[Cite as *State v. Bailey*, 2018-Ohio-4315.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 18CA1059
vs.	:	
JONATHAN DAILEY,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio Public Defender, and Craig M. Jaquith, Assistant Ohio Public Defender, Columbus, Ohio, for Appellant.[1]

David Kelley, Adams County Prosecuting Attorney, and Kris Blanton, Adams County Assistant Prosecuting Attorney, West Union, Ohio, for Appellant.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED:10-10-18
ABELE, J.

{¶ 1} This is an appeal from an Adams County Common Pleas Court judgment of conviction and sentence. The trial court found Jonathan Dailey, defendant below and appellant herein, guilty of: (1) rape in violation of R.C. 2907.02(A)(1)(c); and (2) sexual battery in violation of R.C. 2907.03(A)(2). Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

[1] Different counsel represented appellant during the trial court proceedings.

"THE TRIAL COURT ERRED WHEN IT BARRED EVIDENCE THAT C.B.'S ALLEGATIONS WERE FABRICATED."

SECOND ASSIGNMENT OF ERROR:

"MR. DAILEY'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS."

THIRD ASSIGNMENT OF ERROR:

"PROSECUTORIAL MISCONDUCT DENIED MR. DAILEY A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, ARTICLE I, SECTIONS 10 AND 16, OF THE OHIO CONSTITUTION."

FOURTH ASSIGNMENT OF ERROR:

"MR. DAILEY'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

FIFTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO PROPERLY MERGE THE OFFENSES OF RAPE AND SEXUAL BATTERY."

{¶ 2} During the evening hours of November 12, 2016 through the early morning of November 13, 2016, appellant, C.B. (the victim), and other friends consumed large amounts of alcohol. Throughout the night, C.B. drank eight "Mike's Harder Lemonade," as well as a few beers and a "fruity" alcoholic beverage. C.B. eventually passed out in appellant's bedroom. Later, C.B. became conscious that appellant was having sexual intercourse with her.

Afterwards, C.B. reported the incident to law enforcement and medical personnel performed a rape kit.

{¶ 3} An Adams County grand jury subsequently returned an indictment that charged appellant with two counts of rape, felonious assault, and sexual battery. Appellant entered not guilty pleas.

{¶ 4} On October 30, 2017, the trial court held a bench trial. C.B. testified first and explained that appellant had been like a brother to her and that she never expected appellant would engage in sexual intercourse with her. C.B. admitted that she was quite intoxicated, but denied that she consented to having intercourse. C.B. related that on the night in question, she had consumed large quantities of alcohol and ended the evening at appellant's residence. She stated that she went into appellant's bedroom, alone, to rest and later "pass[ed] out." C.B. attested that her next recollection was appellant on top of her, and she noted that both her pants and underwear had been removed. She explained that she was "drunk" and "so confused and like shocked" that she "didn't know what was going on." C.B. indicated that she became aware that appellant "put his penis in [her]," but she is uncertain "how long it went on." C.B. stated that at some point, appellant left the room, returned, and had sex with her again.

{¶ 5} C.B. testified that she believes that appellant thought she was passed out when he had sex with her. C.B. explained that she pretended to be asleep in the hope that appellant would stop. Once appellant appeared to be sleeping, C.B. then left appellant's house and called her mother. Shortly thereafter, C.B. went to the hospital and had a rape kit performed.

{¶ 6} C.B. additionally related that she sought counseling because the incident has affected her "daily life," she thinks "about it all the time," she does not "sleep well," she has

"flashbacks of that night," she had difficulty concentrating in school, and that she is "scared to be alone." C.B. indicated that she believes she continues to need counseling, but stated that she has not had time to engage in further counseling.

{¶ 7} Dakota Vincent testified that he had been with both appellant and C.B. during the night of the incident, but he did not witness the alleged sexual assault. Vincent nevertheless observed that C.B. appeared "pretty drunk" that night. Vincent explained that C.B. drank between six and eight Mike's Hard Lemonade and then drank one beer. Vincent further related that although he did not witness the assault, Vincent noticed a change in C.B.'s behavior following the night in question. He explained that after the incident, C.B. "wouldn't stay at her house," but instead, she "stay[ed] at her mom's house or had to be around somebody." Vincent stated that C.B. also "quit drinking" "[f]or a few months" and cried more often than before that night.

{¶ 8} Anthony Grey similarly testified that C.B. appeared drunk on the night of the alleged sexual assault.

{¶ 9} Adams County Investigator Kenneth Dick explained that he investigated C.B.'s complaint. As part of his investigation, he interviewed appellant and he eventually admitted that he and C.B. had sex, but denied that he raped her. Appellant claimed that C.B. initiated sexual contact with him and that appellant simply responded to her advances. Appellant additionally emphasized that they both were drunk. Appellant specifically stated that C.B. "[w]as pretty wasted."

{¶ 10} John Roflow, C.B.'s counselor, testified that in March 2017, he diagnosed C.B. with post-traumatic stress disorder (PTSD). Roflow stated that he had only a single encounter with C.B. and that she did not follow up for further counseling.

{¶ 11} At this point, the state rested its case and appellant moved for a judgment of acquittal. The trial court granted the motion with respect to the felonious assault charge, but denied it as to the remaining counts.

{¶ 12} In his defense, appellant attempted to demonstrate that C.B. fabricated the rape allegations. Carissa Miller testified that in early June 2017, she and a few friends were at Hunter Conaway's house. Miller claimed that C.B. called Conaway and informed him that C.B. needed a ride. Miller explained that Conaway and C.B.'s conversation became adversarial, and C.B. proclaimed that "she should've set Hunter up."

{¶ 13} The state objected to Miller's statement and asserted that the defense could not use extrinsic evidence to impeach C.B. The trial court sustained the objection.

{¶ 14} On December 28, 2017, the trial court found appellant guilty of rape and sexual battery. The court, however, found appellant not guilty of the second count of rape and granted appellant's motion for a judgment of acquittal with respect to the felonious assault charge. Later, the trial court sentenced appellant to serve four years in prison for the rape offense and thirty months for the sexual battery offense. The court found that the offenses are allied offenses of similar import and stated that the terms of incarceration are "merged and sentence is imposed [for the rape offense] for a total mandatory term of four (4) years." This appeal followed.

I

{¶ 15} In his first assignment of error, appellant asserts that the trial court abused its discretion by excluding Miller's testimony that she heard C.B. tell Conaway that C.B. should have "set up" Conaway, instead of appellant. Appellant asserts that the trial court failed to consider that Evid.R. 616(A) permits extrinsic evidence to establish that a witness has "any motive to misrepresent." Appellant contends that Miller's testimony documents that C.B. had a "motive to misrepresent." Appellant agrees that the record does not indicate what exactly C.B. had to gain from accusing appellant, but claims that "she unmistakably implied to a third party–after the indictment–that [appellant] did not rape her." Appellant argues that C.B. "had some ulterior motive when she accused [appellant] of raping her," and posits that if the trial court had admitted Miller's testimony, the defense would have been able to undermine C.B.'s credibility.

A

{¶ 16} "'The admission or exclusion of relevant evidence rests within the sound discretion of the trial court.'" *State v. Dean*, 146 Ohio St.3d 106, 2015–Ohio–4347, 54 N.E.3d 80, ¶ 91, quoting *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus. Consequently, "a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice." *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008–Ohio–6266, 900 N.E.2d 565, ¶ 66; *accord State v. Adams*, 144 Ohio St.3d 429, 2015–Ohio–3954, 45 N.E.3d 127, ¶ 198. "An abuse of discretion is more than a mere error of law or judgment." *State v. Thompson*, 141 Ohio St.3d 254, 2014–Ohio–4751, 23 N.E.3d 1096, ¶ 91; *accord State v. Johnson*, 144 Ohio St.3d 518, 2015–Ohio–4903, 45 N.E.3d 208, ¶ 75.

Instead, "'[a] trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.'" *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶ 34. An abuse of discretion includes a situation in which a trial court did not engage in a "'sound reasoning process.'" *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Moreover, "[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *Darmond* at ¶ 34. Additionally, unless the trial court "'has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court should not disturb the decision of the trial court.'" *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 61, quoting *State v. Issa*, 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001).

{¶ 17} In the case sub judice, appellant did not argue during the trial court proceedings that Evid.R 616(A) permitted Miller's testimony and showed that C.B. had a motive to misrepresent. Appellant, therefore, forfeited the argument that the trial court abused its discretion by failing to find Miller's testimony admissible under Evid.R. 616(A). *E.g., State v. Anderson*, 151 Ohio St.3d 212, 2017-Ohio-5656, 87 N.E.3d 1203, ¶ 44 (noting that failure to raise issue during lower court proceedings forfeits "right to present it for the first time" on appeal to supreme court); *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 190 (noting that raising issue "for the first time in the court of appeals" forfeits "all but plain error"). Consequently, we may review this forfeited issue only for plain error.

{¶ 18} Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B) thus permits a court to recognize plain error if the party claiming error establishes (1) that "'an error, i.e., a deviation from a legal rule'" occurred, (2) that the error is a plain or "'an "obvious" defect in the trial proceedings,'" and (3) that this obvious error affected substantial rights, i.e., the error "'must have affected the outcome of the trial.'" *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶ 22, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *accord State v. Thomas*, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821, ¶ 32–33. For an error to be "plain" or "obvious," the error must be plain "under current law" "at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 467, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997); *accord Henderson v. United States*, 568 U.S. 266, 279, 133 S.Ct. 1121, 185 L.Ed.2d 85 (2013); *Barnes*, 94 Ohio St.3d at 27, citing *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (noting that for error to be plain, it must be obvious error under current law); *State v. G.C.*, 10th Dist. Franklin No. 15AP-536, 2016-Ohio-717, 2016 WL 764409, ¶ 14. Even when, however, a defendant demonstrates that a plain error or defect affected his substantial rights, the Ohio Supreme Court has "'admonish[ed] courts to notice plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."'" *Rogers* at ¶ 23, quoting *Barnes*, 94 Ohio St.3d at 27, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 19} As we explain below, after our review of the record we do not believe that the trial court obviously erred by excluding Miller's testimony. Moreover, even if it did, the exclusion

of Miller's testimony did not affect appellant's substantial rights and did not result in a manifest miscarriage of justice.

B

{¶ 20} The potential for witness-bias represents a significant concern when evaluating a witness's credibility. *State v. Dyer*, 2nd Dist. No. 27384, 2017-Ohio-8758, 100 N.E.3d 993, 2017 WL 5953534, ¶ 36. Indeed, "[t]he partiality of a witness * * * is 'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Greene v. McElroy*, 360 U.S. 474, 496, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959), quoting 3A J. Wigmore Evidence Section 940, p. 775 (Chadbourn rev.1970), quoted in *State v. Smith*, 2016-Ohio-7566, 76 N.E.3d 551 (5th Dist.), ¶ 37.

{¶ 21} The Ohio Rules of Evidence allow any party to attack a witness's credibility. Evid.R. 607(A); *State v. Blanton*, 4th Dist. Adams No. 16CA1031, 2018-Ohio-1275, 2018 WL 1611408, ¶ 19. For instance, a party may discredit a witness by exposing "[b]ias, prejudice, interest, or motive to misrepresent." Evid.R. 616(A). Evid.R. 616(A) provides the trier of fact with the means to assess any "underlying relationships, circumstances, and influences operating on the witness." *State v. Williams*, 61 Ohio App.3d 594, 597, 573 N.E.2d 704 (9th Dist.1988); *accord Dyer* at ¶ 36; *State v. Watson*, 2015-Ohio-4517, 46 N.E.3d 1090, ¶ 43 (2d Dist.).

{¶ 22} In the case sub judice, appellant argues that Miller's testimony would have undermined C.B.'s credibility by showing that C.B. possessed a motive to misrepresent. Appellant contends that Miller's testimony that C.B. should have "set up" Conaway would have shown that C.B. fabricated the rape allegation against appellant. We do not agree.

{¶ 23} We first point out that appellant did not present a plain-error argument regarding his assertion that the trial court should have admitted Miller's testimony under Evid.R. 616(A). We generally will not craft a plain-error argument for an appellant who fails to do so. *Redmond v. Wade*, 4th Dist. Lawrence No. 16CA16, 2017-Ohio-2877, 2017 WL 2257731, ¶ 34, citing *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 19, quoting *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, 78 (O'Donnell, J., concurring in part and dissenting in part), quoting *Carducci v. Regan*, 714 F.2d 171, 177 (D.C.Cir.1983) (stating that appellate courts "are not obligated to search the record or formulate legal arguments on behalf of the parties, because '"appellate courts do not sit as self-directed boards of legal inquiry and research, but [preside] essentially as arbiters of legal questions presented and argued by the parties before them"'"); *Coleman v. Coleman*, 9th Dist. Summit No. 27592, 2015-Ohio-2500, ¶ 9 (explaining that reviewing court will not craft plain-error argument for an appellant who fails to raise one).

{¶ 24} Nevertheless, after our review we do not believe that the trial court obviously erred by refusing to allow Miller to testify that C.B. informed Conaway that she should have "set up" Conaway instead of appellant. Although Miller's testimony might suggest that C.B. misrepresented her allegations against appellant, Miller's testimony does not reveal any motive C.B. possessed to misrepresent that appellant was the perpetrator. In fact, the evidence suggests the opposite: C.B. testified that appellant was "like a brother" to her before the incident. C.B.'s testimony thus indicates that before the incident, she thought highly of appellant, and therefore, she did not appear to have had any motive to misrepresent. Appellant has not pointed to anything in the record to illustrate that any events transpired before the date of the rape allegation

to change C.B.'s feelings towards appellant so that she might have had a motive to falsely accuse appellant of rape. *See Blanton* at ¶ 20 (determining that court did not abuse its discretion by refusing to allow extrinsic evidence illustrating witness had motive to falsely accuse defendant of rape when "there was nothing in the record indicating that [the witness] concocted the allegations"). None of C.B.'s testimony suggests that she had a motive to falsely accuse appellant of raping her. Furthermore, none of the other witnesses indicated that C.B. had a motive to falsely accuse appellant. Consequently, we do not believe that the trial court plainly erred–or abused its discretion–by excluding Miller's testimony.

{¶ 25} Moreover, as we explain in our discussion of appellant's fourth assignment of error, the state presented substantial competent and credible evidence that establishes appellant's guilt. Therefore, any error the trial court may have arguably committed by disallowing Miller's testimony did not affect the outcome of the trial and did not create a manifest miscarriage of justice.

{¶ 26} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

II

{¶ 27} In his second assignment of error, appellant asserts that trial counsel did not provide the effective assistance of counsel as guaranteed under the state and federal constitutions. In particular, appellant contends that trial counsel performed ineffectively by failing to argue that Evid.R. 616(A) permitted Miller's testimony regarding C.B.'s statement. Appellant claims that if trial counsel had objected on this basis, the court would have overruled the state's

objection and allowed Miller's testimony. Appellant asserts that admitting Miller's testimony would have made it reasonably probable that the outcome of the trial would have been different.

{¶ 28} Appellant also argues that trial counsel performed ineffectively by failing to object to the state's use of C.B.'s PTSD diagnosis to bolster her credibility. Appellant contends that if trial counsel had objected, the state would have been prevented from using the PTSD diagnosis to bolster C.B.'s testimony and would have led to a different outcome.

A

{¶ 29} The Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution provide that defendants in all criminal proceedings shall have the assistance of counsel for their defense. The United States Supreme Court has generally interpreted this provision to mean a criminal defendant is entitled to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *accord Hinton v. Alabama*, 571 U.S. 263, 272, 134 S.Ct. 1081, 188 L.Ed.2d 1 (2014) (explaining that the Sixth Amendment right to counsel means "that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence").

{¶ 30} To establish constitutionally ineffective assistance of counsel, a defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived the defendant of a fair trial. *E.g., Strickland*, 466 U.S. at 687; *State v. Obermiller*, 147 Ohio St.3d 175, 63 N.E.3d 93, 2016-Ohio-1594, ¶ 83; *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 85. "Failure to establish either element is fatal to the claim." *State v. Jones*, 4th Dist. Scioto No. 06CA3116, 2008-Ohio-968, ¶ 14. Therefore, if one element is dispositive, a court need not analyze both. *State v. Madrigal*,

87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000) (stating that a defendant's failure to satisfy one of the ineffective-assistance-of-counsel elements "negates a court's need to consider the other").

1

{¶ 31} The deficient performance part of an ineffectiveness claim "is necessarily linked to the practice and expectations of the legal community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), quoting *Strickland*, 466 U.S. at 688; *accord Hinton*, 571 U.S. at 273. "Prevailing professional norms dictate that with regard to decisions pertaining to legal proceedings, 'a lawyer must have "full authority to manage the conduct of the trial."'" *Obermiller* at ¶ 85, quoting *State v. Pasqualone*, 121 Ohio St.3d 186, 2009-Ohio-315, 903 N.E.2d 270, ¶ 24, quoting *Taylor v. Illinois*, 484 U.S. 400, 418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Furthermore, "'[i]n any case presenting an ineffectiveness claim, "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Hinton*, 571 U.S. at 273, quoting *Strickland*, 466 U.S. at 688. Accordingly, "[i]n order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation." *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 (citations omitted).

{¶ 32} Moreover, when considering whether trial counsel's representation amounts to deficient performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Thus, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* Additionally, "[a] properly

licensed attorney is presumed to execute his duties in an ethical and competent manner." *State v. Taylor*, 4th Dist. Washington No. 07CA11, 2008-Ohio-482, ¶ 10, citing *State v. Smith*, 17 Ohio St.3d 98, 100, 477 N.E.2d 1128 (1985). Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were "so serious" that counsel failed to function "as the 'counsel' guaranteed * * * by the Sixth Amendment." *Strickland*, 466 U.S. at 687; *e.g.*, *Obermiller* at ¶ 84; *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62; *State v. Hamblin*, 37 Ohio St.3d 153, 156, 524 N.E.2d 476 (1988).

2

{¶ 33} To establish prejudice, a defendant must demonstrate that a reasonable probability exists that "'but for counsel's errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the outcome.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 694; *e.g.*, *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus; *accord State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 91 (indicating that prejudice component requires a "but for" analysis). "'[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Hinton*, 571 U.S. at 275, quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052. Furthermore, courts ordinarily may not simply assume the existence of prejudice but, instead, must require the defendant to affirmatively establish prejudice. *State v. Clark*, 4th Dist. Pike No. 02CA684, 2003-Ohio-1707, ¶ 22; *State v. Tucker*, 4th Dist. Ross No. 01CA2592 (Apr. 2, 2002); *see generally Roe v. Flores-Ortega*, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2008) (observing that prejudice may be

presumed in limited contexts, none of which are relevant in the case sub judice). As we have repeatedly recognized, speculation is insufficient to establish the prejudice component of an ineffective assistance of counsel claim. *E.g., State v. Tabor*, 4th Dist. Jackson No. 16CA9, 2017-Ohio-8656, 2017 WL 5641282, ¶ 34; *State v. Jenkins*, 4th Dist. Ross No. 13CA3413, 2014-Ohio-3123, ¶ 22; *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 25; *State v. Halley*, 4th Dist. Gallia No. 10CA13, 2012-Ohio-1625, ¶ 25; *State v. Leonard*, 4th Dist. Athens No. 08CA24, 2009-Ohio-6191, ¶ 68; *accord State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 86 (stating that an argument that is purely speculative cannot serve as the basis for an ineffectiveness claim).

B

{¶ 34} In the case at bar, we do not believe that trial counsel failed to provide effective assistance of counsel. First, even if appellant could show that trial counsel's decisions not to raise Evid.R. 616(A) and not to object to the state's PTSD reference was professionally unreasonable, appellant cannot establish that counsel's performance affected the outcome of the trial. As we explain in our discussion of appellant's fourth assignment of error, the state presented substantial competent and credible evidence that establishes appellant's guilt. Consequently, if trial counsel had objected on either of the two bases appellant cites as deficient performance, the result of the trial would not have been different.

{¶ 35} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error.

III

{¶ 36} In his third assignment of error, appellant argues that during closing arguments, the state engaged in prosecutorial misconduct and that the alleged misconduct deprived him of a fair trial and due process of law. In particular, appellant alleges that the state improperly cited C.B.'s PTSD diagnosis in an effort to vouch for C.B.'s credibility. Appellant notes that during closing arguments, the state pointed out that Roflow diagnosed C.B. with PTSD and asserted that "you don't get PTSD from a buyers [sic] remorse incident." Appellant also argues that the state's reliance upon Roflow's testimony did not bear any relevance to the pending charges against appellant, but rather only "to the felonious assault charge" and that, once the court determined that the evidence was insufficient to support the felonious-assault offense, Roflow's testimony no longer carried any relevance.

{¶ 37} Appellant recognizes that trial counsel did not object to the state's citation to Roflow's testimony during its closing argument and, thus, we review this assignment of error only for plain error. *State v. Myers*, — Ohio St.3d —, 2018-Ohio-1903, — N.E.3d —, ¶ 144 (noting that failure to object to alleged prosecutorial misconduct forfeits all but plain error). Appellant contends that plain error exists, and without the state's improper reference to Roflow's testimony, a reasonable probability exists that the trial court would have found him not guilty. We therefore first review whether the state's use of the PTSD diagnosis during closing argument constituted an obvious instance of prosecutorial misconduct.

{¶ 38} In order for a defendant to establish prosecutorial misconduct during closing argument, a defendant must show that (1) the remarks were improper, and (2) these improper remarks prejudicially affected the defendant's substantial rights. *State v. Powell*, 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶ 149; *State v. Davis*, 116 Ohio St.3d 404,

2008–Ohio–2, 880 N.E.2d 31, ¶ 231; *State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984). "Prosecutorial misconduct constitutes reversible error only in rare instances." *State v. Edgington*, 4th Dist. No. 05CA2866, 2006-Ohio-3712, 2006 WL 2023554, ¶ 18, citing State v. Keenan, 66 Ohio St.3d 402, 405, 613 N.E.2d 203 (1993). Accordingly, courts ordinarily will not reverse a judgment on the basis of prosecutorial misconduct unless "the prosecutor's conduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Belton*, 149 Ohio St.3d 165, 2016-Ohio-1581, 74 N.E.3d 319, ¶ 125, quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). A prosecutor's improper conduct "'so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process'" when "it prejudicially affect[s] the defendant's substantial rights." *State v. Wilks*, 2018-Ohio-1562, 2018 WL 1960596, ¶ 172, citing *State v. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 243. Courts assess prejudice by examining "the effect of the misconduct "* * * in the context of the entire trial.'" *Wilks* at ¶ 172, quoting *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993). We further note that "[t]he benchmark of the prosecutorial misconduct analysis is 'the fairness of the trial, not the culpability of the prosecutor.'" *State v. Obermiller*, 147 Ohio St.3d 175, 2016-Ohio-1594, 63 N.E.3d 93, ¶ 99, quoting *Smith v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982); *accord State v. Beasley*, — Ohio St.3d —, 2018-Ohio-493, — N.E.3d. —, ¶ 119. Accordingly, "[n]ot every intemperate remark by counsel can be a basis for reversal." *State v. Landrum*, 53 Ohio St.3d 107, 112, 559 N.E.2d 710 (1990).

{¶ 39} During closing arguments, the prosecution generally has "wide latitude to convincingly advance its strongest arguments and positions." *State v. Gibson*, 4th Dist.

Highland No. 03CA1, 2003-Ohio-4910, 2003 WL 22136241, ¶ 35, citing *State v. Phillips*, 74 Ohio St.3d 72, 90, 656 N.E.2d 643 (1995); *State v. Treesh*, 90 Ohio St.3d 460, 466, 739 N.E.2d 749 (2001). Nevertheless, the prosecutor must avoid going beyond the evidence presented in order to obtain a conviction. *E.g., State v. Smith*, 14 Ohio St.3d 13, 14, 470 N.E.2d 883 (1984) (stating that prosecutor has duty "to avoid efforts to obtain a conviction by going beyond the evidence which is before the jury"). "[P]rosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts." *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999). Further, an appellate court must not focus on isolated comments but must examine the prosecution's closing argument in its entirety to determine whether the prosecutor's comments prejudiced the defendant. *Treesh*, 90 Ohio St.3d at 466; *State v. Keenan*, 66 Ohio St.3d 402, 410, 613 N.E.2d 203 (1993).

{¶ 40} Moreover, a prosecutor may not vouch for a witness by expressing a personal belief or opinion as to the credibility of a witness. *E.g., State v. Myers*, — Ohio St.3d —, 2018-Ohio-1903, — N.E.3d —, ¶ 145; *State v. Williams*, 79 Ohio St.3d 1, 12, 679 N.E.2d 646 (1997). Improper vouching occurs when the prosecutor implies knowledge of facts outside the record or places the prosecutor's personal credibility in issue. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, 836 N.E.2d 1173, ¶ 117, citing *State v. Keene*, 81 Ohio St.3d 646, 666, 693 N.E.2d 246 (1998). In contrast, "[a] prosecutor does not improperly vouch for a witness's credibility by arguing, based upon the evidence, that a witness was 'a reliable witness to the simple events she witnessed, that she lacked any motive to lie, [or] that her testimony was not contradictory.'" *State v. Reine*, 4th Dist. Scioto No. 06CA3102, 2007-Ohio-7221, 2007 WL

4696808, ¶ 63, quoting *State v. Green*, 90 Ohio St.3d 352, 373–374, 738 N.E.2d 1208 (2000). Additionally, "[a] prosecutor may argue facts in evidence to support a witness's credibility and may respond to defense attacks on the witness's credibility and mental abilities." *Reine*, citing *Green*, 90 Ohio St.3d at 374; *State v. Woodard*, 68 Ohio St.3d 70, 76, 623 N.E.2d 75 (1993).

