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 REPLY BRIEF

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

VanDyke offers the following in response to the State.

I. IT WAS CONSTITUTIONAL ERROR TO CHARGE VANDYKE WITH A SINGLE CRIME BASED ON MULTIPLE CRIMINAL ACTS; THE LAW CITED BY THE STATE SUPPORTS THAT CONCLUSION.

The State responds to VanDyke's double jeopardy and unanimity arguments by asserting that "there was no error in the criminal complaint, Information, or jury verdict forms that were filed against VanDyke" because "proof of the four elements beyond a reasonable doubt does not require date-certain proof of where or how the delivery occurred." St.'s Br. at 11-12.

In support of its position, the State selectively summarizes *State v. Lomagro*, 113 Wis. 2d 582, 335 N.W.2d 583 (1983), and relies on its language for the proposition that "'[u]nanimity is required . . . only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged.'" St.'s Br. at 13-14 (quoting *Lomagro*, 113 Wis. 2d at 595-96). VanDyke cannot dispute the occurrence of that language in *Lomagro*. However, a close read of the whole of *Lomagro* demonstrates that the parts omitted from the State's brief actually advance VanDyke's claim.

In *Lomagro*, the defendant was charged with a single count of sexual assault following a one-night criminal episode in which he committed multiple sex acts with a single victim, any one of which would independently constitute sexual assault. 113 Wis. 2d at 583-84, 335 N.W.2d at 585-86. On appeal, the defendant argued that his constitutional rights were violated when the separate crimes were charged as a single count. *Id.* at 585, 335 N.W.2d at 586.

The supreme court ultimately concluded, under the facts of that case, that no constitutional error had occurred. *Id.* at 598, 335 N.W.2d at 592. Of importance was the fact that "[t]he acts alleged in the complaint were committed by the same two co-defendants in a short period of time and as part of one continuous criminal transaction." *Id.* at 589, 335 N.W.2d

at 588. The court explained the law behind its decision as follows:

> This court has consistently held that acts which alone constitute separately chargeable offenses, when committed by the same person at substantially the same time and relating to one continued transaction, may be coupled in one count as constituting but one offense without violating the rule against duplicity. If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge one continuous offense or a single offense or series of single offenses.

Id. at 587-88, 335 N.W.2d 586-87 (cited authority omitted). Whereas the multiple sexual assaults alleged in *Lomagro* were committed by the same persons over a short period of time and as part of a single, continuous transaction, "it was proper for the state to charge the defendant with one offense." *Id.* at 589, 335 N.W.2d at 588. It was only because of the court's threshold determination that the charges were proper that it then turned to the defendant's separate unanimity challenge, *id.* at 589-90, 335 N.W.2d at 588-89, from which the State quoted in the instant case, St.'s Br. at 13-14.

The above-detailed portion of *Lomagro* sustains the conclusion that had the multiple alleged sexual assaults in that case not been committed by the same persons over a short period of time as part of a single, continuous transaction, charging a single crime would not have proper. Instead, it would have been an affront to the defendant's constitutional rights, which are protected by the prohibition of duplicity. *Lomagro*, 113 Wis. 2d at 586-87, 335 N.W.2d at 587. Amongst the "purposes of the prohibition against duplicity" are "protect[ing] the defendant against double jeopardy" and "guarantee[ing] jury unanimity." *Id.*

Like *Lomagro*, VanDyke's case involved multiple criminal acts underlying a single charge. However, unlike *Lomagro*, VanDyke's alleged criminal acts involved different participants, occurring at different times of day, that were not part of a single, continuous transaction. Under the law and reasoning set forth in *Lomagro*, it was improper for the State to

charge VanDyke with one offense based on those two different crimes.

The State's reliance on *State v. Fawcett*, 145 Wis. 2d 244, 426 N.W.2d 91 (Ct. App. 1988), is also misplaced. St.'s Br. at 11. Unlike the instant case, there was no allegation in *Fawcett* that the criminal charge was unconstitutional because it charged multiple criminal acts as a single offense. Instead, the defendant in *Fawcett* argued that his "due process right to notice of the charges [against him] and his fifth amendment right against double jeopardy" were violated because "the six-month period of time alleged in the complaint and information [was] too expansive to allow him to prepare an adequate defense." 145 Wis. 2d at 247, 249, 426 N.W.2d 93.

