

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-0179

STATE OF OHIO

APPELLEE

V

GUY KRUPA

APPELLANT

CASE NO:

ON APPEAL FROM THE
MAHONING COUNTY COURT OF
APPEALS, SEVENTH APPELLATE
DISTRICT CASE NO. 2009 MA 135

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT GUY KRUPA

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JAN 31 2011
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FILED
JAN 31 2011
CLERK OF COURT
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**EXPLANATION OF GREAT PUBLIC OR GENERAL INTEREST
WHY SUBSTANTIAL CONSTITUTIONAL QUESTIONS ARE INVOLVED**

Guy Krupa saw a young girl walking by railroad tracks along a heavily traveled road in the middle of the afternoon. She looked distraught and appeared to be talking to the railroad tracks. He stopped to ask if she needed help or needed a ride. When the girl said no, Mr. Krupa drove away. The trial court concluded "there was absolutely no force, no weapon, no threat, no physical violence, no threat of harm." The Court of Appeals concluded Appellant "did not use any violence, compulsion, or constraint" against the girl and that he "never touched" her "Nor did he attempt to touch, reach for, or grab" the girl. "He never brandished a weapon. And at oral argument, the state agreed that Appellant did not use force." Moreover, the Court of Appeals rightly held that "The evidence is clear that appellant never made any direct threats" against her and never indicated to her "that there would be any consequences if she refused to get into his car." *State v. Krupa*, 2010 Ohio 6268, 2010 Ohio App. LEXIS 5245. Despite this consensus regarding the evidence, the lower courts have permitted Mr. Krupa's attempted abduction conviction to stand and he faces a one year prison sentence.

Abduction and attempted abduction cases are emotionally charged. But courts are to act as guardians of individual rights to ensure convictions in emotionally charged cases are obtained only upon proof beyond a reasonable doubt as to each element of the offense. *In re Winship* (1970), 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368; *State v. Nucklos*, 121 Ohio St. 3d 332, 2009 Ohio 792, 904 N.E.2d 512; *State v. Manley*, 71 Ohio St.3d 342, 346, 1994 Ohio 440, 643 N.E.2d 1107, citing *Mullaney v. Wilbur* (1975), 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508. Because our justice system operates on a respect for the legal system rather than on force of arms, the system can continue to

serve the public only for as long as it continues to earn and enjoy the public's confidence. It is for this very reason that the Due Process Clause permits criminal convictions only if there is proof beyond a reasonable doubt; no lesser standard of proof will suffice. In *Winship*, the Supreme Court clearly delineated the import of the rationale of proof beyond a reasonable doubt:

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S., at 364.

This Court should accept jurisdiction of this case because the issues involved are of great general public interest and also involves substantial constitutional questions. At issue are the fundamental rights that are the foundation of the criminal justice system; that a person may not be convicted except upon proof beyond a reasonable doubt as to each element of an offense and that the courts are to function as the guardian of individual rights.

Indeed, the stringent standard of proof is not the only safeguard designed to insure a just and reliable outcome. One of those safeguards is the sufficiency of the evidence standard. This standard insures the reliability of criminal convictions by insuring that trial juries are insulated from the possibility of returning a conviction upon something less than proof of every element of an offense. OHIO CRIM. R. 29's

prophylactic method installs a trial judge as a gatekeeper to prevent unjust convictions.

In construing the *Winship* mandate in the context of a sufficiency of the evidence challenge, the Supreme Court explained that courts are required to guard against what occurred in this case—a conviction obtained when there is no evidence from which a rational trier of fact could find guilt beyond a reasonable doubt:

The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A “reasonable doubt,” at a minimum, is one based upon “reason.” Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. *Glasser v. United States*, 315 U.S. 60, 80; *Bronston v. United States*, 409 U.S. 352. See also, e. g., *Curley v. United States*, 81 U. S. App. D. C. 389, 392-393, 160 F.2d 229, 232-233. Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand.

Jackson v. Virginia (1979), 443 U.S. 307, 316-318, 99 S. Ct. 2781, 61 L. Ed. 2d 560.

(Footnotes omitted.) When, as a matter of law, the evidence is legally insufficient to support a conviction, the trial court is obliged to preserve this fairness and to avoid the risk of erroneous, unsubstantiated convictions, and remove the case from the jury’s consideration. That did not occur here.

The reliability of verdicts and the public’s right to express confidence in those verdicts would be washed away if a trial judge fails in that role and permits even the possibility that a trial jury will return a criminal conviction where there is entirely lacking evidence of one or more of the elements of an offense.

Here, two tribunals found no evidence of an essential element of attempted abduction. The trial judge specifically found that there was no evidence of force or of

a threat, a necessary element required for a valid conviction. The Court of Appeals likewise found no evidence of force or threats. That Court chose instead to create the artifice of an "implicit threat." The Court of Appeals defined "threat" as "an expression of intention to inflict evil, injury, or damage." Although there was no evidence that Appellant expressed any intention to "inflict evil, injury or damage," the Court of Appeals concluded that the statement, "get in the f-ing car" was circumstantial evidence of an implicit threat! Construing the evidence of a "threat" in a light most favorable to the State, there was no threat as the court of Ohio have employed that term. Certainly because the Court invented the "implied threat" element after the trial, Appellant had no meaningful opportunity to defend against such an "element" of the offense.

