2012 IL App (1st) 1-07-1333U

FOURTH DIVISION
December 20, 2012

No. 1-07-1333

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 27592
	)	
WAYNE WILLIS,	)	Honorable
	)	Thomas V. Gainer
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

¶ 1 *Held*: Expert testimony regarding DNA analysis performed by other analysts was not reversible error under the Confrontation Clause and the State presented sufficient proof of the *corpus delicti* of the offenses charged.

¶ 2 This case comes before this court for the third time based on the United States Supreme Court's mandate that we reconsider our prior decision in light of *Williams v. Illinois*, 132 S.Ct. 2221 (2012). On appeal, defendant Wayne Willis once more contends that his two convictions for aggravated criminal sexual assault must be vacated because his right to confrontation was denied due to the admission of DNA evidence where analysts who physically performed the lab work did not testify. He also contends that the divided

decision in *Williams* lacks precedential value and that the State failed to prove the *corpus delicti* of the offenses. We affirm the judgment once more.

¶ 3 I. FACTUAL BACKGROUND

¶ 4 The victim, S.J.F., testified at defendant's bench trial that at approximately 9 or 10 p.m. on October 31, 1998, she, then a 15-year-old, exited a bus at 79th Street and South King Drive. As she was walking south toward her home, she noticed that someone was behind her. Shortly thereafter, a man grabbed her around her neck and she blacked out. When she awoke, she was on a grassy area near an apartment building and her jogging-suit jacket was put over her face. At some point during the encounter she was also placed face down on the grass. The man asked S.J.F. if she was a virgin, undressed her, performed oral sex and vaginally penetrated her. He then put her clothes back on, told her to count to 50 and left. S.J.F. did not see her attacker because her jacket covered her head and her eyes were shut.

¶ 5 Nurse Mae Osunero testified that on the night in question, S.J.F. arrived at Jackson Park Hospital, where she was interviewed and examined by Osunero and Dr. Bello. In court, Osunero identified S.J.F.'s sexual assault kit. Osunero testified that she broke the kit's red integrity seal and collected items to be placed in the kit. At trial, Osunero identified several exhibits related to the kit, including S.J.F.'s vaginal, rectal and cervical specimens, her blood sample, her fingernail scrapings, her clothing samples and her stained underwear. Osunero further testified, however, that two slides presently contained in the kit were not originally contained therein. Osunero testified that after

collecting the evidence for the kit, she placed it in a box and sealed it. She either put that box in the narcotic box or kept with her until the police came to collect it.

¶ 6 Officer Alvin Green, an evidence technician, testified that he collected the properly sealed kit from the hospital at about 1 p.m. on November 1, 1998. In addition, Officer Green brought the kit to the police station and inventoried it according to procedure under inventory number 2088652. Officer Green further testified that on May 14, 2003, he collected buccal swabs from defendant. Officer Green then sealed and inventoried the swabs, which were assigned inventory number 10138773.

¶ 7 Forensic scientist Karen Abbinanti[1] testified that she received S.J.F.'s sexual assault kit at the Illinois State Police Crime Lab (ISP Lab) on December 15, 1998. The Chicago Police Department inventory label on the kit was number 2088652. The kit was also assigned ISP Lab number C9856940. Abbinanti opened the sealed kit on January 14, 1999. She then inventoried its contents and tested the rectal and vaginal swabs for the presence of semen. Based on the tests, Abbinanti concluded that semen was present on both swabs. She then examined the underwear and bra contained in the kit to recover and preserve any hair, fiber and debris samples. Abbinanti also tested S.J.F.'s underwear and concluded that semen was present. In addition, Abbinanti testified that the two slides contained in the kit were created during her analysis. After completing the tests, she preserved the kit for further analysis by placing it in a freezer. Abbinanti further testified that the case was subsequently assigned to forensic scientist Peter Bosco. Although Bosco was deceased,

[1]Abbinanti also testified for the State in *Williams*. *Williams*, 132 S.Ct. at 2229.

Abbinanti testified that according to procedure, he would have retrieved the items from the freezer, performed a DNA extraction, and returned the kit to the ISP Lab's vault, to be returned to the police department.

