[Cite as *State v. Jackson*, 2007-Ohio-2494.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 88074

STATE OF OHIO

PLAINTIFF-APPELLEE
vs.

RONALD JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-467833

BEFORE: Rocco, J., Sweeney, P.J., Boyle, J.

RELEASED: May 24, 2007

JOURNALIZED:

ATTORNEY FOR APPELLANT

Margaret Amer Robey
Robey & Robey
14402 Granger Road
Maple Heights, Ohio 44137

ATTORNEYS FOR APPELLEE

William Mason
Cuyahoga County Prosecutor

BY: Edward J. Corrigan
Assistant Prosecuting Attorney
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

KENNETH A. ROCCO, J.:

{¶ 1} After a jury convicted him of all twenty-six counts of an indictment that charged him with committing rape, gross sexual imposition and kidnapping, defendant-appellant Ronald Jackson appeals both his convictions and the sentence subsequently imposed upon him.

{¶ 2} Jackson presents seven assignments of error in which he claims that the prosecutor's misconduct compromised the fairness of his trial, that many of the indicted counts failed to give him adequate notice of the particular charge and, further, constituted allied offenses for which he should not have been convicted, that some of his rape convictions were based upon insufficient evidence, that his convictions are unsupported by the weight of the evidence, and that he was

improperly sentenced.[1]

{¶ 3} Since this court finds his first assignment of error has merit, i.e., that the prosecutor's conduct tainted the trial's fairness, Jackson's convictions must be reversed, and this matter remanded for a new trial. Jackson's remaining assignments of error, accordingly, are moot. App.R. 12(A)(1)(c).

TRIAL PROCEEDINGS

{¶ 4} Jackson's convictions were based mainly upon the testimony of the two female victims, his granddaughters, T and M.[2] In 1994, at the ages of five and two-and-a-half, respectively, they came to live with Jackson and some of their other relatives in a house on Hampden Avenue in Cleveland. At the time, Jackson was in his forties, and their great-grandparents, who also lived in the house, were in their seventies.

{¶ 5} T testified as follows. When she attained puberty at about the age of eleven, Jackson began molesting her. She stated he called her down to the basement, asked her to lift her shirt and bra, and "would touch on [her] breasts and put his mouth on [her] breasts and stuff like this." This occurred "about twelve times" between her eleventh and thirteenth birthdays. Although she never noted either the dates or the time of year of these incidents, T seemed very sure of her

[1]Jackson's assignments of error are attached as an appendix to this opinion.

[2]Pursuant to this court's policy of protecting their privacy, the victims are referred to

count. She stated that although she felt that she "could have" left the basement, she did not.

{¶ 6} T further testified that "sometimes" Jackson came into the bathroom while she was bathing. Jackson got "on his knees" next to the tub, and "just start touching [her] on [her] breasts or putting his mouth on [her] breasts." She stated this occurred "one time," while "the other two times he just came in there and went to the bathroom."

{¶ 7} Sometime when she was twelve years old, T remembered waking in her bed to find Jackson "on top of [her], trying to have intercourse with" her. She stated Jackson was "trying to insert [his penis] in [her] vagina" for approximately ten minutes before he gave up. T testified that Jackson "four times [had] intercourse" with her. T subsequently explained her interpretation of Jackson's actions on these occasions, however, by indicating "intercourse" encompassed any attempt at sexual conduct. To her, "successful" intercourse meant that Jackson ejaculated; she made no distinction on the basis of whether penetration occurred.

{¶ 8} According to her testimony, the "first" rape occurred in the basement, when Jackson "started touching on [her] breasts and putting his mouth on them," then told her to "pull up [her] dress and pull down [her] underclothes." She testified that Jackson ordered her to lay upon a pile of clothing on the floor, "and then he got

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only by initials.

on top of [her] and then he started to penetrate" her vagina with his penis. This incident occurred when she was "between either twelve or thirteen" years old.

