[Cite as *State v. Riffle*, 2010-Ohio-2812.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

STATE OF OHIO	C. A. No. 09CA0056-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
PETER RIFFLE	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 06-CR-0487

DECISION AND JOURNAL ENTRY

Dated: June 21, 2010

MOORE, Judge.

{¶1} Appellant, Peter Riffle, appeals from the decision of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 16, 2006, Riffle was indicted on one count of rape of a victim under the age of thirteen years in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree.

{¶3} The indictment stemmed from allegations that the victim, Riffle's step-daughter, S.R., made to her mother. When S.R. was in eighth grade, Riffle and S.R.'s mother separated. In December of 2005, shortly after Riffle moved out of the family home, S.R. observed a fight between the couple. As a result, S.R. and her mother engaged in a conversation regarding the family. During the conversation, S.R. informed her mother that Riffle used to "touch me down there." The next day, S.R.'s mother, with the help of a member of the family's church, contacted authorities.

{¶4} On December 18, 2006, Riffle was tried to a jury, but the jury was unable to reach a unanimous verdict and a new trial date was set. Riffle was re-tried on January 29, 2007, and he was convicted by the second jury. Riffle appealed this conviction, and this Court reversed and remanded for a new trial. On August 3, 2009, the matter again proceeded to trial. The jury found Riffle guilty of rape of a victim under the age of thirteen years, and the trial court sentenced him to four years of incarceration. Riffle was labeled a Tier III sex offender. Riffle timely appealed and has raised three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"[RIFFLE] WAS DENIED A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT."

{¶5} In his first assignment of error, Riffle contends that he was denied a fair trial due to prosecutorial misconduct.

{¶6} In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a reviewing court determines if the prosecutor's actions were improper, and, if so, whether the substantial rights of the defendant were actually prejudiced. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. "[An appellant] must show that there is a reasonable probability that but for the prosecutor's misconduct, the result of the proceeding would have been different." *State v. Overholt*, 9th Dist. No. 02CA0108-M, 2003-Ohio-3500, at ¶47. Riffle takes issue with statements made by the prosecutor during opening and closing statements as well as on cross-examination.

Opening Statement

{¶7} Initially, we note that Riffle did not object to any of the instances of alleged prosecutorial misconduct during the State's opening statement. Accordingly, any alleged errors

are forfeited absent plain error. *Akron v. McGuire*, 9th Dist. No. 24638, 2009-Ohio-4661, at ¶11; Crim.R. 52(B).

> "The Supreme Court has remarked that '[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus. In order for this Court to apply Crim.R. 52(B), it must be clear that the outcome of the trial would have been different but for the alleged error. [*State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶16]." *McGuire*, supra, at ¶11.

{¶8} Riffle challenges the prosecutor's statement that the testimony of S.R.'s psychologist, Stacy Hancock, would show that S.R. had been diagnosed with post-traumatic stress, consistent with a child who had been sexually abused.

{¶9} "The purpose of opening statements is to inform the jury of the nature of the case and to outline the facts that each party will attempt to prove. *Maggio v. Cleveland* (1949), 151 Ohio St. 136, paragraph one of the syllabus." *State v. Overholt*, 9th Dist. No. 2905-M, at *8. See, also, *State v. Hamilton* (Feb. 11, 2002), 12th Dist. No. CA2001-04-044, at *4 (explaining that the "purpose of an opening statement is to acquaint the jury with the general nature of the case and to outline the facts which counsel expects the evidence to show").