VanDyke has not argued to this Court that the complaint was insufficiently pled to allow him to prepare a defense. While that is one of the "purposes of the prohibition against duplicity," it is not amongst the violations about which VanDyke complains. *See Lomagro*, 113 Wis. 2d at 586-87, 335 N.W.2d at 587. Instead, VanDyke asserts the lack of specificity in the charging document violated two of the other "purposes of the prohibition against duplicity:" double jeopardy and jury unanimity. Thus, *Fawcett* is inapposite. *Id.*

Finally, the State's assertion of *State v. Badzinski*, 2014 WI 6, 352 Wis. 2d 329, 843 N.W.2d 29, does not help it defeat VanDyke's claim. *See* St.'s Br. at 14-15. In that case, the defendant had been charged with a single sexual assault occurring during a single criminal episode involving the same actors. *Badzinski*, 2014 WI 6, ¶ 9. Like *Fawcett*, the defendant did not challenge whether the charges unconstitutionally combined multiple acts into one crime. *Id.* ¶ 23. Instead, the issue was whether the jury had to unanimously agree on the location of that a sexual assault. *Id.* ¶¶ 2, 5. VanDyke, however, challenges the charges against him as combining multiple criminal acts into a single charge. *Badzinski*, like *Fawcett*, is therefore distinguishable.

For those reasons, the State's cited authority is not dispositive of the claim that VanDyke has asserted on appeal. To the contrary, *Lomagro* actually supports VanDyke's

contention that the charge against him violated his constitutional rights.

II. THE STATE MISREPRESENTS THE RECORD WHEN IT SUGGESTS THAT VANDYKE WAS INVOLVED IN HIS COUNSEL'S FAILURE CHALLENGE THE CHARGES AGAINST HIM.

The State argues that "VanDyke was entirely aware of [Attorney Muza's] strateg[ic]" choice not to challenge the lack of specificity in the information and "was supportive of that choice." St.'s Br. at 20 (emphasis in original). Thus, says the State, VanDyke "should not now be allowed to go back on that choice simply because the strategy did not work;" VanDyke's trial counsel was therefore not deficient. *Id.*

There is nothing in the record to support the assertion that VanDyke was entirely aware of any strategic choice to forgo a constitutional challenge to the information, jury instructions, or verdict forms. Trial counsel unequivocally testified that he did not see a constitution problem in the information, jury instructions, or verdict forms, and he never discussed with VanDyke "the issue of multiple counts as far as a strategic issue." All that trial counsel discussed with VanDyke was the difficulty that the State would have in proving that he committed either delivery. But that does not mean that counsel informed VanDyke of any potential constitutional error, or even that he obtained VanDyke's agreement to proceed without a challenge to it.

Indeed, if counsel did not identify the constitutional issue of which VanDyke complains on appeal, there is no way that he could have obtained VanDyke's consent to forgo a challenge to it as part of some strategy.

In light of that record, the claim that VanDyke was "entirely aware" of the constitutional problem and participatory in some knowing, strategic choice not to challenge the information, jury instructions, or verdict forms is unsustainable. The State's contentions regarding deficiency and prejudice are thereby undercut.

III. THE STATE'S ARGUMENT THAT TRIAL COUNSEL EFFECTIVELY HANDLED THE CONFRONTATION ISSUE ARE UNSUPPORTED BY THE RECORD AND THE APPLICABLE LAW.

A. The Statements in the Toxicology Report Were Testimonial.

Contrary to the State's suggestion, the test for ascertaining when a statement is testimonial is not exclusively whether it will later be used at trial. *See* St.'s Br. at 25-27. The test is instead whether the circumstances at the time that it was made objectively indicate that its primary purpose was to establish or to prove past events *potentially relevant* to later criminal prosecution. *Michigan v. Bryant*, 526 U.S. __, 131 S. Ct. 1143, 1154 (2011). Under that standard, Long's statements certainly qualify as testimonial.

