[Cite as *State v. Dillon*, 2009-Ohio-3134.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Julie A. Edwards, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2008-CA-37
RANDY L. DILLON	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Muskingum County Court of Common Pleas, Case No. CR2007-0014
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 24, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
D. MICHAEL HADDOX Muskingum County Prosecutor's Office 27 North Fifth Street - Suite 201 Zanesville, OH 43701	KRISTOPHER A. HAINES Assistant State Public Defender 8 East Long Street – 11th Floor Columbus, OH 43215

Gwin, P.J.

{¶1} Defendant-appellant Randy L. Dillon appeals his convictions and sentences entered by the Muskingum County Court of Common Pleas on one count of attempted murder, one count of rape, one count of burglary, and one count of kidnapping. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} Appellant was indicted by the Muskingum County Grand Jury on one count of burglary, a violation of R. C. 2911.12(A)(1); one count of kidnapping, a violation of R.C. 2905.01(B)(1); one count of attempted murder, a violation of R.C. 2903.02(A) and R.C. 2923.02(A); one count of rape, a violation of R.C. 2907.02(A)(1)(b); and one count of gross sexual imposition, a violation of R.C. 2907.05(A)(4).

{¶3} Appellant's first trial began on January 10, 2008 when the jury was selected. On January 11, 2008 after opening statements, the state called its first witness, Tonya Alexander, the mother of the child victim that had been kidnapped. After testifying on direct examination, Ms. Alexander was questioned by defense counsel. After a few preliminary questions, defense counsel asked the following:

{¶4} "Isn't it also true that you were interviewed for several hours prior to your being released after this all happened" which was followed by "Isn't it true that you also failed a lie detector test?"

{¶5} The state objected immediately. The court excused the jury for a recess and the state moved for a mistrial. The Court took a brief recess before resuming discussions on the record with both counsels in chambers. During the in-chamber discussion the Court informed the state and defense counsel that all parties would re-

convene in one hour with research to support their positions on the admissibility of the polygraph question. The Court ultimately granted the state's motion for a mistrial indicating that there was a high degree of necessity and explained that there were no viable alternatives available. The Court further acknowledged that the state would be unable to rehabilitate such a key witness, and a mistrial best served the public interest.

{¶6} Defense counsel subsequently filed a motion to dismiss based on Double Jeopardy grounds under the United States and Ohio Constitutions, arguing that the trial court erred by granting a mistrial. The trial court denied appellant's motion to dismiss by Judgment Entry filed April 3, 2008. Appellant's re-trial commenced on April 4, 2008. The following was adduced during appellant's re-trial.

{¶7} On March 13, 2007 M.B., the 14-month-old daughter of Tonya Alexander, was kidnapped. M.B. was taken from the bed where she was sleeping at her home on Schaum Avenue. M.B. was put to bed sometime after 11:00 p.m. When Tonya Alexander awoke around 4:00 a.m., she went to check on M.B. and found her missing. Tonya immediately began looking for Miah. Tonya woke her daughters to see if either of them had M.B. with them. The daughters helped their mom look throughout the house. When M.B.could not be found, Tonya, who had neither a flashlight nor a telephone, ran next door to her friend's house to get a flashlight and ask for help. Tonya's neighbor called 911. Police soon responded and began searching for Miah. Once it was determined that M.B. was not in the house, the scene was secured for purposes of investigation and evidence collection. Law enforcement collected numerous items for testing and comparison both from inside and outside the home. Among items collected

by law enforcement were various fingerprints, bedding from where M.B. was sleeping, Miah's bottle, and castings of tire impressions in the back yard.

{¶8} About the same time M.B. was being put to bed, appellant was drinking with Mike Norris, a friend, Stella Lantz, his girlfriend and Mary Bittner, his mother. Sometime after midnight, Mike Norris ran out of cigarettes. Mr. Norris was going to go out to his van and get some when appellant offered to run out and get them. Mike Norris gave the keys to his van to appellant. Appellant left and did not return. Sometime after 5:00 a.m., appellant called to say he was at a gas station and needed a ride. Shortly after making this call, a clerk from the gas station called the police because the appellant was bothering the customers.

{¶9} When Sheriff's deputies arrive at the gas station, they discovered that appellant had an outstanding warrant. Appellant was taken into custody on the warrant and transported to jail. As part of the booking procedure, appellant's clothes and personal effects were placed in storage. At this time, M.B. is still missing and appellant has not been connected to her disappearance.

{¶10} Shortly before noon on March 13, 2007, M.B. was found alive next to State Route 146 in the Dillon Wildlife area. Jeff Yingling found M.B. wrapped in a comforter. Mr. Yingling testified that when he first saw the legs sticking out of the comforter he thought it was a doll. He only realized it was a living baby when he opened the comforter. Mr. Yingling flagged down a car driven by Joseph Schilling. Mr. Schilling was unable to get cellular phone service. He was able to flag down another motorist, Danny Price. Mr. Price drove up the road and called for help. While waiting for

help to arrive, another motorist, Randy Rowell, a hospital salesperson, pulled up and offered his assistance.

{¶11} After medical crews and law enforcement personnel arrived at the scene, M.B. was transported to a local hospital. She was ultimately taken to Children's Hospital in Columbus. Law enforcement secured the area where M.B. was found and begin taking pictures and collecting evidence.

{¶12} Several days later, the police received a call about an abandoned van in a cornfield near the area where M.B. was found. The van that was abandoned was Mike Norris' van. At this time, appellant emerged as a suspect in the case.

{¶13} A search of the van's interior revealed a bed sheet that was the same pattern and same brand as the bed sheet M.B. was sleeping on when she was kidnapped. Further, investigation revealed that the comforter that M.B. was wrapped up in when Jeff Yingling discovered her alongside the road belonged to the Norris', and had been put in the van by Mike Norris' wife. According to Tonya Alexander, appellant had rented a garage at her residence and had been inside of the house on several occasions.

{¶14} Ultimately, the investigation established the following facts. Appellant knew the victim; appellant had been driving the van that was found approximately 500 feet from where M.B. was found; an eyewitness described seeing someone walking alongside the road around 4:00 a.m. away from the area where M.B. had been left that had similar characteristics to appellant. Additionally, surveillance video from two separate gas stations placed appellant in the same area moving in a direction toward Zanesville and away from where M.B. was found. Tire castings recovered from behind

Miah's house are consistent with the tires on the van. An analysis of the clothes appellant was wearing at the time he was arrested on the unrelated warrant revealed mud that is consistent with mud samples taken from the location where the van was recovered.

{¶15} DNA analysis revealed appellant's DNA on the "onesie" that M.B. was wearing when she was found. Additionally, Miah's DNA was found on the hip area of appellant's shirt. DNA testing excluded more than 99.89% of the population as contributors for each respective sample.

{¶16} Medical evidence in this case as provided by Dr. Joseph Stein and certified nurse practitioner Gail Hornor established that M.B. suffered an injury inside of her labia majora that was not consistent with a rash but was consistent with sexual assault. No semen was found on any of the items that were submitted for forensic analysis.

{¶17} The trial court did not allow appellant to present his so-called "alibi defense." Appellant contended that he had been seen beaten up and confused in the early morning hours of March 13, 2007. After his arrest on the unrelated warrant, appellant met with Patrolman Terry Sheets and filed a report indicating that he was attacked, robbed, and abducted during the timeframe when the state contended that the alleged crimes occurred. Through a series of sustained objections, this information was never presented to the jury.

{¶18} Ms. Bittner, appellant's mother, was also prevented from testifying regarding appellant's statements that he had been robbed and required help. She testified that she received a telephone call from appellant in the early morning hours.

When asked what she did in response to the telephone call, she stated that she went to her brother's house to see if he would take her to appellant's because "Randy was robbed. . . ." The prosecutor objected and the trial court sustained the objection.

{¶19} The jury found appellant guilty of burglary, kidnapping, attempted murder, and rape. A nolle prosequi was entered regarding the gross sexual imposition charge. The trial court sentenced appellant to a life term of imprisonment without the possibility of parole on the rape charge, eight years on the burglary charge, ten years on the kidnapping charge, and ten years on the attempted murder charge. All sentences were ordered to run consecutively to one another.

{¶20} It is from these convictions and sentences appellant appeals, raising the following assignments of error:

{¶21} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT OVERRULED THE ADMISSION OF HIGHLY PROBATIVE, ADMISSIBLE EVIDENCE IN SUPPORT OF MR. DILLON'S ALIBI DEFENSE, AND THUS IMPEDED MR. DILLON'S ABILITY TO DEFEND HIMSELF AGAINST THE CHARGES LEVIED AGAINST HIM, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶22} "II. THE TRIAL COURT VIOLATED MR. DILLON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THE TRIAL COURT CONVICTED MR. DILLON OF RAPE AND ATTEMPTED MURDER, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH

AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶23} "III. THE TRIAL COURT VIOLATED MR. DILLON'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED JUDGMENTS OF CONVICTION FOR RAPE *AND* ATTEMPTED MURDER, WHEN THOSE JUDGMENTS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, IN VIOLATION OF MR. DILLON'S RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶24} "IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO INSTRUCT THE JURY REGARDING GROSS SEXUAL IMPOSITION AND ATTEMPTED RAPE AS LESSER INCLUDED OFFENSE OF RAPE, IN VIOLATION OF MR. DILLON'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶25} "V. THE TRIAL COURT'S ERRONEOUS DECLARATION OF A MISTRIAL AT MR. DILLON'S FIRST TRIAL, AND SUBSEQUENT RETRIAL OF MR. DILLON, WAS IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶26} "VI. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF MR. DILLON'S RIGHTS UNDER THE FIFTH, SIXTH,

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION."

I.

{¶27} In his first assignment of error appellant argues that the trial court abused its discretion in not allowing him to present certain exculpatory evidence. Specifically, his statements to Zanesville police officer Terry Sheets and his mother, Mary Bittner.

