

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 24AP-320
Plaintiff-Appellee,	:	(C.P.C. No. 22CR-5170)
v.	:	(REGULAR CALENDAR)
Dontae M. Upchurch,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 8, 2026

On brief: *Shayla D. Favor*, Prosecuting Attorney, and *Mark R. Wilson*, for appellee. **Argued:** *Mark R. Wilson*.

On brief: *Brehm Legal Group*, *Eric W. Brehm*, and *Heather J. Landis*, for appellant. **Argued:** *Eric W. Brehm*.

APPEAL from the Franklin County Court of Common Pleas

MENTEL, J.

{¶ 1} Defendant-appellant, Dontae M. Upchurch, appeals from the judgment of the Franklin County Court of Common Pleas entered after a jury found him guilty of one first-degree felony count of kidnapping and one fourth-degree count felony of domestic violence. Mr. Upchurch argues that the trial court erred by elevating the domestic violence charge from a misdemeanor to a felony under R.C. 2919.25(D)(3) based on his previous conviction for domestic violence under the Columbus City Code, by not declaring a mistrial based on allegedly prejudicial statements by the prosecutor and the victim, and by allowing the admission of purportedly expert testimony by a law enforcement detective without qualifying him as an expert. Finding no merit to these arguments, we affirm.

I. Factual and Procedural Background

{¶ 2} On November 3, 2022, plaintiff-appellee, the State of Ohio, filed a three-count indictment charging Mr. Upchurch with kidnapping in violation of R.C. 2905.01, rape in violation of R.C. 2907.02, and domestic violence in violation of R.C. 2919.25.¹ The alleged victim of each offense was G.B., his former girlfriend. The kidnapping and attempted rape charges each carried a repeat violent offender specification under R.C. 2941.149(A) due to a previous felonious assault conviction. The state also sought to enhance the domestic violence charge, typically a first-degree misdemeanor under R.C. 2919.25(A), to a fourth-degree felony under R.C. 2919.25(D)(3), based his conviction in the Franklin County Municipal Court for domestic violence under Columbus City Code 2319.25(D). Mr. Upchurch entered a plea of not guilty to all charges on November 10, 2022.

{¶ 3} On August 28, 2023, Mr. Upchurch filed a motion in limine seeking to exclude evidence of his prior misdemeanor conviction for domestic violence, arguing that the state could not use it to enhance the felony level of the domestic violence charge. (Aug. 28, 2023 Mot. in Lim. at 3-4.) He argued that only a previous offense against “a family or household member” could elevate a misdemeanor to a felony because R.C. 2919.25(A) described the victim in those terms. *Id.* at 3. In contrast, his conviction under Columbus City Code 2319.25(D) only applied to an “intimate partner,” a term defined in the municipal code as “a person with whom the offender is or has been in a dating relationship but who does not meet the definition of a family or household member.” *Id.*

{¶ 4} The trial court addressed the motion at a hearing held on August 29, 2023. After hearing from both Mr. Upchurch’s attorney and the state, the trial court noted that under R.C. 2919.25(D)(3), “a violation of [a] municipal ordinance or law of this or any other state or the United States that is substantially similar” to domestic violence raised the offense level to a felony. (Aug. 29, 2023 Tr. at 30.) While acknowledging that the language of the municipal ordinance was “a little bit more expansive” than the state statute because it criminalized not only physical harm directed to a family or household member, but to an “intimate partner” as well, the trial court concluded that “the Columbus City Code is a

¹ The state originally indicted Mr. Upchurch with one count of rape in violation of R.C. 2907.02, then amended the charge to attempted rape before trial. (Aug. 29, 2023 Tr. at 8-10.) The jury eventually acquitted Mr. Upchurch of attempted rape.

domestic violence [law] that is substantially similar to” R.C. 2919.25(A). *Id.* at 31. Accordingly, the trial court ruled that the state could use the prior conviction to enhance the domestic violence charge to elevate the offense level to a felony. *Id.*

{¶ 5} The matter proceeded to trial. During the opening statement, the prosecutor described Mr. Upchurch and the victim, G.B., as being “in an intimate relationship” that had led to “a falling out” six months before the night of October 19, 2022, when he showed up unannounced at G.B.’s apartment and forced his way inside. (Mar. 5, 2024 Tr. at 20.) The prosecutor described “the overnight hours,” during which Mr. Upchurch had threatened G.B. with a knife, physically assaulted her, and “guarded the bedroom door so she couldn’t leave.” *Id.* at 21-22. Relevant to this appeal is the following statement by the prosecutor:

Over the course of the night, this defendant, in an effort to satisfy his own perverse sexual desires, pulled down his pants and underwear and rubbed her vagina with his exposed penis attempting to penetrate her on three separate occasions.

...

And, finally, after over 12 hours trapped in the apartment with this defendant, the incident came to an end not because he decided he had inflicted enough terror, not because he felt remorse for his actions, but because [G.B.] found an opportunity to escape his grasp.

(Tr. at 22-23.)

{¶ 6} The state’s first witness was K.L., a friend of G.B. *Id.* at 31. The two had met when they were coworkers at a Family Dollar store. *Id.* at 33. On October 19, 2022, K.L. gave G.B. a ride to her apartment. *Id.* at 38. G.B. had ordered food during the ride, and they were watching a movie together when the food arrived. *Id.* at 39. G.B. went to the door to get her food and when she came back, Mr. Upchurch was with her. *Id.*

{¶ 7} According to K.L., Mr. Upchurch “was visibly agitated” and “was using aggressive language and sharp wording” while questioning why K.L. was at G.B.’s apartment. *Id.* at 40. He recounted that G.B. “asked him to sit down, eat some food with her and [said] let’s chat and watch TV for a little bit and continue the hang out.” *Id.* at 40-41. Although Mr. Upchurch “did eventually sit down,” K.L. testified that “the mood had shifted. It was no longer a comfortable situation anymore.” *Id.* A couple of minutes later,

K.L. stated that he was “not feeling this anymore” and left. *Id.* He did not speak to G.B. until two days later. *Id.* at 42.

