[Cite as *State v. Young*, 2010-Ohio-5157.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23438
v.	:	T.C. NO. 2008 CR 03745
ANTIONE R. YOUNG	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 22nd day of October, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant Antione R. Young appeals his conviction and sentence for one count of rape of a child under thirteen, in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree; one count of rape of a child under the age of thirteen (by force or threat of

force), in violation of R.C. 2907.02(A)(1)(b), a felony of the first degree; and two counts of gross sexual imposition (GSI) of a child under thirteen years of age, in violation of R.C. 2907.05(A)(4), both felonies of the third degree. After a jury trial, Young was found guilty of the charged offenses and sentenced to an aggregate term of twelve years in prison. Young filed a timely notice of appeal with this Court on May 20, 2009.

I

{¶ 2} The facts of the instant case arise from an incident which occurred on the afternoon of August 9, 1999, when the victim, C.M., left her home which was located on Brightwood Avenue in Dayton, Ohio, to travel approximately two blocks to her church. C.M. was twelve years old on the date in question.

{¶ 3} Upon leaving the church, C.M. encountered K.S., a friend from her neighborhood who was about the same age, and the two of them began walking back towards C.M.'s house. Before they reached her house, C.M. and K.S. came into contact with Young in an alley which ran behind C.M.'s house. C.M. testified that she believed Young and K.S. were friends because they spoke with each other. Eventually, K.S. went home, and C.M. was left alone with Young.

{¶ 4} C.M. testified that Young then lured her into the laundry room of a nearby apartment building where he pushed her down on the floor, lifted up her dress, pulled down her underwear, and placed his penis in her vagina. C.M. testified that she unsuccessfully attempted to resist the rape by yelling "No," and scratching Young. During the course of the sexual assault, Young touched C.M.'s breasts and buttock.

{¶ 5} At some point, C.M. escaped from Young and ran to her house. C.M. found

her mother in the kitchen and informed her of what had occurred. C.M.'s mother called the police and reported the rape. C.M.'s mother then took her to Children's Medical Center where a rape kit was performed.

{¶ 6} DNA samples from C.M.'s vaginal swabs collected as part of the rape kit were analyzed and revealed that the donor of semen was Young. Young was subsequently indicted on November 10, 2008, for one count of rape of a child under thirteen, one count of rape of a child under the age of thirteen (by force or threat of force), and two counts of gross sexual imposition (GSI) of a child under thirteen years of age. Young was arraigned on November 20, 2008, stood mute, and the trial court entered a not guilty plea on his behalf.

{¶ 7} On December 4, 2008, Young filed a motion to suppress. An evidentiary hearing was held on said motion on February 4, 2009. On February 6, 2009, the trial court filed a written judgment entry in which it denied Young's motion to suppress.

{¶ 8} Following a jury trial held on May 4, 2009, through May 6, 2009, Young was found guilty of all counts in the indictment. The jury, however, specifically found that Young did not compel the victim to submit to rape by force or threat of force. For the purposes of sentencing, the trial court merged the two counts of rape and sentenced Young to ten years imprisonment. With respect to the two counts of GSI, the court sentenced Young to two years for each count. The court ordered that the GSI sentences were to be served concurrently to each other but consecutive to the sentence for rape, for an aggregate term of twelve years in prison.

{¶ 9} It is from this judgment that Young now appeals.

II

{¶ 10} Young's first assignment of error is as follows:

{¶ 11} "THE COURT COMMITTED PLAIN ERROR BY SENTENCING HIM TO A SENTENCE EXCEEDING THE STATUTORY GUIDELINES, BASED ON JUDICIAL FACT-FINDING, IN VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHTS."

{¶ 12} In his first assignment, Young contends that the trial court erred when it imposed a sentence for the merged rape count which exceeded the statutory guidelines for that offense. Specifically, Young argues that the court engaged in improper fact-finding when it held that the maximum prison term of ten years for the rape count was appropriate. Young also asserts that the trial court erred when it failed to merge the two counts of GSI with the merged rape count.

{¶ 13} It is undisputed that defense counsel failed to object to the sentence imposed by the trial court at any point during the sentencing hearing. Normally, failure to object waives all but plain error. *McBride v. Quebe*, Montgomery App. No. 21310, 2006-Ohio-5128. Plain error exists "if the trial outcome would clearly have been different, absent the alleged error in the trial court proceedings." *State v. Rollins*, Clark App. No. 2005-CA-10, 2006-Ohio-5399. "[T]o successfully prevail under plain error the substantial rights of the accused must be so adversely affected that the error undermines the 'fairness of the guilt determining process.'" *State v. Ohl* (Nov. 27, 1991), Ashland App. No. CA-976.

{¶ 14} In support of his assertion that the court engaged in improper fact-finding when it sentenced him for the rape count, Young relies on the following

statement made by the court at the sentencing hearing:

{¶ 15} "The Court: But the most telling and important factors from my estimation are the age of the victim at the time of this offense, *the fact that according to her testimony it was violent in nature, whether the jury found you guilty of force or not, the testimony indicated that it was very violent, almost brutal, offense*. She was a child that you took advantage of. But perhaps, more importantly, sir, you have exhibited not one ounce of remorse or acceptance of responsibility for your behavior."

{¶ 16} Initially, it should be noted that pursuant to the Ohio Supreme Court's holding in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the trial court was not required to make any findings on the record in order to support the imposition of Young's sentence. Post *Foster*, trial courts have full discretion to impose any sentence within the statutory range and are no longer required to make findings or give their reasons for imposing more than the minimum sentences. R.C. 2929.14(A)(1) authorizes a prison term of "three, four, five, six, seven, eight, nine, or ten years" for a felony of the first degree. In sentencing Young to ten years for the merged count of rape, the trial court imposed a sentence that did not exceed the statutory guidelines for that offense.

{¶ 17} Moreover, the court's finding that C.M.'s rape was "violent" and "brutal" in nature did not constitute the kind of judicial fact-finding prohibited by *Foster*, nor did it contradict the jury's finding that no force was involved in the rape. Rape is defined as "unlawful sexual intercourse with a female without her consent." Black's Law Dictionary, Sixth Ed. (1990). Rape, by its very nature, is a violent offense.

The trial court acknowledged that the jury found that no force was involved in the commission of the rape. The court, however, was not prohibited from relying on C.M.'s characterization of the rape as a violent, brutal episode when fashioning Young's sentence. Simply because the jury found that Young did not rape C.M. by force or threat of force did not mean that the rape itself was not a violent, reprehensible act. Characterizing the rape of a child as brutal is reasonable. The court's statements in this regard did not amount to judicial fact-finding as discussed in *Foster*, and the court did not err, plainly or otherwise, when it relied on that rationale when it sentenced Young to ten years for the rape of C.M.

{¶ 18} Next, we address Young's argument that the trial court erred when it failed to merge the two counts of GSI with the rape count based on his assertion that GSI and rape are allied offenses of similar import. We note, however, that prior to the trial court imposing sentence, defense counsel specifically requested that the court merge all of the counts in the indictment for purposes of sentencing. Defense counsel stated as follows:

{¶ 19} "Defense Counsel: My understanding of the law as it was at the time of the offense, 1999, each rape could carry a three to ten year range and then the GSI's could carry a one to five year range. *It's our position that the GSI's and the rapes were allied offenses. One continuous course of conduct in this particular incident all happened on the same date, under the same set of conditions, and in one continuous course of action, so there was no separate animus for the rapes as opposed to the GSIs.*

{¶ 20} "***

{¶ 21} "The Court: All right. Thank you. First of all, Mr. Young, with regard to the two rape counts I'm going to find those counts merged. There was no evidence at trial of any separate acts of rape. They were charged the same offense charged two separate ways. So I'm going to find that those two rape counts merge.

{¶ 22} "*However, my reading of the case law does not indicate that the gross sexual impositions merge. They are not lesser included offenses and there's no requirement that they merge with each other or with the rape counts*."

{¶ 23} In light of the request made by defense counsel immediately prior to sentencing regarding the merger of all of the counts in the indictment, we find that the merger issue was preserved for appeal. Thus, we review this portion of Young's assignment of error under a de novo standard of review.

{¶ 24} R.C. 2941.25, Ohio's allied offense statute, protects against multiple punishments for the same criminal conduct, which could violate the Double Jeopardy Clauses of the United States and Ohio constitutions. It provides as follows:

{¶ 25} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 26} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where this conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each,

the indictment or information may contain counts for all such offenses, and the defendant may be convicted for all of them."

{¶ 27} The Supreme Court of Ohio held that the elements of alleged allied offenses are to be compared in the abstract. *State v. Rance* (1999), 85 Ohio St.3d 632, ¶ 1 of the syllabus. In *Rance*, supra, the Supreme Court set out a two-part test to determine when convictions may be obtained for two or more allied offenses of similar import. In the first step, the elements of the offenses at issue are compared in the abstract to determine whether the elements correspond to such a degree that the commission of one offense will result in the commission of the other. *Id*. at 638. However, if a defendant commits offenses of similar import separately or with a separate animus, he may be punished for both of them pursuant to R.C. 2941.25(B). *Id.*, *State v. Jones* (1997), 78 Ohio St.3d 12, 13-14.

{¶ 28} Under R.C. 2907.02, the elements of rape as indicted in this case are as follows:

{¶ 29} "(A)(1) 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:

{¶ 30} "***

{¶ 31} "(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

{¶ 32} Under R.C. 2907.05, the elements of GSI as indicted in this case are as follows:

{¶ 33} "(A) No person shall have sexual contact with another, not the spouse

of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more persons to have sexual contact when any of the following applies:

{¶ 34} "***

{¶ 35} "(4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person."

{¶ 36} Sexual conduct is defined 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." R.C. 2907.01(A).

{¶ 37} Sexual contact is defined as "any touching of an erogenous zone of another, including without limitation the thighs, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B).

{¶ 38} Upon review, the elements of rape and GSI lead us to conclude that their elements correspond to such a degree that Young's commission of vaginal rape necessarily resulted in the commission of a GSI. Stated differently, the sexual conduct involved in the instant case necessarily involved sexual contact with the victim. Thus, rape and GSI are allied offenses of similar import.[1]

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[1]The State mistakenly asserts that we held in *State v. Roy*, Montgomery App. No. 12525, that rape and GSI are allied offenses of similar import. While

{¶ 39} Having satisfied the first prong of the *Rance* test, we must now determine whether the rape and the GSI's were committed separately or with a separate animus as to each of the offenses. When asked about the events surrounding the rape, C.M. testified as follows:

{¶ 40} "The State: [C.M.], the last we left off you had indicated that you were down into this laundry room area. And I had asked you a question and I'm going to repeat that question.

{¶ 41} "What happened near that washer in that back room with this individual?

{¶ 42} "C.M.: I was pushed down.

{¶ 43} "Q: How were you pushed down?

{¶ 44} "A: He pushed me from the back – from behind me and I fell.

{¶ 45} "Q: What happened then?

{¶ 46} "A: I skinned my knee.

{¶ 47} "Q: Do you remember which knee was skinned?

{¶ 48} "A: My right knee.

{¶ 49} "Q: And then what happened?

{¶ 50} "A: I was laying on the floor.

{¶ 51} "Q: And what did he do?

{¶ 52} "A: He held my arms down.

{¶ 53} "Q: Were you on your back?

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we presently hold that rape and GSI can be allied offenses, in *Roy*, we held that *attempted rape and GSI* were allied offenses.

{¶ 54} "A: Yes.

{¶ 55} "Q: And what did he do when he held your arms down?

{¶ 56} "A: He held me in place and he took my dress and lifted it up.

{¶ 57} "Q: You were wearing a dress that day?

{¶ 58} "A: Yes.

{¶ 59} "Q: Was he saying anything to you during this?

{¶ 60} "A: Not that I can recall.

{¶ 61} "Q: And what happened after he lifted your dress up.

{¶ 62} "A: He pulled my underwear down.

{¶ 63} "Q: Did you know what was going on?

{¶ 64} "A: No.

{¶ 65} "Q: What happened next, [C.M.]?

{¶ 66} "A: I don't remember if he was wearing pants or shorts but he took them down.

{¶ 67} "Q: Okay. And then what happened?

{¶ 68} "A: He took his boxers, I believe it was boxers that he was wearing, he took them down.

{¶ 69} "Q: Was he on top of you at this point?

{¶ 70} "A: Yes.

{¶ 71} "Q: What were you doing?

{¶ 72} "A: I was trying to fight him off of me.

{¶ 73} "Q: Can you tell us what you were doing, if you remember?

{¶ 74} "A: I was scratching him.

{¶ 75} "Q: Were you yelling or anything like that?

{¶ 76} "A: Yes.

{¶ 77} "Q: Do you recall what you were yelling?

{¶ 78} "A: No.

{¶ 79} "Q: What happened next?

{¶ 80} "A: He put his hand over my mouth and told me not to be too loud.

{¶ 81} "Q: And then what happened?

{¶ 82} "A: He took my legs and put them up like near his shoulders so I couldn't get up.

{¶ 83} "Q: Were you still trying to fight him at that point?

{¶ 84} "A: Yes.

{¶ 85} "Q: Did you get away?

{¶ 86} "A: No.

{¶ 87} "Q: And then what happened?

{¶ 88} "A: That's when he put his penis inside of me.

{¶ 89} "Q: Can you tell us where he put his penis?

{¶ 90} "A: In my vagina.

{¶ 91} "Q: What happened after he did that?

{¶ 92} "A: He pushed up and down a couple of times.

{¶ 93} "Q: Did you understand what was happening at that point?

{¶ 94} "A: No.

{¶ 95} "Q: How did it feel?

{¶ 96} "A: It hurt.

{¶ 97} "Q: How long did this go on?

{¶ 98} "A: Not very long.

{¶ 99} "Q: What happened at that point?

{¶ 100} "A: I started fighting again and I managed to wiggle away.

{¶ 101} "Q: Prior to that happening, I'm going to ask you, did you – he ever touch you anywhere else?

{¶ 102} "A: Yes.

{¶ 103} "Q: Can you tell the ladies and gentlemen of the jury where he touched you?

{¶ 104} "A: On my breasts and on my butt.

{¶ 105} "Q: Was that before, after, or during?

{¶ 106} "A: During.

{¶ 107} "Q: During, okay. And what was he doing with his hands?

{¶ 108} "A: Groping me."

{¶ 109} The Eighth Appellate District has recently held that "simply because gross sexual imposition and rape may be allied offenses in one does not mean that they are allied in every other case." *State v. Knight*, Cuyahoga App. No. 89534, 2008-Ohio-579. In *Knight*, the evidence established that the defendant groped the breast of the victim during the same episode in which he also raped her both vaginally and anally. *Id.* The court found that the defendant's groping of the victim's breast was separate from the conduct which constituted the rape offense. *Id.* Thus, the court ultimately held that the defendant committed GSI when he groped the victim's breast, and the offense was committed with a separate animus

from the sexual contact that led to the conviction for rape. *Id.*

{¶ 110} In the instant case, it is undisputed that the vaginal rape and the GSI's involving the victim's breasts and buttocks occurred during a single assaultive episode. That fact standing alone, however, does not require us to hold that the vaginal rape and two GSI's were allied offenses of similar import. The two offenses were committed separately. Given the facts and circumstances in the present case, the separate acts of groping C.M.'s breasts and buttocks were not incidental to the vaginal rape. Simply put, Young did not necessarily have to touch C.M.'s breasts or buttocks as a result of committing the vaginal rape. Thus, the trial court did not err when it found that the two GSI counts were not allied offenses of the rape count, and sentenced Young separately as to each count.

{¶ 111} Young's first assignment of error is overruled.

III

{¶ 112} Because they are interrelated, Young's second and third assignments of error will be discussed together:

{¶ 113} "THE COURT COMMITTED ABUSE OF DISCRETION BY NOT ALLOWING A CONTINUANCE WHEN DEFENDANT WAS ABLE TO RAISE MONEY TO HIRE A PRIVATE ATTORNEY."

{¶ 114} "THE COURT ABUSED ITS DISCRETION BY DISALLOWING THE DEFENDANT THE ABILITY TO HIRE PRIVATE COUNSEL."

{¶ 115} In his second and third assignments, Young argues that the trial court abused its discretion when it denied his request for a continuance so that he could retain new counsel to represent him at trial. Specifically, Young contends that his

request for a continuance was denied because the trial court was concerned solely with managing its docket.

{¶ 116} " 'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶ 117} "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." *AAAA Enterprise, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 118} The decision of whether to grant or deny a continuance is within the sound discretion of the trial court. *State v. Sowders* (1983), 4 Ohio St.3d 143, citing *Ungar v. Sarafite* (1964), 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921. There are no mechanical tests for deciding whether a denial of a continuance violates due process. Rather, the trial court should balance several factors when ruling on continuances. *Id.*

{¶ 119} "These factors, representing competing interests, include the defendant's right to counsel, any potential prejudice to the defendant and the state, the court's right to control its own docket, and the public's interest in obtaining prompt justice. To balance the weight of these various factors, consideration must

be directed to several areas of inquiry. What was the length of the delay requested? Was any other continuance granted? What is the reason cited for the delay? Is the need for the continuance attributable to the party requesting it? What, if any, other relevant factors are present?" *State v. Jones* (1987), 42 Ohio App.3d 14, 15-16.

{¶ 120} An element of the Sixth Amendment right to counsel is the right of a defendant who does not require appointed counsel to select an attorney of his own choosing. *United States v. Gonzalez-Lopez* (2006), 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409. The Sixth Amendment right is violated when the Defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he receives. *Id.* A trial court's erroneous deprivation of a criminal defendant's Sixth Amendment right to counsel of his own choosing entitles Defendant to a reversal of his conviction because the error is "structural error." *Id.*

{¶ 121} After considering all of the factors, we find that the trial court did not abuse its discretion when it denied Young's request for a continuance. We note that Young filed his motion for continuance on May 1, 2009. Young's trial was scheduled to begin the following Monday on May 4, 2009. The sole basis for Young's motion was that he be allowed to substitute retained counsel for his court appointed attorney. The record reflects that Young had already requested and been granted a prior continuance. The court also noted that numerous witnesses had been subpoenaed, and the State was ready to proceed with its case. Defense counsel also stated that he was ready to proceed to trial. Additionally, the court

was concerned with the impact that a continuance would have on the victim who was scheduled to testify. The court noted that Young was currently represented by competent appointed counsel who had spent a great deal of time and effort preparing Young's defense. The court did state that because of its congested docket, it would not be able to reschedule Young's trial until the end of July, 2009. Clearly, however, docket management was not the court's only concern. After balancing these competing factors, we find that the trial court did not abuse its discretion in denying Young's motion for continuance.

{¶ 122} Young's second and third assignments of error are overruled.

IV

{¶ 123} Young's fourth assignment of error is as follows:

{¶ 124} "THE COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE OF SENSORY OR MENTAL DEFECT CONTRARY TO OHIO RULE OF EVIDENCE 516(2)."[2]

{¶ 125} In his fourth assignment, Young contends that the trial court abused its discretion when it prohibited defense counsel from cross-examining C.M. regarding an allegedly false prior rape allegation that she made against another individual besides Young. Young also argues that defense counsel could have demonstrated that C.M. had "a complete and utter lack of understanding of the circumstances surrounding rape and gross sexual imposition." Young argues that

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[2]We assume, since there is no Evid. R. 516(2), that appellant meant to cite Evid. R. 616(B), which states that a witness may be impeached by evidence of a sensory or mental defect.

if defense counsel had been allowed to question C.M. about the alleged prior false allegations, it would have called into question the veracity of C.M.'s statements regarding specific actions she took on the day she was raped, as well as the identity of the man who raped her.

{¶ 126} The admission or exclusion of evidence rests soundly within the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, ¶ 2 of the syllabus. The trial court's decision concerning the admission or exclusion of evidence will not be reversed absent an abuse of that discretion. *Id.* at 182.

{¶ 127} Initially, we note that the evidence adduced at trial failed to establish that C.M. suffered from any type of mental or sensory defect such that defense counsel should have been permitted to impeach her testimony through the use of extrinsic evidence of prior false rape allegations pursuant to Evid. R. 616(B). Some evidence was presented that C.M. suffered from a learning disability which caused problems with her ability to comprehend information and then explain it in her own words. C.M. specifically testified, however, that she did not have any difficulty with perceiving events that occurred around her. Thus, the record fails to support Young's assertion that C.M. possessed a mental defect which impaired her ability to understand her rape and gross sexual imposition at the hands of Young.

{¶ 128} Evidence Rule 613(B) allows the use of extrinsic evidence to impeach by prior inconsistent statement when the following two steps are satisfied: "(1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement

or the interests of justice otherwise require; (2) The subject matter of the statement is one of the following: (a) A fact that is of consequence to the determination of the action other than the credibility of a witness; (b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(B) or 706; (c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence." Evid.R. 613(B). We have stated that, under this rule:

{¶ 129} "If the witness admits making the conflicting statement, then there is no need for extrinsic evidence. If the witness denies making the statement, extrinsic evidence may be admitted, provided the opposing party has an opportunity to query the witness about the inconsistency, and provided the 'evidence does not relate to a collateral matter[.] ***' However, if the witness says he cannot remember the prior statement, 'a lack of recollection is treated the same as a denial, and use of extrinsic impeachment evidence is then permitted.'" *State v. Harris* (Dec. 21, 1994), Montgomery App. No. 14343 (citations omitted); see also *State v. Taylor* (July 26, 1996), Montgomery App. No. 15119 ("A prior statement of a witness may be proved by extrinsic evidence if the witness denies the statement or claims he cannot remember the statement.").

{¶ 130} The record establishes that defense counsel attempted to question C.M. regarding statements she made to police in which she allegedly stated that it was K.S. who raped her on August 9, 1999, and not Young. The court allowed defense counsel to ask C.M. if she remembered making any allegations against K.S., but C.M. stated repeatedly that she did not recall making any such statements. In fact, C.M.'s testimony in which she incriminated Young as the individual who raped did not waver.

{¶ 131} During cross-examination, defense counsel also asked C.M. the following question:

{¶ 132} "Defense Counsel: *** Would you agree that when Detective Wolford confronted you with information that he had obtained through the course of his investigation, *namely that you were walking hand-in-hand with who you've identified as the perpetrator*. You acknowledged –

{¶ 133} "The State: Objection.

{¶ 134} "Defense Counsel: – that that was true.

{¶ 135} "The Court: Sustained. The jury will disregard that question and any implication from it.

{¶ 136} ***

{¶ 137} "(Bench conference)

{¶ 138} "The Court: That isn't impeachment. You have just used a police statement to try and get in evidence which is absolutely impermissible. You have to ask her the question – and the connotation from your question, the police confronted you. That is wholly inappropriate."

{¶ 139} After a thorough review of the record, we find that the court did not abuse its discretion when it limited defense counsel's attempts to question C.M. regarding alleged false rape allegations made against K.S. Defense counsel was permitted to ask C.M. whether she made incriminating statements against K.S., and C.M. stated unequivocally that she did not recall ever accusing anyone other than Young as being the individual who raped her. Lastly, pursuant to Evid. R. 613(B), the court correctly sustained the State's objection to defense counsel's improper attempt to impeach C.M.'s testimony through the use of extrinsic evidence, namely Det. Wolford's police report.

{¶ 140} Young's fourth assignment of error is overruled.

V

{¶ 141} Young's fifth assignment of error is as follows:

{¶ 142} "THE COURT ABUSED ITS DISCRETION BY ALLOWING A WITNESS TO MAKE AN IMPROPER IDENTIFICATION OF THE DEFENDANT AT TRIAL."

{¶ 143} In his fifth assignment, Young contends that the trial court abused its discretion by permitting C.M. to make an in-court identification of the appellant. Young asserts that C.M. had arguably not seen him in approximately ten years since the alleged assault occurred when she was only twelve years old. Young argues that considering the length of time that had passed, as well as the age of the victim when the assault occurred, the in-court identification was extremely unreliable and unduly suggestive.