{¶28} Appellant claimed that shortly after his arrest on the unrelated warrant, he met with Patrolman Sheets to file a report that he, appellant, had been attacked, robbed and abducted during the time period that the incident in the case *sub judice* had occurred. Appellant's mother, Mary Bittner was also precluded from testifying concerning appellant's statements to her that he had been robbed and needed help.

{¶29} In *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056, 1058, the Supreme Court reaffirmed the longstanding test for appellate review of admission of evidence:

{¶30} "Ordinarily, a trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence. The admission of relevant evidence pursuant to Evid.R. 401 rests within the sound discretion of the trial court. E.g., *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343, paragraph two of the syllabus. An appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion. *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233, 1237. As this court has

noted many times, the term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. E.g., *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142.

{¶31} A reviewing court should be slow to interfere unless the court has clearly abused its discretion and a party has been materially prejudiced thereby. *State v. Maurer* (1984), 15 Ohio St.3d 239, 264, 473 N.E.2d 768, 791. The trial court must determine whether the probative value of the evidence and/or testimony is substantially outweighed by the danger of unfair prejudice, or of confusing or misleading the jury. See *State v. Lyles* (1989), 42 Ohio St.3d 98, 537 N.E.2d 221.

{¶32} "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the recognized exceptions. Evid.R. 802; *State v. Steffen* (1987), 31 Ohio St.3d 111, 119, 509 N.E.2d 383.

{¶33} "The hearsay rule…is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court." *Williamson v. United States* (1994), 512 U.S. 594, 598,114 S.Ct. 2431, 2434.

{¶34} Under Evid.R. 801(D), prior statements by a witness and admissions by a party-opponent are not hearsay even though the statements or admissions are offered for their truth and fall within the basic definition of hearsay. However, Evid.R. 801(D) (1) requires that the declarant testify at trial and be subject to cross-examination concerning the statement. Because appellant did not testify at trial, his exculpatory statement did not fall under Evid.R. 801(D) (1). *State v. Wilson,* Clermont App. No. CA2001-09-072, 2002-Ohio-4709 at ¶ 56.

{¶35} Appellant argues that his statements to Patrolman Sheets were not hearsay because he was not introducing them to establish that he was kidnapped and robbed; rather the statements are admissible to show why the officer instituted an investigation into the kidnapping and robbery of appellant.

{¶36} Appellant further argues that his out-of-court "alibi" statement that he sought to introduce through his mother was admissible as one or more exceptions to the hearsay rule pursuant to Evid. R. 803(2), which provides, in part,

{¶37} "Evid R 803 Hearsay exceptions; availability of declarant immaterial

{¶38} "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

{¶39} "**1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

{¶40} "**(2) Excited utterance.** 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.

{¶41} "**(3) Then existing, mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

{¶42} "**(4) Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

{¶43} Initially, we note that appellant has failed to properly brief these issues on appeal. App.R. 16(A)(7) states that an appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citations to the authorities, statutes and parts of the record on which appellant relies." In this case, appellant has wholly failed to present any specific argument concerning each of the hearsay exceptions he contends apply to his out-of-court statements. "It is the duty of the appellant, not this court, to demonstrate [his] assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at *3. See, also, App.R. 16(A) (7). "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to

comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶44} Appellant's out-of-court "alibi" statement that he sought to introduce through the testimony of other witnesses was clearly offered to prove the truth of the matter asserted, that he could not have committed the crimes in this case because he was being robbed and kidnapped at the time the incident occurred. The statements constituted inadmissible hearsay that would have effectively allowed appellant to testify without being under oath, without cross-examination, and without direct scrutiny by the jury. *United States v. McDaniel* (6th Cir 2005), 398 F.3d 540, 546. "Coming as it did during the defense, * * * it borders on an attempt to introduce a self-serving affidavit during trial, which of course clearly is inadmissible under the circumstances. If appellant wanted the exculpatory material brought before the jury [,] he could not do so through the mouth of another, thereby obviating the possibility of cross-examination." *State v. Gatewood* (1984), 15 Ohio App.3d 14, 16, 472 N.E.2d 63.

{¶45} We therefore find that the trial court properly refused to allow appellant's exculpatory "alibi" statements. *State v. Gatewood*, supra 15 Ohio App.3d at 16, 472 N.E.2d 63; State *v. Wilson,* supra, 2002-Ohio-4709 at ¶ 58; *State v. Beeson*, Montgomery App. No. 19312, 2002-Ohio-4341 at ¶56.

{¶46} Appellant's first assignment of error is denied.

II. & III

{¶47} In his second assignment of error, appellant maintains that his convictions for rape and attempted murder are against the weight of the evidence; in his third assignment of error appellant argues that his convictions for rape and attempted

murder are based upon insufficient evidence.[1] Because we find the issues raised in appellant's second and third assignments of error are closely related, for ease of discussion we shall address the assignments of error together.

