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FOURTH DIVISION
January 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 1 CR 22735
)	
JOSEPH BYRD,)	Honorable
)	Daniel P. Darcy,
Defendant-Appellant.)	Judge Presiding.

____ JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

HELD: Defendant's right to confront witnesses against him was not violated when forensics expert was allowed to testify regarding DNA evidence even though that expert did not perform the DNA tests herself.

Following a jury trial, defendant, Joseph Byrd, was found guilty of home invasion and attempted aggravated criminal sexual assault. Defendant was sentenced to consecutive terms of 30 years for the home invasion and 15 years for attempted aggravated criminal sexual assault. On appeal, defendant contends that: (1) his right to confront witnesses against him was violated; (2) the trial court erred in deferring a ruling upon defendant's motion *in limine*; (3) the

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imposition of consecutive sentences was in error; and (4) the trial court improperly entered a monetary judgment against defendant. We affirm.

On September 29, 2010, our supreme court denied defendant's petition for leave to appeal but issued a supervisory order directing this court to vacate and reconsider its judgment in light of People v. Williams, No. 107550 (July 15, 2010) and People v. Patrick, 233 Ill. 2d 62 (2009). Williams and Patrick are respectively relevant to defendant's first and second contentions. In accordance with the supervisory order, we vacate our original judgment in People v. Byrd, No. 1-05-1081 (2008) (unpublished order under Supreme Court Rule 23), and consider whether the decisions in Williams and Patrick require a different result. We conclude it does not.

The victim, S.O., testified that on September 7, 2001, at 4 a.m., she was awakened by a loud thud and found a man standing in the middle of her room. S.O. testified that the man attacked her in her bed and hit her about her face and head. The man pinned her down with his hand around her throat and threatened to kill her. S.O. testified that the man attempted to pull her shorts off and open her legs, and that she felt his penis on her legs. During the struggle, S.O. bit the man on the thumb, and the struggle continued on the floor until S.O. broke free and ran to a panic room. S.O. struggled to keep the man out of the panic room until she was able to call 911, and at some point thereafter the man fled. The police arrived and escorted S.O. out of the apartment building. As she walked onto the sidewalk in front of the building, she saw a man sitting in the rear seat of a police car and identified the man as her attacker. S.O. identified defendant at trial as the man who had attacked her.

Officer David Grant testified that he responded to a call at S.O.'s apartment where he was met by Officer Patrick Aylward, who directed his attention to defendant walking westbound on the next corner. Officer Grant noticed that defendant was not wearing a shirt and had sweat glistening from his body. Defendant was also bleeding from his thumb at that time. Officer Grant pursued defendant while Officer Aylward remained at the apartment.

The State also entered into evidence photos of items defendant allegedly left inside S.O.'s apartment. A camera was left on the stairs, clothes were in the library, shoes were near the back door, and a cigarette lighter was in the vestibule leading to S.O.'s apartment. Forensic investigators collected DNA samples from S.O. and her apartment. The samples were sent to Orchid Cellmark, a private DNA lab. Cellmark performs DNA tests in a process in which different people in the lab participate in various aspects during the DNA extraction and analysis processes. Dr. Jennifer Reynolds, a lab director and senior manager of forensics for Cellmark, testified at trial as a technical reviewer. Dr. Reynolds did not actually perform any of the testing, but instead gathered the data generated and interpreted that data to reach a conclusion. Dr. Reynold testified that based on her examination of the data, her opinion was that the samples tested contained DNA that matched defendant.

Assistant State's Attorney Mike Clarke testified that defendant gave him an oral and written statement indicating defendant's role in the attack. In his statement, defendant stated he was walking through an alley looking for money and food. He saw a back door open and entered the residence looking for items he could sell. Defendant removed his shoes so that he would not make any noise and had removed his clothing because he had previously had a bowel movement

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in his clothes and wanted to find some clean replacements. Defendant stated that when S.O. awoke, he struggled with her to keep her quiet but that at some point during the struggle he became sexually aroused. He stated that he tried to pry S.O.'s legs open and hit her, and also that she bit his left thumb. Defendant stated that he kissed S.O. in the mouth and rubbed his penis on her waist area. Defendant stated that after S.O. escaped and hid in a closet, he exited the residence through the back door, leaving his shoes and shirt in the residence.

The jury found defendant guilty of attempted aggravated criminal sexual assault and home invasion. The trial court imposed consecutive sentences on defendant pursuant to 730 ILCS 5/5-8-4 (West 2000), finding that there was a substantial change in the criminal objective and consecutive sentences were necessary to protect the public.

