[Cite as *State v. Totarella*, 2010-Ohio-1159.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-064**
- vs -	:	
THOMAS M. TOTARELLA,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 09 CR 000144.

Judgment: Affirmed.

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

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Thomas M. Totarella, appeals his convictions for Abduction, Assault, two counts of Aggravated Menacing, and Carrying Concealed Weapons, following a jury trial in the Lake County Court of Common Pleas. Totarella was sentenced to serve five years in prison for the current convictions, plus an

additional two years for violating post release controls. For the following reasons, we affirm the decision of the court below.

{¶2} On March 6, 2009, Totarella was indicted by the Lake County Grand Jury on three counts of Kidnapping, felonies of the second degree in violation of R.C. 2905.01(A)(3), three counts of Abduction, felonies of the third degree in violation of R.C. 2905.02(A)(2), one count of Felonious Assault, a felony of the second degree in violation of R.C. 2903.11(A)(2), two counts of Aggravated Menacing, misdemeanors of the first degree in violation of R.C. 2903.21, and one count of Carrying Concealed Weapons, a felony of the fourth degree in violation of R.C. 2923.12(A)(1).

{¶3} The case was tried before a jury on March 24 and 25, 2009.

{¶4} Patrolman Greg Spakes of the Willowick Police Department testified that shortly after midnight, on the morning of December 25, 2008, he received a dispatch regarding a disturbance involving a Thomas Totarella at the Willowick Cafe on Lakeshore Boulevard. Before entering the parking lot, Spakes was met by a "hysterical" woman yelling that Totarella was in a purple Lincoln and exited westbound on Lakeshore Boulevard. Patrolman Spakes began following a purple Lincoln, registered to Totarella, on Grand Boulevard. The Lincoln entered Route 2 westbound and continued to the East 185th Street exit. Shortly after exiting, the Lincoln crashed through a utility pole. Totarella was arrested upon exiting the vehicle.

{¶5} Babette Hockenberry testified that she was with Totarella on Christmas Eve at a house on Kipling Avenue in Cleveland. Hockenberry observed that Totarella became "pretty angry" after being informed that his girlfriend was at the Willowick Cafe. Totarella and a resident of the house, Donna Scafe, left in his purple Lincoln sometime after 11:00 p.m.

{¶6} Brandi Cinkole testified that, on Christmas Eve, she was with her half-sister, Carla Cinkole, and Carla's daughter, Joelle Totarella-Cinkole. The three of them had been at Stingers Bar in Euclid before going to the Willowick Cafe while Carla visited friends. At the Willowick Cafe, Brandi and Joelle waited in the car while Carla was inside. Joelle received a phone call from Totarella. After speaking with him, Joelle passed the phone to Brandi. Totarella, sounding agitated, told her not to leave the bar. Brandi sent Joelle inside to get Carla. They returned after a couple of minutes and entered the vehicle, with Brandi in the driver's seat, Carla in the front passenger's seat, and Joelle in the back seat.

{¶7} Shortly after Carla and Joelle returned, Totarella sped into the parking lot. Carla and Totarella exited their vehicles and began yelling at each other in the parking lot. Totarella, after discarding a beer he was drinking, produced and brandished a large knife. Carla and Totarella returned to their vehicles. Totarella drove around the bar and brought the Lincoln to a stop behind Brandi's vehicle, so that she was unable to back up. Totarella approached the vehicle and began tapping on the rear passenger's side window with the knife and yelling. Carla tried to exit the vehicle again, but Brandi pulled her back inside. Totarella went around to the driver's side and entered the back seat. Still brandishing the knife, Totarella said he had no problem killing all three of them and continued yelling at Carla. Totarella reached forward and grabbed the side of Carla's head and/or ear with his free hand and pulled her toward the back seat. Totarella then exited the vehicle and Brandi noticed the arrival of police.

{¶8} In a written statement to the police, Brandi did not mention seeing Totarella with a knife until he entered their vehicle.

{¶9} Carla Cinkole testified that she has known Totarella since she was a teenager, but had not seen him for about fifteen years prior to December 2008. Totarella was present when Carla gave birth to Joelle, although he was not her father, and filled out the birth certificate. Carla admitted that she allowed Totarella to believe he was Joelle's father. Carla admitted that Totarella had given her a couple hundred dollars for her daughter's driving lessons. Carla denied claiming that Totarella and Joelle shared a resemblance.

{¶10} Prior to the December 25, 2008 incident, Carla and Totarella had seen each other several times and had been in regular contact throughout the month.

{¶11} Carla testified that, on Christmas Eve, Totarella called her while she was at her mother's house and demanded that they meet. Carla later called Totarella and told him that she was at Stingers Bar.

{¶12} Carla testified to visiting a friend at the Willowick Cafe while Brandi and Joelle waited in the car. When Joelle came inside, Carla returned to her vehicle. As soon as she got in the car, Totarella arrived. She immediately confronted him in the parking lot. Carla told Totarella to "get back in the car" with "the whore he was with and leave." Totarella was drinking a beer when he exited his vehicle. He threw the beer down and produced an approximately nine-inch long kitchen or butcher's knife.

{¶13} Carla returned to the car and dialed 911. A recording of the 911 call was played at trial. On the recording, Carla is heard reporting that Totarella pulled a "big-ass" knife on her and is driving a 1994 Lincoln. Another voice is heard saying, "he's back, he's back," and then screaming. At this point, Carla terminated the call.

{¶14} Carla testified that when Totarella returned, he parked his car so that it blocked her vehicle. She tried to exit the vehicle while Totarella was tapping on the

back window with the butcher's knife. Totarella then entered the rear driver's-side seat of the vehicle. Totarella said he had no problem killing them all. He grabbed the side of Carla's head and pulled her toward the back seat. Carla testified she lifted herself up because it felt like Totarella was ripping her earring out. Totarella was holding the knife in his other hand, pointed in her direction. When Carla saw police lights, Totarella left the vehicle and returned to his own and drove away. Carla described Totarella's demeanor as psychotic.

{¶15} The defense introduced phone records demonstrating that Totarella called Carla's cell phone at 9:18 p.m., when she was at her mother's house, and 11:44 p.m., when she was at the Willowick Cafe. There were two phone calls from Carla to Totarella at 10:04 and 10:24 p.m., when she was at Stingers Bar, and another call at 12:01 a.m., after she had left the Willowick Cafe.

{¶16} The defense pointed out certain inconsistencies between Carla's trial testimony and a written prepared statement made within an hour of the incident. In the statement, Carla wrote that she noticed the butcher's knife the second time he exited his vehicle, i.e. after circling the Cafe and blocking her vehicle. In other respects, the written statement was consistent with Carla's trial testimony.

{¶17} Joelle Cinkole testified that she met Totarella for the first time in December 2008, and knew that he was not her father despite being identified as such on her birth certificate. Joelle testified that she answered a call from Totarella on Carla's phone, while Carla was inside the Willowick Cafe. Totarella sounded "edgy" and asked where they were. Joelle told him they were at the Cafe and that Carla was inside visiting a friend named Pat. At this point, Totarella began yelling and Joelle handed the phone to Brandi and went inside to get Carla. Joelle testified about Totarella's arrival at

the Cafe, the confrontation with Carla, Totarella tapping the rear window with a large knife, and his entering their vehicle. Joelle testified that she tried to push Totarella out of the vehicle with her feet, but was unable to do so.

{¶18} George Groves lived with Donna Scafe on Kipling Avenue. He testified that Totarella was at his house on Christmas Eve before leaving with Scafe. Groves testified that a butcher's knife was missing from the kitchen within a "few days" of Totarella being at the house.

{¶19} Detective Robert Prochazka of the Willowick Police Department testified regarding unsuccessful efforts to locate the butcher's knife at the scene of the accident and at the impound lot where Totarella's Lincoln was taken after the accident.

{¶20} John Totarella, Thomas Totarella's uncle, testified on his behalf. John testified that Carla told him Joelle was Totarella's daughter and asked him if he saw a resemblance between Joelle and Totarella.