{¶48} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the 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. Jenks* (1991), 61 Ohio St. 3d 259.

{¶49} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶50} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, citations deleted. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact

[1] Appellant does not challenge his convictions for kidnapping and burglary under the second or third assignments of error.

clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶51} In *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498.

{¶52} In the case at bar, appellant was convicted of attempted murder. R.C. 2923.02, provides that attempted murder is committed by purposely engaging in conduct that, if successful, would constitute or result in the purposeful death of another person.

{¶53} Appellant was also convicted of rape. The crime of rape is defined in R.C. 2907.02(A) (1) (b) as follows: "No person shall engage in sexual conduct with

another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: * * * The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶54} A. Rape

{¶55} Appellant first argues the state failed to prove that sexual conduct occurred with the child.

{¶56} Sexual conduct is defined in R.C. 2907.01(A) as, "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

{¶57} In the case at bar, Adam Garver, a forensic analyst for the Ohio Bureau of Criminal Identification and Investigation testified that he detected the presence of amylase, an enzyme, on the baby's diaper. According to Mr. Garver, "[a]mylase is present in saliva approximately 50 times more concentrated than in any other body fluid. Its main purpose is to begin breaking down foods…" (4T. at 752).

{¶58} Dr. Joseph Stein, an emergency room physician, examined the baby shortly after her discovery. He testified, "There was a tiny tear in the left vaginal mucosa anterior or in front of the hymen, which is a hymeneal ring, a tiny amount of bleeding. And there was some erythema or what we call redness to the area." (4T. at 850). Dr.

Stein explained that the injury was not any type of skin irritation and that this injury was "very specific to the vaginal vault." (Id. at 851).

{¶59} Gail Hornor, a nurse practitioner and child sexual assault examination expert testified that the injury was above the vagina, "yet it is enclosed in your labia." (5T. at 869). She further testified further, "it (the injury) is very concerning for sexual abuse or sexual assault." (Id. at 870).

{¶60} The state further submitted evidence that the mud covering appellant's clothing is consistent with the samples from where the van was found. (5T. at 888-896); appellant's DNA is on the onesie that the baby was wearing when she was found (4T. 815 -824); and the child's DNA was found on the hip area of the appellant's shirt. (Id.) DNA testing excluded more than 99.89% of the population as contributors for each respective sample. (Id. at 842- 843).

{¶61} Viewing this evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that appellant had committed the crime of rape of a child less than thirteen years of age.

{¶62} We hold, therefore, that the state met its burden of production regarding each element of the crime of rape and, accordingly, there was sufficient evidence to support appellant's conviction for rape.

B. Attempted Murder

{¶63} Appellant next contends that the state failed to prove that he took a substantial step toward the commission of attempted murder.

{¶64} R.C. 2923.02(A) provides a definition of attempt: "[n]o person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission

of an offense, shall engage in conduct that, if successful, would constitute or result in the offense."

{¶65} The Ohio Supreme Court has held that a criminal attempt occurs when the offender commits an act constituting a substantial step towards the commission of an offense. *State v. Woods* (1976), 48 Ohio St.2d 127, 357 N.E.2d 1059, paragraph one of the syllabus, overruled in part by *State v. Downs* (1977), 51 Ohio St.2d 47, 364 N.E.2d 1140; See also, *State v. Ashbrook,* 5th Dist. No.2004-CA-00109, 2005-Ohio-740, reversed on other grounds and remanded for re-sentencing pursuant to *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856; *In re: Ohio Criminal Sentencing Statutes Cases,* 109 Ohio St.3d 313, 2006-Ohio-2109. In defining substantial step, the *Woods'* Court indicated that the act need not be the last proximate act prior to the commission of the offense. *Woods* at 131-32, 357 N.E.2d 1059. However, the act "must be strongly corroborative of the actor's criminal purpose." Id. at paragraph one of the syllabus. This test "properly directs attention to overt acts of the defendant which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when the criminal intent becomes apparent." *Woods*, supra at 132, 357 N.E.2d at 1063. In other words, a substantive crime would have been committed had it not been interrupted. R.C. 2923.02(D) provides that: "[i]t is an affirmative defense to a charge under this section that the actor abandoned his effort to commit the offense or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

{¶66} However, the abandonment must be "complete" and "voluntary" in order to exculpate a defendant. Where one abandons an attempted crime because he fears detection or realizes that he cannot complete the crime, the "abandonment" is neither "complete" nor "voluntary." *Woods*, supra, 48 Ohio St. 2d at 133.

{¶67} Precisely what conduct will be held to be a substantial step must be determined by evaluating the facts and circumstances of each particular case. *State v. Group* (2002), 98 Ohio St.3d 248, 262, 2002-Ohio-7247 at ¶100, 781 N.E.2d 980, 996.

{¶68} The intent with which an act is committed may be inferred from the act itself and the surrounding circumstances, including acts and statements of a defendant. *State v. Garner* (1995), 74 Ohio St.3d 49, 60, 1995-Ohio-168, 656 N.E.2d 623, 634; *State v. Wallen* (1969), 21 Ohio App.2d 27, 34, 254 N.E.2d 716, 722.

