FIFTH DIVISION
June 7, 2013

No. 1-07-3372

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05 CR 4414
	)	
LORELL JOHNSON,	)	
	)	Honorable
Defendant-Appellant.	)	Rosemary Higgins-Grant,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Palmer concurred in the judgment.

O R D E R

¶ 1 HELD: (1) Where a DNA profile was not prepared for the primary purpose of targeting defendant or for the primary purpose of creating evidence for use at trial, the report was not testimonial in nature and did not implicate the confrontation clause of sixth amendment; and (2) Where the expert who testified to the contents of the DNA profile extensively detailed the laboratory accreditations, noted that proper procedures were followed in completing the profile, and based her opinion on her review of the case file, there was no foundational error.

¶ 2 This case comes before this court for the third time based on a supervisory order from the Illinois Supreme Court directing us to vacate and reconsider our previous decision in *People v.*

Johnson, 406 Ill. App. 3d 114 (2010), in light of *People v. Leach*, 2012 IL 111534, and to determine whether a different result is warranted. See *People v. Johnson*, 2013 IL 111630.

¶ 3 Following a jury trial which included deoxyribonucleic acid (DNA) evidence, defendant Lorell Johnson was found guilty of aggravated criminal sexual assault and not guilty of aggravated kidnaping. The trial court sentenced him to a term of 30 years to run consecutive to defendant's prior conviction. Defendant appeals, arguing that the admission of inculpatory DNA evidence violated his sixth amendment confrontation rights and that the trial court erred in admitting this DNA evidence because a sufficient foundation was not established for the forensic scientist's opinion testimony. We affirm.

¶ 4 The following evidence was admitted at defendant's jury trial. Shortly after midnight on July 12, 2003, the victim, F.F., was standing in line at Maxwell's, a neighborhood hot dog stand on the south side of Chicago. At the time, F.F. was addicted to drugs. Defendant approached F.F. as she stood in line. F.F. had never seen defendant before that moment. F.F. and defendant spoke. He told her that he had drugs at his house. F.F. got out of the line and followed defendant to get the drugs. She followed him down an alley into the backyard of an abandoned building. F.F. wanted to leave, but defendant grabbed her body and dragged her up the stairs of the building to the top floor. F.F. yelled, "stop," and "no," but defendant continued to carry her up the stairs. F.F. scraped her arm on the railing while trying to reach for it.

¶ 5 When they reached the top of the stairs, defendant pulled F.F. into a dark room and threw her against the wall. F.F. hit her head on a low part of the ceiling. He pushed her against the window, put his hand around her throat and told her to be quiet or he would throw her out the

window. Defendant pulled down F.F.'s pants and then his own pants. He then had vaginal intercourse with F.F. F.F. described the assault as violent and that he "jammed" his penis into her vagina. Defendant removed his penis from F.F.'s vagina, turned to the side and ejaculated on the floor.

¶ 6 Defendant then pulled up his pants and ran down the stairs. F.F. waited until she could no longer hear defendant on the stairs. She left and went to the nearest pay phone at 51st Street and Ashland to call the police. She saw defendant running across the street and pointed him out to a group of nearby men, who then chased defendant. When the police arrived at F.F.'s location, she was incoherent, screaming and pointing in several directions. A police officer suggested she seek treatment for the scrape on her arm that was bleeding. F.F. refused and tried to tell the police that defendant was running across the street, but the officer did not give chase and the group of men did not catch him. F.F. led the police officer to the abandoned building and told him that defendant had ejaculated on the floor. The officer called for an evidence technician to come to the scene and recover the stain. The stain was recovered on two swabs and was later submitted for biological testing. F.F. became frustrated with the police officer because she felt he was not trying to catch defendant, so she left the scene and stayed with a friend for several days.

¶ 7 In 2004, F.F. entered a drug rehabilitation facility. In January 2005, a detective located F.F. at the facility. The detective spoke with F.F. about the sexual assault. After receiving information from the Illinois State Police crime lab (ISP lab), defendant was arrested. F.F. viewed a lineup at Area One and immediately identified defendant as the man who sexually

assaulted her.

¶ 8 During the trial, defendant's attorney filed a "Motion *in limine* to Exclude Testimony of Reviewing Expert as Lacking Foundation and Improper Hearsay." The motion asserted that the State would seek to introduce DNA evidence through an analyst, Charlotte Word, who had reviewed the file, but did not participate in any of the actual testing. Defense counsel argued that "[i]ntroduction of this evidence solely through this witness fails to lay a proper foundation for the testing conditions and procedures" and "violates defendant's rights to confrontation" under the sixth amendment and article I, section 8, of the Illinois Constitution. The trial court heard argument on the motion and denied the motion. The court held that the testimony about the DNA profile was admissible if it was the sort of information reasonably relied on by experts in the field.