{¶10} As Riffle correctly points out, although the prosecutor stated that he intended to present the testimony of Dr. Hancock, Dr. Hancock did not, in fact, testify. "In general, a statement made by counsel of the evidence that he expects to introduce is not reversible error unless it appears that counsel made the statement in bad faith, even if it turned out that such evidence was incompetent." (Internal quotations omitted.) *State v. Neal*, 10th Dist. No. 95APA05-542, at *12, quoting *State v. Lipker* (1968), 16 Ohio App.2d 21, 25. See, also, *State v. Simonson* (Dec. 31, 1991), 3d Dist. No. 2-91-8 (failure of prosecution to prove some fact claimed in opening argument does not warrant reversal on grounds that defendant was denied fair trial

unless statement appears to be made in bad faith and also was of such a nature, in and of itself, as to be manifestly prejudicial). It is clear from the record that the parties all believed Dr. Hancock would testify, as she had been subpoenaed. Despite the subpoena, Dr. Hancock did not appear. This eventuality was not apparent until well after opening statements had concluded. Accordingly, the prosecutor's reference to this proposed testimony was not made in bad faith, and therefore cannot form the basis for prosecutorial misconduct.

{¶11} Next, Riffle points to the prosecutor's statements regarding the fact that S.R. had no reason to lie and that she was testifying against Riffle because it was the truth. The opening statements of counsel are not evidence. *State v. Frazier* (1995), 73 Ohio St.3d 323, 338; *Overholt*, supra, at *8; *Hamilton*, supra, at *4. The jury was informed by both the prosecutor and the trial court that opening statements were not to be considered as evidence. We presume that the jury followed the trial court's instructions when deliberating in this matter. See *State v. Downing*, 9th Dist. No. 22012, 2004-Ohio-5952, at ¶51.

{¶12} The record shows that while the jury heard opening and closing statements by the State, it also heard the evidence presented in the form of trial testimony. Notably, S.R. testified repeatedly that she would not make up these allegations. Accordingly, by stating that S.R. had no reason to lie and that she was testifying because it was the truth, the prosecutor was outlining the facts that he expected the evidence to show. Further, the statements were supported by S.R.'s own testimony. Accordingly, this Court cannot conclude that the prosecutor's statements resulted in prosecutorial misconduct.

Closing Statement

{¶13} Riffle points to statements made by the prosecutor during the State's closing argument. Particularly, Riffle contends that the prosecutor's statements served to bolster S.R.'s

credibility and to explain perceived discrepancies in her testimony. Again, Riffle did not object during the prosecutor's closing statement.

{¶14} "Parties have wide latitude in their closing statements, particularly 'latitude as to what the evidence has shown and what inferences can be drawn from the evidence.'" *State v. Wolff*, 7th Dist. No. 07 MA 166, 2009-Ohio-7085, at ¶13, quoting *State v. Diar,* 120 Ohio St.3d 460, 2008-Ohio-6266, [] at ¶213. Riffle specifically points this Court to the State's rebuttal, in which the prosecutor referenced the fact that S.R. had twice subjected herself to cross-examination and that she had stated during her testimony that she did not expect things to go as far as they had. These statements, however, were in direct response to Riffle's counsel's closing statement, in which he pointed out that Riffle testified and subjected himself to cross-examination, and that the jury should view S.R.'s testimony that she did not think it would go this far as an admission that her accusations were false. On rebuttal, the prosecutor explained that S.R. subjected herself to cross-examination because her testimony was the truth. Again, this was merely a summation of S.R.'s testimony. She testified that she did not make up the allegations.

{¶15} Further, the prosecutor noted that Riffle's defense, in which Riffle specifically testified, was that S.R.'s mother had orchestrated the allegations and made S.R. lie. Had this been the case, according to the prosecutor, at now almost 17 years old, S.R. could have decided to put a stop to the lies. But, as the prosecutor pointed out, she did not. Instead, she again subjected herself to cross-examination. A reasonable inference would be that because S.R. had testified three times on this issue that she was telling the truth. *Wolff*, supra, at ¶13.

{¶16} Finally, with regard to the prosecutor's perceived explanation of S.R.'s statement "I didn't think it would get this far[,]" this was again in direct response to Riffle's counsel's

statement that this was an admission that S.R.'s allegations were false. In fact, S.R. testified as follows:

> "I wouldn't make this up. Like, I—I mean, I loved him. He was like—he was my dad. I wouldn't want anybody to have to go through this, I mean, like, being wrongly accused or something. And I didn't, like, hate him. I just—I didn't even know this was going to come to this. I mean, I didn't. I was just telling my mom because I wanted her to know."

