

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS GUZMAN,

Defendant and Appellant.

G045627

(Super. Ct. No. 10NF1748)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

*

*

*

Defendant Jesus Guzman was found guilty of assault with intent to commit sexual offense; rape, as charged in count one of the information. The court conducted a trial on the prior allegation, and found the prior to be true. The court sentenced defendant to seven years in state prison.

In his appeal, defendant contends the trial court erred in allowing an expert witness to testify about the results of DNA testing performed by nontestifying analysts. Alternatively he argues that, in the event this court concludes defense counsel failed to preserve his confrontation issue, then he received ineffective assistance of counsel. He further contends the trial court erred in imposing a one-year enhancement due to his failure to remain free from custody for five years prior to committing this crime. We are not persuaded by any of defendant's arguments and affirm.

I

FACTS

On Sunday August 5, 2007, 18-year-old Adriana attended church with her mother in Fullerton. Afterward, her mother went to work, and Adriana walked home alone, carrying her Bible. It was broad daylight and there was a lot of activity on the street. Someone bumped into her and "he like grabbed my butt while passing me."

Adriana described what happened next: "And then while walking away from him I felt like he was following me. So at that moment I tried to walk faster." She picked up a three-inch rock. Adriana described what happened at the point of an underpass and steps: "He tries to block me to where I was walking home. And I tried to tell him to move out of my way, and he wouldn't move. And at that point he grabbed me and threw me on the stairs." She added: "He has one hand on my shoulders, trying to struggle to unzip his pants." She pleaded with him to leave her alone, and threw the rock in his face. Adriana testified: "I can remember scratching him, and that's how they got the DNA tests from my fingernails." She was screaming and he struck her near her jaw

with his fist. She tried to bite him. At some point when she was in the midst of fighting him off, he left.

A man and a woman pulled over in their car and offered assistance. The man was off-duty Los Angeles County Sheriff Richard Adams. Adams was driving and his wife alerted him that it looked as if a girl was in trouble. He heard a woman screaming.

Vicki Adams described what she saw: “I just happen[ed] to look over and I saw an altercation between a man and a woman on that concrete staircase. And he was straddling her. And it was just a drive-by, so it wasn’t very long. But just her face is something, I will never forget the terrified look on her face. And him straddling her and like struggling with her. And I don’t know if he heard my car or what drew his head around, but we locked eyes.” She added: “I saw him straddling this young woman, and he was either hitting her or pulling on her clothing or — there was a struggle going on.” In 2010, a detective from the Fullerton Police Department contacted Vicki Adams to say “they had now a hit to DNA they found underneath Adriana’s fingernail.”

Fingernail Scrapings

Cindee Lozano is a crime scene investigator. She was called to the scene. She took photographs and scraped the victim’s fingernails. The fingernail evidence was marked with a Fullerton Police Department No. 07-61690.

Forensic scientist Corrie Maggay works at the Orange County crime laboratory (OCCL). Maggay described the procedure for handling evidence received sent to OCCL by police agencies. Maggay was the person who received the evidence taken from the victims fingernails. The evidence bore the Fullerton Police Department No. 07-61690 and was assigned another number at OCCL, FR No. 07-52405.

Maggay described what happened to the evidence after it was taken in by OCCL: 1) She removed the evidence from the freezer area and examined the specimens;

2) She documented the contents, and “with this case there were two smaller manila envelopes that were sealed that were labeled ‘right hand’ and ‘left hand’”; 3) In each envelope, there were fingernail scraping sticks, and she sent the sticks off for extraction which is “where we want to remove the DNA or the cells” from the “fingernail scraping sticks”; 4) At that point OCCL, but not Maggay personally, “break[s] them open so that we can obtain the DNA”; 5) Then OCCL, but not Maggay personally, isolates the DNA.

The following questions and answers occurred between the prosecutor and Maggay:

“Q: And did you do that in this case with this evidence?”

“A: I did not do that on this case.

“Q: Well, you didn’t do the extraction, but you sent it to extraction?”

“A: Yes, I did.

“Q: And that extraction is done within your crime lab; is that correct?”

“A: Yes, ma’am.”

