

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070070
	:	TRIAL NO. B-0606944
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
BRYAN HOARD,	:	
	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Bryan Hoard was indicted for two counts of aggravated burglary,² two counts of kidnapping,³ and theft of a motor vehicle.⁴ Following a jury trial, an acquittal was entered for one count of kidnapping and for theft of a motor vehicle. Hoard was convicted of the remaining charges and sentenced to a total of nine years' imprisonment. He now appeals, raising four assignments of error. For the following reasons, we affirm the trial court's judgment.

Hoard twice burglarized the apartment of his ex-girlfriend, Kanisha Hodrick—on July 19, 2006, and on July 27, 2006. His current paramour testified that Hoard was with her at the time of the burglaries, and that Hodrick had sent a

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 2911.11(A)(1).

³ R.C. 2905.01(A)(3).

⁴ R.C. 2913.02(A)(1).

text message to Hoard's cellular phone on July 19, 2006, insinuating that she was going to "frame" him for stealing from her and hitting her. But Hodrick testified that the first time Hoard forced his way into her apartment by breaking the safety chain on her front door, he had taken her cellular phone and had created and sent that text message to his cellular phone.

Hodrick further testified that after Hoard had forced his way into her apartment, he had grabbed her by the hair and ordered her to stay in her bedroom. When she attempted to leave, he shoved her onto the floor. Hodrick testified that Hoard then found some lighter fluid and threatened to burn the apartment down with them in it if Hodrick attempted to leave again.

Eventually Hoard indicated that if Hodrick would give him bus fare, he would leave. She did not have any money so they used her car to drive to the nearest convenience store. Hodrick entered the store by herself to use the automated teller machine. Hoard and Hodrick returned to Hodrick's apartment, but Hoard again refused to leave, insisting that Hodrick drive him to his sister's house. She refused, and Hoard grabbed her neck and pushed her onto the bed. Hoard then left the bedroom. At that time, Hodrick found her cellular phone and called her mother, who lived down the block. Her mother arrived and called the police. Hoard then gathered some things in a bag and left on his bicycle.

Colerain Township Police Officer Christopher Phillips, who had responded to the mother's call, testified that he saw the front door's broken chain lying on the floor. He testified that he did not remember seeing lighter fluid in the apartment.

On cross-examination, Hodrick admitted that she had sent a text message to Hoard after this incident, telling him that she had aborted his baby. She said that she was never pregnant, but wanted to “hurt” Hoard.

On July 26, 2006, Hodrick testified that she was sitting on the toilet in her bathroom, talking on the phone and running water for a bath, when she heard a “boom.” She testified that Hoard had forced open the back sliding-glass door, come into the bathroom, and hit her face. She testified that she fell over and that he continued hitting her. She testified that she was bleeding from the mouth. Hoard then took a butcher knife from the kitchen and threatened to kill them both “if he was going to jail.” Eventually, Hoard used bleach to clean up the blood in the bathroom and then took Hodrick’s car keys and left. Once she was certain that he was gone, Hodrick testified, she ran to her mother’s residence.

Kelly White, the woman whom Hodrick was speaking to on the telephone when Hoard burst into the bathroom, called the police. She testified that she had been talking to Hodrick when Hodrick told her to call 911. White said that she then heard the phone drop. White testified that she saw Hodrick later that night, and that Hodrick was visibly upset, her face was cut, and there was blood on her shirt.

Colerain Township Police Officers Chris Cullman and Steve Karwisch responded to the scene. Officer Cullman testified that Hodrick’s face was swollen under her right eye, and Officer Karwisch testified that the patio door to Hodrick’s apartment was forced off the track and wedged open several feet. He also testified that he smelled an odor of bleach in the apartment. Neither officer could remember Hodrick telling them that Hoard had wielded a knife.

In his first assignment of error, Hoard contests the sufficiency and weight of the evidence underlying his convictions. In the review of the sufficiency of the evidence to support a conviction, the relevant inquiry for the appellate court “is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”⁵ To reverse a conviction on the manifest weight of the evidence, a reviewing court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and conclude that, in resolving the conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice.⁶

A review of the record demonstrates that this case was decided on the basis of credibility—whom the jury believed. Thus, Hoard’s main argument in support of his assignment is that Hodrick had been lying and that the text message that she had allegedly sent to him proved this. But given that a jury is free to believe all, part, or none of a witness’s testimony, we cannot say that the trier of fact lost its way in resolving conflicts in the evidence so that Hoard’s convictions created a manifest miscarriage of justice. Further, we hold that there was sufficient evidence presented to support the convictions for the aggravated burglaries. The state presented evidence that Hoard had entered Hodrick’s apartment by force on two separate occasions and each time threatened to inflict or inflicted physical harm on Hodrick. On the first occasion, Hoard broke the chain on Hodrick’s front door, shoved her, and threatened to burn down her apartment. On the second occasion, Hodrick wedged open the sliding glass door and punched Hodrick in the face.

⁵ *State v. Waddy* (1992), 63 Ohio St.3d 424, 430, 588 N.E.2d 819.

⁶ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

Finally, there was sufficient evidence underlying the kidnapping charge. R.C. 2905.01(A)(3) provides in part that “no person, by force, threat, or deception * * * shall * * * restrain the liberty of the other person * * * to terrorize * * * the victim.” Here, Hodrick testified that on July 27, 2006, after Hoard had forcefully entered her apartment and punched her, he then retrieved a knife and threatened to kill them both, effectively restraining Hodrick from leaving the apartment. Accordingly, the first assignment of error is overruled.

In his second assignment of error, Hoard contends that the trial court erred by allowing the state to make improper closing arguments. Specifically, Hoard cites the prosecutor’s comments inviting the jury to imagine what the victim had felt by placing themselves in the “victim’s shoes.” Because Hoard failed to object to these comments, we review for plain error.⁷ Plain error is only present when, but for the error, the outcome of the trial would have been different.⁸

After reviewing the record, we hold that these comments did not amount to plain error. Assuming *arguendo* that the comments were in error, they did not change the outcome of the trial. In fact, the comments appeared to have no effect whatsoever on the trial, in light of the fact that Hoard was acquitted of the kidnapping charge based on the events that had taken place on July 19, 2006. When making the comments, the prosecutor had been explaining why Hodrick had failed to alert anyone in the convenience store that she was being held against her will. The second assignment of error is overruled.

In the third assignment of error, Hoard maintains that he was improperly convicted and sentenced for the kidnapping and the second aggravated burglary, as

⁷ *State v. Smith*, 168 Ohio App.3d 141, 2006-Ohio-3720, 858 N.E.2d 1222, at ¶103.

⁸ See *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

these were allied offenses. We overrule this assignment of error on the authority of *State v. Sheppard*,⁹ where we held that aggravated burglary and kidnapping are not allied offenses of similar import.¹⁰ Applying the test set forth in *State v. Rance*,¹¹ we noted in *Sheppard* that it is possible to commit aggravated burglary without restraining a person and that, conversely, it is possible to kidnap a person without trespassing into an occupied structure.¹²

Finally, in his last assignment of error, Hoard argues that his trial counsel was ineffective for failing to object to improper comments during closing arguments by the prosecutor. But reversal of a conviction based upon the ineffective assistance of counsel requires a showing by the defendant that his counsel's performance was deficient and that he was prejudiced by the deficiency.¹³ Assuming *arguendo* that the prosecutor's remarks were improper, we cannot say that Hoard was prejudiced by his counsel's failure to object. The prosecutor's comments were aimed at establishing a crime that Hoard was ultimately acquitted of—the first count of kidnapping. Accordingly, we overrule Hoard's fourth assignment of error and affirm the judgment of the trial court.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and CUNNINGHAM, JJ.

To the Clerk:

Enter upon the Journal of the Court on April 9, 2008
per order of the Court _____.
Presiding Judge

⁹ 1st Dist. Nos. C-060042 and C-060066, 2007-Ohio-24.

¹⁰ Id. at ¶6; see, also, *State v. Reynolds*, 80 Ohio St.3d 670, 682, 1998-Ohio-171, 687 N.E.2d 1358.

¹¹ 85 Ohio St.3d 632, 638, 1999-Ohio-291, 710 N.E.2d 699.

¹² *State v. Rance*, 85 Ohio St.3d 632, 638, 1999-Ohio-291, 710 N.E.2d 699.

¹³ *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.