{¶21} On March 26, 2009, the jury found Totarella guilty of the following charges: the Abduction of Carla Cinkole; the lesser offense of Assault of Carla Cinkole; the Aggravated Menacing of Brandi Cinkole; the Aggravated Menacing of Joelle Cinkole; and Carrying Concealed Weapons.

{¶22} On April 22, 2009, a sentencing hearing was held. At the conclusion of the hearing, the trial court sentenced Totarella to four years of imprisonment for Abduction, six months for Assault, six months for each Aggravated Menacing, and one year for Carrying Concealed Weapons. The court ordered the Abduction and Carrying Concealed Weapons sentences to be served consecutively with each other and concurrently with the other sentences. Additionally, the court imposed a consecutive two-year sentence for violating post release controls, for an aggregate prison term of

seven years. On April 23, 2009, the trial court's Judgment Entry of Sentence was journalized.

{¶23} On May 20, 2009, Totarella filed his Notice of Appeal.

{¶24} On appeal, Totarella raises the following assignments of error:

{¶25} "[1.] The trial court erred to the prejudice of the defendant-appellant by failing to allow him a thorough cross-examination of the victim in violation of his right to confront the witnesses against, and his right to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution."

{¶26} "[2.] The trial court erred to the prejudice of the defendant-appellant when it allowed the jury to hear a recording that was not admitted into evidence in violation of the defendant-appellant's state and federal constitutional rights to due process and a fair trial guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution."

{¶27} "[3.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A)."

{¶28} "[4.] The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶29} In the first assignment of error, Totarella claims the trial court prejudicially limited the scope of his cross-examination in several instances.

{¶30} "Cross-examination shall be permitted on all relevant matters and matters affecting credibility." Evid.R. 611(B). "The limitation of such cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. Such exercise of discretion will not be disturbed in the absence of a clear

showing of an abuse of discretion." *State v. Acre* (1983), 6 Ohio St.3d 140, 145. "Trial judges may impose reasonable limits on cross-examination based on a variety of concerns, such as harassment, prejudice, confusion of the issues, the witness's safety, repetitive testimony, or marginally relevant interrogation." *State v. Treesh*, 90 Ohio St.3d 460, 480, 2001-Ohio-4.

{¶31} "Based on Evid.R. 611(B), a witness' bias and prejudice by virtue of a pecuniary interest in the outcome of the proceeding is a matter affecting credibility." *State v. Vanek*, 11th Dist. No. 2002-L-130, 2003-Ohio-6957, at ¶31; *State v. Ferguson* (1983), 5 Ohio St.3d 160, 165-166.

{¶32} In the first instance, Totarella claims the trial court denied him the opportunity to cross-examine Carla regarding a financial bias/motive for testifying against him. The relevant testimony is as follows:

{¶33} Defense counsel: Now there was money also involved in this relationship, didn't Tom help you out financially?

{¶34} Carla Cinkole: He gave me a couple hundred dollars towards my daughter's driving lessons.

{¶35} Defense counsel: And you had asked for I think some, substantially more money, correct?

{¶36} Carla Cinkole: No.

{¶37} Defense counsel: You had asked for like $700.00 for a staph infection that you were having, something like that?

{¶38} Prosecutor: Objection.

{¶39} Trial judge: I'm not sure where we're going here?

{¶40} Defense counsel: Want me --

{¶41} Trial judge: Well here, was there any other money that was -- did you ask him for any other money?

{¶42} Carla Cinkole: He said he came into a substantial amount of money if I needed anything he was there for me.

{¶43} Trial judge: Did you ask for any other money other than the money for the driving lessons?

{¶44} Carla Cinkole: Not that I recall.

{¶45} Trial judge: Okay.

{¶46} Defense counsel: Not that you recall?

{¶47} Trial judge: Move on to something else.

{¶48} There was no abuse of discretion in the trial court's limiting this line of cross-examination. The court allowed defense counsel to question Carla regarding her financial involvement with Totarella. Carla responded that such involvement was limited to a few hundred dollars. The court then asked Carla directly if there was any further involvement and again she responded in the negative. At this point, the court was within its discretion to order defense counsel to take up another line of questioning. Any further questioning on this issue would have been repetitive, and the issue was only of marginal relevance. Carla had no financial stake in the outcome of the trial, only a potential bias against Totarella based on his alleged refusal to loan her money.

