[Cite as *State v. Honzu*, 2017-Ohio-626.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-T-0056**
- vs -	:	
DAVID RICHARD HONZU,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CR 00538.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Scala, 244 Seneca Avenue, N.E., Warren, OH 44481 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, David Richard Honzu, appeals from the May 6 and 31, 2016 judgments of the Trumbull County Court of Common Pleas rendering judgment on the verdict and sentencing him to 18 months in prison for attempted abduction. On appeal, appellant asserts the trial court erred in overruling his Crim.R. 29 motion for acquittal,

failed to instruct the jury of an available affirmative defense, and alleges his conviction is against the manifest weight of the evidence. For the following reasons, we affirm.

{¶2} On September 17, 2015, the Trumbull County Grand Jury indicted appellant on one count of attempted abduction, a felony of the fourth degree, in violation of R.C. 2923.02(A) and 2905.02(A)(1), (B), and (C), with a sexual motivation specification pursuant to R.C. 2941.147. Appellant was represented by counsel, entered a not guilty plea at his arraignment, and waived his right to a speedy trial.

{¶3} A jury trial was held on May 2, 2016. Prior to the start of trial, appellee, the state of Ohio, moved to nolle the sexual motivation specification. The trial court agreed and granted the motion. The state presented four witnesses to testify on its behalf: Carol Matacic, the victim; Patrolman Daniel Wasko, Jr., with the Champion Township Police Department ("CTPD"); Sergeant Jeffrey A. White, also with the CTPD; and Deputy Russ Molinatto, with the Trumbull County Sheriff's Office. Appellant did not testify and presented no witnesses.

{¶4} Ms. Matacic is an R.N. who works for a local hospital. On May 17, 2015, around 9:30 a.m. on a Sunday morning, she was taking her routine morning run on Airport Road in Champion Township, Trumbull County, Ohio. Her route is through a residential area where the houses are spaced out. Traffic is typically light and was light on the Sunday morning at issue.

{¶5} About five minutes into her run, Ms. Matacic noticed a royal blue truck pass her in the eastbound lane as she was jogging west. The same truck passed her a second time shortly thereafter. The truck then pulled into a driveway and approached

her for a third time. The truck pulled over and stopped next to Ms. Matacic who was near the passenger side door.

{¶6} There was only one occupant in the truck. Ms. Matacic indicated the driver was a tall, thin male, in his 40s or 50s, and wearing a baseball cap on his head. The driver rolled down his window and asked Ms. Matacic directions to a road she was unfamiliar with. The driver questioned whether he was still in Champion. Ms. Matacic grew suspicious. She testified, "At that moment, there was a sick feeling on the inside. Like something wasn't right. And so my response to him was, 'Well, you're gonna have to figure that out.' * * * My intention was to leave at that point." (Transcript p. 211).

{¶7} The driver then told Ms. Matacic that he had a map, opened his door, and started running towards her. Ms. Matacic started running away as fast as she could. The driver said, "'Come here, come here,'" ordering her back to his truck in "a very low [tone] and terrifying voice" while chasing after her. (Transcript p. 213). Ms. Matacic testified there was "no doubt in [her] mind" that appellant was trying to "abduct" her. (Transcript p. 224). She was "terrified." (Transcript p. 225). Ms. Matacic began screaming for help, ran to a nearby house, and called 911.

{¶8} Patrolman Wasko was dispatched. He searched the area but did not locate the blue truck. When Patrolman Wasko arrived at the residence, he described Ms. Matacic as "upset, red-faced, teary - - tears in her eyes. * * * Somewhat panicked." (Transcript p. 240).

{¶9} An anonymous tip came in that appellant matched the physical description and the truck. Deputy Molinatto interviewed appellant at the sheriff's office. Appellant acknowledged driving a blue truck. Appellant also acknowledged being in Champion

Township on the morning at issue. However, appellant denied asking anyone for directions, indicating to Deputy Molinatto that he does not get lost. Appellant also denied leaving his vehicle or chasing anyone.

{¶10} On May 18, 2015, Ms. Matacic met with CTPD officers. Sergeant White prepared a photo lineup. Ms. Matacic selected appellant from a six-person photo array with "one hundred percent" certainty. (Transcript p. 220). Sergeant White testified on cross-examination that photos of trucks that looked similar to the suspect vehicle were taken from Auto Trader. Sergeant White stated that Ms. Matacic initialed several photographs that looked very similar to the truck that passed her and the truck that belonged to appellant.

{¶11} At the close of the state's case, defense counsel moved for an acquittal pursuant to Crim.R. 29, which was overruled by the trial court.

{¶12} Appellant did not testify nor did he present any defense witnesses. At the conclusion of all the evidence, appellant renewed his Crim.R. 29 motion, which was overruled by the trial court.

{¶13} Following trial, the jury returned a guilty verdict, finding appellant guilty of attempted abduction. The trial court rendered judgment on the verdict on May 6, 2016. On May 31, 2016, the court sentenced appellant to 18 months in prison and notified him that post-release control is optional up to a maximum of three years. Appellant filed a timely appeal and asserts the following assignments of error:

{¶14} "[1.] The Trial Court erred, to the detriment of Appellant, by overruling Appellant's Motion For A Directed Verdict, as required elements of Attempted Abduction (F-4) were lacking in Appellee's case in chief.

{¶15} "[2.] The Trial Court erred, to the detriment of Appellant, by failing to instruct the jury of the affirmative defense available in this O.R.C. 2923.02 attempt to commit an offense."

{¶16} In his first assignment of error, appellant maintains the trial court erred in overruling his Crim.R. 29 motion made at the close of both the state's case in chief and after the defense rested. Appellant also raises a manifest weight of the evidence contention in a portion of his second assignment of error. For ease of discussion, we will address appellant's sufficiency of the evidence and manifest weight of the evidence arguments in a consolidated fashion under this assignment.

{¶17} With regard to sufficiency, in *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied. The Court stated that "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *Id*. at syllabus. "Thus, when an appellant makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state." *State v. Patrick*, 11th Dist. Trumbull Nos. 2003-T-0166 and 2003-T-0167, 2004-Ohio-6688, ¶18.

{¶18} As this court stated in *State v. Schlee*, 11th Dist. Lake No. 93-L-082, 1994 WL 738452, *4-5 (Dec. 23, 1994):

{¶19} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶20} "'"The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*."'

{¶21} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' '(a) reviewing court (should) not reverse a [guilty] verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.'" * * *

{¶22} "On the other hand, 'manifest weight' requires a review of the weight of the evidence presented, not whether the state has offered sufficient evidence on each element of the offense.

{¶23} "'In determining whether the verdict was against the manifest weight of the evidence, "(* * *) the court reviewing the entire record, *weighs the evidence* and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (* * *)"' (Citations omitted.) * * *" (Emphasis sic.) (Citations omitted.)

{¶24} Regarding sufficiency, "a reviewing court must look to the evidence presented * * * to assess whether the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed

beyond a reasonable doubt." *State v. March*, 11th Dist. Lake No. 98-L-065, 1999 WL 535675, *3 (July 16, 1999). The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks*, 61 Ohio St.3d 259, paragraph two of the syllabus (1991), superseded by state constitutional amendment on other grounds as stated in *State v. Smith*, 80 Ohio St.3d 89 (1997). Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis*, 79 Ohio St.3d 421, 430 (1997).

{¶25} Regarding manifest weight, a judgment of a trial court should be reversed "'only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). The trier of fact is in the best position to assess the credibility of witnesses. *State v. DeHass*, 10 Ohio St.2d 230, paragraph one of the syllabus (1967).

{¶26} "[C]ircumstantial evidence and direct evidence inherently possess the same probative value." *State v. Fasline*, 11th Dist. Trumbull No. 2014-T-0004, 2015-Ohio-715, ¶39, citing *State v. Biros*, 78 Ohio St.3d 426, 447 (1997), citing *Jenks, supra*, paragraph one of the syllabus.

{¶27} "A finding that a judgment is not against the manifest weight of the evidence necessarily means the judgment is supported by sufficient evidence." *Patterson v. Godale*, 11th Dist. Lake Nos. 2014-L-034 and 2014-L-042, 2014-Ohio-5615, ¶23, citing *State v. Arcaro*, 11th Dist. Ashtabula No. 2012-A-0028, 2013-Ohio-1842, ¶32 ("'Since there must be sufficient evidence to take a case to the jury, it follows

that "a finding that a conviction is supported by the *weight* of the evidence necessarily must include a finding of sufficiency."'" (Emphasis sic.) (Citations omitted.))

