LEX ENFANTS

QUARTERLY NEWSLETTER | SUMMER 2019

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CHILD ABUSE PROSECUTION PROJECT

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DIRECTORS MESSAGE:

Welcome to the Summer 2019 Edition of Lex Enfants.

Welcome to the Summer 2019 edition of ***Lex Enfants***. This issue focuses on methods to identify, investigate and prosecute physical abuse crimes against children. Many thanks to the authors of the highly specialized articles on medical evidence in child physical abuse cases and effective prosecution of child physical abuse cases. We are pleased to feature in our Spotlight section this quarter the innovative and dedicated work of Leigh Bishop, former Chief of the Child Fatality Unit of the Queens District Attorney's Office.

Please join us for our tuition free, 4th National Symposium on Child Abuse and Neglect to be held October 23-25, 2019 in Salt Lake City, Utah. We are also sponsoring a series of cutting edge, tuition-free regional trainings led by experts in the field for 2019. Please check our website at **childabuseprosecution.APAinc.org** for our calendar and details.

Our Wednesday Webinar series continues to address key topics for child abuse prosecutors and their multidiscplinary partners. Please check our website for upcoming webinars and other useful resources. Past webinars are included in our on-line library, which can be found under our "resources" tab at **childabuseprosecution.APAinc.org**.

Thank you for all you do on behalf of children,

David LaBahn, CEO
Director, *Child Abuse Prosecution Project*
Association of Prosecuting Attorneys

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IN THIS ISSUE:

PROSECUTOR SPOTLIGHT:

LEIGH BISHOP

Former Chief, Child Fatality Unit

Queens County, New York District Attorney's Office

By: Beth Merachnik

How long have you been a prosecutor?

Leigh: 22 ½ years.

What led you to this career?

Leigh: I started at Southern Methodist University (SMU) in a joint JD/MBA Program. I already had a background in French and Japanese. I wanted to use my languages in some aspect of international law. I took criminal law my first semester – that was it for me! I knew the first week of law school I wanted to be a prosecutor. It swept me off my feet!

What is your position presently at the Queens District Attorney's Office?

Leigh: I am the Chief of the Child Fatality Unit.*

When was the Child Fatality Unit developed?

Leigh: The Child Fatality Unit was developed five years ago by the late Queens District Attorney Richard A. Brown. District Attorney Brown was a visionary and realized how different child fatality cases were from traditional prosecutions. He deserves all of the credit for establishing this innovative unit. He gave me the opportunity to specialize in these cases. Judge Brown's rich legacy includes our office's pro-active, pre-arrest response in major cases, which involves working with police to investigate fully before charging decisions are made.

I feel strongly about cases involving babies and toddlers - since they cannot speak - there needs to be a solid investigation. We need to get to the right answer: crime, accident or illness. Our Child Fatality Unit has developed a wonderful partnership with police. We also have built good working relationships with the doctors and medical examiners that may be involved. We work together to answer the question of what happened to this child.

What are your duties and responsibilities in the Child Fatality Unit?

Leigh: I respond right away when I am notified of a baby or toddler fatality. The call may come in via 911 or I may be directly contacted by the doctor or the police. We have established an efficient notification system when there is a baby or toddler death. We know who needs to be notified and what needs to get done. The investigation begins immediately. We do not wait several days to get a full medical report on the baby; if we did, the police could lose ground in their investigation that they cannot recover. By taking initial statements and searching the house, for example, the information may be critical to the diagnosis or to determine inconsistencies in a subsequent suspect interrogation.

Generally, parents tend to leave their babies and toddlers with relatives or close friends. I have found that when there is a death of a baby or toddler, oftentimes the non-offending caregiver is reluctant to demand justice by insisting on a thorough investigation since they have already lost a child and do not want to lose a close relative or friend. It is for this very reason that I believe these kids need an advocate. The Child Fatality Unit responds to that need. I believe strongly that baby and toddler cases are their own specialty.

In Queens, there are approximately 30 reported child fatalities a year. Of those 30 reported deaths, approximately 20% are determined to be the result of criminality. It is critical that a thorough investigative process be followed every single time. If we don't solve the mystery about what happened to this child, for example, social services doesn't know if the removal of other children in the home is warranted. Utilizing a thorough, coordinated investigative process immediately in these cases provides law enforcement the best opportunity to either charge a perpetrator or clear grieving family members. It is vital that we get it right. I believe that when the disciplines involved in the investigation see the thorough investigative process work, they are motivated to continue the practice in every child death case.

