[Cite as *State v. Montgomery*, 2015-Ohio-3066.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 14-CA-49
	:	
CYRILL J. MONTGOMERY	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Fairfield County Court of Common Pleas, Case No. 2013-CR-0058
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	July 27, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
GREGG MARX FAIRFIELD CO. PROSECUTOR ANDREA GREEN 239 W. Main, Ste. 101 Lancaster, OH 43130	DAVID A. SAMS Box 40 W. Jefferson, OH 43162

Delaney, J.

{¶1} Appellant Cyrill J. Montgomery appeals from the judgment entry of conviction and sentence entered in the Fairfield County Court of Common Pleas on July 30, 2014. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} This case arose in the early morning hours of January 27, 2013 as victim M.T. was babysitting her disabled cousin overnight. M.T. was sleeping next to her cousin, D.D., when the repeated ringing of the doorbell awakened her. M.T. looked through the peephole and was unable to recognize the person at the door, later identified as appellant. Appellant has known M.T. since she was 14 and she knows appellant by his nickname, "Ril." Appellant identified himself to M.T. through the door and she finally opened it when appellant told her D.D.'s mother was in jail.

{¶3} Appellant told M.T. that D.D.'s mother called him from jail and asked him to check on M.T. and D.D. Appellant and M.T. talked for a while in the kitchen but M.T. became uncomfortable when appellant began making sexual comments. She asked him to leave.

{¶4} Appellant briefly left the house to smoke a cigarette in the garage. In the meantime, M.T. texted a friend as she sat on a couch in the living room. Appellant returned and M.T. described him as anxious and angry. Appellant snatched M.T.'s phone out of her hand and pulled her off the couch, grabbing her by the neck and pulling her leg. Appellant attempted to pull down M.T.'s pants as he began to pull his penis out of his pants with the other hand. M.T. screamed "please no, please no" and kicked and punched appellant.

{¶5} M.T. grabbed her phone and locked herself in a bathroom. She called 911 as appellant opened the door with a credit card and chased her into D.D.'s room. M.T. climbed into bed with D.D. and placed D.D. between her legs. Appellant grabbed her phone and left the room with it.

{¶6} M.T. then called 911 again from the house phone in D.D.'s room. She left the bedroom and discovered appellant was still in the kitchen with M.T.'s phone in his hand. He refused to give it back until she calmed down, then finally handed it to her and ran out the door. M.T. called her mother and said she was "petrified and scared out of her mind."

{¶7} Police arrived around 5:45 a.m. and observed appellant walk away from the house, get in a car, and drive away. Appellant was traffic-stopped and told police several versions of a story regarding bailing D.D.'s mother out of jail. Police suspected appellant was under the influence of alcohol due to his red, bloodshot, glassy eyes, slurred speech, and the strong odor of an alcoholic beverage emanating from him.

{¶8} Police also witnessed M.T. run out the front door of the house; she was described as disheveled and breathing heavily. Officers observed the strap of her shirt was around her shoulder and she had blood around her mouth and redness to her chest area. M.T. went to the hospital two days later due to numerous injuries she sustained in the assault: neck pains, a "busted lip," and scratches on her face, neck, chest, chin, arms, and buttocks. She had pain when she tried to move her neck, which was swollen for a week. Handprints on her neck remained visible for several days. M.T. was treated with pain medication.

{¶9} Appellant was charged by indictment with one count of attempted rape pursuant to R.C. 2923.02(A) and R.C. 2907.02(A)(2), a felony of the second degree [Count I]; one count of attempted rape pursuant to R.C. 2923.02(A), a felony of the second degree [Count II]; and one count of disrupting public services pursuant to R.C. 2909.04(A)(1) and (C), a felony of the fourth degree [Count III]. Appellant was found guilty upon Counts I and III and not guilty upon Count II. The trial court sentenced appellant to prison terms of four years on Count I and 18 months on Count III to be served concurrently.

{¶10} Appellant appeals from the judgment entry of his conviction and sentence.

{¶11} Appellant entered pleas of not guilty and the case proceeded to trial by jury.

{¶12} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶13} "I. THE DEFENDANT-APPELLANT WAS DENIED A FAIR TRIAL BY PROSECUTORIAL MISCONDUCT."

ANALYSIS

I.

{¶14} In his sole assignment of error, appellant argues he was denied a fair trial due to repeated instances of prosecutorial misconduct. We disagree.

{¶15} The test for prosecutorial misconduct is whether the prosecutor's remarks and comments were improper and if so, whether those remarks and comments prejudicially affected the substantial rights of the accused. *State v. Lott*, 51 Ohio St.3d 160, 166, 555 N.E .2d 293 (1990), cert. denied, 498 U.S. 1017, 111 S.Ct. 591, 112 L.Ed

.2d 596 (1990). In reviewing allegations of prosecutorial misconduct, we must review the complained-of conduct in the context of the entire trial. *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived appellant of a fair trial based on the entire record. *Lott*, supra, 51 Ohio St.3d at 166. Appellant points to a number of instances of alleged prosecutorial misconduct and argues that the cumulative effect of these examples deprived him of a fair trial.