{¶ 9} Another time, Jackson had her bend over a basement cabinet, "and then he just pulled [her] dress up and pulled [her] underwear down and then he tried to penetrate [her] in the anus, but it didn't work." The third time was the incident she described in her bed, and the fourth time occurred "in the bathroom." No further description of this particular occasion was provided. T indicated that on two of these occasions, Jackson ejaculated. When the prosecutor asked if Jackson ever inserted his fingers into her, T answered, "No.".

{¶ 10} In addition to the foregoing testimony, T indicated that during the time she lived in the house, her great-grandfather, who was over eighty years old, sometimes had "sexual intercourse" with her. Furthermore, Jackson's brother Timothy, her great-uncle, sexually abused her, along with two other uncles who were unrelated to Jackson. T also stated that one of her foster fathers touched her in a sexual manner.

{¶ 11} M testified as follows. She stated Jackson began sexually abusing her when she reached the age of twelve. M seemed to have a better memory of the incidents than T. M stated Jackson called her to the basement, "told [her] to lift up [her] shirt,***and he touched [her] breasts."

{¶ 12} M testified Jackson raped her on two occasions. Once, he pushed her

onto a bed, "got on top of [her], and he stuck his penis in [her] vagina, and [she] screamed," because "it hurt and [she] was scared." The second time, he entered the bathroom while she was bathing, and, before she could wrap a towel around herself, he "lifted [her] up by [her] arms and set [her] on the dresser," pushed her onto her back, held her hands down, and "stuck his penis in [her] vagina again."

{¶ 13} According to the testimony of other witnesses, Jackson's abuse of the girls came to light early in 2005. By that time, T was sixteen years old and lived with other relatives. One of those relatives found a letter she wrote that referred to the incidents, confronted T with it, and convinced her to talk about the letter's contents. Approximately a month later, M also spoke out about her experiences.

{¶ 14} Cleveland police detective Pamela Berg investigated the case. Berg testified Jackson provided a written statement in which he denied improper sexual behavior with the girls, but conceded, among other things, that T once might have "bumped" him with her breasts, that he saw M's breasts one time when she deliberately lifted her shirt in his presence, and that he sometimes checked on them while they were bathing. Jackson asserted that schoolteachers complained about each girl's "smell," and "they" told him to check on the girls' bathing habits.

{¶ 15} As a result of the investigation, Jackson was indicted on twenty-six counts. The first five pertained to M, and charged him with gross sexual imposition, two counts of forcible rape of a child under thirteen years old, and two counts of

kidnapping. The remaining counts pertained to T. In them, Jackson was charged with thirteen counts of gross sexual imposition, four counts of forcible rape of a child under thirteen years old, and four counts of kidnapping. Each count of rape and kidnapping contained a notice of Jackson's prior conviction for burglary in 1977, and each count of kidnapping additionally contained a sexual motivation specification.

{¶ 16} After hearing the testimony and the arguments of counsel, the jury found Jackson guilty on all counts. The trial court imposed concurrent terms of imprisonment as follows: life on each count of rape, nine years on each count of kidnapping, and three years on each count of gross sexual imposition. Additionally, although the trial court failed to mention it during the hearing, the journal entry of sentence states that "post release control is part of" Jackson's sentence.

LAW AND ANALYSIS

{¶ 17} Although Jackson presents seven assignments of error, his first is dispositive of this appeal. In his first assignment of error, Jackson argues that the conduct of the prosecutor during the proceedings compromised his right to a fair trial.

{¶ 18} Jackson points mainly to statements made during closing argument, but a review of the entire record supports a conclusion that the prosecutor's misconduct renders the jury's indiscriminate verdict of guilt against Jackson on all counts unreliable. *State v. Person*, 167 Ohio App.3d 419; 2006-Ohio-2889.

