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DISTRICT I

December 9, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP2223-CR State of Wisconsin v. Darian Darnell Alexander
(L.C. # 2016CF634)

Before Brash, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Darian Darnell Alexander appeals a judgment, entered upon a jury's verdict, convicting him of three felonies as a repeat offender: first-degree reckless homicide by use of a dangerous weapon as a party to a crime; first-degree reckless injury by use of a dangerous weapon as a party to a crime; and possession of a firearm by a felon. Alexander seeks a new trial on the ground that he suffered a violation of his constitutional right to confront adverse witnesses because a medical examiner who did not conduct the autopsy on the homicide victim testified as

an expert about the victim's cause of death. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

According to the criminal complaint, on September 4, 2013, police officers responded to reports of a shooting at 1801 West Center Street, in Milwaukee, Wisconsin. One victim, T.H., was injured. A second victim, Samuel Roby, died at the hospital. Dr. Agnieszka Rogalska, a forensic pathologist in the office of the Milwaukee County Medical Examiner, conducted an autopsy. She determined that Roby died of gunshot wounds and that his death was a homicide.

The complaint further alleged that police interviewed Q.S. and T.H., who said that on September 4, 2013, they were in Roby's car waiting outside of a store for Roby to complete a purchase. While Roby was leaving the store, a second car approached. Its front-seat passenger, who was armed with a semi-automatic handgun, fired eight to ten shots at Roby and his car.

Further investigation led police to conclude that Alexander was the gunman. In 2016, the State charged him with three crimes as a repeat offender in connection with the shooting: first-degree reckless homicide and first-degree reckless injury, all by use of a dangerous weapon as a party to a crime; and possession of a firearm by a felon. The matters proceeded to a jury trial in August 2017.

The State's evidence at trial included testimony from Dr. Wieslawa Tlomak. She told the jury that Rogalska conducted an autopsy of Roby but that Rogalska was no longer employed by

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

the Milwaukee County Medical Examiner and had left Milwaukee County. Tlomak then testified that she was a physician who was board certified in forensic pathology and that she was the Milwaukee County Deputy Medical Examiner. She said that she had been employed by the medical examiner's office for eleven years and had conducted more than 3000 autopsies. Tlomak went on to testify that as an expert in her field of forensic pathology, she could examine the photographs, reports, notes, and documentation of an autopsy that someone else had performed and reach an independent conclusion as to cause and manner of death. She said that she had testified in other cases as an expert where she had not conducted the autopsy but had reached an independent conclusion based on an autopsy conducted by another medical examiner. In the instant case, she had reviewed the photographs, reports, notes, and documentation from the autopsy that Rogalska performed. Based on that independent review, Tlomak concluded that Roby sustained three gunshot wounds, specifically, two entrance wounds and one exit wound, that he died as a result of those wounds, and that his death was a homicide. Alexander did not object to Tlomak's testimony.

The jury found Alexander guilty as charged. He appeals, arguing that because Rogalska performed the autopsy, Tlomak's testimony about the manner and cause of death violated his right to confront the witnesses against him.

The Confrontation Clause in the Sixth Amendment of the United States Constitution guarantees a criminal defendant the fundamental right to confront the witnesses against him or her. *See* ***State v. Griep***, 2015 WI 40, ¶18, 361 Wis. 2d 657, 863 N.W.2d 567. Article I, section 7 of the Wisconsin Constitution provides a similar guarantee. *See* ***State v. Hale***, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. "[W]hether the admission of evidence violates a defendant's

right to confrontation is a question of law subject to independent appellate review." ***State v. Williams***, 2002 WI 58, ¶7, 253 Wis. 2d 99, 644 N.W.2d 919.

When a defendant fails to object at trial to an alleged Confrontation Clause violation, we may nonetheless review the claim under the plain error doctrine, notwithstanding that the defendant otherwise forfeited the claim. *See* ***State v. Jorgensen***, 2008 WI 60, ¶¶21, 33, 54, 310 Wis. 2d 138, 754 N.W.2d 77. For purposes of the doctrine, a plain error is one "so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time." ***Id.***, ¶21 (citation and one set of quotation marks omitted). If the defendant demonstrates that the error occurred and was "fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless." *See* ***id.***, ¶23.

In this case, Alexander alleges that Tlomak's testimony about the autopsy results constituted plain error because only testimony from the medical examiner who actually conducted the autopsy could afford him a meaningful cross-examination about the results of the procedure and protect his right to confront the witness against him. We disagree.

In ***Griep***, our supreme court considered a Confrontation Clause challenge to testimony from an expert witness who testified at trial about a forensic analysis of the defendant's blood alcohol concentration. *See* ***id.***, 361 Wis. 2d 657, ¶1. The defendant alleged that he suffered a violation of his right to confront a witness against him because the testifying expert had not conducted the original blood alcohol analysis and, in the defendant's view, the expert's testimony was an insufficient substitute for testimony from the absent analyst who conducted the original testing. *See* ***id.***, ¶¶1-2. The ***Griep*** court applied a two-part test to determine whether expert testimony that is "based in part on tests conducted by a non-testifying analyst satisfies a

defendant's right of confrontation." *See* ***id.***, ¶47. Under the two-part test, if the testifying expert has "(1) reviewed the [original] analyst's tests, and (2) formed an independent opinion to which he [or she] testified at trial," then the testimony satisfies the defendant's right of confrontation. *See* ***id.***

Here, Tlomak testified about her extensive experience in the field of forensic pathology and explained that as an expert in that field, she was able to come to an independent conclusion as to manner and cause of death by reviewing the photographs, reports, notes, and documentation of an autopsy performed by someone else. She testified that in this case she had reviewed the photographs, reports, notes, and documentation of the autopsy that Rogalska performed. Tlomak further testified that based on her independent review of the autopsy materials, she had formed an independent opinion to a reasonable degree of medical certainty that Roby died of gunshot wounds and that his death was a homicide. Accordingly, her testimony satisfied the two-part ***Griep*** test.

Alexander responds that ***Griep*** should not be applied to autopsies. He argues that autopsies involve medical judgments, and he draws our attention to several cases from outside Wisconsin to support his contentions that autopsies are therefore subjective and susceptible to error. In light of the alleged subjective and error-prone nature of autopsies, he asserts that they are so different from other kinds of testing that only the original examiner can provide meaningful testimony and opportunity for cross-examination about a decedent's cause of death. We are not persuaded. Regardless of any contrary conclusions reached by other jurisdictions, ***Griep*** holds that Wisconsin uses a two-part framework for analyzing the admissibility of testimony from an expert witness who relies on forensic tests conducted by a non-testifying analyst. *See* ***id.***, ¶47. Nothing in ***Griep*** carves out exceptions based on a witness's area of

expertise, let alone suggests that the two-part framework is inapplicable to a medical examiner's testimony. Indeed, this court previously construed ***Griep*** as controlling when the expert at issue was a medical examiner who testified about a homicide victim's cause of death based on a review of the autopsy file of the original analyst. *See* ***State v. Muniz-Munoz***, No. 2014AP702-CR, unpublished slip op., ¶¶23-25 (WI App Mar. 1, 2016).[2] Accordingly, we are satisfied that ***Griep*** controls the admissibility of the medical examiner's testimony in the instant case.

Alexander next contends that, assuming ***Griep*** applies to a substitute medical examiner's testimony in regard to autopsies, then "Tlomak's testimony exceeded what is permi[tted] by ***Griep***." According to Alexander, Tlomak improperly "acted as a conduit" for the statements of the original medical examiner when Tlomak described the wounds that Roby received and the path of the bullets through his body. We disagree. In ***Griep***, our supreme court determined that "it was acceptable that the analyst's report, data, and notes were the factual bases of the expert witness's opinion, in addition to the witness's own professional expertise.... [A]n expert witness need not have personal knowledge of the forensic tests, as long as the witness's opinion is reached independently." ***Id.***, 361 Wis. 2d 657, ¶55. Here, as ***Griep*** permits, Tlomak reached an independent opinion about the manner and cause of Roby's death based upon her years of professional practice, her extensive experience with autopsies, and her review of the documentation from the original analyst. *See* ***id.***, ¶¶55-56. Tlomak presented that opinion under oath to the jury and she was available for cross-examination. Therefore, her testimony did not violate Alexander's right to confrontation. *See* ***id.***, ¶56.

[2] "[A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel ... may be cited for its persuasive value." WIS. STAT. RULE 809.23(3)(b).

Moreover, assuming only for the sake of argument that Tlomak testified in error, we conclude that any such error was harmless. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶23. "[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." *See* ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted). We determine whether an error was harmless by considering a variety of factors:

> "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."

Id. (citation omitted).

Alexander did not discuss harmless error in his brief-in-chief. In his reply brief, he offers only three paragraphs of argument on the issue, suggesting that Tlomak's testimony was not harmless because it was necessary to prove that Roby died from a gunshot wound. We rejected a similar argument in ***State v. McDougle***, 2013 WI App 43, 347 Wis. 2d 302, 830 N.W.2d 243. There, we held that where witnesses saw a shooting and the defendant never challenged the victim's cause of death but rather denied being the shooter, "testimony and documentation confirming that the victim died of blood loss from gunshot wounds was unnecessary, [and] its admission was harmless." *See* ***id.***, ¶17.

In the instant case, the cause and manner of the victim's death were not in dispute. The jury watched surveillance video recorded at 1801 West Center Street on September 4, 2013. The video showed a passenger in a car firing shots at Roby, and Roby falling in reaction to the shots. Roby's brother D.L. testified that he, Q.S., and T.H. were with Roby when he was shot and

killed. Q.S. provided corroborating testimony that he was with Roby when he was shot on September 4, 2013, and both Q.S, and D.L. went on to describe taking Roby to the hospital after the shooting. As the trial drew to a close, the circuit court noted that it was "assuming from everything that we have heard that the whole issue here is identification," and Alexander's trial counsel responded, "[t]hat's correct." In short, the disputed issue was the identity of the person who shot and killed Roby.

Tlomak's testimony did not implicate Alexander in Roby's death, or link Alexander to the shooting, or offer any evidence that made Alexander's involvement in the death more likely. Accordingly, upon review of the entire record and upon consideration of the specific factors outlined in ***Deadwiller***, we are satisfied beyond a reasonable doubt that Tlomak's testimony did not contribute to the jury's determination that Alexander was guilty of first-degree reckless homicide.

IT IS ORDERED that judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals