**[Cite as *State v. Dougherty*, 2011-Ohio-788.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NOS. CA2010-02-036<br>CA2010-02-037 |
| - vs - | : | O P I N I O N |
| | : | 2/22/2011 |
| RUSSELL LEE DOUGHERTY, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case Nos. CR2009-07-1241, CR2009-10-1693

Michael T. Gmoser, Butler County Prosecuting Attorney, Gloria J. Sigman, Government Services Center, 315 High Street, 11th Fl., Hamilton, Ohio 45011, for plaintiff-appellee

Charles M. Conliff, P.O. Box 18424, Fairfield, Ohio 45018-0424, for defendant-appellant

**RINGLAND, J.**

**{¶1}** In this consolidated appeal, defendant-appellant, Russell Lee Dougherty, appeals his conviction for two counts of domestic violence and violating a protective order, after he was found guilty of all three offenses in the Butler County Court of Common Pleas.[1]

**{¶2}** In case number CA2010-02-036, appellant was indicted for one count of domestic violence, a violation of R.C. 2919.25(A), which is a felony of the fourth degree

1. Case Nos. CA2010-02-036 and CA2010-02-037 were consolidated by this court via an entry on March

where there are previous domestic violence convictions. The indictment stemmed from a July 14, 2009 incident in which Connie Jo Proffitt, appellant's live-in girlfriend, sustained a scalp laceration, a closed head injury, and a left rib strain during an altercation with appellant. As a result of this incident, the Hamilton Municipal Court issued a domestic violence criminal temporary protection order (DVTPO) pursuant to R.C. 2919.26 on July 15, 2009. The DVTPO ordered appellant, inter alia, to stay away from Proffitt, not enter the couple's residence, and have no contact with her, even if she gave him permission to do otherwise. Appellant signed the DVTPO, and in so doing acknowledged service and agreed to be bound by the DVTPO's terms.

**{¶3}** In case number CA2010-02-037, appellant was indicted for one count of domestic violence, a violation of R.C. 2919.25(A), which is a felony of the fourth degree where there are previous domestic violence convictions; one count of violating a protective order, a third-degree felony in violation of R.C. 2919.27(A)(1); and one count of aggravated burglary, a first-degree felony violation of R.C. 2911.11(A)(1). This indictment was based on a September 27, 2009 incident wherein appellant entered Proffitt's home, and Proffitt sustained a bruise and cut to her arm.

**{¶4}** After a two-day trial, a jury found appellant guilty of both counts of domestic violence and violating the DVTPO. The jury acquitted appellant of aggravated burglary. The trial court sentenced appellant to 18 months for each domestic violence offense and five years for violating the protective order, for an aggregate term of eight years of incarceration. Appellant appealed his conviction, raising three assignments of error.

**{¶5}** We have elected to address appellant's assignments of error out of order.

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3, 2010.

**{¶6}** Assignment of Error No. 2:

**{¶7}** "THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION FOR VIOLATING A PROTECTIVE ORDER."

**{¶8}** In his second assignment of error, appellant maintains the state failed to offer sufficient evidence to prove that he recklessly violated the DVTPO. Appellant also suggests the state failed to prove he committed domestic violence.

**{¶9}** A claim of insufficient evidence tests "whether the evidence is adequate enough to support the verdict of the jury as a matter of law." *State v. Craft*, 181 Ohio App.3d 150, 2009-Ohio-675, ¶34, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. "[A]n 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, 273, (superseded on other grounds by state constitutional amendment in *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355). Therefore, our inquiry on appeal is to determine, "after viewing the evidence in the light most favorable to the prosecution, whether any reasonable trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

**{¶10}** In order to prosecute appellant for violating a protective order, R.C. 2919.27(A)(1) required the state to show appellant recklessly violated the terms of the protection order issued pursuant to R.C. 2919.26. In order to elevate the offense to a third-degree felony, the state also needed to demonstrate that the violation occurred while appellant committed a felony offense. R.C. 2919.27(B)(4). Lastly, "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely

disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

**{¶11}** The state offered testimony by two police officers who responded to the September 27, 2009 domestic disturbance call. Both officers testified they found appellant lying on the living room floor of Proffitt's home. In addition, both Proffitt and appellant's mother, Donna Haynes, testified that appellant and Proffitt walked their dog and adjourned to Proffitt's home on the evening of September 26, 2009. The state also offered a certified copy of the DVTPO into evidence. Appellant's signature appears in two places on the DVTPO where he acknowledged service and agreed to be bound by the terms of the DVTPO. Those terms included: an order to stay away from Proffitt, not to enter her residence, and to have no contact with her, even with her permission. The DVTPO also contained a warning that a violation of any of the terms of the order could result in arrest, and further stated, "YOU ACT AT YOUR OWN RISK IF YOU DISREGARD THIS WARNING." (Emphasis sic.) Finally, the state showed appellant violated the terms of the DVTPO while committing a domestic violence felony. Therefore, we find the state presented sufficient evidence to show that appellant committed a violation of R.C. 2919.27(A)(1).

