STATE OF WISCONSIN
IN SUPREME COURT
Case No. 2015AP158-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ROZERICK E. MATTOX,

Defendant-Appellant.

On Certification from the Court of Appeals, District II, Reviewing a Judgment of Conviction Entered in the Waukesha County Circuit Court, the Honorable Jennifer Dorow Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Toxicology Report Was a Testimonial Out-of-Court Statement.

The State argues that the toxicology report is non-testimonial pursuant to the "primary purpose test." (State's Resp. Br. at 26-31). Under the facts of this case, however, the "primary purpose" of the toxicology report was "to establish or prove past events potentially relevant to later criminal prosecution." *See* ***Michigan v. Bryant***, 562 U.S. 344, 356 (2011) (quoting ***Davis v. Washington***, 547 U.S. 813, 822 (2006)). The report is therefore testimonial.

In ***Davis***, the United States Supreme Court held that statements made by a domestic abuse victim to a 911 operator during and shortly after an attack were non-testimonial. 547 U.S. at 828. Announcing what has come to be known as the "primary purpose test," the Court explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

In ***Bryant***, the Supreme Court further expounded on the primary purpose test. ***Bryant*** involved statements made to police by a gunshot victim as he was lying in a parking lot mortally wounded. 562 U.S. at 349. After restating ***Davis***'

primary purpose holding, the Court stated that the existence of an ongoing emergency "is among the most important circumstances" in the primary purpose analysis. ***Id.*** at 361. The Court further stated that a statement's formality is another factor to be considered. ***Id.*** at 366.

The Court in ***Bryant*** also emphasized that the primary purpose test requires an inquiry "that accounts for both the declarant and the interrogator," and that considers "all of the relevant circumstances" surrounding a statement. ***Id.*** at 367, 369. Applying these principles to the facts in that case, the ***Bryant*** Court held that the victim's statements were non-testimonial, since "a person in [the victim's] situation would [not] have had a 'primary purpose' 'to establish or prove past events potentially relevant to later criminal prosecution." ***Id.*** at 375; *see also* ***Ohio v. Clark,*** 135 S. Ct. 2173, 2179-80 (2015) (reiterating that statements are testimonial when their "primary purpose" "is to establish or prove past events potentially relevant to later criminal prosecution"; and that the inquiry "must consider all of the relevant circumstances").[1]

In this case, the primary purpose test demonstrates that the toxicology report is testimonial. There was no ongoing emergency at the time the report was requested or prepared. The report also contains indicia of formality. The report bears the name of an accredited laboratory, is titled as an

[1] This primary purpose test is functionally indistinguishable from the standard previously adopted by this Court in ***State v. Jensen***, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518: "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." ***Id.*** ¶ 25; *see also* ***State v. Frazier***, 735 S.E.2d 727, 731 (W.Va. 2012) (stating that this formulation "reflects the 'primary purpose test'").

official toxicology report, and is hand-signed with time and date stamps above the signature. With respect to its level of formality, the report is substantially similar to the blood alcohol content (BAC) report in ***Bullcoming v. New Mexico***, 564 U.S. 647 (2011). *See* ***State v. VanDyke***, 2015 WI App 30, ¶ 17, 361 Wis. 2d 738, 863 N.W.2d 626.

The assertions in the report were also "made for the purpose of establishing or proving some fact." ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305, 310-11 (2009). The fact in question here is the substances (and their levels) present in Leuck's system at the time of his death. The only reason for establishing this information was to determine if a drug overdose caused Leuck's death. Thus, the primary (and sole) purpose of the toxicology report was "to establish or prove a past event," i.e., whether Leuck died as a result of a drug overdose.

This past event was also "potentially relevant to later criminal prosecution." There are three details of this case which bear this out. First, Leuck's death occurred under suspicious circumstances that indicated his death was the result of a crime. Leuck was found dead in his bedroom at the age of twenty-seven. (29 Ex. 14 at 1-2; 70:122-28). He had track marks on his arm (70:217; App. 182), and his room was littered with drug paraphernalia, including syringes, a tin cooker, and a tourniquet. (29 Ex. 14 at 3-4, 70:283-85; 71:9, 22). These facts certainly suggested that Leuck had died as a result of a homicide by delivery of a controlled substance. *See* WIS. STAT. § 940.02(2)(a).

