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**IN THE  
COURT OF APPEALS OF INDIANA**

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ROBERT DAY, )  
 )  
Appellant-Defendant, )  
 )  
vs. ) No. 49A02-0605-CR-433  
 )  
STATE OF INDIANA, )  
 )  
Appellee-Plaintiff. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Sheila Carlisle, Judge  
Cause No. 49G03-0306-FA-100257

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**April 3, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Robert Day appeals his conviction for rape, as a class A felony.<sup>1</sup>

We affirm.

### ISSUES

1. Whether the trial court erred in admitting evidence.
2. Whether the State presented sufficient evidence to convict Day.

### FACTS

On September 26, 2002, L.K. was living with her three children in a first-floor apartment located in Marion County. After putting her children to bed, L.K. went to bed at approximately 11:30 p.m. L.K. kept her bedroom door open, in case her youngest child woke during the night. The only lights on in the apartment were a light above the stove and a nightlight in the children's bathroom.

At approximately 5:30 a.m. on September 27<sup>th</sup>, L.K. woke to find a man lying on top of her, "with a knife going across [her] neck." (Tr. 273). L.K. could feel that the knife had a plastic handle, as did the cutlery she owned. L.K. later determined that one of her knives was missing. L.K. could not see what the man looked like because it was dark in the apartment. She could only describe him as "[s]tocky" and "[b]lack." (Tr. 280).

The man told L.K. that his partner would kill her children if she screamed. L.K. then realized that the door to her bedroom was closed. The man "began to reach under the covers . . . . He pulled the covers down. And his pants were already loose." (Tr.

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<sup>1</sup> Ind. Code § 35-42-4-1.

273). L.K. attempted to push the man off but could not. Despite her protests, he proceeded to rape her until he ejaculated. During her struggle with her assailant, L.K. sustained scratches and a broken fingernail. The man then left L.K.'s bedroom via a sliding glass door. As soon as the man left, L.K. telephoned the police.

Michael Estep, a crime scene investigator Indianapolis-Marion County Forensic Services Agency (the "Crime Lab"), processed L.K.'s apartment for evidence. Specifically, Estep photographed the crime scene and lifted fingerprints from several surfaces both inside and outside L.K.'s apartment. David Zauner, "a forensic scientist specializing in latent print examination," subsequently examined the prints and photographs collected and taken by Estep. (Tr. 517). Zauner, however, "was not able to identify Mr. Day to any of the prints." (Tr. 520).

Beck Navarro, a registered nurse, treated L.K. at Wishard Hospital. Using a Sexual Assault Evidence Collection Kit, Navarro swabbed L.K.'s mouth, vagina and anus for evidence. Navarro also conducted a vaginal wash on L.K., which is done to "collect any evidence that's inside the vaginal vault." (Tr. 287). After collecting, sealing and labeling the samples obtained from the swabs and vaginal wash, Navarro "placed [them] into a box, and then . . . seal[ed] the box with red evidence tape and put a patient label on the outside of the box . . . ." (Tr. 288). Navarro put the sealed box "into an evidence refrigerator," where it stayed until someone from the Crime Lab retrieved it on September 30, 2002. (Tr. 288).

Judith Macechko, a forensic scientist at the Crime Lab, was assigned to L.K.'s case. Upon obtaining the kit containing the evidence collected from L.K., Macechko

“inventor[ied] everything that [was] in the kit, and [she] examine[d] the slides . . . microscopically.” (Tr. 302). Macechko “identified spermatozoa on the vaginal/cervical slide[,] . . . seminal material on the vaginal/cervical swabs, on the external genital swabs, and in the vaginal wash.” (Tr. 303).

After Macechko identified seminal material and spermatozoa in the samples, the evidentiary samples were sent to Dr. Khalid Lodhi, a DNA analyst with the Crime Lab. After analyzing the samples, Dr. Lodhi extracted<sup>2</sup> deoxyribonucleic acid (“DNA”) from the seminal material collected from the external genital swab and vaginal wash. (Tr. 314). Dr. Lodhi determined that there were two contributors to the DNA: a “female fraction” and a male fraction. (Tr. 316). The female fraction was a mixture.<sup>3</sup> The male fraction, however, was from a “[s]ingle source[.]”<sup>4</sup> Tests indicated that L.K. was the “female fraction” or female “contributor in both” items from which DNA was extracted. (Tr. 316).

Dr. Muhammad Amjad, a manager at the Crime Lab, reviewed the DNA analysis done by Dr. Lodhi, to make sure proper procedures were followed. Dr. Amjad then

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<sup>2</sup> Extraction is done by processing the evidentiary sample “to separate sperm cells from non-sperm cells” (Tr. 473) and then “break[ing] open the . . . sperm and non-sperm cells, present in the evidentiary sample” (Tr. 472) to “come up with [a] female specific profile from [the] female fraction and [a] male specific profile from [the] male fraction.” (Tr. 473).

<sup>3</sup> A mixture often occurs when, due to a sexual assault, the DNA from sperm cells “mixes with the DNA from the female cells.” (Tr. 456). While the cells can be separated, the DNA cannot, “result[ing] in a mixture of DNA profiles . . . .” (Tr. 456).

<sup>4</sup> “‘Single source’ means one individual present in that particular profile, compared to a mixture.” (Tr. 474).

“uploaded”<sup>5</sup> the DNA profile<sup>6</sup> obtained from the external genital swab into the Indiana State Police Laboratory’s DNA database, referred to as CODIS,<sup>7</sup> of “genetic profiles” obtained from more than 34,000 known people and approximately 2,000 crime scenes. (Tr. 368).

Paul Meisner, a supervisor at Indiana State Police Laboratory, performed a search of the DNA profile entered by Dr. Amjad at the Crime Lab. Meisner specified the search “at moderate stringency, which allows for a certain number of mismatches,” which is valuable when matching or comparing crime scene samples because they often are mixtures. (Tr. 373). The search “generated a moderate stringency 13-loci match” (Tr. 379-80) between “a [blood] sample from Robert Day” already contained in CODIS and the “DNA profile from the [Crime Lab] . . . .” (Tr. 380). Of the 13 loci in the DNA profile uploaded from the Crime Lab and that from Day, “12 of them matched at high stringency, meaning it was an exact match, and one of the loci matched at moderate stringency, which is . . . a partial match at that loci.” (Tr. 380). It was a partial match because “the sample that the State had entered in the database from Robert Day, at loci

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<sup>5</sup> “Uploading” entails “identifying the specimen by case number and specimen number, and then keying in the numbers associated with that loci to generate a DNA profile” into the DNA database system (Tr. 376).

<sup>6</sup> A DNA profile consists of 13 “core loci or core DNA markers.” (Tr. 369). A “locus” is “the position in a chromosome of a particular gene or allele[.]” Merriam-Webster Medical Dictionary at <http://www.intelihealth.com> (March 5, 2006). Each locus contains one or two allele. An allele is “any of the alternative forms of a gene that may occur at a given locus[.]” *Id.* Thus, a DNA profile may consist of 13 to 26 alleles. In an unmixed sample, a person’s DNA profile “would only have one number or one marker at [a] particular loci [sic]” if that person got “the same trait,” or gene, “from both parents[.]” (Tr. 370). If, however, that person “got different markers . . . from their parents, then they could have two.” (Tr. 370).

<sup>7</sup> CODIS is an acronym for the Federal Bureau of Investigations Combined DNA Indexing System.

D13, . . . only had . . . one DNA marker. It was an 11. The blood sample uploaded from the [Crime Lab] had an 11, but they also had a 12.” (Tr. 380). The sample from Day already in the database “did not have a 12” (Tr. 381) because it had only “one allele at that loci.” (Tr. 386). The State Police Laboratory and the Crime Lab used different kits to generate their DNA profiles, which most likely resulted in the variation because either kit “can produce a profile with allelic dropout at [a] particular loci [sic].” (Tr. 419).

After contacting the Crime Lab and confirming that their case was unsolved, Meisner “initiated a match confirmation procedure,” by confirming that the blood sample in CODIS was from Day. (Tr. 381). On or about February 3, 2003, Meisner gave “a portion of the sample . . . from Robert Day” to the Crime Lab “so they could do their own testing and compare it directly to their case evidence.” (Tr. 382).

Using Day’s blood sample received from the State Police Laboratory, Dr. Lodhi extracted a DNA profile and again extracted a DNA profile from the evidentiary sample to confirm the match. The alleles at loci D13 for both the sample from the State Police Laboratory and the evidentiary sample were “11, 12[.]” (Tr. 441).

Dr. Amjad and Meisner both telephoned Detective Julie McHenry, the lead investigator of the rape of L.K., and informed her that there “had been a match” of the evidentiary samples. (Tr. 115). Seeking a search warrant to draw a sample of Day’s blood, Detective McHenry submitted a probable cause affidavit on or about February 11, 2003. The affidavit provided, in relevant part, as follows:

1. That on September 27, 2002, [L.K.] reported to the Marion County Sheriff’s Department that she was a victim of rape . . . . The bedroom was pitch dark which prevented the victim from making an identification.

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3. At, or near the time of the crime alleged, evidence was collected from the person of [L.K.], the victim of the alleged rape.
4. Polymerase Chain Reaction (PCR)—DNA testing was done upon this collected evidence by the Indiana State Police and/or Genelex, an accredited DNA laboratory in Seattle, Washington, and the results of that testing were entered into a DNA data base maintained by the Indiana State Police.
5. On October 31, 1997, a blood sample was obtained from [Day], pursuant to the provisions of I.C. 10-1-9-10 (Indiana Data Base).
6. The blood sample drawn from the person of [Day] was divided into two parts. One of these parts was sent for PCR-DNA analysis to Genelex.
7. The results of that testing (the DNA profile) were returned from Genelex to the Indiana State Police where said results were entered into the Combined DNA Index System.
8. The DNA evidence taken from [L.K.] was then run against the DNA profiles of convicted offenders in Indiana, which profiles included the DNA profile of [Day.]
9. The DNA markers present on the DNA profile of [Day] were found to match the DNA markers on the sample collected from [L.K].
10. Given the match referenced in paragraph 8 above, DNA analysis will be done upon the retained portion of the blood sample taken from the person of [Day], and comparisons were made with the [L.K.] sample by the Indiana State Police.
11. These tests are currently underway to confirm that the DNA markers present in the blood sample taken from [Day] will indeed match the DNA markers present in the sample taken from [L.K].
12. By reason of the foregoing, there exists probable cause for obtaining from the person of [Day], an evidentiary blood sample to be used for purposes of further confirmatory DNA testing by the Indianapolis Police Department/Marion County Forensic Services Agency.

13. This affidavit is given for the purpose of obtaining a warrant with specific directions in said warrant directing [Day] to submit to the taking of a blood sample . . . for analysis by the Indianapolis Police Department/Marion County Forensic Services Agency.

(Ex. 23-24).<sup>8</sup> The Marion County Superior Court issued a search warrant for a sample of Day's blood, and two vials of Day's blood were drawn on February 13, 2003.

On February 13, 2003, Macechko received from Detective McHenry a blood sample obtained from Day. The blood sample consisted of blood contained in two tubes. Using Day's blood from the tubes, Macechko prepared "a stain card," by making four stains of Day's blood on a card, which "has a flap to protect the stain[s]." (Tr. 305). Macechko then discarded the remaining blood. After the stains were dry, Macechko placed one of the four stains with the empty tubes and returned them to the property room. Another stain was "packaged in a coin envelope, and . . . placed in the frozen storage, to be later used by the DNA analyst." (Tr. 305-06).

Dr. Lodhi then extracted DNA from the blood stains and "compare[d] it with the evidentiary sample which [was] uploaded to the CODIS database[.]" (Tr. 319). Dr. Lodhi determined that the profile originally generated from the evidentiary samples matched the blood standard taken from Day "on all 13 locations." (Tr. 319). Dr. Lodhi also determined that the DNA profile extracted from the vaginal wash "matched the Robert Day blood standard." (Tr. 319).

Dr. Lodhi submitted the results to Dr. Muhammad Tahir and Dr. Muhammad Amjad for technical review. On April 9, 2003, Dr. Lodhi created a laboratory

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<sup>8</sup> The citations to the exhibits cite to the page numbers of the volume of exhibits.

examination report documenting the results of the DNA analysis, which gave “the description of the items which [Dr. Lodhi] received, the results of those items which [Dr. Lodhi] analyzed, and . . . the conclusions of those items which [Dr. Lodhi] analyzed.” (Tr. 327). In the April 9 report, Dr. Lodhi reached the following conclusion:

The DNA profile obtained from Item(s) H1F [the external genital swab] (male fraction) was searched in the Indiana DNA Database and was found to be consistent with the sample from Robert Day . . . .

The DNA profile from the male fraction of Item(s) H1F and H1I [the vaginal wash] matches the DNA profile of D2 (Robert Day). In the absence of an identical twin, Robert Day is the source of the DNA obtained from the male fraction of Item(s) H1F and H1I to a reasonable degree of scientific certainty.

The DNA profile from the female fraction of Item(s) H1F and H1I is a mixture with major and minor contributors. The profile of the major contributor matches the DNA profile of H1A ([L.K.]). The profile of the minor contributor is consistent with the DNA profile of D2 (Robert Day).

(Ex. 113).

Dr. Lodhi based the conclusion that “Day is the source of the DNA obtained from the male fraction of Item(s) H1F and H1I to a reasonable degree of scientific certainty” (Ex. 113) on a “statistical calculation,” (Tr. 328), which determined that, in the Caucasian population, only “1 in 186 quintillion people” would match the DNA of the male fraction taken from the external genital swab. (Tr. 329; Ex. 111). In the African-American population, “1 in 524 quadrillion”<sup>9</sup> would match, and in the Hispanic population, “1 in 2 sextillion” would match. (Tr. 330; Ex. 111). Regarding the DNA of the male fraction taken from the vaginal wash, “1 in 3 quadrillion” Caucasians, “1 in 7 trillion” African-

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<sup>9</sup> “[A] thousand million . . . make one billion. A thousand billion . . . make one trillion[,] [a]nd a thousand trillion . . . make one quadrillion.” (Tr. 469).

Americans, and “1 in 9 quadrillion” Hispanics would match. (Tr. 330; Ex. 111). On June 28, 2004, Dr. Tahir issued another laboratory examination report, which confirmed Dr. Lodhi’s report.

On or about June 19, 2003, the State charged Day with rape, as a class A felony, and burglary, as a class B felony. On August 19, 2003, the State filed an amended information against Day, alleging him to be an habitual offender.

On April 14, 2005, Day filed a motion to “exclude all DNA evidence and testimony from the State’s case” pursuant to Indiana Evidence Rules 702 and 403. On April 26, 2005, Day filed a motion to suppress, asserting that “the content of [Detective McHenry’s] affidavit is legally insufficient to permit a judicial finding of probable cause” because “[n]o mention was made in the affidavit for probable cause . . . about a frequency calculation for the match, the loci matched or the number of loci matched.” (App. 202; 203). The trial court held hearings on Day’s motions on May 11, 2005 and May 27, 2005. On May 27, 2005, Day filed a supplement to his motion to suppress. The State filed responses to Day’s motions on June 24, 2005, June 27, 2005 and June 28, 2005.

The trial court denied Day’s motion to suppress on July 5, 2005, and denied his motion to exclude evidence on July 7, 2005. Day filed a motion to reconsider, which the trial court denied. Day then filed a petition for interlocutory appeal, which a panel of this court denied.

The trial court held a jury trial on April 3-6, 2006, after which the jury found Day guilty of rape, as a class A felony, and burglary, as a class B felony. Day waived his right to a jury finding on the habitual offender allegation, and the trial court found Day to

be an habitual offender. The trial court held a sentencing hearing on April 26, 2006, during which the trial court merged the burglary charge with the rape charge and sentenced Day to fifty years on the rape conviction. The trial court enhanced that sentence by adding thirty years for being an habitual offender, for a total executed sentence of eighty years.

Additional facts will be provided as necessary.

## DECISION

### 1. Admission of Evidence

Day asserts that the trial court erred by allowing the State to present the DNA evidence in this case. Day argues the trial court erred when it denied his motion to suppress the admission of his blood sample obtained on February 13, 2003, pursuant to the search warrant, and the DNA evidence derived from it.<sup>10</sup>

The admission of evidence is a matter left to the sound discretion of the trial court, and a reviewing court will reverse only upon an abuse of that discretion. *Washington v. State*, 784 N.E.2d 584, 587 (Ind. Ct. App. 2003). An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the

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<sup>10</sup> Here, Day seems to argue that only the DNA evidence obtained from the blood sample collected on or about February 13, 2003 should have been suppressed. We note that after the initial match of the DNA evidence collected from L.K. and that from Day's DNA evidence contained in CODIS, the State Police Laboratory then provided a sample of Day's blood to the Crime Lab, which confirmed a "high stringency match." (Tr. 467). Thus, the Crime Lab confirmed a match of all thirteen loci, using the blood sample from Day originally provided for CODIS. "[O]nce DNA is used to create a profile, the profile becomes the property of the Crime Lab." *Smith v. State*, 744 N.E.2d 437, 439 (Ind. 2001). Thus, Day cannot argue that he had a possessory or ownership interest in the profile contained in the State's database. *See id.* "[S]ociety recognize an expectation of privacy in records made for public purposes from legitimately obtained samples." *Id.* Thus, "the comparison of a DNA profile with other DNA evidence from a database does not violate the Fourth Amendment" and "that comparison does not constitute a search or seizure under the Indiana Constitution." *Id.*

trial court. *Id.* “We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court’s ruling.” *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). “However, we must also consider the uncontested evidence favorable to the defendant.” *Id.*

Day contends that the affidavit supporting the search warrant did not establish probable cause because the

conclusion of a purported ‘match’ does not provide sufficient information to establish probable cause (i.e., how is a match defined and what is the statistical significance of finding a match) or sufficient information about the source of that conclusion to prove its reliability (i.e., description of the make up of the Indiana CODIS database, the quality of control and assurance procedures in place to guarantee the search results, and an explanation of the search techniques used).