How is the Child Fatality Unit organized?

Leigh: The Unit is housed in the Special Victims Bureau. That Bureau has 8-9 prosecutors plus supervisors. I have one other prosecutor specifically assigned to the Child Fatality Unit. The Child Fatality Unit is notified of all child deaths under four years of age. The prosecutors in the Child Fatality Unit are on call 24/7 and share beeper duty.

In the Child Fatality Unit we also get involved in cases where the baby/toddler is seriously injured but will live. In these cases - just as in the child deaths, we go to the scene, go to the hospital, go to the police station as well as to the pediatrician. I have even retrieved a Ret-Cam from hospital so that it could be used in another hospital to document critical eye findings.

I keep most of my cases, but I also serve as a resource for other prosecutors in my office who show an interest in handling a child death case. There is a big learning curve when you handle a child death case. There is always new medical information to learn or new ways to interpret injuries. It is very time consuming and often a challenge for prosecutors to handle a child death case in conjunction with a caseload of other types of cases. That is why a Child Fatality Unit is so important because the prosecutors in that unit can focus their practice solely on these type of cases. Especially in larger prosecutor's office, I believe it is critical that such a unit be developed.

How does the Child Fatality Unit assess cases and make charging decisions?

Leigh: These are out of the box cases. There is very rarely DNA or a confession in child death cases. As a result, under New York penal law, the investigation involves an element of creativity in that we assemble circumstantial evidence of the act, the perpetrator, and the mens rea. This is not an easy task. I like to gather all the evidence and speak with other lawyers in my office about the case. I like to bring the best legal minds together to evaluate these cases. I am a big believer in it takes a village. I believe it is a strength and not a weakness to bring knowledgeable people in on the case assessment. To make a sufficient complaint and set out accurate facts and details requires input from doctors and police. Child death investigations continue even after an arrest. I believe that you need to be flexible in charging decisions. You may have to amend complaints in some cases, depending on where the evidence takes you. I also believe strongly in developing a good working relationship with the defense bar.

How does the Child Fatality Unit handle victim support?

Leigh: We refer cases to our Crime Victim Services Unit as well as to the Administration for Children's Services (ACS) for assistance.

Can you discuss a case that you handled that illustrates the importance of a Child Fatality Unit?

Leigh: Yes – there was a case of an infant that was found dead by the parents. This family had no prior involvement with social services and no criminal background. There was an older sibling in the home and the family had a lot of family support. The doctors examined the child externally and the child appeared healthy and well nourished. There did not seem to be any red flags. Even though initially the doctors told the police that it did not look like any criminality was involved, the police immediately began our "process" with a thorough investigation. A team of detectives were deployed to cover interviews including the pediatrician and family members, search phone records and surveillance videos. Multiple search warrants were executed.

Several days later an autopsy of the baby revealed devasting abusive head trauma. Thankfully, the police had positioned the investigation well and were able to develop a specific timeline with the assistance of the medical examiner. From that evidence we identified the perpetrator, who was subsequently convicted. If the police had waited 2 or 3 days to begin their investigation, our access to many parts of the investigation would have been shut down.

What advice would you give a prosecutor's office who want to develop a Child Fatality Unit?

Leigh: I would say go for It. It is all about learning some of the medicine and cultivating relationships. As prosecutors, we all have way too much to do. Take the time, not in the heat of an investigation, to go and meet with the homicide detectives, pediatric ophthalmologists, and child abuse doctors in the hospital. When you realize there are many committed people out there giving their best effort and when everyone involved in the child death investigation works together doing their part, it builds confidence in the process and is a very powerful tool.

When the disciplines work together to confidently close a case and move on to the next case, it is a powerful motivator that this is what we are here for, to solve the mystery of what happened to this child.

What advice would you give a prosecutor handling their first child abuse case?

Leigh: Start at the beginning of this child's life. Obtain every medical record possible of the child. Ideally, pre-arrest, comb through all the child's medical records. Develop a timeline before an arrest. Well in advance of trial, sit down with the medical specialists that participated in this child's diagnosis. Ask that the medical specialists teach you about the medical findings. How did they arrive at their conclusion? Ask them to provide you with reading material. Challenge the medical specialists about possible defenses to the injuries.

These cases require a tremendous amount of preparation and cannot be left to the last minute. Start from the beginning to gather all of your clues.

Thank you Leigh.

*Please note that Leigh departed the Queens District Attorneys Office on May 10, 2019. In her new roles, she will be broadening the scope of her work on cases involving babies and toddlers.

KEYS TO EFFECTIVE PROSECUTION OF CHILD PHYSICAL ABUSE

By: Rob Parrish, Deputy Salt Lake County District Attorney

Successful prosecution of cases where caretakers of children cause physical injuries to children in their care requires the prosecutor to:

- Understand the medical basics concerning how the injuries to the child were likely inflicted by some other person rather than the result of accident or something else
- Work with medical professionals involved with the victim's treatment and assessment to understand the dynamics of this particular case and retain consulting experts when necessary to explain the significance of the injuries in the context of child abuse
- Take into account whether the injuries were inflicted over an extended period of time, thus representing an escalating pattern of child harm, or were the result of a single loss of impulse control by an overwhelmed caregiver who has no prior history of harm to children or of interpersonal violence
- Grasp the significance of the onset of symptoms for the child's injuries to help understand whether the caretakers' explanation for the injuries is plausible or not
- Learn the common behaviors of child abuse perpetrators which help identify the person who caused the injuries among several who had "access" to the victim and prove the mental state of the abuser
- Comprehend how severe injuries often require an extended application of violent force, application of burning liquids or forcing the child into hot liquid, or acts by the perpetrator that evidence more culpability than causing a bruise or other minor injury
- Collect all prior medical records relating to the victim of abuse, to identify a prior pattern of abuse and since it is common for those accused to claim the injuries were caused by a pre-existing medical condition
- Collaborate and coordinate with child welfare professionals as well as child protection attorneys who are dealing with the same family

> In jury selection and in trials, overcome the general pattern of disbelief among the general public that anyone who is a parent or caregiver of a child would ever intentionally or knowingly cause harm to that child

> Be prepared to prove your case without eyewitnesses and with purely circumstantial evidence

> Master the use of expert witnesses and develop ways to illustrate the expert's opinions to educate the trier of fact and equip the jury or judge with the tools needed to understand the significance of the pattern of the child's injuries and what that reveals concerning the perpetrator's mental state

> Recognize the specious claims of certain medical witnesses that there are alternative explanations for the child's injuries when such claims are scientifically unsupported or offered only in courtrooms but not in peer-reviewed medical literature

> Be creative in fashioning possible resolutions of a case to achieve justice but also to avoid future occurrences of abuse of children

> Consider what is in the "best interest" of both the child victim and other children affected by the perpetrator, which is highly dependent upon the whole history of the case

This list is just the beginning of what is required for prosecution of child physical abuse and child homicide by abuse cases. The plain fact is that these cases are never simple and all require the prosecutor to get up to speed in a very particular area of medical science which is different from most other crimes.

Prosecutors of child physical abuse cases in larger jurisdictions are often the same prosecutors who are tasked with prosecuting child sexual abuse, domestic violence, and adult sex crimes. They soon learn that these are widely disparate cases, requiring very different skills and understanding. Child physical abuse and homicide cases can be even more challenging in the small prosecution office where a few attorneys must handle everything that happens in their jurisdiction.

Most child physical abuse is done by the child's parents, with live-in paramours of a parent and other caregivers also in the list. Most such abuse is committed by someone who is overwhelmed providing care for the child, but not always triggered by the child's own behavior. A majority of abuse is committed by someone without a prior criminal history, or even reports of prior violence. That's because most child physical abuse is the result of a sudden loss of impulse control. The unfortunate reality, though, is that some abusers have a long history of violence, have been abusing this or other children in the family for an extended time, and some are sadistic criminals who should never have been around children, let alone left to care for children. A fairly common scenario for serious child physical abuse involves the live-in paramour of the child's parent left to care for the victim because the parent believes if he/she loves the paramour, they must be a good caregiver for their children.