The Waukesha County Medical Examiner's Office was aware of the suspicious nature of Leuck's death. (29 Ex.

14; 70:209-10, 213; App. 174-75, 178).[2] The Office, which requested the toxicology report, would thus have reasonably believed that the report "would be available for use at a later trial." *See* ***Melendez-Diaz***, 557 U.S. at 31.[3]

Despite these suspicious circumstances, the State argues that at the time the toxicology report was requested, "it was still not obvious that a crime had been committed, because Leuck could have injected drugs he manufactured himself." (State's Resp. Br. at 29). However, while it is theoretically possible for a person to be his own manufacturer, distributor, and supplier of an illegal drug, common sense suggests that this is a very rare circumstance. Consequently, where a death results from an overdose on a controlled substance, there will almost always be another person in the chain of distribution who is criminally liable under WIS. STAT. § 940.02(2).

The second relevant factor is law enforcement's investigation into Leuck's death. This investigation would have further signaled to the Waukesha County Medical Examiner's Office that the toxicology report might be relevant to a future criminal trial. It was law enforcement, in fact, that first reported Leuck's death to the Office. (29 Ex.

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[2] The circumstances surrounding Leuck's death are described in the investigative report prepared by Deputy Medical Examiner Nichol Wayd, which was relied on by Assistant Medical Examiner Dr. Zelda Okia. (29 Ex. 14; 70:209-10, 213; App. 174-75, 178).

[3] The toxicologist from St. Louis University Laboratory would also have "objectively foresee[n] that [the toxicology report] might be used in the . . . prosecution of a crime." *See* ***Jensen***, 299 Wis. 2d 267, ¶ 25. The toxicology request from the Medical Examiner's Office sought testing for contraband substances in Leuck's blood and urine, as well as the tissue samples from the injection sites on his arm. The request also indicated that Leuck was twenty-seven years old and "found unresponsive at home." (29 Ex. 22 at 4; App. 194).

14 at 1). After Deputy Medical Examiner Wayd arrived at the scene, police briefed her on the details of Leuck's death. They also informed Wayd that Leuck was "suspected to use illegal drugs" and asked her to wait for detectives to arrive before touching anything. (29 Ex. 14 at 2; 70:162-65).

After the detectives arrived, Wayd and the detectives proceeded to investigate Leuck's bedroom together. (29 Ex. 14 at 2-3). The detectives collected the drug paraphernalia in Leuck's room. They were also present when Wayd performed her initial examination of Leuck's body. (29 Ex. 14 at 3-4; 70:165, 283).

The third factor bearing on testimonial nature of the report is the statutory relationship between the Medical Examiner's Office and law enforcement. Pursuant to statute, medical examiners act as "medical detectives" for the criminal justice system by aiding the investigations of suspicious and violent deaths. *See generally* WIS. STAT. CH. 979; *see also* ***State v. Jaramillo***, 272 P.3d 682, ¶ 13 (N.M. Ct. App. 2012).

By statute, police must immediately notify the medical examiner when a death occurs under a variety of different circumstances, including those that are homicides or involve unexplained, unusual, or suspicious circumstances. WIS. STAT. § 979.01(1g). The medical examiner, in turn, must immediately notify the district attorney. *Id.* §§ 979.01(1m), 979.04(2).

In addition, in cases involving homicides or where there are unexplained or suspicious circumstances, the district attorney may request that the medical examiner conduct a preliminary investigation and report back to the district attorney. *Id.* § 979.04(3). In such cases, the district attorney or medical examiner may order an autopsy. *Id.* § 979.02.

Both may also obtain subpoenas for any record necessary to establish a decedent's cause of death. *Id.* § 979.015.

In light of this statutory framework, and given the suspicious nature of Leuck's death and law enforcement's investigation, the toxicology report in this case is testimonial. Its primary purpose was to confirm that Leuck had died as a result of an illegal drug overdose, a fact that would be highly relevant to a later potential criminal prosecution for Leuck's death.

