

VOL I OF II

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BERKELEY COUNTY

Deadra L. Jefferson, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER W. BERKE,

APPELLANT

APPELLATE CASE NO. 2014-000464

RECORD ON APPEAL

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorney for Appellant

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

SCARLETT ANNE WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting St., Ste. 400
Charleston, SC 29401-2214
fax (843) 740-5858
(843) 958-1900

Attorneys for Respondent

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS
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**STATE'S EXHIBITS # 1 THROUGH #11
(PHOTOGRAPHS)**

STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF CHARLESTON	)	DOCKET NO. 2013-GS-08-0603
	)	2013-GS-08-0604
	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
	)	
vs.	)	
	)	
	)	
CHRISTOPHER BERKE	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	TRANSCRIPT OF RECORD

March 3, 2014
Moncks Corner, S. Carolina

VOLUME 1 (OF 3)

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

ANNE WILLIAMS, ESQ.
COLLEEN TAYLOR, ESQ.
Attorneys for the State

CHAD D. SHELTON, ESQ.
CODY GROEBER, ESQ.
Attorneys for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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1 PROCEEDINGS

2 THE COURT: All right. Ladies and gentlemen, again
3 we appreciate your patience. We're just trying to make
4 sure we have everyone present and accounted for that was
5 supposed to return for jury selection.

6 We're going to select a jury for the case of the
7 State of South Carolina versus Christopher W. Berke,
8 indictments 2013-GS-08-603 and 604. One is an indictment
9 for Unlawful Conduct Toward a Child and that indictment
10 alleges as follows:

11 That Christopher W. Berke did in Berkeley County
12 South Carolina on or about -- on or between December 1,
13 2010 and September 6, 2011 have charge or custody of Minor
14 Berke and did place the child at unreasonable risk of
15 harm affecting the child's life, physical or mental
16 health or safety alleging a violation of Code section 63-
17 570; and indictment 604 an indictment for Infliction of
18 Great Bodily Injury Upon a Child, which alleges that as
19 follows:

20 That Christopher W. Berke did in Berkeley County
21 South Carolina on or about -- on or between September
22 3rd, 2011 and September 6th, 2011 willfully and
23 unlawfully inflict great bodily injury upon Minor Berke,
24 date of birth to wit injured the victim's head,
25 ears and face causing a skull fracture and brain injury

1 and other cranial and muscle damage alleging a violation
2 of Code section 16-395 of the Code of Laws of South
3 Carolina and alleging these actions to be against the
4 peace and dignity of the state of South Carolina.

5 We're going to go through a process that is called
6 Voir Dire, which is simply a legal term meaning that I am
7 going to ask you some questions so that the attorneys can
8 more effectively exercise their preemptory challenges in
9 jury selection.

10 If a question applies to you please stand and in a
11 loud and clear voice tell us your name, your juror number
12 and an answer to the question if applicable and remain
13 standing until the court has completed questioning you.

14 Before we begin that process I am going to have
15 counsel for the State to stand and introduce themselves
16 and also publish the names of the members of their
17 office, all the lawyers and have counsel for the defense
18 to provide us with the same information as well as having
19 their client stand and face the panel. You may proceed
20 Ms. Williams.

21 MS. WILLIAMS: Thank you, Your Honor. My name is
22 Anne Williams. I'm an assistant Solicitor of Berkeley
23 County. With me is Colleen Taylor. She is also going to
24 assist -- she is another assistant Solicitor. In our
25 office we have other assistant Solicitors. Brian Alfaro

1 MR. SHELTON: Please seat the juror.

2 CLERK OF COURT: Seat the juror.

3 [Whereupon, juror number 113 is seated in the jury
4 box as a alternate juror]

5 THE COURT: Are there any motions regarding the
6 selection of the jury from the State?

7 MS. WILLIAMS: Not from the State, Your Honor.

8 THE COURT: From the defense?

9 MR. SHELTON: None, Your Honor.

10 THE COURT: Would counsel approach for me, please?

11 [Whereupon, an off the record bench conference is
12 held]

13 THE COURT: Ladies and gentlemen, you've been
14 selected for the case of the State of South Carolina
15 versus Christopher Berke. Instead of having you wait
16 this afternoon I still have to pick another jury.

17 We have a little court reporter shortage so I need
18 to pick the jury for Judge Harrington and it's probably
19 going to take the same length of time that it took for us
20 to pick this jury. It would not be a good use of your
21 time to have you all waiting while we do that.

22 In addition to that I still have some matters of law
23 that I need to dispose of in regards to this case that
24 will take us probably a little past 5 o'clock once I'm
25 done picking this jury. We will resume this trial in the

1 morning at 9:30. You will come -- the Bailiff is going
2 to show you exactly where you need to report. In the
3 time of this recess please do not discuss this case among
4 yourselves or with anyone else.

5 Please don't speculate about what you think this
6 case may or could be about. Don't do any independent
7 research on the Internet regarding any of the subject
8 matter that you may anticipate could be a part of this
9 case. As the fact finders in this case you are duty
10 bound to decide this case only according to the evidence
11 that will be submitted into the record along with the
12 other testimony that will be introduced.

13 Also, please do not discuss your jury service on any
14 social networking sites that includes Facebook,
15 Instagram, Vine; there are so many I've lost track and I
16 don't have any so that puts me at a great deficit.
17 However, I will tell you based on a breadth of experience
18 that there are many busy bodies that read these social
19 networking sites and are not hesitant in calling the jury
20 coordinator to let us know that one of you are talking
21 about your jury service on a social networking site,
22 which means then even an innocent comment could be very
23 easily misinterpreted.

24 So I would ask that you refrain from any social
25 networking while you are on jury duty at least as in

1 regards to this case. It's probably prudent not to have
2 any comments or anything on any social networking sites
3 while you are on jury duty; period. Again, I would not
4 want an innocent conversation to be misinterpreted.

5 When you return to the courthouse please don't have
6 any contact with anyone that you do not recognize to be a
7 fellow juror. Again, we would not want an innocent
8 conversation to be misinterpreted. People are very
9 sensitive during litigation. I wouldn't even hesitate to
10 say they are a little paranoid as advocates and as
11 litigants.

12 So the best bet is to only talk to people that have
13 a juror sticker on; that way you don't run into any
14 inadvertent and having a conversation with someone that
15 could be a witness or a party. You would be amazed with
16 the advent of technology how many conversations I've had
17 to watch that have been recorded on cell phones or
18 otherwise. And you notice these little bubbles that are
19 through the courthouse almost all of the courthouse is
20 recorded.

21 So again it is the better course of action to
22 refrain from any conversations. Even an innocent
23 conversation could be misinterpreted. You all have been
24 incredibly patient with us today. Technology is a
25 beautiful thing. When it works it's a wonderful aid but

1 when it breaks down -- I'm sure you all know if you've
2 ever had a computer crash at home just how inconvenient
3 that can be. But you all have been incredibly patient
4 with us. Normally we would have been done with this
5 process by lunchtime today but because of those hiccups
6 we were not able to complete it.

7 But again we do not take your time for granted. We
8 could not hold jury trials without your willingness to be
9 here with us. If you will go with the bailiffs they will
10 show you what you need to do in the morning. Have a
11 great afternoon and we'll see you at 9:30.

12 [Whereupon, the jury exits at 3:01 p.m.]

13 THE COURT: Ladies and gentlemen, we need to take a
14 very brief recess to sort of switch gears while we are
15 getting ready to pick this second jury. If you could
16 indulge us for five minutes after which -- we just need
17 to switch out the parties and everything and then we will
18 resume with jury selection. It is 2 after 3 according to
19 that clock that is behind us. It's actually 3 o'clock.

20 So if you could return in five minutes which would
21 be according to that clock 7 after, but 5 after 3 we'd
22 greatly appreciate it. Please don't go too far as we
23 need to account for everyone when we resume the process.
24 If you would follow the lead of the bailiffs please.

25 [Whereupon, the court takes a recess]

1 THE COURT: We're back on the record in the case of
2 the State of South Carolina versus Christopher Berke
3 2013-GS-08-603 and 604. In chambers the court heard the
4 motion to quash as well as the motion to sever. I ruled
5 on the motion to quash which was denied and took the
6 motion to sever under advisement. I advised the parties
7 prior to resuming jury selection that I had denied the
8 motion and that I would put the basis of that ruling on
9 the record after we had selected the jury in the interest
10 of judicial economy and time.

11 The court has considered the applicable precedent
12 and is applying the following criteria as articulated by
13 the Supreme Court and the Court of Appeals that the -- do
14 the charges arise out of the same set or single chain of
15 circumstances the court finds that it does -- that the
16 charges do.

17 Whether it is proved by the same evidence the court
18 finds that the injury that is most in contention does
19 arise or is proved by the same -- is proved by the same
20 evidence. Whether the charges are the same general
21 nature the court finds that they are. And the court can
22 discern no substantive right of the defendant that is
23 being prejudiced. In looking at the argument as it was
24 presented to the court the evidence that will be
25 presented on indictment 603, which is Unlawful Conduct

1 Toward a Child deals with the fact that the child had not
2 received immunizations, no doctor -- or at least it's
3 being alleged that the child had no immunizations, no
4 doctor visits, had had an untreated broken leg two weeks
5 prior to the incident and had not been taken to the
6 doctor for severe head injuries. Again, the court can
7 discern no prejudice in presentation of evidence on these
8 charges.

9 As the fact that the child was not immunized or the
10 allegation that the child was not immunized goes directly
11 to the element of whether there was neglect in the care
12 of the child. As the State will only be producing
13 evidence regarding subsection (1) of 63-5-70 as well as
14 the no doctor visits.

15 As regards to the broken leg the State will not be
16 presenting any evidence that the defendant broke the
17 child's leg; simply that the child's broken leg went
18 untreated. And in terms of these events as they
19 developed it is part of a continuum of events that will
20 be a part of the same or a single chain of circumstances
21 and proven by the same elements and are of the same
22 nature.

23 The same is true when we deal with the lack of
24 treatment for severe head injuries. It is hard to see
25 how you would be able to parse out these into separate --

1 these out separately -- well you could but there really
2 is no need to when in fact they all arise out of a single
3 chain of circumstances. They will be proven by the same
4 evidence and they are of the same or general nature and I
5 can discern no substantive right of his that is being
6 prejudiced by that.

7 So the motion to sever was denied or is denied and
8 the court has placed on the record it's findings pursuant
9 to the criteria set forth in State v Middleton and State
10 v Tate and State v McGaha M-C-G-A-H-A, which is the most
11 recent case which merely articulates the same standards
12 set forth in Tate and Middleton.

13 That then leaves us with the motion in limine to
14 exclude character evidence. And I guess the question
15 becomes do you all plan to present testimony regarding
16 your client's reputation for truthfulness?

17 MR. SHELTON: Your Honor, prior to ---

18 THE COURT: --- I'm not taking any further argument
19 on the motion. I've already heard the motion. Your
20 position is clear that you oppose it and so you don't
21 have to take exception to it.

22 MR. SHELTON: Your Honor, I just wanted to make the
23 record ---

24 THE COURT: --- what is ambiguous about ---

25 MR. SHELTON: --- sure on the 404(b) evidence ---

1 THE COURT: --- I've already heard argument. I'm
2 not hearing any further argument.

3 MR. SHELTON: I just want the record to be clear on
4 the ruling about the 404(b) evidence ---

5 THE COURT: --- meaning?

6 MR. SHELTON: Whether it is allowed in or not in
7 based on the 404(b) ---

8 THE COURT: --- I don't know. You're going to have
9 to make a contemporaneous objection. I don't know what
10 they are going to present. I can't rule in advance.

11 MR. SHELTON: Fair enough.

12 THE COURT: You're going to have to make a
13 contemporaneous objection.

14 MR. SHELTON: As far as the military record, Your
15 Honor, the ---

16 THE COURT: --- is that what you plan to present in
17 terms of his character?

18 MR. SHELTON: He was deployed during five months of
19 the Unlawful ---

20 THE COURT: --- I don't think that's what they are
21 talking about. They're talking about his reputation for
22 truthfulness as I read their motion; unless I misread it.

23 MS. TAYLOR: I'm sorry. It actually is dealing
24 with his military record. We were provided from the
25 defense with some awards that he had received during his

1 time in the service and we just don't think those are
2 relevant to any trait that are being questioned ---

3 THE COURT: --- you're absolutely correct. I
4 misread insomuch as his military record has no relevance.

5 MS. WILLIAMS: Yes, Your Honor.

6 THE COURT: What purpose would you be intending to
7 present evidence regarding his military record? I
8 thought you were going to be presenting witnesses on his
9 reputation for truthfulness or untruthfulness which would
10 go to his character. And since this is a creditability
11 case I could discern no reason to exclude that at least
12 not at this early stage of the trial. But how would his
13 military record be relevant?

14 MR. SHELTON: Your Honor, the Unlawful Conduct has
15 a date timeframe from December of 2010 to September of
16 2011. From the time of December in 2010 until April 19th
17 of 2011 my client was deployed in Afghanistan.

18 THE COURT: The entire time? He didn't come home
19 at all?

20 MR. SHELTON: From December 2010 to April 19th of
21 2011 he was deployed in Afghanistan the whole time, Your
22 Honor. And so ---

23 THE COURT: --- so December 10th, of 2013 through
24 April 19th -- no, 12 to 13?

25 MR. SHELTON: From December of 2010, which is what

1 they allege in the indictment ---

2 THE COURT: --- I'm sorry, let me look at these
3 dates. 2010. So from December 10th of 2010 so that
4 means he would have been home December 1st through the
5 9th?

6 MR. SHELTON: No, Your Honor. He was -- I'm sorry;
7 he was deployed July 20th of 2010 through April 19th of
8 2011.

9 THE COURT: So that means he would have been home
10 April 20th, 2011 through the date of this incident?

11 MR. SHELTON: Yes, Your Honor.

12 MS. TAYLOR: And Your Honor just to -- it may
13 expedite things we're certainly not trying to keep out
14 that he was deployed ---

15 THE COURT: --- yes, I was about to say that's
16 admissible ---

17 MS. TAYLOR: --- the issue that we have is just the
18 awards -- any medals he received or anything like that
19 during his military service.

20 THE COURT: Do you all plan to present anything of
21 that nature?

22 MR. SHELTON: Not unless there's a question that
23 might bring that out but I don't see them opening the
24 door to anything that we can bring out about his awards.
25 If they question that then obviously we would want to put

1 that in. But if they -- but I don't see anything that
2 would lead to those awards.

3 THE COURT: So then we don't have an issue then
4 it's moot?

5 MS. TAYLOR: That sounds correct, Your Honor.

6 THE COURT: Because the State concedes that it
7 would be admissible his not being in South Carolina July
8 20th, 2010 through April 19th of 2011 that he was
9 deployed in Afghanistan?

10 MS. TAYLOR: That's correct, Your Honor.

11 MR. SHELTON: And he was in the Army prior to that
12 also, Your Honor.

13 THE COURT: I'm sorry, you lost me.

14 MR. SHELTON: Your Honor, I'm just -- if my client
15 decides to testify I'd like to get into just him being in
16 the Army and his occupation ---

17 THE COURT: --- I can't imagine they would object
18 to that.

19 MS. TAYLOR: No, Your Honor.

20 THE COURT: Okay. The other deals with evidence
21 of third party guilt. Now do you all plan to present any
22 evidence of third party guilt?

23 MR. SHELTON: Your Honor, there is no one that is
24 going to come testify that they saw Sandra Berke commit
25 these offenses.

1 THE COURT: Okay.

2 MR. SHELTON: I think that there are some things in
3 the discovery materials that might lead to her being a
4 suspect in this including the Solicitor's office charging
5 her for Unlawful Conduct.

6 THE COURT: But they haven't charged her with this
7 child's injury.

8 MR. SHELTON: Right.

9 THE COURT: They've charged her basically with
10 criminal neglect of her child.

11 MR. SHELTON: Right, Your Honor. And so there is
12 no argument that I am going to have a witness -- I'm not
13 going to have a witness that is going to come up and say
14 that Sandra committed these offenses. I would like to
15 get into the fact that there is a time frame where my
16 client is not home and the only other person that's home
17 is Sandra.

18 THE COURT: When is that? Are you talking about
19 when he was deployed?

20 MR. SHELTON: No, Your Honor. The injuries cannot
21 be timed.

22 THE COURT: But there is a timeframe?

23 MR. SHELTON: Right, within 72 hours -- or 48
24 hours, 72 hours. And the -- my client is gone during
25 some of that time and the only other person that is there

1 is his wife.

2 MS. WILLIAMS: Your Honor, we're not going to try
3 to keep -- we're not asking to keep that out. I think
4 part of the res gestae is that she is in the home. I
5 don't think we can avoid that. All we're trying to keep
6 out is ---

7 THE COURT: --- is them saying she did it.

8 MS. WILLIAMS: Well, and we don't think like her
9 depression, the fact that she wasn't engaging with her
10 children at some time. There is a lot of stuff in the
11 DSS file about her thyroid cancer and how unengaged she
12 was with the kids. We don't think that her behavior
13 toward her children outside this period of time is
14 relevant.

15 The fact that she had thyroid cancer and the fact
16 that she was depressed a lot; certainly anything around
17 the period of time that the child was injured we think is
18 relevant in terms of her presence in the home and
19 anything that is directly connected with the injuries or
20 the neglect. We just don't think her background
21 information, her medical history, and her psychological
22 history are relevant. And we think ---

23 THE COURT: --- was she suffering from these things
24 at the time?

25 MS. WILLIAMS: She was suffering from -- I don't

1 know when her thyroid cancer was.

2 MR. SHELTON: Your Honor, she had her -- she had
3 thyroid cancer actually while he was deployed and she had
4 surgery in May of 2011 shortly after he got back from his
5 deployment. And so these allegations for Unlawful
6 Conduct once again the timeframe December of 2010 to
7 September of 2011 there is going to be -- there is
8 evidence -- I don't have Ms. Berke's ---

9 THE COURT: --- you're going to have to connect the
10 dots for me ---

11 MR. SHELTON: --- absolutely ---

12 THE COURT: --- because a person who has just had
13 cancer surgery it is unlikely they would even have the
14 strength to pick up a child and inflict that type of
15 injury. I don't know how that helps your client.

16 MR. SHELTON: Well, this would -- it was ---

17 THE COURT: --- because I would assume she's
18 getting chemo and radiation after that.

19 MR. SHELTON: That was four months later and there
20 is also ---

21 THE COURT: --- yes, you've obviously never been
22 around somebody getting chemo and radiation.

23 MR. SHELTON: Your Honor, there are mood issues
24 that are associated with thyroids and getting ---

25 THE COURT: --- I understand that. But you're

1 still going to have to establish for me that she had the
2 physical strength to do this. You're not going to be --
3 that's the whole purpose you have the concept of third
4 party guilt. You just can't come in and say somebody
5 else did it.

6 MR. SHELTON: And ---

7 THE COURT: --- it has to be a theory that is
8 totally inconsistent with your client's -- with the
9 State's theory of your client's guilt.

10 MR. SHELTON: I mean if my client is able to
11 testify to what he observed and what he saw and ---

12 THE COURT: --- yes, I would have to cross that
13 bridge when I came to it because I don't what he may or
14 may not say.

15 MR. SHELTON: Absolutely. Your Honor, I don't have
16 Ms. Berke's -- just for the record I don't have Ms.
17 Berke's DSS file so I don't know exactly what -- as far
18 as medical things are in Ms. Berke's DSS file I don't
19 have that.

20 All I have and all I would be looking to present are
21 the medical history that she provided to MUSC the next
22 day -- the day that they took the child to the hospital
23 and that MUSC doctors took into consideration. I think
24 it ---

25 THE COURT: --- the doctors don't decide who is

1 charged and they don't take a parent's physical -- they
2 don't take any of that into consideration in diagnosing a
3 child.

4 MR. SHELTON: Your Honor, then I don't know if the
5 State is going to present my client's medical history.

6 THE COURT: Your client's medical history is
7 germane and relevant. You're going to have to prove to
8 me hers is relevant, that it makes some issue of
9 consequence more or less probable. I haven't heard
10 anything up to this point other than throwing in this
11 cloud that maybe somebody else did it and that's why you
12 have third party guilt and that's why there are standards
13 that are applicable to it because it has the tendency to
14 mislead a jury and I'm not going to allow that.

15 Now if you can meet the elements of third party
16 guilt then it may well be relevant; I don't know. If you
17 can establish that -- I think it goes without contention
18 that she -- its uncontroverted she was in the house. If
19 you can establish that she had -- at this point what
20 you're telling me really is adverse.

21 Its contrary to what you are saying because a person
22 who is getting treatment for cancer really doesn't have
23 the capacity to pick up a child of any weight really
24 especially any form of -- because thyroid cancer of
25 course deals with your capacity -- it deals with energy,

1 it deals with your capacity to really function, to walk,
2 to ambulate, to do the basic things. And of course it
3 causes mood swings; it causes often great increases in
4 weight, great decreases in weight.

