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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0205**

State of Minnesota,
Respondent,

vs.

Max Leo Miller,
Appellant.

**Filed February 24, 2025
Reversed and remanded
Connolly, Judge**

Blue Earth County District Court
File No. 07-CR-21-1253

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Patrick McDermott, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rebecca Ireland, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ede, Presiding Judge; Connolly, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges his conviction of third-degree murder under Minn. Stat. § 609.195(b) (2020), arguing that (1) the district court violated his Confrontation Clause rights by admitting forensic toxicology results in the absence of testimony from the

laboratory analyst who performed the toxicology testing, and (2) the error was not harmless beyond a reasonable doubt. We reverse and remand.

FACTS

On February 24, 2021, T.G. was found unresponsive in his home. T.G.'s girlfriend found him lying on his bed and could not wake him up. T.G.'s girlfriend summoned T.G.'s mother and brother to the home, and the brother called 911. Law enforcement was informed that T.G. had a history of chemical use. After T.G.'s mother and first responders performed life-saving measures, including the administration of Narcan,¹ T.G. was declared dead.

Sheriff J.F. seized various pieces of evidence from T.G.'s home, including pills, a "gem baggie," and T.G.'s phone. The sheriff believed some of the pills were counterfeit Xanax. The sheriff field tested the pills, some of which were positive for methamphetamine. None of the pills field tested positive for fentanyl.

An analyst with the Bureau of Criminal Apprehension (BCA) conducted further testing on the gem baggie and one of the suspected-counterfeit Xanax pills. Residue from the gem baggie tested positive for heroin and fentanyl. The counterfeit Xanax pill tested positive for "alprazolam," which is the chemical found in Xanax, and did not test positive for any other substance.

After seizing T.G.'s phone, the sheriff found messages on the phone between T.G. and appellant Max Leo Miller. In the messages, T.G. and Miller discussed meeting that

¹ Narcan is a medication used to counteract the effects of an opioid overdose.

evening to trade drugs. T.G. agreed to give Miller counterfeit Xanax in exchange for Miller giving him a counterfeit opioid called “m30” and heroin. Miller and T.G. agreed to meet at a community center in Mankato. T.G. later sent Miller a photograph of a line of white powder on a table with a message asking, “Or bigger?” Miller responded: “Smaller bro, [expletive], Be careful plz! Take half and wait a sec.” Approximately 30 minutes later, Miller messaged T.G.: “How are you feeling bro.” T.G. did not respond.

The medical examiner performed an autopsy on T.G. During the autopsy, the medical examiner drew a sample of T.G.’s blood. The sample was sent to NMS, a laboratory in Pennsylvania, for toxicology testing. The toxicology results indicated T.G.’s blood tested positive for “4-ANPP,” a component related to either the “creation or . . . degradation” of fentanyl; morphine, the “breakdown component” of heroin; and alprazolam, among other substances. After receiving the results, the medical examiner listed them in the autopsy report. He determined the cause of death was “mixed drug toxicity.”

Respondent State of Minnesota charged Miller with third-degree murder under Minn. Stat. § 609.195(b) for proximately causing the death of T.G. after bartering a controlled substance. Miller’s case proceeded to a jury trial, held from September 5-7, 2023.

At a pretrial hearing, the state noted that its toxicologist witness, K.G., would be unavailable for trial. The state said a different toxicologist witness, J.S., who issued a supplemental toxicology report, would testify. Defense counsel did not object, on the record, to the proposed witness change.

At trial, T.G.'s girlfriend, T.G.'s family members, the sheriff, other police investigators, and the BCA analyst testified consistent with the facts above. The state then planned to call the medical examiner as a witness prior to the toxicologist witness, J.S. The defense objected on the grounds that, should the toxicology report be admitted into evidence through the medical examiner, his testimony concerning the report and the report itself would be inadmissible because it contained hearsay, lacked proper foundation, and violated Miller's Confrontation Clause rights. The district court overruled the objection, on the grounds that the state would call J.S. after the medical examiner to testify about the toxicology report and would move to admit the report at that time. The defense also objected to J.S.'s testimony on the ground that it would violate Miller's confrontation rights, because he had the right to confront the witnesses "who actually performed the test." The district court overruled the objection.

The medical examiner testified about the autopsy. His autopsy report, which incorporated the toxicology report, was admitted into evidence over the defense's objection. The medical examiner testified that the toxicology results showed T.G.'s blood tested positive for "4-ANPP," caffeine, Narcan, Xanax, morphine, and marijuana. He opined that fentanyl was "probably responsible" for T.G.'s death, because fentanyl is a drug that is "extremely potent," and the level of fentanyl in T.G.'s blood sample was enough to cause death. Relying on the toxicology results, the medical examiner concluded that the final cause of death was "mixed drug toxicity," meaning T.G. died from a drug overdose "where more than one drug [was] present."

