

VOLUME II OF II

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

APPELLANT

SUPPLEMENTAL RECORD ON APPEAL

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1 occurred on November 23rd and wasn't reported until sometime after
2 the first week of December? Did they bother to tell you that?

3 A. Yes. I knew about that.

4 Q. And did they indicate to you that there were seventeen broken
5 ribs, not one or two?

6 A. No.

7 Q. So, ma'am, isn't it true that you just are concerned that your
8 son is going to jail, and you are here to make sure that you don't
9 want that to happen today?

10 A. No. If someone did something to the baby, I want them
11 prosecuted.

12 Q. We've got that. Yes, ma'am.

13 MR. VON HERRMANN: No further questions, Your Honor.

14 THE COURT: Alright.

15 You have any further questions.

16 MR. TAYLOR: Just a quick question, Your Honor.

17 REDIRECT EXAMINATION BY MR. TAYLOR:

18 Q. Ma'am, the day after your children died, did you clean up the
19 house?

20 A. No.

21 Q. Did you cry?

22 A. Yes. I was devastated.

23 Q. That's the normal reaction you consider?

24 A. Yes.

25 MR. VON HERRMANN: Your Honor, that's with regard to her, not

1 with regard to Ms. Dandridge.

2 THE COURT: Yes. I sustain that.

3 Let's move on.

4 MR. TAYLOR: Alright.

5 Q. And, again, would you face perjury yourself to go to jail here
6 today to lie on behalf of your son?

7 A. No.

8 Q. Okay.

9 And, again, this deals with your grandchild.

10 A. Yes.

11 Q. And how, again, tell me how you feel about your grandchild
12 dying?

13 A. I feel devastated. I'm hurt.

14 Q. Alright.

15 And would you want to lie for the person that did that?

16 A. No.

17 Q. Are you lying here today?

18 A. No.

19 Q. Okay. Thank you.

20 THE COURT: You may come down, now. Thank you.

21 Next witness, please.

22 (The witness leaves the witness stand.)

23 MR. AXELROD: Your Honor, may we approach?

24 THE COURT: Yes, sir.

25 (Bench conference off record and in the presence of the jury

1 but outside the hearing of the jury.)

2 THE COURT: I'll let you go to the jury room.

3 (The jury retires to the jury room at 4:08 p.m.)

4 DISCUSSIONS - WITNESSES AND VIDEO TAPE

5 THE COURT: Alright. What's before me, now.

6 Mr. Taylor, Mr. Axelrod, what's before me?

7 MR. TAYLOR: Your Honor, I'll give you - - Mr. Axelrod just
8 talking about the position we're in here.

9 Mr. Axelrod made arrangements with Mr. Von Herrmann concerning
10 the scheduling of this case. He tells me that since speaking with
11 Mr. Von Herrmann that there were certain witnesses that he was
12 going to call being Ms. Dandridge at a certain date and time.

13 Mr. Axelrod has made arrangements with Rosen Technologies out
14 of Charleston to come in and have some exhibits put up - - -

15 THE COURT: Well, I thought it's clear, now. I can read
16 the record back to you. We went through all this yesterday and
17 today, and I told Mr. Axelrod to be ready with his clients, all his
18 witnesses at 2:00 today. You can't disagree with that. The
19 record is going to show it.

20 Now, I want to know why he is not here today. I - - you told
21 - - I told you to have them here. You got to understand that this
22 jury has been here very patiently since Monday.

23 MR. AXELROD: Your Honor, Mr. Von Herrmann told me - - -

24 THE COURT: I don't care what he told you.

25 MR. AXELROD: Well, I - - -

1 THE COURT: Wait a minute. Don't argue with me.

2 MR. AXELROD: Let me talk to the Court, please.

3 THE COURT: Okay, but I'm not interested in what Von
4 Herrmann told you. I told you to be here at 2:00 with your
5 witnesses.

6 MR. AXELROD: But, Your Honor, I have to explain. If you'll
7 let me explain.

8 THE COURT: I'll let you explain but I'm not interested in
9 what the Solicitor said.

10 MR. AXELROD: I scheduled Rosen Technologies to come
11 Wednesday afternoon when Charlene Dandridge was going to testify.
12 When Mr. Von Herrmann called me - - when did Mr. Von Herrmann call
13 us? Monday night or something and says, "Hey, I'm changing my
14 schedule. Charlene is going to testify on Tuesday."

15 I was unable to get Rosen Technology at that point to come on
16 Tuesday. I had this schedule for a month. When Mr. Von Herrmann -
17 - I asked him - - -

18 THE COURT: Why didn't you tell me this yesterday?

19 MR. AXELROD: I thought that our witnesses would go another
20 thirty minutes is what I thought to 4:30 or so because I have three
21 witnesses tomorrow, and then we're done, and I went by what Mr. Von
22 Herrmann told me. I scheduled everything weeks ago.

23 THE COURT: Wait a minute, now. What other - - what other
24 - - you know, you don't understand that I run my court, and there
25 ain't no question about it. I told you to be here at 2:00.

1 What you want to tell me, Mr. - - -

2 MR. VON HERRMANN: Your Honor, I had called and relayed as
3 soon as I realized I was going to put Ms. Dandridge up first. In
4 fact, I had contemplated that. I called Mr. Bailey last night and
5 left a message for him today. I have tried to do my best to give
6 him a ballpark estimate of when we were going to proceed - - -

7 THE COURT: I understand that but he says he couldn't be
8 here. What other witnesses you have?

9 MR. TAYLOR: Your Honor, there is a video tape of Ms.
10 Dandridge the day that she was interviewed by the police officers.

11 THE COURT: We can play that today.

12 Sir?

13 MR. VON HERRMANN: Your Honor - - Your Honor, we would
14 object. There's no question that she was asked on that particular
15 tape. That's inadmissible evidence, Your Honor. There's no basis
16 for it. Everything they asked her on the stand, she admitted that
17 she lied about it. That tape should be inadmissible. We would
18 request that that tape be suppressed.

19 THE COURT: Well, it may be - - -

20 MR. TAYLOR: Your Honor, I think we - - we have her under
21 our subpoena, and we can question her regarding that she testified
22 on the stand that she was distraught that day, and on the video
23 tape, she's actually laughing.

24 I think that it comes in to impeach her based on - - on what
25 she testified - - -

1 THE COURT: How long is the video?

2 MR. TAYLOR: The part - - the entire video is - - -

3 MR. AXELROD: We're only showing - - -

4 THE COURT: Wait a minute, now, please.

5 MR. AXELROD: I'm helping him out.

6 THE COURT: Well, he's handling it well if you'll hush.

7 MR. TAYLOR: Your Honor, we've had the video tape redacted

8 to show the certain parts that are imperative to impeach what she

9 said.

10 MR. VON HERRMANN: Your Honor, she never testified - - -

11 MR. TAYLOR: She was - - -

12 MR. VON HERRMANN: No.

13 MR. TAYLOR: Judge, she testified to certain things - -

14 THE COURT: Is the video here?

15 MR. TAYLOR: - - in the video.

16 THE COURT: Is it here?

17 MR. TAYLOR: If we had to - - if we had to redact the whole

18 video tape that Rosen Technology has done, it would take longer

19 than us arguing here to do it - - -

20 THE COURT: Well, if I let you play the video, you don't
21 need Rosen Technologies, do you?

22 For what purpose if I let you play it?

23 MR. AXELROD: Your Honor, the tape is an hour and fifteen

24 minutes. Now, we're - - we're only showing certain clips. I'm

25 putting up the police officers, inserting those clips as well, and

1 it will be the fastest way to do it. It will take longer to play
2 the video than it would to put up these three people. I'm just
3 looking at approximately, maybe an hour tomorrow morning or so, and
4 they're coming in at 8:00 tomorrow morning to set up the equipment.

5 THE COURT: Has the tv been redacted? Has it already been
6 redacted?

7 MR. AXELROD: Yes.

8 MR. TAYLOR: They've redacted it.

9 THE COURT: Why can't we play the redacted version now?

10 MR. AXELROD: We don't have it. They have it down in
11 Charleston.

12 MR. TAYLOR: He sent it to Charleston to get it redacted,
13 and I can take care of that, Your Honor.

14 MR. VON HERRMANN: And I can take care of that, Your Honor.
15 We have the right of having the statement put into evidence.

16 THE COURT: Sir?

17 MR. VON HERRMANN: If the Court is going to allow it which I
18 believe it's inadmissible, I don't see any basis for the
19 admissibility of the - - -

20 THE COURT: Well, it may be a basis on, clearly, on her
21 demeanor for whatever it's worth to the jury. I would not deny
22 them that right.

23 MR. VON HERRMANN: Well, then, the State certainly would not
24 allow them to pick and choose and play what they want to. They
25 would have to - - under the rule of completeness, they will have to

1 play the hundred - - the hour and fifteen minutes.

2 THE COURT: Oh, yeah. I'm not going to redact it.

3 If you play it, we going play where everything she said.

4 MR. AXELROD: Your Honor, if we redact it if we play the
5 clips, the State has the opportunity on under Rule 106 to ask for
6 the full tape to be played.

7 THE COURT: Well, that's what they just did.

8 MR. AXELROD: That's right but - - but - - and we'll play our
9 clips, and they can have the whole thing played if they choose
10 that.

11 MR. VON HERRMANN: No, sir, Your Honor. We're going to
12 object to that.

13 It has to be in context. They can't redact out just the
14 portions they want to.

15 THE COURT: Not going to let them do that.

16 If they - - if any portion of that video is played, we going
17 play it all at the same time in the interest of judicial economy
18 saving the jury that additional time and in accordance with the
19 rule.

20 Mr. Taylor - - sit down, please. This is Mr. Taylor's point.

21 MR. AXELROD: It - - it - - it isn't, Your Honor. He doesn't
22 know.

23 Your Honor, I'm calling up police officers to ask specific
24 questions about the video. That's what the clips were.

25 The police interviewed Charlene - - -

1 THE COURT: No, wait a minute. You let Mr. Taylor handle
2 it or you going to handle it?

3 MR. AXELROD: We both are.

4 MR. TAYLOR: I'll defer to Mr. Axelrod.

5 THE COURT: Let me tell you this.

6 The video speaks for itself. There's two things.

7 The jury can look at the video. We don't need a police
8 officer to interpret it. If you play the video, the jury is the
9 finders of the fact for whatever it's worth.

10 The point - - I'm not going to let a police officer interpret
11 it for you.

12 MR. AXELROD: I'm not asking that. I'm going to ask the
13 police officer the questions he asked, and I'm going to refresh his
14 memory by showing each individual clip, and I'm - - -

15 THE COURT: No, not going to do that. Not going to do
16 that.

17 I'm going - - there won't be an individual clip. If you show
18 any part of it, I'm going to show all of it.

19 You understand?

20 MR. TAYLOR: Yes, sir.

21 THE COURT: We not going to let you pick and choose which
22 part, and I'm not going to have a police officer - - if the police
23 officer is here, I'll be glad to listen to what he - - what you
24 propose to do but I - - in limini but I'm not about to - - you tell
25 me, Mr. Taylor - -

1 MR. TAYLOR: Yes, sir.

2 THE COURT: - - what the police officer can help the jury
3 with.

4 MR. TAYLOR: Your Honor, I'm going to have to defer to Mr.
5 Axelrod on that.

6 THE COURT: Well, I'll ask Mr. Axelrod.

7 How can the police officer assist the jury who is going to see
8 the video?

9 MR. AXELROD: I - - I - - I want to question the police
10 officers about the questioning they did of Charlene for one hour
11 and fifty-four minutes. They questioned her.

12 Charlene testified that she lied to the police yesterday. I
13 want to question the police officers about their questioning of
14 Charlene.

15 THE COURT: I'll permit that but I'm not going to let you
16 question the police officer as to his views of what occurred on the
17 video.

18 MR. AXELROD: I'm not going to use the word occurred. I'm
19 going to ask him to look at the video and ask her questions
20 concerning the Charlene, the questions, was it - - her demeanor.
21 Was it believable?

22 THE COURT: No, sir. No, sir. No, sir.

23 The jury will observe her demeanor. It's not for the police
24 officer to say that.

25 If you play - - I don't mind you asking him under what

1 conditions or circumstance it was made. You're not going to let -
2 - I don't need his opinions on what the video showed because you
3 going to show it to me and the jury. I'm not going to do that.

4 If the police officer is here, bring him on now.

5 I don't need - - I'll let you testify as to what circumstances
6 or conditions the video was shown.

7 MR. AXELROD: Well, I don't have - - I don't have the
8 equipment here. It's in Charleston.

9 THE COURT: You got the police officer?

10 MR. AXELROD: Your Honor released him.

11 THE COURT: Well, I - - -

12 MR. VON HERRMANN: I have the police officer right here
13 involved in this interview - -

14 MR. AXELROD: That's not the one.

15 MR. VON HERRMANN: - - and I have the original tape.

16 MR. AXELROD: That is not the police officer.

17 THE COURT: Sir?

18 MR. AXELROD: That is not the police officer.

19 MR. VON HERRMANN: We can get him up here, Your Honor.

20 THE COURT: Get him.

21 MR. AXELROD: And they don't have the tape.

22 THE COURT: Don't - - I'm telling you what I'm going to do.

23 We going to take the police officer now, and he can tell me -
24 - tell us if you choose to under what circumstances it was taken
25 but we don't need the video because I'm not interested in his

1 opinions of what it shows. The jury will view that.

2 Now, other than the police officer and the video if you still
3 want to show it understanding if you show any portion of it, you
4 going to show it all.

5 MR. TAYLOR: That's fine, Your Honor... I think the jury
6 needs to see it.

7 THE COURT: Do you have the video?

8 MR. TAYLOR: I didn't bring it. It's in my office, the
9 video because I thought that Axelrod - - -

10 THE COURT: Go get it.

11 MR. TAYLOR: But he's got the original, and he's probably
12 going to want to submit the State's original.

13 THE COURT: Alright. If you want to play it, play it.

14 MR. TAYLOR: Your Honor, so that means the jury's going to
15 be here until 6:05 tonight.

16 THE COURT: That will be alright. We going to do it.

17 Now, if you want to get the police officer, have at it.

18 MR. VON HERRMANN: Your Honor, can you ask them what police
19 officer it is. I will have one of my police officers - - -

20 THE COURT: Which one you want? You got a - - you got a
21 video?

22 MR. VON HERRMANN: It's all right here, Your Honor.

23 THE COURT: Bring it in.

24 MR. AXELROD: We can use - - we need Detective Carr and
25 Detective Graham.

1 MR. VON HERRMANN: Your Honor, you want them up here today?

2 THE COURT: What you need them - - yeah, I do.

3 Wait a minute. What you need them for?

4 MR. AXELROD: Your Honor, I want to talk to them about the
5 case. I want to call them as a witness. That's what I want to do.

6 THE COURT: Get them up here now.

7 MR. VON HERRMANN: Yes, sir, Your Honor.

8 THE COURT: I'll take them first and see where we are
9 tonight, and then if I - - we got time to play the video, we will.

10 Bring all the witnesses you got, and then if I decide to stay
11 here and play the video I will. If not, I'll play it in the
12 morning if you still want it.

13 MR. TAYLOR: Yes, sir.

14 MR. VON HERRMANN: It's going to take a few minutes for them
15 to get up here.

16 THE COURT: Get them up here.

17 Alright. Let me ask you this.

18 Other than the police officer and this detective, who else you
19 got.

20 MR. TAYLOR: I got nobody that I know of.

21 THE COURT: Mr. Axelrod, who else you got?

22 Stuart?

23 MR. AXELROD: Sir?

24 THE COURT: Other than the police officer and this
25 detective, who was the other witness?

1 MR. AXELROD: We were going to have the pharmacist come in
2 and bring the prescription for the Rondec.

3 THE COURT: Where is the pharmacist?

4 MR. AXELROD: In Socastee somewhere.

5 THE COURT: Where?

6 MR. AXELROD: In Socastee.

7 THE COURT: Well, have you subpoenaed him to be here today?

8 Get him over here. Tell him to come on.

9 Who else you got?

10 Now, if I permit you to play - - and I'm going to do it if you
11 request it - - the video in full, is there any reason for these
12 people for Charleston to come here?

13 Mr. Axelrod?

14 MR. AXELROD: Yes, sir?

15 THE COURT: Assuming that you decide to put the entire
16 video into evidence, is there any then - - any reason to bring
17 these people from Charleston?

18 I don't understand what they can testify to.

19 In the meantime somebody be getting - - -

20 MR. AXELROD: The people from Charleston - -

21 THE COURT: Sir?

22 MR. AXELROD: - - the people from Charleston will bring the
23 video.

24 One second, Your Honor.

25 THE COURT: Alright. I want to know now who that

1 pharmacist is if you want to get him from Socastee.

2 Josh, you going to get him?

3 MR. TAYLOR: Yes, sir, Your Honor.

4 THE COURT: Sir?

5 MR. TAYLOR: Yes, sir.

6 THE COURT: It's your responsibility to have him here, you
7 know.

8 Alright. How about the detectives.

9 Bert, you getting them?

10 Wait a minute.

11 Alright, Mr. Axelrod, on the record, now. Mrs. McCall, we're
12 on the record.

13 I am permitting the video to come in without objection to the
14 Solicitor. So, why - - why do you need these people from
15 Charleston?

16 Wait a minute.

17 Get on the record. Get back on the record.

18 Tell me why you need anybody from Charleston? All they did,
19 they developed a video.

20 MR. AXELROD: No. The video was given to me by the
21 Solicitor.

22 THE COURT: Okay.

23 MR. AXELROD: Your Honor, there's nothing in the rules that
24 prohibits me - - and please hear me out.

25 THE COURT: Go ahead.

1 MR. AXELROD: If you're going to interrupt me, now, I'll just
2 sit down.

3 THE COURT: No. Go ahead.

4 MR. AXELROD: There's nothing in the rule to prohibit me from
5 playing a clip, several clips of a long video. At that point if
6 the State wants the whole video as to Rule 106 which you are aware
7 of, then they can ask for it come in but it doesn't - - I'm not
8 prohibited. I was trying to streamline my presentation so that it
9 goes to - - it goes to the credibility of the mother in this case,
10 and I'm being - - I'm being hindered by not allowing it to come in.

11 I have - - I have presented two hours of testimony this entire
12 week.

13 THE COURT: Mr. Axelrod, I have told you, sir, that as you
14 well know, if you play any portion of the video, they entitled to
15 have it all played.

16 MR. AXELROD: After I play my piece.

17 THE COURT: Well, you say that but in the interest of time
18 and in the interest of conserving the jury's time we going to play
19 the entire video, and you can relate to the jury - - we'll stop at
20 that point that you want to point to the jury, and I'll let you
21 emphasize that point if you care to.

22 MR. AXELROD: You see, we're not able to stop this. It's a
23 DVD.

24 THE COURT: Oh, I'll - - -

25 MR. AXELROD: What the Court's ruling is doing is hindering

1 the presentation of my case - -

2 THE COURT: No, sir.

3 MR. AXELROD: - - for my client.

4 THE COURT: No, sir.

5 I - - I, ah - - if you wish to have him here, you could do it
6 under any circumstances. Now, I don't want to argue with anybody,
7 and you know the Rule. Don't argue with me.

8 MR. AXELROD: I'm not arguing with you.

9 THE COURT: Well, don't - - you have said that you wanted
10 to play a portion of this video, and I'm telling you that I'm not
11 going to take it out of context, and it's fair to both sides to
12 play the video in its entirety, and I've ruled on that, and that's
13 going to be the end of it.

14 MR. AXELROD: I understand, Your Honor, but - - -

15 THE COURT: Don't argue with me, Mr. Axelrod.

16 MR. AXELROD: I'm not, Your Honor. I just want to look at
17 the Rule.

18 It says, "When a writing is introduced by a party in part, an
19 adverse party may require the introduction at the time of any other
20 part of the full writing."

21 So, I'm allowed by this Rule to put forth my case in - - in
22 the way I plan to present my case.

23 THE COURT: Have you got - - have you got the clips that
24 you propose to do?

25 MR. AXELROD: There were twenty-nine clips that we had pulled

1 out of that, and we have a little thing that we're able to go
2 through.

3 THE COURT: I conclude - - I understand the Rule but I
4 conclude in the interest of continuity and the interest - - rather
5 than letting you do twenty-nine separate clips, I think it's more
6 than fair for the jury to hear the entire video at the time, the
7 continuity of it.

8 MR. AXELROD: Let me ask you this.

9 If that's the Court's ruling and I'll live with that, tomorrow
10 in my closing argument, can I use those clips that I have chosen?

11 THE COURT: Yes, sir, I'll permit that.

12 MR. AXELROD: Thank you.

13 THE COURT: I surely will.

14 MR. AXELROD: Thank you.

15 THE COURT: That will take care of your problem.

16 Now having said all of these things, do you still need the
17 people to come from Charleston?

18 MR. TAYLOR: I think he is now just from the standpoint of
19 having to put them up for his closing.

20 THE COURT: That's fine. He can do that.

21 And I don't mind you presenting your case but in the
22 continuity of the thing, the jury will best see it in its entirety.

23 MR. TAYLOR: Yes, sir.

24 THE COURT: Otherwise, the Solicitor will have me go back
25 and play it in full anyway to which he's entitled to do.

1 So, I don't want to play it twenty-nine separate clips and
2 then play it in its entirety.

3 Having said that, during closing arguments I'll let you have
4 somebody stop the special clips that you are interested in. That
5 will address your concern.

6 Now, let's get through - - any other witness?

7 Okay, and what you do is I want hear all your witnesses you
8 got, and we'll play the video first thing in the morning.

9 MR. AXELROD: We're going to play the video in the morning?

10 THE COURT: Play it right now if you want to.

11 (Bench conference held off the record and outside the presence
12 of the jury.)

13 THE COURT: Alright.

14 Are your witnesses - - Mr. Axelrod, so we can get on, what
15 we're saying is you want to play the video now?

16 MR. TAYLOR: Yes, sir.

17 MR. AXELROD: We don't want to keep the jury in longer than
18 we need to, Your Honor.

19 THE COURT: I understand.

20 MR. AXELROD: I need - - what I need this pulled closer so we
21 can get a little closer to the jury. Can we do that?

22 THE COURT: If you get it too close, now, these jurors on
23 the end can't see.

24 MR. AXELROD: Well, that's true. You're right.

25 THE COURT: Alright.

1 Now, let's get this understood.

2 The video will be played in its entirety, and the State's not
3 objecting to that.

4 MR. VON HERRMANN: No, sir.

5 THE COURT: With the understanding that there are certain
6 portions of it that you want to emphasize to the jury, and I'll
7 permit that during your final closing.

8 You understand?

9 MR. AXELROD: Yes, sir, Your Honor.

10 THE COURT: Now, is that procedure satisfactory?

11 MR. AXELROD: Yes, sir, Your Honor.

12 And - - and - - and for the Court's knowledge, it - - the
13 video will go until 6:30 probably.

14 THE COURT: Well, that's fine. That's fine.

15 Bring the jury in.

16 MR. VON HERRMANN: Your Honor, the equipment right now is not
17 prepared - - it's not playing. They've gone to get the laptop and
18 some other stuff to set it up.

19 MR. AXELROD: While they set up, can I take a bathroom break,
20 Your Honor?

21 THE COURT: Yes, sir.

22 MR. AXELROD: Thank you.

23 THE COURT: Have you got - - while these - - while they're
24 setting it up - - well, how long does it take to set it up?

25 MR. VON HERRMANN: Your Honor, they've gone to get the laptop

1 and the other stuff to play it right now.

2 THE COURT: Alright, sir.

3 I'm going to go ahead and hear this video tonight.

4 MR. VON HERRMANN: And I'm told, Your Honor, that the
5 investigators are on the way up here. One will take about fifteen
6 minutes, and the other will take about thirty.

7 He was home asleep.

8 THE COURT: Well, we may do that in the morning. I'm told
9 this video is going to take an hour.

10 MR. VON HERRMANN: And, Your Honor, both of these
11 individuals, the investigators, the only involvement in this
12 particular case with regards to one of them is that he sat in on
13 the interview, and with regards to the other one, he interviewed -
14 - he investigated the spiral fracture of the child and sat in on
15 the interview. That's the only involvement they had.

16 THE COURT: Mr. Taylor, we off the record. Well, we on
17 the record.

18 MR. TAYLOR: Yes, sir.

19 THE COURT: If you - - if you still desire to call them if
20 they can have some testify bearing some issue in this case, we'll
21 be glad to listen to them.

22 MR. TAYLOR: Your Honor, only if Mr. Axelrod wants to call
23 them. I don't at this point.

24 THE COURT: Okay.

25 We'll then see the video, and then I'll probably let the jury

1 go home for the night, and then I'll address these issues as to
2 what we can do but I'm going to see this video tonight if I can - -
3 and then if you got a couple of short witnesses in the morning,
4 we'll move on with it.

5 MR. TAYLOR: Okay.

6 Your Honor, may I have a short break as well since you're
7 waiting on the laptop?

8 THE COURT: Yes, sir. Yes, sir.

9 Anybody else need a short break?

10 Alright, fine. About ten minutes.

11 (The Court recesses the trial of this case for a short break
12 and thereafter reconvenes the trial of the case.)

13 THE COURT: Counsel and defense, come forward just a
14 minute.

15 Be seated, please.

16 (Bench conference held off record and outside the presence of
17 the jury.)

18 THE COURT: Okay. While we waiting to set it up, let's go
19 ahead and take one - - take the investigator that you wish to call.
20 Is that okay?

21 MR. AXELROD: Um, at this point, Your Honor - - -

22 THE COURT: And the pharmacist is on the way. I'm going to
23 take that pharmacist as soon as they get here - - tonight anyway so
24 they won't have to come back in the morning.

25 What did you start to say, Mr. Axelrod? Please stand.

1 MR. VON HERRMANN: Your Honor, we might be able to work out
2 a stipulation. If - - if all they're bringing the pharmacist to
3 say is that there was a prescription for that particular medication
4 and it was filled, we'll stipulate to that.

5 I don't have a problem with that. We know it was - - -

6 THE COURT: Want to know the date of it.

7 MR. VON HERRMANN: Yes, sir. That's what I was going to say.

8 MR. AXELROD: Well, the pharmacist is on the way, Your Honor.
9 We're okay with bringing the pharmacist in. We're okay with
10 bringing the pharmacist in.

11 THE COURT: Well, can we go ahead and take the detective
12 now?

13 How long will it be before this tape is ready to go?

14 MR. VON HERRMANN: Shouldn't be that long, Your Honor, but
15 they're working on it.

16 MR. AXELROD: These are very - - that's why - - these are
17 very complicated things that they gave us, and I've had trouble
18 making them work.

19 MR. VON HERRMANN: It won't be but a minute.

20 THE COURT: Well, we've got some competent folks here
21 working on it.

22 I don't want to be taking testimony while they're working on
23 it, though. So, we'll just wait a few minutes.

24 I would suggest, though, gentlemen, if you can have all that
25 you're interested in, no need in wasting your time and that of the

1 jury in playing the rest of it but I leave that to you. I'm not
2 going to limit you unless it's by consent.

3 MR. TAYLOR: Judge, the only parts I want to see is the part
4 where the mother's - -

5 THE COURT: What?

6 MR. TAYLOR: - - the only parts I want the jury to see is
7 the parts where the mother's laughing and joking.

8 THE COURT: Okay.

9 What's Mr. Axelrod want them to see?

10 MR. AXELROD: I want to see the whole tape, Judge. I want to
11 see the whole tape now. That's what we're going to see. That's
12 what the Court ordered, and I'll do the clips tomorrow.

13 I'm okay with it, Your Honor. I really am okay with that, and
14 I'll do an examination of the officer today, and we'll get on, and
15 when the pharmacist comes in, we're going to put the pharmacist up
16 and we'll put the prescription in.

17 THE COURT: Alright, sir.

18 MR. AXELROD: We'll do all that, and - - and, Your Honor, I
19 have no problem even - - if the pharmacist comes, I have no problem
20 with even holding the tape, putting the pharmacist up and then
21 letting the pharmacist go.

22 MR. TAYLOR: I think they're going to have to see the whole
23 tape because Mr. Von Herrmann is not going to show - - allow me to
24 show just the parts where she's laughing and joking with the - - -

25 THE COURT: Well, in fairness to Mr. Axelrod, he just said

1 when the pharmacist gets here, we can stop the tape and take her
2 testimony and then resume the tape.

3 MR. AXELROD: Yes, Your Honor.

4 THE COURT: You don't have any objection to that, do you,
5 Mr. Axelrod?

6 MR. AXELROD: No. I suggested it.

7 THE COURT: No, I asked - - I don't mean Mr. Axelrod, Mr.
8 Von Herrmann.

9 MR. VON HERRMANN: Yeah. Your Honor, I have no problem with
10 stopping the tape. I have no problem with anything.

11 MR. AXELROD: Your Honor, we're now going to call and see
12 where the pharmacist actually is at.

13 THE COURT: Sir?

14 MR. AXELROD: Mr. Bailey is going to call the pharmacist
15 right now and see where she's at.

16 THE COURT: That's fine.

17 MR. AXELROD: Maybe she's in the courthouse.

18 THE COURT: Here's what we're going to do. Yours was an
19 excellent suggestion. If we even start the tape when gets here
20 we'll stop it and take her testimony and then resume the tape. I
21 don't want to keep the pharmacist waiting here.

22 MR. AXELROD: That's why Mr. Bailey's on the phone right now
23 to see exactly where she is because she might be - - she might be
24 here by now. That's what I'm saying.

25 THE COURT: That's fine. If she's here we'll move on with

1 that.

2 MR. AXELROD: Yes, sir, Your Honor.

3 THE COURT: Mr. Taylor.

4 MR. TAYLOR: Yes, Your Honor.

5 THE COURT: I well may - - if you got all the - - I just
6 don't want to quit here at 4:30. If you've got the remaining
7 witnesses available, we'll do that, and I'll consider letting you
8 play the tape first thing in the morning - - but I want to make
9 sure we get all of the witnesses. I want to occupy the rest of
10 this day.

11 Go find out if he's got any more other than we talked about.

12 (Court stands down awaiting return of attorneys and witnesses
13 and then resumes the trial on the record.)

14 THE COURT: Mr. Axelrod.

15 MR. AXELROD: Your Honor, all I want to do is put up an
16 officer and identify through Mr. Carr. I don't need Mr. Brantley.
17 I'll put Mr. Carr up and testify they conducted an interview with
18 Charlene.

19 Now, Charlene testified that she lied to the police. So, I
20 was going to ask Mr. Carr about Charlene lying to him, whether he
21 knew that at the time.

22 Then, I'd like to play the full video, introduce that the
23 pharmacist - - she's fifteen minutes out. She should be here by
24 5:00. She can bring in the prescription for Rondec-DM, and then
25 we'll play the rest of it.

1 I don't need Brantley. He's asleep. Let him sleep right now.
2 I'm not here to wake him up from his sleep. I have one officer to
3 set the foundation for the video.

4 THE COURT: Well, let me - - well, let me do this - - say
5 this to you. I just want to use the rest of the day.

6 If you're telling me you can get all of your witnesses here
7 today, I'll consider recessing and let you play the video first
8 thing in the morning. Would you like to do it that way?

9 MR. AXELROD: I - - -

10 THE COURT: Sir?

11 MR. AXELROD: No.

12 THE COURT: Why is that?

13 MR. AXELROD: What the Court has said - - -

14 THE COURT: Wait a minute. Let me take one - - -

15 MR. VON HERRMANN: Your Honor, quite frankly, this is the
16 night I have my children, and I - - -

17 MR. AXELROD: He's agreeing. He's agreeing.

18 MR. VON HERRMANN: I would prefer to do it tomorrow morning
19 but I'll do whatever you want. I've got arrangements for my
20 children to be picked up. I have taken care of it.

21 THE COURT: But you'd prefer in the morning?

22 MR. VON HERRMANN: I would prefer to play the video tape and
23 get all of the testimony in today.

24 THE COURT: Well, I don't - - -

25 MR. VON HERRMANN: But I'll do whatever the Court wants to

1 do.

2 I've got arrangements made. We can here all -- as late as
3 the Court wants to go.

4 THE COURT: Well, I'm concerned - - what about your
5 children in the morning?

6 MR. VON HERRMANN: My wife - - my former wife will pick them
7 up and take care of them.

8 THE COURT: You not babysitting in the morning?

9 MR. VON HERRMANN: No, sir.

10 THE COURT: I didn't think so.

11 Well, let me ask you this. Other than the pharmacist, can
12 somebody answer me, Mr. Axelrod, or Mr. - - I want somebody here
13 who can answer.

14 Other than the pharmacist and the one individual are there any
15 other witnesses other than the video?

16 Has he got it ready, yet?

17 MR. VON HERRMANN: No, sir. They had to switch a laptop.

18 THE COURT: Sir.

19 MR. VON HERRMANN: They had to switch a laptop. The laptop
20 won't play it.

21 THE COURT: The laptop's not up here yet?

22 MR. VON HERRMANN: We tried the one that did work last time
23 because they have a minute.

24 MR. GRAVES: But the other one is on the way.

25 MR. VON HERRMANN: And, Your Honor, understanding that the

1 tape is going to be admitted for the purpose of demeanor only, I
2 don't think it would be appropriate for him to inquire of Mr. Carr
3 if he knew he was being lied to at the time.

4 THE COURT: Oh, no.

5 I'm not - - I already said. I'm not going to do that.

6 MR. VON HERRMANN: Well, that was what Mr. Axelrod - - I
7 mean, he can authenticate the tape and say he recorded it but
8 that's about all he can say in my opinion - - estimation of the
9 Rule.

10 THE COURT: Let - - I want to address this issue.

11 Other than the video, can we get in all the witnesses tonight?

12 MR. AXELROD: Yes, sir.

13 THE COURT: Sir?

14 MR. AXELROD: With the pharmacist, yes, sir.

15 THE COURT: Alright.

16 How many witnesses - - other than the pharmacist, how many
17 witnesses you got?

18 MR. AXELROD: Well, I was going to put up Detective Carr - -

19 THE COURT: Alright, sir.

20 MR. AXELROD: - - and Detective Brantley but since Detective
21 Brantley is sleeping, I'm going to skip Detective Brantley. We
22 have Detective Carr.

23 Who is the one that - - -

24 COURT REPORTER: Your Honor, I'm sorry but I'm going to
25 need Mr. Axelrod to be near a microphone.

1 THE COURT: Yes.

2 MR. AXELROD: I'm going to put up Detective Cox. He's here.
3 Detective Cox is here.

4 THE COURT: Wait a minute, now. Let's stop one minute.
5 Let's get on the record. Talk into a microphone so my Court
6 Reporter can hear you.

7 What are you saying?

8 We are now on the record.

9 What are you saying, sir?

10 MR. AXELROD: Detective Cox, he was the lead investigator
11 here. I want to ask him about some of his investigation
12 positions.

13 Detective Carr can authenticate the making of the tape. We've
14 got to lay the foundation for that tape.

15 And Officer - - -

16 THE COURT: That's not necessary. They've agreed to let
17 the tape come in. So, you don't need a foundation.

18 MR. AXELROD: For the jury's understanding I think it's
19 proper.

20 And, also, Joshua has one detective. What's his name?

21 MR. BAILEY: Detective Strickland.

22 MR. AXELROD: Detective Strickland, possibly, because he
23 approved - - one of the police officers is no longer with us.

24 THE COURT: This last one you talking about, where is he,
25 the last one you mentioned?

1 MR. AXELROD: He - - he - - he approved - - he was the
2 approving officer of Patty *** (unintelligible) report, and I want
3 to ask him about his report because he was part of that report
4 about some information in the report.

5 THE COURT: Where is he? Where is he?

6 MR. AXELROD: We're calling him right now.

7 THE COURT: Is he here?

8 MR. AXELROD: He's an ordinary police officer. We're calling
9 him now. He said he would come when we called.

10 MR. VON HERRMANN: Your Honor, and he has nothing more than
11 to approve a report. He doesn't have any information about what
12 the report contains.

13 He just makes sure the punctuation is correct and signs off on
14 it. There's no - - he has nothing to do with this case.

15 THE COURT: Why do you need him, Mr. Axelrod?

16 MR. AXELROD: Well, he - - he read this report.

17 Now, we have an officer - - -

18 THE COURT: No, no, no. If it's not his report, I'm not
19 going to let him testify to it.

20 MR. AXELROD: Yes, sir.

21 I don't need him then, sir.

22 THE COURT: No. Sure you don't.

23 MR. AXELROD: I'll tell Mr. Bailey.

24 THE COURT: Now, I'll be glad to listen to the author of
25 the report, you understand.

1 Alright.

2 Can you be - - let's see.

3 While he's working on that, can we go ahead and take this
4 testimony.

5 MR. VON HERRMANN: Yes, sir.

6 I'm prepared to do - - I'll do whatever this Court wants to
7 do, Judge.

8 THE COURT: I understand.

9 Well, I - - I think time we get through these witnesses, I'm
10 not going to want to keep the jury here until 7:00 tonight, and I
11 don't mind just finishing the witnesses and take the video first
12 thing in the morning. It will get them a chance to set it up. You
13 understand?

14 MR. VON HERRMANN: We can stop setting it up right now, Your
15 Honor, and take the witnesses if that's what the Court pleases.

16 THE COURT: Well, just hold on. I'll get Mr. Axelrod back
17 here.

18 Again, he continues to leave without letting anybody know.

19 (The Court awaits the return of Mr. Axelrod to the courtroom
20 and then continues on the record.)

21 THE COURT: Alright, Mr. Axelrod, I think we'll go forward
22 with your remaining witnesses this afternoon, and, ah, depending on
23 the time, we may wait and play the video in its entirety first
24 thing in the morning. Does that suit you?

25 MR. AXELROD: At this point, Your Honor, whatever suits this

1 Court suits me.

2 THE COURT: Alright.

3 Turn the lights off and bring the jury in and get ready to
4 call your remaining witnesses.

5 MR. AXELROD: All we have is the pharmacist, and she's not
6 here yet.

7 THE COURT: I thought you wanted these witnesses.

8 MR. AXELROD: The pharmacist - - okay. Detective Cox.

9 THE COURT: Well, the pharmacist is not here.

10 MR. AXELROD: She'll be here in about fifteen minutes.

11 THE COURT: Keep on working on your video.

12 Other than the detective, you got any other witnesses? The
13 pharmacist and who else, Mr. Axelrod?

14 MR. AXELROD: Detective Cox.

15 THE COURT: So, you got the detective and the pharmacist,
16 is that correct?

17 MR. AXELROD: Right. And Detective Carr to get the video.

18 THE COURT: Sir?

19 MR. AXELROD: And Detective Carr.

20 THE COURT: We on the record now.

21 Tell me - - the prosecution has consented to the introduction
22 of the video. There's no foundation necessary to put it in. What
23 is Detective - - -

24 MR. AXELROD: I think for continuity for the jury, Your
25 Honor, I think that we need it on the stand that Detective Carr was

1 the one who took the video of Charlene, and then we play the video
2 like we normally do.

3 MR. VON HERRMANN: Your Honor, if I could? Possibly, the
4 way we could do this and to save everything.

5 If he could put all - - if he could put up Officer - -
6 Investigator Carr up. Investigator Carr can, you know,
7 authenticate his audio or video tape, and we can just play it in
8 the morning early. Investigator Carr who has got another murder
9 he's working on.

10 THE COURT: Well, I'm going to let him authenticate the
11 tape but I'm not going to let him testify as to what's in it
12 because that's for the jury to see.

13 MR. AXELROD: Okay. I'm not going to ask him about what's in
14 it.

15 THE COURT: Okay.

16 MR. AXELROD: I'm not going to ask him about what's in it.

17 THE COURT: Okay.

18 MR. AXELROD: Actually, I would never do that.
19 That's for the jury to decide.

20 THE COURT: Okay.

21 Well, let me know when the pharmacist gets here.

22 MR. AXELROD: Okay.

23 THE COURT: Mr. Taylor, let me ask you something. How long
24 is this video?

25 MR. TAYLOR: An hour and fifty minutes, Your Honor.

1 THE COURT: An hour and what?

2 MR. TAYLOR: An hour and fifty.

3 THE COURT: Fifty. I'm going to play it in the morning.
4 I'm not going to keep them.

5 (Bench conference held off record and outside the presence of
6 the jury.)

7 THE COURT: Now, I'm going to be on the record - - again.

8 I understand that the pharmacist is on the way. We're going
9 to take that one.

10 You have a detective - - will you listen to me?

11 And you have a detective, who, Carr?

12 MR. AXELROD: Yes, sir. Detective Bob Carr.

13 THE COURT: Okay.

14 Now, who else do you need? What other detectives do you
15 need?

16 MR. AXELROD: Detective Cox, and I believe he's here, too.

17 THE COURT: Alright. That's fine.

18 Who else do you need?

19 MR. AXELROD: I need the pharmacist.

20 THE COURT: I understand that but the pharmacist is on the
21 way.

22 MR. VON HERRMANN: And we have both police officers.

23 THE COURT: Both police officers.

24 Is there anybody else - - that you need?

25 MR. AXELROD: No, sir.

1 THE COURT: Okay.

2 I'm going to take these three witnesses and probably - - -

3 MR. AXELROD: Oh, Your Honor, we were going to recall
4 Charlene tomorrow.

5 THE COURT: No, sir. We going to recall Charlene tonight
6 if that's what you want to do.

7 MR. AXELROD: After we show the video to the jury.

8 THE COURT: No, sir. We going to do it my way. We going
9 to call Charlene now.

10 Well, I understand. I may let you. I'll let you call
11 Charlene - - recall after the video.

12 MR. AXELROD: Thank you, sir.

13 THE COURT: Because that will raise some issues.

14 MR. AXELROD: May we please get Detective Carr?

15 THE COURT: Now, when you do that, you understand that
16 you're opening her up for cross examination on any issue in the
17 video or otherwise?

18 MR. AXELROD: Absolutely. Absolutely.

19 THE COURT: Okay.

20 One more time. Come back.

21 I want to have it clear, now, that you've got the pharmacist -

22 -

23 MR. AXELROD: The pharmacist.

24 THE COURT: --- and the two detectives - -

25 MR. AXELROD: The two detectives.

1 THE COURT: - - and you're saying to me that other than
2 possibly calling Charlene as a - - as your witness, the video is
3 the only thing you've got left?

4 MR. AXELROD: Yes.

5 THE COURT: Let's go with the jury. That's fine.

6 So, what I'm going to do is take these three witnesses and
7 we'll start with the detectives, and, hopefully, the pharmacist
8 will be here. If not, we'll take a break.

9 We'll take these three witnesses tonight and play the video at
10 9:30 in the morning, and you can call Charlene if you care to. I'm
11 not requiring you to.

12 MR. AXELROD: And then we'll close after that.

13 THE COURT: Correct. That's fair enough.

14 Bring the jury in.

15 And, Mr. Bailiff, you keep your eye out for the - - -

16 Now with reference to the video, Solicitor, I want that
17 resolved tonight and ready to go in the morning. I don't want
18 anybody working on it at 9:30.

19 MR. VON HERRMANN: Yes, sir.

20 (The jury returns to the courtroom at 4:57 p.m.)

21 THE COURT: Mr. Foreman, let me tell you where we are.

22 We are going to have this afternoon three short witnesses.
23 Two are here and the pharmacist is on the way.

24 We will recess then for lunch - - for the evening, and when
25 you return in the morning at 9:30, there's a video to be played

1 lasting approximately an hour and a half. I would not want to play
2 that tonight and keep you away from your family and your dinners
3 but I'm thinking you need to know for time schedules - - I am
4 thinking that we can have, ah, the rest of the testify first thing
5 in the morning, closing arguments, and I will be - - final
6 arguments and instructions in the law.

7 I fully anticipate that you will have this case by tomorrow
8 afternoon for your deliberation, and if we can then conclude it,
9 you will be free on Friday.

10 So, I'm working a little longer than necessary so hopefully I
11 won't have to bring you back on Friday because I know your time is
12 valuable, too.

13 So, that's where we trying to work at.

14 Alright.

15 Call the two witnesses who are here, and if the pharmacist is
16 not here, we'll wait on her. She's on the way.

17 MR. AXELROD: Yes, Your Honor.

18 We'd call Detective Bob Carr.

19 (The witness takes the witness stand.)

20 DETECTIVE ROBERT E. CARR, being duly
21 sworn, testifies as follows:

22 CLERK OF COURT: Please be seated

23 Please state your full name.

24 DETECTIVE CARR: Robert E. Carr, C-a-r-r.

1 DIRECT EXAMINATION BY MR. AXELROD:

2 Q. How you doing, Detective?

3 A. Wonderful.

4 Q. How are you?

5 A. Wonderful.

6 MR. AXELROD: I'd like to get this marked right now to save
7 time.

8 (Court Reporter marks exhibit.)

9 Q. Detective, you've had the opportunity to be involved in a case
10 with Charlene and Wesley?

11 A. Yes, sir, I did.

12 Q. In fact, were you not the detective that interviewed Charlene?

13 A. That is correct, sir.

14 Q. And you interviewed her on, I think the day after **Minor** died
15 on the 15th of February?

16 A. Yes, sir, I believe that is the correct date.

17 Q. And approximately an hour and fifty minute video, somewhere in
18 there?

19 A. If I recall correctly, it did exceed an hour, yes, sir.

20 Q. Okay.

21 And when you interviewed her that day, do you remember? Was
22 she laughing with you?

23 A. She did laugh during some part of the conversation.

24 Q. Okay.

25 And did she - - did she seem to be - - appear to be truthful

1 with you?

2 MR. VON HERRMANN: Objection, Your Honor. Calls for
3 speculation.

4 MR. AXELROD: This is a trained police officer.

5 THE COURT: I will let him answer that question.

6 Q. Did she appear to be truthful with you?

7 A. She appeared to be truthful. I had no reason to doubt what
8 she was saying.

9 Q. Would it surprise you - - -

10 THE COURT: No, sir. Don't - - do not be surprising but
11 go ahead. Ask him a question.

12 Q. Charlene testified that she lied to you.

13 A. Okay. I'm not familiar with that, sir.

14 Q. But when you met with her, you believed everything she said
15 was truthful.

16 A. I believed everything she said was truthful, yes, sir.

17 Q. Well, sometimes you have - - you have - - sometimes you
18 interview people, and you don't think they're being truthful,
19 correct?

20 A. Um, I would say I believe everybody is truthful until I find
21 them specifically lying to me.

22 If I find out during an interview that they're misleading me
23 or something I know that they don't know, under most cases I
24 believe everything everybody is telling me, initially.

25 Q. But is it sometimes that you interview somebody that you think

1 is being less than candid with you?

2 A. I would say that that is possible.

3 Q. But in this case?

4 A. In this case I had no reason. She - - I had no reason to
5 doubt what she was telling me.

6 Q. She laughed. She joked with you.

7 A. I wouldn't say joked. I would say she, ah, laughed, I think,
8 at least on one occasion.

9 Q. On one occasion?

10 A. Uh-huh.

11 Q. And this was the day after - - I guess it was within twelve
12 hours within **Minor** passing?

13 A. Ah, yes, sir, I would say that is the case.

14 Q. What time did you do - - do the interview?

15 A. I actually don't recall to tell you the truth, sir.

16 Q. Do you have any notes for that?

17 A. No, sir.

18 Q. But within twelve hours?

19 A. Um, I - - that would be only - - I couldn't tell you if it was
20 within twelve hours to be honest. It was sometime the next day.

21 Q. There was - - there was - - okay.

22 THE COURT: Now, Mr. Axelrod, I know you're use to cross
23 examination but this is direct. This is your witness.

24 MR. AXELROD: I understand, Your Honor, but under Rule 611
25 concerning an adverse party, this is a member of the State, and the

1 State is prosecuting. So - - -

2 THE COURT: No. It doesn't fall under that rule. Go
3 ahead and ask your questions.

4 MR. AXELROD: Thank you, Your Honor.

5 THE COURT: But he's not an adverse party. He is an
6 investigator.

7 MR. AXELROD: But - - but he is with the State.

8 THE COURT: I understand that but that doesn't give you the
9 right to call that witness and then cross examine him unless - -
10 unless it's another issue.

11 Q. Did you go to Charlene's house that day?

12 A. I don't - - I don't recall but I did go - - that particular
13 day of the interview, no, I don't believe I did.

14 Q. Okay.

15 But after you interviewed Charlene, your focus was then placed
16 to Wesley. Is that correct?

17 A. I was merely the interviewer of Charlene.

18 Q. And that's - - -

19 A. Other detectives were handling that particular.

20 Q. Okay.

21 A. My only involvement was the interview with her.

22 Q. Okay.

23 That's fair enough.

24 MR. AXELROD: And at this time, Your Honor, I think I've laid
25 the foundation for Defendant's Exhibit #2 to come in.

1 THE COURT: The record will reflect that Exhibit #2 is a
2 video of the conversations, apparently, they had with this
3 particular witness, and by consent of the - - you and the
4 Solicitor, that video will be played in full.

5 In addition to that, I have agreed that if you are interested
6 in certain clips, you may do that during your final closing.

7 Does that comport with our understanding of this procedure?

8 MR. AXELROD: Exactly what I requested, Your Honor.

9 MR. VON HERRMANN: Yes, sir, Your Honor.

10 THE COURT: Alright, sir.

11 The foundation is laid, and it is in evidence.

12 (The Court Reporter accepts Defendant's Exhibit #2 into
13 evidence.)

14 THE COURT: Anything further from this witness?

15 MR. AXELROD: No, sir, Your Honor.

16 He stated - - he stated to the jury that all he did was
17 basically take an interview.

18 THE COURT: That's what I understand.

19 MR. AXELROD: Thank you, Your Honor.

20 THE COURT: You have any questions?

21 MR. VON HERRMANN: Just a couple, Your Honor.

22 THE COURT: Alright, sir.

23 Thank you, Mr. Axelrod.

24 CROSS EXAMINATION BY MR. VON HERRMANN:

25 Q. Detective Carr, let me show you. Did you read Charlene

1 Dandridge her rights?

2 A. Well, the other detective that was there, yes. There were two
3 of us there.

4 Q. You were present?

5 A. Yes, sir.

6 Q. Would that help you tell what time it was that you interviewed
7 her?

8 A. Yes. It says 17:37.

9 Q. And what time is that?

10 A. That is 5:37.

11 Q. So, that's nearly - - over twenty-four hours after the baby
12 died. Correct?

13 A. Yes, sir.

14 Q. Was Ms. Dandridge nervous when she was talking to you?

15 A. Ah, she did seem to be a little bit nervous. She kept kind of
16 moving back swaying in the chair a little bit.

17 MR. VON HERRMANN: No further questions, Your Honor.

18 MR. AXELROD: Just one, Your Honor.

19 REDIRECT EXAMINATION BY MR. AXELROD:

20 Q. Just for clarification, the baby died - - what time did the
21 baby die?

22 A. That wasn't part of my - - my only involvement was the
23 interview with Ms. Dandridge.

24 Q. I think the baby died after 5:30. So it would be less than
25 twenty-four hours that you did your interview then?

1 A. If that is the case, sir, I guess that would be less than
2 twenty-four hours.

3 Q. Thank you, sir.

4 Thank you, Detective.

5 THE COURT: Alright, Detective, you may come down, and we
6 thank you.

7 DETECTIVE CARR: Thank you.

8 (The witness leaves the witness stand.)

9 THE COURT: Call your next witness, please.

10 MR. AXELROD: Detective Cox.

11 MR. VON HERRMANN: Your Honor, we'd ask that he be excused
12 from his subpoena.

13 THE COURT: Yes, sir.

14 MR. AXELROD: Without objection.

15 THE COURT: You're excused but you're certainly entitled to
16 remain but you may be excused if you care to.

17 DETECTIVE CARR: Thank you, sir.

18 (The witness takes the witness stand.)

19 DETECTIVE TODD COX, being duly sworn,
20 testifies as follows:

21 CLERK OF COURT: State your full name.

22 DETECTIVE COX: Todd Cox, C-o-x.

23 MR. AXELROD: Your Honor, may we approach before I question
24 the detective?

25 (Bench conference held off the record and in the presence of

1 the jury but outside the presence of the jury.)

2 MR. AXELROD: I'll go ahead, Your Honor.

3 THE COURT: Alright, sir.

4 DIRECT EXAMINATION BY MR. AXELROD:

5 Q. Detective Cox, tell the jury what your role in this case was.

6 A. I was the lead investigator in this case, sir.

7 Q. And tell the jury what a lead investigator is.

8 A. A lead investigator is typically the first when it comes to a
9 crime of this nature would be the first violent crime detective
10 from the county police department, and, usually, if it's after
11 hours, it's the on-call detective. The first responding
12 investigator to the scene is the lead investigator.

13 Q. And what do you actually do as a lead investigator? Tell the
14 jury.

15 A. To a degree, direct the investigation. There is more than
16 one investigator involved in investigating the case, ah, such as
17 Detective Carr who was just on the stand, ah, and as the case
18 proceeds, the chief case agent or lead investigator collects all
19 the information that is obtained by the other detectives working
20 out in the field working on the case.

21 Ultimately, it is the lead investigator's job to compile that
22 case file, present it to the Solicitor's Office, go and seek any
23 arrest warrants that may be appropriate, present that case to the
24 Grand Jury for indictment, and, ah, the ultimate compilation of the
25 case is the responsibility of the lead investigator.

1 Q. Alright.

2 Now, did you have the opportunity to review Corporal's ***
3 (unintelligible), Patty *** (unintelligible)?

4 A. I haven't in quite some time read that. The actual initial
5 police report, is that what you're referring to?

6 Q. Yes, sir.

7 A. I haven't in quite some time, no, sir.

8 Q. Okay.

9 Well - - at some point you met with - - you met with Charlene
10 and Wesley at the hospital, I believe?

11 A. Yes, sir, that's correct.

12 Q. Okay, and what did they tell you that night if you remember?

13 A. What did Charlene and the defendant tell me?

14 Q. What did Charlene and Wesley tell you if you remember?

15 A. Just very brief basic statements trying to establish a time-
16 line as to how things had transpired, and, really, my discussion
17 with them was very limited that night, and I obtained consent to
18 search their residence from Charlene but I didn't obtain any formal
19 statements from either party on that night.

20 Q. Okay.

21 And I think you - - I think Wesley told you at one point he
22 attempted CPR?

23 MR. VON HERRMANN: Objection, Your Honor.

24 THE COURT: Wait a minute. I sustain that.

25 MR. AXELROD: What I asked the detective was when he

1 interviewed Wesley, did Wesley tell him that - - -

2 MR. VON HERRMANN: Your Honor, I object.

3 THE COURT: Wait a minute, no, sir.

4 Come here. Let's see.

5 (Bench conference held in the presence of the jury but outside
6 the presence of the jury.)

7 THE COURT: I decline to do that.

8 Q. When you - - when you conducted your investigation, were you
9 aware of anybody giving CPR to this baby?

10 A. Yes.

11 Q. Who were you aware of?

12 A. The defendant.

13 Q. Wesley?

14 A. Yes. The security guard, the EMS personnel that responded to
15 the scene.

16 Q. Okay.

17 And did you know when you read your report that the security
18 guard told you that there was a woman there prior to him giving
19 CPR?

20 A. Not that I recall, no, sir.

21 Q. When you searched the apartment, did you find any
22 pseudoephedrine in the apartment?

23 A. No, sir.

24 If I can clarify that? I didn't find any prescription
25 pseudoephedrine in there. If there was any over-the-counter

1 medication that could be purchased by the general public, ah, I
2 don't recall if there was any over-the-counter cold remedies or
3 anything like that that may have contained pseudoephedrine. They
4 may have been present there but there was no prescription, ah, no
5 prescription bottles, tablet or liquid form that clearly indicated
6 on the label that it contained any pseudoephedrine?

7 Q. Alright, and you didn't find any cough medicine there, did
8 you?

9 A. I don't know. There was - - as I said, there was some - -
10 there was prescription medication present there but whether they
11 were cough medicine or not, I don't know.

12 Q. Well, according to your report, you find warfarin sodium, 5
13 mg., for Wesley located on the television in the living room?

14 A. That's correct.

15 Q. Um, ripulvinzee (spelled phonetically) for Tyrell located in
16 the downstairs bathroom. Correct?

17 A. Yes, sir.

18 Q. And you found prednisone, 15 mg., for Tyrell located in the
19 upstairs bathroom?

20 A. Yes, sir.

21 Q. And that was all you found?

22 A. Yes, sir.

23 And whether or not they contain pseudoephedrine, I'm
24 uncertain.

25 Q. But - - but my question was you didn't find any generic cough

1 medicine there that said cough medicine?

2 A. I didn't specifically look. I don't know if it was present
3 or not.

4 Q. But you took all the medications you could find?

5 A. I believe I photographed the prescription medications that I
6 could find. I did not take them.

7 Q. Okay.

8 Now, Charlene told you that on February 12th and 13th that she
9 was the sole provider for **Minor** for those days. Remember?

10 It's a long time ago.

11 MR. VON HERRMANN: Your Honor, I would object to the
12 questions. It's his witness. He's needs to ask the questions,
13 not lead him.

14 THE COURT: Alright, sir.

15 Just follow the rule.

16 Q. When you interviewed Charlene on the 14th of February at the
17 hospital after her daughter passed, did she tell you about taking
18 the baby for a wellness checkup on February 12th?

19 A. Yes. Yes.

20 And, if I may clarify? I didn't do a formal interview with
21 either the defendant or Charlene on the night of the 14th at the
22 hospital. A written statement had been obtained from Charlene by
23 the responding patrol officers. That statement was immediately
24 given to me upon my arrival, and, ah, it - - no formal interview
25 was conducted that night. Just the very basic reviewing what was

1 written the statement. Ah, regardless, no formal interview was
2 conducted with her at that time.

3 Q. Okay.

4 But - - so - - did you have any conversations with Charlene
5 that evening about what occurred the day or two prior?

6 A. I don't recall if I did that night. I recall specifically
7 trying to establish, um, some sort of time-line during the hours
8 leading up to the child being brought to the hospital, and I do
9 recall speaking to her in regards to that, ah, but - - but I don't
10 recall talking to her about a time frame outside of maybe that - -
11 maybe the afternoon of the 14th leading up to the child, ah, being
12 pronounced deceased.

13 Q. Well, when you say the time-line, was the time-line just for
14 the one day? Was the time-line for the three days?

15 A. As I recall it at the hospital, um, and it may have been for
16 more but I specifically recall talking to her about a time-line for
17 several hours leading up to the time that we were present there.

18 Q. And she told you that she was home for lunch that day?

19 A. Yes, sir.

20 Q. About three hours before **Minor** passed?

21 A. No, it was longer than that. Probably closer to five hours
22 but, yes. She had been at work. She came home for lunch. Was
23 home for a period of time. Went back to work.

24 Q. Okay.

25 Well, let's go back to that now?

1 The ambulance came at what time for Minor

2 A. I believe it was somewhere around 8:00.

3 And that may have been the response of law enforcement. I may
4 be wrong about that. Um - - but it should - - yeah, I may be
5 wrong about that. That may be the time that - - that law
6 enforcement was actually dispatched.

7 Q. Okay.

8 Because I thought that the ambulance came somewhere in the
9 6:30 time or so.

10 Because Charlene - - that's what I thought, and that's what I
11 was asking you. I'm not trying to mislead you.

12 A. Well, then, and, ah, the one thing that I do recall about the
13 initial police report that was written was that the patrol officer
14 was dispatched to Conway Hospital in reference to an infant being
15 brought there in cardiac arrest, and when the patrol officer got
16 there and had stepped into the emergency room is when the ambulance
17 arrived with the victim in this case.

18 So, ah, then I believe that was around 8:00, about 20:00
19 hours.

20 Q. About 20:00 hours.

21 A. Yes, sir. And I'm sure it didn't take the ambulance 90
22 minutes to get from Socastee to Conway Hospital. So, it's probably
23 pretty close to 8:00.

24 Q. Well, I have EMS arriving at their location at 19:26. That
25 would be 7 - - -

1 A. 7:26 p.m., yes, sir.

2 Q. 7:26.

3 A. Yes, sir.

4 Q. And Charlene told you that she was home until approximately -
5 - -

6 MR. VON HERRMANN: Your Honor, I'm going to have to object.
7 He's leading the witness.

8 THE COURT: Yes, sir. I sustain that.

9 Q. What time did Charlene tell you she went back to work that day
10 after lunch?

11 A. I believe it was around two or three she went back to Office
12 Depot where she was working.

13 Q. What time did she come home for lunch, now? Was it two?

14 A. I - - yeah, I believe it was two and three. She came home
15 from work at two and went back to work at three.

16 Q. So, from three to seven-thirty would be about four and a half
17 hours?

18 A. Yes, sir.

19 Q. And at that point when EMS arrived, EMS had been called prior
20 to their arrival. Correct?

21 A. Yes, sir.

22 Q. So, it might be fair to say that the baby was found not to be
23 breathing slightly before that time even?

24 A. Yeah. Around 7:30 would be fair.

25 Q. Well, they arrived before 7:30.

1 A. Yeah.

2 Q. So, towards 7:00 or after seven or sometime in there, however
3 long it took.

4 A. That's fair.

5 Q. I don't think anybody knows that.

6 A. Okay.

7 Q. Now, on the time-line, did you do the time-line from just that
8 day or did you do the time-line for two days before that when you
9 talked to them initially at the hospital at 10:00 that night?

10 A. No. As I said, I tried to establish the sequence of events
11 that immediately led up to the child being rendered in that
12 condition which was - - it certainly incorporated the fact that she
13 had gone to work, came home for lunch and then the events that
14 transpired subsequent to that.

15 But outside of that time frame I don't recall any discussion
16 regarding that.

17 Q. And, in fact, you had the autopsy results, I think, the next
18 day?

19 A. No, sir. No, sir. It was several weeks before I learned
20 that it was toxicology related death. Some of the physical
21 injuries that - - some of the gross findings, ah, certainly were
22 made aware to me as I was present at the autopsy, ah, the fractured
23 ribs that were previously testified to. That was made aware to me
24 on the 15th as I was present at the autopsy but as far as any
25 toxicological, ah, analysis that was done and the result of those

1 tests I wasn't made aware of those for some time later.

2 Q. And I didn't mean to confuse you but I was speaking of the
3 gross observations - -

4 A. Okay. Okay.

5 Q. - - the 15th of February.

6 A. Yeah, I was aware. I was present, yes, sir.

7 Q. It's been established that the toxicology, the report wasn't
8 run until I think the 16th of March of that - - of that year.

9 A. Uh-huh.

10 Q. So, you were aware that ribs had been broken in **Minor**

11 A. Yes, sir.

12 Q. And you were aware, I believe, I would think the pathologist
13 had told you that at point on that day that these ribs were broken
14 in a period that could be ten to twenty-one days prior to Ebony's
15 death.

16 A. Yes, sir. In addition to that, there were injuries that they
17 informed me at the time of the autopsy appeared to be fresh in
18 nature. So.

19 Q. But she testified today if you were here for the testimony
20 that the ribs had callus formations on them?

21 A. Yes, sir.

22 And I think the question you asked me was what I found at the
23 autopsy.

24 Q. Okay.

25 A. Yes, sir. That's what I was informed of at the autopsy.

1 Q. Okay.

2 Now, my concern is there's been ample information put forth in
3 this courtroom concerning Charlene's involvement.

4 MR. VON HERRMANN: Your Honor, I going to have to object.

5 THE COURT: Wait a minute, now. No, that's not - - you ask
6 - - this is your witness, now. You ask any question directly
7 without leading as to what it is.

8 Q. Why did you not charge Charlene with homicide?

9 A. I didn't charge anybody with homicide.

10 Q. Did the Solicitor charge him?

11 A. I believe the defendant was indicted by the Grand Jury but I -
12 - I never signed an Affidavit or swore out an Arrest Warrant for
13 the defendant for any type of homicide charge - -

14 Q. So what you're saying - - -

15 A. - - nor did I Ms. Dandridge.

16 THE COURT: I would charge - - I would explain to the jury
17 that the final charge is the decision of the Solicitor and not the
18 investigating officer.

19 MR. AXELROD: Right.

20 Well, I - - I think that if the Court could maybe explain to
21 the jury that sometimes an officer can take out a warrant. In this
22 case he didn't.

23 THE COURT: I decline to do that. Who - - the charge to
24 be made is based on the Solicitor's understanding of what they
25 perceive to be the facts in this case, and it's not his - - it's

1 not his determination to make that decision.

2 An investigator delivers to the Solicitor the facts as he
3 thinks he's found them. The Solicitor based on that and other
4 information provided makes the ultimate decision, first, as to
5 charge or not charge, and, secondly, if charge, what charge. It's
6 not his prerogative to do that.

7 Alright, sir.

8 Q. So - -

9 MR. AXELROD: And, Court's indulgence.

10 Q. - - so, in this case it was a direct indictment taken out by
11 the Solicitor?

12 A. Yes, sir.

13 Q. And if you could just explain to the jury the difference
14 between what direct indictment is and what you would take out?

15 THE COURT: No, sir. No, sir. That's not necessary.

16 MR. AXELROD: Okay.

17 Q. But you didn't take out the warrant?

18 A. Not for this - - not for the specific charge that the
19 defendant is on trial for today, no, sir.

20 Q. Okay.

21 Now, so that - - did you review the victim's medical records
22 from Healthcare Partners? Did you review Ebony's records?

23 A. Ah, I obtained them. To be honest with you, most of those
24 records typically from a medical facility like that, number one,
25 they're difficult to read, the handwritten notes, and, number two,

1 often times it's something that's - - contains information that's
2 outside my area of expertise, a lot of medical terminology and the
3 prescribed treatments and diagnoses and such but I did glance
4 through them, yes, sir. I didn't read them in great detail.

5 Q. Well, you noted in your report that the records showed no
6 indication that **Minor** had ever been prescribed nor were her parents
7 ever directed to medicate her with pseudoephedrine. You made that
8 statement. Can you explain that to the jury?

9 A. As I recall, that came as a result - - I had talked to a Dr.
10 Cooper or a Dr. Cooper-Merchant, ah, who was the primary care
11 pediatrician in an effort to learn some kind of background as far
12 as the victim's previous medical history, and, obviously, in
13 compiling a case like this although those specific medical records
14 may not mean a whole lot to me, essentially, a lay person in the
15 field of medicine, ah, when a case such as this comes to the point
16 where we're at today, they are significant, um, and, certainly, I
17 would be remiss as an investigator if I didn't obtain those
18 records, didn't forward those to the Solicitor's Office and didn't
19 have them as part of the case file.

20 That - - that's where the best I recall that's where I learned
21 that information was speaking with the doctor.

22 Q. And Dr. Cooper told you that she never had prescribed
23 pseudoephedrine?

24 A. Yes, sir.

25 Q. And looking at your report further, I believe you talked to

1 Solicitor Von Herrmann on April 27, 2004, about the findings of
2 this case?

3 A. Yes, sir.

4 That's probably around the time that the autopsy results, the
5 final autopsy results to include the toxicology was forwarded to
6 me.

7 Q. And - - and your report says that it was decided that a direct
8 indictment would be sought against Wesley with the offense of
9 homicide by child abuse.

10 A. Yes, sir.

11 Q. When you write that it was decided, did you have input into
12 that decision?

13 A. To a degree, yes, sir. We maintain a good working
14 relationship with our Solicitor's Office.

15 MR. AXELROD: Court's indulgence, Your Honor.

16 Your Honor, Mr. Bailey informs me the pharmacist is here. I
17 have no further questions.

18 THE COURT: I understand.

19 You have any?

20 MR. VON HERRMANN: Yes, just a couple.

21 CROSS EXAMINATION BY MR. VON HERRMANN:

22 Q. Detective Cox, the medication or prescribed medication that
23 you located in the residence, who was the - - suppose to be the
24 recipient of all of those medications?

25 A. Um, as I recall, there was one for the defendant and two for

1 Tyrell who was the sibling of the deceased.

2 Q. Did you notice or did you - - were you looking for just
3 medications that were prescribed?

4 A. Yes, sir.

5 Q. And did you write down every prescription medication that you
6 were able to find?

7 A. Yes, sir.

8 Q. Were there any prescription medications that were written for

9 **Minor**

10 A. No, sir, there was none.

11 Q. Had there been, would you have written that down in your
12 report?

13 A. Absolutely.

14 Q. In this particular case, did you know at the time of the - -
15 at the time of the investigation that pseudoephedrine had caused -
16 - had partially caused or was believed to have caused the death of
17 this child?

18 A. No, sir.

19 Q. So, were you looking for any other kind of cough medication,
20 pseudoephedrine?

21 A. No, sir.

22 Q. Did you have an occasion to be alone with the defendant,
23 Wesley Smith?

24 A. Yes, I did.

25 Q. And tell me about - - tell me when that was?

1 A. That was on the following day, February 15th. I had been to
2 the Medical University in Charleston for the autopsy, and when I
3 came back it was late afternoon, early evening on the 15th of
4 February.

5 Q. And that would have been the day after the child died?

6 A. That's correct.

7 Q. Can you tell the jury how he was acting that day when, ah, you
8 and he were together.

9 A. Ah - - -

10 Q. Don't tell me anything he said. Just tell me his demeanor,
11 how he was acting.

12 A. Yes, sir.

13 I had gone to the defendant's apartment in Plantation
14 Apartments and had him step outside and spoke to me, and he agreed
15 to ride to Conway with me.

16 MR. AXELROD: Your Honor, may we approach at this moment?

17 THE COURT: Yes, sir.

18 (Bench conference is held off the record and in the presence
19 of the jury but outside the hearing of the jury.)

20 Q. During the short time that you were in the car together, ah,
21 and let's limit it to that, can you tell the jury what his demeanor
22 was?

23 A. I would classify it as light-hearted. Ah, we talked, open
24 conversation, joked, kidded around, ah, for the entire - - the ride
25 from Socastee to Conway.

1 MR. VON HERRMANN: I have no further questions.

2 Thank you.

3 DETECTIVE COX: Yes, sir.

4 REDIRECT EXAMINATION BY MR. AXELROD:

5 Q. Was he in a police car with you?

6 A. An unmarked police car, yes, sir.

7 Q. Okay, but it was a police car?

8 A. Sure.

9 Q. And I just want to make something clear.

10 Dr. Cooper told you she never prescribed pseudoephedrine?

11 A. Yes, sir. I had gone there to pick up the records, and that
12 was a question that I had.

13 Q. So, that was an important question?

14 A. Sure.

15 Q. Thank you.

16 THE COURT: Alright. You may come down.

17 Thank you.

18 DETECTIVE COX: Thank you, Your Honor.

19 (The witness leaves the witness stand.)

20 THE COURT: The pharmacist is here. Let's call here, now,
21 and finish this testimony for the evening.

22 Where is she?

23 MR. BAILEY: She's just stepped out, Your Honor.

24 THE COURT: I've waited - - this jury has waited very
25 patiently on this witness, now. I want to go ahead and get her up

1 here and let this jury go home for the evening.

2 Come forward, please, ma'am.

3 I understand you had some traffic difficulties getting here.

4 MS. LAMP: I did.

5 THE COURT: We understand that.

6 Thank you.

7 (The witness takes the witness stand.)

8 RENE E ANTWANETTE LAMP, being duly sworn,
9 testifies as follows:

10 CLERK OF COURT: Please be seated.

11 Please state your full name.

12 MS. LAMP: Renee Antwanette Lamp.

13 CLERK OF COURT: Spell your last for the Court.

14 MS. LAMP: L-a-m-p as in Paul.

15 DIRECT EXAMINATION BY MR. AXELROD:

16 Q. Ms. Lamp, can you tell the jury what you do for a living?

17 A. I'm a pharmacist.

18 Q. And where are you currently a pharmacist?

19 A. Um, right now it's Rite-Aid Pharmacy.

20 Q. Okay, and use to be Eckerd's?

21 A. Yes.

22 Q. And did I ask you to bring something with you today?

23 A. You did. You asked me to bring a prescription prescribed for

24 **Minor**

25 Q. Alright.

1 And can you get that out for me right now.

2 I'm going to mark this. I'm going to show it to you.

3 THE COURT: Have you seen this?

4 MR. VON HERRMANN: No, sir, Your Honor. He said he's going
5 to show it to me.

6 MR. AXELROD: Your Honor, I'm just going to - - -

7 THE COURT: That's fine.

8 (Court Reporter marks the exhibit.)

9 MR. AXELROD: We're marking it as Defendant's #3, Your Honor.

10 MR. VON HERRMANN: No objection, Your Honor.

11 THE COURT: Alright.

12 You may proceed, Mr. Axelrod.

13 MR. AXELROD: Thank you, Your Honor.

14 Q. You sure you had time to look at this?

15 A. Yes.

16 Q. And is this a prescription? Is part of this prescription a
17 prescription for Rondec-DM?

18 A. Yes.

19 Q. And who is it written by, which doctor?

20 A. Can I look at the prescription?

21 Q. Yes.

22 A. Ah, Dr. Eugenia Cooper-Merchant.

23 Q. So, Dr. Cooper wrote this prescription?

24 A. Yes.

25 Q. And back in December 18th of 2003 - -

1 A. That's correct.

2 Q. - - tell the jury of pseudoephedrine would be in a
3 prescription in Rondec.

4 A. That's - - yes, and, also, chlorpheniramine.

5 Q. Okay.

6 Answer any questions Mr. Von Herrmann may have.

7 May I move this into evidence, Your Honor?

8 THE COURT: Yes, sir.

9 MR. VON HERRMANN: Without objection.

10 (The Court Reporter accepts Defendant's Exhibit #3 into
11 evidence.)

12 CROSS EXAMINATION BY MR. VON HERRMANN:

13 Q. Ms. Lamp, can you please tell me when this prescription was
14 filled?

15 A. Yes.

16 It was filled December 18, 2003.

17 Q. Now, were there instructions on that particular prescription
18 with regard to how much to give the child?

19 A. Yes.

20 Q. And how much would that be?

21 A. The prescription as we typed it in says, "Give by mouth one
22 quarter cc four times a day as needed."

23 Q. How many days was that child suppose to receive that?

24 A. The directions don't say.

25 Q. It doesn't say - - -

1 A. That's - - that's for another prescription.

2 Q. That's for another prescription?

3 A. Yeah.

4 Q. How long would the supply have been for?

5 A. Thirty days.

6 Q. And it was filled in December 18th?

7 A. That's correct.

8 Q. So, thirty days later would have been January 18, 2004,
9 correct?

10 A. That's correct.

11 Q. And so by the time February 14th, there shouldn't have been any
12 of this medication left, should there?

13 A. There shouldn't have but a lot of times people don't finish
14 their prescription, and it will be in the cupboard.

15 Q. But it shouldn't be?

16 A. That's correct.

17 Q. And had the doctor wanted to prescribe straight
18 pseudoephedrine or given the child pseudoephedrine, they could have
19 done that, couldn't they?

20 A. Yeah. That's over-the-counter. It was over-the-counter at
21 the time.

22 Q. And you have no way of knowing whether or not that was done?

23 A. No.

24 Q. And if there were to - - and if you can't answer this and it's
25 not in your expertise, don't - - just tell me you can't answer.

1 It's not a problem.

2 The other ingredient that's in this particular medication,
3 what was it you called it?

4 A. Chlorpheniramine.

5 Q. If there was a screen done or a toxicology screen, that would
6 show up on the screen, wouldn't it?

7 MR. AXELROD: Your Honor, objection. It's beyond her - - -

8 A. I'm not sure.

9 THE COURT: Wait a minute. No, sir. It's not beyond.
10 She's a pharmacist, and she's entitled to answer that question.

11 MR. VON HERRMANN: Yes, sir.

12 Q. And if you don't know, that's fine but if you were running a
13 toxicology screen looking for that, you would find that if you
14 administered that medication?

15 A. I'm not sure. I don't know that.

16 Q. That's fine.

17 MR. VON HERRMANN: I have no further questions, Your Honor.

18 THE COURT: Alright.

19 REDIRECT EXAMINATION BY MR. AXELROD:

20 Q. If - - if cough medicine - - if Rondec-DM was for the child
21 and the child stopped coughing or felt better, however the case
22 might be, and the parents didn't give it every day but gave it
23 every other day or gave it for two weeks and then skipped two weeks
24 and then did two weeks, that would take it out two months, would it
25 not?

1 A. Yes.

2 Q. And, actually, in Rondec-DM, it's Rondec-Dm, it has
3 dextromethorphan in it, does it not?

4 A. Yes, it does.

5 Q. And that's a more dangerous drug that has to be prescribed?
6 It's not over-the-counter?

7 A. It's in - - yes, it is. Dextromethorphan is over-the-
8 counter.

9 Q. In - - in Rondec-DM?

10 A. No. That is a prescription item but you can get
11 dextramathorathan over the counter.

12 Q. But and I - - I change my question.

13 Rondec-DM, the - - and I'll call it a cocktail because we have
14 two or three chemicals within this one drug - -

15 A. Uh-huh.

16 Q. - - is only by prescription?

17 A. That's correct.

18 Q. Thank you.

19 MR. VON HERRMANN: No further questions, Your Honor.

20 THE COURT: You may come down and are released from your
21 subpoena, and we apologize for calling you late in the afternoon
22 but we didn't want to interrupt your work schedule in the morning.

23 MS. LAMP: Thank you, Your Honor.

24 THE COURT: You're certainly welcome.

25 (The witness leaves the witness stand.)

1 THE COURT: Alright, sir.

2 Any other witnesses tonight?

3 MR. AXELROD: Your Honor, I think for the jury's benefit it's
4 twenty of six almost. It would be a good time to break for this
5 evening.

6 THE COURT: Well, as I understand it and I've told the
7 jury. As I understand it, in the morning at 9:30 there will be a
8 video shown which by agreement it's to be shown, and there may be
9 one more potential witness.

10 Is that right?

11 MR. AXELROD: Yes, sir, Your Honor.

12 THE COURT: And so I just want to let the jury know why we
13 worked them here this late so that we can conclude this case
14 tomorrow.

15 Mr. Foreman, ladies and gentlemen, I appreciate your presence
16 and your attention all day long and all week long to the
17 presentation of this case. This Court and litigants are deeply
18 appreciative of your service knowing we are inconveniencing all of
19 you but, ah, I would conclude that, ah, we can probably conclude
20 this case tomorrow and give you Friday off.

21 So, have a nice evening. Be back at 9:30. Please remember
22 my admonitions. Don't discuss the case. Let no one discuss it
23 with you. Don't read or write or listen to anything.

24 Thank you.

25 (The jury departs the courtroom at 5:40 p.m. for the day with

1 instructions to return at 9:30 a.m. on Thursday.)

2 CHARGE CONFERENCE

3 THE COURT: Alright.

4 Before we leave, I want to discuss the potential charge.

5 Other than talking about the potential charge is there
6 anything further from the State tonight?

7 MR. VON HERRMANN: No, sir, nothing from the State, Your
8 Honor.

9 THE COURT: Gentlemen, Mr. Taylor, Mr. Axelrod?

10 MR. TAYLOR: Yes, sir.

11 THE COURT: Anything further tonight?

12 MR. TAYLOR: Nothing further, Your Honor.

13 THE COURT: Alright.

14 Mr. Axelrod, listen very carefully to what I'm saying. I want
15 to talk to you about the proposed charge.

16 With reference to this charge, obviously, I'm going to charge
17 the general matters which is his presumption of innocence. The
18 State must prove it beyond a reasonable doubt.

19 With regards to reasonable doubt, I propose to charge Victor
20 v. Nebraska.

21 I will as customary charge the law with reference to
22 credibility of witnesses. I, of course, will charge the
23 appropriate law regarding I'm the instructor of the law, and they
24 take the law as I give it to them applying the facts as they find
25 them to be.

1 I will charge failure to take the witness stand. I will
2 charge expert witness. I will charge circumstantial evidence, and
3 I will charge the meaning with specificity of the statute.

4 Now, relative to that, ah, he stands indicted under 16-3-
5 85(A) (1).

6 Mr. Taylor, you have indicated to me that you also desire for
7 me to charge part 2 - -

8 MR. TAYLOR: Yes, sir.

9 THE COURT: - - which is aiding and abetting.

10 MR. TAYLOR: Yes, sir.

11 THE COURT: And, ah, with - - with the consent of the
12 parties - - -

13 MR. AXELROD: Your Honor, do you have the full statute right
14 there?

15 THE COURT: Yes, sir.

16 MR. AXELROD: Can I see it for one second, Your Honor?

17 THE COURT: And, of course, I will - - let me say what I
18 propose to do, and then I'll hear from you.

19 MR. AXELROD: Okay.

20 THE COURT: If I do that, I would charge and I'll hear from
21 you as to what I propose to do and hear your objections, if any.
22 If I do that I would charge as to Section A, they could find him
23 not guilty or guilty or they could find him not guilty or guilty as
24 to B. Of course, that's not for the jury to determine. The jury
25 is not here but there are sentencing considerations differing from

1 A or B.

2 MR. AXELROD: Your Honor, as Wesley's lead attorney, I only
3 want to charge A, just the homicide by the child abuse. That's
4 what he's indicted for. That's all I want him to be charged with
5 in the charge.

6 THE COURT: What - - what says the State on that issue?
7 The indictment specifically says (A)(1).

8 MR. VON HERRMANN: Your Honor, my only concern and I just
9 have to give this some thought is I'm not - - I'm not necessarily
10 concerned about whether they want it or not want it because the law
11 has come down and said that whatever they want, they can't waive
12 the lesser included offense if there's any evidence presented.

13 So my question to the Court is and, I guess, something that I
14 would have to think is is there any evidence, any evidence that
15 would tend to give the jury the ability to convict of the lesser
16 included offense.

17 THE COURT: Well, I'll - - I'll hear your position
18 tomorrow.

19 I tell you that in the last year I have tried a case very
20 similar to this, and I charged both and gave them the option of
21 doing the lesser, and in that case, quite candidly, they did the
22 lesser.

23 I'm inclined to do it unless somebody can talk me out of it.

24 MR. AXELROD: Your Honor, as his attorney, if the Solicitor
25 wanted to charge him with the lesser - - -

1 THE COURT: Well, now, wait a minute, now.

2 I'll hear you in the morning. I want to hear him next. He
3 may - - he may - - he may agree with you, and I'll - - I'll see.

4 It will be the first time y'all have agreed in three days but
5 I'll - - I'll listen to you.

6 I won't make that final determination tonight. I'll let y'all
7 think about it and let him think about it. That's an option I'm
8 considering. I may do it with or without your objection.

9 MR. AXELROD: Well, Your Honor - - -

10 THE COURT: I may not.

11 I'm not going to argue with you tonight, Mr. Axelrod. I want
12 to hear - - he may object to it, too. So, let's wait and hear
13 what the positions - - you know, they're entitled to have their
14 position on the record, too.

15 You understand?

16 MR. AXELROD: I just want to make one more point before he
17 puts his position on the record.

18 THE COURT: What is that?

19 MR. AXELROD: The point was that if you - - he wants the
20 lesser included charge then maybe Charlene should have been here
21 for this trial and done it at the same time because then they'd
22 both been charged with the lesser.

23 He charged only Wesley with the homicide by child abuse, the
24 greater. He tried them separately and had the co-defendant
25 testify. I think for that reason I'm entitled just to the greater

1 charge.

2 THE COURT: I understand that.

3 Well, I'll consider it overnight myself and, perhaps, do a
4 little research on it, and you may want to discuss it further with
5 Mr. Taylor.

6 I will not make a definitive decision yet but with reference -
7 - other than that issue is there any other additional charges
8 requested by the State?

9 MR. VON HERRMANN: None from the State, Your Honor.

10 THE COURT: Any other than that issue is there any charges
11 requested, Mr. Axelrod, Mr. Taylor or Mr. Bailey?

12 MR. AXELROD: Yes, sir.

13 THE COURT: What other?

14 MR. TAYLOR: I'm fine, Your Honor. Mr. Axelrod would have -

15 - -

16 MR. AXELROD: Mere presence. I want a mere presence charge,
17 Your Honor.

18 THE COURT: I'll charge mere presence.

19 MR. AXELROD: Thank you.

20 THE COURT: I'll charge that.

21 Alright. Now, let me ask you this. As is my custom - -
22 wait a minute. How about listen to me, and then I'll let y'all
23 talk.

24 MR. TAYLOR: Yes, sir, Your Honor.

25 MR. AXELROD: Okay.

1 THE COURT: As is my custom, I generally charge prior to
2 final summation. Jurors have told me many times in the last years
3 and both of you have seen me do it that they wish I would have told
4 them the law before your summation. They think they could have
5 followed your position better.

6 What you say, Solicitor?

7 MR. VON HERRMANN: Your Honor, I've tried before you many
8 times. I think it works very effectively, and I have no objection.