{¶28} For the reasons addressed below, we determine the judgment is not against the manifest weight of the evidence and, thus, further conclude it is supported by sufficient evidence.

{¶29} Appellant takes issue with the guilty finding for attempted abduction, a felony of the fourth degree, in violation of R.C. 2923.02(A) and 2905.02(A)(1).

{¶30} R.C. 2923.02, "Attempt," states: "(A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶31} R.C. 2905.02, "Abduction," provides: "(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[.]"

{¶32} R.C. 2901.22, "Culpable mental states," defines "knowingly" as:

{¶33} "(B) A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact."

{¶34} In defining "force or threat," the trial court instructed the jury as follows:

{¶35} "Force means any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.

{¶36} "Threat includes a direct or indirect threat." (Transcript p. 307).

{¶37} "Threat" is defined as follows: "A communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another[.]" Black's Law Dictionary (10th Ed.2014).

{¶38} As stated, on May 17, 2015, around 9:30 a.m. on a Sunday morning, Ms. Matacic was taking her routine morning run on Airport Road. Her route is through a residential area where the houses are spaced out. Traffic is typically light and was light on the Sunday morning at issue.

{¶39} About five minutes into her run, Ms. Matacic noticed a royal blue truck pass her in the eastbound lane as she was jogging west. The same truck passed her a second time shortly thereafter. The truck then pulled into a driveway and approached her for a third time. The truck pulled over and stopped next to Ms. Matacic who was near the passenger side door.

{¶40} There was only one occupant in the truck. Ms. Matacic indicated the driver was a tall, thin male, in his 40s or 50s, and wearing a baseball cap on his head. The driver rolled down his window and asked Ms. Matacic directions to a road she was unfamiliar with. The driver questioned whether he was still in Champion. Ms. Matacic grew suspicious. She testified, "At that moment, there was a sick feeling on the inside. Like something wasn't right. And so my response to him was, 'Well, you're gonna have to figure that out.' * * * My intention was to leave at that point." (Transcript p. 211).

{¶41} The driver then told Ms. Matacic that he had a map, opened his door, and started running towards her. Ms. Matacic started running away as fast as she could. The driver said, "'Come here, come here," ordering her back to the truck in "a very low [tone] and terrifying voice" while chasing after her. (Transcript p. 213). Ms. Matacic testified there was "no doubt in [her] mind" that appellant was trying to "abduct" her. (Transcript p. 224). She was "terrified." (Transcript p. 225). Ms. Matacic began screaming for help, ran to a nearby house, and called 911. Patrolman Wasko described Ms. Matacic after the event as "upset, red-faced, teary - - tears in her eyes. * * * Somewhat panicked." (Transcript p. 240).

{¶42} Appellant fled the scene. Neither the police nor the concerned neighbor could locate him. During his later interview at the sheriff's office, Deputy Molinatto testified that appellant acknowledged driving a blue truck. Appellant also acknowledged being in Champion Township on the morning at issue. However, appellant denied asking anyone for directions, indicating to Deputy Molinatto that he does not get lost. Appellant also denied leaving his vehicle or chasing anyone. Thus, the jury heard testimony regarding appellant's consciousness or awareness of guilt as well as statements which eroded his credibility.

{¶43} Ms. Matacic later met with CTPD officers. Sergeant White prepared a photo lineup. Ms. Matacic selected appellant from a six-person photo array with "one hundred percent" certainty. (Transcript p. 220). Sergeant White testified on cross-examination that photos of trucks that looked similar to the suspect vehicle were taken from Auto Trader. Sergeant White stated that Ms. Matacic initialed several photographs

that looked very similar to the truck that passed her and the truck that belonged to appellant.

{¶44} Appellant argues there is nothing in Ms. Matacic's testimony to substantiate the element of "force or threat" to remove her from the place where she was found. Although appellant did not physically constrain or touch Ms. Matacic, the evidence, as discussed, establishes that Ms. Matacic felt threatened by appellant's actions and commands.

{¶45} Appellant also argues the jury engaged in "pure speculation" in order to reach a guilty verdict. We disagree. As instructed by the trial court, "to infer, or to make an inference, is to reach a reasonable conclusion or deduction of fact which you may, but are not required to make from other facts which you find have been established by direct evidence. Whether an inference is made rests entirely with you. Direct and circumstantial evidence are of equal weight and probative value." (Transcript pp. 302-303).

