[Cite as *State v. Warren*, 2011-Ohio-4886.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-T-0027**
- vs -	:	
MARTIN ELLIS WARREN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 777.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Martin Ellis Warren, appeals from the Trumbull County Court of Common Pleas' judgment of conviction entered after a trial by jury on one count of rape. For the reasons discussed in this opinion, we affirm the trial court's judgment.

{¶2} Appellant was indicted on two counts of rape: Count One, vaginal rape, and Count Two, anal rape. He entered a plea of not guilty to both counts and the matter proceeded to jury trial. Appellant was acquitted on the anal rape charge and the jury

was unable to reach a unanimous verdict on the vaginal rape charge. A second jury trial commenced, at which the following facts were adduced at trial:

{¶3} Thirteen-year-old C.G. ("victim") and her older brother had lived on-and-off with their grandparents for approximately five years due to their parents' inability to care for them. On January 28, 2006, the victim had been recently grounded for poor grades and she and her grandfather, appellant herein, were alone in the home. While the victim was doing dishes, appellant was in the basement playing video games on the computer. Appellant, who was unable to change games on the computer, called for the victim to come to the basement and assist him. She obeyed and sat on appellant's knee while changing the game. The victim began to tickle appellant who told her that if she did not stop, he was going to "blow bubbles" on her stomach. The victim then ran to a nearby couch and appellant pulled up her shirt and began to blow on her stomach. The victim stated that such horseplay was not uncommon.

{¶4} After "blowing bubbles," however, appellant began to kiss the victim's neck. This behavior, the victim indicated, was not common and, in fact, had never happened in the past. Appellant proceeded to pull down the victim's pants and underwear and began kissing her "private areas." The victim stated she was scared and pleaded with appellant to stop. Appellant, however, did not stop and continued to hold the victim down. According to the victim, she then felt something penetrate her vaginal area. Although she did not see what it was, she felt "skin on skin." The victim started crying and demanded that appellant stop. After one or two minutes, appellant asked the victim if she wanted him to stop. She frantically responded, "yes." Appellant complied and stood up. The victim pulled up her pants and ran upstairs.

{¶5} The victim testified she went to her brother's room and retrieved some change to use on a pay phone. Before she left, however, she heard appellant coming up the stairs. The victim then pretended like she was again doing dishes. Once in the kitchen, appellant asked the victim if she was "okay," to which she responded, "yes." Appellant again went to the basement and the victim fled the house. She ran approximately one mile to a Kwik Fill gas station where she knew there was a pay phone. Confused and crying, the victim made several unsuccessful attempts to reach her grandmother.

{¶6} While standing at the phone, she observed appellant driving his red truck at a stop light. The victim did not want appellant to see her so she left the phone and hid under a camper parked at a neighboring house. After several minutes, she returned to the phone and was finally able to reach her aunt. The victim was crying so hard, however, she could not clearly explain the circumstances. After ending the conversation with her aunt, the victim stated she "just waited and *** there were people all around *** and they were all looking at me." Apparently, the victim spoke briefly with a concerned woman but did not provide the unknown individual with any details. The victim subsequently ran to a nearby music store.

{¶7} Officer Brian Mackey, of the Champion Township Police Department, was dispatched to the Kwik Fill gas station in Champion based upon an anonymous report that a young female had been seen crying near a pay phone. The officer did not find the female at the gas station, but discovered her at the music store. Upon inquiry, the female identified herself as the victim and explained she was trying to reach her

grandmother or her aunt by phone. When the officer offered the victim a ride home, she began crying hysterically and stated appellant had raped her.

{¶8} The officer transported the victim to the Champion Police Station and notified the Children Services Board ("CSB"). Two CSB caseworkers arrived at the station along with the victim's grandmother and aunt, as well as appellant. While at the station, the victim provided a written statement regarding the rape. The victim was subsequently taken to Northside Hospital with her grandmother, aunt, and the two CSB caseworkers. Appellant remained at the station where Officer Mackey read him his rights and discussed the allegation. Appellant provided the officer with a statement and the officer transported appellant to his home. Once home, appellant consented to a search of his residence and gave officers the clothes he was wearing. Later in the investigation, Officer Mackey contacted appellant and requested he come to the station to provide a DNA sample. Appellant complied with the request.

{¶9} While at the hospital, the victim was initially assessed by emergency room nurse Barbara Plaskett. Nurse Plaskett collected the victim's undergarments and preserved these items in a sealed envelope. The nurse further obtained a blood sample, fingernail scrapings and cuttings, oral swabs, a hair sample from the victim's head, pubic hair combings, and pubic hair strands, all of which were preserved and collected for future analysis.

{¶10} Next, pediatric emergency room physician Dr. Gerhart Perz saw the victim. Dr. Perz was aware of the alleged sexual assault and proceeded to interview the victim. According to the doctor, the victim reported she was alone with her grandfather in the basement of their home. The grandfather was "blowing bubbles" on the victim's

stomach and began kissing her shoulder. The victim then reported her grandfather pulled her pants and underwear down and kissed her genital area. After removing his pants, he commenced vaginal intercourse for approximately one or two minutes. The victim specifically told the doctor that appellant stuck his penis in her and it had hurt. According to Dr. Perz, the victim was "very anxious, afraid" and "almost broke down at certain points of the interview."

