[Cite as *State v. Graffius,* 2019-Ohio-2714.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

ROBERT D. GRAFFIUS,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0008

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2017-CR-282

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Robert Herron, Columbiana County Prosecutor, *Atty. John E. Gamble*, Chief Assistant Prosecutor, *Atty. Megan L. Bickerton* and *Atty. Abbey Minamyer*, Assistant Prosecuting Attorneys, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Timothy Young, Ohio Public Defender and *Atty. Craig M. Jaquith,* Senior Assistant State Public Defender, Office of the Ohio Public Defender, The Midland Building, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant-Appellant.

Dated: June 24, 2019

WAITE, P.J.

{¶1} Appellant Robert D. Graffius appeals a March 27, 2018 Columbiana County Court of Common Pleas judgment entry convicting him of one count of rape, a felony of the first degree in violation of R.C. 2907.02(A)(2). Appellant argues that the prosecutor improperly vouched for the victim's credibility and stated that Appellant lied during his testimony. Appellant argues that his trial counsel was ineffective for failing to object to these errors and for failing to object to a reference during the victim's testimony that he was jailed during trial. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant and the victim were both with their respective friends at a local restaurant when they met. The victim was interested in dating Appellant's friend so she exchanged phone numbers with Appellant to talk with him about the friend. Although the victim admits that she and Appellant texted each other, she clarified that the conversation was not romantic and was for the purpose of learning about his friend.

{¶3} On June 6, 2017, Appellant texted the victim around 6:00 a.m. She did not respond until around 11:00 a.m. The victim's sister was also her roommate. They had argued that morning and the victim left the house. The victim walked to the library and, at some point, Appellant texted her and asked if she wanted to join him and his brother at his apartment to drink beer. He offered to pick her up at the library. She accepted his invitation.

{¶4} Appellant and his brother drove to the library and the victim entered his vehicle. Before driving to Appellant's apartment, they stopped at a gas station to

purchase beer. The victim and Appellant's brother accompanied him to his apartment and began to drink the beer. Appellant's brother left after drinking one beer. Appellant and the victim remained at the apartment. The facts up to this point are not disputed, but at this point the parties' stories diverge.

{¶5} According to the victim, she felt tired from not sleeping the night before and was emotional after the fight with her sister. She asked Appellant if she could take a nap in his bedroom. At first, Appellant remained in the living room. However, a short time later, Appellant entered the bedroom and got in bed next to the victim. She asked him what he was doing and he responded that he just wanted to listen to music and would leave her alone. After a few minutes, he began to touch her over her clothes. The victim told him to stop and he did. However, a few minutes later he began to touch her again. The victim got up, went to the living room and sat down on a reclining chair.

{¶6} The victim noticed that Appellant had begun playing a pornographic movie while she was in the bedroom which was still playing as she sat in the chair. Appellant entered the living room and asked if she wanted to watch it with him. She said no. When the victim looked up, he was standing in front of her and had taken off his pants. He pulled her pants off and got on top of her. She began to scream and pound the wall behind her with her fists while yelling for help. At some point, she convinced him to let her go to the bathroom. She had hoped that she would be able to run out of the bathroom and out the door without him catching her. However, when she opened the door he grabbed her and threw her onto his bed. He penetrated her and she begged him to stop. Appellant repeatedly asked her why she was yelling at him and said "[y]ou know you want this." (Tr., p. 272.)

{¶7} After he completed the rape, Appellant helped the victim off the bed and hugged her. She did not respond to the hug until he told her to hug him back. He kept asking her if she was mad at him and said "[y]ou're not gonna tell on me, are you?" (Tr., p. 274.) The victim put her clothes back on and asked Appellant where he threw her phone. After finding the phone under a table, the victim walked to the door. As she left, Appellant told her to "[s]tay in touch." (Tr., p. 275.)

{¶8} Once outside, the victim called a friend who told her to call 911. The victim waited for police at her house which was two or three blocks from Appellant's apartment. As she waited, Appellant repeatedly called and texted her phone. The calls continued even after Officer Richard Whitfield arrived. Officer Whitfield told the victim to text Appellant "[a]re you sorry [for] what you did to me?" (Tr., p. 284.) Appellant responded that he did not know what she was talking about. Officer Whitfield testified that the victim appeared to be in shock and "shaken." (Tr., p. 171.)

{¶9} Officer Whitfield located Appellant and brought him to the station on a bench warrant. Appellant repeatedly denied having intercourse with the victim and began to get defensive during the interrogation. Appellant stated that he "[d]idn't have sex with her. Absolutely not. Didn't have sex with that lady." (Tr., p. 180.) He declined Officer Whitfield's request for a DNA sample.

