

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

STATE OF OHIO,	:	APPEAL NO. C-080518
	:	TRIAL NO. B-0701472A
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
CARSON JONES,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 21, 2009

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *James Michael Keeling*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Christine Y. Jones*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

**DINKELACKER, Judge.**

{¶1} Defendant-appellant, Carson Jones, appeals a conviction for kidnapping under R.C. 2905.01(A)(3). We find no merit in his eight assignments of error, and we affirm the trial court's judgment.

***I. Facts and Procedure***

{¶2} The state's evidence showed that, on a snowy day in February 2007, Mikhail Hicks and his girlfriend, Ashley Oliver, visited Ashley's mother's house. There, they saw Jack Oliver, Ashley's brother, and Jones, Jack's friend. Jones was a longtime friend of Ashley's family. Her mother described him as a "stepson," saying that she had "practically raised him"

{¶3} After the visit, Hicks and Ashley left in Hicks's car. They did some shopping and went out to eat. As they were returning to Ashley's apartment, she received a call from Jack asking where they were and telling her that he was dropping off her car at the apartment.

{¶4} As they turned into the driveway of Ashley's apartment building, Jack charged out of the front door of the building and began screaming and banging on the trunk of Hicks's car. He yelled for Hicks to pull in the back. Jones watched from the doorway of the apartment building.

{¶5} Hicks drove around to the back of the building. He and Ashley got out of the car and asked what was going on. Jack told Hicks to "shut up and cooperate." He ordered Hicks to get into the trunk of the car. Jones then walked to the back of the apartment complex and joined the attack.

{¶6} Hicks argued, stating that he was not getting in the trunk. Jack and Jones kept yelling for him to get into the trunk, while Ashley was crying and asking what

was going on. At some point, Jack went into Hicks's car and got the keys. He then opened the trunk and ordered Hicks to get in. When Hicks again refused, he opened his coat to reveal an assault rifle.

{¶7} After being threatened with the gun, Hicks got into the trunk of the car and Jack closed the trunk. Jack and Jones got into Hicks's car and drove away. Hicks used his cellular phone to call Ashley and asked her to call the police. But Hicks had no idea where he was, and his phone battery died after he had made another 911 call.

{¶8} After riding around for several hours, Jack drove to a wooded area and stopped the car. He and Jones got out and opened the trunk. This time, Jones was holding the gun. Jack asked Hicks if he was ready. Hicks asked, "Ready for what?" Jack responded, "Are you ready to die?"

{¶9} Jack and Jones again closed Hicks in the trunk and continued to drive. While they were driving, Hicks was able to open the trunk with a pair of pliers. He bailed out of the moving car and tried to run away. But Jack and Jones soon caught him again.

{¶10} This time, Jack and Jones ordered Hicks to lie on the back floorboard of the car. After driving a while longer, they stopped the car and ordered Hicks to kneel on the back seat. They covered his head and began choking him with string or wire. Hicks passed out and awoke several times. Each time he awoke, they beat him and strangled him with the wire until he lost consciousness again.

{¶11} The final time he awoke, Hicks was alone. He staggered out of the car, bleeding from the neck. Strangers found him and helped him to a nearby apartment, where he called Ashley. Ashley came to get him and called an ambulance. Hicks's injuries required nearly 200 stitches in his neck.

{¶12} While Hicks was in the hospital, Officer William Young, an investigator for the Cincinnati Police Department, brought Hicks a photographic lineup. Hicks identified both Jack and Jones as his attackers. Police detectives tried to contact Jones, but they could not find him.

{¶13} The next morning, Jones came to a police station and told the officers that he had heard that the police were looking for him. Detective Robert Harold read Jones his rights under *Miranda v. Arizona*<sup>1</sup> and interviewed him. Jones told Detective Harold that he had been present at the initial abduction at Ashley's apartment building, and that he had seen Jack with a gun. He claimed that he had been a bystander, not an active participant.

{¶14} At trial, Jones presented an alibi defense. He presented two witnesses who testified that he had been elsewhere at the time of the offenses. He also attacked Hicks's credibility, pointing out numerous inconsistencies in Hicks's testimony. Specifically, Jones questioned Hicks about an earlier court hearing in which Hicks had stated that neither Jones nor Jack Oliver had done anything to him. Hicks contended at trial that he had been threatened and had been afraid at the earlier hearing when he recanted, but that Jack and Jones had been his attackers.