{¶ 8} G.B. testified that she and Mr. Upchurch met when he approached her at a gas station in March of 2022. *Id.* at 118. Her intimate relationship with him began a week or two later. *Id.* At the time, she was living with her stepfather in a one-bedroom apartment. *Id.* at 119.

{¶ 9} Soon after, G.B. and Mr. Upchurch began working together at a warehouse on the weekends. *Id.* at 120-21. Mr. Upchurch stayed the night with G.B. three days a week when they had work together in the morning. *Id.* at 121. Mr. Upchurch “wouldn’t tell” G.B. where he was staying the other four nights of the week. *Id.* During this time, they shared expenses, which G.B. described as “[g]as, food, just everyday necessities.” *Id.* She did not have a car, so Mr. Upchurch drove her to work. *Id.*

{¶ 10} G.B. described living at her stepfather’s apartment as “a short term-solution.” *Id.* at 122. She explained that she had recently moved to Columbus and was in a rental assistance program, but she had to pay the application fee to retrieve the keys to an apartment that had already been rented to her. *Id.* Although she and Mr. Upchurch had originally discussed moving into the apartment together, he “wouldn’t help with the expenses” and G.B. never had enough money to pay the application fee: “And he failed to help me with that so I told him that I was going to get it on my own and I didn’t need anybody to reside with me.” *Id.* at 123-24. The amount of time that Mr. Upchurch stayed with her at her stepfather’s apartment was “two to three weeks.” *Id.* at 177.

{¶ 11} G.B. and Mr. Upchurch broke up in April of 2022. *Id.* at 123. They had no contact until October 19, 2022, the night that G.B. and K.L. were at her apartment. *Id.* at 125-26. While watching television that night, K.L. told her that someone was “throwing rocks at [her] window,” which G.B. witnessed as well, but she “didn’t see anybody” when she looked outside. *Id.* at 127.

{¶ 12} G.B. received a delivery notification for food that she had ordered and went to the door to retrieve it. *Id.* She couldn’t see out the peephole and opened the door. *Id.* at 128. Mr. Upchurch “was holding the food in his hand and pushed the door open[] and pushed [her] out of the way.” *Id.* G.B. told him “to get out,” but Mr. Upchurch began to walk to the bedroom where he “began to shout ‘get out’ ” to K.L. *Id.* Mr. Upchurch began

to collect K.L.'s belongings. *Id.* As K.L. left, he asked G.B. if she "was okay" and she said yes. *Id.* at 129.

{¶ 13} After K.L. left, G.B. called her mother. *Id.* She told her mother that Mr. Upchurch was "trespassing" and that G.B. "wanted him to leave." *Id.* G.B. felt "intimidated" and told Mr. Upchurch that she was "very scared." *Id.* G.B. said that her mother, who was on speakerphone, "was shouting something" while she and Mr. Upchurch were "dancing around [the] living room table" as he was "reaching" for her phone. *Id.* at 130. Her mother told him to leave and he disconnected the call. *Id.* G.B. was unable to get her phone back from Mr. Upchurch. *Id.* at 131. According to G.B., she had two shots of vodka in the hour before Mr. Upchurch arrived, but was not drunk. *Id.*

{¶ 14} G.B. and Mr. Upchurch went to her bedroom, at which time he was "still angry." *Id.* at 132. G.B. wanted to take a shower to give him time to calm down or "get his own thoughts together," but Mr. Upchurch did not allow her to leave the bedroom. *Id.* He stood "with his arms out" and guarded the doorway. *Id.* G.B. decided to lay down and go to sleep, but Mr. Upchurch was "hovering over" her and accusing her of "cheating on him and being a bad wife." *Id.* at 133. G.B. reiterated that they were not in a relationship at that time and had never been married. *Id.* at 134.

{¶ 15} G.B. testified that Mr. Upchurch "continued to walk around the bed" and alternated between "speaking loudly" and "whispering that [she] was a bad wife" while holding a flashlight, as the lights were off in the bedroom. *Id.* at 134-35. She tried to get out of the bed "20, 30 times," but Mr. Upchurch would grab her wrist and push her back on the bed "forcibly" while telling her to "sit down and shut up." *Id.* at 136. G.B. stated that her "whole body was very tender," she was "in pain," and had bruises on her wrist. *Id.* at 137.

{¶ 16} Eventually, G.B. fell asleep and was woken up early in the morning by Mr. Upchurch "trying to pull [her] pants down." *Id.* at 138. She was naked from the waist up because she had started to undress the night before when she attempted to take a shower. *Id.* at 139. G.B. described "a tug of war" between the two of them as Mr. Upchurch tried to remove her pants while she resisted and kept "pulling them back up." *Id.* He continued to call her "a bad wife" and told her that she "needed to shut up." *Id.* at 140. She asked him for her phone so that she could call off work, as she feared losing her job. *Id.* In response,

Mr. Upchurch accused G.B. of “trying to fool him” so that she could “call the police.” *Id.* at 140-41. He never let her call work or returned her phone. *Id.* at 141.

{¶ 17} G.B. recounted that Mr. Upchurch began to try to take her pants off, but this time “had a knife in his hand.” *Id.* He held the knife “very, very close” to her thigh while telling her to open her legs. *Id.* at 142. G.B. complied, and he was able to get her pants down to her ankles. *Id.* at 142-43. Mr. Upchurch pulled down her underwear and began to rub his penis against her vagina with his pants “partially pulled down.” *Id.* at 143. According to G.B., Mr. Upchurch was unsuccessful when trying to penetrate her because he couldn’t achieve an erection. *Id.* at 144. G.B. kept “telling him to stop,” that she “didn’t want it,” and described herself as “very, very weak.” *Id.*

{¶ 18} G.B. insisted that she “was nauseous” and informed Mr. Upchurch that she was “going to defecate on him” because she “couldn’t hold it in,” explaining that he had “only allowed [her] to go to the bathroom once” before then. *Id.* at 145. He relented and allowed her to use the bathroom. *Id.*

{¶ 19} After that, G.B. asked if they could “go to the store to grab a ginger ale.” *Id.* at 147. Mr. Upchurch thought about it, then allowed G.B. to get dressed. *Id.* at 148. However, he then changed his mind and told G.B. that they were not going and demanded that she take her clothes off. *Id.* Mr. Upchurch got into bed with her, turned her over so that G.B. was on her back, and lay on top of her. *Id.* at 150. He tried to kiss her on the lips but G.B. covered her mouth with her hands until he put the knife against them, at which time she “removed [her] hands immediately.” *Id.* at 150-51. He was also “licking [her] neck.” *Id.* at 150. At the same time, Mr. Upchurch was touching her vagina with his hands without penetration. *Id.* at 152.