Numerous courts from other jurisdictions have found toxicology and/or autopsy reports to be testimonial in cases involving some or all of these three factors. *See, e.g.*, ***United States v. Moore***, 651 F.3d 30 (D.C Cir. 2011) (autopsy reports were testimonial where victims died as a result of gunshot wounds, police observed autopsies, and medical examiner was required by statute to investigate deaths when requested by law enforcement); ***United States v. Ignasiak***, 667 F.3d 1217 (11th Cir. 2012) (autopsy reports finding cause of death to be intoxication from controlled substances were testimonial "[i]n light of [] statutory framework" linking law enforcement and medical examiner); ***People v. Dendel***, 797 N.W.2d 645 (Mich. Ct. App. 2010) (autopsy and toxicology reports were testimonial where police informed medical examiner they suspected insulin poisoning); ***Com. v. Carr***, 986 N.E.2d 380 (Mass. 2013) ("where death resulted from an obvious homicide, it is reasonable to expect that the death certificate will be used as evidence at trial"), *abrogated on other grounds by* ***Com. v. Crayton***, 21 N.E.3d 157 (Mass. 2014); ***State v. Bass***, 132 A.3d 1207 (N.J. 2016); ***State v. Navarette***, 294 P.3d 435 (N.M. 2013); ***State v. Locklear***, 681 S.E.2d 293 (N.C. 2009); ***Cuesta-Rodriguez v. State***, 241 P.3d 214 (Okla. Crim. App. 2010); ***State v. Frazier***, 735 S.E.2d 727, 731 (W. Va. 2012).

In contrast, in cases lacking suspicious circumstances, or where cause of death is unclear, courts have found autopsy reports to be non-testimonial. *See, e.g.*, ***United States v. James***, 712 F.3d 79 (2nd Cir. 2013) ("routine" autopsy report non-testimonial where no one "involved in this autopsy suspected that [the victim] had been murdered"); ***Ackerman v. State***, 51 N.E.3d 171 (Ind. 2016) (cause of infant's death was unclear and no criminal charges were filed for thirty-six years).

The State cites a handful of cases where autopsy reports have been found to be non-testimonial despite suspicious circumstances.[4] (State's Resp. Br. at 22, citing ***People v. Dungo***, 286 P.3d 442 (Cal. 2012); ***State v. Leach***, 980 N.E.2d 570 (Ill. 2012); ***State v. Maxwell***, 9 N.E.3d 930 (Ohio 2014)). These cases conclude that autopsy reports prepared in the normal course of business are non-testimonial, even if the medical examiner is aware that police suspect a homicide and that a specific individual may be responsible. This near-categorical approach is contrary to the weight of authority on this issue. It is also inconsistent with the Supreme Court's instruction that the primary purpose test must "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *See* ***Bryant***, 562 U.S. at 359.

[4] The State also cites ***State v. Medina***, 306 P.3d 48 (Ariz. 2013), and ***State v. Hutchison***, 482 S.W.3d 893 (Tenn. 2016). However, these cases do not utilize the primary purpose test. Instead, they apply the "targeted accusation test" used by the plurality in ***Williams v. Illinois***, 132 S. Ct. 2221 (2012), as well as the formality criterion used by Justice Thomas in his concurring opinion. This Court has previously rejected this approach, holding that ***Williams*** has no precedential value except where the parties are in a "substantially identical position." ***State v. Deadwiller***, 2013 WI 75, ¶¶ 30-32, 350 Wis. 2d 138, 834 N.W.2d 362.

The better-reasoned approach recognizes that where the relevant circumstances indicate that a homicide has occurred, and where police are engaged in a death investigation to which a medical examiner is statutorily linked, any forensic report prepared by or at the direction of a medical examiner takes on a testimonial character. The primary purpose of such a report is "to establish or prove past events potentially relevant to later criminal prosecution."

II. The Medical Examiner Was a "Mere Conduit" for the Toxicology Report's Testimonial Conclusions.

Okia's testimony only compounded the constitutional violation in this case. According to ***State v. Griep***, 2015 WI 40, 361 Wis. 2d 657, 863 N.W.2d 567, an expert can testify based in part on forensic tests conducted by a non-testifying analyst only if the expert: (1) reviews the analyst's tests, including the notes, graphical information, and other raw data associated with the tests; and (2) forms an independent opinion. ***Id.*** ¶¶ 47-55. ***Griep*** also makes clear that the expert must be familiar with the testing procedures at hand. ***Id.*** ¶ 51

Okia's testimony satisfied none of these criteria. There is no indication that Okia was familiar with the testing procedures at St. Louis University Laboratory. She also did not review the notes, graphical data, or any other records associated with the creation of the toxicology report. Nor did she form an independent opinion regarding the presence or levels of morphine or 6-MAM in Leuck's system.

