

4-29-2019

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Recommended Citation

Calder Thingvold, Oral Argument Preview, *State of Montana v. Laird: Prosecutorial Delay, Insufficient Evidence, and Hearsay*, 79 Mont. L. Rev. Online 95, https://scholarship.law.umt.edu/mlr_online/vol79/iss1/14/.

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**PREVIEW; *State of Montana v. Laird*: Prosecutorial Delay,
Insufficient Evidence, and Hearsay**

Calder Thingvold*

Oral arguments are scheduled for Wednesday, May 1, 2019, at 10:00 a.m. in Ballroom A of the Strand Union Building on the Montana State University Campus in Bozeman, Montana. An introduction to the oral argument will begin at 9:30 a.m.

I. INTRODUCTION

This case presents three issues for review: 1) what constitutes actual prejudice for an unconstitutional prosecutorial delay; 2) whether the State may use circumstantial evidence to prove cause of death in a homicide case when that cause is in question; and 3) whether testimony from an unavailable witness is hearsay when it is introduced to describe the steps taken during an autopsy.

In 2016, Defendant Brian Laird (Laird) was convicted of murdering his wife, Kathryn, who died in 1999.¹ On appeal, Laird argues his case must be dismissed because the 15-year prosecutorial delay violated his due process rights and because the State failed to present sufficient evidence that he murdered Kathryn.² Alternatively, Laird argues that the district court improperly admitted hearsay testimony and an unduly prejudicial photograph from Kathryn's autopsy.³ The State responds that Laird was not unduly prejudiced by the delay.⁴ Further, the State argues it presented sufficient evidence to show that Laird, not an accident, killed Kathryn.⁵ Finally, the State argues that the district court properly admitted the testimony and the photograph.⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

Kathryn's body was found in the "Afterbay" area on July 31,

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¹ Appellee's Response Brief at 1, 12, *State v. Laird*, <https://perma.cc/9U38-YJVX> (Mont. Nov. 1, 2016) (No. DA 16-0473).

² Appellant's Corrected Opening Brief at 16–18, *State v. Laird*, <https://perma.cc/Y8GT-DAPY> (Mont. Oct. 16, 2018) (No. DA 16-0473).

³ *Id.* at 36, 39.

⁴ Appellee's Response Brief, *supra* note 1, at 24.

⁵ *Id.* at 24–25.

⁶ *Id.* at 25.

1999.⁷ Witness reported seeing Laird arguing with Kathryn in the preceding days, sometimes turning violent.⁸ The night before Kathryn died, the pair argued at her workplace and Laird's neighbors, Kathleen and Erik, heard raised voices at the Laird's home that evening.⁹ Later, Kathleen saw a male figure drive away from the Laird residence and later still heard their daughter's dog, who had a history of aggression towards males, barking in the direction of the Afterbay walking path.¹⁰

The next morning, Laird visited Kathryn's friend Tanya and told her Kathryn was missing.¹¹ Laird said he had argued with Kathryn when she arrived home the previous night, and he had then driven to the Afterbay parking lot.¹² Kathryn found him there and they eventually returned home, where Laird reported she seemed agitated and suicidal.¹³ Tanya and Laird unsuccessfully searched for Kathryn before Laird called 911 to report her disappearance, and Tanya then found Kathryn's body floating in the Afterbay.¹⁴

The county coroner responded to the scene, then arterially embalmed the body before an autopsy, which is a process known to make bruises appear darker than usual.¹⁵ Dr. Mueller autopsied Kathryn's body, then brought in Dr. Bennett for a second autopsy.¹⁶ FBI Agent Jackson secured a warrant, searched Laird's trailer, and found potential evidence that Laird accounted for.¹⁷ Agent Jackson also received a tip that Kathleen heard an argument the night before Kathryn died, but he did not recall following up with her.¹⁸

Laird was not charged until 2014 after the re-discovery of a note containing Kathleen's contact information and other possible evidence.¹⁹ The district court denied Laird's pretrial motion to dismiss for unfairly prejudicial delay and loss of evidence, finding Laird's argument that lost evidence would have helped his case speculative and that he had failed to demonstrate undue prejudice.²⁰ The district court also denied Laird's motion to dismiss at the close

⁷ Appellant's Corrected Opening Brief, *supra* note 2, at 3.

⁸ *Id.* at 4.

⁹ *Id.* at 4–5.

