STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RICKY DALE JACK,

Defendant-Appellee.

FOR PUBLICATION
March 11, 2021
9:05 a.m.

No. 354524
Ingham Circuit Court
LC No. 18-001048-FC

Before: BOONSTRA, P.J., and BORRELLO and RICK, JJ.

RICK, J.

In this interlocutory appeal, the People of the State of Michigan appeal by leave granted[1] the trial court's order granting defendant's motion to compel the production of unredacted police reports. The prosecution argues that MCR 6.201(A)(1) provides her the authority to redact witness contact information from police reports, which are discoverable under MCR 6.201(B)(2). The prosecution maintains that the trial court abused its discretion by granting defendant's motion to compel unredacted police reports.[2] For reasons stated in this opinion, we affirm the trial court's order and remand the case for proceedings consistent with this opinion.

I. BACKGROUND

[1] *People v Jack,* unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354524).

[2] For the first time on appeal, the prosecutor argues that MCL 767.40a also does not compel her to disclose unredacted police reports. Accordingly, this issue is unpreserved and we need not consider it. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Nonetheless, we note that MCL 767.40a does not conflict with or inform MCR 6.201 and is not relevant to the interpretation issue on appeal.

This case arises out of defendant's prosecution for first-degree child abuse and open murder. The details of the allegations against defendant are not relevant to this appeal.

In November 2018, the prosecutor provided defense counsel with discovery materials which included a copy of the felony information containing the names of witnesses who could be called at trial. The prosecutor did not provide defense counsel with contact information for any witnesses. The prosecutor's office also provided a redacted police report. According to the prosecutor, the information redacted from the police report included the addresses, phone numbers, and birthdates of several witnesses who were also included on the prosecutor's witness list. Defendant's prior attorneys demanded discovery which included requests for the names and addresses of all witnesses and copies of the police reports.[3]

In March 2020, defendant's current counsel filed a supplemental discovery request for unredacted police reports. In April 2020, the prosecutor sent defense counsel an e-mail asserting that the contact information for potential witnesses was redacted in the police report consistent with MCR 6.201(A)(1). In response, defendant filed a motion to compel discovery, arguing that MCR 6.201(B)(2) did not allow the prosecutor to redact a police report unless it was related to an ongoing investigation or there was a protective order.

A hearing on defendant's motion was held on June 18, 2020. The prosecutor argued that she was not required to provide the addresses or other contact information for witnesses under MCR 6.201. The prosecutor asserted that she had offered to make the witnesses available to defense counsel to interview, and that she remained "ready, willing and able to comply with MCR 6.201(A)(1) and make all witnesses available to Defendant's attorneys for interview." The prosecutor also asserted that providing witness contact information to defendant presented a safety issue for the witnesses. For this reason, the prosecutor redacted that information from the police report before providing it to defense counsel. Defendant argued that the disclosure of police reports under MCR 6.201(B)(2) was separate from the disclosure of a witness list under MCR 6.201(A)(1). Defense counsel also asserted that defendant did not pose a risk of harm to anyone because he was in custody at the time of the hearing and would remain so until trial.

The trial court granted defendant's motion to compel and ordered the prosecutor to produce the unredacted police reports to defense counsel. The court concluded that MCR 6.201(A)(1) did not allow the prosecutor to redact police reports required to be disclosed under MCR 6.201(B)(2). The court determined that although the information required to be disclosed in a witness list under MCR 6.201(1)(A) and a police report under MCR 6.201(B)(2) could substantially overlap, the witness list was a separate and distinct disclosure from the production of police reports that contained witness information required by MCR 6.201(B)(2). The trial court noted that the police reports could be redacted if they concerned a continuing investigation, as provided by MCR 6.201(B)(2), or the prosecutor could seek a protective order. This appeal followed.

II. STANDARD OF REVIEW

[3] Prior to defendant's current counsel, three other attorneys separately represented defendant and each withdrew as his counsel.