Prosecutors have a significant task to learn as much as possible about the cause of childhood injuries, ranging from bruises to burns to inflicted head trauma. While each case contributes to such knowledge, success often requires outside reading, research, and attendance at training conferences. Because of the special knowledge required to explain complex medical concepts to a jury of laypersons, prosecutors should seek out and consult with those who have more expertise
One of the particular challenges of child physical abuse prosecution is a small number of physicians who provide testimony based on unproven and scientifically unsupported alternative theories for the cause of child injuries. Though these witnesses can be persuasive, prosecutors must be well-prepared to refute their claims with valid science explained by experts who are actually part of the relevant scientific community: that is, those who regularly diagnose the cause of child injuries in their daily practice of medicine. Prosecutors should do everything possible to obtain timely disclosure of expert witness reports in each case so that they can consult with their own experts as to the validity of claimed alternative causes. If the rules in the prosecutor's jurisdiction still allow trial by ambush, the rules should be changed. Even in that situation, though, a lot of information can be learned about the proposed expert through research and talking to others in the criminal justice field.

While child physical abuse and child homicide cases are very challenging, they can also be very gratifying for the prosecutor who is well prepared and who thoughtfully considers the interest of justice in each case. Effectively handling a case can result in protection from future abuse for the victim and for other children, can result in changing caretaker behavior regarding harming children as part of discipline, and does not have to result in dissolution of families in the great majority of cases. Often, collaborative resolution of both the child welfare case in juvenile or family court and the criminal case can extend the time during which the family is complying with conditions of settlement or probation, is being monitored by both social service agencies and probation and parole agencies, and can give families time to truly alter their prior behaviors and keep their children safe.

PHYSICAL ABUSE IN CHILDHOOD: IMPORTANT MEDICAL FACTS FOR PROSECUTORS

By: Bailee A. Stark, B.S. and Barbara L. Knox, MD, FAAP

Over 500,000 cases of child physical abuse are reported to child protective services every year in the United States, many of which are reported by healthcare professionals[1]. What is more alarming is that this number may only represent 25% of true cases of abuse. One source of such concern is that healthcare professionals often fail to recognize the signs of maltreatment[2]. While these statistics are distressing, many strides have been made to educate the interdisciplinary team as to how to appropriately recognize, diagnose, and medically treat these children. In this article, we will discuss sentinel injuries and other abusive patterns, the medical workup for a child who presents with injuries concerning for child physical abuse, and how prosecutors can use all of this information to protect children and hold the perpetrators accountable.

The concept of sentinel injuries is important to understand when working with infants who have physical injuries concerning for nonaccidental trauma. Once child abuse is ultimately diagnosed, there is often a history of minor injury to the infant that might have tipped off the professional sooner. A sentinel injury is defined as a previous minor injury in a precruising infant (an infant that is not yet pulling to stand and taking steps) that is concerning for abuse because the mechanism of injury is implausible or the explanation of the injury is poor[2,3]. Studies have shown that sentinel injuries are common in abused infants but not present in infants who sustain accidental injuries, making sentinel injuries an important indicator of potential abuse. One study found that 27.5% of definitely abused infants had a history of previous sentinel injury[2]. While sentinel injuries can be any minor injury, they are most often bruising or oral injuries[2,3]. In fact, many studies have shown that accidental bruises in precruising infants are extremely rare[1–4]. Unfortunately, when these injuries are discovered during routine wellness checks, many go undocumented as the injury is interpreted as trivial[3,5]. However, nearly half of medical providers admit that

they were aware of the sentinel injury preceding the ultimate diagnosis of abuse[2]. Given this evidence, identification of sentinel injuries may be key to providing early intervention and preventing potential severe, and perhaps fatal, cases of abuse in the future.

The location, pattern, and amount of bruising is also important for determining the likelihood of physical abuse. Studies demonstrate that any bruise in infants under four months of age is abnormal and should be immediately concerning for child physical abuse[1,4]. In ambulatory children, accidental bruises are most often found on the anterior body overlying bony prominences, such as the knees, elbows, and forehead. Pierce et. al. reported that bruises in the TEN location [torso (chest, abdomen, back, buttocks, genitals, upper arms, and thighs), ears, and neck] are concerning for abuse in all children 4 years of age or less[1]. Patterned cutaneous injuries in identifiable shapes such as loop marks, hand prints, or bite marks are also much more concerning for child physical abuse[3,6]. Finally, multiple studies have found that victims of child maltreatment are more likely to sustain multiple, larger bruises often found in clusters[1,6]. If there is a concern for physical abuse, an appropriate and thorough medical evaluation is warranted.