{¶ 144} In *State v. Brown*, Montgomery App. No. 21540, 2007-Ohio-2098, we recently stated the following in regards to in-court identifications:

{¶ 145} "Due process requires suppression of an identification, whether made in court or out of court, if the confrontation procedure was 'unnecessarily suggestive of the suspect's guilt and the identification was unreliable under all the circumstances.' *Manson v. Brathwaite* (1977), 432 U.S. 98, 116, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140; *State v. Luna*, Lucas App. No. L-05-1245, 2006-Ohio-5907, ¶24. 'In the context of eyewitness identification testimony, an impermissibly suggestive identification procedure will be suppressed due to the substantial likelihood of irreparable misidentification.' *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401; *State v. Marbury*, Franklin App. 03AP-233, 2004-Ohio-3373, ¶56. 'It is the likelihood of misidentification which violates a defendant's right to due process * * *.' *Biggers,* 409 U.S. at 198. Thus, 'reliability is the linchpin in determining the admissibility of identification testimony.' *Manson*, 432

U.S. at 114. *** An in-court identification typically occurs under circumstances that suggest the identity of the defendant. *State v. Johnson,* 163 Ohio App.3d 132, 2005-Ohio-4243, ¶55. However, such an identification may nonetheless possess sufficient indicia of reliability to comply with due process. *Id.*"

{¶ 146} In *Neil v. Biggers* (1972), 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401, the United States Supreme Court set out a list of factors for courts to consider "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." The factors to be considered include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.*

{¶ 147} Applying these factors to the instant case, we find that the circumstances surrounding C.M.'s in-court identification of Young was not so suggestive as to render the identification unreliable. Although approximately ten years had passed since the sexual assault occurred, C.M. initially encountered Young on the afternoon of August 9, 1999, in broad daylight. Moreover, C.M. had ample time to observe Young during the course of the rape. C.M. made her identification of Young under oath, in court, and was subject to a vigorous cross-examination concerning her memory of Young and the events surrounding the rape. Defense counsel, however, chose not to object to C.M.'s identification of Young.

{¶ 148} We also find persuasive the State's argument that, even if C.M.'s identification was unreliable, any error in refusing to exclude her identification was harmless in light of the fact that Young's DNA was taken from the rape kit performed on C.M. at the time of the sexual assault. Accordingly, the trial court did

not abuse its discretion in permitting the in-court identification.

{¶ 149} Young's fifth assignment of error is overruled.

VI

{¶ 150} Young's sixth assignment of error is as follows:

{¶ 151} "THE COURT ABUSED ITS DISCRETION BY ALLOWING INCOMPLETE DNA EVIDENCE TO BE ADMITTED AT TRIAL AND TO NOT COMPEL THE STATE TO PRODUCE THE INDEPENDENT LAB ANALYSIS."

{¶ 152} In his sixth assignment, Young contends that the court abused its discretion when it allowed the State to introduce the results of the DNA test performed by the Miami Valley Regional Crime Lab while failing to require the State to introduce the results of the DNA test performed by an independent testing facility located in Florida. Specifically, Young argues that the court should have required the State to introduce both sets of test results because the results of the Florida test did not specifically match the results of the test performed by the Miami Valley lab.

{¶ 153} At trial, the State called Denise Rankin, a forensic scientist at the Miami Valley lab, who testified as follows regarding the two DNA tests that were performed on the vaginal swabs taken from C.M. during the rape kit conducted after the sexual assault:

{¶ 154} "The State: And you said in 2004, you sent this particular sample out involving a minor victim in this case?

{¶ 155} "Rankin: Yes. I'll correct myself though. It was 2005.

{¶ 156} "Q: 2005.

{¶ 157} "A: Yes.

{¶ 158} "Q: and what was the name of the minor victim regarding – or what was her name listed on the –

{¶ 159} “A: [C.M.].

{¶ 160} “Q: Okay. And you said you sent that out of state?

{¶ 161} “A: Yes.

{¶ 162} “Q: And when were you made aware of those initial results that you sent out of state?

{¶ 163} “A: They returned a report to us in December of 2005.

{¶ 164} “Q: And what were the findings that you were made aware of at that time?

{¶ 165} “Defense Counsel: Objection, Your Honor.

{¶ 166} “The Court: Overruled.

{¶ 167} “Rankin: *** So I – they sent me a report with a DNA profile listed on it.

{¶ 168} “The State: And what was that DNA profile that they sent you that you, later, then tested yourself?

{¶ 169} “A: Well, it consists of alleles, which are just – what we designate with numbers at different areas on the DNA molecule. And then I take those particular alleles and input them into a computer.

{¶ 170} ***

{¶ 171} “Q: And what were those matches?

{¶ 172} “A: One –

{¶ 173} “Defense Counsel: Objection, Your Honor.

{¶ 174} “The Court: Overruled.

