

ORIGINAL

THE OHIO STATE SUPREME COURT  
2013

STATE OF OHIO

Case No. 13-1394

Plaintiff/Appellee

On Appeal from Tuscarawas  
County Court of Appeals,  
Fifth Appellate District

vs.

DANIAL MCCOMAS

Defendant/Appellant

Court of Appeals Case No. 2013 AP 03 001

MEMORANDUM IN SUPPORT OF JURISDICTION

Daniel McComas  
Inmate No. 768167  
Chillicothe Correctional Institution  
P.O. Box 5500  
Chillicothe, Ohio 45601  
Defendant/Appellant Acting Pro se

Ryan Styler (0069730)  
Tuscarawas County Prosecuting Attorney  
Amanda K. Miller (0078958)  
Assistant Prosecuting Attorney  
125 E. High Avenue  
New Philadelphia, Ohio 44663  
Plaintiff/Appellee

RECEIVED  
AUG 29 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

FILED  
AUG 29 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

## TABLE OF CONTENTS

	<b>Page</b>
NOTE TO COURT REGARDING CITATION OF TRANSCRIPTS	-i-
TABLE OF AUTHORITIES	-ii-
STATEMENT OF ASSIGNMENTS OF ERRORS	-iii-
STATEMENT AS TO WHY THIS ISSUE IS OF GREAT IMPORTANCE	1
FACTS OF THE CASE	3
ASSIGNMENT OF ERROR 1 ARGUMENT	5
ASSIGNMENT OF ERROR 2 ARGUMENT	11
ASSIGNMENT OF ERROR 3 ARGUMENT	13
CONCLUSION	15
CERTIFICATE OF SERVICE	15
APPENDIX:	
Judgment Entry of July 17 <sup>th</sup> , 2013 from the Fifth District Appellate Court A-1	

**NOTE TO COURT REGARDING CITATION OF TRANSCRIPT**

There were two separate trials in this case and transcripts have been prepared and filed for both and will be referenced throughout the Appellant's appeal

The first trial was held from the 20<sup>th</sup> of February, 2013 to the 21<sup>st</sup> of February, 2013. all references to that transcript will be TR1.

The second trial was held from the 25<sup>th</sup> of February, 2013 to the 28<sup>th</sup> of February, 2013. All references to that transcript will be TR2.

## Table of Authorities

### Case Law:

1. *State v Miller*, April 20, 1987 Tuscarawas App. No. 86AP060038 (pg 2)
2. *Downum v. United States*, 372 U.S. 734, 735-36, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (pg 2, 11)
3. *U.S. Ex rel Rush v Watson*, 28 F. Cas. 499, 501 (1868) (pg 2, 11)
4. *Oregon v Kennedy*, 456 U.S. 667,673, 72 L.Ed. 2d 416, 102 S. Ct. 2083 (1982) (pg 5)
5. *Serfass v. United States*, 420 U.S. 377, 388, 43 L.Ed 2d 265, 95 S. Ct. 1055,1975 (pg 5)
6. *Arizona v Washington* 434 U.S. 497, 516, 54 L.Ed. 2d 717, 98 S. Ct. 824 (pg 6, 11)
7. *U.S. Jorn* 400, U.S. 470, 487, 27, L.Ed. 2d 543, 91 S. Ct. 547 (1971) (pg 7)
8. *State v Jones* 91 Ohio St. 3d 335, 344 (2001) (pg 7)
9. *State v Raglin*, 83 Ohio St. 3d 253, 264 (1998) (pg 7)
10. *State v Ahmed* (2004), 103 Ohio St. 3d 27, 41, 813 N.E. 2D 637 (pg 7)
11. *State v Herring* (2002), 94 Ohio St. 3d 246, 254, 762 N.E. 2D 940 (pg 7)
12. *United States v Shafer*, 987 F 2d 1054, 1057 (Fourth Circuit 1993) (pg 7)
13. *Harris v Young*, 607 F 2d 1081, 1085 n. 4<sup>th</sup> Circuit 1979 (pg 8)
14. *United States v Sartori*, 730 F 2d 973, 976 (4<sup>th</sup> Circuit) (pg 8)
15. *State v. Smith, Clark*, App No. 2003-CA-23, 2004-Ohio-665 (pg 8)
16. *United States v Dinitz*, 424, U.S. 600, 609n 11, 47 L.Ed. 2d 267, 96 S. Ct. 1075 (pg 9)
17. *Aetna Ins. Co. v Kennedy* 301 U.S. 389, 393, 81 L.Ed 1177, 57 S. Ct. 809 (1937)(pg 9)
18. *U.S. ex rel Rush v Watson*, 28 F. Cas. 499, 501 (1868) (pg 9)
19. *Ramdass v Angelone*, 530 U.S. 156, 166, 147 L.Ed. 2d, 125, 120 S. Ct. 2113 (pg 10)
20. *United States v Sanford*, 429, U.S. 14, 15-16, 50 L.Ed. 2d 17 97 S.Ct. (1976) (pg 10)
21. *United States v Perez*, 22 U.S. (9 Wheat) 579, 580, 6 L.Ed. 165 (1824) (pg 6, 11)
22. *State v Otten* (1986) 33 Ohio App. 3D 339, 340 (pg 12)
23. *State v Thompkins* (1997), 78 Ohio St. 3d, 386 (pg 12)
24. *State v Long* (1978) 53 Ohio St. 2d 91, 98, 3d 178, 181-182, 372 N.E. 2d (pg 13)
25. *Blakemore v Blakemore* (1985) 5 Ohio St. 3d 217, 219 (pg 13)

### Statutory/Constitutional Law:

1. Fifth Amendment to the United States Constitution (pg 1)
2. ORC 2907.02 (A)(1)(b) (pg 12)
2. Fourteenth Amendment to the United States Constitution (pg 12)

## ASSIGNMENT OF ERRORS

1. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR A MISTRIAL DUE TO STATEMENTS MADE REGARDING POLYGRAPH EXAMINATIONS, THEREFORE INFRINGING UPON APPELLANT'S 5TH AMENDMENT RIGHTS TO "DOUBLE JEOPARDY."
2. THE FINDING THAT THE APPELLANT WAS GUILTY OF RAPE PURSUANT TO ORC 2907.02 (A)(1)(b) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE; HENCE THE SECOND TRIAL VIOLATED HIS 14TH AMENDMENT RIGHTS TO DUE PROCESS OF THE LAW.
3. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE TO EXCLUDE NEW EVIDENCE THAT THE PROSECUTION REVEALED AFTER THE CONCLUSION OF THE FIRST TRIAL.

