[Cite as *State v. Dudley*, 2005-Ohio-6503.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 05AP-144
v.	:	(C.P.C. No. 03CR03-1637)
Ronald E. Dudley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on December 8, 2005

Ron O'Brien, Prosecuting Attorney, and *Richard Termuhlen, II*, for appellee.

G. Gary Tyack, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Ronald E. Dudley, appeals from the judgment of the Franklin County Court of Common Pleas, whereby a jury convicted appellant of kidnapping and rape.

{¶2} The Franklin County Grand Jury indicted appellant of rape, a first-degree felony, in violation of R.C. 2907.02, kidnapping, a first-degree felony, in violation of R.C.

2905.01, and aggravated robbery, a first-degree felony, in violation of R.C. 2911.01. The charges stem from appellant sexually assaulting a victim during the early morning hours of February 27, 2003.

{¶3} Appellant pled not guilty, and a jury trial commenced. During voir dire, appellant's defense counsel asked prospective jurors if they felt comfortable with the possibility that they might be the "last person to hold out on the jury" and vote not guilty. Plaintiff-appellee, the State of Ohio, addressed defense counsel's question, by stating during voir dire:

> [Defense counsel] was asking a lot about being an individual holdout * * *. While she is absolutely right, you should stick to your guns so to speak, what the good judge is going to instruct you and what we ask you to do, all of you, is to make a group decision. Right or wrong, at the end of all of this you're going to take an oath to follow the law and reach a decision and that is either going to be unanimously guilty or unanimously not guilty. * * *

(Tr. at 112.)

{¶4} At trial, the victim testified to the following during direct examination. On February 27, 2003, the victim was watching television at home with her boyfriend. She and her boyfriend were drinking alcohol, and the victim decided to go to a nearby bar to get some beer around 1:45 a.m. The victim was "buzzed" from drinking, but was not drunk. (Tr. at 34.)

{¶5} The victim drove to the bar, but did not purchase any beer because the bar was closed. The victim then drove to a gas station to get gas and cigarettes. While the victim walked to the salesperson to pay for the gas and cigarettes, appellant asked the victim if she would give him money for gas. The victim did not know appellant, but gave him a dollar for gas. Eventually, the victim and appellant started talking, and the

victim told appellant that she was trying to get some beer. Appellant offered to buy the victim beer at a "bootleg joint." (Tr. at 36.) The victim gave appellant money for the beer and the two individuals drove separately to the "bootleg joint," with the victim following appellant.

{¶6} No one was present at the "bootleg joint," and appellant proposed that they drive to another "bootleg joint." The victim agreed and followed appellant to the second location.

{¶7} At the second location, appellant went into the "bootleg joint," but returned with no beer. Appellant stated that he wanted to go to his son's house to get beer. Appellant asked the victim to get into his automobile, but the victim refused and decided to follow appellant instead.

{¶8} At the third location, appellant went into the house and returned with a bag in his hand. Next, appellant rushed to his automobile and the victim saw two men with black hoods walking down an alley. Appellant started driving away in his automobile and the victim followed. Appellant drove down a dead-end street. The victim pulled up behind appellant, and appellant convinced her to get in his automobile to retrieve the beer.

{¶9} The victim entered appellant's automobile and shut the door. After the victim shut the door, she heard appellant lock the automobile with the automatic locks. Thereafter, appellant grabbed the victim, told her not to move and held a box cutter knife to her face.

{¶10} According to the victim, "[a]t that point I was terrified. I was so scared I didn't know what to do." (Tr. at 43.) Appellant proceeded to force the victim to perform

fellatio. The victim complied because she "didn't know what [appellant] was going to do." (Tr. at 43.) The victim "felt like [appellant] was going to kill [her]." (Tr. at 43.)

{¶11} While the victim performed fellatio, appellant grabbed a cane and gestured in such a way that the victim thought that appellant was going to beat her. Moreover, during the sexual encounter, appellant did not ejaculate, and the victim ultimately offered to get money from her car so that they could pick up a female prostitute. The victim made this suggestion because appellant had fantasized during the incident about the victim having sexual encounters with women.

{¶12} Appellant exited the automobile to get money from the victim's automobile. Appellant instructed the victim to remain in his automobile. While appellant was searching for money in the victim's automobile, the victim "sprung out" of appellant's automobile. (Tr. at 49.) Appellant came up to the victim and started "digging in his pocket[,]" possibly looking for the box cutter knife. (Tr. at 49.) The victim went to her automobile, gave appellant the money and "took off like a bat out of hell." (Tr. at 50.)

{¶13} Next, the victim ran toward a house, cried for help, and the resident called law enforcement. A law enforcement officer arrived, and the victim told the officer about the sexual assault. The victim then went to the hospital.

{¶14} The victim sustained bruises on her thigh and abrasions on her knees from the incident. The entire encounter with appellant lasted approximately two hours.

{¶15} On cross-examination, the victim testified as follows. The victim admitted that she originally told law enforcement that she left her house at 12:30 a.m., not 1:45 a.m., as she testified. The victim also conceded that she told law enforcement that the rape occurred at 1:00 a.m. The victim also confirmed that appellant slapped her during

the incident and that the bag that appellant retrieved from his son's home contained empty cans.

{¶16} On re-direct examination, the victim indicated that, when she provided law enforcement with a time frame of the incident, she estimated the times. The victim also confirmed that she was not wearing a watch that night.

{¶17} Next, Nurse Cheryll Minke testified on appellee's behalf. Nurse Minke spoke with the victim at the hospital on February 27, 2003. The nurse testified that the victim described the sexual assault. The nurse noted that the victim did not mention appellant brandishing a cane during the incident, and the nurse stated that the victim did not mention appellant slapping her during the incident. Additionally, Nurse Minke stated that, when the victim described how she fled from appellant, the victim stated: "I told him I had money in my car. He wanted me to get on the car floor, but he left the car open, and ultimately," the victim ran. (Tr. at 122.) Lastly, the nurse mentioned that she took photographs of the victim's injuries, and the nurse indicated that the injuries were consistent with what the victim told her had occurred.

{¶18} Lealia Bunch also testified on appellee's behalf. Bunch testified that she heard the victim outside her home during the early morning hours of February 27, 2003. According to Bunch, the victim was crying for help and appeared nervous. Bunch also confirmed that she called for law enforcement.

{¶19} Appellee also called Officer Donald W. Paden to testify. Officer Paden testified as follows. Officer Paden arrived on the scene after Bunch called for law enforcement. The victim was crying, upset, and traumatized. The victim told Officer Paden about the forced fellatio. The victim also mentioned appellant brandishing a

cane and box cutter knife, but did not mention appellant slapping her during the incident. Officer Paden also confirmed that the victim appeared "very disoriented as to her times as to when this did occur." (Tr. at 148.) However, Officer Paden explained that "[i]t is not uncommon in my experience that whenever a person has been involved in a situation to where they're excited that the time is incorrect." (Tr. at 149.) In addition, Officer Paden indicated that he spoke with the victim to get basic information "and then I allow the detective to go ahead and get specifics." (Tr. at 154.) According to the officer, he spoke with the victim "to get just a vague description so that I can radio it to other units." (Tr. at 154.)

{¶20} Next, Officer Mark Henson testified for appellee. Officer Henson testified that he searched appellant's automobile and found a box cutter knife and cane.

{¶21} Lastly, appellee admitted into evidence, among other things, a copy of the hospital social worker's report. In the report, the social worker indicated that the victim claimed that her "[m]ain concern was that [her] boyfriend didn't know where she was and neither did her children." Moreover, according to the social worker in the report, the victim stated that appellant forced oral sex "before she could get out of [the] car and run away." Additionally, the report denotes that appellant slapped the victim in the face and that appellant brandished a box cutter knife. However, the report does not mention appellant brandishing a cane during the incident.

{¶22} Appellant did not testify, and the parties gave closing arguments. During closing arguments, appellant's defense counsel suggested that the victim was lying and that her testimony did not make sense. In response, appellee stated during the rebuttal portion of its closing argument that the victim "gave detail about what happened to her,

who did it, and how[.]" (Tr. at 42.) Appellee also stated that "[a]ll of the testimony, physical evidence, and testimony before you * * * buttresses what [the victim] tells you." (Tr. at 41.) Moreover, appellee argued:

> * * * [The victim] has no motive to be making this up, no reason to be lying to you. She told you the truth. The inconsistencies, they are expected in a case like this, in human affairs, and they're not significant as to what happened, the truth of what happened to her that night.

(Tr. at 45.) Appellant's defense counsel did not object to the above statement.

{¶23} After deliberating for two and one-half days, the jury asked the following question:

> We've reached a verdict on one count. We are very disparate on the other two counts. What happens if we cannot reach a verdict on the remaining two counts?

{¶24} The trial court responded by giving an instruction pursuant to *State v. Howard* (1989), 42 Ohio St.3d 18. In the instruction, the trial court noted, in part:

> Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desirable that the case be decided.
>
> * * *
>
> It is your duty to decide the case if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you're convinced that it is erroneous.
>
> If there is disagreement, all jurors should reexamine their positions given that a unanimous verdict has not been reached.

(Tr. at 240-241.) Appellant's defense counsel did not object to the trial court providing the above instruction.

{¶25} Approximately one and one-half days later, the jury found appellant guilty of rape and kidnapping, but not guilty on aggravated robbery. Thus, the trial court set the case for a sexual predator hearing and for sentencing on June 13, 2003.

{¶26} At the sexual predator hearing, appellee asked the trial court to consider evidence and testimony from appellant's trial. Appellee also admitted into evidence a sentencing memorandum that detailed appellant's criminal history, which included: (1) 1983 convictions for gross sexual imposition, attempted aggravated trafficking in drugs, and attempted drug abuse; (2) 1989 convictions for drug abuse and felony theft; (3) a 1992 conviction for misdemeanor attempted drug abuse; (4) a 1993 conviction for theft; (5) a 1996 conviction for theft; (6) 1997 convictions for misdemeanor attempted drug abuse, felony receiving stolen property, felony drug trafficking, felony unauthorized use of a motor vehicle, felony failure to obey an order of a police officer, and felony receiving stolen property; (7) a 1999 misdemeanor conviction for failure to comply with an officer's order; and (8) 2001 misdemeanor convictions for unauthorized use of property and disorderly conduct. According to the sentencing memorandum, appellant received prison time for some of the above convictions.

