[Cite as *State v. Canterbury*, 2015-Ohio-1926.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

STATE OF OHIO,	:	
	:	Case No. 13CA34
Plaintiff-Appellee,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
LEVI D. CANTERBURY,	:	
	:	
Defendant-Appellant.	:	**Released: 05/05/15**

APPEARANCES:

Timothy Young, Ohio Public Defender, and Eric M. Hedrick, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Keller J. Blackburn, Athens County Prosecuting Attorney, and Merry M. Saunders, Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

McFarland, A.J.

{¶1} Levi Canterbury appeals the decision of the Athens County Court of Common Pleas, convicting him and sentencing him to a seven-year term of imprisonment after a jury found him guilty of two counts of rape, first-degree felonies in violation of R.C. 2907.02(A)(1)(a) and 2907.02(A)(1)(c). On appeal, Appellant contends that 1) the prosecutors' misconduct denied him a fair trial and due process of law, in violation of his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, Section 10 and 16, Article I of the Ohio Constitution, and R.C.

2901.05; 2) the trial court violated his rights to due process and a fair trial when, in the absence of sufficient evidence, it entered a judgment entry convicting him of rape under R.C. 2907.02(A)(1)(c) in violation of his Fifth, Sixth, and Fourteenth Amendment rights under the United States Constitution, Sections 10 and 16, Article I of the Ohio Constitution, and Crim.R. 52(B); and 3) trial counsel rendered ineffective assistance in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

{¶2} Upon review, we find that Appellant's conviction was supported by sufficient evidence. Further, we find that Appellant was not denied effective assistance of counsel and that the prosecution's conduct did not rise to the level of prosecutorial misconduct under a plain error standard of review. Thus, we find no merit in Appellant's assigned errors. Accordingly, the decision of the trial court is affirmed.

FACTS

{¶3} A review of the record before us indicates that B.J., the victim herein, was a female student at Ohio University's Athens, Ohio campus. She spent the evening of September 9, 2011, with her girlfriend, Madeline

Ciarlillo.[1] The two girls ate dinner in one of the campus dining halls and then went to Madeline's dorm room, located in Voigt Hall, where they proceeded to drink vodka and Mountain Dew, mixed by Madeline. The girls drank until approximately 10:00 p.m., at which time they left for a party. They walked to the party, which took place at Neil Patten's house. Once they arrived at the party, B.J. purchased at least one rum and Coke, and possibly more. This is the last memory B.J. has of the evening until she encountered Appellant, Levi Canterbury.

{¶4} The record indicates that B.J. left the party without Madeline, which was very uncharacteristic as the two of them usually would leave together. Samantha Bailo, who is acquainted with B.J., saw B.J. leave the party alone and noticed that B.J. "seemed really drunk and tired, and like kind of had her head hanging down." B.J. later testified that she blacked out for a period of three to four hours, has no memory of leaving the party, and has no memory of how she reached the location in which she encountered Appellant. All she remembers is seeing an orange light and a metal door at some point during that time, and she remembers that she started to become "coherent" when she realized she was walking in gravel along a roadside.

[1] The record indicates that B.J. and Madeline Ciarlillo are involved in a same-sex relationship.

{¶5} The record indicates that Appellant, a specialist in the Ohio Army National Guard, was visiting his girlfriend, Ashley Spencer, on the evening of September 9, 2011. The two spent time in Ashley's dorm room, drinking alcohol, with the intention of having sex. When Ashley became sick, Appellant decided to leave. As Appellant was leaving Ohio University's campus, he noticed B.J. walking along the side of the road on State Route 682, in a direction heading away from campus. Appellant stopped the vehicle and asked B.J. if she needed assistance. Appellant also pointed out to B.J. the fact that she was not wearing any pants. B.J. was unaware until this time that she was not wearing pants.

{¶6} B.J. entered Appellant's vehicle and advised she needed to be taken to Court Street. Instead of taking her to Court Street, Appellant took her to the football stadium parking lot, explaining that he didn't want to drop a girl with no pants off at Court Street. She advised she couldn't find her way to the dorm from the stadium and needed to go to Court Street. Appellant then took her to at least one, possibly two more parking lots, at which point he stopped the car. This is where Appellant's and B.J.'s accounts of the events of the night begin to differ.

{¶7} According to B.J., Appellant got out of his side of the car, came around to her side of the car, entered the vehicle and then raped her by force,

vaginally. According to Appellant, the two engaged in consensual sexual contact, that did not include intercourse, but which resulted in him ejaculating onto the seat of the car. Both agree that once this encounter was over, Appellant drove B.J. to Court Street and dropped her off. When B.J. exited the car, Appellant noticed she was bleeding and that there was a pool of blood on the leather seat of his car. Appellant told B.J. she was bleeding, but she continued walking.

{¶8} Appellant then placed a call to 911, advising he had picked a female student up on State Route 682, dropped her off on Court Street, and that he noticed she was bleeding when she got out of his vehicle. He provided his contact information to the dispatcher. Appellant then met up with law enforcement, provided them with information regarding the direction B.J. was walking, and advised that there was blood in the seat of his car. Appellant then proceeded to clean the blood from his car, with law enforcement's knowledge. Appellant later called 911 a second time to check the status of the report; however, law enforcement was unable to locate B.J.

{¶9} After exiting the vehicle, B.J. made her way to Voigt Hall, where Madeline's dorm was located. Madeline let B.J. into the building, with the assistance of the residence advisor, Kristin Huber. B.J. was crying and bleeding. B.J. undressed and got into the showers. Madeline, seeing that

B.J.'s underwear was bloody, threw them into the garbage can in her room and gave B.J. a clean pair of underwear to put on. It was not until the next morning that B.J. told Madeline what had occurred. Later that day, after also talking with Kristin Huber, B.J. was taken to the emergency room at O'Bleness Hospital.

{¶10} The medical records indicate that B.J. was treated for "sexual assault" and an "unprotected sexual encounter." The records indicate B.J. complained of vaginal discomfort, but no bleeding at that time. The records also indicate that B.J. thought she had been drugged and did not remember having sexual intercourse. B.J. explained during trial that she actually reported that there were parts of the evening she did not remember, not that she did not remember having intercourse. Although B.J. met with SANE nurse, James Schultz, she refused the performance of a rape kit. B.J. did not report the incident to police until September 15, 2011.

{¶11} Once the Ohio University Police Department and the Athens Police Department realized that the alleged rape had reportedly occurred on the same night as the 911 call placed by Appellant, a campus crime alert was issued and law enforcement contacted Appellant and arranged for an interview. Appellant voluntarily met with members of both the Athens and Ohio University police. During that initial interview, he denied any physical

contact whatsoever with B.J., except that his hand might have brushed her thigh as he was handing her a jacket. He denied any sexual contact or sexual conduct with B.J. It was not until he later testified at trial that he claimed that a consensual sexual encounter occurred.

