

treatment avenues for the patient and the restrictive power of a state that is so deeply involved in civil commitment and correctional care.

Cross-Examination and Witness Bias in Attempted First Degree Murder

Michael Heneghan, MBBCh
Fellow in Forensic Psychiatry

Darren Lish, MD
Associate Professor of Psychiatry, Faculty, Forensic Psychiatry

Richard Martinez, MD, MH
Robert D. Miller Professor of Forensic Psychiatry,
Director, Forensic Psychiatry

Department of Psychiatry, Division of Forensic Psychiatry
University of Colorado at Anschutz Medical Center
Aurora, Colorado

Exclusion of Defense-Proffered Evidence of Witness Bias Violated Defendant's Sixth Amendment Rights

DOI:10.29158/JAAPL.210129L2-21

Key words: cross examination; bias; Sixth Amendment; confrontation clause

In *State v. Orn*, 482 P.3d 913 (Wash. 2021), the Washington Supreme Court considered whether a defendant's constitutional right to confrontation of a witness and to present a complete defense had been violated. The court held that the trial court's decision to exclude evidence that the state's key witness worked as a confidential informant for the police department involved in prosecuting Nicholas Orn's case was an abuse of discretion and violated Mr. Orn's constitutional rights. But it affirmed the previous intermediate appellate court's decision to uphold the finding of the trial court after determining beyond a reasonable doubt that the error was harmless.

Facts of the Case

On August 2, 2016, Nicholas Orn shot Thomas Seamans eleven times with a .22 rifle, following a disagreement and conflict about Mr. Orn's personal

property stored in Mr. Seamans garage, where he was living. Following the shooting, Mr. Orn admitted to his ex-girlfriend that he had shot Mr. Seamans. A neighbor called 911, and officers from the Kent Police Department (KPD) arrived and arrested Mr. Orn at the scene. At trial, Mr. Orn's lawyer acknowledged that Mr. Orn had fired the shots but argued that they were in self-defense.

Mr. Seamans survived the shooting. In December 2016, he was investigated by the Kirkland Police Department for unrelated charges of felony theft and identity theft. Kent Police subsequently contacted Mr. Seamans and offered that if he worked as a confidential informant for them, his Kirkland felony charges would not be forwarded to the Prosecuting Attorney's Office. Mr. Seamans accepted and signed a written agreement.

At Mr. Orn's trial, the court granted the state's motion *in limine* to exclude the informant agreement and prevent Mr. Orn from asking Mr. Seamans any questions about it, "determining that the evidence's probative value was substantially outweighed by unfair prejudice or confusion of issues," (*Orn*, p 919). The only question defense counsel could ask was, "[I]sn't it true that since this incident, you have actually worked with Kent Police Department?" to which Mr. Seamans responded, "Yes" (*Orn*, p 921).

Mr. Orn was convicted of attempted first-degree murder with a firearm enhancement. He appealed, arguing that the exclusion of evidence about the informant agreement violated his Sixth Amendment rights to present a defense and to cross-examine adverse witnesses. He also argued there was an error in the trial court's jury instruction regarding the elements of attempted first-degree murder. The Court of Appeals rejected both of Mr. Orn's arguments and affirmed. Mr. Orn petitioned the state supreme court for review.

Ruling and Reasoning

The Washington Supreme Court affirmed Mr. Orn's conviction in a unanimous decision. Though it ruled that the trial court had erred and had violated Mr. Orn's Sixth Amendment rights by preventing him from exposing possible bias via cross-examining Mr. Seamans on the details of the confidential informant agreement, it also determined beyond a reasonable doubt that the error was harmless.

