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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re T.F., a Person Coming Under the Juvenile Court Law.	B214260
THE PEOPLE, Plaintiff and Respondent, v. T.F., Defendant and Appellant.	(Los Angeles County Super. Ct. No. JJ16140)

APPEAL from a judgment of the Superior Court of Los Angeles County. Judy Fridkis, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Joseph P. Lee and Sharlene A. Honnaka, Deputy Attorneys General, for Plaintiff and Respondent.

T.F. (the minor) appeals from the December 17, 2008 order sustaining a Welfare and Institutions Code section 602 petition which alleged that he possessed marijuana for sale. He contends: (1) his Sixth Amendment right to confrontation was violated and (2) there was insufficient evidence to establish the chain of custody of the marijuana he was charged with possessing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules of appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that at about 5:00 p.m. on April 19, 2008, the minor's father Ed., brother Ez. and Ez.'s girlfriend Stacy H., were in the back of Ez.'s van parked in front of the family's home.[1] As Los Angeles Police Officer Todd Bracht and his partner drove past, Bracht observed the minor leaning into the van's open front passenger side window; another person was standing in the front yard of the house in front of which the van was parked. As Bracht pulled his patrol car up behind the van, Bracht saw the minor look in Bracht's direction, make eye contact with Bracht, then turn and walk away from the van to join the other person standing in the front yard. When Bracht got out of the patrol car, he noticed a strong marijuana odor emanating from the van. Bracht ordered Ed., Ez. and Stacey out of the van and directed them and the minor to stand on the sidewalk.

In a search of the van, Bracht found a total of two and three-quarters bricks of what appeared to be marijuana, a set of digital scales and two 150-count boxes of clear plastic sandwich bags. As Bracht was transferring these items from the van to the patrol car, the minor volunteered: "That weed is all mine, everything is mine." When Bracht was putting the minor in the back of the patrol car, the minor reiterated, "Everything is

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[1] Because Ed. and Ez. have the same last name as the minor, we refer to them by their first two initials. Because it is unclear from the record whether Stacy H. is a minor, we refer to her by her first name as well.

mine, the weed, the scales, and the bags." Bracht booked the marijuana found in the van into evidence under DR#081312024.

Over the minor's objection, a criminalist in the Narcotics Analysis Unit of the Los Angeles Police Department testified that the substance booked into evidence under DR#081312024 was analyzed and determined to be marijuana; the testifying criminalist did not test the substance himself, but supervised the criminalist who did the testing and signed off on her report. Also over the minor's objection, the Analyzed Evidence Report was admitted into evidence as a business record.

In Bracht's opinion, the minor possessed the marijuana for sale. His opinion was based on the large quantity of marijuana found, the scales and the baggies used to package the bricks into smaller amounts, the absence of any smoking paraphernalia and the fact that Ed. was in possession of $3,502.

Ed., the minor's father, testified that he observed the officers removing the items from the van, including what the officers thought was marijuana. Ed. said, "That's it. You're not going to find anything else in there. That's all there is." Ed. said this because he knew exactly what was in the van, including the scales and baggies. Ed. never heard the minor say, "That weed is all mine." When the police asked, "Whose marijuana is this?" Ed. and the others answered, "We don't know." The police responded, "Since you guys don't know whose weed this is, everybody is going. Book them all." Ed. and Ez. were both convicted of possession of marijuana for sale.

The juvenile court sustained the petition and placed the minor home on probation. The minor filed a timely notice of appeal.

DISCUSSION

1. Evidence of the Tests Performed on the Substance Did Not Violate the Confrontation Clause

The minor contends admission into evidence of the criminalist's testimony concerning the testing done on the substance found in the van, and of the Analyzed Evidence Report itself, violated the minor's Sixth Amendment right to confrontation because the testifying criminalist was not the criminalist who actually tested the substance and prepared the report. He argues that, notwithstanding the California Supreme Court's decision in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the evidence was inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*). We disagree.

A. The Evidence

Richard Raffel was a criminalist assigned to the Narcotics Analysis Unit of the Los Angeles Police Department. In addition to analyzing evidence, Raffel's duties included managing case work, reviewing reports, signing off reports, and acting as supervisor when the supervisor was not in the lab. One of the criminalists Raffel supervised was M.B. Chance. Raffel testified that Analyzed Evidence Reports are prepared on a computer at the chemist's work station, at or near the time the samples are analyzed. On April 21, 2008, Raffel reviewed and signed an Analyzed Evidence Report prepared that day by Chance for samples relating to DR#081312024. According to the report, the samples related to the minor's father. In preparation for his trial testimony, Raffel reviewed the report as well as Chance's notes of the tests she performed; the notes were what Raffel reviewed prior to approving the Analyzed Evidence Report. According to the notes, after Chance obtained the samples from the narcotics storage locker, she performed two tests which established that the samples were marijuana: (1) a microscopic examination and (2) a modified Duquenois Levine test. Raffel did not personally test the substance.

