**[Cite as *State v. Salinas,* 2010-Ohio-4738.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

| | | |
|---|---|---|
| State of Ohio, | : | |
| Plaintiff-Appellee, | : | |
| | | No. 09AP-1201 |
| v. | : | (C.P.C. No. 09CR-03-1949) |
| Salvador A. Salinas, | : | (REGULAR CALENDAR) |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on September 30, 2010

*Ron O'Brien,* Prosecuting Attorney, and *Sheryl L. Prichard,* for appellee.

*Keith O'Corn,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

**{¶1}** Defendant-appellant, Salvador A. Salinas, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of gross sexual imposition ("GSI"), a felony of the third degree. Because (1) defendant's indictment was not defective; (2) the state did not violate defendant's rights pursuant to *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194 and Crim.R. 16; (3) sufficient evidence and the manifest weight of the evidence support defendant's conviction; (4) a clerical error in the

judgment entry pertaining to defendant's sentence requires modification; (5) the trial court did not abuse its discretion in denying defendant's motions for new trial; and (6) defendant received effective assistance of counsel, we affirm the judgment as modified.

**I. Facts and Procedural History**

**{¶2}** Through an indictment filed on March 31, 2009, the state charged defendant with one count of GSI in violation of R.C. 2907.05. At a trial commencing August 18, 2009, the victim, then ten years old, testified defendant touched her breasts underneath her clothes and touched her vaginal area on top of her clothes during the early morning hours of January 1, 2009, when the victim was nine years old. According to the victim, she went to the house of Sue Zuniga on December 31, 2008 to spend the night. After watching on television a ceremony attending the first moments of the New Year, she got into bed with Zuniga and fell asleep. She was awakened some time later by "noises" and testified she saw defendant was kissing Zuniga. (Tr. 122.) He stopped and, according to the victim, turned his attention to her.

**{¶3}** Zuniga testified she was drunk the night of the events in question, but the victim woke her up to tell her defendant had touched her. Zuniga testified defendant "kept saying he didn't touch her, he didn't touch her." (Tr. 180.) Zuniga further testified she did not remember writing a report for the police which stated the victim told Zuniga defendant touched the victim's private areas; rather, Zuniga remembered the victim's telling her defendant touched the victim's back. (Tr. 181.)

**{¶4}** Roger Richards, the firefighter/paramedic who responded to Zuniga's the morning of January 1, 2009 testified the victim told him defendant touched her both inside and outside of her garments; she informed Richards she told defendant, "Stop. This is

sexual harassment." (Tr. 151.) After Richards examined her, the victim traveled by ambulance to Children's Hospital with her mother, who had just arrived on the scene.

**{¶5}** At the hospital, Detective Sterling Trent, Columbus Division of Police, observed an interview of the victim that a hospital social worker conducted. Detective Trent testified he obtained a DNA mouth swab from defendant, and someone in the emergency room collected the victim's clothing as evidence. The crime laboratory tested them "for any body fluids, semen, saliva," but the "tests were negative." (Tr. 236.) Although Detective Trent read a hospital report that indicated wetness on the victim's clothing, he testified that portion of the interview occurred prior to his arrival. Defendant did not attempt to enter the hospital report into evidence.

**{¶6}** The jury returned a guilty verdict on August 19, 2009. Defendant filed a motion for a new trial on September 2, 2009 based on the state's alleged failure to disclose exculpatory evidence to defendant. Following the state's response, the trial court on October 23, 2009 denied defendant's motion for a new trial. The trial court concluded defendant failed not only to provide any affidavits to support his contentions but also to demonstrate the evidence he sought, DNA laboratory results, would have made a difference in the outcome of the case. The trial court pointed out that defendant knew of the laboratory results prior to trial and argued repeatedly no DNA evidence linked him to the crime.

**{¶7}** On October 29, 2009, the trial court sentenced defendant to three years in prison, informed defendant of his classification as a Tier II sexual offender, and advised defendant of the registration requirements accompanying that classification. At the

sentencing hearing, the trial court noted defendant's crime carried with it a presumption of prison time, but the final judgment entry states prison time is mandatory.

**{¶8}** The day of the sentencing hearing, defendant filed a motion to reconsider the trial court's decision denying his motion for a new trial. Defendant argued both that the laboratory technician was a material witness to the case and that introducing the laboratory tests and results at trial would have revealed the victim made a prior inconsistent statement regarding wetness on her clothing. The trial court orally denied the motion to reconsider at the sentencing hearing. The same day, defendant filed a second motion for a new trial, reiterating the contentions he made in his first motion for a new trial and in his motion to reconsider.

**{¶9}** Defendant filed a third motion for a new trial on November 23, 2009. Defendant stated the prosecution mailed to defense counsel a copy of the written report of the laboratory technician who performed the DNA test on November 10, 2009, and defense counsel received that report on November 16, 2009. The state again opposed the motion for a new trial.

**{¶10}** On November 25, 2009, the trial court journalized its decision in a judgment entry, sentencing defendant to three years in prison and five years mandatory post-release control.

**II. Assignments of Error**

**{¶11}** Defendant appeals, assigning the following errors:

> ASSIGNMENT OF ERROR #1
>
> APPELLANT'S INDICTMENT WAS DEFECTIVE UNDER ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION, AND HIS CONVICTION OF THIRD-DEGREE FELONY GSI

SHOULD BE CONVERTED TO MINOR-MISDEMEANOR DISORDERLY CONDUCT

ASSIGNMENT OF ERROR #2

THE STATE'S NONDISCLOSURE OF SCIENTIFIC TESTS OF APPELLANT'S MOUTH SWAB AND THE ALLEGED VICTIM'S CLOTHING, ALONG [WITH] THE IDENTITY OF THE LAB TECHNICIAN THAT PERFORMED THE TESTS, VIOLATED APPELLANT'S DUE PROCESS RIGHTS PURSUANT TO *BRADY V. MARYLAND* AND THE FEDERAL AND OHIO CONSTITUTIONS AND CRIM.R. 16

ASSIGNMENT OF ERROR #3

APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

ASSIGNMENT OF ERROR #4

THE SENTENCE WAS CONTRARY TO LAW

ASSIGNMENT OF ERROR #5

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING AND NOT RULING ON THE APPELLANT'S REQUESTS FOR A NEW TRIAL BASED ON THE STATE'S NONDISCLOSURE OF THE LAB TESTS, RESULTS, FORMS, AND LAB TECHNICIAN'S NAME AND ITS VIOLATION OF *BRADY* AND CRIM.R. 16

ASSIGNMENT OF ERROR #6

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION

For ease of analysis, we address defendant's assignments of error out of order.

**III. First Assignment of Error – Defective Indictment**

**{¶12}** In his first assignment of error, defendant asserts his indictment is defective in that it fails to allege defendant acted with the requisite intent. The state responds that defendant waived his argument when he did not object to the indictment prior to trial.

**{¶13}** "Under Crim.R. 12(C), '[d]efenses and objections based on defects in the indictment' must be raised before trial." *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶27. "As stated in Crim.R. 12(H), '[f]ailure by the defendant to raise defenses or objections' within the time required 'shall constitute waiver of the defenses or objections,' although the court may grant relief from the waiver." Id. Defendant nonetheless contends he can dispute the sufficiency of his indictment for the first time on appeal, citing *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624 *("Colon I")*, syllabus (stating "[w]hen an indictment fails to charge a mens rea element of a crime and the defendant fails to raise that defect in the trial court, the defendant has not waived the defect in the indictment").

**{¶14}** After the parties filed their respective appellate briefs, the Ohio Supreme Court decided *State v. Horner,* ___ Ohio St.3d ___, 2010-Ohio-3830 which specifically addressed in the syllabi the issues defendant raises on appeal regarding his indictment. In overruled *Colon I* and *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749 ("*Colon II*"), the court held, in the syllabi (1) "[a]n indictment that charges an offense by tracking the language of the criminal statute is not defective for failure to identify a culpable mental state when the statute itself fails to specify a mental state," and (2) "[b]y failing to timely object to a defect in an indictment, a defendant waives all but plain error on appeal."

**{¶15}** Defendant's indictment alleged defendant violated "section 2907.05 of the Ohio Revised Code" when defendant "did have sexual contact with [the victim], not his

spouse, the said [victim] being less than thirteen (13) years of age, to wit: 9 years of age, contrary to the statute[.]" R.C. 2907.05 provides "[n]o person shall have sexual contact with another, not the spouse of the offender * * * when any of the following applies: * * * [t]he 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." R.C. 2907.05(A)(4). The indictment thus tracks the statutory language for the offense of GSI and thus is not defective. *Horner,* supra.

