[Cite as *State v. Hayes*, 2019-Ohio-2696.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
NOBLE COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

SCOTT A. HAYES,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 NO 0463

Criminal Appeal from the
Court of Common Pleas of Noble County, Ohio
Case No. 218-2007

BEFORE:
Gene Donofrio, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. Kelly Riddle, Prosecutor, 150 Courthouse, Caldwell, Ohio 43724 , for Plaintiff-Appellee and

Atty. Samuel Shamansky, Atty. Donald Regensburger, Atty. Colin Peters, Samuel H. Shamansky Co., L.P.A., 523 South Third Street, Columbus, Ohio 43215, for Defendant-Appellant.

Dated:
June 26, 2019

Donofrio, J.

{¶1} Defendant-appellant, Scott Hayes, appeals his conviction following a jury trial in the Noble County Common Pleas Court for one count of sexual battery on the basis that the victim submitted because she was unaware that sexual conduct was being committed in violation of R.C. 2907.03(A)(3), a third-degree felony.

{¶2} In 2017, appellant and the victim, A.B., were involved in a sexual relationship. A.B. decided to end the relationship in November of 2017. There were no negative feelings between appellant and A.B. and the two continued to communicate regularly.

{¶3} On February 11, 2018, A.B. contacted appellant about potentially re-starting their relationship. Appellant indicated that he wanted the same thing. The two agreed to meet and appellant arrived at A.B.'s home at approximately 1:00 a.m. on February 12, 2018.

{¶4} According to A.B., when appellant arrived, A.B. suggested that they watch a movie. A.B. told appellant that she was not willing to have sex on this occasion. The two went into A.B.'s room in order to watch the movie. The two laid on A.B.'s bed and A.B. laid her head on appellant's chest while the movie was playing. A.B. told appellant that she might fall asleep and appellant responded that he would leave once the movie was finished. A.B. said she was "too tired to do anything * * *." (Tr. 28).

{¶5} According to A.B., she eventually fell asleep. She testified that when she woke up, her pants were off and appellant "had inserted his penis inside me * * *." (Tr. 29). A.B. backed away and told appellant she did not want to have sex. Appellant then began to perform oral sex on A.B. A.B. again said no and tried to push appellant away. Appellant then began touching A.B.'s breasts and put his hands around A.B.'s throat. At the end, appellant told A.B. "whatever dream [she] was having had to have been some dream * * *." (Tr. 32). A.B. collected her clothes and went to the bathroom to get dressed. When A.B. left the bathroom, appellant was already dressed and ready to leave.

{¶6} According to appellant, he and A.B. were talking about their relationships with other people since their relationship ended in November of 2017. The two were also making sexually based jokes. The two were talking throughout the beginning of the movie. Appellant laid back and A.B. put her head on appellant's chest. Appellant stated that he was willing to leave once A.B. told him that she might fall asleep, but A.B. wanted him to stay. When appellant was ready to leave, A.B. grabbed his hand and put it on her breast. Eventually, A.B. and appellant removed A.B.'s pants together.

{¶7} According to appellant, he then began performing oral sex on A.B. A.B. told him no because his beard tickled her. Appellant then removed his clothes, put on a condom, and the two began having sex. Appellant stopped to perform more oral sex on A.B. before the two began having sex again. At the end, A.B. went into the bathroom and appellant got dressed. Appellant and A.B. looked outside A.B.'s window, commented on how much it had snowed since appellant came over, and appellant left before the snow got worse. As appellant was attempting to leave, he noticed that A.B.'s front door did not shut all the way and the two had a conversation about that. Appellant testified that A.B. did not fall asleep.

{¶8} Once appellant left, according to A.B., she tried to call her mother and then called her cousin. A.B. then went to the Noble County Sherriff's Office to report what had happened between her and appellant. A.B. arrived at the Noble County Sheriff's Office at approximately 3:30 a.m. on February 12, 2018. A.B. gave a statement to deputies, was sent to the hospital for a rape kit, and the investigation of what happened between A.B. and appellant was assigned to Deputy Stokes.

