[Cite as *State v. Cundiff*, 2013-Ohio-1806.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	No. 12AP-483 (C.P.C. No. 11CR-4725)
v.	:	(REGULAR CALENDAR)
Daniel M. Cundiff,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 2, 2013

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *John Q. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Daniel M. Cundiff ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of gross sexual imposition. He also argues that the trial court erred by denying his motion to suppress certain evidence. Because we conclude that the evidence appellant sought to suppress was admissible under the inevitable- discovery doctrine and that gross sexual imposition is a lesser-included offense of the charged crime of rape, we affirm.

{¶ 2} Appellant was staying at the home of his cousin, S.B., and his cousin's wife, S.N., during late May and early June 2011. On the evening of June 10, 2011, while S.B. was at work, appellant entered S.N.'s bedroom and attempted to initiate sex with her.

Appellant was not wearing any clothes at the time. S.N. resisted appellant's advances and appellant left and re-entered S.N.'s bedroom multiple times. At some point after appellant left S.N.'s bedroom for the final time, S.N. heard a thump from the next bedroom, where her 17-month-old daughter, A.B., and her younger infant son, E.B., were sleeping. She also heard A.B. begin crying. S.N. looked out the door of her bedroom and saw appellant walking away from A.B. and E.B.'s bedroom. S.N. went into the bedroom and found A.B. lying on the floor, with her shirt pulled up and her diaper off. S.N. cleaned up A.B. and put her in another bedroom with her two older brothers, then took E.B. into her bedroom.

{¶ 3} S.N. then heard appellant, who was downstairs in the home, making strange noises and thumping sounds, crying and moaning "oh, God, oh, God, her daughter." (Tr. Vol. I, 53.) After calling her husband and a friend, S.N. called the police. When the police arrived, appellant was lying on the stairs, naked and mumbling incoherently. The responding officer could smell alcohol on appellant. The police removed appellant from the home and placed him in a police cruiser. While appellant was in the police cruiser, a detective collected buccal swabs from the interior of his cheeks. The police also collected evidence from the home, including A.B.'s diaper and swabs from her abdomen, thighs, and vaginal area. Subsequent forensic testing indicated the presence of appellant's DNA on A.B.'s diaper and on the abdominal swab.

{¶ 4} Appellant was charged with rape for having engaged in cunnilingus on A.B., a victim less than 13 years old. Prior to trial, appellant filed a motion to suppress the buccal swabs taken on June 10, 2011, and all evidence derived therefrom. The trial court denied the motion to suppress. Appellant waived his right to a jury, and the case proceeded to trial before the court. The trial court ruled that appellant was not guilty of rape as charged in the indictment but that he was guilty of the lesser-included offense of gross sexual imposition.

{¶ 5} Appellant appeals from the trial court's judgment, assigning two errors for this court's review:

> ASSIGNMENT OF ERROR NUMBER ONE
>
> THE TRIAL COURT ERRED WHEN IT CONVICTED THE DEFENDANT OF GROSS SEXUAL IMPOSITION WHEN THE DEFENDANT WAS NEVER CHARGED WITH THAT

> CRIME, WAS NEVER TRIED FOR THAT CRIME, AND NEVER HAD A CHANCE TO DEFEND AGAINST THAT CRIME BECAUSE GROSS SEXUAL IMPOSITION WAS NEVER CHARGED IN THE INDICTMENT AND IS NOT A LESSER-INCLUDED OFFENSE OF RAPE.
>
> ASSIGNMENT OF ERROR NUMBER TWO
>
> THE TRIAL COURT ERRED WHEN IT OVERRULED THE DEFENDANT'S MOTION TO SUPPRESS THE WARRANT-LESS SEIZURE OF THE DEFENDANT'S DNA FROM THE INTERIOR OF HIS MOUTH MADE AT THE TIME OF HIS ARREST.

{¶ 6} In his first assignment of error, appellant argues that the trial court erred by convicting him of gross sexual imposition. Appellant asserts that he was not indicted or tried on the charge of gross sexual imposition and that he could not be convicted of that offense because it was not a lesser-included offense of the charge of rape.