5 I don't know exactly what her situation was but it
6 -- and I would have to know whether she is getting chemo,
7 whether she is getting radiation; all of those things
8 deplete the body's function. It just seems to me that it
9 would be completely opposite of what you're saying
10 because if somebody is bedridden and getting some form of
11 treatment for cancer...

12 MR. SHELTON: I think that there is some evidence
13 that may contradict her strength and her ability to have
14 held the child and to care for the children, Your Honor.

15 THE COURT: Okay. Then we'll have to cross that
16 bridge when we come to it because at this point I don't
17 have enough information to make an informed decision.

18 MR. SHELTON: Yes, Your Honor.

19 THE COURT: Okay. So that would be under
20 advisement and nobody is going to make any reference to
21 it in opening arguments. And when we get to that part of
22 any testimony you need to make me aware we have a matter
23 of law so I can take it up in camera and create a proffer
24 and make a reasoned decision at that time.

25 MR. SHELTON: And that's for -- I'm sorry, Your

1 Honor, that's for the -- not that she was there -- not
2 that she wasn't there but ---

3 THE COURT: --- well anything that is controverted.
4 I mean you all agree that she was in the house. I think
5 that's uncontroverted. I don't think there is any
6 factual contest about that.

7 MR. SHELTON: Okay.

8 THE COURT: That these were the only two adults
9 living in the residence with the children. All right.
10 Do we have any other matters of law that we need to take
11 up before we start with opening argument and opening
12 instruction in the morning?

13 MS. TAYLOR: Your Honor, we do have what should be
14 a relatively quick Jackson v Denno hearing.

15 THE COURT: How many witnesses? You don't have
16 your witness here today for your Jackson v Denno?

17 MS. TAYLOR: One.

18 THE COURT: Let's roll; no time like the present.

19 MS. TAYLOR: The State calls Detective Brian
20 Fenton.

21 THE COURT: Are there any other pretrial motions we
22 need to hear other than Jackson v Denno?

23 MS. WILLIAMS: We object to State -- I'm sorry,
24 Your Honor. The defense has provided the State with some
25 pictures and some videos. And our contention is the

1 pictures are not even around the same period of time that
2 the child ---

3 THE COURT: --- I haven't even had a chance to look
4 at them. They are on a disk. There are some that I have
5 been able to see. I have not been able to see the
6 videos. I guess I'm trying to figure out what they would
7 be relevant to.

8 MS. WILLIAMS: That's what we're trying to do.

9 THE COURT: But I'll look at them and then we'll
10 take it up contemporaneously at the time they seek to --
11 but don't seek to publish them in the presence of the
12 jury until I hear it in camera.

13 MR. SHELTON: Yes, Your Honor.

14 THE COURT: Because y'all got some pictures he
15 doesn't like too.

16 MS. WILLIAMS: I haven't heard that he objects to
17 any of our pictures ---

18 MR. SHELTON: --- well, I haven't --

19 [Whereupon, Ms. Williams and Mr. Shelton confer]

20 THE COURT: And that begs another question. Have
21 y'all talked about pre-marking exhibits?

22 MS. WILLIAMS: We've pre-marked all the exhibits
23 and given the list to the court reporter, Your Honor.

24 THE COURT: And y'all have agreed to them all?

25 MS. WILLIAMS: We haven't -- I haven't heard that

1 he objects to any of them. This is the first time I've
2 heard that.

3 MR. SHELTON: Your Honor, I don't know exactly
4 which ones ---

5 MS. WILLIAMS: --- all of the ones I gave you.

6 MR. SHELTON: There was a disk of -- there were
7 many pictures, Your Honor on the disk. I'm not sure
8 exactly which ones that...

9 MS. WILLIAMS: It was all the ones I gave you.

10 MR. SHELTON: Then we will probably have an
11 objection, Your Honor.

12 THE COURT: Y'all need to talk and figure out what
13 you agree to and what you object to so then I can --
14 because I'm not going to like referee like that. Y'all
15 let me know what you can agree to and what you can't
16 agree to then I'll deal with it.

17 And I need to know numbers that you can't agree to
18 and then I need to know the numbers you can agree to on
19 both sides. I assume there is not a Neil v Biggers or
20 anything like that but there is a Jackson v Denno. Okay,
21 you may proceed.

22 JACKSON V DENNO HEARING

23 [Whereupon, Detective Fenton comes forward]

24 [Whereupon, the witness is duly sworn by the Clerk
25 of Court]

STATE OF SOUTH CAROLINA)

COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON)

DOCKET NO. 2013-GS-08-0603

2013-GS-08-0604

STATE OF SOUTH CAROLINA)

vs.)

CHRISTOPHER BERKE)

Defendant)

TRANSCRIPT OF RECORD

March 4, 2014

Moncks Corner, S. Carolina

VOLUME 2 (OF 3)

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

ANNE WILLIAMS, ESQ.
COLLEEN TAYLOR, ESQ.
Attorneys for the State

CHAD D. SHELTON, ESQ.
CODY GROEBER, ESQ.
Attorneys for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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PROCEEDINGS

1
2 THE COURT: Is the State ready to proceed?

3 MS. WILLIAMS: The State is, Your Honor.

4 THE COURT: Is the defense ready to proceed?

5 MR. SHELTON: Your Honor, just briefly before we
6 proceed if I could just ask you your advice on how to go
7 about the Unlawful Conduct and my severance motion.

8 THE COURT: I don't understand what you mean.

9 MR. SHELTON: The 404(b) the Unlawful Conduct I
10 understand is in ---

11 THE COURT: --- well, I didn't sever the charges.
12 Your motion was for a severance.

13 MR. SHELTON: Yes, Your Honor. So just the
14 objection of the 404(b) I think I had asked about that
15 yesterday and Your Honor said when it comes up so ---

16 THE COURT: --- I said you need to make a
17 contemporaneous objection because I can't rule in a
18 vacuum. I don't know what it is you object to.

19 MR. SHELTON: Any evidence on the Unlawful Conduct,
20 Your Honor.

21 THE COURT: Then you're going to have to make a
22 contemporaneous objection. I think at some point it's a
23 moot issue because I've already ruled that the charge
24 itself is admissible and the elements of the charge are
25 admissible. So I don't -- absent that I don't really

1 know how to give you any additional guidance because I've
2 already ruled that the charges are not to be severed.
3 The State has the burden to prove the charges. I do not
4 foresee that any of this stuff is prior bad acts because
5 the jury is going to be instructed regarding the elements
6 of Unlawful Conduct and either they will have met their
7 burden or they will not have.

8 And they are not going to be allowed on the Unlawful
9 Conduct to say your client did it. So I don't see how
10 that really prejudices him because the only thing the
11 State has to prove is that these conditions existed and
12 that they were not attended to. They are only proceeding
13 under subsection (1) of the statute not subsection 2 that
14 deals with who caused the injury.

15 MR. SHELTON: Okay.

16 THE COURT: So it really doesn't matter who caused
17 the injury under that statute. What they are required to
18 prove is that your client was aware of the condition and
19 failed to render aid or treatment to his child, which is
20 really just negligence basically.

21 MR. SHELTON: I think that clears it up. Thank
22 you, Your Honor.

23 THE COURT: You're welcome.

24 MS. WILLIAMS: And Your Honor just one thing?

25 THE COURT: Yes, ma'am?

1 MS. WILLIAMS: The State is asking for the rule to
2 sequester and it's my understanding the defense is not.
3 We have a ---

4 THE COURT: --- I'm sorry. Repeat that one more
5 time.

6 MS. WILLIAMS: I'm talking too fast. I'm sorry,
7 Your Honor.

8 THE COURT: That's okay.

9 MS. WILLIAMS: The State is asking for the rule in
10 terms of sequestering witnesses.

11 THE COURT: You're asking that witnesses be
12 sequestered?

13 MS. WILLIAMS: Yes, Your Honor.

14 THE COURT: Does the defense have any exception?

15 MR. SHELTON: No objection but we're not also
16 asking for it, Your Honor.

17 THE COURT: You're not or you are?

18 MR. SHELTON: We're not asking for it but we're not
19 objecting ---

20 THE COURT: --- opposed to it. Okay, then the
21 witnesses will be sequestered.

22 MS. WILLIAMS: The first witness is in the courtroom
23 and can he watch opening arguments? We don't mind if he
24 does but...

25 THE COURT: Who is the first witness?

1 MS. WILLIAMS: Doctor Jacobsen.

2 THE COURT: I don't see how an opening argument can
3 affect testimony. I would assume you've already prepped
4 your witness.

5 MS. WILLIAMS: Yes, Your Honor. And we are going
6 to be using the photographs for the first witness so I
7 did want ---

8 THE COURT: --- you all need to tell me what you
9 have agreed to in terms of exhibits and what exhibits
10 you've agreed to and what will come in without objection
11 and I just need numbers.

12 MS. WILLIAMS: My understanding is that Mr. Groeber
13 wants to make a general objection to any pictures but
14 that if any pictures come in ---

15 THE COURT: --- you're getting ahead of me. I need
16 you to tell me the numbers you've agreed on.

17 MS. WILLIAMS: 1 through 12, and then 21 through
18 34. And then the demonstrative aids we're going to go
19 over at lunchtime.

20 THE COURT: Okay. So you all have agreed -- and
21 let me be clear -- to the State's exhibits 1 through 12
22 and 21 through 34 coming in without objection is that
23 correct?

24 MR. GROEBER: That is not quite correct, Your
25 Honor.

1 THE COURT: Okay, what is correct?

2 MR. GROEBER: 1 through 12 we would object -- the
3 pictures ---

4 THE COURT: --- I don't want to hear any
5 objections. I was very clear in my instructions. I want
6 to know what you have agreed to.

7 MR. GROEBER: It would be I believe the rest of
8 them.

9 THE COURT: Well, I need to know numbers.

10 [Whereupon, Ms. Williams and Mr. Groeber confer]

11 MR. GROEBER: 21 through 34.

12 THE COURT: So you all have agreed to 21 through 34
13 coming in without objection is that correct?

14 MR. GROEBER: I would object to ---

15 THE COURT: --- I don't want to hear any objection.
16 Let me make my instructions very clear.

17 MR. GROEBER: --- I understand ---

18 THE COURT: --- time is at a minimum. I am not
19 going to expend time arguing motions. I don't have any
20 context to rule on anything. I've asked you all to go
21 through the exhibits. I've asked you to tell me what
22 exhibits you agree upon so I can have those marked and
23 admitted without objection so that we don't have to
24 expend time on that as we go through the trial. What you
25 do not agree on you will make a contemporaneous

1 objection. I will take the objection up; I will hear the
2 basis of the objection. If I require argument I will
3 allow it. If not, I will make a contemporaneous ruling.
4 So I need to know what have you agreed upon. In other
5 words what is there no objection to in terms of the
6 State's exhibits and I need to know those numbers.

7 MR. GROEBER: If I may have one moment I can give
8 you that answer.

9 THE COURT: Okay.

10 [Whereupon, Mr. Groeber and Ms. Williams confer]

11 MR. GROEBER: May I approach the court reporter?

12 THE COURT: I have the exhibits.

13 MR. GROEBER: Oh, okay.

14 MS. WILLIAMS: The Judge has 1 through 12.

15 THE COURT: Do you need 1 through 12?

16 MR. GROEBER: No ma'am, I do not need those. I do
17 need the rest of them.

18 [Whereupon, Mr. Groeber reviews photographs]

19 MR. GROEBER: The legs are the only ones we would
20 have a...

21 THE COURT: Pardon me?

22 MR. GROEBER: The legs are the only ones we don't
23 agree to.

24 THE COURT: So you agree...

25 MR. GROEBER: Anything that -- of the pictures of

1 the head we agree.

2 THE COURT: That's 21, 22, 23, 24, 25, 26, 27, 28,
3 29, 31, and 33. So that would be 21 through 29 and 31
4 and 33 come in without objection. Those are the cranial
5 x-rays.

6 [Whereupon, State's exhibit numbers 21, 22, 23, 24,
7 25, 26, 27, 28, 29, 31, 33 are entered into evidence by
8 the court]

9 MS. WILLIAMS: Your Honor, we thought that they
10 were agreeing to the pictures. There are other pictures
11 that we pulled out. And I'll just give those to Your
12 Honor because if we're not agreeing to any pictures
13 then...

14 THE COURT: I told y'all to do this yesterday
15 because I wasn't going to do this back and forth. So I
16 tell you what; you can lay your foundation and you move
17 to admit your photographs or whatever evidence and then
18 I'll take it as it comes. Is the State ready to proceed?

19 MS. WILLIAMS: The State is ready, Your Honor.

20 THE COURT: Is the defense ready to proceed?

21 MR. GROEBER: Your Honor, the only other thing was
22 the bond and we talked with your clerk briefly about
23 that. She had provided us with the Attorney General's
24 opinion. It appears that it is in the court's
25 discretion. I read ---

1 THE COURT: --- there is a statute on point and I'm
2 just going to have to locate it myself.

3 MR. GROEBER: And I will tell Your Honor I read 17-
4 15 all of the statutes on bond there and 38-53 all the
5 statutes there. I couldn't find anything directly on
6 point. So those are from my research the statutes that
7 would apply to the bail bondsmen in this issue.

8 THE COURT: Is the State -- is the defense ready to
9 proceed?

10 MR. SHELTON: Yes, Your Honor.

11 THE COURT: Ms. Fabian, number 48 is the
12 Foreperson. And of course please seat the alternate in
13 the appropriate seat and make sure all the remaining
14 jurors are appropriately seated and you may bring them
15 in.

16 [Whereupon, the jury enters at 9:55 a.m.]

17 THE COURT: Ladies and gentlemen, you've been given
18 notebooks to take notes. If you would write your juror
19 number on the first page of that notebook so that you
20 will be able to identify which notepad belongs to you.
21 And if you would stand for me please and raise your right
22 hand so that the Clerk can swear you.

23 [Whereupon, the jury is sworn by the Clerk of Court
24 as follows: You shall well and truly try and a true
25 deliverance make between the State of South Carolina and

1 the defendant at the bar whom you shall have in charge a
2 true verdict render according to the evidence so help you
3 God say I do]

4 [Whereupon, the jury complies]

5 CLERK OF COURT: Please be seated.

6 THE COURT: Good morning ladies and gentlemen. I
7 hope that y'all had a pleasant evening and we're happy
8 that you are here with us. I hope that everyone is
9 refreshed from the stress of yesterday.

10 We are used to this process. We do it every day
11 probably I'm thinking out of 52 weeks about 47 weeks we
12 have jury trials; except I would only exclude holidays
13 and we have two mandatory conferences a year. So other
14 than that we hold jury trials.

15 Of course in Berkeley County because it's a smaller
16 county even though it's within the 9th Circuit jury
17 trials are held at a lesser rate but in Charleston we
18 hold four trial courts every week. And so while we are
19 used to this process, we're used to the glitches in it we
20 know that you all are not and that it can be stressful
21 and taxing on you. So we appreciate your patience on
22 yesterday as we worked through our computer challenges.

23 You've been selected for the cases of the State of
24 South Carolina versus Christopher W. Berke. I'm going to
25 give you some preliminary instructions so that you will

1 better know procedurally how the case is advancing
2 through the system and what your role is and your
3 obligations as the fact finders in this case.. What I --
4 as I have already stated what I am saying is intended to
5 serve as an introduction to the trial of this case.
6 These remarks are not a charge on the law. I will
7 instruct you on the law applicable to this case at the
8 end of the trial before you retire to consider your
9 verdict.

10 And when you hear the court use the term charge,
11 charge is a legal term of ours that simply means
12 instructions. So charge and instructions are
13 interchangeable terms. This is merely an explanation of
14 the procedure that we will follow in the trial of this
15 case so that you may better understand what may be
16 happening.

17 The defendant is charged by two indictments in this
18 case and those are 2013-GS-08-603 and 604 with the crimes
19 of Unlawful Conduct Toward a Child and Infliction of
20 Great Bodily Injury Upon a Child the elements of which I
21 will explain to you at the conclusion of the case.

22 The indictments ladies and gentlemen are simply the
23 charges by which the case is brought into this court and
24 they are not in any sense evidence of any of the
25 allegations they may contain. The defendant has pled not

1 guilty to the indictments. The State therefore has the
2 burden of proving each of the elements of the indictments
3 beyond a reasonable doubt. And it will be your duty
4 ladies and gentlemen to decide whether the State has met
5 that burden or not. Your purpose as jurors is to find
6 and determine the facts. You are the sole judges of the
7 facts in this case. If at any time I make any comment
8 regarding the facts you must disregard it. The
9 Constitution does not allow me to have any opinion about
10 the facts in a case tried by a trial jury.

11 You are to determine the facts ladies and gentlemen
12 from the testimony you hear and the other evidence
13 introduced in court. It is up to you to determine the
14 inferences which you feel may be properly drawn from the
15 evidence.

16 It is especially important that you perform your
17 duty of determining the facts diligently and
18 conscientiously because ordinarily there is no way to
19 correct an erroneous determination of facts made by a
20 trial jury. On the other hand and with the full emphasis
21 the same law that makes you the judges of the facts makes
22 me the judge of the law.

23 The law as given by this court is the only law you
24 may consider. You must accept and follow it even though
25 you may disagree with it. I cannot tell you what the

1 facts are and you cannot disagree with the court about
2 what the law is or what the law should be. Your
3 responsibility ladies and gentlemen is to take the law as
4 I instruct it and apply it to the facts as you find them
5 from the testimony of the witnesses and the other
6 evidence that will be introduced during the course of
7 this trial.

8 After doing that you will render your verdict; a
9 true and just verdict under the solemn oath that you have
10 just taken as jurors in this case. Until I advise you to
11 begin your deliberations you must not discuss this case
12 with anyone; that includes your fellow jurors, your
13 friends, family members, or anyone involved in the case.

14 After the case is submitted to you you must discuss
15 it only in the jury room among your fellow jurors. The
16 attorneys and the parties in this case as well as the
17 witnesses have been advised that they should not speak
18 with you at all.

19 So if you should see anyone involved in the case
20 even in the parking lot as you leave the courthouse or a
21 local restaurant during lunch and they don't speak with
22 you please don't think they are being unfriendly or
23 untoward; they are simply strictly following the court's
24 instructions.

25 Again, we would not want an innocent conversation to

1 be misinterpreted as you having an improper discussion
2 about the facts involved in this case. During the trial
3 you are not to read, watch or listen to any media
4 accounts about this case if there are any. This includes
5 anything that could be in the newspaper, on the Internet,
6 radio, or television. And there is a great deal of
7 information available on the Internet but you're strictly
8 instructed no matter how curious you are about a subject
9 matter that you are not to do any independent research of
10 any type regarding any issue or matter involved in this
11 case on the Internet.

12 As the fact finders in this case you are to decide
13 this case only according to the testimony that you hear
14 from the sworn witnesses and the other evidence that will
15 be introduced during the course of this trial. You must
16 not consider anything that you may have read or heard
17 about this case outside the courtroom; whether before or
18 during the course of this trial.

19 It is essential that you maintain an open mind and
20 that you not decide any issue in this case until all of
21 the evidence has been presented, the parties have made
22 their closing arguments and I've instructed you on the
23 law applicable to this case.

24 It is your solemn responsibility to determine the
25 guilt or innocence of the defendant and your verdict must

1 be based solely on the evidence as it is presented to you
2 in this trial and on the law as I will instruct you
3 during and at the close of this trial. In just a moment
4 the Solicitor will make what is called an opening
5 statement in which the Solicitor will explain to you what
6 they believe the evidence to be in this case. We call
7 that an opening statement; the lawyers state what they
8 believe the evidence will show in a particular case.

9 The attorney for the defendant may also make an
10 opening statement although he is not required to do so.
11 What the attorneys tell you during their opening
12 statements ladies and gentlemen is not evidence in this
13 case. It is only their contention as to what they
14 believe the evidence will show in this case.

15 The evidence in this case will be presented to you
16 by the testimony of sworn witnesses from the witness
17 stand and or by exhibits that may be introduced into
18 evidence. From time to time during the trial you will
19 hear one of the attorneys say something like Your Honor I
20 object. Just as in sports, business, or any other
21 structured activity there are certain rules that we must
22 obey in the presentation of evidence. These rules ensure
23 that you receive the most trustworthy and reliable
24 evidence available.

25 An objection is the procedure that an attorney uses.

1 to call a possible violation of these rules to my
2 attention as the Judge of this court. And for this
3 reason you should never hold an attorney's objection
4 against them; in fact you should expect objections, nor
5 should you conclude from the court overruling or
6 sustaining an objection that I favor one side or the
7 other.

8 Also from time to time you will hear the attorneys
9 say something like Your Honor, we have a matter of law to
10 discuss or they may ask to approach the bench or I may
11 ask them to approach the bench. Sometimes we do that as
12 a time saving measure, but sometimes it will be necessary
13 for us to exclude you from the courtroom while we discuss
14 matters of law.