{¶ 20} G.B. was able to make a “quick jump up” and “yelled out the window” before she was “yanked right back” by Mr. Upchurch, who “choked [her] from behind” by squeezing her neck with his hands. *Id.* at 152-53. G.B. couldn’t breathe. *Id.* at 153. Mr. Upchurch “slammed” her on the head, causing her to fall on the floor near the bed. *Id.* She gagged up “[a] lot of mucous” and tasted blood. *Id.* at 153-54. She asked him repeatedly for water. *Id.* He eventually gave her water, but she threw it up. *Id.* G.B. “had to crawl back” to her bed, where Mr. Upchurch was laying. *Id.* at 155. “He was laughing,” she recounted. *Id.*

{¶ 21} While G.B. was facing away from him in the bed, Mr. Upchurch pulled down her pants, touched her vagina with his penis, and attempted to penetrate her. *Id.* at 157-58. Once again, he could not maintain an erection. *Id.* G.B. “was screaming rape,” telling Mr. Upchurch that she didn’t want to have sex with him, and that penetrating her would be rape. *Id.* at 158. He got out of bed to go to the restroom. *Id.* at 159. G.B. “ran towards” the front door of the apartment, but Mr. Upchurch pulled her back and she fell, hitting her head. *Id.* He began to beat G.B., and she grabbed an umbrella from the closet by the front door and hit him with it. *Id.* at 160.

{¶ 22} G.B. went back to her bedroom to lie down and Mr. Upchurch followed her. *Id.* at 161. He told her “that he came back for revenge” and threatened to kill her. *Id.* G.B. did not respond, even though she was scared. *Id.* at 162. Mr. Upchurch went to the bathroom and G.B. decided to leave. *Id.* at 163. She grabbed her clothes and ran out of the apartment. *Id.* She did not have shoes. *Id.* at 167.

{¶ 23} G.B. ran to the apartment complex’s rental office, where she encountered a security guard who advised her to call the police. *Id.* at 168. She described her state of mind at the time as “hectic” and “traumatized.” *Id.* at 173. She used his phone to make the call. *Id.* at 168. After calling 9-1-1, they walked back to G.B.’s apartment and she found her phone. *Id.* at 171. Mr. Upchurch was gone. *Id.* After speaking with law enforcement, she was taken to a hospital for a sexual assault examination. *Id.* at 172.

{¶ 24} The state also called T.S., a security guard who worked at G.B.’s apartment complex. *Id.* at 69-71. He testified that he had been working on the morning of October 20, 2022, when G.B. appeared at the rental office “barefooted, very startled; stating that she just escaped from a situation that happened at her home.” *Id.* at 73. T.S. stated that G.B. was “breathing heavily as if she just got done running or fast walking,” had “scratch marks on her face,” was crying, and appeared scared. *Id.* at 74. According to T.S., G.B. “explained that her and her ex-boyfriend were fighting all night into the morning and then in the morning he attempted to have sex with her and she refused.” *Id.* at 77.

{¶ 25} T.S. testified that he escorted G.B. back to her apartment. *Id.* at 78. The interior appeared “very demolished.” *Id.* A couch was flipped over and a table was knocked down. *Id.* No one was there other than T.S. and G.B. *Id.* He waited for G.B. “to collect shoes and a jacket” before escorting her back to the rental office. *Id.* at 80. At first, T.S.

was unsure whether G.B. had her cellphone and believed that they used his phone to call the police. *Id.* at 81-82. After being shown his statement to police to refresh his memory, T.S. testified that G.B. did have her cellphone. *Id.* at 84. He waited with her until the police arrived. *Id.* at 82.

{¶ 26} G.B.'s mother, T.S., also testified. *Id.* at 86. She recalled that G.B. had been living with G.B.'s stepfather when she and Mr. Upchurch met. *Id.* at 89. T.S. herself did not live there at that time. *Id.* at 90.

{¶ 27} T.S. recalled that on the night of October 19, 2022, G.B. called her around 11 p.m., "yelling" and saying that she wanted Mr. Upchurch to leave her apartment. *Id.* at 94-95, 109. T.S. described G.B.'s demeanor on the call as "angry" and "mad." *Id.* at 96. G.B. put her mother on speakerphone and T.S. told Mr. Upchurch that her daughter wanted him to leave. *Id.* T.S. stated that Mr. Upchurch "said he was going to leave." *Id.* On cross-examination, T.S. agreed that his demeanor during the call appeared "calm." *Id.* at 111. The phone call ended shortly thereafter. *Id.* at 96. T.S. called G.B. back "a couple times" but got "no answer." *Id.* at 97.

{¶ 28} The state's next witness was Joshua Murdock, a firefighter and paramedic with the Columbus Fire Department. *Id.* at 216. In addition to the general training he received as a paramedic, Mr. Murdock also described the specific training he received for treating sexual assault victims. *Id.* at 220. He estimated that he had been called to hundreds of sexual assault scenes. *Id.* at 222.

{¶ 29} When Mr. Murdock arrived at G.B.'s apartment, a detective and police officer were already there with G.B. *Id.* at 228. He described G.B.'s demeanor as "very withdrawn" and "emotionally upset," and that she was "very, very reluctant to really want to open up about what happened." *Id.* at 229. When asked how he had treated G.B., he explained he had not because the protocol with sexual assault victims was different than trauma patients: "When it comes to sexual assault victims, it's all about preserving evidence." *Id.* at 231. Unless the victim reports injuries or has visible ones, "[w]e don't do an examination," he explained. *Id.* at 232. Mr. Murdock did note that G.B. "kept on touching her neck," which appeared "red and inflamed." *Id.* at 239. However, "because she was talking and walking, we didn't have to do any type of treatment besides vitals." *Id.* at 232. He rode with G.B. to the hospital and transferred her to a sexual assault nurse examiner there. *Id.* at 246.

{¶ 30} When asked about the details of his report, Mr. Murdock noted that no one informed him of any head trauma or injury at the scene. *Id.* at 251.

{¶ 31} Detective Dennis Harbin of the Columbus Division of Police arrived at G.B.'s apartment complex after the first responders had arrived. *Id.* at 275-77. He first interviewed her in his unmarked police vehicle, where she recounted the events of the previous evening and morning. *Id.* at 276-77.

{¶ 32} After the interview, Detective Harbin and G.B. went to her apartment. *Id.* at 278. According to the detective, "the apartment was in disarray." *Id.* He testified that "it looked like there was some sort of struggle. There was a chair tipped over . . . it looked as if a fight happened." *Id.* at 278-79. In the bedroom, the blinds on the window were "all destroyed, damaged." *Id.* at 280. He authenticated a number of photographs he took as part of the investigation, including ones reflecting the condition of G.B.'s apartment. *Id.* at 283-84.

{¶ 33} Detective Harbin also described the process of creating a photo array of suspects that included Mr. Upchurch. *Id.* Another officer showed the array to K.L., who identified Mr. Upchurch "as the person [who] was in the apartment at the time he was there." *Id.* at 285.

{¶ 34} During Detective Harbin's testimony, a recording of a 9-1-1 call that Mr. Upchurch made was played for the jury. *Id.* at 298. During the call, Mr. Upchurch told the dispatcher that G.B. had run outside the apartment. *Id.* He was told to stay there, but Detective Harbin did not find him at G.B.'s apartment when he arrived. *Id.* at 299. It took "a few days" for the detective to find Mr. Upchurch and apprehend him. *Id.*

{¶ 35} Ashley Topper is a forensic nurse who examined G.B. at the hospital. Her testimony began with an explanation of the steps for examining a sexual assault survivor, which differ from the typical treatment of a trauma patient. According to Ms. Topper, the patient is asked if they want to have a rape kit collected or not, if they want to anonymize their report to police, and are asked "to tell us exactly what happened word for word in her or his own statement." *Id.* at 349. Open-ended questions are preferred over yes-or-no ones "because you want to make sure you gather as much information as possible." *Id.* at 350. A genital exam requires consent "because it's pretty invasive" and could retraumatize the patient. *Id.* at 250-51.

{¶ 36} Ms. Topper described G.B. as “very upset” upon meeting her and stated that G.B. appeared to have “just gone through something traumatic.” *Id.* at 354. G.B.’s demeanor was “pretty shaken,” “withdrawn” and she appeared “saddened by the situation.” *Id.* at 355.

{¶ 37} G.B. agreed to an examination and the preparation of a rape test kit. *Id.* at 359. The nurse began the exam by taking “a full-body photo” before taking more detailed ones of G.B.’s injuries. *Id.* at 360. Ms. Topper noted that G.B. had scratches and abrasions on her neck, arms, and knuckles, “and there were some bruises as well.” *Id.*

{¶ 38} During her testimony, Ms. Topper authenticated a number of photographs that she had taken during the exam and described the injuries they documented. *Id.* at 361. In addition to the abrasions on G.B.’s neck, arms and knuckles, she described an “abrasion on the left side of the face,” bruising on her back and shoulder, and a “point of tenderness on her neck.” *Id.* at 365-67. Ms. Topper took eight photos of G.B.’s neck to document the injuries resulting from the strangulation she described. *Id.* at 369.

{¶ 39} Miranda Smith, a forensic scientist at the Columbus Division of Police’s crime laboratory, testified about her analysis of the DNA samples taken by the forensic nurse who had examined G.B. She stated that DNA collected from G.B.’s buttocks was “a mixture of three individuals,” the majority of DNA in the sample matching G.B.’s control sample. *Id.* at 428. However, “the minor second and third contributors were not suitable for comparisons based on the finding and quality of [the] DNA” recovered there. *Id.* A sample from G.B.’s right wrist contained male DNA but it was “not a good enough profile to make any sort of comparison to.” *Id.* at 435. A sample from G.B.’s wrist contained DNA from “at least two individuals,” and Mr. Upchurch’s DNA was consistent with and could not “be excluded as the major contributor of the male” DNA in the sample. *Id.* at 436.

{¶ 40} The state’s final witness was Mr. Upchurch’s probation officer, Korrie Cornelius. She testified that Mr. Upchurch had a previously scheduled appointment on October 20, 2022, that “was supposed to be at 11 a.m. but he didn’t check in until 2:00.” *Id.* at 451. She noted that “he had a cut on his cheek.” *Id.* at 452. “He was crying. He was upset.” *Id.*

{¶ 41} Ms. Cornelius testified that Mr. Upchurch told her that G.B. had “made him have sex with her but she was on her period,” that “there was a bump on her vagina,” and

claimed that she was “the reason he’s on supervision in the first place.” *Id.* On cross-examination, she affirmed that Mr. Upchurch “never actually said that he had sex with anyone at that point” and that “someone [had] attempted to have sex with him” when asked to clarify her testimony. *Id.* 455. Mr. Upchurch was arrested at the probation office on his next visit on the charges in the present case. *Id.* at 459.

{¶ 42} The jury found Mr. Upchurch guilty of kidnapping and domestic violence, but returned a verdict of not guilty on the attempted rape charge. The trial court sentenced him to an indeterminate term of imprisonment on the kidnapping charge, with a minimum of eight years and a maximum of twelve years, to be served concurrently with an eighteen-month term for the domestic violence charge. (May 3, 2024 Jgmt.)

{¶ 43} Mr. Upchurch appealed and asserts the following assignments of error:

[I.] The trial court erred in denying Mr. Upchurch’s Motion in Limine as it relates to his prior conviction of domestic violence.

[II.] Inflammatory comments on opening were unfairly prejudicial and deprived Mr. Upchurch of a fair trial as guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution, and Article I, § 10 of the Ohio Constitution.

[III.] The trial court erred in failing to grant a mistrial because the prejudicial testimony regarding Mr. Upchurch’s incarceration was not cured by a mere instruction to disregard.

[IV.] The trial court erred in overruling defense counsel’s objection and admitting improper testimony from the investigating officer that functioned as [an] unqualified expert opinion, resulting in unfair prejudice against Mr. Upchurch.

II. Analysis

{¶ 44} We consider each assignment of error asserted by Mr. Upchurch in turn.

A. First Assignment of Error

{¶ 45} In the first assignment of error, Mr. Upchurch argues that the trial court abused its discretion by admitting evidence of his prior conviction under Columbus City Code 2919.25(D) for the purpose of elevating the offense level of the domestic violence charge to a felony. In his view, because R.C. 2919.25(D)(3) requires that the offenses be “substantially similar,” and the municipal offense “contains a materially different element—specifically, the inclusion of ‘intimate partner’ as part of the offense—which is not present”

in Ohio’s domestic violence statute, the enhancement was erroneous. (Brief of Appellant at 13.)

{¶ 46} In response, the state argues that this “argument is based on a misinterpretation [of R.C.] 2919.25(D)(3),” and interprets the statutory language to permit the enhancement. (Brief of Appellee at 17.)

{¶ 47} Typically, “[b]ecause a trial court’s decision on a motion in limine is a ruling to admit or exclude evidence, the standard of review on appeal is whether the trial court committed an abuse of discretion that amounted to prejudicial error.” *State v. Mobarak*, 2017-Ohio-7999, ¶ 18 (10th Dist.), citing *Gordon v. Ohio State Univ.*, 2011-Ohio-5057, ¶ 82 (10th Dist.). Here, the parties stipulated that the exhibit itself was a certified copy of the judgment of conviction, as “is sufficient to prove [a] prior conviction” under R.C. 2945.75(B)(1).² (Tr. at 511.) Thus, there is no alleged evidentiary deficiency to implicate the abuse of discretion standard. However, the admissibility of Mr. Upchurch’s conviction actually hinged upon the trial court’s determination that his previous conviction for domestic violence and the offense of domestic violence in the Ohio Revised Code were “substantially similar” under R.C. 2919.25(D)(3), as required to enhance the offense level from a misdemeanor to a felony. Whether a previous conviction satisfies the requirements of the enhancement provision is “a purely legal question,” and we therefore hold that a de novo standard of review applies to this preliminary issue. *State v. R.S.M.*, 2023-Ohio-4288, ¶ 26 (10th Dist.) (affirming trial court’s decision to omit the trial court’s analysis of the “statutory question” of whether defendant’s prior conviction qualified as an offense of violence under R.C. 2919.25(D)(3) from jury instructions).

{¶ 48} In this case, Mr. Upchurch was indicted on one charge of domestic violence under R.C. 2919.25(A), which states: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” A violation of R.C. 2919.25(A) is typically a first-degree misdemeanor. R.C. 2919.25(D)(2). However, “if the offender previously has pleaded guilty to or been convicted of domestic violence, a violation of an existing or former municipal ordinance or law of this or any other state or the United States that is

² Apart from the statutory requirement, admissibility of such a judgment must also comply with Crim.R. 32(C). *State v. Gwen*, 2012-Ohio-5046, paragraph two of the syllabus.

substantially similar to domestic violence,” a violation of R.C. 2919.25(A) is elevated to a fourth-degree misdemeanor. R.C. 2919.25(D)(3).

{¶ 49} The Supreme Court of Ohio has not provided specific guidance for determining what constitutes an offense that is “substantially similar” to the offense of domestic violence under R.C. 2919.25(A) for the purpose of enhancement under R.C. 2919.25(D)(3). However, in *State v. Lloyd*, 2012-Ohio-2015, it developed a test for identifying whether a prior offense is “substantially equivalent” to a sexually oriented offense under Ohio law to determine whether a sex offender is required to register in this state under R.C. 2950.01(A)(13). Accordingly, we join other appellate courts in Ohio that have applied *Lloyd* when reviewing trial court rulings under R.C. 2919.25(D)(3). *State v. Mallory*, 2022-Ohio-3667, ¶ 37-39 (8th Dist.); *State v. Karns*, 2021-Ohio-1836, ¶ 28-39 (2d Dist.).

{¶ 50} In *Lloyd*, the court held that

in order to determine whether an out-of-state conviction is substantially equivalent to a listed Ohio offense, a court must initially look only to the fact of conviction and the elements of the relevant criminal statutes, without considering the particular facts disclosed by the record of conviction. If the out-of-state statute defines the offense in such a way that the court cannot discern from a comparison of the statutes whether the offenses are substantially equivalent, a court may go beyond the statutes and rely on a limited portion of the record in a narrow class of cases where the factfinder was required to find all the elements essential to a conviction under the listed Ohio statute. To do so, courts are permitted to consult a limited range of material contained in the record, including charging documents, plea agreements, transcripts of plea colloquies, presentence reports, findings of fact and conclusions of law from a bench trial, jury instructions and verdict forms, or some comparable part of the record.

Id. at ¶ 31.

{¶ 51} Beginning with “the fact of conviction and the elements of the relevant criminal statutes,” we first examine and compare the language of the Columbus City Code to R.C. 2919.25(A). *Id.* Titled “Domestic Violence,” Columbus City Code 2319.25 in relevant part states:

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

...

(D) No person shall knowingly cause or attempt to cause physical harm to an intimate partner.

{¶ 52} We note that Columbus City Code 2319.25(A) and R.C. 2919.25(A), the offense that Mr. Upchurch was convicted of, are textually identical. Both provisions provide: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” However, Mr. Upchurch’s previous conviction was under Columbus City Code 2319.25(D), which, as stated above, prohibits inflicting physical harm on “an intimate partner.” (State’s Ex. L.)