{¶15} Jones was originally charged with one count of attempted murder,<sup>2</sup> two counts of felonious assault,<sup>3</sup> and two counts of kidnapping.<sup>4</sup> The jury acquitted him of all charges except one count of kidnapping. The trial court sentenced him to serve eight years' imprisonment on that count. This appeal followed.

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<sup>1</sup> (1966), 384 U.S. 436, 86 S.Ct. 1602.

<sup>2</sup> R.C. 2923.02(A) and 2903.02.

<sup>3</sup> R.C. 2903.11(A)(1) and 2903.11(A)(2).

<sup>4</sup> R.C. 2905.01(A)(2) and 2905.02(A)(3).

**II. Statements to Police**

{¶16} For clarity, we address Hicks’s assignments of error out of order. In his eighth assignment of error, he contends that the trial court erred in overruling his motion to suppress his statements to the police. He argues that his statements were not made voluntarily because the police continued to question him even though they knew that he had been drinking alcohol and smoking marijuana. This assignment of error is not well taken.

{¶17} Appellate review of a motion to suppress presents a mixed question of law and fact. We must accept the trial court’s findings of fact as true if competent, credible evidence supports them. But we must independently determine whether the facts satisfy the applicable legal standard.<sup>5</sup>

{¶18} This assignment of error involves two distinct issues: (1) whether Jones knowingly, intelligently, and voluntarily waived his *Miranda* rights; and (2) whether his statements were voluntary under the Due Process Clause of the United States Constitution. We analyze both issues using a totality-of-the-circumstances test.<sup>6</sup>

{¶19} We begin with the *Miranda* analysis. The state bears the burden to prove by a preponderance of the evidence that the accused knowingly, voluntarily, and intelligently waived his *Miranda* rights. Courts will not presume a waiver just because the accused responded to the interrogation.<sup>7</sup>

{¶20} A suspect makes his decision to waive his Fifth Amendment privilege voluntarily absent evidence that his will was overborne or that his capacity for self-

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<sup>5</sup> *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶8; *State v. Taylor*, 174 Ohio App.3d 477, 2007-Ohio-7066, 882 N.E.2d 945, ¶11.

<sup>6</sup> *State v. Eley*, 77 Ohio St.3d 174, 178, 1996-Ohio-323, 672 N.E.2d 640; *State v. Burton*, 1st Dist. No. C-080173, 2009-Ohio-871, ¶9.

<sup>7</sup> *State v. Edwards* (1976), 49 Ohio St.2d 31, 37-38, 358 N.E.2d 1051, vacated as to death penalty (1978), 438 U.S. 911, 98 S.Ct. 3147; *Burton*, supra, at ¶10.

determination was critically impaired because of coercive police misconduct.<sup>8</sup> “Once it is determined that a suspect’s decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State’s intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.”<sup>9</sup>

{¶21} Under the due-process analysis, the prosecution must prove by a preponderance of the evidence that a confession was voluntary.<sup>10</sup> “In deciding whether a defendant’s confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of the interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.”<sup>11</sup> A finding of coercive police activity is necessary to a determination that a confession was involuntary within the meaning of the Due Process Clause.<sup>12</sup>

{¶22} Jones argues that the police continued to question him even though he had been drinking alcohol and smoking marijuana. Intoxication, in and of itself, is not sufficient to render a confession involuntary.<sup>13</sup> Detective Harold testified at the suppression hearing, that Jones had mentioned that he had been drinking and smoking. But the detective further testified that he had been seated close to Jones and that he had not smelled any odor of an alcoholic beverage. He stated, “Based on that I didn’t smell or detect the odor, [Jones] didn’t have any slurred speech or anything, I figured he was

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<sup>8</sup> *State v. Dailey* (1990), 53 Ohio St.3d 88, 559 N.E.2d 459, paragraph two of the syllabus; *Burton*, supra, at ¶11.

<sup>9</sup> *Dailey*, supra, at 91, quoting *Moran v. Burbine* (1986), 475 U.S. 412, 422-423, 106 S.Ct. 1135.

<sup>10</sup> *Lego v. Twomey* (1972), 404 U.S. 477, 489, 92 S.Ct. 619; *Burton*, supra, at ¶12.

