[Cite as *State v. Keener*, 2006-Ohio-5650.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2005-L-182**
- vs -	:	
JAMES D. KEENER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 04 CR 000758.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor and *Stephanie G. Snevel,* Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Leo J. Talikka, Talidyne Building, #100, 2603 Riverside Drive, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, James D. Keener, appeals from the judgment of the Lake County Court of Common Pleas convicting him, after trial by jury, of one count of kidnapping, two counts of aggravated burglary, one count of disrupting public services, one count of domestic violence, and one count of abduction. For the reasons herein, we affirm.

{¶2} Appellant and the victim, Kathleen McGeever, had a lengthy, twelve year relationship out of which their son, James Patrick ("J.P.") was born in February of 2004. At birth, JP suffered from a medical anomaly known as tracheoesophageal fistula, a condition in which the esophagus and the stomach are disconnected at birth. As a result of J.P.'s medical condition, he required numerous surgeries and was hospitalized for the first four months of his life. In June of 2004, J.P. was released from the hospital and both he and Ms. McGeever moved in with appellant. Shortly thereafter, however, Ms. McGeever moved out (with J.P.) owing to appellant's alcohol abuse. Ms. McGeever and J.P. subsequently took up residence with her mother and her mother's boyfriend.

{¶3} After Ms. McGeever and J.P. left, appellant became gradually more depressed and his drinking increased. Eventually, appellant told Ms. McGeever he was contemplating suicide and was admitted to Laurelwood Hospital for several days. After his release from Laurelwood, he was fired from his job at Mentor Electronics where he had been employed for seven years.

{¶4} Notwithstanding appellant's problems, he consistently visited his son and maintained a continuing and relatively amenable relationship with Ms. McGeever. However, on November 24, 2004, this changed. That morning, appellant began drinking early because "[he] had no plans that day." After calling Ms. McGeever a number of times, appellant went to Wal-Mart and purchased shotgun shells. Appellant then bought beer from a gas station and proceeded to Ms. McGeever's home.

{¶5} Around noon on the same day, J.P.'s physical therapist, Ellen Smith-Susan arrived to treat J.P. While Ms. Smith-Susan was providing J.P. therapy,

appellant arrived at the house. Appellant first cut the cable line to the house and kicked the telephone line from its junction box. Appellant then approached the house. Ms. McGeever noticed appellant at the door and advised Ms. Smith-Susan to take J.P. upstairs and phone 9-1-1. Ms. Smith-Susan ascended the steps and attempted to call the police from Ms. McGeever's land line. Upon discovering the phone was not working, she used her cell phone and successfully notified the police.

{¶6} Downstairs, Ms. McGeever ordered appellant to leave but he forced his way into the house. Appellant advanced on Ms. McGeever, grabbed her hair, and pushed her to the ground. Ms. McGeever testified appellant, with her hair in his hand, pushed her face into the floor after which he briefly choked her. Appellant released Ms. McGeever and ordered her to stop crying or he would "tie her up," at which point he brandished a lock blade knife. Appellant ordered Ms. McGeever off the floor and, while shaking the knife at Ms. McGeever, demanded she get J.P. Ms. McGeever ran upstairs and barricaded herself in the bedroom with Ms. Smith-Susan and J.P. Appellant followed and demanded entry. Ms. McGeever rebuffed the demand and appellant threatened to retrieve an axe and "chop down the door."

{¶7} In the meantime, police were dispatched to Ms. McGeever's home. Officers were advised that a man was in the home terrorizing a woman. Patrolmen George Lessick and Matthew Jackson responded and, upon arrival, entered Ms. McGeever's home. As they proceeded into the kitchen, they encountered appellant who had a knife in his right hand. The officers ordered appellant to drop the weapon. In lieu of complying, appellant, with knife in hand, directed the officers to shoot him. While the officers had their firearms drawn, testimony indicated they did not believe appellant

was posing a threat to their safety. Eventually, appellant surrendered the knife and was placed under arrest without significant struggle. The officers took possession of the knife and discovered shotgun shells in his coat pocket and a pair of handcuffs and handcuff keys in appellant's pants. After conducting an inventory search of appellant's vehicle, the officers recovered a machete in the passenger compartment. Further, officers recovered a loaded shotgun, nylon rope and two boxes of shotgun shells from the vehicle's trunk.

