THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Pen-23-376

STATE OF MAINE
Appellee

v.

RONALD HARDING
Appellant

ON APPEAL from the Penobscot County
Unified Criminal Docket

REPLY BRIEF OF APPELLANT

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INTRODUCTION

(I) Red flags should accompany that portion of the State's brief where it disavows its expert witness's belief that Jaden had an ongoing brain-bleed *before* the brief window during which defendant supposedly injured him. Normally, in a sufficiency-of-the-evidence argument, the State would be quick to embrace the proposition that this Court will review *all* the State's evidence in the light most favorable to it. Here, however, it wants this Court to affirm by ignoring its own expert's opinion that, at the time he was proximately injured, Jaden was not a healthy child but instead was experiencing brain hemorrhaging. To affirm, this Court would have to approve of a theory of causation that the State's own experts' testimony does not fully permit.

(II) Perhaps realizing its closing argument went too far, on appeal the State mischaracterizes that argumentation. Chiefly, the State contends that "Harding can identify no 'unmistakable accusation of suborning perjury' or clear argument 'that the defense bought Dr. Turner to lie.'" (Red Br. 24) (quoting Blue Br. 19, 21). But at trial, the State's argued, **"[Defendant] hired an expert to say this was not inflicted trauma, this devastating brain injury was from complications of Covid.**" (A40; 4Tr. 88) (emphasis added). The clear implication is that the defense hired Dr. Turner, not to testify to the truth, but to offer a concocted defense – perjury and lying, in other words. The State doubled down, suggesting that it was Dr. Turner's "job" to "search the internet" and "cherry pick" information favorable to the defense.

ARGUMENT

I. There is insufficient evidence of reckless or negligent causation.

Shaken-baby prosecutions are somewhat atypical in American criminal law. Instead of pinpointing a particular mechanism and manner of death, abusive-head-trauma prosecutions are premised on the notion that certain injuries – *e.g.*, retinal hemorrhaging, subdural hemorrhaging and hypoxemia of the brain – cannot soundly be ascribed to less than grossly deviant causation. *Cf. State v. Brown*, 2017 ME 59, ¶¶ 9-15, 158 A.3d 501. The State's presentation and its brief on appeal remain fixed in this paradigm, contending that only rapid acceleration/deceleration or other "forceful[] shaking" could have caused Jaden's death. (*See* Red Br. 16).

However, Dr. Elizabeth Bundock – the State's own witness and Vermont's Chief Medical Examiner, (*see* 3Tr. 5) – steadfastly maintained that the State *cannot* exclude the possibility that Jaden had a brain-bleed *before* defendant allegedly injured him. (*See*, *e.g.*, 3Tr. 75-76). The State, therefore, lacks evidence that Jaden – as it claims in its brief, (*see* Red Br. 1, 4) – was a "healthy" child.[1] Its own expert testified that the State cannot exclude the possibility that Jaden's brain was hemorrhaging at least a day before defendant supposedly injured him. Defendant knows of no other abusive-head-trauma prosecution with comparable facts.

[1] Testimony to this effect – from Jaden's mother and the treating providers at EMMC – predates Dr. Bundock's evaluation of, and conclusions about, Jaden's brain tissue.

While the fact that Jaden was unhealthy does not alone mean that defendant did not cause Jaden's death, it does mean that there can be no inference, on these facts, that whatever defendant might have done to injure Jaden was *grossly deviant*. To permit such a conclusion, the experts would need to have testified about what mechanisms could have caused the fatal injuries given the possibility that Jaden was already undergoing a brain-bleed. At this point, the jury cannot know – without guessing – that those injuries were necessarily caused by anything more than normal (*i.e.*, *not* grossly deviant) conduct common to living rooms across America.

This Court should not be comfortable with this quantum of evidence. There is a very real possibility that an innocent man has been convicted despite constitutionally insufficient evidence. The notion that the State asks this Court to affirm by simply ignoring Dr. Bundock's doubts that Jaden was healthy is anathema to notions of justice and fairness. *See* M.R. App. P. 1. The State should not be able to obtain and maintain a conviction when the testimony of its own witnesses raises such doubts about its theory as those do here.

