[Cite as *State v. Cope*, 2010-Ohio-6430.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-11-285
	:	O P I N I O N
- vs -		12/29/2010
	:	
DOUGLAS A. COPE II,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CR2008-10-1862

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POWELL, J.

{¶1} Douglas A. Cope II argues for reversal of his kidnapping conviction due to insufficient evidence, trial court errors, prosecutorial misconduct, and a miscarriage of justice by the jury. Finding none of his claimed errors merits reversal, Cope's conviction is affirmed.

{¶2} The adult female victim, R.H., told police that on October 7, 2008, Cope kidnapped her, held her in his vehicle for two days, and raped her. As a result of those events, Cope was charged with one count of rape, two counts of kidnapping, and a misdemeanor count of obstructing official business. The obstructing charge was based on events that occurred when Cope eluded police trying to arrest him.

{¶3} A jury in Butler County Common Pleas Court found Cope not guilty of rape, but guilty of the kidnapping offenses and the obstructing charge. Cope was sentenced to prison and classified as a Tier II sexual offender. He appeals the kidnapping convictions and presents five assignments of error, which will be addressed out of order for ease of discussion.

{¶4} Assignment of Error No. 1:

{¶5} "THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT CONVICTIONS KIDNAPPING." [sic]

{¶6} Assignment of Error No. 5:

{¶7} "JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.[1] In reviewing the sufficiency of the evidence underlying a criminal conviction, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offenses proven

1. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

beyond a reasonable doubt.[2]

{¶9} A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses.[3] The question is whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.[4]

{¶10} The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.[5] The determination of weight and credibility of the evidence is for the trier of fact.[6] The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the testimony is credible.[7] A unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required to reverse a judgment on the weight of the evidence in a jury trial.[8]

{¶11} The applicable version of R.C. 2905.01(A)(3), states in pertinent part that no person, by force, threat, or deception shall remove another from the place where the other person is found or restrain the liberty of the other person for the purpose "[t]o terrorize, or to inflict serious physical harm on the victim or another."

2. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160*,* ¶34.
3. Id. at ¶39.
4. Id.
5. *Thompkins* at 387.
6. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.
7. *State v. Johnson*, Franklin App. Nos. 10AP-137, 10AP-138, 2010-Ohio-5440, ¶18.
8. *Thompkins* at 389.

{¶12} For purposes of this subsection of the kidnapping statute, the definition of "terrorize," according to its common usage, is "to fill with terror or anxiety."[9]

{¶13} The applicable version of R.C. 2905.01(A)(4), states in pertinent part that no person, by force, threat, or deception shall remove another from the place where the other person is found or restrain the liberty of the other person for the purpose of engaging in sexual activity with the victim against the victim's will.

{¶14} R.C. 2907.01(C) defines "sexual activity" as sexual conduct or sexual contact, or both. "Sexual conduct" is defined as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another."[10] "Sexual contact" is defined as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."[11]

{¶15} The appellate court in *State v. Peck*, cites the staff note to R.C. 2905.01, or what may now be found under the Legislative Service Commission note from 1973, which states in pertinent part that kidnapping does not depend on the distance the victim is removed or the manner in which he is restrained; rather, it depends on whether the removal or restraint places the victim in the offender's power

9. *State v. Eggleston*, Lake App. No. 2008-L-047, 2008-Ohio-6880, fn 1.
10. R.C. 2907.01(A).

11. R.C. 2907.01(B).

and beyond immediate help, even temporarily.[12] In addition, the restraint involved need not be actual confinement, but may be merely compelling the victim(s) to stay where they are.[13]

{¶16} The record shows that R.H. told the jury that she knew Cope for about two months before the week of October 6. She said they did not have a sexual relationship. She testified that she told Cope a few weeks before October that she did not want him around her because he was rude and disrespectful.

{¶17} R.H. said she was taking out the garbage on Tuesday night, October 7, when Cope approached her in his sport utility vehicle (SUV). She initially balked at speaking with him, but he told her he was leaving for Florida and wanted to talk. She said she voluntarily entered Cope's SUV, but then he "just took off." After driving around for a while, Cope eventually parked in his grandparents' driveway. His grandparents were in Florida for the winter.

{¶18} R.H. said that Cope was angry and began cursing her. He accused her of not wanting to talk to him because she wanted to reconcile with her ex-husband. R.H. said Cope struck her head, and her head bounced off the passenger-side window. R.H. said Cope then got into the back seat and grabbed her by the hair and dragged her from the front seat into the back-seat area. She said Cope was screaming at her, choking her, and placed his hand over her mouth. She was kicking and pushing at him. She said Cope pinned her down, removed her clothing at some point, and inserted his penis into her mouth. She said he also had vaginal intercourse with her. R.H. indicated at trial that Cope had intercourse with her again

12. *State v. Peck* (Dec. 15, 1988), Athens App. No. 1361, 1988 WL 85104 at *5-6.

13. Id.

during the two-day time frame.

{¶19} R.H. said she was scared and humiliated. She said she was apologetic to Cope, hoping he would quit. She accidently urinated on a sweatshirt in the back seat. Cope removed the shirt from the vehicle and returned it some time later. R.H. also indentified a duffel bag that was found in the back seat of the SUV. She said Cope used the bag to attempt to strangle her.

{¶20} That evening and the next day, R.H. indicated that she repeatedly begged Cope to let her go so she could see her children. She said Cope threatened to kill her, threatened that he would have other people harm her, and that he would harm her family. She said she heard Cope lock and unlock the doors with a handheld remote or key fob device. She said she was too afraid to attempt to leave the vehicle because of Cope's threats, regardless of whether Cope was in the vehicle or not.

{¶21} R.H. stated that the SUV was driven to other locations during this two-day time period, including K-Mart so Cope could retrieve wired money. She said she would either be in the back area or sitting in the front passenger seat. R.H. stated that she was naked some of the time, until Cope gave her a shirt to wear.

{¶22} On Thursday, Cope dropped off R.H. at her parents' apartment, where she had been living. She ran into the apartment, got into bed, and cried for some time. When her stepfather checked on her, she explained her condition by telling him that she had gotten into a fight.

{¶23} R.H.'s stepfather testified that it was unusual for R.H. to leave home for two days and not contact them about where she was and whom she was with. When he talked to his stepdaughter, he said she "had been beat up. She was very upset.

She was hysterical and crying, very afraid."

{¶24} R.H.'s stepfather said he talked with Cope on the phone the day that R.H. returned home, and Cope said R.H. had been in a fight with another girl. After hearing a different version of events from a friend who talked with R.H., the stepfather called Cope again and told him he knew Cope had previously lied to him about what happened. R.H.'s stepfather said Cope admitted to beating R.H. because she had "run her mouth." Cope told the stepfather that he had beat R.H., "fucked her," and that he was sorry. Cope told the R.H.'s stepfather that he was leaving Ohio and going to Florida. It was during or after this conversation that police were called.

{¶25} A Middletown Police detective testified that he took photographs of marks and scratches on R.H., and those photographs were entered into evidence.

{¶26} The detective also described the efforts required to arrest Cope. He said police approached a specific residence in Middletown and observed Cope standing outside the residence with his SUV parked nearby. Cope ran into the house when police approached and would not respond to their requests to speak with him. Police waited outside for about an hour. When they eventually entered the residence using the owner's key, no one was inside. The detective testified that he believed Cope arranged for someone to pick him up and escaped by pushing out a window screen at the same time that police were entering the house.

{¶27} After checking with additional sources, police approached another residence and again found Cope standing outside. As police approached, Cope ran inside the residence and into the basement. He did not respond to requests to come out of hiding. When he was informed that a police canine was going to be brought into the basement, Cope surrendered to police. At booking, police noticed fresh

scratches on Cope's upper chest or neck area. The detective said Cope volunteered that "oh, the whore got rough with him." We note that no one appears to contest that the detective said Cope used the word, "whore," although the transcript contains the following sentence: "He saw that we were photographing them [scratches] and he made the statement, 'oh, the horror got rough with me.'"

{¶28} The state also presented the testimony of a sexual assault nurse examiner who performed an examination of R.H. The nurse said when she entered the examination room, R.H. was in a fetal position, crying. The nurse said she sat with R.H. for about an hour before she would respond to simple questions. The nurse said R.H. was memorable because of her responses and reactions throughout the examination.

{¶29} The nurse observed what she described as injuries consistent with defensive wounds on R.H.'s arms. She said R.H.'s voice was raspy and hoarse, which she indicated can happen if someone had been choked.

{¶30} The nurse described how she collected certain samples based on what R.H. told her occurred. The nurse indicated in her report that R.H. reported to her one incident of sexual assault. R.H. complained of pain related to the assault. She declined to have a pelvic examination with a speculum performed and the nurse was therefore unable to make certain observations this type of exam might have permitted.

{¶31} A police officer trained in crime scene investigation testified that police found pierced earring parts in Cope's SUV and some long light-colored hair, along with other items. R.H. identified the earrings as hers. The hair was not tested by the crime lab. Police also recovered a sweatshirt in the back of the vehicle that was

damp. There was testimony that tests to determine the presence of urine on the sweatshirt were negative. The police officer collecting the evidence testified that the dampness and absence of odor could be consistent with a washed item.

{¶32} A forensic scientist indicated that no semen was found on the swabs that the nurse was able to gather from the examination of R.H. The scientist found a "mixture" of DNA on a duffel bag submitted for testing. He said Cope and R.H. could not be excluded as possible contributors to the sample found on the outside of the bag.

{¶33} The state also presented a number of recordings of telephone calls Cope made to family and friends after he was placed in the Butler County Jail. The state presented the recordings in an attempt to show that Cope was getting family and friends to lie for him to refute portions of R.H.'s version of events. On one of the recordings, Cope said his attorney would have to "coach" everybody.

{¶34} The tapes also revealed that Cope told one or more people that R.H. was perjuring herself, that it was "all lies," and he didn't want anybody [any witnesses] to lie.

{¶35} Cope's counsel used R.H.'s testimony from the preliminary hearing to question her about some alleged inconsistencies in her testimony. R.H. acknowledged that she denied having a sexual relationship with Cope, but answered at the preliminary hearing that she had a sexual relationship with him before the events of the week in October 2008. R.H. replied at trial that she had a "sexual relationship" if one counts "his fingers penetrating a private." She explained that Cope rubbed around on her and "stuff like that. And I pushed him away. He took it well. He didn't get upset or nothing."

{¶36} Evidence was presented that Cope was intermittently living in his SUV. Cope's aunt testified that Cope was doing drywall for her during the days in question and that R.H. was sometimes with him when he stopped by. The aunt said on Tuesday, October 7, she came home from work and saw Cope and R.H. sleeping in the bed in the room where they had been working on the drywall all night. The aunt indicated Cope stopped by two or three other times that week and spent about an hour each time on the drywall project. She saw R.H. sitting in Cope's vehicle, but R.H. did not come inside.

{¶37} Cope's brother testified that he came home in the afternoons from his Mason school to find Cope at the home, showering or sleeping on the couch on Wednesday through Friday of that week in October. The brother indicated that Cope would stay for several hours until their mother came home from work.

{¶38} Cope's cousin testified R.H. was Cope's girlfriend and he saw them together a lot. The cousin testified that he knocked on the window of Cope's SUV on the morning of October 9, found Cope and R.H. sleeping in the vehicle, and nothing seemed wrong.

{¶39} Cope's 18-year-old son testified that R.H. was his father's girlfriend and he woke up both of them when they were sleeping in the backseat of the SUV on Wednesday and Thursday of that week in October. He said they both seemed happy and all three talked for a while.

{¶40} A male friend of Cope's testified that Cope and R.H. came over to his home on Wednesday, and they "were hanging out, watching TV." He said R.H. was crying, upset about her daughter. When Cope left the room, the friend said R.H. mouthed that "she hated Dougie." The friend said R.H. did not appear to be fearful.

When R.H. left the room to go to the bathroom, Cope was angry, saying he wanted to beat up R.H.'s ex-husband. On Thursday, Cope told the friend that he and R.H. had a fight. The friend said Cope slept on his (the friend's) couch that evening.

{¶41} A neighbor of R.H. testified that he would hang out with Cope and R.H. He said Cope and R.H. did drugs together during the week in question. He said he also saw R.H.'s stepfather smoke marijuana that week, while acknowledging that he also smoked marijuana during that time.

{¶42} A neighbor of Cope's grandparents said Cope and R.H. were living in the SUV parked behind the grandmother's garage for two months. He said he saw Cope and R.H. every day of the week of October 7. He testified that he believed they were "an item," based on their behavior. The neighbor provided a physical description of the woman, but said he did not know the name of the woman with Cope and did not hear Cope call her by name.

{¶43} Cope's father testified that R.H. was introduced as his son's friend. He said he arranged to have a birthday dinner with Cope on Thursday, October 9 because his son said he was leaving for Florida that night. At dinner, the father said Cope received a call and said it was R.H. Cope told the other person on the line that he was moving to Florida and she needed to get on with her life. However, the father said Cope called him on Friday and was still in Ohio, finishing drywall work for his aunt.

{¶44} The above is a lengthy, but not exhaustive recitation of the evidence provided to the jury. We have examined the record, mindful of the applicable standard of review, for challenges to the sufficiency of the evidence and the manifest weight of the evidence.

{¶45} Viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found beyond a reasonable doubt that Cope, by force, threat, or deception, removed R.H. from the place where she was found, or restrained her liberty for the purpose of engaging in sexual activity with her against her will, and by force, threat, or deception removed R.H. from the place where she was found, or restrained her liberty for the purpose of terrorizing her or to inflict serious physical harm on her.

{¶46} Further, this court reviewed the entire record in consideration of whether the conviction was against the manifest weight of the evidence. We find the jury did not clearly lose its way and create such a manifest miscarriage of justice that the conviction for two counts of kidnapping must be reversed.

{¶47} Cope is not entitled to a reversal on manifest-weight grounds merely because inconsistent evidence was presented at trial.[14] The jury was in the best position to take into account inconsistencies, along with manner and demeanor to determine witness credibility, and the jury was free to believe or disbelieve all or any of the testimony.[15]

{¶48} Cope's first and fifth assignments of error are overruled.

{¶49} Assignment of Error No. 2:

{¶50} "THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL BY FAILING TO PROPERLY INSTRUCT THE JURY REGARDING THE ELEMENTS OF KIDNAPPING."

{¶51} Cope argues that he was prejudiced by the trial court's failure to

14. *Johnson*, 2010-Ohio-5440 at ¶18.

15. Id.

include the language "against her will" [victim's will] when instructing the jury on the elements of kidnapping on the count charged under R.C. 2905.01(A)(4).

{¶52} We previously noted the applicable version of R.C. 2905.01(A)(4), which states in pertinent part that no person, by force, threat, or deception, shall remove another from the place where the other person is found or restrain the liberty of the other person, for the purpose to engage in sexual activity with the victim against the victim's will.

{¶53} The record indicates that during deliberation the jury asked a question about this particular kidnapping count. The trial court discussed with counsel how to answer the question.

{¶54} Cope's trial counsel told the court that it was their position that jury instructions suggested in the Ohio Jury Instructions materials have been "tried and tested" in the appellate system. Counsel said that "answering the question in any other language than repeating the jury instructions for that charge would be tantamount to changing the language that is in the OJI, and for that purpose we would request that the Court simply instruct the jury to refer back to the instruction that was given in the jury instructions under Count Three." The jury instruction did not contain the "against her will" language at issue in this appeal. Contrary to appellate counsel's argument, the omission of the language was not brought to the trial court's attention so that it could be corrected at trial.

{¶55} The trial court in this case admitted it made a mistake when it failed to include the language "against her will" in the jury instruction for this offense. The trial court would later have the opportunity, when ruling on Cope's motion for a new trial, to state that objections were not made as to the missing language and the issue

would be reviewed for plain error. Finding no plain error, the trial court overruled the motion.

{¶56} Generally, a defendant is entitled to have the jury instructed on all elements that must be proved to establish the crime charged.[16] The Ohio Supreme Court in *Adams*, however, held that the failure to instruct on each element of an offense is not necessarily reversible as plain error.[17] An appellate court must review the instructions as a whole and the entire record to determine whether a manifest miscarriage of justice has occurred as a result of the error in the instructions.[18]

{¶57} In determining the question of prejudicial error in instructions to the jury, the Ohio Supreme Court explained in *State v. Hardy* that the charge must be taken as a whole; if it appears from the entire charge that a correct statement of the law was given in such a manner that the jury could not have been misled, no prejudicial error results.[19]

{¶58} The Eleventh District Court of Appeals in *State v. Brumley* encountered a similar jury instruction issue when the trial court instructed the jury with respect to a kidnapping charge that the forceful or deceptive removal of the person had to be for the purpose of engaging in sexual activity, but did not state that the sexual activity itself had to be against the victim's will.[20] The defendant in *Brumley* argued that the omission in the instruction allowed the jury to find him guilty even if it did not find that

16. *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, ¶17, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 153.
17. *Wamsley*, citing *Adams* at paragraph two of the syllabus.

18. *Adams* at paragraph three of the syllabus.

19. *State v. Hardy* (1971), 28 Ohio St.2d 89, 92.

20. *State v. Brumley* (March 29, 1996), Portage App. No. 89-P-2092, 1996 WL 210767 at *25-26.

the sexual activity had been against the victim's will.[21]

{¶59} The *Brumley* court noted that the trial court should have followed the statute verbatim when instructing on the offense of kidnapping.[22] But, the appellate court found the instruction was sufficient to inform the jury of all elements of the offense because, when the jury considered the instruction in context, the only reasonable inference was that the intended sexual activity, which had to have been facilitated by the forceful or deceptive actions of the defendant, was also to have been forced upon the victim.[23]

{¶60} The *Brumley* court explained that it believed the defendant's intention to use force when engaging in the sexual activity can be inferred from "both his use of force in restraining the victim's liberty and his concurrent intent to facilitate the sexual conduct or sexual contact."[24] The court concluded that the phrase "against her will" in R.C. 2905.01(A)(4) was a restatement of the "force" element, which is set forth in the earlier portion of the statute.[25] The court said, "[E]ven if the phrase 'against her will' were not included as an element of kidnapping, no reasonable person would conclude that a defendant could be convicted of kidnapping, with its requirement of concurrent intent to facilitate the sexual conduct or sexual contact, when the resulting sexual activity is consensual."[26]

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21. Id. at *26.

22. Id.

23. Id.

24. Id. at *27.

25. Id.

26. Id.

{¶61} Crim.R. 52(B) states that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. A defective jury instruction does not rise to the level of plain error unless it can be shown that the outcome of the trial would clearly have been different but for the alleged error.[27] In addition, the plain error rule is to be applied with the utmost caution and invoked only under exceptional circumstances in order to prevent a manifest miscarriage of justice.[28]

{¶62} We agree with the reasoning of the *Brumley* court that the failure to instruct the jury on the phrase "against her will" did not render the entire instruction deficient if that instruction expressly referred to the element of force in relation to the restraint or removal of the victim for this count.[29] The trial court in this case instructed the jury on the element of force. The outcome of the trial would not clearly have been different but for the alleged error. Cope's second assignment of error is overruled.

