STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2014AP481-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JASON S. VANDYKE,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN WINNEBAGO COUNTY, THE HONORABLE THOMAS J. GRITTON, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Page

CASES

Page

Page

Page

Page

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The plaintiff-respondent, State of Wisconsin, requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

STATEMENT OF THE CASE, FACTS AND PROCEDURAL HISTORY

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2. Instead, the State will present additional facts in the "Argument" portion of its brief.

ARGUMENT

VANDYKE RECEIVED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND ANY ERRORS AT HIS TRIAL WERE THE PRODUCT OF SOUND TRIAL STRATEGY THAT ACTUALLY BENEFITED HIS DEFENSE.

A. APPLICABLE LEGAL PRINCIPLES AND STANDARDS OF REVIEW.

1. Regarding Ineffective Assistance Of Counsel.

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305. A claim of ineffective assistance fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719.

To prove that his attorney's performance was deficient, the defendant must establish that counsel's representation fell below an objective standard of reasonableness. *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

The reasonableness of an attorney's acts are judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217. Importantly, trial counsel's failure to make a meritless objection does not constitute deficient performance. *See State v. Wheat*, 2002 WI App 153, ¶ 23, 256 Wis. 2d 270, 647 N.W.2d 441.

Indeed, to prove that an attorney's performance was deficient, it is not enough for a defendant to establish merely that his attorney was not very good. *Thiel*, 264 Wis. 2d 571, ¶ 19. Instead, the defendant must establish that his attorney's acts were outside the wide range of professionally competent assistance as illustrated by prevailing professional norms. *Id.*; *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The defendant must demonstrate that his attorney made serious mistakes that could not be justified under an objective standard of reasonable professional judgment. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Further, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (citation omitted). In evaluating a deficiency claim, the court should not "second guess trial counsel's selection of trial tactics or

strategies." *State v. Nielsen*, 2001 WI App 192, ¶ 44, 247 Wis. 2d 466, 634 N.W.2d 325.

Secondly, the defendant must "offer more than rank speculation to satisfy the prejudice prong." *State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). The test is whether "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687; *Johnson*, 133 Wis. 2d at 222. The defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense." *State v. Koller*, 2001 WI App 253, ¶ 9, 248 Wis. 2d 259, 635 N.W.2d 838. And when the defendant alleges that his attorney was ineffective for failing to take some action, he must show with specificity what that action would have accomplished if it had been taken, and how its accomplishment would have probably altered the result of the proceeding. *State v. Byrge*, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

On appellate review, ineffective assistance of counsel cases present a mixed question of fact and law. The circuit court's factual findings will be upheld unless clearly erroneous. Whether counsel's performance was deficient and prejudicial to the defense is a question of law reviewed de novo. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115.

2. Regarding Duplicity Challenges.

A complaint is duplicitous if:

> it joins two or more distinct and separate offenses in a single count. A duplicitous charge is defective because the jury may find the defendant guilty without the state proving each element of the offense beyond a reasonable doubt. However, "where an offense is composed of continuous acts it may be charged as one offense without rendering the charge duplicitous." The nature of the charge is a matter of election on the part of the state.

State v. Copening, 103 Wis. 2d 564, 572, 309 N.W.2d 850 (Ct. App. 1981) (citations omitted).

The discretion to join multiple acts in a single charge is "limited by the purposes of the prohibition against duplicity[.]" *State v. Lomagro*, 113 Wis. 2d 582, 588, 335 N.W.2d 583 (1983).

> Those dangers include the possibility that the defendant may not be properly notified of the charges against him, that he may be subjected to double jeopardy, that he may be prejudiced by evidentiary rulings during the trial, and that he may be convicted by a less than unanimous verdict. If any of these dangers are present, the acts of the defendant should be separated into different counts even though they may represent a single, continuing scheme.

Id.

Still, in order to overcome the presumption of innocence accorded a defendant in a criminal trial, the State bears the burden of proving each

essential element of the crime charged beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 316 (1979); *In re Winship,* 397 U.S. 358, 364 (1970); *State v. Poellinger,* 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

In addition to the due process requirement of proof beyond a reasonable doubt, "[t]he decisions of this court have long assumed" that a criminal defendant's right to a jury trial in Article I, Sections 5 and 7 of the Wisconsin Constitution "includes the right to a unanimous verdict." *Holland v. State*, 91 Wis. 2d 134, 138, 280 N.W.2d 288 (1979). The court has described the jury unanimity and due process requirements as linked. *Id*.

