In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-18-00368-CR

DONNA GORE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law No. 2
Orange County, Texas
Trial Cause No. E110214

OPINION

Complaining the trial court violated her constitutional rights by allowing a lab supervisor to testify about her interpretation of the results of a gas chromatograph test performed by another scientist who worked in the same lab, Donna Gore seeks to overturn her conviction for DWI. Gore argues her conviction hinges on the lab supervisor's testimony, testimony she contends was inadmissible because admitting

it violated her rights under the Confrontation Clause to confront the scientist who tested her blood.[1]

We conclude the trial court did not abuse its discretion by allowing the supervisor to testify. Before the trial court allowed the supervisor to testify, the trial court conducted a hearing to consider Gore's objections to the testimony she expected the State to elicit from the supervisor when questioning her in Gore's trial. In the hearing, the supervisor, Haley Yaklin, explained she intended to base her testimony on her independent review of the raw data that had been generated by a gas chromatograph the lab it when it tested Gore's blood. Yaklin acknowledged she is not the person who used the gas chromatograph to test Gore's blood, explaining that another scientist in the lab, Katherine Brown was the scientist who used the equipment to test Gore's blood. Yet the result of that test was the one Yaklin reviewed to form the opinion she expressed in Gore's trial. Because the trial court could reasonably believe Yaklin's testimony about the manner she formed her opinions in Gore's case, we overrule Gore's sole issue, which complains the trial court violated Gore's rights to confront the testimony the State used against her in her trial.

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[1] *See* U.S. CONST. amend. VI (granting defendants in criminal trials the right "to be confronted with the witnesses against [them]"). The jury answered an issue and found Gore guilty of driving while intoxicated because she had a blood-alcohol concentration of 0.15 more.

Background

In June 2017, Sergeant Jesse Byrd, a police officer employed by the City of Bridge City, stopped Gore's car after he saw the car weave through some traffic, fail to exhibit a signal when returning to the middle lane, and fail to maintain its lane without exhibiting a signal to indicate the driver intended to change lanes. After Gore stopped, Sergeant Byrd approached her car. When she responded to the sergeant's questions, Gore told him she had consumed two beers and taken prescription medications—a nonsteroidal anti-inflammatory and a narcotic pain reliever, representing she got them from a doctor who was treating her for a back injury. Sergeant Byrd gave Gore a standard field sobriety test. From the results of the test, which Sergeant Byrd detailed, and from the beer the sergeant testified he saw in Gore's car, the sergeant expressed his opinion that he thought Gore was intoxicated. Sergeant Byrd arrested Gore and charged her with driving while intoxicated. After that, he took her to the Orange County Jail, where she gave police a specimen of her blood.

Katherine Brown, a forensic scientist with the Texas Department of Public Safety Crime Lab in Houston, tested Gore's blood in the lab. But Brown was unavailable to testify when Gore's case went to trial. By then, Brown no longer worked for the Department and worked in Colorado. Since Brown no longer worked for the Department, the State named Haley Yaklin, Brown's supervisor, as the expert

it intended to call to testify about the results of the gas chromatograph test Brown performed on Gore's blood. Before trial, Gore sought to exclude Yaklin's testimony and filed a motion in limine for that purpose.

On the morning of Gore's trial, the trial court told the parties that it wanted to conduct a hearing to decide whether to allow Yaklin to testify. In the hearing, Gore argued that Yaklin could not testify without violating Gore's right to confront the witnesses the State was using against her in her trial. According to Gore, Yaklin was not qualified to testify because she is not the person who tested Gore's blood. In the hearing, Yaklin testified that, when Brown tested Gore's blood, she was Brown's supervisor. She explained that as the person who supervised the lab, she reviewed the report Brown signed, a report that contained Brown's opinions about the test Brown performed on Gore's blood. Yaklin also explained she approved Brown's report before the Department sent it to the police. Still, Yaklin explained she intended to base the opinions she expressed during Gore's trial "on the raw data that was generated" by the gas chromatograph Brown used when she tested Gore's blood. After considering Yaklin's testimony, the trial court overruled Gore's objections and allowed Yaklin to testify.

When she testified before the jury, Yaklin described the procedures used in the lab to test a person's blood. According to Yaklin, the lab uses gas chromatographs

when testing blood to determine the level of alcohol present in samples tested in the lab. She explained gas chromatographs produce raw data, which scientists then use to determine whether the blood being tested contains alcohol. The testing procedures the lab uses, according to Yaklin, include protocols designed to ensure that the gas chromatographs used in the lab are working properly. When the prosecutor asked Yaklin whether she had an opinion about the alcohol-concentration results from the test on Gore's blood, Gore's attorney objected. He asserted Yaklin's testimony about the test on Gore's blood was inadmissible hearsay because Yaklin's testimony hinged on a test done by someone other than Yaklin that the State indicated it did not plan to call in Gore's trial. He also complained that, by allowing Yaklin to testify, the court would violate Gore's rights to confront the witnesses the State had used against her in her trial. The trial court overruled the objections and allowed Yaklin to express the opinion she formed from the review she conducted of the data generated by the test Brown did on Gore's blood.

During the trial, Yaklin explained she was Brown's supervisor when Brown tested Gore's blood in the lab. In her role as Brown's supervisor, Yaklin testified she had reviewed a report Brown authored about the results of the test performed on Gore's blood. The record does not show, however, that when before the jury, Yaklin testified about the opinions Brown expressed in her report. When the prosecutor asked Yaklin about whether she had an opinion about the level of alcohol in Gore's

blood from her analysis of the raw data, she testified Gore's blood test showed she had a blood-alcohol concentration level of "0.204 grams of alcohol per 100 milliliters of blood." In answering the charge, the jury found Gore was intoxicated because she had an alcohol concentration level of 0.15 or more in her blood.

On cross-examination, Yaklin agreed she is not the person who tested Gore's blood. Gore's attorney then questioned Yaklin about a note that Brown included in the report she authored that references a "blip" in the data produced by a gas chromatograph Brown used in the lab. In any event, the State never introduced Brown's report into evidence and never elicited testimony from Yaklin referencing the opinion Brown included in her report about the alcohol level she found in Gore's blood. And when answering Gore's attorney's question asked about the "blip" mentioned in the report, Yaklin explained the "blip" Brown referred to in her report was based on testing the lab did on a known sample, and it was not the test Brown performed on Gore's blood. When Gore's attorney asked whether the "blip" affected the test on Gore's blood, Yaklin responded: "I'm 100 percent that [the blip] did not affect" the test done on Gore's blood.

Standard of Review

We review a trial court's ruling admitting or excluding evidence for abuse of discretion.[2] We will uphold a trial court's ruling involving the admission or exclusion of evidence if the ruling the trial court made is one that is reasonably supported by the record and is correct under any theory of law that applies to the arguments the defendant raises in her appeal.[3]

Analysis

The Sixth Amendment's Confrontation Clause gives those accused of crimes the right to confront the witnesses against them.[4] Trial courts may admit testimonial statements in a defendant's trial only when the declarant is unavailable and the defendant has had a prior chance to cross-examine the witnesses the State uses against the defendant in the trial.[5] Mainly, Gore's argument requires this Court to determine whether the State introduced *testimonial statements* in Brown's report into evidence through Yaklin by using her to testify as a surrogate for Brown. *Testimonial statements* are those an individual "made under circumstances which

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[2] *Ramos v. State*, 245 S.W.3d 410, 417-18 (Tex. Crim. App. 2008).
[3] *Id.* at 418.
[4] U.S. CONST. amend. VI.
[5] *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[6]

Generally, when lab reports are prepared by individuals so the State can use them in a criminal investigation or prosecution, the statements within such reports are considered by courts to be testimonial. If testimonial, the defendant has the right to have the court exclude the statement in the report unless the State calls the witness who made the statement in the trial, since allowing the testimonial statement is evidence the jury might consider without having given the defendant the chance to confront the testimony before it is used against the defendant in the trial.[7] Thus, when the State elects to place testimonial statements before a jury without calling the individual who made the statement as a witness, the defendant has a right to object and have the court exclude the evidence to prevent the State from violating the defendant's right to confront the testimony the State is using in the trial.[8]

While the discussion above sets out the rules of the road that apply to *testimonial statements*, it does not control the outcome of testimony when offered by an expert who has based her opinions on raw data generated from the lab equipment, a non-testifying scientist used to conduct a test in a lab. Unlike

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[6] *Id*. at 52.
[7] *Id*.
[8] *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011).

testimonial statements in reports, courts do not characterize the raw data generated by machines such as those used in labs as the equivalent of a *testimonial statement* by the individual who used the machine.[9] The difference is logical since the machine did not create the results in anticipation of testifying in a trial.[10] Courts also do not consider data to be the equivalent of hearsay.[11] Thus, a trial court may allow an expert to testify to the opinion the expert formed from when that expert forms the opinion from his or her independent review of the raw data produced in a lab even when the date is generated by equipment used by someone other than the expert who did the test.[12]

In *Paredes v. State*, the Court of Criminal Appeals addressed whether to treat raw data generated by lab equipment as a *testimonial statement* when the State sought to have an expert witness testify about the opinions she drew from the raw data, she was not the scientist who used equipment to perform the test, and the State

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[9] *Hamilton v. State,* 300 S.W.3d 14, 21-22 (Tex. App.—San Antonio 2009, pet. ref'd) ("[W]e hold [a forensic scientist lab supervisor's] opinion, based on data generated by scientific instruments operated by other scientists, did not violate the Confrontation Clause."); *see also United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007) (rejecting an argument claiming the trial court should have excluded data generated by a gas chromatograph used to test the defendant's blood for alcohol and PCP over an objection the data was testimonial).

[10] *Id*.

[11] *Id*.