{¶ 19} In order to determine whether prosecutorial misconduct occurred, a reviewing court must determine whether the statements or questions were improper, and if so, whether in the context of the entire record, they affected the defendant's substantial rights, including his right to a fair trial. *State v. Papp* (1978), 64 Ohio App.2d 203; *State v. Smith* (1984), 14 Ohio St.3d 13; *State v. Ford*, Clark App. No. 2005-CA-76, 2006-Ohio-2108. See also, *State v. Poling*, Portage App. No. 2004-P-0044, 2006-Ohio-1008, ¶17, citing *State v. Smith*, 87 Ohio St.3d 424, 442, 2000-Ohio-450.

{¶ 20} With respect to closing argument, the prosecutor is entitled to a certain degree of latitude. *State v. Apanovich* (1987), 33 Ohio St.3d 19. Isolated comments, therefore, should not be taken out of context and given their most damaging meaning. *State v. Carter*, 89 Ohio St.3d 593, 2000-Ohio-172. Nevertheless, the prosecutor must confine himself to certain limits. *State v. Liberatore* (1982), 69 Ohio St.2d 583.

{¶ 21} It must be noted in considering Jackson's first assignment of error that Jackson made only one objection during the course of the prosecutor's closing argument. Ordinarily, this fact in itself waives most of his appellate argument. *State v. Poling*, supra, ¶29. However, the trial court overruled the objection, which indicates more would have been futile. Additionally, as is its duty, this court has reviewed the entire record, and, in that light, is constrained to agree that the

prosecutor's conduct in this case cannot be countenanced. Id., ¶30-37; see also, *State v. Person*, supra.

{¶ 22} The record in this case demonstrates the prosecutor failed to limit himself to appropriate closing argument by: 1) stating facts that were not in evidence; 2) extensively giving his personal opinions on the credibility of the witnesses; 3) denigrating the defense; and, 4) appealing on behalf of the victims to the sympathy of the jurors. *State v. Ford*, supra; *State v. Thornton*, Cuyahoga App. No. 80136, 2002-Ohio-6824.

{¶ 23} First, at the outset of the prosecutor's closing argument, he not only sought to supply deficiencies in his evidence by providing "facts" not provided by the witnesses during their testimony, but he also usurped the province of the trial court. The prosecutor stated:

{¶ 24} "Each of the young ladies who testified in this case told you they were afraid of the defendant, and that he held them down by force or he held them against their will. They were not free to leave. That is enough for kidnapping. Restraint of liberty for the purposes of committing a sex offense is kidnapping." T testified, however, that, sometimes, she felt that she "could have" left the basement.

{¶ 25} Further on in his remarks, the prosecutor asserted that M, rather than T, first disclosed the abuse; by explaining "why she was withdrawn and why she was sullen." According to the testimony, however, M did not disclose any abuse until a

month after T.

{¶ 26} Thereafter, the prosecutor additionally asserted that T "came forward" to disclose the abuse when "she was finally in a safe place." T's testimony, however, proved she continued to run away from her homes up until the time of trial.

{¶ 27} The prosecutor mischaracterized T's testimony, arguing that her "coming forward" was the result of "just writing as young girls in adolescence will, just journalizing her life." T said nothing about keeping any journal of her experiences. Moreover, the prosecutor also asserted that, during her testimony about the abuse, T spoke "about other instances where [Jackson] put his fingers in her vagina," when she specifically had stated nothing of the sort occurred.

{¶ 28} Second, the prosecutor gave his personal opinion concerning the credibility of the witnesses. He challenged the jurors to find Jackson "not guilty if you don't believe those two little girls," because "no one else can tell you what happened***." The prosecutor further asserted that the "only" people "who were there [during the incidents] came in and told 'ya that [Jackson] raped them, that he fondled them, that he kissed their breasts." Furthermore, "not once did they switch up or falter or change their story. The truth does not change." The prosecutor thereby asserted his witnesses were truthful.

