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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOSE ISLAS, Defendant and Appellant.	2d Crim. No. B248511 (Super. Ct. No. BA372794) (Los Angeles County)

Jose Islas appeals his conviction by jury of murder (Pen. Code, § 187, subd. (a))[1] and attempted willful, deliberate, and premeditated murder (§§ 664, subd. (a), 187, subd. (a)), with gang and firearm enhancements (§§ 186.22., subd. (b)(1)(C), 12022.53, subds. (b)-(d)). The trial court sentenced him to an aggregate term of 90 years to life in state prison.

Appellant contends that the deoxyribonucleic acid (DNA) evidence admitted in this case constitutes testimonial hearsay. Thus, he argues its admission violated his Sixth Amendment right of confrontation. We affirm.

FACTS

Shortly before midnight on February 29, 2008, appellant, a member of a street gang, approached Isaac Lauriano and Marvin Dominguez on the sidewalk outside

[1] All statutory references are to the Penal Code unless otherwise stated.

of Lauriano's residence on South Oxford Avenue in Los Angeles. Another gang claimed that area, but the territory was in dispute. Brandishing a chrome .38-caliber revolver, appellant stated, "Mara rules here." Dominguez warned Lauriano, "[B]e careful because he's got a weapon." As Lauriano turned to look, appellant shot Lauriano in the chest, killing him. Appellant then shot Dominguez in the chin. Appellant continued to fire at Dominguez, who took cover behind a tree. When appellant ran out of ammunition, he turned and walked away. Dominguez saw appellant toss the revolver onto the ground.

Andre Mosley, a security guard who was nearby, heard gunshots and called 911. Mosley saw appellant fire a handgun twice at Lauriano, who fell backwards in the street. Mosley heard a distraught person cry out, but did not see that person. He observed that appellant had an unusual gait, or "duck walk," in which his feet pointed outward and he appeared to limp.

Responding police officers found a revolver along the route where appellant had fled. Bullets recovered from Lauriano's body and from a nearby parked car were fired from the revolver.

Investigators took three DNA swab samples from the revolver and sent them to Orchid Cellmark (Cellmark) for analysis. Cellmark developed a single-source DNA profile from the samples. The contributor of the DNA was male.

At some point during the investigation, appellant became a suspect. In June 2010, Dominguez and Mosley identified appellant as the shooter in a photographic lineup. Appellant was arrested for the offenses. The arresting officer observed that his gait was similar to a "duck walk" in that both feet pointed out, making it appear as though he had a limp or an injury to one foot. Another officer collected an oral reference swab from appellant, which was sent to Cellmark for DNA analysis.

Peggy Rodriguez is a forensic DNA analyst for Cellmark. She testified regarding the DNA analysis process at Cellmark. Although Rodriguez did not personally analyze the samples in this case, she testified that she is familiar with the process by which employees of the laboratory analyzed the DNA samples, and has personally performed the analysis thousands of times. Rodriguez explained that when DNA samples

are received by Cellmark they are documented and stored in a limited-access evidence room, then checked out by analysts who use robotic equipment to extract, quantify and amplify the DNA. The DNA samples are then loaded into a genetic analyzer machine, which generates the DNA profiles represented in a chart. Rodriguez testified the data from the testing process in this case was automatically recorded into the laboratory's computer system. Upon the completion of each testing procedure, the data was printed and placed in the case file.

Rodriguez testified the records in the file prepared in this case were of the same type she and other DNA experts regularly rely upon in forming opinions as to DNA matches or exclusions. She stated the records, which were made in the regular course of business, did not reveal any unexpected results or violations of protocol. Based on these records, Rodriguez prepared a report concluding the DNA profile obtained from the revolver is identical to appellant's DNA profile. She testified the probability of selecting a random individual from the southwest Hispanic population with appellant's DNA profile was one in 77 trillion individuals.

DISCUSSION

Appellant contends his right to confront witnesses against him was violated by the admission of expert testimony based on DNA analyses reported by non-testifying declarants. We disagree.

The confrontation clause of the Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right applies to federal and state prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 401, 406.)

