STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 13, 2010
v	No. 296583 Macomb Circuit Court
MICHAEL CRISTINI, Defendant-Appellee.	LC No. 08-006113-FC

Before: MURRAY, P.J., AND DONOFRIO AND GLEICHER, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order denying its motion to introduce statements made by defendant. We reverse.

I. FACTS AND PROCEEDINGS

On January 8, 2009, defendant was charged with five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13) alleged to have occurred between April 2004 and April 2005. Trial commenced on February 17, 2009. That same day, the prosecutor and defense counsel were first apprised of a jail voice recording of a conversation between defendant and his mother (Joan Cristini) recorded on January 3, 2009.[1] On the third day of jury selection, February 19, 2010, and after the trial judge declared a mistrial, the prosecutor moved to admit the recording. In doing so, the prosecutor explained to the trial court that she first learned of the recording the day of jury selection, February 17, 2010, and shared it with defense counsel at that time. She then argued:

> Judge, as everyone knows, the jail conversations are taped . . . . Now [in this case] Detective Stafford had been listening to the jail conversations that this defendant had over several months. There were statements made by the defendant that he knew the phone calls were being recorded. Also, judge, at the very beginning of

[1]The recording allegedly contains statements made by defendant to the effect that he told an officer that he thought his niece (the victim) had sex appeal, that he thought that this was a "sexual thought about her," and that Benet Ramsey was "sexy."

> every single call from the jail, there is a recording saying this call will be recorded or monitored.
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> * * *
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> And also, the courts have indicated that preclusion of otherwise admissible evidence should only be a remedy in the most egregious cases. . . . And I don't know, I mean, Judge, I got this case a week ago, which is no excuse . . . . However, I am saying that this was a telephone conversation and statements [were] made by the defendant. And he knew those telephone calls were recorded, and they are his own statements. . . . So, obviously, this defendant knows what statements he had made . . . .

The prosecutor further argued that defendant should have to show how admission of the statements would prejudice his case, explaining that because of the mistrial defense counsel had several days to prepare his case in light of the statements.

Defense counsel argued that "early on in this case there was a written defense request for discovery under the court rule. This evidence was never forthcoming within the time frame set forth in the statute . . . ." Thus, "we didn't learn, as the court is well aware, of the existence of this recording until the date of jury selection last week." He further stated that the evidence was "obviously" prejudicial.

After a continued colloquy between counsel and the court over the reason for the late disclosure, and whether the prosecutor was improperly motivated, the court ruled:

> It's not about motivation, it's a results business the way I look at it. There is [sic] discovery rules, and they are very simple. Get them the stuff when you're supposed to get it to them, both sides. If they don't get it, keep it out. That is incentive to make sure we get it to them ahead of time, make sure it is even.
>
> I will stick with the original ruling we made when we were starting to pick the jury. Available for impeachment, not in the case in chief. So, we will go with that.

When the prosecution asked if defendant's mother (who was on the witness list) could be questioned about the conversation, which would be considered a party admission under the rules of evidence, the court stated that, in addition to putting defendant's mother on the witness list, the prosecutor should have put the proposed statement "on paper and sen[t] it over to the other side." Consequently, on February 19, 2010, the court entered an order stating that (1) the prosecution was precluded from admitting the telephone recordings of defendant into evidence, and (2) the prosecution could not question Joan regarding the incriminating statements made during this recorded call, but the statements could be used for impeachment purposes.

As already noted, the prosecutor filed an application for leave to appeal with this Court, and asked for a stay in the lower court. The motion for stay was granted on February 23, 2010, *People v Cristini*, unpublished order of the Court of Appeals, entered February 23, 2010 (Docket No. 296583), while this Court granted the prosecutor's application for leave to appeal on March

5, 2010. *People v Cristini*, unpublished order of the Court of Appeals, entered March 5, 2010 (Docket No. 296583).

II. ANALYSIS

We agree with the prosecutor's argument that the trial court abused its discretion in precluding admission of the recorded jailhouse conversation between defendant and his mother.

"This Court reviews a trial court's evidentiary decisions for an abuse of discretion. However, this Court reviews de novo whether a rule or statute precludes admission of evidence as a matter of law." *People v Roper*, 286 Mich App 77, 90-91; 777 NW2d 483 (2009) (citations omitted). In addition, this Court reviews "a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion." *People v Davie* (*After Remand*), 225 Mich App 592, 597-598; 571 NW2d 229 (1997). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

Pursuant to MCR 6.201(B)(3), a prosecutor must, upon request, provide "any written or recorded statements by a defendant . . . pertaining to the case . . . ." In addition, "[u]nless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within 21 days of a request under this rule . . . ." MCR 6.201(F). In this case, there is no dispute that the prosecutor failed to comply with the requirements of MCR 6.201(F). When this rule is violated:

> [T]he court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion. [MCR 6.201(J).]

This Court has instructed that

> [t]he purpose of broad discovery is to promote the fullest possible presentations of the facts, minimize opportunities for falsification of evidence, and eliminate vestiges of trial by combat. . . . [D]isclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. [*People v Valeck*, 223 Mich App 48, 51-52; 566 NW2d 26 (1997), quoting *People v Wimberly*, 384 Mich 62, 66; 179 NW2d 623 (1970) (citations and internal quotation marks omitted).]

The exercise of a trial court's discretion when addressing discovery violations, "involves a balancing of the interests of the courts, the public, and the parties. It *requires inquiry into all the relevant circumstances*, including the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice." *Davie*, 225 Mich App at 598

(emphasis added) (quotation marks and citations omitted). The trial court must also consider "any circumstances that might bear on the choice of an appropriate remedy." *People v Taylor*, 159 Mich App 468, 475 n 9; 406 NW2d 859 (1987).

When conducting an inquiry, a trial court should recognize that:

> While the courts have an interest in the integrity of their orders, nothing about noncompliance with a discovery order seems to be the moral or constitutional equivalent of an illegal search or coerced confession so as to justify the extreme sanction of exclusion of evidence without regard to its truth. Other sanctions are available and adequate to deal with counsel who cause the courts and opposing litigants expense and delay by noncompliance with court orders. [*Id*. at 485.]

Moreover, "[t]here are countless cases in which last minute disclosure has been held appropriate so long as the prosecutor made the disclosure as soon as he became aware of the existence of the evidence." *Id*. at 476 n 10. Thus, "the critical question is as to the appropriate response and remedy by the trial court." *Id*. at 477. "[T]he exclusion of otherwise admissible evidence is a remedy which should follow only in the most egregious cases." *Id*. at 487.

As noted above, the trial court in the case at bar was required to make an inquiry into the reasons for the discovery violation and any resulting prejudice against defendant. *Davie*, 225 Mich App at 598; *Taylor*, 159 Mich App at 476 n 9. Although the prosecutor explained that she had only recently been put on the case and was unaware that defense counsel did not have access to the recordings of defendant's conversations, the trial court focused *solely* on the fact that the discovery rule had been violated. The court incorrectly stated:

> It's not about motivation, it's a results business the way I look at it. There is [sic] discovery rules, and they are very simple. Get them the stuff when you're supposed to get it to them, both sides. If they don't get it, keep it out. That is incentive to make sure we get it to them ahead of time, make sure it is even.

Regarding prejudice to the defense as a result of delayed disclosure, the prosecutor pointed out that the trial had already been adjourned once (on the first day of trial), and defendant had more time to prepare. Although defense counsel argued that it was prejudicial, "[i]t is not a valid objection to the use of such evidence that such evidence is 'prejudicial' in the sense of being unfavorable . . . ." *Taylor*, 159 Mich App at 486. Nevertheless, despite protestations from the prosecutor that defendant had to show how delayed disclosure of the evidence was prejudicial, the court again focused on the mere fact that the discovery rule had been violated.

