

67706-3

67706-3

NO. 67706-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FABION MANION,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE
JUL 23 2012

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

2012 JUN 25 PM 2:
COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SAMANTHA D. KANNER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. SUFFICIENT EVIDENCE SUPPORTS MANION'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM	6
2. THE TESTIMONY FROM WOODARD ABOUT THE RESULTS OF THE DNA ANALYSIS DID NOT VIOLATE MANION'S RIGHTS UNDER THE CONFRONTATION CLAUSE	12
a. Relevant Facts	12
b. Woodard's Testimony Was Appropriately Admitted	23
D. <u>CONCLUSION</u>	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Bullcoming v. New Mexico, ___ U.S. ___,
131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011) 24, 25, 26

Crawford v. Washington, 541 U.S. 36,
124 S. Ct 1354, 158 L. Ed. 2d 177 (2004) 13, 23

Melendez-Diaz v. Massachusetts, 557 U.S. 305,
129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) . 15, 23, 24, 26, 29

Williams v. Illinois, ___ U.S. ___,
132 S. Ct. 2221, ___ L. Ed. 2d ___
(June 18, 2012) 26, 28, 29, 30

Washington State:

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 7

State v. Callahan, 77 Wn.2d 27,
459 P.2d 400 (1969)..... 7

State v. Cote, 123 Wn. App. 546,
96 P.3d 410 (2004)..... 7

State v. Echeverria, 85 Wn. App. 777,
934 P.2d 1214 (1997)..... 6

State v. Enlow, 143 Wn. App. 463,
178 P.3d 366 (2008)..... 8, 10

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 7

State v. Hill, 123 Wn.2d 641,
870 P.2d 313 (1994)..... 9

<u>State v. Lucca</u> , 56 Wn. App. 597, 784 P.2d 572 (1990).....	10
<u>State v. Lui</u> , 153 Wn. App. 304, 221 P.3d 948 (2009).....	15, 17, 18, 21, 29
<u>State v. Nation</u> , 110 Wn. App. 651, 41 P.3d 1204 (2002).....	15, 17
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	7
<u>State v. Spruell</u> , 57 Wn. App. 383, 788 P.2d 21 (1990).....	8
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	11

Constitutional Provisions

Federal:

U.S. Const. amend VI	12, 23, 27
----------------------------	------------

Statutes

Washington State:

RCW 9.41.040.....	6
-------------------	---

Rules and Regulations

Federal:

FRE 703 27

Washington State:

ER 703 28, 29

Other:

Illinois ER 703 26, 27

A. ISSUES PRESENTED

1. Whether sufficient evidence supports Manion's conviction for Unlawful Possession of a Firearm in the Second Degree.

2. Whether the testimony of a forensic scientist violated the Confrontation Clause, where the testifying witness relied on data from testing done by another scientist to draw her own conclusions.

B. STATEMENT OF THE CASE

On November 29, 2009, shortly after midnight, Seattle police officers observed the defendant, Fabion Manion, walking with two other males (K'Breyan Clark and Jeffrey Banks) in downtown Seattle away from a local nightclub. 4RP 5-6, 93.¹ The officers were dressed in police uniform but were inside an unmarked car. 4RP 16, 96. The car was equipped with police dash lights and is still recognizable by some people as being a police vehicle. 4RP 96-97.

The officers did not recognize the three males but saw them display gang signs and heard them yell at a larger group of males

¹ The Verbatim Report of Proceedings consists of six volumes, referred to as follows: 1RP (2/15/2011 and 3/22/2011), 2RP (4/12/2011), 3RP (4/13/2011), 4RP (4/14/2011), 5RP (4/15/2011, 4/26/2011, and 5/17/2011), and 6RP (6/8/2011).

outside the nightclub. 4RP 8, 94. As Clark walked, the officers observed his jacket tilt to the right hand side and bulge as if a heavy object were inside his right jacket pocket. 4RP 9, 95; 3RP 98. Clark was also observed putting his hand in and out of his pocket several times. 4RP 9.