Crawford v. Washington (2004) 541 U.S. 36, 59, held that the prosecution may not rely on "testimonial" hearsay unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. The United States Supreme Court did not define testimonial, but stated: "'Testimony,' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' [Citation.] An accuser who makes a formal statement to government officers bears

testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement. [¶] Various formulations of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Id.* at pp. 51-52.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the defendant was charged with cocaine distribution. The prosecution introduced certificates prepared by a laboratory analyst and sworn to before a notary public. The certificates stated the substance found in plastic bags was cocaine. The Supreme Court held the certificates constituted testimonial hearsay, and thus were inadmissible under *Crawford*. (*Melendez-Diaz*, at p. 310.) The court stated the certificates were: (1) a """solemn declaration or affirmation made for the purpose of establishing or proving some fact;""" (2) "functionally identical to live, in-court testimony;" (3) """made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial;""" and (4) created "to provide 'prima facie evidence of the composition, quality, and the net weight' of the . . . substance [found in the plastic bags seized from the defendant's car.]" (*Id.* at pp. 310-311.)

In *Bullcoming v. New Mexico* (2011) 564 U.S. ____ [131 S.Ct. 2705, 180 L.Ed.2d 610] the defendant was charged with driving under the influence of alcohol. The prosecution introduced a laboratory analyst's certificate stating that a blood sample taken from the defendant showed an illegal level of alcohol. The Supreme Court noted that although the certificate was not notarized, as in *Melendez-Diaz*, the certificate was

formalized in a signed document that referenced court rules providing for its admission. The court concluded that the "formalities" were sufficient to qualify the certificate as testimonial. (*Id.* at pp. 2716-2717.)

Most recently, in *Williams v. Illinois* (2012) 567 U.S. ____ [132 S.Ct. 2221, 183 L.Ed.2d 89] (*Williams*), the defendant was charged with rape. Vaginal swabs containing semen were sent to a Cellmark laboratory. A police laboratory expert testified that Cellmark analysts derived a DNA profile of the man whose semen was on the swabs and sent the profile to the police laboratory. In the expert's opinion, the Cellmark DNA profile matched the police laboratory's DNA profile obtained from the defendant when he was arrested for an unrelated offense. The Cellmark report was not introduced into evidence and no Cellmark analyst testified. (*Id.* at pp. 2229-2230.)

Justice Alito wrote the plurality opinion in *Williams*. The opinion concluded the evidence was not testimonial hearsay for alternative reasons. First, out-of-court statements related by an expert solely for the purpose of explaining the assumption on which the opinion rests are not offered for their truth. (*Williams, supra,* 132 S.Ct. at pp. 2239-2240.) In the alternative, the Cellmark report was not testimonial because it was not prepared for the primary purpose of accusing a targeted individual. (*Id.* at p. 2242.)

Justice Thomas rejected the plurality's reasoning but concurred in the result. He concluded that the evidence did not violate the Confrontation Clause because the Cellmark report lacked the requisite "solemnity" to be considered testimonial. (*Williams, supra,* 132 S.Ct. at p. 2255.) Justice Kagan's dissenting opinion agreed with Justice Thomas's criticism of the plurality. The dissent observed testimony relating to the Cellmark report was admitted for its truth, and a report may be testimonial even if it was not prepared for the purpose of accusing a targeted individual. It disagreed, however, with Justice Thomas's conclusion that the report was admissible because it lacked formality in that it was neither sworn nor a certified declaration of fact. (*Id.* at pp. 2275-2276 (dis. opn. of Kagan, J.).)

The California Supreme Court considered testimonial hearsay in *People v.*

Lopez (2012) 55 Cal.4th 569 (*Lopez*), in which the defendant was charged with vehicular manslaughter while intoxicated. (§ 191.5, subd. (b).) The prosecution introduced a laboratory analyst's report on the defendant's blood-alcohol level. The analyst who prepared the report did not testify. Instead, a colleague testified that he knew the proper procedure for testing for blood-alcohol, that he was familiar with the procedure the analyst uses, and that the report shows a blood alcohol concentration of 0.09 percent. (*Lopez,* at p. 574.) The court concluded the evidence was properly admitted because the report was "not made with the requisite degree of formality or solemnity to be considered testimonial [citation]." (*Id.* at p. 582.) It distinguished *Melendez–Diaz* on the basis that the certificates in that case were notarized and *Bullcoming* on the basis that the report there was formalized in a signed document that expressly referred to the court rules providing for its admissibility. (*Id.* at pp. 584-585.)

