REL: March 15, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1180006

Ex parte Cary Trant Jefferson

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Cary Trant Jefferson

v.

State of Alabama)

(Madison Circuit Court, CC-16-1084; Court of Criminal Appeals, CR-17-0275)

PER CURIAM.

WRIT QUASHED. NO OPINION.

Parker, C.J., and Wise, Bryan, and Stewart, JJ., concur.

Bolin and Shaw, JJ., concur specially.

Sellers, Mendheim, and Mitchell, JJ., dissent.

SHAW, Justice (concurring specially).

I concur to quash the writ of certiorari.

The petitioner, Cary Trant Jefferson, was convicted of murder and was sentenced to 30 years' imprisonment. The evidence at trial indicated that Jefferson shot Doris Timmons, rendering her a quadriplegic, and that she died three months later. At no point during trial was there an issue raised as to whether the gunshot was the actual cause of Timmons's death.[1]

The record demonstrates that, during voir dire, the State indicated that it was going to offer the autopsy report on the victim into evidence through the testimony of Dr. Valerie Green, who prepared the report. During trial, the State instead called Carl Mauterer, the director of the Alabama Department of Forensic Sciences' Huntsville laboratory. It is clear from the record that Mauterer's testimony was limited to establishing a foundation for the report to be considered a

[1]Jefferson's motion for a judgment of acquittal at the close of the State's case specifically argued only that the State had failed to prove Jefferson's intent, and his renewed motion at the close of the evidence added only an argument that the State had failed to show that Jefferson did not act in self-defense. There was no challenge, generally or otherwise, to whether Jefferson caused Timmons's death.

"business record" for purposes of Rule 803(6), Ala. R. Evid., as an exception to the general rule forbidding hearsay testimony. The contents of the report were not discussed. When the State moved to have the report admitted into evidence, Jefferson's trial counsel objected:

> "[DEFENSE COUNSEL:] Your Honor, the Defendant has the following objections as to the admission thereof.
>
> "First of all, it is hearsay. Second of all, it is not properly authenticated under Rule 901[, Ala. R. Evid.].
>
> "Most importantly, it deprives Mr. Jefferson of his right to confront the witnesses against him under the Sixth Amendment of the United States Constitution.
>
> "And lastly, that there is an insufficient predicate laid for the offering of the doctor's underlying opinion in terms of her expertise."

The State responded that Mauterer had provided a sufficient evidentiary predicate to establish that the report was a business record. The trial court then asked defense counsel: "[D]o you want to cross-examine the witness before I rule or do you want me to rule now?" Defense counsel stated that he was "prepared for [the trial court] to rule," and the trial court overruled the objections. The autopsy report was

admitted into evidence, and its contents were never subsequently mentioned on the record.

At the time Jefferson lodged his objections, Alabama law held that the admission of an autopsy report sometimes violates a defendant's Confrontation Clause rights as described in Crawford v. Washington, 541 U.S. 36 (2004), see Smith v. State, 898 So. 2d 907, 916 (Ala. Crim. App. 2004), and sometimes does not, see Perkins v. State, 897 So. 2d 457, 463-65 (Ala. Crim. App. 2004).[2] Whether it did or did not depended on the information contained in the autopsy report and the relationship between that information and the State's burden of proof. Smith, 898 So. 2d at 915-17. But at the time the autopsy report in the instant case was offered into evidence, there was no testimony about its contents: Mauterer testified only as to whether the autopsy report was a business record. Defense counsel was then offered the opportunity to cross-examine Mauterer, but declined to do so.

[2]See also Thompson v. State, 153 So. 3d 84, 129 (Ala. Crim. App. 2012), and Gobble v. State, 104 So. 3d 920, 960 (Ala. Crim. App. 2010), in which the Court of Criminal Appeals applied the ruling in Perkins and held that the admission of autopsy reports in those cases did not violate Crawford.