However, there is an important corollary to the principle that due process requires that the State prove all elements of the charged offense beyond a reasonable doubt. That corollary is that a defendant "has no due process right . . . to proof beyond a reasonable doubt of elements *not* necessary to constitute the crime charged[.]" *United States v. Inman*, 558 F.3d 742, 748 (8th Cir. 2009) (quoted with approval in *State v. Beamon*, 2011 WI App 131, ¶ 9, 336 Wis. 2d 438, 804 N.W.2d 706).

3. Regarding Hearsay And The Confrontation Clause.

The Confrontation Clause of the United States Constitution guarantees that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The

Wisconsin Constitution provides the same guarantee. *See* Wis. Const. art. I, § 7.

The right of confrontation applies only to statements that are "testimonial." *Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis v. Washington*, 547 U.S. 813, 821 (2006). In *Crawford*, the United States Supreme Court held that "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59. The Court defined "'witnesses' against the accused" as "those who 'bear testimony.'" *Id.* at 51. The Court in turn defined "testimony" as a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (citation omitted).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Wis. Stat. § 908.01(3); *Jones v. Basinger*, 635 F.3d 1030, 1041 (7th Cir. 2011). Indeed, the Confrontation Clause of the Sixth Amendment applies only to testimonial statements that are offered to prove the truth of the matter asserted. *Crawford*, 541 U.S. at 59-60.

And, as the Seventh Circuit recognized in *United States v. Ellis*, 460 F.3d 920, 923 (7th Cir. 2006), *Davis* explicitly stated that the admission of nontestimonial hearsay is not subject to the constraints of the Sixth Amendment's Confrontation Clause.

"While 'a circuit court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a

question of law subject to independent appellate review.'" *State v. Deadwiller*, 2013 WI 75, ¶ 17, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted).

B. APPLICATION OF PRINCIPLES AND STANDARDS TO FACTS OF THIS CASE.

1. The Single Charge Of Which Vandyke Was Convicted Did Not Violate His Right To Jury Unanimity. Consequently, Counsel Did Not Perform Deficiently In Failing To Object, And VanDyke Was Not Prejudiced In Any Event.

VanDyke argues that he was deprived of his right to a unanimous verdict because the evidence reflected in the criminal complaint and Information alleged two possible delivery points for the heroin that killed Cole Trittin. VanDyke's brief at 11-15. He contends his trial counsel, Attorney Daniel Muza, was ineffective for failing to challenge this alleged infirmity, for failing to request Wis. JI-Criminal 517 (2010), which instructs the jury that its verdict must be uniform, and for failing to request a more specific jury verdict form. VanDyke's brief at 15-23.

For reasons that follow, Attorney Muza did not perform deficiently, and, in any event, VanDyke's defense was not prejudiced.

a. Deficient performance.

VanDyke was charged with one count of first-degree reckless homicide, in violation of Wis. Stat. § 940.02(2) (*see* 1; 8). This crime is comprised of four elements: 1) the defendant delivered a substance; 2) the substance was a prohibited controlled substance; 3) the defendant knew or believed that the substance was a prohibited controlled substance; and, 4) the victim used the substance and died as a result of that use. *See* Wis. JI- Criminal 1021 (2011). The jury here was instructed consistent with those elements (77:309-11).

Notably, proof of a date-certain delivery is not listed as an element of the crime. Thus, there was no error in the criminal complaint, information, or ultimately the jury verdict forms that were filed in this case, and Attorney Muza had no reason to object to same.

As is evident from the complaint, police had received evidence that on April 13, 2011, VanDyke left his car door open so that Zachary Jungwirth, a mutual friend and heroin user, could pick the heroin up and then deliver it to Trittin (1:2, 4-5). Jungwirth told police that Jungwirth did so because Trittin owed money to their dealer, and thus VanDyke would not sell to Trittin (*id*). VanDyke denied this sale, saying only that Jungwirth had in fact stolen the bindle of heroin from his vehicle (1:5). Unfortunately, by trial, Jungwirth had himself died of a heroin overdose, and so his testimony could not be obtained (76:213-14).

However, police had <u>also</u> received evidence that Trittin was driven to a park and ride the

following night on April 13, 2011, by his father Bud Trittin (1:6). Bud testified that Cole told his him that he was meeting Jungwirth's father because his son had overdosed on heroin the previous day (*id*.; 76:182-88). However, based on later text messages, law enforcement suspected that Cole Trittin actually picked heroin from VanDyke at the park and ride that night (1:6). That is consistent with Cole asking Bud for $20 immediately before meeting with the unidentified individual, and going nowhere else (76:185-88, 206). Trittin was found dead by his father the following day (1:1; 8; 76:177-78).

Thus, both charging documents fully and fairly informed VanDyke of the evidence against him, including who provided that information and how it was authenticated, and described in requisite detail why VanDyke was being charged (*see* 1; 8). Thus, the complaint was not duplicitous because it charged VanDyke with one count for one crime: delivering the heroin that killed Trittin. VanDyke's single charge for a single death did not risk allowing the jury to return a "disunited" verdict: they could only find that VanDyke delivered a substance, that substance was heroin, that VanDyke knew what the substance was (heroin again), and that use of that heroin killed another (Trittin).

Indeed, as this court is well aware, and as the jury was instructed, a criminal complaint, and a subsequent Information, are solely allegations against the defendant, subject to later proof at trial (*see* 77:60-63 (defining evidence, declaring the presumption of innocence, obligation to proof every element is on the State); 77:312-13 (quoting Wis. JI-Criminal 145 (2000)) (Information not evidence)). In a similar vein, opening arguments

are just that: argument, not evidence, and a preview of what evidence the State hopes to show at trial. Here, the State had obtained information that tended to show that Zachary Jungwirth had taken heroin from VanDyke's Jeep on April 13, 2011 (1:2, 4-5; 76:96-102) The State included that information with particularity and identifying the source, date, and time of that information, including corresponding text messages that supported the theory, and previewed it for the jury in opening arguments (76:68-74). The State also alluded to the park and ride meeting the following day (76:71-72).

Likewise, the jury verdict form, filled out by the jury after having been properly instructed by the circuit court on the elements of the crime as well as the need for total uniformity regarding VanDyke's guilt or innocence in delivering the heroin that killed Trittin, was entirely proper. Attorney Muza requested and received Wis. JI-Criminal 515 (2012), which states: "This is a criminal, not civil, case; therefore, before the jury may return a verdict which may legally be received, the verdict must be reached *unanimously*. In a criminal case, all twelve jurors must agree in order to arrive at a verdict" (19:1; 77:362-63 (emphasis supplied)).

Thus, there was no error in the criminal complaint, Information, or jury verdict forms that were filed against VanDyke.

This conclusion is well supported by Wisconsin caselaw. In *State v. Fawcett* 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), the defendant challenged the sufficiency of a complaint that alleged that he engaged in two instances of sexual contact with a ten-year-old boy over a span of six

months. *See id.* at 247. This court stated the basic principles involved:

> The criminal complaint is a self-contained charge which must set forth facts that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and that the defendant is probably culpable. The sufficiency of a pleading is a question of law which we review independently on appeal. Whether a depravation of a constitutional right has occurred is a question of constitutional fact which we also independently review as a question of law.
>
> A criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense. However, where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged.

Id. at 250 (citations omitted). *Cf. State v. Conner*, 2011 WI 8, ¶ 28, 331 Wis. 2d 352, 795 N.W.2d 750 (holding, in a stalking case with adult victims, that the complaint gave sufficient notice when it listed twenty-seven dates on which specific acts occurred).

As set forth above, here VanDyke was charged with one count of first-degree reckless homicide for causing the death of Trittin by delivery of a specified controlled substance as described in Wis. Stat. § 961.41. Regardless of the specific delivery, proof of the required four elements beyond a reasonable doubt does not require date-certain proof of where or how the delivery occurred. Rather, it only required proof beyond a reasonable doubt that VanDyke 1) delivered a substance; 2) the substance was

heroin; 3) VanDyke knew or believe that the substance was heroin; and 4) Trittin used the substance alleged to have been delivered. *See* Wis. JI-Criminal 1021. Thus, there is no concern that VanDyke was not properly noticed regarding allegations against him, because those allegations detailed exactly who, what, where, when, and how the State believed VanDyke delivered heroin to Trittin.