{¶12} Appellant was ultimately indicted on October 13, 2011, for one count of rape in violation of R.C. 2907.02(A)(1)(a) and one count of rape in violation of R.C. 2907.02(A)(1)(c), both felonies of the first degree. At trial, the State presented twenty-one witnesses, including B.J., Madeline, various friends, telephone records custodians, medical staff personnel, Appellant's girlfriend, law enforcement personnel involved in the investigation, as well as the testimony of forensic scientists from the Bureau of Criminal Identification, or BCI. Of importance, BCI forensic scientist, Raymond Peoples, testified that Appellant's DNA and specifically his semen, was found on the inside of B.J.'s underwear. He further testified that the semen was located in a pattern indicating that it had drained from the vaginal cavity. Appellant testified in his own defense but presented no other witnesses.

{¶13} After nine days of trial, the jury found Appellant guilty of both counts of the indictment. The trial court merged the counts for purposes of sentencing, and sentenced Appellant to a seven-year term of imprisonment.

He was also ordered to register as a Tier III Sex Offender with lifetime registration. It is from this final order that Appellant now brings his timely appeal, setting forth the following assignments of error for our review.

ASSIGNMENTS OF ERROR

"I. THE PROSECUTORS' MISCONDUCT DENIED LEVI A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATION OF LEVI'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION, AND R.C. 2901.05.

II. THE TRIAL COURT VIOLATED LEVI'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, IT ENTERED A JUDGMENT ENTRY, CONVICTING LEVI OF RAPE UNDER R.C. 2907.02(A)(1)(c) IN VIOLATION OF LEVI'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION, AND CRIM.R. 52(B).

III. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF LEVI'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION. "

ASSIGNMENT OF ERROR I

{¶14} In his first assignment of error, Appellant contends that he was deprived of due process and a fair trial as a result of prosecutorial misconduct. Appellant raises several claims of prosecutorial misconduct under this assignment of error, contending that 1) the prosecution repeatedly

expressed their personal beliefs in Appellant's guilt during both their case-in-chief and in closing; 2) the prosecution repeatedly attacked Appellant's credibility by expressing their personal belief that Appellant was lying when he testified at trial; 3) the prosecution vouched for the credibility of B.J.; and 4) the prosecution directed the jury to adopt allegedly "improper, inadmissible, unqualified 'expert' opinion testimony as scientific evidence" of Appellant's guilt. The State counters by noting that Appellant failed to object to any of the alleged instances of prosecutorial misconduct during trial and as such, has waived all but plain error.

{¶15} Failure to object to an alleged error waives all but plain error. *State v. Keeley*, 4th Dist. Washington No. 11CA5, 2012-Ohio-3564, ¶ 28. Notice of Crim.R. 52(B) plain error must be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 6; *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. To find plain error, the outcome of trial must clearly have been otherwise. *State v. McCausland*, 124 Ohio St.3d 8, 2009-Ohio-5933, 918 N.E.2d 507, ¶ 15; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 50.

{¶16} "The test for prosecutorial misconduct is whether the conduct was improper and, if so, whether the rights of the accused were materially prejudiced." *State v. Purdin*, 4th Dist. Adams No. 12CA944, 2013-Ohio-22, ¶ 31; quoting *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 36; citing *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221, ¶ 45, in turn citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "The 'conduct of a prosecuting attorney during trial cannot be grounds for error unless the conduct deprives the defendant of a fair trial.' " *Purdin* at ¶ 31; quoting *State v. Givens*, 4th Dist. Washington No. 07CA19, 2008-Ohio-1202, ¶ 28; quoting *State v. Gest*, 108 Ohio App.3d 248, 257, 670 N.E.2d 536 (8th Dist. 1995). Accord *State v. Apanovitch*, 33 Ohio St.3d 19, 24, 514 N.E.2d 394 (1987). "Prosecutorial misconduct constitutes reversible error only in rare instances." *Purdin*, supra; quoting *State v. Edgington*, 4th Dist. Ross No. 05CA2866, 2006-Ohio-3712, ¶ 18; citing *State v. Keenan*, 66 Ohio St.3d 402, 406, 613 N.E.2d 203 (1993). The "touchstone analysis * * * is the fairness of the trial, not the culpability of the prosecutor. * * * The Constitution does not guarantee an 'error free, perfect trial.' " *Purdin* at ¶ 31; quoting *Leonard* at ¶ 36; quoting *Gest* at 257.

Expression of Personal Belief in Appellant's Guilt

{¶17} We now turn to an examination of the alleged instances of prosecutorial misconduct raised by Appellant, beginning with Appellant's claim that the prosecution repeatedly expressed their personal beliefs in Appellant's guilt both during the presentation of evidence and also during closing arguments. More specifically, Appellant alleges that the prosecutors repeatedly asserted the legal conclusion that Appellant raped B.J. A few examples of the claimed misconduct and improper commentary are illustrated as follows during the direct examination of B.J.:

> "When he was finished raping you what happened?"
>
> * * *
>
> How were you sitting after the sexual attack?
>
> * * *
>
> And so after you were raped you said something was wrong with that, with how you thought about the world. What do you mean?"

The foregoing constitutes three examples of allegedly improper commentary by the prosecution regarding their legal conclusions and personal beliefs that B.J. had, in fact, been raped by Appellant. Overall, this Court identified seven instances during the direct examination of B.J. where the prosecution made these types of comments. Thus, in five hours of testimony and 188

pages of transcript, the terms "sexual attack" and/or "rape" were used in the questioning of B.J. seven times. We further note that defense counsel used the term "rape" as well in his questioning of B.J., approximately three times.

{¶18} Prosecutors " 'may not express their personal beliefs or opinions regarding the guilt of the accused.' " *State v. Marcum*, 4th Dist. Gallia No. 12CA6, 2013-Ohio-5333, ¶ 63; quoting *State v. Topping*, 4th Dist. No. 11CA6, 2012-Ohio-5617, ¶ 85; in turn quoting *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E.2d 293 (1990). With respect to the seven comments made by the prosecution during direct examination of B.J., we agree with Appellant they were improper. However, as we discuss in detail under Appellant's second assignment of error, Appellant's conviction was supported by sufficient evidence, not only because of the testimony of B.J., but also because of the DNA evidence introduced by the State.

{¶19} As we explain more fully below, "[i]t is well settled that a rape conviction may rest solely on the victim's testimony, if believed, and that '[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction.' " *State v. Patterson*, 8th Dist. Cuyahoga No. 100086, 2014-Ohio-1621, ¶ 40; quoting *State v. Lewis*, 70 Ohio App.3d 624, 638, 591 N.E.2d 854 (4th Dist. 1990). " 'Prosecutorial misconduct rises to plain error only if it is clear that a defendant would not have been

convicted in the absence of the improper comments.' " *State v. Marcum*, supra, at ¶ 38; quoting *State v. Purdin*, supra, at ¶ 39; quoting *State v. Keeley*, supra, at ¶ 28; citing *State v. Conley*, 4th Dist. Pike No. 08CA784, 2009-Ohio-1848, ¶ 27; *State v. Olvera-Guillen*, 12th Dist. Butler No. CA2007-05-118, 2008-Ohio-5416, ¶ 36. Furthermore, we must be mindful that when reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the context of the entire trial. *State v. Waters*, 4th Dist. Vinton No. 13CA693, 2014-Ohio-3109, ¶ 33; citing *Sunbury v. Sullivan*, 5th Dist. Delaware No. 11CAC030025, 2012-Ohio-3699, ¶ 30; citing *Darden v. Wainright*, 477 U.S. 168, 106 S.Ct. 2464 (1986).

{¶20} Here, we cannot conclude that using the word "rape" seven times in the course of five hours and 188 pages of direct examination was so pervasive that it rendered Appellant's trial unfair. Further, in light of the other evidence before the jury, it is not clear that Appellant would not have been convicted in the absence of the improper comments. Thus, we cannot conclude, under a plain error review, that the comments made by the prosecution constituted prosecutorial misconduct.

{¶21} Appellant also contends the prosecution made similar statements approximately thirty-five times throughout closing arguments. A few examples found in the transcript of the closing arguments are as follows:

> "She testified she later threw the shoes that she was wearing when he raped her away.
>
> * * *
>
> Even here when he's about to rape her she still thinks the best of mankind.
>
> * * *
>
> No intention to report this rape to the police."

Additionally, Appellant argues that the prosecution described Appellant as a predator during closing argument, which was highly prejudicial, aroused the passion and prejudice of the jury against Appellant and thus deprived him of his right to be presumed innocent. A review of the transcript reveals the following comments by the prosecution during closing arguments:

> "The fact is that on September 9th of 2011 the Defendant didn't have sex with his girlfriend and he saw [B.J.] was an opportunity because he's a predator, a predator who uses his military background to get what he wants."

{¶22} We again note that prosecutors " 'may not express their personal beliefs or opinions regarding the guilt of the accused.' " *State v. Marcum*, supra, at ¶ 63; quoting *State v. Topping*, supra, at ¶ 85; quoting *State v. Lott*, supra. However, both the prosecution and the defense have wide latitude during opening and closing arguments. *State v. Waters*, supra, at ¶ 33; citing *Sunbury v. Sullivan*, supra, at ¶ 30. Here, based upon a review of the record and considering the complained of statements within the context of the entire trial, we cannot conclude that the statements by the prosecution, when reviewed under a plain error standard, rose to the level of prosecutorial misconduct. Here, we cannot say the Appellant would not have been convicted in the absence of the statements.

{¶23} As set forth above, we have already noted that Appellant's conviction was based upon sufficient evidence, in the form of victim testimony and also DNA evidence. Further, in reaching this decision, we rely on the instructions given to the jury, which inform the jury that statements of counsel are not to be considered as evidence. For instance, the jury was instructed that "[t]he evidence does not include * * * the opening or closing arguments of counsel." Further, the jury was instructed that "[t]he opening statements and closing arguments of counsel are designed to assist you. They are not evidence." " 'A presumption always exists that the jury

has followed the instructions given to it by the trial court.' " *State v. Murphy*, 4th Dist. No. 09CA3311, 2010-Ohio-5031, ¶ 81; quoting *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph four of the syllabus. Based on the trial court's instructions, as well as the other evidence in the record which sufficiently supports Appellant's conviction, we cannot say that the prosecutors' statements changed the outcome of the trial. As such, Appellant has failed to demonstrate plain error.

{¶24} Finally, with respect to Appellant's contention that the prosecution's characterization of Appellant in closing as a "predator" was improper, we agree. Once again, however, there is a presumption that the jury followed the instructions provided by the court. Here, the jury was instructed that Appellant was to be presumed innocent of the charge until his guilt was established beyond a reasonable doubt, and was also instructed that Appellant was to be acquitted of the charge unless the State produced evidence which convinced the jury beyond a reasonable doubt of every essential element of the charge. Further, bearing in mind our plain error standard of review, considering that this statement was made one time during closing arguments, and in light of the other evidence before the jury, we cannot conclude that Appellant would not have been convicted but for the prosecutions' use of the term.

Expression of Personal Belief that Appellant was Lying

{¶25} Appellant contends that the prosecutions' statements indicating he was either lying or was a liar constituted prosecutorial misconduct. As a general matter, "[i]t is improper for an attorney to express his or her personal belief or opinion as to the credibility of a witness." *State v. Thompson*, 141 Ohio St.3d 254, 292, 2014-Ohio-4751, 23 N.E.3d 1096; quoting *State v. Williams*, 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997). Further, "the state may not 'unfairly suggest[ ] that the defense's case was untruthful and not honestly presented.' " *State v. Thompson* at 291; quoting *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶ 167.

{¶26} Appellant cites this Court to several instances throughout closing argument where the prosecution stated that Appellant had lied about the events that transpired between himself and B.J. In particular, Appellant directs our attention to statements made during closing indicating Appellant had lied to law enforcement regarding the direction in which B.J. was walking when he placed the call to 911. Further, that he had lied to law enforcement when he was interviewed regarding B.J's condition on the night in question and he lied to law enforcement regarding whether he had engaged in sexual conduct or sexual contact with her. And, that he lied to his friend, Dane Black, regarding the events of that night. Appellant also

cites us to statements during closing argument where the prosecution indicates that Appellant's "story" was a fabrication. The State responds by arguing that it was not error to characterize Appellant as a liar where the evidence reasonably supports that characterization.

{¶27} A review of the record indicates that Appellant did lie to law enforcement when he was initially interviewed. He denied having sex with B.J. and specifically denied any sexual contact whatsoever. At trial, he admitted that he had lied to investigators during the initial interview, claiming that he was scared. He then testified during trial that he had consensual sexual contact with B.J., but he denied intercourse. Thus, Appellant admitted he lied. Further, the DNA evidence admitted at trial refuted Appellant's testimony that the encounter was limited to sexual contact only, and not intercourse. As discussed more fully below, forensic evidence established that Appellant's semen was located on the inside of B.J.'s underwear in a pattern indicating vaginal drainage. Thus, Appellant was proven, by scientific evidence, to be lying. As such, Appellant admitted that he lied prior to trial, and forensic scientific evidence indicated Appellant was still lying when he testified at trial. Based upon these facts, we cannot conclude that the State impermissibly characterized Appellant as a liar. See *State v. Arnold*, 2 N.E.2d 1009, 2013-Ohio-5336, ¶ 140-141 (2nd Dist.);

citing *State v. Baker*, 159 Ohio App.3d 462, 2005-Ohio-45, 824 N.E.2d 162 (2nd Dist.) ([i]t is not prosecutorial misconduct to characterize a witness as a liar or a claim to be a lie if the evidence reasonably supports that characterization.).

{¶28} Further, although Appellant cites *State v. Baldev*, 12th Dist. Butler No. CA2004-05-106, 2005-Ohio-2369 in support of his argument, we conclude that *Baldev* is factually distinguishable from the present case. In *Baldev*, the court noted that "[i]t is improper for a prosecutor to state that the defendant is a liar or that he believes the defendant is lying." *Baldev* at ¶ 20; citing *State v. Rahman*, 23 Ohio St.3d 146, 154, 492 N.E.2d 401 (1986) (comments improper, but not plain error, where appellant was labeled a "hypocrite" and "the biggest liar that's taken the stand in a long time"). Although the *Baldev* court found that approximately nineteen comments by the prosecution indicating that the appellant was lying rose to the level of plain error and therefore constituted prosecutorial misconduct, the court noted that appellant's assault conviction "hinged on the jury's determination of the credibility of each of the testifying witnesses, including appellant[.]" *Baldev* at ¶¶ 34 and 37. Here, however, in addition to hearing the testimony of both Appellant and B.J., the jury had before it forensic evidence and the

testimony of Raymond Peoples from BCI. Thus, this case was not simply a matter of "he said/she said" as was the situation in *Baldev*.

{¶29} For the most part, in the present case, the prosecution made the references to lying when referencing that the evidence did not support Appellant's version of the events. Thus, the prosecution was not arguing Appellant was a liar in general, rather they suggested that the evidence demonstrated that Appellant had lied, not only during interviews prior to trial, but also during trial. We do acknowledge that there are a few instances where the prosecution refers to Appellant's version of the events as being a "story" and a "work of fiction," commenting that he was "telling a bunch of lies." While these comments were improper, we cannot conclude that they changed the outcome of the trial and thus they did not rise to the level of prosecutorial misconduct under a plain error standard of review.

Improper Vouching

{¶30} Next, Appellant contends that the State explicitly vouched for B.J. during closing arguments. Appellant contends this improper vouching unfairly attacked him, bolstered B.J.'s credibility and deprived him of a fair trial. The State argues that the comments that were made were simply designed to invite the jury to weigh the credibility of both the victim and

Appellant and did not constitute vouching. For the following reasons, we agree.

{¶31} Once again, we are reminded that during closing arguments, the prosecution "may not express their personal beliefs or opinions regarding the guilt of the accused." *Topping*, supra at 85; quoting *State v. Lott*, supra, at 166. Further, they may not express their personal beliefs or opinions regarding a witnesses' credibility. *Topping*, supra; *State v. Williams*, supra, "Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." *Topping*, supra, at 85; quoting *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 232; citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117. The prosecutor is however, permitted to fairly comment upon the testimony and evidence. *Topping*, supra; *State v. Mundt* , 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, ¶ 119.

{¶32} Appellant challenges the following comments made by the prosecution during closing arguments:

> "Either you believe the fabrication he told you or you believe her recounting what occurred to her.
>
> * * *

> Her story hasn't changed because it is not a story, it's a recounting of the events that happened on September 20, 2011.[2]
>
> * * *
>
> Well I would agree [B.J.] wasn't lying when she said she was sexually assaulted.
>
> * * *
>
> She wasn't lying when she asked for STD prevention and the morning after pill because she had been subjected to an unprotected sexual assault."

First, there is no indication that the prosecution implied facts outside of the record. Appellant, however, seems to argue that the above statements constitute the prosecution placing their credibility in issue. After reading the comments in the context in which they were made, we disagree with Appellant's contention.

{¶33} We believe the first two statements, which urged the jury to either believe Appellant's version of the events or B.J.'s version of the events, were not improper. While we already discussed that the prosecution's use of the word "fabrication" was problematic, we found that it did not rise to the level of plain error. Moreover, as indicated by the State,

[2]Although this is the date stated in the transcript, the date is incorrect.

while a prosecutor is not allowed to express an opinion concerning the credibility of evidence, they "can argue that the character, quality, or consistency of particular evidence or witnesses should be considered when assessing credibility." *State v. Hostacky*, 8th Dist. Cuyahoga No. 100003, 2014-Ohio-2975, ¶ 47; citing *State v. Cody*, 8th Dist. Cuyahoga No. 77427, 2002-Ohio-7055, ¶ 35. We believe that the complained-of statements here were permissible invitations for the jury to consider the consistency of B.J.'s testimony compared to the evident inconsistency in Appellant's testimony. Thus, they were not improper and did not constitute vouching.

{¶34} We further believe that the last two statements, when read in context of the entire trial, were not improper. The last two statements were made by the prosecution in direct response to defense counsel's urging that the jury consider the reliability of the medical records. As will be discussed more fully below, one entry in the medical record indicates that B.J. stated she could not remember having intercourse. Appellant's counsel urged during closing that the jury heavily weigh the statements B.J. made to medical personnel due to their reliability. The complained-of statements were made by the prosecution in direct response to this argument raised by defense counsel. The prosecution was likewise urging the jury to find the medical records reliable to the extent they indicate that B.J. reported she was

sexually assaulted and to the extent they indicate she was treated for STD prevention. When viewed in this context, we do not find that the statements constitute improper vouching.

{¶35} Further, as we have noted above, both the prosecution and the defense have wide latitude during opening and closing arguments. *State v. Waters*, supra, at ¶ 33; citing *Sunbury v. Sullivan*, supra, at ¶ 30. Here, based upon a review of the record and considering the complained-of statements within the context of the entire trial, we cannot conclude that the statements by the prosecution constituted vouching, and even assuming arguendo they were improper, when reviewed under a plain error standard, they did not rise to the level of the prosecutorial misconduct.

Improper Argument Based Upon Testimony of James Schultz

{¶36} Next, Appellant contends that the prosecution improperly directed the jury to adopt unqualified, inadmissible, "expert" testimony of SANE nurse, James Schultz, as scientific evidence of Appellant's guilt. More specifically, Appellant contends that Nurse Schultz was not qualified as an expert and as a result the prosecution should not have elicited expert testimony from him. Appellant argues that Nurse Schultz's testimony was expressed in terms of "possibility" rather than "probability," as required for the admission of expert testimony. Appellant further argues that the

prosecution mischaracterized Nurse Schulz's testimony in closing argument, which misled the jury to Appellant's detriment.

