STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP001399-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TAMMY GENEVIEVE HARDENBURG,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying Postconviction Relief Entered in Milwaukee County Circuit Court, the Honorable Dennis R. Cimpl Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. This prosecution for operating while under the influence of prescription medication involved blood tests conducted by three different analysts. At trial, only one of the three analysts testified. Did this procedure violate Ms. Hardenburg's right to confrontation?

   The circuit court concluded that no confrontation error occurred because the testifying analyst "was more than a 'mere conduit'" for the findings of the non-testifying witnesses. (71:2); (App. 106).

2. Was the asserted Confrontation Clause violation "fundamental, obvious and substantial," thereby meriting reversal under the plain error doctrine?

   Assuming that Ms. Hardenburg's right to confrontation was violated, the circuit court found any claimed confrontation clause error to be harmless. (71:2); (App. 106).

3. Was trial counsel ineffective for not objecting to the admission of the opinion of the non-testifying experts?

   The circuit court found that the exclusion of this evidence would not have created a reasonable probability of an acquittal and denied relief. (71:3); (App. 107).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Hardenburg requests publication, as this case represents a sound vehicle for reinforcing and applying fundamental Confrontation Clause principles.

Ms. Hardenburg does not request oral argument given the straightforward facts and legal principles at issue.

STATEMENT OF THE CASE

The information filed on August 4, 2017 charged Ms. Hardenburg with operating a motor vehicle with a detectable amount of a restricted controlled substance as a fifth or sixth offense, contrary to Wis. Stat. § 346.63(1)(am). (6:1). This charge was ultimately amended, on the day of trial, to operating while under the influence of prescription drugs. (86:2).[1]

That trial was held in Milwaukee County Circuit Court, the Honorable Dennis R. Cimpl presiding. (86:1). At its conclusion, the jury convicted Ms. Hardenburg of the charged offense. (29). She was subsequently sentenced to a term of imprisonment in

[1] The parties stipulated to this charging language, which appears to be a more specific phrasing of the "any other drug" language in Wis. Stat. § 346.63(1)(a). (86:3).

the Wisconsin State Prison System. (34:1); (App. 101).

Ms. Hardenburg filed a Rule 809.30 postconviction motion seeking a new trial and additional sentence credit. (61).[2] After an exchange of briefs, the motion for a new trial was denied in a written order. (71); (App. 105). This appeal follows. (72).

STATEMENT OF FACTS

Trial Testimony

Law Enforcement Contact

At trial, the parties stipulated that Ms. Hardenburg "had a valid prescription for the drugs in her system on the night in question." (87:22). In order to prove that Ms. Hardenburg was incapable of operating her vehicle as a result of consuming those substances, the State began its case by calling West Allis Police Officer John Kleinfeldt, who was out on patrol at around midnight on December 11, 2016. (87:26).

On the evening in question, Officer Kleinfeldt testified that he observed a Nissan Altima parked in a parking stall at the Speedway gas station. (87:26). The engine "appeared to be running" and the lights were off. (87:26). Officer Kleinfeldt observed "a single

[2] The circuit court granted Ms. Hardenburg's request for seven additional days of sentence credit. (62:1).

occupant" in the driver's seat. (87:26). Officer Kleinfeldt watched the car "from a distance" for approximately five minutes. (87:26-27). During that time, he witnessed the driver "continuously manipulate something with their hands" while periodically leaning and reaching over to the passenger seat. (87:27). Officer Kleinfeldt testified that he found this conduct "odd." (87:27).

Officer Kleinfeldt, who was parked across the street, therefore exited his squad and approached the car to make contact with the driver. (87:28; 87:63). Because he did not activate the emergency lights on his squad car, no video was captured of the ensuing interaction. (87:63).

As Officer Kleinfeldt approached, he observed tire tracks in the fresh snow leading up to Ms. Hardenburg's car. (87:28). He could tell that the engine was running. (87:28). He also observed Ms. Hardenburg "intently manipulating a napkin with both hands." (87:29). When asked, Ms. Hardenburg stated that "she was trying to kill the bugs in the inside of her vehicle, which had come from her apartment." (87:29). Although she showed Officer Kleinfeldt the napkin, he did not see any bugs. (87:29). Ms. Hardenburg also claimed that there were bugs in her purse. (87:29). Again, Officer Kleinfeldt failed to observe any such infestation. (87:29). Based on his observations as well as Ms. Hardenburg's statements—"which didn't make any logical sense"—Officer Kleinfeldt formed a belief that Ms.

Hardenburg may have been under the influence of "drugs." (87:29).

He therefore asked her to exit her car. (87:30). She complied. (87:30). She told Officer Kleinfeldt, in response to his question, that she had been driving from "92nd Street." (87:30). While speaking to Ms. Hardenburg, Officer Kleinfeldt observed her to be unsteady on feet. (87:31). She had difficulty concentrating and "was talking very excitedly." (87:31). "She had volume changes, and she had a lot of exaggerated movements with her hands." (87:31). Officer Kleinfeldt also detected a "faint" odor of alcohol. (87:32). Officer Kleinfeldt ultimately clarified, however, that he could have been smelling her "bug spray." (87:55).[3]

Ms. Hardenburg denied taking drugs. (87:33). However, Officer Kleinfeldt discovered a prescription bottle during a consent search of her car. (87:33). He could not remember what the prescription was for. (87:33). There were no "cautions" on the label that Officer Kleinfeldt could recall. (87:34).

