

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court Docket No. 149380

vs

Court of Appeals Docket No. 309481

ADAM BENJAMIN STEVENS,

Lower Court No. 10-005622-FC

Defendant-Appellant.

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SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR LEAVE TO APPEAL

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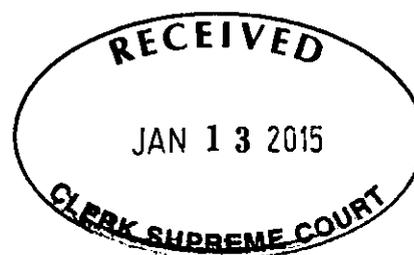


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JURISDICTIONAL STATEMENT

The Defendant-Appellant has filed a timely application for leave to appeal from a decision of the Michigan Court of Appeals

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Was the Defendant denied his constitutional right to a fair trial by the trial court’s questioning of the Defendant and his expert witness?

Defendant-Appellant would answer “yes.”

The trial court would answer “no.”

The Court of Appeals would answer “no.”

The Plaintiff-Appellee would answer “no.”

STATEMENT OF APPLICABLE STANDARD OF REVIEW

The applicable standard is set forth in the argument portion of this brief.

STATEMENT OF FACTS

This case is on appeal from the conviction of the Defendant, Adam Benjamin Stevens of two counts, second-degree murder, MCL 750.317, and second-degree child abuse, MCL 750.136b(3). Mr. Stevens was originally charged with first-degree felony murder and first-degree child abuse. He was convicted of the two lesser charges by a jury trial that took place on January 30, 31, February 1, 2, 6, 7, 9, and 9, 2012. On March 22, 2012, the trial court sentenced Mr. Stevens to a term of 25 years to 50 years for second-degree murder, and 32 months to 48 months for second-degree child abuse.

The trial court has several exchanges with the Defendant and his expert witness, Dr. Mark Shuman. On the fifth day of the trial, when Mr. Stevens was testifying, the trial court had this exchange with him (tr. Vol. V, 158-160):

THE COURT: Mr. Stevens, I've got a question for you. This toy box, is that just a general -- I know that picture doesn't show it very well and I don't know if there's another picture of it, is it just a general large size tote with a wide variety of toys in it?

THE WITNESS: Correct.

THE COURT: Okay. Why did you pick this **alleged** truck up and not put it in the toy box, as I recall your testimony, was somewhere in the -- in the bedroom, you said you took it? [emphasis added]

MR. KIRKPATRICK [defense attorney]: Your Honor, I think he was talking about the marijuana that he took to the bedroom.

THE WITNESS: Yes.

THE COURT: Well let me restate it, then what happened to the truck that you **allegedly** tripped and lost your balance on? [emphasis added]

THE WITNESS: I -- I left it there. I didn't move it.

THE COURT: So you left it on the floor. Would it have been there when Detective Boulter came in and did a physical inspection?

THE WITNESS: I believe so, unless it was cleaned up beforehand, I don't know.

MR. KIRKPATRICK: Your Honor, I believe the testimony from the detective was that this place was cleaned and vacuumed before they got there, and I believe that's what he testified to. I had the same photo up there, so this is not an accurate depiction of how the house was that evening, this is after everything's been picked up. Obviously, the bassinet's gone, the swing's gone, the toys are picked up and it's been vacuumed.

THE COURT: Okay.

MR. JARZYNSKA [assistant prosecutor]: Your Honor -- statement is an accurate depiction of the crime scene, but it is something used to help show the jurors what this defendant is telling them about his story, how it relates to the scene -- (inaudible - speaker not near microphone).

THE COURT: It's admitted. There's certainly sufficient foundation and it's also knowledge that it's not totally an accurate depiction of what it looked like on the time of the alleged entry.

Go ahead, Mr. Jarzynka.

Later, the trial judge had this exchange with the Defendant's expert witness, Dr. Mark Shuman (tr., Vol. VI, 14-17):

THE COURT: Doctor, I've got a question for you.

THE WITNESS: Yes.

THE COURT: Is -- is an infant's brain more easily subject to this -- these type of different movement forces because it's less developed than -- than an adult brain?

THE WITNESS: As far as I can tell the research has said no. I mean, because of the -- there -- the -- the ro -- the rotation causing axonal injury, or it would be a pulling type of injury on the brain -- on the -- on the axons, that force -- the type of motion you would need to do that, does not change based on whether it's myelinated or not myelinated.