As explained in VanDyke's opening brief, the toxicology report was commissioned by the medical examiner to search for contraband substances in a dead person's blood and urine. A significant role of the lab where Long performed the tests is to generate statements that are to be used for litigation. Long's statements were thus made to prove past events potentially relevant to a criminal prosecution. St. Br. 27.

Additionally, Long's report bears other indicia of its testimonial character, which the State fails to address. Namely, Long's statements were not some casual observation or mere data; they were formalized in a document published in the name of the Lab, which Long signed, dated, and provided to the medical examiner. R.30, A. Ap. 18-20. The report named and quantified substances contained in the tested blood and urine samples, and asserted that they belonged to Trittin, even though no chain of custody evidence was presented. R.30, A. Ap. 18-20, R.31, A. Ap. 21.

For all those reasons, Long's statements 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." *Crawford v. Washington*, 541 U.S. 26, 51-52 (2004). They were therefore testimonial. *Id.*

B. The Testimonial Statements in the Toxicology Report Required Confrontation.

The State argues that confrontation was not required because Long's statements were merely support for the medical examiner's expert opinion. St. Br. 24-26. The record does not bear out that assertion.

The medical examiner testified that his examination of Trittin's tissues and organs demonstrated "medication toxicities, drug toxicities" and other conditions such as heart failure. R.77:232-35. The medical examiner said nothing about heroin or any specific drug before referenced Long's report.

Proof of the crime with which VanDyke was charged necessitated proof that there was heroin in Trittin's system at the time of his death. While the medical examiner's testimony and opinion were important, it alone could not satisfy the State's burden of proof. Only Long's statements answered the fundamental question, "Was there heroin in VanDyke's system when he died?" Thus, to satisfy confrontation, a witness familiar with Long's report had to testify regarding its contents, not the medical examiner. *See Bullcoming v. New Mexico*, 564 U.S. __, 131 S. Ct. 2705, 2715-16 (2011).

The State cites to *State v. Heine*, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409, to support its contention that Long's statements were merely the basis of the medical examiner's opinion, and thus confrontation was not required. St. Br. 25. *Heine* is distinguishable on its facts.

The defendant in *Heine* was charged with the same crime as VanDyke. 2014 WI App 32, ¶ 1. The medical examiner in *Heine* testified how his own observations led him to conclude that heroin caused the victim's death. *Id.* ¶ 15. To the contrary, the medical examiner in the instant case made no such assertion. Prior to his reliance on Long's report, the medical examiner said only that "drug toxicities" was a possibility. R77:234. Unlike *Heine*, in the instant case Long's report was the only source of evidence satisfying the essential element of whether Trittin had heroin in his system.

There is another significant difference in *Heine*, which the State's argument ignores: three people from the toxicology lab that generated the challenged report testified, in addition to the medical examiner. 2014 WI App 32, ¶¶ 3-4. In stark contrast, no one from the toxicology lab testified in the instant case. Consequently, the medical examiner in the instant case served as a conduit for facts that went directly to an essential element. *See United States v. Turner*, 709 F.3d 1187, 1191-92 (7th Cir. 2013).

The State's selective citation to *Walworth County v. Therese B.*, 2003 WI App 223, 267 Wis. 2d 310, 671 N.W.2d 377, in support of its confrontation argument weakens its position. Namely, the State cited *Therese B.* for the proposition a physician may properly "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." St. Br. 25-26; *Therese B.*, 267 Wis. 2d 310, ¶ 8. But, the State omitted from its argument *Therese B.*'s subsequent explanation that, while an expert can testify about the bases of his or her opinion, the proponent of an expert witness cannot use the expert solely as a conduit for the hearsay opinions of others. 2003 WI App 223, ¶¶ 8-9.

In the instant case, the medical examiner served as a mere conduit for the contents of Long's report: he testified extensively about Long's statements and vouched for their credibility despite the absence of any knowledge about how Long prepared his findings. R.77:236-41. Moreover, the report itself was admitted into evidence. R.77:241. For all those reasons, VanDyke's confrontation rights were violated.

C. Trial Counsel's Failure Object was Ineffective.

The State asserts that Long's report was helpful to trial counsel and that it was reasonable strategy use the report to his advantage. St. Br. 27, 28. But that argument relies on a false assumption.

