

No. SC85958

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,

Respondent,

v.

JERRY L. KEIGHTLEY,

Appellant.

**Appeal from the Circuit Court of Webster County, Missouri
30th Judicial Circuit, Division 1
Honorable John W. Sims, Judge**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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§566.034, RSMo 2000 9

JURISDICTIONAL STATEMENT

This appeal is from convictions for one count of statutory rape in the second degree, § 566.034, RSMo 2000, and two counts of statutory sodomy in the second degree, § 566.064, RSMo 2000, obtained in the Circuit Court of Webster County, and for which appellant was sentenced as a prior and persistent offender to consecutive terms of twelve years in the custody of the Department of Corrections on each count. The Missouri Court of Appeals, Southern District, affirmed appellant's convictions and sentences. State v. Keightley, SD25102, slip opinion (Mo. App., S.D. March 30, 2004). On May 25, 2003, this Court sustained appellant's application for transfer pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Jerry Keightley, was charged in Hickory County by information as a prior and persistent offender with one count of second-degree statutory rape and two counts of second-degree statutory sodomy (L.F. 8-11). Following a change of venue, this cause went to trial by jury beginning on July 1, 2002, in the Circuit Court of Webster County, the Honorable John W. Sims presiding (L.F. 2, 5).

The sufficiency of the evidence is at issue in this appeal. Viewed in the light most favorable to the verdict, the following evidence was adduced: Appellant met the victim's mother, Sarah Bass, while both were living in Florida, and eventually they moved in together (Tr. 266-267). In 1997, Ms. Bass and her children, including the victim, who was born on January 1, 1983, and three sons, moved with appellant to a trailer located on his family's property in Wheatland, Missouri (Tr. 267-269). Appellant, Ms. Bass, and her family lived in Wheatland for three years (Tr. 269). Around April 1999, right after Easter, appellant gave Ms. Bass a diamond ring and told her she could think of it as an engagement ring (Tr. 270). Even though appellant gave Ms. Bass that token of affection, there were problems in the relationship, as appellant would turn Ms. Bass' sexual advances away, only wanting Ms. Bass to perform oral sex on him (Tr. 272, 281-282). The two did not have sexual relations in 1999, leading Ms. Bass to become suspicious that appellant was having an affair (Tr. 272). What Ms. Bass did not know was that appellant had been engaging in sexual activity with the victim, who was sixteen years old during this time (Tr. 276, 380-395).

One day, about a month or two prior to Ms. Bass receiving the ring from appellant, when

Ms. Bass had gone to the store with the rest of the family, appellant called the victim back into his bedroom, and had her shut and lock the door (Tr. 381-383). Appellant told the victim to take off her clothes and lay on the bed, which she did, and then appellant lay on top of her and put his penis inside her vagina, raping her until he ejaculated (Tr. 385-387). At one point, the victim tried to push away and slide off the bed, but appellant pulled her back over and told her if she did not lie still, he would “shove it up in her really hard” (Tr. 385-386).

From that point on, appellant continued to have sexual intercourse with the victim on numerous occasions, in the bedroom as well as in the front and back of appellant’s pickup truck when he would take her to a friend’s house (Tr. 386-387, 389-392). On more than one occasion, appellant would have the victim lie on her stomach and would penetrate the victim’s anus with his penis (Tr. 387-388). On one occasion in the bedroom, appellant tried to have the victim suck his penis, and actually put his penis in her mouth (Tr. 388-389).

During this time, Ms. Bass became suspicious that appellant was inappropriately touching the victim because appellant would often send her to town to the store and have her take the boys, but leave the victim alone with him, and because the victim was starting to not want to be out of her mother’s sight (Tr. 273-274, 280). Ms. Bass would ask the victim if appellant had ever touched her, but the victim denied it (Tr. 273, 280-281). The victim was afraid to tell because appellant told her that nobody would believe her if she told anyone about the abuse (Tr. 393).

The last time that appellant molested the victim was in August 1999, just prior to the family leaving to move to North Carolina, where Ms. Bass had family (Tr. 282-283, 394). On

that occasion, appellant lay on top of the victim and inserted his penis, and then had the victim turn over with her “butt up in the air” and started “sticking it” into her vagina from behind until he ejaculated (Tr. 394-395). Appellant then told her to clean off and get dressed, so she wiped off with a towel and put on her clothes (Tr. 395). When she put on her underpants, she noticed that they felt wet (Tr. 396).

The family then left for Ms. Bass’s parents’ house in Robbinsville, North Carolina (Tr. 282). The family arrived in North Carolina on August 6 or 7, 1999 (Tr. 284). When they arrived, appellant wanted to go on to Florida, but Ms. Bass said no (Tr. 284). Appellant went on to Florida anyway (Tr. 284).

That day or the day after arriving in North Carolina, the victim went to nearby Dahlonega, Georgia, to visit her aunt, Ms. Bass’ sister, Deana (Tr. 286). The victim told her aunt what appellant had been doing to her (Tr. 375-376). On August 8, Deana called Ms. Bass and told her what the victim had said, and the victim also told her mom “a little bit” of what happened (Tr. 285-286, 376). On August 9, Ms. Bass took the victim to the hospital, where the victim’s underpants, the same pair she had worn the day they left from Missouri, were taken into evidence (Tr. 286, 348-349, 376).

Sometime after this, Ms. Bass spoke with the appellant and told him he and she were through because of what appellant had done, and appellant denied doing anything to the victim (Tr. 285-286). However, after Ms. Bass moved to Dahlonega to get counseling for the victim, appellant started calling and threatened to kill her if he wound up in jail (Tr. 286-287).

Tests performed on the victim’s underwear revealed the presence of semen (Tr. 359).

Polymerase Chain Reaction-Short Tandem Repeat (PCR-STR) DNA tests on the semen stain contained a mixture of appellant's and the victim's DNA (Tr. 447, 480-489, 497-498, 510).

Appellant did not testify in his own defense, but presented the testimony of a microbiology professor regarding concerns with the process used to identify appellant's DNA, as well as testimony of other witnesses regarding portions of the victim's and Ms. Bass' testimony (Tr. 551-646).

At the close of the evidence, instructions, and arguments of counsel, appellant was found guilty on all counts (L.F. 74-76; Tr. 691). The court sentenced appellant to consecutive terms of twelve years in the custody of the Department of Corrections on each count (L.F. 84-86; Tr. 718-719). This appeal follows.

ARGUMENT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANT'S MOTION TO DISMISS ALLEGING THAT THE PROSECUTION ACTED IN BAD FAITH IN ENTERING A *NOLLE PROSEQUI* DURING PRETRIAL PROCEEDINGS IN A PRIOR CASE ON THE SAME CHARGES AND IN REFILEING THOSE CHARGES BECAUSE THE STATE'S ACTION WAS LAWFUL AND NOT IN BAD FAITH IN THAT, UNDER MISSOURI LAW, THE PROSECUTOR HAS UNFETTERED DISCRETION IN DECIDING TO ENTER A *NOLLE PROSEQUI* AND IS NOT PROHIBITED FROM FILING NEW CHARGES SO LONG AS JEOPARDY HAS NOT ATTACHED AND THERE WAS NO DUE PROCESS VIOLATION.

FURTHER, TO ANY EXTENT THAT THIS COURT WOULD CONSIDER A CHANGE IN THE LAW GOVERNING PROSECUTORIAL DISCRETION TO FILE A *NOLLE PROSEQUI*, THE BETTER PRACTICE, AS SUGGESTED BY CASES FROM THE MAJORITY OF OTHER JURISDICTIONS, WOULD BE TO MAKE SUCH CHANGES THROUGH PASSING LEGISLATION OR PROMULGATING COURT RULES.

ADDITIONALLY, THE TRIAL COURT DID NOT PLAINLY ERR IN NOT APPLYING COLLATERAL ESTOPPEL TO THE ISSUE OF WHETHER PCR-STD DNA TESTING HAD GAINED GENERAL ACCEPTANCE IN THE SCIENTIFIC COMMUNITY AS COLLATERAL ESTOPPEL DOES NOT APPLY TO CHARGES

REFILED FOLLOWING THE ENTRY OF A *NOLLE PROSEQUI*.

Appellant claims that the trial court erred in denying his motion to dismiss because the State acted in bad faith when it entered a *nolle prosequi* in a previous case involving the same charges as those in this case, and in refileing the same charges (App.Br. 22). Appellant argues that the State entered the *nolle prosequi* in “bad faith” because it was seeking to “defeat a ruling the State dislike[d]” in the prior hearing (App.Br. 26). Appellant contends that this court should create a new rule of law limiting the State’s power to enter a *nolle prosequi* (App.Br. 21, 35-36).

A. Facts

Appellant was originally charged in June 2000 with one count of statutory rape and two counts of statutory sodomy in Hickory County (Supp.L.F. 90). The Hickory County docket sheet shows that, after the circuit court excluded DNA evidence following a Frye hearing, the State filed a motion to reconsider to exclude “population genetics evidence” (Supp.L.F. 92). During the hearing on that motion on April 11, 2001, the State requested and was granted a recess (Supp.L.F. 92). The State then filed a *nolle prosequi* (Supp.L.F. 92). On June 29, 2001, an information was filed in the Circuit Court of Hickory County charging appellant with one count of statutory rape and two counts of statutory sodomy (L.F. 1, 8-11).

Appellant filed a motion to dismiss the new charges, claiming that the State abused its discretion in entering the *nolle prosequi* and refileing the charges, and alleging that the State entered the *nolle prosequi* simply to avoid the prior court’s ruling on the DNA evidence (2nd Supp.L.F. 1-7). The State responded that it had no power to appeal that previous ruling, and

that, regardless, the State had the “absolute right” to dismiss and refile charges so long as jeopardy had not attached (Supp.L.F. 2). Following a pretrial hearing, the trial court overruled appellant’s motion to dismiss (L.F. 15).

B. Standard of Review

A trial court’s ruling on a motion to dismiss is reviewable for an abuse of discretion. State v. Burns, 112 S.W.3d 451, 454 (Mo. App., W.D. 2003). An abuse of discretion will only be found when that decision is clearly against the logic of the circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Id.

C. Analysis

1. Missouri Law Supports the Trial Court’s Ruling

A *nolle prosequi* is a prosecutor’s formal entry on the record stating that he or she will no longer prosecute a pending criminal charge. State v. Flock, 969 S.W.2d 389, 389 (Mo. App., W.D. 1998). It operates as a dismissal without prejudice unless subsequent prosecution would be barred by the prohibition against double jeopardy. Id. The prosecutor had unfettered discretion to enter a *nolle prosequi*, and the court may not interfere with the exercise of that discretion. Id. This “unfettered discretion” existed under the common law, and in the absence of any statute or rule abrogating that discretion, this Court has held that such unfettered discretion is the rule in Missouri.¹ State v. Berry, 298 S.W.2d 429, 431-32 (Mo. 1957); State

¹Under Missouri law, the common law is still controlling where statutes to the contrary

ex rel Griffin v. Smith, 258 S.W.2d 590, 593 (Mo. banc 1953).²

Further, this Court has also stated that a *nolle prosequi*, if made prior to the time a jury is impaneled or sworn, is not a bar to a subsequent prosecution for the same offense. State v. Lonon, 56 S.W.3d 378, 380 (Mo. 1932). This Court recently revisited the issue in State v. Honeycutt, 96 S.W.3d 85 (Mo. banc 2003). In Honeycutt, the Court held that the circuit court has no authority to convert a *nolle prosequi* into a dismissal with prejudice or to force the prosecutor to trial against his or her wishes. Id. at 89. Therefore, it is clear that the law in Missouri still supports the prosecutor's unfettered discretion to enter a *nolle prosequi* for whatever reason he or she deems necessary.

Applying that rule to this case, it is clear that not only did the trial court not abuse its discretion in overruling the motion to dismiss, the trial court had no authority to grant that motion. Had the court granted the motion, it would have, in effect, made the State's previous *nolle prosequi* a dismissal with prejudice, which is clearly contrary to Honeycutt. Id. In

have not been enacted. §1.010, RSMo 2000.

