[Cite as *State v. Worth*, 2012-Ohio-666.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1125
v.	:	(C.P.C. No. 09CR-150)
William A. Worth, II,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on February 16, 2012

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶1} Defendant-appellant, William A. Worth, II, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to a jury verdict finding him guilty of one count of aggravated burglary, one count of felonious assault, three counts of rape, one count of kidnapping, and six firearm specifications. Because the trial court committed no reversible error in appellant's convictions, we affirm those convictions, but remand for resentencing.

{¶2} On January 8, 2009, appellant was indicted on one count of aggravated burglary in violation of R.C. 2911.11, one count of felonious assault in violation of R.C. 2903.11, three counts of rape in violation of R.C. 2907.02, and one count of kidnapping in

violation of R.C. 2905.01. All counts carried three-year firearm specifications pursuant to R.C. 2941.145. The charges arose from the alleged beating and rape of M.B.[1] on December 29, 2008.

{¶3} Appellant subsequently pled guilty to one count of rape with a three-year firearm specification and aggravated burglary, felonious assault, and kidnapping without specifications. The trial court accepted appellant's plea and sentenced him to 34 years imprisonment. On appeal, this court vacated appellant's guilty plea, reversed the trial court's judgment, and remanded the matter for further proceedings. *State v. Worth*, 10th Dist. No. 09AP-867, 2010-Ohio-1996.

{¶4} Following the remand, a jury trial was held at which the following evidence was adduced. M.B. testified that she and appellant became friends in 1997. Their friendship eventually developed into a romantic relationship, and appellant began staying overnight at M.B.'s apartment on a fairly regular basis beginning in October 2008. The relationship ended very shortly thereafter, in mid-November 2008. Despite their break-up, the two remained on reasonably amicable terms.

{¶5} On December 29, 2008, M.B. agreed to meet appellant at her apartment on her lunch hour so that appellant could return his keys to the apartment and retrieve his personal belongings. During this encounter, M.B. mentioned that she was going to her parents' home for dinner that evening. Appellant assured M.B. he would leave the keys in the mailbox after he gathered his personal effects. M.B. agreed to this arrangement and returned to work, leaving appellant alone in the apartment.

{¶6} M.B. returned home from work around 5:00 p.m. As appellant had promised, he left the keys to the apartment in the mailbox. At around 5:45 p.m., M.B. left for dinner and locked the front door. She returned at approximately 8:00 p.m., sat on her living room couch, and made several telephone calls. While on the phone, M.B. noticed several items under the coffee table, including a balled-up sock, duct tape, and a long strip of a cut-up bed sheet. She also spotted plastic rope stuffed under the loveseat. As she reached down to retrieve one of the items from under the coffee table, appellant suddenly emerged from behind the couch, knocked M.B. to the floor, held her down, and began

[1] To protect the victim's identity, she and members of her family will be identified by their initials.

striking her in the face with his closed fists. He thereafter choked M.B. with his hands until she lost consciousness. When M.B. regained consciousness, appellant repeatedly attempted, albeit unsuccessfully, to force the balled-up sock into her mouth.

{¶7} Appellant then dragged M.B. across the floor, flipped her onto her stomach, and choked her from behind with his arm in what M.B. described as a "sleeper hold." (Tr. 64.) M.B. again briefly lost consciousness; when she regained consciousness, appellant tied her wrists behind her back with the rope and cut off her shirt and bra. He then removed M.B.'s jeans and panties, removed his own clothing, and forced M.B. to perform fellatio on him. Appellant then forced M.B. to have vaginal intercourse with him. He thereafter again forced M.B. to perform fellatio on him. M.B. testified that appellant ejaculated in her mouth, hair and face; she spit the ejaculate onto the carpet.

{¶8} According to M.B., appellant then "got up and * * * came back" and started talking about guns. (Tr. 74.) M.B. testified that, at this point, she was "still laying [sic] on the floor and had my face turned towards the couch so I couldn't see [appellant]." (Tr. 74.) Appellant then "came back down to the floor and he started talking about he had a gun and how he would kill me and kill himself." (Tr. 74.) At this point in time, M.B. had not yet seen a gun. Thereafter, appellant "got up again; and when he came back, he untied me and told me to sit on the couch." (Tr. 74.) Appellant then sat next to her, holding a handgun; M.B. noticed a shotgun leaning against the couch. M.B. testified that appellant must have "got[ten] the guns out" when he "got up the first time and then when he came back," but she was "not really sure." (Tr. 76.) Appellant again discussed killing M.B and himself, and pointed one of the guns at M.B. while doing so. Appellant then drank a beer and threatened to shoot M.B. if she tried to leave the apartment.

{¶9} At some point, appellant allowed M.B. to go to the bathroom. She wiped her face and body off with a towel, got dressed, and came back into the living room. When M.B. asked appellant how he got into her apartment, he said he made a duplicate of her key and hid in a closet prior to the attack.

{¶10} M.B. eventually convinced appellant to let her leave to seek medical attention. M.B. left appellant in her apartment and drove to her mother's house. On the way, M.B. called her stepfather, J.W., and told him that appellant had beaten her up. J.W. gave the phone to M.B.'s mother, S.W. According to S.W., M.B. was "hysterical" and told

her that appellant had broken into her apartment and beaten her up and that she was on the way to S.W.'s house. (Tr. 203.) S.W. returned the phone to J.W. and told him to keep M.B. on the line while she called 911 from another phone. S.W. called 911 and reported what M.B. had told her. After gaining more information about the situation from J.W. (who was still on the phone with M.B.), S.W. called 911 a second time and reported that appellant had raped M.B. S.W. also warned the 911 dispatcher that appellant was still in M.B.'s apartment and had loaded weapons.

{¶11} Shortly after arriving at S.W.'s house, M.B. was transported by ambulance to Grant Hospital, where physicians' assistant, Heather Baker, performed a physical examination and rape kit on M.B. According to Ms. Baker, M.B. reported that appellant "came out of nowhere" and started punching her and choking her until she passed out. (Tr. 192.) He then pulled off her jeans and panties and put his finger in her vagina, twice forced her to perform fellatio, and once forced her to have vaginal intercourse with him. M.B. told Ms. Baker that, during the second act of fellatio, appellant ejaculated into M.B.'s mouth; when she spit the ejaculate out, he rubbed it on her face with his penis. M.B. further reported that after the incident, she urinated and wiped herself, drank water, smoked, and changed clothes.

{¶12} Ms. Baker noted during the physical examination that M.B had a swollen face, a black eye that was swollen shut, broken blood vessels in her eyes, strangulation marks on her neck, bruises on both arms, cuts on her lip and tongue, and marks on both wrists. Further physical examination revealed no vaginal trauma; however, Ms. Baker noted that vaginal trauma was "very rare" in cases where no foreign object had been inserted in the victim's vagina or where the victim had not previously engaged in vaginal intercourse. (Tr. 187.)

{¶13} Detective Jennifer Gribi interviewed M.B., J.W., and S.W. at the hospital and collected the evidence obtained from M.B.'s person and clothing. In the meantime, Officer Marc Dopp and several other officers responded to M.B.'s apartment, where they found appellant sitting naked on the bedroom floor with a shotgun in his mouth. Appellant told Officer Dopp that he did not want to go to jail, that he had mental issues, and that his mother had recently committed suicide. One of the other officers eventually coaxed appellant into unloading and relinquishing the shotgun.

{¶14} Photographs and evidence collected from M.B.'s apartment generally corroborated M.B.'s account of the incident. Included among the evidence collected were a shotgun, a handgun, cut-up women's clothing, a balled-up sock with bloodstains on it, a plastic rope, towels, and bloodstains on the living room carpet.

{¶15} Dr. Raman Tejwani, a forensic scientist with the Columbus police crime lab, performed biological fluid and DNA analyses on evidence collected from M.B.'s person and clothing at the hospital, as well as on evidence collected from M.B's apartment, including the carpet. Dr. Tejwani found no semen on any of the items tested. She testified that the absence of semen on M.B.'s person and clothing could be attributed to the fact that M.B. urinated and wiped, changed clothes, and drank a beverage after the incident. Dr. Tejwani further posited that appellant's ejaculate would not have contained semen had he had a vasectomy, had a low sperm count, or if significant time had elapsed between the time of the sexual assault and examination of the ejaculate.

{¶16} Upon this evidence, the jury returned verdicts finding appellant guilty of aggravated burglary and kidnapping with three-year firearm specifications, and guilty of felonious assault and three counts of rape with one-year firearm specifications. Based on the convictions and specifications, the trial court sentenced appellant to 44 years imprisonment.

{¶17} On appeal, appellant advances the following seven assignments of error:

> ASSIGNMENT OF ERROR #1
>
> EVIDENTIARY RULINGS CONSTITUTED ABUSES OF DISCRETION AND VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.
>
> ASSIGNMENT OF ERROR #2
>
> APPELLANT WAS DEPRIVED OF HIS RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW AS GUARANTEED BY THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION BY PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS.

ASSIGNMENT OF ERROR #3

APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #4

THE SAME TRIAL COURT SENTENCED APPELLANT TO A HARSHER SENTENCE BY 10 ADDITIONAL YEARS FOLLOWING A SUCCESSFUL APPEAL IN VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT PLAINLY ERRED BY ENTERING CONVICTIONS AND SENTENCING THE APPELLANT ON BOTH THE RAPE AND KIDNAPPING COUNTS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE 5TH AMENDMENT TO THE U.S. CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION, AND OHIO'S MULTIPLE-COUNT STATUTE.

ASSIGNMENT OF ERROR #6

APPELLANT'S SENTENCE WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW AND CONSTITUTED AN ABUSE OF DISCRETION.

ASSIGNMENT OF ERROR #7

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶18} Under the first assignment of error, appellant asserts the trial court erred in two of its evidentiary rulings. Appellant first contends that the trial court erred in allowing S.W. to testify about statements M.B. made to J.W. on the phone regarding the rape and in admitting the 911 call which referenced those statements. Appellant contends that

S.W.'s statements and the corresponding 911 call constitute inadmissible double hearsay, the admission of which prejudiced his right to a fair trial.

{¶19} S.W. testified that M.B. called J.W. after the incident; J.W. gave the phone to S.W. so that she could speak to M.B. S.W. stated that M.B. reported to her that appellant had broken into her apartment and beaten her up. S.W. returned the phone to J.W. and told him to keep M.B. on the line while she called 911 from another phone. S.W. called 911 and reported what M.B. had told her. S.W. further testified that while J.W. was still on the phone with M.B., M.B. told him that appellant had raped her, and J.W. then relayed this information to S.W. S.W. called 911 a second time to report the rape. Over objection, the state played the recorded 911 call for the jury. During the 911 call, S.W. told the dispatcher that appellant had raped M.B. Appellant's counsel objected to S.W.'s testimony and the 911 call on grounds that it constituted inadmissible double hearsay. The state argued that the testimony and 911 call were admissible under the excited utterance exception to the hearsay rule.

{¶20} "Hearsay" is defined as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is generally inadmissible. Evid.R. 802. There are numerous exceptions to the rule, however, as set forth in Evid.R. 803 and 804. As with other evidentiary rulings, the determination whether hearsay statements are subject to exception rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Hand,* 107 Ohio St.3d 378, 2006-Ohio-18, ¶ 92. An abuse of discretion is more than an error in judgment or a mistake of law; it connotes that the court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219 (1983).

{¶21} Pursuant to Evid.R. 805, hearsay within hearsay is admissible if each part of the combined statements conforms to an exception to the hearsay rule. Accordingly, in order for S.W's statement about the rape and the related 911 call to be admissible, M.B.'s statement to J.W., and J.W.'s subsequent statement to S.W., must both fall under an exception to the hearsay rule.

{¶22} Evid.R. 803(2) provides an exception to the hearsay rule if the out-of-court statement constituted an "excited utterance," defined as a "statement relating to a

startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Pursuant to Evid.R. 803(2), a hearsay statement is admissible as an excited utterance if: (1) there was an event startling enough to produce a nervous excitement in the declarant; (2) the statement was made while under the stress of excitement caused by the event; (3) the statement related to the startling event; and (4) the declarant must have had an opportunity to personally observe the startling event. *State v. Taylor*, 66 Ohio St.3d 295, 300-301 (1993).

{¶23} M.B.'s statement to J.W. that appellant raped her falls under the excited utterance exception to the hearsay rule. Appellant's rape of M.B. constituted an event startling enough to produce a nervous excitement in M.B. M.B. reported the rape to J.W. immediately after she fled her apartment and was driving to her parents' home, while she was still under the stress of excitement caused by the attack. Indeed, J.W. testified that M.B. was "very distraught," "very upset," and "frantic" on the phone. (Tr. 228-229.) M.B.'s statement to J.W. related to the startling event. Finally, M.B. clearly had an opportunity to personally observe the matters asserted in her statement given that she was the victim of rape.

{¶24} We further find that J.W.'s statement to S.W. qualifies as an excited utterance. J.W.'s statement to S.W. was made nearly contemporaneously with him being told by M.B. that appellant had raped her. Indeed, J.W. was still on the phone with M.B. when he relayed the information about the rape to S.W. There is no indication that J.W.'s statement to S.W. was the result of reflective thought; it appears that J.W. was startled to have learned about what had occurred to his stepdaughter. Indeed, J.W. testified that he was "completely shocked" by M.B.'s revelation. (Tr. 229-230.) We find that the trial court was in the best position to make a determination whether J.W.'s statement constituted an excited utterance.

{¶25} Moreover, any error in the admission of S.W.'s testimony and the related 911 call was harmless. Harmless error is defined as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights." Crim.R. 52(A). When the error does not affect a substantial right, it "shall be disregarded." *Id*. Prejudicial error is harmless beyond a reasonable doubt where the remaining evidence, standing alone, constitutes overwhelming proof of a defendant's guilt. *State v. Williams*, 6 Ohio St.3d. 281, 291

(1983). In this case, M.B. unequivocally testified that appellant repeatedly beat her, twice choked her to the point of unconsciousness, tied her up, cut off her clothing, and raped her three separate times. Given M.B.'s testimony and the physical evidence admitted, any error in the admission of S.W.'s testimony and the corresponding 911 call was harmless.

{¶26} Appellant next contends that the trial court abused its discretion in allowing Dr. Tejwani to testify as to whether the absence of semen on M.B.'s person or clothing or in her apartment was consistent with her claim that appellant sexually assaulted her.

{¶27} Dr. Tejwani testified that she holds a Ph.D. in physiological chemistry. In her role as a forensic scientist in the Columbus police crime lab, she performed biological fluid and DNA analyses on evidence collected from M.B.'s person and clothing at the hospital, as well as on evidence collected from M.B.'s apartment, including the carpet. Dr. Tejwani testified on direct examination that no detectable semen was found on the items tested. She further testified that the absence of semen on M.B.'s person and clothing could be attributed to the fact that, following the incident, M.B. urinated and wiped, changed clothes, and drank a beverage.

{¶28} In an attempt to challenge M.B.'s credibility regarding the rapes, defense counsel's cross-examination of Dr. Tejwani focused almost exclusively on her previous testimony that no detectable semen was found on any of the items submitted for testing. On redirect examination, the prosecutor asked Dr. Tejwani whether the lack of semen was consistent with allegations of sexual assault. The trial court overruled defense counsel's objection that the line of questioning was beyond Dr. Tejwani's expertise. Dr. Tejwani thereafter testified that M.B. taking a drink after appellant ejaculated in her mouth could have eliminated any semen contained therein. The prosecution then asked Dr. Tejwani if it were possible for a person's ejaculate not to contain semen. Dr. Tejwani responded that such was possible if the person had undergone a vasectomy, had a low sperm count, or if significant time had elapsed between the time of the sexual assault and examination of the ejaculate.

{¶29} The admission of expert testimony is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Williams*, 74 Ohio St.3d 569, 576 (1996). Evid.R. 702 governs the admission of expert testimony. Appellant does not dispute Dr. Tejwani's qualifications as an expert in physiological

chemistry under Evid.R. 702. Rather, appellant claims that the trial court erred in permitting Dr. Tejwani to render an opinion outside her area of expertise. More specifically, appellant claims that Dr. Tejwani was not qualified to opine regarding the absence of semen in appellant's ejaculate because she is not a urologist.

{¶30} An expert need not be the best witness on the subject. *Scott v. Yates*, 71 Ohio St.3d 219, 221 (1994), citing *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St.2d 155, 159 (1978). Rather, the expert need only demonstrate some knowledge on the particular subject superior to that possessed by an ordinary juror. *Scott* at 221, citing *State Auto Mut. Ins. Co. v. Chrysler Corp.*, 36 Ohio St.2d 151, 159-160 (1973). Dr. Tejwani, a physiological chemist, undoubtedly possesses knowledge on the subject of the presence of semen in ejaculate superior to that possessed by the average juror. Moreover, the competency of an expert is left to the sound discretion of the trial court. *Scott* at 221. The fact that Dr. Tejwani is a physiological chemist and not a urologist goes to the weight to be afforded her opinion rather than its admissibility. See *Roetenberger v. Christ Hosp.*, 163 Ohio App.3d 555, 563, 2005-Ohio-5205 (5th Dist.). Thus, the trial court did not abuse its discretion in admitting Dr. Tejwani's testimony regarding the absence of semen in appellant's ejaculate.

{¶31} We further find unavailing appellant's claim that the state failed to establish a proper foundation for its question pertaining to the absence of semen in M.B.'s mouth. As noted above, Dr. Tejwani testified that M.B. taking a drink after appellant ejaculated in her mouth could have eliminated any semen contained therein. Appellant hinges his foundational argument on the fact that M.B. never testified that she drank something after the attack. However, Ms. Baker, the physicians' assistant who examined M.B., testified that M.B. told her that she had taken a drink after the incident, and Ms. Baker documented that information in her report. Dr. Tejwani testified that she reviewed Ms. Baker's report before conducting her tests. Appellant's first assignment of error is overruled.

{¶32} In his second assignment of error, appellant alleges two separate incidents of prosecutorial misconduct during closing arguments. Appellant maintains that the prosecutor's misdeeds deprived him of a fair trial and due process of law in contravention of the United States and Ohio Constitutions.

{¶33} The test for prosecutorial misconduct in closing arguments is whether the prosecutor's remarks were improper, and if so, whether they prejudicially affected the substantial rights of the accused. *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶ 38, quoting *State v. Phillips*, 455 U.S. 209, 219, 102 S.Ct. 940 (1982). An improper comment by the prosecutor does not affect a substantial right of the accused if it is clear beyond a reasonable doubt that the jury would have found the accused guilty even without the improper comment. *State v. Treesh*, 90 Ohio St.3d 460, 464 (2001), citing *Smith*.

{¶34} Appellant first contends that the prosecutor made an inflammatory and prejudicial comment when he asserted that appellant "chickened out when it came down to killing [M.B.]." (Tr. 426-427.) The trial court, however, sustained defense counsel's objection to the remark and instructed the jury to disregard it. At the conclusion of the trial, the court instructed the jury that closing arguments are not evidence and that statements they had been instructed to disregard are not evidence and are to be treated as never having been heard. We presume the jury followed the trial court's instructions, including the instructions to disregard the prosecutor's comment. *State v. Lowe*, 164 Ohio App.3d 726, 2005-Ohio-6614, ¶ 14 (10th Dist.).

{¶35} Appellant next claims that the prosecutor unfairly portrayed defense counsel as assailing the veracity of most rape victims. As noted above, Ms. Baker testified that her physical examination of M.B. revealed no evidence of vaginal trauma. When questioned about the significance of such a finding, she averred that, in her experience, she found vaginal trauma in only five to ten percent of the cases in which she had performed a rape kit. During summation, defense counsel questioned M.B.'s credibility as to the rape, citing Ms. Baker's testimony that M.B. suffered no vaginal trauma. In his rebuttal argument, the prosecutor referenced Ms. Baker's testimony regarding the very low percentage of vaginal trauma in reported rape cases, and asked the jury to consider whether 90 percent of rape victims fabricated their allegations.

{¶36} The prosecution is entitled to a certain degree of latitude in closing argument. *State v. Grant*, 67 Ohio St.3d 465, 482 (1993), citing *State v. Richey*, 64 Ohio

St.3d 353, 362 (1992). The prosecution "may draw reasonable inferences from the evidence presented at trial, and may comment on those inferences during closing argument." *Treesh* at 466, citing *State v. Smith,* 80 Ohio St.3d 89, 111 (1997). In addition, the prosecutor may respond to the specifics of defense counsel's closing argument. *State v. Loughman,* 10th Dist. No. 10AP-636, 2011-Ohio-1893, ¶ 40. "[T]he conduct of a prosecuting attorney during a trial cannot be made a ground of error unless the conduct is so egregious in the context of the entire trial that it renders the trial fundamentally unfair." *State v. McGrath,* 8th Dist. No. 77896, 2002-Ohio-2386, ¶ 30, citing *State v. Papp*, 64 Ohio App.2d 203 (9th Dist.1978).

{¶37} The prosecutor properly referenced Ms. Baker's testimony about the absence of vaginal trauma in most rape victims to support the reasonable inference that M.B. did not fabricate the rape allegations and to contest defense counsel's suggestion that M.B.'s testimony was incredible. Because Ms. Baker's testimony supported the prosecutor's comment about the veracity of M.B.'s testimony despite the lack of vaginal trauma, the comment was not improper. Furthermore, as noted above, the trial court instructed the jury that closing arguments are not evidence.

{¶38} Moreover, even assuming the prosecutor's comment deviated to some extent from the general rules governing closing argument, it was not egregious in the context of the entire trial and did not affect appellant's substantial rights. Appellant's second assignment of error is overruled.

{¶39} In his third assignment of error, appellant contends that his convictions for aggravated burglary and the one-year firearm specifications for the felonious assault and rape charges were not supported by sufficient evidence and that his convictions for aggravated burglary, rape, kidnapping, and the firearm specifications were against the manifest weight of the evidence.

{¶40} We consider appellant's sufficiency claims first. In reviewing whether sufficient evidence supports a conviction, " '[t]he 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 crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937 ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Whether the evidence is legally

sufficient to sustain a verdict is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1978). On review for sufficiency, courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence would support a conviction. *Id.* at 390. (Cook, J., concurring.) In determining the sufficiency of the evidence, an appellate court must give " 'full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *State v. Gordon*, 10th Dist. No. 10AP-1174, 2011-Ohio-4208, ¶ 5, quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979). Consequently, a verdict will not be disturbed based upon insufficient evidence unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *Treesh* at 484.

{¶41} R.C. 2911.11(A) proscribes aggravated burglary and provides, in pertinent part, that "[n]o person, by force, stealth, or deception, shall trespass in an occupied structure * * * when another person * * * is present, with purpose to commit in the structure * * * any criminal offense, if any of the following apply: (1) [t]he offender inflicts, or attempts or threatens to inflict physical harm on another; (2) [t]he offender has a deadly weapon * * * on or about the offender's person or under the offender's control."

{¶42} Appellant's sole contention regarding the sufficiency of the evidence as to his aggravated burglary conviction is that the state failed to prove that he trespassed in M.B.'s apartment. "[T]respass is an essential element of aggravated burglary." *State v. O'Neal*, 87 Ohio St.3d 402, 408 (2000). Pursuant to R.C. 2911.21(A)(1), a criminal trespass occurs when a person "without privilege to do so," "[k]nowingly enter[s] or remain[s] on the land or premises of another." R.C. 2901.01(A)(12) defines "privilege" as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." "Land or premises" includes "any land, building, structure, or place belonging to, controlled by, or in custody of another." R.C. 2911.21(F)(2).

