NO. COA09-1552

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

STATE OF NORTH CAROLINA

v. Mecklenburg County
Nos. 05 CRS 245718
05 CRS 239736

DAVID RICHARD DAVIS

Appeal by Defendant from judgment entered 20 May 2009 by Judge W. Robert Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 11 May 2010.

Attorney General Roy Cooper, by Special Deputy Attorney General Steven M. Arbogast, for the State.

Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for the defendant-appellant.

WYNN, Judge.

It is unconstitutional to admit evidence of forensic analyses performed by a forensic pathologist who did not testify without proof that the pathologist was unavailable to testify and that Defendant was given a prior opportunity to cross-examine her. *State v. Locklear*, 363 N.C. 438, 452, 681 S.E.2d 293, 305 (2009). Here, the trial court admitted into evidence an autopsy report prepared by a non-testifying pathologist and allowed a different forensic pathologist to testify as to the contents thereof without proof that Defendant had an opportunity to cross-examine the

unavailable pathologist. Following *Locklear,* we must hold that Defendant's constitutional rights were therefore violated and, because the State failed to prove that this violation was harmless beyond a reasonable doubt, Defendant is entitled to a new trial.

On 17 October 2005, Defendant David Richard Davis was indicted by a Mecklenburg County grand jury for first-degree murder. On 19 September 2005, Defendant was indicted for malicious injury by use of an explosive and incendiary device. Defendant was tried on 4 May 2009.

The State's evidence tended to show that in August 2005 Defendant and Michael Winecoff, who were both homeless, shared a campsite located in the woods across the street from a gas station on Sugar Creek Road in Charlotte. On 24 August 2005, Defendant entered the gas station and purchased $0.50 of gasoline. Zemas Mengesha, the gas station clerk, testified that within minutes of selling the gasoline to Defendant he saw a fire burning in the lot across the street from the gas station.

Firefighters, medical personnel, and law enforcement officers responded to the reported fire. Officer Don Avant of the Charlotte-Mecklenburg Police Department, the first to arrive, observed a "sizable fire in progress" and found Winecoff laying naked on the ground in the fetal position. According to Officer Avant, Winecoff was "steaming" and had been "burned severely."

Officer Ann Murphy of the Charlotte-Mecklenburg Police Department arrived on the scene shortly after Officer Avant. She testified that she heard Winecoff accuse Defendant, saying, "You

did this to me, you shouldn't have done this to me." Jamie McCraven, a member of the Charlotte Fire Department, also testified that Winecoff repeatedly pointed to Defendant and said, "He set me on fire, he poured gas on me and set me on fire." Winecoff repeated these accusations to Robin Carlson, a paramedic who responded to the fire, saying that the fire was not self-inflicted and that Defendant had caused his injuries.

Winecoff was taken to the Carolinas Medical Center and treated by Dr. David Jacobs, a trauma surgeon working in the emergency room. Dr. Jacobs testified that Winecoff had second- and third-degree burns on sixty-five percent of his body, with the most severe burns located on his legs. Winecoff remained in the hospital for just over one month until he was removed from life support and died on 9 September 2005. An autopsy was performed the same day by Dr. Garner, an employee of the Medical Examiner's Office in Chapel Hill.

At trial, Dr. Garner did not testify; however, the State sought to introduce the autopsy report through the testimony of Dr. Christopher Gulledge, who had not participated in the autopsy and was employed by the Mecklenburg County Medical Examiner's Office. Over Defendant's objection, Dr. Gulledge was permitted to testify. During Dr. Gulledge's testimony, the State introduced the autopsy report into evidence and had it published to the jury. Dr. Gulledge stated, after reading from and explaining multiple entries in the report, that in his opinion Mr. Winecoff's death was the result of complications from burn injuries. Dr. Gulledge also

noted that the report included Dr. Garner's opinion that Winecoff's death was the result of a homicide.

Dwayne Davis, a fire investigator for the Charlotte Fire Department, testified as an expert in the origin and causes of fires. After conducting his investigation of the campsite, Davis concluded that the fire was intentionally set by Defendant after he poured gasoline on Winecoff. Paul Wilkinson, another prosecution expert, concurred in this assessment.

Samuel Jackson also testified for the State. Jackson indicated that although Defendant and Winecoff were friends, occasionally Davis would get drunk and threaten violence toward Winecoff. Jackson recalled one incident during which Davis threatened to pour lighter fluid on Winecoff and "burn him up."

