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NOS. 40 EAP 2016 & 41 EAP 2016

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Designated as Appellee,

v.

DARNELL BROWN,

Designated as Appellant

BRIEF FOR CROSS-APPELLANT IN No. 40 EAP 2016 AND BRIEF FOR APPELLEE IN No. 41 EAP 2016

Cross-Appeal from the May 10, 2016 published decision of the Superior Court (Reargument denied July 13, 2016), affirming the judgment of sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, at CP-51-CR-0003322-2013

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TABLE OF CONTENTS

TABLE OF CITATIONS

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

STATEMENT OF JURISDICTION

This Court has jurisdiction under 42 Pa.C.S. § 724(a) (final orders of Superior Court reviewable by allowance of appeal). This Court granted the petitions for allowance of appeal on December 14, 2016.

ORDER IN QUESTION

The order in question is the Superior Court's May 10, 2016 ruling that autopsy reports are "testimonial" under the Confrontation Clause. *Commonwealth v. Brown,* 139 A.3d 208 (Pa. Super. 2016).

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Whether the admission of a forensic document implicates the Confrontation Clause is a question of law, for which the standard of review is de novo and the scope of review is plenary. *Commonwealth v. Yohe*, 79 A.3d 520, 530 (Pa. 2013).

STATEMENT OF THE QUESTIONS PRESENTED IN 40 EAP 2016

I. Did the Superior Court err when it rejected binding Confrontation Clause authority and held as a matter of first impression that autopsy reports are testimonial?

(Answered in the negative by the court below.)

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED IN 41 EAP 2016

II. Does the Confrontation Clause prohibit an expert witness from offering an independent opinion about the cause and manner of death based on his review of materials prepared by another doctor?

(Answered in the negative by the court below.)

III. Is defendant entitled to relief on his claim that an expert witness violated Pa.R.E. 703 when he testified to the information that formed the basis of his opinion, where he never raised that claim below and such testimony is required under Pa.R.E. 705?

(Answered in the negative by the court below.)

SUPPLEMENTAL STATEMENT OF THE CASE

For a forensic document to be testimonial, it must be created specifically for use in a criminal prosecution. Each year, the Philadelphia Medical Examiner's Office examines about 2,500 decedents. MEDICAL EXAMINER'S OFFICE PATHOLOGY UNIT, http://www.phila.gov/health/medicalexaminer/Pathology.html (last accessed May 16, 2017). Less than 300 of those are homicide victims. PHILADELPHIA POLICE DEPARTMENT CRIME MAPS AND STATS https://www.phillypolice.com/crime-maps-stats/ (last accessed May 16, 2017). Yet the Superior Court held that autopsy reports are testimonial under the Confrontation Clause. To arrive at this holding, the Court abandoned the well-established primary purpose test in favor of its own analysis, which was entirely divorced from relevant precedent. The lower court's holding was erroneous and should be reversed.

Facts and Procedural History

On December 9, 2012, defendant attended a party on the 2600 block of Stanley Street in Philadelphia armed with a revolver. He and the victim began to argue after defendant threw a tissue at the victim. To settle the dispute, defendant called for his gun, which he had placed on a nearby car tire. Codefendant Marcus Stokes retrieved the revolver and handed it to defendant. The victim's cousin attempted to diffuse the situation, but defendant fired four shots into the victim from close range, killing him (N.T. 11/4/2014, 105, 116–18, 121, 125).

Dr. Marlon Osbourne of the Philadelphia Medical Examiner's Office performed the victim's autopsy and prepared a report of his findings. At the time of trial, however, Dr. Osbourne was no longer employed by the Medical Examiner's office and was unavailable to testify. Instead, the Commonwealth called Dr. Albert Chu, who had reviewed Dr. Osbourne's report. Dr. Chu rendered an independent opinion that the cause of death was multiple gunshot wounds and the manner of death was homicide. The autopsy report prepared by Dr. Osbourne was also admitted into evidence (N.T. 11/5/2014, 9, 65, 130).

The jury convicted defendant of murder of the third degree and related offenses. On March 26, 2015, Judge O'Keefe sentenced him to an aggregate term of twenty-five to fifty years' imprisonment. Defendant appealed, alleging only that his Confrontation Clause rights were violated when the court admitted the autopsy report without Dr. Osbourne's testimony.

On May 10, 2016, the Superior Court, with two jurists joining in the majority opinion, affirmed defendant's conviction in a published opinion. *Commonwealth v. Brown,* 139 A.3d 208 (Pa. Super. 2016). The Honorable Judith Ference Olson, joined by the Honorable John T. Bender, held as a matter of first impression that autopsy reports are testimonial under the Confrontation Clause, and that admitting the report into evidence without testimony from Dr. Osbourne was error. The Court

also concluded that the error was harmless because Dr. Chu rendered his own independent opinion about the cause and manner of death.[1]

The Commonwealth's request for reargument was denied and both defendant and the Commonwealth sought *allocatur*. On December 14, 2016, this Court granted both petitions.

[1] The Honorable William H. Platt concurred without an opinion.

SUMMARY OF THE ARGUMENT

Autopsy reports are not testimonial for the purposes of the Confrontation Clause because they are not created for use in a criminal prosecution. The Superior Court's holding to the contrary was erroneously based on a test that significantly differed from the well-established primary purpose test used by this Court and the United States Supreme Court to determine if documents are testimonial. Here, a medical examiner who did not perform the autopsy reviewed data collected another medical examiner and rendered an independent opinion. Such testimony has never been held to violate the Confrontation Clause. Under the primary purpose test, autopsy reports are not testimonial because they are mandated by statute irrespective of any possible criminal prosecution. Accordingly, the Superior Court's holding should be reversed.

Even if this autopsy reports were testimonial, defendant would not be entitled to a new trial because the report's admission into evidence was harmless. Because the expert witness offered an independent opinion about the cause and manner of death—which was not at issue, obviously the victim was shot to death—the admission of the report was at most harmless error.

Finally, defendant's claim that the medical examiner's testimony violated Pa.R.E. 703 is waived. He did not object on that basis at trial, nor did he raise that issue in the Superior Court. Accordingly, he may not raise it for the first time now.

COMMONWEALTH'S ARGUMENT AS CROSS-APPELLANT IN No. 40 EAP 2016

I. The Superior Court's analysis for testimonial evidence departed from the well-established primary purpose test; under a correct application of that test, autopsy reports are not testimonial because they are required by statute and created irrespective of an impending criminal prosecution.

The Superior Court erroneously held that autopsy reports are testimonial. To reach that conclusion, it disregarded the "primary purpose" test which this Court and the United States Supreme Court use to determine whether evidence implicates the Confrontation Clause. Under the primary purpose test, forensic documents are not testimonial unless the primary purpose for their creation was their use in a criminal prosecution. The Superior Court rejected that test and instead held that a document is testimonial if it was "potentially relevant" to a criminal prosecution. This overbroad test has no precedential support.

Using the correct primary purpose analysis, autopsy reports are not testimonial. Medical examiners are statutorily required to perform autopsies to determine cause of death. Therefore, autopsy reports are created without regard to a possible criminal prosecution. The Superior Court's holding to the contrary should be reversed.

A. The Superior Court erred by using a relevance-based confrontation test of its own creation.

The Superior Court erred when it disregarded binding precedent and created its own test for determining if evidence is testimonial under the Confrontation Clause. The Confrontation Clause guarantees that a criminal defendant be afforded the opportunity to cross-examine those who "bear testimony" against him. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009). Evidence that is nontestimonial, however, is "exempted . . . from Confrontation Clause scrutiny altogether." *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

A forensic report is testimonial for the purposes of the Confrontation Clause only if was created specifically for use in a criminal prosecution under circumstances that would lead an objective observer reasonably to believe that the report would be available for use at a later criminal trial. *Melendez-Diaz*, 557 U.S. at 311. Neither this Court nor the United States Supreme Court has ever held that a forensic report was testimonial unless an objective observer would believe it would be potentially relevant to a criminal prosecution and it was *specifically created for that purpose*. *Id.*; *Bullcoming v. New Mexico*, 564 U.S. 647, 664 (2011); *Williams v. Illinois*, 132 S.Ct. 2221, 2242 (2012); *Commonwealth v. Yohe*, 79 A.3d 520, 555 (Pa. 2013). The Superior Court has removed the second half of this test.

In *Yohe*, this Court held that a toxicology report was testimonial because it "was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, and was plainly created for an evidentiary purpose." *Yohe*, 79 A.3d at 555 (internal quotations omitted). The toxicology report was created after a police officer pulled Yohe over for having a faulty license plate and brake lights. Yohe appeared intoxicated and the officer placed him under arrest. He then brought Yohe to a hospital where his blood was drawn and sent to a lab. The lab tested the blood and created a report that indicated Yohe's blood alcohol content ("BAC") was almost twice the legal limit. *Id.* at 533. Because the BAC report was created for use at trial and under circumstances which would lead a reasonable observer to believe that the statement would be available for use at a later trial, this Court held that that it was testimonial.

Yohe's Confrontation Clause analysis adopted the test used in *Melendez-Diaz* and *Bullcoming*. In both cases, the United States Supreme Court examined whether a forensic document was created for use in a criminal trial, and whether it was created under circumstances that would reasonably lead an objective observer to believe that it would be used at trial. In *Melendez-Diaz*, police arrested Melendez-Diaz on suspicion of trafficking cocaine. Officers seized multiple bags of suspected cocaine and submitted them to a state laboratory for analysis. *Id.* At trial, the state introduced into evidence the seized bags of cocaine as well as "certificates of

analysis" which showed that the recovered substance was cocaine. *Id.* Massachusetts law required that these certificates be created to prove that the substance was an illegal narcotic. *Melendez-Diaz* held that narcotic analysis affidavits were testimonial because the "*sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight of the analyzed substance,'" and the affidavits were created "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 331. Because the affidavits satisfied both prongs of the primary purpose test, they were testimonial under the Confrontation Clause.

Bullcoming likewise held that a forensic report was testimonial because it was both "created solely for an evidentiary purpose" and "made in aid of a police investigation." *Bullcoming*, 564 U.S. at 664. Bullcoming, like Yohe, was arrested on suspicion of driving under the influence of alcohol. *Id.* at 652. Police obtained a warrant to draw his blood and sent the sample, along with information related to Bullcoming's arrest, to a New Mexico Department of Health laboratory. *Id.* at 652–53. An analyst at the laboratory tested the blood sample, and determined that Bullcoming's BAC was in excess of the legal limit *Id.*

Bullcoming held that the BAC report was testimonial because it was "'inconvertibly [an] affirmation made for the purpose of establishing or proving some fact' in a criminal trial." *Id.* at 664 (quoting *Melendez-Diaz*, 557 U.S. at 310).

The Court reiterated that a document created "solely for an evidentiary purpose . . . ranks as testimonial," and held that Bullcoming's BAC report was materially indistinguishable from the narcotics report in *Melendez-Diaz*. *Bullcoming*, 564 U.S. at 664–65. Both documents were prepared at the request of law enforcement and were created only for use in a criminal trial. *Id.* at 664.