As the three males walked toward Seattle Center the officers continued to observe them. 4RP 8-9. When the males reached the northwest corner of 5th and Harrison, they began to cross a parking lot heading northbound. 4RP 10. As the officers followed, the males looked back at the vehicle as if they recognized it as a police car. 4RP 96. The males quickened their pace and began running as they turned westbound and rounded the corner of a building. 4RP 18-19, 99. The officers lost sight of the three males momentarily when the three turned the corner. 4RP 19. Once the officers turned the corner, the males came back into view. 4RP 19. Officers observed Clark and Manion positioned along the north side of a building facing some bushes. 4RP 19. Officer Harris noted that both Manion and Clark were stooped or bent at the knees down toward the bushes. 4RP 105, 107. Officer Diamond observed Clark make a furtive movement as if he was depositing something in the bushes. 3RP 100. Manion was east of Clark and

the two were separated by about an arm's length. 4RP 21;
3RP 108.

The officers parked near the northwest corner of the building, exited their vehicle and ordered the three males to stop. 3RP 65, 72. As he exited the vehicle, Officer Pasquan focused on Banks and observed him turn left along the northwest corner of the building and run southbound along the west side of the building. 4RP 19. Pasquan saw Banks slough an object into bushes at the southwestern corner of the building. 4RP 28.

At that point the officers ordered all three males to lie on the ground, to which they complied. 4RP 31. Pasquan found a .40 caliber handgun in the bush near the southwest corner of the building where he observed Banks slough an object. 4RP 32. When Pasquan announced that he had found a gun, Banks ran eastbound and across the street. 4RP 41. He was quickly apprehended by other officers. 4RP 42.

Officer Diamond located a .38 caliber revolver in the bushes along the north side of the building near the westernmost area of the bushes. 4RP 42-43; 3RP 108-09. Officer Pasquan then retrieved the .38 caliber revolver from the ground in the bushes where Clark was observed depositing something into the bushes.

4RP 46, 76. Officer Pasquan also located and retrieved a .22 caliber revolver from the ground in the bushes directly in front of where Manion had been stooped when officers rounded the corner. 4RP 44, 76.

Officer Pasquan noted that although the bushes and ground were damp and dewy, the .22 caliber revolver was completely dry. 4RP 50. The firearms were packaged and sent to the Washington State Patrol Crime Lab for fingerprint and DNA testing. 3RP 153-54; 4RP 112-13; 5RP 68-69. Seattle Police Detective Chan obtained DNA cheek swab samples from Manion and handed them off to Detective Hughey who submitted them to the Washington State Patrol Crime Lab for comparison. 3RP 124, 143-44; 5RP 60-65.

The .22 caliber revolver was swabbed for DNA and the profile recovered was a mixture that originated from at least two individuals. 3RP 154; 5RP 113, 132. Manion was included as a possible contributor to that mixture. 5RP 128-29. Based on the United States population, it was estimated that 1 in 2200 individuals was a potential contributor to this mixture. 5RP 128. A DNA mixture from at least three people was found on the .38 revolver.

5RP 98. Manion was excluded as a possible contributor to that mixture. 5RP 98.

Fingerprints of comparison value were located on the .40 caliber handgun but were not attributable to Manion. 4RP 200. No prints of comparison value were located on the .22 or the .38 caliber revolvers. 4RP 199. In January of 2012, Detective Hughey tested the .22 caliber revolver and found it to be in operable condition. 3RP 155-62. Manion's mother testified that his date of birth was July 24, 1993, thus making him 16 years old at the time of the current offense. 3RP 38.

Manion was charged in Juvenile Court with Unlawful Possession of a Firearm in the Second Degree for being in possession of the .22 caliber revolver while being under 18 years old. CP 5. He was found guilty by way of a bench trial. CP 39-42. The court entered oral findings of fact and conclusions of law and also entered written findings which incorporated the oral findings by reference. Id.; 5RP 236-41.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS MANION'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

Manion contends that the State failed to present sufficient evidence that he possessed the firearm in this case. His argument rests on the principle that constructive possession of contraband requires proof of dominion and control, which must be proven by more than mere proximity and/or passing control. Contrary to Manion's view of the case, the State did not rely on the theory of constructive possession of the gun at the time of his arrest. Rather, based on rational inferences from the evidence, the State presented a circumstantial case that Manion *actually* possessed the gun immediately before his arrest. As such, the State presented sufficient evidence to prove that Manion unlawfully possessed the firearm.

A person is guilty of Unlawful Possession of a Firearm in the Second Degree if, while under 18 years old, he owns, has in his possession, or has in his control any firearm. RCW 9.41.040(2)(a)(iii). Possession of contraband may be actual or constructive. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). At trial, the State must prove each element of the

charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that reasonably can be drawn therefrom." Id.

Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719. The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

The majority of the cases Manion cites on appeal involve cases where the State could not prove actual possession through either direct or circumstantial evidence and thus had to rely on a theory of constructive possession. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); State v. Cote, 123 Wn. App. 546, 96 P.3d 410

(2004); State v. Enlow, 143 Wn. App. 463, 178 P.3d 366 (2008).

Proof of dominion and control relates exclusively to constructive possession and does not bear on whether the State has proved actual possession. Id. at 29-31.

The only case cited by Manion that addresses proof of actual possession (as well as constructive possession) is State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990). In that case, police entered defendant Spruell's residence pursuant to a search warrant and saw defendant Hill standing up from a table. Id. at 384. Cocaine and drug paraphernalia were observed on the table. A plate was found on the floor about 1.5 feet from the door. Id. White powder residue was found on the plate but was of insufficient quantity to perform forensic testing. Id. A latent print found on the plate matched Hill's fingerprint. Id. Both Hill and Spruell were found guilty of possession of cocaine. Id. at 385.

Division I reversed Hill's conviction as his fingerprint on the plate proved only that he had touched the plate. Id. at 386.

Importantly, no evidence was presented to show how long Hill's fingerprint had been on the plate, and whether it had been on the plate before the white powder was ever placed on it. Thus, there was insufficient proof that Hill actually possessed the cocaine as it

was not found on his person. Id. Likewise, there was no evidence that he had dominion and control over the premises to establish constructive possession. Id. at 388-89.

Conversely, rather than being on a plate, which is not contraband in and of itself, Manion's DNA was found on the gun.² 5RP 128-29, 238-40. The gun was hidden in bushes in a location closest to him. 4RP 44, 76. Further, there was evidence presented supporting an inference that the gun had not been hidden in the bushes long. First, Manion was seen stooped down toward that area of the bushes, suggesting he sloughed the gun there. 4RP 105, 107. Second, the condition of the gun being dry compared to its wet surroundings suggested it had just been placed there. 4RP 50.

The court drew the logical inference from this evidence that, while Manion and his companions were fleeing from the police officers, either Manion or Clark had deposited the .22 gun into the

² Manion attempts to challenge the weight of the DNA evidence, as 1 in 2200 people could be a possible contributor to the mixed DNA profile found on the gun. App. Br. 20-21. In its oral findings of fact, incorporated by reference in the written findings, the court found that, based on the statistical evidence, Manion's DNA was found on the gun. RP 238-40. Likewise, the court concluded that Manion's DNA was on the gun because he deposited it directly when he was in possession of the gun, not through secondary transfer. RP 241. As Manion has not challenged any of the trial court's factual findings, the findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

bushes. 5RP 238. The court noted that it was very unlikely that Clark was carrying two firearms and deposited both into the bushes, and that Manion's DNA had somehow gotten onto one of them. 5RP 240. The court held that, based on the testimony of the experts, secondary transfer of Manion's DNA onto the gun was highly unlikely. 5RP 240. Rather, based on the fact that Manion was a contributor to the mixed DNA profile found on the gun, it was the court's holding that Manion was the one who discarded the gun in the bushes and thus it had been in his actual possession immediately before arrest. 5RP 239.

Manion correctly notes that fingerprint evidence alone does not provide sufficient evidence of a conviction unless the fingerprints could only have been impressed at the time of the crime. App. Br. at 19 (citing Enlow, supra and State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990)). However, Manion fails to provide any analysis as to how this applies to the case at hand. In Lucca, the defendant was charged with Residential Burglary when his fingerprint was found on a broken window of the house that had been burglarized. Id. at 598. The window was in an area not accessible to the public and the victim did not know the defendant and testified that he never gave Lucca permission to

enter the home. Id. at 601. The court held that the evidence was sufficient because the jury could reasonably infer that the fingerprint had been left at the time of the burglary. Id. Likewise, the court here inferred that Manion's DNA had been deposited on the gun when it was in his actual possession immediately before he hid it in the bushes. 5RP 238-40.

