

STATE v. RONALD HARDING

There are cases that are fairly innocuous. This was one until fn. 9, one of the worst footnotes, or even statements, in Maine history for the trial practitioner when experts are involved in a criminal case. First, Justice Connors cites a civil case for the proposition that it would be permissible for the prosecutor to comment that the State's expert isn't being paid by the prosecution for the case and the Defense expert is a hired gun. So let's play this out. We know that in State v. Michael Smith, the State can bring in a 'delayed disclosure' expert. So hypothetical case, the State chooses to do so. The Defense hires its own expert to discuss the questionable methodology regarding delayed disclosure. The State, in closing, states that Diane Brown is testifying without compensation from the prosecutor while the defense expert is specifically retained by the defense to bolster their claims with the obvious inferences.

Permissible? Well, check out the 'for the practitioner section...'

State v. Ronald Harding:

Background/Summary:

Harding lived with his girlfriend, her three children, and their infant son. On the evening of May 31, 2021, Harding, his girlfriend, and the four children returned to their home in Brewer around 6:00 p.m. Harding's girlfriend passed their infant son to him so she could get the other three children ready for bed. When Harding took his infant son from his girlfriend, the infant was acting normally. While Harding was holding him, the infant became unresponsive and did not regain consciousness or breathe on his own again. Medical examinations revealed an abrasion on the back of the infant's head with an associated hemorrhage and further brain injury with multiple hemorrhages that were consistent with non-accidental trauma, resulting in a fatal brain herniation. The victim's symptoms appeared the result of shaken impact syndrome.

On June 4, 2021, Harding was arrested and charged by complaint with manslaughter. On June 30, 2021, a grand jury indicted Harding on one count of manslaughter (Class A), 17-A M.R.S. § 203(1)(A). The case proceeded to trial in February/March of 2023. The State presented its case to the jury over four days in late February and early March 2023. The State's case consisted of testimony and exhibits from thirteen witnesses, including medical professionals who treated the victim, the medical examiner who performed the autopsy, and the State's consulting neuropathologist, Dr. Elizabeth Bundock. In addition to recalling a detective and Dr. Bundock, the defense presented the testimony of Dr. Jane Turner, a consulting forensic pathologist. [The State's presentation included evidence of the healthy state of the victim up until Harding's time alone with him, immediately followed by the victim's critical condition; the testimony of the treating medical professionals, the deputy chief medical examiner, and Dr. Bundock that the cause of death was a traumatic head injury; and the testimony of the treating professionals and medical examiner that the injury occurred on May 31. The defense's position was that death could have been caused not by a brain injury inflicted by Harding on May 31, but by COVID as opined by Dr. Turner, or an injury occurring before May 31, a theory based on aspects of Dr. Bundock's testimony.

During the State's Closing, Harding moved for a judgment of acquittal after the State rested, renewing the motion following the close of evidence. The trial court denied the motion at both stages, noting that it was the jury's role to determine which witness's testimony to believe. During its closing, the State argued that Harding "hired an expert to say this was not inflicted trauma" but was COVID. Contrasting such an expert with medical professionals testifying for the State, the

prosecutor said, “It wasn’t the job of these medical professionals to come in to court and give opinions supporting one side or the other, to search the internet and cherry[-]pick for information to try to come up with some”—at which point defense counsel objected. At the sidebar held immediately thereafter, defense counsel argued that the State was improperly minimizing Dr. Turner’s credibility based on her being hired. After having the argument read back, the court said it was not sure whether it agreed with the defense but asked what defense counsel would like the court to do in response if it agreed with defense counsel’s position. Defense counsel answered, “A curative instruction that would indicate that you can take no inference from whether an expert is presented by one side or the other.” The court agreed that it would give such an instruction with its standard jury instructions, to which defense counsel responded, “Very good.” After closing arguments, defense counsel withdrew his request for the curative instruction, so it was not given. After the jury retired to deliberate, it requested a readback of the deputy chief medical examiner’s testimony referencing spinal fluid clarity. The jury returned a guilty verdict a little more than an hour after beginning deliberations. Harding then renewed his motion for a judgment of acquittal and made a motion for a judgment notwithstanding the verdict, and the court denied both motions. The court entered its judgment of conviction on September 19, 2023, and Harding timely appealed.

Basis for Appeal:

- 1) the evidence was insufficient to support the conviction and 2) the State committed reversible prosecutorial error in its closing by implying that the defense hired its expert for cherry-picked testimony while vouching for the State’s medical witnesses.

Discussion:

For the first argument, the Law Court reminded that it is the jury’s role to evaluate the evidence and the presumption is always in favor of the jury verdict. They followed that the jury was free to reject any suggestions by Dr. Bundock or any other witness regarding the timing of the injury and to accept other evidence indicating that a traumatic brain injury occurred on May 31 while the victim was in Harding’s sole care. The Law Court then outlines the evidence against the Defendant.

On the second argument, the Law Court found that the issue was waived when the objection was withdrawn, thus creating the argument that the obvious error standard applies based on the failure to request a mistrial (but not outright waiver). The Court did understand the strategic reason for the waiver (“[w]e understand the difficult position that defense counsel can confront when something objectionable is said.”) This is somewhat akin to the 5th Amendment issue, one where there is no right or wrong approach (whether you want the judge to remind the jury in the end that the defendant did not testify by issuing an instruction or leave it be and not say anything). As the Law Court stated, “Counsel needs to preserve an objection but may also not want to bring more attention to the objectionable statement by seeking a curative instruction.” But unnecessarily, the Law Court found that even under the obvious error standard, the appeal would fail, leading to fn. 9.

For the Practitioner:

Footnote nine has the potential for a lot of damage. It will not so subtly allow the jury to hear that the State expert is doing so based on their belief in the case (without specific compensation) and the Defense expert to line their own pockets. So what can the practitioner do?

First, if the State is designating an expert, ask for discovery on payment including any employment contracts. We have no obligation to accept that there is no inherent compensation. In other words, the contract might discuss testifying for the State at hearings. If so, it is part of compensation. The

State might object to producing this and if so, ask in limine for an order precluding any discussion on compensation.

Another possibility (more for assigned cases) is arguing that the defense isn't actually paying the expert since the payment does not come from the defendant, but from the State (often the same entity if the payment is from a Gov. agency).

Finally, nothing prevents on cross examination from inquiring when the expert was retained, both direct and cross. This would be helpful if the defense expert was in rebuttal.

And object object object, and always ask for a mistrial to preserve the issue. Prosecutors are going to cross the line on this.