In light of these observations, Officer Kleinfeldt asked Ms. Hardenburg to participate in roadside field sobriety testing (FSTs). (87:34). During the first test—the horizontal gaze nystagmus test (HGN)—Officer Kleinfeldt testified that he observed nystagmus, although he was unable to complete the

[3] Lab tests eventually revealed that Ms. Hardenburg's blood contained no ethanol. (88:8).

test in its entirety. (87:35-37). Ms. Hardenburg claimed she was unable to complete the test because she had bugs in her eye. (87:38). Officer Kleinfeldt examined her eyes and did not observe any bugs therein. (87:38). After Officer Klienfledt abandoned the HGN test, Ms. Hardenburg continued to "argue" with the officer, complained of bugs in her eyes, and asked for sympathy from the officer. (87:39).

Due to Ms. Hardenburg's non-cooperation, Officer Kleinfeldt was unable to complete the remainder of the FSTs. (87:39). He then asked Ms. Hardenburg to comply with a preliminary breath test. (87:39). Ms. Hardenburg was unable to satisfactorily complete that test, however, becoming more agitated and insistent that she had not been drinking. (87:41).

Following further erratic behavior, Officer Kleinfeldt placed Ms. Hardenburg under arrest for a suspected OWI.[4] (87:42). Police transported her to Aurora West Allis Hospital for an evidentiary blood draw.[5] (87:50). She consented to that procedure and,

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[4] After being arrested, Ms. Hardenburg alleged that police had used excessive force. (87:54). Officer Kleinfeldt confirmed that he had wrapped his arms around Ms. Hardenburg and "directed" her toward a car but otherwise denied "slam[ming]" her into that car during her arrest. (87:62).

[5] Multiple videos of her agitated demeanor during the ride to the hospital were played for the jury. (92). Officer (continued)

afterwards, was taken to the West Allis Police Department for "booking." (87:53). During that process, Officer Kleinfeldt claimed that Ms. Hardenburg "appeared to be coming down off of whatever substance was in her system." (87:53).

On cross-examination, Officer Kleinfeldt testified that he was familiar with the "Chapter 51 Civil Commitment" process used to take custody of a mentally ill person who is a danger to themselves or others. (87:59). He testified that he considered detaining Ms. Hardenburg pursuant to Chapter 51 during this police contact, as she met the "perimeters [sic] for an emergency detention." (87:60-61). However, Officer Kleinfeldt ultimately decided she "did not meet the criteria for Chapter 51" in what he described as the current "climate." (87:61). In his words, just because someone was mentally ill, "does not mean that they qualify for a Chapter 51." (87:61). In making the emergency detention decision, Officer Kleinfeldt relied on evidence that Ms. Hardenburg was apparently able to buy food and claimed to have a residence available to her. (87:61-62). Ultimately, he decided that an arrest for an OWI would be the more appropriate decision. (87:62). He further agreed with the prosecutor's assertion that "[o]perating while intoxicated can't be overlooked in lieu of a potential Chapter 51 or a mental health commitment." (87:67).

Kleinfeldt testified that she continued to discuss "bugs" throughout the ride to the hospital. (87:44).

Officer Jacob Kaye was the backup officer dispatched to assist Officer Kleinfeldt. (87:68). He testified that Ms. Hardenburg told him she was taking "Suboxone and Adderall." (87:72). He further stated that she told him she was taking her medicine as prescribed and had last taken the Adderall "in the morning time hours." (87:72). He described Ms. Hardenburg's difficulties in performing the PBT, culminating with her blowing air at his face and actually hitting him in the face with her saliva. (87:74). She was then "stabilized against a squad car" and handcuffed. (87:75). Officer Kaye could not recall if she hit her head on the squad car during the arrest. (87:77).

Expert Testimony

As their expert, the State called Leah Macans, a "toxicologist advance at the Wisconsin State Crime Lab in Milwaukee." (88:4). The State utilized Ms. Macans to introduce Exhibit Three, "the confidential report of laboratory findings" regarding Ms. Hardenburg's case. (88:7). Exhibit Three is a two-page, typewritten document printed on letterhead containing the seal of the State of Wisconsin and the contact information for the Wisconsin Department of Justice. (26:1); (App. 108). The document is dated April 17, 2017 and contains respective case, report, and agency numbers. (26:1); (App. 108). The report indicates that the evidence tested was submitted by the West Allis Police Department and references Ms. Hardenburg as the "Case Name." (26:1); (App. 108). Attorney General Brad D. Schimel's name is

typewritten, followed by the signature of an illegible "designee." (26:1); (App. 108). The document contains the signature of Leah J. Macans. (26:1); (App. 108). It also contains the signed initials, accompanied by a date, of "J.M.G." on both pages. (26:1-2); (App. 108-102. Another illegible signature is also present on the first page. (26:1); (App. 108).

The document summarizes six different tests performed on Ms. Hardenburg's blood. First, it informs the reader that Amy L. Sasman conducted "Immunoassay Screening Using Enyzme Linked Immunosorbent Assay" testing. (26:1); (App. 108). The sample tested "positive" for amphetamines and buprenorphine. (26:1); (App. 108). Second, a follow-up screening by Ms. Sasman "confirmed" the presence of caffeine, topiramate, cotinine, flueoxetine, and lamotrigine. (26:1); (App. 108). Third, Jennifer M. Greene "confirmed" the presence of amphetamines using Gas Chromatography/Mass Spectrometry. (26:1); (App. 108). The amount listed is "320 ug/L." (26:1); (App. 108). Finally, the report indicates that Ms. Macans conducted three additional confirmation tests for fluoxetine, topiramate, and lamotrigine. (26:2); (App. 109).

At trial, Ms. Macans identified her signature, as well as the signature of "J.M.G.", who conducted

what she asserted was the "technical review."[6] (88:9). Technical review was defined as follows:

> Technical review is when-- For this period, it would be when all of the data that is supporting this case, when it's completed, has been brought into a packet along with a report, and there are set -- there's a checklist that you would go through and make sure that all of those aspects of the checklist have been met, and therefore, meeting all of our quality control procedures and looking at administrative factors in this case. And when that is completed, it's signed off on with those initials and date.

(88:9).

In addition to the "technical" review, Ms. Macans also testified that the laboratory supervisor, Dirk Janssen, had signed off on the report after conducting an "administrative" review. (88:10).

Ms. Macans was then asked about the "ELISA testing" which was performed by Amy L. Sasman. (88:13). She recited that Ms. Sasman conducted the test on December 29, 2016. (88:13). She then explained "[w]hat Ms. Sasman would of done" by describing the steps that Ms. Sasman would presumably have carried out in testing the blood sample. (88:13). She testified that "Ms. Sasman

[6] Although it is reasonable to assume that "J.M.G." is Jennifer M. Greene, Ms. Macans never confirmed this link in her testimony.

concluded that amphetamines positive and buprenorphine was positive." (88:14). The scope of Ms. Macans' review was as follows:

> Q: Did you personally review the findings of this test?
>
> A: I did.

(88:14).

Next, Ms. Macans testified that Ms. Sasman had performed confirmatory testing for caffeine, topiramate, cotinine, fluoxetine, and lamotrigine. (88:15). She told the jury when the test was conducted and what steps Ms. Sasman would have carried out to reach her result. (88:15). There was no testimony regarding what level of review, if any, Ms. Macans conducted with respect to these confirmatory tests.

The next test was a specific confirmation test for amphetamines conducted by Jennifer Greene. (88:15). Ms. Macans gave a brief explanation of the test and the ensuing result. (88:15-16). She also told the jury when the testing was conducted. (88:16). She told the jury that the amount Ms. Greene discovered was "high" and "above where we would typically see someone who would be on a therapeutic dosage." (88:17). The amount listed by Ms. Greene was "way outside" that range. (88:17). She explained that this drug would cause a person to become agitated, confused, and possibly hallucinate. (88:16). Amphetamines, Ms. Macans told the jury, can cause

"overstimulation" which could impair a driver. (88:18). In large doses, it can cause specific hallucinations—symptoms which Ms. Macans testified were consistent with Ms. Hardenburg's behavior on the night of the police contact with respect to her repeated references about "bugs." (88:18). She also testified that the high level of amphetamines would explain other facets of Ms. Hardenburg's behavior, including her "talkativeness" and "aggression." (88:19). There was no testimony as to whether Ms. Macans had conducted an independent review of this high result for amphetamine.

The next test was a confirmatory test for fluoxetine conducted by Ms. Macans. (88:20). She told the jury that she confirmed the presence of fluoxetine in Ms. Hardenburg's blood. (88:21). She described fluoxetine as having "depressant characteristics" including drowsiness and delayed reaction times. (88:21). While fluoxetine was "potentially" impairing, "that would be determinant on their dosage, how long they'd been taking the medication, if they had become tolerant to those effects and -- and again, what – if -- as long as you're taking the prescription as prescribed." (88:21). In this case, the amount in Ms. Hardenburg's blood was 170 micrograms per liter, well below the maximum therapeutic amount of 400 micrograms per liter. (88:21-22). Lacking more precise information about Ms. Hardenburg's history with this medication, Ms. Macans was unable to confirm whether these impairing side effects would have been present with this dose. (88:22).

The next test conducted by Ms. Macans was a confirmation test for topiramate, another "depressive" used to treat seizures. (88:22-23). Because there was a problem with the first test, Ms. Macans actually had to run the test twice. (88:23). Ms. Macans testified that this drug had side effects which were potentially impairing. (88:24). She told the jury that Ms. Hardenburg's level was 6.4 milligrams per liter, close to the minimum therapeutic level of 5.9 and well below the maximum therapeutic dose of 35 milligrams per liter. (88:23-24).

The final test conducted by Ms. Macans was a confirmatory test for lamotrigine, another epilepsy medication. (88:24-25). Again, while the medication had side effects which were potentially impairing (including "a strong desire to sleep"), Ms. Hardenburg's result was "far below" the therapeutic range. (88:25-26). Ms. Macans also testified that the existence of side effects was variable depending on a person's tolerance. (88:26).

In light of this testimony, Ms. Macans was ultimately asked specifically about the possibility of drug interactions:

> Q: Can you testify about how drugs interact?
>
> A: Sometimes. It depends on the drugs, and if there's documented interaction, then I can comment on using the reference.

> Q: Are you able, based on just the answer you just gave, how these particular drugs interact?
>
> A: There's nothing notable about them that I can mention.

(88:33-34). She further testified that she was not able to "differentiate between behavior caused by a prescription drug and a behavior caused by a mental illness." (88:31).

Closing Arguments

In closing, the State emphasized the "odd" nature of Ms. Hardenburg's behavior. (88:64). The State also relied heavily on the testimony of Ms. Macans, especially her testimony about the high level of amphetamine detected in Ms. Hardenburg's blood:

> The amphetamine, she said this was a stimulant, an upper she said. She stated that at excessive doses it can cause restlessness, confusion irritability, hyperactivity and aggression. Also high dosage, which is what she had in her system, very, very high dosage, is associated with hallucinations and delusional parasitosis, and that is, as she stated, the belief that you're almost being infested by parasites or bugs. And that's extremely consistent with Ms. Hardenburg's behavior all the time she thought the bugs were all over her.
>
> Ms. Macans also testified that the amphetamine can cause impairment and it can affect the ability to safely operate a motor vehicle due to the overstimulation that a person is experiencing

> at such a high dosage. She stated that an individual wouldn't have the factors that you need to multitask because, as she said, when you're driving a car, you don't even notice, but you have to be able to multitask when you're doing that. And when you're so overly stimulated, you don't have those same factors to multitask. She even said on the stand that an individual taking this high amount would not have the steady hand necessary to operate a motor vehicle.

(88:69-70).

The State also argued that "the amphetamine caused a lot of her behavior." (88:77). The State believed that the amphetamine evidence proved she was impaired "not even considering the other three drugs" given that the "amount was so high." (88:78).

Counsel for Ms. Hardenburg conceded that Ms. Hardenburg had acted oddly, but also reminded the jury that the responding officer had considered a Chapter 51 mental commitment—suggesting that her odd behavior was proof of a mental illness, not impairment. (88:79). Counsel argued that the State was therefore unable to meet its burden of proof that she was "unable to drive that night because of the prescription drugs." (88:82).

Verdict and Sentence

Following a guilty verdict, Ms. Hardenburg returned to court for sentencing. (91). At sentencing, the State conceded that the case was mitigated

because "there was no bad driving seen." (91:5). The State argued that it was also aggravated, however, due to Ms. Hardenburg's refusal to accept responsibility. (91:6). The State emphasized Ms. Hardenburg's prior OWIs and asserted that the "only possible recommendation is prison to the Court." (91:7). When pushed to make a specific recommendation, the State asked for two years of initial confinement followed by two years of extended supervision. (91:8).

Counsel for Ms. Hardenburg argued that the dated nature of the prior record was mitigating. (91:9). Counsel also pointed to Ms. Hardenburg's serious mental health issues as well as evidence that Ms. Hardenburg was dealing with a residential bug infestation at the time of this incident. (91:9). Counsel asked for a time served disposition in light of Ms. Hardenburg's substantial sentence credit. (91:11).

The circuit court focused on what it viewed as a refusal to take responsibility (91:27). It therefore followed the recommendation of the State and sentenced Ms. Hardenburg to two years of initial confinement followed by two years of extended supervision. (91:31).

Postconviction Proceedings

Ms. Hardenburg ultimately filed a Rule 809.30 postconviction motion seeking a new trial and additional sentence credit. (61:1). She asserted that the admission of the opinions of Amy Sasman and

Jennifer Greene, absent their testimony, violated her constitutional right to confrontation. (61:8). The motion argued that this was plain error or, in the alternative, that counsel was ineffective for not objecting. (61).

The circuit court granted the request for sentence credit. (62:1). However, it denied the request for a new trial. (71:2); (App. 105). First, the court concluded that Ms. Macans' surrogate testimony was not constitutionally infirm as she was more than a "mere conduit" for the opinions of the non-testifying analysts. (71:2); (App. 106). Second, the court concluded that any confrontation error was harmless in light of the tests that Ms. Macans did perform and the officers' observations about Ms. Hardenburg's behavior. (71:2); (App. 106). Finally, the court rejected the ineffective assistance claim as it found that exclusion of results obtained by either Ms. Sasman or Ms. Green would not have created a reasonable probability of an acquittal. (71:3); (App. 107).

This appeal follows. (72).

ARGUMENT

I. Admission of the scientific conclusions of Ms. Sasman and Ms. Greene violated Ms. Hardenburg's right to confrontation and the prohibition against hearsay evidence.

A. Legal principles and standard of review.

Under the evidence code, the State was clearly precluded from presenting hearsay evidence. Wis. Stat. § 908.02.

Ms. Hardenburg also had a right under the state and federal constitutions to "confront witnesses who testify against [her] at trial." *State v. Mattox*, 2017 WI 9, ¶ 20, 373 Wis. 2d 122, 890 N.W.2d 256; U.S. Const. Amend. VI; Wis. Const, art. I, § 7. Pursuant to well-settled United States Supreme Court precedent, "a defendant's right to confrontation is violated if the trial court receives into evidence out-of-court statements by someone who does not testify at the trial if those statements are 'testimonial' and the defendant has not had 'a prior opportunity' to cross-examine the out-of-court declarant." *Mattox*, 2017 WI 9, ¶ 24 (quoting *Crawford v. Washington*, 541 U.S. 36, 68 (2004)). Laboratory reports prepared in anticipation of a criminal prosecution are testimonial for the purposes of the Confrontation Clause. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

With respect to forensic evidence, however, our Supreme Court has added another layer of analysis: While the Confrontation Clause forbids an expert witness from acting as a "mere conduit" for the opinions of a non-testifying individual, *State v. Griep*, 2015 WI 40, ¶ 21, 361 Wis. 2d 657, 863 N.W.2d 567, surrogate testimony is admissible so long as the expert witness fulfills an additional requirement—they must examine the underlying data and reach an independent opinion. *Id.*, ¶ 52.

This Court independently applies these legal principles to the facts of this case in determining whether the defendant's rights were violated. *Mattox*, 2017 WI 9, ¶ 19.

B. The laboratory report—and the assertions therein—was testimonial hearsay that should have been subjected to confrontation at trial.

Here, the laboratory report was received into evidence. (26). That report is a summary document which contains the scientific conclusions of three distinct "speakers"—Amy Sasman, Jennifer Greene, and Leah Macans. (26); (App. 108). Testimony regarding the substances found in Ms. Hardenburg's blood—and the corresponding levels of those substances—was integral evidence in this OWI prosecution and was therefore offered for its truth. Accordingly, it was subject to the statutory prohibition against hearsay evidence. Wis. Stat. § 908.02.

At the same time, the laboratory report is clearly testimonial for purposes of the Confrontation Clause for two reasons. First, the report is functionally identical to the evidence assessed in *Bullcoming* and *Melendez-Diaz* and found to be testimonial.