J.S., a forensic toxicologist employed at the NMS laboratory, then testified for the state, and the state offered the toxicology report into evidence. She explained NMS's testing procedures and the testing that occurred in this case. J.S. signed and issued the toxicology report, but she testified that she did not perform or observe the testing performed on the blood sample. She explained her role in the case "comes in once all the testing is complete," and she assesses all testing done on the case to evaluate the quality-control measures taken when testing was performed. She testified that another toxicologist, K.G., had initially issued the report, and she issued and signed an identical report when K.G. became unavailable to testify at court. J.S. explained that she completed her "own independent review" of the results. She acknowledged that all her findings and conclusions were "exactly the same" as K.G.'s. Like the medical examiner, J.S. relayed the toxicology results and testified that T.G.'s blood tested positive for caffeine, marijuana, Narcan, Xanax, morphine, and fentanyl. J.S. also testified that the absence of "norfentanyl"—a metabolite of fentanyl—in T.G.'s blood sample "tends to indicate a rapid death."

At the conclusion of trial, the jury found Miller guilty of third-degree murder under Minn. Stat. § 609.195(b). The district court sentenced him to 74 months in prison.

This appeal follows.

DECISION

Miller contends that the admission of forensic toxicology results violates his confrontation rights, because the laboratory analyst who performed the testing did not testify. Because of the recent United States Supreme Court opinion in *Smith v. Arizona*, the parties do not dispute that the toxicology report admitted in Miller's trial violated his

confrontation rights.² 602 U.S. 779 (2024). We agree with the parties’ analysis and review the issue considering *Smith*. The parties dispute whether the violation was harmless beyond a reasonable doubt.

I. The admission of the toxicology results violates Miller’s rights under the Confrontation Clause.

The United States and Minnesota constitutions provide a criminal defendant the right “to be confronted with the witnesses against him.” U.S. Const. amend. VI; Minn. Const. art. I, § 6; see *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (“We apply an identical analysis under both the state and federal Confrontation Clauses.”). An absent witness’s testimonial statements are barred from admission at trial, unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). We review de novo whether the admission of evidence violates the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

We analyze whether a statement violates the Confrontation Clause in two steps. See *Smith*, 602 U.S. at 800 (stating that “[t]o implicate the Confrontation Clause, a statement must be hearsay (‘for the truth’) and it must be testimonial—and those two issues are separate from each other”). First, we consider whether the statement was testimonial. *Caulfield*, 722 N.W.2d at 309. Second, we consider if the statement is out-of-court hearsay

² The Court decided *Smith* after Miller was convicted. That decision applies here because Miller’s case is pending on direct review. See *State v. Losh*, 721 N.W.2d 886, 893-94 (Minn. 2006) (concluding that a defendant benefits from a new caselaw rule if the defendant’s case is “pending on direct review”).

offered “to prove the truth of the matter asserted.” *Smith*, 602 U.S. at 785 (quotation omitted). The “critical determinative factor” to assess if a statement is testimonial is “whether it was prepared for litigation.” *Caulfield*, 722 N.W.2d at 309. Minnesota case law establishes that laboratory reports, such as the one at issue here, are testimonial statements. *See id.* at 310 (concluding that a BCA laboratory report indicating a substance was cocaine was testimonial evidence); *see also State v. Weaver*, 733 N.W.2d 793, 800 (Minn. App. 2007) (concluding that toxicology reports of blood samples were testimonial evidence), *rev. denied* (Minn. Sept. 18, 2007).

Applying the first step, the toxicology report admitted into evidence was testimonial. In *Weaver*, this court concluded that toxicology reports were testimonial because the reports were “obtained at the request of the medical examiner . . . during an autopsy that occurred in the course of a homicide investigation” and the “results were specifically relied on by [the medical examiner] in reaching her conclusion on the cause of death.” 733 N.W.2d at 799. We concluded that, because the toxicology reports were testimonial and admitted through the testimony of the medical examiner, the defendant’s right to confront the witness who *performed* the toxicology testing was violated. *Id.* at 803 (emphasis added). Here, the toxicology report was not admitted through the medical examiner. But the police investigating T.G.’s death suspected T.G. overdosed and the medical examiner performed an autopsy. Like the medical examiner in *Weaver*, the medical examiner here submitted T.G.’s blood sample to the toxicology lab, but did not perform the testing, and subsequently relied on the toxicology report to conclude that T.G.

died from “mixed drug toxicity.” Thus, the toxicology report was prepared for litigation and is testimonial evidence.