{¶43} Appellant cites M.B.'s testimony that appellant owned some of the furniture in the apartment and that she did not realistically expect appellant to remove all of his

furniture while he was in the apartment during her lunch hour on December 29, 2008 as proof that he did not trespass in the apartment when he entered later that evening.

{¶44} In *O'Neal,* the Supreme Court of Ohio held that "R.C. 2911.21(A)(1), when read in conjunction with R.C. 2911.21(E) [now (F)(2)], establishes that *any* person can indeed commit a trespass against property that belongs to, is controlled by, or is in the custody of, someone else." (Emphasis sic.) *Id*. at 408. Indeed, even "a spouse can be convicted of trespass and aggravated burglary in the dwelling of the other spouse who owns, has custody of, or control over the property where the crime has occurred." *Id*., citing *State v. Lilly*, 87 Ohio St.3d 97 (1999), paragraph one of the syllabus.

{¶45} Here, M.B testified that appellant's name was not on the apartment lease or on any of the utility bills associated with the apartment. M.B. further testified that, as of December 29, 2008, appellant was no longer staying at her apartment and that she asked him to return his keys because she "didn't want him to just come and go as he wanted." (Tr. 162.) She further averred that she gave appellant permission to enter her apartment only during her lunch hour for the sole purpose of returning his keys and retrieving his personal belongings. M.B. asserted that appellant agreed to leave his keys in the mailbox after he left her apartment, and that she assumed appellant had done so because she found the keys in the mailbox when she returned home from work later that afternoon. She further testified that appellant admitted after the attack that he had entered the apartment after M.B. left to visit her parents using a duplicate key he had made. This evidence supports the conclusion that M.B. exercised sole custody and/or control of the apartment at the time appellant entered and that appellant knowingly entered M.B.'s apartment without privilege to do so, thereby committing trespass in violation of R.C. 2911.21(A)(1).

{¶46} Moreover, regardless of whether appellant's entry into the apartment was authorized or unauthorized, his privilege to remain therein was implicitly revoked due to his acts of violence against M.B. The evidence is undisputed that appellant physically attacked M.B. in the apartment. Appellant's privilege to remain in the apartment thus terminated when he commenced his assault on M.B. *State v. Murray*, 11th Dist. No. 2003-L-045, 2005-Ohio-1693, ¶ 59; *State v. Casey*, 2d Dist. No. 19940, 2004-Ohio-1017, ¶ 26.

{¶47} Viewing the evidence in a light most favorable to the prosecution, and without making credibility determinations, we conclude that the evidence was sufficient to prove the element of trespass, and, by extension, to support the conviction for aggravated burglary in violation of R.C. 2911.11(A)(1).

{¶48} Appellant also contends the evidence was insufficient to support his convictions for the one-year firearm specifications accompanying the felonious assault and rape charges. More particularly, appellant contends that no evidence established that he either possessed or controlled a firearm during the felonious assault or rapes, as M.B. testified that she did not actually see the firearms until after the assaults were completed.

{¶49} R.C. 2941.141(A) is a penalty enhancement statute which provides for the imposition of a one-year mandatory term upon any offender for having a firearm on or about the offender's person or under the offender's control during the commission of a felony. *State v. Ervin*, 93 Ohio App.3d 178, 179-180 (8th Dist.1994). A trier of fact may consider all relevant facts and circumstances surrounding a crime. *Thompkins* at 385. A firearm specification may be proven by circumstantial evidence. *State v. Jackson*, 169 Ohio App.3d 440, 2006-Ohio-6059 ¶ 27 (6th Dist.), citing *Thompkins* at 385. Circumstantial evidence and direct evidence have the same probative value. *Jenks* at paragraph one of the syllabus.

{¶50} In order for an accused to be convicted of a firearm specification under R.C. 2941.141, the state must first establish that the firearm existed and was operable at the time the offense was committed. *State v. Murphy*, 49 Ohio St.3d 206, 208 (1990). Here, the parties stipulated that two firearms were recovered from appellant and that both were operable. The state must then prove, beyond a reasonable doubt, that the offender committed a felony, and the offender had the firearm on or about his person or under his control while committing the felony. *State v. Boyce*, 21 Ohio App.3d 153 (10th Dist.1985). A conviction under R.C. 2941.141 does not require an accused to use the firearm to commit the felony; rather, all that is necessary is that the offender have the firearm on or about his person or under his control "*at some point*" during the commission of the crime. (Emphasis sic.) *State v. Harry*, 12th Dist. No. CA2008-01-0013, 2008-Ohio-6380, ¶ 53.

{¶51} For purposes of R.C. 2941.141, the state may prove an accused has dominion or control over a firearm by proving constructive possession. *State v. Easterly*, 8th Dist.

No. 94797, 2011-Ohio-215, ¶ 24. Constructive possession exists "when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 91 (1982).

{¶52} Although M.B. testified that she did not actually see the firearms until after appellant assaulted and raped her, there was sufficient evidence to establish that appellant constructively possessed the firearms while he committed these offenses. Immediately after appellant raped M.B. for the third time, while she was still bound on the floor, appellant told M.B. he had a gun. M.B. testified that, at this point, she had not seen either of the firearms; however, she also testified that she could not see appellant because she was on the floor with her face turned toward the couch. Given her position on the floor, the fact that M.B. did not see the firearms until after the attack does not mean that appellant did not have dominion and control over them during the assaults.

{¶53} After viewing the evidence in a light most favorable to the prosecution, and without making credibility determinations, we conclude that a rational trier of fact could have found that the state proved, beyond a reasonable doubt, that appellant had a firearm under his control while committing the offenses of felonious assault and rape. We thus find that appellant's convictions for the one-year firearm specifications were supported by sufficient evidence.

{¶54} We turn next to appellant's contention that his convictions for aggravated burglary, rape, kidnapping and the firearm specifications on the aggravated burglary and kidnapping charges were against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, an appellate court sits as a "thirteenth juror." *Thompkins* at 387. Accordingly, we review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the jury clearly lost its way and created a manifest miscarriage of justice. *Id*., citing *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Id*. When an accused challenges the credibility of a witness on manifest weight grounds, " '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} Appellant first contends that his conviction for aggravated burglary was against the manifest weight because the evidence established he still had furnishings in the apartment and thus did not legally trespass in the apartment. However, as explained above, the state provided substantial evidence establishing that appellant had no legal right or privilege to enter or remain in M.B.'s apartment on the night of December 29, 2008. The evidence supports the conclusion that M.B. exercised sole custody and/or control of the apartment at the time appellant entered and that appellant knowingly entered M.B.'s apartment without privilege to do so. The evidence alternatively supports the conclusion that any privilege appellant may have had to enter M.B.'s apartment terminated upon appellant's assault of M.B. Accordingly, appellant's contention that the manifest weight of the evidence did not support the element of trespass required for a conviction for aggravated burglary is unavailing.

{¶56} Appellant next contends that his convictions for rape were against the manifest weight of the evidence. Appellant was convicted of three counts of rape in violation of R.C. 2907.02(A)(2), which provides that "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force."

{¶57} Appellant contends that M.B.'s testimony regarding the rapes lacked credibility due to inconsistencies in that testimony. Appellant first argues that Ms. Baker testified that M.B. reported that appellant had digitally penetrated her, while M.B. testified that she did not recall appellant committing that sex act. Appellant further complains of inconsistencies between M.B.'s testimony and that of Detective Gribi regarding the timing of appellant's ejaculation related to the second act of fellatio. Appellant also claims that M.B. was generally inconsistent about the sequence of events during the attack, such as when appellant put the sock in her mouth and when she was choked into unconsciousness. Appellant further maintains that M.B.'s testimony was inconsistent regarding other details of the attack, such as whether appellant tied her up with rope or bed sheets and the position of her body on the floor. Appellant additionally

complains about inconsistencies between M.B.'s testimony and that of her mother regarding whether appellant put the gun to M.B.'s head.

