[Cite as *State v. Smith*, 2015-Ohio-1736.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101351

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ADRIENNE SMITH

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-576650-A

BEFORE: Stewart, J., Celebrezze, A.J., and McCormack, J.

RELEASED AND JOURNALIZED: May 7, 2015

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MELODY J. STEWART, J.:

{¶1} In March 2014, a jury found defendant-appellant, Adrienne Smith, guilty of perjury for giving false testimony in a trial where her former boyfriend had been accused of raping her then nine-year-old daughter in 2002. The rape prosecution was premised on the theory that the boyfriend, who was a carrier of the herpes simplex virus type 1 (HSV-1), transmitted the virus to the daughter, who contracted it in her genital area consistent with her accusation that the boyfriend performed oral sex on her.

{¶2} The state's theory appeared solid, given the daughter's repeated insistence that she had yet to become sexually active — this created the strong inference that she could only have contracted the virus because of the boyfriend's conduct. That theory took a huge hit during pretrial discovery when the boyfriend's attorneys learned that, contrary to her initial representations, the daughter had in fact been sexually active as a teenager. In fact, it was only after the daughter received treatment for herpes as a teenager that she came forward with her allegation that the boyfriend raped her. Despite the daughter's revelation about her sexual history in her teenage years, the state nonetheless pressed on with the theory that the daughter had contracted herpes from the boyfriend and that it remained latent until the outbreak that prompted her accusation.

{¶3} Once the rape trial commenced, Smith testified for the state and denied that the daughter had ever been treated for herpes prior to her treatment as a teenager, saying that the daughter had only been treated for periodic diaper rash in her genital area. The boyfriend countered Smith's denial with testimony by Smith's mother (the daughter's maternal grandmother) and a babysitter who both claimed that they not only saw a genital rash on the daughter in 2001 (a time before the boyfriend and Smith began dating), but that Smith told them at the time that the

daughter had been diagnosed with herpes. The state impeached the testimony of the grandmother and babysitter by noting that the daughter's medical records contained nothing about her being treated for herpes.

{¶4} After both sides rested and before closing arguments, investigators for the boyfriend discovered medical records from 2000 showing that the daughter had been treated for a genital rash and prescribed a medicine commonly used for the treatment of herpes, well before she would have met the mother's boyfriend. Smith denied any recollection of this treatment. Deciding that the newly discovered medical records destroyed the state's case, the judge[1] dismissed the case against the boyfriend with prejudice over the state's objection. The judge also drafted a letter to both the administrative judge of the court of common pleas and the Cuyahoga County Prosecuting Attorney requesting that Smith be investigated for perjury. That request and subsequent investigation resulted in the perjury indictment against Smith.

{¶5} Smith raises seven assignments of error on appeal, but we find two, interrelated ones to be dispositive, requiring reversal: that the court erred by allowing the judge who conducted the rape trial to testify in the perjury trial and render an opinion that Smith committed perjury, and that defense counsel was ineffective for failing to object to the admission of this testimony.[2]

{¶6} The judge who presided over the rape trial testified as a witness during Smith's perjury trial. As he testified, the judge read portions of a letter he wrote to the administrative

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[1] Unless otherwise indicated, we use the word "judge" to refer to the judge who presided over the rape trial; we use the word "court" to refer to the judge who presided over the perjury trial.

[2] Smith also complains that state engaged in prosecutorial misconduct in opening statement and closing argument by vouching for the credibility of its witnesses; that it was improper for the assistant prosecuting attorney who prosecuted the rape case against the boyfriend to testify at the perjury trial and render an opinion that Smith committed perjury; that the court erred by allowing a medical doctor to read and interpret the notes of the daughter's treating physician; that the court erred by failing to give the jury a limiting instruction on the use of polygraph evidence; and that the cumulative effect of the claimed errors deprived her of a fair trial.

judge of the court of common pleas and county prosecutor requesting that they investigate Smith for perjury. That letter contained the judge's assertion that Smith gave "patently false" testimony in the rape case. In addition, the judge testified that the newly-discovered medical records, that Smith said did not exist, "completely undermined" the state's rape prosecution. Smith argues that these and other statements by the judge were irrelevant, unfairly prejudicial, rife with hearsay, and improperly vouched for the state's witnesses. Defense counsel did not object to those statements, so Smith claims that she was denied the effective assistance of counsel.

{¶7} Before considering the judge's testimony at trial, we first frame Smith's arguments in the context of what the state had to prove in the perjury trial.

{¶8} Perjury is defined in R.C. 2921.11(A) as knowingly making a false statement under oath when the statement is material. A statement is "material" regardless of its admissibility "if it can affect the course or outcome of the proceeding." R.C. 2921.11(B). The test for materiality is an objective one. By using the word "can," R.C. 2921.11(B) makes it irrelevant whether the false statement actually influenced or affected the decision-making process of the trier of fact. The standard is whether the false statement was capable of influencing the trier of fact on the issue before it. The materiality of a false statement is a question of fact. *See State v. Rawcett*, 5th Dist. Tuscarawas No. 85-A01-006, 1985 Ohio App. LEXIS 7036 (Aug. 23, 1985); *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995).

{¶9} The order dismissing the rape prosecution against the boyfriend stated:

> Prior to closing arguments defense produced medical records containing information which directly contradicts key witness produced by the state — hearing held — defense renews motion for acquittal pursuant to CR 29. Motion granted. Case dismissed with prejudice.

{¶10} During the perjury trial, the judge testified in response to the question of how the medical records affected the state's case against the boyfriend, that: "Well, they completely undermined them. They corroborated what the defense witnessed [sic] testified to, they corroborated." Tr. 147. This testimony should not have been admitted because it revealed the judge's mental processes in dismissing the rape prosecution.

{¶11} It is a basic rule that unless certain exceptions apply, every person is competent to be a witness. *See* Evid.R. 601. A judge who is presiding at trial may not testify in that trial as a witness. *See* Evid.R. 605. But apart from that caveat (and subject to standard competency requirements), a sitting judge is not, as a consequence of the office, barred from giving testimony at a trial.

{¶12} There are, however, inherent issues with using a judge as a witness, particularly when the judge is to give testimony with respect to the mental processes performed in deciding a case. A court speaks through its journal, so a judge's opinions and mental processes are not subject to examination. *Fayerweather v. Ritch*, 195 U.S. 276, 306-307, 25 S.Ct. 58, 49 L.Ed. 193 (1904); *In re Disqualification of Schweikert*, 110 Ohio St.3d 1209, 2005-Ohio-7149, 850 N.E.2d 714, ¶ 7. The reasons for this rule were explained in *Georgou v. Fritshall*, N.D.Ill. No. 93 C 997, 1995 U.S. Dist. LEXIS 5540 (Apr. 26, 1995):

> There is a substantial risk that a jury will give too much credence to the testimony of a judge. A judge's testimony is likely to bear additional weight in the mind of jurors because of his position and authority, and because it automatically bears the imprimatur of character, credibility and reliability emanating from the judge's position rather than the quality or veracity of his testimony. * * * [T]he judge also confers the prestige and credibility of judicial office to the litigant's position. Forcing an opposing party to contend with the substance of a witness's testimony as well as the additional measure of credibility that a judge is likely to inspire merely due to his position places a heavy burden on the party opposing the judge's testimony. Additionally, it is practically impossible for a party to challenge the mental impressions of a judge, as his thought process is known to him alone.

(Citations omitted). *Id.* at *10-11.

{¶13} The order of dismissal served to explain the judge's reasons for dismissing the rape prosecution. Testimony regarding why the judge dismissed the rape charges went beyond what was stated in the dismissal order and improperly delved into the judge's thought processes as to why he dismissed the rape case. The error in allowing this testimony was compounded when the judge later explained what happened in chambers after the state verified that the newly discovered medical records referred to Smith's daughter:

> Well, what occurred was after I had disclosed it, I had gone back into chambers to deal with something else. And my recollection, I was very upset with this revelation because of the seriousness of this case and the parties about to argue in favor of a conviction that would be a mandatory life sentence.[3] Any sentence would make me upset, but particularly in this case. And so I inquired as to where the parties were, I want to get out on the record and address this issue and hear what the parties have to say about this. And it was represented that the prosecutors were downstairs talking to supervisors who may consider amending the case to some type of misdemeanor in terms of offering a plea agreement. And I said to the bailiff, I'm not accepting a plea agreement with this revelation. There is not going to be a plea. We're addressing these records, why they exist and why they seem to contradict the testimony that the mother provided under oath during the State's case. We're going to address that on the record.