<sup>11</sup> *Edwards*, supra, paragraph two of the syllabus.

<sup>12</sup> *Colorado v. Connelly* (1986), 479 U.S. 157, 167, 107 S.Ct. 515; *State v. Combs* (1991), 62 Ohio St.3d 278, 285, 581 N.E.2d 1071; *Burton*, supra, at ¶12.

<sup>13</sup> *Eley*, supra, at 178-179; *State v. Slaughter* (Apr. 28, 2000), 1st Dist. No. C-980702.

functioning okay.” The trial court believed this testimony. In a hearing on a motion to suppress, matters as to the credibility of witnesses are for the trier of fact to decide.<sup>14</sup>

{¶23} In this case, Jones came to the police station voluntarily and was not in custody at the time of the interview. But Detective Harold read him his rights anyway. Jones was willing to talk to the police. He told them that he had nothing to hide, and that he had not been involved in any crime. The interrogation was not long or protracted, and the record does not show any coercive police activity.

{¶24} Thus, the record shows that the state proved by a preponderance of the evidence that Jones had knowingly, voluntarily, and intelligently waived his Fifth Amendment rights, and that his statements had been voluntary under the Due Process Clause. Consequently, the trial court did not err in overruling his motion to suppress his statements to the police, and we overrule his eighth assignment of error.

### **III. Mistrial**

{¶25} In his first assignment of error, Jones contends that the trial court erred in overruling his motions for a mistrial. He argues that the jury was influenced by events outside the courtroom, and that a state’s witness improperly testified about his criminal history. This assignment of error is not well taken.

{¶26} The decision whether to grant a mistrial lies within the trial court’s discretion. A trial court should not order a mistrial merely because an error or irregularity has occurred, unless it affects the defendant’s substantial rights.<sup>15</sup> The court should declare a mistrial “only when the ends of justice so require and when a fair trial is no longer possible.”<sup>16</sup>

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<sup>14</sup> *State v. Fanning* (1982), 1 Ohio St.3d 19, 20, 437 N.E.2d 583; *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶37.

<sup>15</sup> *State v. Sage* (1987), 31 Ohio St.3d 173, 182, 510 N.E.2d 343; *Williams*, supra, at ¶50.

<sup>16</sup> *State v. Brewster*, 1st Dist. Nos. C-030024 and C-030025, 2004-Ohio-2993, ¶67, quoting *State v. Broe*, 1st Dist. No. C-020521, 2003-Ohio-3054, ¶36.

{¶27} The record shows that the jurors sent a note to the trial court after an incident that had occurred as they were leaving one night after the courthouse had officially closed. They had asked for a safer way to exit or an escort out of the building.

{¶28} The trial court individually questioned each of the jurors about what had occurred. They stated that they had been coming down the stairs when they had heard a commotion. The bailiff escorting them had told them to wait at the bottom of the stairs. They waited for a while, but they never received an explanation of what was occurring.

{¶29} Some of the jurors saw Hicks running from a security guard. Other security guards aimed a Taser at him and asked him to leave. He left without further incident. Then, the jurors were told that they could leave. As they left through the side security entrance, they heard arguing among some people who had been spectators at the trial. One woman told another woman named Ashley to “be quiet.” One juror told the court that a man in the group had spit in her direction. She thought that the spitting was on purpose, but she was not sure.

{¶30} Jones moved for a mistrial based on these incidents. The trial court overruled the motion, and under the circumstances, we cannot hold that the trial court erred. Many of the jurors did not see much of the incident. They all testified that it would not affect their judgment, and that they could still be fair and impartial. Further, most of what occurred reflected badly on the victim and his wife, not on Jones. The court’s decision to overrule the motion was not so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.<sup>17</sup>

{¶31} Jones again moved for a mistrial later in the trial. The trial court had ruled that references to Jones’s criminal history were not admissible into evidence. The state had been careful not to refer at all to Jones’s criminal history. But in his testimony,

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<sup>17</sup> See *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331.

Detective Harold discussed the procedure for doing a photographic lineup. He referred to getting photographs of people “in the system,” although he never specified which system. He also briefly mentioned that Jones had gotten out of the penitentiary.

{¶32} The trial court overruled Jones’s motion for a mistrial based on Detective Harold’s testimony. The court asked if Jones wanted a curative instruction. Jones replied that he did. After consulting with Jones’s attorney about the language, the court instructed the jury to “disregard any testimony about any jail time served by the defendant.”

{¶33} Detective Harold’s brief references to using photographs of people “in the system” to set up a photographic lineup and to Jones getting out of the penitentiary were not sufficient to deny Jones a fair trial, particularly given that he was acquitted of most of the charges against him. Further, a curative instruction is an appropriate remedy for inadvertent answers from a witness to an otherwise innocent question.<sup>18</sup> In this case, the trial court gave a curative instruction after consulting with Jones, and we presume that the jury followed that instruction.<sup>19</sup> We cannot hold that the trial court abused its discretion in overruling Jones’s motion for a mistrial based on Detective Harold’s comments. Consequently, we overrule his first assignment of error.

#### **IV. Prior Consistent Statements**

{¶34} In his second assignment of error, Jones contends that the trial court erred in allowing the state to play for the jury prior, recorded statements of both Hicks and Ashley. He argues that those statements were not admissible as prior consistent

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<sup>18</sup> *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶33-35; *State v. Mobley*, 2nd Dist. No. 18878, 2002-Ohio-1792.

<sup>19</sup> *State v. Garner*, 74 Ohio St.3d 49, 59, 1995-Ohio-168, 656 N.E.2d 623; *State v. Vanover* (Sept. 29, 2000), 1st Dist. No. C-990104.

statements under Evid.R. 801(D)(1)(b) because no express or implied charge of recent fabrication had been made. This assignment of error is not well taken.

{¶35} Evid.R. 801(D)(1)(b) provides that a statement is not hearsay if “the declarant testifies at a trial or hearing and is subject to cross-examination concerning the statement, and the statement is \* \* \* consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]” Ohio courts have interpreted this rule to include only those prior consistent statements that have been made before prior inconsistent statements or before any motive to falsify testimony.<sup>20</sup> In determining whether to admit a prior consistent statement, a trial court should take a “generous view” of “the entire trial setting to determine if there was sufficient impeachment to amount to a charge of fabrication or improper influence or motivation.”<sup>21</sup>

{¶36} At trial, on cross-examination of both Hicks and Ashley, defense counsel implied repeatedly that they were lying. Counsel cross-examined Hicks at length about his recanting at a pretrial hearing and about statements he had made to Jones’s former attorney. Defense counsel also implied that Ashley had changed her testimony about the incident to include Jones, when, at first, she had only implicated Jack. Her previous taped statement rebutted that claim.

{¶37} Thus, sufficient impeachment occurred to amount to a charge of fabrication at trial. Under Evid.R. 801(D)(1)(b), the taped statements were not hearsay, and the trial court did not err in admitting them into evidence.<sup>22</sup> We overrule Jones’s second assignment of error.

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<sup>20</sup> *State v. Burrell*, 1st Dist. No. C-030803, 2005-Ohio-34, ¶17.

<sup>21</sup> *State v. Grays*, 12th Dist. No. CA2001-02-007, 2001-Ohio-8679; *State v. Lopez* (1993), 90 Ohio App.3d 566, 578, 630 N.E.2d 32.

<sup>22</sup> See *State v. Moore*, 3rd Dist. Nos. 1-06-89 and 1-06-96, 2007-Ohio-3600, ¶65; *State v. Townsend*, 8th Dist. No. 87521, 2006-Ohio-5457, ¶59.

**V. Prosecutorial Misconduct**

{¶38} In his third assignment of error, Jones contends that the prosecutor made improper comments during closing argument. He argues that the prosecutor improperly stated that defense counsel had tried to hide a witness's dishonesty, mischaracterized a witness's testimony, testified as to what she saw outside the courtroom, and made speculative statements not supported by the evidence. Therefore, Jones insists, the prosecutor denied him a fair trial. This assignment of error is not well taken.