**{¶16}** Even apart from *Horner,* defendant's argument is unpersuasive. "[G]ross sexual imposition involving a victim under the age of 13 is a strict liability offense in Ohio and requires no precise culpable state of mind." *State v. West*, 10th Dist. No. 06AP-11, 2006-Ohio-6259, ¶17, citing *State v. Astley* (1987), 36 Ohio App.3d 247, 250. "All that is required is a showing of the proscribed sexual contact." Id. For strict liability offenses, the indictment need not contain any reference to defendant's mental state. See, e.g., *State v. Guthrie*, 2d Dist. No. 08-CA-88, 2009-Ohio-4586, ¶10 (holding an indictment alleging a strict liability offense need not include a mens rea element).

**{¶17}** As a result, not only does *Colon* not control defendant's first assignment of error, but in view of *Horner,* defendant cannot demonstrate any error, much less plain error. Defendant's first assignment of error is overruled.

**IV. Second Assignment of Error – *Brady* Violation**

**{¶18}** Defendant's second assignment of error asserts the state violated *Brady*, his due process rights under the federal and Ohio Constitutions, and Crim.R. 16 when it withheld evidence regarding scientific tests, test results, and the identity of the laboratory technician who performed the tests.

**{¶19}** In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1197. *Brady* thus places on the prosecution a duty to disclose to a criminal defendant evidence material to guilt or punishment. Id. The prosecution's duty to disclose encompasses impeachment evidence and exculpatory evidence, including evidence known only to police investigators and not to the prosecution. *Strickler v. Greene* (1999), 527 U.S. 263, 280-81, 119 S.Ct. 1936, 1947-48. To establish a *Brady* violation, a defendant must demonstrate the prosecution failed to disclose evidence that not only is favorable to the defense, but is material. See *State v. Crawford*, 10th Dist. No. 08AP-1055, 2009-Ohio-4649, ¶23, citing *State v. Jones*, 11th Dist. No. 2000-A-0083, 2002-Ohio-2074.

**{¶20}** The United States Supreme Court in *United States v. Bagley* (1985), 473 U.S. 667, 105 S.Ct. 3375, clarified the concept of "material" evidence, holding evidence is "material" only if a "reasonable probability" exists that the result of the proceeding would have been different had the evidence been disclosed to the defense. Id. 473 U.S. at 682, 105 S.Ct. at 3383. See also *Kyles v. Whitley* (1995), 514 U.S. 419, 434, 115 S.Ct. 1555, 1565. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Id., quoting *Strickland v. Washington* (1984), 466 U.S. 668, 694, 104 S.Ct. 2052, 2068. See also *State v. Johnston* (1988), 39 Ohio St.3d 48, paragraph five of the syllabus. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish

'materiality' in the constitutional sense." *United States v. Agurs* (1976), 427 U.S. 97, 109-10, 96 S.Ct. 2392, 2400; see *Bagley*, supra.

**{¶21}** Crim.R. 16(B)(1)(f) similarly requires the prosecution to disclose material, favorable evidence to the defense. "[T]he terms 'favorable' and 'material' in Crim.R. 16(B)(1)(f) have the same meaning as they do in *Brady* and its progeny." *State v. Keene*, 81 Ohio St.3d 646, 650, 1998-Ohio-342.

**{¶22}** Here, the prosecution did not produce the laboratory forms, laboratory reports or the laboratory technician's name until November 10, 2009, after the jury returned a guilty verdict and the trial court sentenced defendant pursuant to that verdict. Defendant, however, did not object to the state's failure to disclose during its examination of Detective Trent, the point at which the late disclosure was apparent. Moreover, defendant indicated discovery was complete during the pretrial hearing conducted July 29, 2009. Defendant thus arguably waived any objection to the state's failure to disclose. See Evid.R. 103(A)(1).

**{¶23}** Even if defendant did not waive his argument, defendant does not demonstrate the evidence was "material." The laboratory report indicates the tests of the victim's clothing were negative for semen and saliva. Knowing the state collected a DNA swab of his mouth during its investigation, defendant at trial repeatedly stated the state had no DNA evidence to connect defendant to the crime. Defendant responds that, with the laboratory report and the identity of the laboratory technician, he would have been able to cross-examine the laboratory technician about other possible DNA found. Defendant's argument is unpersuasive, as the laboratory report indicates "no" semen or saliva was present on the victim's clothing, not that none matched defendant's DNA.

Defendant thus fails to demonstrate the laboratory evidence would have affected the outcome of the trial, as the laboratory results only confirmed the argument defendant placed before the jury.