**{¶12}** In order to prosecute appellant for domestic violence, R.C. 2919.25(A) required the state to prove appellant "knowingly cause[d] or attempt[ed] to cause physical harm to a family or household member." In order for a violation to be a fourth-degree felony the state also had to show appellant had previous domestic violence convictions. Lastly, "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B).

**{¶13}** Proffitt first testified that she and appellant had been in a relationship for eight years and resided together. Proffitt further testified, in regard to the July 14, 2009 incident, that the police came to their home, "cause me and Russell got in an argument, and he had me down on the floor beating me, and my head was split open, and I called for help." Although Proffitt later stated she had difficulty remembering exactly how her injury was caused, she acknowledged that she did not have a head laceration before the fight occurred.

**{¶14}** With regard to the September 27, 2009 incident, Proffitt stated that she awoke to appellant "hollering" and throwing trays, a glass and a TV remote. In addition, the following testimony was adduced at trial:

**{¶15}** "[THE PROSECUTING ATTORNEY]: What happened after you woke up?

**{¶16}** "[CONNIE PROFFITT]: I woke up. I didn't have my glasses on. I started coming around the bed. As I come around the bed, all I can remember is bouncing off the wall and hitting a kiddie gate and that's it.

**{¶17}** "[THE PROSECUTING ATTORNEY]: What is a kiddie gate?

**{¶18}** "[CONNIE PROFFITT]: It's a door we had open for the dogs, open for the dogs up against the wall.

**{¶19}** "[THE PROSECUTING ATTORNEY]: Like a baby gate?

**{¶20}** "[CONNIE PROFFITT]: Yes.

**{¶21}** "[THE PROSECUTING ATTORNEY]: Did Russell punch you?

**{¶22}** "[CONNIE PROFFITT]: I can't recall, because I don't know.

**{¶23}** "[THE PROSECUTING ATTORNEY]: Okay. You said he – what did he do to you that you remember?

**{¶24}** "[CONNIE PROFFITT]: He pushed me and I went backwards and I hit the

gate.

**{¶25}** "[THE PROSECUTING ATTORNEY]: Okay. Did you get injured?

**{¶26}** "[CONNIE PROFFITT]: Yes, I did."

**{¶27}** On cross-examination, Proffitt testified her vision was restricted that morning because she was not wearing her glasses, so she only saw "*something* charge against the bed and push up against me and hit the wall and hit the gate." (Emphasis added.) However, she later responded affirmatively when asked by appellant's trial counsel if she was sure appellant ran into her.

**{¶28}** Finally, during examination of the state's first witness, appellant stipulated to three prior convictions of domestic violence. After carefully reviewing all of the evidence, we find the state offered sufficient evidence to show that appellant committed both domestic violence offenses for which he was charged.

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

**{¶30}** Assignment of Error No. 1:

**{¶31}** "APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT."

**{¶32}** In his first assignment of error, appellant argues the prosecution committed multiple instances of misconduct throughout the trial. In particular, appellant maintains the prosecutor (1) made improper testimonial assertions during his examination of Proffitt and his cross-examination of Haynes, (2) repeatedly referenced Proffitt's grand jury testimony without obtaining the trial court's approval, and (3) engaged in improper arguments during his closing statements to the jury.

**{¶33}** "In general terms, the conduct of a prosecuting attorney during trial cannot

be made a ground of error unless that conduct deprives the defendant of a fair trial." *State v. Maurer* (1984), 15 Ohio St.3d 239, 266. In order to find prosecutorial misconduct, we must determine "whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused." *State v. Cornwall*, 86 Ohio St.3d 560, 570, 1999-Ohio-125, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14-15. "Not every intemperate remark by counsel can be a basis for reversal." *State v. Landrum* (1990), 53 Ohio St.3d 107, 112, citing *Maurer* at 267. "The touchstone of analysis 'is the fairness of the trial, not the culpability of the prosecutor.'" *Cornwall* at 570-71, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

**{¶34}** Although appellant's trial counsel objected to one instance of alleged prosecutorial misconduct, he failed to object to the numerous other occurrences of misconduct that are raised in this appeal. Therefore, those comments that were not objected to are analyzed under the plain error rule, since "'[a] claim of error in a criminal case can not be predicated upon the improper remarks of counsel during his argument at trial, which were not objected to, unless such remarks serve to deny the defendant a fair trial.'" *State v. Frears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111, quoting *State v. Wade* (1978), 53 Ohio St.2d 182, paragraph one of the syllabus.

