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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASMINE LIZ MARIE ROBINSON,

APPELLANT

APPELLATE CASE NO. 2023-000830

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing an expert witness, a forensic pathologist, to testify regarding the findings of the decedent's autopsy, including the manner and cause of death, when the witness did not perform the autopsy but merely peer reviewed the findings of the pathologist who actually performed the autopsy in violation of Appellant's Sixth Amendment right to confront the witnesses against her?

STATEMENT OF THE CASE

A Greenville County grand jury indicted Appellant on July 6, 2021, for murder, attempted murder, and possession of a weapon during the commission of a violent crime. R. 773-776. Her case was called to trial on May 8, 2023, before the Honorable Alex Kinlaw, Jr., and a jury. R. 1. Assistant Solicitors Meghan Gasser and Brittany Scott represented the state. Ernest Hamilton represented Appellant. R. 1.

On May 12, 2023, the jury found Appellant guilty as indicted. R. 764, ll. 2-16. She was sentenced to forty-five years for murder, twenty years for attempted murder, and five years for the weapons offense. All sentences were ordered to be served concurrently. R. 770, l. 21 – 771, l. 8.

This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted). The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted).

An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001)).

"Additionally, whether a statement is testimonial and therefore subject to the confrontation clause is a question of law reviewed de novo." State v. Brewer, 438 S.C. 37, 44, 882 S.E.2d 156, 160 (2022) (citing United States v. Mathis, 932 F.3d 242, 255 (4th Cir. 2019) (noting an alleged confrontation clause issue presents a question of law)).

ARGUMENT

The trial judge erred by allowing an expert witness, a forensic pathologist, to testify regarding the findings of the decedent's autopsy, including the manner and cause of death, when the witness did not perform the autopsy but merely peer reviewed the findings of the pathologist who actually performed the autopsy in violation of Appellant's Sixth Amendment right to confront the witnesses against her.

Relevant Facts

The state explained pretrial that Dr. Michael Ward, the forensic pathologist who conducted the autopsy on the decedent, was unavailable. He was "out of state" and "unavailable to testify remotely." Apparently, the state had sent Dr. Ward a subpoena to testify in February, three months before trial, but Dr. Ward "had already requested his time off or his unavailability in January." R. 83, ll. 1-12. The assistant solicitor told the judge that the state planned to call Dr. Grace Dukes of the Greenville County Medical Examiner's Office to testify in his place. Dr. Dukes "was the peer reviewer of the autopsy that was actually conducted by Dr. Michael Ward." The solicitor asserted that pursuant to Rule 803(6), SCRE, which is the business records exception to the hearsay rule, Dr. Dukes "could testify as to her agreement with the findings of cause of death." She explained the state would "curtail [Dr. Dukes's] testimony to only what she reviewed and agreed with the findings of Dr. Ward through the business records exception a/k/a manner and cause of death." However, the solicitor said Dr. Dukes would not "testify as to the specifics of how he [the decedent] passed." R. 75, l. 9 – 77, l. 1.

Defense counsel objected to Dr. Dukes testimony in lieu of Dr. Ward. He maintained Dr. Dukes had no personal knowledge of the autopsy as she was not present when the procedure was performed. Counsel argued Dr. Dukes reviewed Dr. Ward's findings and "signed off on" his

report, but Dr. Dukes is "not able to say what she saw" because she was not present during the autopsy. R. 77, l. 11 – 78, l. 10.

After defense counsel objected, the solicitor argued Dr. Dukes's testimony was also admissible pursuant to Rule 803(4), SCRE, the medical diagnosis and treatment exception to the hearsay rule. The trial judge immediately interjected, "How does that . . . not hamper the Defendant's ability to cross-examine the medical - - Dr. Ward?" He asserted, "You're limiting . . . defense counsel's ability to ask pertinent cross-examination questions as it relates to the autopsy." In response, the assistant solicitor argued calling Dr. Dukes as opposed to Dr. Ward who actually conducted the autopsy "does not violate the confrontation clause" because Dr. Dukes, as the peer reviewer, "had to look at the findings and be in agreement with it in order to sign off on it [Dr. Ward's autopsy report]." The judge asserted, "She didn't make the findings, though." He continued to express his concern that defense counsel would be unable to cross-examine the pathologist who actually conducted the autopsy. He emphasized, "You've got a situation where you're trying to talk about the cause of death of the decedent. And you're not going to give the defense counsel an opportunity to cross-examine the examiner who made the findings." The judge made clear that he believed Appellant should be able to question "the doctor [who] did the exam, not the person who peer reviewed [the autopsy report]." R. 78, l. 11 – 81, l. 2.

The assistant solicitor merely repeated her argument that Dr. Dukes should be permitted to testify pursuant to the business record exception to the hearsay rule since she is "an additional qualified witness" without further addressing the separate argument that permitting Dr. Dukes to testify about Dr. Ward's findings would violate Appellant's Sixth Amendment right to confrontation. R. 81, ll. 3-12.

The judge ultimately stated he would allow the state to proffer Dr. Dukes's testimony and make a ruling then. R. 82, ll. 6-23.

Before Dr. Dukes testified in front of the jury, defense counsel renewed his objection. He argued Dr. Dukes did not have personal knowledge of the autopsy since she was not present and did not actually conduct the autopsy and, consequently, she should not be permitted to testify concerning Dr. Ward's findings. R. 328, l. 4 – 330, l. 1. The assistant solicitor offered additional grounds as to why she believed Dr. Dukes's testimony in lieu of Dr. Ward was admissible. Specifically, she cited to Rule 702, SCRE, State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011), and State v. Hutto, 325 S.C. 221, 481 S.E.2d 432 (1997). The solicitor admitted that Hutto was overruled in part by Crawford v. Washington, 541 U.S. 36 (2004), but she claimed "it was on something separate from this specific issue." R. 330, l. 2 – 332, l. 10.

The state then proffered Dr. Dukes's testimony. During the proffer, Dr. Dukes was qualified as an expert in forensic pathology without objection. R. 339, ll. 1-8. She testified that in November 2020, she was a forensic pathologist and medical examiner for Greenville County. However, she did not perform the autopsy on Desmond Parks, the decedent. The autopsy was performed by Dr. Michael Ward. Dr. Ward was not available to testify the week of Appellant's trial. R. 339, ll. 15-25.

Dr. Dukes explained that she reviewed the autopsy performed by Dr. Ward. She testified that it is common for medical examiners to review each other's autopsies, especially in homicide cases. The review is "a quality assurance measure." According to Dr. Dukes, a "second medical examiner will routinely read the autopsy report, examine the photos, examine the scene investigation, and all of that information, and then edit the report, and sign off in agreement."

She testified that after reviewing all the materials related to the decedent's autopsy, she agreed with Dr. Ward's findings. R. 340, ll. 1-14.

Dr. Dukes testified that the decedent suffered a gunshot wound to the head. The wound "was on the left parietal scalp on the left side of the head." There was no exit wound. Rather, the projectile was located in the decedent's head. Dr. Ward determined the cause of death was the gunshot wound to the head and Dr. Dukes testified that she agreed with that finding. R. 340, l. 15 – 341, l. 10.

On cross-examination during the proffer, Dr. Dukes testified that her sole role is to review what Dr. Ward documented, which is the injury to the body. Defense counsel attempted to question Dr. Dukes about her opinion on the distance between the firearm and the body when the fatal shot was fired. However, the assistant solicitor objected, arguing the question asked for a conclusion about criminal culpability, which is improper. In reply, defense counsel emphasized his point was "it takes the actual person who performed the examination to testify to matters of that nature, not reading the report." He argued Dr. Ward, as the pathologist who performed the autopsy, should be rendering testimony on the cause and manner of death. R. 343, l. 5 – 344, l. 11.

The trial judge ultimately ruled that Dr. Dukes was "permitted to testify as to her findings . . . if they were based - - even if they were based upon her review of Dr. Ward's report." R. 344, ll. 14-22.

Dr. Dukes was qualified as an expert in forensic pathology before the jury. As she did during the proffer, Dr. Dukes explained that she did not perform the autopsy. It was performed by Dr. Ward, who was not available to testify. She peer reviewed Dr. Ward's autopsy report, which is "commonly done in medical examiner's offices as a quality assurance measure."

Specially, Dr. Dukes reviewed Dr. Ward's autopsy report, photographs taken during autopsy, and the coroner's investigative report. All of these materials are "standard parts" of the medical examiner's file" in order to "get a full picture of the . . . circumstances of the death." R. 346, l. 4 – 348, l. 9.

Dr. Dukes "signed off and agreed" with the findings of Dr. Ward. She claimed that by doing so she formed her own opinion in the case. R. 348, ll. 10-25. Dr. Dukes testified that the decedent had a gunshot wound to the head. The entrance wound was located on the left side of the head on the parietal scalp. There was no exit wound. Rather, the projectile was found in the decedent's skull. R. 349, ll. 1-13. Dr. Dukes concluded the cause of death was the gunshot wound to the head. R. 350, ll. 2-7.

During cross-examination, Dr. Dukes could not testify regarding whether Dr. Ward made any errors while performing the autopsy on the decedent. She merely concluded that "based on the materials [she] reviewed, [she] . . . agreed with his conclusions." Based on Dr. Ward's report, Dr. Dukes testified that the "wound track was from left to right, slightly back to front, and slightly downward." R. 350, l. 15 – 351, l. 15.

Discussion

The trial judge erred by allowing Dr. Grace Dukes to testify regarding the findings of the decedent's autopsy, including the manner and cause of death, when Dr. Dukes did not perform the autopsy but merely peer reviewed the findings of Dr. Michael Ward who actually performed the autopsy in violation of Appellant's Sixth Amendment right to confront the witnesses against her.

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine

witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987); Pointer v. Texas, 380 U.S. 400 (1967); U.S. Cons. Amend. VI. The South Carolina Constitution also provides that "any person charged with an offense shall enjoy the right … to be confronted with the witnesses against him." S.C. Const. art. I, § 14.

In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. The Court has held that statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006). As explained by the Court, "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis, 547 U.S. at 822. Conversely, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), the United States Supreme Court analyzed a case similar to the one sub judice – testimony regarding a forensic lab report from a witness who did not conduct the actual testing that resulted in the report. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009). "The Massachusetts courts admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine." Id. at 307. The Court was to answer whether those affidavits were testimonial, meaning the affiants were witnesses whose presence was required pursuant to the Sixth Amendment. Id. Police found numerous bags containing a

white substance on Melendez-Diaz's person and in a location where he had been. Id. at 308. The police submitted the evidence to a state laboratory for chemical analysis. Id. During Melendez-Diaz's trial for distributing and trafficking cocaine, the prosecution presented three "certificates of analysis" showing the results of the chemical testing performed on the evidence at the state lab. Id. The certificates indicated the only key facts necessary for the prosecution of Melendez-Diaz—the weight of the substance and that the substance was cocaine. Id. Melendez-Diaz objected to the certificates as violating his right under the Confrontation Clause. Id. at 309.

The Supreme Court held there was "little doubt" that the certificates fell "within the core class of testimonial statements" described in Crawford. Id. at 310. While the documents were labeled certificates, the documents were "quite plainly affidavits." Id. The certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" Id. at 310-311 (quoting Davis, 547 U.S. at 830)). "Not only were the affidavits 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,'" but under state law, the sole purpose of the affidavit was to provide evidence of the composition, quality, and net weight of the substance. Id. at 311 (quoting Crawford, 541 U.S. at 52). Thus, the Court held Melendez-Dias was entitled to be confronted with the analysts at trial. Id.

The Court rejected the argument that forensic analysts were excepted from the Confrontation Clause because they conducted so called "neutral scientific testing." Id. at 318. The Court explained "forensic evidence is not uniquely immune from the risk of manipulation." Id. Noting that most laboratories producing forensic evidence are administered by police agencies and report to the heads of those agencies. Id. As a result, the forensic scientists "sometimes face pressure to sacrifice appropriate methodology for the sale of expediency." Id.

(internal quotation omitted). Thus, "confrontation is one means of assuring accurate forensic analysis." Id. "Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well." Id. at 319. "Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination." Id. at 320.