{¶ 29} On the other hand, a defense witness' testimony that "nobody [was] allowed down in that basement [was] a lie." Thus, he implied that since the defense

witness was a liar, Jackson's defense, too, was not worthy of any belief.

{¶ 30} The prosecutor encouraged the jury to "find [Jackson] guilty of everything because he touched those little girls over the period of time of 1999 right through 2004. And he raped them on numerous occasions. And any time you restrain someone of their liberty for committing a sex act, that's kidnapping. [The judge] will tell you that. That's what the evidence told 'ya. It's a no brainer. Find him guilty because no one, not one shred of evidence in this case says that did not happen." These statements were asserted despite the evidence that Jackson made a written statement to deny the allegations.

{¶ 31} Following defense counsel's closing argument, the prosecutor in rebuttal denigrated opposing counsel's argument thusly: "Defense counsel is absolutely right. My victim, [T] is not a perfect human being.***[S]o find [Jackson] not guilty." The prosecutor provided his own opinion: opposing counsel's defense "theory , I think, is just incredible–but what the heck, apparently [M] is making this up because she wants to be with her sister. Well, that's novel." As he continued, the prosecutor stated that T did not have to "tell you about any of" the abuse, but she "didn't duck one punch from defense counsel," implying that defense counsel himself was abusing her.

{¶ 32} Furthermore, defense counsel's view of the evidence was "absolutely mistaken;" the girls could not have "got together and put these stories together"

because T was "running away" and could not have spoken to M. The prosecutor made this assertion despite M's testimony that she and T remained close after they were separated.

{¶ 33} The prosecutor's parting shots informed the jury that "there is no defense [in the judge's instructions that] will tell you***if a person has been a victim before, sexually assaulted before, find this knucklehead not guilty***. [T] told you what happened in that house. And not one person, not one single, solitary person has said anything to the contrary." Indeed, "there is nothing to suggest that what she told you is not accurate."

{¶ 34} The prosecutor thus appealed to the sympathy of the jury by characterizing the victims, who were teenagers living in other homes at the time of trial, as "little girls" still fighting against their lying grandfather, and by implying Jackson's written statement in which he denied his guilt was unworthy of any rebuttal argument.

{¶ 35} The jury followed the prosecutor's suggestion and simply found Jackson guilty on all counts.

{¶ 36} T's testimony, however, proved only two counts of rape; as to the other two counts, she testified Jackson made only an attempt. As to the counts of gross sexual imposition, the only distinctions T made were that some occurred in the basement, and some in the bathroom; she gave no details that otherwise would

separate them. Moreover, neither of the victims provided evidence which supported convictions for kidnapping separate from the rapes. The jury's indiscriminate verdict, therefore, demonstrates the prosecutor's improper argument tainted the fairness of Jackson's trial.

{¶ 37} Additionally, the transcript of trial shows the prosecutor's leading questions, in many instances, provided for the victims the answers he sought to obtain from them. *State v. Poling*, supra. In other words, the evidence of Jackson's guilt of each of the twenty-six counts of the indictment is not so overwhelming as to overcome the amount of misconduct that exists in the record. Id., citing *State v. Lott* (1990), 51 Ohio St.3d 160; cf., *State v. Ahmed*, Stark App. No. 2004CA00379, 2005-Ohio-5654.

{¶ 38} This is an unfortunate result, because overwhelming evidence of Jackson's guilt was presented on a number of the counts. However, from the totality of the record, this court cannot find the prosecutor's conduct constitutes "harmless error." See, *State v. Brewer*, Cuyahoga App. No. 87701, 2006-Ohio-6029; *State v. Person*, supra.

{¶ 39} Jackson's first assignment of error, accordingly, is sustained. His remaining assignments of error are moot.

{¶ 40} His convictions and sentence are reversed, and this matter is remanded to the trial court for a new trial.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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

_____
KENNETH A. ROCCO, J.

JAMES J. SWEENEY, P.J. CONCURS
MARY J. BOYLE, J.
CONCURS IN JUDGMENT ONLY
(SEE ATTACHED CONCURRING OPINION)

Appendix

The assignments of error state:

First Assignment of Error:

"The defendant was denied his constitutional right to a fair trial because of prosecutorial misconduct during closing argument that unfairly prejudiced the defendant."