While there are many similarities across the standard medical evaluation for all children with injuries concerning for child physical abuse, there are age-specific guidelines that should be followed. Infants with injuries who are not yet cruising are particularly concerning for nonaccidental trauma. Given that these patients cannot communicate with providers, the history and physical examination may not provide sufficient data for determining the likelihood of child physical abuse. Therefore, if physical abuse is suspected in a patient who is less than 6 months old, a full workup is recommended. Because head trauma is a common form of physical abuse, and the neurologic exam is not sensitive in this age group, a CT scan of the head with 3D reconstruction is recommended. Infants between 6-12 months of age should have a head CT if they show signs of altered mental status. If there are abnormalities on the head CT, an MRI of the head and total spine should also be obtained, which can assist in dating of the injuries[7]. If there are any abnormalities on head imaging, the infant should also have a dilated ophthalmologic examination completed to assess for retinal hemorrhages or other ocular findings. Any infant also should have a skeletal survey to examine for both acute and chronic fractures[7]. If fractures are present, laboratory studies to evaluate bone health, including calcium, magnesium, phosphate, alkaline phosphatase, parathyroid hormone, and 25-OH-Vitamin D are sent to rule out metabolic bone disease. Regardless of whether or not fractures are identified, a two week follow up skeletal survey is often recommended for cases especially concerning for physical abuse, as they can confirm existing fractures, detect any new fractures, and help date existing injuries[8]. All children less than 12 months old should also be screened for occult abdominal injury, as abdominal exams are also not sensitive in this age group[9]. These labs include an ALT and AST. If these labs are elevated greater than 80 IU/L, it may be indicative of abdominal organ trauma and necessitates an abdominal CT for further characterization[9]. For any patient in this population who presents with unusual bruising consideration should be given for laboratory evaluation for possible underlying coagulopathy[10,11]. This includes obtaining a CBC, PT, PTT, Factor VIII, Factor IX, von Willebrand factor activity, and von Willebrand factor antigen. The workup should also consider a drug screen in patients particularly at risk. While this may seem extensive, it is very important to perform a full evaluation in this high-risk population.

In patients ranging from 12-24 months of age, a somewhat more focused evaluation can be completed. For example, since the neurologic exam is more sensitive in this age range, a head CT is only indicated if there are abnormalities in the neurologic exam or other signs of abusive head trauma, such as bruising or bleeding to the face or scalp. The skeletal survey, abdominal trauma labs, and bleeding disorder labs are still indicated as described above because these exams still lack sensitivity in this group. Another important consideration in this group is the developmental ability of the child. Most of these patients can cruise or walk, leading to increased frequency of accidental skin (cutaneous) injuries. One should assess these injuries in the context of the child's developmental abilities and use this to inform any further workup.

For children older than 24 months with injuries concerning for abuse, a much more focused workup should be completed. These children are especially mobile and sustain many accidental cutaneous injuries. If there is suspicion for abuse, one should not hesitate to obtain further workup. Special attention should be paid to the child's developmental history, as the evaluation should be consistent with the child's developmental age rather than their chronological age. As with children ages 12-24 months, this older population should receive a head CT if there are concerns for abusive head trauma. Skeletal surveys between the ages of 2-5 are conducted at the medical provider's discretion. Over the age of 5, x-rays of specific bone related injuries should be obtained. Up to the age of 5, children with injuries concerning for physical abuse should undergo abdominal trauma labs regardless of the location of the injury[9]. Concerning bruises should also be carefully documented and coagulopathy studies should be completed if warranted. While this population is much more likely to sustain accidental injuries, it is important to acknowledge and remember that these children are still potential victims of physical abuse.

Though physical abuse is socially, medically, and legally complex, continued education of the multidisciplinary team who cares for these children is vital. While prosecutors may

not be familiar with the intricacies of a child physical abuse medical evaluation, these details are often paramount in a case in providing mechanism(s) of injury and timing. A basic understanding of sentinel injuries, patterns of abuse, and the evaluation of these children is important in the furtherance of the truth and justice.