**STATEMENT AS TO WHY THIS IS AN IMPORTANT CONSTITUTIONAL  
ISSUE AND ONE OF GREAT PUBLIC CONCERN AND INTEREST  
AND WHY THIS HONORABLE COURT SHOULD GRANT JURISDICTION**

The Matter brought before this Honorable Court by the Appellant is one that is an inherited right that has existed for over 200 years, protection against "Double Jeopardy." Without this right, the State and Federal Courts could keep trying an individual until they achieve a victory. Everybody has bad days whether it be at the office, at school, on the golf course, in your car, or even in Court; however that does not give someone the power to erase that day as if it never happened. We have to live with our bad days and our good days and move on from there; however that's not what happened on February 20, 2013 in the case at hand.

The Council for the Appellant was having a very good day on February 20, 2013, however as the record will show Council for the Prosecution was not having a good day and wanted that day erased as if it never happened; therefore was looking for a way out and erase that day as if it never happened; sort of like a "Do Over." The only problem was that the prosecution was looking for any reason possible to achieve her "Do Over," not considering the consequences or the Constitutional Rights of the Appellant.

Certain testimony concerning the Appellant's willingness to take a polygraph was explained by Officer Gray. The only reason Defense Council orchestrated this line of questioning of Officer Gray concerning the Appellant's willingness to take a polygraph was because it was in Officer Gray's report and part of the record, therefore the jury would have been privy to this information since Officer Gray's report would have been part of the record [TR 1 pg. 213-214]. However, for the prosecution, this was her way out of that bad day, her "Do Over," and she took full advantage of it, once again not considering Appellant's Constitutional Rights.

So, about 24 hours after the (4) questions were asked of Officer Gray and answered regarding his report, the prosecution asked for her "Do Over" by motioning the court to grant a mistrial. As the record will show, the previous day the prosecution objected to that line of questioning which was sustained by the judge who informed the jury and the courtroom about the inadmissibility of polygraphs and to disregard that line of questioning. However the judge

granted and gave the prosecution their "Do Over" by declaring the proceedings a mistrial; therefore also not taking into consideration the Appellant's Constitutional Rights.

The Appellant is entitled to relief because the trial court and the Fifth District Appellate Court's decisions were contrary to and involved an unreasonable application of clearly established Federal law and the decision was based upon an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings.

Jurisdiction must be granted for two reasons: First the trial court and Appellate court refused to establish legal principles announced by the United States Supreme Court on Appellant's case and further the decision to declare a mistrial was based on an Appellant case presented by the prosecution (**State v Miller, April 20, 1987 Tuscarawas App. No. 86AP060038**). In *State v Miller*, the roles were reversed and differ from the present case. Miller asked for the mistrial in that case and was granted, therefore there was no issue of "Double Jeopardy." There are certain situations, however, when a criminal defendant may be retried for the same offense without offending **double jeopardy** principles. **Downum v. United States, 372 U.S. 734, 735-36, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963)**. Absent judicial or prosecutorial misconduct intended to "goad" the defendant into moving for a **mistrial, double jeopardy** principles will not bar reprosecution where a criminal defendant consents to the declaration of a **mistrial. Kennedy, 456 U.S. At 673-76**. As previously stated, Miller consented to a mistrial, so "Double Jeopardy does not attach. When it comes down to deciding when a mistrial be declared as in *State v Miller* and as in the present case, the United States Supreme Court has often stated that course should "Indulge every reasonable presumption against [the] waiver" of fundamental rights. "Any doubts should be resolved in "Favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion." **Downum v United States 372 U.S. 734,738, 10 L.Ed 2d 100, S. Ct. 1033 (1963) quoting U.S. Ex rel Rush v Watson, 28 F. Cas. 499, 501 (1868)**.

Second, the trial court was unreasonable in it's determination of the facts not supported by the record. This court must find that the trial court and Appellate Courts' decisions resulted in

the deprivation of Appellant's Fifth Amendment Rights against twice placed in jeopardy.

In Sum, because Appellant, Danial McComas, did not consent to the trial court's declaration of a mistrial for which there was no necessity, the Constitution requires that this Honorable Court grant jurisdiction.

### **FACTS OF THE CASE**

The alleged victim, Cheyenne Craig, and her brother Dakota Craig, frequently stayed at the home of Vella Abbott due to her parents' work schedule. [TR 2 at pg. 155]. In fact there were times that they stayed at Miss Abbott's up to half the week. [TR 2 at pg. 185]. Daniel McComas, hereinafter referred to as "defendant," resided in the home of his mother, Vella Abbott, along with his other siblings. [TR 2 at pg. 156].

During the summer of 2011 Cheyenne Craig and her brother were staying at Vella Abbott's residence. [TR 2 at pg. 135]. Cheyenne Craig and Daniels' sister, Sierra McComas where watching television in the living room during the evening. [TR 2 at pg. 160-161]. Cheyenne alleged that the defendant came into the living room, sat next to her, and forced her to masturbate his penis with her hand. [TR 2 at pg. 163]. Then he allegedly forced her to lay down and inserted his penis between her buttocks. [TR 2 at pg. 166]. Lastly, she alleged that she went into his bedroom and they had sexual intercourse until he ejaculated inside of her. [TR 2 at pg. 154, 170-171]. After this she went to the bathroom and then went to sleep in the living room. [TR 2 at pg. 173-175]. However, she alleged she never changed her underwear, sanitary pad, or clothes that she was wearing that evening. [TR 2 at pg. 174, 181-182].

Upon waking the next day she and her brother walked back to their home. [TR 2 at pg. 177]. once there she wrote her mother a note stating the defendant had sex with her. [TR 2 at pg. 178]. Once her mother learned of this Cheyenne and her family went to the Newcomerstown police station and made a report to officer John Gray. [TR 2 at pg. 180]. Afterwards they went to Akron Children's Hospital where a rape kit was done, samples obtained, and she was interviewed by Twyla Dudley, which was video-taped. [TR 2 at pg. 181-182]. throughout this process she claimed to have on the same clothes, underwear and sanitary pad as she did during the alleged

rape. [TR 2 at pg. 181-182].