Unfortunately, no one knows exactly whom Trittin was speaking to in a car at the park and ride on April 13, 2011. His father Bud testified without contradiction that he drove Cole to a park and ride, where he ostensibly was to meet Jungwirth's father in an attempt to console him over his son's recent overdose. Bud never saw proof of Jungwirth's father however; he gave Cole $20 that Cole represented was for Jungwirth's father to help him pay for gas money to and from the hospital (*see* 76:184-86).

After the evidence came in at trial, the State primarily focused its argument on the park and ride delivery because it came 1) after the earlier Jungwirth pick up or theft and 2) Bud Trittin drove Cole to the park and ride, and Cole returned home and went nowhere else before his father found him unresponsive the following day (*see* 77:321-22).

However, as argued above, the date of the delivery itself is <u>not</u> an element of first-degree reckless homicide, and, in any event, this court made clear in *Fawcett* that a specific date is not required for conviction.

The Wisconsin Supreme Court's decision in *Lomagro*, 113 Wis. 2d 582, also supports this conclusion. In *Lomagro*, the defendant was

charged with and convicted of one count of first-degree sexual assault as party to a crime. *See id.* at 583-86. The evidence at trial showed that he and a co-defendant drove the victim to multiple locations and sexually assaulted her six times during a two-hour period. *Id.*

The defendant argued on appeal that his right to jury unanimity was violated because the State introduced evidence of those multiple acts but the jury was not required to agree upon a specific act. *See id.* at 586. This court rejected that claim, reasoning that because the six acts of nonconsensual sex constituted alternative means of committing first-degree sexual assault, the jury was not required to unanimously determine which act formed the basis of its guilty verdict. *Id.* at 595, 598. The court concluded that unanimity was achieved because the jury unanimously agreed a sexual assault had been committed. *Id.* at 594-95, 598. "'Unanimity is required,'" the court held, "'only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged.'" *Id.* at 595-96 (quoting *Holland,* 91 Wis. 2d at 143).

Thus, *Lomagro* also establishes that the jury need not unanimously agree upon the specific act or the specific location of the act, as long as the jury unanimously agrees that all the elements of the offense are proven.

That principle was also recently reinforced in *State v. Badzinski*, 2014 WI 6, 352 Wis. 2d 329, 843 N.W.2d 29. In that case, the jury unanimously found that Badzinski had sexual contact with A.R.B. and that she was under the age of thirteen years at the time of the sexual contact. *Id.* ¶¶ 17, 20-21. The Wisconsin Supreme Court, in a

unanimous decision, held that the State was not required to prove the specific location of the assault beyond a reasonable doubt, and the jury was not required to find unanimously, any other fact, including the specific room in which the assault took place. *Id.* ¶¶ 30-34.

Again, VanDyke was charged with one count of first-degree reckless homicide, in violation of Wis. Stat. § 940.02(2) (*see* 1; 8). This crime is comprised of only four elements: 1) the defendant delivered a substance; 2) the substance was a prohibited controlled substance; 3) the defendant knew or believed that he or she was delivering a controlled substance; and 4) use of that substance caused a person's death. Wis. JI-Criminal 1021. Notably, just as in *Badzinski*, not one of those elements is the date of which the delivery took place.

Still, VanDyke argues that Attorney Muza was ineffective in failing to challenge these allegations on duplicity grounds. VanDyke anchors his argument that his trial counsel was ineffective and that this ineffectiveness deprived him of jury unanimity in *State v. Marcum*, 166 Wis. 2d 908, 480 N.W.2d 545 (Ct. App. 1992). VanDyke's brief at 15-23.

In terms both factual and legal, VanDyke's case is fundamentally different.

In *Marcum*, the State charged six counts in the Information; some of which were alleged to have occurred in August 1989, and some in September. *Id.,* 166 Wis. 2d at 912-13. The fourth, fifth, and sixth counts related to the September incidents. *Id.* at 913. The court used identical wording in the verdict form for these three counts. *Id.* The jury returned a verdict of guilty on count

six, but not guilty on counts four and five. *Id.* at 915.

On appeal, Marcum argued that the jury may not have been unanimous on its guilty verdict on count six because different members of the jury may not have agreed on the acts charged in count six. *Id.* at 915. In Marcum's case, the circuit court read the standard instruction on unanimity. *Id.* at 917-18. That instruction reads in part:

> This is a criminal, not a civil, case; therefore, before the jury may return a verdict which may legally be received, the verdict must be reached unanimously. In a criminal case, all 12 jurors must agree in order to arrive at a verdict.

