

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
April 16, 2013

v

TERRY ANTHONY BROWN,  
Defendant-Appellant.

No. 308368  
Wayne Circuit Court  
LC No. 10-012014-FH

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Before: MARKEY, P.J., and TALBOT and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of first-degree home invasion, MCL 750.110a(2), assault with intent to rob while unarmed, MCL 750.88, and aggravated assault, MCL 750.81a. Because defendant was not denied right to confrontation or to the effective assistance of counsel, we affirm.

I. CONFRONTATION CLAUSE

Defendant argues that he was denied his right to confrontation when the trial court admitted the expert testimony of a Michigan State Police Crime Laboratory employee, Andrea Halvorson, regarding tests performed by Bode Technology Group (Bode), an independent laboratory that performed DNA tests on swabs that were outsourced to Bode to help with the state crime lab's backlog. Defendant contends that because Halvorson had no way of knowing whether the proper protocol was followed at Bode or how the end results were achieved, her testimony violated his right to confrontation. Defendant asserts that the prosecution was required to present the testimony of the person who conducted the tests at Bode.

We review de novo questions of constitutional law. *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011). Preserved claims of constitutional error are reviewed "to determine whether they are harmless beyond a reasonable doubt." *People v Dendel (On Second Remand)*, 289 Mich App 445, 475; 797 NW2d 645 (2010).

Both the United States and the Michigan Constitutions guarantee a criminal defendant the right "to be confronted with the witnesses against him." *People v Nunley*, 491 Mich 686, 697; 821 NW2d 642 (2012); see also US Const, Am VI; Const 1963, art 1, § 20. The Confrontation Clause "is aimed at truth-seeking and promoting reliability in criminal trials," *Nunley*, 491 Mich at 697, and "applies only to statements used as substantive evidence," *Fackelman*, 489 Mich at

528. In particular, the Confrontation Clause protects against “hearsay evidence that is ‘testimonial’ in nature.” *Nunley*, 491 Mich at 697-698, quoting *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1345; 158 L Ed 2d 177 (2004). Because “the introduction of out-of-court testimonial statements violates the Confrontation Clause,” such statements “are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant.” *Nunley*, 491 Mich at 698.

The United States Supreme Court has not provided a particular definition regarding what constitutes a “testimonial statement,” see *id.*, but the Court has recognized that “[t]estimony” “is typically ‘a solemn declaration or affirmation made for the purpose of establishing or proving some fact.’” *Crawford*, 541 US at 51 (citation and brackets omitted). “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Id.* Testimonial statements include *ex parte* in-court testimony, affidavits, depositions, custodial examinations, confessions, and prior testimony that the defendant was unable to cross-examine. *Id.* at 51-52.

The circumstances involving the DNA evidence in this case are nearly identical to those in *Williams v Illinois*, \_\_ US \_\_; 132 S Ct 2221; 183 L Ed 2d 89 (2012). In that case, a woman was abducted and raped, and vaginal swabs revealed the presence of semen. *Id.* at 2229. The swabs were sent to Cellmark Diagnostics Laboratory (Cellmark), an independent laboratory, for DNA testing because of the state crime lab’s backlog. Cellmark then sent the Illinois State Police (ISP) “a report containing a male DNA profile produced from the semen taken from those swabs.” Sandra Lambatos, an ISP forensic specialist, conducted a computer search to determine whether the DNA profile matched any of the entries in a DNA database. *Id.* At trial, Lambatos testified that there was a match generated of the DNA profile found in the semen on the vaginal swabs to a DNA profile known to have originated from the defendant. *Id.* at 2236. Defense counsel objected on the basis of the Confrontation Clause, arguing that Lambatos did not personally test or observe the testing of the vaginal swabs and that her testimony relied on the DNA profile that Cellmark produced. *Id.* at 2230. As in the instant case, the trial court determined that defense counsel’s argument went to the weight of the evidence rather than its admissibility. *Id.* at 2231. Also as in this case, the DNA report was not admitted into evidence or shown to the factfinder and Lambatos did not read from the report. *Id.* at 2230.