Manion also notes that mere momentary handling is insufficient to prove possession. State v. Staley, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). Again, Manion provides no analysis regarding how this applies to this case. "Momentary handling" goes to the question of whether the defendant had possession in the first instance. Id. at 802. Depending on the total situation, a "momentary handling," along with other sufficient indicia of control over the contraband, will support a finding of possession. Id. Here, the court properly inferred, based on the totality of the evidence, that Manion had done more than "momentarily handle" the gun; rather, he had it on his person and he sloughed it into the bushes prior to his arrest.

Considering Manion's DNA on the gun, the location of the gun in the bushes relative to Manion, his stooping down toward the bushes, the dry condition of the gun, and Manion's flight from

police, the State presented sufficient evidence that Manion unlawfully possessed the gun immediately prior to his arrest.

2. THE TESTIMONY FROM WOODARD ABOUT THE RESULTS OF THE DNA ANALYSIS DID NOT VIOLATE MANION'S RIGHTS UNDER THE CONFRONTATION CLAUSE.

Manion contends that his Sixth Amendment right "to be confronted with the witnesses against him" was violated by the State's introduction of scientific testimony through an expert witness whose opinion rested on data originally collected and analyzed by a non-testifying expert. This claim should be rejected. The United States Supreme Court has recently addressed this type of scientific testimony. Based on the Court's analysis, the testimony presented here comports with the Confrontation Clause.

a. Relevant Facts.

Prior to trial, the State gave notice to defense that it would be calling forensic scientist Kathryn Woodard from the Washington State Patrol Crime Lab (WSPCL) to testify about the DNA testing and analysis for this case. 4RP 174-76. The defense was provided with all of the notes, charts and reports that made up the WSPCL file on this case. Id. The WSPCL report was written by forensic scientist Jennifer Reid, who conducted the testing and the original

analysis in this case, but the report was signed by both Reid and Woodard. 4RP 86-87. No DNA report was admitted into evidence at trial.

Prior to trial, defense counsel interviewed Woodard, and obtained funding for and subpoenaed a defense expert who was going to be called as a rebuttal witness. 4RP 174, 178. Defense expert Elizabeth Johnson reviewed all of the work conducted by the WSPCL as well as a transcript of defense counsel's interview of Woodard. 5RP 153. During a pretrial discussion of anticipated issues that might arise at trial, defense counsel stated, "I don't think the issue of Crawford will come up in this case."³ 3RP 33.

Without objection by defense, and without any defense motion in limine regarding the anticipated DNA testimony, the State called Woodard to the stand on April 14, 2011. 4RP 144. Woodard is a forensic scientist at the WSPCL whose responsibilities include performing DNA testing and case work analysis. 4RP 146. The direct examination on April 14, 2011 began with Woodard's qualifications and some general testimony regarding DNA and how a person's DNA can be left on objects or surfaces. 4RP 146-51.

³ Crawford v. Washington, 541 U.S. 36, 124 S. Ct 1354, 158 L. Ed. 2d 177 (2004).

Woodard then testified generally about secondary transfer (explained in more detail below); she said that, although it is recognized in her field as possible, it is generally recognized as having a low likelihood of occurrence. 4RP 153-55. Further, Woodard testified that, in her opinion, secondary transfer was a lot less likely when dealing with dry cellular material such as skin cells than with cells deposited in a wet stain such as within a bodily fluid. 4RP 154-55. Woodard then also testified that natural elements such as rain are likely to wash off DNA cells. 4RP 156.

