**[Cite as *State v. Cappadonia*, 2010-Ohio-494.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2008-11-138 |
| | : | O P I N I O N |
| - vs - | | 2/16/2010 |
| | : | |
| JAMES CAPPADONIA, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08-CR-24779

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, OH 45036, for plaintiff-appellee

Ravert J. Clark, 114 East Eighth Street, Suite 400, Cincinnati, OH 45202, for defendant-appellant

**YOUNG, J.**

**{¶1}** Defendant-appellant, James Cappadonia, appeals his convictions in the Warren County Court of Common Pleas for rape and gross sexual imposition. For the reasons that follow, we affirm the judgment of the trial court.

**{¶2}** On February 29, 2008, appellant was indicted on two first-degree felony counts of rape of a child under the age of ten in violation of R.C. 2907.02(A)(1)(b),

and three third-degree felony counts of gross sexual imposition in violation of R.C. 2907.05(A)(4). The indictment stemmed from allegations made by appellant's stepdaughter, V.P., that appellant sexually abused her in July of 2007 when she was nine years old.

**{¶3}** At trial, V.P. testified that the first incident with appellant occurred on the evening of July 23, 2007. V.P.'s younger brother had injured himself earlier in the day and her mother had elected to stay with him at the hospital overnight. As V.P. got ready for bed, appellant told her that he wanted to sleep with her in her bed. V.P. testified that once in bed, appellant placed his hand down her underwear and rubbed her vagina with his fingers. He then pulled the covers down to the bottom of the bed, pulled off her pants and underwear, and licked her vagina. V.P. testified that when appellant asked her how it felt she replied, "It feels like I want to go to sleep." According to V.P., appellant stopped and she put her pants and underwear back on. Appellant apologized and told her that he would never do it again.

**{¶4}** V.P. testified that the next morning, she and appellant were going to the hospital to pick up her mother and brother. Prior to leaving, appellant told V.P. to take a shower. V.P. testified that while she was in the shower, appellant came into the bathroom and told her that he wanted to shower with her. V.P. testified that as appellant stood behind her and shampooed her hair, she felt his penis "rubbing against" her lower back.

**{¶5}** According to V.P., the third incident occurred on July 29, 2007. V.P.'s maternal grandmother had suffered a heart attack, and her mother was once again at the hospital overnight. V.P. testified that she and appellant watched a movie together at their house. Afterwards, appellant unbuttoned his boxer shorts, placed

V.P.'s hand on his penis and "made her hand go up and down" on it. V.P. testified that appellant then stood up and "made me put his penis in my mouth." V.P. stated that liquid came out of appellant's penis and she thought he was "peeing in [her] mouth."

**{¶6}** Several months later, on January 4, 2008, V.P. informed her mother of the incidents with appellant. The allegations were reported to the Hamilton Township Police Department and an investigation ensued, during which appellant denied the allegations of abuse.

**{¶7}** Following a three-day jury trial in October 2008, appellant was found guilty of both rape counts and one count of gross sexual imposition.[1] He was sentenced to life imprisonment on each of the rape counts, and five years in prison on the gross sexual imposition count. The trial court ordered appellant's sentence for gross sexual imposition to run concurrently with the life sentences for rape.

**{¶8}** Appellant appeals his convictions, raising six assignments of error for our review. For ease of discussion, we will address appellant's fifth assignment of error out of order.

**{¶9}** Assignment of Error No. 1:

**{¶10}** "A PROPERLY QUALIFIED EXPERT IS PERMITTED TO TESTIFY TO THE ULTIMATE ISSUE IN A CASE AS LONG AS THE OPINION IS BASED ON INFORMATION PERCEIVED BY THE EXPERT OR ADMITTED INTO EVIDENCE AT TRIAL. THE TRIAL COURT PERMITTED THE STATE'S MEDICAL EXPERT TO TESTIFY FROM A REPORT WHERE THE PERSON WHO DRAFTED THE

1. The trial court granted appellant's Crim.R. 29 motion for acquittal with respect to the second count of gross sexual imposition, and appellant was acquitted of the remaining count involving the alleged abuse on the morning of July 24.