{¶39} Prosecutors are normally entitled to wide latitude in their remarks.<sup>23</sup> The test for prosecutorial misconduct is (1) whether the remarks were improper, and (2) if so, whether the remarks affected the accused's substantial rights.<sup>24</sup> The conduct of the prosecuting attorney during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial.<sup>25</sup>

{¶40} In this case, some of the prosecutor's remarks were improper. But the trial court sustained objections to those remarks and instructed the jury to disregard them. We presume that the jury followed those instructions.<sup>26</sup> Otherwise, the prosecutor's arguments were fair comments on the evidence. The record does not show that the prosecutor's remarks affected Jones's substantial rights or denied him a fair trial. Consequently, we overrule his third assignment of error.

**VI. Weight and Sufficiency**

{¶41} In his fourth assignment of error, Jones contends that the evidence was insufficient to support his conviction. In his sixth assignment of error, he contends that

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<sup>23</sup> *State v. Mason*, 82 Ohio St.3d 144, 162, 1998-Ohio-370, 694 N.E.2d 932; *Williams*, supra, at ¶49.

<sup>24</sup> *State v. Lott* (1990), 51 Ohio St.3d 160, 165, 555 N.E.2d 293; *Williams*, supra, at ¶49.

<sup>25</sup> *State v. Keenan* (1993), 66 Ohio St.3d 402, 405, 613 N.E.2d 203; *Williams*, supra, at ¶49.

<sup>26</sup> *Garner*, supra, at 59; *Vanover*, supra.

the trial court erred in overruling his Crim.R. 29(A) motion for an acquittal, which is the same as a claim that the evidence was insufficient to support the conviction.<sup>27</sup> These assignments of error are not well taken.

{¶42} R.C. 2905.01(A)(3) provides that “[n]o person, by force, threat, or deception, \* \* \* shall remove another from the place where the person is found or restrain the liberty of the other person \* \* \* [t]o terrorize, or to inflict serious physical harm on the victim or another.” Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of this offense.<sup>28</sup>

{¶43} Jones’s main argument is that Hicks and Ashley’s testimony was not credible, but matters as to the credibility of evidence are for the trier of fact to decide.<sup>29</sup> The jury was free to believe some, all, or none of any witness’s testimony.<sup>30</sup> Jones also argues that no physical evidence connected him to the crime. But no rule of law exists that a witness’s testimony must be corroborated by physical evidence.<sup>31</sup> Consequently, we overrule Jones’s fourth and sixth assignments of error.

{¶44} In his fifth assignment of error, Jones contends that his conviction was against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse his conviction and order a new trial. Therefore, his conviction was not

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<sup>27</sup> *Brewster*, supra, at ¶73.

<sup>28</sup> See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Platt*, 10th Dist. No. 03AP-1148, 2005-Ohio-705, ¶27-30.

<sup>29</sup> *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116; *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824, ¶23.

<sup>30</sup> *Williams*, supra, at ¶45.

<sup>31</sup> *State v. Byrd*, 1st Dist. No. C-050490, 2007-Ohio-3787, ¶34.

against the manifest weight of the evidence.<sup>32</sup> We overrule Jones's fifth assignment of error.

### **VII. Sentencing**

{¶45} In his seventh assignment of error, Jones contends that his sentence was excessive. Following *State v. Foster*,<sup>33</sup> trial courts have full discretion to impose sentences within the statutory range for the crimes committed.<sup>34</sup> Kidnapping under R.C. 2905.01(A)(3) is a first-degree felony, and the eight-year sentence was within the statutory range for that level of offense.<sup>35</sup> The trial court based the sentence on Jones's extensive criminal history. Jones has failed to demonstrate that the sentence was so arbitrary, unreasonable, or unconscionable as to connote an abuse of discretion.<sup>36</sup> We, therefore, overrule Jones's seventh assignment of error.

### **VIII. Summary**

{¶46} In sum, we overrule Jones's eight assignments of error. We affirm his conviction for kidnapping under R.C. 2905.01(A)(3).

Judgment affirmed.

**HENDON, P.J., and SUNDERMANN, J., concur.**

*Please Note:*

The court has recorded its own entry this date.

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<sup>32</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *Williams*, supra, at ¶47; *Platt*, supra, at ¶15.

<sup>33</sup> 109 Ohio St.3d 1, 2008-Ohio-856, 845 N.E.2d 470.

<sup>34</sup> Id. at paragraph seven of the syllabus; *State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, ¶42.

<sup>35</sup> R.C. 2905.01(C)(1) and 2929.14(A)(1).

<sup>36</sup> See *Clark*, supra, at 470.