{¶9} Deputy Stokes contacted appellant and asked him to come in for an interview. Appellant voluntarily came in and gave a statement. Appellant's statement was recorded. Appellant admitted to Deputy Stokes that he had sex with A.B., but appellant said that the sex was consensual. Deputy Stokes explained that appellant was not arrested at the end of the interview because "the only thing we established is that there was sex, but it was essentially her word against his." (Tr. 76).

{¶10} Scott Stoney, an officer for the Ohio Department of Mental Health and the Guernsey County Sheriff's Department, contacted Deputy Stokes regarding appellant and A.B. Officer Stoney is a friend of appellant's and has been for approximately 30

years. Officer Stoney spoke to appellant three times regarding the incident with A.B. The first time, appellant told Officer Stoney that he was going to the Noble County Sheriff's Department to give a statement. After he gave a statement, appellant called Officer Stoney back. Appellant told Officer Stoney of the events that occurred between him and A.B. When describing the sexual encounter, Officer Stoney said appellant told him that A.B. fell asleep and appellant "pulled her pants down and stuck it in her * * *." (Tr. 105). Appellant also told Officer Stoney that the Noble County Sheriff's Department wanted him to take a polygraph test. Appellant asked Officer Stoney "how can I beat this polygraph[?]" (Tr. 106). When Officer Stoney said that the only way to beat a polygraph was to tell the truth, appellant responded "I can't do that." (Tr. 106-107).

{¶11} Officer Stoney spoke to Noble County Sheriff Robert Pickenpaugh directly. The conversation between Sheriff Pickenpaugh and Officer Stoney was recorded and admitted into evidence as Exhibit B (Ex. B). Officer Stoney informed Sheriff Pickenpaugh of the details of the conversations he had with appellant. Officer Stoney then agreed to contact appellant again and record the conversation.

{¶12} After Officer Stoney's interview with Sheriff Pickenpaugh concluded, Officer Stoney contacted appellant. Officer Stoney recorded this conversation with appellant which was admitted into evidence as Exhibit C (Ex. C). During his testimony, Officer Stoney explained that his previous conversations with appellant about A.B. and appellant's statements in Ex. C were "pretty much the same, but different a little bit." (Tr. 112).

{¶13} A Noble County Grand Jury indicted appellant on two counts of sexual battery: count one for a violation of R.C. 2907.03(A)(1), a third-degree felony; and count two for a violation of R.C. 2907.03(A)(3), a third-degree felony. R.C. 2907.03(A)(1) defines sexual battery as the offender knowingly coerces a victim to submit to sexual conduct by any means that would prevent resistance by a person of ordinary resolution. R.C. 2907.03(A)(3) defines sexual battery as the offender knows the victim submits to sexual conduct because the victim is unaware that the sexual conduct is being committed.

{¶14} The matter proceeded to a jury trial. The jury found appellant not guilty on count one and guilty on count two. In a judgment entry dated July 17, 2018, the trial court

sentenced appellant to 30 months of incarceration. Appellant timely filed this appeal on August 9, 2018. Appellant now raises four assignments of error.

{¶15} Appellant's first assignment of error states:

> THE INTRODUCTION OF UNFAIRLY PREJUDICIAL HEARSAY STATEMENTS DURING APPELLANT'S TRIAL VIOLATED HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND WAS CONTRARY TO THE OHIO RULES OF EVIDENCE.

{¶16} Appellant argues that Ex. B, Sheriff Pickenpaugh's recorded conversation with Officer Stoney, was impermissible hearsay which should have been excluded.

{¶17} The admission of evidence is within the discretion of the trial court and the court's decision will only be reversed upon a showing of abuse of discretion. *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317, 770 N.E.2d 584. But when no objection to evidence is raised at trial, all but plain error is waived. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 108. An alleged error is plain error only if the error is "obvious" and "but for the error, the outcome of the trial would have been otherwise." *Id*.

{¶18} The record shows that appellant made no objection to Ex. B being introduced into evidence. As such, this assignment of error is subject to a plain error analysis.

{¶19} Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible at trial. Evid.R. 802.

{¶20} Ex. B was played in its entirety at trial. In this recording, Officer Stoney informed Sheriff Pickenpaugh of all of the details of his two previous conversations with appellant. The conversations were about events between A.B. and appellant and appellant's interview with the Noble County Sheriff's Office.

{¶21} In the recording, Officer Stoney recalled from his conversations with appellant that A.B. invited appellant to her home. A.B. informed appellant that "nothing

is going to happen, we are here to talk." According to Officer Stoney, appellant told him that A.B. fell asleep, appellant pulled A.B.'s pants down, and began having sex with her. A.B. told appellant to stop. Officer Stoney remembered appellant telling him that he told deputies the truth but that appellant said "I'm not going to tell [the Noble County Sheriff's Office] that she told me no." Appellant also asked Officer Stoney how to beat a polygraph test. When Officer Stoney told appellant that the only way was to tell the truth, appellant responded that he could not do that. (Ex. B).

{¶22} Ex. B contained out of court statements by Officer Stoney. These statements were offered into evidence to prove the truth of the matters asserted. Namely, that A.B. told appellant they were not going to have sex and appellant began having sex with A.B. when she was asleep and after A.B. told appellant no.

{¶23} But the state argues that Ex. B is not hearsay under Evid.R. 801(D)(1)(b). A statement is not hearsay if "[t]he declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive[.]" Evid.R. 801(D)(1)(b). The state argues that appellant made a charge of recent fabrication against Officer Stoney during opening statements.

{¶24} During opening statements, appellant's counsel told the jury:

> [C]losely listen to the testimony of Mr. Stoney, and you will find out about his inner relationship not only with Mr. Hayes, but with the sheriff's department, and what the inconsistencies are in his statement. What he told the sheriff's department was never recorded. The evidence that he will testify to is that Mr. Hayes admitted committing the crime. However, when Mr. Hayes is clandestinely recorded, he doesn't know they are wired up so to speak, they are having a phone call, and he doesn't say any of the things that he told the sheriff's department * * *.

(Tr. 11).

{¶25} The comments during appellant's opening statement are an implied charge of recent fabrication against Officer Stoney. In support of this argument, the state cites

this court's decision in *State v. Johnson*, 7th Dist. Mahoning No. 15 MA 0197, 2017-Ohio-7702. In *Johnson*, this court held that "attacking a victim's credibility during opening statements is grounds for permitting a prior consistent statement into evidence pursuant to Evid.R. 801(D)(1)(b)." *Id.* at ¶ 21-22 citing *State v. Hunt*, 10th Dist. Franklin No. 12AP-103, 2013-Ohio-5326; *State v. Crawford*, 5th Dist. Richland No. 07 CA 116, 2008-Ohio-6260; *State v. Abdussatar*, 8th Dist. Cuyahoga No. 86406, 2006-Ohio-803. This rule also applies to witnesses who are not victims. See *Hunt*.

{¶26} Appellant's opening statement implied to the jury that Officer Stoney told Sheriff Pickenpaugh things that appellant never said about what happened between appellant and A.B. The implication appellant's opening statement made is that Officer Stoney recently fabricated facts.

{¶27} Officer Stoney testified at trial about the conversations he had with appellant concerning A.B. According to Officer Stoney, when appellant arrived at A.B.'s home, A.B. told appellant "nothing's happening." (Tr. 105). He testified that appellant told him "[t]hey were in bed, and he said that she falls asleep. He says - - he said I pulled her pants down and stuck it in her, he said, but I can't say that; I didn't say that to them." (Tr. 105). Appellant also asked Officer Stoney how to beat a polygraph test. After this testimony, the state played Ex. B in its entirety.