"This Court reviews the grant of a discovery motion for an abuse of discretion." *People v Valeck*, 223 Mich App 48, 51; 566 NW2d 26 (1997). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014) (citation omitted). A trial court's interpretation and application of court rules is reviewed de novo. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). Our Supreme Court has articulated the following method of interpreting a court rule:

> When called on to construe 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. Similarly, common words must be understood to have their everyday, plain meaning. [*People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003) (quotation marks and citations omitted)].

III. ANALYSIS

Whether or not MCR 6.201(A)(1) allows a prosecuting attorney to redact witness contact information from police reports otherwise discoverable under MCR 6.201(B) is an issue of first impression for this Court and is a matter of statutory interpretation.

MCR 6.201 controls discovery in a criminal case. *Id.* MCR 6.201 provides, in relevant part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
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> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial[.]
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> (B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
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> * * *
>
> (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation[.]
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> * * *
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> (D) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts

> and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.
>
> (E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters . . . .
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> * * *
>
> (I) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

It is the prosecutor's position that MCR 6.201(A)(1) provides her the authority to redact witness contact information from a police report as long as the witnesses are made available to defendant for interviews. We disagree.

The plain language of MCR 6.201 is unambiguous. MCR 6.201(A) governs the mandatory mutual disclosures that parties to a criminal prosecution must provide. MCR 6.201(A)(1) pertains to witness lists, and permits parties to amend their list without leave of the court no later than 28 days before trial. MCR 6.201(B), on the other hand, sets forth the additional discovery that a prosecuting attorney must provide upon request to each defendant charged. "Upon request, the prosecuting attorney *must* provide each defendant (2) any police report and interrogation records concerning the case, *except so much of a report as concerns a continuing investigation*[.]" MCR 6.201(B)(2) (emphasis added.) Thus, redaction of police reports and interrogation records is permitted only when the information relates to an ongoing investigation, MCR 6.201(B)(2).

In general, provisions that are not included in the court rules should not be supplied by judicial construction. *People v Pinkney*, 501 Mich 259, 286 n 67; 912 NW2d 535 (2018); see also *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008) ("The omission of a provision in one statute that is included in another statute should be construed as intentional and provisions not included in a statute by the Legislature should not be included by the courts.") (citations omitted). Additionally, *expressio unius est exclusio alterius*, a canon of statutory interpretation, recognizes that "the express mention of one thing implies the exclusion of other similar things." *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45 (2014). Following these principles, the fact that MCR 6.201 provides specific avenues to restrict the information disclosed in police reports supports the interpretation that the prosecutor does not have the unilateral authority to redact information in a police report.

MCR 6.201(A)(1) and MCR 6.201(B)(2) are two separate provisions that deal with two distinct disclosure requirements. MCR 6.201(A)(1) exclusively concerns a party's obligation to provide a list of the names and addresses of all witnesses whom may be called at trial or, in the

alternative, the party can provide the names of the witnesses and make them available for interviews. On the other hand, MCR 6.201(B)(2) concerns the prosecutor's obligation to provide police reports and interrogation records. The information required to be disclosed under subrules (A)(1) and (B)(2) is separate and distinct and the prosecution must comply with the separate requirements of each section of the court rule.

The prosecutor asserts there is good cause for excising witness contact information. She submits this practice protects the privacy rights of the witnesses and it minimizes the potential risk of witness intimidation or harm. The court rule provides the prosecutor with an avenue to seek judicial permission to withhold otherwise presumptively discoverable contact information. MCR 6.201(E) permits a party upon good cause shown to seek a protective order. The court must consider "the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters." MCR 6.201(E). Additionally, MCR 6.201(I) permits the court, upon good cause shown, to order a modification of the requirements and prohibitions of the discovery rule.

We hold that, absent an applicable exception provided for in MCR 6.201, a prosecutor is required to produce unredacted police reports under MCR 6.201(B)(2). Accordingly, the trial court did not err when it determined that MCR 6.201(A)(1) did not grant the prosecutor the unilateral authority to redact police reports that were required to be disclosed under MCR 6.201(B)(2). The trial court left open the possibility that the prosecution may file for a protective order.

For these reasons, we affirm the trial court's order compelling disclosure of the unredacted police reports and remand to the trial court for proceedings consistent with this opinion. On remand, the prosecutor may request a protective order under MCR 6.201(E) or pursue an exception under MCR 6.201(I). We do not retain jurisdiction.

Affirmed.

/s/ Michelle M. Rick
/s/ Stephen L. Borrello

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BOONSTRA, P.J. (*dissenting*).

I respectfully dissent. The majority affirms the trial court's determination that MCR 6.201(A)(1) and MCR 6.201(B)(2) are appropriately read in isolation, and that the two rules impose wholly separate and independent discovery obligations. I disagree and instead would follow a cardinal rule of statutory interpretation that "statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole[.]" *People v Hershey*, 303 Mich App 330, 336; 844 NW2d 127 (2013) (quotation marks and citation omitted).[1]

The issue before us requires that we interpret the language of a single court rule, MCR 6.201, which provides in pertinent part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

[1] We apply principles of statutory interpretation in construing our court rules, *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). See also *People v Traver*, 502 Mich 23, 31 (2018); ("The same broad legal principles governing the interpretation of statutes apply to the interpretation of court rules; therefore, when interpreting a court rule, this Court begins with the text of the court rule and reads the individual words and phrases in their context within the Michigan Court Rules.") (citation omitted).

(1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial[.]

* * *

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

* * *

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation[.]

* * *

(D) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.

(E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matter . . . .

* * *

(I) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

Specifically at issue are subsections (A)(1) and (B)(2). Lurking in the background are subsections (D), (E) and (I).[2] Because all of these subsections of the single court rule at issue must be harmonized if possible, I will outline how I believe the court rule should be applied in this case.

First, it bears noting at the outset that MCR 6.201(A)(1) speaks of "lay and expert witnesses whom [a] party may call at trial."[3] By contrast, MCR 6.201(B)(2) speaks of a "police report." MCR 6.201(A)(1) sets forth a mandatory obligation of all parties, upon the request of a party. MCR 6.201(B)(2) sets forth a mandatory obligation of the prosecution, upon the request of a defendant.[4] Because MCR 6.201(A)(1) addresses "witnesses" and MCR 6.201(B)(2) addresses "police reports," they, to some extent, have different focuses. But to the extent a police report contains witness information, the information that a party may request under MCR 6.201(B)(2)—via a request for a police report—necessarily overlaps with the information that a party may request under MCR 6.201(A)(1).[5]

Importantly, MCR 6.201(A)(1) provides two options to a party when, in the course of discovery, it is requested to provide witness information: (1) it may provide the "names and addresses" of the witnesses; or (2) "in the alternative," it "may provide the name of the witness and make the witness available to the other party for interview." If the party selects the alternative opinion, it then must still provide the names of witnesses; but it need not provide the addresses of the witnesses (but must instead make the witnesses available for interview). *Id*. Herein lies the rub with the trial court's and the majority's interpretation of MCR 6.201(B)(2): if a defendant requests a police report, and the police report contains witness address information, then the application of MCR 6.201(B)(2) in isolation from MCR 6.201(A)(1) effectively divests the prosecution of the alternative option otherwise available to it under MCR 6.201(A)(1).

Before addressing how to harmonize these provisions, I would first bring MCR 6.201(D) into the mix. That subsection provides that when "some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder." MCL 6.201(D). That is effectively the process the prosecution followed in this case (although it was not styled in that fashion): the prosecution produced the police report, but produced it in redacted fashion, excising witness information that it deemed to

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[2] As noted, the trial court concluded that MCR 6.201(A)(1) and MCR 6.201(B)(2) operate wholly independently. It referenced MCR 6.201(E) as potentially invokable as the matter proceeds. It did not mention MCR 6.201(D) or MCR 6.201(I).