On appeal, defendant first contends that his right to confront witnesses against him was violated when the trial court allowed Dr. Reynolds to testify regarding the DNA evidence. Defendant argues that because Dr. Reynolds did not actually perform the DNA tests, he was deprived of his right to cross-examine those who did perform the tests. We disagree.

The Sixth Amendment's Confrontation Clause 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. The Supreme Court held that the confrontation clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203, 124 S. Ct. 1354, 1374 (2004). While the Court did not specify what constituted a "testimonial" statement, it stated that the

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confrontation clause did not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. Crawford, 541 U.S. at 59 n. 9, 158 L. Ed. 2d at 191, 124 S. Ct. at 1370.

In People v. Williams, No. 107550 (July 15, 2010), our supreme court addressed the precise issue which defendant raises here. In Williams, a crime lab analyst opined that the defendant's DNA profile matched the semen from the victim's vaginal swab. While testing on the vaginal swab was conducted by Cellmark, no Cellmark analyst testified at trial. Instead, the analyst testified about the analysis conducted at Cellmark based on her review of Cellmark's paperwork. She also testified that Cellmark's testing and analysis methods were generally accepted in the scientific community. The supreme court rejected the defendant's argument that Cellmark's report was inadmissible hearsay and concluded that the report was offered to provide a basis for the analyst's opinion and not offered for the truth of the matter asserted. Williams, No. 107550, slip op. at 18-19. Because of this, the supreme court concluded that the confrontation clause was not violated. Williams, No. 107550, slip op. at 14.

Here, Dr. Reynolds was accepted as an expert in forensic human DNA analysis. She testified as to the process used by Cellmark in analyzing DNA and that the methodology has been generally accepted in the scientific community as a method of analyzing DNA. Finally, although she admitted that she did not perform any physical testing on the samples, she stated she had conducted a review of all the resultant data related to the case and independently drew her own conclusions with respect to that data. As in Williams, we find that Dr. Reynolds' testimony regarding the Cellmark report she relied on was not offered to prove the truth of Cellmark's

findings. Instead, Dr. Reynolds testimony regarding the report was made only to provide a basis for her own independent opinion on the report itself. Accordingly, we see no reason to depart from our supreme court's holding in Williams and we find that defendant's right to confront witnesses against him was not violated.

Defendant next contends that the trial court erred in deferring ruling upon his motion *in limine* which sought to exclude evidence of his prior convictions for impeachment purposes.

Our supreme court has held "that a trial court's failure to rule on a motion *in limine* on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion." People v. Patrick, 233 Ill. 2d 62, 73 (2009). However, Patrick also held that if a defendant chose not to testify at trial, the issue of the trial court's refusal to rule on a motion *in limine* seeking to bar the use of prior convictions for impeachment is not preserved for review. Patrick, 233 Ill. 2d at 77-78. Defendant, in the instant appeal, did not testify at trial and therefore any argument that he was harmed from any alleged error here is speculative.

Accordingly, defendant failed to properly preserve his right to appellate review of this issue.

Defendant next contends that the trial court erred by imposing consecutive sentences. We disagree.

Pursuant to section 5-8-4(b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 2004)), the trial court had the discretion to impose a consecutive sentence if the crimes were not committed in a single course of conduct or there was a substantial change in defendant's criminal objective and the trial court determine consecutive sentences were necessary to protect the public. Here, the evidence clearly shows that the defendant's criminal objective

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substantially changed. In defendant's statement, he stated he entered the residence looking for objects to take so that he could sell them. Clearly, defendant's initial objective was to steal objects from the victim's residence. Defendant then stated that he began struggling with the victim to keep her quiet and at some point he became sexually aroused. Defendant then tried to pry the victim's legs apart and rubbed his penis on her as he ejaculated. Therefore, the record shows that defendant's criminal objective substantially from stealing objects from the residence to sexual assault. Because the intent to sexually assault the victim formed after defendant had committed the home invasion, we find the imposition of consecutive sentences was proper.

Lastly, defendant contends that the trial court improperly entered the monetary judgment against him.

The trial court imposed a \$4 fine against defendant pursuant to section 5-9-1(c-9) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c-9) (West 2004)). The effective date of the applicable statute section was June 20, 2003. Defendant, however, committed his crime on September 8, 2001. Accordingly, we vacate the imposition of the \$4 fine.

For the reasons stated above, we vacate the fine imposed on defendant but affirm in all other aspects the judgment of the circuit court of Cook County.

Affirmed in part, vacated in part.