UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1922

September Term, 2014

TOWANDA REAVES

v.

STATE OF MARYLAND

Woodward,
Friedman,
Zarnoch, Robert, A.
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: October 27, 2015

A jury in the Circuit Court for Baltimore City convicted Towanda Reaves, Appellant, of second-degree murder, second-degree child abuse, and child abuse resulting in the death of Aadyn O. Appellant was also convicted of first- and second-degree child abuse of Aviana O. Appellant was sentenced to thirty years' imprisonment for second-degree murder, a concurrent thirty years' imprisonment for child abuse resulting in death, and a consecutive ten years' imprisonment for first-degree child abuse. Appellant timely appealed and presents the following issue for our review, which we rephrase[1]:

> Did the trial court violate Appellant's Sixth Amendment right to confrontation by admitting the victim's toxicology report into evidence without affording Appellant the opportunity to confront the laboratory analysts whose findings served as the basis for the report?

For the following reasons, we answer the question in the negative and affirm the judgments of the circuit court.

BACKGROUND

After a family party on July 4, 2013, two of Appellant's grandchildren, Aadyn O. (age 2) and Aviana O. (age 1), were asleep in bed at Appellant's home in Baltimore. Early the next morning, Appellant awoke and found Aadyn to be unresponsive. At approximately the same time, Aviana was found suffering from severe lethargy and diminished awareness. Both children were taken to the hospital, where Aadyn was

[1] Appellant phrased the question as:

> "Was Ms. Reaves's constitutional right to confrontation violated when the trial court permitted the toxicologist to testify in place of the laboratory analysts; in admitting the toxicology report into evidence; and/or in failing to strike the testimony of the toxicologist and the toxicology report?"

pronounced dead. Aviana was successfully treated and released in stable condition, after it was discovered that she was suffering from methadone intoxication. When questioned by the police, Appellant admitted rubbing methadone on the children's gums to help them sleep.[2] Aadyn's death was later ruled a homicide, the cause of death being methadone intoxication.

At Appellant's trial, the State sought to introduce the testimony and autopsy report of Patricia Aronica, M.D., Assistant Medical Examiner in the Office of the Chief Medical Examiner for the State of Maryland, to render her expert opinion on the manner and cause of Aadyn's death. As part of her autopsy report, Dr. Aronica included a toxicology report that showed the levels of methadone in Aadyn's blood at the time of his death. This toxicology report also served as the basis for Dr. Aronica's ruling that the cause of Aadyn's death was methadone intoxication.

Prior to the admission of Dr. Aronica's testimony, it was revealed that Dr. Aronica did not physically administer the toxicology tests or author the toxicology report, despite the fact that her signature was on the report. Appellant objected to the admission of the toxicology report on these grounds, claiming that Dr. Aronica's testimony as to the findings contained in the toxicology report would violate Appellant's right to cross-examine her accusers, due to the fact that Dr. Aronica did not actually administer the toxicology tests directly or author the report.

[2] Appellant later recanted her confession and insisted that the children ingested the methadone accidently.

In an attempt to remedy this perceived problem, the State called as a witness the toxicologist, Rebecca Phipps, Ph.D., who was responsible for supervising all of the toxicology lab's work and authoring all of the lab's reports. Although Dr. Phipps also signed the toxicology report, it was later revealed that she neither conducted nor observed the toxicology tests themselves. Instead, Dr. Phipps relied on a number of lab technicians to physically place Aadyn's specimens in the lab instruments and conduct the individual tests, the results of which Dr. Phipps later reviewed and used as the basis for the toxicology report.

When the report was offered into evidence by the prosecution, Appellant renewed her objection, again arguing that its admission would violate the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. More specifically, Appellant argued that the Confrontation Clause required the presence of every individual who was responsible for each and every lab test that served as the basis for the toxicology report.

The trial court rejected this argument, stating:

> The argument that [Appellant's] making is losing sight of whether or not… [the technicians have] filed a report that the State is moving to submit. Not one of those people has – has presented a conclusion that is in any way a testimonial accusation against the Defendant. These are technicians under the supervision of Dr. Phipps. Dr. Phipps is the only person who has rendered an opinion about what, in fact, the actual levels were.
>
> That she took into consideration the results of tests performed by other people does not extend *Crawford* [*v. Washington*, 541 U.S. 36 (2004)] to that level. The Supreme Court has been debating and trying to refine *Crawford*, but it has never taken it out to this level.

The trial court admitted the toxicology report into evidence, after which Dr. Phipps was questioned at length by both the State and Appellant regarding the report's nature and conclusions.

DISCUSSION

Appellant argues that the toxicology report in question was "testimonial" and subject to the requirements of the Confrontation Clause because it was sufficiently formalized after being included in the autopsy report. Appellant further argues that the trial court erred in admitting the toxicology report because Appellant was denied the right to cross-examine the technicians whose findings served as the basis for the report.

