

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2010-A-0060
RODNEY TURNER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court of Common Pleas, Case No. 2010 CR 70.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047 (For Plaintiff-Appellee).

Michael A. Hiener, P.O. Box 1, Jefferson, OH 44047 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Rodney Turner, appeals his convictions, following a jury trial in the Ashtabula County Court of Common Pleas, for two counts of Felonious Assault, one count of Kidnapping, and one count of Abduction. Turner received an aggregate prison sentence of four years. The issues in this case are whether a bill of particulars with improperly numbered counts warrants a reversal of a conviction and whether a trial court is required to instruct a jury that a victim was released unharmed

for the purposes of a Kidnapping conviction. For the following reasons, we affirm the decision of the court below.

{¶2} On April 23, 2010, Turner was indicted by the Ashtabula County Grand Jury for the following: Felonious Assault (Count One), a felony of the second degree, in violation of R.C. 2903.11(A)(2); Felonious Assault (Count Two), a felony of the second degree, in violation of R.C. 2903.11(A)(1); Kidnapping (Count Three), a felony of the second degree, in violation of R.C. 2905.01(A)(2) and (C)(1); Kidnapping (Count Four), a felony of the first degree, in violation of R.C. 2905.01(A)(2); Kidnapping (Count Five), a felony of the second degree, in violation of R.C. 2905.01(A)(3) and (C)(1); Kidnapping (Count Six), a felony of the first degree, in violation of R.C. 2905.01(A)(3); and Disrupting Public Services (Count Seven), a felony of the fourth degree, in violation of R.C. 2909.04(A)(1).

{¶3} On May 12, 2010, Turner requested a bill of particulars, which the State provided on May 13, 2010.

{¶4} On August 5, 2010, the trial court granted the State's Motion to Dismiss Counts Five and Six of the Indictment and dismissed those counts.

{¶5} A trial was held on August 9 through August 12 of 2010. The following testimony was presented.

{¶6} Kelly Davis testified that she lives at 1025 West 38th Street in Ashtabula and that her daughter, Shelly, also lived at that address. She testified that Turner was her boyfriend, he spent a lot of time at her apartment, he spent the night there on some occasions, and that he kept clothes there.

{¶7} Kelly testified that on the morning of February 18, 2010, she and Turner were arguing about scrap metal and whether to buy a new washing machine. She

stated that the two began yelling at each other and arguing about her ex-boyfriend. Kelly stated that, during this argument, Turner grabbed her by the hair and punched her “at least 8 to 10 times.” She stated that he punched her so hard she flipped out of her chair. Kelly stated that Shelly got between her and Turner and pushed Turner away. Kelly testified that Turner then got a butcher knife and swung the knife toward her, over Shelly’s shoulder and said “I’m gonna kill you.” Kelly then moved from the kitchen into the living room, where Turner hit her on the back of the head with a lamp. Kelly went upstairs to get a phone, but the phone was not working. Kelly went back downstairs, heard a bat hit the floor, and heard Turner tell Shelly “you ain’t going nowhere.” Kelly testified that she tried to walk outside but Turner grabbed her, pulled her back in the house, and said “you ain’t going nowhere.” Kelly testified that she then asked Turner to let Shelly leave and he did. Kelly stated that Turner told her that if she called the police or showed up in court, he would kill her. Turner then left, and after he left, Kelly heard him say that she “deserved what she got.”

{¶8} Kelly went to her neighbor’s home and subsequently was taken in an ambulance for treatment. She stated that after the attack, she was coughing up blood and had a bloody nose. She testified that she sustained a broken nose, her eye socket was shattered in three places, and she has permanent nerve damage on one side of her face.

{¶9} Shelly Davis testified that she was staying at her mother’s apartment on February 18th and that she had been sleeping on the couch. She stated that she was awoken by an argument between Kelly and Turner and she saw Turner grab Kelly by the hair and punch her in the face. Shelly stated that Turner had punched Kelly seven or eight times before Shelly tried to separate the two, and Turner continued punching

Kelly several more times after Shelly attempted to intervene. Shelly also testified that Turner “tried to stab” Kelly over Shelly’s shoulder but was unsuccessful at reaching Kelly. Shelly stated that Turner swung a lamp at Kelly, but she could not tell if he did hit Kelly. Shelly tried to leave but Turner told her “you ain’t goin’ nowhere,” and swung a bat at her. She also testified that Kelly tried to leave, but Turner pulled Kelly back into the house by the hood on her sweatshirt.

