STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal No. 2014AP481-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

-vs.-

JASON S. VANDYKE,
Defendant-Appellant.

APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON FEBRUARY 11, 2013, AND THE ORDER DENYING POSTCONVICTION RELIEF FILED ON FEBRUARY 6, 2014, IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. GRITTON, PRESIDING.
WINNEBAGO COUNTY CASE NO. 2012CF431

DEFENDANT-APPELLANT'S BRIEF AND SHORT APPENDIX

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Following a *Machner* hearing, the circuit court concluded that counsel was not ineffective.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Insofar as this case involves argument about the confrontation clause and testimonial hearsay statements made by an expert other than the expert who testified at trial, VanDyke believes that oral argument may assist this Court in understanding the issues presented.

At present, the legal rules governing testimonial hearsay statements are a confusing mess. While counsel for the parties will undoubtedly try their best to answer what questions they anticipate the panel may have, the issue presented poses a question that very likely may generate unanticipated questions that could go unaddressed but for oral argument. Insofar as oral argument would allow the panel to query counsel for both parties on any pertinent but

[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

unanswered questions that may arise, oral argument may be appropriate. VanDyke therefore requests it.

VanDyke believes the Court's opinion in the instant case will meet the criteria for publication. No case has before decided the issue of duplicity and the failure to instruct on multiple theories of the offense in a Len Bias homicide, *see* Wis. Stat. § 940.02(2)(a) (reckless homicide by delivery of controlled substance). Similarly, the confrontation clause issue presents a fact pattern distinguishable from those cases to have previously dealt with the issue. The issues presented herein are thus novel and warrant publication.

STATEMENT OF THE CASE

I. NATURE, PROCEDURAL STATUS, AND DISPOSITION BELOW

Jason S. VanDyke was prosecuted in the instant case for the heroin-overdose death of Cole Trittin. R.1, A. Ap. 1. The State alleged that VanDyke delivered to Trittin the heroin that ended up killing him. *Id.*

VanDyke went to trial with counsel. *See* R.76:1. In the midst of trial, the parties resolved the matter by a negotiated plea agreement, but the circuit court rejected their agreement as contrary to the public interest. R.76:119-27. The jury convicted Vandyke, R.25, A. Ap. 25, and he was sentenced to twenty-years imprisonment, with fifteen years of initial confinement and five years of extended supervision, R.79:26.

VanDyke exercised his direct appeal rights, R.49, and filed a postconviction motion, alleging the same claims he asserts herein, R.56. The circuit court held a *Machner* hearing at which VanDyke's counsel was the only witness. R.80. Following supplemental briefing, the same judge that rejected the plea agreement as contrary to the public interest denied VanDyke's postconviction motion on the ground that he could not show that his counsel was deficient. R.81, A. Ap. 89-93.

VanDyke appeals. R.66.

II. STATEMENT OF RELEVANT FACTS

Cole Trittin fatally overdosed on heroin on April 13, 2011. R.77:240. The State charged Jason VanDyke with his death under the state's Len Bias law, Wis. Stat. § 940.02(2)(a) (reckless homicide by delivery of controlled substance), alleging that VanDyke delivered him heroin on the day of his death. R.1:1, A. Ap. 1. However, the manner of that delivery was unclear in the criminal complaint. R.1:2-3, 5-6, A. Ap. 2-3, 5-6. The State offered two theories regarding how it may have occurred, each differing in time, location, and persons involved. *See id.*

First, the State alleged that delivery occurred through a third party, Zach Jungwirth. R.1:2-3, A. Ap. 2-3. According to this theory, Jungwirth took heroin out of VanDyke's vehicle during the day of April 13th while it was parked in Oshkosh, Wisconsin, at VanDyke's place of employment. *Id.* Jungwirth then gave some of that heroin to Trittin, which later caused his death (hereinafter referred to as "the Jungwirth delivery"). *Id.* Under the State's second theory, VanDyke directly delivered heroin to Trittin at a park-and-ride in Winneconne, Wisconsin, on the night of April 13th (hereinafter referred to as "the park-and-ride delivery"). R.1:5-6, A. Ap. 5-6.

Despite the two theories of delivery, the State charged VanDyke with only one count of reckless homicide. R.8, A. Ap. 8. However, the State did not specifically allege which of the two deliveries purportedly resulted in Trittin's death. *See id.* The information reads as follows:

> The above-named defendant on or about Wednesday, April 13, 2011, in the City of Oshkosh, Winnebago County, Wisconsin, did cause the death of COLE R. TRITTIN, by the delivery ~~or manufacture~~ of a Schedule I or II controlled substance, Heroin, in violation of sec. 961.41 Wis. Stats., which COLE R. TRITTIN used, dying as a result of that use, contrary to sec. 940.02(2)(a), 939.50(3)(c) Wis. Stats., a Class C Felony, and upon conviction may be fined not more than One Hundred Thousand Dollars ($100,000), or imprisoned not more than forty (40) years, or both.

Id. (stricken language in original). As shown by its plain language, the information does not make clear whether the State was alleging VanDyke's guilt based on the Jungwirth delivery or the park-and-ride delivery. *Id.* VanDyke's trial counsel made no objection to the lack of specificity in the information.

In fact, counsel had not recognized as a constitutional problem the lack of specificity in the information. R.80:46. He thus did not "think to object to any lack of specificity in [the information]." R.80:9. Trial counsel was not "thinking about it in the framework of a constitutional issue," but rather viewed the State's dual charging "as a proof issue." *Id.* "[T]he constitutionality of the [information, verdict form, and jury instructions] wasn't being considered." R.80:47.

At trial, the State proceeded as though VanDyke was charged with both deliveries. In opening statements, the State told the jurors that they would hear evidence of both. R.76:69-70, 71-72, A. Ap. 30-31, 32-33. VanDyke's roommate, Eric Brown, would tell the jury that VanDyke admitted Jungwirth's removal of heroin from his jeep while he was at work. R.76:72-73, A. Ap. 33-34. Wyatt Farley would admit to being with Jungwirth and Trittin when Jungwirth took the heroin from VanDyke's jeep. R.76:69-70, A. Ap. 30-31. Trittin's father would explain how he took Trittin to the park-and-ride where Trittin met briefly with VanDyke, and then later died of a heroin overdose. R.76:71-72, A. Ap. 32-33.

VanDyke's counsel recognized in his opening statement the State's "two potential theories" of delivery. R.76:77, A. Ap. 38. He explained:

> [The prosecutor]'s theory to the Court is or to you is that one of two things happened essentially. Quite honestly because the State isn't quite sure and they are going to take a guess at one or two of them and hope you fill in the gaps there that, well, maybe between one or two of these possible situations maybe these were the drugs that ended up in Cole Trittin's system and caused him to die even though there's no direct line showing that and you are going to see that throughout the evidence here in this case.

R.76:78, A. Ap. 39.

It is thus obvious from the parties' opening statements that VanDyke was made to defend against the two purported deliveries that were charged under the single count. At the *Machner* hearing, trial counsel confirmed that, based on the charges, he "had to present a defense . . . to deal with . . . both the earlier Zachary Jungwirth matter, . . . as well as the subsequent park-and-ride alleged delivery." R.80:9, 41.

The evidence at trial was consistent with the parties' expectation.[2] To prove that Trittin had died from a heroin overdose, the State introduced testimony from the chief medical examiner of the Fond du Lac County Medical Examiner's Office. R.78:228. He testified about the autopsy that he had performed on Trittin, as well as the toxicology test results that had been generated by an out-of-state lab at his request. R.78:235-36.

The medical examiner explained that the purpose of obtaining the toxicology test results was to discern whether "the toxicology [was] either directly or indirectly contributory to [Trittin's] death." R.78:236. He informed the jury that what was stated in the toxicology report showed that Trittin had heroin in his system and had died of a heroin overdose. R.78:237, 239-40.

Christopher Long, a toxicologist with "the St. Louis University Forensic Toxicology Laboratory" (hereinafter referred to as "the Lab"), had produced the toxicology report. R.78:235; *see also* R.31, A. Ap. 21. To prove what Long had said in his report about the contents of Trittin's blood and urine, the State introduced into evidence "three pages from [his] toxicology report." R.77:230, 241; *see also* R.30, A. Ap. 18-20. Long stated therein that: (1) he tested Cole Trittin's blood and urine; (2) certain substances were present in and certain substances were excluded from the samples he tested; and (3) the substances that were found occurred in certain quantities. *See* R.30, A. Ap. 18-20, R.31, A. Ap. 21. Long, however, did not testify at trial and was not subjected to

[2] With one exception: In opening, the State forecasted that it would be able to produce a third-party who had been present with Jungwirth and Trittin at the time of the Jungwirth delivery. That witness would tell the jury how Jungwirth had obtained heroin from Vandyke's vehicle. However, as the State later admitted, it could not produce that witness.

cross-examination. He was not even named on the State's witness list. *See* R.13.

VanDyke's counsel made no objection to introduction of Long's report or the statements therein. He explained at the *Machner* hearing that he did not object because "[w]e did not necessarily view the report as adverse to our strategic position." R.80:12. The toxicology report "assisted in [VanDyke's] defense," said counsel, because it tended to show that Trittin was "a junkie" who had "multiple other controlled substances" in his body at the time of his death. R.80:32-33. Trittin's "junkie" status helped the argument that "the heroin which was found or referred to in the report may have been purchased from someone other than an individual either connected with or directly Mr. Vandyke." *Id.*

Furthermore, said counsel, the report helped to dispel the notion that heroin killed Trittin:

> The report itself indicated apparent consumption of not only heroin but other controlled substances as well. One of the arguments that we made was that the State was not able to prove from our perspective conclusively that it was exclusively heroin that was the contributor to the death of Cole Trittin but potentially could have been one of several other controlled substances that he had consumed.

R.80:12. Whereas the toxicology report introduced evidence that Trittin had consumed other substances besides heroin, said counsel, it helped create doubt that Trittin died from a heroin overdose. *Id.*

Trial counsel nonetheless recognized that the State relied on the toxicology "report for the purpose of establishing an element of the crime" for which VanDyke was prosecuted, namely that Trittin "had died of a heroin overdose." R.80:19. And he could remember no "other evidence in the discovery that would have allowed the State to prove the toxicity of Mr. Trittin's blood had [the toxicology] report been excluded" from evidence. R.80:21. Counsel further admitted that if the toxicology report had not been introduced into evidence, he would never have had to make the argument that he said helped his client: that the

other substances it reported in Trittin's blood diminished the likelihood that heroin caused his death. R.80:21-22.

Whatever the case, said counsel, "it was [his] belief that [the toxicology report] would be able to be brought in through the witness who did testify." R.80:32. Thus, he did not object on confrontation grounds. *Id.*

On agreement of the parties, the circuit court gave the standard instruction regarding first degree reckless homicide. *See* WIS JI-CRIMINAL 1021; *see also* R.24, A. Ap. 22. As given, the reckless homicide instruction said nothing about the purported manner of delivery. *See* R.24, A. Ap. 22 (requiring jury to find only that "The defendant delivered a substance"). Nor did it inform the jurors of the time, place, or date on which the State was alleging that the fatal delivery occurred. *See id.* The instruction says nothing about to whom VanDyke had to deliver heroin to have committed his crime, but rather allows the jury to convict him for simply having "delivered a substance" to someone. *Id.* (jury need find only that "Trittin used Heroin delivered by the defendant").

As for jury unanimity, only the standard unanimous verdict instruction was given. *See* WIS JI-CRIMINAL 515, R.24, A. Ap. 24. It, too, was mute regarding the jury's unanimous agreement as to which of the two deliveries occurred. *Id.* It does not demand that the jurors unanimously agree that VanDyke delivered heroin to Trittin at a particular time or location, directly or through a third party. *Id.* It did not demand that the jury select between the Jungwirth delivery and the park-and-ride delivery. *Id.* Instead, it merely advised the jurors that all twelve had to unanimously agree regarding guilty or not guilty. *Id.*

The verdict form submitted to the jury was similarly vague. It read, "We jury [*sic*] find the Defendant, Jason S. VanDyke, (not guilty/guilty) of First Degree Reckless Homicide of Cole Trittin by Delivery of Heroin, contrary to Section 940.02(2)(a), of the Wisconsin Statutes, as charged in the information." R.25, A. Ap. 25. The verdict form thus omitted the purported time, location, and type of delivery; it said nothing about which of the two deliveries constituted the basis for the jury's finding. *See id.*

VanDyke's counsel made no objection to either the instructions or the verdict form. (R.77:304-06.) Nor did he request the standard jury instruction that is to be given when evidence of multiple acts is introduced to prove one count—WIS JI-CRIMINAL 517.

WIS JI-CRIMINAL 517 is appropriate "where there is one charge but evidence of multiple acts [is] introduced to support the one charge." *State v. Marcum*, 166 Wis. 2d 908, 918 n.3, 480 N.W.2d 545, 551 n.3 (Ct. App. 1991). The instruction reads:

> The defendant is charged with one count of _____. However, evidence has been introduced of more than one act, any one of which may constitute _____.
>
> Before you may return a verdict of guilty, all 12 jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

WIS JI-CRIMINAL 517. However, that instruction was neither requested nor given in the instant case.

Trial counsel admitted at the *Machner* hearing that it never crossed his mind to ask for a verdict form specific as to the alleged delivery. R.80:42. Nor did it cross his mind to ask for a specific jury instruction or for WIS JI-CRIMINAL 517. R.80:9, 33, 42. He never "talked about the specificity issue and a motion specifically on that topic" with VanDyke, and he never discussed with VanDyke whether he wanted to waive his right to a unanimous jury verdict. R.80:44, 45. Counsel was not "thinking about [specificity] in the framework of a constitutional issue." R.80:46. To counsel, the issue was instead one of "proof;" it "was the entire crux of the defense." *Id.*

In closing, the State argued to the jury evidence of both the Jungwirth and park-and-ride deliveries. R.77:319-22, 326, 328, A. Ap. 46-49, 53, 55. The State told the jury that the evidence showed that VanDyke had himself delivered drugs to Trittin at the park-and-ride, R.77:321-22, A. Ap. 48-49, and that Jungwirth had obtained heroin from VanDyke's jeep with his permission, R.77:328-29, A. Ap. 55-56. The State ended its initial closing remarks by telling the jury that "Mr.

VanDyke provided heroin to Cole the meeting that night at the park-and-ride. Cole used it. Cole died." R.77:330, A. Ap. 57.

