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Jury Selection in Abusive Head Trauma Cases: The People Thank and Excuse Juror #2

By Taya Moxley-Goldsmith¹

Introduction

Abusive head trauma (AHT)² is an area of prosecution in which the defense bar has been particularly aggressive, and the underlying medical issues especially volatile. In addition to the other challenges that these cases pose to prosecutors, each involves complicated expert testimony. Moreover, Shaken Baby Syndrome (SBS) has been the subject of frequent and sometimes conflicting media attention. Because of the inherent complexities of these cases, conducting an effective jury selection is crucial. Though the rules governing jury selection vary considerably across jurisdictions, this article will serve as a general approach to selecting a fair jury in AHT cases.

Approach to AHT jury selection

It is especially important in AHT cases that jury selection be specifically tailored to the facts, the prosecutor's theme of the case and the defense being advanced. As Paul DerOhannesian notes, "jury selection – the questions and jurors – are linked to the prosecutor's theme. Without a theme, asking jurors questions can be like trying to climb a mountain in the fog. Having an effective theme guides jury selection as well as the other major stages of the trial." Achieving such precision requires multiple layers of inquiry. At the broader end of the spectrum, prosecutors will want to know what experience jurors have with children and, more specifically, with child abuse. It is common for some members of the venire to have heard of SBS, although a little knowledge can be dangerous. For others it will be a completely new concept. Narrowing the focus, prosecutors should explore how jurors may respond to the expert testimony. For instance, one study focusing exclusively on child sexual abuse found that 60% of jurors expected *definitive* medical evidence.³ Compare that finding to the fact that victims of AHT may exhibit few or even no external signs of injury. By anticipating that expectation, prosecutors can use jury selection to appraise and educate potential jurors. Another specific area of inquiry should be the media. In order to understand how jurors might deliberate, the prosecutor must understand the extent to which jurors are predisposed to the issues and the process, and how much exposure they have received previously about the topic.

The following are sample questions prosecutors might use when selecting a jury:⁴

- **Experience with children.** Defenses to AHT can include shortfall and accidental injury scenarios. Begin to address these issues with general questions about caring for children.
 - How many of you have children? How old are they?
 - How did you handle your baby's head? Why did you do that?

- Do you remember how old they were when they began to walk? Did they fall over often during that time? Did you have to change anything about the way you were parenting when your child (ren) began to move around the house?
- Did your child ever fall off a couch or bed? What happened? Was your child injured? Was it serious?
- Did you ever bounce your baby in your arms or lift them up and down in the air? Did this bouncing ever cause an adverse reaction in the health of your child?
- If this is a daycare or nanny scenario: How many of you place your children in daycare? What are the responsibilities of the daycare provider? What do you think of people who use daycare/nanny? Why?
- Who do you think is responsible when a child gets injured while outside the parent's care? Does anyone agree with the statement "the parent is still responsible if a child is injured in daycare (or by a babysitter)"? Why?
- How would you react if your child was injured? Or in danger?
- If the defense involves vaccinations: How many of you have had a vaccination? Which ones? Note those who have had the vaccination(s) at issue in your case. Have your children been vaccinated? Were there any adverse reactions? Did you or your child have to go to the hospital?

- **Experience with child abuse or AHT.** Sensitive questions should be asked discreetly and may require the questions be asked by the court and/or prosecutors to approach the bench.
 - What is your definition of child abuse?
 - Who is a "typical" child abuser? Why do you think that?
 - Have you or someone close to you ever been accused of child abuse? What happened? How were you or that person treated? Will that impact your ability to act impartially on this jury?
 - Have you or someone close to you been a victim of child abuse?
 - Have you or someone you know suffered the death or serious injury of a child? What happened? How did the parents behave?
 - Do you believe that parents can actually harm their children?⁵ How many of you agree with the statement, "Even if a parent harms a child, s/he probably did not intend to"? (Prosecutors may use this opportunity to talk about the *mens rea* requirement.)
 - Would you have difficulty with an instruction from the judge that states a defendant who recklessly kills someone can still be guilty of murder?
 - Could you consider whether a parent had reck-



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lessly, rather than intentionally, killed or injured a child? Can you accept that reckless killing of a child is a crime?

- Do you believe that a child can be severely injured and/or die as the result of one abusive incident? (Abusive head trauma can be a one-time incident resulting in the death or severe disability of a child.)
- Do you feel that you would need an eyewitness in order to find the defendant guilty? Why or why not? Would you be surprised to know that few criminal cases have eyewitnesses?
- Has anyone heard of Shaken Baby Syndrome? Can you describe what that means? What should happen to someone who does that?
- How many of you believe that it is ever appropriate to shake a child/infant?

• **Expert witnesses:** These cases can often become a battle of the experts. Jurors need to be able to assess both the substance and credibility of expert testimony and not be persuaded simply by the fact that a witness has an MD, PhD, etc. It is important to determine how a potential juror might approach this type of testimony.