Lisa Winter is also a forensic scientist at OCCL. She is assigned to the DNA unit. Winter was the case manager for the sample marked FR No. 07-52405. She described what a case manager does: “A case manager is someone who would be the one that would put all the evidence together at the end of the case, look at the DNA typing results, come to the conclusion, because sometimes we get mixtures, you have to interpret that. Sometimes there are standards you have to compare it to. So the case manager is the one that kind of pulls the case together at the end, writes the report, and submits the report.” She explained how the process of DNA testing works, and how a buccal swab was obtained from the victim.

Testing of the specimen taken from under the victim’s right hand fingernails revealed male DNA. Winter explained, “At that point the right hand fingernail profile would be put into a database.” OCCL was notified by the Department of Justice there was a match with a standard specimen in the database.

Winter explained the next step: “Then we need to confirm that in our laboratory. So, we would want a sample from the suspect.” At some point, Winter received buccal swabs taken from defendant. The procedure was to confirm that the standard in the database for a person is the same DNA as the same as the sample taken from a suspect.

Winter personally performed the comparison testing on the standard for defendant and the actual sample taken from defendant. She said: “The results were that the same profile that was found under the right hand fingernail scrapings, were the same as Mr. Guzman.”

Exhibit 22 is a chart titled “ORANGE COUNTY SHERIFF-CORONER [¶] FORENSIC SCIENCE SERVICES [¶] REPORT OF EVIDENCE EXAMINATION and DNA TYPING.” It lists three items, the victim’s DNA, the DNA for the scrapings from her right hand and the DNA for scrapings from her left hand. The reported numbers for the victim’s DNA and the scrapings from her left hand fingernails match across the chart, but the DNA for the scrapings from her right hand do not.

Exhibit 23 is a chart titled “OC CRIME LAB [¶] County Executive Office-District Attorney-Sheriff [¶] REPORT OF EVIDENCE EXAMINATION AND DNA TYPING.” It lists two items, defendant’s DNA and the DNA taken from the victim’s fingernails on her right hand. The categories match across the chart.

OCCL has a computer that analyzes the statistics of a particular match. In this case, the analysis showed one in one trillion it is Mr. Guzman’s DNA under Adriana’s right hand fingernails.

Defense counsel asked only one question of Maggay. When the time came to cross-examine Winter, defense counsel stated: “No questions, your Honor.”

Court Trial on Prior

To prove defendant committed the prior alleged crime, the prosecutor offered two documents which were received into evidence. Exhibit No.1 is a certificate of record from the Department of Justice. The second exhibit is defendant's rap sheet.

Within the two exhibits is evidence defendant was arrested for possessing methamphetamine for sale in 1996, in 1997 he pled guilty to conspiracy to distribute methamphetamine, he was sentenced to 87 months in prison to be followed by five years of supervised release, he was sent to a federal prison in 1998, and he was on supervised release on July 27, 2006.

II

DISCUSSION

Right to Confrontation

Defendant contends: "The trial court committed prejudicial error in allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts, where the defendant has no opportunity to confront the actual analysts in violation of [defendant's] Sixth Amendment right to confrontation." Alternatively, defendant contends that if this court concludes trial counsel failed to preserve the confrontation issue, he received ineffective assistance of counsel.

Despite the fact that trial counsel did not object to the admission of DNA evidence here, and did not cross-examine Winter, we address the merit of defendant's argument.

Admission of testimonial out-of-court statements is barred by the confrontation clause of the Sixth Amendment unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 68-69.) In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, the prosecution proved a substance recovered by police was cocaine by submitting sworn certificates of analysis rather than live testimony. (*Id.* at p. 307.) The

court concluded the analysts' statements, prepared specifically for trial against Melendez-Diaz, were testimony against him and the analysts were subject to confrontation under the Sixth Amendment. (*Id.* at p. 324.)

