

ORIGINAL

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO

PLAINTIFF-APPELLEE

-vs-

GUY KRUPA

DEFENDANT-APPELLANT

CASE NO.: 2011-0179

ON APPEAL FROM CASE NO. 09 MA 135
BEFORE THE COURT OF APPEALS FOR
THE SEVENTH APPELLATE DISTRICT

**STATE OF OHIO'S RESPONSE TO DEFENDANT-APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

LYNN MARO, 0052146

7081 WEST BOULEVARD, SUITE 4
YOUNGSTOWN, OH 44512
PH: (330) 758-7700
FX: (330) 758-7757

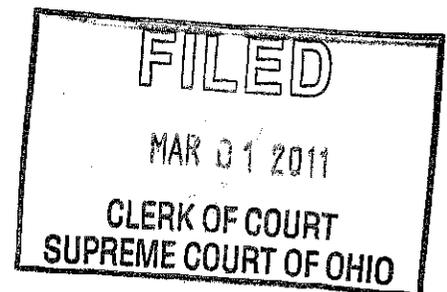
COUNSEL FOR DEFENDANT-
APPELLANT

PAUL J. GAINS, 0020323
MAHONING COUNTY PROSECUTOR

RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

OFFICE OF THE MAHONING COUNTY
PROSECUTOR
21 W. BOARDMAN ST., 6TH FL.
YOUNGSTOWN, OH 44503
PH: (330) 740-2330
FX: (330) 740-2008

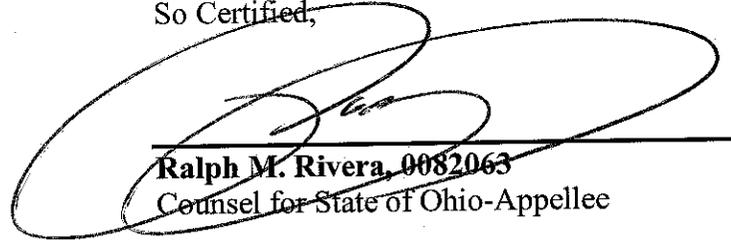
COUNSEL FOR PLAINTIFF-APPELLEE



Certificate of Service

I certify that a copy of the State of Ohio's Response to Defendant-Appellant's Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Defendant-Appellant, **Lynn A. Maro, Esq.**, at her above address, on February 23, 2011.

So Certified,



Ralph M. Rivera, 0082063
Counsel for State of Ohio-Appellee

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Statement of Why This Appeal is Not of Great Public or General Interest, and Does Not Present a Substantial Constitutional Question

This Court must decline jurisdiction as to all three of Defendant-Appellant's propositions of law. Each proposition of law does not present a substantial constitutional question and is of little general or public interest. Appellant has requested this Court to essentially revisit three well settled areas of law.

As for Appellant's first proposition of law, he contends that the State failed to present sufficient evidence to support this conviction for Attempted Abduction. Here, given that standard, the State presented sufficient evidence that Appellant attempted to remove B.S. from the place where she was found by force or threat.

As for Appellant's second proposition of law, he contends that the manifest weight of the evidence did not support his conviction for Attempted Abduction. Here, the evidence supported Appellant's conviction as he, without privilege to do so, knowingly attempted to remove B.S. from the place where she was found with force or threat.

As for Appellant's third proposition of law, he contends that he was denied a fair trial by several of the prosecutor's comments made during trial, and defense counsel failure to properly object. To the contrary, Appellant suffered no prejudice as a result; therefore, he was afforded a fair trial as guaranteed by the U.S. and Ohio Constitutions.

And because this Court has adequately addressed all three propositions of law, it is unnecessary for this Court to accept jurisdiction of Defendant-Appellant's appeal.

WHEREFORE, State of Ohio-Appellee hereby requests this Honorable Court to Deny Defendant-Appellant's Memorandum in Support of Jurisdiction, as this case does not involve any substantial constitutional questions and is of little general or public interest.

Law and Argument

Appellant's Proposition of Law No. I: A conviction not supported by sufficient evidence as to each statutory elements (*sic*) violates U.S. Const., amend. XIV and the Ohio Const., art. I, §§1, 2, and 16.

State's Response to Proposition of Law No. I: The State presented sufficient evidence that supported Appellant's conviction for Attempted Abduction, as taking all facts as true, a rational juror could find that Appellant attempted to remove B.S. from the place where she was found by force or threat.

As for Appellant's first proposition of law, he contends that the State failed to present sufficient evidence to support this conviction for Attempted Abduction. Here, given that standard, the State presented sufficient evidence to support his conviction.

Sufficiency is a legal standard that is applied to determine whether the evidence admitted at trial is legally sufficient to support the verdict as a matter of law.¹ The relevant inquiry is whether there existed adequate evidence to submit the case to the trier of fact.² According to this Court,

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, *if believed*, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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.³

Given that, sufficiency is a test of adequacy, and *the facts are taken as true*.⁴

¹ See *State v. Thompkins*, (1997), 78 Ohio St.3d 380.

² *State v. Lewis* (May 24, 2005), 7th Dist. No. 03 MA 36, 2005 Ohio 2699.

³ *State v. Jenks* (1991), 61 Ohio St.3d 259, ¶ 2 of the syllabus, emphasis added.

⁴ *Id.*, accord *Thompkins*, supra; *State v. Bridgeman* (1978), 55 Ohio St.2d 261.

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH APPELLANT'S ACTIONS CONSTITUTED A SUBSTANTIAL STEP TOWARDS ABDUCTING B.S.

Appellant was charged and convicted of one count of Attempted Abduction, in violation of R.C. §2923.02(A) and R.C. §2905.02(A)(1), a felony of the fourth degree. That is, Appellant, without privilege to do so, knowingly attempted to remove B.S. from the place where she was found with force or threat.

Because Appellant was charged and convicted of *attempted* abduction, the State only had to establish that his actions constituted a substantial step towards the commission of the intended offense—abduction.⁵

“Force” is defined as “any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing.”⁶ The Second District previously explained that any minimal amount of force sufficient, however slight, based upon the defendant’s purpose:

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.⁷

⁵ This Court previously held that “[a] ‘criminal attempt’ is when one purposely does or omits to do anything which is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. To constitute a substantial step, the conduct must be strongly corroborative of the actor’s criminal purpose.” *State v. Woods* (1976), 48 Ohio St.2d 127, ¶ 1 of the syllabus, construing Ohio Rev. Code Ann. §2923.02(A), vacated on other grounds by (1978), 438 U.S. 910.

⁶ Ohio Rev. Code Ann. §2901.01(A)(1) (West 2009).

⁷ *State v. Muniz* (8th Dist 2005), 162 Ohio App.3d 198, 204, quoting *State v. Gregg* (Oct. 26, 1992), 2nd Dist. No. 91 CA 15, unreported, 1992 WL 302438, at *3.

Further, “force may properly be defined as ‘effort’ rather than ‘violence’ in a charge to the jury.”⁸ This Court has previously used Webster’s Dictionary in defining “threat:”

But the word “threat” is defined as “an expression of an intention to inflict evil, injury, or damage on another usu[ally] as retribution or punishment for something done or left undone.” Webster’s Third New International Dictionary (1986) 2382. It connotes almost any expression of intent to do an act of harm against another person irrespective of whether that act is criminal. *State v. Moyer* (1920), 87 W.Va. 137, 104 S.E. 407 (“The word ‘threat’ is very broad and indefinite. It includes almost any kind of an expression of intention of one person to do an act against another. Ordinarily, it signifies intention to do some sort of harm, but the realm of injury is equally broad and undefined. All wrongs are not criminal offenses”).⁹

The Eighth District likewise recognized that “[t]hreat has not been defined in the Revised Code; therefore, it is given its ordinary meaning and is defined as ‘an expression of intention to inflict evil, injury, or damage.’”¹⁰ And “[t]hreat’ includes a direct and indirect threat.”¹¹ Accordingly, the trial court here defined “threat” as “a direct or indirect threat that must be sufficient to overcome the will of B.S.”¹²

⁸ *Muniz*, 162 Ohio App.3d at 204-05, quoting *State v. Johnson* (June 19, 2003), 8th Dist. Nos. 81692, 81693, 2003 Ohio 3241, ¶ 67, citing *State v. Lane* (10th Dist. 1976), 50 Ohio App.2d 41, 45.

⁹ *State v. Cress* (2006), 112 Ohio St.3d 72, 76.

¹⁰ *State v. Spruce* (April 6, 2006), 8th Dist. Nos. 86496, 86497, 2006 Ohio 1730, ¶ 33, quoting Webster’s Ninth New Collegiate Dictionary (1990) 1228.

¹¹ *Spruce*, supra at ¶ 33, quoting 4 OJI 507 .02 Section 12.

¹² Trial Transcript, July 13, 2009, before the Honorable R. Scott Krichbaum, (hereafter “Trial Tr.”), Vol. II of II, at 249; see *State v. Cerutti* (June 22, 2004), 11th Dist. 2002-L-140, 2004 Ohio 3335, ¶ 41.

To establish Appellant's substantial step towards his abduction of B.S., the State was only required to show that his conduct was strongly corroborative of his purpose to remove her from the place where she was found with force or threats.

At approximately 3:30 p.m. on April 13, 2009, fourteen-year-old B.S. was walking to her friend's house when Appellant attempted to abduct her.¹³

En route, B.S. traveled down Southern Boulevard in Boardman Township, Mahoning County, Ohio.¹⁴ B.S. was walking in the grass that runs north and south alongside the railroad tracks.¹⁵ B.S. had planned to meet her friend halfway between their houses, but before she met up with her, she encountered Appellant.¹⁶

B.S. observed Appellant beeping his horn and waiving his hands as he drove towards her.¹⁷ Appellant stopped his vehicle and rolled down his window.¹⁸ Appellant asked if she needed help, but B.S. responded, "No, thanks." After telling Appellant that she did not need any help, he proceeded to pull alongside her, and then tried to cut her off with his vehicle.¹⁹ In attempting the cut her off, Appellant left the roadway and pulled into the grass in which B.S. was walking.²⁰ Appellant's vehicle was now directly in front

¹³ Trial Tr., Vol. I of II, at 32-33.

¹⁴ *Id.* at 33.

¹⁵ *Id.* at 34-35.

¹⁶ *Id.* at 35-36.

¹⁷ *Id.* at 36.

¹⁸ *Id.* at 38.

¹⁹ *Id.*

²⁰ *Id.* at 38-39.

of B.S.²¹ At this point, Appellant leaned out the window and told B.S. “to get in the fucking car.”²² After B.S. refused, Appellant repeated his commands twice for her to get into his vehicle.²³

B.S. then attempted to get away from Appellant, but every time she moved in a different direction, Appellant would continue to cut her off with his vehicle.²⁴ B.S. testified that she was frightened and believed that Appellant was going to hurt her.²⁵

Appellant only fled the area after a passerby, Kathryn White, stopped to assist B.S..²⁶ Ms. White was traveling northbound on Southern Boulevard between Leyton and Arlene.²⁷ Ms. White observed B.S. walking in the grass to her right, between the road and tracks.²⁸ Ms. White slowed down because the vehicle in front of her kept braking.²⁹ Ms. White thought that it was odd for this vehicle to be braking in the manner that he was, because there was no stop lights or traffic in front of him.³⁰

²¹ *Id.* at 39.

²² *Id.* at 39, 56.

²³ *Id.* at 40.

²⁴ *Id.* at 40-41.

²⁵ *Id.* at 41-42.

²⁶ *Id.* at 43.

²⁷ *Id.* at 61.

²⁸ *Id.* at 62.

²⁹ *Id.* at 64.

³⁰ *Id.* at 65.

Ms. White then observed Appellant drive onto the grass median and stop directly in B.S.'s line of walking.³¹ Appellant parked in a way that B.S. was forced to move towards the tracks to avoid the vehicle.³² B.S. appeared "very startled." Ms. White then observed Appellant "leaning over and motioning" to B.S. in an attempt to get her over to him.³³ B.S. appeared to be answering Appellant in the negative, and "was very adamantly motioning no and saying no and using her hands to like pushing out, no."³⁴ Ms. White could not hear the conversation between the two, but could hear B.S. saying, "No, No," and Appellant using "a very loud voice[.]"³⁵

Ms. White then observed Appellant open the passenger side door and motioned B.S. to get into the vehicle, as he began using curse words.³⁶ Appellant then sped away, cutting off traffic, after he motioned Ms. White go ahead of him, but she stayed there.³⁷ Ms. White proceeded to follow Appellant in his light-colored SUV.³⁸ Ms. White wrote down his license plate number.³⁹ Ms. White then observed Appellant pulled out of the

³¹ *Id.* at 65-66.

³² *Id.* at 66.

³³ *Id.* at 67.

³⁴ *Id.* at 68.

³⁵ *Id.* at 69.