- Has anyone ever sought out a second opinion from a doctor? Why?
- Would you agree that doctors make mistakes, too?
- How many of you feel you should accept the opinions of medical experts because they are “experts” and have more knowledge about the subject than you have?
- Have you ever had a bad experience with a doctor? Will that cause you to question the opinions of a doctor if one testified?
- What might cause you to question an opinion made by a medical expert?
- How will you determine whether an expert’s opinion makes sense or seems logical?
- How would you feel if you heard conflicting medical opinions in this case about the nature and cause of the child’s injuries?
- If there are conflicting medical opinions among the expert witnesses, how many of you would automatically conclude there must be reasonable doubt in the case? In other words, how many of you agree with the statement, “If the experts can’t agree, how can we be expected to?”
- What do you think about trying to reach agreement with your fellow jurors, if the experts themselves don’t agree about what caused the child’s injuries?
- Do you think that the testimony of an expert witness should be treated differently than other testimony when you consider the evidence?
- Do you think you would be capable of rejecting testimony of an expert witness if the testimony of that witness did not appear to be reliable or *consistent with common sense or the evidence in the case?*

• **Media exposure:** Questioning in this area should be designed to neutralize negative impressions formed by jurors as a result of exposure to media information and create sufficient information for exercise of peremptory challenges or challenges for cause.⁶ If there has been recent media exposure (especially about local issues or high profile cases of abuse), be sure to include it in your *voir dire*.⁷

- How many of you read the newspaper? Watch the morning or evening news? Where do you get your news (i.e., family, friends, the internet, school, or colleagues at work)? How many of you use the internet, watch CNN, C-SPAN, etc.? How often? (Keep in mind that “[i]ndependent information gatherers will want proof and will more likely form their own opinions. Jurors who are lax in gathering information are more apt to be swayed by the majority during deliberations.”⁸)
- After receiving an affirmative response regarding media exposure –

How many of you thought that it was an accurate representation? How many of you felt that the story portrayed in the article/news program is typical of most AHT/SBS cases?

- What, if any, role or effect do you think stories you have read or programs you have seen should have on this trial? Do any of you think that you should rely on information presented in the popular media to help you decide the facts of this case?⁹ Do you all understand that the media information is not evidence in this case?
- Do you think you will be able to put aside what you have seen or read in the media when deliberating on this case? How will you do that?

Conclusion

In addition to the questions above, prosecutors should make the usual inquiries into the venire’s experience with the justice system, burden of proof, intent, and character issues of prosecution witnesses (if relevant), and they should always be alert to answers suggesting bias. Jury selection is not limited to asking a series of questions.

Remember that jury selection is not just about choosing jurors; it also marks the beginning of the relationship between the prosecutor and the jury. To make the best impression, be respectful, attentive, and sensitive to the feelings of the venire. Though the perfect jury may be unattainable, jury selection *can* affect a successful outcome. By carefully crafting the approach to jury selection, prosecutors can lead the jury through their case from the first *voir dire* question to the last sentence in summation, ultimately arriving at a just result in these difficult cases.

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2 The term “abusive head trauma” includes the injuries sustained in shaken baby syndrome, shaken impact syndrome, and other non-accidental head injuries. For more information on jury selection, please consult APRI’s National Center for Prosecution of Child Abuse.

3 Nick Maroules & Charles Raymond, *VOIR DIRE IN CHILD-VICTIM SEX TRIALS: A STRATEGIC GUIDE FOR PROSECUTORS*, Illinois State’s Attorney Appellate Prosecutor Child Witness Project 28-9 (1993).

4 These questions were compiled from the following sources: APRI’s National Center for Prosecution of Child Abuse, *INVESTIGATION AND PROSECUTION OF CHILD ABUSE 287* (2004), materials developed by former NCPA Senior Attorney and current Tennessee Assistant District Attorney General Brian Holmgren, Paul DerOhannessian, *SEX ASSAULT TRIALS, 2ND ED.* (1998), and the author.

5 In one study of 81 perpetrators who admitted to inflicting traumatic brain injury, 15% were the mother of the child, 56% were the father of the child, 16% were the mother’s boyfriend, and 5% were the babysitter. Suzanne P. Starling, et al., *Analysis of Perpetrator Admissions to Inflicted Traumatic Brain Injury*, *ARCH PEDIATR ADOLESC MED* at 455 (May 2004).

6 Brian Holmgren, *Jury Selection in Child Abuse Cases*, p. 24, prepared for APRI’s National Center for Prosecution of Child Abuse (on file with the National Center).

7 An episode of ABC’s PrimeTime about Louise Woodward and skeptical of SBS diagnosis aired on October 7, 2004, and the CBS Early Show had a segment about the dangers of shaking on March 1, 2005.

8 Cynthia R. Cohen, Ph.D., *Asking the Right Questions: Current Events Shadowing the Jury Pool*, *TRIAL BRIEFS*, (North Carolina Academy of Trial Lawyers, Raleigh, NC), August 2002 at 5.

9 In the discussion of media exposure, prosecutors may also need to address the non-news television viewing habits of potential jurors. See Maricopa County Attorneys Office, *CSI: Maricopa County, The CSI Effect and its Real-Life Impact on Justice* (June 30, 2005) available at

<http://www.maricopacountyattorney.org/Press/PDF/CSIRreport.pdf>; Kit R.

Roane and Dan Morrison, *The CSI Effect, US News and World Report*,

<http://www.usnews.com/usnews/culture/articles/050425/25csi.htm> (April 25,

2005) and Karin H. Kather, *The CSI Effect: Fake TV and its Impact on Jurors in*

Criminal Cases, *THE PROSECUTOR*, March/April 2004.

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