{¶ 7} "The trial court's decision to allow the finder of fact, whether a jury or the court itself in a bench trial, to consider a lesser-included offense will be reviewed on appeal under an abuse-of-discretion standard." *State v. Cain*, 10th Dist. No. 06AP-1252, 2007-Ohio-6181, ¶ 7. The trial court may submit consideration of a lesser-included offense where the evidence presented at trial would reasonably support an acquittal on the crime charged and a conviction on the lesser-included offense. *Id.*

{¶ 8} The Supreme Court of Ohio has previously held that gross sexual imposition is a lesser-included offense of rape. *State v. Johnson*, 36 Ohio St.3d 224 (1988), paragraph one of the syllabus. Relying on that precedent, this court has also previously held that gross sexual imposition is a lesser-included offense of rape. *State v. Cardona*, 10th Dist. No. 10AP-1052, 2011-Ohio-4105, ¶ 16; *State v. Gale*, 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶ 14 ("Gross sexual imposition is a lesser-included offense of rape when based on the same conduct: its elements are identical to rape except that the type of sexual activity involved in gross sexual imposition is 'sexual contact,' while 'sexual conduct' is necessary for a rape conviction."). Appellant urges this court to disregard *Johnson*, asserting that the portion of that decision stating that gross sexual imposition is a lesser-included offense was dictum. In the alternative, appellant argues that the court's

statement in *Johnson* was incorrect. However, "[a]n intermediate appellate court is not free to ignore a syllabus nor is an intermediate appellate court free to consider a syllabus to be obiter dictum." *State v. McCown*, 10th Dist. No. 06AP-153, 2006-Ohio-6040, ¶ 34, citing *Smith v. Klem*, 6 Ohio St.3d 16, 18 (1983).

{¶ 9} Moreover, applying the test to determine whether one offense is a lesser-included offense of another, we conclude that gross sexual imposition is a lesser-included offense of rape. The Supreme Court of Ohio has set forth a three-part test to determine whether an offense is a lesser-included offense of another: (1) whether one offense carries a greater penalty than the other; (2) whether some element of the greater offense is not required to prove commission of the lesser offense; and (3) whether the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, paragraph two of the syllabus. To apply this test, we must consider how each offense is defined under the relevant statutes.

{¶ 10} The statute defining the offense of rape, R.C. 2907.02, generally prohibits a person from engaging in "sexual conduct" with another when certain conditions apply. Similarly, the statute defining gross sexual imposition, R.C. 2907.05, generally prohibits a person from having "sexual contact" with another when certain conditions apply. "Sexual conduct" is defined to include intercourse, fellatio, and cunnilingus. R.C. 2907.01(A). "Sexual contact" is defined in R.C. 2907.01(B) as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." In this case, appellant was charged with rape in violation of R.C. 2907.02(A)(1)(b), by engaging in sexual conduct, specifically cunnilingus, with an individual who was less than 13 years of age. The trial court convicted appellant of gross sexual imposition in violation of R.C. 2907.05(A)(4) for having sexual contact with an individual who was less than 13 years of age.

{¶ 11} The first element of the test for a lesser-included offense is satisfied because rape, a felony of the first degree, carries a greater penalty than gross sexual imposition, which is a felony of the third or fourth degree, depending on the circumstances. R.C.

2907.02(B); 2907.05(C).[1] The second element of the test for a lesser-included offense is also satisfied because one of the elements of rape—i.e., sexual conduct—is not required to prove commission of the offense of gross sexual imposition. Finally, the third element of the test for a lesser-included offense is satisfied because the greater offense of rape cannot be committed without also committing the lesser offense of gross sexual imposition. As explained above, in order to commit the offense of rape, an offender must engage in sexual conduct, defined by statute to include intercourse, fellatio or cunnilingus. By necessity, in order to engage in one of these acts, the offender must touch an erogenous zone, such as the genitals, buttocks, pubic region or mouth of the victim. *See* R.C. 2907.01(B) (defining "erogenous zone" to include "genitals, buttock, [or] pubic region"); *State v. Ball*, 4th Dist. No. 07CA2, 2008-Ohio-337, ¶ 26 (concluding that, under the facts of a particular case, the mouth may be considered an erogenous zone). Therefore, the offense of rape cannot be committed without the offense of gross sexual imposition also being committed. *See State v. Napier*, 1st Dist. No. C-980999 (Dec. 30, 1999) ("[I]t is clear, using a purely textual analysis, that it would be impossible to engage in 'sexual conduct' without engaging in 'sexual contact.' The former is merely a more egregious form of the latter."); *State v. Didio*, 8th Dist. No. 53745 (May 19, 1988) ("It is clear from a reading of R.C. 2907.01, sexual conduct cannot be accomplished without sexual contact. Therefore, the offense of the greater degree, rape, which involves sexual conduct cannot be committed without also committing gross sexual imposition."). Because all three elements of the test for a lesser-included offense are satisfied, gross sexual imposition is a lesser-included offense of rape.