In his dissenting opinion, Justice Sellers engages in an analysis of what the autopsy report stated; how it was relevant to proving the cause of Timmons's death; what the decision in Crawford and the subsequent decisions in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and Bullcoming v. New Mexico, 564 U.S. 647 (2011), deem as testimonial evidence to which the Confrontation Clause would apply; and how those dots can be connected to provide that the admission of the autopsy report here violated Jefferson's rights. None of this was provided to the trial court by Jefferson when he lodged his objection. No further objection or discussion of the Confrontation Clause issue was provided to the trial court before its judgment was entered and Jefferson was sentenced. Without suggesting what the scope of a proper objection should have been in this case, I note only that a sufficiently specific objection was necessary. Mitchell v. State, 913 So. 2d 501, 505 (Ala. Crim. App. 2005) ("To preserve an issue for appellate review, the issue must be timely raised and specifically presented to the trial court and an adverse ruling obtained. The purpose of requiring an issue to be preserved for review is to allow the trial court

the first opportunity to correct any error." (second emphasis added)).[3] In this case, however, the bare-bones objection that the introduction of the autopsy report violated the Confrontation Clause, with no argument to apprise the trial court of the specific and complicated inquiry required in this case, was not meritorious on its face when the contents of the autopsy report had not been, and never were, discussed on the record. The trial court may have ruled differently had

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[3]The fact that a more specific argument was raised in a postjudgment motion for a new trial is of no consequence when the objection at trial was insufficient in the first place:

> "The grounds urged for a new trial must ordinarily be preserved at trial by timely and adequate objections. Smith v. State, 393 So. 2d 529, 532 (Ala. Crim. App. 1981); Fuller v. State, 365 So. 2d 1010 (Ala. Crim. App. 1978), cert. denied, 365 So. 2d 1013 (Ala. 1979).
>
> > "'[A] new trial will not be granted for matters pertaining to rulings, evidence, or occurrences at a trial ... unless timely and sufficient objections ... have been made and taken. ...'
>
> "Fuller v. State, 365 So. 2d at 1012 (quoting 24 C.J.S. Criminal Law § 1428 (1961))."

Williams v. State, 710 So. 2d 1276, 1293 (Ala. Crim. App. 1996) (emphasis added). See also Trawick v. State, 431 So. 2d 574, 578-79 (Ala. Crim. App. 1983) ("The grounds urged on a motion for a new trial must ordinarily be preserved at trial by timely and specific objections." (emphasis added)).

Justice Sellers's analysis and the analysis provided by Jefferson on appeal[4] actually been provided by Jefferson at trial, but I cannot hold the trial court in error for failing to consider an argument never argued.

> "I would hold that, (1) because the trial court did not have the opportunity to consider [Jefferson's] contention, (2) because [the State] did not have the opportunity at the proper time to rebut it, and (3) because judicial economy would have best been served if the contention had first been addressed below, that issue was not preserved for review on appeal."

Ex parte Knox, 201 So. 3d 1213, 1221 (Ala. 2015) (Shaw, J., concurring in the result) (footnote omitted). In light of the above, I concur to quash the writ.

Bolin, J., concurs.

[4]Jefferson is represented by different counsel on appeal.

SELLERS, Justice (dissenting).

Cary Trant Jefferson petitioned this Court for a writ of certiorari to review the decision of the Court of Criminal Appeals, an unpublished memorandum, holding that an autopsy report admitted into evidence did not constitute "testimonial" hearsay under the Confrontation Clause of the Sixth Amendment to the United States Constitution. See Jefferson v. State (No. CR-17-0275, August 3, 2018), ___ So. 3d ___ (Ala. Crim. App. 2018)(table). This Court granted Jefferson's petition, issued the writ, and, today, quashes the writ of certiorari. I respectfully dissent.

Facts

On August 30, 2015, Jefferson shot Doris Timmons in the left shoulder, rendering her quadriplegic. After being shot, Timmons was transported by ambulance to Huntsville Hospital; while there, she was interviewed on two occasions by Investigator Stacey Rutherford with the Huntsville Police Department. On September 18, 2015, Timmons was discharged from Huntsville Hospital and moved to a rehabilitation center in Atlanta, Georgia; she was discharged from the rehabilitation center on November 12, 2015; and she died 14

days later on November 26, 2015. After being notified that Timmons had died, Investigator Rutherford arranged for her body to be taken to the laboratory operated by the Alabama Department of Forensic Sciences for an autopsy. The autopsy report, prepared by Dr. Valerie Green, a medical examiner for the Department of Forensic Sciences, references a diagnosis of "Bilateral acute bronchopulmonary pneumonia and edema" ("bronchopneumonia"); the report lists the cause of death as "Complications of a Gunshot Wound of the Left Shoulder into the Cervical Vertebral Column" and the manner of death as homicide.

On March 11, 2016, a Madison County grand jury indicted Jefferson for murder pursuant to § 13A-6-2, Ala. Code 1975, and a jury trial was held in August 2017. At trial, the State called Carl Mauterer, the director of the Alabama Department of Forensic Sciences' Huntsville laboratory, who testified that the autopsy report prepared by Dr. Green was a routine record kept in the ordinary course of business by the Department of Forensic Sciences. Mauterer did not testify concerning the contents of the autopsy report, and Dr. Green, although subpoenaed, did not attend the trial. When the State

moved to admit the autopsy report into evidence, defense counsel objected, asserting, among other things, that the autopsy report was "hearsay" and, "[m]ost importantly, it deprives [Jefferson] of his right to confront the witnesses against him under the Sixth Amendment of the United States Constitution."[5] The trial court allowed the autopsy report into evidence under the business-record exception to the hearsay rule. See Rule 803(6), Ala. R. Evid.; § 12-21-43, Ala. Code 1975. A jury found Jefferson guilty of murder, and the trial court imposed a 30-year sentence. Further preserving the Confrontation Clause claim, Jefferson filed a motion for a judgment of acquittal or a new trial, in which he argued, among other things, that the admission of the autopsy report violated his right "to confront witnesses against him as protected by Art. I, § 8, Ala. Const. (1901) and the 6th

[5]Contrary to the State's position, it is apparent that counsel was objecting to Jefferson's inability to confront Dr. Green because Dr. Green, the author of the autopsy report, had been subpoenaed to testify at trial but did not appear. The trial court was therefore sufficiently and more than adequately informed of both hearsay and Confrontation Clause concerns. See D.E.R. v. State, 254 So. 3d 242 (Ala. Crim. App. 2017)(acknowledging that this Court has always looked to substance over form and that, although a defendant may not use "magic words" in stating an objection, a court may nonetheless be sufficiently informed of the legal basis for the objection).

Amendment to the United States Constitution." Jefferson specifically argued in that motion that the United States Supreme Court in Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), and Bullcoming v. New Mexico, 564 U.S. 647 (2011), have held that, although a document might fall within a hearsay exception for business records, it may still be inadmissible under the Confrontation Clause if the document was created for the purpose of establishing or proving some fact at trial. The trial court denied Jefferson's motion for an acquittal or a new trial. On appeal, the Court of Criminal Appeals affirmed the trial court's judgment in an unpublished memorandum, concluding that the autopsy report was nontestimonial and that its admission, thus, did not violate Jefferson's right to confront witnesses against him. The Court of Criminal Appeals further held that, even assuming that the admission of the autopsy report was error, that error would be harmless.

Standard of Review

> "In reviewing the Court of Civil Appeals' decision on a petition for the writ of certiorari, 'this Court "accords no presumption of correctness to the legal conclusions of the intermediate appellate court. Therefore, we must apply de novo the standard of review that was applicable in the

> Court of Civil Appeals."' Ex parte Exxon Mobil Corp., 926 So. 2d 303, 308 (Ala. 2005)(quoting Ex parte Toyota Motor Corp., 684 So. 2d 132, 135 (Ala. 1996))."

Ex parte Wade, 957 So. 2d 477, 481 (Ala. 2006).

Discussion

Relying on the principles set forth in Crawford v. Washington, 541 U.S. 36 (2004), Melendez-Diaz v. Massachusetts, and Bullcoming v. New Mexico, Jefferson argues that the admission into evidence of the autopsy report violated his Sixth Amendment right to confrontation because the report was prepared by Dr. Green, who did not testify at trial, and whom Jefferson had no prior opportunity to cross-examine. The Confrontation Clause of the Sixth Amendment to the United States Constitution, which is binding on the States though the Fourteenth Amendment, provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend VI. In Crawford, the United States Supreme Court indicated that the Confrontation Clause is aimed at "testimonial" hearsay admitted against a criminal defendant and that the admission of testimonial hearsay against a defendant is prohibited unless the witness who provided the

testimonial evidence is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the witness--regardless of whether the hearsay is deemed reliable by a court, abrogating Ohio v. Roberts, 448 U.S. 56 (1980). Hearsay that is not testimonial does not implicate Crawford. Although Crawford did not provide a comprehensive definition of "testimonial," it did identify three "core classes" of testimonial statements implicating the Confrontation Clause:

> "[1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ...; [2] extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions ...; [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 51-52 (internal quotation marks omitted). Following Crawford, the United States Supreme Court decided Melendez-Diaz and Bullcoming, involving the application of the Confrontation Clause to forensic-laboratory reports.

In Melendez-Diaz, the United States Supreme Court held that certificates of analysis sworn by analysts at a state laboratory--attesting that a seized substance was cocaine--were the equivalent of affidavits that had been prepared specifically to serve as evidence; thus, the certificates of analysis could not be admitted at trial unless the analysts who prepared them were present for cross-examination. Melendez-Diaz, 557 U.S. at 310-11. In Bullcoming, the United States Supreme Court held that a "report of blood alcohol analysis" ranked as testimonial because it was prepared in connection with a criminal investigation and its purpose was establishing or proving some fact in a criminal proceeding; thus, the trial testimony by the surrogate analyst who did not participate in or observe the forensic testing violated the Sixth Amendment. Noteworthy, the Court explained that, although the "report of blood alcohol analysis" was unsworn, the formalities of the report were more than adequate to qualify the assertions therein as testimonial:

> "In all material respects, the laboratory report in this case resembles those in Melendez-Diaz. Here, as in Melendez-Diaz, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations, N.M. Stat. Ann. § 29-3-4 (2004). Like the analysts

> in Melendez-Diaz, [the analyst here] tested the evidence and prepared a certificate concerning the result of his analysis. App. 62. Like the Melendez-Diaz certificates, [the analyst's] certificate [here] is 'formalized' in a signed document, ... headed a 'report,' App. 62. ...
>
> "In sum, the formalities attending the 'report of blood alcohol analysis' are more than adequate to qualify [the analyst's] assertions as testimonial. The absence of notarization does not remove his certification from Confrontation Clause governance."

Bullcoming, 564 U.S. at 664-65.

It is undisputed that the autopsy report in this case contains out-of-court statements offered by the State to prove the matters asserted therein, more specifically, the cause and manner of Timmons's death. It is also undisputed that Jefferson did not have a prior opportunity to cross-examine Dr. Green. Nor did the State assert that Dr. Green was unavailable to testify at trial. Thus, admission of the autopsy report violated the Confrontation Clause to the extent that it constitutes "testimonial" hearsay.

Applying the principles set forth in Crawford, Melendez-Diaz, and Bullcoming, I agree with Jefferson that the autopsy report is testimonial. To begin, the autopsy was arranged at the request of Investigator Rutherford because she suspected that Timmons had died as a result of the gunshot wound Timmons

sustained on August 30, 2015. Investigator Rutherford testified as follows:

> "Q. [By the State]: And an autopsy was performed after her death?
>
> "....
>
> "A. Yes, sir. ... I just happened to be at my desk early that morning in my office. The phone rang and I didn't answer it initially. That number called back and I answered it. And it was Miss Timmons's family advising me that she had passed. After gathering some basic circumstances surrounding her passing, secondary to [the August 2015 shooting], I needed to make contact and get other things lined up or in movement in order for us to do the autopsy. So I disconnected with the family and contacted the coroner's office, I contacted Huntsville Hospital and I told them to stop where they were and that we needed to have Miss Timmons taken to forensics.
>
> "Q. [By the State]: And did you attend the autopsy with Dr. Green?
>
> "A. I did."

The autopsy report further indicates that it was authorized by the Madison County District Attorney pursuant to § 36-18-2, Ala. Code 1975, which states that the duties of the director of the Department of Forensic Sciences include "investigations of unlawful, suspicious or unnatural deaths and crimes as are ordered by the Governor, the Attorney General, any circuit judge, or any district attorney in the State of Alabama." The

statute requires the director to conduct such investigations, "including any necessary autopsy, to be performed by physicians," and provides:

> "[T]he director and his staff shall cooperate with the coroners, sheriffs and other police officers in Alabama in their investigations of crimes and deaths from unlawful, suspicious or unnatural causes. The director shall within his discretion visit the scene of any crime in the state for the purpose of securing evidence for the state. The director shall furnish a certified copy of his report of any investigation that the department conducts to the person or persons who ordered the investigation conducted. ...
>
> "....
>
> "The director and his designated assistants shall exercise the same police authority as any deputy sheriff or state trooper in the State of Alabama."

Obviously, the Madison County District Attorney authorized the report because the circumstances surrounding Timmons's death were "unlawful, suspicious or unnatural." Like the forensic-laboratory reports in Melendez-Diaz and Bullcoming, the autopsy report here was requested by law enforcement to aid in its investigation, and the purpose of the report was to establish or prove some fact at a later criminal trial and, more specifically, to prove that Timmons died on November 26, 2015, as a result of the gunshot wound she sustained on August

30, 2015. The autopsy report, thus, is functionally identical to live, in-court, testimony; concomitantly, Dr. Green is a "witness" for purposes of the Sixth Amendment. Had Dr. Green been called to testify at trial, her opinions, conclusions, and interpretations contained in the autopsy report would have been subject to the challenge of cross-examination. Moreover, because the autopsy report was created in connection with a prior police investigation, because Investigator Rutherford observed the autopsy, and because the autopsy report lists the manner of death as homicide caused by a gunshot wound, Dr. Green could have reasonably believed that the report would be available for later use at trial. Finally, like the unsworn forensic-laboratory report in Bullcoming, the formalities attending the autopsy report in this case are more than adequate to qualify Dr. Green's assertions as testimonial. Although the autopsy report is unsworn, Dr. Green signed the report and verified that "[t]he facts stated [in the 'Report of Autopsy'] are correct and to the best of my knowledge and opinion." See, e.g., United States v. Moore, 651 F.3d 30, 73 (D.C. Cir. 2011)(noting that "the autopsy reports were formalized in signed documents titled 'reports'").

The Court of Criminal Appeals also held that, even assuming that admission of the autopsy report was error, that error was harmless. I disagree. In Neelley v. State, 494 So. 2d 669, 674 (Ala. 1985), this Court stated:

> "'[B]efore a federal constitutional 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, 87 S. Ct. 824, 828, 17 L.Ed. 2d 705 (1967). It must appear 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,' id. at 24, 87 S. Ct. at 828, because if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' id. at 23, 87 S. Ct. at 827 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230-231, 11 L.Ed. 2d 171 (1963)), then the error must be considered harmful."

The Court of Criminal Appeals specifically held that any error in admitting the autopsy report into evidence was harmless because Jefferson admitted to shooting Timmons, albeit allegedly in self-defense; the location of the bullet wound was not at issue; and Jefferson did not challenge the cause of death during the trial. Even though Jefferson shot Timmons on August 30, 2015, Timmons did not die until November 26, 2015. The autopsy report references bronchopneumonia as the direct cause of death and then concludes:

> "[Timmons's] risk of infection is high due to the various complications that have developed due to the spinal cord injury involving autonomic dysfunction of her respiratory system, skin degradation due to an inability to ambulate and moisture, and an inability to void the bladder and bowel in the usual manner. All of these risks were increased as a result of the gunshot wound she received in August 2015, and the bronchopneumonia she had is a direct result of these risks; therefore, the cause and manner of death in this case is best classified as ['Complications of a Gunshot Wound of the Left Shoulder into the Cervical Vertebral Column']."

(Emphasis added.)

As Jefferson argues, the cause of death in this case is not as clear as one might conceive; he argues that there is a possibility that Timmons could have died of bronchopneumonia regardless of the gunshot wound. Arguably, cross-examination could have revealed assumptions leading to a conclusion that the effects of the gunshot wound were ancillary to a preexisting condition or were influenced by an intervening factor; we just do not know. It is well settled that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." Patterson v. New York, 432 U.S. 197, 210 (1977). Here, the State was permitted, over objection, to introduce the autopsy

report to establish the legal cause of Timmons's death. As offered, the report reaches a conclusion that was the essential element to prove the charge of murder: that the victim died from a gunshot wound inflicted by the defendant. Accordingly, it cannot be said that the admission of the autopsy report, without the testimony of Dr. Green, was harmless beyond a reasonable doubt. See D.G. v. State, 76 So. 3d 852, 859 (Ala. Crim. App. 2011)("Given that there was no other evidence of first-degree sexual abuse ... besides the interview ... recorded on the DVD, we cannot say that the admission of the DVD was harmless beyond a reasonable doubt."); see also Grantham v. State, 580 So. 2d 53, 58 (Ala. Crim. App. 1991)(noting that, "where the evidence which violates the confrontation clause also establishes an essential element of the crime with which the defendant is charged, the error cannot be deemed harmless").

Conclusion

For the reasons stated above, I conclude that the autopsy report was testimonial in nature. Accordingly, I would reverse the judgment of the Court of Criminal Appeals and remand this case.

Mendheim and Mitchell, JJ., concur.