

IN THE
SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO : NO. 2011-2075 and 2011-2178
Appellant/Cross-Appellee : On Appeal from the Hamilton County
Court of Appeals, First Appellate
vs. : District
JULIAN STEELE : Court of Appeals Case
Appellee/Cross-Appellant : Number C-100637

MERIT BRIEF OF APPELLANT/CROSS-APPELLEE, STATE OF OHIO

Daniel J. Breyer, 0008683
Special Prosecuting Attorney
123 North 3rd Street
Batavia, Ohio 43103
(513) 732-7588
Fax No. (513) 732-7592
wbreyer@co.clermont.oh.us

COUNSEL FOR APPELLANT/CROSS-APPELLEE, STATE OF OHIO

Gloria L. Smith, 0061231
The Gloria L. Smith Law Office, LLC
2783 Martin Road, #215
Dublin, Ohio 43017
(888) 575-9950
Fax (888) 575-9970
gloriasmithlaw@aol.com

COUNSEL FOR APPELLEE/CROSS-APPELLANT, JULIAN STEELE

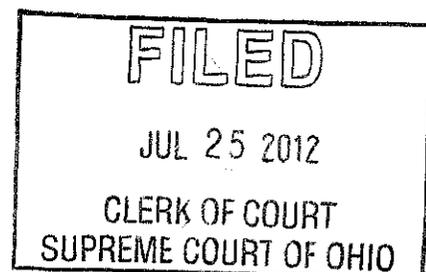


TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES ii.

STATEMENT OF FACTS 1.

ARGUMENT IN SUPPORT OF APPELLANT/CROSS-APPELLEE’S
PROPOSITION OF LAW I 5.

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..... 5.

ARGUMENT IN OPPOSITION TO APPELLEE/CROSS-APPELLANT’S
PROPOSITION OF LAW III 13.

PROPOSITION OF LAW III: The crime of intimidation as set forth in Ohio Revised Code Section 2931.03(B) (*sic*) does not apply to police officers when they interview or interrogate a suspect..... 13.

CONCLUSION..... 14.

CERTIFICATE OF SERVICE 15.

APPENDIX:

Notice of Appeal of Plaintiff-Appellant, State of Ohio, to the Ohio Supreme Court (Dec. 12, 2011) (Case No. 2011-2075).....1.

Opinion of the Hamilton County Court of Appeals (Oct. 28, 2011)3.

Judgment Entry of the Hamilton County Court of Appeals (Oct. 28, 2011).....13.

Notice of Appeal on Behalf of Defendant-Appellant, Julian Steele, to the Ohio Supreme Court (Dec. 28, 2011) (Case No. 2011-2178).....14.

CONSTITUTIONAL PROVISIONS: STATUTES:

R.C. 2905.02 Abduction16.

R.C. 2901.01(A)(12) “Privilege”.....17.

R.C. 2921.03 Intimidation.18.

R.C. 2925.03 Trafficking, aggravated trafficking in drugs.....19.

TABLE OF CONTENTS

	<u>PAGE NO.</u>
R.C. 2905.12 Coercion.....	20.
R.C. 2923.12 Carrying concealed weapons.	22.
R.C. 2921.04 Intimidation of attorney, victim or witness in criminal case or delinquent child action proceeding.	26.
R.C. 2921.21 Compounding a crime.	27.

TABLE OF AUTHORITIES

CASES:

<i>Hunter v. Bryant</i> (1991), 502 U.S. 224, 112 S.Ct. 534.....	6.
<i>Pearson v. Callahan</i> (2009), 555 U.S. 223, 129 S.Ct. 808.....	6.
<i>State v. Barnes</i> , 94 Ohio St.3d 21, 27, 2002-Ohio-68,759 N.E.2d 1240.....	8.
<i>State v. Feliciano</i> , 2010-Ohio-2809 (9 th Dist.)	9.
<i>State v. Gordon</i> (1983), 9 Ohio App.3d 184, 458 N.E.2d 1277	7.
<i>State v. Rick</i> , 2009-Ohio-785 (3 rd Dist. 2009)	9.
<i>State v. Robinson</i> , 1995 W.L. 635428 (4 th Dist. 1995).....	9.
<i>State v. Underwood</i> , 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983)	8, 9.

CONSTITUTIONAL PROVISIONS: STATUTES:

R.C. 2901.01(A)(12).....	5.
R.C. 2905.02(A)(1).....	5, 14.
R.C. 2905.02(A)(2).....	5.
R.C. 2905.12(B).....	14.
R.C. 2921.03	14.
R.C. 2921.21(B).....	14.
R.C. 2923.12	14.
R.C. 2925.03(B).....	14.
R.C. 2935.03(B)(1)	13.