In the lead opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Breyer, the Court held that Lambatos’s testimony did not violate the Confrontation Clause based on two independent rationales: (1) out-of-court statements related by an expert solely for the purpose of explaining the assumptions on which the expert’s opinion is based are not offered for the truth of the matter asserted, and (2) the statements were not testimonial because the report was generated before a suspect was identified and the purpose of the report was not to obtain evidence to be used against the defendant. *Id.* at 2228. Regarding the first rationale, the Court stated that “[i]t has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts.” *Id.* at 2233. The Court noted that the critical portion of Lambatos’s testimony was her affirmative answer to the question, “[w]as there a computer match generated of the male DNA profile *found in the semen from the vaginal swabs of [the victim]* to a male DNA profile that had been identified as having originated from [the defendant]?” *Id.* at 2236 (emphasis original). The Court opined that the italicized phrase was

not being offered for its truth, but rather, “was a mere premise of the prosecutor’s question, and Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles.” *Id.*

Although this Court is not bound by *Williams* because it was a plurality decision, see *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000), we find Justice Alito’s reasoning in this regard persuasive. Applying that reasoning in this case, we note that any indication of Halvorson that Bode’s DNA profile was generated from a glove recovered near the scene of the crime was merely prefatory to her testimony regarding the comparisons that she personally made between the Bode DNA profile and defendant’s known DNA profile. Halvorson testified that she personally ran a DNA sample from “Terry Spann,” defendant’s alias, and compared that data with the data that she received from Bode. Halvorson maintained that she double-checked the work that she received from Bode; she looked at all the data generated; and she arrived at her own conclusions. Notably, defendant did not challenge the accuracy of Bode’s data in the trial court and does not challenge its accuracy in this Court.<sup>1</sup>

We note that Justice Alito acknowledged the danger that a jury may have viewed Lambatos’s testimony as proof that the Cellmark profile was derived from the vaginal swabs. Justice Alito noted that *Williams* involved a bench trial rather than a jury trial and that the danger did not exist because the trial judge understood that the challenged portion of Lambatos’s testimony was not admissible for its truth. Although this case involved a jury trial rather than a bench trial, the record demonstrates that the danger similarly did not exist. Halvorson testified that she could not guarantee that Bode’s data was free from error or contamination; she did not know the process that Bode followed in reaching its results, and she acknowledged that if there were errors with respect to the Bode results, it could create an error with respect to her conclusions. Further, when the prosecutor asked Halvorson whether she performed an analysis involving a glove, she responded, “I looked at the results generated by the Bode Technology Group for the evidence items. I personally ran the known sample from [defendant.]” Thus, the jury was informed that Halvorson did not personally analyze the glove and could not attest to the accuracy of Bode’s data. Halvorson’s testimony was sufficient to dispel the danger that Justice Alito spoke of in *Williams*.

We also find persuasive Justice Thomas’s concurring opinion in *Williams* to the extent that he concluded that no Confrontation Clause violation occurred “because Cellmark’s statements lacked the requisite ‘formality and solemnity’ to be considered “‘testimonial’” for purposes of the Confrontation Clause.”<sup>2</sup> *Williams*, \_\_ US at \_\_; 132 S Ct at 2255 (THOMAS, J.,

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<sup>1</sup> We note that MRE 703 provides, in relevant part, “[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.” Defendant, however, did not object on the basis of MRE 703 in the trial court and does not seek relief in this Court based on a violation of MRE 703.

<sup>2</sup> Justice Thomas disagreed with the lead opinion’s conclusion that the statements were not offered for the truth of the matter asserted. *Williams*, \_\_ US at \_\_; 132 S Ct at 2256-2257 (THOMAS, J., concurring).

concurring), quoting *Michigan v Bryant*, 562 US \_\_ , \_\_; 131 S Ct 1143, 1167; 179 L Ed 2d 93 (2011) (THOMAS, J., concurring). Justice Thomas opined that “the Confrontation Clause regulates only the use of statements bearing ‘indicia of solemnity.’” *Id.* at 2259, quoting *Davis v Washington*, 547 US 813, 836-837, 840; 126 S Ct 2266; 165 L Ed 2d 224 (2006) (THOMAS, J., concurring in part and dissenting in part). Justice Thomas further opined that “the Confrontation Clause reaches “‘formalized testimonial materials,’” such as depositions, affidavits, and prior testimony, or statements resulting from “‘formalized dialogue,’” such as custodial interrogation.” *Williams*, \_\_ US at \_\_; 132 S Ct at 2260 (THOMAS, J., concurring), quoting *Bryant*, 562 US at \_\_; 131 S Ct at 1167 (THOMAS, J., concurring). Accordingly, Justice Thomas concluded:

Applying these principles, I conclude that Cellmark’s report is not a statement by a “witness” within the meaning of the Confrontation Clause. The Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . The report is signed by two “reviewers,” but they neither purport to have performed the DNA testing nor certify the accuracy of those who did. . . . And, although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.

The Cellmark report is distinguishable from the laboratory reports that we determined were testimonial in *Melendez-Diaz* [*v Massachusetts*], 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 [2009], and in *Bullcoming v New Mexico*, 564 US \_\_; 131 S Ct 2705; 180 L Ed 2d 610 (2011). In *Melendez-Diaz*, the reports in question were “sworn to before a notary public by [the] analysts” who tested a substance for cocaine. 557 US at 308. In *Bullcoming*, the report, though unsworn, included a “Certificate of Analyst” signed by the forensic analyst who tested the defendant’s blood sample. 564 US at \_\_; 131 S Ct at 2710. The analyst “affirmed that ‘[t]he seal of th[e] sample was received intact and broken in the laboratory,’ that ‘the statements in [the analyst’s block of the report] are correct,’ and that he had ‘followed the procedures set out on the reverse of th[e] report.’” *Ibid.*

The dissent<sup>[3]</sup> insists that the *Bullcoming* report and Cellmark’s report are equally formal, separated only by such “minutia” as the fact that Cellmark’s report “is not labeled a ‘certificate.’” [*Williams*, \_\_ US at \_\_; 132 S Ct at 2275-2276 (KAGAN, J., dissenting).] To the contrary, what distinguishes the two is that Cellmark’s report, in substance, certifies nothing. . . . That distinction is constitutionally significant because the scope of the confrontation right is properly limited to extrajudicial statements similar in solemnity to the Marian examination

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<sup>3</sup> Justice Kagan filed a dissenting opinion in *Williams* in which Justices Scalia, Ginsburg and Sotomayor joined.

practices that the Confrontation Clause was designed to prevent. [*Williams*, \_\_\_ US at \_\_; 132 S Ct at 2260 (THOMAS, J., concurring).]

Consistent with Justice Thomas’s analysis, we conclude that Bode’s DNA report was not testimonial within the meaning of the Confrontation Clause because it lacked the requisite formality and solemnity. Unlike an affidavit or deposition, the report contained raw data that lacked the formality of a declaration. As Justice Thomas recognized, the report itself certified nothing. *Id.* Halvorson testified that she reviewed all of Bode’s data to determine whether it was consistent with the testing that Bode claimed it conducted. Halvorson then analyzed the data and reached her own conclusions regarding what it indicated. She also personally ran a known sample from “Terry Spann,” defendant’s alias, and compared the results. Thus, because the Bode DNA report lacked the requisite formality and solemnity to be considered “testimonial,” Halvorson’s testimony regarding the report did not run afoul of defendant’s Confrontation Clause protections.

In summary, we agree with Justice Alito’s lead opinion in *Williams* to the extent that he concluded that out-of-court statements related by an expert solely for the purpose of explaining the assumptions on which the expert’s opinion is based are not offered for the truth of the matter asserted. We also agree with Justice Thomas’s concurring opinion to the extent that he opined that no Confrontation Clause violation occurred because the lab report lacked the requisite formality and solemnity to be considered “testimonial” for purposes of the Confrontation Clause. Given the nearly identical circumstances regarding the DNA evidence in this case and that in *Williams*, and the fact that a majority of Justices concluded in *Williams* that no Confrontation Clause violation occurred, we similarly hold that defendant’s Confrontation Clause rights were not violated.

## II. STANDARD 4 BRIEF

In his Standard 4 Brief, defendant argues he was denied the effective assistance of counsel because defense counsel (1) failed to investigate the nature of the DNA evidence, and (2) failed to retain an expert witness to substantiate or refute Halvorson’s claims. Because defendant failed to preserve his argument for our review by moving for a new trial or *Ginther*<sup>4</sup> hearing, our review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant has been denied his right to the effective assistance of counsel is a question of constitutional law, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In order to establish ineffective assistance of counsel, “the defendant must show that counsel’s performance fell below an objective standard of reasonableness[,] and that, “but for counsel’s deficient performance, a different result would have been reasonably probable.” *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). The defendant must also overcome the strong presumption that counsel’s decisions and performance constituted sound trial strategy.” *Id.* “We will not second-guess matters of strategy or use the benefit of hindsight

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<sup>4</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

when assessing counsel's competence." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defense counsel's failure to adequately investigate a case may constitute ineffective assistance of counsel. See *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Defendant argues that defense counsel "failed to investigate the degree to which the collection of DNA samples were [sic] conducted as well as the veracity of those findings." Defendant does not challenge the accuracy of the DNA evidence, however, and makes no argument that it was erroneous. Thus, he has failed to establish a reasonable probability of a different result but for defense counsel's purportedly insufficient investigation.

Similarly, defendant has failed to establish a likelihood of a different result had defense counsel retained an expert "to verify the veracity of the findings made and reported by Bode Technology Group." Again, defendant does not argue that the DNA data was erroneous. As this Court stated in *Payne* when addressing the same argument, "defendant has merely speculated that an independent expert could have provided favorable testimony." *Payne*, 285 Mich App at 190. Thus, as in *Payne*, defendant has failed to establish that the retention of a DNA expert would have affected the outcome of the lower court proceedings. See *id.*

Affirmed.

/s/ Jane E. Markey  
/s/ Michael J. Talbot  
/s/ Pat M. Donofrio