When the prosecutor began to question Woodard about her role in this case and about participation in STR testing, Woodard explained that, while she had not conducted the STR testing herself, she conducted a peer review of Jennifer Reid, the forensic scientist who had done the testing and the original analysis for this case. 4RP 157. At that point, the trial judge interrupted the testimony and questioned why Woodard was testifying rather than Reid. Id. Woodard explained that Reid was on medical leave and that Woodard had conducted the technical peer review of this case. 4RP 158. The prosecutor, not expecting the court to *sua sponte* raise this issue, attempted to explain the anticipated testimony. 4RP 157-66. However, because the prosecutor was not prepared

to argue the issue, she asked for a brief recess to attempt to provide the court with the relevant case law that supported admission of the witness's testimony. 4RP 159. The court inquired of the witness as to the anticipated technical testimony and then held a brief recess. 4RP 160-66.

Upon return from the recess the prosecutor, who indicated that she had not had an adequate opportunity to address the issue, brought Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), to the court's attention to explain the distinction between those facts and the case at hand. 4RP 166. Further, the prosecutor attempted to point the court to State v. Lui, 153 Wn. App. 304, 221 P.3d 948 (2009), but did not have the citation to that case on hand. 4RP 182. Again, Manion made no objection to Woodard's testimony under the Confrontation Clause. 4RP 168. The trial judge, looking at the Division Three case of State v. Nation, 110 Wn. App. 651, 41 P.3d 1204 (2002), noted that he was likely to exclude the testimony absent the prosecutor providing case law to the contrary. 4RP 171.

After the recess, the prosecutor represented that she had spoken to Reid's supervisor at the WSPCL during the court break and that Reid, although on bed rest, could possibly be made

available to testify, as she was testifying by phone in another case approximately a week and a half later. 4RP 171. The court then asked if the State was asking to hold trial over a week and a half for that to occur, to which the prosecutor answered yes and asked to recess until April 26, 2011. 4RP 171-72. At that point, Manion objected to the court allowing Reid to testify, as she had not been included on the State's witness list due to her expected medical leave. 4RP 172-73. Upon inquiry from the court, defense counsel conceded that they had all of the reports from the WSPCL that had been prepared and signed by Reid, but indicated that they had only interviewed Woodard for trial. 4RP 174.

Defense characterized the prosecutor's proposal of calling the original forensic scientist, so as to address the court's concerns regarding the Confrontation Clause and hearsay, as "unfair." 4RP 174. Defense then, for the first time, asked the court to strike the testimony that had been presented by Woodard and to prevent Reid from testifying based on late notice of her as a witness. 4RP 174-75. The prosecutor responded that, although Reid had not been listed as a witness in the State's trial brief, she would not be a surprise witness, as the defense was in possession of all of her lab notes and was aware of her work because she was the

original forensic analyst. 4RP 176. The prosecutor also explained to the court that defense had been aware for at least a month that the State intended to call Woodard, and had raised no motion to exclude her testimony on the grounds that she was not the original forensic analyst. 4RP 176. The trial court decided to prohibit Woodard's testimony based on State v. Nation, supra, and denied the requested recess to arrange for Reid's testimony based on the fact that the request was being made mid-trial.⁴ 4RP 177.

In response, the prosecutor asked if the court would accept additional briefing, and apparently provided some briefing in another case that cited to State v. Lui, supra. However, rather than looking at the Lui case, the trial judge shepardized Nation, supra, and ruled that Woodard would not be allowed to testify under its holding. At that point, defense counsel released its DNA expert, who had travelled from California to testify. 4RP 191.

After hearing testimony from another witness, the prosecutor again directed the court to Division One's holding in Lui, supra. RP 203-04. The trial judge briefly stopped the proceedings to read

⁴ On appeal, Manion incorrectly states that "Reid was on leave because she was pregnant and the prosecution did not try to arrange for her testimony." App. Br. at 5. To the contrary, the prosecution in fact did attempt to arrange for Reid's testimony, but her testimony was excluded based on Manion's objection regarding notice. 4RP 174-75.

the opinion. 4RP 204. After reviewing the case, the trial judge noted that, under Lui, he would likely reverse his prior ruling and hold that Woodard's testimony would be admissible so long as Woodard used her own analysis and opinion to testify as to the scientific results, even if that analysis was based on work done by another scientist. RP 207. Because the witnesses had been released for the day and because defense counsel had not had an opportunity to read the Lui case, the court noted that it would give the parties an opportunity to review the case law overnight, and the parties and the court could address the issue the next day.

RP 208-09.