{¶46} Thus, the jury was permitted to infer and did infer certain facts from the record. The only witness to testify under oath as to what occurred on May 17, 2015, around 9:30 a.m. on a Sunday morning on Airport Road was Ms. Matacic. Nothing in her testimony is vague or conflicting. The jury did not engage in unfounded speculation in finding Ms. Matacic's testimony more credible than appellant's out-of-court denials.

{¶47} Pursuant to *Schlee, supra*, there is sufficient evidence upon which the jury could reasonably conclude beyond a reasonable doubt that the elements of attempted abduction were proven. Thus, the trial court did not err in overruling appellant's Crim.R. 29 motion.

{¶48} Also, the jury chose to believe the state's witnesses. *DeHass, supra*, at paragraph one of the syllabus. Based on the evidence presented, as previously stated, we cannot say that the jury clearly lost its way in finding appellant guilty of attempted abduction. *Schlee, supra*, at *4-5; *Thompkins, supra*, at 387.

{¶49} Appellant's sufficiency and manifest weight arguments contained in his first and second assignments of error are without merit.

{¶50} In the remainder of appellant's second assignment of error, he alleges the trial court erred in failing to instruct the jury on the affirmative defense of attempt.

{¶51} Crim.R. 30(A) states in part: "[o]n appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection."

{¶52} "'Pursuant to (Crim.R. 30(A)), the failure to object to a jury instruction in a timely manner generally constitutes a waiver of any claimed error relative to the instructions. *State v. Holley* (Dec. 17, 1999), (11th Dist.) No. 98-A-0089, (* * *) 1999 Ohio App. LEXIS 6101, (at) 26, 1999 WL 1313667. Under Crim.R. 52(B), however, this court has the power to recognize plain error or defects involving substantial rights even if they are not brought to the attention of the trial court. *State v. Moreland* (1990), 50 Ohio St.3d 58, 62 (* * *).'

{¶53} "'In the context of a criminal case, a court of review should invoke the plain error doctrine with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *State v. Jenks* (1991), 61 Ohio St.3d 259, 282 (* * *); *State v. Long* (1978), 53 Ohio St.2d 91, * * *, paragraph three of the syllabus; *Holley* at

26. Thus, plain error does not exist unless, but for the error, the outcome of the proceeding would have been different. *Jenks* at 282 * * *; *Moreland* at 62 * * *; *Long* at paragraph two of the syllabus; *Holley* at 26-27.'

{¶54} "'Generally, "a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged(.)" *State v. Adams* (1980), 62 Ohio St.2d 151, 153 (* * *).'" (Parallel citations omitted.) *State v. Cobb*, 11th Dist. Portage No. 2007-P-0004, 2007-Ohio-5614, ¶21-23, quoting *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252, 2001 Ohio App. LEXIS 1122, at 16-19, 2001 WL 253048.

{¶55} In this case, appellant points out that the trial court read to the jury the elements of attempt. Appellant indicates, however, that the court did not read section (D) of R.C. 2923.02. Thus, appellant asserts the court erred by not including the following affirmative defense to the jury instruction on attempt:

{¶56} "(D) It is an affirmative defense to a charge under this section that the actor abandoned the actor's effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of the actor's criminal purpose."

{¶57} The record reveals that appellant never requested an R.C. 2923.02(D) instruction. Also, appellant made no objections with respect to the jury instructions given by the trial court. Defense counsel stated: "I have reviewed it. For the record, I make a generalized exception to it, but I have no particular objection." (Transcript p. 277).

{¶58} Based on Ms. Matacic's testimony, the only eyewitness testimony offered at trial, appellant never "abandoned" his attempt to abduct her. Rather, Ms. Matacic's testimony establishes that she merely outran him. In his statement to Deputy Molinatto, appellant denied the incident ever occurred. Appellant presented no evidence that he abandoned anything, failed to request the abandonment instruction, and failed to object with respect to the jury instructions given. The trial court did not commit plain error in this case.

{¶59} Appellant's jury instruction argument contained in his second assignment of error is without merit.

{¶60} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgments of the Trumbull County Court of Common Pleas are affirmed.

CYNTHIA WESTCOTT RICE, P.J.,

TIMOTHY P. CANNON, J.,

concurs.