The State contends that the Confrontation Clause does not apply, because the toxicology report was not "testimonial," and did not bear any indicia of solemnity or accuse Appellant of criminal wrongdoing. The State also argues that, even if the toxicology report were testimonial, the signatory toxicologist was an appropriate witness to sponsor the report's admission into evidence.

The issue presented in this case is whether the admission of certain evidence violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. Because this is a question of law, we apply a *de novo* standard of review. *See Langley v. State*, 421 Md. 560, 567 (2011) ("[W]hether certain statements admitted at trial were admitted in violation of . . . the Confrontation Clause . . . is a question of law, which we review under a non-deferential standard of review").

The Confrontation Clause of the Sixth Amendment to the United States Constitution states that "[i]n all prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. Amend. VI. The Supreme Court of the United States has interpreted the Confrontation Clause's use of the word "witnesses" to include both in-court and out-of-court statements. *See Crawford v. Washington*, 541 U.S. 36, 50-51 (2004) ("[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony"). Therefore, any testimonial statement, whether made in court or out of court, that is offered as evidence against a criminal defendant is subject to the Confrontation Clause. *Id.* at 59. If the defendant is denied the right to confront the statement's declarant, then the statement is inadmissible unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. *Id.*

Nevertheless, before the Confrontation Clause is implicated with respect to an out-of-court statement, a court must determine that the statement constitutes testimonial hearsay:

> [T]here are two limitations on the reach of the right to confront witnesses. First, the right only applies if a statement is testimonial; nontestimonial statements are governed by the applicable rules of evidence. Second, the Confrontation Clause only applies to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted.

Derr v. State (Derr II), 434 Md. 88, 107 (2013). If the statement in question is either non-testimonial or non-hearsay, then the admission of the statement does not violate the Confrontation Clause. *Id.*

In cases involving forensic reports, both the Supreme Court and the Court of Appeals have identified two characteristics, one of which must be present in order for the report to be considered testimonial: (1) the report must include an out-of-court statement having the primary purpose of accusing a defendant of criminal conduct; or (2) the report was formalized. *Williams v. Illinois*, ___ U.S. ___, ___, 132 S.Ct. 2221, 2242 (2012); *State v. Norton*, 443 Md. 517, 547-48 (2015); *Derr II*, 434 Md. at 114.

Although no bright-line rule has been established to determine when a forensic report is sufficiently "formalized," examples given by the Supreme Court include "affidavits, depositions, prior testimony, or statements made in formalized dialogue or a confession." *Derr II*, 434 Md. at 116 (quoting *Williams*, 132 S.Ct. at 2242 (plurality opinion)).

In *Derr II*, the defendant was convicted of multiple sexual offenses, based partly on the report of a forensic DNA examiner, who testified that serological evidence collected following a 1984 sexual assault matched DNA collected from the defendant in 2002 and 2004. 434 Md. at 188. The defendant objected to the admission of the serological evidence and two DNA tests as a violation of the Confrontation Clause. *Id*. The Court of Appeals held that the Clause did not apply because none of the tests were sufficiently formalized. *Id.* at 118-120. The Court explained that not one of the three tests contained any statements of certification, attestations of prescribed procedures, or indications that the persons preparing the reports were swearing to the reports' accuracy. *Id.*

Similarly, in *Cooper v. State*, 434 Md. 209 (2013) *cert. denied,* 134 S. Ct. 2723 (2014), the Court concluded that the report did not implicate the confrontation right because it was not sufficiently testimonial. The Court noted that, "[n]owhere on either page of the report . . . is there an indication that the results are sworn to or certified or that any person attests to the accuracy of the results," and "the [] report is not the result of any formalized police interrogation." 434 Md. at 236.

Most recently, in *State v. Norton*, the Court of Appeals affirmed this Court's conclusion that a forensic DNA report was testimonial because, in the words of the Court of Appeals, the report "was certified and was signed by the analyst who had performed the test, indicating that the analyst's results had been validated according to federal standards." 443 Md. 517, 549 (2015). Specifically, the report certified that DNA matched the defendant's DNA "within a reasonable degree of scientific certainty."[3] *Id.* However, the Court reaffirmed that laboratory reports similar to the DNA tests at issue in *Derr II*—i.e. reports containing "no statement regarding the accuracy of the procedures the analyst had used to reach the results and was created before a suspect had been identified in the investigation"—remained non-testimonial under *Williams v. Illinois*. *Id.* at 550.

[3] The certification included the phrase "within a reasonable degree of scientific certainty"—language required to be present in a DNA report identifying "a match between a defendant's profile with that of a perpetrator is key to the acceptance of the expert's testimony into evidence in Maryland." *Id.* at 548 (citing *Young v. State*, 388 Md. 99, 120 (2005)).

In *Malaska v. State*, this Court has had occasion to apply the *Williams* test, as articulated by the Court of Appeals. 216 Md. App. 492, 510 (2014), *cert. denied,* 439 Md. 696 (2014), *cert. denied,* 135 S. Ct. 1162 (2015). Malaska was convicted of voluntary manslaughter after shooting his neighbor in property dispute—a conviction based, in part, on evidence introduced by the State of the decedent's autopsy report and the testimony of an assistant medical examiner who supervised the autopsy. *Id.* at 502-03. On appeal, Malaska argued that his right to confrontation was violated when the trial court admitted the decedent's autopsy report into evidence because 1) the report was testimonial and therefore, its contents were subject to the Confrontation Clause, and 2) the assistant medical examiner was not the proper person to testify to the autopsy. *Id.* at 504-05.

We concluded that the autopsy report was testimonial because it bore suitable indicia of solemnity. The *Malaska* court highlighted the fact that the last page of the report contained the signatures of three medical examiners, including the Chief Medical Examiner for the State of Maryland, and found instructive several provisions of the Maryland Code that require a medical examiner to investigate a death occurring under certain circumstances and follow certain procedures during that investigation.[4] Other provisions of the statute emphasized the formalized nature of an autopsy report:

[4] Maryland Code (1982, 2009 Repl. Vol.), § 5-309(a)(1) of the Health–General Article ("HG") requires that "[a] medical examiner shall investigate the death of a human being if the death occurs: . . . (iv) Suddenly, if the deceased was in apparent good health (Continued…)

> [If the death was under suspicious circumstances,] "the police or sheriff immediately shall notify the medical examiner and State's Attorney for the county where the body is found and give the known facts concerning the time, place, manner, and circumstances of the death." HG § 5-309(b). "If the medical examiner who investigates a [§ 5–309(a)] death considers an autopsy necessary, the Chief Medical Examiner, a deputy chief medical examiner, an assistant medical examiner, or a pathologist fellow authorized by the Chief Medical Examiner shall perform the autopsy." HG § 5–310(b)(1). During the progress of the autopsy, "[t]he individual who performs the autopsy shall prepare detailed written findings" and, thereafter, shall file a copy of the report "in the office of the medical examiner for the county where the death occurred" and the original "in the office of the Chief Medical Examiner." HG § 5–310(d)(1). HG § 5–311(d)(2) states that, "a record of the Office of the Chief Medical Examiner or any deputy medical examiner, if made by the medical examiner or by anyone under the medical examiner's direct supervision or control ... is competent evidence in any court in this State of the matters and facts contained in it."

216 Md. App. at 510-11. Thus, after considering the legal obligations placed upon the medical examiner, the *Malaska* court held that the autopsy report was "sufficiently formalized to be 'testimonial' for purposes of the confrontation clause." *Id.* at 511.

Summarizing the cases discussed above, we note that for a report to be sufficiently formalized and thus, testimonial, it must contain an attestation that the report's "statements accurately reflect the . . . testing processes used or the results obtained," *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring), or the report must be a product of a process formalized by law, *see Malaska*, 216 Md. App. at 510-11. Notably, however, the fact that a report is signed by its authors does not, without more, warrant that the report is

(…continued)
or unattended by a physician; or (v) In any suspicious or unusual manner." *See also Malaska*, 216 Md. App. 492 at 510-11.

sufficiently formalized to be testimonial under the Sixth Amendment. *See Williams*, 132 S. Ct. at 2260.

In the present case, the toxicology report did not bear sufficient indicia of solemnity to be considered testimonial under the Sixth Amendment. Reaves relies on the Supreme Court's opinions in *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 308 (2009), and this Court's opinion in *Norton v. State*, 217 Md. App. 388 (2014), *aff'd*, 443 Md. 517 (2015); however, each of these cases is factually distinguishable from the present case because, in each of those cases, an analyst certified that the contents of the laboratory report were accurate.[5] This contrasts with the circumstances of the present case, where no part of the toxicologist's report contained words of testimonial significance. Unlike in *Bullcoming* and *Melendez-Diaz*, here the State did not introduce certificates of analysis to accompany the laboratory report. Similarly, in the report in *Norton*, the laboratory analyst certified that, "within a reasonable degree of scientific certainty," the report's contents were accurate. *Norton v. State*, 217 Md. App. at 404.

