[Cite as *State v. Farmer*, 2009-Ohio-6013.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 22852
vs.	:	T.C. CASE NO. 07CR4216
DAVID ALLEN FARMER	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 13th day of November, 2009.

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GRADY, J.:

{¶ 1} Defendant, David Farmer, appeals from his convictions for rape and gross sexual imposition and the sentences imposed for those offenses pursuant to law.

{¶ 2} Defendant occupied a basement bedroom at the home of his girlfriend, L.C., her seventeen-year-old daughter, A.C., and

L.C.'s great niece, eight-year-old M.R. On October 12, 2007, Defendant told M.R. to come to his bedroom. As he had before, Defendant directed M.R. to undress and lie on his bed. He then rubbed his hands between M.R.'s legs, and following that put his penis in her mouth. Defendant removed his penis when M.R. said she needed to use the bathroom. M.R. then fled. These events were witnessed by her cousin, A.C., who had been alerted by M.R. and was hiding on the landing of the basement steps.

{¶ 3} M.R. called her father and told him what had happened. Her father and mother then came to the house, where they confronted Defendant. They severely beat Defendant, causing serious injuries. Police were called and arrested him. Defendant was removed to a hospital for treatment of his injuries.

{¶ 4} Defendant was interviewed at the hospital by police. He denied M.R.'s accusations, but consented to a search of his basement bedroom. Defendant also consented to DNA swabs of his mouth, fingers, and penis by police.

{¶ 5} Defendant was indicted on two counts of rape involving a child under ten years of age,[1] R.C. 2907.02(A)(1)(b), and one count of gross sexual imposition involving a child under age

[1]One count was based on the events of October 12, 2007, and another was based on an allegation of similar conduct on a prior occasion.

thirteen, R.C. 2907.05(A)(4). Defendant filed a motion to suppress evidence. The court suppressed evidence seized in a search of Defendant's bedroom,[2] but denied the motion with respect to evidence of DNA test results.

{¶ 6} At Defendant's jury trial, M.R. and A.C. testified concerning the events of October 12, 2007. A DNA expert testified that saliva found on the swab of Defendant's penis contained M.R.'s DNA. Defendant was convicted of all charges. He was sentenced to prison terms totaling twenty years to life, and was classified a Tier III sex offender. Defendant filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT IMPROPERLY DENIED THE APPELLANT'S MOTION TO SUPPRESS AND ALLOWED HIGHLY PREJUDICIAL EVIDENCE TO BE ADMITTED THAT WAS GATHERED BY WARRANTLESS SEARCHES IN THE ABSENCE OF VOLUNTARY CONSENT."

{¶ 8} Defendant argues that the trial court erred when it failed to suppress evidence of DNA tests of swabs of his mouth, fingers, and penis, on the court's finding that Defendant consented to those searches of his person, avoiding the need for a prior judicial warrant to perform them. Defendant contends that due

[2]The court found that Defendant's consent was ineffective to justify the prior, warrantless search of his bedroom that police performed.

to his serious injuries "it is highly unlikely that any such consent could have been given," and that the court "failed to put proper weight on the Appellant's physical condition." Defendant further contends that approaching Defendant after he was seriously injured "suggests coercive conduct," and points out that he was not specifically informed that he could refuse consent to those searches.

{¶ 9} The only DNA evidence offered by the State at trial that connected Defendant to the offenses with which he was charged was evidence obtained from the swab of his penis. When police performed that search, Defendant was under a custodial arrest and temporarily detained at a hospital for treatment. Being supported by probable cause, Defendant's arrest provided all the justification necessary for police to conduct a full search of his person to obtain and preserve evidence of the crimes for which Defendant had been arrested. *United States v. Robinson* (1973), 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427.

{¶ 10} The swab searches that were performed of Defendant's hands, mouth and penis were performed to obtain DNA evidence that could corroborate M.R.'s allegations. That evidence could be lost if it was washed away. Defendant does not argue that the methods used to obtain it were improper. See, e.g. *Rochin v. California* (1952), 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183. The swabs

of his hands and mouth were not unduly intrusive. The swab of his penis was reasonable on standards applied to even more intensive strip searches: it was (1) limited in scope, (2) not forced, (3) justified under the circumstances, and (4) performed in a hospital. ***Bell v. Wolfish*** **(1979), 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447.**