{¶63} Assignment of Error No. 3:

{¶64} "THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS PREJUDICED BY AN INCONSISTENT VERDICT."

{¶65} Cope argues that the jury's verdict finding him guilty of kidnapping on the count involving the purpose to engage in sexual activity against the victim's will was inconsistent with the not guilty verdict for the offense of rape.

{¶66} For the offense charged, the applicable language of the rape statute

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27. *State v. Campbell*, 69 Ohio St.3d 38, 49, 1994-Ohio-492.

28. *State v. Copperrider* (1983), 4 Ohio St.3d 226, 227.
29. *Brumley* at *25-27.

indicates that no person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.[30] "Sexual conduct" has been previously defined.

{¶67} The Ohio Supreme Court in *State v. Davis* noted that R.C. 2905.01(A)(4) requires only that the restraint or removal occur for the *purpose* of non-consensual sexual activity, not that sexual activity actually take place.[31]

{¶68} The appellate court in *State v. Matthieu* explained that the kidnapping statute punishes certain removal or restraint done with a certain purpose, and the eventual success or failure of the goal is irrelevant.[32]

{¶69} We believe this assignment of error is determined by the reasoning set forth in the Ohio Supreme Court case of *State v. Brown*, wherein the court held that an inconsistent verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.[33] Each count in an indictment charges a distinct offense and is independent of all other counts; a jury's decision as to one count is independent of and unaffected by the jury's finding on another count.[34]

{¶70} The jury's verdict on the kidnapping count is not inconsistent with its decision on a separate count of rape. Cope's third assignment of error is overruled.

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30. R.C. 2907.02(A)(2).

31. *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶197.

32. *State v. Matthieu*, Mercer App. Nos. 10-02-04, 10-02-05, 2003-Ohio-3430, ¶17.
33. *State v. Brown* (1984), 12 Ohio St.3d 147, syllabus; see *State v. Lovejoy*, 79 Ohio St.3d 440, 446, 1997-Ohio-371, paragraph one of the syllabus.

34. *Brown*.

{¶71} Assignment of Error No. 4:

{¶72} "APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY PROSECUTORIAL MISCONDUCT."

{¶73} Cope argues that the two prosecutors trying the case engaged in prosecutorial misconduct while questioning witnesses and during closing arguments.

{¶74} To make a finding of prosecutorial misconduct, a reviewing court must determine whether the challenged statements or acts were improper, and if so, whether they affected the defendant's substantial rights.[35] The conduct of a prosecuting attorney cannot be grounds for error unless the conduct deprived the defendant of a fair trial.[36] The issue is the fairness of the trial, not the culpability of the prosecutor.[37]

{¶75} Cope argues that the prosecutors asked leading questions of their witnesses, and made what he called "testimonial assertions" with those questions.

{¶76} According to Evid. R. 611(C), leading questions should not be used on the direct examination of a witness except as necessary to develop the witness' testimony. The court shall exercise reasonable control over the mode and order of interrogating witnesses.[38] According to the Ohio Supreme Court, it is improper for a prosecutor to continue to ask leading questions after the trial court sustains objections to such questioning.[39]

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35. *State v. Smith,* 87 Ohio St.3d 424, 442, 2000-Ohio-450.

36. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶24.

37. *Smith* at 442.

38. Evid.R. 611(A).

{¶77} In *State v. Poling*, the Eleventh Appellate District reversed a case, in part, because the prosecutor engaged in "examination by leading," providing witnesses with the answers sought.[40] The *Poling* court explained that violations of the rules of evidence during trial, singularly, may not rise to the level of prejudicial error, but a conviction will be reversed when the cumulative effect of the error deprives a defendant of the constitutional right to a fair trial.[41] It is not the number of improper questions asked by the prosecution; it is relying on such questions and answers to prove the state's case.[42]

{¶78} We reviewed the instances of leading questions or "testimonial assertions" cited by Cope. Not all of the questions at issue were leading or improper. Cope acknowledges that the trial court sustained some of the objections and instructed the jury to disregard the question or answer. The jury is presumed to have followed the court's instructions.[43]

{¶79} We do not condone any attempt by the state to suggest answers to its witnesses. Any subsequent attempt to lead after a sustained objection is particularly improper. We find, however, that any improper leading was not pervasive and did not so taint the proceedings that Cope was deprived of a fair trial.

{¶80} Cope also argues that the state committed prosecutorial misconduct in its closing argument by mischaracterizing both the evidence and the law, and

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39. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶205.

40. *State v. Poling*, Portage App. No. 2004-P-0044, 2006-Ohio-1008, ¶27-28.

41. Id. at ¶31, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.

42. *Poling*.

43. *State v. Raglin*, 83 Ohio St.3d 253, 264, 1998-Ohio-110.

"attacking" defense counsel.

{¶81} The prosecution is entitled to a certain degree of latitude in summation.[44] Both prosecutors and defense counsel are entitled to wide latitude in summation as to what the evidence has shown and what reasonable inferences may be drawn from the evidence.[45] However, prosecutors must avoid insinuations and assertions that are calculated to mislead the jury.[46] They may not express their personal beliefs or opinions regarding the guilt of the accused and the credibility of witnesses, and may not allude to matters not supported by admissible evidence.[47]

{¶82} Further, it is improper to denigrate defense counsel in the jury's presence.[48] Comments that impute insincerity to defense counsel are improper.[49]

{¶83} In *State v. LaMar*, the Ohio Supreme Court stated that the prosecutor's juxtaposition of his "honest" case with the defense's case, particularly when viewed in light of the pointed criticism of one of LaMar's defense attorneys, unfairly suggested that the defense's case was untruthful and not honestly presented. [50] In the context in which they were stated, the *LaMar* court said the prosecution's comments imputed insincerity to defense counsel and were therefore improper.[51] The *LaMar* court found the improper comments about defense counsel and the defense case did not warrant

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44. *State v. Jackson,* 107 Ohio St.3d 300, 2006-Ohio-1, ¶105.

45. *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, ¶197.

46. *State v. Lott* (1990), 51 Ohio St.3d 160, 166.

47. Id.; *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, ¶124.

48. *Diar*, 2008-Ohio-6266 at ¶219.

49. See *State v. Keenan* (1993), 66 Ohio St.3d 402, 405.

50. *LaMar* at ¶167.

51. Id.

reversal as it found the comments did not pervade the entire case or closing argument.[52]

{¶84} In this case, the state argued in its closing and rebuttal statements that the recordings of Cope's calls from jail showed that he was trying to get witnesses to testify on his behalf and that those witnesses would have to be "coached" to provide favorable testimony. In one recording, Cope told the other person on the phone that "his attorney would have to coach everybody because he is going to have to coach everybody." A prosecutor commented on closing that "[e]ven with an alleged coaching, they still didn't do a very good job." A prosecutor later told the jury they could listen to the tapes of the recorded jail calls for the full context, "and they are coaching…corroborating and putting it all together."

{¶85} Some of those comments by the prosecution did not draw an objection. Instead, defense counsel argued to the jury that defense witnesses were not coached because their testimony was not perfect, as some witnesses couldn't recall some facts or pinpoint specific days, and some of the timelines for events did not coincide with other testimony.

{¶86} Cope now argues that the prosecutor's arguments took Cope's comments out of context and implicated Cope's trial counsel, even though he had different counsel at trial than at the onset of the charges.