REPORT DID NOT TESTIFY AT TRIAL. WERE [APPELLANT'S] CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL VIOLATED WHEN THE STATE'S MEDICAL EXPERT INDIRECTLY VOUCHED FOR THE CREDIBILITY OF THE ALLEGED VICTIM BY TESTIFYING TO PROBABLE SEXUAL ABUSE, DESPITE HER OPINION BEING BASED SOLELY ON AN INTERVIEW CONDUCTED BY A SOCIAL WORKER AND A REPORT LATENT WITH THE SOCIAL WORKER'S SUBJECTIVE OPINION?"

**{¶11}** In his first assignment of error, appellant contends that the state's medical expert improperly bolstered V.P.'s credibility to the jury.

**{¶12}** The state presented the testimony of Dr. Kathy Makoroff, a pediatrician at the Mayerson Center at Cincinnati Children's Hospital. The Mayerson Center is a child-advocacy unit of the hospital that evaluates children who are suspected victims of physical and sexual abuse. Makoroff testified that she examined V.P. on January 7, 2008. Prior to the examination, V.P. was interviewed by a social worker employed by the center. V.P. provided the social worker with a detailed history of the alleged sexual abuse, recounting the events of July 2007. V.P. stated that on July 23, appellant "touched my privates with no underwear or pants on me." The history included additional allegations that appellant performed cunnilingus on V.P., and that he forced her to perform fellatio on him on July 29. The social worker recorded V.P.'s statements in the history section of her report, which was provided to Makoroff prior to conducting her physical examination of V.P.

**{¶13}** In Makoroff's written report, which was read into evidence and admitted as a state exhibit at trial, she noted that V.P.'s physical examination revealed no signs of injury and that her laboratory work was normal. Based on the history

provided by V.P., her physical examination, and the laboratory data, Makoroff's impression in her written report was "concerning/probable abuse." Makoroff explained at trial that a normal physical exam can be seen in children who have been sexually abused and does not exclude the possibility of abuse. She testified that "upwards of 90 percent" of children who disclose a history of sexual abuse have normal physical examinations, and that the majority of the children she examines who have been sexually abused show no physical signs of abuse. She also stated that the acts alleged by V.P. would not "automatically" cause injury to her.

**{¶14}** Appellant contends that Makoroff's testimony improperly bolstered V.P.'s credibility because there was no physical evidence of abuse. He argues that in the absence of physical findings, Makoroff relied solely on V.P.'s unsupported statements to the social worker in forming her opinion, thereby "indirectly vouching" for V.P.'s credibility to appellant's prejudice at trial.

**{¶15}** The record indicates that appellant did not object to Makoroff's testimony. In failing to object, appellant has waived all but plain error. See Crim.R. 52(B). Plain error exists where there is an obvious deviation from a legal rule which affected the defendant's substantial rights, or influenced the outcome of the proceeding. *State v. Barnes,* 94 Ohio St.3d 21, 27, 2002-Ohio-68. The burden is on the defendant to show a violation of his substantial rights. *State v. Perry,* 101 Ohio St.3d 118, 2004-Ohio-297, ¶14. Notice of plain error is taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Landrum* (1990), 53 Ohio St.3d 107, 111.

**{¶16}** At the outset, we note that although appellant appears to argue otherwise, it was proper for Makoroff to rely on the history provided by V.P. to the

social worker in forming her opinion. Makoroff testified that the history was obtained for the purpose of medical diagnosis, and aided her in determining a course of testing and treatment for V.P. Evid.R. 803(4) establishes a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." This exception has been extended to statements made to hospital social workers, "if the purpose of the statement was to help initiate medical diagnosis or treatment." *State v. Cashin*, Franklin App. No. 09AP-367, 2009-Ohio-6419, ¶16. See, also, *State v. Muttart*, 116 Ohio St.3d 5, 2007-Ohio-5267. The history provided by V.P. clearly falls within the purview of Evid.R. 803(4).

**{¶17}** With respect to appellant's claim of improper vouching, he correctly states that in *State v. Boston* (1989), 46 Ohio St.3d 108, the Ohio Supreme Court held that an expert witness may not testify as to the veracity of the statements of a child victim because it is the fact-finder who bears the burden of assessing the credibility and veracity of witnesses. However, *Boston* does not prohibit an expert from giving their opinion as to whether a child has been sexually abused where that opinion is based upon the expert's medical examination of the victim, the victim's statements to the expert, and the victim's history. *State v. France* (Mar. 4, 1992), Summit App. No. 15198, 1992 WL 41285 at *2, citing *Boston* at 128.

**{¶18}** Upon review of Makoroff's testimony, we find no indication that she testified as to the truth of V.P.'s statements or vouched for her credibility. "Only statements directly supporting the veracity of a child witness are prohibited under

*Boston*." *State v. Cashin*, Franklin App. No. 09AP-367, 2009-Ohio-6419, ¶20, citing *State v. Rosas*, Montgomery App. No. 22424, 2009-Ohio-1404, fn. 1. Although appellant claims that the effect of Makoroff's testimony indirectly bolstered V.P.'s credibility, "indirect bolstering of a victim's credibility is not the same as the direct rendering of an opinion as to a victim's veracity that was involved in *Boston*." Id.

**{¶19}** In addition, Makoroff testified repeatedly that her opinion was based upon V.P.'s history as well as the results of her medical examination. Although, as appellant points out, there was no physical evidence of abuse, this fact was still medically significant to Makoroff. She testified that a high percentage of children who are sexually abused do not exhibit physical signs of abuse. She further opined that the alleged abuse in V.P.'s case would not necessarily cause injuries, and that the six-month lapse of time from the alleged abuse to the date of the physical examination would certainly allow any injuries to heal. Since Makoroff's opinion was based both on V.P.'s physical examination and history, we find that it did not run afoul of *Boston*. See *France* at *2 (expert opinion of abuse did not violate *Boston* where the exam produced no physical evidence of abuse because lack of physical findings was medically significant to expert).

**{¶20}** Moreover, unlike the child victim in *Boston* who was unavailable to testify, V.P. testified at trial and described detailed instances of abuse. She was subject to cross-examination regarding her allegations and the jury was able to independently assess her credibility. *State v. Smith,* Butler App. No. CA2004-02-039, 2005-Ohio-63, ¶22; *State v. Proffitt* (1991), 72 Ohio App.3d 807, 809. As a result, it cannot be said that the result of the trial would have been otherwise absent Makoroff's testimony.

**{¶21}** Based on the foregoing, we find that trial court's admission of Makoroff's testimony did not constitute error, plain or otherwise. Appellant's first assignment of error is therefore overruled.

**{¶22}** Assignment of Error No. 2:

**{¶23}** "THE CONSTITUTION GUARANTEES THE ACCUSED AN OPPORTUNITY TO CONFRONT THE WITNESSES AGAINST HIM. THE TRIAL COURT ADMITTED INTO EVIDENCE A REPORT PREPARED BY THE FORENSIC INTERVIEWER, CONTAINING THE SUBJECTIVE ASSESSMENT OF THE FORENSIC INTERVIEWER AND RELIED ON BY A STATE[ ] EXPERT WHEN THE INTERVIEWER WAS NOT SUBJECT TO CROSS-EXAMINATION. WERE [APPELLANT'S] CONSTITUTIONAL RIGHTS VIOLATED WHEN THE TRIAL COURT ADMITTED THE SUBJECTIVE ASSESSMENTS CONTAINED IN THIS REPORT?"

