COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2247-CR **Cir. Ct. No. 2010CF79**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JIMMY RAMIREZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Oneida County: PATRICK F. O'MELIA, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Jimmy Ramirez appeals a judgment of conviction for two counts of first-degree sexual assault. He asserts a video recording of the

child victim's statements to police was improperly admitted at trial because it did not comply with WIS. STAT. § 908.08(3).[1] He also claims his attorney was ineffective for failing to object to the testimony of a DNA analyst from the state crime lab. We reject Ramirez's arguments and affirm.

BACKGROUND

¶2 On April 19, 2010, the State filed a criminal complaint charging Ramirez with three counts of first-degree sexual assault of a child under the age of twelve. According to the complaint, four-year-old S. C.'s father reported on April 15 that he had discovered blood in the toilet and S. C. mentioned "Jimmy," with whom S. C. had been alone earlier in the week. S. C. was examined by a sexual assault nurse examiner, who found injuries to S. C.'s vaginal area.

¶3 S. C. was interviewed by detective Teresa Smoczyk and social worker Michele Weizenicker later that day at the Oneida County Sheriff's Department. During the interview, S. C. stated Ramirez had sexually assaulted her with his finger and various objects, which she described as a "Scooby Doo foot" and a "rabbit." Police initiated a consent search of S. C.'s home and discovered objects matching S. C.'s descriptions, including a keychain shaped like male genitalia. At a follow-up interview on April 20, 2010, S. C. confirmed the objects were those she had previously described. Both interviews with S. C. were video recorded.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Ramirez contested the admissibility of S. C.'s recorded statements at the preliminary hearing. Ramirez's attorney remarked that the video of the April 15 interview ended with S. C. still seated with her interviewers. He also observed that the audio briefly cut out and, later, a short buzzing noise could be heard. Finally, Ramirez asserted S. C. did not demonstrate an understanding that lies are punishable. After taking Smoczyk's testimony, the circuit court determined the recording was admissible under WIS. STAT. § 908.08(3).

¶5 The recording of both interviews was played at Ramirez's bench trial in December 2010. A transcript of the interviews was prepared by the defense and formally offered by the State. S. C. was present in the courthouse and available to testify, but was not called by the State and the defense elected not to cross-examine her based on her recorded statements.

¶6 Bart Naugle, a senior DNA analyst at the state crime lab, testified for the State. Several items, including the keychain, had been tested for DNA by another analyst, Samantha Delfosse. The testing revealed that S. C. and Ramirez were both possible contributors to the DNA mixture profile detected. A report based on the testing indicated that only one in 8,000 people would have genetic markers consistent with those found on the keychain.

¶7 Naugle testified he performed a peer review of Delfosse's work and initialed Delfosse's report beneath her name to indicate he agreed with her conclusions. According to Naugle, a peer review involves "go[ing] through all the data and then review[ing] her report to make sure that we agree with the conclusions that have been made by her or the analyst." Naugle explained that computers at the crime lab generate a printout of the genetic profile found on the evidence, which can then be translated into a table representing genetic markers.

Naugle used the profiles to reach his own conclusions. Ramirez's trial counsel did not object to Naugle's testimony.

¶8 The trial court found S. C.'s statements credible and supported by the other evidence at trial. Ramirez was ultimately found guilty of two counts of first-degree sexual assault. He was sentenced to twenty-five years' initial confinement and twenty-five years' extended supervision on each count, to run concurrently.

¶9 Ramirez filed a post-conviction motion. At the hearing, the issues were narrowed to whether the circuit court erroneously admitted S. C.'s videotaped statements under WIS. STAT. § 908.08 and whether trial counsel was ineffective for failing to object to Naugle's trial testimony on confrontation clause grounds.

¶10 Naugle, along with Ramirez's trial attorney, testified at the post-conviction hearing. Naugle explained he was called to testify because Delfosse was on maternity leave during Ramirez's trial. Naugle stated that when evidence is received at the crime lab, DNA will be extracted by a technician, usually by swabbing the evidence, and then a robotic process will purify, quantify, and amplify the DNA. Naugle testified that much of a DNA report is generated by an automated process:

> Well, the DNA is ran on the machine to produce the genetic profile. So that machine produces raw data which is then input into software that … analyzes that raw data. And the software is performing according to our protocols which have been validated, and from that we receive a genetic profile and then analysts will use protocols that have been validated to further analyze and interpret the profile.

Naugle's opinion was based on his own examination of the raw data and was independent of Delfosse's analysis, though he ultimately agreed with her conclusions. Trial counsel stated he believed the person who actually did the DNA testing was required to testify and he did not have a reason for failing to object to Naugle's trial testimony.

¶11 The court denied Ramirez's post-conviction motion. It once again concluded S. C.'s recorded statements were admissible under WIS. STAT. § 908.08(3). It also concluded trial counsel was not ineffective for failing to object to Naugle's trial testimony because "Naugle did have an integral part in the peer review of the testing and was not merely a surrogate …." Ramirez appeals.

DISCUSSION

¶12 Ramirez's appeal raises two grounds for relief. First, Ramirez claims the circuit court erroneously admitted the victim's videotaped statements because the recording did not comply with WIS. STAT. § 908.08. Second, Ramirez asserts his trial attorney was ineffective for failing to object to Naugle's testimony because Naugle merely "peer reviewed" another analyst's work instead of directly testing the DNA. We reject each of Ramirez's arguments.

I. Admissibility of videotaped statement

¶13 By enacting WIS. STAT. § 908.08, the legislature intended to make it "easier … to employ videotaped statements of children in criminal trials and related hearings." ***State v. Snider***, 2003 WI App 172, ¶13, 266 Wis. 2d 830, 668 N.W.2d 784. Without the statute, a child's videotaped statement would have to come within an exception to the hearsay rule to be admitted at trial. ***Id.***

¶14 Under WIS. STAT. § 908.08, a child's videotaped statement may be admissible in two ways. One way remains the use of a hearsay exception.[2] ***Snider***, 266 Wis. 2d 830, ¶16; *see also* WIS. STAT. § 908.08(7). Alternatively, a circuit court "shall admit the recording" upon making certain enumerated findings. *See* WIS. STAT. § 908.08(3). One requirement is that "the recording is accurate and free from excision, alteration and visual or audio distortion." *See* WIS. STAT. § 908.08(3)(b). Another is that "the child's statement was made upon oath or affirmation or, if the child's developmental level is inappropriate for the administration of an oath or affirmation in the usual form, upon the child's understanding that false statements are punishable and of the importance of telling the truth." *See* WIS. STAT. § 908.08(3)(c).

¶15 Ramirez first contends the recording violates WIS. STAT. § 908.08(3)(b). We have distilled four arguments from Ramirez's frenetic brief: (1) the transcript of the recording indicates that at various times statements were inaudible or reflected demonstrative actions (i.e., "nodding" and "indicating"); (2) Smoczyk and Weizenicker misheard S. C. a few times and had to request clarification; (3) there is an approximate two-minute omission in the video; and (4) the April 15 recording ends while S. C. is still seated at a table with her interviewers. For these reasons, Ramirez asserts the recording is not "accurate and free from excision, alteration and visual or audio distortion." *See* WIS. STAT. § 908.08(3)(b).

[2] The State has explicitly disclaimed any reliance on a hearsay exception. Our review is therefore limited to whether it was appropriate to admit the video recording on the alternative basis set forth in WIS. STAT. § 908.08(3).

¶16 Ramirez's arguments implicate several standards of review. Generally, the admissibility of evidence is left to the trial court's discretion. ***State v. Tarantino***, 157 Wis. 2d 199, 207, 458 N.W.2d 582 (Ct. App. 1990). "We will not disturb a trial court's discretionary ruling if the trial court applied accepted legal standards to the facts of record and we can discern a reasonable basis for its ruling." ***Snider***, 266 Wis. 2d 830, ¶16. However, to the extent we must interpret and apply WIS. STAT. § 908.08, we do so as a matter of law. *See* ***Tarantino***, 157 Wis. 2d at 208.

