[Cite as *State v. Anderson*, 2005-Ohio-534.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-04-035

Appellee — Trial Court No. 03-CR-152

v.

Lincoln Anderson — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: February 11, 2005

* * * * *

Raymond C. Fischer, Wood County Prosecuting Attorney, Gary D. Bishop and Jacqueline M. Kirian, Assistant Prosecuting Attorneys, for appellee.

Julianne Claydon, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the March 29, 2004 judgment of the Wood County Court of Common Pleas, which sentenced appellant, Lincoln Anderson, following his conviction of one count of sexual battery, a violation of R.C. 2907.03(A)(2) and (3). Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following assignments of error on appeal:

{¶ 2} "I. The state failed to present sufficient evidence for the crime of sexual battery upon which to convict defendant-appellant.

{¶ 3} "II. The jury verdict finding defendant-appellant guilty of sexual battery in violation of Ohio Revised Code Section 2907.03 is against the manifest weight of the evidence.

{¶ 4} "III. The prosecutor misstated the evidence before the jury during closing argument which substantially prejudiced defendant-appellant and denied him a fair trial.

{¶ 5} "IV. Appellant's sentence is contrary to law."

{¶ 6} Appellant was charged with one count of sexual battery, a violation of R.C. 2907.03(A)(2) and (3), and one count of burglary, a violation of 2911.12(A)(1), stemming from an incident that occurred on March 30, 2003, in Bowling Green, Ohio. Appellant was convicted of only the sexual battery count. Appellant was sentenced to one year of imprisonment and was classified as a sexually oriented offender. The following evidence was admitted at trial.

{¶ 7} The victim testified as follows. She shares an apartment with her sister and two other roommates. She first met appellant through a friend who brought appellant over to her apartment for the first time a few months before March 30, 2003, the date of the incident that gave rise to the charges in this case. After that date, appellant continued to visit them at the apartment. She did not like appellant coming to her house and tried to ignore him, as did her roommates. They did not kick him out because they did not want to be rude. Sometimes, appellant would stop over in the evening and hang out for several

hours. He generally left by 11:00 p.m. The victim did not like appellant because he seemed shady or creepy. She said that he would hit on her and her roommates. He complimented them. He talked about his past sexual experiences. He talked about how he never had a girlfriend and wanted one. He would not say where he lived.

{¶ 8} One night in February 2003, appellant came into her room while she was sleeping. He was using her computer to listen to one song played very slowly and repeatedly. She woke up and asked him what he was doing in her room. She was half asleep, but recalled that he came over to her and tried to talk to her and tell her about how many girls he had slept with and other things. She told him that she had a boyfriend, pointed to his picture, and told appellant to leave. Appellant asked to kiss her. When she said no, he asked to kiss her on the cheek. She let him, and then he left. She never saw anyone else in the room. She did not see appellant again until the night of March 29, 2003.

{¶ 9} That night the victim and two of her roommates had made plans to go first to a pajama party and then to another party. About 9:00 p.m., appellant called and said he and his friend, Scott LaGrange, were coming over. She told him that they were going to a party. When he called a second time, her sister answered the phone. The victim assumed that her sister gave appellant the directions to the pajama party because he showed up there.

{¶ 10} The women had another friend drive them to the pajama party. The victim brought along beer which she drank. She normally only drank one or two beers before

she would be drunk. She recalled that she was "buzzed" after drinking three beers. She could not recall if she drank anything before the party. During the party, everyone joined in a drinking game. She did not invite appellant and LaGrange to play. She had never played it before and did not know what to expect. Appellant and LaGrange stood on each side of her during the game. She did not know LaGrange and did not interact with him. She also testified that she was not jealous that appellant gave a kiss to another girl. She recalled only that she drew a tile that required her to do something with the person next to her and she would not do what the tile stated because appellant was standing next to her.

{¶ 11} The women left the pajama party about 11:30 p.m. and rode with appellant and LaGrange because the women thought they were too drunk to drive. They went back to the victim's apartment and the women changed their clothes. The victim could not remember what she wore, but she assumed it was her usual jeans and a t-shirt. Everyone rode in LaGrange's car to the next party. At the next party, she drank more. During this party, she talked to her friends and was only polite to appellant and never talked at length with him. She did not offer him any beer because she had none. She could not recall all of the events of the party because she was drunk. She recalled that appellant went with some others to get more beer and returned after the police had arrived. The group left the party about 2:00 a.m. and went back to her apartment. By this point, the victim had drunk six or eight beers and felt drunk.

{¶ 12} Back at her apartment, the group continued to drink. The victim recalled changing into a sweatshirt and shorts. She also had at least two more beers and was very

drunk by that time. She normally went to bed around 10:00 p.m., so she was also very tired. The group at the house included her three roommates, a friend, Joshua Boothby, appellant, and LaGrange. Boothby fell asleep in the victim's room. Her sister and one of her roommates went to their bedroom. The victim's other roommate agreed to stay up because the victim did not want to be alone with appellant and his friend. Later, the victim recalled passing out on the couch. She knew that she had not blacked out from drinking that night because she could recall the events of the evening. While she drank on a regular basis, she had never blacked out from drinking. She denied inviting appellant and LaGrange to stay over at the apartment. She also denied waking up when appellant returned and did not interact with him in any way.

{¶ 13} When she awoke the next morning, the victim realized that she was laying on the couch and appellant was lying next to her. Her pants and underwear were down and appellant's penis was in her vagina. She was positive that she understood what was happening at the time because she was shocked by the grossness. She screamed at appellant. He swore and ran away. She woke the others up with her screaming. She called the police immediately. Appellant came back to the apartment because he had forgotten his keys. Her roommates tried to keep appellant out of the apartment and eventually someone threw him his keys and he left.

{¶ 14} The victim testified that she did not need to make up a story if the others saw her with appellant. Her sister was her best friend and the victim would tell her

anything. She never told appellant she thought he was good looking, or cute, or could be a model, or that he was cool. She had never been attracted to him.

{¶ 15} The victim's testimony was corroborated by the testimony of her sister; her roommates; Ryan Springer, who had witnessed appellant's late-night visit to her bedroom; and Boothby. Boothby also testified that when he awoke the morning after the parties, he had seen the victim asleep on the couch, laying down and in a sitting-up position. Appellant was sitting at the other end of the same couch with his head laid back. Boothby went back to sleep and was awakened by the victim's screams 30 minutes to an hour later.

{¶ 16} A police officer testified that she responded to the 6:30 a.m. call on March 30, 2003. She found everyone present at the apartment very upset. She was directed to the victim, who was very upset and saying "that was wrong; a guy should not do that to you while you were sleeping."

{¶ 17} A nurse at Wood County Emergency Department testified that she completed the sexual assault kit after the victim stated that she had been raped. The forensic scientist with the Ohio Bureau of Criminal Identification and Investigation who examined the evidence testified that no semen stains were found on anything from the victim. However, there was one stain with sperm cells on appellant's underwear. She could not determine the age of the stain nor quantity of semen that was present. She also could not draw any conclusions based on her analysis as to how the semen came to be there.

{¶ 18} The police officer who apprehended appellant about a half mile from the apartment testified that he could detect alcohol on appellant's breath. He denied ever asking appellant if he had any drugs. The officer read appellant his *Miranda* rights and transported appellant to the apartment for identification and then to the police station. The officer described appellant as being very cooperative and very quiet.

{¶ 19} Brad Conner, a Bowling Green police officer, testified that he initially interviewed appellant alone for approximately 20 minutes. Because the officer had not yet interviewed the victim, he let appellant tell his story without questioning him or commenting about his truthfulness. Because appellant initially denied having done anything wrong, Officer Conner went to the hospital to talk to the victim. After he told her that appellant had denied everything, she became very upset and angry. Scott Kleiber, a detective with the Bowling Green Police Department, finished the interview while Officer Conner listened. Officer Kleiber testified that when he first met the victim, there was a strong odor of alcohol about her, but that she was coherent.

{¶ 20} Because the officers believed that something had happened after hearing the victim tell her story, they returned to the station to interview appellant to determine what exactly had transpired. During the second interview with both officers present, appellant gave seven different versions of what happened during the half-hour to forty-five minute interview.

{¶ 21} At first, appellant denied that anything had happened. As the officers pressed appellant to tell the truth, he began to tell them more and more. Officer Conner

thought it was unusual that each time appellant told his story, he would return to the beginning. Eventually, appellant told the officers that he had returned to the apartment and entered without permission. He admitted that he whispered in the victim's ear, removed her clothing, fondled her, and moved her legs without any response from her. He presumed that she was not objecting. However, when he penetrated her a few inches, she awoke and pushed him off screaming.

