Filed 7/3/13 P. v. Arauz CA2/6

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO ARAUZ, Defendant and Appellant.	2d Crim. No. B242843 (Super. Ct. No. BA364023) (Los Angeles County)

Deoxyribonucleic acid (DNA) evidence may or may not be testimonial under *Crawford v. Washington* (2004) 541 U.S. 36. It depends on the circumstances. Here we hold that a DNA report is not testimonial because defendant was not a suspect when the report was produced.

A jury found Roberto Arauz guilty of forcible oral copulation (Pen. Code, § 288a, subd. (c)(2); count 1), forcible sodomy (§ 286, subd. (c)(2), count 2) and forcible rape (§ 261, subd. (a)(2), count 3).[1] The jury also found true as to each count that Arauz

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

inflicted great bodily injury on the victim (§ 12022.7) and committed the offenses during the commission of a first degree burglary (§ 667.61, subds. (a), (b) & (d)(4)).

On appeal, Arauz contends that the DNA evidence admitted in this case constitutes testimonial hearsay. Thus, he argues its admission violated the Confrontation Clause of the Sixth Amendment to the United States Constitution (Confrontation Clause). We affirm.

FACTS

On July 18, 1999, Arcenia M. lived in an apartment with her cousin and her husband. Arcenia was home alone when she heard a knock on the door. She saw a man through the peephole. The man said he was looking for her cousin. When Arcenia told the man her cousin was not home, he asked for a glass of water.

Arcenia opened the door and gave the man a glass of water. He drank the water and pushed his way inside the apartment. He continually hit Arcenia on her face and head. She tried to run away, but he knocked her down. When Arcenia was on the floor, he pulled down her underwear and penetrated her rectum with his penis. He ejaculated. He put a chair on top of her and threatened to kill her if she said anything. He left the apartment and Arcenia called the police.

An ambulance took Arcenia to the hospital. A nurse took swab samples from her anus and vagina and collected her underwear. The samples were sealed in a sexual assault kit and given to a police officer. Arcenia was unable to identify her attacker.

In October 2001a police department criminalist sent a sample from the rectal swab to Reliagene Laboratory for DNA testing. The DNA profile was placed in the combined DNA Index System (CODIS).

In 2009 Arauz was arrested in an unrelated matter. The police obtained a DNA sample from him. The sample matched the DNA profile of the man who attacked Arcenia.

Linton Von Beroldingen

Linton Von Beroldingen is a criminalist manager with the California Department of Justice (DOJ). He is the administrator for CODIS. He described the process in which a DNA profile of an unknown person is matched to a CODIS profile.

A DNA sample of an unknown suspect is derived from biological material collected by local authorities at the crime scene. The local authorities take the biological material to an accredited laboratory where a DNA profile is created. That profile is compared with DNA profiles contained in the CODIS computer system. The profiles in the CODIS computer system are derived from people who are legally required to provide samples. If the computer finds a match, the DOJ laboratory verifies the match and notifies the local authorities. Verification involves retesting the DNA sample the person was legally required to give.

Von Beroldingen testified that the 2002 DNA profile developed in Arcenia's case was uploaded to CODIS in 2002 and a match between that profile and a profile developed from buccal swabs taken from Arauz in 2009 was found. Von Beroldinger did not perform any of the tests himself. Instead, his testimony was based on the report of the Reliagene DNA profile provided in 2002 and a document entitled "Notification of California Cold Hit Program Database Hit 0828S."

Because the offenses occurred more than 10 years prior to the filing of charges against Arauz, there was a question concerning the statute of limitations. To avoid the bar of the statute of limitations, the People had to prove the biological evidence was analyzed for DNA type no later than January 1, 2004. (§ 803, subd. (g)(1).) The 2002 Reliagene DNA report and the notification of a cold hit were both admitted into evidence over Arauz's objection.

Roger's Testimony

Aimee Rogers is a DNA analyst for Cellmark. Orchid Cellmark acquired Reliagene in 2008.

Rogers testified Cellmark received from police department criminalists anal and vaginal swabs taken from Arcenia. Cellmark also received a buccal sample taken from Arauz.

Rogers explained the DNA analysis process at Cellmark. First, a technician receives the evidence, inspects the package to ensure the seals are intact and assigns an identification number. Rogers did not have any contact with the evidence during this phase of the process.

The second phase is the extraction. Rogers personally extracted the DNA from cells taken from the vaginal swab, but not any other items.

Following extraction, the DNA profile is completed by robots, which are supervised by the automation team. Rogers is not a member of the automation team.

Finally, the DNA profile is analyzed by two analysts, one of whom was Rogers. Rogers found the DNA profile developed from material taken from Arcenia's body matched the profile developed from Arauz's buccal swab.

Rogers testified the "most conservative" random match probability of seeing the same profile in unrelated individuals is one in 1.278 quintillion. A quintillion is a million times a billion. The Cellmark report was not entered into evidence.

DISCUSSION

Arauz 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.

The Confrontation Clause 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 both federal and state prosecutions. (*Pointer v. Texas* (1965) 380 U.S. 400, 401, 406.)

