[Cite as *State v. Oldaker*, 2017-Ohio-1201.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
MEIGS COUNTY

STATE OF OHIO,	:	Case No. 16CA3
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
GABRIEL C. OLDAKER,	:	**RELEASED: 3/21/2017**
Defendant-Appellant.	:	

APPEARANCES:

Angela Wilson Miller, Jupiter, Florida, for appellant.

James K. Stanley, Meigs County Prosecuting Attorney, and Jeremy L. Fisher, Meigs County Assistant Prosecuting Attorney, Pomeroy, Ohio, for appellee.

Harsha, J.

{¶1} After his conviction for kidnapping, Gabriel Oldaker's first assignment of error asserts that the trial court erred by denying his motion for a new trial. He claims that he should have received a new trial because: (1) the trial court erred by excluding the admission of an exhibit containing the victim's Facebook posts; and (2) the state failed to provide an unrelated inventory sheet of items seized from Oldaker's residence; that inventory did not include a gun, a fact Oldaker contends was important to his defense.

{¶2} However, even if the trial court's rationale for excluding the victim's Facebook posts was incorrect, the statements would not have been admissible because they constituted hearsay and were not necessarily inconsistent with the victim's trial testimony. More importantly, the trial court allowed the substance of the post into evidence during the cross-examination of the victim; and the victim's testimony was

corroborated by his cousin, as well as the testimony of a Meigs County Deputy Sheriff, and was never directly controverted. We conclude that any error was harmless.

{¶3} Despite Oldaker's claim that it was relevant, the police inventory of the items it seized from Oldaker's residence nearly three months after the kidnapping occurred was not materially exculpatory. The fact that there was no gun in his home three months later could not disprove that Oldaker had a gun in his possession on the date of the kidnapping. Therefore, there was no *Brady* error. We overrule Oldaker's first assignment of error.

{¶4} Next Oldaker contends that his convictions for kidnapping are not supported by sufficient evidence and are against the manifest weight of the evidence. But the victim and Michael Cremeans both testified that Oldaker held the victim at gunpoint and forced him to ride from Fisher's residence to the garage so that they could retrieve the car that Fisher sold to the victim. And a Deputy Sheriff testified that on the date that the offenses occurred, Oldaker called him and told him he had the victim and asked whether there were any outstanding warrants for him. After viewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found the state presented sufficient evidence of kidnapping.

{¶5} Moreover, because the jury was free to credit this same evidence, it did not clearly lose its way or create a manifest miscarriage of justice by finding that the state had proven the essential elements of kidnapping beyond a reasonable doubt. We reject Oldaker's claim contesting the sufficiency and manifest weight of the evidence, overrule his second assignment of error, and affirm his convictions.

I. FACTS

{¶6} The Meigs County Grand Jury returned an indictment charging Oldaker with two counts of kidnapping. Oldaker pleaded not guilty to the charges, and the case proceeded to a jury trial that produced the following evidence.

{¶7} The victim, Brandon Cremeans, purchased a car from Dewayne Fisher, but a dispute arose between them concerning the sale. Brandon's cousin, Michael, deceived Brandon into getting into a vehicle and drove him to Fisher's residence, where Fisher and Fisher's ex-wife blocked the vehicle in the driveway. Fisher and his ex-wife then approached the vehicle, and Fisher, who was armed with a rifle, demanded money that Brandon still owed him for the car, or the return of the car. Fisher took his rifle and slammed the muzzle into Brandon's eye, causing him severe injury that ultimately cost him his eye.

{¶8} According to the testimony of both Brandon and Michael, Oldaker, who was armed with a gun, arrived at Fisher's residence after Brandon had been assaulted. They testified that Oldaker forced Brandon into the front passenger seat of a vehicle. Oldaker sat right behind Brandon and pointed a gun at Brandon's head as they drove to JTS Automotive, a car-repair shop where Brandon was storing the car. After they let Brandon out in the garage, they hooked up the car and took it away.

{¶9} Ohio Bureau of Criminal Investigation ("BCI") Agent Michael Trout testified that he retrieved the videotape surveillance from the car-repair shop and identified Oldaker wearing gym shorts in the footage, but could not see Oldaker holding anything he could identify as a gun. Meigs County Deputy Sheriff Michael Hupp testified that he was an old family friend of Oldaker and that on the date in question, Oldaker called him and told him that "he had Brandon Cremeans" and asked him whether there were any

outstanding warrants for him. Deputy Sheriff Hupp told Oldaker that Hupp would meet him at Oldaker's house; once there Hupp informed Oldaker that there were no warrants for Brandon and that there was nothing he could do at the time. According to Hupp, he did not believe that a crime had occurred at that point.