**{¶24}** Defendant nonetheless contends that with the laboratory report he would have been able to question Detective Trent about the reason the request for laboratory services indicated the offense was rape rather than GSI. Defendant posits that the victim initially reported she was raped, but on the state's receiving a report that did not support her, she changed her testimony. Not only did defendant fail to object during Detective Trent's testimony regarding the missing laboratory report and accompanying information, but defendant failed to request additional time or a continuance upon learning of the laboratory results in order to explore the possibility he raises on appeal. See, e.g., *State v. Boone* (Dec. 24, 1998), 10th Dist. No. 98AP-352 (stating "appellant never contended that he needed extra time to review such materials, nor did he request a continuance for such purpose"), citing *State v. Weind* (1977), 50 Ohio St.2d 224, 235 (noting defendant's failure to request continuance upon late production of discovery materials under Crim.R. 16 is relevant in finding no prejudice); *State v. Brown* (1993), 85 Ohio App.3d 716, 720-21. Apart from those factors, defendant's argument is speculative and finds no support in any other aspect of the trial record.

**{¶25}** Defendant also argues the material the prosecution withheld adds "another level of inconsistency to the victim's story." (Defendant's brief, 18.) Defendant essentially argues that because the state tested the victim's clothing for semen and saliva, the victim must have indicated some type of fluid was on her clothing, something the victim did not testify to at trial. Defendant's argument again finds no support in any part of the record, is

speculative, and thus does not create a reasonable probability the outcome of trial would have been different.

**{¶26}** In the final analysis, defendant cannot demonstrate a strong probability of a different outcome had the state disclosed the actual laboratory results prior to trial. We therefore overrule defendant's second assignment of error.

**V. Third Assignment of Error – Sufficiency and Manifest Weight of the Evidence**

**{¶27}** In his third assignment of error, defendant asserts sufficient evidence and the manifest weight of the evidence do not support his conviction.

A. Sufficiency of the Evidence

**{¶28}** Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

**{¶29}** Here, the state was required to present evidence that defendant had "sexual contact with another, not the spouse of the offender * * * when * * * [t]he 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." R.C. 2907.05(A)(4). The state introduced evidence through the victim's testimony that when she was nine years old defendant touched her breasts and vaginal area. Defendant nevertheless argues the evidence is insufficient to sustain a conviction against him because the state did not present evidence

that defendant's contact with the victim was for the purpose of sexually arousing or gratifying either one of them.

**{¶30}** As used in R.C. 2907.05, "sexual contact" is "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, *for the purpose of sexually arousing or gratifying either person*." (Emphasis added.) R.C. 2907.01(B). Although the state did not present specific evidence that defendant touched the victim for the purpose of sexual arousal or gratification, the trier of fact "may infer what the defendant's motivation was in making the physical contact with the victim" by considering "the type, nature and circumstances of the contact, along with the personality of the defendant." *State v. Cobb* (1991), 81 Ohio App.3d 179, 185. The state introduced ample evidence at trial that defendant had a sexual purpose in his contact with Zuniga on the night at issue. With that evidence, a rational trier of fact could infer defendant's subsequent and immediate contact with the victim was for the purpose of sexual arousal or gratification.

**{¶31}** Sufficient evidence supports defendant's conviction.

B. Manifest Weight of the Evidence

**{¶32}** When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the manifest weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and

weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

**{¶33}** Defendant contends the jury "lost its way" in assessing the victim's credibility. Defendant initially argues the level of detail the victim presented suggests she was indoctrinated to tell the same story over and over again. Defendant asserts that the ability of the victim, a ten-year-old child, to remember more details than any of the adults involved in the incident indicates the victim's story was rehearsed. Zuniga, however, admitted to being intoxicated on the night in question, an admission that could account for her inability to remember as many details as the victim.

**{¶34}** Defendant also points to the large number of inconsistencies both within the victim's own testimony and between the victim's testimony and that of the other witnesses. For example, defendant notes the victim testified defendant touched her "once" but later described being touched two times: once under her clothes on her breasts and again on top of her clothes in her vaginal area. Further, the victim testified she told Zuniga what happened while the victim was standing next to the bed, but Zuniga testified the victim told her about the incident while lying in bed in Zuniga's arms. Defendant also contends the victim's statement to the paramedic that defendant's conduct constituted "sexual harassment" demonstrates a level of exaggeration indicating the victim fabricated the story.

