
Defendant-Appellee :

Plaintiff-Appellant, State of Ohio, hereby gives Notice of Appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case number C-100637 rendered on October 28, 2011. This case involves a felony and is of public or great general interest.

Respectfully submitted,

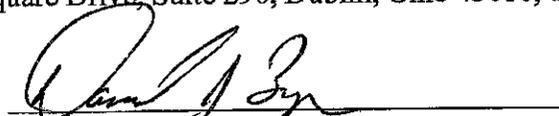


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PROOF OF SERVICE

I hereby certify that I have sent a copy of the foregoing Notice of Appeal of Appellant, State of Ohio, by regular United States mail, addressed to Gloria L. Smith, Attorney at Law, The Gloria L. Smith Law Office LLC, 5837 Karric Square Drive, Suite 290, Dublin, Ohio 43016, this 9 day of December, 2011.



Daniel J. Breyer, 0008683  
Special Prosecuting Attorney

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

STATE OF OHIO,	:	APPEAL NO. C-100637
	:	TRIAL NO. B-0903495
Plaintiff-Appellee,	:	
	:	<i>OPINION.</i>
vs.	:	PRESENTED TO THE CLERK
JULIAN STEELE,	:	OF COURTS FOR FILING
	:	
Defendant-Appellant.	:	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.

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Per Curiam.

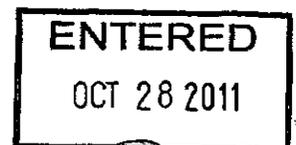
{¶1} This case presents an issue of first impression: what is the proper jury instruction concerning “privilege” when a police officer is charged with abduction arising from an alleged abuse of the power to arrest? That question also presents a difficult challenge to the court to balance the realities 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



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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.<sup>1</sup>

{¶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.<sup>2</sup> And while the trial court has discretion in fashioning the jury's charge, the charge must accurately reflect the law.<sup>3</sup>

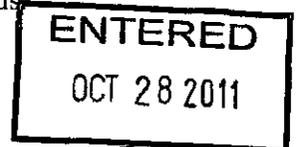
{¶8} In pertinent part, the abduction statute provides that "[n]o person, *without privilege to do so* shall knowingly \* \* \* (1) By force or threat, remove another from the place where the other person is found; (2) By force or threat,

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<sup>1</sup> See *Crim.R. 52(B)*.

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

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



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**OHIO FIRST DISTRICT COURT OF APPEALS**

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

{¶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.<sup>5</sup> 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.

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<sup>4</sup> R.C. 2905.02(A)(1) and (A)(2).

<sup>5</sup> 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.

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**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.”<sup>6</sup>

{¶13} A police officer’s right to arrest without a warrant is conferred by statute,<sup>7</sup> 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.”<sup>8</sup> We note that the legislature “will not be presumed to have intended to enact a law producing unreasonable or absurd consequences.”<sup>9</sup> It is the court’s duty to construe the statute, if possible, to avoid such a result.<sup>10</sup>

{¶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

<sup>6</sup> R.C. 2901.01(12).

<sup>7</sup> See Crim.R. 2(J); R.C. 2935.03.

<sup>8</sup> See *Carter*, supra.

<sup>9</sup> *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.

<sup>10</sup> *Savord*, supra.

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OCT 28 2011

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."<sup>11</sup> We therefore turn to Section 1983<sup>12</sup> 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.<sup>13</sup> But even in the absence of probable cause, officers who "reasonably but mistakenly conclude that probable cause is present" are immune from suit.<sup>14</sup> 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.<sup>15</sup> Qualified immunity "shields an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law."<sup>16</sup>

{¶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

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

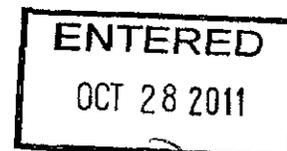
<sup>12</sup> Section 1983, Title 42, U.S. Code.

<sup>13</sup> *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.

<sup>14</sup> *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.

