

[Cite as *State v. Garrett*, 2010-Ohio-5431.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO, : APPEAL NO. C-090592  
Plaintiff-Appellee, : TRIAL NO. B-0806496  
vs. : *DECISION.*  
RODNEY GARRETT, :  
Defendant-Appellant. :

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: November 10, 2010

*Joseph T. Deters*, Hamilton County Prosecuting Attorney, and *Rachel Lipman Curran*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Roger W. Kirk*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

**J. HOWARD SUNDERMANN, Presiding Judge.**

{¶1} Defendant-appellant Rodney Garrett was indicted for the rape, kidnapping, and aggravated robbery of H.W. on February 13, 2000, the aggravated robbery and robbery of Kimberly Mattingly on August 6, 2003, and the aggravated robbery and robbery of Antoinette McCrary on August 12, 2003. Prior to trial, Garrett moved to sever the charges relating to each victim. The trial court denied his motion, and all three incidents were tried together before a jury.

{¶2} The jury found Garrett guilty of the aggravated robbery, kidnapping, and rape of H.W., as well as the aggravated robbery and robbery of McCrary, but it acquitted him of the aggravated robbery and robbery of Mattingly. The trial court imposed maximum and consecutive ten-year prison terms for the aggravated robbery, kidnapping, and rape counts related to H.W. The trial court merged the aggravated-robbery and robbery counts relating to McCrary, imposed the maximum ten-year prison term for the aggravated-robbery count, and made that term consecutive to the three ten-year prison terms relating to H.W., for a total aggregate sentence of 40 years' incarceration. The trial court also classified Garrett as a Tier III sex offender. Garrett now appeals, raising eight assignments of error. Finding none of his arguments meritorious, we affirm the trial court's judgment.

***I. The Kidnapping, Rape, and Aggravated Robbery of H.W.***

{¶3} At trial, the state presented evidence that in the early morning hours of February 13, 2000, H.W., a college student, was walking along the block from a neighborhood delicatessen to her apartment, when a man approached her from behind, placed a broken bottle against her throat, and clasped his hand over her mouth and nose. He took H.W. to an isolated walkway leading to some apartments

nearby and told her to take her pants off. He then tried to rape her both vaginally and rectally, while holding her hands up against a wall.

{¶4} When he could not perform the rape, he told H.W. to put her pants back on. H.W. pleaded with the man to release her, but he silenced her by placing his hand tightly over her mouth and nose. The man then forced H.W. to walk up the street and onto another street to a stairway by some apartments. H.W. testified that she thought about running away, but no one was present and she was afraid that the man would kill her, so she just obeyed his commands.

{¶5} When they reached the stairway, something startled the man. He forced H.W. to walk back down the stairs, onto the street, and down the driveway of a house there. He took her back by a garage, pulled her pants down, and took off one of her shoes. He then made H.W. lay on her stomach. He again tried to penetrate her from behind. He could not. So the man covered H.W.'s eyes with his knit cap and told her to flip over. The man then raped H.W., ejaculating inside her. Before running away, he told H.W. to give him all her money. She gave him three dollars, which was all she had.

{¶6} H.W. jumped a fence and ran to her car, which was parked nearby. As she drove down the street, she saw two police officers. She stopped her car, jumped out, and reported the rape. She took the officers to the rape scene and provided them with the details of the attack. When asked for a description of her attacker, H.W. told police that he was a black man who was 20 to 25 years of age, with a medium build and of medium height, and that he had been wearing a black knit cap, a black sweat shirt, blue jeans, and brown boots. The police searched the area, but they were unable to find a man matching this description.

{¶7} H.W. was then taken to University Hospital in Cincinnati where she was examined by Arlean Humphreys, a sexual-assault nurse examiner. Humphreys testified that she interviewed H.W. and conducted a physical exam. During the exam, she observed tears in H.W.'s perineum, the skin between her vagina and rectum. She testified that the tears could have been consistent with trauma from the sexual assault. Humphreys also collected evidence during the exam, including oral, vaginal, and rectal swabs that she dried and sealed in separate envelopes before including them in a rape kit. Humphreys testified that she sealed the rape kit and locked it in a social worker's office at the hospital.

{¶8} Fifteen days later, Regina Frisby, an employee with the Cincinnati Police Department's Personal Crimes Unit, picked up H.W.'s rape kit from the social worker and transported it to the property room, a locked facility, at the police department. The following day, the rape kit was taken to the Hamilton County Coroner's laboratory for analysis.

{¶9} In March 2000, Joan Burke, a serologist and DNA analyst at the Hamilton County Coroner's office, tested the oral, vaginal, and rectal swabs in H.W.'s rape kit. The vaginal and rectal swabs tested positive for semen. There was a backlog in processing cases at that time, so Burke was unable to perform a DNA analysis on the swabs. As a result, she cut off the cotton tops of the vaginal and rectal swabs, sealed them in separate bags, labeled them, and placed them in a freezer at the coroner's office for further testing.

{¶10} When Burke later tested the semen from the swabs, she found a mixture of DNA from H.W. and another person. Burke testified that the frequency of the other person's particular DNA strand in the semen was 1 in 5 quintillion 266 quadrillion Caucasian individuals or 1 in 352 quadrillion 900 trillion African-

American individuals. Burke further testified that because only 6.5 billion people live on Earth, this particular DNA strand would have been unique to one person, unless that person had an identical twin. She placed the DNA profile of this other person into a DNA database in the coroner's office and into the Combined DNA Index System (CODIS), a national DNA database system. Burke then waited for the police to provide her with the DNA of a suspect for comparison with the DNA profile.

{¶11} In the meantime, the police had photographed and processed the crime scenes, but they were unable to recover any evidence identifying the perpetrator. They had also worked with H.W. to make a composite sketch of the rapist, which was then distributed to a number of police agencies. In addition, they had canvassed the area where the rape had occurred, looking for any witnesses, had reviewed local surveillance video, and had conducted plainclothes surveillance of the area, but they were unable to develop any further leads regarding the identity of the suspect. As a result, H.W.'s case was placed on inactive status.

### ***III. The Aggravated Robbery of Antoinette McCrary***

{¶12} On August 6, 2003, Antoinette McCrary, a cab driver, picked up a male passenger at University Hospital and drove him to multiple locations before ending up on a dead-end street off of Sycamore Avenue, in Cincinnati. The man grabbed McCrary, put his arms around her neck, and told her to give him all her money. He threatened to kill her and said he had a weapon. She felt him holding something with a point to her side. McCrary struggled with the man, scratching and biting him, before he fled from the cab with her money.

{¶13} McCrary called the police. She told police that her attacker was a black man who had short black hair and brown eyes, was five feet six inches to five feet eight inches tall, had a medium build, and was wearing a white T-shirt and black

jeans. A broadcast was put out, but no one matching that description was located by police. Although McCrary complained of a sore head, she otherwise had no visible injuries. When McCrary told police that she had scratched and bit her attacker, they looked inside her cab and saw a number of items with bloodstains on them. As a result, McCrary's cab was processed for evidence.

{¶14} The police collected a number of items from inside the cab, including a blood-stained envelope that was placed in a sealed bag and given to William Hillard, a criminalist for the Cincinnati Police Department, for testing. Hillard tested the blood-stained envelope for fingerprints, but he was unable to recover any usable prints. He then resealed the evidence bag, initialed it, and returned it to the property room. Although Hillard could not find his initials on the evidence seal at trial, he testified that he had resealed the bag, and that his initials could have been inadvertently taped over. This evidence was then forwarded to Burke for DNA testing. Burke's testing yielded a mixed DNA profile because there were skin cells on the envelope in addition to blood. Without a known sample for her to compare the DNA to, she was unable to enter a DNA profile into a computer database.

{¶15} In the meantime, the police had developed a suspect in McCrary's robbery. In April 2004, McCrary was shown a photo array that included this suspect. McCrary selected the suspect's photo from the array. The police then obtained buccal swabs from McCrary and the suspect and submitted them to Burke for testing. Burke generated a DNA profile from the swabs and compared them to the mixed DNA profile obtained from the envelope.

{¶16} The suspect was excluded as the source of the DNA on the envelope. But after comparing McCrary's known DNA to the mixed DNA profile from the envelope, Burke obtained a separate DNA profile that she entered into the CODIS

system. Once she entered the DNA profile, she found a match for H.W.'s case. Thus, Burke informed police that the person who had deposited the semen in the H.W. case had also deposited blood on the envelope in the McCrary robbery. After exhausting all their leads in McCrary's case, the police waited patiently for a DNA match.

***III. CODIS Match Linking Garrett to the H.W. and McCrary Cases***

{¶17} In 2006, Burke learned from the CODIS database that Garrett's DNA profile matched the DNA profiles from the H.W. and the McCrary cases. She forwarded that information to police. As a result, H.W. and McCrary were separately shown a photo array that included Garrett's photo, but neither woman was able to identify anyone in the array. In 2008, Garrett was located in Texas. He was arrested and returned to Cincinnati. While he was in custody, a buccal swab was taken from Garrett and submitted to Burke for DNA testing. Burke testified that the DNA profile obtained from Garrett's buccal swab matched the DNA profiles from the semen in H.W.'s case and from the blood-stained envelope in McCrary's case.

{¶18} Garrett's counsel subsequently hired Dr. Julie Heinig, the assistant director at an independent laboratory, DNA Diagnostic Center, to review Burke's DNA analysis. At trial, Dr. Heinig testified as an expert for the state. She told the jury that Burke had followed the proper procedures for DNA testing of the items in the H.W. and the McCrary cases, and that she agreed with Burke's conclusions that Garrett's semen was on the vaginal and rectal swabs in the H.W. case, and that his blood was on the envelope recovered in the McCrary case.

***II. Garrett's Appeal***

{¶19} In this appeal, Garrett raises eight assignments of error: (1) the trial court erred by denying his motion for relief from joinder; (2) the trial court erred when it admitted testimony regarding Garrett's CODIS match; (3) and (5) the

assistant prosecuting attorney engaged in misconduct that deprived him of a fair trial; (4) the trial court erred when it allowed the sexual-assault nurse examiner to testify as an expert; (6) Garrett's convictions were against the manifest weight of the evidence and rested on insufficient evidence; (7) the kidnapping offense was an allied offense of similar import to the rape and aggravated-robbery offenses in the H.W. case; and (8) the trial court abused its discretion in sentencing Garrett to 40 years' incarceration.

**A. Joinder of the Offenses**

{¶20} In his first assignment of error, Garrett argues that the trial court committed reversible error by refusing to sever the counts relating to each victim, thus rendering his trial fundamentally unfair. Garrett argues that the jury could not have evaluated the evidence relating to each of the crimes separately, and that he was prejudiced as a result of the joinder of the charges against him.

{¶21} The law favors the joinder of multiple offenses in a single trial.<sup>1</sup> Nevertheless, a trial court may grant severance under Crim.R. 14 if a defendant affirmatively demonstrates that he will be prejudiced by the joinder.<sup>2</sup> The state can negate claims of prejudice by showing either "(1) that the evidence for each count will be admissible in a trial of the other counts under Evid.R. 404(B) or (2) that the evidence for each count is sufficiently separate and distinct so as not to lead the jury into treating it as evidence of another."<sup>3</sup> The tests are disjunctive so that the satisfaction of one test negates the defendant's claim of prejudice without the need to consider the other.<sup>4</sup>

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<sup>1</sup> *State v. Torres* (1981), 66 Ohio St.2d 340, 343, 421 N.E.2d 1288.

<sup>2</sup> *State v. Roberts* (1980), 62 Ohio St.2d 170, 405 N.E.2d 247.

<sup>3</sup> *State v. Bennie*, 1st Dist. No. C-020497, 2004-Ohio-1264, at ¶20.

<sup>4</sup> *State v. Gravely*, 10th Dist. Nos. 09AP-440 and 09AP-441, 2010-Ohio-3379, at ¶38.

{¶22} Here, we find no prejudice from the trial court’s failure to sever the charges relating to each victim, because the proof presented as to each of the charges was direct and uncomplicated, thus enabling the jury to segregate the relevant proof for each offense. The state’s evidence was presented chronologically by victim, and the trial court instructed the jury to consider each count separately. The fact that the jury acquitted Garrett of the charges from the Mattingly incident, which was the state’s weakest case, further illustrates that the jury evaluated the evidence separately for each crime.<sup>5</sup> Because the trial court’s failure to sever the counts did not result in prejudice, we overrule Garrett’s first assignment of error.

***B. Other-Acts Evidence***

{¶23} In his second assignment of error, Garrett contends that the trial court erred in permitting the state to introduce “other acts” evidence. His argument centers on a motion in limine that defense counsel had filed prior to trial. In the motion, defense counsel had sought to prevent the state from making any reference to the CODIS database because it would lead the jury to infer that Garrett had one or more prior criminal convictions. Counsel argued that any mention of a match from the CODIS database would lead the jury to infer that Garrett had one or more prior criminal convictions. The trial court overruled Garrett’s motion in limine on the basis that there had to be some explanation as to how the DNA match had occurred, and that the general public was unaware of the DNA requirements for convictions. The court did, however, preclude the state from making any direct reference to the fact that Garrett’s DNA profile was in the CODIS database as a result of his prior convictions. Garrett’s counsel accordingly objected throughout the trial to any

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<sup>5</sup> *Bennie*, supra, at ¶23.

reference made by the prosecuting attorney or the state's witnesses to the CODIS database.

{¶24} On appeal, Garrett contends the trial court should have prohibited the state and its witnesses from referring to the CODIS database because any reasonable juror would have concluded that he had been convicted of felony offenses due to the presence of his DNA in the CODIS system.

{¶25} Generally, evidentiary motions, such as motions in limine, are directed to the trial court's discretion.<sup>6</sup> A trial court's rulings on such motions will not be disturbed on review absent an abuse of discretion.<sup>7</sup> An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable.<sup>8</sup>

{¶26} During the trial, the assistant prosecuting attorney did not produce any evidence or present any argument as to whose DNA profiles were contained in the CODIS database or how those profiles had come to be stored within the database. Nor was there was any suggestion by the assistant prosecuting attorney that the database contained any samples from convicted felons. The jury, moreover, heard no evidence or argument concerning Garrett's criminal history. Thus, Garrett's argument that jurors actually knew that his DNA was in CODIS because he had been convicted of other crimes is purely speculative. Because the trial court's decision to admit the CODIS testimony was not arbitrary, unreasonable, or unconscionable, we overrule Garrett's second assignment of error.<sup>9</sup>

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<sup>6</sup> *State v. Brown* (1996), 112 Ohio App.3d 583, 601, 679 N.E.2d 361.

<sup>7</sup> *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, at ¶92.

<sup>8</sup> *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

<sup>9</sup> See, e.g., *State v. Townsend*, 8th Dist. No. 87521, 2006-Ohio-5457, at ¶64 (noting that reference to the CODIS database in and of itself has been permitted by a number of Ohio appellate courts, including this one).

**C. Prosecutorial Misconduct**

{¶27} In his third assignment of error, Garrett contends that the assistant prosecuting attorney engaged in misconduct by asking leading questions of the state's witnesses and by eliciting expert testimony from Humphreys, the sexual-assault nurse examiner. In his fifth assignment of error, Garrett claims that the prosecutor engaged in misconduct during closing argument. He also claims that the prosecutor engaged in misconduct by eliciting testimony about the CODIS system throughout the trial.

{¶28} The touchstone of due-process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.<sup>10</sup> For this reason, misconduct is not grounds for reversal unless the defendant has been denied a fair trial.<sup>11</sup> The relevant inquiry for an appellate court when reviewing a claim of prosecutorial misconduct is whether the prosecutor's remarks were improper, and if so, whether a substantial right of the accused was adversely affected.<sup>12</sup>

**1. Leading Questions**

{¶29} Garrett first contends that the assistant prosecuting attorney improperly used leading questions during his direct examination of the state's witnesses. While we agree that the assistant prosecuting attorney asked some leading questions during the trial, not all of the questions Garrett challenges on appeal were leading or improper. Most of the questions referred to undisputed facts and were not even objected to during the trial. Garrett, furthermore, has not

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<sup>10</sup> *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940.

<sup>11</sup> *State v. Maurer* (1984), 15 Ohio St.3d 239, 266, 473 N.E.2d 768.

<sup>12</sup> *State v. Lott*, 51 Ohio St.3d 160, 165, 555 N.E.2d 293.

demonstrated that he was prejudiced by any of the questions or that the testimony elicited was itself inadmissible.

## **2. Elicitation of Expert Testimony from SANE**

{¶30} Garrett next argues that the assistant prosecuting attorney committed misconduct when he elicited expert testimony from Humphreys, the sexual-assault nurse examiner, regarding the cause of H.W.'s injuries. Because we have concluded in response to the fourth assignment of error that Humphreys's testimony was admissible, we cannot say that the prosecuting attorney's elicitation of this testimony involved misconduct.

## **3. Closing Argument**

{¶31} Garrett also argues that the assistant prosecuting attorney denigrated defense counsel and improperly shifted the burden of proof to Garrett during closing argument. We judge a prosecutor's remarks in closing argument in the context of the entire trial.<sup>13</sup> The prosecution is entitled to wide latitude in closing argument.<sup>14</sup>

{¶32} During closing argument, Garrett's counsel had implied that the blood-stained envelope and semen samples had been tampered with, but Garrett had never presented evidence to show that any police officer, social worker, nurse, or other person had the motivation or opportunity to tamper with this evidence. Moreover, Garrett never presented any evidence disputing the reliability of the DNA evidence, and his court-appointed expert testified for the state. Thus, the state was entitled to rebut Garrett's unsupported assertion that the evidence had been tampered with and to assert during closing argument that Garrett's claim that the

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<sup>13</sup> *State v. Durr* (1991), 58 Ohio St.3d 86, 94, 568 N.E.2d 674.

<sup>14</sup> *State v. Smith* (1984), 14 Ohio St.3d 13, 470 N.E.2d 883; *State v. Smith*, 1st Dist. No. C-080126, 2009-Ohio-3727, at ¶49.

blood and semen did not contain his DNA was “absurd.” With respect to the prosecuting attorney’s comment that Garrett had been reading the newspaper during the trial, the comment merely reflected what the jurors could have observed themselves. And even if the comment was improper, we cannot say that, absent that one comment, the outcome of Garrett’s trial would have been any different. Garrett was convicted because his DNA was identified from the semen that was inside H.W.’s vagina, and from the blood that was inside McCrary’s cab. This evidence was so significant that the assistant prosecutor’s comment could not have meaningfully affected Garrett’s convictions.

#### ***4. References to CODIS Database***

{¶33} Finally, Garrett argues that the prosecutor committed misconduct throughout the trial by referring to the CODIS database. But based upon our holding in response to the second assignment of error that the references to the CODIS database were not impermissible other-acts evidence, we cannot say the prosecutor’s comments amounted to misconduct. We, therefore, overrule Garrett’s third and fifth assignments of error.

#### ***D. Expert Testimony of Sexual Assault Nurse Examiner***

{¶34} In his fourth assignment of error, Garrett argues that the trial court erred when it permitted Humphreys, the sexual-assault nurse examiner, to testify that it was not uncommon for an alleged rape victim to have no trauma in the vagina, and that H.W.’s perineum tears could have been caused by a penis being placed in either her rectum or her vagina. Garrett argues that because Humphreys was not qualified as a medical doctor, she could not render these opinions. We disagree.

{¶35} Evid.R. 702 provides that a witness may testify as an expert if (1) the witness is qualified by specialized knowledge, skill, experience, training, or education

regarding the subject matter; (2) the testimony either relates to matters beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons; and (3) the testimony is based upon scientific, technical, or other specialized information. The determination of whether a witness possesses the qualifications necessary to give expert testimony lies within the sound and broad discretion of the trial court.<sup>15</sup> Such a determination will not be reversed by an appellate court unless the trial court abused its discretion.<sup>16</sup>

{¶36} Here, Humphreys testified that she was a registered nurse who had participated in specialized training to care for and collect evidence from victims who had allegedly been raped. This training qualified her as a sexual-assault nurse examiner. She further testified that she had treated a large number of patients, and that she had previously testified in the same capacity. Because Humphreys's testimony related to matters beyond the scope of a layperson's knowledge and was based on her specialized education, training, and experience, we cannot conclude that the trial court abused its discretion in permitting her testimony.<sup>17</sup> As a result, we overrule Garrett's fourth assignment of error.