Defendant did not contest the fact that the cause of Winecoff's death was complications from burn injuries. His defense was instead focused on a different theory of the origin of the fire. Specifically, Defendant contended that the fire was the result of an accident. Defendant testified that he purchased the gasoline in a leaky container, returned to the campsite, gave the container to Winecoff, and told Winecoff to build a fire while Defendant retrieved the grill. According to Defendant, as he was walking down a hill toward the grill, he saw a flash of light, heard a scream, and turned to see Winecoff on fire.

Defendant also elicited testimony from Jeff Von Cannon, a captain in the Charlotte Fire Department. Von Cannon investigated the campsite and opined at trial that the fire originated some 25

to 30 feet away from where Winecoff's body was found burning.

Bernard Thomas Kromenacker testified on Defendant's behalf as an expert in the cause and origin of fires. Kromenacker testified that in his opinion, the gasoline leaked from the container while it was sitting upright on the mattress and then a fire ignited when Winecoff lit a cigarette.

After hearing all the evidence, the jury found Defendant guilty of malicious injury by use of an explosive and incendiary device as well as guilty of first-degree murder under the felony murder rule. The trial court arrested judgment on the former charge[1] and sentenced Defendant upon his murder conviction to life imprisonment without parole. Defendant gave timely notice of appeal.

On appeal, Defendant argues that the trial court erred, and violated his constitutional rights, by admitting into evidence testimonial statements rendered by a non-testifying pathologist. In light of our Supreme Court's holding in *Locklear*, we must agree.

The Sixth Amendment to the United States Constitution states 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. Thus, the Constitution prohibits the "admission of testimonial statements of a witness who did not

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[1]Constitutional prohibitions against double jeopardy prevent a defendant from being sentenced for both felony murder and the underlying felony used to secure the murder conviction. *See State v. Small,* 293 N.C. 646, 660, 239 S.E.2d 429, 438-39 (1977)("It is well established that a defendant who is convicted upon the theory of the felony murder rule cannot be separately punished for the commission of the underlying felony.").

appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54, 158 L. Ed. 2d 177, 194 (2004).

In *Melendez-Diaz v. Massachusetts,* 557 U.S. __, 129 S.Ct. 2527, 174 L. Ed. 2d 314 (2009), the Supreme Court of the United States addressed a challenge to the admission of "certificates of analysis" as evidence that a substance was cocaine. The Supreme Court of the United States held that these documents, completed by a forensic analyst in preparation for trial, are "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'" *Id.* at __, 129 S.Ct. at 2532, 174 L. Ed. 2d at 321 (quoting *Davis v. Washington*, 547 U.S. 813, 830, 165 L. Ed. 2d 224, 242 (2006)(emphasis omitted)). Thus, the Supreme Court of the United States held that such reports are "testimonial statements, and the analysts [are] 'witnesses' for purposes of the Sixth Amendment." *Id.* at __, 129 S.Ct. at 532, 174 L. Ed. 2d at 322. Accordingly, the Supreme Court of the United States held that without proof "that the analysts were unavailable to testify at trial" and that the accused "had a prior opportunity to cross-examine them," the defendant "was entitled to 'be confronted with' the analysts at trial." *Id.* at ___, 129 S.Ct. at 2532, 174 L. Ed. 2d at 322 (quoting *Crawford*, 541 U.S. at 54, 158 L. Ed. 2d at 177). In the immediate aftermath of *Melendez-Diaz*, the Supreme Court of North Carolina in *State v. Locklear*, 363 N.C. 438, 681 S.E.2d 293 (2009), noted that autopsy reports were

explicitly identified as examples of forensic analyses to which the ruling in *Melendez-Diaz* applied. *Id.* at 452, 681 S.E.2d at 305 (citing *Melendez-Diaz*, 557 U.S. at __ n.5, 129 S.Ct. at 2536 n.5, 174 L. Ed. 2d at 326 n.5).

In this case, although there was some indication that Dr. Garner was unavailable to testify, the State failed to show that Defendant was given a prior opportunity to cross-examine Dr. Garner. Based on *Melendez-Diaz* and *Locklear*, it was therefore error for the trial court to admit the autopsy report into evidence. Notably, Defendant did not object when the report was actually entered into evidence. We need not address whether this issue was preserved for appeal, however, as Defendant unequivocally objected to Dr. Gulledge's testimony, which, upon further examination, was erroneously permitted, thus entitling Defendant to the same remedy available due to the admission of the report into evidence.

In *Locklear*, our Supreme Court applied *Melendez-Diaz* in a case in which a forensic pathologist gave expert testimony as to the cause of death by referring to an autopsy report completed by a non-testifying pathologist. Because there was no showing that the pathologist who conducted the autopsy was unavailable to testify and that Defendant had been given a prior opportunity to cross-examine her, the Court held that the admission of the expert testimony was erroneous. *Id.* at 452, 681 S.E.2d at 305.

