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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. NECOLE RICHARDS, Defendant and Appellant.	B232300 (Los Angeles County Super. Ct. No. BA323979)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Verna Wefald, 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, Victoria B. Wilson and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Necole Richards appeals from a judgment of conviction entered after a jury found him guilty of forcible rape (Pen. Code, § 261, subd. (a)(2)) and found true the allegations defendant personally used a firearm in the commission of the crime (*id*., § 12022.5, subd. (a)); defendant kidnapped the victim in the commission of the crime (*id*., § 667.61, subds. (a), (b) & (e)), and the statute of limitations on the crime had been extended under Penal Code section 803, subdivision (g)(1).

On appeal, defendant contends his due process rights were violated by the admission of DNA evidence despite missing links in the chain of custody of the evidence, and his right to confront witnesses against him was violated by the introduction of DNA evidence without requiring key witnesses to testify. Defendant also claims the jury instructions allowed the jury to convict him on no more than the preponderance of the evidence. We disagree and affirm the judgment.

FACTS

A. *Overview*

R. C. was raped in 1996. In 2003, DNA evidence from the case was analyzed. In 2007, there was a "cold hit" on the DNA profile. Further testing confirmed that defendant's DNA matched the profile. R. then identified defendant from a photographic lineup.

B. *Rape of R. C.*

On the evening of December 11, 1996, R. was getting out of her car when a man approached her, pointed a gun at her and forced her to an alley about three blocks away. He ordered her to undress and hit her when she did not comply. He then pulled her pants

down and penetrated her vagina with his penis. Before he left, he took her wallet and some of her jewelry.

R. went to her uncle's house, and the police were called. Los Angeles Police Sergeant Charles Springer and Officer Robert Borbois went to the house and observed an injury to R.'s face. She directed them to the alley, where they found one of her earrings. R. gave the officers a description of her attacker. The officers then took R. to the hospital for an examination and collection of biological evidence.

C. ***Rape Examination and Collection of DNA Evidence***

Dr. Mark Curran examined R. at Harbor UCLA hospital. Dr. Curran had no independent recollection of the examination but reviewed his report prior to testifying.

Dr. Curran observed a laceration on R.'s lip. When he performed a genital examination, he observed redness at the bottom of R.'s vagina.

Clean swabs were kept in a locked cabinet. Three swabs were taken from the cabinet and used to swab R.'s vagina and rectum. Two were given to the nurse assisting with the examination, Nurse Phabhamala, and then placed in a Lucite holder to dry. One was examined under a microscope in the emergency room. When the swabs in the rack were dry, they were placed into separate envelopes which were sealed, signed and dated. Dr. Curran did not recall if he signed the envelopes; he did not observe Nurse Phabhamala as she handled the swabs. The envelopes were then placed into a plastic bag, which was given to Sergeant Springer. Dr. Curran did not seal the plastic bag.

Sergeant Springer received a sexual assault kit at the hospital. It contained 14 items, including "vaginal aspirate, vaginal slides, vaginal swabs, a rectal swab, rectal slide, blood sample, pubic hairs, pubic combings, the medical report itself, underwear, a brassiere, long-sleeve shirt, a jacket, and overalls." Sergeant Springer thought he received the kit from Dr. Curran, but he acknowledged he could have received it from Nurse Phabhamala. He did speak to Dr. Curran at the end of the examination.

Sergeant Springer maintained the integrity of the sexual assault kit between the hospital and the police station. Once there, he booked the items into evidence under D.R.

No. 96-18-31056. He made sure the clothing and pubic hair were placed in dry storage; the remainder of the items were stored as frozen evidence.

D. *DNA Analysis*

Angela Zdanowski (Zdanowski) was a criminalist in the Los Angeles Police Department Scientific Investigation Division, Serology DNA Unit. In July 2003, she was asked to analyze the evidence booked under D.R. No. 96-18-31056. She received vaginal aspirate, vaginal slides, vaginal swabs, a rectal swab, a rectal slide, blood and the medical report. All the items were sealed in envelopes. The blood had been refrigerated, and the other items had been frozen.

Zdanowski discovered a sperm on each of two vaginal swabs and the rectal swab. She sent the two vaginal swabs to the Department of Justice laboratory in Richmond.

Jonathan Schell (Schell) was a senior criminalist at the Department of Justice laboratory. He testified that the evidence from the Los Angeles Police Department labeled D.R. No. 96-18-31056 was booked into his laboratory as No. BK3000787. Berhanu Temesgen did the original analysis of the evidence between September 30 and October 23, 2003, and wrote a report on his analysis dated November 24, 2003. Schell did a technical review of the report, making sure it was correct. The DNA profile obtained from the analysis was then uploaded into CODIS, the Combined DNA Index System. It did not match the DNA profile of anyone already in CODIS.

On March 12, 2007, CODIS generated a "cold hit" on the DNA profile. According to Schell, "[a]fter a cold hit occurs, the data bank takes the original reference sample from that offender and reruns it again as a quality control check to make sure that they have not made any mistakes in the processing of the samples. So they did that." The data bank is operated in a separate section of the laboratory. Once the data bank verifies the cold hit, "they send a report to the case work section of the laboratory advising us that we've got a hit," and they provide the offender's name and S.I.D. number, the offender's identifying number in the system.

Schell confirmed that the match was correct. On March 30, 2007, he sent a report to the Los Angeles Police Department, identifying defendant as the offender whose DNA matched the swab taken from R. C.

E. *Further Police Investigation*

Los Angeles Police Detective Carla Zuniga prepared a six-pack photographic lineup which included a photograph of defendant. She showed it to R. C., who almost immediately selected the photograph of defendant as that of her attacker.

Detective Zuniga determined that in 1996, defendant lived about five miles from the alley where R. C. was attacked.

Detective Zuniga went to Harbor UCLA hospital in order to interview Nurse Phabhamala. She was told that Nurse Phabhamala no longer worked at the hospital because she was terminally ill with cancer. The hospital would not give Detective Zuniga Nurse Phabhamala's personal information.

F. *Additional DNA Analysis*

Rick Staub (Staub) is the laboratory director at Orchid Cellmark's Dallas laboratory, which does DNA testing for identification purposes. He oversees laboratory operations to ensure compliance with laboratory standards. He has performed DNA analysis himself, and he has testified as an expert in DNA analysis between 150 and 200 times.

The laboratory has controls in place to make sure that the process for identifying DNA has been completed properly. In addition, there is a review system to make sure that an analyst's results have been properly recorded and analyzed. The laboratory process is typically carried out by several people. Then an analyst puts together the results and puts together a report. After that, a technical reviewer goes over the analyst's work to make sure everything has been put together properly. The technical reviewer is able to look at the actual data produced in the laboratory to make sure that the testing has been performed properly.

Orchid Cellmark obtained the evidence booked under D.R. No. 96-18-31056. Erica Jimenez (Jimenez) was the analyst who put together the report on the results of the DNA testing in the case. Staub performed the technical review of Jimenez's work. In the course of his review, he also looked at the case report and the laboratory test results.

Staub testified that the analysis of a vaginal swab revealed DNA from both defendant and R. C.

G. *Physical Examination*

Nurse practitioner Julie Lister, an expert on sexual assault examinations, reviewed the results on the physical examination of R. C. She testified that the injuries noted were consistent with a sexual assault.

DISCUSSION

A. *Admission of DNA Evidence Despite Missing Links in Chain of Custody*

At the conclusion of the prosecution's case, defendant made a motion for acquittal under Penal Code section 1118.1, as well as a motion to exclude the Orchid Cellmark DNA test results and to strike the testimony of Zdanowski and Staub. These were based on the absence of any testimony by Nurse Phabhamala, Dr. Curran's inability to recall who sealed the samples taken from R. C. or who gave the samples to Sergeant Springer.

