No. 21-1043
Jasper County No. FECR022121

IN THE
SUPREME COURT OF IOWA

STATE OF IOWA.,

Appellee,

v.

JEFFREY LEE STENDRUP,

Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JASPER COUNTY
THOMAS MURPHY, DISTRICT COURT JUDGE

REPLY BRIEF FOR APPELLANT

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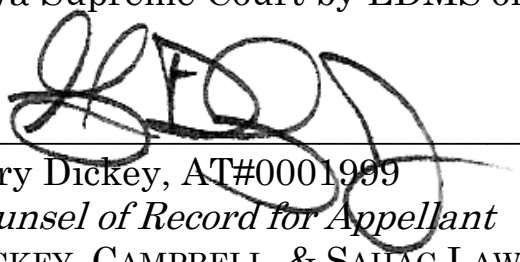
PROOF OF SERVICE & CERTIFICATE OF FILING

On May 4, 2022, I served this reply brief on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to Mr. Stendrup at the Iowa State Penitentiary.

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on May 4, 2022.



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REPLY ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE MEDICAL EXAMINER'S OPINIONS AS TO THE CAUSE OF DEATH BASED ON HEARSAY WITHIN HEARSAY RATHER THAN SCIENTIFIC, TECHNICAL, OR OTHER SPECIALIZED KNOWLEDGE

A. Dr. Thompson's opinion that the assault contributed to McDowell's death was predicated entirely upon hearsay-within-hearsay rather than his own autopsy findings

Implicitly recognizing the evidentiary problems in this case, the State asks the Court to ignore the district court's ruling that excluded Dr. Thompson's opinion as to cause of death under the rule set forth in *State v. Tyler*, 867 N.W.2d 136 (Iowa 2015). Under the *Tyler* rule, the *sine qua non* for admissibility is whether the medical examiner bases his opinion as to manner and cause of death "largely on witness statements or information obtained through police investigation" or whether he relies "primarily on the autopsy." *Id.* at 162. If the latter, the opinions are admissible under Rule 5.702. *Id.* If the former, the opinions are inadmissible under Rule 5.702 because "they would not assist the trier of fact."

Id. Dr. Thompson's opinions squarely fall into the former category.

In addressing the admissibility of Dr. Thompson's opinion as to the cause of death, the district court had the benefit hearing his testimony from the earlier trial involving Stendrup's co-defendant Jaycee Sheeder. (App. at 191). At Sheeder's trial, Dr. Thompson testified that McDowell's injuries from the assault were not enough to conclude that they caused his death. (App. at 191). Indeed, based upon the autopsy alone, his initial impression was that methamphetamine overdose was the manner and cause of death:

> Q. And I believe you testified that you based some of your conclusions or why you essentially changed your -- your report from an OD to a homicide was based on reports from Sheriff Halferty; correct?
>
> A. Yeah, I -- I didn't actually change the report. It was -- After I did the autopsy, because there was no injury to the organs or the bones, as we mentioned, I thought that this was going to be a drug over – an overdose case just because of the history of -- of possible recent methamphetamine use. But then *when I got the additional history that he went unresponsive during the assault*, then that's when I certified the cause and manner of death.

(App. at 191). More specifically, Dr. Thompson acknowledged his opinion that the assault contributed to McDowell's death was based on third-hand testimony provided to him by Jasper County Sherriff John Halferty:

> Q. And I believe you -- you – you've stated before that without the statements from police you wouldn't have been able to sign this off as a homicide; correct?
>
> A. That's correct. The -- *The specific information that I need was that he went unresponsive during the assault and didn't regain consciousness. That's -- That's the vital piece of information I need*. If he would have been alive even 5, 10 minutes after the assault and then suddenly collapsed and died, now it is more difficult to render the -- the manner of death a homicide because you don't have quite a -- the temporal relationship of the assault and the unresponsive that you do in this case.
>
> Q. And again, you didn't interview or look at any interviews of the witnesses; correct?
>
> A. No, sir.
>
> Q. You're relying solely on what Sheriff Halferty told you what happened?
>
> A. Yes, sir.

(App. at 191). Thus, there is no dispute that Dr. Thompson based his opinion on the information relayed to him secondhand by

Anderson through Sheriff Halferty. Without Anderson's information, Dr. Thompson admittedly would not have been able to opine that the alleged assault contributed to the McDowell's death. Instead, he would have concluded that the cause and manner of death was methamphetamines overdose. Accordingly, the district court correctly concluded that Dr. Thompson's testimony should not be admitted because it was based "largely" (if not entirely) on Anderson's testimony and not "primarily on the autopsy." *Tyler*, 867 N.W.2d at 163. And, because the district court's ruling was correct, no abuse of discretion occurred. *See State v. Dudley*, 856 N.W.2d 668, 675-77 (Iowa 2014)(noting that admissibility of expert witness testimony is reviewed for abuse of discretion).