The defendant went to the Newcomerstown police station on the 28<sup>th</sup> of June 2011 because he was told that Officer John Gray was looking for him. [ TR 2 at pg 270]. There he told Officer Gray the following:

**Cheyenne walked into my room and told me she would give me a hand job if I'd give her a cigarette. I told her hell no. and she walked out of my room; my sister walked into the kitchen and I got up and walked in there I told her what Cheyenne said and she was mad. Then I walked into my mom's room where Lionel Woods was and started talking to him and Tia Sims and my mom. Lionel and I left to go get something to eat a bit later. Tia had to leave a bit before this. she left around ten-fifty. we sat at the table for a bit and we went to get food again due to McDonald's breakfast schedule. I was told to ask Cheyenne and Dakota what they wanted; they were asleep so I didn't wake them. We went to leave and Dom showed up, we asked her what we could get him. He told us and we left, we came home and talked, and then I went to bed. Lionel left like five minutes after I laid down and fell asleep. then my mom walked in to see if I was feeling OK. I fell back asleep and got up the next morning and no one was home but me, Bryce, and mom. [ TR 2 at pg 271-272].**

DNA was eventually obtained from the samples taken from Cheyenne Craig during the rape examination. [TR 2 at pg. 274]. Later, the defendant came to the Newcomerstown police station and submitted a DNA sample. [TR 2 at pg. 275]. A portion of this DNA was later found to match a sample taken from the alleged victim's underwear. [TR 2 at pg. 277]. Upon this the defendant was arrested and charged with the rape of Cheyenne Craig. [TR 2 at pg. 277].

A trial in this matter was held on the 20<sup>th</sup> of February, 2013. Cheyenne Craig, Twyla Dudley and officer John Gray testified for the prosecution. However, on 21<sup>st</sup> of February, 2013 the court, over the objection of the defense counsel, declared the case to be a mistrial. [ TR 2 at pg. 215].

After this, defense counsel filed a number of motions on the 25<sup>th</sup> of February, 2013, including a motion in limine regarding new evidence from the prosecution that was made known to him on the 22<sup>nd</sup> of February, 2013. the court overruled this motion. [TR 2 at page 6].

The trial resumed on the 25<sup>th</sup> of February, 2013 and concluded on the 28<sup>th</sup> of February, 2013. At the conclusion of the trial the jury found the defendant guilty. A notice of appeal was filed on the 8<sup>th</sup> of March , 2013 and a decision from the Fifth District Appellate Court was rendered on July 17, 2013.

### **ARGUMENT (ASSIGNMENT OF ERROR 1)**

**The trial court erred in granting Appellee's motion for a mistrial due to statements made regarding polygraph examinations, therefore infringing upon Appellant's 5th Amendment Rights to "Double Jeopardy."**

One of the most important and essential rights for every person as guaranteed by the 5th Amendment to the United States Constitution is to not be put twice in jeopardy, better known as the "Double Jeopardy" clause. The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. The double Jeopardy clause protects a criminal defendant from multiple prosecutions for the same offense, affording a defendant the right to have his "trial completed by the first jury empaneled to try him" **Oregon v Kennedy, 456 U.S. 667,673, 72 L.Ed. 2d 416, 102 S. Ct. 2083 (1982)**. In a jury trial, jeopardy attaches once the jury is empaneled and sworn in, **Serfass v. United States, 420 U.S. 377, 388, 43 L.Ed 2d 265, 95 S. Ct. 1055 (1975)(citations omitted)**.

The defendant argues that the trial court erred in granting the Appellee's motion for a mistrial for the first trial which occurred between the 20th of February, 2013 and the 21st of February, 2013. Alternatives and options must first be considered before a trial court judge may declare a mistrial. Simply put, the trial court abused it's discretion in granting this and a limiting instructions could have been provided to the jury for them to disregard any alleged inadmissible testimony. Therefore, there was another option in this case as opposed to the harsh remedy of granting a mistrial.

It was clear as the record dictates that the prosecution's case was falling apart, so the timing of the motion made by the prosecution was a way to dismiss everything and regroup to get

all the facts and witnesses on the same page. The trial court's granting of the mistrial not only benefited the prosecution, but also the trial court did not take into effect or consider the Constitutional rights of the accused, Danial McComas. "In declaring a mistrial without consent of the defendant, a trial judge is to act responsibly and deliberately and accord careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding" [\*811]\_Arizona v Washington 434 U.S. 497, 516, 54 L.Ed. 2d 717, 98 S. Ct. 824 (1978). A trial judge exercises sound discretion when determining whether a manifest necessity exists to declare a sua sponse mistrial by taking all the surrounding circumstances into account." See U.S. Jorn 400, U.S. 470, 487, 27, L.Ed. 2d 543, 91 S. Ct. 547 (1971), Citing Perez, 22 U.S. (9Wheat) at 580.

As the transcript reflects during the cross-examination of Officer John Gray, the following exchange occurred:

**Defenses counsel.** He [defendant] even offered to take a polygraph didn't he?

**Officer Gray.** Yes he did.

**Defense counsel.** And you talked to him about getting it set up?

**Officer Gray.** Well I told him I would see about it.

**Defense Counsel.** Okay. Well did you see about it?

**Officer Gray.** No sir.

**Defense counsel.** Why not?

**Officer Gray.** I was waiting on the rest of the evidence to come back.

**Defense Counsel.** Wouldn't a polygraph have been helpful?

**Prosecution.** Objection your honor. Polygraphs are inadmissible and this is completely irrelevant.

**Defense Counsel.** I think it goes to the investigation and what was done. He said he could get a polygraph. My client said he would be fine doing one.

**Court.** Well, but it is inadmissible so I'm going to sustain the objection.

[TR1 at pg 204].

It should be noted that 4 questions were asked by defense council prior to an objection by the prosecution [Tr 1 at pg. 204]. Once the objection was raised then the trial court did sustain it, thus keeping that evidence out [Tr 1 at pg. 204]. Additionally, a limiting instruction could have been placed in the final written instructions to the jury to disregard this testimony. Furthermore the prosecution could have moved for a mistrial after the line of questioning was initially asked; but instead opted to raise the motion the next day claiming that she needed time to research the issue [Tr 1 at pg. 214].

Defense council argued that there was no prejudice to the prosecution's case and this could have been resolved with a limiting instruction to the jury [Tr 1 at pg. 213]. In fact there is a long-standing presumption that a jury follows the trial court's instructions. **State v Jones 91 Ohio St. 3d 335, 344 (2001) citing State v Raglin, 83 Ohio St. 3d 253, 264 (1998)**. In fact, when analyzing the propriety of a mistrial, it is presumed that the jury will follow the trial courts curative instructions concerning improper comments. **State v Ahmed (2004), 103 Ohio St. 3d 27, 41, 813 N.E. 2d 637; State v Herring (2002), 94 Ohio St. 3d 246, 254, 762 N.E. 2d 940**.

Thus it is presumed that the jury would have followed the instructions to disregard the testimony, however the jury never received that opportunity as this was arbitrarily taken away from them by the trial court judge. The judge never even questioned the jury one by one as to whether they could disregard the testimony regarding the polygraph and remain objective and neutral and base their verdict on the evidence presented at the trial and disregard the testimony regarding the polygraph. By not taking these steps, and just declaring an outright mistrial, the trial court abused its discretion and violated Appellant's Constitutional Rights under the 5<sup>th</sup> Amendment to "Double Jeopardy."

In order to determine if a mistrial was required by manifest necessity, the critical inquiry is whether less drastic alternatives were available, **United States v Shafer, 987 F 2d 1054, 1057 (Fourth Circuit 1993) (Citing Harris v Young, 607 F 2d 1081, 1085 n. 4<sup>th</sup> Circuit 1979)**, See also **Jorn 400 US. at 486-87** (holding that a trial judge abused his discretion in declaring a

mistrial because he did not consider the alternatives to the mistrial). One Alternative that a trial court should consider [\*\*48] before sua spone declaring a mistrial is a trial continuance. (**Jorn 400, U.S. at 487 (Citing Wheat at 580)**). Furthermore, if a trial judge is aware of a potential problem that might lead to a mistrial, the judge should address the problem prior to empaneling the jury. See **United States v Sartori, 730 F 2d 973, 976 (4<sup>th</sup> Circuit)**

As the record shows, the reasoning behind the granting of the mistrial was because inadmissible evidence was heard by the jury that the trial court judge felt could not be disregarded if instructed to. If this line of thinking was followed, then virtually every court would grant mistrials for inadmissible evidence such as hearsay, polygraphs, discredited witnesses, or any other tainted evidence or testimony that was objected to and sustained; because virtually every trial has some sort of inadmissible evidence or testimony that is objected to.

Furthermore the prosecution should have known the rules regarding the polygraph examinations, which she stated she did on February 21 [tr 1 at page 214]. However she waited until defense council asked 4 questions which were answered by Officer Gray, before she objected to them [tr 1 at pg. 104]. However the following day she claimed she wanted some time to do research. In the case of **State v. Smith, Clark, App No. 2003-CA-23, 2004-Ohio-665**, the court makes it clear that the prosecution should know the rules regarding polygraph examinations and should not allow this info to be admitted. Instead, she allowed the line of questioning and waited until (4) questions were asked and answered by Officer Gray, and even after that waited until the next day to file for her the motion for the mistrial.

The defense council made it very clear that if a mistrial was granted, it would give the Prosecution the ability to fix the errors that were made during the presentation of her case [tr 1 at pg. 214]. The trial court did not take this into account, therefore violating Appellant's Constitutional Rights to "Double Jeopardy."

The state relies on the fact that Appellant's council participated in the new trial without objection therefore preventing any claim Appellant has towards "Double Jeopardy." Consent to a mistrial need not be "Knowing, intelligent, voluntary." See **United States v Dinitz, 424, U.S.**

600, 609n 11, 47 L.Ed. 2d 267, 96 S. Ct. 1075 (1976). The United States Supreme Court has often stated that courts should “Indulge every reasonable presumption against [the] waiver” of Fundamental Rights. *Aetna Ins. Co. v Kennedy* 301 U.S. 389, 393, 81 L.Ed 1177, 57 S. Ct. 809 (1937). Any doubts should be resolved in “Favor of the liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and arbitrary judicial discretion.” *Downum v United States*, 372 U.S. 734, 738, 10 L.Ed 2d 100, 83 S. Ct. 1033(1963) ), quoting *U.S. ex rel Rush v Watson*, 28 F. Cas. 499, 501 (1868). The trial court did not extend these governing legal principles to the case at hand; but instead the court announced a bright line rule that resulted in a presumption of waiver of Appellant's Constitutional rights to “Double Jeopardy” protection despite the fact that Appellant's attorney had immediately objected to the mistrial which caused the violation of his 5<sup>th</sup> Amendment Rights to “Double Jeopardy.”

The following excerpt is from the Defense Council's objection to the mistrial be granted and as the record shows, he wholeheartedly disagreed with it:

**“I think there are some differences here between what happened yesterday and in these cases. I asked the question, and there was no objection, the officer, if I recall, correctly answered it. And only then was there an objection. If it was such an issue then, it should have been objected to right away. I recall that you did say anything with a polygraph is, inadmissible. You did say that, I believe the jury heard it. So I think a limiting instruction would be fine in this case. The only reason I mentioned the polygraph was obviously for credibility but also because it was in the officers report. The officer made note of that in his case. My client and I are deeply concerned about the, obvious timing of this motion. Why wasn't this made yesterday? There's a glaring problem with the state's case and now what's going to happen is, you grant the mistrial they're going to be able to go back and fix their all mistakes and come back again against my client, which is improper.”**  
[TR 1 at pg 213-214].

The line of questioning orchestrated by defense council of Officer Gray regarding the fact that Appellant was willing to take a polygraph was in no way harmful to the average layman in

deciding guilt or innocence; especially when a judge asks the jurors to disregard that testimony. In the juror's minds the Appellant had not actually taken a polygraph, so there was not a presumption of guilt or innocence based on the polygraph answers given by Officer Gray. It may have been a different situation if Appellant had taken a polygraph test and passed; and that information was passed onto the jury. One's willingness to take a polygraph does not insinuate whether that individual will pass or fail that polygraph and that is something the trial court should have taken into consideration, but did not. There are many people willing to take a polygraph, yet when it comes down to it, end up failing the polygraph, so one's willingness to take a polygraph is not grounds for the trial court to grant a mistrial.

A lot is asked of a jury throughout the trial, including disregarding certain testimony and evidence; they are to be impartial and open minded when rendering a verdict. Another crucial Constitutional Right an individual has under the 5<sup>th</sup> Amendment is "The Right to remain silent," and a right against "Self Incrimination." Therefore a defendant at a trial does not have to testify against himself; that in itself is something a jury must heavily weigh in all the evidence presented to them; and if a jury can be impartial enough to give a fair verdict due to the fact that an individual did not testify, as guaranteed under the 5<sup>th</sup> Amendment, and say he/she did not commit the crime, they can surely disregard a questioned asked of Officer Gray if Appellant was willing to take a polygraph test.