²While Griffin was recently overruled by this Court to the extent it held that the trial court *did not* have the power to dismiss without prejudice a case for want of prosecution, the Court did not overrule the prosecutor's unfettered discretion to dismiss a case prior to verdict. State v. Honeycutt, 96 S.W.3d 85, 88-89 (Mo. banc 2003). In fact, Honeycutt upholds the power of the State to refile charges after dismissal, and reaffirms Griffin's rule as to the State's discretion regarding the power to file a *nolle prosequi*. Id. at 89.

making its decisions, a trial court is not only entitled but is required to rely on the prior precedents of this Court and the statutes and rules in place at the time of its rulings. Supreme Court Rule 19.04. This is exactly what the trial court did in this case, and it should not be found to be in error for doing so. Therefore, the trial court did not abuse its discretion in overruling the motion to dismiss.

2. No Due Process Violation

Appellant recognizes that Missouri law does not actually support the motion to dismiss he filed below, conceding that the State has “unfettered discretion” to enter a *nolle prosequi* (App.Br. 24). However, appellant suggests that this Court create a new rule law to hold that his motion to dismiss should have been granted because the State acted in “bad faith” in entering the *nolle prosequi* after a contrary evidentiary ruling (App.Br. 22, 26-27, 30, 31, 37, 39). To justify such a rule, appellant attempts to raise his claim from a mere review of the trial court’s discretionary action to a violation of appellant’s “due process” rights (App.Br. 22, 27). Appellant’s reliance on a generic due process argument cannot alone provide the basis for the relief he seeks. “Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.” Dowling v. United States, 493 U.S. 342, 352, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). “Judges are not free, in defining ‘due process,’ to impose on law enforcement officials our ‘personal and private notions’ of fairness and to ‘disregard the limits that bind judges in their judicial function.’” United States v. Lovasco, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); quoting Rochin v. California, 342 U.S. 165, 170, 72 S.Ct. 205, 208, 96 L.Ed. 183 (1952). Therefore, to find an actual due process violation,

appellant must point out some specific right that is violated.

Appellant attempts to isolate a “right” that was implicated by the prosecutor’s action, claiming that criminal defendants have a “right to be tried by the trial judge or jury that were [sic] initially selected and approved by both parties” (App.Br. 29). Appellant provides no citation to support this assertion, nor can he. A criminal defendant has no constitutional right to have a certain judge preside over his trial. See State v. Purdy, 766 S.W.2d 476, 478 (Mo. App., E.D. 1985), citing State v. Perkins, 95 S.W.2d 75, 76 (Mo. 1936)(the right to disqualify a judge is not a constitutional right, but a statutory privilege); Strickland v. Washington, 466 U.S. 668, 695, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)(no constitutional prejudice from counsel’s failure to change judge, as defendant is not entitled to “the idiosyncracies of [a] particular decisionmaker”). Therefore, this nonexistent right cannot support appellant’s claim.

To the extent that appellant’s claim that the prosecution’s alleged “bad faith” gives rise to a due process violation, that assertion must also fail. Any constitutional guarantee of substantive due process only prevents conduct by the State that “shocks the conscience or interferes with rights implicit in the concept of ordered liberty” or “that is so outrageous that it . . . offends ‘judicial notions of fairness’” or is “offensive to human dignity.” Moran v. Clarke, 296 F.3d 638, 643 (8th Cir. 2002); quoting Weiler v. Purkett, 137 F.3d 1047, 1051 (8th Cir. 1998). Courts are wary of extending substantive due process into new areas. Weiler, 137 F.3d at 1051.

Appellant’s claim that the State acted with bad faith presents appellant with a glaring problem—the prosecutor did not act in bad faith by dismissing the case following an adverse

evidentiary ruling. Far from shocking the conscious or offending judicial notions of fairness, the prosecutor in this case acted lawfully in accordance with Missouri law. Missouri courts have repeatedly upheld the right of the State to enter a *nolle prosequi* after a contrary evidentiary ruling, refile those charges, and receive a different evidentiary ruling. State v. Maggard, 906 S.W.2d 845, 847-48 (Mo.App., S.D. 1995); State v. Beezley, 752 S.W.2d 915, 916-18 (Mo.App., S.D. 1988); see also State v. Pippenger, 741 S.W.2d 710, 710-12 (Mo. App., W.D. 1987). Unless this Court concludes that the Courts of Appeal have been permitting action that “interfered with the concepts of ordered liberty” or “offended human dignity,” the suggestion that a prosecutor acted in bad faith amounting to a due process violation by doing an action expressly permitted by the laws of this State is wholly without merit.

Even to the extent that the prosecution may have filed the *nolle prosequi* for the purposes of avoiding the court’s ruling on the DNA evidence, such motivation is not automatically “bad faith,” as appellant conclusively states. Appellant attempts to minimize and belittle the State’s important interest in insuring that trial courts rule correctly on matters of the admissibility of evidence, claiming the State can *nolle pros* when it receives an evidentiary ruling “the State dislikes” or when the prosecutor believes the case “is not going his way” (App.Br. 26). However, the State, as well as the defendant, is entitled to a fair trial. State v. Isa, 850 S.W.2d 876, 888 (Mo. banc 1993). Here, the State believed³ that the original

³The State still believes the original court’s ruling on that PCR-STR DNA testing was not generally accepted in the scientific community was erroneous, and that the later ruling

court's ruling on the DNA issue was erroneous. It does not appear that the State had the ability to appeal this decision, as the court's decision was not one specifically enumerated by statute as permitting an appeal⁴, there was no final judgment, and there is no other statute unequivocally granting the State such a right of appeal.⁵ See § 547.200, RSMo 2000; State v. Burns, 994 S.W.2d 941, 942-943 (Mo. banc 1999); State v. Evans, 679 S.W.2d 434, 435 (Mo. App., E.D. 1984).⁶ Essentially, because he believes that the State must accept an incorrect ruling without utilizing the only tool it had available to correct it, he is arguing that he has a due process right to an incorrect ruling by a trial court.⁷ Such a conclusion is preposterous and cannot stand. Because the State used a tool available to it in a manner permitted under law to avoid an injustice caused by an erroneous evidentiary ruling, it did not act in bad faith, but simply relied on the state of the law, which is the prosecution's duty to uphold. Therefore, the

admitting the evidence was correct. See Point III, supra.

⁴A ruling of the trial court excluding evidence on an evidentiary basis is not an order "suppressing" evidence under § 547.200. State v. Rivers, 26 S.W.3d 608, 609 (Mo. App., W.D. 2000).