Second Assignment of Error

II. The prosecutor committed reversible error.

The State presents only an argument that its argumentation was not erroneous, thereby waiving any other contentions it might have made. *United States v. Paret-Ruiz*, 567 F.3d 1, 6 n. 4 (1st Cir. 2009) ("[A]rguments not briefed by government are deemed waived."). Respectfully, the

prosecutor's argumentation was improper, and reversal is therefore required.[2]

There were three portions of the prosecution's closing argument that were subject to objection:

> He hired an expert to say this was not inflicted trauma, this devastating brain injury was from complications of Covid.

(A40; 4Tr. 88: argument) (A44; 4Tr. 92: objection). Then, after listing the bona fides of the State's experts, the prosecutor continued,

> 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 –

(A43; 4Tr. 91). Defense counsel objected at this point, and after the court ruled, the prosecutor continued,

> It was not their job to – to look through the – to search the internet trying to find other reasons for – 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.

(A45; 4Tr. 93).

Within these, there are two portions where the prosecution implies that the defense suborned perjury. First and most obvious is, "He hired an

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[2] It is clear that the prosecutor thinks dimly of Dr. Turner. However, defendant wants to briefly address an inaccuracy in the State's preamble to its discussion of its closing argument about Dr. Turner. The State asserts that Dr. Turner "entirely missed" an abrasion on the back of Jaden's head. (Red Br. 18). But its own medical examiner, Dr. Funte, changed his opinion midtrial, testifying that he was no longer sure that the "bruises" were in fact bruises and that they might just be merely the results of lividity. (2Tr. 156-57).

expert to say this was not inflicted trauma, this devastating brain injury was from complications of Covid." Such is directly within the uprights of the decisions defendant cited in the Blue Brief, Pages 19-21. Second and less direct was the prosecution's suggestion that the "job" of Dr. Turner was to "search the internet" and "cherry pick" facts amenable to an exculpatory defense. Taken together, the clear implication was that the defense was fabricated, and with the knowledge of the defense.

Also, in context, the prosecution was clearly juxtaposing Dr. Turner's status as an independent contractor for the defense with its own experts' lack of financial ties. If this is permissible, though, the State walks on eggshells. For example, the Dr. Funte made over $306,000 in the year he testified in this trial,[3] despite leaving a legal mess behind him in Mississippi. *See* 1Tr. 9-12; 2Tr. 134-49. It might reasonably be argued that the reason Dr. Funte preliminarily identified "bruises" on Jaden's body before allowing on cross-examination that they were likely instead signs of lividity is because of his handsome remuneration by the State of Maine. Does anyone want this kind of sniping to become a proper part of our trials? It will become so if this Court welcomes the argumentation by the State in this case.

Finally, in context, it is clear that the prosecution intended to bolster its own witnesses' credibility by noting how they "called it … as they saw it."

[3] *See* https://opencheckbook.maine.gov/transparency/index.html (search terms: 2023, employee compensation, "Funte") (last accessed March 19, 2024).

That was a call appropriately left to the jurors, without prodding from the prosecutor.

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's conviction and remand, either for, in this order, entry of a judgment of acquittal, or to conduct further proceedings not inconsistent with the mandate.

Respectfully submitted,

March 22, 2024

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CERTIFICATE OF SERVICE

I sent a native PDF version of this brief to the Clerk of this Court and to opposing counsel at the email address provided in the Board of Bar Overseers' Attorney Directory. I mailed 10 paper copies of this brief to this Court's Clerk's office via U.S. Mail, and I sent 2 copies to opposing counsel and counsel for other parties at the addresses provided on the briefing schedule.

/s/ Rory A. McNamara

STATE OF MAINE

SUPREME JUDICIAL COURT
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CERTIFICATE OF SIGNATURE

Ronald Harding

I am filing the electronic copy of this brief with this certificate. I will file the paper copies as required by M.R.App.P. 7A(i). I certify that I have prepared the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R.App.P. 7A(f), and conform to the form and formatting requirements of M.R.App.P. 7A(g).

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