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BENCHMARKS:

Court Rules Text Messages Between Husband and Wife Admissible in Child Abuse Case

The Court of Appeals of Maryland held "in a case in which defendant was convicted of first-degree murder, first-degree child abuse, and neglect of a minor child, the confidential marital communications privilege in Md. Code Ann., Cts. & Jud. Proc. § 9-105 was not applicable to the text messages between defendant and his wife because, under Md. Code Ann., Fam. Law § 5-705(a)(1), all Marylanders, including defendant's wife, owed a legal duty to make a report if they had any reason to believe that a child was the victim of abuse or neglect, notwithstanding any other provision of law, including the confidential marital communications privilege; and, when defendant discussed matters that he knew (or should have known) his wife had an affirmative duty to report, he no longer retained a colorable claim that the communications were reasonably expected to remain confidential".

State v. Sewell, 2019 Md. LEXIS 169 (April 2, 2019)

Court Rules Defendant Acted Recklessly in Child Endangerment Case

The Ohio Appeals Court recently ruled that "sufficient evidence supported defendant's convictions for child endangering under R.C. 2919.22(A) and (B) because there was evidence that defendant was babysitting, that he consumed several beers and became angry at the victim, his grandson, grabbed his arm, and yanked it twice. A trier of fact could reasonably have concluded that he acted recklessly". The Court further reasoned that "Defendant's convictions for child endangering and felonious assault under R.C. 2903.11 were not against the manifest weight of the evidence because the victim told several people following the incident that defendant had broken his arm and his story remained the same over a year later when he testified at trial".

State v. Tenney, 2019-Ohio-927, 2019 Ohio App. LEXIS 985, 2019 WL 1270494 (March 18, 2019)

Grooming Testimony Held Inadmissible Without Scientific Foundation

The Court of Appeals of Oregon recently ruled on a case that was "on remand from the Supreme Court for reconsideration in light of State v. Henley, 363 Ore. 284, 422 P3d 217 (2018). At trial, defendant was convicted of first-degree sexual abuse, ORS 163.427, and using a child in display of sexually explicit conduct, ORS 163.670. Defendant raised three assignments of error on appeal, including an argument that the trial court erred by admitting testimony relating to "grooming" without requiring a scientific foundation". The evidence of grooming was offered through the interviewer, a licensed clinical social worker with a Master's Degree in Social Work.

The Supreme Court remanded the case to the Court of Appeals of Oregon "after it issued its opinion in Henley, in which it held that—at least as offered in the context of the trial in that case—evidence about sexual grooming of children "was 'scientific' evidence under OEC 702" that could not be admitted "without first requiring the state to establish its scientific validity." Henley, 363 Ore. at 304.

State v. Plueard, 2019 Ore. App. LEXIS 387, 296 Ore. App. 580 (March 20, 2019)

Court Rules Parent's Discipline of Child Unreasonable Pursuant to Parental Discipline Privilege

The Court of Appeals of Texas found that "in a conviction for continuous sexual abuse of a child, any error by the trial court in admitting the video recording of the complainant's forensic interview under the rule of optional completeness did not constitute Tex. R. App. P. 44.2(b) reversible error, but rather was harmless error, because the interview did not influence the jury or had but a slight effect as the victim's forensic interview was mostly cumulative of her properly admitted trial testimony as well as the testimony of several other witnesses".

Prince v. State, 2019 Tex. App. LEXIS 2328, 2019 WL 1338950 (March 26, 2019)

Admittance of Statistical Evidence About False Allegations of Child Sexual Abuse Held Harmless

The California Court of Appeals has found that "the trial court's error in admitting statistical evidence about false allegations of child sexual abuse was harmless". The Court reasoned that "where both the victim and another accuser testified extensively and the jurors could assess their credibility, other percipient witnesses were called, and the defense offered effective rebuttal expert testimony, the appellate court saw no reasonable probability defendant would have achieved a more favorable result in the absence of the challenged testimony".