15 And the reason we do this is because you are the
16 fact finders and sometimes when I'm discussing matters of
17 law with the attorneys it might be necessary for me to
18 make some comment about the facts in connection with
19 ruling whether a particular statute, procedural rule, or
20 evidentiary rule applies. And for this reason we would
21 never want you to be influenced by anything that the
22 court may say or do in connection with the facts of the
23 case.

24 In determining what the true facts are in this case
25 ladies and gentlemen you must decide whether or not the

1 testimony of a witness or witnesses is believable. It is
2 my responsibility to rule as a matter of law as to
3 whether certain testimony is admissible at all or not.
4 But once it is admitted whether or not you believe it is
5 solely a matter for you to determine. In deciding
6 whether to believe a witness you have the right to
7 consider the interest of any witness, the bias of any
8 witness, the prejudice of any witness, the opportunity
9 for the witness to have seen the matters and things about
10 which the witness may testify and the way the witness
11 acts on the witness stand; something we commonly refer to
12 as demeanor.

13 You have a right to consider anything that is in the
14 record that will help you to evaluate the testimony of
15 the witnesses. That means ladies and gentlemen that it
16 is your duty to pay close attention to the witnesses, to
17 observe them, to listen to them, and to pay close
18 attention to the attorneys and the court.

19 Although I know it is very difficult please do not
20 allow your attention to wander but give strict attention
21 to the evidence so that at the end of all the testimony,
22 after the arguments of counsel, and the charge on the law
23 as given by the court you will then be in a position to
24 determine what the true facts are and apply the law to
25 those facts and thus render a true and just verdict in

1 this case.

2 During the course of this trial you will be given
3 the opportunity to take notes. Note taking is a
4 privilege that you may choose to exercise or choose not
5 to exercise. Please don't feel that you are required to
6 take notes. Not everyone finds note taking helpful to
7 them. If you should decide to take notes please don't
8 try to record everything that is said; it's physically
9 impossible. The average person speaks over 200 words a
10 minute and that's a moderate speaker; that's not even
11 someone that speaks very quickly.

12 And as I've explained as the fact finders it is
13 essential that you rely on your powers of observation in
14 determining the believability and the creditability of
15 the witnesses who testify. So please do not allow note
16 taking to become a distraction to you. You may want to
17 keep an outline of the main points and arguments that are
18 being made so that when you retire to deliberate
19 regarding this case you can allow your notes to refresh
20 your memory.

21 Please be reminded that your notes are for your
22 specific and your individual purposes. They are only to
23 be used to refresh your own memory; they are not to be
24 shared with anyone else. During breaks and recesses your
25 notes will be left in your seats and we do that to make

1 sure that there is no premature temptation to discuss
2 anything that may have been presented just prior to a
3 break during the case. You should also be reminded that
4 your notes should not be considered any more reliable
5 than someone else's memory. Someone else's memory should
6 be considered just as reliable as notes that may have
7 been taken by a fellow juror. It is your added duty
8 Madame Foreperson to write out the verdict but I will
9 give you instructions regarding that at the conclusion of
10 the case.

11 Ladies and gentlemen, the Foreperson is an
12 administrative function. That person does not have any
13 greater vote or voice than you do. It is purely
14 administrative and is a completely random process that
15 the court employs in selecting the Foreperson so that a
16 cross section of the community is represented. Again, I
17 reinforce that that person does not have any greater
18 voice or vote than the remaining jury panel.

19 In order to reserve everyone's rights I'm going to
20 give the parties the opportunity to take exception to
21 anything that the court has said by way of opening
22 instructions. Are there any exceptions from the State?

23 MS. TAYLOR: None from the State, Your Honor.

24 THE COURT: From the defense?

25 MR. SHELTON: None, Your Honor.

1 THE COURT: Ladies and gentlemen, I would ask that
2 you give the attorneys your undivided attention in
3 opening argument. The State may proceed.

4 MS. TAYLOR: Thank you, Your Honor. May it please
5 the court?

6 THE COURT: You're welcome. Yes, ma'am?

7 OPENING STATEMENT

8 BY MS. TAYLOR:

9 At fifteen months of age a little girl should be
10 standing on her own. She should be learning how to walk
11 and beginning to talk; exploring the world around her
12 with curiosity and amazement. At fifteen months of age a
13 little girl should be laughing and giggling and playing
14 with her siblings and with her parents.

15 But at fifteen months of age Minor Berke was being
16 transported by ambulance to the pediatric emergency room
17 at the Medical University downtown. And while she was
18 there she was diagnosed with a complex skull fracture to
19 the back of her head. You will hear that she was
20 diagnosed with severe bleeding to her head. You will
21 hear that she had bleeding on her brain.

22 You'll also hear that while she was there the
23 doctors discovered troubling information about her
24 medical history. The doctors will tell you that
25 according to her medical history Minor hadn't received a

1 doctor's visit or immunizations in months. The doctors
2 will tell you that when they were scanning Minor a full
3 body x-ray, they discovered an untreated healing leg
4 fracture. The medical testimony in this case is going to
5 be extensive. You're going to hear from a lot of doctors
6 and the doctors will tell you about how Minor presented
7 that day. It's our intent to show you pictures of what
8 she looked like when she got to the emergency room. It's
9 our intent to show you the x-rays and the CT scan and the
10 MRI that was performed on her at that visit and in the
11 follow-up weeks later.

12 The doctors will also tell you that while she was at
13 the hospital they spoke to her father, the defendant
14 Christopher Berke. The doctors will tell you that the
15 defendant gave them a story of what happened to cause
16 Minor head injuries. And they will tell you that in
17 their medical experience and opinion it's just not
18 possible what the defendant said happened to Minor to
19 cause all of those injuries cannot possibly explain the
20 injuries to her head.

21 You're also going to hear from law enforcement, from
22 workers with DSS, the guardian ad litem that was
23 appointed to represent Minor. They are going to tell you
24 that they too spoke to the defendant. According to the
25 defendant and his wife Minor was fine before September

1 5th, the night before she was taken to the hospital; she
2 had no head injuries until the defendant gave her a bath.
3 And while the defendant's story about what happened in
4 the bath changed a little bit over time the most
5 important thing, the thing that remained consistent is
6 that he was the one with her when she was injured.

7 Now in this case the defendant is charged with two
8 counts. The first is Unlawful Conduct Toward a Child and
9 that statute reads that it is unlawful for a person who
10 is the parent or guardian of a child or has charge or
11 custody of that child to place the child at unreasonable
12 risk of harm affecting her life, physical or mental
13 health, or safety.

14 In order to prove that the State will prove to you
15 beyond a reasonable doubt that Minor was placed at
16 unreasonable risk of physical harm because she hadn't had
17 her immunizations, hadn't been to the doctor, had a
18 healing leg fracture that was not treated, and finally
19 had severe head injuries and there was a delay in
20 treatment for those.

21 The defendant is also charged with Infliction of
22 Great Bodily Injury Upon a Child. The State must prove
23 to you beyond a reasonable doubt the defendant himself
24 inflicted great bodily injury upon Minor And Great
25 bodily injury is such that creates a substantial risk of

1 death or a serious permanent disfigurement or loss of the
2 bodily member or organ. You will hear the doctors tell
3 you that although Minor did not die from these injuries
4 the possibility of death existed because of the severity
5 of the head injuries. You've heard me say a couple of
6 times beyond a reasonable doubt and you'll hear that many
7 more times throughout the trial. What does that mean? A
8 reasonable doubt is a doubt which would cause a
9 reasonable person to hesitate to act.

10 That's a legal definition if you've ever heard one.
11 But here's what it is not; it's not every possible doubt.
12 There are very few things in life that we know with
13 absolute certainty. That's not our burden. The burden
14 that we have we accept. It is proof that leaves you
15 firmly convinced of the defendant's guilt.

16 At the end of this trial ladies and gentlemen after
17 you've heard from the doctors, you've heard their
18 testimony about what happened to Minor the injuries that
19 she had, you've heard person after person tell you that
20 the defendant himself says he was with her when it
21 happened.

22 You've heard all the testimony about the medical
23 treatment she didn't get. The State will have proven to
24 you beyond a reasonable doubt that the defendant is
25 guilty of Unlawful Conduct Toward a Child and is guilty

1 of inflicting great bodily injury upon his daughter.

2 Thank you.

3 THE COURT: You may proceed.

4 MR. SHELTON: Thank you, Your Honor. May it please
5 the court?

6 THE COURT: Yes, sir?

7 OPENING STATEMENT

8 BY MR. SHELTON:

9 I love baseball. This time of the year I don't know
10 what it is. It's just maybe the fresh cut grass and you
11 smell -- and you just know spring is coming, summer's
12 coming. I just remember playing catch with my Dad in the
13 backyard, playing catch with my brothers. We always --
14 we played baseball from about the middle of March until
15 August when soccer and football started up. I loved
16 baseball.

17 Well, anybody that is familiar with baseball, major
18 league baseball knows that there is a new rule going into
19 effect this year; and that's replay. The coaches get
20 challenged -- there has been replay before with baseball
21 but coaches get challenged and they get to challenge the
22 evidence. They get to challenge what was out there, what
23 decision was made by an umpire.

24 Similar football; the umpire goes into the hood and
25 checks the video replay. It must be uncontroverted

1 evidence. Baseball is going to be a little bit
2 different. Baseball is going to follow a little bit of
3 what hockey does; and that is they are going to go to an
4 impartial judge. If you think about it baseball on the
5 field you've got the coaches on both sides arguing you're
6 right, you're right and one arguing you're wrong, you're
7 wrong. And the umpire who thinks they are right has a
8 lot of pride and wants to be right. You've got the home
9 ump and the home fans yelling whichever way they want to
10 go. But for baseball they are going to move it to an
11 independent judge of the facts. The independent judge is
12 going to look at that video replay and make a decision.

13 That's what I am asking y'all to do; be that
14 independent judge of the facts. Take the emotion out of
15 it. That's one thing that baseball is doing with the
16 replay is taking all the emotion out of it, taking the
17 umpires pride, taking what team is winning and what team
18 is losing, what home team fans are yelling. They are
19 taking all of that out and they are letting somebody that
20 has taken the emotions out of it.

21 This is an emotional case. This is going to be
22 hard. No child -- Minor Berke did not deserve what
23 happened to her. She didn't deserve the skull fracture.
24 She didn't deserve the leg injury. Just like that one
25 juror member going to be upset; be upset about hearing

1 what happened to her. That's a normal reaction. But as
2 a juror member you take an oath to be fair and impartial
3 and to listen to the evidence. And if you can't do that
4 I ask you to tell the Judge that you can't be fair
5 because Chris deserves it. Chris deserves you to be
6 fair.

7 Now one thing that I hit on a little bit but the
8 difference with replay and the criminal justice system is
9 type of evidence. Replay they say has to be
10 uncontroverted. So they give all the benefit of the
11 doubt to the umpires. If they can't see it different
12 then all the benefit goes to the umpires.

13 Well, in the criminal justice system as jury members
14 you have to give the benefit of the doubt to Chris. He
15 is innocent and the Judge mentioned that and you have to
16 give every benefit of the doubt to him. They can only --
17 the State has to prove their case beyond all reasonable
18 doubt. And you're reasonable people. If you have a
19 doubt, if you hesitate to act then they haven't met their
20 burden. And I'm confident that when you hear that -- all
21 the evidence you will find Chris not guilty.

22 The last biggest difference from this case and
23 replay is replay you get a video. You get to see what
24 happened. Here no one is going to take that stand and
25 say that Chris committed the skull fracture. No one is

1 going to say that Chris committed the leg injury. There
2 are two people and the medical evidence is going to say
3 that the skull fracture, the bruises are within 72 hours.
4 Within 72 hours of occurring those injuries appear. You
5 will hear testimony about what Chris said and what he
6 told the police, what he told DSS, what he told the
7 medical personnel MUSC. And you will see and I intend to
8 show that it's plausible some of the injuries from the
9 tub incident -- and I'm confident I will be able to show
10 you that.

11 The unlawful conduct that is going to the leg injury
12 and the immunizations. No one is going to say like I
13 said before that Chris committed the leg injuries. No
14 one can say that. But what the State is alleging in this
15 piece of paper when the Judge read out everybody got
16 quiet and people made their decision quick about whether
17 they could be fair or not. And this piece of paper that
18 the Judge read out about the Unlawful Conduct Toward a
19 Child the State is alleging between December 1st, 2010
20 and September 6th of 2011 that's when she was taken to
21 the hospital September 6th of 2011.

22 Well, you're going to hear evidence that from July
23 of 2010 to April of 2011 Chris Berke served our United
24 States Army in Afghanistan. He was not even in the
25 country from December 10th to April 19th, 2011. You're

1 also going to then hear more history of the family and I
2 ask you to really pay attention to that; that's
3 important, what happened to the family from the time that
4 he got back till they come to South Carolina and I intend
5 to show you that evidence.

6 I intend to present to you what occurred and then
7 when you take all that into consideration and you hear
8 what was said, what happened the day before and who said
9 it, who tries to make -- who tries to say things I'm
10 confident that when you hear all the evidence you will
11 find Chris not guilty of both charges. Thank you.

12 THE COURT: The State may proceed.

13 MS. TAYLOR: Thank you, Your Honor. The State
14 calls Doctor William Jacobsen.

15 [Whereupon, Doctor Jacobsen comes forward]

16 [Whereupon, the witness is duly sworn by the Clerk
17 of Court]

18 CLERK OF COURT: Please be seated and state your
19 full name and spell your last name for the record.

20 THE WITNESS: Sure. William Jacobsen, last name is
21 J-A-C-O-B-S-E-N.

22 THE COURT: You may proceed.

23 MS. TAYLOR: Thank you.

24 - - -

25 - - -

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 WILLIAM JACOBSEN,
2 Having been first duly sworn,
3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. TAYLOR:

6 Q. Doctor Jacobsen, where do you work?

7 A. The Medical University of South Carolina.

8 Q. And how long have you worked there?

9 A. Going on two and half years now.

10 Q. What department do you work in?

11 A. I work in the emergency department.

12 Q. And what do you do in the emergency department?

13 A. I'm an emergency medicine physician responsible for
14 seeing patients and coming up with therapy plans either
15 admitting them to the hospital or sending them home.

16 Q. Can you tell the jury briefly about your educational
17 background, please?

18 A. Sure. I went to the University of Georgia for
19 undergrad. I did my medical school at the Medical
20 College of Georgia in Augusta, Georgia and then I started
21 my residency here in Charleston at the Medical University
22 of South Carolina in July of 2011.

23 Q. And as a medical resident what does that mean?

24 A. Essentially -- you have your doctor degree but
25 you're still being trained in your specific field so you

1 have an attending physician who is also present any time
2 you are working.

3 And basically you see the patients and come up with
4 plans and then are overseen an attending physician that
5 kind of agrees or makes recommendations for you. It's a
6 learning kind of an education type position.

7 Q. Were you working in that capacity in September of
8 2011?

9 A. I was.

10 Q. And what department were you working in then?

11 A. I was in the pediatric emergency department.

12 Q. Do you remember encountering a patient named Minor
13 Berke on September 6th?

14 A. I do.

15 Q. And can you tell me what was the first interaction
16 that you had with Minor

17 A. Sure. She was brought in by EMS from a
18 pediatrician's office. And the way that it works is we
19 -- when patients come in by ambulance that shows a higher
20 level of service so they are brought right back to a
21 room.

22 So my job as the resident physician is to go into
23 the room and get a history from whoever is in the room;
24 be that an EMS ambulance provider or the patient if they
25 can actually give a history and then start doing my

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 physical exam and coming up with a plan for what I want
2 to do.

3 Q. And who was with Minor when she was brought to the
4 hospital?

5 A. Minor was just with the ambulance providers that
6 transported her from the pediatrician's office.

7 Q. When you first interacted with Minor what was your
8 initial course of treatment?

9 A. I just got history from the providers that were
10 there and then I started just doing my general physical
11 exam. She was too young to give me any type of history so
12 I couldn't ask her any specific questions.

13 Q. Is there anything that you initially noticed based
14 on that initial physical exam?

15 A. Sure. She had significant amount of bruises and
16 that was the most impressive part of the physical exam
17 that I...

18 MS. TAYLOR: Permission to approach, Your Honor?

19 THE COURT: You may.

20 Q. [Ms. Taylor] Doctor Jacobsen, I'm going to show you
21 what has been marked as State's Exhibits 1 and 12 for
22 identification.

23 [Whereupon, the witness is shown photographs]

24 Q. Can you tell me do you recognize those pictures?

25 A. I do.

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 Q. And what are those pictures of?

2 A. These are pictures of Minor Berke. This is the
3 patient that I saw on the day that we're talking about.
4 Most significantly are the scalp hematomas that are
5 present on the left side of her head involving her eye.

6 Q. And that's how she appeared on September 6th?

7 A. Yes. These are consistent with how I saw her.

8 MS. TAYLOR: Your Honor, at this time we would ask
9 to move State's 1 and 12 into evidence.

10 THE COURT: Any objection?

11 MR. SHELTON: Objection 403.

12 THE COURT: I need to see what you are referring
13 to.

14 MS. TAYLOR: Yes, ma'am.

15 [Whereupon, Ms. Taylor provides photographs to the
16 court]

17 THE COURT: The objection is overruled. Marked and
18 admitted 1 and 12.

19 [Whereupon, State's exhibit numbers 1 and 12 are
20 entered into evidence by the court]

21 MS. TAYLOR: Thank you, Your Honor. Permission to
22 publish to the jury?

23 THE COURT: You may. They establish an element of
24 the offense.

25 [Whereupon, photographs are projected for the jury]

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 Q. [Ms. Taylor] Doctor Jacobsen if you could just turn
2 around in your seat for me. Can you describe what we are
3 seeing in this picture?

4 A. Sure. So that's considered a scalp hematoma. It's
5 a collection of blood outside the cranium but under all
6 that skin. It's on the left side extending into and
7 involves her left orbit.

8 Q. And could you describe this for me please?

9 A. Sure. This is another image of the same as before.
10 It's a significant size of the left side called a
11 temporoparietal scalp hematoma.

12 Q. And what does that mean exactly?

13 A. Those are just parts of the skull. It's like I said
14 before it's bleeding that is -- it's basically a bruise
15 is how I would describe it outside the actual skull but
16 underlying the skin.

17 Q. Okay. Thank you. Doctor Jacobsen other than an
18 initial physical exam did you run any other tests on Minor
19 that day?

20 A. We did. I believe there were labs that were drawn
21 and normally if there is a concern for any type of abuse
22 they will do what is called a skeletal survey. They will
23 also image areas that are concerning for injuries.

24 So for her she had a CT of her head and she also had
25 the skeletal survey that we talked about on top of the

1 labs and some other things.

2 Q. Let's start with the skeletal survey. When that
3 skeletal survey was done was anything diagnosed at that
4 point?

5 A. From what I understand and the reports that I
6 reviewed after she -- there was evidence of some prior
7 healed fractures. I think there was a left arm fracture
8 that was repaired or that was healing. And then a right
9 tibial healing fracture.

10 Q. And the tibia is where?

11 A. A leg bone; a lower leg bone.

12 Q. You also said that she had a CT scan.

13 A. She did.

14 Q. Were there any diagnoses from the CT scan?

15 A. Sure. The scalp hematomas that we talked about, the
16 left side temporoparietal scalp hematoma, there was a
17 small frontal subdural hematoma as well as a right sided
18 scalp hematoma, and underlying the hematoma on the right
19 was two parietal skull fractures.

20 Q. Let's talk about the skull fractures. Were they --
21 what area of the head were they on?

22 A. They were right beside the right parietal is the
23 specific bone. They were not displaced -- they were non-
24 displaced fractures.

25 Q. Is that the front or the back or the side of the

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 head?

2 A. The side essentially.

3 Q. Okay. And then you said that there were subdural
4 hematomas?

5 A. There is a frontal subdural hematoma and as opposed
6 to the scalp hematomas that are outside the cranium a
7 subdural hematoma is actually intracranial in between the
8 brain and the cranium.

9 Q. After you got all of these tests back on Minor was
10 she admitted to the hospital or released?

11 A. She was admitted to the hospital. She was admitted
12 to the pediatric ICU.

13 Q. At any point during your examination of Minor or
14 running these tests did you encounter the defendant?

15 A. I did.

16 Q. Did you have any conversations with him?

17 A. I spoke to him briefly.

18 Q. What was the purpose of your conversation with him?

19 A. So normally we like to talk to the family members
20 just to get an idea of what occurred at home or any type
21 of incident that could have happened; any type of trauma
22 or any type of history that can assist us in the
23 patient's presentation and then also just to get more
24 medical history from the parents as well.

25 Q. What, if anything, did the defendant tell you about

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 what had happened to Minor

2 A. The story that he told me was that he had been
3 interacting with her, he was giving her a bath and that
4 she had struck her head on the faucet of the tub. He
5 said that she didn't lose consciousness but that she kind
6 of fell backwards and he tried to catch her and was able
7 to do so before she hit any other part of the tub.

