

[Cite as *State v. Urban*, 2009-Ohio-2789.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 08CA009396

Appellee

v.

CHARLES A. URBAN

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 08CR075148

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} A jury convicted Charles Urban of abducting Paul Brown and of having a weapon under disability. This Court affirms because his abduction conviction is supported by sufficient evidence and is not against the manifest weight of the evidence and because the trial court did not err by refusing to instruct the jury on unlawful restraint as a lesser included offense of abduction.

SUFFICIENCY

{¶2} The first part of Mr. Urban’s first assignment of error is that his abduction conviction is not supported by sufficient evidence. Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the

prosecution, it could have convinced an average juror of Mr. Urban's guilt beyond a reasonable doubt.

{¶3} The alleged victim in this case was a 68-year-old man named Paul Brown. Mr. Brown's 49-year-old girlfriend, Sandra White, lived with him in an apartment in Elyria. Although Mr. Brown did not use drugs, Ms. White did.

{¶4} Ms. White testified at trial that Mr. Urban had previously given her crack in return for her allowing him and a woman named Angelique to engage in sex at Mr. Brown's apartment. According to Ms. White, Mr. Urban had also used crack to pay Angelique for that sex.

{¶5} Ms. White testified that, on the night of the alleged abduction, Angelique had been at Mr. Brown's apartment and had made a number of telephone calls attempting to get Mr. Urban to come over and again give her crack for sex. She eventually gave up and left. But later, around 2:00 or 2:30 a.m., Mr. Urban showed up, accompanied by someone named Andrew Gray. Despite the fact that Angelique was no longer there, Mr. Urban gave Ms. White a piece of crack to smoke, and he, she, Mr. Gray, and another woman who was temporarily staying at the apartment sat around. Mr. Brown spent some of this time downstairs in a different room, but then went upstairs and watched a movie. According to Ms. White, at around 4:00 or 4:30 a.m., she asked Mr. Urban if he was going to give her any more crack and he said he was not. She testified that she then told him that there was a motel across the street where he could get a room for four hours for \$20 and she went upstairs.

{¶6} When she got upstairs, Mr. Brown asked her if Mr. Urban and Mr. Gray were still downstairs, and, when she told him they were, he got dressed and went down to tell them to leave. Ms. White apparently followed him downstairs. Mr. Brown testified that, when he told Mr. Urban and Mr. Gray to leave, Mr. Urban began yelling at him, using profanity, and refused

to go. The argument continued until Mr. Urban punched Mr. Brown in the face, knocking him down. Mr. Brown got up and tried to leave the apartment through a side door, but Mr. Urban blocked him from doing so. He got out the front door and headed for a neighbor's apartment to telephone police. But before he got there, Mr. Urban caught up with him, grabbed him by his shirt, hit him on the side of his head with a gun, and told him if he didn't return to his apartment he would kill him. They went back to the apartment. The other woman who was in the apartment testified that she saw a gun in Mr. Urban's hand when he and Mr. Brown returned to the apartment.

{¶7} While Mr. Brown and Mr. Urban were outside, Ms. White ran upstairs and used her cellular telephone to dial 911. When a dispatcher answered, Ms. White said that she needed help. Although she told the dispatcher the address of the apartment complex, she did not include the apartment number.

{¶8} When Mr. Urban got back in the apartment and discovered that Ms. White had gone upstairs, he went up after her. Ms. White hid the cell phone in her pants. He tore the upstairs landline phone from the wall and asked Ms. White whether she had called anyone, which she denied. He had the gun in his hand and told Ms. White to go downstairs.

{¶9} Police officers responded to the 911 call and began trying to determine which apartment it had come from. They saw a person moving around in Mr. Brown's apartment, but that person, apparently Mr. Gray, did not answer the door. They, therefore, focused their attention on that apartment.

{¶10} In the meantime, although it is unclear whether it was before or after the police arrived, Mr. Urban "pushed" Mr. Brown and Ms. White into the bathroom with him and "held"

them there. Mr. Brown began having “very sharp” chest pains and thought he was having a heart attack.

{¶11} According to Ms. White, as the police were trying to get into the apartment, Mr. Urban gave her his remaining crack and told her to hide it. She concealed it in her vagina. He also told her to do something with the gun, and she put it on top of the water heater in the bathroom. Mr. Urban then allowed her to open the door and let the police in.

{¶12} As mentioned previously, Mr. Urban was convicted of abduction. Under Section 2905.02(A)(2) of the Ohio Revised Code, a person commits abduction if he “[b]y force or threat, restrain[s] the liberty of another person under circumstances that create a risk of physical harm to the victim or place the other person in fear.” If Mr. Brown’s, Ms. White’s, and the other woman’s testimony is believed, that testimony could convince a reasonable juror that Mr. Urban initially restrained Mr. Brown from leaving the apartment through the side door, that Mr. Urban then restrained Mr. Brown as he attempted to go to his neighbor’s apartment, striking him with the handgun and threatening to kill him, and then restrained both Mr. Brown and Ms. White in the bathroom. The evidence that was before the trial court, therefore, was sufficient to convict Mr. Urban of abduction.

MANIFEST WEIGHT

{¶13} The second part of Mr. Urban’s first assignment of error is that his abduction conviction is against the manifest weight of the evidence. When a defendant argues that his conviction is contrary to the weight of the evidence, this court must review and weigh all the evidence that was before the trial court: “[A]n 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 and a new trial ordered.” *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶14} Mr. Urban has attacked the credibility of Ms. White’s and Mr. Brown’s testimony by pointing out that Ms. White was an admitted drug user and that Mr. Brown allowed her to use drugs in his apartment.