{¶10} The victim was taken to the hospital for an examination. The Sexual Assault Nurse Examiner, Clarrissia Miller, performed the examination. Miller testified that she observed an abrasion to the victim's periurethral area, the presence of light blood, and significant swelling. She also noted that the victim was unable to tolerate a speculum due to the amount of swelling. She testified that these injuries are indicative of force and are

not consistent with consensual acts. During the examination, a single sperm cell and semen were found.

{¶11} During the investigation, officers obtained a warrant for Appellant's DNA and to search his apartment. Appellant's DNA sample matched the sample obtained during the victim's examination. After investigators informed Appellant of the match, he conceded that he and the victim engaged in intercourse but claimed that it was consensual.

{¶12} On August 16, 2017, Appellant was charged through a secret indictment on one count of rape, a felony of the first degree in violation of R.C. 2907.02(A)(2). A two-day jury trial commenced on March 20, 2018. At trial, Appellant testified that the victim texted him while she was at the library and asked if she could come to his house and drink beer. At first, he told her that he was busy but agreed when she persisted. He testified that he told the victim that he was going to lay down in his bedroom and that she could join him if she wanted. After about fifteen minutes had passed, she remained in the living room so he called out and asked her if she wanted to join him. He claimed that she entered the room and they fell asleep. Once they woke up, they engaged in consensual sex. Afterward, she was mean and disrespectful to him so he told her to leave. He claimed that she kept calling him and asking if she could return to the house and continue to drink beer.

{¶13} On March 21, 2018, the jury found Appellant guilty of the sole charged offense. On March 26, 2018, the trial court sentenced Appellant to eight years of incarceration with credit for 209 days served. Appellant was also designated as a tier three sex offender. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

PROSECUTORIAL MISCONDUCT DENIED MR. GRAFFIUS A FAIR TRIAL AND DUE PROCESS OF LAW. FIFTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION. (TR. 432.)

{¶14} Appellant argues that, during closing arguments, the prosecutor improperly vouched for the victim's credibility and accused him of lying during his testimony. Appellant concedes that he is limited to a plain error analysis as his trial counsel failed to object to the comments. Appellant believes that the jury did not find the victim credible as evidenced by their questions regarding some of the evidence.

{¶15} In response, the state argues that it is permitted to give an opinion during closing arguments so long as it is supported by evidence, does not imply knowledge of evidence outside of the record, and does not place the prosecutor's credibility at issue. The state contends that Appellant admittedly lied to investigators, and the evidence at trial demonstrated that he continued to lie during his testimony. As to the comment regarding the victim, the state highlights the fact that her statements to investigators remained consistent from the time of her initial statement and throughout her trial testimony. Even if the comments were improper, the state argues that Appellant suffered no prejudice, as the nurse's testimony demonstrated that force was used during the sexual encounter. The state refutes Appellant's claim that the jury questioned the victim's credibility.

{¶16} The comments at issue were made during the state's closing argument. A prosecutor is afforded wide latitude during closing argument and it is within the trial court's sound discretion to determine whether a comment is improper. *State v. Williams,* 7th Dist. Jefferson No. 11 JE 7, 2013-Ohio-2314, ¶ 10, citing *State v. Benge*, 75 Ohio St.3d 136, 661 N.E.2d 1019 (1996). When reviewing a comment made by the state, we must first determine whether the remark was proper. *State v. Peeples*, 7th Dist. Mahoning No. 07 MA 212, 2009-Ohio-1198, ¶ 74, citing *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). If the remark appears to be improper, we must then determine whether it prejudicially affected the defendant's substantial rights. *Id*.

{¶17} As noted by Appellant, his trial counsel did not object to the prosecutor's comments. Thus, he is limited to a plain error review. To determine whether plain error exists, a three-part test is employed. *State v. Parker*, 7th Dist. Mahoning No. 13 MA 161, 2015-Ohio-4101, ¶ 12, citing *State v. Billman*, 7th Dist. Monroe Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25; *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "First, there must be an error, *i.e.* a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' " *Parker* at ¶ 12, citing *Billman*, *supra*.

{¶18} During closing arguments, the prosecutor stated:

> You have a Defendant who, when originally asked about this, says, "I didn't sleep with that woman, no way, no how." Lies. Lies are what come from the Defendant. He does not tell the truth. He didn't tell the truth then. He didn't tell the truth today.

> [The victim] told the truth. She has always told the truth. What does she have to gain from this, ladies and gentlemen? Nothing. But to be victimized again. To have to come here and go through this. Ladies and gentlemen, she was honest. She has been honest from day one. Her story has been consistent. Every time she was asked what happened, she told exactly what happened and she was truthful and honest. You saw the pain in her testimony, how much she has suffered from this rape.
>
> You heard from the officers about what happened that day. About their investigation, how they followed up with footage, and you saw a little bit of footage, confirmed everything that was being told to them. That they had not known each other that long. That was consistent. That they had on that day -- that she had been picked up from the library.