**{¶35}** Inconsistencies do not necessarily render a conviction against the manifest weight of the evidence, as the jury may note the inconsistencies and resolve them accordingly. See *Raver* at ¶21. Here, the victim testified defendant had sexual contact with her. Zuniga testified the victim reported that contact to her on January 1, 2009, and Zuniga wrote a report for police on January 1, 2009 corroborating the victim's version of events. Although Zuniga testified at trial she did not remember writing the statement, the jury was free to question Zuniga's credibility since she testified she was intoxicated the night of the incident. In assessing credibility, the jury also was free to consider Zuniga's romantic relationship with the defendant and any impact that may have had on Zuniga's testimony. Similarly, the paramedic largely confirmed the version of events reflected in the victim's testimony, and Detective Trent's findings from his investigation were consistent with the victim's testimony regarding defendant's conduct.

**{¶36}** Defendant, however, also points out the victim noted "wetness" on her clothing following the incident and uses the testimony to highlight the inconsistency in the victim's version of events. The statement, however, was contained in a hospital social worker's report that never was introduced at trial. Under those circumstances, defendant fails to explain how the statement renders unreliable either the victim's previous accounts of the incident or the version she told at trial.

**{¶37}** In the end, although details of the incident vary from one account to the next, the substance of the victim's statements regarding the incident remained the same: defendant had sexual contact with her at least once on January 1, 2009. The jury had the opportunity to observe the victim as she testified and determine whether she was a credible witness. We may not second-guess the jury's determination in that regard, as "[i]t

is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness." *State v. Haynes*, 10th Dist. No. 03AP-1134, 2005-Ohio-256, ¶24, quoting *State v. Lakes* (1964), 120 Ohio App. 213, 217. Defendant's conviction is not against the manifest weight of the evidence.

**{¶38}** Because sufficient evidence and the manifest weight of the evidence support the jury's verdict, we overrule defendant's third assignment of error.

**VI. Fifth Assignment of Error – Motions for New Trial**

**{¶39}** Defendant's fifth assignment of error asserts the trial court erred in either denying or not ruling on defendant's multiple requests for a new trial under Crim.R. 33(A)(2) and 33(A)(6).

**{¶40}** A Crim.R. 33 motion for a new trial is addressed to the sound discretion of the trial judge. *State v. Schiebel* (1990), 55 Ohio St.3d 71, 76. An appellate court will not reverse a trial court's decision on a motion for new trial absent an abuse of discretion. Id.; *State v. Townsend*, 10th Dist. No. 08AP-371, 2008-Ohio-6518, ¶8; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151 (noting an abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable).

**{¶41}** Pursuant to Crim.R. 33(A)(2), a new trial may be granted based on "[m]isconduct of the jury, prosecuting attorney, or the witnesses for the state." A new trial also may be granted under Crim.R. 33(A)(6) "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." "It is clear from the language of Crim.R. 33 that a new trial is not to be granted unless it affirmatively appears from the record that a

defendant was prejudiced by one of the grounds stated in the rule, or was thereby prevented from having a fair trial." *Columbus v. Carroll* (Aug. 27, 1996), 10th Dist. No. 96APC01-90, citing Crim.R. 33(E); see also *State v. Samatar*, 152 Ohio App.3d 311, 2003-Ohio-1639, ¶35.

**{¶42}** Defendant filed three separate motions for a new trial. The first, on September 2, 2009, alleged the trial deprived defendant of his due process rights and of a fair trial based on the prosecution's misconduct in failing to disclose exculpatory evidence. Defendant, however, did not comply with Crim.R. 33(C), which requires a defendant alleging prosecutorial misconduct in his motion for new trial to provide affidavits demonstrating the truth of the alleged misconduct. "A trial court does not abuse its discretion by denying a motion or a hearing on such motion for new trial on Crim.R. 33(A)(2) grounds if no affidavits are submitted with the motion." *State v. Tolliver*, 10th Dist. No. 02AP-811, 2004-Ohio-1603, ¶118, citing *Toledo v. Stuart* (1983), 11 Ohio App.3d 292, 293. The trial court thus did not abuse its discretion in denying defendant's first motion for a new trial.

**{¶43}** Defendant filed his second motion, again without an affidavit, on October 29, 2009, largely reiterating the arguments he made in his September 2, 2009 motion. He filed his third motion for new trial on November 23, 2009, this time alleging newly discovered evidence pursuant to Crim.R. 33(A)(6). The trial court never formally ruled on either of these motions, but instead entered judgment against defendant on November 25, 2009. Defendant argues the trial court abused its discretion when it failed to rule on defendant's subsequent requests for a new trial. Alternatively, defendant

asserts the trial court at least should have conducted hearings on the motions and ordered an in camera review of the new evidence in the third motion for new trial.