{¶ 12} Further, based on the evidence presented in this case, the trial court did not abuse its discretion by considering the lesser-included offense of gross sexual imposition. Appellant was charged with having committed rape by engaging in cunnilingus. "[T]he act of cunnilingus is completed by the placing of one's mouth on the female's genitals." *State v. Lynch*, 98 Ohio St.3d 514, 2003-Ohio-2284, ¶ 86. Therefore, the state was required to establish that appellant placed his mouth on A.B.'s genitals. At trial, the state's forensic expert testified that amylase was identified on A.B.'s diaper and on abdominal and vaginal

[1] Appellant was convicted of gross sexual imposition in violation of R.C. 2907.05(A)(4), which is a felony of the third degree. R.C. 2907.05(C)(2).

swabs taken from A.B. One of the state's forensic experts testified that amylase is a component of saliva and other bodily fluids and that the highest concentration of amylase is found in saliva. Forensic testing identified appellant's DNA on the samples taken from A.B.'s diaper and abdomen but not on the sample taken from the vaginal swab. The trial court could have concluded that this evidence would reasonably support an acquittal on the charge of rape because the state had failed to prove beyond a reasonable doubt that appellant placed his mouth on A.B.'s genitals, but would support a conviction on the charge of gross sexual imposition because the state established that appellant's mouth touched A.B.'s abdomen, buttocks or pubic region for the purpose of sexually arousing or gratifying himself, based on the presence of his DNA on A.B.'s abdomen and in her diaper. Therefore, the trial court did not abuse its discretion by considering the lesser-included offense of gross sexual imposition. *See Cain* at ¶ 7.

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

{¶ 14} In his second assignment of error, appellant asserts that the trial court erred by denying his motion to suppress the evidence derived from the buccal swabs taken from his mouth at the time of his arrest. Appellant argued that the police obtained this evidence through an illegal search because appellant did not consent to the search, and the police did not have a search warrant requiring appellant to provide a DNA sample.[2] The trial court denied the motion to suppress based on its conclusion that taking the buccal swabs did not implicate the warrant requirement under the Fourth Amendment to the U.S. Constitution.

{¶ 15} Appellate review of a motion to suppress involves mixed questions of law and fact and, therefore, is subject to a twofold standard of review. *State v. Humberto*, 10th Dist. No. 10AP-527, 2011-Ohio-3080, ¶ 46. "Because the trial court is in the best position to weigh the credibility of the witnesses, we must uphold the trial court's findings of fact if competent, credible evidence supports them. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard." *Id*., citing *State v. Reedy*, 10th Dist. No. 05AP-501, 2006-Ohio-1212, ¶ 5.

[2] Current Ohio law provides that a person who is arrested for a felony offense on or after July 1, 2011 must submit to a DNA specimen collection procedure administered by the arresting law enforcement agency. R.C. 2901.07(B)(1)(a). In this case, the buccal swabs were taken on June 10, 2011. Therefore, the buccal swabs were not collected pursuant to the authority granted under R.C. 2901.07(B)(1)(a).

{¶ 16} The Fourth Amendment to the U.S. Constitution, applied to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or other things to be seized." The Ohio Constitution contains a nearly identical provision. Ohio Constitution, Article I, Section 14. As noted above, in denying the motion to suppress, the trial court ruled that taking the buccal swabs did not implicate the warrant requirement under the Fourth Amendment.

{¶ 17} The Supreme Court of Ohio has not ruled on the question of whether taking a DNA sample from an in-custody suspect constitutes a search for purposes of the Fourth Amendment. Various appellate courts in Ohio have held that collection and retention of a DNA sample from a convicted offender constitutes a search for purposes of the Fourth Amendment but also held that Ohio's law allowing authorities to take such samples without a warrant is constitutional. *See, e.g., State v. Cremeans*, 160 Ohio App.3d 1, 2005-Ohio-928, ¶ 11 (2d Dist.); *State v. Steele*, 155 Ohio App.3d 659, 2003-Ohio-7103, ¶ 23 (1st Dist.). In several cases involving DNA samples taken from in-custody suspects, other appellate courts have sidestepped the question of whether taking the sample was a search, implicitly treating the taking of the sample as a search by focusing directly on whether a warrant for the sample was supported by probable cause or whether an exception to the warrant requirement existed. *See State v. Corbin*, 6th Dist. No. WD-10-013, 2011-Ohio-3491, ¶ 41 (concluding that warrant to compel DNA sample through buccal swabs was supported by probable cause); *State v. Bell*, 7th Dist. No. 06-MA-189, 2008-Ohio-3959, ¶ 72-78 (concluding that appellant consented to buccal swabs); *State v. Oke*, 6th Dist. No. WD-04-082, 2005-Ohio-6525, ¶ 41-48 (concluding that appellant consented to buccal swab test). Moreover, we note that the state does not argue on appeal that the trial court was correct in ruling that taking the buccal swab did not implicate the warrant requirement. Rather, as discussed below, the state presents two arguments based on exceptions to the warrant requirement. Accordingly, for purposes of analysis and without deciding the issue, we will consider the taking of the buccal swabs to have been a

search for purposes of the Fourth Amendment and the Ohio Constitution, Article I, Section 14.

{¶ 18} In this case, the police did not have a warrant to take a DNA sample from appellant. The Supreme Court of Ohio has recognized certain exceptions to the search warrant requirement, including consent and search incident to a lawful arrest. *See State v. Alihassan*, 10th Dist. No. 11AP-578, 2012-Ohio-825, ¶ 8. On appeal, the state offers two bases for admission of the buccal swabs taken from appellant and the DNA evidence derived therefrom. First, the state argues that the buccal swabs were taken as part of a search incident to arrest. Second, the state asserts that, despite the lack of a warrant, the DNA evidence was admissible under the inevitable-discovery doctrine.

{¶ 19} A search incident to arrest constitutes an exception to the warrant requirement and is a reasonable search under the United States and Ohio Constitutions. *State v. White*, 10th Dist. No. 07AP-246, 2007-Ohio-7143, ¶ 11. Courts have concluded that searches incident to arrest are supported by two rationales: officer safety and the need to discover and preserve evidence. *State v. Broughton*, 10th Dist. No. 11AP-620, 2012-Ohio-2526, ¶ 31. However, neither of these rationales supports taking buccal swabs from appellant without a warrant in this case. Obviously, it was not necessary to take the buccal swabs to preserve the safety of the arresting police officers. Likewise, it was not necessary to take the buccal swabs prior to obtaining a warrant in order to preserve evidence. As other authorities have noted, absent a mutation, the identifying characteristics of DNA generally do not change over time. *See U.S. v. Gross*, 554 F.Supp.2d 773, 776-77 (N.D.Ohio 2008), *aff'd in part, rev'd in part on other grounds*, 662 F.3d 393 (6th Cir.2011) ("As DNA does not change over time, the Government inevitably would have matched Defendant's DNA to the DNA on the firearm, even without a warrant for the buccal swab."); *see also King v. State*, 425 Md. 550, 600 (2012) ("The State's purported interests are made less reasonable by the fact that DNA collection can wait until a person has been convicted, thus avoiding all threats to privacy discussed in this opinion. DNA profiles do not change over time (as far as science "knows" at present), so there is no reasonable argument that unsolved past or future crimes will go unresolved necessarily."); *U.S. v. Mitchell*, 652 F.3d 387, 413 (3d Cir.2011) ("It is true, as Mitchell asserts, that the information contained in a DNA sample does not change over time and

cannot be concealed; thus, there is no need for the Government to act quickly to prevent the destruction of evidence."). The state does not argue that any identifying characteristics obtained from appellant's DNA would have differed if the buccal swabs had been taken later pursuant to a warrant. Therefore, the buccal swabs and the DNA evidence were not admissible as evidence derived from a proper search incident to arrest.