{¶49} In the second instance, Totarella claims the trial court limited his cross-examination of Carla with respect to prior inconsistent statements made at trial.

{¶50} On direct examination, Carla testified as following regarding Totarella's movements between the initial confrontation and his entry into her vehicle.

{¶51} Prosecutor: *** [I]f you could explain where you were parked and when you saw him coming back where, if anywhere, he went?

{¶52} Carla Cinkole: We were parked on the side of the building. *** We hadn't moved and then when he came back, when he left the first time he went like this, came around the side street and went back around the back.

{¶53} Prosecutor: And when he comes back into the back parking lot where, if anywhere, did he go?

{¶54} Carla Cinkole: Right behind our car, he almost hit us.

{¶55} On cross-examination, Carla was asked again about Totarella's movements during this time.

{¶56} Defense counsel: *** [W]hen he had gotten back into his car and then pulled towards you what you're saying today is that he didn't just pull the 5, 10, 15, 25 feet from his parking spot or where he was parked in the parking lot towards your car he went out in the parking lot totally into the street, came in back in and pulled up behind you?

{¶57} Carla Cinkole: I honestly don't know if he drove around the parking lot once or twice. I don't know if, if, I wasn't in his vehicle, I don't know what he did I was in my car calling 911 and making sure that my family was safe.

{¶58} Defense counsel: Okay. So when you told the jury 20 minutes ago --

{¶59} Carla Cinkole: That he pulled --

{¶60} Defense counsel: -- that he got out and drove around that parking lot one time and you were under oath at that time when you told them that, you said that as if that was a fact, you didn't say you know it could have been two times or three times?

{¶61} Prosecutor: Objection.

{¶62} Trial judge: Sustain the objection.

{¶63} Defense counsel: Well, when you testified earlier you didn't qualify your answer with I don't know.

{¶64} Prosecutor: Objection, judge.

{¶65} Trial court: I'm going to sustain the objection. I think everybody can rely on what [her] testimony was earlier.

{¶66} Defense counsel: Well, can I ask her why she was testifying --

{¶67} Trial court: I don't think that it's changed.

{¶68} ***

{¶69} Defense counsel: Well, what you're saying now then, anyways, whatever you said earlier you're saying now that you don't know whether he pulled around once or twice or three times or no times?

{¶70} Carla Cinkole: I'm saying that he got back into his car, he drove toward our car after that.

{¶71} Defense counsel: Okay. So now you're saying he drove towards your car?

{¶72} Carla Cinkole: No, he drove out of the parking lot and then drove toward our car.

{¶73} Defense counsel: Okay. Did he drive around one time or twice or three times?

{¶74} Carla Cinkole: He went --

{¶75} Prosecutor: Objection. Judge, asked and answered.

{¶76} Trial judge: I don't think it's been different. I think she's indicated that he drove out, went around and came back, I think that's what her testimony was so if you're asking her if he went around two times, three times I think you already asked her, I think that's what she said. *** I'm going to sustain it.

{¶77} The trial court did not abuse its discretion in sustaining the objection. Carla's testimony was consistent that she saw Totarella leave the parking lot and return and that she was not certain how many times he may have circled the Cafe. Defense counsel was allowed to ask Carla several questions about this issue and further questioning would have been repetitive.

{¶78} In the third instance, Totarella claims the trial court prejudicially limited defense counsel's cross-examination of Carla with respect to the manner in which he held the knife.

{¶79} Defense counsel: At that point and he's holding the knife in his right hand with his hand around the blade?

{¶80} Carla Cinkole: On the handle. On the handle, around the handle and the part of the lower part of the blade that goes into the handle.

{¶81} Defense counsel: You told the officers when you met them on the 29th, four or five days after this happened, that he was holding the blade not holding the handle, correct?

{¶82} Carla Cinkole: He had his hand around both of them, the blade is a lot longer than the handle is.

{¶83} Defense counsel: Did you tell him his hand was wrapped around the blade?

