[Cite as *State v. Poling*, 2006-Ohio-1008.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2004-P-0044**
- vs -	:	
GREGORY Y. POLING,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2004 CR 0051.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 466 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

George G. Keith, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, OH 44221-0374 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Gregory Y. Poling, appeals from judgment entries of the Portage County Court of Common Pleas, finding him guilty of multiple counts of rape, sexual battery, unlawful sexual conduct with a minor, and gross sexual imposition, and sentencing him to an aggregate prison term of 35 years. For the reasons that follow, we reverse the judgment of the trial court and remand the matter for a new trial.

{¶2} By way of background, appellant is the biological father of the alleged victim. Her date of birth is April 23, 1989. The incidents which resulted in appellant's conviction occurred from the winter of 2001 until the fall of 2003. Thus, the alleged victim was eleven to fourteen years old when the incidents allegedly occurred. During this time, appellant, his wife, Denise Poling ("Denise") — the victim's biological mother — the victim, and her older brother resided in Portage County, Ohio.

{¶3} On January 30, 2004, appellant was indicted on the following counts: (1) three counts of rape, in violation of R.C. 2907.02(A)(1), each a first degree felony; (2) three counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4) and (B), each a third degree felony; (4) nine counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04(A) and (B)(3), each a third degree felony; and (5) twelve counts of sexual battery, in violation of R.C. 2907.03(A)(5), each a third degree felony.

{¶4} At his arraignment, appellant pleaded not guilty to the aforementioned charges. Shortly thereafter, the court granted the state's motion to dismiss one count of sexual battery and one count of unlawful sexual conduct with a minor.

{¶5} This matter ultimately proceeded to a jury trial. Testimony at trial revealed that on September 29, 2003, the Portage County Sheriff's Department received a phone complaint from appellant regarding an unruly child at his residence. Appellant informed a deputy responding to the complaint that the unruly child was his daughter, the alleged victim.

{¶6} The deputy and the alleged victim discussed the situation in his police car. At this time, the alleged victim told the deputy that appellant had engaged in multiple instances of sexual conduct and sexual contact with her. The deputy then contacted

Portage County Job and Family Services ("PCJFS"). After speaking with appellant, Denise, and the alleged victim, PCJFS assumed temporary custody of the alleged victim.

{¶7} During trial, the alleged victim provided testimony regarding ten separate incidents of appellant engaging in sexual conduct and sexual contact with her. She testified that the first incident occurred when she was eleven years old in the winter of 2001. She stated that the final incident occurred when she was more than thirteen years old in the fall of 2003. The victim disclosed rather sketchy details involving certain incidents, and could not recall virtually any of the details of others. Generally, she provided a loose time frame for each incident, the place where it transpired, the manner of the occurrence, and appellant's conduct during the incident. The only evidence regarding any of these incidents was the testimony of the alleged victim, and that of a girlfriend and that friend's mother, to whom the alleged victim spoke at Christmas 2002. No physical evidence of abuse was introduced. Indeed, the testimony of a state witness revealed that the girl's hymen was intact.

{¶8} Following the close of the state's case, appellant moved for an acquittal pursuant to Crim.R. 29(A). The courted granted an acquittal as to one count of unlawful sexual conduct with a minor, one count of gross sexual imposition, and one count of sexual battery. The remaining twenty-two counts were determined by the jury.[1] After deliberations, the jury returned verdicts of guilty on the remaining twenty-two counts. The court issued a judgment entry convicting appellant of these charges.

1. Appellant renewed his motion for acquittal as to the remaining twenty-two counts after the close of all evidence.

{¶9} Following appellant's conviction, the trial court held a sentencing hearing and issued a judgment entry of sentence. The court sentenced appellant as follows: three seven-year terms of imprisonment on three counts of rape, with the terms to run consecutively; two four-year terms of imprisonment on two counts of gross sexual imposition, with these terms running concurrently to the rape terms; and seven two-year terms of imprisonment on seven counts of sexual battery, with these terms to run consecutively to each other and the rape terms.[2] Appellant's sentence resulted in an aggregate prison term of 35 years.

{¶10} From these judgments, appellant filed a timely notice of appeal and now sets forth the following five assignments of error for our consideration:

{¶11} "[1.] The prosecution in this matter engaged in a pervasive pattern of misconduct throughout the proceedings which combined to deprive the appellant of his right to a fair trial.

{¶12} "[2.] The trial court erred to the prejudice of the appellant in failing to grant the appellant's motion for a mistrial.

{¶13} "[3.] The trial court erred in failing to grant the appellant's motion for judgment of acquittal on all charges, as the evidence presented was not legally sufficient to support a conviction.

{¶14} "[4.] The appellant's convictions are against the manifest weight of the evidence.

{¶15} "[5.] The trial court erred in imposing a thirty-five year prison sentence upon the appellant."

2. When sentencing appellant, the court consolidated many of the counts as allied offenses of similar import.

{¶16} Under his first assignment of error, appellant argues that he was denied a fair trial due to prosecutorial misconduct. Appellant maintains that various instances of misconduct occurred during the prosecutor's opening and closing statements. He also contends that the prosecutor's multiple leading questions were misconduct.

{¶17} To make a finding of prosecutorial misconduct, a reviewing court must determine whether the challenged statements were improper, and if so, whether the remarks affected the defendant's substantial rights. *State v. Smith*, 87 Ohio St.3d 424, 442, 2000-Ohio-450. A conviction will not be reversed because of prosecutorial misconduct unless it so taints the proceedings that a defendant is deprived of a fair trial. Id. We hold that in this case, appellant was deprived of a fair trial.

{¶18} First, appellant argues that, during the state's opening statement, the prosecutor made reference to evidence of other bad acts beyond those appellant had been charged with, in contradiction to Evid.R. 404(B). Appellant had requested, and the trial court granted, a motion in limine regarding other acts prior to opening statements. Appellant directs our attention to the following remark made by the prosecutor during opening statement:

{¶19} "*** And those charges, some of them are based upon how old [the alleged victim] was at the time she can remember this incident occurred and there is a difference between 12 and under age 13 and above and for purposes of this trial the charges that were charged in this case that [the alleged victim] was best able to remember details about were - ***."

{¶20} Appellant's counsel objected to this statement, arguing that the phrase "was best able to remember details about" suggested evidence of other bad acts. The

trial court warned the prosecution and overruled the objection. Immediately thereafter, despite the court's admonishment, the prosecutor told the jury:

{¶21} "Specifically, when you get your instructions in this case [the victim's] going to testify to you and I'm going to ask her about 11 specific instances *beginning at a time period she can best remember[.]*" (Emphasis added.)

{¶22} Evid.R. 404(B) is to be strictly construed against the state. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194. Herein, appellant's counsel objected to the clear implication of "other acts" evidence made by the prosecutor, thus preserving the issue for appeal. *State v. Davis* (1991), 62 Ohio St.3d 326, 337. Then, the trial court having overruled the objection — while nevertheless warning the prosecutor — a similar reference was immediately made. Ultimately no evidence of other bad acts was introduced at trial, so this portion of appellant's first assignment of error is not well-taken. And yet, the incident foreshadows the problem posed by this trial, i.e., the relentless "piling on" of questionable trial tactics by the prosecution.

{¶23} Next, appellant argues that the prosecutor's persistent use of leading questions resulted in prosecutorial misconduct. This portion of appellant's first assignment of error has merit.

{¶24} Evid.R. 611(C) provides that leading questions cannot be used on direct examination of a witness "except as may be necessary to develop his testimony." The exception of Evid.R. 611(C) "is quite broad and places the limits upon the use of leading questions on direct examination within the sound discretion of the trial court." *State v. Lewis* (1982), 4 Ohio App.3d 275, 278.

{¶25} With respect to the direct examination of minor sex abuse victims, it is well-established that "[a] prosecutor may ask leading questions of a minor victim to establish the manner in which he or she has been specifically abused *** and to pinpoint specific details and times." *State v. Rodrigues* (Mar. 26, 1996), 10th Dist. No. 95APA06-683, at 13, citing *State v. Madden* (1984), 15 Ohio App.3d 130, 133.

{¶26} Nevertheless, there is some limit upon the use of leading questions in these situations. Thus, abuse of discretion was not found when the trial court allowed "limited" use of leading questions with a twelve-year old, particularly since these "were generally followed with other questions which required the girl to provide additional information." *State v. DeBlasis*, 8th Dist. No. 81126, 2004-Ohio-2843, at ¶45. In *Madden*, the minor victims were an eight-year old girl and an eleven-year old, mentally-challenged boy. Id. at 130-135. In finding no reversible error in the use of leading questions, the Twelfth District relied on the decision of the Ohio Supreme Court in *State v. Holt* (1969), 17 Ohio St.2d 81, 83, wherein the use of leading questions with a seven-year old rape victim was approved.

{¶27} In the case sub judice, we have reviewed the testimony elicited by the state from its witnesses, line by line. The state called eleven witnesses. Leading questions, often supplying testimony, were asked of eight witnesses. These questions, with their answers, often formed a substantial part of the witness' performance. The prosecution would persist in leading, following objections (often sustained) by the trial court. The prosecution did this with mature, experienced witnesses, such as Detective Hillegas of the Portage County Sheriff's Department. It did this in questioning its own

investigator, Ron Craig. It did this with Denise, the victim's mother, providing her with an answer following a sustained objection.

{¶28} In this case, the direct examination of the alleged victim did not contain a "limited" number of leading questions, buttressed by information elicited in the normal manner. *DeBlasis*, supra, ¶45. Rather, it was examination by leading, and providing the witness with the answers sought.

{¶29} Defense counsel did not object to the balance of the improper questions posed by the prosecution. Generally, this results in waiver of the claimed error on appeal, absent plain error. Cf. *State v. Lott* (1990), 51 Ohio St.3d 160, 167. Plain error exists when it is clear that a defendant would not have been convicted absent the offending conduct. *State v. Jenks* (1991), 61 Ohio St.3d 259, 282. Plain error is a doctrine to be applied with forbearance. But in this case, it exists. The prosecution relied so heavily on leading its witnesses, and supplying them with answers, that we cannot see how appellant's conviction could otherwise have been obtained.

{¶30} The prosecution cannot employ trial tactics requiring defense counsel to become a "jack-in-the-box," popping up every third minute to object, in order to create a record on appeal, when the purpose of our criminal justice system is, principally, to provide a fair trial in the first instance. It is notable, in similar vein, that when appellant's counsel moved for a mistrial, at sidebar, on the basis of the prosecution's leading its witnesses, the trial court felt compelled to note in front of the jury, that it had sustained appellant's objections to leading questions, and the prosecutor stated that he could vouchsafe for that. This incident is tending toward the conduct so thoroughly

disapproved by the Supreme Court in *State v. Keenan* (1993), 66 Ohio St.3d 402, 406-407.

{¶31} The cumulative effect doctrine is also applicable to the prosecution's questioning in this case. "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed when the cumulative effect of the error deprives a defendant of the constitutional right to a fair trial." *DeMarco* at paragraph two of the syllabus. Of course, the mere number of errors does not bring the cumulative effect doctrine into play. *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶211. However, in this case, it is not the number of improper questions asked by the prosecution which is at issue; it is the effect of relying on such questions, and the answers thereto, in proving the state's case. Once again, remove these from the record, and it ceases to exist.

{¶32} Appellant also cites to portions of the prosecutor's closing statement as evidence of prosecutorial misconduct. Specifically, appellant argues that the prosecutor engaged in misconduct during the closing statement by expressing his own personal beliefs and by mentioning facts not in evidence.[3]

{¶33} At the outset, we note that appellant failed to object to the prosecutor's closing remarks. When a defendant fails to object to the prosecutor's remarks made during closing arguments, a plain error analysis under Crim.R. 52(B) is required. *State v. Entze*, 11th Dist. No. 2003-P-0018, 2004-Ohio-5321, at ¶40. "Plain error does not

3. Appellant's argument also states that the prosecutor engaged in similar misconduct during the opening statement. However, appellant fails to direct our attention to a specific example of such misconduct during the opening statement, and our own review of the opening statement fails to reveal any misconduct.

exist unless, but for the error, the outcome at trial would have been different." *Jenks* at 282.

{¶34} "*** [T]he prosecution is entitled to a certain degree of latitude in summation ***." *State v. Liberatore* (1982), 69 Ohio St.2d 583, 589. A prosecutor may comment upon the evidence in his closing argument and state the appropriate conclusions to be drawn therefrom. *State v. Kish*, 11th Dist. No. 2001-L-014, 2002-Ohio-7130, at ¶52. However, prosecutors "may not express their personal beliefs or opinions regarding the guilt of the accused, and they may not allude to matters not supported by admissible evidence." *Lott* at 166. Comments not derivative of the evidence, but rather reaching a conclusion about the merits of the evidence, are "unconstitutionally poaching on the sacred preserves of the factfinder." *State v. Hale*, 11th Dist. No. 2003-P-0075, 2004-Ohio-6943, at ¶50.

{¶35} Appellant notes the following portion of the prosecution's closing statement: "I argue to you that her [the alleged victim's] testimony is the truth. She could have had opportunities up there to demonize her father. She could have had opportunities up there to create and fabricate and I don't — I don't believe any of this evidence or the testimony of the evidence in this case, Ladies and Gentlemen, has shown you she's done that." The foregoing is on the precipice of plain error. The prosecutor, in effect, told the jury his chief witness was credible and telling the truth — then sought to bolster the assertion with reference to what she did not state.

{¶36} However, what tips the prosecution's closing statement from the precipice of admissibility, into the slough of reversal, is the assertion that the alleged victim testified that the final instance of abuse, on or about September 29, 2003, involved a gift

of $60.00 from appellant, for the alleged victim's homecoming dance dress, in return for sex. This is simply not the evidence adduced at trial. Regarding an entirely separate incident, the alleged victim asserted that she was required to have sex in order to visit with friends. "'Where opinions [on guilt] are expressed on facts outside the evidence, or are predicated on inferences based on facts outside the evidence, such opinions have not been countenanced and the judgments in those cases have been reversed upon appeal.'" (Citation omitted.) *Lott* at 166. Accordingly, appellant's assertion that the closing statement of the prosecution constituted misconduct has merit.

{¶37} Appellant's first assignment of error is well-taken.

{¶38} Appellant's second assignment of error, that the trial court erred in not granting his motion for mistrial, is also well-taken. As was discussed above, the prosecution's misuse of leading questions, effectively supplying answers to its witnesses, denied appellant a fair trial, whether analyzed under prosecutorial misconduct and plain error analysis, or under the cumulative effect doctrine.

{¶39} In view of our disposition of appellant's first two assignments of error, the other three are moot, and we decline to reach them.

{¶40} Appellant's conviction is reversed, and this case remanded for new trial.

WILLIAM M. O'NEILL, J., concurs,

DONALD R. FORD, P.J., dissents with Dissenting Opinion.

DONALD R. FORD, J., dissents with Dissenting Opinion.

{¶41} I respectfully dissent from the majority's opinion and conclusion in this matter.

{¶42} At the outset of the majority opinion, it indicates that the victim involved here "disclosed rather sketchy details involving certain incidents and could not recall virtually any of the details of others" and then proceeds to state that the victim provided loose time frames for each incident where alleged sexual encounters transpired, the manner of their occurrence, and appellant's conduct during such sexual acts.