{¶ 22} During the course of the interview, the officers noted that appellant's demeanor shifted from nonchalant to deeply concerned and remorseful. Officer Kleiber interpreted appellant's remorsefulness to mean that he realized that he had done something wrong. Appellant was directed to write a letter of apology to the victim. However, he did not write any details.

{¶ 23} On behalf of the defense, appellant presented the following evidence. LaGrange testified that he went with appellant to a party with his friends. The two went first to the women's apartment and waited for them to get ready to go to the party. The women were nice to them. Nothing seemed unusual. He believed that he drove only appellant to and from the party. At the first party, everyone was enjoying himself or herself playing a drinking game. He could not recall if the women went back to their apartment and changed. At the second party, the group only stayed for an hour or so. He went to buy some beer and when he returned, he found a fight was going on. Everyone left and went back to the women's apartment around 2:00 a.m. The women were very nice to them and no one tried to get rid of him or appellant. LaGrange had been drinking

that night, but he did not believe that he was drunk. Appellant did not appear to LaGrange to be drunk either. As some of them were getting ready to go to bed, LaGrange and appellant decided to go to a friend's house. When they left, one of the women was lying on the couch and a couple of the girls were sitting on chairs. No one asked them to leave. He recalled that the women had left an open invitation to stop back any time if their plans did not pan out.

{¶ 24} LaGrange spent the night at his friend's house. Appellant left after a half-hour to an hour to retrieve the beer that they had left at the women's apartment.

{¶ 25} Appellant testified that a mutual friend brought appellant to a party at the victim's apartment sometime in Spring semester of 2002. At the first party, he was doing rap music and free styling and everyone was complimenting him. He went to another party at their apartment the next weekend. He and the friend stayed until 2:00 a.m. or 3:00 a.m. The women made him feel welcome and told him that he could come over anytime he wanted because they leave the door unlocked. Several times, he went to the apartment in the early evening and they would invite him to go with them to a party. On the weekdays, he would come over and play cards or games or watch television. He also recalled driving the women to a club one time. He liked the victim most of all because she was the one who was the nicest to him. She talked to him the most and they would exchange compliments.

{¶ 26} Appellant recalled that one night he was in the apartment with Ryan Springer and another man when he told them that he was going to use the computer.

Appellant woke the victim up and she permitted him to use her computer. Springer came in and asked what was going on. Appellant told him he was using the computer and Springer shut the door. A few minutes later, Springer and the other man came back and turned on the light waking up the victim. The other man wanted to use the computer after appellant. Appellant sat on the couch in the room and talked to the victim and Springer. After Springer and the other man left the room, appellant asked the victim about the picture of her boyfriend. He asked her if she broke up with her boyfriend whether she would consider going out with appellant. She said yes because he was nice and cute. He asked if she would kiss him. She said no because she did not know him. She agreed to let him kiss her on the cheek. As appellant left the victim's room, he saw Springer asleep in a chair. Appellant saw the victim again in the morning and two weeks later at her house. Everyone still treated him the same.

{¶ 27} Appellant denied making off-handed compliments to the women. He only made comments about their looks in response to questions about how they looked when they were getting ready for a party. He believed that he never initiated conversations with them because he is a very laid-back person.

{¶ 28} On March 29, 2003, appellant was hanging out with LaGrange when he called the women around 8:30 p.m. and asked what they were doing that evening. They invited him

{¶ 29} and LaGrange to join them at a pajama party and a "kegger." At the pajama party, everyone started to play a game called "sex Jenga." The victim invited them to

play and said she would tell them how. At one point, appellant had to kiss another girl to his left and the victim gave him a stare. He thought she might be upset because he had kissed her on the cheek about a month earlier. LaGrange was very intoxicated at this time and had taken off his shirt. The victim was hanging on LaGrange and talking to him. When it was the victim's turn, she was saying that she wanted to have a lap dance with the man on her left. Then she drew a block that said she should do exactly that. He indicated that she did not have to do it. She indicated that he would like it, but she did not do it. The game ended and everyone separated.

{¶ 30} The group went to the next party in Boothby's car because LaGrange was too drunk to drive. They discovered that there was no beer, but the victim offered appellant and LaGrange one of her beers and talked to him awhile. Appellant and LaGrange went with Boothby to get more beer. When they arrived back at the party, they saw police officers around. The victim and her roommates were fighting with some other women in the front yard. Eventually the women came out and wanted to leave.

{¶ 31} The group returned to the women's apartment around 2:00 p.m. or 2:45 p.m. and socialized, watched television, and listened to some music. At 3:00 p.m., appellant and LaGrange left to get something to eat. The victim's sister wanted something brought back for her. When they came back, they knocked on the door and someone yelled, "come in." Appellant went to LaGrange's car to get some music someone wanted. When he returned, everyone except the victim and one of her roommates had gone to bed. The victim and her roommate were sitting on the couch. Meanwhile, LaGrange had gotten a

phone call inviting them to another party. While they were waiting for another phone call, the victim and one of her roommates asked them if they were going to the party or wanted to stay there. Appellant decided to go to the other party. The victim talked to them as they left.

{¶ 32} At the next party, appellant stayed about an hour and a half or two hours drinking and socializing. LaGrange threw appellant the car keys and told him to go back to the women's apartment and get some beer. Before he left, he told LaGrange that he might just crash at the women's apartment since they invited him to do so.

{¶ 33} When he got back to the apartment, he saw that the light was on and knocked three times. Because the victim had told him that the door would be unlocked, he went inside. He saw the victim asleep on the couch. He woke her up, told her that he was back, and that he wanted to crash there. She said he could. He went to the bathroom. He did not buckle or zip his pants afterward because he was drunk. He sat down on the couch, laid back, and fell asleep. He never saw Boothby.

{¶ 34} As the victim was lying there, she began to rub him with her feet. He pushed her away three times. Then, he decided that she must want to make out. He started rubbing her legs. She moved up so that he could lay behind her on the couch. She turned around and looked at him. Being a gentleman, he asked her if she wanted to make out and she said "uh-hum." He asked her again and she said "uh-hum, okay." She reached around and started rubbing his leg. He fondled her under her clothing. She moved to enable him to lower her shorts and underwear. He lowered his pants and

underwear and rubbed against her. He never intended to have sex with her. Then, he passed out asleep on top of her. He had drunk eight-to-nine beers over almost a seven-hour time span. He told the officers that he had not penetrated her even a millimeter. He never told the officers the other statements they had testified that he did.

{¶ 35} When the victim woke up 20 minutes later, she turned around and appellant fell off the couch and woke up. She sat up and yelled at him asking him what he was doing. He asked her what she meant because they had been making out. She then paused before looking toward the bedrooms and yelling at him and asking him what he was doing. Boothby came out and she asked him to get appellant out of there. Appellant stated that he left immediately.

{¶ 36} When he realized that he had forgotten his keys, appellant went back for them. As he was approaching the apartment, he overheard the victim through a window that was open just a little. She was saying that she did not know what had happened. After he came to the door and asked for his keys, one of the roommates threw him his keys and he left. The victim's sister came after him hitting him. They were accusing him of rape. He denied it and apologized just because they thought he had done something wrong. He could not believe that they were treating him like this. He thought the victim had been a willing participant because of her actions.

{¶ 37} When he was arrested, the officer kept asking him where the drugs were. Appellant did not understand what was going on. When he was at the police station, he was trying to tell the officers what happened but they kept calling him a liar. He was

exhausted because he had hardly slept the night before. Appellant admitted that he first told the officers that he had crashed on the couch and did not realize that anyone else was there. He admits that was not true, but that he did so only because he could not gather his thoughts to tell what happened.

{¶ 38} He further testified that when he said that he had not done anything, he meant that he had not raped the victim. He admitted from the beginning that he was on the couch with her. His story never changed, he just recalled more of the events as the officers pressed him. The officers kept making him start from the beginning repeatedly because they thought he was lying. He denied making all of the statements that the officers wrote down. He also denied ever having said the things the women accused him of saying prior to this incident.

{¶ 39} In his first assignment of error, appellant argues that there was insufficient evidence to convict him of sexual battery under R.C. 2907.03(A)(2).

{¶ 40} The standard for determining whether there is sufficient evidence to support a conviction is whether the evidence admitted at trial, "if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. The 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; and *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, reconsideration denied

(1997), 79 Ohio St.3d 1451. We must uphold the verdict unless we find that reasonable minds could not reach the conclusion reached by the trier of fact.