{¶16} Appellant cites a number of instances of alleged prosecutorial misconduct during voir dire. We note appellant did not object to the alleged improper comments at trial. If trial counsel fails to object to the alleged instances of prosecutorial misconduct, the alleged improprieties are waived, absent plain error. *State v. White,* 82 Ohio St.3d 16, 22, 1998–Ohio–363, 693 N.E.2d 772 (1998), citing *State v. Slagle,* 65 Ohio St.3d 597, 604, 605 N.E.2d 916 (1992).

{¶17} We therefore review appellant's allegations under the plain-error standard. Pursuant to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule places several limitations on a reviewing court's determination to correct an error despite the absence of timely objection at trial: (1) "there must be an error, i.e., a deviation from a legal rule," (2) "the error must be plain," that is, an error that constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that "the trial court's error must have affected the outcome of the trial." *State v. Dunn*, 5th Dist. No. 2008-CA-00137, 2009-Ohio-1688, citing *State v. Morales*, 10 Dist. Nos. 03-AP-318, 03-AP-319, 2004-Ohio-3391, at ¶ 19. The decision to correct a plain

error is discretionary and should be made “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶18} Appellant's first example is the prosecutor's statement "* * * [T]he prosecution's job is to build up a house that isn't made of straw or sticks, but is sold (*sic*), made of brick and [defense counsel] has the duty to basically try to huff and puff and blow that house down." We have examined this comment in the context of the entire voir dire and the prosecutor's point was that the jury would likely hear "more" evidence in terms of quantity from the state than from the defense because the state has the burden of proof. Although this may have been an awkward way to emphasize the point, we disagree with appellant's inference that the prosecutor misstated the burden of proof. This statement is not improper.

{¶19} This comment was followed by the prosecutor’s explanation that he might ask many of the same questions during voir dire as defense trial counsel would later. This statement is merely an explanation why prospective jurors might hear the same questions repeated by both counsel. We disagree with appellant's argument that this statement denigrated defense counsel and find this statement is not improper.

{¶20} Appellant next points to a portion of voir dire in which the prosecutor asked prospective jurors about their understanding of the burden of proof and what effect it might have on their decision if appellant chose not to testify. In his brief appellant has cited only part of the exchange, thereby changing the interpretation thereof. Upon our review of the record, we note the following statements were made:

* * * *.

> PROSPECTIVE JUROR [NO.1]: I feel I could be fair, but I would prefer facts from both sides.
>
> [PROSECUTOR:] What are your thoughts, [Prospective Juror No. 2]? You raised your hand? Do you intend to agree with--
>
> [PROSPECTIVE JUROR NO. 2:] Yes, but--
>
> [PROSECUTOR:] But--
>
> [PROSPECTIVE JUROR NO. 2:] If I was innocent, I'd be screaming from the heavens to let you know I was innocent **and isn't that in there that you can't be forced to incriminate yourself?** (Emphasis added.) Maybe. I don't know. I'm not a lawyer.
>
> [PROSECUTOR:] That's exactly what the constitution says.
>
> * * * *.

{¶21} This conversation led to a discussion among the prospective jurors in which some volunteered that a defendant may choose not to testify for many reasons other than guilt, including the possibility that the state's case is so weak they have no reason to testify. (T. 79-80.) In the context of the entire conversation, we find the prosecutor did not misstate the presumption of innocence or imply appellant's guilt if he chose not to testify.

{¶22} Appellant points to Prospective Juror No. 2's related statement that a defendant might not testify out of fear that he will incriminate himself as proof jurors accepted the prosecutor's alleged impermissible inference. In context, however, another juror immediately responds "[t]hat's so not true" and lists other reasons why a

defendant might choose to remain silent. We find the prospective jurors' statements do not constitute evidence the jury pool drew the prohibited inference that silence equals guilt. The prosecutor's statements that "people can disagree" and there is "no wrong opinion" refer to the various reasons discussed why a defendant would not testify and do not imply prospective jurors may ignore the presumption of innocence if they disagree with it.

{¶23} Appellant points to the following statements as further evidence the prospective jurors believed they could ignore the burden of proof and appellant's right to remain silent:

> * * * *.
>
> [The prosecutor says the defense may or may not cross-examine the state's witnesses and may or may not present witnesses of their own.]
>
> [PROSPECTIVE JUROR NO. 3:] My point was the same about * * * * cross examination. It's not like the defense isn't taking the opportunity to cast reasonable doubt on the evidence, they just may not choose in their portion of the trial to present any evidence of their own.
>
> [PROSPECTIVE JUROR NO. 4:] Like pretty much like kind of what you were saying like basically their defense is being made--like their point they're trying to make for their defense is being made with the cross examinations.
>
> [PROSECUTOR:] Sure.

