[Cite as *State v. Bunch*, 2015-Ohio-4151.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 14 MA 168
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
CHAZ BUNCH,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 01CR1024
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman St., 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. Donald R. Caster Ohio Innocence Project University of Cincinnati College of Law P.O. Box 210040 Cincinnati, Ohio 45221-0040
JUDGES:	
Hon. Carol Ann Robb Hon. Gene Donofrio Hon. Cheryl L. Waite	
	Dated: September 29, 2015

ROBB, J.

{¶1} Appellant Chaz Bunch appeals the decision of the Mahoning County Common Pleas Court denying his post-conviction application for DNA testing. The issue is whether a DNA test result would be outcome determinative. Pursuant to R.C. 2953.71(L), an outcome determinative test result is one that "had the results been presented at the trial" and "found relevant and admissible" and "had those results been analyzed in the context of and upon consideration of all available evidence," there exists "a strong probability that no reasonable fact-finder would have found the offender guilty."

{¶2} The state urges that the trial court did not abuse its discretion in concluding that a DNA test would not be outcome determinative due to the other evidence in the case against Appellant. The state concludes that any alternative issues raised by Appellant are moot. For the following reasons, we agree. The trial court's decision, that the desired test result would not be outcome determinative, is upheld.

STATEMENT OF THE CASE

{¶3} On October 2, 2002, a jury found Appellant guilty of three counts of rape, three counts of complicity to rape, aggravated robbery, kidnapping, and eight firearm specifications. He was also convicted of aggravated menacing, a misdemeanor. *See State v. Bunch*, 7th Dist. No. 02CA196, 2005-Ohio-3309 (reversing an additional conviction of conspiracy to commit aggravated robbery due to an indictment deficiency and remanding for resentencing on a maximum of three firearm specifications).

{¶4} Appellant was sentenced to consecutive terms of ten years on each of the eight felonies (with the misdemeanor menacing count running concurrent) plus three years on each of three firearm specifications (the other specifications were merged). This is a total sentence of 89 years in prison. *See* Sent. J.E. July 7, 2006, affirmed by *State v. Bunch*, 7th Dist. No. 06MA106, 2007-Ohio-7211.

{¶5} Appellant filed a post-conviction request for DNA testing. Before we discuss his post-conviction request, the state's opposition, and the trial court's decision, a review of the file and trial transcript must be considered.

{¶6} On August 21, 2001 at 10:23 p.m., a twenty-one-year-old college student ("the victim") arrived for work at a group home on Detroit Avenue in the city of Youngstown. As she was gathering items from her vehicle, she saw a car slow down and turn its lights off. A person, later identified as fifteen-year-old Brandon Moore, ran toward her with a handgun. He wore a partial mask, which she described as similar to one worn by wrestlers. (Tr. 866); State's Exhibit 62. Moore demanded money, forced her into the passenger seat of her vehicle, and drove her vehicle down the street.

{¶7} Moore stopped the car to allow another person to enter the backseat. The victim later identified this person as Appellant, who was sixteen years old at the time. He put a gun to her head, demanded money, and threatened to kill her. (Tr. 873-874). The victim described this second suspect as round, broad, shorter than Moore (around her height), with shorter hair than Moore, and with darker skin. She said he was wearing an oversized black sweatshirt with a white T-shirt underneath. (Tr. 885). Both suspects wore a head-band or headscarf type of "wave cap" with ends that tie behind the head. State's Exhibit 63 ("Blue Do-Rag"); State's Exhibit 64 ("Black Do-Rag"). Appellant wore the blue cap loosely around his face as a mask. (Tr. 884-885, 993-994).

{¶8} While Moore was driving, he began digitally raping the victim. As a result, he nearly crashed into the vehicle from which he originally alighted. At that point, the victim was able to see and to memorize the other vehicle's license plate number. Moore passed the other vehicle (which then began to follow them), turned around at a dead-end road, and parked in a gravel lot on Henry and Erie Streets. (Tr. 1431).

{¶9} The victim was ordered out of her vehicle. Appellant and Moore took multiple turns orally raping the victim; one would force his penis into her mouth while the other would hold her head. (Tr. 889). Next, they brought the victim to the trunk of

her vehicle where she saw Jamar Callier going through her belongings. (Tr. 890-892). She also saw Andre Bundy sitting in the driver's seat of the other vehicle. (Tr. 891).

{¶10} While at the trunk, she was instructed to pull her pants down and to turn around. (Tr. 892). She crossed her legs and claimed to be pregnant. After they threatened to kill her, she complied. (Tr. 893). At this point, she was anally raped from behind and, consequently, could not determine who violated her in this manner. (Tr. 893, 894 952, 958, 1265, 1470).

{¶11} Next, she said Appellant pushed her to the ground where he and Moore took multiple turns vaginally and orally raping her. One vaginally raped her while the other orally raped her; they switched positions multiple times. (Tr. 894-897). While Appellant was vaginally raping the victim, Jamar Callier pushed Appellant off of the victim. (Tr. 897). The scene became chaotic with Appellant arguing that they should kill the victim and Callier arguing for her release. (Tr. 899).

{¶12} After she was released, the victim drove to the home of her boyfriend's family, where she had been prior to leaving for work. She repeated the license plate number which they wrote down. (Tr. 902). They drove her to the hospital and provided the license plate number to an officer at the hospital for another case. At 11:13 p.m., the officer broadcasted the plate number. (Tr. 1030).

{¶13} Around 11:30 p.m., a police officer saw an older black vehicle at the Dairy Mart on the corner of Mahoning and Belle Vista Avenues. A person wearing all gray was pumping gas. (Tr. 1086). When the vehicle left the parking lot, the officer noticed it contained four males. He also noticed the license plate number was nearly identical to the one he heard in the broadcast (with two numbers transposed). (Tr. 1062). The officer called for back-up.

{¶14} He followed the vehicle down Mahoning Avenue and onto Interstate 680 southbound. (Tr. 1062-1063). The vehicle took the Glenwood exit, turned south on Edwards Street without stopping at the stop sign, and pulled into the first driveway on the right. (Tr. 1063). The driver fled on foot.

{¶15} Brandon Moore, Andre Bundy, and Jamar Callier stayed in the car and were arrested at approximately 11:48 p.m. (Tr. 1067-1068, 1095). They told the officer that the driver's name was "Shorty Mack." A K-9 unit began tracking the driver through a wooded area toward Glenwood Avenue. The dog lost the trail in the middle of Rockview Avenue. (Tr. 1113-1114).