The trial court asked defense counsel whether chain of custody was "a matter that goes classically to weight as opposed to admissibility." Counsel responded that it went to admissibility. He argued that Nurse Phabhamala was "a necessary witness to establish this chain of custody," and "absent her being here and testifying about [the evidence], it must be thrown out."

The trial court disagreed, reiterating that the question was one of weight, rather than admissibility. It therefore denied defendant's motions.

Where there is a question regarding chain of custody, "'"[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all of the

circumstances into account, including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' (*People v. Diaz* [1992] 3 Cal. 4th [495,] 559; see also Méndez, Cal. Evidence (1993) § 13.05, p. 237 ['While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering.'].) The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

In a case such as this, where the DNA evidence was obtained years before it was analyzed, there are bound to be difficulties in remembering all of the details of the collection of the evidence, as well as gaps in the chain of custody due to missing witnesses. While ideally Nurse Phabhamala would have remembered and testified as to the collection of evidence from R. C. and its transfer to Sergeant Springer, there nonetheless was sufficient evidence to support a conclusion that it was reasonably certain that there was no tampering with the evidence.

Dr. Curran testified as to his customary procedure in performing a rape examination. Both he and Nurse Phabhamala were present during the examination and performed their functions. One of the two gave the evidence obtained from R. C. to Sergeant Springer at the hospital. Although neither Dr. Curran nor Sergeant Springer could recall who gave the bag containing the evidence to the sergeant, they both testified that it was given to him.

There is no basis other than speculation for believing that the evidence was altered or exchanged at the hospital. The evidence went directly from Dr. Curran or Nurse Phabhamala at the hospital to Sergeant Springer, who then logged it into evidence at the

police department. There was nothing to suggest that the evidence was altered or tampered with, mislabeled, exchanged with evidence from another case, or otherwise mishandled during the brief gap in time between its collection from R. C. and its transfer to Sergeant Springer.

This case is distinguishable from *People v. Jimenez* (2008) 165 Cal.App.4th 75, cited by defendant, in which there was essentially no testimony as to the handling of swabs taken from the defendant by the police department or as to the transfer of the evidence to the Department of Justice for analysis. The court found "[t]he woefully inadequate chain of custody here raises grave concerns about whether the reference sample with which the criminalist compared the [evidence collected at the scene of the crime] came from [the defendant's] cheek or from some altogether different source with no connection to him at all." (*Id.* at p. 81.)

Here, by contrast, it is reasonably certain that the evidence collected from R. C. by Dr. Curran at the hospital was the same evidence given to Sergeant Springer at the hospital. It is reasonable to "believe that [the obtaining of evidence] in a hospital environment by medical personnel, as opposed to in a police station by police technicians, substantially lessens the basis for any suspicion that a sample has been substituted. Although it is unclear who labeled, sealed, and [gave] the evidence envelope [to Sergeant Springer], it is proper to presume that an official duty has been regularly performed unless there is some evidence to the contrary. [Citations.]" (*People v. Hall* (2010) 187 Cal.App.4th 282, 296.) Hence, we find no abuse of discretion in the trial court's decision to admit the evidence and leave it to the jury to determine its weight in light of the absence of testimony by Nurse Phabhamala. (*People v. Catlin, supra,* 26 Cal.4th at p. 134.)

B. *Whether Admission of DNA Evidence Without Testimony by Nurse Phabhamala or Jimenez Violated Defendant's Right to Confront Witnesses Against Him*

Defendant contends the admission of the DNA evidence without the testimony of Nurse Phabhamala and Jimenez violated his Sixth Amendment right to confront

witnesses against him under *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314].

Defendant points to nothing in the record indicating that he objected on confrontation clause grounds to the prosecution's failure to have Nurse Phabhamala testify, and his argument regarding her absence is nothing more than a reiteration of his chain of custody argument. Consequently, any confrontation clause claim as to her failure to testify is forfeited. (Evid. Code, § 353; *People v. Partida* (2005) 37 Cal.4th 428, 433-434; cf. *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Rowland* (1992) 4 Cal.4th 238, 265, fn. 4.)