{¶ 41} In the case sub judice, we do not believe that the prosecutor committed misconduct by improperly vouching for C.B. Here, the prosecutor did not place his own personal credibility at issue. Instead, the prosecutor argued facts in evidence (C.B.'s PTSD diagnosis) that supported the particular credibility decisions that the fact-finder needed to consider (whether C.B.'s rape allegation was credible). *See State v. Harp*, 4th Dist. Adams No. 07CA848, 2008-Ohio-3703, 2008 WL 2853672, ¶ 26, citing *Green*, 90 Ohio St.3d at 374 (finding that the prosecution did not vouch for a witness in closing arguments but instead "argued facts to support [the witness's] credibility * * *."). Here, the prosecutor pointed out that C.B.'s PTSD diagnosis tended to show that she suffered mental trauma as a result of appellant's alleged sexual misconduct, which, in turn, lent support to her claim that she did not consent to having sexual intercourse with appellant. We therefore do not believe that the prosecutor attempted to personally vouch for C.B. Consequently, we do not believe that appellant has demonstrated prosecutorial misconduct rising to the level of plain error.

{¶ 42} Appellant further asserts that the prosecutor's citation to the PTSD diagnosis constituted misconduct when the PTSD was not relevant to the charges that remained (the two counts of rape and one count of sexual battery). Instead, appellant contends that the PTSD diagnosis bore relevance only to the felonious assault charge. Appellant notes that before closing arguments, the trial court granted appellant's motion for a judgment of acquittal

regarding the felonious assault charge. Appellant thus contends that the prosecutor could no longer rely upon C.B.'s PTSD diagnosis as a fact in evidence. Appellant, however, has not cited any authority to support this proposition.

{¶ 43} Under App.R. 16(A)(7), an appellant's brief shall include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Appellate courts do not have any duty "to root out" an argument in support of an assignment of error. *Prokos v. Hines*, 4th Dist. Athens Nos. 10CA51 and 10CA57, 2014–Ohio–1415, 2014 WL 1339676, ¶ 55; *Thomas v. Harmon*, 4th Dist. Lawrence No. 08CA17, 2009–Ohio–3299, ¶ 14; *State v. Carman*, 8th Dist. Cuyahoga No. 90512, 2008–Ohio–4368, ¶ 31. "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Cantanzarite v. Boswell*, 9th Dist. Summit No. 24184, 2009–Ohio–1211, ¶ 16, quoting *Kremer v. Cox*, 114 Ohio App.3d 41, 60, 682 N.E.2d 1006 (9th Dist. 1996); *Quarterman* at ¶ 19. Appellate courts possess discretion to disregard any assignment of error that fails to include citations to the authorities in support. *Robinette v. Bryant*, 4th Dist. Lawrence No. 14CA28, 2015–Ohio–119, 2015 WL 223007, ¶ 33; *State v. Adkins*, 4th Dist. Lawrence No. 13CA17, 2014–Ohio–3389, ¶ 34, citing *Frye v. Holzer Clinic, Inc.*, 4th Dist. Gallia No. 07CA4, 2008–Ohio–2194, ¶ 12; App.R. 12(A)(2).

{¶ 44} In the case at bar, appellant failed to cite authority to support his argument that the prosecutor committed misconduct by citing facts in evidence that appellant alleges were no longer relevant. Consequently, we will not address this "undeveloped argument[] or assume

[appellant]'s duty and formulate an argument for him." *State v. Palmer*, 9th Dist. Summit No. 28303, 2017–Ohio–2639, 2017 WL 1749087. We therefore disagree with this argument.

{¶ 45} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error.

IV

{¶ 46} In his fourth assignment of error, appellant argues that his convictions are against the manifest weight of the evidence. In particular, appellant asserts that the weight of the evidence fails to show that C.B. was substantially impaired. Appellant contends that the evidence instead indicates that C.B. could appraise the nature of her conduct and control her conduct.

A

{¶ 47} When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence and all reasonable inferences, and consider the witness credibility. *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 151, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); *State v. Murphy*, 4th Dist. Ross No. 07CA2953, 2008-Ohio-1744, ¶ 31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" *Barberton v. Jenney*, 126 Ohio St.3d 5, 2010-Ohio-2420, 929 N.E.2d 1047, ¶ 20, quoting *State v. Konya*, 2nd Dist. Montgomery No.

21434, 2006-Ohio-6312, ¶ 6, quoting *State v. Lawson*, 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the court explained in *Eastley*:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Id. at ¶ 21, quoting *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact-finder, as long as a rational basis exists in the record for its decision. *State v. Picklesimer*, 4th Dist. Pickaway No. 11CA9, 2012-Ohio-1282, ¶ 24; *accord State v. Howard*, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶ 6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 48} Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, "'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *e.g., Wilks* at ¶ 168. If the prosecution presented substantial credible evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *E.g., State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, superseded

by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). *Accord Eastley* at ¶ 12, quoting *Thompkins*, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th ed.1990) (explaining that a judgment is not against the manifest weight of the evidence when "'"the greater amount of credible evidence"'" supports it). A reviewing court should find a conviction against the manifest weight of the evidence only in the "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717; *accord Myers* at ¶ 142.