The report, admitted into evidence as People's Exhibit 1, states that on April 21, 2008, Chance obtained from the "narcotics locker evidence consisting of: [¶] (1) A plastic wrapper containing compressed green plant materials [weighing 442.16 grams], [¶] (2) a plastic bag containing green plant materials [weighing 82.16 grams]." The report states that Chance examined and analyzed this evidence and, in her opinion, both items contained marijuana. The report is signed by Chance as the analyst and by Raffel as the technical and administrative reviewer, and dated April 21, 2008.

B. The United States Supreme Court Decisions in Crawford, Davis *and* Melendez-Diaz *and the California Supreme Court Decision in* Geier

Under the Sixth Amendment to the United States Constitution, a defendant in a criminal trial has the right to confront and cross-examine adverse witnesses. In *Crawford*, the United States Supreme Court held that "testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination. (*Crawford*, *supra*, 541 U.S. at p. 59.)" (*Geier*, *supra*, 41 Cal.4th at p. 597.) "Under *Crawford*, the crucial determination about whether the admission of an out-of-court statement violates the confrontation clause is whether the out-of-court statement is testimonial or nontestimonial." (*Ibid*.)

In *Davis*, *supra*, 547 U.S. 813, the United States Supreme court fine-tuned the distinction between testimonial and nontestimonial out-of-court statements to law enforcement personnel. It held that the defendant's Sixth Amendment rights were violated by the admission into evidence of a "battery affidavit" signed by the victim who did not comply with a subpoena to appear at the trial, and the investigating officer's testimony about what the victim told him. The *Davis* court reasoned that the victim's statements were made "under official interrogation [as] an obvious substitute for live testimony, because [it does] precisely what a witness does on direct examination; they are inherently testimonial." (*Davis*, at p. 830, fn. & italics omitted.)

Post-*Davis*, our Supreme Court in *Geier*, *supra*, 41 Cal.4th 555 was called upon to determine the admissibility of a report detailing DNA testing where the evidence came in not through the analyst who performed the testing, but through a lab director who cosigned the report. The court in *Geier* concluded that laboratory reports are nontestimonial business records and therefore not inadmissible under *Crawford* and *Davis*. (*Geier*, at pp. 605-607.) The *Geier* court explained that "the crucial point is whether the statement represents the contemporaneous recordation of observable events" (*id.* at p. 607) and not whether "it might reasonably be anticipated [that the statement] will be used at trial." (*Id.* at p. 606.)

Two years after *Geier*, the United States Supreme Court decided *Melendez-Diaz*, *supra*, 129 S.Ct. 2527. At issue in that case was the prosecution's ability to prove a substance was cocaine exclusively by way of an ex parte affidavit devoid of any details apart from the unsupported conclusion that unspecified test results showed it was cocaine.[2] The court held that for purposes of the confrontation clause, the affidavits were the same as depositions, declarations and other testimonial statements. (*Melendez-Diaz*, *supra*, 129 S.Ct. at pp. 2531-2532.) In a five-to-four decision, the court held that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to ' "be confronted with" ' the analysts at trial." (*Melendez-Diaz*, at p. 2532.) In a concurring opinion, Justice Thomas wrote that he "continue[d] to

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[2] In *Melendez-Diaz*, the prosecution placed into evidence the seized substance and "three 'certificates of analysis' showing the results of the forensic analysis performed on the seized substances. The certificates reported the weight of the seized bags and stated that the bags '[h]a[ve] been examined with the following results: The substance was found to contain: Cocaine.' [Citation.] The certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law. Mass. Gen. Laws, ch. 111, § 13." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2531.) According to a decision of the Massachusetts Supreme Judicial Court, the authors of forensic analysis were not subject to confrontation under the Sixth Amendment. (*Ibid.*)

adhere to my position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citations.] I join the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,' [citation]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Id*. at p. 2543.)