Second Assignment of Error:

"Appellant's indictment for and conviction of repetitive and unspecific offenses violated his due process rights to notice of the crime charged and protection from

double jeopardy, and requires the dismissal of duplicative counts."

Third Assignment of Error:

"The kidnapping convictions and sentences must be reversed, as any restraint of the victims was merely incidental to the underlying crimes."

Fourth Assignment of Error:

"The jury's decision finding the defendant guilty of four counts of rape of T was not supported by sufficient evidence when she only claimed to have been raped two times."

Fifth Assignment of Error:

"The jury's decision finding T to have been under the age of thirteen at the time of the alleged rapes was not supported by sufficient evidence when she testified that she may have been thirteen years of age at the time."

Sixth Assignment of Error:

"The jury's decision finding the defendant guilty of sexually molesting his young granddaughter was against the manifest weight of the evidence."

Seventh Assignment of Error:

"The trial court erred in failing to advise Mr. Jackson of post-release control, and erroneously sentencing him to three years on Count 26, a felony of the fourth degree."

BOYLE, M.J., J.:

{¶ 41} Although I agree with the majority's conclusion to sustain appellant's first assignment of error and reverse and remand this case due to prosecutorial misconduct, I concur in judgment only for the reasons set forth as follows.

{¶ 42} First, the majority makes credibility assessments in its presentation of the facts. When discussing how many times Jackson had touched T on her breasts, the majority concludes, "[a]though she never noted either the dates or the time of the year of these incidents, T seemed very sure of her count." It further determines, "M seemed to have a better memory of the incidents than T." These conclusions were no where to be found in the transcript, and thus, are credibility assessments made by the majority.

{¶ 43} Appellate courts are not in a position to weigh the evidence or make credibility determinations. We are not present in the courtroom during questioning. It is the trier of fact who has the "best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger* (1997), 77 Ohio St.3d 415, 418.

{¶ 44} In addition, the majority makes legal conclusions when presenting the facts – as if they were the testimony of the witness. The majority makes the following statements: 1) "T testified as follows. When she attained purberty at about the age of eleven, Jackson began molesting her," 2) "[a]ccording to her testimony,

the 'first' rape occurred in the basement ***," 3) "M testified as follows. She stated Jackson began sexually abusing her when she reached the age of twelve ***," and, 4) "M testified Jackson raped her on two occasions ***."

{¶ 45} A review of the testimony reveals no such legal conclusions or statements made by T or M. In their words, both women testified as to what happened to them. However, no where in their testimony do they state they were molested, abused or raped. These conclusory statements are not appropriate in the presentation of facts or testimony in a court opinion.

{¶ 46} Further, when describing an incident that T testified to, which occurred in her bedroom, the majority states "[s]ometime when she was twelve years old ***." However, T is not that specific in her testimony. She actually said that she was "about twelve" when it occurred. This is an important distinction, in a case where an issue exists as to whether the victim had reached the age of thirteen.

{¶ 47} With respect to the same paragraph, the majority quotes T in part as follows: "[s]he stated Jackson was 'trying to insert (his penis) in (her) vagina' for approximately ten minutes before he gave up." I have several problems with the majority's recitation of the facts here.

{¶ 48} The following testimony is what actually transpired at trial:

{¶ 49} "Q. Tell the ladies and gentlemen of the jury as much detail as you can remember what your grandfather did?

{¶ 50} "A. Yes. I was laying on the bed, about then, you know, all I had on was my underwear, and he got on top of me.

{¶ 51} "***

{¶ 52} "Q. Tell the ladies and gentlemen of the jury what he did.