Tr. 148-149. Again, the judge was improperly allowed to testify to his reasons for granting the dismissal. What is more, the court allowed the judge to testify further that after he dismissed the case, his decision to dismiss was not appealed. This was unfairly prejudicial to Smith because it implied that the state agreed with the judge's decision to dismiss the case — a point that will be discussed in detail later in the opinion.

{¶14} In addition to the judge being allowed to state his reasons for dismissing the rape case, the state improperly solicited testimony from the judge that allowed him to burnish his

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[3] The daughter was under ten years of age at the time she claimed to have been raped by the boyfriend, so a conviction on a rape count as charged would have resulted in a life sentence as required by R.C. 2907.02(B).

credentials in a manner that gave undue weight to his credibility as a witness solely by virtue of his office. The state asked the judge questions about his background, including his "excellent" ratings by local bar associations, including the "Cuyahoga County Criminal Defense Lawyers Association." Without impugning the judge's credentials, those credentials were simply irrelevant to his testimony and the state's questioning could only be viewed as intending to bolster the judge as a witness owing to the prestige of his office.

{¶15} The error in allowing the judge to testify to his thought processes was compounded by his repeated assertions on the ultimate questions of whether Smith lied about the daughter contracting herpes before she would have met the boyfriend and whether those statements were material.

{¶16} The judge was ostensibly called as a fact witness, not as an expert. "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Evid.R. 704. However, Evid.R. 701 states:

> [i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

So even though a lay witness can give testimony in the form of an opinion, that testimony should avoid the use of common terms that have a specific legal meaning. *See* Gianelli, *Rules of Evidence Handbook*, 427 (2014). And when the opinion testimony is stated as a legal conclusion, it will not be "helpful" because "the testimony attempts to answer, rather than aid the jury in

answering, the ultimate question at issue." *State v. Marrero*, 10th Dist. Franklin No. 10P-344, 2011-Ohio-1390, ¶ 46, citing *Becton v. Starbucks Corp.*, 491 F.Supp.2d 737, 742 (S.D.Ohio 2007).

{¶17} The court allowed the judge to explain why he asked the administrative judge of the court of common pleas and the county prosecutor to investigate Smith for perjury:

> On the record I called for an investigation. I indicated that in view of this material contradiction and the evidence that was produced that established that contradiction, an investigation was warranted. And I stated that if an investigation was to take place that would result in any types of charges of perjury, that I was a witness to that, the prosecutors in the room, the defense lawyers were all witnesses, and in light of that fact, I made a call for the administrative judge to appoint an independent prosecutor.

Tr. 150. Although the judge used the term "contradiction" instead of "falsehood," he left no doubt that he believed that Smith purposely withheld information that the daughter had been diagnosed with herpes before she met the boyfriend.

{¶18} The judge dismissed the rape case unaware of the doctor's (the author of the newly discovered medical records) reasons for not making a definitive diagnosis of herpes. But it is unclear whether that fact would have mattered because the judge made a credibility determination against Smith:

> It struck me as implausible that a parent who had taken their child in to be treated for a baby rash — you may forget a baby rash, but it struck me as implausible that if you took your child in to be treated as a rash and it was discussed the possibility of herpes and the doctor said, is there any chance of possible sexual contact, that would be something that, in my humble opinion, that every parent would recall.

Tr. 161.

{¶19} The judge essentially stated that he found Smith lacking in any credibility when dismissing the case with prejudice. That was a determination that should have been made by the jury as the trier of fact in the rape case, not the judge. If the state insisted on continuing with the rape prosecution, the judge had the option of allowing the trial to go forward with the newly

discovered medical records and let the jury weigh them against Smith's testimony and the testimony of the defense witnesses. The court's dismissal of the rape charges prevented that from occurring.