Day’s Br. 9.

Pursuant to the Fourth Amendment to the United States Constitution, Article 1, Section 11 of the Indiana Constitution, and Indiana Code section 35-33-5-1, a search warrant must be supported by probable cause.

An affidavit demonstrates probable cause to search premises if it provides a sufficient basis of fact to permit a reasonably prudent person to believe that a search of those premises will uncover evidence of a crime. The decision to issue the warrant should be based on the facts stated in the affidavit and the rational and reasonable inferences drawn therefrom. Sufficiency need not rest on a single piece of information, but rather in the way the pieces fit together.

*Uiley v. State*, 589 N.E.2d 232, 236 (Ind. 1992) (internal citations omitted), *cert. denied*, 506 U.S. 1058 (1993). “[P]robable cause requires only a fair probability of criminal activity, not a prima facie showing.” *Rios v. State*, 762 N.E.2d 153, 161 (Ind. Ct. App. 2002).

In determining whether an affidavit provided probable cause for the issuance of a search warrant, doubtful cases are to be resolved in favor of upholding the warrant. Furthermore, we will not invalidate warrants by interpreting probable cause affidavits in a hypertechnical, rather than a commonsense, manner.

*Id.* (internal citations omitted).

The duty of the reviewing court, whether it is the trial court ruling on the motion to suppress or the appellate court reviewing that decision, “is simply to ensure that the magistrate had a “substantial basis” for concluding that probable cause existed.” *Overstreet v. State*, 783 N.E.2d 1140, 1157 (Ind. 2003), *cert. denied*, 540 U.S. 1100 (2004). When determining whether a substantial basis exists, the reviewing court focuses “on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause.” *Id.* (quoting *Figert v. State*, 686 N.E.2d 827, 827 (Ind. 1997)).

In this case, the affidavit established that L.K. was the victim of rape but could not identify her assailant. The affidavit further informed the magistrate that the Crime Lab submitted evidence collected from L.K. to the State Police Laboratory, which maintains a database of DNA samples obtained “pursuant to the provisions of I.C. 10-1-9-10<sup>[11]</sup> . . . ,” including a sample obtained from Day on October 31, 1997. (Ex. 23). The affidavit

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<sup>11</sup> Now codified Indiana Code section 10-13-6-10, which provides that certain felons shall provide a DNA sample to the:

- (1) department of correction or the designee of the department of correction if the offender is committed to the department of correction;
- (2) county sheriff or the designee of the county sheriff if the offender is held in a county jail or other county penal facility, placed in a community corrections program (as defined in IC 35-38-2.6-2), or placed on probation; or
- (3) agency that supervises the person, or the agency’s designee, if the person is on conditional release in accordance with IC 35-38-1-27.

further established that when the evidence taken from L.K. was compared to the DNA profiles contained in CODIS, the DNA markers from Day's profile "were found to match the DNA markers on the sample collected from [L.K]." (Ex. 24). The affidavit also provided that additional tests were being conducted to "to confirm that the DNA markers present in the blood sample taken from [Day] will indeed match the DNA markers present in the sample taken from [L.K]." (Ex. 24). We are satisfied that the affidavit's recitation of the type of testing performed on the DNA evidence;<sup>12</sup> who tested it; that it was compared to evidence contained in the CODIS database; that there was a match; and that further tests were being performed to confirm the match is sufficient, and therefore, the information included in the affidavit adequately established the requisite probable cause.<sup>13</sup>

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<sup>12</sup> Day argues that the search warrant is invalid because the affidavit fails to "demonstrate the reliability of the State's information source. Specifically, the affidavit omits any relevant details that establish the trustworthiness of the DNA testing methods employed by the Indiana State Police Laboratory[.]" We disagree.