{¶87} The record indicates that Cope indeed made the statement in the recording about "coaching." The recording was played in an attempt to provide the context. The prosecutor is given latitude to argue what the evidence has shown and

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52. Id. at ¶168.

the reasonable inferences to be drawn from that evidence.[53]

{¶88} However, we are concerned by the extent to which the prosecutor pushed this theory of witness coaching when he commented that a defense witness' response was "almost so quick it was coerced." "[Defense counsel] couldn't get the question out before she had the answer." Defense counsel objected and the trial court instructed the prosecutor to "refrain from some of that description." The prosecutor continued by stating that "whether someone is coerced or coached is completely up to you, but when you look at the answers, her answers were extremely quick, and that's part of the demeanor of a witness."

{¶89} In addition to the argument about coaching of Cope's witnesses, Cope also asserts that the prosecutors mischaracterized evidence and the law.

{¶90} Cope argues, for example, that the state mischaracterized the law and the state's burden of proof when the prosecutor stated on rebuttal argument that the state had presented at trial a search for the truth, but "what you just heard is a request from the defense for you to flip that and search for doubt." The prosecutor stated that the defense argued reasonable doubt was created when certain things were not done in the state's case and "[t]hat's the best they have."

{¶91} Cope argues the state likewise mischaracterized the evidence when the prosecutor said in rebuttal argument that "[i]t's interesting to note that all of these things that the state doesn't have or the police didn't do, or the victim didn't say, those weren't raised on cross-examination." After objection, the trial court indicated that the statement was a "pretty sweeping statement." The trial court cautioned both sides to pay close attention to the details. The trial court added that "when the state

53. *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, ¶67.

is making some restatements, make sure they are grounded in what you know to be the facts."

{¶92} The trial court instructed the jury that the state's argument was "over sweeping," but it didn't believe there was any intent to misconstrue what evidence had been elicited by defense cross-examination. The trial court assisted in negating any misleading comments by telling the jury not to rely on the prosecutor's representation of what the defense did in cross-examination, but to rely on their collective memory.

{¶93} The Ohio Supreme Court in *State v. Fears* stated that "prosecutors of this state must take their roles as officers of the court seriously."[54] "As such, prosecutors must be diligent in their efforts to stay within the boundaries of acceptable argument and must refrain from the desire to make outlandish remarks, misstate evidence, or confuse legal concepts."[55]

{¶94} Cope cites additional examples of alleged prosecutorial misconduct and while we have not listed all of them here, we thoroughly reviewed them. While there was evidence in the record that Cope discussed witness coaching, we believe the prosecution pushed the boundary on acceptable argument on that issue.

{¶95} The fact that the prosecutors engaged in some improper argument, however, does not warrant reversal unless the remarks prejudicially affected substantial rights of the accused.[56] To make this determination, we must consider

54. *State v. Fears*, 86 Ohio St.3d 329, 332, 1999-Ohio-111.

55. Id.

56. *State v. Hessler*, 90 Ohio St.3d 108, 125, 2000-Ohio-30.

the effect of any misconduct in the context of the entire trial.[57] The prosecutor's closing argument should also be viewed in its entirety when determining prejudice.[58]

{¶96} As we previously noted, this court will not deem a trial unfair if, in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found the defendant guilty even without the improper comments.[59] Considering the effect of any misconduct in the context of the entire trial, it appears clear beyond a reasonable doubt that the jury would have found Cope guilty even without the improper comments. Having rejected both the evidentiary and closing argument portions of Cope's prosecutorial misconduct allegations, we overrule Cope's fourth assignment of error.

{¶97} Judgment affirmed.

YOUNG, P.J., and RINGLAND, J., concur.

57. *Keenan,* 66 Ohio St.3d at 410.

58. *State v. Hill* (1996), 75 Ohio St.3d 195, 204.
59. *LaMar*, 2002-Ohio-2128 at ¶121.