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

<sup>16</sup> *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.”<sup>17</sup> So, a more subjective test is mandated.<sup>18</sup> 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.<sup>19</sup>

**The Error was Plain Error**

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

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

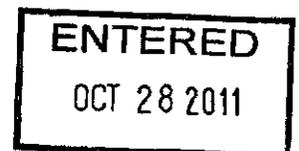
<sup>18</sup> See *Morissette v. United States* (1952), 342 U.S. 246, 250-252, 72 S.Ct. 240.

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

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

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*



substantial right—meaning that the error must have affected the outcome of the trial.<sup>23</sup>

{¶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.<sup>24</sup> It relieved the state of its burden to prove all elements of abduction beyond a reasonable doubt.<sup>25</sup> 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.<sup>26</sup> Steele’s fourth assignment of error is therefore sustained. His abduction convictions are reversed, and the counts are remanded for further proceedings.<sup>27</sup>

**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.<sup>28</sup> As to the firearm specifications that accompanied the abduction counts,

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<sup>23</sup> Id.

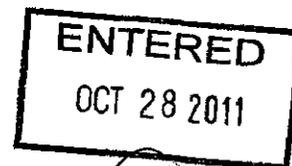
<sup>24</sup> See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶97.

<sup>25</sup> Id.

<sup>26</sup> 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

<sup>27</sup> 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).

<sup>28</sup> 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.<sup>29</sup>

**Intimidation**

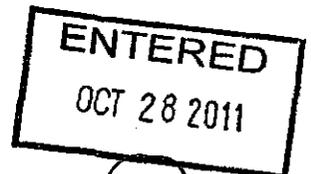
{¶24} Steele also claims that his intimidation conviction and accompanying firearm specification must be reversed. R.C. 2931.03(B), the intimidation statute, provides that no person, “by filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, 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

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



reasonable doubt.<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.

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

<sup>31</sup> *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.

<sup>32</sup> See *Ford*, supra.



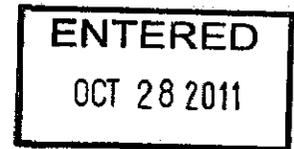
**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO, : APPEAL NO. C-100637  
Plaintiff-Appellee, : TRIAL NO. B-0903495  
vs. : *JUDGMENT ENTRY.*

JULIAN STEELE,  
Defendant-Appellant.



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:   
Patricia A. Etnier Presiding Judge

## APPENDIX

### **R.C. 2905.02 Abduction.**

**(A) 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;**

(3) Hold another in a condition of involuntary servitude.

(B) No person, with a sexual motivation, shall violate division (A) of this section.

(C) Whoever violates this section is guilty of abduction. A violation of division (A)(1) or (2) of this section or a violation of division (B) of this section involving conduct of the type described in division (A)(1) or (2) of this section is a felony of the third degree. A violation of division (A)(3) of this section or a violation of division (B) of this section involving conduct of the type described in division (A)(3) of this section is a felony of the second degree. If the offender in any case also is convicted of or pleads guilty to a specification as described in section 2941.1422 of the Revised Code that was included in the indictment, count in the indictment, or information charging the offense, the court shall sentence the offender to a mandatory prison term as provided in division (B)(7) of section 2929.14 of the Revised Code and shall order the offender to make restitution as provided in division (B)(8) of section 2929.18 of the Revised Code.

(D) As used in this section:

(1) "Involuntary servitude" has the same meaning as in section 2905.31 of the Revised Code.

(2) "Sexual motivation" has the same meaning as in section 2971.01 of the Revised Code.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

Amended by 128th General Assembly File No. 58, SB 235, § 1, eff. 3/24/2011.

Effective Date: 07-01-1996; 2007 SB10 01-01-2008; 2008 HB280 04-07-2009

## **APPENDIX**

### **R.C. 2901.01 General provisions definitions.**

(A) As used in the Revised Code:

\* \* \*

(12) "Privilege" means 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.