{¶28} Officer Stoney's testimony at trial and his statements in Ex. B were consistent. Appellant's opening statement implied that Officer Stoney's recollection about what appellant told him happened regarding A.B. was a recent fabrication. Ex. B was offered to rebut that charge. Therefore, it was not hearsay pursuant to Evid.R. 801(D)(1)(b).

{¶29} Based on the above, there was no plain error in the admission of Ex. B, the recording of the conversation between Officer Stoney and Sheriff Pickenpaugh.

{¶30} Accordingly, appellant's first assignment of error lacks merit and is overruled.

{¶31} Appellant's second assignment of error states:

> APPELLANT'S COUNSEL WAS INEFFECTIVE BY FAILING TO OBJECT TO IMPERMISSIBLE HEARSAY EVIDENCE, IN VIOLATION OF

HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶32} Appellant argues that his trial counsel's failure to object to Ex. B constitutes ineffective assistance of counsel.

{¶33} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Second, appellant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, 848 N.E.2d 810, ¶ 95 citing *Strickland*.

{¶34} Appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id.*

{¶35} Based on our resolution of appellant's first assignment of error that Ex. B was admissible, counsel was not ineffective for failing to object to Ex. B.

{¶36} Accordingly, appellant's second assignment of error lacks merit and is overruled.

{¶37} Appellant's third assignment of error states:

APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE OHIO CONSTITUTION.

{¶38} Appellant argues that A.B.'s testimony and Officer Stoney's testimony lack credibility which renders his testimony the most credible version of events. As such, he argues that his conviction is against the manifest weight of the evidence.

{¶39} The claim that a verdict is against the manifest weight of the evidence concerns whether a jury verdict is supported by "the greater amount of credible evidence." *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 45 citing *State v.*

Thompkins, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). The reviewing court weighs the evidence and all reasonable inferences and considers the credibility of the witnesses. *Thompkins* at 387. Although the appellate court acts as the proverbial "thirteenth" juror under this standard, it rarely substitutes its own judgment for that of the jury's. *Meritt* at ¶ 45. This is because the trier of fact was in the best position to determine the credibility of the witnesses and the weight due the evidence. *Id.* citing *State v. Higinbotham*, 5th Dist. Stark No. 2005CA00046, 2006-Ohio-635.

{¶40} Only when "it is patently apparent that the factfinder lost its way," should an appellate court overturn the jury verdict. *Id.* citing *State v. Woullard*, 158 Ohio App.3d 31, 2001-Ohio-3395, 813 N.E.2d 964 (2d Dist.). If a conviction is against the manifest weight of the evidence, a new trial is to be ordered. *Thompkins* at 387. "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." *State v. Miller*, 96 Ohio St.3d 384, 2002-Ohio-4931, 775 N.E.2d 498, ¶ 36 quoting Ohio Constitution, Article IV, Section 3(B)(3).

{¶41} Appellant was convicted of sexual battery in violation of R.C. 2907.03(A)(3), which provides that no person shall engage in sexual conduct with another, not the spouse of the offender, when the offender knows that the other person submits because the other person is unaware that the act is being committed. The state's theory of the case was that appellant knew A.B. only submitted to the sexual conduct because A.B. was asleep and, therefore, unaware that the sexual conduct was being committed. As appellant admitted at trial that he had sex with A.B., the disputed fact was whether A.B. was asleep when the sexual conduct began.

{¶42} First, appellant argues that A.B.'s testimony lacks credibility overall. A.B. testified that she fell asleep while watching a movie with appellant. (Tr. 28-29). When A.B. woke up, her pants were off and appellant was having sex with her. (Tr. 29-30). When A.B. pushed back and told appellant she did not want to have sex, appellant began performing oral sex on her. (Tr. 29-30).

{¶43} Appellant contends that this testimony lacks credibility for two reasons. First, appellant argues that it does not make sense that A.B. fell asleep, appellant removed her pants, climbed on top of her, and A.B. did not wake up until appellant began

having sex with her. Appellant argues that this is supported by the fact that no evidence in the record indicates that A.B. was under the influence of any drugs or alcohol. Second, appellant argues that the assertion that he continued to force oral sex on A.B. after she said she did not want to have sex lacks credibility.

{¶44} Next, appellant argues that Officer Stoney's testimony regarding the various conversations he had with appellant are inconsistent and indicates a lack of credibility. Appellant points to the inconsistencies between Ex. B (the recorded conversation between Officer Stoney and Sheriff Pickenpaugh), Officer Stoney's testimony, and Ex. C (the recorded conversation between Officer Stoney and appellant).

{¶45} Officer Stoney testified that appellant told him A.B. was asleep when appellant initiated the sexual encounter. (Tr. 105). In Ex. B, Officer Stoney said appellant told him that A.B. was asleep when appellant initiated the sexual encounter. But in Ex. C, appellant did not say that A.B. was asleep when the sexual encounter began. Also in Ex. C, appellant said the sexual encounter started when A.B. placed appellant's hand on her breast and began moving her hips against appellant in a sexually suggestive manner. Appellant noted in Ex. C that is how at least one prior sexual encounter between him and A.B. began.

{¶46} The only disputed fact relevant to the charge is whether A.B. was asleep when the sexual encounter began. A.B. testified that she was asleep. Officer Stoney testified that appellant told him A.B. was asleep. Appellant testified that A.B. was not asleep because she was the one who initiated the encounter. It was up to the jury to determine the credibility of the witnesses.

{¶47} Additionally, appellant argues that his testimony was more credible than A.B.'s or Officer Stoney's. But there was also evidence produced at trial that indicated appellant's lack of credibility. Officer Stoney testified that appellant asked him how to pass a polygraph test. When Officer Stoney replied that the only way to pass was to tell the truth, appellant responded "I can't do that." (Tr. 106-107). In Ex. C, when appellant and Officer Stoney were talking about a polygraph, appellant said "[m]y whole story is going to change, that's why I'm worried about that polygraph."

{¶48} Appellant's assignment of error challenges the jury's determination of the witnesses' credibility. The trier of fact is in the best position to determine credibility of the

witnesses and the weight due the evidence. *State v. Meritt*, 2011-Ohio-1468 at ¶ 45. As appellant is arguing issues of witness credibility, that determination is best left to the trier of fact. Thus, appellant's conviction is not against the manifest weight of the evidence.

{¶49} Accordingly, appellant's third assignment of error lacks merit and is overruled.

{¶50} Appellant's fourth assignment of error states:

> THE PROSECUTION'S REFERENCE TO FACTS EXPLICITLY EXCLUDED FROM EVIDENCE IN ITS CLOSING ARGUMENT CONSTITUTED PROSECUTORIAL MISCONDUCT AND DEPRIVED APPELLANT OF A FAIR TRIAL, IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶51} Appellant argues that the state's mentioning of a polygraph exam during closing arguments amounted to prosecutorial misconduct.

{¶52} The test for prosecutorial misconduct is whether the remarks were improper and, if so, whether the remarks prejudicially affected the accused's substantial rights. *State v. Twyford*, 94 Ohio St.3d 340, 2002-Ohio-894, 763 N.E.2d 122. The touchstone of this analysis "is the fairness of the trial, not the culpability of the prosecutor." *Id.* quoting *Smith v. Phillips*, 495 U.S. 209, 102 S.Ct 940 (1982). An appellate court should not find reversible error unless, in the context of the entire proceedings, it appears that the misconduct deprived the appellant of a fair trial. *State v. Fears*, 86 Ohio St.3d 329, 332, 715 N.E.2d 136 (1999).