Melendez-Diaz concerned "certificates of analysis" prepared by experts that showed "the results of the forensic analysis performed on the seized substances"—in that case, suspected narcotics. *Melendez-Diaz*, 557 U.S. at 308. Those certificates were essential in proving that the substance seized from Melendez-Diaz was, in fact, cocaine—the ultimate issue at his trial. *Id*. In that circumstance, the Court found the constitutional question to be relatively clear-cut: "There is little doubt that the documents at issue fall within the 'core class of testimonial statements' thus described [in prior cases]." *Id*.

In *Bullcoming*, arguably even more on point, the evidence found to be "testimonial" involved analyst certificates which certified the defendant's blood alcohol content for the purposes of an OWI prosecution. *Bullcoming*, 564 U.S. at 653. In light of its holding in *Melendez-Diaz*, the Court held that these certificates once again "'fell within the core class of testimonial statements' […] described in this Court's leading Confrontation Clause decisions […]." *Bullcoming*, 564 U.S. at 665 (quoting *Melendez-Diaz*, 557 U.S. at 308).

Second, this evidence clearly satisfies the "testimonial" test—whether the "primary purpose [...] is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). As our Supreme Court has framed the issue, the "primary purpose test" looks at whether the challenged evidence is intended to serve as an "out-of-court substitute for trial testimony." *Mattox*, 2017 WI 9, ¶ 32 (quoting *Ohio v. Clark*, 135 S. Ct. 2173, 2180 (2015)).

Here, the analysts, who work for an arm of a law enforcement agency, the Wisconsin Department of Justice—tested Ms. Hardenburg's blood at the request of the West Allis Police Department in order to establish or prove facts necessary to the State's OWI prosecution: specifically, the nature and amount of any substances in Ms. Hardenburg's blood. The purpose of this analysis was to prove, at a trial, that Ms. Hardenburg was unlawfully impaired as a result of her ingestion of those substances.

Thus, the conclusory statements embodied in the laboratory report are clearly testimonial under controlling state and federal precedent.[7] Accordingly, Ms. Hardenburg had a right to confront and cross-examine Ms. Sasman and Ms. Green about their testimonial conclusions. Because she was not given

[7] The record is also clear that Ms. Hardenburg lacked any prior opportunity to cross-examine either Ms. Sasman or Ms. Greene.

that opportunity, it was clearly erroneous to admit their opinions into evidence.

C. Ms. Macans served as a "mere conduit" for the opinions of Ms. Sasman and Ms. Greene.

1. The *Griep* standard.

In reviewing the case law, the United States Supreme Court has been clear that witnesses bearing testimony about scientific evidence—even those with the "scientific acumen of Mme. Cuire and the veracity of Mother Theresa"—are subject to its strict formulation of the Confrontation Clause. *Melendez-Diaz*, 557 U.S. at 319 n.6.

Our Supreme Court, however, discerns an exception to this rule—"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.'" *Griep*, 2015 WI 40, ¶ 40 (quoting *State v. Williams*, 2002 WI 58, ¶¶ 20, 25, 253 Wis. 2d 99, 644 N.W.2d 919). Wisconsin case law therefore recognizes 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 the later instance, the expert would be a 'mere conduit for the opinion or another.'" *Id.*, ¶ 20.

The Confrontation Clause does not allow one witness to merely "recite" the testimony of another, *Bullcoming*, 564 U.S. at 660. However, this

prohibition is not applicable "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." *Griep*, 2015 WI 40, ¶ 40. "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." *Id.*

Thus, in order to pass muster under *Griep*, the State must present the testimony of an "independent expert" whose testimony satisfies specialized admissibility criteria. *Id.*, ¶ 20. The expert must be qualified as such and their testimony must establish that they possess analogous credentials and experience to opine on the test result at issue. *Id.*, ¶ 21. The analyst must then conduct a review of the non-testifying expert's underlying tests (not simply their ultimate conclusions). *Id.* While not requiring a process akin to formal peer review, the review requirement is still very stringent and requires proof that the testifying expert conducted a review of the non-testifying analyst's notes and raw data such that they can form a truly "independent" opinion. *Id.*

Here, unlike in *Griep*, the State placed the scientific conclusions of Ms. Sasman and Ms. Greene into evidence via Exhibit Three. (26). That error is harmless, however, so long as the testimony of Ms. Macans as to those results was otherwise admissible as an "independent" opinion. *See Id.*, ¶ 22. However,

Ms. Macans' testimony does not meet the admissibility requirements of *Griep*. As demonstrated below, because she acted as a mere conduit for the testimonial statements of Ms. Sasman and Ms. Greene, her testimony as to their scientific conclusions was therefore also constitutionally impermissible.

2. Ms. Macans merely recited the conclusory opinions of non-testifying witnesses.

At trial, the State asked Ms. Macans to describe the tests conducted by Ms. Sasman. (88:13-15). She described two sets of tests. The first set—the ELISA testing—consisted simply of a description of what Ms. Sasman "would of done" with respect to the blood sample and a conclusory recitation of the ensuing result. (88:13-14). She did not testify that she ever reviewed the underlying data or methods actually utilized in this case. She also did not claim to come to an independent opinion about the ELISA testing, telling the jury that "Ms. Sasman concluded that amphetamines positive and buprenorphine was positive." (88:14). Rather than arriving at a truly independent opinion, Ms. Macans merely recited the conclusory result obtained by Ms. Sasman as stated in Exhibit Three. This fails to pass muster under *Griep*.

Ms. Macans also testified about a second set of tests conducted by Ms. Sasman—confirmatory tests for a battery of substances. (88:15). Here, there was

absolutely no attempt to lay any *Griep* foundation. Instead, Ms. Macans once again recited that "Ms. Sasman confirmed the presence of caffeine, topiramate, cotinine, fluoxetione, and lamotrigine." (88:15). She never claimed to independently assess the underlying data or the mechanics by which Ms. Sasman arrived at the result in question. Once again, this fails to pass muster under *Griep*.

