[Cite as *State v. Vargas*, 2012-Ohio-6368.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee/ [Cross-Appellant],	:	
v.	:	No. 10AP-952
	:	(C.P.C. No. 10CR-02-651)
Luis M. Vargas,	:	(REGULAR CALENDAR)
Defendant-Appellant/ [Cross-Appellee].	:	

D E C I S I O N

Rendered on May 1, 2012

Ron O'Brien, Prosecuting Attorney, *Steven L. Taylor* and *Catherine M. Russo*, for appellee.

Kerry M. Donahue, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, Luis M. Vargas ("appellant"), appeals from a judgment entry of conviction entered following a jury trial in the Franklin County Court of Common Pleas in which he was convicted of two counts of rape and one count of kidnapping. The State of Ohio ("the State") has also filed a cross-appeal challenging the trial court's purported "merger" of the rape and kidnapping counts through the imposition of concurrent sentences. For the reasons that follow, we affirm the findings of guilt, but we remand this matter for proper sentencing.

I. Facts and Procedural History

{¶ 2} On February 2, 2010, appellant and a co-defendant, Jeffrey Rivera ("Rivera" or "co-defendant"), were indicted for raping and kidnapping S.K. at knifepoint on October 3, 2009. Appellant was charged with one count of kidnapping and three counts of rape. The co-defendant was charged with one count of kidnapping and two counts of rape.

{¶ 3} Appellant and his co-defendant were tried jointly in a jury trial which commenced on or about August 17, 2010. At trial, the State presented the testimony of several witnesses, including that of the victim, a sexual assault nurse examiner, and three Columbus police officers.

{¶ 4} S.K. testified that on October 2, 2009, she was visiting her cousin Annice, who lived in an apartment on Brookway Road. Also present at Annice's apartment were S.K.'s two minor children, Annice's boyfriend Shaway and his brother Deshawn, as well as Annice's female friends, Tanitia ("Nee Nee"), and Marva Johnson. The group watched movies, ate dinner, and played with the kids. Later that night, as it approached the early morning hours of October 3, 2009, S.K. and the other women decided to leave the apartment to get a drink. The four women walked to a nearby Marathon gas station and purchased alcohol and cigarettes. Annice, Nee Nee, and Marva wanted to go to a bar near the gas station, but S.K. decided to go back to the apartment to be with her children. The three other women stood outside the bar and watched S.K. as she crossed the street to return to Annice's apartment.

{¶ 5} S.K. testified she was scared about walking back alone, so she called and sent a text message to Deshawn to ask him to meet her halfway, but he did not respond. S.K. then called her friend Chantler Tennant and spoke with him until he ended the call, stating he would call her back. At about the time that call ended, S.K. noticed a black vehicle coming toward her. It drove past her and turned around in a parking lot. She began to walk faster. The car slowed down and someone yelled out the window, asking to talk to her. She responded that she could not talk because she needed to get home. The passenger in the vehicle, who was later identified as Rivera, asked S.K. if she needed a ride home, but she declined his offer. Rivera informed S.K. his name was "Young" and showed her a tattoo on his right arm that said "Young." S.K. provided her first name and kept

walking. The passenger asked again if S.K. wanted a ride and when she said no, the vehicle pulled away.

{¶ 6} As S.K. was beginning to walk across a field near her Annice's apartment, she noticed the black vehicle again. The passenger asked to talk to her. S.K. said no, but he gestured to her to approach. S.K. testified she stopped walking and spoke to Rivera while maintaining a distance. Rivera then suddenly pulled out his penis and said, "Don't you want this[?]" (Tr. 127.) S.K. said no, but Rivera grabbed her arm and started trying to rub against her. S.K. testified she tried to pull away. Rivera repeatedly told S.K., "You know you want it." (Tr. 128.) S.K. told Rivera she had to go. The driver of the vehicle, later identified as appellant, exited the vehicle and retrieved a knife from the trunk.

{¶ 7} S.K. testified appellant and Rivera began speaking to each other in Spanish. Appellant gave the knife to Rivera, who ordered S.K. to get into the vehicle. S.K. got into the rear of the vehicle and sat in the middle. Appellant returned to the driver's seat and Rivera got into the rear passenger's seat. Rivera still had his penis exposed. He instructed S.K. to "suck it." (Tr. 136.) S.K. told Rivera she wanted to go home to her children, but he repeatedly insisted she was a "streetwalker" and said, "You know you want it." (Tr. 137.) Rivera advised S.K. to "suck my penis." (Tr. 137.) Fearing for her life, S.K. did what she was told to do and performed fellatio on Rivera at knifepoint for approximately five to ten minutes as appellant drove the vehicle.

{¶ 8} S.K. testified she noticed the car had stopped near an abandoned building. Appellant and Rivera spoke to one another in Spanish. She recognized the word "policia" and noticed a police car driving away. Appellant then exited the vehicle and got into the rear of the car on the driver's side. Rivera asked appellant if he "want[ed] to get some of this, too?" (Tr. 140.) Appellant responded affirmatively. Appellant pulled down S.K.'s pants and forced vaginal intercourse with her while she continued to give Rivera oral sex. S.K. described the intercourse as "really, really rough," particularly due to the fact she had recently given birth and her body had not completely healed. (Tr. 274.)

{¶ 9} S.K. testified she stopped performing oral sex on Rivera when appellant was about to ejaculate because appellant wanted S.K. to "suck me off." (Tr. 141.) Rivera advised appellant not to ejaculate in S.K because they did not want to leave behind any evidence. S.K. "sucked off" appellant while giving Rivera a "hand job" at the same time.

(Tr. 142-43.) Appellant ejaculated on S.K.'s back but then wiped it off with a cloth he picked up from the floor of the car. After that, appellant exited the back seat and returned to the driver's seat and began driving again. As appellant drove, S.K. testified she continued to give Rivera oral sex for approximately five or ten minutes until he was about to ejaculate, at which point he ordered her to give him a "hand job" until he ejaculated into a piece of clothing.

{¶ 10} At one point during the course of the kidnapping and rape while S.K. was giving Rivera oral sex, Rivera located S.K.'s cell phone and began scrolling through and reading S.K.'s text messages. Rivera read one particular sexting message sent by S.K. to Deshawn out loud to appellant. Rivera then commented to S.K., "If you didn't want none, why are you talking nasty? You probably had some earlier that day." (Tr. 219.)

{¶ 11} Appellant drove the vehicle to another apartment complex in a wooded area. The men ordered S.K. to wash out her mouth with alcohol by swishing the alcohol around in her mouth and spitting it out in a jug. They also ordered her to spit some alcohol into her hand and rub it onto her face.

{¶ 12} Eventually, the men drove S.K. to the general location of the original kidnapping. She was pushed out of the vehicle. S.K. testified the entire event lasted approximately 30 to 40 minutes. Afterwards, she called Nee Nee's cell phone to get a message to Annice to ask Annice to return to the apartment. When Annice returned home, S.K. informed Annice she had been raped. Annice called 911 and an officer came to Annice's apartment to take a statement from S.K.