{¶ 175} “Rankin: Once I obtained the information as to the person who the DNA profile that my sample matched, I was told that it was Antione Young.

{¶ 176} “The State: And then once you were – it came back as Antione Young, you then performed another test to verify that at Miami Valley Regional

Crime Lab?

{¶ 177} "A: Yes. Then I personally took these samples that we had in the freezer, the vaginal swabs and the sample from Mr. Young, and did a comparison in-house; so basically, did additional work using Mr. Young's standard and redid the work on the vaginal swabs.

{¶ 178} "Q: And can you tell the members of the jury when you did this confirmatory test or this other – additional test?

{¶ 179} "A: I did the test. I began it in December of 2008, and my report was finished and written in February of 2009.

{¶ 180} "Q: Okay. And what were the results on that particular test, please?

{¶ 181} "A: I found that the semen donor's DNA profile matched that of Antione Young.

{¶ 182} "Q: And, ma'am, is that with a reasonable degree of scientific certainty?

{¶ 183} "A: Yes.

{¶ 184} "Q: And that term being said, can you break it down with regards to probability or odds that the semen found in the minor victim's vaginal swabs matching the Defendant, can you give us the odds?

{¶ 185} "A: Yes. We do generate allele frequencies. And in the *** Black population, the frequency is one in 2.3 quintillion that the sample belonged to another person. In the Caucasian, it is one in 19 quintillion. And I – the southwest Hispanics, one in 1.2 sextillion."

{¶ 186} The results from the DNA test performed in Florida were not admitted at trial. Despite this, the trial court allowed Rankin to testify over objection that the results of the Florida test established that Young's DNA was found on the vaginal swabs. Rankin's testimony was inadmissible hearsay, and the trial court erred by

allowing her to testify regarding the results of the Florida lab tests. In light of Rankin's subsequent testimony, however, regarding the DNA test she personally performed at the Miami Regional Crime Lab which conclusively established Young as the donor of the DNA taken from the vaginal swabs, the error was harmless.

{¶ 187} Additionally, Young points out that Mark Squibb, another employee at the Miami Valley Regional Crime Lab, testified at a pre-trial hearing that the results from the Florida DNA test from 2005 did not exactly match the results of the DNA test performed by Rankin in 2009. Specifically, Squibb stated that while the results of the two tests were not a complete match, "the majority of the alleles or DNA types are the same in *** both tests." Squibb later testified that the differences in the two tests' results was explained by the fact that the 2009 test performed by Rankin was more sophisticated than the test performed in 2005 in Florida. More importantly, the test performed by Rankin in 2009, whose results were admitted at trial, conclusively established that the DNA taken from the vaginal swabs in C.M.'s rape kit belonged to Young.

{¶ 188} Young's sixth assignment of error is overruled.

VII

{¶ 189} Young's seventh and final assignment of error is as follows:

{¶ 190} "THE COURT ABUSED ITS DISCRETION BY ALLOWING VIDEO OF AN UNAVAILABLE WITNESS TO BE USED AS TESTIMONY AT TRIAL."

{¶ 191} In his final assignment, Young argues that the trial court erred by permitting the State to play a video of an unavailable witness' testimony in front of the jury. Specifically, the court allowed the State to introduce the testimony of Detective Philip Olinger who testified at Young's motion to suppress hearing on February 4, 2009. Det. Olinger died shortly thereafter, and was, therefore, unavailable for trial. Young contends that defense counsel was limited by the trial

court from fully cross-examining Detective Olinger at the suppression hearing.

{¶ 192} In reviewing an assigned error on appeal, pursuant to App. R. 12(A)(1)(b), we are confined to the record that was before the trial court as defined in App. R. 9(A). See *Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277. App. R. 9(A) identifies the record on appeal as consisting of "the original papers and exhibits thereto filed in the trial court, *the transcript of the proceedings*, if any, including exhibits, and a certified copy of the docket and journal entries prepared by the clerk of the trial court ***."

{¶ 193} App. R. 9(A) provides if the transcript of the proceedings is in the video tape medium, counsel for appellant shall print or type those portions of the transcript necessary for the court to determine the questions presented, shall certify their accuracy, and append such copy of the portions of the transcript to the brief. Additionally, App. R. 9(B) imposes the duty on an appellant to file a transcript of the proceedings underlying the final order or judgment from which the appeal is taken and concerning which the appellant seeks appellate review. *State ex rel. Montgomery v. R & D Chem. Co.* (1995), 72 Ohio St.3d 202, 1995-Ohio-21. If the transcript is not included in the record, the court of appeals must presume the validity of the trial court's proceedings unless error of law is demonstrated. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384.