**{¶35}** Although not specifically brought to our attention in appellant's brief, we feel compelled to discuss an additional improper remark we found after reviewing the 34 transcribed pages of the state's closing arguments. During his final argument, the prosecutor stated:

**{¶36}** "This is nonsense that I don't want you to see the big picture. I'm the one who brought it up. You need to know the big picture. You need to know the context, because if you don't and you take her performance *with him not testifying*, just agreeing,

yes, yes, yes, yes and you put that in a little vacuum, you can't find anybody guilty of anything based on that performance in a vacuum. You need the whole context, absolutely." (Emphasis added.)

**{¶37}** "The prosecution is normally entitled to a certain degree of latitude in its concluding remarks." *State v. Smith* (1984), 14 Ohio St.3d 13, 13-14, citing *State v. Woodards* (1966), 6 Ohio St.2d 14, 26, certiorari denied (1966), 385 U.S. 930, 87 S.Ct. 289; *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. "A prosecutor is at liberty to prosecute with earnestness and vigor, striking hard blows, but may not strike foul ones." *Smith* at 14, citing *Berger v. United States* (1935), 295 U.S. 78, 88, 55 S.Ct. 629.

**{¶38}** However, a prosecutor's comments regarding a defendant's failure to testify violates the accused's Fifth Amendment right to remain silent. *Griffin v. California* (1965), 380 U.S. 609, 85 S.Ct. 1229. See, also, *State v. Beebe*, 172 Ohio App.3d 512, 2007-Ohio-3746, ¶11; *State v. Butler*, Franklin App. No. 01AP-590, 2002-Ohio-1437, 2002 WL 465091, at *6; *State v. Clark* (1991) 74 Ohio App.3d 151 156; *State v. Belcher* (Sep. 21, 2000), Franklin App. No. 99AP-620, 2000 WL 1357797, at *1. Accordingly, a prosecutor's comments on a defendant's failure to testify "have always been looked upon with extreme disfavor because they raise an inference of guilt from a defendant's decision to remain silent." *State v. Thompson* (1987), 33 Ohio St.3d 1, 4. "In effect, such comments penalize a defendant for choosing to exercise a constitutional right." Id. "Prosecutors must therefore take care not to equate the defendant's silence to guilt." Id.

**{¶39}** This was not a case where the prosecution was commenting on the strength of the state's evidence or the defense's lack thereof. See *State v. Williams* (1986), 23 Ohio St.3d 16, 20-21. Nor was the prosecutor's statement an indirect

reference or allusion to appellant's failure to testify. See *State v. Keenan*, 81 Ohio St.3d 133, 149, 1998-Ohio-459. Instead, the prosecution's remark was a *direct reference* that was "manifestly intended" as a comment on appellant's silence at trial, and was "of such character" that the jury would have "naturally and necessarily" taken it as such. *State v. Cooper* (1977), 52 Ohio St.2d 163, 173, vacated on other grounds by *Cooper v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3137.

**{¶40}** Simply put, there was nothing subtle about the prosecutor's comment. It was a direct and impermissible reference to appellant's constitutional right to not testify, which colored the jury's view of the trial. Moreover, it is conceivable the jury was given the idea that defense witnesses were being orchestrated by appellant while he was using the protection of the Fifth Amendment. Therefore, we find the prosecutor's statement regarding appellant's failure to testify was an improper remark. See *State v. Feerer*, Warren App. No. CA2008-05-064, 2008-Ohio-6766, ¶36-46.

**{¶41}** Appellant also argues that other occurrences of prosecutorial misconduct occurred during the prosecution's closing argument. Appellant directs this court to several statements the prosecutor made at closing in which he questioned Proffitt's credibility. These include:

**{¶42}** "Before you today is the task of trying to figure out which Connie Proffitt you need to believe. Before yesterday the Connie Proffitt, who was at the scene talking to the officers in July and September, was the same Connie Proffitt who testified at a hearing – a preliminary hearing in July and again in September, and was the same Connie Proffitt that testified at two different grand juries, which is what produced these two different indictments.

**{¶43}** "I[n] fact, that was the same Connie Proffitt that you heard at the beginning

of the afternoon, the Connie Proffitt said this man assaulted her on July 14, 2009. He split her head open. That's the same Connie Proffitt that said this man entered her home when she was asleep on September 27th in the early morning hours and threw her around into the doorframe off the kiddie gate and put the bruise on her arm, which you have yet to see. And when she went to bed that night, he was not – was not in that home.

**{¶44}** "So do you believe that Connie Proffitt at scenes, preliminary hearings and grand jury testimony and direct examination? Or do you believe the Connie Proffitt, who testified during cross-examination, who all of a sudden said, I don't know how I got that injury. It could have been the dog. Yeah, he was in the house. He was my guest when I went to bed and he was in some medical distress. And I didn't have my glasses on, so I really don't know. I couldn't make out the figure, but he was really in distress so I tried to call for help, 911 to get him medical help. And I brought a picture of the dog to show you how big he is. That is the task before you today, is to figure out which one of those Connie Proffitt is telling the truth.

