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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Cases

Statutes

Rules

Constitutional Provisions

INTRODUCTION

There were two trial errors, each requiring vacatur:

I. According to the State's own expert witness, at least a day prior to the approximately twenty-minute-long window during which, according to the State's theory, defendant must have somehow caused his son's death, the boy was already suffering a brain-bleed. Even assuming, in the light most favorable to the State, that defendant did something that was the but-for cause of the death, the State adduced insufficient evidence to support a finding that, in so doing, defendant acted recklessly. Because Jaden's was brain was already compromised rather than that of a typical healthy infant, in other words, no rational juror could have determined that defendant's conduct grossly deviated from that of a reasonable and prudent person.

II. Defendant has a theory why the jury nonetheless reached a "guilty" verdict: Instead of rationally weighing the evidence offered by the competing medical experts, the jury was swayed by the prosecutor's, respectfully, improper argumentation. That argumentation both implied that defense counsel suborned perjury by the defense's forensic pathologist, and it expressed the prosecutor's personal assessment that the State's own expert witnesses had testified truthfully. In this very close case, such tipping of the scales may well have affected the verdict.

JURISDICTIONAL STATEMENT

The trial court had jurisdiction over the criminal prosecution by virtue of 15 M.R.S. § 1 and 17-A M.R.S. § 9. After a judgment of conviction was entered onto the docket on September 19, 2023, (A16), defendant noticed

this appeal on September 26, 2023, (A14). *See* M.R. App. P. 2B(b). Therefore, this Court has jurisdiction pursuant to 15 M.R.S. § 2115 and 4 M.R.S. § 57.

STATEMENT OF THE CASE

After a jury-trial, defendant was convicted of manslaughter, 17-A M.R.S. § 203(1)(A) (Class A). The Penobscot County Unified Criminal Docket (Murray, A.) thereafter sentenced defendant to 15 years' prison, suspending all but eight and a half years of that term for the duration of six years' probation.

I. Defendant's son, Jaden, died when he was about six weeks old.

Jaden, born April 14, 2021, was defendant's first-born child. (1Tr. 63). On Memorial Day, May 31, Jaden lived at home with his father (defendant), Jaden's mother (Kayla Hartley), and Kayla's three other children (with a different partner), and Kayla's brother. (1Tr. 40).

That day, however, defendant, Kayla and the four children travelled from their residence in Brewer to defendant's mother's and step-father's home in Newport. (1Tr. 42-43). After lunch and some leisure, the family piled into the family vehicle and made the hour-or-so drive back home to Brewer. (1Tr. 43). Jaden consumed a bottle of baby-formula before the return trip. (1Tr. 43-44).

Upon their return to Brewer, Kayla left Jaden with defendant while she supervised her two daughters' showers in the bathroom. (1Tr. 44). At the time, Jaden was awake, smiling, and "cooing" – normal-baby behavior. (1Tr.

44-45). He even whimpered briefly when Kayla handed him over to defendant. (1Tr. 45).

Defendant sat in the living room, holding Jaden on his lap, according to defendant's statements to police. (*See, e.g.*, SX 10 ca. 10:30 to 11:30 & SX 11 ca. 11:45 to 12:30). Kayla's four-year-old son sat with Jaden and defendant, watching television. (*Id.*; 1Tr. 40-41). At some point, Jaden woke from his sleep, began crying and stuck out his tongue. (SX 10 ca. 00:05 to 01:45; SX 11 ca. 11:55 to 12:45). Defendant told police that Jaden became limp and was having difficulty breathing. (*Id.*; 1Tr. 81, 172-73). Defendant then rushed Jaden to Kayla in the bathroom. (SX 11 ca. 12:30 to 13:30; 1Tr. 46). Defendant called 9-1-1 and Kayla attempted to resuscitate Jaden as directed. (SX 8).

When paramedics arrived, they found Jaden in "very poor shape" – pale, mottled and cyanotic skin, no muscle-tone, and barely a pulse. (1Tr. 89). After three attempts, the first responders were able to intubate Jaden, and after multiple attempts, they were able to place an intravenous line. (1Tr. 92-93, 95-97). They observed no apparent external signs of trauma. (1Tr. 91).

