STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 27, 2018
v	No. 336685 Livingston Circuit Court
JUSTIN MICHAEL BAILEY, Defendant-Appellee.	LC No. 15-023204-FH

Before: CAVANAGH, P.J., and HOEKSTRA and BECKERING, JJ.

PER CURIAM.

Defendant is charged with third-degree criminal sexual conduct (incapacitated victim), MCL 750.520d(1)(c), and third-degree criminal sexual conduct (force or coercion), MCL 750.520d(1)(b). This is an interlocutory appeal by the prosecutor of a pre-trial order allowing defendant "to cross-examine witnesses and provide rebuttal witnesses regarding the results of the DNA sample" under an exception to the rape-shield statute, MCL 750.520j(1)(b). This Court denied the prosecutor's application for leave to appeal[1]; but, the Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Bailey*, 501 Mich 883; 901 NW2d 889 (2017). For the reasons explained in this opinion, we reverse the trial court's order to the extent that the trial court allowed defendant to introduce evidence of a second male DNA donor and we remand for further proceedings consistent with this opinion.

On November 29, 2014, the complainant became intoxicated at a house party and began vomiting in a bathroom. Defendant allegedly indicated that he was a firefighter who could assist her, and a friend therefore left the complainant in defendant's care. It is alleged that defendant then locked the bathroom door, pulled down the complainant's pants, and proceeded to engage in nonconsensual vaginal intercourse. The complainant's friends took her to the hospital where a rape kit was administered. DNA tests subsequently performed by Michigan State Police forensic

[1] *People v Bailey*, unpublished order of the Court of Appeals, entered May 17, 2017 (Docket No. 336685).

scientists on samples collected from the victim's vulva revealed the presence of DNA from defendant and another unidentified male donor.[2]

Before trial, the prosecutor filed a motion to exclude evidence of the victim's sexual conduct with people other than defendant, including evidence of the unknown man's DNA. Defendant filed a motion to allow evidence relating to the unknown male's DNA as an exception to the rape shield act. Relevant to this appeal, according to defendant, the presence of a second male DNA donor was admissible, despite the rape-shield statute, because without this evidence defendant could not fully cross-examine the forensic scientist about the DNA testing methodologies used in this case and this line of inquiry is relevant to determining the source of the semen in question. Following hearings on the parties' motions, the trial court granted the prosecutor's motion in part, ordering that defendant could not question the victim or other witnesses about the victim's sexual acts with anyone other than defendant. However, with regard to the DNA evidence, the trial court's order states:

> The Court DENIES the People's Motion and GRANTS the Defendant's Motion to the extent that Defendant shall be allowed to cross-examine witnesses and provide rebuttal witnesses regarding the results of the DNA sample. Such evidence is not precluded by the rape-shield act. MCL 750.520j(1)(b) . . . by its plain terms allows evidence regarding an alternative source of semen. Such evidence shall only be admissible upon a proper showing that the probative value outweighs any danger of unfair prejudice. To the extent that the lab report puts the source of semen at issue, Defendant may cross-examine witnesses as to those lab results. The Court will exercise authority to control the manner of questioning, to prevent unfair prejudice.

The trial court stayed proceedings, and the matter is now before us on remand from the Supreme Court as on leave granted.

On appeal, the prosecutor argues that the trial court abused its discretion by allowing for the introduction of evidence relating to the presence of a second male DNA donor because evidence of a second male donor should be excluded under the rape shield act as evidence of the victim's sexual conduct. While the trial court relied on MCL 750.520j(1)(b) to admit the DNA evidence as relating to an alternative source of semen, the prosecutor maintains that the presence

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[2] We note that the DNA testing in this case involved Y-STR analysis, which cannot be used to uniquely identify an individual because all males in the paternal line share the same Y-STR haplotype and, though less common, an unrelated male could also share the same Y-STR haplotype. See *People v Wood*, 307 Mich App 485, 511-514; 862 NW2d 7 (2014), vacated in part on other grounds by 498 Mich 914 (2015). Thus, in this case, the test results specify that the major Y-STR haplotype identified in the sample from the victim matches defendant and would be expected to match all his paternal relatives. The lab report also provides statistical information of the frequency of this Y-STR haplotype in the population. While we acknowledge that defendant cannot be uniquely identified based on the Y-STR haplotype, for ease of discussion we will refer to the two donors as defendant and the unidentified or other male.

of a second male donor is irrelevant to whether defendant's DNA was recovered and that admission of evidence of a second male donor would amount to a highly prejudicial attack on the victim's character. Insofar as defendant contends that the presence of a second male donor impacts the science involved with the DNA testing, the prosecutor asserts that defendant failed to make an appropriate offer of proof to support such an assertion.