{¶ 20} The inevitable-discovery doctrine provides that illegally obtained evidence may be admitted at trial "once it is established that the evidence would have been ultimately or inevitably discovered during the course of a lawful investigation." *State v. Perkins*, 18 Ohio St.3d 193 (1985), syllabus. Generally, the inevitable-discovery doctrine may apply where, prior to the misconduct, authorities were actively pursuing an alternate line of investigation that would have resulted in discovery of the evidence, or authorities would have subsequently discovered the evidence through a standardized procedure or established routine. *State v. Bradford*, 4th Dist. No. 09CA880, 2010-Ohio-1784, ¶ 55. This court has previously noted that the doctrine should not be applied in a manner that encourages unconstitutional shortcuts in police investigations. *Alihassan* at ¶ 30.

{¶ 21} Under the facts presented in this appeal, we conclude that the evidence was admissible under the inevitable-discovery doctrine because, even if they had not taken the buccal swabs on June 10, 2011, the police would have subsequently obtained a sample of appellant's DNA as part of their investigation and the DNA evidence would have been (1) available and (2) in the same condition at a later date as it would have been when the buccal swab was taken after appellant was removed from the home. At trial, S.N. testified that she saw appellant walking away from A.B.'s bedroom moments after hearing a thump and then hearing A.B. begin to cry. S.N. also testified that she later heard appellant moaning "oh, God, oh, God, her daughter." The only other individual in the bedroom at the time was S.N.'s younger child, E.B., who was sleeping in a crib. Based on these facts, appellant was the only suspect in the case. The police also had the results of forensic testing establishing the presence of amylase in A.B.'s diaper and on swabs taken from her abdomen. This information would have led the state to seek a sample of appellant's DNA for comparison to the results of the forensic testing. Moreover, this sort of case, involving possible rape or sexual contact, is the type of investigation where a DNA evidence is routinely gathered from suspects. *See, e.g., State v. Metcalf*, 12th Dist. No. CA2010-12-

326, 2012-Ohio-674, ¶ 4 (defendant required to provide a DNA sample through an oral swab in a rape case); *State v. Biddings*, 49 Ohio App.3d 83, 84 (10th Dist.1988) (defendant required to provide a DNA sample through a blood test in a rape case). At the suppression hearing, counsel for the state indicated that obtaining DNA sample was a required part of the investigation. As noted above, other authorities have noted that the identifying characteristics of DNA generally do not change over time, and neither appellant nor the state argues that the evidence obtained from buccal swabs taken from appellant would have changed based on when those swabs were taken. Under similar circumstances, courts in other jurisdictions have applied the inevitable-discovery doctrine, concluding that the police routinely seek DNA samples from rape suspects. *See, e.g., U.S. v. Eastman*, 256 F.Supp.2d 1012, 1021-22 (D.S.D. 2003).

{¶ 22} The inevitable-discovery doctrine is an exception to the "exclusionary rule," which bars the use of illegally obtained evidence and any evidence that was an indirect product of unlawful police conduct. *Perkins* at 194. We conclude that barring the evidence derived from the buccal swabs in this case would be inconsistent with the purposes of the exclusionary rule. "While the Exclusionary Rule is used to deny the admission of evidence unlawfully gained, and thereby to put the state in the same position it would have been absent the evidence seized, the rule should not be used to put the state in a worse position by refusing evidence that would have been subsequently discovered by lawful means." *Id.* at 196. As explained above, under these circumstances, we conclude that applying the exclusionary rule would have the effect of putting the state in a worse position because the DNA evidence would have been subsequently discovered by lawful means. Moreover, if the trial court had granted the motion to suppress, the state likely would have had probable cause to obtain a search warrant requiring appellant to provide a DNA sample. Appellant does not challenge the accuracy of the DNA evidence the state presented. Presumably, the state would have obtained the same results if the trial court granted the motion to suppress and the state obtained new buccal swabs pursuant to a search warrant. Therefore, the practical effect of granting the motion to suppress simply would have been to delay the proceedings.

{¶ 23} We conclude that the evidence appellant sought to suppress was admissible under the inevitable-discovery doctrine. Because this is the same result that the trial court reached, albeit for a different reason, we overrule appellant's second assignment of error.

{¶ 24} For the foregoing reasons, we overrule both of appellant's assignments of and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.