B. The district court correctly disregarded Dr. Thompson's answers to hypothetical questions

As an end run around the district court's evidentiary ruling concerning the admissibility of Dr. Thompson's opinions, the State posed a series of hypothetical questions. Below is an example:

> Q. Dr. Thompson, generally, if there is an assault that you are made aware of on someone who has a high amount of methamphetamine in their body,

and hypothetically you have information that those conditions are present at the same time a person goes unresponsive during the assault and never regains their consciousness or responsiveness, to a reasonable degree of medical certainty would the assault have been a cause of death?

MR. DICKEY: Same objection.

THE COURT: Okay. Any response to the objection?

MR. BLINK: Same response.

THE COURT: Okay. You may answer, Doctor.

A. It -- It would be a contributory cause, yes.

(Trial Tr. Vol. 5 at 101:2-14). The court ruled that these questions "went too far" and disregarded the questions "in which Dr. Thompson was asked to consider whether a person who had a similar level as Mr. McDowell, who suffered beating, and was immediately responsive, died as a result of the beating." (App. at 448). The court did not abuse its discretion. *Porter v. Iowa Power & Light Co.*, 217 N.W.2d 221, 231 (Iowa 1974) ("we will not reverse [the trial court's] ruling unless manifest abuse of discretion is shown").

The prosecutor's hypotheticals were triply flawed. First, the questions conflated the medical examiner's expertise in determining cause and manner of death as required by Iowa law with the concept of legal and proximate cause of death as used in criminal law. As Dr. Thompson testified, his role as a medical examiner is to perform an autopsy to establish the cause and manner of death, which is used for tracking the State of Iowa's vital statistics. (Trial Tr. Vol. 5 at 39:2-16, 87:10-25 through 88:1-8); *see also* Iowa Code § 144.28. Hence, a medical examiner's use of "[t]he term 'homicide' expresses no opinion as to the criminality of the killing or the culpability of the killer." *Tyler*, 867 N.W.2d at 155. It is merely an administratively created classification to label the cause of death. *See id.* (citing Iowa Admin. Code r. 641-127.1). Consequently, a medical examiner is not qualified to give an opinion as to criminal culpability when such opinion is outside of his expertise. *Tappe v. Iowa Methodist Med. Ctr.*, 477 N.W.2d 396, 402 (Iowa 1991) ("It is not enough that a witness be *generally* qualified in a certain area; he must also be qualified to answer the particular question propounded"). As a result, the admission of

Dr. Thompson's opinions as to the legal cause of McDowell's death would have been confusing and misleading because homicide and murder are often associated in everyday parlance. *See Illinois v. Perry*, 593 N.E.2d 712, 716 (Ill. Ct. App. 1992) (recognizing that "opinion as to homicide" offered by pathologist "might be construed as prejudicial, since a layperson might equate the word homicide with murder").

Second, the district court correctly recognized that the hypotheticals tended to impermissibly vouch for the credibility of Dave Anderson's testimony. Rule 5.703 is not a Trojan Horse in which to smuggle otherwise inadmissible evidence. For this reason, facts relied upon by an expert are "not admissible for the substantive evidence of the matters asserted therein." *Gracke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 183 (Iowa 2004). Rule 5.703 "is intended to give experts appropriate latitude to conduct their work, not to enable parties to shoehorn otherwise inadmissible evidence into the case." *In re Det. of Stenzel*, 827 N.W.2d 690, 705 (Iowa 2013). "[T]here is a very thin line between testimony that assists the jury in reaching its verdict and testimony that conveys

to the jury that a witness's out-of-court statements and testimony are credible." *Tyler*, 867 N.W.2d at 154. Allowing Dr. Thompson to testify that he relied upon Anderson's version of events (as relayed by Sheriff Halferty) would have been an abuse of the rule because of the likelihood "that the testimony [would have been] construed . . . as evidence of the facts asserted." *State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011) (explaining that testimony from an investigating officer that repeats "definite complaints of a particular crime" should be excluded as hearsay because it "is so likely to be misused by the jury as evidence of the fact asserted"). The case law is clear that expert testimony that implies an accuser is credible or telling the truth constitutes improper vouching testimony resulting in reversible error. *Dudley*, 856 N.W.2d 668 (Expert testimony that a child's manifestations and symptoms were consistent with a child suffering sexual abuse trauma was impermissible vouching); *State v. Jaquez*, 856 N.W.2d 663 (Iowa 2014); *State v. Brown*, 856 N.W.2d 685 (Iowa 2014); *State v. Myers*, 382 N.W.2d 91 (Iowa 1986); *State v. Pansegrau*, 524 N.W.2d 207, 211 (Iowa Ct. App. 1994) (Hypothetical questions

that mirror the victim's testimony presented to the expert is improper vouching); *State v. Pitsenbarger*, 2015 WL 1815989 (Iowa Ct. App. 2015) (Testifying that a child's behaviors and statements are consistent with abuse by referring to statistics, reports and opinions was improper vouching).

