STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2015AP158-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROZERICK E. MATTOX,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

TABLE OF CONTENTS

CASES CITED

Page

Page

Page

STATUTES CITED

Page

RULES CITED

CONSTITUTIONAL PROVISIONS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2015AP158-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROZERICK E. MATTOX,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE JENNIFER DOROW, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

ISSUE PRESENTED

Did the trial court violate Rozerick Mattox's right to confront his accusers when it allowed the medical examiner who performed the autopsy to render the opinion that, based in part on data compiled at an out-of-state toxicology laboratory from forensic tests of the victim's bodily fluids, the victim died of a heroin overdose?

The medical examiner testified that the cause of the victim's death was a heroin overdose, a fact that was undisputed at trial. The medical examiner's opinion was based upon her personal examination of the body and in part on data compiled from tests of the victim's bodily fluids by a forensics laboratory at St. Louis University.

The trial court overruled Mattox's confrontation clause objection to the medical examiner's opinion testimony because, it held, her opinion as to the cause of death was within her area of expertise and was independent of the data compiled by the laboratory; data that showed the presence of morphine in the victim's bodily fluids at specified volumes but did not establish, as the medical examiner independently opined, that the opiates in his system were the byproducts of "heroin breakdown."

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument. The parties' briefs should adequately address the legal and factual issues presented.

Publication may be of benefit because this is the first case since the recent Wisconsin Supreme Court decision in *State v. Griep,* 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, to consider the admissibility of a medical examiner's expert opinion testimony as to cause of death that is based in part on data compiled by a forensics laboratory. Publication may also be beneficial to enable this court to more fully explain in light of *Griep* its own seemingly contradictory recent decisions on this issue in *State v. VanDyke,* 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626, issued six weeks before *Griep,* and *State v. Heine,* 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409.

STATEMENT OF THE CASE

Rozerick Mattox appeals (58) from a judgment of conviction entered January 3, 2014, in the Circuit Court for Waukesha County (39; A-Ap. 179-81).

After a trial to the court October 15-16, 2013 (70-71), Waukesha County Circuit Court Judge Jennifer R. Dorow found Mattox guilty of first-degree reckless homicide caused by delivering a controlled substance, in violation of Wis. Stat. § 940.02(2)(a) (71:97-117; A-Ap. 157-78). There were no postconviction proceedings. Mattox appeals directly from the judgment of conviction.

Mattox challenges the trial court's decision, over his confrontation clause objection, to allow the medical examiner who performed the autopsy to render the opinion that the cause of the victim's death was "acute heroin intoxication"; an opinion that was based in part on bodily fluid test data compiled at a St. Louis University toxicology laboratory (70:188-95, 213, 225; A-Ap. 119-26, 144, 156). Mattox also separately objected to the admission into evidence of the laboratory's toxicology report, Trial Exhibit No. 22 (70:225; A-Ap. 156).

Statement of Facts Relevant to the Confrontation Clause Issue.

Terry Tibbits testified that he purchased heroin from Rozerick Mattox (a/k/a "Kevin") shortly after 10:00 a.m. on February 14, 2013, near 47th and Hadley Streets in the City of Milwaukee. Tibbits said he purchased the heroin for Sam Leuck, who had called Tibbits from his Waukesha home around 8:30 a.m. asking for his help in finding heroin.

Leuck accompanied Tibbits to the deal with Mattox. Using Leuck's money, Tibbits purchased one-half gram of heroin from Mattox for $80. Tibbits said he and Leuck went to a park after the deal and each injected a small amount of the heroin they had just purchased. Leuck kept the rest for

himself. Tibbits then dropped Leuck off at his Waukesha apartment never to see him alive again (70:22-42).

Leuck was found dead of an apparent drug overdose in his locked room at his Waukesha apartment by his roommate in the wee hours of February 15, 2013 (70:125-28). Drug paraphernalia found in Leuck's room was later tested and the results were positive for heroin. There were puncture marks on Leuck's arms (70:164, 167, 178, 284-85). Nichol Wayd, the Assistant Waukesha County Medical Examiner who inspected the body at the scene shortly after 4:00 a.m. February 15, said the victim had been dead for no more than 8-12 hours (70:162, 170, 174-77, 179).

Waukesha County Associate Medical Examiner Dr. Zelda Okia performed the autopsy on Leuck. Her examination of his body produced findings consistent with death caused by a drug overdose. These findings included fluid-filled lungs, brain swelling, and multiple fresh puncture marks on both arms (70:188-89, 202-05, 211-13).

Dr. Okia used those findings, as well as the findings of Assistant Medical Examiner Wayd who observed the body at the scene, to support her opinion that Leuck died of "acute (recent) heroin intoxication" (71:213), and that this was a "rapid death." She opined that Leuck died within one to three hours of injecting the heroin (71:208, 219).

On March 8, 2013, or twenty-two days after Leuck obtained the heroin that killed him, police arrested Mattox for attempting to sell heroin again to Tibbits. This time, police used Tibbits in a controlled buy to set up Mattox. Police found heroin in Mattox's van (70:45-47, 296-97).

After his arrest on March 8, Mattox gave a statement to police admitting that he arranged to sell heroin to Tibbits March 8, and admitting that he sold heroin regularly to Tibbits (also known to Mattox as "T.J.") so that Tibbits could, in turn, distribute it to his own customers in Waukesha (70:301-02; 71:20). Mattox told Waukesha County

Detective Thomas Casey that he could not specifically recall whether he sold heroin to Tibbits on February 14, 2013 (71:38, 41).

Mattox took the stand at trial and, as he did in his March 8 statement to Detective Casey, admitted that he regularly sold heroin to Tibbits and specifically admitted that he attempted to sell heroin to Tibbits on March 8, 2013. Mattox also admitted for the first time, contrary to his statement upon arrest, that he met with Tibbits near 47th and Hadley Streets in Milwaukee on the morning of February 14 to sell him heroin but, because of a dispute over quality, the deal was never completed. According to Mattox, Tibbits said he and his customer would look elsewhere for better heroin instead. Mattox testified that Tibbits paid off a $20 debt at their meeting on February 14 to settle a dispute from the day before but left without purchasing any heroin. Mattox also admitted that he knew Tibbits regularly sold the heroin he purchased from him to others in Waukesha (71:48-55).

Mattox admitted on cross-examination that he sold heroin to Tibbits "plenty of times" (71:57) and, despite the disagreement with Tibbits the day before, Mattox still agreed to sell heroin to him on February 14 because "I sell drugs" (71:67). Mattox admitted that, when Tibbits called him on the morning of February 14, Tibbits said he was on his way to get "his guy" for the heroin deal and they agreed to meet at 47th and Hadley Streets (71:68-69). Mattox said Tibbits was a middle man who would bring his customers along with him when purchasing the heroin (71:70).

Mattox did not dispute at trial that Leuck died of a heroin overdose. His theory of defense was that the fatal heroin dose was obtained for Leuck by Tibbits on February 14, 2013, from someone other than Mattox, perhaps from Tibbits' cousin with whom he had been exchanging text messages that morning (71:86-95).

The confrontation clause objection and ruling.

The only issue before this court is whether the trial court violated the confrontation clause when it allowed Waukesha County Associate Medical Examiner Dr. Okia to render her opinion, over Mattox's objection, that heroin intoxication caused Leuck's death. Mattox maintained that, because her opinion was based in part on data compiled at the St. Louis University toxicology laboratory from tests run on Leuck's bodily fluids by an examiner who did not testify, neither the laboratory report nor Dr. Okia's opinion based in part thereon was admissible (Trial Exhibit No. 17; A-Ap. 106; 70:196-200).

The laboratory test results were that Leuck's blood contained 0.61 micrograms per milliliter of morphine, a small amount of something called "6-MAM" morphine and 0.27 grams per milliliter of "free" (active) morphine. Blood sample tests were "negative" for anything else (70:196-200; A-Ap. 101-04). Morphine was also found at all locations of the thirteen puncture wounds in Leuck's arms (70:204-05, 208, 223).

Mattox objected during Dr. Okia's testimony to the admissibility of the toxicology report itself (70:188). Later, he objected to the admissibility of both the report and any testimony by Dr. Okia about its findings (70:192-93). Mattox again objected to the report later on (70:225).

The trial court overruled Mattox's objections because, it held, the report was of the type routinely relied on by medical experts in Dr. Okia's field, as permitted by Wis. Stat. § 907.03 (70:193-94, 225). The trial court explained that the laboratory report does not conclude that morphine "is a breakdown of heroin" (70:194-95). Dr. Okia testified that she has relied on this laboratory before, this is the type of report she has relied on in the past, and her experience with this laboratory is reliable (70:195-96). The court explained that the report (Exhibit No. 22) was admissible only "to the extent that it forms part of the basis for Dr.

Okia's testimony" (70:225). When asked, the prosecutor specifically assured the court that the state was not introducing the report "to prove that any of the substances were, in fact, heroin" (70:225). The court again explained that it received the report "for the limited purpose of being part of the basis upon which Dr. Okia rendered her opinions" (70:225).

Dr. Okia rendered the expert opinion that the level of morphine found in Leuck's blood sample (0.61 micrograms) was at a "fatal level." She arrived at that opinion based on her own training and experience, and not on any opinion from the St. Louis laboratory (70:197-98). Rather, Okia said she relied on the laboratory's "numbers" to arrive at that conclusion (70:197-98). Dr. Okia next rendered the opinion that the presence of 6-MAM morphine, even in the small amount detected by the laboratory, was "specific" for only heroin because it was a "breakdown" of heroin (70:198-99). Finally, Okia said the amount of free morphine in the blood (0.27 grams) was also at a "fatal level." Again, this was not something the laboratory told her. Dr. Okia arrived at that opinion based upon her own training and experience that allowed her to interpret the test results (70:199-200). Her analysis of the laboratory findings led Dr. Okia to render the opinion that Leuck's death was "rapid," within one to three hours of injecting the heroin (70:208, 214, 219). Dr. Okia's opinion, based in part on those laboratory findings, but also on her examination of the body, was that Leuck died of "acute heroin intoxication" to a reasonable degree of medical certainty (70:213-14).

ARGUMENT

THERE WAS NO CONFRONTATION CLAUSE VIOLATION BECAUSE DR. OKIA ARRIVED AT HER INDEPENDENT OPINION REGARDING CAUSE OF DEATH BASED ON HER OWN EXAMINATION OF THE VICTIM'S BODY AND ON DATA COLLECTED FROM AN ACCREDITED FORENSIC LABORATORY. DR. OKIA WAS NOT A MERE "CONDUIT" FOR THE OPINION OF AN UNAVAILABLE LABORATORY TECHNICIAN.

Only Dr. Okia rendered an opinion as to the cause of Leuck's death. She was the only witness qualified by training and experience to render the opinion that Leuck died of "acute heroin intoxication." A medical examiner such as Dr. Okia is trained to analyze and interpret toxicology laboratory test findings to arrive at that opinion.

The technician who ran the tests on Leuck's bodily fluids at the St. Louis University laboratory did not render any opinion as to the cause of his death. The tests run by the laboratory technician produced data that begged for analysis and interpretation. Dr. Okia was the one qualified by training and experience to analyze that data and render an expert opinion explaining its significance with respect to the cause of Leuck's death. Wis. Stat. § 907.03. The St. Louis laboratory technician was not qualified to render such an opinion had he or she been called to the stand by either side at trial.

Conversely, Dr. Okia did not render the opinion that Leuck's bodily fluids contained morphine in the various forms and levels found by the laboratory technician. Dr. Okia's opinion was that *if* his bodily fluids contained the various forms of morphine in the percentages found by the laboratory technician, then those findings coupled with her personal examination of his body supported her conclusion that Leuck died of heroin intoxication.

Dr. Okia's opinion as to the cause of death was independent of the laboratory data. The data would be meaningless to a lay person or, here, to the trial judge acting as the finder-of-fact. The data was given meaning by Dr. Okia's expert interpretive analysis of it that supported her independent expert medical opinion as to the cause of death.

Mattox confronted and cross-examined at trial the only person who actually "accused" him of anything: Tibbits (70:48-77). Tibbits was the only person who accused Mattox of delivering the fatal dose of heroin to Tibbits who, in turn, delivered it to Leuck. No one else directly accused Mattox of playing any role in the homicide.

Mattox confronted and cross-examined Detective Casey, who arrested Mattox and took his inculpatory statement on March 8, 2013 (71:4-25, 30-33, 39-41).

Dr. Okia did not accuse Mattox of anything. She was in no position to do so. Even so, Mattox confronted and cross-examined Dr. Okia directly about the autopsy results. He confronted and cross-examined Dr. Okia about her opinion as to the cause of Leuck's death and the factual basis for it (70:214-22, 224).

The only person who Mattox did not confront was the St. Louis laboratory technician. There was no reason to confront him or her, however, because that technician "accused" Mattox of nothing and would have had no opinion as to the cause of Leuck's death. The technician merely analyzed Leuck's bodily fluids collected by Dr. Okia at the autopsy and sent by her to the laboratory for analysis.[1] The technician then drafted a report containing toxicology findings that proved nothing more than the presence of morphine in various forms and at specified percentages by weight in Leuck's bodily fluids.

[1] Mattox did not challenge the chain of custody of the samples at trial.

There was no reason for Mattox to confront the laboratory technician about his or her findings in the toxicology report because Mattox never disputed at trial that Leuck died of a heroin overdose. His defense was that Tibbits acquired the fatal dose of heroin that he gave to Leuck on February 14, 2013, from someone else (71:86-95).

There was no reason to confront the laboratory technician unless Mattox had reason to challenge the reliability of the test results. To this day, Mattox offers no reason to believe that those test results were any less reliable than they have always been. And, of course, Mattox was free on cross-examination of Dr. Okia to raise doubt by getting Okia to admit that the validity of her opinion depended in part on the reliability of the laboratory findings and, absent the technician, we do not know for sure whether he or she followed the proper protocol, whether the test equipment was functioning properly, whether the samples were tampered with or whether the tested samples were from Leuck or someone else.

There was no reversible confrontation clause violation here because Dr. Okia was permitted to rely on the laboratory findings, and Mattox confronted and cross-examined the only witnesses who mattered. Recent case law from this court and from the Wisconsin Supreme Court leads to no other reasonable conclusion.

A. The applicable law and standard for review regarding confrontation clause challenges to an expert's reliance in part on data compiled at a forensic laboratory to arrive at an opinion.

The Sixth Amendment to the United States Constitution guarantees Mattox the right "to be confronted with the witnesses against him." The confrontation right is fundamental. *Griep,* 361 Wis. 2d 657, ¶ 18. The issue whether the admission into evidence of Dr. Okia's opinion as to the cause of Leuck's death violated Mattox's right to

confront his accusers is one of law subject to independent review in this court. *Id.* ¶ 17. *See Heine,* 354 Wis. 2d 1, ¶ 8.

The Confrontation Clause permits precisely the sort of opinion testimony provided by Dr. Okia here: A medical examiner's opinion as to the cause of death based in part on the expert's independent analysis of data obtained from toxicology laboratory testing. *State v. Williams,* 2002 WI 58, ¶¶ 19-20, 253 Wis. 2d 99, 644 N.W.2d 919.

> A defendant's confrontation right is satisfied if a qualified expert testifies as to his or her independent opinion, even if the opinion is based in part on the work of another.

State v. Barton, 2006 WI App 18, ¶ 20, 289 Wis. 2d 206, 709 N.W.2d 93. *See* Wis. Stat. § 907.03.

That conclusion is consistent with *Crawford v. Washington,* 541 U.S. 36 (2004), and *Barton,* 289 Wis. 2d 206, ¶¶ 17-20, and it is not adversely affected by the Supreme Court's subsequent decisions in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 129 S. Ct. 2527 (2009), and *Bullcoming v. New Mexico*, __ U.S. __, 131 S. Ct. 2705 (2011). *See State v. Deadwiller,* 2013 WI 75, ¶¶ 36-40, 350 Wis. 2d 138, 834 N.W.2d 362. *See also United States v. Turner,* 591 F.3d 928, 931-34 (7th Cir. 2010); *United States v. Moon,* 512 F.3d 359, 362 (7th Cir. 2008); *Vann v. State,* 229 P.3d 197, 205-11 (Alaska Ct. App. 2010); *State v. Gomez,* 226 Ariz. 165, 244 P.3d 1163, 1166-68 (2010); *Commonwealth v. Barbosa,* 457 Mass. 773, 933 N.E.2d 93, 105-11 (2010); *State v. Hough,* 690 S.E.2d 285, 289-92 (N.C. Ct. App. 2010); *Aguilar v. Commonwealth,* 280 Va. 322, 699 S.E.2d 215, 218-23 (2010); *See also Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, concurring) ("[T]his is not a case in which an expert was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence").

"[W]e opined that 'an expert who forms an opinion based in part on the work of others and an expert who merely summarizes the work of others' are quite different because in that later instance, the expert would be 'a mere conduit for the opinion of another.'" *Griep,* 361 Wis. 2d 657, ¶ 20, (quoting *Williams,* 253 Wis. 2d 99, ¶ 19).

In *Griep,* our supreme court surveyed all of the United States Supreme Court case law, and relevant Wisconsin case law, in this developing yet still-complex, often confusing, area of the law. It distinguished the situation where the confrontation clause challenge is to the admissibility of the laboratory report itself from the situation where the challenge is to the admissibility of the expert's opinion that is based in part on the findings in that report. *Id.* ¶¶ 24-40. The court summarized its survey of the case law as follows:

> In review, *Williams* and *Barton* establish that an expert witness does not violate the Confrontation Clause when his or her opinion is based in part on data created by a non-testifying analyst if the witness "was not merely a conduit." *Williams,* 253 Wis. 2d 99, ¶¶ 20, 25, 644 N.W.2d 919; *accord Barton,* 289 Wis. 2d 206, ¶¶ 13–14, 709 N.W.2d 93. *In other words, if the expert witness reviewed data created by the non-testifying analyst and formed an independent opinion, the expert's testimony does not violate the Confrontation Clause. Williams,* 253 Wis. 2d 99, ¶ 20, 644 N.W.2d 919; *Barton,* 289 Wis. 2d 206, ¶¶ 13–14, 709 N.W.2d 93. No federal decision addresses this type of expert testimony. In *Crawford,* admission of testimonial statements of an unavailability declarant violated the Confrontation Clause if the declarant was unavailable and the defendant had no prior opportunity to cross-examine. *Crawford,* 541 U.S. at 59. *Melendez–Diaz* applied *Crawford* to conclude that testimonial statements made in a forensic report that was admitted into evidence, but was created by a non-testifying analyst, violated the Confrontation Clause. *Melendez–Diaz,* 557 U.S. at 311. The facts of *Bullcoming* go one step further, involving both the admission of a testimonial forensic report and testimony of an expert witness who did not conduct the tests or offer an independent opinion. *Bullcoming,* 131 S. Ct. at 2712, 2716. However, *Crawford, Melendez–Diaz,* and *Bullcoming* do not address a situation where a

> non-testifying analyst's testimonial statements do not come into evidence, i.e., where the testimonial forensic report is not admitted and the expert witness who testifies at trial gives his or her independent opinion after review of laboratory data created [by] another analyst. Stated otherwise, when a non-testifying analyst documents the original tests "with sufficient detail for another expert to understand, interpret, and evaluate the results," that expert's testimony does not violate the Confrontation Clause. David H. Kaye, David E. Bernstein, & Jennifer L. Mnookin, *The New Wigmore: Expert Evidence,* § 4.10.2, pp. 204–05 (2d ed. 2010); *accord Williams,* 253 Wis. 2d 99, ¶ 20, 644 N.W.2d 919; *Barton,* 289 Wis. 2d 206, ¶¶ 13–14, 709 N.W.2d 93. *Williams v. Illinois* has not altered Confrontation Clause jurisprudence, which we confirmed in *Deadwiller*. *See Deadwiller,* 350 Wis. 2d 138, ¶ 30, 834 N.W.2d 362.

Id. ¶ 40 (emphasis added).

After completing this overview of the law, the court in *Griep* held that its 2002 decision in *Williams,* 253 Wis. 2d 99, and this court's 2006 decision in *Barton,* 289 Wis. 2d 206, remain good law. *Id.* ¶¶ 44, 47. *See also Deadwiller,* 350 Wis. 2d 138, ¶¶ 37-40. Pertinent here, the court in *Griep* thoroughly explained why the sort of opinion testimony presented by Dr. Okia was admissible even though it relied in part on the findings of a laboratory technician who did not testify:

> In both *Williams* and *Barton,* the expert witness offered his or her independent opinion based in part on the data provided by the non-testifying analyst and the expert witness's own expertise. *See Williams,* 253 Wis. 2d 99, ¶¶ 25–26, 644 N.W.2d 919; *Barton,* 289 Wis. 2d 206, ¶ 16, 709 N.W.2d 93. *Williams* and *Barton* also discussed the expert witnesses' qualifications and noted they were qualified to give an expert opinion based on the information before them. *Williams,* 253 Wis. 2d 99, ¶ 21, 644 N.W.2d 919; *Barton*, 289 Wis. 2d 206, ¶¶ 13, 16, 709 N.W.2d 93. We discussed the role of an independent opinion most thoroughly in *Williams,* where we stated that "one expert cannot act as a mere conduit for the opinion of another." *Williams,* 253 Wis. 2d 99, ¶ 19, 644 N.W.2d 919. However, we recognized that an expert

> may form an independent opinion based in part on the work of others without acting as a "conduit." *Id.* ¶ 25.
>
> In *Williams,* the expert witness reviewed the tests done by another analyst, including the data and notes, and then formed her own opinion. *Id.* We concluded that the testifying expert's opinion was sufficiently independent to protect the defendant's right of confrontation, and was not a mere recitation of another analyst's conclusions. *Id.* ¶¶ 25–26. In *Barton,* the expert offered his opinion based on his review of the entire file, including data similar to the chromatograms in this case. *Barton,* 289 Wis. 2d 206, ¶¶ 13–14, 709 N.W.2d 93. The court of appeals concluded the expert's testimony was his independent opinion. *Id.* ¶ 13.

Griep, 361 Wis. 2d 657, ¶¶ 53-54.

B. The trial court's decision to receive Dr. Okia's expert medical opinion is fortified by the supreme court's decisions in *Griep, Deadwiller,* and *Williams,* by this court's decision in *Barton*, and especially by this court's on-point decision in *Heine*.

It should be apparent from the discussion of the relevant facts and the controlling law set out above that there was nothing wrong with Dr. Okia rendering an opinion as to the cause of Leuck's death based in part on toxicology findings in a report prepared by a laboratory technician who did not testify. There was nothing wrong with Dr. Okia's opinion, that is, so long as she was qualified to render it and an expert in her field would normally rely on such toxicology reports; and so long as the laboratory that produced the toxicology findings was accredited and reliable.

Mattox does not argue that Dr. Okia was unqualified to render an opinion as to cause of death, that an expert in her field would not normally rely on a toxicology report such as the one produced by the St. Louis University laboratory, or that the St. Louis laboratory was not accredited or capable of producing reliable test results.

1. This court's decision in *Heine* controls.

If this court requires additional confirmation that there was no confrontation clause violation here, it need only turn to its own on-point decision in *Heine,* 354 Wis. 2d 1.

The facts in *Heine* are almost identical to the facts presented here. There, as here, the charge was reckless homicide caused by the delivery of heroin. There, as here, the defendant did not challenge on appeal the sufficiency of the evidence "that he sold heroin to the victim shortly before the victim died." *Id.* ¶ 2. There, as here, the state introduced the opinion testimony of the medical examiner who performed the autopsy to the effect that the victim died of a heroin overdose. There, as here, the medical examiner relied in part on a toxicology report prepared by a laboratory technician who analyzed the victim's bodily fluids but did not testify. *See id.* ¶ 7 (the prosecutor asked for the expert's opinion as to cause of death based on his physical examination at autopsy "combined with the toxicology results"). There, as here, defense counsel did not object to the opinion testimony. There, as here, the toxicology report was received into evidence but, "*was neither introduced nor received into evidence to trace or identify the specific heroin* the State said that Heine sold to the victim." *Id.* ¶ 1 (emphasis in original).

There, as here, Heine did not challenge the qualifications of the medical examiner who performed the autopsy to testify as an expert under Wis. Stat. § 907.02. *Heine*, 354 Wis. 2d 1, ¶ 5. There, as here, the medical examiner could rely on the report's findings to arrive at her independent opinion as to cause of death. Wis. Stat. § 907.03. There, as here, the medical examiner found evidence during the autopsy supporting her opinion as to cause of death: puncture marks to the victim's arms and fluid in the lungs. *Heine*, 354 Wis. 2d 1, ¶ 6. There, as here, the doctor also relied on the results of the toxicology report, as he testified he regularly does. *Id.* ¶ 7. There, as here, the

toxicology report revealed the presence of morphine, as well as a "specific metabolite for heroin," in the blood sample; findings the doctor opined were "very consistent with a heroin intoxication." *Id.* There, as here, the doctor's opinion that the cause of death was "acute heroin intoxication" was based on both the doctor's findings at the autopsy and on his interpretation of the toxicology laboratory's findings. *Id.*

This court held that there was no confrontation clause violation, "because the physician who performed the autopsy testified at the trial and could, consistent with Heine's right of confrontation, rely on the report in giving his medical opinion that the victim died from a heroin overdose." *Id.* ¶ 1.

As the supreme court later did in *Griep,* this court in *Heine* surveyed the relevant case law before arriving at its conclusion that there was no confrontation clause violation. *Id.* ¶¶ 9-10. This court also reviewed the relevant statutes that generally allow for the admissibility of such opinion testimony, specifically Fed. R. Evid. 703, and its close cousin Wis. Stat. § 907.03. *Heine*, 354 Wis. 2d 1, ¶¶ 11-14. This court explained that these time-honored rules of evidence serve two salient purposes: (1) to ensure that the properly qualified expert is relying on material that, though inadmissible in and of itself, is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"; and (2) the material relied upon may be revealed by the expert to the factfinder only after the court determines that its probative value in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. *Id.* ¶ 12.

This court explained why the first purpose makes sense:

> The first part of the Rule rests on the commonsense reality that a testifying expert could not be required to replicate all of the experiments and personally make all of the observations either underlying the development of the expert's field or otherwise relevant to the expert's opinion. Thus, Isaac Newton observed: "If I have seen a

> little further it is by standing on the shoulders of Giants." Certainly, a courtroom would be overflowing if *every* giant who developed the field had to testify, and, also, few expert witnesses would be able to testify at all if they had to personally reproduce the experiments and analyses that underlay developments in their field. *See, e.g., Williams,* 2002 WI 58, ¶ 29, 253 Wis. 2d at 117, 644 N.W.2d at 928 ("Section 907.03 implicitly recognizes that an expert's opinion may be based in part on the results of scientific tests or studies that are not her own. It is rare indeed that an expert can give an opinion without relying to some extent upon information furnished by others."); *Walworth County v. Therese B.,* 2003 WI App 223, ¶ 8, 267 Wis. 2d 310, 319, 671 N.W.2d 377, 382 ("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.'") (quoted source omitted). Thus, permitting the expert to rely on inadmissible material in accordance with Rule 907.03 does not violate a defendant's right to confrontation. *Williams,* 2002 WI 58, ¶ 52, 253 Wis. 2d at 124, 644 N.W.2d at 931. *See also Williams v. Illinois,* 567 U.S. at ——, 132 S. Ct. at 2239–2240 (in connection with Rule 703 of the Federal Rules of Evidence) (the lead opinion on behalf of three other justices in support of the judgment).

Id. (footnote omitted).

This court next explained the rationale for the second part of the rule:

> The second part of the rule is designed to prevent the expert from being a mere conduit for inadmissible material. *See Williams,* 2002 WI 58, ¶ 19, 253 Wis. 2d at 113, 644 N.W.2d at 926 ("[O]ne expert cannot act as a mere conduit for the opinion of another."); *Walworth County,* 2003 WI App 223, ¶ 8, 267 Wis. 2d at 319, 671 N.W.2d at 382 ("[A]lthough Wis. Stat. § 907.03 allows an expert to base an opinion on hearsay, it does not transform the hearsay into admissible evidence.").

Id. ¶ 13.

After that thorough review of the law, this court in *Heine* agreed with the state that the medical examiner's opinion testimony, "that he regularly relied on toxicology results in forming his final opinion as to cause of death laid the proper foundation for him to have relied on the toxicology report irrespective of whether that report was admissible into evidence or disclosed to the jury." *Id.* ¶ 14.

This court went on to conclude that the medical examiner "was no mere conduit for the toxicology report." *Id.* ¶ 15. Its reasoning applies with equal force here:

> [R]ather, he fully explained why *he,* based on his education and experience, honed in on heroin as the cause of the victim's death: the fresh elbow punctures, the "white frothy foam" that extended "down deep into [the victim's] airways, his trachea and his bronchi," that the victim's lungs were "full of fluid," and the victim's inordinate retention of urine. It was perfectly reasonable and consistent with both Wis. Stat. Rulee [sic] 907.03 and Heine's right to confront his accusers, for Dr. Tranchida to take into account the toxicology report in firming up his opinion as to why the victim died. Heine was fully able to confront Dr. Tranchida and challenge his opinion and his supporting reasons. *See* Wis. Stat. Rulee [sic] 907.05 set out in footnote 5. Heine was not deprived of his right to confrontation, and the trial court's receipt of the toxicology report into evidence was harmless beyond a reasonable doubt because, as we have already noted, Dr. Tranchida could have given his opinion exactly as he gave it without referring to the report. Thus, we affirm.

Id. (emphasis in original).

So, too, here Dr. Okia could have rendered her expert opinion that Leuck died of heroin intoxication without mentioning the St. Louis laboratory report. The autopsy findings pointed her in that direction, causing Dr. Okia to "hone in on" heroin as the cause of death. The toxicology test results confirmed those findings at the autopsy to the extent that they showed there were fatal levels of morphine in his system. "It was perfectly reasonable and consistent with both Wis. Stat. Rule 907.03 and [Mattox's] right to confront

his accusers for Dr. [Okia] to take into account the toxicology report in firming up [her] opinion as to why the victim died." *Id.* This court is, accordingly, bound by its binding precedent in *Heine* to affirm.

2. This court's decision in *VanDyke* is not controlling.

a. The *Heine* and *VanDyke* decisions cannot reasonably be reconciled.

The gorilla in the room, however, is this court's opinion issued a little more than one year after *Heine* in *State v. VanDyke,* 2015 WI App 30, 361 Wis. 2d 738, 863 N.W.2d 626, relied on by Mattox as support for his argument that Dr. Okia's opinion testimony in partial reliance on the toxicology laboratory test findings violated his right to confront his accusers.

As with the facts in *Heine,* the facts in *VanDyke* are almost identical to the facts presented here. *See id.* ¶ 20 ("The facts in *Heine* are admittedly similar to the present case."). Indeed, the very same St. Louis University toxicology laboratory was used to examine the victim's bodily fluids for opiates in *VanDyke*. There, as here, the medical examiner relied on the laboratory findings in part to support his expert opinion that the victim died of a heroin overdose. *Id.* ¶¶ 3-4. There, as here, the medical examiner's opinion was also based on his examination of the body which revealed puncture wounds in the arms, fluid-filled lungs and brain swelling. *Id.* ¶¶ 5-6. There, as here, the toxicology report revealed the presence of morphine at a high level as well as 6-MAM morphine. The presence of morphine at such a high level led the medical examiner to render the opinion that death was caused by "opiate toxicity or heroin toxicity." *Id.* ¶ 7.

Unlike here or in *Heine*, defense counsel did not even object in *VanDyke* to the expert opinion testimony. This court nonetheless reversed because it ruled that counsel was ineffective for not objecting. This court found trial counsel ineffective even though counsel offered a sound strategic reason at the postconviction hearing for not objecting: the toxicology report revealed other opiates in the victim's system, supporting the defense theory that he was a "junkie" who died from a drug other than the heroin delivered by Heine. This court found counsel ineffective despite the undeniably uncertain status of the law in this area at the time of VanDyke's trial that has even confounded all nine United States Supreme Court justices to this day. *Id.* ¶¶ 10, 26-28. *See Griep,* 361 Wis. 2d 1, ¶ 40 ("No federal decision addresses this type of testimony."). *See generally State v. Maloney,* 2005 WI 74, ¶¶ 28-30, 281 Wis. 2d 595, 698 N.W.2d 583. Successful ineffective assistance claims "should be limited to situations where the law or duty is clear." *Id.* ¶ 29.

This court reversed because, it held, neither the report nor the medical expert's opinion testimony in partial reliance on the report's findings was admissible (and, apparently, any minimally competent defense attorney would have figured that out and objected). *VanDyke*, 361 Wis. 2d 738, ¶¶ 17-28.

This court found to be dispositive the fact that the medical examiner's autopsy examination alone "did not lead him to [the victim's] cause of death," and therefore his opinion as to cause of death was not "made independently of the toxicology report." *Id.* ¶ 24. This made the medical examiner "a mere conduit for the toxicology report." *Id.* ¶ 25.

To say that *VanDyke* is difficult to reconcile with *Heine* is to overstate the obvious. The two are difficult to reconcile, even though this court in *VanDyke* tried mightily, *id.* ¶¶ 20-24, especially when one considers that it was decided in the context of a strained ineffective assistance of counsel

analysis one step removed from the confrontation clause claim that was properly preserved with a contemporaneous objection both here and in *Heine*.

b. This case is distinguishable on its facts from *VanDyke*.

In any event, *VanDyke* is distinguishable from this case on its facts. In *VanDyke,* there were only two puncture wounds in the victim's arms, one in each, and the medical examiner acknowledged that both could have been the result of medical intervention. 361 Wis. 2d 738, ¶ 5. Here, there were thirteen fresh puncture wounds to both arms and there was no dispute they were heroin injection sites (70:204-05, 208, 217-18, 223-24). The medical examiner in *VanDyke* found "there were numerous drugs in [the victim's] system" leading to the opinion that he died of "opiate toxicity *or* heroin toxicity." 361 Wis. 2d 738, ¶ 7 (emphasis added). Here, the tests were "negative" for any opiate other than morphine in the victim's blood, and Dr. Okia's opinion was that he died only of heroin toxicity. *See VanDyke*, 361 Wis. 2d 738, ¶ 24 (the medical examiner "testified the pulmonary edema was a nonspecific condition that could occur from 'a lot of different things'"; with regard to the two puncture wounds on the victim's arms, the medical examiner "was confident one was from medical intervention, and he had no opinion whether the other was from illicit drug use or medical intervention").

Finally, the focus of *VanDyke* was primarily on the admissibility of the "testimonial" toxicology report and not on the admissibility of the medical examiner's expert opinion testimony as to cause of death in partial reliance on the findings in that report. *Id.* ¶ 14 ("VanDyke argues his attorney was ineffective for failing to object to introduction of the toxicology report, which he asserts violated his right to confrontation"); *id.* ("we agree with VanDyke that the laboratory report containing [the victim's] blood and urine test results was testimonial"); *id.* ¶ 17 (rejecting the state's argument that the report was not "testimonial"); *id.* ¶¶ 18-

19 ("The toxicology report directly proved [the victim's] 'use,' and was the conclusive basis of [the medical examiner's] cause-of-death opinion."). *Id.* ¶ 25. This court did, however, also determine rather summarily that the medical examiner was "a mere conduit" for the report and was unable to render an independent opinion as to cause of death. *Id.* But this appears to be a distinction without a difference. *See Heine,* where the medical examiner was asked by the prosecutor for his opinion as to cause of death based on his examination of the body "combined with the toxicology results." 354 Wis. 2d 1, ¶ 7. The medical examiner's partial reliance on the toxicology test results was sufficient for this court in *Heine* to hold that his opinion as to cause of death was independent of the report. For the same reasons, Dr. Okia's opinion testimony was sufficiently independent of the toxicology report to be admissible.

3. The outcome here is dictated by *Griep* and *Heine.*

This court need not reconcile *Heine* and *VanDyke* because it is now plain after the Wisconsin Supreme Court's decision in *Griep* that *Heine* correctly applies the relevant confrontation clause law to these almost identical facts, while *VanDyke* does not.

Dr. Okia was no more a "mere conduit" for the toxicology examiner's findings than was the medical examiner in *Heine* or the crime laboratory blood/alcohol expert who reviewed a toxicology report prepared by a non-testifying laboratory technician in *Griep*. Dr. Okia's expert opinion was based in part on, but independent of, the "work of others" at the laboratory. *See Griep,* 361 Wis. 2d 657, ¶¶ 20-21. Dr. Okia was qualified by her medical training and experience to render an opinion as to the cause of Leuck's death (70:184-86, 188). She followed established procedures for collecting and sending bodily fluid samples from the autopsy to the St. Louis University laboratory for toxicology testing (70:186-87). The St. Louis laboratory is accredited and run by a board certified toxicologist. The Waukesha

County Medical Examiner's Office has been using the St. Louis laboratory for this purpose at least since Dr. Okia began working there in 2009 (70:185, 187, 191). In Dr. Okia's experience, the St. Louis laboratory has provided truthful and accurate test results. She was unaware of any difficulties with it over the years (70:187-88).

Dr. Okia did not merely rely on the laboratory findings to arrive at the opinion that Leuck died of "acute heroin intoxication." She relied heavily on what she observed when performing the autopsy. She found thirteen fresh needle marks on both arms, pulmonary edema (fluid-filled lungs), and cerebral edema (brain swelling) (70:189, 202-07, 211-12). She also relied on Assistant Medical Examiner Wayd's report of her findings after observing the body at the scene (70:209-10, 213).

It is not clear from this court's opinion in *VanDyke* how the cross-examination of the medical examiner there went. Here, Mattox successfully confronted Dr. Okia's opinion testimony. On cross-examination, counsel for Mattox established that the St. Louis laboratory test results were "positive for opiates" and not necessarily just for heroin. Dr. Okia agreed that the test results only showed: "It's an opiate. It's a class," of which heroin is only one (70:215). Dr. Okia agreed that the test results do not reveal the characteristics or strength of any heroin in the blood (70:215-16). Dr. Okia also agreed that another opiate, codeine, was found in the urine sample (70:216). She described codeine as a "contaminant" that is not part of the heroin chemical structure (70:216). Counsel established that all thirteen of the puncture wounds on Leuck's arms were fresh, indicating injection within 18-24 hours. Dr. Okia could not determine the sequence of those injections (70:217-18). Counsel established on re-direct that all thirteen puncture sites tested positive for morphine, indicating that heroin might have been injected into each one (70:224). Dr. Okia admitted that she could be no more specific as to time of death than that it occurred within 8-12 hours before Leuck was found in his room, and within 1-3 hours after injection

(70:218-19). Dr. Okia agreed it was "possible" that the presence of heroin in his system was due to the "cumulative effect of more than one injection," nor could she determine exactly when he injected the heroin (70:219). Counsel established that the laboratory tests of the vitreous humor samples taken from the victim's eyeballs provided no evidence of a heroin overdose (70:220). Dr. Okia admitted that her findings of brain swelling and fluid-filled lungs are also common in deaths caused by other opiates such as Percocet because these opiates are "respiratory depressant[s]" (70:221). She was not sure whether Clonazepan has the same effect (70:221).

Counsel's cross-examination lent support to the defense argument that Leuck had been injecting heroin extensively over the 24 hours or so preceding his death and one cannot tell with any certainty who was the source of that heroin. This was consistent with the testimony of Leuck's roommate, Gary Sweezey, that Leuck seemed "really messed up" and like "he was on something" when Sweezey left for work at 8:30 a.m. February 14, shortly before Leuck called Tibbits looking for more heroin (70:124).

The St. Louis laboratory technician was not qualified to render any opinions as to cause of death. Presumably, the laboratory technician in *VanDyke* was also not trained or qualified to render any opinions as to cause of death. As here, it is doubtful that cross-examination of the laboratory technician in *VanDyke* would have produced anything of exculpatory value. It would have done so only in the highly unlikely event that the technician took the stand and admitted that he or she was dishonest, failed to follow standard protocol, used defective equipment, or mixed up the samples. As he was able to do with Tibbits, Mattox was able to confront and cross-examine the only other witness who mattered here: Dr. Okia.

Sure, as would have been the case in *VanDyke,* Mattox might have confronted the laboratory technician with questions about whether the laboratory's testing protocol

was followed, whether the testing equipment functioned properly, whether he or she tested the right samples, whether the samples might have been mixed up or contaminated, whether the technician was honest, etc. But, to this day, Mattox offers no reason to believe the test results from this accredited laboratory run by a certified toxicologist were anything but reliable. Mattox presents no evidence to overcome Dr. Okia's testimony that the St. Louis laboratory was accredited and run by a board certified toxicologist. Mattox offers no evidence to overcome Dr. Okia's testimony that the laboratory's testing of samples sent from Waukesha County has always proven reliable at least since she arrived in 2009. Mattox offers only rank speculation that something may have gone awry in the testing process.[2]

It was not error for the trial court to receive (a) the laboratory test results for the limited purpose of establishing that they served as a partial basis for Dr. Okia's opinion; and (b) Dr. Okia's opinion testimony that was based in part on those findings.

The report was received not to prove that Leuck in fact injected heroin or that the substance found in his system was heroin, or more specifically that it was the heroin delivered by Mattox. The laboratory technician was unqualified and otherwise incapable of making such findings, and his or her report made no such findings. The report only showed that morphine was in Leuck's blood in various forms and at various levels. Dr. Okia was trained to interpret and explain those findings. Those laboratory

---

[2] Another unsettling aspect of *VanDyke* is that it does not appear Mr. VanDyke presented any proof at his ineffective assistance postconviction hearing from the laboratory technician or others to call into question the reliability of the St. Louis laboratory test results. It was rank speculation. This court did not, therefore, hold Mr. VanDyke to his burden of *affirmatively proving actual prejudice* caused by counsel's failure to object (or, more accurately, strategic decision not to object) to the test results. *See State v. Balliette,* 2011 WI 79, ¶¶ 24, 63, 70, 336 Wis. 2d 358, 805 N.W.2d 334.

findings confirmed Dr. Okia's findings from her examination of the body at the autopsy, and they supported her opinion that death was caused by an opiate overdose. Those findings were also consistent with observations by witnesses at, and evidence recovered from, the victim's room pointing to a heroin overdose. Those findings were consistent with Tibbits's testimony that he delivered heroin to Leuck on February 14, 2013.

In short, Dr. Okia relied on her own observations, on other evidence, but also in part on "the work of others" at the toxicology laboratory, before arriving at her own independent expert opinion that Leuck died of acute heroin intoxication. Dr. Okia did not merely "summarize" the work of the laboratory technician. She interpreted and explained the significance of the technician's findings; findings that were otherwise meaningless to the trial court as the finder-of-fact until Dr. Okia provided her expert analysis. *Griep,* 361 Wis. 2d 657, ¶ 20. Receiving the report and Dr. Okia's testimony in partial reliance on it did not violate Mattox's right to confront his accusers. This court is bound by *Griep* and *Heine* to affirm.

C. Any proven confrontation clause violation was harmless.

The harmless error doctrine applies to proven violations of the Sixth Amendment rights to confrontation and to present a defense. *Deadwiller,* 350 Wis. 2d 138, ¶¶ 41-43; *State v. Rhodes,* 2011 WI 73, ¶ 32, 336 Wis. 2d 64, 799 N.W.2d 850. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Ghilarducci*, 480 F.3d 542, 549 (7th Cir. 2007); *Burns v. Clusen*, 798 F.2d 931, 943-45 (7th Cir. 1986); *State v. Lomprey*, 173 Wis. 2d 209, 220-21, 496 N.W.2d 172 (Ct. App. 1992). *Also see State v. Martin,* 2012 WI 96, ¶¶ 42-44, 343 Wis. 2d 278, 816 N.W.2d 270 (most constitutional errors are subject to harmless error analysis, including the admission of statements obtained in violation of *Miranda v. Arizona,* 384 U.S. 436 (1966)).

The state, as beneficiary of the error, bears the burden of proving "'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Deadwiller,* 350 Wis. 2d 138, ¶ 41 (quoting *State v. Martin,* 343 Wis. 2d 278, ¶ 45, quoting in turn *State v. Harvey,* 2002 WI 93, ¶ 49, 254 Wis. 2d 442, 647 N.W.2d 189). Stated another way, the error is harmless if the state proves beyond a reasonable doubt the error did not contribute to the verdict. *Id. See State v. Mayo,* 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115. *Also see State v. Travis,* 2013 WI 38, ¶¶ 64-87, 347 Wis. 2d 142, 832 N.W.2d 491. Factors to be considered include: the importance of the proffered testimony, whether it was cumulative, whether other evidence corroborated or contradicted the testimony, the extent of cross-examination allowed, and the overall strength of the prosecution's case. *Rhodes,* 336 Wis. 2d 64, ¶ 33.

Any error was harmless because Mattox did not at trial, and does not now, dispute that Leuck died of heroin intoxication. His defense was that the lethal heroin given to Leuck by Tibbits on February 14 came from someone else. Mattox argued that Tibbits got the heroin from his cousin instead. Presumably, that theory of defense would not have changed had the laboratory technician testified. *See Deadwiller,* 350 Wis. 2d 138, ¶ 3 ("[W]e conclude that the error was harmless in light of the defendant's previous admissions of sexual intercourse with the victims and the fact that throughout the proceedings, he maintained a defense that the victims consented"); *id.* ¶ 43 ("In other words, whether intercourse occurred, the subject of the expert's testimony was irrelevant to Deadwiller's defense because his defense was that intercourse did occur but that the victims consented.").

Any error was harmless because, as discussed above, Mattox was able to fully confront and cross-examine the two most important witnesses against him: Tibbits and Dr. Okia. Leuck called Tibbits around 8:30 a.m. February 14 looking for heroin. This call caused Tibbits to immediately contact

Mattox. There were also multiple text messages back and forth at this time between Tibbits and his cousin who, defense counsel argued, provided the lethal heroin to Tibbits for delivery to Leuck. Tibbits also tried to contact another heroin dealer named "Melinda" at that time (70:27-33, 62-68, 69-70). Tibbits testified he pled guilty to a reduced charge of second-degree reckless homicide, with sentencing yet to take place and sentence length up to the judge, in exchange for his testimony against Mattox (70:17-18, 72-74). On cross-examination, Mattox's attorney established that Tibbits lied to police when arrested February 25, 2013, about when he last saw Leuck. It was only when he was caught in the lie that Tibbits agreed to cooperate with police to save himself and implicated Mattox (70:48-53). Counsel established that Tibbits lied when he told Detective Casey that he had been "clean" for some time (70:54-55, 70-71). Tibbits also may have lied about the amount paid for the heroin (70:59-60). Other than Mattox, no one was able to dispute anything Tibbits would say; he could take the stand and say whatever he wanted "without any fear of consequences" (70:71). Counsel established that Tibbits had been convicted of false swearing in the past for lying to police (70:74-75). Tibbits denied that he took part in the March 8 undercover buy to help himself, insisting that he did it "out of the goodness of [his] heart" (70:76-77).

As discussed above, Mattox was able to use the toxicology report to challenge Dr. Okia's opinion that heroin, and no other opiate, caused Leuck's death. Mattox was able to establish through cross-examination that Dr. Okia did not know when Leuck injected the fatal dose, how often he injected before he died, how much he injected, or where he got the heroin. Counsel also could have, if he so chose, challenged her opinion by indirectly challenging the reliability of the toxicology reports on cross-examination; getting Dr. Okia to admit that the reliability of the laboratory findings depended on whether proper protocol was followed in the laboratory, whether the technician was honest, whether the testing equipment functioned properly, whether the sample was contaminated, etc. Counsel chose

not to do so, no doubt because his defense was that Leuck indeed died of a heroin overdose, but Mattox did not deliver the heroin that killed him. Counsel chose not to do so, no doubt because he did not have any reason to dispute the reliability of the test results in light of Dr. Okia's testimony that the laboratory was accredited and run by a certified toxicologist, was routinely relied on by the Waukesha County Medical Examiner's office, and there had been no problems at least since 2009 (70:187-88, 195-96).

Any error was harmless because evidence that Leuck died of a heroin overdose, and not an overdose of any other opiate, was both undisputed and overwhelming. Leuck called looking for heroin and Tibbits helped him get it. Tibbits said he and Leuck then drove to 47th and Hadley Streets where they purchased the heroin from Mattox with Leuck's money. Cell phone records showed that Leuck's and Mattox's phones were, indeed, in the vicinity of 47th and Hadley Streets around 10:00 a.m. February 14. Mattox admitted he regularly sold heroin to Tibbits at that time who, in turn, sold it to customers in Waukesha. When arrested on March 8, Mattox denied remembering selling heroin to Tibbits on February 14, 2013. But, when he took the stand at trial, Mattox admitted for the first time that he indeed met with Tibbits and his customer at 47th and Hadley Streets around 10:00 a.m. on February 14 to sell him heroin, but denied that the deal was completed because there was a dispute over its quality. Mattox claimed he only delivered heroin to Tibbits the day before, February 13. Drug paraphernalia found at the scene of the death tested positive for heroin. Approximately three weeks later, on March 8, Mattox was arrested attempting to sell heroin again to Tibbits in a controlled buy and police indeed recovered heroin from Mattox's van. Mattox never claimed in his statement to police, or testified at trial, that he sold anything other than heroin to Tibbits.

There was no evidence that Leuck was using, or looking for, any opiate other than heroin on February 14, 2013. There was no evidence that Tibbits gave him anything

but heroin on February 14. The only dispute at trial was whether the heroin Tibbits gave Leuck on February 14 was the same heroin he obtained from Mattox that morning and the same heroin that killed Leuck later that evening. Beyond a reasonable doubt, the jury would have arrived at the same verdict had either: (a) the laboratory technician testified and been cross-examined by Mattox; or (b) absent the laboratory technician's testimony, Dr. Okia was only allowed to render the opinion that Leuck died of an opiate overdose or his death was consistent with a heroin overdose.

Any error was harmless because, as discussed above, Mattox was likely not going to get anything exculpatory out of the laboratory technician had he or she testified at trial. To this day, Mattox offers no evidence to challenge the accuracy and reliability of the test results.

Dr. Okia's autopsy findings based only on her physical examination of the body (but without the toxicology report), would still be positive for death caused by a drug overdose of some kind, including heroin. There were thirteen fresh needle marks on both arms, brain swelling and fluid-filled lungs. This would have allowed Dr. Okia to render the opinion to a reasonable degree of medical certainty that: (a) Leuck died of opiate intoxication; or, at least, (b) her physical findings were consistent with heroin intoxication. *See* Mattox's brief at 22-23 (Dr. Okia "testified that pulmonary edema and cerebral edema could be caused by an overdosing on Percocet or any other opiate type of drug, not just heroin").

Finally, if it was error to receive the toxicology report (Exhibit No. 22) into evidence, the error was harmless.[3] Even if the toxicology report should not have been received, the *autopsy* report and Dr. Okia's testimony were properly received. *See Heine,* 354 Wis. 2d 1, ¶¶ 14-15. And, it is plain after *Griep* that Dr. Okia could also testify that her opinion as to cause of death was based in part on the laboratory findings that morphine was present in Leuck's blood at specified levels. After all, the toxicology report "*was neither introduced nor received into evidence to trace or identify the specific heroin* the State said that [Mattox] sold to the victim." *Heine*, 354 Wis. 2d 1, ¶ 1 (emphasis in original). So, any error in receiving the St. Louis laboratory toxicology report for the limited purpose of establishing a basis for Dr. Okia's opinion as to cause of death was harmless beyond a reasonable doubt. *See State v. Crane,* 17 N.E.3d 1252, 1266 (Ohio App. 2014).

---

[3] It is also the state's position that there was no confrontation clause violation in receiving the toxicology report upon which Dr. Okia relied because it was not "testimonial." *See Ohio v. Clark,* No. 13-1352, slip op. at 4-12 (U.S. June 18, 2015). The report's "primary purpose" was not to create a substitute for trial testimony, *Michigan v. Bryant,* 562 U.S. 344, 131 S. Ct. 1143, 1155 (2011), or to accuse someone. *Williams v. Illinois,* 132 S. Ct. 2221, 2242 (2012) (plurality opinion), or to create a record for use at a criminal trial. *United States v. James,* 712 F.3d 79, 97-102 (2d Cir. 2013), *cert. denied,* 134 S. Ct. 2660 (2014) (autopsy and toxicology reports non-testimonial). *See State v. Maxwell,* 139 Ohio St.3d 12, 9 N.E.3d 930, 949-52 (2014) (autopsy report non-testimonial); *State v. Crane,* 17 N.E.3d 1252, 1260-66 (Ohio Ct. App. 2014) (toxicology report non-testimonial); *United States v. De la Cruz,* 514 F.3d 121, 132-34 (1st Cir. 2008), *cert. denied,* 557 U.S. 934 (2009) (autopsy and toxicology reports non-testimonial); *People v. Dungo,* 55 Cal. 4th 608, 286 P.3d 442, 450 (2012) (autopsy report normally not testimonial); *Banmah v. State,* 87 So. 3d 101, 103 (Fla. Dist. Ct. App. 2012) (same); *People v. Cortez,* 402 Ill. App. 3d 468, 341 Ill. Dec. 854, 931 N.E.2d 751, 756 (2010) (same). *See also Hensley v. Roden,* 755 F.3d 724, 733-34 (1st Cir. 2014) (testimonial nature of autopsy reports not "clearly established" for purposes of federal habeas corpus review); *People v. Acevedo,* 976 N.Y.S.2d 82, 83 (N.Y.A.D. 2013); *State v. Carey,* No. M2013-02483-CCAR3-CD 2015 WL 1119454, *12-15 (Tenn. Crim. App. Mar. 10, 2015).

The state acknowledges that this argument is foreclosed by *VanDyke,* 361 Wis. 2d 738, ¶ 7 (toxicology report is testimonial). The state wishes, however, to preserve this argument in the event of further review in the Wisconsin Supreme Court or in federal court.

Dr. Okia's opinion testimony would not have changed even if the report had been kept out. Her opinion as to cause of death would not have changed even if she never mentioned the laboratory findings in her testimony. *See* Wis. Stat. § 907.05 (the expert may give opinion testimony "without prior disclosure of the underlying facts or data," but may "be required to disclose the underlying facts or data on cross-examination").[4]

It is clear beyond a reasonable doubt that the result of Mattox's trial would not have changed had the St. Louis laboratory technician testified at trial or had Dr. Okia's opinion testimony been limited to opining that Leuck's death was consistent with a heroin overdose.

[4] In the future, to avoid confrontation problems, medical examiners might be well advised to testify on direct examination that they performed the autopsy, to discuss what they personally observed and what their findings were, and then to render their opinions as to cause of death. It would then be for defense counsel on cross-examination to strategically decide whether to delve more deeply into the bases for that expert opinion even though it might reveal that the expert also relied on findings in a toxicology report prepared by a non-testifying laboratory technician. *See* Wis. Stat. § 907.05; *State v. Heine,* 2014 WI App 32, ¶ 15, 354 Wis. 2d 1, 844 N.W.2d 409 ("Dr. Tranchida [the medical examiner] could have given his opinion [as to cause of death] exactly as he gave it without referring to the [toxicology] report.").

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction be AFFIMRED.

Dated at Madison, Wisconsin this 25th day of June, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,965 words.

Dated this 25th day of June, 2015.

_____
Daniel J. O'Brien
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 June, 2015.

_____
Daniel J. O'Brien
Assistant Attorney General