To create this artifice of an implied threat simply so that a conviction can be affirmed denies the person who has been charged and convicted the constitutional right to remain free of the conviction except upon proof beyond a reasonable doubt as to each element, and therefore this case presents a substantial constitutional question. Of equal importance, this case is one of great general or public interest because the public, not just the court system itself, must have confidence in the results that the system produces, be they verdicts of conviction or verdicts of acquittal. The artifice of an implied threat created by the Court of Appeals here erodes that confidence, and makes this case one of great general or public interest.

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE:

On April 13, 2009 Guy Krupa (hereinafter "Appellant"), a United States Air Force veteran, was en route to Home Depot to compare prices on supplies for a neighbor's home repair project. While traveling on Southern Boulevard, a heavily

traveled street in Boardman Township, Appellant saw a young girl walking along the railroad tracks. She was pointing her finger and talking as if to be saying something to the railroad tracks. The girl, B.S., a fourteen year old autistic girl, was walking to her friend's house. It was approximately 3:20 p.m.; traffic on Southern Boulevard was heavy. Appellant believed that the girl needed help. He pulled along the edge of the road, rolled down his window, and asked if the girl if she was okay. He then asked her if she needed a ride or needed help. When she said she did not need help or a ride, Appellant drove away and B.S. walked away. Although B.S. met her friend a short time later, she made no effort to get help or to call the police.

Kathryn White had been traveling behind Appellant on Southern Boulevard.. White called the police because she was concerned. Officer O'Grady responded to the scene. He interviewed B.S. and White. The initial reports indicated Appellant pulled off the road, yelled out his window and then drove away. No one reported that Appellant used any curse words. No reports of threats or force were made. There were no reports of any effort to grab B.S. There were no reports that Appellant opened his door. All that was reported was that Appellant stopped, talked to B.S., and drove away. By all reports, when B.S. declined the offer for help, Appellant drove away.

On June 11, 2009 Appellant was indicted via direct presentment by the Mahoning County Grand Jury. The one count indictment charged Appellant with attempted abduction in violation of Ohio Rev. Code §2905.02(A)(1) a felony of the fourth degree. On July 13, 2009, the morning of trial, the State moved to amend the indictment because Ohio Rev. Code §2905.02(A)(1)(B) required the State to prove the attempted abduction was done with sexual motivation, of which there was absolutely nothing to support such charge. The State was permitted to amend the indictment

charging Appellant with attempted abduction pursuant to Ohio Rev. Code §2905.02(A)(1)(C). The State presented testimony of B.S., White, Officer O'Grady, Amy Slaven Cartwright, B.S.'s mother, and Detective Doug Flara who investigated the case. O'Grady testified as to what was reported to him immediately after the incident. There were inconsistencies in B.S.'s and White's initial reports to the police and their trial testimony. At trial, for the first time B.S. claimed Appellant made three (3) statements to her; did she need help, did she need a ride, and get in the f-ing car. She told Appellant no thank you, at which time he backed up and told her to get in the car. B.S. testified she simply walked away .

There were major inconsistencies between B.S.'s and White's testimony. B.S. testified Appellant never opened the passenger door. Although never reported to the police, White claimed at trial that Appellant opened his passenger door. B.S. claimed Appellant backed up, but White testified he could not back up because he would have hit her car. However, by *all* accounts given both at the scene and at trial, when B.S. declined any help or offer for a ride, she walked away and there was no effort to stop her from doing so.

Appellant testified that when he saw B.S. walking along the tracks she appeared to be pointing at the tracks and talking to the tracks. He asked her three questions, are you okay; do you need any help; do you need a ride. When she said no, he put on his blinker and left. The entire event lasted less than 30 seconds.

At the conclusion of the State's case, Appellant made a motion pursuant to Ohio Crim. R. 29. After reviewing the testimony that Appellant told B.S. to get in the "f-ing car" the trial court concluded "that's certainly not force. It doesn't appear to the Court to be force, because force is defined." The trial court specifically found no threats

either: "The statutory definition of threat is that it include a direct or indirect threat sufficient to overcome the will of the victim. There's no evidence that the Defendant acted in any way to overcome the will of the victim. . ." Despite these findings, that there was no evidence to support the statutory definition of force or threat, the trial court denied Appellant's Rule 29 motion.

Appellant was convicted of attempted abduction. Thereafter, a written Motion for Judgment of Acquittal or Motion for New Trial was filed.. At the hearing on the motions, the trial court noted that the State had presented improper, inflammatory comments by beginning opening statements and closing arguments with the comment that Appellant was "every parent's worst nightmare. . ."

At the trial the state opened its case with a remark that the court felt was inappropriate and prejudicial to the defendant in his first statement in opening statement. An opening statement is designed to inform the jury of what the evidence will show or what it will not show. And, instead, the prosecutor opened with a line I believe it was that this defendant is every parent's worst nightmare, an inappropriate statement in opening, perhaps an appropriate statement in a closing arguments.