On April 15, 2011, the court gave the parties the opportunity to provide further argument or case law regarding the admission of Woodard's testimony. 5RP 3. For the first time, Manion objected to the introduction of Woodard's testimony under the Confrontation Clause. 5RP 10. After hearing argument from defense, the court held that Woodard's testimony was admissible, so long as Woodard could testify to her own interpretations or opinions, albeit based on work conducted by another scientist. 5RP 8. Before hearing from the next witness, the parties had an off-the-record discussion regarding scheduling the next day for testimony from Woodard,

a police detective, and the defense DNA expert Johnson. 5RP 13. Based on scheduling issues not readily apparent from the record, the next date on which the court took testimony was April 26, 2011, approximately a week and a half later.⁵ 5RP 56, 58.

The State recalled Woodard. Rather than repeating the earlier testimony, the prosecutor first inquired as to procedures at the WSPCL regarding DNA work and the peer review process. 5RP 71-73. Woodard explained that the forensic scientist assigned to a case will remove or extract the DNA from an item of evidence and then amplify the DNA. 5RP 73-74. The next step done is capillary electrophoresis, which involves putting the sample into an instrument that separates the sample and measures its output using computer software. 5RP 74-75. In DNA analysis, the data are reduced by the scientific instruments to an electronic format, known as an electropherogram; this plot has peaks and valleys, and any expert can look at the objective data. 5RP 100-07. An analyst in turn copies down the data and interprets the data by determining what alleles are appropriately used to create the

⁵ Notably, this was the date the prosecutor had indicated that Reid could possibly have been made available for testimony. Most likely this date was picked, at least in part, because defense had to make arrangements for its DNA expert to fly back from California.

resulting profile that will be used for comparison. Id. Woodard explained that Reid had done all of these steps and that the case notes were in Reid's handwriting. Id.

However, Woodard reviewed every step and satisfied herself that everything had been done properly. 5RP 107. She did not simply rely on the analyst's conclusions, however. 5RP 96-109. Woodard explained that she did not repeat the capillary electrophoresis process, which would have involved simply pushing the button on the instrument a second time. However, she looked at the entire sample in the same way as the original analyst in documenting and creating the DNA profile and in comparing it to another profile. 5RP 101-02. When asked by the court for additional clarification, Woodard explained that she reviewed the original electropherogram that had been generated by a computer program and the corresponding worksheet where Reid had written down each allele call (or number designation for each peak). 5RP 105. Woodard then interpreted the data just as Reid had, by determining what information was sufficient to be used for comparison purposes. 5RP 105-07.

Throughout Woodard's testimony, the court asked clarifying questions and interjected:

recorded by a forensic scientist and interpreted to create a profile before it is compared. 5RP 96-109, 114-18. Woodard explained that she, as the technical peer reviewer, reviewed, interpreted and compared the same data generated by the computer program that Reid had reviewed and interpreted. Id.

The eventual conclusion that Woodard testified to was that the DNA profile created based on a swab of the .22 gun in this case was a mixed profile (meaning it contained the DNA of more than one person), to which Manion was a potential contributor. 5RP 128. Woodard explained that, based on the U.S. population, she estimated that 1 in 2,200 individuals was a potential contributor to the mixed profile. 5RP 128.

Elizabeth Johnson, the DNA expert retained by defense, testified that there did not appear to be any error regarding either the procedures or the analysis done by either Reid or Woodard. 5RP 159-60. She testified that she did not take issue with the inclusion of the defendant as a potential contributor to the mixed profile or with the estimate generated by the WSPCL. 5RP 160-61. She also testified that she did not believe the WSPCL had contaminated any of the material or made any errors. 5RP 172-73. Rather, her testimony was that DNA analysis could not account for

secondary transfer that could have occurred before the gun was collected in evidence. 5RP 173. She noted that people in the community aren't nearly as careful as scientists are, and may easily transfer their cells containing DNA onto another person's skin; the second person may, in turn, transfer the first person's cells onto an object. 5RP 173. Thus, she explained, a person's DNA could be found on an object that the person never touched. 5RP 173.

b. Woodard's Testimony Was Appropriately Admitted.

In Crawford, the Court addressed whether admission at trial of a tape-recorded statement, given in response to police questioning by a witness who did not testify, violated the defendant's Sixth Amendment right to confrontation. Crawford v. Washington, 541 U.S. 36, 38-40, 124 S. Ct 1354, 158 L. Ed. 2d 177 (2004). The Court ultimately announced a complete ban on out-of-court statements that are "testimonial," unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant about the statement. Id. at 59, 68.

In Melendez-Diaz, the Supreme Court reversed a Massachusetts court's admission of a certificate that essentially "testified" that the bags examined contained cocaine.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). As the State had called no witness to testify about the analysis that led to that conclusion, the court found a violation of the Confrontation Clause. Id.

In Bullcoming v. New Mexico, the United States Supreme Court continued to develop its Confrontation Clause jurisprudence in the context of scientific testimony. Bullcoming, ___ U.S. ___, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011). The Court framed the question as “whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification, made for the purpose of proving a particular fact, through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” Id. at 2713.

The scientific result at issue in Bullcoming was a blood alcohol concentration. Id. This result was obtained by forensic analyst Caylor. Id. at 2714. Rather than calling Caylor at trial to testify about the results of the gas chromatography test that he had performed, the State called forensic analyst Razatos, who had neither observed nor reviewed Caylor's analysis. Id. at 2715-16. The trial court allowed the State to admit the “certificate of analyst,”

completed and signed by Caylor and containing the results of Caylor's testing, as a business record during the testimony of Razatos. Id. By a bare five-justice majority, the Supreme Court held that the certificate was testimonial, and that Bullcoming accordingly had a right to confront Caylor, the forensic analyst who had prepared it. Id. at 2716.

Of particular significance to this case is the concurrence written by Justice Sotomayor in Bullcoming. Justice Sotomayor provided the majority with its fifth vote in that case, and wrote to “emphasize the limited reach of the Court's opinion.” Id. at 2719. (Sotomayor, J., concurring). Drawing a distinction highly relevant to the issue on appeal here, Justice Sotomayor cautioned that “this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue.” Id. at 2722.

Justice Thomas, also a member of the five-justice majority in Bullcoming, has repeatedly made it clear that his view of the scope of the Confrontation Clause is a narrow one. He believes that the Clause is implicated by extrajudicial statements “only insofar as they are contained in formalized testimonial materials, such as

affidavits, depositions, prior testimony, or confessions.”

Melendez-Diaz, 129 S. Ct. at 2543 (Thomas, J., concurring).

According to the Supreme Court’s most recent opinion on this topic, neither Melendez-Diaz nor Bullcoming addressed the issue posed here. Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221, 2233, ___ L. Ed. 2d ___ (June 18, 2012) (citing J. Sotomayor’s concurring opinion in Bullcoming). In Williams, the Court upheld the admission of expert testimony in a case that bears significant similarities to that admitted here. Sandra Lambatos, a forensic specialist at the Illinois State Police Lab, testified that she matched a male DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of the defendant’s blood. Id. at 2229-30. Lambatos explained that she trusted Cellmark’s work because it was an accredited lab, but admitted that she had not seen any of the calibrations or work that Cellmark had done in deducing the male DNA profile from the vaginal swabs obtained from the victim. Id.

At a bench trial, the defense objected to Lambatos’s testimony and sought exclusion insofar as it incorporated events at the Cellmark lab. Id. at 2231. The prosecution responded that under Illinois Rule of Evidence 703, the expert could testify to the

facts upon which she relied even if she would not otherwise be competent to testify as to the underlying facts. Id. The trial judge agreed and permitted the testimony to stand, saying that he would not exclude Lambatos's testimony based on her own independent DNA comparison using the data from Cellmark. Id.

Williams argued that this testimony violated his Sixth Amendment confrontation right because Lambatos's opinion on the match between his DNA and that extracted from the vaginal swabs was based on data and tests she did not personally conduct. Id. In its decision, the Supreme Court noted that it has long been accepted that an expert witness may voice an opinion based on relevant facts even if the expert lacks firsthand knowledge of those facts. Id. The Court discussed how both Illinois Rule of Evidence 703 and Federal Rule of Evidence 703 allow an expert to do just that. Id. at 2233-35. The Court further explained that the admission of testimony under those rules does not implicate the right to confront because the "Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Id. at 2235 (internal quotations removed).

