

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from York County

John C. Hayes, III, Circuit Court Judge

VOL. II OF III

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S.C. Supreme Court

ADAM LEE BERARD

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001351

APPENDIX

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ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL

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1 Q. Now, Ms. Alexander, its most basically you are in fact
2 a nurse?

3 A. Yes, sir.

4 Q. And in addition to your regular nursing duties you've
5 also received specific training in some areas; correct?

6 A. Yes, sir.

7 Q. And the specific area we are dealing with here is
8 training you received to examine people who are victims or
9 alleged victims of certain types of crimes?

10 A. Yes, sir.

11 Q. And you are on call as you said twenty-four seven
12 basically?

13 A. Yes, sir.

14 Q. And you are basically there subject to the needs of
15 law enforcement?

16 A. I assist law enforcement but my goal is to give
17 compassionate care to victims of sexual assault.

18 Q. Obviously that's your goal but basically you are
19 called out to perform that service not just on every person
20 that comes in but because somebody has requested that you
21 perform these services; right?

22 A. Yes that's true.

23 Q. And that request typically comes via law enforcement
24 information; right?

25 A. Yes, sir, that's true.

1 Q. All right. And so necessarily you become involved
2 only after somebody else has made the determination or has
3 the belief that a sexual assault has occurred?

4 A. Usually the patients are the ones that state they've
5 been sexually assaulted.

6 Q. Somebody else besides you?

7 A. Right.

8 Q. In other words you don't just randomly come out and
9 perform these exams on people?

10 A. No, sir.

11 Q. You are coming out because that allegation has already
12 been made?

13 A. Yes, sir.

14 Q. By somebody via patient via family member via law
15 enforcement?

16 A. Yes, sir.

17 Q. And as you indicated the prosecutor was asking you
18 basically about the assistance that was provided to you by
19 the victim in some cases okay. Do you remember when she
20 was asking you about that?

21 A. Yes.

22 Q. And you've had cases before when victims were unable
23 to provide significant assistance to you; correct?

24 A. Yes.

25 Q. And just because the victim themselves are unable to

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1 perform that assistance that doesn't mean you can't do your
2 job as a sexual assault nurse examiner?

3 A. Yes that's true.

4 Q. It is of assistance to you it's not necessarily a
5 critical component?

6 A. No, sir.

7 Q. And just because they don't it doesn't mean that your
8 findings are invalid in any way does it?

9 A. No, sir.

10 Q. Okay. Now in your training you are taught to look for
11 certain things?

12 A. Yes, sir.

13 Q. And ask certain questions if possible?

14 A. That's right.

15 Q. Both from alleged victims?

16 A. Yes.

17 Q. And potentially from alleged assailants if you have
18 any contact with them?

19 A. That's rare but yes.

20 Q. There may be times when you are simply called on to
21 collect samples from alleged assailants for example?

22 A. In Mecklenburg County usually the jail nurse does that
23 but yes it could happen.

24 Q. It is part of your training as a sexual assault nurse
25 examiner?

1 A. Yes, sir.

2 Q. Its not usually CMC that does that as you said but
3 it's something you could do for example if you are
4 confronted?

5 A. Yes, sir.

6 Q. And to follow these questions and these collections
7 and things like that you are given a procedure for doing
8 that; right?

9 A. Yes, sir.

10 Q. What we sometimes call protocols?

11 A. Yes, sir.

12 Q. Is that what you sometimes refer to them as?

13 A. Uh-huh.

14 Q. For the court reporter's sake I am going to ask that
15 you to answer me - - -

16 A. Yes. Sorry.

17 Q. - - - that way so that she doesn't have to worry about
18 interpreting things okay. Thank you. These protocols are
19 put in place to assist you?

20 A. Yes, sir.

21 Q. To make sure that things aren't left out?

22 A. Yes.

23 Q. Or mistakes are made?

24 A. Yes that's right.

25 q. Basically following the protocols gives you a standard

1 practice that you can follow?

2 A. Yes, sir.

3 Q. And that's what you are trying to do in every case as
4 best you can you follow the protocols?

5 A. Yes, sir.

6 Q. That's an important part of being a sexual assault
7 nurse examiner?

8 A. Yes, sir.

9 Q. And you said that you've been so classified as a
10 sexual assault nurse examiner since about 2004?

11 A. Yes, sir.

12 Q. You've done exams before that as a nurse; right?

13 A. Yes, sir.

14 Q. Now the advent of the sexual assault nurse examiner is
15 more a modern thing?

16 A. Yes, sir.

17 Q. For many basically for most of that we really didn't
18 have a specific set of protocols specific training and
19 things like that?

20 A. Yes, sir.

21 Q. It was left a lot more vague in terms of who happen to
22 be the on call doctor or nurse or who was willing to step
23 up and do that examination; right?

24 A. That's true.

25 Q. But in the modern era we've sort of evolved beyond

1 that where we have some specific training?

2 A. Yes, sir.

3 Q. And that training typically does involve nurses not
4 doctors; right?

5 A. That's right.

6 Q. That's why they call them sexual assault nurse
7 examiners or SANE'S as opposed to doctor examiners?

8 A. That's exactly right.

9 Q. And you've been through that training and that's this
10 process?

11 A. Yes, sir.

12 Q. Okay. And this process this training that you went
13 through that's what is now these protocols?

14 A. Yes, sir.

15 Q. That's why you know when you are opening up the box
16 that has that same kit in it you know what you are going to
17 find because that's what the protocols say; right?

18 A. Yes, sir.

19 Q. One of the things that you indicated as part of the
20 protocol is that you attempt to obtain background
21 information about the patient?

22 A. That's correct.

23 Q. From the individual that you are examining if
24 possible?

25 A. Yes, sir.

- 1 Q. But family back you do try to find it from other
2 sources?
- 3 A. Exactly.
- 4 Q. Which may include family members?
- 5 A. Yes.
- 6 Q. Other medical professionals?
- 7 A. Yes.
- 8 Q. Or law enforcement?
- 9 A. It's unusual but yes.
- 10 Q. And again it may be more limited to obviously what law
11 enforcement can tell you about a case?
- 12 A. Right.
- 13 Q. They are not going to know a person's medical history
14 for example?
- 15 A. Yes.
- 16 Q. Okay. But its possible you may get some information
17 from them?
- 18 A. Yes.
- 19 Q. In this case you did attempt to get that from Ms.
20 Moss?
- 21 A. Yes.
- 22 Q. But you were unable to get that from her?
- 23 A. That's right.
- 24 Q. Because basically she was incoherent unable to
25 communicate with you at that point in time?

1 A. Yes, sir.

2 Q. Was not able to verbally respond appropriately to the
3 question that you were asking?

4 A. Right.

5 Q. So you went and obtained information from other
6 sources?

7 A. Her daughter.

8 Q. And what the allegations were from her grandson I
9 believe you said?

10 A. Yes, sir.

11 Q. Okay. And that information allows you to proceed on
12 as we discussed?

13 A. Yes, sir.

14 Q. You had enough to go forward with your examination
15 based upon those sources even though you didn't have the
16 assistance of Ms. Moss herself?

17 A. That's right.

18 Q. And at one point in time I think you had made a note
19 on one of these envelopes in referring to the envelopes
20 that are contained in Number Thirty-Five. Do you remember
21 seeing a note on there about her ability to cooperate with
22 you at all?

23 A. No, sir.

24 Q. I beg the Court's indulgence.

25 I'm removing the envelopes from the bag in Number

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL

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1 Thirty-Five.

2 I'm showing you - there's not an individual -- within

3 Thirty-Five there's a number of envelopes; correct?

4 A. Yes, sir.

5 Q. And this one is individualized as it says known cheek

6 scraping; correct?

7 A. Yes.

8 Q. That would differentiate it from any of the other

9 envelopes that are contained in State's Exhibit Number

10 Thirty-Five; right?

11 A. Right.

12 Q. And as part of that cheek scraping there is a

13 procedure, a protocol on the envelope itself; right?

14 A. Yes.

15 Q. That requires then that they shouldn't have anything

16 to eat, drink or smoke for fifteen minutes for example?

17 A. Yes, sir.

18 Q. And that the victim in some situations should rinse

19 his or her mouth beforehand?

20 A. Yes, sir.

21 Q. And you made a note basically that the patient is NPO?

22 A. Yes. Nothing By Mouth?

23 Q. Nothing By Mouth. And therefore she was unable to

24 assist you with that particular process?

25 A. Yes, sir.

1 Q. Okay. But that would be the kind of note you would
2 note on these envelopes?

3 A. Yes, sir.

4 Q. To show that perhaps that part of the protocol
5 couldn't be followed just leaving a trail of what was done
6 and what wasn't done?

7 A. Yes, sir.

8 Q. Okay. So Ms. Moss basically was not really able to
9 assist you on that sort of informational side of things?

10 A. No, sir.

11 Q. Okay. Now you do do a generalized physical exam of
12 her; correct?

13 A. Yes, sir.

14 Q. For example you take her blood pressure?

15 A. Yes, sir.

16 Q. Which in this situation was within normal ranges?

17 A. Yes, sir.

18 Q. You count her respirations or how many breathes she
19 takes per minute?

20 A. Yes, sir.

21 Q. Which again she was breathing at that point in time?

22 A. Yes, sir.

23 Q. The normal sort of range of respirations per minute at
24 that point?

25 A. Yes, sir.

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL

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- 1 Q. She wasn't hyperventilating for example?
- 2 A. No, sir.
- 3 Q. You measured her pulse?
- 4 A. Yes.
- 5 Q. How many times her heart beats per minute?
- 6 A. Yes.
- 7 Q. And that again was within a normal range?
- 8 A. Yes, sir.
- 9 Q. And you take her blood pressure?
- 10 A. Yes, sir.
- 11 Q. Again that was within a normal range?
- 12 A. Yes, sir.
- 13 Q. So at that point in time basically her vital signs are
- 14 all within normal ranges?
- 15 A. Yes, sir.
- 16 Q. Nothing extraordinary there that would lead you to a
- 17 crash cart or crash scene that she needs immediate medical
- 18 intervention?
- 19 A. Not from her vital signs.
- 20 Q. Right and that's what I'm talking about. Basically
- 21 what that lets you do is once you know that she's that
- 22 stable you can proceed on with the rest of the examination?
- 23 A. Yes, sir.
- 24 Q. Obviously you are not going to perform these types --
- 25 one of these investigations on somebody who's having a

- 1 heart attack at that point?
- 2 A. Yes, sir.
- 3 Q. That's part of why you take vital signs is just to
- 4 check on basic conditions like that?
- 5 A. Yes, sir.
- 6 Q. You do move on to a full physical exam as you
- 7 indicated?
- 8 A. Yes, sir.
- 9 Q. Which includes you documenting anything unusual on the
- 10 box?
- 11 A. Yes, sir.
- 12 Q. And you documented any number of contusions, abrasions
- 13 and lacerations on her body?
- 14 A. Yes.
- 15 Q. And you detailed that for the jury?
- 16 A. Yes, sir.
- 17 Q. And you actually keep that on an anatomical chart as
- 18 part of your notes?
- 19 A. Yes, sir.
- 20 Q. So that you can go back when you are asked exactly
- 21 what part of the abdomen was and you can specify it was the
- 22 right abdomen.
- 23 A. Yes.
- 24 Q. It's basically a chart of the body of the person?
- 25 A. Right. It's a blank body diagram and revealing

1 wherever their injuries are.

2 Q. Part of your examination of the body is checking for
3 the presence of semen?

4 A. Yes, sir.

5 Q. Okay. And that's performed with what's called a
6 Wood's light?

7 A. We use a searching lamp. It's a different type of
8 alternative light source but yes.

9 Q. So you a searching light as opposed to the Wood's
10 light?

11 A. Right.

12 Q. But they basically perform the same function?

13 A. Yes, sir.

14 Q. You turn off all the lights in the room and you scan
15 this over an individual and it will cause a reaction to
16 certain substances?

17 A. Yes, sir.

18 Q. That reaction as you refer to it is florescence?

19 A. Uh-huh. Yes, sir.

20 Q. Basically means a glow?

21 A. That's right.

22 Q. Similar to somebody saw something under a dark light
23 for example the way certain objects glow under dark lights?

24 A. Yes, sir.

25 Q. A common sort of prevalence you would get a similar

- 1 sort of reaction from certain substances under in your case
2 a searching light as opposed to a Wood's light?
- 3 A. Yes, sir.
- 4 Q. They both do the same thing?
- 5 A. Yes.
- 6 Q. And in this particular situation you examined
7 basically the entire body to check for that; correct?
- 8 A. Yes, sir.
- 9 Q. And in the examination of the entire body you did not
10 find any indication of any semen anywhere on the body?
- 11 A. That's correct.
- 12 Q. You also collect physical evidence?
- 13 A. Yes, sir.
- 14 Q. Swabs from various parts of her body?
- 15 A. Yes, sir. I'm sorry.
- 16 Q. Which would include the area around her mouth?
- 17 A. Yes, sir.
- 18 Q. The vaginal area?
- 19 A. Yes.
- 20 Q. And the rectal area as you detailed?
- 21 A. Right.
- 22 Q. You included as you said pubic hair combings?
- 23 A. Yes, sir.
- 24 Q. And there is a procedure for how you to do this?
- 25 A. Yes, sir.

1 Q. Because it is possible that hair or skin fragments can
2 become intermixed when a sexual assault occurs?

3 A. That's true.

4 Q. Sometimes those will become trapped in the pubic hair
5 or the pubic region of the victim of a sexual assault?

6 A. Yes.

7 Q. Because the nature of that region of the hair there
8 substance can be stay trapped there for hours potentially
9 for you to find then later?

10 A. That's true.

11 Q. And so you gathered all these samples from Ms. Moss?

12 A. Yes.

13 Q. And preserve them?

14 A. Yes, sir.

15 Q. Put them in the envelopes as indicated?

16 A. Yes.

17 Q. And pass those on to the detective from York County
18 for them to process further?

19 A. That's right.

20 Q. You don't do the further processing yourself?

21 A. No, sir.

22 Q. Your job is the collection of the evidence?

23 A. Yes, sir.

24 Q. And somebody else has to actually test that evidence
25 that you collect?

1 A. That's right.

2 Q. After the general surface exam you do go on - I am
3 going to call it a gynecological exam in this particular
4 situation. Would you agree is that an appropriate term?

5 A. Sure yes.

6 Q. As part of that exam you have certain protocols of
7 what you are looking for?

8 A. Yes, sir.

9 Q. And in the process of a sexual assault injury occur to
10 the area of the genitalia?

11 A. In the process of me looking?

12 Q. No in the process of a sexual assault those injuries
13 can occur?

14 A. Yes, sir.

15 Q. You used a different word for genitalia. I am just
16 going to use the whole genitalia. We are talking about
17 there is the pubic region of an individual from the waste
18 down?

19 A. Yes, sir.

20 Q. Sometimes these injuries can be very obvious?

21 A. Yes, sir.

22 Q. They can include large tears?

23 A. Yes, sir.

24 Q. Sometimes these injuries can be much more subtle?

25 A. Yes, sir.

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL

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1 Q. It can be injuries that are not actually visible with
2 the naked eye?

3 A. That's true.

4 Q. And therefore have to be discovered via the use of
5 various enhancing items?

6 A. That's true.

7 Q. Those enhancing items can include a magnifying scope?

8 A. Right.

9 Q. It can also include certain dyes?

10 A. Yes, sir.

11 Q. There are dyes - I believe its trobeline dye.

12 A. Toluidine

13 Q. Toluidine which is basically a dye that reacts
14 differently to different layers of the skin?

15 A. That's true.

16 Q. When the skin is scraped layers are scraped off?

17 A. Yes, sir.

18 Q. And when you apply this dye it will differentiate at
19 various levels?

20 A. Right. Yeah.

21 Q. And that can be particularly meaningful in a situation
22 particularly in a vaginal assault?

23 A. Yes, sir.

24 Q. Where it can be very difficult to differentiate those
25 various abrasions because of the coloration of the skin,

1 moisture and things of that nature?

2 A. Yes, sir.

3 Q. That can be a particular hard area to find abrasions?

4 A. Yes, sir.

5 Q. Okay. All right. And you are looking for any of
6 these indicators as you do that in these exams any of these
7 injuries?

8 A. Any vaginal injuries yes, sir.

9 Q. Not just vaginal injuries but injuries in the
10 genitalia area?

11 A. Yes sir.

12 Q. Which includes redness?

13 A. Redness.

14 Q. Abrasions?

15 A. Yes, sir.

16 Q. Tears?

17 A. Yes, sir.

18 Q. Swelling?

19 A. Yes, sir.

20 Q. Bleeding?

21 A. Yes.

22 Q. Do you still use -- there used to be a term called
23 BRATS, bruising, redness, abrasion, tears, swelling?

24 A. Yes.

25 Q. Do you all still use that protocol in North Carolina?

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMBL

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1 A. Uh-huh.

2 Q. And those are sort of the standards under the
3 protocols that you are looking for as evidence that a
4 sexual assault has occurred those injuries are found not
5 always but found as a result of sexual encounters?

6 A. That's true.

7 Q. And can the evidence be in fact that a sexual assault
8 occurred?

9 A. Yes, sir.

10 Q. Okay. And in this case you did in fact do an
11 examination to see these things that you could find if you
12 could find?

13 A. Yes.

14 Q. And the first area that you examined is the area
15 that's referred to as the vulva?

16 A. Yes, sir.

17 Q. Now the vulva is a medical term for a part of the
18 body?

19 A. That's true.

20 Q. The vulva in layman's' purposes is sort of the
21 external genitalia of a female?

22 A. It's the outer vaginal lips.

23 Q. Outer vaginal lips. It would include the labia
24 majora?

25 A. Yes.

1 Q. That labia minora in fact which are those areas of
2 those lips?

3 A. Yes.

4 Q. It would also include the patorial area?

5 A. Yes, sir.

6 q. And what we call basically the vestibule of the vagina
7 that opening areas?

8 A. The vaginal opening yes.

9 Q. That would be the areas of the vagina that's basically
10 closest to the surface?

11 A. Yes, sir.

12 Q. Okay. And you examined all of these areas?

13 A. Yes, sir.

14 Q. And even though she was not in a pelvic situation in
15 pelvic posture you were able to visualize all of these
16 areas sufficiently?

17 A. All of the outer areas yes, sir.

18 Q. Again I am talking about the vulva areas only at this
19 point in time?

20 A. Yes, sir.

21 Q. And in all these areas of the vulva you found no
22 tears?

23 A. No tears.

24 Q. No abrasions?

25 A. No abrasions.

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL

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- 1 Q. No redness?
- 2 A. No.
- 3 Q. No bruising?
- 4 A. No.
- 5 Q. No bleeding?
- 6 A. No.
- 7 Q. You also examined the area of the vagina; correct?
- 8 A. Yes, sir.
- 9 Q. And the vagina is part of the interior genitalia of a
10 female?
- 11 A. That's right.
- 12 Q. It is basically the canal between the vulva and the
13 cervix?
- 14 A. Yes, sir.
- 15 Q. And that includes things like the vagina walls?
- 16 A. Yes.
- 17 Q. The hymenal ring?
- 18 A. Yes.
- 19 Q. Basically anything between those two spots the vulva
20 and the cervix?
- 21 A. Yes, sir.
- 22 Q. Essentially it is a canal; it's the birth canal?
- 23 A. Right.
- 24 Q. And again in your examination of the canal you found
25 no signs of injury?

- (1 A. That was the part that it was poorly visualized
2 because I couldn't use the speculum and her position being
3 flat on a back board.
- 4 Q. But you did examine that area?
- 5 A. I did the best I could.
- 6 Q. Right. And in that area you found no tears?
- 7 A. No tears.
- 8 Q. No abrasions?
- 9 A. No.
- 10 Q. No redness?
- 11 A. No.
- 12 Q. No bruising?
- (13 A. No.
- 14 Q. No bleeding?
- 15 A. Right.
- 16 Q. No swelling?
- 17 A. No.
- 18 Q. And under the full exam as you said you go all the way
19 down to the cervix?
- 20 A. Yes, sir.
- 21 Q. The cervix is the narrow outer end of the uterus?
- 22 A. Yes, sir.
- 23 Q. Basically where the uterus extends into the vaginal
(24 canal?
- 25 A. That's right.

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL

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1 Q. That point is located fairly significantly inside the
2 female body?

3 A. Yes, sir.

4 Q. That's something that's no where near the surface
5 essentially?

6 A. Exactly.

7 A. And because of Ms. Moss's treatment at that point in
8 time you simply weren't able to visualize that at all?

9 A. That's right.

10 Q. You would have had to have her in the pelvic chair and
11 had been able to use a spectrum?

12 A. That's right.

13 Q. And of course you just weren't able to do it?

14 A. No, sir.

15 Q. Okay. You also were able to examine the rectal area
16 of Ms. Moss; correct?

17 A. That's correct.

18 Q. It didn't have any impairment to that particular area?

19 A. No, sir.

20 Q. And again you found no signs of injury anywhere in the
21 rectal area?

22 A. That's true.

23 Q. No tears?

24 A. No.

25 Q. No redness?

- 1 A. No.
- 2 Q. No abrasions?
- 3 A. No.
- 4 Q. No bleeding?
- 5 A. No.
- 6 Q. No bleeding?
- 7 A. No.
- 8 Q. So in all these parts of Ms. Moss's genitalia you
- 9 found no bruising anywhere?
- 10 A. That's true.
- 11 Q. No redness?
- 12 A. No.
- 13 Q. No abrasions?
- 14 A. No.
- 15 Q. No tears?
- 16 A. No.
- 17 Q. Now the solicitor asked you if it's possible for a
- 18 sexual assault to occur and these things not be present.
- 19 A. Yes.
- 20 Q. And you replied yes?
- 21 A. Yes.
- 22 Q. But is it also possible if none of these things are
- 23 present then simply no sexual assault occurred?
- 24 A. That's true.
- 25 Q. It's equally possible?

1 A. Yes.

2 Q. And you can't say in your expert opinion which one of
3 those things is true?

4 A. That's true.

5 Q. All you can say is there is no evidence of the assault
6 in terms of bruising, redness, abrasions, any sort of
7 injury to Ms. Moss in her genital area?

8 A. Yes.

9 Q. I beg the Court's indulgence.

10 Now you also testified about whether in the condition
11 that she was in what her ability to fight back would have
12 been?

13 A. Yes, sir.

14 Q. You don't know; you weren't present when the alleged
15 assault took place?

16 A. No, sir.

17 Q. So you don't know to what extent she was able to fight
18 back or anything like that?

19 A. No, sir.

20 Q. You also testified that the lack or non-presence of
21 semen doesn't initially mean a sexual assault didn't occur?

22 A. That's true.

23 Q. But it's also equally possible that no semen is
24 present because no sexual assault actually occurred?

25 A. That's true.

ANGIE ALEXANDER: CROSS EXAMINATION BY MR. LEMEL
REDIRECT EXAMINATION BY SOLICITOR SIKORA

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1 Q. Equally possible?

2 A. Yes, sir.

3 Q. And you as an expert cannot say which one of those
4 things is true?

5 A. That's right.

6 Q. All you can say is there is no semen present in this
7 particular case?

8 A. Right.

9 Q. From your examination?

10 A. Exactly.

11 Q. No further questions.

12 SOLICITOR SEKORA: Just briefly, Your Honor.

13 REDIRECT EXAMINATION

14 ANGIE ALEXANDER BY SOLICITOR SIKORA:

15 Q. I am going to ask you briefly about the cheek swab
16 that you obtained from Ms. Moss that Mr. Lemel asked you
17 about. What do you mean when you say - when you said she
18 was unable to assist you with it or swab?

19 A. Normally when a patient comes in and say that they
20 were orally assaulted which means in their mouth we usually
21 obtain those swabs because we are looking for semen the
22 presence of semen in their mouth. Then we will have them
23 brush their teeth or rinse their mouth out and wait at
24 least fifteen minutes before we get their cheek scrapings
25 which is their DNA and this is so the two don't mix. In

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1 Ms. Moss's case because she was so confused and her head
2 injury was so severe she would not be able to sit up and
3 rinse her mouth out or brush her teeth.

4 Q. In your opinion were you able to obtain a proper
5 sample from her cheek or mouth area?

6 A. Yes, ma'am.

7 Q. And is that despite the condition she was in?

8 A. Yes, ma'am.

9 Q. And there has been some talk about the use of a
10 speculum?

11 A. Yes, ma'am.

12 Q. And the speculum is again what?

13 A. The speculum is this duck bill device that is inserted
14 into the vagina and holds the vagina; the vaginal walls
15 apart so that you can visualize the end of the womb or the
16 cervix.

17 Q. And were you able to use that in performing your exam
18 of Ms. Moss?

19 A. No, ma'am.

20 Q. And is it possible that if you had been able to use
21 that device on her you could have found tears or some sign
22 of physical trauma?

23 MR. LEMEL: Objection. That calls for speculation.

24 THE COURT: Repeat the question again.

25 BY SOLICITOR SIKORA:

1 Q. Is it possible that if you were able to use the
2 speculum to examine Ms. Moss that you could have found
3 tears or some signs of physical trauma?

4 THE COURT: Over ruled.

5 Q. You may answer the question.

6 A. It is a lighted duck bill device which helps me see so
7 I was not able to really examine that whole part of her
8 vaginal opening and canal. So yes looking - being able to
9 look inside there to see if there is injuries is part of
10 our exam.

11 Q. And had you been able to do that is it possible that
12 you may have seen injuries?

13 A. Yes, ma'am.

14 Q. And in performing gynecological exams I believe the
15 term Mr. Lemel used of a female patient when you are
16 examining the genital area have you ever seen signs of
17 physical trauma to the area?

18 A. Yes I have.

19 Q. If there is physical trauma to the female genital area
20 does that necessarily mean a sexual assault occurred?

21 A. No, ma'am.

22 Q. Thank you. Please answer any further questions from
23 the defense attorney.

24 RECROSS EXAMINATION

25 ANGIE ALEXANDER BY MR. LEMEL:

ANGIE ALEXANDER: RE-CROSS EXAMINATION BY MR. LEMEL

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1 Q. With regard to the speculum if used is it equally
2 possible that you may see no injury?

3 A. Yes, sir.

4 THE COURT: Ma'am, you can step down.

5 SOLICITOR LIPINSKI: Your Honor, may we approach just
6 briefly.

7 THE COURT: We are going to take a break. I am going
8 to let the jury go back into the jury room for a few
9 minutes and we will see you shortly.

10 (JURY LEAVING THE COURTROOM AT 10:42 A. M..)

11 THE COURT: All right we will take a short break.

12 (SHORT RECESS AT 10:43 A. M..)

13 THE COURT: Back on the record at 10:57 A. M..)

14 THE COURT: Be seated.

15 (DEPENDANT ENTERING COURTROOM.)

16 THE COURT: What was it you wanted to bring up?

17 SOLICITOR LIPINSKI: I needed a break to get that
18 witness in.

19 THE COURT: You ready now?

20 SOLICITOR LIPINSKI: Yes, sir, I am.

21 THE COURT: Okay. Bring in the jury.

22 (JURY ENTERING COURTROOM AT 10:58 A.M..)

23 SOLICITOR LIPINSKI: The State calls Investigator
24 Kevin Tolson.

25 (WHEREUPON: LIEUTENANT KEVIN

1 TOLSON, BEING FIRST CALLED, WAS DULY SWORN AND TESTIFIED AS
2 FOLLOWS:)

3 MADAME CLERK: Thank you.

4 DIRECT EXAMINATION

5 KEVIN TOLSON BY SOLICITOR LIPINSKI:

6 Q. Investigator Tolson, with whom are you currently
7 employed?

8 A. With the York County Solicitor's Office.

9 Q. And in what capacity?

10 A. As an investigator.

11 Q. And prior to being employed with the York County
12 Solicitor's Office as an investigator what was your most
13 recent occupation?

14 A. I was the director of the York County Multi-
15 Jurisdictional Forensic Service's Unit.

16 Q. And I know that's a very long word but let's explain
17 to the jury what the York County Multi-Jurisdictional
18 Forensic Service's is.

19 A. It's a multi-agency unit that was put together in 2002
20 represented by various law enforcement agencies within York
21 County to work crime scenes and collect evidence; process
22 certain pieces of evidence and then facilitate the
23 submission of some of it to SLED.

24 Q. Why was it necessary to form this multi-agency
25 division as opposed to allowing the local municipalities to

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1 individually process their own crime scenes?

2 A. In short some of the equipment that is purchased is
3 quite expensive. It was more efficient from a financial
4 standpoint to pool resources and man power. Also
5 information coming from one agency doing crime scenes in
6 one fashion; more structured, ended up in a better
7 processing of crime scenes.

8 Q. Was it possible that some - so you assisted some of
9 the smaller municipalities here in York County?

10 A. That is correct.

11 Q. For instance some of those may not, Clover Police
12 Department or other smaller ones would they have even had
13 the capacity to employ someone who was trained in forensic
14 services or evidence collection?

15 A. That's correct. Nor no one could probably afford the
16 equipment.

17 Q. And you obviously were the director of that. How long
18 have you been in law enforcement specifically?

19 A. Since 1992.

20 Q. And were you always in the forensic services unit?

21 A. No I was not. I started out like most folks I started
22 at the sheriff's office in patrol worked my way through
23 patrol into narcotics and then into the Crimes Against
24 Person's Unit. Left for a short period of time and worked
25 for the State Law Enforcement Division and got a job with

1 the solicitor's office for a short time as an investigator
2 which is about the time that the forensic unit was formed
3 and I was asked by my boss then Mr. Pope to assist with the
4 forensic services unit.

5 Q. And other than being the director and having the
6 administrative role over this multi-agency unit did you
7 have any day to day responsibilities and duties in terms of
8 evidence collection?

9 A. That is correct. I did some of the same duties that
10 some of the some of the officers within the unit I would do
11 on a part-time basis when needed.

12 Q. And prior to and during your tenure with the forensic
13 services unit did you receive and kind of specialized
14 training and education in forensic evidence collection?

15 A. I did.

16 Q. And briefly if you could explain your training and
17 education to the jury as it relates to forensics?

18 A. Twenty-hours of school in North Carolina specifically
19 designed for crime scene processing; documentation evidence
20 collection, a basic fingerprint school, identification and
21 comparison certification in that area. Numerous medical,
22 legal, death investigation courses which deals specifically
23 with crime scene processing, evidence collection,
24 preservation, submission and analysis.

25 Q. And have you ever testified before?

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1 A. I have.

2 Q. And have you ever been qualified as an expert before?

3 A. Yes I have.

4 Q. Your Honor, at this time we would proffer Kevin Tolson
5 as an expert in forensic science identification and
6 collection.

7 MR. LEMEL: Without objection, Your Honor.

8 THE COURT: All right he qualified to testify in those
9 subject areas.

10 BY SOLICITOR LIPINSKI:

11 Q. Did you have the occasion -- you stated that some of
12 your roles were as director or supervisor but you also
13 additionally process crime scenes -- did you have the
14 occasion to participate in the investigation of the case
15 State versus Adam Berard?

16 A. I did yes, ma'am.

17 Q. And in June of 2008 were you then employed as the
18 director of that unit?

19 A. I was.

20 Q. And specifically before we get to any of the crime
21 scenes in this particular case explain to the jury what the
22 general process is when you arrive on a crime scene and how
23 you go about getting the process of evidence collection and
24 identification?

25 A. Generally speaking if it's after hours and after hours

1 being pretty much ten o'clock during the week or any
2 weekends there is somebody on call they would be notified
3 by it used to be pagers now it's cell phones but would be
4 notified by a central dispatch to respond to a certain
5 address and all the information you would basically have is
6 what the particular type case is and what the address is.
7 You would respond to the location speak with the officers
8 on the scene gather as much information that can help you
9 decide how it is you are going to process the scene and
10 what evidence that you may be looking for what you may be
11 able to process and collect.

12 Q: And when you get to the scene before do you do a thing
13 where you walk through and see what's there or do you do
14 anything once you initially get there to preserve the crime
15 scene as you originally find it?

16 A. Yes we ask the uniform division already to secure the
17 area and you can do it a number of ways. This particular
18 area was a little easier to secure. It was surrounded by a
19 fence but we ask that uniform if that's not the case to
20 take crime scene tape string it along to form basically a
21 bearer so that we can control who comes in to the crime
22 scene. And then you would initially do what we call a walk
23 through and that's where you just basically walk through
24 the crime scene get a general idea of what the area looks
25 like and what you may be looking for.

1 Q. And did you do that in this particular case?

2 A. I did.

3 Q. At the Zinker Road address?

4 A. At the [REDACTED] I believe Zinker Road.

5 Q. And while you are doing this walk through are you
6 taking any photographs or does that come later?

7 A. That comes later.

8 Q. And what is the significance of taking photographs
9 Prior -- do you take them before or after you collect the
10 evidence?

11 A. Before.

12 Q. And what is the significance of taking those
13 photographs before versus after?

14 A. So that you can document the scene as accurately as
15 possible as it was at the time of whatever incident that
16 you are investigating.

17 Q. And did you take photographs of this particular crime
18 scene or did someone assist you in taking photographs?

19 A. Someone assisted me and took photographs.

20 Q. And do you recall who assisted you out there that day?

21 A. Yes, ma'am, it was Investigator Brian Bagwell with the
22 Forensic Service's Unit.

23 Q. Is that typical for you all to work in pairs in bigger
24 crime scenes?

25 A. That's correct. We were short at the time in the unit

1 and I was sort of filling my name in on the non-call
2 schedule which is how I became to be involved in this case.
3 I was called to it I saw that it was probably going to be a
4 fairly large scene and so I contacted Investigator Bagwell
5 for him to come out and help me and we made the decision
6 there that basically I would be the evidence collector if
7 he would handle the photographs because obviously you have
8 gloves on it's hard to have a camera strapped around your
9 neck take a picture and pick evidence up and bag it and
10 collect it. So basically his role was to photograph and
11 document and my role was to collect.

12 Q. And at this particular crime scene even though you
13 didn't take the photographs were you able to identify the
14 authenticity of Brian Bagwell's photographs as they relate
15 to the evidence that was collected there?

16 A. Yes I was at the locations where he took the
17 photographs.

18 Q. So basically you identify a piece of evidence and ask
19 him to photograph it and you go about the process of
20 collecting that?

21 A. That's correct.

22 Q. When you got to the crime scene at [REDACTED] [REDACTED] [REDACTED]
23 just briefly describe to the jury the condition of the
24 crime scene when you found it? Was it secure; were there a
25 number of people going in and out? What did you see?

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1 A. It was secure. I don't think that the gate was even
2 shut but Officer, Sergeant Wright was the officer if I
3 recall on scene. There weren't many people I think
4 Lieutenant W. J. Miller was on the scene. Those were the
5 only two officers I recall being there at that time. And I
6 think Mr. Rusty Berard and a companion of his was also on
7 scene. And that is all of the folks I recall being there
8 at the time.

9 Q. And did you speak with any of the witnesses or did you
10 predominately obtain that information from law enforcement
11 about what had occurred at Zinker Road?

12 A. I got it predominantly from Lieutenant Miller and
13 Sergeant Wright. I did have a short conversation with Mr.
14 Berard, Mr. Rusty Berard. I may have been present while
15 either I believe Lieutenant Miller had an additional
16 conversation with Mr. Berard.

17 Q. And what is [REDACTED] [REDACTED] [REDACTED], what type of residential
18 structure is it?

19 A. It's a single family dwelling.

20 Q. Small house?

21 A. Small house.

22 Q. One story, two story?

23 A. One story.

24 Q. And are there two entrances to the house?

25 A. Yes there are.

1 Q. Front door and a back door as it were?

2 A. Front door. Side door I would probably call it yes,
3 ma'am.

4 Q. And did the focus of your investigation go through the
5 front door or through a back porch door?

6 A. The focus of our investigation went through what you
7 are calling the back porch door leading from a deck.

8 Q. Let me show you what's been previously been marked as
9 State's Exhibit Number 4 A, B and C and ask if you
10 recognize what is contained in these photographs as it
11 relates to the crime scene at [REDACTED]?

12 A. I do recognize these.

13 Q. And do they depict that porch or deck area that was a
14 part or a focus of your investigation?

15 A. They do.

16 Q. And do they accurately reflect the condition that you
17 saw it on the night in question?

18 A. They do.

19 Q. Your Honor, at this time the State would move Four A,
20 B and C into evidence.

21 MR. LEMEL: Without objection, Your Honor.

22 THE COURT: It's admitted.

23 (WHEREUPON: STATE'S EXHIBIT NUMBER FOUR A, B, C,

24 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

25 BY SOLICITOR LIPINSKI:

1 Q. We are going to bring these photographs up on the over
2 head projector if you could just walk the jury through.

3 Madame Clerk, will you dim the lights. I will try to
4 keep this to a minimum.

5 What are we looking at here?

6 A. You are looking at - -

7 Q. I apologize I don't mean to interrupt you. We have he
8 latest technology a laser pointer let me hand that to you.
9 It might assist you in pointing things out in these
10 photographs during your testimony.

11 Your Honor, do you have any objection if he steps
12 down?

13 THE COURT: No problem. Come on down.

14 (WITNESS STEPPING DOWN FROM WITNESS STAND.)

15 Q. What is this? This is State's Exhibit Four A I
16 believe.

17 A. This is the side of the house. The road is back this
18 way. The deck obviously is right there. This deck leads
19 to the double French doors right there going into the house
20 in the kitchen area.

21 Q. Let me move to Four B. Is this just showing the steps
22 walking up onto that deck?

23 A. That's correct. This picture was taken if you step
24 three or four steps to the right showing straight down to
25 the deck the double French doors being right there.

1 Q. And again Four C. This would be the opposite side of
2 the deck?

3 A. That's correct. This picture would have been taken if
4 you walk -- in the original two pictures were from the
5 other side of that deck just walk around. This is some
6 steps leading up to the same deck that's on the other side
7 of the deck.

8 Q. Were you able to locate the French doors we talked
9 about earlier?

10 A. The door knob, the door handle would be right there.

11 Q. I am going to ask that just for the purposes of not
12 bringing the lights up if you would just stay there. Let
13 me show you what's been previously marked and admitted as
14 State's Exhibit Number One and ask you if you recognize
15 what is depicted in that particular photograph?

16 A. In State's Exhibit One I do recognize what's depicted
17 in this photograph.

18 Q. If we could bring up State's Exhibit Number One
19 please.

20 What is this?

21 A. That is a denture plate.

22 Q. And was this located on the porch?

23 A. It was located on the deck yes, ma'am.

24 Q. Let me show you what's been marked as State's Exhibit
25 Number Three A and B and ask you similarly - -

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1 These photographs have been moved into evidence?

2 (SOLICITOR LOOKING AT CO-COUNSEL.)

3 Do those further document the location of the denture
4 plate?

5 A. Three A does Three B does not.

6 Q. Let's start with Three A. If you could look to that.
7 Again is the French doors in this photograph?

8 A. Right there is the French doors. That's sort of the
9 door hinge there. Next to the photo marker on the door and
10 right there is the denture plate.

11 Q. And would you place photo identification markers there
12 for what particular purpose?

13 A. For documentation and easier reference when we look at
14 the photos.

15 Q. And you collected these dentures?

16 A. I did.

17 Q. Outside on the porch is that where you found them?

18 A. On the deck outside yes, ma'am.

19 Q. And did you retain them property and evidence or did
20 you ever turn them over to anyone?

21 A. I think they were eventually turned over to Ms. Moss.

22 Q. They were returned to Ms. Moss?

23 A. Yes.

24 Q. And other than the dentures we see in this particular
25 photograph are there any other items of evidentiary

1 significance in this photo?

2 A. Behind photo marker Number Two right there is a stick.

3 Q. And is there anything on the door indicating any sign
4 of a struggle or stress on the porch?

5 A. That would have been marked also probably in the area
6 by Number Two. Obviously potentially we think of that as
7 probably blood.

8 Q. And if I can move to Three B please.

9 And is that the same blood stain that we saw in Three
10 A?

11 A. That is correct. It's a more close up view.

12 Q. And is there any additional blood splatter on the door
13 itself? Were you able to discern that?

14 A. Down there that would be right there. This would be a
15 window pane to the French door and down in that area right
16 there.

17 Q. If you can retake your seat we will go through some
18 additional photographs as well and some additional
19 evidence.

20 (WITNESS RETURNED TO WITNESS STAND.)

21 Q. You can move the lights up if you want too, Tracy.

22 (CLERK OF COURT BRIGHTENED COURTROOM LIGHTS.)

23 Let me show you what's been previously marked as

24 State's Exhibit Number Two for identification purposes and
25 ask if this diagram was produced either in cooperation with

1 you or at your direction as it relates to the evidence that
2 was collected at the crime scene?

3 A. That is correct. It was at my request of Investigator
4 Bagwell to prepare this diagram.

5 Q. And what specifically is documented in this diagram?

6 A. The basic lay out of the residence as well as the
7 location of the items that we had documented and collected.

8 Q. So there's an outline of the house so to speak?

9 A. Correct.

10 Q. And there's some numbers on there?

11 A. Correct.

12 Q. And we previously saw a photograph with some numbers;
13 some numbered markers on it, do they relate in any way to
14 the numbers on the diagram?

15 A. They do. If I remember correctly at least Items
16 Number One that we collected through Items Number Twelve
17 corresponds to the numbers and the number cones in the
18 photographs.

19 Q. And would using this diagram assist you in your
20 discussion of the evidence you collected for the jury?

21 A. It would yes, ma'am.

22 Q. Your Honor, at this time we would move State's Number
23 Two into evidence.

24 MR. LEMEL: Without objection at this time, Your
25 Honor.

1 THE COURT: It's admitted.

2 (WHEREUPON: STATE'S EXHIBIT NUBMER TWO PREVIOUSLY
3 MARKED AND IDENTIFIED, ENTERED INTO EVIDENCE.)
4 BY SOLICITOR LIPINSKI:

5 Q. Again, Detective Tolson, you may need to step down in
6 order to go through this. Just briefly if you could just
7 relate to the jury before we start talking about the
8 evidence again the lay out of house and the covered porch
9 that we talked about as indicated in this diagram.

10 A. Okay. The drive way if it were depicted in this
11 diagram would be out here somewhere. The front what I
12 would consider to be the front door right here. The
13 pictures that we just discussed this is the covered porch
14 area of the deck in those pictures I just showed you and
15 this is the covered porch area with the door to the kitchen
16 being basically right there.

17 Q. Did you go in through the kitchen? What is the main
18 room the one right inside the front door?

19 A. In this area right here?

20 Q. Yes.

21 A. That would be the kitchen.

22 Q. Is there a dining table of any kind?

23 A. There is a dining table in there.

24 Q. And is that a oval kind in the bottom corner?

25 A. That is correct. That right there will be the kitchen

1 table in the picture and the two kitchen chairs I believe
2 these are benches.

3 Q. So you move into the kitchen from - -

4 A. The kitchen area. The sink would be right there.
5 This is depicting the stove. An open sort of work area
6 right here. This would be sort of a walk way leading into
7 this right here would be like a laundry room; what I
8 consider to be a laundry room. This would be a storage
9 area inside the house. This would be the door way. No
10 door leading into a living area right here. Again exit
11 door or a door to the outside right here. This would lead
12 back into a bedroom. The hall way right here; bedroom
13 right here, bathroom right here and a bedroom right here.

14 Q. And -- you can retake the stand if you would like.

15 (WITNESS RETURNED TO THE WITNESS STAND.)

16 Q. Despite the indication that you saw of a crime
17 occurring how would you characterize the condition of the
18 house itself? Is this a clean house, a house of disarray
19 not taking into consideration the evidence of the crime
20 itself if you understand my question?

21 A. A well kept clean house over all generally speaking.

22 Q. And on the porch area you indicated that the dentures
23 and those items that you collected did you see any
24 indication of a struggle or anything out of array on the
25 porch itself?

1 A. The dentures obviously. The blood on the door jam
2 near the hinges and then a little bit of a splatter below
3 the window.

4 Q. And as you go inside the kitchen going into the door
5 with the table just off to your left and I believe a
6 counter top off to your right is there any evidence right
7 inside that floor area indicating the struggle moved
8 inside?

9 A. Yes, ma'am. I believe there was some clothing; a pool
10 -- what I believe to be vomit and some blood stain on the
11 floor as well as on the walls within the kitchen.

12 (WHEREUPON: STATE'S EXHIBIT NINE, TEN AND ELEVEN
13 PREMARKED FOR IDENTIFICATION.)

14 Q. Let me show you what's been previously marked for
15 identification purposes State's Exhibit Nine, Ten and
16 Eleven and ask if you can recognize what is depicted in
17 those photographs and whether they relate to that entry
18 area or the eat in dining room area as you saw it on the
19 night in question?

20 A. I do recognize these photos and they do depict the
21 main part of the kitchen eating area.

22 Q. And do they accurately depict the condition of the
23 crime scene as you saw it that night?

24 A. They do.

25 Q. Your Honor, at this time the State would move Nine,

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1 Ten and Eleven into evidence.

2 MR. LEMEL: Without objection, Your Honor.

3 THE COURT: They are admitted.

4 (WHEREUPON: STATE'S EXHIBIT NUMBER NINE, TEN AND
5 ELEVEN PREMARKED AND IDENTIFIED, ENTERED INTO EVIDENCE.)
6 BY SOLICITOR LIPINSKI:

7 Q. Okay if you could just go through those briefly with
8 the jury. Number Nine that is the dining room table that
9 we discussed?

10 A. That is correct. If you were to take this picture you
11 would have stepped in just from the deck area through the
12 French door and taken that picture again with the dining
13 room table to the left.

14 Q. And you can see just beyond the dining room table is
15 that the kitchen area that you indicated?

16 A. That's correct. The little white object on the top of
17 the picture near the left hand side would be the oven.

18 Q. Drawing your attention is there a rug on the floor?

19 A. A rug?

20 Q. A rug or a carpet off to the side?

21 A. That is correct on the right hand side.

22 Q. And did anything in particular about this rug and
23 surrounding area draw your attention as you went about
24 collecting evidence?

25 A. Yea. Well the rug is obviously not how you would

1 normally see rugs in a house. They are usually flattened
2 out of course the rug is a little bit wrinkled up. And if
3 you look just above the rug sort of almost under the chair
4 that's in front of that rug there appears to be a blood
5 stain on the floor.

6 Q. Is Number Ten a close up of that area or Number
7 Eleven?

8 A. Number Ten is a more close up photograph of that.

9 Q. If we can bring Number Ten up?

10 (EXHIBIT NUMBER TEN SHOWN ON OVER HEAD PROJECTOR.)

11 Q. And again the stains on the floor what are you seeing
12 here?

13 A. Just above the rug and also under the chair it appears
14 to be blood stain what I would consider to be transfer.

15 Q. And Number Eleven.

16 (EXHIBIT NUMBER ELEVEN SHOWN ON OVER HEAD PROJECTOR.)

17 Q. The same thing?

18 A. Same thing. A little bit further to the left of the
19 chair the smearing of what I believed to be blood.

20 Q. And you used the term transfer. What do you mean by
21 that particular term?

22 A. I would consider that to be blood that's not you know
23 if you are cut and you are bleeding and it lands on a hard
24 object that like that it would tend to pool in a more
25 regular form. That has been what appears to me something

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1 has changed the shape of that blood pooling sort of
2 flattened it out in what I consider to probably be
3 smearing.

4 (WHEREUPON: STATE'S EXHIBIT NUMBER TWELVE AND
5 EIGHTEEN PREMARKED FOR IDENTIFICATION.)
6 BY SOLICITOR LIPINSKI:

7 Q. I am going to show you what's been marked previously
8 as State's Exhibit Twelve and Number Eighteen and ask you
9 if you recognize what is depicted in those photographs?

10 A. I do recognize State's Exhibit Twelve and State's
11 Exhibit Number Eighteen.

12 Q. And are those photographs taken further inside the
13 kitchen area in the residence?

14 A. They are.

15 Q. If you can bring the diagram Number Two back up
16 please.

17 And if you could just point out to the area of the
18 house that these photographs generally depict?

19 A. It would be -- is that showing up -- in that general
20 area right there leading from the kitchen into this living
21 area.

22 Q. Your Honor, at this time we will be moving State's
23 Exhibits Twelve and Eighteen into evidence.

24 MR. LEMEL: Without objection, Your Honor.

25 THE COURT: They are admitted.

1 (WHEREUPON: STATE'S EXHIBIT NUMBER TWELVE AND
2 EIGHTEEN PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO
3 EVIDENCE.)

4 BY SOLICITOR LIPINSKI:

5 Q. If you could bring up Number Twelve.

6 So again the rug, the blue rug at the top - - -

7 A. Correct.

8 Q. - - - of the photograph is that the door that leads
9 into the living room?

10 A. That is the door way that leads in from the kitchen to
11 the living room.

12 Q. And do you see a small room off to the side in the
13 upper corner where -- leading to a trash can and perhaps
14 some shoes? Is that the laundry room that you discussed?

15 A. That is correct.

16 Q. And in the bottom corner is that still part of the
17 kitchen cabinetry?

18 A. That is correct. It's a counter and cabinet below the
19 counter.

20 Q. And what do we see on the floor here in terms of
21 evidence or items that may or not been collected?

22 A. Potential blood and the pool of what I considered to
23 be probably vomit near the blue rug.

24 Q. And moving to State's Exhibit Number Eighteen. The
25 scale and the shoes that we saw on the previous photograph

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1 are now at the top of the scene. What room - that door way
2 what does it go into if you are able to tell?

3 A. That appears to be the door way going into the laundry
4 room so you are referencing from the last picture you would
5 have basically turned ninety degrees to the right taking a
6 picture of that door way there.

7 Q. And the item I see on the floor here I believe your
8 Item Number Seventeen what item would that be?

9 A. Its an article of clothing that I identified as a
10 green blouse with red stains I labeled again Item Twelve.

11 Q. Do you have a knife on you to open this up with?

12 A. Yes, ma'am.

13 Q. We can bring the lights back up now, Tracy.

14 (WITNESS OPENED ITEM WITH POCKET KNIFE.)

15 Q. Let me show you if you will look at the outside of
16 this envelop and ask if it indicates what's contained with
17 inside that envelope.

18 A. In my writing the indication is a green blouse with a
19 red stains.

20 Q. And did you collect that item?

21 A. I did.

22 Q. And did you turn it into property and evidence?

23 A. I did.

24 Q. Your Honor, at this time State would move State's
25 Exhibit Number Seventeen into evidence.

1 MR. LEMEL: Without objection, Your Honor.

2 THE COURT: It's admitted.

3 (WHEREUPON: STATE'S EXHIBIT NUMBER SEVENTEEN

4 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

5 BY SOLICITOR LIPINSKI:

6 Q. If you could to the best of your ability kind of
7 unfold that and display it to the jury. Is it in the
8 condition you obtained it on the night in question?

9 A. It's a inside out blouse. This should be the front.

10 Q. And being Item Number Seventeen that would be what you
11 collected at from where it's depicted in photograph Number
12 Eighteen.

13 A. That's correct.

14 Q. If you can return that to the envelope please.

15 (WITNESS RETURNED EVIDENCE TO ENVELOPE.)

16 Q. Well let me show you what's been marked as State's
17 Exhibit Number Five and State's Exhibit Number Twenty and
18 ask you if recognize what's depicted in those photographs
19 and whether they are similarly items of clothing and
20 material you collected at the crime scene?

21 A. State's Exhibit Number Five and State's Exhibit Number
22 Twenty I do recognize as articles of clothing that were
23 documented in these photographs that I later collected.

24 Q. And, Your Honor, at this time we would move State's
25 Exhibit Number Five and State's Exhibit Number Twenty into

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1 evidence.

2 MR. LEMEL: Without objection.

3 THE COURT: They are admitted.

4 (WHEREUPON: STATE'S EXHIBIT NUMBER FIVE AND TWENTY
5 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

6 BY SOLICITOR LIPINSKI:

7 Q. I think they are visible without dimming the lights. I
8 don't want to keep dilating the jury's eyes.

9 If you could describe - -

10 This is Five?

11 (SOLICITOR LIPINSKI LOOKING AT CO-COUNSEL.)

12 This is State's Exhibit Number Five. What do we see
13 in this photograph?

14 A. Its separate articles of clothing just inside the
15 living room leading from the kitchen. If you were to look
16 to your left there is a couch. It appears to be a vacuum
17 cleaner behind the couch. And Number Six is depicting the
18 articles of clothing behind the couch and in front of the
19 vacuum cleaner.

20 Q. Ms. Sikora, if you could go back to the diagram
21 State's Exhibit Number Two for just a moment.

22 And if you could point out to the jury as best you can
23 where these photographs depict in relation to the house?

24 A. Going into the kitchen area I don't know if this is
25 showing up or not.

1 Q. If you need to step down you may need to do that given
2 the brightness of the light.

3 (WITNESS LEFT WITNESS STAND.)

4 A. From the kitchen area which is right here of the
5 photograph that was taken that way . . .

6 MADAME COURT REPORTER: I'm sorry. I'm sorry, Mindy,
7 he's got his back to me and I can't understand him.

8 SOLICITOR LIPINSKI: You need to speak up a little bit
9 and talk back toward the court reporter and if you could
10 just repeat what you just said.

11 A. Leading in from the kitchen you just come to the left
12 right here from the kitchen area and this is the couch that
13 was depicted in the photograph. And this is Number Six as
14 depicted in the photograph indicating the article of
15 clothing.

16 Q. And before you walk away just point out the
17 relationship of these two items to the blouse that you just
18 showed to the jury if you remember where it was? I believe
19 Item Number Seventeen.

20 Q. The blouse was right here leading into the laundry
21 room and the item in this photograph is right here. Blouse
22 Seventeen in this Item Number Six.

23 Q. All right. Thank you. If you can retake your seat.

24 A. Sorry about that.

25 MADAME COURT REPORTER: That's okay.

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1 BY SOLICITOR LIPINSKI:

2 Q. Do you have any objection to this?

3 MR. LEMEL: (NEGATIVE RESPONSE.)

4 (WHEREUPON: STATE'S EXHIBIT NUMBER SIX AND TWENTY-ONE
5 PREMARKED FOR IDENTIFICATION.)

6 Q. I'm showing you what's been marked for identification
7 purposes at this time as State's Exhibit Item's Number Six
8 and Twenty-One. I ask you if the outer markings of these
9 packages demonstrate that you collected these items and do
10 they contain the items you just saw in the photographs?

11 A. In order?

12 Q. Do them in order.

13 A. State's Exhibit Six would be an item number that I
14 labeled as Number Six. In my writing is a red stained
15 white towel that I packaged and submitted to the York
16 County Evidence.

17 Q. And does it indicate that it was collected from behind
18 that couch area?

19 A. It indicates that it was collected in the living room
20 entrance near kitchen in victim's residence.

21 Q. And Item Number Twenty-One?

22 A. Again my handwriting. It indicates this is State's
23 Exhibit Twenty-One. My Item Number Twenty-One that I
24 labeled white underwear and green shorts that was collected
25 by me on the living room floor near the kitchen in the

1 victim's residence that I submitted to evidence control.

2 Q. And did you collect both of these items and placed
3 them into property and evidence?

4 A. I did.

5 Q. Your Honor, at this time the State would move State's
6 Exhibit Number Six and Twenty-One into evidence.

7 MR. LEMEL: Without objection, Your Honor.

8 THE COURT: Admitted.

9 (WHEREUPON: STATE'S EXHIBIT NUMBER SIX AND TWENTY-ONE
10 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

11 BY SOLICITOR LIPINSKI:

12 Q. And if you could starting with State's Exhibit Number
13 Six open it and display it to the jury.

14 And if you can bring up that photograph which I
15 believe will be Number Five.

16 A. This is State's Exhibit Six that I labeled as a red
17 stained white towel.

18 Q. And is it in the original condition as depicted in the
19 State's photograph Number Five with the Marker Six next to
20 it?

21 A. Just to the right and below six.

22 Q. Thank you. If you could exhibit State's Exhibit
23 Number Twenty-One when you get a chance.

24 A. State's Exhibit Twenty-One is an item that I labeled
25 as my Number Twenty-One piece of evidence that I labeled as

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1 white underwear and green shorts depicted in the
2 photograph.

3 Q. I'm sorry. That's photograph Number Five that you are
4 referring to as State's Exhibit Number Five and I am just
5 clarifying that for the record.

6 A. Okay.

7 Q. Again if you could again unravel those items and
8 display them for the jury.

9 A. This would be the green shorts inside out which would
10 have been the condition they were in when I collected them.
11 White underwear.

12 Q. Thank you. You can return those to the envelope.
13 When you found them were they separate like this?

14 A. They were. You can see in the photograph there either
15 on top of each other or interwoven with each other.

16 (PAUSE.)

17 Q. The Court's indulgence, I apologize, Your Honor.
18 This is now in the living room area?

19 A. Just inside the living room from the kitchen.

20 Q. Madame Clerk, I am going to ask that you dim the
21 lights just one more time so we can view three more
22 photographs.

23 (CLERK OF COURT DIMMED COURTROOM LIGHTS.)

24 (WHEREUPON: STATE'S EXHIBIT NUMBER NINETEEN A AND B
25 PREMARKED FOR IDENTIFICATION.)

1 Q. Let me show you what's been previously marked
2 initially as State's Exhibit Nineteen A and B and ask if
3 you recognize what is depicted in this photograph?

4 A. I do recognize Nineteen A and Nineteen B as
5 photographs of blood stain.

6 Q. And do they accurately depict the condition of the
7 house as you found it on the night in question?

8 A. Both of them do yes, ma'am.

9 Q. Your Honor, at this time we would move State's Exhibit
10 Nineteen A and B into evidence.

11 MR. LEMEL: Without objection, Your Honor.

12 THE COURT: Admitted.

13 (WHEREUPON: STATE'S EXHIBIT NUMBER NINETEEN A AND B
14 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
15 BY SOLICITOR LIPINSKI:

16 Q. And if you could bringing up Nineteen A is this a
17 blood stain?

18 A. It is.

19 Q. What you believe in your opinion to be a blood stain?

20 A. In m opinion is a blood stain on the wall near a door,
21 a door way.

22 Q. And bringing up Nineteen B again what do we see?

23 A. Again a blood stain left on a wall.

24 Q. And just back, can you see any carpeting in this
25 photograph that helps you orient the location of these

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1 blood stains as to the house itself?

2 A. I do. The gray area that you see in the photograph on
3 the left hand side about mid ways up all the way to the top
4 is the flooring of the living room area, the carpet you can
5 see in the other photographs. The blood stain in the
6 middle of the photograph would be low on the wall leading
7 into from the kitchen to the living room area.

8 Q. I'm handed you Two. Is that all?

9 A. You handed me two yes, ma'am.

10 Q. I'm sorry, I'm just trying to keep up.

11 (WHEREUPON: STATE'S EXHIBIT NUMBER EIGHT PREMARKED
12 FOR IDENTIFICATION.)

13 Q. Let me show you State's Exhibit Number Eight A. No
14 Eight. I'm sorry no letter just Eight and ask if you
15 recognize what is depicted in State's Exhibit Number Eight?

16 A. I do recognize the photograph in State's Exhibit
17 Number Eight.

18 Q. In what room in Ms. Moss's house does all this depict?

19 A. The living room area.

20 Q. Does it accurately depict the condition of the living
21 room as you found it?

22 A. It does.

23 Q. Your Honor, at this time we move State's Exhibit
24 Number Eight into evidence.

25 MR. LEMEL: Without objection.

1 THE COURT: It's admitted.

2 (WHEREUPON: STATE'S EXHIBIT NUMBER EIGHT PREVIOUSLY
3 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

4 BY SOLICITOR LIPINSKI:

5 Q. Do I need to take some of the photos away from you?

6 A. Just making sure I don't get them mixed up. I'm good.

7 Thank you.

8 Q. If you could and again it may necessary for you to
9 step off the stand. We see an item marker in the middle of
10 the floor here; Item Number Seven?

11 A. I do.

12 Q. And Item Number Seven, your Item Number Seven would
13 have been what where; are you aware?

14 A. This would have been my Item Number Seven.

15 Q. Right but what is that?

16 A. Item Number Seven is a robe, a bath robe with red
17 stains.

18 Q. And we previously talked about State's Exhibit Number
19 and your Item Number Six. Can you see it from behind the
20 recliner in this photograph?

21 A. You can. The piece we just previously discussed?

22 Q. Yes.

23 A. Is about mid ways in the photograph half way over and
24 a little bit more than half way up next to the recliner
25 that you see in the middle of the photograph.

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1 Q. Almost directly behind what would be considered the
2 recliner?

3 A. Correct.

4 Q. And then once again we see a rug in between the living
5 room and the kitchen area that we just saw near the blood
6 stained photographs that we just looked at?

7 A. That is correct.

8 Q. So they would have been in that general vicinity of
9 that blue rug?

10 A. That is correct.

11 (WHEREUPON: STATE'S EXHIBIT NUMBER SEVEN PREMARKED
12 FOR IDENTIFICATION.)

13 Q. I'm showing you what's been previously marked for
14 identification purposes as State's Exhibit Number Seven,
15 also your Item Number Seven, and ask you if the outside of
16 that box denotes whether or not that is a bathrobe you
17 collected from Ms. Moss's living room floor?

18 A. It does. It's written in my hand writing as I labeled
19 it. Bathrobe with red stain located victim's living room.

20 Q. And did you collect that item?

21 A. I collected this item yes, ma'am.

22 Q. And turned it into property and evidence?

23 A. I did.

24 Q. Your Honor, at this time the State would move State's
25 Exhibit Number Seven into evidence.

1 MR. LEMEL: Without objection, Your Honor.

2 THE COURT: It's admitted.

3 (WHEREUPON: STATE'S EXHIBIT NUMBER SEVEN PREVIOUSLY
4 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

5 Q. If you could open that box and display that item to
6 the jury.

7 (WITNESS OPENING EVIDENCE BOX.)

8 Q. Madame Clerk, could you bring up the lights so they
9 can see that item.

10 (CLERK OF COURT BRIGHTENED COURTROOM LIGHTS.)

11 (WITNESS DISPLAYED ITEM TO JURY.)

12 Q. Thank you, Agent Tolson.

13 (WHEREUPON: STATE'S EXHIBIT NUMBER FOURTEEN PREMARKED
14 FOR IDENTIFICATION.)

15 Q. Let me show you what's been previously been marked as
16 State's Exhibit Number Fourteen and ask you if you
17 recognize what is depicted in that photograph?

18 A. I do recognize what is depicted in this photograph.

19 Q. And is this yet again an area of evidence collection
20 inside of Ms. Moss's house?

21 A. It is. On that diagram it would be in the top right
22 corner of that diagram.

23 Q. What room?

24 A. Bathroom area.

25 Q. And does it accurately depict the condition of the

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1 bathroom in which you found it?

2 A. It does.

3 Q. Your Honor, at this time the State would move State's

4 Exhibit Number Fourteen into evidence.

5 MR. LEMEL: No objection, Your Honor.

6 THE COURT: It's admitted.

7 (WHEREUPON: STATE'S EXHIBIT NUMBER FOURTEEN

8 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

9 BY SOLICITOR LIPINSKI:

10 Q. And in State's Exhibit Number Fourteen we see your

11 Item Number Thirteen depicted in the photograph?

12 A. Correct.

13 Q. And in particular what is the piece of significant

14 evidence in this photograph that you are collecting?

15 A. The red stained wash cloth located in the sink.

16 (WHEREUPON: STATE'S EXHIBIT NUMBER THIRTEEN PREMARKED

17 FOR IDENTIFICATION.)

18 Q. Let me show you your Item Number Thirteen that's also

19 been marked for identification purposes as State's Exhibit

20 Number Thirteen and ask you if the handwriting on the

21 outside of that box indicates whether or not that is the

22 wash cloth you collected from the sink?