As to Jimenez, defense counsel argued that she "should and must be available to testify for cross-examination because she is the person that did every step of the procedure. Dr. Staub did participate in the review of everything that Ms. Jimenez did, but he didn't actually do the inputting of the actual substance, the manipulation of the substance that was tested. . . . [¶] . . . [¶] That's what the case *Melendez* is all about, in saying that in an analysis case where the person who did the — that person is a witness, and that report that they wrote, while Dr. Staub can testify to a lot of different protocols and a lot of different things, there is one part of this that it's going to be hearsay that he's talking about. And that will be what Ms. Jimenez did initially. [¶] And that hearsay falls underneath the *Melendez* case because it falls under the Confrontation Clause, and it is something that I should and must be able to contest in this particular case."

The trial court did not believe *Melendez-Diaz* required Jimenez to testify as to the physical performance of the DNA analysis. It ultimately allowed Staub to testify as to Orchid Cellmark's DNA test results.

In its recent decision in *People v. Lopez* (Oct. 15, 2012, S177046) ___ Cal.4th ___ [2012 WL 4856705], the California Supreme Court addressed the "constitutionality of a prosecution expert's testimony about certain information in a report prepared by someone who did not testify at trial." (*Id*. at p. ___.) It explained that in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the United States Supreme Court "created a general rule that the prosecution may not rely on 'testimonial' out-of-court

statements unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. [Citation.]" (*Lopez*, *supra*, at p. ___.) The court noted that "[a]lthough the high court in *Crawford* did not define the term 'testimonial,' it made these observations: '[T]he Confrontation Clause . . . applies to "witnesses" against the accused—in other words, those who "bear testimony." [Citation.] "Testimony," in turn is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." [Citation.]'" (*Id*. at p. ___.)

The California Supreme Court in *People v. Geier* (2007) 41 Cal.4th 555 addressed the import of *Crawford*. "In *Geier*, a laboratory director—relying on a laboratory report prepared by a nontestifying analyst—testified at the defendant's trial that DNA found on vaginal swabs taken from the murdered rape victim matched the defendant's DNA. [The court] unanimously rejected the defendant's argument that the report was testimonial. [The court] said: '[A] statement is testimonial if (1) it is made . . . by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial.' [Citation.] Under that test, *Geier* concluded, the report of the nontestifying laboratory analyst was not testimonial and thus admissible, because it was 'a contemporaneous recordation of observable events rather than the documentation of past events' related to criminal activity. [Citation.]" (*People v. Lopez*, *supra*, ___ Cal.4th at p. ___.)

The court in *Lopez* noted that since its opinion in *Geier*, the United States Supreme Court "has in three cases applied its *Crawford* holding . . . to documents reporting the laboratory findings of nontestifying analysts." (*People v. Lopez*, *supra*, ___ Cal.4th at p. ___.) The first of these, *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. 305, involved laboratory certificates sworn before a notary public identifying the substance found in the defendant's car to be cocaine. The court in a five-to-four decision held that the certificates "fell 'within the "core class of testimonial statements"' [citation], and thus were inadmissible under *Crawford* . . . . The court observed that each certificate was (1) 'a "'solemn declaration or affirmation made for the purpose of

establishing or proving some fact’”’ [citation], (2) ‘functionally identical to live, in-court testimony’ [citation], (3) ‘“‘made under circumstances which would lead an objective witness reasonably to believe that [it] would be available for use at a later trial”’” [citation], and (4) created ‘to provide “prima facie evidence of the composition, quality, and the net weight”’ [citation] of the substance found in the . . . defendant’s car.” (*Lopez, supra*, at p. ___.)