The information regarding the testing of the evidence was obtained entirely from law enforcement channels. "Probable cause may be based on the collective information known to the law enforcement organization as a whole." *Rios*, 762 N.E.2d at 163 (quoting *Williams v. State*, 528 N.E.2d 496, 500 (Ind. Ct. App. 1988), *trans. denied*). This case clearly is different from those where law enforcement officers have obtained hearsay information from an informant, thereby requiring the officers to set forth in the affidavit particularized facts that demonstrate some basis for the informant's knowledge. Thus, we find that the "heightened requirements for establishing the veracity of hearsay information were not implicated in this case." *Id.* Furthermore, Day does not argue in his brief that the test was indeed unreliable.

<sup>13</sup> Day also argues that the DNA tests resulting in the initial match between the DNA evidence taken from L.K. and his DNA profile contained in CODIS were scientifically unreliable, and thus, inadmissible under Indiana Evidence Rule 702 and that the DNA evidence was unfairly prejudicial, and thus, inadmissible under Indiana Evidence Rule 403. Day essentially maintains that "[b]ecause no statistical method is generally accepted for expressing the significance of a cold hit [which Day defines as occurring when 'biological evidence collected from a crime scene is run through a database containing a fixed number of DNA profiles' (Day's Br. 21)], the methodology and error rate associated with such calculations is unreliable . . . ." Day's Br. 15. This argument, however, assumes reversal of the trial court's ruling on the admissibility of Day's blood sample obtained pursuant to the search warrant, and

## 2. Sufficiency of the Evidence

Day asserts that the State failed to present sufficient evidence to convict him of rape. Day presents the following argument:

Where, as here, there is no other evidence linking a suspect to the crime other than DNA obtained from a moderate stringency run through a database across all loci, and because there is no consensus within the scientific community regarding the statistical significance to give a cold-hit moderate stringency match, and because the State Police and [the Crime Lab] showed different alleles at loci D13, the “match” of Day’s DNA falls far below a reasonable doubt and the evidence is insufficient to support Day’s conviction.

Day’s Br. 28-29. We disagree.

Our standard of review for sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the credibility of witnesses. *Snyder v. State*, 655 N.E.2d 1238, 1240 (Ind. Ct. App. 1995). We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom, and, if there is substantial evidence of probative value to support the conviction, it will not be set aside. *Id.*

Pursuant to Indiana Code section 35-42-4-1

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therefore, a finding that the trial court erred in admitting the DNA tests performed on that blood sample as well as the expert testimony regarding the calculation of the match probabilities between the DNA evidence collected and that of Day. Because Day does not contest the admissibility of the evidence of match probabilities “in a confirmation type DNA case,” (Day’s Br. 19), such as occurs where a match is found between DNA evidence collected from the crime scene and the DNA profile from someone identified as a suspect, we find the issue regarding the admissibility of the blood sample dispositive, and we therefore need not address the admissibility of evidence obtained from a “cold hit.” See *Patterson v. State*, 742 N.E.2d 4, 13-14 (Ind. Ct. App. 2000) (finding testimony of State’s expert witnesses regarding DNA testing performed on defendant’s blood and match probabilities admissible), *aff’d on reh’g*, 744 N.E.2d 945 (Ind. Ct. App. 2001), *cert. denied*, 534 U.S. 961 (2001).

a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

- (1) the other person is compelled by force or imminent threat of force;
- (2) the other person is unaware that the sexual intercourse is occurring; or
- (3) the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given;

commits rape. The crime of rape is a class A felony if

- (1) it is committed by using or threatening the use of deadly force;
- (2) it is committed while armed with a deadly weapon;
- (3) it results in serious bodily injury to a person other than a defendant; or
- (4) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge.

I.C. § 35-42-4-1(b).

L.K. testified at trial that, while armed with “a knife going across [her] neck,” (Tr. 272-73), and threatening that “his partner will kill [L.K.’s] kids,” (Tr. 273), if she screamed, an unknown assailant “proceeded to rape [her].” (Tr. 273). DNA evidence subsequently was collected from L.K., and the initial DNA test resulted in a match between the evidence obtained from L.K. and Day’s profile, which was in CODIS. This match, along with other facts, created sufficient probable cause to issue a search warrant for a sample of Day’s blood. A subsequent test of the DNA extracted from Day’s blood resulted in the conclusion that “Day is the source of the DNA obtained from” the DNA evidence collected from L.K.’s person “to a reasonable degree of scientific certainty.” (Ex. 113). Day does not refute this finding, and we will not reweigh the evidence. Given

this evidence and L.K.'s testimony, we find the evidence is sufficient to prove beyond a reasonable doubt that Day committed crime of rape.

Affirmed.

BAKER, C.J., and ROBB, J., concur.