

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS CHRISTOPHER FIGUEROA,

Defendant-Appellant.

UNPUBLISHED

March 9, 1999

No. 201719

Oceana Circuit Court

LC No. 96-002490 FC

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

PER CURIAM.

Defendant appeals as of right jury convictions of armed robbery, MCL 750.349; MSA 27.797, and kidnapping, MCL 750.349; MSA 20.521. The trial court sentenced defendant to fifteen to forty-five years' imprisonment for the armed robbery and to twenty-five to seventy-five years' imprisonment for kidnapping. We affirm.

Defendant's convictions stem from his actions on the night of March 7, 1996, when he robbed an eighteen-year-old woman at gun point while she was working at a convenience store. At this time, the woman was four months pregnant, and she asked him not to hurt her because she was pregnant. Defendant used his gun and threats to force her to accompany him in his car, where she claimed that he later raped and sodomized her after they crossed the county line. The woman testified that defendant was inebriated and drove the car into a ditch while driving. Later, defendant let her go. DNA evidence taken from semen found in the woman's undergarments was used in part to identify defendant as the perpetrator.

Defendant first claims that the trial court abused its discretion by admitting DNA evidence at trial when the prosecutor allegedly violated a discovery agreement or order to turn over a laboratory technician's notes. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). However, we do not believe that MCR 6.201(A)(3), which requires a party to disclose only an expert's "report" after a proper request by an opponent, also encompasses the preliminary notes a laboratory technician makes while performing DNA testing. Such notes lack the permanence and conclusory nature of a report, which adequately fulfills the purpose of discovery to inform the defendant about the evidence the prosecutor intends to use against him. See *People v Turner*, 120 Mich App 23, 32-3; 328 NW2d 5

(1982). Even if defendant could show a discovery violation by the prosecutor, he would be unable to show prejudice resulting from the trial court's refusal to exclude the DNA evidence or grant a continuance. *People v Taylor*, 159 Mich App 468, 482, 484, 487; 406 NW2d 859 (1987) (where a party can show that there was a discovery violation the trial court must determine whether prejudice resulted and what remedy would be appropriate for that prejudice). Not only was there eyewitness testimony that defendant was the perpetrator of the crimes charged, but defendant's trial counsel skillfully cross-examined the prosecution's expert on highly technical aspects of DNA testing and statistical probabilities. See *People v Lee*, 212 Mich App 228; 537 NW2d 233 (1995). We find no abuse of discretion here.

Defendant next argues that his sentence for kidnapping is disproportionately harsh, since his twenty-five-year minimum sentence represents an upward departure from the guidelines' minimum of eight to fifteen years' imprisonment. "[A] given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990). In our judgment, the trial court acted reasonably in identifying aggravating factors which it used as its basis to upwardly depart from the guidelines. *People v Naugle*, 152 Mich App 227, 237; 393 NW2d 592 (1986). The risk of injury to the pregnant victim from defendant's drunk driving and accident, the psychological effects of defendant's threats to harm or kill the victim and her baby, the sexual assaults, and defendant's use of a gun to terrorize the victim are all aggravating elements that the court properly took into consideration in its sentencing determination. We find that defendant's actions during the kidnapping warranted the upward departure and, thus, that the sentence is proportionate to the crime committed. *People v Harris*, 190 Mich App 652, 668-69; 476 NW2d 767 (1991).

Affirmed.

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