{¶37} Initially we note that the admission or exclusion of evidence is within the sound discretion of the trial court, and the trial court's decision to admit or exclude such evidence cannot be reversed absent an abuse of discretion. *State v. Craft*, 4th Dist. Athens No. 97CA53, 1998 WL 255442, *7 (Internal citations omitted.). The term "abuse of discretion" connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. Id.; citing *State v. Xie*, 62 Ohio St.3d 521, 583 N.E.2d 715 (1992); *State v. Montgomery*, 61 Ohio St.3d 410, 575 N.E.2d 167 (1991) (reversed on other grounds). When applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *Craft* at *7; citing *In re Jane Doe 1*, 57 Ohio St.3d 135, 137–138, 566 N.E.2d 1181 (1991), citing *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990). We also note, however, that because Appellant did not object to the admission of Nurse Schultz's testimony at trial, we will review Appellant's argument under a "plain error" standard of review.

{¶38} Evid.R. 702 governs the admissibility of expert testimony. The rule states:

"A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable, scientific, technical, or other specialized information....."

{¶39} The record indicates that Nurse Schultz was not expressly qualified as an expert by the trial court. However, it appears from the record that the defense stipulated that Nurse Schultz was an expert based upon the following exchange during cross-examination of Nurse Schultz:

"Q: Okay. Now let's talk about what you can collect in a SANE examination. And I'll go through these and you tell me because you know. You're the expert, not me.

A: I'm not an expert.

Q: Well, compared to me you are. How's that?

A: Okay. That's fine."

{¶40} Based upon the foregoing, not only did defense counsel not object to Nurse Schultz's status as an expert, he considered him to be an expert and then went on to ask him a series of questions regarding the collection of evidence in SANE examinations. As such, any error in the trial court's allowance of this testimony could be attributed to invited error. "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 471, 692 N.E.2d 198 (1998) (per curiam).

{¶41} Further, even if Appellant had not invited the error, we would have found no plain error. Although Appellant contends that Schultz's testimony should not have been permitted because he testified in terms of possibilities rather than probabilities, a review of the case law in this area reveals differently. The prosecution elicited the following testimony from Nurse Schultz during re-direct at trial:

"Q: Okay. If a female is not ready to have sexual intercourse doesn't there involve a change in the vaginal area?

A: Well, I mean unfortunately the Court knows that the vaginal vault of a child is capable of having sexual

intercourse. It's a very flexible piece of structure, otherwise we couldn't, women couldn't deliver babies.

Q: Right. But if they're not ready *could* there be trauma, *could* there be bleeding?

A: There *could* be. A lot of weight was put on certain aspects of that in earlier times. But I think we realize that the hymen or the cherry is often broken well before any kind of sexual intercourse has happened. So that's not the only indicator of sex is what I'm saying.

Q: Okay. So if there is vaginal trauma and vaginal bleeding would that indicate – and I hate to be vulgar – rough sex?

A: Correct.

Q: And possibly –

A: Rough sex or a fall on an object. I mean that's –

Q: And possibly unconsented sex.

A: *Possibly*." (Emphasis added).

{¶42} "It is well established that unless an expert witness expresses his or her opinion in terms of probability, the testimony will be excluded as speculative." *Huffman v. Kenworth Trucking Co.*, 4th Dist. Ross No. 00CA2552, 2000 WL 33226198, * 2 (Dec. 14, 2000); citing *Shumaker v.*

Oliver B. Cannon Sons, Inc., 28 Ohio St.3d 367, 369, 504 N.E.2d 44 (1986); *Stinson v. England*, 69 Ohio St.3d 451, 633 N.E.2d 532, paragraph one of the syllabus (1994). While this is true in civil cases, the Ohio Supreme Court has relaxed the requirement in criminal cases. In *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191, 616 N.E.2d 909 (1993), the Ohio Supreme Court held that:

> "While several decisions from this court indicate that speculative opinions by medical experts are inadmissible since they are based on possibilities and not probabilities, see, e.g., *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 28 OBR 429, 504 N.E.2d 44, we believe that the better practice, especially in criminal cases, is to let experts testify in terms of possibility. See Giannelli, Ohio Evidence Manual (1988) 98, Section 702.05, and Jacobs, Ohio Evidence (1989) 168, Section 702-03."

The Court cited Evid.R. 702 in support of its reasoning, which allows expert opinion that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Thus, based upon the foregoing, we cannot conclude Nurse Schultz's testimony should have been excluded.

{¶43} Our inquiry, however, does not end here. Appellant further contends that the prosecution mischaracterized and misrepresented Nurse Schultz's testimony to the jury, and urged the jury to adopt the testimony as scientific evidence of Appellant's guilt. During the closing arguments, the prosecution referenced Nurse Schulz's testimony four different times, characterizing it as follows:

> "You heard Nurse Schultz, Nurse Schultz, a male, RN, SANE examiner, testify that sexual assaults can be accomplished without any trauma to the vagina, but if there's trauma it's likely due to unconsented sexual intercourse.
>
> * * *
>
> Remember what James Schultz said. Vaginal trauma. If there's bleeding it's probably not consented sexual intercourse.
>
> * * *
>
> She suffered a sharp, uncomfortable pain because he entered her vagina, she didn't want it, her body wasn't ready for it, she bled because of it, just like James Schultz said could happen.
>
> * * *

> James Schultz testified if there's vaginal bleeding as a result of a sexual contact it would indicate non-consensual sex because the vagina is a very flexible organ."

{¶44} Comparing the foregoing, it is clear that the testimony of James Schultz was improperly misrepresented by the prosecution. Nurse Schultz testified vaginal bleeding could "possibly" indicate unconsented sex, not that it was "probable" or "likely." This is an improper mischaracterization of Nurse Schultz's testimony. However, bearing in mind our plain error standard of review as well as the other evidence before the jury, we cannot conclude that Appellant would not have been convicted in the absence of these comments by the prosecution. Thus, we find no prosecutorial misconduct.

Improper Argument Based Upon Testimony of Raymond Peoples

{¶45} Appellant initially argues that although Raymond Peoples, a forensic scientist with BCI, was qualified by the trial court as a DNA expert to testify about DNA testing and results, he was not qualified, as an expert, "in identifying the means by which semen had adhered to or soaked into fabric or cloth. Nor was he qualified as an expert in deriving conclusions about what sexual activities took place based on his identification of a 'semen pattern' in fabric or cloth." Thus, Appellant challenges the

prosecution's elicitation of testimony from Peoples that the semen in B.J's underwear could not have gotten there as a result of sitting in semen. Appellant also challenges Peoples' expert opinion that the "semen pattern in B.J.'s underwear was "typical of drainage from a body cavity following intercourse."