Justice Sotomayor's concurring opinion in *Bullcoming* was "of particular importance" because it "limit[ed] the reach of the Majority Opinion." *Yohe*, 79 A.3d at 550. In that concurrence, Justice Sotomayor emphasized that *Bullcoming*'s conclusion (that the forensic document there was testimonial) was limited to documents whose primary purpose was to create a record for trial. *Bullcoming*, 564 U.S. at 669 (Sotomayor, J., concurring) ("when the primary purpose of a statement is not to create a record for trial, the admissibility of the statement is the concern of state and federal rules of evidence, not the Confrontation Clause") (citations omitted). Justice Sotomayor wrote that the BAC report was testimonial "specifically because its 'primary purpose' is evidentiary," and that the holding of the case would likely have been different if the prosecution had suggested "an alternate purpose" or an "alternate *primary* purpose" for the creation of the report. *Id.* at 672 (emphasis in original).

Here, despite unambiguous guidance from this Court and the United States Supreme Court, the Superior Court decided that it was "immaterial that the autopsy

report was not created for the sole purpose of being used in court." *Commonwealth v. Brown*, 139 A.3d 208, 216 (Pa. Super. 2016). In so holding, the Superior Court created its own Confrontation Clause analysis, one entirely divorced from the test used in *Yohe, Bullcoming,* and *Melendez-Diaz.* Instead of determining whether the primary purpose of a medical examiner's report was use in a criminal prosecution, the court held that a forensic document is testimonial if it is "potentially relevant" to a criminal prosecution. *Id.* at 212:

> A document or statement is testimonial if its primary purpose is 'to establish or prove past events potentially relevant to later criminal prosecution.' A document or statement has such a primary purpose if it is created or given 'under circumstances which would lead an objective witness reasonably to believe that the [document or] statement would be available for use at a later trial[.]'

Brown, 139 A.3d at 212 (quoting *Yohe*, 79 A.3d at 531) (bracketed text and punctuation in original).

The Superior Court ostensibly quoted this test from *Yohe*—but in fact chopped this Court's test in half. *Yohe* held that a toxicology report was testimonial because it was created "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial, *and was plainly created for that purpose*." *Yohe*, 79 A.3d at 555 (citations omitted) (emphasis added). The Superior Court eliminated the italicized portion of the rule, deeming it "immaterial." *Brown*, 139 A.3d at 216.

The Superior Court's new test has no support in the law, and creates a far broader definition of testimonial evidence than put forth by this Court. In fact, the Superior Court's test would compel a different result in *Williams v. Illinois*. In that case, police submitted a semen sample recovered from a rape victim to Cellmark laboratories for DNA analysis. At trial, an expert witness reviewed the laboratory's results and testified that, in her opinion, the DNA recovered from the victim matched Williams. The Supreme Court held that this opinion did not implicate the Confrontation Clause because it was nontestimonial. 132 S.Ct. at 2242; *see Yohe*, 79 A.3d at 553 (the "narrowest grounds for the Court's affirmance of the lower court . . . is their conclusion that the Cellmark report was not testimonial. It is irrelevant for our purposes to determine the narrowest commonality of their respective legal rationales for reaching this result.").

Under the Superior Court's test, however, the DNA report in *Williams* must be considered testimonial because it is "potentially relevant" to a criminal prosecution. Virtually any, a DNA report is "*potentially* relevant" to a criminal prosecution, and so would be testimonial under the Superior Court's conception of the Confrontation Clause. But *Williams* held otherwise.

The Superior Court's holding that a forensic document is testimonial if it is "potentially relevant" to a criminal prosecution is incorrect and workable. The court should have utilized the established "primary purpose" analysis to determine

whether the autopsy report in this case was testimonial. Under a proper application of that test, autopsy reports are not testimonial because they are not created solely for use in a criminal prosecution, but for other reasons that are mandated by statute.

B. Autopsy reports are not testimonial because the primary purpose for their creation is not evidentiary.

Autopsy reports are not testimonial because the primary purpose for their creation is to fulfill a statutory obligation to determine the cause and manner of death, not to create evidence for a criminal trial. There are several statutes in Pennsylvania that govern medical examiners' investigations. 16 P.S. §§ 1237, 1238; 35 P.S. § 450.503. These statutes contemplate the use of autopsy reports in criminal prosecutions, but that is not the *sole or primary purpose* for which the autopsies are conducted. *Melendez-Diaz*, 557 U.S. at 308. Because the creation of these reports is mandated by statute, without regard for a possible criminal prosecution, autopsy reports are not testimonial under the primary purpose test.

By law, medical examiners are required to investigate deaths in eleven situations:[2]

[2] The Pennsylvania County Code, which describes the role of a Coroner, does not explicitly govern Philadelphia County, 16 P.S § 102, and the Philadelphia County Code abolished the role of Coroner and replaced it with a Medical Examiner. PHILADELPHIA, PA CODE § 2-102(1). However, the Philadelphia County Code transferred all duties previously performed by the Coroner to the Office of the Medical Examiner. *Id.* at § 2-102 at (2)-(4).

(1) sudden deaths not caused by readily recognizable disease, or wherein the cause of death cannot be properly certified by a physician on the basis of prior (recent) medical attendance;

(2) deaths occurring under suspicious circumstances, including those where alcohol, drugs or other toxic substances may have had a direct bearing on the outcome;

(3) deaths occurring as a result of violence or trauma, whether apparently homicidal, suicidal or accidental (including, but not limited to, those due to mechanical, thermal, chemical, electrical or radiational injury, drowning, cave-ins and subsidences);

(4) any death in which trauma, chemical injury, drug overdose or reaction to drugs or medication or medical treatment was a primary or secondary, direct or indirect, contributory, aggravating or precipitating cause of death;

(5) operative and peri-operative deaths in which the death is not readily explainable on the basis of prior disease;

(6) any death wherein the body is unidentified or unclaimed;

(7) deaths known or suspected as due to contagious disease and constituting a public hazard;

(8) deaths occurring in prison or a penal institution or while in the custody of the police;

(9) deaths of persons whose bodies are to be cremated, buried at sea or otherwise disposed of so as to be thereafter unavailable for examination;

(10) sudden infant death syndrome; and

(11) stillbirths.

16 P.S. § 1237(a)(1)-(11). If, in any of the above instances, the medical examiner is unable to determine cause and manner of death, an autopsy (or coroner's inquest) *is statutorily required*. *Id.* § 1238.

The statute states three reasons for the creation of autopsy reports. The *primary* purpose of the medical examiner's investigation is to "determine the cause of any such death." *Id.* § 1237(b). Secondarily, the medical examiner is to determine whether there is reason to believe the death may have resulted from criminal acts. *Id.* In those cases, the coroner "shall, so far as may be practicable, consult and advise with the district attorney." *Id.* § 1242. Finally, the medical examiner performs an investigation to determine the identity of the decedent and to notify his or her next of kin. *Id.* § 1237(c).

Similarly, under the Vital Statistics Law of 1953, coroners and medical examiners are required to perform an investigation in all cases:

> (1) where no physician, certified registered nurse practitioner or dentist who is a staff member of an approved hospital was in attendance during the last illness of the deceased or in the case of a fetal death where there was no attending physician or certified registered nurse practitioner or
>
> (2) where the physician, certified registered nurse practitioner or dentist who is a staff member of an approved hospital in attendance during the last illness of the deceased or the attending physician or certified registered nurse practitioner in the case of a fetal death is physically unable to supply the necessary data, or

> (3) where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes, or
>
> (4) where the physician, certified registered nurse practitioner, dentist or coroner who provided or would provide the medical certification is a member of the immediate family of the deceased.

35 P.S. § 450.503. In these cases, the coroner or medical examiner "shall make an immediate investigation and shall supply the necessary data, including the medical certification of death or fetal death" to the local registrar's office. *Id.*; *accord* 16 P.S. § 1244 ("The coroner shall issue a certificate of cause of death in all cases referred to him by the local registrar of vital statistics"). Like the provisions in the County Code, the Vital Statistics law requires a pathologically focused investigation whether or not a criminal investigation is possible.

The statutory reasons for creating autopsy reports—to determine cause of death, supply families with information, provide vital statistics, and assist with law enforcement—mirror those advanced by the National Association of Medical Examiners ("NAME"). NAME states that autopsies are performed to determine "the cause and manner of death" of a deceased individual. NATIONAL ASSOCIATION OF MEDICAL EXAMINERS: MISSION, VISION, VALUES (Feb. 14, 2017) (available at https://netforum.avectra.com/Public/DocumentGenerate.aspx?wbn_key=23167593-1174-4171-bb72-7206b5390cc6&SITE=NAME). Medical examiners conduct their investigations to provide information "critical to families, vital statistics, public

health, governmental agencies, law enforcement, the judicial systems, and the public." *Id.*

Importantly, medical examiners are not law enforcement agents—they are not detectives or prosecutors. Their medical and scientific determinations are made "parallel to and distinct from the law enforcement investigation" and "independent of external influences." *Id.* Given the importance of their independent status, medical examiners do not create autopsies solely for use in criminal prosecutions.

The statutory, statistical, and scientific reasons for creating autopsy reports make them substantially different from the narcotics analyses in *Melendez-Diaz* and the BAC reports in *Bullcoming* and *Yohe*. The state creates a narcotics analysis and analyzes an intoxicated driver's blood for one reason—use in a criminal prosecution. They are not created unless there is already a suspect. The same is not true for autopsy reports; they are created in any situation where cause of death cannot be determined. While a medical examiner would of course know that his or her autopsy report could be used in an eventual criminal prosecution, that is not dispositive of a testimonial forensic document. The documents must be created primarily for use in a prosecution.

Under Justice Sotomayor's concurrence in *Bullcoming*, autopsy reports are not testimonial. Justice Sotomayor stated that *Bullcoming*—which held a forensic report there was testimonial—was *not* a case in which "the State suggested an

alternate purpose, much less an alternate *primary* purpose" for the creation of the document. *Bullcoming*, 564 U.S. at 672 (Sotomayor, J., concurring) (emphasis in original). Here, the main, non-prosecutorial purpose for the creation of an autopsy report is apparent on the face of Pennsylvania's statutes. Even if the Commonwealth had no intention of bringing criminal charges, medical examiners and coroners would still be obliged to investigate the circumstances of a "violent" or "sudden" death. 16 P.S. § 1237(a). Autopsy reports, therefore, cannot be said to have been prepared for an evidentiary purpose, and thus are not testimonial under the primary purpose test.