The trial court noted the inconsistencies between the two accounts from B.S. and White and emphasized how the trial testimony was not consistent with the initial reports to the police. The trial court specifically concluded it had "trouble in my mind believing that force or a threat was used against the victim" that "even if the victim's account is true" he had trouble understanding how threat was present. The trial court then offered the following: "My difficulty with this whole thing I suppose is, my duty of course is to see to it that justice is done, and I don't know that I would have convicted the defendant on the charges—or on the charge made here from a legal perspective." Despite these findings, the trial court denied the Appellant's motion for acquittal. On August 12, 2009 Appellant's sentencing hearing was conducted and the trial court

again found “absolutely no force, no weapon, no threat, no physical violence, no threat of harm.” Yet, despite these findings, the trial court sentenced Appellant to twelve months in prison. A timely appeal was filed with the Seventh District Court of Appeal and a stay of the sentence obtained. The Court of Appeals concluded that Appellant “did not use any violence, compulsion, or constraint against B.S.” and that “The evidence is clear that appellant never made any direct threats against B.S. He never indicated to B.S. that there would be any consequences if she refused to get into his car” “Appellant never touched B.S. Nor did he attempt to touch, reach for, or grab B.S. He never brandished a weapon. And at oral argument, the state agreed that appellant did not use force. Instead, it argued that appellant used an ‘implicit threat of force.’” The Court of Appeals affirmed the conviction finding the phrase “get in the f—ing car” was an “implicit” threat. The State failed to offer any evidence that Appellant used force or any threats as required to prove attempted abduction. As such Appellant’s conviction should have been vacated.

ARGUMENT:

Appellant was convicted of attempted abduction in violation of Ohio Rev. Code Ann. §2905.02 (A)(1) which defines abduction as follows:

(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;

The State was required to present evidence that Appellant knowingly used force or threats in an attempt to remove B.S. from the place where she was found. Ohio law defines force as “any violence, compulsion, or constraint physically exerted by any means upon or against a person.” Ohio Rev. Code §2901.01(A). The State presented

no evidence Appellant employed any violence, compulsion, or constraint physically exerted and further presented no evidence of any threats, Appellants conviction should have been reversed.

Proposition of Law No. 1

A conviction not supported by sufficient evidence as to each statutory elements violates U.S. Const., amend. XIV and Ohio Const., art. I, §§1, 2, and 16.

Due process requires the State prove every element of an offense beyond a reasonable doubt. *In re Winship, supra*. When, as a matter of law, the evidence is legally insufficient to support a conviction, the trial court is required to remove the case from the jury's consideration. This due process guarantee in these circumstances is enforced by Rule 29 of the Ohio Rules of Criminal Procedure which provides:

(A) Motion for judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

In *State v. Scott*, 101 Ohio St.3d 31, 2004 Ohio 10, 800 N.E.2d 1133, this Court emphasized that a claim of insufficient evidence “invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law.” *Id.*, at 36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541. *Scott* reaffirmed that “the 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.” *Id.* at 37, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, syl. ¶2, following *Jackson v. Virginia, supra*. *Thompkins* delineated

the well-known standard for a sufficiency of the evidence challenge. Here, the trial court did in fact review the evidence and concluded that “I don’t know that I would have convicted the defendant on the charges— or on the charge made here from a legal perspective.” The trial court’s denial of the Rule 29 motion undermines public confidence in its justice system.

The United States Court of Appeals for the Sixth Circuit addressed the issue of force or threats under Ohio’s abduction statute and found, under virtually identical circumstances, that the evidence was insufficient to support an attempted abduction charge. *United States v. Griffith* (6th Cir.2006), 193 Fed. Appx. 538, 2006 WL 2456950. In *Griffith*, the defendant was arrested on suspicion of attempted abduction. When arrested the police conducted a search of the defendant’s home which culminated in the defendant being charged with other crimes. Griffith challenged his arrest based upon lack of probable cause. The District Court found that the arrest of the defendant on the attempted abduction was lawful. The Sixth Circuit reversed, finding no probable cause to arrest the defendant for attempted abduction. In determining the facts did not support probable cause for the arrest for attempted abduction, the Court in *Griffith* reviewed the account provided by the witness, an account virtually identical to this case: A witness observed Griffith approach Wilcox, a 9 year old girl from his car. The witness said that the girl was carrying an umbrella and that when the Griffith spoke to the girl, she pointed the umbrella at him and used it to “try to avoid” him. Griffith drove away without ever leaving his car. Immediately after the incident, the witness spoke with the girl who told him that the defendant “tried to get her into his car.”

The Sixth Circuit concluded the facts did not support attempted abduction under Ohio law because there was no evidence of force or threats and thus, there was no

probable cause to arrest the defendant for attempted abduction:

Although probable cause does not require proof of each element of an offense, it does require a belief that the arrestee "probably" committed the offense, *Thacker v. City of Columbus*, 328 F. 3d 244, 256 (6th Cir. 2003) -- which obviously entails the presence of each offense element. See *Be Vier v. Hucal*, 806 F.2d 123, 126-27 (7th Cir. 1986)(no probable cause existed when the offense required knowing or willful conduct, and arresting officer had no knowledge as to knowingness or willfulness and took no action to obtain such information from readily-available sources).

We hold that the information the police had, even taking Wilcox's hearsay statements at face value (as the police were entitled to do in light of his status and the statements' inherent plausibility), did not present evidence of the use of force or threats that would warrant a man of reasonable caution in believing that a crime had been committed. Neither Wilcox's own observation nor his relation of the girl's statements indicated that any physical interaction had taken place between Griffith and the girl, or that any such interaction had even been possible. At most, Wilcox's statement could sustain a belief that a conversation had taken place between the two, and that Griffith had in some way solicited (or been perceived to solicit) further social or even sexual interaction.