¶ 9 Charlotte Word testified as a DNA analysis expert. Defendant made no objection to her qualification as an expert. She stated that she worked at Orchid Cellmark in Germantown, Maryland, from 1990 to 2005, when the facility closed. In 2004, Cellmark had a contract with the ISP lab to complete overflow testing. Cellmark was accredited by the American Association of Blood Banks and by the American Society of Crime Laboratory Directors. Word worked as a laboratory director in 2004.

¶ 10 Word stated that she did not participate in the testing of the swab recovered from the crime scene and the preparation of a DNA profile, but she was able to testify as to the results. Her testimony was based on her review of the notes and documentation kept in the lab folder. She said that through her review of the case file, she was able to determine that the proper

procedures were followed with the appropriate control tests. Word explained that polymerase chain reaction (PCR) testing, commonly accepted in the scientific community, was conducted on the swab. DNA was extracted, profiled, and the results were documented in a report. The results showed a single male donor of the semen from the swab. Based on her independent review, Word concluded that the results were correct. She observed no discrepancies in the case folder.

¶ 11 The results and the swab were sent to the ISP lab. Following defendant's arrest, a buccal swab was taken from defendant and sent to the ISP lab for testing. ISP lab forensic scientist Brian Schoon testified at trial that he received defendant's buccal swab in June 2005. He performed tests and prepared a DNA profile from the buccal swab. Schoon compared defendant's DNA profile with the single male donor DNA profile obtained from the swab and concluded that the profiles matched. Schoon conducted a statistical analysis and found that the DNA profile from the swab would be expected to occur in 1 in 710 quadrillion black, 1 in 550 quadrillion white or 1 in 430 quadrillion Hispanic individuals. Schoon stated all of his results and conclusions were to a reasonable degree of scientific certainty.

¶ 12 Defendant did not offer any evidence in his case-in-chief. Following deliberations, the jury found defendant guilty of aggravated criminal sexual assault and not guilty of aggravated kidnaping. Defendant filed a motion for a new trial, which included claims that the trial court erred in overruling defense counsel's objections for foundation and confrontation to the testimony about the Cellmark DNA profile. The trial court denied the motion and subsequently sentenced defendant to 30 years in prison to be served consecutive to his sentence for a prior conviction.

¶ 13 This appeal followed.

¶ 14 On appeal, defendant argues that the DNA profile prepared by Cellmark was inadmissible because (1) it was testimonial hearsay and violated his rights under the confrontation clause because defendant did not have an opportunity to cross-examine any of the analysts who prepared the profile, and (2) the State failed to lay a proper foundation for this evidence because there was no evidence presented that the equipment used to prepare the profile was adequately calibrated and functioning properly.

¶ 15 Initially, the State points out that defendant did not raise any objection that Schoon's testimony violated his confrontation rights in his motion *in limine* nor in his motion for a new trial, and therefore, any error in Schoon's testimony is forfeited. To preserve an issue for review, defendant must both object at trial and in a written posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). If a defendant fails to satisfy either prong of this test, his challenge is considered waived on appeal. *Id*. at 470. "This rule is particularly appropriate when a defendant argues that the State failed to lay the proper technical foundation for the admission of evidence, and a defendant's lack of a timely and specific objection deprives the State of the opportunity to correct any deficiency in the foundational proof at the trial level." *Id*. at 470. Thus, any issue regarding Schoon's testimony is forfeited.

¶ 16 However, in his reply brief, defendant asserts that should we find that he forfeited any error in respect to Schoon's testimony, then we should review that issue for plain error. Defendant also contends that he may raise plain error for the first time in his reply brief, despite the

fact that Supreme Court Rule 341(h)(7) holds that "[p]oints not argued are waived and shall not be raised in the reply brief." 210 Ill. 2d R. 341(h)(7). Defendant cites to the supreme court's decision in *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000), in which the supreme court found that it was not precluded from reviewing the defendant's plain error argument despite her failure to raise it in her opening brief.

¶ 17 Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S.Ct. R. 615(a) (eff. Jan. 1, 1967). "Under the plain error rule, issues not properly preserved may be considered by a reviewing court under two limited circumstances: (1) where the evidence is closely balanced, so as to preclude argument that an innocent person was wrongfully convicted; or (2) where the alleged error is so substantial that it affected the fundamental fairness of the proceeding, and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Hall*, 194 Ill. 2d 305, 335 (2000). "However, before invoking the plain error exception, 'it is appropriate to determine whether error occurred at all,' because without error, there can be no plain error." *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007) (quoting *People v. Wade*, 131 Ill. 2d 370, 376 (1989)). Therefore, we will review the issue to determine if there was any error before considering it under plain error.

¶ 18 The sixth amendment to the United States Constitution 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. This part of the sixth amendment is known as the

Confrontation Clause and applies to the states through the fourteenth amendment. *People v. Stechly*, 225 Ill. 2d 246, 264 (2007). In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford,* 541 U.S. at 68-69. "However, the *Crawford* Court explicitly declined to define what exactly makes a statement 'testimonial.' " *Stechly*, 225 Ill. 2d at 266; see *Crawford*, 541 U.S. at 68. The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). But the *Crawford* Court pointed out that "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985)." *Crawford*, 541 U.S. at 59 n.9. Here, defendant asserts that the DNA profile prepared by Cellmark was testimonial hearsay in violation of the confrontation clause since no one who worked on its analysis testified at his trial.

¶ 19 In *People v. Williams*, 238 Ill. 2d 125 (2010), the Illinois Supreme Court considered the issue raised by defendant. In that case, the defendant was convicted of aggravated criminal sexual assault, aggravated kidnaping, and aggravated robbery. At the bench trial, a forensic scientist with the ISP lab testified that the victim's sexual assault kit was sent to Cellmark for analysis and a DNA profile was prepared. The scientist compared the Cellmark DNA profile with the defendant's DNA profile and concluded that they were a match. The scientist admitted that she did not perform any of the physical testing on the samples herself. *Williams*, 238 Ill. 2d

at 131. On appeal, the supreme court concluded that the expert's testimony about the Cellmark report was not admitted for the truth of the matter asserted, but instead was admitted to establish the underlying facts and data used to reach her expert opinion in the defendant's case. *Id*. at 145. The supreme court held that the Cellmark report was not used to show the truth of the matter asserted and was not hearsay. *Id*. at 147.

¶ 20 The United States Supreme Court affirmed the decision of the Illinois Supreme Court in *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221 (2012). There was no majority opinion. The plurality, written by Justice Alito, and joined by Chief Justice Roberts and Justices Kennedy and Breyer, first found that "out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." *Id*. at ___, 132 S. Ct. at 2228. The plurality further held that the Cellmark report was nontestimonial and admissible under the confrontation clause because the report was not prepared for the primary purpose of accusing a targeted individual or to create evidence at trial. *Id*. at ___, 132 S. Ct. at 2243. The plurality further stated:

> "In identifying the primary purpose of an out-of-court statement, we apply an objective test. [Citation.] We look for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances. [Citation.]
>
> Here, the primary purpose of the Cellmark report, viewed

> objectively, was not to accuse petitioner or to create evidence for use at trial. When the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner who was neither in custody nor under suspicion at that time. Similarly, no one at Cellmark could have possibly known that the profile that it produced would turn out to inculpate petitioner - or for that matter anyone else whose DNA profile was in a law enforcement database." *Williams*, 567 U.S. at ___, 132 S. Ct. at 2243-44.

¶ 21 In his concurrence, Justice Thomas disagreed with the plurality's finding that the statements in the Cellmark report were not introduced to prove the truth of the matter asserted, finding "no plausible reason for the introduction of Cellmark's statements other than to establish their truth." *Id*. at ___, 132 S. Ct. at 2256 (Thomas, J., concurring in judgment). However, Justice Thomas agreed that the statements in the Cellmark report did not violate the confrontation clause because they "lacked the requisite 'formality and solemnity'" to be considered testimonial." *Id*. at ___, 132 S. Ct. at 2255 (Thomas, J., concurring in judgment) (citing *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143, 1167 (2011) (Thomas, J., concurring in judgment).