**{¶44}** Where a trial court fails to rule upon a motion for new trial and instead enters a final judgment, the trial court often will be deemed to have implicitly overruled the motion. See *State v. Davis*, 9th Dist. No. 07CA0028-M, 2008-Ohio-999, ¶5, quoting *Lorence v. Goeller*, 9th Dist. No. 04CA008556, 2005-Ohio-2678, ¶47 (stating "[i]n general, if the trial court fails to mention or rule on a pending motion, the appellate court presumes that the motion was implicitly overruled"). We assume from the trial court's silence on the second and third motions for new trial followed by entry of final judgment that the trial court overruled the motions.

**{¶45}** Even if we assume the trial court denied defendant's second and third motions for a new trial, defendant does not demonstrate the requisite prejudice. The second motion for a new trial mirrored the first motion. Because defendant did not provide the required affidavit to support his allegations of prosecutorial misconduct, the trial court properly denied the motion. Moreover, Crim.R. 33(B) requires a party seeking a new trial to file his or her motion "within fourteen days after the verdict was rendered." Defendant filed his second motion for new trial on October 29, 2009, more than two months after the jury returned its verdict. Because defendant did not seek leave to file his motion for new trial, the trial court did not abuse its discretion in denying the motion. See *State v. Woodward*, 10th Dist. No. 08AP-1015, 2009-Ohio-4213, ¶17 (noting a trial court does not abuse its discretion in denying a motion for a new trial where defendant does not comply with time constraints of Crim.R. 33(B) without explanation for the delay).

**{¶46}** Defendant's third motion for new trial alleged newly discovered evidence pursuant to Crim.R. 33(A)(6) and attached the laboratory forms and results indicating the laboratory results were negative for semen and saliva. Crim.R. 33(B) requires a defendant seeking a new trial based on newly discovered evidence to file the motion within 120 days from the day upon which the verdict was rendered. Crim.R. 33(B). Defendant filed his third motion for new trial outside the statutory time frame, but did not seek leave to file an untimely motion based on the state's late production of the document at issue.

**{¶47}** Timing issues aside, defendant does not demonstrate the trial court abused its discretion in denying his third motion for new trial. In order to receive a new trial based on newly discovered evidence, a defendant must demonstrate the new evidence discloses a strong probability the evidence will change trial results if a new trial is granted, it must have been discovered since trial, and it must be such that it could not in the exercise of due diligence have been discovered before trial. *State v. Petro* (1947), 148 Ohio St. 505, syllabus; *State v. Wilson*, 10th Dist. No. 02AP-1350, 2003-Ohio-5892, ¶14. In addition, it must be material to the issues, and it cannot simply duplicate, or contradict former evidence. Id.

**{¶48}** Defendant did not object at trial when he discovered the state's failure to disclose the laboratory tests and results. An objection at that time likely would have resulted in defendant's obtaining the document at issue before the end of trial and obviated the need for a post-trial motion. Moreover, the evidence did not bring unheard evidence to the trial but corroborated other testimony introduced at trial. Defendant's motion thus fails to demonstrate a strong probability that the outcome of the trial would

have been different. Because defendant failed to meet the *Petro* requirements, the trial court did not abuse its discretion in denying defendant's third motion for new trial.

**{¶49}** Defendant nonetheless argues the trial court at least should have held a hearing and conducted an in-camera review of the new evidence before entering its final judgment in this case. The trial court has the discretion to "determine whether a motion for a new trial and the material submitted with the motion" warrant an evidentiary hearing. *State v. Haynes*, 10th Dist. No. 07AP-508, 2007-Ohio-6540, ¶6, citing *State v. Clark* (Nov. 22, 2000), 2d Dist. No. 17839, citing *State v. Hill* (1992), 64 Ohio St.3d 313, 333. Given the deficiencies in the timeliness of defendant's motion, coupled with defendant's inability to demonstrate a strong probability the results of the trial would have been different with the additional information, defendant cannot demonstrate the trial court abused its discretion in not holding a hearing on defendant's third motion.