8 Q. What area of her head did he say hit the faucet?

9 A. I believe he said the left front of her head.

10 Q. And did he say that any other part of her head hit
11 the bathtub?

12 A. Not that I can recall.

13 Q. Based on your training and experience in emergency
14 medicine was that story consistent with the injuries you
15 saw on Minor

16 A. I would ---

17 MR. SHELTON: --- objection, Your Honor.

18 THE COURT: Basis?

19 MR. SHELTON: Calls for an opinion. He's not an
20 expert.

21 THE COURT: It's his rational opinion. He was the
22 treating physician. Overruled. You may proceed.

23 MS. TAYLOR: Thank you, Your Honor.

24 THE COURT: You're welcome.

25 A. I would say the injuries were not consistent with

(WILLIAM JACOBSEN - DIRECT BY MS. TAYLOR)

1 the mechanism of how it was described.

2 Q. [Ms. Taylor] Other than telling you about how he
3 says Minor got injured did the defendant offer any other
4 information to you?

5 A. Yes, he did.

6 Q. And what was that?

7 A. He had mentioned to me that he had been serving in
8 the military and had recently returned home and felt that
9 he had never warmed up to Minor specifically.

10 Q. Did he tell you anything else about Minor medical
11 history?

12 A. He did. We generally ask pediatric patients, their
13 parents, who their primary care doctor is, if they are up
14 to date on their immunizations.

15 From what I documented and what I can recall they
16 were working on getting a new primary doctor for her and
17 that she had not received her yearly immunizations.

18 Q. And were those immunizations overdue?

19 A. I believe so, yes.

20 Q. Thank you. I don't have any further questions.

21 THE COURT: You may proceed.

22 - - -

23 - - -

24 - - -

25 - - -

(WILLIAM JACOBSEN - CROSS BY MR. SHELTON)

1 CROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. Doctor Jacobsen, did you create a report?

4 A. I did.

5 Q. Was there swelling on the left side right above her
6 eye?

7 A. The left side?

8 Q. Yes?

9 A. There was some swelling.

10 Q. So there was some swelling and then some of the
11 blood I guess some of the bruise went down into her eye,
12 the orbit?

13 A. The left eye.

14 Q. Okay, the left eye.

15 A. Right.

16 Q. And I think you said -- you mentioned that you
17 looked at some of the skeletal survey reports and you
18 mentioned left ulna. That's the arm?

19 A. It's a bone in the forearm.

20 Q. Okay. Have you looked at any reports that -- there
21 is usually a follow-up survey correct?

22 A. Sure.

23 Q. Did you look at that report?

24 A. I've not seen that report.

25 Q. Okay. Bruises; you really can't date bruises though

(WILLIAM JACOBSEN - CROSS BY MR. SHELTON)

1 correct?

2 A. That's true.

3 Q. And did you have a chance to talk with Sandra Berke?

4 A. I did not.

5 Q. Did you see Sandra Berke?

6 A. I did not.

7 Q. So when you came -- do you know about what time you
8 came into contact with Chris Berke?

9 A. As far as time of day?

10 Q. Yes?

11 A. I can't recall.

12 Q. You've got the history as far as him being in the
13 military. Did you get a history of where they had come
14 from or when they had moved to South Carolina?

15 A. I did not.

16 Q. Were you there when Minor was discharged from the
17 hospital?

18 A. I wasn't. When we're in the emergency department we
19 generally see them when they come in and outside of that
20 interaction it's very rarely that we interact with them
21 again once they're admitted to the hospital.

22 It's a different floor in the hospital and an
23 entirely different group of providers so I did not see
24 her after that.

25 Q. Did you have a chance -- the subdural hematomas were

(WILLIAM JACOBSEN - CROSS BY MR. SHELTON)

1 very small?

2 A. From the report that's what it was documented as a
3 small subdural hematoma.

4 Q. Okay. And was there a course of treatment as far
5 as surgery or anything that needed to be done?

6 A. It's a little outside my scope. I'm an emergency
7 physician so I don't generally know the recommendations
8 for surgery based on imaging.

9 Q. Okay. Fair enough. No further questions.

10 THE COURT: Any redirect?

11 MS. TAYLOR: No, Your Honor.

12 THE COURT: Any objection to the witness being
13 excused from the State?

14 MS. TAYLOR: None from the State, Your Honor.

15 THE COURT: From the defense?

16 MR. SHELTON: No objection.

17 THE COURT: Doctor, you are excused.

18 THE WITNESS: Thank you.

19 [Whereupon, the witness is excused and exits the
20 witness stand]

21 THE COURT: Call your next witness.

22 MS. WILLIAMS: The State calls Jessica Credeur
23 Beattie.

24 [Whereupon, Ms. Beattie comes forward]

25 [Whereupon, the witness is duly sworn by the Clerk]

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 of Court]

2 CLERK OF COURT: Please be seated. State your full
3 name and spell your last name for the record.

4 THE WITNESS: My name is Jessica Credeur Beattie,
5 B-E-A-T-T-I-E.

6 THE COURT: You may proceed.

7 MS. WILLIAMS: Thank you, Your Honor.

8 THE COURT: You're welcome.

9 JESSICA BEATTIE,

10 Having been first duly sworn,

11 Was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MS. WILLIAMS:

14 Q. Ms. Beattie, where do you work?

15 A. I work at the Medical University of South Carolina
16 Children's Hospital.

17 Q. And what department do you work in now?

18 A. I currently work in the Pediatric Endocrinology
19 clinic.

20 Q. And how long have you worked there?

21 A. I've worked with the Children's Hospital since June
22 of -- I'm sorry, July of 2011.

23 Q. And what is your position there?

24 A. I'm a social worker.

25 Q. And what is your educational background?

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 A. I have a Bachelor's degree in Spanish International
2 Trade and a Master's degree in social work.

3 Q. And what other kinds of occupational education do
4 you have to obtain in order to keep -- is that a licensed
5 position?

6 A. It is.

7 Q. What kinds of education do you have to engage in
8 during the year to keep that license current?

9 A. I am a licensed master's social worker so I was
10 required to take Boards and then to keep my license
11 current I have to do 20 hours of continuing education
12 each year.

13 Q. Now what department were you working in at MUSC in
14 September of 2011?

15 A. The inpatient social work department.

16 Q. And what exactly did you do? Like what were your
17 daily activities?

18 A. I covered multiple pediatric specialties. Typically
19 I would be consulted to see families for a variety of
20 reasons whether its difficulty obtaining medications or
21 recent stressors. One of the teams that I covered was
22 the VIP team, which is the violence intervention and
23 prevention team.

24 Q. Okay. And did you regularly speak to parents of
25 children when you dealt with the VIP team?

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 A. I did.

2 Q. And what was the purpose of that?

3 A. I was a member of the interdisciplinary team and our
4 role was to gather initial data and pass it along to the
5 appropriate agencies which in most cases are the
6 Department of Social Services and law enforcement.

7 Q. And when you collected the data are there other
8 people in the hospital that you shared that with?

9 A. There are.

10 Q. Who would those be?

11 A. I work closely with the physicians on the VIP team.

12 Q. Did you encounter or did you work on a case
13 involving victim Minor Berke on September 6th of 2011?

14 A. I did.

15 Q. And what physician did you consult about that case?

16 A. I was consulted due to concern for non-accidental
17 trauma.

18 Q. And was there a particular doctor or doctors that
19 you remember talking to about that case?

20 A. I did. I coordinated with Doctor Amaya.

21 Q. And as you were working that case did you encounter
22 Minor Berke?

23 A. I did.

24 Q. And did you also encounter her father Christopher
25 Berke?

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 A. I did.

2 Q. Where was that?

3 A. It was in the step down Pediatric Intensive Care

4 unit.

5 Q. Do you remember about what time it was?

6 A. Sometime in the late afternoon.

7 Q. Can you describe that room that you were in with

8 Minor and her Father?

9 A. It was a smaller room on the unit. Minor had a crib

10 that was to the left on the wall. Then there was also a

11 couch that is a sleeper sofa. So Minor was in the crib to

12 the left of us while we spoke.

13 Q. And as you were speaking to Mr. Berke how far away

14 would you say Minor was?

15 A. She was a few feet from us. The room was pretty

16 small.

17 Q. And what was Mr. Berke's demeanor like?

18 A. He seemed nervous. He was pacing the room while we

19 spoke, at times seemed to be speaking louder as the

20 conversation went on.

21 Q. And did you gather historical information about how

22 Minor got her injuries and what happened that landed her

23 in the hospital?

24 A. I did.

25 Q. Okay. Tell us what -- and did you gather that from

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 Mr. Berke?

2 A. I did.

3 Q. What did he tell you?

4 A. So I started my assessment as I do with most
5 consults for non-accidental trauma and just ask parents
6 tell me a little bit about what brought you here, open
7 ended non-leading questions; tell me about your child's
8 injuries, what brought you to the hospital. He described
9 that he was bathing Minor the night before on the 5th and
10 that Minor typically does not like to take a bath.

11 He said this was his first time bathing her and he
12 was holding her underneath her arm pits in the tub, tried
13 to lift her and she got upset and he said that she
14 flailed forward and hit her head on the faucet, which he
15 said did not have a cover.

16 Q. And did he tell you anything else about what was
17 going on between him and Minor during that period of time?

18 A. He did make a comment that he had not been around
19 for a lot of Minor life. He had been deployed for a
20 good portion of it. And then he also volunteered that he
21 did not feel bonded with Minor

22 Q. Now as you were speaking with him what was Minor
23 doing?

24 A. Minor had toys in her crib. We have a child life
25 department that brings toys to the toddlers in the

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 hospital. So she played with her toys for part of the
2 visit and then she did become upset and start to cry.

3 Q. How did he react when she started to cry?

4 MR. GROEBER: Objection; relevance.

5 THE COURT: Please approach.

6 [Whereupon, an off the record bench conference is
7 held]

8 THE COURT: The objection is overruled. Relevant
9 as to the element of the offenses and it is based on the
10 witness's rational perception and she was present. You
11 may proceed. Ma'am, you may answer the question.

12 A. Could you repeat the question?

13 Q. [Ms. Williams] Yes. When Minor started crying how
14 did Mr. Berke react?

15 A. He seemed uncomfortable. He didn't seem to know how
16 to respond or comfort her. And he actually increased the
17 volume with which he was talking and kind of clenched his
18 fists at his side.

19 Q. So, can you just show us what he was doing?

20 A. Just tightened up [indicates].

21 Q. And when she cried did he ever go comfort her?

22 A. Not that I recall. He did not pick her up or go to
23 the crib.

24 Q. And when you say he increased the volume of his
25 voice that when she is crying he is talking louder?

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 A. Right.

2 MS. WILLIAMS: Court's indulgence for just a
3 moment.

4 [Whereupon, Ms. Williams and Ms. Taylor confer]

5 Q. [Ms. Williams] In addition to your observations of
6 Mr. Berke in the room did you also ask him questions,
7 historical questions about where -- who else was in the
8 home during this when the child was injured?

9 A. I did.

10 Q. Okay. And who did he say was in the home?

11 A. His wife. And then they had two children Sibling1
12 [phonetic] and Sibling2 [phonetic].

13 Q. And do you remember if he told you how old those
14 children were?

15 A. I believe Sibling2 was five at the time and Sibling1 two
16 and a half.

17 Q. And did he say anything about any other adult in the
18 house?

19 A. Other than his wife, no.

20 Q. And did he tell you when he was giving the child a
21 bath where the wife was?

22 A. She was in another bathroom assisting one of the
23 children with drying their hair.

24 Q. And after the child was injured in the bathtub did
25 he tell you what he did?

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 A. He said that he took her out of the tub. He did
2 notify his wife that Minor had hit her head and then he
3 gave her I believe Triaminic and some apple juice to see
4 if she would keep those down.

5 Q. And did he say what he did if anything over the
6 course of the next evening?

7 A. He put her in her crib to go to sleep and said that
8 he did check on her every hour throughout the night and
9 that he thinks he fell asleep about 3 o'clock that
10 morning.

11 Q. And did he say anything about leaving the home at
12 any time from the time she was injured until she finally
13 went to the hospital?

14 A. He did leave to take I believe Sibling2 to
15 kindergarten.

16 Q. And is that the only time he says he left?

17 A. Yes.

18 Q. And when does he say he left?

19 A. I don't recall what time he left but I noted that he
20 got home around 7:30.

21 Q. And did he say where his wife was when he returned
22 home at 7:30?

23 A. She was still sleeping.

24 Q. And does he say where Minor was when he returned?

25 A. She was still in her crib.

(JESSICA BEATTIE - DIRECT BY MS. WILLIAMS)

1 Q. Does he indicate whether she was asleep or not?

2 A. He did say she was still sleeping.

3 Q. And did he tell you where the school was that he
4 took Sibling² when he returned at 7:30 a.m.?

5 A. No, not that I can recall.

6 Q. Would it refresh your memory to look at your report?

7 A. I have it in front of me.

8 [Whereupon, the witness reviews documents]

9 A. Oh, I see it; Devon Forest.

10 Q. Okay. Thank you. No further questions.

11 THE COURT: Any questions for the witness?

12 MR. GROEBER: Yes, Your Honor.

13 THE COURT: You may proceed.
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(JESSICA BEATTIE - CROSS BY MR. GROEBER)

1 CROSS-EXAMINATION

2 BY MR. GROEBER:

3 Q. Ms. Beattie, correct?

4 A. Correct.

5 Q. Just a few questions. You said that you believe
6 based on your watching Mr. Berke that he was nervous I
7 think you testified.

8 A. I did.

9 Q. Okay. And it was clear at that time that Minor had
10 significant injuries was it not?

11 A. It was.

12 Q. And he was at the hospital with her?

13 A. He was.

14 Q. And do you know about what time he got to the
15 hospital?

16 A. I don't.

17 Q. Do you know what time he left?

18 A. He left sometime in the evening on the 6th because
19 his wife needed their family vehicle.

20 Q. So they only had one car?

21 A. Yes.

22 Q. And you met with him -- about how long do you think
23 your interview with him lasted?

24 A. Maybe an hour.

25 Q. Okay. And you were in that room for an hour right?

(JESSICA BEATTIE - CROSS BY MR. GROEBER)

1 So you asked him a lot of questions it's fair to say?

2 A. I did.

3 Q. And he answered all of your questions right?

4 A. He did.

5 Q. He didn't try to avoid any of the questions that you
6 asked him did he?

7 A. Some questions he defaulted to his wife and said
8 that he had not lived with Minor and couldn't provide all
9 of his history, which was understandable given his
10 deployment.

11 Q. Okay. So you did not see his involvement with Minor
12 at the hospital before you met him correct?

13 A. I'm not sure I understand the question.

14 Q. Badly worded; sorry. You saw him for an hour in
15 that room, right? You didn't see him before that.

16 A. No, that was my first time meeting Mr. Berke.

17 Q. And then you didn't see him at the hospital after
18 did you?

19 A. I did not.

20 Q. Okay. So you don't know how long he was by Minor
21 side at the hospital before you arrived correct?

22 A. I don't.

23 Q. And you don't know how long he was by Minor side
24 after you left?

25 A. I can't recall that today.

(JESSICA BEATTIE - CROSS BY MR. GROEBER)

1 Q. Okay.

2 MR. GROEBER: Can I have one moment, Your Honor?

3 THE COURT: Uh Huh.

4 [Whereupon, Mr. Groeber and Mr. Shelton confer]

5 Q. [Mr. Groeber] In his description -- Mr. Berke that
6 is, description of what happened that morning he told you
7 that he had gone to take Sibling² to school right?

8 A. Correct.

9 Q. And then after that he came home and he realized
10 something was wrong with Minor

11 A. Yes.

12 Q. And he and his wife called the pediatrician.

13 A. They did.

14 Q. And they took Minor to the pediatrician.

15 A. They took her to I believe some type of clinic.
16 They did not have a pediatrician yet established in South
17 Carolina.

18 Q. But they took her to a doctor.

19 A. They did.

20 MR. GROEBER: No further questions, Your Honor.

21 THE COURT: Any redirect?

22 MS. WILLIAMS: No, Your Honor.

23 THE COURT: Any objection to the witness being
24 excused?

25 MS. WILLIAMS: None from the State.

(JESSICA BEATTIE - CROSS BY MR. GROEBER)

1 THE COURT: From the defense?

2 MR. SHELTON: None, Your Honor.

3 THE COURT: Ma'am, you're excused.

4 [Whereupon, the witness is excused and exits the
5 witness stand]

6 THE COURT: You may call your next witness.

7 MS. TAYLOR: Thank you, Your Honor. The State
8 calls Doctor Robert Cina -- apparently he's downstairs,
9 Your Honor.

10 MS. WILLIAMS: The State calls Deputy Arrington.

11 [Whereupon, Deputy Arrington comes forward]

12 [Whereupon, the witness is duly sworn by the Clerk
13 of Court]

14 CLERK OF COURT: Please be seated and state your
15 full name and spell your last name for the record.

16 THE WITNESS: Cory Arrington A-R-R-I-N-G-T-O-N.

17 THE COURT: You may proceed.

18 MS. WILLIAMS: Thank you, Your Honor.

19 THE COURT: You're welcome.
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(CORY ARRINGTON - DIRECT BY MS. WILLIAMS)

1 CORY ARRINGTON,
2 Having been first duly sworn,
3 Was examined and testified as follows:
4 DIRECT EXAMINATION
5 BY MS. WILLIAMS:
6 Q. Mr. Arrington -- or Deputy Arrington, where are you
7 employed?
8 A. Berkeley County Sheriff's Office.
9 Q. And how long have you been there?
10 A. Eight years.
11 Q. And what are your present duties?
12 A. A patrolman on the patrol division and answer calls
13 for service and traffic enforcement.
14 Q. And were you working in that capacity in September
15 of 2011?
16 A. Yes, ma'am.
17 Q. And did you have any involvement in the case
18 involving Minor Berke?
19 A. Yes, ma'am. I was dispatched to MUSC for suspected
20 child abuse case.
21 Q. Okay. And what date was that?
22 A. I believe September 6th, 2011.
23 Q. Okay. And where did you see the victim Minor Berke?
24 A. I saw her briefly in the children's ER at MUSC.
25 Q. I'm going to show you a picture that is marked as

(CORY ARRINGTON - DIRECT BY MS. WILLIAMS)

1 State's 1.

2 MS. WILLIAMS: May I approach, Your Honor?

3 THE COURT: You may.

4 Q. [Ms. Williams] Can you tell us if this is how Minor
5 looked the day that you saw her?

6 [Whereupon, the witness is shown photograph]

7 A. Yes, ma'am.

8 Q. If you could just turn around. When you saw her she
9 was already at the emergency room?

10 A. Yes. She was in the ER and I believe she was
11 transferred shortly after to the ICU. So I only saw her
12 very briefly.

13 Q. And were any of her parents with her at that time?

14 A. The Mother was at the hospital.

15 Q. And that's Sandra Berke?

16 A. Yes, ma'am.

17 Q. Where if anywhere did you go next involving this
18 case?

19 A. After I spoke to the Mother at the hospital and
20 talked to Detective Fenton and I believe Ms. Waring
21 [phonetic] from DSS we went out to their residence.

22 Q. And did you encounter Christopher Berke there?

23 A. Yes, ma'am.

24 Q. And who was asking him questions at that time?

25 A. Detective Fenton. He met me out there and Detective

(CORY ARRINGTON - DIRECT BY MS. WILLIAMS)

1 Fenton interviewed him.

2 Q. And were you listening to what he said?

3 A. Briefly, yes. I was only there a short time.

4 Q. What did he say about this incident?

5 A. This one he said he was giving her a bath for the
6 first time I believe he said. He was in the military and
7 this was the first time that he was able to bathe her by
8 himself.

9 So I recall he said Sandra was not feeling well so
10 he was doing the bathing. He said something about
11 underestimating her power and she wiggled and slipped
12 from his grip and hit her head on the faucet to the
13 bathtub.

14 Q. Did he say what part of her head she hit?

15 A. I believe the forehead.

16 Q. And at some point during that conversation was he
17 giving more information about injuries that didn't match
18 that?

19 A. We did question him about the skull fractures that
20 were in the back of the head and I believe he stated it
21 was from her falling backwards on the dining room table
22 off the bench.

23 Q. So in addition to the bathtub incident he then gives
24 an explanation for the fracture in the back?

25 A. Yes, ma'am.

(CORY ARRINGTON - DIRECT BY MS. WILLIAMS)

1 Q. Nothing further. Thank you.

2 THE COURT: Any questions for the witness?

3 MR. SHELTON: Yes, Your Honor.

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(CORY ARRINGTON - CROSS BY MR. SHELTON)

1 CROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. Deputy Arrington, you went -- you talked to the
4 Mother at the hospital?