A State court acts unreasonable if it's Application of clearly established Federal Law if the court was unreasonable "In refusing to extend [a] governing legal principle to a context in which the principle should have controlled." **Ramdass v Angelone, 530 U.S. 156, 166, 147 L.Ed. 2d, 125, 120 S. Ct. [\*805] 2113 (2000).**

A mistrial without consent will bar retrial of the defendant on Double Jeopardy grounds unless it is determined that there was a manifest necessity for the mistrial. See **United States v Sanford, 429, U.S. 14, 15-16, 50 L.Ed. 2d 17 97 S.Ct. (1976), Citing United States v Perez, 22 U.S. (9 Wheat) 579, 580, 6 L.Ed. 165 (1824).** "The key word necessity" cannot be interpreted literally, instead...there are degrees of necessity...a "high degree" [is required] before concluding

that a mistrial is appropriate. **Arizona v Washington, 434 U.S. 497, 506, 54 L.Ed 2d 717, 98 S. Ct. 824 (1978)**. “The prosecution bears a heavy burden of establishing a manifest necessity in order to avoid a “Double Jeopardy” bar to a retrial. I.D. at 505. Furthermore, any doubts in favor of liberty of the citizen, rather than exercise what would be an unlimited, uncertain, and an arbitrary discretion,” is resolved in favor of the defendant, **Downum v United States 372 U.S. 734, 738, 10 L.Ed. 2D 180, 83 S. Ct. 1033 (1963) quoting United States v Watson 28 F. Cas. 499, 501 (1868)**.

In the instant case, the trial court judge declared a mistrial Sua Sponte after the mention of, and the line of questioning involving the Appellant's willingness to take a polygraph. The granting of a mistrial was in no means in favor of the defendant or at a “high degree” of necessity as required per the United States Supreme Court in *Arizona v Washington* (1978).

Thus, despite the fact that several alternatives to a mistrial existed, including several that would have addressed the problem prior to empaneling of the jury, the trial judge failed to consider any of the myriad of appropriate options aside from declaring a mistrial. The trial judge did not take all of the surrounding circumstances into account when declaring a mistrial; thus, he failed to appropriately consider the Appellant's interest in having his trial concluded by the first jury empaneled to try him. No matter the salutary motives of the original trial judge, the “Double Jeopardy” protections of the United States Constitution are mandatory. Therefore the Ohio State Supreme Court must conclude that there was no manifest necessity for the declaration of a mistrial in Appellant's case and a retrial of Appellant infringed upon his Constitutional rights as guaranteed by the 5<sup>th</sup> Amendment; the only thing left to do is thereby dismiss all the charges against Appellant by vacating his sentence.

## Assignment of Error II

**THE FINDING THAT THE APPELLANT WAS GUILTY OF RAPE PURSUANT TO ORC 2907.02 (A)(1)(b) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE; HENCE THE SECOND TRIAL VIOLATED HIS 14TH AMENDMENT RIGHTS TO DUE PROCESS OF THE LAW.**

The defendant argues that his conviction for rape under 2907.02(A)(1)(b) is against manifest weight of the evidence and therefore was denied his rights under the 14<sup>th</sup> Amendment to Due Process. There were numerous inconsistencies and contradictions in testimony from the alleged victim, Cheyenne Craig, from the first trial to the second trial that the trial court judge did not consider when allowing such testimony and evidence into the record. Even admittance from Cheyenne Craig that she lied was not addressed by the trial court judge, which was also the same judge that declared a mistrial to allow the second trial to take place, further violating Appellant's Constitutional Rights. "The jury clearly lost it's way in this case and the defendant should have been found not guilty.

A court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of facts clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed and a new trial ordered." **State v Otten (1986) 33 Ohio App. 3d 339, 340.** "Whether the evidence adduced at trial is legally sufficient to support a conviction is a question of law." **State v Thompkins (1997), 78 Ohio St. 3d, 380, 386.**

Therefore from the trial transcripts of the first trial and the second trial [trial 1 at pgs. 123, 144-145], [TR 2 at pg. 195, 279], [TR 1 at pgs. 121-122], [TR 2 at pg. 196], [TR 2 at pgs 166-167, pgs 261-262], [TR 2 at pgs 384-385], TR 2 at pg 186], [TR 2 at pg 224], and [2 at pg 227] in which she admitted to changing her story from first to second trial; there were many inconsistencies, changes and additions to her story. The first trial was conducted on February 20, and the second trial on February 25, which her testimony occurred on February 26; just a few days apart, yet she couldn't keep her stories straight therefore she showed by her testimony that she was not a credible witness.

“At trial, the judge is the gatekeeper and the referee of all proceedings including sentences, rulings on admission of evidence, and overall conduct of a trial are within the discretion of the court and must be overturned when a trial court judge abused that discretion.” **State v Long (1978) 53 Ohio St. 2d 91, 98, 3d 178, 181-182, 372 N.E. 2d 804, 808-809.** The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. **Blakemore v Blakemore (1985) 5 Ohio St. 3d 217, 219.**

The record clearly shows throughout these proceedings that the trial court judge did indeed abuse his discretion: 1) by declaring a mistrial in the first trial merely on the mention of one's willingness to take a polygraph, thereby infringing upon defendant's Constitutional Rights, and 2) At the second trial to continue to allow inconsistencies, conflicting testimony, additional testimony by Cheyenne Craig, and allowing her admittance to lying between the first and second trials, yet not taking action clearly demonstrates the Judge's discretion is questionable in these proceedings.

Defense Council tried very hard to object to the mistrial and when the judge granted the mistrial, the defense council felt he could not get a fair trial for his defendant, thus filing several motions including Motion in Limine (Appellant's 3<sup>rd</sup> assignment of error) and Motion for a “Change of Venue” which were all denied by the trial court judge.

Therefore by considering the inconsistencies of the two trials, this Honorable Court must find that the manifest weight of the evidence was not sufficient enough to convict Appellant and thus send an innocent man to prison for 25 to life; while continuing to have his Constitutional Rights violated.