{¶11} After discussing the nature of the assault, Dr. Perz examined the victim's vaginal, rectal, and oral regions. Upon visual examination, the doctor did not notice any visible exterior injuries, e.g., no redness, bruising, bleeding, tears, abrasions, or swelling. Notwithstanding these points, Dr. Perz stated the absence of these signs does not rule out the occurrence of a sexual assault or penetration. The doctor emphasized that "[t]he assault may have occurred through touching, the area may have been touched only and there may not have been any forceful penetration to the vaginal area."

{¶12} The physical evidence was initially sent to the Bureau of Criminal Identification and Investigation ("BCI") where Brenda Girardi, a forensic scientist, conducted initial autosomal DNA tests. Girardi performed a presumptive test for semen on the vaginal swabs, anal swabs, oral swabs, and the bra and underwear.[1] After receiving the results, Girardi concluded the vaginal swabs, anal swabs, and underwear tested presumptively positive for semen. After further testing, Girardi confirmed the presence of sperm on smears taken from the vaginal swabs and anal swabs. Rather

1. According to Girardi, the presumptive test allows an investigator to know whether further testing is necessary. If the presumptive test is negative, then semen is not present. If it is positive, the investigator moves forward with a confirmatory test, the results of which would show whether spermatozoa, a component of semen, is present.

than perform a confirmatory test on the underwear evidence, Girardi preserved the evidence for future DNA analysis.

{¶13} Stacey Violi, also a forensic scientist with BCI, conducted further DNA testing on the vaginal swabs, anal swabs, and underwear. Upon receipt of the evidence, Violi was aware that sperm was confirmed on the vaginal and anal swabs; she was also aware that semen was presumptively indicated on the underwear. After further testing, however, Violi was unable to identify any DNA foreign to the victim on the vaginal swab. She testified that this did not imply the previous tests confirming the presence of sperm on the vaginal swabs were inaccurate; the results simply indicated that the victim's DNA "overwhelmed" the extant male DNA such that there was insufficient sperm to yield a profile.

{¶14} With respect to the anal swab, Violi's tests revealed the presence of a mixed DNA profile, one consistent with the victim and one consistent with appellant. As a result, appellant could not be excluded as the source of the sperm on the anal swabs. After running a statistical analysis of the sample, Violi specifically found that the proportion of the population that cannot be excluded as contributors to the DNA profile was one in 37,500 individuals.

{¶15} Violi testified she next examined the underwear evidence. On this sample, Violi found the presence of a mixed DNA profile consistent with both the victim and appellant. Once again, therefore, appellant could not be excluded as the source of the semen found on the victim's underwear. The statistics revealed that the expected frequency of occurrence of the DNA identified in the sperm found on the victim's underwear was one in four quintillion, 179 quadrillion unrelated individuals (i.e., one in

4,179,000,000,000,000,000). In other words, the results excluded 99.999999999999999 percent of the current population from contributing to the sperm sample tested from the victim's underwear.

{¶16} Although the "frequency of occurrence" statistics relating to the anal swab and the underwear sample differed greatly, Violi explained this is because each sample was based upon quantitatively different profiles. In the course of autosomal DNA testing, a forensic scientist tests 15 "locations." If DNA is present in all 15 locations, the profile is deemed a "complete profile." If it is present in less than all 15 locations, it is considered a "partial profile." According to Violi, the profile in the underwear sample yielded a complete DNA profile which allowed for a more comprehensive statistical assessment. With the complete profile, the statistical model indicated the frequency of occurrence of the male DNA profile identified in the underwear was one in over four quadrillion. Alternatively, while the anal swab revealed the presence of sperm, it did not produce a complete DNA profile. As a result, the frequency of the profile's occurrence was radically higher, one in 37,500.

{¶17} YSTR DNA testing was subsequently conducted on the vaginal swabs (from which BCI was unable to obtain a DNA profile) by a private biomedical testing company, Laboratory Corporation of America ("LabCorp"). DeWayne Winston, a forensic scientist and technical director for the company, oversaw the testing and interpreted the results. Winston testified YSTR testing is a more sensitive form of testing than traditional autosomal DNA testing. The procedure focuses specifically on the male "Y" chromosome and, as a result, where DNA evidence includes a mixture of

male and female DNA, YSTR testing effectively ignores the female DNA, concentrating only on the male DNA profile.

{¶18} With regard to YSTR DNA profiling, Winston testified the male "Y" chromosome has 17 different regions; to obtain a full YSTR DNA profile, all 17 systems must be manifest. If the test shows less than 17, the profile is considered a partial or limited profile. In this case, the swabs tested included three of the 17 systems. As a result, the samples LabCorp received disclosed only a partial YSTR DNA profile. In interpreting the test results, Winston concluded the sample was consistent with appellant's DNA and therefore appellant could not be excluded as the source of the male DNA found on the vaginal swabs. Statistically, the three YSTR systems identified in the sample have a one in 19 frequency of occurrence in males.

{¶19} After deliberating on the foregoing evidence, appellant was found guilty of vaginal rape. Appellant was sentenced to a term of ten years imprisonment and this appeal followed. Appellant asserts five assignments of error for our review. His first assignment of error provides:

{¶20} "The trial court erred by denying appellant's request for independent, scientific testing, in violation of his rights to confrontation and due process, as guaranteed by the Sixth and Fourteenth Amendments."

{¶21} On January 23, 2009, prior to trial, the state filed a "notice of intent to consume evidence" with the trial court. The state was interested in having the remaining evidence taken from the victim's vaginal swab tested for DNA using a different method of analysis than the methods already employed by BCI. Subsequently, appellant, through counsel, filed a combined memorandum in opposition to the state's

notice and a motion seeking an order allowing appellant to have the remaining evidence tested by an independent expert of his choice. In support of his motion, appellant argued that the court should not give the state a "second bite at the apple" because nothing indicated the results would differ from the original, inconclusive BCI test. Consequently, appellant concluded, if a separate test is ordered, fairness would dictate that the defense be allowed to "choose the expert and have the test done."

{¶22} The state filed a memorandum in opposition to appellant's motion for an independent evaluation and emphasized its reasons for seeking to consume the remaining evidence. The prosecutor noted that, although BCI's original tests demonstrated the existence of sperm on the vaginal swab, the victim's DNA so "overwhelmed" the male DNA that a profile could not be established. The prosecutor therefore sought the remaining evidence to subject it to the more specialized YSTR DNA analysis. The prosecutor represented to the court that she was unaware of this testing prior to the first trial, but had subsequently learned that such testing "*** can be helpful in cases of mixed male/female strains, especially if the female is the predominant donor." Thus, the state argued, there is a sound basis for the conclusion that the YSTR test would yield different results than original autosomal tests performed on the sample by BCI.

{¶23} A hearing was held on the issue, after which the court overruled appellant's motion and, in doing so, ordered that the state be allowed to consume the evidence for further testing at LabCorp. Although appellant's motion for an independent evaluation was overruled, the court allowed appellant to enlist his own expert, at the state's expense, to oversee the testing process. The defense secured the assistance of

Dr. Julie Heinig, a practicing forensic scientist and laboratory director for a private DNA diagnostics lab. The record indicates Dr. Heinig observed the YSTR DNA testing at LabCorp. The defense, however, did not call her as a witness to testify at trial.

{¶24} With these facts in mind, appellant asserts the trial court violated his constitutional rights when it denied his request to have independent DNA testing performed on the remaining physical evidence taken from vaginal swabs collected after the incident. We do not agree.[2]

{¶25} Initially, it is important to point out that the defense, in its motion for independent testing, never specified the nature of the DNA test it wished to use. The defense's motion only indicated that it wished to select the expert, who it never identified, to conduct an analysis of the remaining DNA. On the other hand, in opposing the defense's motion, the state set forth specific, cogent reasons for seeking to consume the evidence for YSTR DNA analysis: because the YSTR analysis is a more specialized procedure for establishing a male DNA profile where, such as here, the sample contains the mixed DNA of a male and female. Although appellant argued there was nothing to suggest the additional test would yield different results, the state rebutted this assertion by explaining the potential benefits of the YSTR test. The state offered practical and compelling reasons to support its request to consume the evidence—reasons that assist in the truth-finding functions of the criminal trial. Under

2. Appellant recognizes that in situations where the state fails to properly preserve or destroys evidentiary samples, the criminal defendant bears the burden of demonstrating bad faith on the part of the prosecution. See, e.g., *Arizona v. Youngblood* (1988), 488 U.S. 51. Appellant also acknowledges that the scenario under consideration does not involve the improper preservation or destruction of evidence. The remaining sample from the vaginal swab still existed and, apparently, was in a condition that allowed it to be tested. Moreover, even if this case could be framed in terms of destruction or inappropriate preservation, appellant concedes that the state, in seeking to consume the evidence, did not act in bad faith. We therefore need not pursue this line of analysis.

the circumstances of this case, the consumption of the entire sample of DNA by the state's expert can be considered scientifically justified such that it does not violate appellant's right to due process. See *State v. Abercrombie*, 8th Dist. No. 88625, 2007-Ohio-5071, at ¶24.

{¶26} Moreover, even though the trial court denied appellant's motion, it permitted the defense to obtain an independent expert of its choice to oversee the YSTR DNA test at the state's expense. The presence of the independent expert allowed the defense to make an informed appraisal of the nuances of the test methodology employed by LabCorp. Moreover, through its expert's oversight, the defense was able to ensure that LabCorp's test was conducted in a manner consistent with relevant scientific standards and be certain that Winston's analysis of the test results was not inconsistent with the data. As noted above, the defense did not call its expert to testify. It is consequently reasonable to conclude that the reliability of the process as well as Winston's interpretation of the data could not be fairly challenged. Given these points, we hold appellant was afforded due process of law throughout the testing procedure.

{¶27} Appellant next analogizes the instant matter to narcotics cases where the state fails to provide an evidentiary sample for independent analysis upon a defendant's request. In such cases, courts have found that the state's destruction or consumption of an evidentiary sample is a violation of a defendant's right to confrontation. See *State v. Zarbaugh* (Aug. 10, 1993), 5th Dist. No. 92-CA-122, 1993 Ohio App. LEXIS 4187; *State v. Riley* (1990), 69 Ohio App.3d 509. Appellant's statement of the law in these cases is

correct; the outcome of these cases, however, was dictated by R.C. 2925.51, a statute which expressly applies *only to* narcotics cases.

{¶28} R.C. 2925.51 entitles a criminal defendant, upon written request, to conduct an independent test of a portion of the narcotic that serves as the basis of an alleged criminal violation. Where an officer or the prosecution destroys or completely consumes such evidence, regardless of the intent or motivation, courts have held the defendant is deprived of the opportunity to effectively cross-examine a witness against him. See *Zarbaugh*, at *4, citing *State v. Kelly* (July 2, 1992), 7th Dist. No. 91 CA 166, 1992 Ohio App. LEXIS 3592.

{¶29} The instant case, however, is not a narcotics case. The General Assembly has not enacted legislation that would require the state to provide a defendant with a sample of the DNA evidence upon written request. And we find no authority that has extended the application of R.C. 2925.51 to DNA evidence cases. See *State v. Williams* (Aug. 16, 1991), 6th Dist. No. L-90-175, 1991 Ohio App. LEXIS 3883, *12-*13 (R.C. 2925.51 applies only to drug offenses). Furthermore, with respect to appellant's ability to effectively cross-examine his accusers, appellant had an expert observe the YSTR DNA testing process and possessed the results as interpreted by DeWayne Winston. Defense counsel was able to cross-examine Winston regarding the statistical import of his interpretations and, as a result, down-play the results of the YSTR test. Given these points, we hold appellant did not suffer a violation of his Sixth Amendment right to confrontation.

{¶30} As we find no due process or confrontation clause violation, appellant's first assignment of error is without merit.

{¶31} Appellant's second assignment of error alleges:

{¶32} "The trial court abused its discretion by excluding evidence that the alleged victim returned home to live with appellant – being placed at appellant's home by child services – after she had alleged that appellant had raped her, and evidence that she ran away from the home of foster parents to return to live with appellant."

{¶33} Under this assignment of error, appellant argues the trial court erred when it excluded evidence that the victim (1) ran away from her foster home, voluntarily returning to live with him after she had accused him of rape, and (2) was actually placed back in appellant's home after an investigation by CSB. Appellant maintains this evidence was crucial to the victim's credibility as well as fundamental to his defense, viz., that the victim manufactured the rape allegations because she resented appellant's decision to ground her for poor grades.

{¶34} By way of background, prior to trial, the state filed a motion in limine to exclude the above evidence. A hearing was held on the issue after which the trial court issued the following ruling from the bench:

{¶35} "*** [I]t is my opinion that having a limited amount of testimony with respect to [the victim's] testimony with respect to her whereabouts and where she was placed and particular points after the event occurred without going into the full explanation to why they moved her from place to place which would be, in my opinion, and I will allow counsel to reflect on it, a trial within a trial as to the basis and the rational[e] of moving from place to place, that it doesn't have any probative value since where the child lived after the alleged incident is not material to whether or not a particular event occurred as alleged in Count 1 of the indictment ***. And for that

reason, I am not going to allow any evidence on where she lived after the alleged incident as not being material and probative."

{¶36} Appellant's defense was actual innocence. The defense theorized that the victim lied about the rape to punish her grandfather for his harsh disciplinary policies. Thus, the defense maintained, the victim had a motive to lie about the rape. Given this theory, the defense claimed that evidence of the victim's post-allegation whereabouts would cast serious doubt on the victim's story because a rape victim would neither voluntarily return to live with her alleged assailant nor would CSB, after investigating the situation, place the rape victim in the same home as her alleged assailant.

{¶37} Appellant's argument that the evidence should have been permitted is premised upon Evid.R. 616, which governs the various methods a party may use to impeach a witness. Appellant specifically focuses upon Evid.R. 616(A), which provides: "Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence." We do not believe Evid.R. 616 would necessitate the admission of the evidence at issue.

{¶38} As indicated above, Evid.R. 616 controls the methodology by which counsel may impeach a witness. As a precursor to selecting a method of impeachment, the evidence must first be deemed admissible. See, e.g., *State v. Malloy*, 2d Dist. No. 09CA0092, 2011-Ohio-30, at ¶72 (evidence of bias, prejudice, interest, or any motive to misrepresent, if relevant, is admissible to impeach a witness). Here, the trial court determined the evidence was not admissible because it is neither probative nor material to whether the rape occurred. We shall therefore consider whether the trial court erred in excluding the evidence on this basis.

{¶39} Unless otherwise prohibited, evidence is relevant and admissible if it has any tendency to make a consequential fact more or less probable. Evid.R. 401 and Evid.R. 402. A trial court, however, is required to exclude relevant evidence "*** if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. *State v. Boggs* (1992), 63 Ohio St.3d 418, 422. Alternatively, a trial court possesses the discretion to exclude relevant evidence "*** if its probative value is substantially outweighed by considerations of undue delay, or needles presentation of cumulative evidence." Evidence is probative if it tends to establish the proposition it is offered to prove. *State v. Fortson*, 8th Dist. No. 92447, 2010-Ohio-2337, citing McCormick, Evidence (6 Ed.2006) 514, Section 185.

{¶40} Here, the trial court ruled the proffered information was neither material nor probative of whether the crime occurred. The trial court further opined that, if it allowed defense counsel to introduce the information, the ensuing inquiry could invite a "trial within a trial."

