RECEIVED
03-04-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP32-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OSCAR C. THOMAS,

Defendant-Appellant-Petitioner.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN THE CIRCUIT COURT FOR KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

ISSUES PRESENTED

1. Petitioner Oscar C. Thomas confessed to police that after he watched a porn video, he sexually assaulted the victim while she told him to stop. To satisfy the corroboration requirement for the confession, the State offered the porn video found at the scene and the testimony of the downstairs neighbor who overheard the victim screaming, "Stop, stop" during the early morning assault.

Do those facts satisfy the corroboration requirement?

The Court of Appeals answered yes.

This Court should answer yes.

2. Thomas elicited testimony from his medical expert on the need to look for "an exchange of evidence" between victim and perpetrator in a case like this; when asked if there were "signs of a struggle," the expert said there were not—even though the lab report he'd reviewed showed that Thomas's DNA was found under the victim's fingernails and the victim's DNA was found under Thomas's fingernails. Photos in evidence showed ten scratch marks on the victim's face.

a. Where the defense expert witness's testimony contradicted the contents of the crime lab report on which he relied, did eliciting unconfronted testimonial hearsay about the part of the report that contradicted the expert's testimony violate Thomas's right of confrontation?

The Court of Appeals answered yes.

This Court should answer no.

b. If admitting the evidence was error, would a rational jury have reached the same result had the error not occurred?

The Court of Appeals answered yes.

This Court should answer yes if it reaches this question.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that oral argument and publication are appropriate.

INTRODUCTION

This case is about Thomas's constitutional right to confront a witness against him—namely, the person who prepared the crime lab report on which Thomas's expert witness relied for his opinion about the cause of the victim's death. The lab report, which was not in evidence, showed that the victim's DNA was found under Thomas's fingernails and Thomas's DNA was found under the victim's fingernails. Thomas's medical expert said that 1) he'd reviewed the crime lab report, 2) it was critical to check for "an exchange of evidence" between victim and perpetrator to discern the cause of death, 3) there were no "signs of a struggle" "that [he] could see," and 4) the ten abrasions on the victim's face "could" have happened from having sex facedown on the floor.[1] On cross-examination, the State asked about the fingernail evidence.

That was entirely proper. When the defense asked if there were signs of struggle and elicited an answer that flatly contradicted evidence contained in a lab report the expert had reviewed, that made the remainder of the crime lab report's contents fair game. The law generally presumes that someone who knowingly "acts in a manner inconsistent with" the exercise of his rights "has made a deliberate choice to relinquish the protection those rights afford."[2] The rule of

---

[1] (R. 320:20–21, 28.)

[2] *Hemphill v. New York*, 142 S. Ct. 681, 694 (2022) (Alito, J., concurring).

completeness is one manifestation of this implied waiver principle.[3]

That's how the evidence was used here. *Hemphill* reiterated *Crawford*'s view barring "open-ended exceptions" to the right of confrontation, but in his concurrence, Justice Alito wrote, "The Court emphasizes that its decision does not call into question the rule of completeness or other principles that may support implied waiver of the confrontation right."[4] He suggested that the confrontation right is subject to the same kind of implied waiver that occurs when a defendant takes the stand. He wrote, "The Sixth Amendment right to confrontation should be analyzed no differently[,]" and explained,

> When a defendant introduces the statement of an unavailable declarant on a given subject, *he commits himself to the trier of fact's examination of what the declarant has to say on that subject.* The remainder of the declarant's statement or statements—and any other statements by the same declarant on the same subject—*are fair game. The defendant cannot reasonably claim otherwise, given his tactical choice to put the declarant's statements on the relevant subject in contention despite his unavailability for cross-examination.* And that is true regardless of whether the defendant attempts to "invoke" his right to confront an unavailable declarant after introducing his out-of-court statements. Having made the choice to introduce the statements of an unavailable declarant, *a defendant cannot be heard to complain that he cannot cross-examine that declarant with respect to the remainder of that statement* or the declarant's related statements on the same subject.[5]

---

[3] *Id.* at 695 ("The rule of completeness fits comfortably within the concept of implied waiver.") (Alito, J., concurring).

[4] *Id.* at 695–696 (Alito, J., concurring).

[5] *Id.* (Alito, J., concurring) (emphasis added).

In short, nothing in the Supreme Court's Confrontation Clause jurisprudence to date makes the fingernail evidence inadmissible in these circumstances.

But even if this Court concludes that it *was* error to admit it, the error was harmless because the defense expert provided an innocent explanation for the presence of the DNA (the couple lived together), and the remainder of the evidence, including Thomas's confession, was overwhelming.

As to the other issue in this case, a defendant's confession can support a conviction as long as it's corroborated by a significant fact; under *Bannister*, it's not necessary that the significant fact "either independently establish the specific elements of the crime or independently link the defendant to the crime."[6] Thomas's confession was corroborated here by the porn video found at the scene and the testimony of the downstairs neighbor who overheard the victim saying "Stop, stop," during the 2 a.m. assault. Thomas's argument would essentially require an eyewitness to corroborate a confession of any sexual assault that does not involve physical evidence. *Bannister* doesn't.