THE COURT: Okay.

THE WITNESS: So it doesn't --

THE COURT: Would you be surprised if I told you that an expert didn't testify in this case that infant's brain was sloshing around like an egg?

THE WITNESS: I saw Dr. Mohr's testimony, she said the brain sloshed around.

THE COURT: Okay, so you think because one pediatrician said that, that that's -- that that's just your opinion, correct?

THE WITNESS: I'm just trying to educate the jury on that's not how it works.

THE COURT: Okay. And now, you would agree with me that other pathologists might have very different views than your -- (inaudible) -- correct? Or incorrect? Do you think that there's other doctors that might have different views of the vulnerability of the child's brain versus an adult brain, or would you say that there's a consensus in the medical community of that?

THE WITNESS: Well, I think there's -- there's people who may disagree with that. I think that the -- the main issue is, is the infant is much more susceptible to impact injury.

THE COURT: I have another question for you. Have you ever traveled so far to testify?

THE WITNESS: Yes.

THE COURT: Okay, how often and how far did you go?

THE WITNESS: Well, I've testified in --

MR. KIRKPATRICK: Your Honor, may we approach?

THE COURT: No, Mr. Kirkpatrick, you may not. I have some questions, I'm answering (ph).

MR. KIRKPATRICK: Well, your Honor, just for the record I believe that that particular question is inappropriate. I -- it's clear that this is a court appointed medical examiner. The fact that he traveled from Florida to Michigan has absolutely no bearing in this case. But certainly, Doctor, you can --

THE COURT: Your exception's noted, Mr. Kirkpatrick.

MR. KIRKPATRICK: Thank you, your Honor.

Go ahead, Doctor.

THE WITNESS: I think the furthest would probably be Vermont from Miami.

THE COURT: Okay. Go ahead, Mr. Kirkpatrick.

Later there was this exchange where the trial judge questioned Dr. Shuman's competence solely because he was not the chief pathologist for Dade County. (tr., Vol. VI, 17-20):

THE COURT: But Dr. Shuman, as I understand it, you're an assistant pathologist, correct, you're not --not the pathologist at Dade County are you?

THE WITNESS: That's correct. We have -- we have a district medical examiner, that's Dr. Hyma, my boss, and he appoints associates.

THE COURT: Okay, well how -- how many associate pathologists are there in Dade County?

THE WITNESS: Right now there are four others.

THE COURT: Would -- would you consider any of your associate pathologists in -- not qualified to testify in any of the courts that they work in in Dade County --

MR. KIRKPATRICK: Your Honor, I guess my objection to my question to the Court is, this Court has endorsed this witness as an expert.

THE COURT: I understand --

MR. KIRKPATRICK: Clearly --

THE COURT: -- but -- but --

MR. KIRKPATRICK: -- the prosecution had an opportunity to voir dire --

THE COURT: -- Mr. Kirkpatrick -- Mr. Kirkpatrick, if I have a question I can ask a question, all right?

MR. KIRKPATRICK: (No audible response).

THE COURT: So -- so Dr. Shuman, are there any of the assistant pathologists that you work with that you would consider unqualified to testify in the fields of forensic pathology?

THE WITNESS: No.

THE COURT: Are there any assistant pathologists, as an example, that you think that work for Detroit, Flint, Saginaw, as far as you know that would be unqualified to testify?

THE WITNESS: Not unqualified but maybe not willing.

THE COURT: Okay, and all things being equal do you think a head pathologist is more qualified to testify by way of experience or do you think an assistant pathologist is more qualified to testify by way of experience?

THE WITNESS: I -- I wouldn't make that determination based on just being a head versus an assistant.

THE COURT: Okay. All things being equal would you agree with me that -- that generally head pathologists reach the top of their profession because they have the most experience or the least experience?

THE WITNESS: Well no, no. I mean, it -- I know pathologists that are head pathologists that have less experience than I do.

THE COURT: Okay, does your head pathologist of Dade County have more or less experience than you do?

THE WITNESS: He has more.

THE COURT: He has what?

THE WITNESS: He has more but I've trained pathologists who are head pathologists in other areas.

THE COURT: Okay. Go ahead, Mr. Kirkpatrick.

Shortly after this there was the following exchange. The trial judge never questioned the prosecution witnesses about how many pathologists or physicians agreed with their analysis. (tr., Vol. VI, 26-27):

THE COURT: Mr. Kirkpatrick, I have a couple questions. So are you saying that you believe that there's a widely held consensus among pathologists that disagree with this study?

THE WITNESS: Disagree with what?

THE COURT: With this study that you just cited.

THE WITNESS: I'm sorry, what do you mean?

THE COURT: Would you say that pathologists, based on your -- give -- some recognize the study as being correct and other rise -- other experts recognize it as not being correct?

THE WITNESS: I don't know particularly with this study. I think among forensic pathologists I'd say whether or not forensic pathologists think shaking can cause primary brain injury are probably in the 50/50 range.

THE COURT: When did this study happen?

THE WITNESS: This one was just published in, I think September of 2011, somewhere around there.

THE COURT: Did it -- did it change your opinion from what you held before, before you read this study in 2011 did you have a different opinion about shaken baby syndrome -- (inaudible)?

THE WITNESS: No. What it did was, it -- it filled in the gap and that gap was injury thresholds. I mean, one of the arguments was, you don't know what it takes to injure a child but now we know if you have a second month old who's bouncing on a bouncy chair achieving these accelerations, that those accelerations are not injurious.

THE COURT: Okay, do you know what Kian Stevens' injury threshold is?

THE WITNESS: No.

THE COURT: How come you don't know that?

THE WITNESS: Nobody knows it. I mean, there are -- there are some thresholds that, based on some car crash data and I'm sure everybody's aware that infants have been killed in -- in car seats from air bags, and in those recreations of those air bag incidents where infants have died have been around the same magnitude of a three foot fall.

THE COURT: Go ahead, Mr. Kirkpatrick.

The Defendant's attorney made a record of his objections to the trial court's conduct (tr., Vol. VI, 28-30):

MR. KIRKPATRICK: Your Honor, with all due respect, I'd like to make a record. This is my expert witness and I take exception and object. I understand the Court has the ability to ask questions of an expert but I believe it is objectionable and I believe that it crosses the line when it appears as though the Judge, who is the impartial overseer of this trial, is cross-examining my expert as if you are the prosecuting attorney. Because that sends a message to the jurors immediately to disregard what he's saying. And I'm getting that feel, your Honor, and if I'm getting that feel I believe the jury's getting that feel. You're aggressively asking him questions, you are downgrading the fact that he's got to travel across this country, you're insinuating to the jury that he's coming -- we couldn't find somebody in Detroit or Flint, we got to bring somebody all the way from Florida, you're destroying his credibility in front of the jury before they even have an opportunity to hear him fully testify. And I take -- and I object to it. I think it's improper.

THE COURT: All right. Well, Mr. Kirkpatrick, as you well know the Court can ask questions as I go along, and if the fact that you -- you know, that he's had -- you know, what I want to hear a question, as an example, what -- you know, what is Kian Stevens' threshold, and he doesn't -- you know, I want to ask questions as I get along at certain junctures. I certainly anticipate if other pathologists get up here too, I may ask some of the very same questions. But clearly, the Court can ask certain questions, as you well know, Mr. Kirkpatrick.

MR. KIRKPATRICK: I do, your Honor, but --

THE COURT: And -- and -- and I can guarantee you, when you get down and you -- you figure out the amount of questions that I'm going to ask this doctor it's going to pale in comparison with the total number that Mr. Jarzynka is. And throughout this trial I have asked questions of other doctors, other witnesses, especially at a point in time when I think it's appropriate, so your exception's noted. Thank you, Mr. Kirkpatrick.

MR. KIRKPATRICK: Your Honor, just a problem too because the record doesn't accurately -- accurately reflect, but I believe the manner in which you are asking them, the voice in which you're asking them, the tone in which you're asking them, and the way that you're looking at him when you ask him those questions is giving a projection that you have -- you're taking issue and exception to his testimony. That's my problem, your Honor.

THE COURT: Well, I don't think I'm sitting any farther, I don't think I'm yelling at your witness. I think I asked some questions. Sometimes he answers them, sometimes he doesn't, you know. Sometimes witnesses do that all the time, so your exception's noted, Mr. Kirkpatrick.

MR. KIRKPATRICK: Thank you, your Honor.

THE COURT: Bring the jury back in. And just for the record, I don't think one of my questions was inappropriate as a legal matter.

Later the trial court asked about the rarity of short fall accidents (tr., Vol. VI, 38-39):

THE COURT: Doctor, I want to -- I want to ask you, when you say rarely but not often, what does that mean?