A few months ago, the California Supreme Court issued three cases of importance here. In *People v. Lopez* (2012) 55 Cal.4th 569, the defendant was charged with vehicular manslaughter while intoxicated, and the prosecution introduced into evidence a laboratory analyst's report on the percentage of alcohol in a blood sample taken two hours after the accident. (*Id.* at p. 573.) The analyst wrote a notation on the report linking defendant's name to the sample number. (*Id.* at p. 585.) The court stated that for a statement to be testimonial, it must be made with some degree of formality or solemnity, and its primary focus must pertain in some fashion to a criminal prosecution. (*Id.* at pp. 581-582.) The court held the laboratory report, even with the analyst's notation, was not testimonial in nature. (*Id.* at p. 585.)

The prosecution proved its murder case with the testimony of a forensic pathologist, who did not prepare the autopsy report or take the photographs he testified about, in *People v. Dungo* (2012) 55 Cal.4th 608 at page 612. The court concluded the witness's testifying about objective facts concerning the condition of the victim's body, which facts he derived from the autopsy report prepared by another pathologist, did not give the defendant the right to confront and cross-examine the pathologist who prepared the report and took the photographs. (*Id.* at p. 621.)

In *People v. Rutterschmidt* (2012) 55 Cal.4th 650, two elderly women were convicted of murdering two men in order to collect life insurance proceeds. (*Id.* at p. 652.) To prove its theory one of the victims was drugged before he was killed, the prosecution presented the testimony of a laboratory director who, relying on reports not prepared by him, testified that testing of the victim's blood samples by analysts at his laboratory had determined the presence of drugs that could have caused drowsiness. (*Ibid.*) The court concluded it did not need to decide whether the trial court erred in

allowing the laboratory director's testimony because the evidence of guilt was overwhelming. (*Id.* at p. 661.)

Since the California Supreme Court issued its three opinions on this issue, *People v. Holmes* (2012) 212 Cal.App.4th 431 was decided. In *Holmes*, a defendant who was convicted of murder, robbery and burglary, complained that testifying DNA experts did not personally perform all the testing upon which they relied in reaching their opinions. (*Id.* at p. 433.) The *Holmes* court found the analysis in *Lopez*, particularly persuasive. Referring to the two steps set forth in *Lopez*, the *Holmes* court stated: "That a statement is prepared for use at trial is not alone sufficient to render it 'testimonial' under any formulation of that term yet adopted by a majority of the United States Supreme Court justices or the California Supreme Court. It must also be 'formalized.' [Citation.]" (*People v. Holmes, supra*, 212 Cal.App.4th at p. 436.)

Here, while the DNA analysis was done in preparation for prosecuting defendant, it was not formalized in any way, and amounted to analysis and recordation of objective facts. The case manager, who testified, interpreted the objective data recorded by others, and performed the ultimate comparison of the sample taken from under the victim's fingernails and the one taken from defendant by the Fullerton Police Department. Based upon existing precedent from both the United States Supreme Court and the California Supreme Court, we conclude the analysis performed by nontestifying DNA experts in this case was not testimonial, and defendant's right to confront witnesses against him was not violated.

Sufficient Evidence to Prove Prior

Defendant next argues the "evidence did not establish beyond a reasonable doubt that [defendant] had not been free of prison custody for five years before the commission of the offense on August 5, 2007," as required by Penal Code section 667.5.

In addressing challenges to the sufficiency of evidence, “the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]” [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) The reviewing court must presume the existence of every fact the fact finder could reasonably deduce from the evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

Here the evidence shows the October 31, 1997 judgment stating he was sentenced to 87 months imprisonment, and that defendant was delivered to federal prison in Lompoc on January 20, 1998. The judgment also states: “Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five (5) years” Defendant’s federal rap sheet states: “Date in Custody 2003-01-14 [¶] Correction Action STATUS—SUPERVISED RELEASE [¶] Corrections Agency US PROBATION LOS ANGELES.” The next item on the rap sheet states: “Date in Custody 2006-07-27 [¶] Correction Action STATUS—SUPERVISED RELEASE EARLY TERMINATED.” The instant crime was committed on August 5, 2007. Under the circumstances we find in this record, we conclude sufficient evidence supports the court’s

imposition of punishment because defendant did not remain free from custody for five years before he committed the instant crime.

III

DISPOSITION

As we have reviewed defendant's contentions on the merits, we do not address his ineffective assistance of counsel argument based on counsel's failure to preserve issues for appeal. The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.