

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of GARY TYLER KADZBAN,
Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

GARY TYLER KADZBAN,

Respondent-Appellant.

UNPUBLISHED

October 22, 2002

No. 233391

Shiawassee Circuit Court

Family Division

LC No. 00-009391-DL

Before: Talbot, P.J., and Whitbeck, C.J., and Gage, J.

PER CURIAM.

Respondent appeals as of right an order of disposition entered after delinquency proceedings in which the family court determined that respondent, a minor, committed second-degree criminal sexual conduct against a four-year-old minor, MCL 750.520c(1)(a). We affirm.

Respondent first argues that the family court erroneously admitted testimony that the results of DNA testing on gloves allegedly used on the complainant showed that neither respondent nor the complainant could be excluded as a contributor of the DNA. Respondent contends that the evidence was unfairly prejudicial in the absence of a statistical analysis regarding the likelihood that the DNA of other persons in the relevant population would also match the DNA found on the gloves. Respondent did not object to the lack of testimony regarding the statistical significance of the DNA evidence. Rather, the record indicates that respondent's counsel agreed to the admission of Jeffrey Nye's expert testimony. Nye testified that DNA testing did not reveal a match between the DNA found on the gloves and respondent's DNA. During direct examination, petitioner's counsel requested the admission of Nye's laboratory report and respondent's counsel interjected:

Mr. Furgason [Respondent's Counsel]: Excuse me, counsel. I think for the record we should state that counsel and I agreed to use Mr. Nye. We both are aware he is not the author of the exhibit itself. We agreed for purposes – correct me on this, counsel, if I'm wrong. We agreed because we want to get this in. We spoke to Mr. Nye and had him come here today and speak as to the contents of that report only –

Mr. Winger [Petitioner's Counsel]: I think he's going to basically describe how the test is done and what this test – what happened with this test, what the results were.

Mr. Furgason: From the report?

Mr. Winger: Yes.

Mr. Furgason: Very good. Thank you. I just wanted the record to reflect that.

Because respondent affirmatively indicated his approval of the admission of the test results, respondent has waived review of this issue. *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001); *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000); *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Respondent also argues that he was denied due process and a fair trial as a result of the prosecution's violations of discovery rules and a discovery order. Respondent claims that the prosecution failed to provide him with the notes of expert Julie Howenstine, which, according to her, were consistent with her testimony that she found evidence of one cell on one of the gloves. She testified that she could not determine whether the cell was oral or vaginal, nor could she determine from whom the cell came. Howenstine acknowledged that the presence of the cell was not included in her report, but she stated that it was indicated in her notes. Respondent disputes this assertion, and argues that he could have impeached her if the prosecution had provided him with Howenstine's notes. He also complains that the prosecution knew about the "one cell" prior to trial, but failed to inform the defense. Respondent argues that he was unfairly surprised by Howenstine's testimony and was unable to effectively cross-examine her.

This issue was not properly preserved for review. Respondent did not object when Howenstine testified about the cell and her notes. A timely objection would have given the court the opportunity to rule upon and remedy any discovery violation by granting a continuance or suppressing evidence. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999), quoting *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994) ("[R]equiring a contemporaneous objection provides the trial court 'an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights.'"). Accordingly, we review this issue for plain error affecting his substantial rights. *Carines, supra* at 763-764.

After the proceedings, respondent moved for JNOV or a new trial on the basis that the prosecution failed to comply with discovery requirements. At the hearing on respondent's post-trial motion, the prosecutor stated that he was unaware of Howenstine's notes until she testified about them. The family court found no discovery violation and denied the motion. We find no error in the family court's ruling.

. . . [I]n *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992), this Court identified three situations in which a defendant's due process rights to discovery may be implicated: (1) where a prosecutor allows false testimony to stand uncorrected; (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed;

or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. [*People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997).]

In this case, the evidence was neither favorable to defendant nor exculpatory, and it was not known to be false. *Id.* at 324-325; MCR 6.201(B)(1). See *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). At the hearing on respondent's motion, respondent conceded that Howenstine's notes refer to a cell, and were therefore consistent with her testimony that testing revealed the presence of a cell. Further, respondent elicited testimony from Howenstine in which she agreed that she had made "no affirmative findings of any type." We find no error requiring reversal.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Hilda R. Gage