³⁶ *Id.* at 70.

³⁷ *Id.* at 71.

³⁸ *Id.* at 72.

³⁹ *Id.* at 72-73.

driveway and headed back toward where the incident occurred.⁴⁰ When Ms. White went back, she encountered B.S. with her friend Irish.⁴¹

B.S. was visibly shaken and upset.⁴² Ms Slaven “was clutching her friend. She was visibly shaken and crying and upset.”⁴³ B.S. told her that she thought she was going to die.⁴⁴ After a brief conversation with B.S., Ms. White called the police.⁴⁵

After arriving at the scene, Boardman Patrolman Joseph O’Grady observed that B.S. “was trembling, a little shaken. She did appear very apprehensive, very fearful of the situation, what was going on.” She soon began to cry.⁴⁶

Again, the State need only establish that Appellant’s conduct constituted a substantial step in a course of conduct that he planned to abduct B.S.⁴⁷

For example, in *State v. Muniz*, the Eighth District found there was sufficient evidence to convict the defendant of two counts of attempted abduction where no threats were made and no physical force was exerted upon the intended victims:

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

⁴⁰ *Id.* at 73.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 74.

⁴⁴ *Id.*

⁴⁵ *Id.* at 43, 75.

⁴⁶ *Id.* at 100-101.

⁴⁷ See *Woods*, 48 Ohio St.2d at 127, ¶ 1 of the syllabus, construing Ohio Rev. Code Ann. §2923.02(A), vacated on other grounds by (1978), 438 U.S. 910.

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.⁴⁸

Thus, the Eighth District concluded that “[a]ny rational trier of fact could have found all the essential elements of attempted abduction proven beyond a reasonable doubt.”⁴⁹

In comparison, the Second District found sufficient evidence to convict the defendant of *abduction* where only words were used:

Ciano testified that she and Blausner had attempted to leave the apartment, but that Garrison and his brother stepped in front of the door, would not allow them to pass, and told them to sit back down. Ciano testified that she had not attempted to proceed through the door because she was scared that she would be hit. She also testified that “[w]ith the tone of voice [Garrison] used to tell us to sit back down, to me, it meant, you do this or you suffer the consequences * * *.” Similarly, Blausner stated that the brothers blocked the doorway when she and Ciano attempted to leave and that she was afraid of them because they were bigger than she and because she was eight months pregnant at the time.⁵⁰

And the evidence was not against the manifest weight where the defendant “used the threat of force to restrain the liberty of Ciano and Blausner under circumstances that placed them in fear.”⁵¹

Again, “[t]he conduct complained of need not be the *last* proximate act prior to the commission of the felony.”⁵² (Emphasis added.)

⁴⁸ *Muniz*, 162 Ohio App.3d at 205.

⁴⁹ *Id.*

⁵⁰ *State v. Garrison* (2nd Dist. 1997), 123 Ohio App.3d 11, 19.

⁵¹ *Id.*

In *State v. Siouffi*, the Second District stated that “a threat of force need not be conveyed expressly; it may just as well be conveyed implicitly by conduct. Conduct which is threatening in nature is no less threatening because it is unaccompanied by verbal expression of the threat.”⁵³ In *State v. Eckert*, the Twelfth District explained that “[t]he threat of physical harm need not be explicit; rather, an implied threat of physical harm is sufficient * * *.”⁵⁴

Further, the facts here can easily be distinguished from those in *U.S. v. Griffith*. In *Griffith*, the only evidence to establish the defendant’s conduct was an eyewitness’s account of how the victim reacted to his statements.⁵⁵ Without speaking with the victim, the police obtained an arrest warrant for the defendant.⁵⁶ Further, after the defendant was arrested, police discovered that the girl was eighteen, and so the abduction charges were then dropped.⁵⁷ The Sixth Circuit concluded that the police lacked probable cause

⁵² *State v. Lopez* (Mar. 1, 2010), 12th Dist. No. CA2008-1291, 2010 Ohio 732, ¶ 34, citing *State v. Fuller* (Aug. 12, 2002), 12th Dist. Nos. CA2000-11-217, CA2001-03-048, CA2001-03-061, 2002 Ohio 4110, ¶ 25.

⁵³ *Siouffi v. Siouffi* (Dec. 18, 1998), 2nd Dist. No. 17113, unreported, 1998 WL 879255, *3.

⁵⁴ *State v. Eckert* (July 6, 2009), 12th Dist. No. CA2008-10-099, 2009 Ohio 3312, ¶ 11, quoting *State v. Harris* (Jan. 8, 2008), 10th Dist. No. 07AP-137, 2008 Ohio 27, ¶ 14, citing *State v. Ellis* (Aug. 15, 2006), 10th Dist. No. 05AP-800, 2006 Ohio 4231, ¶ 7.

⁵⁵ *United States v. Griffith* (C.A.6, 2006), 194 Fed. Appx. 538, 539.

⁵⁶ *Id.* at 540.

⁵⁷ *Id.*

because the witness's statement only established that a conversation between two occurred, and there was no further actions taken by the defendant.⁵⁸

But here, Appellant's conduct went beyond merely asking B.S. if she needed a ride. After B.S. indicated that she did not need any help, Appellant proceeded to pull alongside her, and attempted to cut her off with his vehicle.⁵⁹ Appellant then leaned out the window and told B.S. "to get in the fucking car."⁶⁰ After B.S. refused, Appellant repeated his commands twice for her to get into his vehicle. And as B.S. attempted to get away, Appellant continued to cut her off with his vehicle.⁶¹

Again, "[t]he conduct complained of need not be the *last* proximate act prior to the commission of the felony."⁶² (Emphasis added.) Appellant's actions constituted a substantial step towards his abduction of B.S., as his conduct was strongly corroborative of his purpose to remove her from the place where she was found with force or threats.

Accordingly, the State presented sufficient evidence to establish that Appellant, without privilege to do so, knowingly attempted to remove B.S. from the place where she was found with force or threat.

Appellant's first proposition of law is meritless and jurisdiction must be denied.

⁵⁸ *Id.* at 541.

⁵⁹ Trial Tr., Vol. I of II, at 38.

⁶⁰ *Id.* at 39, 56.

⁶¹ *Id.* at 40-41.

⁶² *Lopez*, supra at ¶ 34, citing *Fuller*, supra at ¶ 25.

Appellant's Proposition of Law No. II: 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 Const.

State's Response to Proposition of Law No. II: The jury properly convicted Appellant of Attempted Abduction, because his conviction was supported by the manifest weight of the evidence admitted at trial and proven beyond a reasonable doubt.

As for Appellant's second proposition of law, he contends that the manifest weight of the evidence did not support his conviction for Attempted Abduction. Here, the jury had substantial evidence and a rational basis to find Appellant guilty.

A. **THE MANIFEST WEIGHT OF THE EVIDENCE SUPPORTED APPELLANT'S CONVICTION.**

A manifest weight of the evidence challenge contests the believability of all the evidence produced at trial.⁶³ And when making the determination as to whether a conviction is or is not against the manifest weight of the evidence, a court in review combs the entire record, weighs the evidence and all reasonable inferences one could draw from it, weighs witness credibility, and decides whether in resolving the conflicts in the evidence, the trier of fact lost its way and created a manifest miscarriage of justice when it returned a guilty verdict.⁶⁴

To avoid regurgitating each fact set forth above, the State incorporates all of the facts and corresponding arguments set forth above, and submits that the State has proven the charge against Appellant beyond a reasonable doubt.

⁶³ See, e.g., *State v. Schlee* (Dec. 23, 1994) 11th Dist. No. 93-L-082, unreported, 1994 WL 738452, at *13.

⁶⁴ *Id.* at *15, citing *State v. Davis* (8th Dist. 1988), 49 Ohio App.3d 109, 113.

Here, the manifest weight of the evidence supported Appellant's conviction for abduction as he, without privilege to do so, knowingly attempted to remove B.S. from the place where she was found with force or threat. And any inconsistencies between the witnesses did not call upon the Seventh District to set aside the jury's verdict.⁶⁵

Appellant's second proposition of law is meritless and jurisdiction must be denied.

Appellant's Proposition of Law No. III: Inflammatory remarks in opening statements and closing statements, 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.

State's Response to Proposition of Law No. III: Appellant was afforded a fair trial as guaranteed to him by the United States and Ohio Constitutions, because he was not unduly prejudiced by either the prosecutor's statements or defense counsel's actions.

As for Appellant's third proposition of law, he contends that he was denied a fair trial by several of the prosecutor's comments made during trial, which defense counsel failure to properly object. To the contrary, Appellant suffered no prejudice as a result; therefore, he was afforded a fair trial as guaranteed by the U.S. and Ohio Constitutions.

A. **THE PROSECUTOR'S COMMENTS AND ARGUMENTS WERE PROPER.**

First, a prosecutor may, in good faith, make any statements as to what he expects the evidence to show.⁶⁶ This includes "characterizing a defendant in the context of the crime he committed is 'fair comment' if the evidence supports such a characterization."⁶⁷

⁶⁵ See Section 3(B)(3), Article IV, Ohio Constitution.

⁶⁶ *State v. Clay* (8th Dist. 2009), 181 Ohio App.3d 563, 575, citing *State v. Patterson* (Dec. 19, 2005), 5th Dist. No. 2005CA00078, 2005 Ohio 6703.

For example, this Court has found the following characterizations to be proper: a “baby murderer” and “baby molester;”⁶⁸ a “mean-spirited derelict” and an “unemployed killer;”⁶⁹ and a “coward.”⁷⁰

Here, the prosecutor opening statement was proper: “The evidence in this case is going to show that this Defendant is every parent’s worst nightmare, and the reason we’re here today is because this nightmare almost became a reality for 14-year-old B.S. and her family when Defendant attempted to abduct her from the side of the road and force her into his car.”⁷¹ This Court cannot say that the prosecutor’s comment here is any more prejudicial than the above examples that this Court previously found to be fair.

Second, Appellant takes issue with a comment concerning defense counsel. This Court has previously found the following statements did not deprive the defendant of a fair trial: “remarks that counsel followed a ‘dartboard approach’ to defense, that counsel talked out of both sides of the mouth, and that counsel’s theory of the case was ‘baloney.’”⁷²

⁶⁷ *State v. McKinney* (Oct. 18, 2004), 3rd Dist. No. 4-04-12, 2004 Ohio 5518, ¶ 35, citing *State v. Smith* (2002), 97 Ohio St.3d 367, 377.

⁶⁸ *Smith*, 97 Ohio St.3d at 376.

⁶⁹ *Nields*, 83 Ohio St.3d at 37.

⁷⁰ *State v. Clemons* (1998), 82 Ohio St.3d 438, 451.

⁷¹ Trial Tr., Vol. I of II, at 22.

⁷² *State v. Brown* (1988), 38 Ohio St.3d 305, 317.

The Second District concluded that the prosecutor's reference to defense counsel as the "spin doctor" "was not a personal attack upon defense counsel, but rather an attack upon defense counsel's interpretation of the evidence."⁷³ Thus, the comment was proper.

Here, the comment concerning defense counsel was made in response to his cross-examination of Officer O'Grady. The fact remains that B.S. feared for her life, and Appellant's continued mischaracterization of the evidence continues to ignore what transpired that afternoon.

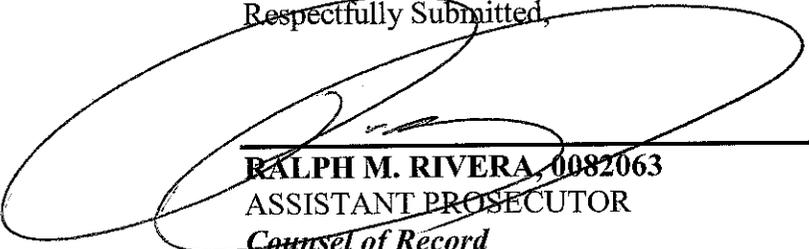
The comment was proper, and did not affect the outcome of the trial had defense counsel objected to it. Furthermore, the trial court's admonishments to the prosecutor cured defense counsel's failure to object.

Appellant's third proposition of law is meritless and jurisdiction must be denied.

Conclusion

WHEREFORE, the State of Ohio-Appellee hereby requests this Honorable Court to Deny Defendant-Appellant's Memorandum in Support of Jurisdiction.

Respectfully Submitted,



RALPH M. RIVERA, 0082063
ASSISTANT PROSECUTOR
Counsel of Record

Mahoning County Prosecutor's Office
21 W. Boardman St., 6th Fl.
Youngstown, OH 44503-1426
PH: (330) 740-2330
FX: (330) 740-2008
rrivera@mahoningcountyoh.gov
Counsel for State of Ohio-Appellee

⁷³ *State v. Burg* (July 15, 2005), 2nd Dist. No. 04CA94, 2005 Ohio 3666, ¶ 73.