Moreover, Okia's ultimate cause-of-death opinion was conclusively based on the toxicology report. *See* ***VanDyke***, 361 Wis. 2d 738, ¶ 24-25. Without the report, she could not have concluded that heroin was the specific drug that caused Leuck's death (or even perhaps that Leuck had died as a result of any drug). Her cause-of-death opinion was thus little

more than an interpretation of the toxicology report's testimonial conclusions. She therefore served as a mere conduit for the report.

The State argues that Okia's review of the toxicology report itself was sufficient under ***Griep*** because "the report simply gathered 'raw data.'" (State's Resp. Br. at 36). However, the toxicology report was no more "raw data" than the BAC reports from ***Bullcoming*** and ***Griep***. The critical point in ***Griep*** was that the expert's review of the raw data underlying the BAC report allowed him to independently determine that proper procedures were followed and that the conclusions in the report were correct. *See* ***Griep***, 361 Wis. 2d 657, ¶ 45 n.21, 51. Here, "nothing in the record suggests [Okia] was a witness capable of answering questions regarding the testing or analysis that resulted in the report identifying in [Leuck's] blood the high level of morphine and presence of 6-MAM." (Ct. App. Opp. at 20; App. 120). Okia's testimony was thus insufficient to protect Mattox's right of confrontation.

The State also argues that Okia's review of the toxicology report was sufficient because the report did not draw the ultimate legal conclusion in this case, i.e., the cause of Leuck's death. (State's Resp. Br. at 38-39). However, the report drew conclusions that were highly relevant to this issue. The State cites no authority to support the position that an expert can serve as a mere conduit for the testimonial conclusions of another expert simply because those conclusions do not directly answer the ultimate issue in a case.

III. The Constitutional Errors in this Case Were Not Harmless.

To prove the constitutional violations in this case were harmless, the State must prove beyond all reasonable doubt that the verdict would have been the same if the circuit court had excluded the toxicology report, Okia's testimony regarding the report, and her cause-of-death opinion based on that report. *See* ***State v. Hale***, 2005 WI 7, ¶ 60, 277 Wis. 2d 593, 691 N.W.2d 637. The State cannot meet this burden. *See* ***VanDyke***, 361 Wis. 2d 738, ¶ 25 (finding admission of toxicology report prejudicial). One of the elements the State was required to prove was that Leuck used heroin delivered by Mattox *and died as a result of that use*. *See* WIS. STAT. § 940.02(2)(a); WIS. JI-CRIMINAL 1021. The toxicology report and Okia's opinion were the only pieces of evidence that proved Leuck actually died as a result of heroin use.

Other evidence may have been consistent with this theory, such as the drug paraphernalia found in Leuck's room and the track marks on this arm. However, absent speculation and conjecture, no reasonable fact-finder could have concluded from such slight evidence alone that Leuck had actually died as a result of heroin use. They certainly could not have found so beyond a reasonable doubt. This type of finding requires expert medical testimony regarding cause of death.

While Okia testified that pulmonary and cerebral edemas were "typical finding[s] in drug overdoses," these factors are non-specific for heroin. (70:189, 221; App. 154, 186). They do not even appear to be specific to drug overdoses in general. *See* ***VanDyke***, 361 Wis. 2d 738, ¶ 6 (pulmonary edema can be caused by "heart failure and things of that nature"). Thus, it is entirely possible that without the

toxicology report, Okia would have been unable to determine the cause of Leuck's death. *See* ***id***, ¶ 24 (cause of death remained "undetermined following the autopsy").

Accordingly, without the toxicology report and Okia's cause-of-death opinion, a reasonable fact-finder would have had no way of knowing whether Leuck had died of a drug overdose or natural causes. They also would have had no way to determine whether he had overdosed on heroin or some other substance. As the State acknowledges, "[e]ven after the autopsy suggested a drug overdose, it was still not obvious" that Leuck had died of a heroin overdose, as Leuck could have "overdosed on some other substance, such as the Clonazepam nearby." (State's Resp. Br. at 29).

CONCLUSION

For these reasons, the judgment of conviction should be reversed and the case remanded for a new trial.

Dated this 19th day of July, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: 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 and maximum of 60 characters per line of body text. The length of the brief is 3,000 words.

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I hereby certify that:

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Dated this 19th day of July, 2016.

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