{¶69} In the case *sub judice*, the information before the jury was that a 14-month-old baby was removed from her home in the middle of the night. She was driven to an abandoned cornfield some 25 minutes from her home. The baby was sexually assaulted and left near a road at the edge of the woods with nothing but a blanket for protection.

{¶70} Upon careful review of the record, we are persuaded that the state adduced credible probative evidence on each element of the offense of attempted murder that would enable a reasonable juror to find that appellant took a substantial step in a course of conduct planned to culminate in the commission of murder. *State, ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345; *State v. Woods*, supra

{¶71} We hold, therefore, that the state met its burden of production regarding each element of the crime of attempted murder and, accordingly, there was sufficient evidence to support appellant's conviction for attempted murder.

{¶72} “A fundamental premise of our criminal trial system is that ‘the *jury* is the lie detector.’ *United States v. Barnard,* 490 F.2d 907, 912 (C.A.9 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the ‘part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.’ *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891).” *United States v. Scheffer* (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267.

{¶73} The jury was free to accept or reject any and all of the evidence offered by the parties and assess the witness’s credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence". *State v. Craig* (Mar. 23, 2000), Franklin App. No. 99AP-739, citing *State v. Nivens* (May 28, 1996), Franklin App. No. 95APA09-1236 Indeed, the jurors need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* Franklin App. No. 02AP-604, 2003-Ohio-958, at ¶ 21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548.; *State v. Burke,* Franklin App. No. 02AP-1238, 2003-Ohio-2889, citing *State v. Caldwell* (1992), 79 Ohio App.3d 667, 607 N.E.2d 1096. Although the evidence may have been circumstantial, we note that circumstantial

evidence has the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St. 3d 259, 574 N.E. 2d 492.

{¶74} After reviewing the evidence, we cannot say that this is one of the exceptional cases where the evidence weighs heavily against the convictions. The jury did not create a manifest injustice by concluding that appellant was guilty of the crimes of attempted murder and rape.

{¶75} Based upon the foregoing and the entire record in this matter, we find appellant's convictions were neither against the manifest weight nor against the sufficiency of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before it. The jury heard the witnesses, evaluated the evidence, and was convinced of appellant's guilt.

{¶76} Appellant's second and third assignments of error are overruled.

IV.

{¶77} In his fourth assignment of error appellant contends the trial court committed plain error when it failed to instruct the jury regarding the offenses of gross sexual imposition and attempted rape as lesser-included offenses of rape. We disagree.

{¶78} The giving of jury instructions is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Martens* (1993), 90 Ohio App. 3d 338. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.

3d 217. Jury instructions must be reviewed as a whole. *State v. Coleman* (1988), 37 Ohio St. 3d 286.

{¶79} Crim.R. 30(A) governs instructions and states as follows:

{¶80} "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court need not reduce its instructions to writing.

{¶81} "On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury."

{¶82} In *Neder v. United States* (1999), 527 U.S. 1, 119 S.Ct. 1827, the United State Supreme Court held that because the failure to properly instruct the jury is not in most instances structural error, the harmless-error rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 applies to a failure to properly instruct the jury, for it does not *necessarily* render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

{¶83} In the case at bar, appellant concedes that he did not object nor did he request orally or in writing the instructions that he now contends should have been

given by the trial court. Accordingly, our review of the alleged error must proceed under the plain error rule of Crim. R. 52(B).

{¶84} In criminal cases, plain error is governed by Crim. R. 52(B), which states:

{¶85} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." An alleged error "does not constitute a plain error ... unless, but for the error, the outcome of the trial clearly would have been otherwise." *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

{¶86} The defendant bears the burden of demonstrating that a plain error affected his substantial rights. *United States v. Olano* (1993), 507 U.S. at 725,734, 113 S.Ct. 1770; *State v. Perry* (2004), 101 Ohio St.3d 118, 120 802 N.E.2d 643, 646. Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only to ‘prevent a manifest miscarriage of justice.' " *State v. Barnes* (2002), 94 Ohio St.3d 21, 27, 759 N.E.2d 1240, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus. *Perry*, supra, at 118, 802 N.E.2d at 646.

{¶87} The Supreme Court has repeatedly admonished that this exception to the general rule is to be invoked reluctantly. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus. See, also, *State v. Thompson* (1987), 33 Ohio St.3d 1, 10, 528 N.E.2d 542; *State v. Williford* (1990), 49 Ohio St.3d 247, 253, 551 N.E.2d 1279 (Resnick, J., dissenting).

{¶88} It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 348 N.E.2d 135; *Murphy v. Carrollton Manufacturing Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828, 832. "In reviewing a record to ascertain the presence of sufficient evidence to support the giving of an * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 275 N.E.2d 340, at syllabus; *Murphy v. Carrollton Manufacturing Co.*, supra; *State v. Coleman*, 6th Dist. No. S-02-41, 2005-Ohio-318 at ¶12; *State v. Horton*, Stark App. No. 2007-CA-00085, 2007-Ohio-6469 at ¶ 77.