**{¶24}** In his second assignment of error, appellant argues that the trial court erred in allowing Makoroff to read the content of the "assessment" portion of the social worker's report into evidence because the social worker did not testify at trial. Appellant further contends that the court erred in admitting the assessment into evidence as a state exhibit. According to appellant, without the opportunity to cross-examine the social worker, the admission of the assessment violated his constitutional rights under the Confrontation Clause.

**{¶25}** The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, the United States Supreme Court held that testimonial

statements by witnesses offered to establish the truth of the matter asserted are inadmissible unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. A critical portion of this holding is the phrase "testimonial statements." Although *Crawford* did not provide a comprehensive definition as to what constitutes a testimonial statement, it includes one made "under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts* (2009), __ U.S. __, 129 S.Ct. 2527, 2529, quoting *Crawford* at 52. In determining whether a statement is testimonial, courts should focus on "'the expectation of the declarant at the time of making the statement.'" *In re J.M.*, Pike App. No. 08CA782, 2009-Ohio-4574, ¶46, quoting *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, paragraph one of the syllabus.

**{¶26}** Makoroff testified that the assessment portion of the report was comprised of what the social worker concluded from the history that she received from V.P. The assessment at issue provided:

**{¶27}** "[Patient] is a bright, articulate 9 [year-old] girl who reports [appellant] had oral-vaginal contact to this [patient], [appellant] forced this [patient] to have oral-penile contact with him [with] ejaculation, [appellant] forced the [patient] to masturbate him and [appellant] fondl[ed] this [patient's] vaginal area. This information, along with specific details that the [patient] is able to provide is consistent with inappropriate sexual contact. Based on this information, a medical exam is indicated."

**{¶28}** At the outset, we note that appellant did not object when Makoroff read the contents of the assessment into evidence from the witness stand. Moreover,

although he objected to the admission of the assessment into evidence as a state exhibit, the objection was not based on the specific ground that he now advances on appeal. Evid.R. 103(A)(1) provides that a claim of error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected and, if the ruling is one admitting evidence, the opponent of the evidence raises a timely objection to the evidence, stating the specific ground of objection, unless the ground of objection is apparent from the context. See *State v. O'Connor*, Fayette App. No. CA2007-01-005, 2008-Ohio-2415, ¶27. In this case, appellant's objection was based on hearsay grounds, and our review of the record indicates that the trial court's comments in overruling his objection focused on whether the statements fell under the hearsay exception for statements made for purposes of diagnosis and treatment.[2] There is no indication that the court understood that appellant was challenging the admission of those statements as violating his rights under the Confrontation Clause. See *State v. Schewirey*, Mahoning App. No. 05 MA 155, 2006-Ohio-7054, ¶16.

**{¶29}** As a result of appellant's failure to specifically object to the admission of the social worker's assessment on Confrontation Clause grounds, we need only determine whether the admission of the assessment constituted plain error on the part of the trial court. *O'Connor* at ¶28. Upon review, we find that appellant has failed to demonstrate the existence of plain error. Initially, we note that the first sentence of the assessment summarily recounts the history provided to the social worker by V.P. As a result, V.P. is the out-of-court declarant with respect to that statement. Because V.P. testified at trial and was subject to cross-examination with

2. Appellant has not challenged the propriety of the trial court's hearsay ruling on appeal.

regard to her interview with the social worker, the Confrontation Clause is not implicated. See *State v. Williams*, Butler App. No. CA2007-04-087, 2008-Ohio-3729, ¶31.

**{¶30}** In addition, although the remainder of the assessment is comprised of statements made by the social worker regarding her interview with V.P., we conclude that those statements were not testimonial in nature in violation of *Crawford*. There is no evidence to indicate that at the time the statements in the assessment were made, the social worker could have objectively believed that they would be available for use at a later trial. Testimony at trial indicated that the primary purpose for interviewing V.P. was for information gathering purposes to assist the medical staff at the hospital in diagnosing and treating her. The assessment specifically provides that based on the information provided by V.P., a medical examination was indicated.

**{¶31}** Moreover, the statements in the assessment were not central to the state's case, and contrary to appellant's argument, there is no indication that Makoroff specifically relied upon the social worker's statements in the assessment portion of the report. She testified to relying only on the history provided by V.P. As a result, it cannot be said that the outcome of appellant's trial would have clearly been otherwise had the assessment been excluded from evidence.

**{¶32}** Appellant's second assignment of error is therefore overruled.

**{¶33}** Assignment of Error No. 5:

**{¶34}** "[APPELLANT] WAS DENIED HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN THE TRIAL COURT ALLOWED DOCTOR MAKOROFF AND [V.P.'S MOTHER] TO TESTIFY TO THE VERACITY OF [V.P.'S] STATEMENTS?"

**{¶35}** In his fifth assignment of error, appellant argues that the trial court erred in allowing Makoroff and V.P.'s mother to testify as to the veracity of V.P.'s statements. In our disposition of appellant's first assignment of error, we concluded that Makoroff's testimony did not improperly bolster V.P.'s credibility. We will therefore confine our review of this assignment to the testimony of V.P.'s mother.

**{¶36}** Specifically, appellant contends that V.P.'s mother improperly bolstered her daughter's credibility when she testified that "[V.P.] was my only child that always told the truth." Appellant correctly notes that lay witnesses are prohibited from testifying as to another witness' veracity. *State v. Kovac*, Montgomery App. No. 18662, 2002-Ohio-6784, ¶32. "'[I]t is the fact-finder, not the so-called expert or lay witness, who bears the burden of assessing the credibility and veracity of witnesses.'" *Burchett*, 2004-Ohio-4983 at ¶19, quoting *Boston*, 46 Ohio St.3d 108 at 129. However, as the state points out in its brief, this testimony was elicited on cross-examination in response to a question by appellant's trial counsel that V.P. had lied in the past to get her younger brother into trouble. As a result, we find that the alleged error was invited by appellant. Under the invited-error doctrine, a party cannot take advantage of any alleged error that the party himself invited or induced. *State v. LaMar,* 95 Ohio St.3d 181, 2002-Ohio-2128, ¶102; *State v. Bell,* Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶28.

**{¶37}** In addition and as previously discussed, V.P. testified at trial and was subject to cross-examination. The jury was therefore able to witness her demeanor and judge her credibility independent of her mother's testimony. See *State v. Amankwah*, Cuyahoga App. No. 89937, 2008-Ohio-2191, ¶44. Appellant's fifth assignment of error is therefore overruled.

**{¶38}** Assignment of Error No. 3:

**{¶39}** "THE UNITED STATES AND OHIO CONSTITUTIONS GUARANTEE A DEFENDANT A FAIR TRIAL. DID PROSECUTORIAL MISCONDUCT RENDER [APPELLANT'S] TRIAL FUNDAMENTALLY UNFAIR?"

**{¶40}** In his third assignment of error, appellant contends that the state committed prosecutorial misconduct in its closing argument. Appellant alleges that the state disparaged him, vouched for the credibility of V.P., inflamed the passions and prejudice of the jury, and argued irrelevant issues that were not supported by the evidence. Appellant failed to object to these alleged instances of misconduct. Therefore, he has waived all but plain error. See Crim.R. 52(B).

**{¶41}** In order to determine whether a prosecutor's remarks constitute misconduct, a court must consider the following: "(1) whether the remarks were improper; and, if so, (2) whether the remarks prejudicially affected a defendant's substantial rights. * * * To demonstrate prejudice, a defendant must show that the improper remarks or questions were so prejudicial that the outcome of the trial would clearly have been otherwise had they not occurred." *State v. Jones*, Butler App. No. CA2006-11-298, 2008-Ohio-865, ¶21. (Citations omitted.) In reviewing allegations of prosecutorial misconduct, it is the duty of this court to consider the complained of conduct in the context of the entire trial. *State v. Waters,* Butler App. No. CA2002-11-266, 2003-Ohio-5871, ¶23. The touchstone of the analysis is the fairness of the trial, not the culpability of the prosecutor. *State v. Lott* (1990), 51 Ohio St.3d 160, 166. The Ohio Supreme Court has held that prosecutorial misconduct is not ground for error unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266; *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-

2630, ¶42.