Finally, Ms. Sasman was also asked to recite the results of the confirmatory test for amphetamine conducted by Ms. Greene. (88:15). Beyond a cursory explanation of the nature of a "confirmatory" test, Ms. Macans gave no other insights into the underlying scientific process. (88:15). She also failed to state a truly independent opinion, baldly asserting that "Ms. Greene confirmed and quantitated amphetamine at 320 micrograms per liter." (88:16). This is another rote recitation of the information contained on Exhibit Three and, as such, fails to pass muster under *Griep*.

Accordingly, for each piece of evidence obtained by a non-testifying analyst, Ms. Macans repeatedly failed to demonstrate that she had conducted any kind of "review" or that she had generated a truly independent scientific opinion. As her testimony was flatly incompatible with controlling precedent, this was improper and inadmissible evidence which violated Ms. Hardenburg's right to confrontation.

II. This egregious Confrontation Clause violation constitutes plain error.

A. Plain error standard.

Counsel did not object to this testimony at Ms. Hardenburg's trial. Accordingly, this Court should analyze whether the admission of otherwise constitutionally infirm testimony was "plain error" under Wis. Stat. § 901.03(4).

This statute allows this Court to review an error that has otherwise been waived by the lack of an objection. *State v. Jorgensen*, 2008 WI 60, 21, 310 Wis. 2d 138, 754 N.W.2d 77. "Plain error is 'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" *Id.* (quoting *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1985)). A plain error must be "obvious and substantial." *Id.* This standard is especially appropriate in a circumstance "where a basic constitutional right has not been extended to the accused." *Id.*

The determination of whether an error is plain depends on the facts of particular case. *Id.*, ¶ 22. The defendant bears the initial burden of proving that the "unobjected to error is fundamental, obvious, and substantial [...]." *Id.*, ¶ 23. If that standard is satisfied, "the burden then shifts to the State to show the error was harmless." *Id.* This is an imposing standard and requires the State to prove, beyond a reasonable doubt, that a jury would have found the defendant guilty absent the error. *Id.* The Wisconsin

Supreme Court has "identified several factors to assist in determining whether an error is harmless: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case." *Id.*

B. When this standard is applied to Ms. Hardenburg's case, a new trial is the only possible remedy.

1. Admission of Ms. Macans' improper testimony was a "fundamental, obvious and "substantial" error which distorted the fairness and integrity of this trial.

In this case, Ms. Hardenburg's constitutional rights were egregiously violated by State conduct when the State repeatedly presented testimony flatly inconsistent with settled constitutional norms in order to prove an essential fact of its case—that Ms. Hardenburg had prescription drugs, including excessive levels of amphetamine, in her blood at the time she operated her motor vehicle. The State argued that the high level of amphetamine explained her erratic behavior, proved impairment, and rebutted any argument that it was mental health, as

opposed to intoxication, underlying her actions on the night in question.

As the United States Supreme Court asserted in *Crawford v. Washington*, 541 U.S. 36, 43 (2004), the right to confrontation is fundamental to our system of adversarial justice. Indeed, the right "dates back to Roman times" and is well established in historical common law sources. *Id*. Moreover, the federal constitution's focus on the right to confrontation is also intended as a response to, and a means of preventing, abuse of power by state actors. *Id*. at 51.

Thus, a defendant's right to confront and cross-examine her accusers can be fairly labeled one of the core components—on both a procedural and substantive level—of our legal system. Accordingly, a denial of that constitutional right is "fundamental." *See State v. Jorgenson*, 2008 WI 60, ¶ 28, 310 Wis. 2d 138, 754 N.W.2d 77 (Confrontation Clause error one of several meriting plain error reversal). This is especially true in a case involving forensic evidence, where confrontation is an essential tool for weeding out incompetent, unreliable, or fraudulent scientific evidence. *See Melendez-Diaz*, 557 U.S. at 318-321.

Those concerns are at play in this case, which involves two types of blood testing—both "ELISA" and "Gas Chromatography/Mass Spectrometry." Both tests, based on the scant record developed at this trial, appear to require some degree of human input. With the ELISA screening, the analyst is responsible

for removing blood from an evidence vial, properly diluting it, and then physically placing it in the machine. (88:13). The analyst also needs to set up "negative controls, a positive control and a positive calibrator." (88:13). While there is a "robot" which performs the actual chemical analysis, it would appear that the analyst is still required to analyze and confirm the machine-driven output. (88:14). Moreover, the analyst would also be an essential witness in determining whether the proper chain of custody for the sample was established—a topic for which Ms. Macans offered no meaningful testimony.

With respect to confirmatory testing using gas chromatography, the United States Supreme Court has already found that analysts certifying this kind of result go beyond that of a "mere scrivener" simply reiterating machine-generated data. *Bullcoming*, 564 U.S. at 659-660. The analyst is still responsible for an array of tasks which cross-examination would meaningfully assess, including whether the analyst followed proper protocols. *Id*. As articulated in *Melendez-Diaz*, this scientific process "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination." *Melendez-Diaz*, 557 U.S. at 320. Even though the machine is used to generate data, subjective lab analyst judgment is still used to interpret and make sense of that data—and that subjective judgment must be tested in the "crucible of cross-examination." *Id*. at 317. Finally, cross-examination would also be essential to establish the proper chain of custody—which was also not established with respect to the

confirmatory testing performed by Ms. Sasman or Ms. Greene.

Thus, not only was the error "fundamental"—because it deprived Ms. Hardenburg of an opportunity to adequately assess the reliability and trustworthiness of otherwise crucial forensic evidence—the error was also "obvious" and "substantial."