{¶ 13} Officer Mario Penny testified he was dispatched to 1280 Brookway Road on October 3, 2009 at 1:33 a.m. to meet with S.K. He described her demeanor as "shell-shocked," "wide-eyed," and "disconnected." (Tr. 505.) Officer Penny obtained basic information from S.K. about the incident, as well as a description of the suspects. Officer Penny called a medic for S.K. and also contacted Detective Jennifer Watson of the sexual assault squad. In addition, because Rivera had touched S.K.'s cell phone, Officer Penny collected the cell phone as evidence. On cross-examination, Officer Penny testified S.K. informed him the two suspects had switched places behind the wheel. He also testified one of the men had ejaculated on her face and then wiped it off her face. On re-direct,

Officer Penny testified S.K. also reported the man who forced vaginal intercourse ejaculated on her back and used a t-shirt to wipe it off her back.

{¶ 14} Sarah Koenig, a sexual assault nurse examiner ("SANE") and a labor and delivery nurse, testified she examined S.K. and completed a sexual assault evidence collection kit. This included collecting a blood sample as well as cheek swabs for DNA, along with S.K.'s clothing. Based upon the history provided by S.K., Nurse Koenig also swabbed S.K.'s right hip area to attempt to recover any semen which may have been present. In addition, Nurse Koenig visually inspected S.K. for bruises, abrasions, redness, tears or swelling. A speculum exam and a toluidine blue dye exam were also performed. No evidence of trauma was detected, which Nurse Koenig testified was not uncommon in a rape case.

{¶ 15} Detective Watson testified she is assigned to the sexual assault unit of the Columbus Division of Police and she investigates rapes and kidnappings within the city. Detective Watson was notified by Officer Penny of the incident involving S.K. Detective Watson made several attempts to contact S.K. and exchanged messages with her before finally interviewing S.K. on either October 22 or 23, 2009. Prior to the interview with S.K., Detective Watson submitted items from the rape kit for testing. No spermatozoa were found on the submitted slides, but the swab obtained from S.K.'s right hip indicated the presence of semen.

{¶ 16} Detective Watson developed a potential suspect prior to meeting with S.K. on October 22 or 23, 2009. At the interview, she showed S.K. a photo array containing six photographs. S.K. immediately identified Rivera, located in position No. 3 of the photo array, as the passenger in the vehicle and reiterated that he had a tattoo on his arm with the word "Young." Detective Watson confirmed Rivera indeed had such a tattoo on his arm. Based upon that information, Detective Watson eventually obtained a search warrant to collect a DNA swab from Rivera for comparison purposes.

{¶ 17} Detective Watson also testified a second potential suspect was developed. That suspect was appellant. Detective Watson eventually obtained an oral swab from appellant as well. The oral swabs of appellant and Rivera were submitted to the crime lab for comparison to the DNA obtained from the swab collected from S.K.'s right hip area.

{¶ 18} Sergeant John Stadley, a third shift officer with the Columbus Division of Police, testified that on January 23, 2010, he came into contact with appellant and Rivera at approximately 4:00 a.m. in the area of East Long Street and Taylor Avenue. The two men were in a four-door, dark-colored Chevrolet Cavalier. Appellant was driving and Rivera was the front-seat passenger. Sergeant Stadley described the vehicle as messy with lots of trash and miscellaneous items on the floor. Sergeant Stadley also made an in-court identification of the two men.

{¶ 19} Prior to the close of the State's case, the parties entered into a stipulation, which was read to the jury, regarding the DNA obtained from the male fraction of the dried stain swab collected from S.K.'s right hip. Rivera was excluded as a contributor, but it was stipulated that the dried stain swab from S.K.'s right hip matched the DNA swab standard obtained from appellant.

{¶ 20} At the conclusion of the State's case, the trial court granted appellant's Crim.R. 29 motion with respect to one of the two rape counts alleging that appellant had engaged in vaginal intercourse with S.K. The trial proceeded on all other counts.

{¶ 21} Appellant did not introduce the testimony of any witnesses on his behalf. However, his co-defendant introduced the testimony of three witnesses: Marva Johnson, Chantler Tennant, and defense investigator Scott Hall.

{¶ 22} Marva testified she was at Annice's apartment on October 2, 2009. Later that night, Marva, Nee Nee, Annice, and S.K. left the apartment to go to a bar on Livingston Avenue called Misty's. Before reaching the bar, they stopped at a Marathon gas station where S.K. purchased alcohol and everyone drank from the bottle. All four women then went to the bar. S.K. only stayed for 20 or 30 minutes before leaving to go back to Annice's apartment. Later, S.K. called to say she had been raped. As a result of the phone call, Annice left the bar, but Marva and Nee Nee stayed for a while because they did not believe S.K. had been raped.

{¶ 23} Chantler testified he was talking to S.K. on the phone during the early morning hours of October 3, 2009. He testified he believed S.K. had initiated the call. They were discussing an upcoming hair appointment. S.K. advised she was walking down Livingston Avenue. Chantler testified he heard a car approach and a guy yelled something. S.K. told Chantler she would have to call him back later. Chantler denied that

the reason for the termination of the call was because he had another call he had to take. At that time, he was not under the impression that S.K. was in trouble. He did not hear from her again that night and, in fact, he did not hear from her for approximately three weeks.

{¶ 24} Investigator Hall testified he participated in interviewing S.K. for the defense. During the course of the interview, S.K. described appellant as five feet four inches tall, denied drinking on the night of the incident, and stated she wore her glasses throughout the entire incident.

{¶ 25} The jury found appellant guilty of one count of kidnapping, one count of rape alleging vaginal intercourse, and one count of rape alleging fellatio. Rivera was found guilty of two counts of rape (fellatio) and one count of kidnapping. A sentencing hearing was held on September 3, 2010. The State argued against merger of the rape and kidnapping offenses and requested consecutive sentences. Appellant's trial counsel referenced a recent tenth district case, *State v. Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385, and argued the offenses should be merged. The trial court stated it believed the kidnapping count had to be merged with the rapes because it was directly related to the rape offenses. The trial court sentenced appellant to eight years of incarceration on each of the rape counts, which he ordered to be served consecutively to one another. However, the trial court also imposed eight years for the kidnapping count, but ordered that count to be served concurrently. This timely appeal now follows.

