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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1199**

State of Minnesota,
Respondent,

vs.

James Antuan Scott,
Appellant.

**Filed June 3, 2019
Affirmed
Bjorkman, Judge**

St. Louis County District Court
File No. 69DU-CR-16-2867

Keith Ellison, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Reyes, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his unlawful-possession-of-a-firearm conviction, arguing that
the admission of DNA test results developed by a non-testifying scientist violated his rights

under the Confrontation Clause. Because any violation is harmless beyond a reasonable doubt, we affirm.

FACTS

In July 2016, law-enforcement officers with the Lake Superior Drug and Violent Crime Task Force were watching a house to execute a search warrant for appellant James Antuan Scott. Two officers saw Scott leave the house carrying a black backpack. Scott walked toward a vehicle parked on the street. After he entered the front-passenger door, the officers approached the vehicle. Scott immediately exited the vehicle, tossing the backpack onto the sidewalk as he walked away from the officers. The officers stopped Scott, discovered a small amount of cocaine in his wallet and his sock, and arrested him. A search of the backpack revealed a loaded .22 caliber firearm, .22 caliber ammunition, and a charging cord compatible with Scott's cell phone, among other items.

The next day, an officer took buccal swabs from Scott's cheek. From those swabs, Laura Nelson, a scientist at the Minnesota Bureau of Criminal Apprehension (BCA) lab in St. Paul, developed Scott's DNA profile.¹ Theresa McGuire, a scientist at the BCA lab in Bemidji, analyzed a mixed DNA sample taken from the firearm's cylinder and developed the profile of the major contributor. Scott's DNA profile matched the major contributor of the DNA profile obtained from the firearm's cylinder.

¹ During trial, defense counsel mistakenly referred to Nelson as "Pearlson," but the mistake was later rectified.

Respondent State of Minnesota charged Scott with possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(2) (2014), and fifth-degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(b)(1) (2014).

In January 2018, following two mistrials,² Scott's case was tried to a jury. Scott stipulated that he was prohibited from possessing firearms and ammunition. The state presented testimony from task-force officers and two scientists, including McGuire, but it did not call Nelson to testify. McGuire described the five-step process used to develop a DNA profile and compare it to other profiles. She explained that she conducted all five steps on swabs taken from the firearm's trigger, grip, and cylinder. She testified that a scientist in the St. Paul BCA lab conducted all but the final step on Scott's buccal sample.³ McGuire testified that sending a known DNA profile to another laboratory is a common practice that improves work flow and minimizes the risk of contamination. After receiving the DNA profile from Nelson, McGuire completed the final step of comparing Scott's known DNA profile with the profiles she developed. She testified that the major male DNA profile developed from the firearm's cylinder matched Scott's known DNA profile.

The state moved to admit McGuire's report, which covered all aspects of the BCA's analysis. Defense counsel objected based on deficiencies in the chain of custody. The district court reserved ruling until the state called all of its witnesses. Defense counsel later argued that Scott's confrontation rights were violated because Nelson did not testify. The

² The state requested the first mistrial after one of its witnesses was hospitalized. Scott requested the second mistrial based on statements made during jury selection.

³ Nelson did not compare Scott's DNA profile to other profiles.

district court ruled that McGuire's testimony was "appropriate" and admitted her report into evidence. Scott conceded his guilt on the controlled-substance charge and presented no evidence. The jury found Scott guilty of both charged offenses. Scott appeals his unlawful-firearm-possession conviction.

DECISION

The Confrontation Clause provides a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. amend. VI; *see* Minn. Const. art. I, § 6; *see also State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) ("We apply an identical analysis under both the state and federal Confrontation Clauses."). Admission of an out-of-court statement violates the Confrontation Clause when "the statement in question was testimonial, the statement was admitted for the truth of the matter asserted, and the defendant was unable to cross-examine the declarant." *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 59 & n.9, 124 S. Ct. 1354, 1369 & n.9 (2004)). We review *do novo* whether the admission of evidence violates the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Minnesota courts have not squarely considered whether the Confrontation Clause prohibits evidence of a DNA match when one of the two profiles was developed by a non-testifying expert. But both parties direct us to *Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012), in support of their respective positions. In *Williams*, a plurality of the United States Supreme Court held that admission of expert testimony that incorporated the report of a DNA profile developed by a non-testifying scientist from another laboratory, did not violate the Confrontation Clause. 567 U.S. at 50, 132 S. Ct. at 2222-23. Justice Alito, for

the plurality, concluded that admission of the report did not violate the Confrontation Clause because it was not offered for the truth of the matter asserted and was not prepared for the primary purpose of accusing a particular person of a crime. *Id.* at 50-51, 58, 132 S. Ct. at 2223-24, 2228. Justice Thomas, in a concurring opinion, reasoned that the report was not testimonial because it “lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact.” *Id.* at 110-11, 132 S. Ct. at 2260. In dissent, Justice Kagan concluded there was a Confrontation Clause violation. *Id.* at 55, 132 S. Ct. at 2227.

