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December 16, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP434-CR State of Wisconsin v. Demetrius Jackson (L.C. #2010CF1357)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Demetrius Jackson appeals a judgment convicting him as a repeater of attempted first-degree intentional homicide, substantial battery, strangulation and suffocation, false imprisonment, robbery with use of force, burglary, and burglary with intent to commit battery. He also appeals an order denying his motion for postconviction relief. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).[1] We affirm the judgment and order.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

After being arrested as a suspect in a home invasion, Jackson was charged with attempted first-degree intentional homicide, substantial battery, strangulation and suffocation, false imprisonment, robbery with use of force, burglary, and burglary with intent to commit battery, all as a repeater. A pair of shoes recovered in the search of his home was stained with blood.

State Crime Lab employee Duc-Minh Nguyen analyzed the blood and concluded that the DNA profile matched the victim's. Before trial, the State informed defense counsel that Nguyen no longer was employed at the State Crime Lab and, due to Nguyen's unavailability, it intended to call analyst Sharon Polakowski, who had peer reviewed the case, to testify about the results. The State said it did not intend to introduce Nguyen's report. Jackson moved to preclude the State from introducing the DNA evidence through Polakowski, asserting that doing so would violate his Confrontation Clause rights. *See* ***Crawford v. Washington***, 541 U.S. 36, 53-54 (2004). The trial court denied his motion after a hearing and the evidence was admitted.

The jury found Jackson guilty of all charges. Postconviction, he sought a new trial, again on the basis that his confrontation rights were violated by admitting the nontesting analyst's findings. The trial court denied the motion after a hearing. This appeal followed.

The sole question is whether Jackson's confrontation rights were violated when Polakowski testified based on her independent review of the crime lab report Nguyen prepared from his lab test results. A trial court's decision to admit evidence ordinarily is a matter within its discretion, but whether admitting the evidence violates the defendant's right to confrontation is a question of law subject to independent appellate review. ***State v. Ballos***, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999).

In admitting the DNA evidence, the trial court looked to ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919. ***Williams*** held that the testimony of a highly qualified witness who is familiar with the procedures supervises or reviews the work of the testing analyst and renders his or her own independent expert opinion is sufficient to protect a defendant's right to confrontation, although the testifying expert did not perform the mechanics of the original test. *See* ***id.***, ¶¶20, 26.

Jackson contends the court erred because Polakowski's opinion was not independent of the information Nguyen documented but, rather, hinged on its accuracy and completeness. Accordingly, he argues, the court's ruling should have been guided by ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009), and ***Bullcoming v. New Mexico***, 131 S. Ct. 2705 (2011). In ***Melendez-Diaz***, the Court held that the admission of test results through notarized "certificates of analysis" rather than the performing analyst's testimony violated the Confrontation Clause. *See* ***Melendez-Diaz***, 557 U.S. at 309-11. Similarly, in ***Bullcoming***, a crime lab report admitted through the testimony of an analyst who played no part in the underlying lab analysis and thus had no independent opinion about it also was held to pose a confrontation problem. *See* ***Bullcoming***, 131 S. Ct. at 2715-17. The trial court here found ***Melendez-Diaz*** and ***Bullcoming*** inapt, as Nguyen's actual report was not going to be introduced into evidence.

The record supports the trial court's ruling. A case recently decided by the Wisconsin Supreme Court cements our conclusion that the trial court was correct. In ***State v. Griep***, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, the court held that ***Melendez-Diaz*** and ***Bullcoming*** are inapplicable where the forensic lab report prepared by the testing analyst is not introduced into evidence:

> ***Melendez-Diaz*** and ***Bullcoming*** do not address a situation where a non-testifying analyst's testimonial statements do not come into evidence, i.e., where the testimonial forensic report is not admitted and the expert witness who testifies at trial gives his or her independent opinion after review of laboratory data created [by] another analyst.

Griep, 361 Wis. 2d 657, ¶40.

As in ***Griep***, the focus here is on Polakowski's in-court testimony, not Nguyen's report; thus, ***Williams***, not ***Crawford***, ***Melendez-Diaz***, or ***Bullcoming*** guide our analysis. *See* ***Griep***, 361 Wis. 2d 657, ¶45 n.20. Polakowski did not merely parrot Nguyen's conclusions. Rather, she fashioned her opinion by examining his report, data, and notes against the backdrop of her own professional expertise. *See* ***id.***, ¶55. She even identified two errors. Because Polakowski applied her independent expertise to her review of the unavailable Nguyen's forensic tests and, from that review, formed the opinion to which she testified at trial, Jackson's right of confrontation was satisfied. *See* ***id.***, ¶57. ***Williams*** remains good law.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the trial court are summarily affirmed. WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals