



In the recent case of Crawford v. Commonwealth, Record No. 0683-99-1, the Court of Appeals of Virginia held, on September 19, 2000, that instructing the jury that DNA (deoxyribonucleic acid) testing is deemed a reliable scientific technique and thus recognized under the laws of Virginia was improper when DNA evidence was used to prove a person's identity.

In the case, the defendant Jeffrey Crawford had entered the home of a woman in Virginia, put a knife to her throat, covered her eyes with his hand, and asked for money. When the victim protested she did not have any money, the defendant raped her, searched the premises, and left. After the defendant had departed, the victim succeeded in freeing herself and promptly reported what had happened to the police. In the process, she was able to give a fairly complete and accurate description of the assailant, and evidence technicians retrieved a seminal fluid sample from her clothing – a sample that was suitable for DNA testing.

Since no suspects were arrested, the crime remained unsolved for two years, until an inmate of a jail in Washington, D.C., reported to the police that the defendant, who had been arrested there and was incarcerated in the same cell with the inmate, had confessed to him to having committed a rape upon a woman in Virginia two years earlier, after which he had fled to Maryland.

The defendant's DNA was obtained and compared with the DNA extracted from the seminal stain on the rape victim's clothing. Both samples were found to "match."

The forensic scientist who conducted a PCR (polymerase chain reaction) analysis, found that the DNA had been typed in six different systems and that defendant's DNA was consistent with that extracted from the victim's clothing. The expert would later so testify at defendant's trial for armed statutory burglary, rape, robbery, and abduction, and add in her testimony that the possibility of all six systems being found to match with a randomly selected African-American male was one in 970. She also stated that if the DNA of both samples had not matched in any one of the six systems, then the test would have positively excluded the defendant as the person who left the seminal stain on the victim's clothing.

When the case went to the jury, the court, over defendant's objection, instructed the jury in this manner:

DNA testing is deemed to be a reliable scientific technique under the laws of Virginia when admitted to prove the person's identity. In deciding what weight, if any, to give the DNA evidence, you may consider any evidence offered bearing upon the accuracy and reliability of the procedures employed in the collection and analysis of a particular sample. Regardless of the results of any DNA analysis, you may consider any other evidence offered to prove the identity of the defendant.

The jury convicted the defendant on all counts and sentenced him to a total term of life plus sixty years in the penitentiary. On appeal, the defendant contended that the trial court erred in giving the above DNA instruction, in that by telling the jury that DNA testing was "deemed to be a reliable technique," the court also told the jury that the DNA evidence also compelled a particular finding that the DNA tests conducted in his own case were "reliable" also in identifying him as the person who raped the victim. Not only was this instruction improper on that account, argued the defendant, but it also constituted an improper comment on one particular piece of evidence, thus giving the DNA identification undue prominence.

Two judges of the three-judge appeals court panel agreed and reversed the conviction and remanded for a new trial. We quote here verbatim the opinion for the court, authored by Judge Coleman, omitting only certain internal citations to other case authority, and the footnotes:

A reviewing court's responsibility in reviewing jury instructions is to see that the law has been clearly stated and that the instructions cover all issues which the evidence fairly raises.

When a trial judge instructs the jury in the law, he or she may not "single out for emphasis a part of the evidence tending to establish a particular fact." The danger of such emphasis is that it gives undue prominence by the trial judge to the highlighted evidence and may mislead the jury.

Terry v. Commonwealth, 5 Va.App. 167, 170, 360 S.E.2d 880, 882 (1987)

However, in admitting scientific evidence, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered. If the court determines that there is a sufficient foundation to warrant admission of the evidence, the court may, in its discretion, admit the evidence with appropriate instructions to the jury to consider the disputed reliability of the evidence in determining its credibility and weight.

Code § 19.2-270.5, enacted by the General Assembly in 1990, provides, in part, that "in any criminal proceeding, DNA ... testing shall be deemed to be a reliable scientific technique and the evidence of a DNA profile comparison may be admitted to prove or disprove the identity of any person." By enacting Code § 19.2-270.5, the General Assembly has declared that DNA testing and profile comparisons are recognized in the scientific community as reliable procedures for purposes of admitting the results into evidence in Virginia courts to prove or disprove a person's identity. The purpose of the statute is to recognize the reliability of the scientific techniques which underlie DNA testing and profile comparisons, thereby eliminating the need for exhaustive proof in each case of how and why profiling is scientifically reliable before the DNA evidence can be admitted. The purpose of the statute, thus, is to render DNA test results admissible. The statute does not, however, establish that a particular DNA test is reliable or has yielded reliable results that identify the accused in a particular case as the perpetrator.

Here, the instruction, based on Code § 19.2-270.5, not only informed the jury that DNA testing is recognized in Virginia as a valid scientific procedure in identifying a person as the source of DNA material, but also told the jury, in effect, that the DNA technique used in this case, which identified Crawford as the person who most probably deposited the DNA at the crime scene, was reliable--subject to "any evidence offered bearing upon the accuracy and reliability of the procedure employed in the collection and analysis of a particular DNA sample." By informing the jury that DNA testing was reliable, in the absence of an evidentiary challenge to the accuracy and reliability of the collection and analysis procedure for the particular sample, the court gave credence to the specific test results even though the Commonwealth offered no proof that the collecting and testing procedure for this sample was reliable. Although the instruction did not tell the jury that they were to give any particular weight to the test results or that they were bound to find Crawford guilty based on the test results, the instruction unduly emphasized the DNA results over other evidence presented in the case tending to establish the assailant's identity.

Thus, the court's instruction did more than inform the jury that DNA testing is a competent and reliable scientific procedure and that the methodology is sound; it "singled out" the DNA test results and stated that DNA test results were reliable in establishing Crawford's identity as the perpetrator. Code § 19.2-270.5 permits trial courts to admit DNA test results without having to prove the scientific reliability of DNA testing; it does not, however, authorize trial courts to comment upon the reliability of particular DNA test results or techniques in a case.

Accordingly, the trial court erred by granting the DNA instruction based on Code § 19.2-270.5. We, therefore, reverse and remand the case for further proceedings.

There was a dissent in this case by Judge Bumgardner. He would have affirmed the conviction, and stated:

I respectfully dissent. I conclude the instruction correctly stated the law applicable to DNA evidence. It properly instructed the jurors on the legal principles, so they could apply that law to the evidence before them.

A court confronts two distinct considerations when a new scientific discovery is first offered to prove a fact. The first consideration is whether the newly discovered scientific principle is authentic. The second consideration is whether the scientific principle was applied properly to the particular circumstances of the case. The first inquiry tests the validity of the underlying scientific principle. The second inquiry tests the validity of the application of that principle. The term "scientific technique" is used in both the Code and decisions when referring to the underlying scientific principle, and the term "procedure" is used when referring to the application of the principle.

When the Commonwealth first offered DNA evidence as a form of forensic evidence, it had to meet both tests. . . . In [an earlier case], the Supreme Court ruled that the evidence presented at trial proved the underlying principle was reliable. . . . The Court also ruled the application of the principle was reliable.

As the new scientific principle moves from being a theory to being an axiom, the need to prove the scientific principle ends. Courts no longer require proof of the underlying scientific principle for fingerprint evidence, radar, or blood alcohol tests. The scientific principle underlying each of those types of evidence progressed from theory to universal acceptance. The same progression has occurred with DNA testing. The General Assembly enacted Code § 19.2-270.5 in 1990 and stated . . . DNA testing is a reliable scientific technique. The statute confirmed that the scientific foundation for DNA testing was not susceptible to reasonable dispute. When an issue of fact is not subject to dispute, it is not an issue for the jury to decide. The statutory rule of evidence left only the second consideration as an issue of fact over which reasonable minds could differ. When presented with DNA test evidence, the only issue for the jury is whether the science was properly applied in the case. The science of DNA testing has moved from theory to axiom.

In this case, the trial court must instruct on DNA testing for the jury to apply the law properly. The jury must know that they do not assess the verity of the scientific foundation of DNA testing. However, they are to evaluate whether that principle was applied properly. The instruction given by the trial court instructed the jury on the distinction between "scientific technique" (which the jury must accept) and "procedures employed" (which they must question). The instruction carefully placed qualifiers at critical points to emphasize the discretion resting with the jury.

In deciding what weight, if any, to give the DNA evidence, you may consider any evidence offered bearing upon the accuracy and reliability of the procedures employed in the collection and analysis of a particular DNA sample. Regardless of the results of any DNA analysis, you may consider any other evidence offered to prove the identity of the defendant.

In no way did this instruction tell the jury that the test was reliable or compel that finding.

The majority holds that the instruction improperly singled out the DNA test results. As a general principle, an instruction should not appear to place judicial approval on selective

evidence. However, that maxim is applied in the context of finding instructions or instructions that comment on specific items of evidence.

The maxim that an instruction should not emphasize one part of the evidence cannot apply when the trial court must explain a rule of evidence so the jury can properly apply that law to the facts of the case. Instructions that apply to one part of the evidence are replete: prior inconsistent statements, inference of intent, possession of recently stolen goods, blood alcohol concentrations, possession of forged writing, motive, inference of malice from the use of a deadly weapon, and willful concealment of merchandise.

In *Terry v. Commonwealth*, 5 Va.App. 167, 360 S.E.2d 880 (1987), this Court approved an instruction that told the jury it could consider the quantity, packaging, location, and use of the drugs in determining whether the defendant intended to distribute them. The instruction did not impermissibly highlight any of the evidence to the exclusion of other evidence. The Court emphasized the instruction informed the jury of the types of evidence it could use to reach legal conclusions but it did not suggest that specific evidence impelled any particular finding, comment upon specific facts proven in the case, suggest the credibility or weight which should be given any specific evidence, or characterize the evidence by describing it. The instruction given in this case could be characterized in the same manner.

I would hold that the trial court properly gave the instruction to inform the jury of its proper but limited duty when assessing the DNA evidence. The instruction was given to inform the jury of the proper and only purpose for which the evidence should be considered. As such, it was a proper and necessary instruction. Accordingly, I would affirm.