During trial counsel's closing argument, he admitted to the jury his uncertainty about which of the two deliveries the State was alleging as the basis for VanDyke's guilt:

> I'm not quite sure as I stand here before you if indeed the State is now exclusively saying that the transaction where supposedly the heroin was delivered was the one at night. I think as I sit and I listened to Mr. Sparr at the conclusion of his closing argument that seems to be what he's saying. I am not quite clear about that. I know he didn't say that at the beginning of the case because as I recall he indicated to you there was one of two things that the State was arguing as far as when the supposed delivery happened that caused this heroin to end up in Cole Trittin's possession so I'm still going to focus on this earlier situation involving the supposed jeep transaction involving Zachary Jungwirth because I want to talk about this again because this is my last time to talk about it.

R.77:335-36, A. Ap. 62-63. In trial counsel's opinion, he had to address both purported deliveries during his closing argument because the jury had before it evidence of both and it was necessary to defeat the State's argument that either delivery could be the basis for a guilty verdict. R.80:55. To counsel, "it was necessary to address both [deliveries] so that [he] could wipe . . . both out from the jury" "[s]o that they didn't rely on the Jungwirth delivery" or "on the park-and-ride delivery" to convict VanDyke. *Id.*

In rebuttal, the State told the jury,

> And another thing that Attorney Muza said that I agree with, the delivery that is at issue is the later one. He said the earlier one there is no evidence that that heroin gets to Cole. That situation involved Zach. We don't know what happened. I agree. The delivery that is at issue as far as heroin going to Cole is the later one, the one from the park-and-ride.
>
> The thing about that is if Cole already has heroin, why is he meeting with Mr. Vandyke? If Cole already has heroin, he's at home using heroin, he's not taking a ride with his dad. . . .

> The only thing that explains all of [the evidence] is that last meeting was a heroin delivery. That's the heroin that Cole Trittin used. That's what killed him.

R.77:359-60, 361, A. Ap. 86-87, 88.

The jury found VanDyke guilty. R.25, A. Ap. 25. The verdict form does not indicate for what. *Id.*

VanDyke's postconviction motion alleging ineffective assistance garnered a *Machner* hearing. Following that hearing, the circuit court concluded that trial counsel was not deficient with regard to the duplicity issue because "he wanted" a lack of specificity in the information, instructions, and verdict form. R.81:4, A. Ap. 91. According to the circuit court,

> there was discussions with Mr. Vandyke about what the trial strategy was going to be and where they were going and how they were going to defend the case. I think under those circumstances I think it's something that I'm okay with. And that was discussed by Mr. Muza during the course of his testimony how he believed that was the best defense, just showing the State had a weak case from his perspective, and so with those comments having been said, I'm going to find that he provided effective assistance to Mr. Vandyke and they had a clear strategy going in. The strategy was done throughout the case, and the strategy quite frankly I thought was pretty effective where I sat from and, you know, I never predict one way or the other but I think he did an excellent job and under those circumstances I'm going to deny the motions.

R.81:5-6, A. Ap. 92-93.

As for the confrontation issue, the court concluded that trial counsel's choice regarding how Long's report would be handled was "a good decision on his part." R.81:3, A. Ap. 90. Said the court, "the center of this case really wasn't what the victim died from, it was whether or not there was a delivery." *Id.* The circuit court then characterized the issue of counsel's ineffectiveness as it related to Long's report not as a decision not to object to its admissibility, but rather as a "reasonable decision by an attorney not to call [a] witness" to testify. *Id.* Given that interpretation of the issue, the circuit court found that, even though "we can go back and forth, the

advantage or disadvantage of [not calling Long as a witness]," the failure to call him did not "even border on in any way being ineffective on the part of [trial counsel]." R.81:3-4, A. Ap. 90-91.

ARGUMENT

VanDyke argues herein that his counsel erred in two ways. First, he did not recognize as a constitutional problem and then object to the lack of specificity in the information, jury instructions, and verdict forms. Second, he did not object to introduction of the toxicology test results on confrontation grounds.

"The failure to request an instruction or to object effectively waives any right to review." *Bergeron v. State*, 85 Wis. 2d 595, 605, 271 N.W.2d 386, 389 (1978). In the instant case, counsel's failure to demand specificity and to object to the toxicology report are thus properly evaluated under the rubric of ineffective assistance. *See State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis. 2d 565, 808 N.W.2d 691 ("[I]ssues not raised in the circuit court will not be considered for the first time on appeal."), *State v. Koller*, 2001 WI App 253, ¶ 25, 248 Wis. 2d 259, 635 N.W.2d 838 (defendant's "claims were waived and are, therefore, appropriately addressed in the context of ineffective assistance of counsel.").

VanDyke should have a new trial. He offers the following in support.

I. STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL

> "Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly: the question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel. In applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise."

State v. Felton, 110 Wis. 2d 485, 499, 329 N.W.2d 161, 167-68 (1983) (quoting David Bazelon, *The Realities of Gideon and Argersinger*, 64 Georgetown Law J. 811, 822-23 (1976)).

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, *Strickland v. Washington*, 466 U.S. 668, 685-85 (1984), and Article I, Section 7 of the Wisconsin Constitution, *State v. Thiel*, 2003 WI 111, ¶ 11, 264 Wis. 2d 595, 665 N.W.2d 305. The rules governing ineffective assistance are well settled. *See State v. McDowell*, 2004 WI 70, ¶ 30, 272 Wis. 2d 488, 681 N.W.2d 500.

This Court explained the standard by which courts are to judge ineffective assistance claims in *State v. Marcum*:

> The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *State v. Pitsch*, 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). The test for the performance prong is whether counsel's assistance was reasonable under the facts of the particular case, viewed as of the time of counsel's conduct. *Pitsch* at 636-37, 369 N.W.2d at 716. In making that determination, we must keep in mind that counsel's function is to make the adversarial testing process work in the particular case. *Id.*
>
> The test for the prejudice prong is whether counsel's errors deprived the defendant of a fair trial, a trial whose result is reliable. *Id.* at 640-41, 369 N.W.2d at 718. Contrary to the state's assertion, this is not an outcome determinative standard. *Id.* at 642, 369 N.W.2d at 718. The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at 642, 369 N.W.2d at 719. Our concern must be whether there was a breakdown in the adversarial process that our system counts on to produce just results. *Id.* Even where the evidence is sufficient to sustain the conviction, when a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined. *Id.* at 645-46, 369 N.W.2d at 720.

166 Wis. 2d at 916-17, 480 N.W.2d at 550.

As noted in *Marcum*, the prejudice inquiry is not an outcome-determinative one. *Id.* That proposition has been equally recognized by the supreme court:

> Under *Strickland*, a defendant is not required to show that counsel's deficient conduct was outcome determinative. *See* [*Strickland*, 466 U.S.] at 693-94. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

McDowell, 2004 WI 70, ¶ 54.

On review of an ineffective assistance claim, appellate courts evaluate the circuit court's factual findings for an erroneous exercise of discretion. *State v. Manuel*, 2005 WI 75, ¶ 26, 281 Wis. 2d 554, 697 N.W.2d 811. However, the legal question of whether trial counsel was ineffective is reviewed de novo. *Id.*

II. TRIAL COUNSEL WAS INEFFECTIVE INSOFAR AS HE FAILED TO RECOGNIZE AND OBJECT TO A DOUBLE JEOPARDY PROBLEM IN THE NON-SPECIFIC INFORMATION, JURY INSTRUCTIONS, AND VERDICT FORM, WHICH ALLOWED THE JURY TO FIND VANDYKE GUILTY ON A DISUNITED VERDICT.