¶17 Ramirez's first two arguments are not proper arguments against the recording's admissibility. First, whether the transcript accurately captures the interview is irrelevant under WIS. STAT. § 908.08(3)(b); the statute's focus is whether the *recording* is an accurate representation of events. The transcript's indication of inaudible statements or demonstrative actions does not affect the admissibility of the recording itself.[3] Second, § 908.08(3)(b) does not require that an interviewer have a clear and flawless understanding of a child's statements. Again, the statute requires that the recording be an accurate depiction of events. If the interviewer in fact had difficulty understanding the victim, the recording is not

[3] However, once admitted and played in open court, the video recording should be transcribed by the official court reporter. *See generally* ***State v. Ruiz-Velez***, 2008 WI App 169, 314 Wis. 2d 724, 762 N.W.2d 449; *but see* ***State v. Marinez***, 2010 WI App 34, ¶19 n.4, 324 Wis. 2d 282, 781 N.W.2d 511 (noting the subsequent amendment of a Supreme Court Rule relied on in ***Ruiz-Velez***). The ***Ruiz-Velez*** rule is not at issue here because the State accepted the transcript prepared by the defense as accurate and complete.

inadmissible simply because it accurately depicts that circumstance.[4] That goes to the weight of the evidence.

¶18 Ramirez might have a viable argument against admissibility if the recording were indeed missing two minutes, but there is no such gap in the recording. Notably, Ramirez cites his attorney's argument at the preliminary hearing—not the recording itself—as proof that there is a two-minute omission. However, Ramirez's attorney described two separate occurrences, two minutes apart, not a two-minute gap in the recording. Counsel stated:

> There's a spot where the audio goes out. It's brief but … it is there. ... So at 1:01:58 the audio went out, and then at 1:04—I didn't write down the second—there's a buzzing noise that we talked about. So it isn't free from visual or audio distortion as the statute requires.

The second "buzzing noise" was not a problem with the recording at all; an interviewer testified it was simply her cell phone vibrating.

¶19 So we are left with one brief audio lapse, which we are not persuaded is sufficient distortion to render the recording inadmissible under WIS.

[4] We observe that the interviewers had difficulty understanding because S. C. was eating during the early part of the April 15 interview, and it does not appear S. C. was at all reluctant to correct an interviewer when there was a misunderstanding. For example, this exchange occurred early in the first interview, when one interviewer asked who S. C. lived with at home:

> [S. C.]: Oscar.
>
> Terri: Austin? Who's Austin?
>
> [S. C.]: I said Oscar.
>
> Terri: Oh, Oscar. I'm sorry. See, now if I make a mistake, I want you to be sure to tell me, okay, 'cause sometimes I make mistakes.

STAT. § 908.08(3)(b). The audio lapse occurs from approximately 1:01:53 to 1:01:57, and the circuit court described it as merely a "blip" or a "skip."[5] We agree with the circuit court's conclusion that the problem was insignificant. *See* DANIEL D. BLINKA, 7 WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 808.1 at 886 (3d ed. 2008) ("Audio distortions are perhaps inevitable, so the degree of distortion should be left to the trial judge's discretion.").

¶20 Finally, Ramirez asserts the recording is not complete because a portion of it—the April 15 interview—ends while the victim is still seated with her interviewers. However, Ramirez ignores Smoczyk's testimony at the preliminary hearing that the victim was not asked any further questions after the recording stopped. Smoczyk also testified the recording was accurate and free from excision or alteration. Ramirez did not present any contrary evidence that there was additional questioning absent from the recording. As the circuit court observed, the only evidence was that any unrecorded events were "simply set up and break down … and returning items." In other words, the unrecorded events were "nothing of any significance."

¶21 Ramirez next challenges the recording's admissibility because there was no indication S. C. understood that false statements are punishable.[6] As indicated earlier, a recording is admissible only if the child demonstrates he or she understands the importance of telling the truth and that false statements are

[5] Although we quote the transcript at various times in this opinion, we have also viewed the video recording.

[6] We observe that under WIS. STAT. § 908.08(3)(c), an oath or affirmation should be used unless doing so would be inappropriate in light of the child's developmental level. We do not perceive Ramirez to be arguing that an oath or affirmation should have been used, only that the victim did not establish a sufficient understanding that false statements are punishable.

punishable. *See* WIS. STAT. § 908.08(3)(c). Whether a child has the requisite understanding is generally a question of fact, although if the only evidence on the question is the video itself, we may independently make this determination. *See* ***State v. Jimmie R.R.***, 2000 WI App 5, ¶39, 232 Wis. 2d 138, 606 N.W.2d 196. Ramirez appears to concede that the victim understood the importance of telling the truth, but contends her statements do not demonstrate an understanding that lies are punishable.