In *State v. Mobley*, __ N.C. App. __, 684 S.E.2d 508 (2009), *disc. review denied*, 363 N.C. 809, 692 S.E.2d 393 (2010), this

Court sought to reconcile the demands of the Confrontation Clause, and specifically the holding in *Locklear*, with "[w]ell-settled North Carolina case law [that] allows an expert to testify to his or her own conclusions based on the testing of others in the field." *Id.* at __, 684 S.E.2d at 511. The *Mobley* Court explained that when an expert is merely using the reports of another expert as the basis for her own independent expert opinion the reports are not offered for their truth and as such the testimony does not implicate the Confrontation Clause. *Id.* at __, 684 S.E.2d at 511-12. We distinguished *Locklear* by noting that the expert witness in that case "was merely reporting the results of other experts." *Id.* at __, 684 S.E.2d at 511; *see also State v. Galindo,* __ N.C. App. __, 683 S.E.2d 785 (2009)(finding error in admission of expert testimony that was based "solely" on the absent analyst's lab report). Contrastingly, in *Mobley*, the expert "testified not just to the results of other experts' tests, but to her own technical review of these tests, her own expert opinion of the accuracy of the non-testifying experts' tests, and her own expert opinion based on a comparison of the original data." *Id.* at __, 684 S.E.2d at 511.

More recently, in *State v. Hough*, __ N.C. __, 690 S.E.2d 285 (2010), this Court followed *Mobley* and found no error in the admission of expert testimony as to the identity of controlled substances, delivered by a witness who did not conduct or witness the underlying test, on the grounds that the "expert opinion was based on an independent review and confirmation of test results."

Id. at __, 690 S.E.2d at 291. Notably, however, the *Hough* Court stated that "[i]t is not our position that every 'peer review' will suffice to establish that the testifying expert is testifying to his or her expert opinion . . . ." *Id.* at __, 690 S.E.2d at 291.

Consequently, subsequent cases have addressed whether the review and confirmation of a non-testifying pathologist's report was sufficient to view the testifying pathologist as rendering an independently admissible expert opinion. In *State v. Brennan*, __ N.C. App. __, 692 S.E.2d 427 (2010), *temp. stay allowed*, No. 211P10, 2010 WL 2265704 (N.C. May 21, 2010), this Court found inadmissible the testimony of an expert whose "'review' [of a non-testifying pathologist's report] consisted entirely of testifying in accordance with what the underlying report indicated." *Id.* at __, 692 S.E.2d at 431. This Court noted that the witness, although purporting to offer an expert opinion as to the identity of a controlled substance, had conducted "no independent research to confirm" the contents of the underlying report. *Id.*

In *State v. Brewington*, __ N.C. App. __, 693 S.E.2d 182 (2010), this Court once more deemed expert testimony inadmissible because of the insufficiency of the witnesses' review of the underlying pathologist's report. Again at issue was the identity of a chemical substance. The *Brewington* Court found the witnesses' testimony inadmissible because she "had no part in conducting any testing of the substance, nor did she conduct any independent analysis of the substance." *Id.* at __, 693 S.E.2d at 190 (emphasis omitted). The Court explained that the witness

> merely reviewed the reported findings of Agent Gregory, and testified that if Agent Gregory followed procedures, and if Agent Gregory did not make any mistakes, and if Agent Gregory did not deliberately falsify or alter the findings, then Special Agent Schell "would have come to the same conclusion that she did." As the Supreme Court clearly established in *Melendez-Diaz*, it is precisely these "ifs" that need to be explored upon cross-examination to test the reliability of the evidence. *Melendez-Diaz*, 557 U.S. at __, 129 S.Ct. at 2537, 174 L. Ed. 2d at 327 (methodology that forensic drug analysts use "requires the exercise of judgment and presents a risk of error that might be explored on cross-examination").

Id.

In the case *sub judice*, Defendant argues that it was error to allow Dr. Gulledge, who admitted to having no independent or personal knowledge of what happened during the autopsy, to testify as to the opinions contained in the autopsy report prepared by a non-testifying pathologist.[2] Thus, we must ascertain whether Dr. Gulledge was merely reporting the results of another expert or instead testifying as to his own expert conclusion reached after a technical review of the underlying data in the report.

At trial, Dr. Gulledge testified as an expert in forensic pathology. He was shown the autopsy report prepared by Dr. Garner. Dr. Gulledge testified that two weeks prior to trial he had been asked to review Dr. Garner's report. He explained:

> Typically the way a review of another medical

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[2]At trial, defense counsel objected to the testimony at issue on the grounds that Defendant had "the right to confront the author of the actual report." Counsel specifically implicated the constitutional issue by identifying the objection as a "Crawford problem."

> examiner's report is done is to review the report of the investigation and then review the autopsy for clarity, to review it for accuracy, and to review it for the findings to determine whether the findings makes [sic] sense in the light of the investigation.

Conspicuously absent from this concept of review is any mention of independent testing designed to confirm the conclusions reached by the non-testifying expert. Although Dr. Gulledge testified that he "reviewed" the autopsy report, the bulk of his testimony consisted of reading and translating into layman's terms the language of Dr. Garner's report.

The prosecutor began by asking Dr. Gulledge if "the report indicate[d] what medical procedures were performed on Mr. Winecoff prior to his death." Dr. Gulledge answered that "[t]he report indicates that at the time of death Mr. Winecoff had undergone several major medical procedures[.]" Dr. Gulledge proceeded to identify each of the procedures that the report indicated had been conducted on Winecoff. He then explained what each procedure entailed. After Dr. Gulledge testified as to what type of injuries a burn victim might be susceptible to, the prosecutor asked whether the report contained "Dr. Garner's opinion as to the cause of death." Dr. Gulledge responded, "It does contain it," and the prosecutor had the autopsy report published to the jury.

Dr. Gulledge was asked to read from the report the date and time of the autopsy and explain how the autopsy numbering system assured that the autopsy was conducted on Micheal Winecoff. Next, Dr. Gulledge was directed to read and explain the Pathological Diagnosis listed on the report. He read that the report diagnosed,

inter alia, "diffuse alveolar damage" and "acute bronchial pneumonia." The prosecutor then asked, "What does [the report] say the cause of death was?" Defendant replied, "Complications of burns."

Dr. Gulledge stated that the report "doesn't go into a tremendous amount of detail [as to how the conclusion was reached] other than descriptions of the various insults that were present to the body at the time which we covered mostly here, the presence of bronchial pneumonia, the presence of diffuse alveolar damage, and the fact that both the spleen and the kidney were infarcted." After explaining that infarction "happens in burn patients," Dr. Gulledge testified that it was a "fair statement" that "but for the burn injuries . . . Michael Winecoff would not have died."

On cross-examination, defense counsel asked if it was correct that "there is no way of telling whether this was an accidental incident or a homicide incident." Dr. Gulledge replied, "The only way that I would have to determine what [Dr. Garner's] opinion of the manner of death was is that on the report . . . she has checked the box marked homicide[.]" Dr. Gulledge further stated "I don't know where she received the information [relied on to reach this conclusion]. I don't know why she formed that opinion."

After reviewing the transcript, we are compelled to hold that Dr. Gulledge was not offering an independent expert opinion based on a review of Dr. Garner's report but was instead, like the witness in *Locklear*, merely reporting the results of Dr. Garner's anslysis. Although Dr. Gulledge said that he "reviewed" the

autopsy, we find this review, which involved no retesting[3] and instead relied on the accuracy of unconfirmed observations made by Dr. Garner, insufficient to establish that Dr. Gulledge was testifying as to his own expert opinion. As such, we hold that allowing Dr. Gulledge to testify as to the contents of the report was an error which violated Defendant's constitutional rights under the Confrontation Clause. Accordingly, we must determine whether the error prejudiced Defendant.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2009); *see also State v. Lewis*, 361 N.C. 541, 549, 648 S.E.2d 824, 830 (2007)(applying harmless beyond reasonable doubt analysis to Confrontation Clause violation). Defendant contends that because his defense relied on the theory that the death of Michael Winecoff was an accident, the erroneous admission of Dr. Gulledge's testimony, including the opinion of the non-testifying pathologist that the death was a homicide and not an accident, was not harmless beyond a reasonable doubt. Notably, the jury heard expert testimony supporting both the State's and Defendant's theories as to the origin of the fire. It is possible that, without improperly admitted additional testimony from a purported medical expert

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[3]We recognize that certain types of forensic analysis, such as that conducted when performing an autopsy, are inherently difficult to reproduce. However, the burden on the State of producing the actual analyst is preferable to the denial of Defendant's constitutional rights, which would occur if our courts permitted an inference of the accuracy of the tests and observations performed during an autopsy.

asserting that the death was the result of homicide, the jury would have reached a different conclusion. We therefore hold that Defendant is entitled to a new trial.[4]

New trial.

Judges CALABRIA and STEELMAN concur.

Report per Rule 30(e).

[4]Because we hold that Defendant is entitled to a new trial on the basis of the violation of his constitutional rights, we decline to address Defendant's additional arguments on appeal.