Whether the jury instructions and verdict form violate a defendant's federal and state constitutional rights to due process and a unanimous verdict is reviewable under a claim of ineffective assistance of counsel. *Marcum*, 166 Wis. 2d at 917, 480 N.W.2d at 550. "[W]hen a defendant's constitutional rights are violated because of counsel's deficient performance, the adversarial process breaks down and our confidence in the outcome is undermined." *Id.*

A. Specificity is Required When Evidence of More Than one Criminal act is Introduced to Prove a Single Charged Offense.

Under settled federal and state law, the defendant's right to a jury trial in criminal cases includes the right to a

unanimous jury verdict as to each offense. *State v. Seymour*, 183 Wis. 2d 683, 694, 515 N.W.2d 874, 879 (1994); *State v. Lomagro*, 113 Wis. 2d 582, 590, 335 N.W.2d 583 (1983). "This right is secured under art. I, secs. 5 and 7 of the Wisconsin Constitution, as well as the fourteenth amendment's guarantee that one shall be proved guilty of a crime beyond a reasonable doubt." *Seymour*, 183 Wis. 2d at 694, 515 N.W.2d at 879.

If the jury is presented with evidence of more than one criminal act and each such act might establish a single alleged offense, then the jury must unanimously agree as to which particular act constitutes the offense in order to return a conviction. *Boldt v. State*, 72 Wis. 7, 16, 38 N.W. 177, 179-80 (1888); *cf. also Lomagro*, 113 Wis. 2d at 592, 335 N.W.2d at 589; *State v. George*, 69 Wis. 2d 92, 99, 230 N.W.2d 253, 257 (1975). The only exception to this rule occurs when the several criminal acts were conceptually similar in nature and were committed during a single, continuous episode. *See, e.g.*, *Lomagro*, 113 Wis. 2d at 592-97, 335 N.W.2d at 589-92 (multiple acts of sexual assault committed during a two-hour continuing episode); *State v. Giwosky*, 109 Wis. 2d 446, 456-58, 326 N.W.2d 232 (1982) (multiple acts of battery committed during a two-minute fight).

However, barring application of the single-continuing-offense exception, if evidence of more than one criminal act is presented with respect to any one charge, then the jury instructions and verdict forms must require the jury to unanimously agree upon which specific criminal act formed the basis for each relevant guilty verdict. *Marcum*, 166 Wis. 2d at 918-19, 480 N.W.2d at 550-51. The standard jury instruction on jury unanimity—WIS JI-CRIMINAL 515—will not alone suffice to remedy the defect if the charging document and the verdict form described the alleged offense in mere generic terms. *Id.* at 917-25, 480 N.W.2d at 550-54.

Proper jury instruction is a crucial component of the fact-finding process. *State v. Perkins*, 2001 WI 46, ¶ 40, 243 Wis. 2d 141, 626 N.W.2d 762. "Whether a jury instruction fully and fairly informs the jury of the law applicable to the charges being tried is a question of law that [appellate

courts] review independently." *State v. Ferguson*, 2009 WI 50, ¶ 9, 317 Wis. 2d 586, 767 N.W.2d 1.

B. VanDyke's Counsel Failed to Recognize the Lack of Specificity as a Constitutional Issue, and Thus did not Object on Those Grounds.

An unreasonable failure by a defendant's counsel to object to duplicitous jury instructions and verdict forms is deficient performance, which is prejudicial to the defendant's substantial rights. *Marcum*, 166 Wis. 2d at 924-25, 480 N.W.2d at 553-54. "Duplicity" refers to the improper confluence of two or more distinct offenses in a single count. *Cf. Seymour*, 183 Wis. 2d at 693 n.8, 515 N.W.2d at 879.

In the instant case, the State charged and the jury was presented with evidence of two distinct criminal acts, either of which individually constituted the crime: the Jungwirth delivery and the park-and-ride delivery. The Jungwirth delivery allegedly occurred at a plumbing shop in Oshkosh, Wisconsin, during the day of April 13th, and involved Trittin, Jungwirth, and Farley. Those three people had together gone to VanDyke's place of employment where Jungwirth entered VanDyke's vehicle and took heroin from it. The park-and-ride delivery occurred near Winneconne, Wisconsin after 10:00 p.m. on April 13th. VanDyke was said to have met Trittin alone at that location and provided him with heroin.

The two deliveries therefore differ in time, location, and persons involved. The Jungwirth delivery was a third-party delivery in Oshkosh during the day. The park-and-ride delivery, on the other hand, was a direct delivery occurring at night in Winneconne. For all those reasons, the two alleged deliveries were distinct criminal acts.

VanDyke's trial counsel should have recognized as a constitutional violation the State's failure to specifically charge VanDyke in the information with one of the two criminal acts. *See State v. Becker*, 2009 WI App 59, ¶ 10, 318 Wis. 2d 97, 767 N.W.2d 585 (stating that, if the State fails to charge with "particularity," "defense counsel should bring a motion to make the complaint and/or information more defining and certain").

Likewise, counsel should have recognized that the proposed jury instructions were an insufficient remedy to the constitutional error, *see Marcum*, 166 Wis. 2d at 924-25, 480 N.W.2d at 553, and should have requested the standard jury instruction that would have resolved the issue of unanimity in the instant case, *see* WIS JI-CRIMINAL 517. If counsel had requested the aforementioned instruction, the jurors would have been required to unanimously agree on which of the two alleged criminal acts VanDyke committed.

Instead, pursuant to the given instructions, if half of the jury thought the Jungwirth delivery resulted in Trittin's death and the other half thought the park-and-ride delivery resulted in Trittin's death, VanDyke could still be convicted on the single count. *See* R.24 (elements of offense defined without description of time, place, or persons involved in delivery). That result is in contradiction to VanDyke's state and federal constitutional rights to a unanimous verdict. *See Seymour*, 183 Wis. 2d at 694, 515 N.W.2d at 879.

Finally, counsel should have objected to the lack of specificity in the verdict form. Like the instructions, it omits any reference to the time, place, or persons involved in the delivery. Thus, it, too, would not have dissuaded the jurors from the unconstitutional finding of guilt split on which of the two deliveries actually occurred. *See id.*

C. The Wisconsin Supreme Court has Previously Recognized That the Failure to be Informed of Relevant law Constitutes Deficient Performance, and Thus VanDyke's Counsel was Deficient for not Recognizing the Double Jeopardy Issue in the Instant Case.

In *State v. Felton*, the Wisconsin Supreme Court considered an issue similar to the one that is presently before this Court:

> The question in this case is whether there was ineffective counsel where the lawyer failed to inform himself of a defense provided for in the statutes, and where he failed to adequately investigate the facts in respect to a potential defense, when the record indicates

> that, had these failure not occurred, a judge, after a proper evaluation of the record, could be impelled to instruct the jury in respect to these defenses and a jury could return a verdict based on one of these defenses.

110 Wis. 2d at 503, 329 N.W.2d at 169. The supreme court concluded that counsel had been deficient and his client prejudiced; it remanded for a new trial. *Id.* at 504, 329 N.W.2d at 170.

Rita Felton was charged with first degree murder for having fatally shot her husband while he slept. *Id.* at 487, 329 N.W.2d at 162. At trial, "[h]er defense was that she was a 'battered' spouse who acted in self-defense." *Id.* at 488, 329 N.W.2d at 162. The jury was instructed "on first degree murder, second degree murder, manslaughter (imperfect self-defense)—sec. 940.05(2), Stats., and on the privilege of self-defense. There was no request for instruction on heat-of-passion manslaughter under sec. 940.05(1)." *Id.* She filed a postconviction motion alleging, *inter alia*, that her "counsel was ineffective when he failed, because he was unaware of the law, to consider as a defense the lesser crime of manslaughter—heat-of-passion, as provided in sec. 940.05(1), Stats." *Id.*

At a hearing on Felton's motion, her trial counsel "acknowledged that he was ignorant of the possible defense afforded by the Wisconsin law under sec. 940.05(1), Stats., manslaughter—heat-of-passion." *Id.* at 496, 329 N.W.2d at 166. Nonetheless, the trial court denied Felton's motion, holding that counsel was not deficient because he had made a "strategic choice" to not pursue the heat-of-passion defense: "'[T]here may have been some shortcomings in the matters handled during the trial, but very often that is a matter of trial strategy. . . . [T]he defenses [Felton's attorney] put forth were a matter of choice and of trial strategy, and not grounds for a new trial.'" *Id.* at 498, 329 N.W.2d at 167 (quoting circuit court decision).

However, the supreme court rejected that reasoning. Because counsel was ignorant of the heat-of-passion defense, said the court, "he never was in a position even to consider whether, in light of the facts, heat of passion was an

appropriate defense." *Id.* at 505, 329 N.W.2d at 170. The court explained that "a prudent lawyer must be 'skilled and versed' in criminal law. . . . Trial counsel's decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied." *Id.* at 502, 329 N.W.2d at 169. Counsel's failure to recognize the heat-of-passion defense and its applicability to the facts in Felton's case constituted deficient performance:

> The failure to be informed of this defense in the circumstances of this case constitutes a glaring deficiency in trial counsel's knowledge of the law. Without that knowledge, it was impossible for him to weigh alternatives and to make a reasoned decision consistent with the standard of performance expected of a prudent lawyer.

Id. at 506, 329 N.W.2d at 170. The fact that counsel's deficiencies deprived Felton "of the benefit of two crucial defenses" to which she would otherwise have been entitled constituted prejudice and required reversal. *Id.* at 504, 329 N.W.2d at 170.

The analysis should be the same in the instant case as it was in *Felton*.

In denying VanDyke's postconviction motion, the circuit court reasoned that trial counsel was not deficient because he wanted a lack of specificity in the information, instructions, and verdict form. R.81:4-6, A. Ap. 91-93. Trial counsel, said the circuit court, had made a justifiable, strategic choice to use the lack of specificity to challenge the State's ability to prove its case. *Id.* According to the circuit court, that strategy was reasonable and therefore trial counsel not deficient. *Id.* However, that reasoning suffers from the same defect that attended the circuit court's reasoning in *Felton*, which the supreme court overturned.

Namely, VanDyke's trial counsel did not recognize the constitutional dimensions presented by the State's having charged and presented evidence of two separate deliveries. R.80:46. Instead, he saw it as a matter of proof. *Id.* Trial counsel admitted that he did not think to object to any lack of specificity in the information or the verdict form. R.80:9-

10, 36. He additionally stated that he "did not consider the introduction of [WIS JI-CRIMINAL 517]," R.80:33, 36, and he had no reason for not having requested it, R.80:9, 36.

Furthermore, the circuit court's finding that VanDyke's trial counsel had discussed constitutional specificity with VanDyke as part of any discussion regarding strategy, R.81:5, A. Ap. 92, is directly contradicted by the record, R.80:44, 45. Trial counsel testified at the *Machner* hearing that he never discussed "the specificity issue and a motion specifically on that topic" with VanDyke, and he never discussed with VanDyke whether, as part of some trial strategy, he wanted to waive his right to a unanimous jury verdict. R.80:44, 45.

Like the lawyer in *Felton*, VanDyke's counsel's operated under "a glaring deficiency in [his] knowledge of the law." *Felton*, 110 Wis. 2d at 505, 329 N.W.2d at 170. The entire manner by which VanDyke's counsel dealt with the multiple charges was colored by his not having recognized the issue's constitutional dimensions. Without knowing that he could have challenged the information, verdict forms, and instructions for lack of specificity, "it was impossible for [VanDyke's counsel] to weigh alternatives and to make a reasoned decision consistent with the standard of performance expected of a prudent lawyer." *Id.* at 506, 329 N.W.2d at 170.

For all those reasons, VanDyke's counsel was deficient for not having demanded specificity.

D. VanDyke was Prejudiced by his Counsel's Deficiency.

To prove prejudice, VanDyke must be able to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Franklin*, 2001 WI 104, ¶ 14, 245 Wis. 2d 582, 629 N.W.2d 289 (quotation and quoted authority omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694.

The postconviction court did not reach any conclusions regarding prejudice, instead denying VanDyke's motion solely because it found that his counsel was not deficient.

However, the State argued below that VanDyke was not prejudiced because any potential constitutional error was cured by comments that the prosecutor made in closing and in rebuttal. R.59:1-2. According to the State, the prosecutor's argument that "the delivery that is at issue is the" park-and-ride delivery "[r]ealistically" "addressed, and made clear to the jury, though admittedly in a less than ideal manner," that it could convict VanDyke by relying only on the park-and-ride delivery. R.59:1. The prosecutor's comments retreating from the Jungwirth delivery, said the State, cured any constitutional defect in the information, instructions, and verdict form and VanDyke could therefore not prove prejudice. R.59:1-2.

That argument is untenable.

First, "[a]rguments by counsel cannot substitute for an instruction by the court. Arguments by counsel are likely to be viewed as statements of advocacy, whereas a jury instruction is a definitive and binding statement of law." *Perkins*, 2001 WI 46, ¶ 41. In the instant case, the instructions allowed the jury to consider all the evidence before it, including evidence the State introduced regarding both deliveries. The instructions did not demand that the jury unanimously agree on which one delivery constituted the criminal act. Instead, the instructions allowed the jury to reach a disunited verdict. Thus, the State's rebuttal comments do not remedy the instructional errors. *Id.*

Second, "[t]he independent opinion of counsel is not evidence," *Embry v. State*, 46 Wis. 2d 151, 160-61, 174 N.W.2d 521, 526 (1970), and jurors are not to decide a defendant's guilt based on extraneous information, *State v. Eison*, 194 Wis. 2d 160, 174, 533 N.W.2d 738, 743 (1995). Thus, the State's opinion regarding which delivery VanDyke committed was not properly before the jury during its deliberation. Thus, the prosecutor's opinion could not legally have prevented the jury from reaching a disunited verdict.

Third, the jurors were instructed to decide VanDyke's guilt by consideration of the evidence received at trial, *see* R.24 (WIS JI-CRIMINAL 100), which included evidence of both deliveries. Insofar as jurors are presumed to follow the instructions that they are given, *State v. Bembenek*, 111 Wis. 2d 617, 634, 331 N.W.2d 616, 625 (Ct. App. 1983), the prosecutor's comments alone could not prevent the jury from following the court's instructions. In the instant case, it is presumed that the jurors would have considered evidence of both deliveries when deciding VanDyke's guilt. No evidence to the contrary was offered to rebut that presumption.

Fourth, the State's rebuttal comments were too little too late. By the time the State was retreating from the Jungwirth delivery, it had already discussed the Jungwirth delivery in opening as possibly having caused Trittin's death. It had introduced evidence at trial regarding the delivery. And, in its initial closing argument, the State had discussed the Jungwirth delivery four separate times. R.77:319, 326, 328, 329. During one of those references, the State lobbied for the jury to conclude that Jungwirth had received permission to take heroin out of VanDyke's vehicle, and thus he did not steal it. R.77:328. "If this is a situation where people stole from Mr. Vandyke," said the prosecutor, the "[d]on't find him guilty if that is what happened. The question is whether there is a delivery. Did he voluntarily provide it." *Id.* Nonetheless, said the State, the evidence showed that Jugwirth took heroin with VanDyke's permission. R.77:329-30. Thus, said the State, the jury should find that VanDyke delivered heroin to Jungwirth. *Id.* The purpose of that argument was clearly to dissuade the jurors from reasoning that VanDyke was not guilty because Jungwirth had stolen, instead of permissively taken, heroin from VanDyke.

The State's initial closing argument was so unclear as to whether it was abandoning the Jungwirth delivery that even VanDyke's trial counsel did not know whether the State was giving it up. He believed it necessary to address in closing both theories of delivery so that the jury would not decide guilt based on either theory.

Thus, despite the prosecutor's closing remarks, there can be no confidence in the jury's verdict. We cannot know

on what theory the jury convicted VanDyke, nor can we know whether the jury reached a unanimous verdict. Wisconsin law renders jurors incompetent to offer evidence regarding the basis of their verdict. Wis. Stat. § 906.06. However, we do know that evidence was presented of both deliveries and that trial counsel believed the State's proof of both was sufficient to warrant his argument on both theories in closing.

Furthermore, as detailed above, there is no legal basis on which the jury could have focused on one delivery at the exclusion of another. To the contrary, the jurors were instructed to decide VanDyke's guilt by consideration of all the evidence received at trial, *see* R.24 (WIS JI-CRIMINAL 100), which included evidence of both deliveries. It is thus presumed that the jurors relied on evidence of both deliveries when deciding VanDyke's guilt, *Bembenek*, 111 Wis. 2d at 634, 331 N.W.2d at 625, and no instruction existed to prevent them from reaching an unconstitutional verdict.

"In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." *Strickland*, 466 U.S. at 694. In the instant case, when the jury is presumed to have acted according to the law with which it was instructed, its finding of guilt is based on a disunited verdict.

For all those reasons, there can be no confidence in the outcome of VanDyke's trial; the failure to object on specificity grounds was prejudicial. In *Marcum*, this Court "concluded that . . . Marcum was prejudiced by his counsel's deficient performance, given that Marcum's due process rights were violated by the lack of verdict specificity." *Becker*, 2009 WI App 59, ¶ 13.[3] The result should be the same in the instant case.

[3] *Becker* distinguished *Marcum* on the ground that, "[u]nlike the *Marcum* jury, the jury [in *Becker*] did not return a combination of acquittal and guilty verdicts; rather, it convicted Becker on both counts in question, returning two verdicts of guilty." 2009 WI App 59, ¶ 23. The two verdicts remedied any potential unanimity problem. VanDyke's case is not similarly distinguishable. The jury returned only one verdict after having been presented with evidence of two

Vandyke's counsel was thus ineffective, and he is entitled to a new trial.

II. COUNSEL WAS INEFFECTIVE INSOFAR AS HE FAILED TO OBJECT TO (1) THE MEDICAL EXAMINER'S TESTIMONY ABOUT TESTIMONIAL HEARSAY STATEMENTS IN THE TOXICOLOGY REPORT AND (2) THE INTRODUCTION OF THAT SAME REPORT INTO EVIDENCE.

Proof of the offense with which VanDyke was charged necessitated proof that Trittin had heroin in his system when he died. The medical examiner who performed the autopsy needed a toxicological examination of Trittin's blood and urine to determine whether heroin caused his death. However, the medical examiner did not perform a toxicological examination. Instead, he sent samples of Trittin's blood and urine to an out-of-state lab where toxicologist Christopher Long performed the analysis. Long's report was admitted at trial and his statements therein were discussed extensively by the medical examiner, but Long himself was not present for trial. Counsel did not object and, as is detailed below, the jury was permitted to consider testimonial hearsay on the central issue in the case: the cause of Trittin's death.

A. The Statements of Toxicologist Christopher Long Concerning the Contents of Trittin's Blood and Urine at the Time of his Death, Which Were Facts Critical to the State's Case, Were Admitted in Violation of VanDyke's Right to Confrontation.

Both the federal and state constitutions provide the accused with the right to confront the witnesses against him. U.S. Const. Amend. VI; Wis. Const. Art. 1, § 11. This fundamental protection requires the State to present its witnesses in court to provide live testimony subject to adversarial testing. *Crawford v. Washington*, 541 U.S. 36, 43

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distinct criminal acts and not informed that it could rely on only one to form the basis of a guilty verdict. VanDyke's due process rights were violated by the absence of the unanimity instruction, and he was prejudiced as explained herein.

(2004); *State v. King*, 2005 WI App 224, ¶ 4, 287 Wis. 2d 756, 706 N.W.2d 181. Absent such live testimony, out-of-court statements are barred by the confrontation clause, unless the witness is unavailable and the accused had a prior opportunity to confront that witness. *Crawford*, 541 U.S. at 68; *State v. Hale*, 2005 WI 7, ¶ 54, 277 Wis. 2d 593, 691 N.W.2d 637. Witness statements are subject to the confrontation clause when they are testimonial and offered to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 59-60, fn. 9, *citing Tennessee v. Street*, 471 U.S. 409, 414 (1985).

1. Long's statements are testimonial because it was objectively reasonable to expect that his report would be available for use later in litigation, where it was performed in a lab that is involved in litigation and the specific tests in this case looked for contraband substances.

Prior courts have recognized a number of factors that aid in the determination of whether a statement is testimonial. A statement is testimonial when it is "made under circumstances which would lead an objective witness to reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusets*, 557 U.S. 305, 310 (2009); *State v. Jensen*, 2007 WI 26, ¶ 80, 299 Wis. 2d 267, 727 N.W.2d 518. When circumstances objectively indicate that the primary purpose of the statement is to establish or to prove past events potentially relevant to later criminal prosecution, the statement is testimonial. *Michigan v. Bryant*, __ U.S. __, 131 S. Ct. 1143, 1154 (2011), *quoting Davis v. Washington*, 547 U.S. 813, 822 (2006); *Jensen*, 2007 WI 26, ¶¶ 71-72.

In *Melendez-Diaz*, the Court noted that statements made with the purpose of being used for litigation can be testimonial, including statements about scientific testing. 557 U.S. at 321-22.

A statement's formality is also relevant to deciding its testimonial nature. *Bryant*, __ U.S. __, 131 S. Ct. at 1160; *Jensen*, 2007 WI 26, ¶ 16. A statement's testimonial character is illustrated where there are indications it was made with a

degree of solemnity. *Jensen*, 2007 WI 26, ¶ 16, *citing Crawford*, 541 U.S. at 51. A casual remark to an acquaintance would not suffice as a solemn declaration. *Crawford*, 541 U.S. at 51. But, a statement does not need to be as formal as an affidavit either. *Bullcoming v. New Mexico*, 564 U.S. __, 131 S. Ct. 2705, 2717 (2011) (limiting application of the confrontation clause only to sworn statements "would make the right to confrontation easily erasable"). Instead, testimony is typically a solemn declaration such as a formal statement to government officers. *Crawford*, 541 U.S. at 51.