STATEMENT OF THE CASE

Thomas's trial focused on whether he caused the death of Joyce Oliver-Thomas accidentally, recklessly, or intentionally.

Thomas was charged in connection with Joyce Oliver-Thomas's death.

Responding to a 911 call from Thomas on December 27, 2006, officers found Joyce Oliver-Thomas, Thomas's partner of about 20 years, dead on the floor next to her bed. (R. 1:1–

---

[6] *State v. Bannister*, 2007 WI 86, ¶ 31, 302 Wis. 2d 158, 734 N.W.2d 892.

2.) Following an investigation, the State charged Thomas with first-degree intentional homicide, first-degree sexual assault, and false imprisonment. (R. 1:1.)

The complaint alleged that Thomas told police that after smoking crack cocaine and watching porn, he went to Oliver-Thomas's bedroom at about 2 a.m. and had sex with her, then after more crack and porn, he physically restrained her and "began humping" on "her hip area" even though she told him to stop. (R. 1:2.) He described putting his left arm around her neck as she was "struggling," "kicking the floor," and "yelling for [him] to stop." (R. 1:2.) The complaint alleged that Thomas told police that he had left the apartment and came back and found her dead; he said he was "accidentally responsible for" her death. (R. 1:3.) The complaint also included the statement from a downstairs neighbor who told police she'd heard what sounded like a person thrown to the floor, heard a woman screaming and saying, "Stop, stop, I love you, I love you," heard kicking and sounds of choking, and then heard complete silence. (R. 1:2.)

The issue at trial was whether Oliver-Thomas's death was accidental.

At a six-day jury trial in January 2018,[7] there was no dispute that Thomas's actions played a role in Oliver-Thomas's death. The question was whether he committed the crimes charged.

The State argued that the death was first-degree intentional homicide or, at least, first-degree reckless homicide. (R. 321:57–58.) The defense argued that the death was an accident or, at most, second-degree reckless homicide.

---

[7] Thomas was tried and convicted on all charges in 2007; that conviction was affirmed on direct appeal (R. 161) but vacated in federal habeas proceedings (R. 126; 182). This appeal pertains solely to the 2018 trial. (R. 251–253; 316–321.)

(R. 321:64.) The jury was instructed on the charged offenses and the two lesser-included offenses. (R. 320:124–25.)

The State presented Thomas's many statements to police and more than a dozen witnesses, including a downstairs neighbor who was home the night the victim died.

Testimony about Thomas's statements.

The jury heard the 911 call Thomas made in which he told the operator that he had found Oliver-Thomas on the floor, blue and unresponsive, and said, "I think my wife just choked to death." (R. 81; 317:84–85.) Jurors also received a transcript of the recording.[8] (R. 317:84–85.)

Thomas made a statement at the scene that an officer wrote down and Thomas signed. (R. 83; 319:15.) He made a statement at the police station when he spoke to the police voluntarily and was not under arrest. (R. 89; 319:20–21.) In these statements, he described finding Oliver-Thomas unresponsive on the floor next to their bed. (R. 81:2; 236:2; 237:2–3.)

He made another voluntary statement to police after he was arrested. (R. 237; 319:53–54.) In it, he described forcing sexual contact after watching a porn video, ignoring Oliver-Thomas's objection, and squeezing her neck with his arm as she "was struggling":

> Joyce asked me if I was watching one of those dam movies. After that Joyce had laid back down on the bed and was lying on her left side. I said yeah I had been watching one of my movies. I then jumped on her hip area and I was humping. I was just messing

---

[8] The record shows that the defense agreed that the transcript shared with the jury in the 2018 trial accurately reflected the 911 recording. (R. 317:85.) The 911 call transcript does not appear to have been entered as an exhibit. (R. 211.) A transcript of the December 27, 2006, call to Kenosha 911 is in the record from the 2007 trial. (R. 81.)

> around and I told her I had time for a quicky. I believe that Joyce was wearing her underpants and I'm not sure if she was wearing a bra. I rolled Joyce over and we went back down on the floor. Joyce was lying on her left side and I was on my left side behind her. *I had my left arm was around Joyce neck. I didn't think I was squeezing hard but Joyce was struggling and was yelling for me to stop and to quit it.* Joyce's feet were kicking the floor while she was telling me to stop. Joyce was telling me she loved me and for me to quit playing. *I kept squeezing for a little while* until she said she would bite the shit out of me. Joyce's breathing started to slow down so I turned her loose. After I turned her loose Joyce was breathing funny and looking at me. I got up and left.

(R. 237:3 (emphasis added).)

Thomas also stated, "I do believe I was accidentally responsible for the death of Joyce. I'm not sure if it was my mixing of the crack and medicine that made me so rough with Joyce." (R. 237:3.)

Thomas made another statement to police while he was incarcerated in which he claimed that a drug dealer named Greg was the person who killed Oliver-Thomas while Thomas was out of the apartment briefly. (R. 102; 319:104–07.) This statement was discredited by both parties at trial. (R. 319:104–07; 321:81.)