{¶20} The dismissal of the rape charges leads to the more grievous error in this case: the trial court allowed repeated questions and answers in reference to Smith's actions being "material" to the boyfriend's prosecution. The judge was allowed to testify to the following:

> Q. Okay. And, sir, you understand, given the issues before you and before that jury, was that testimony material?
>
> A. Absolutely.
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> * * *
>
> Q. So, Judge, if Ms. Smith knew that medical evidence existed showing a genital rash that predated the operative dates of the indictment, or she had suspected and described herpes related to the victim, prior to the operative dates in the indictment, and withheld that testimony, would that have been material to this prosecution?
>
> A. Yes. Absolutely.

Tr. 138-139.

{¶21} In other parts of his testimony, the judge was allowed to explain that he called for an investigation "in view of this material contradiction" and that a genital rash suffered by the daughter for which she sought medical attention was "absolutely" material. *See* Tr. 150, 185.

{¶22} Apart from the judge rendering a lay opinion in language that matched the terminology employed by R.C. 2921.11(A), the judge's opinion that Smith's failure to divulge the medical record was material to the state's case was self-serving because the rape case against the boyfriend was essentially dismissed at the judge's prompting. The judge testified that "the revelation that these [records] existed completely undermined the theory of [the state's] case and they would not be able to go forward on closing argument with that evidence and make the same arguments they were prepared to make about the defendant's guilt." Tr. 148.

{¶23} Contrary to the judge's assertion, the assistant prosecuting attorney who tried the rape case testified that the judge dismissed the case over the state's objection, saying that it could continue with the rape prosecution despite the revelation of the daughter's medical records. She testified that she needed more time to verify the records and inquire why the doctor did not report a herpes diagnosis in a child:

> I asked for some time to verify [the records]. Again, they looked authentic but we usually have a certification on there. I wanted to call the doctor, I wanted to speak to the doctor. I wanted to see who took that child in; was it the grandmother, was it the mother. I wanted to see why he didn't report, because in my mind it went straight to mandatory reporting. Because if a child is being sexually abused, he should be reporting it. I wanted to do so many things, but I was not permitted to do so many things. We were given a time line.

Tr. 213.

{¶24} The judge made it impossible for the state to investigate records that had only just been provided to it. There was some disagreement as to the amount of time the judge gave the state to investigate the records: the judge said that he gave the state 15 minutes to address the questions it had about the newly discovered records; the assistant prosecuting attorney claimed it was only ten minutes. Regardless, 15 minutes was simply not enough time for the state to investigate medical records that had just been handed to it.

{¶25} Additional investigation of the medical records was necessary for no other reason than to determine what they said. It borders on stereotype to state that doctors have poor handwriting, but the parties agreed that the doctor's notes were particularly illegible. Even the state's expert witness in the perjury trial conceded that he had difficulty reading the notes of the daughter's office visit. The expert based his opinion on "key words that are discernable" among them being "rash, herpes, sexual contact, discussed with mother." Tr. 167. It was not until the doctor who was the treating physician testified at the perjury trial and read his notes to the jury that

it became clear what the notes stated. As previously noted, the doctor had no independent recollection of the daughter's office visit but explained that he had such a "low suspicion" of herpes that he would not have discussed it with Smith, particularly after Smith denied that the daughter had any sexual contact.

{¶26} Had the state been given a greater opportunity to contact the doctor and have him decipher his handwriting, this fact would have come out much sooner and perhaps changed the course of the prosecution. Indeed, the judge noted at the time the medical records were discovered that there was a need to determine their "legitimacy." But instead of allowing the state a reasonable opportunity to discover the "legitimacy" of the records and how they impacted the case, the judge went on to dismiss the case. The judge testified in response to a question:

> Q. Okay. And, obviously, then within the 15 minutes [the assistant prosecuting attorney] did not produce the information that would have kept the case from being dismissed, right?
>
> A. The only information that would have kept it from being dismissed would be information that that record did not pertain to [Smith's daughter].

Tr. 166.

{¶27} Even without being able to verify the records, the assistant prosecuting attorney testified that she was not saying at that point that Smith had committed perjury and believed that the state could go forward with the rape case against the boyfriend. The prosecuting attorney stated:

> Full knowledge of the facts and full knowledge of the — if I had those records, if Adrienne Smith had said to me [the doctor] did diagnose my daughter in 2000 with

> herpes or a rash that looks like herpes and was treated like herpes, I would have dealt with it. The time frame was still there for [the boyfriend] to have committed these crimes. Would she have looked like a bad mom for not taking care of her child back then and for staying with that guy, sure. But we would have dealt with it, we would have figured out why she did these things and we would have dealt with it. He still had access to that child and she still had herpes. I would have gone forward, but with proper dates and with proper due diligence.

Tr. 218-219.

{¶28} In response to the state's request for time to investigate the records, the judge replied, "The problem is, we have a jury waiting. I told them that this case will be over today. I will give you 15 minutes. I'm prepared to hear a motion to dismiss based on this new evidence[.]" Tr. 166.

{¶29} The judge had other options available short of dismissing an indictment with prejudice; he could have declared a mistrial or granted the state a short continuance. What is more, even had the rape case proceeded to trial and resulted in a guilty verdict, the judge had the option, upon proper motion, of setting aside the verdict and granting a judgment of acquittal under Crim.R. 29(C) if he believed that the boyfriend had been wrongfully found guilty.

{¶30} These options were suitable alternatives given that the judge acknowledged that the state was not at fault for failing to produce the medical records — the judge testified that "[t]hese [records] came as a complete surprise to prosecutors as well." Tr. 148. The judge thus personally affected the materiality question, without any additional information about those records, seemingly because he wanted to keep his promise to the jury that the case would be "ending today." Declaring a mistrial would have served the same purpose.

{¶31} There is more on the question of how the judge's actions affected materiality: the judge said he would not consider any possible plea bargain between the state and the boyfriend. The judge testified that when he learned that the state and the boyfriend were discussing a possible

plea bargain, he told his bailiff, "I'm not accepting a plea agreement with this revelation. There is not going to be a plea." Tr. 149. This was a dubious position to take. Although a trial judge has the discretion whether to accept or reject a plea bargain, *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.E.2d 427 (1971), it is an abuse of discretion for a judge to impose a blanket policy of rejecting plea agreements. *State v. Caldwell*, 8th Dist. Cuyahoga No. 99166, 2013-Ohio-5017, ¶ 11. Admittedly, the parties had not actually reached any kind of agreement, but the judge's statement that he would refuse to consider any plea agreement was functionally equivalent.

{¶32} To be clear, none of what has been said should be interpreted as suggesting that the discovery of the medical records did not change the course of the rape trial. And Smith does not challenge the sufficiency of the evidence on appeal. That evidence shows that the assistant prosecuting attorney who tried the rape case said that if she had been in possession of the medical records before the rape trial, it would "absolutely" have affected the way she would have cross-examined witnesses. That was sufficient evidence of the materiality component of the perjury charge. It was also the best evidence of materiality: it was the state's burden of trying the boyfriend for rape, so the assistant prosecuting attorney was the person who could testify as to how the revelation of the medical records changed the course of the proceedings.

{¶33} In short, the judge's opinion that Smith's false testimony materially affected the rape trial was in large part the result of his own actions in making that testimony material. He gave the state essentially no time to investigate the records, flatly stated that he would not allow any agreed resolution of the case, announced his intention to dismiss the case, and failed to consider any other alternatives short of dismissal with prejudice. Although the boyfriend did ask the court to dismiss

the case with prejudice, that motion came only after the judge stated on the record that he would dismiss the case.[4]

{¶34} Finally, the judge's testimony was unfairly prejudicial because of the sense of moral outrage he repeatedly expressed over what he believed Smith had done.[5] This testimony should have been excluded.