{¶84} Carla Cinkole: His hand was wrapped around the knife.

{¶85} Defense counsel: Did you tell them his hand was wrapped around the blade?

{¶86} Carla Cinkole: I don't recall the exact words that I told him.

{¶87} Defense counsel: Would you disagree with them if he says that?

{¶88} Carla Cinkole: Would I disagree with --

{¶89} Defense counsel: In other words are you saying that you did not say that?

{¶90} Trial judge: She said she didn't recall.

{¶91} Carla Cinkole: I'm saying I don't recall the exact words that I used.

{¶92} Defense counsel: Well, then are you saying that when he was sitting behind you he did not have his hand around the blade instead of the handle?

{¶93} Carla Cinkole: He hit the side of my head, was pulling me over the back seat of the car at that time when I, what I saw as I'm going backward over the seat toward a knife that's between him and my daughter was a knife pointed at me and his hand on the knife, on the knife, the handle, the knife. All I know is I saw metal and it looked sharp and it was pointed at me.

{¶94} Defense counsel: Okay. So that would be no?

{¶95} Carla Cinkole: If that's how you want to take it then I don't --

{¶96} Defense counsel: My question is are you denying that when you looked back and saw this knife that his hand was around the blade instead of the handle; are you saying that that's not true?

{¶97} Prosecutor: Objection, your Honor.

{¶98} Trial judge: I'm going to sustain the objection. I think she's given the best answer she's given.

{¶99} Defense Counsel: Judge, this is cross, I think I'm allowed to probe here a little bit to see what [her] answer is.

{¶100} Trial judge: You certainly are. I think she said she was not certain. If you think there is a need to ask another question in that area I'll allow you to ask the same question if you want.

{¶101} Defense counsel: *** Are you saying you're certain, saying you were certain he had his hand on the handle too?

{¶102} Carla Cinkole: I'm not 100 percent certain because I had a knife coming at me.

{¶103} Defense counsel: All right. So you don't know?

{¶104} Carla Cinkole: I was looking at the knife, I wasn't particularly looking at what fingers were wrapped around what part of the knife.

{¶105} Again, the trial court did not abuse its discretion. In this instance, the trial court initially sustained the objection, it nevertheless allowed defense counsel to continue questioning Carla about the manner in which Totarella held the knife.

{¶106} Finally, Totarella claims the trial court erred by vouching for Carla's credibility when it stated, "I think she's given the best answer she's given." We disagree. A fair understanding of this statement is not that Carla is being truthful but that she has answered defense counsel's question to the best of her ability.

{¶107} The first assignment of error is without merit.

{¶108} In his second assignment of error, Totarella argues the trial court erred by allowing the jury to hear a recording that was not admitted into evidence.

{¶109} The recording was played over defense objection during the direct examination of Detective Prochazka, who testified that it represented a message left by Totarella on Carla's phone. On the recording, a male voice can be heard saying: "Tommy. You're still going to play, huh. Okay. You won't like the other game." Detective Prochazka was unable to say when the message was left. At the close of the

trial, the trial court declined to admit the recording into evidence, observing "I don't know what that phone message said. I don't have any idea what it was for."

{¶110} In considering this assignment of error, we will apply the case law governing the analogous situation where unadmitted exhibits are inadvertently given to the jury during deliberation. In those situations, reversal is warranted where the defendant has suffered material prejudice as a result. *State v. Adams*, 8th Dist. No. 89919, 2008-Ohio-3136, at ¶12 (citations omitted); *State v. Locklin*, 2nd Dist. No. 21224, 2006-Ohio-3855, at ¶12 (citations omitted); *State v. Westwood*, 4th Dist. No. 01CA50, 2002-Ohio-2445, at ¶¶24-37 (citations omitted).