{¶ 41} R.C. 2907.03(A)(2) and (3) provide that a sexual battery occurs if a person: "engages in sexual conduct with another, not the spouse of the offender, when * * *" the offender either "* * *knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired;" or "* * * that the other person submits because the other person is unaware that the act is being committed." "Sexual conduct" is defined as "vaginal intercourse between a male and female; * * * 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 cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(A). A jury can reasonably conclude that the defendant knew the victim was substantially impaired and unable to object to the defendant's conduct if there was evidence that the victim was in a state of deep sleep or drunkenness. *State v. Branch* (May 24, 2001), 10th Dist. App. No. 00AP-1219, at 6.

{¶ 42} Appellant contends that there was insufficient evidence to convict him of violating R.C. 2907.03(A)(2) because if the victim was so substantially impaired that appellant would have known it, then she was not a credible witness to testify as to what was happening when she woke up. He points to evidence that the victim was so drunk that she could not fully recall the events of the evening. She was unable to recall what clothing she wore to the second party, the fact that she had gotten in a fight at the second

party, and which end of the couch she was lying on when she passed out or how she was laying.

{¶ 43} We find this argument lacks merit. Only appellant knows exactly what occurred prior to the victim waking up that morning and he had a motive to lie about what happened. The victim testified that she had been drinking heavily and had fallen asleep on the couch. Her roommate also testified that the other women had been drinking a lot and that the victim was asleep prior to appellant leaving the apartment. While the victim was unable to recall certain events of the prior evening, not all of these events were significant at the time they occurred. She was able to recall the major events of the evening. Others were able to corroborate these events as well. The victim also testified that she regularly drank on the weekends. Therefore, a reasonable jury could determine that she was only heavily asleep at the time of the offense and not that she had blacked out from excessive drinking.

{¶ 44} Furthermore, the only evidence of the extent of the contact prior to the act of penetration and the victim waking up came from appellant's statements to the police and his testimony at trial. We see no conflict between believing that the victim did not immediately wake up at the first contact and the fact that when she woke up she could appreciate what was happening at that moment.

{¶ 45} In contrast, appellant argues that he was a credible witness because he admitted to some sexual contact without, allegedly, knowing that the level of contact would alter the charges against him. He also asserts that his credibility was further

bolstered by the fact that there was no physical evidence to support the victim's allegations.

{¶ 46} We find that appellant's credibility was at issue in this case. While appellant testified that he experienced pre-ejaculation and a semen stain was found only on his clothing, the forensic scientist testified that she was unable to date the stain. Therefore, the lack of physical evidence does not automatically bolster appellant's credibility. Furthermore, appellant's credibility was impaired by the fact that his confession changed over time. Appellant did confess at one point to some limited contact. However, the officers who interrogated appellant testified that this confession came after an initial denial of any contact and was eventually followed by a full confession. After hearing the other testimony at trial, appellant's testimony differed from what the officers testified that he had confessed to doing.

{¶ 47} We find that a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The fact that there is conflicting evidence is not an issue when determining whether there was sufficient evidence to submit the case to the jury. Appellant's first assignment of error is not well-taken.

{¶ 48} In his second assignment of error, appellant argues that his conviction of violating R.C. 2907.03 was contrary to the manifest weight of the evidence.

{¶ 49} Even where there is sufficient evidence to support the verdict, the appellate court may decide that the verdict is against the weight of the evidence. *Thompkins,* supra at 387. To determine if the verdict was contrary to the manifest weight of the evidence,

we must consider whether the greater amount of credible evidence was admitted to support the conviction than not. Id. at 387-390, and *State v. Smith* (1997), 80 Ohio St. 3d 89, 113, certiorari denied (1998), 523 U.S. 1125. However, a new trial is warranted only in an exceptional case where the evidence weighs heavily against conviction. *Thompkins,* supra.

{¶ 50} Appellant argues the weight of the evidence does not support his conviction. His first two arguments relate to the lack of physical evidence and the victim's credibility. Both of these arguments have been addressed and rejected.