{¶41} The trial court was correct that the proffered information was not necessarily material to or probative of whether the rape, as alleged, occurred. This, however, does not imply the proffered information was neither material to nor probative of other issues before the jury. Appellant's entire defense was based upon the theory that the victim was lying about the allegations. Consequently, the proffered information, if introduced, would tend to show the victim may have manufactured the allegations; i.e., it would tend to make a consequential fact more or less probable. See Evid.R. 401. In this regard, the trial court erred in ruling the information was neither probative nor material.

{¶42} Nevertheless, the defense failed to set forth an adequate foundation for the evidence relating to CSB's placement, as there was nothing in the record indicating CSB returned the victim because the agency did not believe her allegations. There are a myriad of reasons why the agency may have returned the victim to the home. And it is mere hypothetical conjecture to conclude the agency's purported actions were occasioned by its belief that the victim was lying about the allegations. Allowing this evidence would run the immediate danger of confusing the matters at issue in the case.

{¶43} Moreover, the policy of avoiding a so-called "trial within a trial" is based upon the concern that certain proffered evidence might unnecessarily waste time and/or potentially confuse the jury. See, e.g., *State v. Carroll* (May 31, 1985), 12th Dist. No. CA84-08-056, 1985 Ohio App. LEXIS 8186, *12. Embarking on an inquiry into why CSB acted as it did would certainly run the risk of a trial within a trial, which would have created the realistic risk of confusing the jury. Furthermore, permitting appellant to introduce evidence as to why the victim purportedly returned to the residence of her own volition would not only unnecessarily place *the victim* under a microscope, but could also potentially distract the jury from the facts precipitating the charges. Accordingly, although the proffered evidence may have been germane to appellant's defense, we hold its relevance was substantially outweighed by the foreseeable danger of confusing the jury or the issues it was empanelled to consider. Evid.R. 403(A). Thus, the trial court did not abuse its discretion in granting the state's motion in limine.

{¶44} For the sake of argument, even assuming the trial court committed error in excluding the evidence, any such error was harmless as a matter of law. Crim.R. 52(A) defines harmless error as "[a]ny error, defect, irregularity, or variance which does not

affect substantial rights ***." Such errors do not warrant reversal and may be disregarded. *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297. "A constitutional error may be considered harmless where it can be said beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Jenkins*, 11th Dist. No. 2003-L-173, 2005-Ohio-3092, at ¶37.

{¶45} As previously highlighted, BCI's analysis confirmed the presence of sperm on the underwear sample and anal swabs. The DNA obtained from the samples was consistent with appellant's DNA profile. After processing the results, the evidence showed that the frequency of occurrence of the DNA found on the underwear sample was one in 4.1 quintillion. Put another way, the results excluded over 99.9 percent of the earth's population. Although the frequency of occurrence of the DNA profile found in the anal swab was higher, it still occurred at a rate of only one in 37,500 individuals. Finally, the YSTR DNA test results of the vaginal swab were consistent with appellant's DNA such that he could not be excluded as a potential contributor. Considering the strength of the physical evidence, the exclusion of the proffered information relating to the victim's voluntary return as well as CSB's purported post-allegation placement of the victim in appellant's residence had no bearing on the outcome of this case. We therefore hold any arguable error in excluding the evidence was harmless beyond a reasonable doubt.

{¶46} Appellant's second assignment of error is overruled.

{¶47} For his third assigned error, appellant contends:

{¶48} "The trial court abused its discretion by permitting appellee to elicit testimony concerning evidence relating to the anal rape charge for which appellant had

previously been acquitted, over the objection of appellant, to the prejudice of the appellant."

{¶49} Under this assignment of error, appellant asserts the trial court committed reversible error by admitting the DNA evidence from the anal swab because it suggested he committed anal rape, a charge of which he had been previously acquitted. We do not agree.

{¶50} Appellant was charged only with vaginal rape. At no time did the prosecution argue or intimate appellant committed anal rape. In fact, during its closing argument the prosecution directly emphasized the victim's statement to Dr. Perz that appellant "*** put his penis in her vagina and it hurt." Furthermore, the victim testified appellant committed only vaginal rape. And Dr. Perz testified that, upon his initial interview with the victim, she reported appellant had placed his "genital area" into her "genital area." Although the victim did not use specific anatomical terminology, the doctor stated, in relating the episode, she pointed at her vagina. Finally, the jury was instructed as follows:

{¶51} "For purposes of this case, sexual conduct means vaginal intercourse between a male and a female and/or without privilege to do so, the insertion, however slight, of any part of the body into the vaginal cavity of another. Penetration, however slight, is sufficient to complete vaginal intercourse."

{¶52} The testimonial evidence indicated appellant committed one vaginal rape. The jury instructions further specified that the charge was vaginal rape. The phrases "anal rape," "anal penetration," or "anal intercourse" were never used in the course of the trial. Given these points, we hold an average juror would draw the reasonable

inductive inference that the DNA evidence taken from the anal swab was *not* the result of anal penetration, but rather the result of gravity and the victim's physical movements after the vaginal rape.