9 THE COURT: Mr. Axelrod, you've had me do this many
10 occasions for you.

11 MR. AXELROD: Your Honor, I wish all judges did it.

12 THE COURT: Sir?

13 MR. AXELROD: I wish every judge did what you do.

14 MR. TAYLOR: I agree.

15 THE COURT: Well, that's fine.

16 First time - - congratulations. Y'all finally agreed on
17 something.

18 Alright, now, in the morning, we going to play the video
19 promptly at 9:30 followed by your witness if you care to call her,
20 and that will conclude it, and then we'll, ah, have, ah, I'll
21 listen to your motions. I'll charge the jury, and we'll have final
22 summations.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 THE COURT: I would hope that we can do that by 1:00.
25 Order the jury lunch, and let them begin their deliberations.

1 After all of this I intend to have lunch for the jury at
2 sometime tomorrow. You understand?

3 MR. TAYLOR: Yes, sir.

4 MR. AXELROD: Yes, sir, Your Honor.

5 THE COURT: Alright. Anything further?

6 MR. AXELROD: No, Your Honor.

7 Have a nice night, Your Honor.

8 THE COURT: Alright. Now, I want you all of you here,
9 now, about about 9:15 in case anything - - yes, sir.

10 Let's do this. I'm always here. I want you here at 9:15 so
11 if necessary we can discuss that issue as to A and B at 9:15.

12 MR. VON HERRMANN: Yes, sir.

13 THE COURT: If anybody got any law on that issue, I'll be
14 glad to discuss it with you.

15 Alright. Thank you.

16 (The Court adjourns the trial of this case at 5:48 p.m. on
17 Wednesday to convene again on Thursday at 9:15 a.m.)

1 In final arguments how much time you feel you need, Mr.
2 Axelrod? I don't want to limit you but I just want to get some
3 idea so I'll know when to order food for the jury - - whether
4 lunch or dinner.

5 MR. AXELROD: Your Honor, I think you need to order dinner.

6 THE COURT: I think not but go ahead.

7 MR. AXELROD: Order dinner for them.

8 The Court - - the Court has made me put this case up in
9 approximately two hours, a week-long trial - - -

10 THE COURT: Wait a minute. I didn't make you do anything.
11 You got all day long to call any witnesses you want, now.

12 That's an erroneous statement. We came back here today to
13 hear any further witnesses you had. So, you can't say that.

14 MR. AXELROD: Your Honor, at this time I would like to ask
15 the Court to give me discretion in my closing argument and give me
16 some time and latitude. Please, sir.

17 THE COURT: Well, can you do it within an hour?

18 MR. AXELROD: Probably longer, sir, maybe an hour and a half.

19 THE COURT: Well, I will - - I'll see how you're going and
20 see whether the jury has gone to sleep on you or not but I'm not
21 going to limit you at this time.

22 I want this record - -

23 MR. AXELROD: Your Honor, I promise you.

24 THE COURT: - - to be clear. I don't want you misquoting
25 me.

1 The record is going to reflect yesterday that, first, we
2 talked about playing the video today in full, and I'll still do
3 that if you want to, and you were going to call at least one
4 witness, and I told you that I'll let you call anything you got.

5 So, I got all day, tomorrow and Saturday.

6 MR. AXELROD: Yes, sir, Your Honor. I - - I just - - you're
7 correct, Your Honor. I just want the Court to be aware that when
8 you asked me, you wanted to see if the jury would be sleeping. I
9 promise you one thing if I promise you anything, Your Honor.
10 Today, the jury will not be sleeping.

11 THE COURT: Well, that's because - - well, we'll see about
12 that. If they are, I'll wake them up. How about that?

13 Alright. Now, let's say this. To save some time if you
14 have any other witnesses we going forward with that at this moment.
15 If you have no other witnesses and you're agreeable to it, I would
16 like to rest now and hear any motions, and then I'll permit you to
17 rest in the presence of the jury just to save bringing the jury in
18 and taking them back out. How you - - -

19 MR. AXELROD: That will be fine, Your Honor.

20 THE COURT: What's your preference there?

21 MR. AXELROD: Your Honor, I'm fine with that. If you
22 protect the record for me, I'm okay with that.

23 THE COURT: Okay.

24 So, am I hearing since we've worked out the video in closing,
25 is there any other witnesses? Is the State prepared to rest or

1 not - - I mean, the defense?

2 MR. AXELROD: Yes, sir, Your Honor.

3 We rest at this point.

4 THE DEFENSE RESTS

5 THE COURT: Okay.

6 Is there going to be any reply?

7 MR. VON HERRMANN: No, sir, Your Honor. We're not going to
8 have any reply.

9 THE COURT: Alright.

10 Let the record then reflect that I'm considering these motions
11 at this time and will give the defense the opportunity to say, "The
12 Defense Rests" in the presence of the jury, and we'll handle - -
13 that's to keep from bringing the jury in, and then you say you rest
14 and send them right back out.

15 MR. TAYLOR: Yes, sir.

16 THE COURT: You agree with that, Mr. Axelrod?

17 MR. AXELROD: Yes, sir, Your Honor.

18 THE COURT: Alright, now.

19 Mr. Axelrod, I can't see you with the film here.

20 MR. AXELROD: I'm going to come over here and see you, Judge.

21 THE COURT: Well, come in front of it.

22 MOTIONS AND RULING OF THE COURT

23 THE COURT: Now, first, let's hear any motions for - - any
24 motions on behalf of the State?

25 MR. VON HERRMANN: Your Honor, we have a few motions in

1 limini prior the closing arguments but that's it. We have no
2 motions other than that.

3 MR. AXELROD: Well, can I hear his motions now.

4 THE COURT: Yes, sir, let me hear it.

5 MR. VON HERRMANN: The motions, Your Honor, are we want to
6 make sure the defense excludes all third party guilt with the
7 exception of and I do believe there's evidence of Charlene
8 Dandridge. He's certainly entitled to point out that she was
9 present at the particular times but there is no evidence of any
10 other babysitter, anybody present at the time the child died or any
11 of that, and I don't want Patricia Wright, or, you know, the
12 neighbor down the street or I don't want any of that coming in in
13 his closing argument because there is no evidence that anybody was
14 present or ever hurt that child.

15 MR. AXELROD: I agree, Your Honor. I agree.

16 THE COURT: Okay. That's fine.

17 What else you got?

18 MR. VON HERRMANN: And the only other request I would have
19 for the Court is and I don't have any problem with Mr. Axelrod
20 playing how ever long the video tape is during his closing argument
21 but I would like the Court to - - to let the jury know that the
22 entirety of the video is a hundred - - is, roughly, an hour and
23 fifteen minutes.

24 THE COURT: I will let the jury know that. I've already
25 told them that but I'll do it again. I'll tell them through

1 consent of counsel we've saved some time.

2 MR. VON HERRMANN: And it is available if they want to watch
3 it, Your Honor.

4 THE COURT: Why, sure. It's in the record.

5 MR. AXELROD: Your Honor?

6 THE COURT: Yes, sir.

7 MR. AXELROD: Mr. Taylor brought a point up, and he's correct
8 that at the time the baby -- Mr. Taylor has an objection.

9 THE COURT: Yes, sir.

10 MR. TAYLOR: At the time -- whenever the security guard
11 testified, he said that there was a woman there that was assisting
12 with the CPR. So there was somebody there at the time that the
13 baby died.

14 THE COURT: I know it but there's no evidence in there from
15 anybody who witnessed that that she did -- --

16 MR. TAYLOR: Your Honor, nobody witnesses that my client
17 killed this baby either.

18 THE COURT: I understand either but that -- this -- --

19 MR. AXELROD: But we should be able to argue that point that
20 there was someone else there, though.

21 MR. VON HERRMANN: No, Your Honor. It -- he can say --
22 certainly, he can say that there was somebody present while they
23 were giving CPR.

24 THE COURT: Well, sure. If you want to say she was there,
25 fine, but you can't argue third party guilt on that fact.

1 MR. TAYLOR: Well, all we want to say is there was somebody
2 other than my client there present at the time this baby died.

3 THE COURT: Sure.

4 MR. TAYLOR: That's all we want to say.

5 THE COURT: That's in the record.

6 MR. TAYLOR: That's fine.

7 THE COURT: I'm not going to deny what's in the record.

8 MR. TAYLOR: We're not saying directly that this woman was
9 the one who did it.

10 THE COURT: Oh, no.

11 MR. TAYLOR: But we're just saying that there was more than
12 my client being there at the time the baby died.

13 THE COURT: I understand and the record reflects that.

14 MR. TAYLOR: We just want to make sure that's the - - -

15 THE COURT: Alright.

16 Now, having said that, we had a preliminary request to charge
17 status on yesterday, and, ah, the discussion centered around the
18 statute with regards to charging A and B.

19 The State has requested that I charge A and B of the
20 applicable statute. Now, Mr. Axelrod, I think, had some other
21 view, and I'll be glad to hear from you for the record.

22 MR. AXELROD: Thank you, Your Honor.

23 THE COURT: I had indicated at pretrial conference this
24 morning that my intention is to charge A and B, and I'll put on the
25 record why but I want Mr. Axelrod to protect himself if he feels

1 that that is erroneous.

2 Mr. Axelrod, I'll be glad to hear from you.

3 MR. AXELROD: Yes, sir, Your Honor.

4 Your Honor, the Court is well aware that there is only one
5 indictment Wesley was charged with, and the Court is also aware
6 that an indictment is to put a defendant on notice as to what
7 charges he's facing.

8 Now, the indictment is two-fold. Not only does the indictment
9 put Wesley on notice, it's to put his attorneys on notice for what
10 they should prepare for, clearly, and 16-385 which he was charged
11 with (A) (1) and only (A) (1) where the person is guilty of homicide
12 by child abuse if the person causes the death of a child under the
13 age of eleven while committing child abuse or neglect and the death
14 occurs under circumstances manifesting an extreme indifference to
15 human life. That was specifically what Wesley Smith was charged
16 with.

17 Four years ago they charged with 3 - - 16-385(A) (1). For
18 three years I have prepared this case for 16-385(A) (1) and nothing
19 more, nothing more at all.

20 Now, on the eve of close, the Court informs me that they will
21 charge 16-3-85(A) (2) which is a person is guilty of homicide by
22 child abuse if the person knowingly aids and abets another person
23 to commit child abuse or neglect and the child abuse or neglect
24 results in the death of the child under the age of eleven.

25 There's absolutely no evidence in this record, and, in fact,

1 when I wanted to put in Tara Phillips saying that she thought
2 Wesley was covering up for the mother, the Court said, "We will not
3 allow that," even though Rule 701, a lay witness, she was a social
4 worker.

5 THE COURT: That was - - I wasn't going to let her give her
6 opinion. That's one for the jury.

7 MR. AXELROD: Absolutely.

8 But now - - -

9 THE COURT: Got nothing to do with the issue that I'm
10 talking about.

11 MR. AXELROD: There is nothing in this record that says that
12 Wesley Smith aided or abetted anybody in homicide by child abuse.
13 There's nothing in this record. Charlene is not charged with
14 homicide by child abuse, only Wesley.

15 Specifically, the Legislature, they could have put the two
16 together. They could have made this one statute, both parts with
17 the and and the or, not add a number two, and then have mitigating
18 circumstances. It's not a lesser included offense.

19 I would have done, Your Honor, my cross of Charlene
20 differently. Don't want to redo it. I prepared for a year for
21 that cross of her based on what he was charged with, nothing more,
22 nothing less.

23 THE COURT: You understand Charlene is available to you if
24 you care to put her up.

25 MR. AXELROD: Not at this point for a cross, Your Honor,

1 because I open her up to wide latitude of cross, and the Court told
2 me yesterday.

3 If the Court would let me put her up and not let them have
4 another - - examine her, maybe we'll do that.

5 THE COURT: No, sir. That would violate the rules.

6 MR. AXELROD: Yes, sir, but that's my point, Your Honor.

7 THE COURT: You know, the State's entitled to a fair trial,
8 too.

9 MR. AXELROD: Your Honor, that's what - - that's what I'm
10 saying. I'm entitled to a fair trial, and I was never put on
11 notice for 16-3-85-(A)(2) until yesterday.

12 THE COURT: Okay. Alright.

13 I want - - you have any other position on the record. We're
14 not going to argue about it.

15 MR. AXELROD: Yes, sir, Your Honor.

16 THE COURT: What is your other position? I want you fully
17 protected.

18 MR. AXELROD: And I think I made that clear that I'm not
19 prepared at this point for what he was charged with. I want that
20 to be on the record. I never prepared for 16-3-85(B)(2).

21 THE COURT: It's on the record.

22 I accept that, and whether you're prepared or not, you've got
23 to be prepared to go with the statute, and I'll explain the statute
24 to you in a minute.

25 MR. AXELROD: I believe what Your Honor - - I need to be

1 prepared for what he's indicted for, and that's what I did prepare
2 for.

3 THE COURT: I understand.

4 MR. AXELROD: Okay.

5 Now, the Court limited - - at this point I'm making a motion
6 for a directed verdict.

7 THE COURT: Alright. No, let's deal with the other issue,
8 first.

9 MR. AXELROD: What other issue?

10 THE COURT: The A and B.

11 MR. AXELROD: Well, I think you just told me. You don't want
12 to hear me anymore from me on A and B.

13 THE COURT: I don't but I need to let the record reflect my
14 thinking about the thing.

15 MR. AXELROD: Yes, sir.

16 THE COURT: The statute clearly says under the section,
17 there's A and B. B is probably a lesser included but if it's not
18 if you study the entire statute as we must to ascertain the intent
19 of the Legislature, in my view the Legislature in writing homicide
20 by child abuse desired to give the finders of the facts an
21 opportunity to have a defendant found guilty of something that
22 would not provide minimum twenty years or possible life
23 imprisonment.

24 I conclude it is a sentencing statute, not necessarily lesser
25 included. It could be but I'm convinced it's a sentencing statute

1 to avail the finders of the facts to give a lesser sentence to one
2 who was not the primary culprit in the totality of the
3 circumstances.

4 I am convinced if I fail to charge it and the jury found him
5 guilty under Section A which require a minimum of twenty years and
6 possible life imprisonment that our appellate courts would say that
7 the failure to give the finders of the facts an opportunity to give
8 - - sentence him under Section B would be to deprive him of his
9 constitutional rights.

10 You well may be right. I have researched this thing
11 diligently through the night. It's just simply my view that it is
12 - - if it's not lesser included, and I think that it is, if it's
13 not, it's simply a sentencing statute to permit the jury to be fair
14 to the defendant and not put him at the risk of life imprisonment
15 if they thought on the totality of the evidence that it was less.

16 I agree with you that our courts have never addressed this
17 issue that I can find. They going have a full opportunity to
18 address it, one, if he's found guilty of A and I didn't charge it;
19 two, if he's guilty of B and you ask that I not do it.

20 I conclude even though you are asking that I not charge B,
21 I've concluded that if he be convicted of A, and I'm not saying he
22 would, that the appellate court would say that you didn't have the
23 right to deprive this defendant of his constitutional right to have
24 the finders of the facts consider the lesser charge.

25 MR. AXELROD: Yes, sir, Your Honor.

1 THE COURT: And my concern is with that, too.

2 So, I just don't - - I know you wish - - you are asking me not
3 to do it.

4 MR. AXELROD: Yes, sir, Your Honor.

5 THE COURT: The record is replete.

6 I am concerned that it would be reversal error, and I am
7 concerned that it would be unfair to the defendant to not permit
8 the finders of the facts to charge him something under which the
9 Court could consider - - could sentence him less than twenty years,
10 and if he's convicted under A, he's got to go for a minimum of
11 twenty and well may go for life imprisonment. That decision has
12 not been made.

13 And, so, you are protected for the record, and you well may be
14 right.

15 MR. AXELROD: And, Your Honor, I appreciate the Court's
16 candor there.

17 THE COURT: Well, if you are right, we'll be back in this
18 courtroom later, and I'll be here to try it again.

19 MR. AXELROD: And I appreciate the Court's candor that it is
20 an interesting question.

21 THE COURT: It is.

22 MR. AXELROD: That's not been heard before.

23 THE COURT: I would not disagree that your decision may be
24 right but I just don't think so.

25 MR. AXELROD: And just in closing, I would say to the Court

1 that to charge a lesser included offense all the elements of the
2 greater - - the lesser must have all of the elements of the greater
3 but no more, and in this case the words specifically that the
4 Legislature chose "aiding and abetting" is not in the greater.
5 Therefore, it can not be a lesser included offense on its face, and
6 I believe for that reason it will be a reversible error.

7 THE COURT: Here's why, again, in the charge that's been
8 approved by our Supreme Court if you've looked at it. Homicide by
9 child abuse is on the internet. It's been approved by the Supreme
10 Court, and we deal with the appropriate charge in Section A.

11 Now, if you'll look at the additional part of that charge,
12 that charge which apparently has been approved by the Appellate
13 Court says, "The State may also prove homicide by child neglect by
14 proving beyond a reasonable doubt that the defendant knowingly
15 aided, abetted another person to commit it."

16 So, the charge itself is going to say that in addition to A
17 the State may also prove aiding and abetting. That's in the
18 charge.

19 MR. AXELROD: Absolutely, Your Honor, but the difference in
20 the Court's logic is they gave each a number. If they did give a
21 number, Your Honor, I would agree with your logic that it would be
22 both.

23 THE COURT: My logic may be erroneous, and the appellate
24 courts - - it will be - - will not be the first time they've told
25 me I was in error.

1 MR. AXELROD: And many times I've been in error.

2 THE COURT: No. I've followed the, ah, rule of Justice
3 Ness who said, and I agree with him, "I may be in error but I'm
4 never in doubt."

5 And we going to charge A and B.

6 Now, let's get on to the rest of it.

7 MR. AXELROD: I bet - - I guess we both have that saying.

8 THE COURT: We do and you remind me of Justice Ness, not in
9 a lot of particulars but some.

10 MR. AXELROD: Your Honor, at this time I would like to ask.
11 I take exception to that ruling. I want to perfect each time from
12 here on out.

13 THE COURT: Yes, sir.

14 MR. AXELROD: To complete this record, I would ask for a
15 directed verdict in favor of Wesley. There is no evidence beyond
16 speculation and conjecture.

17 THE COURT: Sir?

18 MR. AXELROD: There's no evidence beyond speculation and
19 conjecture that this jury can find Wesley guilty of homicide by
20 child abuse.

21 THE COURT: I understand.

22 MR. AXELROD: Absolutely none.

23 THE COURT: Let me listen to the distinguished counsel for
24 the State address what he perceives to be the basis for that.

25 MR. VON HERRMANN: Your Honor, in the event that you would

1 like me to itemize the extensive information that we've put up.

2 THE COURT: Don't need extensive.

3 MR. VON HERRMANN: Your Honor, we would stand and rest on our
4 arguments that were made at the directed verdict stage when we were
5 half-way through the trial when the State rested if the Court has
6 any particular issue they're concerned with.

7 Obviously, it's our position that the evidence actually became
8 stronger with the defense's witnesses taking place.

9 THE COURT: Well, I conclude given the totality of all of
10 the evidence, there is sufficient evidence, if believed, to convict
11 this defendant of A and B on numerous incidences on the record,
12 one, that is the jury may well conclude that he was the last one
13 who had custody of that four months old baby.

14 Two, somebody somewhere gave that baby of four months an
15 overdose more than four times what the adult would take, and we all
16 know that a four months old baby can't reach for it and take it
17 accidentally.

18 Third, there's testimony by Dr. Collins standing alone that in
19 her view as an expert this was no accident when you had a broken
20 femur, numerous ribs and a death by either broken ribs or the
21 inhaling of this foreign substance.

22 All of that well may be - - the jury may conclude. They may
23 not conclude, "Well, we don't know who broke the baby's ribs."

24 Somebody did based on Dr. Collins but they well may conclude
25 that he was the last one who had the baby and the one who most

1 probably gave the baby the pseudo - -

2 MR. VON HERRMANN: Pseudoephedrine, Your Honor.

3 THE COURT: - - pseudoephedrine.

4 So, I would respectfully deny your motion for a directed
5 verdict upon the grounds that if believed, there is actual and
6 circumstantial evidence pointing unerringly to his guilt on either
7 A or B if believed.

8 I do not commit on his innocence or guilt. That's for twelve
9 people of the jury.

10 What other issues, now?

11 MR. AXELROD: Are you denying my directed verdict motion?

12 THE COURT: Yes, sir - - specifically.

13 MR. AXELROD: Your Honor, I renew my objection that the Court
14 denied me the availability of putting up Dr. Cross to testify that
15 Wesley's I.Q. was in border range of 70 with mental retardation.
16 The Court told me that the only way that might possibly come in was
17 if Wesley took the stand and said he didn't do it or he didn't know
18 about the medicine.

19 I told the Court specifically that I wanted to introduce that
20 evidence not with diminished capacity but to introduce that
21 evidence to show that Wesley was not aware of the dangers nor the
22 mathematical level of grade two or the reading level of - - -

23 THE COURT: Well, if he'd have testified to that, I'd have
24 considered letting it in but I can't let it in that he wasn't aware
25 of the mathematical formula. If he says, "I didn't do it," it

1 makes no difference.

2 MR. AXELROD: I just - - -

3 THE COURT: If he would testify that with his limited
4 intelligence he didn't understand what five drops or ten drops
5 would do, it might be a matter but I'm not going to say. I can
6 tell you this. Until and unless he testified it cannot reach any
7 issue in the trial of this case.

8 How can it possibly - - how can I possibly let the doctor in
9 that he didn't know about it when he hasn't said he didn't know
10 about it?

11 MR. AXELROD: He could - - the doctor could testify to his
12 abilities with understanding of medication.

13 THE COURT: If he did - - if he gave it to him. How can he
14 testify to it when the defense - - when he hasn't ever said that he
15 did that. That's the problem I have with it.

16 MR. AXELROD: No, the State is saying that he did it.

17 THE COURT: Well, the State - - -

18 MR. AXELROD: I'm not arguing with the Court.

19 THE COURT: I understand.

20 MR. AXELROD: I just wanted to renew my objection.

21 THE COURT: Well, clearly, I conclude to you that his
22 mental capacity, if any, of course, we've ruled State v. Blair he's
23 mentally competent but it cannot be an issue that he didn't
24 understand what he was giving the baby if he says he didn't give it
25 to him.

1 pool. Every juror heard the questions that the Court asked of
2 each juror about their opinion, and no matter what when one or two
3 or three or four or five or six or seven, eight, nine of them said,
4 "I have an opinion," well, everyone heard that. Everyone heard
5 that.

6 THE COURT: Wait a minute, now. You're not - - misquoting
7 the record on the thing.

8 Anybody that said they had formed an opinion was immediately
9 dismissed.

10 MR. AXELROD: Absolutely.

11 THE COURT: Okay.

12 MR. AXELROD: But what I'm saying, Your Honor, is the jury
13 heard that the opinions they'd formed was probably a guilty
14 verdict.

15 THE COURT: No, no, wait a minute. That's not true. I
16 would not - - I told them not to give their opinion and never did
17 do.

18 MR. AXELROD: Absolutely, but - - -

19 THE COURT: Then, don't say the jury heard their opinions
20 they formed.

21 MR. AXELROD: But the inference.

22 THE COURT: They didn't do that.

23 MR. AXELROD: The inference.

24 THE COURT: No, sir.

25 MR. AXELROD: That these people - - -

1 MR. AXELROD: I'm not arguing.

2 THE COURT: And no need in arguing that any further. I'm
3 so clear on that that I'm satisfied.

4 Now, what next?

5 MR. AXELROD: Next is the change of venue motion that we made
6 prior to the swearing of the jury that I renewed at the end of the
7 State's case I'll renew now.

8 I believe that the jury pool is poisoned and tainted based on
9 several issues, based on the amount of coverage in the media.

10 The day before all day and all night thirty-eight jurors said
11 they saw it on the television and they heard on the radio or they
12 read it in the newspaper.

13 In the newspaper, Solicitor Von Herrmann is quoted as saying
14 that Wesley could receive twenty years to life. It was also said
15 in there that some clinical psychologist said that Wesley gave
16 pseudoephedrine to the baby, and what concerned me is that I asked
17 the Court to strike those people for cause, and the Court chose not
18 to but beyond that, Your Honor, the Court did ask the questions I
19 asked about the venire. Had they formed an opinion based on what
20 they'd heard but I think what was done wrong and I asked the Court
21 to do it. I asked the Court to ask those questions outside the
22 presence of the venire itself because I believed that some people
23 were embarrassed to say, "I have an opinion."

24 Everybody that this Court talked to when they were asked about
25 it, they were in this entire courtroom. They were in the jury

1 THE COURT: They didn't say what their opinion was.

2 MR. AXELROD: I understand but the people stood up there and
3 said, "No, I don't think I can be fair."

4 THE COURT: Okay.
5 They were dismissed immediately.

6 MR. AXELROD: Absolutely.

7 But I'm saying to the Court and I want it on the record that
8 the inference of their speech where everyone else could hear it
9 tainted and poisoned the pool. That's what I'm saying.

10 THE COURT: Okay. I got your record.

11 The record will speak for itself as to the exhaustive voir
12 dire. The record will also show that anybody who any indicated in
13 anyway that they had formed an opinion was dismissed.

14 The record will reflect that I told the jury if there was any
15 reason whatsoever that they couldn't give a fair and impartial
16 trial, I would excuse them, and I would not ask them why.

17 I think there's an exhaustive voir dire. The jury was fair
18 in every way and still is.

19 I note your objections but they are respectfully overruled.

20 MR. AXELROD: And that's it, Your Honor.

21 THE COURT: Now, I don't need to hear anymore about that.

22 MR. AXELROD: Yes, sir, Your Honor.

23 Your Honor, I'm going to move on to the question you brought
24 up concerning the femur.

25 We did exhaustive research. State v. Northcut said - - -

1 THE COURT: Are you talking about prior injuries? Is that
2 what you're - -

3 MR. AXELROD: That's the femur.

4 THE COURT: - - yeah.

5 MR. AXELROD: We said that the femur occurred almost three
6 months before the pseudoephedrine and the actual demise of **Minor**

7 It's on the record that there was no further responsibility
8 found towards Wesley. It was founded towards an unknown
9 perpetrator but not towards Wesley at all. In fact, it was not
10 even towards Charlene.

11 To Northcut specifically on point says that the femur should
12 be kept out in this case based on Northcut. The four corners of
13 Northcut were directly on point to this case that - -

14 THE COURT: Let me hear - - -

15 MR. AXELROD: - - that the - - -

16 THE COURT: Wait a minute.

17 In fairness - - I want the record to reflect here that that
18 pretrial hearing was upon the record on that issue, too, and I made
19 an exhaustive, as I recall, explanation of why Northcut can clearly
20 be distinguished from State v. Fletcher.

21 Fletcher in my view is right on this thing, and I conclude
22 under Fletcher given the fact that all of these events had to occur
23 within a short period of four months at the most. That's all the
24 baby lived from date of birth from death. Probably occurred
25 somewhere withing two months.

1 State v. Fletcher says that the proximity is close enough to
2 permit it.

3 I did - - I convinced myself and the record reflects that I
4 found that evidence clear, cogent and convincing.

5 In addition to that, I weighed the probative value against the
6 prejudicial effect, agreed with you that it has some significant
7 prejudicial effect but conclude that the positive approaches of
8 that, that the jury was entitled to hear in order to render a fair
9 opinion the fact that somebody somewhere within three months
10 inflicted a broken leg and many fractures on that baby child and,
11 thereafter, somebody gave him cough syrup or whatever it was to the
12 extent that it killed him.

13 The jury in my opinion is entitled to know the damages
14 inflicted upon that young child, clearly, and State v. Fletcher is
15 right on it. I've ruled on it. I've concluded it was clear,
16 cogent and convincing. I've given it the weight test, and I
17 conclude under State v. Fletcher.

18 MR. AXELROD: Thank you, Your Honor.

19 THE COURT: Now, you're protected on that issue.

20 MR. AXELROD: I understand.

21 Your Honor, just one further point. I think if you look at it
22 under a Lyle position that, clearly, the Court might be clearly
23 convinced but I don't think there's any clear and convincing
24 evidence.

25 THE COURT: No need in arguing about it. Your position is

1 upon the record.

2 If I'm wrong, again, there's an appellate court that can tell
3 me so but my view to do so, they going to have to reverse State v.
4 Fletcher, and I don't think they will but you're protected on the
5 record.

6 MR. AXELROD: Thank you, sir.

7 Your Honor, I'd also, um, Mr. Taylor did an examination of
8 Dona Warrington, an expert, the Court concluded an expert that she
9 could give the results of the analysis of the cough medicine.

10 THE COURT: The technician, yes, sir.

11 MR. AXELROD: The technician, 1300 nanograms per milliliter
12 but, clearly, as a technician she has no specialized training. Mr.
13 Taylor brought that out in examination. She just really learned
14 how to run a machine and the analysis - - -

15 THE COURT: He failed to show - - it was the machine that
16 spit out the result. All she did was push the button and get the
17 paper when the machine read the analysis. She didn't read the
18 analysis. The machine did it.

19 She's entitled to interpret the results of the machine.

20 MR. AXELROD: But she didn't know whether or not the machine
21 worked or how the machine worked.

22 Your Honor, Mr. Taylor - - -

23 THE COURT: Well, no, that's not what the evidence says.
24 The evidence showed that it was - - gave a complete retesting once
25 a year, and as I recall, it was tested daily. That's what the

1 evidence.

2 No, sir, I'm not going to listen to two of you, now.

3 MR. TAYLOR: I know, Your Honor. I've just going to tell
4 him another point to make.

5 THE COURT: Okay.

6 You need to be heard?

7 MR. TAYLOR: No, Your Honor.

8 MR. AXELROD: Your Honor, she read the results but she wasn't
9 qualified to read the results.

10 THE COURT: I understand what you're saying. I qualified
11 her to do so.

12 I'll let the jury - - and I told the jury they could accept or
13 reject her qualifications. I told them twice, and I'm going to
14 tell them again when I charge expert witnesses. I want to make
15 sure your view is protected.

16 MR. AXELROD: Yes, sir, Your Honor.

17 Also, the opinion of Tara Phillips was excluded.

18 THE COURT: Who?

19 MR. AXELROD: The opinion of the social worker, the case
20 worker, the investigator that investigated this report, her opinion
21 was excluded by the Court.

22 THE COURT: And what opinion is it you think I should have
23 let in?

24 MR. AXELROD: That she thought that Wesley was covering up
25 for Charlene, and Charlene was actually the one guilty of the

1 femur.

2 THE COURT: I concluded at that time and still do that
3 that's an issue for twelve folks to determine and not some witness
4 who by herself indicates that she really wasn't prepared to
5 investigate the case to start with.

6 MR. AXELROD: Your Honor, I - - -

7 THE COURT: I think she stated she'd only been there eleven
8 months.

9 She wasn't qualified to make the opinion, and it wasn't hers
10 to make.

11 MR. AXELROD: And I would say the same way that Donna
12 Warrington was only working for eleven months when she read that
13 opinion of the cough medicine.

14 They fly in the face of each other with the Court's ruling.

15 THE COURT: Well, no. That other one was qualified as an
16 expert in pharmacy.

17 MR. VON HERRMANN: Your Honor, if I could and I hesitate to
18 stand up but I would like to point out for the Court that not only
19 was that 1300 nanograms per milliliter interpreted by Donna
20 Warrington, it was also reviewed by another person, and Demi Garvin
21 who is an expert Toxicologist who reviewed the actual raw data made
22 the interpretation of 1300.

23 So it came from not just one witness, Your Honor.

24 THE COURT: I understand that.

25 He was apparently confused as to that testimony by one person.

1 MR. VON HERRMANN: Yes, sir.

2 THE COURT: Even if it was error, there was cumulative
3 testimony regarding that issue by other witnesses.

4 MR. VON HERRMANN: Yes, sir.

5 MR. AXELROD: Your Honor.

6 THE COURT: You're on the record. Next. Let's move on.

7 MR. AXELROD: My last one, Your Honor, and this is an
8 interesting one because I'd like to see the Court's analysis of
9 this.

10 The chain was not perfected for the blood. Clearly, Dr.
11 Collins said she put it somewhere. Doesn't know where it went to
12 the mail room. Doesn't know where it went anywhere, and all of a
13 sudden it ends up in California a month later or something.

14 There's a missing - - there's two missing links probably in
15 this chain.

16 Now - - -

17 THE COURT: Tell me what they are, and I'm going to let him
18 respond.

19 MR. AXELROD: Well, we don't know who sent the drugs to
20 California. We don't know whether the drugs sat in a hallway in
21 a box with no protection. We don't know where they sat. We don't
22 know how they left MUSC.

23 We know that they were drawn from MUSC by Dr. Collins. Dr.
24 Collins - - -

25 THE COURT: Bert, you know his position on those two

1 issues. You care to address them?

2 MR. VON HERRMANN: Your Honor, Dr. Collins testified that she
3 took the tube. She drew the blood. She put it in a tamper-sealed
4 envelope. It was put in another envelope that was tamper-proof
5 and then placed in a box and sent to the mail room to be next-day
6 aired which we can only assume with their receipt, it got there the
7 next day.

8 MR. AXELROD: But we have no receipt.

9 MR. VON HERRMANN: Mr. Axelrod, please.

10 THE COURT: I understand.

11 MR. AXELROD: We have no receipt.

12 THE COURT: I let you talk. Now, how about letting him
13 talk.

14 MR. AXELROD: Okay.

15 THE COURT: Thank you.

16 MR. AXELROD: Go ahead.

17 MR. VON HERRMANN: The individual at National Medical
18 Services testified that he received it. It was sealed. It was
19 untampered with. That he would not have sent it for testing and
20 that NMS would not have accepted it had it been tampered with in
21 some way.

22 It would certainly be impractical to try to hunt down a FedEx
23 driver and figure out every terminal it went through when it's only
24 you're talking about a day, and it's tamper-proof.

25 THE COURT: That - - the Rule doesn't require that. There

1 is substantial compliance in every respect in my view with that
2 issue.

3 MR. AXELROD: Your Honor, just - - just to close on that.

4 Dr. Collins testified that she took the blood or the colleague
5 took the blood, I think maybe Dr. Marcus. She gives it to the - -
6 gives it to somebody, some courier or something and sends it down
7 to the mail room but there's no evidence that it was ever placed in
8 a refrigerator or sealed with any kind of ice.

9 We don't - - there's no record that it was air-lifted
10 overnight and it went to the wrong place. It was suppose to go to
11 Pennsylvania. They sent it to California.

12 THE COURT: Well, I don't know that there's any record that
13 refrigeration is necessary to make that specific test.

14 MR. AXELROD: Well, that's the point. The point is that by
15 not refrigerating it, it could and if the Court would let me argue
16 in the closing also but by not refrigerating it; we - - it might
17 have evaporated - - -

18 THE COURT: No. As I recall there was some testimony it's
19 not necessary for this particular test to start with.

20 MR. VON HERRMANN: Your Honor, what the testimony was is that
21 in order to preserve this sample, every possible step was done in
22 accordance with their policy and procedures. There's no - -
23 there's no indication that there's anything wrong with the way this
24 was transported, and I think it would be highly prejudicial and
25 incorrect and not by the record to argue it.

1 THE COURT: Well, I'm going to let him argue it if he chose
2 to that there - - that he doesn't know what condition the blood was
3 in. I'll let him argue that if he wishes to but I'm certainly
4 going to let the jury make that determination.

5 MR. AXELROD: There's nothing in the record that the blood
6 was - - -

7 THE COURT: I conclude that under the totality of the
8 evidence regarding that issue, there is sufficient evidence for the
9 jury to consider it, and if they think that there was something
10 improper in that, they can tell me so by their verdict.

11 MR. AXELROD: Thank you.

12 That's it, Your Honor.

13 THE COURT: Alright, and so that we'll understand, and, Mr.
14 Taylor, I'll let you address this, too.

15 When the jury comes out, you're going to rest.

16 MR. TAYLOR: Yes, sir, Your Honor.

17 THE COURT: And the record will reflect that I'm
18 considering these motions for a directed verdict as and if made
19 after you have rested, and we do that by consent of everybody to
20 keep the jury from coming in and going right back out.

21 MR. TAYLOR: Yes, sir, Your Honor.

22 THE COURT: You agree with that, Mr. Axelrod?

23 MR. AXELROD: Yes, sir, Your Honor.

24 THE COURT: Alright.

25 Can we now bring the jury in?

1 Now, let me ask you this.

2 Is there opening and closing by the State or just one?

3 MR. VON HERRMANN: The State is going to wave the opening.

4 THE COURT: Alright, sir.

5 And you prepared to go first, Mr. Axelrod?

6 MR. AXELROD: Yes, Your Honor, if I could have just a few
7 minutes to - - -

8 THE COURT: Yes, sir.

9 Go ahead, quick.

10 Yes, we're going to be in just about a ten minute recess, now.
11 If anybody needs to step out, do so but I don't want you to step
12 out during my charge or during arguments of esteemed counsel.

13 What I'll do, the charge is not - - is relatively short.
14 After counsel for the defense, I'm going to let the jury take a
15 break before you have your final argument.

16 MR. VON HERRMANN: Thank you, Your Honor.

17 THE COURT: Let me see here quickly.

18 Charge of the jury.

19 Yes, sir, let them go smoke.

20 (The Court recesses the trial of this case for a short break
21 and thereafter reconvenes the trial of this case.)

22 THE COURT: Come around, Mr. Axelrod, so I can see you.

23 MR. AXELROD: Yes, sir, I'm coming.

24 I want to put on the record, Your Honor, one more point that
25 I consider that statute 16-3-85 to be unconstitutional, that it

1 actually seems to be more of a mitigation factor. It's almost as
2 if the we're doing a death penalty with the Court by charging the
3 B now have to have a mitigation hearing. I - - I think that,
4 clearly, it's an unconstitutional statute.

5 THE COURT: Well, you got to understand that that language
6 in my view is for the system to the defendant. I can't understand
7 how you would object to anybody receiving mitigating circumstances
8 as he considers the serious of a sentence. No, sir, it's not
9 unconstitutional.

10 MR. AXELROD: Then, is it the Court's impression that we - -
11 we would have a full scale hearing as to mitigation? I could bring
12 in Dr. Cross to testify.

13 THE COURT: No, no. I'll deal with that issue when I get
14 to it. I don't anticipate anything much.

15 But if it be necessary - - you don't need a hearing if it's
16 convicted under A, period.

17 MR. AXELROD: Yes, sir, Your Honor.

18 THE COURT: The mitigation is under B.

19 MR. AXELROD: I just think by charging B we're charging an
20 unconstitutional statute as well.

21 THE COURT: I understand, and I note that but I - - I'm
22 read the Constitution several times, and I haven't read in there
23 where B is unconstitutional. It may be.

24 Go ahead.

25 MR. AXELROD: That's all, Your Honor.

1 THE COURT: Alright. Thank you.

2 Bring the jury in.

3 Gentlemen, come forward right quick like.

4 This is the verdict form which I told you I'm going to charge.

5 MR. AXELROD: And, Your Honor, also mere presence.

6 THE COURT: Oh, yeah, sure.

7 That's the verdict form that I propose consistent with my
8 charge of A and B to which the record will reflect that you have
9 objected.

10 Any objection to this verdict form.

11 MR. AXELROD: What I would like - - -

12 THE COURT: It's right clear.

13 She's making you a copy.

14 (The jury returns to the courtroom at 10:32 a.m.)

15 MR. VON HERRMANN: Your Honor, if we could approach just one
16 second?

17 THE COURT: Yes, sir.

18 (Bench conference held off the record in the presence of the
19 jury but outside the hearing of the jury.)

20 THE COURT: Alright.

21 MR. AXELROD: Court's indulgence, Your Honor.

22 THE COURT: Wait a minute. I need to speak to the jury.

23 MR. AXELROD: I'll do it - - I'll do it when I come back.

24 THE COURT: Good morning, Mr. Foreman, ladies and
25 gentlemen.

1 On yesterday we - - when we concluded at about 6:00 I had told
2 you when we returned this morning we would be playing a video of
3 approximately one hour and fifty minutes or two hours. Ah, we
4 have, ah, gone over that aspect of the case, and in order to save
5 the Court's time and you, the jury's time, the counsel for the
6 State and the defense have agreed, one, that the video is in
7 evidence, and if you wish to see it all in the jury room, it will
8 be played for you. Two, instead of playing it out here in the
9 trial, counsel for the State and the defendant has agreed that
10 either party may show from that video such excerpts or such
11 testimony as they care to present.

12 That will save an hour and fifty minutes or two hours of
13 listening to a video but neither side is limited in any way of
14 showing any and all of it if they care to but they have told me
15 that they can save you, the jury, a vast amount of time by
16 permitting them to show excerpts from it rather than the entire
17 video, and during their arguments, they will be permitted to do
18 that.

19 Any other instructions on that issue required by the State?

20 MR. VON HERRMANN: No, Your Honor.

21 THE COURT: Mr. Axelrod, anything further on that issue
22 required by the defense?

23 MR. AXELROD: No, sir, Your Honor.

24 THE COURT: Alright, sir.

25 Are you ready to proceed, and what is now the position of the

1 State?

2 MR. AXELROD: Your Honor, we rest at this point.

3 THE COURT: The State rests.

4 MR. AXELROD: The defense rests.

5 THE COURT: Alright, sir.

6 Is there anything in reply?

7 MR. VON HERRMANN: Your Honor, the State has nothing in
8 reply.

9 THE COURT: Are both parties prepared now for the final
10 arguments?

11 MR. VON HERRMANN: Yes, Your Honor. It's my understanding
12 that you're going to instruct the jury on the law prior to our
13 arguments.

14 THE COURT: So, you waive his opening and going to permit -
15 - let him go forward with the testimony - - let him testify - -
16 argue first at the appropriate time?

17 MR. VON HERRMANN: Yes, sir.

18 MR. AXELROD: Your Honor, I think what Mr. Von Herrmann said
19 was does the Court want to charge first.

20 THE COURT: I'm going to charge first, yes, and by
21 agreement we have agreed to do that.

22 Alright.

23 MR. AXELROD: Court's indulgence one second, Your Honor.

24 THE COURT: Remove that podium. It's interfering with my
25 view.

1 MR. AXELROD: Yes, sir, Your Honor.

2 THE COURT: And I thank you.

3 CHARGE OF THE COURT

4 THE COURT: Mr. Foreman, the State has elected to rest
5 which their certainly entitled to meaning they have no further
6 testimony to present.

7 The State has indicated it has no reply testimony, and so for
8 the purposes of this trial, this testimony is now complete.

9 At this time I'm going to instruct you with regards to the
10 issues of law in this case followed by summation by Mr. Axelrod
11 and, thereafter, finally, by the State of South Carolina.

12 Ordinarily in trials of this case we permit the final
13 arguments to happen first, and then the Judge charges the law.
14 I've been on the Bench twenty-five years now, and lawyers in the
15 last - - jurors in the last ten or fifteen years have said to me,
16 "Judge, I - - I wish you would have told me what the law was before
17 they argued. I could have followed their positions better
18 consistent with what you tell me the law is."

19 And that sounds reasonable to me. You know, sometimes jurors
20 can help us in the trial of a case.

21 And given that philosophy, in the last few years I've taken
22 the charge of the jury ahead of time as I do know with the consent
23 of the State and the defense.

24 Now, and, ah, at the conclusion of final arguments I will
25 discharge - - not discharge - - but excuse the jury for purposes of

1 any other matters we may need to consider prior to their beginning
2 their deliberations.

3 You understand that and you understand that?

4 MR. VON HERRMANN: Yes, sir, Your Honor.

5 THE COURT: Alright, sir.

6 And I thank y'all and I know the jury does for agreeing to
7 redact some of this hour and fifty minute statement and only
8 permitting - - only considering that which you deem - - which you
9 desire to do, and that will save us about two hours.

10 Alright. Mr. Foreman and members of the jury, as you
11 understand, this defendant is charged under 16-3-85 of homicide by
12 child abuse, and I'm going to read that statute to you.

13 "A person is guilty of homicide by child abuse if the person
14 causes the death of the child under the age of eleven while
15 committing child abuse or neglect' and the death occurs under
16 circumstances manifesting an extreme indifference to human life or
17 knowingly aids and abets another person to commit child abuse or
18 neglect, and the child abuse or neglect results in the death of
19 that child under the age of eleven."

20 This is the charge upon the indictment as against this
21 defendant, and to this charge and to this indictment this defendant
22 specifically pleads not guilty thereby placing the burden of proof
23 of proving every issue of these charges to your satisfaction
24 unanimously beyond a reasonable doubt.

25 I will explain further in my charge to you the elements with

1 reference to homicide by child abuse as maintained in the statute.

2 Now, to this indictment, this defendant has plead not guilty
3 which places upon the State the burden of proving the defendant
4 guilty if they can to your satisfaction.

5 A person charged with a criminal offense in South Carolina is
6 never, ever required to prove himself innocent. They got to prove
7 him guilty.

8 I charge you that it is a vital, important rule of law of
9 evidence that a defendant in a criminal case no matter how great or
10 serious may be the offense with which he is charged must always be
11 presumed innocent until his guilt has been proven beyond a
12 reasonable doubt.

13 This presumption of innocence remains with this defendant at
14 all times from the moment of his arraignment throughout the trial
15 and until you, the jury, have upon the testimony and evidence
16 presented reached a verdict of guilty beyond a reasonable doubt for
17 it is, ladies and gentlemen, the solemn duty of a jury if not
18 clearly convinced of his guilt beyond every reasonable doubt to the
19 contrary to acquit the defendant.

20 And so the burden of proof as I continue to emphasize is upon
21 the State to establish by evidence to your satisfaction the guilt
22 beyond a reasonable doubt of this defendant here on trial for the
23 charge of homicide by child abuse as is contained in 16-3-85 that
24 I have just read to you.

25 Now, I use the term "reasonable doubt". Let's talk about

1 that.

2 The State has the burden of proving the defendant guilty
3 beyond a reasonable doubt, and some of you may have served on
4 juries in civil cases where you were told that it is only necessary
5 to prove that a fact is more likely true than not.

6 In criminal cases the State's proof must be more powerful than
7 that. It must be beyond a reasonable doubt.

8 Mr. Foreman, and ladies and gentlemen, proof beyond a
9 reasonable doubt is proof that leaves you firmly convinced of the
10 defendant's guilt.

11 Ladies and gentlemen, there are very few things in this wide
12 world that we know with absolute certainty, and in criminal cases
13 the law does not require proof that overcomes every possible doubt.

14 If, based on your consideration of the evidence, you are
15 firmly convinced that the defendant is guilty of the crime charged,
16 you must find him guilty.

17 If, on the other hand, you think there is a real possibility
18 that he is not guilty, you must give him the benefit of that doubt
19 and find him not guilty.

20 Now, ladies and gentlemen, under the Constitution and laws of
21 South Carolina, you are the finders of the facts in this case. You
22 are the sole finders of the facts. I am not entitled to a
23 position with the finders of the facts as to what the facts are,
24 and I absolutely have none.

25 If any ruling, opinion, mannerism of mine might tend to

1 indicate to any of you twelve how I feel about any factual
2 situation between these litigants, please dismiss and disregard
3 that. I am not entitled to a factual opinion, and I absolutely
4 have none.

5 You twelve and you twelve only in this wide world are the only
6 ones that can have a factual opinion that counts in the trial of
7 this case.

8 I tell you, too, that you are also the judges, the sole judges
9 of the credibility meaning the believability of the various
10 witnesses who have testified. We touched on this briefly at the
11 time you were sworn in but I tell you again in passing upon the
12 credibility of a witness and particularly the witnesses in this
13 case you are entitled to take into consideration several things,
14 for instance, the appearance and manner of a witness who has
15 testified, sometimes referred to as the demeanor.

16 You would always consider if you choose to was a witness
17 forthright or hesitate. Was a witness' testimony consistent or did
18 it contain discrepancies? You may consider if you choose what was
19 the ability of a particular witness to know the facts about which
20 he or she has testified.

21 Obviously, you would consider whether or not a particular
22 witness had a cause or reason to biased or prejudiced in favor the
23 testimony that he or she gave.

24 You may consider whether or not somebody is trying to mislead
25 you deliberately or unintentionally. That's again for you to

1 determine.

2 You may if you choose consider whether or not the testimony of
3 a witness was corroborated or made stronger by other testimony or
4 evidence. Was it made weaker?

5 Ladies and gentlemen, in considering the testimony in this and
6 all cases you may believe all of what you hear or none. You may
7 believe the testimony of a small - - one witness against that of
8 many. You may believe a portion of a witness' testimony and
9 disregard the larger depending on your view.

10 In judging credibility and believability, Mr. Foreman, you
11 have but one single job, just one. That is to seek the truth. In
12 judging credibility look for, find and express in your verdict the
13 truth whatever it is.

14 Now, obviously, you do not determine the truth or falsity of
15 a matter by counting up the number of witnesses who have testify in
16 favor of one party or one position or the other.

17 As I've indicated before, throughout this entire process you
18 have but one single objective in judging credibility and that is to
19 seek the truth regardless of from what witness or what element of
20 that testimony may be derived.

21 When I say element I mean from other matters that may have
22 been introduced in the trial of this case, and these exhibits that
23 are in the trial of this case, as I indicated, will be with you in
24 the jury room.

25 Now, Mr. Foreman, the same Constitution of Law which makes

1 unto you folks the finders of the facts, that August document makes
2 unto me, State and Federal, the instructor in the law, and under
3 your oath as jurors, you are required, required to accept the law
4 as I now charge it to you and may hereafter charge to you. Even
5 though you or I for that matter might disagree with what the law is
6 or ought to be, please accept the law as I now charge it to you.

7 If in the event I charge you the incorrect law, there's an
8 appellate court that can look at that issue but for the purposes of
9 this trial please accept the law as I give it to you remembering
10 that you take the facts as you find them to be and apply those
11 facts to the law of this case and thereafter reach a verdict.

12 Verdict comes from the Latin word "verdicto" meaning to speak
13 the truth. Let your verdict, therefore, speak the truth.

14 Now, the defendant in this case has not testified. This is
15 his constitutional right, and it is not a circumstance that you can
16 take into your consideration or even to allow that issue in your
17 discussion in the jury room. I emphasize this to you, Mr.
18 Foreman.

19 Under the Constitution of South Carolina and of the United
20 States, it is his constitutional right not to testify. The burden
21 is upon the State of South Carolina to establish his guilt by
22 competent testimony to your satisfaction unanimously beyond a
23 reasonable doubt.

24 The fact that this defendant did not take the stand and
25 testify in his own behalf does not create any presumption or

1 inference against him. The jury must not permit that fact to way
2 in the slightest degree against this fact.

3 Mr. Foreman, the fact that he did not testify must not even
4 enter into your discussions in the jury room in any manner.

5 Now, there have been witnesses qualified by me as an expert,
6 and I charge you in that connection that witnesses who by training,
7 education or experience are considered experts in a particular
8 field and they may give opinions in that field based upon the
9 evidence of a matter.

10 An expert's conclusions and opinions constitutes evidence to
11 be considered by you in connection with all the other testimony and
12 evidence in this case. You, the jury, however, may give that
13 testimony such weight as you in your experience and discretion may
14 deem appropriate.

15 Now, I charge you, Mr. Foreman, and ladies and gentlemen, that
16 mere presence at the scene is not sufficient to prove someone
17 guilty of a crime. A defendant's presence where a crime is being
18 committed or mere association with a person who commits a crime
19 does not make the defendant an accomplice or an aider or abettor of
20 the person committing the crime.

21 The burden is on the State of South Carolina to prove every
22 element of the crime charged. If you find after reviewing all of
23 the evidence that the State has proven that the defendant was only
24 present at the scene of the crime and that the State has not proved
25 beyond a reasonable doubt any participation in the crime, then you

1 must find him not guilty. The law is that the proof at the scene
2 of the crime alone is not sufficient to find someone guilty.

3 Mr. Foreman, ladies and gentlemen, there are two types of
4 evidence which are generally presented during a trial, direct and
5 circumstantial evidence.

6 Direct evidence is the testimony of a person who asserts or
7 claims to have actual knowledge of a fact such as an eye witness.

8 Circumstantial evidence is proof of a chain of facts and
9 circumstances indicating the existence of a fact.

10 The law makes absolutely no distinction between the weight or
11 value to be given to either direct or circumstantial evidence nor
12 is a greater degree of certainty required of circumstantial
13 evidence than of direct evidence.

14 You should weigh all the evidence in this case. If after
15 weighing all of the evidence if you are not convinced of the guilt
16 of the defendant beyond a reasonable doubt, then you must find that
17 defendant not guilty.

18 Now, I charge you with reference to the indictment and the
19 statute under which this defendant comes to court, and to this
20 indictment he specifically pleads not guilty, it being embraced in
21 our Code of Laws of Section 16-3-85 containing a Section A and a
22 Section B.

23 The defendant is charged with homicide by child abuse. The
24 State must prove beyond a reasonable doubt that the defendant
25 caused the death of the child under the age of eleven which the

1 State must prove while committing child abuse or neglect.

2 Child abuse or neglect is an act or failure to act which
3 causes harm to the child's physical health, welfare or death. Harm
4 to the child's physical health or welfare means that the defendant
5 either, (1) inflicted or allowed to be inflicted on the child
6 physical injury; (2) failed to supply the child with adequate food,
7 clothing, shelter or healthcare and this failure caused a physical
8 injury or condition which caused death; or, (3) abandoned the child
9 causing the child's death.

10 The State must also prove beyond a reasonable doubt that the
11 death occurred under circumstances showing an extreme indifference
12 to human life.

13 Under this statute, section, statute, the State may also prove
14 homicide by child elect - - neglect by proving beyond a reasonable
15 doubt that the defendant knowingly aided and abetted another person
16 to commit child abuse or neglect which resulted in the death of a
17 child under the age of eleven.

18 Aid means to help, to promote the course of an accomplice or
19 to give support or to give assistance to. Abet means to encourage
20 or appear to favor or support.

21 Now, Mr. Foreman, you twelve have been selected as fair and
22 impartial jurors having told me on voir dire that each of you can
23 give both the State and the defendant an impartial trial swore to
24 impartially try and to determine the facts of this case, and when
25 you comply with your oath to do so, then no one will have a right

1 to criticize your verdict and you will have fully discharged your
2 duty as jurors.

3 You must not be influenced by opinions or expressions of
4 opinions if any that you may have made on the outside including
5 what you may have seen in the paper or heard on the tv or whatever.
6 You must not be influenced by outside material.

7 But you are to decide this case according to the testimony
8 that you have heard from the lips of the sworn witness from this
9 stand along with all the other evidence that I have had - -
10 permitted to be introduced into the trial of this case.

11 Now, Mr. Foreman, I have prepared for your guidance a verdict
12 form, and there's no suggestion by me as to what your verdict
13 should be, and the form in which I give it is I could turn it
14 around and give it to you the other way but there are several
15 possible verdict forms.

16 First, as to guilty or not guilty of homicide by child abuse,
17 as to that you may find him not guilty and so signify or you could
18 find him guilty and so signify.

19 Of course, any - - any charge of guilty must be beyond a
20 reasonable doubt .

21 Or as to - - you may find him not guilty of aiding and
22 abetting another person to commit child abuse which resulted in the
23 death of a child or not guilty of aiding and abetting.

24 And so it is that you will first consider the first charge and
25 depending on your verdict, you will then consider if necessary the

1 second charge, and whatever it is, you would so indicate and sign
2 your name on the form of this verdict.

3 I think that you will find it totally - - totally informed for
4 your benefit but if you have any question about it, I'll be glad to
5 answer it for you.

6 Alright. Remembering, now, whatever your verdict is, it must
7 be the unanimous verdict of all twelve of you.

8 And, Mr. Foreman, when you agree on the verdict, knock on the
9 door and let the bailiff know, and we'll be glad to accept your
10 decision whatever it is, and that's for you to decide as the
11 finders of the facts.

12 Now, the State has waived its right upon the opening of the
13 law.

14 MR. VON HERRMANN: Correct, Your Honor.

15 THE COURT: Mr. Axelrod consents to that and now has the
16 opportunity of addressing you, and you may proceed.

17 MR. AXELROD: Your Honor, the Court's indulgence one moment.
18 Let me set up, please.

19 THE COURT: Yes, sir.

20 Would you need a few minutes? I'll let the jury go to the
21 jury room just a second or are you ready.

22 MR. AXELROD: No, Your Honor. I'll go forward.

23 THE COURT: Okay.

24 MR. AXELROD: I'm okay unless the jury needs a break.

25 (The Court allows the attorney for the defendant to set up the

1 video.)