{¶10} Jeremy Benson, Kelly’s neighbor, who lived at 1015 West 38th Street, testified that on February 18, he was outside of his apartment smoking and heard “arguing coming from a couple doors down.” He went inside of his apartment and a few minutes later, Shelly walked past, holding her baby. Jeremy invited Shelly inside of his apartment and noticed she had blood on her arm. Jeremy stated that he then resumed smoking while standing in front of the door, looking outside. He noticed Turner walk by the apartment, and heard him state “she deserved it,” and that he was going to “kill her.” After Jeremy saw Turner pass by, he observed Kelly walking down the sidewalk, with blood dripping from her mouth and nose. He testified that Kelly was “falling over constantly.” He and his mother carried Kelly inside of their apartment and called 911.

{¶11} Jeremy testified that he did not see anyone other than Kelly, Shelly, and Turner exit the 1025 West 38th Street apartment. The State presented Jeremy with an exhibit, which was described as a “lightweight jacket” that Turner was wearing at the time of his arrest. Jeremy testified that this was not the jacket he saw Turner wearing on the date of the incident. Jeremy also stated that he was aware of a surveillance camera located outside, close to his mother’s apartment.

{¶12} Crystal Benson, Jeremy’s wife, testified that she was also present at the 1015 West 38th Street apartment on February 18th. She explained that she was

standing at the door smoking when she saw Shelly walk by with her baby and that neither of the two were dressed appropriately for the cold weather. She stated that Shelly came into the apartment and after she entered, Turner walked by and stated that “she got what she *** deserved.” After Turner passed by, Crystal saw Kelly outside, stumbling and disoriented. Crystal explained that Kelly’s left eye was swollen shut and that it was dripping blood. She stated that after Kelly came inside, she was coughing up and throwing up blood.

{¶13} Crystal testified that she did not see anyone other than Kelly, Shelly, and Turner exit Kelly’s 1025 West 38th Street apartment. Crystal stated that she entered Kelly’s apartment later that day to help Shelly clean up blood in the kitchen. She observed knives on the floor and saw that the silverware drawer was open. The prosecutor showed Crystal the jacket Turner was wearing at the time of his arrest. Crystal testified that this was not the jacket she saw Turner wearing on the date of the incident and explained that he had been wearing a dark brown jacket.

{¶14} Kay Segall, Jeremy’s mother, who also lived at 1015 West 38th Street, testified that she heard yelling coming from the direction of apartment 1025 on February 18, 2011. She heard someone in that direction yelling “let them out.” She then saw Shelly running down the sidewalk. She testified that approximately four or five minutes later, she saw Turner exit the house and heard him say “I’ll kill her.” Soon thereafter, she saw Kelly walking up the sidewalk, bleeding. She helped clean Kelly’s apartment later that day and saw trails of blood in the living room and in the kitchen.

{¶15} Officer Thomas Perry, of the City of Ashtabula Police Department, responded to the 911 call regarding Kelly’s injuries. He testified that he saw Kelly being treated and that she appeared to have been “severely beaten.” Officer Perry explained

that her hair was “blood-soaked” and that her face was swollen. He testified that the police responded to several locations where they believed Turner may have been, but were unsuccessful in locating him at that time. Approximately three hours later, Officer Perry was on patrol, saw a suspect who he believed to be Turner walking on Station Avenue, and placed him under arrest.

{¶16} Officer Perry also testified regarding photographs presented as exhibits by the State. He stated that they depicted the circumstances he saw when he entered Kelly’s apartment. Inside of the apartment, there were knives on the kitchen floor, two baseball bats by the front door, and coffee spilled on the kitchen floor.

{¶17} Officer Perry interviewed Turner after his arrest, and the State presented a video recording of the interview. Turner told Officer Perry that Kelly kicked him in the leg and pushed him into the wall and he responded by striking Kelly’s face with his open hand. Officer Perry testified that he examined Turner’s leg and did not see any injuries. He also stated that he did not observe any injuries to Turner’s hands.

{¶18} Regarding which jacket Turner was wearing on the date of the incident, Turner stated to Officer Perry that he had been wearing the same jacket all day, but Officer Perry “was suspicious of the jacket that he was wearing because of the amount of blood on the scene,” and because there was no blood on the jacket. Officer Perry testified that he did not return to Kelly’s apartment to see if Turner had a brown jacket there, like the one the witnesses had described.