Wilcox's statement, however, offers scant support for a belief that Griffith had used force or threats. The only phrases that could even conceivably be interpreted as meeting this statutory element of attempted abduction were that the girl "tried to avoid him" with her umbrella, and stated that Griffith had "tried to get her inside of his car." In light of the clear evidence that any 'avoiding' or attempts to get the girl into the car were not physical (because Griffith never got out of the car), Wilcox's statement cannot reasonably be interpreted to imply that threats were being made, as opposed to the much stronger implication that the girl simply indicated her lack of interest in Griffith by cutting off visual contact with him through an interposition of her umbrella. In light of the absence of any other corroborating or incriminating information, a very strained interpretation of this hearsay language cannot support the existence of probable cause.

Id at 541. The facts in *Griffith* were incredibly similar to the evidence in this case. Even accepting B.S.'s account, all that is present here is Appellant telling her to get in the "f—ing car." It was accompanied by nothing to cause apprehension. B.S. simply walked away. The trial court, upon finding no evidence of force and no evidence that any threats were used, should have granted the Rule 29 motion. The Court of Appeals creation of an implicit threat is not supported by the evidence and is a distortion of the

statutory elements required to convict for attempted abduction. In construing a statute, it is the duty of the court to give effect to the words used in a statute, not to insert words not used. *State v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319.

Proposition of Law No 2

A criminal conviction without an evidentiary basis is against the manifest weight of the evidence denies a criminal defendant due process and the fair trial with results reliably determined as secured by violates U.S. CONST. amend. VIII and XIV and OHIO CONST. art. I, §§1, 2, 9, and 16 the Ohio Constitution.

A reviewing court can reverse a verdict when there is not substantial evidence from which the trier of fact can reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394. In *Apanovitch*, this Court adopted eight factors to determine if a verdict is against the manifest weight of the evidence. *Id.*, 33 Ohio St.3d 23-24. As set forth above, there was no evidence presented that Appellant used any force or threats, and the Court of Appeals employed the artifice of an implied threat, something the statute does not permit. The trial court was cognizant of and emphasized the inconsistencies between B.S. and White's statements, inconsistencies between the police reports and what was offered at trial, and the fact that several items were simply not credible. The trial court concluded that testimony at trial was "absolutely the opposite of what was reported to the police." B.S. never told the police Appellant used any swear words. Southern Boulevard is a heavily traveled road such that the trial court had difficulty believing the exchange occurred as reported. B.S. made no effort to seek help or call the police after Appellant drove away. These inconsistencies and unreliable accounts, coupled with the fact that there was no evidence of force or threats render the verdict unreliable. The verdict certainly does not attain "the high degree of

probative force and certainty required of a criminal conviction.” *State v. Tibbetts* (2001), 92 Ohio St.3d 146, 163, 749 N.E.2d 226, quoting *State v. Getsy* (1998), 84 Ohio St.3d 180, 193, 702 N.E.2d 866. Under the factors set forth in *Aponovich*, Appellant’s conviction must be vacated in that it is against the manifest weight of the evidence

Proposition of Law 3:

Inflammatory remarks in opening statements and closing arguments, combined with disparaging comments regarding defense counsel undermine the ability of a jury to decide a case objectively as to deny a defendant a fair trial demanded by U.S. CONST., amend. XIV and by OHIO CONST., art. I, §§1, 2, and 16.

Given the lack of evidence, inflammatory comments designed to appeal to passion and emotion are an affront to Due Process, though they do explain a conviction in this case. The State began the trial by telling the jury that Appellant was “every parent’s worst nightmare.” Trial counsel failed to object to the statement, but the trial court specifically found the remark “inappropriate and prejudicial.” Yet, no action was taken to instruct the jury or admonish the prosecutor. The same comment was made during closing arguments.

The prosecutor exacerbated the effects of this misconduct by characterizing defense counsel’s actions during cross examination as “disingenuous.” The trial court did intervene to advise the prosecutor that he could not characterize what defense counsel did, but no curative instruction was given to the jury. The record shows nothing disingenuous by counsel and reveals the comment as one designed to disparage defense counsel.

The United States Supreme Court has noted the impact of personal attacks upon the fairness of the trial:

The prohibition of personal attacks on the prosecutor is but a part of the

larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal

United States v. Young (1985), 470 U.S. 1, 10, 105 S.Ct. 1038; 84 L. Ed.2d 1. The touchstone is the "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78.

In a case where the facts did not support the charge against Appellant, the prosecutor did exactly what should not be done: he started the trial with inflammatory remarks designed to poison the minds of the jury against Appellant before the jury heard any evidence in order to improperly prejudice Appellant in the eyes of the jurors. Worse, the improper comments were uttered without objection, Appellant was denied the effective assistance of counsel. See, U.S. CONST., amend. VI and XIV; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Trial counsel should have objected, but whether he did or not, trial judges have an obligation that stems from the Due Process Clause to see to it that proceedings are not infected with unfairness. See, e.g., *State v. Lane* (1979), 60 Ohio St.2d 112, 397 N.E.2d 1338. Appellant's conviction should have been vacated.

Conclusion:

We live in a society where people are afraid to render aid or assistance. The nightly news, newspapers and countless magazine styled television shows all routinely carry stories of appalling incidents where someone was in need of help and everyone went about their business. Appellant did not do that and he now faces one year in prison. Appellant's conviction for attempted abduction should have been vacated. The

lack of evidence on each statutory element, coupled with the improper comments by the prosecutor, taints the verdict and denies the high degree of reliability required for a criminal conviction. This Court should accept jurisdiction and vacate his conviction with an opinion that restores confidence in the judiciary and reiterates that crimes are statutory in Ohio. Courts may not add elements or change them.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify a copy of the foregoing was sent regular U.S. Mail this 30th day of January, 2011 to Assistant Mahoning County Prosecutor Ralph Rivera, Esq. 21 W. Boardman Street, Youngstown, Ohio 44503


Lynn Maro

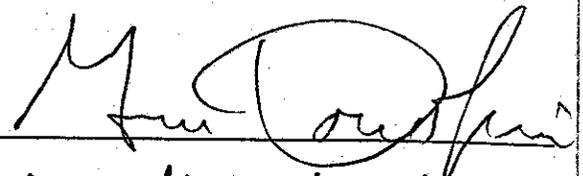
APPENDIX A

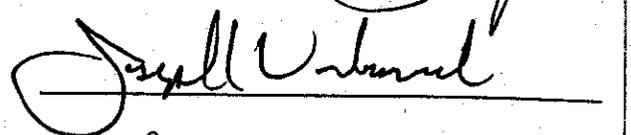
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STATE OF OHIO)
) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT
STATE OF OHIO,)
)
 PLAINTIFF-APPELLEE,)
)
 VS.) CASE NO. 09-MA-135
)
 GUY KRUPA,) JUDGMENT ENTRY
)
 DEFENDANT-APPELLANT.)

For the reasons stated in the opinion rendered herein, appellant's three assignments of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio, is affirmed. Prior stay order vacated and set aside.

Costs taxed against appellant.







JUDGES.

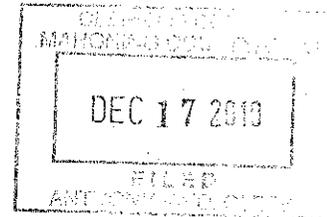


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APPENDIX B

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT



STATE OF OHIO,)
)
 PLAINTIFF-APPELLEE,)
)
 VS.)
)
 GUY KRUPA,)
)
 DEFENDANT-APPELLANT.)

CASE NO. 09-MA-135

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 09CR651

JUDGMENT: Affirmed

APPEARANCES:
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JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: December 17, 2010

DONOFRIO, J.

{¶1} Defendant-appellant, Guy Krupa, appeals from a Mahoning County Common Pleas Court judgment convicting him of attempted abduction, following a jury trial, and the resulting sentence.

{¶2} At approximately 3:30 p.m. on April 13, 2009, 14-year-old B.S. was walking down Southern Boulevard on her way to a friend's house. While en route, B.S. encountered appellant. Appellant was driving north on Southern Boulevard when he noticed B.S.. According to appellant, B.S. appeared troubled. He pulled over to the side of the road and asked B.S. if she was ok and if she needed a ride. B.S. told him she did not need a ride. According to B.S., appellant then pulled into the grass in front of her in an attempt to cut off her path and told her to get into the "f-ing" car. She stated he did this twice and she refused. B.S. stated that another car driven by Kathryn White then pulled up and appellant drove away. According to White, she noticed that B.S. appeared to be afraid of appellant as she had watched the exchange between B.S. and appellant. She followed appellant when he drove away, wrote down his license plate number, and called the police.

{¶3} A Mahoning County grand jury indicted appellant on one count of attempted abduction, a fourth-degree felony in violation of R.C. 2905.02(A)(1)(B) and R.C. 2923.02(A). With the court's permission, plaintiff-appellee, the State of Ohio, later amended the charge to a violation of R.C. 2905.02(A)(1)(C), also a fourth-degree felony.

{¶4} The matter proceeded to a jury trial on July 13, 2009. At the close of the state's case, appellant moved for a judgment of acquittal, which the court denied. The jury returned a guilty verdict.

{¶5} Appellant filed a motion for judgment of acquittal or, in the alternative, for a new trial. He alleged that the evidence was insufficient to sustain a conviction. Specifically, appellant asserted that the state failed to prove that he acted purposely or that he used force or the threat of force to attempt to remove the victim from the place where she was found. The trial court denied the motion.

{¶16} The court subsequently sentenced appellant to 12 months in prison.

{¶17} Appellant filed a timely notice of appeal on August 14, 2009. After a denied request in the trial court, this court granted appellant a stay of execution of his sentence pending this appeal.

{¶18} Appellant raises three assignments of error, the first of which states:

{¶19} "APPELLANT'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND THE TRIAL COURT ERRED IN OVERRULING THE MOTIONS FOR ACQUITTAL PURSUANT TO OHIO CRIM.R. 29."

{¶110} Appellant argues that the evidence was insufficient to support his conviction. He points out that he never left his vehicle, there was no evidence of a threat of force, and he never used any force. Appellant asserts that even taking B.S.'s testimony as true, the most that occurred was that he told her to get into the "f-ing car" and then she walked away.

{¶111} Crim.R. 29(A) provides that, "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses."

{¶112} An appellate court reviews a denial of a motion to acquit under Crim.R. 29 using the same standard it uses to review a sufficiency of the evidence claim. *State v. Rhodes*, 7th Dist. No. 99-BA-62, 2002-Ohio-1572, at ¶9; *State v. Carter* (1995), 72 Ohio St.3d 545, 553.