{¶16} Another officer heard about the chase and set up a perimeter just west of that location. He positioned his vehicle in the Volney Rogers baseball field parking lot on Glenwood. (Tr. 1155-1156). At 11:54 p.m., he spotted Appellant "trotting" around the corner of Bernard Avenue and heading south on Glenwood. Appellant noticed the police cruiser and stopped running. (Tr. 1157). The officer pointed his spotlight on Appellant.

{¶17} Appellant walked to a house and knocked on the door. (Tr. 1158). The officer drove over and asked Appellant his name and age. Appellant provided his name, "Chaz Bunch," and said that he was 16 going on 17. (Tr. 1161). Appellant advised the officer that he just left his cousin's house and was arriving at his uncle's house. (Tr. 1172-1173). The man at the house confirmed he was Appellant's uncle. (Tr. 1184).

{¶18} Appellant was wearing a navy blue shirt with a white T-shirt showing at the neck and navy blue pants. (Tr. 1164-1165). Because the police broadcast stated that the suspect was wearing gray sweatpants and the homeowner identified Appellant as his nephew, the officer did not detain Appellant. (Tr. 1162). Three days later at roll call, this officer learned that the suspect who fled from the vehicle had been identified as Chaz Bunch. He informed his supervisor about his encounter with Appellant and positively identified Appellant at trial. (Tr. 1163).

{¶19} It was then discovered that the man who answered the door to Appellant's knocking did not know Appellant before that night. He testified that Appellant asked for help because he was being chased by the police. Appellant asked him to tell the officer he was Appellant's uncle, and the man complied because he thought the matter dealt with a curfew violation. (Tr. 1184, 1188). The man identified Appellant at trial. (Tr. 1183, 1186, 1191). He also testified that, after the

officer left, Appellant made a call from his house and paid him to drive Appellant to another location. (Tr. 1185). Phone records showed that the call was made to the residence of a female who testified and confirmed that Appellant called her that night. (Tr. 1197).

{¶20} From the vehicle stopped on Edwards, police recovered the property of the rape victim, a .38 caliber revolver, a black neoprene mask ("like a half-face mask worn in the wintertime"), a blue wave cap, and a black wave cap. (Tr. 1071-1073, 1097). Video footage from Dairy Mart showed two people enter together with the one in a dark shirt paying for gas from the pump where the subject car was spotted. (Tr. 1078).

{¶21} Andre Bundy told police he was the driver of the vehicle when occupants alighted at Detroit Avenue. He said they followed each other to the parking lot. Once there, he heard the victim screaming. (Tr. 1420). He reported that he instructed his cousin, Jamar Callier, to stop the assault by the other two individuals. (Tr. 1421).

{¶22} Upon his arrest, Brandon Moore was wearing gray sweatpants and a gray sweatshirt. (Tr. 1099). He had a piece of paper in his pocket, torn from the victim's school planner, which stated, "Property of [the victim]." (Tr. 1098, 1100). Moore admitted he robbed and kidnapped the victim with a gun. (Tr. 1430)[1]. He confirmed he raped the girl while she pleaded with them. (Tr. 1431). He said he feared "Shorty Mack" would kill him if he refused. (Tr. 1465, 1468). He also stated that Shorty Mack tried to rape the victim "up the booty" and then laid her down to rape her. (Tr. 1470). He provided a description of Shorty Mack that had some consistencies and some inconsistencies with Appellant's features. (Tr. 1505, 1509)

{¶23} Jamar Callier also had the victim's property in his pocket when he was arrested. (Tr. 1082-1083). He was the only one of the four to testify. Andre Bundy is

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[1] Moore also admitted that he robbed others with a gun on Maywood Avenue earlier in the night. Those victims testified that only one of the occupants of Bundy's car alighted and robbed them in their driveway. He was said to be wearing a do-rag on his head and the black mask or balaclava represented by State's Exhibit 62. (Tr. 830). Appellant was found not guilty of the two counts of aggravated robbery related to that incident.

Callier's cousin. (Tr. 1257). Callier did not know Brandon Moore before that day, but he had known Appellant for a few months. (Tr. 1258). He stated that Moore had a chrome automatic weapon and Appellant had a .38 revolver. (Tr. 1262). He identified the gun found in the vehicle as the gun used by Appellant. (Tr. 1263). He also said Appellant wore the blue cap and Brandon Moore wore the black cap and the mask recovered from the vehicle. (Tr. 1279-1280).

{¶24} Callier stated that Moore and Appellant alighted from Bundy's vehicle on Detroit Avenue. Thereafter, he saw them in the victim's vehicle, which they followed to the parking lot where the rape occurred. (Tr. 1261). He said Moore got out of the driver's seat and Appellant got out of the backseat. He saw them bring the victim to the front of her vehicle and force her down. Callier witnessed one of the males standing while the other was not, and then he saw them switch places. (Tr. 1264). After a couple minutes, Appellant brought the victim to the back of her car. According to Callier, Appellant then had sex with the victim while standing behind her.

{¶25} Callier explained that Bundy, who could not walk without crutches due to cerebral palsy, instructed him to stop Appellant. Callier confirmed the victim's testimony that he pushed Appellant off of the victim. (Tr. 1265). He said that he shut the victim's doors for her and told her to "get out of here." (Tr. 1266). When they got back in Bundy's vehicle, Callier and Moore divided the items taken from the victim's car. (Tr. 1266-1267).

{¶26} Callier explained that Bundy's car started overheating so Appellant took the driver's seat and drove to his house to get water for the car. (Tr. 1270-1271). Then, they traveled to Dairy Mart to get gas. He explained that he and Appellant went in the store where Appellant paid for the gas. (Tr. 1271). He identified himself and Appellant in the store video. (Tr. 1272). He recited how Appellant saw the police car behind them, ran a stop sign, told them he was not going back to jail, and instructed them to say his name was "Shorty Mack." (Tr. 1274). Callier stated that he had heard Appellant called Shorty Mack. (Tr. 1315-1316).