II. Assignments of Error and Cross-Assignment of Error

{¶ 26} Appellant has raised four assignments of error for our review:

> ASSIGNMENT OF ERROR #1
>
> APPELLANT'S DUE PROCESS RIGHT TO PRESENT A MEANINGFUL DEFENSE AND HIS RIGHT TO CONFRONT HIS ACCUSER WAS VIOLATED BY THE TRIAL COURT'S EXCLUSION OF THE ALLEGED VICTIM'S TEXT MESSAGES AND PRIOR INCONSISTENT STATEMENTS.
>
> ASSIGNMENT OF ERROR #2
>
> THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND ABUSED ITS DISCRETION WHEN IT ALLOWED THE SANE NURSE TO RENDER A LAY

> OPINION THAT RAPE VICTIMS TYPICALLY DO NOT HAVE IDENTIFIABLE TRAUMA BECAUSE WOM[E]N EXPERIENCE AROUSAL AND ATTENDANT LUBRICATION OF THEIR SEX ORGANS REGARDLESS OF WHETHER THE SEX IS CONSENSUAL OR NOT, THEREBY DECREASING THE RISK OF TRAUMA FROM VAGINAL RAPE.
>
> ASSIGNMENT OF ERROR #3
>
> APPELLANT'S CONVICTIONS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTIONS WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> ASSIGNMENT OF ERROR #4
>
> TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

{¶ 27} In addition, the State has filed a cross-appeal in which it also asserts a single assignment of error for our review:

> THE TRIAL COURT ERRED BY PURPORTING TO MERGE DEFENDANT'S RAPE AND KIDNAPPING COUNTS THROUGH THE IMPOSITION OF CONCURRENT SENTENCES.

{¶ 28} We shall begin by addressing appellant's assignments of error before addressing the cross-assignment of error raised by the State.

A. First Assignment of Error—Exclusion of Photographs of Text Messages and Prior Inconsistent Statements

{¶ 29} In his first assignment of error, appellant argues his right to due process, his right to present a meaningful defense, and his right to confront his accuser were all violated by the trial court's exclusion of S.K.'s text messages and testimony regarding prior inconsistent statements.

{¶ 30} Specifically, appellant submits the trial court's rulings improperly prevented the introduction of S.K.'s text messages sent to an individual prior to her encounter with appellant and his co-defendant, wherein she expressed a desire to have sex with a man whose last name she did not know. Appellant argues the trial court also improperly denied the request to offer testimony from a defense witness (Marva) to show S.K. had advised the witness that she voluntarily got into the car with the two men. As a result, appellant contends the trial court violated his rights to confrontation and due process and to present a complete defense based upon consent. Appellant submits the evidence excluded by the trial court was highly relevant to the issue of whether or not S.K. consented to the sexual activity at issue with appellant and his co-defendant.

{¶ 31} We shall begin our analysis by addressing the issue of the photographs of the text messages. "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173 (1987), paragraph two of the syllabus. Here, we find the trial court did not abuse its discretion in excluding photographs of text messages sent and received by S.K., where the messages contained in the photographs had already been introduced into evidence via testimony.

{¶ 32} S.K. sent a text message to Deshawn in which she stated she wanted to have sex with him. S.K. admitted she had known Deshawn for a few months, but she did not know his last name. Appellant has argued this text message is probative of consent with respect to the rapes involving appellant and his co-defendant, claiming that because she wanted to have sex with Deshawn, it is likely S.K. also wanted to have sex with appellant and Rivera. We find appellant's challenges on this issue to be without merit.

{¶ 33} First, pursuant to Crim.R. 52(A), any error in refusing to admit the photographs of the text messages into evidence was harmless because the text messages were admitted via direct testimony from S.K. S.K. testified on both direct and cross-examination that she was "sexting" with Deshawn prior to her encounter with appellant and Rivera. In fact, on cross-examination, she actually read the most probative message into the record, which stated, "U comin. I wanna fuck." (Tr. 190; *see also* Defendant's Proffered exhibit E.) Because this evidence was introduced via S.K.'s testimony, any error on the part of the trial court in declining to allow the admission of the actual photographs depicting the text message on top of the testimony provided was harmless. *See State v.*

Woods, 10th Dist. No. 09AP-667, 2010-Ohio-1586, ¶ 40 (defendant suffered no prejudice when the trial court declined to admit voicemail messages because the evidence was admitted through "other means," such as direct testimony); and *State v. West*, 10th Dist. No. 06AP-11, 2006-Ohio-6259, ¶ 10 (the same evidence defendant sought to present to the jury was presented by other means, so any error committed by excluding the evidence is harmless error). Here, the photographs of the text messages at issue would have been cumulative of the testimony already presented on the issue.

{¶ 34} In addition, the text messages were inadmissible under Evid.R. 801 and 802 because they were inadmissible hearsay evidence which failed to meet any exception. Pursuant to Evid.R. 801(C), "hearsay" is defined as "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." The statements were offered to prove that S.K. wanted to have sex with Deshawn. Furthermore, the text messages were inadmissible propensity evidence. Under Evid.R. 404(B), evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith, although it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. In the instant case, the defense offered the text messages in order to show that because S.K. wanted to have sex with Deshawn, a man whose last name was unknown to her, she must have wanted to also have sex with appellant and Rivera, neither of whom she knew. However, appellant was not attempting to show here that any of the exceptions set forth in Evid.R. 404(B) (e.g., motive, intent, plan, etc.) were applicable. As a result, the trial court did not abuse its discretion in declining to admit the photographs of the text messages.

{¶ 35} Appellant also challenges the trial court's refusal to permit defense counsel to ask its witness, Marva, if S.K. had told her she voluntarily got into the car with the two men. We find no abuse of discretion here, given that the proper foundation for such evidence was not laid.

{¶ 36} Pursuant to Evid.R. 613(B)(1), extrinsic evidence of a prior inconsistent statement by a witness is admissible if the statement is offered "for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the

statement and the opposite party is afforded an opportunity to interrogate the witness on the statement."

{¶ 37} Here, S.K. did not have the opportunity to explain or deny whether she informed Marva that she voluntarily got into the car with the two men. Despite trial counsel's claims to the contrary, we find the statement claiming that S.K. said she voluntarily got into the car with the two men was attempted to be introduced (improperly) for the first time through Marva, and that appellant's trial counsel failed to follow the proper evidentiary procedures required to impeach S.K. with this statement.

{¶ 38} Trial counsel for appellant argued at a sidebar in the midst of Marva's testimony that S.K. had been confronted with this statement during cross-examination via a hypothetical question. (Tr. 686.) However, this claim is not supported by the record. Appellant's current counsel cites generally to a span of more than 220 consecutive pages in the transcript and argues that appellant's trial counsel was repeatedly prevented from laying a foundation to introduce evidence of prior inconsistent statements during cross-examination and that such action violated confrontation guarantees. However, counsel fails to point to a more specific page or short span of pages in the transcript to support trial counsel's vague sidebar assertion that S.K. did in fact have an opportunity to explain or deny this *particular* statement. Our independent review of these more than 220 pages of the transcript has failed to reveal anywhere where this specific question was asked of S.K., even in a "hypothetical" format. We decline to interpret what was apparently an ongoing effort to generally address a variety of alleged inconsistent statements throughout the entire course of appellant's (and his co-defendant's) cross-examination of S.K. as an opportunity to explain or deny this specific statement. Thus, we find appellant's claim to be completely unsupported by the record, and because a proper foundation was not laid, we find the trial court did not abuse its discretion in refusing to allow Marva's testimony on this allegedly prior inconsistent statement.