In the second case, *Bullcoming v. New Mexico* (2011) 564 U.S. ___ [131 S.Ct. 2705, 180 L.Ed.2d 610], “the prosecution introduced at trial a laboratory analyst’s certificate stating that a blood sample taken from the defendant shortly after his arrest [for driving while intoxicated] contained an illegally high level of alcohol. That analyst did not testify. Instead, the prosecution called as a witness another analyst who had ‘neither participated in nor observed the testing.’ [Citation.]” (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) In another five-to-four decision, the United States Supreme Court held that even though the certificate was not notarized, it nevertheless was a formalized document sufficient to qualify as testimonial. (*Id*. at p. ___.)

The third case, *Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221, 183 L.Ed.2d 89], decided earlier this year, involved testimony by a police forensic biologist regarding the results of DNA testing done at Cellmark Diagnostic Laboratory. She testified that the Cellmark DNA profile matched a previously-obtained DNA profile of the defendant. No one from Cellmark testified, and the Cellmark laboratory report was not introduced into evidence. (*People v. Lopez, supra*, ___ Cal.4th at p. ___.)

The California Supreme Court explained in *Lopez* that in *Williams*, four justices “found common grounds for the conclusion that the expert’s testimony did not violate the Sixth Amendment’s confrontation right, one justice wrote separately expressing agreement with that conclusion but for very different reasons, and four justices through a single dissenting opinion concluded that defendant’s confrontation right was violated.” (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) “The plurality opinion observed: ‘Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall

outside the scope of the Confrontation Clause. Applying this rule to the present case, we conclude that the expert's testimony did not violate the Sixth Amendment.' [Citation.]" (*Id*. at p. ___.) The plurality stated alternatively that "even if the expert's testimony had been admitted for the truth of the matter asserted in the Cellmark laboratory's report, the report was not testimonial (and hence the expert's testimony about the report was admissible) because it was not prepared 'for the primary purpose of accusing a targeted individual.' [Citation.] Indeed, the plurality noted, the defendant was not yet a suspect at the time the report was produced. [Citation.]" (*Id*. at p. ___.)

The separate opinion by Justice Thomas rejected the rationale of the plurality opinion. (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) He agreed that the Cellmark report was not testimonial, but for a different reason. He found it was not testimonial "'*solely* because Cellmark's statements lacked the requisite "formality and solemnity" to be considered "'testimonial'" for purposes of the Confrontation Clause.' [Citation.]" (*Id*. at p. ___.)

The dissent opined that the expert's "testimony about the Cellmark laboratory's report containing the DNA profile resulted in a violation of the defendant's right to confront the Cellmark analysts who had produced the report. Like Justice Thomas in his concurrence, the dissent rejected the *Williams* plurality's conclusion that [the expert's] testimony about the report was not admitted for the truth of the matters asserted in the report. [Citation.]" (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) The dissent rejected the plurality's alternate conclusion that the report was not testimonial because it was not prepared to accuse a targeted individual. (*Id*. at p. ___.) It also rejected Justice Thomas's conclusion that the report "was not testimonial because . . . it was neither a sworn nor a certified declaration of fact. That view, the dissent stated, 'grants constitutional significance to minutia, in a way that can only undermine the Confrontation Clause's protections.' [Citation.]" (*Id*. at p. ___.)

Bearing the foregoing in mind, the California Supreme Court in *Lopez* then turned to the question whether the laboratory report before it was testimonial and therefore inadmissible. It first noted that under *Geier*, the report "would *not* be testimonial, and

hence would be admissible at trial, because the report was a 'contemporaneous recordation of observable events' [citation] rather than a description of 'a past fact related to criminal activity' [citation]. But two years later the high court in *Melendez-Diaz* said that a laboratory report may be testimonial, and thus inadmissible, even if it '"contains near-contemporaneous observations of [a scientific] test."' [Citations.]" (*People v. Lopez, supra*, ___ Cal.4th at p. ___.)

The court acknowledged that under *Crawford*, *Melendez-Diaz*, *Bullcoming*, and *Williams*, "the prosecution's use at trial of testimonial out-of-court statements ordinarily violates the defendant's right to confront the maker of the statements unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination." (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) While the United States Supreme Court "has not agreed on a definition of 'testimonial,' a review of the just-mentioned four decisions indicates that a statement is testimonial when two critical components are present." (*Id*. at p. ___.)