For example, in *Bullcoming*, the Court concluded that a statement made regarding the contents of the defendant's blood was testimonial, despite the fact that it was not sworn. 131 S. Ct. at 2717. The statement's testimonial nature was sufficiently demonstrated by the fact that it was a signed and certified document that was headed a "report." *Id.*

In the instant case, Long's statements in the report were made for the purpose of future litigation and bore indicia of formality. First, the lab where the toxicology tests were performed—the St. Louis Forensic Toxicology Laboratory (herein after referred to as "the Lab")—regularly performs work in cases involving litigation, including criminal matters. The St. Louis Medical Examiner describes the Lab as follows:

> St. Louis University, renowned for its medical school and medical center, responds to the need for drug and alcohol testing with a superior laboratory. The St. Louis University Forensic Toxicology Laboratory provides on-site drug and alcohol testing *for the St. Louis County Medical Examiner's Office, and serves medical, legal and business professionals throughout the United States.*

See St. Louis County—Office of the Medical Examiner, *Our Mission* and *Other info., servs., and resources*, http://www.stlouisco.com/HealthandWellness/MedicalExaminer (2010) (accessed last Oct. 18, 2013) (emphasis added). Thus, a significant part of the Lab's work is to generate statements that are to be used for litigation. *See id.*

Additionally, the reason behind the report's production demonstrates the likely use of Long's statements

in future litigation. The report was commissioned by the Fond du Lac County Medical Examiner as part of a death investigation that was specifically searching for contraband substances. Long's report was therefore a document that would be relevant to criminal litigation. As noted above, statements made with the purpose of being used for litigation constitute testimonial hearsay. *Melendez-Diaz*, 557 U.S. at 321-22; *State v. Luther Williams*, 2002 WI 58, ¶¶ 38-43, 253 Wis. 2d 99, 644 N.W.2d 919.

Moreover, Long's assertions in the report were not casual remarks to an acquaintance. *Jensen*, 299 Wis 2d. 267, ¶ 16. They were presented in a document published in the name of the Lab, which Long signed, dated, and provided to the Fond du Lac County medical examiner, which used it as part of a death investigation. They were also not just pure data. The report named and indicated the quantity of substances contained in a blood sample and asserted that the sample belonged to Trittin, even though no chain of custody evidence was presented.

For those reasons, Long's statements in his report were testimonial hearsay subject to the confrontation clause.

2. Long's testimonial statements were presented to the jury for consideration of their truth insofar as his report was admitted into evidence and discussed extensively by the medical examiner.

The facts asserted in Long's report were presented at VanDyke's trial for no purpose other than to prove that Trittin had significant amounts of narcotics in his body when he died. Long's testimonial statements were thus offered to prove the truth of the matter asserted.

First, the report was not used in some limited manner or for some non-hearsay purpose. Instead, Long's report was admitted into evidence and the jury was instructed to consider it, just like any other exhibit or testimony. R.77:236; R.24 (WIS JI-CRIMINAL 103); *see Bullcoming*, 131 S.Ct. at 2710-11 (scientific report was admitted into evidence and its contents were testified to by a witness who did not prepare the report).

Second, the medical examiner's analysis and conclusion about the cause of Trittin's death was dependent entirely on the truth of the statements made in the report. He emphasized the importance of the statements in Long's report and explained that such reports are always helpful when determining the cause of death, whether they indicate the presence of toxic substances or not. R.77:236. He further testified in detail about the presence of substances found in Trittin's blood and the urine, and noted their amounts. R.77:237-39.

Third, there was no other evidentiary source for any of the facts stated in Long's report. The specific contents of Trittin's blood and urine, and amounts thereof, came only from Long's report. Even the simple fact that the tested samples belonged to Trittin was not supported by any evidence about a chain of custody. The truth of all of Long's assertions was essential to the medical examiner's conclusions regarding the cause of Trittin's death, and consequently, violated the confrontation clause. *See Williams v. Illinois*, 567 U.S. __, 132 S. Ct. 2221, 2258-59, 2268 (2012) (J. Thomas concurrence, with reasoning agreed upon by four other Justices, that the confrontation clause is implicated where the only direct evidence used as the basis of the testifying expert's opinion was testing by a non-testifying expert).

VanDyke recognizes that the Wisconsin Supreme Court has held that an expert witness can testify about the basis of his or her conclusion without running afoul of the confrontation clause, even where testing was performed by another person. *State v. Deadwiller*, 2013 WI 75, ¶¶ 37-40, 350 Wis. 2d 138, 834 N.W.2d 362. However, *Deadwiller* does not affect the outcome in this case because it is significantly distinguishable. In *Deadwiller*, the expert merely relied on data he received from a lab testing DNA samples. *Id.* ¶ 32. The data itself was not admitted into evidence and there was no question about chain of custody. *Id.*

But here, the medical examiner was not simply relying on data from another source. Long asserted in his report, without evidence about a chain of custody, that the blood tested belonged to Trittin. The report listed chemical

substances, amounts, and was signed and dated by Long. This was not simply a machine generated result, but assertions and statements as contemplated by the confrontation clause.

The medical examiner was not simply acting as expert relying on Long's report, but served as a conduit for the crucial conclusions Long reached therein. *See United States v. Turner*, 709 F.3d 1187, 1191-92 (7th Cir. 2013) (defendant's right to confrontation implicated where an expert was used to introduce the results of testing he did not perform and vouched for their credibility); *contra State v. Heine*, 2014 WI App 32, ¶¶ 14-15, __ Wis. 2d __, 844 N.W.2d 409 (defendant's confrontation challenge to toxicology report denied where persons from the toxicology lab testified and the medical examiner did not need to rely on the report to reach his conclusion). Consequently, Long's statements were presented at trial in violation of Vandyke's right to confrontation.

3. The fact that the medical examiner was subject to confrontation is no substitute to VanDyke's right to confront Long about the assertions in his report.

The medical examiner was in no position to testify about the truth of Long's statements because he lacked the knowledge to do so. The medical examiner worked for the Fond du Lac coroner's office, and had no association with the Lab. There was absolutely no evidence that he observed what the lab does regularly, much less what was done in this specific case. *See Bullcoming*, 131 S. Ct. at 2715-16 (admitting evidence through a surrogate witness with no direct knowledge about the evidence does not satisfy the confrontation clause).

Nevertheless, the medical examiner's lack of knowledge about what occurred with the toxicology testing did not stop him from vouching for the lab's credibility. The medical examiner testified that he used Long's lab often and that they were "a very good, solid lab . . . [with] a very experienced director who is board-certified in forensic toxicology." R.77:236.

But the medical examiner's biased opinion about the quality of the toxicology lab does not dispel with the need to confront those with actual knowledge about the tests done in Trittin's case. Although modern forensic analysis has tremendous capacity to reveal truth and bring perpetrators to justice, its reliability is still subject to the problems of human error and misconduct that beset all forensic sciences. *See* Nat'l Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, 116-17, 184-85 (Nat'l Acads. Press 2009), available at http://www.nap.edu/catalog.php?record_id=12589 (last accessed Oct. 18, 2013).

It is inescapable that the statements and assertions about what was in Trittin's blood and urine at the time of his death were essential to the State's evidence. As the prosecutor noted in his closing, "If you heard [the medical examiner] and didn't believe that was not a heroin death, you find Mr. VanDyke not guilty and then we're doing done [sic]." R.77:356.

Of course, the medical examiner's opinion was only as good as the basis it rested upon. The statements in Long's report were testimonial hearsay, and yet they were offered to the jury without anyone who actually knew the circumstances in which they were created. Consequently, the most critical piece of evidence in this case was presented to the jury in violation of VanDyke's right to confrontation.

B. VanDyke's Trial Counsel was Deficient for not Objecting to Long's Report and the Medical Examiner's Testimony About its Contents.

In the instant case, a reasonably prudent defense counsel would have objected to the introduction of the Long's statements in his report. The United States Supreme Court made clear in *Melendez-Diaz* and *Bullcoming* that forensic evidence is subject to the confrontation clause when it is testimonial and offered to prove the truth of the matter asserted. *Melendez-Diaz*, 557 U.S. at 321-22, *Bullcoming*, 131 S. Ct. at 2715-16. Both *Melendez-Diaz* and *Bullcoming* were decided by the time of VanDyke's trial. Thus, it would have been clear to a reasonable prudent defense attorney that Long's statements

in his report constituted testimonial hearsay based on clearly established law regarding confrontation. *See Crawford*, 541 U.S. at 43. Reasonable defense counsel would thus have understood that the State's introduction of Long's statements violated VanDyke's confrontation right. The failure to protect VanDyke's right to confrontation was therefore constitutionally deficient performance. *See State v. Domke*, 2011 WI 95, ¶ 45, 337 Wis. 2d 268, 805 N.W.2d 364.

The circuit court's reasoning on the matter of trial counsel's deficiency is inapposite. VanDyke has consistently presented the confrontation issue as his counsel's failure to object to the State's introduction of Long's report without affording him an opportunity to cross examine Long about its contents. However, the circuit court considered the issue of whether trial counsel was deficient for not calling Long as a witness at the trial. That analysis misses the point. VanDyke is not arguing that his counsel should have called Long to testify, but rather that he should have put on the State the burden of producing Long or abandoning as evidence his report. Whether VanDyke's counsel made a strategic decision not to call Long is irrelevant to VanDyke's ineffective assistance claim.

The circuit court also stated that trial counsel was not deficient for not challenging Long's report because the central part of the case was not from what Trittin died, but rather whether VanDyke delivered the heroin that killed him. But that conclusion is directly contradicted by trial counsel's testimony at the *Machner* hearing, where he explained that he sought to use the contents of Trittin's blood to convince the jury that he was killed by something other than heroin. To establish VanDyke's guilt, the State had to prove that he died from a heroin overdose, and VanDyke made no concession or stipulation that the cause of his death was heroin. Thus, whether heroin killed Trittin was as central to the case as whether VanDyke delivered the heroin that killed him.

While trial counsel's use of the report to suggest to the jury that Trittin died of something other than a heroin overdose was adept in light of the report's admission, such use of the report was necessary solely because the report was, in fact, introduced into evidence. If the report had been

excluded, trial counsel would never have had to make that argument because, as counsel recognized at the *Machner* hearing, if the report had been excluded, the State would not have been able to prove by other evidence the toxicology of Trittin's blood. Absent proof of Trittin's blood toxicology, the State could not prove that Trittin's death was caused by heroin toxicity, and thus could not have proven all the elements of the offense with which VanDyke was charged.

Trial counsel's reasoning that he wanted the report introduced into evidence because it supported his theory of defense that additional substances besides heroin caused Trittin's death is thus justifiable only when it is assumed that the report will be introduced into evidence. Had counsel objected to the report and secured its exclusion, he would never have had to worry about explaining to the jury that Trittin had substances in his blood other than heroin.

Where the law provides a basis for counsel to contest the introduction of testimonial hearsay, counsel performs below acceptable standards by failing to object to it. *Domke*, 2011 WI 95, ¶ 45. VanDyke's counsel was thus deficient in not challenging the admission of Long's report.

C. Admission of the Report and the Medical Examiner's Testimony Regarding its Contents Violated VanDyke's Confrontation Rights, and he was Thus Prejudiced by his Counsel's Deficient Performance.

In the instant case, prejudice derives from the importance of Long's untested testimonial hearsay statements.

Long's statements were a key component of the State's case. That Trittin's death was caused by heroin was an essential element of the crime with which VanDyke was charged. *See* R.24, WIS JI-CRIMINAL 1021. The medical examiner relied upon Long's testimonial statements when testifying to the cause of Trittin's death, and thus if those statements were inaccurate or otherwise incorrect, the medical examiner's conclusion would have to change. As previously noted, the prosecutor informed the jury in closing

to find VanDyke not guilty if they did not believe Trittin's death was the result of a heroin overdose. R.77:356.

Additionally, Long's hearsay statements provided facts that were not otherwise in evidence: they were the sole source of evidence showing the toxicological contents of Trittin's blood. Consequently, counsel's failure to object left VanDyke unable to confront the only evidence proving the State's contention that Trittin died because of heroin.

The failure to object to Long's testimonial statements undermines the confidence in the outcome of this trial. *See Pitsch*, 124 Wis. 2d at 642, 369 N.W.2d at 718-19 (prejudice inquiry focuses on reliability). Given the argument above, if counsel had objected the circuit court should have either excluded the report or required the State to produce Long to testify regarding his report.

If the report had been excluded, the State would have had no other way to establish the toxicology of Trittin's blood, and thus could not have proved that heroin caused Trittin's death. Thus, the failure to object was prejudicial because it allowed the State to prove an element of the offense that it otherwise would have been unable to prove.

If the circuit court had adjourned the trial to allow the State an opportunity to produce Long to testify regarding the content of his report, there is no way to know whether the State would actually have undergone the expense to call Long as a witness. Long was an out-of-state expert employed by a lab in Saint Louis, Missouri. His testimony would have required expenditure of substantial tax payer money on travel, lodging, and expert witness fees. Given that the State wanted to resolve the instant case by a negotiated plea agreement to a lesser offense that did not include Trittin's homicide, the State may simply have elected not to pay for Long to come to court. If the State elected not to produce Long and therefore not prove that heroin killed Trittin, the alternative would have been dismissal for lack of proof. If the State was going to abandon Long's report and its case against VanDyke, it is likely that the circuit court's assessment of the negotiated plea agreement would have changed in VanDyke's favor.

Even if the State had produced Long at trial, VanDyke could have challenged his credibility and the credibility of his conclusions. By so doing, he could have created doubt that the samples received by Long were not in fact Trittin's; that the contents of the blood and urine were not accurate; or that the amounts of any substances found therein were not accurate. If any these assertions were called into doubt, the entire foundation of the State's case would crumble.

For all those reasons, the failure to object on confrontation grounds prejudiced VanDyke, and thus denied him the effective assistance of counsel.

He should be entitled to a new trial.

CONCLUSION

For the aforementioned reasons, VanDyke asks this Court to hold that he is entitled to a new trial and to remand to the circuit court for proceedings consistent with so holding.

Dated this 22nd day of May, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,537 words, as counted by the commercially available word processor Microsoft Word.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Section 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 22nd day of May, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 22nd day of May, 2014.

Matthew S. Pinix
Attorney for Defendant-Appellant

CERTIFICATION OF FILING BY MAIL

I hereby certify, pursuant to Rule 809.80(4)(a), Rules of Appellate Procedure, that this Appellant's Brief and Appendix will be deposited in the United States mail for delivery to the Clerk of the Court of Appeals, Post Office Box 1688, Madison, Wisconsin, 53701-1688, by first-class mail, or other class of mail that is at least as expeditious, on May 23, 2014. I further certify that the brief will be correctly addressed and postage pre-paid. Copies will be served on the parties by the same method.

Dated this 22nd day of May, 2014.

Matthew S. Pinix
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