**{¶42}** At the outset, we observe that the jury was instructed that the statements made by the parties during closing arguments were not evidence. *Bell*, 2009-Ohio-2335 at ¶85. We must therefore presume that the jury followed the trial court's instructions. Id.

**{¶43}** Appellant initially contends that in its rebuttal argument, the prosecutor injected his personal opinion regarding the credibility of appellant's testimony when he stated that appellant's testimony was "unbelievable." The prosecutor appeared to be referring to appellant's explanation at trial as to why V.P. was able to provide specific details regarding the alleged sexual abuse. The prosecutor stated:

**{¶44}** "When I was thinking about this case last night, I really got to the point where if you did not, after looking at [V.P.'s] testimony and listening to what she said and how she described it and her mannerism and going up and down and talking the kind of talk with all that stuff in her mouth and then *listening to that unbelievable story coming from that man*." If that still did not convince you beyond a reasonable doubt there is absolutely nothing I thought that I could say to change your mind." (Emphasis added.)

**{¶45}** Appellant testified on direct examination that he believed V.P. had learned about sex from the internet and by inadvertently observing him and her mother engaging in sexual acts. However, on cross-examination, appellant testified that V.P. learned about sex from him in the context of a discussion about child abduction on July 23, 2007. Appellant told V.P. that if she was abducted, she could be sexually abused. He testified to describing cunnilingus and fellatio in detail to her, including what semen would taste like. He also discussed vaginal intercourse with

her.

**{¶46}** Appellant claims that in stating that his testimony was "unbelievable," the prosecutor was improperly expressing his opinion as to appellant's credibility. A prosecutor may comment upon the testimony and suggest the conclusions to be drawn from it, but "a prosecutor cannot express his personal belief or opinion as to credibility of a witness or as to the guilt of the accused, or go beyond the evidence which is before the jury." *State v. Stone,* Warren App. No. CA2007-11-132, 2008-Ohio-5671, ¶27. In this case, although the prosecutor made reference to the credibility of appellant's testimony regarding V.P.'s knowledge of particular sexual acts, his statement fell short of directly commenting on appellant's credibility. Moreover, the prosecutor's statement was based on evidence in the record. "It is well-established that 'the prosecutor is permitted to make a fair comment on the credibility of witnesses based upon their testimony in open court.'" *State* v. *Brown*, Warren App. No. CA2002-03-026, 2002-Ohio-5455 at ¶22, quoting *State v. Mundy* (1994), 99 Ohio App.3d 275, 304.

**{¶47}** Appellant also claims that the prosecutor improperly vouched for V.P. in his rebuttal argument when he made the following statements: "There's absolutely no justification for [V.P.] to make [the allegations] up except for the fact that it happened to her;" and "It's that child's fault that she didn't come forward immediately when she's living with her abuser. Let me tell you something, six months later is pretty darn good for a child who is day in and day out living [with] her abuser."

**{¶48}** Improper vouching occurs when the prosecutor implies knowledge of facts outside the record or places their personal credibility in issue. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶232. We do not find improper vouching present

in these remarks, as the prosecutor was responding to statements made by appellant in his closing argument regarding the lack of physical evidence to support V.P.'s allegations of abuse, as well as the state's theory that V.P. fabricated the allegations because she was upset that appellant was a strict disciplinarian. In addition, the prosecutor did not place his credibility at issue or allude to any knowledge of facts outside the record, as Makoroff testified at trial that it was not uncommon for children living with their abusers to delay reporting abuse. See, also, *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶119-¶120 (no improper credibility vouching present where the prosecutor stated that the witness "had no motive to lie. No motive. None whatsoever").

**{¶49}** Appellant further claims that the prosecutor improperly inflamed the passions and prejudice of the jury by making the following statement:

**{¶50}** "Because [V.P.] told what were the consequences to her family. They lost their house, she lost her dogs, she lost having the man around again, granted I don't think she wants to see this man around anymore but there was something there about having financial support. She didn't benefit from this. She's getting herself into trouble, in fact that poor child got up there and said to you about the fact that she almost wished she had not said anything because you know, she feels guilty that her mommy is now a single mother of six. She feels guilty that they lost their house and they lost their dogs. She is internalizing all of this."

**{¶51}** Statements that may "inflame the passions and prejudice of the jury" are deemed improper because they wrongly "'invite the jury to judge the case upon standards or grounds other than those upon which it is obligated to decide the case, namely, the law and the evidence.'" *State v. Cunningham*, 178 Ohio App.3d 558,

2008-Ohio-5164, ¶27, quoting *State v. Draughn* (1992), 76 Ohio App.3d 664, 671. However, we do not find that the prosecutor's comments improperly inflamed the jury, as the comments were based on the testimony of V.P. regarding the effect of the abuse on her family. In addition, the prosecutor was responding to appellant's assertion in his closing argument that V.P. fabricated the allegations.

**{¶52}** Finally, appellant argues that the prosecutor engaged in improper speculation and argued irrelevant issues by stating: "Now in that nine year old's mind, if it started off with licking and went into her mouth and ejaculated, God knows what the next step would have been. Although we can infer, because he told her and talked to her about vaginal intercourse. Could that [have] been the next step that would have happened? Is that the reason she told?"

**{¶53}** Prosecutors are entitled to wide latitude in closing argument as to what the evidence has shown and what inferences may be drawn therefrom. *State v. Wright*, Butler App. No. CA2003-05-127, 2004-Ohio-2811, ¶24. However, prosecutors must avoid making insinuations and alluding to matters not supported by admissible evidence. Id. Here, although there was evidence that appellant had explained vaginal intercourse to V.P., we find that the prosecutor's statement as to what V.P. was thinking when she informed her mother of the alleged abuse, and his alluding to the "next step" of abuse were speculative in nature. However, in the context of the entire trial, we do not find that these statements prejudiced appellant. The remarks therefore do not rise to the level of plain error. Appellant's third assignment of error is accordingly overruled.

**{¶54}** Assignment of Error No. 4:

**{¶55}** "THE SIXTH AMENDMENT GUARANTEES THE ACCUSED

EFFECTIVE ASSISTANCE OF COUNSEL. [APPELLANT'S] TRIAL COUNSEL ABDICATED HIS ROLE AS ADVOCATE, FAILED TO PROPERLY PRESENT CHARACTER EVIDENCE, AND FAILED TO OBJECT TO PROSECUTORIAL MISCONDUCT IN THE FORM OF IMPROPER VOUCHING FOR THE ALLEGED VICTIM BY THE PROSECUTOR AND STATE[ ] WITNESSES AND IMPROPER COMMENTS BY THE PROSECUTOR IN CLOSING. WAS [APPELLANT'S] CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL VIOLATED?"

**{¶56}** In his fourth assignment of error, appellant contends that his trial counsel was ineffective for failing to: 1) properly present character evidence on his behalf; 2) object to the alleged improper vouching by state witnesses; and 3) object to the alleged instances of prosecutorial misconduct discussed in his third assignment of error.

**{¶57}** In reviewing an ineffective assistance of counsel claim, an appellate court must determine: (1) whether counsel's performance fell below an objective standard of reasonable professional competence, and (2) if so, whether there is a reasonable probability that counsel's unprofessional errors prejudiced appellant such that he was deprived of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052. In performing its review, an appellate court is not required to examine counsel's performance under the first prong of the *Strickland* test if an appellant fails to prove the second prong of prejudicial effect. See *State v. Salahuddin*, Cuyahoga App. No. 90874, 2009-Ohio-466, ¶28, citing *State v. Bradley* (1989), 42 Ohio St.3d 136. "'The object of an effectiveness claim is not to grade counsel's performance.'" Id., quoting *Bradley* at 143.

