

**STATE OF MAINE
PENOBSCOT, ss.**

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. PEN-23-376**

STATE OF MAINE,

APPELLEE

V.

RONALD HARDING,

APPELLANT

ON APPEAL FROM THE UNIFIED CRIMINAL DOCKET

BRIEF OF APPELLEE

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STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Factual Background

On May 31, 2021, at around 6:00 p.m. at their apartment in Brewer, Kayla Hartley handed her healthy, happy, alert six-week-old son to his father, Ronald Harding (“Harding”), so that she could bathe her three older children to get them ready for school the next day. (Trial Transcript (Tr.T.) 2/27/23 at 43-46.) Harding was left alone to care for Jaden, initially joined by Kayla’s four-year-old son, while Harding attempted to watch an X-Men movie. (State’s Exhibit 11A at 8.) About an hour later, while Kayla was still bathing Jaden’s four-year-old brother, Harding came into the bathroom and informed her that the baby “wasn’t breathing.” (Tr.T. 2/27/23 at 46, 71.) Kayla told Harding to call 911 and followed the instructions of the dispatcher until the ambulance arrived about seven minutes later. (*Id.* at 46-47; State’s Exs. 9 and 9A.) The responding paramedic found a baby who appeared “[v]ery pale, very [mottled], very cyanotic. It was obvious he was not breathing....” (Tr.T. 2/27/23 at 89.) Jaden was “essentially lifeless” upon his presentation at the emergency room at Eastern Maine Medical Center (EMMC) in Bangor. (*Id.* at 105.) Despite the efforts of the first responders and the EMMC medical staff, Jaden never regained consciousness or breathed again on his own. (*Id.* at 94, 143, 182, 211-212.)

The evidence at trial compelled the conclusion that Harding had inflicted a devastating brain injury on Jaden while he was in Harding's care, causing Jaden to immediately become unresponsive. Harding, then age 36, had been living in Brewer with his girlfriend of about one-year, Kayla Hartley, Jaden, and her three older children from a previous relationship. (*Id.* at 40-41; State's Ex. 9A at 4-5.) At approximately 7:06 p.m., Harding called 911, reporting that "my baby...just started having trouble breathing." (State's Ex. 8A at 1; Tr.T. 2/27/23 at 71.)

Upon arriving, the paramedic immediately swept Jaden out to the ambulance and used a bag valve mask and then intubation in an effort to get him oxygen. (*Id.* at 90-94.) While Jaden was still in the ambulance outside the apartment, Brewer Officer Brian Lunt (BL) and Emergency Medical Technician Devin Plant (DP) spoke with Harding (RH) to gather more information about the onset of Jaden's symptoms:

BL: So, what was going on today-

RH: Uh, I was basically just holding him and then all of a sudden he started having another attack again 'cause he-

BL: Mean another attack again?

RH: He's been having like, uh, short of breathing, choking on his vomit...and then all of a sudden he just started doing it again really bad.

BL: When was the last time he had anything in his mouth to eat or anything?

RH: It was...about 4:30...last time.

BL: OK. He wasn't eating at the time you were holding onto him?

RH: No-I was just holding onto him and all of a sudden he just started...the choking.

DP: So, like aspiration choking?

RH: Yup.

DP: OK.

BL: Nothing by mouth-by-since 4:30?

RH: No.

(State's Exs. 9 & 9A at 4.)

While first responders were still at the house, Kayla, clearly distraught, asked Harding, "When did he stop breathing?" Harding responded, "It was...just before...I came to see you. He started...choking on his saliva and then...just like...he's done a few times." (State's Ex. 9A at 9.) Harding later related to Mark Moran, EMMC's social worker, that Jaden was sleeping in Harding's arms and "then started doing that." When asked what "that" was, Harding responded, "like he was having trouble breathing" and demonstrated by bringing his hands to his throat in a choking gesture. (Tr.T. 2/27/23 at 221-222.)

