

AFFIRMED and Opinion Filed March 30, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-14-00251-CR

JOSE ADAN RICO, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the Criminal District Court No. 7
Dallas County, Texas
Trial Court Cause No. F-1300619-Y**

MEMORANDUM OPINION

Before Justices Lang, Brown, and O'Neill¹
Opinion by Justice Lang

Jose Adan Rico appeals from a jury conviction for the aggravated sexual assault of twelve year old L.B. In a single issue, Rico asserts his rights under the Confrontation Clause of the United States Constitution were violated when the trial court allowed, over objection, a surrogate analyst to testify about DNA test results that linked Rico to the sexual assault of L.B. and another victim. We affirm the trial court's judgment.

I. BACKGROUND

The assault occurred in L.B.'s home on a school day, after L.B.'s mother and six of her seven siblings had left for the day. According to L.B., she was getting ready for school, and her

¹ The Hon. Michael J. O'Neill, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

infant sister was sleeping, when she heard the front door open. L.B. went to see who it was and found a Hispanic male wearing “a white sweater, . . . white gloves, and jeans.” The man led her into the bathroom where he took duct tape from his sweater pocket, taped her wrists behind her back, and also placed tape around her eyes and mouth. He then assaulted her multiple times. Before leaving, he removed the tape from her wrists and told her to get in the shower.

After the assailant had left, L.B. got her sister and ran to her aunt’s home nearby. The police were called, and, following an interview, L.B. was taken to Children’s Hospital, where she was examined.

L.B. was unable to describe the assailant in detail and never identified him from photographic line-ups. However, after fourteen year old A.S. was sexually assaulted in a similar manner three months later and close to L.B.’s home, police officers were led to Rico. The officers searched Rico’s two cars and found duct tape, gloves, and a white jacket. Two “buccal swabs” were collected from Rico, and based on DNA test results, he was charged with the offense. The DNA test results also linked him to the sexual assault of A.S.

At trial, rather than offering the reports of the DNA testing into evidence through the testimony of the two analysts who conducted the testing and prepared the reports, the State offered them through the analysts’ supervisor. The supervisor testified she signed the reports but did not do any testing herself or observe the analysts as they performed the testing. Rico objected under the Confrontation Clause, but the objection was overruled. The State subsequently called the analysts as witnesses, and Rico cross-examined them without limitation.

Following the jury’s verdict, the trial court assessed a life sentence.

II. APPLICABLE LAW

The Confrontation Clause of the Sixth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, affords a criminal defendant the

right “to be confronted with the witnesses against him.” U.S. CONST. amend. VI; *Burch v. State*, 401 S.W.3d 634, 636 (Tex. Crim. App. 2013). The primary purpose of the Confrontation Clause is to ensure the reliability of the evidence against a defendant by affording the defendant an opportunity to cross-examine the witness, subjecting the witness to testimony under oath and under the threat of a penalty for perjury, and permitting the fact-finder to assess the witness’s credibility by observing the witness’s demeanor as he testifies. *See Maryland v. Craig*, 497 U.S. 836, 845-46 (1990).

A defendant’s right to confrontation is violated when the trial court (1) admits a hearsay statement by a non-testifying declarant, (2) the statement is testimonial, that is, it was “made under circumstances which would lead an objective witness to believe that the statement would be available for use at a later trial,” and (3) the defendant had no prior opportunity to cross-examine the declarant. *See Crawford v. Washington*, 541 U.S. 36, 52, 68 (2004); *Woodall v. State*, 336 S.W.3d 634, 642 (Tex. Crim. App. 2011). A forensic laboratory report, such as a DNA report, created specifically to serve as evidence in a criminal proceeding is a testimonial statement under the Confrontation Clause. *See McWilliams v. State*, 367 S.W.3d 817, 819 (Tex. Crim. App. 2012). Because a violation of the Confrontation Clause is constitutional error, a reviewing court must reverse the judgment unless it determines beyond a reasonable doubt the error did not contribute to the defendant’s conviction or punishment. *See TEX. R. APP. P. 44.2(a); Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010).

III. APPLICATION OF LAW TO FACTS

Rico asserts his confrontation rights were violated when the trial court allowed the supervisor to testify about the DNA test results. In response, the State argues in part that the Confrontation Clause was not offended because the analysts testified at trial. Seemingly recognizing this, Rico argues that the analysts’ testimony, presented after the supervisor’s

“extensive” testimony “about the date and information contained in each report,” failed to “redeem the character of the inadmissible testimonial hearsay which had already been heard and analyzed.” Rico asserts the analysts’ testimony was presented “only . . . to corroborate” the supervisor’s testimony instead of “to explain the procedures these analysts followed or question the data obtained.” Rico, however, was able to cross-examine these witnesses without limitation and could have delved into any area he felt needed to be addressed to ensure the jury, as the factfinder, had all the information it needed to assess the witnesses’ credibility and determine the reliability of the evidence. *See Craig*, 497 U.S. at 845-46.

On the record before us, we cannot conclude Rico’s rights under the Confrontation Clause were violated. *See Kentucky v. Stincer*, 482 U.S. 730, 744 n.17 (1987) (“[I]n determining whether the Confrontation Clause has been violated[,] [t]he appropriate question is whether there has been any interference with the defendant’s opportunity for effective cross-examination.”); *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) (per curiam) (“[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’s testimony.”). We decide his sole issue against him.

IV. CONCLUSION

Having sustained Rico’s sole issue, we affirm the trial court’s judgment.

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/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

JOSE ADAN RICO, Appellant

No. 05-14-00251-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
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Opinion delivered by Justice Lang. Justices
Brown and O'Neill participating.

Based on the Court's opinion of this date, we **AFFIRM** the trial court's judgment.

Judgment entered this 30th day of March, 2016.