B

{¶ 49} In the case at bar, appellant disputes his convictions for rape, under R.C. 2907.02(A)(1)(c), and sexual battery, under R.C. 2907.03(A)(2). R.C. 2907.02(A)(1)(c) provides:

> No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies:
>
> * * * *
>
> (c) The other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age, and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition or because of advanced age.

R.C. 2907.03(A)(2) states as follows:

> No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:
>
> * * * *
>
> (2) The offender knows that the other person's ability to appraise the nature of or control the other person's own conduct is substantially impaired.

Here, the only element appellant seemingly disputes is whether C.B. was "substantially impaired." We limit our review accordingly.

{¶ 50} In *State v. Canterbury*, 4th Dist. Athens No. 13CA34, 2015-Ohio-1926, 2015 WL 2452024 we discussed the meaning of "substantial impairment":

> "The phrase 'substantial impairment' is not defined in R.C. 2907.02, nor has the Ohio Supreme Court provided any definition." *State v. Keeley*, [4th Dist. Washington No. 11CA5, 2012-Ohio-3564] at ¶ 16; citing *State v. Daniels*, Summit No. 25808, 2011–Ohio–6414, ¶ 6. However, the Ohio Supreme Court has stated, in regards to a sexual battery charge against a youth victim alleged to have an impairment due to alleged mental retardation, as follows:
>
> "The phrase 'substantially impaired,' in that it is not defined in the Ohio Criminal Code, must be given the meaning generally understood in common usage. As cogently stated by the appellate court, substantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim's ability, either to appraise the nature of his conduct or to control his conduct." *State v. Zeh*, 31 Ohio St.3d 99, 103–104, 509 N.E.2d 414 (1987).
>
> * * * *
>
> Further, "[w]hether a person is substantially impaired 'does not have to be proven by expert medical testimony; rather, it can be shown to exist by the testimony of people who have interacted with the victim, and by allowing the trier of fact to do its own assessment of the person's ability to appraise or control his or her conduct.'" *State v. Lasenby*, 3rd Dist. Allen No. 1–13–36, 2014–Ohio–1878, ¶ 27; quoting *State v. Brady*, 8th Dist. Cuyahoga No. 87854, 2007–Ohio–1453, ¶ 78; *State v. Brown*, 3rd Dist. Marion No. 9–09–15, 2009–Ohio–5428, ¶ 21. Thus, the determination of substantial impairment is made "on a case-by-case basis, providing great deference to the fact-finder." *Lasenby* at ¶ 27; citing *Brown* at ¶ 22.
>
> Additionally, voluntary intoxication or impairment is included in the terms "mental or physical condition" as used in R.C. 2907.02(A)(1)(c). *Lasenby* at ¶ 28; citing *State v. Harmath*, 3rd Dist. Seneca No. 13–06–20, 2007–Ohio–2993, ¶ 14; *see also State v. Boden*, 9th Dist. Summit No. 26623, 2013–Ohio–4260, ¶ 20; *State v. Cedeno*, 8th Dist. Cuyahoga No. 98500, 2013–Ohio–821, ¶ 20. Further, courts have held that "[t]he consumption of large amounts of alcohol in a short period of time is evidence that voluntary intoxication caused substantial impairment." *Lasenby* at ¶ 28; citing *State v. Hatten*, 186 Ohio App.3d 286, 2010–Ohio–499, ¶ 22 (2nd Dist.); *see also State v. Lindsay*, 3rd Dist. Logan No. 8–06–24, 2007–Ohio–4490, ¶ 20."

Id. at ¶¶ 57-59.

{¶ 51} In the case sub judice, after our review we believe that the state presented substantial, competent and credible evidence that allowed the fact-finder to find that C.B. was substantially impaired at the time appellant committed the offense. Every witness who interacted with C.B. during the night of the incident testified that C.B. was drunk. Even appellant admitted that C.B. "was pretty wasted." Not one person stated that C.B. appeared sober and in control of her faculties. Moreover, every witness testified that C.B. consumed at least six to eight alcoholic beverages over the course of a four- to six-hour period. *Lasenby* at ¶ 28 (stating that consuming large quantity of alcohol in short time period evidence of substantial impairment); *State v. Kuck*, 2nd Dist. No. 2015-CA-13, 2016-Ohio-8512, 79 N.E.3d 1164, 2016 WL 7493691, ¶ 95 (concluding that substantial impairment established when evidence showed victim "consumed at least ten alcoholic drinks"). Additionally, C.B. stated that she "passed out." *Hatten* at ¶ 24 (noting that passing out indicative of substantial impairment). Thus, substantial evidence was adduced at trial to show that C.B. experienced a "reduction, diminution or decrease in [her] ability, either to appraise the nature of [her] conduct or to control [her] conduct." *Zeh*, 31 Ohio St.3d at 103–104.