**{¶45}** "* * *

**{¶46}** "Does anyone else find it ironic that you're being asked to believe her version on the phone instead of his?

**{¶47}** "* * *

**{¶48}** "So if at the end of the day you sort this out and you say I think given the totality of the circumstances and all of the evidence, given everything I observed and know about what happened yesterday, I think Connie of the scene, the preliminary hearings, the grand jury, and the direct examination testimony, I think that is the truth. I believe that is the truth. If you believe that, then this – this is it."

**{¶49}** Recently, this court reiterated the impropriety of a prosecutor expressing a "personal belief or opinion as to the credibility of a witness." *State v. Givens*, Butler App. Nos. CA2009-05-145, CA2009-05-146, 2010-Ohio-5527, ¶10, quoting *State v. Baldev*, Butler App. No. CA2004-05-106, 2005-Ohio-2369, ¶19, citing *Smith*, 14 Ohio St.3d at 14. See, also, *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶232. In *Givens* we found that "[t]he prosecutor improperly expressed his personal opinion that [the victim] was not a credible witness." Id. at ¶40. Similarly, in the instant case the prosecution expressed a multiple personal opinions on Proffitt's credibility. We find these comments were improper

**{¶50}** In addition, appellant maintains the prosecutor made improper remarks about Proffitt by referring to her as "sympathetic", "pathetic" and "infuriating" and further stating:

**{¶51}** "Folks, she is – how do I put it? Well, I think we saw from the example. She's functionally illiterate. There is a class of folks all around us who move through life and move through adulthood and get through life not being able to read of write. And they just get through, but that makes them vulnerable. For example, she could sit up here and after she's done telling [appellant's trial attorney], yeah, I said at the preliminary hearing that I don't remember what happened. You saw me do it. I could walk the transcript up here and she can't read it. She can't read it. She's at the mercy of whoever is in front of her saying this is what you said. Who remembered what – one word they said five months ago? But if you can't read the transcript, what are you going to say? What are you going to do?"

**{¶52}** "While we realize the importance of an attorney's zealously advocating his or her position, we cannot emphasize enough that prosecutors of this state must take

their roles as officers of the court seriously. As such, prosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." *Frears*, 86 Ohio St.3d at 332. We find the prosecution's disparaging comments about Proffitt were highly improper. Not only did he go beyond the bounds of an acceptable argument, but he rudely characterized a witness, who was also the victim in this case.

**{¶53}** Appellant also maintains the prosecutor committed misconduct during final arguments when he misrepresented the jury's role in the trial process. At closing, the prosecution told the jury:

**{¶54}** "You took an oath. It's your duty and your duty is to enforce the law, the rule of law."

**{¶55}** After explaining the "rule of law," via a confusing and peculiar analogy regarding the transition of power after the most recent United States presidential election and an election in Zimbabwe, the prosecutor misstated the jury's role again, when he said, "[a]nd you enforce the law."

**{¶56}** Misleading statements by the prosecution are not necessarily improper if they correctly state the law. See *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶68-72. It is well-settled that a jury's "primary responsibility [is] to weigh the evidence and assess the credibility of the witnesses." *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶54, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. A jury is not, however, responsible for "enforcing" the law. By incorrectly stating the jury's role in the trial process, the prosecutor made an improper misleading statement.

**{¶57}** Appellant also contends the prosecution impermissibly asked Proffitt about

her grand jury testimony and referenced that testimony throughout his closing argument.[2] In addition, appellant argues that he had a right to examine Proffitt's grand jury testimony when the state used it to impeach her at the trial.[3]

**{¶58}** During her direct examination, Proffitt testified she did not give appellant permission to be in her home on the evening of September 26, 2009. On cross-examination, Proffitt admitted she asked appellant into her residence that evening, and went to sleep while he was still inside her home. Claiming surprise, the prosecution obtained permission from the trial court to impeach Proffitt:

**{¶59}** "[THE PROSECUTING ATTORNEY]: You just testified about ten minutes ago when [appellant's trial attorney] was questioning you that when you went to bed the night of September 26th, that Russell was in the house with your permission. Do you recall testifying to that?

**{¶60}** "[CONNIE PROFFITT]: Yes, I did.

**{¶61}** "[THE PROSECUTING ATTORNEY]: That's different than what you testified at the preliminary hearing in October, isn't it?