{¶58} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶ 21. The determination of weight and credibility of the evidence is for the trier of fact. *State v. DeHass,* 10 Ohio St.2d 230 (1967), paragraph two of the syllabus. The rationale is that the trier of fact is in the best position to take into account inconsistencies, along with the witness's manner and demeanor, and determine whether the witness's testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶ 58. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the jury's determination of witness credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶ 22.

{¶59} While M.B.'s testimony may at times have lacked both internal and external consistency with regard to specific details of the rapes, the jury apparently found M.B.'s overall testimony that appellant twice forced her to engage in fellatio and once vaginally raped her to be credible. " 'The jury was free to believe all, part, or none of the testimony of each witness.' " *State v. Dillon,* 10th Dist. No. 04AP-1211, 2005-Ohio-4124, ¶ 20, quoting *State v. Colvin,* 10th Dist. No. 04AP-421, 2005-Ohio-1448, ¶ 34. Further, "[w]hile 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 (May 28, 1996).

{¶60} Appellant also claims that his conviction for vaginal rape was against the manifest weight of the evidence because M.B.'s physical examination revealed no evidence of vaginal trauma. However, the absence of physical evidence of the use of force against a rape victim does not render a conviction invalid, as not all rape victims exhibit signs of physical injury. *State v. Flowers,* 10th Dist. No. 99AP-530 (May 4, 2000), citing *State v. Van Buskirk,* 8th Dist. No. 57800 (Sept. 29, 1994). Physical injury is not a condition precedent to a conviction for rape. *Flowers,* citing *State v. Goodman,* 10th Dist. No. 91AP-1298 (Apr. 21, 1992). Furthermore, Ms. Baker testified that vaginal trauma is "very

rare" in rape cases unless a foreign object was used or the victim had not previously had sexual intercourse.

{¶61} Appellant also argues that all three of his rape convictions were against the manifest weight of the evidence because no semen was found on any of the evidence gathered, including on M.B. or on the apartment carpeting upon which M.B. claimed to have spat ejaculate. "[T]here is no requirement, statutory or otherwise, that a rape victim's testimony be corroborated as a condition precedent to conviction." *Flowers*, citing *State v. Banks*, 71 Ohio App.3d 214, 220 (3d Dist.1991). Rather, " 'the testimony of a rape victim, if believed, is sufficient to support each element of rape.' " *State v. Kring*, 10th Dist. No. 07AP-610, 2008-Ohio-3290, ¶ 42, quoting *State v. Reinhardt*, 10th Dist. No. 04AP-116, 2004-Ohio-6443, ¶ 29. As noted above, the jury apparently believed M.B.'s testimony regarding all three of the rapes, despite the absence of corroborating physical evidence.

{¶62} Appellant also challenges as incredible M.B.'s testimony that appellant told her he duplicated the key to her apartment and then waited for her while hiding in one of the closets. As with any testimony, the jury was free to determine the reasonableness and credibility of this testimony. *DeHass*, paragraph two of the syllabus.

{¶63} Appellant also maintains that his kidnapping conviction was against the manifest weight of the evidence. The indictment charged appellant with kidnapping in violation of R.C. 2905.01(A)(2), (3), or (4), which provide, in relevant part, that "[n]o person, by force, threat, or deception * * * shall * * * restrain the liberty of the other person * * * (2) [t]o facilitate the commission of any felony or flight thereafter; [or] (3) [t]o terrorize, or to inflict serious physical harm on the victim * * * [or] (4) [t]o engage in sexual activity, as defined in section 2907.01 of the Revised Code, with the victim against the victim's will."

{¶64} Appellant argues that his kidnapping conviction was against the manifest weight of the evidence because any forcible restraint of M.B.'s liberty occurred only in conjunction with the rapes, which, appellant contends, were not supported by the manifest weight of the evidence. We have previously determined that appellant's rape convictions were supported by the manifest weight of the evidence. Appellant's argument is thus without merit. Having determined that the manifest weight of the evidence

supported appellant's kidnapping conviction under R.C. 2905.01(A)(4), we need not consider appellant's alternative claim that the manifest weight of the evidence did not support his kidnapping conviction under R.C. 2905.01(A)(3).

{¶65} Appellant lastly contends that his convictions for the three-year firearm specifications on the aggravated burglary and kidnapping offenses were against the manifest weight of the evidence. R.C. 2941.145(A) is a penalty enhancement statute providing for the imposition of a three-year mandatory term of imprisonment upon any offender for having a firearm on or about the offender's person during the commission of a felony and either displaying, brandishing, indicating possession of, or using the firearm to facilitate the felony. Appellant contends that, because the predicate crimes of aggravated burglary and kidnapping were not supported by the manifest weight of the evidence, the firearm specifications were similarly not supported by the manifest weight of the evidence. As we have already determined that appellant's aggravated burglary and kidnapping convictions were supported by the manifest weight of the evidence, appellant's argument is without merit.

{¶66} Moreover, review of the record reveals that the state presented ample evidence to support the convictions for the firearm specifications on the aggravated burglary and kidnapping charges. After assaulting and raping M.B., appellant remained in the apartment, pointed the handgun at M.B., leaned the shotgun against the couch where he and M.B. were sitting, and threatened to shoot M.B. This evidence supports a finding that, while committing aggravated burglary and kidnapping, appellant displayed, brandished, and threatened to use the firearms. Appellant's third assignment of error is overruled.

{¶67} Appellant argues in his fourth assignment of error that the trial court violated his constitutional right to due process by sentencing him to a harsher sentence following a successful appeal. Appellant contends that the trial court's imposition of a sentence ten years longer than the one imposed following his guilty plea is presumptively vindictive in the absence of new evidence.

{¶68} Appellant relies heavily on the United States Supreme Court's decision in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). In *Pearce*, the Court set aside the sentence of a defendant who had successfully appealed his conviction but upon

remand was given a harsher sentence. The Court held that a defendant's due process rights were violated when a harsher sentence was imposed as a result of judicial vindictiveness following a successful appeal. *Id*. Appellant contends that the *Pearce* presumption of vindictiveness applies in this case since he was given an increased sentence on remand.

{¶69} However, in *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201 (1989), the Supreme Court held that the *Pearce* presumption of vindictiveness does not apply when an offender receives a harsher sentence after being tried following vacation of a guilty plea. The Court stated that "when a greater penalty is imposed after trial than was imposed after a prior guilty plea, the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge." *Id*. at 801. The Court noted that "[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial." *Id*. Also, "in the course of the proof at trial the judge may gather a fuller appreciation of the nature and extent of the crimes charged." *Id*. Further, "[t]he defendant's conduct during trial may give the judge insights into his moral character and suitability for rehabilitation." *Id*. The Court also noted that "after trial, the factors that may have indicated leniency as consideration for the guilty plea are no longer present." *Id*. The Court stated that, unless there is a reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing judge, the offender has the burden of proving actual vindictiveness. *Id*. at 799-800.

{¶70} Accordingly, under *Smith*, appellant bore the burden of demonstrating that there was a reasonable likelihood that vindictiveness motivated the harsher sentence stemming from appellant's decision to go to trial. Review of the record reveals that appellant failed to meet his burden. The jury convicted appellant of two additional counts of rape, as well as five additional firearm specifications. Even though his aggregate sentence increased from 34 to 44 years, the trial court's sentence on all the previously convicted charges was more lenient, save for the felonious assault charge, which the trial court increased only by one year. The court imposed the lesser sentences and opted not to impose maximum sentences on the two additional rape counts despite the prosecution's urging to the contrary. Moreover, even though the court was aware of the details of the

attack at the time of the original guilty plea, the court likely garnered a much fuller appreciation of the nature and extent of the crimes, as well as the physical and emotional impact of the attack on M.B., after hearing all the testimony at trial. Furthermore, considerations which supported leniency at the time of the guilty plea, including appellant's expression of remorse, were no longer present when he was sentenced following trial. These factors sufficiently justified sentences that undisputedly fell within the statutory limits.

