

FILED
Jul 21, 2014
Court of Appeals
Division III
State of Washington

NO. 319211-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JAIME HERNANDEZ, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00872-3

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. **The trial court did not abuse its discretion when it denied the defendant's motion to dismiss pursuant to CrR 8.3(b).**
- B. **The trial court properly denied the defendant's motion to exclude the DNA evidence pursuant to CrR 4.7.**
- C. **The defendant's Sixth Amendment right to confront witnesses was not violated when a technical peer reviewer testified regarding her own independent comparisons of the DNA data and her analysis of the protocols followed.**

II. STATEMENT OF THE CASE

On March 27, 2011, K.H. awoke to find the defendant behind her and beneath her bedcovers. (RP¹ at 241). K.H.'s pajamas and underwear had been pulled down below her buttocks to her mid-thigh. (*Id.*; RP at 222, 338). The defendant had his hand on K.H.'s hip and he was rubbing something wet and slimy between her buttocks and vagina. (CP 4; RP at 219-21, 333). K.H. turned to the defendant and told him to leave and that she was going to tell her mother what he had done. (CP 4). The defendant told her that she was a woman now, that she would have to do it someday anyway, and that he knew that she liked it. (CP 4; RP at 221).

¹ Unless otherwise dated, RP refers to the Verbatim Reports of Proceedings of June 24, 25, 27 and 28, and September 10, 2013, reported by Lisa S. Lang.

He told her it was normal and every woman did it. (CP 4; RP at 219-21). K.H. told him no and yelled at him to leave. (RP at 221). The defendant took K.H.'s phone and left the room. (CP 4; RP at 221). After the defendant left the room, K.H. pulled up her underwear, got out of bed and locked the bedroom door. (RP 221-22).

The next morning, the defendant returned K.H.'s phone. (RP at 223). K.H. did not change her clothing or her underwear, left the residence and called her mother, Maria Hernandez. (RP at 224). Ms. Hernandez was at a hospital in Seattle with her terminally ill mother when she received the phone call from K.H., who was crying. (RP at 145-46). K.H. told her mother what had happened the previous night. (RP at 146, 223-24). Upon hearing from K.H., Ms. Hernandez immediately started the drive back to Kennewick. (RP at 146-47). Upon returning, Ms. Hernandez picked up her daughter from school and took her to the Kennewick Police Department to give a statement. (RP at 147). Officer Tony Valdez with the Kennewick Police Department took a statement from K.H. and collected the underwear that she was wearing, the same underwear that she was wearing during the sexual assault. (RP at 222-24, 308). Officer Valdez also obtained a statement from Ms. Hernandez. (RP at 307). Later that evening, at the direction of law enforcement, Ms. Hernandez called the defendant and made plans to meet him at a local

Burger King so that he could be arrested, but the defendant never showed up. *Id.*

On March 29, 2011, K.H. was examined at Kadlec Regional Medical Center in Richland, Washington, by sexual assault nurse examiner Traci Swett. (RP at 154, 344-68). When describing the assault, K.H. reported to Nurse Swett that she awoke to find her dad behind her and felt him rubbing her with his penis. (RP at 375). The evidence collected from the sexual assault examination was placed in a sexual assault kit and turned over to law enforcement for DNA testing. (CP 8; RP at 360-64). Law enforcement searched for the defendant but were unable to locate him; he was believed to have fled to California or Mexico. (CP 5; RP 01/09/2013 at 3-4; RP 01/18/2013 at 9).

The defendant was charged by information on August 14, 2011, with one count of Child Molestation in the Third Degree and one count of Possession of a Stolen Firearm. (CP 1-3). Prior to his arrest on November 19, 2012, the only verbal contact the defendant had with Ms. Hernandez was through phone calls from the defendant originating from San Diego, California, and Los Angeles, California. (RP at 155).