**{¶50}** Defendant's fifth assignment of error is overruled.

**VII. Sixth Assignment of Error – Ineffective Assistance of Counsel**

**{¶51}** In his sixth assignment of error, defendant asserts his trial counsel rendered ineffective assistance of counsel in violation of his state and federal constitutional rights. Specifically, defendant argues his trial counsel was deficient in: (1) failing to seek the indicted offense be dismissed due to a defective indictment; (2) failing to request jury instructions on lesser-included offenses; (3) failing to raise *Brady* and Crim.R. 16 objections during Detective Trent's testimony; (4) failing to seek admission into evidence of the hospital records; and (5) failing to object to the trial court's instruction to the jury during closing arguments to disregard defendant's statements.

**{¶52}** To prove ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was deficient. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Defendant thus must establish his counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. Id. Defendant also must establish that his counsel's deficient performance prejudiced him, demonstrating that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Id. Unless defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Id.

**{¶53}** Defendant initially argues his trial counsel was ineffective in not objecting to the adequacy of the indictment prior to trial. Here, defendant "recasts one of his substantive propositions of law into an ineffective-assistance claim." *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶233. Because the indictment was sufficient, defense counsel's failure to object does not render his assistance ineffective. Id., citing *State v. Holloway* (1988), 38 Ohio St.3d 239, 244.

**{¶54}** Defendant's second point contends his trial counsel was ineffective in failing to request an instruction on sexual imposition and disorderly conduct as lesser-included offenses of GSI. An instruction on a lesser-included offense is appropriate "only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. Defendant argues the evidence at trial did not support a finding that defendant touched the victim with the requisite purpose of sexually gratifying or arousing himself, thus allowing potential convictions for the lesser-

included offenses. Defendant's argument recasts his third assignment of error. In resolving that assigned error, we concluded the evidence supported a finding that defendant's purpose was sexual gratification. Given that defendant touched the victim's breasts and vaginal area in bed after kissing Zuniga and before partially disrobing Zungia, the jury could not reasonably reach a different conclusion. Defense counsel's failure to request the instruction thus did not amount to ineffective assistance.

**{¶55}** Defendant's third point asserts his trial counsel was ineffective in failing to raise *Brady* and Crim.R. 16 objections during Detective Trent's testimony regarding the laboratory tests and results. While defense counsel should have addressed the issue during Detective Trent's testimony, defendant cannot demonstrate prejudice on this record from his trial counsel's failure to object, as noted in our resolution of defendant's second assignment of error.

**{¶56}** Defendant further contends under his third point that, had his counsel objected and sought a continuance to obtain the documents during trial, counsel could have asked Detective Trent why the laboratory request form indicates the case initially was investigated as a rape rather than a GSI. In turn, defendant argues, the answer would have revealed further inconsistencies in the victim's version of events. Defendant's argument, however, assumes answers not in the record. "An appellate court's direct review of an ineffective assistance claim 'is strictly limited to the record that was before the court' and cannot be based upon speculation." *State v. McClurkin*, 10th Dist. No. 08AP-781, 2009-Ohio-4545, ¶61, quoting *State v. Lewis*, 10th Dist. No. 04AP-1112, 2005-Ohio-6955, ¶35. Because defendant cannot demonstrate from this record that defense counsel's failure to object on *Brady* and Crim.R. 16 grounds during Detective

Trent's testimony prejudiced him, he likewise fails to demonstrate ineffective assistance of counsel.

**{¶57}** Defendant's fourth point asserts his trial counsel was ineffective in failing to seek admission of the hospital social worker's record that reflected the victim indicated "wetness" on her clothing. Because the social worker's report is not part of the record, we are unable to review it. Moreover, defendant's contention that the records would have revealed the victim made a prior inconsistent statement is speculative. Equally plausible is the state's speculation that defense counsel did not seek to admit the hospital records for strategic reasons. *State v. Brown* (1988), 38 Ohio St.3d 305, 319 (noting counsel is not ineffective where counsel decides for strategic reasons not to pursue every potential trial tactic). In any event, defendant fails to demonstrate prejudice on this record.

**{¶58}** Defendant's fifth point contends his trial counsel was ineffective in failing to object to the court's instruction during closing arguments to "disregard that statement," referring to defendant's statements to Zuniga that he did not touch the victim. The transcript reveals defense counsel argued to the jury in closing argument that defendant "was outside of the bed standing at the foot of the bed, and he said 'I didn't touch the little girl.' Throughout my time in this case, that has consistently been his statement, 'I did not touch the little girl.' " (Tr. 270.) When the prosecution objected, the trial court stated, "The defendant didn't testify. Obviously, he's entered a not guilty plea. Just let's move on." (Tr. 270.)

**{¶59}** After defendant's closing argument, the court stated to the jury, "I want to make a curative instruction to the jury, and that is counsel made the reference that defendant stated that, 'I did not touch the little girl.' " (Tr. 277). The court noted "[t]here

was an objection that was made. The Court indicated that the defendant did not testify." (Tr. 277.) As the court explained, "Obviously, he entered a not guilty plea. I asked to move on. I'm going to instruct the jury to disregard that statement. All right? And that's going to be the curative instruction of the Court." (Tr. 277.) Defendant responded, "Your Honor, I think that testimony was offered by Sue Zuniga, that he was standing at the foot of the bed and said, 'I didn't touch the little girl.' " (Tr. 277-78.) The trial court responded, "Okay. Very good. I'm going to instruct the jury to disregard that statement." (Tr. 278.) Defendant asserts his trial counsel should have objected following the noted exchange.

**{¶60}** We acknowledge the transcript is confusing concerning which statement the court intended the jury to disregard. One interpretation suggests the court instructed the jury to disregard its own statements regarding defendant's not guilty plea. Another interpretation suggests the court instructed the jury to disregard defendant's statement denying he touched the victim. We need not speculate about the court's true intentions, as the trial court instructed the jury that closing arguments are not evidence. (Tr. 286.) Moreover, the court did not strike any of Zuniga's testimony that defendant denied touching the victim. Thus, we cannot find the requisite prejudice from defense counsel's failure to object to the court's statement.

**{¶61}** Because defendant is unable to demonstrate prejudice from any of the instances in which he contends his trial counsel's performance was deficient, his claim that he was denied the effective assistance of counsel is unpersuasive. We therefore overrule defendant's sixth assignment of error.

**VIII. Fourth Assignment of Error – Sentence**

**{¶62}** Defendant's fourth assignment of error asserts his sentence is contrary to law. The judgment entry journalizing defendant's conviction and sentence states "[t]he Court finds that a prison term is mandatory pursuant to R.C. 2929.13(F)." (Judgment Entry, 1.) Defendant correctly asserts R.C. 2929.13(F) does not subject defendant to mandatory prison time for his GSI offense. The state properly concedes the statement in the judgment entry is inaccurate.

**{¶63}** A prison term is mandatory for a GSI offense only when "the victim is less than thirteen years of age" and either of the following applies: (a) "the offender previously was convicted of or pleaded guilty to rape, the former offense of felonious sexual penetration, gross sexual imposition, or sexual battery, and the victim of the previous offense was less than thirteen years of age"; or (b) "the offense was committed on or after August 3, 2006, and evidence other than the testimony of the victim was admitted in the case corroborating the violation." R.C. 2929.13(F)(3)(a) and (b). Neither applies here, and defendant thus was not subject to a mandatory prison term under the statute.

**{¶64}** At the sentencing hearing, the trial court did not mention a mandatory sentence for defendant's GSI offense. Rather, the trial court noted that not only did the offense carry a "presumption" of prison time but also the individual circumstances of this case convinced the trial court to "go along with the presumption in this case and impose a prison sentence." (Sentencing Tr. 15.) The judgment entry reflects the three-year prison sentence the trial court imposed at the sentencing hearing; it further reflects the mandatory term of post-release control that the trial court explained to defendant at the sentencing hearing. The only discrepancy between what transpired at the sentencing

hearing and what is reflected in the judgment entry is the word "mandatory" in the judgment entry to describe the prison term imposed.

**{¶65}** Because the three-year sentence was within the statutory range of permissible sentences the trial court could impose for this offense, neither the sentencing hearing nor the judgment entry reflects an abuse of discretion in the trial court's imposing the noted sentence. See R.C. 2929.14(A)(3). Moreover, because the word "mandatory" in the judgment entry was a clerical error that does not accurately reflect the proceedings of the sentencing hearing held October 29, 2009, we may modify the judgment entry to correct the clerical error in the judgment entry. See R.C. 2953.07(A); Crim.R. 36.

**{¶66}** Accordingly, we sustain defendant's fourth assignment of error to the extent that we modify the judgment entry to remove the word "mandatory" with respect to defendant's prison term.

**IX. Disposition**

**{¶67}** Having overruled defendant's first, second, third, fifth and sixth assignments of error, and having sustained his fourth assignment of error to the limited extent indicated, we affirm the judgment of the Franklin County Court of Common Pleas as modified.

*Judgment affirmed as modified.*

FRENCH and CONNOR, JJ., concur.

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