Medical staff at EMMC's Pediatric Intensive Care Unit concluded that Jaden was unresponsive due to a diffuse brain injury. The attending pediatrician, Amy Movius, testified that she had been doing "nothing but pediatric intensive care" for about 30 years. (*Id.* at 104-105.) Dr. Movius found that the brain injury was evident on Jaden's head CT scan:

[H]e had evidence of blood in multiple places...and a loss of gray/white differentiation, that speaks to there being a lot of swelling and damage to the tissue...And then the evidence of swelling that was pushing down through the base of his skull, which we call herniation.

(*Id.* at 120.) In consulting with EMMC's neurosurgeon, Michael Paci, she learned that Jaden had sustained "a fatal, nonsurvivable injury." (*Id.* at 3.)

EMMC staff concluded that the injury had been inflicted ("non-accidental trauma"), because Jaden's history indicated that he had been healthy and acting normally, including taking a bottle earlier that day at 4:30 p.m., before he suddenly lost consciousness while in his father's care. (*Id.* at 131, 133, 135, 136-137, 166, 178-179, 180-181, 200-201, 209-210.) Dr. Paci, the neurosurgeon, found that Jaden's brain stem was "not working, the brain is not working and has suffered a terrible injury." (*Id.* at 176.) He concluded that "something that happened where there was a force that was applied and something traumatic happened to the child to cause these injuries." (*Id.* at 178.) He went on to say that "[T]here's only a limited number of things that can cause this sort of trauma and one of them is...shaking the baby or some sort of abuse." (*Id.*)

Dr. Movius also consulted with EMMC's pediatric ophthalmologist, Theodore Curtis, who found retinal hemorrhages in Jaden's left eye that "were very, very extensive. There were too many for me to count. They basically

covered the entire back of the eye.” (*Id.* at 195-197). He opined that the retinal hemorrhages were “highly correlated with abusive head trauma...a type that is very specific to abusive head trauma” and not consistent with any disease process. (*Id.* 195-196.)

EMMC’s pediatric neurologist, Brooke Surran, determined that Jaden had “three different types of focal hemorrhages.” (*Id.* at 207.) She explained that his brain injury was “related to a form of head trauma, oftentimes closed head trauma. And this is usually from rotational or acceleration/deceleration forces.” (*Id.* at 208.) She described the mechanism that caused Jaden’s brain injury:

When ...the brain accelerates or decelerates abruptly, it can hit against the skull itself. And it can also lead to sort of a sheering (sic) injury in the brain tissue or in the veins or vessels around the brain...So you could think of it as two planes being next to each other and sliding across each other. So different planes of the brain tissue actually sheer across each other and this leads to that type of injury. Additionally, sheering of the blood vessels can occur. And this is how those hemorrhages develop. ...[I]n a very young infant, this can be caused by any number of mechanisms, but usually it’s a mechanism where the head is moving back and forth or side to side abruptly. In an adult, or an older patient, it may be different forces, like a car accident. But oftentimes...it has to do with how the baby was held or moved, since they can’t do this on their own.

(*Id.* at 208-210; see also 137-141 (Movius testimony).)

EMMC conducted a battery of tests which ruled out other possible causes of his brain injury, including infection or disease. (State's Exs. 25 and 27.) Jaden had no indication of lung disease or pneumonia, no coagulopathy or clotting disorder, no signs of infection in his blood or urine, no sepsis, and no thrombosis. (Tr.T. 2/27/23 at 111-112, 121, 133-135, 165-166, 213-214.)

At the time of Jaden's admission, EMMC was routinely testing for the COVID-19 virus, even if the patient had no COVID symptoms. (*Id.* at 141-142.) An initial test for Jaden came back positive, but a second test by the hospital had a negative result (no COVID detected). (*Id.* at 141-143; Tr.T. 2/28/23 at 105-106; Tr.T. 3/1/23 at 128-129.) The initial positive COVID test did not change the diagnosis of the EMMC providers that Jaden's brain injury resulted from non-accidental trauma. (Tr.T. 2/27/23 at 142-143, 187.) A subsequent COVID test administered by the Deputy Chief Medical Examiner, Liam Funte, also showed that Jaden was in fact negative for COVID. (Tr.T. 2/28/23 at 59, 106-108.)¹

¹ A nasopharyngeal swab taken from Jaden at autopsy was sent to the State Health and Environmental Testing Laboratory and tested negative for COVID. (State's Ex. 28; Tr.T. 2/28/23 at 105-107.) Dr. Funte's examination of the lungs revealed them to be "perfectly fine," with no signs of pneumonia or other disease. (*Id.* at 102-103.) Having conducted autopsies on individuals who died of COVID, Dr. Funte testified that Jaden had none of the physical conditions that he had observed in such patients. (*Id.* at 107-108.)

Having ruled out “an alternative concerning cause for [Jaden] to be unresponsive and comatose in the way that he was” (Tr.T. 2/27/23 at 214), the treating and consulting physicians concluded that the infliction of the injury would have occurred immediately before Jaden lost consciousness. Dr. Paci testified that: “[A]fter the injury that we could observe, I...would expect that the baby would have become unresponsive almost immediately.” (*Id.* at 178-179.) Dr. Surran added:

Typically it’s very rapid. There may be moments after this type of injury where there may be some preserved level of alertness, but generally neurologic symptoms begin very rapidly, as you might expect from such a diffuse and significant injury. Oftentimes there’s a loss of consciousness almost immediately. Certainly not normal neurologic function for very long...Maybe some brief crying because of the pain that can ensue, but generally not alert and acting normally.

(*Id.* at 210.)

Maine State Police Detectives Jen Fiske and Andrew Peirson interviewed Harding at EMMC, first going through the questions on the Center for Disease Control’s Sudden Unexpected Infant Death Investigation (SUIDI) form with him. (*Id.* at 15-16.) While filling out the form, Detective Fiske asked, “Describe exactly what happened.” Harding responded:

Basically I was holding him like usual. And then he woke up, I don’t know where, started crying. And then kind of like started like basically opening his mouth, sticking his tongue out. And then that’s when I kind of noticed something wasn’t right. And so it’s

like I tried getting him up on his side, so it's like kind of like tapping his back, trying to help him. He just wasn't really responding and breathing on his own. So that's when I brought him to Kayla's attention and that's when we called 911.

(State's Exs. 10 and 10A at 1.) Harding confirmed that he was holding Jaden while Kayla was bathing the children in another room when Jaden suddenly lost consciousness. (Id. at 2-3, 8.)

After filling out the form, the detectives (Andrew Peirson (AP) and Jennifer Fiske (JF)) asked Harding whether the doctors had informed Harding of Jaden's prognosis:

RH: Basically they think he's, uh, braindead from what they're telling us.

AP: How does that make you feel?

RH: Very hurtful. It's like, this is my firstborn. And it's like, this really, really hurts.

[pause]

JF: What are you thinking right now?

RH: I'm thinking like...I'm really bummed that something's wrong-

JF: Mm-hmm-

RH: And he might not make it.

(State's Exs. 10 and 10A at 22.)

Jaden was declared dead on June 1, 2021. (Tr.T. 2/27/23 at 146-148, 211-212; State's Exhibit 17.) On June 2, 2021, Detectives Fiske and Peirson conducted a "walk-through" interview with Harding at the apartment in Brewer. (State's Exs. 11 and 11A.) Harding related that he, Kayla, Jaden, and Kayla's three older children had visited Harding's mother and stepfather in

Newport during the day of May 31, which was the Memorial Day holiday. They returned to the apartment at about 6:00 p.m. (State's Exs. 11 and 11A at 3.) Kayla took Jaden out of his car seat and handed him to Harding so that she could bathe the other three children. Harding indicated that Jaden cried for a few minutes after he was handed to Harding, but he was able to calm him down by rocking him. (*Id.* at 7.) Harding said that he then sat with Jaden on the couch while Harding watched an X-Men movie. (*Id.* at 8.) Kayla's four-year-old son was in the room with him for about 20 minutes until he was called away for his turn in the shower. (*Id.* at 8-9.)

It was while Harding was alone with Jaden that Jaden "kind of went tight acting, like he was trouble breathing, sticking his tongue out...and then just went limp. He was at, he was, his chest wasn't moving. So I, I ran directly to Kayla in the bathroom. And that's when she took him and I got on the phone to dial 911." (*Id.* at 9-10.)

When asked by Detective Paul White (PW) what Jaden felt like when Harding carried him to Kayla in the bathroom, Harding responded:

RH: He's basically limp. Not moving, not breathing, not doing anything.

PW: What about his, his coloration, his facial expressions.

RH: It was uh red.

PW: Red. It is he, he's not doing anything, he's not choking...

RH: No, he's, he's not choking, he's not breathing, he wasn't doing anything after he started doing what he did.

PW: Was he tense? Was he...

RH: No, he was loose.

PW: He was loose.

RH: Loose, literally you can move his arms all around and there was just nothing there.

(*Id.* at 11-12.)

Dr. Funte conducted Jaden's autopsy and documented numerous abrasions and contusions on Jaden's body that had not been noted at EMMC. In particular, he found an abrasion on the back of Jaden's head, indicative of a "blunt force injury." (Tr.T. 2/28/23 at 81; State's Ex. 6.) He also noted bruising near Jaden's left ear, a bruise on his face, bruising on his left upper eyelid, and bruising on the side of his right eye. (Tr.T. 2/28/23 at 81-83, State's Ex. 18 and 19.) Dr. Funte examined Jaden's brain and observed a "hemorrhage in the scalp where that abrasion was on the back of his head in the scalp. Under that abrasion was hemorrhage in the scalp, which is called a subgaleal hemorrhage." (Tr.T. 2/28/23 at 87-88.) He further observed a "subdural hemorrhage, which is hemorrhage in a potential space around the brain" and a "subarachnoid hemorrhage." (*Id.* at 88.) He noted "bright red blood" in the subdural hemorrhage, indicating that it was "an acute hemorrhage" that "occurred at or about the time of death or within that day." (*Id.* at 92-93; State's Ex. 24.) He agreed with the EMMC physicians that "[w]ith the extent of injury that I saw, I would say that [the onset of symptoms

after the infliction of injury] was almost immediate.” (Tr.T. 2/28/23 at 100.)

Dr. Funte consulted with a neuropathologist, Vermont’s Chief Medical Examiner Dr. Elizabeth Bundock, and based on her findings, his review of all the medical records and his observations at autopsy, he concluded Jaden’s cause of death was “inflicted head trauma, shaken impact syndrome.” (*Id.* at 108-110.)

Harding was arrested on June 4, 2021, and released on cash bail on June 7, 2021, with a condition that he have no contact with Kayla. (App. 3-5.) From July 13 through 20, 2021, Harding violated his conditions of release by contacting Kayla through a series of emails. (Tr.T. 2/28/23 at 47-48.) The emails culminated with, “Did you or the kids cause this because I think it’s fucked up. I went out for a cigarette and find him like he was in his dome.” (State’s Ex. 7.) Harding admitted that he had sent the emails to Kayla. (Tr.T. 2/28/23 at 49.)

Procedural Background

On June 4, 2021, Harding was arrested on a complaint charging him with manslaughter and made his initial appearance in court. (Appendix (“App.”) at 3.) Bail was set at \$3,000 cash with conditions of release including no contact with Jaden’s mother, Kayla Hartley. (*Id.*) The Penobscot County Grand Jury returned an indictment for manslaughter under 17-A M.R.S. § 203 on June 30, 2021. (App. at 4 and 54). Harding posted the cash bail on June 7, 2021, only to have his bail revoked on July 28, 2021, for violating the condition prohibiting contact with Kayla Hartley. (See State’s Motion to Revoke Bail dated 7/21/21; App. at 5.)

The jury trial before Justice Anne Murray was held from February 27, 2023, through March 2, 2023. The State rested on March 1, 2023, and the defense moved for judgment of acquittal based upon the estimate of Dr. Elizabeth Bundock, the State’s consulting neuropathologist, that Jaden’s brain may have had some bleeding two or three days before he presented at the hospital. (Tr.T. 3/1/23 at 59-64, 77-78.) The motion was denied, and the defense presented three witnesses: a pathology expert, Jane Turner; the State’s primary investigator, Detective Fiske; and Dr. Bundock; before resting the following day. The State rested finally, and the defense renewed its

motion for judgment of acquittal, which was again denied. (Tr.T. 3/2/23 at 78-79.)

After a little over an hour of deliberation, the jury returned a verdict of guilty. (*Id.* at 146-148.) On September 19, 2023, after the preparation of a pre-sentence report, the court adjudged Harding guilty of manslaughter and sentenced him to 15 years all but 8 ½ years suspended and 6 years of probation. (App. 13-14, 16.) Harding filed a timely appeal pursuant to 15 M.R.S. § 2115 and M.R. App. P. 2B(b)(1) on September 26, 2023. (App. 14.)

STATEMENT OF THE ISSUES

- I. **Whether, viewing the evidence in the light most favorable to the State, the jury could find beyond a reasonable doubt each element of the offense charged.**
- II. **Whether the prosecutor committed error during closing argument by directing the jury to the reasons that the testimony of the EMMC medical providers was credible.**

ARGUMENT

- I. **Viewing the evidence in the light most favorable to the State, the jury could have found beyond a reasonable doubt each element of the offense charged.**

Viewing the evidence in the light most favorable to the State, the jury had compelling evidence that Harding inflicted the devastating brain injury on his son:

When a defendant challenges the sufficiency of the evidence supporting a conviction, we determine, viewing the evidence in the light most favorable to the State, whether a trier of fact rationally could find beyond a reasonable doubt every element of the offense charged. *State v. Anderson*, 2016 ME 183, ¶ 30, 152 A.3d 623 (quotation marks omitted). The jury is permitted to draw all reasonable inferences from the evidence presented at trial. *State v. Hopkins*, 2018 ME 100, ¶ 51, 189 A.3d 741.

State v. Brown, 2019 ME 41, ¶ 14, 205 A.3d 1.

“[T]he fact-finder is free to selectively accept or reject testimony based on the credibility of the witness or the ‘internal cogency of the content.’” *State v. Williams*, 2012 ME 63, ¶ 49, 52 A.3d 911. The jury’s role in determining the weight of the evidence and the credibility of witnesses extends to expert

testimony. *State v. Maine*, 2017 ME 25, ¶ 21, 155 A.3d 871; see also Tr.T. 3/2/2023 at 130-132 (jury instructions on witness credibility).

The jury's verdict was amply supported by the EMMC physicians who had years of combined experience in treating children and infants with head injuries and concluded that the injuries to Jaden were the result of non-accidental trauma. As in *State v. Brown*, "although there was no direct evidence as to how the defendant inflicted the fatal injury, ...a conviction for manslaughter was supported by sufficient record evidence '[g]iven the ample medical testimony about the timing, presentation, and cause of [Jaden's] injuries.'" 2017 ME 59, ¶ 10, 158 A.3d 501. The EMMC physicians testified that Jaden's symptoms (loss of consciousness, cessation of breathing, unresponsiveness) would have occurred immediately after the infliction of the devastating brain injury. Dr. Funte, after examining Jaden's brain at autopsy, agreed. As the EMMC physicians and Dr. Funte told the jury, Jaden could not have been alert, cooing, or taking a bottle with the brain injury that he presented with in the emergency room.

It was undisputed that when Kayla entrusted Jaden to Harding's care at around 6:00 p.m. on May 31, 2021, Jaden was conscious, alert, and awake. The baby that Harding returned to Kayla at around 7:00 p.m. was limp, lifeless, and unresponsive. Once the alternate causes of infection, disease,

sepsis, clotting disorders, and thrombosis were ruled out, there was only one conclusion: Harding had forcefully shaken Jaden and hit his head on a hard object, causing an abrasion to the back of Jaden's head and a devastating head injury from the "acceleration/deceleration injuries and rotational forces." (Tr.T. 2/28/2023 at 94-96; 99-100.) Based on the facts set forth in this brief's "Factual Background," the jury "was amply justified in finding beyond a reasonable doubt that [Harding], acting with criminal negligence [or recklessness], caused [Jaden's] death" given the evidence supporting the conclusion that (1) Jaden's death resulted from an inflicted injury and (2) only Harding could have inflicted it. *State v. Mackin*, 2020 ME 78, ¶ 6, 234 A.3d 1232.

Harding contends the testimony of Elizabeth Bundock, the State's consulting neuropathologist, compelled the conclusion that Jaden had bleeding on the brain for several hours before he was handed to Harding and therefore "was not in good health." (Appellant's Brief at 11.) Harding overstates the impact of Dr. Bundock's testimony. Dr. Bundock testified that her observations of hemocytarin ("the breakdown product of the blood cells") caused her to estimate that Jaden had bleeding on his brain as early as two to three days before he presented at EMMC, because "hemocytarin is typically thought to take a couple days before it appears." (Tr.T. 3/1/23 at 59-60.) Her

estimate was based on studies, most involving adult autopsies, and she recognized that “infants in many aspects can heal faster.” (*Id.* at 45, 76.) She further qualified her answer that the hemocytarin that she observed could represent bleeding from another event (including birth); that she would not have seen the liquid blood observed by Dr. Funte which indicated a more recent bleeding event, because such blood would get “washed away by the formalin” when the brain was sent to her for examination; that “with the limitations of what science can tell us, which are not insignificant,” her opinion on timing “is still an estimate of what’s happening. It’s not an absolute science that it happened at this exact time, that we can tell that from looking at a slide under the microscope”; that the presence of hemocytarin did not “exclude the possibility that there was additional injury or additional bleeding...on either side of that time frame”; and that it was “hard to make the call with respect to the...aging of infant injuries.” (*Id.* at 3, 45-46, 59-64, 74-76; Tr.T. 3/2/23 at 60-63.)

The jury was free to accept or reject Dr. Bundock’s testimony on timing, or to give it whatever weight they deemed appropriate. They had more than sufficient evidence from the testimony of the treating physicians and the Deputy Chief Medical Examiner to conclude that the traumatic injury to Jaden’s brain would have occurred immediately prior to his loss of

consciousness. That testimony supported their conclusion that Harding, acting recklessly or with criminal negligence, inflicted the injury that caused his son's death.

II. The prosecutor committed no error during closing argument by directing the jury to the reasons that the testimony of the EMMC medical providers was credible.

A. Procedural History

The defense expert, Jane Turner, was a contract forensic pathologist who conducted about 15 to 25 autopsies a year for “a family owned business,” Southwest Missouri Forensics, that brokers “autopsies for coroners in the State of Missouri.” (Tr.T. 3/1/23 at 90, 189-190.) She opined contrary to every other medical provider and medical expert at trial that Jaden had died not of a traumatic brain injury but from complications of COVID-19. (*Id.* at 92-96.) She testified that she had been unaware of the negative COVID test at EMMC; that she simply disregarded the negative test from the autopsy as unreliable; and that she entirely missed the abrasion on the back of Jaden's head that had been depicted in an autopsy photograph showing blunt force injury. (T.T. 3/1/23 at 124-125, 127-130, 201, 202-204.) She further relied on incorrect information that Jaden's spinal fluid was cloudy at autopsy, indicating infection, when in fact Jaden's spinal fluid had been clear, indicating no signs of infection. (Tr.T. 2/28/23 at 117-118 (Dr. Funte describing Jaden's

cerebral spinal fluid as bloody not cloudy, ruling out “any kind of infection in the central nervous system”); Tr.T. 3/1/23 at 99-100.) She speculated that Jaden’s bruises were lesions from COVID, even though she had not reviewed a single article that suggested that COVID could cause bruising on the legs, face and head. (Tr.T. 3/1/23 at 202-204.)

Dr. Turner had no experience with live patients with COVID symptoms, having never treated a live patient with COVID and having only autopsied “two or three” adults with COVID. (*Id.* at 130-131.) She had never autopsied a child with COVID, and none of the adults with COVID that she had autopsied had had a subdural hemorrhage such as the one that caused Jaden’s death. (*Id.* at 190.) Rather, she extrapolated information from various journal articles to come up with the diagnosis that no one else saw coming: that complications from the COVID-19 virus caused Jaden’s devastating brain injury. (*Id.* at 94, 96, 97, 101, 131, 190, 201-204.) She also admitted that while she had previously testified as a medical examiner that “subdural hemorrhages occur from a shearing of the bridging veins that go into the brain,” she now asserted, as a private forensic pathologist, “That is a theory that has yet to be proven.” (*Id.* at 190-191.)

In closing the State reviewed Harding’s various statements describing Jaden’s sudden loss of consciousness, his deflection of blame, and his hiring

“an expert to say this was not inflicted trauma, this devastating brain injury was from complications of COVID.” (App. 35-40.) The State then listed all the evidence that ruled out COVID as a cause of Jaden’s fatal injury. (App. 41-42.) The State directed the jury to the testimony of the EMMC physicians who had concluded that this was “a classic case of forceful or violent shaking inflicted by an adult on an infant resulting in devastating and fatal brain injury.” (App. 42.)

The State argued: “It wasn’t the job of these medical professionals to come into 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---” (App. 43.) The defense objected that: “It is absolutely improper to try to minimize the credibility of a defense expert based on them being hired. It’s listed in Field and Murray. There’s a Law Court case on it.” (*Id.*) The court responded, “I’m not sure I agree with you. But let me ask you this. If I did agree with you, what do you want me to do about it?” Counsel responded that he wanted “[a] curative instruction that would indicate that you can take no inference from whether an expert is presented by one side or the other.” (App. 44.)

The State went on to explain:

It was not their job...to search the internet trying to find other reasons...for what happened to this baby. They were called upon to save Jaden Harding's life and they provided the best care they could to him. They called his condition and the source of the injuries as they saw it based on their years of experience in treating live patients and patients who have passed away in their care. And what did they see? They saw a baby presenting with no brain activity, ...who had been healthy and alert just prior to becoming unresponsive.

(App. 45.) The State continued to describe in detail the physicians' clinical findings supporting their conclusion "that the brain injury was inflicted on Jaden and his symptoms would have been immediate."

(App. 45-48.)

When the court later reviewed the proposed jury instructions about witness credibility with the parties, the court confirmed that "Mr. Ashe is withdrawing his request for a curative instruction that he...initially requested during the state's closing." (App. 53.)

The court ultimately instructed:

A case is not decided according which side presents more witnesses...The test is not which side brings the greater number of witnesses or presents the greater quantity of evidence but which witness and which evidence you find is most accurate and otherwise trustworthy in determining whether or not the state has met its burden of proof considering all of the evidence in the case.

You are the judges of whether to believe each witness and how important the testimony of each witness is...Consider any interest a witness may have in the case and the extent to which, if at all,

each witness is either supported or contradicted by other evidence in the case...

You should consider the opinions presented and give them such weight as you think they deserve...An expert witness's testimony should be considered like any other testimony. You alone decide how much of the witness's testimony you believe or do not believe and how much weight any such testimony should be given.

(Tr.T. 3/2/23 at 131-132.)

B. Legal Argument

Harding contends that the State's argument violated the prohibition against an attorney stating "a personal opinion as to...the credibility of a witness" under M.R. Prof. Conduct 3.4(e), relying on this Court's decision in *State v. Steen*, 623 A.2d 146, 149 (Me. 1993). His argument mischaracterizes the State's argument and misconstrues *Steen*.