{¶27} Next, appellee admitted into evidence documents pertaining to the 1983 gross sexual imposition conviction. The documents consisted of police reports containing statements from the victim and appellant. The documents also consisted of the indictment and guilty plea.

{¶28} According to the documents, appellant was indicted on three counts of rape, and appellant pled guilty to one count of gross sexual imposition. In the police report, the victim mentioned the following. Appellant and a female co-defendant approached the victim and took her to an apartment. At the apartment, appellant slapped the victim and told her to remove her clothes and get into bed. Appellant then forced the victim to perform fellatio on him and to engage in vaginal intercourse. Appellant also forced the victim to engage in sexual activity with the female co-defendant. At one point during the incident, appellant took a stick and threatened to beat the victim if she did not engage in the sexual activity.

{¶29} At the sexual predator hearing, appellant acknowledged that he had a "lengthy criminal history[.]" (Tr. at 254.) Ultimately, the trial court found appellant to be a sexual predator. The trial court noted that it had "no evidence that [appellant] participated in any sexual offender programming while he was in the institution after having pled guilty to the sexual offense" in 1983. (Tr. at 260-261.) The trial court also recognized that appellant used a box cutter knife and cane during the incident and, therefore, "displayed cruelty or made one or more threats of cruelty." (Tr. at 261.) Lastly, the trial court concluded that the underlying sexual assault in this case was identical to the 1983 sex offense involving a different victim.

{¶30} After the trial court made the sexual predator finding, appellant's defense counsel stated that appellant did participate in a sex offender treatment program after the 1983 sex offense. The trial court stated that it would "allow that into evidence[,]" but that the information "does not materially impact [its] decision. There are other factors as well." (Tr. at 262.)

{¶31} Next, the trial court held a sentencing hearing. The trial court merged the kidnapping into the rape conviction and sentenced appellant to ten years imprisonment on the rape conviction, which, as noted below, is the maximum prison sentence for the first-degree felony offense. The trial court concluded that, "I do not find that this was the worst form of the offense, but I do find based upon [appellant's] prior record, * * * that [appellant] poses the greatest likelihood of committing future crimes[.]" (Tr. at 282.)

{¶32} The trial court issued a judgment entry that included appellant's conviction and sentence, but did not include the sexual predator finding. Appellant appealed, but this court dismissed the appeal for lack of a final appealable order because the trial court did not journalize the sexual predator finding. *State v. Dudley*, Franklin App. No. 03AP-744, 2004-Ohio-5661.

{¶33} On January 14, 2005, the trial court held additional sexual predator and sentencing hearings. The parties agreed to have additional sexual predator and sentencing hearings "as opposed to simply amending the journal entry to reflect a finding of sexual predator." (Tr. at 3.)

{¶34} At the subsequent sexual predator hearing, the parties agreed to "[incorporate] all of the evidence that was presented at the earlier hearing into" the January 14, 2005 hearing. (Tr. at 11.) Additionally, at the January 14, 2005 hearing, appellant reiterated that he participated in a sex offender treatment program, and appellant's defense counsel confirmed that appellant had been in prison four previous times.

{¶35} The trial court proceeded to find appellant to be a sexual predator. The trial court considered appellant's assertion that he took a sex offender treatment

program, but found appellant to be a sexual predator "based upon [appellant's] prior record, based upon the behavior in this case and all the other findings that the Court made on the record at the time the original determination was made." (Tr. at 15.)

{¶36} Next, the trial court merged the kidnapping conviction into the rape conviction and sentenced appellant to the maximum sentence of ten years imprisonment. The trial court reiterated that appellant poses the greatest likelihood of committing future crimes. The trial court also concluded that appellant committed the worst form of the offense, despite having not so concluded at the original hearing.

{¶37} Appellant appeals, raising five assignments of error:

> 1. The trial court erred in giving Ronald E. Dudley the maximum sentence of incarceration for the offense of rape.
>
> 2. The trial court erred in finding Ronald E. Dudley to be a sexual predator.
>
> 3. The trial court erred in giving a so-called "dynamite" or "Howard" charge to the jury to encourage the members of the jury to reach a unanimous verdict.
>
> 4. The verdicts of guilty were against the manifest weight of the evidence.
>
> 5. The trial court committed [plain] error in failing to stop the assistant prosecuting attorney who tried the case from asserting his personal belief in his witness and vouching for her credibility.

{¶38} Appellant's first assignment of error concerns his prison sentence. As noted above, the trial court sentenced appellant to ten years imprisonment for his rape conviction. The ten-year prison sentence exceeds the minimum authorized sentence of three years for first-degree felonies and constitutes the maximum authorized sentence for first-degree felonies. R.C. 2929.14(A).

{¶39} In challenging his sentence, appellant contends that the trial court erred by imposing the maximum prison sentence for his rape conviction. R.C. 2929.14(C) authorizes a trial court to impose the maximum authorized prison sentence on defendants who "committed the worst forms of the offense" or "who pose the greatest likelihood of committing future crimes[.]" Appellant argues that his Sixth Amendment right to a jury trial prohibits a trial court from imposing the maximum prison sentence without the jury finding, or appellant admitting to, the factors in R.C. 2929.14(C).