{¶ 53} Thus, the salient difference between the two statutes is the category of victim each describes. To be found guilty of domestic violence under R.C. 2919.25(A), the state must prove that the victim was “a family or household member,” whereas the municipal offense requires proof that the victim was an “intimate partner.” R.C. 2919.25(F) provides a definition of “family or household member,” and the relevant portion of the definition states:

(1) “Family or household member” means any of the following:

(a) Any of the following who is residing or has resided with the offender:

(i) A spouse, a person living as a spouse, or a former spouse of the offender

{¶ 54} One further relevant definition:

“Person living as a spouse” means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question.

R.C. 2919.25(F)(2).

{¶ 55} The Columbus City Code provides identical definitions for “family or household member” and “person living as a spouse.” *Compare* R.C. 2919.25(F) *with*

Columbus City Code 2319.25(K)(1) (defining “family or household member”) and 2319.25(K)(2) (defining “person living as a spouse”). In addition, the Columbus City Code defines “intimate partner” as “a person with whom the offender is or has been in a dating relationship but who does not meet the definition of a family or household member.” Columbus City Code 2319.25(K)(3). The plain text of the “intimate partner” definition indicates that the class of victims it includes is broader than that covered by the definition of “family or household member.” Indeed, the ordinance describes the offenses themselves in these terms, stating that a person who violates Columbus City Code 2319.25(A) “is guilty of domestic violence” and a person who violates Columbus City Code 2319.25(D) “is guilty of intimate partner violence.” Columbus City Code 2319.25(G)(1).

{¶ 56} In Mr. Upchurch’s reading, “[t]his is not a trivial or semantic distinction but a substantive legal difference” that renders the offenses not substantially similar. (Brief of Appellant at 13.) He argues that a conviction under Columbus City Code 2319.25(D) “does not necessarily satisfy the elements of the state offense, and therefore cannot be used to elevate a charge under the state’s enhancement framework.” *Id.* at 15.

{¶ 57} The question, however, is not whether the elements of one statute “necessarily satisfy” the other, but whether they are substantially similar. *Id.* We acknowledge that the state offense is underinclusive relative to the municipal offense when comparing the possible class of victims covered by each statute. Nevertheless, substantial similarity does not require complete identity. *Lloyd* held that the “statutory phrase ‘substantially equivalent’ expressly leaves room for potential distinctions between” the statutes. (Emphasis in original.) *Lloyd* at ¶ 28. The phrase “does not contemplate identical or even strict equivalence and presumes potential differences.” *Miller v. Cordray*, 2009-Ohio-3617, ¶ 15 (10th Dist.).

{¶ 58} For two additional reasons, we reject Mr. Upchurch’s argument. First, the statutory test for evaluating a previous conviction for offense level enhancement under 2919.25(D)(3) differs slightly from the R.C. 2950.01(A)(13) test for identifying whether a prior offense is “substantially equivalent” under Ohio law. The allowances for difference described in *Lloyd* and *Miller* pertain to the phrase “substantially equivalent,” but we are reading a statute that asks whether the prior conviction is “substantially similar.” Compare R.C. 2950.01(A)(13) with 2919.25(D)(3). We “presume that the General Assembly intends

different meanings when it uses different language” in the statutes it enacts. *State ex rel. Steen v. Bishop*, 2024-Ohio-1489, ¶ 21 (10th Dist.). If anything, “similar” demands less identity between comparators than “equivalent.”

{¶ 59} Second, the Supreme Court of Ohio has “decline[d]” to narrowly interpret the definitions applicable to the elements of domestic violence under R.C. 2919.25, and adopting Mr. Upchurch’s argument would not harmonize with that interpretive tradition. *State v. Williams*, 1997-Ohio-79, ¶ 8. In *Williams*, the appellant argued that his conviction for domestic violence was legally insufficient because there was no evidence that he and the victim had cohabitated. The appellant cited the statute’s definition of a “family or household member,” which “necessarily includes a person ‘who is residing or has resided with the offender,’ ” and argued that it should only apply “to those who actually share one residential address.” *Id.* The court rejected this argument, holding that “the offense of domestic violence, as expressed in R.C. 2919.25[F])(1)(a) and related statutes, arises out of the relationship of the parties rather than their exact living circumstances.”³ *Id.* at ¶ 12. The *Williams* court provided an exhaustive list of “the wide-ranging definitions of ‘cohabitant’ and ‘family or household member’ in the context of domestic violence developed by various courts of appeals and trial courts in Ohio, as well as courts in other states” to support its holding. *Id.* at ¶ 13.

{¶ 60} Furthermore, the Supreme Court of Ohio has described its holding in *Williams* as “interpret[ing] the statute broadly to include those who did not live with the offender but who also deserved protection under the statute based on their relationship with the offender.” *State v. McGlothan*, 2014-Ohio-85, ¶ 14. Mr. Upchurch’s formalistic argument is not consonant with the broad interpretation the court requires. We read *Williams* and *McGlothan* to emphasize that the relationship between the parties is the paramount consideration when interpreting Ohio’s domestic violence statute. Given this emphasis, as well as the slightly less demanding standard that the offenses be “substantially similar” rather than “substantially equivalent,” we conclude that the Columbus City Code’s “intimate partner violence” offense is substantially similar to Ohio’s domestic violence

³ The General Assembly renumbered a number of subsections of R.C. 2919.25, effective March 31, 2003. 2001 H.B. 548, Section 1.

statute for the purpose of elevating the offense level of a domestic violence charge to a felony under R.C. 2919.25(D)(3).

{¶ 61} Finally, because we have been able to “discern from a comparison of the statutes” that they are substantially similar, we are precluded from taking the additional step of going “beyond the statutes and rely[ing] on a limited portion of the record” from Mr. Upchurch’s previous conviction. *Lloyd* at ¶ 31. *See State v. Greenlee*, 2014-Ohio-1437, ¶ 23 (8th Dist.) (declining “to consider whether the second [*Lloyd*] condition is satisfied, because the trial court readily discerned, and so do we, that assault in Iowa is not substantially equivalent to gross sexual imposition in Ohio”). The first assignment of error is overruled.