¹⁰ *Id.*

¹¹ Appellant's Corrected Opening Brief, *supra* note 2, at 6.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 7–8.

¹⁸ Appellee's Response Brief, *supra* note 1, at 15.

¹⁹ Appellant's Corrected Opening Brief, *supra* note 2, at 15.

²⁰ *Id.* at 21.

of the State's case-in-chief due to lack of sufficient evidence.²¹ At trial, Laird objected to the State's evidence, offered through Agent Jackson, regarding Dr. Mueller's comments during the autopsy and a photograph showing Kathryn's exposed skull.²² The district court admitted the statement for the limited purpose of describing a shift in the tone of the autopsy and admitted the photograph.²³

III. SUMMARY OF ARGUMENTS AND ANALYSIS

A. Prosecutorial Delay

The Due Process Clause of the United States Constitution protects an individual from oppressive prosecutorial delays, requiring that charges be dismissed when a trial would violate fundamental judicial fairness.²⁴ Oppressive delays are evaluated under a two-step test that first asks whether the delay actually, substantially prejudiced the defendant.²⁵ If so, the court then examines the State's reasons for the delay and weighs those reasons against the defendant's prejudice, weighing intentional or reckless delay more heavily against the State than delay resulting from negligence.²⁶

1. Appellant/Defendant Brian Laird

Laird argues that the district court erred in dismissing his pretrial motion for prosecutorial delay because he demonstrated actual prejudice.²⁷ Laird relies on *State v. Passmore*²⁸ and *State v. Taylor*²⁹ to support his argument that prejudice in the context of delay contemplates more than just "helpful" evidence, and instead it also includes the "impairment" of a defendant's ability to present their defense.³⁰

First, Laird argues the deaths of potential witnesses Russell Renner and Dr. Mueller impaired his ability to defend himself effectively, as did the loss of body tissue evidence.³¹ Dr. Mueller's report following Kathryn's initial autopsy sparked suspicions about

²¹ *Id.* at 2.

²² *Id.* at 37–38.

²³ *Id.* at 39.

²⁴ *United States v. Lovasco*, 431 U.S. 783, 790 (1977).

²⁵ Appellant's Corrected Opening Brief, *supra* note 2, at 20.

²⁶ *Id.*

²⁷ *Id.* at 21.

²⁸ 225 P.3d 1229 (Mont. 2010).

²⁹ 960 P.2d 773 (Mont. 1998).

³⁰ Appellant's Corrected Opening Brief, *supra* note 2, at 21.

³¹ *Id.*

Laird's involvement in the death.³² According to Laird, the State used statements about Dr. Mueller's suspicions concerning Kathryn's bruising to establish her manner of death and convince the jury of Laird's involvement.³³ Laird alleges that his inability to confront Dr. Mueller due to prosecutorial delay prejudiced him substantially.³⁴ Laird similarly argues that Renner's death also unfairly prejudiced him, as Renner would have corroborated Laird's version of events.³⁵ Lastly, Laird argues the loss of body tissue evidence was unfairly prejudicial because Laird's medical expert, Dr. Bennett, could not re-examine the samples to confirm his recollections that Kathryn's bruising occurred post-mortem as a result of embalment.³⁶

Laird next contends the State's reasons for delay do not outweigh his prejudice. According to Laird, the State's argument that it could not bring charges earlier because key evidence was not discovered and investigated until 2012 is not good cause for delay because the State possessed the note since 1999; Laird argues it was negligence, and maybe even reckless disregard, for a homicide investigation not to timely pursue all possible leads.³⁷ Thus, Laird argues the prolonged prosecutorial delay substantially impaired his ability to mount an effective defense and the State's reasons for delay do not outweigh these adverse results.³⁸

2. Appellee/Plaintiff State

The State responds that the absent witnesses and lost evidence helped Laird's defense, pointing to Laird's use of Dr. Bennett's testimony for an alternative explanation for Kathryn's bruises as helpful and arguing that Dr. Mueller's unavailability aided this testimony because he could not contradict Dr. Bennett.³⁹ Further, Dr. Mueller's absence did not impede Laird's ability to cross-examine witnesses present at the autopsy with Dr. Mueller.⁴⁰

The State also argues that Laird's assessment of the benefit of Renner's testimony to his defense is speculative. The parties dispute what statements Renner made to the FBI, and Laird did not

³² *Id.* at 23.

³³ *Id.* at 22–23.

³⁴ *Id.* at 23.

³⁵ *Id.* at 24.

³⁶ *Id.* at 26.

³⁷ *Id.* at 28.

³⁸ *Id.*

³⁹ Appellee's Response Brief, *supra* note 1, at 30.

⁴⁰ *Id.* at 29.

provide Renner's statements to the district court for review.⁴¹ Further, the State was unable to cross-examine Renner about his relationship to Laird and possibly undermine the statements' authenticity.⁴² The loss of body tissue samples, the State argues, also aided Laird because Dr. Bennett was able to present his recollection regarding the samples without fear of contradiction from the State.⁴³

Even if Laird could establish prejudice from the delay, the State argues that its reasons for delaying the prosecution weighed in favor of the State. Agent Jackson's failure to follow up on the tip about Kathleen in 1999 was mere negligence on the State's part, which should not weigh against the State as unfairly prejudicial to Laird.⁴⁴

3. Analysis

The question here is whether prejudice from delay only considers the loss of helpful evidence or whether it also contemplates impairment of the defense as prejudicial. Laird asserts that while he successfully demonstrated a loss of helpful evidence, the test for determining prejudice should not be limited to "helpful" evidence if the loss materially affects a defendant's ability to confront the State's case.⁴⁵

Framed this way, Laird's argument about his inability to cross-examine Dr. Mueller might prove persuasive, considering the State's use of Dr. Mueller's statements in closing argument, where the State used the statement to suggest that after the doctor examined the bruises, Laird became the sole suspect.⁴⁶ The Court may not need to consider Laird's argument to find prejudice where the lost evidence is not necessarily helpful; the use of the statement in closing argument presents the Court with the question of whether the State impermissibly used it beyond the limited scope for which it was admitted. If so, the Court must consider whether the use of the statement and the impossibility of cross-examining Dr. Mueller deprived Laird of a fair trial. Given the State's use of the statement in closing to directly blame Laird, it is likely the Court may find it to be materially harmful evidence and find Dr. Mueller's absence prejudicial to Laird's defense. Should the Court agree with Laird on this issue, there would be no need to proceed to the next two

⁴¹ *Id.* at 31.

⁴² *Id.*

⁴³ *Id.* at 32–33.

⁴⁴ *Id.* at 34.

⁴⁵ Appellant's Corrected Opening Brief, *supra* note 2, at 21.

⁴⁶ Appellant's Reply Brief at 7, *State v. Laird*, <https://perma.cc/PP5A-B85B> (Mont. Dec. 24, 2018) (No. DA 16-0473).

arguments.

B. Sufficient Evidence

Due process requires the State to prove every element of a criminal charge beyond a reasonable doubt.⁴⁷ Here, the State had to prove Laird purposefully or knowingly caused Kathryn's death.⁴⁸

1. Appellant/Defendant Brian Laird

Laird argues the State failed to prove the causation element in Kathryn's death beyond a reasonable doubt because it did not use a medical expert to establish the exact cause of Kathryn's physical incapacitation.⁴⁹ In support, Laird points to several Nevada cases establishing the State's burden to affirmatively prove a criminal act caused the death and that circumstantial evidence showing only the possibility of such an act is insufficient.⁵⁰ Laird argues against the State's theory that Kathryn was incapacitated prior to drowning, stating this was not supported by affirmative proof that Laird incapacitated her. The State did not use a medical expert to testify to the cause of incapacitation, so Laird argues the State's use of "suspicious" circumstances to point to his involvement was insufficient.⁵¹ Laird argues this circumstantial evidence amounted to mere speculation as to how Kathryn drowned.⁵² Laird further argues that while the bruising around Kathryn's neck may be suspicious, the bruises alone were insufficient to prove a homicide without the medical opinion.⁵³

2. Appellee/Plaintiff State

Countering Laird's arguments, the State distinguishes the Nevada cases from the present action by pointing out that those cases involved victims who died from natural causes.⁵⁴ The State argues that Kathryn's death was not "natural," leaving only accident, suicide, or a criminal act as the cause.⁵⁵ To rule out suicide,

⁴⁷ Appellant's Corrected Opening Brief, *supra* note 2, at 29.

⁴⁸ Appellee's Response Brief, *supra* note 1, at 34.

⁴⁹ Appellant's Corrected Opening Brief, *supra* note 2, at 32.