[12] *Id*.

did not call the individual who used the equipment to conduct the test during the defendant's trial.[13] In resolving whether the expert should be allowed to testify, the *Paredes* Court explained the expert's opinion did not violate the Confrontation Clause because the expert based her testimony on the opinion she formed from her independent review of data generated by a machine.[14] The *Paredes* Court concluded the expert could form an opinion, which was admissible at trial, using lab data generated by a machine even though that data had not been first discovered first by the expert who used the machine that did the test performed in the lab.[15] Concluding that the opinion of the expert who testified did not inject the individual who did the test into the evidence the State asked the jury to consider, the *Paredes* Court held the trial court did not abuse its discretion by allowing the expert to testify when the expert "used non-testimonial information—computer generated DNA data—to form an independent, testimonial opinion and [the defendant] was given the opportunity to cross-examine her [at trial]."[16]

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[13] 462 S.W.3d 510, 517-18 (Tex. Crim. App. 2015).

[14] *Id.* at 519 ("[Raw, computer-generated data is] not the functional equivalent of live, in-court testimony because [it] did not come from a witness capable of being cross-examined. [The data] came from a computer.").

[15] *Id*.

[16] *Id.* at 549.

In Gore's case, the record shows the trial court conducted a hearing outside the presence of the jury and concluded Yaklin intended to base her opinions in the trial on the raw data Brown gathered from the gas chromatograph, not from Brown's report about the data. When Yaklin then testified before the jury, the State questioned her about the statements Brown put in her report. Also, the State never offered Brown's report as evidence in Gore's case. Last, Gore examined Yaklin about a "blip" that Brown noted in her report, but the State did not question Yaklin about that "blip" before Gore did so in her trial.

In her brief, Gore relies on *Bullcoming* and *Burch* to argue the trial court violated her Sixth Amendment rights by allowing the State to call Yaklin in Gore's trial. But the record shows the opinions the State elicited from Yaklin depended on Yaklin's expertise based on her review of the raw data generated by the machine used to test Gore's blood. The record simply does not show the State attempted to use Yaklin to testify as a surrogate for Brown and through Yaklin, introduce the statements in Brown's report into the evidence admitted before the jury during Gore's trial.

We conclude *Bullcoming* and *Burch*, the cases Gore relies on in her brief, are distinguishable from the facts in the record of Gore's trial.[17] In those cases, the trial court in each case admitted a lab report written by an individual who did not testify in the defendant's trial. By admitting the lab reports and testimony from the State's expert about the opinions the individuals reached in their report when those same individuals did not testify in the trials, both reviewing courts found the trial courts erred by allowing the testimonial statements of individuals who did not testify to be introduced through the expert the State called since doing so violated the Confrontation Clause.[18]

In Gore's case, Yaklin relied on raw data generated by the equipment Brown used when she tested Gore's blood. The State never offered Brown's report or Brown's opinions into evidence during Gore's trial. Instead, Yaklin testified she was basing the opinions she intended to express on her independent review of the raw data generated by equipment used in the lab. The trial court was entitled to accept the testimony Yaklin provided in the hearing the trial court conducted on Gore's objections, and the court had the discretion to admit Yaklin's testimony about the opinions Yaklin expressed in the trial. We conclude the raw data Yaklin relied on

[17] *Bullcoming*, 564 U.S. at 655-56; *Burch v. State*, 401 S.W.3d 634, 635-36 (Tex. Crim. App. 2013).

[18] *Id*.

was not testimonial, so admitting Yaklin's opinion based on Yaklin's review of the raw data from the gas chromatograph Brown used to test Gore's blood did not violate Gore's rights under the Confrontation Clause.

In her brief, Gore raises one other complaint, suggesting the trial court violated her rights by failing to require the State to call Brown so she could cross-examine Brown about a note Brown placed in her report. The note concerned a "blip" Brown reported in the testing relevant to qualifying the gas chromatographs used in the lab. But Gore is the one who asked Yaklin about the "blip" Brown noted in her report. Gore could have called Brown had she wanted to examine her about her report. Thus, Gore's complaint that Yaklin testified about the "blip" Brown noted in her report is testimony Gore asked Yaklin about in questioning her about the "blip." Before Gore brought up the "blip," the prosecutor had not mentioned it or asked Yaklin to address the significance of the "blip" in Brown's report.

We conclude that Gore—not the State—is responsible for the fact the jury heard Yaklin testify about the "blip" in Brown's report. Because Gore invited that testimony, she is not entitled to another trial because the testimony about the "blip" is testimony she invited from Yaklin during her trial.[19]

[19] *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999) ("Just as the law of entrapment estops the State from making an offense of conduct that it induced,

Conclusion

We conclude the arguments in Gore's brief lack merit. As a result, the trial court's judgment is

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on January 28, 2020
Opinion Delivered July 15, 2020
Publish

Before Kreger, Horton and Johnson, JJ.

the law of invited error estops a party from making an appellate error of an action it induced.").