{¶53} Still, appellant argues the state never asserted this "migration" theory at trial and thus the jury had no basis for drawing such a conclusion. We, however, do not think specific evidence related to the process of fluid migration was required for the jury to draw such an inference. An average juror is aware that liquids, regardless of their viscosity, will move or transfer when subjected to a given force, such as gravity or friction. This is not a theory, but an observable fact common to everyone's experience. Here, the evidence indicated that, after being vaginally raped, the victim quickly scrambled to pull up her pants and underwear. She then ran upstairs to retrieve change from her brother's room. She subsequently ran nearly a mile to the Kwik Fill. Under the circumstances, the jury could draw the reasonable inference that the various forces acting synergistically could cause residual seminal fluid to "migrate" to the victim's anal cavity. As no additional evidence was necessary to connect the anal swab sample to the alleged vaginal rape, we hold the trial court did not err in denying appellant's motion in limine.

{¶54} Appellant's third assignment of error is overruled.

{¶55} Appellant's fourth assignment of error provides:

{¶56} "The appellant's conviction is against the manifest weight of the evidence."

{¶57} A manifest weight challenge concerns:

{¶58} "'*** [T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the

jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible* evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing Black's Law Dictionary (6 Ed.Rev.1990).

{¶59} An appellate court must bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should be utilized only in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, supra. Hence, a reviewing court will not reverse a conviction if there is substantial evidence upon which the court could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt. *State v. Johnson* (1991), 58 Ohio St.3d 40, 42.

{¶60} Appellant argues this court should reverse the underlying judgment of conviction because the victim's testimony was fundamentally unreliable. Appellant asserts the weight of the credible evidence demonstrates the victim was a troubled, recalcitrant teenager who prevaricated allegations of rape to avoid grounding and cause distress to a figure of authority. Appellant contends the victim's background, in conjunction with the evidence that she suffered no post-assault visible physical trauma to her vaginal area, demonstrates the state failed to meet its burden of persuasion and, as a result, the jury lost its way. We do not agree with appellant's construction of the evidence.

{¶61} Although the victim admitted appellant was a disciplinarian who had occasion to spank and ground her if she broke certain established house rules, she also indicated she was accustomed to appellant's methods of discipline. She testified: "[grounding] was nothing new. I usually got - - if I got a detention, I got grounded. If I got a bad grade, I got grounded, and I knew I already got a bad grade [at the time of the incident] so I seen it coming." While it is unlikely any child embraces punishments such as grounding, the victim's testimony did not necessarily indicate she had any specific animosity towards appellant for his disciplinary policies.

{¶62} Furthermore, we acknowledge Dr. Perz's initial examination did not reveal any bleeding, redness, tears, bruising, swelling, or abrasions to the victim's vaginal area. We further recognize the evidence indicated such trauma is frequently apparent in cases of rape via vaginal penetration. Still, the doctor nevertheless testified that the absence of such trauma does not imply a vaginal rape did not occur. Indeed, Dr. Perz specifically stated that the absence of visual physical trauma may result from penetration without significant force. And, moreover, the doctor stated evidence of a sexual assault is not always visible to the naked eye and therefore the lack of apparent trauma to appellant's vaginal area did *not* rule out sexual assault.

{¶63} The jury heard the evidence of the victim's troubled past as well as the evidence that appellant was somewhat strict and authoritarian. It heard Dr. Perz's testimony that the victim exhibited no outward, identifiable physical trauma to her vagina. However, it also heard the victim's detailed recounting of the rape and the doctor's testimony that visible trauma is not sine qua non for vaginal rape.

{¶64} Finally, and perhaps most significantly, the jury was able to consider the DNA evidence that included a partial DNA profile obtained from sperm found in the victim's anal and vaginal cavities as well as a full profile found on the crotch of the victim's underwear. The statistical evidence indicated appellant could not be excluded from any of the samples. To wit, the partial DNA profile taken from the vaginal swab had a frequency of occurrence of one in every 21 males; the partial DNA profile taken from the anal swab had a frequency of occurrence of one in every 37,500 males. And the full DNA profile taken from the underwear sample had a frequency of occurrence of one in 4.1 quadrillion. To illustrate the magnitude of the statistic based upon the full profile, forensic scientist Stacey Violi noted that the odds excluded *over* 99.9 percent of the population on earth. To further underscore the statistical import of the full profile, Violi noted the current population of the earth is approximately 6.8 billion. Mathematically, therefore, to find this specific DNA profile again, a mind-boggling 614,558,823 "earths" would be required. Appellant's DNA profile was consistent with all samples.

{¶65} We acknowledge that, in an attempt to devalue the weight of the DNA findings, appellant alleges there was no dispositive evidence that the samples taken from the rape kit were sterile. He points out that Nurse Barbara Plaskett testified she could not remember if she changed gloves after handling each of the different swabs from the rape kit. The nurse also testified, however, that, "*** if there would have been a need to [change gloves], I would have." With this in mind, there was no evidence that would suggest the samples were contaminated or the results questionable.

{¶66} Viewing the evidence as a whole, there was substantial, credible evidence upon which the jury could find each element of the crime of vaginal rape proved beyond a reasonable doubt. We therefore hold the jury did not lose its way when it found the victim's version of events more believable than the theory espoused by the defense.