The downstairs neighbor's testimony.

Erika Cruz, the woman who lived in the apartment beneath Thomas's, testified that she was awakened at about 2:00 a.m. on December 27, 2006, by "a lot of noise, people fighting, a lot of noise like screaming" from the apartment above her. (R. 316:119.) She said she heard two people upstairs who "were fighting" and she heard "a woman screaming." (R. 316:121.) At one point, she heard the woman say, "Stop, stop, I love you, I love you." (R. 316:126.) After that, she testified, she heard "When she yelled and everything, I

heard, like, something fell on the ground -- something big, quite big, and then I heard silence." (R. 316:126–27.) She testified that she then heard steps upstairs and saw Thomas leave the apartment. (R. 316:127.)

The homicide detective's testimony.

The homicide detective testified, and, as relevant to the issues on appeal, was asked on re-cross-examination about the results of a rape kit done on Oliver-Thomas's body. (R. 319:118–19.) The detective answered that the rape kit did not show DNA from Thomas. (R. 319:119.)

The medical examiner's testimony.

The medical examiner who performed the autopsy of the victim testified that the cause of death was strangulation based on the "extensive" internal injuries to Oliver-Thomas's mouth and neck. (R. 316:22, 213.) The autopsy report described Oliver-Thomas as "morbidly obese" at an estimated 250 pounds, and listed her injuries:

> I. Strangulation
>
> A. Extensive hemorrhage involving soft tissues and strap muscles of neck bilaterally
>
> B. Hemorrhages, bilateral bulbar and palpebral conjunctivae (petechial and confluent)
>
> II. Blunt force injuries to face
>
> A. Superficial abrasions, nose, cheeks and lips
>
> B. Lacerations, buccal mucosa
>
> C. Approximately 70 cc bloody gastric contents.

(R. 88:2.)

The medical examiner testified that she saw scratches on Oliver-Thomas's face and that though she had in other cases seen scratches caused in the course of resuscitation attempts, the scratches in this case did not look like that.

(R. 316:194; 317:60–61, 65–66.) On cross-examination, defense counsel elicited that there were no fingertip bruises or fingernail marks on Oliver-Thomas's neck, and no chin abrasions that would indicate defensive efforts to use the chin to protect the neck. (R. 317:36–39.) Defense counsel also elicited from the witness that it is common in manual strangulation cases for there to be bruising on the perpetrator and that she did not review any photos of the defendant before reaching her conclusion. (R. 317:36, 39.)

The State's other witnesses.

The State presented 14 other witnesses, including the man Thomas was smoking crack with before and after he killed Oliver-Thomas, the 911 operator, the officers and detectives who responded to the scene and conducted the investigation, the lab analyst who found cocaine in Thomas's blood, the victim's co-workers and supervisors, and the victim's daughter. (R. 316:2; 317:2–3; 318:2.)

The defense expert witness.

The defense called one witness, a practicing medical examiner from another state, who testified that based on the pattern of injuries reported in the autopsy, there was "insufficient evidence to prove that this was an intentional manual strangulation," and instead that the injuries showed a brief "compression of the neck" that was consistent with Thomas's account of accidental strangulation. (R. 320:52–55.)

The defense expert testified that his opinion was based on his review of a 219-page file that contained "[t]he Kenosha Police Department files, sworn statements from Mr. Thomas, Alfonso Platt, Erika Cruz, Kenosha Fire Department, the emergency transport record, toxicology reports from the autopsy and the crime laboratory reports"—he said it was "correct" that he had "reviewed everything that exists in the case." (R. 320:14–15, 16.)

The expert testified that he had reviewed photos of the victim and had reviewed photos of Thomas. (R. 320:20.) He explained that it was necessary "to examine both" for "an exchange of evidence":

> [I]n allegations of violence resulting in death where there is evidence of some sort of a physical struggle as in this case, *you need to examine both the victim as well as the alleged perpetrator* to see if--any event like that *there will be an exchange of trauma, an exchange of evidence.* To the degree that you have got extensive trauma that looks like self-defense, to the degree that you have got extensive trauma that looks like it's on the perpetrator, it gives you again a better overall sense of the degree of trauma, the degree of force related during the incident.

(R. 320:20–21 (emphasis added).)

The expert testified that he reviewed the material he did because 1) "you need to get as much information as you can" before you reach a conclusion; 2) "[y]ou can't tell [the difference between a homicide and an accident] at all at the autopsy table"; and 3) "[y]ou never know when any one specific part of those investigations will drive your determinations one way or the other." (R. 320:15–16.)

When asked if there were "signs of defensive wounds" or "signs of a struggle," he answered that there were not. (R. 320:21.)

Defense counsel asked the expert witness whether the abrasions to Oliver-Thomas's face visible in the photo exhibits (R. 222; 223) could have been caused by emergency medical personnel during resuscitation attempts; he answered that, "most of the time it is just, as in this case - - just a mixture that it is very hard to sort out." (R. 320:22–23, 28.) Defense counsel asked the expert witness, "If a person were having sex and their face was down on the floor, could that cause scratches and abrasions to the face?" and the witness

answered, "It could certainly explain some of these, yes." (R. 320:28.)