{¶ 39} Furthermore, the fact that S.K. was subject to cross-examination is sufficient to satisfy appellant's right to confrontation. *See generally State v. J.G.*, 10th Dist. No. 08AP-921, 2009-Ohio-2857, ¶ 15 (confrontation clause not violated where witness underwent cross-examination); and *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio- 6677, ¶ 46 (the confrontation clause does not bar the admission of out-of-

court statements from an individual who testifies at trial and is subject to cross-examination at trial). "The Confrontation Clause of the Sixth Amendment to the United States Constitution gives the accused the right to be confronted with the witnesses against him. However, the Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis sic.) *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 83, quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985). Therefore, we find appellant's confrontation clause and due process claims to be without merit.

{¶ 40} Accordingly, we overrule appellant's first assignment of error.

B. Second Assignment of Error—Admission of Testimony of SANE Nurse

{¶ 41} In his second assignment of error, appellant asserts the trial court abused its discretion in allowing the SANE nurse to render a lay opinion regarding the physiology of a woman's response to a sexual act, whether or not said act is consensual, as part of her testimony on why it is not uncommon to find no evidence of trauma in a rape case. Appellant submits the SANE nurse's testimony was actually expert in nature and that her background and qualifications failed to meet the standards for an expert in physiology. Appellant argues that because Nurse Koenig does not qualify as an expert and because her testimony did not constitute opinion testimony by a lay witness, the trial court abused its discretion in allowing this testimony.

{¶ 42} "This court, as well as other Ohio courts, have recognized that nurse practitioners may testify as experts, pursuant to Evid.R. 702, concerning medical findings and may render opinions as to whether a patient's physical condition is or is not consistent with a history of sexual abuse." *State v. Smith*, 10th Dist. No. 03AP-1157, 2004-Ohio-4786, ¶ 25.

{¶ 43} Nurse Koenig provided testimony regarding a woman's response to sexual stimulation. She testified that whether said stimulation is consensual or nonconsensual, such stimulation often causes lubrication, which in turn reduces evidence of trauma. A review of the transcript of the trial proceedings reveals that the trial court appeared to admit such testimony under the notion that it was opinion testimony about physiology

provided by a lay witness pursuant to Evid.R. 701. However, Nurse Koenig's testimony is actually more of an expert nature, which would be governed by Evid.R. 702.

{¶ 44} Although the State never moved for Nurse Koenig to be declared an expert, a formal declaration is not required where the witness is in fact qualified to render expert testimony pursuant to Evid.R. 702. *See generally State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084. *See also State v. McGlown*, 6th Dist. No. L-07-1163, 2009-Ohio-2160, ¶ 43 (although the trial court did not expressly determine that the witness was an expert, the trial court did not abuse its discretion in allowing him to testify as an expert); and *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 94-95 (where the prosecution never offered the witness as an expert and did not formally qualify him as such, but his testimony bore all the indicia of expert testimony, given that his knowledge of criminal law and of the facts and circumstances of the defendant's plea is not knowledge possessed by the average person, the witness was qualified to testify as an expert on such matters under Evid.R. 702, even though the court did not formally qualify him as an expert).

{¶ 45} Under Evid.R. 702, a witness may testify as an expert if his or her testimony relates to matters beyond the knowledge or experience possessed by lay persons and if he or she has specialized knowledge or skill and the testimony is based upon reliable scientific, technical or other specialized information. *State v. Warmus*, 8th Dist. No. 96026, 2011-Ohio-5827, ¶ 9. Pursuant to Evid.R. 702(B), an expert may be qualified due to his or her specialized knowledge, skill, experience, training or education to provide an opinion that will assist the jury in understanding the evidence and determining a fact at issue. *Drummond* at ¶ 113. Neither special education nor certification is required to grant a witness expert status. *Id*. "The individual offered as an expert need not have complete knowledge of the field in question, as long as the knowledge she possesses will aid the trier-of-fact in performing its fact-finding function." *State v. Baston*, 85 Ohio St.3d 418, 423 (1999), citing *State v. D'Ambrosio*, 67 Ohio St.3d 185, 191 (1993). "An expert need not be the best witness on the subject." *State v. Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, ¶ 30, citing *Scott v. Yates*, 71 Ohio St.3d 219, 221 (1994). "Rather, the expert need only demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror." *Id*., citing *Scott*.

{¶ 46} Here, the testimony clearly shows Nurse Koenig possessed "specialized knowledge, skill, experience, training, or education" and that such knowledge was beyond the knowledge or experience possessed by lay persons and would dispel any misconception among lay persons that a rape must produce vaginal trauma because a woman would not become lubricated in a situation involving nonconsensual sex. Nurse Koenig testified she graduated from Mount Carmel College of Nursing 22 years earlier as a registered nurse and was also certified in inpatient obstetrics. She testified she has been a full-time labor and delivery nurse for 20 years and has also served as a SANE nurse on an on-call basis for approximately 18 months. Prior to her examination of S.K., Nurse Koenig had been independently performing exams for approximately 8 months. At the time of the trial, she had performed approximately 15 to 20 SANE exams. She further described the specialized training she received as a SANE nurse, which included 40 hours of classroom time, 25 supervised speculum exams, 3 actual SANE cases with a preceptor, as well as courtroom observation time. She also described in detail the process used for completing a sexual assault evidence collection kit.

{¶ 47} We find Nurse Koenig's training qualified her to testify as to whether or not it was common for a rape victim to display signs of vaginal trauma. In *State v. Garrett*, 1st Dist. No. C-090592, 2010-Ohio-5431, ¶ 34, the First District Court of Appeals allowed a SANE nurse, who was not qualified as a medical doctor, to testify that it was not uncommon for an alleged rape victim to have no trauma to her vagina. *See also State v. Young*, 6th Dist. No. L-06-1106, 2007-Ohio-754, ¶ 21-22 (sexual assault nurse examiner was found to be qualified as an expert witness as to the examination and recognition of injuries and trauma due to her educational qualifications and the fact her testimony was based upon reliable procedures and information); and *State v. Spires*, 10th Dist. No. 10AP-861, 2011-Ohio-3312, ¶ 7 (sexual assault nurse examiner was qualified as an expert and was permitted to testify as to physical signs of sexual abuse and trauma and the healing process). Any error on the part of the trial court in seemingly characterizing Nurse Koenig's testimony as a lay opinion rather than expert testimony is harmless. *See generally In re Priser*, 2d Dist. No. 19861, 2004-Ohio-1315, ¶ 26 (trial court's error in declining to qualify the witness as an expert witness was harmless because the witness expressed her views on the issue and the trial court was not obligated to afford any less

credibility to that testimony simply because she testified as a lay witness, rather than an expert).

{¶ 48} Accordingly, appellant's second assignment of error is overruled.