{¶71} Finally, nothing in the record suggests that the trial court's resentencing resulted from judicial vindictiveness. At the sentencing hearing, the trial court simply stated that the incident was "pretty violent" and that appellant's actions were against someone that trusted and probably loved him at one time. (Tr. 467.) Having concluded that appellant failed to demonstrate that his sentence resulted from the trial court's vindictiveness, we overrule appellant's fourth assignment of error.

{¶72} In his fifth assignment of error, appellant argues that the trial court erred by imposing multiple sentences for his rape and kidnapping convictions. Appellant contends these crimes are allied offenses of similar import and should merge for purposes of sentencing. Appellant maintains that these unmerged convictions led to multiple punishments for the same offense and thus violated the Double Jeopardy clauses of the United States and Ohio Constitutions.

{¶73} Appellant concedes that he did not raise the merger issue at trial and has therefore forfeited this argument on appeal absent plain error. *State v. Taylor*, 10th Dist. No. 10AP-939, 2011-Ohio-3162, ¶ 34, citing *State v. Sidibeh*, 192 Ohio App.3d 256, 2011-Ohio-712 ¶ 55 (10th Dist.), citing *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207 ¶ 127. "Plain error exists when a trial court was required to, but did not, merge a defendant's offenses because the defendant suffers prejudice by having more convictions than authorized by law." *Taylor* at ¶ 34, citing *Sidibeh* at ¶ 55, citing *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1 ¶ 31.

{¶74} R.C. 2941.25 is a "prophylactic statute that protects a criminal defendant's rights under the Double Jeopardy Clauses of the United States and Ohio Constitutions." *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314 ¶ 45. Pursuant to R.C. 2941.25, "[w]here 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." R.C. 2941.25(A). By contrast, "[w]here 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." R.C. 2941.25(B).

{¶75} In *Johnson,* the Supreme Court of Ohio held that "[w]hen 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." *Id*. at syllabus. In so holding, the court expressly overruled *State v. Rance,* 85 Ohio St.3d 632 (1999) "to the extent that it calls for a comparison of statutory elements solely in the abstract under R.C. 2941.25." *Johnson* at ¶ 44.

{¶76} The *Johnson* court adopted a two-part test for determining allied offenses. "In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other. * * * If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import." (Emphasis sic.) *Id*. at ¶ 48, citing *State v. Blankenship,* 38 Ohio St.3d 116, 119 (1988).

{¶77} If the offenses can be committed by the same conduct, then "the court must determine whether the offenses were committed by the same conduct, i.e., 'a single act, committed with a single state of mind.' " *Johnson* at ¶ 49, quoting *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569 ¶ 50. If the answer to both questions is in the affirmative then the offenses are allied offenses of similar import and will be merged. *Id.* at ¶ 50. "Conversely, if the court determines that the commission of one offense will *never* result in the commission of the other, or if the offenses are committed separately, or if the defendant has separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge." (Emphasis sic.) *Id*. at ¶ 51.

{¶78} Thus, pursuant to *Johnson,* we must first determine whether it is possible to commit the offenses of rape and kidnapping with the same conduct. We answer that question in the affirmative.

{¶79} As we have previously set forth the elements of both kidnapping and rape as charged in the indictment, we need not repeat them here. The Supreme Court of Ohio has held that " '[i]t is clear from the plain language of the statute that no movement is required to constitute the offense of kidnapping; restraint of the victim by force, threat, or deception is sufficient. Thus, implicit within every forcible rape * * * is a kidnapping.' " *State v. Winn,* 121 Ohio St.3d 413, 2009-Ohio-1059 ¶ 23, quoting *State v. Logan,* 60 Ohio St.2d 126, 130 (1979). In analyzing the two crimes post-*Johnson,* we reach the same conclusion because the crimes of kidnapping and rape as charged in this case may be committed with the same conduct.

{¶80} We next determine whether appellant in fact committed kidnapping and rape by way of a single act, performed with a single state of mind, or whether he had separate animus for each offense. *Johnson* at ¶ 49. In *Logan*, the Supreme Court of Ohio adopted the following guidelines in determining whether kidnapping and another offense are committed with a separate animus: "[w]here the restraint or movement of the victim is merely incidental to a separate underlying crime, there [is] no separate animus * * *; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense." *Id*. at syllabus. Further, "[w]here the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense." *Id*.

{¶81} We find the factors set forth in *Logan* exist in this case. Appellant's restraint of M.B. both subjected her to "substantial increase in risk of harm separate and apart" from the rapes, and was "prolonged." Prior to engaging in any sexual conduct with M.B., appellant knocked her to the floor, held her down, and repeatedly struck her in the face. He choked her to the point of unconsciousness and repeatedly attempted to force a sock into her mouth. He then dragged her across the floor, again choked her into unconsciousness, and bound her wrists behind her back. After raping M.B., appellant

kept her hands bound. When he finally untied her, he pointed a gun at her and threatened to kill her. We find that these facts establish that the restraint used to facilitate the kidnapping was independent of, and not merely incidental to, that used to facilitate the rapes. Therefore, we find that appellant committed the crime of kidnapping with a separate animus from that involved in the crime of rape. Having found that the kidnapping and rapes are not allied offenses of similar import, we conclude that the trial court properly sentenced appellant on the kidnapping and rapes under R.C. 2941.25(B). The fifth assignment of error is overruled.

{¶82} By his sixth assignment of error, appellant argues that his sentence is contrary to law and constitutes an abuse of discretion. Appellant contends that the trial court could not impose one-year sentences on the firearm specifications attached to the felonious assault and rape counts because the indictment failed to charge him with such specifications as required by R.C. 2941.141. Appellant also argues that the trial court's imposition of consecutive three-year firearm specifications on the aggravated burglary and kidnapping counts violates former R.C. 2929.14(D)(1)(b). Appellant further asserts that the trial court erred in finding that the one-year firearm specifications require mandatory prison terms. Appellant additionally contends that his sentence violates consistency and proportionality principles under R.C. 2929.11.

{¶83} Before addressing appellant's arguments, we set forth the applicable standard of review. In *State v. Pankey*, 10th Dist. No. 11AP-378, 2011-Ohio-6461, this court recently addressed the standard of review applicable to felony sentencing decisions, 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. at ¶ 18, quoting *State v. Allen*, 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶ 19-21.

{¶84} We note initially that appellant raised none of the foregoing arguments during the sentencing proceedings; accordingly, he has waived all but plain error. Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Under the plain error test, a reviewing court must consider whether, "but for the existence of the error, the result of the trial would have been otherwise." *State v. Wiles*, 59 Ohio St.3d 71, 86 (1991), citing *State v. Long*, 53 Ohio St.3d 91, 97 (1978).

{¶85} We find unavailing appellant's contention that the trial court erred in imposing one-year sentences on the firearm specifications attached to the felonious assault and rape counts because the indictment failed to charge him as such. In *State v. Morris*, 2d Dist. No. 07-CA-112, 2008-Ohio-4744, the court confronted a similar issue. There, the defendant was charged in the indictment with aggravated burglary and a three-year firearm specification pursuant to R.C. 2941.145. Pursuant to R.C. 2941.145, the specification stated that the grand jury found and specified that the defendant "had a firearm on or about [his] person or under [his] control while committing the offense and displayed the firearm, brandished the firearm, indicated that [he] possessed the firearm, or used it to facilitate the offense." *Id*. at ¶ 7.

{¶86} The jury found the defendant guilty of aggravated burglary and the firearm specification, and imposed a ten-year sentence on the aggravated burglary and a three-

year sentence on the firearm specification. On appeal, the court determined that the state's evidence supported a finding that the defendant had a firearm in his possession while committing the aggravated burglary; however, no evidence established that he displayed, brandished, indicated that he possessed, or used the firearm to facilitate the offense. On remand, the trial court found sufficient evidence that the defendant had a firearm on or about his person while committing the aggravated burglary and imposed a one-year sentence pursuant to R.C. 2941.141. On appeal from the revised sentence, the defendant maintained that the trial court erred in sentencing him on the one-year firearm specification because the indictment did not charge him under R.C. 2941.141.

{¶87} Noting the language required by R.C. 2941.141, i.e., that the offender "had a firearm or on about the offender's person or under the offender's control while committing the offense," the appellate court determined that the specification utilizing the language from R.C. 2941.145 "substantially complies with" the language required by R.C. 2941.141. *Id*. at ¶ 21. The court further noted that the verdict form separated the two issues by allowing the jury to first consider whether the defendant had a firearm on his person or under his control while committing the aggravated burglary and then separately considering whether he displayed, brandished or used the firearm to commit the offense.

{¶88} The court concluded that "[w]hen the grand jury found probable cause to believe that Morris 'had a firearm on or about [his] person or under [his] control while committing the offense and displayed the firearm, or used it to facilitate the offense,' the grand jury necessarily found probable cause to believe the lesser state of facts required for the one-year firearm specification that Morris 'had a firearm on or about [his] person or under [his] control while committing the offense.' " *Id*. at ¶ 27. Accordingly, the court determined that Morris was neither mislead nor prejudiced by the specification in the indictment, as the indictment notified him of a specification involving his possession or control of a firearm and, consistent with that specification, the jury found that Morris was in possession of control of a firearm while committing aggravated burglary. *Id*. at ¶ 28.

{¶89} This court applied the *Morris* analysis in *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840. There, Jennings' indictment contained the same R.C. 2941.145 language noted in *Morris*, and the verdict form required the jury to separately find that Jennings possessed a firearm during the offense, as required by R.C. 2941.141,

from the element requiring Jennings to brandish, display, use or indicate possession of a firearm during the offense, as required by R.C. 2941.145. We concluded that Jennings was neither mislead nor prejudiced by the specification, as the jury found that he possessed a firearm, the evidence supported that finding, and the trial court sentenced him only for possession. *Id*. at ¶ 49.

{¶90} Application of *Morris* and *Jennings* to the instant case compels the same result. Appellant's indictment contained the same R.C. 2941.145 language noted in *Morris* and *Jennings*, and such language necessarily included the language required for a one-year firearm specification under R.C. 2941.141. Moreover, the verdict forms required the jury to find that appellant possessed a firearm while committing the aggravated burglary and rapes. As in *Morris* and *Jennings,* appellant was neither mislead nor prejudiced by the specification, as the jury found that he possessed a firearm, the evidence supports that finding, and the trial court sentenced him only for possessing or controlling a firearm.

{¶91} Appellant next contends the trial court erroneously imposed consecutive three-year sentences for his convictions on the firearm specifications accompanying the aggravated burglary and kidnapping counts. Appellant argues the trial court should have merged the sentences because the firearm specifications arose from the same act or transaction.

{¶92} At the time of the offenses, R.C. 2929.14(D)(1)(a)(ii) required a sentencing court to impose a three-year prison term "if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense." An exception to this requirement was set forth in R.C. 2929.14(D)(1)(b), which stated that "[a] court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same transaction."[2]

[2] These provisions are now set forth in R.C. 2929.14(B)(1)(a)(ii) and 2929.14(B)(1)(b), respectively.

{¶93} The Supreme Court of Ohio has defined the term "transaction," as used in the firearm specification statutes, as a "series of continuous acts bound together by time, space and purpose, and directed toward a single objective." *State v. Wills*, 69 Ohio St.3d 690, 691 (1994). "Transaction," as defined by this court, "contemplates a series of criminal offenses which develop from a single criminal adventure, bearing a logical relationship to one another, and bound together by time, space, and purpose directed toward a single objective." *State v. Crawford*, 10th Dist. No. 85AP-324 (Feb. 6, 1986). We note that the "separate animus" test applicable to R.C. 2941.25 does not apply when determining whether firearm specifications merge. *State v. Jones*, 10th Dist. No. 98AP-639 (Mar. 18, 1999).

{¶94} Thus, to support the imposition of two periods of actual incarceration, the evidence had to establish that the aggravated burglary and kidnapping occurred in two separate transactions. In this case, the evidence established that the two crimes were bound together by time and space, both having been committed in a continuous time sequence and in close proximity, inside M.B.'s apartment. Moreover, the offenses were bound together by a common purpose and directed toward a single objective. Appellant entered M.B.'s apartment with the purpose of restraining her liberty in some manner, as evidenced by the items he brought with him to the apartment, including a plastic rope, duct tape, and two firearms. Thus, although involving separate acts, the crimes constituted a single transaction within the contemplation of former R.C. 2929.14(D)(1)(b). Appellant should therefore have been subject to only one three-year term of actual incarceration on the firearm specifications, and the trial court plainly erred in sentencing him to two three-year terms of actual incarceration.

{¶95} Appellant next maintains the trial court erred in imposing mandatory one-year prison terms on the firearm specifications attached to the felonious assault and rape convictions. As noted above, former R.C. 2929.14(D)(1)(b) prohibited a trial court from imposing more than one prison term for multiple firearm specifications if the specifications were committed as part of the same act or transaction. That provision was subject to R.C. 2929.14(D)(1)(g), which provided, in relevant part:

> If an offender is convicted of * * * two or more felonies, if one or more of those felonies is * * * felonious assault, or rape, and

> if the offender is convicted of * * * a specification of the type described under division (D)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (D)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted, * * * and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

{¶96} Appellant was convicted of multiple felonies, including felonious assault and rape. Pursuant to R.C. 2929.14(D)(1)(g), the trial court was required to impose prison terms for the two three-year firearm specifications, i.e., the two most serious firearm specifications. Although the trial court, in its discretion, could have imposed prison terms for any or all of the remaining specifications, it was not required to do so. However, the trial court's November 3, 2010 judgment entry refers to the one-year specifications as a "mandatory sentence." Because the judgment entry suggests that the trial court erroneously believed that all of the one-year firearm specifications required mandatory prison terms, the trial court did not exercise its discretion in imposing its sentence for these specifications. The state concedes error in this regard, and agrees that the case should be remanded for resentencing appellant on the one-year firearm specifications.

{¶97} Appellant lastly contends his sentence violates consistency and proportionality principles under R.C. 2929.11. Appellant submits that his 44-year sentence was "worse" than a sentence for rape and murder.

{¶98} The consistency and proportionality requirements of R.C. 2929.11(B) require that sentencing courts impose punishment and sentence "consistent with the sentences imposed for similar crimes committed by similar offenders." In *State v. Battle*, 10th Dist. No. 06AP-863, 2007-Ohio-1845, this court stated that " '[c]onsistency * * * does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. * * * Although offenses may be similar, distinguishing factors may justify dissimilar sentences.' " *Id.* at ¶ 24, quoting *State v. King*, 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶ 23.

{¶99} Thus, consistency in sentencing does not derive from a case-by-case comparison, but by the trial court's proper application of the statutory sentencing guidelines. *State v. Hall,* 179 Ohio App.3d 727, 2008-Ohio-6228, ¶ 10 (10th Dist.). In order to demonstrate that a sentence is inconsistent, an offender must demonstrate that the trial court did not properly consider applicable sentencing criteria found in R.C. 2929.11 and 2929.12. *State v. Holloman,* 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶ 19.

{¶100} In its sentencing entry, the trial court stated that it "considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12" and "weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and 2929.14." This court has held that such statements defeat a claim that the trial court failed to consider the purposes and principles of felony sentencing as set forth in R.C. 2929.11 and 2929.12. *Battle* at ¶ 26.