{¶27} Callier admitted that when police originally questioned him, he identified the fleeing suspect only as Shorty Mack and would not confirm that the suspect's name was Chaz Bunch. (Tr. 1277). He explained that Appellant instructed them to say he was Shorty Mack in a manner that made him fear Appellant. (Tr. 1278, 1281). At trial, he identified Appellant as the person referred to as Shorty Mack on the night of the incident. (Tr. 1284). Callier disclosed that as part of his plea deal, the state was recommending he receive seven years for his part in the crimes. (Tr. 1285-1286). He was originally charged with conspiracy to commit aggravated robbery, kidnapping, two counts of aggravated robbery, two counts of rape, plus three-year gun specifications. He pled to theft, abduction, and a one-year gun specification. (Tr. 1300-1303).

{¶28} The victim identified photographs of Brandon Moore, Jamar Callier, and Andre Bundy from photographic line-ups. In viewing an array containing Appellant's photograph, she told police she was drawn to the photograph of Appellant, noting that his eyes were sunken into his face. She asked for a full body shot to be sure. (Tr. 1449). The police could not immediately find photographs of juveniles with similar chubby and stocky builds in order to construct such a line-up. (Tr. 1449-1450).

{¶29} Two weeks later, Appellant was arrested after an officer conducting a traffic stop recognized him as the suspect in the rape case. Appellant gave the officer a false name. (Tr. 1119). The victim saw Appellant's picture in the newspaper and reported that he was the second suspect. She also identified him in juvenile court when she saw him in person and again at trial.

{¶30} A rape kit was conducted on the victim at the hospital and sent to BCI. BCI screened various items for DNA testing after finding semen: the vaginal and anal swabs; a dried stain swab from the victim's inner thigh; and cuttings from the victim's shorts and underwear. (Tr. 1613, 1619, 1621, 1664-1665). Both semen and blood were found on Brandon Moore's underwear. (Tr. 1616). BCI saves half of each positive sample in case anyone wants to test the materials later. (Tr. 1623).

{¶31} BCI then performed the DNA testing. The evidence was placed in the freezer in case it needed to be retested. (Tr. 1672). BCI used STR (short tandem repeat) DNA testing, which was described as new technology. The process looks at alleles at 13 locations along the DNA strand. (Tr. 1648). It was concluded that Brandon Moore could not be excluded as the source of the semen on the vaginal and rectal swabs, the dried stain swab, the underwear, or the shorts. (Tr. 1661). Specifically, the match with Moore's DNA to the vaginal swab was said to be 1 in 4 quintillion in the African-American population. (Tr. 1670). No DNA matching Appellant (or Callier or Bundy) was identified. (Tr. 1685).

{¶32} As to the vaginal swab, anal swab, dried stain swab, and underwear cutting, the first nonsperm fraction was consistent with the victim and the sperm fraction matched Brandon Moore. (Tr. 1667-1668). As to the cutting from the victim's shorts, there was a mixture of DNA from the victim and Brandon Moore in the nonsperm fraction and the sperm fraction was consistent with Brandon Moore. (Tr. 1668). The nonsperm fraction of the vaginal swab was consistent with the victim and the sperm fraction was consistent with Moore. (Tr. 1668).

{¶33} Regarding the anal and dried stain swabs, the nonsperm portion was a mix of the victim and Moore, and the sperm fraction was consistent with Moore. (Tr. 1668-1669). There was not enough DNA to test the remaining locations. (Tr. 1669). As to the underwear, the nonsperm fraction was consistent with the victim and the sperm fraction consistent with Moore. As to the shorts, the nonsperm fraction was consistent with the victim, and the sperm was consistent with Moore. (Tr. 1669).

{¶34} There were asterisks throughout the notes which meant a sample was below reporting standards. For instance, there was an asterisk on one page by the rectal swab, the nonsperm portion of the dried stain swab, and the shorts and on another page by the rectal swab, the dried stain swab, and the nonsperm portion of the underwear. (Tr. 1676-1677). Testimony disclosed that the asterisk was used when: "A profile was detected but we could not draw any conclusions on it;" and "It was actually tested, but it's below our reporting standards so I could not draw any conclusions." (Tr. 1676, 1688).

{¶35} No mystery or rogue DNA was found. (Tr. 1686). The BCI employee testified that a man would not have to ejaculate in order to leave fluids in the victim. (Tr. 1687). She agreed with defense counsel's statement: "if some other person left DNA material into those substandard reporting criterion amounts, you would have no way of knowing that today." (Tr. 1688).

{¶36} In closing arguments, the prosecutor laid out six facts supporting its position that Appellant was the fourth occupant of the vehicle and the second person who raped the victim. First, the victim's identification, including that she was drawn to his picture in the line-up, asked for a body shot, and then identified him from the newspaper picture and later in court. Second, an officer found Appellant running from the direction of the vehicle minutes after the vehicle was abandoned. Appellant identified himself to the officer, and the officer positively identified Appellant. (Tr. 1829). Third, the man who answered the door at the house on Glenwood identified Appellant as the person who knocked and asked him to lie to police. (Tr. 1832).

{¶37} Fourth, Jamar Callier's testimony against Appellant, which confirmed the victim's testimony about Appellant's participation in the rape. (Tr. 1833). Fifth, photographs from the Dairy Mart video which showed Appellant paid for gas from the pump where the subject car was waiting. (Tr. 1834). The victim gave the robbers her diamond earring, and the photographs showed Appellant wearing a diamond earring, which the victim believed was hers. (Tr. 1835). Sixth, Appellant called a girl from the house on Glenwood and the telephone records support this call. (Tr. 1834-1835).

{¶38} In opening statements and closing arguments, the defense argued there was no physical evidence linking Appellant to the offenses. Defense counsel specified that three body parts of the victim were assaulted but Appellant's DNA was not found. (Tr. 793-794, 797, 1896, 1901). It was noted there were no fingerprints on the gun or the car. (Tr. 794, 1895-1896). The defense proposed that the ultimate question was whether Appellant was the person who committed these offenses and whether Appellant was Shorty Mack. (Tr. 1872, 1886).

{¶39} The defense posited that misidentifications occur all the time, the victim may be mistaken, and the assailant may just look like Appellant. (Tr. 795, 1900). It was urged that it was not unusual for a sixteen-year-old to be short, stocky, chubby, round, and dark-complected with eyes that disappear into the face. (Tr. 1887). Counsel emphasized that Appellant has an upper set of gold teeth but the victim did not notice this feature while noticing the rapist's eyes. (Tr. 1888-1889, 1897).