At the hospital, the attending physician testified, Jaden was "essentially lifeless," exhibiting no signs of life other than a heartbeat. (1Tr. 105). Jaden's eyes were not responsive to stimuli; he lacked a pain response; and the softspot on the boy's head felt full and firm to the touch, suggesting pressure within the skull. (1Tr. 106-07, 112). A CT scan revealed "multiple significant abnormalities," including brain swelling and tissue damage. (1Tr.

120-21). A neurosurgeon testified that the injuries were non-survivable, not amenable to surgical remedy. (1Tr. 123, 177).

Following protocol for determining that a patient has deceased by "neurologic criteria" – what formerly might have been called "brain dead" – doctors ultimately declared Jaden dead the following day (June 1) at about 3:50 p.m. (1Tr. 147-48; 2Tr. 22).

II. The State theorized that defendant inflicted Jaden's fatal injuries.

The doctors at the hospital quickly began to suspect that Jaden's injuries were "inflicted," mostly because of their precipitousness and the lack of another alternative explanation. (*See* 1Tr. 133, 136-37, 177, 179, 196, 200). Within a couple short hours, law enforcement had been summoned to the hospital. (1Tr. 148, 219; 2Tr. 13). One physician suggested that Jaden's was a "classic" case of "shaken baby." (1Tr. 149).

An ophthalmologist testified at trial that Jaden's left eye exhibited "very extensive" retinal hemorrhaging, which "highly correlated with abusive head trauma." (1Tr. 195-96). The CT scan, according to the treating neurosurgeon, depicted bleeding both "inside" and "around the brain," as well as a "significant amount of swelling inside the brain." (1Tr. 176). The pediatric neurologist testified that, based on the same imaging, she identified hemorrhages underneath the dura mater on through to the brain tissue itself. (1Tr. 207-08).

The day after Jaden was pronounced dead, Maine's deputy chief medical examiner performed the autopsy. (2Tr. 74). The autopsy results

mostly mirrored what the treating physicians had observed at the hospital. (*See* 2Tr. 88-91, 99-100). The medical examiner identified the cause of death as "inflicted head trauma, shaken impact syndrome." (2Tr. 110). Desiring a second opinion, the medical examiner extracted the brain and spinal cord and sent them to a neuropathologist. (2Tr. 97-98).

The neuropathologist testified that she, too, believed that Jaden had suffered a traumatic injury. (3Tr. 31-32). Jaden's brain was so soft upon examination that it began to fall apart, indicating ischemia, plausibly in the neuropathologist's opinion, as a result of shearing/tearing of bridging veins within the brain. (3Tr. 31-32). Similar injuries in the spinal cord suggested a stretching or crushing mechanism. (3Tr. 32-33). All of the injuries were "consistent with an acceleration/deceleration event." (3Tr. 33).

In the meanwhile, defendant was communicating with police, even walking them through the events of May 31 from his vantage point. (2Tr. 42-43; SX 11). The prosecutor noted, in the State's opening statement, how, in those discussions, defendant "came up with nothing that could explain the brain injury that killed Jaden." (1Tr. 27-28). The onus was on defendant and Kayla "to tell [police] everything that they know that might explain what happened Jaden[.]" (2Tr. 45). Because, according to the State, the trauma inflicted upon Jaden had to have occurred during the 20 or so minutes when Jaden was in defendant's care, *see* SX 11:10 to 11:30, "[o]nly one person ... had the opportunity to inflict this injury ... and that person was Ronald Harding." (4Tr. 96). In other words, to convict defendant, the State needed to prove that defendant's actions about 20 to 21 hours before Jaden's death

were the but-for cause of death. (3Tr. 62) (time calculation); (4Tr. 136) (but-for causation instruction).