{¶8} At trial, evidence was presented as to appellant's intent on the day in question. The state called Suzette Berlet, appellant's former co-worker at Mentor Electronics, regarding this issue. Ms. Berlet testified appellant visited her shortly after the incident in question. Evidently, Ms. Berlet was familiar with the events of November 24, 2004 and questioned appellant as to why he acted as he did. Appellant discussed his various problems and ultimately revealed he intended to kidnap Ms. McGeever and force her to watch him "blow his head off."

{¶9} On March 7, 2005, appellant was indicted on one count of kidnapping in violation of R.C. 2905.01(A)(3), two counts of aggravated burglary in violation of R.C. 2911.11(A)(1) and R.C. 2911.11(A)(2), one count of disrupting public services in violation of R.C. 2909.04(A)(1), one count of domestic violence in violation of R.C. 2919.25(A), one count of improperly handling of a firearm in a motor vehicle in violation of R.C. 2923.16(C), and one count of abduction in violation of R.C. 2905.02(A)(2). Trial commenced on August 23, 2005. At the close of the state's case, the court dismissed count six, i.e. improper handling of a firearm, and renamed count seven as count six. On August 26, 2005, the jury returned a verdict of guilty on all six counts. On October

3, 2005, appellant was sentenced to five years in prison for counts one and six, five years for counts two and three, twelve months for count four, and six months for count five. The sentences were ordered to run concurrently for a total term of five years imprisonment. Appellant now appeals and assigns the following three errors for our review:

{¶10} "[1.] The trial court erred to appellant's prejudice, by admitting into evidence a machete, shotgun shells, handcuffs, and nylon rope which were irrelevant to the offenses charged, and the admission of which was unfairly prejudicial and confusing to the jury, in violation of appellant's constitutional right to a fair trial and due process a[s] guaranteed by both the Ohio and U.S. constitutions.

{¶11} "[2.] The trial court erred to the prejudice of appellant when it failed to dismiss or question a juror who fell asleep during the trial.

{¶12} "[3.] The trial court erred to the prejudice of appellant when it did not grant appellant's Rule 29 motion, as there was insufficient evidence by which to convict appellant." (Sic.)

{¶13} Under his first assignment of error, appellant argues the trial court erred in admitting a machete, shotgun shells, handcuffs and rope in violation of Evid.R. 402 and 403(A). We disagree.

{¶14} The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Stackhouse*, 11th Dist. No. 2002-P-0057, 2003-Ohio-1980, at ¶19. An appellate court will not interfere with a trial court's evidentiary ruling absent an abuse of discretion. *State v. Benson,* 11th Dist. No. 2001-P-0086, 2002-Ohio-6942. at ¶7. Here, appellant attacks the trial court's admission of specific items found on his

person and his vehicle. In appellant's view, the items were irrelevant to the charges and their introduction was highly prejudicial.

{¶15} As a general rule, "[a]ll relevant evidence is admissible ***." Evid.R. 402. However, where the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice or obfuscation, that evidence is inadmissible. Evid.R. 403(A). Here, we believe the various implements at issue were relevant and, given the charges, their probative value outweighed the danger of prejudice and/or confusion.

{¶16} First, appellant argues that the machete, which was located inside appellant's vehicle, should not have been admitted into evidence. Although evidence was not directly offered as to how appellant cut the line, the record establishes that appellant had a knife on his person when the officers arrived at the scene. This knife could have cut the cable line to Ms. McGeever's home and therefore we do not believe the machete was clearly connected to a crime at issue in the case. Nevertheless, the admission of the machete only amounts to harmless error since it does not affect the outcome of this case. *State v. Haynes,* 11th Dist. No. 2003-A-0055, 2004-Ohio-3514, at ¶16, citing *State v. Brown,* 100 Ohio St.3d 51, 2003-Ohio-5059, at ¶25.

