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2023 WL 4883377

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.
Court of Appeals of Ohio, Tenth District, Franklin County.

STATE of Ohio, Plaintiff-Appellant,
v.
Alan J. BUTTS, Defendant-Appellee.

No. 22AP-763
|
Rendered on August 1, 2023

ON MOTION FOR LEAVE TO APPEAL, (C.P.C. No. 02CR-1092).

Attorneys and Law Firms

Janet A. Grubb, First Assistant Prosecuting Attorney, and Taylor M. Mick, for appellant.

Ohio Innocence Project at University of Cincinnati College of Law, and Donald R. Caster, for appellee.

MEMORANDUM DECISION

EDELSTEIN, J.

***1** {¶ 1} Plaintiff-appellant, the State of Ohio, has filed a motion seeking leave to appeal an order of the Franklin County Court of Common Pleas that granted defendant-appellee, Alan J. Butts, leave to file a delayed motion for new trial and his motion for a new trial based on newly discovered evidence. Mr. Butts opposes the state's motion. Because we find the state has failed to sufficiently demonstrate a probability that the trial court abused its discretion in granting either, we deny the state's motion for leave to appeal.

I. Procedural History

{¶ 2} Following the death of his girlfriend's two-year-old son, J.U., Mr. Butts—then, 22-years-old—was indicted on February 27, 2002 by a Franklin County grand jury with felony murder, involuntary manslaughter, felonious assault, and two counts of child endangering. No one disputed that Mr. Butts, who was caring for J.U. at their home and called 911 when J.U. collapsed, was the last person with J.U. prior to his February 13, 2002 hospitalization. The state's theory was that J.U.'s injuries were caused by intentional shaking—i.e., what was then known as "Shaken Baby Syndrome" ("SBS"), now often referred to as "Abusive Head Trauma" ("AHT")—and that Mr. Butts was the perpetrator. The state's case against Mr. Butts was almost exclusively predicated on medical evidence and testimony about the cause of J.U.'s fatal injuries—namely, brain swelling (cerebral edema) and ruptured blood vessels in J.U.'s eyes (retinal hemorrhages and optic nerve sheath hemorrhages) and in his brain (subdural hemorrhages).

{¶ 3} At Mr. Butts's 2003 trial, the state presented four medical expert witnesses who testified to a reasonable degree of medical certainty that this constellation (or triad) of injuries were, as a matter of medical science, diagnostic of death caused by SBS. The state's expert witnesses also testified that after being injured, J.U. would have had an immediate and obvious response and would not have had any lucid intervals. This testimony was generally accepted by the mainstream medical community at that time.

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{¶ 4} A jury found Mr. Butts guilty on all five counts. In May 2003, Mr. Butts was sentenced to an indefinite prison term of 15-years-to-life on the murder and involuntary manslaughter offenses. *State v. Butts*, 10th Dist. No. 03AP-495, 2004 WL 449245, 2004-Ohio-1136, ¶ 1 ("*Butts I*").

{¶ 5} The general facts and procedural history preceding Mr. Butts's 2019 postconviction motions are further laid out in *Butts I* (affirming convictions on direct appeal), *State v. Butts*, 10th Dist. No. 05AP-732, 2006 WL 1390838, 2006-Ohio-2538 (affirming trial court's denial of postconviction motion for resentencing and correction of sentence), *Butts v. Sheets*, S.D. Ohio No. 2:05-cv-994, 2006 WL 2612976, 2006 U.S. Dist. LEXIS 64395 (Sept. 8, 2006) (denying petition seeking federal habeas corpus relief), and *Butts v. Sheets*, 279 F.Appx 354 (6th Cir. 2008) (affirming denial of federal habeas corpus petition).

{¶ 6} Mr. Butts unsuccessfully appealed his 2003 convictions to this court in *Butts I*, exhausted his potential state remedies, and was denied federal habeas corpus relief. (*See* Nov. 10, 2022 Decision and Entry at 11-12.)

***2** {¶ 7} On April 5, 2019, Mr. Butts moved the trial court for leave to file a delayed motion for a new trial and presented arguments and evidence in support of his contemporaneously filed new trial motion (collectively, the "2019 Motions"). He argued that, in the 16 years since his trial, there have been significant developments in the medical community concerning the diagnosis of SBS. These developments, he contended, constitute new evidence that could not have been, with reasonable diligence, discovered at the time of his trial or 120 days after the verdict was rendered. Mr. Butts asserted this new evidence creates a strong probability of a different result at trial. Thus, Mr. Butts argued he is entitled to a new trial under Crim.R. 33(A)(6). Attached to his motion were the affidavits and reports of three experts whose testimony was proffered as the "newly discovered evidence" warranting a new trial. The state opposed both motions.

{¶ 8} In May/June 2021, the trial court held an evidentiary hearing on Mr. Butts's 2019 Motions. [1] Over the course of six days, the parties presented evidence and testimony from four medical experts. Mr. Butts's proffered experts were neuropathologist **Dr. Roland Auer**, pediatric radiologist **Dr. Julie Mack**, and pathologist **Dr. Michael Laposata**. The state proffered one expert witness in opposition, pediatrician **Dr. Lori Frasier**.

{¶ 9} The defense experts explained that, at the time of Mr. Butts's trial, there was not a significant debate in the medical community regarding whether J.U.'s injuries were necessarily diagnostic of intentional shaking (i.e., SBS). Therefore, possible alternative, non-intentional causes for the injuries resulting in J.U.'s death were not thoroughly considered (or even known about) in 2002/2003.

{¶ 10} At Mr. Butts's 2003 trial, the sole defense witness, Dr. John Plunkett, challenged the validity of the SBS diagnosis by the state's experts. Dr. Plunkett testified that non-abuse causes for J.U.'s injuries were instead indicated by J.U.'s medical records, lack of significant neck injury, and historical information provided by J.U.'s mother, B.U., and Mr. Butts about J.U.'s fall, illness, and abnormal behaviors in the week preceding his death. Dr. Plunkett told the jury that, in his opinion, shaking a two-year-old child would not cause the injuries J.U. sustained. But, at the time of trial, Dr. Plunkett's testimony would have been considered a fringe medical opinion. Indeed, arguing there was no debate on SBS diagnosis standards in the medical community and equating Dr. Plunkett to a transient quack was precisely the trial prosecutor's strategy in undermining Mr. Butts's defense. (*See, e.g.*, Mar. 5, 2003 Trial Tr. Vol. II at 436-40, 473-75, 503-11.) This strategy was fatal to Mr. Butts's defense, as his convictions were almost exclusively predicated on medical testimony elicited from the state's four medical experts.

{¶ 11} In stark contrast to 2003, however, there is now a significant debate in the medical community as to whether injuries like J.U.'s are necessarily diagnostic of intentional shaking. (*See, e.g.*, May 17, 2021 Hearing Tr. Vol. I at 38-39, 53-88; May 18, 2021 Hearing Tr. Vol. II at 175-237; May 19, 2021 Hearing Tr. Vol. III at 322-47, 403-04; May 20, 2021 Hearing Tr. Vol. IV

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at 468-70; May 25, 2021 Hearing Tr. Vol. V at 697-723; June 2, 2021 Hearing Tr. Vol. VI at 737-39.) Moreover, new scientific evidence has expanded the differential diagnosis[2] applicable to J.U.'s injuries. Thus, the medical community's literature and guidance pertaining to the diagnosis of SBS (now referred to as AHT) has changed significantly since Mr. Butts's 2003 trial. It is now the standard practice for medical providers to eliminate the possibility of non-abuse causes of injuries mimicking those believed to be diagnostic of SBS before diagnosing a patient with SBS (now AHT). This was not the standard practice in 2003 because the medical community's knowledge about the cause of injuries typically observed in SBS cases was significantly more limited than it is today.

***3** {¶ 12} Indeed, Dr. Frasier (the state's proffered expert) conceded that in the years following Mr. Butts's trial, standards and guidance from key organizations—including the American Academy of Pediatrics ("AAP")—about diagnosing SBS (or AHT) significantly changed from those that existed in 2002/2003. Notwithstanding the advances in the field over the past two decades, however, Dr. Frasier nonetheless maintained that she arrived at the same conclusions today that the treatment team did in 2002 when she reviewed all relevant records. (*See, e.g.*, Hearing Tr. Vol. V at 573-74, 606-07, 671-91. *See generally*, *id.* at 602-71.)

{¶ 13} In addition to this proffered expert testimony, counsel for the parties presented arguments at the 2021 hearing and filed post-hearing briefs summarizing their arguments based on the experts' hearing testimony.

{¶ 14} On November 10, 2022, the trial court issued a written decision finding that Mr. Butts had presented newly discovered evidence that was not available to him at trial or 120 days after the jury's verdict was rendered, thus satisfying the requirements of Crim.R. 33(B) for a delayed new trial motion. The trial court also concluded the new evidence created a strong probability of a different result at trial, which entitled him to a new trial under Crim.R. 33(A)(6). Accordingly, the trial court granted Mr. Butts's motion for leave to file a delayed new trial motion and his motion for a new trial.

{¶ 15} On December 12, 2022, the state filed a notice of appeal in the common pleas court. Two days later, the state filed a motion seeking leave to appeal the trial court's November 10, 2022 Decision and Entry, the propriety of which is now before us in this case. In support of its motion for leave to appeal, the state has presented two claimed errors:

> [I.] The trial court abused its discretion and erred in granting Defendant's motion for leave to file a delayed motion for new trial.
>
> [II.] The trial court abused its discretion and erred in granting Defendant's motion for new trial.

(Dec. 14, 2022 Mot. for Leave to Appeal at 26, 37.)

II. State's Right to Appeal

{¶ 16} The state's right to appeal a trial court's decision is governed by R.C. 2945.67(A). That statute grants the state an absolute right to appeal certain categories of trial court decisions and permits the state to appeal "any other decision" of the trial court, except the final verdict, by leave of the court of appeals. *State v. Matthews*, 81 Ohio St.3d 375, 377, 691 N.E.2d 1041 (1998). *See also State v. Caulley*, 10th Dist. No. 12AP-100, 2012 WL 2150927, 2012-Ohio-2649, ¶ 6-7, citing *State v. Burke*, 10th Dist. No. 06AP-656, 2006 WL 2567834, 2006-Ohio-4597, ¶ 7 (explaining the state cannot appeal as a matter of right a decision granting a new trial).

{¶ 17} In this case, the parties agree the statute permits the state to seek leave of this court to appeal the trial court's November 10, 2022 decision.

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{¶ 18} The state's motion for leave to appeal must set forth the errors it claims occurred in the trial court proceedings. *Caulley* at ¶ 7; App.R. 5(C). That motion must also be accompanied by affidavits and/or the parts of the record upon which the state relies to demonstrate a probability that the claimed errors occurred. *Caulley* at ¶ 7, citing *State v. Holzapfel*, 10th Dist. No. 10AP-17, 2010 WL 2502216, 2010-Ohio-2856, ¶ 10, citing App.R. 5(C).

{¶ 19} The decision to grant or deny the state leave to appeal rests solely within the discretion of the court of appeals. *Caulley* at ¶ 7, citing *State v. Fisher*, 35 Ohio St.3d 22, 23, 517 N.E.2d 911 (1988) and *Burke* at ¶ 8.

III. Analysis

{¶ 20} Mr. Butts's motion for a new trial was based on newly discovered evidence under Crim.R. 33(A)(6). Since his motion for a new trial was filed years after the jury verdict was rendered, Mr. Butts appropriately sought leave from the trial court to file his delayed new trial motion pursuant to Crim.R. 33(B). Following an evidentiary hearing and briefing by the parties, the trial court granted Mr. Butts's motion for leave to file a delayed motion for new trial *and* granted his motion for a new trial in a single decision, dated November 10, 2022. The state moves for leave to appeal that decision, arguing the trial court erred in granting both of Mr. Butts's motions.

A. Standard of Review

***4** {¶ 21} A decision granting a motion for leave to file a delayed motion for new trial is subject to an abuse of discretion review. *State v. Townsend*, 10th Dist. No. 08AP-371, 2008 WL 5196493, 2008-Ohio-6518, ¶ 8. And a trial court's decision granting a new trial based on newly discovered evidence will also not be disturbed on appeal unless we find the trial court abused its discretion. *See Caulley* at ¶ 20, citing *Burke* at ¶ 14, citing *State v. Schiebel*, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990), paragraph one of the syllabus.

{¶ 22} An abuse of discretion occurs when the trial court's decision was unreasonable, arbitrary, or unconscionable. *See, e.g.*, *State v. Brown*, 10th Dist. No. 22AP-38, 2022 WL 16947402, 2022-Ohio-4073, ¶ 19, citing *State v. Angel*, 10th Dist. No. 19AP-771, 2021 WL 5853788, 2021-Ohio-4322, ¶ 68, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion and the judge's exercise of that discretion is outside the legally permissible range of choices." *State v. Hackett*, 164 Ohio St.3d 74, 2020-Ohio-6699, ¶ 19, 172 N.E.3d 75. An abuse of discretion may also be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶ 15, 892 N.E.2d 454 (8th Dist.). *See also New Asian Super Mkt. v. Jiahe Weng*, 10th Dist. No. 17AP-207, 110 N.E.3d 131, 2018-Ohio-1248, ¶ 16.

B. Mr. Butts's Motion for Leave to File a Delayed Motion for New Trial

{¶ 23} The state's first claimed error is that the trial court abused its discretion by granting Mr. Butts leave to file a delayed motion for new trial pursuant to Crim.R. 33(B).

1. Controlling Legal Standard

{¶ 24} Crim.R. 33(B) provides that a motion for new trial based on newly discovered evidence must be filed within 120 days after a verdict is rendered. A party who fails to file a motion within that time must seek leave from the trial court to file a delayed motion for new trial. *State v. Armengau*, 10th Dist. No. 16AP-355, 2017 WL 237834, 2017-Ohio-197, ¶ 9. The trial court may grant leave to file a delayed motion for new trial if the movant shows, by clear and convincing evidence, that he was " 'unavoidably prevented from the discovery of the evidence upon which he must rely.' " *State v. Bethel*, 167 Ohio St.3d 362, 2022-Ohio-783, ¶ 53, 192 N.E.3d 470, quoting Crim.R. 33(B).

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{¶ 25} The standard of "clear and convincing evidence" is defined as " 'that measure or degree of proof which is more than a mere "preponderance of the evidence," but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' " *Schiebel*, 55 Ohio St.3d at 74, 564 N.E.2d 54, quoting *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. *See also Armengau* at ¶ 12.

2. Analysis of State's First Claimed Error

{¶ 26} In his motion for leave to file a new trial motion, Mr. Butts argued the evidence supporting his new trial motion—namely, the shift in the medical community's understanding of the mechanisms and non-abusive mimics of pediatric injury and death from SBS/AHT—was not available and could not have been discovered prior to, at the time of, or 120 days after the verdict was rendered in his March 2003 trial.

{¶ 27} The state argued in response that Mr. Butts waited too long to file his motion for leave. (*See* Oct. 21, 2021 State's Posthearing Brief at 15-18.) But the trial court rejected that argument under *Bethel* and did not abuse its discretion in doing so. (Nov. 10, 2022 Decision and Entry at 16.) In *Bethel*, the Supreme Court of Ohio expressly rejected precedent from appellate courts (including this one) imposing a "reasonable-time filing requirement" on Crim.R. 33(B) motions for leave like the one at issue here. *See id.* at ¶ 51 -58. The *Bethel* court emphasized that Crim.R. 33(B) "does not establish a time frame in which a defendant must seek leave to file a motion for a new trial based on the discovery of new evidence." *Id.* at ¶ 55.

***5** {¶ 28} We recognize, as the state also points out, that many of the arguments Mr. Butts raises here—for instance, that J.U.'s injuries could have occurred without an intentional injury, and the possibility of J.U. having a substantial lucid interval following a head trauma, if one occurred—were presented, at least in part, at his 2003 trial through Dr. Plunkett's testimony. However, that does not end our inquiry. Although the basic arguments are similar, the form and nature of the evidence supporting his contentions today are dramatically different from the evidence presented at Mr. Butts's 2003 trial.

a. 2003 Trial Evidence

{¶ 29} After J.U. collapsed in the living room and became unresponsive, Mr. Butts called 911. (Trial Tr. Vol. II at 351-52.) The responding officers arrived on the scene 3-5 minutes later, and once they entered the residence at Mr. Butts's invitation, they examined J.U. and discovered he was not breathing. (Mar. 3, 2003 Trial Tr. Vol. I at 22-24, 31.) Officer Tim Keller suspected J.U. had stopped breathing 3-4 minutes before he attempted CPR. (Trial Tr. Vol. I at 23-24, 27.) Paramedics, who examined J.U. approximately 12 minutes after the 911 call, similarly believed J.U. "had been down and not breathing on his own for several minutes" prior to their arrival. (*See* Trial Tr. Vol. I at 66-67. *See also id.* at 86, 89-92, 107-08, 564 N.E.2d 54.)

{¶ 30} Mr. Butts and B.U. testified about J.U. being sick about a week and a half prior to his death. (*See* Trial Tr. Vol. I at 39-43; Trial Tr. Vol. II at 342-45.) At trial, B.U. and Mr. Butts recounted how J.U. "wasn't himself" in the week preceding his death. (Trial Tr. Vol. I at 40, 43; Trial Tr. Vol. II at 343.) Both described J.U. falling, not catching himself, busting his mouth open, hitting his head/face in the bathtub, and not being as talkative or active as he usually was. (Trial Tr. Vol. I at 40, 43-44, 50-51; Trial Tr. Vol. II at 342-43.) *See generally Butts I* at ¶ 2-3, 8-12. During her trial testimony, B.U. lamented that she "should have taken [J.U.] to the doctor" after that incident. (Trial Tr. Vol. I at 43, 50.) In fact, B.U. testified that Mr. Butts told her she should take J.U. to the doctor, but she ultimately decided against it because she attributed his unusual behavior to him having a cold. (*See* Trial Tr. Vol I at 44.) Of note, J.U. had two bluish bruises on his forehead at the time of his hospitalization. (*See, e.g.*, Trial Tr. Vol. I at 199. *See also* Trial Tr. Vol. II at 289, 299-300, 302-04.) And, no skull fracture was observed in the autopsy. (Trial Tr. Vol. II at 303-04.)

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{¶ 31} On the day of J.U.'s death, B.U. and S.C. (Mr. Butts's friend) both observed J.U. acting fussy. (*See* Trial Tr. Vol. I at 39-41, 53.) B.U. testified J.U. ate little breakfast that morning, was not talking, was dizzy, had a cold, was moving slowly, and wanted to be held. (Trial Tr. Vol. I at 39-41, 45.) To help treat his symptoms, B.U. gave J.U. cold medicine (Triaminic) before she went to work. (Trial Tr. Vol. I at 41, 45-47. *See also id.* at 156, 206, 172 N.E.3d 75.) Prior to and on the date of his death, Mr. Butts was the sole caretaker for J.U. when B.U. was at work. (*See* Trial Tr. Vol. I at 39, 45-46, 50.)

{¶ 32} Despite that evidence, the state's expert witnesses discounted the possibility of alternative diagnosis of an accidental injury. This is largely because, at the time of Mr. Butts's 2003 jury trial, it was generally accepted by the medical community (including pediatricians and medical examiners) that findings like those observed by the forensic pathologist in this case—retinal and optic nerve hemorrhage, subdural hemorrhages, and cerebral edema—could only result from four circumstances: (1) a fall from more than ten feet; (2) a high-velocity vehicular crash; (3) an object protruding from the head; or (4) intentional shaking. (*See, e.g.*, Hearing Tr. Vol. III at 322-25. *See also* Trial Tr. Vol. I at 199, 257-59, 292-98; Trial Vol. II at 323-24.)

***6** {¶ 33} It was also generally accepted that an injury resulting in this triad of symptoms would be immediately incapacitating, meaning there would be no delay (i.e., "lucid intervals") between the injury and a resulting collapse. (*See, e.g.*, Hearing Tr. Vol. I at 224-25, 232. *See also* Trial Tr. Vol. I at 233, 260; Trial Tr. Vol. II at 296, 324-25.)

{¶ 34} The state presented numerous medical expert witnesses at Mr. Butts's 2003 trial who testified to a reasonable degree of medical certainty that the cause of J.U.'s death was violent shaking, which caused the blood vessels in J.U.'s eyes and brain to rupture (retinal and subdural hemorrhages) and his brain to swell (cerebral edema). *See Butts I*, 2004-Ohio-1136 at ¶ 21. The state's theory was that this triad of injuries was, based on the generally accepted medical science at that time, diagnostic of death caused by SBS. (*See, e.g.*, Hearing Tr. Vol. II at 222-32.) This was the testimony of the state's expert witness on child abuse, Dr. Charles F. Johnson, and J.U.'s treating physicians, Dr. Jonathan Groner and Dr. Karla Hauersperger. It was also consistent with the testimony of Dr. Patrick Fardal, the forensic pathologist from the coroner's office who performed the autopsy.

{¶ 35} The state's experts all opined that J.U.'s injuries could not have been caused by an accidental short-distance fall, even in combination with pneumonia or other illness. *See Butts I* at ¶ 8-11. They also testified that after being injured, J.U. would have had an immediate and obvious response and would not have appeared normal. Thus, according to their testimony, a fall in the bathtub days before J.U.'s hospitalization could not have caused the injuries that resulted in his death. Because Mr. Butts was the last person in J.U.'s presence before he collapsed and became unresponsive—as evidenced by the fact that Mr. Butts called 911 when this occurred—the state's medical experts surmised that Mr. Butts must have been the perpetrator of the intentional shaking.

{¶ 36} We summarized the testimony of the state's experts at the 2003 trial in *Butts I*, which is incorporated by reference herein. *Id.* at ¶ 6-11, 21-25.

{¶ 37} The defense presented expert medical testimony from Dr. John Plunkett suggesting otherwise. We previously summarized his relevant testimony as follows:

> John Plunkett, M.D., a laboratory and medical education director at Regina Hospital in Hastings, Minnesota, who is board certified in anatomic pathology, clinical pathology and forensic pathology, testified on behalf of appellant. Dr. Plunkett reviewed copies of [J.U.'s] medical records from Children's Hospital, the autopsy report, photographs and slides.
>
> Dr. Plunkett testified that there is a scientific invalidity with the concept of shaken baby syndrome because one does not cause injuries usually associated with shaken baby syndrome by shaking a child. He believes that the theory of retinal bleeding being a sign of shaken baby syndrome is not a valid assessment.

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> Dr. Plunkett reviewed the readings of the CT scans, but not the CT scans themselves, and testified it showed a loss of gray/white matter distinction in the brain, something that occurs or is seen 12 to 24 or more hours after an injury or event. He believes that the CT scan strongly suggests that the brain swelling started 12 to 24 hours or more prior to [J.U.'s] admission to the hospital. He believes [J.U.'s] cause of death was brain swelling probably due to impact injury and may have been complicated by pneumonia. He testified that [J.U.'s] behavior the week before, which included not eating, being fussy and lack of coordination, were consistent with a pre-existing head injury possibly suffered from the fall in the bathtub.
>
> ***7** Dr. Plunkett did not think that [J.U.] died of shaken baby syndrome because appellant would need to generate 2,400 pounds of force to cause such injuries based on [J.U.'s] weight of 30 pounds. Rather, he believes that the brain swelling was the result of hypoxia, which was very long in this case. The police had been dispatched at 4:36 p.m., as the result of a 911 hang-up call and arrived approximately three to five minutes later. The paramedics waited until the police officers indicated the scene was safe before entering, per normal procedure. It took 12 minutes from the dispatch until the paramedics began working on [J.U.]. The epinephrine that was administered to start [J.U.'s] heart requires three minutes to elapse between doses, and [J.U.] received six doses before his heart responded. [J.U.'s] heart also stopped again during the Medflight.

Butts I at ¶ 13-16. *See also id.* at ¶ 27.

{¶ 38} As we noted in *Butts I*, although Dr. Plunkett "testified that there is a scientific invalidity with the concept of shaken baby syndrome because one does not cause injuries usually associated with shaken baby syndrome by shaking a child," he was required to admit on cross-examination "that his opinion is contrary to what has been taught in medical schools since 1972, is contrary to the views of the [AAP] and that an overwhelming majority of pediatricians disagree with his opinion, including the ones that testified for the prosecution." *Id.* at ¶ 26. *See also id.* at ¶ 17.

{¶ 39} The impact of this concession was detrimental to Mr. Butts's trial defense in 2003. Equating Dr. Plunkett to a transient quack played a key role in the state's ability to undermine the viability of Mr. Butts's defense that J.U.'s fatal injuries came from an accidental injury, not an intentional shaking that could only be caused by the last person he was with prior to his collapse. In closing arguments, the trial prosecutor described Dr. Plunkett as being "equivalent to the guy who goes from town to town selling magic beans." (Trial Tr. Vol. II at 508.) The trial prosecutor emphasized that Dr. Plunkett's opinion that "there is no such thing as shaken baby syndrome" is "contrary to everything that's been taught in the medical community since 1972." (Trial Tr. Vol. II at 508.) And the trial prosecutor told the jury that Dr. Plunkett's opinions "are directly contrary to the beliefs of the American [Academy of] Pediatric[s] [ ]" and to the opinions of "the four expert doctors who testified" on behalf of the state. (Trial Tr. Vol. II at 508.)

{¶ 40} Beyond the state's four expert witnesses at trial, there was little else presented by way of nonmedical evidence of Mr. Butts's guilt. There was no evidence whatsoever that Mr. Butts abused J.U. in the past or acted with any malicious intent on the day in question. [3] Instead, the evidence indicated that Mr. Butts was "very loving towards [J.U.]" and treated J.U. as though he was his own son. (Trial Tr. Vol. I at 42-43. *See also id.* at 47-48, 55-58, 517 N.E.2d 911.) J.U. called Mr. Butts "[D]ad," and B.U. and S.C. described them as close. (Trial Tr. Vol. I at 42, 47-48, 55-56.) We thus stress the absence of evidence regarding any motive or precipitating event that might have led Mr. Butts to shake J.U. so violently. To the contrary, B.U. and S.C. testified Mr. Butts was "very calm" with J.U., even when J.U. was fussy, including in the hours prior to his death. (Trial Tr. Vol. I at 44-45, 48-49, 54-56.) And, B.U. testified, when J.U. threw tantrums, their standard disciplinary practice was to send him to timeout. (Trial Tr. Vol. I at 48-49.) No evidence or testimony about the scene suggested foul play either. (*See, e.g.*, Trial Tr. Vol. I at 103, 142-57.)

b. Newly Discovered Evidence Presented in 2019 Motion

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***8** {¶ 41} In the years following Mr. Butts's March 2003 trial, doubt has increased in the medical community concerning whether young children can be fatally injured by shaking alone. *See, e.g.*, *State v. Edmunds*, No. 2007AP933, 308 Wis.2d 374, 746 N.W.2d 590, 2008 WI App 33, ¶ 15 (Jan. 31, 2008); *Cavazos v. Smith*, 565 U.S. 1, 13-14, 132 S.Ct. 2, 181 L.Ed.2d 311 (2011) (Ginsburg, J., dissenting). At his 2003 trial (and 120 days after the jury's verdict was rendered), the defense experts offered (or would have offered) the existing theories in the medical community—disavowed by the mainstream at that time—that shaking alone could not cause fatal injuries, that there were other non-intentional causes for J.U.'s injuries, and that a toddler can experience a head trauma from a short fall and have a significant lucid interval thereafter.

{¶ 42} In contrast, the defense expert testimony Mr. Butts proffered in support of his 2019 motions explained that, in the more than 15 years since Mr. Butts's trial, a shift has occurred in the medical community that would "cause a sea change in the trial dynamic if it were held today." (*See, e.g.*, 2019 Motions, Ex. A at 4.) As one of Mr. Butts's experts, Dr. Roland Auer, wrote in his 2019 report:

> This new evidence deals with an expanded differential diagnosis of the type of injuries discovered in [J.U.] at autopsy, the knowledge that short falls can and do cause death, the now known possibility of a lucid interval, and the effects of advanced resuscitation efforts. Although the scientific principles behind some of this evidence were previously known, the science was not part of the medicine at the time, and no differential diagnosis was in place for the medical community in 2003 at the time of Mr. Butts'[s] trial.

(2019 Motions, Ex. A at 4. *Compare* Trial Tr. Vol. I at 199, 227-28; Trial Tr. Vol. II at 438.) Mr. Butts thus argued in his 2019 motions that new expert medical testimony now supports the theory that J.U.'s injuries could have occurred without intentional head trauma, and that J.U. could have had a substantial lucid interval following a head trauma if one occurred. And, of particular significance, a factual record to support the possibility of non-abusive causes for J.U.'s injuries was developed by the evidence and testimony presented at Mr. Butts's 2003 trial.

{¶ 43} Based on the evidence and testimony presented in connection with Mr. Butts's 2019 motions and at the 2021 hearing on those motions, the trial court found that "the medical community['s] consensus differs drastically than that which existed at the time of [Mr. Butts's] trial." (Nov. 10, 2022 Decision and Entry at 20. *See generally* 2019 Motions, Ex. A at 31-34.) For the reasons described below, we find the trial court did not abuse its discretion in concluding that the relevant shift in the medical community's understanding of injuries like J.U.'s—and thus the evidence in support of Mr. Butts's new trial motion—did not begin to occur until after the Crim.R. 33(B) deadline expired, thus warranting leave to file a delayed motion for a new trial (as well as a new trial).

Differential Diagnosis Standards for J.U.'s Injuries

{¶ 44} During the 2021 hearing on Mr. Butts's motions, Dr. Auer and Dr. Laposata testified that no differential diagnosis concept (other than a high-velocity mechanism) was in place in 2003 when the triad of injuries believed to be diagnostic of SBS presented. (*See, e.g.*, Hearing Tr. Vol. I at 117-18; Hearing Tr. Vol. II at 175-76, 226-28; 2019 Motions, Ex. A at 4.)

{¶ 45} At the time of Mr. Butts's 2003 trial, the standard of care accepted and taught in medical schools since 1972 was that the presence of this triad of injuries—retinal hemorrhage, subdural hemorrhage, and cerebral edema—was, as a matter of science, diagnostic of death caused by SBS. (*See, e.g.*, Trial Tr. Vol. II at 437-38.) Indeed, in 1998, the *Journal of Pediatrics* published a "letter to the editor" from Dr. Frasier and approximately 70 other pediatricians stating that SBS, with or without evidence of impact, is "now" (i.e., in 1997/1998) "a well-characterized clinical and pathological entity with diagnostic features in severe

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cases ***virtually unique*** to this type of injury, swelling of the brain, secondary to severe brain injury, bleeding within the head, and bleeding in the interior linings of the eyes." (Emphasis added.) (Hearing Tr. Vol. V at 716-17.)

***9** {¶ 46} In 2001, the AAP published "Shaken Baby Syndrome: Rotational Cranial Injuries-Technical Report," which established a triad of injuries associated with SBS, namely subdural hematoma, retinal hemorrhages, and neurological injury. (Hearing Tr. Vol. II at 176-78.) This was also the position of the National Association of Medical Examiners ("NAME") at that time. (Hearing Tr. Vol. II at 177.) At the time of Mr. Butts's trial, the medical community generally accepted that J.U.'s injuries should be treated as abuse unless definitively proven otherwise. (*See, e.g.*, Hearing Tr. Vol. V at 698-705.) Indeed, Dr. Frasier conceded the AAP's 2001 paper did not include much discussion about non-abusive head trauma or diseases that can result in the constellation of injuries typically associated with SBS. (*See* Hearing Tr. Vol. V at 706.)

{¶ 47} These diagnostic positions of the AAP and NAME (among others) and the corresponding literature about SBS reflected the generally accepted standards in the medical community in 2002/2003. It follows, then, that such literature informed the manner in which J.U.'s injuries were treated in 2002 (including the failure to consider or rule out alternative diagnoses) and the testimony of the state's witnesses at trial about the cause of J.U.'s injuries. (*See, e.g.*, Hearing Tr. Vol. II at 177-78, 228; Hearing Tr. Vol. III at 322-30; Hearing Tr. Vol. V at 656-57.)

{¶ 48} By 2007, there was a more widespread understanding in the medical community that non-abusive mechanisms (independently or in cumulation) can mimic the symptoms of "pathognomonic [4] (or presumed) SBS," i.e., the presence of the triad of injuries—retinal hemorrhage, subdural hemorrhage, and cerebral edema—and the absence of a high-velocity event. (*See, e.g.*, Hearing Tr. Vol. I at 60-61, 69; Hearing Tr. Vol. II at 179-81; Hearing Tr. Vol. V at 547-50; 718-22. *Compare* Hearing Tr. Vol. V at 602-06, 703-08.) Dr. Frasier acknowledged that at least 88 mimics for abusive head trauma were identified in a book published in 2006 to which she was a contributing editor. (Hearing Tr. Vol. V at 718-20.) These non-abusive mimics were not, however, widely accepted as alternative diagnoses for J.U.'s constellation of injuries in 2002/2003. (*See, e.g.*, Hearing Tr. Vol. V at 716-23. *Compare* Hearing Tr. Vol. II at 228; Hearing Tr. Vol. V at 548-50, 656-57.) These advancements in research unequivocally reshaped the medical community's understanding of several factors relevant to the diagnosis of SBS. (*See, e.g.*, Hearing Tr. Vol. II at 180-82; Hearing Tr. Vol. III at 325; Hearing Tr. Vol. V at 705-09.)

{¶ 49} In 2009, the AAP issued guidance advising medical providers to consider alternative hypotheses and all clinical data before making a medical diagnosis of SBS for a patient who presents with the constellation (or triad) of injuries believed to be virtually unique to intentional shaking. (*See, e.g.*, Hearing Tr. Vol. II at 180-81; 2019 Motions, Ex. A at 4, 13, 27.) Dr. Frasier, herself, explained that the AAP also revised its SBS diagnostic terminology in 2009 to AHT in order "to be inclusive of other mechanisms [for the associated injuries] rather than just a single shaken baby syndrome or rotational cranial injury." (Hearing Tr. Vol. V at 705-07. *See also* Hearing Tr. Vol. II at 179-82, 228; Hearing Tr. Vol. V at 578-79, 657.) In 2017, a paper written by authors from the Karolinska Institutet in Sweden postured that the triad of injuries previously believed to be virtually unique to intentional shaking was, alone, insufficient to diagnose intentional shaking or trauma. (*See, e.g.*, Hearing Tr. Vol. I at 39, 69-72; Hearing Tr. Vol. II at 182-83, 223.)

10** {¶ 50} In response to the quantum leap in the mainstream medical community's understanding of SBS mimics, the AAP issued in 2018 a *Consensus Statement on Abusive Head Trauma in Infants and Young Children* ("2018 Consensus Statement"). (*See, e.g.*, Hearing Tr. Vol. I at 69-72, 183-84; Hearing Tr. Vol. IV at 458-59.) The 2018 Consensus Statement advises that, in suspected cases of AHT, a workup must exclude medical disease that can mimic AHT and alternative diagnoses ***must be considered before diagnosis of AHT as the cause of injuries believed in 2002/2003 to be virtually unique to intentional shaking. (*See, e.g.*, Hearing Tr. Vol. I at 69-72, 183-84; Hearing Tr. Vol. IV at 458-59; Hearing Tr. Vol. V at 708-09; Hearing Tr. Vol. VI at 737-39.) In other words, the 2018 Consensus Statement repudiates the notion that abuse should be presumed from an

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intracranial injury in the absence of a high-velocity event. (*See, e.g.*, Hearing Tr. Vol. V at 708; Hearing Tr. Vol. VI at 737-38. *See also* Hearing Tr. Vol. II at 177-84, 226-28)

{¶ 51} Of considerable note, the trial court found this 2018 Consensus Statement was key to Mr. Butts's arguments for leave and a new trial. (Nov. 10, 2022 Decision and Entry at 17, citing State's Hearing Ex. 2.) This is because the 2018 Consensus Statement's recommendations substantially differ from the mainstream diagnostic standards accepted and followed by the state's 2003 trial experts and J.U.'s treating providers in 2002. (*See, e.g.*, Hearing Tr. Vol. I at 69-72, 100-01; Hearing Tr. Vol. II at 177-84, 202, 226-28, 231, 284-87; Hearing Tr. Vol. III at 326-34; Hearing Tr. Vol. IV at 458-60.) Dr. Auer explained that this 2018 Consensus Statement (along with the AAP's 2009 policy statement updates) revealed a significant shift of mainstream opinion among pediatricians that did not exist at the time of Mr. Butts's trial. (*See, e.g.*, Hearing Tr. Vol. II at 177-84; Hearing Tr. Vol. III at 324-26.) Indeed, Dr. Frasier agreed the 2018 Consensus Statement differed substantially from the state of the medical literature in 2002/2003. (*See, e.g.*, Hearing Tr. Vol. V at 697-708; Hearing Tr. Vol. VI at 737-39.) More precisely, Dr. Frasier acknowledged that, at the time of Mr. Butts's trial, the medical community would have viewed J.U.'s triad of injuries as conclusive proof that he had been shaken. (*See, e.g.*, Hearing Tr. Vol. V at 704-09. *See also id.* at 656-57, 120 N.E.2d 118.) She agreed that, in her own practice today, she would never presume abuse. (*See, e.g.*, Hearing Tr. Vol. V at 708-09.)

{¶ 52} We acknowledge that mimics of child abuse (bruising, bleeding, skin changes, and bone fractures) have increasingly been recognized in the medical community since Mr. Butts's 2003 trial. (*See, e.g.*, Hearing Tr. Vol. I at 68-69, 136-37; Hearing Tr. Vol. II at 179-84; Hearing Tr. Vol. III at 325-26; Hearing Tr. Vol. V at 602-06.) But, critically, the AAP's consensus of opinion on the diagnostic significance of J.U.'s triad of injuries did not expand to formally include consideration of diseases and other natural or accidental causes as a part of differential diagnosis until 2009—approximately six years after Mr. Butts's trial. (*See, e.g.*, Hearing Tr. Vol. II at 179-84; Hearing Tr. Vol. III at 324-26; Hearing Tr. Vol. V at 707-08.)

Lucid Intervals

{¶ 53} At Mr. Butts's 2003 trial, the state's medical experts repeatedly told the jury that J.U. would have lost consciousness within seconds or minutes after sustaining his injuries. (*See, e.g.*, Trial Tr. Vol. I at 173-74, 200, 233, 260; Trial Tr. Vol. II at 296, 324-25.) According to their testimony—and the AAP and NAME consensus position papers issued at that time—a lucid interval between an impact (or injury) and unconsciousness was not possible. (*See, e.g.*, Hearing Tr. Vol. II at 224-25, 232.) Thus, Dr. Plunkett's 2003 testimony about the likelihood of J.U. experiencing a lucid interval was generally discounted by all of the state's medical experts at Mr. Butts's trial. (*See, e.g.*, Hearing Tr. Vol. II at 225, 291. *See also* Trial Tr. Vol. II at 507-08.)

***11** {¶ 54} The medical community has since accepted that the onset of symptoms does not reliably indicate the actual timing of the injuries. (*See* 2019 Motions, Ex. A at 5, 10; Hearing Tr. Vol. I at 68-69; Hearing Tr. Vol. II at 224-25, 229-32, 268-69.) That is to say, the medical community now accepts that a lucid interval can exist in children who have experienced a severe brain injury. (*See, e.g.*, 2019 Motions, Ex. A. at 13-14. *Compare* Hearing Tr. Vol. V at 642-44.)

Short Falls

{¶ 55} The state's medical experts also told the jury in 2003 that J.U.'s triad of injuries could not have been caused by a short (or standing) fall. (Hearing Tr. Vol. I at 63; Hearing Tr. Vol. II at 219. *See, e.g.*, Trial Tr. Vol. I at 199, 205-06, 226-27, 258-59; Trial Tr. Vol. II at 294, 324.) Indeed, Dr. Frasier acknowledged at the 2021 hearing that AAP guidance at the time of trial counseled that the triad of symptoms resulting in death could not occur following a fall from a short height. (*See, e.g.*, Hearing Tr. Vol. III at 706-07.) This guidance informed the expert testimony presented at Mr. Butts's 2003 trial. (*See, e.g.*, Trial Tr. Vol. I at 199, 205-06, 227-28, 234-35; Trial Tr. Vol. II at 438.)

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{¶ 56} Since 2009, however, AAP guidance no longer categorically rejects short falls as a possible cause (or contributing cause) of the triad of symptoms resulting in death. (*See, e.g.*, Hearing Tr. Vol. I at 63-65; Hearing Tr. Vol. II at 219-20; 2019 Motions, Ex. A at 12-13, 29-30. *Compare* Hearing Tr. Vol. II at 277; Hearing Tr. Vol. V at 655-56, 706-07.)

Biomechanical Studies on Viability of Sustaining Injuries via Shaking

{¶ 57} At Mr. Butts's 2003 trial, the state's medical experts repeatedly told the jury that J.U.—an approximately 30-pound toddler—sustained the triad of injuries by being violently shaken. To rebut those claims, the defense's trial expert, Dr. Plunkett, testified that it would not have been possible for Mr. Butts to shake J.U. hard enough to cause the necessary acceleration/deceleration velocity or speed to result in such injuries, especially in the absence of any injury to J.U.'s neck. (*See, e.g.*, Trial Tr. Vol. II at 393-401.) But such opinion was not widely accepted by the medical community in 2003 and was generally considered to be a "fringe" theory, as emphasized by the prosecutor throughout Mr. Butts's 2003 trial. (*See, e.g.,* Trial Tr. Vol. II at 438-40, 472, 508-10. *Compare* Hearing Tr. Vol. II at 179-87; Hearing Tr. Vol. IV at 470-72. *But see* Hearing Tr. Vol. V at 651-55.)

{¶ 58} Since Mr. Butts's 2003 trial, however, biomechanical studies regarding the feasibility of generating a significant enough force or acceleration to result in the triad of injuries in a toddler have developed more widespread acceptance in the medical community. (*See, e.g.*, Hearing Tr. Vol. II at 179-87, 222, 274-75; Hearing Tr. Vol. III at 334-35; 2019 Motions, Ex. A at 24-29. *Compare* Hearing Tr. Vol. V at 578-86, 652-55.)

Post-Trial Differential Diagnoses Relating to J.U.'s Injuries

{¶ 59} At the outset, it is important to point out that Mr. Butts's proffered experts do not dispute J.U. sustained injuries including retinal hemorrhages, optic nerve sheath hemorrhages, subdural hematomas or subdural hemorrhages, and cerebral edema (brain swelling). (*See, e.g.*, Hearing Tr. Vol. I at 146.) At issue is the medical expert testimony elicited at Mr. Butts's 2003 trial about the cause of those injuries upon which the state's case against Mr. Butts almost exclusively relied.

***12** {¶ 60} In 2003, the constellation of findings that led to a diagnosis of SBS required retinal hemorrhage, subdural hemorrhage, and some sort of encephalopathy, meaning anything wrong with the brain. (*E.g.*, Hearing Tr. Vol. II at 175-76.) In other words, bleeding in the eyes (retinal hemorrhages/optic nerve sheath hemorrhages), bleeding in the head (subdural hematomas or subdural hemorrhages), and swelling in the brain (cerebral edema) were accepted by the medical community to be diagnostic of SBS (except in the presence of a "high velocity event") at the time of Mr. Butts's trial. (*See, e.g.*, Trial Tr. Vol. I at 257-59; Trial Tr. Vol. II at 294-98, 323-24. *Compare* Hearing Tr. Vol. II at 175-79, 226-28; Hearing Tr. Vol. V at 599-602.)

{¶ 61} The state's theory of guilt—that Mr. Butts caused J.U.'s death by shaking him shortly before J.U.'s collapse and hospitalization—was proven almost entirely through expert medical testimony. The state's medical experts told the jury that J.U.'s triad of injuries—most notably, retinal and optic nerve sheath hemorrhages—was pathognomonic of or "relatively unique" to intentional shaking. (*See, e.g.*, Trial Tr. Vol. I at 169-71, 177-78, 187-88, 257-60.) The jury was also told by the trial experts, including Dr. Plunkett—and the relevant literature at that time supported—that the mainstream medical community generally accepted those opinions to be true. (*See, e.g.*, Trial Tr. Vol. II at 322-24, 436-38, 473-74; Hearing Tr. Vol. VI at 737-40.)

{¶ 62} Today, we know that critical aspects of the state's experts' trial testimony are no longer accepted by the medical community as unequivocally true. Most notably, subsequent research and studies now demonstrate that non-abuse mechanisms can cause retinal and optic nerve sheath hemorrhages. (*See, e.g.*, Hearing Tr. Vol. I at 59-63, 114-15; Hearing Tr. Vol. II at 227-29; Hearing Tr. Vol. V at 703-22; 2019 Motions, Ex. A at 31-35.) Significant advancements in the medical community's knowledge have also greatly broadened the differential diagnosis applicable to cerebral edema and subdural hemorrhage injuries. (*Compare* Trial Tr. Vol. I at 170-71, 193-94, 199, 228-29, 257-60; Trial Tr. Vol. II at 291-93, 307, 311-12, 319, 419, *with* Hearing Tr. Vol.

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I at 67-71, 77, 84-86, 192-222; Hearing Tr. Vol. II at 261-64, 275-76; Hearing Tr. Vol. III at 358-403; Hearing Tr. Vol. IV at 465-71; 2019 Motions, Ex. C at ¶ 8-11. *But see* Hearing Tr. Vol. V at 585-602.)

{¶ 63} As Mr. Butts's proffered experts described during the 2021 hearing, the differential diagnoses considered by medical providers today for the constellation of injuries the medical community thought in 2003 were "virtually unique" to intentional shaking would include a number of variables, including the effects of disseminated intravascular coagulation ("DIC"), multiple short falls, serious infection (sepsis), pneumonia, large doses (or overuse) of over-the-counter cold medicine, hyperglycemia, and extended resuscitation efforts following brain death. (*See, e.g.*, Hearing Tr. Vol. I at 40-114, 134; Hearing Tr. Vol. II at 193-268; Hearing Tr. Vol. III at 315-16, 336-402; 2019 Motions, Ex. A; 2019 Motions, Ex. B; 2019 Motions, Ex. D. *Compare* Hearing Tr. Vol. V at 610-70, 723-29.)

{¶ 64} In sum, Mr. Butts's proffered expert testimony is that J.U.'s fall in the bathtub (and continuous falls in the subsequent week), his infection and pneumonia, and/or the overuse of over-the-counter cold medication (among other non-intentional causes) could have, individually or in combination, caused his collapse and resulted in his cerebral edema and acute hypoxia. (*See, e.g.*, Hearing Tr. Vol. I at 65-68; Hearing Tr. Vol. II at 233-40; 2019 Motions, Ex. A at 30-37; 2019 Motions, Ex. C at ¶ 6-15; 2019 Motions, Ex. D at 9. *Compare* Hearing Tr. Vol. V at 629-70.) Mr. Butts's proffered experts also opined that J.U.'s injuries could be explained by a mechanism other than intentional abusive trauma, such as DIC, undiagnosed diabetes, systemic inflammatory responses syndrome ("SIRS"), and/or other conditions not considered, researched, or known by his treating doctors in 2002 or the state's testifying experts in 2003. (*See, e.g.*, Hearing Tr. Vol. I at 55-70; Hearing Tr. Vol. II at 234-37; Hearing Tr. Vol. III at 399-403; 2019 Motions, Ex. A at 30-37; 2019 Motions, Ex. C at ¶ 6-15; 2019 Motions, Ex. D at 9. *Compare* Hearing Tr. Vol. V at 622-70.)

c. The State's Arguments Under Crim.R. 33

***13** {¶ 65} In support of its first claimed error, the state generally contends that the newly discovered evidence proffered by Mr. Butts is procedurally barred because it does not satisfy the requirements of Crim.R. 33. It asserts the trial court erred in reaching the merits of this case because Mr. Butts already raised at his 2003 trial alternative non-abuse causes for J.U.'s fatal injuries, as well as challenges to the SBS diagnosis opined by the state's four experts. But the issue with the state's arguments is that the evidence and testimony offered in support of Mr. Butts's 2019 motions is entirely different in character from the expert medical evidence offered at his 2003 trial.

{¶ 66} Generally, the state argues Mr. Butts's proffered evidence is not "newly discovered" because it is predicated upon medical records describing J.U.'s injuries that existed at the time of Mr. Butts's 2003 trial. (*See, e.g.*, Mot. for Leave to Appeal at 16, 19, 23, 33-36; Hearing Tr. Vol. V at 577-79, 602-71.) But it is the emergence of a legitimate and significant dispute within the medical community in the years following Mr. Butts's trial as to the causes of J.U.'s injuries—which is material to the defense and could not have been discovered within the timeframe set forth in Crim.R. 33—that constitutes newly discovered evidence.

{¶ 67} The state notes that the idea of differential diagnosis existed in 2002/2003. (*E.g.*, Hearing Tr. Vol. V at 576-77, 602-71.) And, more specifically, the state contends that non-abusive mechanisms for J.U.'s injuries were part of the differential diagnosis in 2002. (*See, e.g.*, Mot. for Leave to Appeal at 23.) It is true that J.U.'s treating doctor, Dr. Johnson, testified at the 2003 trial that "always in the back of [his] mind [he considers] other causes [including known bleeding disorders] for rapid decrease in consciousness * * * with bleeding into the brain." (Trial Tr. Vol. I at 228. *See also* Trial Tr. Vol. I at 171, 178. *Compare* Hearing Tr. Vol. I at 129-30, 143-55; Hearing Tr. Vol. II at 273-74; Hearing Tr. Vol. V at 602-08.) But it is also true that, in 2002/2003, the medical community generally believed, pursuant to the medical guidance in effect at that time, that under the circumstances presented here—the triad of injuries with no high-velocity incident—SBS was the diagnostic cause of J.U.'s death. (*See, e.g.*, Trial Tr. Vol. I at 170-71, 259-60; Trial Tr. Vol. II at 323-24.) This generally accepted belief undoubtedly impacted the extent to which J.U.'s medical providers evaluated and researched alternative diagnoses. It also dictated their expert opinion testimony

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about the cause of J.U.'s injuries at Mr. Butts's 2003 trial. And, of course, J.U.'s treating doctors would not have been aware of differential diagnoses for conditions about which the medical community had no (or limited) knowledge at that time. So, these arguments by the state are not well-taken.

{¶ 68} The state also contends that Mr. Butts's proffered evidence is procedurally deficient because Dr. Plunkett raised many of these alternative diagnoses, opined on the possibility of lucid intervals following injury, and postured that shaking alone could not produce the triad of injuries when he testified at Mr. Butts's 2003 trial. (*See, e.g.*, Hearing Tr. Vol. I at 116-24; Hearing Tr. Vol. II at 274-82; Hearing Tr. Vol. III at 318-34, 343-44; Hearing Tr. Vol. IV at 470-72.) But, as described above and more extensively below, Dr. Plunkett's testimony was considered a fringe medical opinion at that time. And the trial prosecutor repeatedly emphasized that point to the jury.

{¶ 69} Subsequent research and studies demonstrate that the state's expert medical testimony admitted at Mr. Butts's 2003 trial is now the subject of substantial criticism that could reasonably cause the factfinder to reach a different conclusion. Further, results of subsequent research and studies demonstrate significant jumps in the medical community's knowledge about non-abusive causes for J.U.'s constellation of injuries, thus resulting in a substantial change in the way medical providers determine their diagnoses. The new research, knowledge, and studies described by all of the proffered experts thus cast serious doubt to a degree that could not have been raised at Mr. Butts's trial. *Compare with State v. Gillispie*, 2d Dist. No. 22877, 2009 WL 2197052, 2009-Ohio-3640, ¶ 148-50; *State v. Hoover-Moore*, 10th Dist. No. 14AP-1049, 50 N.E.3d 1010, 2015-Ohio-4863; *State v. Stein*, 5th Dist. No. 13CA51, 2014 WL 265478, 2014-Ohio-222; *State v. Chambers*, 4th Dist. No. 20CA1125, 2021 WL 4391255, 2021-Ohio-3388.

***14** {¶ 70} Although the basic premises underlying Mr. Butts's arguments are generally parallel to those raised at his 2003 trial, we nonetheless agree with the trial court that the form and nature of the evidence supporting the arguments are drastically different today than they were in 2003. The "new advancements" presented by Mr. Butts are a quantum leap in the medical community's understanding of non-abusive mechanisms that can mimic abusive head trauma and development of standards that require medical providers to consider and, where appropriate, explore alternative diagnoses before finding the cause to be abuse, trauma, or shaking. Thus, under the facts and circumstances of this case, the newly discovered evidence presented by Mr. Butts creates a strong probability that a jury would have reached a different result had his proffered evidence been admitted at trial.

{¶ 71} We also reject the state's suggestion that the trial court "essentially rejected the theory of SBS in this district." (Mot. for Leave to Appeal at 3.) Rather, it found that the standards and methods of diagnosing SBS (or AHT) have changed so substantially that—given the meager nonmedical evidence presented at the 2003 trial and the fact that alternative explanations consistent with testimony from Mr. Butts and B.U. about J.U.'s preexisting conditions and behavior were discounted because of medical standards that have since shifted—a new trial is appropriate in this case. *Compare with State v. Thoss*, 6th Dist. No. S-16-043, 120 N.E.3d 1274, 2018-Ohio-4051 (finding conviction to be against the manifest weight of the evidence and remanding for a new trial).

{¶ 72} More precisely, the trial court found Mr. Butts has demonstrated that, if he were tried today, the expert testimony presented on both sides would ***differ*** in the following ways:

1) Experts could not categorically exclude a short fall as a cause of death. (*See, e.g.*, 2019 Motions, Ex. A at 4-5, 12-13, 27-29, 34-35.)

2) Experts could not rule out the possibility of a lucid interval. (*See, e.g.*, 2019 Motions, Ex. A at 4-5, 13-14, 29-30, 34-35.)

3) Retinal optic nerve sheath hemorrhages could no longer be the basis of an SBS/AHT diagnosis today. (*See, e.g.*, 2019 Motions, Ex. A at 4, 20, 32, 35; 2019 Motions, Ex. D at 8.)

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4) Doctors now know that infection (sepsis) and pneumonia could have been contributing factors in J.U.'s death. (*See, e.g.*, 2019 Motions, Ex. A at 4-11, 19, 23-24, 34; 2019 Motions, Ex. C at ¶ 14; 2019 Motions, Ex. D at 5-8; Tr. Vol. I at 40-45.)

5) The toxicity of over-the-counter cold medicines in pediatric patients is known and understood today. (*See, e.g.*, 2019 Motions, Ex. A at 23-24.)

6) Biomechanical research conducted since Mr. Butts's 2003 trial shows that shaking a two-year-old child similar in size to J.U. hard enough to cause a brain injury would have also caused neck injury, a symptom never noted by any physician at or prior to Mr. Butts's trial. (*See, e.g.*, 2019 Motions, Ex. A at 25-27.)

(*See* Decision and Entry at 25-26.)

{¶ 73} For the reasons stated above, and as discussed more extensively below, there is no basis in the record for us to find the trial court's determination that "[t]he accumulation of [Mr. Butts's] newly-presented evidence, including the 2018 Consensus Statement and the opinions of three new defense experts," was "not available until his [2019] motion was filed" is unreasonable, arbitrary, or unconscionable. (Decision and Entry at 20-21.) Accordingly, we find the state has failed to demonstrate a probability that the trial court abused its discretion (or otherwise erred) when it granted Mr. Butts's motion for leave to file a delayed motion for new trial. The state's motion for leave to appeal its first claimed error is therefore denied.

C. Motion for New Trial

{¶ 74} The state's second claimed error is that the trial court abused its discretion by granting Mr. Butts a new trial.

1. Controlling Legal Standard

***15** {¶ 75} Mr. Butts based his motion for a new trial on newly discovered evidence under Crim.R. 33(A)(6). In support of his motion, Mr. Butts attached affidavits and reports of three expert witnesses. Those three witnesses also testified extensively at the evidentiary hearing on Mr. Butts's motion for new trial.

{¶ 76} Crim.R. 33(A)(6) provides that a new trial may be granted "[w]hen new evidence material to the defense is discovered which the defendant could not with reasonable diligence have discovered and produced at the trial." More precisely, Ohio courts have held that a new trial is warranted when the newly discovered evidence satisfies all of the following criteria (referred to by the state in its motion as the "*Petro* factors"):

1) Discloses a strong probability that it will change the result if a new trial is granted.

2) Has been discovered since the trial.

3) Is such as could not in the exercise of due diligence have been discovered before the trial.

4) Is material to the issues.

5) Is not merely cumulative to former evidence.

6) Does not merely impeach or contradict the former evidence.

See, e.g., *State v. Cashin*, 10th Dist. No. 17AP-338, 2017 WL 6616884, 2017-Ohio-9289, ¶ 15, quoting *State v. Hawkins*, 66 Ohio St.3d 339, 350, 612 N.E.2d 1227 (1993), quoting *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947), syllabus.

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2. Analysis of State's Second Claimed Error

{¶ 77} The trial court found that Mr. Butts established all six *Petro* factors by clear and convincing evidence. The state argues the trial court abused its discretion in finding that Mr. Butts satisfied any of these six factors. [5]

{¶ 78} As we concluded above, Mr. Butts presented evidence in his 2019 motions and at the 2021 hearing that could not have been discovered until many years after his 2003 convictions were entered. Mr. Butts was not negligent in seeking this evidence, as the record demonstrates the bulk of the medical research and literature supporting the defense position, and the emergence of the defense theory as a legitimate position in the medical community, only came about in the years following his trial.

{¶ 79} Mr. Butts's proffered evidence is material to the key issue in this case—the cause of J.U.'s fatal injuries. The state's medical experts opined that J.U.'s injuries were pathognomonic for intentional shaking trauma. The new medical testimony presents an alternate theory for the source of those injuries.

{¶ 80} The defense experts who testified in support of Mr. Butts's 2019 motion explained that in the past 16 years, a shift has occurred in the medical community around SBS, so that Dr. Plunkett's "fringe" views at trial are now recognized as legitimate and part of a significant debate. They testified that there has been significant development in research and literature challenging the medical opinions presented at Mr. Butts's trial. They also explained that, since 2002/2003, new scientific evidence has expanded the differential diagnosis that would be applicable to diagnose the cause of J.U.'s injuries. Along with the state's hearing expert, they told the trial court that AAP's guidance now directs doctors (but did not in 2002/2003) to first consider alternative hypotheses when presented with a patient who has injuries similar to J.U.'s before diagnosing the patient with SBS/AHT. And they suggested that, in light of evidence and testimony in the record about J.U.'s fall, injuries, illness, and abnormal behavior preceding his death, J.U.'s death may not have been caused by abusive trauma.

***16** {¶ 81} We recognize, as did the trial court, that Mr. Butts now presents medical opinions as to how J.U.'s injuries arose that only challenge the states' trial experts' testimony that J.U's injuries resulted from intentional shaking trauma. We also acknowledge the new evidence proffered by Mr. Butts does not completely dispel all of the old evidence presented during his trial. But we cannot agree with the state's argument that the trial court abused its discretion in reaching its conclusions here. Nor do we agree with the state's position that the new evidence is merely impeaching or cumulative, or that, to be admissible under Crim.R. 33, the newly discovered evidence must conclusively prove Mr. Butts's innocence. (*See* Mot. for Leave to Appeal at 45.)

{¶ 82} As discussed above, what is now known about non-abusive mechanisms that mimic the injuries believed in 2002/2003 to be pathognomonic for shaking casts grave doubt on the charges leveled against Mr. Butts in 2003. This is particularly true when we factor in the lack of ***nonmedical*** evidence presented by the state at Mr. Butts's trial. The state claims the trial court's finding that the opinions of Mr. Butts's three new defense experts constitute "new evidence" and are not merely cumulative to Dr. Plunkett's trial testimony is contrary to binding precedent from this court and decisions of other Ohio appellate districts. (*See* Mot. for Leave to Appeal at 35-36, 44-45.) But the three cases the state cites in support of this assertion—*State v. Hoover-Moore*, *State v. Stein*, and *State v. Chambers*—are easily distinguished from this case.

{¶ 83} Most notably, although the standard of review in each case is the same—abuse of discretion—the holding of the trial court's decision here is unique. Since the trial court ***granted*** Mr. Butts's Crim.R. 33 motions and ordered a new trial, we are tasked with determining whether that decision was unreasonable, arbitrary, or unconscionable, or otherwise contrary to law. And, as described above and more fully below, we cannot say that it was. In stark contrast, the appellate courts in *Hoover-Moore*, *Stein*, and *Chambers* were all tasked with determining whether the trial court abused its discretion in ***denying*** the defendant's motion for leave to file a delayed new trial motion and/or motion for a new trial. The "abuse of discretion" standard is always a difficult standard for an appellant to overcome. That remains true irrespective of who the appellant is. Here, it is the state. In those three cases, it was not.

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{¶ 84} Moreover, while we generally agree that *Hoover-Moore* is binding upon this court and the trial court, that decision has no bearing on this case. [6] In addition to its opposite procedural posture, *Hoover-Moore* is factually distinguishable from this case in at least seven respects. *First*, *Hoover-Moore*, 2015-Ohio-4863, 50 N.E.3d 1010, did not only involve a SBS diagnosis; the child also suffered a skull fracture that would have involved significant force. [7] *Id.* at ¶ 9. Developments in the medical community's diagnosis of SBS would have had no bearing on a skull fracture injury. *Second*, the child in *Hoover-Moore* was reported as acting normally prior to the incident; J.U. was not. *See id.* at ¶ 4. *Third*, there was no evidence presented at trial in *Hoover-Moore* suggesting an alternative, accidental cause of the child's death that was, like the alternative theories presented here, vehemently rejected based on the SBS medical standards followed at that time. *Fourth*, *Hoover-Moore* involved a different defense theory. At Mr. Butts's trial, the defense argued J.U.'s injuries were not caused by him being intentionally and violently shaken. In *Hoover-Moore*, on the other hand, the defense's theory was about timing—e.g., that someone else (the child's parents) shook the child. *See id.* at ¶ 9, 17-18. While changes in medical opinion on lucid intervals might have been relevant in that regard in *Hoover-Moore*, the key in this case is that alternative explanations for J.U.'s injuries were discounted because, in 2002/2003, the mainstream medical opinion presumed abuse when the triad of injuries was present and a high-velocity event was absent. *Fifth*, in *Hoover-Moore*, the defendant's motion for delayed leave to file a new trial motion was not supported with any clear medical opinion because the defendant could not provide the consulting doctor with the child's medical records. *See id.* at ¶ 8. In other words, the "newly discovered evidence" in *Hoover-Moore* was purely speculative. But here, the newly discovered evidence is concrete and precise. *Sixth*, the deceased child in *Hoover-Moore* was an infant, whereas here, J.U. was two years old at the time of his death. And *seventh*, the newly discovered evidence found to be key in this case (the 2018 Consensus Statement) did not exist when *Hoover-Moore* was decided in 2015.

***17** {¶ 85} Furthermore, we cannot say the trial court abused its discretion in finding that Mr. Butts's proffered new evidence is not merely cumulative. This evidence differs significantly from the substance and quality of the defense evidence presented at his 2003 trial. The form and nature of the evidence supporting Mr. Butts's defense—namely, that J.U.'s injuries were caused by non-abusive mechanisms, and, thus, that he is innocent—is dramatically different today. And we believe this new evidence goes well-beyond merely impeaching the states' medical expert testimony.

{¶ 86} That said, " ' "[n]ewly discovered evidence impeaching key testimony may alone be sufficient to grant a new trial if introduction of the evidence at trial probably would have changed the result." ' " *State v. Bressi*, 9th Dist. No. 29257, 2020-Ohio-4, ¶ 29, 150 N.E.3d 1217, quoting *State v. Fortson*, 9th Dist. No. 18513, 1998 Ohio App. LEXIS 2027, *3 (May 6, 1998), quoting *State v. Brumback*, 109 Ohio App.3d 65, 85-86, 671 N.E.2d 1064 (9th Dist.1996). *See also State v. Woodward,* 10th Dist. No. 08AP-1015, 2009 WL 2579503, 2009-Ohio-4213, ¶ 20, citing *State v. Burke*, 10th Dist. No. 06AP-686, 2007 WL 1125825, 2007-Ohio-1810, ¶ 18 ("A witness's recantation of testimony can be newly discovered evidence if the court finds the new testimony credible and if the new testimony would materially affect the outcome of the trial."); *State v. Robertson*, 1st Dist. No. C-160681, 2017 WL 3499834, 2017-Ohio-7225, ¶ 23-24. That is to say, " '*Petro* does not establish a per se rule excluding newly discovered evidence as a basis for a new trial simply because that evidence is in the nature of impeaching or contradicting evidence.' " *State v. Cureton*, 9th Dist. No. 03CA0009-M, 2003 WL 22657842, 2003-Ohio-6010, ¶ 19, quoting *Dayton v. Martin*, 43 Ohio App.3d 87, 539 N.E.2d 646 (2d. Dist.1987), syllabus.