(Tr., pp. 432-433.)

{¶19} "An attorney may not express a personal belief or opinion as to the credibility of a witness." *State v. Myers,* 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶ 145, citing *State Williams,* 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997). However, "[t]he prosecutor may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument." *State v. Treesh,* 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001), citing *State v. Smith,* 80 Ohio St.3d 89, 111, 684 N.E.2d 668 (1997). When reviewing a prosecutor's comments, a court must view the state's closing argument in its entirety. *Treesh, supra,* at 466, citing *State v. Moritz,* 63 Ohio St.2d 150, 157, 407 N.E.2d 1268 (1980). Although a prosecutor should avoid

voicing a personal opinion as to a defendant's guilt, a comment on guilt is not *per se* improper. *State v. Zehenni,* 12th Dist. Warren No. CA2016-03-020, 2016-Ohio-8233, ¶ 46.

{¶20} In *Zehenni*, the prosecutor stated: "[t]he State believes that he's completely making up that he has no memory of it, that's what the State believes…But it doesn't matter necessarily what I believe, what does matter is what he has testified to is unreasonable." (Emphasis deleted.) *Id.* at ¶ 47. Although the Twelfth District called the comments "unfortunate," it found that the comment was not improper, as the statement was based on evidence that contradicted the defendant's claims.

{¶21} The First District addressed a prosecutor's comments which went further than those in *Zehenni.* In *State v. Howard,* 1st Dist. No. C-130058, 2014-Ohio-655, the prosecutor stated: "It's amazing how often these guys will lie to get out of trouble[.] * * * The defendant wants us to believe this was the murder weapon that Buddha had, when we said, fine, we'll test the thing, if it's the murder weapon, it's the murder weapon. Well you can't do that. [W]e called their bluff." *Id.* at ¶ 30. The court held that the comment was proper because the evidence tended to show that the defendant's story had changed over the course of the investigation and supported the state's belief that he lied.

{¶22} In an Eighth District case, a similar comment was found to be proper. *State v. Peterson*, 8th Dist. Cuyahoga Nos. 100897, 100899, 2015-Ohio-1013. In that case, the state said: "[a]nd he is supposed to get on the stand and tell the truth. And what does he do? He lies. And I submit to you he lies." *Id.* at ¶ 124. The court held that it was apparent that the defendant's claim of innocence during his testimony was contradicted by the evidence presented at trial.

{¶23} The instant comment is comparable to the one made in *Peterson.* Importantly, Appellant admittedly lied to police during the investigation, which was revealed during his testimony. He originally told investigators that he did not engage in intercourse with the victim. He did not admit to any sexual contact with the victim until investigators informed him that his DNA sample matched the sample obtained from the rape kit. His sole explanation for his lying was his alleged fear of police due to a claimed incident of police brutality suffered in his youth. He did not elaborate on the alleged incident.

{¶24} Regardless, the evidence presented at trial directly contradicted Appellant's version of the facts. The victim's statements during the investigation and her trial testimony was largely corroborated by the nurse examiner's testimony that the injuries suffered by the victim were consistent with force and inconsistent with consensual intercourse. Thus, while a prosecutor should avoid such comments whenever possible, the comment regarding Appellant's truthfulness was not improper.

{¶25} The state's second comment addressed the victim's credibility. "It is improper for a prosecutor to vouch for the credibility of a witness at trial. Vouching occurs when the prosecutor implies knowledge of facts outside the record or places his or her personal credibility in issue." *Myers* at ¶ 145, citing *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117; *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 232.

{¶26} Again, the state relied on evidence already in the record when making a comment as to the victim. The victim's statements to investigators remained consistent throughout the investigation. Law enforcement was able to corroborate her statements

through surveillance videos, the nurse's examination, and the rape kit evidence. There is no indication that the state's comment was based on evidence outside the record and the state did not imply such outside knowledge. Further, there is nothing within the record to suggest that the prosecutor placed her own credibility at issue. As such, the prosecutor did not improperly vouch for the victim's credibility.

{¶27} Even assuming, arguendo, that the state's comments were improper, such comments do "not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments." *State v. Dyer,* 4th Dist. Scioto No. 07CA3163, 2008-Ohio-2711, ¶ 48. Again, the victim's testimony was largely corroborated by the nurse examiner's testimony. Officer Whitfield testified that investigators were able to corroborate most of the victim's statement through surveillance videos. Appellant's claim that the victim kept texting him after he ordered her out of his house was contradicted by testimony that Appellant repeatedly called and texted the victim even in the presence of Officer Whitfield. Also, Appellant's dishonesty with investigators was revealed during his own testimony.