C. Third Assignment of Error—Manifest Weight and Sufficiency of the Evidence

{¶ 49} In his third assignment of error, appellant submits his convictions for kidnapping and rape are not supported by sufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶ 50} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 78; and *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶ 51} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *See Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶ 79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001); *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶ 52} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's?

Id. at ¶ 25. Although there may be legally sufficient evidence to support a judgment, it may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; *see also State v. Robinson*, 162 Ohio St. 486 (1955) (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95 (2000).

{¶ 53} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the fact finder's resolution of the conflicting testimony." *Wilson* at ¶ 25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 54} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶ 10, quoting *State v. Long*, 10th Dist. No. 96APA04-511 (Feb. 6, 1997).

{¶ 55} In the instant case, appellant challenges the sufficiency of his rape by fellatio conviction, arguing there is insufficient evidence to demonstrate that he forced S.K. to give him oral sex. Appellant asserts S.K.'s testimony on this issue was contradictory, arguing she testified that at one point she was forced to give him oral sex, while at another point during her testimony, she claimed it did not occur. As a result of this conflicting testimony, as well as S.K.'s failure to mention the forced oral sex in other statements, and the fact the jurors had questions regarding this particular count, appellant argues his conviction on this particular rape count must be reversed. However, we believe the evidence here is more than sufficient to support appellant's conviction for rape by fellatio.

{¶ 56} The jury found appellant guilty of one count of rape, pursuant to R.C. 2907.02(A)(2) for engaging in sexual conduct, to wit: fellatio, with S.K. by purposely compelling her to submit by force or threat of force. S.K.'s testimony establishes that she was raped by appellant when he ordered her to "suck off" his penis. S.K. testified in detail about the rape by fellatio. She testified that appellant (the driver) stopped the car, got into the back seat, pulled her pants down and started intercourse with her while she was giving oral sex to Rivera. Appellant advised S.K. he was about to ejaculate and ordered her to "suck me off" until he was about to ejaculate. (Tr. 141-42.) Rivera told appellant not to ejaculate in S.K.'s mouth because they did not want any evidence to be left behind. Rivera told appellant he should have S.K. suck him off instead. S.K. testified she sucked off appellant while giving Rivera a hand job. She further testified appellant ejaculated into a piece of clothing, then got back into the driver's seat and started driving again. On cross, S.K. again testified that appellant (the driver) had both oral and vaginal sex with her. (Tr. 270.)

{¶ 57} In analyzing whether a conviction is based upon sufficient evidence, we do not assess whether the evidence is to be believed, but instead, whether the evidence, if believed, would support a conviction. Here, the testimony of S.K., if believed, is sufficient to find appellant guilty of the rape count alleging fellatio. " '[T]here is no requirement, statutory or otherwise, that a rape victim's testimony be corroborated as a condition precedent to conviction.' " *Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, at ¶ 61, quoting *State v. Flowers*, 10th Dist. No. 99AP-530 (May 4, 2000). " '[T]he testimony of a rape victim, if believed, is sufficient to support each element of rape.' " *Id*., quoting *State v. Kring*, 10th Dist. No. 07AP-610, 2008-Ohio-3290, ¶ 42.

{¶ 58} S.K.'s testimony alone establishes the elements of rape by fellatio. Appellant's claim that S.K. testified she did not give appellant oral sex is unsupported. We find the evidence on this count to be sufficient to support appellant's conviction for rape by fellatio.

{¶ 59} As to his manifest weight challenge, appellant argues S.K. was not a credible witness, claiming she either contradicted herself and/or was contradicted by the testimony of the other witnesses throughout the entire trial. Appellant contends S.K.'s

testimony was fraught with inconsistencies and implausibilities and, therefore, it is not believable.

{¶ 60} For example, appellant takes issue with the following, claiming it raises questions as to S.K.'s credibility: (1) S.K.'s testimony that she left her two young children with two men whose last names she did not know; (2) the conflict between S.K.'s testimony that she was not drinking that night and she did not go to the bar next to the gas station, and the contradictory testimony from Marva; (3) S.K.'s claim she was not seeking sex, despite the "sext" message she sent to Deshawn earlier in the day; (4) the discrepancy between who ended the phone call with Chantler just before S.K. was kidnapped and raped—S.K. or Chantler; (5) discrepancies in S.K.'s testimony as to whether the two offenders switched places behind the wheel at any point; (6) S.K's testimony that the vaginal intercourse with appellant was "really, really rough," despite the fact that it was not described in that fashion to the SANE nurse; (7) the discrepancy as to where the liquor bottle she purchased from the gas station was located in the vehicle during the sexual assault; (8) the inconsistencies in her testimony as to whether she did or did not give oral sex to appellant; (9) her testimony that her phone vibrated during the sexual assaults, but she could not explain why there was no record of a call to her phone during that time period; (10) the inconsistency between her trial testimony stating she held her glasses in her hand during the rapes and her statement to the defense investigator claiming she wore her glasses throughout the event; and (11) the inconsistency between her testimony that she called Annice immediately after the attack as she walked back to the apartment and the phone records showing that call was placed after the 911 call made at Annice's apartment.

{¶ 61} Appellant claims the evidence in this case supports a "consensual and/or commercial encounter," rather than a rape, and that the verdicts are against the manifest weight of the evidence. We find no merit in this argument.

{¶ 62} Appellant was found guilty of kidnapping, pursuant to R.C. 2905.01(A)(4), for removing S.K. from the place where she was found and/or by restraining her for the purpose of engaging in sexual activity with her against her will, using force, threat or deception. Appellant was also found guilty of one count of rape, pursuant to R.C. 2907.02(A)(2), for engaging in sexual conduct, to wit: fellatio, with S.K. by purposely

compelling her to submit by force or threat of force, and of one count of rape, pursuant to R.C. 2907.02(A)(2), for engaging in sexual conduct, to wit: vaginal intercourse, with S.K. by purposely compelling her to submit by force or threat of force.

{¶ 63} A reasonable juror could have found appellant guilty of all three crimes. S.K.'s testimony itself establishes that she was kidnapped. She testified the two men forced her into their car at knifepoint and held her against her will using force and/or threats for the purpose of engaging in sexual activity with her. Appellant forced vaginal intercourse with S.K. and also ordered her to perform oral sex on him. Additionally, appellant attempted to limit the evidence of the rapes by ejaculating into a piece of clothing, and by forcing S.K. to rinse out her mouth with alcohol and to rub alcohol onto her face.

{¶ 64} Even in analyzing these convictions under a manifest weight review, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice warranting reversal, as a reasonable juror could find the testimony of S.K. to be credible. Many of appellant's challenges to S.K.'s credibility involved details which were in no way significant to the account of the actual crimes at issue (e.g., who ended the phone call just before she encountered the two offenders, where the liquor bottle was located in the vehicle, whether or not her cell phone vibrated during the incident).

{¶ 65} Furthermore, we note that a decision on the credibility of the witnesses made by a fact finder, such as a jury, is given great deference by a reviewing court. *State v. Covington*, 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 28. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley*, 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶ 16, citing *State v. Gray*, 10th Dist. No. 99AP-666 (Mar. 28, 2000); *see also State v. Chandler*, 10th Dist. No. 05AP-415, 2006-Ohio-2070, ¶ 8. The weight to be given to the evidence, as well as the credibility of the witnesses, are issues which are primarily to be determined by the trier of fact. *State v. Hairston*, 10th Dist. No. 05AP-366, 2006-Ohio-1644, ¶ 20, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967). The trier of fact is in the best position to take into account any inconsistencies, along with the witnesses' demeanor and manner of testifying, and determine whether or not the witnesses' testimony is credible. *Chandler* at ¶ 9, citing *State v. Williams*, 10th Dist. No.

02AP-35, 2002-Ohio-4503, ¶ 58. A jury, as the finder of fact and the sole judge of the weight of the evidence and the credibility of the witnesses, may believe or disbelieve all, part, or none of a witness's testimony. *State v. Antill*, 176 Ohio St. 61, 67 (1964); *State v. Jackson*, 10th Dist. No. 01AP-973 (Mar. 19, 2002); and *Chandler* at ¶ 13. "While the jury may take note of the inconsistencies and resolve or discount them accordingly, * * * such inconsistencies do not render [a] defendant's conviction against the manifest weight of the evidence." *State v. Nivens*, 10th Dist. No. 95APA09-1236 1996 Ohio App. LEXIS 2245, *7, 1996 WL 284714, *3 (May 28, 1996). A conviction is not against the manifest weight of the evidence merely because the jury believed the prosecution testimony. *State v. Houston*, 10th Dist. No. 04AP-875, 2005-Ohio-4249, ¶ 38 (reversed and remanded in part on other grounds); *State v. Stewart*, 10th Dist. No. 08AP-33, 2009-Ohio-1547, ¶ 22.

{¶ 66} Here, the jury was well aware of the fact that one of the defense attorneys had introduced testimony to contradict the testimony of S.K., and that S.K. had admitted that she made some statements which were inconsistent with previous statements. It was within the province of the jury to take this into consideration when weighing the evidence in order to determine whether or not it found S.K.'s testimony credible. Furthermore, the testimony of S.K. was subject to cross-examination, at which point appellant's counsel had ample opportunity to attempt to undermine her credibility. Based upon the evidence presented, the jury was free to determine that it believed the events relayed by S.K. and the other State witnesses. It was also within the province of the jury to determine that S.K.'s testimony, in whole or in part, was believable.

{¶ 67} In addition, as previously stated above, there is no requirement that a rape victim's testimony must be corroborated. Furthermore, a rape victim's testimony, if believed, is sufficient to support each and every element of a rape charge. Moreover, in the instant case, there is DNA evidence linking appellant to the crime. The stipulation presented to the jury established that the DNA obtained from the male fraction of the dried stain swab collected from S.K.'s right hip matched the DNA swab standard obtained from appellant.

{¶ 68} In conclusion, based upon all of the above, we find there is sufficient evidence to support appellant's conviction for rape by fellatio and we also believe a reasonable jury could find appellant guilty of kidnapping and rape. Accordingly, we

overrule appellant's third assignment of error challenging the sufficiency and manifest weight of the evidence.

D. Fourth Assignment of Error—Ineffective Assistance of Counsel

{¶ 69} In his fourth assignment of error, appellant argues his trial counsel was ineffective for the following reasons: (1) failing to request a mistrial due to juror misconduct, a lack of juror impartiality, and the trial court's hostility toward the defense; (2) failing to assert an objection to the due process violation committed by the trial court in refusing to allow the defense to ask Marva about the alleged prior inconsistent statement made by S.K. with respect to whether or not she voluntarily entered the car with the two men and/or failing to lay a proper foundation in order to raise the issue of the inconsistent statements; and (3) failing to object to the trial court's failure to merge the kidnapping and rape offenses as allied offenses of similar import when no separate act or animus existed.

{¶ 70} In Ohio, a properly licensed attorney is presumed competent. *Vaughn v. Maxwell*, 2 Ohio St.2d 299, 301 (1965). Therefore, the burden of showing ineffective assistance of counsel is on the party asserting it. *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). Trial counsel is entitled to a strong presumption that all decisions fall within the wide range of reasonable professional assistance. *State v. Sallie*, 81 Ohio St.3d 673, 675 (1998). Additionally, in fairly assessing counsel's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *State v. Conway*, 109 Ohio St.3d 412, 2006-Ohio-2815, ¶ 101.

{¶ 71} Trial strategy and even debatable trial tactics do not establish ineffective assistance of counsel. *Id.* A reviewing court must be "highly deferential to counsel's performance and will not second-guess trial strategy decisions." *State v. Tibbetts*, 92 Ohio St.3d 146, 166-67 (2001). Strategic choices made after substantial investigation "will seldom if ever" be found wanting. *Strickland v. Washington*, 466 U.S. 686, 681, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.*

{¶ 72} "[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that

the trial court cannot be relied on as having produced a just result." *Id.* at 686. In order to succeed on a claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, he must demonstrate that his trial counsel's performance was deficient. *Id.* at 687. This requires a showing that his counsel committed errors which were "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* If he can show deficient performance, he must next demonstrate that he was prejudiced by the deficient performance. *Id.* To show prejudice, he must establish there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the trial would have been different. A reasonable probability is one sufficient to erode confidence in the outcome. *Id.* at 694.

{¶ 73} First, we shall address appellant's claim that counsel was ineffective in failing to request a mistrial.

{¶ 74} Mistrials need to be declared only when justice so requires and where a fair trial is no longer possible. *State v. Franklin,* 62 Ohio St.3d 118, 127 (1991). The decision as to whether to declare a mistrial is one that is in the sound discretion of the trial court, since it is in the best position to determine whether the circumstances necessitate the declaration of a mistrial, or whether there are other corrective measures which are adequate. *See Parker v. Elsass*, 10th Dist. No. 01AP-1306, 2002-Ohio-3340, ¶ 19. The remedy for claims of juror partiality is a hearing in which the defendant has the opportunity to demonstrate actual bias. *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, citing *State v. Phillips*, 74 Ohio St.3d 72, 88 (1995). The defense must establish that the juror has been biased by the improper communication. *Id.*, citing *State v. Keith*, 79 Ohio St.3d 514, 526 (1997). A trial court has broad discretion in determining whether to grant a mistrial or replace a juror when there are allegations of improper communication with jurors. *Johnson,* 88 Ohio St.3d 95, 107 (2000). "In cases involving outside influences on jurors, trial courts are granted broad discretion in dealing with the contact and determining whether to declare a mistrial or to replace an affected juror." *Phillips* at 89.