¶ 22 The dissent, written by Justice Kagan and joined by Justices Scalia, Ginsburg, and Sotomayor, first concluded that the statements in the Cellmark report were introduced to prove the truth of the matter asserted. *Williams*, 567 U.S. at ___, 132 S. Ct. at 2269 (Kagan, J.,

dissenting, joined by Scalia, Ginsburg, and Sotomayor, JJ.). The dissent also found the statements in the report were testimonial because the report was made for the primary purpose of "establishing 'past events potentially relevant to later criminal prosecution' - in other words, for the purpose of providing evidence." *Id*. at ___, 132 S. Ct. at 2273 (Kagan, J., dissenting) (citing *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

¶ 23 The Supreme Court's decision in *Williams* was considered by the Illinois Supreme Court in *Leach*, 2012 IL 111534. There, the defendant claimed that the admission of expert testimony from Dr. Arangelovich about the findings of an autopsy report that Arangelovich did not complete was a violation of the confrontation clause because the findings were being admitted for their truth. *Leach*, 2012 IL 111534, ¶ 20. The defendant also argued that the admission of the autopsy report itself violated the confrontation clause because he did not have an opportunity to cross-examine the doctor who completed the report. *Id*. The Illinois Supreme Court first found that the autopsy report was admissible evidence under a hearsay exception or state statute and then turned to the question of whether the report was testimonial hearsay. *Id*. ¶¶ 74-77.

¶ 24 The court discussed the United States Supreme Court cases which have considered the scope of the confrontation clause, beginning with *Crawford*. *Leach*, 2012 IL 111534, ¶ 77-121. The court noted that, in *Davis*, the Supreme Court distinguished between testimonial and nontestimonial statements, finding that statements to the police were testimonial in nature if the " 'primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' " *Leach*, 2012 IL App (1st) 111534, ¶ 82 (quoting *Davis*, 547 U.S. at 822). The *Leach* court then compared the definitions of the primary purpose test used by the

Williams plurality and the *Williams* dissent. *Leach*, 2012 IL App (1st) 111534 ¶¶ 118, 121. The court concluded that under either definition of the primary purpose test, "the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case." *Id*. ¶ 122

¶ 25 More recently, another division of this court considered whether DNA reports are testimonial statements in violation of the confrontation clause in *Negron*, 2012 IL App (1st) 101194, ¶ 1. The *Negron* court first discussed *Williams* and concluded that the central holding was that "the confrontation clause of the sixth amendment was not implicated by expert opinion testimony from a forensic DNA analyst who did not personally conduct the DNA analysis." *Negron*, 2012 IL App (1st) 101194. The court noted that it "glean[ed] the central holding of *Williams* from the narrow grounds on which Justice Thomas agreed with the plurality." *Id*. ¶ 48. The court then summarized *Leach* and noted that *Leach* involved an autopsy report rather than a DNA analysis report. *Id*. ¶ 56. Accordingly, the *Negron* court found the narrow holding from the majority in *Williams*,"that the admission of the expert testimony of an expert who did not perform the DNA analysis in a report does not violate the confrontation clause," to be applicable in the *Negron* case. *Negron*, 2012 IL App (1st) 101194.

¶ 26 The court observed that the blood sample used for the DNA profile was collected and analyzed by Cellmark before the defendant was under suspicion and therefore "the laboratory analysts at Cellmark had no idea what the results would be" so the report was not created for the primary purpose of targeting the defendant. *Id*. ¶ 59. The court further explained that the

Williams plurality had considered both formulations of the primary purpose test, and determined that the DNA analysis report was not testimonial evidence under either formulation. Ultimately, the court concluded:

> "As the Illinois Supreme Court has applied both formulations of the primary purpose test in *Leach*, under this precedent, we modify our opinion to note that in the case before us, the DNA report was '(1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case.' [Citation.]
>
> We repeat our previous discussion of the nature of DNA reports. The science of DNA testing has evolved to the point where it can statistically identify or exclude a suspect and courts have widely accepted the science as reliable. See *In re Jessica M.*, 399 Ill. App. 3d 730, 743-48 (2010) (describing the evolution of DNA analysis, including the statistical aspect of DNA profiling). The testing can include or *exclude* suspects. *** The science is such that it buttresses the plurality's view in *Williams*.
>
> Thus, it appears that the instant case would satisfy both the *Williams* plurality's primary purpose test and the *Williams* dissent's primary purpose test. Although the Illinois Supreme Court applied both the *Williams* plurality and dissent's primary purpose tests

> regarding whether a report is testimonial in *Leach* to an autopsy report, it has not yet done so for DNA reports. As this area of the law is still unclear, we ultimately rely on only the narrow majority holding of *Williams* in holding that the expert testimony regarding the DNA report in this case was admissible and did not violate the confrontation clause." (Emphasis in original.) *Negron*, 2012 IL App (1st) 101194, ¶¶ 59-61.

¶ 27 We see no reason to depart from the reasoning in *Williams* or *Negron* and find that the DNA report in the present case was not testimonial hearsay under either definition of the primary purpose test. The semen sample was recovered from the floor of the building where F.F. was assaulted. The sample was analyzed using PCR testing, commonly accepted in the scientific community, and a DNA profile was generated before defendant was under suspicion. Moreover, at the time the sample was analyzed, no one at Cellmark could have known the sample would eventually inculpate defendant. As the Supreme Court noted in *Williams*, "there was no 'prospect of fabrication' and no incentive to produce anything other than a scientifically sound and reliable profile." *Williams*, 567 U.S. at ___, 132 S. Ct. at 2244 (quoting *Bryant*, 562 U.S. at ___, 131 S. Ct. at 1157). Here, as in *Williams* and *Negron*, the DNA analysis report was neither prepared for the primary purpose of targeting defendant, nor for the primary purpose of creating evidence. As the Cellmark report was not testimonial in nature, we find the testimony of Word and Schoon about the contents of the Cellmark report similarly does not violate the confrontation clause of the sixth amendment. Under these circumstances, we find no confrontation clause violation and,

accordingly, we find no error. The defendant's claim as to Schoon is forfeited, and as to Word, defendant's argument fails.

¶ 28 Next, defendant contends that the State failed to establish a proper foundation for admission of the Cellmark DNA profile because there was no evidence that the equipment used to prepare the profile was adequately calibrated and functioning properly.

¶ 29 In *Wilson v. Clark*, the Illinois Supreme Court adopted Rule 703 of the Federal Rules of Evidence, allowing an expert to give his opinion based on facts not in evidence if those facts are " 'of a type reasonably relied upon by experts in the particular field.' " *Wilson v. Clark*, 84 Ill. 2d 186, 193 (1981) (quoting Fed. R. Evid. 703). However, where the expert testimony is based upon an electronic or mechanical device, the expert must provide some foundational proof that the device was functioning properly at the time it was used. *People v. Raney*, 324 Ill. App. 3d 703, 710 (2001); see also *People v. Bynum*, 257 Ill. App. 3d 502 (1994). In *Raney*, the defendant contended that the State failed to establish a proper foundation for the admission of scientific results from the gas chromatography mass spectrometer (GCMS) machine. The reviewing court found that the record contained no evidence regarding whether the GCMS machine was functioning properly at the time it was used to analyze the substance. *Raney*, 324 Ill. App. 3d at 710. The *Raney* court did recognize that "[i]t may not be feasible for each expert to personally test the instrument relied upon for purposes of determining what is a suspected controlled substance." *Id*. at 710.

¶ 30 This issue was also resolved in *People v.Williams*, 238 Ill. 2d 125, *aff'd*, *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221. In that case, no Cellmark representative testified, but the

DNA expert from the ISP lab stated that Cellmark was an accredited laboratory and was required to follow specified guidelines in order to perform DNA analysis. The expert "maintained that Cellmark necessarily met the threshold of proper DNA analysis because Cellmark was an accredited laboratory and followed guidelines that she had personally developed." Williams, 238 Ill. 2d at 140. The supreme court distinguished between the testing of narcotics, as done in *Raney*, and the analysis done in the *Williams* case. The court found that "the testing of narcotics using a GCMS machine is not comparable to the scientific process at issue in this case." *Id*. The expert in the defendant's case did not "regurgitate results generated by a machine," but instead conducted her own independent examination of the data related to the samples of genetic material, including items from Cellmark and from the ISP crime lab. *Id*.

¶ 31 The *Williams* court further noted that the burden is on the adverse party to challenge the facts underlying the opinion on cross-examination. *Id*. Therefore, "the issue of [the expert's] reliance on Cellmark's report went to the weight of her opinion and not its admissibility." *Id*. at 141 (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 n.1 (2009) (stating that it was not the case that "anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case")).

¶ 32 This case presents a stronger foundational grounds as a Cellmark director testified at defendant's trial. Word testified as a DNA expert, without objection, and she worked at Cellmark as a laboratory director. She testified extensively about Cellmark's accreditations and the thorough review required to attain such accreditations. She stated that the proper procedure

mandated specific notations and the subject case file indicated that those procedures were followed. Her opinion was based on this review of the case file. Under *Williams*, any challenge to Word's testimony went to its weight, not its admissibility. Therefore, we find no foundational error in this case.

¶ 33 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 34 Affirmed.