{¶10} After Oldaker took the car away, Michael drove Brandon to get gas and then dropped him off outside a radio station, where he was picked up and taken to a hospital. Brandon lost his eye as a result of Fisher's assault.

{¶11} Michael conceded on cross-examination that he never advised the police that Oldaker was involved in the crimes against Brandon. He also acknowledged that he only agreed to testify against Oldaker on the day before trial as part of a plea bargain, which allowed him to plead guilty to possession of criminal tools, with kidnapping charges being dismissed. He testified that he did not previously tell the police about Oldaker because he was scared of him.

{¶12} During cross-examination Brandon Cremeans admitted that he had a Facebook page, which he created on his sister's ex-husband's cellular telephone when he lived with them in January or February of 2015. But he initially denied making a post about Oldaker:

> Q: * * * [D]id you ever make any posts or anything on facebook [sic] since this incident happened?
>
> A: I'm hardly ever on Facebook. I had some lady contact me, something about dating with my phone number and never talked to her a day in my life.
>
> BY ATTORNEY SAUNDERS: May I approach Your Honor?
>
> BY THE JUDGE: Sure. Has it been marked for identification.

Q: Yeah. Marked as Defendant's Exhibit 'A'. Can I show you, well I'll show you this um, I don't know if you recognize this first page?

A: Yeah, that's Gabe.

Q: Okay. Um, who's, who's that?

A: That's my facebook [sic].

Q: So that's your Facebook?

A: Yes sir.

Q: Cool. Um, so you wrote that?

A: No, I didn't.

Q: You didn't write it?

A: No.

{¶13} However, on further cross-examination, Brandon testified that the Facebook post stating that "if he didn't do it he still was with the guy who did" sounded familiar to him and came from his Facebook account:

Q: Well if it's your Facebook, who wrote it?

A: The only other person my phones logged in is Joe Walters, who is my sister's ex-husband.

Q: I thought you said you hadn't been with Joe since-

A: I haven't.

Q: How, how are you talking to people on Facebook and getting-

A: I don't. I've got a different profile.

Q: Well you just stated that this is your Facebook.

A: That is my Facebook. That's my, you see my picture?

Q: Yeah.

A: Yeah. That's my Facebook.

Q: Okay. Well you state right here or read, read what I'm underlining? What's, first or all, what's this post referring to?

A: I haven't read it. I don't know.

Q: I'll let you read it.

A: Evidently, it's about him not being a true military person.

Q: Will you read the underlined part?

A: He did even if he didn't do it, was still with the guy who did, so it sounds like a real hero.

Q: No further. Your Honor, may I read this into the record since it's what he read?

BY THE JUDGE: Uh, I think you can make it an Exhibit and it'll be.

BY ATTORNEY SAUNDERS: Okay. I'll ask a question from it?

BY THE JUDGE: Sure.

BY ATTORNEY SAUNDERS: Yeah, so what you read right there said, he did even if he didn't do it he still was with the guy who did. Does that sound familiar?

A: Sounds about right.

Q: And that's your Facebook?

A: My Facebook.

{¶14} At the close of the state's evidence, Oldaker rested. He attempted to introduce the Facebook page designated as Defendant's Ex. A into evidence:

THE COURT: * * * Defendant's Exhibit A, which is a Facebook page, I guess. Now let's hear arguments as to why Defendant's Exhibit A should come in. From Defense first.

ATTORNEY SAUNDERS: Yes, Your Honor. Uh I believe it is a question of fact for the jury. Mr. Cremeans admitted that it was his Facebook. After I showed it to him, he said "That's my Facebook." Uh he also uh changed

> his story after I showed it to him. Uh I think it is just an issue for the jury to weigh. They can consider it part of the credibility of the witness. Uh he did admit to it being his Facebook and admitted that his Facebook was password protected. And when I showed him it, he said "That's my Facebook." So, I would just make the argument that it is relevant to this case, * * * relevant to Defendant's innocence here and it's also a question that the jury should weigh and they could do so.
>
> THE COURT: State.
>
> ATTORNEY WILLIAMS: The Defendant (sic) indicated that it was not his Facebook. It has not been verified that… Or I'm sorry. He indicated that it is his facebook [sic] but that he did not post that. He also indicated that he… So it hasn't actually… It hasn't been verified from anyone that it was, in fact, who it was posted by.
>
> THE COURT: That's… As I recall, Mr. Cremeans stated "That's not mine. That's my Facebook, but I didn't do that."
>
> ATTORNEY SAUNDERS: Your Honor, I think with the testimony that Mr. Cremeans had, that's another issue for the jury to weigh. His story's changed several times.
>
> * * *
>
> THE COURT: * * * Defendant's Exhibit A will not be allowed over your objection.