Similarly, autopsy reports are not testimonial under the more narrowly-focused test used by the *Williams* plurality in the Opinion Announcing the Judgment of the Court ("OAJC"). There, Justice Alito limited the scope of testimonial forensic documents to those that are "made for the purposes of proving guilty of a *particular criminal defendant* at trial" under circumstances in which the authors of the document would know that their contents would be "incriminating." *Williams*, 132 S.Ct. at 2243 (Alito, J., OAJC) (emphasis added). Applying that test to the report which reflected the DNA sample collected from a rape victim, Justice Alito held that it was not testimonial because the primary purpose was "not to accuse [Williams] or to create evidence for use at trial." *Id.* Instead, the purpose of the DNA report was to "catch a dangerous rapist who was still at large, not to obtain evidence for use

against [Williams]." *Id.* Justice Alito noted that the specialists preparing the report could not "possibly know that the profile [they] produced would turn out to inculpate [Williams]." *Id.* Given that the report was neither accusatory nor created for use at a criminal trial, it was not a testimonial document.

Under Justice Alito's formulation of the primary purpose test, autopsy reports are not testimonial because they are not accusatory. The autopsy report in this case was not prepared to inculpate defendant. There is nothing in Dr. Osbourne's report to suggest that he was aware defendant was a suspect, nor did the autopsy link defendant to the homicide. The report simply includes Dr. Osbourne's descriptions of the gunshot wounds. Under the *Williams* OAJC, such a document is not testimonial.

Defendant's reliance on Second Circuit reasoning regarding expert testimony that conveys "testimonial statements of cooperating witnesses and confidential informants directly to the jury in the guise of an expert opinion" (Brief for Appellant, 16) (quoting *U.S. v. Mejia*, 545 F.3d 179, 198–99 (2d Cir. 2008)) is misplaced. Indeed, the Second Circuit held that autopsy reports are *not* testimonial. *U.S. v. James* 712 F.3d 79 (2d Cir. 2013) ("In short, the autopsy report was not testimonial because it was not prepared primarily to create a record for use at a criminal trial."). Defendant's citation to unrelated, a pre-*Melendez-Diaz* and *Bullcoming* case about a tangentially related issue is therefore unpersuasive.

Mejia's holding is quite narrow. The Second Circuit held that the expert's "reliance on and repetition of out-of-court testimonial statements made by individuals during the course of custodial interrogations violated [Mejia's] rights under the Confrontation Clause." *Mejia*, 545 F.3d 199. No testimony of the sort was elicited at defendant's trial. *Mejia*'s reasoning is also inapplicable because the expert witness there did not "appl[y] his expertise" to the underlying statements but simply summarized the results of the police investigation. *Id.* Here, Dr. Chu applied his own medical training in rendering an independent expert opinion as to the cause and manner of death (N.T. 11/5/2014, 130). *Mejia* is therefore inapposite.

In addition to the Second Circuit, the First Circuit and thirteen states have concluded that autopsy reports are not testimonial because they are not created solely for an evidentiary purpose. *See, e.g., U.S. v. De La Cruz*, 514 F.3d 121, 133 (1st Cir. 2008) ("An autopsy report is made in the ordinary course of business by a medical examiner who is required by law to memorialize what he or she saw and did during an autopsy. An autopsy report thus involves, in principal part, a careful and contemporaneous reporting of a series of steps taken and facts found by a medical examiner during an autopsy. Such a report is, we conclude, in the nature of a business record, and business records are expressly excluded from the reach of *Crawford.*");; *State v. Pesquiera*, 333 P.3d 797 (Ariz. Ct. App. 2014) ("Here, however, the autopsy report was not testimonial because it was not offered to establish or prove some

fact"); *People v. Dungo,* 286 P.3d 442 (Cal. 2012) ("In short, criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of Pina's body; it was only one of several purposes."); *People v. Leach*, 980 N.E. 2d 570 (Ill. 2012) ("We conclude that whichever definition of primary purpose is applied, the autopsy report in the present case was not testimonial because it was (1) not prepared for the primary purpose of accusing a targeted individual or (2) for the primary purpose of providing evidence in a criminal case."); *State v. Mitchell*, 4 A.3d 478 (Me. 2010)("it appears unlikely that the majority of the Supreme Court intended to include autopsy information underlying expert testimony in the same category as evidence 'prepared specifically for use at ... trial'"); *People v. Richardson*, 147 A.3d 577 (N.Y. App. Div. 2017) ("Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner. The report was not testimonial, since it "d[id] not link the commission of the crime to a particular person.") (citations and internal quotations omitted).[3]

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[3] Alabama, Delaware, Indiana, Louisiana, Ohio, South Carolina, Tennessee, and Mississippi have also concluded that autopsy reports are not testimonial. *Thompson v. State*, 153 So.3d 84 (Ala. Crim. App. 2012) (holding that an autopsy report is a business record, and therefore "nontestimonial in nature"); *State v. Benson*, 2015 WL 3539995 (Del. Super. Ct. 2015) (memorandum opinion) ("In this sense the case law has been quite consistent: autopsy reports are more like "business records" or "public records" or "medical records," and not at all like lab tests in drug or alcohol

Many of the states that have concluded otherwise did so prior to Justice Sotomayor's critical concurrence in *Bullcoming*. *See, e.g.*, *See State v. Locklear*, 681 S.E. 2d 293 (N.C. 2009); *Commonwealth v. Nardi*, 893 N.E. 1221 (Mass. 2008); *State v. Johnson*, 756 N.W. 883 (Minn. 2008); *State v. Davidson*, 242 S.W. 3d 409 (Mo. Ct. App. 2007). Other states have reached the erroneous conclusion that

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cases, whose sole purpose is to provide the evidence to convict the defendant. It is therefore abundantly clear to the Court that certification of the question raised would be an inappropriate use of judicial resources and set a dubious precedent in capital litigation."); *Ackerman v. State*, 51 N.E. 3d 171 (Ind. 2016) ("After examining Indiana statutes, the Coroner's Guidebook, the objective circumstances surrounding the autopsy, and the formality of the autopsy report, today we hold that the autopsy report admitted in the present case was non-testimonial. Thus, Ackerman's confrontation rights were not violated."); *State v. Francis*, 111 So. 3d 529 (La. Ct. App. 2013) ("The autopsy report in this case is likewise different from the documents intended to fall within the scope of the Confrontation Clause. The autopsy report had no bearing on the guilt *vel non* of Defendant. It simply identified the cause of death."); *State v. Maxwell*, 9 N.E. 3d 930 (Oh. 2014) ("We hold that an autopsy report that is neither prepared for the primary purpose of accusing a targeted individual nor prepared for the primary purpose of providing evidence in a criminal trial is nontestimonial, and its admission into evidence at trial under Evid.R. 803(6) as a business record does not violate a defendant's Sixth Amendment confrontation rights"); *State v. Cutro*, 618 S.E. 2d 890 (S.C. 2005) ("A public record, very much like a business record, is not testimonial and its admission similarly does not violate the defendant's confrontation rights. Moreover, appellant was able to cross-examine Dr. Ophoven regarding the possible inaccuracies in these autopsy reports and presented extensive expert testimony reinterpreting the significance of their findings. We find appellant's confrontation rights were not infringed."); *State v. Hutchison*, 482 S.W.3d 893 (Tenn. 2015) ("We hold, therefore, that the autopsy report is not testimonial under *Williams* and its admission into evidence at trial did not violate the Defendant's rights under the Confrontation Clause."); *Hull v. State*, 174 So. 3d 887 (Miss. Ct. App. 2015) (death certificate indicating that the decedent had been "struck in the head" was not testimonial).

autopsy reports were testimonial by committing the same error as the Superior Court—straying from the primary purpose test in favor of a relevance-based test. *See, e.g., Wood v. State*, 299 S.W. 3d 200, 210 (Tex. 2009) (holding that an autopsy report was testimonial where "it was reasonable to assume that [the medical examiner] understood that the report containing her findings and opinions would be used prosecutorially"); *Cuesta-Rodriguez v. State*, 241 P.3d 214 (Okla. Crim. App. 2010) (autopsy report was testimonial where it was "reasonable to assume that Dr. Jordan understood that the report containing his findings and opinions would be used in a criminal prosecution"). The decisions of those states are unpersuasive for the reasons already stated.

The primary purpose of an autopsy report is not to accuse an individual of a crime, nor is it created for the sole purpose of being used at a criminal trial. Autopsy reports are mandated by Pennsylvania statutes, and are created irrespective of possible prosecution. They are not testimonial documents under the primary purpose test. The Superior Court's erroneous holding, using a test of its own creation, should be reversed.

COMMONWEALTH'S ARGUMENT AS APPELLEE IN No. 41 EAP 2016

II. Even if autopsy reports were testimonial, defendant would not be entitled to a new trial. An expert may offer an independent opinion about the cause and manner of death, and admission of the autopsy report was at most harmless error.

Even if autopsy reports were testimonial, defendant's Confrontation Clause rights were not violated when the Court permitted an expert witness to offer an independent opinion about the cause and manner of the victim's death. Expert opinion testimony based on information provided by persons not in court has never been held to violate the Confrontation Clause. *See, e.g.*, *Commonwealth v. Baumhammers*, 960 A.2d 59, 95 n.28 (Pa. 2008) (holding, in the alternative, that expert opinion that relied on statements of a person who did not testify was not testimonial within the meaning of *Crawford* and not violative of Confrontation Clause). Accordingly, the Superior Court correctly concluded that Dr. Chu's independent conclusions regarding the cause and manner of the victim's death were admissible. Hence, the admission of Dr. Osbourne's autopsy report was cumulative, and therefore harmless.

An expert witness "who did not perform [an] autopsy may testify as to cause of death as long as the testifying expert is qualified and sufficiently informed." *Commonwealth v. Ali*, 10 A.3d 282, 306 (Pa. 2010) (citing *Commonwealth v. Mitchell*, 570 A.2d 532 (Pa. 1990). In *Mitchell*, like here, an expert witness testified

as to the cause and manner of the victim's death even though he did not prepare the autopsy report. *Id.* at 534. Like here, the medical examiner who prepared the report had moved out of state and was therefore unavailable to testify at trial trial. *Id.* Mitchell alleged that his counsel was ineffective for failing to object to this testimony, which he claimed violated the Confrontation Clause. *Id.*

In rejecting Mitchell's claim, this Court noted that "[e]xperts may offer testimony based on the reports of others." *Id.* With regard to homicide cases, "pathologists may base their opinions on facts from autopsy reports prepared by others." *Id.* This Court ultimately concluded that it was appropriate for the expert to testify about the nature of the decedent's wounds because the witness's opinions were based on those facts. *Id.* at 534 n.2.

Dr. Chu's expert testimony mirrored that in *Mitchell* and *Ali.* Dr. Chu testified that he reviewed the autopsy report prepared by Dr. Osbourne and photographs of the victim's body (N.T. 11/5/2014, 123). Based on that information, he offered an independent expert opinion that the cause of death was multiple gunshot wounds and the manner of death was homicide (*id.* at 130). Under *Ali* and *Mitchell*, this testimony was admissible.