⁵Appellant admitted at oral argument before the Southern District that the State had no right to appeal the ruling on the Frye issue.

⁶The Court in Burns noted that the State's ability to refile charges precluded a finding of a final judgment permitting a State appeal. Burns, 994 S.W.2d at 942-43.

⁷Obviously, appellant's due process right to challenge an incorrect court ruling is fully guaranteed by his right to appeal any conviction implicating that ruling.

State's dismissal and refiling of charges was not a due process violation, and appellant is not entitled to relief.

3. Other Jurisdictions

Further, appellant argues that this Court should limit the State's power to enter a *nolle prosequi* based on authority from other jurisdictions, including the federal courts (App.Br. 27-35). However, a review of the sixteen jurisdictions cited by appellant shows that the majority of those jurisdictions have enacted either statutes or court rules to govern the circumstances under which a prosecutor can dismiss a case. See, e.g., Fed. Rule of Crim. Pro. 48; Ala. Code 1975 § 15-8-130 (Alabama); Ga. Code Ann. §§ 15-18-9, 17-8-3 (Georgia); MD Rules, Rule 4-247 (Maryland); M.C.L.A. § 767.29 (Michigan); M.S.A., Rules Crim.Proc., Rule 30.01 (Minnesota); N.R.S. 174.085(5) (Nevada); N.M. R. Metro. Ct. Rules 6-506, 7-506, 8-506⁸ (New Mexico); N.J. R. Cr. R. 3:25-1 (New Jersey); 16 P.S. §§ 8932, 9952 (Pennsylvania); Tex. Code Crim. Pro. Art. 32.02 (Texas); WA St. Super.Ct.Cr. CrR 8.3(Washington).⁹

⁸The version of the rule in the New Mexico case cited by appellant is different from the current rule, which no longer contains the language requiring court endorsement. See State v. Gardea, 989 P.2d 439 (N.M.App. 1999).

⁹A review of the cases cited by appellant where the State's ability to enter a *nolle prosequi* does not appear to be governed by statute or rule fail to help appellant's case. For example, in Illinois, the common law prosecutorial power to enter a *nolle prosequi* is checked only by a judicially recognized prohibition against capriciously or vexatiously repetitive *nolle prosequis*. People ex rel. Castle v. Daniels, 132 N.E.2d 507, 510 (Ill. 1956); People v.

The above jurisdictions are part of at least 41 United States jurisdictions (including the federal courts and U.S. territories) that have statutes or rules defining the State's ability to dismiss a case, ranging from granting full prosecutorial discretion to abolishing the power to file a *nolle prosequi* altogether. See also, Ak. Rules Crim. Pro. 43(a) (Alaska); A.R.S. Rules Crim.Proc., Rule 16.6 (Arizona); A.C.A. § 16-85-713 (Arkansas); West's Ann.Cal.Penal Code §§ 1385, 1386 (California); Co. St. Crim.P. Rule 48(a) (Colorado); Ct. R.Super.Ct. Cr. § 39-30 (Connecticut); De. Super.Ct. Crim. R., Rule 48(a) (Delaware); DC SCR, Criminal Rule 48(a)

Verstat, 444 N.E.2d 1374, 1384-85 (Ill.App. 1983). Where there is only one *nolle pros*, there is no capricious or vexatious repetition. Daniels, 132 N.E.2d at 510. Because there was only one *nolle prosequi* at issue here, the Illinois common law limitation cannot aid appellant here. Further, the case that appellant cites for Maryland's rule, Baker v. State, 745 A.2d 1142 (Md. 2000), interprets a now-repealed statute involving statutory speedy-trial rights, and implicates none of the issues found in this case; subsequent case law states that the prosecutor's discretion to file a *nolle prosequi* without court approval in Maryland is absolute, so long as it is done in open court. Williams v. State, 780 A.2d 1210, 1216 (Md.App. 2000). The New Hampshire case cited by appellant, State v. Courtmarche, 711 A.2d 248 (N.H. 1998), also deals with the effect of a *nolle prosequi* statutory speedy trial rights and does not implicate this case. Commonwealth v. Pyles, 672 N.E.2d 96 (Mass. 1996), does not appear to deal the prosecutor's discretion to enter a *nolle prosequi*, but with the *court's* ability to dismiss or continue a case, and is simply irrelevant to the issues here. Pyles, 672 N.E.2d at 97-98.

(District of Columbia); 8 G.C.A. §§ 80.70(a), 80.80 (Guam); H.R.S. § 806-56 (Hawaii); Id. St. § 19-3504 (Idaho); In. St. 35-34-1-13 (Indiana); I.C.A. Rule 2.33 (Iowa); LSA-C.Cr.P. Art. 691 (Louisiana); Miss. Code Ann. § 99-15-53 (Mississippi); M.C.A. 46-13-401 (Montana); McKinney’s CPL § 210.40 (New York); Rule 48, N.D.R.Crim.P. (North Dakota); O.R.C.A. § 2941.33 (Ohio); 22 Okl.St. Ann. § 815 (Oklahoma); O.R.S. §§ 135.755, 135.757 (Oregon); Super. R. Crim. P., Rule 48(a) (Rhode Island); S.D.C.L. § 23A-44-2 (South Dakota); Tenn.R.Crim.P., Rule 48(a) (Tennessee); U.C.A. 1953 § 17-18-1 (Utah); Vt. R.Cr.P. Rule 48(a) (Vermont); Va. Code. Ann. § 19.2-265.3 (Virginia); W.V. R. R.Cr.P. Rule 48(a) (West Virginia); Wy.R.Cr.P. 48(a) (Wyoming). In Missouri, there is no such statute or rule, and therefore the common law rule still controls. § 1.010, RSMo 2000.

If this Court is inclined to believe a change in the law may be a matter of sound policy, respondent submits that the better practice for making that change in the law is to follow the lead of the vast majority of American jurisdictions—the legislature should enact a statute or this Court should promulgate a new court rule. The rationale supporting restraint in making a new law governing trial procedure in an appellate opinion is apparent in this Court’s own rules. According to Rule 19.04, if no criminal procedure is specially provided by rule, the “court having jurisdiction shall proceed in a manner consistent with judicial decisions or applicable statutes.” Supreme Court Rule 19.04. That is exactly what happened in this case—the prosecutor followed a procedure specifically allowed by the common law (which is to be followed, according to statute) and the opinions of Missouri courts, including this Court, and the trial court relied on such precedent and the lack of any specific court rule to the

contrary in upholding that procedure. Because, as illustrated by the majority of the cases appellant cites in support, the better method for changing this practice is by legislation or rulemaking, not by opinion claiming trial court or prosecutorial error where there was none, appellant's cases from other jurisdictions afford no relief.

4. Collateral Estoppel

Appellant claims, in the alternative, that this Court should find that collateral estoppel barred the State from relitigating the issue of the general acceptance of the DNA testing after the case was refiled (App.Br. 40-42). As a preliminary matter, it should be noted that appellant did not raise this claim in his opening brief in the Southern District, but only in his reply brief (SD25102 App.Br. 18, 21-36; Reply Br. 11-12). An appellant cannot raise new matters in a reply brief. State v. Boulder, 635 S.W.2d 673, 693 (Mo. banc 1982), cert. denied 459 U.S. 1137 (1983). Nor can he alter the basis of a claim contained in his original brief in his substitute brief. Supreme Court Rule 83.08(b). Appellant's argument that respondent's citation in its original brief of cases which mention collateral estoppel "brought the issue of collateral estoppel into Appellant's case" is disingenuous, as respondent made no argument regarding collateral estoppel in connection with those cases (App.Br. 41; SD25102 Resp.Br. 14). Because appellant's claim regarding collateral estoppel does not comply with this Court's rules, it should not be reviewed.

To any extent this Court wishes to consider the issue of collateral estoppel, it can do so only for plain error, as appellant did not include a claim that the State was barred from relitigating the DNA issue in his motion for new trial (L.F. 77-83). Supreme Court Rule

29.11(d). Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice would occur if the error was left uncorrected. State v. Williams, 97 S.W.3d 462, 470 (Mo. banc 2003).

The doctrine of collateral estoppel bars the relitigation of a previously determined “issue of ultimate fact” when that fact has been determined by a valid judgment. State v. Nunley, 923 S.W.2d 911, 922 (Mo. banc 1996), cert. denied 519 U.S. 1094 (1997). Collateral estoppel applies when four factors are met: 1) is the issue in the present case identical to the issue decided in the prior adjudication; 2) was there a judgment on the merits in the prior adjudication; 3) is the party against whom collateral estoppel is asserted the same party or in privity with a party in the prior adjudication; and 4) did the party against whom collateral estoppel is asserted have a full and fair opportunity to litigate the issue in the prior suit. Id. The Courts of Appeal have held that collateral estoppel does not apply to a case where the prosecution files a *nolle prosequi* then refiles the charges because the second prong, a judgment on the merits, is not met. State v. Maggard, 906 S.W.2d 845, 848 (Mo.App., S.D. 1995); State v. Beezley, 752 S.W.2d 915, 917-18 (Mo.App., S.D. 1988); State v. Pippenger, 741 S.W.2d 710, 711-12 (Mo. App., W.D. 1987). For purposes of collateral estoppel, there must be a final judgment on the merits. Nunley, 923 S.W.2d at 922. A final judgment does not occur in a criminal case until either sentencing or an order of dismissal or discharge of the defendant foreclosing further prosecution. Burns, 994 S.W.2d at 942; State v. Larson, 79 S.W.3d 891, 893 (Mo. banc 2002). Because the original circuit judge’s ruling on the DNA

issue was neither of these, there was no final judgment, and collateral estoppel is inapplicable.

Because, under the common law and this Court's precedents, the State has the unfettered discretion to enter a *nolle prosequi* and refile charges prior to jeopardy attaching, because there was no due process violation or bad faith in the prosecutor's actions, and because collateral estoppel did not apply, the trial court's rulings in this case were not erroneous. Further, to grant appellant the windfall of a dismissal with prejudice by changing the law regarding the prosecutor's discretion by an opinion in this case, in contrast to the vast majority of states which have enacted statutes or rules to accomplish that purpose, would amount to punishing the trial court, prosecutor, and victim of these crimes simply because the court and the State followed the existing law. Such a punishment should not be allowed. Therefore, this Court should find that the trial court did not abuse its discretion in overruling appellant's motion to dismiss based on alleged bad faith in entering a pretrial *nolle prosequi* in his previous case, appellant's first point on appeal must fail.

II.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL FOR STATUTORY SODOMY INVOLVING APPELLANT PLACING HIS PENIS INTO THE VICTIM'S MOUTH ON THE GROUNDS THAT THE VICTIM'S TESTIMONY REQUIRED CORROBORATION BECAUSE CORROBORATION WAS NOT REQUIRED IN THAT THE VICTIM'S TRIAL TESTIMONY WAS CLEAR AND UNCONTRADICTIONARY, THERE WAS NO EVIDENCE OF ANY ALLEGED INCONSISTENCY THAT WOULD TRIGGER THE RULE, AND THE VICTIM'S TESTIMONY OF ABUSE WAS CORROBORATED BY EVIDENCE THAT APPELLANT'S SEMEN WAS FOUND MIXED WITH THE VICTIM'S DNA IN THE VICTIM'S PANTIES.

Appellant claims that there was insufficient evidence to support his conviction for Count II, statutory sodomy involving appellant's oral sodomy of the victim (App.Br. 43). Appellant does not argue that the State's evidence did not establish the elements of the offense, but that the victim's testimony was so contradictory as to this count that corroboration of her testimony was required, and no corroborating evidence was introduced (App.Br. 51-52).

In examining the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable trier of fact might have found a defendant guilty beyond a reasonable doubt. State v. Chaney, 967 S.W.2d 47, 52 (Mo. banc), cert. denied 525 U.S. 1021 (1998). The appellate court does not act as a "super juror" with veto powers, but gives great deference to the trier of fact. Id. In applying

the standard, the appellate court accepts as true all of the evidence favorable to the state, including all favorable inferences drawn from the evidence, and disregards all evidence and inferences to the contrary. Id.