**{¶58}** In order to first demonstrate an error in counsel's actions, an appellant

must overcome the strong presumption that licensed attorneys are competent, and that the challenged action is the product of sound trial strategy and falls within the wide range of reasonable professional assistance. *Strickland* at 690-91. In establishing resulting prejudice, an appellant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Id. To that end, the trial must be shown to be so demonstrably unfair that there is a reasonable probability that the result would have been different absent the attorney's deficient performance. Id. at 693.

**{¶59}** Appellant initially contends that his trial counsel was ineffective for failing to properly present character evidence. At trial, appellant presented the testimony of two friends who had known him for several years. During direct examination, appellant's trial counsel asked the witnesses to give their opinion as to whether appellant was "of a character inconsistent with having committed these crimes." The state objected, and the trial court struck the testimony of both witnesses pursuant to R.C. 2907.02(D),[3] Ohio's Rape Shield Statute. Appellant does not dispute the appropriateness of the court's ruling, but argues that based on the question posed, his trial counsel was "apparently unaware" of the rules governing the admissibility of character evidence. Appellant contends that his trial counsel should have instead elicited testimony from the witnesses that appellant was a loving and caring stepfather to V.P. According to appellant, there is a reasonable probability that the outcome of the trial would have been otherwise had his counsel presented

3. R.C. 2907.02(D) provides, in pertinent part: "Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code * * *."

evidence regarding his relationship with V.P. We find this contention without merit.

**{¶60}** First, there is no evidence in the record to suggest that appellant's trial counsel was unaware of the prohibition on eliciting the character evidence objected to by the state. In addition, even if we were to find that his counsel's line of questioning was a debatable trial tactic, this alone does not establish that he suffered ineffective assistance of counsel. *State v. Leonard,* 104 Ohio St.3d 54, 2004-Ohio-6235, ¶146. In this case, there was significant testimony by both V.P. and her mother that appellant was a good stepfather. V.P. testified that she did "fun stuff" with appellant, and that before the alleged sexual abuse occurred, she "loved and liked" him. V.P.'s mother testified that appellant was the "father anybody would ever dream of" and that he was actively involved in their childrens' lives. In light of this testimony, appellant has not demonstrated that the outcome of his trial would have clearly been otherwise had the character witnesses specifically testified that appellant was a loving stepfather to V.P.

**{¶61}** Appellant also contends that his trial counsel was ineffective in failing to object to the alleged improper credibility vouching by V.P.'s mother and Makoroff, as well as the alleged improper statements made by the prosecutor in the state's closing argument. We note that generally, a failure to object is viewed as trial strategy and alone will not establish an ineffective assistance claim. See *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶103. Moreover, in our resolution of appellant's first and fifth assignments of error, we concluded that neither Makoroff nor V.P.'s mother improperly vouched for V.P.'s credibility at trial. In our disposition of his third assignment of error, we further determined that the prosecutor's comments in the state's closing argument were not improper or otherwise prejudicial to appellant.

Having found no error or resulting prejudice, his trial counsel's failure to object to these alleged instances of misconduct cannot be deemed ineffective.

**{¶62}** Based on the foregoing, appellant's fourth assignment of error is overruled.

**{¶63}** Assignment of Error No. 6:

**{¶64}** "CUMULATIVE ERROR DEPRIVED [APPELLANT] OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL."

**{¶65}** In his final assignment of error, appellant argues that he was denied a fair trial due to the cumulative errors of the trial court, his trial counsel, and the prosecutor.

**{¶66}** Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

**{¶67}** Since we do not find any instances of error in this case, we overrule appellant's sixth assignment of error.

**{¶68}** Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.