III. The defense pointed out a serious flaw in the State's theory and presented alternative theory of Jaden's death.

Astonishingly, the State's own witness – the neuropathologist on whom it depended to document and describe the injuries to Jaden's brain and spine – undermined the State's theory by pointing out evidence of bleeding in Jaden's brain that preceded the State's tight window for causation. The neuropathologist documented hemocytorin[1] deposits, a by-product of the breakdown of once healthy blood cells. (3Tr. 59-60). "[H]emocytoricn is typically thought to take a couple of days before it appears, if it wasn't there already from something else." (3Tr. 60). In other words, the neuropathologist pointed to evidence of bleeding in or on Jaden's brain occurring at least two days prior to his death (declared at 3:50 p.m. on June 1). (2Tr. 22; 3Tr. 60-67).

These "[m]oderate hemocytorin deposits" indicated some nature of "an inflammatory process" within Jaden's brain *at least a day prior* to the time when the State theorized defendant caused his injuries. (3Tr. 63-64). When the prosecutor tried to clean up this testimony, the neuropathologist repeated: "I believe that the injuries were about the two days" prior to the time of death. (3Tr. 75-76). She added, there might be a "possibility that there was an additional injury or additional bleeding on either side of that

[1] This seems to be a misspelling, in the transcripts, of "hemosiderin."

timeframe." (3Tr. 76). Later, perhaps becoming aware of the import of her testimony, the neuropathologist tellingly revealed that she did not, until mid-trial, understand the State's theory of the case: "I thought it was [inflicted trauma about] 20 hours of *hospitalization*," rather than 20 hours of *death*. (4Tr. 62) (emphasis added). Nonetheless, she insisted that the initial bleeding in Jaden's brain occurred two to three days – not 20 hours or so, as the State theorized – before death. (4Tr. 76). Likewise, Jaden exhibited evidence of blodd-clotting at least two or three days before his death. (4Tr. 60-61).

The defense called Dr. Jane Turner, a forensic pathologist. (3Tr. 90). Dr. Turner testified that it was her opinion that Jaden died as a result of a stroke caused by abnormal blood-clotting attendant to COVID. (3Tr. 91-93). Indeed, upon his arrival at the hospital, Jaden tested positive for COVID. (1Tr. 141-42). And the radiologist who conducted the CT scan indicated that the imaging revealed that Jaden was then suffering from pneumonia. (1Tr. 212-13). Earlier in the day, according to Kayla, Jaden had stopped breathing after choking on his phlegm. (1Tr. 47-48, 58). Kayla also reported that, in the days prior, Jaden suffered from rhinorrhea and nasal congestion. (1Tr. 184-84).

Dr. Turner also noted damage to Jaden's lungs resulting, in her opinion, from infection: His "lungs had diffuse alveolar damage with hyaline membranes." (3Tr. 94). Other signs of infection were recognized by the neuropathologist called by the State: "granulocyte clumping" – a massing of white blood cells – was found in the blood on Jaden's brain. (4Tr. 52-54).

Jaden's prothrombin time – a measurement of blood clotting – was clinically abnormal. (1Tr. 154). Dr. Turner herself noted Lines of Zahn within thrombi, indicating that "Jaden had blood clots forming in his blood cells" within his brain. (3Tr. 110-14). She observed microglial nodules, further evidence of a viral infection, in the microscopic evidence gathered during the autopsy. (3Tr. 93-95, 97, 116, 129). And, at the hospital, Jaden was hypothermic, which, according to Dr. Turner, was not something one would find in a child who was dying (rather than already deceased) but for infection. (1Tr. 150-51; 3Tr. 98-99). The medical examiner acknowledged evidence of chronic inflammation within Jaden's pancreas – which "could be" evidence of an ongoing infectious process. (2Tr. 152-54).

IV. The State contested portions of the defense's theory.

The State elicited that, subsequent to his positive COVID test, Jaden twice tested negative for COVID. (1Tr. 142; 2Tr. 59, 106-07). For her part, Dr. Turner took issue with the quality of those two tests. (3Tr. 96, 128). The medical examiner reported no indication of an ongoing infectious process, although he later backtracked on that blanket statement. (*Compare* 2Tr. 113 *with* 2Tr. 153-54). The State developed testimony that Jaden's lungs looked fine and that there was no alveolar damage, although its witness was forced on cross-examination to admit that there were "possibly" indicia of bleeding in Jaden's lungs. (*Compare* 2Tr. 102, 115 *with* 2Tr. 155).