MISCELLANEOUS

Ohio Jury Instructions, Volume 4.....	5.
---------------------------------------	----

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(A) with a gun specification. 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, 2010.

On appeal, in its October 28, 2011 Opinion, the First District Court of Appeals reversed the two abduction counts (Counts 1 and 2) because of a supposedly flawed jury charge, and ordered a new trial on those counts. Steele's intimidation conviction (Count 3) was affirmed, but the accompanying gun specification was vacated.

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. This Court also accepted the defendant's delayed appeal and on June 20, 2012, sua sponte consolidated the two appeals, and ordered the cases briefed jointly.

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 5th 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 8th, 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 IN SUPPORT OF
APPELLANT/CROSS-APPELLEE’S PROPOSITION OF LAW**

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.

The charge as given on this topic was not objected to by the defendant. However, the appellate court found the jury charge as given was improper and plain error. The court suggested that the proper charge should have reflected as follows:

“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 the 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 reinstated in the Section 1983 cases cited above.”

Because the defendant did not object to the charge as given, the claim can only be reviewed on a plain error standard. The Court of Appeals cites to *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240 for the applicable three-part “plain error” standard; *i.e.*, (1) there must be error, (2) the error must be obvious, and (3) the error must have affected the outcome of the trial. It is the State’s position that, even assuming the appellate court is correct as to the finding of an erroneous charge, the defendant cannot satisfy the third prong of the *Barnes* “plain error” standard. That is that the defendant cannot show that the erroneous charge impacted the “outcome of the trial.”

In *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983), this Court discussed the application of the plain error rule in the context of the failure of the defendant to object to an erroneous jury instruction. In particular, this Court discussed the application of the third prong of the test; the necessity of the defendant to show that, but for the error, the outcome of the trial “clearly would” have been different. (3 Ohio St.3d 112, syllabus paragraph.) This court did not say probably or possibly, but rather deliberately used the language, “. . . the outcome of the trial clearly would have been different.” (Emphasis added.) This is an extremely high standard, and not one that can be easily satisfied.

In fact, in the body of the opinion the *Underwood* court wrote:

“We have held that a jury instruction which improperly places the burden of proof upon a defendant ‘does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise.’ *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804 [7 O.O.3d 178], paragraph two of the syllabus. In the same case we concluded that the plain error rule should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice.

The evidence on extreme emotional stress was barely sufficient to warrant a charge on voluntary manslaughter. The state’s evidence of murder was overwhelming.

The facts in this case fall far short of meeting the criteria for plain error. We see no miscarriage of justice in this case.”

The *Underwood* court conceded that there was sufficient evidence to justify a voluntary manslaughter charge. That, alone, was not enough for a plain error finding. Thus, the law requires the appellate court to look at the actual evidence adduced at this trial, and make an initial determination that the evidence would satisfy the *Underwood* standard; otherwise, there can be no finding of plain error. *State v. Rick*, 2009-Ohio-785, at ¶¶39-43 (3rd Dist. 2009). At ¶43, the *Rick* court wrote:

“Based on those inferences, as well as the testimony of multiple other witnesses, and Rick’s own statements to police and after he was apprehended, this Court finds that it is unlikely that the jury would have reached the issue as to whether Rick had a duty to retreat in analyzing his claim of self-defense. Therefore, the trial court’s failure to instruct more fully on the duty to retreat was harmless error. “[A] court’s failure to give a requested pertinent instruction may be deemed harmless error when the evidence clearly supports a guilty verdict beyond a reasonable doubt. *State v. Jacobs*, 3rd Dist. No. 5-99-17, 1999-Ohio-899 citing *State v. Mitchell* (1989), 60 Ohio App.3d 106, 674 N.E.2d 573, 577.

{¶44} Accordingly, Rick’s second assignment of error is overruled. (Emphasis added.)”

See also, *State v. Robinson*, 1995 W.L. 635428 (4th Dist. 1995), *State v. Feliciano*, 2010-Ohio-2809 (9th Dist.) (continued vitality of *Underwood*.)

In the present case there is absolutely no evidence in the record that “would clearly” show the verdict would have been otherwise if the charge would have been different. In fact, the defendant presented no evidence to show the existence of probable cause to arrest or to show that he even believed probable cause existed. To the contrary, the evidence presented by the State¹ showed the defendant admitted he knew the victim was innocent from the start, and that he had no probable cause to arrest the victim, and only did so to coerce the victim’s mother Alicia Maxton. The actual evidence produced at trial is set forth below.

¹ The defendant did not take the stand and called no witnesses.

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 the 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 victim 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 Froelich 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 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.)

There was nothing uncovered in the investigation of these robberies which pointed to Ramone Maxton as a possible suspect other than the fact that he was a black male and the perpetrators were mostly male blacks. There clearly was no probable cause either to believe he was a suspect or to arrest him. The jury, by their verdict, unanimously agreed there was no probable cause to arrest Ramone Maxton. The appellate court has not questioned the finding that

there was no probable cause to arrest Ramone Maxton. However, the appellate court has decided that had the proposed jury instruction been given, the jury might possibly have believed that defendant Steele did not realize he was acting without probable cause. The State of Ohio respectfully disagrees.

Uncontradicted evidence presented at trial demonstrated beyond any doubt that Steele was aware he had no probable cause. On three separate occasions he told Assistant Prosecutor Megan Shanahan he knew Ramone had nothing to do with these robberies. In fact, he stated “I knew Ramone was innocent.” (T.p. 487 et seq.) He indicated his reason for locking up an innocent person was not probable cause, but a desire to force his mother to cooperate. (T.p. 525) Even after being confronted and accused of wrongdoing, Steele declared he “. . . was 80 to 90 percent sure that . . . [Ramone] . . . didn’t have anything to do with it.” (T.p. 492) Based on this evidence alone, the jury had to find Steele knew he had no probable cause when he took Ramone into custody.

Steele’s friend, roommate, and partner, Calvin Mathis, testified that nothing in the various reports pointed to Ramone as the perpetrator. (T.p. 381, 386, 387, 391.) He agreed that based on the evidence, the perpetrators could have been anyone. (T.p. 583) He defended Steele’s actions on direct examination not by claiming they had probable cause, but by asserting no arrest took place, that Ramone Maxton wanted to be handcuffed and taken into custody! (T.p. 396-397, 402.)

A school nurse, Cornella Jones, testified that the day after the arrest Julian Steele told her that Ramone Maxton was not guilty. (T.p. 623-624) This occurred at the beginning of Ramone’s 10 days in detention and clearly is irreconcilable with any belief that probable cause existed to arrest and detain.

Alecia Maxton's testimony was equally supportive of both Steele's knowledge of no probable cause and his true motive for taking Ramone into custody. Steele repeatedly told her, "I believe your son didn't do it. I am going to get him out." "It's a process." (T.p. 794 et seq., 799, 827) The "process" was obviously holding clandestine meetings with Alecia Maxton at his apartment for sexual activity.

Assistant Prosecutor Jesse Kramig's testimony was important on several points. Initially, he provides additional instances of Steele's admitting his knowledge that Ramone was innocent. (T.p. 989) Secondly, he pointed out that Steele intentionally included gun specifications in charges where he knew such specifications were not provable. (T.p. 984) And finally, he highlights the falsity of Steele's claim to investigator Bob Randolph that he had been working with Jesse Kramig since May 7th to get Ramone released. (T.p. 990-991) In reality, he wanted Ramone to remain locked up to enable his dalliances with Alecia Maxton to continue.

Finally, Steele's own words in his taped statement to Bob Randolph demonstrate that he knew he had no probable cause to arrest Ramone and, furthermore, his disregard for the concept of probable cause generally. He admitted that he never did a lineup even though several victims could identify their assailants. (Statement Transcript p.10.) He admitted that school personnel expressed genuine surprise that Ramone could be involved in such a crime. (Statement Transcript p. 13.) He admitted A.J. (one of the actual perpetrators) told him immediately that Ramone had nothing to do with these incidents. (Statement Transcript pgs. 23-25.) He admitted Ramone denied any involvement repeatedly until Steele threatened his mother and family. (Statement Transcript p. 25) He bragged that "I lock people up – that's what I'm in the business of doing." (Statement Transcript p. 21) He admitted that he tries to get people indicted in the grand jury, without probable cause, by "working his mojo." (Statement Transcript pgs. 38-39.) He even bragged that ". . . [no evidence]. . . to hell with it. I'm going with it." (Statement

Transcript p. 38) And, last but not least, the defendant's taped statement to Bob Randolph contains a fairly obvious confession to the fact that he was aware no probable cause existed to arrest Ramone Maxton:

"I make a lot of arrests and a lot of times it ain't from ID's. A lot of times it's me bullshitting – that's what I did on this. I just took the initiative and said, hey, I'm finding out where the kids go to school because they young male blacks description coming out." (Emphasis added.) (Statement Transcript p. 45)

Based on this uncontradicted evidence, no juror could have found that Steele believed he had probable cause to arrest and detain Ramone Maxton, jury instruction or not.

**ARGUMENT IN OPPOSITION TO
APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW NO. III**

APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW III: The crime of intimidation as set forth in Ohio Revised Code Section 2931.03(B) (sic) does not apply to police officers when they interview or interrogate a suspect.

The appellee/cross-appellant Julian Steele, in his proposition of law III, maintains that the Ohio Criminal Code contained in chapter twenty-nine of the Ohio Revised Code, does not apply to police officers in uniform or on duty. Or else he is suggesting that Ohio trial courts must examine each statute in the Ohio Revised Code individually to determine if they apply to police officers. Either contention is patently absurd. And it is not surprising that he can cite no case law in support of such a proposition.

In introducing his argument in support of this proposition of law, Steele maintains that he had the authority to arrest Ramone Maxton under R.C. 2935.03(B)(1) because probable cause existed to believe he had committed violent crimes. However, one thing clear from the trial of this matter, having been determined unanimously by the jury beyond a reasonable doubt, is that no probable cause existed and Julian Steele knew that. In fact, he admitted knowing Ramone was innocent and he was using the arrest to coerce cooperation, in various forms, from various people. So, all his reasoning based on his "authority to arrest" is void ab initio.

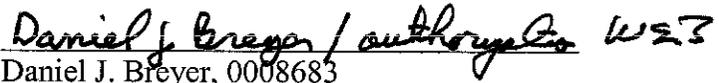
The Ohio legislature has never indicated in any manner that a general immunity exists for police officers which prohibits their being charged with criminal offenses. If the legislature intended to prevent the prosecution of police officers for either the crime of Abduction (R.C. 2905.02) or the crime of Intimidation (R.C. 2921.03), they would have spelled out such an exclusion within those statutes. There are certainly many such exclusions set forth in the Revised Code. Most drug offenses exempt certain classifications of people from prosecution under those statutes. See R.C. 2925.03(B) *et seq.* The coercion statute contains an exclusions for prosecutors and court personnel. See R.C. 2905.12(B). Most weapons offenses do specifically exclude law enforcement officers from their restrictions. See R.C. 2923.12 *et seq.* Within the same R.C. chapter as Intimidation, indeed, in the very next statute, the legislation has set forth an exclusion for the crime of Intimidation of Attorney, Victim or Witness in Criminal Case (R.C. 2921.04). Additionally, many statutes contain specific, affirmative defenses. See R.C. 2921.21(B) Compounding a Crime.

There can be no doubt that if the legislature did not want the abduction or intimidation statutes to apply to police officers, they would have explicitly said as much.

CONCLUSION

The State requests this Court to reinstate appellee/cross-appellant's convictions.

Respectfully submitted,


Daniel J. Breyer, 0008683
Special Prosecuting Attorney
123 North 3rd Street
Batavia, OH 43103
Phone: (513) 732-7588
Fax: (513) 753-7592
wbreyer@co.clermont.oh.us

Counsel for Appellant/Cross-Appellee, State of
Ohio

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of July, 2012, a copy of this Merit Brief of Appellant/Cross-Appellee, State of Ohio, was sent by ordinary U.S. mail to counsel of record for appellee/cross-appellant, Gloria L. Smith, The Gloria L. Smith Law Office LLC, 2783 Martin Road, #215, Dublin, Ohio 43017.

Daniel J. Breyer/for authorization, WSP
Daniel J. Breyer, 0008683
Special Prosecuting Attorney

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**

Daniel J. Breyer, 0008683
Special Prosecuting Attorney
123 North 3rd Street
Batavia, Ohio 43103
(513) 732-7588
Fax No. (513) 732-7592
wbreyer@co.clermont.oh.us

COUNSEL FOR PLAINTIFF-APPELLANT, STATE OF OHIO

Gloria L. Smith, 0061231
Attorney at Law
The Gloria L. Smith Law Office, LLC
5837 Karrie Square Drive, Suite 290
Dublin, Ohio 43016
(888) 575-9950
Fax (888) 575-9970
gloriasmithlaw@aol.com

FILED
DEC 12 2011
CLERK OF COURT
SUPREME COURT OF OHIO

COUNSEL FOR DEFENDANT-APPELLEE, JULIAN STEELE

RECEIVED
DEC 12 2011
CLERK OF COURT
SUPREME COURT OF OHIO

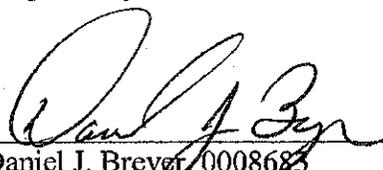
①

IN THE
SUPREME COURT OF OHIO

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

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.

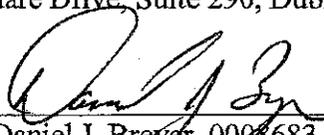
Respectfully submitted,


Daniel J. Breyer, 0008683
Special Prosecuting Attorney
123 North 3rd Street
Batavia, OH 43103
Phone: (513) 732-7588
Fax: (513) 753-7592
wbreyer@co.clermont.oh.us

Counsel for Plaintiff-Appellant, State of Ohio

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

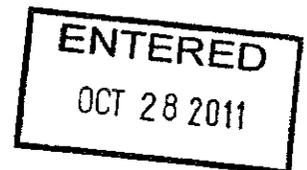
Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

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.



