STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHAD LEWIS ELSTON,

Defendant-Appellant.

UNPUBLISHED
March 5, 1999

No. 199557
Eaton Circuit Court
LC No. 96-000134 FC

Before: Cavanagh, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Defendant Chad Lewis Elston appeals as of right his conviction by jury of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). The trial court sentenced defendant to fifty to seventy-five years' imprisonment. We reverse and remand for a new trial.

Defendant's conviction in this case stems from his sexual assault of his girlfriend's two-year-old son while defendant and the child were taking a bath together. Defendant, his brother, defendant's girlfriend and her son were living together on March 5, 1996, when defendant and the child took a bath together. After hearing a bang and the child screaming, the mother went to the bathroom and removed the child from the tub. When she put his diaper on, she noticed blood between his buttocks. The child was shaking, crying and saying "ow" a number of times. When the mother asked defendant to drive them to the hospital, defendant responded that he was not dressed and suggested that they wait until the next day to see if the child's injuries improved.

Instead, the mother's cousin drove the mother and child to the hospital. The cousin stated that when she arrived, she saw the child and noted that the area around his anus was swollen and badly bruised, with dried blood. Both women testified that on the drive to the hospital, they heard the child say, "Chad butt." At the hospital, when the child saw his grandmother, he bent over and said, "Chad butt, Chad hurt." The doctor who examined the child, Scott Randall, D.O., observed swelling, redness and two minor tears around his anus. Dr. Randall testified that the child's injuries were inconsistent with a fall or digital penetration, but consistent with penetration by an "adult erect penis." The doctor called the police and sent two dry swabs to test for the presence of sperm to the Michigan State Police Laboratory. These swabs did not show the presence of sperm, and both parties initially relied upon this

finding. Both parties received a copy of Dr. Randall's initial report on the child's emergency room examination, in which he wrote that after obtaining the two dry swabs, he spoke to another physician who "suggested wet prep / GC / Chlamydia Culture and attemt [sic] for motile sperm slide which were obtained." Also on this report, in small section in the upper right corner under the heading "present medications," Dr. Randall listed the words, "Wet Prep, GC, Chlamydia Culture, Motile Sperm." Dr. Randall testified that he did two wet swabs, one to test for sperm and another to test for gonorrhea and chlamydia. He said that he was present when a laboratory technician made a microscope slide from the material collected by one wet swab, then he looked at the slide under the microscope later on that night and saw two sperm fragments. He did not add this finding to any report or notify the police or prosecutor until just prior to the start of the trial. Dr. Randall also sent the wet swabs to the hospital laboratory for these tests, and a laboratory report was issued with the results. Dr. Randall testified that he did not see the laboratory report until the Friday before the first day of trial on Monday, although he did not testify regarding the substance and conclusions of the report.[1]

At the start of the trial, the prosecutor moved to have two witnesses endorsed because, although they had been listed as witnesses in the information, they were inadvertently left off of the final witness list. One of the witnesses was Officer John Vance, who took defendant's confession to inserting the tip of his finger into the child's rectum. The second unendorsed witness was the mother's cousin, who heard the child say, "Chad butt." The trial court allowed the witnesses to be called over defendant's objection because defendant had notice that they could be called to testify from the information. Also on the first day of trial, the prosecutor notified the defendant of the presence of sperm in the child's rectum, but did not turn over the hospital laboratory report or allow defendant access to the physical evidence itself. Dr. Randall had notified the prosecutor just prior to the start of the trial of this finding. On the second day of trial, defendant moved to suppress this evidence based on the prosecutor's failure to disclose this evidence during discovery. The trial court allowed the testimony of Dr. Randall because it determined that Dr. Randall's initial report, which defendant did receive during discovery, gave sufficient notice to the parties regarding the search for "motile sperm" evidence. The prosecutor did not attempt to use or disclose the laboratory report. At the conclusion of the prosecutor's case, defendant moved for a directed verdict, which the court denied. Defendant did not present any evidence and the jury found him guilty as charged. At the sentencing hearing, the trial court determined that certain guidelines' factors should have been scored higher, and thus increased the recommended range from eight to fifteen years' imprisonment to ten to twenty-five years' imprisonment. He then made an additional upward departure from guidelines' range and sentenced defendant to fifty to seventy-five years' imprisonment.

Defendant first argues that the trial court violated his due process rights by allowing Dr. Randall to testify about previously undisclosed physical evidence of the presence of sperm in the child's rectum. We review discovery issues for abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). "The purpose of broad discovery is to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate vestiges of trial by combat." *People v Taylor*, 159 Mich App 468, 483-84; 406 NW2d 859 (1987) (citations omitted). In other words, it is to promote the search for truth in the criminal justice process and eliminate gamesmanship. One important aspect of discovery is to allow the defendant in a criminal case to prepare to meet the case

the prosecutor intends to bring before the jury by eliminating the element of unfair surprise and enhancing the adversarial nature of the process. *People v Turner,* 120 Mich App 23, 32-33; 328 NW2d 5 (1982). In the past, as defendant argues, this Court has on several occasions found non-compliance with discovery agreements to be a constitutional denial of due process and thus, held that admission of any undisclosed evidence required reversal unless its admission was harmless beyond a reasonable doubt.[2] *People v Clark,* 164 Mich App 224, 228-29; 416 NW2d 390 (1987). However, in *Taylor, supra* at 471, this Court renounced the "view that this procedural problem should be elevated to constitutional rank." See *People v Davie,* 225 Mich App 592, 598; 571 NW2d 229 (1997). Generally, unless the prosecutor fails to correct false testimony or suppresses evidence favorable to an accused where the evidence is material either to guilt or to punishment, discovery violations do not implicate constitutional due process, *Brady v Maryland,* 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Clark,* 164 Mich App 224, 228-29; 416 NW2d 390 (1987), and a court must exercise its discretion to balance the interests of the public, the courts and the parties when it considers how it should rule on an alleged discovery violation. *Davie, supra* at 598; *Taylor, supra* at 487. Thus, this Court held that the following procedure was to be followed in analyzing an alleged discovery violation:

> The question, rather, in any given case is first, whether the party's interest in preparing his own case or his opportunity to test the authenticity of his opponent's evidence has been prejudiced by a noncompliance with a discovery order or agreement, and second, if that be the case, what remedy may be appropriate giving due regard to the competing interests of the opposing party, the court and the public. A remedy which would put the objecting party in a better position than he would have enjoyed had disclosure been timely made would seem of dubious value. [*Taylor, supra* at 486-87.]

Applying this analysis to the facts of this case, we must first determine whether discovery was complied with by the prosecutor and trial court. In criminal cases tried after January 1, 1995, discovery is governed by MCR 6.201, which makes certain discovery mandatory. *People v Tracey,* 221 Mich App 321, 324; 561 NW2d 133 (1997). Pursuant to MCR 6.201(A), a party must disclose the following evidence upon request:

> (3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;
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> * * *
>
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party intends to introduce at trial. On good cause shown, the court may order that a party be given the opportunity to test without destruction such tangible physical evidence.

Consistent with constitutional due process considerations, a prosecuting attorney must also produce upon request "any exculpatory information or evidence known to the prosecuting attorney." MCR 6.201(B)(1). The duty to disclose such information is continuing, and "any time a party discovers

additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party." MCR 6.201(H).

In this case, defendant made a demand for the disclosure of any expert witness reports, tangible physical evidence and exculpatory evidence prior to trial pursuant to MCR 6.201. Although it is undisputed that the prosecutor promptly notified defendant that Dr. Randall had found sperm in the child's rectum-- at least as soon as Dr. Randall told the prosecutor on the first day of trial-- the prosecutor did not then make available the laboratory report or the wet swab evidence itself for evaluation by defendant. The trial court concluded that the words "motile sperm" on the child's initial emergency room medical report achieved the required notice, thus apparently finding that the prosecutor complied with discovery requirements. However, given the complete absence of explanation on the medical report for these words, the absence of any substantive results of the motile sperm tests performed by the lab or Dr. Randall, and indeed even the absence of notice that any results were obtained, we conclude that there was no reasonable way that the words "motile sperm," by themselves or even within the very limited context of Dr. Randall's notes in the report, could have afforded defendant reasonable notice that evidence of sperm had been discovered. Pursuant to the discovery rules, since the laboratory report was produced in response to Dr. Randall's request for tests, and since he testified that he read the lab's report prior to testifying at trial, we conclude that this report was "produced by or for an expert witness whom [the prosecutor] intends to call at trial." MCR 6.201(A)(3). Further, Dr. Randall's testimony introduced at trial information and test results regarding the "tangible physical evidence"-- the material obtained by the wet swab. MCR 6.201(A)(6); *People v Valeck*, 223 Mich App 48, 51; 566 NW2d 26 (1997) (holding that the breath sample, not the Datamaster instrument used to test the breath for alcohol, was the tangible physical evidence). However, defendant was not allowed an opportunity to inspect the wet swab sample, as required by MCR 6.201(A)(6).

We recognize that, due to Dr. Randall's delay in informing anyone of the presence of sperm in the child's rectum, there was little that the prosecutor could have done in order to reduce the surprise to defendant once the new evidence of the presence of sperm was uncovered on the first day of trial. The prosecutor's options were further limited by the need to gain the court's approval for any action that would delay the trial. However, there is no evidence in the record that the prosecutor attempted to take any mitigating action other than informing defendant that Dr. Randall would testify to finding sperm. The prosecutor argued that no further action was required because the initial emergency room report provided sufficient notice to defendant that the hospital or doctor had tested for sperm. Once the prosecutor learned of such evidence, he apparently attempted to bypass defendant's discovery request and MCR 6.201(A)(3) and (A)(6), by relying solely on Dr. Randall's oral testimony and by foregoing the introduction of either the hospital laboratory report or the laboratory technician. After denying defendant's motion to suppress Dr. Randall's testimony, the trial court failed to offer any alternative remedy such as a continuance, and also failed to require the prosecutor to turn over to defendant either the hospital laboratory report or the physical swab evidence. Instead, the trial court determined that the testimony was admissible and required defense counsel to cross-examine Dr. Randall approximately twenty minutes after its ruling. We reject the prosecutor's argument that the trial court was excused from remedying the potential prejudice in this case unless defendant specifically asked for a continuance.