Applying the second step, the toxicology report was offered for its truth. In *Smith*, the United States Supreme Court determined that, “[i]f 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.” 602 U.S. at 795. In that case, a Department of Public Safety (DPS) analyst tested drugs and paraphernalia to identify those items. *Id.* at 789-90. That analyst issued her findings and conclusions in a report, but later stopped working at the DPS laboratory. *Id.* at 790. The state did not call that analyst as a witness, and instead called a different DPS forensic analyst to testify at trial. *Id.* at 790-91. The testifying analyst reviewed the former analyst’s notes and relied on those notes to offer an “independent opinion” of what the drug items were. *Id.* at 791. The Supreme Court concluded that the former analyst’s statements came in for their truth, because they were admitted to show the basis of the testifying witness’s expert opinions. *Id.* at 798.

Here, the toxicology report was offered for its truth in two ways. First, as noted above, the medical examiner relied on the toxicology report to conclude that fentanyl was “probably responsible” for T.G.’s death and concluded the cause of death was “mixed drug toxicity.” And he incorporated the toxicology report in his own autopsy report, which was admitted at trial. Because the results of the toxicology report formed the basis of the medical examiner’s expert testimony that T.G. died from “mixed drug toxicity,” the toxicology results were admitted for their truth—that T.G. had fentanyl in his system.

Second, although the toxicology report admitted into evidence was signed and issued by J.S., she did not perform the testing underlying the report. And J.S., like the testifying analyst in *Smith*, relied on the results and findings from testing performed by another analyst to offer her own conclusions that fentanyl was present in T.G.’s blood, and the absence of a certain metabolite of fentanyl indicated a “rapid death.”

When a testimonial statement is offered for its truth, the defendant has the right to confront the person who made the statement through cross-examination. *Smith*, 602 U.S. at 785. In *Melendez-Diaz v. Massachusetts*, the United States Supreme Court determined that affidavits conveying laboratory test results, which identified a substance as cocaine, were testimonial evidence, and the defendant had the right to confront the analysts who conducted the testing. 557 U.S. 305, 308, 311 (2009). And in *Bullcoming v. New Mexico*, the Supreme Court determined that a blood-alcohol-content report could not be introduced through a “surrogate” analyst who neither signed the report, nor personally performed the underlying test, nor observed it. 564 U.S. 647, 661-62 (2011). The Supreme Court concluded: “[W]hen the [s]tate elected to introduce [the report], [the author] became a witness [the defendant] had the right to confront.” *Id.* at 663.

Because the toxicologist report was a testimonial statement offered for its truth, we conclude Miller had a right to confront the analyst who performed the testing. Although J.S. signed the toxicology report that was offered at trial and offered her “own independent review” of the test results, she did not conduct or observe the testing that was done. Like the surrogate witnesses in *Smith* and *Bullcoming*, the basis of J.S.’s opinion comes from

the opinions of analysts who performed the testing. Miller was entitled to confront those analysts who were witnesses against him.

II. The constitutional violation was not harmless beyond a reasonable doubt.

When a defendant's confrontation rights are violated, we review whether the error was harmless. *Weaver*, 733 N.W.2d at 801. The state bears the burden of proving the error was harmless beyond a reasonable doubt. *State v. Conklin*, 444 N.W.2d 268, 275 (Minn. 1989). "In assessing whether an error is harmless, the question is not whether the other evidence was sufficient to support the conviction, but rather whether the error substantially influenced the verdict." *State v. Bigbear*, 10 N.W.3d 48, 54 (Minn. 2024). We consider five factors: (1) the "manner in which the evidence was presented," (2) "whether it was highly persuasive," (3) "whether it was used in closing argument," (4) "whether it was effectively countered by the defendant," and (5) "whether other evidence of guilt was overwhelming." *Weaver*, 733 N.W.2d at 801 (quoting *State v. Al-Naseer*, 690 N.W.2d 744, 748 (Minn. 2005)). "[S]trong evidence of guilt undermines the persuasive value of wrongly admitted evidence," but we do not focus only on evidence of guilt. *Biggear*, 10 N.W.3d at 54-55.

Our analysis is informed by the Minnesota Supreme Court opinion in *Caulfield* and this court's opinion in *Weaver*. In *Caulfield*, the defendant was convicted of possession of a controlled substance with intent to sell. 722 N.W.2d at 306. After determining that a BCA report is testimonial and it is error to admit a BCA report without the testimony of the report's preparer, the supreme court concluded "the erroneous admission of the report was not harmless beyond a reasonable doubt." *Id.* at 313-14, 317. In analyzing the

harmless-error factors the supreme court noted: (1) the bench trial was a “very short affair” and there was “no chance that the report was lost among a plethora of other evidence”; (2) the lab report “has the appearance of being conclusive proof”; (3) the state referenced the report in its opening and closing statements; (4) the evidence was unrebutted by the defendant, so it had a “greater impact” on the verdict; and (5) the state’s other evidence included Caulfield’s admission to police that he possessed drugs and two field tests of the substances the BCA tested. *Id.* at 314-15, 317.