2 MR. AXELROD: May it please the Court, Your Honor?

3 THE COURT: Yes, sir. You may proceed.

4 SUMMATION BY MR. AXELROD

5 MR. AXELROD: Firmly convinced, the Judge says you have to be
6 firmly convinced beyond all reasonable doubt that Wesley committed
7 homicide by child abuse.

8 Originally, when the Judge read the indictment to you at the
9 beginning of the week, he read one part of the indictment. Wesley
10 was only charged with homicide by child abuse. He was charged.
11 A person is guilty of homicide by child abuse if the person causes
12 the death of a child under the age of eleven while committing while
13 committing child abuse or neglect. Absolutely no mention in the
14 original indictment about aiding or abetting but I submit to you.
15 The State knows they can't make that burden.

16 MR. VON HERRMANN: Objection, Your Honor. That's entirely
17 inappropriate.

18 THE COURT: Well, he's entitled to show that you have met
19 the burden. The jury will decide whether you've made it or not.

20 MR. VON HERRMANN: Yes, sir.

21 THE COURT: That's a question for the jury. The jury will
22 make that determination.

23 MR. AXELROD: And only one person has been charged with
24 homicide by child abuse, and that's in the record. Charlene was
25 not charged with that, and, now, the Court is going to charge you

1 that you can find Wesley guilty of the aided or abetted somebody
2 else in the commission of homicide by child abuse, and there will
3 be two placed on that verdict form. There will be one for homicide
4 by child abuse, and there will be one for aiding and abetting
5 somebody with homicide by child abuse but to aid and abet which
6 what he was not charged with in his original indictment to be
7 charged with aiding and abetting somebody with homicide by child
8 abuse, you need another person.

9 THE COURT: Alright.

10 I want to charge you now. I have charged the statute. The
11 statute clearly permits a jury to find him not guilty of
12 everything. They also permit them to find that he is - - if he is
13 not guilty of the principal act, then they may consider assault and
14 battery. That is the law of this State and I have charged it to
15 you, aiding and abetting, rather. Excuse me.

16 The jury will determine first, was he the principal actor. If
17 they find no, then they are to entitled to consider the second
18 charge. If they find no, fine but they are entitled to consider it
19 under the statute as made by Legislature of South Carolina.

20 MR. AXELROD: And I submit - - -

21 THE COURT: And I make no comment on what the jury's
22 finding should be.

23 MR. AXELROD: And I submit to you, ladies and gentlemen, that
24 the logic would say that if only one person is charged with
25 homicide by child abuse, then nobody else can aid and abet somebody

1 else with homicide by child abuse. I want you to think about that.

2 Wesley is here because he's charged with homicide by child
3 abuse. Now you're going to be asked to see whether he aided and
4 abetted somebody with homicide with child abuse but nobody else has
5 been charged with homicide by child abuse, and I want you to keep
6 that in your mind when you deliberate.

7 In the opening statement, the State said all the facts were
8 tied to Wesley, all the facts. Everything was tied to Wesley.

9 They told you in the opening statement that there was
10 fractured ribs that occurred within forty-eight hours of Ebony's
11 death, and we'll get into that later but there was testimony, clear
12 testimony that all seventeen ribs broke between ten and twenty-one
13 days.

14 I'm not going to stand up here and tell you **Minor** was not a
15 victim of child abuse because that would be foolish, without a
16 doubt. The girl was born on October 7th. She died a death that,
17 hopefully, wasn't that painful on February 14th. She is a victim
18 of abuse, absolutely a victim of abuse but I submit to you today
19 not by Wesley, absolutely not by Wesley.

20 I know two things. If there's two things I know about this
21 case, there's two things. The baby was abused and not by Wesley,
22 not by Wesley.

23 Dr. Cooper testified that on 12/9 of 2003, they go in there
24 with the femur. The baby has a broken femur, the biggest bone in
25 the body, the biggest bone, and they say that - - and they say that

1 it is a clear indication of abuse but Dr. Crane said that thirty
2 percent of spiral fractures are accidental.

3 There's testimony that you heard that with the femur it was
4 unfounded against Wesley. No criminal liability or responsibility
5 to Wesley.

6 You heard from Dr. Rahter the femur did not kill **Minor** but the
7 State puts it in.

8 There's three things that occurred in this case. There's a
9 broken femur that occurred somewhere between the 10th of October,
10 2003, and the 21st of October, 2003. There is rib fractures that
11 occurred sometime between the 25th of January and maybe the - - gee,
12 the 20th of January and maybe the 1st of February, and there was a
13 toxic level of some type of cough medicine given to her.

14 There's three different incidents, three different events,
15 three horrific events. We're not going to go around that but if
16 you've taken your oath and you literally take your oath because
17 he's sitting there he is not guilty until you prove him guilty.
18 He's not guilty.

19 But if you sit there in that bench and you say, "Well, you
20 know what? We have a dead baby. We have a dead baby, and we're
21 going to find somebody guilty today no matter what because I'll
22 feel better when I go home tonight."

23 I submit to you, don't do that. Do not say that he is guilty
24 until he proves himself innocent because that's not the oath you
25 took. You took an oath that they would have to prove him guilty

1 beyond all reasonable doubt, and the Judge tells you you must be
2 firmly convinced, no doubt, firmly.

3 Dr. Cooper writes in her report, and you'll have her report
4 back there, "Charlene was afraid to go to the ER because she's be
5 a bad mother."

6 Not because Wesley would be a bad father. She'd be a bad
7 mother because she knew the fracture was there. She knew it.

8 Now, she tells you on testimony that Wesley made a splint.
9 That's what she tells you. I submit that that's a lie.

10 She told you she lied, and I asked her specifically, "What did
11 you lie about to the police when you talked to them?"

12 And everybody objected about that. They objected but I wanted
13 to know. How can we believe anything Charlene said if she tells
14 you she lied because what she's asking you to do, she's asking you
15 to rely on something that might be a lie. We don't know if she
16 lied here or we don't know if she lied here but she told you she
17 lied.

18 And when I asked what. Did she lie about the splint? I
19 submit to you that there's not record, not one doctor, not expert,
20 not one person, not anybody associated with this case, not the
21 police, not anybody. They did an interview. Nothing. She never
22 tells anybody about a splint but she told us here. For four years
23 she could have told somebody about a splint but she chose not to.

24 Is that the truth or is that a lie? I tried to find out.
25 They objected.

1 MR. VON HERRMANN: Your Honor, I'm going to have to object to
2 that. Objection is simply us calling an inattention when he
3 violates the rules of evidence.

4 THE COURT: I'm going to sustain that objection. That is
5 an improper argument. He objected many, many times as you did and
6 I explained to the jury. They cannot hold that against either
7 side. It is simply a mechanism for calling to me a possible
8 infraction of the rules.

9 Both of you objected, and both of you were proper. So you can
10 not raise that as an improper inference.

11 Now, you may proceed.

12 MR. AXELROD: The fact is we were not allowed elaborate and
13 expound to find out what she lied about.

14 Is it okay for a child to come home and say, "I lied," but
15 they don't say what about? The child would say, "I don't have to
16 tell you."

17 Would we believe anything the person said?

18 She told you she was facing thirty years in the penitentiary.
19 She didn't want to spend the rest of her life in the penitentiary,
20 and she said to you the only reason she lied was to save her
21 family. She don't have Tyrell. She didn't want Tyrell. She
22 lied to save herself.

23 She told you she lied. That might be the only truthful thing
24 she tells she. She lied.

25 What does a coyote do when he gets his foot in a trap. He's

1 out in the wild and he gets hungry. It chews its leg off to get
2 out of the situation it's in.

3 And I submit to you if you base - - if you base any of your
4 opinion on a liar, I would submit to you that that is an injustice.

5 Dr. Cooper told you she never prescribed pseudoephedrine.
6 Well, she didn't want to get in trouble. She didn't want someone
7 to look at her herself. But she did. She prescribed it.

8 And then Demi Garvin gets on the stand and says, "Rondec-DM,
9 well, could not have been this medicine in the baby because there's
10 no dextromethorphan."

11 That's what the DM stands for.

12 Well, that was convincing. We should say, "Hey, it can't be
13 this medicine because Demi Garvin told us, absolutely, it can't be
14 dextromethorphan."

15 But I submit to you. When Donna - - when Renee - - Donna
16 Warrington, when Dona Warrington went on the stand, the one that
17 worked in Pennsylvania, the one that was certified as an expert to
18 read the results of 1300 nanograms per milliliter, they asked,
19 "Would there have been a high level of dextromethorphan in your
20 test?"

21 And you remember what she said? She said, "No."

22 And he said, "Why?"

23 And she said, "Because they never tested for it."

24 They never tested for it.

25 So we don't know right now what medicine. If it was a

1 prescription medicine that Wesley tells Tara Phillips that he gave
2 this much out of that dropper to that baby that day.

3 Charlene denied giving medicine to the baby. She denied
4 giving cough medicine to the police but to Tara Phillips she said,
5 "Yes, I got generic cough medicine. I gave it to the baby."

6 She told you that she gave the medicine to the baby on the 12th
7 and the 13th and the 14th when the baby was well. At first she
8 denied it but I finally got her to tell you she gave the baby
9 pseudoephedrine.

10 Now, the Judge charged mere presence. See, Wesley's charged
11 with homicide by child abuse because he was home when **Minor** died.
12 He was there, absolutely. My logic to you would be if Charlene
13 had been home and not Wesley, would she be there?

14 And I submit to you when I asked Dr. Collins about the
15 metabolic rate of breaking down a cough medicine, of any medicine
16 that you - - you have certain time periods. You have half-lives.
17 You have different things, and so much medicine is broken down in
18 such a period of time.

19 And I submit to you that when Charlene came home for lunch at
20 2:00, she gave that baby that cough medicine. She gave the baby
21 that cough medicine because it takes that long to get it into the
22 system to do what it does.

23 It has to go through the stomach. It has to go through the -
24 - the entire system to do that, and I submit to you that 1300
25 nanograms per milliliter cannot occur at that one time of Wesley

1 giving this. It was given at other times.

2 I will agree with you today. It was given at other times.
3 What we don't know is by whom, and if you have a doubt today and
4 you base your opinion and have that doubt, as the Judge told you,
5 Whether you like it not you must come back not guilty.

6 You already know that the femur had been excluded from
7 criminal responsibility. What we have left are ribs.

8 Steven Hayes testified he gave the baby the albuterol -- the
9 albuterol inhaler. Did not know that Dr. Cooper had prescribed
10 the pseudoephedrine. Told you that you could have -- you could
11 have reactions. No one ever told that doctor that the baby had
12 pseudoephedrine. Is that intentional? I think not.

13 I don't think when we have children, they don't give us a
14 manual.

15 Rodney Robinson, the security guard, he comes over. He comes
16 over, and he finds a woman doing CPR on the couch. You heard from
17 Dr. Rahter that Wesley said he attempted CPR. Then the woman
18 attempted CPR, two -- two people that have no training.

19 Then you have the security guard who said he had training and
20 then EMS came.

21 There was some hemorrhage in **Minor** at that time but there was
22 no hemorrhage of broken ribs. All the broken ribs were broken
23 between ten and twenty-one days, and we will go through that today.
24 We will go through that.

25 Dr. Rahter said the spiral fracture is not the cause of death,

1 not the cause of death. The baby was clean. She said no one
2 knows when that fracture occurred.

3 The Solicitor said that when the fracture occurred **Minor** was
4 in the sole custody and care of Wesley. That's what the Solicitor
5 said. That's not true. We don't know where **Minor** was. We
6 don't know who had **Minor** and that is doubt.

7 For you to say that Wesley had **Minor** when the spiral fracture
8 occurred would be wrong. They said Wesley's story when he said he
9 woke up and he fell - - and he fell over and he had the baby was
10 not consistent with how a spiral fracture occurs.

11 I submit to you I agree. It's not consistent. He wasn't
12 there. He didn't know. He's trying to come up with something
13 that they're trying to blame him for.

14 What was the investigation of this case? What kind of
15 investigation did they do? They didn't put the police officers.
16 There's no investigation. There's absolutely none.

17 They interviewed Wesley. You don't see it. The only clips
18 you're going to see is what I show you. They don't want you to see
19 these things.

20 The police did and interview, and that was it. They said, "It
21 got to be the daddy. Can't be the mom."

22 Even though they had evidence that she was disinterested, she
23 was distended. She was away. They - - they saw her at the home.
24 They saw her demeanor. They saw Wesley's demeanor. Couldn't be
25 the mother. Tell that to Susan Smith. Mothers kill babies, too.

1 We just don't want to believe it. We don't want to believe it.

2 Dr. Rahter - - Demi Garvin said that Wesley's story about
3 giving the inch and a half of pseudoephedrine or whatever he says
4 he gave was inconsistent with the toxicity level of **Minor** I
5 agree.

6 It seems that Wesley's story each time that he's pushed for an
7 answer because Wesley is the one that killed **Minor** all they ask is
8 about Wesley. They don't ask, "Charlene, did you give cough
9 medicine?" They don't ask these questions. They don't seek to
10 find that out.

11 Wesley, and Wesley's inconsistent with the femur. Wesley's
12 inconsistent with the cough syrup, and you know what that makes
13 Wesley? Consistent. The stories are inconsistent because he
14 didn't do it. He didn't do it.

15 They interviewed him. You didn't have a single police officer
16 get in this witness stand to tell you - - -

17 MR. VON HERRMANN: Objection, Your Honor. Could we approach
18 on this issue?

19 THE COURT: Yes, sir.

20 MR. VON HERRMANN: Thank you.

21 (Bench conference is held off the record and in the presence
22 of the jury but outside the hearing of the jury.)

23 MR. AXELROD: Nothing - - Wesley gets in a police car with
24 Detective Cox, unmarked police car. Has conversations with him.
25 You haven't heard about any of those conversations. Why not?

1 Do you think that in a homicide by child abuse case, do you
2 think that Wesley would not be interviewed? Think about it. Why
3 was there no testimony to that?

4 Why for four years has this case languished?

5 Dr. Mallikarjun, on February 12th, they go for the wellness
6 checkup. He testifies. He says, "The baby is fine on February 12th
7 in the afternoon."

8 Forty-eight hours before she dies, the baby is fine.

9 That's what he says. He did a head-to-toe exam, and that baby
10 is fine.

11 The Solicitor argued to you in opening statement that the ribs
12 broke within forty-eight hours because they could not draw the
13 correlation that how could a baby be fine on February 12th and be
14 dead on February 14th if it had seventeen broken ribs at the time
15 of the examination.

16 Dr. Collins told you, highly qualified Pathologist, going to
17 Greece next month. She told you. She's very qualified. The ribs
18 broke between ten and twenty-one days. That's what she told you.

19 So, they go for the wellness checkup. The baby has seventeen
20 broken ribs, and the doctor does a head-to-toe exam. Palpitates
21 her. Feels all over and grabs her and touches her and says, "She's
22 okay."

23 Well, if she's okay for him how should he know any different?

24 Because they want you to believe that they were broken after
25 that appointment but they weren't, and we're going to go through

1 them. All seventeen ribs were broken between ten and twenty-one
2 days.

3 So, when you're back there in that jury room, think about
4 that. If a doctor doesn't know it, how does he know it?

5 I asked Dr. Collins for a tube of blood. She went to the
6 freezer. It was gone. They threw it away.

7 She said she asked me why I wanted it, and I told her I
8 wouldn't tell her but eventually I did when she told me it was
9 gone.

10 A homicide case, a tube of blood that's evidence that we could
11 use to test was gone. The only way you can test for osteogenesis
12 imperfecta if this baby had it would be that tube of blood. They
13 didn't test for that. That test costs \$5,000.

14 "We already got Wesley. Why test for that?"

15 Osteogenesis imperfecta, babies get spiral fractures and
16 broken ribs. The bones are brittle. All the testimony we have of
17 the bones being pliable but that's what that disease is.

18 And the doctor said, "It didn't look it. She didn't have
19 blue eyes."

20 And I didn't elaborate with her on that. You don't have to
21 have blue eyes, and you don't have to look it. That's why you
22 tested.

23 That would be the same thing as saying, "Well, I'm going to
24 look at my car tire. My car tire looks okay. So I don't think
25 I'll have to check to see if it needs any air."

1 And I'm not trivializing this point. I'm making a point. We
2 don't know if this baby had that disease. It has all the symptoms
3 of that disease but for the cough medicine. It has the symptoms.

4 And - - and what happens in osteogenesis imperfecta, it
5 continues. People can break bones their whole life. Hundreds and
6 hundreds of bones break in their lifetime. It's a debilitating
7 disease, and children have it, and she has - - she had the symptoms
8 but we're not testing for it.

9 The left posterior ribs, you call the ribs by the way you look
10 at it. You look at the left side. This would be the left side.
11 Posterior is the back.

12 The left posterior, they're marked, and they'll be back there
13 for you to look at. Numbers 2, 3 and 4 right here. Dr. Collins
14 testified, and if you have any trouble with the testimony, Ms.
15 Linda can play it back for you because it is all recorded. It is
16 all recorded. She said ribs #2, 3 and 4 had callus deposits on
17 them.

18 Callus deposits is nature's way of healing a bone. The only
19 thing we can do, we can't grow legs and we can't grow arms yet. We
20 might someday. A starfish can grow an arm but what we can do is
21 we can heal a bone, and the way we heal a bone is a little - - a
22 little membrane is formed around, a little cocoon and all of a
23 sudden it goes together, and she heals again.

24 And sometimes one would say to you when they heal, they're
25 stronger because there's more calcium around it.

1 She said they were broken ten to twenty-one days.

2 The left anterior lateral ribs 5 and 6, ten to twenty-one
3 days, callus deposits. Left anterior lateral ribs 7, 8 and 9,
4 callus deposits, ten to twenty-one days, not when **Minor** died.

5 Left posterior rib #11 right down there, callus deposits, ten
6 to twenty-one days.

7 Right posterior ribs 3, 4, 5 and 6, callus deposits, ten to
8 twenty-one days.

9 Am I being repetitious? No. We're going through these ribs
10 because they told you in the opening. They all occurred when the
11 baby died.

12 After the 12th, bam. Give the cough medicine. They gave the
13 cough medicine because they squeezed the baby, and they broke all
14 the ribs. They're going to have to put a chemical restraint on
15 her. That's what they're telling you but it couldn't have
16 happened.

17 And when the doctor said the baby was fine, he didn't know.

18 The right lateral ribs 8, 9 and 10, 8, 9 and 10 down here,
19 callus deposits, ten to twenty-one days.

20 And the left interior lateral rib #2, callus deposit, ten to
21 twenty-one days.

22 And that is seventeen ribs, 3, 5, 8, 9, 13, 14, 17 ribs all
23 with callus deposits.

24 Dr. Collins said there's no studies to develop the absorption
25 rate of the medicine. She doesn't know who gave the medicine. She

1 doesn't know when it was given.

2 I asked her. "Who broke the femur?"

3 And she said, "I have no idea."

4 I said to her, "Who broke the seventeen ribs?"

5 She said, "I have no idea."

6 She said, "Who gave the baby the cough medicine?"

7 She said, "I have no idea."

8 She didn't know who gave it. She didn't know when it was
9 given.

10 There is no testimony or evidence placing Wesley with doing
11 this. There's none.

12 There's another person involved in this case. I submit to
13 you. Why isn't she sitting right there right now?

14 Think about that. Go back in that jury room. Say, "Why
15 wasn't Charlene sitting at this table with her lawyer?"

16 Because they think mothers don't kill babies. The police
17 think mothers don't kill babies. Ask Susan Smith.

18 We said, "How can a mother kill a child? How could she do
19 that?"

20 It's easier for our conscious. It's easier for us to say,
21 "We'll blame daddy."

22 Lasheka Walker tells you she - - she hires a babysitter from
23 the Social Services. She never goes to the house. She never
24 checks out anything. We don't know anything about the woman.

25 You heard from the maintenance man that sometime after **Minor**

1 died, the woman just vanishes in the middle of the night and leaves
2 all of her belongings. That's all we know about the woman that was
3 the babysitter.

4 Charlene says the babysitter only kept her for three days. Is
5 that the truth or is that a lie?

6 Should we believe everything Charlene said? No. And why?
7 Because she told you she lied, and I say to you we cannot believe
8 anything Charlene says.

9 And I submit to you to decide this case based on the facts
10 without Charlene. If you can't - - if you don't know what she lied
11 about, how can you - - how can you deliberate on what might be a
12 lie? That would be for a better term justice, and that's what our
13 Constitution is about. We establish justice.

14 And this is a serious case. This is the most serious case
15 that there can be. This is a murder case.

16 Tara Phillips tells you that Wesley gives an inch of medicine.
17 She tells you that Charlene said she gave medicine, too. The
18 Solicitor says, "Didn't she tell you she gave that medicine for
19 Tyrell?"

20 That's what he said.

21 Tara Phillips said, "No. No. She gave the medicine to **Minor**

22 She testified she gave **Minor** medicine on the 12th and the 13th.
23 She had sole and complete custody of her those days, and she was
24 pumping her with medicine those days all the way to 10:00 in the
25 morning that day.

1 And she came home, and she said she gave the baby cereal. I
2 submit to you she gave the cough medicine, and I submit to you that
3 at five or six o'clock when they said that Wesley said that the
4 baby was coughing, was gurgling, he gave her cough medicine,
5 absolutely, but he did not know what was given prior, and if
6 there's a chance that Charlene was giving that medicine prior, if
7 you have a doubt to that, you have to exclude the cough medicine.

8 And we know by Dr. Collins' testimony that there's no
9 knowledge of who had the baby when the ribs broke because they
10 broke between ten and twenty-one days.

11 She said it is not an exact science. They can look at the
12 callus formation, and they can guess. That is all they can do is
13 guess, and now they want you to convict Wesley on circumstantial
14 evidence that does not place him doing these events except it
15 places him in the house at 6:00 at night - - trying - - 6:30 at
16 night trying to do CPR on the daughter that he doted over, the one
17 that was the apple of his eye, the one that he showed off to
18 everybody.

19 "Here is my daughter."

20 That is not consistent with breaking her ribs, it's not
21 consistent.

22 But you heard that Charlene, the day - - the day she dies, the
23 day after she dies, Charlene is cleaning the kitchen. The
24 Solicitor is cleaning the kitchen because people are coming over.
25 Wesley's in a fetal position crying holding his daughter's teddy

1 bear, and Charlene is cleaning up the kitchen.

2 Which is consistent? Which is not consistent?

3 We have to look at all of these things. It doesn't make sense
4 for someone that is in a fetal position holding the teddy bear
5 crying that he did what they said he did.

6 Is there any police investigation done? Was there anything
7 done, anything? Did they search through the house? Did they do
8 anything? Did they just take everything out of the house? When
9 there's a murder case, they take it all. They take boxes. They
10 take bags. They take everything. Here they didn't take anything.
11 They took some pictures, and you didn't see those.

12 It's easier. Let's just rush through this case. Let's just
13 get it over with, and let's just convict him. That's the easiest
14 thing that we can do today.

15 Connie Rains, before I get to Connie Rains, Tara Phillips
16 said, "The mother was uninterested. Showed no emotion. Rather
17 watch tv. Asked no questions," when the femur was brought out on
18 December 9th.

19 The only one concerned or who was attentive to **Minor** was
20 Wesley.

21 It's consistent again. Each time something happens to **Minor**
22 he's consistent. She's not.

23 His story's not consistent with the cough medicine. His
24 story's not consistent with femur. Correct because he didn't do
25 it.

1 There is consistency in inconsistency. There is.

2 But mothers don't kill babies.

3 Connie Rains said the day after **Minor** died, the mother was in
4 the kitchen in the house cracking jokes. Is that consistent
5 Cracking jokes twelve hours after your daughter is dead?

6 He's in a fetal position crying. Which is consistent today?

7 Why isn't she at that table? Because they never investigated.

8 There's nothing. In 1689 the Salem witch trials occurred, and
9 they hung thirteen men and women.

10 MR. VON HERRMANN: Your Honor, I know we're not going to get
11 into the Salem witch trials in the closing argument of this case.

12 THE COURT: No, sir.

13 Let me do this.

14 Mr. Axelrod, I'm not going to limit you in any way but I do
15 recall for your edification that you have been talking for forty-
16 five minutes, and at some point in time, now, the jury has been out
17 here nearly two hours, and I'm going to have to - - I just hesitate
18 to break and send the jury out but at some point in time, now, I'm
19 going to have to do that.

20 If you wish me to send them out so you can continue here for
21 another hour or so?

22 MR. AXELROD: If they need a break, Your Honor, we'll send
23 them out now if that's what you want to do.

24 THE COURT: No, sir, but if you keep on I prefer not to
25 interrupt you. You go ahead but at some point in time I got to

1 concern myself with the jury.

2 Go ahead.

3 MR. AXELROD: Your Honor, if you can ask the jury if they
4 would like a break now.

5 THE COURT: Please don't argue with me.

6 MR. AXELROD: I'm not.

7 THE COURT: I'm trying to do you a favor. I'm just merely
8 stating to you that you've been speaking for forty-five minutes.

9 MR. AXELROD: Yes, sir.

10 THE COURT: And that's all I'm saying.

11 MR. AXELROD: Yes, sir.

12 THE COURT: If at some appropriate time, and it won't be
13 long from now, I'm going to have to give this jury a break, and I
14 just tell you that because I'm always reluctant to break counsel's
15 summation.

16 MR. AXELROD: I have no problem with a break in my summation,
17 Your Honor.

18 THE COURT: You don't but I do. Proceed.

19 MR. AXELROD: In 1689, they had the Salem witch trials, and
20 they hung thirteen people, and I want to tell you why they hung
21 them. Because a bunch of kids said they saw a bunch of people
22 spitting nails out of their mouths and flying on broom sticks, and
23 they hung those people.

24 They did not investigation. They did no reports. You don't
25 see anything, nothing. This is a murder trial, a murder trial, the

1 trial that you had boo-coo of evidence, witnesses. They're going
2 to say, "Oh, we don't need any witnesses. We don't need any
3 evidence. We have all we need."

4 I say to you they decided that day, the next day it couldn't
5 be the mother. It had to be the father. They made that decision.

6 The detective told you that he never took out the warrant. He
7 told you that it was a direct indictment by the State. They looked
8 at the limited stuff they had. They looked at a couple of pieces
9 of paper, and they said, "It's got to be Wesley."

10 I say to you based on what you heard why couldn't it be
11 Charlene. What couldn't it be Charlene? She should be there.
12 She's not.

13 The one that did this is not there today, and I submit that is
14 an injustice to all of us.

15 Your Honor, I'm going to show these clips, now.

16 THE COURT: Alright, sir.

17 Anybody needs to take a quick break, just let me know.

18 MR. AXELROD: If they want this would be a good time.

19 THE COURT: Well, they don't indicate that. I just want to
20 make sure that my jury is comfortable. That's all.

21 Go ahead and show your clips.

22 MR. AXELROD: Yes, Your Honor.

23 THE COURT: Have you got - - made arrangements with your
24 technician and all?

25 MR. AXELROD: Your Honor, we're going to see if we can do a

1 little bit of magic here.

2 Charlene testified she never saw Wesley hurt the baby. Did
3 Wesley only do it when Charlene wasn't around?

4 Charlene worked twenty-five to thirty hours a week but they
5 want you to believe that Wesley was the sole care giver and
6 provider and nurturer of **Minor** and you figure the amount of days
7 twenty-five hours is. It could be two or three days depending on
8 the amount of hours per day, and she said when she wasn't working,
9 she took care of the baby.

10 I submit to you that she took care of the baby more than
11 Wesley took care of the baby but he is here today, and she is not.

12 She says that when she comes home for lunch on February 14th,
13 the baby was fine.

14 (Clip #1 played from video, Defendant's Exhibit #2.)

15 MR. AXELROD: The baby's fine but she testified she felt the
16 need to give it medicine that day. She gave it medicine that day.
17 She tells you that the baby was normal since Thursday.

18 (Clip #2 played from video, Defendant's Exhibit #2.)

19 MR. AXELROD: She's normal but she testified. She testified
20 on this witness stand. She gave that baby medicine, and the baby
21 was fine. Why, why, why did she give that baby medicine? Was that
22 the chemical restraint that you heard about? Did she have a reason
23 to give the baby medicine?

24 She's goes to the wellness checkup.

25 (Clip #3 played from video, Defendant's Exhibit #2.)

1 MR. AXELROD: She says the baby's fine on the wellness
2 checkup but she gives it medicine. She told you she gave it
3 medicine on the 12th and the 13th and the 14th.

4 They asked her, "Is there any - - is the baby uncomfortable?
5 Was there any evidence of that?"

6 (Clip #4 played from video, Defendant's Exhibit #2.)

7 MR. AXELROD: The baby is fine. She tells them she doesn't
8 give any medicine. She testified that she gives medicine.

9 She testified that Wesley was the sole care giver between
10 January 15th and February 14th, the sole care giver. Nobody but
11 Wesley took care of this baby.

12 It would make you think, "Well, in that time period, it had to
13 be Wesley."

14 Well, first of all, there was Charlene that had the baby more
15 than Wesley, and there was other people.

16 (Clip #5 played from video, Defendant's Exhibit #2.)

17 MR. AXELROD: Now we have another person taking care of the
18 baby. We've got the babysitter taking care of the baby.

19 (Clip #6 played from video, Defendant's Exhibit #2.)

20 MR. AXELROD: Charlene tells you she's in charge of all the
21 feeding. Charlene is working all day long. When she's not
22 working, she says Wesley's taking care of the baby. When she
23 comes home from work, she says she takes care of the baby. She
24 says she gets up at night and she does all of the feeding of the
25 baby.

1 She is the only one taking care of this baby the majority of
2 the day. Work all day, stay up all night.

3 And this started to concern the officers.

4 (Clip #7 played from video, Defendant's Exhibit #2.)

5 MR. AXELROD: This is the day after **Minor** dies, and she's
6 laughing with the police about this.

7 (Clip #8 played from video, Defendant's Exhibit #2.)

8 MR. AXELROD: She does all the feeding, and we cut these
9 clips down so we wouldn't play an hour and forty-five minute video
10 today.

11 And then Charlene tells them that she takes care of the baby
12 day and night.

13 (Clip #9 played from video, Defendant's Exhibit #2.)

14 MR. AXELROD: And at this point the police get concerned, and
15 they start to talk to Charlene about stress.

16 (Clip #10 played from video, Defendant's Exhibit #2.)

17 MR. AXELROD: And then Detective Carr - - Detective Carr asks
18 Charlene is it possible that Tyrell injured **Minor**

19 (Clip #11 played from video, Defendant's Exhibit #2.)

20 MR. AXELROD: And then Charlene tells the detective that
21 Tyrell always tells the truth.

22 (Clip #12 played from video, Defendant's Exhibit #2.)

23 MR. AXELROD: So she tells the police that he always tells
24 the truth, and then she says he lies.

25 (Clip #13 played from video, Defendant's Exhibit #2.)

1 MR. AXELROD: And at that point Detective Brantley reads
2 Charlene her rights.

3 (Clip #14 played from video, Defendant's Exhibit #2.)

4 MR. AXELROD: And after they read her rights because this is
5 an important case and the police are really concerned about this
6 investigation, they ask her - - Detective Carr asks her, "Do you
7 need something to drink?"

8 He doesn't say water.

9 (Clip #15 played from video, Defendant's Exhibit #2.)

10 MR. AXELROD: This is where she asks about the autopsy. She
11 wanted to know about the autopsy. She wanted to know if anybody
12 knew anything and when they would find out anything, and when Carr
13 asks her does she want something to drink.

14 (Clip #16 played from video, Defendant's Exhibit #2.)

15 MR. AXELROD: Asks her if she wants a gin and tonic.

16 If it's a murder investigation and there's a person that might
17 have perpetrated that murder sitting there in that room with the
18 interview approximately one hour and fifty minutes or thirty
19 minutes or whatever it might, and he asks her, "Do you want a gin
20 and tonic?"

21 He's taking this investigation seriously.

22 "Do you want a gin and tonic?"

23 He was doing no investigation. He said all he did was take an
24 interview. That was it. He never did anything else. They didn't
25 do one piece of investigation, and now they want you to sit here

1 and find firmly convinced beyond all reasonable doubt that Wesley
2 did everything that happened to **Minor** and then they're going to
3 say to you that he's going to have to aided or aided or abetted.
4 Helped them, helped Charlene.

5 There is nothing in this record, and you may not like it and
6 you might not want to do this but there is nothing in this record
7 that shows that he aided, abetted Charlene or anybody in the demise
8 of the daughter that he loved, nothing.

9 Charlene did not go to the doctor to keep her family together.
10 That's a lie. That's a lie. She didn't go to the doctor because
11 she didn't want to get in trouble.

12 She said Wesley put the splint on the baby. That's a lie.
13 There's nothing in the evidence. There's no reports. That's
14 absolutely nothing in four years that Wesley put the splint on the
15 baby until she testified a day ago.

16 You judge the credibility of each witness yourself. Judge
17 that credibility of the witness that told you she lied. She lied.
18 The only time she was interviewed she lied.

19 She said she took **Minor** off the inhaler. She only used it two
20 times. Dr. Rahter testified that she said they used it everyday.
21 She lied.

22 She worked twenty-five hours a week. She said Wesley was the
23 sole care giver. She lied because she realizes, "Hey, they
24 charged Wesley. I'm going to get out of this."

25 She says, "No deal." She says, "No deal." She says, "They

1 made no deal."

2 I say to you there is a deal. I say you can see the deal.
3 You want to see the deal? I'll show you the deal. The deal is
4 she's not there. That's your deal.

5 She said she never gave the baby pseudoephedrine. She lied.
6 She finally said she gave it everyday. She gave the baby
7 pseudoephedrine everyday from the 12th through the 14th because she
8 had the baby in her control those days. She had the baby when she
9 - - when she was at night she had the baby.

10 She said that nobody watched the baby but Wesley. It's a lie.

11 She said she didn't get angry. She lied. She said she had
12 outbursts. She said she only got stressed once a month.

13 That seemed to be her answer.

14 "I only gave the inhaler twice. I only got stressed out once
15 a month."

16 The one thing that Charlene is consistent with is her lies.

17 You have to find beyond all reasonable doubt. That's what
18 this case is about.

19 She made a statement, though.

20 Well, I was watching the history channel last night, and it
21 was about a dictator in Bolivia, and I learned a little but in 1339
22 there was a guy that ran Peru, and he invaded Bolivia and took over
23 both countries, and it was Andres de la Cruz, and he was a
24 dictator, and what he did was he would go and anybody that was
25 charged with a crime Monday through Friday he'd bring them out into

1 the soccer field, and he'd kill them, and then on Saturday they'd
2 play soccer.

3 If you think that the State has met its burden and brought
4 forth enough evidence with no investigation at all, then I submit
5 to you. Let's tear down this courthouse, and let's build a soccer
6 field.

7 The ribs were broken by squeezing. They were, and they were
8 broken in the middle of the night when Charlene could not control
9 **Minor** She squeezed it, and she'd tell it to be quiet. Every
10 single night she squeezed it. She squeezed these ribs. She broke
11 these ribs.

12 And if we listen, we can hear, "Daddy didn't do it. Mommy did
13 it."

14 Thank you, Your Honor.

15 THE COURT: Thank you, Mr. Axelrod.

16 That will conclude the summation of the defense. When we
17 return, we'll have final summation of counsel. Then I'm going to
18 give the case to the jury for their deliberation.

19 I want to take - - take a few minutes. Mr. Foreman, I'm
20 going to order lunch for the jury, and your lunch will be here
21 after counsel for the State has finished his summation.

22 Madame Clerk, I'll talk to you in just a few minutes. I want
23 you to go back and see what they want for lunch. Okay?

24 CLERK OF COURT: Yes, sir.

25 THE COURT: I'll let you go to the jury room for about

1 fifteen minutes. Give a chance to talk to the Clerk about
2 ordering lunch, and we'll bring you out and conclude this case, and
3 you'll have it - - you'll have this case for your deliberation by
4 1:00.

5 Thank you.

6 (The jury retires to the jury room at 12:10 p.m.)

7 THE COURT: I will ask you again.

8 Were there any exceptions or additional charge required - -
9 requested by the State?

10 MR. VON HERRMANN: Nothing from the State, Your Honor.

11 THE COURT: How about it from the defense?

12 MR. AXELROD: No, sir, Your Honor.

13 THE COURT: The charge found satisfactory subject to your
14 objection to me charging Section B.

15 MR. AXELROD: Yes, sir. I renew that objection.

16 THE COURT: Alright, sir. Fine.

17 MR. AXELROD: Thank you.

18 THE COURT: Let's take about a fifteen minute break and
19 then you can have your final summation.

20 (The Court recesses the trial of this case and after a short
21 break reconvenes the trial of this case.)

22 THE COURT: Okay.

23 Be seated, please.

24 Okay.

25 Are you ready for your final summation?

1 MR. VON HERRMANN: Yes, sir, Your Honor.

2 THE COURT: Alright.

3 Bring the jury in, please.

4 I've asked for lunch to be here around 1:00 if that will meet
5 your schedule?

6 MR. VON HERRMANN: Your Honor, Your Honor. I don't
7 anticipate taking very long at all.

8 (The jury returns to the courtroom at 12:35 p.m.)

9 THE COURT: Alright. You may have final summation,
10 Solicitor.

11 MR. VON HERRMANN: Thank you, Your Honor.

12 SUMMATION BY MR. VON HERRMANN

13 MR. VON HERRMANN: Folks, if there's nothing more tragic than
14 a child's death and the death of **Minor** **██████** it can only be
15 exacerbated by one thing, and that is made worse by the fact that
16 it came at the hands of her father, the one person that she should
17 have been able in life to trust to take care and to make sure she
18 was okay, the one person in this world that she should have ben
19 able to look to.

20 The systematic abuse that child went through from a period of
21 November 23rd, roughly, until the death of this child shows nothing
22 but a systematic abuse of that child by his father or her father.

23 Please make no mistake about it, and I can't apologize for
24 the subjects and the topics that we have to talk about and horrific
25 the injuries this child sustained because it is important, and it

1 is important that we hold this defendant responsible for what he
2 did.

3 There's a saying that I learned in law school, and I think its
4 no more telling than what we've seen today for the last hour and
5 half, and you're taught or at least there are some people that
6 believe in if the facts are on your side, you yell and argue about
7 the facts. If the law is on your side, you yell and you argue
8 about the law. If neither are on your side, you just yell and
9 argue.

10 And that's what we've seen Mr. Axelrod do for an hour and half
11 is just yell, confuse you and trying to change the facts to fit
12 something that just doesn't exist, and that's what we've been
13 through for the last hour and half.

14 I promise you I'm not going to take an hour and half of your
15 time. Y'all sat here diligently watching the witnesses and ***
16 (unintelligible) the best in your hands to make the decisions but
17 I am going to point out where he has misled you in a number of
18 ways.

19 My dad later on after I got out of law school, he kind of
20 simplified in non-legal terms because, you know, we all think after
21 our first year of law school that we are lawyers, and we can talk
22 like. My dad kind of simplified it for me.

23 He said, "What they're doing, son, is if they can't dazzle
24 them with brilliance, they dazzle them with bull, and that is what
25 Mr. Axelrod has tried to do for the last hour and half.

1 So, let's now really focus on what the case has shown.

2 And I want to address, first of all, this skeleton. If you
3 notice, Mr. Axelrod pointed out all seventeen injuries on this
4 child, all seventeen fractures. You'll notice the location of the
5 fractures are absolutely consistent with squeezing.

6 But if you'll notice there was one thing that he left out that
7 he never mentioned to you. All of the rib fractures are marked in
8 black grease pencil where they occurred, and those all occurred
9 within ten to twenty-one days of when this child - - when they wer
10 broken. Okay? We all agree to that. That's what Dr. Collins
11 said.

12 But Dr. Collins also said and what Mr. Axelrod forgot to
13 mention to you is on the back the red spots for which are what she
14 described as re-injuries and hemorrhaging, and that's the reason
15 they're read to distinguish them from the broken fractures.

16 These are not fractures. These are re-injuries to those
17 fractures. You have one over here where it occurred where it
18 wasn't even on a fractured rib.

19 I noticed he left that out. Why did he leave that out?
20 Because that's what Dr. Collins testified occurred within twenty-
21 four hours of this child's death. I'd have left it out too if I
22 was him because I don't want you thinking about that child abused
23 and bleeding that hard to cause - - -

24 MR. AXELROD: Your Honor, I don't think he can say what I - -
25 what I would leave in or leave out. I don't think he can speak for

1 me.

2 THE COURT: Now, I gave you an hour and eight minutes to
3 talk. I'm going to let him talk for thirty minutes or so.
4 There's nothing wrong with his comments.

5 MR. VON HERRMANN: Folks, you have been told time and time
6 again and misled about what people testified to. Dr. Collins
7 testified that those injuries were acute injuries that occurred
8 within twenty-four hours of that child's death.

9 Now, what are we talking about when we talk about the spiral
10 fracture? We're talking about a start of a pattern of abuse of a
11 child that occurred.

12 The father doesn't want to take the child. He has a
13 discussion with Charlene Dandridge and doesn't want to take that
14 child to the hospital because they know the leg's broken. They've
15 had that discussion, and they don't want that child taken away, and
16 she doesn't want to be accused of child abuse. So he does a home-
17 made remedy, and he tries to fix it. He doesn't fix it. They take
18 the child at a well-baby visit.

19 He's the one that was there and had the child in his custody
20 when that spiral fracture occurred. There is nobody else in this
21 world that was with that child.

22 We all know. We've sat here and listened to expert after
23 expert after expert that has said that that is indicative of child
24 abuse. That injury was caused as a matter of child abuse and that
25 it could not have been an accident.

1 I understand what Dr. Crane said. Seventy percent are, you
2 know, intentional. Thirty percent are accidents but then we go one
3 step further. Then we have what he does know. We have the
4 benefit of him, and it's the autopsy.

5 And Dr. Collins who, I mean, you saw her resume. It's thirty-
6 five pages and of particular interest to her is the abuse and
7 neglect of a child, and she had made a determination along with Dr.
8 Rahter who is an expert and Dr. Crane that those injuries were
9 caused intentionally.

10 Then we look at the rib fractures. The rib fractures are
11 important to continue to see the pattern of abuse that this child
12 went through during the four months of her life.

13 Now, every expert also told you. If we were trying to mislead
14 you, we would have been able to get an expert to come in here and
15 say this happened on December 3rd, whatever day we wanted it to
16 occur. We didn't do that because it's not an exact science, and
17 we recognize that, and we try to get you what the truth is.

18 And the truth is ten to twenty-one days prior to the child's
19 death is when it occurred which if you think about really makes
20 since because we know on January 15th the child was x-rayed because
21 it had RSV, and there were no rib fractures. So we know it
22 happened after January 15th.

23 We know the child had a well-baby visit that the mother took
24 the child to on February 12th. So we know it had to have occurred
25 between those - - that time period. We know it happened between -

1 - somewhere between the 15th and the 12th.

2 So, if you back out the dates ten to twenty-one days from the
3 day the child died, it fits perfectly within that category of time.

4 We also know from Dr. Collins that it took more than one
5 attempt, more than one squeeze to have that occur.

6 Now, people do not abuse children in front of an audience.
7 People don't squeeze children in an audience. When this child
8 sustained these injuries and that child was squeezed, there was
9 nobody else around.

10 Charlene Dandridge was not up there changing the diaper and
11 feeding the baby. As loud as that baby would have cried, do you
12 not think Tyrell and Wesley Smith would have woken up? Do you not
13 think that would have drawn attention? Of course it would have.
14 It would have been ridiculous, absolutely ridiculous.

15 There was nobody but the perpetrator, Wesley Smith, who was
16 with this child when that child was hurt.

17 And when that child sustained the hemorrhaging on the back of
18 that on February 14th, that child was inconsolable. That child
19 could not quit crying, and we all know by the testimony Wesley
20 Smith can't handle extreme crying because what he does when he gets
21 like that is he gives the baby to momma and he has to leave.

22 And, in fact, we also know that he got so bad one time she had
23 to get in the back of the car and take care of the baby to get him
24 to where he could just get away from everybody. We know that.

25 The problem is when you're the only sole care giver to that

1 child, you have no where to leave. You can't go.

2 So, what do we know that we did? You know - - we know by his
3 own admission he gave the child pseudoephedrine, something that was
4 absolutely not suppose to be given to that child.

5 We know that child was not sick. At autopsy there was no
6 signs of RSV. There is absolutely nobody that says anything was
7 wrong with that child.

8 He was trying to chemically restrain that child and put that
9 child to sleep so he could go back and rest and do what he wanted
10 to do.

11 He had already tried to self - - take care of the leg
12 fracture. He had already tried to take care of the rib fractures
13 that that child had. This was just one more time that he was going
14 to take care of that child and make sure that child didn't bother
15 him while he took his nap or while he did whatever he did.

16 There is absolutely no evidence to the contrary that this
17 child died while anybody else was present. There's absolutely no
18 evidence including the three or four stories he told the medical
19 providers and others that were inconsistent when that leg fracture
20 occurred that he was the one that had the child. Those are
21 absolutes.

22 The evidence is clear that those rib fractures were
23 intentional and part squeezing, and I submit to you if you look at
24 the injuries and the re-injuries, it shows you the same person did
25 it. It's in the same place, and that is Wesley Smith, the only

1 that had any reason to do it.

2 Now, if you remember Mr. Axelrod's opening statements, he was
3 going to bring in these people that were there an hour before
4 Charlene, and then Charlene had come home and given medications.
5 Did you see any of those folks because I didn't.

6 And when he talks about Charlene Dandridge's testimony and
7 what occurred on the stand, I swear to you. For a second there,
8 I thought we were in different courtrooms. Maybe he heard her in
9 a different room testifying.

10 She never testified that she gave **Minor** pseudoephedrine.
11 She never testified that she gave that child any medication. In
12 fact, she testified exact opposite. She testified she didn't
13 during those two days because there was nothing wrong with the
14 child because she took it alone for the well-baby visit.

15 What she did testify to was that in January when the child had
16 RSV that they had used the inhaler and the prescribed medication
17 that was done, the Rocodall (sic) or I'm not real good with words
18 but that particular medication.

19 So, then you start wondering, "Well, maybe that's what the
20 pseudoephedrine overdose. Just give it a thought."

21 But then you think about what the evidence shows. The
22 evidence shows that that was prescribed in December. It should
23 have been used within thirty days which would have been January
24 19th. Okay?

25 And the drug panel screen that was run from National Medical

1 Services did not show the other two compounds that were associated
2 in that particular drug, and you heard Dr. Demi Garvin say, "That
3 was not the drug that was administered to this child."

4 It was - - the only medication in this child is
5 pseudoephedrine. What is the number one common drug that you see
6 people use to chemically restrain children? Benadryl. What is
7 the number two medication you see parents chemically restrain
8 children that are crying too much? Pseudoephedrine.

9 Where do you get pseudoephedrine? Any over-the-counter store
10 you want.

11 And if you think about it further even if you had just a
12 little concern about the prescription that was back in December.
13 They inventoried - - Dr. Cox told you.

14 "I inventoried every medication there that was prescribed.
15 They were all - - one was for Wesley Smith and the rest were for
16 Tyrell."

17 There was no prescription for **Minor** to be given.

18 Now, he says, "I didn't look for pseudoephedrine - - straight
19 pseudoephedrine cough syrup or anything else because I didn't know
20 that's what we had. You know, we were dealing with a dead body.
21 We hadn't even gotten our toxicology results. I guarantee you we'd
22 be looking for it if we knew."

23 That's not how it happened, folks.

24 Pseudoephedrine is a depressant. Pseudoephedrine is given to
25 chemically arrest when a child by a parent, in this case Wesley

1 Smith, to keep that child from crying and to keep that child
2 sedated and going to sleep and actually in an odd way make it feel
3 better.

4 He didn't give it a little bit. He indicated he gave it to he
5 child but then he also told the DSS Worker, "I'm not good with
6 measurements, and I don't know how much I gave the child."

7 Well, we know this about that particular thing, and that is we
8 know he over-medicated the child because what he indicated had he
9 done and followed the prescription on any over-the-counter
10 medication would have been part of a dropper full.

11 Demi Garvin tells you that part of a dropper full, the amount
12 .25 would not have raised that level to 1300 nanograms per
13 milliliter. So we know he overdosed the child, and we know he
14 overdosed the child intentionally to chemically restrain the child.

15 But then you look at the horrific amount and the extreme
16 indifference to human life. He didn't overdose that child to a
17 point where you overdose a four month old child. He overdosed it
18 to where it's four times the level of me and the therapeutic of me
19 or any other adult. That's a lot of medication.

20 You have rib fractures here, folks. You have a spiral
21 fracture that occurred under his care. You have the death
22 occurring because he squeezed the child and he tried to cover it up
23 by giving that child medication.

24 It's plain and simple. There were no babysitters over there.
25 The only babysitter the only time that we even know about a

1 babysitter was in January 15th, 16th and 17th and possibly the 18th,
2 and that was pursuant to a court order, and that was the neighbor,
3 the preacher lady, who had come over and because of the court order
4 and said that Wesley Smith can't even be around **Minor** He's
5 not even suppose to be alone with this child.

6 Four days is how long that lasted, four days. Then she hurt
7 herself, and she couldn't come back over, and y'all heard that
8 testimony. There was nobody else.

9 When Charlene went to work she admitted that she left that
10 child and that Wesley Smith was the sole care giver, and he is the
11 one that killed this child.

12 They violated a court order. They weren't even suppose to be
13 doing that.

14 Let's talk about this stuff about the deals and all that mess
15 about Charlene Dandridge.

16 If y'all haven't figured out by now, Charlene Dandridge does
17 not have a deal with the State. She is facing zero to thirty
18 years. That's the reason she's not over there because she got on
19 the stand and admitted everything she did. She told you folks even
20 though it was painful, even when it's hurting her, when it's
21 painful to tell you what happened and even though she knows she's
22 facing thirty years in jail, she comes in here and admits her
23 involvement in this.

24 Well, let me ask you this.

25 If there is - - she's admitting involvement, why would I be

1 trying her? It doesn't make any sense. Don't go down that trail.
2 That's just the baffle them with bull.

3 It doesn't make any sense. Why would she be sitting over
4 there when she's coming in here and she's telling the truth, and
5 she's saying, "I wish it hadn't happened. I wish I had done things
6 differently."?

7 Now, I understand that you saw some clips and some of them,
8 quite frankly, are a little bit disturbing in that, you know, it
9 does look like there is not a whole lot of sympathy.

10 I submit to you that it's twenty-four hours after it occurred.
11 I don't think that any of what they testified her actions were if
12 you remember. The defendant's mother testified, "She's a hard
13 worker. She takes care of the family."

14 I think it's absolutely ludicrous that the child has passed
15 away and that you wouldn't want your home straightened up or taken
16 care for neighbors and guests and family and things like that.

17 Plus, what do they want to happen? Do they want her to sit in
18 the corner and cry?

19 I mean, of course, she - - she's there six or seven times or
20 six or seven hours. Of course, she was alone at time, and that's
21 when you reflect.

22 It is not fair to say that because she wasn't a bawling mess
23 twenty-four hours a day that she didn't love that child and that
24 she didn't do - - that she murdered the child because she wasn't
25 just hysterical - - I am sure that to this day that she has her

1 moments. I can't imagine anybody else.

2 If you think conversely, if you didn't contribute to it why
3 would you just lay around and not help her do anything at all about
4 it? Wouldn't you be a little bit more concerned?

5 I think it's absolutely appropriate that she asked the
6 investigators, "What in the world could have happened? Tell me.
7 When will I get the autopsy results back so we will know what
8 happened to **Minor**

9 He didn't need to know because he killed the child. He knew
10 how he killed the child.

11 So, don't - - don't go down these trails where you're trying
12 to figure out how somebody would react or maybe I would react
13 different. I'm going to react different to a tragedy than
14 anybody else - - -

15 MR. AXELROD: Your Honor, the Solicitor's putting himself
16 into his close and what he would do or what he believes is
17 inappropriate in here.

18 THE COURT: No, sir. In the general context of what he's
19 saying it's appropriate. He was saying. I'll leave it for the
20 jury to determine.

21 MR. AXELROD: Yes, sir.

22 THE COURT: Go ahead.

23 MR. VON HERRMANN: It is a matter of how people deal with
24 stress and how people deal with situations. That is not evidence
25 of anything. The evidence you have here, folks, is that that

1 child died while Mr. Smith was the one that had the child, and he
2 gave her the medication, that the child was hemorrhaging during
3 that time period, that pseudoephedrine is an absolute chemical
4 restraint and should have never been given to that child and had
5 not prescribed to that child in any way, shape or form except for
6 with the other ingredients.

7 And if you notice when she was talking about the level of
8 pseudoephedrine in that particular prescription, it was very, very
9 minimal pseudoephedrine. This child had four times the adult
10 therapeutic level of pseudoephedrine. It was used to chemically
11 arrest that child to make that child go to sleep.

12 And that's it, folks. If that's not extreme indifference to
13 human life, then there never will be.

14 I believe we have proved beyond a reasonable doubt that he was
15 the sole provider, sole care giver at the time of this child's
16 death.

17 This child underwent a substantial, painful, horrible life at
18 the time where it shouldn't be that way, and it was at the hands of
19 her father which makes it that much worse.

20 I ask you folks to go back, deliberate, look at the evidence.
21 If you're not satisfied with that snippets the defense came where
22 you'd hear them start to say a word and they'd cut it off, you've
23 got the whole audio tape. You can listen to every bit of it if you
24 feel that's necessary.

25 The x-rays will be back there for you to look at. Look at how

1 horrible that fracture is.

2 Folks, at the end of the day I really believe you need to
3 return a verdict of guilty of homicide by child abuse in this case.
4 Please make no mistake about it. There are legal issues out there
5 that, obviously, you have the lesser included offense of aiding and
6 abetting. I have specifically charged this defendant and I have
7 proved this defendant committed the homicide by child abuse.

8 There are other legal issues out there that give you other
9 opportunities to review it. Understand. My position has not
10 changed one bit, not one bit. He is guilty of homicide by child
11 abuse.

12 What happens to Charlene Dandridge will happen in another day
13 in another courtroom, perhaps, in front of another jury. That's
14 not something that y'all need to worry about. Right now what you
15 need to worry about is holding this man responsible for killing his
16 child.

17 Thank you.

18 THE COURT: Thank you, Solicitor, for your remarks.

19 MR. VON HERRMANN: Thank you.

20 THE COURT: And thank you, Mr. Axelrod, for your remarks.

21 MR. AXELROD: Thank you, sir.

22 FINAL CHARGE OF THE COURT

23 THE COURT: Ladies and gentlemen, you've heard all the
24 testimony in the case. You've heard excellent summation for the
25 counsel for the State and for the defense. I have given you the

1 appropriate instructions in the law as that law relates to the
2 various issues in this case, and it is now for you as the sole and
3 only finders of the facts to make a decision based on the testimony
4 and evidence presented in the trial of this case.

5 I ask that during your deliberations you remember the various
6 propositions of law that I have given to you, and, Mr. Foreman,
7 during your deliberations, there will be pencil and paper provided
8 in the jury room, and if you or any member of your distinguished
9 jury has any questions about the law, let me know and I'll be glad
10 to call you out and recharge you remembering I can't tell you what
11 the facts are.

12 I remember some years ago I was trying a young lady in
13 Darlington County for burning - - allegedly burning down her mobile
14 home.

15 The jury came out and said, "Judge, would you tell us whether
16 she smoked or not?"

17 Well, that question was never asked. Consequently, it was
18 never answered on the record. I knew she smoked because I gave
19 her a smoke break but I couldn't comment on that because it wasn't
20 in the record.

21 And so I tell you that base your verdict on whatever is in the
22 record and any reasonable inferences to be derived therefrom.

23 Now, I have given you a form verdict, and I want to discuss it
24 with you one more time.

25 First, a person is guilty of homicide by child abuse if the

1 person causes the death of the child under the age of eleven while
2 committing child abuse or neglect and the death occurs under
3 circumstances manifesting an extreme indifference to human life.

4 You will consider that first. If your verdict be guilty of
5 that, homicide by child abuse, unanimously, you would stop there
6 and let us know, and we would accept your verdict.

7 If under guilty of homicide by child by child abuse, you would
8 then go to the next consideration, and that is as follows:

9 A person is guilty of homicide by child abuse if the person
10 knowingly aids and abets another person to commit child abuse or
11 neglect and the child abuse or neglect results in the death of a
12 child under the age of eleven.