On cross-examination, the witness confirmed that it was "correct" to state that were "ten or so abrasions on the face." (R. 320:76.) The State also questioned the expert in connection with the rape kit results and then proceeded to ask about other DNA analysis relevant to the expert's testimony; the circuit court overruled defense counsel's objection:

> [Prosecutor]: . . . But in those crime lab reports, you are aware that there was some analysis done?
>
> [Defense counsel]: Objection.
>
> [Prosecutor]: It's what he relied on in his opinion.
>
> [Defense counsel]: I'm objecting to going into the details of reports that haven't been introduced into evidence, though. It's a back door - -
>
> THE COURT: If he examined it, then it's presumably something he discounted or relied upon. The objection is overruled.
>
> [Prosecutor]: And you are aware in those crime lab reports that *Oscar Thomas's DNA was found under Joyce Oliver-Thomas's fingernail clippings*, which were clipped from her body at the time of the autopsy, correct?
>
> [Witness]: I believe so. I would like to look at the report again, if you can show me that, no?
>
> . . .
>
> [Prosecutor]: Dr. Williams, I'm handing you a document which we have marked as Exhibit No. 36. Can you please take a look at that? It's a three-page document. Let us know if that is the Wisconsin state crime lab report that you reviewed in preparation for your report.
>
> [Witness]: (Witness complies.) Yes, this appears to be an analysis that shows that the DNA

> found under the fingerprints was obviously a mixture. *You are going to have her DNA, but also evidence of DNA from Oscar Thomas.*
>
> [Prosecutor]: And similarly the fingernails from the defendant were also swabbed, and *her DNA was found under that as well; is that correct*?
>
> [Witness]: Yes.

(R. 320:88–89 (emphasis added).)

The witness quickly dismissed the significance of the findings, stating, "A finding of the DNA, they could be scratching each other's back," and restating that "there is no evidence of trauma on him to support the fact that she was struggling sufficiently." (R. 320:89.)

The parties' closing arguments.

In closing argument, the prosecutor presented the State's theory of how the victim died—with the defendant holding her neck in a choke hold with one arm and scratching her face with the other hand as he tried to cover her mouth and muffle her screams. (R. 321:37–38.) Defense counsel objected—"[t]here is no evidence of that"—and the circuit court admonished the prosecutor that closing argument is "[c]onfined to the evidence." (R. 321:37–38.) The prosecutor responded that "the evidence supports this theory." (R. 321:37–38.) He referred to the evidence of the defendant's DNA under the fingernails of the victim. (R. 321:37–38.) The circuit court overruled the objection and permitted the prosecutor to argue that the evidence of the victim's DNA under Thomas's fingernails supported the prosecution theory that Thomas scratched the victim's face in the process of strangling her. (R. 321:38.)

In the defense closing, the jury heard that Thomas's position was the version Thomas told officers about having sex with the victim that evening—"That is in evidence, and he maintains that story that there was sex." (R. 321:73–74.)

Defense counsel pointed to the absence of a broken hyoid bone (R. 321:77–78) and absence of external bruising of the neck as evidence that the compression that caused her death was of short duration and not much force—which, he argued, meant it was not intentional. (R. 321:78–79.) He argued that the question before the jury was whether "Mr. Thomas's behavior as he described it, the attempt to initiate sexual contact, rolling onto the floor and having his arm around her neck and noticing her breathing slowing, whether that event was an intent to kill her, to murder her, or whether it is an accident, which we believe it is, or a reckless event." (R. 321:81.) Defense counsel minimized the significance of the contact: "[h]e hopped on the side of her hip with his clothes on" and was "joking around," and in the process of that he "falls down next to her, has his arm around the neck, and they roll off the bed." (R. 321:84.)

Thomas asked the court to vacate the sexual assault conviction and grant a new trial on the other charges.

Thomas sought postconviction relief. (R. 279; 285.) First, he sought to have the conviction for sexual assault vacated on the grounds that there was no corroboration of any significant fact of his statement to police about the sexual contact, as is required for convictions based on confessions. (R. 279:3–7.) Second, he sought a new trial on the ground that the testimony the State elicited about the victim's DNA under Thomas's fingernails was hearsay evidence[9] that was admitted in violation of the rule that hearsay data is not made

[9] Thomas made a different argument against the DNA evidence argument in his motion but withdrew the argument in his reply to the State's response and advanced the hearsay argument. (R. 279:8–13; 285:3–6.)

admissible just because it was the basis for an expert's opinion. (R. 285:5.)

To the first argument, the State responded that the confession was corroborated by the discovery of the porn video Thomas had mentioned in his statements to police as well as the downstairs neighbor's testimony about hearing a woman telling Thomas to stop, as Thomas said the victim did. (R. 283:1.)

The State argued that there was no error in admitting the DNA fingernail evidence and that "the State cross-examined the defendant's expert witness regarding the report because it contradicted his findings." (R. 286:1.) It argued that the DNA evidence was properly admitted as impeachment evidence. (R. 286:1.)

The circuit court denied the motion by operation of law pursuant to Wis. Stat. § (Rule) 809.30(2)(i). (R. 287:1–2.) Thomas appealed.

The Court of Appeals affirmed all three convictions, concluding that the fingernail evidence was erroneously admitted but the error was harmless.

In a split decision, the court of appeals decided the issue based on the United States Supreme Court's post-*Crawford* right of confrontation cases (*Melendez-Diaz*, *Bullcoming*, and *Williams*[10]), this Court's decision in *Watson*,[11] and the court of appeals' analysis in *Heine*.[12] It held that the DNA evidence

---

[10] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Williams v. Illinois*, 567 U.S. 50, 79 (2012).

[11] *State v. Watson*, 227 Wis. 2d 167, 595 N.W.2d 403 (1999).

[12] *State v. Heine*, 2014 WI App 32, 354 Wis. 2d 1, 844 N.W.2d 409.

the prosecutor elicited from Thomas's expert "could not be used by the State as substantive evidence." (Pet-App. 122–23, ¶ 35.)

The concurring opinion faulted the majority's analysis for "fail[ing] to address the facts" before the court. (Pet-App. 137, ¶ 63.) First, it noted that the majority "fail[ed] to address Thomas's constitutional challenge based on the fact that the disclosure was made via Thomas's expert whose opinion was impeached through cross-examination, rather than through direct examination of the prosecution's expert." (Pet-App. 131, ¶ 50.) Second, it stated that the majority "fail[ed] to identify legal support for its analysis," noting that "[t]he Majority relie[d] on cases involving direct examination of the prosecutor's expert." (Pet-App. 132, 135, ¶¶ 53 n.3, 59.) It concluded that the majority had erred by "importing and relying upon" rules concerning testimonial hearsay on direct examination because "none of the disclosure issues are presented with impeachment through cross-examination." (Pet-App. 134–35, ¶¶ 57, 58.)

This Court granted Thomas's petition for review.

Thomas petitioned for review of the court's rulings on harmless error and the corroboration rule; and the State joined in the request for review, seeking reversal on the Confrontation Clause holding. This Court granted Thomas's petition.

ARGUMENT

I. The State provided evidence of the sexual assault sufficient to satisfy the corroboration rule.

A. The standard of review.

The corroboration rule is a common-law standard. *State v. Hauk*, 2002 WI App 226, ¶ 20, 257 Wis. 2d 579, 652 N.W.2d 393. Determining if the facts fulfill a common-law standard presents a question of law. *Peplinski v. Fobe's Roofing, Inc.*, 193 Wis. 2d 6, 18, 531 N.W.2d 597 (1995). The facts in evidence are viewed in a light most favorable to the jury's verdict. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

B. The corroboration rule does not require that a fact establish the elements of the crime.

"[T]he State must present at least one significant fact [in addition to a confession] that gives confidence that the crime the defendant has been convicted of actually did occur." *State v. Bannister*, 2007 WI 86, ¶ 31, 302 Wis. 2d 158, 734 N.W.2d 892. "[T]he corroboration rule functions to ensure a jury has not convicted a defendant on his or her confession alone." *Id.* ¶ 33. "A significant fact need not either independently establish the specific elements of the crime or independently link the defendant to the crime." *Id.* ¶ 31.

C. The video and the testimony of the witness who heard the crime are the significant facts that corroborate Thomas's confession.

Thomas's confession included two specific facts that were corroborated at trial. The first is that he said he watched a porn video before going to the bedroom and getting on the bed with the victim and "humping" her hip. (R. 11:2–3.) The

police recovered the porn video he said he watched when they searched the house. (R. 319:25, 36.) The second is that while he was "humping" her hip, the victim told him to stop and that she loved him. (R. 11:3.) The downstairs neighbor testified that during the fighting, she heard a woman say, "Stop, stop, I love you, I love you" immediately before things went silent. (R. 316:126.) These facts satisfy the standard for corroboration of a confession; they are not required to "independently establish the specific elements of the crime." *Bannister*, 302 Wis. 2d 158, ¶ 31.

Thomas argues in his brief that "[n]othing in the evidence aside from Mr. Thomas'[s] statements suggests any sexual contact or sexual assault." (Thomas's Br. 29.) He points to the fact that the autopsy did not show evidence of "sexual activity," by which he appears to mean intercourse. (Thomas's Br. 29–30.) There are two problems with his argument. One, the State alleged sexual contact over clothing, not intercourse, and the autopsy results concerning evidence of intercourse are irrelevant to that allegation. And two, by his own argument, a finding of DNA showing intercourse would still be insufficient to corroborate sexual assault because it would not confirm nonconsensual sex. It appears that to satisfy Thomas's interpretation of the corroboration rule, the State would need to produce video footage of the incident to corroborate the sexual contact. By his interpretation, the State could not successfully charge sexual contact *that the defendant confessed to* without an eyewitness or video because even a witness who overhears the assault cannot corroborate it. That is not the law.