{¶17} **That said**, the state fairly connected the shotgun shells, rope and handcuffs to the charges in question. The charges of kidnapping, aggravated burglary, abduction and domestic violence are crimes involving violent conduct and the use of force. These crimes involve restraining another's liberty, causing physical harm, and threatening and/or terrorizing another. While, unto themselves, shotgun shells are not necessarily threatening, appellant had a loaded shotgun in his vehicle. We believe the introduction of the shells underscores the nature and magnitude of the threat appellant

was posing to Ms. McGreever, Ms. Smith-Susan and/or his son, J.P. Furthermore, it is self-evident that rope and handcuffs are devices for manacling and therefore restraining the liberty of another. Such observations are directly tied to elements of the various charges for which appellant was on trial.

{¶18} We therefore hold the shotgun shells, rope and handcuffs are relevant and their probative value outweighed the danger of unfair prejudice. Further, while the machete was improperly admitted, any resulting error was harmless. Accordingly, appellant's first assignment of error lacks merit.

{¶19} Under his second assignment of error, appellant argues the trial court committed plain error by not questioning or dismissing a sleeping juror after being informed of the same. Specifically, appellant contends the trial court should have replaced, or at least examined, the juror to determine what he or she missed. That said, appellant concedes trial counsel did not object and move the court to excuse the juror who was allegedly sleeping. Thus, any allegation of a sleeping juror is waived absent plain error. *State v. Brown*, 11th Dist. No. 2003-A-0092, 2005-Ohio-2879, at ¶80. Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long* (1978), 53 Ohio St.2d 91, 97. Plain error exists only where the results of the trial would have been different without the alleged error. *State v. Green,* 90 Ohio St.3d 352, 373, 2000-Ohio-182.

{¶20} At trial, the following exchange occurred at the bench after direct examination of state's witness and victim Kathleen McGeever:

{¶21} "[Prosecutor]: Judge, the second juror in the front row, first row to the right has been sleeping the entire testimony. I don't know if anybody else had seen that. Okay.

{¶22} "[Defense cousnsel]: I can't hear what you are saying.

{¶23} "The Court: She is indicating that one of the jurors – tell me?

{¶24} "[Prosecutor]: The second juror has been sleeping

{¶25} "The Court: I will keep my eye out for that."

{¶26} A trial court possesses considerable discretion in deciding how to handle a sleeping juror. *State v. Sanders*, 92 Ohio St.3d 245, 253, 2001-Ohio-189, citing *United States v. Freitag* (C.A. 7, 2000), 230 F.3d 1019, 1023. Furthermore, there is no per se mandate that a trial judge is to inquire into every instance of alleged juror misconduct. Id., citing *United States v. Hernandez* (C.A. 11, 1991), 921 F.2d 1569, 1577. Under the circumstances, we find no plain error.

{¶27} The prosecutor was the only individual who observed the sleeping juror. Although she indicated the juror had been sleeping throughout Ms. McGeever's testimony, we do not know for certain how long the juror had been dozing. Moreover, defense counsel could have objected and moved the court to voir dire or replace the juror. Instead, defense counsel chose to remain silent.

{¶28} In a similar situation, the Seventh Appellate District observed:

{¶29} "One cannot sit on his rights, hope for a favorable jury verdict and after receiving an unfavorable verdict, finally assert an issue which was easily remedied at the time of its inception." *State v. Brletich* (June 28, 2000), 7th Dist. No. 98 CO 84, 2000 Ohio App. LEXIS 2965, at 10.

{¶30} Without more evidence, e.g., that the juror was actually sleeping and how long, we find no error. Appellant's second assignment of error lacks merit.

{¶31} Appellant's final assignment of error challenges the sufficiency of the evidence. Evidential sufficiency involves an analysis of whether the case should have gone to the jury. See, *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. When examining a claim that there was insufficient evidence to sustain a conviction, the "inquiry is, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. A verdict will not be disturbed unless the reviewing court finds that reasonable minds could not reach the conclusion drawn by the trier of fact.

{¶32} Here, appellant was convicted on six criminal counts. We shall address each count in turn. First, appellant was convicted of kidnapping, pursuant to R.C. 2905.01, which provides, in relevant part:

{¶33} "(A) No person, by force, threat, or deception, or in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes:

{¶34} "***

{¶35} "(3) To terrorize or to inflict serious physical harm on the victim."