{¶17} During the State's rebuttal to Riffle's closing statement, the prosecutor explained the above testimony as

> "'It wasn't my purpose to get him in trouble. It wasn't my purpose to sit here in trial five years later and try to convict him of rape. I didn't even know it was rape. I'm just telling my mom what happened to me. I didn't think it would get this far.' She's thirteen. Thirteen. Do you think she's thinking about court and testifying? That's not what she meant. She meant, 'That wasn't even in my mind. It wasn't even the point that I was making, to tell my mother to try to get him in trouble. That's not the point I'm trying to make with my mom.'"

{¶18} A prosecutor may comment upon the testimony of witnesses and suggest the conclusions to be drawn. *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, at ¶16. The prosecutor's suggestion of the conclusion to be drawn from S.R.'s testimony, albeit vastly different from the conclusion drawn by Riffle, was reasonable, and therefore not improper. See *Wolff*, supra, at ¶13.

{¶19} Riffle further points to the prosecutor's explanation that S.R. testified to several events for the first time during trial "[b]ecause she's becoming an adult and she's remembering things that happened to her throughout her childhood by this man." This was a proper summation of S.R.'s testimony. During her testimony, S.R. was asked, "is it fair to say that you began remembering more events as you got older and every time you are asked to remember this[?]" S.R. responded yes. Riffle did not object to this question and answer during trial. Thus, Riffle's argument that during his closing statement, the prosecutor was improperly "testifying" to

facts not in evidence, is without merit, as S.R. herself verified the statement. Accordingly, the prosecutor's statements were not improper.

{¶20} Riffle further takes issue with the prosecutor's statements in which he "expressed to the jury his belief as to the guilt of" Riffle. Notably, Riffle contends that the prosecutor attempted to explain the meaning of Riffle's statements to a social worker that he loved his children and would not harm them. The prosecutor also commented on the fact that when informed of the allegations against him, Riffle said that he "knew something like this would happen." Riffle contends that "the prosecutor misled the jury by advancing his belief as to why [Riffle] would say he loved his children and wouldn't hurt them." As we have explained, however, the prosecutor had wide latitude to comment on the evidence presented and to the inferences that could be drawn from that evidence. *Wolff*, supra, at ¶13. Riffle had latitude as well to set forth an alternative explanation as to what his comments meant. To the extent that Riffle contends that the prosecutor's statements were an improper comment on his credibility, "[a] prosecutor may even point out a lack of credibility of a witness, if the record supports such a claim." *Wolff*, supra, at ¶13, citing *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171. Riffle, however, does not present an argument that the record did not support any alleged comment by the prosecutor regarding Riffle's credibility. App.R. 16(A)(7); App.R. 12(A)(2).

{¶21} Finally, "[c]omments made in closing argument are not viewed in isolation, rather the closing argument is reviewed in its entirety to determine whether remarks by the prosecutor were prejudicial." *State v. Henry*, 9th Dist. No. 02CA008170, 2003-Ohio-3151, at ¶28, quoting *State v. Smith* (Jan. 17, 2001), 9th Dist. No. 99CA007451, at *1. The specific comments Riffle references occurred during the State's rebuttal to his closing argument and must be viewed in the context of responding to Riffle's closing argument. Riffle does not point to any instances of

alleged misconduct during the State's closing argument. Even if we were to agree that the statements to which Riffle points were improper, when viewing the closing argument as a whole, we do not conclude that the result of the trial would have clearly been different. Id. Accordingly, Riffle's contention of prosecutorial misconduct with regard to closing statements is overruled.

Questioning

{¶22} Riffle points to two specific instances of alleged prosecutorial misconduct that occurred during Riffle's cross examination. First, the prosecutor asked, "do you understand how, when a child is raped, especially an eight-year-old child who's raped repeatedly, that their memory is clear, and they remember more incidents as they get older? Are you familiar with that?" Riffle answered no and stated that he had never heard that before. Again, there was no objection to this statement. Riffle does not explain how this question resulted in prejudice, nor would this Court find that, assuming the question was asked in error, that the result of the trial would have clearly been different but for this alleged error. *McGuire*, supra, at ¶11.

