Affirmed and Memorandum Opinion filed August 15, 2023

In The

Fourteenth Court of Appeals

NO. 14-22-00050-CR

NEILO JHARMARCUS JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 1629759

MEMORANDUM OPINION

Appellant Neilo Johnson raises one issue challenging his conviction for the murder of complainant James Booker II, resulting in a 30-year prison sentence. Appellant complains that the trial court erroneously admitted the testimony of Dr. Varsha Podduturi[1] over his objections that her testimony violated his Sixth

[1] Dr. Podduturi is an assistant medical examiner at the Harris County Institute of Forensic Sciences. At trial, she testified that complainant's cause of death was gunshot wounds; however, she did not perform the autopsy of his body.

Amendment right to confrontation. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant was arrested on April 29, 2019 and was charged with the murder of complainant James Booker II, which occurred three days prior to appellant's arrest. He pleaded "not guilty" to the offense, and his case was tried before a jury.

At trial, appellant admitted that he intentionally killed complainant by shooting him several times. Appellant confessed to facts supporting every element of the crime with which he was charged but claimed that his actions were in self-defense. Appellant and complainant had been friends for many years. Appellant testified that earlier the day of the shooting, he had picked up the complainant driven with him to friend David Hawkins' house who had a home music studio. He testified that at some point while appellant and complainant were at Hawkins' house, complainant had flashed a gun at him, making him feel uncomfortable. He further testified that he feared for his life after complainant's Uber arrived. When appellant and complainant were outside Hawkins' house, appellant threatened him, as appellant testified he had done before. In this moment, while complaint and appellant were outside together, appellant testified that he concluded "his family was in danger and the threat would not end unless he ended it." Appellant retrieved his gun from his vehicle in this fear, approached the Uber after it had turned around, and fired upon complainant.

Additionally, an eyewitness gave significant details about the shooting. James Perry, Uber driver of the vehicle into which appellant shot complainant, testified to the jury that when he first arrived at the house, he saw appellant and the complainant on the steps of the house, and that he saw them embrace and shake hands with one another, after which the complainant entered the Uber. While Perry was turning around in the neighbor's driveway across the street, he observed

appellant go to his own vehicle in the driveway, and when he had completed the maneuver he stopped when he saw appellant returning from his car as if to speak with the complainant. He told the jury he saw appellant in his mirror, walk toward his vehicle and shoot several times into the backseat shattering the rear window. At that point, Perry sped away and pulled into a parking lot that was nearby and called 911. Perry's call, which details his account of the events to the operator, was also admitted into evidence. The State also provided a video its officer's obtained from a nearby resident which illustrates the events from the perspective of a doorbell.

During appellant's trial, the State called assistant medical examiner Dr. Varsha Podduturi to testify regarding complainant's cause of death. Defendant's counsel objected to Dr. Podduturi's testimony because she did not perform the autopsy. Counsel argued that because the autopsy had been performed by Dr. Lucille Tennant, Dr. Podduturi's testimony violated defendant's Sixth Amendment right to confrontation:

> MR. PARRISH: […] And we have had no opportunity to cross-examine the original medical examiner, Lucille Tennant, in this case. My –
>
> THE COURT: I thought y'all spoke with her already.
>
> MR. PARRISH: That's not -- Judge, speaking with somebody is not cross-examining them. Those aren't the same thing. So, we had no opportunity to cross-examine her. My client is being denied his right to confront the medical examiner. So, we are objecting to confrontation as well as hearsay.

Appellant's objections to Dr. Podduturi's testimony were overruled, and the trial court allowed her to testify in front of the jury. She testified as to cause of death based on the autopsy photographs presented to her at trial. Among the photographs that she was presented included the photographs of articles found on the complainant; these included photos of a gun discovered on the complainant. Dr. Podduturi confirmed that the gun had been discovered at the time of the

autopsy. This corroborated Appellant's testimony that complainant had flashed the gun at him while at Hawkins' house.

Although the gun had not played a role in the police investigation, and Hawkins could not confirm having seen the gun, its existence at the time of the shooting was not directly disputed. In closing argument, the State took the position that the gun did exist, and in the manner it was found, tucked into complainant's clothing.

At the conclusion of appellant's trial, the jury returned a guilty verdict for murder and assessed a sentence of thirty (30) years' confinement. The trial court entered judgment in accordance with the jury's verdict and punishment assessment. This appeal followed.

II. ISSUES AND ANALYSIS

Appellant complains that the trial court erred in admitting Dr. Podduturi's testimony over his objections that her testimony violated his Sixth Amendment right of confrontation. On appeal, appellant argues that his right to confrontation was violated under both the Sixth Amendment of the United States Constitution, Article I Section 10 of the Texas constitution, and Article 1.051 of the Texas Code of Criminal Procedure. We first consider the scope of our review.

A. What is the reviewable scope of appellant's Confrontation clause complaint on appeal?

To justify compound review of Confrontation clause complaints separately under the federal and state constitutions, appellant must explicitly preserve confrontation challenges under the Texas constitution and on appeal must make arguments *in addition* to those made regarding his denial of confrontation under the Sixth Amendment. *See Stuart v. State*, No. 14-18-00463-CR, 2020 WL 830682, at *3 n.2 (Tex. App.—Houston [14th Dist.] Feb. 20, 2020, no pet.)(not designated for publication). However, appellant fails to make any argument, analysis, or point

to any authority that his state right to confrontation afford him any different or additional protections beyond those raised in his Sixth Amendment confrontation argument. Thus, to the extent, if any, that appellant's challenge under the Texas constitution is different from his argument regarding denial of confrontation under the Sixth Amendment, such argument has been waived. *See* Tex. R. App. P. 33.1; *see also Clark v. State*, 365 S.W.3d 333, 380 (Tex. Crim. App. 2012) ("The court needs to be presented with and have the chance to rule on the specific constitutional objection because it can have such heavy implications on appeal.").

B. Did the trial court err in allowing Dr. Podduturi to testify?

In his sole issue, appellant complains that the trial court erroneously denied his Sixth Amendment right to confrontation by allowing Dr. Podduturi to testify as a surrogate medical examiner in place of Dr. Tennant. The Confrontation Clause of the Sixth Amendment guarantees the accused the right to confront the witnesses against him. U.S. Const. amend. VI. The Confrontation Clause applies to in-court testimony and testimonial statements made outside of court. *Molina v. State*, 632 S.W.3d 539, 543 (Tex. Crim. App. 2021) (citing *Paredes v. State*, 462 S.W.3d 510, 517–18 (Tex. Crim. App. 2015)). Testimonial statements are those "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." *Paredes*, 462 S.W.3d at 514 (citing *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). Therefore, the accused has a right to confront witnesses who make out-of-court testimonial statements, including forensic analysts. *See, e.g.*, *Crawford*, 541 U.S. at 54; *Bullcoming v. New Mexico*, 564 U.S. 647, 651 (2011); *Paredes*, 462 S.W.3d at 514-15.

Forensic analysts may not testify as "surrogate[s]" regarding reports made by other analysts. *See Bullcoming*, 564 U.S. at 661 (holding that a "surrogate" could

not testify regarding what the certifying analyst "knew or observed about the events his certification concerned.... Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part"). However, expert witnesses may testify to their own independent conclusions, even if they reached those conclusions by examining data collected by another analyst. *See Paredes*, 462 S.W.3d at 517 ("For an expert's testimony based upon forensic analysis performed solely by a non-testifying analyst to be admissible, the testifying expert must testify about his or her own opinions and conclusions."). Therefore, "[w]hile the testifying expert can rely upon information from a non-testifying analyst, the testifying expert cannot act as a surrogate to introduce that information." *Id*. at 517-18.

In this case, although Dr. Tennant performed the autopsy, Dr. Podduturi performed her own independent analysis of the autopsy file:

> Q. Now, Doctor, after reviewing these photographs and the autopsy file, did you come to a conclusion on your own in your own expert opinion as to what the cause of death was for this decedent?
>
> A. Yes.
>
> Q. And what is your opinion as to the cause of death?
>
> A. Multiple gunshot wounds.
>
> Q. How many gunshot wounds do you believe this decedent suffered?
>
> A. The decedent had three gunshot wounds.
>
> Q. And is that in addition to the ballistic injury that you observed that did not penetrate the skin?
>
> A. That's correct

Although her review of the autopsy file included the report made by Dr. Tennant, Dr. Podduturi acted as more than a mere surrogate for the certifying analyst. The record shows that Dr. Podduturi did not blindly recite Dr. Tennant's findings. Rather, her testimony illustrates her independent work. Dr. Podduturi

testified as to each wound on complainant's body and stated her reasoning for each of her conclusions. Her testimony was based on her independent analysis of the autopsy photos, x-rays, notes, and diagrams, which she explained thoroughly during the State's direct examination. Accordingly, because we conclude Dr. Podduturi did not act as a mere surrogate, and offered independent opinions, her testimony was permissible, and the trial court did not err in admitting her testimony over appellant's Sixth Amendment confrontation clause objection. *See Harrell v. State*, 611 S.W.3d 431, 439 (Tex. App.—Dallas 2020, no pet.) (finding a substitute medical examiner's testimony, premised upon his independent review of the autopsy file, did not violate the Confrontation Clause).