With respect to obviousness, a cursory review of the controlling precedents from both the United States Supreme Court and the Wisconsin Supreme Court establish that this testimony was improper. This is not a close legal case. As to the substantial nature of the error, this was critical evidence which pertained to the ultimate issue in this trial.

Accordingly, in light of the foregoing, Ms. Hardenburg has satisfied her burden and should be entitled to a new trial.

2. The error was not harmless.

Based on the above arguments, a compelling case for plain error has been stated—Ms. Hardenburg was deprived of a fundamental right to cross-examine witnesses, in obvious violation of otherwise settled constitutional precedents. Due to the nature of the evidence, the error was substantial, as it went to an ultimate issue in her trial. The burden should therefore be shifted to the State in order to justify the outcome here and to prove, beyond a reasonable doubt, that this error was harmless. In analyzing the

factors articulated by the Wisconsin Supreme Court, however, it is clear that the State cannot overcome this significant legal obstacle.

The Frequency of the Error

Here, the Confrontation Clause error pervaded the entire trial, beginning with opening statements. The State informed the jury that they would hear from Ms. Macans "that the result of [Ms. Hardenburg's] blood test showed that she had several prescription drugs in her system." (87:16). The State focused extensively on the amphetamine evidence, which was derived from the two non-testifying analysts:

> She will also tell you that the defendant's erratic behavior and her hallucinations of all these bugs on her and in her car and her agitation and her irritability, that behavior is very consistent with the high amount of amphetamine that was found in her system.

(87:16-17).

Exhibit Three, containing the inadmissible conclusions of two non-testifying experts, was received as an exhibit and then submitted to the jury during their deliberations. (88:91).

The State also called Ms. Macans to recite the otherwise inadmissible assertions of Ms. Sasman and Ms. Greene, with her testimony on these points spilling forth across numerous pages of the recorded transcript. The State then reiterated those

conclusions in both its closing and rebuttal argument, focusing especially on the evidence of excessive amphetamine use as ostensibly verified by the non-testifying Ms. Greene. (88:77). Accordingly, this factor weighs in Ms. Hardenburg's favor.

The Importance of the Erroneously Admitted Evidence

In assessing this factor, this Court should consider whether the "erroneously admitted evidence directly pertained to the crimes charged." (*Jorgenson*, 2008 WI 60, ¶ 47. In this case, Ms. Hardenburg was charged with an OWI offense and the State alleged that she was impaired as a result of ingesting prescription medications. (86:2). Thus, evidence of prescription medications in her blood—and the levels of those drugs—goes directly to the charged offense.

The evidence was crucial to the State's case, as the high amphetamine level ostensibly verified by the non-testifying analyst directly rebutted any inference that Ms. Hardenburg had used that medication appropriately—what she had apparently told one of the arresting officers on the night in question. (87:72). The evidence of excessive use also contradicted any favorable inferences the jury might otherwise draw from the stipulated fact that Ms. Hardenburg was legitimately prescribed these medicines. (87:22).

Focusing on the amphetamine result, which derived from the work of Ms. Sasman and Ms. Greene, the State clearly believed that this was the most significant fact supporting a finding of guilt.

The excessive amphetamine result was used to explain all aspects of Ms. Hardenburg's actions during the police interaction, including her delusions and otherwise "odd" behavior. (88:18-19). The State therefore suggested, in closing argument, that the amphetamine results alone could support a finding of OWI. (88:78).

Moreover, the amphetamine evidence was significant to the State not only because it appeared to explain the behavior on the night in question, but also because the other drugs were all within therapeutic ranges and had side effects—like sleepiness—which did not track with the observations of Officer Kleinfeldt or Officer Kaye.

Finally, the State's case lacked any actual evidence of impaired driving, as Ms. Hardenburg was parked when contacted by police. (87:26). Like a high BAC OWI case, the State's case depended on an inference that the high level of amphetamine would have almost certainly caused legal impairment.

Thus, evidence of amphetamine usage—in particular, amphetamine overuse—was crucial to the State's case. However, the only evidence of amphetamine use came in through impermissible means—evidence regarding Ms. Sasman's ELISA testing and Ms. Greene's confirmation and quantification testing. Accordingly, this factor weighs in Ms. Hardenburg's favor.

The Presence or Absence of Evidence Corroborating or Contradicting the Erroneously Admitted Evidence

Here, the State's case was "significantly enriched" by otherwise improperly admitted evidence regarding the blood test results. *See Jorgenson*, 2008 WI 60, ¶ 48. Absent the blood test results, the behavior observed in the Speedway parking lot is inherently ambiguous and subject to a reasonable competing inference—that Ms. Hardenburg was mentally ill, not chemically impaired. Ms. Hardenburg's statements to the officer directly contradict this result and, while the search of the car revealed unstated prescription medications, the State never established what those medications were or whether there was any other evidence of recent use. Accordingly, this factor weighs in Ms. Hardenburg's favor.

Whether the Erroneously Admitted Evidence Duplicates Untainted Evidence

It is worth noting that the duplicative nature of evidence is "but one factor" in the harmless error analysis and is not dispositive. *Jorgenson*, 2008 WI 60, ¶ 39. Here, the only source of evidence regarding amphetamine in Ms. Hardenburg's blood came from these non-testifying witnesses. While Ms. Macans performed other tests, she did not perform any tests related to amphetamine. Her tests also revealed prescription drugs well within therapeutic ranges and with side effects that did not correspond to the behavior at issue in this case. Thus, the erroneously

admitted scientific evidence, rather than being duplicative, was uniquely significant to this case. Accordingly, this factor weighs in Ms. Hardenburg's favor.