We need not reconcile the various pronouncements in *Williams* or determine whether Scott’s Confrontation Clause right was violated if any such violation would have been harmless beyond a reasonable doubt. *See State v. Courtney*, 696 N.W.2d 73, 79 (Minn. 2005) (declining to decide whether defendant’s Confrontation Clause rights were violated because any error was harmless beyond a reasonable doubt). A Confrontation Clause error is harmless when the verdict is “surely unattributable to the error.” *Hawes v. State*, 826 N.W.2d 775, 786 (Minn. 2013) (quotation omitted). In determining whether a Confrontation Clause violation is harmless, we examine the record as a whole, considering (1) how the evidence was presented; (2) whether the evidence was “highly persuasive”; (3) whether the evidence was highlighted in closing arguments; (4) whether the defendant effectively countered the evidence; and (5) whether the other evidence of guilt was overwhelming. *Caulfield*, 722 N.W.2d at 314. While the final factor is not conclusive, “[o]verwhelming evidence of the defendant’s guilt is a very important factor” in

determining whether a Confrontation Clause violation is harmless beyond a reasonable doubt. *Hawes*, 826 N.W.2d at 786.

Based on our careful review of the record, we conclude that admission of the challenged DNA evidence, if error, is harmless beyond a reasonable doubt. We acknowledge that DNA evidence is, by its nature, highly persuasive. *See State v. Weaver*, 733 N.W.2d 793, 801 (Minn. App. 2007) (stating that laboratory report concerning carbon-monoxide levels in victim's blood has "the appearance of being conclusive proof"), *review denied* (Minn. Sept. 18, 2007). And we note the prosecutor referenced the DNA match during closing argument, which weighs against finding harmless error. But the state did not solely rely on this evidence. Of the seven witnesses who testified for the state during the two-day trial, only McGuire discussed Scott's DNA profile and its match with DNA obtained from the firearm. Her report and resume comprised only two of the state's 24 trial exhibits. Defense counsel cross-examined McGuire about the other DNA profiles obtained from the firearm and how DNA may be transferred by touch. *See Caulfield*, 722 N.W.2d at 315 (noting that "unrebutted evidence has greater impact"). During closing argument, the prosecutor discussed other evidence of guilt before commenting on the DNA evidence. In response, defense counsel offered alternative explanations for the presence of Scott's DNA on the firearm. The prosecutor did not mention the DNA evidence in rebuttal, instead highlighting testimony of the officers who saw Scott carrying the backpack that contained the firearm.

We are most persuaded that any error is harmless because of the overwhelming evidence that Scott possessed the firearm. To convict Scott, the state had to prove that he

had knowing actual or constructive possession of the firearm. *State v. Harris*, 895 N.W.2d 592, 601 (Minn. 2017). Officers conducting surveillance to look for Scott observed only Scott carry the backpack that contained the loaded firearm and ammunition. From the time they first saw him until the final moments before they apprehended him, the officers saw Scott carrying the backpack. One officer testified that Scott was carrying the backpack when he left the house, when he entered the parked vehicle, and when he exited the vehicle. Officers did not see any of the vehicle's other occupants touch the backpack during the brief time that Scott was in the vehicle. When officers approached him, Scott immediately threw the backpack onto the sidewalk and walked away. This action, which one officer described as Scott "clearly trying to separate himself from the backpack and its contents," demonstrates both possession of the backpack and knowledge that it contained a prohibited firearm. See *State v. Holmes*, 325 N.W.2d 33, 35 (Minn. 1982) (stating that a defendant's abandonment of property linking him to a crime "show[s] consciousness of guilt on his point"). And other items in the backpack connected it to Scott as well, including the charging cord that matched the cell phone Scott was carrying at the time of his arrest. Given this overwhelming evidence, the jury could not have reached any conclusion other than guilt, even without the DNA evidence.

On this record, we conclude that any Confrontation Clause violation is harmless beyond a reasonable doubt.

Affirmed.