{¶40} In support, appellant relies on *Blakely v. Washington* (2004), 542 U.S. 296; and *Apprendi v. New Jersey* (2000), 530 U.S. 466. In *Apprendi*, the United States Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. Otherwise, the sentence violates a defendant's right to a jury trial under the Sixth Amendment to the United States Constitution and Fourteenth Amendment due process guarantees. *Apprendi* at 476-478, 497. In *Blakely*, the United States Supreme Court defined " 'statutory maximum' for *Apprendi* purposes" as "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (Emphasis sic.) *Blakely* at 303.

{¶41} However, we reject appellant's contentions based on our decision in *State v. Satterwhite*, Franklin App. No. 04AP-964, 2005-Ohio-2823. In *Satterwhite*, we concluded that *Apprendi* and *Blakely* do not prohibit a trial court from imposing a maximum sentence under Ohio's felony sentencing statutes even though the sentencing

statutes do not require the jury to find, or the defendant to admit to, the applicable statutory factors that allow a trial court to impose the maximum sentence. Id. at ¶21-23.

{¶42} As the Twelfth District Court of Appeals stated, Ohio's felony sentencing statutes " 'involve guidance for determining the impact of a sentence on public protection and proportionality—determinations that have always been made by a judge in deciding fairness and necessity of a sentence. Those are decisions that have never been consigned to juries and, thus, are not governed by the Sixth and Fourteenth Amendments to the United States Constitution[,]' " the constitutional principles underlying *Blakely* and *Apprendi*. *State v. Berry*, 159 Ohio App.3d 476, 2004-Ohio-6027, at ¶40, quoting Griffin & Katz, Ohio Felony Sentencing Law (2004), 482, Section 2:22; see, also, *State v. Abdul-Mumin*, Franklin App. No. 04AP-485, 2005-Ohio-522, at ¶32 (Klatt, J., concurring) (emphasizing that "it has always been the province of the judge, not the jury, to determine the impact of a sentence on public protection and proportionality").

{¶43} Accordingly, we previously concluded that, under Ohio's felony sentencing statutes, "[a]s long as a court sentences a defendant to a prison term within the stated minimum and maximum terms permitted by law, * * * *Blakely* and *Apprendi* are not implicated." *State v. Sieng*, Franklin App. No. 04AP-556, 2005-Ohio-1003, at ¶38. Here, the trial court sentenced appellant within the standard sentencing ranges. Thus, in accordance with *Satterwhite* and *Sieng*, we conclude that *Blakely* and *Apprendi* did not preclude the trial court from imposing the maximum sentence on appellant for his rape conviction.

{¶44} We further reject appellant's contentions because his prior criminal record supports his maximum sentence, and *Apprendi* and *Blakely* specifically exclude from its holding a sentence based on a defendant's prior record. See *Apprendi* at 490; *Blakely* at 301, quoting *Apprendi* at 490. A defendant's prior record signifies recidivism, a "traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Jones v. United States* (1999), 526 U.S. 227, 249, quoting *Almendarez-Torres v. United States* (1998), 523 U.S. 224, 245.

{¶45} Consequently, we previously concluded that a trial court did not implicate *Blakely* and *Apprendi* by relying on a defendant's prior record when imposing a maximum sentence on the R.C. 2929.14(C) factor concerning a defendant posing the "greatest likelihood of committing future crimes[.]" *Satterwhite* at ¶24-25.

{¶46} Similarly, in *State v. Lowery*, 160 Ohio App.3d 138, 2005-Ohio-1181, at ¶43, 46, the First District Court of Appeals held that a trial court did not implicate *Blakely* and *Apprendi* by relying on a defendant's prior record when imposing a maximum sentence based on a defendant posing the "greatest likelihood of committing future crimes" pursuant to R.C. 2929.14(C). According to the appellate court:

> The court's finding of a high risk of recidivism, given what it described as [the defendant's] "long history of criminal convictions," is significant because both *Apprendi* and *Blakely* specifically allow a sentencing court to consider a defendant's prior convictions without resubmitting the fact of those convictions to the jury. * * *

Lowery at ¶43. Thus, in upholding the R.C. 2929.14(C) finding, the appellate court recognized that the prior record exception to *Blakely* and *Apprendi* applies to "sentencing factors that are concerned with the defendant's potential for recidivism based upon a prior criminal history." *Lowery* at ¶44.

{¶47} Despite the above holdings in *Satterwhite* and *Lowery*, appellant relies on *Shepard v. United States* (2005), ___ U.S. ___, 125 S.Ct. 1254, to argue that the trial court could not rely upon appellant's prior record to make the finding under R.C. 2929.14(C) that appellant poses the "greatest likelihood of committing future crimes[.]" In support, at oral argument, appellant referenced a statement in *Shepard* wherein the United States Supreme Court concluded that the "fact about a prior conviction" under review in *Shepard* was "too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to * * * *Apprendi*" and a defendant's Sixth Amendment right to a jury trial. *Shepard* at 1262.

{¶48} However, *Shepard* is inapposite. *Shepard* involved the prosecution seeking to enhance a defendant's sentence for his federal possessing a firearm conviction. Id. at 1257. The prosecution sought the enhancement under Section 924(e), Title 19, U.S. Code, the Armed Career Criminal Act. *Shepard* at 1257. The Armed Career Criminal Act mandates a sentence of at least 15 years imprisonment for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. Id.

{¶49} The prosecution sought to enhance the defendant's sentence under the Armed Career Criminal Act due to the defendant pleading guilty to four Massachusetts burglary offenses. Id. The United States Supreme Court first indicated that "[t]he [Armed Career Criminal Act] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle." Id. However, the court recognized that, in the case under review, "the offenses charged in [the] state complaints were broader than generic burglary[.]" Id. at 1258.

{¶50} Next, the United States Supreme Court recognized that the prosecution urged the trial court "to examine reports submitted by the police with applications for issuance of the complaints, as a way of telling whether [the defendant's] guilty pleas went to generic burglaries notwithstanding the broader descriptions of the offenses in the complaints, descriptions that tracked the more expansive definition in Massachusetts law." Id. However, according to the Untied States Supreme Court, the trial court could not review such evidence to conclude whether the defendant's convictions constituted generic burglary for purposes of the Armed Career Criminal Act. Id. at 1262-1263. In so noting, the court reiterated the holding in *Apprendi* that "any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." Id. at 1262. According to the court, "[w]hile the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to * * * *Apprendi*[.]" Id.

{¶51} Here, unlike *Shepard*, the trial court did not look through inconclusive police records to determine what types of crimes appellant previously committed. Rather, the prosecution provided the trial court with appellant's criminal record, and appellant and his counsel confirmed that appellant had a criminal history. Thus, as we concluded above, appellant's prior criminal record triggered the exclusion in *Apprendi* and *Blakely*, and the trial court did not sentence appellant in contravention of *Apprendi* and *Blakely* when it utilized appellant's prior criminal record to find, under R.C. 2929.14(C), that appellant poses the "greatest likelihood of committing future crimes[.]"

{¶52} Lastly, appellant argues that we should reverse his sentence because the trial court found that appellant committed the worst form of the offense at the January 14, 2005 sentencing hearing after previously concluding at the June 13, 2003 sentencing hearing that it did "not find that this was the worst form of the offense[.]" (Tr. at 282.) While appellant contends that the above findings conflict, appellant makes no argument that the record does not support the trial court's subsequent conclusion that appellant committed the worst form of the offense. Regardless, we uphold appellant's maximum sentence because the trial court provided a separate, legitimate ground for imposing the maximum sentence when it concluded that appellant poses the "greatest likelihood of committing future crimes[.]" See *Lowery* at ¶46.

{¶53} Therefore, based on the above, we conclude that the trial court did not err by imposing a maximum prison sentence for appellant's rape conviction. As such, we overrule appellant's first assignment of error.

{¶54} In his second assignment of error, appellant asserts that the trial court erred in finding him to be a sexual predator. We disagree.

{¶55} In order for a trial court to find an offender to be a sexual predator, the prosecution must establish by clear and convincing evidence that the offender has been convicted of, or pled guilty to, a sexually oriented offense and is likely to commit one or more sexually oriented offenses in the future. R.C. 2950.01(E)(1); 2950.09(B)(3); *State v. Eppinger* (2001), 91 Ohio St.3d 158, 163. Clear and convincing evidence is:

> * * * "[T]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable

> doubt as in criminal cases. It does not mean clear and unequivocal." * * *

Id. at 164, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 477. In making a sexual predator determination, the trial court considers "all relevant factors, including, but not limited to," those enumerated in R.C. 2950.09(B)(3). *Eppinger* at 164.

{¶56} Here, appellant does not dispute that he was convicted of a sexually oriented offense, but contends that the evidence fails to establish his likelihood of committing future sex offenses. However, the circumstances of the rape offense and appellant's background evoke several factors under R.C. 2950.09(B)(3) to establish by clear and convincing evidence that appellant is a sexual predator.

{¶57} Appellant "displayed cruelty" and "threats of cruelty" when committing the rape, factors under R.C. 2950.09(B)(3)(i). Specifically, appellant brandished a box cutter knife and put it to the victim's face. Appellant also threatened the victim with a cane, causing the victim to think that appellant was going to beat her.

{¶58} We further note that appellant used deception and deceit to get the victim to follow him around the neighborhood to a dead-end street and, ultimately, into his automobile. Such conduct further mitigates in favor of the trial court's sexual predator finding. See *State v. Dickason* (Feb. 2, 1999), Stark App. No. 1997CA00370.

{¶59} Next, we conclude that appellant's criminal record, including, but not limited to, the 1983 gross sexual imposition conviction, evokes R.C. 2950.09(B)(3)(b) and is another factor that establishes appellant's recidivism and supports the trial court's sexual predator determination. *State v. Stanley* (July 12, 2001), Franklin App. No. 00AP-1230; *State v. Jackson*, Franklin App. No. 05AP-101, 2005-Ohio-5094, at ¶38; and *Kansas v. Hendricks* (1997), 521 U.S. 346, 358.

{¶60} Additionally, we find significant that the gross sexual imposition offense bears similarities to the underlying sex offense. Specifically, in both sex offenses, appellant approached a woman, took her to a secluded place, displayed acts of cruelty, forced the woman to perform fellatio, and engaged in fantasies regarding the victim having sexual encounters with other women. Courts may look to the facts of non-related sex abuse to determine that a defendant is likely to commit one or more sexually oriented offenses in the future. See *State v. McElfresh* (July 14, 2000), Washington App. No. 99CA36.