¶22 The division between the two inquiries is not as clear as Ramirez suggests. The statutory provisions requiring an understanding that false statements are punishable and of the importance of telling the truth are "very much interrelated." ***Jimmie R.R.***, 232 Wis. 2d 138, ¶42. "[I]n most instances, a reasonable child would associate a warning about the importance of telling the truth with the related concept of untruthfulness and the consequences that might flow from such deceit." ***Id.***

¶23 The interview in this case demonstrates the four-year-old victim had a reasonable understanding of the related concepts of truthfulness and the consequences of deceit. The following exchange occurred early during the first interview of the victim:

> Terri: [S. C.], can you tell me the difference between the truth and a lie?
>
> [S. C.]: (Nodding head.)
>
> Terri: What's the truth?
>
> [S. C.]: Uhm, uhm, I don't know.
>
> Terri: You don't know. What if I said that Michelle has on—what color is Michelle's jacket?
>
> [S. C.]: White.

Terri: White. What if I said that Michelle's jacket is pink, is that the truth or is that a lie?

[S. C.]: A lie.

Terri: A lie. And why is that?

[S. C.]: Because you're wrong.

Terri: Okay. Because I'm wrong. Right. So that is a lie. Now if I say—what color is that blanket over there?

[S. C.]: Red.

Terri: If I said that blanket is red, is that the truth or a lie?

[S. C.]: The truth.

Terri: The truth. Right. So what I want us to do today is only tell the truth. Can we only tell the truth today?

[S. C.]: (Nodding head.)

Terri: 'Cause this room we just want to only tell the truth, and I promise to only tell you the truth, too. Okay. What happens when little kids get caught telling a lie?

[S. C.]: That means they're wrong.

Terri: Hmm?

[S. C.]: That means they're wrong.

Terri: That means they're wrong. And does anything happen to them?

[S. C.]: (Shaking head.)

Terri: No? Do you ever get in trouble for telling a lie?

[S. C.]: No.

Terri: No? Okay. Have you ever told a lie before?

[S. C.]: Yeah.

Terri: Yeah. And what happened?

[S. C.]: Nothing.

> Terri: Nothing. Okay. Well, let's only tell the truth today. Okay?

¶24 We agree with the circuit court's construction of these comments. The circuit court determined S. C. was not saying that "people don't get in trouble for telling a lie, only that she hasn't gotten in trouble for telling a lie and … apparently didn't get caught." As the circuit court stated, the victim "certainly understood even at five … what was a truth and what was a … lie."[7] S. C. also agreed to tell the truth and demonstrated an understanding that a lie was bad, stating numerous times that a liar was "wrong."

¶25 The circuit court's analysis closely tracks the analysis in ***Jimmie R.R.*** There, a social worker interviewed a five-year-old victim, questioning her about the difference between the truth and a lie. *See* ***Jimmie R.R.***, 232 Wis. 2d 138, ¶40. The child confirmed she knew what a lie was and nodded her head when asked if she understood how important it was to tell the truth. ***Id.*** We concluded this was sufficient to satisfy WIS. STAT. § 908.08(3)(c).

¶26 The ***Jimmie R.R.*** decision rested on two rationales, both of which are applicable in this case. First, the interviewers in ***Jimmie R.R.*** repeatedly used the word "lie," thereby implicitly suggesting that false statements were bad. ***Jimmie R.R.***, 232 Wis. 2d 138, ¶43. The interviewers in this case also repeatedly used the word "lie" to describe a failure to tell the truth, and the victim acknowledged that people who lie are "wrong." Second, the ***Jimmie R.R.*** court recognized that the interview was "no ordinary event" for the five-year-old victim in that case. ***Id.***, ¶44. "Strangers in an unfamiliar setting were interviewing her

[7] S. C. was still four at the time of the preliminary hearing. She turned five in August 2010.

about a difficult and sensitive topic. The solemnity and importance of such a moment would not be lost on a young child." ***Id.*** We therefore agree with the ***Jimmie R.R.*** court: "Considering the entire interview, the language employed and the surrounding circumstances, we conclude that the 'punishment' prong was satisfied" despite S. C.'s failure to employ the precise wording of WIS. STAT. § 908.08(3)(c) in her responses. *See* ***Jimmie R.R.***, 232 Wis. 2d 138, ¶45.

II. Failure to object to Naugle's testimony

¶27 Ramirez next argues trial counsel should be found ineffective for failing to object to Naugle's trial testimony, which Ramirez asserts violated his confrontation right. To establish ineffective assistance of counsel, the defendant must prove that counsel's performance was deficient, and that the defendant was prejudiced by the deficient representation. ***State v. Starks***, 2013 WI 69, ¶54, 349 Wis. 2d 274, 833 N.W.2d 146.

¶28 A defendant proves deficient performance by showing that counsel made errors so serious that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment. ***Id.*** (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)). We indulge in a strong presumption that counsel performed effectively, and are highly deferential when judging an attorney's strategic decisions. ***Id.*** The reasonableness of counsel's actions is to be judged by the facts of the particular case, viewed as of the time of counsel's conduct. ***State v. Pitsch***, 124 Wis. 2d 628, 636, 369 N.W.2d 711 (1985) (citing ***Strickland***, 466 U.S. at 690).

¶29 With respect to prejudice, the defendant must show that counsel made errors "of such magnitude that there is a 'reasonable probability' that but for the error the outcome would have been different." ***Starks***, 349 Wis. 2d 274, ¶55.

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." ***Strickland***, 466 U.S. at 691. Evidence that the deficient performance merely had some conceivable effect on the outcome of the proceeding is insufficient. ***State v. Carter***, 2010 WI 40, ¶37, 324 Wis. 2d 640, 782 N.W.2d 695.

¶30 We review an ineffective assistance claim using a mixed standard of review. ***State v. Manuel***, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811. We will not set aside a trial court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the attorney's performance is constitutionally deficient is a question of law this court reviews de novo. ***Id.*** The underlying question of whether the admission of evidence violates a defendant's right to confrontation is a question of law. ***State v. Deadwiller***, 2013 WI 75, ¶17, 350 Wis. 2d 138, 834 N.W.2d 362.

¶31 "The Sixth Amendment's Confrontation Clause confers upon the accused '[i]n all criminal prosecutions, … the right … to be confronted with the witnesses against him.'" ***Bullcoming v. New Mexico***, 131 S. Ct. 2705, 2713 (2011) (plurality opinion). "The Confrontation Clause prohibits the introduction of testimonial hearsay of a witness who is absent from trial unless the witness is unavailable and the defendant had the prior opportunity to cross-examine the witness." ***Deadwiller***, 350 Wis. 2d 138, ¶1 (citing ***Crawford v. Washington***, 541 U.S. 36, 51 (2004)). The ***Crawford*** decision spurred much litigation over what constitutes a testimonial statement. ***Deadwiller***, 350 Wis. 2d 138, ¶21. In ***Melendez-Diaz v. Massachusettes***, 557 U.S. 305, 310-11 (2009) (plurality opinion), the Supreme Court concluded a forensic laboratory report opining that a suspected substance was cocaine was testimonial in nature, and the defendant was therefore entitled to be confronted at trial by the analysts who generated the report.

¶32 ***Melendez-Diaz*** does not resolve the present question, which is whether, under the law that existed at the time of Ramirez's trial, the confrontation clause is violated by the testimony of an analyst who conducts a "peer review" of another analyst's work when the original analyst does not testify at trial. That question is conclusively answered in the negative by ***State v. Williams***, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, and ***State v. Barton***, 2006 WI App 18, 289 Wis. 2d 206, 709 N.W.2d 93.

¶33 In ***Williams***, 253 Wis. 2d 99, ¶3, police recovered a jacket, which contained a substance that appeared to be cocaine. At trial, the state introduced a crime lab report confirming that suspicion. ***Id.***, ¶4. The analyst who performed the underlying tests was unable to testify, however, and the state presented the testimony of a unit leader in the drug identification section who performed a peer review of the other analyst's testing. ***Id.*** Our supreme court rejected Williams' assertion that this violated his confrontation right. The court held:

> [T]he presence and availability for cross-examination of a highly qualified witness, who is familiar with the procedures at hand, supervises or reviews the work of the testing analyst, and renders her own expert opinion is sufficient to protect a defendant's right to confrontation, despite the fact that the expert was not the person who performed the mechanics of the original tests.

Id., ¶20. The court emphasized that although the peer reviewer's opinion was based in part on facts and data gathered by someone else, she was not merely acting as a conduit for another expert's opinion. ***Id.***, ¶25.