VanDyke did not have to choose between allowing the report into evidence and seeking to keep it out. Instead he could have sought to exclude it, and if unsuccessful, made the best of it. If the court did prevent the State from using the

report, then the State would be asking the jury to guess what it was that caused the "drug toxicities" in Trittin's system, which is a far better position for VanDyke. Consequently, merely because the report had weaknesses that counsel could exploit for his advantage does not excuse the failure to seek exclusion of the State's only proof of an essential element. It was objectively unreasonable for counsel to view the defense of Vandyke not miss this opportunity. *See State v. Domke*, 2011 WI 95, ¶ 45, 337 Wis. 2d 268, 805 N.W.2d 364.

The State also contends that trial counsel cannot be faulted for not arguing a point of law that was unsettled due to the fractured opinion in *Williams v. Illinois*, 567 U.S. __, 132 S. Ct. 2221 (2012). VanDyke has two responses.

First, trial counsel never testified that he would have made the confrontation argument but for a lack of clarity in the law. Second, any confusion caused by *Williams* did not relieve trial counsel of his obligation to make an objection. *Williams* was a plurality opinion that set forth no clear law in contradiction to the position VanDyke now asserts. Indeed, the law that counsel needed to make a confrontation challenge survived it.

At the time of trial, an unbroken chain of decisions from the Supreme Court squarely made Long's statements subject to confrontation. In 2004, the Supreme Court held that whether a statement was testimonial hearsay was the proper inquiry into whether it was subject to the confrontation clause. *Crawford*, 541 U.S. at 43. Then in *Melendez-Diaz v. Massachusetts*, the Court held fast to this definition, regardless of whether the testimonial hearsay concerned scientific opinion. 557 U.S. 305, 321-22 (2009). In *Bullcoming*, the Court continued its adherence to these principles by holding that the testifying person cannot serve as a conduit for the opinion of another, even if it is scientific evidence. 131 S. Ct. at 2715-17. Wisconsin courts, including *State v. Deadwiller*, similarly recognized limits to an expert's testimony when testimonial hearsay is utilized to explain an expert's opinion. 2013 WI 75, ¶ 37, 350 Wis. 2d 138, 834 N.W.2d 362; *State v. Luther Williams*, 2002 WI 58, ¶¶ 38-43, 253 Wis. 2d 99, 644 N.W.2d 919.

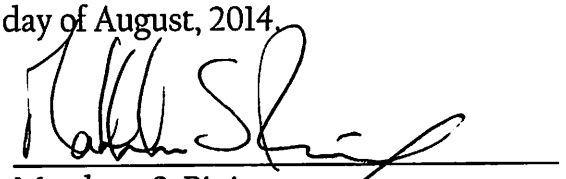
It is this last point that makes the confrontation violation clear in VanDyke's case, regardless of *Williams*. Like *Bullcoming*, and unlike *Williams*, Long's statements concerned an element of the offense, were admitted on their own, and were testified to extensively by someone else. R. 77:235-41; *see Bullcoming*, 131 S.Ct. at 2710-11, *Williams*, 132 S. Ct. at 2230. But even considering *Williams*, five justices held that the requirement of confronting testimonial statements does not disappear merely because it involves facts relied upon by experts. 132 S. Ct. at 2258-59, 2268. Again, this case is different in that the medical examiner testified in place of Long, just like *Bullcoming*. *See* 131 S. Ct. at 2710-11. Thus, even in light of *Williams*, counsel had a strong confrontation argument.

For these reasons, counsel needlessly abandoned a strategy available to him to keep proof of an element of the offense out of the trial. Moreover, a confrontation challenge to the use of the toxicology report was far from murky, where both federal and Wisconsin courts continue to provide a basis to make that challenge. Consequently, counsel's decision to ignore the confrontation challenge was objectively unreasonable.

CONCLUSION

For those reasons and those set forth more fully in his first brief, VanDyke asks this Court to grant him a new trial.

Dated this 28th day of August, 2014.



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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 2,918 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 28th day of August, 2014.

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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 August 28, 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 28th day of August, 2014.

Matthew S. Pinix
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