¶ 8 Greg Didomenic, a forensic scientist at the ISP Lab, testified that on January 28, 1999, Bosco received S.J.F.'s kit. During Didomenic's testimony, he was given Bosco's notes but none of the notes or reports forming the basis of Didomenic's opinion were admitted into evidence. Didomenic then testified that Bosco extracted DNA from the vaginal and rectal swabs as well as S.J.F.'s blood standard. Bosco did not, however, examine the kit's underwear. When Bosco completed his analysis in March 1999, the extracted DNA was packaged and placed in frozen storage at the ISP Lab. In January 2001, when there was still no suspect in this case, an evidence technician packaged the evidence and sent it to Orchid Cellmark (Cellmark). Didomenic testified that when he was later assigned to this case in 2003, he reviewed all the notes regarding where the evidence had been. No other analyst did any work on the evidence before the evidence technician packaged it and sent it to Cellmark.

¶ 9 Didomenic also testified that he personally received defendant's buccal swab in a sealed kit at the ISP Lab on September 23, 2003. Didomenic extracted DNA from the swab to obtain a DNA profile and then searched the results against a DNA index, which identified an association with S.J.F.'s case. After obtaining paperwork related to S.J.F.'s case from Cellmark, which included printouts of the DNA profile, Didomenic compared the printouts of the DNA profile from the vaginal swabs to the DNA profile obtained from

defendant and determined that the samples matched. The Assistant States Attorney (ASA) then asked, "and this is the DNA profile from the DNA extracted from the vaginal swabs that Cellmar[k] did, correct?" Didomenic answered, "correct." On cross-examination, Didomenic testified that over the last couple of days, he reviewed Bosco's notes for the purpose of testifying at trial but "didn't technically review his file at the laboratory." In addition, Didomenic's opinion regarding Bosco's work was based solely on Didomenic's review of the relevant paperwork. Didomenic assumed that Bosco followed procedures to prevent contamination but he did not know. Didomenic testified on redirect examination that there was no evidence that any of the material tested in this case was contaminated at any time.

¶ 10 Dr. Jennifer Reynolds testified that she formerly worked as a laboratory director for Cellmark. Between 2000 and 2005, Cellmark contracted with the ISP Lab to process the ISP Lab's backlog. As a technical reviewer, Dr. Reynolds would review all documents involved in a particular case, review results from the controlled samples and evidence samples, and independently draw conclusions regarding those samples. She also testified that technical reviewers co-sign reports with the analyst whose work is being reviewed.

¶ 11 Dr. Reynolds testified that on January 9, 2001, Cellmark received evidence, specifically, a victim standard previously extracted by the Illinois police, regarding the sexual assault of S.J.F. The evidence was received in a sealed condition from the Illinois State Police in Chicago and was marked with ISP Lab number C-98-56940. Dr. Reynolds also testified that, "I did participate in the testing of this case with respect to [*sic*] I performed a review

of the data and the case file at the time of the testing and co-signed the report that was dated back in March of 2001." Dr. Reynolds testified that a male profile was developed from the evidence in the S.J.F. case, which the Illinois police could use to search their DNA database. In addition, the report was written on March 20, 2001, and was sent to the Illinois police at about that time. The evidence was returned on June 4, 2011. Based on her experience and her independent review of the case, Dr. Reynolds opined that the testing was performed correctly and accurately reported. On cross-examination, Dr. Reynolds testified that she did no physical lab work in this case. She also described in detail the procedures used in DNA analysis and described how Cellmark analysts Ellie Sammon and Leslie Roacher performed a number of the procedures in connection with S.J.F.'s case. Neither Sammon nor Roacher testified at trial.

¶ 12 Defendant, who identified a photograph of S.J.F., made a written statement that was published by ASA Kelly Navarro at trial. Defendant stated that on October 23, 2004, he saw the girl in the photograph walking near 80th and King Drive. He followed her for half of a block, grabbed her from behind using a forearm lock, and told her not to make a sound. Defendant took the girl to a grassy area between two buildings that were approximately 10 feet from where he had grabbed her. Defendant made the girl, who was wearing a dark-colored warm-up suit, lie on her stomach and pulled her coat over her head. Defendant recalled asking the girl how old she was and when she last had sex. In addition defendant stated that he may or may not have performed oral sex. He then told her to lay on her back and removed her pants and underwear. He vaginally penetrated

her and ejaculated. Before defendant left, he told her not to tell anyone and to count to 50.

¶ 13 At trial, the court rejected defendant's objections to the testimony of Didomenic and Dr. Reynolds regarding the analysis of Bosco, Sammon and Roacher. The court essentially found that Didomenic and Reynolds could identify such analysis as the bases for their opinions. Following closing arguments, the trial court found defendant guilty of four counts of aggravated criminal sexual assault, finding as follows:

> "The [defendant's] statement alone in the way it dove tails with the testimony of the victim is sufficient to convict him beyond a reasonable doubt.
>
> He was arrested because his profile matched. The DNA evidence is just the icing on the cake. But if there was no DNA evidence, this statement is proof beyond a reasonable doubt when you look and see how it dove tails with the testimony of the victim.
>
> Based on everything that I have heard here, based on the very compelling nature of this statement and the testimony of the witness, and the victim [S.J.F.], I find the defendant guilty of aggravated criminal sexual assault."

The trial court subsequently denied defendant's motion for a new trial, which argued that the court erred in allowing Dr. Reynolds and Didomenic to testify about work performed by other individuals and that the State failed to present evidence of a complete chain of custody. The court subsequently found that two counts merged into the remaining two counts of aggravated criminal sexual assault and imposed a 10-year prison term, to be served consecutively to a 23-

year prison term. Defendant appealed.

¶ 14 II. PROCEDURAL BACKGROUND

¶ 15 On May 22, 2009, this court entered an order affirming the trial court's judgment, rejecting defendant's assertions that his right to confrontation was violated when witnesses were allowed to rely on hearsay reports concerning DNA and that the State failed to establish a sufficient chain of custody for the DNA evidence. *People v. Willis*, No. 1-07-1333 (May 22, 2009) (unpublished order under Supreme Court Rule 23) (vacated). The Supreme Court of Illinois subsequently denied defendant's petition for leave to appeal but issued a supervisory order directing this court to vacate our decision and reconsider its judgment in light of a similar case, *People v. Williams*, 238 Ill. 2d 125 (2010). Upon reconsideration, this court affirmed the judgment a second time. *People v. Willis*, No. 1-07-1333 (November 29, 2010) (unpublished order under Supreme Court Rule 23) (vacated). On June 28, 2011, however, the United States Supreme Court granted the defendant's petition for writ of certiorari in *Williams v. Illinois*, 131 S.Ct. 3090 (2011). That court affirmed the judgment against Williams on June 18, 2012. *Williams v. Illinois*, 132 S.Ct. 2221 (2012). In addition, the United State's Supreme Court subsequently granted defendant Willis' petition for writ of certiorari, vacated our second decision in this case and remanded for further consideration in light of the recent *Williams* decision.

¶ 16 III. ANALYSIS

¶ 17 On appeal, defendant again asserts that the testimony of Dr. Reynolds and Didomenic

regarding tests performed by other individuals violated his Confrontation Clause rights. We review resolution of defendant's Confrontation Clause claim *de novo*. *People v. Leach*, 2012 IL 111534,¶ 64. In *Crawford v. Washington*, 541 U.S. 36, 53-54, 68, fn. 9 (2004), the Court held that when a declarant does not appear for cross-examination at a defendant's trial, the Sixth Amendment of the United States Constitution requires that the declarant's testimonial evidence not be admitted unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court also stated, however, that the clause does not prohibit the use of testimonial statements offered for purposes other than establishing the truth of the matter asserted and declined to "spell out a comprehensive definition of 'testimonial.' " *Id*. at 68. The divided decision in *Williams* was the product of the Court's most recent attempt to formulate a definition. Although defendant contends that the *Williams* decision lacks precedential value because no five justices agreed to any particular reasoning in support of disposition in that case, the Illinois Supreme Court recently had the opportunity to examine the *Williams* decision, as applied to an autopsy report that had been admitted into evidence and an expert's testimony regarding the report's contents. *Leach*, 2012 IL 111534, ¶ 57. Accordingly, we consider both *Williams* and our supreme court's understanding of that decision.