> [PROSECTIVE JUROR NO. 4:] And if you basically--if they basically got all the things they wanted to get across done with your side of the case and it's basically trying to say like what we're going to be bringing up is basically just repeating all the stuff that we've already made the point about, then you don't really have to bring up the--bring up the defendant himself to try and build his own case again basically repeating everything. I mean that * * * if he doesn't want to testify, it shouldn't be held against him for doing that since basically they've proven their point already.
>
> * * * *.

{¶24} We disagree with appellant's assertion that these statements prove the jurors thought "a defendant must prove something to raise reasonable doubt." Instead, we find these comments illustrate the prospective jurors' understanding of the fact that the defense case may be established through cross-examination of the state's witnesses and if reasonable doubt exists in the state's case, there is no reason for the defense to present a case of its own because the point has already been made through the flaws in the state's case.

{¶25} The basis of appellant's argument is that the prosecutor essentially instructed the prospective jurors that a defendant's silence equals guilt, but we find no such direct or indirect implication from the prosecutor's statements. In *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the United States Supreme Court held " * * * that the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth

Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Although we find the prosecutor's statements in context do not violate *Griffin,* we note "we are troubled by the considerable amount of time the prosecution devoted to an inquiry about defendant's right not to testify and to the feelings of potential jurors should they not hear both sides of the story." *State v. Heller*, 2002-Ohio-879 (10th Dist. Franklin). Nonetheless, appellant has failed to demonstrate plain error such that the comments affected the outcome of the trial. Id.

{¶26} Appellant next points to the prosecutor's discussion there is no "typical" rape victim and is sometimes under-reported by children and young adults; following this discussion, the prosecutor pointed out a prospective juror was either nodding along with him in agreement or else falling asleep. Appellant asserts the prosecutor thereby impermissibly commented on the evidence because the victim in the case is a young adult but we find these statements were not improper. The prosecutor did not comment upon the credibility of rape victims in general or in this case specifically and it is not evident what prejudicial effect these statements would have had upon the potential jurors.

{¶27} Finally, with respect to alleged prosecutorial misconduct during voir dire, the appellant points to the prosecutor's statement that appellant is male "like ninety-nine percent of sexual assault defendants" in the broader context of asking the jury pool whether they believe men tend to be "railroaded" when allegations of sexual assault are raised. In the context of the entire statement we find this statement is an inquiry into

prospective jurors' attitudes and potential biases and not improper comment on the evidence.

{¶28} Appellant next turns to comments made by the prosecutor during closing argument emphasizing "beyond a reasonable doubt" does not mean "beyond a possible doubt." Appellant argues the prosecutor minimized the state's burden of proof and misstated the statement contained in R.C. 2901.05(E):

> "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. **It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt**. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs. (Emphasis added).

We find the prosecutor's statements cited by appellant to be accurate summaries of reasonable doubt as defined supra.

{¶29} Appellant does not suggest the trial court's jury instructions upon the legal standards were erroneous, nor that the jury did not follow the trial court's instructions. Consequently, even if the prosecutor's comments in voir dire and closing argument were improper, appellant has not shown these statements prejudiced him. See, *State v. Bassett*, 6th Dist. Lucas No. L-01-1493, 2002-Ohio-6689, ¶ 26.

{¶30} If a prosecutor's comments are found to be improper, it is not enough that there is sufficient evidence to otherwise sustain a conviction. “Instead, it must be clear beyond a reasonable doubt that absent the prosecutor's comments, the jury would have found defendant guilty.”*State v. Clay*, 181 Ohio App.3d 563, 2009-Ohio-1235, 910 N.E.2d 14 at ¶ 49 (8th Dist.), citing *State v. Smith*, 14 Ohio St.3d 13, 470 N.E.2d 883 (1984). Appellant cannot demonstrate, even if any of the cited comments were improper, “but for” the comments he would not have been convicted. Appellee presented voluminous evidence, including the victim's testimony and corroborating evidence such as the 911 call, her mother’s testimony, and that of officers responding to the scene. Having failed to demonstrate a causal connection between the alleged misconduct and his resulting convictions, therefore, appellant cannot demonstrate reversible error.

{¶31} Appellant's sole assignment of error is thus overruled.

CONCLUSION

{¶32} The sole assignment of error is overruled and the judgment of the Fairfield County Court of Common Pleas is affirmed.

By: Delaney, J. and

Farmer, P.J.

Wise, J., concur.