STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, The prosecution-Appellee,	UNPUBLISHED November 15, 2012
v	No. 304434 Wayne Circuit Court
CHARLES A. EVANS, Defendant-Appellant.	LC No. 98-007098-FH

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's post-judgment order denying his motion for a more specific order for DNA testing. We reverse and remand for entry of an order directing that further testing be conducted.

I. BASIC FACTS

Defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (penetration of a child between the ages of 13 and 16) in December 1998; he was sentenced as a fourth habitual offender, MCL 769.12, to serve 6 to 15 years' imprisonment.[1] Medical records from the post-assault hospital examination of the victim indicated that biological evidence, a "rape kit," had been collected during the examination. However, when defendant requested that this evidence be subject to testing in advance of trial, the prosecution advised that there was no biological evidence available for testing. Consequently, no testing was conducted at that time.

Following his conviction, defendant made additional inquiries regarding the existence and location of the rape kit, and, in 2007, he was advised that the kit was in the possession of the Detroit Property Control Unit. Defendant then petitioned the trial court for the release and testing of the rape kit under MCL 770.16, and based on the parties' stipulation that the requirements of that statute were met, the trial court ordered that DNA testing of the rape kit be conducted. Thereafter, the rape kit was transferred to the Michigan State Police Crime

[1] This Court affirmed defendant's conviction and sentence. *People v Evans*, unpublished opinion per curiam of the Court of Appeals, issued December 26, 2000 (Docket No. 217947).

Laboratory (the Lab), which performed presumptive testing on certain items in the rape kit, resulting in the identification of a very small quantity of possible epithelial male DNA from the victim's rectal swab. Apparently, the Lab declined to conduct further testing on this material to determine whether a DNA profile might be obtained from it. Defendant then moved the trial court for an order directing that the material be sent to an outside laboratory capable of performing such testing, in accordance with the terms of the parties' stipulation. After a hearing, the trial court denied defendant's motion, concluding that DNA testing "was done" in this case and that it was satisfied that there had been compliance with its prior order.

II. ANALYSIS

Defendant argues that the trial court erred in concluding that DNA testing was completed in this case in accordance with the parties' stipulation and the trial court's order. We agree.

The parties characterize the trial court's determination that testing "was done" in this case and its order complied with as a question of fact. This Court reviews a trial court's factual findings for clear error.[2] "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made."[3]

"Like contracts, stipulated orders are agreements reached by and between the parties," and accordingly, "[s]tipulated orders that are accepted by the trial court are generally construed under the same rules of construction as contracts."[4] "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement."[5] When interpreting such an agreement, the language used is to be given its ordinary and plain meaning.[6]

The parties stipulated that the requirements of MCL 770.16(3) were met in this case, entitling defendant to DNA testing of the rape kit. As a result, the trial court ordered that DNA testing be completed. As this Court has explained, the process of DNA testing is complex; it involves multiple stages, including identifying biological material containing DNA, isolating, purifying or amplifying the DNA, examining the DNA to determine whether it "matches' known samples, and conducting a statistical analysis of the results.[7] The parties do not dispute that the only testing undertaken here was the preliminary determination of whether human DNA was

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[2] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011).

[3] *Id*.

[4] *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000).

[5] *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001).

[6] *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002).

[7] See, e.g., *People v Coy*, 243 Mich App 283, 290-291; 620 NW2d 888 (2000); *People v Chandler*, 211 Mich App 604, 608; 536 NW2d 799 (1995).

present, and in what amount, on some of the biological samples contained in the rape kit. Indeed, there was no attempt made to test the possible male DNA identified during this process to determine whether a DNA profile could be obtained, or to test biological evidence, other than the vaginal, oral and rectal swabs, for the presence of DNA. The stipulation underlying the trial court's November 11, 2008 order requires "advanced testing on the items of evidence contained within the rape kit" and it recognizes the possibility that "DNA testing beyond the [Lab's] capabilities" may be required in order to complete DNA testing of this evidence. This indicates that the presumptive testing and quantification of potential DNA performed on certain items of biological evidence contained is not the DNA testing to which defendant is entitled by the parties' stipulation and the resulting trial court order. Accordingly, we conclude that the completion of the preliminary steps of testing for, and quantifying, the presence of human DNA on certain items of biological evidence contained in the rape kit does not constitute DNA testing under the court's order. Consequently, the trial court clearly erred when it determined that DNA testing "was done," and its November 11, 2008 order fully was complied with. Accordingly, we reverse the trial court's order denying defendant's motion for a more specific order for testing, and remand this matter to the trial court for entry of an order directing that the biological material contained in the rape kit be further tested to determine whether a DNA profile may be obtained.[8]

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

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

[8] We note that plaintiff argues that the possible male DNA identified on the rectal swab is not "material" within the meaning of MCL 770.16. However, plaintiff previously stipulated to the materiality of the biological evidence in the rape kit and may not now be heard to claim otherwise. See *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001) ("A party cannot stipulate a matter and then argue on appeal that the resultant action was error.").