{¶53} As for statements complained of during closing arguments, "we must keep in mind the latitude counsel is given during closing arguments and that the closing must be viewed in its entirety in determining whether the complained of remarks were prejudicial." *State v. Morris*, 7th Dist. Columbiana No. 08 CO 7, 2009-Ohio-3326, ¶ 133, citing *State v. Byrd*, 32 Ohio St.3d 79, 82, 512 N.E.2d 611 (1987), and *Smith, supra*. An appellate court must "view the state's closing argument in its entirety to determine whether the allegedly improper remarks were prejudicial." *State v. Treesh*, 90 Ohio St.3d 460, 466, 2001-Ohio-4, 739 N.E.2d 749. A conviction should be reversed due to improper

statements in closing only if the jury would have found the defendant not guilty but for the improper statements. *State v. Benge*, 75 Ohio St.3d 136, 141-142, 1996-Ohio-227, 661 N.E.2d 1019.

{¶54} After appellant rested and just prior to closing arguments, the trial court noted that "[p]olygraphs have been mentioned in this case." (Tr. 245). The trial court instructed the jury "not to consider for any reason that polygraphs have been mentioned. You disregard the mentioning of polygraphs, and treat the mentioning as though you never heard it." (Tr. 245). Near the end of the state's closing argument, the prosecutor said: "The defendant tells Scott Stoney he's worried about taking a polygraph because his whole story is going to change, and you hear him say that in [Ex. C]. He says his story has to be he licked her and stuck it in her." (Tr. 256).

{¶55} No objection was made to this statement. "A claim of prosecutorial misconduct is waived unless raised at trial, and if so waived, can serve as the basis for relief only if the conduct constitutes plain error." *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 24.

{¶56} Despite the trial court instructing the jury to disregard any mention of polygraphs, counsel for the prosecutor made one reference to a polygraph test near the end of its closing argument. The state concedes that this reference was error. Proceeding under a plain error analysis, we must now address whether, but for this statement, the outcome of the trial would have been otherwise.

{¶57} Appellant argues that this case ultimately came down to an issue of witness credibility between A.B. and appellant. Appellant argues that the polygraph reference served the sole purpose of inferring that appellant was dishonest about what had occurred between him and A.B.

{¶58} As previously mentioned, polygraphs were mentioned in Ex. B which was played in its entirety for the jury and admitted into evidence without objection. Ex. C also mentioned a polygraph exam, was played for the jury in its entirety, and admitted into evidence without objection.

{¶59} On cross-examination, appellant was questioned about Ex. C where he said his "whole story is going to change." (Tr. 234). After that question, the portion of Ex. C where appellant said "my whole story is going to change, that's why I'm worried about

that polygraph," was played again. (Tr. 234, Ex. C). Officer Stoney testified on direct examination that appellant asked how to beat a polygraph. Officer Stoney was also asked about polygraphs during his cross-examination. Appellant's trial counsel asked Officer Stoney "[a]nd there's no polygraph in this case, is there?" to which Officer Stoney replied that he did not know. (Tr. 128).

{¶60} The single polygraph reference in the state's closing argument did not prejudice appellant. First, polygraphs were mentioned throughout the trial, including by appellant's trial counsel. Second, the trial court instructed the jury not to consider polygraphs for any reason. "It is presumed that the jury obeys the instructions of the trial court." *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 54. Third, the context of the state's reference is not that appellant failed a polygraph or refused to take a polygraph. The state was arguing that appellant's version of events was subject to change. This indicates that appellant lacked credibility which the state is free to argue during closing argument if it is supported by the record. *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, 896 N.E.2d 212, ¶ 45 (4th Dist.).

{¶61} Accordingly, appellant's fourth assignment of error lacks merit and is overruled.

{¶62} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, P. J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Noble County, Ohio, is affirmed. Costs to be taxed against the Appellant.

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

NOTICE TO COUNSEL

This document constitutes a final judgment entry.