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

{¶68} Appellant's fifth and final assignment of error alleges:

{¶69} "The appellant received ineffective assistance of counsel in violation of his rights pursuant to the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶70} In order to establish a claim of ineffective assistance of counsel, an appellant must demonstrate that his attorney's performance was deficient and that the alleged deficiencies prejudiced his defense. *Strickland v. Washington* (1984), 466 U.S. 668, 687. Both the performance and prejudice prongs must be established to demonstrate counsel's ineffectiveness.

{¶71} A lawyer's performance is deficient if, under the totality of the circumstances, his or her representation fell below an objective standard of reasonableness. Id. at 688. A court, however, "must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." Id. at 689. Debatable trial tactics do not generally constitute deficient performance. *State v. Phillips*, 74 Ohio St.3d 72, 85, 1995-Ohio-171, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49.

{¶72} With respect to the prejudice prong, an appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. *Strickland*, supra, at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding. Id. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *State v. Loza*, 71 Ohio St.3d 61, 83, 1994-Ohio-409, citing *Strickland*, supra, at 697.

{¶73} Under his final assignment of error, appellant first contends counsel was ineffective for failing to present evidence that he was acquitted of anal rape where the prosecution presents evidence concerning anal rape. We do not agree.

{¶74} Initially, as discussed under appellant's third assignment of error, the state *did not* offer evidence that appellant anally raped the victim. The jury was aware that appellant was on trial for vaginal rape and no testimony, evidence, or argument was offered to prove appellant had committed anal rape.

{¶75} With this in mind, a judgment of acquittal is not generally admissible in a subsequent trial for two reasons: "(1) because it is hearsay, *Prince v. Lockhart* (C.A.8, 1992), 971 F.2d 118, 122; and (2) because it is not relevant since it is not a finding of fact, but merely an ""'acknowledgement that the government failed to prove an essential element of the offense beyond a reasonable doubt.'"" *United States v. Watts* (1997), 519 U.S. 148, quoting *United States v. Putra* (C.A.9, 1996), 78 F.3d 1386, 1394 (Wallace, J., dissenting)." *State v. Wilson* (June 15, 1999), 10th Dist. No. 98AP-965, 1999 Ohio App. LEXIS 2683, *6.

{¶76} In this case, counsel cannot be held deficient for failing to seek introduction of potentially inadmissible hearsay. Moreover, the decision not to seek admission of the acquittal can be strategically justified; while it may be marginally

relevant to appellant's defense, its admission could also be prejudicial. Although the acquittal may have cast some doubt on the victim's credibility with respect to the charge of vaginal rape, it also demonstrates appellant faced additional charges and cast him in an even less favorable light in the eyes of the jury. Counsel was not deficient for failing to seek admission of the previous acquittal.

{¶77} Even assuming counsel's conduct was unreasonable, however, the outcome of the case would not have changed. The state's evidence supporting the vaginal rape charge was sufficiently strong, particularly the DNA evidence from the underwear sample, to overcome the evidence of a previous acquittal on an anal rape charge. Thus, appellant cannot demonstrate prejudice.

{¶78} Next, appellant contends counsel was ineffective for failing to call the victim's aunt, Andrea Nannicola, who the victim contacted immediately after the assault occurred. Appellant argues that Nannicola's testimony would have called into question Officer Mackey's testimony that the victim was "crying hysterically" when he found her as well as Dr. Perz's testimony that the victim was "anxious and afraid" during his examination. We again disagree.

{¶79} Nannicola testified at appellant's first trial. The transcript of those proceedings indicates that, when the victim called her, Nannicola could not tell if the victim "*** was crying or laughing. I am not sure, I couldn't understand her." Nannicola further indicated she sensed something was wrong with the victim and testified she was concerned that the victim had been "beat up."

{¶80} Assuming that Nannicola would have provided the same testimony if called, its value would have had ambiguous evidentiary value at best. On one hand,

Nannicola testified she could not tell if the victim was laughing or crying. On the other hand, she consistently indicated she could not understand the victim and thought something was wrong. Because a jury could reasonably view this testimony as consistent with Officer Mackey's and Dr. Perz's descriptions of the victim, we decline to hold defense counsel acted unreasonably in failing to call Nannicola. And, given the ambiguity of the testimony, we cannot hold appellant was prejudiced by the absence of Nannicola's testimony.

{¶81} Finally, appellant argues that counsel was ineffective for failing to object to DeWayne Winston's testimony regarding the reliability of YSTR DNA testing. Appellant contends Winston's testimony violated Evid.R. 702 as well as *Daubert v. Merrell Dow Pharms.* (1993), 509 U.S. 579 as it failed to establish the reliability of YSTR DNA testing. Thus, appellant concludes, counsel's failure to object or move to strike the testimony constituted deficient performance, which caused him material prejudice. We disagree.

{¶82} Contrary to appellant's assertion, Winston was qualified as an expert forensic scientist. He explained the difference between YSTR DNA testing and traditional DNA testing (autosomal); to wit, the former analysis focuses upon the DNA specific to the male "Y" chromosome. He also explained that YSTR DNA testing is helpful in the context of forensic biological identification particularly for samples, such as the vaginal swab in this case, where scientists have a mixed male-female DNA profile. Winston further detailed the protocol for handling a sample used for YSTR DNA testing as well as the process of obtaining results for scientific interpretation. While appellant is

correct that defense counsel did not object to this testimony, we fail to see how such an omission rendered counsel's assistance ineffective.