{¶101} Moreover, the facts and circumstances support the lengthy sentence imposed. Appellant duplicated a key to M.B.'s apartment without her permission, entered the apartment in M.B.'s absence equipped with duct tape, rope, and two firearms, repeatedly assaulted and raped M.B. when she returned home, and thereafter held her at gunpoint and threatened to kill her. At the sentencing hearing, the prosecutor outlined the psychological and emotional harm M.B. suffered as a result of the ordeal. The trial court's imposition of sentence on the six felony counts is supported by the evidence and is not otherwise contrary to law. However, to the extent appellant claims that his sentence is inconsistent because the trial court erroneously believed that the prison terms for the one-year firearm specifications were mandatory and failed to merge the three-year firearm specifications, we remand the case for the purpose of resentencing appellant on the firearm specifications. The sixth assignment of error is thus sustained in part and overruled in part.

{¶102} In his seventh assignment of error, appellant contends he was denied the effective assistance of counsel in violation of his constitutional rights under the United States and Ohio Constitutions.

{¶103} "The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel." *State v. Belmonte,* 10th Dist. No.

10AP-373, 2011-Ohio-1334, ¶ 8, citing *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970). Courts employ a two-step process in determining whether the right to effective assistance of counsel has been violated. *Belmonte* at ¶ 8, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). First, the defendant must demonstrate that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the defendant must demonstrate that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Belmonte*, citing *Strickland*.

{¶104} "An attorney properly licensed in the state of Ohio is presumed competent." *Belmonte* at ¶ 9, citing *State v. Lott*, 51 Ohio St.3d 160, 174 (1990). The defendant bears the burden of proof and must overcome the strong presumption that counsel's performance was adequate or that counsel's action might be sound trial strategy. *Belmonte,* citing *State v. Smith*, 17 Ohio St.3d 98, 100 (1985). In demonstrating prejudice, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different. *Belmonte,* citing *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph three of the syllabus.

{¶105} Several of appellant's contentions relate to defense counsel's failure to raise certain objections. Appellant argues that defense counsel was ineffective by: (1) failing to add relevancy and foundational objections to Dr. Tejwani's testimony regarding the consistency between M.B.'s claims of sexual assault and the absence of detectable semen; (2) failing to object to the jury instructions pertaining to the one-year firearm specifications on the felonious assault and rape charges because the indictment alleged only three-year firearm specifications on those counts; (3) failing to object to the trial court's improper jury instruction on the definition of "trespass" as related to the offense of aggravated burglary; (4) failing to object to the trial court's failure to merge the kidnapping and rape counts for purposes of sentencing; and (5) failing to object to his aggregate sentence on due process and vindictiveness grounds. In each of these arguments, appellant essentially "recasts one of the substantive propositions of law into an ineffective-assistance claim." *State v. Hale,* 119 Ohio St.3d 118, 2008-Ohio-3426 ¶

233. The failure to object to error, alone, is not sufficient to sustain a claim of ineffective assistance of counsel. *Id*. Having already determined that appellant's recast assignments of error are not prejudicial, defense counsel's failure to object on these grounds does not render his assistance ineffective.

{¶106} Appellant also contends that defense counsel should have moved for a new trial rather than merely objecting to the prosecutor's misconduct during closing argument. When a claim for ineffective assistance of counsel is based upon counsel's failure to make a particular motion, the defendant must demonstrate that the motion had a reasonable probability of success. *State v. Barbour*, 10th Dist. No. 07AP-841, 2008-Ohio-2291, ¶ 14, citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577 (4th Dist.). Having previously determined that the prosecutor's comments in closing arguments did not rise to the level of prosecutorial misconduct, we cannot find that counsel was ineffective in failing to raise a motion for new trial which had no reasonable probability of success.

{¶107} Appellant next contends he received ineffective assistance of trial counsel when counsel failed to request a unanimity instruction on his alleged purpose to commit kidnapping. Crim.R. 31(A) provides that a jury verdict must be unanimous. However, a jury " 'need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime.' " *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787 ¶ 38, quoting *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707 (1999). When determining whether a defendant was deprived of the Crim.R. 31(A) right to juror unanimity, the critical inquiry "is whether the case involve[d] 'alternative means' or 'multiple acts.' " *Id*. at ¶ 48.

{¶108} Pursuant to *Gardner*, an "alternative means" case is one where "a single offense may be committed in more than one way." *Id*. at ¶ 49. Although the jury must be unanimous "as to guilt for the single crime charged, * * * [u]nanimity is not required, * * * as to the means by which the crime was committed so long as substantial evidence supports each alternative means." *Id*. In "reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt." *Id*. In contrast, a case involves

"multiple acts" when several acts are alleged, and any one of the acts could constitute the crime charged. In such cases, "the jury must be unanimous as to which act or incident constitutes the crime." *Id*. at ¶ 50. In such circumstances, "the State [must] elect the particular criminal act upon which it will rely for conviction," and the trial court must "instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." *Id*.

{¶109} The Supreme Court of Ohio discussed jury unanimity as applied to a kidnapping charge in *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046. There, the court instructed the jury "to determine whether McKnight, by force, threat or deception, *did remove* [the victim] from the place where she was found or *restrain* [the victim] of her liberty." (Emphasis sic.) *Id*. at ¶ 227. McKnight maintained that the instruction deprived him of a unanimous jury verdict because the jury was instructed on alternative means for committing kidnapping. The court found the instruction was not improper "because the alternatives were given to the jury disjunctively." *Id*. at ¶ 228, citing *State v. Nields*, 93 Ohio St.3d 6, 30 (2001); *State v. Cook*, 65 Ohio St.3d 516, 527 (1992). The court averred that "[j]urors need not agree on a single means for committing" the offense, because " 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.' " *Id*. at ¶ 228, quoting *Schad v. Arizona*, 501 U.S. 624, 631-632, 111 S.Ct. 2491 (1991), quoting *McKoy v. North Carolina*, 494 U.S. 433, 449, 110 S.Ct. 1227 (1990).

{¶110} Here, the court disjunctively instructed the jury on the alternatives for committing kidnapping. Pursuant to R.C. 2905.01, the court instructed the jury that it could find appellant guilty of kidnapping if "the defendant, by force or threat, restrained [M.B.] of her liberty for the purpose of facilitating the commission of any felony or flight thereafter, and/or terrorizing or inflicting serious physical harm on the victim or another, and/or engaging in sexual activity with the victim against the victim's will." (Tr. 448-449.) Because appellant's case involved a single crime that could have been committed by alternative means, a unanimity instruction was not required. Thus, defense counsel's failure to request a unanimity instruction on the kidnapping charge was not deficient.

{¶111} Moreover, appellant has failed to demonstrate that the jury would not have convicted him of kidnapping had it been instructed to unanimously agree on the purpose for the kidnapping. The jury found appellant guilty of rape, which supported a finding that he kidnapped M.B. "for the purpose of facilitating the commission of a felony." The rape convictions also supported a finding that he kidnapped M.B. for the purpose of "engaging in sexual activity." Finally, M.B.'s testimony that appellant repeatedly assaulted her, held her at gunpoint, and threatened to kill her supported a finding that he kidnapped her for the purpose of "terrorizing or inflicting serious physical harm." As defense counsel's failure to request a unanimity instruction on the kidnapping charge was neither deficient nor prejudicial, appellant did not receive ineffective assistance of counsel.

{¶112} Lastly, appellant contends that defense counsel was ineffective in failing to object to the sentences imposed on the firearm specifications and the overall consistency and proportionality of the sentence. As we have already concluded, the trial court did not err in imposing sentence except for failing to merge the sentences on the three-year firearm specifications on the aggravated burglary and kidnapping counts and for concluding that the one-year sentences imposed on the felonious assault and rape counts were mandatory. Defense counsel's failure to object to the sentences on these grounds constitutes ineffective assistance, as appellant was prejudiced by counsel's failure. Accordingly, the seventh assignment of error is overruled in part and sustained in part.

{¶113} In conclusion, we overrule appellant's first, second, third, fourth, and fifth assignments of error, and overrule in part and sustain in part appellant's sixth and seventh assignments of error. Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed as to appellant's convictions, but reversed and remanded for resentencing on the firearm specifications in accordance with law and consistent with this decision.

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

BRYANT and KLATT, JJ., concur.