Nor do the facts here remotely resemble the 1965 case Thomas cites that found insufficient corroboration of a confession. In that case, the State argued that corroboration was provided by a co-actor's statement "agree[ing] it was possible" that the date the detective identified "could have

been the date" the defendant committed the alleged crime. *Barth v. State*, 26 Wis. 2d 466, 468, 132 N.W.2d 578 (1965). The court concluded that "[t]hese words are not only inexact and vague, but, furthermore, do not confirm the happening of *any fact significant to this alleged crime.*" *Id.* at 469 (emphasis added). One fact significant to the alleged crime here is that the victim did not consent to the confessed sexual contact; the fact that the downstairs neighbor heard her screaming "Stop, stop," which is neither inexact nor vague, corroborates that.

The standard is whether the corroborating facts here "give[ ] confidence that the crime the defendant has been convicted of actually did occur," and the facts here do so. *See Bannister*, 302 Wis. 2d 158, ¶ 31. Thomas is therefore not entitled to have his conviction for sexual assault vacated.

II. The fingernail evidence was properly admitted because when Thomas's expert gave testimony directly contradicting the lab report on which he relied, it was an implied waiver of Thomas's right to confront the author of the lab report.

A. Standard of review.

Appellate courts review evidentiary decisions under the erroneous exercise of discretion standard. *State v. Sullivan*, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). A court properly exercises discretion when it considers the facts of record under the applicable law and reasons its way to a rational conclusion. *Burkes v. Hales*, 165 Wis. 2d 585, 590–91, 478 N.W.2d 37 (Ct. App. 1991). Where a circuit court reaches the right result for the wrong reason, a reviewing court will nevertheless affirm. *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

B. The constitutional right to confrontation.

The Sixth Amendment to the Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." For a time, unconfronted statements were nevertheless deemed admissible if they were held to be adequately reliable. *Hemphill v. New York*, 142 S. Ct. 681, 690 (2022). Beginning with *Crawford*, the Supreme Court "rejected that reliability-based approach to the Confrontation Clause." *Id.* Thus, with only "those exceptions established at the time of the founding," the right to confrontation means that "testimonial statements of a witness who did not appear at trial" aren't admissible unless the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004).

In *Hemphill*, 142 S. Ct. at 688, the Supreme Court considered unconfronted testimonial hearsay evidence that was admitted against the defendant pursuant to New York's evidentiary rule that allows such evidence when a trial court determines 1) that the jury has heard "incomplete and misleading" evidence, and 2) that "otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *See State v. Reid*, 971 N.E.2d 353, 388 (N.Y. Ct. App. 2012) (citation omitted).

Reid characterized its exception as a "case-by-case" response to door-opening by the defense. *Id. Hemphill* held that the *Reid* rule suffered the same defect as the old reliability-based rule for unconfronted statements: "the role of a trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence." *Hemphill*, 142 S. Ct. at 692. The Court reiterated its "emphatic rejection of the reliability-based approach" to confrontation right exceptions. *Id.* at 691.

C. Implied waiver of constitutional rights.

The law generally presumes that someone who knowingly "acts in a manner inconsistent with" the exercise of his rights "has made a deliberate choice to relinquish the protection those rights afford." *Hemphill*, 142 S. Ct. at 694 (Alito, J., concurring). The common law rule of completeness is one manifestation of the implied waiver principle. *Id.*

As Justice Alito wrote, the confrontation right, like the Fifth Amendment privilege against self-incrimination, is subject to a waiver, as when a defendant takes the stand:

> The Sixth Amendment right to confrontation should be analyzed no differently. When a defendant introduces the statement of an unavailable declarant on a given subject, *he commits himself to the trier of fact's examination of what the declarant has to say on that subject.* The remainder of the declarant's statement or statements—and any other statements by the same declarant on the same subject—*are fair game. The defendant cannot reasonably claim otherwise, given his tactical choice to put the declarant's statements on the relevant subject in contention despite his unavailability for cross-examination.* And that is true regardless of whether the defendant attempts to "invoke" his right to confront an unavailable declarant after introducing his out-of-court statements. Having made the choice to introduce the statements of an unavailable declarant, *a defendant cannot be heard to complain that he cannot cross-examine that declarant with respect to the remainder of that statement* or the declarant's related statements on the same subject.

Id. at 695 (Alito, J., concurring) (emphasis added).