{¶113} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the 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. *Smith*, 80 Ohio St.3d at 113.

{¶14} Appellant was convicted of attempted abduction in violation of R.C. 2905.02(A)(1) and R.C. 2923.02(A). The abduction statute provides:

{¶15} "(A) No person, without privilege to do so, shall knowingly do any of the following:

{¶16} "(1) By force or threat, remove another from the place where the other person is found." R.C. 2905.02(A)(1).

{¶17} And the attempt statute states:

{¶18} "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." R.C. 2923.02(A).

{¶19} A criminal attempt occurs when one purposely does or omits to do something that is an act or omission constituting a substantial step in a course of conduct planned to result in the commission of a crime. *State v. Woods* (1976), 48 Ohio St.2d 127, paragraph one of syllabus, overruled in part on other grounds by *State v. Downs* (1977), 51 Ohio St.2d 47, 52. "To constitute a substantial step, the conduct must be strongly corroborative of the actor's criminal purpose." *Id.*

{¶20} The evidence at trial was as follows.

{¶21} B.S. testified that as she was walking in the grass between the road and the railroad tracks on Southern Boulevard she noticed an SUV beeping at her. (Tr. 35-37). She stated that the driver of the SUV, later identified as appellant, rolled down his window and asked her if she needed any help. (Tr. 38). B.S. responded, "No, thank you." (Tr. 38). B.S. stated that appellant then pulled up into the grass in front of her trying to cut her off. (Tr. 38-39). He then told her twice to get into the "f-ing" car. (Tr. 39-40). B.S. testified that she tried to go a different way around appellant's vehicle but he backed up and tried to cut her off again. (Tr. 41). She then jogged away from him. (Tr. 41). B.S. stated she thought appellant was going to hurt her. (Tr. 42). Finally, B.S. testified that White pulled up and scared appellant

away. (Tr. 43). B.S. testified that during the incident, appellant only opened his window. (Tr. 50).

{¶22} White testified that she was driving north on Southern Boulevard when the SUV in front of her (appellant's SUV) started braking. (Tr. 64). She then noticed B.S.. (Tr. 64). White stated that the SUV veered into the grassy median and stopped in front of B.S.'s path. (Tr. 65-66). White testified that B.S. appeared startled and immediately moved away from the SUV. (Tr. 66-67). She then observed appellant motioning to B.S. to come over to him and B.S. responded negatively to him. (Tr. 67-68). She could hear appellant yelling and B.S. saying "no." (Tr. 69). White testified that appellant then opened his passenger-side door and motioned for B.S. to get in. (Tr. 70, 84). White stated that appellant motioned to her to pull her car around his but she remained behind him. (Tr. 71). She stated that appellant then swore and took off in front of her. (Tr. 71).

{¶23} White testified that she followed appellant to a house where she wrote down his license plate number. (Tr. 72). She then went back to the area where B.S. was. (Tr. 73). White stated that B.S. was now with her friend. (Tr. 74). She stated B.S. was crying and upset. (Tr. 74). After learning that B.S. did not know appellant, White called the police. (Tr. 74-75).

{¶24} Contrary to B.S.'s testimony, White was unequivocal that appellant opened the passenger-side door. (Tr. 70, 84). White also testified that once appellant pulled up into the median, he never moved his car until he pulled back onto the road. (Tr. 84-86, 95-96). She stated that appellant could not have backed his car up because he would have hit her car. (Tr. 84-85).

{¶25} Officer Joseph O'Grady responded to White's call. He stated that when he arrived on the scene, B.S. was trembling and was very fearful. (Tr. 101). He took statements from both B.S. and White. (Tr. 115). Officer O'Grady testified B.S. did not tell him that appellant used a swear word during the incident. (Tr. 116). And he testified White did not report that appellant opened the car door. (Tr. 117).

{¶26} Detective Sergeant Doug Flara testified that when he questioned appellant, appellant reported that he stopped and talked with B.S. because she appeared to be in distress. (Tr. 140). He told Detective Flara that he offered assistance. (Tr. 141). Appellant further told the detective that he asked B.S. if she needed a ride and offered to give her one. (Tr. 141).

{¶27} Finally, appellant testified in his defense. He stated that he was driving down Southern Boulevard when he noticed B.S. walking by the railroad tracks. (Tr. 170). He stated that she appeared to be talking to the railroad tracks and pointing. (Tr. 171). Appellant stated that he wondered if she was mentally challenged. (Tr. 171). He stated that he pulled off to the side of the road, rolled down his passenger window and asked her if she was ok. (Tr. 172). He further asked her if she needed any help or if she needed a ride to which she responded no. (Tr. 173-74). He stated that the whole conversation lasted 15 to 20 seconds. (Tr. 178). Appellant denied that he told B.S. to get in the f-ing car. (Tr. 174). He stated that he then rolled up his window and went on his way. (Tr. 178-79).

{¶28} Given this testimony, we cannot conclude that the trial court erred in denying appellant's Crim.R. 29 motion as his conviction is supported by sufficient evidence.

{¶29} If we take as true all of the evidence offered against appellant it reveals that appellant pulled up alongside B.S. as she walked in the grassy median. He either rolled down his window or opened his passenger-side door and asked her if she needed a ride. She told him she did not. He then twice told her to get into the f-ing car, backed up and attempted to cut her off. B.S. refused appellant and jogged away. White's appearance scared appellant and he drove off. This evidence supports an attempted abduction.

{¶30} The only question surrounds the element of force or threat. The Ohio Revised Code defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A)(1). In this case, appellant did not use any violence, compulsion, or constraint against B.S..

Appellant never touched B.S.. Nor did he attempt to touch, reach for, or grab B.S.. He never brandished a weapon. And at oral argument, the state agreed that appellant did not use force. Instead, it argued that appellant used an "implicit threat of force."

{¶31} The term "threat" is not defined in the Revised Code. But it is clear that "threat" as used in the abduction statute does not mean only "threat of force" or "threat of harm." This is because in several other sections defining various other crimes, the legislature used the term "threat of force" or "threat of harm" instead of merely using the term "threat" as it did in the abduction statute. See R.C. 2907.02(A)(2) (where the definition of rape includes compelling another to submit by "force or threat of force"); R.C. 2919.25(C) (where the definition of domestic violence includes knowingly causing a family or household member to believe that the offender will cause imminent physical harm to the family or household member "by threat of force"); and R.C. 2921.03(A) (where the definition of retaliation includes attempting to influence, intimidate, or hinder a public servant, party official, or witness in the discharge of the person's duty by "unlawful threat of harm.")

{¶32} A term not defined by statute is accorded its common, everyday meaning. *State v. Dorso* (1983), 4 Ohio St.3d 60, 62. Therefore, because "threat" is not defined in the statute, we will first look to its common, everyday meaning. Merriam-Webster's Online Dictionary defines "threat" as "an expression of intention to inflict evil, injury, or damage." <http://www.merriam-webster.com/dictionary/threat>. Further, the Ohio Supreme Court has defined "threat" as representing "a range of statements or conduct intended to impart a feeling of apprehension in the victim, whether of bodily harm, property destruction, or lawful harm, such as exposing the victim's own misconduct." *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, at ¶39. The Ohio Supreme Court also quoted the "threat" definition set out in *Planned Parenthood League of Massachusetts, Inc. v. Blake* (1994), 417 Mass. 467, 474, that being "the intentional exertion of pressure to make another fearful or apprehensive of

injury or harm.” Id. Thus, we must determine whether appellant’s actions expressed such an intention.

{¶33} The evidence is clear that appellant never made any direct threats against B.S.. He never indicated to B.S. that there would be any consequences if she refused to get into his car. The state asserts that appellant’s threat was implicit.

{¶34} In *State v. Muniz*, 162 Ohio App.3d 198, 2005-Ohio-3580, at ¶26, the Eighth District described “force” and “threat of force” in a case where the defendant was convicted of two separate attempted abductions:

{¶35} “In *State v. Gregg* * * * the court explained: ‘O.R.C. 2901.01(A) does not provide for any measure of the physical exertion that might constitute force, but instead looks to the purpose for which the physical exertion, however slight, has been employed. If that purpose is to overcome a barrier against the actor’s conduct, whether that barrier is in the will of a victim or the closed but unlocked door of a home, the physical exertion employed to overcome the barrier may constitute force.’ Furthermore, ‘force may properly be defined as “effort” rather than “violence” in a charge to the jury.’” (Internal citations omitted.)

{¶36} The court went on to apply these definitions to its two sets of facts:

{¶37} “In the first case, Muniz hung out the window and attempted to grab the victim’s arm. This act of physical exertion on the part of Muniz is an act of force and is sufficient to sustain a conviction for attempted abduction. In the second case, Muniz moved toward the 11-year-old and attempted to grab her twice. Both acts of physical exertion by Muniz are sufficient to sustain a conviction for attempted abduction. Had Muniz been successful in his attempt to grab either young girl, it would have resulted in an abduction.” Id. at ¶27.

{¶38} In the present case, like in *Muniz*, appellant took a substantial step in attempting to abduct his victim. In *Muniz*, the defendant attempted to grab his victim’s arm to prevent her from getting away, but did not succeed. In the present case, appellant attempted to use his car to block B.S.’s path and prevent her from getting away. B.S. testified that she was afraid appellant was going to hurt her. Her

testimony, coupled with appellant's actions, are enough to demonstrate that appellant intentionally exerted pressure that made B.S. fearful of injury or harm.

{¶39} Considering the entire encounter between appellant and B.S. in the light most favorable to the state, as we are required to do, appellant's actions did express an intention to inflict evil, injury, or damage. The evidence may have been mostly circumstantial, however: "It is * * * well-settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence. [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others. Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable." (Internal citations and quotations omitted.) *State v. Nicely* (1988), 39 Ohio St.3d 147, 151. Appellant's efforts to get B.S. into the car were an attempt to intimidate or bully B.S. into succumbing to his demand. This can be seen as an implicit threat. B.S. was a 14-year-old girl walking alone. She was confronted by a grown man who yelled obscenities at her, moved his car toward her, and ordered her to get into his car. This clearly could have been a threatening situation for her. Furthermore, had appellant succeeded in his actions and had B.S. actually got into his car, we would view the situation as an abduction.

{¶40} Additionally, although the trial court in this case questioned the sufficiency of the evidence, it too resolved the issue by finding that reasonable minds could conclude that the evidence was sufficient to convict.

{¶41} Accordingly, appellant's first assignment of error is without merit.