5 A. Yes, sir.

6 Q. And what she told you as far as the bathtub ---
7 MS. WILLIAMS: --- objection.

8 THE COURT: Basis?

9 MS. WILLIAMS: Hearsay.

10 THE COURT: Unless you can establish it coming
11 within an exception it is hearsay.

12 [Whereupon, Mr. Shelton and Mr. Groeber confer]

13 Q. [Mr. Shelton] So you talked with the Mother at the
14 hospital and then you went to the house?

15 A. Yes, sir.

16 Q. And the home was clean?

17 A. Yes, sir.

18 Q. And so it was about what time did you go and talk
19 with Christopher?

20 A. I don't recall exactly.

21 Q. So you were there with Detective Fenton?

22 A. Yes, sir.

23 Q. And at some point in time Sandra showed up back at
24 the house?

25 A. Right before I left, yes.

(CORY ARRINGTON - CROSS BY MR. SHELTON)

1 Q. Okay. Do you recall Chris writing his statement?

2 A. I think I left right as Detective Fenton was
3 providing him statements to write.

4 Q. Okay. So right as he was starting to write the
5 statement?

6 A. Yes, sir. Detective Fenton had it under control and
7 I had to check up on some of the calls that were pending
8 in my area.

9 Q. And you don't recall about what time that was?

10 A. It was later in the evening. If I had to guess
11 maybe 11 or 12 o'clock but I'm not certain ---

12 Q. --- about 2 a.m. sound about right?

13 A. It might have been that.

14 Q. And that was the next morning?

15 A. Midnight. So it would be during my same shift.

16 Q. Okay. And the incident -- you got information that
17 the incident had -- they had taken to MUSC about 8:30 in
18 the morning or so.

19 MS. WILLIAMS: Objection to the form of the
20 question. He's stating evidence not...

21 THE COURT: I didn't hear it. Please restate the
22 question.

23 Q. [Mr. Shelton] Did Chris provide you information as
24 to when he called the police -- or called the
25 pediatrician in the morning?

(CORY ARRINGTON - CROSS BY MR. SHELTON)

1 A. I didn't speak to Chris directly. I spoke to
2 Sandra. I know they took them to a doctor that morning.
3 The doctor -- I guess their pediatrician transferred them
4 to MUSC due to the severity of the injuries.

5 Q. And so that was -- did they give you any timeframe
6 on that?

7 A. I don't recall exactly. I believe it was the
8 morning.

9 Q. Okay.

10 THE COURT: Any redirect?

11 MS. WILLIAMS: No, Your Honor.

12 THE COURT: Any objection to the witness being
13 excused?

14 MS. WILLIAMS: None from the State.

15 THE COURT: Any from the defense?

16 MR. SHELTON: No objection, Your Honor.

17 THE COURT: Sir, you are excused.

18 [Whereupon, the witness is excused and exits the
19 witness stand]

20 THE COURT: Madame Forelady and ladies and
21 gentlemen, I'm going to give you a brief restroom break.
22 During the break please do not discuss the case among
23 yourselves and please leave your notepads in your seats.
24 If you will go with the Bailiff please.

25 [Whereupon, the jury exits at 11:02 a.m.]

1 THE COURT: We'll be at ease until 11:10 and my
2 clock has 11:01.

3 MS. WILLIAMS: Thank you, Your Honor.

4 [Whereupon, court is in recess from 11:02 a.m. to
5 11:15 a.m.]

6 THE COURT: Is the State ready to proceed?

7 MS. TAYLOR: The State is ready, Your Honor.

8 THE COURT: Is the defense ready to proceed?

9 MR. SHELTON: Yes, Your Honor.

10 THE COURT: Who is the State's next witness?

11 MS. TAYLOR: Doctor Cina.

12 THE COURT: You think the jury is ready? Have they
13 had enough time? You can go ahead and bring them in.

14 [Whereupon, the jury enters at 11:16 a.m.]

15 THE COURT: The State may proceed.

16 MS. TAYLOR: Thank you, Your Honor. The State
17 calls Doctor Robert Cina.

18 [Whereupon, Doctor Cina comes forward]

19 [Whereupon, the witness is duly sworn by the Clerk
20 of Court]

21 CLERK OF COURT: Please be stated and state your
22 full name.

23 THE WITNESS: My name is Robert Cina.

24 CLERK OF COURT: Spell your last name for the
25 record.

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 THE WITNESS: C, as in Charles, I-N-A.

2 THE COURT: You may proceed.

3 MS. TAYLOR: Thank you, Your Honor.

4 - - - - -

5 ROBERT CINA,

6 Having been first duly sworn,

7 was examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MS. TAYLOR:

10 Q. Doctor Cina, where do you work?

11 A. I work at Medical University of South Carolina
12 Children's Hospital.

13 Q. And how long have you worked there?

14 A. I've been there just over -- about five and a half
15 years.

16 Q. What department at MUSC do you work in?

17 A. I am a pediatric surgeon in the department of
18 General Surgery.

19 Q. And can you tell the jury briefly about your
20 educational background.

21 A. Sure. So after four years of college I went through
22 four years of medical school. And following that I did a
23 general surgery residency program, which for me was about
24 eight years.

25 And then subsequent to that I did two additional

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 years specializing in pediatric surgery, which is a
2 specialty that treats both abdominal and thoracic
3 conditions in children as well as pediatric trauma.

4 Q. And in your field do you have any certifications or
5 licenses?

6 A. Yes. So I am board certified in both adult general
7 surgery and in pediatric surgery.

8 Q. And do you have any specific classes that you take
9 to keep up with your license?

10 A. Yes. So we not only to maintain our South Carolina
11 licenses but also to maintain accreditation through the
12 American Board of Surgery we do ongoing maintenance
13 certification, which consists of continuing medical
14 education.

15 Q. Thank you.

16 MS. TAYLOR: Your Honor, at this time we would ask
17 to qualify this witness as an expert in pediatric
18 surgery.

19 THE COURT: Any questions or objection?

20 MR. SHELTON: No.

21 THE COURT: So admitted without objection.

22 MS. TAYLOR: Thank you, Your Honor.

23 THE COURT: You're welcome.

24 Q. [Ms. Taylor] In the pediatric department that you
25 work in what are your general day to day duties?

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 A. So I take care of children ranging in age from a
2 newborn who is premature at 26 weeks to 18 year old
3 adults.

4 And predominately we care for congenital problems in
5 babies as well as traumatic injury in children which is
6 one of the number one causes of death in children less
7 than 18.

8 Q. And were you working in that capacity on September
9 6th of 2011?

10 A. Yes.

11 Q. Do you remember treating a patient named Minor Berke?

12 A. Yes.

13 Q. And can you tell the jury how Minor came to be in
14 your care?

15 A. So she was I believe -- through the pediatric trauma
16 service we see patients in a number of different ways. I
17 believe that she came into the emergency room and the
18 pediatric emergency room doctor after assessing her asked
19 us to become involved in her care because they were
20 concerned about multiple injuries.

21 And given that fact since some children have
22 injuries that span more than one organ system so it might
23 be orthopedic, might be -- more than one organ might be
24 affected in that case we coordinate the care of those
25 children when they are in our hospital.

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 Q. Do you remember when you initially saw Minor how she
2 presented?

3 A. Yes. She presented I believe her Father brought her
4 to the emergency room. And when I met her he told me
5 that she had fallen in the tub the night before and
6 banged her head on the faucet in the tub and then
7 developed some swelling several hours later on.

8 She slept through the night and then the swelling
9 and bruising became progressively worse and that led to
10 her coming to the emergency room.

11 Q. Do you remember where the defendant told you she hit
12 her head specifically?

13 A. Not specifically, no.

14 Q. When you became involved in Minor care had there
15 been any tests run on her?

16 A. Yes. They had already -- the emergency room doctors
17 already had done a CT scan of her head to look at either
18 injury to the brain or to the bone surrounding the brain
19 and skull.

20 And they had also I believe done a skeletal survey
21 which looks at basically x-rays or pictures of all the
22 bones in a child's body to look for other fractures that
23 may not be clinically evident at that time.

24 Q. Let's start with the skeletal survey. Were the
25 results of that remarkable in any way?

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 A. So there were two different long bone fractures; so
2 one in her arm and one in her leg that were in various
3 stages of healing.

4 And what that tells us is that obviously if you
5 injure something at the same time everything that is
6 healing is going to be at the same stage of healing.

7 If you have two different fractures at different
8 stages of healing that would mean that there were two
9 different injuries that occurred as opposed to just one
10 event.

11 Q. And the CT scan of her head was that remarkable?

12 A. That was. In terms of the skeletal survey at that
13 point it appeared that those were more distant than the
14 night before as well. So that was what the skeletal
15 survey suggested.

16 And the CT scan of the head showed bleeding around
17 the brain what is called a subdural hematoma as well as
18 multiple skull fractures.

19 Q. And where were those skull fractures located?

20 A. I'll have to refer to my note if that's okay.

21 Q. That's fine.

22 [Whereupon, the witness reviews documents]

23 A. This is my progress note, which I believe is already
24 -- you have a copy of. So she had a right side parietal
25 skull fracture; two of them.

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 Q. And can you show the jury on your head where that
2 would have ---

3 A. --- right around here somewhere [indicates].

4 THE COURT REPORTER: Can you repeat it again,
5 please?

6 A. Yes. She had two parietal skull fractures; and
7 parietal P-A-R-I-E-A-T-A-L.

8 Q. And while you were treating Minor did you call in any
9 other doctors to consult with her treatment?

10 A. Yes. So what I knew at that point was that she had
11 enough injury that she had bleeding around her brain,
12 which is called a subdural hematoma.

13 Those are very concerning when we see those because
14 when you injure your arm or you injure your leg and
15 you've got swelling you bruise. And the same thing can
16 happen in the brain.

17 The difference between the brain and your leg is
18 that your brain is encased in this hard bone, the skull,
19 and so if you have swelling, there is nowhere for that
20 pressure to be relieved from.

21 So when you have either swelling of the brain or
22 bleeding near the brain and that enlarges it increases
23 the pressure on the brain tissue and can cause injury and
24 death to those cells. And so in some cases that requires
25 a drainage procedure to relieve that pressure. And so

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 the pediatric neurosurgery team was called immediately to
2 have them assess that and whether that was necessary to
3 be done.

4 Q. And was that necessary ---

5 A. --- no, it was not. In most cases it is not
6 necessary but in some cases it is.

7 Q. So in the cases where the bleeding does not resolve
8 itself what are the possible outcomes?

9 A. So if the bleeding does not resolve or the brain
10 continues to swell you can have a non-ending cascade
11 where you get more swelling and less blood can get to the
12 brain, less blood can drain from the brain and you get
13 more swelling and ultimately the brain gets squeezed and
14 the brain can die.

15 Q. So in Minor case the injuries that she received
16 that you saw on those scans is it possible that that
17 could have led to her death?

18 A. Possible.

19 Q. Were any other doctors consulted in Minor care?

20 A. Yes. I called neurosurgery; we called orthopedic
21 surgeons, the bone doctors, because of the fractures that
22 we were concerned about in her arm and her leg. Every
23 patient that comes into our trauma service has a social
24 worker consult just because we know that a lot of
25 patients whether it's accidental or not someone with

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 trauma is at risk -- social situations so we always want
2 to make sure their care is as comprehensive as possible.

3 And then given her injuries I also asked the
4 ophthalmology service to look at her eyes as well.

5 Q. You said that you spoke with the defendant correct?

6 A. Yes.

7 Q. And the story that he gave you about how Minor
8 injured her head was that consistent with the injuries
9 you saw?

10 A. So he had told me that she had fallen in the bathtub
11 the night before and suffered these injuries.

12 The amount of force necessary to not only cause the
13 skull fractures but also to rip the blood vessels around
14 the brain that caused that subdural hematoma is an order
15 of magnitude more than what you would see at a fall from
16 a standing position of I think she was 15 months -- 13
17 months old at the time.

18 So that made me very, very concerned that the injury
19 pattern did not describe this -- it was not consistent
20 with the mechanism of the story of how he said it
21 happened.

22 Q. Is there anything about specifically the skull
23 fracture, the force necessary for the skull fracture
24 explain why there is more force necessary for this skull
25 fracture?

(ROBERT CINA - DIRECT BY MS. TAYLOR)

1 A. So the skull is essentially a very thick hard bone.
2 It's a little bit softer in children than adults and all
3 the sutures haven't quite closed yet as well.

4 So in general children have a -- the force required
5 to break a bone in a child is much more than the force
6 that would be necessary to break a bone in an adult.

7 And just -- I've taken care of well over 1,000
8 trauma patients in my life; many of them kids, and that
9 -- a fall from that height in my mind there was no way
10 that that could cause sufficient amount of force to cause
11 those fractures.

12 Or even more so the force was such that it not only
13 broke the outer protective covering, which is the skull
14 but also ripped the blood vessels underneath that caused
15 that bruising.

16 Q. Thank you, Doctor Cina.

17 MS. TAYLOR: No further question, Your Honor.

18 THE COURT: Any questions for the witness?

19 MR. SHELTON: Yes, Your Honor.
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(ROBERT CINA - CROSS BY MR. SHELTON)

1 CROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. Doctor Cina, there is no way to date a subdural

4 hematoma?

5 A. There is -- in terms of?

6 Q. When it happened. It was acute.

7 A. It was acute.

8 Q. And acute in a medical term is?

9 A. It was probably within 48 hours, 72 hours; somewhere

10 in that timeframe. I can't tell you it was -- it was

11 probably not more than two or three days before that but

12 I can't tell you with certainty it happened twelve hours

13 before the injury. It's hard to say.

14 Q. So you couldn't say how long within three days?

15 A. Correct. Honestly, it's probably more like two

16 days. Two days would probably be a better time estimate

17 for dating it.

18 But just like when you bruise your arm and you get a

19 bruise it takes a while for it to go away. You know if

20 you look at your arm a week later you know that you did

21 it -- approximately when you did it but you can't give a

22 specific time as to it happened at 11:30 in the morning

23 on this day.

24 Q. Right. So in that same way you can't date a bruise.

25 A. Correct. Unless you look at a -- so bruises go

(ROBERT CINA - CROSS BY MR. SHELTON)

1 through a very set injury kind of resolution pattern. So
2 bruises, again obviously you can't date them to six hours
3 but you could probably do it with a more timeframe than
4 your hematoma around the brain.

5 Q. Okay. And the skull fracture; you mentioned there
6 were two skull fractures. That doesn't necessarily mean
7 that there were two incidents?

8 A. No, it could be the same force that caused one of
9 the skull fractures also caused the other.

10 Q. Okay. And there is no way to date time the skull
11 fracture.

12 A. There is a way to date time. You'd have to discuss
13 that with a radiologist because I can't tell you
14 specifically what that time period is.

15 But they can date those. Again, not to five minutes
16 versus five hours ago but they can look at various stages
17 of healing and discern that.

18 Q. And did you consult with any radiologists about
19 timeframe on this?

20 A. Yes. I don't recall what their specific analysis of
21 that was but I know that in addition to the services that
22 I did consult I also consulted the forensic pediatric
23 service and that's Doctor Amaya and her group.

24 And they can specify with expert knowledge of being
25 able to determine the age of an injury. So I would refer

(ROBERT CINA - CROSS BY MR. SHELTON)

1 -- I think they are going to talk to you later on today
2 and I think they will have that specific information that
3 you are looking for but I cannot answer that.

4 Q. Okay, fair enough. You did consult to the
5 ophthalmology?

6 A. Uh huh.

7 Q. And was there anything alarming that came from ---

8 A. --- to my knowledge that was normal.

9 Q. That was normal?

10 A. Yes. The reason why we do that is we look for
11 retinol hemorrhages specifically in cases where --
12 children can be injured in a number of different ways.

13 The reason why we look for it in patients who don't
14 have a history that is congruent or that matches the
15 story as patients can also have shaken baby syndrome
16 which that manifests as retinol hemorrhages and that's
17 the reason why we check that.

18 Q. And there was no retinol hemorrhages?

19 A. Not to my knowledge.

20 Q. Okay. You also consulted with neurosurgery?

21 A. Yes.

22 Q. And are you familiar with their report?

23 A. Yes. I read it at the time. You have it in front
24 of you so I don't remember exactly what they said at this
25 moment but...

1 Q. That there were no neurological deficits.

2 A. Correct.

3 Q. Okay.

4 A. And that's so -- that's a broad term though so even
5 though you don't see neurological deficit -- and when
6 they say deficit they mean hard signs of neurological
7 injury; so paralysis, abnormal reflexes. It doesn't mean
8 there wasn't any neurological damage it just means that
9 on their exam they cannot see that.

10 We know that in children who are even in minor
11 injuries traffic accidents for instance they can have
12 lingering effects of that traumatic brain injury for
13 years to come.

14 So even though they did not see a neurologic deficit
15 at that time which would force them to evacuate the
16 subdural hematoma it does not mean there was not injury
17 to the brain.

18 Q. And that was going to be my follow up question.

19 There was no surgery or ---

20 A. --- correct ---

21 Q. --- or anything that was needed.

22 A. A lot of times those injuries will slowly heal on
23 their own but that does not mean that the neurologic --
24 the injury to the brain cells -- once the brain cells are
25 dead they are dead; they don't come back. So you may not

(ROBERT CINA - CROSS BY MR. SHELTON)

1 need surgery but to say that the brain heals completely
2 is -- I can't make that argument.

3 Q. You can't make that argument?

4 A. Correct.

5 Q. But your course of action I guess to help treat Minor
6 while she was in the hospital was providing her with
7 Tylenol and watching her.

8 A. Just to watch her to make sure that her injuries did
9 not progress. And a lot of times in most cases of brain
10 injury that don't require -- almost all cases that don't
11 require surgery the best course is to support the child
12 and allow their body to deal itself.

13 Q. And that's -- she was discharged two days later.

14 A. Yes.

15 Q. Okay. The fractures that were noted on I guess the
16 arm and the leg did you -- did you have a chance to
17 review Doctor Hills report?

18 A. I did at the time but I haven't seen it in the last
19 two years.

20 Q. She's a radiologist ---

21 A. --- no, I know but I did not review -- I reviewed it
22 when I was caring for Minor I have not reviewed it in
23 preparation today ---

24 Q. --- she is a radiologist correct?

25 A. Yes. She is the head of pediatric radiology at

1 MUSC.

2 Q. Are you aware that she said says there was no arm
3 fracture?

4 A. I don't recall seeing that.

5 Q. Okay. No further questions.

6 THE COURT: Any redirect?

7 MS. TAYLOR: Briefly, Your Honor.

8 THE COURT: You may proceed.

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(ROBERT CINA - REDIRECT BY MS. TAYLOR)

1 REDIRECT EXAMINATION

2 BY MS. TAYLOR:

3 Q. Doctor Cina, you were talking to Mr. Shelton about
4 the course of treatment for Minor What is the purpose of
5 keeping her in the hospital?

6 A. So that's a great question. After an injury to your
7 brain not only -- you can you have swelling inside your
8 brain from either the brain tissue or from the blood that
9 is there.

10 So really the thing that we are concerned about is
11 that that swelling will progress. And usually after you
12 injure something the swelling progresses for a number of
13 days afterwards.

14 And the goal of watching her and doing neuro checks
15 was to make sure that swelling didn't progress to such a
16 point that it would cause a neurological deficit in which
17 case you would have to intervene.

18 So obviously I wouldn't want to get that CAT scan,
19 see the injury and say oh it will be fine, go home and
20 then have that injury progress because there is a
21 progression of the injury that takes place for a set time
22 point after the injury until it starts healing.

23 Q. Okay. And Mr. Shelton had asked you about dating
24 skull fractures. With the amount of force that you think
25 is necessary to have fractured Minor head would she have

(ROBERT CINA - REDIRECT BY MS. TAYLOR)

1 had a reaction at the time that the skull fracture
2 happened?

3 A. A reaction?

4 Q. Would it have hurt?

5 A. Oh, it would definitely hurt and you would
6 definitely see bruising as she exhibited. When she came
7 into the emergency room she had bruises around her eye.
8 It was very, very impressive.

9 Q. Was there any specific swelling or bruising to the
10 area over the fracture?

11 A. She had a large scalp hematoma which a hematoma is
12 fancy word for basically a blood collection or a bruise
13 over that area of her skull that was fractured.

14 Q. And is there any way to say how soon in time that
15 happened?

16 A. It was probably in the order of anywhere from three
17 hours to 48 hours -- it's hard to say in a tighter
18 timeframe than that.

19 Q. That swelling over the skull fracture -- obviously
20 you can't see a skull fracture from outside ---

21 A. --- correct, correct.

22 Q. The swelling over the skull fracture would that have
23 been noticeable?

24 A. That would have been noticeable, yes.

25 Q. Thank you.

(ROBERT CINA - REDIRECT BY MS. TAYLOR)

1 A. Her bruise was noticeable on exam. It was
2 remarkable.

3 Q. Thank you. No further questions.

4 MR. SHELTON: Just briefly, Your Honor.

5 THE COURT: Limited to redirect.

6 MR. SHELTON: Yes, Your Honor.

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(ROBERT CINA - RECROSS BY MR. SHELTON)

1 RECROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. The scalp hematoma could that also be called a
4 subgaleal hematoma?