{¶83} First of all, defense counsel enlisted the assistance of an independent expert to oversee LabCorp's YSTR DNA analysis and review Winston's interpretations. The expert was not called to testify and, as a result, it is reasonable to conclude that both the testing process and Winston's conclusions were reliable within a reasonable degree of scientific certainty. Counsel's performance, therefore, was not deficient for failing to object to Winston's testimony.

{¶84} Moreover, assuming counsel objected to Winston's testimony, there is nothing to indicate the trial court would have excluded the testimony. As indicated above, Winston set forth the YSTR DNA testing procedure, the protocol LabCorp follows in conducting the procedure, and his interpretation of the resulting data. As appellant's expert was not called to testify, the court could infer that the entire process was sufficiently reliable to meet the relevant evidentiary standards. See *State v. Bell*, 7th Dist. No. 06 MA-198, 2008-Ohio-3959, at ¶42 (a case in which the Seventh Appellate District determined YSTR DNA testing reliable and admissible, holding: "[the expert] testified regarding the type of test she performed and how she went about performing it. She further explained how she can be sure the results of her tests are reliable and stated that she follows standard protocol in performing the tests.")

{¶85} Finally, even if the YSTR DNA test results were excluded, the remaining evidence was sufficiently compelling to convict appellant beyond a reasonable doubt. Accordingly, we hold appellant did not suffer prejudice from counsel's failure to object. We therefore hold appellant received effective assistance of counsel at trial.

{¶86} Appellant's final assignment of error is overruled.

{¶87} For the reasons discussed in this opinion, appellant's five assignments of error are not well taken, and the judgment of the Trumbull County Court of Common Pleas is therefore affirmed.

MARY JANE TRAPP, J., concurs,

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs with a Concurring Opinion.

{¶88} I concur in the decision to affirm in this case primarily on the strength of the unrebutted DNA evidence that supports Appellant's conviction.

{¶89} I write separately to address the trial court's failure to allow evidence concerning the victim's voluntary return to Appellant's home after making allegations that Appellant raped her. Appellant, in his second assignment of error, argues that the trial court erred by preventing him from presenting evidence that the victim voluntarily returned to live with Appellant after the rape. The majority follows the trial court's position that such testimony would be irrelevant, speculative, and confusing to a jury. I disagree. Such evidence was relevant and probative. Cf. *People v. Brown* (Cal.1994), 883 P.2d 949, 957 ("evidence of a victim's conduct following the alleged commission of a crime *** frequently will help place the incident in context, and may assist the jury in arriving at a more reliable determination as to whether the offense occurred"); *State v. Howard*, 8th Dist. No. 70987, 1997 Ohio App. LEXIS 1303, at *12 (evidence that the

victim no longer associated with a friend after being molested by the friend's uncle "was extremely probative of the issue of credibility").

{¶90} In the present case, a police officer and doctor testified that the victim's demeanor and conduct after the rape were consistent with someone having gone through a traumatic experience. The victim testified that she was scared of the Appellant. Accordingly, Appellant should have been allowed to introduce evidence of conduct inconsistent with the allegation of rape, i.e., the victim's returning to live with her rapist. This evidence did not have to be introduced through a children services witness. Appellant could have and should have been permitted to question the victim about her voluntary return to Appellant's home during her cross-examination.

{¶91} The Rules of Evidence are clear that "[c]ross-examination shall be permitted on all relevant matters and matters affecting credibility." Evid.R. 611(B). "To restrict a defendant's right to cross-examine serves no useful purpose, hinders the truth-seeking function of a trial, and clearly violates his guaranteed Sixth Amendment right of confrontation." *State v. Rapp* (1990), 67 Ohio App.3d 33, 37. Cf. *State v. Goins*, 12th Dist. No. CA2000-09-190, 2001-Ohio-8647, 2001 Ohio App. LEXIS 5329, at *2 ("[o]n cross-examination, the victim testified that she returned to [the defendant's] house to play the next day but that [the] mother would not allow her to stay").

{¶92} The trial court's decision to preclude such cross-examination is particularly disturbing in this retrial because the trial court allowed such evidence to be introduced in the first trial, through the testimony of the victim and Appellant's daughter. In closing argument in the first trial, the State addressed the issue directly: "And [the victim] told

you that she moved back to her grandparent's house after that. You also know that she was no longer there. She was removed from the home again."

{¶93} In the first trial, the jury acquitted Appellant of the charge of Anal Rape and was unable to reach a verdict with respect to the charge of Vaginal Rape.

{¶94} The lower court's preclusion of "any evidence on where the [victim] lived after the alleged incident" in the second trial is inconsistent with that court's ruling in the first trial. There was no difference between the two proceedings that would justify the prohibition of Appellant's cross-examination of the victim as to her post-incident return to Appellant's home.

{¶95} While the lower court's exclusionary ruling on this issue is troubling, the record, as a whole, demonstrates that the lower court's error is harmless and not sufficient to warrant a reversal in this case. Overall, the DNA evidence, victim's testimony, and corroborating witness' testimony support the jury's verdict.