**{¶62}** "[CONNIE PROFFITT]: Yes.

**{¶63}** "[APPELLANT'S TRIAL ATTORNEY]: Objection.

**{¶64}** "THE COURT: Overruled.

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2. Appellant also argues that the prosecution improperly used Proffitt's preliminary hearings testimony. We note that the state filed notice of its intention to use Proffitt's two preliminary hearings testimony more than two weeks before appellant's trial. The state also filed transcripts of Proffitt's testimony with the court and served the transcripts upon appellant's trial counsel. Lastly, appellant's trial counsel also referred to preliminary hearings during Proffitt's cross-examination.

3. We agree that when the state uses a witness' grand jury testimony for impeachment purposes, a defendant has a right to view the grand jury testimony in order to confirm any contradiction. *Hopfer* at 550; Evid.R. 613(A); *State v. Jacobs* (1995), 108 Ohio App .3d 328, 332. However, that right can only be exercised upon a request to the trial court. Id. In this case, appellant failed to ask the trial court for a copy of Proffitt's grand jury testimony. Therefore, appellant cannot now complain on appeal that he should have been given a copy of Proffitt's testimony. Cf. *State v. Schnipper* (1986), 22 Ohio St.3d 158, 160 (appellant cannot appeal wrongful denial of the opportunity to cross-examine a testifying officer about inconsistencies

**{¶65}** "[THE PROSECUTING ATTORNEY]: * * * It's different, isn't it?

**{¶66}** "[CONNIE PROFFITT]: Yes.

**{¶67}** "[THE PROSECUTING ATTORNEY]: It's different than what you told the grand jury?

**{¶68}** "[CONNIE PROFFITT]: Yes, that I recall, yes.

**{¶69}** "[THE PROSECUTING ATTORNEY]: That's, in fact, different than what you told this jury an hour and a half ago, isn't it?

**{¶70}** "[CONNIE PROFFITT]: Yes.

**{¶71}** "[THE PROSECUTING ATTORNEY]: And different from what you written statement from that night says, isn't it?

**{¶72}** "[APPELLANT'S TRIAL ATTORNEY]: Objection.

**{¶73}** "THE COURT: Overruled.

**{¶74}** "[CONNIE PROFFITT]: Yes."

**{¶75}** In addition, the prosecuting attorney made at least seven other references to the substance of Proffitt's grand jury testimony during his closing arguments.

**{¶76}** In general, proceedings before a grand jury are secret. *State v. Greer* (1981), 66 Ohio St.2d 139, 147. The disclosure of such testimony is controlled by Crim.R. 6(E). Id. at paragraph one of the syllabus. Crim.R. 6(E) states in pertinent part:

**{¶77}** "Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A * * * prosecuting attorney * * * may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters

within his testimony and the police report where no request for inspection of the police report was made).

only when so directed by the court preliminary to or in connection with a judicial proceeding * * *." See, also, *State v. Hopfer* (1996), 112 Ohio App.3d 521, 549.

**{¶78}** In this case, the prosecuting attorney disclosed the substance of Proffitt's grand jury testimony on multiple occasions, after the trial court gave him permission to impeach his witness. We believe the better practice in cases such as this, is to only use grand jury testimony to impeach a witness, at the trial court's direction per Crim.R. 6(E). However, because the prosecutor obtained permission to impeach Proffitt, we cannot say that his use of her grand jury testimony, under the particular circumstances of this case, was improper.

**{¶79}** Although not directly brought to this court's attention, we find there was an additional instance of an improper remark made by the prosecuting attorney. On cross-examination of Officer Christopher Robinson, appellant's trial counsel asked if he had met appellant prior to responding to the July 14, 2009 incident and, whether he was familiar with appellant. Officer Robinson answered affirmatively to both questions. Appellant's trial counsel did not question Officer Robinson any further on this topic. On redirect the following occurred:

**{¶80}** "[THE PROSECUTING ATTORNEY] * * *: Since you were asked, you said you've had prior contact with Mr. Dougherty prior to July 14th, 2009.

**{¶81}** "[OFFICER ROBINSON]: Yes.

**{¶82}** "[THE PROSECUTING ATTORNEY]: How? In what way?

**{¶83}** "[OFFICER ROBINSON]: Same situation, domestics.

**{¶84}** "[THE PROSECUTING ATTORNEY]: Okay. How many times have you had prior contact with him in situations like that?

**{¶85}** "[OFFICER ROBINSON]: Maybe twice."

**{¶86}** Appellant's trial counsel objected to this line of questioning, and the trial court sustained the objection.

**{¶87}** Later during closing arguments the prosecutor made the following statement:

**{¶88}** "So I will remind you of one tiny bit of testimony, Officer Chris Robinson. And I didn't ask him this question. I'm not allowed to. He asked the question. Officer, did you know my client when he got there and found him lying on the floor of the garage? Or maybe he was on the floor of the living room, I can't keep them straight. Officer Chris Robison said, yeah, I knew him from a couple of prior occasions. And he asked, What were those? Well a couple prior calls out to their home for domestic disturbance."

**{¶89}** "The prosecutor is a servant of the law whose interest in a prosecution is not merely to emerge victorious but to see that justice shall be done. It is a prosecutor's duty in closing arguments to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury." *Smith* (1984), 14 Ohio St.3d at 14, citing *United States v. Dorr* (C.A.5, 1981), 636 F.2d 117, 120. While a prosecutor has wide latitude during summation regarding what the evidence has shown and what reasonable inferences may be drawn, the prosecution may not allude to matters not supported by admissible evidence. *State v. Lott* (1990), 51 Ohio St.3d 160, 165-66. Moreover, "[i]t is improper for the prosecuting attorney to refer to evidence that has been excluded by the court." 29 Ohio Jurisprudence 3d (2000) 552, Criminal Law, Section 2704. See, also, *State v. Heinish* (1990), 50 Ohio St.3d 231, 241; *Lott* at 166; *State v. Whitt*, Cuyahoga App. No. 82293, 2003-Ohio-5934, ¶30, 31.

**{¶90}** During closing, not only did the prosecutor comment about testimony the

trial court sustained an objection to at trial, but he completely misrepresented Officer Robinson's testimony.[4] First, the prosecution stated that Officer Robinson answered that he knew appellant from "a couple prior calls out to their home for domestic disturbance." Officer Robinson never stated he had been at "their home" on two prior occasions because of domestic disturbance. As this fact was not elicited at trial, it constitutes evidence that was not before the jury. In addition, the prosecuting attorney stated the queries about prior incidents were asked by appellant's trial counsel. It is patently clear from the transcript that the prosecution asked Officer Robinson that question, not appellant's trial attorney. Because the prosecuting attorney made reference to excluded evidence, and evidence outside the record, we find his remarks regarding Officer Robinson's testimony were improper.

**{¶91}** Lastly, appellant argues the prosecutor engaged in improper conduct by making testimonial assertions about appellant's family's conduct toward Proffitt, questioning Proffitt about a prior conversation they had in his office, speaking to Haynes about what appellant said on the telephone when she never listened to the call, and asking Haynes about the DVTPO and about seeing Proffitt in the hallway.

**{¶92}** Appellant relies on *State v. Daugherty* (1987), 41 Ohio App.3d 91, to support his argument. In *Daugherty*, the accused took the stand and testified that she left her restaurant job at 11:15 p.m., went to her friend's home until 1:20 a.m., and drank

4. **{¶a}** This was not the only instance where the prosecution misstated what evidence was adduced at trial. During his closing, the prosecutor stated that appellant's family was "watching her," because appellant told Proffitt during a phone call that his family "is driving up and down that street. I know where you go."

**{¶b}** In actuality during the call, appellant asked Proffitt, "who'd you see down on Main Street?" After Proffitt responded she was on Main Street paying a phone bill, she asked appellant "who told you I was down seeing somebody on Main Street?" Appellant responded, "you forget my family goes up and down through there all the time."

**{¶c}** While inferences may be drawn from the evidence, insinuations that go beyond the evidence are impermissible. *State v. Kaufman*, 187 Ohio App.3d 50, 2010-Ohio-1536, ¶156, citing *Smith*, 14 Ohio St.3d at 14.

one beer. Id. at 91. She was subsequently arrested by a state highway patrolman at 1:50 a.m. for driving under the influence. Id. "Upon cross-examination of the accused, the prosecuting attorney, under the pretext of asking a question, stated to the jury, in effect, that one Cindy Smith, a manager at Chi-Chi's, had records that showed that the accused worked the day shift on Sunday, August 24, 1986, and was 'gone by 6:30.'" Id. at 91-92. After Daugherty's conviction, the trial court, sua sponte, discovered that the restaurant employment records showed Daugherty left at 11:15 p.m. Id. at 92. Although the trial court considered vacating the conviction, the court essentially determined that there was no prejudice. Id.

**{¶93}** The Fifth District Court of Appeals disagreed, and found that Daugherty would not have been convicted absent the untrue testimonial assertion made by the prosecutor. Id. The *Daugherty* court further stated:

**{¶94}** "[I]t is highly improper for any lawyer in the trial of any jury case, civil or criminal, to make what amounts to testimonial assertions under the pretext that he is merely 'asking a question.' Secondly, it is unprofessional to put before a jury, under the pretext of asking questions, information that is not in evidence. See 1 ABA Standards for Criminal Justice (2 Ed. 1980 and 1986 Supp.) 3.91, Standard 3-5.9. Cf. DR 7-106(C)(1) of the Code of Professional Responsibility (a lawyer *shall not* state any matter not supported by admissible evidence). As the commentary to Standard 3-5.9 admonishes: 'It is indisputable that at the trial level it is highly improper for a lawyer to refer in colloquy, argument, or other context to factual matter beyond the scope of the evidence or the range of judicial notice. This is true whether the case is being tried to a court or a jury * * *. At the appellate level it is also a grave violation of ethical standards to argue factual matters outside the record.'" (Emphasis sic.) Id. at 92-93.