[5] In *Bullcoming* the report contained a "certificate of analyst," affirming that "[t]he seal of th[e] sample was received intact and broken in the laboratory," that "the statements in [the analyst's block of the report] are correct," and that he had "followed the procedures set out on the reverse of th[e] report." It also contained a "certificate of reviewer," which certified that the analyst was qualified to conduct the laboratory test and that the "established procedure" for handling and analyzing Bullcoming's sample "ha[d] been followed." 131 S. Ct. at 2710-11. In *Melendez-Diaz v. Massachusetts*, the prosecutor introduced three certificates of analysis "showing the results of the forensic analysis performed on the seized substances." Notably, "[t]he certificates were sworn to before a notary public by analysts at the State Laboratory Institute of the Massachusetts Department of Public Health, as required under Massachusetts law." 557 U.S. at 308.

Words of solemnity are absent from the toxicology report at issue in this case. The report indicated a concentration of .8 milligrams of methadone per liter of heart blood and a concentration of 1.2 milligrams of methadone per kilogram in the liver. As highlighted by Reaves, the report was signed by Dr. Phipps, chief toxicologist, and by Dr. Patricia Aronica, assistant medical examiner, both employed by Office of the Chief Medical Examiner of the State of Maryland. However, without some accompanying testimonial language, a laboratory report containing a signature "lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact," and thus is not testimonial for the purposes of the Confrontation Clause. *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring) ("Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained. . . . The report is signed by two 'reviewers,' but they neither purport to have performed the DNA testing nor certify the accuracy of those who did."); *see also Derr II*, 434 Md. at 119 (concluding that a report bearing the initials of two reviewers was not testimonial, without statements "attesting to their accuracy or that the analysts who prepared them followed any prescribed procedures").

Reaves mistakenly asserts that the report "was a signed document under oath in the form of an affidavit under notarial seal," and that "it was forwarded by the Office of the Chief Medical Examiner under cover of letter to the Office of the State's Attorney

pursuant to law."[6] In fact, both of these assertions relate to the autopsy report as a whole, not to the toxicology report itself. We have previously held that an autopsy report *is* testimonial expressly as a consequence of the Chief Medical Examiner's obligations under Maryland law. *Malaska*, 216 Md. App. at 510-11. We have not, however, held and do not hold today, that a laboratory report contained within autopsy report automatically assumes the testimonial significance of the report as a whole. In contrast to the role of the Chief Medical Examiner—who, in certain enumerated circumstances, is required under the Health - General Article to investigate a person's death and to prepare detailed written findings—the Maryland Code does not articulate any obligations for the Chief Toxicologist nor does it require a toxicology report to be performed in any particular fashion. *Cf. Malaska*, 216 Md. App. at 510-11. Thus, because the report in the present case does not contain testimonial language and because state law does not specify a formalized procedure for toxicologists, we conclude that the toxicology report is not testimonial. We, therefore, affirm the circuit court because Reaves's confrontation right was not violated.

Assuming, *arguendo*, that the toxicology report was testimonial, we would not reach a different result. The report's author, Dr. Phipps, was cross-examined at trial by Appellant. That Dr. Phipps did not conduct any of the individual lab tests that served as

[6] We note that the affidavit present in the record certifies only that the autopsy report introduced into evidence was a "true copy of the original record of" the victim's autopsy report, on file at the Office of the Chief Medical Examiner. Thus, it did not certify that the contents of the autopsy report itself were accurate, only that it was a true copy of the report.

the basis of her report does not change the fact that she reviewed the findings of the lab tests and generated the toxicology report, which she signed and testified to.

This Court held, in *Malaska v. State*, *supra*, that a supervising medical examiner who signed an autopsy report was an appropriate witness under the Confrontation Clause, despite the fact that his assistant performed the physical dissection of the body and also signed the report. *Id.* at 516. We reasoned that the supervising medical examiner was, in essence, the author of the report, regardless of whether or not he was responsible for each test or was the report's sole signatory, because he was responsible for the report's conclusions. *Id.* We explained that there were "no authorities . . . which suggest that, where a supervisor and an assistant are involved in their respective roles in performing a test or scientific procedure, or in contributing to a scientific report, the Sixth Amendment mandates that both be called to testify." *Id.* at 516-517.

Likewise, here, even if Dr. Phipps's toxicology report is testimonial and subject to the Confrontation Clause, Dr. Phipps's testimony and subsequent cross-examination satisfied Reaves's confrontation right. Because Dr. Phipps signed and was responsible for the toxicology report that was introduced into evidence, and because Dr. Phipps was subsequently cross-examined by Appellant at trial, the rights of Appellant under the Confrontation Clause were not violated. As the trial court pointed out, none of the laboratory analysts submitted a written report that could even remotely be deemed testimonial; they simply performed the on-site lab work that was used by Dr. Phipps to generate the conclusions contained in her toxicology report. Any knowledge or thought

on the part of Dr. Phipps regarding the individual tests that make up her report goes to credibility not admissibility.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.