{¶19} Officer Perry testified that he was aware of surveillance cameras on the property but had “never been successful in obtaining any camera footage” from these cameras.

{¶20} James Noyes, the director of Ashtabula Metropolitan Housing Authority (AMHA), testified that Metro Estates are AMHA apartments located on West 38th Street. He testified that AMHA had surveillance cameras located at Metro Estates. The video footage from these cameras is kept for thirty days and then recycled. He testified that the police did not ask him for the video from the cameras related to this case and no footage was provided to the police.

{¶21} At the conclusion of the State's case, Turner moved for acquittal, pursuant to Crim.R. 29, on counts one, four, and seven. The court granted Turner's motion for acquittal as to count seven, Disrupting Public Services.

{¶22} On August 17, 2010, the jury found Turner guilty of both counts of Felonious Assault, the lesser included offense of count three, Abduction, and count four, Kidnapping. The jury found Turner not guilty of count three, Kidnapping.

{¶23} On November 22, 2010, the trial court entered a Judgment Entry of Sentence. The court sentenced Turner to four years of prison on the first count of Felonious Assault, two years on the second count of Felonious Assault, one year for the lesser included offense of Abduction, and four years for Kidnapping. These sentences were to be served concurrently, for a total sentence of four years.

{¶24} Turner timely appeals and raises the following assignments of error:

{¶25} "[1.] The Trial Court erred with its jury instructions as to count one of the indictment and erred when it denied Appellant's motion for acquittal pursuant to Crim. R. 29.

{¶26} "[2.] The Trial Court erred by not submitting the question to the jury in count 4 as to whether the Appellant had released victim in a safe place unharmed.

{¶27} “[3.] The State failed to present sufficient evidence to sustain the conviction upon counts 1 and 4 of the indictment.

{¶28} “[4.] The Jury’s verdict is against the manifest weight of the evidence in counts 1 and 4 of the indictment.

{¶29} “[5.] Appellant was afforded ineffective assistance of counsel.”

{¶30} In his first assignment of error, Turner argues that, regarding count one, the bill of particulars provided by the State listed a different charge and description of the charge than that listed in the indictment. Therefore, Turner asserts that the trial court should have granted Turner’s motion for acquittal pursuant to Crim.R. 29 as to count one.

{¶31} The State admits that, due to a clerical error, the bill of particulars provided to Turner improperly contained the specifics for count two under the heading of count one and vice versa. The State argues that this error does not violate any statutes or criminal rules and that Turner was provided with sufficient information to mount his defense.

{¶32} The language of the indictment, regarding count one, stated that Turner “did knowingly cause or attempt to cause physical harm to another, to-wit: Kelly Davis, by means of a deadly weapon or dangerous ordnance; contrary to the form of the statute (in violation of Section 2903.11(A)(2) of the Ohio Revised Code).” Count two of the indictment specified that Turner “knowingly caused serious physical harm” to Kelly, in violation of R.C. 2903.11(A)(1).

{¶33} In the bill of particulars, count one described Turner punching Kelly in the face, causing broken bones and cartilage. In count two, the bill of particulars described

Turner punching Kelly in the face, hitting Kelly with a lamp, and threatening to kill Kelly while using a knife.

{¶34} We first note that appellant failed to object to the state's bill of particulars as required by Crim.R. 12(C)(2). Accordingly, Turner has waived all but plain error on appeal with respect to the adequacy of the bill of particulars. See, e.g., *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, at ¶26. Plain error is present only if the error is obvious and, but for the error, the outcome of the trial clearly would have been different. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, at ¶108.

{¶35} "An individual accused of a felony is entitled to an indictment setting forth the 'nature and cause of the accusation' pursuant to Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution." *State v. Sellards* (1985), 17 Ohio St.3d 169, 170. "In addition to the indictment, an accused may also request a bill of particulars under R.C. 2941.07, which requires the prosecuting attorney to furnish a bill of particulars setting up specifically the nature of the offense charged and the conduct of the defendant which is alleged to constitute the offense." *State v. Cooper* (2000), 139 Ohio App.3d 149, 162.