The Court's plurality opinion held that because Lambatos testified and could be cross examined about her opinion, which was offered for the truth of the matter asserted, there was no violation of the Confrontation Clause. Id. at 2228. Conversely, the information from Cellmark was not being offered for the truth of the matter asserted and thus did not implicate the Confrontation Clause. Id.

The dissent in Williams takes particular issue with the fact that some of the underlying work done by Cellmark came out in the questioning and testimony of Lambatos and was therefore, the dissent argues, improperly considered by the fact finder. Id. at 2270. However, the Court notes that the danger of this testimony improperly being taken for the truth of the matter asserted was not present as the testimony was presented in a bench trial. Id. at 2236. As such, the trial judge is presumed to understand that that portion of the expert's testimony was not admissible for the truth of the matter asserted, and to evaluate the testimony appropriately. Id.

Here, both the prosecutor and the trial court recognized that Washington Evidence Rule 703 (which is identical in effect to both

the Federal and Illinois rules) was applicable in this case.⁶

Woodard looked at the electropherogram created by a computer program from the sample input by Reid, used her expertise to examine the profile created, and came to her own conclusion, to which she testified. As Manion's trial was also a bench trial, and the trial judge specifically and repeatedly explained that this was the exact logic he was applying pursuant to Division I's holding in Lui, there can likewise be no concern that Woodard's testimony regarding Reid's work or opinion was improperly considered.

Because the result in Williams was a plurality, this Court must also look to Justice Thomas's opinion, which concurs in the result that there was no Confrontation Clause violation, but reaches that conclusion using a different analysis. Williams, 132 S. Ct. at 2255 (Thomas, J., concurring). Justice Thomas's concurrence is based on the fact that the substance of Cellmark's work, as testified to by Sandra Lambatos, lacks the requisite formality and solemnity to be considered testimonial. Id. Justice Thomas indicates that, unlike the certificate in Melendez-Diaz, Cellmark's report merely

⁶ "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." ER 703.

created a profile for Lambatos to compare and did not certify any conclusion. Id. at 2260. As Woodard testified to her own conclusions based on a profile created by Reid, and no report or certificate by Reid was admitted into evidence, there was no testimonial statement from Reid. Thus, under Justice Thomas's analysis, the underlying profile created by Reid was non-testimonial in the same way that Cellmark's work was non-testimonial.

Under the rationale of the Court's plurality opinion and Justice Thomas's concurring opinion, there was no violation of the Confrontation Clause in the case at bar. Like the expert in Williams, forensic scientist Woodard relied upon the data generated by the work of forensic scientist Reid but conducted her own analysis, to which she testified. As evidenced by the significant interruptions of the testimony by the trial court, the court made a concerted effort to ensure that Woodard was not merely parroting the work of Reid.⁷ 5RP 75-76, 77, 96, 97. Thus, the trial court here

⁷ On appeal, Manion claims that Woodard's testimony was merely a parroted recitation of scientist Reid's conclusions. This argument is not supported by the record. First, it is clear that Woodard was testifying to her own conclusions, which were in accord with Reid's. 5RP 97. Second, trial counsel clearly did not believe that Woodard's testimony would be parroting Reid's conclusions, as he objected to the State's offer to produce Reid for trial based on notice. 4RP 176-77. Defense counsel noted that he was prepared for Woodard's testimony as he had interviewed her, but that it would be unfair for the State to call Reid as she had not been listed as a witness in the State's trial brief. 4RP 174.

correctly held that Woodard's testimony did not violate Manion's right to confront witnesses and appropriately admitted it.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Manion's conviction.

DATED this 25 day of July, 2012.

Respectfully submitted,

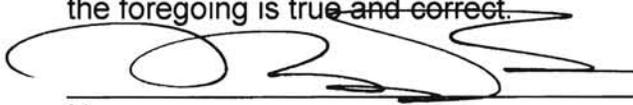
DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
SAMANTHA D. KANNER, WSBA #36943
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy P. Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FABION MANION, Cause No. 67706-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

07-25-12
Date