The first component is that the out-of-court statement be made with "some degree of formality or solemnity," although the requisite degree of formality "remains a subject of dispute." (*People v. Lopez*, *supra*, ___ Cal.4th at p. ___.) As the second component, "all nine high court justices agree that an out-of-court statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution, but they do not agree on what the statement's primary purpose must be." (*Id*. at p. ___.)

The California Supreme Court in *Lopez* did not consider the primary purpose component with respect to the report at issue, because it concluded that "the critical portions of that report were not made with the requisite degree of formality or solemnity to be considered testimonial." (*People v. Lopez*, *supra*, ___ Cal.4th at p. ___.) The first page of the report was a chain-of-custody log sheet showing the results of blood tests. The second through sixth pages of the report, which were initialed by the analyst, "consist[ed] entirely of data generated by a gas chromatography machine to measure calibrations, quality control, and the concentration of alcohol in a blood sample." They contained no statement by the analyst. (*Id*. at p. ___.)

The court observed that the United States Supreme Court has not yet addressed the question "whether the prosecution's use at trial of a machine printout violates a defendant's right to confront and cross-examine the machine's operator when, as here, the printout contains no statement from the operator attesting to the validity of the data shown." (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) The court agreed with the lower federal court which have upheld the use of such printouts on the ground "'the raw data generated by the machines do not constitute "statements," and the machines are not "declarants."'" (*Id*. at p. ___, quoting from *U.S. v. Washington* (4th Cir. 2007) 498 F.3d 225, 231.) The court concluded that, "[b]ecause, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts shown in pages two through six of [the] nontestifying analyst['s] . . . laboratory report did not implicate the Sixth Amendment's right to confrontation." (*Lopez, supra*, at p. ___.)

The more difficult question before the court was the admissibility of the chain-of-custody log sheet. This contained booking information logged in by a laboratory assistant as well as test results entered by the analyst. (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) Based on the laboratory assistant's information and the machine-generated results, the prosecution's expert witness, a criminalist employed by a law enforcement agency, "gave his independent opinion—reflecting his 'separate abilities as a criminal analyst'—that defendant's blood sample contained .09 percent alcohol." (*Id.* at pp. ___, ___.)

The court concluded that the laboratory assistant's entries did not meet the "high court's requirement that to be testimonial the out-of-court statement must have been made with formality or solemnity." (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) They were not signed or certified but were merely "an informal record of data for internal purposes." (*Id*. at p. ___.) Therefore, the chain-of-custody log sheet also was admissible. (*Id*. at p. ___.)

In her concurring opinion, Justice Kathryn M. Werdegar[1] urged that the court "continue the search for a workable rule that does not render it a constitutional violation whenever the prosecution fails to call to the stand everyone 'whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device.'" (*People v. Lopez*, *supra*, ___ Cal.4th at p. ___, quoting *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 311, fn. 1.) In her view, the laboratory assistant's entries lay beyond "a fair and practical boundary for applying the confrontation clause. Certainly the recording of an identifying notation, even in a county crime laboratory, raises none of the risk of fabrication or biased reporting that flows from police or prosecutorial interrogation; in that respect, the [laboratory assistant's] notation here bears no resemblance to the products of ex parte examinations, the use of which at trial was the principal evil at which the confrontation clause was aimed. [Citation.] Of course, unintentional errors can occur in recording an identifying number. But all record keeping by human hand is subject to such error. Unless business and public records generally are to be considered testimonial—which the high court [in *Crawford* and *Melendez-Diaz*] has said they are not [citations]—the possibility of mistakes in record keeping, alone, cannot be sufficient to render a statement testimonial." (*Lopez*, *supra*, at p. ___.)

Justice Werdegar further observed that there would be little benefit to having laboratory personnel testify in all cases as to their recordation of identifying notations, as such personnel likely make many such notations and are unlikely to remember any individual notation. (*People v. Lopez*, *supra*, ___ Cal.4th at p. ___.) Rather, it should be sufficient if there is evidence of the procedures in place at the laboratory which indicate trustworthiness. (*Id*. at p. ___.) In the case before the court, "that was accomplished through the testimony of a supervising forensic analyst with long experience and full knowledge of the laboratory's procedures. In the absence of anything dubious about an identifying notation, a cross-examiner would have no starting point to question its

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1 Three justices concurred in her opinion.

accuracy. [Citation.] No significant benefit appears that would justify the expense of trial and witness time involved in requiring live witnesses on all such identifying notations." (*Id*. at p. ___.)

Turning now to the evidence in the instant case, it is clear under *Lopez* that admission of, and testimony regarding, the machine-generated results of the DNA testing does not violate the Confrontation Clause. (*People v. Lopez, supra*, ___ Cal.4th at p. ___.) It is unnecessary to determine whether Jimenez's report was testimonial in nature and thus inadmissible in the absence of her testimony. Staub not only reviewed Jimenez's work, he also reviewed the same laboratory test results that Jimenez relied upon to prepare her report, and his testimony was based upon those test results. As in *Lopez*, "[t]he demands of the confrontation clause were properly satisfied . . . by calling a well-qualified expert witness to the stand, available for cross-examination, who could testify to the means by which the critical instrument-generated data was produced and could interpret those data for the jury, giving his own, independent opinion, as to the [DNA testing results]." (*Id*., at p. ___ (conc. opn. of Werdegar, J.).)

C. *Jury Instruction on Burden of Proof*

Defendant contends that the jury instruction on the statute of limitations impermissibly allowed the jury to convict him based on a preponderance of the evidence standard, rather than requiring proof beyond a reasonable doubt.

The instruction at issue, CALJIC No. 4.74, told the jury: "A criminal defendant can be convicted of a crime only if the People have commenced this action against him within the statute of limitations. The People commenced this action with the filing of criminal charges on June 13, 2007. You may convict the defendant of count 2, forcible rape, only if the People prove by a preponderance of the evidence that the action was commenced within the statute of limitations." The instruction went on to explain the time frames in which certain events must have occurred in order for the action to have been filed within the statute of limitations.

CALJIC No. 4.74 was immediately followed by CALJIC No. 2.50.2, defining "preponderance of the evidence." Thereafter, the trial court instructed the jury pursuant to CALJIC No. 2.90 on the defendant's presumption of innocence and the People's "burden of proving him guilty beyond a reasonable doubt."

Defendant argues that while "[i]t appears that [CALJIC No. 4.74] was intended to focus the jury solely on the issue of whether there had been compliance with the statute of limitations . . . the instructions as a whole make doubtful that the jury understood this. Indeed, the instructions read as a whole created the distinct risk the jury would not seize this distinction."

As the People point out, there were a number of other jury instructions given which referred to the People's burden of proving defendant guilty beyond a reasonable doubt: CALJIC No. 2.01 on the sufficiency of circumstantial evidence, CALJIC No. 2.61 on the defendant's right to rely on the state of the evidence, CALJIC No. 2.91 on the People's burden of proving identity based solely on eyewitness identification, CALJIC Nos. 10.00.1 and 10.02 on the kidnapping allegations, and CALJIC No. 17.19 on the firearm use allegation.

When reviewing defendant's claim of error, "'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction[s] in a way" that violates the Constitution.' [Citations.] In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

When viewed in their entirety, the "instructions made clear the reasonable doubt standard applies" to the determination whether defendant committed the charged crimes. (*People v. Carpenter* (1997) 15 Cal.4th 312, 383.) Therefore, it is not reasonably probable that the jury applied the challenged instructions to convict defendant by a preponderance of the evidence rather than beyond a reasonable doubt. (Cf. *People v.*

O'Neal (2000) 78 Cal.App.4th 1065, 1078-1079; *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1061-1063.)

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.