{¶40} The defense pointed out the victim was not sure who committed the anal rape. It was noted that the victim originally reported a third person may have been involved in the rape, and it was suggested the anal rape could have been committed by Callier. (Tr. 1880). The defense concluded that Jamar Callier was lying and pointed out that he was receiving a plea deal. (Tr. 796, 1894).

{¶41} It was surmised that, if he were running from the police, Appellant would not have slowed to a walk when he saw the cruiser on Glenwood and would not have provided his real name to the officer. (Tr. 1890). The defense reiterated the victim's description that the suspect's shirt was black but the officer's description that Appellant's shirt was navy blue. (Tr. 1897). Counsel also argued the person in the photographs taken from the Dairy Mart video may not be Appellant. (Tr. 1893). Defense counsel also criticizes the police investigation into other people called Shorty.

{¶42} We turn now to Appellant's August 18, 2014 application for DNA testing filed by counsel for the Ohio Innocence Project. The application asked for DNA testing on the rape kit and the victim's clothing, asserting that the victim was raped by two or three men but only one male profile was found through testing available at the time. If DNA testing using the newer Y-STR or mini-STR found other male profiles, then Appellant could be excluded as a contributor. The application referred to the attached memorandum in support for an explanation on how a DNA test would be outcome determinative.

{¶43} The memorandum in support urged that the six requirements in R.C. 2953.74(C) for granting the application were met by stating: (1) the DNA test regarding the same biological evidence was not a definitive test because it did not

clearly establish that the biological material was or was not from him and because a prior test is not definitive where advances in technology make it possible to discover new biological material from the perpetrator; (2) biological material was collected from the crime scene, and the evidence still exists; (3) the samples are suitable for DNA testing; (4) the identity of the perpetrator was a major issue at trial; (5) an exclusion result will be outcome determinative; and (6) the evidence has not left state custody and has not been tampered with or contaminated.

{¶44} Regarding whether a new DNA test result would be outcome determinative, Appellant argued that if a male DNA profile is present in the swabs from the rape kit that does not belong to Moore or Appellant, then the result would conclusively establish that Appellant was not one of Moore's accomplices. He urged that if another's DNA is recovered from the skull caps, then Appellant is not Shorty Mack. He concluded that if the same unknown male profile were detected across multiple items of evidence, then the "anchoring effect" of such a result would create a strong probability that the unknown profile belongs to the actual rapist.

{¶45} Appellant attached the affidavit of Julie Heinig, Ph.D., the assistant laboratory director in the forensics department of DNA Diagnostic Center in Fairfield, Ohio. She stated that the current DNA testing is STR, Y-STR, and mini-STR. She explained that Y-STR analysis is used to test male specific DNA in cases where female DNA may be present in concentrated amounts and may overwhelm the low amounts of male DNA present in a sample. She stated that her lab has been using Y-STR since 2005. Mini-STR is a more recent system used to test degraded or limited DNA and includes eight of the conventional autosomal STR loci. As to this case, she stated:

> 10. Although the victim stated there were at least 2 perpetrators who raped her, DNA was detected from only one male individual using conventional STR analysis. In a case like this it is often recommended to test the items of evidence using Y-STR analysis. If there is an overwhelming amount of DNA on the evidence from the victim and/or one of the suspects it may be difficult to detect DNA from any other

> individual. Y-STR will focus only on the male DNA that is present and will ignore the female DNA. If male DNA, from one contributor, or more than one contributor, is detected on the vaginal, anal, dried stain swabs, underwear and shorts it can be compared to the DNA profiles from the male reference standards.
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> 11. In addition, the 2 do rags collected from the car have not been previously tested. It is possible to examine the do rags for visible stains or fluorescence, using UV light, and swab them for "wearer DNA" which is the presence of DNA from skin cells or sweat from the head area. If DNA profiles are obtained, using the conventional STR method, they can be compared to reference standards in the case.

The affiant then spoke of uploading any profiles to the FBI's Combined DNA Index System ("CODIS").

{¶46} The state filed a response in opposition to Appellant's application. The state argued that a DNA exclusion would not be outcome determinative. The state emphasized that eyewitness and co-defendant testimony identified Appellant as one of the perpetrators and DNA was not used to identify Appellant. The state claimed, "The identity of the defendant was not at issue considering all of the eye-witness testimony."

{¶47} On September 10, 2014, the trial court summarily overruled Appellant's application. Appellant appealed that decision. In an October 31, 2014 decision, this court quoted R.C. 2953.73(D), which provides: "Upon making its determination, the court shall enter a judgment and order that either accepts or rejects the application and that includes within the judgment and order the reasons for the acceptance or rejection as applied to the criteria and procedures set forth in sections 2953.71 to 2953.81 of the Revised Code." As the trial court failed to provide a reason for denying the application, this court dismissed the appeal for lack of a final order. *State v. Bunch*, 7th Dist. No. 14MA141, 2014-Ohio-4921, citing, *e.g., State v. Hickman*, 9th Dist. No. 22279, 2005-Ohio-472, analogizing *State v. Mapson*, 1 Ohio St.3d 217, 218, 438 N.E.2d 910 (1982) (holding that a decision on a post-conviction

petition is not final if it does not contain the statutorily-mandated findings of fact and conclusions of law).

{¶48} On November 4, 2014, the trial court entered judgment denying Appellant's application for DNA testing. The court found DNA testing would not be outcome determinative. The court stated that Appellant was identified by eyewitness and co-defendant testimony and other evidence. The court noted that Appellant was not identified because of DNA evidence but in spite of it; he was convicted even though he was excluded as the source of semen taken from the victim.

{¶49} Appellant filed a timely appeal from the final order rejecting his application. *See* R.C. 2953.73(E)(2) (rejection of the application for DNA testing is a final appealable order with the appeal to be filed in the court of appeals of the district in which the court of common pleas is located unless the offender was sentenced to death). *See also* R.C. 2953.72(A)(8).

REVIEW OF APPLICABLE DNA STATUTES

{¶50} An eligible offender can file a request for post-conviction relief, called an "application for DNA testing," on a form prescribed by the attorney general, requesting the state to do DNA testing on biological material from the case in which the offender was convicted. *See* R.C. 2953.71(A),(F); R.C. 2953.73(A). Appellant is an eligible offender because he was convicted of a felony by a judge or jury and did not plead guilty or no contest, he was sentenced to a prison term, and he is in prison serving that term. *See* R.C. 2953.72(C)(1)(a),(b)(i) (or under post-release control or community control sanction). In filing the application, the offender must sign an acknowledgement setting forth his recognition that if the court rejects the application due to the failure to meet the criteria, the court will not accept or consider subsequent applications. R.C. 2953.72(A)(7).