The neuropathologist disagreed with Dr. Turner's finding that Jaden's brain contained microglial nodules. (4Tr. 73-74). And she did not agree that Jaden exhibited Lines of Zahn, either. (4Tr. 65-68).

V. The prosecutor's closing argumentation implied that the defense hired Dr. Turner to lie.

In closing, the State argued that, once the State's theory – non-accidental trauma – became known to him, defendant began "to point the finger at others." (4Tr. 88). As an example, the prosecutor continued, "He hired an expert to say this was not inflicted trauma, this devastating brain injury was from complications of COVID."[2] (4Tr. 88). After mentioning the bona fides of the medical professionals who testified on the State's behalf, the State's attorney continued with the theme, "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 --." (4Tr. 91). Defense counsel objected and, at sidebar, complained that the prosecutor was offering improper argumentation. (4Tr. 91-92).

After the judge remarked that she was "not sure [she] agree[d] with" defense counsel, she nonetheless offered to give a curative instruction when presenting her final jury-instructions. (4Tr. 92). Back in front of the jury, the prosecutor continued, of the State's witnesses,

> 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.

[2] The State elicited from Dr. Turner that she "get[s] paid by the case to perform medical legal autopsies." (3Tr. 189).

(4Tr. 93). Defense counsel later withdrew his request for the curative instruction the judge had offered. (4Tr. 123).

VI. Defendant was convicted.

The court denied defense counsel's repeated motions for judgment of acquittal, all premised on the lack of evidence that defendant caused Jaden's death. (3Tr. 77-78; 4Tr. 28-34, 79, 154-55). Months later, defendant was sentenced to serve between eight and a half and 15 years' prison. (STr. 15-16).

ISSUES PRESENTED FOR REVIEW

I. Did the State fail to present sufficient evidence that Jaden's death would not have occurred but for defendant's reckless conduct when the State's own undisputed evidence is that Jaden was already experiencing bleeding and clotting within his brain before the time when defendant supposedly injured him?

II. Did the prosecutor commit reversible error by implying, in the State's closing argument, that the defense hired an expert forensic pathologist to present perjured, "cherry pick[ed]" testimony while simultaneously vouching for the State's expert witnesses' credibility by noting their comparative desire to call it "as they saw it?"

ARGUMENT

First Assignment of Error

I. The State failed to present sufficient evidence that Jaden's death would not have occurred but for defendant's reckless conduct when the State's own undisputed evidence is that Jaden was already experiencing bleeding and clotting within his brain before the time when defendant supposedly injured him.

All of the State's evidence about the mechanism of "non-accidental trauma," "abusive head trauma," or "shaken impact syndrome" contemplated a normal, healthy six-week-old child. But Jaden Harding, according to the State's own expert, was not in good health. For hours or days preceding the narrow window of time during which, according to the State, defendant injured Jaden, the young boy was experiencing bleeding and clotting in his brain. Because the State offered zero evidence that a child in such a compromised state would have survived but for whatever the State alleges defendant did to Jaden, no rational juror could have found – without wildly guessing – that defendant's conduct represented a gross deviation from that of a normal, prudent person. The remedy is remand for entry of judgment of acquittal.

A. Preservation and standard of review

Defendant repeatedly moved for judgment of acquittal, with the trial court denying that relief each time. (3Tr. 77-78; 4Tr. 28-34, 79, 154-55). Anyway, M.R.U. Crim. P. 29(a) requires trial judges to sua sponte review the sufficiency of the evidence: "The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more crimes

charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such crime or crimes." In either case, the issue is preserved for review.

Therefore, this Court's review, mandated by the Fourteenth Amendment, is "to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). If no rational trier of fact could have found the essential elements of the crime to have been established beyond a reasonable doubt, this Court must reverse and order acquittal. *Id*. at 318-19.

B. Analysis

In the typical "shaken baby" case, a healthy child suddenly falls gravely ill. When a child with a healthy brain suddenly develops catastrophic injuries without another plausible explanation, it may be reasonable for a factfinder to infer two things: (1) the person caring for the child at the time is responsible for the injuries, and (2) that person acted at least recklessly in inflicting them. Shaking and acceleration/deceleration, after all, are forces capable of causing typically healthy children to suffer shearing and the resulting brain-swelling and hemorrhaging. Any reasonable, prudent person would know not to forcefully shake a child in that manner. *Cf. State v. Brown*, 2017 ME 59, ¶ 16, 158 A.3d 501 ("'A reasonable and prudent person would not forcefully shake a baby because that person would recognize that babies are fragile. Shaking a baby with the degree of force sufficient to cause shaken baby syndrome, therefore, can constitute a gross deviation from a

reasonable person's standard of conduct.'") (quoting *In re Ashley M.*, 2000 ME 120, ¶ 10, 754 A.2d 341).

However, in our case, Jaden's brain was already bleeding before the time that defendant supposedly injured the child. The blood in his brain was already clotting. These facts are important because the State adduced no evidence that a baby in such a compromised position would have suffered injuries as devastating as Jaden's only from (*i.e.*, "but for")[3] forceful shaking. Unlike the usual inferential chain in such cases involving healthy children, common sense dictates that a child with an ongoing brain-bleed and clotting might fall ill after merely non-forceful handling, soothing and rocking, or a simple accident. In other words, because Jaden's brain was already hemorrhaging, on this record, no rational factfinder could have determined, without guessing, that defendant recklessly caused his son's injuries. The State was required to prove that a child with an ongoing brain-bleed such as Jaden was experiencing hours or days before his 20 minutes on the couch with defendant could only have suffered such devastating injuries as a result of grossly deviant conduct. Its failure to do so requires judgment of acquittal.

1. Legal principles

To obtain a manslaughter conviction, the State must prove that defendant, "[r]ecklessly[] or with criminal negligence," caused Jaden's death. 17-A M.R.S. § 203(1)(A). Both "recklessly" and "criminal negligence" require the State to prove, *inter alia*, conduct that "involve[s] a gross

[3] The State was required to prove that Jaden's death "would not have occurred but for the conduct of the defendant … ." 17-A M.R.S. § 33(a).

deviation from the standard of conduct that a reasonable and prudent person would observe in the same situation." 17-A M.R.S. §§ 35(3)(C), (4)(C); *cf. State v. Gammon*, 529 A.2d 813, 814-15 (Me. 1988). This is the decisive, bottom line in our case: The State failed to prove a gross deviation from whatever a reasonable and prudent person might have done.

"The culpable state of mind required by the statutory definition of manslaughter … calls for jurors to resort to their own experiences and common sense in order to identify normative expectations about how 'reasonable and prudent' people should act in a particular situation." *State v. Lowe*, 2015 ME 124, ¶ 33, 124 A.3d 156. "After making that determination, the jurors must then decide whether a defendant's particular actions, arising from a conscious disregard or failure to be aware of a risk, constituted a gross deviation from the standard of conduct they have identified." *Ibid.* This Court "will leave such a determination undisturbed as long as it is rational." *Ibid.*

The gross-deviation standard is imperative for at least two reasons. First, it saves the manslaughter statute from unconstitutional vagueness. *State v. Carisio*, 552 A.2d 23, 25 (Me. 1988) ("Maine case law makes amply clear that criminal negligence and recklessness, requiring as they do a finding of gross deviation from reasonable and prudent conduct, are capable of understanding by and give fair warning of what conduct is forbidden to a person of ordinary intelligence."). Second, the gross-deviation requirement is necessary to distinguish mere civil negligence from criminal negligence and recklessness. *State v. Crocker*, 435 A.2d 58, 65-67 (Me. 1981) ("[T]o

constitute criminal negligence the risk involved must be greater in degree than will suffice for civil negligence.").

2. It was irrational for jurors to find that defendant must have caused Jaden's injuries by conduct constituting a gross deviation from that of a reasonable and prudent person.

The record does not permit a finding that a six-week-old baby suffering from an ongoing brain hemorrhage would suffer injuries like Jaden's *only if* handled in a grossly deviant manner. The evidence that the jury received presumed a healthy child without a brain-bleed. And the explanations they heard regarding the mechanics of "abusive head-trauma," common sense would suggest, are subject to significant caveats when there is already an active hemorrhage and clotting ongoing within the child's head.

