

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2012-CR

Cir. Ct. No. 2009CF552

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH PRINGLE, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Kenneth Pringle, Jr., appeals a judgment convicting him of one count of second-degree sexual assault of a child, one count of second-degree sexual assault by use of force, and one count of false imprisonment. He argues that the circuit court violated his constitutional right to

confront the witnesses against him when it allowed testimony at trial from a State Crime Lab DNA analyst who had not performed the DNA analysis done in his case. We affirm.

¶2 Debra Kaurala, a State Crime Laboratory DNA analyst, performed DNA testing on evidence collected in this case and prepared a report that showed that no semen or male DNA was present on items submitted for analysis, which included a bed sheet and samples taken from the victim. Kaurala was not available to testify at trial, so the State called Patricia Diaz, who was also a State Crime Laboratory DNA analyst and had performed a “peer review” of Kaurala’s report before it was approved. Diaz testified that Kaurala’s report showed that no semen or male DNA had been found on various evidentiary items submitted for analysis. She also testified about the reasons DNA evidence might not be present in some circumstances. She testified that DNA evidence would not likely be present where, as here, a victim washes after a sexual assault. She also testified that semen would not likely be present where a perpetrator does not ejaculate during an assault.

¶3 “‘The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them.’” *State v. Jensen*, 2007 WI 26, ¶13, 299 Wis. 2d 267, 277, 727 N.W.2d 518, 523 (citations omitted; some quotation marks omitted); U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. “[T]he Confrontation Clause bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement.” *Jensen*, 2007 WI 26, ¶15, 299 Wis. 2d at 279, 727 N.W.2d at 524 (citing *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004)). Whether admission of evidence violated a defendant’s constitutional right to confront witnesses

against him is a question of law that we review *de novo*. **Jensen**, 2007 WI 26, ¶12, 299 Wis. 2d at 277, 727 N.W.2d at 523.

¶4 Pringle argues that the circuit court should not have allowed Diaz to testify about Kaurala's report because Diaz did not perform the DNA analysis or prepare the report. Pringle contends that Diaz's testimony harmed him because it provided an explanation to the jury of why it should not expect DNA evidence in this case and why absence of DNA evidence did not undercut the victim's assertion that Pringle had assaulted her.

¶5 We conclude that Diaz's testimony did not violate Pringle's right to confront the witnesses against him. The United States Supreme Court recently held that reports like the one at issue here may be relied on by a testifying expert without violating a defendant's right to confrontation, even though the person who prepared the report does not testify. **Williams v. Illinois**, 567 U.S. ___, 132 S.Ct. 2221. Moreover, Diaz did not *rely* on the report in giving the testimony to which Pringle objects. The portion of Diaz's testimony that Pringle claims harmed him was not based on information contained in the DNA report. He challenges Diaz's general testimony about why DNA evidence might not be found in certain situations. Diaz's opinions in this regard were based on her education, training, and extensive experience as a DNA analyst at the State Crime Lab, not on anything in particular in the report, and were subject to thorough cross-examination, as required by the Confrontation Clause. Pringle's right to confront the witnesses against him was not violated.

By the Court.—Judgment affirmed.

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