3

OHIO FIRST DISTRICT COURT OF APPEALS

Per Curiam.

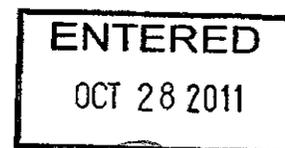
{¶1} This case presents an issue of first impression: what is the proper jury instruction concerning “privilege” when a police officer is charged with abduction arising from an alleged abuse of the power to arrest? That question also presents a difficult challenge to the court to balance the realities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



4

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

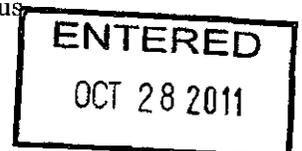
{¶7} A trial court must give the jury all relevant instructions that are necessary for the jury to weigh the evidence and to discharge its duty as the fact-finder.² And while the trial court has discretion in fashioning the jury's charge, the charge must accurately reflect the law.³

{¶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.



5

OHIO FIRST DISTRICT COURT OF APPEALS

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.

ENTERED

OCT 28 2011

6

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.

ENTERED
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."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.

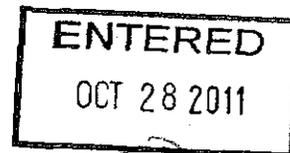
¹² Section 1983, Title 42, U.S. Code.

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. Horrichs* (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.

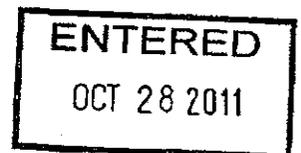
¹⁸ See *Morissette v. United States* (1952), 342 U.S. 246, 250-252, 72 S.Ct. 240.

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.

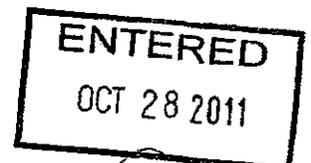
²⁴ See *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, ¶97.

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.



**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

ENTERED
OCT 28 2011

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: _____

ACTING

Presiding Judge

(13)

ORIGINAL

IN THE SUPREME COURT
OF THE
STATE OF OHIO

STATE OF OHIO

Plaintiff-Appellee

--vs--

JULIAN STEELE

Defendant-Appellant

11-2178

On Appeal from the First
District Court of Appeals
for Hamilton County

Court of Appeals
Case No. C10000637

NOTICE OF APPEAL ON BEHALF OF
DEFENDANT-APPELLANT, JULIAN STEELE

FILED
DEC 28 2011
CLERK OF COURT
SUPREME COURT OF OHIO

DANIEL J. BREYER (0008683)
Special Prosecuting Attorney

123 North 3rd Street
Batavia, OH 43103
(513) 732-7588 fax 946-3021
Fax (513) 732-7592
wbreyer@co.clermont.oh.us

GLORIA L. SMITH (0061231)

2783 Martin Rd., #215
Dublin, OH 43016
(888) 575-9950
Fax (888)575-9970
gloriasmithlaw@aol.com

Counsel for Plaintiff-Appellee
STATE OF OHIO

Counsel for Defendant-Appellant
JULIAN STEELE

14.

NOTICE OF APPEAL ON BEHALF OF
DEFENDANT-APPELLANT JULIAN STEELE

Appellant, Julian Steele, hereby gives notice of his appeal to the Supreme Court of Ohio from the judgment of the First District Court of Appeals for Hamilton County, entered in Court of Appeals case number C10000637 on October 28, 2011. This case involves conviction of a felony offense, raises substantial constitutional questions and is one of public or great general interest.

Respectfully submitted,



GLORIA L. SMITH, Counsel of Record
Supreme Court No. 0061231

Counsel for Appellant
JULIAN STEELE

PROOF OF SERVICE

I hereby certify that the foregoing pleading was served upon Daniel J. Breyer, Special Prosecuting Attorney, 123 North 3rd Street, Batavia, Ohio 43103 by Regular U.S. Mail on this 28th day of December 2011.



GLORIA L. SMITH

15.

Appendix

State v. Steele, OSC Nos. 2011-2075 & 2011-2178

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

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.

2921.03 Intimidation.

(A) 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.

(B) Whoever violates this section is guilty of intimidation, a felony of the third degree.

(C) A person who violates this section is liable in a civil action to any person harmed by the violation for injury, death, or loss to person or property incurred as a result of the commission of the offense and for reasonable attorney's fees, court costs, and other expenses incurred as a result of prosecuting the civil action commenced under this division. A civil action under this division is not the exclusive remedy of a person who incurs injury, death, or loss to person or property as a result of a violation of this section.

Effective Date: 11-06-1996

2925.03 Trafficking, aggravated trafficking in drugs.

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.

(B) This section does not apply to any of the following:

(1) Manufacturers, licensed health professionals authorized to prescribe drugs, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4723., 4729., 4730., 4731., and 4741. of the Revised Code;

(2) If the offense involves an anabolic steroid, any person who is conducting or participating in a research project involving the use of an anabolic steroid if the project has been approved by the United States food and drug administration;

(3) Any person who sells, offers for sale, prescribes, dispenses, or administers for livestock or other nonhuman species an anabolic steroid that is expressly intended for administration through implants to livestock or other nonhuman species and approved for that purpose under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040 (1938), 21 U.S.C.A. 301, as amended, and is sold, offered for sale, prescribed, dispensed, or administered for that purpose in accordance with that act.

* * *

2905.12 Coercion.

(A) No person, with purpose to coerce another into taking or refraining from action concerning which the other person has a legal freedom of choice, shall do any of the following:

- (1) Threaten to commit any offense;(2) Utter or threaten any calumny against any person;
- (3) Expose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, to damage any person's personal or business repute, or to impair any person's credit;
- (4) Institute or threaten criminal proceedings against any person;
- (5) Take, withhold, or threaten to take or withhold official action, or cause or threaten to cause official action to be taken or withheld.

(B) Divisions (A)(4) and (5) of this section shall not be construed to prohibit a prosecutor or court from doing any of the following in good faith and in the interests of justice:

- (1) Offering or agreeing to grant, or granting immunity from prosecution pursuant to section 2945.44 of the Revised Code;
- (2) In return for a plea of guilty to one or more offenses charged or to one or more other or lesser offenses, or in return for the testimony of the accused in a case to which the accused is not a party, offering or agreeing to dismiss, or dismissing one or more charges pending against an accused, or offering or agreeing to impose, or imposing a certain sentence or modification of sentence;
- (3) Imposing a community control sanction on certain conditions, including without limitation requiring the offender to make restitution or redress to the victim of the offense.

(C) It is an affirmative defense to a charge under division (A)(3), (4), or (5) of this section that the actor's conduct was a reasonable response to the circumstances that occasioned it, and that the actor's purpose was limited to any of the following:

- (1) Compelling another to refrain from misconduct or to desist from further misconduct;
- (2) Preventing or redressing a wrong or injustice;
- (3) Preventing another from taking action for which the actor reasonably believed the other person to be disqualified;
- (4) Compelling another to take action that the actor reasonably believed the other person to be under a duty to take.

(D) Whoever violates this section is guilty of coercion, a misdemeanor of the second degree.

(E) As used in this section:

- (1) "Threat" includes a direct threat and a threat by innuendo.

(2) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

Effective Date: 01-01-2004

2923.12 Carrying concealed weapons.

(A) No person shall knowingly carry or have, concealed on the person's person or concealed ready at hand, any of the following:

- (1) A deadly weapon other than a handgun;
- (2) A handgun other than a dangerous ordnance;
- (3) A dangerous ordnance.

(B) No person who has been issued a license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code shall do any of the following:

(1) If the person is stopped for a law enforcement purpose and is carrying a concealed handgun, fail to promptly inform any law enforcement officer who approaches the person after the person has been stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then is carrying a concealed handgun;

(2) If the person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun, knowingly fail to keep the person's hands in plain sight at any time after any law enforcement officer begins approaching the person while stopped and before the law enforcement officer leaves, unless the failure is pursuant to and in accordance with directions given by a law enforcement officer;

(3) If the person is stopped for a law enforcement purpose, if the person is carrying a concealed handgun, and if the person is approached by any law enforcement officer while stopped, knowingly remove or attempt to remove the loaded handgun from the holster, pocket, or other place in which the person is carrying it, knowingly grasp or hold the loaded handgun, or knowingly have contact with the loaded handgun by touching it with the person's hands or fingers at any time after the law enforcement officer begins approaching and before the law enforcement officer leaves, unless the person removes, attempts to remove, grasps, holds, or has contact with the loaded handgun pursuant to and in accordance with directions given by the law enforcement officer;

(4) If the person is stopped for a law enforcement purpose and if the person is carrying a concealed handgun, knowingly disregard or fail to comply with any lawful order of any law enforcement officer given while the person is stopped, including, but not limited to, a specific order to the person to keep the person's hands in plain sight.

(C)(1) This section does not apply to any of the following:

(a) An officer, agent, or employee of this or any other state or the United States, or to a law enforcement officer, who is authorized to carry concealed weapons or dangerous ordnance or is authorized to carry handguns and is acting within the scope of the officer's, agent's, or employee's duties;

(b) Any person who is employed in this state, who is authorized to carry concealed weapons or dangerous ordnance or is authorized to carry handguns, and who is subject to and in compliance

with the requirements of section 109.801 of the Revised Code, unless the appointing authority of the person has expressly specified that the exemption provided in division (C)(1)(b) of this section does not apply to the person;

(c) A person's transportation or storage of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in a motor vehicle for any lawful purpose if the firearm is not on the actor's person;

(d) A person's storage or possession of a firearm, other than a firearm described in divisions (G) to (M) of section 2923.11 of the Revised Code, in the actor's own home for any lawful purpose.

(2) Division (A)(2) of this section does not apply to any person who, at the time of the alleged carrying or possession of a handgun, is carrying a valid license or temporary emergency license to carry a concealed handgun issued to the person under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, unless the person knowingly is in a place described in division (B) of section 2923.126 of the Revised Code.

(D) It is an affirmative defense to a charge under division (A)(1) of this section of carrying or having control of a weapon other than a handgun and other than a dangerous ordnance that the actor was not otherwise prohibited by law from having the weapon and that any of the following applies:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of a character or was necessarily carried on in a manner or at a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

(2) The weapon was carried or kept ready at hand by the actor for defensive purposes while the actor was engaged in a lawful activity and had reasonable cause to fear a criminal attack upon the actor, a member of the actor's family, or the actor's home, such as would justify a prudent person in going armed.

(3) The weapon was carried or kept ready at hand by the actor for any lawful purpose and while in the actor's own home.

(E) No person who is charged with a violation of this section shall be required to obtain a license or temporary emergency license to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code as a condition for the dismissal of the charge.

(F)(1) Whoever violates this section is guilty of carrying concealed weapons. Except as otherwise provided in this division or division (F)(2) of this section, carrying concealed weapons in violation of division (A) of this section is a misdemeanor of the first degree. Except as otherwise provided in this division or division (F)(2) of this section, if the offender previously has been convicted of a violation of this section or of any offense of violence, if the weapon involved is a firearm that is either loaded or for which the offender has ammunition ready at hand, or if the weapon involved is dangerous ordnance, carrying concealed weapons in violation of division (A) of this section is a felony of the fourth degree. Except as otherwise provided in division (F)(2) of this section, if the offense is committed aboard an aircraft, or with purpose to carry a concealed weapon aboard an aircraft, regardless of the weapon involved, carrying concealed weapons in violation of division (A) of this section is a felony of the third degree.

(2) If a person being arrested for a violation of division (A)(2) of this section promptly produces a valid license or temporary emergency license to carry a concealed handgun issued under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, and if at the time of the violation the person was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code, the officer shall not arrest the person for a violation of that division. If the person is not able to promptly produce any of those types of license and if the person is not in a place described in that section, the officer may arrest the person for a violation of that division, and the offender shall be punished as follows:

(a) The offender shall be guilty of a minor misdemeanor if both of the following apply:

(i) Within ten days after the arrest, the offender presents a license or temporary emergency license to carry a concealed handgun issued under section 2923.125 or 2923.1213 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, which license was valid at the time of the arrest to the law enforcement agency that employs the arresting officer.

(ii) At the time of the arrest, the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code.

(b) The offender shall be guilty of a misdemeanor and shall be fined five hundred dollars if all of the following apply:

(i) The offender previously had been issued a license to carry a concealed handgun under section 2923.125 of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code and that was similar in nature to a license issued under section 2923.125 of the Revised Code, and that license expired within the two years immediately preceding the arrest.

(ii) Within forty-five days after the arrest, the offender presents any type of license identified in division (F)(2)(a)(i) of this section to the law enforcement agency that employed the arresting officer, and the offender waives in writing the offender's right to a speedy trial on the charge of the violation that is provided in section 2945.71 of the Revised Code.

(iii) At the time of the commission of the offense, the offender was not knowingly in a place described in division (B) of section 2923.126 of the Revised Code.

(c) If neither division (F)(2)(a) nor (b) of this section applies, the offender shall be punished under division (F)(1) of this section.

(3) Except as otherwise provided in this division, carrying concealed weapons in violation of division (B)(1) of this section is a misdemeanor of the first degree, and, in addition to any other penalty or sanction imposed for a violation of division (B)(1) of this section, the offender's license or temporary emergency license to carry a concealed handgun shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code. If, at the time of the stop of the offender for a law enforcement purpose that was the basis of the violation, any law enforcement officer involved with the stop had actual knowledge that the offender has been issued a license or temporary emergency license to carry a concealed handgun, carrying concealed weapons in violation of division (B)(1) of this section is a minor misdemeanor, and the offender's license or

temporary emergency license to carry a concealed handgun shall not be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.

(4) Carrying concealed weapons in violation of division (B)(2) or (4) of this section is a misdemeanor of the first degree or, if the offender previously has been convicted of or pleaded guilty to a violation of division (B)(2) or (4) of this section, a felony of the fifth degree. In addition to any other penalty or sanction imposed for a misdemeanor violation of division (B)(2) or (4) of this section, the offender's license or temporary emergency license to carry a concealed handgun shall be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.

(5) Carrying concealed weapons in violation of division (B)(3) of this section is a felony of the fifth degree.

(G) If a law enforcement officer stops a person to question the person regarding a possible violation of this section, for a traffic stop, or for any other law enforcement purpose, if the person surrenders a firearm to the officer, either voluntarily or pursuant to a request or demand of the officer, and if the officer does not charge the person with a violation of this section or arrest the person for any offense, the person is not otherwise prohibited by law from possessing the firearm, and the firearm is not contraband, the officer shall return the firearm to the person at the termination of the stop. If a court orders a law enforcement officer to return a firearm to a person pursuant to the requirement set forth in this division, division (B) of section 2923.163 of the Revised Code applies.

Effective Date: 04-08-2004; 03-14-2007; 2008 SB184 09-09-2008

2921.04 Intimidation of attorney, victim or witness in criminal case or delinquent child action proceeding.

(A) No person shall knowingly attempt to intimidate or hinder the victim of a crime or delinquent act in the filing or prosecution of criminal charges or a delinquent child action or proceeding, and no person shall knowingly attempt to intimidate a witness to a criminal or delinquent act by reason of the person being a witness to that act.

(B) No person, knowingly and by force or by unlawful threat of harm to any person or property or by unlawful threat to commit any offense or calumny against any person, shall attempt to influence, intimidate, or hinder any of the following persons:

- (1) The victim of a crime or delinquent act in the filing or prosecution of criminal charges or a delinquent child action or proceeding;
- (2) A witness to a criminal or delinquent act by reason of the person being a witness to that act;
- (3) An attorney by reason of the attorney's involvement in any criminal or delinquent child action or proceeding .

(C) Division (A) of this section does not apply to any person who is attempting to resolve a dispute pertaining to the alleged commission of a criminal offense, either prior to or subsequent to the filing of a complaint, indictment, or information, by participating in the arbitration, mediation, compromise, settlement, or conciliation of that dispute pursuant to an authorization for arbitration, mediation, compromise, settlement, or conciliation of a dispute of that nature that is conferred by any of the following:

- (1) A section of the Revised Code;
- (2) The Rules of Criminal Procedure, the Rules of Superintendence for Municipal Courts and County Courts, the Rules of Superintendence for Courts of Common Pleas, or another rule adopted by the supreme court in accordance with section 5 of Article IV, Ohio Constitution;
- (3) A local rule of court, including, but not limited to, a local rule of court that relates to alternative dispute resolution or other case management programs and that authorizes the referral of disputes pertaining to the alleged commission of certain types of criminal offenses to appropriate and available arbitration, mediation, compromise, settlement, or other conciliation programs;
- (4) The order of a judge of a municipal court, county court, or court of common pleas.

(D) Whoever violates this section is guilty of intimidation of an attorney, victim, or witness in a criminal case. A violation of division (A) of this section is a misdemeanor of the first degree. A violation of division (B) of this section is a felony of the third degree.

(E) As used in this section, "witness" means any person who has or claims to have knowledge concerning a fact or facts concerning a criminal or delinquent act, whether or not criminal or delinquent child charges are actually filed.

Amended by 129th General Assembly File No. 83, HB 20, § 1, eff. 6/4/2012.
Effective Date: 09-03-1996

2921.21 Compounding a crime.

(A) No person shall knowingly demand, accept, or agree to accept anything of value in consideration of abandoning or agreeing to abandon a pending criminal prosecution.

(B) It is an affirmative defense to a charge under this section when both of the following apply:

(1) The pending prosecution involved is for a violation of section 2913.02 or 2913.11, division (B)(2) of section 2913.21, or section 2913.47 of the Revised Code, of which the actor under this section was the victim.

(2) The thing of value demanded, accepted, or agreed to be accepted, in consideration of abandoning or agreeing to abandon the prosecution, did not exceed an amount that the actor reasonably believed due him as restitution for the loss caused him by the offense.

(C) When a prosecuting witness abandons or agrees to abandon a prosecution under division (B) of this section, the abandonment or agreement in no way binds the state to abandoning the prosecution.

(D) Whoever violates this section is guilty of compounding a crime, a misdemeanor of the first degree.

Effective Date: 07-18-1990