In its reasoning, the court explained that revealing a witness' bias can expose the motivation to testify,

and always has relevance in “discrediting the witness and affecting the weight of his testimony” (*Orn*, p 920, quoting *Davis v. Alaska*, 415 U.S. 308 (1974), p 316). In this case, the court allowed that Mr. Seamans’ testimony could have been affected by his motivation to cooperate with the state and KPD to avoid prosecution for his charges or receive more lenient treatment. In assessing whether the lower courts had erred in excluding evidence and barring cross-examination, the state supreme court applied a three-part test it had previously articulated in *State v. Hudlow*, 659 P.2d 514 (Wash. 1983). This test from *Hudlow* considers “(1) whether the excluded evidence was at least minimally relevant, (2) whether the evidence was ‘so prejudicial as to disrupt the fairness of the fact-finding process at trial,’ and, if so, (3) whether the State’s interest in excluding the prejudicial evidence outweighs the defendant’s need to present it” (*Orn*, p 920).

First, as Mr. Orn did not testify and Mr. Seamans was the only eyewitness to the shooting, Mr. Seamans had an essential role in supporting the state’s case that Mr. Orn’s actions were not in self-defense. Thus, evidence of the informant agreement, and Mr. Orn’s right to cross-examine Mr. Seamans about it to reveal bias, was especially important and relevant.

Second, the court determined that the excluded evidence was not unfairly prejudicial. The state argued that revealing the informant agreement would “disparage the KPD and King County prosecutor” (*Orn*, p 921) by implication that they might give Mr. Seamans special treatment if he testified favorably. The court stated it was not shown how this would create unfair prejudice, rather than merely revealing the “true risks to taking Seamans’s word at face value,” (*Orn*, p 921), and that the excluded evidence would be unlikely to “inflame the jury” or influence the ability of the jury to make a rational decision.

Third, the court determined that Mr. Orn’s need for the evidence outweighed the state’s interest in excluding it. Mr. Seamans’ motive and credibility were “crucially important” as the key prosecution witness, and though other evidence was available to impeach Mr. Seamans’ credibility in general, excluding evidence of the agreement was an error “specifically because it showed Seamans’ bias” (*Orn*, p 921).

In holding beyond a reasonable doubt that the trial court’s error was harmless, the Washington Supreme Court noted the ample uncontradicted evidence that linked Mr. Orn to the shooting, and of

his premeditation. Even if unfettered cross-examination had successfully cast doubt on Mr. Seamans’ testimony, or if Mr. Seamans had not testified at all, the court was convinced that the jury would have reached the same verdict.

Discussion

Orn is not directly about a mental health related problem, but it nonetheless highlights several aspects of jurisprudence that have relevance to the practice of expert testimony. It illustrates the difficult task trial courts face in balancing the probative value of evidence with the potential for prejudice, confusion, and irrelevance of some evidence.

Orn also highlights the importance of cross-examination to uncover witness bias. In the current climate of forensic practice, as individuals and societal institutions attempt to identify, acknowledge, and correct for biases, it is conceivable that there will be an increasing focus on the biases of expert witnesses in the courtroom. *Orn* cited several cases highlighting the essential and fundamental nature of the right to cross-examination in ensuring a fair trial, particularly its function of alerting the factfinder to questions of witness bias, and thus credibility. And although the cited cases are clear that the right to cross-examination has limits, they emphasize the significant weight to this right in the face of competing interests.

In *Davis*, the U.S. Supreme Court held that the petitioner’s right to cross-examine a state’s key witness to highlight potential bias (related to the witness’ prior adjudication of juvenile delinquency and the fact that the witness was on probation) outweighed the state’s interest in protecting the confidentiality of the witness’ juvenile offender record. In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the U.S. Supreme Court held that the defendant was improperly denied the opportunity to cast doubt on the credibility of an adverse witness when the trial court barred cross-examination about an agreement the witness had made to have a drunkenness charge dropped “in exchange for his promise to speak with the prosecutor about the murder” (*Van Arsdall*, p 676).

Sources of bias in forensic assessments can be both external and internal, and bias can result from unconscious mechanisms. Research has suggested the existence of “selection effects” as a source of bias in experts, in which shrewd attorneys tend to retain evaluators who are already oriented to their side. But,

“allegiance effects” have also been demonstrated experimentally, in which after retention, evaluators interpret case data in a way that supports the side that retained them (Murrie DC *et al.*, Are Forensic Experts Biased by the Side That Retained Them? *Psychol. Sci.*, 2013; 24(10):1889–97).

Hence, experts should prepare themselves to be cross-examined about their potential biases. For example, bias may be suggested by an expert’s predilection toward testifying for a particular side, by previous opinions given, and by previously published writing. Research suggests that introspection is a poor strategy for mitigating one’s own biases; a better approach involves structured self-monitoring, with tracking and analysis of one’s evaluations and opinions (Gowensmith WN, McCallum KE. Mirror, mirror on the wall, who’s the least biased of them all? Dangers and potential solutions regarding bias in forensic psychological evaluations. *S. Afr. J. Psychol.*, 2019; 49(2):165–176).

Exclusion of Expert Exposition Testimony for a Lack of Fit with the Facts in a Hit and Run Homicide Case

Alyssa Tran, DO

Fellow in Forensic Psychiatry

Richard Martinez, MD, MH

Robert D. Miller Professor of Forensic Psychiatry, Director, Forensic Psychiatry

Department of Psychiatry, Division of Forensic Psychiatry

University of Colorado at Anschutz Medical Center Aurora, Colorado

Exposition Testimony on General Principles Must Assist the Factfinder in Connecting the Witness’s Expertise to the Particular Facts of the Case

DOI:10.29158/JAAPL.210129L3-21

Key words: exposition testimony; custodial interrogation; *Miranda*; Federal Rule of Evidence 702; expert testimony

In *State v. Dobbs*, 945 N.W.2d 609 (Wis. 2020), Timothy E. Dobbs appealed his convictions of homicide by intoxicated use of a vehicle and hit and run

resulting in death to the Wisconsin Supreme Court on the claim that the circuit court improperly excluded an expert’s exposition testimony and the circuit court improperly allowed pre-*Miranda* statements while Mr. Dobbs was in custody. The court of appeals affirmed the judgment of conviction in an unpublished, *per curiam* decision. The Supreme Court of Wisconsin also affirmed the decision of the circuit court, while ruling that the admission of pre-*Miranda* statements was harmless error.

Facts of the Case

On September 5, 2015, Mr. Dobbs drove his vehicle across several lanes of traffic and a median and over a curb, striking and killing a pedestrian. He then drove away from the scene and was found in the damaged vehicle several blocks away by Madison Police Officer Jimmy Milton. Mr. Dobbs was handcuffed and placed in Officer Milton’s squad car. Officer Milton informed Mr. Dobbs that he was being detained for an ongoing accident investigation and that he was suspected of striking a pedestrian. Officer Milton later learned that the pedestrian had died. Officer Milton began questioning Mr. Dobbs in the back of the squad car about his birthdate, vehicle registration, medical history, whether he was taking medications for depression and anxiety, and whether he was injured. Mr. Dobbs told Officer Milton that he had not slept in 40 hours, that he had not taken his medication that morning, and that he was adjusting his arm in a sling, and he lost control of the vehicle, hitting a curb, which caused the observed damage to his vehicle. While observing Mr. Dobbs’ vehicle, Officer Milton observed a can of air duster in plain view on the front center console. Mr. Dobbs passed a field sobriety test, and a breath test was negative for alcohol two hours after he was initially questioned. He was transported to a nearby hospital for blood alcohol testing.

Mr. Dobbs was read his *Miranda* warnings by two different officers approximately three hours after he was first handcuffed and placed in a locked squad car. He waived his *Miranda* rights, was formally placed under arrest, and was informed the pedestrian had died. During questioning, he confessed that he had taken a puff of the air duster while he was driving, passed out, swerved, and then drove away from the scene. In the day following his initial arrest, Mr. Dobbs spontaneously confessed multiple times to “taking a puff of Dust-off” (*Dobbs*, p 616). Mr.