{¶51} In making its determination, the trial court shall consider all files and records pertaining to the proceedings against the applicant, including the indictment, the journal entries, the transcript, and the state's response (unless the application and the files and records show the applicant is not entitled to DNA testing, in which

case the application may be denied). R.C. 2953.73(D). The trial court need not hold an evidentiary hearing in reviewing the application. R.C. 2953.73(D).

{¶52} The court shall reject the application if a prior definitive DNA test has been conducted regarding the same biological evidence that the offender seeks to have tested. R.C. 2953.74(A). A definitive DNA test is initially defined as one that clearly establishes that biological material from the perpetrator was recovered from the crime scene and clearly establishes whether or not the material is that of the eligible offender. R.C. 2953.71(U). However, the statutory definition goes on to state:

> A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior test may have failed to discover.

Id. (and prior test results may be definitive as to some evidence but not definitive as to other evidence).

{¶53} Therefore, a prior DNA test failing to find the defendant's profile in a bite mark was not definitive when a new DNA testing method, such as Y-STR, can detect information that could not be detected in 1998 (when tests had issue with female DNA overwhelming male profiles). *See State v. Prade*, 126 Ohio St.3d 27, 2010-Ohio-1842, 930 N.E.2d 287, ¶ 15, 19-20, 23, 29, fn.1 (finding prior DNA test was not definitive and remanding to trial court to evaluate whether an exclusion would be outcome determinative; a case predating the statutory addition of a "very similar" definition of "definitive DNA test").

{¶54} In addition, where a prior DNA test excluded a defendant and his codefendants as the smoker of a cigarette found at the scene, that test was not per se definitive; therefore, the trial court could not reject the application solely because the defendant and his codefendants had already been excluded. *State v. Noling*, 136 Ohio St.3d 163, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 35, 42. Rather, the trial court must consider whether that prior evidence and advances in technology show by a preponderance of the evidence that there is a possibility of discovering new material

from the perpetrator. *Id.* (remanding for trial court to apply proper test to whether prior test was definitive).

{¶55} An exclusion is a result that scientifically precludes or forecloses the subject offender as a contributor of biological material recovered from the crime scene or victim. R.C. 2953.71(G). An inclusion is a result that scientifically cannot exclude, or that holds accountable, the offender as a contributor of biological material recovered from the crime scene or victim. R.C. 2953.71(I).

{¶56} If a prior inconclusive DNA test has been conducted on the same biological evidence, then the court shall review the application and has discretion, on a case-by-case basis, to either accept or reject the application. R.C. 2953.74(A). An inconclusive result exists when a scientifically appropriate and definitive DNA analysis or result cannot be determined. R.C. 2953.71(J). The court may direct a testing authority to provide information to assist in determining whether prior DNA test results were definitive or inconclusive and whether to accept or reject the application where prior DNA test results were inconclusive. R.C. 2953.74(A).

{¶57} R.C. 2953.74(B) provides that a court may accept the application of an eligible offender only if division (1) or (2) applies. Both divisions require a determination of whether the result would be outcome determinative at trial after considering all available admissible evidence related to the offender's case. *See* R.C. 2953.74(B). *See also* R.C. 2953.74(D).

{¶58} Division (B)(1) deals with the situation where the offender did not have a DNA test taken at the trial stage and requires the offender to show that at the time of trial, DNA testing was not generally accepted, the results were not generally admissible in evidence, or DNA testing was not yet available. R.C. 2953.74(B)(1). Division (B)(2) deals with the situation where the offender had a DNA test taken at the trial stage, it was not a prior definitive test subject to division (A), and the offender requests DNA testing regarding the same biological evidence. R.C. 2953.74(B)(2).

{¶59} R.C. 2953.74(C) then provides that a court may accept an eligible offender's application if six criteria exist. The first, second, and sixth criteria deal with the sample and require the following determinations: (1) biological material was

collected from the crime scene or the victim and the parent sample still exists; (2) the testing authority determines that the parent sample (a) contains sufficient material to extract a sample, (b) is not so minute or fragile as to risk destruction (but the court can use its discretion on a case-by-case basis to order the test in spite of that risk), and (c) has not degraded or been contaminated to the extent that it is unsuitable for testing and has been preserved in a condition suitable for testing; and (6) from the chain of custody and totality of circumstances, the parent sample and extracted test sample are the same sample collected and there is no reason to believe they have been out of the state's custody or have been tampered with or contaminated since collected. R.C. 2953.74(C)(1), (2), (6).

{¶60} The third, fourth, and fifth criteria required in order for a court to accept an application are set forth in R.C. 2953.74(C) as follows:

> (3) The court determines that, at the trial stage in the case in which the offender was convicted of the offense for which the offender is an eligible offender and is requesting the DNA testing, the identity of the person who committed the offense was an issue.
>
> (4) The court determines that one or more of the defense theories asserted by the offender at the trial stage in the case described in division (C)(3) of this section or in a retrial of that case in a court of this state was of such a nature that, if DNA testing is conducted and an exclusion result is obtained, the exclusion result will be *outcome determinative*.
>
> (5) The court determines that, if DNA testing is conducted and an exclusion result is obtained, the results of the testing will be *outcome determinative* regarding that offender. (Emphasis added.)

{¶61} As outlined above, the outcome determinative mandate is set forth in R.C. 2953.74(B)(1), (B)(2), (C)(4), and (C)(5). An exclusion is outcome determinative if the results of DNA testing had been presented at trial and found relevant and admissible and if those results had been analyzed in the context of and upon consideration of all available admissible evidence related to the case, then "there is a

strong probability that no reasonable fact-finder would have found the offender guilty of that offense * * *." R.C. 2953.71(L).[2]

{¶62} Regarding the standard of review, the trial court "has the sole discretion subject to an appeal" to determine whether the application satisfies the acceptance criteria and whether the application should be accepted or rejected. R.C. 2953.72(A)(8), citing (A)(4) (which in turn cites R.C. 2953.74 for the criteria to be applied by the judge). The statute does not prioritize the court's obligations and provides the trial court with discretion to find one criterion from R.C. 2953.74 lacking so that other criteria need not be evaluated. *See State v. Buehler*, 113 Ohio St.3d 114, 2007-Ohio-1246, 863 N.E.2d 124, ¶ 31-36 (if DNA testing would not be outcome determinative, the trial court need not evaluate the other criteria or require the prosecutor to file a report on the sample).