{¶15} The jury returned a verdict finding Oldaker guilty of two counts of kidnapping for the incident where he removed Brandon at gunpoint from Fisher's residence and had him transported to the garage to retrieve the car.

{¶16} After being convicted but before sentencing, Oldaker filed a timely Crim.R. 33 motion for new trial in which he claimed that: (1) the trial court erred by excluding the Facebook posts in his Exhibit A from being considered by the jury; and (2) the state failed to provide exculpatory evidence in the form of a police return of a search conducted of his residence in an unrelated criminal case 87 days after the kidnapping

incident occurred. Because the return revealed that no gun was located in the search, Oldaker contended this was a *Brady* violation.

{¶17} At sentencing the trial court denied Oldaker's motion for a new trial. The trial court merged the kidnapping counts and sentenced Oldaker to a six-year prison term and three years of post-release control. This appeal ensued.

II. ASSIGNMENTS OF ERROR

{¶18} Oldaker assigns the following errors for our review:

> I. THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED TO THE PREJUDICE OF APPELLANT OLDAKER WHEN IT DENIED HIS MOTION FOR A NEW TRIAL. FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION; CRIM.R. 33.
>
> II. APPELLANT OLDAKER'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. THIS DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

III. LAW AND ANALYSIS

A. Motion for New Trial

1. Standard of Review

{¶19} The proper standard of review to be applied in reviewing a trial court's ruling denying a motion for new trial is dependent on the grounds raised. *See, e.g., State v. Campbell*, 4th Dist. Adams No. 13CA969, 2014-Ohio-3860, ¶ 10, citing *State v. Ogle*, 4th Dist. Hocking Nos. 11CA29, 11CA32, 12CA2, 12CA11, 12CA12, and 12CA19, 2013-Ohio-3420, ¶ 61-63 ("although the abuse-of-discretion standard of review is generally used in reviewing a trial court's ruling denying a motion for new trial, it is

inapplicable when material, exculpatory evidence is withheld by the prosecution in a criminal proceeding"); *State v. Johnson*, 1st Dist. Hamilton Nos. C-990482 and C-990483, 2000 WL 1714213, *6 (Nov. 17, 2000) ("Application of Crim.R. 33, which provides the particulars upon which a motion for a new trial may be brought, demand two standards of review depending upon the grounds relied upon by the movant").

{¶20} Oldaker claims that he was entitled to a new trial based on the trial court's error in excluding the admission of the exhibit containing Brandon Cremeans's Facebook posts. However, the trial court has broad discretion in the admission or exclusion of evidence; appeals of these decisions are reviewed under an abuse-of-discretion standard of review. *See State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 20, citing *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67, and *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, syllabus. " '[A]buse of discretion' [is] an 'unreasonable, arbitrary, or unconscionable use of discretion, or * * * a view or action that no conscientious judge could honestly have taken.' " *Kirkland* at ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23.

{¶21} Oldaker's claim that the trial court erred in granting his new trial because the state had not provided him with a copy of the police inventory of a search of his residence raises a question of law, which we review de novo. *See, e.g., Campbell* at ¶ 10, quoting *State v. Fox*, 2012-Ohio-4805, 985 N.E.2d 532, ¶ 28 (4th Dist.) (" 'Whether evidence is materially exculpatory is a question of law' ").

2. Exclusion of Facebook Posts

{¶22} First Oldaker claims that the trial court abused its discretion by denying his motion for new trial based on an error in excluding his exhibit containing Brandon's Facebook posts. The trial court excluded the exhibit containing Brandon's social media posts because he testified that the posts were not his, i.e., the exhibit was not in the court's view properly authenticated.