Third, the hypotheticals regarding the cause of McDowell's death struck at the heart of the ultimate issue. And, an expert witness "cannot opinion on a legal conclusion or whether the facts of the case meet a given legal standard." *In re Palmer*, 691 N.W.2d 413, 418 (Iowa 2005). As posed in this case, the prosecutor's hypotheticals about whether the assault caused McDowell's death were akin to asking Dr. Thompson whether Stendrup should be found guilty. For all these reasons, the district court correctly disregarded them as improper.

II. BECAUSE MCDOWELL'S DRUG USE WAS INDEPENDENTLY SUFFICIENT TO CAUSE DEATH (AND ASSAULT WAS NOT), STENDRUP'S CONDUCT WAS NOT THE BUT-FOR CAUSE OF DEATH

A. The district court was wrong on the law

The State does not even attempt to defend the trial court's use of the "direct and foreseeable consequence" standard for legal

The State does not even attempt to defend the trial court's use of the "direct and foreseeable consequence" standard for legal and proximate cause. (State's Br. at 39-40). The best the State can offer is to chide Stendrup for taking a "myopic" view of the ruling and ignoring the preceding pages of the court's verdict. (State's Br. at 39-40). But, the district court's analysis does not hold up even under the most hyperopic view.

As set forth in Stendrup's initial merits brief, the cases cited in the preceding three pages of the district court's ruling are easily distinguishable. (Stendrup Br. at 30-35)(distinguishing the *McClain*, *Smith*, and *Tyler* decisions). The remaining case, *State v. Tribble*, 790 N.W.2d 121 (Iowa 2010), is equally inapposite. *Tribble* involved a defendant convicted of first-degree murder arising from the death of a victim found with "horrific blunt-force injuries" who was determined to have died "by drowning, suffocation, or strangulation." *Id.* at 123. On appeal, Tribble argued that the felony-murder rule did not apply because the assault and nonspecific asphyxia were the product of a single assault. *Id.* at 123-24. In analyzing whether the evidence

supported the existence of independent acts, the Iowa Supreme Court explained that when the evidence establishes the existence of multiple sufficient causes of death, "our law declares each act to be a factual cause of the harm." *Id.* at 127 (citing Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 at 376 (2010)). But, *Tribble's* discussion about factual cause offers no aid because this case does not involve multiple sufficient causes of death.

The State's attempt to portray the district court's causation analysis as "correct" simply disregards the holdings of the cases upon which the court below relied. The cases involving multiple insufficient causes of death offer no guidance. Nor do cases involving multiple sufficient causes of death. Any analogy to the *McClain*, *Smith*, *Tyler,* or *Tribble* decisions, therefore, is misplaced. In all these respects, those decisions are inapplicable.

B. The *Burrage* rule applies to the causation question in this case because it involves an independently sufficient cause of death coupled with an independently insufficient cause of death

While the meaning of Dr. Thompson's trial testimony remains vigorously disputed, two things are not. First,

McDowell's level of methamphetamine intoxication was "more than sufficiently toxic to be lethal." (Trial Tr. Vol. 5 at 104:13-15). Second, the blunt force injuries that McDowell suffered in the assault "were not sufficient alone to kill Jeremy McDowell." (Trial Tr. Vol. 5 at 104:6-12). This undisputed testimony is outcome-determinative because where a defendant's conduct "is not an independently sufficient cause of the victim's death," he cannot be held liable as "a but for cause of the death." *Burrage v. United States*, 571 U.S. 204, 218 (2014).

The decision in *Fleming v. United States*, 224 A.3d 213 (D.C. Ct. App. 2020), illustrates how the *Burrage* rule works in the context of a murder statute. In *Fleming*, the D.C. Court of Appeals accepted the analytical framework laid out in *Burrage* and held that a conviction under the District's second-degree murder statute — making it crime to "kill[] another," i.e., cause death — requires but-for causation. *See id.* at 217, 219-21. A "defendant cannot be held to have personally caused a death unless an action by the defendant is a but-for cause of the death, i.e., unless it is true that in the absence of the defendant's action

the death would not have occurred." *Id.* In describing but-for causation, the court noted that it requires the prosecution to "prove that, if one subtracted the defendant's actions from the chain of events, the decedent would not have been killed." *Id.* at 221. The *Fleming* court endorsed the following language as properly instructing a jury on but-for causation: "the government must prove that the decedent's death occurred as a result of an action by the defendant. In other words, the government must prove that in the absence of an action by the defendant the decedent's death would not have occurred." *Id.* at 229. As the court explained, "the requirement that Mr. Fleming's conduct [was] a substantial factor in [the decedent's] death is not remotely equivalent to a requirement of but-for-causation." *Id.* at 223.

