COURT OF APPEALS
DECISION
DATED AND FILED

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1693-CR **Cir. Ct. No. 2009CF69**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHRISTOPHER L. ROALSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County: KENNETH L. KUTZ, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Christopher Roalson appeals a judgment of conviction for first-degree intentional homicide and burglary of a dwelling with a dangerous weapon. Roalson argues his constitutional confrontation right was violated when the State failed to produce the DNA analyst who analyzed the

evidence, as opposed to an analyst who reviewed the original analysis. We reject Roalson's argument and affirm.

BACKGROUND

¶2 A jury found Roalson guilty of entering Irena Roszak's home and stabbing her to death. Roalson's accomplice, fifteen-year-old Austin Davis, pled guilty to second-degree intentional homicide as party to a crime.

¶3 In October 2009, DNA analyst Ryan Gajewski of the Wisconsin State Crime Laboratory conducted DNA analysis on items from the murder scene. Among the items analyzed were two knives, one with a black handle and the other with a wood handle. Gajewski detected no blood on the knives, but recovered DNA from both.

¶4 Gajewski determined the DNA on the black-handled knife's blade was from Roszak, but the handle had a mixed DNA profile from at least four people. Roszak, Roalson, and Davis were all possible contributors, and approximately 1 in 510 people could be a contributor.

¶5 On the wood-handled knife's blade, Gajewski found a mixed profile from at least four people. Roszak and Davis were possible contributors, and approximately 1 in 1000 people could be a contributor.[1] The handle had a mixed DNA profile from at least three people, and Roszak and Roalson were possible

[1] The State incorrectly informs us "Gajewski detected the DNA of Roszak and Davis" on the blade of the wooden knife. While perhaps this was merely an oversight, it is a significant misstatement to assert a person was a DNA match, rather than a possible contributor to a mixed sample in which 1 in every 1000 people could have contributed. Yet, Roalson's appellate counsel makes a more egregious error, incorrectly stating "Roalson's DNA was found on the handles of both of the knives …."

contributors. Approximately 1 in 12,000 people could have been a contributor to that profile.

¶6 Gajewski was not available at the time of trial, nor was the analyst who did the original peer-review analysis. Gajewski was employed elsewhere and located in Afghanistan. The peer-review analyst had retired. Thus, over Roalson's objection, the trial court allowed the State to introduce the DNA evidence via analyst Carly Leider, who did a "complete technical review" of Gajewski's work. Her conclusions matched Gajewski's.

¶7 In addition to the DNA evidence, two witnesses testified for the State. Davis testified he accompanied Roalson into the home, but that Roalson stabbed the victim and beat her with a chair. Jacqueline Walsczak, who was "a very good friend" of Roalson, testified Roalson confessed the stabbing to her three days before the victim's body was found. Walsczak also testified to details of the events prior to and during the crime. The details she provided were consistent with those provided by Davis.

DISCUSSION

¶8 Roalson argues his constitutional confrontation right was violated when the State introduced DNA evidence but failed to produce at trial Gajewski, the analyst who actually analyzed the DNA evidence and prepared a report. "In all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him …." U.S. CONST. amend. VI. The Wisconsin Constitution provides the same guarantee. *See* WIS. CONST. art. I, § 7. Whether admission of evidence violates an accused's right to confrontation is reviewed de novo. ***State v. Luther Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919.

¶9 In ***Luther Williams***, a state crime lab analyst tested a substance and determined it was cocaine. ***Id.***, ¶4. That analyst was unavailable at trial, so the State presented the testimony of Sandra Koresch, a unit leader in the drug identification section of the crime lab who performed the peer review on the tests the original analyst conducted. ***Id.*** Based in part on the original analyst's lab report, Koresch testified that the substance in the jacket contained cocaine. ***Id.***

¶10 On review, our supreme court observed, "The central question we address is whether Williams' right to confrontation was violated when Koresch, rather than the analyst who performed the tests, testified in part based on the crime lab report containing the lab test results." ***Id.***, ¶7. The court determined there was no confrontation violation, relying on three nonbinding cases, including two DNA-analysis cases. *See* ***id.***, ¶¶10-16. The court explained, "In each case, the testifying expert was highly qualified and had a close connection with the testing in the case such that the expert's presence at trial satisfied the defendant's rights to confront and cross-examine." ***Id.***, ¶11. However, the court also cited a fourth case for a "critical point"—"the distinction between an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others. In short, one expert cannot act as a mere conduit for the opinion of another." ***Id.***, ¶19. Ultimately, the court held:

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id., ¶20.