Wis. JI-Criminal 515.

This court found that any unanimity problem could have been avoided by an instruction telling the jury that it must be unanimous about the specific act that formed the basis for each count. *Marcum,* 166 Wis. 2d at 918. The court found that there was nothing to focus the jury on a specific act or a unanimity instruction that told the jury that it needed to agree on which act formed the basis for its verdict. *Id.* at 919. Therefore, this court reversed Marcum's conviction. *Id.* at 925.

As set forth above, VanDyke was not charged with multiple counts, but only one. This is significant because the crux of the problem in *Marcum* was the risk that some jurors could have found the defendant guilty of some counts but not others and that such evidence could have impermissibly overlapped:

> The standard instruction when applied to unspecific verdicts, as in this case, left the door open to the possibility of a fragmented or patchwork verdict. For instance, there was nothing to prevent three jurors from thinking there was hand-to-vagina contact, three thinking hand-to-breast contact, three thinking penis-to-vagina contact, and three thinking penis-to-mouth contact when they agreed to find him guilty of count six. Yet, those same acts could already have formed the basis for the jurors' agreement to find Marcum not guilty of counts four and five. Such an outcome would violate the due process requirement that the prosecution prove each essential element of the offense beyond a reasonable doubt. *Holland v. State,* 91 Wis. 2d 134, 138, 280 N.W.2d 288, 290 (1979), *cert. denied,* 445 U.S. 931, 100 S. Ct. 1320, 63 L.Ed.2d 764 (1980). It is this which the unanimous jury requirement is designed to protect.

Id. at 920.

No such "unspecific verdicts" were possible here. Jurors had to all[1] agree to proof of all elements of the crime charged, which was only one charge that resulted in a single person's death. Thus, there is no concern that VanDyke was not properly noticed regarding allegations against him, because those allegations detailed exactly who, what, where, when, and how the State believed VanDyke delivered heroin to Trittin. Likewise, there was no double jeopardy concern for the same reason. *See Copening*, 103 Wis. 2d at 572 (complaint only duplicitous if a defendant may be convicted without all the elements being

[1] The jury was also in fact given the instruction that required a unanimous verdict (77:362), and jurors are presumed to follow instructions as given. *See State v. Gary M.B.*, 2004 WI 33, ¶ 33, 270 Wis. 2d 62, 676 N.W.2d 475.

proved, if complaint not sufficiently noticed to mount a defense, if double jeopardy concerns are implicated).

Indeed, VanDyke has no right to proof of any element beyond those that comprise the crime of first-degree reckless homicide. *Accord Inman*, 558 F.3d at 748 (A defendant "has no due process right . . . to proof beyond a reasonable doubt of elements *not* necessary to constitute the crime charged."). By virtue of their verdict, all jurors agreed VanDyke delivered heroin to Trittin. That is all that is required.

As argued above, jury unanimity is required with respect to the ultimate issue of the defendant's guilt or innocence and not with respect to the alternative means or ways the crime can be committed. *Lomagro*, 113 Wis. 2d at 595-96; *see also State v. Derango*, 2000 WI 89, ¶ 14, 236 Wis. 2d 721, 613 N.W.2d 833. Here, VanDyke's right to jury unanimity was not violated because all twelve jurors had to agree that the State had proven all four elements of the crime charged beyond a reasonable doubt. As such, this case is fundamentally different from *Marcum*, and the same concerns are not present: there was no risk that the jury found VanDyke guilty of one count for conduct that some other jurors may have found him innocent.

Indeed, Attorney Muza testified without contradiction at the postconviction hearing that he was aware that the State had two theories of how the delivery occurred (80:4-7). Consequently, Attorney Muza described his theory of the defense:

> Well, a fairly elaborate defense between my discussions with Mr. Vandyke, but it was primarily based upon the State's anticipated

> inability to meet its burden of proof to establish that the drugs that actually caused Mr. Trittin's death could be traced back to Mr. Vandyke.
>
> . . . .
>
> . . . [F]rom our perspective it was the uncertainty that the State had as to exactly…which alleged transaction resulted in the transfer of heroin to Mr. Trittin that he subsequently supposedly ingested which caused his apparent death.

(80:7-8).