{¶36} "[T]he purpose for giving a bill of particulars is 'to elucidate or particularize the conduct of the accused,' but not 'to provide the accused with specifications of evidence or to serve as a substitute for discovery.'" *State v. Lawrinson* (1990), 49 Ohio St.3d 238, 239, (citation omitted); *State v. Robinson*, 11th Dist. No. 2004-L-146, 2005-Ohio-6286, at ¶24.

{¶37} While Turner argues that the error in the bill of particulars should have resulted in acquittal under Crim.R. 29, "Crim.R. 29 does not provide for acquittal on grounds other than insufficiency of evidence. *** Therefore, an error in the bill of

particulars or an error in the admission of evidence cannot form the basis for a Crim.R. 29 motion for acquittal.” *State v. Lampkin*, 4th Dist. No. 99CA2635, 1999 Ohio App. LEXIS 6395, at *7 (citation omitted). However, “an error in the bill of particulars may provide the basis for reversal of a conviction if the error misled or prejudiced the defendant.” *Id.*, citing *State v. Kersey* (1997), 124 Ohio App.3d 513, 518.

{¶38} The purpose of a bill of particulars is to provide the defendant with information about the conduct forming the basis of appellant’s crimes and charges. In the current case, such information was provided as to each count of the indictment. As the State admits, counts one and two were numbered incorrectly. However, Turner was still provided with the factual basis for the charges he faced and was made aware of the conduct forming the basis for such charges.

{¶39} Turner provides no support for his argument that the bill of particulars did not give counsel an adequate description of the conduct that formed the basis of Turner’s crimes. Although the two counts in question may have been improperly switched in the bill of particulars, counsel knew the two courses of conduct that the State alleged had occurred and was able to argue both at trial.

{¶40} Turner also provides no authority for his proposition that the State’s error renders his conviction invalid. Turner cites *State v. Woody* (1986), 29 Ohio App.3d 364, for the proposition that when a bill of particulars contains elements different from those found in the indictment, this is “fatal to a conviction.” However, we note that *Woody* involves an amended indictment that changed the elements of the charges against the defendant. Such was not the case here, as the indictment was not amended to change the elements of the charges in this case and the charges against Turner have always remained the same. Moreover, as noted previously, although the

counts in the bill of particulars were numbered incorrectly, the elements of counts one and two are consistent with counts one and two of the indictment, although reversed in order.

{¶41} Turner has also failed to show that he suffered any prejudice due to the State's error. In order to prevail on a challenge to a bill of particulars, an appellant must show that he was prejudiced. *Kersey*, 124 Ohio App.3d at 518. See, also, *State v. Boivin*, 4th Dist. No. 958, 1979 Ohio App. LEXIS 12445, at *9 (where an appellant "makes no claim or showing that he was prejudiced or misled by the [error in the bill of particulars] or in any way hindered or prevented from presenting an adequate defense," and instead "simply points out the error," there are no grounds for reversal). In this case, Turner was able to mount a defense on both of the assault charges, the indictment clearly specified the charges against him, the bill of particulars provided the conduct and facts that would be used by the State at trial, and discovery was properly carried out. Based on the foregoing, and on Turner's failure to assert any prejudice, there was no harm suffered by Turner due to the State's error. See *Robinson*, 2005-Ohio-6286, at ¶¶26-27 (although the bill of particulars was inadequate, the defendant's ability to learn of the conduct related to the crime through discovery, the defendant's references to the conduct during trial, and the defendant's failure to show prejudice precluded his ability to obtain a reversal of his conviction).

{¶42} The first assignment of error is without merit.

{¶43} In his second assignment of error, Turner argues that the trial court erred by failing to give a jury instruction requiring the jury to determine whether Kelly was released in a "safe place unharmed" after the kidnapping. Turner argues that the failure to provide this instruction to the jury prevented the jury from determining, if it found that

Kelly was released unharmed, that Turner was guilty of a second-degree felony instead of a first-degree felony.

{¶44} “An appellate court is to review a trial court’s decision regarding a jury instruction to determine whether the trial court abused its discretion.” *State v. Mitchell*, 11th Dist. No. 2001-L-042, 2003-Ohio-190, at ¶10, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68.

{¶45} The applicable statute, which has since been amended, stated “[e]xcept as otherwise provided in this division or division (C)(2) or (3) of this section, if the offender releases the victim in a safe place unharmed, kidnapping is a felony of the second degree.” Former R.C. 2905.01(C).