{¶89} "Ohio law permits a trier of fact to consider three types of lesser offenses when determining a defendant's guilt: '(1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses.' *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, paragraph one of the syllabus, construing R.C. 2945.74 and Ohio Crim.R. 31(C)". *Shaker Heights v. Mosely*, 113 Ohio St.3d 329, 332, 2007-Ohio-2072 at ¶ 10, 865 N.E.2d 859, 862-863.

{¶90} In determining whether an offense is a lesser-included offense of the charged offense, "'the evidence presented in a particular case is irrelevant to the determination of whether an offense, as statutorily defined, is necessarily included in a greater offense.'" *State v. Barnes* (2002), 94 Ohio St.3d 21, 26, 759 N.E.2d 1240, quoting *State v. Kidder* (1987), 32 Ohio St.3d 279, 282, 513 N.E.2d 311; See, also, *State v. Koss* (1990), 49 Ohio St.3d 213, 218-219, 551 N.E.2d 970. However, the

evidence in a particular case is relevant in determining whether a trial judge should instruct the jury on the lesser-included offense. If the evidence is such that a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser-included offense, then the judge should instruct the jury on the lesser offense. *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633, 590 N.E.2d 272.

{¶91} Gross sexual imposition, R.C. 2907.05(A) (4), is a lesser-included offense of rape, R.C. 2907.02(A) (1) (b). See *State v. Johnson* (1988), 36 Ohio St.3d 224, 522 N.E.2d 1082, paragraph one of the syllabus.

{¶92} "Sexual conduct" with another is an element of rape, whereas only "sexual contact" is required to prove gross sexual imposition. R.C. 2907.02 and 2907.05. R.C. 2907.01(A) defines "sexual conduct" as "vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." R.C. 2907.01(B) defines "sexual contact" 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."

{¶93} Appellant now argues that he was entitled to an instruction on gross sexual imposition and attempted rape because “[t]he jury could have easily found that if any sexual misconduct occurred at all, it amounted to a ‘touching….’” [Appellant’s Brief at 22-23].

{¶94} However, the evidence shows that there was penetration. As previously noted, Dr. Joseph Stein, an emergency room physician, examined the baby shortly after her discovery. He testified, "There was a tiny tear in the left vaginal mucosa anterior or in front of the hymen, which is a hymeneal ring, a tiny amount of bleeding. And there was some erythema or what we call redness to the area." (4T. at 850). Dr. Stein explained that the injury was not any type of skin irritation and that this injury was "very specific to the vaginal vault." (Id. at 851). Further, Adam Garver, a forensic analyst for the Ohio Bureau of Criminal Identification and Investigation testified that he detected the presence of amylase, an enzyme, on the baby's diaper. According to Mr. Garver, "[a]mylase is present in saliva approximately 50 times more concentrated than in any other body fluid. Its main purpose is to begin breaking down foods…" (4T. at 752).

{¶95} Even assuming that the jury might reasonably conclude that there was no penetration, appellant was not entitled to an instruction on the lesser-included offense of gross sexual imposition or attempted rape. *State v. Lynch*, 98 Ohio St.3d 514, 787 N.E.2d 1185, 2003-Ohio-2284 at ¶86. Penetration is not required to commit cunnilingus. Rather, the placing of one's mouth on the female's genitals completes the act of cunnilingus. See *State v. Ramirez* (1994), 98 Ohio App.3d 388, 393, 648 N.E.2d 845; *State v. Bailey* (1992), 78 Ohio App.3d 394, 395, 604 N.E.2d 1366.

{¶96} In *State v. Johnson* (1988), 36 Ohio St.3d 224, 522 N.E.2d 1082, the accused was charged with eight counts of rape involving his two daughters. The girls both testified to at least four acts of penetration by the accused. The accused presented a complete defense by trying to show that the girls' stories were wholly fabricated. The Supreme Court of Ohio held that "[i]n view of such defense, the jury

could not consistently or reasonably disbelieve the girls' testimony as to penetration and, at the same time, consistently and reasonably believe their testimony on the contrary theory of mere touching specifically related to any of the charged events." *Johnson, supra* at 227, 522 N.E.2d at 1085. Therefore, the accused was not entitled to an instruction on gross sexual imposition as a lesser-included offense of rape.

{¶97} In the matter *sub judice*, the prosecution's entire case against appellant depended on the credibility that the finder of fact attached to the forensic testimony regarding penetration.

{¶98} Appellant's defense, like the accused's defense in *Johnson,* was a complete one: he attempted to show through cross-examination that the evidence was insufficient to prove beyond a reasonable doubt that penetration had occurred, and further that he was not the person who committed these crimes. As the court did in *Johnson,* we hold that in view of such defense, the fact finder could not consistently or reasonably disbelieve the experts testimony as to penetration and, at the same time, consistently and reasonably believe his evidence or argument on the contrary theory of mere touching or attempted penetration. If the evidence was deficient in proving the charged offense of vaginal rape, specifically penetration, the fact finder should not have compromised an acquittal in favor of a lesser offense on which no evidence was presented. *State v. Render* (June 17, 1992), Hamilton App. No. C-910666.