{¶63} The *Buehler* Court reviewed the merits of the trial court's statement that a DNA test excluding the applicant would not be outcome determinative. The Court concluded that the trial court did not abuse its discretion in finding that a DNA test would not be outcome determinative. *Id.* at ¶ 37. We consequently review the trial court's decision as to whether a criterion is lacking for an abuse of discretion. *See id. See also* R.C. 2953.72(A)(8) (trial court has the "sole discretion" to determine whether the application satisfies the acceptance criteria and whether the application should be accepted or rejected); R.C. 2953.74(A) (trial court "has the discretion, on a case-by-case basis, to either accept or reject the application").

{¶64} Finally, we note that in listing the requirements for an untimely or successive post-conviction relief petition, the post-conviction statute provides that a felony offender for whom DNA testing was performed under R.C. 2953.71 through 2953.81 (and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case) can obtain relief if "the results of

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[2] Previously, to be outcome determinative, the court had to find that no reasonable factfinder would have found the offender guilty if the DNA result was provided at trial. Effective July 11, 2006, the legislature changed the statutory language so the question is now whether there is a "strong probability" that no reasonable factfinder would have found the offender guilty and added instructions to analyze the results in the context of and upon consideration of all available admissible evidence. R.C. 2953.71(L).

the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense * * *." R.C. 2953.23(A)(2). Said statute contains the next step, *after* DNA testing has been ordered and performed. This case concerns whether DNA testing should be ordered under R.C. 2953.71 et seq.

ASSIGNMENT OF ERROR

{¶65} Appellant's sole assignment of error contends:

"THE TRIAL COURT ERRED IN DENYING APPELLANT'S APPLICATION FOR POSTCONVICTION DNA TESTING."

{¶66} Appellant divides his arguments into three issues, the first of which provides: "When one possible outcome of DNA testing would exonerate an inmate, the testing is outcome determinative." Under this section, Appellant reasons that if retesting of the rape kit discovers male DNA belonging to someone other than him or Moore, this would conclusively establish that he was not Shorty Mack, was not the fourth person in the vehicle, and did not rape the victim with Brandon Moore that night.

{¶67} Appellant concludes that no reasonable fact-finder would have found him guilty if a DNA test yielded the profile of a fifth male. He adds that if the same unknown DNA profile is found across multiple items, including the wave caps, the "anchoring" effect would create a strong probability that the unknown profile is the perpetrator, citing *State v. Emerick*, 170 Ohio App.3d 647, 2007-Ohio-1334, 868 N.E.2d 742, ¶ 25 (2d Dist.). He reviews other appellate cases reversing trial court denials of applications for DNA testing. *See State v. Johnson*, 8th Dist. No. 100503, 2014-Ohio-2646, 14 N.E.3d 482; *State v. Reynolds*, 186 Ohio App.3d 1, 2009-Ohio-5532, 926 N.E.2d 315 (2d Dist.). He urges that whether DNA was central to the state's case is irrelevant.

{¶68} The state responds that the trial court did not abuse its discretion in denying the application as the results would not be outcome determinative. The state asserts that a reasonable fact-finder would still find Appellant guilty of the offenses even if another male profile was found in addition to the one already identified as Brandon Moore. The state points out that multiple pieces of independent evidence

linked Appellant to the offenses against the victim. The state relies on cases upholding a trial court's factual decision that an exclusion would not be outcome determinative, such as the Supreme Court's decision in *Buehler* and our decision in *Lemke*. The state urges that a DNA test result excluding Appellant would still be consistent with the state's theory and the jury's findings at trial.

{¶69} In *Johnson*, the Eighth District reversed the trial court's finding that a potential DNA test would not be outcome determinative. In that case, three victims identified the defendant as the person who robbed them. The hat and jacket described to officers were found discarded in the bushes by the scene. The defendant asked for post-conviction DNA testing and attached an affidavit in support wherein a man who committed other robberies around the same time admitted that it was he who robbed the victims that night. Due to the confession and the fact that there was only one robber, the court found that a DNA result on the discarded clothing that excluded the defendant and identified the person who confessed would be outcome determinative.

{¶70} The state distinguishes the Eighth District's *Johnson* case: there was only one alleged perpetrator in that case, and someone besides the defendant later confessed to the crime. Here, there was more than one alleged rapist, and no confession was made by an individual not previously identified with the crime. In addition, the victim's testimony identifying Appellant was bolstered by the testimony of Jamar Callier, who was not identifying a stranger. Rather, he knew Appellant and participated with Appellant in robbing the victim that night.

{¶71} In our *Lemke* case, the defendant was found driving the vehicle of a dead woman and was in possession of property from the victim's apartment. Two people he spent time with that night testified that the defendant told them he killed his neighbor. It was surmised that the victim was also raped due to the condition and position of her body and clothing. An inmate testified that Lemke admitted to him while in jail for the murder that he raped the victim (and disclosed that he did not ejaculate). The victim's boyfriend testified that he and the victim engaged in sexual intercourse that day. This court concluded that even if DNA testing excluded Lemke

as the donor of sperm, a reasonable fact-finder could still have found him guilty of rape and murder. *State v. Lemke*, 7th Dist. No. 05CO42, 2006-Ohio-3481, ¶ 29.

{¶72} In *Buehler*, the Supreme Court first held that a court need not make determinations and orders regarding the criteria dealing with the sample if the court evaluates the record and finds that a DNA result would not be outcome determinative. *Buehler*, 113 Ohio St.3d 114 at ¶ 34, 36. The Court then held that the trial court did not abuse its discretion in finding that any DNA test excluding the defendant as the source of material retrieved from under the murder victim's fingernails would not be outcome determinative. *Id.* at ¶ 37.

{¶73} The Court stated that although the co-defendant testified that he hit the victim in the head with a mallet after Buehler and the victim struggled and that Buehler then hit her more times, this would not necessarily mean Buehler's DNA would be under her fingernails. *Id.* The Court concluded that a DNA test result excluding Buehler would be consistent with the state's position at trial that the victim attempted to defend herself against the co-defendant's initial blows with the hammer after struggling with Buehler. *Id.*

{¶74} The Court found that the DNA test excluding Buehler would not prevent a reasonable fact-finder from reaching a guilty verdict "in view of the independent evidence of Buehler's guilt" and "[a] DNA test result excluding Buehler, therefore, would not be outcome-determinative." *Id.* This independent evidence was the co-defendant's testimony, expert testimony that the blood-spatter pattern showed two people were present (in addition to the victim), Buehler's flight to West Virginia with the co-defendant in the victim's car, and the theft of the victim's television and money. *Id.* (the Court expressed no concern that a third profile could hypothetically be found.)

{¶75} *Lemke* and *Buehler* did not involve the victim's testimony identifying the defendant as the rapist (as the victims were killed). Here, there was semen found on the swabs from the rape kit with sperm on the vaginal and rectal swabs. There was also semen on the dried stain swab from the victim's inner thigh and on her underwear and shorts. The source of all sperm fraction material sufficient for testing

was said to be consistent with Brandon Moore. All nonsperm fraction material sufficient for testing was said to be consistent with the victim or a mixture of the victim and Moore.

{¶76} Although the forensic scientist explained that a male need not ejaculate in order to leave DNA evidence, we note that Callier knocked Appellant off the victim during the last act of vaginal rape. The forensic scientist excluded Appellant as a depositor of all tested fluids and stated that no mystery person's DNA was found. Yet, she also said some locations had DNA that was below her reporting standards, and she agreed with the statement: "if some other person left DNA material into those substandard reporting criterion amounts, you would have no way of knowing that today; right?"

{¶77} Appellant believes that if a DNA test result, obtained by new DNA testing such as Y-STR, were to find a fifth male profile, this would show that he was not the person whom the victim believed raped her. That is, he believes "there is a strong probability that no reasonable fact-finder would have found the offender guilty" had his hoped-for test result been admitted at trial and analyzed in the context of and upon consideration of all available admissible evidence.

{¶78} As to Appellant's fifth male profile hypothesis, the victim's testimony referred to her boyfriend and fiancé; it was his parents to whom she fled and his parents who drove her to the hospital. Any fifth male profile could be her fiancé. There is no reason to pursue this hypothesis further. There is ample independent evidence supporting the state's theory that Appellant was the fourth person at the rape scene that night and was correctly identified by the victim as one of her rapists.

{¶79} The victim provided a license plate number for the subject vehicle. Although two numbers were transposed, *her memory* of the sequence of seven digits was quite a feat considering she briefly viewed those numbers as she was being digitally raped during a carjacking; she was thereafter raped in multiple ways; and she may be killed. The victim originally reported there were four to five males present and two or three raped her. At trial, she testified there were four males present.

{¶80} The subject vehicle, containing four males, was located soon after her arrival at the hospital. Upon spotting a police cruiser following him, the driver of the subject vehicle stopped the car and fled on foot. Two wave caps (one black and one blue) were in the vehicle. Appellant wore the blue one during the assault on the victim. Appellant believes the cap may show someone else's DNA. We note, however, there was no testimony that the cap originally belonged to Appellant, i.e. that it was not borrowed for use as a mask during the assault.

{¶81} Brandon Moore, Andre Bundy, and Jamar Callier stayed in the vehicle and were arrested. They all admitted their presence during the rape. Brandon Moore admitted his active participation in raping the victim. All three of these witnesses named the fleeing driver as Shorty Mack. Callier testified that Appellant was Shorty Mack and that Appellant instructed him to use that name if asked.

{¶82} The victim viewed photograph line-ups. She positively identified Brandon Moore as the one who originally kidnapped her and as one of the rapists. She identified Jamar Callier as the one going through her belongings after she was forced to perform oral sex on Brandon Moore and Appellant and just before she was anally raped. She identified Andre Bundy as the one she saw sitting behind the wheel in the other vehicle. Her identifications combined with their admissions provide another example of her memory for details that night.

{¶83} Upon her viewing of the photographic array containing Appellant's picture, she told the officer that she was "drawn" to the photograph of Appellant, but she asked for a body shot to be certain. She then saw Appellant's picture in the newspaper and immediately "knew" Appellant was the other person who raped her along with Brandon Moore. Jamar Callier testified that the victim was correct in identifying Appellant as the other rapist.

{¶84} The victim stated that Appellant forced her to perform oral sex and held her head while forcing her to perform oral sex on Moore (and they switched positions more than once). He brought her to the trunk of the car where she was anally raped. Appellant thereafter forced her to the ground where he vaginally raped her while Moore forced his penis into the victim's mouth. Appellant also forced her to perform

oral sex on him while Moore vaginally raped her (and they changed positions more than once).

{¶85} The victim was not sure if the person who raped her anally was someone besides Appellant or Brandon Moore. Jamar Callier testified that the perpetrator of that offense was Appellant. The portion of Brandon Moore's statement admitted at trial confirmed that the person who participated in the rapes with him was the one who committed the anal rape.[3]

{¶86} Appellant was the person stopped by a police officer within minutes of the stop of the subject vehicle. He asked a homeowner on Glenwood Avenue to lie about being his uncle. Appellant gave his correct name and age to the officer. He was said to be wearing a navy shirt with a white T-shirt underneath; the victim said he was wearing a black sweatshirt with a white T-shirt underneath.

{¶87} The officer and the homeowner identified Appellant as the person outside of the house on Glenwood during the perimeter search for the rapist. The homeowner testified that Appellant used his phone that night, and a female testified that Appellant called her that night. Phone records confirmed that a call was made from the house on Glenwood to the female's house.

{¶88} Besides this evidence, the jury viewed photographs from the video surveillance at Dairy Mart which showed Appellant paying for the gas for the subject vehicle approximately 15 minutes after the rape was reported at the hospital. Callier confirmed that the photographs made from the video were of Appellant. The victim also identified Appellant in that photograph and said the clothing in the photograph matched what he wore during the rape. She also believed Appellant was wearing her diamond earring that had been stolen from her during the robbery in her vehicle.

{¶89} Jamar Callier knew Appellant prior to the night of the rape. He also traveled with him in the subject vehicle that night before Appellant was dropped off near the victim's workplace and again after the rape. Callier's testimony invoked no

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[3] Even if Appellant did not physically perform the anal rape, he would be a complicitor as he was holding a gun on the victim at the time. *See* R.C. 2923.03(F) (a person who is complicit in an offense may be charged and punished as if he were the principal offender, and a charge of complicity may be stated under R.C. 2923.03 or in terms of the principal offense).

allegation of misidentification. Rather, Appellant urged that Callier was lying in exchange for a favorable plea deal. The jury heard this theory and discarded it. Callier's testimony was confirmed by the victim herself, including that Appellant was a main perpetrator of the rape and that Callier saved the victim during Appellant's final rape.

{¶90} Appellant urges that the victim misidentified him, stating that his body type, including eyes that sink into his face because of chubby cheeks, is not rare among sixteen-year-olds. However, a jury saw Appellant and could find that his features are distinctive in the manner described by the victim. Notably, the nature of the offense involved a very close encounter with her assailant's face, chest, hands, and body.

{¶91} As for Appellant's upper gold teeth, which he apparently displayed to the jury at trial, there was no testimony the victim was in a position to observe her attacker's teeth. In fact, Appellant used the cap as a mask for some of his time with the victim.

{¶92} Besides the direct eyewitness evidence of Appellant's identity as the rapist provided by the victim and Jamar Callier, we have reviewed the circumstantial evidence: it was Appellant who ran from the direction of the stopped vehicle and in the direction tracked by the K-9 unit minutes after the suspect fled from the stopped vehicle; the stopped vehicle was the one present during the rape; and there is photographic evidence that Appellant paid the gas bill for the subject vehicle after the rape and before the car was stopped by police.

{¶93} Circumstantial evidence has the same inherent value as direct evidence. *State v. Jenks*, 61 Ohio St.3d 259, 265-266, 272-273, 574 N.E.2d 492 (1991). This case involves strong direct and circumstantial evidence supporting a rational trier of fact's determination that the identity of the perpetrator was Appellant. Even if Appellant's hypothetical was obtained from a DNA test, reasonable fact-finders could still find Appellant guilty, as this jury did.

{¶94} As aforementioned, we review the trial court's decision on the outcome determinative requirement for an abuse of discretion. *See* R.C. 2953.72(A)(8); R.C.

2953.74(A); *Buehler*, 113 Ohio St.3d 114 at ¶ 37. An abuse of discretion has been defined as an "unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *State v. Kirtland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67.

{¶95} This court concludes that the trial court did not abuse its discretion in finding that a further DNA exclusion result would not be outcome determinative. In other words, it was not unreasonable or unconscionable for the trial court to conclude that Appellant failed to show "a strong probability that no reasonable fact-finder would have found [Appellant] guilty" had the test result he hopes for been presented at trial and analyzed in the context of and upon consideration of all available admissible evidence. *See* R.C. 2953.71(L). In addition, this court finds there is no indication the trial court's decision was arbitrary or was a decision that no conscientious judge could make. Appellant's argument regarding the outcome determinative nature of DNA testing is overruled.

{¶96} Alternative issues raised by Appellant concerning other criteria are moot or not reviewable (as a decision was not made on them below). For instance, the second issue presented by Appellant provides: "Identity is 'at issue' at trial when the defendant denies participation in the crime." Because the trial court cited R.C. 2953.74(C)(3) as an alternative reason to deny the application, Appellant believes the court found his identity was not an issue at his trial. R.C. 2953.74(C)(3) provides that an application cannot be granted unless the court determines that "the identity of the person who committed the offense was an issue at trial." Appellant points out that the fact the state succeeded in convincing the jury that he was the perpetrator does not mean identity was not an issue at trial. Appellant's defense strategy at trial was to place his identity at issue as can be seen in the opening statements, the cross-examination of the state's witnesses, and the closing arguments.

{¶97} The state does not dispute this position. Instead, the state points out that a decision on one criterion can be found moot where a decision was properly made as to the lack of another required criterion. The trial court also cited R.C. 2953.74(B) and found the requested DNA test would not be outcome determinative.

The state concludes that because the trial court properly used its discretion to conclude that a DNA test would not be outcome determinative, as required by R.C. 2953.74(B)(1), (B)(2), (C)(4), and (C)(5), the presence of other criteria is irrelevant. As we upheld the trial court's decision on the outcome determinative criteria, any issue with the citation to division (C)(3) is moot; a court has no obligation to consider every criterion if it initially finds a DNA test would not be outcome determinative. *Buehler*, 113 Ohio St.3d 114 at ¶ 31.

{¶98} This is also the position taken by the state in response to the third issue presented by Appellant, which states: "Postconviction DNA testing is available to inmates when DNA testing methods have improved since the time of their trial, the biological evidence has been preserved, and there is no reason to believe the evidence has been subject to tampering since trial." *See* R.C. 2953.74(B)(2) (requiring that there has not been a prior definitive DNA test); R.C. 2953.71(U) ("A prior DNA test is not definitive if the eligible offender proves by a preponderance of the evidence that because of advances in DNA technology there is a possibility of discovering new biological material from the perpetrator that the prior DNA test may failed to discover.")

{¶99} Appellant points to the affidavit of a Ph.D. filed in support of his position that the prior DNA testing was not definitive as newer testing methods exist, such as Y-STR and mini-STR. *See Prade*, 126 Ohio St.3d 27 at ¶ 20 (Y-STR DNA test keeps male suspect's DNA from being overwhelmed by female victim's DNA and is useful when there is merely a minor male component). Appellant also reviews the criteria in (C)(1), (2), and (6) of R.C. 2953.74, which relate to the sample to be tested.

{¶100} As aforementioned, the state urges this court to focus only on the first issue presented because a review of unresolved or alternative issues is not required if the outcome determinative test was not satisfied as required by R.C. 2953.74(B)(1) and (B)(2), (C)(4), and (C)(5). Appellant does not counter this position.[4] Again, if the

[4] In fact, in introducing the arguments under the third issue presented, Appellant's brief acknowledges that the items he sets forth were not ruled upon by the court in a manner unfavorable to his position and he says the arguments are raised "to establish that on remand, the trial court should be required to direct the prosecutor to file an inventory of biological evidence and order that evidence to be tested."

trial court finds a DNA test would not be outcome determinative, it need not be concerned with the other criteria required for granting an application. *See Buehler*, 113 Ohio St.3d 114 at ¶ 31-36 (trial court has discretion to decide whether or not to obtain information about the sample before evaluating the outcome determinative factor).

{¶101} As we are upholding the trial court's decision that a DNA test would not be outcome determinative under the first issue presented, any questions as to the existence of the other criteria are moot and unreviewable. *See id*. The trial court's judgment is hereby affirmed.

Donofrio, P.J., concurs.

Waite, J., concurs.