{¶ 75} In the instant case, the bailiff for the judge who shared chambers with the trial judge in this matter reported that two jurors had been potentially discussing the case in the elevator after court. As a result of this information, the trial judge conducted

individual voir dire on each juror. One juror reported there had been a very brief discussion amongst one or two of them about the length of the trial and the fact that counsel sometimes seemed to be "beating a dead horse." (Tr. 436.) However, the juror added that another juror reminded them that their discussion was not appropriate. A second juror reported a similar incident. A third juror admitted that he had participated in a conversation in the elevator about how long it was taking to try the case and about the fact that he lived near the crime scene. The trial court instructed the juror not to discuss the case and confirmed the juror could still remain fair and impartial. The trial judge characterized the incident in the elevator as a "flip conversation on their way out the door." (Tr. 466.) In the end, none of the attorneys in the case requested to have any of the jurors removed.

{¶ 76} Here, there is nothing that amounted to prejudice requiring a mistrial. Following individual voir dire on the issue, the trial judge was satisfied that there would be no further problems and believed his voir dire and re-admonition sufficiently resolved any problems with the improper discussions. The juror who had been involved in the improper communication on the elevator confirmed he would not participate in similar conduct in the future and reiterated that he could remain fair and impartial. Defense counsel did not request a mistrial or ask to have any of the jurors removed presumably because there was no reason to do so, due to a lack of any prejudice and a lack of any evidence that a fair trial could not be conducted. Appellant cannot demonstrate that his attorney's decision not to request a mistrial was deficient and/or prejudicial.

{¶ 77} Appellant has also asserted his trial counsel was ineffective for failing to object to the trial court's denial of his request to introduce certain testimony from Marva to attempt to impeach S.K. with an alleged prior inconsistent statement. We thoroughly considered and rejected appellant's challenge on this issue in his first assignment of error, and we find no merit to it with respect to his claim of ineffective assistance of counsel either, as any such objection would have also been meritless. Therefore, appellant cannot show deficient performance or prejudice. As to appellant's claim that trial counsel was ineffective in failing to establish the proper foundation in order to introduce the inconsistent statement and impeach the victim, we find this argument to be without merit

as well, since counsel's failure or reluctance to confront S.K. with this particular statement could easily have been part of his trial strategy.

{¶ 78} Finally, we reject appellant's contention that his trial counsel was ineffective for failing to object to the trial court's failure to merge the kidnapping and rape offenses. Had the trial court conducted a proper analysis of appellant's conduct as required, it could have found a legal basis to justify *not* merging the sentences, as shall be explained more fully below in our analysis of the State's cross-assignment of error. Therefore, we find no merit in appellant's assertion his trial counsel was ineffective in failing to object to the trial court's failure to merge the offenses.

{¶ 79} Accordingly, we overrule appellant's fourth assignment of error.

E. State's Cross-Assignment of Error—Concurrent Sentences and Merger of the Rape and Kidnapping Offenses

{¶ 80} We shall now address the State's cross-assignment of error, in which it asserts the trial court erred by purportedly merging the kidnapping count with the two rape counts through the use of concurrent sentences.

{¶ 81} The State argues a trial court cannot "merge" two counts through the imposition of concurrent sentences. The State argues the trial court's improper merger belief caused the trial court to renounce its sentencing discretion as established under R.C. 2929.11 and 2929.12 and, therefore, the imposition of a concurrent sentence on the kidnapping count was contrary to law. In addition, the State argues the counts were not subject to merger because they did not constitute "allied offenses of similar import" subject to merger pursuant to R.C. 2941.25.

{¶ 82} In *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶ 19-21, we recently discussed the standard of review applicable to felony sentencing issues as follows:

> In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶ 19, this court held that, pursuant to R.C. 2953.08(G), we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶ 19.
>
> After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-

> Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶ 4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. *Id.* An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.
>
> As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶ 8. Additionally, since *Kalish*, this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶ 8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100.

Id. See also State v. Pankey, 10th Dist. No. 11AP-378, 2011-Ohio-6461, ¶ 18; and *Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, at ¶ 83.

{¶ 83} The State argues that where a trial court erroneously believes that concurrent sentences are required by law, a reviewable sentencing error occurs. The State further argues that because such sentences are the result of a mistake, rather than discretion, the sentences violate R.C. 2929.11 and 2929.12, in that the trial court fails to consider relevant factors, such as whether consecutive prison terms advance the purposes and principles of felony sentencing. Here, the State contends the record demonstrates the trial court declined to consider consecutive sentences based on an erroneous belief that: (1) the kidnapping count was required to be merged with the rape counts, and (2) the counts merged as a result of the imposition of concurrent sentences.

{¶ 84} Ohio's multiple counts statute, R.C. 2941.25 reads as follows:

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

> indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶ 85} Thus, R.C. 2941.25 prohibits merger and allows cumulative punishment if the offenses: (1) lack a similar import/are of dissimilar import; (2) were committed separately; or (3) were committed with a separate animus as to each. These three bars to merger are disjunctive. *State v. Bickerstaff*, 10 Ohio St.3d 62 (1984).

{¶ 86} During the sentencing proceedings, the trial court referred to defense counsel's citation to *State v. Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385, in which we determined the kidnapping and rape counts in that particular case must be merged. Specifically, the trial judge noted: "Now, I cannot in good consc[ience] not merge the kidnapping count. I feel like it was related directly to the offense. That was the whole basis of the [Judge] Schneider decision that you discussed earlier, okay?" (Tr. 890.) Thus, the trial court in the instant case presumed this matter necessarily required merger of the kidnapping and rape counts based upon our decision in *Hogan*. However, this presumption is incorrect. Although kidnapping and rape are offenses of similar import (*see State v. Donald*, 57 Ohio St.2d 73 (1979)), *Hogan* does not stand for the proposition that all kidnapping and rape offenses must be merged under all circumstances, since merger is not required where the offenses were committed separately or where there is a separate animus, as noted above.

{¶ 87} In *Hogan*, the defendant was convicted of kidnapping, rape, and attempted rape and was sentenced by the trial court to an aggregate prison term of 19 years, which involved consecutive sentences on the three counts. On appeal, we vacated the sentences and remanded for further proceedings, which included allowing the prosecution to elect whether it wished to proceed on the kidnapping count or the rape and attempted rape counts. Relying upon the premise set forth in *State v. Logan*, 60 Ohio St.2d 126 (1979), we found that because kidnapping and rape were offenses of similar import, *and* because the restraint was not prolonged, the confinement was not secretive, and the movement was not substantial, *a separate animus did not exist for the offenses* and, therefore, merger was required. Stated differently, because the restraint or movement was merely incidental to the rape, rather than having its own significance independent of the rape, we determined a separate animus did not exist and, therefore, the offenses in *Hogan* were

required to be merged. This determination was based upon the particular facts of that case, which demonstrated that the victim was grabbed from behind by a stranger after dark, forced into a wooded area, and sexually assaulted.