⁵⁰ *Id.* at 34–35 (citing *Frutiger v. State*, 907 P.2d 158 (Nev. 1995); *Hicks v. Sheriff*, 464 P.2d 462, 465 (Nev. 1970); *Azbill v. State*, 440 P.2d 1014, 1015–16 (Nev. 1968)).

⁵¹ *Id.*

⁵² *Id.* at 35–36.

⁵³ *Id.* at 35.

⁵⁴ Appellee's Response Brief, *supra* note 1, at 35.

⁵⁵ *Id.*

the State pointed to several pieces of evidence, including Laird and Kathryn's arguments in the days before her death.⁵⁶ Other evidence included Tanya's testimony that Kathryn made plans with her the night she died, evidence of tearful conversations Kathryn had with family members before her death, and Kathleen's testimony regarding what she heard the night Kathryn disappeared.⁵⁷

The State also argues that evidence of Laird's behavior before discovering Kathryn's body established guilt beyond a reasonable doubt. The State contends that Laird's apparent failure to make an effort to find Kathryn, taking Tanya to odd search locations, and insistence on cremating Kathryn's body immediately despite her family members' objections support the conclusion that Kathryn did not commit suicide nor die accidentally.⁵⁸ The evidence also showed Kathryn was dragged to the water and did not fall into the bay.⁵⁹ According to the State, this evidence dismissed any inference of suicide or accident and pointed to the conclusion that Kathryn was murdered.⁶⁰

3. Analysis

This issue considers what evidence sufficiently establishes causation in a homicide case when the cause of injury is in question. Neither party cites to a Montana case squarely answering the question for a criminal trial. Laird points to *Estate of Willson v. Addison*,⁶¹ which held that Montana requires a medical expert opinion on causation to avoid summary judgment in civil cases, and argues this requirement should extend to criminal cases.⁶² Laird concedes that a medical expert opinion is not required to prove causation when the cause of injury would be obvious to a layman.⁶³ The State attempts to argue that the circumstantial evidence resulting from the investigation sufficiently ruled out alternative causes of death, leaving criminal activity the only possible cause.⁶⁴

Should the Court agree with Laird that a medical expert is needed when the cause of death is in question, the State might face a more difficult task of proving causation in future homicide trials. However, it does not appear likely to change the result of this case

⁵⁶ *Id.*

⁵⁷ *Id.* at 35–36.

⁵⁸ *Id.* at 35–38.

⁵⁹ *Id.*

⁶⁰ *Id.* at 39.

⁶¹ 258 P.3d 410 (Mont. 2011).

⁶² Appellant's Corrected Opening Brief, *supra* note 2, at 32–33.

⁶³ *Id.* at 33.

⁶⁴ Appellee's Response Brief, *supra* note 1, at 39.

unless Laird successfully suppresses Dr. Mueller's statements.

The State conceded there was no evidence of physical head trauma or other injuries pointing to the cause of incapacitation,⁶⁵ making the bruising Dr. Mueller observed around Kathryn's neck the sole source of suspicion. Dr. Mueller's statement was presented to the jury in a limited capacity as evidence of a shift in the tone of the autopsy.⁶⁶ Laird disputed this suspicion with Dr. Bennett's testimony that the bruises occurred after Kathryn died.⁶⁷ The State cross-examined Dr. Bennett to attempt to discredit his testimony, which must have persuaded the jury since it convicted Laird.⁶⁸ Therefore, unless Laird can suppress Dr. Mueller's statement, the Court may find in favor of the State on this issue even if the Court agrees an expert opinion is required because the record shows Dr. Mueller's statement was more persuasive than Dr. Bennett's opinion.

C. Testimony and Photo Evidence

Testimonial statements made outside the courtroom and offered for the truth of the matter asserted are generally inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.⁶⁹ However, if the party admitting the statement can show the testimony is relevant to a theory other than the truth of the matter asserted, the statement may be admitted.⁷⁰ Additionally, relevant evidence may still be excluded from trial if the probative value is substantially outweighed by the possibility of prejudicing the jury or creating confusion.⁷¹

1. Defendant/Appellant Brian Laird

Laird argues the district court's decision to admit Dr. Mueller's statement that he was "troubled" by the presence of bruises on Kathryn's neck is reversible error because Dr. Mueller was not present at trial and Laird did not have a prior opportunity to cross-examine him.⁷² Laird further asserts that the statement is hearsay because the statement's only possible relevance was to

⁶⁵ *Id.* at 38.

⁶⁶ *Id.* at 39.

⁶⁷ Appellant's Corrected Opening Brief, *supra* note 2, at 12.

⁶⁸ *Id.* at 14.

⁶⁹ Crawford v. Washington, 541 U.S. 36, 59 (2004); Mont. R. Evid. 801(c); Mont. R. Evid. 802.

⁷⁰ Siebken v. Voderberg, 359 P.3d 1073 (Mont. 2015).

⁷¹ Mont. R. Evid. 403.

⁷² Appellant's Corrected Opening Brief, *supra* note 2, at 37–38.

prove the truth of the matter: that Laird incapacitated Kathryn.⁷³ Laird cites two Florida court cases that held that when the only possible relevance of a statement is to the truth of the matter, the admitting party may not attempt to hide the reason for admittance in another theory.⁷⁴ The testimony was supposedly admitted for the limited purpose of demonstrating how the autopsy process changed after the bruises were discovered.⁷⁵ Laird argues this theory does not exempt the hearsay exclusion of the statement because the investigatory steps were irrelevant.⁷⁶ He also argues the State's subsequent use of the statement to convince the jury of Laird's guilt shows that admitting the statement was not harmless error.⁷⁷

Laird further argues that the admitted photograph showing Kathryn's skull with the skin peeled back was unduly prejudicial to the defense because it improperly inflamed the jury's emotions and was not properly supported by any kind of foundation that the injuries depicted caused Kathryn's incapacitation.⁷⁸

2. Plaintiff/Appellee State

The State argues the district court properly admitted Dr. Mueller's statement because it was offered to describe the statement's impact on the investigation.⁷⁹ This limited purpose did not admit the statement as hearsay because the State was only allowed to briefly mention what the doctor said—focusing on how the statement affected decisions, like a second autopsy—and it was not offered for the truth of the matter asserted.⁸⁰ Further, even if the testimony was hearsay, its admission was harmless error because Agent Jackson was present at the autopsy and observed the same bruises about which Laird could cross-examine him. Dr. Bennett, Laird's expert witness, also used Dr. Mueller's statement to attempt to show Kathryn's death resulted from suicide or accident.⁸¹

The State counters Laird's argument regarding the photograph with Montana precedent holding that instructive photographs are relevant and admissible as long they do not unduly

⁷³ *Id.* at 38.

⁷⁴ *Id.* (citing *Tosta v. State*, 786 So. 2d 21, 24 (Fla. Dist. Ct. App. 2001); *Keen v. State*, 775 So. 2d 263, 274 (Fla. 2000)).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Appellee's Response Brief, *supra* note 1, at 39.

⁸⁰ *Id.* at 40.

⁸¹ *Id.* at 41.

prejudice the jury.⁸² The State argues that the photograph did not unduly prejudice the jury because the exact cause of Kathryn's death was disputed, and the photograph was instructive to prove injuries on Kathryn's body and help the jury understand the case.⁸³

3. Analysis

Laird appears to ask the Court to narrow a party's ability to admit hearsay evidence even if it is logically relevant to another theory. The Court may address this question directly and revisit its precedent for admittance of hearsay on another relevant theory, or the Court may choose to decide the issue on narrower Rule 403 grounds. Should that happen, the most persuasive argument for Laird is the State's subsequent use of Dr. Mueller's statement in its closing argument as unfairly prejudicial and inadmissible hearsay.

By directly referencing the statement as the turning point in the investigation and naming Laird as the only suspect resulting from that shift,⁸⁴ Laird's argument that the State exceeded the scope of the statement's admittance is persuasive. Expressly connecting the statement to Laird as a suspect makes the statement more prejudicial than its intended use solely to explain the second autopsy. However, the hurdle for this argument is whether Laird will be able to prove the State's subjective motivations at the time the statement was admitted. Regardless, the Court likely will find narrower Rule 403 grounds to determine the State impermissibly used Dr. Mueller's statements in the closing argument.

IV. CONCLUSION

The questions analyzed here are just a few of the many considerations the Court will likely use to decide the case. Regardless of whether the Court reaches the second and third issue, the Court's decision will provide guidance as to what constitutes actual, substantial prejudice in prosecutorial delays and what violates a defendant's due process right to a fair trial.

⁸² *Id.* at 42 (citing *State v. Dunfee*, 114 P.3d 217 (Mont. 2005)).

⁸³ *Id.*

⁸⁴ Appellant's Reply Brief, *supra* note 46, at 7.