#### ***E. Weight and Sufficiency of the Evidence***

{¶37} In his sixth assignment of error, Garrett argues that the state failed to present sufficient evidence to support his convictions and that his convictions were against the manifest weight of the evidence.

{¶38} When a defendant claims that his conviction is supported by insufficient evidence, this court must review the evidence in the light most favorable

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<sup>15</sup> *State v. Clark* (1995), 101 Ohio App.3d 389, 411, 655 N.E.2d 795.

<sup>16</sup> *State v. Maupin* (1975), 42 Ohio St.2d 473, 479, 330 N.E.2d 708.

<sup>17</sup> See *State v. Young*, 6th Dist. No. L-06-1106, 2007-Ohio-754, at ¶19-23; *State v. Brant* (Sept. 22, 1995), 11th Dist. No. 94-P-0117.

to the prosecution and determine whether any rational trier of fact could have found all the elements of the crime proved beyond a reasonable doubt.<sup>18</sup> When addressing a manifest-weight claim, this court must review the record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding the defendant guilty.<sup>19</sup>

{¶39} Garrett argues that the state failed to prove his identity as the perpetrator because H.W. and McCrary could not identify him as their attacker, and because gaps in the chain of custody made the DNA evidence unreliable.

{¶40} While H.W. testified that she could not positively identify her attacker because he had approached her behind, tried to rape her from behind, and covered her eyes with a knit cap so she could not see his face when his efforts eventually succeeded, she did testify that Garrett's appearance was consistent with the general description that she had given police after the rape. And Garrett's DNA was identified from the sperm found inside H.W.'s vagina immediately after the rape.

{¶41} Similarly, even if McCrary's visual identification of Garrett was flawed, his identity as the perpetrator was not. McCrary testified that she had scratched and bit Garrett during the robbery and that he had bled as a result. And Garrett's DNA was in the blood found on an envelope in McCrary's cab immediately after the robbery.

{¶42} Burke testified that Garrett's DNA pattern was unique. She told the jury that "[u]nless Rodney Garrett has an identical twin, the DNA from the semen in H.W.'s case came from him, and the blood from the envelope in the McCrary case

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<sup>18</sup> *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132.

<sup>19</sup> *Tibbs v. Florida* (1982), 457 U.S. 31, 102 S.Ct. 2211.

came from him.” Julie Heinig, the defense expert, concurred in Burke’s opinion. Thus, contrary to Garrett’s assertions, this evidence was sufficient to prove his identity as the perpetrator of the offenses.

{¶43} With respect to Garrett’s arguments regarding the DNA evidence, the Ohio Supreme Court has held that chain-of-custody problems affect evidentiary weight, not admissibility,<sup>20</sup> and that the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact.<sup>21</sup> Based upon our review of the record, we cannot conclude that the jury lost its way in affording significant weight to the DNA evidence in this case.

{¶44} Humphreys testified that the vaginal, rectal, and oral swabs that she had taken as part of H.W.’s rape kit were dried, sealed in separate envelopes, and initialed by her. Humphreys then placed all the sealed envelopes in large manila envelopes, which she also sealed. She then placed those envelopes in another bag, which she again sealed and initialed. Humphreys gave the bag to the social worker and watched as she locked it in a locker at the hospital. Humphreys testified that the police were to pick up the rape kit and then transport it to the coroner’s office. Frisby testified that she had picked up the rape kit from the social worker and had signed for it on the evidentiary report. The social worker releasing the kit had also signed the report. A copy of this evidentiary report was introduced into evidence at the trial.

{¶45} While Garrett had introduced into evidence a different copy of the evidentiary report on which Humphreys had signed on the wrong line, crossed out

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<sup>20</sup> *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, at ¶57; *State v. Richey*, 64 Ohio St.3d 353, 356, 1992-Ohio-44, 595 N.E.2d 915; see, also, *State v. Hunter*, 169 Ohio App.3d 65, 2006-Ohio-5113, 861 N.E.2d 898; *State v. High*, 143 Ohio App.3d 232, 247-250, 2001-Ohio-3530, 757 N.E.2d 1176.

<sup>21</sup> *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

her signature, and then signed again, Frisby explained to the jury that this copy was an original copy of the evidentiary report that the nurse had retained following the exam, which was why neither her signature nor the social worker's signature was on the document. In light of this testimony, we cannot conclude that the jury lost its way in affording little weight to the chain-of-custody argument that Garrett had made with respect to the rape kit.

{¶46} Similarly, Criminalist Hillard testified that evidence kept at the police department was sealed, tagged, and stored in the secure police property room until it was transferred to the coroner's lab. Police signed in when they delivered evidence and when they removed it. The bag of evidence from McCrary's robbery had been opened prior to trial, and although Hillard could not find his initials on the evidence seal, he indicated that he had resealed the bag, and that his initials could have been taped over. This "break" in the chain of custody was insignificant, and the jury did not lose its way in giving it little, if any, weight.

{¶47} At trial, Garrett also argued that the DNA evidence was unreliable because H.W.'s rape kit had remained untouched too long, from February 13 through February 28, 2000. But even if police protocol had required H.W.'s rape kit to be transferred sooner, Burke testified that the 15-day lag would not have degraded the value of the DNA. Burke testified that she tested the swabs from the rape kit on March 13, 2000, and upon finding semen on the vaginal and rectal swabs, she cut off the cotton tips of the swabs and placed them in sealed envelopes in the DNA freezer at the coroner's office, to prevent the DNA from degrading before she could conduct more testing. Heinig further testified that Burke had followed the proper chain-of-custody procedures in both cases. Garrett, moreover, never showed that any police officer, social worker, nurse, or other person had the motivation or opportunity to

tamper with the rape kit. As a result, we cannot conclude that the jury lost its way in relying upon the DNA evidence to find Garrett guilty of the offenses. As a result, we overrule his sixth assignment of error.

**F. Allied Offenses**

{¶48} In his seventh assignment of error, Garrett argues that trial court erred as a matter of law in convicting and sentencing him separately for the kidnapping, rape, and aggravated robbery of H.W. He argues that these crimes were allied offenses of similar import that were committed with the same animus.

{¶49} In determining whether two crimes are allied offenses of similar import, we employ a two-part test.<sup>22</sup> We first compare the elements of the two crimes.<sup>23</sup> “If the elements of the offenses correspond to such a degree that the commission of one crime will necessarily result in the commission of the other, the crimes are allied offenses of similar import, and the court must proceed to the second part of the test.<sup>24</sup> In the second part of the test, the defendant’s conduct is reviewed to determine whether the defendant can be convicted of both offenses.<sup>25</sup> If we determine “either that the crimes were committed separately, or there was a separate animus for each crime, the defendant may be convicted of both offenses.”<sup>26</sup>

{¶50} The Ohio Supreme Court has held that “[t]he crime of kidnapping, defined by R.C. 2905.01(A)(2), and the crime of aggravated robbery, defined by R.C. 2911.01(A)(1), are allied offenses of similar import pursuant to R.C. 2941.25.<sup>27</sup> The Ohio Supreme Court has also held that “implicit within every forcible rape” is a

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<sup>22</sup> *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶14, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, 526 N.E.2d 816.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059, 905 N.E.2d 154, syllabus.

kidnapping.<sup>28</sup> Thus, rape and kidnapping are also allied offenses of similar import.<sup>29</sup> As a result, we must examine Garrett's conduct to determine whether he committed the offenses separately or with a separate animus so as to permit his conviction for each offense under R.C. 2941.25(B).