{¶99} Under the facts of this case, appellant was entitled to the unqualified right to have the prosecution prove every element of the offense of vaginal rape beyond a reasonable doubt, and if the prosecution was unable to do so, he was entitled to an acquittal. On the state of the record before us, the fact finder's only reasonable choice

based upon the testimony given at trial was between a conviction of vaginal rape or an acquittal thereon. *State v. Render*, supra.

{¶100} Based on the foregoing, we find that the lesser-included offense of gross sexual imposition and the offense of attempted rape were not reasonably supported by the evidence, and the trial court did not err by failing to give these instructions.

{¶101} Appellant's fourth assignment of error is overruled.

V.

{¶102} In his fifth assignment of error, appellant maintains that the trial court erred in failing to grant his motion for dismissal of all charges against him on the basis that he had previously been placed in jeopardy on the same charges. We disagree.

{¶103} There is no doubt that jeopardy had attached in this case by virtue of the first, aborted trial, since the jury had already been impaneled and sworn. *Crist v. Bretz* (1978), 437 U.S. 28, 98 S.Ct. 2156. "In *Oregon v. Kennedy* [(1982), 456 U.S. 667, 102 S.Ct. 2083]*, supra,* at 679, the Supreme Court held: ' * * * the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was *intended* to provoke the defendant into moving for a mistrial.' (Emphasis added.)

{¶104} "*Oregon,* supra*,* makes clear that prosecutorial misconduct will bar a second trial only when such behavior was 'intentionally' calculated to cause or invite mistrial." *State v. Doherty* (1984), 20 Ohio App.3d 275, 276 485 N.E.2d 783. Accordingly, not all retrials after jeopardy attaches are precluded. See *State v. Glover*

(1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900, 902. Rather, if a mistrial was properly granted, then retrial is constitutionally permissible. Id. at 19-20.

{¶105} The reviewing court examines the trial court's decision to grant a mistrial with deference. *State v. Glover,* supra at 19. A balancing test is employed whereby appellant's right to be tried by the original tribunal is weighed against the public's interest in the efficient implementation of justice. Id. At times, the public's interest in a fair trial dominates over appellant's right to have his fate determined by a certain tribunal. Id. Thus, "[w]here the facts of the case do not reflect unfairness to the accused, the public interest in insuring that justice is served may take precedence." Id. In evaluating the propriety of a mistrial order, the reviewing court should apply flexible standards "due to the infinite variety of circumstances in which a mistrial may arise." Id. at 19, citing *United States v. Jorn* (1971), 400 U.S. 470, 480.

{¶106} In the case sub judice, the decision to grant a mistrial was based upon the actions of the appellant, not the actions of the prosecutor. The fact that the appellant created the circumstances making a mistrial necessary added at least some weight to the trial judge’s conclusion that the declaration of a mistrial was fair, so that retrial was not barred by double jeopardy. “To hold otherwise would allow a defendant to avoid prosecution by creating error purposefully while refusing to move for a mistrial.” *United States v. Gantley* (6th Cir 1999), 172 F.3d 422, 430 at n. 5.

{¶107} Another factor a reviewing court will consider in determining whether the trial court abused its discretion by declaring a mistrial is whether the trial court showed sufficient caution before its declaration. *United States v. Gantley*, supra 172 F.3d at 429-430. “Thus, in *Arizona v. Washington,* 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717

(1978), the Supreme Court upheld a trial court's declaration of mistrial only after noting that 'the trial judge did not act precipitately.... On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial., Id. at 515-16, 98 S.Ct. 824." *United States v. Gantley*, supra 172 F.3d at 429-430.

{¶108} In the case at bar, the trial judge conducted an on-the-record in-chambers discussion and permitted the parties time to research their positions on the admissibility of the polygraph question.

{¶109} Further, it is clear that a great potential for jury bias existed at the time the trial judge declared a mistrial. The source of jury bias was defense counsel's insinuation that the state's witness had failed a polygraph examination. Counsel's intent in making this statement obviously was to discredit the witness's credibility, to the prejudice of the government. It is axiomatic that the results of a polygraph examination are not admissible unless the parties stipulate in writing to the admission of the results. See *State v. Jamison* (1990), 49 Ohio St.3d 182, 190, citing *State v. Souel* (1978), 53 Ohio St.2d 123, 126. "[S]ince it is uniformly held that such a test is not judicially acceptable, it reasonably follows that neither a professed willingness nor a refusal to submit to such a test should be admitted." *State v. Hegel* (1964), 9 Ohio App.2d 12, 13. Further, "the Supreme Court of Ohio has held that the state is not required to provide through discovery the results of a polygraph test performed on state witnesses because the subjective interpretations of the examiner prevent polygraph examinations from being reasonably reliable." *State v. Hesson* (1996), 110 Ohio App.3d 845, 858, 675

N.E.2d 532, citing *State v. Davis* (1991), 62 Ohio St.3d 326, 341-42, 581 N.E.2d 1362. Moreover, polygraph results are not scientific tests subject to discovery pursuant to Crim.R. 16. *Davis,* 62 Ohio St.3d at 342, 581 N.E.2d 1362. See, also, *State v. Buhrman* (Sept. 12, 1997), 2d Dist. No. 96CA145.