*People v. Wilson, 2019 Cal. App. LEXIS 265 *; 2019 WL 1373728 (March 27, 2019)*

Court Rules Admittance of Bite Mark Testimony Not Harmless

The Oregon Court of Appeals ruled on a case where the Defendant appealed " a judgment of conviction for 11 offenses related to the death of his girlfriend's daughter and injuries to his girlfriend's sons where his "first of two assignments of error, he challenges the admission of expert testimony on bite marks, arguing that it failed to meet the Brown/O'Key standards for scientific evidence". The State, as the proponent of the bite mark evidence, bears the burden of establishing admissibility by a preponderance of the evidence. The Court concluded that "the erroneous admission of the bite mark testimony was not harmless with respect to the charges for first-degree manslaughter, murder by abuse, or felony murder. The Court reasoned that "that evidence spoke to a factual question central to defendant's main theory of the case: the cause of EW's death". Therefore, the Court determined that they "cannot conclude the error had little likelihood of affecting the jury's verdict for the homicide-related counts".

State v. Roden, 2019 Ore. App. LEXIS 407, 296 Ore. App. 604 (March 20, 2019)

Court Rules Double Jeopardy Does Not Bar Retrial in Child Abuse Immersion Burn Case

The Supreme Court of Illinois found "where defendant's conviction for aggravated battery was reversed due to the erroneous admission of hearsay statements, his retrial was not barred by the double jeopardy clause because there was sufficient evidence to support his conviction based on a doctor's testimony that the complainant's burns resulted from forcible immersion in hot water". The Court further determined that "we believe the evidence, including J.H.'s hearsay statement identifying defendant as the person who caused his injuries, was sufficient when viewed in the light most favorable to the prosecution for a rational trier of fact to find defendant guilty beyond a reasonable doubt. Accordingly, the double jeopardy clause does not bar retrial, and this case must be remanded to the circuit court for retrial without the excluded hearsay evidence".

People v. Drake, 2019 IL 123734, 2019 Ill. LEXIS 440 (March 21, 2019)

Court Rules Classifications Defining Sexual Assault of a Child does not Violate Equal Protection Principles

Defendant challenged constitutionality of Nebraska statute for first degree sexual assault of a child under 12 years based on categorization of age. The Supreme Court of Nebraska found that "age classifications defining sexual assault of a child in Neb. Rev. Stat. § 28-319.01(1)(a) (Reissue 2016) did not violate equal protection principles because the classifications were rationally related to plausible policy reasons and the distinctions were not arbitrary or irrational" and "the associated mandatory sentence was not cruel and unusual because the legislature concluded sexual assault of a child was a more serious crime".

State v. Hibler, 302 Neb. 325, 923 N.W.2d 398, 2019 Neb. LEXIS 33 (March 1, 2019)

Evidence of Defendants Sexual Assault of Child Held Relevant because it was Committed in a Similar Manner and During the Same Time Period

The US Court of Appeals for the Eighth Circuit held that "at trial for sexual abuse crimes against two children, evidence of defendant's sexual assault of a third child was clearly relevant because it was committed in a similar manner and during the same time period as the child sex abuse for which defendant was being tried". The Court further found that "pursuant to Fed. R. Evid. 413, the testimony was not unfairly prejudicial".

United States v. Keys, 2019 U.S. App. LEXIS 8694, __ F.3d __, 2019 WL 1302908 (March 22, 2019)

Court Orders Pipeline Retroactivity on Four CSAAS cases

The Superior Court of New Jersey, Appellate Division consolidated " these four appeals for the purpose of writing a single opinion because they present the issue of whether State v. J.L.G., 234 N.J. 265, 272, 190 A.3d 442 (2018), should be applied retroactively to reverse defendants' convictions of child sexual assault where an expert in "Child Sexual Assault Accommodation Syndrome" (CSAAS) was permitted to testify". In J.L.G. the New Jersey Supreme Court held that CSAAS expert testimony was not reliable except as to a delayed disclosure. For this expert testimony to be admitted, the state must show the evidence is beyond the jury's understanding. The Superior Court Appellate Division further reasoned that "we accord J.L.G. pipeline retroactivity and reverse because the admission of CSAAS expert testimony in these four cases calls into question the validity of each guilty verdict." The Court found that "pipeline retroactivity is appropriate here, because it would afford defendants relief from unfair convictions, while not unduly burdening the criminal justice system. The purpose of the holding in J.L.G. is to avoid unjust convictions in which the State's proofs are unfairly bolstered by expert opinion that lacks a reliable basis".

State v. G.E.P., 2019 N.J. Super. LEXIS 38, 2019 WL 1371764 (March 27, 2019)

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