¶ 18 In *Williams*, the defendant was convicted following a bench trial of, among other offenses, aggravated criminal sexual assault. *Williams*, 132 S.Ct. at 2227 (2012); *People v. Williams*, 238 Ill. 2d 125 (2010). An expert for the State, who was an ISP forensic biologist (*Williams*, 238 Ill. 2d at 131), testified that a DNA profile produced by Cellmark

Diagnostics Laboratory[2] matched a profile generated by the State police lab using defendant's blood sample (*Williams*, 132 S.Ct. at 2227). Specifically, the State asked DNA expert Sandra Lambatos whether there was "a computer match generated of the male DNA profile *found in semen from the vaginal swabs of [L.J.]* to a male DNA profile that had been identified as having originated from Sandy Williams." (Emphasis added.) *Williams*, 132 S.Ct. at 2236. The Cellmark report itself was not admitted into evidence. *Id*. at 2230, 2235. In addition, the expert did not vouch for the accuracy of the profile generated by Cellmark. *Id.* at 2227. The defendant's main contention was that the Confrontation Clause was violated when the expert "referred to the DNA profile provided by Cellmark as having been produced from semen found on the victim's vaginal swabs." *Id.*

¶ 19 The plurality opinion in *Williams*, authored by Justice Alito and joined by Chief Justice Roberts, Justice Kennedy and Justice Breyer, recognized that expert witnesses can provide an opinion based on facts regarding events at issue in a case despite a lack of first-hand knowledge of those facts and found that when an expert testifies to an opinion based on a particular premise, the premise is not necessarily being offered to prove the truth of the matter asserted in the premise. *Id*. at 2233-36. The plurality also recognized the dissent's finding that there would have been no Confrontation Clause issue had the State's question referred to the male DNA profile "produced by Cellmark" instead of the

[2] Dr. Reynolds testified that Cellmark Diagnostics was purchased by Orchid Biosciences and became Orchid Cellmark.

DNA profile "found in the semen from the vaginal swabs of [L.J.]." *Id*. at 2236 (citing *Post*, op. 132 S.Ct. at 2270 (Kagan, J., dissenting, joined by Scalia, Ginsburg and Sotomayor, JJ.)). The plurality further considered whether the admission of the DNA profile at issue for the truth of the matter asserted would have violated the Confrontation Clause. *Leach*, 2012 IL 111534 ¶ 116 (citing *Williams*, 132 S.Ct. at 2242).

¶ 20 The plurality concluded that not all forensic reports offered by the State constitute testimonial statements, but rather, such reports run afoul of the Confrontation Clause where they are made for the purpose of proving the guilt of a particular targeted defendant at trial. *Leach*, 2012 IL 111534 ¶ 118 (citing *Williams,* 132 S.Ct. at 2243). The DNA report at issue in *Williams*, however, was clearly not prepared for the primary purpose of accusing one targeted individual, as the defendant was not under suspicion when the victim's vaginal swabs were sent to the outside laboratory. *Leach*, 2012 IL 111534 ¶ 118 (citing *Williams*, 132 S.Ct. at 2243). Thus, the plurality also found that even had the report itself been admitted into evidence, no Confrontation Clause violation would have existed. *Leach*, 2012 IL 111534 ¶ 118 (citing *Williams,* 132 S.Ct. at 2242-43). Accordingly, as the Illinois Supreme Court recognized in *Leach*, the plurality opinion in *Williams* found that if the primary purpose of a statement is to prove a particular criminal defendant's guilt at trial, the statement is testimonial. *Leach*, 2012 IL 111534 ¶ 120 (citing *Williams*, 132 S.Ct. at 2243).

¶ 21 The *Leach* court also acknowledged that in contrast, the four dissenting justices found precedent dictated that the test for determining whether a forensic report is testimonial is

whether the primary purpose of an out-of-court statement was to provide evidence of past events that are potentially relevant to subsequent criminal prosecution, regardless of whether a particular suspect is being targeted. *Leach*, 2012 IL 111534 ¶ 121 (citing *Williams*, 132 S.Ct. at 2273 (Kagan, J., dissenting, joined by Scalia, Ginsburg and Sotomayor, JJ.)). Moreover, the *Leach* court acknowledged that Justice Thomas, in his concurrence continued to maintain his position that formality and solemnity govern whether a statement is testimonial. *Leach*, 2012 IL 111534 ¶ 115; *Williams,* 132 S.Ct. at 2255 (Thomas, J., concurring).