13 If you are considering that portion of this verdict,
14 obviously, your verdict is either not guilty or guilty, and you
15 would report that to the Court.

16 Whatever your verdict is, I continue to emphasize, must be the
17 unanimous verdict of all twelve of you. It cannot be a verdict of
18 the majority. Obviously, it wouldn't be one of the minority.

19 Mr. Foreman, your lunch will be here at approximately 1:15.
20 I leave it to your discretion to decide. Would you care to eat -
21 - continue eating while in deliberations or stop deliberations and
22 then begin again?

23 If anybody needs a smoke break, that will be fine with me but
24 do not continue your discussions until they return. Our rule is
25 that any discussion about any issue has got to be in the presence

1 of all twelve of you, and I continue to tell you, too, that in this
2 case the fact that this defendant did not testify cannot be used
3 against him, cannot even enter into the discussions. That is his
4 constitutional right.

5 Now, I'm going to send you to the jury room. You may begin
6 your deliberations as soon as the evidence comes in and this
7 verdict form comes in and which will be in just a few minutes, and
8 your lunch will be here, and I'll let you decide how you want to
9 handle that.

10 Okay?

11 Now, remember this. If anybody has any questions about what
12 the law is, let me know. Write it down, and I'll be glad to call
13 you out.

14 Thank you so much. You are - - you may go to the jury room.

15 ALTERNATES SEPARATED

16 Now, under our rules, unfortunately, we don't permit the
17 alternates to go in the jury room but I have to keep you here.
18 Everybody looks healthy but in my experience on the Bench one time
19 in a case similar to this everybody looked healthy and ten minutes
20 after I let the alternates go, somebody had a epileptic attack, and
21 I had to run get them.

22 Again on some - - one time in Florence everybody was doing
23 fine, and about thirty minutes during deliberation I got word that
24 one of the jurors' daughters had been in a serious wreck, and she
25 was in the emergency room, and, fortunately, I had kept the

1 alternates.

2 So, I got to keep you and it is for that reason that things
3 happen but I'll have - - you'll have lunch and we'll make you
4 comfortable.

5 So, let the alternates remain. The jury may retire, and then
6 put the alternates in a place of comfort. Make sure they're
7 comfortable. Make sure they have their lunch.

8 Okay?

9 You may retire, Mr. Foreman.

10 (The jury retires to the jury room at 1:02 p.m.)

11 THE COURT: Alright.

12 You may take - - alternates, they'll find a comfortable place
13 for you. I wish you could stay in with them since you've been very
14 patient with all us but you can't ever tell. I may need one or
15 both of you.

16 (The alternates retire to a separate location from the jury.)

17 THE COURT: Alright.

18 Let's come forward and agree with what the evidence is.

19 First, is there any additional exceptions or different charges
20 requested?

21 MR. VON HERRMANN: No, sir.

22 MR. AXELROD: No, Your Honor.

23 THE COURT: Alright, sir.

24 And let the record reflect, now, that both counsel have
25 reviewed the verdict form and find no exception to it.

1 Okay, and there is the verdict - - and there is the
2 indictment. I see nothing adverse about the indictment. I'll let
3 that go in.

4 Alright, this Court is in recess - - -

5 COURT REPORTER: Your Honor.

6 THE COURT: Ma'am?

7 COURT REPORTER: Give me just a moment to get the exhibits
8 before we recess, please.

9 THE COURT: Yes.

10 Okay. Everybody remain seated now until we get this - - you
11 may leave, counsel, if you care to.

12 MR. AXELROD: Your Honor, we would like to keep the
13 indictment out. He's only - - he's only charged with one. You
14 charged them two. At this point I think this should just be
15 sufficient for the jury.

16 THE COURT: I have no problems with that.

17 MR. VON HERRMANN: I don't either.

18 THE COURT: No problem with that.

19 (Attorneys for both the State and the defense agree to the
20 exhibits which are then sent back to the jury.)

21 THE COURT: Now, I have previously told the jury the video
22 is in evidence and if they want to view any part of it, they can.

23 Alright, sir.

24 Make sure we all agree.

25 Alright. We all agree what's in evidence. Let it go.

1 Tell the jury - - did you get - - did I send in the verdict
2 form in with them?

3 MR. VON HERRMANN: Yes, sir, the verdict form is sitting on
4 top.

5 THE COURT: Alright.

6 Tell them to begin their deliberations, please.

7 Anything further from the State at this time?

8 MR. VON HERRMANN: No, sir.

9 THE COURT: For the defense, Mr. Axelrod, at this time?

10 MR. AXELROD: Not at this time, Your Honor.

11 THE COURT: Alright. We are in recess subject to the call
12 of the Court.

13 Thank you.

14 THE JURY BEGINS DELIBERATIONS AT 1:05 P.M.

15 (The Court recesses the trial of this case awaiting the advice
16 of the jury.

17 The jury begins deliberations at 1:05 p.m.

18 JURY QUESTIONS AND RESPONSE OF THE COURT

19 The jury presents three questions, all of which are handled
20 off the record by agreement of the Court and counsel for both the
21 State and the defendant.

22 Jury questions are made Court's Exhibits 3, 4 and 5.

23 THE JURY REACHES A VERDICT AT 4:33 P.M.

24 The jury advises a verdict is reached at 4:33 p.m., and the
25 Court thereafter resumes the trial of this case to accept the

1 verdict.)

2 THE COURT: Good afternoon. Be seated, please.

3 I understand that the jury has a verdict. Now, let me tell
4 everybody within the confines of my voice whatever the verdict is
5 and I have no way of knowing it would be an emotional issue for
6 folks on either side of this issue but I would tolerate no remarks,
7 no outcry from anybody, and, ah, want my bailiffs around the
8 courtroom at the back. If anybody makes any comment untold,
9 hollers out in anyway, speaks to anybody adversely, arrest them.
10 Bring them before me. Have somebody at the back door. I want
11 them stopped. They're not going to get out of the courtroom.

12 I don't anticipate that happens but I'm not going to tolerate
13 it should it happen.

14 Everybody understand that?

15 Now if anybody for any reason can't handle the verdict, I
16 suggest that you leave now. I have no idea what the verdict is.

17 Bring the jury in.

18 And tell them to bring the alternates in.

19 (The jury returns to the courtroom at 4:36 p.m.)

20 VERDICT

21 THE COURT: Mr. Foreman, have you and your distinguished
22 jury reached a unanimous verdict?

23 FOREMAN OF THE JURY: We have, Your Honor.

24 THE COURT: If this be the unanimous verdict of all twelve,
25 please signify by raising your right hand.

1 Let the record now reflect that the jury has signified that
2 the verdict is with unanimity.

3 Madame Clerk, accept the verdict and hand it to me.

4 (The Clerk of Court accepts the verdict and passes it to he
5 Court.)

6 THE COURT: Read the verdict for me, please.

7 CLERK OF COURT: Docket #2004-GS-26-2150, State of South
8 Carolina vs. Wesley Smith, We, the jury, unanimously find the
9 defendant guilty of aiding and abetting another person to commit
10 child abuse or neglect which resulted in the death of a child.

11 Signed by the Foreperson of the Jury - William Rowell.

12 THE COURT: Alright.

13 Ladies - - anybody care to look at the verdict form?

14 MR. VON HERRMANN: The State does not, Your Honor.

15 THE COURT: Okay.

16 Mr. Foreman, ladies and gentlemen, let me express to you first
17 my sincere thanks for your serving in this most serious of cases.

18 You know, you didn't ask to be in the courtroom this week,
19 and, certainly, you didn't ask to participate as finders of the
20 facts in this case.

21 Having participated, though, you have done your duty under the
22 law and the evidence in this case.

23 I was not entitled to a factual opinion, and I had none. I
24 can say now, however, that since the verdict is rendered that the
25 facts in this case as I understand them applying the facts to the

1 law as you did clearly could justify your verdict in this case.

2 It is inconceivable to me that a human being could inflict
3 upon a four month old baby the enormity of the injuries that that
4 suffering child endured during the short term of her life. I am
5 just horrified, and as you listened to the testimony upon the
6 injuries themselves, I suspect that you felt the same way as I did.

7 But given the totality of the facts in the case, in my view
8 the law and the evidence supports such a finding.

9 I, therefore, discharge you now with my humble thanks and
10 appreciation.

11 You've been an outstanding jury. I knew from the beginning
12 when everybody listened very patiently, extremely polite. You
13 deliberated from 1:00 today until twenty minutes till five. You
14 asked very appropriately three or four different questions which
15 were answered with the consent of the attorneys, and that tells me
16 again that I had twelve folks intent on doing their duty and
17 finding the truth.

18 You know, I've been on the Bench - - I was a lawyer for
19 thirty-two years and been on the Bench twenty-five, and if there's
20 one thing in this world that I've found and that is the jury
21 systems works.

22 I concluded many years ago that if I think one way and twelve
23 good folks think another, chances are I'm wrong, and they are
24 right, and I've found that to be the truth.

25 You give me twelve people with no friends to reward, no

1 enemies to punish and say, "Y'all tell me where the truth is."

2 Invariably, they'll find it, and that's the about our system.

3 You are now discharged, and thank you so much.

4 If anybody cares to remain for the sentencing proceeding, you
5 are welcome to do so.

6 Madame Clerk, I want to make sure that that last inquiry is
7 brought back so that it can be made a part of the record.

8 (The jury is released from the trial of this case and for the
9 week and departs the courtroom at 4:41 p.m.)

10 THE COURT: The Clerk has these answers to these inquiries
11 which were by consent of the parties, and we're going to make that
12 a part of the record, too.

13 Alright, the statute requires - - -

MOTIONS AND RULING OF THE COURT

14 MR. AXELROD: Your Honor.

15 THE COURT: Sir?

16 MR. AXELROD: Prior to your sentencing phase, I would like to
17 renew my motions on the record to protect my record.

18 THE COURT: Sure. You're welcome to do that.

19 MR. AXELROD: Your Honor, Your Honor, I'm going to renew all
20 of my objections individually.

21 First, I'm going to ask the Court to take this from the jury
22 and to grant a new trial that still it was conjecture and
23 speculation that they - - that they could only find for - - there
24 was no evidence that they could find that Wesley actually did it.
25

1 There was nothing in the record that they could find that.

2 THE COURT: Well, obviously, I would respectfully disagree
3 with that. The evidence is absolutely overwhelming if believed
4 that he at least participated to the harsh punishment given to a
5 four months old baby.

6 MR. AXELROD: Your Honor - - -

7 THE COURT: He had to know it was going on. He had to
8 know that.

9 MR. AXELROD: And, Your Honor, to protect the record and,
10 again, limiting the testimony of Dr. Cross. It was clear that
11 Wesley has an I.Q. of 70. He has a reading level of a third
12 grader, a math level of a second grader, and to limit that
13 testimony only - - to allow that testimony, excuse me, only if
14 Wesley testified I think was damaging and I think was
15 inappropriate, and I would ask for a - - -

16 THE COURT: Well, that was your position on the record, and
17 to that position you are protected but I respectfully disagree with
18 you that he has a sixth grade education has some bearing on an
19 issue when he doesn't even testify and for the record is still
20 denying that he did it.

21 Had he testified giving some type of excuse as to why he did
22 that which he would have testified to, I would have certainly
23 considered letting you introduce that testimony.

24 MR. AXELROD: Yes, sir, Your Honor.

25 THE COURT: His 70 I.Q. has no bearing on any issue in the

1 fact - - in this case when he doesn't testify and offer some type
2 of excuse or mitigation.

3 MR. AXELROD: Yes, Your Honor, Your Honor.

4 I want to renew my objection on the qualification of Donna
5 Warrington as an expert concerning the establishment of the 1300
6 nanograms per milliliter of the blood in Pennsylvania, the National
7 Medical Services, even though she is the technician for the
8 machine, I don't she was the one who could actually come to court
9 to testify to the effect of that.

10 THE COURT: The record will reflect that you made that
11 argument, and I, again, respectfully overrule it.

12 MR. AXELROD: Once again, Your Honor, I want to renew my
13 motion that the chain was not perfected. Even though Dr. Collins
14 said that either she or her colleague took the blood because she
15 doesn't remember. There was no trail, no paper trail of that.
16 There was absolutely no knowledge of how the blood got from the
17 autopsy room to California.

18 They said that they think they sent it overnight FedEx but
19 there was no papers, no paper trail. That - - that blood could
20 have sat for three weeks at MUSC lost in the mail room, and that
21 blood - - maybe the pseudoephedrine was only 30 grams per
22 milliliter but by the time it sat there unrefrigerated it went to
23 1300, and I would say based on the lack of - - the lack of control
24 of that chain that this - - this evidence should have been kicked.
25 I would renew that objection once again.

1 THE COURT: Yes, sir, I understand, and that's overruled
2 once again.

3 MR. AXELROD: Your Honor, the opinion of Tara Phillips where
4 Tara Phillips said that she felt as she was the case worker, she
5 was the investigator, she said that she felt that Wesley Smith was
6 covering up for Charlene and she did not feel -- her opinion was
7 that she did not feel that Wesley did anything to cause the femur
8 injury. That was her opinion, and that opinion was not allowed in
9 to the court even though the Rule 701 would allow a lay witness
10 person to form an opinion - - -

11 THE COURT: Wait a minute. They allow lay witnesses to
12 express an opinion if they have expert - - expertise in that area.
13 She is not a doctor. She doesn't know what it takes to break a
14 femur or not break a femur. She's totally unqualified to make it,
15 and that question was one for the finders of the facts which are
16 the jury.

17 MR. AXELROD: And that's why I thought that opinion that
18 Wesley was covering up for the mother should have been allowed to
19 go to the jury.

20 THE COURT: I understand that.

21 MR. AXELROD: Yes, sir, Your Honor.

22 Further, Your Honor, I believe that it was prejudicial and - -
23 highly prejudicial and not probative to allow the femur in. I
24 would rely on the case of State v. Northcut. I believe that when
25 this gets appealed, I think and I hope that it would come back on

1 that. I want to renew that objection.

2 THE COURT: I think State v. Fletcher was more the
3 controlling issue. In my view, State v. Northcut, the issues were
4 entirely different and was not applicable to the enormous facts in
5 this case.

6 In State v. Northcut, of course, there was no agreement that
7 a prior act had ever occurred to the start with. In this case we
8 know that there was significant serious abuse of that young baby.

9 MR. AXELROD: Yes, sir, Your Honor.

10 But we don't know if I do, really.

11 Your Honor, furthermore, the change of venue. I stated to
12 this Court that the jury pool was tainted, was poisoned by numerous
13 sources, by the newspaper, by the articles, by the tv and by the
14 confines of this courtroom, there was no way that when the Court
15 did the additional voir dire there was no way that the entire
16 seventy-five member jury panel heard every single question that the
17 Court said, every single juror, and when the jurors said they did
18 not feel that they could render a fair - - they could be fair and
19 impartial, when they were dismissed, everyone heard that.

20 I think that was something that should have been done in
21 private, and I believe by the mode of questioning of the jurors
22 further tainted the pool, and I just want to renew that objection.

23 THE COURT: You're entitled to that, and the record will
24 speak to my findings on that issue, and I rely on the record and
25 the remarks that I made but you're protected for the record.

1 MR. AXELROD: And, Your Honor, the last one I think it is a
2 little serious one.

3 The court is well aware that when someone is indicted, they're
4 indicted to put a defendant on notice of what they're charged with
5 so they can know but when a defendant has a lawyer, the indictment
6 is to put the lawyer on notice to what to defend.

7 Now, he was indicated under 16-3-85(A) (1), homicide by child
8 abuse. The jury came back with a not guilty on that day. That
9 was what I prepared for. That's what Wesley prepared for. That
10 was all we prepared for.

11 THE COURT: You don't - - you haven't read the statute as
12 I understand it, and we - - we've addressed this in volumes here.

13 MR. AXELROD: I just - - I just want to protect my record,
14 and I'm not here to argue with the Court.

15 THE COURT: The statute says one is guilty of homicide by
16 child abuse if he commits the principal act or is also guilty of
17 homicide by child abuse if he or she aids and abets.

18 You were put on notice that he was being tried for homicide by
19 child abuse.

20 MR. AXELROD: (A) (1).

21 THE COURT: But the statute says that either one is homicide
22 by child abuse.

23 I conclude that you are fully protected on the record but I
24 conclude that that statute is applicable in this case and it
25 expresses the intent of the Legislature.

1 Now, your record reflects your position, and it reflects mine,
2 and if I'm wrong, the Appellate Court will tell me so.

3 MR. AXELROD: And I just - - -

4 THE COURT: Once and a while they tell me I'm wrong, not
5 often but occasionally.

6 MR. AXELROD: Well, I want to put on the record that I think
7 that with the Court's logic if it was (A)(1) and we just put
8 (A)(1), there would be no (A)(2). (A)(2) has added words of
9 aiding and abetting. So, clearly, it's not a lesser included
10 offense.

11 THE COURT: Well, as I indicated to you, I'm not so sure
12 whether it's lesser included or a sentencing proviso. I'm inclined
13 to think it was a sentencing proviso but under either theory it was
14 submitted to the jury, and the case - - that question, candidly and
15 in deference to you, has never been decided by the Supreme Court.
16 This gives them the perfect opportunity to tell us.

17 MR. AXELROD: And, clearly, because Wesley was found not
18 guilty of the greater.

19 THE COURT: No question about that, and he can never again
20 be tried of that charge. I mean, clearly.

21 As to his positions I have respectfully denied. Anything you
22 want to comment on on that issue?

23 MR. VON HERRMANN: No, sir, nothing from the State.

24 THE COURT: Alright, sir.

25 Then, have the defendant come forward.

1 SENTENCE OF THE COURT

2 (The defendant stands before the Court.)

3 THE COURT: Alright, Solicitor, come forward, please.

4 MR. VON HERRMANN: Yes, sir.

5 THE COURT: In sentencing a person, this is Section D of
6 that statute.

7 In sentencing a person under this section the judge must
8 consider any aggravating circumstances including but not limited to
9 a defendant's past pattern of child abuse or neglect of a child
10 under the age of eleven.

11 Let me hear that, and then the statute also says I'll hear any
12 mitigating.

13 You got any other aggravating circumstances.

14 MR. VON HERRMANN: Your Honor, the State is not presenting
15 any aggravating circumstances in this case.

16 THE COURT: Alright, sir.

17 What is your mitigating circumstances?

18 MR. AXELROD: Your Honor.

19 THE COURT: Let me read the statute to you.

20 "And the judge must consider any mitigating circumstances.
21 However, a child's crying does not constitute provocation so as to
22 be considered a mitigating circumstance."

23 MR. AXELROD: Your Honor, my client has sat in jail since
24 February 15, 2004, four years, two months and a few days. Until he
25 was convicted today by the jury, found guilty, the only charge he

1 had against him and conviction, he had a simply possession
2 marijuana.

3 He stands before you, and I want to tell the Court that he was
4 found competent to stand trial, and he's a fine young man. In no
5 way did he understand some of the things that went on.

6 He has an I.Q. of 70. Clearly, we had him tested about a
7 month ago, a month and a half ago. He had an current I.Q. test
8 done of 70.

9 In the DSS report they said he had a reading level of a third
10 grader where the co-defendant Charlene had a reading level of
11 highschool. He had a mathematical level of second grade where
12 Charlene had a mathematical level I believe of eighth or ninth
13 grade.

14 I say to the Court in mitigation. I know he's been found
15 guilty but I don't believe that Wesley has the capacity to create
16 the stories that they - - that they said he created to say what
17 they said he did.

18 He sat here through this trial, and in talking to the family
19 we did all the research we could. Not only does he have the mind
20 of a child - -

21 THE COURT: No, sir, he doesn't have the mind of a child,
22 now.

23 MR. AXELROD: - - but he has the heart of a child.

24 THE COURT: Well, I don't know about his heart.

25 MR. AXELROD: And he is a good person.

1 THE COURT: Well, I won't deny that.

2 MR. AXELROD: And, Your Honor - - -

3 THE COURT: But you cannot deny, now, we've had a Blair
4 hearing.

5 MR. AXELROD: Your Honor, we've had that, and he's competent
6 to stand trial, and I'm not here to say that he isn't competent to
7 stand trial but I as his attorney say - - -

8 THE COURT: I - - I refuse to accept your statement that he
9 has the mind of a child.

10 MR. AXELROD: I'll withdraw that statement.

11 THE COURT: Alright.

12 Go ahead.

13 MR. AXELROD: For three years of being his attorney, he's been
14 a fine man. We've come to see him, and he's always been
15 responsive to us, cordial. Never had a mean thing to say. Never
16 had a mean thing to say ever.

17 Your Honor, I'm asking you. This statute that we charged
18 both. The first one was a twenty to life, and we charged the
19 second one against my wishes which is zero to twenty, and, Your
20 Honor, I'm asking the Court. **Minor** can't come back. She is gone.
21 I'm asking this Court for the mercy. I'm asking this Court to give
22 Wesley the twelve years.

23 MR. VON HERRMANN: Anything you want to reply to that,
24 Solicitor?

25 MR. VON HERRMANN: Your Honor, the only thing that I would

1 comment on is does he have pending charged of assault on a
2 correctional employee while he was a J. Reuben Long. Those are
3 pending charges that have not been resolved. So, I just don't want
4 the Court to be misled in that he has had no infractions.

5 Your Honor, it would be the State's position because of the
6 severity of the injuries, the amount of distress caused this child
7 in her short life that I believe the Court correctly identified as
8 a tragic situation, we would request the maximum penalty available
9 under the law.

10 MR. AXELROD: Your Honor, Wesley would like to address the
11 Court.

12 THE COURT: Yes, sir.

13 DEFENDANT WESLEY SMITH: I would like to say, Your Honor,
14 I love my kids, and I done my best that I could for my kids, the
15 best I know how.

16 I may not be the best father there is in the world but I know
17 for a fact that I did not hurt my child.

18 Even if I'm found guilty today, I came to stand trial to prove
19 my innocence. Even if twelve jurors say that I was found guilty,
20 still, even I say to this day I want to you log this in your
21 memory. I'm an innocent man, and I've done my best for my
22 children.

23 MR. AXELROD: Thank you. Thank you. That's all, Your Honor.

24 THE COURT: I have several thoughts.

25 First, let me say to you that one of the wonderful things

1 under our system of justice if an individual cannot afford an
2 attorney they're entitled to have one appointed for them.

3 The State of South Carolina to ensure and this judge did it
4 your rights to make sure that you were properly defended in every
5 aspect, I didn't give you one lawyer. I gave you three, and I
6 cannot imagine any three groups giving to you a better defense than
7 the aggressive defense that Mr. Axelrod and Mr. Taylor and Mr.
8 Bailey provided to you. It was outstanding in every way but even
9 the best of lawyers can't do a lot with bad facts.

10 Now, in my view, there is no way on God's green earth that you
11 could live in that household with a four months old baby, that
12 child suffer a broken femur, seventeen broken ribs and the
13 ingestion of the quantity of medicine four times sufficient of an
14 adult's dose. There's just no way that you could be there and be
15 a part of it and not know about it and not go along with it.

16 In my view, the jury has been very lenient with you because
17 any human in all this testify would never believe that you not know
18 what was going on. There was no way that you not know.

19 Now, you may have been protecting somebody else and in doing
20 so, you aided abetted. I would suggest that maybe you didn't do it
21 but you had to know what was going on, and to that extent you had
22 to let that poor baby suffer.

23 I, again, tell you that had the jury found you guilty under
24 the A Section, I would have probably given you life imprisonment.
25 I tell you that because as I said to the jury, it's inconceivable

1 that any human being could inflict the pain on that poor baby that
2 you took - - somebody did, and I think that the jury found that you
3 were part and parcel of the whole thing.

4 It is, therefore, the sentence and judgment of this Court that
5 you be confined for a period of twenty years.

6 Thank you so much.

7 This Court is adjourned.

8 Alright. This Court is in recess. Thank you.

9 (The Court adjourns the trial of this case and adjourns this
10 term of court for the week.)

11 - - - END OF TRANSCRIPT - - -

GENERAL SESSIONS JURY SELECTION

CASE NO: 04GS26-2150

DATE: 4-14-08

PLAINTIFF: STATE

ATTORNEY: Bert VonHerrmann AS
Sam Graves AS

DEFENDANT: Wesley Smith

ATTORNEY: Stuart Appleb
Paul Taylor
Josh Bailey

PRESIDING JUDGE: Edward B Cottingham

COURT REPORTER: LINDA W. MCCALL

STRIKES

JUROR #	NAME	RACE	SEX	COURT	STATE	DEF.	ACCEPT
251	Fredrick Miles	C	M				✓
238	Richard Maze	C	M			X	
187	Rebecca Jefferson	C	F				✓
371	Betty Tyler	C	F			X	
117	Johnny Evans	AA	M				✓
222	William Long	C	M			X	
204	Stephen Kovacs	C	M				✓
391	Alex West	C	M		X		
189	Diane Johnson	C	F		X		
29	Stephen Bishop	C	M				✓
229	Karen Mannion	C	F				✓
389	John Wells	C	M			X	
250	Luclus Messervy	C	M		X		
28	Melani Biggerstaff	C	F			X	
164	Stacey Harris	C	F			X	
256	Anne Mitchell	C	F			X	
367	Timmy Todd	C	F				✓
401	Jana Wright	C	F				✓
277	Sandra O'Donnell	C	F			X	
226	Thomas Lynch	C	M				✓
97	Bryan Dodson	C	M		X		
88	Alan Cygan	C	M				✓
24	Michelle Beard	C	F			X	
321	William Rowell - Foreperson	C	M				✓
120	Aneela Ferrebee	C	F			X	
89	Stacy Darroch	C	F				✓
409	Myra Brown	C	F		X		
326	Francesca Schaeffer	C	F				✓
42	Linda Brooks	C	F			X	
43	Pamela Brooks	C	F			X	
93	Ernest Derrick	C	M				✓

CERTIFICATE OF COURT REPORTER

692

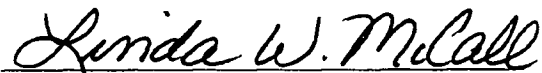
1 STATE OF SOUTH CAROLINA)

2 COUNTY OF HORRY)

3
4 I, the undersigned Linda W. McCall, Official Court
5 Reporter for South Carolina Court Administration, do hereby
6 certify that the foregoing is a true, accurate and complete
7 Transcript of Record of all the proceedings had and evidence
8 introduced in the trial of the captioned case, relative to
9 appeal, in the Court of General Sessions of HOrry County, South
10 Carolina.

11 I do further certify that I am neither of kin, counsel,
12 nor interest to any party hereto.

13 August 18, 2008

14 

15
16 Linda W. McCall

17 Official Reporter

18
19
20
21
22
23 CERTIFICATE AS TO

24 VOLUME 11, PAGES 351-692

COX/HCPD

WITNESSES

DOCKET NO. 2004-GS-26- 2150

THE STATE OF SOUTH CAROLINA

COUNTY OF Horry

73071

SCG

COURT OF GENERAL SESSIONS

MAY

TERM 2004

THE STATE

vs.

WESLEY SMITH BM

ARREST WARRANT NO.

CAW200405079

CDR: 2356-16-03-0085(A)(1)

CDR:

DOA: 02/17/2004

ACTION OF GRAND JURY

TRUE BILL *MAY 27 2004*

James Galmore

Foreman of Grand Jury

VERDICT

ATTORNEY: JAMES GALMORE

INDICTMENT FOR:

HOMICIDE BY CHILD ABUSE

ORIGINAL

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

CERTIFIED COPY
2008 MAR 28 PM 3:52

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

INDICTMENT FOR:
HOMICIDE BY CHILD ABUSE
Death

At a Court of General Sessions, convened on May 27, 2004, the Grand Jurors of Horry County present upon their oath:

HOMICIDE BY CHILD ABUSE
CDR: 2356 16-03-0085(A)(1)

That WESLEY SMITH did in Horry County, on or about February 14, 2004, cause the death of **Minor** a four (4) month old child, while committing child abuse or neglect, and the child's death occurred under circumstances manifesting an extreme indifference to human life, in violation of Section 16-3-85(A)(1), S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with 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."

September 16th, 2013

Susan B. Hackett for

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Supplemental Record on Appeal in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 16th day of September, 2013.

Brandon Hall

Brandon Hall
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2013.

Palmer Key (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24 2022.