{¶23} "Facebook has been described as 'a widely-used social-networking website * * * that allows users to connect and communicate with each other.' " *State v. Gibson*, 6th Dist. Lucas Nos. L-13-1222 and L-13-1223, 2015-Ohio-1679, ¶ 34, quoting *Ehling v. Monmouth-Ocean Hosp. Service Corp.*, 961 F.Supp.2d 659, 662 (D.J.N.J.2013). Facebook users often post content on the user's profile page, which delivers it to the user's subscribers. *Gibson* at ¶ 35, citing *Parker v. State*, 85 A.3d 682, 686 (Del.2014). "These posts often include information relevant to a criminal prosecution: 'party admissions, inculpatory or exculpatory photos, or online communication between users.' " *Gibson* at ¶ 35, quoting *Parker* at 686. "Authentication concerns arise in regard to printouts from Facebook 'because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password,' and, consequently, '[t]he potential for fabricating or tampering with electronically stored information on a social networking [site]' is high." *Gibson* at ¶ 35, quoting *Griffin v. State*, 19 A.3d 415, 421 (Md.2011).

{¶24} In *Gibson* at ¶ 41, the Sixth District Court of Appeals detailed two different approaches by courts addressing the authentication requirement for the admissibility of evidence from social media networking websites like Facebook: (1) some courts do not

admit the social media evidence unless the court definitively determines that the evidence is authentic; and (2) other courts admit the social media evidence if there is sufficient evidence of authenticity for a reasonable jury to conclude that the evidence is authentic.

{¶25} Ohio Evid.R. 901 governs the authentication of demonstrative evidence, and the threshold for admission is very low, with the proponent of the evidence needing only to submit "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A); *State v. Vermillion*, 4th Dist. Athens No. 15CA17, 2016-Ohio-1295, ¶ 14 ("the threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low"). Consequently, " ' "the proponent must present foundational evidence that is sufficient to constitute a rational basis for a jury to decide that the primary evidence is what its proponent claims it to be." ' " *State v. Markins*, 4th Dist. Scioto No. 10CA3387, 2013-Ohio-602, ¶ 49, quoting *State v. Tyler*, 196 Ohio App.3d 443, 2011-Ohio-3937, 964 N.E.2d 12, ¶ 25 (4th Dist.), quoting *State v. Payton*, 4th Dist. Ross No. 01CA2606, 2002 WL 184922, *3 (Jan. 25, 2002); *Vermillion* at ¶ 14.

{¶26} Consistent with Ohio's low threshold for authenticity, the *Gibson* court adopted the "less stringent approach to authentication of social media," which provides for the admission of the evidence if there is sufficient evidence for the jury to determine that it is what its proponent claims. *Gibson*, 2015-Ohio-1679, at ¶ 47. We agree with the applicability of that approach here for the authentication of the exhibit containing Brandon Cremeans's Facebook posts.

{¶27} The trial court incorrectly excluded Oldaker's Exhibit A based on a rationale that there was insufficient evidence to establish that Brandon made the posts.

Although Brandon initially denied making the posts, he later conceded on cross-examination that a post on the exhibit sounded "right" when asked whether it was familiar to him and that it was from his Facebook account. Oldaker thus presented sufficient evidence from which the jury could have reasonably concluded that the proffered exhibit was what he claimed it to be: posts made by the crime victim—Brandon Cremeans—on his Facebook account.

{¶28} Nevertheless, " 'a reviewing court will not reverse a correct judgment merely because it is based on erroneous reasons.' " *State v. Marcum*, 4th Dist. Hocking No. 14CA13, 2014-Ohio-5373, ¶ 27, quoting *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 51. "In other words, we review the merits of a court's decision, not the rationale behind it." *See State v. Nguyen*, 4th Dist. Athens No. 14CA42, 2015-Ohio-4414, ¶ 31. Here we find no reversible error.

{¶29} First, insofar as Oldaker sought to admit the posts to prove the truth of the statements contained therein, they constituted inadmissible hearsay that are not excepted as admissions of a party-opponent. *See* Evid.R. 801(C), defining hearsay as "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and Evid.R. 802, providing that hearsay is generally inadmissible; *see also State v. McKelton*, __ Ohio St.3d __, 2016-Ohio-5735, __ N.E.3d __, ¶ 128, quoting 1 Giannelli, *Evidence*, Section 607.4, at 482-483 (3d Ed.2010) ("As a general rule, 'prior inconsistent statements constitute hearsay evidence and thus are inadmissible only for the purpose of impeachment' "); *State v. Williams*, 7th Dist. Mahoning No. 09 MA 11, 2010-Ohio-3279, ¶ 32 ("we hold

that a victim in a criminal case is not a party-opponent for purposes of Evid.R. 801(D)(2)"); *State v. Browning*, 12th Dist. Clermont No. CA94-02-22, 1994 WL 704903, *2 (Dec. 19, 1994) ("Out-of-court statements of a victim are not [admissible] statements of a party opponent" in a criminal case).