### **Assignment of Error III**

#### **THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE TO EXCLUDE NEW EVIDENCE THAT THE PROSECUTION REVEALED AFTER THE CONCLUSION OF THE FIRST TRIAL**

The defendant argues that the trial court erred in denying his motion in limine to exclude

new evidence in the 2<sup>nd</sup> trial that was not admitted in the first trial. This new evidence both bolstered the prosecution's case and fixed the errors from the first trial; thereby confirming Appellant's argument that the only reason to violate defendant's Constitutional Rights to "Double Jeopardy" was to fix those errors committed by the prosecution in the first trial. The so called evidence was a pair of underwear belonging to the alleged victim, Cheyenne Craig. However unlike the first trial, in the second trial there were (3) pieces of that said pair of underwear.

In the first trial the underwear was presented and the entire courtroom understood that it was the complete pair of underwear, yet had not blood stain on them as Cheyenne Craig testified she was on her period [TR 1 at pgs. 153-154]. During the 2<sup>nd</sup> trial, Shaka Page testified that she had sex with the defendant and the pair of underwear in question was in fact hers and therefore would explain why the underwear and pad had no blood on them since Ms. Page was not on her period [TR 2 at pg 409].

On February 21, 2013 a mistrial was granted by the trial court and on February 22, 2013 is when the prosecution presented the pictures of the underwear as the new evidence with the blood stain. The prosecution had to have had these pictures in her possession the whole time and just miraculously showed up the day after the mistrial was granted a new trial set for February 25, 2013. This is exactly the point defense council made in regards to objecting to the Motion of Mistrial by the prosecution. Defense Council for the Appellant knew that if a mistrial was granted, not only would defendant's Constitutional Rights be violated under the 5<sup>th</sup> Amendment guarantee not to be subject to Double Jeopardy; but also would give the prosecution and the State a chance to "fix the errors" committed in the first trial. Thus, the prediction came fruition.

The underwear and pad were shown without blood in the first trial and it was clearly understood by the Jury, the Judge, and the defense that this was the entire pair of underwear. To reveal the blood stain part of the underwear the day after the mistrial, when one of the issues in the first trial was that Cheyenne Craig was bleeding when the underwear presented in the court clearly had no blood, is concerning. This only shows misleading tactics that are only designed to find the defendant guilty by any means at the Prosecution's disposal, even if it means withholding evidence and violating the defendant's Constitutional Rights against Double Jeopardy.

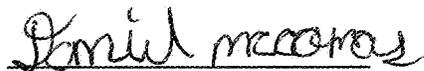
Looking at this issue, coupled with the motion for a mistrial the day after alleged improper testimony was admitted, show tactics designed to fix the problems in the Prosecution's case. Thus, the true motive of the motion for a mistrial is questionable. This case had been pending for many months. Either the Prosecution failed to properly prepare Cheyenne Craig regarding her testimony, including refreshing her memory about what allegedly occurred on or about the 27<sup>th</sup> of June, 2011, or there was not probable cause to charge the defendant and the entire indictment is based upon perjured testimony and evidence that has been withheld and misrepresented. Understandably, rape is a serious offense and should be treated as such. However, it is far more grievous to send an individual to 25 years to life for a crime he did not commit. Although the Prosecution denied making any errors the testimony of Cheyenne Craig differed from the video statement and what she told Officer Gray, as argued in Assignment of Error II. Additionally, as argued in Assignment of Error I, Cheyenne Craig's testimony at the first trial was problematic and not credible. Thus, this new evidence was a step to correct those errors.

Accordingly, the evidence should not have been admitted and the Defendant's Assignment of Error should be sustained.

### CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court to accept jurisdiction of this matter, to review the matter accordingly, and to reverse the decision of the Fifth District Court of Appeals by granting Appellant relief against "Double Jeopardy" and therefore vacating his sentence and conviction.

Respectfully submitted,



Danial McComas (Pro Se)  
Inmate No. 678167  
Chillicothe Correctional Inst.  
P.O. Box 5500  
Chillicothe, Oh 45601  
Appellant/Defendant Pro se

Certificate of Service

I hereby certify that a copy of the foregoing has been sent via the United States Postal Service to the following address: Ryan Styler, Tuscarawass Prosecuting Attorney, 125 E. High Avenue, New Philadelphia, Oh 446633 on the 26 day of August, 2013.

Respectfully submitted,



Daniel McComas (Pro Se)  
Inmate No. 678167  
Chillicothe Correctional Inst.  
P.O. Box 5500  
Chillicothe, Oh 45601  
Appellant/Defendant Pro se

A

FILED  
5<sup>TH</sup> DISTRICT COURT OF APPEALS  
TUSCARAWAS CO., OHIO

JUL 17 2013

*James M. Hopkins*  
CLERK OF COURTS

COURT OF APPEALS  
TUSCARAWAS COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DANIEL MCCOMAS

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P.J.  
Hon. Sheila G. Farmer, J.  
Hon. John W. Wise, J.

Case No. 2013 AP 03 0013

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common  
Pleas, Case No. 2012 CR 08 0217

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

APPEARANCES:

For Plaintiff-Appellee

AMANDA K. MILLER  
125 East High Avenue  
New Philadelphia, OH 44663

For Defendant-Appellant

DAN GUINN  
118 West High Avenue  
New Philadelphia, OH 44663

*Farmer, J.*

{¶1} On August 18, 2012, the Tuscarawas County Grand Jury indicted appellant, Daniel McComas, on one count of rape in violation of R.C. 2907.02. Said charge arose from an incident involving a child under the age of thirteen.

{¶2} A jury trial commenced on February 20, 2013. On the morning of February 21, 2013, the state moved for a mistrial based on testimony of the investigating officer given the previous day regarding appellant's willingness to undergo a polygraph examination. The trial court granted the motion.

{¶3} A second trial commenced on February 25, 2013. The jury found appellant guilty as charged.<sup>1</sup> By judgment entry filed February 28, 2013, the trial court sentenced appellant to twenty-five years to life, and classified him as a Tier III sex offender.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶5} "THE TRIAL COURT ERRED IN GRANTING THE APPELLEE'S MOTION FOR A MISTRIAL DUE TO STATEMENTS REGARDING POLYGRAPH EXAMINATIONS."

II

{¶6} "THE FINDING THAT THE APPELLANT WAS GUILTY OF RAPE PURSUANT TO ORC 2907.02(A)(1)(b) WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

---

<sup>1</sup>Due to the fact that there were two trials, the transcript for the first trial will be referred to as T. I and the transcript for the second trial will be referred to as T. II.

III

{¶17} "THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION IN LIMINE TO EXCLUDE NEW EVIDENCE THAT THE PROSECUTION REVEALED AFTER THE CONCLUSION OF THE FIRST TRIAL."