Recent developments in Confrontation Clause jurisprudence confirm this Court's earlier holdings. An expert witness may offer an independent opinion based on work performed by others. *Yohe*, 79 A.3d at 541. In *Yohe*, neither of the lab

employees who handled the blood sample and tested its alcohol content testified at trial. Instead, the Commonwealth presented the testimony of a supervising toxicologist who reviewed the data from those tests, evaluated the appropriateness of the testing procedures, and certified the test results. *Yohe*, 79 A.3d at 523.

This Court held that the toxicologist who conducted the ultimate review of the data was the "analyst" the appellant was entitled to confront. Thus, there was no Confrontation Clause violation when the Commonwealth presented his testimony, rather than that of the lab employees who performed the tests. *Id.* at 539-42. Although the toxicologist relied on data from tests performed by other technicians, he was the one who "engaged in the critical comparative analysis" of the different tests performed by those individuals. *Id.* at 540. The fact that the expert "did not handle Appellant's blood sample, prepare portions for testing, place the prepared portions in the machines, or retrieve the portions after testing" did not bar his testimony. *Id.* Rather, "he was involved with reviewing all of the raw testing data [and] evaluating the results," and therefore was the "analyst" for the purposes of the Confrontation Clause. *Id.*

Like the expert in *Yohe*, Dr. Chu rendered an independent expert opinion that was based on information collected by a nontestifying witness. Dr. Chu specifically testified that he was not merely parroting Dr. Osbourne's opinion, but that it was his

own and held to a reasonable degree of scientific and medical certainty (*id.*).[4]

Bullcoming and *Melendez-Diaz* do not support defendant's assertion that an expert witness may not offer an independent conclusion based on analyses performed by non-testifying witnesses. In *Melendez-Diaz*, the state did not call any expert witnesses at trial. *Melendez-Diaz*, 557 U.S. at 308. The narcotics analyses were simply moved into evidence. *Id.* In *Bullcoming*, the toxicology report was also offered into evidence as a business record without a supporting, independent expert opinion. *Bullcoming*, 564 U.S. at 655–56. Justice Sotomayor's critical concurrence in *Bullcoming* explicitly noted that the Court would have faced "a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence." *Id.* at 673 (Sotomayor, J., concurring).

In *Williams*, the Court "confront[ed] that question" and the OAJC held that it has "long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks a first-hand knowledge of those facts." *Williams*, 132 S.Ct. at 2233. The lead opinion noted that testimony about facts upon which the expert relied is not offered for its truth, but to explain the information upon which the expert based an opinion. *Id.* at 2234–35.

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[4] Although Dr. Chu *also* testified that Dr. Osbourne held the same conclusion and the autopsy report was admitted into evidence, for reasons explained *infra* that error was harmless given Dr. Chu's opinion.

Indeed, Dr. Chu's on his lack of first-hand knowledge about the facts was a fruitful area for defense cross-examination (N.T. 11/5/2014, 131–32) that satisfied the Confrontation Clause. *See also Crawford*, 541 U.S. at 59–60 (holding that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted").

Given that Dr. Chu's independent expert opinion did not offend the Confrontation Clause, a passing reference to Dr. Osbourne's cumulative opinion about cause and manner of death and the admission of his autopsy report into evidence was at most harmless error. When the prosecutor asked Dr. Chu if he was merely repeating Dr. Osbourne's opinion, or if he held that opinion through his own medical experience and training, Dr. Chu responded that he himself held this opinion (N.T. 11/5/2014, 130).

The alleged error was therefore harmless. An error in admitting cumulative conclusions from a non-testifying medical examiner who performed an autopsy is harmless when there is substantial evidence supporting the testifying medical examiner's conclusion regarding cause of death. *Commonwealth v. Vandivner*, 962 A.2d 1170 (Pa. 2009).

In *Vandivner*, the medical examiner who testified at trial stated that he had spoken with another doctor who performed the autopsy of the decedent. He testified that he always spoke with the original doctor, and that the discussion was "analogous

to the hospital records he would get when someone dies in a hospital and provides information that he utilizes in his overall analysis." *Id.* at 1179–80. This Court held that any error that may have resulted from admitting this testimony was harmless in "light of substantial evidence buttressing [the medical examiner's] conclusions regarding the manner of death." *Id.* at 1180. Indeed, manner of death was "undisputed at [Vandivner's] trial," and four eyewitnesses testified to having seen Vandivner shoot Michelle in the head.

Here as in *Vandivner*, the cause and manner of death was not disputed.[5] An eyewitness stood directly next to defendant and watched as he shot his victim multiple times from point blank range (N.T. 11/4/2014, 121–22). Neither defendant nor his codefendant disputed the cause or manner of death at trial. Accordingly, any error that resulted from the admission cumulative evidence regarding cause and manner of death was harmless.

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[5] The Superior Court believed expert testimony was necessary to establish cause of death. *Brown*, 139 A.2d at 217 (quoting *Commonwealth v. Baker*, 445 A.2d 544, 548 n.2 (Pa. Super. 2016)). The footnote in *Baker*, however, is squarely contradicted by precedent from this Court. *Commonwealth v. Gilman*, 401 A.2d 335, 339 ("medical testimony is not required to prove the cause of death"); *Commonwealth v. Ilgenfritz*, 353 A.2d 387 (Pa. 1976) ("While it is true, of course, that the Commonwealth must prove causation, like every element of a crime, beyond a reasonable doubt, it does not follow that only medical testimony can prove causation")

III. Defendant's claim that Pa.R.E. 703 barred the expert's testimony is waived and meritless.

Defendant's claim that Pa.R.E. 703 does not permit an expert to offer an opinion based on non-hearsay professional reports is waived and, in any event, meritless. The claim is waived because defendant did not raise it in the trial court or in the Superior Court.

"It is a settled principle of appellate review, of course, that courts should not reach claims that were not raised below." *Commonwealth v. Colavita*, 993 A.2d 874, 891 (Pa. 2010); Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal"). Specifically, where defendant failed to preserve an objection to specific testimony at trial, he may not raise it on appeal. Pa.R.E. 103(a)(1). *Commonwealth v. Butts*, 434 A.2d 1216, 1219 (Pa. 1981) (holding that to preserve an issue for appeal, a defendant must "make a timely, specific objection at trial"); *accord Commonwealth v. Poplawski*, 130 A.2d 697, 798 (Pa. 2015).

Here, defendant only objected to the admission of Dr. Chu's testimony on Confrontation Clause grounds, not under Rule 703. During a break in the trial, counsel objected to Dr. Chu offering an independent expert opinion on the basis that it violated a recent United States Supreme Court opinion, presumably *Bullcoming*

(N.T. 11/5/2014, 100–01). He never asserted that Rule 703 barred the evidence. He waived the claim by failing to do so.

Nor did defendant raise Rule 703 in the Superior Court. He claimed only that the expert testimony was admitted in "violation of the holding in *Bullcoming v. New Mexico*" (Br. for Appellant in Superior Ct., 7). He did not cite Rule 703, nor did he make any argument concerning the admissibility of evidence under that rule. The Superior Court held that defendant had preserved *one issue* for appeal—whether the admission of the autopsy report violated the Confrontation Clause. *Brown*, 139 A.2d at 211–12, 220 ("Stokes' counsel objected to Dr. Chu's testimony based on the fact that it violated the Confrontation Clause. Appellant's counsel joined that objection . . . In sum, we conclude that Appellant preserved his *lone issue* for appeal.") (emphasis added). Because defendant did not raise this issue below, he should not be permitted to raise the claim for the first time here. *See Commonwealth v. Colavita*, 993 A.2d 874, 893 (Pa. 2010) (holding that Colavita's claim was waived where he failed to raise it in the trial court and in the Superior Court); *Weigand v. Wiegand*, 337 A.2d 256, 257–58 (Pa. 1975) (finding a claim waived where it was not raised "in the trial court or in [the parties'] briefs in the Superior Court"). [6]

[6] Defendant's failure to object on Rule 703 grounds makes a merits analysis particularly difficult because the Commonwealth was not asked to clarify whether Dr. Chu was basing his opinion on photographs of the victim or the autopsy report.

In any event, this claim is meritless. The Pennsylvania Rules of Evidence require expert witnesses to disclose the bases for their conclusions. Pa.R.E. 705. Such testimony is not hearsay: it is not offered to prove the truth of the underlying fact. Rather it is offered to explain how the expert arrived at his or her opinion. Pa.R.E. 703, *Comment*. The Confrontation Clause does not bar the use of even *testimonial* statements "for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)).

Dr. Chu's expert opinion was that the cause of death was gunshot wounds and the manner of death was homicide (N.T. 11/5/2014, 130). He based that conclusion on his review of photographs of the deceased victims, as well as the autopsy report (*id.* at 123). Dr. Chu's explanation of the wound trajectories was offered to show why he believed that the cause and manner of death was gunshot wounds and homicide, respectively. As the trial court explained, it was up to the members of jury to give this testimony the weight they believed it deserved (N.T. 11/6/2014, 81–83). The admission of testimony describing *how* and *why* the expert reached that

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As defendant concedes, if the autopsy photographs formed the basis of the expert's opinion, there would be no Confrontation Clause violation because these photographs are not testimonial. Additionally, defendant did not ask the trial court to instruct the jury that the basis testimony was not being offered for its truth, yet he claims the absence of such an instruction is an additional reason for relief. He waived these arguments by failing to raise them previously.

conclusion was mandated by Pennsylvania law and did not offend the Sixth Amendment. Pa.R.E. 703; Pa.R.E. 705; *Mitchell*, 570 A.2d at 534 ("pathologists may base their opinions on facts from autopsy reports prepared by others").

Even states that consider autopsy reports to be testimonial have either (1) permitted an independent medical examiner to offer an expert opinion about cause and manner of death, or (2) found that the error in admitting the expert testimony was harmless. *See Adams v. State*, 390 P.3d 1194 (Alaska Ct. App. 2017) ("[W]hen the government's expert is simply a conduit for an absent witness's analysis, [there is] a violation of the confrontation clause; but when the government's expert offers their own analysis, [even though] based in part on test data obtained from other people, ... the confrontation clause is satisfied.") (citations omitted); *People v. Meritt*, 2014 WL 4748090 (Colo. App. 2014) ("We conclude that the autopsy report prepared by Dr. Lear–Kaul and the information within it was testimonial evidence. Dr. Dobersen's testimony on direct examination was permissible expert opinion derived from his observations, and the fact that there may have been an identical analysis of the cause of death contained in the report was harmless beyond a reasonable doubt."); *Rosario v. State*, 175 So.3d 843 (Fla. Dist. Ct. App. 2015) ("We find that the admission of Dr. Gore's autopsy report was harmless beyond a reasonable doubt."); *Commonwealth v. Williams*, 60 N.E. 3d 335 (Mass. 2016) ("We have never stated that a substitute medical examiner may not testify to his or her

own opinions unless the medical examiner who performed the autopsy is shown to be unavailable, nor is there any rule of criminal procedure setting forth such a requirement."); *People v. Childs*, 810 N.W.2d 563 (Mich. 2012) ("the Court of Appeals correctly held that the admission of the report was not outcome determinative"); *State v. Johnson*, 756 N.W. 2d 883 (Minn. Ct. App. 2008) ("Thus, we conclude that the error in admitting the autopsy evidence did not prejudice Johnson's substantial rights and that a new trial is not required on that basis"); *State v. Sauerby*, 447 S.W. 3d 780 (Mo. Ct. App. 2014) ("The general conclusion reached in those cases is that the testifying [medical] examiner may properly testify to his or her *own* opinions and conclusions, even if relying upon the absent examiner's report, without violating the Confrontation Clause, so long as the testifying examiner does not discuss the absent examiner's opinions or conclusions, and the absent examiner's report is not admitted into evidence."); *State v. McLeod*, 66 A.2d 1221 (N.H. 2013) ("We agree with the proposition that the Confrontation Clause is not violated when an expert testifies regarding his or her independent judgment, even if that judgment is based upon inadmissible testimonial hearsay."). Defendant is not entitled to relief on this previously unraised ground.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court apply the primary purpose test, hold that autopsy reports are not testimonial under the Confrontation Clause, and affirm the judgment of sentence.

Respectfully submitted,

/s/ *Anthony J. Carissimi*

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APPENDIX A

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**CRIMINAL TRIAL DIVISION**
vs.	:	**1165 EDA 2015**
DARNELL BROWN	:	**CP-51-CR-0003322-2013**

FILED
JUL 15 2015
Criminal Appeals Unit
First Judicial District of PA

CP-51-CR-0003322-2013 Comm. v. Brown, Darnell
Opinion
7319724961

OPINION

O'KEEFE, J.

Defendant, Darnell Brown, appeals from his conviction of third degree murder and related offenses. Mr. Brown's sole complaint is that the Assistant Medical Examiner who testified at trial was not the doctor who performed the autopsy or authored the Medical Examiner's Report.

PROCEDURAL HISTORY:

Darnell Brown, was arrested on January 3, 2013, and charged with murder, conspiracy, violations of the Uniform Firearms Act and possessing an instrument of crime. The defendant was held for court on all charges after a preliminary hearing on March 12, 2013. Trial was held from November 3, 2014 through November 7, 2014, wherein the jury convicted Mr. Brown of third degree murder, carrying a firearm without a license, carrying a firearm in a public place,

and possessing the instrument of a crime, and not guilty of murder of the first degree and conspiracy. The charge of possession of firearm prohibited was not presented to the jury and subsequently *nolle prossed* by the prosecution. The co-defendant, Marcus Stokes, was acquitted of all charges. Mr. Brown was sentenced to twenty to forty years incarceration for the third degree murder, four to eight years consecutive incarceration for carrying a firearm without a license and a consecutive one to two years incarceration for carrying a firearm in public, to be followed by five years probation for possessing an instrument of a crime. (N.T. 3-26-15, p. 14). The defendant timely appealed.

STANDARD OF REVIEW:

The standard of review for a claim of inadmissibility of evidence is that the admission of evidence is within the sound discretion of the trial court and will not be reversed absent a showing that the trial court clearly abused its discretion. An abuse of discretion occurs when the law is overridden or misapplied, or the judgment exercised was manifestly unreasonable. *Commonwealth v. Handfield*, 34 A.3d 187, 207-08 (Pa.Super. 2011).

FACTS:

On the evening of December 9, 2012 there was a tattoo party on the 2600 block of North Stanley Street in Philadelphia. People were drinking, smoking, going in and out of houses and mingling on the street. Darnell Brown and Marcus Stokes arrived together. Around 11:30 p.m. defendant Brown was 'taking a leak' in the street when his revolver fell to the ground. Apparently the defendant was looking for trouble. (N.T. 11-4-14, p. 109-110). About forty-five

minutes later this defendant started an argument with Cory Morton over one of them throwing a tissue at the other. The verbal confrontation escalated when Brown punched Morton in the face. Brown then retrieved his revolver from the wheel well of a parked car. While Brown had his gun pointed at another individual, Morton quipped that the Brown 'won't do it, he ain't crazy'. In response, Brown took a step back and shot Morton five times, resulting in Cory Morton's untimely demise. (N.T. 11-4-14, pp. 109-122). Brown and Stokes ran away. (N.T. 11-4-14, pp. 120-124).

LEGAL DISCUSSION:

Defendant's sole claim of error is that this court committed reversible error in allowing Assistant Medical Examiner Albert Chu, M.D. to testify as to the cause and manner of death when he had not performed the autopsy, nor certified the Medical Examiner's Report. Appellant relies on *Bullcoming v. New Mexico*, 131 S.Ct. 2705, 180 L.Ed.2d, 610 (2011) for his claim. Such reliance is misplaced.

During the course of this trial, the prosecution presented the expert testimony of Albert Chu, M.D., an Assistant Medical Examiner with the city of Philadelphia. Dr. Chu testified that the autopsy of Cory Morton was performed by Dr. Marlon Osbourne another assistant medical examiner employed by the city. Dr. Chu testified that he reviewed the autopsy report, the autopsy photographs as well as the toxicology report and that he had formed his own opinion, to a reasonable degree of medical certainty, as to the cause and manner of death of the decedent. (N.T. 11-5-14, p. 122-123). Although that opinion was the same as that of Dr. Osbourne, the opinion expressed by Dr. Chu was Dr. Chu's opinion, and he held that opinion to a reasonable degree of medical certainty. (N.T. 11-5-14, p. 130). No objection was made to the witness's

expertise, testimony or opinion at any time during the trial. (N.T. 11-5-14, p. 118-132). The record reveals that both defense counsel stipulated to the expertise of Dr. Chu. (N.T. 11-5-14, p. 118).

It is well settled that failure to timely object to improper testimony constitutes a waiver of that claim of error. *Commonwealth v. Baumhammers*, 599 Pa. 1, 960 A.2d 59, 73 (2008), *Commonwealth v. Powell*, 598 Pa. 224, 956 A.2d 406, 423 (2008), *Commonwealth v. Adams*, 39 A.3d 310 (Pa.Super. 2012), *Commonwealth v. Molina*, 33 A.3d 51 (Pa.Super. 2011). In the case at bar, no objection was made to the testimony of Assistant Medical Examiner Chu, either prior to his testimony, during his testimony, nor at the conclusion of his testimony. As such, the defendant has waived this claim of error.

Assuming *arguendo* that the claim is not waived, the allegation fails on its merits as well.

In *Bullcoming v. New Mexico*, supra, the prosecution attempted to introduce a blood alcohol report prepared by Curtis Caylor, the forensic analyst assigned to test Bullcoming's blood sample, through the testimony of Gerasimos Razatos, a fellow analyst who had neither observed, nor reviewed Caylor's analysis. The state did not assert that Razatos had any independent opinion concerning the blood alcohol content. Mr. Razatos testified as to the standards used by the laboratory as well as the standard procedure mandated by the lab. The analyst expressed no opinion as to the results of the test in question and did no independent verification of the results, but instead, merely testified as to another analyst's findings. Further, Bullcoming's attorney objected to the testimony of Mr. Razatos in lieu of the performing analyst.

Such is not the case at hand. Although Dr. Chu did not perform the autopsy, he did review the autopsy, the autopsy photographs and toxicology reports, and more importantly, the opinions as to the cause and manner of death were his own opinions, expressed to a reasonable

degree of medical certainty. Dr. Chu testified as to the four gunshot wounds suffered by the decedent, including the bullet that entered the victim's right chest and went through the victim's heart, aorta, left lung and left rib. (N.T. 11-5-2014 p.127). Dr. Chu opined that as a result of his examination that the cause of death was multiple gunshot wounds and the manner of death homicide. Dr. Chu's actions and opinions were available for cross-examination. Dr. Chu was more than qualified to express his expert opinion that the four gunshot wounds suffered by the decedent were the cause of death and the manner homicide. It was Dr. Chu's opinion as to the cause and manner of death that were presented to the jury, and as such his unchallenged testimony was properly admitted before the jury.

Accordingly, the judgment of sentence of this court should be affirmed.

BY THE COURT:

J. SCOTT O'KEEFE, J.

DATE: July 15, 2015

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**CRIMINAL TRIAL DIVISION**
vs.	:	**1165 EDA 2015**
DARNELL BROWN	:	**CP-51-CR-0003322-2013**

Proof of Service

I hereby certify that I am on this day serving the foregoing Court's Opinion upon the person(s), and in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 114:

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Date: July 15, 2015

Allison O'Keefe

Allison M. O'Keefe, Law Clerk

APPENDIX B

2016 PA Super 98

COMMONWEALTH OF PENNSYLVANIA, Appellee v. DARNELL BROWN, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1165 EDA 2015

Appeal from the Judgment of Sentence of March 26, 2015
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0003322-2013

BEFORE: BENDER, P.J.E., OLSON AND PLATT,* JJ.

OPINION BY OLSON, J.: **FILED MAY 10, 2016**

Appellant, Darnell Brown, appeals from the judgment of sentence entered on March 26, 2015. In this case, we consider whether an autopsy report is testimonial for purposes of the Confrontation Clause. After careful consideration, we hold that the autopsy report in this case was testimonial and the trial court erred in admitting the autopsy report. The trial court also improperly admitted certain expert testimony relating to the opinions expressed in the autopsy report. We hold, however, that the trial court properly admitted expert testimony expressing independent conclusions based on the autopsy report. Accordingly, we conclude that the improper admission of evidence was harmless error and affirm the judgment of sentence.

* Retired Senior Judge Assigned to the Superior Court

The factual background and procedural history of this case are as follows. On the evening of December 9, 2012, Appellant and his co-defendant, Marcus Stokes ("Stokes"), arrived together at a tattoo party taking place on the 2600 block of North Stanley Street in Philadelphia. At approximately 11:30 p.m., Appellant's revolver fell to the ground after which the revolver was placed in the wheel well of a parked car. Approximately 45 minutes later, Appellant started an argument with Cory Morton ("Morton") over the throwing of a tissue. The verbal confrontation escalated to the point where Appellant punched Morton in the face. Appellant thereafter retrieved his revolver and pointed it at a third-party. Morton stated that Appellant would not shoot the third-party. Appellant then stepped back and shot Morton four times in the chest. Morton died as a result of the gunshot wounds.

On March 25, 2013, Appellant was charged via criminal information with murder,[1] possession of a firearm by a prohibited person,[2] carrying a firearm without a license,[3] carrying a firearm on the streets of Philadelphia,[4]

[1] 18 Pa.C.S.A. § 2502.

[2] 18 Pa.C.S.A. § 6105(a)(1).

[3] 18 Pa.C.S.A. § 6106(a)(1).