{¶51} In *State v. Logan*, the Ohio Supreme Court established guidelines to determine whether kidnapping and another offense are committed with a separate animus so as to permit separate punishment under R.C. 2941.25(B).<sup>30</sup> The court held that "where the restraint or movement of the victim is merely incidental to a separate underlying crime, there exists no separate animus sufficient to sustain separate convictions; however, where the restraint is prolonged, the confinement is secretive, or the movement is substantial so as to demonstrate a significance independent of the other offense, there exists a separate animus as to each offense sufficient to support separate convictions."<sup>31</sup> The court also held that "where the asportation or restraint of the victim subjects the victim to a substantial increase in risk of harm separate and apart from that involved in the underlying crime, there exists a separate animus as to each offense sufficient to support separate convictions."<sup>32</sup>

{¶52} In this case, Garrett's movement of H.W. was substantial, H.W.'s restraint was prolonged, and her confinement was secretive. Garrett approached H.W. from behind with a broken bottle, covered her mouth and nose with his hand, and forced her into an isolated apartment walkway. After unsuccessfully raping her

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<sup>28</sup> See *Winn*, supra, at ¶23, quoting *State v. Logan* (1979), 60 Ohio St.2d 126, 130, 397 N.E.2d 1345.

<sup>29</sup> See, also, *Cabrales*, supra, at ¶25, citing *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29, at ¶89-95 (kidnapping and rape are allied offenses).

<sup>30</sup> *Logan*, supra, at syllabus.

<sup>31</sup> *Id.* at syllabus.

<sup>32</sup> *Id.* at syllabus.

there, Garrett forced H.W., while again covering her mouth and nose, to walk two to three blocks away to a second location, and then finally to a third location, the rear yard of a house, where he raped and robbed her. Garrett's restraint also increased the risk of harm to H.W. H.W. testified that she followed Garrett's commands because she feared Garrett was going to kill her.

{¶53} Garrett's method of kidnapping reflected a separate animus from the rape and robbery. Garrett's motivation was not merely to rape or rob H.W. because he could have done that on the first walkway. Instead, Garrett forced H.W. to three different locations, using a broken bottle as a weapon. Because H.W.'s kidnapping was not merely incidental to the aggravated robbery or rape, Garrett was properly convicted and sentenced for all three offenses. As a result, we overrule his seventh assignment of error.

#### **G. Aggregate Sentence**

{¶54} In his eighth assignment of error, Garrett argues that the trial court erred in sentencing him to the maximum prison term for each offense and then making those terms consecutive, for a total aggregate sentence of 40 years in prison.

{¶55} Following the Ohio Supreme Court's decision in *State v. Kalish*, we employ a two-step analysis for reviewing felony sentences.<sup>33</sup> Under the first step, we must determine whether the sentences are clearly and convincingly contrary to law.<sup>34</sup> If they are not contrary to law, then we must determine whether the trial court abused its discretion in imposing the sentences.<sup>35</sup>

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<sup>33</sup> 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

<sup>34</sup> *Id.* at ¶14.

<sup>35</sup> *Id.* at ¶17.

{¶56} Garrett first argues that his sentences were contrary to law because the three prison terms imposed for the offenses involving H.W. were made consecutive, and because the aggregate sentence imposed for the three counts exceeded the maximum sentence of ten years for each felony. But the Ohio Supreme Court has held that courts are not prevented from imposing an aggregate sentence that exceeds an individual crime's statutorily allowed sentence, when the individual sentences imposed by the court are within the range of penalties authorized by the legislature.<sup>36</sup> Because each of Garrett's individual sentences was within the range provided by the applicable statute, they were not contrary to law.

{¶57} Nor can we conclude that the trial court abused its discretion in sentencing Garrett to 40 years' incarceration. The court had evidence before it that Garrett had, in a public place, raped, kidnapped, and robbed a young woman who was a complete stranger to him. He had also robbed a female cab driver on a public street. Despite DNA evidence linking him to the offenses, Garrett never exhibited remorse and denied culpability for the offenses even after being found guilty. In light of these facts and Garrett's criminal history, we cannot say that the trial court abused its discretion in sentencing Garrett to an aggregate term of 40 years in prison. As a result, we overrule his eighth assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

**HENDON and MALLORY, JJ.**, concur.

*Please Note:*

The court has recorded its own entry this date.

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<sup>36</sup> See *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, 888 N.E.2d 1073, syllabus.