THE WITNESS: I don't think anybody really knows what that means. It's rare. It's not a common phenomenon.

THE COURT: After reading these studies can you quantify it better than rarely but not often, is it one in a million, is it one -- can you -- can you quantify it at all or is it just as you describe it?

THE WITNESS: It's really not quantifiable. I mean, there was one study that tried to quantify it and they concluded less than one in a million but what the million was, was a million children per year. But I have some issues with that, and I'm not sure that that's accurate but it's rare. I mean, the -- the fact that it's rare doesn't matter because you can't apply a statistic to an individual.

THE COURT: So what do you understand rare to mean?

THE WITNESS: I don't think there's any, you know, good, quantified number, you know, to say. It doesn't happen very often but it happens.

THE COURT: Okay. Go ahead, Mr. Kirkpatrick.

The trial court asked Dr. Shuman about the two short fall deaths he had mentioned (tr., Vol. VI, 42-44):

THE COURT: Doctor Shuman, I -- I had another question, were these two short falls that you described, were those cases that you personally did the autopsies on, you -- you were the expert involved or are these ones that you've read about?

THE WITNESS: Those two that I described where I was -- I did the autopsies and I, you know, did the investigation. One of them -- the -- the fall from the train, there was no question it was witnessed by a bunch of people.

THE COURT: Okay.

THE WITNESS: The short fall from the -- that was dropped was one that was thought possibly to be abuse, so I went through and discussed and had meetings with the investigators, the police detectives, my boss and others in my office and we came to -- went through everything and agreed that -- that the short fall scenario matched the autopsy findings and that was the -- the cause.

THE COURT: Okay. Would it be fair to say -- you said you're both a forensic and anatomical pathologist, correct?

THE WITNESS: I have -- yes, I'm --

THE COURT: Okay, and part of any autopsy involves looking at all of the -- the various investigative reports, all the facts and circumstances surrounding the case, correct?

THE WITNESS: That's right, yes.

THE COURT: In fact, would you say that that's as critical as even the anatomical or the actual physical autopsy itself?

THE WITNESS: It can be. Sometimes it's more. I mean, sometimes it doesn't matter because the anatomical findings are, you know, it is what it is. Sometimes there is no anatomical findings and the circumstances are everything. So you know, it could be -- and anything in between.

THE COURT: So would you say in those two short falls that clearly looking at the -- at the forensic, all of the evidence surrounding it was as -- or does the -- autopsy itself?

THE WITNESS: Yes.

THE COURT: Thank you. Go ahead, Mr. Kirkpatrick.

The trial judge questioned Dr. Shuman about not getting police reports during the prosecutor's cross examination that brought up this very subject (tr., Vol. VI, 61-62):

THE COURT: Why didn't you do that in this case then? Why didn't you ask to get the police reports or to talk with the Detective Boulter? If that was important in that short fall case that you do that why didn't you do it in this one?

THE WITNESS: Well, I generally don't, you know, have the opportunity to speak to detectives in cases that I'm consulted in. I -- if I had more time I would have requested some of the, you know, police reports and things like that too.

THE COURT: Well let me ask you this question, you said that the majority of -- huge -- a large percentage of the time you testify for prosecutors, correct?

THE WITNESS: Yes.

THE COURT: And wouldn't you have access to the police reports in those cases?

THE WITNESS: Yes.

THE COURT: I mean, is it any -- when you're going to rule any suspicious death isn't looking at the police reports a critical part of determining the forensic aspect of pathology?

THE WITNESS: Yes. We've discussed it. The circumstances are very important in determining what happened, yes.

THE COURT: Go ahead, Mr. Jarzynka.

The trial court again questioned Dr. Shuman about not reading police reports (Vol. VI, 70-72):

THE COURT: Doctor, I've got a question. Many of these other homicides that you testified, would it be fair to say a lot of times that you looked at the police reports sometimes you got other supplemental reports and you looked at all the reports that were made in the case as part of your forensic evaluation?

THE WITNESS: I'm sorry, I'm not sure I understand that question.

THE COURT: Okay, well you -- you've obviously testified a number of times for prosecutors, correct?

THE WITNESS: Yes.

THE COURT: And it would not be unusual for you to see the police reports, including supplemental police reports? You know what a supplemental police report is?

THE WITNESS: Yes.

THE COURT: What's that?

THE WITNESS: It's a -- well, usually there's a main police report, usually when the -- when the information initially comes in and then there will be supplemental reports as they gather additional information.

THE COURT: And as -- as a forensic and anatomical pathologist would you want to look at not only the main police reports but any supplemental police reports, as an example, of certain breaking developments in the investigation?

THE WITNESS: I generally try to get as much information as I can. In my -- in my role as a medical examiner in Miami I rarely see those reports. I usually just talk to, you know, to the detectives about it. In other cases I've testified in I do see them.

THE COURT: Well let me ask you that, when you -- when you normally talk to the detective in charge of a case do they tell you of late breaking investigations that are of significance in their mind, or do they not normally do that?

THE WITNESS: Sure, they'll tell me whatever information they have.

THE COURT: Okay. Go ahead, Mr. Jarzynka.

ARGUMENT

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY THE TRIAL COURT'S QUESTIONING OF THE DEFENDANT AND HIS EXPERT WITNESS.

Standard of Review: Constitutional questions are reviewed de novo. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). To the extent that Defendant did not object to the conduct of the trial court, the effect of an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. *Id.* As a general rule, this Court will not review allegations of error based on the conduct of the trial court in situations where no objection was made at the trial court level. *People v Collier*, 108 Mich App 687, 697; 425 NW2d 118 (1988). However, since appellate courts cannot condone manifest injustice, an appellate court can react, even in the absence of timely objection, to error which resulted in a denial of a fair trial. *Id.* Such review without benefit of an objection at the trial court level has been characterized as “particularly appropriate” where any objection had to be made to the trial judge himself concerning his own conduct. *Id.*

The Supreme Court has asked the parties to submit supplemental briefs that include discussion of 1) the appropriate standard for determining whether a trial court's questioning of witnesses requires a new trial and 2) whether that standard was met in this case.

A. The Appropriate Standard for Determining Whether a Trial Court's Questioning of Witnesses Requires a New Trial.

Defendant-Appellant asks that the Supreme Court adopt the standard set forth in *People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011) and *People v Ross*, 181 Mich App 89, 91-92; 449 NW2d 107 (1989). In *People v Jackson*, supra, 292 Mich App 583, 598 the Court of Appeals said:

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.

Under MRE 614(b), the court may interrogate witnesses, whether called by itself or by a party. But the trial court's examination of witnesses may not "pierce the veil of judicial impartiality," *People v McDonald*, 303 Mich App 424, 437; 844 NW2d 168 (2013).

The test for whether a new trial should be ordered is whether the judge's questions and comments may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *People v Ross*, supra, 181 Mich App 89. See also *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986). In the latter case, this court said [*Id.*]:

The test [for judicial bias] is whether "a judge's questions and comments 'may well have unjustifiably aroused suspicion in the mind of the jury' as to a witness' credibility, * * * and whether partiality 'quite possibly could have influenced the jury to the detriment of defendant's case.'

B. The Trial Court Pierced the Veil of Judicial Impartiality in the Present Case.

Defendant understands that *People v Jackson*, supra, 292 Mich App 583, 598 also holds that a defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality. He has overcome that presumption in the present case. While the trial court asked questions of both prosecution and defense witnesses, the tone of the trial court's questions was entirely different when questioning the Defendant and the Defendant's expert witness, Dr. Mark Shuman. The questioning by the trial court of the Defendant and Dr. Shuman has been previously set forth in detail in the Defendant's Court of Appeals brief and in the dissenting

opinion of Judge Servitto. The tone of the trial judge's questioning could have unjustifiably aroused suspicion in the mind of the jury about the credibility of both Mr. Stevens and Dr. Shuman. Mr. Stevens' testimony related to how the child was injured and he was entitled to have his credibility judged in the same way that the credibility of other witnesses was judged. Dr. Stevens offered important testimony about whether shaking a baby was sufficient to cause the death of a baby.

Mr. Stevens' constitutional right to present a defense was severely compromised by the trial judge's conduct toward Dr. Shuman, an expert for whom he had authorized payment. It will be necessary for the Supreme Court to review the judge's questioning of all of the witnesses so that the trial judge's questioning of Mr. Stevens and Dr. Shuman is not taken out of context, but a full review will show a clear pattern of piercing the veil of judicial impartiality.

RELIEF REQUESTED

Defendant-Appellee asks that the Supreme Court grant the Defendant-Appellant's application for leave to appeal.

Respectfully submitted,

Dated: January 12, 2015


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