{¶15} The only evidence that Mr. Urban presented at trial was Mr. Gray’s testimony. Mr. Gray testified that he and Mr. Urban had returned to Elyria from being in Cleveland and were drinking at a restaurant at the Elyria Mall when “a woman named Sandy” telephoned Mr. Urban and invited them to Mr. Brown’s apartment for drinks. He said they took a taxi to the apartment and drank a beer with Ms. White and the woman who was staying at the apartment. According to Mr. Gray, Ms. White began flirting with Mr. Urban and that eventually led to her performing fellatio on him. Mr. Gray claimed that Mr. Brown awoke and walked in on Ms. White and Mr. Urban and that Mr. Brown and Ms. White began arguing. He testified that he and Mr. Urban agreed to leave and began making telephone calls looking for someone to pick them up. He said that they eventually found someone who was going to come for them. Apparently, the police arrived before their ride did.

{¶16} Mr. Gray denied that Mr. Urban had struck Mr. Brown or chased him down as he tried to go to a neighbor’s apartment. He claimed he never knew of Mr. Urban either using or selling drugs. He also denied seeing a gun on the night of the alleged abduction until after the police arrived. On cross-examination, he acknowledged that he and Mr. Urban had been friends for seven or eight years.

{¶17} This Court cannot conclude that the jury lost its way and created a manifest miscarriage of justice by accepting Mr. Brown’s and Ms. White’s testimony and rejecting Mr.

Gray's testimony. It could have taken into account Mr. Gray's long friendship with Mr. Urban and concluded that, as a result, his testimony was not credible. It also could have disbelieved his testimony because he denied seeing Mr. Urban strike Mr. Brown, but a police officer testified that Mr. Brown had a large mark on the right side of his face and the State introduced a photograph taken that night that showed that mark. Mr. Urban's conviction is not against the manifest weight of the evidence, and his first assignment of error is overruled.

LESSER INCLUDED OFFENSE

{¶18} At the close of the evidence, Mr. Urban requested the trial court to instruct the jury on the crime of unlawful restraint as a lesser included offense of abduction. His second assignment of error is that the trial court incorrectly refused to provide that instruction.

{¶19} As mentioned previously, abduction, as prohibited by Section 2905.02(A)(2) of the Ohio Revised Code, is the unlawful restraint of a person's liberty under circumstances that create a risk of physical harm or place a person in fear through the use of force or threat of force. Unlawful restraint, in violation of Section 2905.03(A) of the Ohio Revised Code, is the knowing restraint, without privilege, of a person's liberty. Mr. Urban would have been entitled to an instruction on unlawful restraint if the evidence would have reasonably supported an acquittal on the abduction charge but a conviction for unlawful restraint. *State v. Conway*, 108 Ohio St. 3d 214, 2006-Ohio-791, at ¶133 (quoting *State v. Thomas*, 40 Ohio St. 3d 213, paragraph two of the syllabus (1988)). The issue presented by this assignment of error then is whether the evidence before the jury would have supported a conclusion that Mr. Urban knowingly restrained Mr. Brown, but did it without the use of force or threat and without either causing a risk of physical harm to him or placing him in fear.

{¶20} Mr. Brown, Ms. White, and the other woman all testified that Mr. Urban had a gun. Mr. Brown testified that Mr. Urban hit him with the gun when he caught up with him outside the apartment and told him that if he didn't go back to the apartment he would shoot him. Ms. White testified that she first saw the gun in Mr. Urban's hand when he came upstairs to get her after he brought Mr. Brown back from outside. The other woman testified that she saw the gun in Mr. Urban's hand when he brought Mr. Brown back from outside. In contrast, Mr. Gray denied that Mr. Urban had a gun and denied that he went outside to chase Mr. Brown down and return him to the apartment.

{¶21} If the jury had believed Mr. Gray's testimony rather than that of Mr. Brown, Ms. White, and the other woman, it could have reasonably acquitted Mr. Urban of abduction, concluding that he had not restrained Mr. Brown in any way. It could not have reasonably acquitted him of abduction and also convicted him of unlawful restraint, however, because there was no evidence that Mr. Urban restrained Mr. Brown other than through the use of force or threat and did it in a way that would not have caused a risk of physical harm or placed him in fear. For example, there was no evidence that Mr. Urban waited until Mr. Brown had gone into the bathroom and then locked the door from the outside, thereby restraining him without the use of force or threat of force in such a way that would not have put him at risk for physical harm or placed him in fear. The trial court did not err by refusing to instruct the jury on unlawful restraint as a lesser included offense of abduction, and Mr. Urban's second assignment of error is overruled.

CONCLUSION

{¶22} Mr. Urban's abduction conviction is supported by sufficient evidence and is not against the manifest weight of the evidence, and the trial court did not err by refusing to instruct

the jury on unlawful restraint. Mr. Urban's assignments of error are overruled and his convictions are affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
WHITMORE, J.
CONCUR

APPEARANCES:

J. ANTHONY RICH, attorney at law, for appellant.

DENNIS P. WILL, prosecuting attorney, and SHERRY GLASS, assistant prosecuting attorney, for appellee.