5 A. It depends on where it is in relation to the galea
6 but yes.

7 Q. Okay. And subgaleal scalp hematomas have a -- can
8 track?

9 A. They can track, yes.

10 Q. And tracking just means it can move throughout the
11 galea?

12 A. Well, it can spread underneath that layer, yes,
13 although it's not such that you -- you basically get it
14 where your injury is and it spreads out from there. It
15 doesn't migrate to different portions of the head.

16 Q. Right. And so it can go -- but it will spread out
17 from that one area to other places in the head.

18 A. It will spread out kind of radially from where the
19 injury is. So you will have -- it will be wherever the
20 hematoma is it will be contiguous with the injury area
21 but it won't skip to a different area.

22 Q. Okay. And you mentioned that there was a bruise
23 around the eye, the orbit. But you don't remember where
24 Mr. Berke says Minor hit her head.

25 A. I don't recall. I'm just looking at my note from

(ROBERT CINA - RECROSS BY MR. SHELTON)

1 that -- I guess it was 4 p.m. on the day that I saw her;
2 3:55.

3 And so when I saw her she had the right parietal
4 scalp hematoma, which is associated with a fracture and
5 then she had a second scalp hematoma on the left side
6 more over here [indicates] then extended around her left
7 eye.

8 Q. Okay. And so -- but you don't remember where
9 Chris, Mr. Berke, says Minor hit her head?

10 A. I do not. This injury pattern would suggest that
11 she hit her head in two places.

12 Q. Okay. And the large scalp hematoma, the skull
13 hematoma, that you said date is anywhere from three hours
14 to 48 hours.

15 A. Somewhere around there.

16 Q. Okay.

17 A. It's just impossible to give you a specific --
18 something tighter than that from me. Now Doctor Amaya's
19 team might be able to give you a more specific timeframe;
20 I just cannot.

21 Q. Thank you very much.

22 THE COURT: Any further questions from the State?

23 MS. TAYLOR: None, Your Honor.

24 THE COURT: Any objection to the witness being
25 excused from the State.

1 MS. TAYLOR: No, Your Honor.

2 THE COURT: From the defense?

3 MR. SHELTON: None, Your Honor.

4 THE COURT: Doctor, you're excused.

5 THE WITNESS: Thank you. Have a great day.

6 [Whereupon, the witness is excused and exits the
7 witness stand]

8 THE COURT: Proceed with your next witness.

9 MS. WILLIAMS: Thank you, Your Honor. Elizabeth
10 Harvey.

11 [Whereupon, Ms. Harvey comes forward]

12 [Whereupon, the witness is duly sworn by the Clerk
13 of Court]

14 THE COURT: Please be seated. State your full name
15 and spell your last name for the record.

16 THE WITNESS: Elizabeth Geiger [phonetic] Harvey
17 H-A-R-V-E-Y.

18 THE COURT: You may proceed.

19 MS. WILLIAMS: Thank you, Your Honor.

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(ELIZABETH HARVEY - DIRECT BY MS. WILLIAMS)

1 ELIZABETH HARVEY,

2 Having been first duly sworn,

3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. WILLIAMS:

6 Q. Ms. Harvey, what do you do for a living?

7 A. I am a physical therapist and I specialize in
8 working with pediatrics, ages 0 to three mainly; early
9 intervention.

10 Q. And how long have you been doing that?

11 A. I have specifically been doing that for the past six
12 years but I have been working with pediatrics for ten
13 years and a physical therapist for 12.

14 Q. And do you sometimes work -- what's the name of your
15 company?

16 A. ABC Therapies.

17 Q. Is that your own company?

18 A. Yes, ma'am.

19 Q. And do you sometimes work with MUSC?

20 A. Yes, ma'am. I get referrals from different
21 agencies.

22 Q. And did you get a referral for a patient named Minor
23 Berke?

24 A. Yes.

25 Q. And when -- how old was Minor when you first came

(ELIZABETH HARVEY - DIRECT BY MS. WILLIAMS)

1 into contact with her?

2 A. She was 16 months.

3 Q. And what was the purpose of your initial
4 involvement?

5 A. This referral came to me through the early
6 intervention agency that we have in South Carolina which
7 was previously called Baby Net.. It's now called South
8 Carolina First Steps and they identify children with
9 special needs birth to three years old.

10 And so the referral that I received came through
11 that agency because there were concerns with gross motor
12 delay.

13 Q. Okay. And when you say gross motor delay what part
14 of the body does that have to do with?

15 A. When we talk about gross motors it means the big
16 muscles or large muscle groups of the body and that's
17 mainly what physical therapy rehabilitates are those
18 larger muscle groups of the body. So things like
19 walking, crawling; those types of activities are
20 considered gross motor activities.

21 Q. And was Minor walking like a child should at that age
22 when you first encountered her?

23 A. No, she was not.

24 Q. And did you have any information from the medical
25 history that at one time she was pulling up and had

(ELIZABETH HARVEY - DIRECT BY MS. WILLIAMS)

1 stopped?

2 A. I don't recall if I had any -- I did not have any
3 specific past medical history.

4 Q. That's fine. What types of things did you have to
5 do with Minor to help her walk better?

6 A. Well, one of the things that we did with her was
7 evaluate her for orthotics. When I initially evaluated
8 her at 16 months she as I stated was not walking.

9 She was mainly crawling on her knees, which is very
10 unusual for a 16 month old to be using that as her main
11 means of mobility or ambulation. She could also crawl
12 but that's how she presented when I first saw her.

13 So one of the recommendations that we had was to fit
14 her with orthotics and specifically SMO's, which stands
15 for Supra Malleolar Orthosis, and what that is is an
16 orthotic that comes up just above the ankle bones.

17 And so it controls the alignment of the forefoot,
18 mid foot, and heel section as well as providing ankle
19 stability. And because she was not walking she also had
20 what we call pronation where the feet roll in; there is
21 no arch. We were trying to provide her more stability.
22 I describe it to parents like the foundation of a house.

23 If the foundation of the house is not very stable
24 and secure then the rest of the house shifts and creaks
25 on the way up. And so we were trying to provide

1 stability through the orthotics.

2 Q. And how long did you work with these SMO's with
3 Minor

4 A. She -- we had to receive a prescription from the
5 doctor to be able to get the SMO'S. And she received
6 those in the spring of 2012 and she wore them -- she was
7 still wearing them when I discharged her from my
8 services.

9 Q. And when was that?

10 A. That was in September of 2012.

11 Q. Do you have any knowledge of when she was able to
12 stop wearing those?

13 A. I don't know, no ma'am.

14 Q. And at the time that you encountered Minor where was
15 she living?

16 A. She was with foster care.

17 Q. And in addition to her problems with walking did you
18 evaluate her or have access to an evaluation regarding
19 other areas of development?

20 A. The main areas that I looked at were her again, the
21 gross motor function but looking at her balance, looking
22 at her ambulation or mobility skills as well as object
23 manipulation; that would be ball skills.

24 So looking at what a typical toddler preschooler
25 would be doing at that time. The foster mother did also

(ELIZABETH HARVEY - DIRECT BY MS. WILLIAMS)

1 verbalize concerns to me about communication and that was
2 something that they were working on as well.

3 Q. Speech?

4 A. Speech, yes.

5 Q. How -- when you first encountered Minor at 16 months
6 old how did she score in terms of the evaluation for
7 these different areas?

8 A. She scored very poorly. The standardized test that
9 was used is called a Peabody Developmental Motor Scale
10 and it's a standardized test that evaluates typically
11 developing children with no significant past medical
12 history to see at about what age they achieve certain
13 motor skills.

14 And so it's a qualifying criteria that we use
15 through Baby Net. And she -- I mean I have my paper here
16 if you want specific numbers ---

17 Q. --- if it refreshes your memory please feel free to
18 review it.

19 [Whereupon, the witness views documents]

20 A. For her stationary, her balance skills she scored in
21 the 16th percentile. For locomotion she was in the less
22 than one percentile or otherwise 99 percent of typically
23 developing children would have scored better in that area
24 than she did at 16 months old.

25 And then object manipulation she was in the fifth

(ELIZABETH HARVEY - DIRECT BY MS. WILLIAMS)

1 percentile. So overall with all of those three
2 components added together she was in the first percentile
3 for her age compared to typically developing peers.

4 Q. And for stationary what age equivalent was she
5 operating in?

6 A. About a 10 month level.

7 Q. And that's at the age of 16 months.

8 A. That's correct.

9 Q. And for locomotion what age was she operating in?

10 A. At an eight months level.

11 Q. And what about object manipulation?

12 A. At about a 12 month level.

13 Q. And this report that you generated did you have to
14 make any corrections to this report when you reviewed
15 your records?

16 A. Yes, ma'am there was a typo.

17 Q. Okay. But that's corrected now?

18 A. Yes, ma'am.

19 Q. And so for stationary in terms of description where
20 was she scoring?

21 A. It's considered below average.

22 Q. What about locomotion?

23 A. Very poor.

24 Q. And object manipulation?

25 A. Poor.

(ELIZABETH HARVEY - DIRECT BY MS. WILLIAMS)

1 Q. Nothing further. Thank you.
2 THE COURT: Any questions for the witness?
3 MR. SHELTON: Yes, Your Honor.
4 THE COURT: You may proceed.
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(ELIZABETH HARVEY - CROSS BY MR. SHELTON)

1 CROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. Ms. Harvey, you can't because you don't really -- you
4 don't have history on Minor

5 A. That's correct. I did not have past medical history
6 when I initially evaluated her.

7 Q. So you can't give an opinion or anything as to why
8 she was below average or poor.

9 A. The history that I did receive from the foster Mom
10 was not specific and it's like for birth history etcetera
11 what I had been told by her was that she had received
12 Minor from MUSC with -- I can read it to you.

13 [Whereupon, the witness reviews document]

14 A. A diagnosis of skull, arm, and leg fractures. She
15 states that the x-ray revealed past fractures of the
16 skull as well and a follow up appointment revealed there
17 was still some brain bleeding but it's not significant in
18 her report and that the arm and leg had healed -- which
19 cleared me to be able to treat her without any
20 precautions or restrictions.

21 Q. And that's from the foster Mother that had the child
22 according to your report two months?

23 A. That's correct.

24 Q. About a month maybe a month and a half. But you
25 don't have any other history?

(ELIZABETH HARVEY - CROSS BY MR. SHELTON)

- 1 A. That's correct.
- 2 Q. So you don't know how well Minor was doing with any
3 of these tests prior or any actions that she was doing
4 prior to this two months.
- 5 A. Correct.
- 6 Q. The P-D-M-S?
- 7 A. Yes, sir.
- 8 Q. Is that like a computer program?
- 9 A. It may be at this point. I do it manually; I have a
10 handbook.
- 11 Q. And there is some numbers to follow or there are
12 some things to follow and you give it a grade based off
13 how well she did.
- 14 A. That's correct; there are charts and graphs.
- 15 Q. Okay. And so just as an example like playing
16 briefly in her position and bringing hands to the midline
17 you give that a number like a zero, one or two?
- 18 A. That's correct.
- 19 Q. And then you add up each of those tests in the
20 category?
- 21 A. That's correct.
- 22 Q. And so each of those tests are added up and that
23 final number is what tells you whether -- what percentile
24 she is in or what description she gets; like a below
25 average or poor.

1 A. That's correct.

2 Q. So that number that you give is based off what you
3 observed?

4 A. That's correct, during the test.

5 Q. Okay. And I think in your report you mentioned
6 that it was a non-standardized setting?

7 A. That's correct.

8 Q. With the Mom present.

9 A. Uh huh.

10 Q. So usually the Mom is not present? What's
11 standardized -- what does that -- you said it's non-
12 standardized?

13 A. Standardized would be a clinical setting with test
14 objects that are with a standardized kit. So they would
15 give you a tennis ball in the kit versus I bring my own
16 ball.

17 Q. And there's usually not someone else that is present
18 at the time like a family member ---

19 A. --- I just document that just so people will know
20 who was there during the test that I wasn't alone with
21 the child and that doesn't qualify it as non
22 standardized.

23 Q. Okay. That's just for your records.

24 A. That's correct.

25 Q. Do you know how many tests you performed?

(ELIZABETH HARVEY - CROSS BY MR. SHELTON)

1 A. I'm not sure. I'm not clear what you're asking.

2 Q. There's three categories right -- five categories?

3 A. For the whole P-D-M-S is that what you're asking?

4 Q. Yes?

5 A. Yes, there are.

6 Q. Okay. And do you know how many tests you performed
7 within those five categories?

8 A. I tested the three domains; the locomotion, the
9 stationary skills, and the object manipulation. The
10 other two domains are for fine motor skills and those
11 aren't the areas that I serve.

12 Q. Okay. But within those categories and I'm probably
13 using the wrong term; I'm sorry, but in those categories
14 how many tests do you perform as far as bring your hands
15 to the midline, manipulating a ball; how many of those
16 tests do you perform?

17 A. It all depends on the child's performance. So for
18 each specific skill that it would ask like he's referring
19 to as bringing your hands to midline for each little test
20 the child would get a rating of a zero to a two.

21 A zero means the child does not attempt to do the
22 task at all. A one has specific criteria for how much of
23 the task they attempted or completed. A two would mean
24 that they fully executed the skill that was being tested.

25 And so with this test what we do is we begin with a

(ELIZABETH HARVEY - CROSS BY MR. SHELTON)

1 baseline, and a baseline constitutes having three twos in
2 a row. So for three skills they get a two where they
3 execute perfectly in a row.

4 And you continue to test until you get three zeros
5 in a row meaning they did not attempt or were not able to
6 complete those skills at all.

7 And so it would depend on the child and how they
8 performed as to how many specific skill sets I would test
9 within each of the three domains that were tested.

10 Q. Okay. And so how long do you think this test
11 lasted?

12 A. I don't have that in the record.

13 Q. Okay. But this wasn't like an average, these
14 numbers aren't average. This is what you -- raw numbers
15 that you got that day?

16 A. This was the evaluation that I did on October the
17 26th, 2011 and the P-D-M-S test that I did on that day.

18 Q. Okay. So -- and this is a 16 month old child?

19 A. That's correct.

20 Q. Did you make any notes on -- strike that. So there
21 were concerns with her gross motor delay?

22 A. That's correct.

23 Q. Okay. No further questions.

24 THE COURT: Any further questions?

25 MS. WILLIAMS: No, Your Honor.

(ELIZABETH HARVEY - CROSS BY MR. SHELTON)

1 THE COURT: Any objection to the witness being
2 excused from the State ---

3 MS. WILLIAMS: --- not from the State.

4 THE COURT: From the defense?

5 MR. SHELTON: No objection.

6 THE COURT: Ma'am, you're excused.

7 [Whereupon, the witness is excused and exits the
8 witness stand]

9 THE COURT: Call your next witness.

10 MS. WILLIAMS: The State calls Kathleen Spell.

11 [Whereupon, Ms. Spell comes forward]

12 [Whereupon, the witness is duly sworn by the Clerk
13 of Court]

14 CLERK OF COURT: Please be seated and state your
15 full name and spell your last name for the record.

16 THE WITNESS: Kathleen Spell, S as in Sam, P as in
17 Paul, E-L-L.

18 THE COURT: Your may proceed.
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(KATHLEEN SPELL - DIRECT BY MS. WILLIAMS)

1 KATHLEEN SPELL,

2 Having been first duly sworn,

3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. WILLIAMS:

6 Q. Ms. Spell, where are you employed?

7 A. At Berkeley County Department of Social Services.

8 Q. And what is your current position?

9 A. Currently I am a treatment supervisor.

10 Q. And how long have you been employed at the
11 Department of Social Services?

12 A. Over eight years.

13 Q. What are your present duties?

14 A. Presently I monitor abuse and neglect of minor
15 children of Berkeley County for DSS.

16 Q. And back in September of 2011 were you in that
17 position?

18 A. No, I was a foster care case manager.

19 Q. And what does a foster care case manager do?

20 A. We monitor children who have entered foster care in
21 regards to abuse and neglect.

22 Q. And were you involved in the Berke case?

23 A. I was.

24 Q. In what way?

25 A. I was the one who would see about the well being of

(KATHLEEN SPELL - DIRECT BY MS. WILLIAMS)

1 the children and making sure that the parents visit with
2 the children, ensuring that the child goes to their
3 medical appointments or dental appointments; whatever was
4 necessary.

5 Q. Okay. And as part of those responsibilities did
6 you visit with Minor Berke?

7 A. I did.

8 Q. And as part of those responsibilities did you talk
9 to the parents?

10 A. I did.

11 Q. Do you remember speaking with Christopher Berke
12 about how Minor was injured?

13 A. I do.

14 Q. Do you remember about when that was?

15 A. In the beginning of the case sometime in September.

16 Q. Okay. Would it have been after she was already in
17 foster care?

18 A. Correct.

19 Q. And did he tell you how Minor was hurt?

20 A. He reported that he had bathed Minor was
21 flailing -- that was his first time bathing her and
22 during the bathing that she was flailing back and forth
23 which caused the injury at that apparent -- you know she
24 still had the bruises when she entered foster care that
25 caused those bruises.

(KATHLEEN SPELL - DIRECT BY MS. WILLIAMS)

1 Q. Okay. So did he say that she hit her head in the
2 front or the back?

3 A. He said in the front. He indicated that she was
4 flailing back and forth and I believe he portrayed that
5 the faucet was there and that's how she got the knot that
6 was on her head.

7 Q. Okay. Did he also say that she hit her head in the
8 back?

9 A. He didn't give me an explanation as to the back.

10 Q. Okay. And when you would visit the Berkes who did
11 most of the talking?

12 A. Mr. Berke.

13 Q. Was Ms. Berke quiet during that time or did she
14 participate?

15 A. For the most part she was quiet.

16 Q. And have you visited Minor -- did you visit Minor
17 after she was in foster care? I think you said you did.

18 A. Yes.

19 Q. And after she was in foster care did she have any
20 more skull fractures?

21 A. No.

22 Q. Any more broken bones?

23 A. No.

24 Q. When she went into foster care was she up to date on
25 her immunizations before she got to foster care?

(KATHLEEN SPELL - DIRECT BY MS. WILLIAMS)

1 A. No, she was not.

2 Q. Is she up to date on her immunizations afterwards?

3 A. Yes. I had to make sure that was done.

4 Q. Thank you. No further questions.

5 THE COURT: Any questions for the witness?

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(KATHLEEN SPELL - CROSS BY MR. SHELTON)

1 CROSS EXAMINATION

2 BY MR. SHELTON:

3 Q. Ms. Spell, you just said that after she was in

4 foster care she didn't have any more broken bones.

5 A. Correct. There were no broken bones.

6 Q. Are you aware of the hospital visit in 2013?

7 A. From 2000 what date?

8 Q. 2013, July of 2013?

9 A. The last indication from my case would be April of

10 2013. I had the case from 2011 September until April of

11 2013.

12 Q. So you're not aware of it from 2013 ---

13 A. --- I'm not aware of that, no.

14 Q. And I think it was your testimony that Chris never

15 tried to give an explanation for the injury in the back

16 of the head.

17 A. He never gave me any explanation, no sir.

18 Q. Okay. Did you ever get an explanation from anybody

19 else?

20 A. In regards to what occurred? No, I hadn't received

21 any information.

22 Q. What about to the back of the head?

23 A. As to how it occurred, no ---

24 Q. --- to any injury to the back of the head?

25 MS. WILLIAMS: Objection, asked and answered.

(KATHLEEN SPELL - CROSS BY MR. SHELTON)

1 THE COURT: Overruled. You may answer the
2 question, ma'am.

3 A. In regards to -- can you repeat the question?

4 Q. [Mr. Shelton] To a possible injury to the back of
5 the head did you ever get an explanation as to that?

6 A. Not from the parents, no.

7 Q. No further questions.

8 THE COURT: Any redirect?

9 MS. WILLIAMS: No, Your Honor.

10 THE COURT: Any objection to the witness being
11 excused from the State?

12 MS. WILLIAMS: None from the State.

13 THE COURT: From the defense?

14 MR. SHELTON: No, Your Honor.

15 THE COURT: Ma'am, you're excused.

16 [Whereupon, the witness is excused and exits the
17 witness stand]

18 THE COURT: Would counsel approach for me please?

19 [Whereupon, an off the record bench conference is
20 held]

21 THE COURT: You may call your next witness.

22 MS. WILLIAMS: The State would call Carlene
23 Sessions.

24 [Whereupon, Ms. Sessions comes forward]

25 [Whereupon, the witness is duly sworn by the Clerk]

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 of Court]

2 CLERK OF COURT: Please be seated and state your
3 full name and spell your last name for the record?

4 THE WITNESS: My name is Carlene A. Sessions,
5 S-E-S-S-I-O-N-S.

6 THE COURT: You may proceed.

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8 CARLENE SESSIONS,

9 Having been first duly sworn,

10 Was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MS. WILLIAMS:

13 Q. Ms. Sessions, where are you employed?

14 A. Before I can testify because I am a guardian ad
15 litem I have to ask the Judge to excuse me from my
16 confidentiality protocol.