Four days after issuing its decision in *Melendez-Diaz*, the United States Supreme Court denied certiorari in *Geier*. (*Geier*, *supra*, 41 Cal.4th 555, cert. den. June 29, 2009, No. 07-77770, *sub nom. Geier v. California* (2009) ___ U.S. ___ [129 S.Ct. 2856].) The California Supreme Court has since granted review of several appellate decisions, asking for briefing on two issues: (1) whether the defendant was denied his right of confrontation when one forensic expert (e.g., criminalist, pathologist or nurse practitioner) was allowed to testify to the results of testing and/or examination performed by another forensic expert, based on the report prepared by the forensic expert who did the testing; and (2) how the decision in *Menendez-Diaz* affects the viability of *Geier*. (See, e.g., *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620 and *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213 [both concluding that *Geier* remains viable]; *People v. Lopez* (2009) 177 Cal.App.4th 202, 206 review granted Dec. 2, 2009, S177046 [concluding that *Geier* "appears" to have been disapproved by *Melendez-Diaz*] and *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886 [observing that some of *Geier*'s rationale has been undermined by *Melendez-Diaz*].)

Recently, our Supreme Court denied review in *People v. Vargas* (2009) 178 Cal.App.4th 647 (*Vargas*) (review den. Feb. 3, 2010), in which the court held that the reasoning of the majority in *Melendez-Diaz* was inconsistent with the primary rationales relied on by the court in *Geier* but that "because of the limited nature of Justice Thomas's concurrence, the precedential value of the majority's analysis on this point is unclear as applied to a laboratory analyst's report or similar forensic report . . . ." (*Vargas*, at p. 659.) But *Vargas* concerned an entirely different factual setting than this case, the

facts of which are more similar to those in *Geier*.[3] Accordingly, we deem *Vargas* inapplicable to our analysis.

We conclude that *Melendez-Diaz* is limited to the use of affidavits or other formalized testimonial materials to prove the results of scientific lab tests. While we are bound to follow *Melendez-Diaz* in cases involving similar facts (*People v. Superior Court* (*Williams*) (1992) 8 Cal.App.4th 688, 703; *Austin v. Wilkinson* (N.D.Ohio 2006) 502 F.Supp.2d 660, 671), the United States Supreme Court did not reach the issue decided in *Geier*, *supra*, 41 Cal.4th 555 and raised here – whether a forensic expert (in *Geier* the director of a DNA testing lab, in this case a supervisor in the Los Angeles Police Department's Narcotics Analysis Unit) can render an opinion based on the results of lab tests conducted by a subordinate forensic expert, subject to full cross-examination by the defendant.

Nor did the *Melendez-Diaz* court suggest that its reasoning would extend to these circumstances. Instead, Justice Scalia, writing for the majority, framed the question before the court as "whether those [drug analysis] affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment." (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2530.) Its holding was limited to a determination that the "Sixth Amendment does not permit the prosecution to prove its case via *ex parte* out-of-court affidavits . . . ." (*Id.* at p. 2542, fn. omitted.) Even though Justice Thomas joined in the five-to-four majority vote, he wrote a separate concurring opinion stating his belief that the confrontation clause extended to only core testimonial

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[3] In *Vargas*, the defendant was convicted of rape. At trial, a nurse who conducted a sexual assault exam of the victim testified about the victim's statements during the exam that described the assault. The victim, a minor, did not testify. Analyzing the case under pre-*Melendez-Diaz* authority such as *Geier*, the *Vargas* court concluded that the victim's statements to the examining nurse were testimonial because they were made as part of the evidence gathering process for possible use at trial, instead of as part of a medical examination designed to diagnose an injury and render treatment. (*Vargas*, *supra*, 178 Cal.App.4th at pp. 660-662.) The confrontation clause violation was held harmless as to Vargas's conviction of forcible rape, but was not harmless, and therefore required reversal of, his conviction for rape by penetration with a foreign object, because the only evidence to support that charge came from the nurse's testimony. (*Id*. at pp. 662-664.)

statements, while clarifying that he joined the majority solely because the affidavits at issue fell within that class. (*Id.* at p. 2543 (conc. opn. of Thomas, J.).)

In short, *Melendez-Diaz* did not overrule *Geier* and its holding has no application here. Accordingly, we deem *Geier* to be controlling authority on this issue and we hold that under *Geier*, having Raffel testify instead of Chance – subject to vigorous cross-examination – did not violate the minor's confrontation rights.[4]

C. Business Record Foundational Challenge

Apart from Raffel's testimony, the minor contends that admitting the Analyzed Evidence Report into evidence as a business record also violated his confrontation rights.