23 A. It is my handwriting. It does indicate that I

24 collected this white wash cloth from the rear bathroom of

25 the victim's residence.

1 Q. You would have preserved it in that condition and
2 placed it into property and evidence?

3 A. Correct.

4 Q. Your Honor, at this time State moves State's Exhibit
5 Number Thirteen into evidence.

6 MR. LEMEL: Without objection, Your Honor.

7 THE COURT: Admitted.

8 (WHEREUPON: STATE'S EXHIBIT NUMBER THIRTEEN
9 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
10 BY SOLICITOR LIPINSKI:

11 Q. Thank you, Agent. You indicated that you collected
12 some dentures on the exterior of the residence; on the
13 covered porch of the residence?

14 A. That is correct.

15 Q. Did you collect any other items outside or on the
16 covered porch area? And if you need to refer to your notes
17 please do so.

18 A. Do you want me to just state the items that I
19 collected on the outside porch area?

20 Q. Yes. I believe pointing at the diagram that would be
21 Items One, Two and Sixteen.

22 A. Item Number One is the denture plate. Item Number Two
23 is the swab of red stain which appeared to be blood from
24 the door molding. And Item Number Sixteen would be a
25 wooden stick with a red stain.

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1 (WHEREUPON: STATE'S EXHIBIT NUMBER FIFTEEN PREMARKED
2 FOR IDENTIFICATION.)

3 Q. Let me show you what's been previously marked as
4 State's Exhibit Number Fifteen and ask you if this
5 photograph indicates the position of that wooden stick that
6 you collected?

7 A. It does.

8 Q. As to where you found it on the covered porch area?

9 A. Correct.

10 Q. Your Honor, at this time the State would move State's
11 Exhibit Number Fifteen into evidence.

12 MR. LEMEL: Without objection, Your Honor.

13 THE COURT: It's admitted.

14 (WHEREUPON: STATE'S EXHIBIT NUMBER FIFTEEN PREVIOUSLY
15 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

16 BY SOLICITOR LIPINSKI:

17 Q. And you collected Item Number Sixteen?

18 A. I did.

19 Q. Mr. Lemel, do you have any objection to Item Number
20 Sixteen?

21 MR. LEMEL: No.

22 (WHEREUPON: STATE'S EXHIBIT NUMBER SIXTEEN, PREMARKED
23 FOR IDENTIFICATION.)

24 BY SOLICITOR LIPINSKI:

25 Q. Investigator Tolson, let me show you State's Exhibit

1 Number Sixteen -- I also believe your Item Number Sixteen
2 -- and ask if that is the stick that you collected from the
3 porch area of Ms. Moss's residence?

4 A. It is.

5 Q. And if you could take that out of the plastic folder
6 and show that to the jury.

7 (WITNESS REMOVED EXHIBIT FROM PLASTIC FOLDER AND
8 PUBLISHED TO THE JURY.)
9 BY SOLICITOR LIPINSKI:

10 Q. If you can are there any irregularities in the stick
11 or markings that indicate it's origin? Does it appear to
12 be a baseball bat versus any other type of stick?

13 A. Because of the knotting and the indentations I don't
14 know what you would call those but it appears to me to be
15 part of a tree - tree branch.

16 Q. Is there something carved into the branch itself?

17 A. Two letters which appear to be the letter B and O.

18 Q. Is there any knots on other specific areas on the
19 branch?

20 A. There is a defined notch knot - this portion right
21 here at the branch.

22 Q. And did you see any possible red areas in this branch
23 that you would have swabbed or done any photo analyses on?

24 A. I did.

25 Q. And if you could just briefly describe to the jury how

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1 you processed this piece of evidence?

2 A. There was a small area on this branch that I did see a
3 red stain. It was not very very visible but I took
4 distilled water and a swab apply water to the swab to rub
5 the stain into the swab to submit it for testing at SLED.

6 Q. And what is the significance of using the distilled
7 water?

8 A. Well sterile water that doesn't contain any
9 contaminants and it would just allow whatever it is that
10 you are trying to soak up to soak up without any
11 contamination.

12 Q. If you could place the stick back in that plastic bag.

13 (WITNESS RETURNED EVIDENCE TO PLASTIC BAG.)

14 Q. And, Your Honor, I did not take it off my list but I
15 believe Mr. Lemel had no objection I would like to move
16 this into evidence if I have not already but I think I did.

17 THE COURT: Which one?

18 SOLICITOR LIPINSKI: Number Sixteen the stick. I
19 thought I had but I didn't check it off.

20 MR. LEMEL: No objection to its admission, Your Honor.

21 THE COURT: It's admitted.

22 (WHEREUPON: STATE'S EXHIBIT NUMBER SIXTEEN PREVIOUSLY
23 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

24 BY SOLICITOR LIPINSKI:

25 Q. The Court's indulgence for just one moment.

1 Yea, please dim the lights one more time.

2 I'm showing you what's been previously marked and
3 admitted as State's Number Fifteen. Again you may need to
4 come off the witness chair in order to demonstrate. Point
5 out where the stick was located when you got to the crime
6 scene.

7 A. This picture -- this picture is taken from the
8 opposite side of what most of the pictures were taken of
9 this deck. The stick is right here. The door -- the
10 double French doors are right here. And the actual main
11 entrance to the deck is on the other side. It would be on
12 the other side of this picture.

13 Q. Let me draw your attention -- is there a stain in the
14 bottom corner of that?

15 A. Right here.

16 (WITNESS INDICATED TO PHOTO.)

17 Q. Thank you. Thank you, Detective.

18 Can you bring up the lights one more time please?

19 (CLERK OF COURT BRIGHTENED COURTROOM LIGHTS.)

20 BY SOLICITOR LIPINSKI:

21 Q. I'm just zooming in on State's Exhibit Number Two to
22 make it a little bit more readily available to the jury.
23 If you could just go through the Legend as it relates to
24 the items that you collected. Item Number One would have
25 been the denture plate that you collected; correct?

- 1 A. That is correct denture plate.
- 2 Q. And Item Number Two was?
- 3 A. Swab of red stain.
- 4 Q. And that was from the door?
- 5 A. The door area.
- 6 Q. And Item Number Three?
- 7 A. Another swab of red stain.
- 8 Q. And was that near the rug we saw or mat that we saw in
- 9 the kitchen floor? If you need to refer to your notes
- 10 please do so.
- 11 A. Thank you. It's a swab of red stain from the kitchen
- 12 floor area Number Three.
- 13 Q. And Item Number Four?
- 14 A. Swab of red stain on the kitchen floor near the
- 15 laundry room.
- 16 A. And Item Five?
- 17 A. Item Five was a swab of the suspected vomit.
- 18 Q. Item Six?
- 19 A. Is the red stained white towel.
- 20 Q. And this is moving into the living room area?
- 21 A. Correct near the vacuum cleaner near the items of
- 22 clothing.
- 23 Q. Do you have that diagram in front of you?
- 24 A. Yes, ma'am.
- 25 Q. I am going to move State's Exhibit Number Two up so

1 they can see those numbers. But if you could go through
2 the legend on the bottom part of that diagram as it relates
3 to Item Number Seven.

4 A. Seven would be the bath robe with the red stains
5 located about in the middle of the living room.

6 Q. And Number Eight?

7 A. Number Eight would be a swab of red stain that I
8 collected from the bedroom carpet.

9 Q. And Item Number Nine?

10 A. Item Number Nine are some hair clippings that I
11 collected from bedroom floor.

12 Q. And Item Number Eleven?

13 A. A Budweiser beer can that was on top of the chest of
14 drawer's in the victim's bedroom.

15 Q. Item Number Twelve?

16 A. I took a swab of a red stain on the floor of the rear
17 bedroom.

18 Q. Item Number Thirteen?

19 A. A white wash cloth with red stains from the rear
20 bathroom.

21 Q. And the other items on the list. I apologize.

22 A. Seventeen?

23 Q. Yes.

24 Q. The green blouse with the red stain that we discussed
25 earlier in the photographs found on the kitchen floor near

1 the laundry room.

2 Q. Let me go back down I apologize. You said Item Number
3 Seventeen would have been in that laundry room entrance?

4 A. Correct.

5 Q. And Item Twenty-One behind the couch?

6 A. Item Twenty-One was found near Item Number Six near
7 the vacuum cleaner the white underwear and the green
8 shorts.

9 Q. Let me show you what's been previously marked -- we
10 will do a few more items in this house again trying to
11 minimize turning the lights on and off. Did you have the
12 occasion to go next door to [REDACTED] [REDACTED]?

13 A. I did.

14 Q. What was the purpose of going next door to that
15 residence?

16 A. It was our understanding and indication at the time
17 that the suspect lived at that residence and had went to
18 that residence after the assault.

19 Q. And what did you do when you got there? Did you
20 similarly process the crime scene?

21 MR. LEMEL: Your Honor, I am going to object at this
22 time to any evidence gathered at [REDACTED] [REDACTED] pursuant
23 to being previously argued this being before the search
24 warrant.

25 THE COURT: Over ruled.

1 BY SOLICITOR LIPINSKI:

2 Q. You had the occasion to go over to [REDACTED] to
3 process that crime scene again?

4 A. I did.

5 Q. And did you take photographs of the items that you
6 collected?

7 A. Investigator Bagwell would have taken those
8 photographs as well but he was there with me.

9 Q. The Court's indulgence for just one moment.

10 And when you went over there was it also a single
11 family dwelling?

12 A. That is correct single story.

13 Q. Similar clean condition?

14 A. Yes, ma'am.

15 Q. And when you get over there do you take anyone else
16 with you to help you identify a piece of evidence?

17 A. I believe Mr. Rusty Berard was there.

18 Q. And is he there to help orient you to the areas of the
19 house that may or may not be shared or occupied by Mr. Adam
20 Berard?

21 A. He did. Whose bedroom is whose; where the common
22 areas are; whose clothing might be whose and what not.

23 Q. Did you ever have the occasion to speak with his
24 girlfriend Ms. Meghan Hall as well?

25 A. I believe she was with him yes, ma'am.

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1 (WHEREUPON: STATE'S EXHIBIT NUMBER TWENTY-FOUR
2 PREMARKED FOR IDENTIFICATION.)

3 Q. And let me show you what's been previously marked for
4 identification purposes as State's Exhibit Number Twenty-
5 Four. Wait, slow down. I am going to ask you if this is
6 a photograph you took of the residence at [REDACTED]?

7 A. It is a photograph taken at that residence yes, ma'am.
8 It's a little bit hard without the lights being on.

9 Q. Right. Does it accurately depict the condition of the
10 house as you located it on the day in question?

11 A. It does.

12 Q. Your Honor, at this time the State would move State's
13 Exhibit Number Twenty-Four into evidence.

14 MR. LEMEL: Without objection, Your Honor.

15 SOLICITOR LIPINSKI: We will bring up an additional
16 copy. That may be easier to see, Investigator Tolson.

17 I'm sorry is this in evidence. I apologize I did not
18 hear Your Honor. I just want to make sure before I show it
19 to the jury.

20 THE COURT: I'm sorry, what?

21 SOLICITOR LIPINSKI: I moved State's Exhibit Number
22 Twenty-Four into evidence.

23 THE COURT: No objection?

24 MR. LEMEL: No objection, Your Honor.

25 THE COURT: It's admitted.

1 SOLICITOR LIPINSKI: Thank you.

2 (WHEREUPON: STATE'S EXHIBIT NUMBER TWENTY-FOUR
3 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
4 BY SOLICITOR LIPINSKI:

5 Q. Was there anything beeping or did you hear any alarms
6 when you went about the residence?

7 A. If I remember there was a beep coming from this
8 particular piece of electronics.

9 Q. And did this in any way relate to you the defendant's
10 ankle bracelet if you know?

11 A. I was later informed by other officers it was.

12 Q. The Court's indulgence one moment, Your Honor.

13 Let me show you what's been previously marked and
14 admitted as State's Exhibit Number Twenty-Three and ask if
15 you took this photograph?

16 A. I believe Investigator Bagwell would have taken this
17 photograph.

18 Q. Did you witness what is depicted in the photograph?

19 A. I did.

20 Q. And is this again is the note from Russell's parents
21 indicating they would be out of town?

22 A. It does appear to be and it's a note to Russ appearing
23 to be from the parents yes, ma'am.

24 Q. Thank you. Let me show you what's been previously
25 marked and admitted as State's Exhibit Number Twenty-Five

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1 A, B and C and ask you -- again these have been admitted --
2 these are photographs of clothes you collected in the [REDACTED]
3 [REDACTED] residence?

4 A. They are.

5 Q. And you stated that Mr. Berard and Ms. Hall came with
6 you -- and let's be clear Mr. Russell Berard to be clear?

7 A. Correct.

8 Q. Who came to indicate which items of clothes to
9 collect?

10 A. Which items to identify the owner of the items yes,
11 ma'am.

12 Q. And did you collect those items of clothing?

13 A. I did.

14 (WHEREUPON: STATE'S EXHIBIT NUMBER TWENTY-EIGHT
15 PREMARKED FOR IDENTIFICATION.)

16 BY SOLICITOR LIPINSKI:

17 Q. Let me show you what's been marked as State's Exhibit
18 Number Twenty-Eight. I believe additionally again this is
19 your Item Number Twenty-Eight and ask what is contained
20 within this box relating to the photograph depicted?

21 A. Item Twenty-Eight, my Twenty-Eight; State's Exhibit
22 Twenty-Eight is in my handwriting stating that I collected
23 two pair of blue underwear, one pair of camouflage shorts
24 with a black belt and a gray case.

25 Q. Let me bring up State's Twenty-Five A.

1 And does this photograph State's Twenty-Five A
2 correlate to your item in State's Exhibit Number Twenty-
3 Eight?

4 A. It does.

5 Q. And you collected that clothing?

6 A. I did.

7 Q. And placed it into property and evidence?

8 A. I did.

9 Q. Your Honor, at this time we move State's Exhibit
10 Number Twenty-Eight into evidence.

11 MR. LEMEL: Your Honor, subject to my previous
12 objection.

13 THE COURT: Which is Twenty-Eight now?

14 SOLICITOR LIPINSKI: Twenty-Eight would be the
15 defendant's clothes taken from the residence.

16 THE COURT: The objection was just as to the shirt,
17 correct?

18 MR. LEMEL: Your Honor, the objection was as to all
19 clothing gathered pursuant to a search warrant.

20 THE COURT: Search warrant objection?

21 MR. LEMEL: Yes, sir.

22 THE COURT: Over ruled.

23 (WHEREUPON: STATE'S EXHIBIT NUMBER TWENTY-EIGHT
24 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
25 BY SOLICITOR LIPINSKI:

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1 Q. Now Item Number Twenty-Eight has been moved into
2 evidence if you can open that box and display those items
3 for the jury?

4 A. The package I am opening now I labeled another envelop
5 within this box as two pair of blue underwear found in the
6 middle bedroom floor of the suspects residence.

7 (WITNESS PUBLISHED EVIDENCE TO JURY.)

8 Q. Thank you, Agent Tolson.

9 A. In the bag I made a note in my handwriting one pair of
10 camouflage shorts with a black belt and a gray case.

11 Q. Thank you, Investigator Tolson. Did you similarly
12 have the occasion to collect from Investigator or Detective
13 Yeager any other individual items clothing from the
14 defendant that were taken at some other location?

15 A. I did. I received from Deputy Kavin Gwinn what I
16 labeled as - -

17 Q. I believe your Item Twenty-Seven.

18 A. Item Twenty-Seven an orange T shirt, a gray T shirt, a
19 pair of blue jeans, one sock and a pair of boxers that
20 Deputy Gwinn retrieved from the defendant at the York
21 County Detention Center.

22 Q. Now let me show you what's been previously marked for
23 identification as State's Exhibit Number Twenty-Seven. You
24 don't necessarily need to go through these clothes but.
25 confirm this bag contains those contents; the outside

1 labeling coincides with that label that you saw there?

2 A. It does. The description on this label matches the
3 description that I indicated on my paper work. It has
4 Kavin Gwinn's signature indicating that he signed it over
5 to me on June 8TH, 2008 at 5:12 a.m..

6 Q. Your Honor, at this time would we move State's Exhibit
7 Number Twenty-Seven into evidence.

8 MR. LEMEL: May we approach very briefly?

9 (BENCH CONFERENCE AT 12:10 P.M. OFF THE REORD OUT OF
10 THE HEARING OF THE JURY.)

11 THE COURT: All right consistent with the discussion
12 that we had yesterday I believe and the stipulation between
13 the State and the Defendant that exhibit is admitted.

14 SOLICITOR LIPINSKI: Thank you, Your Honor.

15 (WHEREUPON: STATE'S EXHIBIT NUMBER TWENTY-SEVEN
16 PREVIUOLSY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
17 BY SOLICITOR LIPINSKI:

18 Q. Let me show you a copy of your report and indicate
19 whether or not this indicates that you did anything in
20 terms of transporting this sexual assault kit to any
21 particular location for further analysis?

22 A. This report written by me on June 11TH of 2008
23 indicates that on June 10TH of 2008 I transported the
24 criminal sexual conduct kit associated with this case to
25 the State Law Enforcement Division for analysis.

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1 Q. Did you also have any the occasion to take any known
2 or present during the taking of any known blood or other
3 DNA samples from the defendant Mr. Berard?

4 A. I was present.

5 Q. And did you draw the blood or take the samples
6 yourself or was medical personnel involved?

7 A. Medical personnel was involved. I escorted an
8 employee and met with Mr. Berard where the nurse drew blood
9 from Mr. Berard's arm in my presence handed me the vials.
10 I collected what we refer to as buccal swabs, cheek swabs
11 from Mr. Berard.

12 Q. And would those have been your Items Number Thirty--
13 Seven and Thirty-Eight?

14 A. Thirty-Seven being the two buccal swabs from Mr.
15 Berard. Thirty-Eight being one lavender top tube of blood
16 from Adam Berard.

17 Q. If I could I am going to need you to open -- SLED has
18 resealed these two items; correct?

19 A. That is correct.

20 Q. And if I could get you to open that and authenticate
21 them then we will mark them individually as State's Number
22 Thirty-Seven and Thirty-Eight.

23 (WITNESS OPENED SLED SEALED EVIDENCE.)

24 Q. And does State's Thirty-Seven bear your signature
25 indicating that you collected those items?

1 A. State Thirty-Seven two buccal swabs from Adam Berard
2 indicate that I collected those and turned them into York
3 County evidence.

4 Q. And Thirty-Eight as well?

5 A. And Thirty-Eight in my writing I indicate one lavender
6 top tube of blood from Adam Berard collected by me and
7 submitted to the York County evidence.

8 Q. You would have just placed those into Property and
9 Evidence?

10 A. Yes I would have placed those almost immediately into
11 Property and Evidence.

12 Q. And you took some other swabs in this particular case
13 and obtained some other DNA samples. Did you have the
14 occasion to meet with Mr. Robert Moss - - -

15 A. I did.

16 Q. - - - Ms. Moss's husband?

17 A. Correct.

18 Q. And did you obtain a DNA sample from him?

19 A. I did.

20 Q. Let me show you what's been marked for identification
21 purposes only at this time as State's Exhibit Number
22 Thirty-Nine and ask you if this contains the swabs or
23 samples that you collected from Mr. Louder?

24 A. It does indicate that I obtained two buccal swabs from
25 Mr. Louder on August 31ST of this year.

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1 Q. I'm drawing your attention back to State's Exhibit
2 Number Sixteen the wooden stick. Did you also attempt to
3 swab that item to see if you could determine if there was
4 any blood on it?

5 A. I did.

6 Q. Let me show you what's been previously marked for
7 identification purposes only Item Number Thirty-Six. Can
8 you read the markings on the envelope within that? Does
9 that indicate that that contains swabs that you said were
10 from the branch?

11 A. It does indicate that I took a swab from the branch
12 that is correct. Submitted the swab to evidence.

13 Q. And if I could I draw your attention back. You
14 completed initially a summary of your activities when you
15 collected the evidence out there at the two Zinker Road
16 locations?

17 A. That is correct.

18 Q. And if I could you have a two page pretty detailed
19 report. If I could draw your attention to that would that
20 help your recollection?

21 A. It would.

22 Q. And towards the bottom of the page in what we saw in
23 that diagram is that you collected some Budweiser beer
24 cans?

25 A. I did.

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CROSS EXAMINATION BY MR. LEMEL

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1 Q. And if you could indicate where those were located in
2 the house?

3 A. The Budweiser beer cans were collected from the
4 victim's bedroom chest of drawers; the front and side yard,
5 out on the counter near the stove where the beer cans were
6 collected from.

7 Q. Your Honor, that is all we have of Agent Tolson at
8 this time.

9 CROSS EXAMINATION

10 DETECTIVE AGENT TOLSON BY MR. LEMEL:

11 Q. Good afternoon, Agent Tolson.

12 A. Good afternoon.

13 Q. Now, Agent Tolson, you detailed earlier in your
14 testimony sort of your travels through the various agencies
15 that you have worked for in your career; correct?

16 A. That is correct.

17 Q. During that entire time basically you've been a
18 licensed patrol officer or certified law enforcement
19 officer, correct?

20 A. That is correct.

21 Q. Basically you've just occupied various jobs with that
22 understanding in that capacity?

23 A. Yes, sir.

24 Q. And as time has gone on in your career basically and
25 you've developed this specialty in this field of forensics?

1 A. That is correct.

2 Q. Now forensics in the legal and police community has a
3 very specific meaning does it not?

4 A. It does.

5 Q. Forensics deals with the preservation and
6 interpretation of physical evidence essentially?

7 A. Correct.

8 Q. Is there anything you would add to that in the
9 forensic field?

10 A. Well science law -- science as it applies to the law
11 basically.

12 Q. And when you say forensic science forensic science
13 means a little bit different than sort of biological
14 science or physics or chemistry; right?

15 A. I agree yes, sir.

16 Q. This is more about collecting evidence and trying to
17 interpret it as opposed to like experiments in a lab like
18 the majority of a real sort of what we call hard sciences
19 are?

20 A. I agree yes, sir.

21 Q. Okay. So we are talking about forensic science we are
22 still talking about this process as opposed to something
23 like chemistry, biology or physics?

24 A. Yes, sir.

25 Q. And over the course of time basically you had gotten

1 training primarily in how to collect and preserve this
2 evidence?

3 A. Correct.

4 Q. And at certain times you may even get training in
5 somewhat of an interpretation of evidence.

6 A. That is correct.

7 Q. For example there's different things that you can do
8 to interpret how blood is sitting?

9 A. Correct.

10 Q. Whether it's a splatter or a smear or a transfer
11 that's all stuff that is part of this interpretation part
12 of the science as it were?

13 A. Yes, sir.

14 Q. But it is an interpretation; right?

15 A. It is an interpretation.

16 Q. There is no exact answer in anything like this. It's
17 basically educated suppositions, educated conclusions?

18 A. Correct.

19 Q. Okay. Now you yourself were summonsed out to the
20 scene of Zinker Road; correct?

21 A. Yes, sir.

22 Q. And involved Investigator Bagwell as you got there so
23 obviously it was a two man job?

24 A. Yes, sir.

25 Q. And before you got there the incident itself was

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1 complete?

2 A. Correct.

3 Q. And the incident was complete to your understanding
4 before other officers arrived as well?

5 A. Correct.

6 Q. Now these other officers are trained to preserve the
7 scene as they see it when they arrive basically?

8 A. That is correct.

9 Q. But anything that may have been modified either during
10 the incident or after the incident before the officers
11 arrived you wouldn't be able to interpret that?

12 A. That is correct.

13 Q. For example if a piece of clothing was moved from one
14 spot to another before a police officer arrived for
15 whatever reason you would just be subject to say when I got
16 there the clothing was right there?

17 A. That is correct.

18 Q. If someone's hands were washed in a totally different
19 room before everything else occurred that would just be
20 something that you can document there might be evidence of
21 a washing but you can't say how it happened or why it
22 happened it was just there when you got there?

23 A. Correct.

24 Q. So when for example we see things such as the wash
25 cloth that was in the upper right hand corner of the

1 diagram in the bathroom you don't know how it got there?

2 A. No, sir.

3 Q. You don't know who put it there?

4 A. I do not.

5 Q. You don't know how that blood happened to get from the
6 location where we suspected the incident happened over to
7 where the bathroom is?

8 A. No, sir

9 Q. Which is a fairly substantial distance?

10 A. Fairly substantial being a relative term.

11 Q. Being a relative term. Let me put it this way. There
12 is no way that it can just magically fly over there? We
13 are talking about through several twist and turns; doors
14 and things like that?

15 A. No, sir.

16 Q. Its not that it incidentally got flung off in the
17 middle of the assault and happen to land there?

18 A. I agree yes, sir.

19 Q. And you can't explain to us how it happened?

20 A. No.

21 Q. You can just document that it was there by the time
22 you got there?

23 A. Correct.

24 Q. And that is the limitation of everything in this case
25 that you have?

1 A. Limitations?

2 Q. Well the limitation being that you can only tell us
3 what was there at the point in time when another officer
4 decided to start securing the scene?

5 A. That is correct.

6 Q. So for example Ms. Moss was moved around inside the
7 house and her clothing was moved around inside the house
8 before you got there you can't do anything about that?

9 A. No, sir.

10 Q. And therefore what you photographed is only the
11 subsequent to that movement?

12 A. Correct. If any movement occurred that's correct.

13 Q. For example if her robe was moved around - - -

14 A. That is correct.

15 Q. - - - or taken from a different room where she was
16 moved around that just happened to be where it were you got
17 there?

18 A. That is correct.

19 Q. It doesn't mean that it was at all there during the
20 incident of the assault?

21 A. No it does not.

22 Q. All right. So you over the course of this process
23 collected up all of this evidence?

24 A. Yes, sir.

25 Q. And you document where you take it to and what you do

1 with it?

2 A. That is correct.

3 Q. And documentation primarily is that you put these
4 things into evidence here at the Moss Justice Center in the
5 sheriff's office basically?

6 A. Yes, sir.

7 Q. And that includes both the photos which are kept on a
8 disc or a computer file?

9 A. That's correct.

10 Q. I'm sorry.

11 A. A CD actually is burnt of the photographs that are
12 taken that's also submitted into evidence and control just
13 as any other piece would be.

14 Q. And the other actual physical evidence the clothing,
15 the swabs, the cloth all those sorts of things?

16 A. That is correct.

17 Q. And they are all kept in that evidence storage unless
18 they are taken somewhere else for processing?

19 A. That is correct. They are all submitted to a secure
20 environment either being the evidence department directly
21 or in some cases if the evidence is wet it is put into a
22 controlled drying chamber where it is dried for a period of
23 time and then eventually all submitted into evidence and
24 control.

25 Q. So absence that process to make sure there is no

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1 biological contamination going on?

2 A. Right.

3 Q. Everything goes directly into the locker the secured
4 storage?

5 A. Yes, sir.

6 Q. It just may take something a little bit of time to
7 make sure that there is no blood leaking through or mold
8 developing - - -

9 A. That is correct.

10 Q. - - - or anything like that?

11 A. Yes, sir.

12 Q. And that's the purposes of the drying purposes?

13 A. Yes, sir.

14 Q. Now once these items are in the custody of the
15 forensic service unit you guys control the inventory stuff
16 as well or is that somebody else?

17 A. That is the responsibility of the sheriff's office
18 personnel.

19 Q. But you guys have access to it if you need to to have
20 further processing done?

21 A. Yes, sir.

22 Q. And you can do that processing sort of on your own
23 initiative or under the instructions from another agency
24 for example?

25 A. Correct.

- 1 Q. The solicitor's office can instruct you to do stuff?
- 2 A. Correct.
- 3 Q. And obviously you work closely with the solicitor's
- 4 office in the preparation of cases?
- 5 A. Yes, sir.
- 6 Q. And they may come to you and say we want this one or
- 7 we want that done subsequently?
- 8 A. Correct.
- 9 Q. Okay. Now there were a number of actual physical
- 10 evidence that you said you did take from the residence
- 11 correct?
- 12 A. From Ms. Moss's residence?
- 13 Q. Ms. Moss's residence initially.
- 14 A. Yes, sir.
- 15 Q. Well both residences actually?
- 16 A. Correct.
- 17 Q. Now the first one that you identified was Number
- 18 Seventeen the green blouse. Do you remember that?
- 19 A. Okay. Yes, sir
- 20 Q. What's been identified by Number - what's been
- 21 identified here as Number Seventeen?
- 22 A. Okay.
- 23 Q. Not the picture but the actual blouse itself?
- 24 A. Okay.
- 25 Q. Let me finish.

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- 1 A. Yes, sir.
- 2 Q. You took that into evidence and placed it into storage
- 3 here back in June; right?
- 4 A. June of 2008.
- 5 Q. Right.
- 6 A. Yes, sir.
- 7 Q. Since June of '08 where has it been?
- 8 A. To my recollection in evidence.
- 9 Q. So it wasn't taken anywhere for any sort of processing
- 10 or submitted anywhere?
- 11 A. Not to my knowledge.
- 12 Q. And you would be the one to know you are the forensic
- 13 services head man; right?
- 14 A. Yes, sir.
- 15 Q. And you are or you were back then I guess now you are
- 16 working for the solicitor's office?
- 17 A. Yes, sir.
- 18 Q. And you are the forensic services lead investigator
- 19 for this case?
- 20 A. As far as forensics is concerned physical evidence
- 21 yes, sir.
- 22 Q. So if something was taken out and processed you should
- 23 know about it; right?
- 24 A. I should but I can't say that it always happens that
- 25 way.

1 Q. Okay. And to your knowledge since that point in time
2 since it was placed into evidence basically it wasn't
3 opened up again until this case come about; right?

4 A. Yes, sir.

5 Q. Some eighteen months later?

6 A. Yes, sir.

7 Q. Okay. Number Twenty-One; State's Number Twenty-One
8 the shorts and underwear.

9 A. White underwear; green shorts yes, sir.

10 Q. Those were placed into evidence back in June of '08?

11 A. Yes, sir.

12 Q. And were not taken out again until the trial of this
13 case?

14 A. Correct.

15 Q. Some eighteen months later?

16 A. Yes, sir.

17 Q. Number Six; State's Number Six the towel that was
18 taken.

19 A. White stained white towel yes, sir.

20 Q. Was placed into evidence back in June?

21 A. Yes, sir.

22 Q. And was not taken out of evidence eighteen months
23 basically since until this case was entered

24 A. To my knowledge that's correct yes, sir.

25 Q. Number Seven the robe.

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- 1 A. Bathrobe with red stains yes, sir.
- 2 Q. State's Number Seven - - -
- 3 A. Yes, sir.
- 4 Q. - - - was placed into evidence back in June of '08?
- 5 A. Yes, sir.
- 6 Q. And basically hasn't been out of that location until
- 7 this case was imminent some eighteen months later?
- 8 A. Yes, sir.
- 9 Q. Wasn't sent any where for any sort of processing or
- 10 anything done to it?
- 11 A. That is correct.
- 12 Q. And Number Thirteen the wash cloth.
- 13 A. Yes, sir.
- 14 Q. Taken into evidence back in June of '08?
- 15 A. Yes, sir.
- 16 Q. Placed into secure storage?
- 17 A. Yes, sir.
- 18 Q. Had not been taken out again until eighteen months
- 19 since?
- 20 A. Yes, sir.
- 21 Q. Basically other evidence was taken indicating between
- 22 [REDACTED] and the residence of Mr. Berard?
- 23 A. That is correct.
- 24 Q. That would have included Number Twenty-Eight two pairs
- 25 of underwear?

1 A. That is correct.

2 Q. And you've got two pair of underwear from the floor at
3 that point in time?

4 A. Yes, sir.

5 Q. And we saw on the picture where there were a couple of
6 pair of underwear on the floor right?

7 A. That is correct.

8 Q. And those are the two pairs you gathered up?

9 A. Yes, sir.

10 Q. Okay. Those were taken into evidence back in June of
11 '08?

12 A. Yes, sir.

13 Q. Placed into a secure storage at that point in time?

14 A. Yes, sir.

15 Q. And they have not been taken out until eighteen months
16 later when this case was entered?

17 A. Yes, sir.

18 Q. No processing has been done to them?

19 A. No, sir.

20 Q. No testing to see if they had in fact been worn by Mr.
21 Berard?

22 A. Correct.

23 Q. Contained any evidence of any blood, semen, any sort
24 of fluids of any individual?

25 A. Correct.

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- 1 Q. The shorts that were taken into evidence -- I do not
2 have that number. I believe it was also part of Number
3 Twenty-Eight taken in that day?
- 4 A. That is correct.
- 5 Q. Okay. Of Mr. Berard?
- 6 A. That is correct.
- 7 Q. They were taken in on?
- 8 A. June 8TH of 2008.
- 9 Q. 2008. Placed in storage - - -
- 10 A. For eighteen months.
- 11 Q. - - - they have not been removed until we came to this
12 case today?
- 13 A. Correct.
- 14 Q. And there has been no testing of them?
- 15 A. No, sir.
- 16 Q. Nothing to see if there was any blood on them?
- 17 A. No, sir.
- 18 Q. Semen?
- 19 A. No, sir.
- 20 Q. Any other sort of fluids?
- 21 A. Any other sort of fluids no, sir.
- 22 Q. They just been sitting in storage this whole time?
- 23 A. Yes, sir.
- 24 Q. And they could have been tested either of those items
25 we've gone through could have been tested or subject to any

1 examination further at any point in time during this
2 eighteen months?

3 A. Yes, sir.

4 Q. They were there for you all to use?

5 A. They were collected for investigative purposes yes,
6 sir.

7 Q. Okay. Now there were certain things that you went
8 behind and did take in after June 8TH; correct, or
9 submitted after June 8TH?

10 A. There were items that I collected after June 8TH?

11 Q. Yes, sir.

12 A. Yes, sir.

13 Q. One of those that we've talked about was basically
14 what we call a cheek swab or a buccle swab?

15 A. Correct.

16 Q. From Ms. Moss's current husband; correct?

17 A. Mr. Louder yes, sir.

18 Q. Mr. Louder. And you collected that in August?

19 A. August 31ST I think.

20 Q. Of this year 2009?

21 A. That is correct.

22 Q. So that was again a good year after; thirteen months
23 afterwards?

24 A. Correct.

25 Q. And you did that on the instructions of the

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1 solicitor's office?

2 A. That is correct. It was June 29TH of '08.

3 Q. Late June so almost exactly a year later.

4 A. I'm sorry let me get back. June 29TH of '08 was the

5 buccle swabs from Mr. Berard. It was late August of '09

6 from Mr. Louder.

7 Q. Okay. Just to make that clear - - -

8 A. Yes, sir.

9 Q. - - - the swabs we're talking about not from Mr.

10 Berard but from Ms. Moss's current husband?

11 A. That is correct.

12 Q. And again that was a good year a year and a month

13 later?

14 A. Yes, sir.

15 Q. And that was because you needed additional processing

16 at that point in time because of the results had come in

17 from SLED: is that correct?

18 A. That is correct.

19 Q. So in response to the information that you did get in

20 you all went and did further investigation?

21 A. That is correct.

22 Q. And your part of that further investigation is going

23 and collecting these swabs?

24 A. Yes, sir.

25 Q. Also at this same point in time you went and looked

1 back at some of the evidence; right?

2 A. Yes, sir.

3 Q. And at that point in time is when you looked more
4 closely at the stick that we've been talking about that was
5 found?

6 A. That is correct.

7 Q. That being State's Number Sixteen; correct?

8 A. Yes, sir.

9 Q. And that's when you attempted to investigate what you
10 saw as a red stain on that - - -

11 A. Correct.

12 Q. - - - particular item?

13 A. Yes, sir.

14 Q. That was a good year and a month afterwards?

15 A. Yes, sir.

16 Q. Did you do that in August of this year?

17 A. I believe it was around that time yes, sir.

18 Q. Okay.

19 A. Around the same time as the buccle swab of Mr. Louder.

20 Q. And as a result of those two collections you then sent
21 down and request SLED to process them?

22 A. I did.

23 Q. That wasn't the first request you sent for processing
24 the SLED?

25 A. You said it was?

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1 Q. Was not.

2 A. No.

3 Q. In this particular case?

4 A. That is correct.

5 Q. You previously sent down a request for processing back
6 in '08 of the various samples that had been collected
7 pursuant to the sexual assault nurse examiner's kit?

8 A. That is correct.

9 Q. And that was basically a comparison of the samples
10 that were found by the nurse examiner's examination of Ms.
11 Moss?

12 A. Yes, sir.

13 Q. And also the samples that were taken here in York
14 County from Mr. Berard the blood and the buccle swabs that
15 you were present for that those were collected?

16 A. Yes, sir.

17 Q. And those were applied to SLED and you requested that
18 those be processed?

19 A. Those to be compared yes, sir.

20 Q. So the things that were sent to SLED were the various
21 -- basically three individuals?

22 A. Yes, sir.

23 Q. And the stuff from the State?

24 A. Correct.

25 Q. Your swab from the stick?

1 A. Yes.

2 Q. Nothing else?

3 A. No, sir.

4 Q. If you can please bring up Number Fifteen, picture
5 Number Fifteen?

6 Do you have the laser pointer?

7 A. Its right here.

8 Q. All right. The Court's permission if the officer can
9 step down to look at the picture personally?

10 THE COURT: Sure.

11 MR. LEMEL: If the Clerk would dim the lights for us.

12 (CLERK OF COURT DIMMED COURTROOM LIGHTS.)

13 Officer, I am going to ask you on behalf of the court.
14 reporter to keep on what you are doing and let's try to
15 turn a little bit towards her and speak towards her without
16 blocking the jury too much.

17 A. Yes, sir.

18 Q. Now I believe that when you came down the last time
19 that you identified this picture as being of the porch;
20 correct?

21 A. That is correct.

22 Q. And you identified this up here in the upper right as
23 being the French doors?

24 A. That is what I identified then as the French doors
25 which I am looking now was misidentified.

KEVIN TOLSON: CROSS EXAMINATION BY MR. LEMEL

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1 Q. Okay. When you came down and you made that assumption
2 based on what this was this section in the upper left
3 corner was the French doors; correct?

4 A. That is correct.

5 Q. When you examined this again you realized that that is
6 incorrect?

7 A. That it's incorrect.

8 Q. The French doors would actually be here in the lower
9 left hand corner?

10 A. Yes, sir.

11 Q. And the stick was actually found close to that?

12 A. That is correct.

13 Q. So that previous identification you made was
14 incorrect?

15 A. Incorrect yes, sir.

16 Q. You can have a seat then.

17 A. Thank you.

18 Q. You can turn the lights back on and we can take Number
19 Fifteen down.

20 (COURTROOM LIGHTS BRIGHTENED; PHOTO REMOVED FROM
21 OVERHEAD.)

22 Now when you are out there on the scene you are not
23 just looking for blood stains and fluids and some clothing;
24 right?

25 A. That is correct.

1 Q. You are there to document any evidence of any crime
2 that you might see?

3 A. Yes, sir.

4 Q. So you would have examined those French doors that we
5 were just talking about?

6 A. I would have examined those?

7 Q. Looked at them.

8 A. Yes, sir.

9 Q. And you didn't note any damage to those doors?

10 A. No, sir.

11 Q. No panes of glass broken?

12 A. No, sir.

13 Q. No footprints for example showing where they may have
14 been kicked in or something of that nature?

15 A. That is correct.

16 Q. And the lock itself was not broken or did not appear
17 to have been kicked open?

18 A. No it was not.

19 Q. Okay. You said that you found a number of beer cans
20 in the residence?

21 A. That is correct.

22 Q. Do you remember were they open, shut?

23 A. Most of them were open I think with the exception of
24 one which was unopened.

25 Q. Okay. And one of those you found inside the kitchen

KEVIN TOLSON: CROSS EXAMINATION BY MR. LEMEL
REDIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 counter area you said?

2 A. Yes, sir.

3 Q. You don't have a mark on the diagram of where that was
4 but you do recall it was inside the kitchen?

5 A. Yes, sir.

6 Q. And was it standing up right? Did it appear to have
7 been thrown there or placed there?

8 A. If I remember correctly it appeared to have been place
9 there because it was up right.

10 Q. Okay. And who ever obviously was in there they put it
11 down there at some point in time?

12 A. Yes, sir.

13 Q. Whoever was inside the residence put that down?

14 A. That is correct.

15 Q. Okay. No testing was actually done on those cans
16 whatsoever.

17 A. They were not.

18 Q. You didn't try to get any DNA from them or anything of
19 that nature?

20 A. No, sir.

21 Q. I beg the Court's indulgence.

22 Thank you, Investigator Tolson, no further questions.

23 REDIRECT EXAMINATION

24 DETECTIVE KEVIN TOLSON BY SOLICITOR LIPINSKI:

25 Q. You actually -- we didn't ask previously but you had

1 the occasion to examine the scooter that belonged to Mr.
2 Berard?

3 A. Correct.

4 Q. And were you given information that it actually
5 belonged to him?

6 A. Yes, ma'am.

7 Q. And you also stated at some point you collected some
8 clothes. We talked about you took clothes off of Officer
9 Gwinn from the defendant at the hospital?

10 A. Yes, ma'am.

11 Q. Where he was treated also for the cuts to his leg?

12 A. That's correct.

13 Q. Did you receive any information during your
14 investigation the defendant cut himself or was bleeding
15 while he was at Ms. Moss's residence?

16 MR. LEMEL: Your Honor, I don't see how this is in
17 response to anything I asked during my examination.

18 SOLICITOR LIPINSKI: Mr. Lemel brought up some
19 questioning about why certain blood stains were not tested.
20 She was the only one bleeding; I think it is probative as
21 to why those weren't tested and no indication that anyone
22 other than her - -

23 THE COURT: Over ruled.

24 BY SOLICITOR LIPINSKI:

25 Q. Did you receive any information from your

KEVIN TOLSON: REDIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 investigation that anyone other than Ms. Moss was bleeding
2 at her residence?

3 A. I did. I had received information actually had gone
4 to another location documented some items and documented
5 that area which contained blood where Mr. Berard had been
6 shortly after the incident.

7 Q. But that's at the Parker Street location?

8 A. [REDACTED].

9 Q. Do you have any indication from any other witnesses?
10 You say you over heard Detective Miller speaking with
11 Russell Berard that Adam had cut himself prior to leaving
12 Ms. Moss's residence?

13 A. I don't believe I had that information.

14 Q. You obviously collected a significant number of items
15 in this case?

16 A. I did yes, ma'am.

17 Q. And for a case an assault of this kind is that typical
18 or a typical?

19 A. It's typical with the limited amount of information
20 again that I had. My information was assault, serious
21 assault, sexual assault had occurred. We obviously didn't
22 have the benefit of lengthy interviews or detailed
23 information so you try to identify and collect items
24 normally that you wouldn't if you had more information be
25 in that it may turn out later on being important when the

1 investigators do get a chance to do more thorough
2 interviews of witnesses and talk with the victim. You want
3 to tend to collect more rather than less out of the
4 abundance of caution.

5 Q. And that's typical in a case of this nature?

6 A. It is typical.

7 Q. And Mr. Lemel asked you about items that were sent to
8 SLED. Is it typical that you collect all the pieces of
9 evidence in a case and take them all to SLED or let them
10 pick and choose or do they have a priority that they
11 prefer?

12 A. They have a priority. Ideally you would want them to
13 do that. But their acceptance policy is in a case of this
14 nature is what they term as we will work this case from the
15 victim inside out meaning the inside being the inside of
16 the victim's body in the sexual assault and the sexual
17 assault kit and then they work it. They will work that
18 first and they will accept items from there after those
19 results are obtained. .

20 Q. Have you ever been involved in a case where the
21 defense tested evidence?

22 A. I have.

23 Q. I have nothing further, Your Honor.

24 RE CROSS EXAMINATION

25 DETECTIVE KEVIN TOLSON BY MR. LEMEL:

KEVIN TOLSON: RECROSS EXAMINATION BY MR. LEMEL

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1 Q. Now you were told that Ms. Moss herself was bleeding.
2 Obviously somebody was bleeding in there.

3 A. Well it was obvious somebody was bleeding in there. I
4 don't know if anybody ever specifically told me but the
5 assumption was that Ms. Moss was bleeding from the assault
6 yes, sir.

7 Q. And so the clothing that was allegedly worn by an
8 assailant during the assault would be relevant to see
9 whether it picked up blood splatters for example?

10 A. The clothing that the person was wearing at the time
11 of the assault potentially yes.

12 Q. And you said that SLED works as you said from the
13 victim out; inside out?

14 A. That's correct.

15 Q. Basically saying they are going to want to do this
16 base line DNA testing of anything they find there first?

17 A. Yeah they will start with the sexual assault and
18 actually start with the items that were obtained from
19 inside the victim's body and then work out yes, sir.

20 Q. And those did come back?

21 A. They did.

22 Q. And as a result of that you all picked some additional
23 items and then sent it in?

24 A. That's correct.

25 Q. Which would include the DNA from Ms. Moss's husband

1 Mr. Louder?

2 A. Yes, sir.

3 Q. And from the stick?

4 A. That is correct.

5 Q. Nothing else?

6 A. That is correct.

7 Q. Your Honor, the Defense has no further questions of
8 this witness.

9 SOLICITOR LIPINSKI: Nothing further.

10 THE COURT: You can step down, sir.

11 SOLICITOR LIPINSKI: Your Honor, we have one short
12 witness we can do before lunch if you have no objection.

13 THE COURT: That witness can wait until afterwards.
14 That will be better. Let's go ahead and take a lunch
15 break.

16 And I would like for you all to be back in the jury
17 room at two o'clock. Have a nice lunch.

18 (JURY LEAVING COURTROOM FOR LUNCH AT 12:43 P. M.)

19 THE COURT: All right I will see you all just before
20 2:00.

21 SOLICITOR LIPINSKI: Thank you, Your Honor.

22 (COURT RECESSED FOR LUNCH AT 12:44 P.M.)

23 (COURT RECONVENED AT 2:18 P.M.)

24 THE COURT: Be seated.

25 (DEFENDANT ENTERING THE COURTROOM.)

GAR ROLLINS: DIRECT EXAMINATION BY SOLICITOR SIKORA

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1 THE COURT: Bring in the jury.

2 (JURY ENTERING COURTROOM AT 2:19 P.M..)

3 SOLICITOR SIKORA: The State calls Gary Rollins to the
4 stand please.

5 (WHEREUPON: GARY ROLLINS,
6 BEING FIRST CALLED, WAS DULY SWORN AND TESTIFIED AS
7 FOLLOWS:)

8 DIRECT EXAMINATION

9 GARY ROLLINS BY SOLICITOR SIKORA:

10 Q. Sir, would you please state your name and spell your
11 last name for the court reporter?

12 A. My name is Gary Rollins. I spell my last name R-o-l-
13 l-i-n-s.

14 Q. And, Mr. Rollins, where do you work?

15 A. I work for the sheriff's department in the evidence
16 room.

17 Q. Here in York County?

18 A. Yes, ma'am.

19 Q. And how long have you worked there?

20 A. In the evidence room about ten years.

21 Q. Okay. And where did you work before that?

22 A. I have forty-two years in law enforcement.

23 Q. And can you describe what your job duties entail in
24 your current position?

25 A. Yes, ma'am. I take the mail to the different

1 sheriff's offices in York County and I transport evidence
2 to SLED.

3 Q. And what is SLED?

4 A. SLED? South Carolina Law Enforcement Division.

5 Q. And where is that located?

6 A. Columbia.

7 Q. And whenever you take items from evidence do you have
8 to sign for items when you take them out?

9 A. Yes, ma'am, I do.

10 Q. As part of that process do you also have to document
11 where you were taking the evidence?

12 A. I just sign it out and I take it to Columbia.

13 Q. Okay. Did you transport evidence in the case of the
14 State versus Adam Berard?

15 A. Yes, ma'am.

16 Q. And those sheets that you referenced before where you
17 sign out your name - - -

18 A. Yes, ma'am.

19 Q. - - - when you take the evidence you call those
20 property and evidence sheets; correct?

21 A. Uh-huh.

22 Q. And is that what you have in your hand right now?

23 A. Yes, ma'am.

24 Q. And do those sheets help you refresh your memory as to
25 what day you did things and what you took to SLED?

GARY ROLLINS: DIRECT EXAMINATION BY SOLICITOR SIKORA

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1 A. Yes they do.

2 Q. Okay. Can you tell me the items you took to SLED in
3 this particular case?

4 A. On one of my sheets I took Item Number Thirty-Seven
5 which is two swabs from Adam Berard. And I took a lavender
6 top tube of blood from Adam Berard.

7 Q. Could you spell the last name of that person?

8 A. B-e-r-a-r-d, Berard.

9 Q. Did you take anything else to SLED in this case?

10 A. On 5/2/09 I took a swab from Robert Louder.

11 Q. Okay. Did you take anything else in this case from
12 SLED -- I'm sorry, from York County Evidence to SLED?

13 A. I believe I just took those two items.

14 Q. Okay.

15 A. I also took one swab.

16 Q. And where was that swab taken from?

17 A. From Branch Item Number Sixteen.

18 Q. And did you sign for each of these items when you
19 checked them out of evidence here at the York County
20 Sheriff's Office?

21 A. Yes, ma'am, I did.

22 Q. And when you received each of those items you just
23 referenced I believe it was a total of four separate items
24 were those items in sealed containers?

25 A. Yes they were.

GARY ROLLINS: DIRECT EXAMINATION BY SOLICITOR SIKORA
CROSS EXAMINATION BY MR. LEMEL

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1 Q. Did you tamper with those items in any way while
2 transporting them to SLED?

3 A. No I did not.

4 Q. Were those items still sealed whenever you delivered
5 them to SLED?

6 A. Yes they were.

7 Q. Thank you. Please answer any questions Defense
8 Counsel has.

9 CROSS EXAMINATION

10 GARY ROLLINS BY MR. CUMMINGS:

11 Q. Good afternoon, Mr. Rollins. I just have a few
12 questions for you. Say you work in the evidence room at
13 the York County Sheriff's Department; right?

14 A. Yes I do.

15 Q. And basically your job is my understanding is
16 essentially you basically just transport evidence from the
17 sheriff's department down to SLED for processing; correct?

18 A. That's correct.

19 Q. And that happened in this case; correct?

20 A. Yes, sir.

21 Q. And you are also responsible for any paperwork
22 associated with that transfer; right?

23 A. Yes I am.

24 Q. So you basically just sign it out?

25 A. Yes, sir I sign it.

GARY ROLLINS: CROSS EXAMINATION BY MR. CUMMINGS
KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 Q. You take accountability for the evidence; right?

2 A. That's right.

3 Q. At least for the accountability for the transport down
4 to SLED. Okay. So in this case you took the items you
5 just described. You signed out for them and you took them
6 down to SLED?

7 A. That's correct.

8 Q. And other than that you didn't have any other
9 involvement in this case?

10 A. None what so ever.

11 Q. No further questions, Your Honor.

12 THE COURT: You can step down, sir.

13 SOLICITOR LIPINSKI: The State calls forensic
14 scientist Katie Coy.

15 Mr. Rollins can be excused, Your Honor?

16 THE COURT: Certainly.

17 MADAME CLERK: Please raise your right hand and place
18 your left on the bible.

19 (WHEREUPON: KATIE COY, BEING

20 FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

21 DIRECT EXAMINATION

22 KATIE COY BY SOLICITOR LIPINSKI:

23 Q. Ms. Coy, if you could state your name spelling your
24 last name for the record.

25 A. My name is Katie Coy, C-o-y.

1 Q. And with whom are you currently employed?

2 A. I work for the South Carolina Law Enforcement
3 Division.

4 Q. And in what capacity?

5 A. I am a forensic DNA analyst.

6 Q. And explain to the jury what a forensic DNA analyst is
7 or what your daily duties and responsibilities are.

8 A. I receive evidence from agencies across the state; I
9 examine the items they bring us for the presence of
10 biological fluids such as blood, semen or saliva. I
11 attempt to develop DNA profiles from these items as well as
12 from known standards for individuals and I compare them and
13 determine if they match.

14 Q. And prior to you becoming -- and how long have you
15 been employed in that capacity at SLED?

16 A. Almost four years.

17 Q. And prior to your employment and during your
18 employment with SLED have you received any type of
19 specialized training or education in your field?

20 A. Yes I have a Bachelor of Science Degree in Forensic
21 Science with a concentration in forensic biology. I also
22 have a master's of science degree in forensic science with
23 concentration in forensic biology. During my time at SLED
24 I received a year of training under the supervision of a
25 court qualified analyst. Through out that time I was

KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 trained in evidence handling, report writing, DNA analysis
2 and court testimony

3 Q. And could you explain the term to the jury forensic
4 biology? Is it different from having a master degree in
5 just general biology?

6 A. My degree specialize in forensic biology where we deal
7 with aspects of DNA and body fluids that are common in
8 criminal cases.

9 Q. And, Your Honor, at this time - -
10 Have you ever testified before?

11 A. Yes.

12 Q. Have you ever been qualified as an expert before?

13 A. Yes.

14 Q. And, Your Honor, at this time we will proffer Katie
15 Coy as an expert in biology specifically as it relates to
16 DNA serology analysis?

17 MR. LEMEL: We have no objection to Ms. Coy being so
18 qualified.

19 THE COURT: Okay. You can elicit opinions in those
20 subjects.

21 BY SOLICITOR LIPINSKI:

22 Q. And if you could -- we've thrown that term out there
23 DNA but if you could just educate the jury on
24 scientifically what the term means to you.

25 A. DNA stands for deoxyribonucleic acid. It's a chemical

1 that's found in almost every cell of your body with the
2 exception of red blood cells. It gives you all of your
3 unique characteristics such as your hair color, your eye
4 color, your height. You get half of your DNA from your mom
5 and half from your dad. No two individuals should have the
6 same DNA except for identical twins.

7 Q. And when you do DNA analysis for SLED what are some of
8 the types of testing and examinations that you continue to
9 perform?

10 A. Typically start with a serology analysis where we
11 identify body fluids that may be present. That would be
12 blood, semen or saliva. Then we test all of our evidence
13 items and attempt to develop a DNA profile from that. A
14 DNA profile is just a string of numbers it's kind of like a
15 social security number it's unique to you. And we also
16 compare standards that's also a set of numbers that would
17 be like from your cheek your buccle swab. We compare those
18 evidence items and determine if the numbers match.

19 Q. And when you reach a conclusion that DNA matches what
20 specifically are you making a finding of? When you say
21 those numbers match do you have to match so many numbers to
22 get a match? Is there a percentage that you use or how do
23 you go about qualifying or quantifying a result?

24 A. A DNA profile that we look at in forensics is looking
25 at fifteen specific locations on DNA that are known to vary

KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 widely between individuals. So each person will have a
2 unique number at those locations and when we do have a
3 match we assign a statistic to it which gives it weight and
4 how you unique it is.

5 Q. And how do you determine those statistics? Do we have
6 a DNA data base that we use or the FBI protocols? What do
7 you use to quantify those statistics?

8 A. There are frequencies for each location and we use a
9 FBI defined data base to calculate those.

10 Q. And in terms are you familiar with what is commonly
11 referred to as a rape kit or a sexual assault kit?

12 A. Yes.

13 Q. And if you could just explain to the jury your normal
14 process when you examine this key piece of evidence?

15 A. Typically for a sexual assault we receive a sexual
16 assault kit from the victim. It contains swabs from the
17 body; the vaginal swabs, oral swabs, rectal swabs,
18 fingernail scrapings, anything that may be important to the
19 investigation. It will also contain a known standard from
20 the victims so that I can compare it back to the evidence
21 samples.

22 Q. And is it typical in you all -- you said that you do
23 analyses for agencies across the state?

24 A. Right.

25 Q. How many examinations do you routinely perform in a

1 year or approximately?

2 A. I would say I do several hundred cases a year.

3 Q. And are all the agencies across the state they
4 submit evidence to you?

5 A. Right.

6 Q. And would SLED have a means by which you prioritize
7 evidence in determining what you examine first versus
8 others?

9 A. Yeah we typically tend to examine the most probative
10 items first. In a rape that would be the rape kit because
11 it comes directly from the victim's body.

12 Q. And is that where you start your analyses in these
13 types of assault cases?

14 A. Yes.

15 Q. And if you could when you get a sexual assault kit
16 does it have within it certain competent parts?

17 A. Yes.

18 Q. And do you then go about breaking down those component
19 parts to see if you -- you said identify serology. How do
20 you go about doing that?

21 A. Right. First we look at all the swabs that are
22 present. Typically they are vaginal swabs, oral swabs,
23 rectal swabs, miscellaneous body fluid and those we are
24 looking for semen on them and we do a serological test to
25 determine if it's positive or negative. If it's positive

KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 we continue to DNA. If it's negative we stop.

2 Q. And what is a serological test you use to determine
3 whether or not there is DNA present?

4 A. We do a serological test for semen it's called P 30.
5 It's just looking for a protein in a seminal fluid. Its
6 kind like a pregnancy test it comes up with several lines
7 if it's positive.

8 Q. And did you have the occasion in this particular case
9 to receive a sexual assault kit from the victim Loretta
10 Moss?

11 A. Yes.

12 Q. Now when you work on a sexual assault kit do you
13 package it or add your initials to it to confirm that
14 that's the analysis you perform later on?

15 A. Yes I label all the evidence envelopes with my name
16 and the date.

17 Q. Let me show you what's been previously marked for
18 identification purposes as State's Exhibit Number Thirty-
19 Five and that has actually been repackaged at SLED. Heat
20 sealed packaged; correct?

21 A. Yes.

22 Q. So when you got it it wasn't presented to you in that
23 kind of clear plastic envelope form?

24 A. Yes. When an agency brings in a kit it comes in all
25 these envelopes and we repackage it in a heat sealed pouch

1 in our log in department.

2 Q. Does this envelope contain your initials indicating
3 that you performed the test on this particular kit?

4 A. Yes.

5 Q. And, Your Honor, at this time we would move State's
6 Exhibit Number Twenty-Five the sexual assault kit into
7 evidence.

8 MR. LEMEL: No objection, Your Honor.

9 THE COURT: It's admitted.

10 SOLICITOR LIPINSKI: I'm sorry, Your Honor, just to be
11 clear that was Item Number Thirty-Five.

12 THE COURT: That was what?

13 SOLICITOR LIPINSKI: Item Number Thirty-Five.

14 THE COURT: Exhibit Thirty-Five?

15 SOLICITOR LIPINSKI: Yes.

16 THE COURT: Exhibit Thirty-Five you have no objection,
17 to, sir?

18 MR. LEMEL: That's correct, Your Honor.

19 THE COURT: So the number you mentioned a moment ago
20 was mistaken?

21 SOLICITOR LIPINSKI: I thought I mentioned Thirty-
22 Five. Ms. Sikora wrote something different and I just
23 wanted to make sure that's what it was.

24 THE COURT: All right. Thirty-Five is admitted.

25 (WHEREUPON: STATE'S EXHIBIT NUMBER TWENTY-FIVE

KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)

2 BY SOLICITOR LIPINSKI:

3 Q. And explain to the jury you stated that you go through
4 and try and identify whether or not anything -- that you
5 broke those type things down. Contained the sexual assault
6 kit did you have a blood stain from the victim?

7 A. Yes.

8 Q. And did you perform any analysis on that?

9 A. No.

10 Q. And is there a reason why you didn't perform any
11 analysis on that?

12 A. In that particular rape kit there were two standards
13 submitted. They do a blood standard which is where they
14 draw it from your arm and then they also sometimes do
15 buccle swab which is a swab from the inside of your cheek.
16 I preformed my analysis on the buccle swab.

17 Q. Is there any preference as to is one easier than the
18 other or is that just what you got to first?

19 A. Typically we prefer buccle swabs.

20 Q. Is there a reason why? Are they easier to test?

21 A. Yes they are easier.

22 Q. And did you also -- what other parts of the kit did
23 you perform analyses on?

24 A. I examined the vaginal swabs, vaginal smears; oral
25 swabs, oral smears; rectal swabs, rectal smears and pubic

1 hair combings.

2 Q. And going first to the oral swabs were you able to
3 identify any semen or spermatozoa?

4 A. No.

5 Q. And as to the rectal swabs were you able to identify
6 anything as well?

7 A. No.

8 Q. And as to the vaginal swabs or smears were you able to
9 identify anything?

10 A. There was semen indicated on the vaginal swabs.

11 Q. And did you compare those - -

12 The Court's indulgence one moment.

13 And did you also receive a known DNA standard from the
14 defendant Adam Berard?

15 A. Yes.

16 (WHEREUPON: STATE'S EXHIBIT NUMBER THIRTY-SEVEN
17 PREMARKED FOR IDENTIFICATION.)

18 BY SOLICITOR LIPINKSI:

19 Q. And let me show you what's been previously been marked
20 as -- they are contained greater within your SLED envelope
21 but they've been marked as State's Exhibit Numbers Thirty-
22 Seven and Thirty-Eight because they had two component parts
23 when you repackaged them. Were State's Exhibit Thirty-
24 Seven and Thirty-Eight submitted to you?

25 A. Yes.

KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 Q. And those were the known DNA samples from the
2 defendant Adam Berard?

3 A. Yes.

4 Q. And did you examine one or both of those items?

5 A. Just one.

6 Q. And which one?

7 A. The buccle swabs.

8 Q. And again is that just a preference in terms of your
9 testing?

10 A. Right.

11 Q. And did you compare that cheek swab of known DNA
12 sample from Adam Berard as to whether it was related to the
13 spermatozoa you identified from the vaginal smears or swabs
14 from Ms. Moss?

15 A. Correct.

16 Q. Did you?

17 A. Yes.

18 Q. And what were your findings?

19 A. The DNA profile that was developed from the sperm
20 fraction of Item 1.3 which was the vaginal swabs was an
21 extra of at least two individuals. The DNA profile of the
22 major contributor to that mixture was consistent with the
23 DNA profile of Loretta Moss. And Adam Berard was excluded
24 as a possible minor contributor.

25 Q. And you called it a sperm fraction. Could you explain

1 what that term means?

2 A. Anytime we are dealing with semen we have to try to
3 separate all the sperm cells from anything else that's
4 there because the sperm cells from the male are what's
5 going to have his DNA in it. And if it's a vaginal swab
6 you are also going to have the victim's DNA because it's
7 taken off her body so we are trying to separate the victim
8 from the sperm cells. It's not always a good separation
9 for our process especially if there is a lot of victim DNA
10 there and in this case there was very little male DNA so it
11 wasn't a complete separation which was why there was a
12 extra.

13 Q. So you were able to exclude Adam Berard as a
14 contributor to that analysis?

15 A. Right.

16 Q. And you've performed a lot of sexual assault kits?

17 A. Right.

18 Q. And in looking for that semen what is the window of
19 opportunity where you would expect assuming that a male
20 ejaculated inside a female and they did a sexual assault
21 kit is there a window of opportunity where you as a DNA
22 analyst would expect to find semen if it was left there?

23 A. Typically we can get a complete male profile within
24 forty-eight to seventy-two hours after an attack occurs
25 provided that the kit was collected immediately and the

KATIE COY: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 victim hadn't tried to clean or get rid of anything.

2 Q. So it can stay up there up to two or three days
3 depending on the habits of the victim?

4 A. Right.

5 Q. So in this particular case when you ruled out Mr.
6 Berard you did say that you did identify however some type
7 of semen or male donor?

8 A. Right.

9 Q. And were you similarly submitted another known DNA
10 sample from Robert Louder?

11 A. Yes.

12 Q. Let me show you what's been marked as State's Exhibit
13 Number Thirty-Nine and ask you if that was also a sample
14 that was submitted to you for analyses?

15 A. Yes. Item Four was listed as buccle swabs from Robert
16 Louder.

17 Q. And did you compare that to the sperm fraction that
18 you obtained from Ms. Moss's vaginal swabs or smears?

19 A. Yes.

20 Q. And what were you able to say regarding that as it
21 relates to Mr. Louder's swab?

22 A. Robert Louder could not be excluded as a possible
23 minor contributor to the mixture.

24 Q. And what does that mean in layman terms?

25 A. It's possible that the DNA that was foreign to the

1 victim could have come from him if this was a very very
2 partial profile so that's really the best that I could say.

