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SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent,

Appeal No. 2020-AP-32-CR

vs.

Trial No. 07-CF-1

OSCAR C. THOMAS,

Defendant-Appellant-Petitioner.

Review of a decision of the Court of Appeals of July 30, 2021
affirming a judgment of conviction entered August 1, 2018
and an order denying postconviction relief entered December 26, 2019
in the Circuit Court of Kenosha County,
Honorable Bruce E. Schroeder, Judge, presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Court of Appeals erred in concluding that Mr. Thomas' statement was corroborated by a significant fact sufficient to show that a sexual assault actually occurred

The corroboration rule requires that evidence independent of the defendant's confession demonstrates that the crime actually occurred. *State v. Bannister*, 2007 WI 86, 302 Wis.2d 158, 734 N.W.2d 892. See also *Smith v. United States*, 348 U.S. 147, 153-154 (1954): "In order to convict of serious crimes of violence . . . independent proof was required that *someone* had indeed inflicted the violence" (emphasis by the court). Mr. Thomas asserted: "Nothing in the evidence aside from Mr. Thomas' statements suggests any sexual contact or sexual assault." Br. 29. The State does not refute this assertion, but instead bemoans the difficulty the corroboration rule presents. St. br. 22. Indeed, even if corroborating evidence exists, its availability may be fortuitous. Cf. *Bannister*, ¶35 (noting that had one of the two brothers to whom morphine was delivered not died, thus preserving the morphine in his body, corroboration of delivery of morphine would have

been absent). In Mr. Thomas' case, if one assumes a sexual assault occurred, corroboration of such a crime independent of Mr. Thomas' statement does not exist.

Assuming a sexual assault occurred based on the Mr. Thomas' statement is precisely what the state does in arguing corroboration:

> 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.

St. br. 23 (emphasis added). Yet the downstairs neighbor never testified she was hearing a sexual assault. The neighbor's testimony shows only that a woman above her said she wanted *something* to stop. The State attempts to bootstrap the "*confessed* sexual contact" because, outside of the confession, no evidence supports any sexual assault or sexual contact. The State concedes "the jury heard that no physical evidence was recovered" supporting "that he had sex with Oliver-Thomas that night." St. br. 32.

The State argues that the facts in *Barth v. State*, 26 Wis.2d 466, 132 N.W.2d 578 (1965) do not "remotely resemble" the facts in Mr. Thomas' case. St. br. 22. Mr.

Thomas argued that the facts were indeed analogous, for the existence of the porn video was similar to the mundane facts relied upon and found wanting in *Barth* (the existence of the alleged co-actor and of the apartment in which the offence allegedly occurred). Br. 34. The State does not refute this argument, and after mentioning the porn video at the outset of its argument (St. br. 21-22) the State abandons any claim that the porn video corroborates that a sexual assault occurred. St. br. 21-23.

As Mr. Thomas argued, other cases finding a confession to be corroborated point to evidence independent of the confession showing that the offence actually occurred. Br. 31-32. Since no independent evidence outside of Mr. Thomas' statements verifies that a sexual assault occurred, Mr. Thomas asks this Court to order the sexual assault charge dismissed with prejudice.

II. Admission of DNA evidence in violation with Mr. Thomas' right to confront his accusers was prejudicial error

A. Admission of the DNA evidence violated the Confrontation Clause

The State acknowledges that the recent decision in *Hemphill v. New York*, 595 U.S. ____, 142 S.Ct. 681 (2022) "shut down any argument that this Court could find the evidence here admissible under a broad *Reid*-type 'door-opening' principle." St. br. 29. Nevertheless, the State argues that this Court should adopt exactly the type of principle which *Hemphill* precludes while avoiding use of the phrase "opened the door." Thus, the State seeks admission of "the narrow category of evidence that a defense expert relied on *and* gave factually inaccurate testimony about." St. br. 28 (emphasis by the State). The State explains the rule it seeks from this Court:

> 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.

St. br. 30. By arguing that the defendant "made 'a tactical choice' to put the report in play," the State argues the defendant "opened the door" without using those words.

The State seeks to differentiate its proposed "narrow solution" (St. br. 28) from the reliability-based rule invalidated in *Hemphill* by arguing it applies only when an expert's testimony is "flatly contradicted by the crime lab report." That the expert's testimony is flatly contradicted by the DNA reports is, of course, the State's interpretation; it does not withstand scrutiny. The DNA report stated there was DNA evidence under Mr. Thomas' and Ms. Oliver-Thomas' fingernails, but the defense expert never testified there was no such DNA evidence. Thus, there was no "flat contradiction." The defense expert dismissed *the importance* of the DNA evidence in reaching his conclusion, since DNA under the fingernails could be the result merely of "scratching each other's backs." 320: 89.

The solution the State proposes raises the same reliability-based issues as in the *Reid* opened-the-door rule; the problem with the opened-the-door rule is that it

required a factual determination whether admission of otherwise inadmissible testimonial hearsay was "reasonably necessary to correct the misleading impression" created by the defense. *Hemphill*, slip op. 1, 4 (internal quotation marks omitted). The State is asking this Court to adopt a rule in which the trial court must make a factual determination whether the expert's testimony is "flatly contradicted" by other evidence. Thus, the State's proposed rule suffers from the same infirmity as the rule invalidated in *Hemphill*.

The State asserts that existing law on the right of Confrontation cannot resolve the situation in Mr. Thomas' case; therefore, the State points to the concurring opinion in *Hemphill* as "highly relevant because it contemplates fact patterns like this one." St. br. 29. Judge Alito's concurrence does not address similar facts, and does not aid the State's position.

Judge Alito's concurrence addresses situations in which a defendant may be found to have waived his right to confrontation. He cites two specific situations, neither of which are present in Mr. Thomas' case. The first is when a defendant is so disruptive in the courtroom that he may be deemed to have waived his right to confrontation.

Hemphill, slip op. concurrence p. 2 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)). Mr. Thomas did not engage in disruptive conduct. The second situation is under the rule of completeness; Judge Alito explains this rule:

> [I]f a party introduces all or part of a declarant's statement, the opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is testimonial or there was a prior opportunity to confront the declarant.

Hemphill, slip op. concurrence p. 3. Mr. Thomas never introduced any part of any statement of the DNA analyst. Thus, under the rule Justice Alito contemplates, no statement is in need of completion and this rule does not apply; the State never explicitly argues otherwise.

Justice Alito found these waiver situations did not come into play under the facts presented in *Hemphill*:

> The problem with the New York rule at issue in this case is that its application is predicated on neither conduct evincing intent to relinquish the right of confrontation nor action inconsistent with the assertion of that right. The introduction of evidence that is misleading as to the real facts does not, in itself, indicate a decision regarding whether any given declarant should be subjected to cross-examination. Nor is that kind of maneuver inconsistent with the assertion of the right to confront a declarant

> whose out-of-court statements could potentially set the record straight.

Hemphill, slip op. concurrence p. 2.

The State asks this Court to craft an exception to the Confrontation clause to permit admission of the testimonial DNA report without affording Mr. Thomas an opportunity to cross-examine the author of the report. However, the Court in *Hemphill* made clear that courts are not free to craft exceptions to the Confrontation Clause which did not exist at the time of founding. *Hemphill*, slip op. 9, citing *Crawford v. Washington*, 451 U.S. 36, 54 (2004). The State's "solution" does not comport with any exception to the Confrontation Clause existing at the time of founding. Thus, *Hemphill* confirms the correctness of the Court of Appeals' conclusion that testimony and argument based on the DNA report were admitted in violation of Mr. Thomas' Confrontation right.

B. The erroneous admission of the DNA evidence was not harmless

The State claims Mr. Thomas agrees that the Court of Appeals "correctly stated the legal standard for harmless error analysis," and that his only claim of error is in its application. St. br. 31.

Mr. Thomas asserts that the Court of Appeals erred in applying the law of harmless error. More fundamentally, however, the Court of Appeals intermingled what should be two separate standards for assessing harmless error, the *Neder* formulation and the *Chapman* formulation.