{¶35} Evid.R. 403 provides for mandatory exclusion of evidence, even though relevant, if its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." In determining what it means for unfair prejudice to substantially outweigh its probative value, it has been said that the probative value must be minimal and its prejudicial effect great. *State v. Morales*, 32 Ohio St.3d 252, 258, 513 N.E.2d 267 (1987).

{¶36} The judge testified that he would rate sexual assaults of children under the age of 13 as "probably the most serious case that we hear on the criminal docket, short under, next to murder, capital murder and murder." Tr. 127. The judge also told the jury that a conviction on a charge of rape of a child under 13 years of age was "an automatic life sentence." Tr. 128. The purpose

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[4] We note that the judge purported to dismiss the rape prosecution under "CR 29," referencing the grant of a judgment of acquittal under Crim.R. 29(A). A judgment of acquittal cannot be granted if, after viewing the evidence most favorably to the state, "reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus. At the time the medical records were discovered, the parties had rested and were preparing for closing arguments. By reaching the point of closing argument, the judge presumably believed that the state had presented sufficient evidence of rape to allow the case to go to the jury. The discovery of the medical records did not change that fact. At best, the records cast doubt on Smith's credibility, but a witness's credibility is not a valid consideration for granting a judgment of acquittal. *State v. Harris*, 8th Dist. Cuyahoga No. 87915, 2007-Ohio-526, ¶ 16. However, the judge's improper Crim.R. 29(A) dismissal of the case does not affect its finality toward the boyfriend.

[5] The discussion in this part of the opinion is prefaced by stressing that nothing said here is meant to demean the seriousness of perjured testimony and the severe ramifications that kind of testimony could have had in the underlying rape trial. Furthermore, we acknowledge and understand the judge's pique that materially false evidence offered in the rape trial could have led to a person being wrongfully convicted.

of this statement could only be to express the judge's opinion that he found it particularly reprehensible that Smith made a false statement in the context of a rape trial, as though the severity of the harm caused by the false statement was an element of the crime of perjury as opposed to a factor a trial court would consider at sentencing.

{¶37} The judge continued with his sense of outrage when he then told the jury that "unlike many criminal cases down here, the defendant was fortunate to have a very high-paid, well-respected defense counsel who was using investigators to establish, to search, to look at the evidence of the State's case and determine its validity. That's not common." Tr. 134. The judge later testified that "the defense team had a very high-priced investigative team investigating the case prior to the case going to trial." Tr. 146. When asked if he found it "odd that after all this time they discovered [the medical records] on the eave [sic] of the close of trial," the judge replied:

> Yes. But it struck me as even more odd or significant because of the fact that anybody else charged with this — or I shouldn't say anybody else, or probably 95 percent of the people charged with this crime aren't able to afford their own defense team or investigators and probably would have never discovered this record. In a case where an indigent defendant charged with rape would never in their wildest dreams have the resources to be working during the course of a trial with an investigator, or very unlikely.

Tr. 155.

{¶38} The boyfriend's ability to pay for private investigators was a theme that cropped up repeatedly; for example, in his letter to the administrative judge of the court of common pleas and the county prosecutor, the judge stated,

> [i]t is also particularly troubling that the false nature of Ms. Smith's testimony was only uncovered through the diligence of a well-financed defense team with paid investigators. The majority of the criminal defendants facing similar charges are not afforded this benefit.

{¶39} The judge was apparently expressing his sentiment that but for the boyfriend's financial ability to retain investigators, Smith's failure to disclose the purported herpes diagnosis would not have been discovered. This testimony was irrelevant — the state could have offered evidence to show how any contradictory evidence was discovered without harping on the financial means available to the boyfriend to fund a defense in the rape case. Even if the court determined that the judge's testimony was relevant, the judge's repeated comments were unfairly prejudicial and troubling. The jury could have viewed his comments as suggesting that people without financial means were not receiving equal justice, thus creating the possibility that the jury scapegoated Smith for what the judge believed was essentially a flaw of the judicial system.

{¶40} Smith's trial attorney did not object to much of the judge's testimony, raising the issue of whether trial counsel was ineffective for failing to do so.