{¶42} Appellant's second assignment of error states:

{¶43} "APPELLANT'S CONVICTIONS AND PRISON SENTENCES VIOLATE U.S. CONST. AMEND. VIII AND XIV AND OHIO CONST. ART. I, §§ 1, 2, 9, AND 16 AS THE CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶44} Here appellant argues that his conviction is against the manifest weight of the evidence. As argued above, he urges us to find that there was no evidence of force or threats of force. He further argues that B.S.'s and White's testimonies had many significant inconsistencies.

{¶45} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences 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. *Thompkins*, 78 Ohio St.3d at 387. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id.* (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

{¶46} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶47} Appellant is correct that there are several discrepancies between B.S.'s and White's testimonies. B.S. testified that appellant never opened the car door but spoke to her only through the open window. White, however, testified that appellant opened the passenger-side door. Additionally, B.S. testified that twice appellant backed up and pulled in front of her in an attempt to cut her off. But White testified that once appellant pulled up into the median, he never moved his car until he pulled back onto the road. She even testified that there was no way appellant could have backed his car up because he would have run into her car.

{¶48} Despite these inconsistencies, however, whether to believe B.S.'s and White's testimonies was a credibility decision for the jury to make. Although an appellate court is permitted to independently weigh the credibility of the witnesses when determining whether a conviction is against the manifest weight of the

evidence, great deference must be given to the fact finders' determination of witnesses' credibility. *State v. Wright*, 10th Dist. No. 03AP-470, 2004-Ohio-677, at ¶11. The policy underlying this presumption is that the trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Id.*

{¶49} Additionally, as discussed above, while there was no evidence of force, there was evidence that appellant used an implicit threat to try to lure B.S. into his car. Appellant's version of the events indicated that there were no threats. But once again, whether to believe appellant's testimony or that of the other witnesses was a matter for the jury.

{¶50} Thus, we cannot conclude that the jury clearly lost its way in reaching its verdict. Accordingly, appellant's second assignment of error is without merit.

{¶51} Appellant's third assignment of error states:

{¶52} "APPELLANT WAS DENIED A FAIR TRIAL DEMANDED BY U.S. CONST. AMEND. XIV AND BY OHIO CONST., ART. I, §§1, 2, AND 16 THROUGH A COMBINATION OF PROSECUTORIAL MISCONDUCT, INEFFECTIVE ASSISTANCE OF COUNSEL PREMISED UPON A FAILURE TO OBJECT, AND A DENIAL OF DUE PROCESS THROUGH THE TRIAL COURT'S FAILURE TO REMEDY THE ERROR."

{¶53} Here appellant argues both that the prosecutor engaged in misconduct and that his counsel was ineffective for failing to object to said misconduct. Appellant argues that this misconduct was particularly prejudicial because the evidence against him was so scant.

{¶54} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus. Second, appellant must demonstrate

that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

{¶55} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. In Ohio, a licensed attorney is presumed competent. *Id.*

{¶56} The test for prosecutorial misconduct is whether the conduct complained of deprived the defendant of a fair trial. *State v. Fears* (1999), 86 Ohio St.3d 329, 332. In reviewing a prosecutor's alleged misconduct, a court should look at whether the prosecutor's remarks were improper and whether the prosecutor's remarks affected the appellant's substantial rights. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "[T]he touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Hanna*, 95 Ohio St.3d 285, 2002-Ohio-2221, at ¶ 61, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219. An appellate court should not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶121.

{¶57} A failure to object to alleged prosecutorial misconduct generally waives all but plain error. *Hanna* at ¶77; *LaMar* at ¶126. But a defendant's claim that he was denied effective assistance of counsel eliminates the requirement that an objection be made in order to preserve an error for appeal. *State v. Carpenter* (1996), 116 Ohio App.3d 615, 621.

{¶58} Specifically, appellant takes issue with two comments. First, the prosecutor began his opening statement by stating, "this Defendant is every parent's worst nightmare." (Tr. 22). The prosecutor made the same comment during closing arguments. (Tr. 203). Appellant's counsel failed to object on either occasion. Second, during the redirect examination of Officer O'Grady the prosecutor

characterized defense counsel's actions as "disingenuous." (Tr. 121). There was no objection but the trial court interrupted the prosecutor to remind him that he could not editorialize on what opposing counsel did. (Tr. 121).

{¶159} While the above mentioned comments may have been inappropriate, they did not render appellant's trial unfair. These were two isolated comments in an otherwise fair trial. As to the first comment, as appellee points out, this characterization of appellant was no more prejudicial than others that have been upheld by the Ohio Supreme Court such as "baby murderer" and "baby molester," "mean-spirited derelict" and "unemployed killer," and "coward." *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, at ¶47; *State v. Nields* (2001), 93 Ohio St.3d 6, 37; *State v. Clemons* (1998), 82 Ohio St.3d 438, 451. And as to the second comment, the court advised the prosecutor, in the presence of the jury, that his comment was improper.

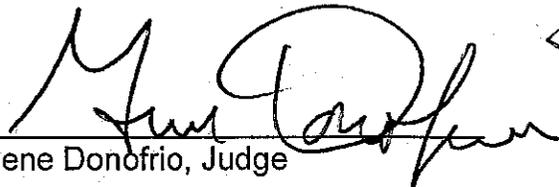
{¶160} Accordingly, appellant's third assignment of error is without merit.

{¶161} For the reasons stated above, appellant's conviction is hereby affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.

APPROVED:


Gene Donofrio, Judge