S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2001
v	No. 226145 Calhoun Circuit Court
SEAN DEDRIC RODEN, Defendant-Appellant.	LC No. 99-002448-FC

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration with a person under the age of thirteen). The trial court sentenced him as a second felony offender, MCL 769.10, to two concurrent 30 to 60 year prison terms. He appeals as of right. We affirm.

Defendant first argues that the trial court erred when it admitted the testimony of a forensic scientist, who had conducted a DNA analysis and found that defendant's DNA matched the DNA of the sperm cells taken from the victim's body, that a statistical analysis revealed that the likelihood of another Caucasian having the same DNA profile as defendant was one in two hundred trillion. More specifically, defendant contends that DNA identification "is nothing more than speculation when the numbers used to support an ostensible statistical analysis are not only without context but, quite literally, out of this world." Reviewing this unpreserved issue for plain error affecting defendant's substantial rights, we disagree. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

When a party presents DNA evidence at trial, that party is required to supplement that evidence with a statistical analysis indicating the significance of a DNA match. *People v Coy*, 243 Mich App 283, 301-302; 620 NW2d 888 (2000). In *Coy*, this Court explained the need for statistical analysis, quoting with approval the language in *Nelson v State*, 628 A2d 69, 75-76 (Del, 1993) (citations omitted):

> "DNA typing produces two distinct, but interrelated, items of information: 1) whether a match exists between the samples; and 2) if a match exists, the ratio expressing the statistical likelihood that 'the crime scene samples came from a third party who had the same DNA pattern as the suspect.' The latter correlation

> is necessary because, even though two human genomes may vary at approximately three million sites, the DNA typing analysis currently employed examines only a few sites for variation in the DNA sequence. The theory is that, besides identical twins, no two individuals will have entire DNA sequences which are identical. The DNA prints which result from the current FBI procedure may not be unique since the entire DNA molecule is not analyzed. Since two unrelated individuals may have identical DNA patterns from the fragments examined in a particular analysis, the potential exists for a match to be mistakenly found. For this reason, statistical interpretation regarding the probability of a coincidental match or the likelihood that two unrelated individuals have the same DNA type is necessary." [*Coy, supra* at 295.]

Thus, because a match found using a polymerase chain reaction test[1] might not necessarily narrow the perpetrator down to the defendant where that particular DNA pattern is common, statistical analysis is necessary to determine how likely it is that an individual other than the defendant has the same DNA pattern.

Here, plaintiff complied with the requirement set forth in *Coy* by having an expert witness testify concerning the uniqueness of defendant's DNA pattern according to the statistical analysis she performed. Although defendant questions the scientific validity of an analysis that would produce such a large number that is "out of this world", defendant correctly concedes in his appellate brief that questions going to the accuracy or validity of the statistical method employed do not affect the admissibility of the DNA evidence but rather the weight a jury may place on that evidence. *People v Adams*, 195 Mich App 267, 279; 489 NW2d 192 (1992), modified on other grounds 441 Mich 916 (1993); see also *People v Leonard*, 224 Mich App 569, 591; 569 NW2d 663 (1997) (any challenge to the statistical evidence is relevant to the weight of the evidence and not to its admissibility). Thus, even if the method by which the forensic scientist arrived at this number were somehow improper, this factor would not render the resulting number of "200.8 trillion" inadmissible.

Defendant also argues that the statistical evidence resulted in unfair prejudice because it caused the jury to convict defendant based on his extremely rare DNA pattern. Generally, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995).

> "Unfair prejudice" does not mean "damaging." Any relevant testimony will be damaging to some extent. We believe that the notion of "unfair prejudice" encompasses two concepts. First, the idea of prejudice denotes a situation in which there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury. In other words, where a probability exists that evidence which is minimally damaging in logic will be weighed by the

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[1] This Court has recognized that the polymerase chain reaction testing method is generally accepted within the scientific community. *Coy, supra* at 291-292.

> jurors substantially out of proportion to its logically damaging effect, a situation arises in which the danger of "prejudice" exists. Second, the idea of unfairness embodies the further proposition that it would be inequitable to allow the proponent of the evidence to use it. [*Mills, supra* at 75-76, quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983) (citation omitted).]

Here, the evidence presented at trial was not merely "marginally probative." To the contrary, the evidence is highly probative of defendant's guilt because it revealed the significance of the match between the DNA in defendant's blood sample and the DNA in the sperm cells taken from the victim's body. The evidence tends to establish that the sperm cells found on the victim's body could have come only from defendant.

Furthermore, we find nothing inequitable or unfair in allowing plaintiff to use this evidence at trial. As noted above, we require DNA identification testing to be accompanied by a statistical analysis explaining the significance of the match. *Coy, supra* at 301-302. Thus, defendant should have expected testimony concerning the statistical significance of the DNA match at trial. Moreover, defendant has provided no authority for the proposition that where a statistical analysis reveals a very high number like that revealed in the present case, the evidence is no longer admissible. We will not search for authority to support defendant's position. *Leonard, supra* at 588. Given the fact that we require the use of statistical evidence to explain DNA evidence, its use in the present case can hardly be said to be unfair. Defendant has not established outcome-determinative plain error. *Carines, supra*.

Defendant also claims that his trial counsel provided ineffective assistance when he failed to object to the introduction of this statistical evidence. However, because the evidence was properly admitted, trial counsel was not ineffective for failing to object to its admission. *People v Snider*, 239 Mich App 393, 424-425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey