[J-54A-2017 and J-54B-2017] [Opinion: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 EAP 2016
	:	
Appellant	:	Appeal from the Judgment of Superior Court entered on 05/10/2016 at No. 1165 EDA 2015 (reargument denied 07/13/2016) affirming the Order entered on 03/26/2016 in the Court of Common Pleas, Criminal Division, Philadelphia County at No. CP-51-CR-0003322-2013.
v.	:	
DARNELL BROWN,	:	
Appellee	:	
	:	ARGUED: September 12, 2017
COMMONWEALTH OF PENNSYLVANIA,	:	No. 41 EAP 2016
	:	
Appellee	:	Appeal from the Judgment of Superior Court entered on 05/10/2016 at No. 1165 EDA 2015 (reargument denied 07/13/2016) affirming the Order entered on 03/26/2016 in the Court of Common Pleas, Criminal Division, Philadelphia County at No. CP-51-CR-0003322-2013.
v.	:	
DARNELL BROWN,	:	
Appellant	:	
	:	ARGUED: September 12, 2017

CONCURRING OPINION

JUSTICE MUNDY **DECIDED: June 1, 2018**

I join the Majority insofar that it concludes Dr. Osbourne's autopsy report was testimonial and its admission as substantive evidence violated Brown's Sixth Amendment right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36 (2004). I further agree that the *Crawford* error was harmless. However, I write separately because my reasoning as to the harmless error doctrine differs from the OAJC's.

As Justice Donohue points out, several non-expert witnesses testified at trial that they saw or heard gunshots. *See* Concurring Op. of Donohue, J., at 13. Sakina Warren testified that she was at Shana Shockley's home on the night in question when she heard gunshots. N.T., 11/4/14, at 86. Warren went outside and saw the victim walking and then collapse on the ground. *Id.* at 87. Antwaine Williams testified that he was outside with Brown and the victim and he personally witnessed Brown shoot the victim. *Id.* at 122. Philadelphia Police Officer Jonathan Mangual testified that when he arrived at the scene, the victim was lying face down, was unresponsive, and was bleeding from a hole in the center of his chest. *Id.* at 32-33. Shockley testified to hearing gunshots, looking out the window and seeing the victim laying on the ground. N.T., 11/5/14, at 8. Tameka McNair, Shockley's neighbor, provided the same account. *Id.* at 55. Damon Swain, the victim's cousin, testified that he was with Shockley in her home when he heard the gunshots, looked out the window and saw Brown standing behind the victim still pointing a gun at the victim's back. *Id.* at 64, 67-68. Swain stated that he observed the victim "dropping on the ground." *Id.* at 68. Moreover, as Justice Donohue points out, at trial, Brown's defense did not focus on challenging the cause or manner of death at all. Concurring Opinion of Donohue, J. at 14.

In my view, if the jurors believed these witnesses, they were permitted to use their common sense to infer from this testimony that the victim died from a homicide as a result of gunshot wounds. *Cf. Commonwealth v. Walker*, 92 A.3d 766, 780 (Pa. 2014) (stating, "to be admissible, the expert testimony must be beyond the knowledge possessed by a layperson and assist the trier of fact to understand the evidence or determine a fact in issue"). In short, I agree with Justice Donohue to the extent she concludes that because the jurors could make these inferences on their own from other uncontradicted witness testimony, the admission of Dr. Osbourne's report did not cause Brown any prejudice.

However, I would end the analysis at that point because Dr. Chu's testimony as to cause and manner of death was not prejudicial for the same reason. Since the jurors could infer the cause and manner of death from the eyewitness testimony of laypersons, expert testimony was not required.[1] Because it is established that any prejudice to Brown arising from the critical evidence in Dr. Osbourne's report and Dr. Chu's testimony was de minimis, I would not express any further opinion on the harmless error question presented in Brown's appeal. *See* OAJC at 21-27.

Based on the foregoing, I agree with the Majority that Brown's Confrontation Clause rights were violated by the admission of Dr. Osbourne's report. I further agree that the *Crawford* error in this case was harmless, but only because the autopsy report and its accompanying testimony did not affect the outcome of Brown's trial in light of other non-expert witness testimony as to the cause and manner of death. Accordingly, I respectfully concur in the result only.

[1] The Superior Court premised its harmless error analysis on its separate conclusion that under Pennsylvania law, "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." *Commonwealth v. Brown*, 139 A.3d 208, 217 (Pa. Super. 2016), *appeal granted*, 164 A.3d 461 (Pa. 2016). However, as Justice Donohue points out, this is not true, because this Court explicitly held "medical testimony is not required to prove the cause of death" and we have held the same for manner of death. *See Commonwealth v. Gilman*, 401 A.2d 335, 339 (Pa. 1979) (plurality); *see also Commonwealth v. Ilgenfritz*, 353 A.2d 387, 390 (Pa. 1976) (stating, "[w]hile 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."); *Commonwealth v. Vandivner*, 962 A.2d 1170, 1180 (Pa. 2009) (concluding any potential evidentiary error as to expert testimony about manner of death was harmless in part due to "[f]our eyewitnesses testified to having seen [the defendant] shoot [the victim] in the head."), *cert. denied*, 559 U.S. 1038 (2010). Therefore, the Superior Court's harmless error analysis was built on a false premise. Nevertheless, even within the harmless error doctrine, this Court is permitted to affirm on any legal grounds supported by the certified record. *Commonwealth v. Fant*, 146 A.3d 1254, 1265 n.13 (Pa. 2016).