**{¶95}** After carefully reviewing the record and appellant's arguments, we do not find any of the questions posed by the prosecution rose to the level of a testimonial assertion as contemplated by the *Daugherty* decision. As such, the prosecuting attorney did not make improper remarks in the guise of testimonial assertions.

**{¶96}** We acknowledge that the trial court instructed the jurors before opening statements "not [to] consider as evidence any statement of any attorney made during the trial." In addition, before closing, the trial court reiterated that "statements of attorneys are not evidence." The trial court also explained that appellant's decision to not testify should not be considered. Upon careful consideration of the prosecutor's remarks and comments made during the trial and the closing arguments, we find the trial court's instructions were too general to cure the prosecution's improper statements. *Smith*, 14 Ohio St.3d at 15; *Givens*, 2010-Ohio-5527 at ¶43; *State v. Smith*, Butler App. No. CA2007-05-133, 2008-Ohio-2499, ¶18. Given the nature and extent of the prosecutor's comments, we find the jury should have been given more specific guidance to cure the error caused by the prosecuting attorney's statements. Id.

**{¶97}** As previously stated, the fundamental question that must be asked when engaging in a prosecutorial misconduct analysis is whether the improper conduct deprived appellant of a fair trial. See *Maurer*, 15 Ohio St.3d at 266; *Cornwall* at 570-71; *Phillips* , 455 U.S. at 219; *Frears*, 86 Ohio St.3d at 332; *Wade*, 53 Ohio St.2d at paragraph one of the syllabus. Arguably, the prosecution's statement regarding appellant's failure to testify could be considered so egregious on its own so as to fundamentally deny appellant a fair trial, and require reversal. See *Griffin*, 380 U.S. 609; *State v. Lynn* (1966), 5 Ohio St.2d 106; *State v. Howell* (1965), 4 Ohio St.2d 11, 12; *State v. Fain* (Jan. 21, 1998), Summit App. No. 18306, 1998 WL 46760, at *3.

**{¶98}** However, we are tasked with considering the effect of the prosecution's improper statements on the jury in the context of the entire trial to determine whether appellant was fundamentally denied due process of law. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, citing *Donnelly v. DeChristoforo* (1974), 416 U.S. 637, 643-645, 94 S.Ct. 1868 and *Darden v. Wainwright* (1986), 477 U.S. 168, 181-182, 106 S.Ct. 2464. This is not a case where the misconduct was limited to a single "isolated incident." *Keenan* at 410, citing *Donnelly* at 645. Instead, "the prosecutor's errors were part of a protracted series of improper arguments." *Keenan* at 410, citing *Liberatore*, 69 Ohio St.2d at 589. Indeed, we conclude that the prosecutor's statements were a pervasive pattern of misconduct that permeated and affected the entire proceedings. *Keenan* at 405; *Beebe*, 172 Ohio App.3d at ¶8.

**{¶99}** We have already determined there was sufficient evidence presented in this case; however, "it is not enough that there be sufficient other evidence to sustain a conviction in order to excuse the prosecution's improper remarks." *Smith*, 14 Ohio St.3d at 15. "Instead, it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty." Id., citing *United States v. Hasting* (1983), 461 U.S. 499, 510-511, 103 S.Ct. 1974. In other words, the evidence of appellant's guilt must be "overwhelming." *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, ¶152.

**{¶100}** In this case, we are unable to conclude that it is "clear beyond a reasonable doubt" the jury would have convicted appellant of the offenses as charged, as the evidence was not so overwhelming so as to proscribe this finding. Accord *Keenan* at 411; *Smith* at 15; *State v. Hart* (1994), 94 Ohio App.3d 665, 676; *Butler*, 2002 WL 465091 at *6; *Belcher,* 2000 WL 1357797 at *4; *Clark*, 74 Ohio App.3d at 159, 160.

Moreover, the cumulative effect of the prosecutor's improper remarks clearly deprived appellant of his constitutional right to a fair trial. See *State v. Demarco* (1987), 31 Ohio St.3d 191, 196-97; *State v. Person*, 167 Ohio App. 3d 419, 2006-Ohio-2889, ¶36; *State v. Freeman* (2000), 138 Ohio App.3d 408, 420, 423.

**{¶101}** We do not reach this decision lightly, nor do we suggest that every "intemperate remark" will lead us to the same conclusion. However, given the facts, circumstances, and evidence in this case in light of the prosecution's misconduct, we have decided that a fair trial was impossible. Appellant's first assignment of error is sustained.