What was true in *Fleming* is also true here. A defendant's conduct is not a but-for cause merely because it contributed to a particular degree in leading to a result. *Burrage*, 571 U.S. at 217-18. "Rather, but-for causation merely determines whether a particular factor played *a necessary role in leading to a particular result*." *Lucas v. United States*, 240 A.3d 328, 341 (D.C. Ct. App.

2020)(emphasis added)(applying the *Burrage* but-for causation requirement to the "bias-related" penalty in the D.C. Code)

C. The State's factual theory of liability for McDowell's death is not supported by evidence in the record

Factually, the State's cause-of-death theory is premised on the belief that McDowell became non-responsive during the altercation with Stendrup and never regained consciousness. Yet, the State's brief is inconsistent on this point. For example, the State repeatedly highlights Stendrup's alleged admission to Julie Landry that he struck McDowell and dragged him into the living room. (State's Br. at 19, 31, 64, 68). In her interview with the county attorney, Landry recounted the conversation with Stendrup:

> Jeff, when he had hit Jeremy, and he hit him in the forehead, and he went down. He said he was in the kitchen. Um, when that happened. He put his head down on the, you know, on the countertop. And, Jeff had grabbed him up and was saying whatever he was saying about the money and the drugs and whatever. *And, you know, basically took him into the living room, and he went face – Jeremy went face first onto the floor in the living room.* And, that's where Jeff left him. He was not bleeding at the time, and he was still breathing from what Jeff said to me.

(Ex. 101, Landry Police Interview DVD at 17:00 – 17:40). This testimony conflicts with the testimony from Anderson upon which the State relies that he found McDowell face down "*in the doorway between the kitchen and the living room*." (State's Br. at 16, 64)(emphasis added). It also conflicts with the plethora of blood evidence found in various locations throughout the kitchen, stereo cabinet, living sofa, and living floor. (Ex. 41, 44, 45, 47, 48, 50, I, J, K, P, O, Y, Z).

Setting aside the numerous factual inconsistencies, the record is devoid of scientific evidence from which to draw the conclusion that the assault pushed McDowell over the proverbial edge. As the prosecutor pointed out on direct examination of Dr. Thompson, McDowell's methamphetamine ingestion itself stimulated the release of norepinephrine, which is the chemical responsible for the fight-or-flight mechanism. (Trial Tr. Vol. 5 at 78:5-21). It essentially is an "adrenaline rush." (Trial Tr. Vol. 5 at 80:7-14). Dr. Thompson further explained that norepinephrine, especially in a diseased heart, could throw a person into a fatal arrhythmia. (Trial Tr. Vol. 5 at 80:15-25 through 81:1).

To determine whether the assault pushed McDowell "over the edge," however, would necessarily require some idea of how much adrenaline to attribute to the methamphetamine and how much adrenaline, if any, to attribute to the assault. But, there are no tests that can be run to determine the levels of adrenaline. (Trial Tr. Vol. 5 at 107:10-14). It would also require consideration of the decedent's drug tolerance and whether he or she has depleted norepinephrine levels, which is impossible to determine from an autopsy. (Trial Tr. Vol. 5 at 86:5-9). In short, there simply is no scientific evidence in the record to support the State's straw-that-broke-the-camel's-back theory. To the contrary, the scientific evidence points in the opposite direction:

> Q. In your scientific medical opinion, based solely on the autopsy findings none of the injuries you observed could have anatomically caused Mr. McDowell's death; right?
> A. That's correct.
>
> Q. And in your medical opinion, the injuries from the blunt force trauma from the assault were not sufficient alone to kill Jeremy McDowell?
> A. Could you repeat that question?
>
> Q. Sure. In your medical opinion, the injuries from the blunt force trauma from the assault were not sufficient alone to kill Jeremy McDowell?

A. Yeah, just from an anatomic standpoint, typically, if you have injuries, you can injure an internal organ, you bleed, and then you die as a result of that, that bleeding.

Q. And the 4,900 nanograms per milliliter is more than sufficiently toxic to be lethal; is that right?
A. Yes, sir.

(Trial Tr. Vol. 5 at 104:23-25 through 105:1-15).

CONCLUSION

For these reasons, Jeffrey Strendrup asks this Court to reverse his convictions.

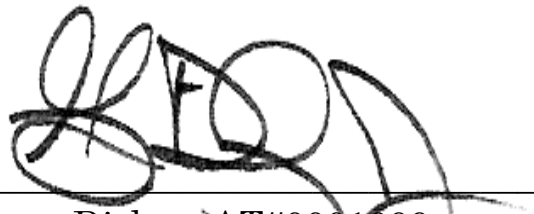
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's reply brief was $9.75, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

> [x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 3,151 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).



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