{¶ 53} "A. He got on top of me and he tried to like move my underwear over so he can like penetrate, but it really don't work out like he planned, so --

{¶ 54} "Q. When you say so he tried to penetrate?

{¶ 55} "A. Yeah.

{¶ 56} "Q. Do you know what a penis is?

{¶ 57} "A. Yes, I do.

{¶ 58} "Q. And what was he doing, if anything, with his penis?

{¶ 59} "A. Trying to insert it is my vagina.

{¶ 60} "***

{¶ 61} "Q. How long did that episode, that incident last?

{¶ 62} "A. For a couple of minutes, probably ten or fifteen minutes."

{¶ 63} First, T never stated that Jackson "gave up" trying to insert his penis in her vagina. She stated that when he was trying to move her underwear so he could "like penetrate," that it did not work out as he had planned. This statement has several connotations, including the one made by the majority. However, that is not what T said. This court does not have the liberty to make those interpretations, that

is for the trier of fact.

{¶ 64} Secondly, when the prosecution leads a witness on an important fact such as whether a defendant was using his penis or not, it was not appropriate to place brackets around "his penis," purporting it to be her testimony, especially in a case such as this. Brackets allow the reader to know that the author altered the original quote. However, they should not be used if the brackets will mislead the reader. See Intermin Edition to the Manual of the Forms of Citation used in the Ohio Official Reports (July 1, 1992), Walter S. Kobalka, Supreme Court Reporter, Reporter's Office for the State of Ohio, 31-32). It is my belief that the majority's characterization of T's testimony seriously misleads the reader.

{¶ 65} I also disagree with the following characterization of the facts. When discussing the first incident, after the majority states, "[a]ccording to her testimony, the 'first' rape occurred in the basement, when Jackson 'started touching on (her) breasts***,'" it then states in the following sentence: "[s]he testified that Jackson ordered her to lay upon a pile of clothing on the floor, 'and then he got on top of (her) and then he started to penetrate' her vagina with his penis." This sentence, "quoting" T, is also a serious misstatement of the testimony.

{¶ 66} When discussing the pile of clothes on the floor, she only states:

{¶ 67} "Then he told me to pull up my dress and pull down my underclothes, and I did. And then he told me to lay on the floor. And there was like clothes on the

floor, and I did. And then he got on top of me and he started to penetrate." The prosecutor then goes on to question T about another incident. After the word "penetrate," the majority added, "her vagina with his penis" to T's testimony. That is not what she testified to at that point. "Penetrate" could mean many things, only one of which is penis in the vagina.[3]

{¶ 68} I further disagree with the following summation of T's testimony regarding her "interpretation" of what successful intercourse is:

{¶ 69} "*** T testified that Jackson 'four times (had) intercourse' with her. T subsequently explained her interpretation of Jackson's actions on these occasions, however, by indicating 'intercourse' encompassed any attempt at sexual conduct. To her, 'successful' intercourse meant that Jackson ejaculated; she made no distinction on the basis of whether penetration occurred."

{¶ 70} The following exchange actually occurred at trial regarding this subject:

{¶ 71} "Q. At that point how many times had he sexually abused you?

{¶ 72} "A. Four times.

{¶ 73} "Q. Four times?

{¶ 74} "A. Yes.

{¶ 75} "Q. When you say he had sexually abused you four times, do you mean

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[1] T does *agree* with the prosecutor, at a much later point in her testimony, that Jackson penetrated her vagina with his penis that first time in the basement. However, she does not state it when she was discussing the pile of clothes on the floor.

he had intercourse with you or was that the fourth time? Tell us what you mean by that?

{¶ 76} "A. That was four times he have sexual intercourse with me."

{¶ 77} At that point, the prosecutor reviewed the four times with T. The following exchange then took place.

{¶ 78} "Q. All right. Four times he attempted to place his penis in your vagina?

{¶ 79} "A. Yes.

{¶ 80} "Q. At any point in time was he able to successfully do that?