{¶ 51} Appellant also contends that all of the participants in the events of the evening provided inconsistent and irrelevant testimony concerning the events of the evening. We disagree with this argument as well. The witnesses' testimonies were slightly inconsistent concerning the details of the events of the evening. However, their overall testimonies provided the necessary corroborating information the jury needed to place appellant at the scene, identify a motive for the crime, establish that appellant knew the victim was asleep when he return to the apartment, and substantiate the victim's reaction to appellant's conduct in the morning. In addition to this evidence, which supports appellant's conviction, there is also the testimony of the officers regarding appellant's confession to the crime. Appellant, on the other hand, was not a credible witness. His testimony regarding his prior contact with the women and the events of the evening conflicts with all of the other witnesses. He gave inconsistent statements to the police and his testimony at trial was inconsistent with his statements to the police.

{¶ 52} We find that, after weighing all of the evidence and any reasonable inferences and after considering the credibility of witnesses, the jury did not lose its way and that a manifest miscarriage of justice did not occur in this case. Appellant's conviction is not contrary to the manifest weight of the evidence. Appellant's second assignment of error is not well-taken.

{¶ 53} In his third assignment of error, appellant contends that he was denied a fair trial because of the prosecutor's improper statements made during closing arguments.

{¶ 54} No objection was made to any of the prosecutor's statements. Therefore, we must analyze the comments under the plain error standard. *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, at ¶126. Plain error is found only in exceptional cases in order to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 95. Plain error will be recognized where, but for the error, the outcome of the trial would have been different. Crim.R. 52(B) and *State v. Wogenstahl* (1996), 75 Ohio St.3d 344, 357.

{¶ 55} Appellant first argues that the prosecutor improperly commented on the veracity of the witnesses when he said that: "[e]very one of those girls was honest in her answer * * *." Appellant claims that this statement improperly boosted the victim's credibility with the jury.

{¶ 56} Upon a review of the comment in context, however, we find that it was made in the context that the jury had every right to question the judgment of the women in ever trusting appellant in the first place and putting themselves in a position where the

crime could have been committed. Several jurors had proposed questions to the witnesses about this issue. The prosecutor told the jury that he hoped their questions had been answered because the women had been honest in their answers. He did not comment on the credibility of the women with regard to their testimony against appellant. Appellant has taken this statement out of context and given it a meaning that was never intended by the prosecution. We find that the jury would never have inferred from his statement that the women were more credible witnesses than was appellant.

{¶ 57} Secondly, appellant argues that the prosecutor misrepresented the evidence by stating that the victim remembered the events of the evening. The prosecutor made this comment in response to the inference raised by the defense that the victim had blacked out from excessive drinking and could not have remembered what happened when she woke up. The prosecutor was commenting that people who black out from drinking forget whole blocks of time, but that the victim was able to testify as to all of the events of the evening. The prosecutor was not making a comment about the victim's credibility but rather that there was evidence that she had not blacked out that night.

{¶ 58} Finally, appellant contends that the prosecutor improperly compared him to a reptile. In his closing arguments, the prosecutor stated to the jury:

{¶ 59} "Perception is the key, ladies and gentlemen. You all know what this is, don't you? Any reasonable doubt in your mind what that is? Hum-um. No reasonable doubt about what it is. But the defense in this case would say, wait a minute, perception here. This thing could have scales on its back. It could have clawed feet. It could be a

forked tail. It may not really be what you perceive it to be. But is that reasonable? Does that rise to the level of reasonable doubt? That's right, perception is key here. And who was misconstruing what their perceptions were? [the Victim]? Or Lincoln Anderson?"

{¶ 60} While we find the statement to be somewhat unintelligible, we believe that the prosecutor was attempting to explain to the jury that they should not be misled by the defense's argument that this case is not what it appears to be. We reject appellant's contention that the "jury easily could have drawn from this that the Prosecutor was not so subtly depicting Appellant as some sort of sinister predatory less than human reptilian like thing not worthy of belief."

{¶ 61} Furthermore, even if any of these statements were inappropriate, we find that with the evidence of guilt in this case, the outcome of the trial would not have been different. Appellant's third assignment of error is not well-taken.

{¶ 62} In his fourth assignment of error, appellant argues that his conviction was contrary to law because it was not supported by the evidence. Appellant appears to be asserting that the conviction is contrary to the manifest weight of the evidence and we have already addressed and rejected this argument. Appellant's fourth assignment of error is not well-taken.

{¶ 63} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Wood County Court of Common Pleas is affirmed. Costs assessed to appellant pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

George M. Glasser, J. _____
CONCUR.
JUDGE

Judge George M. Glasser, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.