{¶23} Riffle further states that the "prosecutor also prejudiced [Riffle] by questioning him over objections about a young lady named Katie Rock, whom the court had previously ruled could not be introduced as evidence pursuant to Evid.R. 404(B) during the first trial in November of 2006." First, we note that the prosecutor asked Riffle who Katie Rock was and questioned Riffle's statement that they were friends. Riffle's counsel objected on the basis of Evid.R. 404(B), explaining that it would result in impermissible other acts evidence. The trial court agreed and sustained the objection. Further, Riffle's counsel requested and the trial court gave a curative instruction explaining that the jury was not to consider any testimony with regard to Katie Rock. Again, we presume that the jury followed the trial court's instructions when

deliberating in this matter. See *Downing*, supra, at ¶51. Accordingly, even if we assumed this line of questioning was improper, we do not conclude that there was a reasonable probability that, but for the prosecutor's misconduct, the result of the trial would have been different. *Overholt*, supra, at ¶47.

{¶24} Riffle's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"[RIFFLE] WAS PREJUDICED WHEN A JUROR CONDUCTED OUTSIDE RESEARCH AND WAS PERMITTED TO REMAIN ON THE PANEL AND DELIBERATE."

{¶25} In his second assignment of error, Riffle contends that he was prejudiced when a juror conducted outside research and was permitted to remain on the panel and deliberate.

{¶26} After the jury retired to deliberate, it came to the parties' attention that a juror had looked up the responsibilities of the foreman and how to conduct a jury deliberation. Accordingly, the trial court inquired of the jury as a whole as to whether there were any discussions regarding the information. The trial court then informed the jury that the person who looked up the information could not serve as the foreman. Riffle contends on appeal that the trial court should have independently inquired of the juror who looked up the information.

{¶27} When asked if defense counsel had anything to add to the trial court's discussion with the jurors, Riffle's trial counsel indicated that he had nothing to add. We note that the trial court indicated that it had discussed the matter with the parties prior to inquiring of the jurors. However, this discussion was not placed on the record. Thus, we do not know the substance of this conversation. "Had [Riffle] preserved an objection at sidebar, it was [his] duty to provide this court with a record on appeal to support [his] claim of error." *State v. Kleinfeld*, 9th Dist. No. 24736, 2010-Ohio-1372, at ¶7, citing Loc.R. 5(A) (it is the appellant's duty to provide a

transcript, "App.R. 9(C) statement, or App.R. 9(D) statement, as may be appropriate, and to ensure that the appellate court file actually contains all parts of the record that are necessary to the appeal[]"); *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199. Therefore, absent plain error, this issue is not properly before this Court. *State v. Hairston*, 9th Dist. No. 05CA008768, 2006-Ohio-4925, at ¶9. Riffle has not raised plain error, nor has he demonstrated why this Court should examine this issue for the first time on appeal. *State v. Meyers*, 9th Dist. Nos. 23864, 23903, 2008-Ohio-2528, at ¶42, citing *In re L.A.B.*, 9th Dist. No. 23309, 2007-Ohio-1479, at ¶19. Riffle's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> "[RIFFLE'S] RAPE CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶28} In his third assignment of error, Riffle contends that his rape conviction was against the manifest weight of the evidence. We do not agree.

{¶29} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶30} A determination of whether a conviction is against the manifest weight of the evidence does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be

> reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶31} Riffle was convicted of one count of rape, in violation of R.C. 2907.02(A)(1)(b), which states, "[n]o person shall engage in sexual conduct with another who is not the spouse of the offender ***, when any of the following applies: *** (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person." R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶32} On appeal, Riffle focuses on the testimony and credibility of S.R.'s mother. Even if the jury completely disbelieved S.R.'s mother, the jury, in resolving the conflicting testimony between S.R. and Riffle, could have believed the testimony of S.R without clearly losing its way.