¶34 In ***Barton***, we applied ***Williams*** and confirmed that decision survived the Supreme Court's ***Crawford*** holding. There, Kenneth Olson, a technical unit leader at the state crime lab, testified he had peer reviewed another analyst's work and presented his own conclusions regarding whether a fire was

intentionally set. ***Barton***, 289 Wis. 2d 206, ¶¶3-5. Applying ***Williams***, we concluded Olson's testimony did not violate the confrontation clause because "he was a highly qualified expert presenting his independent opinion," even if that opinion was based in part on another's work. ***Id.***, ¶¶13, 20. We further concluded "[t]he holding in ***Crawford*** does not undermine our supreme court's decision in ***Williams***." ***Barton***, 289 Wis. 2d 206, ¶20.

¶35 ***Williams*** and ***Barton*** foreclose Ramirez's argument. Naugle is a highly qualified senior DNA analyst at the state crime lab. Naugle's trial testimony demonstrates he was intimately familiar with the process of testing and analyzing DNA. He peer reviewed Delfosse's report, which he also initialed to signify he agreed with her conclusions. His review was an independent examination of the raw data generated by the lab software and also required scrutiny of Delfosse's work in extracting the sample and running it through the lab's machines. Naugle's analysis could have yielded a different result from Delfosse's, but did not. As Naugle was available at trial and actually cross-examined, we conclude Ramirez's confrontation right was preserved. As such, any objection to Naugle's testimony on that ground would have failed. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) (counsel is not deficient for failing to pursue a meritless motion).

¶36 Ramirez primarily relies on ***Bullcoming*** to argue that his confrontation right was violated. The issue in ***Bullcoming***, 131 S. Ct. at 2710, was "whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification … through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." As Justice Sotomayor observed in her concurring opinion, ***Bullcoming*** was "not a case in which the person testifying

is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue."[8] ***Id.*** at 2722 (Sotomayor, J., concurring). ***Bullcoming*** is therefore not controlling, and even Ramirez seems to concede the point by indicating the decision does not clearly address whether peer review is sufficient.

¶37 What's more, ***Bullcoming*** was decided after Ramirez's trial. "[I]neffective assistance of counsel cases should be limited to situations where the law or duty is clear such that reasonable counsel should know enough to raise the issue." ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994). Ramirez suggests ***Bullcoming*** flowed directly from ***Crawford***, and therefore trial counsel should have anticipated ***Bullcoming***'s holding. However, not only is ***Bullcoming*** distinguishable, but ***Barton*** made clear that ***Williams*** survived ***Crawford***. *See* ***Barton***, 289 Wis. 2d 206, ¶20. To the extent Ramirez suggests ***Bullcoming*** represents a sea change in Confrontation Clause jurisprudence and has retroactive application, our supreme court has applied both ***Williams*** and ***Barton*** post-***Bullcoming***, so it is apparent those decisions remain good law even in ***Bullcoming***'s wake. *See* ***Deadwiller***, 350 Wis. 2d 138, ¶¶37-40.

¶38 ***Deadwiller*** is also instructive. There, DNA profiles were developed by an out-of-state lab, Orchid Cellmark. ***Id.***, ¶1. No one from Orchid testified at Deadwiller's trial. ***Id.*** However, the State presented the testimony of a crime lab analyst who received the profiles from Orchid and entered them into the DNA

[8] Indeed, the Court seems to have reserved the question of "what degree of involvement is sufficient because here [the testifying expert] had no involvement whatsoever in the relevant test and report." ***Bullcoming v. New Mexico***, 131 S. Ct. 2705, 2722 (2011) (Sotomayor, J., concurring).

database, resulting in a match to Deadwiller. ***Id.*** Our supreme court concluded the analyst was not merely a conduit for Orchid's DNA profiles, but independently concluded Deadwiller was a match to the profiles. ***Id.***, ¶40 (citing ***Williams***, 253 Wis. 2d 99, ¶20). We see no reason why the State's failure to present Delfosse at trial should be fatal to Ramirez's prosecution if its failure to present an analyst from Orchid was not fatal to Deadwiller's prosecution.

¶39 In sum, we conclude Ramirez's counsel did not perform deficiently by failing to object to Naugle's testimony. There exists no basis in the law—either pre- or post-trial—for such an objection.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.