Defendant hastens to add that we are not talking about the so-called "eggshell skull," either. The notion that a tortfeasor takes his victim as he finds him presupposes that there has indeed been tortious conduct – *i.e.*, in our case, reckless or negligent conduct. But when the result (here: the injuries to Jaden) itself is what is used to determine whether a standard of care has been violated, the same logic cannot apply. A person exercising reasonable and prudent care might well have exacerbated Jaden's injuries by mistake or less-than-criminal conduct.

A couple cases from Maine are illustrative of this Court's role safeguarding the gross-deviation standard. In *State v. Wilder*, 2000 ME 32, ¶¶ 2-12, 748 A.2d 444, a father grabbed and squeezed his nine-year-old son on three separate occasions, causing pain and bruises each time. After his

convictions for assault, the defendant appealed, contending that the State had failed to prove that his attempts to control the son's behavior constituted a gross deviation from what a reasonable and prudent parent would have done in the circumstances. In holding that the State had failed to offer sufficient such proof, the *Wilder* Court noted, "'Gross deviation'" is a considerable narrowing of the reasonableness standard… ." 2000 ME 32, ¶ 34. The Court could not "say, as a matter of law" that "grabbing [the] son hard to get his attention and stop him from talking too much was…beyond a reasonable doubt, an action grossly deviant from what a reasonable and prudent parent would believe necessary in the same situation." *Id.* ¶ 47.

Years earlier, in *State v. Tempesta*, 617 A.2d 566 (Me. 1992), a defendant was convicted of driving to endanger after splashing snow and slush onto the windshields of oncoming vehicles, causing the drivers of those vehicles to momentarily lose control. *Id.* at 566-67. Reasoning thusly, this Court found insufficient evidence of a gross deviation:

> Even if no car were actually to his right, [the defendant's] concern that a vehicle was in his blind spot could justify his choosing to splash the oncoming vehicles rather than chance hitting another vehicle. To the extent that [the defendant's] failure in the circumstances to keep his mirrors clear contributed to his difficulty in determining whether the right-hand lane was occupied, this failure does not reach the level of criminal negligence.

Id. at 567-68. The lesson of *Tempesta* relevant to our case is that, even when a defendant's actions are not perfect – certainly, the defendant "fail[ed]" to

keep his mirrors clean, causing the other drivers' loss of control – the State has not necessarily established a *gross* deviation from those of a reasonable and prudent person.

Forceful shaking of any child, common sense dictates, is an unacceptable risk – a gross deviation, in our vernacular. *Cf. Brown*, 2017 ME 59, ¶ 16. But there can be no inference that defendant shook Jaden, given the boy's already compromised health. Might Jaden's injuries have been caused by less risky behavior – *e.g.*, "rocking," jostling around on the couch, or the clumsiness of a four-year-old sibling? Is that sort of conduct grossly deviant from what happens amongst family members on every couch in America on any given night?

The supervening cause – Jaden's ongoing brain hemorrhage – means there can be no inference that anyone forcefully shook or otherwise accelerated/decelerated him. On this record, the State did not prove that Jaden's injuries must have resulted from anything other than reasonable and prudent conduct. Because "it is far worse to convict an innocent man than to let a guilty man go free," *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring), this Court must reverse and mandate acquittal.

Second Assignment of Error

II. The prosecutor committed reversible error by implying, in the State's closing argument, that the defense hired an expert forensic pathologist to present perjured, "cherry pick[ed]" testimony while simultaneously vouching for the State's expert witnesses' credibility by noting their comparative desire to call it "as they saw it."

The prosecutor's argumentative gambit contrasting Dr. Turner with the State's witnesses served two obvious purposes: (1) suggesting that Dr. Turner was hired by the defense to lie and (2) buttressing the testimony of the State's own witnesses. In this close case boiling down to which experts the jury believed, this improper argumentation was reversible error. The remedy is vacatur.

A. Preservation and standard of review

Notwithstanding defense counsel's contemporaneous objection to this argumentation, defendant here recognizes that this Court will review only for obvious error. That is because the remedy defendant seeks – a new trial – was not requested, in the form of a mistrial, by defense counsel during the trial. Obvious-error review looks for (1) error (2) that is plain, (3) which affects substantial rights, and (4) which undermines the fairness or integrity of judicial proceedings. *State v. Warner*, 2023 ME 55, ¶ 13, __ A.3d ____.

B. Analysis

There are two steps to analyze claims of prosecutorial error: First, this Court will determine whether the prosecutor, in fact, erred. *See State v. Wai Chan*, 2020 ME 91, ¶ 24, 236 A.3d 471. If there is error, second, the Court will evaluate the error within the context of the trial to gauge whether it

might reasonably have affected the outcome. *Ibid.* Defendant adheres to this two-step process.

1. Both Law-Court and out-of-jurisdiction case-law recognize that this was error.

This Court has long recognized that a prosecutor may not suggest to the jury that she thought a witness was lying. *See*, *e.g.*, *State v. Steen*, 623 A.2d 146, 149 (Me. 1993). Indeed, Maine Rule of Professional Conduct 3.4(e) forbids an attorney from "stat[ing] a personal opinion as to ... the credibility of a witness." In *Steen*, for example, this Court vacated a conviction because, *inter alia*, a prosecutor argued:

> Now at trial [Steen] has got a theory for how [the vaginal tear suffered by the complainant] occurred. And what does he do to advance his theory? He calls Dr. Piver, a medical doctor, no less, flown up specially all the way from Maryland just to testify for Jon Steen. And Dr. Piver sits on this witness stand and he says that that tear, well, that tear wasn't big enough for rape, that must have been consensual... . *I suggest to you, ladies and gentlemen, that his opinion is based on $ 2,500, the money the defendant paid him for his testimony.*

623 A.2d at 149 (emphasis in original). For all intents and purposes, the impropriety presented by *Steen* is equivalent to ours. Our prosecutor claimed that defendant "hired an expert to say this was not inflicted trauma" and to "cherry pick" evidence, which, in context, is an unmistakable accusation of suborning perjury. Other jurisdictions' case-law reflect as much. *See*, *e.g.*, *Commonwealth v. Copeland*, 114 N.E.3d 569, 578 (Mass 2019) (Prosecutor "improperly referred to the defendant's medical expert as 'a paid expert with a job to do ..., and that job was to come up with the excuse and then come in and sell that excuse to you.' It is improper for a prosecutor

to suggest that an expert witness's testimony was 'bought' by a defendant or to characterize the witness as a 'hired gun' where ... there was no evidence that he was paid more than his customary fee.") (cleaned up); *People v. McLain*, 757 P.2d 569, 577-78 (Cal. 1988) ("'So obviously what happened, [defense investigators] shopped around, found somebody who was willing to come in and lie, but they didn't get his story straight enough....'" – is improper but harmless given curative instruction and the fact that it "was brief and went to a matter that was relatively insignificant in the determination of the issue of the penalty"); *People v. McBride*, 228 P.3d 216, 223 (Colo. Ct. App. 2009) ("Those attacks denigrated the expert as a 'hired gun' who was 'full of it' and who in return for $275 an hour fees (which overstated the actual $175–225 per hour fees) 'made up' testimony that was 'garbage.'" – vacating attempted murder conviction on obvious-error review); *Sipsas v. State*, 716 P.2d 231, 234-35 (Nev. 1986) (Of prominent California coroner testifying as defense expert: "'The hired gun from Hot Tub Country. Have stethoscope, will travel.'" – is "so prejudicial as to require court intervention sua sponte to protect the defendant's right to a fair trial."); *State v. Vines*, 412 S.E.2d 156, 162-63 (N.C. App. 1992) ("'You can get a doctor to say just about anything these days.' In elaboration upon this theme, the prosecutrix went on to imply or suggest that Dr. Leshner's testimony was motivated by 'pay.' Such argument not only attacked the integrity of Dr. Leshner but also that of defense counsel. We vigorously disapprove of this improper argument and deem it to have been of such gross impropriety as to justify an ex mero motu correction."); *State v. Rose*, 548 A.2d 1058, 1092