{¶61} Nonetheless, in challenging the trial court's decision to find appellant to be a sexual predator, appellant argues that the trial court did not properly consider those R.C. 2950.09(B)(3) factors that he contends mitigate against the sexual predator finding. For instance, appellant notes that the victim was an adult and that the offense only involved one victim with no demonstrated pattern of abuse with the victim. Likewise, appellant states that he did not use alcohol or drugs to impair the victim and that neither the victim nor appellant displayed a mental disability.

{¶62} However, the trial court may place as much or as little weight on any of the R.C. 2950.09(B)(3) factors as it deems relevant. *State v. McDonald*, Franklin App. No. 03AP-853, 2004-Ohio-2571, at ¶8. Indeed, "[n]o requisite number of these factors must apply before an offender is found to be a sexual predator and the trial court may place as much or as little weight on any of the factors as it deems to be relevant; the test is not a balancing one." Id. Even one or two factors are sufficient as long as the evidence of likely recidivism is clear and convincing. Id.; *State v. Hardie* (2001), 141 Ohio App.3d 1, 5. Accordingly, here, we need not disturb the trial court's sexual predator finding on

the existence of the above mitigating factors, given the clear and convincing evidence that demonstrates that appellant is likely to commit one or more sexually oriented offenses in the future.

{¶63} For these same reasons, we reject appellant's contention that the trial court did not properly consider appellant's participation in a sex offender program as another mitigating factor. Indeed, we have previously held that:

> Whether appellant participated in available programs for sexual offenders is a factor to consider, but it may be weighed against other evidence which strongly indicates appellant's propensity to commit future sex offenses. A trial court acts within its discretion when it finds the individual to be a sexual predator based on clear and convincing evidence, even though the individual has completed various counseling programs, including a sex offender program * * *.

State v. Ray (May 3, 2001), Franklin App. No. 00AP-1122, citing *State v. King* (Mar. 7, 2000), Franklin App. No. 99AP-597.

{¶64} Again, based on the above, appellee presented sufficient evidence for the trial court to find by clear and convincing evidence that appellant is likely to commit future sexually oriented offenses. Therefore, we conclude that the trial court properly adjudicated appellant to be a sexual predator. Thus, we overrule appellant's second assignment of error.

{¶65} In his third assignment of error, appellant argues that the trial court erred by providing a jury instruction pursuant to *State v. Howard* (1989), 42 Ohio St.3d 18. Trial courts provide the *Howard* charge when " 'a determination has been made that the jury is deadlocked in its decision.' " *State v. Fannin* (Dec. 12, 1995), Franklin App. No. 95APA05-560, quoting *State v. Minnis* (Feb. 11, 1992), Franklin App. No. 91AP-844. Here, as noted above, the trial court provided the *Howard* charge after the jury indicated

that they were "very disparate" on two counts and asked what would happen if it could not reach a verdict on those counts.

{¶66} Because appellant did not object at trial to the trial court's decision to give the *Howard* charge, appellant waived all but plain error. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Under Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." "By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial." *Barnes* at 27. Under the plain error standard:

> * * * 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." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial. * * *

Barnes at 27.

{¶67} Appellant argues that the *Howard* charge was unnecessary because the jury merely asked what would happen if it could not reach a verdict, and the jury did not specifically state that they were deadlocked. However, there is " 'no formula provided to determine exactly when a jury is deadlocked and exactly when the supplemental charge from *Howard* should be read to the jury.' " *Fannin* quoting *Minnis*. Rather, the trial court "has discretion to determine when the charge should be given." *Fannin.*

{¶68} In *Fannin*, the jury asked the trial court: " 'Can we have a "hung jury" on one or more (but not all) counts?' " In response, the trial court answered, " 'yes' " and proceeded to give the *Howard* charge. The defendant objected, claiming that the jury

provided no indication that it was deadlocked. On appeal, we affirmed the trial court's decision to provide the *Howard* charge because "the jury indicated either it was deadlocked, or possibly so, when it asked the court if they could have a 'hung jury' on one or more but not all counts." Thus, we concluded that "[a] trial court does not abuse its discretion when it issues a *Howard* charge once the jury so indicates, even though the jury does not expressly state that it is deadlocked."

{¶69} Here, like *Fannin,* the trial court acted within its discretion by concluding that the jury was deadlocked. The jury had been deliberating for two and one-half days and, ultimately, told the trial court that it was "disparate" on two counts and inquired about not being able to reach a verdict on those counts.

{¶70} Next, appellant argues that the trial court coerced the jury into reaching a verdict by providing the *Howard* charge. However, the Ohio Supreme Court has upheld the use of the *Howard* charge, specifically finding that the charge is not coercive. *State v. Houston*, Franklin App. No. 04AP-875, 2005-Ohio-4249, at ¶41; *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, at ¶128.