In *Melendez-Diaz*, the court held that the analysts' affidavits did not qualify as traditional official or business records. (*Melendez-Diaz*, *supra*, 129 S.Ct. at p. 2538.) "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (*Id*. at pp. 2539-2540.) The court explained that documents kept in the regular course of business may not be admitted at trial as business records where the regularly conducted business activity is the production of evidence for use at trial. The analysts' certificates – like police reports generated by law enforcement officials – do not qualify as business or public records for precisely the same reason. (*Id*. at p. 2538, citing Fed. Ruled Evid., rule 803(8) [defining public records as

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[4] There is one fact that arguably makes this case closer to *Melendez-Diaz* than some of the other post-*Geier* California cases: the report stated, "I, the undersigned, am prepared to testify . . . ." This is language evocative of the "certificate" in *Melendez-Diaz*. But it is legally distinguishable. The report here was not an affidavit, it was a contemporaneous report. We do not see how adding a statement about a witness's willingness to testify converts a report into a testimonial affidavit.

"excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel"].)

Here, assuming for discussion's sake only that the Analyzed Evidence Report was inadmissible under *Melendez-Diaz*, we will affirm if the error is harmless beyond a reasonable doubt. (*Geier*, *supra*, 41 Cal.4th at p. 608.) Even if the report had not come into evidence, as we have already explained, under *Geier*, Raffel properly testified to his opinions based on the report and notes. Therefore, had the report itself been excluded, Raffel's opinion would have still been before the jury, meaning that a different result was not reasonably probable. Any error, therefore, was harmless.

Any error was harmless for another reason, as well. There was substantial other evidence that the substance was marijuana, including the minor's admission that it was "weed" and his father's statements suggesting that he knew it was marijuana. The scales, plastic baggies and cash also suggest that the substance was marijuana being packaged for sale. That there was some dispute as to who possessed the marijuana does not detract from the evidence that the substance was contraband.

2. The Minor Failed to Timely Object on Chain-of-Custody Grounds

The minor contends Bracht's testimony that he booked the items found in the van into evidence under DR#081312024 and Raffel's testimony that he reviewed an Analyzed Evidence Report with that number on it was insufficient to establish chain of custody. He argues that there was no evidence of who received the items Bracht removed from the van, who labeled the packages, who sealed them, and who placed them in the narcotics locker before they were removed by Chance.

"In a chain of custody claim, ' "[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the

evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." [Citations.]' [Citations.] The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion. [Citation.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 134.)

But objections related to the chain of custody, like other evidentiary objections, are waived if not timely asserted. (Evid. Code, § 353, subd. (a) [objection to the admission of evidence must be timely and clearly specify the basis of the objection]; *People v. Baldine* (2001) 94 Cal.App.4th 773, 779, citing *People v. Barajas* (1978) 81 Cal.App.3d 999, 1011 [absence of timely objection waived issue of whether translated recording was the recording made by the defendant], disapproved of on another point in *People v Laiwa* (1983) 34 Cal.3d 711, 725.) " 'The objection requirement is necessary in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' " [Citation.]' [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 620 [failure to object to witness's testimony on grounds that prosecution failed to disclose it had been paying witness's living expenses].)

Here, Bracht testified that he found bricks of what he believed was marijuana in the van, transferred the substance into his patrol car and then "booked" it "under DR#081312024." Raffel testified that he reviewed the Analyzed Evidence Report "with the DR#081312024," prepared by Chance, as well as Chance's notes of her analysis. According to the report and Chance's notes, she obtained the samples which she analyzed from the narcotics storage locker; when the tests were completed, Chance placed the substances back in the envelope, sealed the envelope and placed it back in the narcotics storage locker. Raffel was in the lab when Chance obtained the substances from the narcotics storage locker, but he did not actually see Chance do so.

The minor's counsel made no chain-of-custody objection during Bracht's or Raffel's testimony. During closing argument, the minor's counsel argued that "the testimony of the criminalist in this case did not show that there was a chain of custody of the marijuana that was established. That this person did not see how this marijuana was taken from the evidence locker, or how it was booked into the evidence locker. No statement as to the chain of custody before the testing." Whereas a timely objection on chain-of-custody grounds would have given the People an opportunity to cure the defect, arguing the issue after the witnesses were excused and both sides had rested did not. The minor's failure to make a timely objection on chain-of-custody grounds constitutes a waiver of the issue on appeal. (*People v. Baldine*, *supra*, 94 Cal.App.4th at p. 779.)

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

LICHTMAN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.