{¶ 87} Impeaching or contradicting evidence thus may be admitted as "newly discovered evidence" under Crim.R. 33(A)(6) if it "create[s] a strong probability of a different result." *State v. Jalowiec*, 9th Dist. No. 14CA010548, 52 N.E.3d 244, 2015-Ohio-5042, ¶ 38, quoting *Martin* at 90, 539 N.E.2d 646. *See also State v. Tebelman*, 3d Dist. No. 12-22-04, 211 N.E.3d 150, 2023-Ohio-882, ¶ 16; *State v. Ward*, 12th Dist. No. CA2022-11-020, 2023 WL 3444748, 2023-Ohio-1605, ¶ 10. As the *Martin* court explained:

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> In singling out impeaching or contradicting evidence, *Petro* recognized that the nature of such evidence requires that a trial court exercise circumspection in determining whether newly discovered evidence of that character would create a strong probability of a different result, because such evidence quite often will not be likely to change the outcome. In a case where the newly discovered evidence, though it is impeaching or contradicting in character, would be likely to change the outcome of the trial, we see no good reason not to grant a new trial.

Martin at 90, 539 N.E.2d 646. *See also Jalowiec* at ¶ 38; *Bressi* at ¶ 26.

{¶ 88} The real crux of the dispute in this case is whether the new expert medical testimony Mr. Butts offers establishes a strong probability that a different result would be reached in a new trial. Ultimately, the trial court concluded that it does. And we agree. What is now known about SBS hypotheses is worthy of considerable weight in the discretionary decision whether to grant a new trial in this case. Indeed, the debate between the defense and state experts reveals a fierce disagreement between forensic pathologists, who now question whether the symptoms J.U. displayed indicate intentional head trauma, and pediatricians, who largely adhere to the science as presented at Mr. Butts's trial.

{¶ 89} There was no such fierce debate in 2003. At the core of Mr. Butts's conviction was expert testimony about the presence of J.U.'s triad of injuries. At that time, it was believed and generally accepted by the medical community—including both NAME and the AAP—that in the absence of a fall from more than ten feet, a high-velocity crash, or an object penetrating the head, an intentional shaking (SBS) was the only other cause of that triad of injuries. It was also believed and generally accepted by the medical community that an injury resulting in this diagnostic triad would be immediately incapacitating, meaning lucid intervals after such injury were not possible. Since Mr. Butts was the last person with J.U., as a matter of the medical science generally accepted at that time, the state's 2003 trial experts all opined that J.U.'s injuries were diagnostic of death caused by Mr. Butts's intentionally shaking him (SBS).

***18** {¶ 90} Even though Mr. Butts's trial defense included expert testimony refuting the medical principles relied upon by the state's experts and opining that J.U.'s death was caused by non-intentional injuries (accident or disease, for instance), the state was able to easily overcome Mr. Butts's claim that he did not cause J.U.'s injuries. The trial prosecutor did this by arguing the jury could only have reasonable doubt as to Mr. Butts's guilt if it accepted the "fringe theory" of Mr. Butts's trial defense expert. (*See, e.g.*, Trial Tr. Vol. II at 504-05, 507-11.) The trial prosecutor lambasted Dr. Plunkett's testimony about alternative causes for J.U.'s injuries as scientifically incredible by emphasizing how significantly his opinions differed from the views of the mainstream medical community in 2003. A review of the prosecutor's closing arguments during the 2003 trial crystallizes this point:

- "Now, the assertion was made [by Dr. Plunkett] that because there is [sic] no injuries to the neck[,] [w]ell, then, that couldn't be Shaken Baby Syndrome. Dr. Plunkett says you'd have to have neck injuries. * * * All four doctors [called by the state] told us that [J.U.] was shaken to death, and that neck trauma is not a necessary component of being shaken to death. The brain is much more fragile than a neck." (Trial Tr. at 510. *Compare* 2019 Motions, Ex. A at 24-27; Hearing Tr. Vol. II at 179-87, 221-23; Hearing Tr. Vol. III at 334-35, 347; Hearing Tr. Vol. IV at 471-72. *See also* Hearing Tr. Vol. V at 582-83, 605, 653-55.)

- "How about [Dr. Plunkett's] article and his theory [that children can suffer fatal head injuries from short falls, including a subdural hemorrhage [8]]? * * * [H]is article contradicts everything that has been taught in the medical community since 1972. Thousands of doctors and pediatricians across the country are supposably wrong. He's supposably right. His theory

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on the nonexistence of shaken baby syndrome is about as sound as the notion that the earth is flat." (Trial Tr. Vol. II at 473-74. *Compare* Hearing Tr. Vol. I at 63-65; Hearing Tr. Vol. II at 219-20, 230-36, 277-78; Hearing Tr. Vol. III at 323-34; Hearing Tr. Vol. V at 530-32, 706-08; Hearing Tr. Vol. VI at 750-53.)

- "And in his report, [Dr. Plunkett] says that he is not sure if [J.U.'s] death was due to pneumonia or if it was due to closed head injury. Okay. He is not sure. But all four of the [state's] doctors who testified are sure. Dr. Groner was sure. Dr. Hauersperger was sure, Dr. Fardal [from the coroner's office] was sure, and Dr. Johnson was sure that [J.U.] was shaken to death. Just because Dr. Plunkett sits on that stand and says it could happen this way doesn't mean reasonable doubt exists. Doubt must be reasonable to acquit the defendant." (Trial Tr. Vol. II at 511. *Compare* 2019 Motions, Ex. A at 31-37; 2019 Motions, Ex. B at ¶ 6-15; 2019 Motions, Ex. C at 8-9.)

- "Dr. Plunkett's testimony, does it create reasonable doubt? * * * His opinions are contrary to everything that's been taught in the medical community since 1972. His opinions are directly contrary to the beliefs of the [AAP]. His opinions are contrary to the four expert doctors who testified [on behalf of the state]." (Trial Tr. Vol. II at 508. *Compare* 2019 Motions, Ex. A; Hearing Tr. Vol. II at 176-237.)

- "How about his bias? Is it any coincidence that [Dr. Plunkett has] testified over 50 times on behalf of defendants accused of child abuse? He isn't called to testify because he has some special expertise. He's called to testify because he'll get up there and say there is no such thing as Shaken Baby Syndrome. How do we know that there is Shaken Baby Syndrome? Four doctors told us that, [as has] the American Academy of Pediatrics." (Tr. Vol. II at 474. *Compare* Hearing Tr. Vol. II at 176-237.)

- "[J.U.] was violently shaken by the defendant. Because of that, [Mr. Butts is] guilty of murder, involuntary manslaughter, felonious assault, and both counts of endangering children. **To find otherwise, we must not only ignore the testimony of the [state's] four doctors, but we must ignore reason and common sense**." (Emphasis added.) (Trial Tr. Vol. II at 511. *See also* Tr. Vol. II at 472-73. *Compare* Hearing Tr. Vol. II at 176-237; 2019 Motions, Ex. A at 31-37; 2019 Motions, Ex. B at ¶ 6-15; 2019 Motions, Ex. C at 8-9.)

19** {¶ 91} In 2003, Mr. Butts's case boiled down to four medical experts testifying in support of the state's theory that J.U. died from intentional shaking versus a quack who postured that something else could have caused J.U.'s death. Unlike in 2003, at a trial today, a jury would be faced with competing ***credible medical opinions in determining whether there is a reasonable doubt as to Mr. Butts's guilt—including viable alternative, non-intentional causes of the injuries that resulted in J.U.'s death. For instance:

- The trial prosecutor told the jury in 2003: "There is an assertion that there's a debate in the medical community over the existence of Shaken Baby [Syndrome]. Basically, it's not a debate. There's the pediatricians and doctors here [called by the state], and then there is Dr. Plunkett and his friend, Dr. Geddes, over here in left field. That is not a debate." (Trial Tr. Vol. II at 510.) ***But today***, there is significant debate about shaking and traumatic head injuries in infants and small children. *See, e.g.*, *Edmunds*, 2008 WI App 33 at ¶ 5-6, 10, 12, 308 Wis.2d 374, 746 N.W.2d 590 (newly discovered evidence showed a significant and legitimate debate in the medical community over whether infants can be fatally injured through shaking alone, whether an infant may suffer head trauma and yet experience a significant lucid interval prior to death, and whether other causes may mimic the symptoms traditionally viewed as indicating SBS); *People v. Miller*, No. 346321, 2020 Mich. App. LEXIS 5076 (Aug. 6, 2020) (Michigan Court of Appeals held that scientific developments in the science relating to SBS/AHT combined with new expert support for an alternative and natural cause for child's death constitute newly discovered evidence.); *Commonwealth v. Epps*, 474 Mass. 743, 53 N.E.3d 1247 (2016) (deprivation of expert testimony that the child's injuries were not the result of SBS, but instead were the result of a series of short falls, constituted a substantial risk of a miscarriage of justice necessitating new trial). *See also Cavazos*, 565 U.S. 1, 13-14, 132 S.Ct. 2, 181 L.Ed.2d 311 (Ginsburg, J., dissenting).

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- In 2003, the trial prosecutor challenged Dr. Plunkett's opinion that the triad of injuries the state's experts claimed were diagnostic of intentional shaking could not be inflicted on a 30-pound 2-year-old by shaking: "His conclusions are supposably based upon biomechanics, but he doesn't even have a degree in biomechanics. And he says you'd have to be strong enough to pick up a car to shake [J.U.] to death[,] [but he also] wants us to believe * * * [J.U.] can die from just falling over? Doesn't make any sense. * * * You can't plug human beings into a mathematical equation and come up with a credible medical conclusion. If you could, we wouldn't need doctors." (Trial Tr. Vol. II at 508-09.) ***But today,*** Dr. Auer explained in 2019, there is a real controversy about whether it is biomechanically possible for a 30-pound toddler to suffer brain damage from shaking without showing signs of neck injury or bruising on his arms/legs. (*See, e.g.*, 2019 Motions, Ex. A at 24-27; Hearing Tr. Vol. II at 179-87, 221-23; Hearing Tr. Vol. III at 334-35; Hearing Tr. Vol. IV at 471-72.) *E.g.*, *Ex parte Henderson*, 246 S.W.3d 690, 692 (Tex. Crim. App. 2007).

- The trial prosecutor told the jury in 2003 that: "[Dr. Plunkett] is saying the entire pediatric community is erroneous. * * * This is not a case where there are multiple [short] falls and gradual deterioration of [J.U.'s] functioning. All four doctors [called by the state] told us that's not the case. All four doctors told us that any prior fall or tumble or hit on the head had nothing to do with the fatal head injury that killed [J.U.]. They all four told us it was shaken baby syndrome." (Trial Tr. Vol. II at 509-10.) ***But***, as described by Dr. Auer at the 2021 hearing, post-trial medical and scientific research now shows short falls can and do cause the types of injuries J.U. sustained, can result in death, and can mimic the symptoms formerly used to "rule-in" a diagnosis of SBS. (*See, e.g.*, 2019 Motions, Ex. A at 4, 12-13, 27-31, 35-36; 2019 Motions, Ex. D at 8; Hearing Tr. Vol. I at 44-45, 63-64, 116-17; Hearing Tr. Vol. II at 219-20, 230, 277-78; Hearing Tr. Vol. III at 324-31.)

***20** {¶ 92} Thus, we conclude the record establishes there is a reasonable probability that a jury, looking at both the old and new medical testimony, would have a reasonable doubt as to Mr. Butts's guilt.

{¶ 93} Furthermore, while the expert testimony proffered by Mr. Butts as newly discovered evidence does not conclusively prove his innocence, it certainly bears upon it in a considerable way, particularly given the lack of nonmedical inculpatory evidence presented at his 2003 trial. And, to be sufficient for a new trial under Crim.R. 33, the newly discovered expert testimony need not prove Mr. Butts's innocence; it need only disclose a strong probability of a different outcome at a new trial. *See, e.g.*, *State v. Wright*, 67 Ohio App.3d 827, 831-32, 588 N.E.2d 930 (2d Dist.1990); *Jalowiec*, 2015-Ohio-5042, ¶ 38, 52 N.E.3d 244. *See generally Petro*, 148 Ohio St. at syllabus.

{¶ 94} Moreover, in light of current information—and as discussed in the previous section—it is unlikely the state's experts would testify today as adamantly as they did in 2003. Certainly, the state's experts would not testify today (as they did in 2003) that J.U.'s constellation of injuries—most notably, retinal hemorrhages and optic nerve sheath hemorrhages—is pathognomonic for (or virtually unique to) abusive head trauma. (*See, e.g.*, Trial Tr. Vol I at 170-71, 177-79, 259; Trial Tr. Vol. II at 464.) While support for that testimony could be found in the medical literature in 2003, such claims could not be supported today. (*See, e.g.*, Hearing Tr. Vol. V at 703-18.)

{¶ 95} Noteworthy in this regard, the trial court found Dr. Frasier's hearing testimony rendered the "new evidence" about retinal hemorrhages more than merely impeaching. (*See* Decision and Entry at 25.) As the trial court noted, "[r]etinal hemorrhages were presented to the jury [in 2003] as the 'smoking gun' of SBS." (*Id. See generally* 2019 Motions, Ex. A at 31-37.) But even the state now agrees that "such testimony was incorrect and can no longer be supported by science." (Decision and Entry at 25. *See, e.g.*, Hearing Tr. Vol. VI at 738-44, 761-62.) Thus, the trial court concluded that "[t]his shift in understanding by the medical community [on retinal hemorrhages, alone] raises a strong probability of a different result on retrial." (*Id. See also* 2019 Motions, Ex. A at 31-35.) We agree with these determinations.

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{¶ 96} Additionally, because the mainstream medical community now recognizes (unlike in 2003) that many non-abusive mechanisms, including disease and accidental trauma, can mimic the constellation of injuries historically associated with AHT, it is also unlikely the state's experts would summarily refute the feasibility of alternative diagnoses proffered at a trial today. Critically, since Mr. Butts's trial, new scientific evidence has expanded the differential diagnosis that would have been applicable to diagnose the cause of J.U.'s collapse and injuries. Mr. Butts contends that under the standards accepted by the medical community today, expert medical testimony at a new trial would support cause of death as accident and disease, as opposed to intentional shaking.

{¶ 97} We also find that meaningful consideration would now be given by all medical experts as to the differential diagnosis of the injuries J.U. suffered, which has expanded greatly since 2003. (*See, e.g.*, 2019 Motions, Ex. A at 34-35. *See also* 2019 Motions, Ex. D at 8-9.) The differential diagnosis considered by medical providers today would include a number of variables applicable to J.U., including the effects of DIC, multiple short falls, serious infection (sepsis), pneumonia, large doses of over-the-counter cold medicine, J.U.'s potential undiagnosed diabetes, and extended resuscitation efforts following brain death. (*See, e.g.*, 2019 Motions, Ex. A at 4, 34-37; 2019 Motions, Ex. B at ¶ 15; 2019 Motions, Ex. D at 8-9; Hearing Tr. Vol. I at 38.) Certainly, Dr. Frasier's lengthy 2021 hearing testimony suggests substantial consideration of alternative diagnoses (even if ruled out) would be required by all testifying experts at a new trial.

***21** {¶ 98} We again acknowledge the expert opinions presented in support of Mr. Butts's 2019 motions are parallel, at least in part, to Dr. Plunkett's 2003 trial testimony. However, the form and nature of the evidence supporting the arguments are dramatically different, and it is that dramatic difference—combined with the meager nonmedical evidence of Mr. Butts's guilt presented at trial—that we, like the trial court, believe warrants both leave to file a delayed new trial motion and a new trial.

{¶ 99} Based on the evidence and testimony presented in the 2019 motions and at the 2021 hearing, the trial court concluded that the jury convicting Mr. Butts in 2003 did not have the benefit of the critical advances in medical knowledge that have taken place since Mr. Butts's trial over the last two decades. (Decision and Entry at 26.) And the trial court found that these advances create sufficient doubt as to whether a jury today would reach the same result as it did in 2003, thus warranting a new trial. (*See id.*)

{¶ 100} We find no erroneous exercise of discretion in the trial court's findings as to the *Petro* factors. They are supported by the evidence and medical expert testimony presented at the 2021 hearing, in contrast to the medical expert testimony—and paltry nonmedical evidence of guilt—presented at Mr. Butts's 2003 trial.

{¶ 101} For these reasons, we find the state has failed to sufficiently demonstrate a probability that the trial court abused its discretion (or otherwise erred) when it granted Mr. Butts's motion for a new trial. Accordingly, we deny the state's motion for leave to appeal its second claimed error.

IV. Conclusion

{¶ 102} The state has failed to sufficiently demonstrate a probability that the trial court erred and abused its discretion when it granted Mr. Butts's motion for leave to file a delayed motion for a new trial or when it granted Mr. Butts's motion for new trial. As the state has failed to demonstrate a probability that either its first claimed error or its second claimed error occurred, we deny the state's motion for leave to appeal.

Motion for leave to appeal denied; case terminated.

MENTEL and BOGGS, JJ., concur.

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Footnotes

1 The parties stipulated to the trial court addressing both the motion for leave and the merits of the motion for a new trial in a single hearing. (*See* Decision and Entry at 1.)

2 At the 2021 hearing, Dr. Laposata explained a differential diagnosis is "absolutely essential when evaluating anyone, and in these particular cases[,] it's often overlooked because there's so much emotion associated with it." (Hearing Tr. Vol. I at 41. *See also id.* at 138-39.) An injury/symptom (or combination of injuries/symptoms) shown by a presenting patient can often be attributed to various causes, including disease, accidental injury, or intentional injury. "[O]nly after some study of the case can [a diagnosing doctor] reach a successful conclusion about what it is." (Hearing Tr. Vol. I at 41.) To approach a patient and immediately opine that their injuries/symptoms must have been caused by one thing means the doctor never made a differential diagnosis. (Hearing Tr. Vol. I at 41.)

3 The state now proffers evidence not presented at the 2003 trial about Mr. Butts allegedly being investigated for abusing J.U. prior to this incident. (Dec. 14, 2022 Mot. for Leave to Appeal at 15, 48. *See also* Hearing Tr. Vol. I at 93-96.) Since the state did not argue this evidence to the jury in 2003, we decline to consider it in evaluating Mr. Butts's 2019 motions.

4 "Pathognomonic" means "that if a symptom or a sign is present, [the patient has] that disease." (Hearing Tr. Vol. I at 61.) Dr. Laposata explained that "in the times when -- [the medical community] knew much less than we do now * * * 36 doublings of knowledge [doctors] would at times say if you have that, then your diagnosis must be this." (Hearing Tr. Vol. I at 61. *See also* Hearing Tr. Vol. I at 40; Hearing Vol. II at 228; Hearing Vol. V at 656-57.)

5 As the state notes in its motion, the second and third *Petro* factors largely overlap with Crim.R. 33(B)'s requirement that, to obtain leave to file a delayed motion for a new trial, Mr. Butts must prove, by clear and convincing evidence, he was unavoidably prevented from the discovery of the "new evidence" he proffers in support of his motion for a new trial. (*See* Dec. 14, 2022 Mot. for Leave to Appeal at 39.) Accordingly, our analysis regarding the state's first claimed error (granting Mr. Butts leave to file a delayed motion for new trial) also applies to our analysis of that portion of the state's second claimed error (granting Mr. Butts a new trial).

6 We also note that *Stein* and *Chambers* are decisions from other appellate district courts and are thus not binding upon this court. *See, e.g., Estate of Aukland v. Broadview NH, LLC*, 10th Dist. No. 16AP-661, 2017 WL 2817460, 2017-Ohio-5602, ¶ 21, citing *Keytack v. Warren*, 11th Dist. No. 2005-T-0152, 2006 WL 2796506, 2006-Ohio-5179, ¶ 51. In any event, they are easily distinguishable. The trials in *Stein* and *Chambers* commenced far more than 120 days after the verdict in this case was rendered—i.e., after additional medical research and literature supporting Mr. Butts's position had emerged. *See Stein*, 2014-Ohio-222 at ¶ 6, 28-32 (trial in fall 2005); *Chambers*, 2021-Ohio-3388 at ¶ 3, 21-22 (trial in 2010). Moreover, both cases were decided before *Bethel*, which eliminated the "reasonable-time filing requirement" that many courts of appeals had imposed on motions for leave to file a delayed new trial motion. *Compare Bethel*, 2022-Ohio-783 at ¶ 51-58, 167 Ohio St.3d 362, 192 N.E.3d 470, *with Chambers* at ¶ 7, 14, 21-22. And, unlike in this case, nothing in the *Stein* or *Chambers* decisions suggests the defendant's proffered newly discovered medical evidence regarding alternative diagnoses corroborated the factual evidence presented at trial about possible non-abusive mechanisms for the injuries. In stark contrast, here, B.U. and Mr. Butts testified about J.U. falling in the bathtub, exhibiting abnormal

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behavior, having a cold, and receiving large doses of cold medicine (among other things) in the days prior to his death. Alternative causes were discounted by the state's experts at Mr. Butts's 2003 trial largely due to the medical community's understanding of SBS at that time. While the medical community's shift in that understanding would have been relevant in *Stein* and *Chambers*, it may not have, arguably, constituted "new evidence" for the purposes of Crim.R. 33 if the shift in mainstream medical opinion about SBS had little or no bearing on the evidence presented at the trials in those cases. But, in this case, the new evidence Mr. Butts has proffered casts serious doubt on his guilt to a degree that was not able to be raised by the expert testimony presented at his 2003 trial.

7 Significantly, too, testimony presented at the trial in *Hoover-Moore* indicated that the defendant (a babysitter) had a history of being abusive towards the children she cared for. *Id.* at ¶ 23. No such evidence was presented at trial in this case.

8 *See State v. Jones*, 2d Dist. 2016-CA-22, 2018-Ohio-673, ¶ 13-18, 106 N.E.3d 353 (discussing Dr. Plunkett's article concerning short falls on playgrounds); *State v. Mills*, 5th Dist. No. 2008 AP 08 0051, 2009-Ohio-5654, ¶ 103 (the same).

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