

[Cite as *State v. Bean*, 2010-Ohio-2494.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23384
vs.	:	T.C. CASE NO. 08-CR-4388
	:	(Criminal Appeal from
RAVEN E. BEAN, JR.	:	Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 4<sup>th</sup> day of June, 2010.

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GRADY, J.:

{¶ 1} Defendant, Raven Bean, Jr., appeals from his conviction  
and sentence for rape.

{¶ 2} On the morning of May 9, 2006, D.E. was traveling by  
bus to the Job Center in Dayton. She got off of the bus at  
Gettysburg Avenue and Third Street. A man she later identified

as Defendant approached her, stuck something sharp in her back, and told her to come with him or he would kill her. Defendant walked D.E. down Gettysburg Avenue to an abandoned warehouse close to the Burger King located at 1110 N. Gettysburg Avenue. There, Defendant repeatedly struck D.E. in the face and forced her to engage in fellatio and vaginal intercourse.

{¶3} After Defendant fled, D.E. walked to the nearby Burger King and asked people there to call the police. Dayton police officers Monica Evans and Jimmy Howard responded to the scene. D.E. reported that she had been sexually assaulted, and she took the officers to the nearby abandoned warehouse where the assault occurred. Officers discovered blood on the floor inside the building as well as inside D.E.'s coat, which was collected as evidence. D.E. was taken to Miami Valley Hospital where abrasions and vaginal tears were observed, a sexual assault examination was conducted and a rape kit prepared. Subsequent DNA testing revealed Defendant's DNA in a dried blood stain found on D.E.'s buttocks. D.E. also identified Defendant from a photospread.

{¶4} Defendant was indicted on one count of forcible rape in violation of R.C. 2907.02(A)(2). Following a jury trial, Defendant was found guilty as charged. The trial court sentenced Defendant to the maximum prison term of ten years.

{¶5} Defendant timely appealed to this court from his

conviction and sentence.

ASSIGNMENT OF ERROR

{¶ 6} "THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED INTO EVIDENCE, OVER OBJECTION, HEARSAY TESTIMONY CONCERNING A REPORT OF THE ANALYSIS AND IDENTIFICATION OF THE DEFENDANT'S DNA, THEREBY DENYING THE DEFENDANT HIS RIGHT OF CROSS EXAMINATION."

{¶ 7} Defendant argues that the trial court erred in permitting testimony from one of the State's witnesses, Amy Rismiller, a forensic scientist at the Miami Valley Regional Crime Lab, about DNA testing that was conducted on some of the evidence in this case by a private laboratory located in North Carolina, LabCorp. Citing *Melendez-Diaz v. Massachusetts* (2009), 557 U.S. \_\_\_\_, 129 S. Ct. 2527, 174 L.Ed.2d 314, Defendant argues that Rismiller's testimony constituted inadmissible hearsay and violated his Sixth Amendment right to confront and cross-examine the witnesses against him.

{¶ 8} In *Melendez-Diaz*, at the defendant's state court drug trial, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to the defendant was cocaine of a certain quantity. The certificates had been sworn before a notary public and were submitted as prima facie evidence of what they asserted. The defendant objected, claiming that *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.

Ct. 1354, 158 L.Ed.2d 277, required the analysts to testify in person. The trial court disagreed, the certificates were admitted, and the defendant was convicted of trafficking in cocaine. The United States Supreme Court held that because the certificates were testimonial in nature, their admission violated the defendant's Sixth Amendment right to confront the witnesses against him. *Melendez-Diaz*, syllabus.

{¶ 9} Rismiller testified concerning DNA evidence that links Defendant to the rape of D.E. Early in her testimony, Rismiller indicated that half the physical evidence from the rape kit was routinely sent to a private laboratory in North Carolina for DNA testing, which then sent its findings to the Miami Valley Regional Crime Lab, along with a C.D. with the DNA data on it. Rismiller testified that, after comparing Defendant's DNA with the report obtained from the North Carolina laboratory, she conducted her own independent analysis of the remaining half of the materials from the rape kit and Defendant's DNA. Her analysis and comparison of the two results she obtained showed a match between DNA obtained from the rape kit and Defendant's DNA.

{¶ 10} Defendant objected multiple times to Rismiller's testimony, both on the basis of a discovery violation, claiming he had not been provided access to the report from the North Carolina lab, and because Defendant was denied the opportunity to

cross-examine the author of the North Carolina lab's report as well as the analyst who performed the actual DNA test at the North Carolina lab. The trial court eventually sustained Defendant's objection, and the prosecutor indicated that further inquiry of Rismiller would be confined to the DNA testing she conducted in this case.

{¶ 11} The decision whether to admit or exclude evidence is a matter entrusted to the trial court's sound discretion and its decision in such matters will not be disturbed on appeal absent an abuse of the court's discretion. *State v. Lundy* (1987), 41 Ohio App.3d 163. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the court. *State v. Adams* (1980), 62 Ohio St.2d 151.

{¶ 12} Defendant argues that the issue in this case is whether Amy Rismiller was the custodian or a witness who is qualified to testify concerning the report prepared by the private laboratory in North Carolina for purposes of the business record exception to the hearsay rule, Evid. R. 803(6), or whether that requirement would mean that someone from the North Carolina lab would have to testify. We need not reach that issue, however.

{¶ 13} After hearing arguments on his constitutional claim, the trial court sustained Defendant's objection and excluded any

substantive evidence concerning findings made by the North Carolina laboratory in its report. That fact clearly distinguishes this case from *Melendez-Diaz*. The only DNA test results that Rismiller testified about were the results obtained from her testing of materials from the rape kit containing DNA and materials containing Defendant's DNA that Rismiller herself conducted at the Miami Valley Regional Crime Lab. She found that Defendant's DNA matched DNA on materials from the rape kit. Accordingly, no inadmissible hearsay was presented by the State, and Defendant, who cross-examined Rismiller, was not denied his Sixth Amendment right to confront the witnesses against him. No abuse of discretion by the trial court has been demonstrated.

{¶ 14} Defendant's assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. concurs.

FROELICH, J. concurring:

{¶ 15} It appears the defendant's timely and correct objections prevented a reversal. After lengthy and sometimes confusing sidebar conferences, the court appropriately limited Rismiller's testimony to her opinion, based on her findings, based on source material for which there was a satisfactory chain of evidence. The prosecutor's opening statement refers only to Rismiller's performing a DNA analysis, as do the closing arguments of both

counsel.

{¶ 16} Even the relevance of the North Carolina report escapes me. Although the North Carolina report may have been kept by the MVRCL as a business record, the introduction of that report, or even reference by Rismiller to facts in that report (which would have to be independently admitted, see, e.g., Evid.R. 703), would have been in violation of the defendant's constitutional confrontation rights. *Melendez-Díaz*, supra.

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