The Nature of the Defense

While Ms. Hardenburg implicitly conceded, via her stipulation, that she had ingested prescription medications, she never conceded the ultimate issue—impairment as a result of that ingestion. Here, trial counsel pursued a reasonable doubt defense, challenging the State's ability to prove that point. In so doing, he presented another alternative hypothesis—that Ms. Hardenburg's actions were caused by mental illness, not impairment. (88:79). Counsel also pointed out that there was no proof that she had operated her vehicle inappropriately. (88:81). Counsel further believed the stipulation about a legitimate prescription was notable, therefore impliedly arguing that Ms. Hardenburg was somehow less likely to be impaired in light of her legitimate usage of prescription medications. (88:81). Counsel argued that the State's expert was unfamiliar with Ms. Hardenburg's "baseline" and could not therefore establish whether these medications would have been impairing to her. (88:81).

Here, the improperly admitted evidence is highly damaging to any reasonable doubt defense. Given the extraordinarily high level, a jury could convict in light of that number alone—even if there

was no evidence of bad driving, as counsel argued. Moreover, the State was also able to use this high level to explain that Ms. Hardenburg may have been experiencing a temporary form of mental illness—delusional parasitosis—caused by her excessive ingestion of amphetamines. (88:18). This directly rebuts the mental health defense raised by counsel. That high level also problematizes any inferences of legitimate usage or tolerance, thereby short-circuiting those arguments as well.

Accordingly, because the erroneously admitted evidence was directly responsive to Ms. Hardenburg's defense, this factor weighs in her favor.

The Nature and Strength of the State's Case

As highlighted above, the State's case was unique. No one saw Ms. Hardenburg driving erratically, or even driving at all. Instead, the State relied on evidence that she had behaved bizarrely and had a high amount of amphetamine in her bloodstream in order to obtain a conviction. Because the improperly admitted evidence was a crucial part of their case—as it explained the bizarre behavior and was prima facie evidence of impairment—this factor weighs in Ms. Hardenburg's favor.

Accordingly, application of the seven *Jorgenson* factors proves that admission of this evidence was not harmless. This Court should remand for a new trial.

III. In addition and in the alternative, Ms. Hardenburg was entitled to a hearing on her ineffectiveness claim.

A. Legal standard.

A criminal defendant has the right to the effective assistance of counsel under both the state and federal constitutions. U.S. Const. Amend. VI & XIV; Wis. Const. Art. 1, § 7 & 8. To prevail on an ineffective assistance of counsel claim, a defendant must establish that counsel's performance was deficient and that counsel's deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if it falls "below objective standards of reasonableness." *State v. Thiel*, 2003 WI 111, ¶ 33, 264 Wis. 2d 571,665 19 N.W.2d 305.

To prove prejudice, the defendant must show that counsel's deficient performance was "sufficient to undermine confidence in the outcome." *Thiel*, 2003 WI 111, ¶ 20 (citing *Strickland*, 466 U.S. at 694). Counsel's deficient performance is prejudicial when there is a reasonable probability "that, but for counsel's [deficient performance], the result of the proceeding would have been different," or when counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694. Whether confidence in the outcome has been undermined is distinct from whether or not the evidence is sufficient to convict. *State v. Pitsch*, 124 Wis. 2d 628, 645, 369

N.W.2d 711 (1985). A defendant also need not be prejudiced by "each deficient act or omission in isolation." *Thiel*, 2003 WI 111, ¶ 63. Rather, prejudice may be established by the cumulative effect of counsel's deficient performance. *Id*.

In Wisconsin, a defendant can only prevail on an ineffective assistance of counsel claim after presenting the testimony of trial counsel at a postconviction hearing. *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). In order to obtain such a hearing, the postconviction motion must allege, on its face, "sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 682 N.W.2d 433. This determination is a question of law, which this Court reviews de novo. *Id*. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing," which this Court reviews under the deferential erroneous exercise of discretion standard. *Id*.

B. The postconviction motion sufficiently alleged that trial counsel performed deficiently by not objecting to clearly inadmissible evidence and that this deficient performance prejudiced Ms. Hardenburg.

As set forth above, the conclusory opinions of non-testifying analysts were not properly admissible in this trial. Ms. Hardenburg's postconviction motion explained, in detail, why the evidence was inadmissible and under what legal theory counsel should have objected. If this Court accepts that legal analysis, then Ms. Hardenburg has sufficiently alleged deficient performance.

As to prejudice, Ms. Hardenburg's motion explained that the blood test evidence went to a central question in this case—whether Ms. Hardenburg was impaired. (61:17). Ms. Hardenburg argued that the State "heavily relied" on this evidence throughout the trial. (61:18). Ms. Hardenburg indicated that the other drug evidence—those tests performed by Ms. Macans—did not appear dispositive and, in fact, failed to "track" with the State's arguments in support of guilt. (61:18). Ms. Hardenburg also pointed out that there was another competing hypothesis—that Ms. Hardenburg was mentally ill. (61:18). Ms. Hardenburg alleged that this was compelling evidence which, if excluded, would create a reasonable probability of a different outcome. (61:18).

Accordingly, the motion sufficiently alleged prejudice. Because the motion satisfied the pleading requirements, the circuit court erred in not holding an evidentiary hearing. Accordingly, this Court should remand for a hearing, at which time counsel can explain his strategic reason—if any—for not objecting.

CONCLUSION

Ms. Hardenburg therefore respectfully requests that this Court grant her a new trial under the plain error doctrine, or in the alternative, remand for an evidentiary hearing on her ineffectiveness claim.

Dated this 12th day of September, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,983 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 12th day of September, 2019.

Signed:

_____

Christopher P. August
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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

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Dated this 12th day of September, 2019.

Signed:

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APPENDIX

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TO
APPENDIX