17 THE COURT: Yes, ma'am. You are permitted to
18 testify.

19 THE WITNESS: Thank you.

20 THE COURT: You're welcome.

21 MS. WILLIAMS: Thank you, Your Honor.

22 THE COURT: You're welcome.

23 Q. [Ms. Williams] I'm sorry about that. I meant to ask
24 her that. So you are employed at the Berkeley County
25 guardian ad litem office?

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 A. Well, I volunteer at the guardian ad litem office.
2 It's called the Cass Elias McCarter Guardian ad Litem
3 program.

4 Q. Okay. And how long have you been doing that
5 volunteer work?

6 A. Since 1996 which would be 18 years.

7 Q. And what are your present duties? What do you do as
8 a volunteer guardian ad litem?

9 A. A guardian ad litem is appointed by the court, by
10 the Family Court when a child is removed from the home,
11 from the biological home and they become involved in the
12 Department of Social Services.

13 At that -- when they are ex parte or removed a
14 guardian is appointed to that child or children to
15 represent their best interest in that particular case of
16 Department of Social Services. I investigate, I
17 interview, ultimately I write reports for the court and
18 those reports include history, interviews, and
19 recommendations to the court.

20 Q. Okay. And as part of that in completing those
21 duties do you visit with the parents of the child?

22 A. Yes, I visit with the parents and interview them.

23 Q. And do you visit with the child?

24 A. Yes.

25 Q. And were you involved in the case involving Minor

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 Berke?

2 A. Yes.

3 Q. And did you gather background information about the
4 family?

5 A. I did. I interviewed the parents.

6 Q. And Mr. Berke was deployed for part of Minor life
7 is that true?

8 A. Yes.

9 Q. What were his dates of his deployment if he told
10 you?

11 A. Can I refer to my notes?

12 THE COURT: Yes ma'am, you may.

13 [Whereupon, the witness reviews documents]

14 A. He was deployed -- well, this is before Minor was
15 born; he was deployed from December 2008 returned 2009 in
16 May. Minor was born June of . He was redeployed in
17 July of 2010 and returned April of 2011.

18 Q. So returned April of 2011 for good?

19 A. Yes.

20 Q. Okay. And did you know when the family moved to
21 Berkeley County?

22 A. I don't know an exact date. I know they moved
23 sometime after April but prior to September.

24 Q. Okay. And at the time Minor was injured were they
25 living in Berkeley County?

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 A. They had a Summerville address and sometimes the --
2 I believe it was Berkeley County part of Summerville,
3 yes.

4 Q. Okay. And during the course of your involvement in
5 the case did Christopher Berke ever tell you how Minor was
6 inured?

7 A. Yes.

8 Q. Okay. What did he tell you?

9 A. He told me that on the day of September the 5th the
10 family was ill; the whole family was ill. He had given
11 Sibling2 a bath and Sibling2 then went with her Mother.

12 He then got Minor because Minor had spit up or vomit
13 in her hair he said he would bathe her. He was -- this
14 was like the first time he had bathed the child. He had
15 put her in the tub and said she was playful and happy and
16 doing fine until he raised her up to wash her bottom.
17 And then she started twisting, thrashing. He lost his
18 grip on her, she fell forward to the faucet. And when
19 she fell forward then she kind of slid just real easy or
20 gently down the side of the tub.

21 He then picked her up, dried her, dressed her,
22 noticed that she had a bump on her head and in fact he
23 made the comment that had to hurt. So he gave her some
24 Triaminic and put her down for the night.

25 Q. And did he tell you who it was that decided to take

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 her to the doctor?

2 A. Well apparently the next morning he said that he
3 took Sibling₂ to school, came back -- took Sibling₂ to school
4 around 6 or 6:30, came back about 7 o'clock or 7:15.

5 He got the other two children Sibling₁ and Minor up, was
6 feeding them breakfast -- prepared breakfast and was
7 feeding them okay when Ms. Berke came into the kitchen
8 area and looked at Minor and said what happened to Minor
9 and told Mr. Berke to call the doctor.

10 Q. And before she came in and said what happened to
11 Minor did he indicate where she was or what she was doing?

12 A. Other than she was sleeping; apparently had not
13 gotten up that morning.

14 Q. And since the time that Minor has been in foster care
15 has she had any injuries that were not considered
16 accidental?

17 A. No.

18 Q. She did have an accidental injury didn't she?

19 A. She did.

20 Q. Okay. Tell us about that?

21 A. She jumped off a sofa with another foster child and
22 they got entangled and she hurt her foot. She wouldn't
23 -- the foster Mother was there, she saw it and was
24 attempting to grab her.

25 And Minor wouldn't get up and put pressure on the

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 foot so the foster Mother took her to the emergency room
2 and to the doctor and they put a splint on it. She wore
3 that for like three to four weeks. It was a removable
4 split so she could still get around; and its fine.

5 Q. And she took her to the emergency room immediately?

6 A. Yes.

7 Q. And the doctors at the emergency room did not keep
8 Minor for any kind of suspicion of abuse or anything like
9 that?

10 A. No, no.

11 Q. She went back to the same foster Mother?

12 A. Yes.

13 Q. During the course of your involvement in the case
14 did you visit with the Berkes other times?

15 A. I visited on a couple -- well, when I say I -- I
16 went one time to the home and spoke to Sandra separately
17 but most of the time when I'm visiting the child for a
18 while they were placed with the paternal grandparent.
19 And when I would visit there Mr. Berke would come so we
20 had ample time to talk.

21 Then during the court cases and involvement in the
22 Family Court I had ample opportunity to speak with both
23 Berkes. So it was not really necessary for me to go to
24 the home because I could visit in other places.

25 Q. Okay. And when you visited with the parents who

(CARLENE SESSIONS - DIRECT BY MS. WILLIAMS)

1 did most of the talking?

2 A. Mr. Berke.

3 Q. And when you had visited the home and Mr. Berke
4 would come over was he invited or did you know he was
5 going to be there ---

6 MR. GROEBER: --- objection. It calls for
7 speculation.

8 THE COURT: It's actually leading; rephrase.

9 Q. [Ms. Williams] Did you arrange for Mr. Berke to be
10 there?

11 A. No.

12 MS. WILLIAMS: Court's indulgence.

13 [Whereupon, Ms. Williams and Ms. Taylor confer]

14 MS. WILLIAMS: No further questions.

15 THE COURT: Any questions for the witness?

16 MR. GROEBER: One moment, Your Honor.

17 [Whereupon, Mr. Shelton and Mr. Groeber confer]

18 MR. GROEBER: No questions, Your Honor. Thank you.

19 THE COURT: You're welcome. Any objection to the
20 witness being excused from the State?

21 MS. WILLIAMS: None from the State, Your Honor.

22 THE COURT: From the defense?

23 MR. GROEBER: No, Your Honor.

24 THE COURT: Ma'am, you're excused.

25 [Whereupon, the witness is excused and exits the

1 witness stand]

2 THE COURT: Madame Forelady, ladies and gentlemen
3 we're going to take advantage of this break in testimony
4 to take our lunch recess. During the break please do not
5 discuss the case among yourselves or with anyone else.
6 Please don't have any contact with anyone in or about the
7 court house.

8 We're going to break for an hour and 15 minutes
9 until 1:30. The bailiffs will show you how to return to
10 the courthouse and at that time we will resume testimony.
11 Please leave your notepads in your seats. Have a good
12 lunch.

13 [Whereupon, the jury exits at 12:14 p.m.]

14 THE COURT: Is there anything we need to take up
15 before we break for lunch from the State?

16 MS. WILLIAMS: Your Honor, just briefly. I
17 neglected to ask the court's permission to have the case
18 agent excluded from the sequester that I requested. But
19 obviously he's been here -- we would have requested that
20 any victim, which there isn't in this case, they could be
21 present and the case agent be excluded from the rule of
22 sequestration?

23 THE COURT: I assume y'all have no exception?

24 MR. SHELTON: No exception, Your Honor.

25 THE COURT: Is there anything else before we break

1 for lunch from the State?

2 MS. WILLIAMS: Nothing from the State.

3 THE COURT: From the defense?

4 MR. SHELTON: No, Your Honor.

5 THE COURT: I'm going to allow him to go to lunch
6 since I have not been able to find an answer to my
7 question yet. But hopefully before the end of the day
8 I'll be able to determine what it is I'm trying to
9 ascertain. Have a good lunch and see you all at 1:30.
10 How many more witnesses does the State have left on their
11 list?

12 MS. WILLIAMS: We have at most three and probably
13 two. Actually we probably have three; three witnesses.

14 THE COURT: So how long is that going to take after
15 lunch?

16 MS. WILLIAMS: I would think probably three hours.

17 THE COURT: So that's 4:30. Did y'all have any
18 witnesses you planned to call?

19 MR. SHELTON: Yes, Your Honor. My expert is not
20 going to be here until tomorrow.

21 THE COURT: Okay. What time?

22 MR. SHELTON: She's flying in tonight so she will
23 be here in the morning.

24 THE COURT: Any other witnesses you intend to call?

25 MR. SHELTON: It depends on if the Solicitor calls

1 one of the witnesses or not.

2 THE COURT: All right. Y'all have a good lunch.

3 See you at 1:30.

4 [Whereupon, court is in recess from 12:15 p.m. until
5 1:30 p.m.]

6 THE COURT: Is the State ready to proceed?

7 MS. WILLIAMS: The State is ready.

8 THE COURT: Is the defense ready to proceed?

9 MR. SHELTON: Your Honor --

10 THE COURT: I can't hear you.

11 MR. SHELTON: Can we talk about scheduling real
12 quick?

13 THE COURT: Yes, sir.

14 MR. SHELTON: I think my witness -- I could have a
15 witness here by this afternoon. It's about an hour and
16 half turn around; she is about 45 minutes out. I could
17 have my investigator go and get her and bring her back.

18 THE COURT: Are y'all going to go through the rest
19 of the afternoon?

20 MS. WILLIAMS: We probably won't last the whole
21 afternoon so that might be good.

22 THE COURT: Well, you said three hours right?
23 That's 4:30.

24 MS. WILLIAMS: It's just hard to judge because I
25 don't know what is going to happen on cross. It's

1 possible.

2 THE COURT: It's possible to go -- is that a
3 conservative estimate or is that -- how many other
4 witnesses do you have ---

5 MS. WILLIAMS: --- I think three hours is generous.
6 We have two maybe three witnesses.

7 THE COURT: Who are your witnesses?

8 MS. WILLIAMS: Detective Fenton, Doctor Amaya --
9 actually three maybe four, Doctor Amaya, Jeannie Hill who
10 is a radiologist and possibly Doctor Jackson. But I
11 think Jeannie Hill and Doctor Jackson would be rather
12 quick. Doctor Amaya is the one that is going to be
13 probably on direct a good 40 minutes.

14 THE COURT: And then who -- you said there was
15 someone else?

16 MS. WILLIAMS: Doctor Jackson and Doctor Hill. Oh,
17 Detective Fenton right now.

18 THE COURT: Okay. So that's four correct?

19 MS. WILLIAMS: There is three ---

20 THE COURT: --- I would hate to have you go to the
21 extent of picking somebody up having them sit here and
22 not be reached.

23 MR. SHELTON: Yes, Your Honor.

24 THE COURT: So why don't we just see how the
25 afternoon goes and then worst case scenario y'all will

1 finish your case today?

2 MS. WILLIAMS: I think we probably will depending
3 on how Doctor Amaya does that could limit the other
4 witnesses. It just depends on how she testifies because
5 she was the main pediatrician. There are lots of stuff
6 she can testify to that we may not need the other doctor.

7 THE COURT: Okay. And then other than this
8 witness -- is that Jennifer Canter ---

9 MR. SHELTON: --- no ---

10 THE COURT: --- no, that's your expert.

11 MR. SHELTON: Yes. Her plane leaves at 5:30
12 tonight.

13 THE COURT: Okay. And who else are you referring
14 to?

15 MR. SHELTON: It would be Ronda Illar.

16 THE COURT: Oh, that's the -- number 17 on the
17 State's list?

18 MR. SHELTON: Yes.

19 THE COURT: How long of a witness is she?

20 MR. SHELTON: I honestly don't know right now, Your
21 Honor.

22 THE COURT: You can just give me an estimate.

23 MR. SHELTON: I'm sorry. Twenty or thirty minutes.

24 THE COURT: So even if we waited we could finish
25 your case tomorrow if we start it in the morning.

1 MR. SHELTON: Absolutely, Your Honor.

2 THE COURT: I think we'll be okay. I just don't
3 want you to have somebody to go get somebody and then
4 they sit here and we not reach them. I don't think that
5 would be a good use of that person's time.

6 MR. SHELTON: Thank you.

7 THE COURT: You're welcome. Are we ready to
8 proceed?

9 MS. WILLIAMS: The State's ready, Your Honor.

10 THE COURT: Defense ready?

11 MR. SHELTON: Yes, Your Honor.

12 THE COURT: Please bring the jury -- wait one
13 second.

14 MS. WILLIAMS: The doctor just called. She should
15 be here by 2 so I'm thinking we will be done with
16 Detective Fenton before that but I'm hoping there is no
17 gap. She is on the way.

18 THE COURT: You're talking about Doctor Amaya?

19 MS. WILLIAMS: Yes, Your Honor.

20 THE COURT: Okay.

21 [Whereupon, the jury enters at 1:36 p.m.]

22 THE COURT: Ladies and gentlemen I hope that you all
23 had a pleasant lunch. I know it's chilly outside -- we
24 go from 70 to 38 or 34; the weather can't make up its
25 mind. But I guess, not guess, we're fortunate because

1 it's minus 7 in some places today so I guess you have to
2 look at the glass half full instead of half empty. We're
3 now going to resume testimony. I would ask that you give
4 the attorneys your attention. You may proceed.

5 MS. TAYLOR: Thank you, Your Honor. The State
6 calls Detective Brian Fenton.

7 THE COURT: Sir, if you would come to the stand to
8 be sworn.

9 [Whereupon, Detective Fenton comes forward]

10 [Whereupon, the witness is duly sworn by the Clerk
11 of Court]

12 CLERK OF COURT: Please be seated and state your
13 full name and spell your last name for the record.

14 THE WITNESS: My name is Brian Fenton, F as in
15 Frank, E-N-T-O-N.

16 THE COURT: You may proceed.

17 MS. TAYLOR: Thank you, Your Honor.

18 THE COURT: You're welcome.

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(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 BRIAN FENTON,
2 Having been first duly sworn,
3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. TAYLOR:

6 Q. Detective Fenton, where are you employed?

7 A. I'm employed with the Berkeley County Sheriff's
8 Office.

9 Q. And how long have you been there?

10 A. Eight years.

11 Q. What do you do at Berkeley County?

12 A. I am in the criminal investigations division. We
13 investigate a multitude of crimes from property offenses
14 to assaults, shootings, stabbings, rape cases, child
15 abuse ---

16 Q. --- and how long have you been with that division?

17 A. Four years.

18 Q. At the time of the incident how long had you been
19 working in criminal investigations?

20 A. Just about a year.

21 Q. Did you get assigned to a case involving Minor Berke?

22 A. I did.

23 Q. And how did you become involved in the case?

24 A. When it was reported to law enforcement I was the
25 on-call investigator so the patrol deputy, Deputy

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 Arrington called me to help in the investigation.

2 Q. What was the first thing you did as part of your
3 investigation?

4 A. I went to the residence of Boulevard in
5 the Summerville area of Berkeley County.

6 Q. And whose residence was that?

7 A. That was the defendant's Mr. Berke.

8 Q. Did you have an opportunity to speak with the
9 defendant?

10 A. I did.

11 Q. And tell us the circumstances of that conversation.

12 A. I was informed that a young child went to the
13 hospital and had some unexplained injuries; a skull
14 fracture. I asked Mr. Berke -- I had a conversation with
15 Mr. Berke and asked him what happened.

16 Q. At the time that you spoke with Mr. Berke was he in
17 custody?

18 A. He was not.

19 Q. Was he detained in any way?

20 A. No, ma'am.

21 Q. Did you actually speak with him at his home?

22 A. I did.

23 Q. Did you have an opportunity to take any statements
24 from him?

25 A. I did.

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 Q. Did you do that orally, in writing, or both?

2 A. Both.

3 Q. Let's talk about the oral statement first. Before
4 you took a statement from the defendant did you threaten
5 him or promise him anything?

6 A. No, ma'am.

7 Q. Coerce him in any way?

8 A. No, ma'am.

9 Q. Did he appear to be under the influence of anything
10 that would make him not understand speaking with you?

11 A. He did not.

12 Q. What did he tell you orally about the circumstances
13 of Minor head injuries?

14 A. He essentially said that he was giving Minor a bath
15 and that she had wiggled out of her hands and struck her
16 head above the left eyebrow on the faucet of the bathtub.

17 Q. Now at the time that you spoke with the defendant
18 had you received any medical reports?

19 A. I hadn't received any when I spoke to him.

20 Q. Had you talked to any doctors at MUSC who were
21 treating Minor

22 A. I hadn't at that time.

23 Q. Did the defendant also give you a written statement?

24 A. He did.

25 Q. And do you have a copy of that with you today?

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 A. I do.

2 MS. TAYLOR: Permission to approach the court
3 reporter?

4 THE COURT: You may.

5 MS. TAYLOR: Thank you.

6 Q. [Ms. Taylor] I'm going to show you what has
7 previously been marked as State's exhibit 32.

8 [Whereupon, the witness is shown document]

9 Q. Can you tell us what that is please?

10 A. That is a copy of the statement that Mr. Berke wrote
11 the night I spoke to him.

12 Q. And is it substantially the same as the original
13 that is in your file?

14 A. It is other than the very bottom of it was cut off
15 and there is just the number 2:25 a.m. marked at the
16 bottom that is missing.

17 Q. Did Mr. Berke sign that statement in your presence?

18 A. That he did.

19 MS. TAYLOR: Your Honor, I believe it's already
20 been entered as State's exhibit 32.

21 THE COURT: Any objection to the admission of the
22 document?

23 MR. SHELTON: No objection.

24 THE COURT: Marked and admitted without objection.

25 [Whereupon, State's exhibit number 32 is entered

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 into evidence by the court]

2 MS. TAYLOR: Thank you, Your Honor.

3 Q. [Ms. Taylor] If you could without reading that
4 Detective Fenton is the written statement that he gave
5 you substantially the same as the oral statement he gave
6 you?

7 A. It is.

8 Q. At that point in your investigation is the morning
9 of September 7th is that correct?

10 A. Very early morning hours.

11 Q. The defendant told you that the incident occurred
12 where?

13 A. At his residence Boulevard Summerville
14 area of Berkeley County.

15 Q. When you spoke with the defendant were there any
16 other adults present in the home?

17 A. Initially there was not and then a little while
18 later his wife arrived at the residence.

19 Q. And do you know -- if you know do you know where his
20 wife was?

21 A. I assumed she was at the hospital.

22 Q. The defendant's statement Detective are there any
23 errors of dates or anything in that statement?

24 A. There is. At the very first line he says after
25 lunch on the 5th of August 2011 and it should have

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 essentially said 5th of September.

2 Q. In your conversation with him did he indicate that
3 it was September?

4 A. Yes, he said the day before and we were in the month
5 of September.

6 Q. Thank you. After you spoke with the defendant what
7 was the status of this case?

8 A. It was still under investigation.

9 Q. Had you received the medical reports in the time
10 after you spoke with him?

11 A. A while later yes, ma'am.

12 Q. When did you receive the last of the medical reports
13 from MUSC?

14 A. The last of the medical reports was on October 23rd,
15 2012.

16 Q. So that was some time later; over a year?

17 A. Yes, a little more than a year.

18 Q. At that point before you received the rest of the
19 medical records had you ever had a conversation with the
20 doctors that treated Minor

21 A. I had not.

22 Q. When did you finally -- when were you finally able
23 to have that conversation?

24 A. I had a conversation by telephone on January 23rd,
25 2013.

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 Q. And who -- do you remember who you spoke with?

2 A. I think it was Doctor Amaya -- Michelle Amaya.

3 Q. After you had that conversation with her what was
4 the status of the case?

5 A. I determined that there was enough evidence to
6 establish probable cause to get an arrest warrant. And
7 then on the very next day on the 24th I got an arrest
8 warrant and he was apprehended.

9 Q. So there was some delay between, a significant delay
10 between the time of the incident and the time of arrest?

11 A. There was.

12 Q. And what was the reason for that delay?

13 A. I had not had a complete understanding of the
14 medical findings with regard to the child's injuries.

15 Q. And during that time do you know where Minor was
16 living?

17 A. She was in foster care at the time.

18 Q. Were any other warrants obtained in this case?

19 A. There was.

20 Q. And what were those warrants for, who for?

21 A. It was for unlawful conduct for Mr. Berkes' spouse
22 Sandra Berke.

23 Q. And was that warrant served?

24 A. It was.

25 Q. Let's talk about the defendant's statement if we can.

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 briefly. Who did he indicate to you was with Minor when
2 she received her injuries?