{¶ 81} "A. Yes.

{¶ 82} "Q. How many times was he able to successfully do that?

{¶ 83} "A. Twice.

{¶ 84} "Q. Twice. And when he was able to successfully do that, you indicated to us that at some point in time you noticed that there was some – are you familiar with the term ejaculate? Do you know what that means? [Contrary to what the prosecutor said, T had not indicated in her testimony up to that point, anything about ejeculation.]

{¶ 85} "A. Yes.

{¶ 86} "Q. Where was that?

{¶ 87} "A. On my leg.

{¶ 88} "Q. On your leg?

{¶ 89} "A. Yes.

{¶ 90} "Q. And how many times did that happen?

{¶ 91} "A. Twice.

{¶ 92} "Q. Twice. So twice he was able to ejaculate?

{¶ 93} "A. Yes.

{¶ 94} "Q. All right. And the other two times he was not able to place his penis fully inside of whatever cavity he was attempting to enter?

{¶ 95} "A. Yes.

{¶ 96} "Q. And over the course of time, how many times did he lift your shirt and touch your breasts or kiss your breasts?

{¶ 97} "A. About twelve times.

{¶ 98} A review of the T's testimony regarding this subject shows that T did not interpret "intercourse" to mean "any attempt at sexual conduct" as the majority concludes. She may have meant any *attempt* at sexual *intercourse*, but not sexual conduct (which would include touching and/or kissing her breasts).

{¶ 99} The majority then concludes, "[t]o her successful intercourse meant that Jackson ejaculated; she makes no distinction on the basis of whether penetration occurred." However, the actual testimony shows that T did make that distinction. She *agreed* with the prosecutor that Jackson was able to place his penis in her vagina twice, and that he *attempted* to do so two other times. That is a distinction.

Further, by answering "yes" to the prosecutor's question, she *agreed* with him that "when [Jackson] was able to successfully do that," referring to the two times he placed his penis in her vagina, he also ejaculated. Thus, "successful intercourse" was not only successful ejaculation, but penetration.

{¶ 100} Turning to the majority's analysis, I also disagree with the following portions of the opinion. When discussing the prosecutor's closing arguments regarding the elements of kidnapping, restraint of liberty, and the prosecutor's statement that T and M were not "free to leave," the majority concludes that, "T testified, however, that, sometimes, she felt that she 'could have' left the basement." The majority oversimplifies T's response. The actual testimony regarding this matter was:

{¶ 101} "Q. All right. When you were down in the basement, did you have an opportunity to leave?

{¶ 102} "A. I could have, but no.

{¶ 103} "When he called you over and lifted up your shirt, did you feel that you were free to leave?

{¶ 104} "A. No, not really.

{¶ 105} "Q. Why is that?

{¶ 106} "A. Because I was too scared.

{¶ 107} "Q. You were afraid?

{¶ 108} "A. Yes.

{¶ 109} "Q. Why were you afraid?

{¶ 110} "A. Because that's my grandfather and he is bigger than me, and I don't think nobody, I mean, my grandmother wasn't going to be able to help me because she bedridden.

{¶ 111} "Q. So you were afraid, and is that why you didn't leave?

{¶ 112} "A. Yes."

{¶ 113} Finally, I disagree with the following conclusion. Near the end of the majority opinion, it concludes that the prosecutor asked leading questions throughout, and then states, "the evidence of Jackson's guilt of each of the twenty-six counts of the indictment is not so overwhelming as to overcome the amount of misconduct that exists in the record." However, in the next paragraph, the majority contradicts what it just determined: "[t]his is an unfortunate result, because overwhelming evidence of Jackson's guilt was presented on a number of counts." This statement does not logically follow the majority's conclusion in the preceding paragraph.

{¶ 114} Thus, I agree that this court must reverse and remand due to prosecutorial misconduct, sustaining Jackson's first assignment of error. However, I concur in judgment only for the reason set forth in this concurring opinion.