{¶46} Once again, we note that the admission or exclusion of evidence is within the sound discretion of the trial court, and the trial court's decision to admit or exclude such evidence cannot be reversed absent an abuse of discretion. *State v. Craft*, supra, at *7. The term "abuse of discretion" connotes more than an error of judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. Id.; citing *State v. Xie*, supra; *State v. Montgomery*, supra. When applying the abuse of discretion standard of review, we are not free to merely substitute our judgment for that of the trial court. *Craft* at *7; citing *In re Jane Doe 1*, supra, at 137-138; citing *Berk v. Matthews*, supra, at 169. We again note, however, that because Appellant did not object to the admission of Raymond Peoples' testimony at trial, we will review Appellant's argument under a "plain error" standard of review.

{¶47} Once again, Evid.R. 702 governs the admissibility of expert testimony and states as follows:

"A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result."

Further, Evid.R. 705 states: "The expert may testify in terms of opinion or inference and give the expert's reasons therefore after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise."

{¶48} The record before us reveals that Mr. Peoples testified at length regarding the DNA testing that was performed on B.J.'s underwear, which included AP Mapping. Part of Mr. Peoples' testimony is set forth as follows:

"Q: And what does this document show?

A: This is a picture that was taken of a cutting from the underwear. And it's reflecting the outside crotch area of the underwear.

Q: Okay. And visually it looks like there's some reddish staining on there. Can you tell us what that is?

A: Visually that appears consistent with blood. There were stains of that nature on the inside of the crotch as well. And we performed presumptive testing and it was positive for blood.

Q: Okay. And on that part there's an AP map.

A: Yes.

Q: And we've heard that means acid phosphatase?

A: Yes.

Q: And what does that test for?

A: That's a presumptive test for the presence of semen because acid phosphatase is present in semen.

Q: And how do you do that testing?

A: For this testing we basically dampen a special piece of paper and we press it onto the area of the surface that we want to test. This is known as AP mapping. We then remove the paper and some of the material from whatever we're testing would have transferred onto the paper. We then add the test chemicals and look for a positive reaction. A positive reaction for this test is a purple color. So it's very, it's rather a quick and it's obvious, a positive test, when you have it.

Q: Okay. And you see the purple color there and there?

A: Yes.

Q: And did you find semen on this?

A: Yes. Semen was identified.

Q: And I believe this is the State's Exhibit 77. And you have that in front of you as well. Can you identify what this document is?

A: That document is a picture of the underwear that were submitted. And it's a picture of the inside crotch area, or interior crotch area of the underwear.

Q: Okay. And again we see some red staining there?

A: Yes.

Q: Can you tell us what that is?

A: Again that was the staining I was referring to that visually is consistent with blood. We did perform a presumptive testing for blood and it was positive.

Q: And this part of the document over here, can you tell us what that is?

A: Again that is an AP map of the inside crotch area of the underwear.

Q: And when you did the testing on the outside, or inside for semen did you find, or in relation to the outside where did you find more semen?

A: The AP map from the inside interior crotch area had a stronger reaction and it's spread out over more of an area.

* * *

Q: Okay. Is it possible that the semen identified on the underwear got there by the person who was wearing the underwear sitting in a puddle of it on a seat?

A: In my opinion, no, for two reasons. One, semen itself is a rather thick fluid. And so although some of it would be able to soak through you would expect the majority of it to remain where it was. And also, two, there was definitely a more of a, more semen on the inside as reflected through the AP mapping. So from the inside in I would expected [sic] to have seen a more stronger result, AP result, and over more of an area.

Q: And have you seen this pattern of staining before?

A: Yes I have.

Q: And where have you seen that?

A: Typically this is a pattern in the testing I have done in case work is drainage from the body into the interior surface of the underwear.

Q: Okay. Do you know if that would be following intercourse or not?

A: Could you repeat?

Q: The body draining?

A: Oh. Following sexual activity of some sort.

Q: And how many times have you seen this pattern in your career?

A: It's hard to estimate. A lot. I don't have a number but I've seen this pattern a lot in casework samples typical of drainage from the vaginal cavity into the interior surface of the underwear."

{¶49} Although Appellant initially denied any contact with B.J., at trial he testified that consensual sexual contact occurred between the two, which resulted in him ejaculating on the seat of the car. The defense theory at trial suggested that B.J. must have sat on the semen on the car seat. B.J., however, maintained from the beginning and testified at trial that Appellant forced her to have vaginal intercourse. Thus, the prosecution sought to prove that the majority of the semen was found on the inside of B.J.'s underwear, which would be consistent with her version of events. We find that Peoples' testimony complied with Evid.R. 702 in that it assisted the trier

of fact with matters beyond their knowledge and helped in determining a fact in issue.

{¶50} Further, defense counsel stipulated to Peoples' qualification as a DNA expert and Mr. Peoples was subject to cross-examination. This Court is unaware of, and Appellant cites no authority in support of his argument that Peoples' had to be further or separately qualified to testify on matters related to the identification of the means by which semen had adhered to or soaked into fabric or cloth, or to testify on matters related to the derivation of conclusions about what sexual activities took place based upon identification of a semen pattern in that same fabric or cloth. To the contrary, this challenged testimony seems to this Court to be a logical and permissible extension of Mr. Peoples' area of expertise. Further, we are mindful of the Ohio Supreme Court's view of the admission of expert testimony in criminal, rather than civil matters, as referenced above in *State v. D'Ambrosio*, supra, which permits arguably speculative expert testimony that will assist the trier of fact to understand the evidence or to determine a fact in issue. Based upon the foregoing, we find no error, let alone plain error, with respect to the admission of this testimony by forensic scientist Raymond Peoples.

{¶51} Our inquiry, however, continues. In addition to the foregoing argument, Appellant contends that the prosecution mischaracterized and misrepresented Peoples' testimony to the jury. Specifically, Appellant draws our attention to the phraseology used by Peoples during his testimony as opposed to the phraseology used by the prosecution during closing. On direct examination, Mr. Peoples stated, with regard to the semen pattern found on B.J.'s panties that "I've seen this pattern a lot in casework samples typical of drainage from the vaginal cavity into the interior surface of the underwear." By contrast, when referring to Peoples' testimony during closing argument, the prosecution stated that "[t]his pattern is consistent with sexual intercourse."[3] Appellant takes issue with the prosecution suggesting to the jury that "drainage from the vaginal cavity" means that "sexual intercourse" occurred.

{¶52} We find no merit to this argument. Common sense dictates that if semen is draining from the vaginal cavity that intercourse occurred. Thus, we find no error, let alone plain error, occurred as a result of these comments. Having found the comments do not constitute plain error, we find no prosecutorial misconduct. Further, having found no plain error and

[3] Appellant directs our attention to four instances during closing and rebuttal where the prosecution referred to Peoples' testimony in this regard.

therefore, no prosecutorial misconduct, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶53} In his second assignment of error, Appellant contends that his conviction for rape, in violation of R.C. 2907.02(A)(1)(c), was not supported by sufficient evidence and thus violated his rights to due process and a fair trial. Specifically, Appellant contends that there was insufficient evidence that B.J. was substantially impaired, as required under the statute. The State counters by arguing that B.J.'s testimony, as well as Appellant's own testimony, provided evidence of substantial impairment.