I

{¶18} Appellant claims the trial court erred in granting the state's motion for mistrial. We disagree.

{¶19} The decision whether or not to grant a mistrial rests in a trial court's sound discretion. *State v. Glover*, 35 Ohio St.3d 18 (1988). In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶10} Appellant argues the prosecutor failed to make the motion for mistrial immediately after an objection was sustained by the trial court during the first trial, and the prosecutor used the motion as a tool to get a second bite of the apple because the case "was not going well" for the state. The testimony at issue was of the investigating officer, John Gray, on cross-examination by defense counsel (T. I at 204-205):

Q. Okay. So he, he [appellant] came right over within the next hour?

A. Yep.

Q. He was cooperative?

A. Yep.

Q. And he said he didn't do it?

A. Yep.

Q. In fact he said hell no?

A. Right.

Q. He even offered to take a polygraph didn't he?

A. Yes he did.

Q. And you had talked to him about getting it set up?

A. Well I told him that I would see about it.

Q. Okay. Well did you see about it?

A. No sir.

Q. Why not?

A. I was waiting on the rest of the evidence to come back.

Q. Wouldn't a polygraph have been helpful?

MS. MILLER: Objection your honor. Polygraphs are inadmissible and so this is completely irrelevant.

MR. GUINN: I think it goes to the investigation and what was done. He said he could get a polygraph. My client said he would be fine doing it.

THE COURT: Well, but it is, it is inadmissible so I'm going to sustain the objection.

{¶11} Although the trial court gratuitously offered a statement on a polygraph's inadmissibility to the jury, no curative instruction was given at the time of the objection. The next morning, the prosecutor made a motion for a mistrial (T. I at 212):

Attorney Guinn asked that inappropriate question of the officer only to bolster the credibility of his client. There was no stipulation. There was no mention of a willingness or unwillingness to take a polygraph in any of the pretrial phases. The State cannot rebut this. I can't cross-examine Daniel on his willingness to take a polygraph because it's inadmissible. And I can't force Daniel to testify. This case here is even more dangerous than, to fundamental fairness than *State v. Miller*. In *Miller*, the Defendant had the recourse of, of appeal after a final verdict. In this case, if a mistrial is not granted, the only recourse that the State has is a possible interlockitory (sic) appeal should the Fifth District grant leave to accept that.

{¶12} In *State v. Miller*, 5th Dist. Tuscarawas No. 86AP060038, 1987 WL 9876 (April 20, 1987), \*2, we found a question on taking a polygraph was inadmissible and a curative instruction would not have cured the problem:

The purpose of the question in the case *sub judice* was clearly directed at bolstering the credibility of the State's witness in the minds of the jurors. The question, though unanswered, was a leading question which suggested but one answer: that the witness was willing to take a polygraph examination as to the particular statement he testified he made to the Dover Police, and that therefore he was telling the truth. The effect

of the question is even more damaging when it is revealed on the cross-examination of McCullough that he had made prior statements to the police which were contradictory and inconsistent.

{¶13} As appellant readily concedes, the trial court is in the best and most authoritative position to assess whether a mistrial is appropriate vis-à-vis a curative instruction. The testimony was clearly leading to the credibility of appellant by showing his willingness to take a polygraph and his immediate denial of the charge, without appellant taking the stand and testifying. The polygraph, to an unsophisticated jury, is an immediate imprimatur on appellant's credibility or innocence. Further, the testimony was totally orchestrated by defense counsel and was not introduced by the state.

{¶14} Upon review, we find no error in the trial court's ruling or any violation of the Double Jeopardy Clause.

{¶15} Assignment of Error I is denied.

II

{¶16} Appellant claims his conviction for rape was against the manifest weight of the evidence. We disagree.

{¶17} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The

granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶18} Appellant argues the difference in the victim's testimony between the first and second trials demonstrates that the victim was not credible, and the existence of his DNA on the victim's underwear was also not credible.

{¶19} Appellant was convicted of rape in violation of R.C. 2907.02(A)(1)(b) which states: "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\*\*\*[t]he other person is less than thirteen years of age, whether or not the offender knows the age of the other person."

#### CREDIBILITY OF THE VICTIM

{¶20} Appellant challenges the credibility of the victim, C.C., who was eleven years old at the time of the offense and thirteen years old at trial. Because of the mistrial, appellant already had C.C.'s testimony from the first trial. C.C. was steadfast that appellant initiated the masturbation incident in the living room and took her pants down and placed his penis in her "butt cheeks." T. I at 120-124; T. II at 164-166. He then made her go to his bedroom, where her pants were pulled down. T. I at 124-126; T. II at 168-170. She laid on the bed and appellant got on top of her and penetrated her with his penis, wherein he ejaculated. T. I at 127-128; T. II at 170-171, 198. An inconsistency in the two testimonies was when C.C. claimed in the first trial she felt she was in danger, like he was going to hurt her, and it hurt when he grabbed her wrist (T. I at 121-122, 151-152), but in the second trial, denied that appellant hurt her and claimed she was not in danger. T. II at 163-164, 179, 196-197. On redirect during the second

trial, C.C. explained when she originally stated she felt like she was in danger, she meant she was afraid that she could become pregnant. T. II at 220. On recross-examination, C.C. admitted she did not tell everything at the first trial because she was too scared, but denied making anything up. T. II at 224-225. Despite any claimed inconsistencies, the elements of appellant's conduct remained the same.

{¶21} C.C. also claimed appellant's sister, S.M., observed the rape in appellant's bedroom as she was standing in the doorway watching, but S.M. denied seeing anything and claimed C.C. never accompanied appellant to his bedroom. T. II at 171, 201, 383.

{¶22} Appellant presented the testimony of his friends, Lionel Woods and Tia Simms, who claimed they were with him the entire time and C.C. was asleep in the living room. T. II at 350-353, 370-372.

{¶23} The issue of C.C.'s credibility was at the forefront of appellant's defense as exemplified in defense counsel's closing argument. T. II at 442-444.

{¶24} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison*, 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶25} From the verdict, it is obvious that the jury rejected appellant's attack on C.C.'s credibility. This is substantiated by the presence of appellant's DNA on the underwear worn by C.C. and the presence of a single sperm cell in her vagina. T. II at 303, 330-332.