{¶28} This case represents the unusual case where the defendant testified at trial and the jury was able to determine his credibility on their own. While Appellant argues that the length of the jury deliberations and the questions the jury asked about the evidence somehow indicates that the jury questioned the victim's credibility, such claim is speculative at best. Both Appellant and the victim testified, as did others who corroborated the victim's version of events. This was a matter of credibility and the jury clearly determined that they believed the victim.

{¶29} Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> MR. GRAFFIUS'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS. SIXTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; ARTICLE I, SECTIONS 10 AND 16, OHIO CONSTITUTION. (TR. 432.)

{¶30} Appellant argues that his counsel's failure to object to the prosecutor's comments amounted to ineffective assistance of counsel. Appellant also argues that he received ineffective assistance of counsel when his counsel failed to object to testimony that indicated that he was jailed during his trial.

{¶31} The state argues that all of the prosecutor's comments were proper. As such, trial counsel could not be ineffective for failing to object. The state also notes that the jail comment was a single reference made during the victim's testimony. As it is unreasonable to assume that a jury would believe that a person facing a criminal trial would not likely be incarcerated at some point during the proceedings, such a comment cannot be prejudicial.

{¶32} In order to prevail on a claim of ineffective assistance of counsel, an appellant must show that his counsel's performance was deficient and that he was prejudiced by the deficiency. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694.

{¶33} As to the state's comments regarding Appellant and the victim's credibility, as previously discussed, neither of these comments were improper. Thus, trial counsel was not ineffective for failing to object.

{¶34} The reference to Appellant's incarceration arose during the victim's testimony. On direct examination, the state asked the victim whether she was afraid after the incident, to which she replied: "I mean, I'm not fearful, because I know he's in jail, but I mean, that whole summer, when he was not, I didn't leave my house except to go to work." (Tr., p. 284.)

{¶35} "Courts have held that verbal references to the jail status of a defendant are improper and potentially prejudicial because they erode the presumption of innocence, for the same reason that wearing prison or jail clothing does." *State v. Stroermer,* 2d Dist. Clark No. 2017-CA-93, 2018-Ohio-4522, ¶ 35, citing *State v. Watters*, 8th Dist. Cuyahoga No. 82451, 2004-Ohio-2405, ¶ 15-16.

{¶36} However, Ohio courts have held that a single isolated comment that defendant is jailed is not enough to demonstrate prejudice. *Stroermer, supra,* at ¶ 35, citing *State v. Sharp*, 12th Dist. Butler No. CA2009-09-236, 2010-Ohio-3470; *State v. Gaona*, 5th Dist. Licking No. 11 CA 61, 2012-Ohio-3622. Where there is no reasonable

possibility that unlawful testimony contributed to a conviction, the error is harmless and therefore will not be grounds for reversal. *State v. Howard-Ross,* 2015-Ohio-4810, 44 N.E.3d 304 (7th Dist.), citing *State v. Lytle*, 48 Ohio St.2d 391, 358 N.E.2d 623 (1976), paragraph three of the syllabus, vacated on other grounds in *Lytle v. Ohio*, 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154 (1978).

{¶37} Here, the reference to Appellant's incarceration was a single isolated reference within the victim's lengthy testimony. Further, the comment was an innocent response to a question which was designed only to determine if the victim was afraid of Appellant.

{¶38} The Ohio Supreme Court has noted that "experienced trial counsel learn that objections to each potentially objectionable event could actually act to their party's detriment." *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, 858 N.E.2d 1144, ¶ 140, citing *Lundgren v. Mitchell*, 440 F.3d 754, 774 (6th Cir.2006). As such, defense counsel's decision not to move to strike an answer can be a trial tactic to prevent emphasizing the information inadvertently elicited. *State v. Fuller,* 7th Dist. Belmont No. 14 BE 0016, 2016-Ohio-4796, ¶ 48, *State v. Schlagheck*, 6th Dist. Lucas No. L-00-1121, 2001 WL 85158, *6 (Feb. 2, 2001). Such trial tactic is presumed to be used by defense counsel as part of trial strategy. *Id*. Here, trial counsel may not have wanted to draw the jury's attention to the comment, particularly as it was buried within the victim's lengthy answer to the question.

{¶39} As the prosecutor's comments were not improper and counsel may have used trial strategy not to object to the fleeting reference of the victim, trial counsel was not ineffective for failing to object to any of these comments. Regardless, Appellant has

not argued or otherwise shown prejudice. Accordingly, Appellant's second assignment of error is without merit and is overruled.

Conclusion

{¶40} Appellant argues that the prosecutor improperly vouched for the victim's credibility and stated that Appellant lied during his testimony. He also contends that his trial counsel was ineffective because counsel failed to object to these comments and an additional comment that improperly informed the jury that Appellant was jailed during trial. For the reasons provided, Appellant's arguments are without merit and the judgement of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.