{¶71} Nonetheless, appellant contends that the *Howard* charge was coercive here because the charge reinforced "misstatements" that appellee made during voir dire concerning the jury's obligation to unanimously agree to a verdict:

> * * * [W]hat the good judge is going to instruct you and what we ask you to do, all of you, is to make a group decision. Right or wrong, at the end of all of this you're going to take an oath to follow the law and reach a decision and that is either going to be unanimously guilty or unanimously not guilty. * * *

(Tr. at 112.)

{¶72} Yet, the *Howard* charge did not reinforce any notions that the jury had no option but to unanimously agree to a verdict. The *Howard* charge informed the jury that: (1) "the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows"; and (2) "[i]t is your duty to decide the case *if* you can *conscientiously* do so." (Emphasis added; Tr. at 240-241.) Thus, the *Howard* charge "encourage[s] a unanimous verdict only when one can conscientiously be reached, leaving open the possibility of a hung jury and resulting mistrial[.]" *State v. Sanders*, Butler App. No. CA2003-12-311, 2004-Ohio-6320, at ¶26, citing *State v. Barrett*, Scioto App. No. 03CA2889, 2004-Ohio-2064. Accordingly, we reject appellant's contention that the trial court coerced the jury into reaching a verdict when it provided the *Howard* charge.

{¶73} Therefore, based on the above, we conclude that the trial court did not commit plain error by giving the jury the *Howard* charge. *Barnes* at 27. As such, we overrule appellant's third assignment of error.

{¶74} In his fourth assignment of error, appellant claims that the rape and kidnapping jury verdicts are against the manifest weight of the evidence. Again, we disagree.

{¶75} In determining whether a verdict is against the manifest of the evidence, we sit as a "thirteenth juror." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine " 'whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial

ordered.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Columbus v. Henry* (1995), 105 Ohio App.3d 545, 547-548. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, Franklin App. No. 02AP-11, 2002-Ohio-5345, at ¶10, quoting *State v. Long* (Feb. 6, 1997), Franklin App. No. 96APA04-511.

{¶76} As noted above, the jury found appellant guilty of rape, in violation of R.C. 2907.02, which states that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." The jury also found appellant guilty of kidnapping, in violation of R.C. 2905.01, which states that:

> (A) No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall remove another from the place where the other person is found or restrain the liberty of the other person, for any of the following purposes:
>
> * * *
>
> (4) To engage in sexual activity * * * with the victim against the victim's will[.]

{¶77} In arguing that the above verdicts are against the manifest weight of the evidence, appellant first contends that "[n]o bodily fluids supported [the victim's] claims" of forced sexual activity. However, the absence of bodily fluids does not negate the victim's claims of rape and kidnapping, and do not undermine the jury verdicts,

especially given the victim's testimony that appellant did not ejaculate during the sexual encounter.

{¶78} Next, appellant argues that the victim's injuries to her knees do not support her testimony because she could have also received such injuries through a voluntary sexual encounter. However, it was within the jury's province to conclude that the injuries occurred from appellant raping and kidnapping the victim, given that Nurse Minke testified that the victim's injuries were consistent with what the victim told her had occurred. We further acknowledge that the jury could properly conclude that the victim sustained the injuries through rape and kidnapping upon considering evidence that corroborated the victim's claims. As an example, law enforcement found, in appellant's automobile, the cane and box cutter that the victim testified appellant used during the incident. Likewise, the victim's own demeanor after the incident supported her claims that she was the victim of rape and kidnapping. Officer Paden testified that the victim appeared upset and traumatized after the incident, and Bunch testified that the victim appeared nervous as she cried for help.

{¶79} Additionally, appellant contends that the jury verdicts are against the manifest weight of the evidence because the victim gave inconsistent accounts of the incident. In his merit and reply briefs, appellant does not specify the inconsistencies. However, we note the following: (1) the victim testified that appellant threatened her with a cane, and the victim mentioned the cane to law enforcement, but the victim did not tell Nurse Minke or the hospital social worker about the cane; (2) the victim testified on cross-examination that appellant slapped her, and the victim told the hospital social worker that appellant slapped her, but the victim did not mention the slap to law

enforcement or Nurse Minke; and (3) the victim's testimony about the time frame was inconsistent with the time frame the victim gave to law enforcement, and when the victim provided a time frame to law enforcement, the victim was "disoriented as to her times as to when this did occur." (Tr. at 148.) We further recognize that the victim gave inconsistent accounts as to when she actually fled from appellant. Specifically, the victim told Nurse Minke that she "told [appellant she] had money in [her] car. [Appellant] wanted [her] to get on the car floor, but he left the car open, and * * * she ultimately ran." (Tr. at 122.) However, the victim testified that she did not flee until she got out of the car and gave appellant money from her automobile.

{¶80} Nonetheless, we conclude that the above inconsistencies do not undermine the victim's testimony or demonstrate that the jury lost its way in finding appellant guilty of rape and kidnapping. First, in regards to the victim not telling law enforcement about the slap, we note that Officer Paden testified that he did not get into detail with the victim about what occurred and that he wanted basic information and "just a vague description so that [he could] radio it to other units." (Tr. at 154.) Likewise, concerning the victim being "disoriented as to her times" when talking with law enforcement, Officer Paden testified that "[i]t is not uncommon in my experience that whenever a person has been involved in a situation to where they're excited that the time is incorrect." (Tr. at 148-149.) Similarly, as to the victim providing law enforcement and the jury an inconsistent time frame, the victim explained at trial that she was merely estimating times and that she was not wearing a watch. Moreover, overall, we conclude that the above inconsistencies do not undermine the victim's testimony or the jury's verdicts on rape and kidnapping, given the above-noted evidence that supports the

victim's version of events and given the victim's unequivocal claim that appellant forced her to perform fellatio and detained her in his automobile while committing the offense.