The uncorroborated testimony of a victim in a sex offense case is sufficient to sustain the conviction for that offense. State v. Sladek, 835 S.W.2d 308, 310 (Mo. banc 1992). Corroboration is not required unless the victim's testimony is so contradictory and in conflict with physical facts, surrounding circumstances, and common experience that the validity of the testimony is doubtful. Id. For corroboration to be required, the victim's testimony as to one of the essential elements of the crime must leave the mind "clouded with doubts." State v. Davis, 903 S.W.2d 930, 934 (Mo. App., W.D. 1995). This "corroboration rule" has been treated with disfavor by the courts because it places a requirement on the victims of sex offenses that is not placed on other witness, and, if followed at all, is followed only in a very restricted manner. See State v. Greenlee, 943 S.W.2d 316, 318 (Mo. App., E.D. 1997); State v. Nelson, 818 S.W.2d 285, 288-89 (Mo.App., E.D. 1991).

During her direct testimony, the victim testified that appellant tried to have her suck his penis, placing his penis in her mouth for a few minutes on at least one occasion (Tr. 388-389). On cross-examination, the following exchange took place:

Q. Dawn, do you remember testifying up in Hickory

County last summer?

A. No.

Q. Do you remember going to a big courtroom and there

was a judge and I was there and Mr. Hendrickson was there?

A. Oh, yeah.

Q. Do you remember Mr. Hendrickson put you on the witness stand?

A. Yes.

Q. You remember that? And he asked you some questions. And I'm going to read you a couple of his questions to see if you recall these questions. . . .

Do you remember when Mr. Hendrickson asked you this question: "Did he ever ask you to suck on his penis?" Do you remember that question?

A. Yes.

Q. Do you remember what your response was?

A. No, I don't.

Q. "He did once or twice. I didn't do it." Do you remember that?

A. No.

Q. Do you remember the next question, "You didn't do it? Did you ever put your mouth on his penis?" Do you remember that question?

A. No.

Q. Your answer was, "No." Do you remember that?

A. No.

Q. Next question, "Did he ask you to do that?" Do you remember that question?

A. Yes.

Q. What did you say to that?

A. Yes.

Q. Yeah or yes?

A. Yes, he did.

Q. The next question was, "Did he ever touch his penis to your mouth?" Do you remember that question?

A. Yes.

Q. Your answer was apparently so inaudible so Mr. Hendrickson said, "I'm sorry?" Do you remember that?

A. Yes.

Q. And your answer was, "No."

Did you try to tell the truth last summer when you were testifying?

A. Yes.

(Tr. 401-403). On redirect, the victim stated that, during her previous times testifying, she had testified that appellant put his penis in her mouth (Tr. 421).

A review of the relevant testimony shows that the victim never actually admitted to making the prior inconsistent statement on which appellant rests his point, thus never proving that the victim actually made the statements. Where a witness unequivocally admits to making a prior inconsistent statement, the content of the statement is in evidence, and therefore other evidence of the prior statement is inadmissible. State v. Wilson, 105 S.W.3d 576, 585 (Mo.App., S.D. 2003). However, where the witness denies or does not remember making the statement, there must be some evidence that the witness actually made the statement for the statement to be admitted into evidence. See id.; State v. Woodworth, 941 S.W.2d 679, 691-692 (Mo. App., W.D. 1997). Here, the only record of the alleged prior inconsistent statement about the sodomy count was the information contained in counsel's questions. The questions of counsel are not evidence, but may be considered only as they supply meaning to the answers. State v. Sutton, 699 S.W.2d 783, 787 (Mo. App., E.D. 1985); MAI-CR 3d 302.02. Therefore, there was no evidence that the victim actually ever made a contradictory statement about the sodomy that would have required any corroboration.

Further, the corroboration rule does not apply to this case because appellant claims that there is only one inconsistency in the victim's testimony. A single inconsistent answer in a victim's testimony does not require reversal based on the corroboration rule. State v. Finney, 906 S.W.2d 382, 386 (Mo.App., S.D. 1995). Further, the corroboration rule only applies to inconsistencies within the victim's testimony, not to inconsistencies between the victim's trial testimony and the victim's out-of-court statements. State v. Sprinkle, 122 S.W.3d 652, 666 (Mo. App., W.D. 2003); State v. Gatewood, 965 S.W.2d 852, 856 (Mo. App., W.D. 1998);

State v. George, 921 S.W.2d 638, 643 (Mo.App., S.D. 1996); State v. Creason, 847 S.W.2d 482, 485 (Mo. App., W.D. 1993); see State v. Patterson, 806 S.W.2d 518, 519-20 (Mo.App., S.D. 1991)(corroboration not required unless the victim's testimony is contradictory; statements made after rape did not make corroboration necessary, as testimony at trial was "clear and uncontradictory"). The victim's trial testimony in this case was clear and uncontradictory—she testified that appellant put his penis into her mouth "once or twice," with only one of those occurrences happening in appellant's bedroom "for a few minutes" (Tr. 388-389, 401-403). Nothing else in the victim's testimony contradicted this evidence. As there was no inconsistency on this issue in the victim's trial testimony, the corroboration rule was not triggered.

Further, to any extent that the victim's testimony about appellant's sexual abuse needed to be corroborated, her testimony was corroborated by evidence that appellant's semen was found mixed with the victim's DNA on the victim's underwear (Tr. 286, 348-349, 376, 447, 480-489, 497-498, 510). While appellant tries to apply the corroboration rule only to the victim's testimony as to one of the two counts, presumably to avoid the issue of appellant's DNA, such an approach is improper, as evidence corroborating testimony as to one count will suffice to corroborate the victim's entire testimony. See State v. Russell, 591 S.W.2d 61, 66-67 (Mo.App., S.D. 1979)(evidence of semen in the victim's panties corroborated testimony regarding rape and oral sodomy). Therefore, there was sufficient corroboration to fulfill any perceived shortcomings in the victim's testimony.