{¶41} To succeed on an ineffective assistance of counsel claim, Smith must show that: (1) counsel's failures fell below an objective standard of reasonableness and (2) counsel's deficient performance was prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is a difficult standard to meet. As to the first prong of the *Strickland* test, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. As to the second prong of the *Strickland* test, the defendant can show prejudice only if there is "a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland* at 694. The defendant must prove both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. *Id.* at 687.

{¶42} Consistent with the preceeding discussion, we have little difficulty in concluding that counsel's failure to object to the offending aspects of the judge's testimony was deficient performance. The remaining question in the ineffective assistance of counsel analysis — whether the failure to object was prejudicial — is met in this case because the erroneously allowed testimony undermines our confidence in the outcome of the trial.

{¶43} Although Smith has not challenged the sufficiency or the weight of the evidence on appeal, it is nevertheless unclear from the evidence that Smith made a false statement under oath. Smith defended the perjury allegations on grounds that, consistent with her testimony at the rape trial, she believed the daughter simply had a rash, not herpes. The doctor who examined the daughter in 2000 testified that he diagnosed her with a "genital rash" and that his treatment notes indicated that Smith "denies the possibility of any sexual contact of the child at home." In a follow-up office visit, the doctor's notes indicated that the rash had "cleared up completely" and "questionable herpes genitalis." The follow-up note stated that the doctor again "[d]iscussed in detail with mother about sexual contact." The doctor said that he prescribed a medicine used to treat herpes, but that he did not diagnose herpes because "it was very low suspicion only." He firmly testified that according to his note (he had no independent recollection of the office visit occurring 14 years earlier) he "did not mention the word herpes to the mother or anybody * * *." Tr. 256-257. An expert for Smith confirmed that his review of the medical records caused him to conclude that the doctor made no diagnosis of herpes.

{¶44} An expert for the state (who also testified at the rape trial) gave his opinion that the doctor's use of the word "herpes" in a note and his prescription for a medicine used almost exclusively to treat herpes showed that the doctor believed the daughter had contracted herpes. The state's expert could only "assume" that the doctor discussed herpes with Smith given that the

doctor discussed sexual contact with Smith and prescribed a herpes medication. The state's expert could not dispute that the doctor had only a "low suspicion" that the daughter contracted herpes.

{¶45} To be sure, Smith's defense was compromised by testimony from the grandmother and babysitter who both claimed that Smith told them that the daughter had herpes. There were credibility issues with these witnesses, however. As noted by Smith, both the grandmother (who at one time had legal custody of her granddaughter) and the babysitter were under a mandatory duty to report that the daughter had herpes to the relevant authorities, yet neither did so nor could they offer satisfactory explanations for why they did not. Only the babysitter testified at the perjury trial and when confronted with her failure to report the daughter's herpes despite being a licensed daycare provider stated, "I just didn't, didn't really know. I left it to the mom. I just didn't, and I'm sorry." Tr. 194.

{¶46} Other incriminating evidence against Smith consisted of the results from a polygraph examination taken by Smith. Those results indicated she had engaged in deception when she answered "no" to the following questions: (1) "Before trial, did you know [the daughter] ever saw [the doctor]?"; (2) "To your knowledge did [the doctor] ever diagnose [the daughter] with a genital rash?"; and (3) "After [the daughter] went out of diapers and prior to 2009, did you know [the daughter] suffered from any genital rash?"

{¶47} Smith criticized the polygraph examiner's methodology, noting that after an initial test indicated that she had not been deceptive, the examiner informed her that the test was a "practice" test. The examiner halted the second examination because he believed that Smith was using controlled breathing measures to affect the test. It was only after four more tests that the examiner concluded that Smith had been deceptive.

{¶48} In addition to possibly questionable results from the polygraph examination, there was a question whether the court failed to give the instruction required by paragraph four of the syllabus to *State v. Sorel*, 53 Ohio St.2d 123, 372 N.E.2d 1318 (1978). That instruction reads:

> If such [polygraph] evidence is admitted the trial judge should instruct the jury to the effect that the examiner's testimony does not tend to prove or disprove any element of the crime with which a defendant is charged, and that it is for the jurors to determine what weight and effect such testimony should be given.