¶11 Roalson argues ***Luther Williams***, 253 Wis. 2d 99, is no longer good law in light of ***Crawford v. Washington***, 541 U.S. 36 (2004), and several subsequent decisions interpreting ***Crawford***, namely, ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011), and ***Williams v. Illinois***, 132 S. Ct. 2221 (2012). We disagree.

¶12 After ***Crawford*** was decided, we reaffirmed ***Luther Williams*** in ***State v. Barton***, 2006 WI App 18, ¶17, 289 Wis. 2d 206, 709 N.W.2d 93. We held:

> The holding in ***Crawford*** does not undermine our supreme court's decision in [***Luther***] ***Williams***. [***Luther***] ***Williams*** is clear: A defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another. … We do not see, and Barton fails to explain, how ***Crawford*** prevents a qualified expert from testifying in place of an unavailable expert when the testifying expert presents his or her own opinion.

Id., ¶20. Further, after the remaining federal precedents Roalson relies on were decided, our supreme court decided ***State v. Deadwiller***, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. The court found there was no confrontation violation, observing the objected-to analyst's testimony there "was similar to that of the testifying analyst" in both ***Luther Williams*** and ***Barton***. ***Deadwiller***, 350 Wis. 2d 138, ¶¶37-40. ***Luther Williams***'s and ***Barton***'s continuing validity was also recognized in ***State v. Heine***, 2014 WI App 32, 844 N.W.2d 409 (citing ***Luther Williams*** favorably), and ***State v. Griep***, 2014 WI App 25, ¶22, 353 Wis. 2d 252, 845 N.W.2d 24 ("[W]e have no choice but to conclude that ***Barton*** remains the law of our state. … No binding federal precedent clearly overrules ***Barton***.").

¶13 Here, the State presented the following facts in an affidavit in support of its motion to introduce the DNA evidence via Leider:

> Ms. Leider explained a peer review is performed as a [matter] of procedure and completed prior to a report being written. The notes, data and any tests are examined to ensure they coincide with the evidence. Further, the data, notes and test lead the reviewer to a conclusion. The peer review is meant to make sure the conclusions in the report are correct.
>
> Ms. Leider thought it would be possible to do a complete technical review of the tests, notes and supporting materials from analyst Ryan Gajewski's report from October 1, 2009 and reach her own opinion.
>
> Ms. Leider described this procedure of a complete technical review to be essentially the same procedure a peer reviewer would follow but it occurs after the report has been completed.

¶14 At trial, Leider explained that the crime lab is accredited by an outside agency and that every DNA analyst in the lab follows the same set of approved procedures. She explained the accreditation process and the lab's procedures for processing evidence and comparing samples to known standards. She also explained that a technical review is

> basically a peer review. What I mean by either of those terms is after the analyst that conducts the work in our laboratory, every case that's generated has to go through a peer or technical review where another analyst will proofread the entire file, come to their own conclusions and check the documentation of the file before it goes out the door.

Further, Leider explained, "I look at the data which is simply the DNA profile that was detected, I can look at that profile that anyone in the laboratory could have generated. I look at the standards and make my conclusions." She compared the profiles Gajewski developed from the evidence found at the crime scene with the standards collected from the three individuals. The opinions Leider reached on the basis of the materials she reviewed were her own.

¶15 Given our conclusion that ***Luther Williams*** is still good law, we must reject Roalson's confrontation argument. ***Luther Williams*** essentially holds that a state crime lab peer-review analyst may testify in place of the original analyst. Leider testified her technical review was the same as a peer review; she reviews the file and reaches her own opinions. Thus, she was not a mere conduit for Gajewski's opinions. *See* ***Luther Williams***, 253 Wis. 2d 99, ¶¶19-20.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2011-12).