In *Weaver*, the defendant was convicted of second-degree unintentional felony murder after his wife was found in their home partially burned with a head injury. 733 N.W.2d at 796. As noted above, this court determined that a toxicology report was testimonial and the admission of the report through the medical examiner violated the defendant’s confrontation rights. *Id.* at 800, 803. And we determined the violation was not harmless beyond a reasonable doubt. *Id.* at 802. Our harmless-error analysis noted: (1) the trial was “lengthy,” and the toxicology report partly formed the basis of the medical examiner’s opinion that “the victim died from carbon-monoxide poisoning”; (2) the report was not merely cumulative of other evidence; (3) the state cited the report in its closing argument; (4) the defense “vigorously attacked” the medical examiner’s reliance on the report; and (5) the report was critical to the defense. *Id.* at 801-02.

Here, with regard to the first factor—the manner in which the report was presented—the record shows that over the course of a three-day trial the jury heard from 14 witnesses. And two of those witnesses, the medical examiner and J.S., testified about the toxicology report. Like the medical examiner in *Weaver*, the medical examiner relied

on the toxicology report to form his opinion that fentanyl was “probably responsible” for T.G.’s death. He also testified that the weight of T.G.’s lungs and the swelling of T.G.’s brain indicated to him that T.G. possibly died from a drug overdose, but it would be “impossible to say” which drug caused the death without laboratory results. Like the scientific reports in *Caulfield* and *Weaver*, the toxicology report here was “presented in a way that was designed to secure the state’s verdict.” *Caulfield*, 722 N.W.2d at 314; *Weaver*, 733 N.W.2d at 801.

As to the second factor, the toxicology report was “highly persuasive” and not cumulative of other evidence presented at trial, because the toxicology report indicating fentanyl was present in T.G.’s blood had the “appearance of being conclusive proof” of the cause of T.G.’s death. *Caulfield*, 722 N.W.2d at 315. And the toxicology report was the only evidence showing the chemicals found in T.G.’s blood.

As to the third factor, the state relied on the toxicology report in its closing argument. The state explicitly stated that it “spent significant time with [the medical examiner]” and summarized the toxicology report findings in approximately two pages of the transcript to support the conclusion that the fentanyl present in T.G.’s blood stream was a “lethal dosage.”

As to the fourth factor, the defense briefly cross-examined both the medical examiner and J.S. on the toxicology report. During cross-examination of the medical examiner, the defense inquired how long a chemical would “show up in a test,” and he responded, “I think that’s something you would need to ask the toxicologist.” During cross-examination of J.S., she confirmed that she did not perform or observe any of the

testing done on the blood sample and that she reviewed the results to “compile for [the] report.”

Finally, as to the fifth factor, there was other evidence of Miller’s guilt, such as the messages exchanged between him and T.G., the gem baggie found in T.G.’s home with heroin and fentanyl residue, and Miller’s own statements to police. But without the toxicology report identifying the fentanyl in T.G.’s blood, this other evidence only circumstantially proves that Miller caused the death of T.G. by bartering heroin for Xanax. *See State v. Schnagl*, 907 N.W.2d 188, 197-98 (Minn. App. 2017), *rev. denied* (Minn. Feb. 28, 2018) (concluding that circumstantial evidence, including that the victim used cocaine at the defendant’s home, the defendant acquired the cocaine, and the victim began convulsing and foaming at the mouth, supported the inference that the defendant proximately caused a victim’s death by giving her cocaine). By contrast, the toxicology report is direct and persuasive evidence that fentanyl caused T.G.’s death and more strongly supports a reasonable inference that Miller gave T.G. heroin that was mixed with fentanyl. *See Caulfield*, 722 N.W.2d at 317 (stating “we do not have a single case where we have held that the admission of direct and persuasive evidence on an element of the crime is harmless because other less direct and less persuasive or largely circumstantial evidence is strong”). The report surely influenced the jury’s finding of guilt in this case.

The state argues that the Confrontation Clause violation was harmless beyond a reasonable doubt because the cause of death was not a contested issue at trial; rather the contested issue was “who provided the lethal dose of drugs” to T.G. But this argument ignores the state’s burden to prove that a criminal defendant commits third-degree murder

by a showing that (1) the defendant, (2) without intent to cause death, (3) proximately caused the death of another by, directly or indirectly, (4) unlawfully selling, giving away, bartering, delivering, exchanging, distributing, or administering, and (5) a controlled substance. *See* Minn. Stat. § 609.195(b). The element of who caused the death of T.G. is necessarily intertwined with the cause of death. Based on the record, we conclude the admission of the toxicology report was not harmless error, and we therefore reverse and remand to the district court for a new trial.

Reversed and remanded.