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

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Introduction

Abusive head trauma (AHT) is an area of discretion 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 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 venue 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. Compare that finding to the fact that victims of AHT may exhibit no 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 previously about the topic.

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

- 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? How many of you agree with the statement “Even if a parent harms a child, s/he probably did not intend to”? (Prosecution may use this opportunity to talk about the mens rea requirement.)
  - Would you have difficulty with an instruction that states a defendant who recklessly kills someone can still be guilty of murder?
  - Could you consider whether a parent had reck-
lesly, 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:
  - How many of you think that the testimony of an expert witness should be treated differently than other testimony when you consider the evidence?
  - 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 because they are “experts” and have more knowledge about the subject than you have?

• Media exposure: Questioning in this area should be designed to neu-