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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VIRGINIA HERNANDEZ LOPEZ,

Defendant and Appellant.

D052885

(Super. Ct. No. SCE274145)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Affirmed.

A jury convicted Virginia Hernandez Lopez of committing vehicular manslaughter while intoxicated in violation of Penal Code section 191.5, subd. (b). Lopez appeals, contending the admission into evidence of a blood alcohol laboratory report violated her constitutional right to confrontation of witnesses by allowing hearsay testimonial evidence prohibited under *Crawford v. Washington* (2004) 541 U.S. 36. We affirm the judgment.

FACTS

On August 18, 2007, Lopez worked the evening shift at a restaurant in Julian, California. During the evening, she drank at least three shots of tequila., Shortly after consuming the last shot, Lopez left the restaurant and drove westbound on State Route 78, a narrow, curving road. At the same time, Allan Wolowsky was driving eastbound on State Route 78. Lopez veered into the driver's side of Wolowsky's pickup truck, pushing his truck into a tree; and as a result Wolowsky died.

An ambulance took Lopez to a nearby church and from there a helicopter took her to a hospital. She suffered facial injuries and a broken leg. Her injuries prevented investigating Officer Pirko from administering a preliminary alcohol screening. At the hospital, two hours after the collision, Officer Pirko observed phlebotomist, Trevin Tuovinen, draw two vials of blood from Lopez at 1:04 a.m. and seal them in an evidence envelope. Officer Pirko transported the vials to a police station in Oceanside where they were placed in evidence storage. Later the vials were transferred to the San Diego Sheriff's Crime Laboratory.

On August 28, 2007, Brian Constantino in the San Diego Sheriff's Crime Laboratory received Lopez's blood samples from the Oceanside station. The San Diego office was beta testing a system for processing evidence. Generally, chain of custody papers accompany a locked evidence box. Under the new system, each item of evidence received individual chain of custody information. As a result, the People did not present chain of custody documentation for an evidence box containing Lopez's blood samples, but presented documentation for the individual blood samples.

Jorge Peña tested the alcohol content of Lopez's blood and reported a level of 0.09 percent blood alcohol content at the time of the blood draw. Over Lopez's *Crawford* objection, John Willey, a Criminalist Forensic Alcohol Supervisor with the San Diego Sheriff's Crime Laboratory and custodian of the laboratory reports, explained the new evidence processing procedures and testified at trial that Lopez's blood alcohol level at the time of the draw was 0.09 percent. A jury convicted Lopez of committing vehicular manslaughter while intoxicated.

DISCUSSION

I

Testimonial hearsay evidence otherwise permitted at a trial may not be admitted in a criminal proceeding unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. (*Crawford v. Washington, supra*, 541 U.S. at p. 59.) Generally, laboratory reports are nontestimonial evidence because they qualify as business records. (*People v. Geier* (2007) 41 Cal.4th 555, 606-607 [concluding contemporaneous recordings of observable events in laboratory reports are nontestimonial business records because they are not accusatory and "can lead to either incriminatory or exculpatory results."].) A business record is a " 'report . . . or data compilation, in any form, of . . . conditions . . . or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report' " (*Geier*, at p. 606.) A person who created a laboratory report does not need to testify at trial about the information contained in a

laboratory report because that person " '[was] "not acting as [a] witness[;]" and [was] "not testifying" ' " while making the report. (*Geier*, at p. 606.) We review evidence rulings under the abuse of discretion standard. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 639-640.)¹

II

Lopez contends the laboratory did not follow the standard procedures required to qualify the laboratory report as a nontestimonial business record under *Crawford*. She argues the new procedures created discrepancies in the chain of custody documentation, and the technician who tested Lopez's blood should have testified.

The People introduced adequate chain of custody documentation for Lopez's blood samples. The documents were not part of the record provided on appeal, but were introduced into evidence at trial. We reviewed these documents and found that they, together with the testimony of the laboratory report's custodian, Willey, show Constantino received Lopez's blood samples in San Diego on August 28, 2007, and Peña tested the blood on August 31, 2007. The court did not abuse its discretion by finding the People adequately established a chain of custody for Lopez's blood samples.

The People also established the technician who tested Lopez's blood produced the laboratory report in the course of a regularly conducted business activity rather than as testimony in preparation for trial. (*People v. Geier, supra*, 41 Cal.4th at p. 606.)

¹ The issue of whether laboratory reports are testimonial under *Crawford* is pending before the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (2008) _ U.S. _ (128 S.Ct. 1647).

Tuovinen, the phlebotomist, testified that he drew Lopez's blood and labeled it according to standard procedures. Pirko testified he took the blood and put it into storage in Oceanside. Willey testified about the evidence processing procedures in San Diego and the differences between the old procedures and those being "beta tested." He identified the person who assigned the individual laboratory numbers when the samples arrived in San Diego, the date of arrival, the reason individual samples rather than entire evidence boxes received numbers, the person who ran the tests, the date of the tests, and the test results. The test was not accusatory, could have led "to either incriminatory or exculpatory results," and could not have constituted testimony. (*Geier*, at pp. 607.) We conclude the court did not abuse its discretion by finding the report was made in the course of regularly conducted business activity and qualified as a nontestimonial business record under *Crawford*.

CONCLUSION

We affirm the judgment.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.