The Court pointed out that the affidavits submitted against Melendez-Diaz were "bare-bones" stating only that the substance was cocaine. Id. "At the time of trial, [Melendez-Diaz] did not know what tests the analysts performed, whether those tests were routine, and whether interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." Id. Such areas are ripe for cross-examination to explore the exercise of judgment and risk of error in the chosen methodology. Id.

Additionally, the Court rejected the argument that the affidavits were admissible because they were similar to business records admissible at common law. Id. at 321. The Court explained that while "documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status," such documents may not be admitted "if the regularly conducted business activity is the production of evidence for use at trial." Id. (citing Palmer v. Hoffman, 318 U.S. 109 (1943)). Thus, the analysts' certificates did not qualify as business or public records. Id. at 321-322.

Confronted with a variation on the issue presented in Melendez-Diaz, the Supreme Court held the Confrontation Clause affords an accused the right to be confronted with the actual analyst who conducted the forensic chemical testing of his blood which was used against him in his driving while intoxicated (DWI) trial—not a "surrogate witness." Bullcoming v. New Mexico, 564 U.S. 647, 651 (2011). Following an automobile accident involving Bullcoming, the police arrested him for DWI and obtained his blood for chemical testing. Id. at 652. To

determine Bullcoming's blood alcohol level, the police sent the sample to a state lab. Id. at 652-653. The lab produced a standard form identifying the participants in the testing and the forensic analyst's finding. Id. at 654. The form was certified by the forensic analyst. Id. At Bullcoming's trial, the state introduced the certified form against Bullcoming as a "business record" through another analyst who neither observed nor reviewed the actual analyst. The state did not call the actual analyst who conducted the testing and produced the form. Id. at 655.

The Supreme Court held the "surrogate testimony" of the second analyst could not satisfy the Confrontation Clause. Id. at 659-662. The Court rejected the argument that the analyst was a "mere scrivener" of what the gas chromatograph machine generated. Id. at 659-661. For example, the actual analyst's report indicated the sample arrived intact with the seal unbroken, the sample matched the lab number, that he performed a particular test on the sample, and that he adhered to certain protocol. Id. at 660. These representations were exactly the types of areas for a lawyer to probe on cross-examination. Id. Further, the Court rejected the suggestion that an analyst's report drawn from machine produced data overcomes the Sixth Amendment bar because the Constitution requires the reliability of such evidence be tested by the crucible of cross-examination. Id. at 661.

Addressing the argument that the surrogate witness was qualified as an expert witness with respect to the gas chromatograph machine and the lab's procedures, thus enabling his testimony to satisfy the Confrontation Clause, the Court held the "surrogate testimony of the kind" the witness "was equipped to give could not convey what [the actual analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed." Id. "Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." Id. at 661-662. The Confrontation "Clause does not tolerate

dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Id. at 662.

In a case analyzing the connection between the Confrontation Clause and expert testimony, the United States Supreme Court addressed whether an expert who testified that a DNA profile produced by an outside laboratory matched a profile produced by the state police lab using a sample of the defendant's blood violated the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, 56 (2012). Writing for four justices, Justice Alito noted that "an expert may express an opinion that is based on facts that the expert assumes, but does not know, to be true" as long as the party who calls the expert introduces other evidence establishing the facts assumed by the expert. Id. at 57. The Court carefully crafted the opinion to explain that "this form of expert testimony does not violate the Confrontation Clause because that provision has no application to out-of-court statements that are not offered to prove the truth of the matter asserted." Id. at 57-58. "Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause." Id. at 58.

Very important to the resolution of the Williams case, the Court held the expert did not testify to the truth of the matter concerning the work done by the outside laboratory in the case nor did the expert "vouch for the quality of the [outside laboratory]'s work." Id. at 71. As mentioned, it was critical that the expert's testimony concerning the conclusions of the outside laboratory was not offered for the truth of the matter, but merely to show what the expert relied upon on arriving at her own conclusions. Id. at 71-72.

Finally, and perhaps most significantly, the Court explained its conclusion was dictated by the fact that Williams was tried by a judge, not a jury. Id. at 72. The Court explained the trier of fact – the judge – would have understood that the expert's statements regarding the work conducted by the outside laboratory were not offered as substantive evidence. Id. The Court held that if Williams had been tried by a jury "there would have been a danger of the jury's taking [the expert's] testimony as proof that the [outside laboratory] profile was derived from the sample obtained from the victim's vaginal swabs." Id. "Absent an evaluation of the risk of juror confusion and careful jury instructions, the testimony could *not* have gone to the jury." Id. (emphasis added). Where Williams was tried by a judge only, the Court "assume[d] that the trial judge understood that the portion of [the expert]'s testimony … was not admissible to prove the truth of the matter asserted." Id. at 72-73.

Most recently, in Smith v. Arizona, 602 U.S. 779 (2024), the United States Supreme Court resolved the confusion which resulted from Williams. Arizona law enforcement officers found Smith with a large quantity of what appeared to be drugs and drug related items. Smith was charged with various drug offenses, and the state sent the seized items to a crime lab for scientific analysis. Analyst Elizabeth Rast conducted forensic tests on the items and concluded that they contained usable quantities of methamphetamine, marijuana, and cannabis. The state originally planned for Rast to testify at Smith's trial, but Rast stopped working at the lab prior to trial. So the state substituted another analyst, Greggory Longoni, to provide an independent opinion on the drug testing performed by Rast. Longoni told the jury about Rast's testing and provided an independent opinion of each item's identity. Smith argued the use of Longoni as a substitute expert violated his Confrontation Clause rights. The Supreme Court agreed.

The Court held "a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing." Because Rast's out of court statements came into evidence for their truth, the Court concluded the statements were hearsay. The Court emphasized, "If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts." Longoni was a "surrogate merely reading from her [Rast's] records." However, the Supreme Court did not address whether the statements Longoni conveyed were testimonial because the question was not presented in Smith's petition for writ of certiorari and the lower court had never ruled on the issue.

Our Supreme Court applied Melendez-Diaz and Bullcoming in State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645 (2013). Brockmeyer objected to a witness reading into evidence computerized chain of custody logs of items that were introduced by the state. Brockmeyer, 406 S.C. at 339-340, 751 S.E.2d at 653. The Court concluded the chain of custody records were nontestimonial. Id. at 352, 751 S.E.2d at 660. Reading Melendez-Diaz very narrowly, our Supreme Court concluded the chain of custody documents "were not created 'for the sole purpose of providing evidence against the defendant.'" Id. (quoting Melendez-Diaz, 557 U.S. at 323). Additionally, the Court was persuaded that the documents were not testimonial because they did "not purport to prove any fact necessary to the conviction, and the custodians who did not testify were in no manner involved in the testing or analysis of the recovered items." Id. Thus, the Court concluded "the statements by non-testifying custodians contained in the chain-of-custody logs are not testimonial in nature because their 'primary purpose' [was] not to constitute evidence in a criminal trial." Id. The statements were "exempt from the Confrontation Clause." Id. See also State v. Trapp, 420 S.C. 217, 236-239, 801 S.E.2d 742,

752-754 (Ct. App. 2017) (holding nontestimonial evidence included testimony from one officer regarding the role of another officer in the chain of custody, an evidence login form, a form to certify the chain of physical custody, and the drug analysis request form because the primary purpose for their creation and maintenance was to document seized evidence).

In State v. Brewer, 438 S.C. 37, 882 S.E.2d 156 (2022), our Supreme Court held the admission of toxicology results from a private laboratory through a forensic pathologist who relied on the results in determining the cause of death of the child violated Brewer's Sixth Amendment right to confront the witnesses against her. Brewer's thirteen month old grandson died from drinking lemonade mixed with oxycodone. Brewer was convicted of homicide by child abuse related to his death. Id. at 40, 882 S.E.2d at 157. The pathologist who performed the autopsy submitted tissue and blood samples to a private laboratory in Pennsylvania for further testing because at that point, he could not determine a cause of death. Id. at 41, 882 S.E.2d at 158. After receiving the toxicology results, the pathologist concluded the cause of death was "acute oxycodone toxicity." Id. The pathologist told the jury the private laboratory "offers the best product he can purchase, and he would not sign his official report if he had any indication that the lab did not provide reliable testing." Id. at 43, 882 S.E.2d at 159. The analyst from the lab who actually conducted the testing did not testify. Our Supreme Court emphasized that "the State cannot undermine the Confrontation Clause by utilizing a private laboratory in a criminal trial without calling the individual who performed the testing." Id. at 52, 882 S.E.2d at 164.