{¶54} "A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. "In reviewing such a challenge, '[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.' " Id.; quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, superseded by constitutional amendment on other grounds. " '[T]he weight to be given the evidence and the credibility of the

witnesses are primarily for the trier of the facts.' " *Hunter* at ¶ 118; quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Accordingly, "a reviewing court is not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.' " *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 12; quoting *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541(1997) (Cook, J., concurring).

{¶55} Appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(c),which states as follows:

> "(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> * * *
>
> (c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age."

Whether a non-forcible sexual encounter with an adult constitutes rape is, thus, dependant on whether the victim had a "substantial impairment" that prohibited her from having the ability to consent to the sexual contact.

{¶56} In raising this argument, Appellant seems to concede "sexual conduct" with B.J., which is a direct departure from his position prior to trial and during trial. The record indicates that Appellant initially denied any sexual contact[4] or sexual conduct[5] with B.J. However, at trial he testified that there was consensual sexual contact that did not include intercourse or penetration. The victim, however, maintained that the encounter was not consensual and that vaginal intercourse did occur. Now, Appellant's only contention is that the State failed to prove that B.J. was "substantially impaired." Further, Appellant does not challenge the jury's finding of guilt on the other count of the indictment, which charged rape in violation of R.C. 2907.02(A)(1)(a).

{¶57} "The phrase 'substantial impairment' is not defined in R.C. 2907.02, nor has the Ohio Supreme Court provided any definition." *State v. Keeley*, supra, at ¶ 16; citing *State v. Daniels*, Summit No. 25808, 2011-

[4] R.C. 2907.01 defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

[5] R.C. 2907.01 defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

Ohio-6414, ¶ 6. However, the Ohio Supreme Court has stated, in regards to a sexual battery charge against a youth victim alleged to have an impairment due to alleged mental retardation, as follows:

> "The phrase 'substantially impaired,' in that it is not defined in the Ohio Criminal Code, must be given the meaning generally understood in common usage. As cogently stated by the appellate court, substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct." *State v. Zeh*, 31 Ohio St.3d 99, 103-104, 509 N.E.2d 414 (1987).

Although the facts at issue in *Zeh* differ from the facts sub judice, we find the Court's reasoning to be helpful with regard to the present case.

{¶58} Further, "[w]hether a person is substantially impaired 'does not have to be proven by expert medical testimony; rather, it can be shown to exist by the testimony of people who have interacted with the victim, and by allowing the trier of fact to do its own assessment of the person's ability to appraise or control his or her conduct.' " *State v. Lasenby*, 3rd Dist. Allen No. 1-13-36, 2014-Ohio-1878, ¶ 27; quoting *State v. Brady*, 8th Dist. Cuyahoga No. 87854, 2007-Ohio-1453, ¶ 78; *State v. Brown*, 3rd Dist.

Marion No. 9-09-15, 2009-Ohio-5428, ¶ 21. Thus, the determination of substantial impairment is made "on a case-by-case basis, providing great deference to the fact-finder." *Lasenby* at ¶ 27; citing *Brown* at ¶ 22.

{¶59} Additionally, voluntary intoxication or impairment is included in the terms "mental or physical condition" as used in R.C. 2907.02(A)(1)(c). *Lasenby* at ¶ 28; citing *State v. Harmath*, 3rd Dist. Seneca No. 13-06-20, 2007-Ohio-2993, ¶ 14; see also *State v. Boden*, 9th Dist. Summit No. 26623, 2013-Ohio-4260, ¶ 20; *State v. Cedeno*, 8th Dist. Cuyahoga No. 98500, 2013-Ohio-821, ¶ 20. Further, courts have held that "[t]he consumption of large amounts of alcohol in a short period of time is evidence that voluntary intoxication caused substantial impairment." *Lasenby* at ¶ 28; citing *State v. Hatten*, 186 Ohio App.3d 286, 2010-Ohio-499, ¶ 22 (2nd Dist.); see also *State v. Lindsay*, 3rd Dist. Logan No. 8-06-24, 2007-Ohio-4490, ¶ 20. Finally, with respect to the statutory requirement that Appellant have knowledge of the victim's substantial impairment, R.C. 2901.22(B) defines "knowledge" as follows:

> "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. A person has knowledge

of circumstances when he is aware that such circumstances probably exist."

{¶60} Here, B.J's counsel represents that she testified for five hours at trial. The trial transcript contains 188 pages of trial testimony of B.J. In her testimony, she stated that she was not an experienced drinker, that she had not consumed alcohol all summer, that she began drinking vodka and Mountain Dew after dinner on the evening in question and drank up until she left for a party at 10:00 p.m., where she then consumed at least one rum and Coke, and possibly more. She testified that she blacked out for three or four hours beginning not long after she arrived at the party. She testified that she has no memory of leaving the party, and that she began to become "coherent" at some point during the night when she realized she was walking in gravel along the highway and was lost. She testified she had no idea how she got where she was. She further testified that she did not even realize she did not have her pants on until Appellant pointed it out to her when he stopped and offered to help her.

{¶61} Further, the evidence admitted at trial, which includes B.J's cell phone records, indicates that B.J. placed a series of calls during that time frame and B. J. testified that she has no memory of placing them. B.J.'s girlfriend, Madeline Ciarlillo, testified and verified the amount of alcohol

that B.J. drank on the evening in question. Another friend who arrived at the party as B.J. was leaving, Samantha Bailo, testified that B.J. "seemed really drunk and tired, and like kind of had her head hanging down." Further, and of great importance, Appellant himself admitted to having knowledge of B.J.'s condition that night when he placed a 911 call reporting that she was "very, very inebriated." Appellant also verified through his own testimony that B.J. was unaware she was walking around with no pants until he told her. Appellant's friend, Dane Black, called as a rebuttal witness by the State, testified that Appellant told him B.J. was very drunk, and had possibly been drugged. We conclude that this testimony provides sufficient evidence upon which the jury could conclude that B.J. was substantially impaired and that Appellant had knowledge of her condition.

{¶62} Further, even if Appellant has not conceded that the State proved the remaining elements of rape under R.C. 2907.02(A)(1)(c), we conclude that B.J.'s trial testimony, if believed, supports Appellant's conviction. As set forth above, "[i]t is well settled that a rape conviction may rest solely on the victim's testimony, if believed, and that '[t]here is no requirement that a rape victim's testimony be corroborated as a condition precedent to conviction.' " *State v. Patterson*, 8th Dist. Cuyahoga No. 100086, 2014-Ohio-1621, ¶ 40; quoting *State v. Lewis*, 70 Ohio App.3d

624, 638 591 N.E.2d 854 (4th Dist. 1990). Further, in addition to the testimony of B.J., the State presented expert DNA evidence in support of its case.