{¶111} In the present case, the effect of the recording being played was harmless beyond a reasonable doubt. *State v. Bates*, 110 Ohio St.3d 1230, 2006-Ohio-3667, at ¶19, quoting *Arizona v. Fulminante* (1991), 499 U.S. 279, 310 ("[w]hen reviewing the erroneous admission of *** evidence, [the appellate court] simply reviews the remainder of the evidence against the defendant to determine whether the admission of the [improperly admitted evidence] was harmless beyond a reasonable doubt"). The trial court properly characterized the recording as being unintelligible and irrelevant. The quality of the recording is very poor. Like the trial judge, the jury could not be expected to have understood what was being said without the benefit of hearing the recording played again and/or a transcription of the message. Assuming the jury was able to comprehend the message, its relevance to the charges against Totarella is, at most, marginal. The message may be construed as a vague threat, but there is no indication of when or why the message was left. There is no connection between the message and the events of December 25, 2008. In light of Carla, Brandi, and Joelle's trial testimony, as well as the 911 call in which Carla states Totarella has attacked her with a

knife, it is unreasonable to conclude that the recorded message contributed in any meaningful way toward Totarella's convictions.

{¶112} The second assignment of error is without merit.

{¶113} In his third and fourth assignments of error, Totarella argues that his convictions are not supported by sufficient evidence and are against the weight of the evidence.

{¶114} "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury," i.e. "whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, quoting Black's Law Dictionary (6 Ed. 1990), 1433. Essentially, "sufficiency is a test of adequacy," that challenges whether the state's evidence has created an issue for the jury to decide regarding each element of the offense. Id.

{¶115} "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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 319. In reviewing the sufficiency of the evidence to support a criminal conviction, "[t]he 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." *Jenks,* 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶116} Weight of the evidence, in contrast to its sufficiency, involves "the inclination of the *greater amount of credible evidence.*" *Thompkins,* 78 Ohio St.3d at 387 (emphasis sic) (citation omitted). Whereas the "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support the verdict as a matter of law, *** weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25 (citation omitted). "In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's?" Id.

{¶117} Generally, the weight to be given to the evidence and the credibility of the witnesses is primarily for the trier of fact to determine. *State v. Thomas* (1982), 70 Ohio St.2d 79, at the syllabus. When reviewing a manifest weight challenge, however, the appellate court sits as the "thirteenth juror." *Thompkins,* 78 Ohio St.3d at 387 (citation omitted). The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses, to determine whether, "in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶118} Totarella challenges his convictions for Abduction and Carrying Concealed Weapons as not supported by legally sufficient evidence. In order to convict Totarella of Abduction, the State had to prove, beyond a reasonable doubt, that Totarella, "knowingly ***[,] [b]y force or threat, restrain[ed] the liberty of another person under circumstances that create[d] a risk of physical harm to the victim or place the other

person in fear." R.C. 2905.02(A)(2). Specifically, Totarella claims that the act of pulling Carla toward the backseat of her vehicle, if believed, does not constitute a restraint of her liberty. We disagree. The element of restraining another's liberty may be proven by evidence that the defendant has "limit[ed] one's freedom of movement in any fashion for any period of time." *State v. Wright*, 8th Dist. No. 92344, 2009-Ohio-5229, at ¶23 (citations omitted).

{¶119} In the present case, the act of grabbing Carla by the ear and pulling her toward the backseat constituted a restraint of her liberty. Cf. *State v. Messineo*, 4th Dist. Nos. 1488 and 1393, 1993 Ohio App. LEXIS 38, at *16-*17 (grabbing victim's arm and shaking her constituted restraint); *State v. Jaryga*, 11th Dist. No. 2003-L-023, 2005-Ohio-352, at ¶15 (Abduction charge based on the act of pushing the victim up against her car to grope her). Totarella asserts that Carla's testimony is "not worthy of belief," since pulling her that hard by the ear would have left some injury. This argument, properly an argument regarding the weight of the evidence, is answered by Carla's testimony that she lifted herself up as he pulled because it felt like he would tear her earring out.

{¶120} With respect to Carrying Concealed Weapons, the State was required to prove, beyond a reasonable doubt, that Totarella "knowingly carr[ied] or ha[d], concealed on [his] person or concealed ready at hand *** [a] deadly weapon other than a handgun." R.C. 2923.12(A)(1). Totarella argues that Carla, Brandi, and Joelle's testimony that he had a butcher's knife is nullified by the fact that he was found guilty of the lesser offense of Assault, rather than Felonious Assault. Totarella notes that the only difference between Assault and Felonious Assault is the element of "by means of a deadly weapon." Cf. Assault R.C. 2903.13(A) ("[n]o person shall knowingly cause or

attempt to cause physical harm to another") and Felonious Assault R.C. 2903.11(A)(2) ("[n]o person shall knowingly [c]ause or attempt to cause physical harm to another *** by means of a deadly weapon or dangerous ordnance").

{¶121} Contrary to Totarella's position, an acquittal for Felonious Assault does not preclude his conviction for Carrying Concealed Weapons. "The several counts of an indictment containing more than one count are not interdependent and an inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count." *State v. Adams* (1978), 53 Ohio St.2d 223, at paragraph two of the syllabus. Accordingly, "where the defendant is convicted on one or some counts and acquitted on others, the conviction will generally be upheld, irrespective of its rational incompatibility with the acquittal." *State v. Brown*, 8th Dist. No. 89754, 2008-Ohio-1722, at ¶27 (citation omitted).

{¶122} The third assignment of error is without merit.

{¶123} In the fourth and final assignment of error, Totarella makes the general argument that all of his convictions are against the weight of the evidence, noting that there were contradictions amongst the testimony of the three witnesses at trial and between their trial testimony and written statements; Carla had no marks on her face following the incident; and the knife was never recovered.

{¶124} While all these arguments have some bearing on the credibility of the witnesses, none of them renders the witnesses' testimony so improbable or untrustworthy that Totarella's convictions constitute a miscarriage of justice. On the whole, Carla, Brandi, and Joelle's trial testimony was consistent with one another's as well as with their written statements. The veracity of their trial testimony is also strengthened by the 911 call made during the incident, which corroborates the presence

of a knife, Totarella's return to the Cafe, their fear, and the fact of Totarella's reckless flight from the scene, which ended with Totarella driving through a utility pole and shearing it in two pieces.[1]

{¶125} The fourth assignment of error is without merit.

{¶126} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, finding Totarella guilty of Abduction, Assault, two counts of Aggravated Menacing, and Carrying Concealed Weapons, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

{¶127} I concur with the majority to affirm the judgment of the trial court. However, I write separately with respect to appellant's second assignment of error.

{¶128} In his second assignment of error, appellant contends that the trial court erred by allowing the jury to hear a recording that was not admitted into evidence in violation of his state and federal constitutional rights. Appellant alleges that the trial

1. Patrolman Spakes began following Totarella within a mile of the Willowick Cafe. He did not activate his lights or initiate a stop because it was reported that Totarella had a weapon and Spakes was without backup. As Totarella drove west on Route 2, Spakes was joined by two Euclid Police Department cruisers. At this point, Spakes activated his lights and Totarella exited the freeway, shortly thereafter losing control of his vehicle.

court permitted the jury to hear a recording that was identified through the use of hearsay testimony.

{¶129} Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and is generally not admissible at trial. Evid.R. 801(C); Evid.R. 802.

{¶130} In the instant matter, the state's last witness was the detective who investigated the case and spoke with Cinkole. The detective recorded onto a CD a message Cinkole claimed appellant left on her cell phone. Defense counsel objected to the introduction of the CD because Cinkole was not present to identify the voices on the phone and it was unclear from the recording what date the message was left. The objection was overruled. The state was then allowed to play the CD for the jury.

{¶131} This writer believes the defense's objection should have been sustained and the detective not permitted to testify about the phone message. The proper party to have introduced the CD would have been the victim. The requirement of authentication under Evid.R. 901 had not been made for the CD (State's Exhibit 8) and it should not have been played for the jury. However, I am unable to agree with appellant that the error was materially prejudicial to him. After a thorough review of the record, I have no doubt that the remaining, properly introduced evidence overwhelmingly establishes appellant's guilt. See *State v. Hobbs*, 8th Dist. No. 81533, 2003-Ohio-4338, at ¶47, citing *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 681; *State v. Williams* (1983), 6 Ohio St.3d 281. Because this error was harmless beyond a reasonable doubt, I believe appellant's contention is not well-taken.

{¶132} I concur.