{¶ 194} As the State notes in their brief, Young has failed to provide those portions of the trial transcript which contain the testimony of Det. Olinger from the suppression hearing. The transcript, however, does contain a discussion between the court and defense counsel regarding the admission of Det. Olinger's suppression hearing testimony:

{¶ 195} "The Court: *** The defendant filed a motion today to reconsider the Court's prior decision to allow the recorded testimony of Detective Olinger at trial. I

advised counsel by phone the other day, the record should reflect, because I wanted everybody to be aware of my decision, that I had reviewed the testimony of Detective Olinger, I reviewed the entire videotape. It was a very rigorous cross-examination of Detective Olinger. In addition, the – the rules of evidence would permit his testimony to be admitted. We are all aware of the fact that following the motion to suppress, within weeks of that time Detective Olinger found out that he was will [sic], and he died, I believe it was 21 days later, without the State having any opportunity to have – he was – my understanding, he was hospitalized that entire time, is that correct?

{¶ 196} "The State: That's correct, Judge.

{¶ 197} "The Court: Without the State having potential opportunity for a more – or an additional examination by the State and the defendant.

{¶ 198} ***

{¶ 199} "The Court: *** I did – I do believe that under [Evid. R.] 804 the defendant had – had a similar motive to cross-examine. While I – I absolutely agree that the Court in a – from my perspective, a minor respect, sustained the State's objection, but that that does not in any way prejudice the defendant. The detective as [sic] asked by [defense counsel] about the fact that the statement he was making was not in his original report but he was remembering this approximately ten years later. And so the Court finds that there would be no violation of the confrontation clause or the mandates in *Crawford v. Washington* or – and that – that the rules of evidence do permit this. So I am going to allow the testimony of – of Detective Olinger by videotape."

{¶ 200} In *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, the United States Supreme Court held that out-of-court statements that are testimonial are barred under the Confrontation Clause unless the witness is

unavailable and the defendant had a prior opportunity to cross-examine the witness, regardless of whether the statements are deemed reliable by the trial court.

{¶ 201} Evid.R. 804(A) provides in pertinent part:

{¶ 202} "(A) Definition of unavailability**.** 'Unavailability as a witness' includes any of the following situations in which the declarant:

{¶ 203} "(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means."

{¶ 204} As a general constitutional principle, the State bears the burden in criminal cases to produce the declarant regarding hearsay made at a prior judicial hearing, or to establish that the declarant is unavailable to testify. See *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597. The prosecution must satisfy this burden in order to utilize hearsay made at the prior judicial proceeding. Likewise, the right of confrontation under the Ohio Constitution requires the prosecution to use live testimony where reasonably possible. See *State v. Storch* (1993), 66 Ohio St.3d 280.

{¶ 205} The Confrontation Clause of the Sixth Amendment and Evid.R. 804(B)(1) normally require a showing by the State that the hearsay declarant is unavailable despite reasonable efforts made in good faith to secure his presence for trial. *State v. Keairns* (1984), 9 Ohio St.3d 228. A showing of unavailability must be based on testimony of witnesses rather than hearsay. *Id.*

{¶ 206} It was undisputed that Det. Olinger was unavailable to testify at Young's trial. More importantly, without the transcript of that portion of Det. Olinger's testimony that was played in front of the jury at Young' trial, we must

assume that the trial court correctly found that the testimony was admissible. We also point out that the trial court specifically found that defense counsel was able to vigorously cross-examine Det. Olinger at the suppression hearing. Under these circumstances, we find that the trial court did not abuse its discretion when it allowed the State to play the videotape of Det. Olinger's testimony at Young's trial.

{¶ 207} Young's final assignment of error is overruled.

VIII

{¶ 208} On June 1, 2010, we ordered counsel for both parties to submit briefs in regards to why this Court should not vacate Young's rape conviction for Count II of the indictment. Specifically, we noted that although defendant-appellant Antione Young was convicted of two counts of rape of a child under thirteen years old, in violation of R.C. 2907.02(A)(1)(b), the evidence adduced at trial establishes that only one vaginal rape occurred. In fact, as noted by the trial court during sentencing, no evidence was presented that Young committed a second rape.

{¶ 209} Pursuant to our order, both parties submitted supplemental briefs regarding that narrow issue on June 30, 2010. After review of the parties' arguments, we find that the trial court erred when it failed to dismiss Count II in the indictment that charged Young with a second rape. Additionally, an inconsistency exists in the second count regarding the verdict form for Count II which was submitted to the jury. The verdict form prepared by the court states that Young was found guilty of rape of a child under thirteen. However, the actual verdict signed by twelve jurors is captioned as follows:

{¶ 210} "RAPE (<13)(BY FORCE) as charged in the indictment."

{¶ 211} The jury, however, specifically found that the rape was not committed with force in a separate interrogatory to Count II.

{¶ 212} In light of the foregoing inconsistencies, Young's conviction for Count

II, rape of a child under thirteen years old, in violation of R.C. 2907.02(A)(1)(b), is hereby reversed and vacated. Accordingly, this matter is remanded for resentencing consistent with this opinion. In all other respects, the judgment of the trial court is affirmed.

. . . .

BROGAN, J. and GRADY, J., concur.

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