In *People v. Dungo* (2012) 55 Cal.4th 608, an expert's opinion testimony as to the cause of death was based on objective facts observed by another pathologist and recorded in an autopsy report. The report itself was not placed into evidence. Our Supreme Court concluded the confrontation clause was not implicated for two reasons. First, observations recorded in an autopsy report lack the requisite formality. (*Id.* at pp. 619-620.) Second, autopsy reports do not have the primary purpose of targeting an accused individual. (*Id.* at p. 620.)

As we summarized in *People v. Holmes* (2012) 212 Cal.App.4th 431 (*Holmes*), "[t]he California Supreme Court has extracted two critical components from the 'widely divergent' views of the United States Supreme Court justices. [Citations.] To be 'testimonial,' (1) the statement must be 'made with some degree of formality or solemnity,' and (2) its 'primary purpose' must 'pertain [] in some fashion to criminal prosecution.' [Citations.] . . . [¶] It is now settled in California that a statement is not testimonial unless both criteria are met." (*Id.* at pp. 437-438.) We concluded the forensic analysis relied on by DNA experts in *Holmes* did not meet this criteria because the unsworn, uncertified reports lacked formality. (*Id.* at pp. 433-434.)

In *People v. Barba* (2013) 215 Cal.App.4th 712 (*Barba*), the trial court admitted into evidence four DNA reports and the testimony of an expert based on the reports. The testifying expert did not prepare any of the reports. The Court of Appeal determined that the evidence did not implicate the confrontation clause because the reports lack the requisite formality and the primary purpose of the report was not to accuse a targeted individual. The court observed: "As for the practical considerations that motivated the plurality in *Williams*, we agree that it makes no sense to exclude evidence of DNA reports if the technicians who conducted the tests do not testify. So long as a qualified expert who is subject to cross examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Id.* at p. 742.)

Here, like the blood-alcohol report in *Lopez*, the records in the case file that formed the basis for Rodriguez's testimony lacked the "requisite degree of formality or solemnity" to qualify as testimonial. (*Lopez, supra*, 55 Cal.4th at p. 582.) The records were not sworn before a notary as in *Melendez–Diaz*. (*Lopez,* at pp. 584-585.) Nor were they formalized as signed documents that referred to court rules expressly providing for their admissibility, as in *Bullcoming*.[2] (*Lopez,* at p. 585.)

Moreover, Rodriguez testified that after the DNA is extracted, a machine produces the DNA profiles. *Lopez* held that machine-generated printouts of blood alcohol analyses do not implicate the confrontation clause. (*Lopez, supra*, 55 Cal.4th at p. 583.) Machine readouts are not "statements" and machines are not "declarants." (*Ibid.*, citing *U.S. v. Moon* (7th Cir. 2008) 512 F.3d 359, 362; *U.S. v. Washington* (4th Cir. 2007) 498 F.3d 225, 231.) For the same reasons, machine-generated DNA profiles do not implicate the confrontation clause.

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[2] Having determined the records lack the requisite formality, we need not consider their primary purpose. (*Lopez, supra*, 55 Cal.4th at p. 582; *Holmes, supra*, 212 Cal.App.4th at pp. 437-438.) Nonetheless, as the People point out, DNA testing is used to include and exonerate suspects. "Just like the lab technicians who worked on the defendant's samples in *Williams*, DNA lab technicians in general perform their tasks in accordance with accepted procedures and have no idea beforehand whether their work will exonerate or inculpate a known suspect. [Citation]." (*Barba, supra*, 215 Cal.App.4th at p. 741.)

Finally, we reject appellant's argument that the trial court erred by admitting the DNA test results under the business records exception to the hearsay rule. (See Evid. Code, § 1271.) First, the exception does not apply unless the proponent seeks to admit a business record into evidence. (*Ibid.*) Here, the prosecution did not mark the case file as an exhibit or have it admitted into evidence. Second, even if the records in the file are considered hearsay, their use by Rodriguez did not violate the confrontation clause. "`Not all erroneous admissions of hearsay violate the confrontation clause. . . . Only the admission of *testimonial* hearsay statements violates the confrontation clause. . . .' [Citations.]" (*People v. Loy* (2011) 52 Cal.4th 46, 66.) As previously explained, the records are not testimonial. (See *Lopez, supra*, 55 Cal.4th at p. 582; *Holmes, supra*, 212 Cal.App.4th at pp. 433-434.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

William N. Sterling, Judge
Superior Court County of Los Angeles

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