Appellant relies heavily on this court's decision in *Lee v. State*, 418 S.W.3d 892, 899 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd). In *Lee*, the State called an alternative medical examiner to testify regarding an autopsy because the certifying examiner had been indicted for a crime himself. 418 S.W.3d at 894-95. However, the court's decision in *Lee* depended on the fact that the trial court admitted both the original autopsy report and testimony parroting that report from the alternative medical examiner. 418 S.W.3d at 899 ("[I]t suffices to say that Dr. Milton's independent evaluation of evidence collected during the autopsy did not violate the Confrontation Clause, and that his repetition of statements from the report were cumulative of the improperly admitted report itself.").

Presently, Dr. Podduturi's testimony was admitted by itself; the autopsy report was not introduced into the record because all parties at trial agreed it should be excluded. Thus, appellant's reliance on *Lee* is misplaced—the *Lee* court did not hold that the expert testimony was inadmissible, but rather the admission of the autopsy report itself was a reversible error; although, that, too was ultimately harmless. *See Lee*, 418 S.W.3d at 901. Here, Dr. Tennant's autopsy report was

excluded from the record, and we find no testimony that Dr. Podduturi provided where she simply repeated any such inadmissible statements from Dr. Tennat's report. We thus find the facts of *Lee* distinguishable from our case, with its reasoning harmonious to our conclusion.

Appellant argued that he had not been provided notice of Dr. Podduturi's anticipated expert testimony, that the State had not amended their expert notice, and provided no reason for Dr. Tenant's absence. But our review of the record shows that on December 21, 2021, the State filed and served its "Second Amended Notice of Intent to Use Expert Testimony and Witness List" which names "Dr. Varsha Podduturi – Assistant Medical Examiner" as an anticipated expert witness to testify "regarding autopsy findings, including but not limited to cause of manner of death." At trial, the State explained that it had not called Dr. Tennant, ". . .[t]he one that actually conducted the autopsy," because she was "no longer employed." Specifically, "[n]ot for any nefarious reasons. She just moved on in her life." To the extent, any part of appellant's complaint is based on its argument that he had not been given proper notice or not been given an explanation as to Tennant's absence, we overrule such complaint.

Appellant's first point of error is overruled.

C. Presuming for the sake of argument that the trial court erred, that error was harmless beyond a reasonable doubt.

A Confrontation Clause violation is constitutional error that requires reversal unless we conclude beyond a reasonable doubt that the error was harmless. *Davis v. State*, 203 S.W.3d 845, 849 (Tex. Crim. App. 2006); *see* Tex. R. App. P. 44.2(a). The critical inquiry is not whether the evidence supported the verdict absent the erroneously admitted evidence, but rather "the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations." *Scott*

v. State, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). In making this determination, we may consider a number of non-exclusive factors, including: "(1) the importance of the hearsay statement to the State's case; (2) whether the hearsay evidence was cumulative of other evidence; (3) the presence or absence of evidence corroborating or contradicting the hearsay testimony on material points; and (4) the overall strength of the prosecution's case." *Davis,* 203 S.W.3d at 850. Applying the factors relevant to this case, we conclude it did not materially affect the jury's deliberations.

At trial, appellant did not dispute that he shot complainant several times, and that the wounds cause by those gunshots were the cause of complainant's death. His sole defense was that he killed complainant in self-defense. Dr. Podduturi's testimony did not give the jury any information that the appellant himself did not freely admit. Her expert testimony only reinforced already undisputed facts. Appellant's counsel's cross examination of Dr. Podduturi allowed appellant to focus on the discovery of complainant's weapon, which served to *support* rather than *detract* from appellant's self-defense argument. Appellant failed to provide any reason, nor is it clear on the record, what further information Dr. Tennant could provide the jury regarding complainant's weapon or otherwise to support his self-defense argument. Even if Dr. Podduturi's testimony was erroneously admitted, it was not particularly important to the State's case, it assisted appellant's case in corroborating appellant's self-defense theory, there was no evidence contradicting her conclusions, and it did not significantly contribute to the strength of the prosecution's case.

For these reasons, we conclude beyond a reasonable doubt that to the extent that the admission of Dr. Podduturi's testimony may have been erroneous, it did not materially affect the jury's deliberations.

Therefore, we would also overrule appellant's sole issue for lack of harm.

III. CONCLUSION

Dr. Podduturi's testimony did not deny appellant his Sixth Amendment right to confrontation, and even if it was admitted erroneously, such an error was harmless beyond a reasonable doubt. Therefore, we affirm the judgment of the trial court.

/s/ Randy Wilson
Justice

Panel consists of Justices Wise, Zimmerer, and Wilson.

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