Because the victim's trial testimony regarding appellant's oral sodomy of her was not

inconsistent to any other statement in evidence, let alone so contradictory as to leave the mind clouded with doubt, the corroboration rule was not triggered so as to require corroboration of the victim's testimony. Further, the victim's testimony of sexual abuse was corroborated by physical evidence that appellant had molested the victim. Therefore, the motion court did not err in overruling appellant's motion for judgment of acquittal and in convicting appellant of statutory sodomy in the second degree, and appellant's second point on appeal must fail.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF PCR-STR DNA TESTING WITHOUT FIRST HOLDING A FRYE HEARING BECAUSE A FRYE HEARING WAS NOT REQUIRED IN THAT THE COURTS OF MISSOURI AND NUMEROUS OTHER JURISDICTIONS HAVE HELD THAT PCR-STR DNA ANALYSIS IS GENERALLY ACCEPTED IN THE FORENSIC SCIENCE COMMUNITY, EVIDENCE OF GENERAL ACCEPTANCE WAS ADMITTED AT TRIAL, AND ANY CONCERNS ABOUT THE PRIMER KITS USED DURING THE TESTS DEALT WITH THE MANNER IN WHICH THE TEST WAS CONDUCTED AND THE RELIABILITY OF THE TEST RESULTS, AND NOT WITH THE GENERAL ACCEPTANCE OF THE PRINCIPLES OF PCR-STR TESTING.

Appellant claims that the trial court abused its discretion in admitting evidence of DNA testing performed by Cary Maloney of the Missouri State Highway Patrol Crime Laboratory without first holding a Frye hearing (App.Br. 54). Appellant complains that he was not given an opportunity to prove that the “new DNA technology” of polymerase chain reaction (PCR) testing using the short-tandem repeat (STR) amplification method was not generally accepted in the scientific community (App.Br. 54). Appellant contends that, had he been given the opportunity to prove that the primer kits used in the crime lab had not been independently validated, there is a “probability” that the trial court would have found that those kits are not generally accepted (App.Br. 54).

A. Facts

Prior to trial, the State filed a motion for a pretrial ruling that PCR-STR DNA analysis was generally accepted in the forensic science community (L.F. 12-39). That same day, appellant filed a motion to determine the admissibility of the DNA tests, arguing the procedure was not generally accepted because the testing kits used in the tests had not been independently validated (Supp.L.F. 83-88). The trial court found that a Frye hearing was not required because an “overwhelming majority of jurisdictions” have found that the PCR-STR DNA testing techniques were generally accepted in the scientific community (L.F. 40). The court denied the request for a Frye hearing and sustained the State’s motion, finding the DNA evidence admissible (L.F. 40-41).

At trial, the State called Cary Maloney, a criminologist with the Missouri State Highway Patrol Crime Laboratory and supervisor of the DNA section (Tr. 438-439). Maloney testified that the PCR-STR method of DNA analysis was generally accepted in the forensic scientific community, and that the techniques used at the lab were not “novel science” but had been used for many years in the medical and research fields (Tr. 442-443, 450). Maloney explained that PCR-STR method consists of three steps: 1) DNA is extracted from the sample; 2) 13 areas, or loci, of the DNA are “amplified,” or copied “many, many times,” using primers (small fragments of DNA) which “set down” in a specific area of the DNA strand; and 3) the amplified DNA fragments are analyzed by a machine called a capillary electrophoresis instrument, which produces results measuring the size of the fragments, allowing for comparison of the sample to a known sample (Tr. 456, 458-459, 463). The primers used by the crime lab come from two kits produced by Applied Biosystems, the Profiler Plus and the COfiler, and each sample is

amplified with both kits (Tr. 456-457). The two primers amplify a total of thirteen loci plus one that tells the sex of the sample, with each primer kit actually repeating the same amplification at three of the thirteen loci (Tr. 458, 479). This operates as an internal quality control check, because the results from each of the kits at those three sites would be expected to match in a reliable test (Tr. 479-480). Maloney testified that the testing done in this case revealed that appellant's DNA matched the DNA sample taken from the victim's underpants at all 13 loci (Tr. 489).

The defense called Dean Stetler, an associate professor of molecular biosciences at the University of Kansas, to testify about the PCR-STR methods used in this case (Tr. 551). Stetler testified that he had cause for "concern" as a scientist about the method because the primer sets in the Profiler Plus and COfiler had not been "fully defined and subject to peer review and independent testing" (Tr. 559). He admitted that the PCR-STR technique had been validated over ten years, and that even the primer kits used in this case had undergone validation studies for 4-5 years and that those studies were published, but complained that they were authored by Applied Biosystems personnel (Tr. 562). Despite his concerns, Stetler never testified that the technique was not generally accepted in the forensic scientific community, and admitted that PCR-STR DNA analysis was accepted in the scientific community for crime laboratories as well as research laboratories (Tr. 608). Stetler testified that his own lab used PCR-STR DNA analysis, although he had only conducted one such test himself and his lab had never done the type of testing done in this case (Tr. 570, 605).

B. Standard of Review

The determination to admit or exclude the testimony of an expert witness is within the sound discretion of the trial court. State v. Davis, 814 S.W.2d 593, 603 (Mo. banc 1991), cert. denied 502 U.S. 1047 (1992). Review is for an abuse of that discretion. See State v. Storey, 40 S.W.3d 898, 910 (Mo. banc), cert. denied 534 U.S. 921 (2001).

C. Analysis

Missouri courts follow the standard of Frye v. United States, 293 F. 1013 (D.C. Dist. 1923), in determining the admissibility of scientific evidence in criminal cases. Davis, 814 S.W.2d at 600; State v. Kinder, 942 S.W.2d 313, 326 (Mo. banc 1996), cert. denied 522 U.S. 854 (1997); State v. Faulkner, 103 S.W.3d 346, 357 (Mo. App., S.D. 2003). Scientific evidence is admissible if the scientific procedure is sufficiently established to have gained general acceptance in the particular field in which it belongs. Id. The general scientific acceptability of DNA identification procedures is a matter of judicial notice. State v. Huchting, 927 S.W.2d 411, 417 (Mo. App., E.D. 1996). While this determination is typically made in a pretrial hearing, there is no abuse of discretion in not holding a hearing where the evidence demonstrates that the procedure has gained general acceptance in the scientific community. State v. Salmon, 89 S.W.3d 540, 544-45 (Mo. App., W.D. 2002); Huchting, 927 S.W.2d at 417-18.

The appellate courts of this State have held that PCR-STR DNA analysis is generally accepted in the forensic scientific community. Salmon, 89 S.W.3d at 545. In Salmon, the Western District of this Court held that the STR method was generally accepted based on the testimony of Cary Maloney and another expert witness, and on the fact that numerous other

jurisdictions found the method to be generally accepted in the scientific community. Id. Thus, the Salmon court found that test results produced by that method were admissible, regardless of the fact that a Frye hearing was not held. Id.