**{¶102}** Assignment of Error No. 3:

**{¶103}** "APPELLANT'S CONSTITUTIONAL RIGHT TO COUNSEL WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

**{¶104}** In his final assignment of error, appellant argues that he was deprived of effective assistance of trial counsel because his counsel failed to object to most of the instances of prosecutorial misconduct. Appellant also maintains that his counsel was defective for failing to object to the admission of over 800 tape recorded calls allegedly made by appellant to Proffitt.

**{¶105}** In order to prevail on an ineffective assistance of counsel claim, appellant must (1) demonstrate that his counsel's performance fell below an objective standard of reasonable representation; and if so, (2) show there was a reasonable probability that his counsel's errors affected the outcome of the proceedings. *Strickland v. Washington* (1984), 466 U.S. 668, 690, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, at paragraph two of the syllabus.

**{¶106}** We have already established that the prosecutor's remarks throughout

the trial rose to the level of prosecutorial misconduct. Appellant's trial counsel only objected to one occurrence of misconduct, when the prosecuting attorney first broached the subject of Proffitt's grand jury testimony. Most of the prosecutor's improper statements were not challenged, and thus they were before the jury. Because appellant's trial counsel failed to object to most of the instances of prosecutorial misconduct, we find his counsel's performance fell below an objective standard of reasonable representation which resulted in prejudice to appellant. Cf. *Smith*, 2008-Ohio-2499, at ¶22.

**{¶107}** With regard to his second claim of ineffective assistance of counsel, appellant maintains his trial counsel erred by not objecting to the admission of a CD with more than 800 calls purportedly made by appellant to Proffitt, because only a couple of the calls were properly authenticated.

**{¶108}** "A telephone conversation must be authenticated before the contents of that phone call are admissible." *State v. Williams* (1979), 64 Ohio App.2d 271, 273. See, also, *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, ¶109 (recordings must be "authentic, accurate, and trustworthy" in order to be admissible). The party seeking admission of telephone calls and/or recordings must provide "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). This is a "low threshold standard [which] does not require *conclusive* proof of authenticity" instead there need only be "sufficient foundational evidence for the trier of fact to conclude that the [evidence] is what its proponent claims it to be." (Emphasis sic.) *State v. Easter* (1991), 75 Ohio App.3d 22, 25. Essentially, "[t]estimony as to a telephone call is admissible where there is a reasonable showing, through testimony or other evidence, that the witness placed or received a call as alleged, plus some

indication of the identity of the person spoken to." *State v. Vrona* (1988), 47 Ohio App.3d 145, 149. See, also, Evid.R. 901(B)(5) and (6).

**{¶109}** During direct examination, Proffitt testified appellant had telephoned her a number of times while he was incarcerated. When the state showed Proffitt the CD containing 834 recordings, she identified the number written on the CD as her cellular telephone number. When asked if she had the opportunity to listen to some of the calls, Proffitt replied affirmatively and identified appellant as the male voice on the recording and herself as the female voice. After receiving permission from the trial court, the state played one of the telephone calls for Proffitt. The prosecution then asked her questions about that call, and about some of the other calls appellant made. During cross-examination, appellant's trial counsel also played two of the recordings from the CD for Proffitt. The trial court later admitted the CD in its entirety into evidence.

**{¶110}** Of the 834 recordings on the CD, only three were actually played in court and in essence properly authenticated by Proffitt. Although Proffitt stated she had listened to other recordings at the prosecutor's office before trial, she did not identify which of the recordings she heard. We are inclined to agree with appellant in finding his counsel erred by failing to object to the admission of the CD, when only three of the recordings were authenticated as telephone calls from appellant to Proffitt. While the threshold for authentication is low, we do not believe the remaining 831 recordings can properly be authenticated and/or identified as telephone phone calls from appellant to Proffitt, absent further evidence.

**{¶111}** Nevertheless, we find the admission of all of the recordings on the CD did not affect the outcome of the proceedings. First, none of the offenses for which appellant was charged were based on the recordings. Second, the state did not offer

the recordings as proof of an element of the offenses. Finally, there is no indication in the record that the jury members listened to the additional 831 recordings, so the admission could not have impacted the jury's verdict. Thus, the admission of the CD could not have prejudiced appellant.

**{¶112}** In conclusion, although appellant's trial counsel's performance fell below an objective standard of reasonable representation, appellant was only prejudiced by his trial counsel's failure to object to most of the instances of prosecutorial misconduct throughout the trial. Therefore, we sustain appellant's third assignment of error, in part.

**{¶113}** Based on the prosecutorial misconduct and ineffective assistance of trial counsel, we reverse appellant's conviction and remand this case to the Butler County Court of Common Pleas for a new trial.

**{¶114}** Judgment reversed and remanded for further proceedings.

BRESSLER, P.J., and HENDRICKSON, J., concur.