The Court also noted that S.C. Code Ann. § 17-5-520 "specifically requires that an autopsy be done by a 'pathologist with forensic training' whenever a child dies as a result of violence, in a suspicious manner, or in an unexplained way" and that "other state appellate courts have looked to their respective statutes governing autopsies and many have reasoned that if an

autopsy is legally required in order to investigate a death, then its primary purpose is for a criminal investigation and thus, is testimonial." Id. 52-53, 882 S.E.2d at 164.

Recently, this Court held an expert's testimony violated the Confrontation Clause because she had no independent basis for her testimony where the testifying expert served as the peer reviewer for the non-testifying analyst. State v. McCray, 413 S.C. 76, 89-90, 773 S.E.2d 914, 921-22 (Ct. App. 2015). The testifying DNA analyst in McCray "merely served as a conduit for introducing the results of DNA tests that were performed by an expert who did not testify." Id.; see also Matter of Bilton, 432 S.C. 157, 163-167, 851 S.E.2d 442, 445-446 (Ct. App. 2020) (remarking that if the case were a criminal matter, "the error would not be debatable" because a testifying expert may not act as a conduit or surrogate for someone else's scientific analysis and holding the error violated due process where the state's expert testified as to a test performed on Bilton that she neither administered nor observed).

In this case, Appellant's confrontation rights were violated when the trial judge allowed Dr. Dukes to testify in lieu of Dr. Ward, the pathologist who actually conducted the autopsy. Dr. Dukes served as a surrogate or substitute forensic pathologist because Dr. Ward was not available to testify during Appellant's trial. Significantly, Dr. Dukes neither participated in nor observed the autopsy performed on the decedent. She merely read Dr. Ward's report and other materials he relied upon, such as the coroner's investigative report, in her role as a peer reviewer.

Dr. Ward's findings from the autopsy, which were conveyed to the jury through Dr. Dukes, were hearsay because they were out of court statements offered for the truth of the matter asserted. Moreover, the statements were certainly testimonial. The autopsy of the decedent was performed as part of a homicide investigation. See S.C. Code Ann. § 17-5-530(A)-(B). Kali Wolf, who was a member of the Greenville County forensic division, attended the autopsy on

behalf of law enforcement. She took photographs and collected the decedent's clothing as well as the projectile removed from the decedent's head. R. 314, l. 20 – 323, l. 18. The primary purpose of the autopsy was for a criminal investigation. In fact, Appellant had already been arrested at the time the autopsy was performed.

Because the trial judge erred by allowing Dr. Dukes to testify regarding the findings of the decedent's autopsy, including the manner and cause of death, when Dr. Dukes did not perform the autopsy but merely peer reviewed the findings of Dr. Ward, the pathologist who actually performed the autopsy, in violation of Appellant's Sixth Amendment right to confront the witnesses against her, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of January, 2025.

RECEIVED
Jan 29 2025
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 29th day of January, 2025.

Lara M Caudy

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Senior Appellate Defender

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ATTORNEY FOR APPELLANT

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Jan 29 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASMINE LIZ MARIE ROBINSON,

APPELLANT

APPELLATE CASE NO. 2023-000830

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon R. Brandon Larrabee, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 29th day of January, 2025.

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

From:	Mcinnis, Sara
To:	Brandon Larrabee
Cc:	Donna D"Alessio; Caudy, Lara
Subject:	2023-000830 The State v. Jasmine L. Robinson Final Brief of Appellant
Date:	Wednesday, January 29, 2025 11:13:00 AM
Attachments:	2023-000830 - State v. Jasmine Robinson - Final Brief of Appellant.pdf

Good Morning Mr. Larrabee,

Attached for service the above-referenced case is the final brief of appellant, which will be filed with the Court of Appeals today, January 29, 2025, via email filing.

Thank you,

Sara McInnis
Administrative Assistant
South Carolina Commission on Indigent Defense
Appellate Division
(803) 734-1330