{¶ 88} In the instant case, however, the facts and circumstances are quite different from those found in *Hogan*. Here, S.K. was kidnapped at knifepoint in a parking lot and forced to get into a vehicle. S.K. testified she was driven around the city for approximately 30 to 40 minutes to various locations, including an abandoned building and a second apartment complex in a wooded area. S.K. was raped four times during the course of the ride around the city. S.K. was ordered to keep her head down so that she could not look around in an attempt to familiarize herself with her surroundings. During the time when S.K. was in the vehicle with the two men while it was parked near an abandoned building, a police car was also in the vicinity. Appellant waited for the police car to leave before he entered the backseat and forced S.K. to submit to intercourse. Later, while they were at the apartment complex in a wooded area, the men ordered her to destroy evidence of the rapes by swishing alcohol around in her mouth and spitting it into a jug and by washing her face with alcohol. After she was ordered to use the alcohol to destroy any evidence of the rapes, S.K. was forced back into the vehicle and eventually driven to the general area from which she had been kidnapped.

{¶ 89} These facts arguably demonstrate a confinement that was prolonged and secretive, and arguably support a kidnapping that was not merely incidental to the rapes. *See State v. Smith*, 10th Dist. No. 94APA-09-1300 (Apr. 6, 1995) (restraint of the victim was not incidental to the rapes where the restraint was prolonged and the movement was substantial: victim was driven around before, during, and after the assaults; victim was not released immediately after the rapes; victim was confined in secret as she was driven to a dark alley/street so that the defendant could have intercourse with her and she was instructed to keep her head down so that she could not see where she was); *State v. Wade*, 10th Dist. No. 10AP-159, 2010-Ohio-6395, ¶ 74 ("the kidnapping was not merely incidental to the rape, which lasted five or ten minutes, but also involved prolonged restraint of 20 to 30 minutes") (reversed on other grounds as to sexual offender classification); and *State v. Greathouse*, 2d Dist. No. 21536, 2007-Ohio-2136, ¶ 46 (crimes were committed with a separate animus where detention was prolonged due to

defendant driving victim around "for quite some time" before driving to the location where the rape occurred; detention posed a substantial increase in risk of harm separate from the rape because the hazard of traveling in a vehicle for a prolonged period of time increased the potential harm).

{¶ 90} When determining whether two offenses are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶ 44. The *Johnson* plurality opinion set forth a two-part test for determining whether or not offenses are allied and therefore required to be merged. The first question is whether it is possible to commit one offense and commit the other offense with the same conduct. *Id.* at ¶ 48. If so, then the offenses are of similar import. If the offenses can be committed by the same conduct, the test requires the court to "determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Id.* at ¶ 49, quoting *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 50.

{¶ 91} It is possible to commit the offenses of rape and kidnapping with the same conduct. *Worth*, 10th Dist. No. 10AP-1125, 2012-Ohio-666, at ¶ 78. Therefore, the two offenses are of similar import, which results in an analysis under the second step in *Johnson*. A trial judge, in its analysis of the second step in *Johnson*, could determine a separate animus existed for the kidnapping count under the facts and circumstances in this case, based upon appellant's conduct and the guidelines set forth in *Logan*, 60 Ohio St.2d at 126, for determining whether a separate animus exists in the context of a kidnapping. *See id.* at the syllabus (where the restraint or movement is merely incidental, there is no separate animus, but where the retraint is prolonged, the confinement secretive or the movement substantial so as to demonstrate a significance independent of the other offense, or where the asportation or restraint subjects the victim to a substantial increase in risk of harm separate from that of the underlying crime, a separate animus exists).

{¶ 92} Here, however, the trial judge did not consider or analyze this issue pursuant to *Johnson* and/or *Logan*. Instead, the trial court relied upon *Hogan*, 10th Dist. No. 09AP-1182, 2010-Ohio-3385, to support its (erroneous) belief that merger was required as a matter of law and, therefore, the trial court applied erroneous legal

reasoning in concluding it could not consider the possibility of consecutive sentences as a sentencing option. In *State v. Damron*, 129 Ohio St.3d 86, 2011-Ohio-2268, the Supreme Court of Ohio addressed an issue very similar to this. The court ultimately vacated the sentence and remanded the matter for proper sentencing.

{¶ 93} In *Damron*, the court accepted the appeal to address two specific issues: (1) whether a sentence is contrary to law, even if it falls within the permitted statutory range, if the court failed to consider the mandatory provisions in R.C. Chapter 2929 or if the court relied upon an erroneous legal determination that removed a sentencing option from its consideration; and (2) whether a sentencing error occurs when a court imposes concurrent prison terms under the mistaken belief that it is merging two allied offenses of similar import and whether such an error can be corrected on appeal.

{¶ 94} Similar to the trial court in the instant case, the trial court in *Damron* relied upon a previously decided case involving similar offenses, *State v. Harris*, 122 Ohio St.3d 373, 2009-Ohio-3323, to presume merger of the felonious assault and domestic violence counts was required as a matter of law in the *Damron* case. Pointing out that *Harris* has never stood for the proposition that offenses of domestic violence and felonious assault are required to merge as a matter of law, the Supreme Court held that because the trial court applied erroneous legal reasoning, the case had to be remanded for resentencing. *Damron* at ¶ 1, 17. The same rationale applies to *Hogan* as it relates to the offenses of kidnapping and rape and as it applies to the trial court's erroneous reasoning in the instant case.

{¶ 95} In *Damron*, the Supreme Court further found that the trial court had failed to properly merge the convictions it was purporting to merge. When an offender has been found guilty of offenses which are allied offenses, the multiple counts statute prohibits the imposition of multiple sentences. *Id.* at ¶ 17, citing *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, ¶ 12. Thus, a trial court must merge the offenses into a single conviction and then impose an appropriate sentence for the offense chosen for sentencing. *Damron* at ¶ 17, citing *Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, at ¶ 41-43. Where a trial court instead finds the offender guilty of both offenses and sentences him on both offenses, error occurs. "The imposition of concurrent sentences is not the equivalent of merging allied offenses." *Id.* For purposes of R.C. 2941.24, the multiple counts statute, a

"conviction" consists of the combination of both a determination of guilt and a sentence/penalty. *Id.*, citing *Whitfield* at ¶ 12.

{¶ 96} Here, like in *Damron*, appellant has been convicted of both offenses which were purportedly merged based upon an erroneous belief that such merger was required. Such error must be corrected.

{¶ 97} Based upon the authority cited above, we sustain the State's sole assignment of error. The sentence is vacated and we remand this matter for proper sentencing for the trial court to apply *Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, to consider appellant's conduct and determine whether a separate animus exists for the two offenses and to consider all relevant sentencing provisions in R.C. 2929.11 and 2929.12, including consecutive sentences if the court determines the offenses do not merge.

III. Conclusion

{¶ 98} We overrule appellant's first, second, third, and fourth assignments of error and we sustain the State's cross-assignment of error. The judgment of the Franklin County Court of Common Pleas is affirmed as to the findings of guilt. However, we vacate the sentence imposed and remand this matter for proper resentencing.

Judgment affirmed in part
and reversed in part;
cause remanded with instructions.

KLATT and SADLER, JJ., concur.

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