D. If an error did not contribute to the verdict, it is harmless.

Even if the circuit court erred in admitting the evidence, however, "[a]n erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial." *State v. Nieves*, 2017 WI 69, ¶ 17, 376 Wis. 2d 300, 897 N.W.2d 363 (citation omitted). A reviewing court that finds such error must conduct a harmless error analysis to determine whether the error affected the substantial rights of the party, and if it did not, the error is considered harmless. *Id.*

"[A] constitutional error may be harmless where it affects not the framework of the trial, but only the trial proceeding itself." *State v. Martin*, 2012 WI 96, ¶ 44, 343 Wis. 2d 278, 306, 816 N.W.2d 270. "[H]armless errors are described as those 'which occurred during the presentation of the case to the jury, and *which may therefore be quantitatively assessed in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt.'" *Id.* (emphasis added) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991)). "The majority of constitutional errors fall into this category . . . ." *Id.*

"[F]or an error to be deemed harmless, the party who benefited from the error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Martin*, 343 Wis. 2d 278, ¶ 45 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999). "As the party benefitted by the error, the State bears the burden of showing the error was harmless." *Id.* "[A]n 'error is harmless if the beneficiary of the error proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *Id.* (quoting *State v. Mayo*, 2007 WI 78, ¶ 47, 301 Wis. 2d 642, 734 N.W.2d 115). "[T]his court must be satisfied, beyond a reasonable doubt, not that the jury *could* have convicted the defendant (i.e.,

sufficient evidence existed to convict the defendant), but rather that the jury *would* have arrived at the same verdict had the error not occurred." *Id.* (citations omitted).

A reviewing court considers factors that quantify the impact the error had on the verdict:

> the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case.
>
> *Martin*, 343 Wis. 2d 278, ¶ 46.

E. Putting testimony in from a defense expert witness that contradicted the lab report the witness said he relied on was an implied waiver of Thomas's right to confront the lab report's author.

Thomas's expert witness knew that the crime lab report showed that his DNA was under the victim's fingernails, and that hers was under his fingernails. He had testified on direct about the importance of looking for "an exchange of trauma, an exchange of evidence" between the victim and the defendant in cases such as this one. (R. 320:20–21.)

Nevertheless, when trial counsel asked him repeatedly about defensive wounds and "signs of a struggle," he said there weren't any. (R. 320:21.) This is the context in which the State asked the witness, "[Y]ou are aware in those crime lab reports that Oscar Thomas's DNA was found under Joyce Oliver-Thomas's fingernail clippings, which were clipped from her body at the time of the autopsy, correct?" (R. 320:88–89.)

In this context, that question was fair game.

Thomas argues that it was not. He argues that he "should not have had to explain or refute the DNA evidence which impaired his defense and supported the prosecutor's theory without being afforded the opportunity to cross-examine the DNA analyst." (Thomas's Br. 56.) But his argument is that he should be permitted to elicit testimony that it's important to look for "an exchange of trauma, an exchange of evidence" between victim and defendant, and that he did, and that he saw no "signs of a struggle" (R. 320:20–21) and that he "should not have had to explain or refute the DNA evidence" his expert knew about that showed otherwise. (Thomas's Br. 56.)

That's not the law. Nothing in the Supreme Court's current Confrontation Clause jurisprudence addresses the problem this case presents or forecloses the narrow solution the State seeks for it.

As the concurrence to the Court of Appeals decision correctly pointed out, the court "fail[ed] to address Thomas's constitutional challenge based on the fact that the disclosure was made via Thomas's expert whose opinion was impeached through cross-examination, rather than through direct examination of the prosecution's expert." (Pet-App. 131, ¶ 50.) The Court of Appeals relied for its analysis on Supreme Court case law, however, that set forth rules "applicable to direct examination of a prosecutor's expert." (Pet-App. 132–33, ¶ 53.)

In addition, what both *Crawford* and *Hemphill* expressly rejected were open-ended, reliability-based exceptions that applied to *any* kind of evidence—not, as here, the narrow category of evidence that a defense expert relied on *and* gave factually inaccurate testimony about. The rationales for the holdings in those cases simply do not apply here.

At the time of its decision, the Court of Appeals did not have the benefit of *Hemphill*, which was then pending. *Hemphill* is relevant in two ways here.

First, there's no question that the decision shut down any argument that this Court could find the evidence here admissible under a broad *Reid*-type "door-opening" principle. *Hemphill*, 142 S. Ct. at 691.

Second, the decision also made clear what it was and was not deciding: it was not deciding "[w]hether and under what circumstances [the common-law rule of completeness] might allow the admission of testimonial hearsay against a criminal defendant." *Hemphill*, 142 S. Ct. at 693. And the concurrence argues persuasively that even though the Court hasn't yet reached that question, there is precedent for sometimes regarding a defendant's introduction of evidence "as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause." *Id.* at 695 (Alito, J., concurring).

The State is not arguing that the *Hemphill* concurrence is binding authority. The State is arguing that the binding authority we have is not much help in this scenario. The *Hemphill* concurrence, while merely persuasive, is highly relevant because it contemplates fact patterns like this one.