[4] 18 Pa.C.S.A. § 6108.

possessing an instrument of crime,[5] and conspiracy to commit murder.[6] A jury trial commenced on November 4, 2014 at which Appellant and co-defendant, Stokes, were tried together. At trial, Dr. Albert Chu, an assistant medical examiner,[7] testified as an expert witness as to the cause and manner of Morton's death. Dr. Chu neither assisted nor was present at Morton's autopsy, which was performed by Dr. Marlon Osbourne. Instead, Dr. Chu testified based upon his review of the autopsy report prepared by Dr. Osbourne and the accompanying autopsy photographs. The autopsy report was admitted into evidence at the conclusion of trial.[8]

On November 7, 2014, the jury found Appellant guilty of third-degree murder,[9] carrying a firearm without a license, carrying a firearm on the streets of Philadelphia, and possessing an instrument of crime. On March

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[5] 18 Pa.C.S.A. § 907(a).

[6] 18 Pa.C.S.A. §§ 903(c); 2502.

[7] Philadelphia abolished the position of coroner and replaced it with a medical examiner. Phila. Code § 2-102. The medical examiner in Philadelphia has the same powers and duties as do coroners in other counties of the Commonwealth. ***Id.*** Throughout this opinion, we refer to "medical examiner;" however, this term is meant to encompass coroners in those counties that retain that office.

[8] The autopsy report was never sent back with the jury. Instead, the parties and the trial court agreed not to initially send any exhibits back with the jury. The parties and trial court agreed to litigate the admissibility of any exhibits if the jury requested them. ***See*** N.T., 11/6/14, at 8.

[9] 18 Pa.C.S.A. § 2502(c).

26, 2015, the trial court sentenced Appellant to an aggregate term of 25 to 50 years' imprisonment. This timely appeal followed.[10]

Appellant presents one issue for our review:

> Did the [trial court] err when, over objection, it ruled that [Dr. Chu] could testify as to [the] cause and manner of [Morton's] death when [Dr. Chu] took no part in the original autopsy?

Appellant's Brief at 3.

In his lone issue on appeal, Appellant argues that the trial court erred by permitting Dr. Chu to testify as to Morton's cause and manner of death. Specifically, Appellant argues that the admission of Dr. Chu's testimony violated the Confrontation Clause of the Sixth Amendment to the United States Constitution as incorporated by the Fourteenth Amendment.[11] Whether Appellant's confrontation rights were violated is a pure question of law; therefore, our standard of review is *de novo* and our scope of review is

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[10] On April 23, 2015, the trial court ordered Appellant to file a concise statement of errors complained of on appeal ("concise statement"). ***See*** Pa.R.A.P. 1925(b). On June 29, 2015, Appellant filed his concise statement. On July 15, 2015, the trial court issued its Rule 1925(a) opinion. Appellant's lone issue on appeal was included in his concise statement.

[11] "Although Appellant has not premised his argument on Article I, Section 9 of the Pennsylvania Constitution, it similarly provides: 'In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him. . . .'" ***Commonwealth v. Yohe***, 79 A.3d 520, 531 n.10 (Pa. 2013), *cert denied*, 134 S.Ct. 2662 (2014) (ellipses in original).

plenary.[12] ***Commonwealth v. Yohe***, 79 A.3d 520, 530 (Pa. 2013), *cert denied*, 134 S.Ct. 2662 (2014).

As a preliminary matter, the trial court found this issue waived based upon Appellant's alleged failure to timely object to Dr. Chu's testimony. ***See*** Trial Court Opinion, 7/15/15, at 3-4. At trial, however, Stokes' counsel objected to Dr. Chu's testimony based on the fact that it violated the Confrontation Clause. ***See*** N.T., 11/5/14, at 100-101. Appellant's counsel joined in that objection. ***Id.*** at 101. Thus, Appellant properly preserved this issue by objecting to Dr. Chu's testimony before the doctor testified at trial.[13] ***See*** Pa.R.Evid. 103(b) ("Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

Turning to the merits of Appellant's lone issue, the Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. Amend. VI. This protection has been incorporated into the Fourteenth Amendment and thus is applicable in state

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[12] Although the admission of expert testimony is subject to an abuse of discretion standard of review, ***Commonwealth v. Watson***, 945 A.2d 174, 176 (Pa. Super. 2008) (citation omitted), an error of law constitutes an abuse of discretion. ***Nat'l Cas. Co. v. Kinney***, 90 A.3d 747, 753 (Pa. Super. 2014) (citation omitted). Thus, we ultimately employ a *de novo* standard of review.

[13] Although not binding on this Court, the trial court acknowledged at trial that the issue was "preserved for the record." N.T., 11/5/14, at 101.

court prosecutions. ***Pointer v. Texas***, 380 U.S. 400, 406-407 (1965). The Confrontation Clause, "applies to witnesses against the accused—in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact." ***Crawford v. Washington***, 541 U.S. 36, 51 (2004) (internal alteration, quotation marks, and citations omitted).

In order to determine if a document or statement created out-of-court is testimonial in nature, our Supreme Court looks at the primary purpose of the document or statement. ***Yohe***, 79 A.3d at 531-532 (citations omitted). A document or statement is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." ***Id.*** at 531. (citation omitted). A document or statement has such a primary purpose if it is created or given "under circumstances which would lead an objective witness reasonably to believe that the [document or] statement would be available for use at a later trial[.]" ***Id.*** (citation omitted). If a document or statement is testimonial, then the witness who prepared it must testify at trial, unless he or she is unavailable and the defendant had a prior opportunity for cross-examination. ***Michigan v. Bryant***, 562 U.S. 344, 354 (2011) ("[F]or testimonial evidence to be admissible, the Sixth Amendment demands what the common law required: unavailability [of a witness] and a prior opportunity for cross-examination." (internal quotation marks and citation omitted)).

In this case, the fact at issue was whether Morton died from the four gunshot wounds he sustained. The autopsy report admitted into evidence addressed this fact, *i.e.*, it listed Morton's cause of death as being multiple gunshot wounds and the manner of death as homicide. Thus, the autopsy report established past events that were potentially relevant to later criminal proceedings, and thus, was testimonial. Furthermore, an objective witness who prepared an autopsy report on an individual who sustained four gunshot wounds to the chest should reasonably believe that the report would be made available for use at a later trial.

Our conclusion finds support in the statutory scheme governing medical examiners. In Pennsylvania, the medical examiner must issue a certificate attesting to an individual's cause of death "where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes[.]" 35 P.S. § 450.503. This is almost always accomplished through performing an autopsy. Although the medical examiner is independent, "[i]n the exercise of his duties as contained in this subdivision, the [medical examiner] shall, so far as may be practicable, consult and advise with the district attorney." 16 P.S. § 1242. Although not all autopsies in Pennsylvania are used in court proceedings, the statutory framework contemplates that the autopsy report will be used in a criminal trial when the circumstances suggest that the death was sudden, violent or suspicious or was the result of other than

natural causes. In this case, the circumstances surrounding Morton's death suggest that his death was sudden, violent and suspicious and not the result of natural causes. A relatively young male died in the middle of the street after being shot multiple times. As such, based upon the statutory framework in Pennsylvania and the circumstances surrounding Morton's death, it is evident that the autopsy report in this case was testimonial in nature.

Several state and federal courts that have recently considered the issue have likewise held that autopsy reports are testimonial. ***E.g.***, ***United States v. Ignasiak***, 667 F.3d 1217, 1232 (11th Cir. 2012); ***West Virginia v. Kennedy***, 735 S.E.2d 905, 917-918 (W.Va. 2012); ***United States v. Moore***, 651 F.3d 30, 69–74 (D.C. Cir. 2011) (*per curiam*), *aff'd in part sub nom.*, ***Smith v. United States***, 133 S.Ct. 714 (2013); ***Cuesta–Rodriguez v. Oklahoma***, 241 P.3d 214, 228 (Okla. Crim. App. 2010); ***North Carolina v. Locklear***, 681 S.E.2d 293, 305 (N.C. 2009); ***Wood v. Texas***, 299 S.W.3d 200, 209–210 (Tex. Crim. App. 2009); ***Massachusetts v. Nardi***, 893 N.E.2d 1221, 1233 (Mass. 2008).

In addition to the reasons set forth above regarding the circumstances surrounding Morton's death and the statutory framework in Pennsylvania, we find persuasive one of the Eleventh Circuit's rationales for concluding that autopsy reports are testimonial in nature. As the Eleventh Circuit Court of Appeals stated, "[m]edical examiners are not mere scriveners reporting

machine generated raw-data. . . . [T]he observational data and conclusions contained in the autopsy reports are the product of the skill, methodology, and judgment of the highly trained examiners who actually performed the autopsy." ***Ignasiak***, 667 F.3d at 1232 (internal quotation marks and citation omitted). The Supreme Judicial Court of Massachusetts relied upon a similar rationale in concluding that an autopsy report was testimonial. The court emphasized how most portions of an autopsy report involve judgments and decisions made by the medical examiner performing the autopsy. ***Nardi***, 893 N.E.2d at 1232-1233. As such, "there is little reason to believe that confrontation will be useless in testing medical examiners'[] honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts." ***Ignasiak***, 667 F.3d at 1233 (internal alteration omitted).

The Commonwealth contends that the autopsy report in this case was nontestimonial because it was non-accusatorial. This contention appears to rely on Justice Alito's opinion announcing the judgment of the court in ***Williams v. Illinois***, 132 S.Ct. 2221 (2012). In ***Williams***, a splintered United States Supreme Court held that a DNA report used to compare with a known subject's DNA profile was nontestimonial. In his opinion, Justice Alito stated that the forensic report at issue in ***Williams*** was nontestimonial because it did not target a specific individual, *i.e.*, the defendant in that case. ***Id.*** at 2243. Five justices, however, rejected Justice Alito's rationale

and instead found that a forensic report need not accuse a particular individual in order to be testimonial in nature. ***Id.*** at 2262 (Thomas, J. concurring) (Justice Alito's "test lacks any grounding in constitutional text, in history, or in logic."); ***id.*** at 2273 (Kagan, J. dissenting) (Justice Alito's test "has no basis in our precedents. We have previously asked whether a statement was made for the primary purpose of establishing past events potentially relevant to later criminal prosecution—in other words, for the purpose of providing evidence."). As a majority of the Court in ***Williams*** rejected the argument being made by the Commonwealth in this case, the Commonwealth's argument based upon Justice Alito's test in ***Williams*** is without merit.

The Commonwealth next argues that autopsy reports are nontestimonial because the medical examiner is required to conduct autopsies in a variety of situations, most of which do not ultimately lead to criminal prosecutions. ***See*** Phila. Code § 2-102; 16 P.S. § 1237. The Commonwealth notes that, in Philadelphia County, approximately 14% of autopsies relate to homicides while the remaining 86% of autopsies are done for some other reason, *e.g.*, the individual will be buried at sea. ***See*** Commonwealth's Brief at 9, *citing* Medical Examiner's Office Pathology Unit (available at http://www.phila.gov/health/medicalexaminer/Pathology.html, last accessed Dec. 11, 2015).

We reject this argument for several reasons. First, in ***Yohe*** our Supreme Court held that whether a document or statement is testimonial depends upon its primary purpose. ***Yohe***, 79 A.3d at 531-532 (citations omitted). Under Pennsylvania law, "where the circumstances suggest that the death was sudden or violent or suspicious in nature or was the result of other than natural causes" the medical examiner must typically perform an autopsy. ***See*** 35 P.S. § 450.503. That is what occurred in this case. Thus, under the particular circumstances of this case, it is evident that the primary purpose of the autopsy was not statistical. Instead, the primary purpose of the autopsy report in this case was to prove that Morton died of multiple gunshot wounds and that his death was the result of a homicide.

As we do today, most courts that considered arguments similar to those advanced by the Commonwealth examined the structure of state laws regarding medical examiners and autopsies to determine whether the primary purpose of an autopsy report is to prove a fact for use at trial. We find persuasive the reasoning used by the Supreme Court of West Virginia in ***Kennedy*** in rejecting the Commonwealth's contention. Like in Pennsylvania, medical examiners in West Virginia are independent. ***See Kennedy***, 735 S.E.2d at 917. Nonetheless, in West Virginia the use of autopsies in judicial proceedings is contemplated. ***See id.*** The Supreme Court of West Virginia relied upon the Eleventh Circuit's decision in ***Ignasiak*** in reaching its conclusion that autopsy reports are testimonial. In ***Ignasiak***,

the Eleventh Circuit held that "even though not all Florida autopsy reports will be used in criminal trials, the reports in this case are testimonial and subject to the Confrontation Clause." ***Ignasiak***, 667 F.3d at 1232.

The United States Court of Appeals for the District of Columbia Circuit adopted similar rationale in finding autopsy reports testimonial. In explaining why the autopsy reports were testimonial, the court stated:

> the autopsy reports were formalized in signed documents titled reports . . . . [C]ombined with the fact that each autopsy found the manner of death to be a homicide caused by gunshot wounds, circumstances [existed] which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Moore, 651 F.3d at 73 (internal quotation marks and citation omitted).

The Court of Criminal Appeals of Oklahoma likewise concluded that an autopsy report is testimonial based upon a similar statutory framework and the nature of the death. That court concluded that "a medical examiner's words recorded in an autopsy report involving a violent or suspicious death could constitute statements that the medical examiner should reasonably expect to be used in a criminal prosecution and therefore under the ***Crawford*** and ***Melendez-Diaz [v. Massachusetts***, 557 U.S. 305 (2009)] framework would be testimonial for Sixth Amendment confrontation purposes." ***Cuesta-Rodriguez***, 241 P.3d at 228.

The Court of Appeals of Texas also looked at the structure of state law and the circumstances surrounding the death when determining an autopsy report was testimonial. Specifically, the court concluded that "the

circumstances surrounding [the victim's] death warranted the police in the suspicion that his death was a homicide . . . . Under these circumstances, it is reasonable to assume that [the medical examiner] understood that the report containing her findings and opinions would be used prosecutorially." ***Wood***, 299 S.W.3d at 209-210.

All of these courts found it irrelevant that not all autopsy reports are used in criminal prosecutions and that a certain (high) percentage of autopsies are done for other reasons. Instead, they found the fact that the statutory frameworks contemplate using autopsy reports in criminal prosecutions compelling. As noted above, we hold today that the statutory framework in Pennsylvania contemplates using autopsies in criminal proceedings.

We acknowledge that there is a sharp split in authority on whether autopsy reports are testimonial. Indeed, the Commonwealth directs our attention to several state and federal courts that have held that autopsy reports are nontestimonial. ***E.g.***, ***Tennessee v. Hutchison***, 2016 WL 531266, *16 (Tenn. Feb. 5, 2016); ***Ohio v. Maxwell***, 9 N.E.3d 930, 949-952 (Ohio 2014); ***Arizona v. Medina***, 306 P.3d 48, 63 (Ariz. 2013); ***United States v. James***, 712 F.3d 79, 97-99 (2d Cir. 2013); ***Illinois v. Leach***, 980 N.E.2d 570, 592 (Ill. 2012); ***California v. Dungo***, 286 P.3d 442, 450 (Cal. 2012).

The Supreme Court of Ohio adopted the rationale advanced by the Commonwealth in this case, *i.e.*, that because autopsy reports have multiple uses, they categorically cannot be considered testimonial in nature. The court specifically held that because autopsy reports are not usually created for use in criminal prosecutions, they do not have the primary purpose of being used as a substitute for out-of-court testimony. ***Maxwell***, 9 N.E.3d at 950-952. The Supreme Court of Illinois employed a similar rationale in finding autopsy reports are nontestimonial. The court stated that "while it is true that an autopsy report might eventually be used in litigation of some sort, either civil or criminal, these reports are not usually prepared for the sole purpose of litigation." ***Leach***, 980 N.E.2d at 592.[14] The Second Circuit Court of Appeals also adopted a rationale similar to that advanced by the Commonwealth. ***See James***, 712 F.3d at 97-99.[15]

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[14] The court in ***Leach*** also argued that it was impracticable to require medical examiners to testify regarding autopsy reports. ***Leach***, 980 N.E.2d at 592. This argument has been soundly rejected by the Supreme Court of the United States. ***Melendez-Diaz***, 557 U.S. at 325 ("The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience."). Thus, although forcing medical examiners to testify regarding the findings of an autopsy report may be costly, that does not exempt autopsy reports from the Confrontation Clause.

[15] As we shall discuss ***infra***, we reject the conclusions reached in this line of authority. In addition, ***James*** is distinguishable from the case *sub judice*. In ***James***, the Second Circuit noted that the medical examiner did not originally believe a homicide occurred when conducting the autopsy. *(Footnote Continued Next Page)*

We respectfully disagree with the rationale endorsed by these courts and advanced by the Commonwealth. Five members of the Supreme Court of the United States concluded that a similar rationale by Justice Alito in ***Williams*** was flawed. As Justice Kagan explained, the primary purpose test asks whether a statement "was made for the primary purpose of establishing past events **potentially** relevant to later criminal prosecution." ***Williams***, 132 S.Ct. at 2273 (Kagan, J. dissenting) (emphasis added); ***see also id.*** at 2262 (Thomas, J. concurring). As the Supreme Court of Ohio recognized, the primary purpose of an autopsy is to establish a fact, *i.e.*, the cause of death. This fact is certainly potentially relevant to later criminal prosecutions. It is immaterial that the autopsy was not created for the sole purpose of being used in court.

We also decline to follow the reasoning adopted by several courts that have held that autopsy reports are not sufficiently solemn to meet the test set forth by Justice Thomas in ***Williams***. ***See Hutchison***, 2016 WL 531266 at *15; ***Medina***, 306 P.3d at 64; ***Dungo***, 286 P.3d at 449-450. In his concurring opinion in ***Williams***, Justice Thomas concluded that the DNA report at issue did not violate the Confrontation Clause because it "lacked

(Footnote Continued) ———————————

James, 712 F.3d at 99. This indicates that the Second Circuit may reach a different conclusion if presented with a case where the autopsy was done because the medical examiner suspected homicide. In the case at bar, it is evident that the autopsy was performed because the medical examiner believed that a homicide was committed.

the requisite 'formality and solemnity' to be considered 'testimonial' for purposes of the Confrontation Clause." ***Williams***, 132 S.Ct. at 2255, *quoting* ***Bryant***, 131 S.Ct. at 1167 (Thomas, J. concurring). We find this rationale unpersuasive for two reasons. First, in ***Yohe*** our Supreme Court did not employ Justice Thomas' solemnity test. Instead, our Supreme Court focused on the primary purpose of the evidence, an approach closer to that of Justice Kagan than that of Justice Thomas. ***See Yohe***, 79 A.3d 537-538. Second, as noted above, under Pennsylvania law the medical examiner is required to certify the findings of the autopsy report. ***See*** 16 P.S. § 1244. This is sufficiently solemn to be considered testimonial even under Justice Thomas' test.

Thus, we hold that an autopsy report that is prepared because of a sudden, violent, or suspicious death or a death that is the result of other than natural causes, is testimonial. Such an autopsy report is prepared to prove a fact, *i.e.*, the victim's cause and manner of death, that an objective observer would reasonably believe could later be used in a criminal prosecution. As such autopsy reports are testimonial and the author of the autopsy report is required to testify at trial in order to satisfy the Confrontation Clause.[16] In this case, Dr. Osbourne did not testify and

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[16] Our holding today is consistent with our Supreme Court's pre-***Crawford*** jurisprudence. In ***Commonwealth v. McCloud***, 322 A.2d 653 (Pa. 1974), *abrogated on other grounds*, ***Commonwealth v. McGrogan***, 568 A.2d 924 (Pa. 1990), our Supreme Court held "that in a homicide prosecution,
(Footnote Continued Next Page)

Appellant did not have a chance to cross-examine him prior to trial. Accordingly, Appellant's Confrontation Clause rights were violated by the admission of the autopsy report in this case.

Having determined that the autopsy report was testimonial, we turn to the Commonwealth's contention that Dr. Chu's testimony was independently admissible. Approximately one week prior to trial, Dr. Chu, who testified as an expert with no challenge to his qualifications, reviewed Dr. Osborne's autopsy report as well as photographs taken during the autopsy. N.T., 11/5/14, at 123, 131-132. Based upon this review of the autopsy report and autopsy photographs, the Commonwealth asked Dr. Chu about the cause and manner of Morton's death. The Commonwealth contends that this testimony was admissible as Dr. Chu proffered his own independent conclusions regarding the cause and manner of Morton's death. Appellant, on the other hand, contends that Dr. Chu merely served as a surrogate for Dr. Osbourne and, therefore, his testimony violated Appellant's Confrontation Clause rights.

The reason that Dr. Chu's expert testimony was critical to the Commonwealth's case is because this Court has held that, although non-expert testimony "may be sufficient to establish cause of death by a

(Footnote Continued) ———————————

evidentiary use, as a business records exception to the hearsay rule, of an autopsy report in proving legal causation is impermissible unless the accused is afforded the opportunity to confront and cross-examine the medical examiner who performed the autopsy." ***McCloud***, 322 A.2d at 656-657.

preponderance of the evidence, it does not satisfy the more stringent standard of criminal trials." ***Commonwealth v. Baker***, 445 A.2d 544, 548 n.2 (Pa. Super. 1982). Thus, in order to prove all the elements of third-degree murder, *inter alia*, that Morton's death was caused by gunshot wounds, expert testimony was required.[17] As Dr. Chu was the only expert called regarding cause of death, we must examine whether he provided sufficient admissible evidence to prove Morton died as a result of gunshot wounds.[18]

In order to understand the background of this issue, it is necessary to review Justice Sotomayor's concurring opinion in ***Bullcoming v. New Mexico***, 131 S.Ct. 2705 (2011).[19] In ***Bullcoming***, the defendant was charged with aggravated driving while under the influence of alcohol. At

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[17] The expert testimony need not be offered by a medical doctor. For example, this Court has found sufficient a lay coroner's expert testimony regarding the cause of death. ***Commonwealth v. Smith***, 808 A.2d 215, 230 (Pa. Super. 2002).

[18] On the other hand, "a conclusion upon the question whether a death from external cause or violence was accidental, suicidal, or homicidal, may ordinarily be determined by a jury without the assistance of expert witnesses." ***Smith***, 808 A.2d at 229 (internal quotation marks and citation omitted). Thus, no expert testimony was necessary to prove the manner of Morton's death.

[19] The Commonwealth states that "***Bullcoming*** is a plurality decision[.]" Commonwealth's Brief at 11 n.3. It appears that the Commonwealth meant to state that ***Williams*** was a plurality opinion. Nonetheless, Justice Ginsburg's opinion in ***Bullcoming*** was joined by four other justices except as to part IV and footnote 6. ***See Bullcoming***, 131 S.Ct. at 2709. As such, it was a majority decision as to all but those portions of Justice Ginsburg's opinion.

trial, the prosecution entered into evidence a forensic laboratory report stating the defendant's blood alcohol concentration was sufficient for aggravated driving while intoxicated. ***Id.*** at 2709. "[T]he prosecution did not call as a witness the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample." ***Id.***

The Supreme Court of the United States held that the prosecution violated Bullcoming's Confrontation Clause rights. The Court held that "surrogate testimony . . . could not convey what [the analyst] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." ***Id.*** Furthermore, the Court explained that the Confrontation "Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." ***Id.*** at 2716.

In her concurrence, Justice Sotomayor stated ***Bullcoming*** was

> not a case in which an expert witness was asked for his independent opinion about underlying testimonial reports that were not themselves admitted into evidence. As the [majority] note[d], the State [did] not assert that [the surrogate] offered an independent, expert opinion about Bullcoming's blood alcohol concentration. Rather, the State explain[ed that] aside from reading a report that was introduced as an exhibit, [the surrogate] offered no opinion about [Bullcoming's] blood alcohol

> content. Here the State offered the BAC report, including [the analyst's] testimonial statements, into evidence. We would face a different question if asked to determine the constitutionality of allowing an expert witness to discuss others' testimonial statements if the testimonial statements were not themselves admitted as evidence.

Bullcoming, 131 S.Ct at 2722 (Sotomayor, J. concurring) (internal alterations, ellipsis, quotation marks, and citations omitted).

The Supreme Court of the United States granted certiorari in ***Williams*** to decide the expert testimony issue left unresolved in ***Bullcoming***. ***See Williams***, 132 S.Ct. at 2233 (Alito, J. announcing the judgment of the Court). Unfortunately, the Supreme Court of the United States did not issue a binding rule on this issue in ***Williams***. ***Medina***, 306 P.3d at 63; ***see also Yohe***, 79 A.3d at 536. Thus, we proceed to consider Dr. Chu's testimony by analyzing the various opinions in ***Williams*** and settled Pennsylvania law.

From the various opinions in ***Williams***, we glean that the Confrontation Clause is not violated when an expert expresses his or her independent conclusions based upon his or her review of inadmissible evidence. ***Williams***, 132 S.Ct. at 2233 (Alito, J. announcing the judgment of the Court). However, the underlying inadmissible evidence does not become admissible based upon the expert's independent conclusions and his or her reliance on such inadmissible evidence. ***See id.*** at 2256-2257 (Thomas, J. concurring); ***id.*** at 2268-2269 (Kagan, J. dissenting). Thus, we turn to Pennsylvania law regarding what evidence an expert can rely upon in order to offer his or her own independent conclusions.

Under Pennsylvania Rule of Evidence 703:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

Pa.R.Evid. 703.

Courts in Pennsylvania have long held that such independent conclusions based upon inadmissible evidence are admissible. ***E.g., In re D.Y.***, 34 A.3d 177, 182-183 (Pa. Super. 2011), *appeal denied*, 47 A.3d 848 (Pa. 2012); ***Boucher v. Pa. Hosp.***, 831 A.2d 623, 628 (Pa. Super. 2003), *appeal denied*, 847 A.2d 1276 (Pa. 2004); ***Primavera v. Celotex Corp.***, 608 A.2d 515, 519-520 (Pa. Super. 1992), *appeal denied*, 622 A.2d 1374 (Pa. 1993); ***Maravich v. Aetna Life & Casualty Co.***, 504 A.2d 896, 900–901 (Pa. Super. 1986); ***Commonwealth v. Thomas***, 282 A.2d 693, 698 (Pa. Super. 1971).

Our Supreme Court addressed a similar situation to the case at bar in ***Commonwealth v. Daniels***, 390 A.2d 172 (Pa. 1978). In ***Daniels***, the Commonwealth called as an expert witness a forensic pathologist, who had not originally investigated the victim's death. The forensic pathologist consulted the following sources prior to testifying:

> interviews with former residents of the school (all of whom testified for the Commonwealth concerning [the victim's] symptoms); certain hospital records . . . ; the death certificate . . . ; a letter from and a conversation with a person who had performed a dissection of a body believed to be that of the [victim]; the testimony the [forensic pathologist] heard during

> the trial; and certain police reports concerning [the victim's] death. [The forensic pathologist] was asked whether, as a result of this investigation, he had come to an opinion regarding the cause and manner of [the victim's] death. He answered in the affirmative and, over objection, was permitted to testify to that opinion.

Daniels, 390 A.2d at 175 (footnote omitted).

Our Supreme Court held that such testimony was admissible. As our Supreme Court stated, "where the information is that of an attending nurse or physician having personal observation and an interest in learning and describing accurately, there seems to be every reason for admitting testimony based in part on this." ***Id.*** at 177 (internal quotation marks and citation omitted). In other words, our Supreme Court held that a medical expert may express his opinion on the cause of death based upon the report of a non-testifying physician who examined the body. ***See also Commonwealth. v. Ali***, 10 A.3d 282, 306 (Pa. 2010) ("[A] medical expert who did not perform the autopsy may testify as to cause of death as long as the testifying expert is qualified and sufficiently informed[.]"); ***Commonwealth v. Smith***, 391 A.2d 1009, 1012-1013 (Pa. 1978) (permitting pathologist to testify regarding cause of death based upon findings of an autopsy performed by a non-physician).

Based upon this precedent, we hold that Dr. Chu's independent conclusions regarding the cause and manner of Morton's death were admissible. During trial, Dr. Chu testified that it was his own independent conclusion that the cause of death was multiple gunshot wounds and that

the manner of death was homicide. N.T., 11/5/14, at 130. He emphasized that these conclusions were his own and not a mere parroting of Dr. Osbourne's conclusions as set forth in the autopsy report. ***See id.*** Thus, the Commonwealth provided sufficient admissible evidence at trial to prove that Morton's cause of death was multiple gunshot wounds.

Finally, having determined that Appellant's Confrontation Clause rights were violated,[20] we turn to whether this error was harmless. ***See Commonwealth v. Rosser***, 2016 WL 769485, *9 (Pa. Super. Feb. 26,

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[20] We see two ways in which the Commonwealth violated Appellant's Sixth Amendment rights; first, admission of the autopsy report without testimony from its author, Dr. Osborne; and second, admission of Dr. Osbourne's opinions found in the report. The Commonwealth avers that "Dr. Osbourne's conclusions were never offered against [Appellant.]" Commonwealth's Brief at 13. Instead, the Commonwealth argues that only Dr. Chu's independent conclusions were offered against Appellant. Our review of the trial testimony, however, belies this assertion. At the conclusion of Dr. Chu's testimony, he testified that Dr. Osborne concluded that the cause of death was multiple gunshot wounds and that the manner of death was homicide. Specifically, the Commonwealth asked Dr. Chu, "Is your opinion in this case, are you merely repeating Dr. Osbourne's opinion from the report or through your medical experience and training, do you **also** hold this opinion?" N.T., 11/5/14, at 130 (emphasis added). Dr. Chu responded, "I **also** hold this opinion." ***Id.*** (emphasis added).

This type of basis evidence is the type that five justices in ***Williams*** rejected as violating the Confrontation Clause. It is similar in nature to the surrogate testimony that the Court rejected in ***Bullcoming***. Dr. Chu was, in at least portions of his testimony, acting as a surrogate for Dr. Osbourne and outlining the conclusions Dr. Osbourne drew as a result of the autopsy conducted in this case. As such, we conclude that while the trial court correctly admitted the portions of Dr. Chu's testimony in which he gave his own independent conclusions regarding the cause and manner of Morton's death, the admission of Dr. Chu's testimony which relayed Dr. Osbourne's opinions regarding the cause and manner of Morton's death violated the Confrontation Clause.

2016) (after determining there was a Confrontation Clause violation the second step is to determine if that violation was harmless); ***see also Melendez-Diaz***, 557 U.S. at 329 n.14 (expressing no view as to whether \ Confrontation Clause violation was harmless). "Before a federal constitutional error can be held harmless [on direct appeal], th[is C]ourt must be able to declare a belief that it was harmless beyond a reasonable doubt." ***Davis v. Ayala***, 135 S.Ct. 2187, 2197 (2015) (internal alteration and citation omitted).

This is not a case where the cause of the victim's death was seriously at issue. For example, this is not a cyanide poisoning case in which the testimony of the medical examiner that performed the autopsy was critical to the Commonwealth's case. ***Cf. Commonwealth v. Ferrante***, CP-02-CR-0013724-2013 (C.C.P. Allegheny). Instead, this is a case where a healthy individual in his twenties was shot several times in the chest. Although this Court's precedent requires that an expert opinion be offered to prove the cause of death, extensive expert testimony was not necessary under the specific facts of this case. Instead, Dr. Chu's opinion was sufficient to prove Morton's cause of death beyond a reasonable doubt. Accordingly, we conclude that the admission of the autopsy report and the portions of Dr. Chu's testimony referencing Dr. Osbourne's opinions was harmless error.

In sum, we conclude that Appellant preserved his lone issue for appeal. We hold that an autopsy report is testimonial when the death was

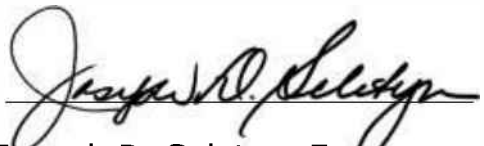
sudden, violent, or suspicious in nature, or was the result of other than natural causes. Because Morton's death was sudden, violent, and the result of other than natural causes, the autopsy report in this case was testimonial and the trial court erred by admitting the autopsy report and Dr. Chu's reference to the opinions expressed by Dr. Osbourne in the autopsy report. Nonetheless, Dr. Chu's independent expert testimony regarding the cause of Morton's death was admissible and sufficient to prove his cause of death beyond a reasonable doubt. Thus, the Confrontation Clause violation was harmless error. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

President Judge Emeritus Bender joins this Opinion.

Judge Platt concurs in the result.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/10/2016