{¶46} Whether a kidnapper releases his victim unharmed in a safe place “is not an element of the offense; rather, the accused must plead and prove it in the fashion of an affirmative defense.” *State v. Sanders*, 92 Ohio St.3d 245, 265, 2001-Ohio-189; *State v. Cornute* (1979), 64 Ohio App.2d 199, at the syllabus (“The provision in R.C. 2905.01(C), reducing kidnapping to a felony of the second degree ‘[i]f the offender releases the victim in a safe place unharmed,’ is a mitigating circumstance, rather than an element of the crime of kidnapping. It is in the nature of an affirmative defense and is to be treated as such.”).

{¶47} The trial court judge in this case determined there was no evidence to support a finding that Kelly was unharmed when released and, therefore, the jury instruction on releasing the victim in a safe place unharmed was not warranted. “The court has no duty to give jury instructions that are neither supported by the facts nor that assist the jury.” *State v. Ogletree*, 8th Dist. No. 79882, 2002-Ohio-4070, at ¶14, citing *State v. Guster* (1981), 66 Ohio St.2d 266, at the syllabus. In this case, it is evident that

Turner failed to provide any evidence that Kelly was released unharmed. Instead, ample evidence was provided by the State that Kelly was harmed, as she suffered a broken nose and eye socket, and surgery was required to repair these injuries.

{¶48} Turner argues that although Kelly may have been harmed, this harm was caused by the assault that occurred *prior to* the kidnapping. Turner asserts that because no further harm occurred during the course of the kidnapping, Kelly was released unharmed.

{¶49} However, Turner provides no case law in support of this argument. In order for the “safe place unharmed” clause of the statute to apply, the language simply states that the offender must release the victim in a safe place unharmed. There is no exception relating to when the harm occurs in relation to the kidnapping. Kelly was not released unharmed and therefore, the court did not act improperly in failing to read an instruction regarding this issue to the jury. We note that the facts presented to the jury supported a finding that Turner harmed Kelly during a series of events that culminated in the kidnapping. As Turner caused the harm during the course of events that involved the beating and the kidnapping, there is no law supporting that this defense is or should be applicable in this case.

{¶50} The second assignment of error is without merit.

{¶51} As Turner’s third and fourth assignments of error deal with the sufficiency and manifest weight of the evidence, we will address them jointly.

{¶52} “[S]ufficiency’ is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury,” i.e. “whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black’s Law Dictionary (6 Ed.1990), 1433.

Essentially, “sufficiency is a test of adequacy,” that challenges whether the state’s evidence has created an issue for the jury to decide regarding each element of the offense. *Id.*

{¶53} “An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, “[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *Id.*

{¶54} Weight of the evidence, in contrast to its sufficiency, involves “the inclination of the greater amount of credible evidence.” *Thompkins*, 78 Ohio St.3d at 387 (citation omitted) (emphasis omitted). Whereas the “sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, *** weight of the evidence addresses the evidence’s effect of inducing belief.” *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted). “In other words, a reviewing court asks whose evidence is more persuasive -- the state’s or the defendant’s?” *Id.*

{¶55} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the “thirteenth juror.” *Thompkins*, 78 Ohio St.3d at 387 (citation

omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether, “in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶56} Turner argues that there was insufficient evidence to support his convictions as to counts one and four of the indictment. Regarding count one, Turner again argues that the State was restricted to presenting evidence related only to the description provided in the bill of particulars under the heading of count one.

{¶57} As noted in the first assignment of error, the inadvertent error in the numbering of the counts in the bill of particulars did not change the charges issued in the indictment. Therefore, for count one, in order to convict Turner of Felonious Assault, the State was required to prove, beyond a reasonable doubt, that Turner “knowingly cause[d] or attempt[ed] to cause physical harm to *** Kelly Davis, by means of a deadly weapon or dangerous ordnance.” See R.C. 2903.11(A)(2).

{¶58} In the current case, the testimony of both Kelly and Shelly was that Turner retrieved a knife from the kitchen drawer and swung the knife toward Kelly. Kelly testified that while Turner was swinging the knife toward her, he stated “I’m gonna kill you.” The pictures taken by officers at the scene, as well as the testimony of these officers and of Kelly’s neighbors, evidenced that the kitchen drawer had been opened and that knives were scattered across the floor. One large knife was found in the sink, where Kelly testified that Turner ultimately placed the knife after swinging it toward her.

This evidence is sufficient to support the jury's verdict that Turner knowingly attempted to use a knife to inflict physical harm upon Kelly.