{¶81} Lastly, appellant argues that the jury verdicts are against the manifest weight of the evidence because the victim acknowledged to the hospital social worker "that her primary concern was explaining to her boyfriend and her children where she had been for so long." However, nothing in this statement suggests that appellant did not commit rape and kidnapping, especially considering that the victim also told the social worker that appellant forced her to perform fellatio and indicated that appellant detained her in the automobile while committing the offense.

{¶82} Based on the above, we conclude that the rape and kidnapping jury verdicts are not against the manifest weight of the evidence. As such, we overrule appellant's fourth assignment of error.

{¶83} Appellant's fifth assignment of error concerns appellee stating during the rebuttal portion of its closing argument:

> * * * [The victim] has no motive to be making this up, no reason to be lying to you. She told you the truth. * * *

(Tr. at 45.) Appellant contends that appellee committed prosecutorial misconduct by vouching for the victim's credibility and, as a result, the trial court erred by allowing the statement. We disagree.

{¶84} As appellant concedes, we review appellant's assertions under the plain error standard because appellant did not object to the above statement. *Barnes* at 27; *State v. Williams* (1997), 79 Ohio St.3d 1, 12 (applying the plain error standard to a defendant's claim that the prosecutor committed prosecutorial misconduct by vouching for a witness' credibility).

{¶85} It is improper for an attorney to express his or her personal belief or opinion as to the credibility of a witness. *Williams* at 12. Thus, the prosecutor is not permitted to personally vouch for the veracity of a prosecutor's witness. *State v. Durbin*, Greene App. No. 2003 CA 53, 2004-Ohio-2201, at ¶27. Alternatively, a prosecutor may refer to a witness' credibility so long as the reference "is rooted in the evidence." Id.

{¶86} In support of his contention that appellee improperly vouched for the victim's credibility, appellant relies on our previous decision in *State v. Banks* (1986), 31 Ohio App.3d 57. In *Banks*, the prosecutor implied during closing argument that defense counsel did not believe in his own case, but that the prosecutor believed in its case. Id. at 60. We concluded that the comment "was so egregious as to require reversal" of the defendant's convictions. Id. at 61.

{¶87} Appellant also relies on *State v. Burke* (May 12, 2000), Lucas App. No. L-98-1166. In *Burke*, the prosecutor stated during closing argument: " '[I]f that's not aiding and abetting, assisting, encouraging, strengthening and all those other things that the law tells you you can't do, I don't know what is.' " Additionally, the prosecutor argued: " '[I]f you don't think that we proved our case beyond a reasonable doubt, let him go out the doors. But look over your shoulder if you do.' " The Sixth District Court of Appeals concluded that the above closing remarks in isolation did not rise to the level of reversible error, but, taken together, rose to the level of reversible prosecutorial misconduct.

{¶88} Appellant's reliance on *Burke* and *Banks* is misplaced. In *Banks*, the prosecutor specifically expressed a personal opinion about the case and the opinion was not "rooted in the evidence." In *Burke*, a series of improper statements made a

prosecutor's closing argument prejudicial. Conversely, here, we conclude that appellee's isolated remark is akin to statements that the Second District Court of Appeals deemed proper in *Durbin*. In *Durbin*, the prosecutor stated during closing argument that "[i]n my opinion, it is not probable" that the prosecutor's witness lied, as the defense claimed. Id. at ¶24. The prosecutor further stated during rebuttal argument: " 'I could not believe that [the prosecutor's witness] lied to you today. * * * I'll just reiterate, she testified on the stand, very clearly, that there was not a doubt in her mind that she recognized [the defendant.]' " Id. at ¶26. The appellate court concluded that the prosecutor's comments were not improper credibility vouching. Id. at ¶28-29. The appellate court reasoned that the prosecutor's statements constituted a permissible "assessment of the evidence[.]" Id. at ¶28.

{¶89} Like *Durbin*, appellee argued against the defense's assertion that the victim had a motive to lie. Specifically, like *Durbin*, before appellee made the above contested remark, appellee discussed how the victim "gave detail about what happened to her, who did it, and how" and argued that inconsistencies in the victim's testimony were not significant. (Tr. at 42.) Appellee also stated that the testimony and physical evidence supported the victim's version of events. Thus, pursuant to *Durbin*, appellee's remark that the victim was not lying and that she had no motive to lie was an "assessment of the evidence" and "rooted in the evidence." As such, the remark did not constitute improper personal vouching and did not rise to the level of prosecutorial misconduct.

{¶90} Therefore, we conclude that the trial court did not commit error, let alone plain error, by allowing appellee to make the above-noted remarks during the rebuttal

portion of its closing argument. *Barnes* at 27. Accordingly, we overrule appellant's fifth assignment of error.

{¶91} In summary, we overrule appellant's first, second, third, fourth, and fifth assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN, P.J., and McGRATH, J., concur.