{¶30} Second, the admission of the Facebook posts to impeach Brandon's credibility was not proper. Evid.R. 613 governs the admissibility of extrinsic evidence of a witness's prior inconsistent statement, and in order to invoke it, "the prior statement must be inconsistent." *State v. Smith*, 8th Dist. Cuyahoga No. 103483, 2016-Ohio-5512, ¶ 14. Many of the statements in the posts contained in the excluded exhibit are irrelevant and not inconsistent with Brandon's trial testimony, i.e., whether Oldaker was "being a true military person." In fact, some of the posts on the proffered exhibit are not made by Brandon at all, but are merely ones that he allegedly responded to. (Deft. Ex. A) Oldaker does not assert on appeal how these posts are admissible.

{¶31} And even the more pertinent post in which Brandon allegedly stated "he did even if he didn't do it he still was with the guy who did" is not manifestly inconsistent with his trial testimony that Oldaker kidnapped him. In the proffered exhibit most of that language is prefaced by "he got punished for a crime he did." (Deft. Ex. A) The language of the post indicates the poster's belief that Oldaker remained guilty of kidnapping even assuming hypothetically that he did not personally perform some of the acts that day. For example, consistent with Brandon's testimony at trial, Oldaker did not feloniously assault him by hitting him in the eye with a rifle. But that did not preclude his conviction for kidnapping.

{¶32} Finally, we are not persuaded that Oldaker was prejudiced by the exclusion of the exhibit for purposes of impeachment. "The admission or rejection of evidence is not valid grounds for a new trial unless the defendant was prejudiced thereby." Katz, Martin, and Giannelli, *Baldwin's Ohio Practice Criminal Law*, Section 79:10 (3d Ed.2016); Crim.R. 33(E)(3) ("No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of: * * * [t]he admission or rejection of any evidence offered against or for any defendant, unless the defendant was or may have been prejudiced thereby"); *State v. Scott*, 4th Dist. Adams No. 05CA809, 2006-Ohio-3527, ¶ 17-18.

{¶33} The harmless-error rule is applicable to motions for new trial based on the admission or rejection of evidence. Katz, Martin, and Giannelli, *Baldwin's Ohio Practice Criminal Law*, at Section 79:10. Under the harmless-error analysis, the state bears the burden of demonstrating that the error did not affect the substantial rights of the defendant. *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, 28 N.E.3d 1256, ¶ 36. The Supreme Court of Ohio set forth a three-part test to determine whether an alleged error affected the substantial rights of the defendant and requires a new trial: "The reviewing court must ascertain (1) whether the defendant was prejudiced by the error, i.e., whether the error had an impact on the verdict, (2) whether the error was not harmless beyond a reasonable doubt, and (3) whether, after the prejudicial evidence is excised, the remaining evidence establishes the defendant's guilt beyond a reasonable doubt." *State v. Arnold*, 147 Ohio St.3d 138, 2016-Ohio-1595, 62 N.E.3d 153, ¶ 50, citing *Harris* at ¶ 37; *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 43 (4th Dist.).

{¶34} Applying these factors here, we find that any error could only be harmless beyond a reasonable doubt. First, during the victim's cross examination, the trial court permitted Oldaker to admit the substance of the Facebook post that he claimed contradicted Brandon's testimony. And Oldaker's trial counsel attacked Brandon's credibility with that post during closing argument. Second, Brandon's testimony that Oldaker held him against his will at gunpoint when he was forced to accompany Oldaker to the garage of the car-repair shop was uncontroverted. Moreover, it was corroborated by his cousin Michael's testimony, as well as Deputy Sheriff Huff's testimony that Oldaker phoned him and told him that he "had" Brandon. This testimony was never directly controverted at trial. Because of the overwhelming evidence of Oldaker's guilt and the fact that he was permitted to introduce the substance of the pertinent Facebook post in his attempt to impeach Brandon Cremeans on cross-examination, any error was harmless beyond a reasonable doubt, i.e., there was no reasonable possibility that the error contributed to his kidnapping convictions.

{¶35} Therefore, trial court did not abuse its broad discretion by denying Oldaker's motion for new trial insofar as it was based on the exclusion of the exhibit containing Facebook posts.

3. State's Failure to Provide the Return of an Unrelated Police Search

{¶36} Next Oldaker argues that the trial court erred in denying his motion for new trial, based on the state's failure to provide him with a copy of the inventory of the items seized in a search of Oldaker's residence during the investigation of Oldaker's unrelated drug crimes. He contends that this inventory sheet constituted exculpatory evidence because no gun was listed in the inventory of the search.