{¶ 52} Appellant nevertheless asserts that the following actions illustrate that C.B. had an ability to appraise the nature of her conduct and to control her conduct: (1) she asked Grey to drive her to appellant's residence, (2) C.B. voluntarily chose to enter appellant's bedroom to rest, and (3) C.B. became aware that appellant was on top of her and feigned sleep. We believe, however, that appellant's argument is unpersuasive. Even though C.B. may have displayed some awareness, this does not mean that she had not experienced a "reduction, diminution or decrease" in her abilities to appraise the nature of, or control, her conduct. *Zeh*, 31 Ohio St.3d at

103–104; *see State v. Bentz*, 2017-Ohio-5483, 93 N.E.3d 358 (3rd Dist.), ¶ 105 (rejecting defendant's argument that weight of the evidence showed that victim was "not substantially impaired because she was able to ambulate out of [defendant]'s bedroom, to [a] vehicle, and to the police department without assistance").

{¶ 53} We observe that appellant does not challenge whether the weight of the evidence shows the remaining elements of rape and sexual battery. Therefore, we do not address them in any detail. Instead, we point out that substantial competent and credible evidence shows that appellant engaged in sexual conduct with C.B. and that he knew C.B. was substantially impaired. Appellant admitted to the investigator that he and C.B. had sexual intercourse. He also admitted that C.B. appeared "pretty wasted." Consequently, based upon our review of the record, we cannot conclude that the fact-finder clearly lost its way and created a manifest miscarriage of justice by finding appellant guilty of rape and sexual battery.

{¶ 54} Accordingly, based upon the foregoing reasons, we overrule appellant's fourth assignment of error.

V

{¶ 55} In his fifth assignment of error, appellant argues that the trial court plainly erred by failing to correctly merge the rape and sexual battery offenses. Appellant asserts that the court improperly imposed separate prison terms for each offense.

{¶ 56} R.C. 2941.25, the allied offense statute, provides as follows:

> (A) Where the same conduct by [a] defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 57} For purposes of R.C. 2941.25 "a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty." *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, ¶ 12; *accord State v. Williams*, 148 Ohio St.3d 403, 2016-Ohio-7658, 71 N.E.3d 234, ¶ 17. Consequently, "R.C. 2941.25(A)'s mandate that a defendant may be 'convicted' of only one allied offense is a protection against multiple sentences rather than multiple convictions." *Whitfield* at ¶ 18. Accordingly, "once the sentencing court decides that the offender has been found guilty of allied offenses of similar import that are subject to merger, R.C. 2941.25 prohibits the imposition of multiple sentences." *Williams* at ¶ 19 (citation omitted). The sentencing court thus has a mandatory duty to merge allied offenses. *Williams* at ¶ 27. "[I]mposing separate sentences for allied offenses of similar import is contrary to law and such sentences are void." *Id.* at ¶ 2. Therefore, "a judgment of sentence is void * * * when the trial court determines that multiple counts should be merged but then proceeds to impose separate sentences in disregard of its own ruling." *State ex rel. Cowan v. Gallagher*, 153 Ohio St.3d 13, 2018-Ohio-1463, 100 N.E.3d 407, ¶ 19, citing *Williams* at ¶ 28–29.

{¶ 58} In *Williams*, for example, the court determined that the trial court's imposition of concurrent sentences for allied offenses rendered the sentence void. The court determined that "the imposition of concurrent sentences is not the equivalent of merging allied offenses." *Id.* at ¶ 3. The court explained:

> It therefore follows that when a trial court concludes that an accused has in fact been found guilty of allied offenses of similar import, it cannot impose a separate sentence for each offense. Rather, the court has a mandatory duty to merge the allied offenses by imposing a single sentence, and the imposition of separate sentences for those offenses—even if imposed concurrently—is contrary to law because of the mandate of R.C. 2941.25(A). In the absence of a statutory remedy, those sentences are void.

Id. at ¶ 28.

{¶ 59} Rather than remanding, the court "modif[ed] the [appellate court's] judgment * * * to vacate the sentences" that the trial court improperly imposed for the allied offenses. *Id.* at ¶¶ 3 and 33. The court explained that a remand for resentencing is not always necessary when a trial court possesses a mandatory duty to merge allied offenses and impose a single sentence. *Id.* at ¶ 31. Instead, if the record indicates which offense the state elected to pursue at sentencing, then a reviewing court may invoke its authority to modify the lower court's judgment. *Id.*

{¶ 60} In the case at bar, the trial court found that the rape and sexual battery offenses constituted allied offenses of similar import. Moreover, the state elected to proceed to sentencing on the rape offense. The trial court, despite its finding that the offenses were allied, imposed separate sentences for each offenses–four years for rape and thirty months for sexual battery. Although the court then attempted to merge the two sentences, according to the *Williams* court a court cannot impose separate sentences for both counts.

{¶ 61} We therefore exercise our authority to modify the trial court's judgment and vacate the separate sentence that the trial court imposed for sexual battery. The remaining four-year prison sentence for rape and the court's finding of guilt for the sexual battery offense remain intact. *Whitfield*, paragraph three of the syllabus (observing that "the determination of the

defendant's guilt for committing allied offenses remains intact, both before and after the merger of allied offenses for sentencing").

{¶ 62} Accordingly, based upon the foregoing reasons, we sustain appellant's fifth assignment of error and modify the trial court's judgment so as to vacate the imposition of a thirty-month prison term for the sexual battery offense. In all other respects, we affirm the trial court's judgment.

JUDGMENT AFFIRMED AS MODIFIED.

[Cite as *State v. Bailey*, 2018-Ohio-4315.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed as modified and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Hoover, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY: _____

Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.