While we believe that the trial court was not obligated to exclude the evidence, as defendant requested, *Taylor, supra*, some remedy which would have allowed defendant the opportunity to defend against this new evidence -- such as a continuance and the opportunity to examine the evidence regarding the presence of sperm -- was required. In our judgment, the discovery rules were breached in this case by virtue of defendant not having been provided access to the laboratory report and having been denied any opportunity to inspect and/or test the wet swab sample.

Accordingly, we must determine "whether the party's interest in preparing his own case or his opportunity to test the authenticity of his opponent's evidence has been prejudiced." *Taylor, supra* at 486-87. In our judgment, defendant was left without an opportunity to scientifically evaluate the wet swabs, examine the hospital laboratory report for possible inconsistencies with the doctor's testimony, or intelligently cross-examine Dr. Randall. Defendant had virtually no time to assimilate the surprise evidence of the presence of sperm in the child's rectum and attempt to develop a strategy to respond to it at trial. We cannot expect a defendant and his attorney to be prepared to meet such critical physical evidence in less than one day and without access either to key reports or to the physical evidence itself. By its nature, such physical evidence is generally so persuasive to a jury that there is an obligation on the part of the prosecutor and the court to fairly share it with defendant. And not only was defendant entitled to have a fair chance to examine the evidence against him, but the jury was entitled to make a decision based on all of the evidence available. We note that we are unaware whether the hospital laboratory report, in fact, confirmed Dr. Randall's finding of sperm in the wet swab sample taken from the child's rectum. As far as we know, this report could have been exculpatory, as could a DNA test of the physical evidence. However, whether or not it was exculpatory, defendant was entitled to an opportunity to fashion an appropriate response.

Further, we are not convinced that this error was harmless. Defendant at trial was clearly unaware of any evidence showing the presence of sperm in the victim, or even that tests had been performed other than those of the police crime laboratory. Although there was considerable other evidence to support defendant's conviction of *some* crime against the child here, the evidence was less dispositive with respect to the fact of penile, as opposed to digital, penetration.[3] Absent the evidence of sperm in the child's rectum, the jury might conceivably have convicted defendant of a lesser degree of criminal sexual conduct. *People v Sabin*, 223 Mich App 530, 539-40; 566 NW2d 677 (1997). Thus, we conclude that the trial court here abused its discretion by not providing some remedy for the discovery violation (which again we emphasize was inadvertent on the part of the prosecutor). We do not make this finding lightly, especially here, where there is compelling evidence that defendant committed some crime against the child that was entrusted to his care. However, we have no choice but to reverse a trial court order which so obviously prejudiced defendant's entitlement to a fair trial. Therefore, we reverse and remand for a new trial.

Defendant also argues that the trial court abused its discretion by failing to exclude testimony that the child said, "Chad butt," during the drive to the hospital to his mother and relative, and at the hospital when his grandmother arrived, which language suggested that defendant had assaulted the victim. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996). Although we reverse defendant's conviction here for a separate reason, we will address this issue because it is likely to recur

in a new trial. We conclude that the victim's statement was admissible as an excited utterance under MRE 803(2) because, from the perspective of a small child, the assault and ensuing pain constituted a seamless 'exciting' event for the four hours in which the victim twice said "Chad butt." See, e.g., *People v Houghteling*, 183 Mich App 805, 807-808; 455 NW2d 440 (1990) (five-year-old child's statement was still an excited utterance after 20 hours); *People v McConnell*, 122 Mich App 208, 210-212; 332 NW2d 408 (1983) (even a one week delay did not eliminate the excitement underlying a six-year-old child's statement concerning a sexual assault). Therefore, the trial court did not abuse its discretion in admitting this hearsay testimony. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996).

Defendant's arguments about the late witness endorsement and the proportionality of his sentence need not be addressed in light of our decision to remand for a new trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Stephen J. Markman
/s/ Michael R. Smolenski

[1] We note that it is unclear from the record whether the hospital laboratory viewed the same slide as that viewed by Dr. Randall, in which he testified that he saw two partial sperm cells, or whether the hospital laboratory prepared its own separate slides and/or other tests.

[2] See *People v Florinchi*, 84 Mich App 128; 269 NW2d 500 (1978); *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980); *People v Turner*, 120 Mich App 23; 328 NW2d 5 (1982).

[3] Although Dr. Randall testified that he believed that the bruising he observed near the child's anus was inconsistent with digital penetration and was consistent with penile penetration, another doctor then testified that external markings of trauma are not always clear indicators of the type of trauma suffered.