B. Second Assignment of Error

{¶ 62} The second assignment of error asserts that the prosecution’s opening statement contained remarks that were sufficiently prejudicial as to deprive Mr. Upchurch of his due process rights under the Sixth and Fourteenth Amendments to the United States Constitution, as well as under Article I, § 10 of the Ohio Constitution. (Brief of Appellant at 17.) He faults two aspects of the prosecutor’s remarks: a reference to his alleged “perverse sexual desires” and lack of remorse. *Id.* at 18-19.

{¶ 63} The state responds that Mr. Upchurch did not object to the prosecutor’s remarks, so plain error applies to this assignment of error. (Brief of Appellee at 25.) Under that standard of review, the state argues, he cannot make the requisite showing of error. *Id.* at 29.

{¶ 64} During opening remarks, the prosecutor stated:

Over the course of the night, this defendant, in an effort to satisfy his own perverse sexual desires, pulled down his pants and underwear and rubbed her vagina with his exposed penis attempting to penetrate her on three separate occasions.

(Tr. at 22.)

{¶ 65} In addition, the prosecutor stated that “the incident came to an end not because he decided he had inflicted enough terror, not because he felt remorse for his actions, but because [G.B.] found an opportunity to escape his grasp.” *Id.* at 23.

{¶ 66} “To demonstrate plain error under Crim.R. 52(B), the party asserting error must show that an error occurred, that the error was plain, and that the error affected his substantial rights.” *State v. Bond*, 2022-Ohio-4150, ¶ 17, citing *State v. Wilks*, 2018-Ohio-1562, ¶ 52. To determine whether a prosecutor’s remarks amounted to prosecutorial misconduct, a reviewing court asks “whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant.” *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). Because an allegation of prosecutorial misconduct implicates a defendant’s due process rights, the “touchstone of analysis ‘is the fairness of the trial, not the culpability of the prosecutor.’” *State v. Gapen*, 2004-Ohio-6548, ¶ 92, quoting *Smith v. Phillips*, 455 U.S. 209, 219 (1982). “Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record.” *State v. Marshall*, 2022-Ohio-4693, ¶ 62 (10th Dist.).

{¶ 67} “During opening statement, counsel is accorded latitude and allowed fair comment on the facts to be presented at trial.” *State v. Leonard*, 2004-Ohio-6235, ¶ 157. “While a prosecutor may not make excessively emotional arguments tending to inflame the jury’s sensibilities, the prosecutor is entitled to some latitude” in its statements to the jury. *State v. Tibbetts*, 92 Ohio St.3d 146, 168 (2001).

{¶ 68} We reject Mr. Upchurch’s characterization of the prosecutor’s remarks as so inflammatory as to have deprived him of a fair trial. In *State v. Napier*, 1999 Ohio App. LEXIS 6328, *39 (1st Dist. Dec. 30, 1999), the First District Court of Appeals considered a prosecutor’s statement that the defendant was “strange. He’s sick. He’s demented and perverted” as “perhaps unnecessarily harsh,” but held that such remarks did not amount to prosecutorial misconduct. The victim, a the 15-year-old daughter of the defendant’s girlfriend, had testified that he “came into her room . . . grabbed her throat and told her to remove her undergarments and lay down on the bed” before raping her. *Id.* at *29.

{¶ 69} Here, the description of Mr. Upchurch’s alleged “perverse sexual desire” is, if anything, mild in comparison to the prosecutor’s statement in *Napier*. Furthermore, he has failed to explain how this characterization did not accord with G.B.’s description of his actions during her testimony. Nor was the reference to a lack of remorse any basis for discerning prosecutorial misconduct. See *State v. Smith*, 80 Ohio St.3d 89, 111 (1997)

(rejecting claim of prosecutorial misconduct based on a “reference to defendant’s lack of remorse,” noting that it “may have been intended to question his credibility”).

{¶ 70} Furthermore, the trial court instructed the jury before opening statement that “the attorneys are not witnesses and since it is your duty to decide this case solely on the evidence which you see or hear in this case, you must not consider as evidence any statement of any attorney made during the trial.” (Tr. at 14.) Even the prosecutor reminded the jury that “opening statements aren’t evidence.” *Id.* at 27. The trial court again reminded the jury of this principle in its instructions: “The evidence does not include the indictment or opening statements or closing arguments of counsel. The opening statements and closing arguments of counsel are designed to assist you. They are not evidence.” (Mar. 12, 2024 Jury Instructions at 3.)

{¶ 71} Mr. Upchurch has not demonstrated error, much less plain error, with regard to the prosecutor’s conduct during the opening statement. Accordingly, the second assignment of error is overruled.

C. Third Assignment of Error

{¶ 72} In the third assignment of error, Mr. Upchurch argues that the trial court erred by “failing to grant a mistrial” after G.B. “improperly referenced” his incarceration during her testimony. (Brief of Appellant at 21, 22.) He considers the mention of this fact so injurious that, “despite the court’s curative instruction [to the jury], the prejudicial impact of the statement was not erased.” *Id.*

{¶ 73} In response, the state points out that Mr. Upchurch’s attorney failed to move the trial court for a mistrial based on the alleged prejudice that the statement, and that he has not demonstrated how this “isolated, one time statement referring to appellant being incarcerated resulted in prejudice to him.” (Brief of Appellee at 30.)

{¶ 74} The statement in question occurred during the following exchange:

Q. So from April of 2022 after you break up with Mr. Upchurch until October 19th of 2022, was there any contact between the two of you? Had you heard from him at all?

A. No. I just recall him being incarcerated.

MS. MURRAY: Objection.

THE COURT: Yes. Sustained. Jurors are to disregard.

(Tr. at 125.)

{¶ 75} Although Mr. Upchurch’s attorney objected to the statement, as the state notes, she did not specifically move the trial court to declare a mistrial. Thus, Mr. Upchurch is assigning error to the trial court’s failure to sua sponte declare a mistrial based on G.B.’s statement.

{¶ 76} “A trial court may grant a mistrial sua sponte when there is manifest necessity for the mistrial or when the ends of public justice would otherwise be defeated.” *State v. Johnson*, 2009-Ohio-3383, ¶ 30 (10th Dist.), citing *Cleveland v. Walters*, 98 Ohio App.3d 165, 168 (8th Dist. 1994). “A mistrial should not be ordered in a criminal case merely because an error or irregularity has occurred.” *State v. Zeune*, 2011-Ohio-5170, ¶ 8 (10th Dist.). Rather, the “error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties” to justify declaring a mistrial. *State v. Harmon*, 2020-Ohio-590, ¶ 18 (10th Dist.), quoting *Tingue v. State*, 90 Ohio St. 368 (1914), paragraph three of the syllabus. Plain error review applies to a trial court’s failure to sua sponte grant a mistrial. *Johnson* at ¶ 30, citing *State v. Jones*, 115 Ohio App.3d 204, 207 (1996).

{¶ 77} Mr. Upchurch has again failed to demonstrate error, plain or otherwise. “A jury is presumed to follow the instructions, including curative instructions, given it by a trial judge.” *State v. Garner*, 1995-Ohio-168, ¶ 39. G.B.’s reference to Mr. Upchurch’s incarceration was brief and the trial court immediately instructed the jury to disregard the statement. *See State v. Akers*, 2019-Ohio-5171, ¶ 31 (3d Dist.) (affirming trial court’s decision to overrule defendant’s motion for a mistrial after a witness made “only a passing reference to [the defendant’s] incarceration and the jury was given an immediate and explicit curative instruction”). *See also State v. Hodge*, 2019-Ohio-4012, ¶ 50 (10th Dist.) (holding that a “brief verbal reference to the possibility that [the defendant] was incarcerated pending the conclusion of trial did not, in itself, prejudice proceedings so as automatically to require mistrial”). We note as well that the trial court’s jury instructions emphasized the presumption of innocence to which Mr. Upchurch was entitled, and additionally stated: “Statements or answers that were stricken by the Court or which you were instructed to disregard are not evidence and must be treated as through you never heard them.” (Mar. 12, 2024 Jury Instructions at 1, 3.)

{¶ 78} Mr. Upchurch argues that “the reference to incarceration was highly prejudicial because it created an inference that [he] was previously jailed for unrelated criminal conduct.” (Brief of Appellant at 23.) However, even apart from G.B.’s statement, the fact that Mr. Upchurch had at some point in the past been incarcerated was an unavoidable inference that the jury was going to make, because his probation officer testified at trial. Mr. Upchurch has not challenged the admissibility of her testimony in this appeal. Thus, even if the jury did not heed the trial court’s instruction, G.B.’s statement was merely duplicative of the inference it would inevitably make as a result of the probation officer’s testimony. The third assignment of error is overruled.

D. Fourth Assignment of Error

{¶ 79} In the final assignment of error, Mr. Upchurch argues that the trial court erred by overruling his objection to a portion of Detective Harbin’s testimony that he believes “functioned as [an] unqualified expert opinion,” in violation of Evid.R. 702. (Brief of Appellant at 24.)

{¶ 80} The state asserts in response that the trial court properly concluded that the detective’s statements were based on his own experience interacting with sexual assault victims, and therefore there was no need for the trial court to qualify him as an expert. (Brief of Appellee at 31.)

{¶ 81} In the testimony that Mr. Upchurch refers to, Detective Harbin stated the following:

[A] [s]exual assault [detective] is not -- it’s not like a property crimes detective or homicide detective. You have a survivor or victim and that victim has to recount what happened to them. And generally the crime scene is what they remember, what’s in their head, how they go about remembering that horrific experience that they went through.

(Tr. at 269.)

At times you can have a survivor that’s very withdrawn. They’re not -- they’re not willing to elaborate. You have some survivors that are very animated, cry. They are very emotional. So there’s a gamut. And what they remember is not, it doesn’t flow. It jumps around.

Id. at 272-73.

{¶ 82} We note that the specific objection to Detective Harbin’s testimony raised by Mr. Upchurch’s attorney, which the trial court overruled, was that he had “not been qualified as an expert in psychology” under Evid.R. 702.⁴ *Id.* at 271. The rule states in part:

A witness may testify as an expert if the proponent demonstrates to the court that it is more likely than not that all of the following apply:

(A) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness’ testimony is based on reliable scientific, technical, or other specialized information and the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case.

{¶ 83} Our review of the detective’s testimony does not support Mr. Upchurch’s assertion that it “constitute[d] expert testimony in substance, though not in form,” based the characterization that it contained “statements concerning how sexual assault victims process trauma” that “requires specialized knowledge not possessed by an average juror.” (Brief of Appellant at 25.) The detective’s testimony was admissible under Evidence Rule 701, which states:

If 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.

{¶ 84} Here, Detective Harbin’s statement centered around his own observations of victims he had interviewed, based on his experience as an investigator of sexual assault crimes. He described a “gamut” of reactions that he had personally observed that were

⁴ Mr. Upchurch also asserts that the testimony “improperly bolstered the victim’s credibility” and violated Evid.R. 403(A) because, in his view, its probative value was substantially outweighed by the danger of unfair prejudice. His attorney did not raise either argument as a basis for the objection to the trial court, and therefore waives all but plain error review to the ruling. We find no merit to either argument.

based on his own perception, and were helpful to the jury's understanding of the investigation he conducted. (Tr. at 273.) The comments Mr. Upchurch points to did not assert any specialized psychological knowledge, posit a scientific theory, or express an opinion based on knowledge that would have required the trial court to certify him as an expert under Evid.R. 702. The fourth assignment of error is overruled.

III. Conclusion

{¶ 85} Mr. Upchurch has failed to demonstrate that any error occurred that affected the fairness of his trial. Having overruled all four assignments of error, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BEATTY BLUNT and DINGUS, JJ., concur.