Upon cross examination by the State, Attorney Muza testified that he contemplated filing a Bill of Particulars (*see* 80:43-44), but thought better of it because:

> It was our position that the State was struggling in the course of its investigation in establishing exactly the necessary proof to show . . . that the heroin that apparently caused the death of Mr. Trittin could be connected to that heroin allegedly in possession at some point of Mr. Vandyke.
>
> Q. Do you think the way it was charged with that uncertainty made the State's case look weaker?
>
> A. Yes.
>
> Q. If you had raised the issue and attempted to get clarification on that, was there any consideration given to what the outcome would have been?
>
> A. Yes.
>
> Q. And what did you think the outcome might have been?

A. There potentially could have been more counts alleged against Mr. Vandyke.

Q. Is that something you hoped to avoid?

A. Yes.

Q. Was that something that has been discussed with Mr. Vandyke?

A: I don't recall that we specifically addressed the issue of multiple counts as far as the strategic issue. We certainly discussed the issue with respect to the difficulty that both he and I perceived the State had in connecting the controlled substance that allegedly caused the death of Mr. Trittin having come from Mr. Vandyke.

(80:26-27).

And, as Attorney Muza testified without contradiction, VanDyke was entirely aware of this strategy. Indeed, he had approved of it. Thus, even if there was error, that error inured to the benefit of VanDyke, and VanDyke was supportive of that choice. He should not now be allowed to go back on that choice simply because the strategy did not work. *Nielsen*, 247 Wis. 2d 466, ¶ 44, (In evaluating a deficiency claim, the court should not "second guess trial counsel's selection of trial tactics or strategies."). Thus, Attorney Muza was aware of the alleged impropriety in the criminal complaint, informed VanDyke, and secured VanDyke's blessing in proceeding with sound trial strategy. He did not perform deficiently.

b. Prejudice.

Even if Attorney provided deficient performance, VanDyke was not prejudiced. In fact,

those alleged errors actually benefited VanDyke's defense at trial.

Attorney Muza testified without contradiction at the postconviction hearing that he was aware that the State had two theories of how the delivery occurred (80:4-7). Thus, as Attorney Muza later testified, any uncertainty as to when exactly the heroin delivery occurred was a "proof issue. That was the entire crux of the defense" (80:46). *Cf. Koller*, 248 Wis. 2d 259, ¶ 9 ("Showing prejudice means showing that counsel's alleged errors actually had some adverse effect on the defense."). Here, there was no adverse effect because the supposedly infirm complaint and related proof should have hurt the State's case, not aided it.

Respectfully, that the strategy did not work is not proof of Attorney Muza's ineffectiveness. *Accord McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (citing *Strickland*, 466 U.S. at 690) ("Strategic choices are 'virtually unchallengable.'"). The record is replete with attacks of the State's proof and argument as to alternative causes of death (i.e. the other drugs in Trittin's system and his known drug habits) (*see* 76:87, 165-69; 77:331-53). Indeed, in closing, Attorney Muza repeatedly put the State to its burden of proof, and reminded the jury of that burden in arguing that the State had failed to meet it (77:331-53).

And, as Attorney Muza testified without contradiction, VanDyke was entirely aware of this strategy. Indeed, he had approved of it. Thus, even if there was error, that error inured to the benefit of VanDyke, and VanDyke was supportive of that choice. He should not now be allowed to go back on

that choice simply because the strategy did not work.

2. Dr. Kelly's Reliance Upon A Lab Report Did Not Violate VanDyke's Confrontation Rights, And Therefore Counsel Was Not Ineffective In Failing To Object.

VanDyke argues that the admission and reliance upon the victim's toxicity by Dr. Kelly violates his Confrontation Clause rights, and thus counsel was ineffective in failing to object. VanDyke's brief at 23-32.

As Dr. Kelly explained, he conducted the autopsy of Trittin to determine the cause of his death (77:229-32). Dr. Kelly personally examined Trittin's body consistent with his autopsy practice, conducting a full external and internal examination (77:232-35). Consequently, at trial, Dr. Kelly testified that his exam produced some "really supportive evidence of what I felt was the cause of death" (77:234). Dr. Kelly identified that Trittin had a pulmonary edema, a "nonspecific condition in which the air sacs of the lungs fill up with water and it can be found in a lot of different things including medication toxicities, drug toxicities" (*id).* Dr. Kelly also testified that Trittin had a swollen brain "which suggested to [him] it was deprived of oxygen for a period of time and then as a result of the insult to the brain, it swelled up" (*id*).

After conducting the autopsy, Dr. Kelly had samples of Trittin's blood sent out to the St. Louis

University Forensic Toxicology Lab (77:235-36). Dr. Kelly opined that those results are helpful "whether they are positive or negative. We're always looking at the potential for either the toxicology to be either directly or indirectly contributory to a person's death and of course negative results are helpful, too, because they rule out the possibility so all of these results are of use" (77:236). The lab reports revealed that "Trittin's blood had a high concentration of morphine in it" (77:237). Morphine is the "active component of heroin because heroin metabolizes away so quickly so that was the thing that stood out in this particular case. There are some other substances present but that's the one that stood out at a very high level" (*id.*). Thus, the St. Louis lab results only confirmed and further cemented Dr. Kelly's opinion that Trittin died from a heroin overdose.

As will be argued below, the admission of a lab report as part of Dr. Kelly's testimony was not error because it was properly admitted under a five Justice plurality in *Williams v. Illinois*, 567 U.S. ____, 132 S. Ct. 2221 (2012), and likewise consistent with the Wisconsin Supreme Court's decision in *Deadwiller*. And, in any event, VanDyke was not prejudiced because Dr. Kelly could have reached the same opinion without said report, and Attorney Muza and VanDyke in fact wanted the report in so as to argue that another drug (or drugs) killed Trittin.

a. Admission of the toxicity report was entirely consistent with Wisconsin and United States Supreme Court precedent. Thus, counsel did not perform deficiently.

Fortunately, the United States Supreme Court addressed this issue in *Williams v. Illinois*. Analogizing to settled law allowing an expert to testify based on hypothetical facts, a plurality of the Court concluded that out-of-court statements relied on by experts for explaining the assumption on which their opinions rest are statements that are not offered for the truth of the matter asserted and, therefore, do not violate the confrontation clause. *Williams*, 132 S. Ct. at 2227-228. However, an opinion by Justice Thomas concurring in the judgment rejected that reasoning as inconsistent with *Crawford* and *Melendez-Diaz v. Mass.*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011), -- as did the four Justice dissent -- but reached the same result based on his conclusion that the statements in the lab report "lacked the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." *Williams*, 132 S. Ct. at 2255, 2256-268. Notably, both rationales were cited with approval

in our supreme court in *Deadwiller*, 350 Wis. 2d 138, ¶¶ 27, 32-35.

Under this latter standard, Attorney Muza could not be ineffective in failing to raise a Confrontation Clause argument because lab report results are not testimonial. The right of confrontation applies only to statements that are "testimonial," *Crawford*, 541 U.S. at 51, and counsel's failure to pursue a meritless issue does not constitute deficient performance. *See State v. Cummings*, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

Indeed, at a minimum, this issue is unsettled in Wisconsin. *Deadwiller*, 350 Wis. 2d 138, ¶ 47 (C.J. Abrahamson, concurring). Counsel cannot be ineffective in failing to argue a point that is unsettled in the law. *State v. Van Buren,* 2008 WI App 26, ¶¶ 18-19, 307 Wis. 2d 447, 746 N.W.2d 545.

In addition, as VanDyke acknowledges, his case is controlled by this court's decision in *State v. Heine*, 2014 WI App 32, ____ Wis. 2d ____, 844 N.W.2d 409, in which this court held that a physician who performed autopsy could, consistent with defendant's right of confrontation, take into account a toxicology report on testing that physician did not perform in testifying to opinion that victim died from a heroin overdose. *Id.* ¶ 15.

Thus, entirely consistent with *Crawford* and its progeny, no testimonial statements from a non-testifying witness were admitted at VanDyke's trial. The toxicity report and live, in-person testimony by Dr. Kelly, confirming his already-existing observations of Trittin's body, do not offend VanDyke's confrontation rights. *See Walworth County v. Therese B.*, 2003 WI App 223,

¶ 8, 267 Wis. 2d 310, 671 N.W.2d 377 (citation omitted) ("It is well settled that it is 'proper for a physician to make a diagnosis based in part upon medical evidence of which he has no personal knowledge but which he gleaned from the reports of others.'").

The lab report results are "non-testimonial" because they do not fit any of the three core classes of testimonial statements identified in *Crawford*, namely:

> [1] "*ex parte* in-court testimony or its functional equivalent–that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially[;]"
>
> [2] "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;]" and
>
> [3] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

541 U.S. at 51-52 (citations omitted).

VanDyke makes mention of the fact that the St. Louis lab that produced the toxicity report "serves medical, legal, and business professionals throughout the United States." VanDyke's brief at 25 (emphasis omitted).

But that is not the test. The fact that a report, prepared only with an eye toward

explaining the death of one of Winnebago County's citizens, could be used at a later trial if charges are filed does not make the report or its findings testimonial. Rather, as set forth above, under *Crawford*, the purpose of the report itself had to be in anticipation of litigation, not merely that a report could be used at some unknown trial.

Consequently, absent any reason to doubt Dr. Kelly's actual conclusions or testimony (and VanDyke presents no alternative or contrary medical opinion or expert bearing same), Attorney Muza could not have been ineffective in addressing Dr. Kelly's testimony. *Wheat*, 256 Wis. 2d 270, ¶ 23 (trial counsel cannot be ineffective for failing to make a meritless objection or file a meritless motion).

Moreover, as Attorney Muza testified without contradiction, VanDyke's defense was in fact aided by the admission and discussion of the toxicity report because it showed the presence of a number of other drugs: THC, amphetamine, alprazolam (Xanax) (77:249-54; 80:11-13). Indeed, Attorney Muza had earlier cross examined law enforcement regarding the high number of pill bottles and substances found in Trittin's room (76:87). Attorney Muza did the same with Dr. Kelly (77:252-54), before arguing strenuously in closing that a combination of other drugs could have been to blame for Trittin's death (77:350-51). Thus, Attorney Muza had a specific strategic reason not to object to the toxicity report's admission. *Cf. McAfee,* 589 F.3d at 356 (citation omitted) ("Strategic choices are 'virtually unchallengable.'").

3. If Attorney Muza Performed Deficiently, That Deficiency Did Not Prejudice VanDyke.

Even if Attorney Muza performed deficiently in not objecting to Dr. Kelly's testimony and admission of the victim's toxicity report, VanDyke was not prejudiced for two reasons.

First, because Dr. Kelly testified without contradiction that he identified Trittin's cause of death as a heroin overdose, and that he did so for reasons independent of the lab results which later confirmed his diagnosis (77:230-35). Therefore even if the toxicity report had been kept out, the conclusion testified to by Dr. Kelly would have been the same: Cole Trittin's death was caused by a heroin overdose. *Cf. Poellinger*, 153 Wis. 2d 493, 507 (circumstantial evidence sufficient to support a conviction, and is evaluated the same way as direct evidence).

Second, as argued above, VanDyke's defense was in fact aided by the admission and discussion of the toxicity report because it showed the presence of a number of other drugs (*see* 77:249-54; 80:11-13, 21). Attorney Muza cross examined law enforcement regarding the high number of pill bottles and substances found in Trittin's room (76:87), and did the same with Dr. Kelly (77:252-54), before arguing strenuously in closing that a combination of other drugs could have been to blame for Trittin's death (77:350-51).

And, in any event, Attorney Muza had concluded that the testimony of Dr. Kelly was coming in independent of the toxicity report anyway:

Q. Now, going back to the time of this trial, was it your impression that if, as suggested, the report from the outside lab had not been admitted, was it your impression that Dr. Kelly would have been able to give his conclusion about cause of death utilizing data that he knew about from that report anyway?

A. Yes.

Q. And is that something that you had considered prior to going to trial?

A. Yes.

Q. If that had been what occurred, that the report itself was not admitted from the outside lab, the data from the outside lab was not introduced in any detail, would it have been more difficult for you to attack Dr. Kelly's conclusion about it being a heroin toxicity death?

A. Yes.

(80:23-24).

Thus, Attorney Muza testified that he was able to argue against a conclusion that heroin killed Trittin, given the litany of other substances present in his system. Consequently, if there was error, that error actually benefited VanDyke and supports his defense. VanDyke could not have been prejudiced by the admission of a report that aided his defense.

CONCLUSION

For the foregoing reasons, this court should affirm VanDyke's judgment of conviction and order denying his motion for postconviction relief.

Dated this 25th day of July, 2014.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,813 words.

_____
Robert G. Probst
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 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 25th day of July, 2014.

_____
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