{¶110} The mere mention that a witness or defendant had taken a lie detector test has been held to be prejudicial error. *State v. Smith* (1960), 113 Ohio App. 461, 18 O.O.2d 19, 178 N.E.2d 605; *People v. York* (1975), 29 Ill.App.3d 113, 329 N.E.2d 845; *State v. Harris* (Oct. 3, 1984), Hamilton App. No. C-830927.

{¶111} We are further convinced that the public interest in just judgments is best served under such circumstances by the declaration of a mistrial and the commencement of a new trial. It cannot be disputed that the mistrial was not prompted or provoked by any misconduct on the part of the prosecutor. *State v. Glover,* supra, 35 Ohio St.3d at 20, 517 N.E.2d at 903. Our conclusion that the Double Jeopardy Clause does not prohibit retrial in this case is bolstered by the fact that the first trial was aborted before a determination on the merits had occurred. Id. "Unlike the situation in which the trial has ended in an acquittal or conviction, *retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused.* Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." (Emphasis added.) *Arizona v. Washington,* supra*,* 434 U.S. at 505,

98 S.Ct. at 830. See, also, *Wade v. Hunter,* supra*,* 336 U.S. at 689, 69 S.Ct. at 837. "At least in the absence of an acquittal or a termination based on a ruling that the prosecution's case was legally insufficient, no interest protected by the Double Jeopardy Clause precludes a retrial when reversal is predicated on trial error alone." *Calhoun,* supra*,* 18 Ohio St.3d at 376-377, 18 OBR at 433, 481 N.E.2d at 628; *State v. Glover,* supra, 35 Ohio St.3d at 20, 517 N.E.2d at 903.

{¶112} In the case at bar, we find the judge's action in declaring a mistrial was not instigated by prosecutorial misconduct designed to provoke a mistrial, nor was the declaration of a mistrial at the state's request an abuse of discretion. The fact that another court may have resorted to alternative remedies (such as a continuance or curative instructions) is not dispositive. *State v. Glover,* supra, 35 Ohio St.3d at 19-20 (disregarding the fact that another judge may have resorted to alternative measures), citing *Washington,* 434 U.S. at 511.

{¶113} Appellant's fifth assignment of error is overruled.

VI.

{¶114} In his sixth assignment of error appellant argues his trial counsel was ineffective because he failed to request the trial court instruct the jury on the lesser offenses of gross sexual imposition and attempted rape. We disagree.

{¶115} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry in whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113

S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶116} In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley*, 42 Ohio St. 3d at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any given case, a strong presumption exists that counsel's conduct fell within the wide range of reasonable, professional assistance. Id.

{¶117} In order to warrant a reversal, the appellant must additionally show he was prejudiced by counsel's ineffectiveness. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial; a trial whose result is reliable. *Strickland* 466 U.S. at 687; 694, 104 S.Ct. at 2064; 2068. The burden is upon the defendant to demonstrate that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.; *Bradley*, supra at syllabus paragraph three. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra; *Bradley*, supra.

{¶118} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Bradley* at 143, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test.

{¶119} The Ohio Supreme Court has recognized that "[f]ailure to request instructions on lesser-included offenses is a matter of trial strategy and does not

establish ineffective assistance of counsel." *State v. Griffie* (1996), 74 Ohio St.3d 332, 333, 658 N.E.2d 764. Since we have found no grounds for reversal of his convictions with respect to the trial court's jury instructions as noted in our disposition of appellant's fourth assignment of error, we obviously do not consider his counsel ineffective in this regard.

{¶120} Appellant has failed to demonstrate that there exists a reasonable probability that, had trial counsel requested the jury instructions, the result of his case would have been different. The result of the trial was not unreliable nor was the proceedings fundamentally unfair because of the performance of defense counsel.

{¶121} Appellant's sixth assignment of error is overruled.

{¶122} For the foregoing reasons, the judgment of the Muskingum County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Edwards, J., and

Delaney, J., concur

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HON. W. SCOTT GWIN

_____

HON. JULIE A. EDWARDS

_____

HON. PATRICIA A. DELANEY

WSG:clw 0518

[Cite as *State v. Dillon*, 2009-Ohio-3134.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RANDY L. DILLON	:	
Defendant-Appellant	:	CASE NO. 2008-CA-37

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Muskingum County Court of Common Pleas is affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. JULIE A. EDWARDS

_____
HON. PATRICIA A. DELANEY