This Court will review "instances of alleged prosecutorial error to determine whether error occurred, and, if there was error, [the Court] will then 'review the State's comments as a whole, examining the incidents of error both alone and cumulatively.'" *State v. Warner*, 2023 ME 55, ¶ 14, 301 A.3d 763, citing *State v. Wai Chan*, 2020 ME 91, ¶ 24, 236 A.3d 471. There was no error in the prosecutor's statements in closing argument.

In *Steen*, this Court's primary concern was the "24 questions" that the prosecutor asked the defendant requiring "him to give his opinion as to whether other witnesses were lying." *Steen* at 148. The prosecutor went on

to suggest that Steen lied on the stand and argued in her closing that the defense expert's testimony supporting Steen's lie was "based on \$2,500, the money the defendant paid him for his testimony." *Id.* at 149.

As Justice Clifford later noted in a law review article analyzing improper prosecutorial comments:

In retrospect, the prosecutor's suggestion to the jury that the testimony of Steen's expert was influenced by the \$2,500 fee he was paid seems significantly less egregious than the questions asked of the defendant on cross-examination. That Steen's conviction would have been vacated if the only issue on appeal were the prosecutor's summation is doubtful. More careful use of language by the prosecutor, however, such as inviting the jury, in view of the evidence from the other expert witnesses, and the testimony of the victim, to consider whether the testimony of Steen's expert may have been influenced by the \$2,500 fee, could have avoided an issue on appeal.

Robert W. Clifford, *Identifying and Preventing Improper Prosecutorial Comment in Closing Argument*, 51 Me. L. Rev. 241, 246 (1999).

The prosecutor's comments criticizing Harding for promoting a theory that COVID-19 caused Jaden's devastating brain injury was targeted at the specious nature of the expert's opinion, not the fact that the expert was retained by the defense. The defense expert's testimony was contradicted by the evidence and the testimony of a series of medical providers who neither party had hired to form an opinion. The absurdity of the defense expert's opinion was demonstrated by the evidence on the record, not by any personal

opinion expressed by the prosecutor. Unlike the series of cases cited in the Appellant's Brief from other jurisdictions, Harding can identify no "unmistakable accusation of suborning perjury" or clear argument "that the defense bought Dr. Turner to lie." (Appellant's Brief at 19-21.)

The State further made no improper argument in directing jurors to facts supporting the credibility of the EMMC physicians. See, e.g., *State v. Hunt*, 2023 ME 423, ¶ 30, 293 A.3d 423 (no error in suggesting "that the evidence would allow the jury to believe the victim"); *State v. Cummings*, 2023 ME 35, ¶¶ 23-25, 295 A.3d 1227 (no error for prosecutor to argue that evidence showed no motive for the victim to lie). The EMMC physicians were not agents or officials of the State. They were neutral professionals making diagnosis and treatment decisions based on science, education, training, and experience, without a stake in the outcome of the prosecution. Unlike the State and defense forensic pathologists, the physicians all had years of experience treating live children with actual COVID-19 infections, brain injuries, or other illnesses, giving them the opportunity that the pathologists did not have: to observe the actual symptoms presented by living—and dying—pediatric patients. They did not have to rely on scientific journals to tell them what symptoms to expect in live patients; they had in fact seen those symptoms in the course of their work.

As the court indicated in its instructions, the jury can consider “any interest a witness may have in the case.” (Tr.T. 3/2/23 at 131.) The treating physicians had none. There was no error in the State’s highlighting that fact in closing argument.

CONCLUSION

By reason of the foregoing, this Court should affirm the conviction below.

Respectfully submitted,

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DATED: March 5, 2023

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CERTIFICATE OF SERVICE

I, Leanne Robbin, Assistant Attorney General, certify that I have mailed two copies of the foregoing "BRIEF OF THE APPELLEE" to the Appellant's attorney of record, Rory McNamara.

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