Although K.H.'s underwear was collected on March 28, 2011, and a sexual assault examination and kit were completed on March 29, 2011, the State was unable to secure a DNA sample from the defendant for DNA

comparison until more than a year and a half later when the defendant was arrested. (CP 7-8, 69-71; RP 01/18/2013 at 8-9, 16). On November 19, 2012, the defendant was arrested on the outstanding warrant from this case. *Id.* He was arraigned on November 20, 2012, and defense counsel was appointed at that time. (CP 7; RP 01/18/2013 at 16).²

On December 13, 2012, twenty-three (23) days after the defendant was arrested, defense counsel was notified that the Kennewick Police Department would be obtaining a search warrant for the defendant's DNA. (Appendix A³; 01/18/2013 at 9-10). After obtaining the warrant, evidence technician Mary Sellars and Detective Wes Gardner from the Kennewick Police Department obtained buccal swabs of the defendant's mouth for DNA comparison to the underwear obtained from K.H. on March 28, 2012. (*Id.*; CP 7-8, 15; RP at 306-10). Evidence technician Sellars testified that the collection of the reference sample was in accordance with the standards and protocols within the field. (RP at 291-93). On December 14, 2012, K.H.'s underwear, the sexual assault kit and the defendant's DNA samples were sent to the Washington State Patrol Crime Lab for DNA comparison. (CP 8). On December 19, 2012, the defendant

² It should be noted that the arraignment and appointment of counsel took place on the Tuesday preceding the Thanksgiving holiday.

³ Appendices A-E refer to the documents supplemented in the record by the Appellate Court on May 7, 2014, pursuant to the State's Motion to Supplement the Record.

was provided with additional information regarding the DNA testing, when the Benton County Prosecutor's Office sent defense counsel the supplemental reports from the Kennewick Police Department investigators that collected the buccal swabs. (Appendix D). The defendant was also provided with information regarding the ongoing DNA testing two days later on December 21, 2012, when he was sent the return on the search warrant, along with the supporting documents. (Appendix E).

On January 4, 2013, defense counsel was again notified that the DNA samples were at the crime lab for comparison and in the process of being analyzed and that the State would be making a motion to amend the witness list. (Appendix B). On January 7, 2013, the State filed a motion to continue the trial date one week to January 22, 2013, and amend the State's witness list to include Anna Wilson, the DNA analyst assigned to examine the case samples. (CP 7-13). The State argued that the continuance was necessary in the administration of justice, and since the DNA evidence could possibly be exculpatory, it was necessary as much for the defendant as for the State. (CP 10; RP 01/18/2013 at 7). The State additionally argued that the defendant was not prejudiced by the delay, since he was on notice and DNA testing was anticipated from the inception of the case. (RP 01/18/2013 at 9-11).

The defendant objected and argued that the State violated CrR 4.7, which resulted in a violation of the defendant's right to a speedy trial under CrR 3.3. (CP 15). The defendant additionally argued that, pursuant to CrR 8.3, the State had committed prosecutorial misconduct and the case should be dismissed, or alternatively the DNA evidence should be suppressed. (CP 15-18). The defendant argued that the Washington State Patrol Crime Lab "did no testing or attempted no testing until January 14th 2012 [sic]" (CP 15). The court rejected that argument and found that the continuance was reasonable given that the defendant was not available until November 20, 2012, because he had fled the jurisdiction. (RP 01/09/2013 at 12-14). The court noted that to the extent January 22, 2013, may be outside of speedy trial, there was good cause for a continuance. *Id.* at 13. The State received a lab report from Anna Wilson documenting her conclusions regarding the DNA comparison between the buccal samples taken from the defendant and K.H.'s underwear on January 9, 2013, and immediately forwarded the report to defense counsel. (RP 01/18/2013 at 11).

On January 18, 2013, the defendant filed a motion to suppress the DNA comparison results. (CP 22-27). In support of his motion, defense counsel's brief to the court stated that "he was unaware of the additional evidence or testing until provide [sic] discovery on January 7th, 2013"

(CP 23). At the hearing, the State responded that the defendant was aware of the DNA testing on December 13, 2012, and arguably since the inception of the action. (RP 01/18/2013 at 9-11). The court rejected the defendant's motion noting "[a]nd I really don't see what more the State could have or should have done under these facts." (RP 01/18/2013 at 16).

In denying the defendant's motion, the court commented that the "Crime Lab couldn't possibly begin any sort of comparison testing until they had something from someone who was charged with a crime" *Id.* at 17. Finding the State's actions reasonable, the court held the trial date of January 22, 2013, concluding there was no discovery violation and that there were no grounds for dismissal or exclusion of evidence. *Id.* at 18. Despite defense counsel urging the court to continue the case upon its own motion, the court refused to do so. *Id.* Following a colloquy with the court, the defendant knowingly and voluntarily waived speedy trial in order to have more time to secure a DNA expert and for his attorney to prepare for trial. (CP 58; RP 01/18/2013 at 20-21).

At the time of trial, Anna Wilson, the DNA analyst who tested the items relating to this case, was on medical leave and unavailable to testify. (CP 71; RP at 427). Another forensic scientist from the Washington State Patrol Crime Lab testified. *Id.* That witness was supervising forensic

scientist Erica Graham who was the technical peer reviewer for the DNA samples tested in this case. *Id.* at 389-93. A hearing was conducted outside of the presence of the jury to determine whether Ms. Graham would be permitted to testify. (RP at 392-404).

Defense counsel had an opportunity to extensively cross-examine Ms. Graham regarding the protocols and procedures used by the Washington State Patrol Crime Lab and by Anna Wilson in this matter. (RP at 404-19). Defense counsel also extensively questioned Ms. Graham regarding her independent conclusions and the procedures she followed in analyzing the DNA data. (RP at 417-19). The court allowed Ms. Graham to testify, finding the facts and foundation provided by Ms. Graham in her testimony analogous to that in *State v. Manion*, 173 Wn. App. 610, 295 P.3d 270 (2013). *Id.* at 429. At the hearing and at trial, Ms. Graham testified to the specific procedures and protocols followed in DNA testing and analysis at the Washington State Patrol Crime Lab. (RP at 392-404, 442-43).

In pertinent part, Ms. Graham stated that:

. . . [w]hen I go through a file, I actually set the report aside. I don't even look at it. And I go through and make my own notes and interpretation based on what's in the file, and then I come to my conclusion, and then I go through her report and what her conclusion is.

Id. at 395. Ms. Graham also testified that she independently compared the DNA profiles with the reference sources and personally determined whether or not the profiles matched. *Id.* at 418-19. At trial, Ms. Graham testified that she reviewed the raw electronic DNA data in the case and performed her own comparison of the Y-STR profile developed from the reference sample from the defendant's buccal swab to the Y-STR sample that was developed from the interior of K.H.'s underwear and concluded that the profiles matched. (RP at 439-42, 446-47). Ms. Graham also testified that statistically, one would not expect to see the Y-STR profile found in the underwear in more than one in 4,400 male individuals in the United States. (RP at 449). On June 28, 2013, the jury found the defendant guilty of one count of Child Molestation in the Third Degree. (CP 171; RP at 532).

The defendant now appeals his conviction, raising three assignments of error: 1) the defendant argues he was not notified until January 7, 2013, of any possible DNA evidence in his case and as a result the State committed prosecutorial misconduct; 2) the defendant argues that the trial court erred when it denied the defendant's motion to exclude the DNA evidence; and 3) the defendant argues that his right to confrontation under the federal and State constitutions was violated when the court

allowed Anna Wilson's technical peer reviewer to testify as to the DNA process and results.

III. ARGUMENT

A. The trial court did not abuse its discretion when it denied the defendant's motion to dismiss under CrR 8.3(b).

The defendant asserts that the trial court abused its discretion when it found there was no basis to dismiss pursuant to CrR 8.3(b). It is well established that CrR 8.3(b) is designed to protect against arbitrary action or misconduct. *State v. Starrish*, 86 Wn.2d 200, 544 P.2d 1 (1975); *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997). The governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

However, Washington courts have clearly held that dismissal is an extraordinary remedy that is improper except in truly egregious cases of mismanagement or misconduct that materially prejudice the rights of the accused. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); *State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996); *Blackwell*, 120 Wn.2d at 832. A trial court's denial of a motion to dismiss under the rule is reviewed for abuse of discretion. *Id.*

A trial court abuses its discretion when its decision to grant or deny a motion to dismiss under the rule is manifestly unreasonable or is based on untenable grounds. *Id.* A decision is based on “untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rohrich*, 149 Wn.2d 647, 655, 71 P.3d 638 (2003) (holding that merely speculative prejudice following an 18-month delay in charging did not satisfy the requirement of actual prejudice). A statement is “manifestly unreasonable” if the court applied the correct legal standard to the supported facts, but still adopted a view “that no reasonable person would take” and arrived at a decision “outside the range of acceptable choices.” *Id.* at 654 (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995), respectively).

A court’s role in reviewing a claim under CrR 8.3(b) is not to “define due process in line with ‘personal and private notions’ of fairness but rather to determine whether the State’s conduct violates ‘fundamental conceptions of justice which lie at the base of our civil and political institutions.’ ” *State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003) (quoting *State v. Cantrell*, 111 Wn.2d 385, 389, 758 P.2d 1 (1988)). To prevail on a motion to dismiss under the rule, the defendant must

demonstrate both “arbitrary action or governmental misconduct” and “prejudice affecting [his or her] right to a fair trial.” *Wilson*, 149 Wn.2d at 9 (citing *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.2d 587 (1997)).

The defendant argues that the State committed misconduct because K.H.’s underwear and sexual assault kit were in evidence since March 29, 2011, and no attempts were made to test those items until January of 2013. (App. Brief at 12). The defendant relies on *State v. Michielli*; however, *Michielli* is easily distinguishable from the case at bar. *Michielli* dealt with a situation where the prosecutor, without any “justifiable explanation,” filed four additional charges only five days before trial. *Michielli*, 132 Wn.2d at 243-44. The prosecutor in that case admitted that all of the information needed to file those charges existed at the inception of the case, but instead of filing them in the beginning, waited until the eve of trial to do so. *Id.* The *Michielli* court noted that “the long delay, without any justifiable explanation, suggests less than honorable motives.” *Id.* at 244. The defendant’s reliance on *Michielli* is misplaced.

Unlike in *Michielli*, the DNA evidence in the present case did not result in additional (previously known) charges being filed. Nor was there any showing of dishonesty, vindictiveness or gamesmanship on the State’s part. To the contrary, the defendant was informed of every step in the process to collect his DNA and its subsequent transfer to the Washington

State Patrol Crime Lab. (*See*, Appendices A, B, D and E; CP 6-14; RP 01/09/2013 at 5; RP 01/18/2013 at 9-12). Given the extensive record showing he was on notice of DNA analysis, the defendant cannot support his claim that he was unduly surprised or prejudiced by the existence of DNA evidence. *Id.* Despite this record, the defendant still argues that he was unaware of any DNA testing until January 7, 2013. (App. Brief at 12-13, 17). This is a conclusion that the facts do not support. (*See*, Appendices A, B, D and E; CP 7-11, RP 01/09/2013 at 5; RP 01/18/2013 at 8-11).

In addition to arraignment and initial discovery, the application for a search warrant and physical collection of buccal swabs on December 13, 2012, put the defendant on notice of the impending DNA analysis. (*Id.*; RP 01/18/2013 at 9-10). However, even if the court assumes that the arraignment and later collection of DNA samples was not sufficient notice, the defendant was again notified through his attorney on December 19, 2012, via the reports of the investigators who took the samples. Appendix D. Only two days later, on December 21, 2012, the defendant was provided with even more information via the return on the search warrant, as well as the evidence log dated 12/13/2012. (Appendix E).

Unlike *Michielli*, *State v. Cannon* is directly on point. *Cannon*, 130 Wn.2d at 328. In *Cannon*, the court considered whether the State's

initial mishandling of a blood sample, and subsequent delays in the testing of DNA and paint chips, were grounds for dismissal of the charge of Rape in the First Degree, pursuant to CrRs 4.7 or 8.3(b). *Cannon*, 130 Wn.2d at 328. The defendant in *Cannon* argued that the delay in processing the DNA tests of his blood and the use of the DNA and paint chip samples effectively denied him his right to a fair trial. *Id.*

Like the defendant in the present case, the defendant in *Cannon* claimed that the “discovery violations” forced him to choose between his right to a speedy trial and effective representation. *Id.* The court rejected that argument, holding that the defendant could not meet the burden to show prejudice, since his trial counsel was on notice from the time of charging that the State intended to introduce scientific evidence relating to blood samples and paint chips in order to tie him to the crime. *Id.* at 329. The court reasoned that since there was no actual prejudice, that even if the State’s actions violated the discovery rules, dismissal would not have been appropriate. *Id.* at 328; *See also, Blackwell*, 120 Wn.2d at 832. The holding of *Cannon* is applicable to the facts here.

In denying the defendant’s motion to dismiss the charge, the trial court noted that the defendant’s whereabouts were unknown until his arrest and subsequent arraignment on November 20, 2012. (RP 01/18/2013 at 16). In regard to the State not sending off the samples from

K.H. earlier, the court stated that “I think we can all agree that the Crime Lab is not going to do any sort of comparison testing until they actually have something to compare with what’s been previously collected. (*Id.* at 17). In finding that there was not a basis for a dismissal or exclusion of the DNA evidence, the court made the observation, “[w]hat more could the State have done in this particular case? And I really don’t see what more the State could have or should have done under these facts.” *Id.* at 16. The court went on to state that “the Crime Lab couldn’t possibly begin any sort of comparison testing until they had something from someone who was charged with a crime” *Id.* at 17. The defendant speculates that law enforcement “could have collected DNA samples of Hernandez because they were in his apartment” (App. Brief at 12). This argument is without merit. The suggestion that law enforcement can walk into a residence and haphazardly collect a suitable reference sample of the defendant’s DNA ignores the protocols and procedures that are stringently followed in reference sample collection. (RP at 291-93).

Consequently, since the defendant cannot show actual prejudice, the claim that he was forced to choose between his right to a speedy trial and effective assistance of counsel fails. *See, Cannon*, 130 Wn.2d at 328. The State acted in a timely manner when Kennewick Police Department investigators sent the sexual assault kit and K.H.’s underwear, along with

the recently collected DNA sample from the defendant, to the Washington State Patrol Crime Lab on December 14, 2012. Had the trial court dismissed the charges pursuant to CrR 8.3(b), it would have done so without adequate support from the record or application of the proper legal standard.

Accordingly, the court did not abuse its discretion by denying the defendant's motion to dismiss pursuant to CrR 8.3(b). The State respectfully requests that the trial court's ruling be affirmed.

B. The trial court properly denied the defendant's motion to exclude the DNA evidence pursuant to CrR 4.7.

The defendant's claim of a discovery violation pursuant to CrR 4.7 is redundant, as it has the same underlying allegation of prosecutorial misconduct that was already addressed in the previous argument. (App. Brief at 14). However, to the extent the defendant's CrR 4.7 argument is distinguishable, the rationale of *Cannon* likewise applies. *Cannon*, 130 Wn.2d at 328.

Discovery decisions based on CrR 4.7 are squarely within the trial court's discretion, and a court will not disturb a trial court's discovery decision absent a manifest abuse of that discretion. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998) (citing *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). Exclusion or suppression of

evidence is an extraordinary remedy and should be applied narrowly. *Id.* Dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when the defendant has been prejudiced by the prosecution's actions. *Cannon*, 130 Wn.2d at 328; *Blackwell*, 120 Wn.2d at 826 (holding that even though the prosecutor failed to provide requested discovery materials, there was no government mismanagement due to the reasonableness of the prosecutor's actions).

In the case at bar, the defendant asked the trial court to either continue (on its own motion) the trial beyond the defendant's speedy trial rights, or exclude the DNA evidence. (RP 01/18/2013 at 15). The trial court did not abuse its discretion when it found that given the facts of this case, neither of those options was appropriate. *Id.* at 16. Instead, the trial court found that the State acted reasonably under the circumstances. *Id.* at 16-17. The defendant claims that the delay was caused by the prosecuting attorney; however, this standpoint blatantly ignores the fact that the defendant willfully fled the area for nearly two years and was not available for a DNA test until after November 20, 2012. To suggest that the State could have conducted the necessary DNA comparison testing within that time period is an assumption that is in no way supported by the record or the trial court's findings. *Id.* Again, *Cannon* is instructive as to this issue.

In *Cannon*, the court dealt with a defendant's CrR 4.7 and CrR 8.3(b) claims and found that the defendant was on notice of the possible DNA evidence since the time of charging. *Cannon*, 130 Wn.2d at 328. As a result, there was no prejudice to the defendant. *Id.* The defendant here gives general accusations that he was prejudiced by the admission of the DNA evidence; however, he fails to point to anything that was unknown or unexpected. Like the defendant in *Cannon*, the defendant was on notice of impending DNA evidence and knew that certain steps would need to be taken to ensure effective assistance of counsel. The court's denial of his motion to suppress does not suffice as actual prejudice. *I.e.*, *Cannon*, 130 Wn.2d at 328.

As the State argued at the trial level, this was a case involving DNA from its inception and the defendant was arguably on notice since the time he was provided with the initial discovery following arraignment. (RP 01/09/2013 at 12; RP 01/18/2013 at 16). The record demonstrates that at the absolute latest, the defendant had notice of DNA testing on December 13, 2012, when a search warrant was obtained and buccal swabs were taken. *Id.* Furthermore, the defendant ignores the fact that following the incident with K.H., he purposely fled the jurisdiction for twenty (20) months and during that time was unavailable for DNA testing.

Consequently, the defendant was not deprived of meaningful access to discovery, nor was he forced to choose between his right to a speedy trial and effective representation. The State respectfully asks this court to deny the defendant's claim of prosecutorial misconduct and affirm the trial court's ruling.

C. The defendant's Sixth Amendment right to confront witnesses was not violated when a technical peer reviewer testified regarding her own independent comparisons of the DNA data and her analysis of the protocols followed.

The defendant's right to confrontation was satisfied when he had an opportunity to extensively confront and cross-examine forensic scientist, Erica Graham, on her independent judgment and conclusions following her technical peer review of the DNA testing procedures conducted by Anna Wilson in this case.

The confrontation clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" U.S. CONST. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Article I, section 22 of the Washington Constitution provides that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face" Const. art. I, § 22; *State v. Lui*, 179 Wn.2d 457, 467, 315 P.3d 493 (2014). When presented with a

question identical to the one here, our Supreme Court has held that the text of article I, section 22 “does not compel a result different from that under the Sixth Amendment.” *Id.* at 468. As a result, both should be reviewed together. *See id.*

In *Crawford*, the U.S. Supreme Court held that the right to confrontation excludes “testimonial” statements by a non-testifying witness unless the witness is unavailable and was previously subject to cross-examination by the defendant. *Crawford*, 541 U.S. at 59; *Manion*, 173 Wn. App. At 638. In applying the standard articulated in *Crawford*, the court later held in *Melendez Diaz v. Massachusetts*, that the certificates of analysis entered were essentially “ex parte out-of-court affidavits” that were erroneously entered in lieu of live testimony. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

In yet another confrontation case, *Bullcoming v. New Mexico*, the court found a confrontation clause violation when an analyst, who had neither observed the blood sample nor participated in the testing process, introduced a laboratory certification of another, in lieu of testimony from the analyst who performed the test. *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 2713, 180 L.Ed.2d 610 (2011). In the opinion of the court, Justice Ginsberg noted that the State “never asserted that the analyst who signed

the certification . . . was unavailable,” nor did the defense have an opportunity to cross-examine him. *Id.* at 2714. Both *Melendez-Diaz* and *Bullcoming* are distinguishable from the case at bar in that Anna Wilson’s report was never offered or admitted into evidence. Unlike in *Bullcoming*, Ms. Graham testified to the independent conclusions she reached based on her technical peer review and comparison of the DNA data in this case.

Recently, the Washington Supreme Court in *State v. Lui* held that an expert witness could rely on DNA profiles created by other laboratory analysts when concluding there is a DNA match. *Lui*, 179 Wn.2d at 483. In its exhaustive opinion, the court considered all the relevant Sixth Amendment jurisprudence and found that its opinion did not conflict with the currently fragmented decisions recently issued by the U.S. Supreme Court. *Id.* at 505. The court reasoned that the absence of the actual analyst did not violate the confrontation clause violation, when the State produced the “actual witness[es]” who independently reached the factual conclusion presented at trial. *Lui*, 179 Wn.2d at 497. The court reasoned that the confrontation clause required the testimony of the individual who reached and presented the factual conclusion against the defendant. *Id.*

That is precisely what occurred in this case when supervising forensic scientist, Erica Graham, testified to her comprehensive and independent peer review of the testing conducted by one of her forensic

scientists, Anna Wilson, who was unavailable due to being on medical leave. (RP at 393, 427). It is the State's position, and appears to be the defendant's real concern, that *Lui* is directly on point here. (App. Brief at 22).

In addition to *Lui*, the case of *State v. Manion* directly applies to facts in the present case. In *Manion*, the court held that DNA testimony from a technical peer reviewer was admissible, when the reviewer exercised her own independent judgment in analyzing the data and reaching an independent conclusion. *Manion*, 173 Wn. App. at 628. That is precisely the case here. Erica Graham explained in depth the process and protocols she and Ms. Wilson followed in analyzing the data from the Y-STR DNA profiles extracted from the buccal swabs and K.H.'s underwear. Ms. Graham examined the raw DNA data, conducted an independent review, and reached an independent comparison result. (RP at 444-46). Ms. Graham explained how she did not read Ms. Wilson's report until she had examined all of the data and made her own conclusions regarding the DNA profiles in this case. (RP at 392-426, 442-43).

Despite the holdings of *Manion* and *Lui*, the defendant asks this court to reject the majority opinion of our Supreme Court, and adopt the dissenting opinion. (App. Brief at 22). The State respectfully requests that

this court deny the defendant's request, and apply the rationale of *Manion* and *Lui*.

IV. CONCLUSION

Based upon the aforementioned rationale, the defendant's appeal should be denied and the conviction affirmed.

RESPECTFULLY SUBMITTED this 18th day of July, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

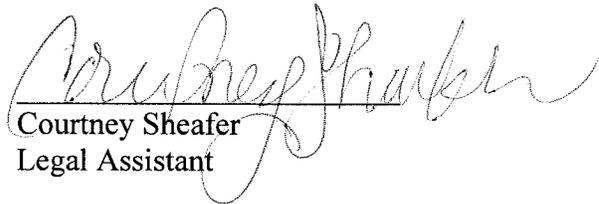
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Signed at Kennewick, Washington on July 18, 2014.



Courtney Sheaffer
Legal Assistant