3 Q. So had you got more DNA; had you got a longer chain of
4 the DNA out of the vaginal smears would you have been able
5 to reach a more definite conclusion whether or not the
6 sperm fraction was from Mr. Louder?

7 A. Yes. Anytime you have more information the better I
8 can interpret the results.

9 Q. You can say it's consistent with him; correct?

10 A. I tend to say he can't be excluded. Its pretty much
11 the same thing though.

12 Q. And that means we didn't find any of those fifteen
13 loci that were inconsistent with what Mr. Louder's known
14 DNA profile is?

15 A. Right.

16 Q. We didn't find enough of the little locations to make
17 a match. It certainly -- I don't want to put words in your
18 mouth if you could explain your results in those terms?

19 A. What I do is I looked at any of the numbers in the
20 profile that did not or could not have come from the victim
21 and all of those numbers could have come from Robert
22 Louder's profile.

23 Q. And did you perform one more piece of analysis in this
24 particular case?

25 A. Yes.

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1 Q. Let me show you what's been previously marked State's
2 Exhibit Number Thirty-Six. And before we go there let me
3 refer back just to the sexual assault kit real quick. In
4 terms of making that comparison that analyses from either
5 the suspect Adam Berard and Mr. Louder that concluded your
6 work on the sexual assault kit; correct?

7 A. I also did pubic hair combings.

8 Q. All right. And did you find anything there?

9 A. The partial profile I developed was consistent with
10 the victim.

11 Q. With the victim?

12 A. Yes.

13 Q. Your Honor, at this time we would move State's Exhibit
14 Number Thirty-Five which is the sexual assault kit.
15 Thirty-Seven and Thirty-Eight which is the DNA samples from
16 the defendant. And the Thirty-Nine the DNA sample from
17 Robert Louder into evidence.

18 MR. LEMEL: Without objection, Your Honor.

19 THE COURT: Admitted.

20 (WHEREUPON: STATE'S EXHIBIT THIRTY-FIVE, THIRTY-SIX,
21 THIRTY-SEVEN, THIRTY-EIGHT AND THIRTY-NINE PREVIOUSLY
22 IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
23 BY SOLICITOR LIPINSKI:

24 Q. Were you also submitted one additional swabbing I
25 believe SLED Item Number Five?

1 A. Right.

2 Q. And State's Exhibit Number Thirty-Nine I believe.

3 Thirty-Six.

4 A. Yes.

5 Q. And what was this that you were submitted or how was

6 it prescribed to you?

7 A. Item Five was listed as swab from branch.

8 Q. And did you perform any analysis on this particular

9 Item?

10 A. Yes.

11 Q. And what is that?

12 A. I was requested to examine for blood and my results no

13 blood indicated.

14 Q. So while they swabbed the branch you weren't able to

15 identify any blood and therefore unable to identify the DNA

16 profile?

17 A. Right.

18 Q. And as it relates to the sexual assault kit is the

19 fact that you were not able to find any DNA from Mr. Berard

20 does that indicate that a sexual assault did not occur or

21 what does that mean in terms of your results in forensic

22 biology?

23 A. I cant' really say what did happen and what didn't

24 happen. All I can say is I did not find his DNA on the

25 items I was submitted.

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CROSS EXAMINATION BY MR. LEMEL

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1 Q. And have you performed testing on similar situated
2 sexual assault kits where you were not able to obtain a DNA
3 sample?

4 A. Yes we quite often have negative rape kits.

5 Q. Is there any forensic reason for that that you are
6 aware of?

7 A. There could be several reasons why we don't get any
8 kind of DNA profile. It can be the attack didn't happen;
9 the male was vasectomized and there is no sperm there for
10 us to get a profile from. The victim could have waited too
11 long to get a rape kit taken.

12 Q. What about whether or not the male ejaculated would
13 that impact whether or not you would expect to find semen
14 or spermatozoa?

15 A. Right if there was not ejaculate present I would not
16 expect to find any semen.

17 Q. So if he used a condom would that affect your results?

18 A. Correct.

19 Q. The Court's indulgence one moment, Your Honor.

20 We have nothing else.

21 CROSS EXAMINATION

22 KATIE COY BY MR. LEMEL:

23 Q. Good afternoon, Ms. McCoy.

24 A. Coy.

25 Q. I'm sorry. Coy. You work for SLED?

1 A. Yes.

2 Q. And basically one of your primary duties in working
3 for SLED is developing these DNA profiles?

4 A. Right.

5 Q. And you follow procedure that's been long established
6 at SLED for doing that?

7 A. Yes.

8 Q. DNA testing and profiling has come a long way in the
9 last couple of decades?

10 A. Right.

11 Q. And it is a fairly routine procedure now?

12 A. Correct.

13 Q. You still have to follow all the rules of the
14 procedure but it's not what we call cutting edge science
15 any more?

16 A. Right.

17 Q. A few decades ago it would have been?

18 A. Uh-huh.

19 Q. I am going to ask you to make sure that the court
20 reporter gets your answers down if you can answer me with a
21 full yes or no so she doesn't have to interpret your
22 comments.

23 A. Sure.

24 Q. Okay. Thank you. Can you speak up a little bit you
25 got a little bit quite on me. I apologize.

KATIE COY: CROSS EXAMINATION BY MR. LEMBL

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1 A. Yes.

2 Q. When you test for DNA what you are looking for again
3 is that part of the cell that contains the DNA?

4 A. Correct.

5 Q. And you break it out and you have to get enough of a
6 sample to test the DNA; correct?

7 A. Right.

8 Q. And you have certain methods or techniques where you
9 can take a very small amount of DNA and expand that out to
10 the point where you can actually test that DNA?

11 A. Right.

12 Q. I believe it's sometimes referred to as PCR?

13 A. That's correct.

14 Q. PCR that's polymerase chain reaction?

15 A. Right.

16 Q. Basically that is you taking a small amount of DNA and
17 getting it to replicate itself over and over and over
18 again?

19 A. Right.

20 Q. I am going to ask you for our court reporter if you
21 could please spell polymerase so she gets that right down.
22 Spell it for her.

23 A. Polymerase is p-o-l-y-m-e-r-a-s-e.

24 Q. And that's just the first step once you've identified
25 that there is some sort of DNA of this process; correct?

- 1 A. Right.
- 2 Q. And once you get enough of the DNA to test you can
- 3 then break it down into its component parts essentially
- 4 A. Well that's actually what PCR is doing its taking
- 5 short pieces of the DNA and multiplying them sort of like a
- 6 photo copy.
- 7 Q. Okay. Once you get enough of photo copies made you
- 8 can then test it against these various specific areas?
- 9 A. Right.
- 10 Q. Which are called locus or loci? I guess part of that
- 11 is loci.
- 12 A. Yes.
- 13 Q. And the standard for DNA testing is actually sixteen
- 14 loci but one of those loci basically just determines
- 15 whether it's male or female; correct?
- 16 A. Right. There is fifteen loci and then there is an
- 17 amelogenia which is a gender determination.
- 18 Q. Okay. So once you get to those fifteen points there
- 19 is a numerical value that is assigned to the DNA that is
- 20 found at those fifteen loci or points; correct?
- 21 A. Right. We use frequencies to determine how common the
- 22 numbers at these locations are.
- 23 Q. Okay. You are getting ahead of me just a little bit I
- 24 think. When you find the bit of DNA that is at this
- 25 specific point you've assign a number to that?

KATIE COY: CROSS EXAMINATION BY MR. LEMEL

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1 A. Right.

2 Q. That bit?

3 A. Right.

4 Q. And there is a wide range of numbers that have been
5 used in DNA standardization; correct?

6 A. I'm not sure what you are asking.

7 Q. The number can be anywhere from one to somewhere in
8 the thirties over the whole string; correct, or over the
9 whole fifteen points?

10 A. I'm not sure how technical you want me to get with
11 that.

12 Q. Not particularly technical. I'm just trying to
13 establish -- the points are assigned numbers based upon
14 what bit of DNA you actually find at that point.

15 A. Okay.

16 Q. Is that correct?

17 A. At each location each person is going to have little
18 chunks that we call them repetitive sequences and each
19 person is going to have a different number of repeats so
20 you might have five the next person might have seven and
21 that's sort of where we are getting that little number
22 that's going to be a string of numbers to make your DNA
23 profile.

24 Q. And when you make that profile you get those numbers
25 at those points?

1 A. Yes.

2 Q. And as you said you get half the DNA from the mother
3 and half from the father?

4 A. Right.

5 Q. And sometimes you will find for each individual they
6 would have two numbers produced at each of those points?

7 A. Right.

8 Q. And on some occasions they will actually produce one
9 number?

10 A. Right.

11 Q. But the actual length of the string can be different;
12 is that correct? One same number for mother and father but
13 the length of the string is different?

14 A. It could be. If you have two different numbers that
15 means your mom and your dad give you different pieces. If
16 you have the same number at a location that means your mom
17 and your dad gave you the same number of repeats.

18 Q. And by checking against a known standard basically a
19 known standard just being you know whose DNA this is versus
20 an unknown sample you compare those various numbers
21 together?

22 A. Right.

23 Q. And those numbers are just a simplistic way of
24 representing the little bits of DNA that are at those
25 fifteen key loci?

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1 A. Right.

2 Q. Okay. When you have a situation like this you have a
3 major and minor contributor as you said. What that means
4 is most of the DNA bits that you find are from one
5 individual as opposed to a second individual?

6 A. Right.

7 Q. And you are still able to look at the minor
8 contributor in that scenario?

9 A. Right.

10 Q. But you may not be able to get as much information
11 about that minor contributor as you are about the major
12 contributor?

13 A. Correct.

14 Q. But given a minor contributor you can still exclude
15 certain people if certain basic things don't match up?

16 A. Right.

17 Q. For example if you have a particular loci that on your
18 sample has the numbers -- I am just going to randomly pick
19 out numbers -- has the numbers twenty and twenty-four from
20 the major contributor okay.

21 A. Uh-huh.

22 Q. And has the number seventeen and eighteen from the
23 minor contributor. So you have four numbers that are
24 present on that loci?

25 A. Right.

1 Q. In that case twenty, twenty-four, seventeen and
2 eighteen?

3 A. Right.

4 Q. If you come up on your unknown sample and the number
5 that is generated from that bit is the number four you know
6 that neither one of those individuals could make that four
7 that sample. It would have to be that that sample some
8 combination of twenty, twenty-four, seventeen and eighteen?

9 A. Right.

10 Q. And in this particular case on the partial profile
11 that you were able to develop of the minor contributor
12 there are a number of spots where it is impossible that
13 Adam Berard produced those bits of DNA?

14 A. Correct. From the minor contributor there are numbers
15 there that could not have originated from him.

16 Q. Okay. And that's how you can tell that it is
17 impossible he is the source of this DNA?

18 A. Right that's why he was excluded.

19 Q. Okay. Now you went back and you looked at DNA from
20 another individual Mr. Louder?

21 A. Right.

22 Q. And his numbers did match up on those points as a
23 possible contributor?

24 A. Right.

25 Q. And you had said as part of that process that you

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1 could not exclude Mr. Louder?

2 A. Right.

3 Q. Because the minor contributor sample was relatively
4 small?

5 A. Yes.

6 Q. And you said had you had more of that minor
7 contributor you could more definitively establish Mr.
8 Louder as being the contributor?

9 A. Right.

10 Q. But even if you had much more of that minor
11 contributor's DNA based upon what you have there is no way
12 that getting more of that DNA would have in any way allowed
13 Adam Berard's DNA to be there as part of what you found.
14 In other words more DNA wouldn't show that Adam Berard was
15 there?

16 A. It's such a partial minor contributor I can't say that
17 more of the minor contributor's DNA -- you can't really get
18 any more of the minor contributor's DNA. What is here is
19 what was there.

20 Q. Right.

21 A. You can't make more DNA from it.

22 Q. Right. And that is more than enough to exclude Adam
23 Berard as a contributor?

24 A. He was excluded as the minor contributor.

25 Q. So you would agree with my statement there was enough

1 there to exclude him?

2 A. Yes.

3 Q. I mean there is no way that he contributed any DNA to
4 that sample?

5 A. I would say he was excluded yes.

6 Q. All right. The second test you were given in this
7 particular case was to test a potential blood sample?

8 A. Correct.

9 Q. And basically what you did there was see if there was
10 in fact any blood?

11 A. Right.

12 Q. And this came up negative on you?

13 A. Correct.

14 Q. So you don't know what that substance was that was
15 swabbed off that branch just that it wasn't blood?

16 A. Right.

17 Q. It could be anything?

18 A. Right.

19 Q. You didn't test it any further to find out what it
20 was?

21 A. No. If we a negative serology result we don't
22 continue with DNA.

23 Q. And when exactly did you complete the testing on the
24 DNA itself the first test?

25 A. The rape kit?

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- 1 Q. Yes.
- 2 A. The first report was issued August 25TH; August 14TH.
- 3 Q. Of what year?
- 4 A. 2009.
- 5 Q. And you originally received the kit when; do you know?
- 6 A. The kit was brought into SLED June 10TH, 2008.
- 7 Q. So basically about a year before?
- 8 A. Right.
- 9 Q. Okay. And because of the back logs you have at SLED
- 10 it just took you a while to get through to test that DNA?
- 11 A. I did it probably as soon as it was assigned to me.
- 12 Q. But for some reason or another it wasn't assigned to
- 13 you until almost a year later?
- 14 A. Right.
- 15 Q. Because of whatever back log of whatever other cases
- 16 you were working on?
- 17 A. Right.
- 18 Q. And then after that happened in May it came back that
- 19 you were able to exclude Adam Berard was when the next
- 20 request came in on this case?
- 21 A. Yes.
- 22 Q. About the branch. And when was that submitted to
- 23 you?
- 24 A. The branch was submitted October 14TH, 2009.
- 25 Q. So a few months after the DNA results were produced?

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1 A. Right.

2 Q. I beg the Court's indulgence.

3 Thank you, Ms. Coy, no further questions.

4 THE COURT: You can step down, ma'am.

5 SOLICITOR LIPINKSI: Thank you, Your Honor. We ask
6 that Ms. Coy to be excused.

7 THE COURT: She is excused.

8 SOLICITOR LIPINSKI: Your Honor, can we approach just
9 briefly?

10 (BENCH CONFERENCE AT 2:55 P.M. OFF THE RECORD OUT OF
11 THE HEARING OF THE JURY.)

12 SOLICITOR SIKORA: The State calls Amanda Carter to
13 the stand please.

14 (WHEREUPON: AMANDA CARTER, BEING
15 FIRST CALLED, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:)

16 MADAME CLERK: Thank you.

17 DIRECT EXAMINATION

18 AMANDA CARTER BY SOLICITOR SIKORA:

19 Q. Would you please state your name for the record and
20 spell your last name?

21 A. Amanda Carter, C-a-r-t-e-r.

22 Q. And, Ms. Carter, where do you work?

23 A. York County Sheriff's Office.

24 Q. And what is your job that you do there?

25 A. I am a detective with the Juvenile Sex Crimes

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1 Division.

2 Q. And how long have you worked with the sheriff's
3 office?

4 A. I been with the sheriff's officer twelve and a half
5 years.

6 Q. Do you have any prior law enforcement experience?

7 A. I do. I was with the state for ten years so a total
8 of twenty-two and a half years.

9 Q. And were you involved in the investigation in the case
10 against Adam Berard?

11 A. I was.

12 Q. And did you have a chance at some point during that
13 investigation to meet with Ms. Loretta Moss?

14 A. I did.

15 Q. And when did you meet with her?

16 A. I met with her on June 9TH, 2008.

17 Q. So you remember about what time you would have met
18 with her?

19 A. It was about 11:50 a.m..

20 Q. And was there anybody else with you when you went to
21 meet with her?

22 A. Yes the Victim Advocate Tina Elliott.

23 Q. Okay. And where did you meet with Ms. Moss?

24 A. Carolina Medical Center. I met with her in the
25 intensive care unit.

1 Q. And when you saw Ms. Moss that morning was she able to
2 communicate with you?

3 A. Yes she was.

4 Q. Did she seem to be able to understand the conversation
5 you were having with her?

6 A. Yes she did.

7 Q. And during that visit with Ms. Moss did you observe
8 any physical injuries to her body?

9 A. I did.

10 (WHEREUPON: STATE'S EXHIBIT NUMBER FORTY-ONE A
11 THROUGH I PREMARKED FOR IDENTIFICATION.)

12 Q. I am handing you what's been marked for identification
13 purposes as State's Exhibit Forty-One A through Forty-One
14 I. If you would just take a look at those please.

15 (WITNESS EXAMINING EXHIBITS.)

16 A. Okay.

17 Q. Did you take a camera with you that day when you
18 visited with Ms. Moss?

19 A. I did.

20 Q. Did you take any photographs of the injuries you saw
21 on her body that day?

22 A. I did.

23 Q. Could you please tell me what you see there in
24 Exhibits Forty-One A through Forty-One I?

25 A. Pictures of Ms. Moss's injuries.

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1 Q. Did you take those photos?

2 A. I did.

3 Q. And do those photos truly depict the way her injuries
4 looked on that day June 9TH, 2008 when you visited with
5 her?

6 A. Yes it does.

7 Q. What is the date listed on those photographs?

8 A. May 25th, 2004.

9 Q. Can you explain why that is?

10 A. I had just got a new camera because mine was broke and
11 I didn't change the date on it when I went to the hospital.

12 Q. How positive are you that those photos were taken on
13 June 9th of 2008?

14 A. Because it was the same day that I did the interview
15 and I did the interview on Ms. Moss.

16 Q. And did you document when you went up there in your
17 notes?

18 A. I did.

19 Q. And is that what you are referring to refresh your
20 memory?

21 A. That's correct.

22 Q. Your Honor, State offers Exhibit Forty-One A through I
23 into evidence at this time.

24 MR. LEMEL: Without objection, Your Honor.

25 THE COURT: Admitted.

1 ((WHEREUPON: STATE'S EXHIBIT FORTY-ONE A THROUGH I
2 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
3 BY SOLICITOR SIKORA:
4 Q. Could you take a look at Exhibit Forty-One A for me
5 please, Detective Carter?
6 A. Okay.
7 Q. Could you please dim the lights, Madame Clerk.
8 (CLERK OF COURT DIMMED COURTROOM LIGHTS.)
9 Q. If you are unable to see the photo in your hand,
10 Detective Carter, are you able to see the larger version of
11 that there on the screen?
12 A. I am.
13 Q. From where you are seated?
14 A. Uh-huh.
15 Q. Could you please describe what we are seeing in this
16 photo?
17 A. This is a face shot of Ms. Moss lying in her bed.
18 Q. And could you take a look at Exhibit Forty-One B
19 please. And what are we seeing in this photo which is also
20 up on the screen that's too dark for you to see?
21 A. This is an injury to her head. The nurse parted her
22 hair so I could get a photo of it.
23 Q. And can we take a look at Forty-One C please. What
24 are we looking at in this photograph?
25 A. This is right under her neck going toward her head on

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1 the right side.

2 Q. And what is that purple mark we see?

3 A. A bruise. That's a bruise.

4 Q. Okay.

5 A. Under her neck.

6 Q. And if we can take a look at Forty-One D please. What
7 is this picture depicting?

8 A. That's a bruise to her right arm that was bandaged.

9 It was still bleeding.

10 A. And Forty-One E please. What are we looking at in
11 this photo?

12 A. That's her left arm; photo of her left arm with
13 stitches and bruises.

14 Q. Can we take a look at the next photo please Forty-One
15 F.

16 A. That's also her left arm with the stitches close up
17 photo.

18 Q. And Forty-One G.

19 A. That's a photo of her back. Well from the side of her
20 back.

21 Q. And Forty-One H.

22 A. That's her shoulder.

23 Q. And Forty-One I.

24 A. That's her right arm. No I'm sorry. That's her left
25 part of her body I believe. Let me look at the close up.

1 Q. Do you want to come down from the stand?

2 A. Yea let me look at the closer one here. Okay this is
3 right under her arm pit on the left side.

4 Q. Okay. Can I ask you to come step down off the stand
5 for a moment?

6 A. Sure can.

7 (WITNESS LEFT WITNESS STAND.)

8 Q. This is a laser pointer if you would press the right
9 button down. You made mention of an area under her arm
10 pit. Could you point out in this photograph where the arm
11 pit is that you are referring to?

12 A. Right there.

13 (WITNESS POINTED TO EXHIBIT ON OVER HEAD PROJECTOR.)

14 Q. Okay. So everything below that area is that Ms.
15 Moss's back side or her front side?

16 A. It's her back side.

17 Q. Thank you. You may return to your seat.

18 (WITNESS RETURNED TO WITNESS STAND.)

19 Q. The Court's indulgence.

20 Thank you. Please answer any questions Mr. Lemel may
21 have for you.

22 A. Okay.

23 MR. LEMEL: Could you turn the lights back on?

24 (CLERK OF COURT BRIGHTENED COURTROOM LIGHTS.)

25 THE COURT: Let's take a short break before we do

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1 cross examination.

2 I want you folks to step back in the jury room for
3 just a minute.

4 (JURY LEAVING COURTROOM AT 3:04 P. M..)

5 THE COURT: We will take a short break.

6 (COURT RECESSED AT 3:04 P.M..)

7 (BACK ON THE RECORD AT 3:16 P.M..)

8 THE COURT: Be seated.

9 (DEFENDANT ENTERING COURTROOM.)

10 THE COURT: Bring in the jury please.

11 (JURY ENTERING COURTROOM AT 3:17 P.M..)

12 THE COURT: All right, sir, cross examination.

13 CROSS EXAMINATION

14 AMANDA CARTER BY MR. LEMEL:

15 Q. Detective Carter, your involvement on this case began
16 on June 9th of 2008; correct?

17 A. That's correct.

18 Q. Prior to that time you had not been involved in the
19 case at all?

20 A. Not at all.

21 Q. You did not go out to Zinker Road which is the
22 location where the incident occurred at any point did you?

23 A. No I did not.

24 Q. So you can't tell us anything about what happened
25 there; what was found there or anything like that?

1 A. That's correct.

2 Q. Basically your involvement was going to the hospital
3 to talk with Ms. Berard and take those pictures?

4 A. That's correct.

5 Q. Okay. And because of that limitation you can't tell
6 how any of these injuries happened of your own knowledge?

7 A. No I cannot.

8 Q. You can just document what you saw that day?

9 A. That's correct.

10 Q. Which would have been some time after the incident
11 happened a couple of days basically?

12 A. That's correct.

13 Q. And the incident itself you were aware it happened
14 sometime on the 7th, right? Or are you even aware of that?

15 A. Yes. Yes I know it was over the weekend.

16 Q. So somewhere between thirty-six and forty hours later
17 would you agree with me on that?

18 A. Yes.

19 Q. And bruises do change over time; is that correct?

20 A. They do.

21 Q. They can become more prominent actually a few days
22 after they concur even than at the time they concur?

23 A. That's correct.

24 Q. I mean in your experience as a detective you have seen
25 bruises change color over time?

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1 A. Yes.

2 Q. And that's standard?

3 A. Yes.

4 Q. And sometimes they become more pronounced even as the
5 severity of them may go down just a little bit?

6 A. That's true.

7 Q. When you spoke with Ms. Moss thirty-six to forty-eight
8 hours later were you aware of what surgery for example
9 might have taken place for her before that?

10 A. No I was not.

11 Q. Did you make any inquiry with regard to any medication
12 that she may have been on at that point in time?

13 A. No I did not.

14 Q. But it's your recollection that she was able to answer
15 your questions and talk with you?

16 A. She was. Most of the time she initiated.

17 Q. You didn't notice any hesitancy or any confusion on
18 her part at any point?

19 A. None at all.

20 Q. But you did bother to check to see what her medical
21 condition would have been in terms of surgery, medication,
22 postoperative influences or anything like that?

23 A. No. I just checked with the nurse and ask her if it
24 was okay to talk to her and she said yes.

25 Q. Thank you. No further questions.

AMANDA CARTER: CROSS EXAMINATION BY MR. LEMEL
MISTY BINKNEY: DIRECT EXAMINATION BY SOLICITOR SIKORA

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1 SOLICITOR SIKORA: Nothing further from this witness
2 at this time.

3 THE COURT: Okay, ma'am, you can step down.

4 (WITNESS LEAVING WITNESS STAND.)

5 SOLICITOR SIKORA: The State calls Misty Binkney to
6 the stand please.

7 Ms. Binkney, if you would step to the Madame Clerk
8 there and please take the oath.

9 (WHEREUPON: MISTY BINKNEY,
10 BEING FIRST CALLED, WAS DULY SWORN AND TESTIFIED AS
11 FOLLOWS:)

12 MADAME CLERK: Thank you. You may have a seat.

13 DIRECT EXAMINATION

14 MISTY BINKNEY BY SOLICITOR SIKORA:

15 Q. Would you please state your name for the record and
16 spell your last name?

17 A. Misty Binkney, B-i-n-k-n-e-y.

18 Q. And where do you work?

19 A. Carolina's Medical Center.

20 Q. What do you do there?

21 A. I am a nurse in the surgical trauma ICU.

22 Q. And what does ICU mean?

23 A. Intensive Care Unit.

24 Q. And how long have you worked for CMC?

25 A. Since 1999.

MISTY BINKNEY: DIRECT EXAMINATION BY SOLICITOR SIKORA

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1 Q. Have you been a nurse since that time?

2 A. I began my nursing career in 1993.

3 Q. Is one of the patients you treated at CMC Ms. Loretta
4 Moss?

5 A. Yes.

6 Q. Do you recall whenever you first saw patient Ms. Moss?

7 A. Yes.

8 Q. And on what date was that?

9 A. June 8th, 2008.

10 Q. Do you make notations of your treatment and
11 observations about a patient as you are treating them?

12 A. Yes.

13 Q. And is that what you are referring to now?

14 A. Yes.

15 Q. And are those medical notes in front of you helpful to
16 you to refresh your memory about your treatment of Ms.
17 Moss?

18 A. Yes.

19 Q. And also to refresh your memory about what you may
20 have observed about her that day?

21 A. Yes.

22 Q. What is one of the first things you did for Ms. Moss
23 when she arrived in your unit?

24 A. Anytime a patient freshly arrives to the unit when
25 they are a new admission the first thing we do is get them

1 on all of our monitoring devices and then we just do an
2 assessment of the patient unless there is emergency
3 treatment that needs to be done prior to doing a full
4 assessment.

5 Q. And by monitoring devices do you mean things like
6 heart rate monitor?

7 A. Cardiac monitor which monitors their heart rate. A
8 monitor that monitors the oxygen level in her blood as well
9 as a blood pressure monitor.

10 Q. Okay. As part of your initial assessment of Ms. Moss
11 did you also examine her for any signs of physical injury?

12 A. Yes.

13 Q. And did you document the injuries that you saw there
14 in your medical -- in her chart?

15 A. Yes.

16 Q. And have you had a chance to review those notes?

17 A. Yes.

18 Q. I'm handing you what's been marked for identification
19 purposes as State's Exhibit Forty A and Forty B. Did you
20 make notations on those two documents I just handed you?

21 A. Yes.

22 Q. And what do those notations represent generally with
23 being specific?

24 A. The wounds that I examined on Ms. Moss on the day that
25 she came into the hospital.

MISTY BINKNEY: DIRECT EXAMINATION BY SOLICITOR SIKORA

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1 Q. And do the two pictures that I handed you is that an
2 actual diagram of Ms. Moss's particular body or just a
3 general anatomical diagram?

4 A. A general anatomical diagram.

5 Q. And would both Forty A and Forty B assist you in
6 providing testimony to the jury to explain the injuries that
7 you saw in Ms. Moss?

8 A. Yes.

9 Q. At this point, Your Honor, the State offers both
10 Exhibits Forty A and Forty B into evidence.

11 MR. LEMEL: Without objection.

12 THE COURT: They are admitted.

13 (WHEREUPON: STATE'S EXHIBIT FORTY A AND FORTY B
14 PREVIOUSLY IDENTIFIED AND MARKED, ENTERED INTO EVIDENCE.)
15 BY SOLICITOR SIKORA:

16 Q. I am going to ask you to step down off the stand so
17 you can get a better view of what we are looking at here.

18 (WITNESS LEFT WITNESS STAND.)

19 Q. Now it may be easier for you to actually point out on
20 the page - let me get the pen - but could you go through
21 the various markings you made on this diagram that we are
22 looking at in Forty A and explain to us what they mean or
23 what they represent?

24 A. It's kind of hard to see on that screen there. I've
25 got letters that represent certain things. Right here you

1 see an E. E just stands for ecchymosis which is a fancy
2 word for bruising. There was bruising right here on the
3 right hand arm. Right up here on the left chest is another
4 E so there was bruising around her left breast. Up in her
5 left axial area which is the arm pit area there was an area
6 of bruising. Down on her left arm there is an AB which
7 stands for avulsion and avulsion is an area of the tissue
8 that's kind of either been ripped or torn away from where
9 it's normally supposed to be. And then I've written along
10 beside of that I've got it's got bruising along with it.
11 There's a ST right below that as well on the left forearm
12 that stands for skin tear which means that it wasn't really
13 a deep cut but the skin was actually torn off of that area.
14 On both of her knees there is an AB as well as an E. AB
15 stands for an abrasion which is just kind of like a
16 roughing up of the skin. And an E again stands for
17 ecchymosis which is bruising. The back side of her body
18 upon the back of the neck you will see an E as well which
19 is again ecchymosis which is the bruising. There was
20 another area of bruising right up here on the left back of
21 her shoulder and then right below that was another smaller
22 area of bruising. You will see at the back part of her
23 left arm pit there's four circles drawn. That was four
24 round shaped areas of bruising in that. The back area of
25 her left arm is another area of bruising. The back of her

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1 left lower forearm is an L which stands for laceration.

2 And then I've written along beside of that the results of
3 bruising associated with that laceration. And then on the
4 left hand and around the left wrist you will also see areas
5 of bruising associated with that. The back of the right
6 arm is another area of bruising. And then along the back
7 along the scapular area I've gotten some lines drawn across
8 there and it was just linear areas of bruising right there
9 as well as the small abrasions on her back.

10 Q. Thank you. And would you please do the same for
11 State's Exhibit Forty B?

12 A. This is just the side views of her body. From the
13 left side of her chest there were two areas of bruising
14 which again you see the two E's right there. Along her
15 right arm on the right upper arm is an AB which again
16 stands for avulsion. That's the area of a tissue that's
17 been damaged. On the lower right arm is another avulsion
18 with some bruising associated with that. And then on the
19 right hand was a large area of bruising.

20 Q. Thank you. You may return to your seat.

21 (WITNESS RETURNED TO WITNESS STAND.)

22 Q. In addition to the injuries that you pointed out to us
23 did you observe any additional injuries to Ms. Moss's body?

24 A. There was an area of bruising that I felt was going to
25 be too complex for me to actually try to document in my

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CROSS EXAMINATION BY MR. CUMMINGS

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1 narrative notes so we did a graph of those. We have a
2 graph that we can actually lay over the bruising and
3 outline the tracing of the bruising itself and I do have
4 that.

5 Q. Okay. Where was this bruising located on her body?

6 A. There's two separate areas. One was located on the
7 right scapular area which is the bone in your upper right
8 back around to the right axilla area which is your arm pit.
9 And then the second area was her right iliac crest which
10 basically your right hip area and goes around to her right
11 lower back.

12 Q. And could give us an idea of how large the bruising
13 was that you just described in those two areas?

14 A. Well this is drawn to scale so this was an actual
15 tracing so these papers may be -- you are looking at maybe
16 four inches by seven inches on each area. It's a rough
17 guess.

18 Q. Thank you. Please answer any questions defense
19 counsel may have for you.

20 CROSS EXAMINATION

21 MISTY BINKNEY BY MR. CUMMINGS:

22 Q. Good afternoon, Ms. Binkney, how are you doing?

23 A.. Good.

24 Q. You are not particularly familiar with the specific
25 duties but you indicated that you are an ICU nurse;

MISTY BINKNEY: CROSS EXAMINATION BY MR. CUMMINGS

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1 correct?

2 A. Correct.

3 Q. So essentially when somebody is having a serious
4 medical issue they come in and you are kind of the first
5 point they meet; is that correct?

6 A. Yeah.

7 Q. Okay.

8 A. In most trauma cases yes I'm the first point but they
9 can come to us at any point in time during their medical
10 condition.

11 Q. Okay. Gotcha ya. And you assisted in the treatment
12 of Ms. Moss; correct?

13 A. Yes.

14 Q. Okay. And basically when she came in you kind of did
15 an over view. I'm looking for like the major that issues
16 you are going to have to address in the immediate future;
17 correct?

18 A. Uh-huh.

19 Q. Okay. And at that time you basically just recorded
20 what you saw. That's kind of what we just went over;
21 right?

22 A. Correct..

23 Q. So you got kind of sort of a triage situation where
24 you see where the major issues are on the body and what
25 needs to get addressed and kind of in what order. Is that

1 a fair description?

2 A. That's how we do our assessment and handle our
3 interventions from there. What we just reviewed just now
4 was primarily just the actual physical injuries that we
5 could see on her body.

6 Q. Okay. But you don't know how those injuries got
7 there; correct?

8 A. I do not.

9 Q. So you just record injuries as you see them and go
10 from there. And of course that's not really your job your
11 job is just treating; correct?

12 A. Is to take care of the patient.

13 Q. Okay. And based on your description of those injuries
14 you did not examine her genitals in any way; correct?

15 A. Not initially.

16 Q. Okay. When she arrived at the hospital she was not
17 responsive; correct?

18 A. She was responsive when she arrived to me.

19 Q. Okay.

20 A. I was not in the emergency department so I can't speak
21 for that.

22 Q. Okay. So at that point you basically got all the
23 information that you could to begin treating her; correct?

24 A. Yes.

25 Q. Okay. I beg the Court's indulgence. Nothing further,

DOCTOR EARL JENKINS: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 Your Honor.

2 SOLICITOR SIKORA: I guess nothing from this witness.

3 May she be excused, Your Honor?

4 THE COURT: You may be excused.

5 SOLICITOR LIPINSKI: The State calls Doctor Earl
6 Jenkins.

7 Doctor Jenkins, if you will please approach the clerk
8 and be sworn please.

9 (WHEREUPON: DOCTOR EARL
10 JENKINS, BEING FIRST CALLED, WAS DULY SWORN AND TESTIFIED
11 AS FOLLOWS:)

12 MADAME CLERK: Thank you.

13 DIRECT EXAMINATION

14 DOCTOR EARL JENKINS BY SOLICITOR LIPINSKI:

15 Q. Doctor Jenkins, with whom are you currently employed?

16 A. York Pathology Associates.

17 Q. And in what capacity?

18 A. I am a medical doctor, pathologist.

19 Q. And what is a pathologist meaning in relation to other
20 doctors?

21 A. A pathologist is a subspecialized area of medicine
22 defined as a study of disease. It involves the diagnoses of
23 disease condition generally through blood and body fluid
24 testing, tissue testing and examination.

25 Q. And prior to and during your tenor with a pathology

1 department what kind of specialized training and education
2 have you received in the field of pathology?

3 A. In the field of pathology in '75, '76 I was a fellow
4 with the chief medical examiner in North Carolina. At the
5 time did medical legal autopsies for the year and have
6 continued to do medical legal autopsies for York, Chester
7 and Lancaster counties since around '77 when I first came
8 to town.

9 Q. And are you board certified in pathology and forensic
10 pathology?

11 A. I am board certified in anatomic and clinical
12 pathology. I am board eligible in forensic pathology but
13 have not taken those boards.

14 Q. And what briefly does your certification take your
15 specialty in pathology and take it into what particular
16 subspecialty clinical and anatomical?

17 A. Pathology is divided into two general areas of
18 practice in hospitals and that is anatomical and anatomic
19 pathology. Anatomic is the visual and microscopic
20 examination of human tissues. In order to provide a
21 diagnosis that might be a malignant diagnosis or a
22 diagnosis of infection. Clinical pathology has to do with
23 the hospital laboratory, blood bank, chemistry,
24 microbiology, urinalysis, hematology where a gamut of blood
25 and body fluid test on individuals to diagnose disease

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1 conditions and follow those conditions and treat those
2 conditions.

3 Q. And on a day to day basis what are some of your duties
4 and responsibilities?

5 A. My daily responsibilities are more surgical pathology
6 which has to do with those things that are removed by
7 surgeons and submitted to pathology for visual and
8 microscopic examination and in over seeing the daily
9 activities of the laboratory.

10 Q. And do you have the occasion to perform what we
11 generally refer to as an autopsy?

12 A. Yes.

13 Q. And how often would say that you do that?

14 A. During a years time our group will perform
15 approximately a hundred.

16 Q. And how many autopsies have you performed during your
17 tenure in the medical field?

18 A. Since the beginning of my training probably somewhere
19 between eighteen hundred and two thousand personally.

20 Q. And what is the term forensic pathology? How is that
21 different from anatomical and clinical pathology?

22 A. Forensic pathology is the medical and legal
23 investigation of a death. Post mortem examinations or
24 autopsies are done in order to determine the cause of death
25 in many cases which are unnatural or suspicious or sudden -

1 unexpected.

2 Q. Does the subspecialty of forensic pathology not only
3 allow you or include the investigation of fatal wounds but
4 does it also include the investigation of non-fatal wounds
5 and how they may have impacted that person?

6 A. Yes. I've seen probably more non-fatal wounds than
7 fatal wounds in the course of my profession.

8 Q. And have you ever testified in court before?

9 A. Yes.

10 Q. And have you ever been qualified as an expert in the
11 field of forensic pathology?

12 A. I have.

13 Q. Your Honor, at this time we would proffer Doctor Earl
14 Jenkins in the field of forensic pathology.

15 MR. LEMEL: Without objection, Your Honor.

16 THE COURT: All right you can give opinions in that
17 subject.

18 BY SOLICITOR LIPINSKI:

19 Q. Obviously in this particular incident Ms. Moss did not
20 expire and you did not at any time perform pathology on
21 her; correct?

22 A. Correct.

23 Q. You are not part of any of the treating physicians who
24 have provided her care while she was at the Piedmont
25 Medical Center?

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1 A. No I wasn't.

2 Q. But you on occasion do work for the Sixteenth Circuit
3 Solicitor's Office?

4 A. Yes I do.

5 Q. And did you have the occasion to examine a photograph
6 of Ms. Moss and a particular item that was collected at the
7 scene to see if they related to one another?

8 A. Yes I did.

9 Q. If you could hand me those group of photographs right
10 in front of you.

11 (WITNESS HANDED SOLICITOR PHOTOS.)

12 Q. Thank you. Let me show you what's been marked as
13 State's Exhibit Forty-One I. It's been moved into evidence
14 and asks if that is one of the photographs you were asked
15 to review?

16 A. Yes it is.

17 Q. Let me further show you State's Exhibit Number Sixteen
18 a stick. We further ask you to see whether or not this
19 stick in any way relates to the injuries depicted on Ms.
20 Moss in Forty-One I?

21 A. At the time I was asked to examine these I felt that
22 the wounds were compatible with being struck by this stick.

23 Q. And let me bring up Forty-One I on the projector if
24 you could.

25 Ms. Childers, if you can dim the lights.

1 (CLERK OF COURT DIMMED COURTROOM LIGHTS.)

2 If you could explain to the jury -- I apologize. We
3 switched between the projector the last time and this. It
4 will come up in a minute.

5 (PAUSE.)

6 Q. I am showing you now on the over head projector what's
7 been previously marked and identified as State's Exhibit
8 Number Forty-One I. Please feel free to come off the stand
9 if that would further allow you - and I am going to hand
10 you this laser pointer you may need it if you do explain to
11 the jury why you feel that stick is related to the
12 injuries; these injuries depicted on Ms. Moss are
13 consistent with these injuries depicted on Ms. Moss?

14 A. This is a bruise; fresh bruise. You notice the
15 differences in colors. Its parallel lines from this side
16 and this side of the bruise. That type of line is typical
17 for being struck by a rounded object; a broom handle or
18 stick, something of this nature.

19 Q. Is there anything in particular about this stick
20 different from a solid broom handle that doesn't have any
21 deviations in it that it relates to these bruises that may
22 suggest it may have come from this stick versus another
23 handle or some other cynical object?

24 A. Potentially there are. On uneven surfaces and the
25 surfaces aren't perfectly rounded there would be parts of

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1 the surface that would go deeper and that could be
2 reflected by this central area. The paler area would be a
3 sight where there was less impact or more of an upward
4 groove so sort of a protrudence here and an inward rove
5 there would fit the unequal sort of circumference of the
6 stick rather than a circle.

7 Q. Let me borrow your laser just briefly and ask you in
8 addition to these linear bruises these two kind of dots
9 here do they in any way relate to the peculiarities of that
10 stick that reinforce or contradict your statement that this
11 stick is consistent with this type of bruising? Is there
12 any knots on that stick that in any way impact what type of
13 bruising that was left?

14 A. The lighter areas are called the areas that were less
15 impacted. The darker areas are those that were more
16 impacted so the differences would be more likely to cause
17 the darker sights. And recessions on the surface of the
18 stick would leave these lighter areas so it just reflects
19 an uneven circle of some circular object that is consistent
20 with a circular object.

21 Q.. Thank you.

22 Those are all of the questions we have of Doctor
23 Jenkins at this time, Your Honor.

24 CROSS EXAMINATION

25 DOCTOR EARL JENKINS BY MR. LEMEL:

1 Q. Good afternoon, Doctor. Doctor Jenkins, I think it
2 was previously indicated that you yourself did not in any
3 way treat Ms. Moss; correct?

4 A. Correct.

5 Q. And in fact you have never had any personal contact
6 with her have you?

7 A. That is correct.

8 Q. Basically you don't know anything about her over all
9 medical care; medical treatment or anything like that?

10 A. No I don't.

11 Q. You are just basically giving us a specific set of
12 things to review on behalf of the solicitor's office?

13 A. Yes, sir.

14 Q. When did they bring those things to you?

15 A. I don't recall. It's been weeks.

16 Q. A few weeks ago: Sometimes this year though?

17 A. Oh yeah.

18 Q. Would you say within the last six months?

19 A. I think so yes.

20 Q. Within the last four months?

21 A. I think so but I'm not certain as to the date.

22 Q. Relatively recent?

23 A. Yes enough to remember - recall.

24 Q. And basically in this particular situation you are
25 relying particularly when it says in the pictures on the

1 person who actually took the pictures; right?

2 A. Yes to accurately depict the conditions yes.

3 Q. And there is nothing on there in particular of any
4 sort of scale, any ruler or anything like that that you can
5 measure against to show exactly how big those bruises were?

6 A. No.

7 Q. And having some more detail like that would of course
8 assist you in how strong your conclusion is?

9 A. It could.

10 Q. For example if you look at a particular impact on a
11 particular item and there is a very definite scale on it
12 you can compare the scale on the items against the scale of
13 the impact?

14 A. To an extent yes.

15 Q. Sure. But you don't have that in this particular
16 case?

17 A. Not strictly no I don't.

18 Q. So basically in this situation you are just making an
19 assessment based on a picture that somebody else took?

20 A. Yes I am.

21 Q. And basically saying that it could have been caused by
22 the stick that was taken into evidence?

23 A. I would say it's consistent with that yes, sir.

24 Q. Just that it's consistent?

25 A. Yes, sir.

1 Q. You don't know exactly how the bruising occurred?

2 A. I would say bruises are generally from impact from
3 trauma so they are traumatic bruises I would assess.

4 Q. Maybe I misspoke that. You weren't present when ever
5 the bruises actually occurred?

6 A. Oh no, sir.

7 Q. So you can't tell us under what circumstances who
8 swung the item or anything like that?

9 A. Oh no, sir.

10 Q. Basically all you can say it is similar? Is that --
11 you are nodding your head I just want to make sure --

12 A. What did you say, sir?

13 Q. Basically you are saying that they are similar between
14 the stick and the bruise?

15 A. They are consistent with wounds inflicted by --
16 bruises inflicted by a stick such as this yes, sir.

17 Q. Thank you.

18 SOLICITOR LIPINSKI: That's all we have of Doctor
19 Jenkins.

20 THE COURT: You can step down, sir.

21 DOCTOR JENKINS: Thank you.

22 SOLICITOR LIPINSKI: Your Honor, if we can just
23 approach briefly.

24 (BENCH CONFERENCE AT 3:45 P.M OFF THE RECORD OUT OF
25 THE HEARING OF THE JURY.)

LORETTA MOSS: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 THE COURT: Okay, ladies and gentlemen, we are going
2 to take a short break before this next witness. I am going
3 to send you back into the jury room but we will have you
4 out here shortly.

5 (JURY LEAVING COURTROOM AT 3:46 P. M..)

6 (SHORT RECESS AT 3:46 P.M..)

7 (BACK ON THE RECORD AT 3:54 P.M..)

8 THE COURT: Be seated. You ready?

9 SOLICITOR LIPINSKI: I am, Your Honor.

10 THE COURT: Bring in the jury.

11 (JURY ENTERING COURTROOM AT 3:55 P.M..)

12 SOLICITOR LIPINSKI: The State calls Ms. Loretta Moss.

13 MADAME CLERK: Please raise your right hand and place
14 your left hand on the bible.

15 (WHEREUPON: LORETTA MOSS,

16 BEING CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

17 MADAME CLERK: Thank you. You may be seated.

18 DIRECT EXAMINATION

19 LORETTA MOSS BY SOLICITOR LIPINSKI:

20 Q. Ms. Moss, I am going to ask you to speak in the
21 direction of that microphone between you and the court
22 reporter just so these last jurors can hear you. You have
23 to lean toward it just speak in that general direction. If
24 you could state your name, your full name, spelling your
25 last name for the record.

- 1 A. Loretta B. Moss, M-o-s-s.
- 2 Q. Ms. Moss, do you live at [REDACTED] [REDACTED]?
- 3 A. Yes I do.
- 4 Q. And approximately how long have you lived there if you
- 5 recall?
- 6 A. About twenty-five; twenty-seven years.
- 7 Q. Okay. Did you grow up here in Rock Hill?
- 8 A. Actually I was born in Gastonia but I came to Rock
- 9 Hill when I was twenty.
- 10 Q. You started working more or less you came to this
- 11 area?
- 12 A. Yes.
- 13 Q. And have you lived there predominately since that
- 14 time?
- 15 A. Yes.
- 16 Q. And are you married?
- 17 A. Yes I am.
- 18 Q. To whom?
- 19 A. Robert Louder.
- 20 Q. That's this gentleman here seated here on the front
- 21 row?
- 22 A. Yes, sir. I mean yes, ma'am.
- 23 Q. Okay. How long have you and Mr. Louder been married?
- 24 A. Three years.
- 25 Q. And how long have you known him?

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1 A. About thirty.

2 Q. Would it be fair to say - -

3 A. We worked together.

4 Q. You worked together?

5 A. Years ago yes.

6 Q. And have you stayed in contact off and on through that
7 thirty year period?

8 A. No not really. After I married Mr. Moss, Tommy Moss,
9 and after he passed away Robert's wife had passed away and
10 we were friends at work and we started talking and after
11 three years we married.

12 Q. And do you and Mr. Louder have any children in common?

13 A. No.

14 Q. Do you have any children?

15 A. I have two.

16 Q. And what are their names?

17 A. Cecilia and Neil.

18 Q. Neil would be your son?

19 A. Right.

20 Q. Is Cecilia your daughter?

21 A. Right.

22 Q. Does she go by Sissy?

23 A. Sissy yeah.

24 Q. And is she also seated here?

25 A. Yes she is. Sissy Berard.

- 1 Q. Sissy Berard. And is that Russell's mom?
- 2 A. Yes it is.
- 3 Q. Is that Adam's mother?
- 4 A. Yes it is.
- 5 Q. And where does Sissy live?
- 6 A. Right beside me at [REDACTED].
- 7 Q. And who is Sissy married to?
- 8 A. Douglas Berard.
- 9 Q. And is that Adam's father?
- 10 A. No stepfather.
- 11 Q. So he and Russell would have different fathers?
- 12 A. Right.
- 13 Q. Even though they have the same name biological they
- 14 have different fathers?
- 15 A. Douglas adopted Adam.
- 16 Q. Douglas later adopted Adam?
- 17 A. Yes.
- 18 Q. And have you stayed for the most part in constant
- 19 contact with your grandson's Russell and Adam over their
- 20 life?
- 21 A. Yes when Adam was available.
- 22 Q. At one time he lived in Ohio would that be fair to
- 23 say?
- 24 A. Right.
- 25 Q. But other than that when he lived in this area would

LORETTA MOSS: DIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 you see him and Russell frequently?

2 A. Russ yes. But Adam was always away.

3 Q. But when he was here did you have a good relation with
4 him?

5 A. Yes.

6 Q. Did you see him on Christmas and birthdays and those
7 kinds of things?

8 A. Yes, ma'am.

9 Q. And prior to June 8th of 2008 how would you describe
10 your relationship with Adam?

11 A. I thought it was good. I loved Adam; I've always
12 loved him.

13 Q. And at some point Adam even returned home living with
14 Doug and Sissy next door to you; correct?

15 A. Yes he did.

16 Q. And would Adam ever have the occasion to do work
17 around the yard either in your yard or Sissy's?

18 A. Absolutely. I paid him to help me do things.

19 Q. Did Russell ever do that kind of work or did he work
20 predominately in a restaurant?

21 A. Russ worked in a restaurant. And school. When he
22 first moved over there he was still in school and after he
23 finished high school and graduated he was working.

24 Q. Do you still work, Ms. Moss?

25 A. I certainly do.

- 1 Q. And where do you work?
- 2 A. At Kohl's in Rock Hill.
- 3 Q. How long have you worked at Kohl's in Rock Hill?
- 4 A. Since before the store opened three years; a little
- 5 over three years.
- 6 Q. Meaning before the store opened did you help it open;
- 7 were you a part of setting up the store?
- 8 A. Yes I was part of the team that opened the store.
- 9 Q. And what do you do at Kohl's?
- 10 A. I work in fine jewelry now.
- 11 Q. Basically retail or retail sales?
- 12 A. Yes.
- 13 Q. That sort of thing?
- 14 A. Yes.
- 15 Q. And does Mr. Louder still work?
- 16 A. No he doesn't.
- 17 Q. But at some point you two have worked together growing
- 18 up?
- 19 A. At the Celanese for years yes, ma'am.
- 20 Q. And do you remember the day of June 7th, 2008 carrying
- 21 over into the night of June 8th, 2008?
- 22 A. Yes, ma'am, I do.
- 23 Q. Do you remember if you worked that day?
- 24 A. I did.
- 25 Q. And do you remember approximately what time if at all

1 you would have gotten off?

2 A. I think I got home around 2:00 or maybe 1:00. It was
3 an early day. I wasn't getting many hours. It was either
4 1:00 or 2:00. Probably 1:00.

5 Q. And do you have to dress up for work at Kohl's?

6 A. Yes.

7 Q. And when you got home would you have changed clothes?

8 A. Absolutely.

9 Q. And do you remember what you changed into?

10 A. Shorts and a top. I did a lot of yard work. I worked
11 out in my yard all the time and I usually put on shorts and
12 a top.

13 Q. And do you remember what you did just generally that
14 afternoon after you got home from work?

15 A. I can't remember exactly but knowing me and how I love
16 my yard I probably went right out into the yard and
17 starting weeding or something like that.

18 Q. And you have flowers and those kinds of plants in your
19 yard?

20 A. Yes, ma'am, I work in my yard all the time.

21 Q. And do you remember whether your husband was home that
22 day or was he away that weekend?

23 A. Yes.

24 Q. He was away that weekend?

25 A. Yes.

1 Q. Was there anyone at home at Doug and Sissy's house
2 when you got off work?

3 A. As a matter of fact they had called me and told me
4 that they were thinking about riding down to the beach just
5 for one day. They went that night and they were just going
6 to stay the day and come back.

7 Q. So Doug and Sissy were not home?

8 A. Right. They were gone to the beach.

9 Q. Do you remember whether or not Russell was at home
10 when you got home?

11 A. No he was working.

12 Q. He had gone to work?

13 A. He was working and then after work he and Meghan had
14 plans. They were going out together.

15 Q. Did you see him that morning at all?

16 A. Russ?

17 Q. Before you went to work?

18 A. Russ?

19 Q. Yes.

20 A. No. I went in on the early shift.

21 Q. Do you remember when you got off work when you got
22 home in the middle of the afternoon whether Adam was home?

23 A. He wasn't when I got home but he came home shortly
24 after.

25 Q. And did he immediately come to your house or did he go

1 back over to his house?

2 A. He usually would go put his moped up and come up to
3 the house. We would sit on the deck and talk or you know.

4 Q. Was that a very common routine for the two of you to
5 spend that time in the afternoon either on your deck or in
6 your yard?

7 A. It was very routine very common. We spent a lot of
8 time sitting on my deck talking.

9 Q. And initially when he came over in the early afternoon
10 hours did you notice anything unusual about Adam's demeanor
11 or appearance?

12 A. Nothing except he had stopped and got beer again and
13 he was drinking.

14 Q. And was that something that you encouraged Adam to do?

15 A. Absolutely not.

16 Q. Was he allowed to drink inside your house?

17 A. No. That's the reason we sat on the deck.

18 Q. And did he stay there pretty much from 2:00 on or did
19 he ever go back to his house?

20 A. Adam was in and out. I'm not sure; I can't say for
21 sure that he went home. He brought his beer and put it in
22 one of those out buildings and he was back and forth from
23 the building drinking beer.

24 Q. Did Doug and Sissy allow him to drink in their home?

25 A. No absolutely not.

1 Q. Is that why he would have the occasion to drink in
2 either the shed or the out building?

3 A. That's the reason he hid it. He not only hid it in
4 the building but he hid it out in the woods or wherever.

5 Q. And do you remember him ever leaving the Zinker Road
6 address? Did he ever leave during that afternoon and come
7 back if you recall?

8 A. He wasn't supposed to go anywhere after he came home
9 from work. And that was after he had come in work early
10 and got off at 2:00. This had to be on a Saturday; it
11 seems like it was on Friday or Saturday, but he came home
12 early and I don't remember him leaving or going anywhere's.

13 Q. You said there may have been an occasion where he went
14 back over to Doug and Sissy's house where you weren't
15 necessarily watching?

16 A. Right. I mean you know we would talk but if I was
17 busy doing something I just got up and went on about my
18 business and he did the same thing.

19 Q. Do you remember what you did for dinner that night?

20 A. Yes. Since Sissy and Doug and gone to the beach I
21 cooked us a hamburger steak and had a salad. I cooked them
22 out on the grill and made us a salad. Fixed his dinner.

23 Q. And did you eat out on the porch or would you have
24 invited him inside your house?

25 A. We ate at my dining room table just right inside the

1 glass doors.

2 Q. And did Adam have a key to your house; was he free to
3 come and go?

4 A. No, ma'am, no.

5 Q. Did he have to knock?

6 A. Yes, ma'am.

7 Q. And so you would have invited him in or invited him
8 over for dinner?

9 A. I told him I would fix us a hamburger steak on the
10 grill if he was hungry and he accepted and yes he came in
11 and ate.

12 Q. Do you remember about what time you think that day or
13 what time you generally ate dinner?

14 A. Probably about -- probably about 4:30 or 5:00.

15 Q. So you would have eaten a little early?

16 A. Right.

17 Q. You are somebody who generally goes to bed early or do
18 you go and lie down?

19 A. Yes I do I go to bed early.

20 Q. About what time do you normally go to bed?

21 A. My goodness some nights after when I work I go to bed
22 at 7:30 or eight o'clock but I watch TV.

23 Q. Are you a morning person?

24 A. Very much so. I wake up and get up about 5:00.

25 Q. And so Adam would have come over and had dinner you

1 say basically to the best of your recollection sometime
2 around 4:00 or 5:00?

3 A. I can't remember exactly but I'm thinking that would
4 be about the time.

5 Q. That's what time you normally ate your supper?

6 A. Right.

7 Q. And how was his demeanor now that you've progressed to
8 about that time in the afternoon? Has anything changed
9 either as a result of his drinking or as a result of his
10 conversation you might have been having with him?

11 A. Nothing except he was getting -- he was continually
12 drinking and he was getting on my nerves. He was getting
13 higher and higher.

14 Q. And is that part of the reason why you didn't
15 encourage him to drink?

16 A. Yes. Well he wasn't supposed to. He had that ankle
17 bracelet on; it was not legal for him to drink. He wasn't
18 supposed to be drinking alcohol.

19 Q. And as he started drinking you said he started getting
20 on your nerves. Is there anything in particular that he
21 did when he drank that got on your nerves?

22 A. When he got really high he didn't make a lot of sense.

23 Q. And after dinner did he stay at your house or did he
24 go back to his house?

25 A. No he didn't -- we always sat on the deck. Very

1 seldom did Adam go in my house with me. You know his mama
2 and dad had got onto him about it. He just wasn't -- he
3 was told not to do that.

4 Q. So after dinner you all would have gone back out?

5 A. Back out on the deck.

6 Q. Did he smoke at all, Ms. Moss, did you at the time?

7 A. I do.

8 Q. And is that part of the reason why you stayed kind of
9 on the deck area?

10 A. Yes, ma'am, I don't like smoking in my house.

11 Q. Was it inside your house or out on the deck?

12 A. I don't like to smoke in my house although I've done
13 it a few times but I try not to do it. I try to go on the
14 outside.

15 Q. So after dinner to the best of your recollection you
16 two would have returned out to the porch area?

17 A. Absolutely.

18 Q. And did the conversation change in any way once you
19 went out on the deck? Did Adam continue drinking or did he
20 stop?

21 A. He did not stop he continued. As a matter of fact he
22 called someone and they brought him two cases of beer. His
23 girlfriend Debbie.

24 Q. And did you see her pull up?

25 A. I did not see her that time but I knew. He told me

1 she had brought him some more beer. Now I have seen her
2 pull up on that road - -

3 MR. LEMEL: Objection as to relevance.

4 THE COURT: Sustain.

5 A. Pardon?

6 THE COURT: That's okay, ma'am. She will ask you
7 another question.

8 A. Okay.

9 BY SOLICITOR LIPINSKI:

10 Q. I was trying to focus a little bit more on that
11 particular day as to other days; things you may have
12 observed. On that particular day you said Adam had told
13 you someone had brought him some more beer?

14 A. Yes.

15 Q. And did you allow him to stay on your deck drinking
16 after dinner?

17 A. I did until he made a pass at me.

18 Q. And when you say he made a pass at you what do you
19 mean, Ms. Moss?

20 A. He tried to kiss me..

21 Q. And how did you respond to that?

22 A. I told him you are my grandson, Adam, you don't do
23 that. You just can't do stuff like this. You need to go
24 home.

25 Q. And how did he respond to that?

- 1 A. He left.
- 2 Q. And do you remember about what time that was?
- 3 A. Probably about 6:30.
- 4 Q. Was it dark yet?
- 5 A. No it was summertime.
- 6 Q. So it would have been getting dark later?
- 7 A. Right.
- 8 Q. And did you stay out on the porch after he went home?
- 9 A. No I went in.
- 10 Q. And did you watch TV or do anything else around the
- 11 house?
- 12 A. I think to the best of my -- I'm trying to remember.
- 13 I took a bath and I shampooed my hair and I was sitting at
- 14 my dresser in my bedroom trimming the ends of my hair off.
- 15 Q. Is that something you typically do?
- 16 A. I cut my hair all the time.
- 17 Q. And did anything unusual happen while you were cutting
- 18 your hair?
- 19 A. I heard pounding on the back door?
- 20 Q. And did you answer it?
- 21 A. I didn't at first but it continued.
- 22 Q. Why didn't you answer?
- 23 A. Because I figured it was Adam and I didn't want him up
- 24 there drunk.
- 25 Q. But you said you finally did go answer the door?

1 A. Well yea I did because he constantly kept knocking on
2 the door.

3 Q. And did you invite him in or did you go back - -

4 A. No, ma'am, I did not invite him in. He said, "Nanny,
5 all I want is for you to come out here and talk to me. I
6 just want somebody to talk to. Just come talk to me." And
7 I stepped out on the porch. I unlocked the door and
8 stepped out on the deck.

9 Q. Did you sit down on the swing at all or did you stay
10 standing?

11 A. No I was standing. Standing because Adam at that
12 point he was reeling; he was so drunk he was reeling.

13 Q. And by reeling do you mean - -

14 A. I mean he wasn't steady on his feet.

15 Q. And at that point or at any point in the evening other
16 than beer did Adam ever drink anything else over at your
17 house that you recall?

18 A. Pardon me.

19 Q. Did he show you anything that night; did you all
20 discuss anything unusual?

21 A. Nothing except - I'm trying to think. Earlier when he
22 was up there on the porch he showed me a hatchet.

23 MR. LEMEL: Objection, Your Honor, relevance?

24 SOLICITOR LIPINSKI: Goes to their conversation, Your
25 Honor, that night.

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1 THE COURT: If it's just relevance it's over ruled.

2 MR. LEMEL: Also pursuant to 403, Your Honor.

3 THE COURT: I need to hear from you up here.

4 (BENCH CONFERENCE AT 4:14 P.M. OFF THE RECORD OUT OF
5 THE HEARING OF THE JURY.)

6 THE COURT: Are you going to rephrase the question?

7 SOLICITOR LIPINSKI: Yes, Your Honor.

8 Going back to when Adam came over there that second
9 time after dinner when he comes back and you said you were
10 cutting your hair and you went back out on the porch and
11 you said he was swaying and everything. Was there anything
12 else about his appearance or demeanor that night that was
13 unusual? Did he appear calm or upset about anything?

14 A. I don't know. I don't remember.

15 Q. You stated he asked you to come back out on the porch
16 and talk to him?

17 A. Yes.

18 Q. And did you do that?

19 A. Yes I did.

20 Q. And what is just generally the nature of your
21 conversation at that time if you recall?

22 A. Just that he needed to go home because he was just too
23 drunk. He was getting on my nerves.

24 Q. And did he honor that request; did he get off your
25 porch?

- 1 A. Yes he did. He was angry but he went.
- 2 Q. Did he ever have the occasion -- did you stay out on
3 the porch or did you go back in?
- 4 A. I went back in the house.
- 5 Q. Did you ever go back out on the porch that night?
- 6 A. Would you ask me that question again because I'm
7 trying to remember whether I was -- that was after he
8 knocked on the back door. Is that when you are referring
9 to?
- 10 Q. I don't mean for you to be confused. I know he came
11 over there other times that night. But you stated that at
12 one point after you had taken your bath and you were
13 cutting your hair you heard a knock on the door and Adam
14 wanted you to come out and just talk to him.
- 15 A. Right.
- 16 Q. And you stated you went out there and talked to him;
17 correct?
- 18 A. Right.
- 19 Q. And you stated that at that point you asked him to
20 leave because that was when he was reeling or swaying?
- 21 A. Yes.
- 22 Q. And did you invite him inside?
- 23 A. No, ma'am. I turned -- I told him to go home.
- 24 Q. And then what happened?
- 25 A. And I turned to go back and to go in the house and I

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1 was hit in the back in the back of the head.

2 Q. Do you remember that hit?

3 A. I remember -- yea, yes. At that moment I do yes. I
4 went to my knees.

5 Q. You wear dentures, Ms. Moss?

6 A. Yes I do upper.

7 Q. And you heard testimony that they were located out on
8 your porch. Did you leave them out there?

9 A. No, ma'am.

10 Q. Would you have taken them out and set them - -

11 A. Absolutely not. Nobody saw me without my teeth.

12 Q. At some point after you were in the hospital that you
13 asked them to actually bring those to you so you could have
14 them back; correct?

15 A. Yes, ma'am.

16 Q. Those dentures that they brought you those were yours?

17 A. Yes.

18 Q. And out on your porch did you ever have the occasion
19 to have a creyp myrtle branch or a stick out there? Did
20 that belong to you?

21 A. No but I knew who it did belong to?

22 Q. How do you know who it belonged to? Does the name Bo
23 have any significance to you?

24 A. Absolutely. It was in my daughter's parrot's cage.

25 His name is Bo.

1 Q. And had you seen it in there in the past?

2 A. Had I what?

3 Q. Had you ever seen it in the actual parrot cage?

4 A. Yes I have.

5 Q. Was that where it was the last time you saw it prior
6 to the night in question?

7 A. No they had taken it out but it was in Sissy's house.

8 Q. It wasn't on your deck? That wasn't something you
9 kept there for security?

10 A. Absolutely not.

11 Q. And you stated you remember going down to your knees?

12 A. Yes.

13 Q. And do you ever remember going back inside? Do you
14 remember how you got back inside if at all?

15 A. I don't know.

16 Q. Did you have any rugs outside on the deck?

17 A. Yes I did. The one that was in the picture that was
18 all crumbled up. That was my outside door mat.

19 Q. The Court's indulgence one moment, Your Honor.

20 A. It was a stripped, brown looking stripped rug.

21 (WHEREUPON: STATE'S EXHIBIT NUMBER NINE, PREMARKED
22 FOR IDENTIFICATION?

23 BY SOLICITOR LIPINSKI:

24 Q. Let me show you State's Exhibit Number Nine and ask if
25 this is a photograph of your kitchen and dining room area?

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1 A. Yes, ma'am, it is and that's the rug that I kept
2 outside my glass sliding doors to clean my feet on.

3 Q. And do you know how that rug came to be inside your
4 house? Did you bring it inside to clean it or anything?

5 A. No, ma'am. No, ma'am, I didn't.

6 Q. To the best of your recollection on the night of June
7 7th, 2008 was it outside on your deck or inside?

8 A. It was outside.

9 Q. And you can see some stains around the rug.

10 A. It looks like drag marks to me.

11 Q. Were those on the floor before - - -

12 A. No, ma'am.

13 Q. - - - you got hit in the head?

14 A. No, ma'am.

15 Q. Do you remember anyone else being on the deck right
16 before you got hit on the head - - -

17 A. Nobody.

18 Q. - - - other than Adam?

19 A. Nobody.

20 Q. And do you remember whether or not Adam followed you
21 inside; how you two went inside after that blow to the
22 head?

23 A. I did not. When he hit me and I fell to my knees I
24 don't remember anything. But later I remember being in the
25 house but I didn't walk in there.

1 Q. Ms. Moss, there has been some testimony that your
2 clothes were found inside the house a green blouse and
3 short set. Do you remember ever taking those off on the
4 night in question?

5 A. No he told me to take them off.

6 Q. And did you take them off at his request?

7 A. I told him no. And he said I either took them off or
8 he would take them off of me.

9 Q. And other than the blow to the head you said you
10 remember on the deck do you remember any other times he may
11 have touched you in any way?

12 A. Not until after he told me to take -- after he took my
13 clothes off.

14 Q. And when he took your clothes off is that something
15 you let him do?

16 A. Of course not but he was hurting me.

17 Q. He was hurting you? Can you say how he was hurting
18 you?

19 A. I thought he was stabbing me.

20 Q. You thought he was stabbing you?

21 A. He was hitting me with something.

22 Q. Do you have any marks on you now?

23 A. Yes I do.

24 Q. Do you know where those marks are?

25 A. Yes.

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1 Q. And where are they, ma'am?

2 A. On my arm and right here on my abdomen where he cut my
3 liver.

4 Q. Did you have any injuries; received some - -

5 A. This is the one right here.

6 (WITNESS INDICATING THE RIGHT ARM.)

7 A. I've got a terrible scar.

8 Q. Are you okay?

9 A. I'm fine.

10 Q. Do you need some water?

11 A. I'm all right.

12 Q. We've seen some pictures where your arm was stapled.

13 A. That was here.

14 (WITNESS INDICATED LEFT LOWER ARM.)

15 I still have a knot. That's where he stabbed into the
16 bone. Right here.

17 Q. And did you say anything to him while he was hurting
18 you?

19 A. I told him to please stop you are hurting me. And he
20 told me to shut up you G - - D - - - bitch.

21 Q. And after he took your clothes off did he continue to
22 hurt you?

23 A. Yes, yes.

24 Q. And in what way did he hurt you, Ms. Moss, if you can
25 tell me?

1 A. Hitting me - I didn't know - it was just like I was
2 kind of in and out of it. I don't remember everything but
3 he was hurting me.

4 (WITNESS CRYING.)

5 Q. When he was hurting you was he just hurting you on
6 your chest and your arms? Did he ever hurt you - -

7 A. My back.

8 Q. Your back?

9 A. My arm. This arm.

10 Q. And when this incident happened do you remember if you
11 were standing or if you were laying down?

12 A. I probably was in the floor. I don't believe I could
13 have endured it on my feet.

14 Q. Do you remember if Adam had his clothes on the entire
15 time?

16 A. I remember -- I remember him taking his pants off and
17 I begged him Adam don't do this. Please don't do this.

18 Q. Did he stop, Ms. Moss?

19 A. No.

20 (WITNESS CRYING, TISSUES PASSED UP TO WITNESS.)

21 Q. After he took his pants off did he continue to hurt
22 you in any way?

23 A. Yes because I was begging him to stop. I don't know I
24 guess I was fighting him. I feel sure I was trying to.

25 Q. When he hurt you was he still just hitting you? Was

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1 there another type of hurt he was doing to you?

2 A. He was trying to have or he was having sex with me.

3 (WITNESS CRYING.)

4 Q. Do you remember if you ever had any pain in that area;
5 your pelvic area?

6 A. I remember my legs hurt -- my legs hurting.

7 Q. Do you know what if anything caused him to stop?

8 A. Pardon me.

9 Q. Do you know what if anything - did he ever stop?

10 A. No. No.

11 (WITNESS CRYING.)

12 Q. Do you remember your other grandson Russ coming over
13 at all?

14 A. No, ma'am, I don't remember that. I mean I know after
15 the fact that he came but I didn't know at that time. I
16 mean I don't remember. I don't remember.

17 Q. Do you remember going to the hospital?

18 A. No, ma'am.

19 Q. Do you remember being in the hospital?

20 A. No, ma'am.

21 Q. Do you remember getting out of the hospital?

22 A. I remember getting out of the hospital after a month.

23 q. After a long while you got out of the hospital?

24 A. After the month. I was at CMC a month and then they
25 transferred to me therapy.

1 Q. Did you go to that therapy?

2 A. Yes, ma'am, I was there about three weeks.

3 Q. And were you finally able to go home?

4 A. Yes, ma'am.

5 Q. Ms. Moss, would you have or did you consent to have
6 any kind of sexual contact with Adam that night?

7 A. Oh God no that's my grandson. I can't imagine. I
8 can't.

9 (WITNESS CRYING.)

10 Q. But, Ms. Moss, you were married at the time you are
11 still married now?

12 A. Yes.

13 Q. And your husband is Robert Louder?

14 A. That's right.

15 Q. And you heard that testimony about his DNA being in
16 the sexual assault kit?

17 A. About what?

18 Q. His DNA being in the sexual assault kit?

19 A. Yes, ma'am.

20 Q. Would you or could you have had relations with Mr.
21 Louder in a couple of days preceding this event?

22 A. Yes, ma'am.

23 Q. But Mr. Louder did he ever sexually assault you or
24 hurt you?

25 A. Oh Lord, Lord no.

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CROSS EXAMINATION BY MR. LEMEL

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1 Q. The Court's indulgence one moment.

2 That's all we have from Ms. Moss.

3 CROSS EXAMINATION

4 LORETTA MOSS BY MR. LEMEL:

5 Q. Ms. Moss, do you need a minute?

6 A. Yeah.

7 Q. Your Honor, if we could have just one moment.

8 (PAUSE.)

9 A. Can I have some water?

10 MADAME CLERK: Yes, ma'am.

11 THE COURT: Would you like for us to take a break,
12 ma'am?

13 A. No, sir, I just want some water.

14 (BAILIFF POURED WITNESS CUP OF WATER.)

15 A. Thank you. I'm fine, sir.

16 Q. I understand this is very difficult for you, Ms. Moss.

17 A. Pardon me.

18 Q. I understand this is very difficult.

19 A. Yes, sir, it is.

20 Q. At any point in time if you feel like you need a break
21 or some more water or anything like that will you tell me
22 that?

23 A. Yes, sir, I will.

24 Q. I want you to be able to answer my questions and I
25 know that is going to be tough for you okay?

- 1 A. I will.
- 2 Q. But if you need a break you just let us know.
- 3 A. All right.
- 4 Q. We will give you a second all right.
- 5 A. Yes, sir.
- 6 Q. Let's just talk first sort of about - -
- 7 A. You talk so soft I can't hardly hear you.
- 8 Q. I'm sorry, I'm sorry. I will come up a little bit
- 9 closer to you I apologize. We've been talking about what
- 10 we refer to as the compound there on Zinker Road.
- 11 A. I heard that and I didn't really like that.
- 12 Q. And it's a bad word but it's just a word we've been
- 13 using. Basically you had two houses inside one fenced lot;
- 14 right?
- 15 A. Yes, sir, myself and my daughter.
- 16 Q. Right. And that fence lot was about three acres
- 17 large?
- 18 A. No, sir, it was 2.5.
- 19 Q. 2.5 two and a half acres?
- 20 A. Yes, sir.
- 21 Q. Plenty of room for the two houses to be on?
- 22 A. Yes, sir.
- 23 Q. And the houses were relatively close together; right?
- 24 A. Probably two or maybe three car driveways apart. I
- 25 mean if it had been three driveways it would have been

LORETTA MOSS: CROSS EXAMINATION BY MR. LEMEL

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1 about three apart.

2 Q. I understand. I don't know how much a driveway is to
3 you but versus me. Do you think you could try to convert
4 that over to maybe yards or feet?

5 A. Now ah, no. I'm not good with -- it's probably --
6 well probably park three trucks side by side?

7 Q. Okay. All right.

8 A. Would that - -

9 Q. And I just want to make sure; side by side do you mean
10 nose to tail or door to door?

11 A. Door to door

12 Q. Door to door. Okay. So say an average car is maybe
13 teen feet wide?

14 A. Truck.

15 Q. Truck. Maybe twelve feet wide then? Would you agree
16 with me on that?

17 A. Right.

18 Q. So we are probably talking somewhere around thirty-
19 five to forty feet?

20 A. Probably.

21 Q. Okay. Which is a relatively short distance; would you
22 agree with me on that?

23 A. Yes, sir.

24 Q. Okay. All right. Certainly within easy shouting
25 distance?

- 1 A. Yes, sir.
- 2 Q. I am going to ask you to speak up for me just like you
- 3 did. I appreciate that, ma'am.
- 4 A. Yes, sir.
- 5 Q. And like we said relatively easy shouting distance I
- 6 think was the question I asked you just a second ago?
- 7 A. Yes, sir.
- 8 Q. So that you can hear what was going on in one house at
- 9 the other house relatively?
- 10 A. No not really.
- 11 Q. Okay. If you were out on the deck - -
- 12 A. They were kind of low like I was up higher like on a
- 13 knoll and they were down lower.
- 14 Q. So - -
- 15 A. Unless you really yelled.
- 16 Q. If you were out on your deck could you hear somebody
- 17 coming out the door of their house for example?
- 18 A. Not necessarily.
- 19 Q. But it was only about thirty-five to forty feet?
- 20 A. Pardon me.
- 21 Q. But it was only about thirty-five to forty feet?
- 22 A. I'm just guessing I don't know.
- 23 Q. That's a fair guess and I appreciate that. Now Adam
- 24 came to live at [REDACTED] about - well sometime
- 25 earlier that year; right? He had been there about six

1 months?

2 A. Somewhere in that proximity.

3 Q. Okay. And as part of him being on that bracelet you
4 mentioned he was allowed initially to go to just part of
5 that lot; right?

6 A. At the beginning I think so yes, sir.

7 Q. And then a request was made that that be changed so
8 that he was able to come over to your house?

9 A. Well yea I guess so.

10 Q. And that - when I say your house I'm talking about - -

11 A. Because he did help me in the yard a lot.

12 Q. And you agreed to that change; right?

13 A. Yes, sir.

14 Q. Okay. And told the probation agent that you were okay
15 with him coming over to that part of the lot?

16 A. Yes.

17 Q. And Adam did come over on a regular basis to your
18 house?

19 A. I wouldn't say regular but he came often.

20 Q. Came often. Okay. And you said you all spent a lot
21 of time out on the deck?

22 A. We all did.

23 Q. And again I'm talking about you and Adam. Adam and
24 you spent a lot of time out on the deck?

25 A. Well not a lot because I worked. But yea he visited.

- (1 He was my grandson.
- 2 Q. And sometimes he was inside the house?
- 3 A. Not often. Sometimes.
- 4 Q. But for example he had been in just that same day?
- 5 A. Right.
- 6 Q. Came over for dinner?
- 7 A. I invited him because - -
- 8 Q. And he came over for dinner?
- 9 A. Yes, sir.
- 10 Q. He was inside your house at that point?
- 11 A. Yes, sir. But we went back outside on the deck.
- 12 Q. Okay.
- (13 A. To smoke.
- 14 Q. And for him to drink?
- 15 A. That was his prerogative.
- 16 Q. And did you drink beer?
- 17 A. No.
- 18 Q. So any beer cans that were inside would not have been
- 19 yours?
- 20 A. No, sir.
- 21 Q. Okay. Do you remember him bringing a beer can inside
- 22 the house and putting it on the kitchen counter at some
- 23 point in time?
- (24 A. No not at that point I don't.
- 25 Q. Now the second after he left before he came back the

LORETTA MOSS: CROSS EXAMINATION BY MR. LEMEL

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1 last time you said you took you back and you were trimming
2 your hair in the bedroom?

3 A. My bedroom.

4 Q. So whatever hair they found there that was a result of
5 what you were doing?

6 A. Right I was trimming my hair.

7 Q. Which was not unusual for you at all?

8 A. No.

9 Q. So you came back out onto the deck?

10 A. Right.

11 Q. And he said that all he wanted was for someone to talk
12 to?

13 A. Right.

14 Q. And at that point in time you told him to leave and
15 turned away from him?

16 A. Yes.

17 Q. Turned back towards the house?

18 A. Yes.

19 Q. And is it at that point in time you were struck?

20 A. Right.

21 Q. And it's safe to say and very understandable following
22 that your memory of exactly what was going on is spotty?

23 A. I don't understand what you are asking me.

24 Q. Your memory is fragmentary; it's broken up?

25 A. It was at that point.

1 Q. There are certain things that you just don't remember
2 at this point in time; right?

3 A. Some things I don't remember I guess.

4 Q. And it's fair to say - -

5 A. Do you remember every thing?

6 Q. Well, ma'am, and I appreciate you saying that okay.

7 But do you understand that I am the one that has to ask you
8 questions?

9 A. Yes I know. I know. I understand.

10 Q. And we are focused on what happened after you were
11 struck - - -

12 A. Yes.

13 Q. - - - in this case and its impact on you. For example
14 you testified you don't remember the whole basic stay in
15 the hospital?

16 A. I don't.

17 Q. Which means your memory is impaired as to what
18 happened; right?

19 A. Yes.

20 Q. Okay. People have told you about stuff that happened;
21 right? Your family?

22 A. My family wouldn't tell me - didn't tell me anything.

23 Q. They didn't tell you you were in the hospital?

24 A. Well after a while I knew I was in the hospital.

25 Q. And you said you don't remember any of that?

LORETTA MOSS: CROSS EXAMINATION BY MR. LEMEL

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1 A. I don't remember a lot of things.

2 Q. Okay. And I guess that's also ultimately what I am
3 trying to get at, ma'am, is you don't remember a lot of
4 that; right?

5 A. Right.

6 Q. And then there are just gaps there that you can't fill
7 in from your own knowledge?

8 A. I guess there are some things I don't remember.

9 Q. And specifically sometimes that comes across when you
10 were testifying earlier when you testified that something
11 may or may not have happened. Do you remember testifying
12 that way or that you thought it maybe happened? Do you
13 remember saying that sometimes?

14 A. I just said I couldn't remember some of the things
15 that happened after being hit that day.

16 Q. I understand. I understand but we are trying to
17 explore exactly what you can remember and what you can't.

18 A. I do remember what I said I remember.

19 Q. Okay. All right. And one of the things that you said
20 she asked you for example where you on the floor or not.
21 Do you remember when the solicitor asked you after you had
22 been hit inside whether you were on the floor?

23 A. Right. I remember.

24 Q. And you said I was probably on the floor. I can't
25 remember but I don't see how I would have stayed up.

- 1 A. Well yeah I remember.
- 2 Q. That's what you answered?
- 3 A. Uh-huh.
- 4 Q. So again that's one of these occasions I'm talking
5 about that your memory is you are probably on the floor but
6 you don't remember exactly how you got on the floor is it
7 safe to say?
- 8 A. I know when I was hit and I fell. I was still on the
9 deck.
- 10 Q. Yes, ma'am.
- 11 A. I don't know how I got in the house.
- 12 Q. And again one of those things that you said and this
13 was your testimony when you was specifically asked about
14 the type of hurting you received that you said he was
15 either trying to or was having sex; right?
- 16 A. Yes.
- 17 Q. And that is an or?
- 18 A. He was.
- 19 Q. And was your testimony was before was trying to or
20 was; right?
- 21 A. Well I was trying to say I didn't know whether it was
22 in the mist of it or I couldn't . . .
- 23 Q. Do you remember when Detective Carter came and talked
24 to you about this?
- 25 A. Yes.

LORETTA MOSS: CROSS EXAMINATION BY MR. LEMEL

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1 Q. Do you remember telling her specifically that you did
2 not know if Adam penetrated your vagina?

3 A. I don't remember telling her that.

4 Q. Do you remember telling her that you do not remember
5 whether Adam penetrated your anus?

6 A. Uh-huh. I don't remember her asking me that.

7 Q. You don't remember her asking you about that?

8 A. Uh-huh.

9 Q. It's possible you told her that and you just don't
10 remember it?

11 A. I don't.

12 Q. And you don't have any recollection of Russell coming
13 in?

14 A. That night?

15 Q. Yes, ma'am.

16 A. Vaguely. Very vaguely.

17 Q. And your testimony earlier was you didn't remember
18 Russell --

19 A. Everything - I don't -- sometimes I don't remember. I
20 was hurt really bad.

21 Q. Yes, ma'am.

22 A. But I remember what I testified to.

23 Q. No further questions, Ms. Moss. Thank you.

24 SOLICITOR LIPINSKI: The Court's indulgence just one
25 moment.

LORETTA MOSS: REDIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 MS. MOSS: Did they tell me to come down?

2 THE COURT: Ma'am?

3 MS. MOSS: Did they tell me to come down?

4 THE COURT: No not yet, ma'am. Just a minute.

5 REDIRECT EXAMINATION

6 LORETTA MOSS BY SOLICITOR LIPINSKI:

7 Q. You okay? I just have a couple of follow up
8 questions. Do you need a moment?

9 A. Yeah.

10 Q. Take your time. Do you need some more water?

11 A. I'm all right.

12 (PAUSE.)

13 A. I'm okay.

14 Q. Just a little bit of follow up. Mr. Lemel was asking
15 you about whether or not you remember Detective Carter
16 coming and talking to you, Amanda Carter?

17 A. Yes I do remember.

18 Q. And she came in with - -

19 A. With Tina Elliott.

20 Q. And you've known Tina for some time?

21 A. Yes.

22 Q. And Mr. Lemel was asking you whether or not you
23 remember being able to tell Amanda Carter whether he
24 penetrated your vagina or you answered and you said you
25 can't remember that question?

LORETTA MOSS: REDIRECT EXAMINATION BY SOLICITOR LIPINSKI

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1 A. I couldn't remember. I remember telling her I
2 couldn't remember.

3 Q. Do you remember telling her that you were just sore
4 everywhere?

5 A. Yes.

6 Q. That's all we have, Your Honor.

7 MR. LEMEL: Nothing on follow up, Your Honor.

8 THE COURT: You can come down now, ma'am.

9 (WITNESS LEAVING WITNESS STAND AT 4:48 P. M..)

10 SOLICITOR LIPINSKI: Your Honor, that's all we have
11 today. Like I said we have an additional witness for
12 tomorrow. Based on some scheduling issues with that with
13 Doctor McLanahan that would be it. He will be our only
14 witness tomorrow.

15 THE COURT: So you are not going to call the
16 additional witness tomorrow?

17 SOLICITOR LIPINSKI: No. He will be the only witness
18 the State has. We can't call him until tomorrow. He has a
19 medical schedule.

20 THE COURT: All right, ladies and gentlemen, we are
21 going to break for the day today. And here is our schedule
22 for the rest of the week. We have some more testimony
23 tomorrow and then we will break early tomorrow. I'm not
24 sure exactly what time it will depend on how long the
25 testimony takes but I expect that it will be before or

1 around lunch time and we will stop there for the day. We
2 will come back Friday morning and do closing arguments and
3 I charge you on the law and then you will go back and start
4 your deliberations. So you can use that information for
5 planning the rest of the week. Please be here tomorrow
6 morning at 9:15. Remember my instructions that you may not
7 discuss the case and we will see you tomorrow morning at
8 9:15. Have a nice night.

9 (JURY LEAVING THE COURTROOM AT 4:49 P.M.)

10 THE COURT: So your witness tomorrow how long do you
11 think your direct will be?

12 SOLICITOR LIPINSKI: Twenty minutes maybe. He's not
13 that lengthy; he's not going into that much details of her
14 injuries.

15 THE COURT: All right.

16 SOLICITOR LIPINSKI: Maybe as much as half an hour.

17 THE COURT: Okay.

18 MR. LEMEL: Cross will probably be very short, Your
19 Honor.

20 THE COURT: All right.

21 (BAILIFF REMOVING DEFENDANT FROM COURTROOM.)

22 THE COURT: Hold on a minute. I want the defendant to
23 stay in here for a minute.

24 All right, Mr. Lemel, I am sure that over the last few
25 days at least and probably over the last several weeks you

1 have discussed with your client that he has the right to
2 testify in the trial of the case and you've also discussed
3 with him that he has the right to remain silent?

4 MR. LEMEL: Yes we have discussed his constitutional
5 rights.

6 THE COURT: All right. And when you have had those
7 discussions with him do you believe that he has understood
8 those rights?

9 MR. LEMEL: Yes, sir.

10 THE COURT: All right. You will have further
11 opportunity tonight to discuss that with him if you choose
12 too. But certainly tomorrow when all the testimony ends
13 you will have the opportunity to discuss that with him.
14 But just for planning purposes I've sort of been operating
15 under the assumption I think based on something you said
16 that you do not anticipate putting up any lengthy defense
17 other than possibly the testimony of the defendant. Is
18 that still true?

19 MR. LEMEL: That is correct, Your Honor.

20 THE COURT: So what I told the jury then about us
21 being finished by lunch it appears to everybody to be a
22 fairly solid prediction?

23 MR. LEMEL: Yes, sir.

24 SOLICITOR LIPINSKI: Yes, sir.

25 THE COURT: That's good for me because that's one of

1 the worse things I do is predict when we are going to be
2 finished with testimony. We will see you all tomorrow
3 morning at 9:15.

4 Now nobody has said anything about any request for
5 charge.

6 SOLICITOR LIPINSKI: Your Honor, I do have some case
7 law I would like to present to you regarding whether or not
8 attempted rape would be a lesser included offense if you
9 would like to read that over the night.

10 THE COURT: We'll take about it right now.

11 SOLICITOR LIPINSKI: All right. Just briefly the
12 State would argue that attempt to commit criminal sexual
13 conduct would be a lesser included offense of criminal
14 sexual conduct and the attempt is a lesser included offense
15 of the principal commonly in that the State has assault
16 with intent to commit CSC they have not added any
17 additional elements to that charge. And following the
18 test that is traditionally used attempt or assault with the
19 intent to commit CSC has no additional elements that
20 criminal sexual conduct does not have. The State would
21 call the Court's attention to the State v. Sosbee, S-o-s-b-
22 e-e which is 637 S.E. 2D 571 which talks about this crime
23 of attempt to commit sexual criminal sexual conduct
24 existing at the common law. It is a case that deals not
25 only by the amending of the indictment but it does none the

1 less indicate that intent was used. The State would
2 further call the Court's attention to State v. Frazier
3 again where the defendant was initially tried for the crime
4 of criminal sexual conduct in the first degree. And the
5 Court in these kinds of cases requests a lesser included
6 offense they usually see assault and battery of a high and
7 aggravated nature. In the cases where you are seeing ABHAN
8 being used as a lesser included offense of criminal sexual
9 conduct with a minor it is usually because either the
10 victim is indicating that she consented to the sex or the
11 defendant is indicating that the victim consented to the
12 injuries and whether the assault is non sexual in nature.
13 And the State would draw the Court's attention to State v.
14 Frazier 397 S.E. 2D, 93 which talks about ABHAN being a
15 lesser included offense of assault with intent or of
16 assault to commit criminal sexual conduct. Obviously if
17 that ABHAN was a lesser included offense of then it goes to
18 state that the assault nature of it is further done. More
19 recently the Court of Appeals ruled in the case of State v.
20 Reid, R-e-i-d; 679 S.E. 2D 194 whether or not the common
21 law crime of attempted CSC nonetheless still exist. In
22 that particular case it dealt with and again that was State
23 v. Reid 679 S.E. 2D 194 is a 2009 Court of Appeals case out
24 of Oconee County where the Court acknowledged that the
25 common law offense of attempted CSC continued with a modern

1 day criminal sexual conduct statute. In that case they
2 really talk about what is an attempt to criminal sexual
3 conduct. There is a case where a guy got on the internet
4 and lured a fourteen year old girl to a hotel room. Law
5 enforcement was made aware and intervened. It was whether
6 or not he took a substantial step and those kind of things
7 is the focus of that particular case law.

8 And, Your Honor, also drawing the Court's attention to
9 State v. Murphy which is another case that talks about
10 assault with intent to commit and what is defined as
11 assault with intent to commit that it is merely the act of
12 an unlawful attempt or an offer to commit a violent injury
13 upon another person coupled with the present ability to
14 complete the attempt and then offer to do so or an offer to
15 do so by some specific battery. And that would be State v.
16 Murphy 471 S.E. 2D 739.

17 I am drawing the Court's attention back to State v.
18 Frazier which is what I previously just recited at 397 S.E.
19 2D 93. What you notice was the defendant was originally
20 indicted and tried for the crime of criminal sexual conduct
21 in the first degree. The Court directed a verdict for
22 criminal sexual conduct in the first degree and a directed
23 verdict of acquittal finding that the victim never
24 testified that he penetrated her or raped her in any way.
25 In fact that he had abandoned that after forcing her into

1 the car. But nonetheless the trial court did after
2 directing that verdict of acquittal on CSC in the first
3 degree proper nonetheless continued and tried the defendant
4 for assault with intent to commit CSC so they directed that
5 verdict and he was convicted of assault with intent to
6 commit CSC. So in State v. Frazier what you find is the
7 Court is operating off that original CSC indictment. The
8 lesser included offense of attempt is recognized and goes
9 on - -

10 THE COURT: Wait a minute.

11 (PAUSE.)

12 THE COURT: Mr. Lemel, it's hard; it's difficult to
13 read the State versus Frazier case and not conclude that
14 assault with intent to commit CSC is a lesser included
15 offense of CSC.

16 MR. LEMEL: Your Honor, I disagree to this extent. If
17 you read the Court's opinion it specifically says that
18 there were two separate incidences in this particular
19 situation, Your Honor.

20 THE COURT: Right.

21 MR. LEMEL: Where there was an assault in which no
22 penetration occurred. And that stopped. And then the
23 Judge charged a separate ABHAN. But at no point in time
24 does the Court indicate that the second charge, the assault
25 with intent to commit criminal sexual conduct is a lesser

1 offense. Basically was it conformity with the fact that he
2 directed a verdict on the original indictment.

3 THE COURT: He could never have been convicted of
4 assault with intent to commit CSC if it weren't a lesser
5 included offense of CSC. There would be no indictment. He
6 would have had to waive presentment to the grand jury in
7 order for there to even be a conviction unless it's a
8 lesser included offense.

9 MR. LEMEL: Your Honor, I think the question there
10 becomes a question of the Court's discretion in doing so
11 and this court does not in any way -- it doesn't appear
12 that that issue was ever passed upon by the Appellate
13 Court.

14 THE COURT: You are right it's not passed upon but
15 that is such an obvious issue - - -

16 MR. LEMEL: Well, Your Honor, - -

17 THE COURT: - - - that it is difficult if not
18 impossible to conclude that it wouldn't have been raised
19 and ruled on by the Court.

20 MR. LEMEL: Your Honor, we don't know that. I would
21 actually point if the court looks to the Sosebee which is a
22 later decision a 2006 decision as opposed to a 1990
23 decision, Your Honor. If you look at the logic contained
24 within that and what the court specifically says about that
25 change up. Look at footnote Four. They indicate Sosebee

1 didn't challenge the trial court's order amending the
2 indictment and therefore they couldn't investigate that.
3 But there clearly is language indicating that that would go
4 way beyond any sort of permissive change. Mr. Sosbee did
5 not challenge that, Your Honor. And certainly it is the
6 appearance of the Court of Appeals had that challenge been
7 made they would have been addressing a different issue and
8 perhaps had it completely different coming from what Mr.
9 Sosbee was in fact challenging. I therefore not only is
10 that demonstrative of that opinion sort of the modern court
11 obviously that's a limitation on what we can take out of
12 this without the court having passed upon that issue. I
13 submit that it is a much different situation here, Your
14 Honor. Unless the court is planning to direct a verdict on
15 the original indictment as was done - -

16 THE COURT: In this case?

17 MR. LEMEL: Yes, sir.

18 THE COURT: Uh-huh.

19 MR. LEMEL: Again I am not surprised that the court is
20 not doing that.

21 THE COURT: I didn't say I wasn't doing that.

22 MR. LEMEL: I would not be surprised if the Court
23 chose not to do that. Obviously motions haven't been made
24 and the court hasn't ruled on that. But I think it is a
25 dramatically different situation in that case where

. 1 factually there was no evidence versus the court giving the
2 option here where -- now if the court is not going to grant
3 the directed verdict that some evidence exist claiming that
4 there was a CSC that the actual sexual battery occurred
5 then allowing both of those charges to go forward - -

6 THE COURT: They -- you can only be convicted of one.

7 MR. LEMEL: But you are giving the jury a selection in
8 that scenario where as the court in the Frazier the jury in
9 the Frazier case was not given a choice. They were not
10 given a choice of CSC. And, Your Honor, it's also a
11 question of noticing us about what we are defending
12 against.

13 THE COURT: Not if it's lesser included offense.

14 MR. LEMEL: And, Your Honor, I would submit that it's
15 not because the assault charge includes other elements. It
16 includes the fact of you have to prove the assault occurred
17 and also requires the specific intent to be proven which
18 under the CSC charge there is not an intent element
19 contained in any - -

20 THE COURT: Yeah there is always specific intent
21 element.

22 MR. LEMEL: But the finding - -

23 THE COURT: You need to focus on the assault.

24 MR. LEMEL: Your Honor, they have to show - -

25 THE COURT: I understand all of that. I don't mean to

1 be cutting you off but I understand all of that.

2 MR. LEMEL: Which is something we have not been
3 essentially, Your Honor, challenging at this point in time
4 the fact that some assault occurred. But the reason for
5 the assault being the further the CSC is not something that
6 we've been on notice that we had to fight against.

7 THE COURT: Really?

8 MR. LEMEL: Yes, sir.

9 THE COURT: Well one of the elements of CSC in the
10 first degree on these facts as this case has been indicted
11 is the use of aggravated force.

12 MR. LEMEL: Yes, sir.

13 THE COURT: And how is it possible that one could use
14 aggravated force without committing an assault? Hold on a
15 minute before you answer that question. Aggravated force
16 is defined in the statute to mean that the act of using
17 physical force or physical violence of a high and
18 aggravated nature to over come the victim or includes the
19 threat of the use of a deadly weapon. Now assault is
20 action taken to put the victim in fear of imminent
21 violence.

22 MR. LEMEL: Yes, sir, but in this case it's got to be
23 related. The assault has to be with the intent to commit
24 the criminal sexual conduct. It's not enough just to and
25 an assault occurs as part of the CSC. That does not

1 translate into us being able to affectively defend against
2 a separate charge, Your Honor, for assault with intent to
3 commit. And clearly it's affected how we presented our
4 defense in this case, Your Honor.

5 THE COURT: Let me focus your argument. If it's a
6 separate offense then you don't have to worry about it.
7 So the being on notice argument is not an issue here.

8 MR. LEMEL: Yes, sir.

9 THE COURT: If it is a lesser included offense then
10 you are on notice and you've got to defend against it.

11 MR. LEMEL: Yes, sir.

12 THE COURT: This is not a question of whether or not
13 the State is going to be permitted to go forward on two
14 separate charges. If its two separate charges then the
15 assault charge will not be charged; not be given to the
16 jury as an option. If it's a lesser included then it will
17 be and that's because it is the same charge. So you don't
18 have to argue that you weren't on notice because if you
19 weren't on notice that's only because it's a separate
20 charge and in that case you've already won and you're not
21 going to have to worry about it. I will read these cases
22 tonight and then I will be ready to hear brief arguments on
23 it in the morning if you all would like and then I will
24 rule.

25 MR. LEMEL: Your Honor, and the only thing if the

1 court doesn't want me to say anything more I will sit down.

2 THE COURT: No you got something useful to say I will
3 hear it.

4 MR. LEMEL: The only other thing I would say, Your
5 Honor, is the court specifically considering this issue of
6 the what the lesser included's are I have consistently said
7 that the lesser included of CSC is assault and battery of a
8 high and aggravated nature they specifically found carved
9 out an exception. Even though they've acknowledged it
10 doesn't really necessarily directly apply Blockburger - -

11 THE COURT: Yes that's right.

12 MR. LEMEL: I would submit to the court that given the
13 specific rulings on that particular issue and the fact that
14 they never said explicitly and its never been passed on by
15 any appellate court in this state that assault with intent
16 to commit isn't a lesser included. That the proper lesser
17 included is assault and battery of a high and aggravated
18 nature.

19 THE COURT: It's never going to get passed on by the
20 appellate court unless some Circuit Court judge allows it
21 to go to a jury. But the reasoning - the reasoning of the
22 court in allowing ABHAN to be a lesser included offense of
23 CSC actually supports the idea that assault with intent to
24 commit CSC is a lesser included because and I haven't read
25 that case in a long time but it talks about how -- in other

1 words basically what the case says as I recall is that
2 normally you can look at the specific elements to tell but
3 in the context of a sexual assault it's difficult to do
4 that. And so you look at actually - you look more
5 generally - I'll have to read the cases.

6 SOLICITOR LIPINSKI: Your Honor, if I could and just
7 on that issue; I don't want to belabor it but I believe
8 part of that is in discussing State v. Elliott which is
9 552D 727 and specifically what they talk about in terms of
10 carving out the exception is that all the circumstances of
11 aggravation not the assault and battery but the
12 circumstances of aggravation ABHAN don't necessarily fall
13 within the context of criminal sexual conduct. In other
14 words there are facts that would support circumstances of
15 aggravation in ABHAN that wouldn't necessarily constitute
16 the aggravated force found to be in CSC. But it does not
17 say that they have to carve out that exception because the
18 assault and battery is not a lesser included offense of
19 that charge.

20 MR. LEMEL: Your Honor, I would also point out just on
21 that same issue one of the reasons why they are able to
22 make that change is that ABHAN is a common law offense as
23 opposed to a statutory offense.

24 THE COURT: So is assault with intent to commit CSC.

25 SOLICITOR LIPINSKI: Thank you, Your Honor.

1 THE COURT: All right. The only -- so obviously ABHAN
2 gets charged. Honestly I'm not sure that you got there on
3 CSC anyway? What do you think?

4 SOLICITOR LIPINSKI: The State would submit that there
5 is sufficient evidence - -

6 THE COURT: What is it?

7 SOLICITOR LIPINSKI: Both the testimony of - -

8 THE COURT: This doctor tomorrow is not going to be on
9 this subject, right? Okay let's talk about it a little bit
10 right now.

11 SOLICITOR LIPINSKI: The testimony of the fiancée
12 walking in stating that what she witnessed was Adam raping
13 Ms. Moss.

14 THE COURT: Yeah but the testimony is that the
15 victim's head was toward the window; right?

16 SOLICITOR LIPINSKI: Yes, Your Honor.

17 THE COURT: There is no testimony -- when she says
18 that he was raping her even in determining the evidence in
19 the light most favorable to the state that from where she
20 was looking from the distance from which she was looking,
21 the angle from which she was looking there is no way she
22 could tell whether or not there was penetration; right?

23 SOLICITOR LIPINSKI: No she could not tell but she
24 certainly could - -

25 THE COURT: She's speculating. I mean I think that in

1 the context of that witness what she could see when she
2 says he's raping she's unable; she does not have personal
3 knowledge of whether or not there was penetration. And
4 listen, you very carefully danced around the question on
5 direct. You intentionally did not ask her directly whether
6 or not there was penetration.

7 SOLICITOR LIPINSKI: I acknowledge that. I'm not
8 going to indicate to the court that it's something else.

9 THE COURT: But on cross in what I think was a very
10 clear attempt to explore whether or not there was
11 penetration as opposed to attempted penetration she said --
12 the question was something like you said that he was raping
13 me or he was trying to rape me; right? And her answer was
14 he was raping me. And I'm just thinking this through but
15 in the context of where that question was aimed and where
16 everybody in this courtroom understood the question was
17 aimed and where everybody in this courtroom understood the
18 answer was going the answer arguably was that there was
19 penetration. And in view of the evidence in the light most
20 favorable to the state maybe that's enough. I don't know.

21 SOLICITOR LIPINSKI: Then the State would call the
22 court's attention to State v. Mathis which is 340 S.E. 2D
23 538. I apologize; I'll get a copy for Mr. Lemel. It
24 involves a little where she stated that he touched her down
25 there and that it hurt and that she simply was not able to

1 describe in detail penetration of her vagina. Using a
2 number of these cases if you look involving children who
3 just lack a vocabulary and granted Ms. Moss does have that
4 vocabulary and I don't mean to argue that point with the
5 court.

6 THE COURT: Well it's not a dissimilar situation
7 because of her mental state as a result of the head
8 beating. But I'll read the case if you want to pass it up
9 but I bet you there is a distinction in that case and that
10 is that this situation was interrupted. And in those
11 situations where you have a child you have a grown man
12 attempting to penetrate a child he was clearly capable of
13 accomplishing it with and there was no interruption. The
14 evidence is that it went as far as he wanted it to go. The
15 jury can infer from that clearly that there was
16 penetration. This may be different.

17 SOLICITOR LIPINSKI: The State's visited it but I
18 understand - -

19 THE COURT: Let's go over real quickly what the
20 medical testimony was. I think I remember it but I want to
21 make sure that I didn't miss something. None, right?

22 SOLICITOR LIPINSKI: None.

23 THE COURT: All right.

24 SOLICITOR LIPINSKI: I don't disagree.

25 THE COURT: So tell me if you agree with this. The

1 only evidence that you can point to that support -- that
2 reasonably could support the inference that there was
3 penetration is the testimony of the half brother and the
4 half brothers

5 SOLICITOR LIPINSKI: I'm listening, Your Honor.

6 THE COURT: The half brother and the half brother's
7 girlfriend who saw him in the position that was consistent
8 with penetration?

9 SOLICITOR LIPINSKI: Yes I believe Mr. Berard
10 described it as a sexual position.

11 THE COURT: Right. Right. And then on top of that
12 whatever it is that we can glean from the testimony of Ms.
13 Moss?

14 SOLICITOR LIPINSKI: Yes, Your Honor, and I will go
15 back in my notes. I do think there was at one point she
16 said he was having sex with her.

17 THE COURT: Yes she said that. She said that. That
18 does not answer the question.

19 SOLICITOR LIPINSKI: State believes based on the
20 current case law that is sufficient evidence of penetration
21 whether circumstantial or direct just submit that issue to
22 the jury. In that it ends in whether or not there is any
23 evidence not considered with the weight of the evidence
24 whether I don't believe they used a scintilla of evidence
25 to support the charge and that is a reasonable

1 interpretation of what occurred when a woman uses the term
2 rape - -

3 THE COURT: They don't use scintilla but they use the
4 word any. The standard is whether there is any evidence.
5 But in answering that question I'm not sitting outside as
6 though I don't hear the questions and the answers in
7 context.

8 SOLICITOR LIPINSKI: I appreciate that, Your Honor.

9 THE COURT: I will read the cases that you have --
10 well I don't even need to read any cases on that but I'll
11 think about the evidence and we'll talk about it again
12 tomorrow and I will read the cases on this lesser included.

13 SOLICITOR LIPINSKI: We are going to pick up the
14 doctor at eight o'clock, Your Honor, and hope to have him
15 here by nine o'clock and we are kind of fighting back
16 against Charlotte rush hour traffic. He provided us a time
17 frame and demanded a ride so we are being quite specific as
18 to when he gets here. I think we should be able to start
19 at any time after nine o'clock in the morning. What time
20 would you like to start?

21 THE COURT: All right we will see you all in the
22 morning at 9:15.

23 SOLICITOR LIPINSKI: Thank you, Your Honor.

24 (COURT RECESSED AT 5:19 P.M..)

25 (BACK ON THE RECORD THURSDAY, DECEMBER 17, 2009 AT

1 9:27 A.M..)

2 THE COURT: Be seated please.

3 (DEFENDANT ENTERING COURTROOM.)

4 THE COURT: Are you ready for the jury?

5 SOLICITOR LIPINSKI: Yes, sir.

6 MR. LEMEL: Yes, Your Honor. Just for the court's
7 edification I did do a little bit of work history on some
8 jury charge and I just came up with brief stuff about
9 kidnapping. It won't take very long to present to the
10 court and we can do that after we get done with the
11 testimony. I wanted to make the court aware of that but
12 otherwise we are ready to proceed.

13 THE COURT: Bring them in please.

14 (JURY ENTERING COURTROOM AT 9:28 A. M..)

15 THE COURT: Good morning.

16 SOLICITOR LIPINSKI: State calls Doctor McClanahan.

17 If you would approach Ms. Childers and be sworn in
18 right there.

19 (WHEREUPON: DOCTOR SCOTT
20 MCCLANAHAN, BEING CALLED AND DULY SWORN, TESTIFIED AS
21 FOLLOWS:)

22 MADAME CLERK: Thank you. You may be seated.

23 DIRECT EXAMINATION

24 DOCTOR SCOTT MCLANAHAN BY SOLICITOR LIPINSKI:

25 Q. Doctor McClanahan, if you can state your name spelling

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1 your full name for the record. If you will just talk in
2 the direction of the microphone. You don't have to lean
3 toward it. Just lean toward the jury and the microphone it
4 will pick you up. Give your name and spell your last name
5 for the record.

6 A. My name is Charles Scott McClanahan and my last name
7 is spelled M-c-L-a-n-a-h-a-n.

8 Q. And, Doctor McLanahan, with whom are you currently
9 employed?

10 A. I am employed by Carolina Neurosurgery and Spine
11 Associates.

12 Q. And in what capacity?

13 A. I am one of the neurosurgeons in the group.

14 Q. And obviously being a neurosurgeon you are a medical
15 doctor?

16 A. Yes.

17 Q. And prior to becoming employed with Carolina
18 Neurosurgery your tenure in the medical field did you
19 receive any type of specialized training or education?

20 A. Beyond medical school I was an intern and resident in
21 neurosurgery at the Emory University Affiliated Hospitals
22 in Atlanta, Georgia from 1973 to 1979.

23 Q. And have you been in the Charlotte greater area for
24 about how long?

25 A. My wife and I arrived with our children in Charlotte

1 in 1980 and I been practicing neurosurgery in Charlotte
2 ever since.

3 Q. And are you board certified in any particular areas?

4 A. I am board certified in neurosurgery and in pediatric
5 neurosurgery.

6 Q. And if you could just explain what does the term
7 neurosurgery encompass?

8 A. Neurosurgery is the treatment of conditions; a wide
9 variety of conditions involving the brain, the spinal cord
10 and the supporting structures to both of those.

11 Q. And have you ever testified in court before?

12 A. Yes.

13 Q. And have you ever been qualified as an expert in the
14 field of neurosurgery?

15 A. Yes.

16 Q. Your Honor, at this time we would proffer Doctor Scott
17 McLanahan as an expert in neurosurgery?

18 MR. LEMEL: Without objection, Your Honor.

19 THE COURT: All right. He can give opinions within in
20 the subject matter of neurosurgery.

21 BY SOLICITOR LIPINSKI:

22 Q. Doctor McLanahan, did you have the occasion to be part
23 of the treatment team for Loretta Moss in June of '08?

24 A. Yes I did.

25 Q. And did you begin treating her immediately upon her

1 arrival to the hospital or some time later?

2 A. No. I did not see her initially. I became involved
3 when complications arose that called upon my particular
4 subspecialty expertise in neurosurgery.

5 Q. But in order to get you up to date on what was going
6 on with Ms. Moss would you have reviewed her chart and been
7 aware of her original diagnoses and condition upon arrival?

8 A. Yes I would have and also have viewed the imaging
9 studies that were done on her periodically while she was an
10 inpatient at Carolina's Medical Center.

11 Q. And initially when Ms. Moss comes to CMC Medical
12 Center what is her primary diagnoses; what's her main
13 issue?

14 A. She had a closed head injury.

15 Q. And did that result in any type of hemorrhage?

16 A. Yes it did. It resulted in an intracranial hemorrhage
17 which involved the subarachnoid spaces and the ventricles.

18 Q. And let's explain to the jury what you mean by a
19 closed head injury.

20 A. Well a closed head injury is one that does not open
21 the skull. It may be associated with a scalp laceration, a
22 cut, swelling, but we typically refer to closed head
23 injuries as those in contrast to open head injuries like
24 gun shot wounds or open fractures that involve the brain
25 being present in the wound.

1 Q. And you use the term subarachnoid hemorrhaging and
2 hemorrhaging in her ventricles. Explain to the jury what
3 that means in layman's terms. What was going on with Ms.
4 Moss?

5 Q. Those are hemorrhages that involve the spinal fluid
6 spaces. The spinal fluid spaces occur both in side and
7 outside the brain. The inside spinal fluid spaces are
8 called ventricles. Those are cavities within the brain
9 that are normally filled with fluid. The clear fluid that
10 you may know as spinal fluid that literally looks like
11 water. And the spinal fluid spaces outside the brain are
12 called subarachnoid spaces.

13 Q. So in terms of this hemorrhaging and location is it in
14 one particular area of her brain or is it generalized?

15 A. It particularly involved the back part of the brain
16 which is called the posterior fossa.

17 Q. And this subarachnoid hemorrhage were you able to give
18 a cause to it? Was it something that resulted from an
19 aneurism or trauma?

20 A. There was some speculation initially that it may have
21 been the consequence of an aneurismal rupture. An aneurism
22 would be a weakness in the wall of one of the blood vessels
23 that supply blood the brain. And that can rupture causing
24 a picture similar to what we were seen on the initial
25 imaging studies. But a CT angiogram was done and there was

1 no evidence of any aneurism on the CT angiogram.

2 Q. Which left because of her subarachnoid injury would be
3 some type of trauma?

4 A. Yes.

5 Q. The type of trauma that could have come from a short
6 fall?

7 A. Unlikely.

8 Q. Could it be a result of some type of blunt force
9 trauma to the head?

10 A. Yes.

11 Q. And when she originally arrived what was the medical
12 care specific to her hemorrhaging that was provided to deal
13 with that immediate issue? What did they do to try and
14 help Ms. Moss in controlling the hemorrhaging?

15 A. They initially placed her in the intensive care unit
16 at Carolina's Medical Center where she was monitored.
17 Consideration was given initially to place a drain that
18 would allow for drainage of the spinal fluid I referenced
19 previously and avoid a build up of pressure inside her head
20 which could cause serious neurological consequences. That
21 decision was deferred until a subsequent evaluation by
22 another of the neurosurgeons in the group who felt that her
23 neurologic condition had worsened subsequent to her arrival
24 at Carolina's Medical Center. And he did go ahead and
25 place what's called a ventriculostomy or an internal

1 ventricular -- external ventricular drain which drains the
2 internal spinal fluid cavities that I described previously.

3 Q. How serious were her injuries upon her arrival at the
4 hospital?

5 A. They were quite serious.

6 Q. Were they life threatening?

7 A. Initially it was difficult to say but subsequent
8 developments -- I don't want to say retrospect but
9 subsequent things that happened indicated that those
10 injuries could have resulted in the loss of her life.

11 Q. Had she not received medical care of any kind could
12 she have passed away from her injuries?

13 A. Yes.

14 Q. And you stated that you placed this ventri - obviously
15 I am not going to pronounce the word but you placed some
16 type of drain to get the build up of fluid out of her head?

17 A. It was actually Doctor Corrick in our group that did
18 that. Yes he did.

19 Q. And did that seem to alleviate or provide restorative
20 care to Ms. Moss?

21 A. Yes she did.

22 Q. Did she develop any other complications while she was
23 at Carolina's Medical Center?

24 A. There was a question of some infection getting into
25 the spinal fluid space. That was never proved yes or no

1 but she did develop a complication related to her initial
2 injury and hemorrhage which is called hydrocephalus and
3 that is a temporary or permanent inability to reabsorb the
4 spinal fluid through the normal spinal fluid pathways and
5 requires subsequent placement of a ventricular CFS shunt
6 and that's where I came in. This is essentially an
7 internal version of the external drain that Doctor Corrick
8 placed initially to control the fluid and pressure build up
9 inside her head and she has that shunt to this day.

10 Q. And why is that still in her to this day?

11 A. Why?

12 Q. Is that something you can't remove or something she
13 will continue to need?

14 A. It's unclear at this point. She may have recovered
15 the ability to reabsorb her spinal fluid through her own
16 mechanisms but it's not uncommon for those mechanisms to be
17 permanently impaired by the hemorrhage that she had with or
18 without the subsequent question of an infection. So we
19 have felt it prudent and safer to continue to leave her
20 spinal fluid shunt in place.

21 Q. And does she remain under your care to this day?

22 A. Yes she does.

23 Q. Was she ever placed on a ventilator?

24 A. I believe that she was. I may not have been directly
25 involved in her care at that time but I believe that there

1 were at least some periods of time where she required
2 respiratory support.

3 Q. And as a result of this on going neurological injury
4 to Ms. Moss did she ever have any issues with impaired
5 mental status of alertness?

6 A. Yes.

7 Q. When you discharged her had those resolved themselves
8 to some extent?

9 A. Well I'm sure she was improved or she wouldn't have
10 been discharged. But I think her recovery has been
11 generally good. I am sure that careful neurologic exam
12 would still show some signs of impairment. I can't be more
13 specific at this point.

14 Q. Is it possible that the traumatic injury to her head
15 caused her to have any degree of memory loss immediately
16 surrounding the event?

17 A. Yes.

18 Q. Is it possible she would be able to regain some of
19 that memory over time?

20 A. Could you restate your question?

21 Q. Is it possible that she had an additional memory loss
22 as a result of the injury to her brain but as that injury
23 to the brain heals would she be able to regain some of that
24 memory?

25 A. Yes.

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CROSS EXAMINATION BY MR. LEMEL

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1 Q. And what is her prognosis today?

2 A. I think it's generally good. She still will require
3 ongoing care and monitoring for her hydrocephalus. There
4 may be a point in time where consideration needs to be
5 given to removing her spinal fluid shunt but there's no
6 urgency to that as long as she is doing well and there
7 haven't been any complications referable to the shunt-
8 surgery itself.

9 Q. The Court's indulgence one moment.

10 That's all we have of Doctor McLanahan at this time.

11 CROSS EXAMINATION

12 DOCTOR SCOTT MCLANAHAN BY MR. LEMEL:

13 Q. Good morning, Doctor McLanahan.

14 A. Good morning.

15 Q. With regard to that shunt is that something that can
16 essentially remain indefinitely?

17 A. Yes.

18 Q. So in a situation such as this it's not unusual for
19 that shunt to remain in for an extended period of time
20 then?

21 A. Yes.

22 Q. Unless some sort of complication develops that
23 requires its removal?

24 A. Yes.

25 Q. Does it harm her or any person when that shunt is in

1 unless some sort of complication develops?

2 A. Correct. It places her at more than the usual risk
3 for certain types of things like injuries; subsequent
4 injuries from falls; possibly secondary infections should
5 she have an infection elsewhere in her body.

6 Q. So besides those sorts of vulnerabilities though
7 absent one of those other things sort of happening
8 otherwise it would not affect her other day to day life?

9 A. Correct.

10 Q. Okay. Now I am going to make sure I have the phrase
11 right. Would you consider yourself to be her attending
12 physician in this case; one of her attending physicians?

13 A. Well I would describe myself as a specialty physician
14 not her primary care physician. I would be a consulting
15 physician under these circumstances.

16 Q. For her time at Carolina's Medical Center did you
17 prepare any sort of summaries of her treatment at any point
18 in time?

19 A. No.

20 Q. You didn't dictate a discharge summary or anything of
21 that nature?

22 A. I don't recall doing so. I think that was done by
23 somebody else.

24 Q. When she first came to your attention you said she had
25 already been at CMC for some period of time; correct?

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1 A. Yes.

2 Q. She had been in ICU was actually seen by an associate
3 in your office another doctor?

4 A. Correct.

5 Q. And it was only after he performed that initial
6 external drain surgery that you became involved; is that
7 correct?

8 A. Yes.

9 Q. Okay. Based upon the indications that you saw that it
10 could not be I believe as a result of an aneurism you
11 concluded that it was the result of some sort of trauma;
12 correct?

13 A. In reviewing the notes it seemed to fit that picture.

14 Q. Okay. But based upon what you do know can you
15 identify exactly what kind of trauma it was that caused it?

16 A. Only by reference to the chart.

17 Q. Nothing that you didn't -- obviously you didn't
18 personally see any injury take place?

19 A. I don't recall what her condition was. At the time
20 she may have been still exhibiting signs to the external
21 trauma to which she was subjected. There were clearly
22 notes in the chart that describe multiple bruises and areas
23 of injury.

24 Q. But that doesn't define for you what exactly what
25 caused the injuries?

1 A. Only in the sense that they fit the description that
2 was in the chart of having been assaulted.

3 Q. Okay. One of the things that you did note about her
4 was you did have altered mental state; correct?

5 A. There were various times during her course in the
6 hospital where she did have an altered mental status and in
7 fact as I recall somewhat vaguely without reference to the
8 daily notes in the chart there were periods of time when
9 she was unconscious and could not follow commands would not
10 wake up.

11 Q. And that would have been several days or even weeks
12 into her treatment even?

13 A. It might possibly have been. Again I have not
14 recently reviewed the daily notes.

15 Q. But it is your memory; do you remember exactly how
16 long she was at the hospital roughly?

17 A. I think she was there in the order of about a month.

18 Q. And it is your recollection that she had these moments
19 of altered conscious basically throughout that period in
20 that month?

21 A. I suspect from reference to similar types of cases
22 there would have been times when the external ventricular
23 drain that I described previously might have been attempted
24 to be removed by the physician making daily rounds either
25 myself or my partners and during those circumstances if a

1 patient does not tolerate the removal of the external
2 ventricular drain that is to say they have not recovered
3 for whatever reason the ability to reabsorb their own
4 spinal fluid. The way you know that is that a patient
5 becomes sleeper and less responsive so there may have been
6 some waxing and waning of her level of consciousness during
7 parts of that period of time that she was in the hospital
8 that would have been a reflection of the hydrocephalous.
9 That ultimately led to the decision to go ahead and place
10 the shunt.

11 Q. So if I understand you correctly basically the way you
12 try to test to see if somebody is ready to come off the
13 external drain is by removing it and seeing how they
14 basically react to that?

15 A. Actually not removing it but raising it or increasing
16 the resistance in the drainage system which requires a
17 greater pressure for the patient to push fluid out through
18 the drain and into a collecting bag.

19 Q. So not removing and not disabling but making it more
20 difficult for the patient to use it essentially and it's
21 not a voluntary use?

22 A. Uh-huh.

23 Q. Right.

24 A. We call it a process of weaning.

25 Q. And by that process of weaning there would be peaks

1 and valleys then based upon the reaction to that whining
2 process?

3 A. There may very well be.

4 Q. All right. And you said it's not unusual I think you
5 testified that there would be memory loss as a result of
6 this sort of trauma or incident?

7 A. Or the subsequent development of the hydrocephalus.

8 Q. And that sometimes that memory can be regained?

9 A. Yes.

10 Q. Sometimes it can't be regained?

11 A. Yes.

12 Q. Sometimes it can actually be over laid. For example
13 somebody is told something happened can they over lay it
14 where their memory was sort of reconstruct their memory
15 that way?

16 A. I think you are asking a question outside my area of
17 my expertise.

18 Q. Thank you, Doctor.

19 No further questions, Your Honor.

20 SOLICITOR LIPINSKI: Nothing on redirect.

21 THE COURT: Sir, thank you for coming. You are free
22 to step down.

23 SOLICITOR LIPINSKI: We ask that Doctor McLanahan be
24 excused.

25 THE COURT: You are excused.

1 DOCTOR MCCLANAHAN: Thank you.

2 SOLICITOR LIPINSKI: State rest.

3 THE COURT: Ladies and gentlemen, there are some legal
4 matters that I am going to take up at this time so I am
5 going to ask you to step back in the jury room for a few
6 minutes and we will have you back out here shortly.

7 (JURY LEAVING COURTROOM AT 9:50 A. M..)

8 MR. LEMEL: Your Honor, at this point in time if it
9 pleases the court the defendant would make a motion for a
10 directed verdict on all charges particularly focusing on
11 the criminal sexual conduct charge; that the State has
12 failed to produce sufficient evidence to allow the jury to
13 determine that the penetration element requirement of a
14 sexual battery has occurred. With regard to testimony as
15 been discussed previously in the court sort of
16 preliminarily about this that there is no medical evidence
17 to support any injury or any penetration of her. No DNA
18 was found relating to the defendant; that the witnesses
19 aside from Ms. Moss were not in a position to view whether
20 actual penetration had occurred. And Ms. Moss herself on
21 her direct testimony said that he was either having sex or
22 trying to have sex. She did not directly respond to my
23 question when I simply asked her on cross whether that was
24 happening. I asked and her response then was he was raping
25 me which again doesn't necessarily answer the question of

1 whether penetration occurred and she certainly never
2 testified the actual penetration occurred. She only
3 testified that she could not remember telling the detective
4 immediately afterwards that she could not tell whether
5 penetration occurred; we therefore move for a directed
6 verdict on that charge on those specific grounds and
7 generally a directed verdict on the other remaining charge.

8 THE COURT: All right. I am going to deny the motions
9 for a directed verdict. And speaking specifically to the
10 question of whether or not the evidence supports the
11 conclusion that there was penetration, as I remarked
12 yesterday you both made tactical strategic decisions not to
13 specifically ask the question of whether or not there was
14 penetration. On direct examination her testimony was left
15 a little bit uncertain. It's clear that she has some
16 memory loss; this doctor who just testified has made that
17 even more clear, but he's also made it clear that memory
18 loss can recover over time. But on cross examination
19 yesterday when you asked her to follow up on the statement
20 that she had said he was either trying to rape me or he was
21 raping me or trying to have sex with me or having sex with
22 me. As I said yesterday I think that the context of that
23 question is very clear that you were asking her to clarify.
24 You were trying to pen her down. I'm not saying you did it
25 poorly or you did it improperly but that's what was

1 happening. You did fine. Her response to the question was
2 -- the question was intended to focus in on whether or not
3 there was penetration. Her response focused in on the
4 question of whether or not there was penetration. Her
5 answer was he was raping me. The jury can infer from that
6 testimony that there was penetration. They don't have to
7 but there is evidence in the record that would support that
8 inference.

9 Now there is no doubt that either side could have if
10 they had chosen to pin her down on that question and ask
11 her specifically was there penetration. At this point we
12 don't know what the answer would have been. She might have
13 said yes she might have said I don't know. But based on
14 the evidence that's in the record I think that there is
15 evidence to support a conclusion of penetration and I deny
16 the motion for a directed verdict.

17 Anything further from the defense by way of motions?

18 MR. LEMEL: Nothing by way of motions, Your Honor.

19 THE COURT: All right. Any further argument from the
20 defense on the question of whether or not assault with
21 intent to commit criminal sexual conduct is a lesser
22 included offense of criminal sexual conduct?

23 MR. LEMEL: Yes, sir. Yes, sir, we would object to
24 that charge obviously. We would state that State versus
25 Frazier does not stand for that proposition, Your Honor.

1 The only discussion in State versus Frazier is as it
2 relates to double jeopardy. There is no indication and in
3 fact it strictly says in terms of what the objections of
4 trial counsel were at that point in time that it doesn't
5 indicate there is any objection to the charge of the
6 attempted -- assault with intent to commit criminal sexual
7 conduct and that issue is reached by neither the primary
8 decision nor the descent so it doesn't appear that there
9 was ever any definition of that. I would further argue
10 that previous decisions with regard to the logic behind the
11 assault and battery with intent to kill do not transfer
12 over to the assault. Excuse me, to assault and battery of
13 a high and aggravated nature being the lesser included do
14 not transfer over to assault with intent to commit criminal
15 sexual conduct. It has to the extent it has been codified,
16 Your Honor, to the extent that the penalty has been
17 codified under statute that it's no longer purely a common
18 law offense as such.

19 Furthermore, Your Honor, the fact that the legislature
20 has provided the penalty for assault with intent to commit
21 criminal sexual conduct with a minor is exactly identical
22 to that of criminal sexual conduct indicates that it is in
23 fact a separate and distinct crime of equal level. Not a
24 lesser included offense by way of the punishment, Your
25 Honor. I think you can glean that from the legislative

1 intent of making those crimes equivalent not one less than
2 the other.

3 THE COURT: Well I think that the penalty part of the
4 argument is completely irrelevant. I don't think that has
5 anything to do with the analyses at all. The elements of
6 assault with intent to commit criminal sexual conduct are
7 assault and the intent. The intent is an element of CSC
8 even though we don't normally list it perhaps as an
9 element. We do charge criminal intent and it has to be
10 proven by the State. So the difference when looking at it
11 from the standpoint of the elements test is that assault
12 with intent to commit criminal sexual conduct has the
13 element of assault whereas criminal sexual conduct does not
14 in those words at least have the element of assault.

15 But criminal sexual conduct in the first degree does
16 have the element of aggravated force. And the way
17 aggravated force is defined it is not possible to read in
18 the context -- in the context of an attempted sexual
19 assault it's not possible to prove aggravated force without
20 first proving assault as a component of that. So I
21 actually think that assault with intent to commit criminal
22 sexual conduct while the elements are defined differently
23 when looking at it from the standpoint of the facts it
24 meets --- it might not be technically correct to say that
25 it meets the elements test but the facts that have to be

1 proven to be true in order to convict someone of assault
2 with intent to commit criminal sexual conduct also have to
3 be proven to be true to prove the greater offense of
4 criminal sexual conduct. So I think from the standpoint of
5 the element test that it's a lesser included offense. But
6 particularly when I look at it in the light of the
7 reasoning of the Elliott case and the other cases that go
8 way back in holding that assault and battery of a high and
9 aggravated nature is a lesser included offense of all these
10 CSC charges. It's an easier leap beyond the elements test
11 to find that assault with intent to commit CSC is a lesser
12 included offense than it is to leap beyond the elements
13 test to conclude that ABHAN is a lesser included offense so
14 I'm charging it.

15 I think that you are correct about the Frazier case.
16 The Frazier case does not specifically hold that assault
17 with intent to commit CSC is a lesser included offense of
18 CSC. As I said yesterday there is also some -- the same
19 situation sort of existing in the Sosebee case. It would
20 be remarkable that attempt is not a lesser included offense
21 and that not being noted somehow in the opinion there. I
22 think it is and I am going to charge it. So on the CSC I
23 will charge that a lesser included of attempt - I'm sorry -
24 of assault with intent to commit the CSC and the lesser
25 included offense of assault and battery of a high and

1 aggravated nature. And on the ABWIK I will charge the
2 lesser included offense of assault and battery of a high
3 and aggravated nature. And I will make it clear that the
4 ABHAN in both of those two incidences is a separate crime
5 and to do so in this fashion. That the aggravated
6 circumstance that the State must prove in order to prove
7 the lesser included offense of CSC is indecent liberties
8 with a female and that's it. Do you disagree with that?

9 SOLICITOR LIPINSKI: No, sir.

10 THE COURT: The aggravated circumstance that the State
11 must prove in order to convict of the lesser included
12 offense of ABWIK are use of a deadly weapon; the intent to
13 commit a felony, the infliction of serious bodily injury,
14 great disparity in the age and physical conditions of the
15 parties, differences in gender, purposeful infliction of
16 shame and disgrace and that's it. Okay. Anything else
17 that we need to discuss? Of course the official discussion
18 of the charge will come up later. Now anything else before
19 we move into considering the defense case?

20 MR. LEMEL: Your Honor, just with regard to we talked
21 a little bit earlier if we wanted to deal with the motion I
22 might have in regard to the kidnapping charge. I don't
23 know if the court wants to do that now with the jury out or
24 wait until after we break for the day to discuss it. I
25 will just leave it at the Court's discretion.

1 THE COURT: I don't know what they are so tell me.

2 SOLICITOR LIPINSKI: Essentially, Your Honor, it's
3 going to be two motions one of which is primarily for the
4 record. The first of which basically, Your Honor, is to
5 charge against precedent and I fully acknowledge that I am
6 going against precedent of State versus Hall of South
7 Carolina in line with the majority of jurisdiction to
8 charge that kidnapping requires unlawful confinement or
9 movement that is not incidental to the commission of other
10 crimes, Your Honor. I make that for the record with the
11 understanding of course that the State versus Hall 280 S.C.
12 74 1983 case disagrees with that but I would make that
13 motion for part of it.

14 Secondly, Your Honor, we would ask for a charge on the
15 kidnapping pursuant to State versus East 353 S.C. 634. I
16 do have a copy for the court. The charge there was
17 actually met positively or positively reviewed by the
18 appellate court with regard to the judge's charge. That
19 discussion of the kidnapping offense, Your Honor, goes on
20 the page I initially handed up starting on Page 636, Page 3
21 of the copy that I handed to the court and then to Page 638
22 where they quote the trial judge -- agree with the trial
23 judge charge that there should be a criminal intent charge
24 relating to the kidnapping such that under the law three or
25 more criminal offenses may grow over the same or out of the

1 same course of action as one offense is committed with the
2 intent thereafter to commit the other and is actually
3 followed by the commission of the other such that you have
4 to show reckless intent to commit the second offense in
5 this case the kidnapping.

6 THE COURT: Okay. All right. I think that's correct.

7 SOLICITOR LIPINSKI: The Court's indulgence so I can
8 just kind of read it over a moment.

9 THE COURT: I don't think there is any room for
10 dispute. I mean it's clearly correct. All that says is
11 there -- the State has to prove intent as to the
12 kidnapping. I'll charge that. All right.

13 MR. LEMEL: And, Your Honor, just for the formal
14 ruling I assume the Court is ruling against my request to
15 go against the precedence in Hall?

16 THE COURT: Well the way that you have positioned your
17 argument about intent the Hall case becomes inapplicable
18 because if I charge the jury that there has to be a
19 separate intent for kidnapping then the question in Hall
20 doesn't arise here. The question in Hall is whether
21 kidnapping -- the basic question there is -- you know any
22 type of a violent that takes -- that involves a victim it
23 takes a period of time to accomplish such as armed robbery,
24 such as CSC, such as an ABWIK perhaps involves a restraint
25 of the victim that could also be a kidnapping. So the

1 question in Hall is does the incidental restraint of the
2 victim during the commission of the armed robbery; during
3 the commission of the CSC can it also be a kidnapping? The
4 answer is yes in Hall. I have to read Hall to see whether
5 or not that was a charge on separate intent but I doubt it
6 otherwise I don't think they would have needed the
7 discussion. The case comes up here in -- I mean the issue
8 comes up in State versus East as you point out that of
9 charging a separate intent. When a separate intent is
10 charged then there is no need to decide if kidnapping can
11 be incidental to CSC because I'm requiring the jury to find
12 that it's not incidental to CSC. I'm requiring the jury to
13 find that it's a separate crime. So your argument is of
14 course preserved and I believe that I have ruled in your
15 favor. I don't believe that I have ruled -- I don't
16 believe that honestly that you have argued against
17 precedence when you take the two arguments together and I
18 believe that I have ruled in your favor on both.

19 MR. LEMEL: I accept that, Your Honor.

20 THE COURT: Okay. I am going to give you a few
21 minutes; take as much time as you need to go into -- I
22 assume there is a conference room back in the back where
23 you can discuss with your client his right to testify and
24 his right to remain silent. Before I do that though is it
25 still your intention that you would put up on evidence

1 unless the defendant were to testify?

2 MR. LEMEL: That is correct, Your Honor.

3 THE COURT: All right then.

4 MR. LEMEL: Your Honor, again part of the analysis we
5 have to have that has to do with the impeachable offenses
6 that my client has - -

7 THE COURT: Let's get back; let me make sure I am
8 correct as to what they are.

9 MR. LEMEL: Yes, sir.

10 THE COURT: Remind me.

11 SOLICITOR LIPINSKI: He has an attempted burglary,
12 Your Honor, I did pull those certified convictions and they
13 did collapse those three burglary charges into one. He was
14 convicted of the attempted burglary. He obviously has the
15 assault and battery of a high and aggravated nature where
16 he was on the ankle bracelet if you are aware and the gross
17 sexual imposition out of Ohio. He has a couple of
18 registered sex offender charges that the State is not going
19 with.

20 THE COURT: Well the attempted burglary might be of a
21 different category. Hold on a second.

22 SOLICITOR LIPINSKI: Your Honor, he was sentenced to
23 two years on that offense.

24 (PAUSE.)

25 THE COURT: All right. I think I am ready to give you

1 a somewhat indefinite ruling. Does either side wish to
2 offer any argument first?

3 SOLICITOR LIPINSKI: None from the State.

4 MR. LEMEL: Your Honor, I would make not so much of an
5 argument as a request that as part of what the court is
6 considering and I understand it's somewhat of an indefinite
7 argument also consider the manner in which the impeachment
8 is to be done in terms of the question that is allowed to
9 be asked in terms of the exact offense versus being asked
10 about you were convicted of any felony; another felony and
11 a misdemeanor that would be relevant in this case so I
12 would just ask that that be part of this analysis.

13 THE COURT: I think that I am pretty sure I am going
14 to exclude the sex offense. Here's why. I have no idea --
15 if he were to testify I have no idea of what he's going to
16 say but that makes it difficult frankly to rule on -- that
17 makes it difficult to evaluate the probative value of the
18 convictions because if he just gets upon the stand; you
19 know if there is some elaborate explanation as to how this
20 all happened and he's completely innocent then the
21 convictions assume a significantly greater probative value
22 than if he gets on the stand and just doesn't go that far.
23 But if this thing happened the way the State has presented
24 it then there is something just really sort of unnatural
25 and the sex conviction feeds into that in a way that is

1 unfairly prejudicial. The effect on his credibility has
2 probative value that's not a question for me to decide.
3 That's in the rules the fact that it's there to be included
4 under 601 - 609 A 1 gives it probative value. But the
5 sexual nature of the crime, the unnatural, it really can go
6 a lot farther than saying unnatural but the unnatural
7 nature of the alleged behavior here it creates an unfair
8 prejudice that I think is such that the probative value
9 does not outweigh it and so I would exclude it.

10 The attempted burglary could possibly be a crime of
11 dishonesty. You know we have State versus Alamein which is
12 a Court of Appeals decision which goes against the majority
13 of jurisdictions around the country which holds that armed
14 robbery is a crime of dishonesty. And in the discussion
15 burglary is mentioned and Judge Anderson who wrote that
16 opinion suggests that burglary also is a crime of
17 dishonesty. I'm not going to treat it in this case as a
18 crime of dishonesty because that would get it in
19 automatically. I am going to treat it as a crime that
20 comes in under 609 A 1; carry more than one year. In my --
21 I am concerned about the fact that here we have a burglary
22 and an assault and the convictions are a burglary and an
23 assault. So in that of course the similarity between the
24 crimes creates the possibility of unfair prejudice. You
25 know I'm just going to tell you this. He ain't gonna get

1 on the stand to admit that he did it. If he gets on the
2 stand his credibility becomes critical and I think the
3 probative value of those convictions is high. The
4 potential for an unfair prejudice is there. I am not going
5 to say it's minimal. But I don't think that the potential
6 for unfair prejudice outweighs the probative value.

7 But now hold on just one second. I'm pretty sure that
8 my ruling is going to be that the probative value of the
9 ABHAN and the attempted burglary outweigh the prejudicial
10 effect to the accused and I would admit 'em. I will give
11 an instruction however a very clear instruction and I will
12 give you -- if you want I'll give it to them at the time
13 the evidence is entered. I certainly would give it to them
14 during the jury charge that explains the restricted way in
15 which they can use that evidence. Okay?

16 MR. LEMEL: We would request that charge at the time,
17 Your Honor, in the impeachment phase of the case.

18 THE COURT: Go talk to your client and then after
19 you've finished that discussion bring him back out here and
20 I will talk to him and we will see what he decides.

21 MR. LEMEL: Yes, sir.

22 THE COURT: Take a short break.

23 SOLICITOR LIPINSKI: Thank you, Your Honor.

24 (SHORT RECESS AT 10:22 A. M..)

25 (BACK ON THE RECORD AT 10:35 A. M..)

1 THE COURT: Be seated.

2 (DEFENDANT ENTERING COURTROOM.)

3 THE COURT: Mr. Lemel?

4 MR. LEMEL: Yes, sir.

5 THE COURT: Have you had all the time you need to
6 discuss with your client the right to testify and also his
7 right to remain silent?

8 MR. LEMEL: Yes we've done it far in advance of today
9 and we also followed up today.

10 THE COURT: And are you satisfied now that your client
11 understands both his right to remain silent and his right
12 to testify?

13 MR. LEMEL: I am, Your Honor.

14 THE COURT: All right, Mr. Berard, please stand.
15 Raise your right hand.

16 (WHEREUPON: ADAM BERARD,
17 BEING DULY SWORN TESTIFIED AS FOLLOWS:)

18 THE COURT: All right. Put your hand down. Now, Mr.
19 Berard, you heard this discussion that I have had with Mr.
20 Lemel about your right to remain silent and also about your
21 right to testify. And Mr. Lemel tells me that today and
22 long before today he's been discussing with you both of
23 these right; is that true?

24 MR. BERARD: It is.

25 THE COURT: And when he's had those discussions with

1 you have you understood what he has explained to you about
2 your right to remain silent and also about your right to
3 testify?

4 MR. BERARD: I have.

5 THE COURT: Now, Mr. Berard, I am going to go over it
6 with you myself so that I can make sure that you understand
7 these two rights. You have the right to remain silent that
8 right comes to you by way of the Fifth Amendment to the
9 United States Constitution and what that means is that no
10 one can make you testify in the trial of this case. That
11 is a decision that you must make. If you choose to
12 exercise your right to remain silent and that means that
13 you choose not to testify then I will explain to the jury
14 in very clear terms that this is a constitutional right
15 that you have and that the exercise of that right cannot be
16 held against you. I will not even allow the jury to
17 discuss in the jury room the fact that you chose not to
18 testify. On the other hand if you choose to testify then
19 just like all the other witnesses who have testified here
20 you will be subject to cross examination on any subject
21 that might be relevant to this case and that includes your
22 credibility. We've had a discussion that you listened to
23 both today and today and perhaps even earlier in the week
24 about the state's right to use the convictions that you
25 have for assault and battery of a high and aggravated

1 nature and also for attempted burglary to impeach your
2 credibility. In other words to introduce those convictions
3 into evidence to attempt to show the jury that the jury
4 should not believe your testimony. Now do you understand
5 everything that I have just explained to you?

6 MR. BERARD: I do.

7 THE COURT: Do you have any questions that you want to
8 ask me or ask Mr. Lemel about your right to remain silent
9 or about your right to testify?

10 MR. BERARD: No, sir.

11 THE COURT: Now, Mr. Berard, even though you should
12 listen carefully to the advice not only of your attorneys
13 Mr. Lemel and Mr. Cummings about the decision that you must
14 make here it is never the less your decision; you are the
15 one who has to decide whether or not you are going to
16 testify. Neither Mr. Lemel nor Mr. Cummings can make that
17 decision for you. Do you understand?

18 MR. BERARD: I do.

19 THE COURT: Have you had all the time you need to make
20 up your mind as to whether or not you wish to testify?

21 MR. BERARD: I do.

22 THE COURT: Are you ready to make your decision?

23 MR. BERARD: Yes, sir.

24 THE COURT: What is your decision?

25 MR. BERARD: I choose to testify.

1 THE COURT: All right. Now, Mr. Lemel, he seems to be
2 a little hesitant in telling me that decision. Are you
3 satisfied that he's confident in his decision?

4 MR. LEMEL: I think he's nervous, Your Honor, that's
5 the reason for the hesitation. That is the indication that
6 he has given us as well so I am confident to that.

7 THE COURT: All right. Are you confident in making
8 that decision, sir?

9 MR. BERARD: Yes, sir.

10 THE COURT: All right then we will proceed. You ready
11 to put him up?

12 MR. LEMEL: Yes, sir, Your Honor. Your Honor, I want
13 to put just one thing on the record just to make sure it's
14 clear. I think I asked the court to address it. I want to
15 make a specific motion that with regard to the attempted
16 burglary and assault and battery of a high and aggravated
17 nature that as opposed to being allowed to ask the specific
18 crimes that the State is only allowed to impeach him
19 pursuant to asking him as to the Ohio conviction that he
20 was convicted of a felony.

21 THE COURT: The Ohio conviction is what?

22 MR. LEMEL: The attempted burglary.

23 THE COURT: Okay.

24 MR. LEMEL: And as to the assault and battery of a
25 high and aggravated nature here in South Carolina that they

1 can only be allowed to impeach him to the extent that they
2 are allowed to ask you were convicted of a misdemeanor.
3 The basis of that of course is the fact that there is
4 certainly assaulted natures of lesser included of ABHAN
5 being charged as well as the assault and battery with
6 intent to kill related closely in nature to the assault and
7 battery of a high and aggravated nature in terms of the
8 offenses. And since we have a burglary charge here and an
9 attempted burglary there that we would submit to the court
10 that it would be proper to simply to restrict that for
11 impeachment purposes they get the same effect asking about
12 a felony conviction and a misdemeanor conviction, Your
13 Honor. I just want to make that clear that that is our
14 request. I don't think I did that clearly enough before.

15 THE COURT: You did it clearly enough; I understand.

16 MR. LEMEL: And, Your Honor, I would just essentially
17 cite to the State versus Young 378 S.C. 101 that basically
18 -- well I'm not saying that that was the procedure that
19 must be done the court did cite approval of the fact that
20 in that case as is in a number of other cases that for
21 impeachment purposes asking you been convicted of a felony,
22 you been convicted of a misdemeanor is sufficient for
23 impeachment purposes.

24 THE COURT: There - that's an interesting - it's very
25 interesting to me how the Court's have addressed that

1 question because some courts like the Young case say its
2 okay if the trial judge chooses to do that. It's
3 permissible. There are other courts that say that under
4 certain circumstances like when the crimes are similar that
5 it's mandatory. There are other courts that say that it's
6 forbidden because when you tell the jury he's convicted of
7 a felony then that has the potential of being worse in the
8 minds of the jury than just going ahead and telling them
9 what the felony is. Their imaginations may run wild.
10 These courts speculate I suppose as to what the crime would
11 be.

12 I am going to allow the State to introduce the
13 convictions themselves and not mandate that they describe
14 them generically or as I think some courts have described
15 it they require that they sanitize them supposedly by
16 calling them a felony and a misdemeanor. I will give the
17 instruction at the time the evidence is admitted as to how
18 that can be used. You simply let me know when you are
19 ready to give that instruction.

20 MR. LEMEL: I guess the question is how does the Court
21 want me to let you know that?

22 THE COURT: Just say, Judge, I would like for you to
23 instruct the jury.

24 MR. LEMEL: Yes, sir.

25 THE COURT: Or are you going to pull it out yourself

1 or are you going to let her do it?

2 MR. LEMEL: Your Honor, given where or how that
3 instruction is I probably not bring it out in my direct of
4 Mr. Berard.

5 THE COURT: Okay.

6 SOLICITOR LIPINSKI: Your Honor, I just want to raise
7 the issue before we get there because I think we are
8 getting there is I provided Mr. Lemel with copies of the
9 certified convictions. I do have a copy of the original
10 ABHAN indictment which does list the aggravating
11 circumstances being that it was serious bodily injury to a
12 victim and a great disparity in the size and physical
13 condition of the party. I also have a copy of the
14 sentencing sheet which obviously omits those details. Ohio
15 has some other associated paperwork as well but it does
16 have -- it does not go into the details of the attempted
17 burglary that I can find. I don't know if Mr. Lemel has
18 any objection but there are some details regarding the
19 nature of his probation that's included in there; a more
20 descriptive paperwork but not as to what happened in terms
21 of the attempted burglary itself. That's how the State
22 would attempt to prove these offenses unless Mr. Lemel has
23 some other way the State can prove that that's his prior
24 record.

25 THE COURT: Are you asking?

1 SOLICITOR LIPINSKI: I think they can ask, Your HOnor,
2 I don't think if he does admit it he's been instructed to
3 do so.

4 THE COURT: I don't think that I am going to let the
5 indictment in.

6 SOLICITOR LIPINSKI: That's fine. I just want to be
7 clear on the - -

8 THE COURT: If you want to put the sentencing sheet in
9 I will consider that. I need to look at the Ohio documents
10 to see what I will allow in. But if you are asking him and
11 you start by asking him the question and if he gives you a
12 satisfactory answer then you decide whether you want to go
13 forward. You offer the exhibits if you want to and I will
14 decide whether or not to let them in. If you want to go
15 ahead and show them to me now. Apparently he's going to
16 admit it if he's asked isn't he?

17 MR. LEMEL: He has been so instructed, Your Honor.

18 THE COURT: If he admits them are you going to offer
19 the documents?

20 SOLICITOR LIPINSKI: If he admits them no.

21 THE COURT: All right.

22 SOLICITOR LIPINSKI: If he waivers and starts to
23 explain them.

24 THE COURT: Well if he starts to explain then you
25 object if you choose because the explanations are not

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1 admissible. Just like the indictment is perhaps not
2 admissible.

3 Okay bring in the jury.

4 (JURY ENTERING COURTROOM AT 10:46 A. M..)

5 THE COURT: Mr. Lemel.

6 MR. LEMEL: Thank you, Your Honor. Your Honor,
7 defense calls Adam Berard to the stand.

8 Adam, if you will step up and be sworn please.

9 MADAME CLERK: Sir, please raise your right hand.

10 (WHEREUPON: ADAM BERARD,
11 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

12 MADAME CLERK: Thank you, you may have a seat.

13 DIRECT EXAMINATION

14 ADAM BERARD BY MR. LEMEL:

15 Q. Adam, I am going to ask you to go ahead and adjust the
16 microphone a little bit so you can speak into it. Please
17 state your name and spell your last name.

18 A. Adam Berard, B-e-r-a-r-d.

19 Q. Adam, if you will just take a second and introduce
20 yourself to the jury.

21 A. As you know my name is Adam Berard, I am twenty-seven
22 years old. I was born in Rock Hill, South Carolina. I do
23 construction work mostly general labor. I stopped at the
24 eleventh grade in high school.

25 Q. Have you lived your whole life in Rock Hill?

- 1 A. No, sir.
- 2 Q. Where else have you lived?
- 3 A. I've lived most of my life in Ohio.
- 4 Q. Where was the last place you went to school?
- 5 A. Wintersville, Ohio.
- 6 Q. And you said you went how far in school?
- 7 A. To the eleventh grade.
- 8 Q. Have you ever finished up your schooling or anything
- 9 like that?
- 10 A. No, sir.
- 11 Q. And you stated you do construction generally?
- 12 A. Yes, sir.
- 13 Q. Work as a laborer?
- 14 A. Mostly, sir.
- 15 Q. And how long have you been doing construction?
- 16 A. Six or seven years.
- 17 Q. Do you like doing construction?
- 18 A. Yes.
- 19 Q. Do you remember back in June of 2008 do you remember
- 20 what was going on in June?
- 21 A. Yes, sir.
- 22 Q. Were you working construction at that point in time?
- 23 A. No, sir.
- 24 Q. Where were you working?
- 25 A. At Carolina Fresh Farms.

ADAM BERARD: DIRECT EXAMINATION BY MR. LEMEL

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1 Q. What were your job duties at Carolina Fresh Farms?

2 A. I was a fork lift operator but mostly what I did is
3 when the trucks come in I unloaded them. I loaded them
4 whenever they needed also when they came in.

5 Q. What else did you do there besides load and unload
6 trucks?

7 A. I stocked and restocked the store the front and the
8 back when need be.

9 Q. Did you like working there?

10 A. I did.

11 Q. And how long had you been working there before leading
12 up to June of 2008?

13 A. About three months.

14 Q. And what sort of work schedule did you typically keep
15 there?

16 A. Eight hours go in at nine get done at five.

17 Q. Was that true every day?

18 A. Pretty much except for the weekends.

19 Q. Now do you remember the day of June 7th?

20 A. Yes, sir.

21 Q. And were you working that day?

22 A. I was.

23 Q. Do you remember what time you went in exactly?

24 A. Early in the morning around 8:30 or nine o'clock.

25 Q. What time did you have to be at work?

1 A. Nine.

2 Q. And how did you get back and forth to work?

3 A. I rode a moped.

4 Q. Is that the yellow moped that we've heard about
5 before; the scooter?

6 A. It is.

7 Q. And about how far or how long did it take you to get
8 from your home to where you worked?

9 A. About twenty minutes.

10 q. So you would have to leave before nine o'clock in
11 order to get there by that time?

12 A. Right.

13 Q. And to the best of your recollection is that what you
14 did that morning?

15 A. It is.

16 Q. What was going on at work that day; anything in
17 particular?

18 A. Just the same oh.

19 Q. Did you work a whole day that day?

20 A. Yeah.

21 Q. About what time did you get off?

22 A. About two o'clock.

23 Q. Do you remember exactly what time you got off?

24 A. No.

25 Q. What did you do once you got off work that day?

ADAM BERARD: DIRECT EXAMINATION BY MR. LEMEL

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- 1 A. I went to the gas station got a case of beer and some
2 cigarettes and went home.
- 3 Q. And where was home at that point in time?
- 4 A. [REDACTED].
- 5 Q. How long had you been living at [REDACTED] [REDACTED]?
- 6 A. About five and a half months.
- 7 Q. Had you been in Ohio before that?
- 8 A. No.
- 9 Q. Once -- let's talk about [REDACTED] Tell me describe that
10 home for me just a little bit.
- 11 A. It's a double wide modular; beige color, three
12 bedrooms.
- 13 Q. Who all lived there?
- 14 A. My parents, my half brother and me.
- 15 Q. And your parents who are your parents?
- 16 A. Doug and Cecilia Berard.
- 17 Q. Now Doug Berard is he your natural father?
- 18 A. No.
- 19 Q. Had he adopted you at some point in time however?
- 20 A. He did.
- 21 Q. And what parent do you and Russell have in common?
- 22 A. Our mothers.
- 23 Q. Are you and Russell particularly close?
- 24 A. Not especially.
- 25 Q. When you got home that day what was going on at the

1 house?

2 A. It was quiet. I got home and I changed my clothes.

3 Q. Was there anyone else at the home?

4 A. No.

5 Q. Where were your parents?

6 A. They had just left to go to the beach that morning.

7 Q. Had they discussed that with you at all?

8 A. Just let me know that they were going and they should
9 be back.

10 Q. So it wasn't a surprise for you that they went - -

11 A. No.

12 Q. And once you changed your clothes, what did you decide
13 to do?

14 A. I called a friend of mine then I had talked to my
15 mother.

16 Q. And after you got done -- I assume you talked to her
17 on the phone?

18 A. Yes, sir.

19 Q. And after you got done talking with your mother what
20 did you do?

21 A. I turned the radio on in my room; I drank a few beers
22 and then I decided to go to my grandmothers.

23 Q. Why did you decide to go up to your grandmothers?

24 A. Because it was intended that I go up there to eat.

25 She said that she was going to cook.

1 Q. Okay. And was it unusual for you to go up to your
2 grandmothers?

3 A. No.

4 Q. How often would you say you would go up to your
5 grandmothers?

6 A. Any time she wasn't working.

7 Q. When you first began living at [REDACTED] you were on an
8 electronic monitor; is that correct?

9 A. It was.

10 Q. When you first got there what part of the lot, that
11 Zinker Road lot, the compound as it's been described; what
12 part of that lot were you allowed to go to?

13 A. From my mother's house to my grandmother's house.

14 Q. Did they change that orientation at all of where you
15 were allowed to go as time went by?

16 A. They did.

17 Q. How did that change?

18 A. I had to get permission from my parole officer to get
19 it changed so I would be allowed to go over to my
20 grandmother's house and it be arranged.

21 Q. Initially it wasn't arranged then?

22 A. No.

23 Q. And did your grandmother also agree to that for you to
24 be allowed to come over to her house?

25 A. She did.

- 1 Q. So it wasn't unusual for you to do that at this point
2 in time?
- 3 A. No.
- 4 Q. How many days a week would you say you would go over
5 to your grandmother's house?
- 6 A. Two, three days a week.
- 7 Q. And what would you do when you got there?
- 8 A. Hang out and talk to her on the porch.
- 9 Q. Did you always stay on the porch?
- 10 A. Most of the time.
- 11 Q. Did you sometimes go inside?
- 12 A. Sometimes.
- 13 Q. Once you got there that particular day, let's focus on
14 that particular day, what was going on?
- 15 A. Nothing unusual.
- 16 Q. Where was she?
- 17 A. She was on the porch.
- 18 Q. And what was she doing?
- 19 A. Nothing really just sitting there.
- 20 Q. Where did you go?
- 21 A. I went up to her house on the porch.
- 22 Q. Where did you sit?
- 23 A. Across from the table from her.
- 24 Q. What did you do at that point in time?
- 25 A. I just sat down and started talking.

1 Q. Do you remember anything in particular that you talked
2 about?

3 A. Not really just life in general just basic things.

4 Q. Did you take anything with you when you went from your
5 house to your grandmother's house?

6 A. I did.

7 Q. What did you take?

8 A. A beer and my cell phone.

9 Q. How many beers did you take?

10 A. One or two.

11 Q. Do you remember exactly?

12 A. No.

13 Q. About how long did you stay there at that point in
14 time?

15 A. Probably about an hour and a half.

16 Q. Why did you leave?

17 A. Because my grandmother said that she was going to go
18 in and take a shower she wouldn't be out for the next
19 twenty or thirty minutes.

20 Q. Okay. Where did she go at that point in time?

21 A. She went in the house.

22 Q. Where did you decide to go?

23 A. I went home.

24 Q. Did you stay at home the whole time?

25 A. No.

- 1 Q. Where did you go?
- 2 A. I went to the gas station to pick up some cigarettes
- 3 because I running out.
- 4 Q. About how long were you gone when you say you went to
- 5 get the cigarettes?
- 6 A. About ten minutes.
- 7 Q. When you got home did you go back to your
- 8 grandmother's house immediately?
- 9 A. No.
- 10 Q. What else did you do?
- 11 A. I just sat down at my house and drank a few beers and
- 12 made a phone call.
- 13 Q. Now you said you had a few beers before you left your
- 14 grandmother's house; right?
- 15 A. Right.
- 16 Q. Did you drink anything at her house?
- 17 A. I had opened a beer and started sipping on it.
- 18 Q. You said when you got back you had a few more beers?
- 19 A. Right.
- 20 Q. Do you remember exactly how many you had?
- 21 A. A total in all probably four, five.
- 22 Q. Once you had been there at your house for a little bit
- 23 after getting back from getting cigarettes what did you
- 24 decide to do?
- 25 A. To see if my grandmother was done showering and back

1 out on the porch. I figured I would go back up there and
2 hang out.

3 Q. Did you take anything with you?

4 A. I think took a beer with me.

5 Q. What happened when you got up to her place?

6 A. We sat back down on the porch was talking about life
7 in general.

8 Q. Do you remember about what time of day it was at this
9 point?

10 A. Later evening.

11 Q. Do you remember if the sun was still up?

12 A. It was going down.

13 Q. Do you remember exactly what time it was beyond that?

14 A. I don't.

15 Q. At some point in time was there some discussion about
16 eating dinner?

17 A. Well early in the morning there was discussion about
18 my Nana said that she was going to cook steaks on the grill
19 but then when I got there she said she decided not to. I
20 don't know I guess she didn't feel like it.

21 Q. What had she done for it?

22 A. She had cooked an oven pizza.

23 Q. Frozen pizza you cook in the oven?

24 A. Right.

25 Q. Okay. Did you have any of that?

1 A. No.

2 Q. Did she offer any to you?

3 A. Yes.

4 Q. At any point in time did you all have a hamburger
5 steak, salad, bake potato, any of that stuff?

6 A. No.

7 Q. Did you eat any hamburger steak or anything like that
8 that day?

9 A. No.

10 Q. So as the night goes on what else happened?

11 A. Well since I didn't eat we just sat out on the porch
12 and talked for a while.

13 Q. Did you continue to drink?

14 A. Yes.

15 Q. What happened then?

16 A. After a period of time probably about two hours or so
17 she got up from her chair and said I'm going in for the
18 night.

19 Q. What happened next?

20 A. We stood up from our chairs she gave me a hug and a
21 kiss like she always does. She turned around and unplugged
22 the radio.

23 Q. What happened then?

24 A. I actually remember that I assaulted my grandmother.

25 Q. By assault her do you mean you hit her?

- 1 A. Yes, sir.
- 2 Q. Why did you hit her?
- 3 A. I don't recall, sir.
- 4 Q. Can you explain why you hit her?
- 5 A. No, sir, I can't but what I can say that it was wrong.
- 6 It was unspeakable never should have happened. I'm ashamed
- 7 of myself for it. I regret that it happened.
- 8 Q. Once you hit her where did she go? What did she do
- 9 after you hit her?
- 10 A. She fell back on the floor on the porch.
- 11 Q. What sort of state was she in?
- 12 A. Probably unconscious or close to it.
- 13 Q. What did you decide to do at that point?
- 14 A. Take her in the house because she was bleeding.
- 15 Q. How did you take her in the house?
- 16 A. Well I couldn't carry her in a descent manner so I had
- 17 to pull her in by her legs.
- 18 Q. So you grabbed her legs and pulled her?
- 19 A. Yes, sir.
- 20 Q. Is that possibly how the rug that was inside got
- 21 pulled inside the house?
- 22 A. That's very well possible how it could have happen.
- 23 Q. What do you next remember from that point?
- 24 A. I remember knelling over top of my grandmother but
- 25 beside her.

1 Q. Where were you knelling over her? Where exactly were
2 you inside the house?

3 A. Beside the refrigerator in and out of a doorway.

4 Q. In that what we call the passage way between the
5 kitchen and the dinning room?

6 A. Right.

7 Q. Do you remember whether she was clothed at that point
8 in time?

9 A. She was at that point in time.

10 Q. She was or she was not, I'm sorry?

11 A. She was.

12 Q. Do you remember at any point in time whether she
13 became unclothed?

14 A. No.

15 Q. Did you take her clothes off if you recall?

16 A. I don't recall.

17 Q. What about your own clothes do you remember anything
18 about that?

19 A. My shorts were off.

20 Q. The camouflage shorts?

21 A. Right.

22 Q. What about your underwear?

23 A. They were still on.

24 Q. What do you next recall? Or what do you recall doing
25 at that point?

- 1 A. I remember holding her arm looking at it stunned as to
2 what had just place something that I didn't recall. And
3 then my half brother come in through the back door. He was
4 finishing a conversation and he asked me what was I doing.
5 Q. And did he use that exact words?
6 A. No.
7 Q. What were his exact words?
8 A. What the fuck are you doing?
9 Q. Now when he came in what position were you in in
10 relationship to your grandmother? Can you describe that
11 for us how you were positioned?
12 A. Yes I was knelt down beside her. I had one knee on
13 the floor and the other knee up toward my face and I was
14 knelt down sort of over top of her and had her wrist in my
15 hand.
16 Q. Were you in any way between her legs?
17 A. No way, sir.
18 Q. Were you in any sort of sexual position with her?
19 A. Absolutely not.
20 Q. What happened after Russell came in?
21 A. After he came in he was just finishing a conversation
22 with a friend of his and after he had asked me what I was
23 doing I believe I told him to call the ambulance. I think
24 that I might have said that she fell but I don't recall
25 that either.

- 1 Q. There is a lot of things you don't recall here, Adam;
2 right?
- 3 A. Right.
- 4 Q. Why is that?
- 5 A. Well because I had had a lot of alcohol in my system
6 and Xanax's.
- 7 Q. You took some Xanax's?
- 8 A. Yes, sir.
- 9 Q. Are you supposed to take Xanax?
- 10 A. No, sir.
- 11 Q. Where did you get them?
- 12 A. From someone at work, sir.
- 13 Q. Once Russell got there and you told him to call the
14 police what did you do?
- 15 A. I believe I stood up and said that I was leaving.
- 16 Q. Where did you go?
- 17 A. Over to my mother's house.
- 18 Q. Why did you go over there?
- 19 A. To get away from the situation at the moment.
- 20 Q. What did you do when you were at the [REDACTED] house?
- 21 A. Took a breath put on a pair of jeans and a shirt.
- 22 Q. Why did you put on a pair of jeans?
- 23 A. Because I was going to leave.
- 24 Q. How did you leave?
- 25 A. On a moped.

- 1 Q. And why did you leave?
- 2 A. Because I needed to get away from that situation.
- 3 Q. And at some point in time as you were leaving what did
- 4 you do with your electronic monitor?
- 5 A. I cut it off.
- 6 Q. What did you use to cut it off?
- 7 A. A hawk-bill, serrated pocket knife.
- 8 Q. Where was that knife located?
- 9 A. In my pocket.
- 10 Q. Did you cut yourself when you did that?
- 11 A. I did.
- 12 Q. How badly did you cut yourself?
- 13 A. Very bad.
- 14 Q. How much did it bleed?
- 15 A. A lot.
- 16 Q. Tell us how much do you mean by a lot?
- 17 A. Well I bleed all the way across town. I would say I
- 18 probably bleed three, four or five cups slam full.
- 19 Q. Is that how your shoe got stained red?
- 20 A. It is.
- 21 Q. Is that how your pant legs got stained?
- 22 A. It is.
- 23 Q. Where did you go first?
- 24 A. I went across town to a person's house that I work
- 25 with.

- 1 Q. Do you remember what street that was?
- 2 A. Parker Street.
- 3 Q. Was that Mr. Lane who testified earlier?
- 4 A. It is.
- 5 Q. How did you know him?
- 6 A. Through work. He had came on to drive a truck for us.
- 7 Q. Had you ever been at his house before?
- 8 A. No.
- 9 Q. How did you know where he lived?
- 10 A. Because one of my half sister's had lived beside him
- 11 all their life and he had told me about it.
- 12 Q. So you knew where he lived in relationship to one of
- 13 your relatives?
- 14 A. Right.
- 15 Q. Why did you go there?
- 16 A. To see if he would help me bandage up my leg.
- 17 Q. What happened when you got there?
- 18 A. He come out on the porch and looked at my leg and then
- 19 asked me what happened.
- 20 Q. And did he offer to call 911 for you?
- 21 A. He probably did but I don't remember that.
- 22 Q. What did you do while you were there?
- 23 A. I got bandaged up.
- 24 Q. Why did you leave there?
- 25 A. Well because he pretty much threatened me with an

- 1 object.
- 2 Q. Do you remember exactly what that object was?
- 3 A. I do.
- 4 Q. What was it?
- 5 A. It was some kind of short sword.
- 6 Q. Was it a gun? Do you recall ever seeing a gun?
- 7 A. No I don't remember seeing a gun.
- 8 Q. He made it pretty clear to you it was some sort of
- 9 weapon and you were supposed to leave?
- 10 A. Right.
- 11 Q. Did you give him any trouble at that point in time?
- 12 A. No.
- 13 Q. And you left?
- 14 A. Right.
- 15 Q. Where did you go at that point in time?
- 16 A. I went to a gas station.
- 17 Q. What did you do at the gas station?
- 18 A. To get gas.
- 19 Q. Where did you go from there?
- 20 A. To Debbie Miller's house.
- 21 Q. Why did you go there?
- 22 A. To lay down because I was feeling really weak from
- 23 loosing all the blood.
- 24 Q. What did you do when you lay down?
- 25 A. When I layed down I went to sleep.

- 1 Q. How hard of a sleep were you?
- 2 A. Strong sleep.
- 3 Q. Do you remember doing anything with the socks and the
- 4 shoes before you got in the bed?
- 5 A. I don't exactly remember but it's possible that I
- 6 could have washed them out or set them aside somewhere.
- 7 Q. Did you know they were pretty bloody at that point in
- 8 time?
- 9 A. They were soaked.
- 10 Q. What's the next thing you remember after you fell
- 11 asleep?
- 12 A. Agent Patton dragging me along the rocks of the
- 13 driveway in handcuffs.
- 14 Q. You were already in handcuffs at that point in time?
- 15 A. Yes.
- 16 Q. Did you ever hear them knocking?
- 17 A. No.
- 18 Q. Can explain why you didn't hear the knocking?
- 19 A. Because I was out cold from the loss of blood.
- 20 Q. And do you recall having any trouble understanding
- 21 what they were asking you to do or do you recall them
- 22 having got you in handcuffs inside the house?
- 23 A. No.
- 24 Q. The next thing you recall is actually being outside?
- 25 A. Right.

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1 Q. Do you remember getting in the police car at all?

2 A. Yes.

3 Q. Do you remember talking with any of the other officers
4 or anything like that?

5 A. No. I just remember Agent Patton had asked me a
6 question.

7 Q. And what did you ask him?

8 A. I had asked him to tell me how my grandmother was.

9 Q. Why did you ask him that?

10 A. Because I was concerned.

11 Q. So, Adam, obviously this has been a very difficult
12 situation for you; right?

13 A. It is.

14 SOLICITOR LIPINSKI: Objection to leading, Your Honor.

15 THE COURT: Over ruled.

16 BY MR. LEMEL:

17 Q. Adam, what do you want to tell the jury about the
18 assault and battery with intent to kill charge?

19 SOLICITOR LIPINSKI: Your Honor, objection as to the
20 form of the question and as to the relevance of what he
21 wants to tell them.

22 THE COURT: Over rule.

23 A. I deserve to be convicted of this charge because what
24 I did was wrong and there is no excuse for it. I'm ashamed
25 of myself; I regret that it happened. I'm pretty sure I

1 let my family down and they hate me too.

2 Q. Do you blame them for that?

3 A. No.

4 Q. At any point in time did you try to commit any sort of
5 sexual act with your grandmother?.

6 A. Absolutely not.

7 Q. Did you do that?

8 A. Never..

9 Q. When you went inside the house that night had you had
10 permission to go inside her house before?

11 A. Yes.

12 Q. Was it a big deal for you to go in and out of her
13 house?

14 A. No.

15 Q. When you went inside her house that night after you
16 had did you feel like you had permission to do that? Did
17 you need to get permission from her to take her inside?

18 A. No.

19 Q. Why were you taking her inside?

20 A. Because I didn't want her to be outside.

21 Q. Were you trying to kidnap her or take her away or do
22 anything like that?

23 A. No.

24 Q. Are you guilty of that?

25 A. No.

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1 Q. Are you guilty of trying to attempt or commit any sort
2 of a criminal sexual conduct your grandmother?

3 A. Absolutely not.

4 Q. Are you guilty of burglarizing her house?

5 A. No, sir.

6 Q. Please answer any questions the solicitor has for you.

7 SOLICITOR LIPINSKI: Your Honor, if we could
8 approach?

9 THE COURT: Ladies and gentlemen I am going to let you
10 step back in the jury room for just a few minutes please.

11 (JURY LEAVING COURTROOM AT 11:08 A.M..)

12 SOLICITOR LIPINSKI: The State would like to renew our
13 motion. We believe the defendant has opened the door to
14 his prior conviction for gross sexual imposition by stating
15 that he would never do such a thing. We feel it is now
16 probative and the probative value does not outweigh the
17 prejudicial effect. It goes ultimately to his credibility
18 on that issue. Mr. Lemel asked him very open ended
19 questions and didn't stop him just at the denial that he
20 didn't do it. The question was would you ever do that kind
21 of thing and the response was no. The State feels that it
22 is now proper to impeach him. He has a prior conviction
23 for sexual offense.

24 THE COURT: Well get your argument straight. If he
25 opened the door then it's not impeachable of his character.

1 Your argument has nothing to do with impeachment. Your
2 argument is that he introduced evidence of a good trait of
3 character and you want to introduce evidence contrary to
4 that under 404 A.

5 SOLICITOR LIPINSKI: Yes.

6 MR. LEMEL: Your Honor, my argument would be that that
7 one comment certainly does not open the door to his
8 character in general.

9 THE COURT: Well - -

10 MR. LEMEL: The specific response to something that in
11 regard to his grandmother I think that's what the jury took
12 it as. Given the facts - -

13 THE COURT: You have had months to think about how to
14 frame your questions on direct and you asked him would you
15 do that. Why? How can he answer that question without
16 introducing evidence of a character trait? Even if it is
17 restricted to his grandmother; even if you had said would
18 you do that to your grandmother its still character
19 evidence.

20 (PAUSE.)

21 THE COURT: Well parts of this are easy and parts of
22 it are more difficult. It's very clear; it's indisputable
23 that he has introduced evidence of a trait of character.
24 It's indisputable that he has introduced evidence of a
25 pertinent trait of character which he is permitted to do

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1 under 404 A 1. But what that does is it allows the state
2 to rebut it under the same rule and the only remaining
3 question is whether the potential for unfair prejudice in
4 allowing the conviction into evidence outweighs --
5 substantially outweighs the probative value.

6 (PAUSE.)

7 THE COURT: Any argument from the Defense?

8 MR. LEMEL: Obviously, Your Honor, we would submit
9 that it does substantially outweigh the probative value.
10 It was an incidental comment that was basically the result
11 of my improper question. I should have said did you as
12 opposed to would you. That's my fault, Your Honor.

13 THE COURT: Before you finish your argument let me say
14 this. It's not just that. We're not talking just about
15 that one question and that one answer because when you
16 asked him you asked him questions about what happened he
17 admitted something; he denied something. And when it came
18 to those -- now there may have been others -- but those
19 times when you asked him questions that related to the
20 sexual allegations as opposed to when he denied the
21 burglary for example or when he denied other things, when
22 he denied the sexual allegations he said it with emphasis
23 and he said absolutely not. And the implication from that
24 -- in my opinion the intended implication by the word
25 choice, the word infliction, the body language is that he's

1 not the kind of person who would do that. That was the
2 message the witness was conveying to the jury. And that's
3 just a small part of it though you know that's to be
4 expected. That probably by itself would not bring us to
5 this discussion that we are having but it adds to the one
6 question and answer that we are focused on. I am going to
7 admit it. I think that the -- when I look at the prejudice
8 as it exist now there's no doubt that allowing in the
9 conviction from Ohio of whatever it is that it's called,
10 the sex conviction, is prejudicial. But because the
11 defendant and his counsel chose to introduce a trait of
12 character that he is not the type of person that would do
13 this it's no longer unfair prejudice. It's fair prejudice.
14 He's the one who brought this up and he's going to have to
15 face the evidence that's on the other side of the question.
16 So on the one hand the probative value of it is now very
17 high. On the other hand the unfair quality of its
18 prejudicial effect is significantly reduced. Plus the
19 analysis is totally different under Rule 404 than it is
20 under 609. Under 609 not only is the threshold different
21 where in order to admit it the probative value must
22 outweigh the prejudice to the accused. Under 609 the
23 prejudice is not evaluated for its unfair nature. It's
24 simply evaluated as whether or not it's prejudicial. Under
25 403 it's evaluated for its unfair quality and I don't find

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1 that it's significantly unfair at this time so I'm going to
2 admit it. We will take a short break.

3 You can remain in your seats.

4 (COURT RECESSED AT 11:19 A.M..)

5 (BACK ON THE RECORD AT 11:35 A.M..)

6 THE COURT: Be seated. All right to finish the
7 discussion about what evidence is admissible. When we were
8 looking at this thing early on under Rule 609 the only
9 thing that could possibly have come in would be the
10 conviction, evidence of the conviction, not the underlying
11 facts and that's the conviction. What now, what is it
12 called?

13 SOLICITOR LIPINSKI: Gross sexual imposition.

14 THE COURT: Gross sexual imposition. All right now
15 that we are looking at it under the rules of evidence
16 regarding character the -- technically the underlying facts
17 are now admissible under Rule 405 A. You can inquire on
18 cross examination into specific incidences of conduct. So
19 it's not just the conviction that is admissible it's the
20 facts of the case in Ohio and it's also the underlying
21 facts of the ABHAN. Now I don't know whether you want to
22 go into all of that or not that's up to you. That's where
23 we are.

24 Are you ready to proceed?

25 SOLICITOR LIPINSKI: Yes, Your Honor.

1 THE COURT: Mr. Lemel?

2 MR. LEMEL: Yes, Your Honor.

3 THE COURT: Bring in the jury.

4 (JURY ENTERING COURTROOM AT 11:39 A. M..)

5 THE COURT: Cross examination.

6 SOLICITOR LIPINSKI: May it please the Court, Your
7 Honor.

8 CROSS EXAMINATION

9 ADAM BERARD BY SOLICITOR LIPINSKI:

10 Q. Mr. Berard, I would like to start with the statement
11 that you gave Investigator Tim Hager. Do you remember
12 giving that statement at all?

13 A. No, ma'am.

14 Q. Do you recall telling him that you had hit her in the
15 head with a bat?

16 A. No, ma'am.

17 Q. Or that you swung at a bat and accidentally hit her in
18 the head?

19 A. No, ma'am.

20 Q. But that's the same story you are telling here today.
21 is that you remember hitting her?

22 A. Yes, ma'am.

23 Q. Do you remember going to John Lane's house that night?

24 A. Yes, ma'am.

25 Q. And do you remember telling him what happened?

- 1 A. Sort of, ma'am.
- 2 Q. Do you remember telling him that you hit your
3 grandmother in the head with a bat?
- 4 A. No, ma'am.
- 5 Q. But again you're saying today that is what happened;
6 that's what you can recall is what happened is you hit her?
- 7 A. Just that I assaulted her, ma'am.
- 8 Q. Just that you assaulted her?
- 9 A. Yes, ma'am.
- 10 Q. What does that term mean to you assault?
- 11 A. That I hit her.
- 12 Q. With what?
- 13 A. My hand; my elbow.
- 14 Q. Just your hand?
- 15 A. My elbow.
- 16 Q. Pardon me?
- 17 A. My elbow.
- 18 Q. Your elbow and your hand?
- 19 A. Yes, ma'am, that I recall.
- 20 Q. That you recall. So your testimony today is you never
21 took State's Exhibit Number Sixteen this crape myrtle
22 branch and struck your grandmother?
- 23 A. I don't recall, ma'am.
- 24 Q. You don't recall?
- 25 A. No, ma'am.

- 1 Q. You could have but you don't recall?
- 2 A. I could have but I don't recall, ma'am.
- 3 Q. Was there anyone else there that night?
- 4 A. No, ma'am.
- 5 Q. Was your grandmother feeling okay that day?
- 6 A. She seemed to be feeling fine, ma'am.
- 7 Q. Did she have any apparent bruises or injuries to her?
- 8 A. No, ma'am.
- 9 Q. And you stated that what you can recall is that you
- 10 hit her in the head?
- 11 A. Just that I had hit her on the back side of her head
- 12 and neck in between so.
- 13 Q. Head and neck. Why did you hit her?
- 14 A. I don't know, ma'am.
- 15 Q. It's your grandmother?
- 16 A. She is.
- 17 Q. She loves you?
- 18 A. Right.
- 19 Q. She's been very good to you over the years?
- 20 A. She has been yes.
- 21 Q. She paid you to do yard work around her house?
- 22 A. She has.
- 23 Q. Cooked you dinner?
- 24 A. She has.
- 25 Q. Celebrated your birthday?

- 1 A. She has.
- 2 Q. Did she do anything that day that made you mad?
- 3 A. No, ma'am. /
- 4 Q. Did she upset you?
- 5 A. No, ma'am.
- 6 Q. Were you unhappy that you didn't get your steak
- 7 dinner?
- 8 A. No, ma'am.
- 9 Q. Well then seeing that you recall hitting her why can't
- 10 you recall why you hit her?
- 11 A. Because I was in a drunken state, ma'am, and I had
- 12 drugs in my system.
- 13 Q. You were in a drunken state?
- 14 A. Yes, ma'am.
- 15 Q. I believe you told Mr. Lemel that you had had about
- 16 four to five beers?
- 17 A. Yes, ma'am.
- 18 Q. Is that at some point in the evening you had four or
- 19 five or throughout the entire evening you drank four or
- 20 five beers?
- 21 A. That was just at the beginning of the evening, ma'am.
- 22 Q. Just at the beginning of the evening?
- 23 A. Yes, ma'am.
- 24 Q. So that day you got up and went to work?
- 25 A. Yes, ma'am.

- 1 Q. Came home from work?
- 2 A. Yes, ma'am.
- 3 Q. Did you stop anywhere on the way home? Did you go to
- 4 a school or anything?
- 5 A. I stopped at a gas station.
- 6 Q. Just at a gas station is all you recall?
- 7 A. Yes, ma'am.
- 8 Q. And you stated you got home about two o'clock?
- 9 A. No I got home about 2:30; three o'clock.
- 10 Q. 2:30 or three o'clock. Do you remember that quite
- 11 vividly? It wasn't 2:00 it was 2:30 or three o'clock?
- 12 A. It was in the early afternoon. I don't recall exactly
- 13 what time.
- 14 Q. And that you started drinking right away?
- 15 A. Yes, ma'am.
- 16 Q. And at some point you go over to her house - - -
- 17 A. Yes, ma'am.
- 18 Q. - - - right; to set out on the porch and talk?
- 19 A. Yes, ma'am.
- 20 Q. Was it a pleasant conversation?
- 21 A. It is.
- 22 Q. Did you get mad at her in any way?
- 23 A. No, ma'am.
- 24 Q. Was she a mean grandma that tells you how to live your
- 25 life or something?

1 A. No, ma'am.

2 Q. And you pretty much spend the afternoon sitting on the
3 porch with your grandma?

4 A. Yes, ma'am.

5 Q. And you were drinking?

6 A. Yes, ma'am.

7 Q. Does your grandmother drink?

8 A. No, ma'am.

9 Q. So the beer cans that they found in the yard and in
10 her home they all came from you?

11 A. Yes, ma'am.

12 Q. Mr. Lemel asked you some questions about how you would
13 frequently go over and visit her.

14 A. Yes, ma'am.

15 Q. And you said you did that about two to three times a
16 week?

17 A. Yes, ma'am.

18 Q. Did you have a good relationship?

19 A. Yes, ma'am.

20 Q. Did you enjoy visiting her?

21 A. Yes, ma'am.

22 Q. But for some reason on June 7th, 2008 you decided to
23 hit her?

24 A. I had no intentions of doing it, ma'am.

25 Q. Did you hit her accidentally?

1 A. Ma'am, I didn't hit her accidentally; I had no
2 intentions of hitting her it just happened. Its something
3 that shouldn't a happened.

4 Q. It had to be an accident didn't it?

5 A. I can't say that it was an accident because I had no
6 intentions of hitting her.

7 Q. But you recall hitting her?

8 A. Yes, ma'am.

9 Q. Were you swinging at a mosquito trying to get if off
10 the porch or something?

11 A. No, ma'am, not that I recall.

12 Q. The only thing between your hand and your elbow and
13 her was air?

14 A. Yes, ma'am.

15 Q. And the only reason you had to hit her was on purpose?
16 Not the intent. It was on purpose. Would you say that?

17 A. No I wouldn't even say it was on purpose. It was just
18 something that happened that shouldn't a happened. I
19 wasn't in my right state of mind.

20 Q. Was this the first time you had been drinking?

21 A. No, ma'am.

22 Q. Do you hit people a lot when you drink?

23 A. Sometimes.

24 Q. You stated that instead of cooking you the steak
25 dinner she made a pizza?

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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- 1 A. Yes, ma'am.
- 2 Q. And you didn't eat anything?
- 3 A. No, ma'am.
- 4 Q. You kept drinking?
- 5 A. Yes, ma'am.
- 6 Q. Why didn't you eat anything?
- 7 A. Because I don't like to eat when I'm drinking, ma'am.
- 8 Q. Why not?
- 9 A. Because it sours the taste in my mouth and it kills
- 10 the high I got.
- 11 Q. And you are not only drinking you said you were taking
- 12 Xanax?
- 13 A. Yes, ma'am.
- 14 Q. But not prescription Xanax?
- 15 A. No, ma'am.
- 16 Q. And what does Xanax do when you mix it with alcohol?
- 17 A. It causes me to black out a lot and do things that I
- 18 regret.
- 19 Q. Well then why do you take it?
- 20 A. I don't know, ma'am.
- 21 Q. I mean if that's the only good things that comes with
- 22 it blacking out and doing things you regret why would you
- 23 ever drink and take Xanax?
- 24 A. Sometimes it happens like that and sometimes it don't.
- 25 Q. You stated that you went inside and sat at the table

1 with your grandma while she ate her pizza?

2 A. No I didn't go inside she brought it out on the porch.

3 Q. Well you never -- prior to you -- you said dragging
4 her back inside was that the first time you had been inside
5 the house that night?

6 A. I can't recall, ma'am.

7 Q. Did you go inside and watch TV?

8 A. No, ma'am.

9 Q. Did you go inside to use the bathroom?

10 A. Yes, ma'am.

11 Q. So you had gone meaning to go to the bathroom and that
12 might have been it?

13 A. I went to the bathroom probably a couple of times but
14 other than that I stayed out on the porch.

15 Q. And she told you that she was going inside to take a
16 shower?

17 A. She did at one period of time.

18 Q. And then you went home?

19 A. I did.

20 Q. Why didn't you stay there until she got done?

21 A. Because I needed cigarettes and I decided I'd go to
22 the store.

23 Q. So that's when you left to go get cigarettes and go to
24 the store?

25 A. It is.

- 1 Q. Did you buy any more beer when you went to the store?
- 2 A. No, ma'am.
- 3 Q. How much beer did you buy earlier in the day?
- 4 A. Probably about a eighteen pack.
- 5 Q. Did you drink them all?
- 6 A. I'm not sure probably pretty close though.
- 7 Q. You said that it was wrong and unspeakable and you
- 8 regret hitting your grandmother?
- 9 A. I do, ma'am.
- 10 Q. And that in response to doing that you are obviously
- 11 aware you hit her; correct?
- 12 A. Yes, ma'am.
- 13 Q. You stated that you knocked her to the ground?
- 14 A. She fell to the ground, ma'am.
- 15 Q. Okay. But she didn't trip over the threshold of the
- 16 door. You hit her she fell?
- 17 A. That's right, ma'am.
- 18 Q. And she fell outside on the porch?
- 19 A. She did.
- 20 Q. And that you stated that you couldn't carry her?
- 21 A. Not in a descent manner, ma'am.
- 22 Q. What would be a descent manner be?
- 23 A. By picking her up behind her up underneath her arms.
- 24 Q. Why couldn't you pick her up like that?
- 25 A. Because she was too heavy, ma'am.

- 1 Q. Loretta Moss?
- 2 A. Yes, ma'am, dead weight, ma'am.
- 3 Q. She's not a very big woman.
- 4 A. It doesn't matter, ma'am.
- 5 Q. It doesn't matter?
- 6 A. The body goes weak that's dead weight.
- 7 Q. And you couldn't have picked her up?
- 8 A. No, ma'am, not in my drunken state, ma'am.
- 9 Q. Did you ever think to call 911?
- 10 A. No, ma'am.
- 11 Q. I mean because you stated after she fell she was
- 12 unconscious to the best that you could tell?
- 13 A. Yes, ma'am.
- 14 Q. And you don't think that's reason to call 911?
- 15 A. Ma'am, I wasn't in my right state of mind. I was in
- 16 and out a lot so I can't really -- you know what I'm saying
- 17 make the proper decisions during that time.
- 18 Q. So when you say you regret it do you just regret it
- 19 today or did you regret it then?
- 20 A. I regret it then and now.
- 21 Q. But you didn't regret enough to call 911 and get her
- 22 some help?
- 23 A. No, ma'am.
- 24 Q. And you remember dragging her inside?
- 25 A. Sort of, ma'am.

ADAM HERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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1 Q. Was she bleeding at that time?

2 A. I don't know, ma'am.

3 Q. There's blood on the floor near the rug?

4 A. There is, ma'am.

5 Q. There's blood outside on the door?

6 A. There is.

7 Q. Not your blood was it?

8 A. No, ma'am.

9 Q. And then the next thing you remember you blacked out?

10 A. The next thing I remember I was stooped over top of my
11 grandmother holding her arm.

12 Q. And she was naked?

13 A. From the waste down.

14 Q. Just from the waste down?

15 A. Yes, ma'am.

16 Q. Were you naked at that time?

17 A. All I had was my boxer briefs on I had my shorts
18 beside me.

19 Q. Your shorts were beside you?

20 A. Yes, ma'am.

21 Q. Why did you take your shorts off?

22 A. I don't recall, ma'am.

23 Q. Do you normally take your shorts off when you drink
24 and take Xanax?

25 A. I don't know, ma'am.

1 Q. How did your grandmother's shorts get off?

2 A. I don't recall that either, ma'am.

3 Q. But you recall the pizza and you recall your hand and
4 elbow. What is it at that particular time? Are you
5 drinking more between dragging her inside and getting half
6 naked?

7 A. Like I said I'm in and out. In that state of mind and
8 the way I was so I can remember pieces here and there.

9 Q. Okay. So you don't remember how that happened?

10 A. No, ma'am.

11 Q. Do you remember hitting her on the side of her back
12 three or four times with a branch?

13 A. No, ma'am.

14 Q. Do you know how she got those bruises?

15 A. I don't, ma'am.

16 Q. Did you see anybody else come inside and hit on her
17 too?

18 A. No, ma'am.

19 Q. Do you know how she got the puncture wounds on her
20 arm?

21 A. No, ma'am, I don't.

22 Q. Did you stab her?

23 A. No, ma'am.

24 Q. Did you have your knife with you?

25 A. I don't know, ma'am.

1 Q. You could have?

2 A. Could have but I don't know.

3 Q. So if you could have had your knife with you and you
4 don't really recall what's happened it's possible you
5 stabbed her too?

6 A. Yea I guess it's possible.

7 Q. Possible you took her clothes off?

8 A. I don't know, ma'am.

9 Q. Why don't you know?

10 A. Because I just don't.

11 Q. Do you remember telling her to take her clothes off?

12 A. No, ma'am.

13 Q. You could have?

14 A. No, ma'am.

15 Q. You couldn't have?

16 A. I don't believe I would have done such a thing, ma'am.

17 Q. You don't believe you would have done such a thing.

18 Why would you have taken your pants off?

19 A. I don't know the answer to that.

20 A. But you did?

21 A. Yeah.

22 Q. And at no point when you wake up and she's half naked
23 and you've got your shorts off you don't call 911 then?

24 A. No, ma'am, not at that exact moment.

25 Q. You don't go get the bathrobe that Russell does and

1 put it around her?

2 A. No, ma'am.

3 Q. So she's not lying on the kitchen floor half naked
4 that doesn't come to you as something you ought to do?

5 A. Not at that exact moment it wasn't.

6 Q. You don't go get a blanket in the living room and
7 cover her up?

8 A. No, ma'am.

9 Q. You just let her lay there?

10 A. When I came to, ma'am, I was stunned to what had just
11 happened. I was kind of in a state of shock myself and
12 then that is the same time that my half brother come
13 walking in the back door.

14 Q. Well what just happened? I thought you don't
15 remember?

16 A. I said all I remember is hitting her.

17 Q. Yeah but then you said I was stunned at what just
18 happened. What had just happened that stunned you?

19 A. Well I don't know, ma'am, she was laying in front of
20 me bottoms off. She was moaning because she was in pain
21 and I had her arm in my hand and she had a nasty cut on the
22 inside of her left arm.

23 Q. So you remember the puncture wound to her arm?

24 A. Yes, ma'am.

25 Q. Did you see the other one?

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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- 1 A. No, ma'am.
- 2 Q. Did you see any other bruising to her knees?
- 3 A. No, ma'am.
- 4 Q. To her hip?
- 5 A. No, ma'am.
- 6 Q. To her breast?
- 7 A. No, ma'am.
- 8 Q. So the only one you can focus in was she had a bad on
- 9 her arm?
- 10 A. Yea she was bleeding bad.
- 11 Q. And you remember Russell walking in?
- 12 A. I do.
- 13 Q. And what did he say exactly? I didn't hear you
- 14 before?
- 15 A. He said what the fuck are you doing.
- 16 Q. You remember that quite vividly?
- 17 A. I do.
- 18 Q. But the other part that's just kind of a gray area?
- 19 A. Yeah.
- 20 Q. And so you didn't pick up the phone and dial 911 then?
- 21 A. I didn't, ma'am, no.
- 22 Q. Do you remember telling Russell that she fell?
- 23 A. No, ma'am, I don't.
- 24 Q. Could you have?
- 25 A. I could have.

- 1 Q. Did you tell him you hit her and that's why she fell?
- 2 A. No, ma'am.
- 3 Q. But that's what happened?
- 4 A. It is.
- 5 Q. So when you told Russell she fell you lied?
- 6 A. I did. That's if I said she fell though. I don't
- 7 know if I said that she fell.
- 8 Q. But if you did say that that was a lie. You recognize
- 9 now today that would have been a lie?
- 10 A. Yes, ma'am.
- 11 Q. And Russell's picking up the phone calling 911?
- 12 A. Yes, ma'am.
- 13 Q. Trying to get her help?
- 14 A. Yes, ma'am.
- 15 Q. What you should have done earlier?
- 16 A. Yes, ma'am.
- 17 Q. And instead of telling EMS what really happened to her
- 18 and how to help her it's possible you lied?
- 19 A. I didn't talk to EMS, ma'am.
- 20 Q. But you told Russell what happened.
- 21 A. No I didn't tell him what happened. That was the
- 22 truth.
- 23 Q. That was the truth she fell?
- 24 A. The truth is I hit her but I didn't tell him that.
- 25 Q. But obviously if she's half naked and unconscious by

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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1 your own description the fact that you hit her that might
2 be pertinent to her care; correct?

3 A. Yes, ma'am.

4 Q. I as a doctor might need to know that Nanna has a blow
5 to the head; right?

6 A. I didn't realize she had a blow to the head, ma'am,
7 because I didn't hit her in the head directly.

8 Q. That's right you said the head and neck area.

9 A. I said in between that area on the back side.

10 Q. And so you stay for a little while?

11 A. For a few minutes.

12 Q. And then you needed to get away from the situation?

13 A. Yes, ma'am.

14 Q. Why did you need to get away from the situation?

15 A. Because I couldn't believe what I was looking at when
16 I came to and I was stooped over my grandmother. The fact
17 that she was in the position that she was and she was
18 bleeding like she was in front of me and that I was looking
19 at her and stunned at what my surroundings were.

20 Q. You knew you screwed up and you ran.

21 A. Well I can't say that I was thinking that no, ma'am.

22 Q. You go next door?

23 A. I did.'

24 Q. You don't put on the shorts you had on at the scene;
25 you put on some jeans?

1 A. I did, ma'am, because it was chilly outside.

2 Q. On June 8th of 2008 you had to put on jeans because it
3 was chilly?

4 A. Because I knew that I was fix'n to get on my scooter
5 and leave and I didn't want to be cold.

6 Q. So you don't stay and tell police what happened to
7 Nanny?

8 A. I didn't.

9 Q. You don't stay and tell the paramedics what happened
10 to her so they can help her.

11 A. I didn't.

12 Q. You needed to get away from the situation.

13 A. I did.

14 Q. But you're not running?

15 A. No I wasn't running. If I were running then I could
16 have easily have hopped on a greyhound and left but I
17 didn't. I knew that I had messed up but I didn't think
18 that I had messed up that bad so that's why I didn't
19 particularly run away from town or city or anything.

20 Q. No being caught half naked over your naked grandma
21 according to you is not screwing up that bad?

22 A. I know what it looked like when I came to, ma'am, and
23 it was bad and it wrong.

24 Q. But not bad enough to get on greyhound?

25 A. And it was wrong.

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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- 1 Q. But not bad enough to get on a greyhound?
- 2 A. No, ma'am.
- 3 Q. But you leave Nanny's house?
- 4 A. Yes, ma'am.
- 5 Q. And you cut off the ankle bracelet?
- 6 A. I did, ma'am.
- 7 Q. At the corner of Holland and Eastview?
- 8 A. Yes, ma'am.
- 9 Q. And that's more or less between your Nanny's house and
- 10 Debbie Miller's house?
- 11 A. It is, ma'am.
- 12 Q. Pretty much on the same side of the road; same side of
- 13 town?
- 14 A. Yes, ma'am.
- 15 Q. Let me show you what's been marked as State's Exhibit
- 16 Number Forty-Two. It's a big aerial map. If you could
- 17 grab that corner and there is a yellow marking where [REDACTED]
- 18 [REDACTED] is; right?
- 19 A. I see that.
- 20 Q. And there is another yellow marking [REDACTED]
- 21 [REDACTED], Debbie Miller's house.
- 22 A. I see that as well.
- 23 Q. And there is a triangle kind of outline of an
- 24 intersection. That's Highland and Eastview?
- 25 A. Yes, ma'am.

1 Q. And that's where you cut off the ankle bracket?

2 A. It is.

3 Q. Well if you didn't screw up that bad why are you
4 cutting off the ankle bracelet?

5 A. I don't recall, ma'am. It was bothering me it was
6 aggravating me and I didn't like it on me.

7 Q. It wasn't your first day wearing it?

8 A. No, ma'am.

9 Q. So just for some reason that didn't have anything to
10 do with the fact that you didn't want them to be able to
11 find you it was just kind of itching?

12 A. Like I said it was aggravating me and I cut it off and
13 it was wrong.

14 Q. You didn't stop on the side of the road and go oh I
15 don't like this ankle bracelet I'm going to cut it off. I
16 mean you hacked it off you cut yourself.

17 Q. I did, ma'am.

18 Q. You said you bleed three to four cups full.

19 A. Or more.

20 Q. And you make it pretty much from 5 and Eastview all
21 the way across town to downtown Rock Hill?

22 A. Yes, ma'am.

23 Q. Shorty off Dave Lyle Boulevard?

24 A. Yes, ma'am.

25 Q. Parker Street just kind of jumps off at that little

- 1 mill town -- little mill neighborhood?
- 2 A. Yes, ma'am.
- 3 Q. But you're not running?
- 4 A. No, ma'am.
- 5 Q. Because the bus station is in the other direction?
- 6 A. Ma'am, because I was going to get a bandage for my
- 7 leg.
- 8 Q. Well you didn't head to Piedmont Medical Center?
- 9 A. No, ma'am.
- 10 Q. You didn't head up Herlong to a urgent care place?
- 11 A. No, ma'am.
- 12 Q. You pick some guy you kind of work with because he had
- 13 some medical skills we don't know about?
- 14 A. No, ma'am.
- 15 Q. Well why did you think he could bandage you better
- 16 than a doctor?
- 17 A. I didn't think that.
- 18 Q. Well why did you pick him?
- 19 A. I don't know I just did.
- 20 Q. So you're not headin out of town realizing you're
- 21 bleeding too bad you better get help or you are not going
- 22 to make it and that's the nearest place to go; that wasn't
- 23 your thought?
- 24 A. My thought was his place.
- 25 Q. Well why him?

1 A. I don't know. Because I worked with him and I knew
2 him.

3 Q. You knew a lot of people?

4 A. No not really.

5 Q. Now you said he threatened you with some type of
6 sword.

7 A. He just pointed it at me and told me to leave.

8 Q. Because you told him you hit your nanny in the head
9 with a bat?

10 A. I don't recall ever saying that to him. I might have
11 said that I assaulted my grandmother I hit her but I never
12 remember saying that I had hit anybody with a bat.

13 Q: He didn't get mad that you are bleeding all over his
14 floor or nothing. You told him you hit your nanny and
15 that's what made him mad and he told you to leave?

16 A. I don't know what made him mad. Probably that and the
17 fact that it was late.

18 Q. And at that point you go back to Debbie Miller's
19 house?

20 A. I went to Debbie Miller's house.

21 Q. But Debbie Miller's house and grandma's house is on
22 one side of the county; right? John Parker's house over on
23 the other side of the City of Rock Hill one side. You head
24 back in the general direction of [REDACTED] and [REDACTED]

[REDACTED]; fair to say?

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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- 1 A. Yes, ma'am.
- 2 Q. Who's Debbie Miller?
- 3 A. An ex-girlfriend of mine.
- 4 Q. How old is Debbie Miller?
- 5 A. Probably about forty-seven, forty-eight.
- 6 Q. And you go to her house?
- 7 A. Yes, ma'am.
- 8 Q. Why do you go to her house?
- 9 A. Well, ma'am, by that time I was feeling pretty weak
- 10 from loosing a lot of blood?
- 11 Q. Why didn't you stop at her house on the way to John
- 12 Lane's house?
- 13 A. I don't remember stopping at her house on the way to
- 14 John Lane's house.
- 15 Q. It's kind of between the two.
- 16 A. And.
- 17 Q. Why didn't you go there first?
- 18 A. Because I knew she wasn't home.
- 19 Q. So she couldn't help bandage you?
- 20 A. If she were home she could have but she wasn't home.
- 21 Q. But then you decide to go back there to see if she's
- 22 gotten home. It's kind of late maybe she's got home now?
- 23 A. After I left Lane's house I went to Debbie Miller's
- 24 house.
- 25 Q. How did you get inside?

1 A. I had a key.

2 Q. And what did you do when you got inside?

3 A. I laid down.

4 Q. Your testimony is that part of the reason you don't
5 remember the sexual assault and part of the reason you
6 don't remember the kidnapping and the burglary and what not
7 is you were so drunk?

8 A. Yes, ma'am.

9 Q. And the reason you don't remember the police banging
10 on the trailer is you passed out you were so drunk?

11 A. And weak from the loss of blood, ma'am.

12 Q. Right. You some how made this cross-town trip both
13 ways; right?

14 A. Yes, ma'am.

15 Q. I mean you're so drunk you're blacking out at Nanny's
16 house but you manage to get on a scooter and go five to
17 seven miles?

18 A. Yeah and I wrecked twice, ma'am.

19 Q. You wrecked twice?

20 A. Yes, ma'am.

21 Q. Into what?

22 A. In the grass and on a ditch.

23 Q. Not a tree or anything?

24 A. No, ma'am.

25 Q. You managed to keep going?

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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- 1 A. Yes, ma'am.
- 2 Q. Are there some dints in the scooter or something?
- 3 A. I don't know, ma'am.
- 4 Q. Maybe not that bad of a wreck?
- 5 A. No, ma'am, just lost my balance and fell over, ma'am.
- 6 Q. Is it legal to drink and drive?
- 7 A. No, ma'am, but I wasn't drinking and driving.
- 8 Q. The moped wasn't driving? Or is that that exception?
- 9 A. It was running but I wasn't drinking and operating
- 10 that at the same time.
- 11 Q. Oh so as long as you are not drinking the beer down
- 12 the road that's not a problem?
- 13 A. It is a problem.
- 14 Q. So you get to Debbie Miller's house and you said it's
- 15 possible you washed out some socks?
- 16 A. Yeah it's possible.
- 17 Q. Were you just doing some laundry?
- 18 A. No, ma'am.
- 19 Q. You stated that the jury should just convict you for
- 20 the assault and battery with the intent to kill.
- 21 A. Yes, ma'am.
- 22 Q. And you stated that you deserve to be convicted
- 23 because it was wrong.
- 24 A. Yes, ma'am.
- 25 Q. Assault and battery with intent to kill that means

1 that you meant to hurt her.

2 A. I had no intentions of hurting my own grandmother.

3 Q. Then why do you think you are even guilty of that
4 offense?

5 A. Well because this is here and now and now that I know
6 that I assaulted her I hit her so I'm convicted of it.

7 Q. Well there's not I'm guilty of simple assault and
8 battery that I accidentally not on purpose with no intent hit
9 nanny with my hand and my elbow. I mean what you described
10 that's now assault and battery with intent to kill so why
11 are you asking the jury to convict you of it?

12 A. I'm not asking the jury to convict me of anything.
13 I'm just telling the jury that it was wrong and I did it.

14 Q. And you deserve to be convicted?

15 A. Yes, ma'am.

16 Q. But hitting her with your hand and your elbow isn't
17 assault and battery with intent to kill.

18 A. How do you know that, ma'am?

19 Q. But did you mean to kill her?

20 A. No, ma'am.

21 Q. Did you have malice in your heart?

22 A. No, ma'am.

23 Q. Evilness?

24 A. No, ma'am.

25 Q. But you are not guilty of the burglary?

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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1 A. No, ma'am.

2 Q. Because when you went over there that night you didn't
3 mean her no harm.

4 A. No, ma'am.

5 Q. When you drug her inside by her feet because some how
6 you couldn't pick up a five foot two maybe a hundred and
7 ten pound woman you didn't have any criminal intent in your
8 mind?

9 A. No, ma'am.

10 Q. And that some how when you blacked out and she ended
11 up naked and you half naked still no criminal intent in
12 your mind?

13 A. No, ma'am. Because I blacked out I don't know what
14 happened in between those times that I blacked out and
15 couldn't remember.

16 Q. And you stated you are not guilty of the kidnapping?

17 A. No, ma'am.

18 Q. And you never confined her in that house?

19 A. No, ma'am.

20 Q. She never begged you to stop hitting her?

21 A. No, ma'am.

22 Q. She never said, Stop, Adam, stop you are hurting me?

23 A. No, ma'am, I believe she was unconscious, ma'am.

24 Q. Did you ever make a pass at her?

25 A. No, ma'am.

1 Q. Did you ever tell her she was a pretty woman?

2 A. No, ma'am.

3 Q. Did you ever tell her it doesn't have to be rape?

4 a. No, ma'am.

5 Q. Do you remember her telling you that if you rape her
6 it will take her near her grave?

7 A. No, ma'am.

8 Q. Do you remember her telling you you are hurting me?

9 A. No, ma'am.

10 Q. Do you remember telling her it ain't over yet?

11 A. No, ma'am, absolutely not.

12 Q. You told Mr. Lemel that you might be guilty of assault
13 and battery with intent to kill but you are not guilty of
14 these other crimes?

15 A. That's right, ma'am.

16 Q. You are not the kind of person that would do that?

17 A. That is right, ma'am.

18 Q. Do you have a criminal record?

19 A. I do, ma'am.

20 Q. For attempted burglary?

21 A. Yes, ma'am.

22 MR. LEMEL: Your Honor, we request specific
23 instructions at this point in time.

24 THE COURT: As we have -- well the landscape has
25 changed considerably since we had that discussion. And I

ADAM BERARD: CROSS EXAMINATION BY SOLICITOR LIPINSKI

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1 am not sure that you are any longer entitled to the
2 instructions you are not asking for. We will discuss it
3 further at the next break.

4 You may proceed.

5 BY SOLICITOR LIPINSKI:

6 Q. Have you been convicted of attempted burglary in the
7 past?

8 A. Yes, ma'am.

9 Q. You have been convicted of assault and battery of a
10 high and aggravated nature in the past?

11 A. Yes, ma'am.

12 Q. You've been convicted of gross sexual imposition?

13 A. Yes, ma'am.

14 Q. We have no more questions.

15 MR. LEMEL: I beg the Court's indulgence. No
16 redirect, Your Honor.

17 THE COURT: Come down, sir.

18 (WITNESS LEAVING WITNESS STAND.)

19 MR. LEMEL: That will be the case for the Defense,
20 Your Honor.

21 THE COURT: Any reply?

22 MR. LEMEL: None.

23 THE COURT: Ladies and gentlemen, that will be all of
24 the testimony and the evidence that you will hear in this
25 case. As I indicated yesterday we are going to break now

1 for the today. We will return tomorrow morning at 9:15 at
2 which time you will hear the closing arguments of the
3 attorneys. I will then charge you on the law and then you
4 will go back into the jury room to deliberate. Now
5 remember the instructions that I have given you that you
6 may not discuss this case and the other instructions as
7 well. You all enjoy your afternoon. Enjoy your evening
8 and we will see you tomorrow morning at 9:15.

9 (JURY LEAVING THE COURTROOM AT 12:09 P.M.)

10 THE COURT: How much time do you need for your closing
11 argument?

12 SOLICITOR LIPINSKI: Thirty or forty minutes. The
13 State would request a charge on voluntary intoxication.

14 MR. LEMEL: I have no objection to that, Your Honor.
15 Thirty minutes probably.

16 THE COURT: You can have thirty minutes a piece.

17 MR. LEMEL: Thank you.

18 THE COURT: All right. Anything further before we
19 break?

20 MR. LEMEL: Your Honor, we renew our previous motion
21 for a directed verdict.

22 THE COURT: It's denied. Now I'll just say this for
23 purposes of following up on the discussion about this
24 opening the door and the introduction of character. But he
25 did it again during his cross examination and said

1 something along the lines of I wouldn't have done that.
2 The question was I think did you kiss your grandmother or
3 something and he said I wouldn't do that. I don't know
4 that it's much of an issue at this point since you
5 completely bailed -- you made such a big deal about wanting
6 to put all this evidence in then you chickened out to
7 actually put it in. Anyway the record is what it is. Is
8 there anything else?

9 MR. LEMEL: Judge, just for purposes of planning which
10 reasonable doubt charges does the court plan - -

11 THE COURT: I am going to e-mail you all my charge. I
12 am going to tinker with it on the way back to Greenville
13 and then if you all will give me your e-mail addresses I
14 will email you a draft. If you have an -- so I should have
15 the draft to you by about two and I would like for you all
16 if you have any suggested changes or objections to it to
17 email those back to me before about seven in the morning.
18 I will work on them on my way back over here in the
19 morning. So as we break just come up here and give my law
20 clerk your email addresses. If there is nothing further I
21 will see you all in the morning.

22 (COURT RECESSED AT 12:12 P. M..)

23 (COURT RECONVENED ON DECEMBER 18, 2009 AT
24 9:31 A.M..)

25 THE COURT: Be seated please.

1 (DEFENDANT ENTERING COURTROOM.)

2 THE COURT: All right. Is there anything that you all
3 need to discuss before we start with closing arguments?

4 SOLICITOR LIPINSKI: Nothing from the State, Your
5 Honor.

6 MR. LEMEL: Nothing from the Defense, Your Honor.

7 THE COURT: In particular with regard to the jury
8 charge that I emailed to you last night did you both get a
9 copy of it?

10 MR. LEMEL: Yes, sir.

11 SOLICITOR LIPINSKI: Yes, sir.

12 THE COURT: There was one email exchange this morning
13 about the limiting instruction regarding the defendant's
14 conviction for ABHAN and attempted burglary which I
15 responded to and everybody is fine with that?

16 SOLICITOR LIPINSKI: Yes, Your Honor.

17 MR. LEMEL: Yes, sir.

18 THE COURT: No further objections to the charge?

19 MR. LEMEL: Except as previously made, Your Honor,
20 with regard to the charge for the inclusion of attempted as
21 a less included.

22 THE COURT: Right. You disagree substantively that it
23 should be included but - - -

24 MR. LEMEL: Yes, sir.

25 THE COURT: - - - given the ruling that I made that it

1 is you don't have any further objection to the charge?

2 MR. LEMEL: No objection to the form of the charge
3 since the court's already ruled on.

4 THE COURT: Okay. All right we will begin -- I really
5 don't imagine that you all are going to really need the
6 whole thirty minutes but I am going to restrict you to
7 thirty minutes.

8 Are you going to open?

9 SOLICITOR LIPINSKI: No.

10 THE COURT: Okay. You ready to proceed then, Mr.
11 Lemel?

12 MR. LEMEL: Yes, Your Honor. In timing myself when I
13 practiced I ended up somewhere between twenty and twenty-
14 five minutes. I will try to keep it within that time
15 frame.

16 THE COURT: Well I'll give you a little flexibility if
17 you need it. I don't think it will be a problem.

18 Let's bring them in.

19 SOLICITOR LIPINSKI: You need to put on the record the
20 alternate substitution.

21 THE COURT: Yea. We had a juror that got sick this
22 morning. I believe you said Juror 248.

23 MADAME CLERK: Yes, sir, Mr. Wendell Wright.

24 THE COURT: Mr. Wright. So we will replace Jeremy
25 Sabo who is number -- the only remaining alternate Number

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1 192.

2 (JURY ENTERING COURTROOM AT 9:35 A.M..)

3 THE COURT: Good morning. One of your fellow jurors
4 became sick over night, you all may know that, and so is
5 unable to make it.

6 So, Mr. Sabo, - - -

7 MR. SABO: Yes, sir.

8 THE COURT: - - - you are on the jury. One of the
9 smartest things I've ever done was to pick two alternates
10 in this case. And let me compliment you this morning on
11 the choice of that red sweat shirt a dramatic improvement
12 over the UNC sweatshirt. We are ready for closing
13 arguments.

14 Mr. Lemel.

15 MR. LEMEL: Thank you. May it please the court.

16 Ladies and gentlemen, when we spoke during the opening
17 statements I told you that this was a tragic situation and
18 indeed as the trial unfolded. I don't think that you can
19 have a situation that is much more tragic than the one that
20 transpired back in June of last year for this family. It
21 is a situation that essentially no family should have to go
22 through. And the tragedy has pervaded everything that has
23 happened here in court. Ms. Moss is obviously a very
24 sympathetic victim in this particular case. She went
25 through things that no person should have to go through and

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1 we are very very sorry about that. We are sorry that she
2 is again having to come to court to discuss that and bring
3 that up. And it is equally clear at this point in time
4 that Adam is unfortunately a very troubled and broken young
5 man. I don't think there is any doubt about that in any
6 one's mind at this point in time. But our system exist in
7 such a way and it is done in such a way that even the most
8 troubled and the most broken among us are treated fairly
9 and equally. That is probably the pinnacle of our system
10 that it protects everyone equally and fairly.

11 In this country we don't have show trials. Even as
12 bad as many pressures that are on our society today we do
13 not have show trials. And the reason why we don't have
14 show trials is that jurors come in jurors just like
15 yourselves and they take an oath and they commit themselves
16 to following the law to not being governed by emotion, to
17 not being governed by sympathy, to being governed by the
18 law and the rules of the court. And one of those guiding
19 principles that govern our system is the fact that no one
20 can be convicted on the basis of assumptions and
21 allegations. It takes more than that and unfortunately in
22 this case we have any number of assumptions being made.

23 Now an assumption is not a deliberate falsehood. An
24 assumption is simply the product of viewing a set of facts
25 through a particular lens. As you view something it

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1 becomes distorted through that lens because of the
2 interpretation that you are placing on it. Quite simply if
3 you expect something is the worst you are going to
4 interpret it as the worst. And we have seen that
5 throughout this case. One of the reasons why we bring in
6 jurors such as yourself who don't know anything about these
7 cases is because you don't have that preexisting lens to
8 distort what you see. But just as easily what we've seen
9 in this case there are distortions that have happened
10 throughout the case for the witnesses of the State and it
11 actually started very early. It started with the very
12 first witness Sergeant Wright.

13 You will recall that Sergeant Wright was asked on
14 direct what was the basis for him changing his
15 classification of this from a fall what the initial report
16 was to a sexual assault and he replied that there were two
17 things that caused him make that change. The first was the
18 statements he received and the second was the position that
19 he found Ms. Moss in when he arrived.

20 Now the thing about that assumption is the most
21 glaring assumption has to do of course with her position.
22 Ms. Moss we now know who was moved repeatedly from various
23 locations in the house long before Sergeant Wright ever got
24 there. She was taken to the bathroom; she was brought back
25 into a different part of the living room, she herself

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1 moved. So when he arrived where he found her even at that
2 point in time she had laid back down on the floor didn't
3 have anything to do with where the actual assault took
4 place and what took place during that assault.

5 Secondly the statements. We now know that those
6 statements came to conclusions based upon things that were
7 not supported by what they actually saw and he was asked
8 about this. He was asked. Remember his reaction when I
9 asked him would it change your opinion if you knew that she
10 had been moved or that these people couldn't see exactly
11 what they claim that they saw? And remember he refused to
12 readdress his reactions; his assumptions. He just said I
13 can't do it now. But that night he was more than willing
14 to make an assumption based upon that and that's the kind
15 of assumption that we've seen portrayed throughout this
16 case and it started with the very first witness and it
17 moved on throughout the case.

18 We also saw it with regard to Ms. Meghan Hall. Now
19 Ms. Hall obviously identifies with her future mother in law
20 and that is as it should be. She should feel as close to
21 this woman as she does. But that very identification is
22 what causes parts of her testimony to be suspect. We saw
23 within her a willingness to make assertions that on the
24 stand under oath that really didn't make any sense. That
25 even the Solicitor when asked the question had to come back

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(1 and say are you sure you mean that when asked what distance
2 is involved. Did you say I'm not really good at this and
3 she said I can't really estimate? No what she said was oh
4 it's about an inch. An inch on a situation where we know
5 now that it was a good yard; somewhere forty inches
6 somewhere in that stand point. But even more so in the
7 assumption that we saw came with her seeing a pair of
8 underwear. At some point in time the police officers took
9 her inside [REDACTED] and she saw a pair of underwear and
10 she's willing to assert with one hundred percent certainty
11 that that's the pair of underwear that she saw earlier.
12 And she's willing to die with one hundred percent certainty
13 when I asked about other things on that that there's any
14 other underwear in that area. There was none according to
15 her. But she admitted that that underwear didn't have any
16 distinguishing marks or tears or stains or anything to
17 distinguish it from the hundreds or thousands or hundreds
18 of thousands of pairs of underwear that Hanes produced
19 every year in that style.

(20 Now even with that admission she was willing to assert
21 that it was the same pair and there was no other underwear
22 in that area. And then low and behold Investigator Tolson
23 on the stand opens up a bag of things that he collected
24 from the floor of the room in [REDACTED] and what does he
25 pull out of that bag? Two pair of very similar underwear.

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1 Now am I saying that that underwear that was on the floor
2 wasn't the same pair? Is that my point? No that's not
3 really the point. Perhaps it was. Perhaps one of those
4 two pair of underwear were the same underwear. Certainly
5 from the location you might guess that. But the standard
6 that we are dealing with in this case is proof beyond a
7 reasonable doubt. You will hear the judge talk about that
8 beyond a reasonable doubt. The kind of doubt that would
9 cause to you hesitate to act. And in order to conclude any
10 fact is that why you have to have the proof that goes
11 beyond that. And there is no way that a reasonable person
12 can conclude anything beyond a reasonable doubt other than
13 that underwear was taken out of that room. Because
14 certainly there was no other testing or anything else that
15 was done that could prove that it was anything other than a
16 pair of underwear from the floor of that room. It wasn't
17 looked at to see if there was any blood on it. It was not
18 looked at to see if there was any fluids on it, DNA, or
19 anything like that. All we know is it was one of two pair
20 of underwear that they found on this floor. But the
21 assumption on the part of Ms. Hall pervades everything in
22 this case. It is just a classic example of that. We even
23 saw medical professionals who can fall prey to assumptions.
24 And we saw it with Doctor Sundararaman and I hope I'm
25 pronouncing his name correctly. He obviously saw both of

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1 these individuals and had a lot of sympathy as one would
2 expect again for Ms. Moss. Not any sympathy at all for
3 Adam. And we saw him minimize the injury. He said that
4 cut oh very shallow, fairly bleeding, maybe a cut maybe a
5 two hundred and fifty millimeters at the most.

6 Now, ladies and gentlemen, you saw the picture of the
7 floor board of the scooter. You saw the pants of the
8 jeans. You saw the shoe that was so saturated in blood
9 that it had to be placed in a dryer to dry it out before
10 they could put it into evidence. There is no way that that
11 cut just bled a little cut. You wouldn't get any where
12 with that little saturation than that. It bled a lot more.
13 Again is that a major issue in this situation? No he cut
14 himself. Does that have anything to do with whether he's
15 guilty or not? No. But what it does do what it is just
16 another example of how an assumption; how that lens can
17 distort what people say. And we saw unfortunately how
18 those sorts of assumptions can influence what law
19 enforcement does and affects this investigation. I believe
20 it was on Wednesday we saw a succession of officers paraded
21 starting with Lieutenant Hager and going to the other
22 officers that were involved in the arrest of Adam that day.
23 They all got up and said that they did not smell any odor
24 of alcohol whatsoever about Adam. Now just a few hours
25 earlier according to Ms. Moss Adam had so much to drink he

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1 was really reeling. Adam himself has testified that he was
2 drinking that day. And in fact Officer Patton with
3 Probation and Parole testified that he smelled a very
4 strong odor of alcohol as he was arresting Adam that day.
5 But these other officers had no problem standing up here
6 and saying there was no odor of alcohol. And they did even
7 after Lieutenant Hager when asked him was told the whole
8 two beers line which he admitted is that's what every
9 person that's ever been arrested for DUI says initially I
10 only had two beers. And they just didn't bother to
11 investigate because they made an assumption. They were
12 told what this case was about via their radio. They were
13 told what they looking for and they made the assumption
14 that they didn't have to worry about things like whether he
15 was under the influence of alcohol.

16 Now I submit to you that day that Adam had a lot to
17 drink. You had the testimony of multiple witnesses that
18 confirms that. And more importantly you don't just have
19 the witness statements but you actually have physical
20 evidence to corroborate it which is very important when you
21 are examining something. What's the corroborating
22 evidence? And the corroborating evidence is the fact that
23 there was beer cans scattered through out the property
24 including at least a couple inside Ms. Moss's residence.
25 And it's crucial that when you have an allegation of a

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1 witness that you have some support behind it.

2 Now being under the influence does not excuse his
3 behavior whatsoever. You are going to hear from the Judge
4 that voluntary intoxication and that's what this is.
5 Voluntary intoxication is in no way shape or form a
6 defense. We are not saying that it is in any way. It does
7 not provide a defense. When you become involuntarily
8 intoxicated you are still responsible for your actions
9 under the law. But the being under the influence does
10 provide us with an explanation. It provides us an
11 explanation for the irrational behavior. It's not a legal
12 excuse but it's an explanation and it provides us an
13 explanation for the black outs and the lack of memory.

14 Sort of along that same line I want to take a second
15 and talk about that evidence that most of you all are not
16 subject to these assumptions and that evidence is the
17 physical and the medical and the forensic evidence that was
18 collected in this case. That evidence as we talked about
19 it is the crucial backup. It is the confirmation or
20 corroboration of a statement of witnesses who may have
21 problems with their memory who may have difficulty
22 remembering. It is the crucial backup that's why we have
23 forensics. That's why forensics has emerged in the law
24 because it is not subject to these assumptions. And the
25 State produced a large number of witnesses relevant to

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1 forensic and medical evidence. They brought in doctors
2 they brought in nurses they brought in DNA experts they
3 brought in forensic technicians. All of these painted a
4 very very clear picture. A very clear picture of guilt of
5 assault and battery with intent to kill. There is no doubt
6 that Ms. Moss suffered life threatening injuries that day.
7 There is no doubt that Ms. Moss suffered those injuries at
8 the hands of Adam and there is no doubt that there is no
9 justification for it. Beyond that charge however that
10 charge for assault and battery with intent to kill there is
11 absolutely no physical or mental evidence that corroborates
12 anything else. And in fact it's not that it just doesn't
13 exist it actually proves that things didn't happen.
14 Remember the testimony of the sexual assault nurse
15 examiner? That on her exam she was not able to find no
16 only not just bleeding or tears but not even any redness or
17 bruising or even an abrasion just a sloughing of the skin
18 area in the genitalia area. Proof that would be there.
19 The reason that we have these nurses if there was a sexual
20 assault and she said its possible that it would have a
21 sexual assault but it's equally possible that the reason
22 why there is no evidence in this particular area is because
23 no sexual assault occurred. It is equally possible. You
24 have the DNA expert. DNA expert comes in and concludes
25 that what was found from Ms. Moss one hundred percent

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1 cannot be from Adam Berard. Genetically it was impossible.
2 And beyond that there was absolutely no other evidence that
3 matched up. There was nothing from the pubic hair
4 combings; no hair samples, no skin cells, no other fluids
5 located anywhere else on the body that would corroborate
6 any form of sexual assault.

7 In the State's opening they told you this wasn't CSI.
8 I find that interesting because in reality they did a lot
9 of things that CSI does in this case. They took DNA, they
10 did medical studies, they brought in a pathologist to study
11 the pictures and the branches. They swabbed for blood on
12 things. And they make these excuses that this is not CSI
13 but they did all this forensic work from the outset. Why?
14 Because their own evidence, their own forensic evidence
15 shows that one crime and only one crime was committed.
16 They did the work. They are unhappy with the results and
17 now they just haven't no more excuses because it doesn't
18 back up what they actually got the charges on this. And
19 let's talk about those charges, let's talk about those
20 crimes.

21 Adam is charged with assault and battery with intent
22 to kill. I submit to you there is absolutely no reasonable
23 doubt that he is not guilty of those charges. The
24 Solicitor challenged him with certain terms on cross
25 examination things like malice and intent. You will hear

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1 from the Judge definitions of those terms. Now it's also
2 fairly clear that a person in Adam's shoes without any sort
3 of instructions that those terms are not going to have any
4 meaning to a person in that scenario. They are not going
5 to understand what you mean by malice and they are not
6 going to understand what you mean by in terms of criminal
7 intent. Your deliberation on this charge is going to be
8 very short. And I submit that you are justified in
9 returning a verdict of guilty on that charge absolutely.
10 But at that point in time you need to pause because each
11 charge is separate. Each charge must be decided on its own
12 independent basis. And each charge in order to be proven
13 has to have each of its elements its component parts proven
14 beyond a reasonable doubt. Proving each element each
15 component part. Some may say that sounds like nit picking.
16 The State picks the charges that they are going to bring
17 against an individual. When they are dissatisfied with the
18 charges they initially get they can actually go and get
19 more. And in this particular situation Detective Yeager
20 went back and got additional charges after the first two
21 that he brought up from the grand jury. When the State
22 chooses the charges they take on the obligation to prove
23 each element beyond a reasonable doubt. Elements are the
24 building blocks, the foundations of criminal charges. It
25 is not nit picking to say that you have got to show each

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1 and every element beyond a reasonable doubt. It is the
2 basis of our criminal system. Think back to what the State
3 said in opening what they were going to show about criminal
4 sexual conduct. They said they were going to show you that
5 Russell and Meghan were in the yard they heard screams they
6 went up onto the deck and they saw criminal sexual conduct.
7 That was not what was testified to at all. In fact it was
8 just the opposite. You heard that neither one of them
9 heard anything in the form of a scream or any sort of noise
10 that caused them to be on alert. The most unusual thing
11 they could point to was that the pets weren't put up
12 properly. But there was nothing else besides that. They
13 said they saw something on direct. They said they saw
14 this. But what is odd is even though they put it in their
15 statement it didn't come out until cross that they both put
16 in their statements that when they first looked through the
17 window and saw something that they paused and turned to go
18 away. That only came out on cross examination. And I
19 submit to you that they paused for a reason because what
20 they saw was not clear. If they had seen clearly what they
21 now say they saw there is no way that any reasonable person
22 would not have rushed immediately into that room. There is
23 no way a reasonable person would have paused at all or
24 turned to go away. What has happened is they heard a cry
25 for help and they have since been dealing with this in the

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1 last eighteen months and they are human and they have
2 adapted and changed their memories to match up with what
3 they think happened over the course. But the reason why
4 that statement and the reason why that statement was gotten
5 from them just that night is it preserves what they saw and
6 what they did at that exact moment before we as humans go
7 through that normal process of adapting and changing our
8 memory.

9 You are going to hear that the elements of criminal
10 sexual conduct require that a sexual battery occurred. A
11 sexual battery by necessity requires that there be
12 penetration; some penetration however slight. From the
13 medical examiner there is absolutely not evidence of any
14 penetration. From the DNA work there is absolutely no
15 evidence of any penetration. And even from what Russell
16 and Meghan say their view was of the top of the head
17 anatomically is it possible for them to say that they saw
18 penetration. They just cannot and they did not do it.
19 Even Ms. Moss on direct said that he was either having or
20 trying to have sex with me. Even she cannot say that
21 penetration occurred. And when you have that situation you
22 do not have proof beyond a reasonable doubt. Ms. Moss's
23 recollection unfortunately now is highly suspect. This is
24 of no fault of her own. She had a severe injury that
25 causes memory to be questionable. It's not her fault but

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1 it is still true. This is why corroborated evidence in
2 this case is so crucial. There are simply cases where the
3 victim is unable to recall. She can't even recall talking
4 with Detective Carter the very next day or the day after
5 about what she said about not remembering these things.
6 She only really knows about the hospital because of what
7 other people told her. Again she's human. What she has
8 done is she has taken the gaps in her memory and she has
9 filled them in with whatever people have suggested to her
10 or told her happened. Should she be punished for this?
11 Should she be punished for this? Absolutely not. Should
12 Adam be punished for this? Absolutely not. Absolutely
13 not. It is the State that has this responsibility. The
14 State has the responsibility of the burden of proof in this
15 situation. After telling you they are going to prove
16 criminal sexual conduct the State has just ultimately
17 failed. And I submit to you they will throw out that you
18 should then go and say that he attempted to commit criminal
19 sexual conduct as an alternate charge. Think about this
20 speed trap. The same assault is both with the intent to
21 kill and with the intent to commit criminal sexual conduct.
22 I submit to you this is just an attempt by the State to get
23 a guilty verdict when they have not done their job. Just
24 as reliant upon the same impaired memory and distorted view
25 and it is not supported any more that the criminal sexual

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1 conduct charge is itself. After those charges the assault
2 and battery with intent to kill and the criminal sexual
3 conduct charge you get to what I call the add on charge the
4 burglary. The Judge is going to tell you that burglary
5 requires entry without permission and the intent to commit
6 a crime. And the State has proven that neither of these
7 were there. Adam had permission to be at the house. All
8 the astringent evidence shows that there was even a request
9 by Probation to change the terms of his electronic
10 monitoring to allow him to be over to her house. And it
11 only makes sense that that was the case. He was over there
12 all the time. We know he was inside the house that day.
13 The beer cans prove it. If she doesn't drink beer and
14 there's beer on the counter it shows that he was inside the
15 house that day. These claims of restrictions that come at
16 this point in time ring hollow and they just don't make
17 sense. They also haven't shown that there's any sort of
18 entry to commit a crime therein. The only evidence that we
19 have about how that entry actually happened is from Adam
20 himself. And bizarrely enough the external factors there
21 actually confirmed what he says with regard to the rug.
22 And the transfer marks that Investigator Tolson talked
23 about those are drag marks and they actually coincide with
24 what Adam says happened.

25 Now I expect the State to criticize Adam's behavior

CLOSING: MR. LEMEL

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1 following the assault and battery. He didn't call 911.
2 Picked her up in the hallway; he lied to Russell about it.
3 Their expectation here that Adam would be acting in a
4 rational and a logical way that expectation is futile and
5 it's simply not going to happen. By definition his state
6 is irrational but he can't be convicted simply because his
7 reactions after the assault were irrational. That's not
8 what we are here for.

9 With regard to the kidnapping I am going to ask you to
10 listen carefully as the Judge tells you about that. One of
11 the things that he is going to tell you has to do with the
12 intent required. The kidnapping requires an intent to
13 kidnap separate from a coincidence with intent with other
14 contact of other behavior. In other words the action and
15 the intent has to be more than just incidental to another
16 crime. If any possible restriction was enough any
17 particular assault on a person any crime against a person
18 would be enough because there is always a momentary control
19 alteration of movement that's not enough. To say that
20 kidnapping happens every time another crime is committed
21 against the person actually cheapens the crime of
22 kidnapping against those who are actually separate. There
23 has to shown a specific intent to kidnap and there has been
24 absolutely no evidence of that intent.

25 Now in a few seconds the solicitor is going to rise up

CLOSING: MR. LEMEL

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1 and give what I expect to be a very well done computerized
2 closing as they normally do. While doing this I just ask
3 that you just remember a few things. Remember the rules.
4 Remember that they have the burden of proof in this
5 situation. Remember that proof is not an assertion or a
6 conclusion. It must be proof beyond a reasonable doubt.
7 Second, don't let them make excuses. If the evidence
8 suffers from disabilities they are the ones that have to
9 deal with it. They are the ones that choose to bring
10 charges. If someone's memory is impaired or an examination
11 wasn't able to be completed they are held responsible when
12 they take on this prosecution. I'm not asking you to blame
13 Ms. Moss but the State is accountable when they rely on
14 nothing but this evidence and they have no other evidence
15 to corroborate it.

16 The last thing I ask you not to let them take and
17 minimize Adam's taking responsibility for the assault and
18 battery with intent to kill. Adam has admitted a very
19 serious and devastating crime and he expects to be
20 convicted and he expects to be punished and I expect that
21 he will be. It is the crime that has been proven by the
22 external evidence and it is the crime that he is taking
23 responsibility for. Ms. Moss is very sympathetic. She has
24 been through an incident and experience that no person
25 should have to go through. We are very sorry for that.

CLOSING: MR. LEMEL
SOLICITOR LIPINSKI

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1 But that sympathy does not allow the State on behalf of her
2 to bring unsupported and speculative charges. Convicting
3 Adam of what he did is your job. But equally so it is your
4 job to find him not guilty because the State simply hasn't
5 done their job and in doing so you are not criticizing Ms.
6 Moss or minimizing it. You are simply saying that the
7 State did their job on some things and they didn't do it
8 others. They did it very clearly on assault and battery
9 with intent to kill but they did not do it with regard to
10 the other charges. And we ask at this point in time simply
11 and only that you do your job. Find him guilty of the
12 charges that he's guilty of and find him not guilty of the
13 charges that he is not guilty of. Thank you.

14 SOLICITOR LIPINSKI: May it please the court, Your
15 Honor.

16 Good morning, ladies and gentlemen of the jury, I am
17 sure that Mr. Lemel -- this is probably my first power
18 point presentation and depending on how well it goes it may
19 be my last. A little more old school than that but in this
20 particular case given the number of charges I thought it
21 was important. Mr. Lemel has done an excellent job. As
22 you can tell this is all part of the process. The State
23 has embraced their burden of proof and I am going to go
24 through that with you but you now understand why competent
25 attorneys on both sides presenting the evidence and

CLOSING: SOLICITOR LIPINSKI

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1 challenging the evidence to you is so entracal to why our
2 criminal system works so well.

3 The Defendant is charged with four separate offenses
4 and the State will ask you to convict him of each and every
5 one. And while he has gotten up here and admitted to one
6 he has played ostrich on all others. He wants to stick his
7 head in the sand and say I blacked out and I don't remember
8 and I couldn't have done that when the evidence suggest
9 something completely different. Mr. Lemel has done an
10 excellent job with what defense attorneys do in every
11 particular case. They take little pieces of the puzzle and
12 they ask you to question the picture itself. She couldn't
13 know what underwear so he can't possibly be guilty. But
14 underwear doesn't help you answer any single question in
15 this case. They paused so they weren't really seeing a
16 rape. Most of us fortunately have never seen our
17 grandmother naked. We've never seen her on the floor
18 lifeless, bloody, beaten, begging for help. And there was
19 no fault in Russell or Meghan taking pause, being in shock,
20 or wondering dear God please let it be that I am not seeing
21 what I think I am seeing.

22 We tested to key pieces of evidence hoping that that
23 would provide corroboration of a witness's testimony.
24 Sometimes we get lucky. Sometimes we have to rely on
25 witness's testimony. But its how their testimony fits into

CLOSING: SOLICITOR LIPINSKI

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1 that forensic evidence that will lead you to believe at the
2 end of this trial that he is guilty of every charge.

3 He has admitted that he is guilty of assault and
4 battery with intent to kill and I submit to you that it is
5 because of this stick. And it is important that you bear
6 in mind assault and battery with intent to kill and this
7 stick because it involves his intent in every single crime
8 because he wants you to believe he was just there and he
9 accidentally struck her. He never remembers hitting her with
10 the stick but Loretta told you this was from his house. He
11 went over there with this stick not just to beat her. To
12 kidnap her and to rape her and he was going in whether she
13 let him or not. Initially he knocked on the door. Nanny,
14 Nanny, I just want somebody to talk to. But when she
15 didn't want to put up with him and she turned around and
16 she told him to go home thump knocking her to the ground
17 beating her unconscious. That is malice. He is guilty of
18 it but it goes to what his intent to this crime as to each
19 and every other crime he is charged with.

20 You've seen the pictures of Ms. Moss in the hospital
21 fighting for her life, blows to her head, bruises, stab
22 marks, laniary bruises down the side of her. She is not a
23 big woman. This beating wasn't necessary. One hit was
24 probably enough but his meanness went further because his
25 intent was more than just to hurt her.

CLOSING: SOLICITOR LIPINSKI

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1 Burglary in the first degree. They want to submit to
2 you that because ms. Moss was kind enough to ask Agent
3 Patton if Adam could come over and do yard work that
4 somehow that meant that he could come into her house any
5 day of the week any time of the month and do whatever he
6 pleased. Burglary does not require kicking in the door,
7 breaking in a window, stomping on anybody. It is simply
8 entry without consent. If you leave your house in the
9 morning and you leave the door unlocked and a burglar comes
10 in and goes inside its burglary if he went inside to commit
11 a crime. He brings the stick with him. He's only going
12 there for one reason. It is entry without consent without
13 permission. And whether she cooked him dinner that night
14 she certainly didn't invite him over for sex later. And
15 how do you know there was no consent? How do you know what
16 started outside the house? Why did the State go back and
17 add burglary? Because when we sat down and talked to Ms.
18 Moss when we sat down and talked to Detective Yeager and
19 Investigator Tolson and we looked at the evidence what we
20 saw was what was outside the door. He knocked her teeth
21 outside of her mouth on the deck not inside. The deck.
22 Look at the door. There is blood on the door. The plant's
23 knocked over. By his own admission he drug her inside. Do
24 you think as he's dragging her inside she's going Adam.
25 please come in? He's going over there for one reason.

CLOSING: SOLICITOR LIPINSKI

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1 He's going inside without consent and he is guilty of
2 burglary in the first degree. That it happened at night
3 that he did it with the intent to cause her injury because
4 he already started that before and he was armed with a
5 deadly weapon. It doesn't have to be a gun. He could have
6 killed her with the stick. He practically did.

7 Kidnapping. Most of us think you got to put somebody
8 in a truck and take them over the state line. But I submit
9 to you that is not that; that you are not required that it
10 is enough that he confines her, that he seizes her and that
11 he holds her against her will. How do we know that it was
12 a kidnapping? How do we know that it wasn't just a violent
13 rape that happened in a few flash of seconds and that she
14 really wasn't confined? As much and as merciful as we
15 would like to believe but Loretta Moss did not suffer and
16 that this was not a quick violent flash of anger and rape
17 and pain. He goes over there between five and six to eat
18 dinner. He says around seven. Not sure when but around
19 seven they go out on the porch they talk a little and she
20 says she normally goes to bed a little later around eight
21 or nine that she goes inside to take a shower or to take a
22 bath and that Adam goes home that he has a couple beers and
23 he makes a phone call. And then she says as she is cutting
24 her hair before she goes to bed Adams knocking on the door.
25 Nanny, Nanny, please come talk to me. Nanny, come out here

CLOSING: SOLICITOR LIPINSKI

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1 I don't want to be alone. Nanny, Nanny, come out here, and
2 that she goes outside. That's when he hit her. They don't
3 talk on the porch. She says she goes out and now he's even
4 more drunk and he's reeling and she don't want to put up
5 with him and she says Adam I'm not doing this go home I'm
6 going to bed then she turns around. Russell doesn't get
7 home until eleven. There are beer cans in her house. When
8 Loretta talks to you about the rape she talks to you that
9 this took a while. That he told her take off your clothes.
10 And when she wouldn't he took them off for her. That she
11 begs him Adam don't hurt me stop hurting me Adam. But he
12 doesn't stop. The number of blows she endures the sheer
13 number took a significant period of time. He went from a
14 stick to whatever it is he's cutting her with. She has
15 puncture wounds to her arms. She has defensive cuts to the
16 palms of her hands. He tries to convince her to go along
17 with it. The more she fights the longer it takes and that
18 is evidence that he confined her in her home against her
19 will. He is guilty of kidnapping her; of holding her; of
20 not stopping when she said stop; of not leaving when she
21 said go. This took a while. As hard as it is to stomach
22 this took a while.

23 Look at Loretta's own words. He made a pass at me and
24 I told him no and to go home. He made a pass at her and
25 she said no. At that point he forms the intent that he is

CLOSING: SOLICITOR LIPINSKI

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1 going to have her whether she wants it or not. That he is
2 going in her house whether she wants him to or not. And
3 that he is going to take his time whether she wants him to
4 or not. This crime is on his terms and his terms only.
5 How long was she trapped there? Even more importantly what
6 would have happened if Russell didn't come home? What
7 would have happened if he went to the movies that night?
8 The reason Adam knows that he can take his time; the reason
9 the confinement doesn't have to be a flash in the pan of
10 pain and sexual assault, why do we admit a note from Doug
11 and Sissy, he knows Loretta's husband is gone for the
12 weekend, he knows his own parents are out of town that day
13 and he knows Russell's working late. Unlike a stranger
14 crime where you don't know when someone is coming home at
15 this particular case Adam knew he had all the time in the
16 world.

17 Criminal sexual conduct in the first degree. Mr.
18 Lemel says he only forms the intent for assault and battery
19 with intent to kill and this crime was never about rape and
20 this crime was never about sex. I'm sorry people only get
21 naked for one reason. If it's just to beat her you don't
22 have to take her clothes off. You don't. Why? He wanted
23 to see the injuries clearly on her body? Why take his own
24 clothes off? By his own admission he's got his pants off
25 over her when he comes to. The only reason you get naked

CLOSING: SOLICITOR LIPINSKI

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1 was to have sex with her. It's a sexual battery it goes
2 beyond assault and battery with intent to kill. This was
3 not just a mean violent rage. This was a sexual perverted
4 rage as well designed to accomplish a sexual battery.

5 Penetration no matter how slight. Mr. Lemel has
6 focused and we told you in opening argument we did a sexual
7 assault kit. We looked at the one piece of forensic
8 evidence that might best objectively answer that question
9 so we didn't have to put Loretta through what she went
10 through on the stand. And sometimes in rape cases we get
11 lucky and sometimes we don't. I been doing sex crimes ten
12 years I probably get DNA nearly five percent of the time.
13 The SANE nurse tells you that sometimes we find evidence of
14 trauma and sometimes we don't. Some of you men on the jury
15 probably learn more about a woman's vagina than you ever
16 possibly wanted to know but the bare fact is our bodies are
17 designed to have sex. And what is significant about what
18 the SANE nurse tells you and what goes along with your own
19 common sense is she didn't have any fight left in her at
20 that point. She's taken a blow to the head. She has
21 bleeding in her brain. She has stab wounds on both arms.
22 She has laniary abrasions up and down her back. She has a
23 bruise on her inner thigh. She has a bruise on her breast.
24 Do you really think she is capable of holding her thighs
25 together so tight that is by what Meghan testifies he is

CLOSING: SOLICITOR LIPINSKI

850

1 going up and down on top of her half naked? She was
2 capable of preventing penetration? Did his prophylactic
3 underwear he says he kept on stop him? Penetration
4 occurred by the nature of what they saw. He's on top of
5 her in a sexual position over her naked. There's no
6 measurement threshold. Meghan doesn't have to see a number
7 of inches deep for this to be the crime. Penetration no
8 matter how slight. And given the facts that everybody
9 agreed occurs except for Adam who wants you to believe he's
10 beside her and not on top of her penetration had to have
11 occurred. And because she didn't have fight left in her
12 because he had already beat it out of her. Just because
13 there aren't the signs of that in her vagina does not mean
14 that penetration did not occur. She used very specific
15 words. He raped me. Raped me. Tried. She says he tried
16 to rape me and Mr. Lemel said was it trying or did and she
17 said he did. When you evaluate Loretta's testimony realize
18 she's been through a lot and Mr. Lemel says that don't
19 punish Adam for her spotty memory. But appreciate that you
20 evaluate the credibility of her testimony given what she's
21 been through. Not only the injury she incurred but think
22 of the shame of being raped by your grandson in and of
23 itself the shame. And then think about having to come into
24 a courtroom with twelve strangers with your husband with
25 your other grandson and talk about it. And think that you

CLOSING: SOLICITOR LIPINSKI

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1 wouldn't hesitate as you described it that you don't want
2 to acknowledge what happened to you that it might be hard
3 for you to speak he raped me. Just imagine that I call you
4 up next week and I said Madame Juror we need you as a
5 witness I would like for you to get on the stand and tell
6 me about the last time you had sex with your spouse.
7 Thank you. That was probably a good time. There was no
8 shame there. When you evaluate her credibility you put it
9 in that context and you remember her words.

10 Mr. Lemel is right. You will be given the lesser
11 included offense of assault with intent to kill. And the
12 reason you are given this choice is if you don't find
13 evidence of penetration certainly he tried to rape her.
14 There's no reason not to be naked. There is no reason not
15 be on top of her. What Meghan and what Russell saw no
16 matter what beyond a reasonable doubt was attempted rape.
17 And the only way the evidence goes further is the
18 penetration had to have occurred. But that the lack of
19 injury in the rape kit gives you pause then convict him of
20 attempted rape because there should be no doubt in anyone's
21 mind that this crime occurred.

22 Mr. Lemel talked a lot about voluntary intoxication
23 and the Judge is going to charge to you that that is not a
24 defense. That is not an excuse and it is not an
25 explanation and I submit to you it's not even true. Was he

CLOSING: SOLICITOR LIPINSKI

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1 drinking? Sure. Could he have been intoxicated? No
2 doubt. But this is a very preordained crime. It's
3 planned. He brings weapons. He knows who's home; he knows
4 who's coming home. Once the rape occurs he needs to get
5 away from the situation. He runs all the way from where
6 Highway 5 splits on Eastview Drive clear across Rock Hill
7 to John Lane's house because he knows if he finds grounds
8 where he lives the police is going to be there so he hopes
9 if he makes it to Rock Hill and I submit to you going down
10 Dave Lyle Boulevard he might be trying to make it to 77.

11 Flight is evidence of guilt. If he didn't do anything
12 wrong he didn't have to go that far. And he didn't cut off
13 his ankle bracelet because it was itching him; because it
14 was scratching him. You don't have to change clothes. You
15 don't have to go to all that trouble. If he just hit her
16 kind of between your hand and your elbow accidentally not
17 with the intent to kill but maybe convict me of that.

18 Adams words convict him of each and every crime. And his
19 selective memory; his selective intoxication is not a
20 reason to doubt his guilt. It's amazing that he has these
21 moments of clarity. I remember Russell coming in mad at me
22 saying what are you doing get out of here. I remember
23 that. I don't remember raping her of course or hitting her
24 or hitting her with a stick or stabbing her. But huh
25 somehow what Russell says sticks out in my mind. And then

CLOSING: SOLICITOR LIPINSKI

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1 I don't really remember but I kind of remember going to
2 John Lane's house and he threatened me. I don't remember
3 admitting to him that I hit granny but I do remember he
4 threatened me. And then I remember going over to Debbie
5 Millers house and I could have tried to wash the evidence
6 away but I just took a nap and fell asleep because I was
7 drunk. And I don't remember anything else but the police
8 banging on the door and me hiding inside or pulling the
9 blanket up over my head. But Agent Patton he pulled me
10 across that drive way I remember that real clear. Loretta
11 has an explanation for his selective memory. Adam has a
12 reason. Because he didn't want to get up and admit to you
13 that he committed all of these crimes. But the State has
14 proven that he is guilty of each and every one.

15 He is guilty of assault and battery with intent to
16 kill of taking a stick and hitting her with meanness and
17 wickedness and evilness in his heart. If she had died it
18 would be murder without a doubt and he is guilty beyond a
19 reasonable doubt. He is guilty of burglary in the first
20 degree because the beating starts on the porch and he has
21 to drag her inside. And he's not doing it to render aid or
22 because he can't carry a five foot hundred pound woman
23 descent like into the house. He's dragging his victim into
24 the house so he can rape her and nobody who pulls up would
25 notice. He can't leave Granny on the porch Russell's sure

CLOSING: SOLICITOR LIPINSKI

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1 to see that when he gets home because his plan wasn't to be
2 caught. It was to leave her there when he was done with
3 her and get out of Dodge. He formed that intent before he
4 went inside and he was not rendering aid. He is guilty of
5 kidnapping. This crime took time; she begged him to
6 stop; she begged him to leave and he kept going. He
7 confined her. She couldn't leave that house on her own
8 accord. She had no ability to stop it and he kept her
9 there until he was done with her or until Russell
10 interrupted him.

11 And he is guilty of criminal sexual conduct in the
12 first degree. Loretta did what every grandmother should do
13 every one. She loved him in spite of his faults in spite
14 of being broken. And Adam did what no grandson should ever
15 do. He is responsible, he is guilty hold him accountable.
16 The pieces of the puzzle only go together one way. We may
17 not have all of them but there is still no doubt in your
18 mind what happened that night. He is guilty hold him
19 accountable of each and every crime.

20 Thank you, Your Honor.

21 THE COURT: All right, ladies and gentlemen. I am
22 going to take a short break before I charge you the law so
23 I am going to let you go back in the jury room for a few
24 minutes and I will have you back out here shortly.

25 (JURY LEAVING COURTROOM AT 10:29 A. M..)

CHARGE

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1 THE COURT: All right we will take a very short break.

2 (COURT RECESSED AT 10:30 A.M..)

3 (BACK ON THE RECORD AT 10:35 A.M..)

4 THE COURT: Be seated.

5 (DEFENDANT ENTERING COURTROOM AT 10:36 A.M..)

6 THE COURT: All right. Is Ms. Moss coming back in?

7 SOLICITOR LIPINSKI: She went down to smoke; I

8 apologize.

9 (PAUSE.)

10 THE COURT: Bring in the jury please.

11 (JURY ENTERING COURTROOM AT 10:38 A.M..)

12 THE COURT: Ladies and gentlemen, now that you have
13 heard all of the evidence and the arguments of the
14 attorneys it becomes my responsibility to explain to you
15 the law that is applicable to this case.

16 Under our constitution and code of laws here in South
17 Carolina only the jury can make the findings of fact and I
18 am not permitted to indicate how I might feel about the
19 facts. So, if I have said anything or done anything during
20 the course of this trial that might lead you to believe
21 that I have an opinion about the facts then you should
22 disregard that.

23 To determine the facts in the case you will have to
24 evaluate the credibility which of course means the
25 believability of the witnesses who have been called on to

1 testify. And some of the things that you might wish to
2 consider as you decide whether to believe a particular
3 witness's testimony include the following:

4 The manner and appearance of the witness who
5 testified, was he or she straightforward, or hesitant, in
6 answering questions?

7 Was the testimony of a witness consistent, or
8 inconsistent?

9 How did the witness come to know the facts that he or
10 she is testifying to? And what is that witness's ability
11 to know those facts?

12 Is there some reason that a witness might want to give
13 testimony that would help, or hurt, one side or the other?

14 Is the testimony of a witness strengthened, or
15 weakened, by other testimony and evidence?

16 As members of the jury you can believe as much or as
17 little of each witness' testimony as you believe it is
18 appropriate to do. You can believe the testimony of one
19 witness against all of the rest of them, or you can do just
20 the opposite. And you are not required to accept testimony
21 as true even if it is uncontradicted.

22 You have heard the testimony of an expert witness.
23 Expert witnesses are those witnesses who have special
24 knowledge, skill, experience, training or education in a
25 particular profession or occupation. And because of those

CHARGE

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1 special qualifications experts are allowed to give opinions
2 as to matters within their areas of expertise. In
3 determining the weight to be given the opinions of experts
4 you should consider the qualifications and the credibility
5 of the expert and the reasons given for his or her
6 opinions. You are not bound by the opinions of the
7 experts. You give them the weight that you believe they
8 should receive.

9 You have heard evidence that the defendant has
10 previously been convicted of assault and battery of a high
11 and aggravated nature, and attempted burglary. This
12 evidence may be considered by you, if you conclude it is
13 true, only in deciding whether the defendant's testimony is
14 believable, and for not other purpose. You must not
15 consider the defendant's prior convictions for these two
16 crimes as evidence of his guilt on the crimes for which his
17 is now charged. Further, you may not draw from this
18 evidence the inference that because the defendant committed
19 these two prior crimes, then he is the type of person who
20 would have committed any of the crimes for which he is now
21 on trial. That is an absolutely impermissible inference
22 for you to draw.

23 Now the same constitution and code of laws that makes
24 you the exclusive judges of the facts also makes me the
25 exclusive judge of the law. So, if you have some idea as

1 to what the law is or what the law should be, and if that
2 differs from what I now tell you the law is, then you are
3 obligated under the oath that you have taken as jurors to
4 set your notion of the law aside, and to accept and apply
5 the law precisely as I now explain it to you.

6 The fact that the defendant was arrested and charged
7 and indicted in this case is not evidence and cannot be
8 considered by you as evidence of the defendant's guilt.
9 Nor does it create any presumption or inference of guilt.
10 The indictment is simply the formal written document that
11 contains the allegations that have been made against the
12 defendant and it serves to process the case and bring into
13 this court for trial.

14 The defendant has pled not guilty to each of these
15 four indictments and the plea of not guilty casts the
16 burden on the State to prove the defendant guilty beyond a
17 reasonable doubt. A person charged with committing a crime
18 in South Carolina is never required to prove themselves
19 innocent. And it is a very important rule of the law in
20 our country that a defendant in a criminal trial will
21 always be presumed to be innocent of the crimes with which
22 he has been charged unless and until his guilt has been
23 proven by evidence that has satisfied you of that guilt
24 beyond a reasonable doubt. This of course is the
25 presumption of innocence. But the presumption of innocence

CHARGE

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1 is just not a mere legal theory or a legal phrase that we
2 use. It is a substantial constitutional right to which
3 every defendant is entitled. The presumption of innocence
4 accompanies the defendant from the time he is charged
5 throughout the trial and into the jury room. Until you
6 reach a verdict of guilt it's based on evidence that has
7 satisfied you of that guilt beyond a reasonable doubt.

8 A reasonable doubt is a doubt which makes an honest,
9 sincere, conscientious juror in search of the truth in the
10 case to hesitate to act. Proof beyond a reasonable doubt
11 must therefore be proof of such a convincing character that
12 a reasonable person would not hesitate and rely on it and
13 act on it in the most important of his or her own affairs.

14 Proof beyond a reasonable doubt can also be described
15 as proof that leaves you firmly convinced of the
16 defendant's guilt. Now there are very few things in this
17 world that we know with absolute certainty, and in criminal
18 cases the law does not require proof that overcomes every
19 possible doubt. If, based on your consideration of the
20 evidence you are firmly convinced that the defendant is
21 guilty of the crime charged then you must find him guilty.
22 But on the other hand if you think there is a real
23 possibility that he is not guilty then you must give him
24 the benefit of the doubt and find him not guilty.

25 I have admitted into evidence in this case statements

CHARGE

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1 alleged to have been made by the defendant. Before you may
2 consider these statements as evidence for any purpose you
3 must find that the State has proven beyond a reasonable
4 doubt that the answer is "yes" to both of the following
5 questions and the questions are:

6 Did the defendant make the statement and was the
7 statement made voluntarily?

8 The word "voluntarily" of course means that he freely
9 chose to make the statement; that it was not induced by
10 pressure or force or intimidation. If the statement was
11 voluntarily given it may be used against him. If the
12 statement was not voluntary it may not be used against him.

13 In determining whether or not the statement of the
14 defendant was voluntary, you should consider all the facts
15 and circumstances surrounding the statement, including the
16 defendant's age and maturity, his level of education and
17 intelligence, his physical and mental health, his
18 background and environment, the nature of any questioning,
19 and any other evidence that you believe bears on the
20 voluntariness of the defendant's statement.

21 The defendant was in custody at the time the alleged
22 statements were made, so you should also consider the place
23 and length of his custody, and whether or not he was given,
24 and whether or not he understood, his constitutional
25 rights, or what are commonly referred to as his Miranda

CHARGE

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1 rights which include:

2 That he has the right to remain silent.

3 That any statement that he does make can and will be
4 used against him in a court of law.

5 That he has the right to consult a lawyer before and
6 during any questioning.

7 That if he cannot afford a lawyer, the court will
8 appoint one to represent him without cost.

9 And that he has the right to exercise these rights at
10 any time and terminate questioning or not answer any
11 questions or not make any statement.

12 There are four separate crimes charged in separate
13 indictments, and you must determine separately as to each
14 indictment whether or not the State has proven the elements
15 of that particular crime beyond a reasonable doubt. Your
16 verdict does not have to be the same for each indictment.

17 The first indictment is for assault and battery with
18 intent to kill. In order to convict the defendant of
19 assault and battery with intent to kill, the State must
20 prove three essential elements, each beyond a reasonable
21 doubt.

22 First, the State must prove that the Defendant
23 committed an assault.

24 Second, the State must prove that the Defendant
25 committed a battery.

1 And third, the State must prove that the Defendant did
2 this with malice aforethought.

3 An assault is an unlawful attempt or threat to commit
4 a violent injury upon another person, made by a person who
5 had the present ability to complete the attempted or
6 threatened injury. It is not necessary that the attempted
7 or threatened injury actually take place.

8 A battery is the unlawful touching of another person
9 by a person who has committed the assault. It is the
10 completion of the assault by using or applying force to
11 another person, however slight, in a rude, angry, or
12 resentful manner without legal justification for doing so.
13 An unlawful touching can be caused by a part of the
14 accused's body or by any object that the accused puts in
15 motion.

16 Malice is hatred, or ill-will, or hostility towards
17 another person. It is the intentional doing of a wrongful
18 act without just cause or excuse and with an intent to
19 inflict an injury or under circumstances from which the law
20 would infer an evil intent.

21 Malice aforethought does not require that the malice
22 exists for any particular length of time before the act is
23 committed, but malice must exist in the mind of the
24 defendant just before and at the time of the act that he
25 has committed. Therefore, there must be a combination of

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1 the previous evil intent and the act.

2 A specific intent to kill is not an element of assault
3 and battery with intent to kill, but there must be a
4 general intent to commit serious bodily injury. Intent of
5 course means intending the result which actually occurs:
6 not that it occurred accidentally or involuntarily. Intent
7 may be shown by acts and conduct of the defendant and any
8 other circumstances from which you may naturally and
9 reasonably infer intent. Evidence of the character of the
10 assault, the character of the instrument used, the manner
11 in which it was used, the purpose to be accomplished, and
12 the resulting wounds or injuries may be considered in
13 determining the intent with which the assault was
14 committed. Intent may be inferred when it is demonstrated
15 that the defendant voluntarily and willfully commits an
16 act, the natural tendency of which is to destroy another's
17 life.

18 If you find that the State has failed to prove that
19 the Defendant is guilty of assault and battery with intent
20 to kill then you must decide whether the State has proven
21 the Defendant guilty of the lesser included crime of
22 assault and battery of a high and aggravated nature. In
23 order to convict the Defendant of assault and battery of a
24 high and aggravated nature, the State must prove, beyond a
25 reasonable doubt, an assault, a battery, and a circumstance

1 of aggravation.

2 In just a few minutes I am going to explain to you
3 that assault and batter of a high and aggravated nature is
4 also a lesser included offense of criminal sexual conduct.
5 But as to assault and battery of a high and aggravated
6 nature as a lesser included offense of assault and battery
7 with intent to kill, circumstances of aggravation can
8 include the use of a deadly weapon, the intent to commit a
9 felony, the infliction of serious bodily injury, great
10 disparity in the ages or physical conditions of the
11 parties, difference in gender, or purposeful infliction of
12 shame and disgrace.

13 Now, ladies and gentlemen, you may be thinking to
14 yourselves that you will never remember all of this and I
15 realize that this is a lot to take in. When you go back
16 into the jury room to deliberate you will have with you a
17 written copy of the charge that you can refer to but still
18 continue to listen very carefully as I go through these
19 other three crimes that have been indicted.

20 The Defendant is also charged with burglary in the
21 first degree. In order to convict the Defendant of this
22 crime the State must prove four essential elements each
23 beyond a reasonable doubt.

24 First the State must prove that the Defendant entered
25 a dwelling.

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1 Second the State must prove that the Defendant did not
2 have permission to enter the dwelling.

3 Third the State must prove that the Defendant entered
4 the dwelling with the intent to commit a crime while
5 inside.

6 Now the Forth element may be proven in any one of
7 three alternative ways. While the State must prove one of
8 these alternatives beyond a reasonable doubt the State need
9 not prove more than one in order to convict the Defendant
10 of burglary in the first degree. These alternative ways of
11 proving the forth element are:

12 First; that the Defendant entered or remained in the
13 dwelling in the night time.

14 Second, that while effecting entry while in the
15 Dwelling or while in immediate flight the Defendant was
16 armed with a deadly.

17 Or Third, that while effecting entry while in the
18 Dwelling or while in the immediate flight he caused
19 physical injury to a person who is not a participant in the
20 crime.

21 With regard to this first element, the term "dwelling"
22 means any house, apartment or building in which an owner or
23 a tenant sleeps.

24 With regard to the third element, the intent to commit
25 a crime, the mere entry into a dwelling without consent is

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1 not burglary. If the intent to commit a crime is formed
2 after the entry, it is not burglary. But on the other
3 hand, if the Defendant intended to commit a crime at the
4 time of the entry, it is a burglary even if the intent was
5 abandoned after the entry. It does not matter that the
6 intended crime was not completed. Intent may be shown by
7 acts and circumstances of the Defendant and any other
8 circumstances from which you may naturally and reasonably
9 infer intent.

10 Regarding the second alternative method of proving
11 this fourth element that I explained to you, a deadly
12 weapon is any article, instrument, or substance which is
13 likely to cause death or great bodily harm. And whether an
14 instrument has been used as a deadly weapon depends on the
15 facts and the circumstances of each case.

16 The State has also charged the Defendant with criminal
17 sexual conduct in the first degree. In order to convict
18 the Defendant of this crime the State must prove two
19 elements each beyond a reasonable doubt.

20 The first element which the State must prove is that
21 the Defendant engaged in "sexual battery" with the victim.

22 Our code of laws defines "sexual battery" to include
23 "sexual intercourse, cunnilingus, fellatio, anal
24 intercourse, or any intrusion, however slight, of any part
25 of a person's body or of any object into the genital or

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1 anal openings of another person's body, except when such
2 intrusion is accomplished for medically recognized
3 treatment or diagnostic purposes."

4 The second element which the State must prove is that
5 the Defendant used "aggravated force" to accomplish the
6 sexual battery.

7 Our code of laws defines "aggravated force" to mean
8 that the actor uses physical force or physical violence of
9 a high and aggravated nature to overcome the victim. Force
10 or violence of a high and aggravated nature can use the
11 threat of the use of a deadly weapon.

12 If you find that the State has failed to prove that
13 the Defendant is guilty of criminal sexual conduct in the
14 first degree then you must decide whether the State has
15 proven the Defendant guilty of the lesser included crime of
16 assault with intent to commit criminal sexual conduct in
17 the first degree. In order to convict the Defendant of
18 assault with intent to commit criminal sexual conduct in
19 the first degree, the State must prove beyond a reasonable
20 doubt that the Defendant committed an assault on the
21 victim, with the intent to commit first degree criminal
22 sexual conduct.

23 I have already charged you on the definition of an
24 assault, and that same definition would apply here just as
25 well.

1 As to proving the intent to commit first degree
2 criminal sexual conduct, the State must prove that the
3 Defendant intended to accomplish the elements of first
4 degree criminal sexual conduct, that is, that he intended
5 to use aggravated force to accomplish a sexual battery on
6 the victim.

7 If you find that the State has failed to prove that
8 the Defendant is guilty of assault with intent to commit
9 criminal sexual conduct in the first degree, then you must
10 decide whether the State has proven the Defendant guilty of
11 the lesser included crime of assault and battery of a high
12 and aggravated nature.

13 As I mentioned to you earlier this lesser included
14 offense has the same name as the crime I charged you with
15 the lesser included offense of assault and battery with
16 intent to kill. Just as with that lesser included offense,
17 in order to convict the Defendant of assault and battery of
18 a high and aggravated nature as a lesser included offense
19 of criminal sexual conduct, the State must prove, beyond a
20 reasonable doubt, an assault, a battery, and a circumstance
21 of aggravation.

22 However, despite having the same elements and having
23 the same name, the State's proof of this crime must be
24 based on separate conduct from that which supports the
25 assault and battery with intent to kill or the offense that

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1 is the lesser included of that crime the State must prove a
2 separate assault, a separate battery, and a separate
3 circumstance of aggravation. Further as to this lesser
4 included of criminal sexual conduct the only permissible
5 circumstance of aggravation that will support a conviction
6 for assault and battery of a high and aggravated nature is
7 taking indecent liberties or familiarities with a female.

8 The last charge is for kidnapping. In order to
9 convict the Defendant of this crime the State must prove
10 four essential elements, each beyond a reasonable doubt.

11 First, the State must prove that the Defendant seized,
12 confined, inveigled, decoyed, kidnapped, abducted, or
13 carried away another person.

14 Second, the State must prove that the Defendant did so
15 unlawfully.

16 Third, the State must prove that the Defendant did so
17 knowingly.

18 And Forth, that the State must prove that the
19 Defendant did so without authority of law.

20 Now let me define for you some of the terms that are
21 used in this first element. Seize of course means to take
22 hold of suddenly or forcibly.

23 Confine means to limit, restrict, or enclose within
24 bounds, to imprison, or to shut in or to keep in.

25 Inveigle means to lure, entice, or lead astray by

1 false representations, promises, or other deceitful means.

2 Decoy means to lure, lure by, or as if by a decoy.

3 And a decoy is something to entice a person into a trap.

4 Kidnap is to remove a person against her will by
5 unlawful force or by fraud.

6 Abduct means to carry off secretly or by force for an
7 illegal purpose.

8 Regarding the second element, to do an act unlawfully
9 is to do the act when one knows it is against the law.

10 Regarding the third element, knowingly of course means
11 with knowledge, it means consciously, not accidentally.

12 And regarding the forth element, something done
13 without authority of law is something that the law does not
14 sanction, permit, allow, condone, or provide any
15 justification for.

16 Now regarding this kidnapping indictment, the State
17 must prove criminal intent that is separate from the intent
18 to commit any of the other alleged crimes. In other words,
19 as to the kidnapping charge, the State must prove that the
20 Defendant unlawfully, knowingly, and without authority of
21 law, intended to seize, confine, inveigle, decoy, kidnap,
22 abduct, or carry away the victim as a separate offense from
23 any of the other alleged crimes.

24 You have heard evidence that the defendant might have
25 been intoxicated. The voluntary use of drugs or alcohol by

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1 a defendant is not a defense to a crime. A person who
2 voluntarily becomes intoxicated is just as responsible for
3 the acts committed while intoxicated as when the person is
4 not intoxicated.

5 Now, ladies and gentlemen, your verdicts on each of
6 these four indictments must be unanimous. In just a few
7 minutes I am going to send you back into the jury room but
8 I am going to ask you not yet to begin your deliberations
9 because I will have some matters of law that I need to take
10 up with the attorneys. While I do that I would like for
11 you all to select a foreperson to serve the jury. The job
12 of the foreperson is to preside over the deliberations and
13 then when it becomes necessary to do so to communicate with
14 me and those communications will have to be in writing.

15 Now one of the times when you will need to communicate
16 with me is when you have reached a verdict. You will have
17 with you in the jury room the indictments. And on the back
18 of the indictments in the lower left hand corner you will
19 see the word verdict and then below that there are four
20 blank lines. When the jury has unanimously reached a
21 verdict as to any one of the indictments then the
22 foreperson would write the verdict in on one or more of
23 those blank lines and then sign it and date it. And then
24 when you've reached a verdict on all four we will get you
25 out here into the courtroom to receive your verdict.

1 Now I am going to go through the indictments with you
2 and I am going to tell you what the permissible verdicts
3 are as to each indictment. And when you are back in the
4 jury room you will be able to refer to the written jury
5 charge as a reference for what you are permissible verdicts
6 are. In other words for each indictment you can find you
7 will consider the crime charged. And then you also have
8 lesser included offenses as to two of the four indictments.

9 For burglary in the first degree your permissible
10 verdicts are either guilty or not guilty.

11 For kidnapping your permissible verdicts are either
12 guilty or not guilty.

13 For criminal sexual conduct in the first degree your
14 verdict options are either guilty of criminal sexual
15 conduct in the first degree. Second option would be guilty
16 of assault with intent to commit criminal sexual conduct in
17 the first degree. Third option would be assault and
18 battery of a high and aggravated nature. And then the
19 fourth option would be not guilty.

20 On the indictment for assault and battery with intent
21 to kill your verdict options are guilty of assault and
22 battery with intent to kill. Second option would be guilty
23 of assault and battery of a high and aggravated nature.

24 And the third option would be not guilty.

25 Ladies and gentlemen, what goes on in the jury room is

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1 private to you and should not be revealed to anyone until
2 after you have reached a verdict. And that is particularly
3 true for any votes that you may take that do not result in
4 a unanimous verdict. If the jury takes a vote and the
5 result is not unanimous do not tell anyone what is the
6 result of that vote. Now it is eleven o'clock and it is
7 close enough to the lunch hour in my view at least to start
8 thinking about what we are going to do for lunch. If you
9 all would like us to we will order you lunch. It will take
10 us forty five minutes or so to get it here. So if you will
11 just let us know forty five minutes before you would like
12 to eat we will have it waiting for you.

13 Now I am going to send you back into the jury room in
14 just a second. As soon as you have selected a foreperson
15 to preside over the deliberations then just let the bailiff
16 know who that is and we will put it on the record out here.
17 And then at that time I will send back to you all of the
18 exhibits that have been introduced into evidence and I will
19 send back to you the indictments. And at that time you
20 will be told that you can begin your deliberations. So
21 don't begin deliberating the case until I have given you
22 the instruction through the bailiff that you may begin and
23 at that time you will have the indictments and the
24 exhibits. So you can go back into the jury room now and we
25 will send that stuff in as soon as we hear who the

1 foreperson is.

2 (JURY LEAVING COURTROOM AT 11:06 A.M.)

3 THE COURT: Any exceptions to the charge?

4 SOLICITOR LIPINSKI: None from the State.

5 MR. LEMEL: Only as previously argued, Your Honor, in
6 regard to the lesser included.

7 THE COURT: Okay. Okay I am going to have a slightly
8 corrected version of the charge and I want you all to
9 review it to make sure that the printed version is
10 agreeable to you to be sent back. And then after we've
11 done that we will mark it as an exhibit and send back at
12 least one copy of it. And then we will just otherwise wait
13 until we hear who the foreperson is. Have you all looked
14 at the exhibits and agreed on what is the proper set of
15 exhibits to go back?

16 MR. LEMEL: We have not yet, Your Honor.

17 THE COURT: How about doing that now while we are
18 waiting?

19 SOLICITOR LIPINSKI: Your Honor, just for clarity are
20 you saying corrections in what you sent us last night in
21 the email?

22 THE COURT: The only changes that I changed a little
23 bit the way I explained the difference between ABHAN under
24 ABWIK as opposed under CSC by expressly stating they had to
25 find a separate assault and a separate battery in addition

1 to what I had sent you last night. And then there were a
2 couple of other little transition spots. I changed a word
3 in the section on prior conviction of the defendant. And
4 the oral presentation reflected that change.

5 MR. LEMEL: I was just making sure, Your Honor.

6 THE COURT: I changed the way that I introduced the
7 circumstance of aggravation for ABHAN as a lesser included
8 of ABWIK. And I changed -- and also I did that. That
9 change was made orally and then I changed the way I
10 introduced the one I just mentioned.

11 MR. LEMEL: Thank you, Your Honor, that clarifies that
12 for me.

13 THE COURT: Okay.

14 MADAME COURT REPORTER: Mindy, do you want a printout
15 of the exhibits so you will know exactly what's there and
16 what's in evidence?

17 SOLICITOR LIPINSKI: No.

18 MADAME COURT REPORTER: Okay.

19 (ATTORNEYS REVIEWING EXHIBITS.)

20 THE BAILIFF: Your Honor, they have chosen a
21 foreperson. It's Number Twenty-One.

22 THE COURT: All right that's Wayne Blair. Okay.

23 THE BAILIFF: And they would like to order lunch.

24 THE COURT: Okay. You all take a look at the written
25 charge. You notice that if you follow the written charge

1 that I had given you you will notice a slight difference in
2 what I said from what's written. I just want to make sure
3 you all are okay with that particular one.

4 (PAUSE.)

5 THE COURT: All right mark that as an exhibit and then
6 there are the indictments. If you have an agreement as to
7 what the exhibits are?

8 SOLICITOR LIPINSKI: We do, Your Honor.

9 MR. LEMEL: We do.

10 THE COURT: You can go ahead and send them back and
11 tell them they can begin their deliberations.

12 (WHEREUPON: COURTS EXHIBIT NUMBER TWO IDENTIFIED AND
13 MARKED, ENTERED INTO EVIDENCE.)

14 THE COURT: We will be in recess until we hear further
15 from the jury.

16 (COURT RECESSED AT 11:16 A.M..)

17 (BACK ON THE RECORD AT 1:36 P.M..)

18 THE COURT: We have a note from the jury that says,
19 Judge, can we have a transcript of the victim's testimony?

20 MADAME COURT REPORTER: No, sir.

21 THE COURT: Ma'am?

22 MADAME COURT REPORTER: No, sir, if that's a question
23 you are putting to me no, sir.

24 THE COURT: Oh I know that. I am handing this to you
25 so you can mark it.

1 MADAME COURT REPORTER: Yes, sir.

2 THE COURT: Madame Clerk, will you hand that to the
3 court reporter so she can mark it.

4 (WHEREUPON: COURT'S EXHIBIT NUMBER THREE, IDENTIFIED
5 AND MARKED, ENTERED INTO EVIDENCE.)

6 THE COURT: You are in a position to play it if
7 necessary aren't you?

8 MADAME COURT REPORTER: Yes, sir.

9 THE COURT: All right so I think what I will do, we
10 have one juror out perhaps smoking and another one is
11 making a telephone call and they've been told as I told you
12 they would be that they cannot deliberate while all twelve
13 of them are not in the room. So when they come back I
14 think I will bring them in and explain to them that we
15 don't have a transcript but that if they truly do want to
16 listen to the testimony we can make that happen.

17 Do you know, does your records show how long the
18 testimony . . .

19 MADAME COURT REPORTER: Yes, sir, it does. When I
20 pull that file up, Judge, it will be timed. Yes, sir, by
21 itself.

22 THE COURT: You can tell me in the next few minutes
23 how long?

24 MADAME COURT REPORTER: Absolutely yes, sir. Could
25 you pause for just a minute and let me look and I will tell

1 you?

2 THE COURT: Yes, ma'am.

3 All right. Forty-nine minutes, oh fifty-three
4 minutes, Judge, right over fifty-three minutes and forty-
5 six seconds.

6 THE COURT: And that's obviously both direct and
7 cross?

8 MADAME COURT REPORTER: I'm assuming, sir. I haven't
9 opened that file up yet to look.

10 THE COURT: Okay. I will tell them that that's an
11 option that they have. What I usually do is urge them to
12 think carefully before they ask for that just to make sure
13 that they really need it. Any objections to me following
14 that approach?

15 MR. LEMEL: No, sir, not from the defense.

16 SOLICITOR LIPINSKI: No, sir.

17 THE COURT: Okay.

18 MADAME COURT REPORTER: That's direct and cross,
19 Judge.

20 THE COURT: Fifty-three, right? Almost fifty-four.

21 MADAME COURT REPORTER: Fifty-three minutes and
22 forty-six seconds.

23 THE COURT: Can you put it like on double speed to
24 make it get down to about - -

25 MADAME COURT REPORTER: I can put it wherever you want

1 it. Can't guarantee you you will understand it if I speed
2 it up.

3 THE COURT: Can you fast forward?

4 MADAME COURT REPORTER: Fast forward yes, sir.

5 THE BAILIFF: Got 'em lined up.

6 THE COURT: Bring 'em on in.

7 (JURY ENTERING COURTROOM AT 1:42 P. M..)

8 THE COURT: All right, ladies and gentlemen, I brought
9 you in because you have passed up a question that says can
10 you have a transcript of the victim's testimony. The court
11 reporter has taken down the testimony and recorded it but
12 it takes a good while to actually transcribe it so we don't
13 have the transcript of the testimony. We do have the
14 ability to replay for you the audio of her testimony. Now
15 we've checked and it will take almost fifty-five minutes or
16 maybe it was almost fifty-four minutes. It was somewhere
17 in that range to replay that. So what I am going to
18 instruct you to do in just a moment is to go back into the
19 jury room and then you all talk about it and if you really
20 do want to listen to it we will play it. It's not unheard
21 of that we do this but it's a little bit unusual. We don't
22 replay testimony in every trial by any means but if you
23 want it done we will do it. But I just encourage you not
24 to ask to have it done unless you really want it done. So
25 with that I will send you back to the jury room. Since all

(1 twelve of you are back together you may resume your
2 deliberations. And if you need anything further including
3 that just let us know. What we will do is bring you out
4 here in the courtroom you sit in the jury box and we will
5 replay the audio of that testimony if that's what you want.
6 You can go back now.

7 (JURY LEAVING COURTROOM AT 1:44 P.M..)

8 THE COURT: Okay any exceptions to those comments?

9 SOLICITOR LIPINSKI: None from the State.

10 MR. LEMEL: No, sir.

11 THE COURT: All right. Then we will be in recess in
12 this case until we hear from the jury.

13 (RECESS AT 1:45 P.M..)

14 (BACK ON THE RECORD AT 3:25 P.M..)

15 THE COURT: Be seated.

16 (DEFENDANT ENTERING COURTROOM.)

17 THE COURT: Okay I have a note that says does there
18 have to be physical evidence of penetration? Or what type
19 of evidence do we need for the charge of criminal sexual
20 conduct first degree?

21 Madame Clerk, would you hand this to the court
22 reporter?

23 And you all are certainly welcome to come look at this
24 note.

25 (JURY NOTE PASSED TO COURT REPORTER.)

1 (WHEREUPON: COURT'S EXHIBIT NUMBER FOUR, IDENTIFIED
2 AND MARKED, ENTERED INTO EVIDENCE.)

3 THE COURT: You all can give your ideas one at a time.
4 Don't jump up all at once.

5 SOLICITOR LIPINSKI: I am thinking aloud. I don't
6 mean to offend the court but I think possibly a charge on
7 under Wright versus circumstantial may be somewhat helpful
8 or telling them simply that that they have all the evidence
9 that whatever weight they assign to the evidence that was
10 presented to them is in their discretion. And the answer I
11 think anything further is a comment on the facts. I think
12 there is a way to engage into those kinds of generic terms
13 that they have to decide based on what's been given to them
14 already.

15 THE COURT: Mr. Lemel, you have anything to say?

16 MR. LEMEL: I probably would echo some of what Ms.
17 Hervey said towards the later part of her statement. I
18 think that we have to be careful about making a comment on
19 the evidence and basically that the evidence contained in
20 the record is what they must draw their conclusion from
21 essentially would be my thought.

22 THE COURT: Well the word penetration is one that you
23 all used in your closing but it's really not in the charge.
24 Its not part of the definition of criminal sexual conduct.
25 The word is intrusion which is one of the ways that sexual

1 battery can be proven. I would think that I would say that
2 the question appears to relate to the element of criminal
3 sexual conduct that requires the State to prove a sexual
4 battery and recharge the definition of sexual battery. And
5 then tell them that the State must prove a sexual battery
6 beyond a reasonable doubt. And that they must make their
7 conclusion about whether the State has done that or not
8 based on the evidence before them - - -

9 Hand the note back up here please.

10 (BAILIFF HANDED UP JURY NOTE TO COURT.)

11 THE COURT: - - - what ever that evidence is. And
12 then I guess I would be inclined -- there really are two
13 questions. The first one is does there have to be physical
14 evidence of penetration. And then after sort of reframing
15 that question according to the language of the statute I
16 think the answer is no and they should be given a no answer
17 in the context that I just described. Is putting their
18 question back in terms of what the State's burden of proof
19 is? The State's burden of proof proof that the elements of
20 the crime beyond a reasonable doubt and recharge the
21 elements and make it clear that it does not have to be
22 physical evidence. Let me . . .

23 Okay, any further thoughts?

24 MR. LEMEL: Judge, with regard to that last part about
25 does it have to be physical evidence is to put simply

1 answering no I would request the instruction be something
2 similar to regarding the question on detective evidence
3 that it must be evidence of what ever type that convinces
4 you beyond a reasonable doubt rather than simply saying no
5 it doesn't have to be this type or not it doesn't have to
6 be that type. That the evidence it has to be evidence of
7 what ever type convinces you beyond a reasonable doubt.

8 THE COURT: Let me see if you like this. Your
9 question appears to address the element of criminal sexual
10 conduct in the first degree which requires the State to
11 prove a sexual battery beyond a reasonable doubt. And then
12 I repeat the definition of sexual battery. There is no
13 specific type of evidence the State must use in order to
14 prove this element. In specific response to your question
15 there is no requirement that the State prove this or any
16 other element with physical evidence. Rather after
17 considering all of the evidence before you if you conclude
18 that the State has proven all of the elements of criminal
19 sexual conduct in the first degree beyond a reasonable
20 doubt then you must find the defendant guilty. If you find
21 that the State has failed to prove any one of the elements
22 then you move on and consider the lesser included offenses
23 about which I have already charged you.

24 MR. LEMEL: The middle sentence where you specifically
25 address physical evidence I would request that that be

1 removed. I think the response is complete without
2 including a specific statement that physical evidence isn't
3 required but simply saying rather what ever type of
4 evidence you have to use to be convinced beyond a
5 reasonable doubt. Or whatever type of evidence you would
6 need to be convinced beyond a reasonable doubt as opposed
7 to specifically saying physical evidence is not needed.

8 THE COURT: Well I'm not sure exactly what you're
9 saying but I think I did that. You're asking me to focus
10 on the burden of proof rather than on the type of evidence.
11 So that if they were to take my answer you would want -- if
12 the answer is no you would want for them to take away from
13 that that whatever type of evidence they use they must find
14 an element proven beyond a reasonable doubt?

15 MR. LEMEL: Yes essentially, yes, sir. My concern of
16 course is focusing on a specific answer regarding a type of
17 evidence.

18 THE COURT: Huh?

19 MR. LEMEL: My concern is an answer that focuses in on
20 a specific type of evidence such as physical evidence
21 versus witness testimony.

22 THE COURT: Well I'm trying to frame the answer so
23 that it focuses on the burden of proof.

24 MR. LEMEL: Yes, sir.

25 THE COURT: But I'm trying to answer the question that

1 relates to physical evidence.

2 MR. LEMEL: Yes, sir.

3 THE COURT: All right hold on a minute and let me
4 tinker with this.

5 (PAUSE.)

6 THE COURT: Well the answer to the first question is
7 no. The answer to the second question is going to focus
8 them in on the burden of proof rather than on any specific
9 type of evidence. That's what you want to accomplish. So
10 let me try this. I redefine sexual battery or repeat the
11 definition that's already been given and then say there is
12 no specific type of evidence the State must use in order to
13 prove this element. In specific response to your question
14 or I will say there is -- and I will leave out that little
15 introduction -- there is no specific type of evidence the
16 State must use in order to prove this element. There is no
17 requirement that the State prove this or any other element
18 with physical evidence. Rather you must consider all of
19 the evidence before and you must determine whether or not
20 the State has proven all of the elements of criminal sexual
21 conduct first degree beyond a reasonable doubt. I mean I
22 can make it really simple and say the answer to the first
23 question is no and the answer to the second question is
24 it's not for me to tell you what type of evidence you need
25 but rather to tell you that it is the State's burden of

1 proving each element beyond a reasonable doubt.

2 MR. LEMEL: Given a choice between the two, Your
3 Honor, I would not choose the simple option. I think they
4 can have a little bit more instruction.

5 THE COURT: Well talk to me again about what you want
6 me to -- I think we are trying to do the same thing.

7 MR. LEMEL: Yes, sir. My primary concern is just
8 singling out physical evidence. I know they asked a
9 question about that.

10 THE COURT: In answering your concern I have two
11 choices. I can ignore the fact that they asked in their
12 question about physical evidence or I can answer their
13 question.

14 MR. LEMEL: Yes, sir.

15 THE COURT: And I think I should answer their
16 question.

17 MR. LEMEL: But I -- and I apologize for interrupting
18 you.

19 THE COURT: It's all right. But in addition to
20 answering their question I want to focus them away from as
21 you suggested what type of evidence is important to the
22 burden of proof. Focus them in on the burden of proof. So
23 that's what I'm trying to do.

24 MR. LEMEL: I guess my suggestion, Your Honor, my
25 position would be in order to focus essentially you don't

1 directly answer the first part of the question but really
2 what we're answering is more of the second part with the
3 language that we have discussed focusing in on what really
4 the burden is and what they have to find based upon the
5 evidence that was presented. So essentially, Your Honor, I
6 am suggesting that we ignore the first part of the
7 question.

8 THE COURT: Yes, ma'am.

9 SOLICITOR LIPINSKI: Your Honor, the State would just
10 renew our request. I think some answers or some charge
11 that they are allowed to take into consideration direct
12 evidence versus circumstantial evidence seeing that that
13 seems to be - -

14 THE COURT: There is no circumstantial evidence of a
15 sexual battery here. It's all direct evidence. What
16 circumstantial evidence is there of sexual battery?

17 SOLICITOR LIPINSKI: I think the position that they
18 find them in.

19 THE COURT: That's direct evidence. That's somebody
20 testifying based on personal knowledge of what they saw.
21 That's direct evidence.

22 SOLICITOR LIPINSKI: Yes, sir. As you pointed out
23 they are not actually at an advantage point where they can
24 see the actual penetration but in circumstantial evidence
25 can deduced from the nature of their position that

1 penetration was occurring.

2 THE COURT: Circumstantial evidence would be more like
3 physical evidence. I'm not getting into circumstantial
4 evidence. I think the question needs to be answered
5 focusing them away from some distinctions about the type of
6 evidence and focusing them back in on the burden of proof.
7 I'm not going to refuse to answer their question. I am
8 going to specifically answer the question.

9 All right, so you your focus on the answering the
10 question, Mr. Lemel, and I want to make sure I got this
11 right, you want to make sure that they are focused on the
12 existence of the burden of proof; the fact that the State
13 has the burden of proving this and other elements beyond a
14 reasonable doubt?

15 MR. LEMEL: Yes, sir, that would be the focus.

16 THE COURT: Focusing them away from any specific type
17 of evidence and focus them towards the burden of proof?

18 MR. LEMEL: Yes, sir, that would be correct.

19 THE COURT: And you don't have any problem with that?

20 SOLICITOR LIPINSKI: No, sir.

21 THE COURT: Just generally?

22 SOLICITOR LIPINSKI: I think they are more concerned
23 with the type of evidence they can use rather than confused
24 about what the burden of proof is. That's why the State
25 ask from the very first for the circumstantial. I

1 understand the Court's point but I think by Mr. Lemel's
2 standard the lack of physical evidence could be
3 circumstantial evidence that no penetration occurred. I
4 think they are confused about what types of evidence they
5 can use and that's why the State requested that charge.

6 THE COURT: Well I mean really to me it's just very
7 simple. The way that I am planning on doing this is just
8 as I said. The first paragraph will be the same; the
9 second paragraph is to repeat the definition of sexual
10 battery and the third paragraph is there is no requirement
11 that the State prove this or any other element with
12 physical evidence. The State bears the burden of proving
13 each element of the crime beyond a reasonable doubt. You
14 must consider all of the evidence before you and you must
15 determine whether or not the State has met that burden of
16 proof.

17 Mr. Lemel.

18 MR. LEMEL: To avoid going around in circles, Your
19 Honor, I understand where the Court's coming from.
20 Obviously my concern is some sort of physical comment on
21 physical evidence I prefer that not be there and I
22 understand the Court has answered the question at this
23 point in time.

24 THE COURT: All right. Well do you object to the
25 answer that I just read?

1 MR. LEMEL: For the record, Your Honor, understanding
2 the court's reasoning I would object for the record.

3 THE COURT: And you object to me - basically you
4 object to me answering the question does there have to be
5 physical evidence?

6 MR. LEMEL: Yes, sir.

7 THE COURT: How about if I say there is no requirement
8 that the State prove this or any other element with any one
9 type of evidence?

10 MR. LEMEL: Yes, sir, I would feel much more
11 comfortable with that.

12 THE COURT: Or with any particular type of evidence?

13 MR. LEMEL: Yes, sir.

14 THE COURT: That actually answers both questions
15 because the second question is what type of evidence do we
16 need.

17 Solicitor?

18 SOLICITOR LIPINSKI: That's fine, Your Honor.

19 THE COURT: There is no requirement that the State
20 prove this or any other element with any particular type of
21 evidence. The State bears the burden of proving each
22 element of the crime beyond a reasonable doubt. You must
23 consider all of the evidence before you and you must
24 determine whether or not the State has met that burden of
25 proof.

1 Any objection to that, Mr. Lemel?

2 MR. LEMEL: No, sir, Your Honor, I think that exactly
3 takes care of the exactly what my objection previously was.

4 SOLICITOR LIPINSKI: None from the State, Your Honor.

5 THE COURT: Ma'am?

6 SOLICITOR LIPINSKI: None from the State.

7 THE COURT: All right. Bring in the jury please.

8 (JURY ENTERING COURTROOM AT 3:58 P.M..)

9 THE COURT: All right, ladies and gentlemen, we have a
10 question from you all. And the answer - the question is
11 does there have to be any physical - does it have to be
12 physical evidence of penetration or what type of evidence
13 do we need for the charge of criminal sexual conduct first
14 degree? Your question appears to address the element of
15 criminal sexual conduct in the first degree which requires
16 the State to prove a sexual battery beyond a reasonable
17 doubt. As I told you in the original charge our code of
18 laws defines sexual battery to include sexual intercourse,
19 Cunnilingus, fellatio, anal intercourse, or any intrusion
20 however slight of any part of a person's body or of any
21 object into the genital or anal openings of another
22 person's body, except when such intrusion is accomplished
23 for medically recognized treatment or diagnostic purposes.
24 There is no requirement that the State prove this or any
25 other element with any particular type of evidence. The

1 State bears the burden of proving each element of the crime
2 beyond a reasonable doubt. You must consider all of the
3 evidence before you and you must determine whether or not
4 the State has met that burden of proof. And with that
5 answer I am going to send you back into the jury room. You
6 can resume your deliberations.

7 (JURY LEAVING COURTROOM AT 3:59 P.M..)

8 THE COURT: Okay. No exceptions?

9 SOLICITOR LIPINSKI: No, sir.

10 MR. LEMEL: None.

11 THE COURT: Okay.

12 (COURT IN RECESS AT 4:00 P.M..)

13 (BACK ON THE RECORD AT 4:15 P.M..)

14 (DEFENDANT ENTERING COURTROOM AT 4:16 P.M..)

15 THE COURT: All right I understand we have a verdict.
16 Bring in the jury.

17 (JURY ENTERING COURTROOM AT 4:17 P.M..)

18 THE COURT: Mr. Foreman, has the jury reached a
19 verdict?

20 MR. FOREMAN: We have, Your Honor.

21 THE COURT: Pass the verdict forms to the bailiff
22 please.

23 THE COURT: Publish them in that order.

24 MADAME CLERK: In that order?

25 THE COURT: Yes.

VERDICT

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1 MADAME CLERK: In the State of South Carolina versus
2 Adam Lee Berard with Indictment 2008-GS-46-3019 for Assault
3 and Battery with Intent to Kill we the jury find the
4 Defendant guilty signed by foreperson this day.

5 2009-GS-46-3928 Burglary in The First Degree guilty
6 signed by the foreperson this day.

7 2008-GS-46-3020 CSC First Degree, guilty signed by the
8 foreperson this day.

9 2009-GS-46-3929 for Kidnapping, guilty signed by the
10 foreperson this day.

11 If these so be your verdict so say you all by raising
12 your right hand.

13 Let the record show all affirmed.

14 THE COURT: Mr. Lemel, is there anything you would
15 like to bring up before we move into sentencing?

16 MR. LEMEL: No, sir.

17 THE COURT: All right. Bring him around please.

18 (DEFENDANT BROUGHT TO BENCH FOR SENTENCING AT 4:20
19 P.M.)

20 THE COURT: Solicitor, will you go over his entire
21 record for me please.

22 SOLICITOR LIPINSKI: Thank you, Your Honor.

23 The Defendant's prior record some of which has
24 obviously been discussed is he was convicted of the attempt
25 of burglary in Ohio and the gross sexual imposition in

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1 Ohio. Once he came here to South Carolina he was convicted
2 of assault and battery with intent to kill and he has two
3 prior convictions for failure to register - -

4 THE COURT: Assault and battery of a high and
5 aggravated nature.

6 SOLICITOR LIPINSKI: I'm sorry, assault and battery of
7 a high and aggravated nature. And he has two prior
8 convictions for failure to register as a sexual offender.
9 And he's been a registered sex offender I believe since his
10 conviction for gross sexual imposition in Ohio.

11 THE COURT: And the date of that was what?

12 SOLICITOR LIPINSKI: 2004. Let me make sure of that,
13 Your Honor. I apologize, Your Honor, 2003 was the gross
14 sexual imposition. The assault and battery of a high and
15 aggravated nature which was reduced down to criminal sexual
16 conduct here in South Carolina occurred in 2005. For that
17 offense he got an active YOA sentence and was on parole
18 when this offense occurred.

19 THE COURT: Anything else from the State?

20 SOLICITOR LIPINSKI: Yes, Your Honor, just briefly.
21 Solicitor Brackett had originally intended to be here and
22 speak at sentencing however Fort Mill schools let out early
23 and he was the only parent in the county for his daughter.
24 He asked me to pass along upon the comments to the court.
25 He stated to tell you that while being a solicitor for

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1 almost twenty years as he has he stated I can understand at
2 least why most crimes are committed. I don't condone them
3 but that I can at least understand why somebody who has a
4 drug addiction might rob a bank to get that money. But in
5 his words this crime is uncomprehensible and unnatural. He
6 stated that he felt the court should impose a sentence that
7 would keep the defendant locked away from society as long
8 as possible. He feels that he presents an on going threat
9 to the community that what is broken inside of him cannot
10 be diagnosed, cannot be treated, and it is beyond repair.
11 He would ask the court to impose a sentence as soon as
12 possible. The State obviously did engage in some plea
13 negotiations but we feel part of going to trial and the
14 reason we fought for the additional charges was to seek
15 that higher punishment. The purpose of engaging in plea
16 negotiations is someone comes forward and admits they've
17 done something wrong and throws themselves on the mercy of
18 the court. And I understand the defendant has a right to a
19 trial and I am not asking that he be punished for that.
20 What I am asking is that he be punished for his lack of
21 remorse on the stand, his lack of acceptance and
22 acknowledgement of the multitude of other crimes that he
23 committed and to the injury that he did to Ms. Moss. I've
24 worked with Ms. Moss now for a year and a half. She has to
25 continue to live in the house where this occurred, to walk

1 into that entry way, to walk over those steps and this is
2 something that will stay with her for the rest of her life.
3 She almost died from it. The family told me that a number
4 of times the doctor's called them and told them she
5 probably wouldn't make it through the next twenty-four
6 hours. And I firmly believe that if Russell had not come
7 home this would be a murder case. And for that reason I
8 concur with Solicitor Brackett that the most serious
9 punishment imposed is what is allowed. Ms. Moss has
10 something she wished to say, Your Honor.. I asked her to
11 direct her comments to the court but she did ask for the
12 opportunity to speak.

13 THE COURT: Certainly.

14 SOLICITOR LIPINSKI: Ms. Moss.

15 MS. LORETTA MOSS: Your Honor, I was just wanting to
16 say -- to tell Adam that I've forgiven him. I am sorry
17 about the choices he made. I feel like he needs to be
18 punished but he's still my grandson and I love him. And
19 I'm so sorry that it came to this but it was his choice.

20 THE COURT: Thank you, ma'am.

21 SOLICITOR LIPINSKI: Your Honor, when we spoke with
22 Ms. Moss we obviously told her earlier that we might be
23 able to reach a plea negotiation to a lighter sentence in
24 the lower range. And I asked her I said you know is that
25 going to be enough for you? And she always said if he

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1 would do this to his Nanny he would hurt anyone. And I am
2 willing to go to trial if that's what it takes to get him a
3 harder sentence.

4 THE COURT: Thank you.

5 Mr. Lemel.

6 MR. LEMEL: Thank you, Your Honor, may it please the
7 court. Your Honor, I have represented Adam now for
8 eighteen months. I was appointed to represent him shortly
9 after he was arrested back in June last year. He has been
10 incarcerated here in the detention center since that time
11 and we would ask that he be given credit for the amount of
12 time that he has served thus far. Your Honor, in that
13 eighteen months of representing Adam I have gotten to know
14 him as a young man. And unfortunately he is a young man
15 who has very deep flaws within him but we would obviously
16 not be here today, Your Honor, under these circumstances
17 with a person who did not have those flaws. I do know and
18 have confirmed from past history, Your Honor, that there
19 was both physical and mental abuse within the family. I
20 deeply suspect that based on some comments that have come
21 out and some statements and some background that I know
22 it's my personal belief that there was sexual abuse of Adam
23 at some point in time when he was a very young child. It's
24 certainly would explain the level of sexual dysfunction
25 that he has exhibited through his adult life, Your Honor.

1 I've never been able to get Adam to confirm that for me
2 with one hundred percent positive; that we have approached
3 that issue on numerous occasions but I have no definitive
4 proof of that. That has been my belief based upon what I
5 have been able to discover about him and his family. He
6 had been in counseling through a number of occasions, Your
7 Honor. We did have an assessment done of him and of course
8 he did come back as competent however I do not think that
9 completely explains the level of dysfunction he does have,
10 Your Honor. He has had various diagnoses of various
11 personality disorders, schizoid-defective disorders. He's
12 never been able to stay in counseling very long, Your
13 Honor. He's never had the kind of support network
14 particularly up in Ohio. There's a lot of indications from
15 medical records there that he was having trouble making
16 appointments, that he was living in a very unstable
17 environment and I don't think that there was ever - once
18 the initial breaking took place when he was a child, Your
19 Honor, I don't think there was ever a chance for repair
20 because the counseling simply was never able to be that
21 thorough and that successful. And then based upon the time
22 that he got to become an adult it was fixed. This is an
23 extraordinarily difficult situation, Your Honor. I had
24 talked with Adam extensively about what he wanted to say at
25 this point in time in this case. He was able to actually

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1 express some very deep thoughts, emotional thoughts to me
2 back in the holding cells. I've asked him whether he feels
3 like he's capable of saying the same things here in court.
4 I do not think that he emotionally can do that at this
5 time, Your Honor, so I am going to try to express to the
6 court some of what he said to me. He said that he wanted
7 to apologize to his grandmother that he is sorry that he
8 did this to her and that there was no excuse for it. He
9 wanted to apologize to his family for all the pain that he
10 has caused and to tell them that he knows that he has hurt
11 them deeply and betrayed them. And that he simply ask for
12 their forgiveness and accept at this point in time any
13 judgment of the court.

14 (PAUSE.)

15 THE COURT: Mr. Lemel, anything else?

16 MR. LEMEL: Nothing further, Your Honor.

17 THE COURT: The sentence on Indictment 2008-GS-46-3019
18 for Assault and Battery with Intent to Kill is twenty
19 years.

20 The sentence on Indictment 2008-GS-46-3020 for
21 Criminal Sexual Conduct in the First Degree is thirty years
22 and that sentence is imposed consecutive to the sentence on
23 the Assault and Battery with Intent to Kill.

24 The sentence on Indictment 2009-GS-46-3929 for
25 Kidnapping is thirty years. That sentence is consecutive

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1 to the sentence on the Assault and Battery with Intent to
2 Kill concurrent to the sentence on Criminal Sexual Conduct.

3 The sentence on Indictment 2009-GS-46-3928 for
4 Burglary in the First Degree is life.

5 Good luck to you, sir.

6 (DEFENDANT ESCORTED FROM COURTROOM.)

7 Ladies and Gentlemen, we all appreciate the hard week
8 of work that you have put in. We can't run our system
9 without the participation of attentive and hard working
10 jurors like you all have been this week. I am going to ask
11 you to step back into the jury room and I am going to come
12 back there and speak to you and I will excuse you from
13 there.

14 (JURY LEAVING COURTROOM AT 4:37 P.M..)

15 (COURT ADJOURNED DECEMBER 18, 2009 AT 4:38 P.M..)

16 ■ END OF TRANSCRIPT OF RECORD-

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STATE OF SOUTH CAROLINA)

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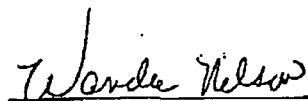
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COUNTY OF YORK)

I, WANDA NELSON, OFFICIAL COURT REPORTER, CERTIFIED VERBATIM REPORTER AND NOTARY PUBLIC, DO HERBY CERTIFY THE FOREGOING HEARING WAS HEARD AND TRANSCRIBED UNDER MY SUPERVISION AND THAT THE FOREGOING NINE HUNDRED (900) PAGES CONSTITUTE A VERBATIM TRANSCRIPTION OF THE PROCEEDING HEREIN.

I DO FUTHER CERTIFY THAT I AM NOT OF COUNSEL FOR OR IN THE EMPLOYMENT OF ANY OF THE PARTIES TO THIS ACTION, NOR DO I HAVE ANY INTEREST, FINANCIAL OR OTHERWISE, IN THE OUTCOME HEREOF.

IN WITNESS THEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME, THIS 5TH DAY OF MARCH, 2010.



WANDA NELSON
OFFICIAL COURT REPORTER
CERTIFIED VERBATIM REPORTER
AND NOTARY PUBLIC IN AND FOR
THE STATE OF SOUTH CAROLINA.

MY COMMISSION EXPIRES:
12/06/2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ADAM LEE BERARD,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to grant a directed verdict to the charge of criminal sexual conduct when the State failed to present any substantial evidence beyond a reasonable doubt of penetration?

STATEMENT OF THE CASE

Appellant was convicted of assault and battery with intent to kill (ABWIK), criminal sexual conduct in the first degree, kidnapping, and burglary in the first degree after a jury trial held before the Honorable John C. Few on December 14-18, 2009, in York County. Appellant was sentenced to twenty (20) years for ABWIK. He was sentenced to thirty (30) years for both criminal sexual conduct and kidnapping with those sentences running consecutive to ABWIK. A life sentence was imposed on the burglary conviction.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a directed verdict to the charge of criminal sexual conduct because the State failed to present any substantial evidence beyond a reasonable doubt of penetration.

Russell Berard, appellant's half-brother, testified that he saw the victim laying on her floor with appellant on top of her. The victim did not have any clothes on and he did not see appellant's pants. It looked like they were in a sexual position. (ROA p. 188, line 6 – p. 189, line 6)

Megan Hall was Russell Berard's girlfriend and was with him at the time. She too, said she saw appellant on top of the victim. Appellant had a shirt on and the victim had no clothes on. She also said appellant was on top of the victim in a sexual position. (ROA p. 233, line 11 – p. 234, line 6)

Angie Alexander, a sexual assault nurse examiner testified that she did not find any tears, redness, abrasions or bleeding to the victim's genitalia or to her rectum. (ROA p. 497, line 14 – p. 498, line 3)

Katie Coy, a SLED DNA analyst, testified that appellant was excluded as a contributor of semen found on the victim. (ROA p. 623, lines 11-24)

Finally, all the victim could say on the issue was that, "he was trying to have or he was having sex with me." (ROA p. 693, line 2)

After the State rested, defense counsel moved for a directed verdict to the criminal sexual conduct charge because the State failed to produce sufficient evidence of the element of penetration or an intrusion. The trial court denied the motion. (ROA p. 741, line 2 – p. 743, line 16). That ruling was in error.

Due process as guaranteed by the Fourteenth Amendment requires "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 2787 (1979).

Our Court has held:

[T]he trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced. [Emphasis added].

State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924, 926 (1955); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989), cert. denied, 493 U.S. 895, 110 S.Ct. 246 (1989).

In applying this standard, our Court has held that evidence which is "sufficient to raise a strong suspicion of the guilt of the accused" is not sufficient to constitute "any evidence from which the guilt of the accused may be fairly and logically deduced." State v. Totherow, 263 S.C. 275, 210 S.E.2d 228, 230 (1974). See also, State v. Turner, 117 S.C. 470, 109 S.E. 119, 120 (1921). The motion for a directed verdict should be granted, therefore, "where evidence merely raises a suspicion of guilt, or is such to permit the jury to merely conjecture or to speculate as to the accused's guilt." State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 677 (1976), citing State v. Matarazzo, 262 S.C. 662, 207 S.E.2d 93, cert. denied, 420 U.S. 945 (1974). "If the evidence is consistent with both innocence and guilt it cannot support a conviction." United States v. Varoz, 740 F.2d 772, 775 (10th Cir.

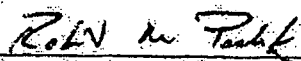
1984); United States v. Ortiz, 445 F.2d 1100, 1103 (10th Cir 1971). Guilt is only to be found when there is a "rationally supportable state of near certitude." Evans-Smith v. Taylor, 19 F.3d 899, 906 (4th Cir 1994).

In this case the State was required to prove that a sexual battery occurred. For that to occur there has to be an intrusion, however slight. S.C. Code §16-3-651(h). The State has failed to prove sufficient evidence of an intrusion or penetration beyond a reasonable doubt. They did not prove it even by a preponderance of the evidence. It was not incumbent upon the defense to prove a lack of penetration but for the State to prove that it did occur.

CONCLUSION

A directed verdict should be granted on the charge of criminal sexual conduct.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 2010.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ADAM LEE BERARD,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Adam Lee Berard states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge John C. Few, which was held on December 14-18, 2009, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Adam Lee Berard.

Respectfully submitted,

Robert M. Pachak
Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of August, 2010.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 16th, 2010



Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Few, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ADAM LEE BERARD,

APPELLANT

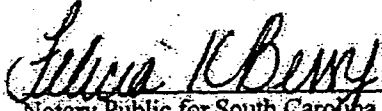
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Final Anders Brief of Appellant and Record on Appeal has been served on Adam Lee Berard, #310249 at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899; this 16th day of August, 2010.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of August, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Adam Lee Berard, Appellant.

Appeal From York County
John C. Few, Circuit Court Judge

Unpublished Opinion No. 2012-UP-320
Submitted May 1, 2012 – Filed May 30, 2012

APPEAL DISMISSED

Appellate Defender Robert M. Pachak, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, and Senior
Assistant Deputy Attorney General Salley W. Elliott,
all of Columbia; and Solicitor Kevin S. Brackett, of
York, for Respondent.

PER CURIAM: Adam Lee Berard appeals his convictions of first-degree criminal sexual conduct (CSC), assault and battery with intent to kill, burglary, and kidnapping, arguing the circuit court erred in denying his motions for a directed verdict on his first-degree CSC charge. After a thorough review of the record and counsel's brief pursuant to Anders v. California, 386 U.S. 738 (1967), and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's motion to be relieved.[1]

APPEAL DISMISSED.

PIEPER, KONDUROS, and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)

County of York)Adam Lee Berard #310749)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2010CP4605386
IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

2010 DEC 17 AM 11:22
OFFICE OF THE CLERK
COURT OF COMMON PLEAS
YORK COUNTY, SCINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick
2. Name and location of Court which imposed sentence York County Moss Justice Center
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) SC Code: 16-03-652 CDR: 160
 - (b) SC Code: 16-3-620 CDR: 014

(c) SC Code: 16-11-311 CDR:079 D. SC Code:16-03-910 CDR:0095

5. The date upon which sentence was imposed and the terms of the sentence:

(a) December 17, 2009

(b) See Attached

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty [Y]

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes, I filed for direct appeal, but it was denied.

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. Appealed from York County

ii. Denied

iii.

(b) the result in each such Court to which you appealed:

i.

ii.

iii.

(c) the date of each such result:

i.

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

Application for Post-Conviction Relief - Adam Lee Berard # 310249

- 5.B. Appellant was sentenced to twenty (20) years for ABWIK. He was sentenced to thirty (30) years for both criminal sexual conduct and kidnapping with those sentences running consecutive to ABWIK. A life sentence was imposed on the burglary conviction.
- 10 A. Ineffective Counsel by not investigating defensive scenarios and preparing a strong investigative defense, and failed to defeat and remove the erroneous Add-On charges of: Kidnapping, Burglary, and Criminal Sexual Conduct.
- B. Mr. Berard had an open invitation like any grandson to visit his grandmother, thus kidnapping could not have occurred.
- C. Burglary was not possible because Mrs. Moss invited Mr. Berard over for dinner as she often did.
- D. Lemel failed to challenge the erroneous assault charge.
- E. Lemel made a serious mistake by introducing previous charges to the jury. Lemel admitted his mistake to Mr. Berard and the judge admonished Lemel for his error in judgement.
- 11 A. The state's witnesses including the Medical Examiner and SLED's DNA Analyst testified there was no evidence of sexual rape / penetration occurred vaginally or anally by Mr. Berard.
- B. Mr. Berard was invited daily, and on this occasion, asked over for dinner, and made no attempt to kidnap his beloved Grandmother, Loretta Moss. The state failed to provide any evidence of plans, intentions, or kidnapping paraphernalia by Mr. Berard for committing the act of kidnapping.
- C. Mr. Berard arrived with Mrs. Moss waiting for him, and they sat down on the patio. He did not have any burglary tools, no duffel bags, and no plans of burglary. The state had no evidence of burglary, no witnesses, and there were no reports of any items missing by Mrs. Moss.
- D. The state provided no witnesses, but only a possible scenario of the assault. An unconscious Mrs. Moss had no recollection of any assault occurring. Mrs. Moss only repeated what her grandson Russ and his girlfriend Megan told her, though neither were present during the accident.
- E. The Trial Transcripts states the judge warned in lengthy conversation not to open the door of Mr. Berard's previous charges that would prejudice the jury. However, Mr. Lemel admitted his mistakes in his examination of Mr. Berard on the witness stand.

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attached _____
- (b) See Attached _____
- (c) See Attached _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached _____
- (b) See Attached _____
- (c) See Attached _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____
 (b) _____
 (c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Gary Lemel - Moss Justice Center, York SC 29745
John Cummings - Moss Justice Center York SC 29745
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. _____
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:
See Attached

20. Are you now under sentence from any other court that you have not challenged?
No

Note: See additional document "Comments on Initial Anders Brief of Appellant Prepared by Robert M. Pachak, Appellate Defender"

STATE OF SOUTH CAROLINA)

County of: _____)

VERIFICATION

I, Adam Berard, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Adam Berard

SWORN to and subscribed before me this 13
 day of March, 2010

Jay L. Young (L.S.)
 Notary Public

My Commission Expires: 8-28-2011

Application for Post-Conviction Relief - Adam Lee Berard #110249

19. The removal of Add-On charges of Kidnapping, CSC1st, Burglary and the sentences imposed and expunged from all records. The removal of the assault charge and the sentences imposed and expunged from all records.

Comments on Initial Anders Brief of Appellant Prepared by Robert M. Pachak, Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia SC 29211-1589
(803) 734-1343

Quote

After the State rested, defense counsel moved for a directed verdict to the criminal sexual conduct charge because the State failed to produce sufficient evidence of the element of penetration or an intrusion. The trial court denied the motion. That ruling was an error.

In this case the State was required to prove that a sexual battery occurred. For that to occur there has to be an intrusion, however, slight. The State has failed to prove sufficient evidence of an intrusion or penetration beyond a reasonable doubt. They did not prove it even by a preponderance of the evidence. It was not incumbent upon the defense to prove a lack of penetration but for the State to prove that it did occur.

A directed verdict should be granted on the charge of Criminal Sexual Conduct.

Unquote

Citing State v. Matarazzo, "If the evidence is consistent with both innocence and guilt it cannot support a conviction."

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Adam Lee Berard, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Adam Berard
Applicant

SWORN or affirmed to and subscribed before me this
13 day of Dec, 2010

Joseph L. Young
Notary Public

My Commission Expires: 8-28-2011

A.I Adam's Recollection of the Incident

A II Case Mistakes

1. No drug and Alcohol testing to Mrs. Moss and Adam Bernard.
2. Failed to fingerprint beer cans inside the house.
3. Failed to note that victim was also drinking on top of daily medication.
4. Russell disturbed the crime scene - High Animosity between Russ/Adam.
5. State took short route, and refused other scenarios, ignored exclusion of attempted rape.
6. Medical Examiner - SLED Experts exclude rape from/of victim, no samples from Adam.
7. Adam seeks new counsel - Denied by court.
8. Counsel Failed to challenge or failed to prepare a defense to these erroneous charges.
9. Defense Counsel failed to dispute, negate and dismiss misleading evidence.
10. Adam's bedroom - Misleading evidence.
11. Random blue boxers.
12. Hatchet from Debbie Miller's house (Not all related to case).

A III Summary of Charges

1. CSE 1st
2. Kidnapping
3. ABWIK
4. Burglary

A IV Trial Contradictions

1. States testimony - review sexual assault kit.
2. DNA Analysis on rape kit.
3. States Evidence exonerated Adam of rape.
4. Charge of rape should've been removed. Charge heavily prejudiced the jury for the entire case.

Adam's Recollection of The Incident

On the afternoon of the incident, I took five Xanax's as I was leaving work, and then stopped and bought an 18 pack of beer on the way home.

Later in the evening, I bought another 12 pack of beer. I turned on the stereo, I changed clothes, and I drank two pints of liquor. Later I went to the refrigerator, retrieved 3 to 5 cans of beer, and went next door for dinner as planned at nana's house. (Known also as my Grandmother.)

Over the course of the evening, I drank 23 to 25 beers, and nana drank 4 to 5 beers. Nana was on medication, and the beers she drank may have affected her more quickly, including both her balance and memory.

I went to and from my house several times during the course of the evening to retrieve more beer from the refrigerator. Nana decided not to cook steaks as planned. She offered frozen oven pizza, but I decided to pass for now.

We sat down on the patio to drink and talk. Nana asked me for a beer, which she drank rather quickly.

Evidence shows an empty beer can in the kitchen and several empty beer cans in the bedroom. Several times I

Went back to my house for more beer and she may have drank the additional beers while I was gone, or she may have drank the beer when she took a break in our conversation to take a shower while I went to the store to buy more beer.

Later after I returned we continued talking on the patio while I was Texting and playing a game on my cell phone. We continued to drink during our conversations. Later when it was time to go home, as usual, we stood and hugged, and she gave me a quick kiss. I was closer to nana than any other relatives, I know nana loved me, and I loved her as much as any grandson could.

After the hug, Nana turned to unplug the beam box, and I instantly noted several flying bats that were known to fly around the patio. I reached for a small stick, about 18" inches in length, I cut for my mom's birdcage and left on the deck. I raised the stick to protect nana and myself from the flying bats. I reared back to swing at the bats while still intoxicated and swung one-handed.

When a baseball player swings and hits a ball, the bats momentum stops. However, if he misses, the bat continues to swing rapidly, almost out of control. Unfortunately, I missed the flying bats, and as the stick flew through

the air it accidentally tapped nana on the neck.

If I had meant to knock her unconscious, I would have moved closer to nana and struck her on the head.

With my back to nana, however, and the swing now out of control, I barely caught her with the end of the stick.

The glancing blow did not break the skin or produce any blood as testified by the states forensic experts.

Due to nana's drinking and perhaps her medication, the surprise blow easily caused her to lose her balance and fall. She hit the door as she fell, perhaps losing control of her dentures, and cut her hand and arm as there was blood on the door area. As her body fell into a heap, it most likely caused numerous bruises to her head and torso.

Drunk and in a stupor, I couldn't process what happened nor what I should do. I tried to help by carrying her, but too weak to lift her.

I tried to pull her with my hands under her arms, but they were too limp giving me nothing to hold on too. My attempts may have caused additional bruises.

Frantic and desperate to help nana, I reluctantly dragged her feet first into the house, because in the position she fell, I did not have to turn her around. Her head may

have bounced once over the door jamb, her arms may have touched the door area with some blood, or her arms may have been cut by something sharp like a loose screw.

I did not inflict any cuts to my grandmother, and the state produced no evidence too the contrary.

As I pulled her across the floor, the floor rug began to roll up as testified by one of the lead detectives. The friction from the floor also rolled nana's shirt upwards.

I did not attempt to straighten her shirt as I was far more worried about the loss of blood from the wound on her left arm. Dizzy from Alcohol, I knelt beside her on one knee and put both hands around the wound to stop the bleeding.

When that failed I went to the sink, washed the blood from my hands while trying to think of a way to stop the bleeding. Nana remained unconscious. I never moved her from the kitchen floor. I again knelt down on one knee at my grandmother's side.

Nana is the only woman in my life that I truly trusted and loved. To see her hurt, shocked me, but do to the alcohol and pills, I was unable to help, and felt frantic with fear.

My brother Russ suddenly appeared and saw me kneeling on one knee at nana's left side while trying to stop the flow of blood.

He had been talking on the phone while walking to the house with his girlfriend Megan. Megan remained outside with nana out of her view sight. As Russ walked up to me, he noted nana's shirt had rolled up from my pulling her across the floor, and having hated me for years, he immediately jumped to an incorrect assumption. He began yelling and falsely accusing me of rape, though nothing like this had happened. His comments absolutely stunned me to the core. He said, "Adam, What the fuck are you doing?" I stood up in shock with with no idea what I should do.

Russell failed to note that I remained on one knee on nana's left side, my hands wrapped around her wound, and thus in no position to attempt to rape my beloved grandmother.

Russ may have assumed I was intoxicated just as I would have assumed that he was high on marijuana as usual. I decided that Russ could help my grandmother and still in shock, I decided to go next door to my house.

Megan did not enter the house, but having heard her boyfriend's accusations, she believed Russ and followed.

the tale of rape even though I was knelt on one knee at nana's left side trying to stop the bleeding.

So from Megan's position outside the house it was impossible for her to see my position beside nana, with my hands holding the wound.

With Russ and Megan accusing me, though I remained in a stupor, I felt outnumbered, and walked home to avoid confrontation with them.

During this entire event my clothes had remained on, I had no erection, and having consumed almost 25 beers, 2 pints of liquor, and 5 Xanax pills, it is not likely that I could have achieved an erection or performed any sexual act. I most certainly would not have attempted to rape my beloved grandmother.

By moving nana, Russ took a huge risk in adding additional injury to nana's back or neck, causing further bruising or damage, as well as he disturbed the scene from the investigation that would have undoubtedly exonerated me.

Nana began to finally awake, heard Russ's wild accusation of rape, and only hearing Russ's tale, she might have thought something bad had happened to her.

Russ did not know that nana had also drank 4 to 5 beers as well.

Russ assumed incorrectly that she was hurting and assumed the bruises were the result of her having been raped, when in fact, the soreness, bruises, bump on the head, pain, and blood resulted from the accident on the deck when I missed the flying bats and tapped nana on the neck, resulting in her fall.

At no time during my visit with nana did I attempt to assault, kidnap, rape or burglarize.

I am completely innocent of all charges.

Summaries of Charges

Burglary

At Least 8 months later, the prosecutor abruptly added a charge of Burglary.

Burglary by exact definition means, "The act of Breaking an Entering a dwelling at night to commit a felony as theft."

I live next door to my nana's house and she gave me permission to come and go to her house anytime she was home. I had been following this instruction for over 5 months. I also arranged for the home monitoring company for zone coverage so I could continue visiting nana's house.

On the day of the Incident, I had been invited to nana's house to cook out steaks. I had no motive or intention of burglary, nor brought any burglary tools or duffal bags, but rather carried only a few beers to drink as I went to nana's house.

Nana welcomed me with open arms as usual, and we sat on the deck for hours drinking, texting on my cell phone, and playing cell phone games.

A charge of Burglary in no way fits the definition of

Burglary, and there was no evidence from the investigators indicating anything had been stolen, nor any ransacking of the house, nor any items stacked up for removal, and nothing was found in my pockets that belonged to Nana.

The Charge of Burglary should be dismissed, and the life sentence removed.

Kidnapping

At least 8 months later, the prosecutor abruptly added a charge of Kidnapping. Kidnapping by exact definition, "To seize and detain or carry away by unlawful force or fraud, and often for a demand for ransom."

Due to my sincere love for Nana and her love for me, I would never have imagined or entertained any suggestion of Kidnapping or harming my grandmother.

Adam in no way demonstrated any intent or preparation for Kidnapping his beloved grandmother. He neither purchased nor brought any binding materials, nor vocal gags, nor chloroform, Etc., to Nana house. He also had no means of removing a kidnapped victim as his transportation was a single-seated Moped.

There was also no accomplices, no planned destination, no Kidnap note with demands, and no request for ransom.

The accused stayed on one knee beside his nana with both hands attempting to stop the bleeding from the accidental wound on her left arm, and help his grandmother in any way that he could.

Therefore a planned or action of kidnapping did not occur and the charge of kidnapping and a sentence of thirty (30) years is fallacious and should be immediately dismissed.

The prosecutor added this charge and two (2) other unfair charges of Burglary and CSC^{1st} to attempt to strengthen an already weakened charge of ABWIS that was actually an accident.

CSC^{1st}

At least 8 months later, the prosecutor abruptly added a charge of CSC^{1st}.

Rape by exact definition is, "sexual intercourse with a woman by a man without her consent and chiefly by force or deception.

The prosecutor added this charge and in an attempt to smear Adam's credibility in the eyes of the jury, when in fact, there was no evidence to support such a charge.

After nana fell, though intoxicated, Adam sought only to help stop the blood loss from his grandmother's left arm. He accomplished this by kneeling down on one knee on her left side and grasping

the wound with both hands. He elevated her arm slowing the blood loss.

Adam continued too be fully clothed in a T-shirt, and his camouflaged long-legged shorts entirely covered his dark pine green boxer briefs, throughout the evening.

Upon arrival, Russ assumed incorrectly that nana displayed bruises as if she had been beaten or raped when in fact the soreness, bruises, pain and blood resulted from the accident on the deck.

The State presented to technical witnesses to determine if a rape or penetration occurred. At the hospital a sexual assault kit was used to gather evidence from the victim. The following was collected from Adam and nana: DNA, hair samples, pubic hair combing while looking for pubic hair from the accused, and vaginal and rectal swabs were done while looking for Semen and DNA.

The Inspectors failed to collect and examine Nana's panties that would have excluded Adam as an assailant.

The examiner confirmed upon inspection that she did not find any tears, redness, bruises or abrasions or bleeding to Mrs. Mass's Vagina or rectum.

After examining for semen she did not find any trace of any semen from Adam.

The states Forensic DNA Analyst examined the samples and swabs and found no semen or DNA Samples from Adam. The witness concluded that was excluded and exonerated as an assailant.

The test confirmed however that a DNA sample from a drop of semen belong to a Mr. Robert Louder in Mrs. Moss's vagina.

In conclusion, based on the information from the states expert Witnesses, Adam was exonerated from rape via penetration Vaginally or rectally from all samples collected from the rape kit.

He was also cleared from any attempt of rape due to the lack of evidence such as scratches or tears.

Therefore the erroneous charge should have not been implied and must be removed. The Solicitor did this in order to address a previous charge to heavily prejudice a jury for the entire case giving the impression that the accused was a repeat offender.

This gave the jury a negative impression that a grandson had raped his beloved grandmother as if the accused was a monster.

This was entirely false, misleading, and completely damaged Adam's character.

Assault on Battery with Intent to Kill

The Solicitor made a charge of Assault with Intent to Kill based on hearsay by Russell Berard and Megan Hall who were not there when the accident occurred.

The victim could not have seen the accidental hit, fell unconscious, and thus had no recollection of how Adam helped her into the house and knelt on one knee beside her and kept both hands clasp around the wound to help her.

Though unconscious the entire time, during testimony Nana only repeated what Russ had ~~speculated~~ speculated, frightening her, and not actually what happened.

Highly intoxicated with beer, liquor and five xanexs, Adam stood, gave his grandmother a hug and kiss as usual, then noting flying bats over-head, A common event, he picked up a stick lying on the deck and swung at the bats.

Unfortunately, he missed the bats and tapped nana on the back of the neck. Instantly, she fell to the deck in a heap causing additional bruises, and then Adam went immediately into recovery-mode to help his grandmother.

The Solicitor and Adam's Defense Attorney failed to fully investigate the accident. Instead they based the case and this charge on the testimony of an unconscious victim and two people who were not actually there and could not have witnessed the accident.

A true assailant probably would have repeatedly swung an object at his victim ensuring her unconsciousness so that he could further violate them. However, Adam's accidental tap, according to the states investigators, did not even break the skin. The charge of Assault with Intent to Kill was and is a fallacious claim by the Solicitor for a swing and a miss resulting in an accidental tap to his beloved grandmother.

Despite repeated warnings by the ~~the~~ Judge to Adam's defense attorney suggesting that Adam not take the stand, but to abruptly plead guilty to ABWIK. Lemel indicated that perhaps the jury would then find him not guilty of Burglary, Kidnapping and rape. The Judge also warned Lemel to be careful in his examination of Adam's testimony to avoid opening prejudicial prior offenses. However, Lemel did open the door so the Solicitor could pounce on his mistakes, sacrificing Adam's innocence and his life. This mistake and others lead to a conviction of all four charges.

- 1.) The investigation failed to test Adam and Mrs. Moss for drugs and their blood Alcohol Levels and consumption.
- 2.) They failed to fingerprint the beer cans found in the house too identify that they were in fact consumed by Mrs. Moss. All the beer cans that Adam drank were either left sitting on the patio table or habitually crushed and tossed over the rail.
- 3.) They failed to take note that the victim was in fact drinking as well and possibly affected by her daily prescribed medication that would have contributed to her fall, injuries, wounds, and bruises.
- 4.) The crime scene had been destroyed by Russ, that would have hindered a thorough and complete investigation, that would have undoubtedly and immediately exonerated Adam of this crime. The investigators failed to note the animosity that Russ and his girlfriend Megan held for Adam. The state used them as their prime witnesses even though they were not there during the accident, after arriving later they had been left alone contaminating evidence and putting their stories together including the accusation of rape. Upon waking from unconsciousness Russ told Mrs. Moss what he felt had happened, even though he was not there to witness the accident, However, Mrs. Moss took his tale and made it her own, including events that occurred while unconscious.

- 5.) The state took the short Route and piled all their ammunition on a young man with no family support and weak counsel to defend himself. They refused to look at any other possible scenarios and conclusions for this accident. In spite of their own evidence via Forensics and Medical examinations that had excluded Adam, They still charged him with rape. Despite no evidence of Burglary, Kidnapping, or pre-meditated assault, they charged Adam.
- 6.) Once Adam realized that his court appointed legal counsel was not going to challenge, dispute, or negate the absurd accusations and charges of Assault, Kidnapping, rape and Burglary He was forced to ask for the right to obtain adequate counseling in order to obtain his constitutional right of a fair and unbiased trial.
- 7.) When Judge Alfred denied proper counsel that ended all chances of Adam receiving and in depth, challenging, and progressive defense of the false charges placed on Adam.
- 8.) The Prosecution began a tenacious attack on Adam's character to destroy his credibility and reputation with numerous pieces of so-called evidence and false statements. However, defense counsel did not adequately dispute, dismiss, and negate these misleading pieces of evidence and poor testimony.
- 9.) After the investigators went to Adam's house, They looked at over 15 shirts in the room and instead of retrieving actual evidence, they chose an Anti-establishment shirt and turned it in as evidence even though the shirt had not been ^{worn} ~~used~~.

during the incident nor in the preceding weeks. The States Three Witnesses did not describe this shirt as having been worn by Adam on the day of the incident.

- 10.) Because Megan Hall did not enter the house, she could not see Adam on one knee beside his grandmother with his hands over the wound. However, her statement and Testimony asserted that Adam was wearing blue boxer briefs. This was completely false because Adam was fully clothed and wearing long-legged Camouflage shorts. Adam was actually wearing dark Pine green boxer briefs. The investigators took photos in Adam's room and randomly removed one pair of ~~the~~ numerous and placed them in evidence as if they'd been worn during the incident.

The defense Counsel failed to bar these random blue boxers from evidence presented at trial. Using Adam's actual clothes worn during the accident, the states investigators and Analyst failed to find any blood splatters commonly found in a brutal Assault because no such assault occurred. Defense Counsel failed to point out this important fact as Adam's clothes were ~~not~~ entered into evidence.

- 11.) Investigators removed a completely unrelated small hatchet from Debbie Millers house that Adam had bought so she could build small campfires next to her house. The hatchet never left the house. There was no evidence at Mrs. Moss's house that the hatchet was ever there. It was entered into evidence as if relating to the crime, when in fact, it was no more relevant than Debbie's

Kitchen knives or scissors. Defense Counsel never challenged or insisted that fingerprint analysis be done on the hatchet, that would have shown Debbie's fingerprints over Adam's, excluding the hatchet as evidence exonerating Adam.

To continue to smear Adam, the prosecutor changed the type of implement from a small hatchet to an Axe in his description. This fictitious was used by the prosecutor to prejudice the jury and court against Adam. Defense Counsel objected as the hatchet had no relevance to the case whatsoever, however, the Judge quickly over-ruled in the prosecutor's favor which made Adam appear in the jury's eyes as if he were an Axe-murderer.

- 12) Though repeatedly warned by the Judge, the defense Counsel failed to properly prepare Adam's testimony and then made a mistake in his own examination, opened the door to a prior sex offense charge. The Solicitor used this mistake to imply that Adam was a serial-rapist.

Trial Contradictions

1) At the hospital, a sexual assault kit was used to gather evidence from the victim. This was administered by Angela Denise Alexander, the states expert witness.

The following was collected from Adam and Mrs. Moss: DNA, hair samples, and pubic hair ~~to~~ Combing in search of a pubic hair from an assailant. Vaginal and rectal swabs were done while looking for semen or DNA. However, they failed to collect and examine the victim's panties that would have excluded Adam as an assailant. Mrs. Alexander testified that she did not find any evidence of rape, vaginally or rectally, including tears, redness, abrasions or bleeding. After examining for semen, she did not find any trace of semen from Adam.

2) Katie Coy, the states witness as a Forensic DNA Analyst for SLED, examined the samples and swabs from the administered rape kit. She also found no semen samples from Adam. She then compared cheek swabs from Adam. ~~and~~ and compared them to the vaginal and rectal smears and swabs obtained from Mrs. Moss. Her results were that Adam Berard was excluded as a contributor, and therefore not a perpetrator or a rapist. However, she found a DNA sample that matched Mrs. Moss's husband, "Robert Lowder", indicating Mr. Lowder as the last person to have sex with Mrs. Moss prior to the medical examination and the collection of swabs and samples.

3) Based on the information the state's expert witnesses, Adam was exonerated from rape or attempted rape via penetration vaginally or rectally, from all samples collected

4) Therefore the fallacious charge of rape should not have been implied and must be removed. This fictitious charge heavily prejudice the jury by implying that if Adam was a rapist, then he must have committed assault, kidnapping, and Burglary.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Adam Lee Berard, #310249,

2010-CP-46-5386

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

FILED-RECEIVED
2012 JUL 23 AM 11:21
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

The Respondent, making its return to the application for post-conviction relief filed December 17, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. The Applicant was indicted at the August 2008 term of the York County Grand Jury for Assault and Battery with Intent to Kill (ABWIK) and Criminal Sexual Conduct (CSC), 1st degree (2008-GS-46-3020). He was also indicted at the September 2009 term of the York County Grand Jury for Kidnapping (2009-GS-46-3928) and Burglary, 1st degree (2009-GS-46-3929). Gary Lemel, Esquire, represented the Applicant. From December 14-18, 2009, the Applicant proceeded to trial and was convicted as indicted. The Honorable John C. Few sentenced him to confinement for twenty (20) years for ABWIK, thirty (30) years, consecutive, for CSC, 1st degree, thirty (30) years,

consecutive to the ABWIK conviction but concurrent with the CSC conviction, for Kidnapping and life for Burglary, 1st degree.

The Applicant filed a timely Notice of Appeal with the South Carolina Court of Appeals. An Anders brief was submitted on his behalf. The South Carolina Court of Appeals affirmed his conviction and sentence. State v. Berard, Op. No. 12-UP-320 (S.C. Ct. App. Filed May 30, 2012). The Remittitur was sent on June 20, 2012.

Attached herewith and incorporated herein are the records of the York County Clerk of Court regarding the subject conviction(s) and the Applicant's records from the South Carolina Department of Corrections, and Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Counsel by not investigating defensive scenarios, ad preparing a strong investigative defense, and failed to defeat and remove the erroneous add-on charges of: Kidnapping, Burglary, and Criminal Sexual Conduct."
 - a. "The State's witnesses including the Medical Examiner and SLED's DNA Analyst testified there was no evidence of sexual rap/penetration occurred vaginally or anally by Mr. Berard"
2. "Mr. Berard had an open invitation like any grandson to visit his grandmother, thus kidnapping could not have occurred"
 - a. "Mr. Berard was invited daily, and on this occasion, asked over for dinner, and made no attempt to kidnap his beloved Grandmother, Loretta Moss. The State failed to provide any

- evidence of plans, intentions, or kidnapping paraphernalia by Mr. Berard for committing the act of kidnapping."
3. "Burglary was not possible because Mrs. Moss invited Mr. Berard over for dinner and she often did."
 - a. "Mr. Berard arrived with Mrs. Moss waiting for him, and they sat down on the patio. He did not have any burglary tools, no duffel bags, and no plans of burglary. The State has no evidence of burglary, no witnesses, and there were no reports of any items missing by Mrs. Moss."
 4. "Lemel failed to challenge erroneous assault charge."
 - a. "The State provided no witnesses, but only a possible scenario of the assault. An unconscious Mrs. Moss had no recollection of any assault occurring. Mrs. Moss only repeated what her grandson Russ and his girlfriend Megan told her though neither were present during the accident."
 5. "Lemel made a serious mistake by introducing previous charges to the jury. Lemel admitted his mistake to Mr. Berard and the judge admonished Lemel for his error of judgment."
 - a. "The Trial Transcripts(sic) states the judge warned in lengthy conversation not to open the door of Mr. Berard's previous charges that would prejudice the jury. However, Mr. Lemel admitted his [mistakes] in his examination of Mr. Berard on the witness stand."

Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. S.C. Code §17-27-50. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

For purposes of this Return, Respondent interprets Applicant's allegations 1, 4 and 5 to be allegations of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for

counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial.

Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent submits Applicant's allegation 2 & 3 raise direct appeal issues that are procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues on appeal. His failure to do so has waived these allegations as grounds for relief. Therefore, the Court should summarily dismiss these allegations.

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held on Applicant's allegations.

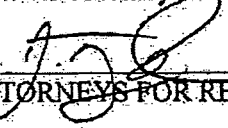
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

July 19, 2012.

FILED-RECEIVED

2012 JUL 23 AM 11:22

STATE OF SOUTH CAROLINA

COUNTY OF YORK

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS

2010-CP-46-5386

ADAM L. BERARD, 310249

Applicant,

vs.

AFFIDAVIT OF SERVICE BY MAIL

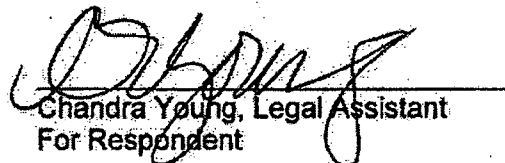
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jennifer Ash, Esquire
141 Oakland Ave.
Rock Hill, South Carolina 29730

DATED this 19th day of July, 2012.


Chandra Young, Legal Assistant
For Respondent

State of South Carolina.,) In the Common Pleas
) Court of York
)
) Case No. 2010-CP-46-05386
 County of York.)

Adam Lee Berard.,)
)
 Applicant.,)
)
 -vs-) Transcript of Record
)
 State of South Carolina.,)
)
 Respondent.)

May 17, 2013
 York, South Carolina

B E F O R E:

Honorable John C. Hayes, III, Judge.

A P P E A R A N C E S:

Ms. Jennifer Creech
 Law Office of Jennifer M. Ash, LLC
 514 Oakland Avenue, Suite 100
 Rock Hill, South Carolina 29730-3532
 803-327-3300
 803-327-3399
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 For the Applicant

ORIGINAL

Mr. J. Rutledge Johnson
 Assistant Attorney General
 State of South Carolina
 Attorney General's Office
 Rembert C. Dennis Building
 Post Office Box 11549
 Columbia, South Carolina 29211-1549
 803-734-3970
 For the Respondent

Wanda Nelson, CVR-M
 Official Court Reporter
 Sixteenth Judicial Circuit
 To the Honorable John C. Hayes, III

I-N-D-E-XE-X-A-M-I-N-A-T-I-O-N

	<u>WITNESS</u>	<u>BY:</u>	<u>PAGE NO.</u>
1			
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3			
4	Gary Lemel	Ms. Creech	P.6-18
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7		Mr. Johnson	P.18-26
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10	Adam Berard	Ms. Creech	P.34-39
11		Mr. Johnson	P.40-43
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E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>

No Exhibits were received into the record.

Court Reporter's Certificate Page P.51

1 (COURT IN SESSION IN THE MATTER OF ADAM LEE BERARD
2 VERSUS STATE OF SOUTH CAROLINA FRIDAY, MAY 17, 2013 AT
3 10:05 A.M..)

4 (WHITE MALE ENTERING COURTROOM FROM HOLDING CELL.)

5 THE COURT: Do you want to let the State introduce
6 where we are with this?

7 MR. JOHNSON: Yes, Your Honor. May it please the
8 court, Your Honor.

9 This is the case of Adam Barard versus State of South
10 Carolina. It's case number 2010-CP-46-5386. Mr. Barard
11 was indicted at the August 2008 term of the York County
12 Grand Jury for assault and battery with intent to kill and
13 criminal sexual conduct, first degree. He was also
14 indicted at the September 2009 term of the York County
15 Grand Jury for kidnaping and burglary in the first degree.

16 From December 14th through the 18th, 2009 he proceeded
17 to trial pursuant to which he was convicted of all counts
18 as indicted. The Honorable John C. Few sentenced him to
19 confinement for twenty years for ABWIK; thirty years
20 consecutive for the criminal sexual conduct first degree,
21 thirty years consecutive to the ABWIK conviction but
22 concurrent with the CSC conviction for kidnaping and life
23 for the burglary first degree.

24 He filed a Notice of Appeal with the South Carolina
25 Court of Appeals. An Anders Brief was submitted on his

-5-

1 behalf. The South Carolina Court of Appeals affirmed his
2 conviction. The remitter was sent on June the 20th, 2012.
3 He actually filed this December 17th, 2010 while his direct
4 appeal was pending. The state filed it's return July 19th,
5 2012, and he is represented here today by Ms. Jen Creech.

6 THE COURT: Do you want to tell me ---

7 MS. CREECH: Good morning, sir.

8 THE COURT: --- what issues I'm looking to - He's got
9 a laundry list here fairly lengthily.

10 MS. CREECH: Yes, sir.

11 THE COURT: What...

12 MS. CREECH: What specifically can we narrow it down
13 to?

14 THE COURT: Right, so I'll know what I'm listening
15 for.

16 MS. CREECH: Well, first we're going to call Mr. Lemel
17 I think to address what really actually seems to be the
18 biggest issue which was during the testimony of Mr. Barard,
19 previously Judge Few had ruled that evidence of his prior
20 convictions would not be brought in; found that it would be
21 too prejudicial and he wasn't going to allow it in.

22 During his testimony, that door was opened basically,
23 and as a result, the state was allowed to bring in evidence
24 of his prior convictions. On so on that basis we believe
25 that letting those in was more prejudicial than helpful in

GARY LEMEL: BY MS. CREECH

-6-

1 the case, and for that reason should be allowed to have his
2 PCR, his Post Conviction granted.

3 In addition to that, Mr. Berard will testify about his
4 concerns with his testimony, his decision to testify and
5 why he made that decision. His concerns about counsel; his
6 request to have counsel relieved at one point during the
7 proceedings and that being denied. And in addition to his
8 admitting to the ABWIK during - the assault and battery
9 with intent to kill during his testimony and why he made
10 that admission and his concerns about what led up to that.

11 Those are the issues that we're going to focus on,
12 Your Honor.

13 THE COURT: All right. Call your first witness.

14 MS. CREECH: I call Gary Lemel, Your Honor.

15 MADAME CLERK: Mr. Lemel, if I can have you place your
16 left on the Bible and raise your right.

17 (WHEREUPON: GARY LEMEL,
18 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:

19 DIRECT EXAMINATION

20 GARY LEMEL BY MS. CREECH:

21 Q. Mr. Lemel, you were appointed to represent Adam Berard
22 in his state trial; is that correct?

23 A. Correct.

24 Q. And was that the first time you represented Mr.
25 Berard?

GARY LEMEL: BY MS. CREECH

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1 A. No. I'd represented him on a previous charge that
2 ultimately I believe he ended up pleading to ABHAN and I
3 believe that's why he was actually on the GPS monitor at
4 the time this incident took place.

5 Q. In addition to the ABHAN, did he have other
6 convictions?

7 A. He did. He had a prior conviction from Ohio that was
8 fairly similar to the first case that I represented him on
9 but not really similar to the case that we're here on today
10 if that makes any sense.

11 Q. And what was the conviction? What was he convicted of
12 in Ohio?

13 A. I do not know what the exact offense was. It was
14 sexually related. Basically, as I recall, it involved an
15 allegation that he had forcibly involved himself with oral
16 sex with a female but I don't remember what the exact Ohio
17 conviction was, what they called it.

18 Q. During his trial, did you request that the evidence
19 of his prior convictions be kept out?

20 A. Yes. As part of the pretrial motions in limine that I
21 filed, one of the things that we always address is to what
22 extent will the State be able to introduce evidence of
23 prior convictions because of course that's very
24 significant, particularly any case where the allegations
25 are similar to what the prior convictions are.

1 In my opinion I think juries weigh that very heavily
2 against defendants when they find out that they have prior
3 convictions. And so even though it's only suppose to be
4 used for impeachment purposes, the reality is it can be
5 very, very harmful. So as standard practice in all cases,
6 one of my motions was to define what could be used and how
7 it would be used by the State in terms of prior
8 convictions.

9 Q. And what was Judge Few's ruling on that?

10 A. At the pretrial stage Judge Few did rule that the sex
11 offenses, the prior offenses from Ohio, and I believe the
12 South Carolina offense, would not be introduced by the
13 State if he chose to testify.

14 It was a preliminary ruling and there was still some
15 question about whether he would allow any inquiry as to,
16 you know, as opposed to saying a specific type of offense,
17 just that he was convicted of a felony or a misdemeanor,
18 something like that. But in general those particular
19 offenses were not to be used by the State as part of their
20 cross examination. They were excluded.

21 Q. Prior to going on the record today, did I hand you a
22 copy of the transcript from Mr. Berard's trial?

23 A. Yes.

24 Q. And could you go to Page 752?

25 A. Yes, ma'am.

GARY LEMEL: BY MS. CREECH

-9-

1 Q. To Line 13.

2 A. Yes, ma'am.

3 Q. From Line 13 to 22, could you read that for me?

4 A. It says - This is Judge Few when he says, "I think
5 that I'm pretty sure that I'm going to exclude the sex
6 offense. Here's why. I have no idea - If you were to
7 testify I have no idea of what he is going to say so that
8 makes it difficult frankly to rule on. That makes it
9 difficult to evaluate the approbative value of the
10 convictions because if he just gets up on the stand, you
11 know, if there is some elaborate explanation as to how this
12 all happened and he is completely innocent, then the
13 convictions assume a significantly greater approbative
14 value than if he gets on the stand and just doesn't go that
15 far."

16 Q. And when Mr. Berard testified, what happened during
17 his testimony with respect to those prior convictions?

18 A. Judge Few ultimately ruled that we opened the door to
19 those prior convictions.

20 Q. What part of Mr. Barard's testimony did Judge Few rely
21 upon for saying that the door had been opened?

22 A. Essentially, Judge Few, and I don't have that exact
23 part of the transcript with me, but essentially Judge Few
24 focused on the fact that at some point in time I asked or
25 the answer to the question I asked, I asked a bad question

1 and the answer was I would not do that or I asked the
2 question in the form of would you do that to your
3 grandmother, was essentially what it came down to as
4 opposed to saying for example, did you do that to your
5 grandmother. Because I used the word would or the word
6 would was used in the answer, Judge Few ruled that that was
7 the introduction of a character element and therefore
8 opened the door to the priors.

9 Q. Did I also hand you Page 787 of the transcript?

10 A. Yes.

11 Q. Would you mind reading from Page 11 on - I'm sorry,
12 Line 11 on Page 787 to Line 7 on Page 788.

13 A. Line 11 or Line 10?

14 Q. Line 10. I apologize.

15 A. When Judge Few was making it known very significantly
16 that he felt that I had messed up, he asked me if I had any
17 argument and my response to it was arguing about the
18 prejudicial value, that I said "it was an incidental
19 comment that was basically the result of my improper
20 question." Incidental comment I think referring to what
21 Adam said and improper question being my improper question.
22 So it was an incidental comment that was basically the
23 result of my improper question.

24 I should have said "did you" as opposed to "would
25 you." That's my fault, Your Honor and the court responded

GARY LEMEL: BY MS. CREECH

-11-

1 basically cutting me off, "before you finish your argument,
2 let me say this. It's not just that. We're not talking
3 just about that one question and that one answer because
4 when you asked him, you ask him questions about what
5 happened he admitted something and he denied something.

6 And when it came to those and not made in others but
7 those times when you asked him questions that related to
8 the sexual allegations as opposed to when he denied the
9 burglary for example or when he denied the other things,
10 when he denied the sexual allegations he said it with
11 emphasis and he said "absolutely not" and the implication
12 from that in my opinion the intended implication by the
13 word choice, the word inflection, the body language, is
14 that he is not the kind of person who would do that.

15 "That's the message the witness was conveying to the
16 jury and that's just a small part of it so you know that's
17 to be expected. That probably by itself would not bring us
18 to this discussion that we're having but it adds to the one
19 question and answer that we were focused on. I'm going to
20 admit it. I think that - well, look at the prejudice as it
21 exists now. There's no doubt that allowing in the
22 conviction from Ohio, whatever it's called, the sex
23 condition, is prejudicial."

24 Q. And so the evidence from his prior conviction was
25 allowed in ---

1 A. Yes.

2 Q. --- for the jury?

3 A. Yes.

4 Q. And during Mr. Berard's testimony, did he admit to the
5 assault and battery with intent to kill?

6 A. Yes, he did.

7 Q. And did you discuss that with him prior to him doing
8 that?

9 A. Yes. We prior to trial I know on at least one
10 occasion, and I think twice, we actually sat down for a
11 contact visit and went through what his direct would be
12 like, what our trial strategy was. We met any number of
13 times over the course of my representation before that
14 discussing what the evidence was against him and what our
15 trial strategy would be.

16 So by the time we got to that point, we pretty much
17 established what our trial strategy would be and part of
18 that, because of the evidence that as involved, the
19 physical evidence that was involved, Adam indicated that he
20 would admit the assault and battery with intent to kill.
21 That he had struck his grandmother as part of his
22 testimony, won't deny the other elements that he was
23 charged with, the other things that he was charged with.

24 Q. Was he hesitant or resistant to admit it?

25 A. I don't recall specific - I don't recall specific

GARY LEMEL: BY MS. CREECH

-13-

1 hesitation. I think it was an evolution as we went over
2 what the evidence was against him versus what his
3 explanation for how she was injured came about. That the
4 statement that he gave was not one that was in my opinion
5 credible and I told him that without any question. And as
6 a result of that, the defense evolved from his admission
7 that he did strike her.

8 Q. At any point did he say he did not want to admit the
9 assault and battery with intent to kill?

10 A. No. That's not my recollection.

11 Q. When Mr. Berard made the decision to testify, did you
12 discuss with him his right not to testify?

13 A. I did. We discussed that a head of time as part of
14 the preparations and I do this in every case. I go in and
15 I go over the fact that the judge is going to ask them
16 whether they understand that it's their right not to
17 testify so that they are ready for that before it happens.
18 I don't want the judge addressing my client without my
19 client knowing that it's coming. And discussed that we
20 would have to make that decision and things that would go
21 into making that decision although we definitely approached
22 this one from the standpoint that he was going to have to
23 testify because given the enormous amount of evidence that
24 the State had in this case, that the only way his version
25 of what happened was going to come out was via is

1 testimony. There was no other way for us to do that.

2 So we certainly went into this one with an expectation
3 that he was going to testify although of course we
4 maintained that flexibility that we don't have to make that
5 decision until we actually get to that point.

6 Q. When you say that he would have to testify, did you
7 tell him that he had to testify?

8 A. I never told him that he had to testify. When I say
9 had to testify in order to get his version of the facts
10 out, that's the only way that was going to happen. We went
11 over the fact that he had the right not to testify and of
12 course as I do in every case, I give them my opinion as to
13 whether they need to or not, and going in I told him it was
14 my expectation that we would probably need to if we wanted
15 his story to come out but it was his decision. And at the
16 time it came to make his decision, I reaffirmed of it yes.
17 We were at that point. My opinion was he needed to testify
18 but it's still his choice. I do that with every trial I've
19 ever done.

20 Q. Did he argue with you about that?

21 A. I don't recall any real argument. We discussed it at
22 length. I think he understand why my opinion was that way
23 and he really did not express any reluctance to get on the
24 stand and testify when it came that time.

25 Q. How many times did you meet with Mr. Berard?

GARY LEMEL: BY MS. CREECH

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1 A. I cannot give you an accurate count. I don't think I
2 kept a particular note in my files, but it was many times.
3 Like I said, I know of at least one and I believe two
4 direct contact visits for trial prep and numerous visits
5 where we met in the attorney booths to discuss the evidence
6 against him, discuss where his case was. More than enough
7 to adequately keep him informed of what was going on. More
8 than enough for me to adequately know what was going on
9 from his standpoint.

10 Q. Did he ask you to go to the crime scene to his
11 grandmother's house?

12 A. I don't recall him specifically asking me that. No.

13 Q. Did you?

14 A. I did not. There were a number of reasons for that.
15 One, in the contact that we did have with the grandmother,
16 it was pretty clear that she was hostile towards us and as
17 she was the state's primary witness, I didn't want to do
18 anything to aggravate that hostility while we were still
19 trying to see if there was anything that we might
20 negotiate.

21 I mean, we threw out some numbers to the solicitor at
22 some point in time and obviously if the victim is enraged,
23 the solicitor is not going to be in a position to be able
24 to negotiate effectively so we were trying to avoid that,
25 and just avoid that particular problem. Nor quite frankly

1 given what the nature of this case was, did I feel there
2 was any need to go to the actual scene. This was not a
3 case where the evidence at the crime scene or there was a
4 question about the crime scene that I thought was going to
5 be significant.

6 Q. Did Mr. Berard express to you his doubt that Megan's
7 testimony, I believe that's his brother's girlfriend, that
8 her testimony did not make sense in view of the actual
9 layout of the home?

10 A. Yes. He said many times that there was no way that
11 she could have seen what she said what she saw. She
12 maintained the entire time she did. She got up and
13 testified to that effect. Adam was of the opinion that
14 basically his brother had hated him; that he wanted to put
15 him away. That his brother saw something and told both his
16 grandmother and his girlfriend about what happened and that
17 they just adopted this - the brother's story wholesale. My
18 impression quite frankly from her testimony was not that
19 that was the case.

20 Q. But if Mr. Barard is saying that there is no way that
21 Megan was seeing what she was testifying that she saw,
22 despite the hostility problem with Ms. Moss, when it became
23 apparent that the State, that you all were going to reach
24 an acceptable plea negotiation, or that that was not going
25 anywhere, why did you not go out to the home to look at it?

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1 A. In my opinion that was not where I needed to devote my
2 time on this case. That was a decision I made.

3 Q. At one point during your representation of Mr. Berard,
4 did he ask to have you relieved as counsel?

5 A. I believe so. I don't have the - my folder so you
6 would know better than I right now as far as what happened
7 on that. I believe so.

8 Q. Did you go before the court on that issue?

9 A. Yes. As was our standard policy at that point in time
10 in the public defender's office, when somebody asks to be
11 relieved, we would take that person in front of the judge
12 so they could be heard by the judge. In my opinion I
13 understood Adam's frustration because the case took a long
14 time to come to trial. It was very, very difficult, it was
15 a very very difficult case on all levels. I understood his
16 frustration and so I understood why he did that.

17 Q. Okay.

18 A. Did I feel like there had been any problem with our
19 relationship that prevented me from representing him
20 effectively? I did not. I only have an issue where
21 somebody asked to be relieved from the public defender's
22 office, I'm very up front with the judge whether I feel
23 like it's a problem for me or not. I'll let the judge know
24 if I've got a problem, if I think that the relationship is
25 broken down, and if I think this is a frustration request,

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1 I'll let the judge know that as well. I assume I did that
2 in this case and obviously I was not relieved because I did
3 keep representing him throughout the case.

4 MS. CREECH: Your Honor, may I have a moment?

5 THE COURT: Yes, ma'am.

6 (PAUSE AT 10:20 A.M..)

7 MS. CREECH: I have no further questions, Your Honor.

8 THE COURT: All right. The State?

9 MR. JOHNSON: Just briefly, your Honor.

10 CROSS EXAMINATION

11 GARY LEMEL BY MR. JOHNSON:

12 Q. Mr. Lemel, let's focus on I guess Judge Few's ruling
13 that you did open the door to allow Mr. Berard's prior
14 convictions but specifically the sexual conviction, the
15 gross sexual imposition from Ohio.

16 A. Yes. That's what they called it.

17 Q. Your term. But you don't have a copy of the
18 transcript.

19 MR. JOHNSON: May I approach the witness, Your Honor?

20 Q. Go to Page 820 and 821.

21 A. Thank you.

22 Q. Look down at the bottom of Page 820 and scan over to
23 the top of 821. Did Judge Few make any other comments
24 about you opening the door and whether or not the solicitor
25 actually used the prior crimes against Mr. Berard?

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1 A. Are you asking me did the judge make some comment
2 about that?

3 Q. Yes.

4 A. Obviously the judge made some comment on Page 821
5 starting with Line 2. I think he went back and addressed
6 it again and the - in Judge Few's way, he addressed that to
7 Ms. Lipinski about her use of it. And I will say I think
8 Ms. Lipinski probably reacted appropriately in terms of the
9 level that she used it for. I think she tried to use it in
10 a manner that was appropriate as opposed to just hammering
11 Adam on it. And then quite frankly Judge Few was very
12 critical of her for doing that for reasons I could not even
13 understand why he would be critical of her for trying to
14 use some restraint but that's what he did. I'll be happy
15 to read it if you want, what I'm talking about.

16 Q. I just have two other questions concerning that.
17 One is she only asked one question about it, whether or not
18 he had been convicted of that. Correct?

19 A. Right. Again I think she used very admirable
20 restraint on that.

21 Q. And Judge Few I guess accused her of chickening out --

22 A. Oh, he read her - yeah, he read her the riot act about
23 it. As much as he had raked me over the coals for opening
24 the door, he turned around and raked her over the coals for
25 not just going crazy with it basically.

1 Q. So in your opinion, do you think that one instance
2 prejudiced this case?

3 A. It certainly was prejudicial. There's no question in
4 my mind that opening that door and having that sort of
5 thing in front of the jury is prejudicial. Given the
6 weight of the evidence in this case, and given the
7 restraint that Ms. Lipinski showed, I can't say that I
8 think that the case turned on that one thing. That's just
9 my honest opinion in terms of the level of it now. It
10 certainly was highly prejudicial but there was a lot of
11 evidence in this case.

12 Q. And turning to Mr. Berard's testimony, he decided on
13 his own to testify. Correct?

14 A. Obviously we talked about it. I wouldn't say he
15 decided on his own. I think the final decision was his but
16 I gave him my opinion. I let him know why I felt that way
17 and he decided to go with what my opinion was, which is
18 what most of my clients do. That's why they have me.

19 Q. But even without his testimony, there was a statement
20 he gave to police which you challenged in a Jackson v.
21 Denno hearing.

22 A. Correct.

23 Q. And ultimately admits that he hit his grandmother with
24 a stick about the head.

25 A. Correct, but I believe that's the statement where it

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1 talks about the bats, swinging at the bats.

2 Q. Yes.

3 A. Yeah. While that statement admitted striking her, it
4 basically created an accident, basically said that it was
5 an accident as opposed to what evolved as far as his
6 voluntarily intoxication causing it. That's why I said
7 that the first statement in my opinion was not very
8 credible.

9 Q. Okay.

10 A. And so while it did have that element in it, it was
11 very different from what came out at trial.

12 Q. But Ms. Moss did sustain life threatening injuries
13 did she not?

14 A. Very significant injuries. Yes, sir.

15 Q. And then you also have a couple witnesses, namely his
16 brother and the brother's girlfriend, that come in and
17 mostly wrestled the brother, sees Mr. Berard on top of -
18 his testimony at trial is that he sees Mr. Berard in a
19 sexual position on top of Ms. Moss and Ms. Moss is
20 completely naked. Mr. Berard is naked from the waist down.

21 A. Yeah, that's the substance of what the brother's
22 testimony was. Yes.

23 Q. And the girlfriend comes behind and kind of confirms
24 that?

25 A. Yes. She corroborated - she said that she

1 particularly had seen the same situation, not that she was
2 just repeating what the brother had said of her own
3 independent sight.

4 Q. And even according to Mr. Berard's testimony, he then
5 fled the scene. The brother walks in and says what the "F"
6 are you doing. Flees the scene, leaves. Cuts his GPS
7 monitor off. There's blood found on his moped. He goes
8 and he is actually - he goes to a co-worker's house. The
9 co-worker, he kind of tells the co-worker what happened
10 because he's trying to get the gash, the co-worker or the
11 gash up - sutured up. The co-worker offers to take him to
12 the hospital, offers to call the police and Mr. Berard
13 turns that down. And then he is found later on at a
14 girlfriend's house underneath the covers with this big gash
15 on his leg. Is that basically the testimony that came -
16 comes out at trial?

17 A. Yeah, in terms of his - yeah, certainly the flight.
18 The cutting off of the GPS and the fact that he hurt
19 himself so badly doing it, the refusal of assistance from
20 the person, the acquaintance whose house he went to. Those
21 were all significant pieces of evidence for the state.

22 Q. And then when questioned - well not even questioned by
23 the probation agent that finds him at the girlfriend's
24 house, because he was on probation with the GPS monitoring
25 system, he asked how is my grandmother doing. Not in those

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1 but says how is Nanny doing.

2 A. As I recall, yes. Again, I would have to see the
3 exact transcript, but yeah, I believe there was something
4 like that that he asked the probation agent.

5 Q. And then there was his testimony to which he admits
6 the ABWIK but yet he doesn't quite remember and denies the
7 sexual assault. He denies the burglary and he denies the
8 kidnaping. Correct?

9 A. Correct.

10 Q. But isn't there overwhelming evidence that Mr. Berard
11 was there and committed at least the ABWIK and then there
12 is evidence sufficient for the jury to find him guilty on
13 the other ones?

14 A. Clearly there was evidence sufficient because they did
15 find him guilty.

16 Q. Right.

17 A. Again, we were not - by the time it went to jury, we
18 were not disputing the ABWIK charge.

19 Q. And you put up a valid defense and arguing that he was
20 invited into the house, that there was no kidnaping and
21 that there was no penetration of Ms. Moss?

22 A. Right. And honestly, on the last factor I still think
23 to this day that the judge made an error in not directing a
24 verdict as to the criminal sexual conduct charge. We
25 actually broke for the evening and I thought he was going

1 to a directed verdict for us, then he came back and said
2 that he wasn't. That he actually charged both the criminal
3 sexual conduct and the assault with intent to commit
4 criminal sexual conduct because I don't think the evidence
5 of penetration was established beyond a reasonable doubt in
6 my opinion but we certainly defended that as strongly as we
7 could.

8 Q. And that's the issue that was raised in the Anyers
9 Brief on appeal.

10 A. Correct.

11 Q. Now going back to your trial strategy in this case,
12 and I guess the overall strategy in this case, was there
13 ever a chance to get a plea offer that was acceptable to
14 Mr. Berard in this case?

15 A. Plea offers were made. As I recall, the best ones we
16 ever got was forty years. I discussed that with Adam and I
17 honestly discussed with him what I thought that the numbers
18 were pretty much irrelevant in this case, that because I
19 felt that if he was convicted of any level of criminal
20 sexual conduct or kidnaping in this case, because of his
21 prior offenses, that he would be subject to the sexually
22 violent predator act, that he would be reviewed and that
23 even if he did forty years successfully assuming the law
24 was the same then as it is now, that the odds of him
25 actually being released in my opinion were nonexistent

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1 because based on my extensive experience of handling
2 criminal sexual conduct cases and with dealing with the
3 realities of the SVP system, that in my opinion he would be
4 declared a sexually violent predator. That he would be
5 held indefinitely for treatment and that basically because
6 of his record and what I've seen in my experience with that
7 program, given what his record is, that it would likely
8 that under the SVP system that he could never be released.

9 And I was very up-front with him about that and told
10 him that, you know, even if we got to it, you know, - I
11 believe at one point in time we were trying to get
12 something in the twenty to thirty range as an acceptable
13 plea on our part but I was up-front with him then. I said,
14 even if we get this number, that doesn't mean that you're
15 going to get out unless other people get out in my opinion.
16 And I believe that, that he would not have made it past SVP
17 reviews successfully without being held indefinitely.

18 Q. And that's because he has the gross sexual imposition
19 in Ohio. And the ABWIK charge that he was on probation for
20 was actually a sexual offense played down.

21 A. Correct. The allegations in the first case were very
22 similar to what had happened in Ohio and had a sexual
23 connotation to it. There were some issues with the
24 evidence in that case which is why it was pled down the way
25 it was pled down. There were issues but given the fact

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1 that he had plead to both of those, and given the nature of
2 those, knowing with the SVP type situations, those sorts of
3 prior convictions are very, very damaging when it comes to
4 SVP review as far as the defendant stands.

5 And my opinion quite frankly convictions like that
6 almost guarantee not only review but an attempt by the
7 attorney general's office to have somebody declared a
8 sexually violent predator and to have them held
9 indefinitely.

10 And given that's a civil case and the way those things
11 go, a lot of times they are very, very successful at that.
12 And I told Adam that repeatedly. It was a big part of why
13 we decided to go to trial because there really just wasn't
14 - there really wasn't an option that didn't involve in my
15 opinion him being committed for essentially the rest of his
16 life for all meaningful purposes.

17 MR. JOHNSON: No further questions at this time, your
18 Honor.

19 MS. CREECH: Redirect, your Honor?

20 THE COURT: Yes, ma'am.

21 MS. CREECH: Thank you.

22 REDIRECT EXAMINATION

23 GARY LEMEL BY MS. CREECH:

24 Q. Mr. Lamel, what is your experience with SVP review?

25 A. I've been involved with those from the standpoint of

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1 having represented many individuals who have been at risk
2 for SVP review and have had several clients who have gone
3 through that. I, during the time that I worked with the
4 public defender's office, is when that really took off so I
5 have actually not myself represented somebody but I have
6 been called as a witness in at least two SVP situations
7 that I can think of to talk about what happened during my
8 representation of somebody.

9 Most of the time by defense attorneys asking that so
10 I'm well aware of that. And under perdition and the other
11 collateral consequences cases that's always something I
12 talk about with somebody when they have a criminal sexual
13 conduct case because of the issues involved in that.

14 Q. But is there a chance that on review he would not
15 be held indefinitely?

16 A. There is always a chance of that and I have to base
17 that based on what I know about that process and what I've
18 seen, the cases that have come in and the cases I've been
19 involved with. I have to tell you, Ms. Creech, in my
20 opinion, and I told him this, it's always my opinion. I
21 can't predict the future but I felt very confident that if
22 he had been subject to SVP review, he would have been held.

23 Q. That was your opinion?

24 A. That's my opinion and I told him that. That's why my
25 clients have it so I can give them my opinions.

1 Q. And so based on your opinion he went to trial and
2 testified and admitted to the assault and battery with
3 intent to kill?

4 A. Yes. All those decisions he - we agreed on. I didn't
5 force him to do anything but I let him know what my opinion
6 was and I let him know very directly. I'm not doing him
7 any favors by shading that kind of situation but he knows -
8 He knew what my opinion was.

9 Q. You also stated that you found his explanation of what
10 happened, the events that night, not believable or --

11 A. Not credible. Yeah.

12 Q. And that was your opinion of his statement?

13 A. Yes.

14 Q. Did he ever say to you, you're right, I'm lying?

15 A. Never those words. But ---

16 Q. I'm sorry, go ahead.

17 A. Never those words but again as we discussed trial
18 strategy and what his testimony would be as far as under
19 oath what would be, that really never came up again.

20 Q. His testimony was more credible, the chain of events
21 in your opinion?

22 A. Yes.

23 Q. But did Mr. Berard ever tell you that what he had
24 originally said had happened was not what happened?

25 A. Not in so many words no, ma'am.

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1 Q. You just didn't believe him. Right?

2 A. Well I told him that in my opinion that was not a
3 credible statement and we needed to examine what the truth
4 was. And I always tell them, I never ask anybody to do
5 anything other than tell the truth on the stand, and that's
6 one of the reasons why we prep, to see what his testimony
7 would be were he under oath on the stand. It's not unusual
8 for people to give initial statements that aren't credible
9 and there's a reason why they're not. And a lot of times
10 those change when they are on the stand and they are
11 subject to cross examination of course by the State as far
12 as what the prior statement was and we talked about that as
13 well. To that extent, that wasn't unusual.

14 Q. Ms. Lipinski as you indicated, she asked one question
15 of Mr. Berard about his prior offense, and do you recall,
16 did she not specifically state the Ohio charge ---

17 A. I don't recall the --

18 Q. --- the gross sexual imposition?

19 A. I don't recall the exact question. I would have to
20 look at the transcript.

21 MS. CREECH: Your Honor, may I have a moment?

22 THE COURT: I looked at it. I think she did exactly
23 that. Whatever criminal sexual imposition she did use that
24 phrase, I seen it.

25 MS. CREECH: Thank you, Your Honor.

1 Q. So whether she asked one question or ten questions,
2 the jury heard that Mr. Berard, who was on trial for
3 allegedly raping or attempting to rape his seventy-year-old
4 grandmother, had already been convicted of gross sexual
5 imposition. Correct?

6 A. Correct.

7 Q. There was also during the trial as you indicated your
8 motion for directed verdict on the criminal sexual conduct.
9 Correct?

10 A. Correct.

11 Q. And as a result, Judge Few decided when he came back
12 the next day that he was going to charge both, the assault
13 with the intent and the CSC. Correct?

14 A. Correct.

15 Q. And Mr. Berard was actually convicted of the CSC?

16 A. Correct.

17 Q. Yet there was no testimony of any penetration.
18 Correct?

19 A. Yes. Yes. Ultimately what it came down to was nobody
20 testified as to penetration. They sort of danced around
21 the outside of it, particularly Ms. Moss herself. On
22 direct clearly never stated penetration; on cross
23 examination she kind of came back and said he was either -
24 I think her exact line was as close as I can recall, he
25 either was or was trying to, which I think is the problem

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1 with allowing the CSC to go forward because that doesn't
2 establish penetration. So that was the crux of my
3 argument. That was as close as anybody came to my
4 recollection of actually saying that there was penetration
5 that took place.

6 Q. And the state's witness, or expert, that testified,
7 there was no DNA evidence of Mr. Berard found in or on Ms.
8 Moss. Correct?

9 A. Correct.

10 MR. JOHNSON: Your Honor, this is getting into
11 directed verdict issue. This is on appeal. This issue has
12 already been dealt with.

13 THE COURT: I've already written the word appeal right
14 beside it. But I'm be glad to hear it.

15 MS. CREECH: Thank you, your Honor. Where I'm going
16 with this line of questioning, Your Honor, and I'll just go
17 ahead and ask Mr. Lemel.

18 Q. The fact that the jury heard a conviction for gross
19 sexual imposition, do you think that could have had an
20 impact on the jury when deciding whether or not he
21 committed an assault with intent to commit --

22 MR. JOHNSON: That's speculation, Your Honor.

23 THE COURT: I'll let her it. I know what --

24 MS. CREECH: Thank you, your Honor. I think it's
25 about as speculative as to whether or not he believes that

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1 there was overwhelming evidence. He is a defense counsel.
2 He has done it a long time but he's not the jury.

3 A Yes. I certainly would not have fought as hard as I
4 did to try to keep it out if I thought it wouldn't have had
5 that impact. I certainly would not have fought as hard as
6 I did when Judge Few reversed himself. I would not have
7 been as upset about it as I was and am about how that
8 happened. To this today, that's one of those incidents
9 that I look back on and replay it quite a bit so there is
10 no question in my mind that it is prejudicial.

11 There is no question in my mind that having that in
12 front of the jury is highly prejudicial. I guess wiser
13 minds than I will have to decide whether it's prejudicial,
14 overwhelmingly versus the other evidence.

15 Had Ms. Lipinski done more with it, I think it
16 certainly would have done that. I think she handled that
17 in a very appropriate manner given the nature of how it
18 evolved, which is a lot of credit to her, but there's no
19 doubt that it was prejudicial and highly prejudicial.

20 MS. CREECH: Thank you.

21 No further questions, your Honor.

22 RECROSS EXAMINATION

23 GARY LEMEL BY MR. JOHNSON:

24 Q. There was also testimony that Mr. Berard cut a GPS
25 monitor off.

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1 A. Yes. Again, very highly prejudicial. The entire
2 flight situation was as prejudicial as anything in the
3 case, leaving on with cutting that off, going to the
4 neighbor's house, where they found him, how they found him.
5 That flight evidence of guilt was highly prejudicial which
6 was quite frankly related back to the whole question of the
7 whole bat story where he swung at a bat and happened to hit
8 her. You know it was that question why would you have that
9 flight if it was completely accidental. That was one of
10 the reasons why the original statement lacked credibility
11 because the reaction to what happened was so extreme if it
12 had just been an accident.

13 Q. And hypothetically, a jury can think that the reason
14 that he has a GPS monitor is because of some prior sexual
15 incident?

16 A. That's getting a little bit far out there in my
17 opinion. Without anything else, they wouldn't have known
18 what the GPS. They would have just known the GPS was there
19 because he was on probation. I think that's where we had
20 that at that point in time so I wouldn't go that far. I
21 mean, I guess they could highly speculated but there was no
22 evidence for that speculation. Hopefully they would have
23 listened to the judge's instructions to no speculate about
24 that kind of thing so I think that's probably pushing it a
25 little bit far in my opinion.

1 MR. JOHNSON: No further questions, your Honor.

2 THE COURT: All right. Mr. Lemel, you can step down.

3 MR. JOHNSON: We just reserve him for any rebuttal
4 testimony.

5 THE COURT: All right. Excuse me. Let's take a short
6 break, a five minute refresher, five, ten minute refresher
7 break.

8 (COURT IN RECESS AT 10:45 A.M..)

9 (COURT BACK IN SESSION AT 11:09 A.M..)

10 THE COURT: Thank you. Take your seats.

11 Ms. Creech, you ready to proceed?

12 MS. CREECH: Yes, Your Honor. I call Adam Berard,
13 Your Honor.

14 MADAME CLERK: Mr. Berard, place your left hand on the
15 Bible and raise your right as far as you can.

16 (WHEREUPON: ADAM BERARD,
17 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

18 MS. CREECH: Thank you.

19 DIRECT EXAMINATION

20 ADAM BERARD BY MS. CREECH:

21 Q. Mr. Barard, when Mr. Lemel was appointed to represent
22 you, at what point did you have concerns about his
23 representation?

24 (PAUSE.)

25 Q. Did you have concerns about Mr. Lemel's

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1 representation?

2 A. Yes, ma'am.

3 Q. What were those concerns?

4 A. That he would not be adequate. That he would not be
5 able to defend me and...

6 Q. Why did you have that concern?

7 A. Because I had dealt with him before and seen that he
8 is not aggressive in the way he defends people.

9 Q. Did you ask to have him relieved as your counsel?

10 A. Yes, ma'am.

11 Q. And what happened when you made that request?

12 A. I was denied.

13 Q. Did you go before the court for that request?

14 A. Yes, ma'am. I went in front of Judge Alford.

15 Q. And at that hearing did you tell the court or have an
16 opportunity to tell the court why you wanted Mr. Lemel
17 relieved?

18 A. Yeah. I told him that we're not getting along and
19 that I don't feel that he is doing his job to my - you
20 know, to how I wanted him to defend me and I was denied.
21 He said, he needs to stick with me for a few more weeks and
22 tough it out.

23 Q. Did you feel like things changed after that hearing
24 with Mr. Lemel's representation?

25 A. No. I don't think anything changed. I mean, I feel

1 Gary Lemel is, I mean he still didn't - I can't figure out
2 the word.

3 Q. You heard Mr. Lemel testify about his understanding of
4 your explanation of events. Correct?

5 A. Yes, ma'am.

6 Q. Did you ever tell Mr. Lemel that your original
7 statement that it was an accident, that you were swinging
8 at bats and that was not true?

9 A. Yes, ma'am. I told him that I was swinging at bats
10 and that it was an accident.

11 Q. Did you ever tell him that in fact when you said you
12 were swinging at bats that that was not true?

13 A. No, ma'am.

14 Q. Why did you agree to admit to the assault and battery
15 with an intent to kill?

16 A. Because Gary Lemel insisted that I get up on the
17 stand, even though I didn't want to get up on the stand,
18 and insisted that I get up here and I felt like it was my
19 only option. Like I had no other choice but to go by what
20 he said. I didn't want to get up here to begin with.

21 Q. You didn't want to testify?

22 A. I didn't want to testify at all.

23 Q. Did you tell Mr. Lemel that?

24 A. Yes, ma'am.

25 Q. How old were you at the time of your trial?

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1 A. I think like twenty-seven, I think.

2 Q. And how far did you go in school?

3 A. To the eleventh grade.

4 Q. Why at the age of twenty-seven would you agree to do
5 something that you didn't want to do?

6 A. I mean, I felt bullied. I felt under pressure by
7 somebody else that I felt that - like he knew his job.
8 Like he knew the right thing to do and - I didn't want to
9 get up here I mean, because he put me under pressure with
10 the words he was using. He was using word play with me and
11 his way of words I felt like there was no other choice.
12 Like I just had to get up here. I didn't want to get up
13 here because I didn't feel like I needed to. I felt like
14 it would have ruined me.

15 Q. In your application for post conviction relief, you
16 indicated that you believe it was ineffective counsel by
17 not investigating defensive scenarios. What specifically
18 are you talking about? What did Mr. Lemel not do that you
19 wanted him to do?

20 A. I don't feel Lemel pointed out the - that the
21 witnesses' statements was - they were inconsistent and that
22 - Will you explain? Repeat the question.

23 Q. Whose statements were inconsistent?

24 A. Loretta's, Megan's and Russell's.

25 Q. And did you discuss those inconsistencies with Mr.

1 Lemel?

2 A. Yeah, I tried. But I mean, he won't listen. He
3 wouldn't listen to anything I had to say.

4 Q. Did you ask Mr. Lemel to go to your grandmother's home
5 and look at the crime scene?

6 A. I asked him to.

7 Q. And did he tell you why he was not going?

8 A. He gave me his opinion that it wasn't worth him going
9 out there and doing so and I totally disagree with that.

10 Q. Did you explain to Mr. Lemel that based on what
11 Megan's statement said that given the layout of the home
12 that she could not have seen what she said she saw?

13 A. Yes. I said that, you know, that there's no way that
14 she could have seen anything at the angle she was standing
15 because she was standing on the far side of the porch where
16 she would be looking right at the wall.

17 Q. How many times did you meet with Mr. Lemel?

18 A. I'm going to say no more than five times that I can
19 remember.

20 Q. And how long did you meet with him?

21 A. Probably no more than fifteen minutes, ten minutes.

22 Q. Did he sit down and prepare you for your testimony?

23 A. No, ma'am.

24 Q. When did you finally agree to testify?

25 A. The day of the trial when it was my turn to get up

ADAM BERARD: BY MS. CREECH

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1 there supposedly and everybody else had already went, he
2 had asked me, said that I needed to get up there. I told
3 him I didn't want to get up there.

4 Q. You told him that day that you did not want to take
5 the stand?

6 A. Yes, ma'am.

7 Q. So why did you take the stand?

8 A. Because he had me under the impression and made me
9 believe that I had to get up here, that there was no other
10 option. I didn't know what else to do but believe him.

11 Q. When you were questioned about the assault and battery
12 with the stick, why did you not testify that you were
13 swinging the stick back?

14 A. Because Mr. Lemel asked me to get up and say that I
15 swung it back and hit Loretta and to say that I committed
16 assault and battery with intent to kill when I know that I
17 didn't.

18 Q. What did he tell you that made you believe you had no
19 other option to do that?

20 A. He said that if you don't get up on that stand, you're
21 going to get life regardless no matter what you do. And I
22 was scared and I felt bullied.

23 MS. CREECH: I have no further questions, Your Honor.

24 THE COURT: Cross.

25 MR. JOHNSON: Just briefly.

ADAM BERARD: BY MR. JOHNSON

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CROSS EXAMINATION

ADAM BERARD BY MR. JOHNSON:

Q. Mr. Berard, your testimony at trial was that you hit your grandmother in the back of the head and shoulder area with your elbows and your hands. Correct?

A. No I don't remember saying that, sir.

MR. JOHNSON: Court's indulgence, your Honor.

(PAUSE.)

MR. JOHNSON: Page 791, Your Honor.

May I approach the witness?

THE COURT: You may.

MR. JOHNSON: Let the record reflect that I'm showing the applicant the transcript.

(ATTORNEY GENERAL GAVE WITNESS TRANSCRIPT TO READ.)

Q. Page 791.

A. My hand and my elbow. That's what I hit her.

Q. Would you agree that's what you testified at trial?

A. It says it but I don't remember why I would have said that.

Q. But in the statement that you initially gave to police, you stated that you hit her with a bat accidentally while swinging at the bats. Correct?

A. Yes, sir.

Q. So you lied to the police?

A. No.

ADAM BERARD: BY MR. JOHNSON

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1 Q. Or you lied under oath.

2 A. No I told the police the truth, that I really was
3 trying to swing at some bats and that I had accidentally
4 nicked her and it was unintentional and I didn't mean to.

5 Q. So then you lied under oath at your trial, that you
6 hit her with your hands and your elbow. Correct?

7 A. I don't even remember why I had said that, sir.

8 Q. But do you agree with me that those are two completely
9 ---

10 A. They are two -

11 Q. --- inconsistent statements?

12 A. Yes, sir.

13 Q. And if you're saying that hitting her accidentally with
14 the bat is the truth, then this would be a lie under oath.
15 Correct?

16 A. Yes, sir.

17 Q. You also testified that Mr. Lemel pressured and
18 bullied you into testifying. Correct?

19 A. Yes, sir.

20 Q. Do you remember Judge Few questioning you about your
21 right to testify and your right to remain silent and that
22 is your decision whether or not to testify?

23 A. Yeah.

24 Q. And you said that you decided that you wanted to
25 testify.

1 A. Yeah but I said that because Mr. Lemel insisted that I
2 agree to what the judge was saying because of the way he
3 had already put me under pressure to do it to begin with.

4 Q. But it's your trial isn't it? It's not what Mr. Lemel
5 wants to do; it's what you want to do.

6 A. But I'm not good at this legal stuff. I've never had
7 to go through anything like this before and I was under the
8 impression that he knew how this was suppose to play out
9 and he led me wrong and had me believing that I needed to
10 get up on the stand when I didn't want to.

11 Q. Would you not agree with me that by you testifying you
12 were able to get your version of the facts out to the jury?

13 A. I mean, I understand but I didn't want to get up on
14 the stand.

15 Q. At all?

16 A. At all.

17 Q. But you didn't tell the judge that did you?

18 A. No. Because I was made to believe by Mr. Lemel, he
19 told me to tell the judge that I agreed to my rights and I
20 know my rights because he wanted me to get up on the stage
21 so I had to agree to the judge when he asked me that in
22 order to get up on the stand.

23 Q. But it's your right to remain silent isn't it? It's
24 not Mr. Lemel's. It's your right.

25 A. But I don't know this stuff. I mean, I don't know

ADAM BERARD: BY MR. JOHNSON
GARY LEMEL: BY MR. JOHNSON

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1 what my rights are and what I am allowed to do and what I'm
2 not allowed to do. I just go by what Mr. Lemel says.

3 MR. JOHNSON: No further questions at this time, Your
4 Honor.

5 THE COURT: Redirect?

6 MS. CREECH: No, your Honor.

7 THE COURT: All right. You can step down and have a
8 seat with your attorney.

9 (WITNESS LEAVING WITNESS STAND.)

10 THE COURT: Do you have any other witnesses?

11 MS. CREECH: No other witnesses, your Honor.

12 MR. JOHNSON: Recall Mr. Lemel.

13 MS. CREECH: I have no other witnesses, Your Honor.

14 THE COURT: Come on up, Mr. Lemel. You come on up and
15 you're still under oath.

16 DIRECT EXAMINATION

17 GARY LEMEL BY MR. JOHNSON:

18 Q. Mr. Lemel, just briefly. I know you're already
19 somewhat covered this, but did you advise Mr. Barard on his
20 rights to testify or right to remain silent?

21 A. I did.

22 Q. Did you ever bully or threaten him to testify?

23 A. No. I gave him my opinion. That's what I'm suppose
24 to do. I let him know why I felt that way. I let him know
25 how strongly I felt but I never put any pressure on him. I

1 never told him to do something he didn't want to do. I
2 always explain why - I probably did tell him something
3 along the lines of you know in my opinion I don't feel we
4 have a choice. To get your story out, the only way we can
5 do that is by putting you up but it's your decision.

6 I probably did tell him something like that but it was
7 always his decision. As part of it again, I told him that
8 Judge Few was going to ask him those questions because
9 that's my job to prep my client and let him know what to
10 expect and what's going to happen in court.

11 So whenever I'm in trial, I always let them know that
12 these are the questions that the judge is going to ask you
13 about this. If you change your mind when you're out there,
14 then change your mind out there. You can tell the judge
15 that at that point in time. So I did that with Adam just
16 like I do with every person I have represented and going to
17 trial.

18 Q. Concerning the other witnesses' statements, did you
19 research or investigate whether or not they were
20 inconsistent with the testimony at trial?

21 A. Yes.

22 Q. And did you feel the need to point this out to the
23 jury? Where there any inconsistencies?

24 A. I'm sure there were inconsistencies. There are always
25 inconsistencies. Whether they are internal to their own

GARY LEMEL: BY MR. JOHNSON

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1 individual statements. If there is a significant one, I
2 certainly will impeach somebody with it. There were other
3 things that I attacked them on. Again, without having the
4 transcript right in front of me and reviewing each
5 individual witnesses' testimony, I can't tell you what I
6 did.

7 But typically the first thing you do with witnesses is
8 I have them acknowledge their statements so that if there
9 is some change I can come back and cross examine with it.
10 I would assume I would have done that in this case but I'
11 would have to look at the exact transcript to see if I just
12 did it with the officers or I did it with each individual.

13 Q. And again how many times did you meet with Mr. Barard?

14 A. Many times. Far more than five and for far more than
15 fifteen minutes. That's the only thing I would disagree
16 with his recollection on that. That's not my recollection
17 at all.

18 Q. And just again for the record, why did you not visit
19 Ms. Moss' house?

20 A. It was my decision that I did not feel that given
21 everything we had that that was necessary.

22 Q. And what do you base that upon?

23 A. Just based on the evidence that we did have, the other
24 statements and what our defense was going to be in the
25 case.

GARY LEMEL: BY MR. JOHNSON
BY MS. CREECH

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1 Q. And the fact that if you show up and she doesn't allow
2 you on her property ever come in?

3 A That certainly was a factor that I considered but I
4 did not - you know, I'm not going to say that's why I
5 didn't do it. I did not go out there so I do not know
6 whether she would have let me on or not. She certainly -
7 her and the rest of the family certainly were not
8 particularly receptive.

9 I had - When I had represented Adam previously I had
10 interacted with some of his family members. On this
11 occasion there basically was not that sort of a - I think a
12 couple - maybe his mother came to see me one time but they
13 were not supportive of Adam at that point in time. They
14 were not supportive of him like they were in the first
15 case.

16 MR. JOHNSON: That's all I have at this time, Your
17 Honor. Thank you.

18 THE COURT: Cross?

19 MS. CREECH: Yes, Your Honor, briefly.

20 CROSS EXAMINATION

21 GARY LEMEL BY MS. CREECH:

22 Q. If you had shown up and Ms. Moss had not allowed you
23 on her property that you felt that you needed to
24 investigate Mr. Barard's assertion that geographically,
25 logistically speaking, Megan could not having seen what she