{¶37} "Due process requires that the prosecution provide defendants with any evidence that is favorable to them whenever that evidence is material either to their guilt or punishment." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, ¶ 30, citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 19 L.Ed.2d 215 (1963); *Fox*, 2012-Ohio-4805, 985 N.E.2d 532, at ¶ 25 ("A criminal defendant's due process right to a fair trial is violated when the prosecution withholds materially exculpatory evidence"). "Evidence is considered material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Brown* at ¶ 40, quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

{¶38} The inventory sheet was not materially exculpatory. It involved a search of Oldaker's residence 87 days after the kidnapping of Brandon Cremeans occurred. That investigation and search arose from an unrelated drug case against Oldaker. The mere fact that the police did not recover a gun from Oldaker's home three months after the kidnapping does not raise a reasonable probability that he could not have had one nearly three months earlier. In fact, both Brandon and Michael testified to the contrary that Oldaker held Brandon at gunpoint. The trial court did not err in determining that Oldaker was not entitled to a new trial on this basis. Because the trial court acted properly in denying Oldaker's motion for a new trial, we overrule his first assignment of error.

B. Sufficiency and Manifest Weight of the Evidence

1. Standards of Review

{¶39} In his second assignment of error Oldaker claims that his convictions for kidnapping should be reversed because they are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶40} "When a court reviews the record for sufficiency, '[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.' " *State v. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶41} "A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness." *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, ___U.S. ___, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶42} By contrast in determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v.*

Hunter, 131 Ohio St.3d 67, 2011-Ohio-6254, 960 N.E.2d 955, ¶ 119. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541.

{¶43} However, we are reminded that generally, the weight and credibility of evidence are to be determined by the trier of fact. *See Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, at ¶ 18.

2. The Kidnapping Convictions

{¶44} The jury convicted Oldaker of two counts of kidnapping in violation of R.C. 2905.01(B)(1) and (2) involving his holding of Brandon Cremeans at gunpoint while they retrieved his car from the garage of the car-repair shop. These sections provide:

> (B) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:
>
> (1) Remove another from the place where the other person is found;
>
> (2) Restrain another of the other person's liberty.

{¶45} Oldaker argues that his kidnapping convictions were not supported by sufficient evidence because he did not restrain Brandon, he did not deceive or trick Brandon into going to Fisher's house where the physical harm occurred, and he played no role in Fisher's felonious assault of Brandon.

{¶46} Oldaker's arguments are meritless. Both Brandon and Michael Cremeans testified that Oldaker held Brandon at gunpoint and forced him to ride with them from Fisher's residence to the garage so that they could repossess the car that Fisher had sold to Brandon. And Deputy Sheriff Huff testified that on that day, Oldaker called him and told him that he "had Brandon." This constituted sufficient evidence that Oldaker, by threat of force, knowingly, under circumstances that created a substantial risk of physical harm to Brandon, removed him from the place where he was found—the Fisher residence—and restrained him of his liberty. No evidence of deceit or a trick on his part was required to convict him of kidnapping because R.C. 2905.01(B) specifies that the offense may be committed by "force, threat, *or* deception." (Emphasis added.) And the mere fact that Oldaker may not have been involved in the felonious assault does not mean that he did not act "under circumstances that create a substantial risk of serious physical harm to the victim." He threatened Oldaker with a gun and although he had reason to believe that Brandon had been seriously injured, he continued to restrain him and deprive him of the opportunity to receive the immediate medical attention that his eye injury needed. After viewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of kidnapping proven beyond a reasonable doubt.

{¶47} Moreover, because the jury was free to credit this same evidence, it did not clearly lose its way or create a manifest miscarriage of justice by finding that the state had proven the essential elements of kidnapping beyond a reasonable doubt. Although Oldaker points to some evidence that supports his defense—Michael Cremeans's change of his story on the eve of the jury trial to identify Oldaker as the perpetrator of the kidnapping offenses, evidence that the video surveillance tape of the garage on the date in question could not definitively show whether Oldaker was armed with a gun, etc.—the jury was free to resolve any real or perceived conflicts in the evidence by crediting the state's evidence that supported the kidnapping convictions.

{¶48} Therefore, Oldaker's kidnapping convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. We overrule his second assignment of error.

IV. CONCLUSION

{¶49} We find no reversible error in Oldaker's kidnapping convictions and the trial court's denial of his motion for new trial. Having overruled his assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Meigs County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.