{¶36} While the term "terrorize" is not defined in the Ohio Revised Code, it is a term a jury is presumed to know and understand. *State v. Leasure*, 6th Dist. No. L-02-

1207, 2003-Ohio-3987, at ¶47 (noting the common meaning of "terrorize" involves the act of filling one with terror or anxiety).

{¶37} Here, Ms. McGeever testified appellant, after forcefully gaining entry into her home, pushed her into her kitchen and restrained her liberty by means of grabbing her hair and forcing her to the floor. She further testified appellant, after holding her to the floor by the hair, attempted to "push [her] face into the floor like he was trying to crush [her] head or something." According to Ms. McGeever, appellant then:

{¶38} "***grabbed me by the neck and he was – he was, like he was choking me but he wasn't choking me and he was still on top of me and he told me to – he is like, 'You better stop crying or I am going to tie you up.' And so I tried to stop crying, calm down a little bit. That's when he pulled out a knife."

{¶39} Ms. McGeever did testify that appellant represented to her that he did not intend to hurt her; however, viewing the foregoing evidence in the state's favor, a reasonable jury could find appellant, by force and threat, restrained Ms. McGeever's liberty for the purpose of terrorizing and/or inflicting serious physical harm on her (regardless of his representations).

{¶40} Next, appellant was convicted on two counts of aggravated burglary pursuant to R.C. 2911.11(A)(1) and (2), which provide:

{¶41} "(A) No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or

separately occupied portion of the structure any criminal offense, if any of the following apply:

{¶42} "(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

{¶43} "(2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control."

{¶44} Here, the evidence demonstrated appellant forcefully entered Ms. McGeever's home without her permission while Ms. McGeever, Ms. Smith-Susan and JP were inside. Although appellant claimed he did not intend to hurt Ms. McGeever, the jury heard testimony that appellant intended to kidnap her and compel her to watch him commit suicide, i.e., he intended to commit a crime. Moreover, Ms. McGeever's testimony demonstrated that appellant, after forcefully entering her home, attempted to inflict physical harm on her while in possession of a knife. Therefore, the evidence presented, when viewed in a light most favorable to the prosecution, is sufficient to support convictions on both counts of aggravated burglary.

{¶45} Next, appellant was convicted of disrupting public services in violation of R.C. 2909.04(A)(1), which provides, in relevant part:

{¶46} "(A) No person, purposely by any means or knowingly by damaging or tampering with any property, shall do any of the following:

{¶47} "(1) Interrupt or impair television, radio, telephone, ***."

{¶48} Here, on direct examination, appellant admitted he cut the cable wires and kicked the telephone box in a manner which disconnected telephone service. Appellant's testimony was an admission to the charge of disrupting public services.

{¶49} Appellant was also convicted of domestic violence in violation of R.C. 2919.25(A), which states:

{¶50} "(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶51} "Family or household member" means, inter al., "[t]he natural parent of any child of whom the offender is the other natural parent ***." R.C. 2919.25(F)(1)(b).

{¶52} The evidence at trial demonstrated appellant caused physical harm to the natural mother of his natural son by means of pulling her hair and pushing her head to the kitchen floor. We believe this evidence is sufficient to obtain a conviction under R.C. 2919.25(A).

{¶53} Finally, appellant was convicted of abduction in violation of R.C. 2905.02(A)(2), which provides:

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

{¶55} "***

{¶56} "(2) By force or threat, restrain the liberty of another person, under circumstances which create a risk of physical harm to the victim or place the other person in fear;"

{¶57} Here, evidence showed that appellant knowingly restrained the liberty of Ms. McGeever by grabbing her hair and forcing her to the ground *and* standing over her while choking her. Clearly, appellant's actions were such that Ms. McGeever was placed at risk of physical harm. Moreover, Ms. McGeever explicitly testified she was in

fear for her safety. Accordingly, we hold the state put forward sufficient evidence to sustain the conviction for abduction.

{¶58} Because the state advanced sufficient evidence to sustain each of the six convictions, appellant's third assignment of error is therefore overruled.

{¶59} For the foregoing reasons, appellant's three assignments of error are without merit. Thus, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

DONALD R. FORD, P.J.,

DIANE V. GRENDELL, J.,

concur.