In *Crawford v. Washington*, *supra*, 541 U.S., page. 59, the United States Supreme Court 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 court in *Crawford* 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]." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the defendant was charged with cocaine distribution. As allowed under Massachusetts law, the prosecution introduced into evidence certificates prepared by a laboratory analyst and sworn 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 were inadmissible under *Crawford.* (*Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 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. As allowed under the law of New Mexico, the prosecution introduced into evidence 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 the certificate was not sworn before a notary public, as in *Melendez-Diaz*. Nevertheless, the certificate was formalized in a signed document that made reference to court rules providing for its admission. The court concluded that the "formalities" were more than adequate to qualify the certificate as testimonial. (*Bullcoming v. New Mexico*, *supra*, 131 S.Ct. at p. 2709.)

Most recently, in *Williams v. Illinois* (2012) 567 U.S. __, [132 S.Ct. 2221; 183 L.Ed.2d 89], the defendant was charged with rape. Vaginal swabs containing semen were sent to a Cellmark laboratory. At trial, a police laboratory expert testified 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.

Justice Samuel A. Alito, Jr., wrote the plurality opinion in *Williams*. (Conc. Roberts, J., Kennedy, J. and Breyer, J.) 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 v. Illinois*, *supra*, 183 L.Ed.2d at p. 99.) In the alternative, the Cellmark report was not testimonial because it was not prepared for the

primary purpose of accusing a targeted individual. The defendant was not a suspect at the time the report was produced. (*Ibid*.)

Justice Thomas rejected the plurality's reasoning but concurred in the result. Justice Thomas concluded that the evidence did not violate the Confrontation Clause solely because the Cellmark report lacked the requisite "solemnity" to be considered testimonial. (*Williams v. Illinois*, *supra*, 183 L.Ed.2d at pp. 133-134.)

Justice Kagan's dissenting opinion (conc. Scalia, J., Ginsburg, J. and Sotomayor, J.) concluded the evidence constitutes inadmissible testimonial hearsay. The dissent agreed with Justice Thomas's criticism of the plurality. 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. The dissent 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. The dissent described Justice Thomas's view as giving constitutional significance to minutia. (*Williams v. Illinois*, *supra*, 183 L.Ed.2d at p. 151 (dis. opn. Kagan, J.)

The California Supreme Court considered testimonial hearsay in *People v. Lopez* (2012) 55 Cal.4th 569. There, the defendant was charged with vehicular manslaughter while intoxicated. (§ 191.5, subd. (b).) The prosecution introduced into evidence 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. The report and testimony were admitted over the defendant's objection.

Our Supreme 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.]" (*People v. Lopez*, *supra*, 55 Cal.4th at p. 582.) The court distinguished *Melendez-Diaz* in that there the certificates were sworn to before a notary by the testing analysts. (*Id.* at p. 585.) The court distinguished *Bullcoming* in that

there the report was formalized in a signed document that expressly referred to the court rules providing for its admissibility. (*Ibid.*)

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.)

In *People v. Holmes* (2012) 212 Cal.App.4th 431, we held that the forensic analysis relied on by DNA experts was not testimonial because the unsworn, uncertified reports lacked formality.

Most recently, in *People v. Barba* (2013) 215 Cal.App.4th 712, the trial court admitted into evidence four DNA reports and the testimony of an expert based on the reports. The testifying expert did not produce any of the reports. The Court of Appeal determined that the evidence did not implicate the Confrontation Clause for two reasons. First, the reports lack the requisite formality. Second, the primary purpose of the report was not to accuse a targeted individual.

Like the blood-alcohol report in *Lopez*, the report and notification that formed the basis of Von Beroldingen's testimony lacked the "requisite degree of formality or solemnity" to qualify as testimonial. (*People v. Lopez*, *supra*, 55 Cal.4th at p. 582.) The documents were not sworn before a notary as in *Melendez-Diaz*. (*Id.* at p. 585.) Nor were the documents formalized as signed documents that expressly referred to court rules expressly providing for their admissibility, as in *Bullcoming*. (*Ibid.*)

In the alternative, like the autopsy report in *Dungo*, the report and notification here were not prepared for the primary purpose of targeting an accused individual. (*People v. Dungo*, *supra*, 55 Cal.4th at pp. 620-621.) In fact, as the plurality

pointed out in *Williams*, the defendant (here Arauz) was not a suspect at the time the report was produced. (*Williams v. Illinois*, *supra*, 183 L.Ed.2d at p. 99.)

The DNA report Rogers referred to in her testimony was not admitted into evidence. Rogers testified that after the DNA is extracted, a machine produces the DNA profiles. Our Supreme Court held that machine-generated printouts of blood alcohol analyses do not implicate the Confrontation Clause. (*People v. 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. Finally, Rogers did not testify to what some other analyst concluded. Instead, Rogers testified she personally analyzed the DNA profiles. Her conclusions were based on her own analysis. Rogers's testimony does not implicate the Confrontation Clause.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Laura F. Priver, Judge

Superior Court County of Los Angeles

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Toni R. Johns Esta Ville, Deputy Attorney General, for Plaintiff and Respondent.