Given that a mistrial had been declared and proceedings had already been adjourned for a few days, the situation faced by defendant was even less prejudicial than in *Taylor*, where the previously undisclosed evidence was introduced *during* trial. *Id*. at 474-475. Here, had the court determined that defense counsel needed even more time to prepare for the introduction of defendant's recorded statements than gained by the adjournment, it could have granted a continuance. If a continuance "would have alleviated any harm to defendant's case by allowing both parties to prepare for the evidence . . . without requiring the exclusion of relevant evidence[,]" then the "more severe remedy of suppression" is not appropriate. *People v Elston*,

462 Mich 751, 764; 614 NW2d 595 (2000). Moreover, defendant himself made the incriminating statements to Joan, and therefore, he had knowledge of his statements independent of discovery. *Taylor*, 159 Mich App at 487-488. Therefore, it was an abuse of discretion for the trial court to deny admission of the recording without considering the reasons for the delay in disclosure, the lack of proof, an argument of any prejudice to defendant, the fact that defendant was aware of his own statements, and the fact that a continuance would have alleviated any harm to defendant's case. Under these facts, the statements should not have been excluded as a discovery violation.

We also agree with the prosecutor's next and final argument, which is that the trial court clearly erred in ruling that Joan Cristini could not be questioned regarding defendant's incriminating statements because the statements were admissible pursuant to MRE 801(d)(2).

As discussed above, the trial court first ruled that the recording of defendant's conversation with Joan could not be admitted because the prosecutor violated the aforementioned discovery rules. When the prosecutor asked to be able to question Joan about the conversation independent of any introduction of the recording, the trial court, apparently, construed the discovery rules as requiring the prosecutor to reduce Joan's testimony to writing (because it would include statements from defendant) and turn it over to defense counsel. The trial court reasoned:

> Let's say there was no tape, and I'm a defendant. We could put [various people] on the witness list . . . . They do not make a report on anything, they come to trial and say I said something. We don't know that I ever said it or not. . . . That is the ultimate logic in your argument. "Hey, he said it." And here you say we have a tape. But philosophically, it's the same position. The fact that we're saying that . . . defendant said something should waive any notice requirement that it be reduced to writing and turned over, so that they know what they're up against.

First, it should be noted that the court rules do not require a party to put a witness statement in writing. "MCR 6.201(A)(1) requires each party to disclose its trial witness list, enabling the opposing party to conduct its own interviews and take statements." *People v Holtzman*, 234 Mich App 166, 170; 593 NW2d 617 (1999). MCR 6.201(B)(3) states that a prosecutor must, upon request, provide "any written or recorded statements by a defendant . . . pertaining to the case . . . ." In addition, pursuant to MCR 6.201(A)(2), it is mandatory that a party provide "any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial . . . ."

When construing a court rule,

> this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. [*People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003) (quotation and citations omitted).]

Here, the plain wording of MCR 6.201(B)(3) and MCR 6.201(A)(2) does not require the prosecutor to create a written statement, but rather, refers to written statements already in existence. MCR 2.302(B)(3)(c) provides the following definition of "statement":

> (i) a written statement signed or otherwise adopted or approved by the person making it; or
>
> (ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

The only third-party renditions of statements by witnesses or defendants that are required to be turned over (upon request) are "any police report and interrogation records concerning the case . . . ." MCR 6.201(B)(2).

Thus, Joan Cristini's testimony regarding her conversation with defendant is not addressed by the discovery rules. It is, however, relevant evidence admissible pursuant to MRE 402. As the prosecutor argues on appeal, defendant's statements to his mother would be admissible pursuant to MRE 801(d)(2)(A), which provides that a statement is not hearsay if the statement is offered against a party and is the party's own statement. Such "[a]dmissions by a party are specifically excluded from hearsay and . . . are admissible as both impeachment and substantive evidence under MRE 801(d)(2)," and this applies as well to a criminal defendant's statements. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). For example, in *People v Kowalak* (*On Remand*), 215 Mich App 554, 556-557; 546 NW2d 681 (1996), the defendant told his mother that he was going to kill her because she testified at a custody/visitation hearing that the defendant had a "severe problem with alcohol" and she believed "that he should not be involved with those little boys." This Court found that the trial court properly admitted, through the testimony of another witness, the defendant's statement that he was going to kill his mother, because it was not hearsay pursuant to MRE 801(d)(2). *Id*. at 556-557. Thus, the trial court abused its discretion by precluding the prosecution from introducing defendant's incriminating statements through Joan's testimony.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.[2]

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

[2] We decline to address defendant's argument that the recording was inadmissible under 18 USC 2510 *et seq.*, as defendant admits in his brief that "the issue of statutory compliance is not ripe for appellate review . . . ."