{¶ 11} An appellate court may decide an issue on grounds different from those determined by the trial court so long as the evidentiary basis upon which the court of appeals decides a legal issue was adduced before the trial court and made a part of the record thereof. ***State v. Peagler*** **(1996), 76 Ohio St.3d 496. It is undisputed that Defendant was under arrest when the swab searches were conducted, and the facts and circumstances demonstrating probable cause for his arrest were adduced at the hearing on the motion to suppress. (T. 56). We therefore rely on the fact of Defendant's custodial arrest to find that his consent was not required for the warrantless swab searches of his person that police performed. Therefore, the error assigned could not affect Defendant's substantial rights and must be disregarded as harmless. Crim.R. 52(A).**

{¶ 12} The first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 13} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND ABUSED

ITS DISCRETION WHEN IT ADMITTED A PARTIAL UNRELIABLE STATEMENT INTO EVIDENCE AND FAILED TO PROPERLY REMEDY THIS ERROR."

{¶ 14} At the suppression hearing, Defendant's counsel asked M.R.'s great-aunt, L.C.: "Has [M.R.] ever denied to you that David Farmer raped her?" The State objected to the question. Before the court could complete its ruling on the objection, L.C. replied: "No, she never –." The court then stopped L.C. from responding further and sustained the State's objection. (T. 150-151).

{¶ 15} At trial, L.C. was called as a witness by Defendant, and she testified that M.R. told her that Defendant "didn't do anything to me." (T. 362). On cross-examination, when the State began to lay a foundation to impeach L.C. with her prior, seemingly inconsistent statement at the suppression hearing, Defendant objected that the court had sustained the objection to the question that elicited L.C.'s response, which was, in any event, incomplete and ambiguous.

{¶ 16} The court overruled Defendant's objection, finding that "the portion that she did blurt out is arguably inconsistent with what she's now testifying." (T. 382). The court then allowed the State to read the exchange from the suppression hearing to L.C., and to ask L.C. what her complete response would be to the question she was asked, if L.C. could remember. The prosecutor read the exchange, but L.C. said she could not remember making

the statement. The prosecutor did not proceed further.

{¶ 17} On re-direct examination, and at the court's direction, Defendant's counsel asked L.C. how she would have finished her statement at the suppression hearing "had you been allowed to?" L.C. replied: "I probably would have told the court that [M.R.] never mentioned the word rape. We never talked about rape. She never mentioned that David raped her." Explaining further, L.C. testified that M.R. never used the word "rape," "She just said he didn't do anything to me." (T. 407-408).

{¶ 18} Defendant argues that the trial court abused its discretion because L.C.'s prior statement was incomplete, that its probative value was outweighed by the unfair prejudice it caused Defendant, and because, after L.C. said she did not remember making the statement, the court ought not have directed Defendant's attorney to ask L.C. what she would have said, which confused the issues for the jury.

{¶ 19} The question Defendant asked of L.C. at the suppression hearing, whether M.R. "ever denied to you that David Farmer raped her," could have elicited a hearsay response, and the court presumably sustained the State's objection for that reason. However, the question asked of L.C. at trial was not likewise objectionable. The question concerned L.C.'s own prior statement that was made under oath and is seemingly inconsistent with L.C.'s

trial testimony, used to impeach the witness through evidence of self-contradiction. Such evidence is not hearsay. Evid.R. 801(D)(1)(a).

{¶ 20} Ordinarily, a prior statement admissible pursuant to Evid.R. 801(D)(1)(a) may be received for its truth. Weissenberger's *Ohio Evidence Treatise*, (2008 Ed.), §801.20. The problem in doing that here is that L.C.'s prior statement was made in response to a question concerning which the court had sustained an objection. However, any prejudice to Defendant was avoided by L.C.'s explanation that her prior statement was intended merely to deny that M.R. had used the word "rape," not that M.R. had not said that Defendant "didn't do anything to me." Reversible error is not demonstrated.

{¶ 21} The second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 22} "THE CLASSIFICATION OF THE APPELLANT UNDER THE SEX OFFENDER REGISTRATION REQUIREMENTS PROVIDED BY SENATE BILL 10 VIOLATED HIS SUBSTANTIVE DUE PROCESS RIGHTS, AS WELL AS THE PROTECTIONS PROVIDED UNDER THE SEPARATION OF POWERS DOCTRINE AND THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE."

{¶ 23} Defendant argues that his classification as a Tier III sex offender and the corresponding registration requirements pursuant to Senate Bill 10 amount to cruel and unusual punishment,

a denial of due process, and a violation of the separation of powers doctrine. Defendant failed to object to his classification and did not raise these constitutional issues in the trial court below. Accordingly, Defendant has forfeited his right to now raise these issues on appeal, and we need not consider constitutional issues for the first time on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120.

{¶ 24} In any event, Defendant's claims have all previously been considered and rejected by this court. See: *State v. Barker*, Montgomery App. No. 22963, 2009-Ohio-2774; *State v. Hall* Montgomery App. No. 22969, 2009-Ohio-3020; *State v. Desbiens*, Montgomery App. No. 22489, 2008-Ohio-3375; *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594. Furthermore, the Ohio Supreme Court has repeatedly upheld the classification and registration requirements in Chapter 2950 of the Ohio Revised Code as constitutional. *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291; *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428; *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824.

{¶ 25} Defendant's third assignment of error is overruled.

FOURTH ASSIGNMENT OF ERROR

{¶ 26} "PROSECUTORIAL MISCONDUCT DURING THE STATE'S CLOSING ARGUMENT LED TO THE PREJUDICE OF THE JURY AND AN UNJUST VERDICT."

{¶ 27} The test for prosecutorial misconduct is whether the prosecutor's remarks were improper and, if so, whether they prejudicially affected substantial rights of the accused. *State v. Bey*, 85 Ohio St.3d 487, 493, 1999-Ohio-283. The focus of that inquiry is on the fairness of the trial, not the culpability of the prosecutor. *Id*.

{¶ 28} Generally, prosecutors are entitled to considerable latitude in opening and closing arguments. *Maggio v. Cleveland* (1949), 151 Ohio St. 136; *State v. Ballew*, 76 Ohio St.3d 244, 1996-Ohio-81. A prosecutor may freely comment in closing argument on what the evidence has shown and what reasonable inferences the prosecutor believes may be drawn therefrom. *State v. Lott* (1990), 51 Ohio St.3d 160, 165; *State v. Root,* Montgomery App. No. 20366, 2005-Ohio-448. In determining whether the prosecutor's remarks were prejudicial, the State's argument must be viewed in its entirety. *Ballew, supra*.

{¶ 29} During the trial, Amy Rismiller, a DNA expert from the Miami Valley Regional Crime Lab, testified that the saliva found on Defendant's penis contained a mixture of Defendant's and another person's DNA at five "markers" or locations. At those five locations, that part of the mixture that did not match Defendant's DNA matched M.R.'s DNA profile. The statistical probability that another African-American other than M.R. had contributed the DNA

in the mixture at those five locations that did not match Defendant's DNA is only 1 in 206.

{¶ 30} Defendant attacked the State's DNA evidence during his closing argument, claiming that 1 in 206 is not that large a number, considering that M.R. would share some DNA with her great aunt, L.C., and that Defendant had an intimate relationship with L.C. The inference Defendant's argument suggested to the jury was that the DNA obtained from Defendant's penile swabs could have come from L.C., his girlfriend, rather than M.R. In response, the prosecutor in his rebuttal closing argument attempted to illustrate the weakness in Defendant's reasoning. The prosecutor stated:

{¶ 31} "Let me give you an example. Let's start with the DNA. He wants to suggest without any evidence that that could be the auntie's, the aunt's DNA. Well, but let me show you something.

{¶ 32} "Remember, Amy Rismiller. She said something that was quite interesting. And this was evidence. She said, there are 15 markers. And you get those markers, if you remember, half from your mom and half from your dad. So, you got, if you get half from your mom and half from your dad, then you would share with your mom we'll say, about seven or eight markers. We'll say eight.

{¶ 33} "Remember the family tree. Was it Aunt [L.]? No. That was great aunt, [L.].

{¶ 34} "Now you're removed one step further to great aunt.

At least that far, right? Because it's not Aunt [L.]. It's great aunt. That means go to the grandma. If you get eight from your mom, how many are you going to get from your grandma?

{¶ 35} "I'm assuming, at best, you're going to get four markers. Now, it's Great Aunt [L.], it's to the grandma that [L.] –

{¶ 36} "MR. LACHMAN: I'm going to object. The evidence did not go into this level of detail.

{¶ 37} "MR. MICHENER: Your Honor, your honor, these are reasonable inferences.

{¶ 38} "THE COURT: It's argument.

{¶ 39} "MR. MICHENER: Four that [M.R.] would get from her grandma. Now, that's not even from her great aunt. And how many were on there? Five.

{¶ 40} "Five? There's no way that that's from the great aunt. And that's why there's no - - this is [M.R.'s] DNA." (T. 513-514).

{¶ 41} Defendant argues that the prosecutor's contentions were statistical extrapolations of facts not in evidence, and were therefore speculative and objectionable. Even if they were objectionable for that reason, we cannot find that they satisfy the test for prosecutorial misconduct. *State v. Bey*. The proper inquiry is whether the court abused its discretion when it overruled Defendant's objection to the prosecutor's argument. We find no abuse of discretion. The contentions the prosecutor made were

reasonable inferences the jury might draw from the evidence by application of mathematical principles, and were made in response to Defendant's arguments suggesting that the State's DNA evidence could support a finding that did not implicate Defendant in the offenses alleged.

{¶ 42} Defendant's fourth assignment of error is overruled.

FIFTH ASSIGNMENT OF ERROR

{¶ 43} "THE GUILTY VERDICTS RENDERED BY THE JURY WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 44} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. ***State v. Hufnagle*** **(Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in** ***State v. Martin*** **(1983), 20 Ohio App.3d 172, 175:**

{¶ 45} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: ***State v. Thompkins*****, 78 Ohio St.3d 380, 1997-Ohio-52.**

{¶ 46} Defendant argues that his convictions for sexually

assaulting M.R. are against the manifest weight of the evidence, for several reasons. First, Defendant claims that there are inconsistencies in the testimony of the victim, M.R., and the eyewitness, A.C., as to certain details surrounding the offenses, such as whether M.R.'s pants were on or off during the incident. For example, M.R. testified that she took off both her pants and her underwear. A.C. testified on direct that M.R. had her pants on, but on cross-examination A.C. stated that she could not remember if M.R.'s pants were on, pulled down, or off. There was no inconsistency however, between M.R. and A.C. as to the facts of the offenses. Both girls testified that on October 12, 2007, Defendant rubbed his hand between M.R.'s legs near her vagina, and that Defendant put his penis in M.R.'s mouth. While some inconsistency in the details surrounding the offenses is to be expected, the testimony of M.R. and A.C. as to the elements of the offenses was consistent and unwavering.

{¶ 47} Next, Defendant claims that there was evidence that A.C. resented Defendant because he lived with A.C.'s mother, L.C., and that on October 12, 2007, A.C. made a statement to M.R. that she wanted to set Defendant up. A.C. explained that what she meant by that statement was not that she was planning to falsely implicate Defendant, but that she wanted to watch from the top of the stairs so she could see what Defendant was doing to her little cousin,

M.R.

{¶ 48} Next, Defendant points out that L.C. testified that about one week after the sexual assault occurred, M.R. recanted and told L.C. that Defendant had done nothing to her. A few weeks later, M.R. told L.C. that A.C. could not have seen what happened. The jury obviously chose not to believe this testimony, which it had a right to do, in light of the fact that L.C. was Defendant's girlfriend and she testified that she loved Defendant regardless of the charges against him. Moreover, Detective Dix's testimony and the photographs that he took refute the claim that A.C. could not have seen what happened from the landing at the top of the basement stairs. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 49} Finally, Defendant claims that the State's DNA evidence was not substantial in terms of proving his guilt. Defendant points out that his DNA was not found on M.R.'s body, and her DNA was not found on Defendant's fingers. However, M.R. and A.C. both testified that Defendant put his penis in M.R.'s mouth. A swabbing of Defendant's penis revealed a mixed DNA profile. That portion of the DNA which did not match Defendant, matched M.R. and only M.R. The State's DNA expert, Amy Rismiller, testified that the statistical probability that some other African-American, other

than M.R., would match that part of the DNA in the mixed profile that did not belong to Defendant was only 1 in 206.

{¶ 50} The evidence of Defendant's guilt in this case, which included the testimony of both the victim and an eyewitness, and DNA evidence, was compelling. The jury did not lose its way simply because it chose to believe the State's witnesses, which it had a right to do. *Dehass*.

{¶ 51} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the jury lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice occurred. Defendant's convictions for rape and gross sexual imposition are not against the manifest weight of the evidence.

{¶ 52} Defendant's fifth assignment of error is overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J., And BROGAN, J. concur.

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