Thomas's expert explicitly stated that he reviewed the crime lab reports along with "everything that exists in the case." (R. 320:14–15, 16.) When Thomas's expert assured the jury that, as an expert, he looked for "an exchange of trauma, an exchange of evidence" and "examine[d] both" Thomas and Oliver-Thomas (R. 320:20–21) and saw no "signs of a struggle," Thomas "commit[ed] himself to the trier of fact's examination of what the declarant," here, the lab report writer, "has to say on that subject." *Hemphill*, 142 S. Ct. at 695 (Alito, J., concurring). In such a case, then, "[t]he remainder of the declarant's statement or statements—and

any other statements by the same declarant on the same subject—are fair game" because the defendant has made a "tactical choice to put the declarant's statements on the relevant subject in contention despite his unavailability for cross-examination." *Id.* Because Thomas elicited testimony from his own witness that contradicted the facts in the report his expert relied on, Thomas "cannot be heard to complain that he cannot cross-examine that declarant with respect to the remainder of that statement or the declarant's related statements on the same subject." *Id.*

It is true that the circuit court admitted the expert's testimony about the fingernail evidence in the report over defense objection on the ground that the expert had "examined" it and either "discounted or relied upon." (R. 320:88; Thomas's Br. 47.) It is not the State's position that by calling an expert witness, Thomas implicitly waived his confrontation right as to all 219 pages of reports and statements his expert reviewed in forming his opinion. It is the State's position that when Thomas elicited testimony that flatly contradicted the crime lab report, he made "a tactical choice" to put the report in play and waived his confrontation right as to that report.

This position is not "functionally indistinguishable from the 'opened the door' rule of admission prohibited by *Hemphill*." (Thomas's Br. 47.) The rule *Hemphill* rejected was an open-ended, reliability-based exception to the confrontation requirement that could be applied to *any* kind of evidence as long as a trial judge decided that admitting otherwise inadmissible evidence was "reasonably necessary" under the circumstances. *See Reid*, 917 N.E.2d at 388.

The focus here is a report that said there was an exchange of evidence between two people, a defense expert who said that kind of evidence was important, and then the defense expert's testimony that there was no "sign of a

struggle." This is substantively different from "making the plea allocution [of another person] arguably relevant to his theory of defense," as Hemphill did. *See Hemphill,* 142 S. Ct. at 686.

Regardless of the circuit court's basis for admitting the fingernail evidence, there's a proper basis for this Court to find that admitting the evidence was not error.

F. If it was error to admit the fingernail evidence, the error was harmless because it did not contribute to the verdict.

Thomas argues that the court of appeals wrongly concluded that the error in admitting the fingernail evidence was harmless. (Thomas's Br. 55.) He acknowledges that the court correctly stated the legal standard for harmless error analysis, but he argues that the court erred in its "application" of the test. (Thomas's Br. 55.) He argues that the court, in its analysis, "recounts *only* the evidence supporting guilt." (Thomas's Br. 56.)

The court of appeals' form of analysis reflected its evaluation of the error "*in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt." *See Fulminante*, 499 U.S. at 308. This illustrates that a court cannot evaluate whether an error contributed to a verdict *without* discussing the other evidence before the jury.[13]

---

[13] Thomas quotes without context (Thomas's Br. 57) a line from a case where the United States Supreme Court was throwing out a state evidence rule that barred a defendant from introducing at trial proof of third-party guilt "if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty

Here, the relevant factors weigh in favor of finding the error harmless. As to the importance of the error, *Martin*, 343 Wis. 2d 278, ¶ 46, it was minimized by the fact that the defense expert immediately diminished the significance of the fingernail evidence by asserting, "A finding of the DNA, they could be scratching each other's back," and restating that "there is no evidence of trauma on him to support the fact that she was struggling sufficiently." (R. 320:89.)

Another factor, the nature of the defense case, *Martin*, 343 Wis. 2d 278, ¶ 46, likewise minimizes the significance of the fingernail evidence because there was no dispute from Thomas that he had physical contact with the victim; Thomas's own accounts, if believed, would have explained the fingernail evidence.

As set forth above, the jury heard from more than a dozen witnesses, saw autopsy photos, and heard detailed medical evidence presented by both parties. The jury heard damaging testimony concerning Thomas's varied statements to police about what happened when Oliver-Thomas died. The jury heard that no physical evidence was recovered that was consistent with Thomas's version, which he maintained at trial, that he had sex with Oliver-Thomas that night. On the full record, it is clear beyond a reasonable doubt that if there

---

verdict." *Holmes v. South Carolina*, 547 U.S. 319, 321 (2006). Noting numerous flaws with the rule, not least that "the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact," the Court held that the rule violated the defendant's constitutional right to present a defense. *Id.* at 330. The Court's statement about "evaluating the strength of only one party's evidence" in that context therefore referred to proffered evidence that *had yet to be found as fact by a trier of fact.*

Holmes holds no meaning for a harmless error analysis.

was error in admitting the fingernail evidence, the jury would have convicted Thomas of the charges absent the error.

CONCLUSION

This Court should reverse the Court of Appeals' decision that the admission of the fingernail evidence violated Thomas's confrontation right. It should otherwise reject Thomas's arguments and affirm his convictions.

Dated this 4th day of March 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Sonya K. Bice

SONYA K. BICE
Assistant Attorney General
State Bar #1058115

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3935
(608) 294-2907 (Fax)
bicesk@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,394 words.

Dated this 4th day of March 2022.

Sonya K. Bice

SONYA K. BICE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12) (2019-20)

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) (2019-20).

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 4th day of March 2022.

Sonya K. Bice

SONYA K. BICE
Assistant Attorney General