## DNA EVIDENCE ON THE UNDERWEAR

{¶26} Appellant also attacks C.C.'s claim that State's Exhibit B was her underwear that she was wearing at the time of the rape. S.M., appellant's sister, testified she gave C.C. a pair of underwear to wear which she had found on the bathroom sink. T. II at 386-387. Another juvenile, S.P., claimed the underwear was hers and she had engaged in sexual intercourse with appellant in the morning on the day of the incident with C.C. T. II at 408-409, 412. S.P. testified after having sexual relations with appellant, she put her underwear back on for about ten minutes before changing into a swimsuit and leaving her clothes and underwear at the house. T. II at 409-410. These claims were never disclosed to the police nor mentioned by either witness until appellant's trial. T. II at 395-397, 414-418.

{¶27} The acceptance or rejection of this exhibit lies with the trier of fact. The credibility of S.M. and S.P. are suspect given the passage of time and their own relationships with appellant.

{¶28} As with most, if not all, cases of rape, it is generally a "he said, she said" situation. Appellant told Officer Gray that C.C. offered him a "hand job" in exchange for a cigarette. T. II at 271. S.M. claimed she told C.C. she was going to tell her mom if she did not stop and C.C. said "she would tell her mom that Daniel did stuff to her if I told," thereby implying that C.C. made up the incident. T. II at 388.

{¶29} As noted above, the believability of anyone's testimony lies with the trier of fact, in this case, the jury. We find C.C.'s consistent statements of the events, coupled with the presence of a sperm cell in her vagina and appellant's DNA on her underwear,

regardless of ownership, was sufficient to substantiate the jury's guilty finding. Upon review, we find no manifest miscarriage of justice.

{¶30} Assignment of Error II is denied.

III

{¶31} Appellant claims the trial court erred in denying his motion in limine regarding photographs of State's Exhibit B, the underwear. We disagree.

{¶32} During the first trial, the state presented State's Exhibit B, the underwear in three pieces, but believed to be the entire garment. After the mistrial, the state informed appellant that it would be presenting two photographs of State's Exhibit B and C.C.'s sanitary pad from the Bureau of Criminal Investigation (hereinafter "B.C.I."). The photograph of the underwear depicted a missing piece from State's Exhibit B which contained blood. In the motion in limine, appellant argued his counsel was not given the photographs earlier, and were produced to substantiate C.C.'s claim in the first trial that she had been bleeding. As noted by the state in its response, all evidence listed on the B.C.I. lab report was available at the Newcomerstown Police Department upon request. Further, none of the B.C.I. experts had testified at the first trial and State's Exhibit B had not even been admitted into evidence.

{¶33} In its judgment entry filed February 26, 2013, the trial court denied the motion in limine "at this point." Defense counsel did not renew the motion at trial and did not object to the admission of the exhibits. T. II at 338-339.

{¶34} In *Akron v. Carter*, 190 Ohio App.3d 420, 2010-Ohio-5462, ¶ 7 (9th Dist.), our brethren from the Ninth District explained the following:

This court has described a motion in limine as "a precautionary request\*\*\*to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury." *State v. Echard*, 9th Dist. No. 24643, 2009-Ohio-6616, 2009 WL 4830001, at ¶ 3, quoting *State v. Grubb* (1986), 28 Ohio St.3d 199, 201, 28 OBR 285, 503 N.E.2d 142. Due to the preliminary nature of the ruling, in order to preserve the issue for appeal, one must object at the point during trial when the issue arises. *Id.* at ¶ 4. In *Echard*, this court pointed out that the Ohio Supreme Court has "explained that renewing a motion and/or objection in the context of when [the evidence] is offered at trial is important because 'the trial court is certainly at liberty\*\*\*to consider the admissibility of the disputed evidence in its actual context.'" *Id.* at ¶ 4, quoting *Grubb* at 202.

{¶35} Appellant's claimed error was not perfected for the record and therefore is subject to review under the harmless error standard. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶36} We find the arguments herein fail under this standard. Photographs of the underwear were admissible under the rules of evidence and were relevant as to the physical examination done by B.C.I. We cannot say with any certainty that they would not have been presented at the first trial. C.C. testified she had a sanitary pad on the

day of the incident because she was on her menstrual cycle (T. I at 138), therefore the presence or absence of blood on the underwear was an issue at both trials. The B.C.I. reports given to defense counsel listed the items examined. We cannot find that they would have ever been inadmissible as they were relevant evidence at both trials.

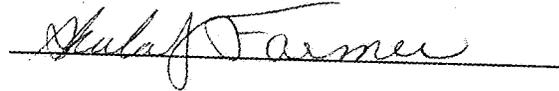
{¶37} Assignment of Error III is denied.

{¶38} The judgment of the Court of Common Pleas of Tuscarawas County, Ohio is hereby affirmed.

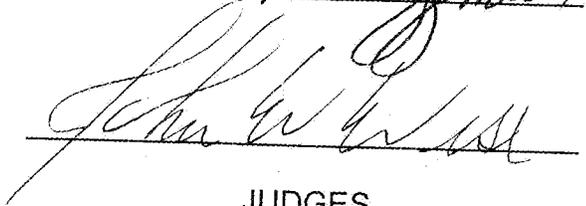
By Farmer, J.

Hoffman, P.J. and

Wise, J. concur.



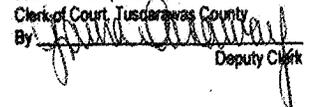




JUDGES

SGF/sg 702

I, the undersigned Clerk of Courts hereby testify this to be a true and correct copy of the original filed in the Common Pleas Court of Appeals of Tuscarawas County, Ohio  
Jeanne M. Stephen  
Clerk of Court, Tuscarawas County

By:   
Deputy Clerk

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FILED  
5TH DISTRICT COURT OF APPEALS  
TUSCARAWAS CO., OHIO

JUL 17 2013

STATE OF OHIO

Plaintiff-Appellee

-vs-

DANIEL MCCOMAS

Defendant-Appellant

*Jeanne M. Stephen*  
CLERK OF COURTS

JUDGMENT ENTRY

CASE NO. 2013 AP 03 0013

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio is affirmed.

Costs to appellant.

*Shudaf Famer*

*William B. Johnson*

*Paul Wise*

JUDGES

I, the undersigned Clerk of Courts hereby testify this to be a true and correct copy of the original filed in the Common Pleas Court of Appeals of Tuscarawas County, Ohio  
Jeanne M. Stephen  
Clerk of Court, Tuscarawas County

By *Jeanne M. Stephen*  
Deputy Clerk