The *Neder* formulation asks: "Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" *Neder v. United States*, 527 U.S. 1, 18 (1999). The Court in *Neder* was addressing an error in the jury instructions (as opposed to evidence improperly admitted or precluded). The *Chapman* formulation states that "before a federal constitution error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Based on cases from both the Supreme Court of the United States

and from this Court, Mr. Thomas asked this Court to clarify that the *Chapman* formulation should be the generally applied test for harmless error, and the *Neder* formulation should apply in *Neder*-like cases involving jury instruction error. Br. 52-55. The State does not respond to this request and does not specify its preferred harmless error formulation except by concluding is its harmless error analysis with a paraphrase of the *Neder* formulation. St. br. 32-33.

The State takes issue with Mr. Thomas' assertion that the Court of Appeals erred in assessing whether the error was harmless by viewing *only* the evidence supporting guilt; the State asserts that the "court of appeals' form of analysis reflected its evaluation of the error '*in the context of other evidence presented*. . .." St. br. 31 (emphasis by the State). However, this emphasized quote comes not from the Court of Appeals' decision below, but from *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). Thus, the State apparently assumes that, because *Fuminante* requires viewing the error in the context of other evidence, the Court of Appeals must necessarily have done so, although the Court of Appeals never mentioned *Fulminante*. Further, as Mr. Thomas has

already argued, the Court of Appeals decision gives no indication that it has so analyzed the error. Br. 55-56.

The State, as both the beneficiary and the cause of the error, bears the burden "either to prove that there was no injury or to suffer a reversal of [the] erroneously obtained judgment." *Chapman*, 386 U.S. at 24. The State fails to meet its burden. The sum and total of the State's argument is that introducing the DNA report was harmless because the defense expert rebutted its importance, physical contact between Mr. Thomas and Ms. Oliver-Thomas was not a point in dispute, and much other evidence was introduced. St. br. 32.

The State views the error as limited to introducing the testimonial DNA evidence in the course of cross-examining the defense medical examiner; this ignores two other important aspects of admitting testimony on the DNA report.

First, the basis for the error was the denial of Mr. Thomas' right to confront the DNA analyst, and to point out irregularities. "Forensic evidence is not uniquely immune from the risk of manipulation" and a forensic analyst "may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution."

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009); see also *Bullcoming v. New Mexico*, 564 U.S. 647, 654, note 1 (2011) (documenting laboratory problems). As the party bearing the burden of establishing harmlessness, the State is not entitled to any presumption that the DNA evidence it improperly introduced is valid and free of taint or contamination. Moreover, even if cross-examination of the DNA analyst were to have revealed no irregularities, Mr. Thomas was deprived of any opportunity to cross-examine the analyst regarding possible innocent explanations for the presence of the DNA.

Second, the State ignores the far more damaging re-introduction of the DNA evidence in the course of the prosecutor's closing argument. The State notes that "there was no dispute with Thomas that he had physical contact with the victim." St. br. 32. But the true issue at stake was the nature and degree of this contact, and whether it showed the death resulted from accident or recklessness, as Mr. Thomas asserted, or from intentional acts. The prosecutor argued that Mr. Thomas was "scratching up [Ms. Oliver-Thomas'] face" with his right hand while trying to cover her mouth. Apx. 143; 321: 37. When Mr. Thomas objected to this scenario as unsupported by the

evidence, the prosecutor cited as supporting evidence: "Her DNA is found under his fingernails" Apx. 143-144; 321: 37-38. Thus, while perhaps initially introduced in an attempt to impeach the defense medical examiner, the DNA evidence transformed in closing argument into substantive evidence, a crucial element in the State's portrayal of Ms. Oliver-Thomas' death as resulting from intentional actions.

The State fails to address the impact of this error in the course of the prosecutor's closing argument. The State cannot meet its burden to prove an error harmless by ignoring it.

CONCLUSION

Oscar C. Thomas prays that this Court order that the sexual assault charge be dismissed with prejudice, and that this court vacate his other convictions and sentences and remand for a new trial.

Respectfully submitted,

_____

John T. Wasielewski
Attorney for
Oscar C. Thomas

FORM AND LENGTH CERTIFICATION
Wis. Stat. §809.19(8g)(a)1 and (b)1.

I hereby certify that this reply brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (bm) and (c) for a reply brief. The length of this reply brief is 2450 words.

I further certify that that the electronic copy of this reply brief submitted for e-filing and the paper copies of this reply brief are identical in all respects (except that the paper copy has ink signatures on the signature lines).

_____
John T. Wasielewski