{¶43} This writer has closely scrutinized the entire transcript in this case. I would indicate from such examination that the victim's testimony regarding the ten incidents, which are the subject of the charges involved in this case, were recanted by her with respect to the expressed sexual acts in more than sufficient detail as to what occurred in each of those events, and she graphically discussed the manner in which appellant engaged in sexual acts with her.

{¶44} For example, she testified that the first sexual encounter with appellant occurred in their home during the winter of 2000-2001. She indicated that she was getting ready for school and was watching the weather channel at about 6:30 a.m., and further stated that her mother was at work and her brother was also not at the home at that time. She related that she was on the couch watching the weather channel when appellant began to touch her and started to have intercourse as is evident from the following portion of the transcript:

{¶45} "Q. You said you had intercourse. Do you remember how your clothes came off?

{¶46} "A. He took them off.

{¶47} "Q. Did you have pants or a skirt?

{¶48} "A. I had pants, I think.

{¶49} "Q. And at that point where were you located in the house?

{¶50} "A. In the living room.

{¶51} "Q. And nobody else home?

{¶52} "A. No.

{¶53} "Q. Was your mom working one of her seven to seven shifts?

{¶54} "A. Yes.

{¶55} " ***

{¶56} "Q. Describe what he did.

{¶57} "A. He would just touch my breasts.

{¶58} "Q. Were your clothes on or off?

{¶59} "A. They were on.

{¶60} "Q. Did he [at] any point attempt to kiss you or anything?

{¶61} "A. No.

{¶62} "Q. What did he do? Describe the actual intercourse event for the jury.

{¶63} "A. He would take off my clothes and he would take down his pants and then he would just have intercourse.

{¶64} "Q. Describe for us that day how --- did his penis penetrate your vagina?

{¶65} "A. Yes.

{¶66} "Q. And I don't mean this like an insensitive question, did it hurt?

{¶67} "A. It hurt.

{¶68} "Q. Like what? Describe it.

{¶69} "A. Pain.

{¶70} "Q. How long did the two of you have intercourse?

{¶71} "A. It wasn't very long because my bus was coming.

{¶72} " ***

{¶73} "Q. What position were you laying at that time? Can you describe the position of yourself and your father?

{¶74} "A. I was laying on the couch, my head towards the armrest and he was on top of me."

{¶75} According to the victim's further testimony, another sexual encounter occurred on July 4, which according to the record was 2003, at their home in her brother's bedroom while she was watching television while no one else was at home. She stated that appellant came in and starting taking off her clothes and that while she was lying on the floor they engaged in intercourse at that time. She further testified with regard to that occasion:

{¶76} "A. I was on the bottom, he was on the top. My head was facing towards my brother's window.

{¶77} "Q. Towards your brother's window?

{¶78} "A. Yes.

{¶79} "Q. Do you remember [if] either of you had clothing on?

{¶80} "A. I didn't and I don't think he did.

{¶81} "Q. But you're not positive?

{¶82} "A. I'm not positive.

{¶83} "Q. What do you remember about the actual act of intercourse itself in regards to did his penis penetrate your vagina?

{¶84} "A. Yes.

{¶85} "Q. What did that feel like? I hate to ask that but I have to. Did it hurt?

{¶86} "A. It didn't really hurt. There was times before he had done it, I had just gotten used to it.

{¶87} "Q. Didn't hurt that time?

{¶88} "A. No.

{¶89} "Q. Do you know if your father ejaculated that day?

{¶90} "A. Yeah.

{¶91} "Q. What do you recall about that?

{¶92} "A. After he was done I got up and I went into the bathroom and when I went to the bathroom there was white stuff in the toilet.

{¶93} "Q. And there was white stuff in the toilet, you say?

{¶94} "A. Yeah."

{¶95} According to the victim, the last sexual encounter with appellant took place on September 29, 2003, again at their home with no one else present. She described this last encounter in part in this manner:

{¶96} "A. He took down my pants in the kitchen, he had his pants down. He like kind of dragged me to the living room and then we laid on the floor and had intercourse.

{¶97} "Q. Do you remember what position your body was in?

{¶98} "A. I was on the bottom, my head facing towards my parents' room and he was on top.

{¶99} "Q. And did his penis penetrate your vagina?

{¶100} "A. Yes."

{¶101} The other sexual encounters between appellant and the victim were described in the same express and specific manner. Thus, this writer cannot agree that the description of the sexual acts in question were "sketchy" or recalled in some equivocal manner.

{¶102} Thus, the majority's characterization that the occasions of the sexual acts were related by the victim without sufficient details is again not supported by the record. Her versions of the incidents occurring outside their home are equally definitive as to the sexual conduct that occurred. Regarding all the incidents occurring at their home, the testimony of the victim was most specific as to the home being the situs of those particular occurrences. She also was graphic about the exact rooms or location in the home where these events transpired as was previously shown in portions of her testimony. Additionally, with respect to the sexual assaults that occurred while she accompanied her father on his Akron Beacon Journal delivery route, her testimony is more than adequately detailed as to those locations. Her account in her testimony of those sites was clearly corroborated by Ron Craig, the prosecutor's investigator, who accompanied her when she traveled with him through appellant's route as evidenced not only by their respective testimony, but also by the photographic exhibits of those places found in State's Exhibits One through Six which were admitted into evidence.

{¶103} While the majority's discussion of the time frames for each incident is generally accurate, it bears some qualification when it refers to time frames being loose for each incident. Clearly, the reference to the September 29, 2003 incident was most specific. With respect to the remaining charges and their time frames, which were

referenced in the victim's testimony, they manifested a reasonably adequate set of calendar time. Appellant's counsel did not raise an issue through a bill of particulars in this regard, and there was no indication made by appellant that sufficient notice of the time frames of the remaining charges provided an inadequate notice to appellant in a due process context in order to impede his ability to provide an adequate defense to the charges involved here.

{¶104} This court has applied the following three pronged analysis when determining whether a defendant has been prejudiced by the lack of a specific date of the offense:

{¶105} "'First, it must be determined whether time was an element of the alleged offense. Second, it must be determined whether the state disclosed to the defendant all of the information it had concerning when the offense occurred. Third, even if full disclosure has taken place, it must be decided whether the state's inability to pinpoint the time has prejudiced the defendant's ability to fully defend himself.'" (Citation omitted.) *State v. Latorres* (Aug. 10, 2001), 11th Dist. Nos. 2000-A-0060 and 2000-A-0062, 2001 Ohio App. LEXIS 3533, at 10, citing *State v. Lawrinson* (1990), 49 Ohio St.3d 238, 239.

{¶106} In cases involving alleged sexual misconduct with children, this court and other courts have held that it is not mandatory for the state to provide precise dates and times. *Latorres* at 10, citing *Lawrinson* at 239. This proposition is supported by the fact that the specific date of sexual contact or sexual conduct is not an element of either gross-sexual imposition or rape. R.C. 2907.02(A); R.C. 2907.05(A). See, also, *State v. Stalnaker*, 11th Dist. No. 2004-L-100, 2005-Ohio-7042, at ¶92.

{¶107} Moreover, as discussed previously, appellant has failed to establish he was prejudiced by the absence of a specific date for each offense. Again, at no time did he request a bill of particulars which would provide specific dates. Also, the exact dates of the offenses were not necessary for appellant to fully defend himself, as his defense did not attempt to establish that he was not with the victim when the offenses occurred. See, e.g., *Latorres* at 11-12.

{¶108} Under appellant's first assignment of error, which avers that the prosecution engaged in a pervasive pattern of misconduct, the majority discusses three issues in its analysis to support its conclusion that appellant was denied a fair trial.

{¶109} The first issue addressed by the majority deals with appellant's request prior to the opening statements in the nature of a motion in limine to limit the state's case to those charges contained within the indictment and not to permit evidence or mention of any other sexual conduct that may have transpired in the general time frames involved in the charges against appellant. The trial court granted this motion with the admonition to the state that it would enforce that ruling unless the state would provide a foundation or basis for an exception under Evid.R. 404(B).

{¶110} During the opening statement, the prosecutor made the following remark:

{¶111} "She will testify to you she was asked to recall best she could these crimes that occurred to her, and that she will testify she did the best job she could in picking out the approximate dates and times."

{¶112} Appellant's counsel requested a sidebar, which was granted, and interposed an objection to that language which he argued suggested that there were

other sexual encounters. The prosecutor indicated he wasn't talking about any other charges or sexual events. The trial court overruled the objection.

{¶113} The majority concludes by indicating that this portion of the first assignment of error was not well-taken. This writer agrees with that conclusion. However, the majority then posits that that incident foreshadowed problems posed during the trial with respect to the relentless "piling on" of questionable trial tactics by the prosecution. Again, I concur with the observation that no error obtained with respect to the trial court's ruling on that issue. However, I do not agree with the implication that a cancerous progression obtained as suggested by the majority. A close examination of the foregoing quote and the diction which it employed does not, in this writer's judgment, provide any basis for references to other acts beyond those charged in the indictment here. Consequently, I do not agree that the statement provided any nexus of a non-benign connection as to what transpired in the ensuing proceedings.

{¶114} The majority then engages in a discussion of the second issue dealing with the prosecutor's persistent use of leading questions which, in its judgment, resulted in prosecutorial misconduct and a basis of error under the first assignment of error. This writer deems this particular portion of the first assignment of error to be the primary issue on appeal.

{¶115} I agree with the majority that the prosecutor's line of questioning with the victim and some of the other state's witnesses was excessive and unnecessary. I would further state that this respective approach in the direct examination of the state's witnesses should not euphemistically or otherwise be characterized as a pedagogical model for law students and practitioners regarding a forum of non-leading questions.

Certainly, there appears to be a significant lack of interrogatories prefaced by "what," "where," "when," and "how," and the alternative forms of "state whether or not," or "did you or did you not."

{¶116} Indeed, the format utilized by the prosecutors goes beyond preliminary matters. However, the primary question to be resolved here is whether there was legal prejudice or clear injustice to appellant. *United States v. Durham* (C.A.4, 1963) 319 F.2d 590; *State v. Smith*, 97 Ohio St.3d 367, 2002-Ohio-6659, at ¶48. See, also, *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252, 2001 Ohio App. LEXIS 1122, at 21.

{¶117} Like the majority, I too, have carefully scrutinized all of the testimony in the record of this case involving the eleven witnesses who were called in the state's case. After that examination, it is my considered view that almost all of the leading questions were transitional in character, and some referred to prior testimony which did not result in prejudice to appellant.

{¶118} Because of appellant's challenge in this regard, and also as a result of the majority's position on this issue, I feel it is appropriate to set forth those particular questions which go to the heart or substance of the matters in this case and to which the defense did submit timely objections.

{¶119} This reader's thorough examination of the transcript reveals only five such instances in which the prosecution asked the victim a leading question that related to arguably material testimony. The leading questions pertained to the victim's conduct following her argument with appellant; a specific date appellant had intercourse with the victim; two statements made by the victim to a nurse during a medical examination; and

a statement made by the victim to the investigator regarding a location on appellant's paper route. With respect to the foregoing five questions, the first one did not relate to any alleged sexual encounters. The fifth question was submitted to the victim after the investigator had testified as to that particular location prior to the victim being called to testify.

{¶120} Considering, particularly, the length of the victim's testimony, this writer fails to perceive prejudice or injustice to appellant and his right to a fair trial based on the paucity of critical and substantive leading questions posed by the state to her or the other witnesses.

{¶121} With regard to the majority's comments that the prosecution cannot employ tactics requiring a defense counsel to become a jack-in-the-box popping up every third minute to object, I would observe that appellant's counsel made no effort to invite a sidebar comment to the trial court out of the hearing of the jury, to request a line of continuing objection to such questions, and to invite the trial court to admonish the prosecutor to the effect that any repetition of that form of questioning could well result in some type of sanction. Through such methodology, skilled counsel can appropriately avoid a "Charlie Chaplin exercise."

{¶122} Additionally, the majority states that when appellant's counsel moved for mistrial at sidebar, the trial court felt compelled to note in front of the jury that it had sustained appellant's objections to leading questions. I would observe that the record does not necessarily support the inference that this was done within the hearing of the jury. Also, the majority suggests that the tenor of that trial court's statement, coupled with the prosecutor's vouching to that remark, was violative of *State v. Keenan* (1993),

66 Ohio St.3d 402. However, this writer notes that the majority's citation to *Keenan* with respect to leading questions is misplaced since that case dealt with prosecutorial misconduct with regard to personal opinions, denigration of defense counsel, appeal to emotion, and bad character.

{¶123} Nor does this writer, who authored the opinion in *State v. DeMarco* (1987), 31 Ohio St.3d 191, conclude that the foregoing colloquy coupled with the issue of leading questions rise to the crest of cumulative error with regard to the issue of leading questions in this case.

{¶124} The third issue addressed by the majority under the first assignment of error references prosecutorial misconduct in what I would characterize as the closing argument. As the majority indicates, appellant argues that the prosecutor engaged in misconduct there by expressing his own personal beliefs regarding the truthfulness of the victim's testimony and by mentioning facts not in evidence. The record reflects that the prosecutor, on two brief occasions, did argue that the victim's testimony was the truth and that her demeanor showed that she was being honest and truthful. The prosecutor also stated that the victim's brother was sent away again to the bank by her father, to get the $60, and the $60 was presented to her, in her own testimony, conditioned upon sex with her father. This comment by the prosecutor was obviously in reference to his earlier utterance in opening statements that this money was for a homecoming dress for the victim for sex with appellant. I agree with the majority that no objection was interposed by appellant's counsel to those comments and that the matter, thus, must be reviewed on a plain error basis.

{¶125} It is conceded that the prosecutor did not have an evidential basis for the money for the homecoming dress statement being conditioned on sex with her father. However, at another point of the record, the victim did indicate that she did receive favorable treatment with regard to interacting with her friends when appellant performed sexual acts with her.

{¶126} It is fundamental when reviewing allegations of prosecutorial misconduct in final arguments that the argument should be reviewed in its totality. *State v. Moritz* (1980), 63 Ohio St.2d 150, 157 (holding that a prosecutor's closing argument must be viewed in its totality to determine whether the remarks were prejudicial). While the foregoing comments by the prosecutor were not proper, however, when viewed in the context of the totality of his argument, I cannot agree with the majority that this again rises to the crest of plain error under the circumstances. Thus, I would conclude that there was no reversible error with respect to the three issues raised by appellant under the first assignment of error.

{¶127} The majority then addresses appellant's second assignment of error in which he claims the trial court erred in not granting his motion for a mistrial. The majority finds that assignment of error is also well-taken on the basis of its analysis under the first assignment of error regarding the misuse of leading questions plus supplying answers to its witnesses as a result of such questions. Thus, the majority concludes that the error committed through the use of such leading questions, when joined with other prosecutorial misconduct in final argument on a plain error basis, and its cumulative effect, also results in the second assignment of error also being well-taken.

{¶128} Based on this writer's analysis of issues under the first assignment of error, I would also conclude that the trial court did not commit error in its denial of appellant's motion for a mistrial. Consequently, I would affirm the trial court.