{¶33} S.R. testified that starting when she was in third grade, Riffle licked her vagina and rubbed his penis on her vagina. She further testified that one time he put his finger in her vagina. She stated that one time she thought she started her period, but Riffle informed her that "'that's probably just from what we do.'" S.R. testified that she did not tell anyone about the incidents because Riffle told her not to, and because he had told her he loved her and that he would not do it anymore. She further explained that when the incidents first occurred she did not know they were wrong. She stated that she did not know it was not normal until she was in sixth grade. She explained that she told her mother about the incidents when she was in eighth grade because at that time she knew Riffle was not coming back to the home and she no longer felt threatened that it would happen again or that he would otherwise hurt her.

{¶34} S.R. stated that she would not make up these allegations. Riffle points out that during her testimony, S.R. testified to events that she had not previously mentioned. However, S.R. explained that every time she was asked to talk about the incidents, and that as she got older, she remembered more and more. She explained that as she had gotten older, she had a clearer understanding of what happened.

{¶35} Riffle testified on his own behalf and denied S.R.'s allegations. He stated that he believed S.R.'s mother told her to lie about the allegations because she was mad at him for leaving the family and asking for a divorce. S.R., however, stated that "I wouldn't make this up. *** I mean, I loved him. He was like – he was my dad. I wouldn't want anybody to have to go through this, I mean, like, being wrongly accused or something. And I didn't, like, hate him."

{¶36} Our review of the record reveals that this is not a case in which the jury clearly lost its way when it resolved the conflicting testimony of S.R. and Riffle. Accordingly, we do not conclude that the jury created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Riffle's third assignment of error is overruled.

III.

{¶37} Riffle's assignments of error are overruled. The judgment of the Medina County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶38} I concur in the main opinion's resolution of Mr. Riffle's assignments of error and agree that the statements of which Mr. Riffle complains, individually or cumulatively, do not warrant reversal. However, I write separately because I am troubled by the repeated instances of inappropriate conduct.

{¶39} The record reveals that during its opening statement the State identified Dr. Hancock as a witness and described her expected testimony. Upon learning that Dr. Hancock was not going to testify, Riffle's counsel properly requested that the court give a curative instruction and, although the trial court agreed to give a curative instruction, that instruction was never given as to Dr. Hancock. Riffle did not object or make any additional motions to the trial

court when it became apparent that Dr. Hancock would not testify and when the trial court failed to give the curative instruction to the jury.

{¶40} Riffle contends that the statements made by the prosecutor during his opening statement constitute prosecutorial misconduct because Dr. Hancock ultimately did not appear to testify. However, it is clear from the record that the prosecutor did not become aware that Dr. Hancock would not appear to testify until the State had presented all of its other witnesses, and there was no evidence to suggest that the prosecutor had any prior knowledge that Dr. Hancock was not going to be a witness. Accordingly, the evidence does not support the assertion that the prosecutor acted in bad faith when mentioning Dr. Hancock's expected testimony during the opening statement.

{¶41} However, during cross-examination of Riffle, *after* it was clear that Dr. Hancock would not be present, the prosecutor asked Riffle whether he had heard that child victims of sexual abuse remember more details of abuse as they mature. Presumably, the prosecutor asked this question because it was the only way it could allude to Dr. Hancock's expected testimony in order to explain why S.R. testified as to encounters of a sexual nature with Riffle that she had not revealed at prior trials. Riffle did not raise any objection. Notwithstanding the lack of an objection, the prosecutor's attempt to inject into evidence the information it sought to present through Dr. Hancock's testimony was improper.

{¶42} Additionally, the prosecutor's statements that S.R. was not lying and was testifying as to events because those events actually happened were not appropriate. A prosecutor may not state his or her personal belief as to the veracity of a witness or as to the guilt of the defendant. *State v. Kirby*, 9th Dist. No. 23814, 2008-Ohio-3107, at ¶23, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14.

{¶43} Notwithstanding these incidents, I agree that when the record is reviewed in its entirety, I cannot say that but for the prosecutor's misconduct, the result of the trial would have been different.

APPEARANCES:

MARTHA HOM, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL A. HOPKINS, Assistant Prosecuting Attorney, for Appellee.