{¶49} The failure to give the instruction is not per se reversible error. *See, e.g., State v. Madison*, 10th Dist. Franklin No. 06AP-1126, 2007-Ohio-3547, ¶ 16. Nevertheless, the need for the instruction is particularly acute in perjury cases where the making of a false statement is an element of the crime of perjury. By failing to give the instruction, the court may have allowed the jury to believe that it could find the false statement element of perjury met solely on the results of the polygraph examination.

{¶50} Perjury is a serious offense that undermines the administration of justice. Nothing that has been said here should be considered as suggesting that the active prosecution of perjury should be avoided. Yet it is perhaps trite to suggest that perjury occurs in nearly all contested trials — sometimes the evidence is so conflicting that someone has to be lying. Despite this acknowledgment, perjury prosecutions are exceeding rare; they make up less than one-half of one percent of all federal prosecutions. *See* http://www.bjs.gov/content/pub/pdf/fjs10st.pdf (Table 4.2) (accessed Apr. 30, 2015). One likely stands a better chance of being struck by lightning than prosecuted for perjury. *See* http://www.lightningsafety.noaa.gov/odds.shtml (accessed Apr. 30, 2015).

{¶51} So why did lightning strike Smith? The obvious answer is that the judge who presided over the rape trial initiated the prosecution. And despite calling for an "investigation"

into whether Smith committed perjury, he had all but concluded in advance that she gave "false testimony" that "irreparably damaged the State's ability to submit the [rape] case to the jury." When the judge was permitted to testify at trial regarding why he dismissed the rape case — all over minimal objection by defense counsel — and his belief that Smith not only lied but that her lie was material, Smith's fate was impermissibly sealed.

{¶52} The jury heard all of the above evidence, and in a manner that highly prejudiced Smith. The state did not need to present the judge as a witness, nor could it validly have the judge testify to his reasons for dismissing the rape prosecution against the boyfriend. Again, a court speaks through its journal. The inescapable conclusion is that the state had the judge testify to leverage the prestige of his office against Smith. Defense counsel should have objected to the judge's testimony. Had he done so, and the objections sustained, we believe that there was a reasonable probability that the outcome of trial would have been different. We therefore sustain the first and fifth assignments of error, reverse Smith's conviction, and remand for a new trial. The remaining assignments of error are moot. *See* App.R. 12(A)(1)(c).

{¶53} This cause is reversed and remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

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MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., A.J., CONCURS IN JUDGMENT ONLY (WITH SEPARATE OPINION);
TIM McCORMACK, J., DISSENTS (WITH SEPARATE OPINION)

FRANK D. CELEBREZZE, JR., A.J., CONCURRING IN JUDGMENT ONLY:

{¶54} As much as I agree with the sentiment of the dissent, in this case the issues pointed out by the lead opinion cannot be overlooked. Therefore, I concur with the lead opinion in judgment only.

TIM McCORMACK, J., DISSENTING:

{¶55} I respectfully dissent.

{¶56} This case is troubling from its beginnings up to today. I find it difficult, nearly impossible, to separate the first alleged rape trial from the second trial involving the two perjury counts. The allegations are ugly, and the testimony of a trial judge in a subsequent trial, even if allowable, greatly complicates it all.

{¶57} I would affirm based on several key considerations.

{¶58} First, were there an applicable statutory prohibition or a direct precedent disallowing the trial judge's participation as a witness, this then would be less complicated on that issue. I do not find that here. Certainly, the very presence of a judge participating as a witness in a trial is volatile. Despite that risk, on balance, I view his role here as being the one best able to decipher, step by step, how this perjury trial came to be. His solicited testimony about his standing in the

legal community, his ratings as a trial judge, was good lawyering on the state's part, not disqualifying as over-the-top prejudice.

{¶59} I find that the two judges who presided over the two trials got it right. The jury in this perjury trial, apparently, faithfully met its responsibility when its verdict reflected one acquittal and one guilty verdict on the two counts. I do not find that there was such an abuse of discretion, plain error, or prejudice as to require us to set this decision aside.