[3] Because MCR 6.201(A)(1) is part of the "discovery" rules, it cannot be interpreted to refer only to a party's final "trial" witness list, i.e., the list of witnesses that a trial court may require a party to file with the court in advance of trial. Rather, it necessarily is refers to witnesses whose identity may be requested *during the course of discovery*.

[4] MCR 6.201(B)(2) contains an exception for "so much of a [police] report as concerns a continuing investigation." That exception is not at issue in its case, and neither its existence nor its inapplicability in this case has any bearing on my statutory analysis.

[5] Indeed, the trial court recognized that "there may and usually will be some or even substantial overlapping information."

be nondiscoverable (and, as is required by MCR 6.201(D), advising defendant that it had done so). Defendant was not without recourse, however, because MCR 6.201(D) further provides that "[o]n motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal." And, indeed, defendant filed a motion to compel, and the trial court held a hearing on the motion. The sole focus of the hearing, however, was the statutory interpretation question that lies at the heart of this appeal. That is, the proceedings in the trial court focused solely on the interplay between MCR 6.201(A)(1) and MCR 6.201(B)(2); apart from that statutory interpretation issue, the prosecution did not offer specific reasons (based on the factual circumstances of this case) for the excisions, defendant did not challenge any such reasons (as it could not have under the circumstances), and the trial court not only did not hold an "in camera" hearing but did not determine whether any such reasons were "justifiable" (as it also could not have under the circumstances).

That brings us full circle back to the statutory interpretation issue. And I conclude, contrary to the trial court and the majority, that the only way to harmonize MCR 6.201(A)(1) and MCR 6.201(B)(2), as applied in this case, is as follows. In response to defendant's request, under MCR 6.201(A)(1), for the names and addresses of witnesses, the prosecution had the option—and the right—to invoke the alternative of providing witness names, withholding witnesses addresses, and making the witnesses (whose addresses are withheld) available for interview. When it did so, it effectively rendered the witness address information "not discoverable"—at least for purposes of MCR 6.201(A)(1). That necessarily also meant that the prosecution had the concomitant right to excise witness address information from any police reports that it produced, upon request, under MCR 6.201(B)(2). To conclude otherwise would effectively read the alternative option under MCR 6.201(A)(1) out of existence, and would render that part of the court rule nugatory. See *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 510; 890 NW2d 875 (2016) ("Court rules, like statutes, must be read to give every word effect and to avoid an interpretation that would render any part of the [rule] surplusage or nugatory.") (quotation marks and citation omitted; alteration in the original).

The prosecution's choice under MCR 6.201(A) need not be the end of the story, however. The information in question may or may not be discoverable or protectable for other, substantive reasons (apart from the statutory interpretation issue), and the parties may in due course bring any such issues before the trial court for determination. Defendant has the right to seek a "modification of the requirements and prohibitions" of MCR 6.201 by filing a motion and showing good cause under MCR 6.201(I). Defendant also the right to challenge any substantive reasons for excision by filing a motion under MCR 6.201(D) (in which case the trial court must hold an in camera hearing and determine whether the reasons are justifiable). And MCR 6.201(E) is an additional vehicle by which the trial court may afford appropriate protections with respect to any information that it may order to be produced during the course of discovery.

For all of these reasons, I would hold that when the prosecution invokes the alternative option under MCR 6.201(A)(1) (thereby providing the names of witnesses, withholding witness addresses, and instead making the witnesses available for interview), it may also excise witness address information (for those witnesses whose addresses are withheld under MCR 6.201(A)(1)) from any police reports produced under MCR 6.201(B)(2), all without prejudice to further proceedings under MCR 6.201(D), MCR 6.201(E), or MCR 6.201(I). I therefore respectfully

dissent and would reverse the trial court's order requiring the prosecution to produce unredacted police reports.

/s/ Mark T. Boonstra