I. STANDARDS OF REVIEW

We review a trial court's evidentiary decision for an abuse of discretion. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). "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). An abuse of discretion may also occur "when the trial court operates within an incorrect legal framework." *People v Kelly*, 317 Mich App 637, 643; 895 NW2d 230 (2016) (quotation marks and citation omitted). "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007) (quotation marks and citation omitted). Likewise, whether an evidentiary decision denies a defendant the right to confront the witnesses against him is reviewed de novo. *Benton*, 294 Mich App at 195.

II. ANALYSIS

The rape-shield statute was enacted to thwart the then-pervasive practice of impeaching a sexual assault complainant's testimony with evidence of his or her prior sexual activity, which discouraged individuals from reporting assaults "because they kn[e]w their private lives [would] be cross-examined." *People v Adair*, 452 Mich 473, 481; 550 NW2d 505 (1996), quoting House Legislative Analysis, SB 1207, July 18, 1974. "The prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant." *Id*. at 480 (citation and italics omitted). Thus, "[t]he law encourages the reporting of assaults by protecting the victims' sexual privacy and bars evidence that may prejudice and mislead the jury and is of only arguable probative worth." *People v Lucas (On Remand)*, 193 Mich App 298, 301; 484 NW2d 685 (1992). For these reasons, evidence of a complainant's past sexual conduct is generally inadmissible under the rape-shield statute with two narrow exceptions. MCL 750.520j; *Adair*, 452 Mich at 482. More fully, in relevant part, the rape-shield statute states:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

"[T]he touchstone of the rape-shield statute is relevance," and both exceptions are premised "on the threshold determination that the proposed evidence is material to a fact at issue." *Adair*, 452 Mich at 482 (quotation marks and citation omitted). Further, under the statute, material evidence falling within one of the exceptions is admissible only if "its inflammatory or prejudicial nature does not outweigh its probative value." *Id*. at 485 (quotation marks and citation omitted). A defendant wishing to introduce evidence under an exception to the rape-shield statute must file a written motion and make an offer of proof within 10 days after the arraignment on the information.[3] MCL 750.520j(2). If necessary, the trial court may hold an in camera hearing to determine the admissibility of the evidence. MCL 750.520j(2).

"In certain limited situations, evidence that is not admissible under one of the statutory exceptions may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation." *Benton*, 294 Mich App at 197. However, "the Sixth Amendment right to confrontation requires only that the defendant be permitted to introduce relevant and admissible evidence," *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984), and it does not "extend to cross-examination on irrelevant matters," *id*. at 356. Consequently, "[t]he defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted." *Id.* at 350. "Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion." *Id.*

In this case, defendant wishes to introduce evidence that, in addition to defendant's DNA, the DNA of a second unidentified male donor was found in the sample collected from the victim. Given that the unidentified male DNA was recovered from the victim's vulva, this DNA evidence gives rise to an inference of sexual conduct, meaning that the DNA evidence constitutes evidence of a specific instance of the victim's sexual conduct that is generally protected by the rape-shield statute. See MCL 750.520j(1). However, defendant contends that the presence of more than one man's DNA would complicate a laboratory technician's process in matching DNA and undermine the technician's ability to match the DNA found in the victim with defendant. Thus, defendant maintains that the presence of a second man's DNA would be relevant to establishing the source or origin of the semen under MCL 750.520j(1)(b) and that he is constitutionally entitled to cross-examine the laboratory technician on this issue. On the facts of this case, we conclude that the trial court abused its discretion by concluding that evidence of

[3] In the trial court, the prosecutor argued that defendant should be precluded from presenting the evidence in question because defendant failed to file his motion within 10 days of the arraignment. Relying on *People v McLaughlin*, 258 Mich App 635, 654; 672 NW2d 860 (2003), the trial court determined that the introduction of the evidence in question was not procedurally barred due to defendant's failure to abide by the notice requirement. While the prosecutor recounts this procedural history on appeal, the prosecutor does not address *McLaughlin* or argue that the trial court's decision to excuse defendant's failure to abide by the 10-day rule was an abuse of discretion. Consequently, we consider this issue abandoned. See *Kelly*, 317 Mich App at 642 n 2.

another man's DNA gleaned from the complainant's rape kit test was relevant to a fact at issue and admissible under MCL 750.520j(1)(b).

We begin our analysis by noting that evidence the prosecutor intends to introduce in this case is the Y-STR haplotype matching defendant. Given that this evidence supports the inference that defendant sexually assaulted the victim, MCL 750.520j(1)(b) could potentially be used to allow a defendant to rebut such evidence by offering evidence of a specific instance of sexual conduct by the victim that explains the source or origin of the Y-STR haplotype which matches defendant.[4] See *People v Mikula*, 84 Mich App 108, 113-114; 269 NW2d 195 (1978). In other words, this subsection is concerned with the admission of evidence that is material to proving that "someone other than the defendant" is responsible for the evidence recovered from the complainant. *Adair*, 452 Mich at 482. See also *Mikula*, 84 Mich App at 114. However, on the facts presented in this case, evidence of a second male donor with a different Y-STR haplotype would not generally be relevant to showing that the presence of the Y-STR haplotype matching defendant was caused by someone other than defendant.[5]

Instead, the only way evidence of a second male donor could potentially be relevant in this case is if, as defendant claims, the presence of a second donor could somehow affect the genetic analysis involved and could lead to an error in identifying the Y-STR haplotype that was found to match defendant. However, defendant failed to make an offer of proof relating to his scientific theories and he has thus failed to demonstrate the relevance of the evidence relating to the second male donor.[6] See *Hackett*, 421 Mich at 350; MCL 750.520j(2). Without such an

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[4] On appeal, the prosecutor asserts that the evidence of an unidentified male donor may not be evidence relating to the source of "semen" because the lab report describes the sample taken from the victim as a "DNA extract, non-sperm fraction." Thus, according to the prosecutor the other male sample could be saliva or some other substance not specifically mentioned in MCL 750.520j(1)(b). We need not attempt to discern whether the sample involves "semen" because the distinction posed by the prosecutor is immaterial to our analysis given that a defendant's constitutional right to present a defense and confront witnesses is not limited to the express statutory exceptions. See *Benton*, 294 Mich App at 197; see also *People v Mikula*, 84 Mich App 108, 113-115; 269 NW2d 195 (1978) (concluding that a defendant's right to introduce evidence is not limited to the conditions expressly included in MCL 750.520j(1)(b)).

[5] We note that defendant has not offered a factual version of events that would render the unidentified male's DNA probative of a material issue or defense theory. See *Adair*, 452 Mich at 482. He allegedly told police that he was in the bathroom with the victim but that he could not recall whether or not he had sex with the victim.

[6] On appeal and in the trial court, defendant has cited Faigman, et al, 4 *Modern Scientific Evidence: The Law and Science of Expert Testimony* (2013), p 140, for the general proposition that "[o]ne of the most problematic areas of forensic interpretation involves how to deconvolve, or pick apart, a strain containing the DNA of more than one person." However, this same source notes that rape cases often involve a sample with multiple DNA donors, i.e., the victim's DNA and that of the perpetrator. See *id*. And, defendant has not explained with any particularity—let alone made an offer of proof to demonstrate—how the presence of multiple male donors

offer of proof, the trial court could not determine that MCL 750.520j(1)(b) applied or that defendant was constitutionally entitled to introduce this evidence because there is no basis for finding that the evidence defendant proposed to offer was material to a fact at issue in the case—the accuracy of the results of the rape kit test. See *Adair*, 452 Mich at 482; *Hackett*, 421 Mich at 350. Further, without an offer of proof demonstrating the relevance of the second male donor, the trial court also could not reasonably determine that the inflammatory or prejudicial nature of this evidence (i.e., that the victim engaged in sexual acts with another man close in time to the alleged sexual assault) did not outweigh the probative value of the evidence. MCL 750.520j(1); *Adair*, 452 Mich at 485. See also *Kelly*, 317 Mich App at 644. In sum, absent an offer of proof demonstrating that the presence of a second male donor affected, or at least could have affected, the DNA testing relating to the victim's rape kit, evidence of the presence of an unidentified male donor was inadmissible as evidence of a specific instance of the victim's sexual conduct under MCL 750.520j(1). The trial court thus abused its discretion by admitting this evidence.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Jane M. Beckering

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complicates the use of Y-STR analysis in a case involving a female rape victim. Had defendant made an offer of proof to support such a theory, the trial court could have held a hearing to consider the admissibility of the evidence relating to a second male donor. See MCL 750.520j(2); *Hackett*, 421 Mich at 350-351.