In Faulkner, the Southern District dealt with a claim nearly identical to that raised by appellant—whether the Profiler Plus and COfiler primers were generally accepted in the scientific community. Faulkner, 103 S.W.3d at 358. Faulkner argued that the kits were not generally accepted because they had not been released to the scientific community for peer review and verification. Id. at 358. The Court noted that Salmon recognized that STR testing was held to be generally accepted, and held that the primer kits involved in such testing did not involve “new scientific techniques” and did not “implicate the reliability or the general scientific acceptance of the principles on which the STR test itself is based.” Id. at 357, 359.

Under Salmon and Faulkner, it is clear that appellant’s claim must fail. The evidence offered at trial, from both Maloney and Stetler, was that the STR technique was generally accepted in the forensic scientific community (Tr. 450, 608). This testimony, coupled with the recognition, both in Missouri courts and throughout the nation, that the STR technique is generally accepted in the scientific community, shows that the trial court was correct in concluding that the STR technique was generally accepted in the forensic community or otherwise “scientifically reliable,” rendering STR evidence admissible. See United States v. Ewell, 252 F.Supp.2d 104, 113 (D.N.J. 2003); United States v. Trala, 162 F.Supp.2d 336, 347-48 (D.Del. 2001); People v. Shreck, 22 P.3d 68, 83 (Colo.2001); State v. Jackson, 582 N.W.2d 317, 325 (Neb. 1998); Commonwealth v. Rosier, 685 N.E.2d 739, 743 (Mass. 1997);

State v. Traylor, 656 Minn. 885, 893 (Minn. 2003); State v. Whittey, 821 A.2d 1086, 1097 (N.H. 2003); State v. Butterfield, 27 P.3d 1133, 1143-45 (Utah 2001); People v. Allen, 72 Cal.App.4th 1093, 1098-1099 (Cal.App. 2 Dist., 1999); People v. Hill, 89 Cal.App.4th 48, 60 (Cal.App. 2 Dist., 2001); People v. Henderson, 107 Cal.App.4th 769, 779-780 (Cal.App. 4 Dist., 2003); Lemour v. State, 802 So.2d 402, 408 (Fla.Dist.Ct.App. 2001); State v. Rokita, 736 N.E.2d 205, 211 (Ill.App. 5 Dist. 2000); Overstreet v. State, 783 N.E.2d 1140, 1151 (Ind. App. 2003); People v. Owens, 187 Misc.2d 838, 725 N.Y.S.2d 178, 180-83 (N.Y.Sup.Ct.2001); State v. Deloatch, 804 A.2d 604, 613 (N.J.Super.L., 2002). Salmon, 89 S.W.3d at 545; Faulkner, 103 S.W.3d at 357. Further, the Southern District's holding in Faulkner makes it clear that any "concerns" about the use of the Profiler Plus and COfiler are irrelevant to the determination of whether the STR technique is generally accepted in the scientific community. Faulkner, 103 S.W.3d at 359.

Here, appellant attempts to distinguish Faulkner because he claims that the primer sequences in the kits did "implicate the reliability of the principles on which the STR test is based" (App.Br. 54). However, this misinterprets Faulkner and overlooks other existing law. Faulkner noted that the problems raised by the defendant in that case with the primer kits (which are the exact same challenges raised in this case) involved the reliability of the results of the test, which do not implicate the general principles behind the STR method itself. Faulkner, 103 S.W.3d at 359. Further, because the primer kits do not involve a new or different manner of conducting the test, but are merely tools used in the generally-accepted STR process, they do not constitute a new scientific technique requiring a finding of general

acceptance. See Whitney, 821 A.2d at 1093; Henderson, 107 Cal.App.4th at 779; Hill, 89 Cal.App.4th at 60. The Southern District's holding in Faulkner is in line with prior Missouri court holdings that only the issue of the general acceptance of the scientific *principle* is subject to Frye—any issue with the reliability of the test results in a specific case or the manner in which the generally accepted testing was conducted goes to the weight of the evidence, not the admissibility. Huchting, 927 S.W.2d at 418; State v. Davis, 860 S.W.2d 369, 374 (Mo. App., E.D. 1993). Because the issue of the lack of independent validation of the primer kits was related to the manner in which the STR testing was conducted in this case, and not the general acceptance of STR testing itself, a Frye hearing was not required on that issue. Id.

Finally, because the Southern District did so in the opinion below, respondent takes note of this Court's recent decision in State Board of Healing Arts v. McDonagh, 123 S.W.2d 146, 152-53 (Mo. banc 2003), which confirmed that § 490.065, RSMo 2000, enacted in 1989, is the standard for expert testimony in civil cases. § 490.065.1, RSMo 2000; Lasky v. Union Electric Co., 936 S.W.2d 797, 801-802 (Mo. banc 1997). Because the plain language of § 490.065 only applies that statute to civil cases and because this Court has continued to apply Frye in criminal cases since that statute was enacted, respondent does not believe McDonagh applies to criminal cases. Further, to apply the principles of § 490.065 to criminal cases in an appellate opinion instead of by statute or rule would raise the same troubling issues as discussed in Point I, supra, regarding the application of a new procedural rule after the parties properly relied on the original rule below. Supreme Court Rule 19.04. Therefore, even after

McDonagh, Frey remains the proper standard for expert testimony in criminal cases, and if this Court was to consider adopting a different standard, the better practice, just as in Point I, would be to do so under by legislative or rulemaking means.

Because the evidence admitted at trial proved that PCR-STR DNA analysis is generally accepted in the field of forensic science, a finding consistent with the decisions of the courts of Missouri and numerous other jurisdictions, and because any issues involving the lack of independent validation of the primer kits used in the tests in this case deal with the manner in which the test was conducted, and thus only went to the weight and not the admissibility of the evidence, the trial court did not abuse its discretion in admitting the results of the DNA tests performed in this case without a Frye hearing. Therefore, appellant's final claim on appeal must fail.

CONCLUSION

In view of the foregoing, the respondent submits that appellant's convictions and sentences should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 9,850 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 2nd day of August, 2004, to:

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APPENDIX

Sentence and Judgment A-1
Supreme Court Rule 19.04 A-4