{¶59} Moreover, evidence shows that Turner used his fist to inflict extensive damage upon Kelly, causing shattered bones within her nose and her face and causing her to fall backwards out of her chair. According to Kelly and Shelly, Turner also swung a lamp at Kelly's head. Kelly testified that the lamp made contact with her head. Based on the foregoing, there was sufficient evidence to create a question for the jury as to whether Turner used a deadly weapon and should be convicted of Felonious Assault under count one.

{¶60} Turner also argues that there was insufficient evidence as to count four, Kidnapping.

{¶61} Regarding count four, in order to convict Turner of Kidnapping, the State was required to prove, beyond a reasonable doubt, that Turner "did by force, threat or deception *** restrain [Kelly] of her liberty, for the purpose of facilitating the commission of a felony or flight thereafter." See R.C. 2905.01(A)(2).

{¶62} The evidence presented at trial included the testimony of both Kelly and Shelly that Kelly tried to leave after being assaulted, but that Turner pulled her back inside of the apartment and told her "you ain't goin' nowhere." Kelly testified that after a few mintues, Turner told her that if she showed up in court, he would kill her. Turner then left the apartment. Police were unable to locate Turner for approximately three hours, although they went to the different locations where Turner may have been staying.

{¶63} Based on this evidence, there was sufficient evidence to submit to the jury the question of whether Turner had prevented Kelly from leaving so that he could flee from the apartment after the assault had been committed.

{¶64} Turner asserts that the kidnapping of Kelly did not facilitate his flight because one witness, Shelly, had already left. However, Kelly was an integral witness, as she was the one who was injured by Turner. The evidence shows that she appeared very bloody and injured after the incident. Allowing her to leave prior to his departure from the apartment may have resulted in a rapid police response and his inability to leave the apartment complex area. There was sufficient evidence to support a finding that Turner kidnapped Kelly to facilitate his flight after the assault.

{¶65} Turner also asserts that the convictions on counts one and four were against the manifest weight of the evidence.

{¶66} Regarding count one, the greater weight of evidence favors the prosecution. The State presented evidence from several sources, including the police officers, Kelly's neighbors, Kelly, and Shelley. The physical evidence at the scene, as well as the testimony, showed that Turner had picked up a knife and had directed that knife toward Kelly. Although the defense questioned whether Turner actually intended to commit an assault on Kelly, there was no other evidence disputing that the assault did occur. The weight of the evidence supports a finding that Turner committed Felonious Assault against Kelly.

{¶67} Regarding count four, the State again presented ample evidence, in the form of Kelly and Shelly's testimony that Turner would not allow Kelly to leave, that he forced her back into the apartment, and that he told her she could not leave. The defense presented little evidence to refute the State's evidence. Moreover, although

Turner calls into question whether he was actually “in flight,” the evidence that an assault occurred, that Turner would not allow Kelly to leave, and that Turner was ultimately missing for several hours, supports a finding that Turner committed the offense of Kidnapping.

{¶68} Based on the foregoing, we cannot conclude that the jury clearly lost its way in finding that Turner committed Felonious Assault under count one and Kidnapping under count four.

{¶69} The third and fourth assignments of error are without merit.

{¶70} In his fifth assignment of error, Turner argues that his trial counsel was ineffective, as she failed to object to the jury instructions regarding count one and failed to bring to the court’s attention the discrepancy between the bill of particulars and the indictment.

{¶71} To reverse a conviction for ineffective assistance of counsel, the defendant must prove “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.” *State v. Madrigal*, 87 Ohio St.3d 378, 388-389, 2000-Ohio-448, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687-688.

{¶72} As discussed in the first assignment of error, the error made in the bill of particulars did not render the conviction on count one invalid. Therefore, we find that trial counsel’s performance did not fall below the objective standard of reasonableness by failing to object to the error in the bill of particulars. However, regardless of whether trial counsel erred in failing to object, no prejudice resulted. Turner was unable to show that counsel did not mount a vigorous defense on both of the Felonious Assault charges

or that any harm resulted from the improper numbering of counts one and two of the bill of particulars.

{¶73} The fifth assignment of error is without merit.

{¶74} For the foregoing reasons, the judgment of the Ashtabula County Court of Common Pleas, finding Turner guilty of two counts of Felonious Assault, one count of Kidnapping, and one count of Abduction, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.