{¶63} B.J. testified at length regarding the events of that night, including Appellant's forcible vaginal intercourse with her, despite her protests and attempts to deflect him. Additionally, Raymond Peoples provided expert testimony indicating Appellant's DNA, and specifically his semen, was found on the inside of B.J.'s underwear, in a pattern indicating that vaginal drainage of the semen had occurred, as opposed to finding semen on the outer portion of B.J.'s underwear, which would have been more consistent with Appellant's account, which suggested that B.J. must have sat in the semen that was on the seat of the car. In addition to this testimony, the jury was able to view the blood stains on Appellant's underwear, which, with or without expert testimony, indicated a traumatic injury of which no evidence existed at the time B.J. entered Appellant's vehicle. Finally, B.J.'s medical records indicate she reported to medical personnel that she had been sexually assaulted and that she obtained

treatment for prevention of sexually transmitted diseases and the "morning-after" pill.[6]

{¶64} Thus, even viewing this testimony and evidence in a light most favorable to Appellant, if believed, the evidence supports Appellant's conviction for rape under R.C. 2907.02(A)(1)(c). Accordingly, we find no merit to Appellant's second assignment of error and it is overruled.

ASSIGNMENT OF ERROR III

{¶65} In his third assignment of error, Appellant contends that trial counsel provided ineffective assistance in failing to object to several instances of alleged prosecutorial misconduct and failed to object to allegedly improper testimony by James Schultz and Raymond Peoples. More specifically, Appellant argues that 1) trial counsel were ineffective for failing to object to the prosecutors repeatedly expressing their personal beliefs in his guilt; 2) trial counsel were ineffective for failing to object to the prosecutors repeatedly attacking his credibility by expressing their personal beliefs that he was lying when he testified at trial; 3) trial counsel were ineffective for failing to object to the prosecutors vouching for the credibility of B.J.; 4) trial counsel were ineffective for failing to object to the

[6] Although the medical records do indicate in one section that B.J. could not remember having intercourse, B.J. explained during trial that she had reported to staff that there were parts of the evening she could not remember, but not that she could not remember having intercourse. Other parts of the record clearly indicate that B.J. was obtaining treatment for "sexual assault" and/or an "uprotected sexual encounter."

improper "expert" opinion testimony of both James Schultz and Raymond Peoples; and 5) trial counsel were ineffective for failing to object to the prosecutors arguing improper "expert" opinion testimony as scientific evidence of his guilt.

{¶66} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson*, 397 U.S. 759, 770, 90 S.Ct. 1441 (1970); *State v. Stout*, 4th Dist. Gallia No. 07CA5, 2008-Ohio-1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted). "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968,

¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, (stating that a defendant's failure to satisfy one of the elements "negates a court's need to consider the other").

{¶67} When considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Id. "A properly licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10; citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶68} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that but for counsel's errors, the result of the

trial would have been different. *State v. White*, 82 Ohio St.3d 16, 23, 693 N.E.2d 772 (1998); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Furthermore, courts may not simply assume the existence of prejudice, but must require that prejudice be affirmatively demonstrated. See *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592, 2002-Ohio-1597; *State v. Kuntz*, 4th Dist. Ross No. 1691, 1992 WL 42774. We are also mindful that "[t]he failure to do a futile act cannot be the basis for claims of ineffective assistance of counsel and is not prejudicial." *State v. Witherspoon*, 8th Dist. Cuyahoga No. 94475, 2011-Ohio-704, ¶ 33.

{¶69} Here, Appellant claims that trial counsel provided ineffective assistance by failing to object to several instances of alleged prosecutorial misconduct. Trial counsel's failure to object to alleged instances of prosecutorial misconduct "does not necessarily constitute ineffective assistance" of counsel. *State v. Topping*, supra, at ¶ 80; citing *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 230; *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 62. That is, a failure to object does not necessarily fall below an objective standard of reasonableness. *Topping*, supra. Instead, a failure to object to alleged instances of prosecutorial misconduct may be considered sound trial

strategy. Id; *State v. Brown*, 5th Dist. Stark No. 2007CA15, 2008-Ohio-3118, ¶ 58 (stating that failure to object to prosecutor's statements during closing arguments may have been trial strategy and thus did not constitute deficient performance).

{¶70} " 'A competent trial attorney might well eschew objecting * * * in order to minimize jury attention to the damaging material.' " *Topping*, supra; quoting *State v. Mundt*, at ¶ 90; quoting *United States v. Payne*, 741 F.2d 887, 891 (C.A.7 1984). Accord. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 42 (stating that "[a] reasonable attorney may decide not to interrupt his adversary's argument as a matter of strategy"); *State v. Clay*, 7th Dist. Mahoning No. 08MA2, 2009-Ohio-1204, ¶ 141 (stating that "[l]imiting objection during closing is a trial tactic to avoid trying to draw attention to the statements."). Thus, in order to establish that trial counsel performed deficiently by failing to object to error at trial, the defendant ordinarily must demonstrate that the error "is so compelling that competent counsel would have been obligated to object to [it] at trial." *Topping*, supra; quoting *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶ 233.

{¶71} The Supreme Court of Ohio has recognized that if counsel decides, for strategic reasons, not to pursue every possible trial strategy, the

defendant is not denied effective assistance of counsel. *State v. Black*, 4th Dist. Ross No. 12CA3327, 2013-Ohio-2105, ¶ 40; *State v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523 (1988). "Speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel." *Leonard*, supra, at ¶ 68; quoting *State v. Cromartie*, 9th Dist. Medina No. 06CA0107-M, 2008-Ohio-273, ¶ 25. An appellate court reviewing an ineffective assistance of counsel claim "must refrain from second-guessing the strategic decisions of trial counsel." *Black*, supra; quoting *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995).

{¶72} The arguments regarding prosecutorial misconduct were discussed at length under Appellant's first assignment of error. Although we did agree with Appellant that some of the statements made by the prosecutors were improper, because we could not conclude that the Appellant would not have been convicted in the absence of the improper comments, we found no plain error. Further, based upon the evidence supporting Appellant's conviction, and bearing in mind the presumption that counsels' actions were sound trial strategy, we cannot conclude that but for counsel's errors, the result of the trial would have been different. As such, we cannot conclude Appellant's trial counsel was ineffective. Thus, we find no merit to Appellant's third assignment of error.

{¶73} Based upon the foregoing, Appellant's third assignment of error is overruled. Accordingly, having found no merit in the assignments of error raised on appeal, the decision of the trial court is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
Harsha, J.: Concurs in Judgment Only.

For the Court,

BY: _____
Matthew W. McFarland,
Administrative Judge

NOTICE TO COUNSEL
Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.