¶ 22 On the facts before it, the *Leach* court found that because no limitations were placed on the autopsy report's admission into evidence, the report was admitted for the truth of the matter asserted therein. *Leach*, 2012 IL 111534 ¶ 67. The court also considered the two predominant views set forth by the *Williams'* plurality and dissent as applied to the autopsy report at issue in *Leach* and concluded as follows:

> "[W]hichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case."

Leach, 2012 IL 111534 ¶ 122. The *Leach* court nonetheless found that even assuming it was error to admit the autopsy report, any error was harmless. *Id*. ¶¶ 140-50. Chief Justice Kilbride dissented, finding, in pertinent part, that the majority erroneously relied on *Williams* because it was a fractured opinion that lacked majority reasoning and that the majority's harmless error

analysis was *dicta*. *Id.* ¶ 170.

¶ 23 Here, it appears from the majority decision in *Leach* that our supreme court has found *Williams* stands for something, although the "jury" is still out on that question. Nonetheless, we need not consider the state of Confrontation Clause law following *Williams* because even assuming the evidence challenged violated defendant's right to confrontation, any error was harmless. As the trial court found, even without the DNA testimony, evidence of defendant's guilt was overwhelming. Defendant gave a written statement that he had assaulted S.J.F. Although he did not know her name, he identified her photograph. Defendant's account of the assault was substantially corroborated by S.J.F.'s testimony, notwithstanding that she never saw her attacker. Both defendant and S.J.F. alleged that he used his arm to restrain her around the neck. They also placed the location of the assault in the general vicinity of 79th or 80th and King Drive and stated that he took her to a grassy area by some buildings. In addition, both alleged that she was wearing a jogging or warmup suit. Furthermore, they both alleged that he put her jacket over her face and penetrated her vagina with his penis. Moreover, both alleged that he asked her personal questions and told her to count to 50 when he left. The record provides ample support for the trial court's finding that S.J.F.'s testimony and defendant's statement alone were sufficient to establish defendant's guilt.

¶ 24 We are also unpersuaded by defendant's assertion that reversal is required because the State failed to prove the *corpus delicti* of the offense. Specifically, defendant asserts that because the DNA evidence was not substantively admissible and the victim could not

identify her attacker, defendant's confession was uncorroborated. It's questionable whether this issue is properly before this court. The mandate of the Court in this case provided that "[t]he judgment *** in this cause is vacated, and the cause is remanded *** for further consideration in light of *Williams*[.]" The judgment referred to, however, did not include any *corpus delicti* issue because defendant did not raise that issue. In addition, defendant's argument that he could not have raised this issue prior to the decision in *Williams* is entirely disingenuous given that defendant has challenged the admission of DNA evidence even when this appeal was first before us. Nonetheless, the State more than adequately proved the *corpus delicti* of the offense.

¶ 25 The commission of a crime constitutes the *corpus delicti* of an offense. *People v. Lara*, 2012 IL 112370, ¶ 17. "Along with the identity of the person who committed the offense, it is one of two propositions the State must prove beyond a reasonable doubt to obtain a valid conviction." *Id*. In addition, when a defendant's confession serves as part of the *corpus delicti*, the State must also provide independent evidence that corroborates the statement. *Id*. Nonetheless, "the *corpus delicti* rule requires only that the corroborating evidence correspond with the circumstances recited in the confession and tend to connect the defendant with the crime." *Id*. ¶ 51. "The independent evidence need not precisely align with the details of the confession on each element of the charged offense[.]" *Id*.

¶ 26 Here, as stated, S.J.F.'s testimony corroborated numerous aspects of defendant's confession. The State was not required to show that she saw or identified her attacker. Accordingly, defendant has not demonstrated that he is entitled to relief.

¶ 27 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 28 Affirmed.