(N.J. 1988) (It's "'clearly improper'" to suggest "'that the experts were told by the lawyers 'how he could beat the penalty that the law provides for him and they came in here and ... gave an opinion,'" because, by such, "the prosecutor implied that the expert's testimony was fabricated or contrived, with the assistance of defense counsel."); *Erskine v. State*, 4 A.3d 391, 396 (Del. 2010) ("[T]he State's use of the phrase 'bought and paid for' was improper. It was pejorative and clearly intended to convey the prosecutor's belief that Mechanick was not giving a professionally supportable opinion." – but harmless give fact that "This was not a close case."); *State v. Wahlberg*, 296 N.W.2d 408, 420 (Minn. 1980) (It's "improper for plaintiff's counsel to characterize one of the defendant's doctors as a professional witness who would testify in a predetermined manner for money, precisely what the prosecutor did in the instant case.").

A second, though related, angle also reveals the prosecutor's argumentation to be improper. Not only was the prosecutor clearly arguing that the defense bought Dr. Turner to lie, the State's attorney did so in a manner that bolstered the State's own witnesses' credibility. *Cf. State v. Robbins*, 2019 ME 138, ¶ 10, 215 A.3d 788 ("Injecting personal opinion regarding the credibility of a witness, or vouching for a witness by using the authority or prestige of the prosecutor's office, will almost always be placed into the category of misconduct.") (cleaned up). The prosecutor here twice engaged in such improper vouching by comparison when she argued, (A) "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...," (4Tr. 91); and, (B) "It was not their job ... 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... ." (4Tr. 93). The Supreme Court of New Jersey previously identified this form of dual vouching. *See State v. Smith*, 770 A.2d 255, 271-74 (N.J. 2001) ("[T]he prosecutor's comments improperly implied that because Lieutenant Mentzer was not paid, and the defense experts were, the State's witness was more credible." – reversing conviction where trial comes down to which experts jury believes).[4] The prosecutor's statement that the State's witnesses "called [it] ... as they saw it" is certainly an expression of personal opinion.

Having established prosecutorial error that is plain – in two different manners – defendant proceeds to the next analytical step.

2. The plain error affected defendant's substantial rights.

In a similar case, the Law Court held, "[I]mproperly questioning a defendant about whether other witnesses lied requires reversal except where there is 'overwhelming' evidence of guilt." *State v. Tripp*, 634 A.2d 1318, 1320 (Me. 1994). Defendant, *supra*, argues that there is insufficient evidence to sustain his conviction; even if, for the sake of argument, there is sufficient such evidence, the State's case was certainly less than

[4] This phenomenon is particularly concerning in criminal cases where, unlike civil cases, the State's experts are almost always unpaid. *See Smith*, 770 A.2d at 274.

overwhelming for all the reasons discussed above. Just as in *Tripp* and *Robbins*, 2019 ME 138, ¶ 11-16, the State's evidence was not overwhelming, and there is obvious error.

Moreover, the impropriety touched on the competing experts' credibility – *the* battle over which the entire trial was pitched. *Cf. State v. True*, 438 A.2d 460, 469 (Me. 1981) (Obvious error particularly like "in a case where so much rode upon the testimony of a single witness, whose credibility on [a] critical issue" is key); *Tripp*, 634 A.2d at 1320 (obvious error when case "turned on" witnesses' credibility). This principle, of course, is quite important in criminal cases where, rather than needing credibility sufficient to persuade a jury by a preponderance, defendant could have prevailed if a juror found Dr. Turner credible enough to generate merely a reasonable doubt.

Nor was there direct evidence of reckless or criminally negligent conduct by defendant – another circumstance auguring in favor of substantial. *Cf. United States v. Acosta*, 924 F.3d 288, 300 (6th Cir. 2019) ("In a case where credibility judgments were almost certainly determinative—because all of the government's evidence of guilt was circumstantial—such a comment may have been highly prejudicial."). While, of course, the State may build a prosecution entirely on circumstantial evidence, it does so without much margin for error when it comes to the credibility of that evidence.

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,

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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
Sitting as the Law Court
Docket No. Pen-23-376

State of Maine

v.

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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