3 A. He indicated he was with the child.

4 Q. And did he indicate where his wife was?

5 A. She was in the bed I believe.

6 Q. And as part of your duties as a case agent do you
7 review the entire file?

8 A. I do.

9 Q. Let's talk about his statement. Did he indicate who
10 was with Minor after her injuries occurred?

11 A. He indicated that he put the child to bed and then
12 checked on the child about every half hour until he went
13 to sleep.

14 Q. I'm sorry. At any point did he indicate that he
15 left Minor after those injuries happened?

16 A. I believe he left the child in the morning to take
17 another child to school.

18 Q. And that other child do you know what school that
19 child was attending?

20 A. Devon Forest Elementary.

21 Q. Did you have an opportunity as part of your
22 investigation to figure out how far it is from the
23 defendant's home to Devon Forest?

24 A. I did.

25 Q. And how far is that?

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 A. In a straight line it's just over a mile. Driving
2 it's about three miles.

3 Q. And did you have an opportunity to drive that
4 distance?

5 A. I did.

6 Q. And can you tell the jury what you were able to
7 discover about how long it would take?

8 A. Yes. I parked my vehicle in the driveway of
9 Boulevard, backed out of the driveway, drove to
10 Myers Road, took a right on Myers Road, drove to Highway
11 176 took a right on Highway 176, got stopped at the stop
12 light at I think it's Devon Forest Boulevard, took a
13 right there, entered the drop off loop and waited in line
14 as if I was dropping a child off, and proceeded back to
15 the residence. It took a total of from my stop watch as
16 ten minutes and 17 seconds.

17 Q. When the defendant said that he got back from
18 dropping the older child off did he tell you what his
19 wife was doing?

20 A. I believe he indicated she was still in bed.

21 Q. And did he tell you what Minor was doing?

22 A. I think he said she was still asleep.

23 Q. During the course of your investigation were you
24 able to discover who it was that took Minor to the doctor
25 on September 6th?

(BRIAN FENTON - DIRECT BY MS. TAYLOR)

1 A. I believe it was the child's mother, Sandra Berke.

2 Q. No further questions.

3 THE COURT: Any questions for the witness?

4 MR. SHELTON: Yes, Your Honor.

5 THE COURT: You may proceed.

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(BRIAN FENTON - CROSS BY MR. SHELTON)

1 CROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. Detective Fenton, about what time was it that you
4 went and got a statement from Chris?

5 A. The time stamp on the statement says 2:25 a.m. so
6 that means I assume it took him probably 20 to 30 minutes
7 to write it so it was around 2 a.m. in the morning when
8 he started the statement. Now I'd spoken to him before
9 then so it was probably closer to midnight when I arrived
10 at the house.

11 Q. And based off your investigation he had dropped
12 Sibling² the oldest child off at school earlier in the day?

13 A. In the morning after the incident with the bathtub,
14 yes.

15 Q. On the 6th -- September 6th?

16 A. Yes.

17 Q. And so time wise that from 2:30 -- 2 a.m. -- 7:30 to
18 2 a.m. the next day that's approximately how many hours?

19 A. 7, 8, 9, 10, 11, 12, 1, 2; so it was 7, 7 and a half
20 hours.

21 Q. --- Seventeen -- or twelve plus eight ---

22 A. --- yes, there you go. So, its 7, 8, 9, 10, 11, 12,
23 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 1, 2; so 14 hours
24 later.

25 Q. Okay, 14 hours later. Do you know about how many

(BRIAN FENTON - CROSS BY MR. SHELTON)

1 statements he had given to various people at that point
2 in time?

3 A. I assume he spoke to the social worker at the
4 hospital.

5 Q. So he was at the hospital at some point in time?

6 A. I believe so.

7 Q. And this statement -- now you heard Corporal
8 Arrington testify earlier in the courtroom.

9 A. Yes.

10 Q. And he mentioned that Chris had talked about a fall,
11 a previous fall.

12 A. Yes.

13 Q. From your notes where did he learn that information?
14 Where did Chris learn that information?

15 A. He learned it from his spouse.

16 Q. From Sandra?

17 A. Yes.

18 Q. Okay. You received -- so you took this statement
19 on September 7th, 2011?

20 A. Yes.

21 Q. And you said you received your last medicals October
22 23, 2012.

23 A. Yes.

24 Q. But you received the first packet of medicals
25 November of 2011.

1 A. I did.

2 Q. And you first talked with the doctor, Doctor Amaya
3 on January 23, 2013?

4 A. Yes.

5 Q. Did you talk with anybody else that day also?

6 A. Did I speak with anybody else?

7 Q. Yes?

8 A. I conferred with the Solicitor.

9 Q. Any Solicitor in particular?

10 A. Anne Williams..

11 Q. Now you arrested Chris -- you only arrested him for
12 one charge correct?

13 A. Initially, yes.

14 Q. Okay. You never had an arrest charge for a second
15 charge?

16 A. No.

17 Q. And the only charge you arrested him for was the
18 unlawful conduct?

19 A. That's correct.

20 Q. You also obtained a statement from Sandra Berke
21 correct?

22 A. That I did.

23 Q. And she attempted to explain the head injury to the
24 back of the head?

25 A. I believe so.

(BRIAN FENTON - CROSS BY MR. SHELTON)

- 1 Q. She also attempted to explain the leg injury?
- 2 A. Yes.
- 3 Q. And she also explained the tub incident ---
- 4 MS. TAYLOR: --- objection, Your Honor.
- 5 THE COURT: Basis?
- 6 MS. TAYLOR: Hearsay.
- 7 THE COURT: Sustained. Out of court statement
- 8 offered for its truth. While you are not directly asking
- 9 him to repeat what she said you're asking him to
- 10 paraphrase or summarize it. Proceed.
- 11 Q. [Mr. Shelton] Chris had stated that Minor had thrown
- 12 up about lunchtime?
- 13 A. I don't remember if he gave an exact time about when
- 14 she threw up but she had thrown up and there was vomit in
- 15 her hair.
- 16 Q. And so that is why he gave her a bath?
- 17 A. I believe so.
- 18 Q. He also is the person that told you that he called
- 19 the Air Force Base.
- 20 A. I believe that's what he said. I'm not sure if he
- 21 exactly said who it was that was trying to call. Well, I
- 22 guess he does say I called the Air Force Base.
- 23 Q. To find out where to take her?
- 24 A. I believe so.
- 25 Q. Now, you said at that point in time he was not under

(BRIAN FENTON - CROSS BY MR. SHELTON)

1 arrest.
2 A. No.
3 Q. And he was not a suspect?
4 A. Not at the point that I believed I was going to
5 arrest him right away.
6 Q. But MUSC had called you out.
7 A. MUSC called the Sheriff's office patrol Deputy
8 Arrington went out there and then Corporal Arrington
9 called me.
10 Q. You had no reason to doubt this statement?
11 A. Not at that time.
12 Q. And the house was in order?
13 A. It appeared to be fairly clean, yes.
14 Q. Had enough food in the house?
15 A. I don't remember looking inside the refrigerator.
16 Q. Nothing that would cause alarm?
17 A. No.
18 Q. Electricity on?
19 A. Yes, there were lights.
20 [Whereupon, Ms. Shelton and Mr. Groeber confer]
21 MR. SHELTON: Your Honor, can we approach?
22 THE COURT: Uh huh.
23 [Whereupon, an off the record bench conference is
24 held]
25 THE COURT: You may proceed.

(BRIAN FENTON - CROSS BY MR. SHELTON)

1 MR. SHELTON: No further questions.

2 THE COURT: Any questions for the witness?

3 MS. TAYLOR: Briefly, Your Honor.

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(BRIAN FENTON - REDIRECT BY MS. TAYLOR)

REDIRECT EXAMINATION

1
2 BY MS. TAYLOR:

3 Q. Detective Fenton, at the time that you originally
4 spoke with the defendant did you know that a crime had
5 occurred?

6 A. Not really. In my experience with investigating
7 incidents involving children there are plenty of times
8 that we are in fact called in that it had in fact been an
9 accident.

10 Q. So at the time that you spoke with him you didn't
11 know if there was a suspect in the case?

12 A. No, ma'am.

13 Q. What led you to eventually consider him a suspect
14 and to doubt his statement?

15 A. When the MUSC staff expressed their concerns.

16 Q. And that wasn't until when?

17 A. Quite a time later.

18 Q. Is it unusual in your experience Detective Fenton
19 that you make initial charges but then additional charges
20 are brought later?

21 A. All the time.

22 Q. Thank you. No further questions.

23 THE COURT: Any objection -- sir, you may step
24 down.

25 THE WITNESS: Thank you, Your Honor.

1 THE COURT: You're welcome, sir.

2 [Whereupon, the witness is excused and exits the
3 witness stand]

4 MS. WILLIAMS: May we approach?

5 THE COURT: Yes.

6 [Whereupon, an off the record bench conference is
7 held]

8 THE COURT: Madame Forelady and ladies and
9 gentlemen, we're waiting on the arrival of a witness who
10 we think is probably in the parking lot making their way
11 up to the courtroom. We're going to take advantage of
12 that to allow you all a brief restroom break. During the
13 break please do not discuss the case and please leave
14 your notepads in your seats.

15 [Whereupon, the jury exits at 1:58 p.m.]

16 THE COURT: We'll be at ease for a few moments
17 until we can ascertain the location of the State's next
18 witness.

19 MS. TAYLOR: Thank you, Your Honor.

20 THE COURT: You're welcome.

21 MR. SHELTON: Your Honor, at the appropriate time I
22 would ask that we have a chance to proffer --

23 THE COURT: You asked to admit Ms. Susan [sic]
24 Berkes statement. It is not admissible. It is hearsay.
25 She is not a party opponent. It cannot be considered as

1 an admission against interest. The witness is available.
2 You can call her anytime you want to and subpoena her in
3 fact.

4 Your only concern probably is that she is going to
5 take the Fifth, which she is certainly entitled to do.
6 She may not; we have no idea. But the State is certainly
7 entitled to cross-examine her. And the investigator is
8 not going to be allowed regurgitate what she said in her
9 statement because its hearsay and it's being offered for
10 its truth. I really don't know what you're asking to
11 proffer.

12 MR. SHELTON: Your Honor, for purposes of the
13 record I'd like to proffer the statement that the
14 detective took.

15 THE COURT: It can be marked as a court's exhibit.
16 I assume the State has no exception?

17 MS. TAYLOR: No, Your Honor.

18 THE COURT: It will be marked as a court's exhibit.

19 MR. SHELTON: Thank you, Your Honor.

20 [Whereupon, court's exhibit number 2 is marked by
21 the court reporter]

22 [Off the record momentarily]

23 MS. TAYLOR: Your Honor, we've gotten in touch with
24 the witness. She's actually looking for parking right
25 now.

1 THE COURT: Okay.

2 [Off the record momentarily]

3 MS. WILLIAMS: Your Honor, we have demonstrative
4 aids marked and cleared with defense counsel. They are
5 41 through -- I'm sorry, 35 through 42. They are on
6 everyone's list. At the

7 THE COURT: Are they demonstrative or are they
8 actually being offered as evidence?

9 MS. WILLIAMS: Just demonstrative. So they are in
10 the ---

11 THE COURT: --- they will be marked for I.D. only
12 then.

13 MS. WILLIAMS: Marked for I.D. only.

14 THE COURT: 35 through 42. Is that correct, Mr.
15 Shelton?

16 MR. SHELTON: Yes, Your Honor.

17 [Whereupon, State's exhibit numbers 35, 36, 37, 38,
18 39, 40, 41, and 42 are marked by the court reporter for
19 I.D. only]

20 [Off the record momentarily]

21 MS. WILLIAMS: Our witness is here, Your Honor. Do
22 you want her in the witness chair or just...

23 THE COURT: I need to see what the status of the
24 jury is.

25 [Off the record momentarily]

1 THE COURT: Is the State ready to proceed?

2 MS. WILLIAMS: The State is ready, Your Honor.

3 THE COURT: The defense ready to proceed?

4 MR. SHELTON: Yes, Your Honor.

5 THE COURT: Please bring in the jury.

6 [Whereupon, the jury enters at 2:11 p.m.]

7 THE COURT: Ladies and gentlemen we appreciate your
8 patience. The State may proceed.

9 MS. WILLIAMS: Thank you, Your Honor.

10 THE COURT: You're welcome.

11 MS. WILLIAMS: The State calls Doctor Michelle
12 Amaya.

13 [Whereupon, Doctor Amaya comes forward]

14 [Whereupon, the witness is duly sworn by the Clerk
15 of Court]

16 CLERK OF COURT: Please be seated. State your full
17 name and spell your last name for the record.

18 THE WITNESS: My first name is Michelle with two
19 L's, last name is Amaya A-M-A-Y-A.

20 THE COURT: You may proceed.

21 MS. WILLIAMS: Thank you, Your Honor.

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(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 MICHELLE AMAYA,

2 Having been first duly sworn,

3 Was examined and testified as follows:

4 DIRECT EXAMINATION

5 BY MS. WILLIAMS:

6 Q. Doctor Amaya, where do you work?

7 A. The Medical University of South Carolina which is in
8 Charleston.

9 Q. And what is your position there?

10 A. I am an Associate Professor of Pediatrics.

11 Q. And are you a licensed physician?

12 A. Yes, ma'am.

13 Q. In what states are you licensed in?

14 A. I have an active licensure in South Carolina. I had
15 former licenses in North Carolina and in Alabama.

16 Q. And how long have you been licensed in your
17 profession?

18 A. Twenty years -- twenty-one years.

19 Q. Do you specialize in a particular field of medicine?

20 A. I do. I actually practice general pediatrics. I'm
21 board certified in general pediatrics. But I'm also
22 board certified in a subspecialty known as child abuse
23 pediatrics.

24 Q. And you are presently practicing in that capacity at
25 MUSC?

- 1 A. Yes ma'am, in both actually.
- 2 Q. And where did you receive your training?
- 3 A. At the University of North Carolina in Chapel Hill.
- 4 Q. Would that be medical school or your residency?
- 5 A. That was medical school and residency both.
- 6 Q. And what is your education before that?
- 7 A. I went to the College of William and Mary in
- 8 Williamsburg, Virginia where I got a Bachelor of Science
- 9 degree in Chemistry.
- 10 Q. And does your work involve participating and
- 11 evaluating child abuse cases?
- 12 A. Yes ma'am, it does.
- 13 Q. And how many cases do you think if you had to give
- 14 us a ballpark that you've evaluated in terms of child
- 15 abuse cases in your career?
- 16 A. I would say for general pediatrics I've estimated
- 17 that I've seen at least 10,000 children since I began
- 18 practicing. And I've probably seen at least 4,000
- 19 children specifically because someone was concerned that
- 20 they may or may not have been abused.
- 21 Q. And are you a member of any specialized medical or
- 22 scientific group or associations?
- 23 A. I am. I'm a member of the American Academy of
- 24 Pediatrics. I'm also a member of the South Carolina
- 25 child abuse medical network; it's called South Carolina

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 Child Abuse Medical Response system so it's a network of
2 child abuse physicians and providers in the area for
3 quality assurance and for making sure we respond to kids
4 in the area.

5 And I'm a member -- I'm a founding member of a
6 national honorary organization for child abuse
7 physicians, which is called the Ray Helfer Society.

8 Q. And you're certified in pediatrics you said?

9 A. Yes, ma'am.

10 Q. What is required to be certified in a specialty of
11 pediatrics?

12 A. Well, you have to complete a three year -- for
13 example, for general pediatrics complete a three year
14 residency program which comes after four years of medical
15 school which in turn comes after four years of college.

16 Once you've completed that then you're eligible to
17 sit for the board exam and then you register and take it
18 and pass the exam. And once you've completed the general
19 pediatric boards then you have to complete either a
20 fellowship, which is three years in child abuse
21 pediatrics or since it's a relatively new subspecialty
22 for old people like me who have been around for a while
23 you have to show that you have participated for at least
24 five years fifty percent of your time in child abuse
25 pediatrics doing child abuse peds work.

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 And you have to have letters from like the
2 department Chair or the Dean etcetera to say that and
3 then the American Board of Pediatrics would accept your
4 application to sit for the exam. Then you pay lots of
5 money and you sit for the exam and hopefully pass.

6 MS. WILLIAMS: Your Honor, at this time the State
7 moves to have Doctor Amaya qualified as an expert in the
8 field of child abuse pediatrics.

9 THE COURT: Any objections or questions?

10 MR. SHELTON: None, Your Honor.

11 THE COURT: So admitted without objection.

12 MS. WILLIAMS: Thank you.

13 Q. [Ms. Williams] Now you mentioned that your
14 department is called the VIP?

15 A. It used to be. It was called VIP which stands for
16 violence intervention prevention and recently our
17 department Chairman wanted us to change our division name
18 to match the subspecialty names. Now it's called child
19 abuse pediatrics division at MUSC within the department
20 of Pediatrics.

21 Q. Okay. And what is its primary function? How does
22 it operate within MUSC?

23 A. It's a consultative service. So what that means is
24 if someone sees a patient, like a primary care person or
25 maybe law enforcement or DSS gets involved in a case,

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 counselor, church, school; pretty much anyone -- if a
2 family member has concerns then they can call and request
3 a consultation service, usually they are referred by
4 someone to come to our clinics.

5 And we have outpatient clinics both in Charleston
6 and in Summerville. And we also have a hospital based
7 clinic in MUSC in Rutledge Tower. We respond to consults
8 in the emergency room so especially for children between
9 birth and 17 who have been sexually assaulted.

10 We respond to those to help collect evidence and to
11 consult on them to see what is going on. And when a
12 child has been admitted to the hospital and there is a
13 concern of possible inflicted injury of any kind then
14 it's very common especially if they are under three years
15 old that our team gets consulted to help see if it's
16 actually an injury or not an injury. And if it is an
17 injury how was it caused? Was it an accident? Does it
18 match the history? Or could it have been inflicted on
19 the child.

20 Q. So you don't get every case where a child is injured
21 in the emergency room?

22 A. Oh no.

23 Q. For example hypothetically if a child jumps off a
24 couch and hurts her foot and winds up in a little splint
25 and they don't see anything suspicious they wouldn't even

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 call you?

2 A. That's correct. And luckily for us is that at
3 Medical University of South Carolina they have people who
4 are specifically board certified in pediatric emergency
5 medicine so they've done their own specialty work in that
6 three year work so they know kids and so it's really
7 helpful for us working with them.

8 Q. And out of the cases some of them are accidents and
9 some are suspected abuse. Of the ones that are suspected
10 abuse that you get what percentage of those do you
11 determine are actually abused?

12 A. We track that actually. Every since we joined the
13 South Carolina network and it was formed, which was
14 somewhere around 2008 or so it's tracked.

15 So each year that we get statistics -- in fact we
16 just in fact came back from our State meeting in Columbia
17 last week and so for the last year of all the kids we saw
18 54 percent of the ones that we saw had medical findings
19 where we said they were abused. The rest of them were
20 either undetermined or not abuse.

21 So about half and that's been true year to year and
22 it's actually true when you look at all the State network
23 providers they run about the same; somewhere between 50
24 to 54 percent.

25 Q. So out of the pool of people that come into the

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 emergency room the few that they pluck out and give to
2 you that they think are abused you're saying only about
3 50 percent of those you determine are actually abused?

4 A. That's correct; by our medical assessments.

5 Q. Sometimes you just determine it was an accident and
6 give the child back to the parent is that correct?

7 A. Well, we don't really be in charge of giving people
8 their children. That's up to I think our mandated
9 representatives in law enforcement and DSS.

10 But we will make the recommendation that the
11 explanation is plausible, it seems to be no specific
12 worry. Of course, there is no magic test ever to rule
13 out child abuse because you can be completely normal and
14 have been abused many times in your life.

15 But best as you can tell by putting together the
16 whole story that is certainly the case that many times
17 we'll say reassuring at this point for non-abuse and if
18 you have concerns please don't hesitate to let your
19 primary care doctor know and they will let us know as
20 well.

21 Q. And when you're trying to figure out if a child has
22 been abused what do you examine and look at in order to
23 figure out on each case; figure that out on each case?

24 A. Actually like most of medicine whether you're an
25 adult medicine or a pediatric doctor most of medicine

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 depends very heavily on the history. So whatever history
2 you can get from the caregiver who brings them, if
3 multiple caregivers come you try to get history from the
4 ones who have been taking care of the child, of course.

5 If they are in the care of an investigating agency
6 or someone has seen them or knows some information you
7 try to get them. If one of your consultants like say the
8 primary care team has admitted them or the ER doctors
9 have seen them of course we want to get their history
10 what did they see.

11 If EMS was involved we'd like to get the EMS report
12 if we can; so as much history as you can. But of course
13 the hallmark is sitting down and having a conversation
14 with the person who has brought them if at all possible.

15 Q. And how do you time an injury? How do you determine
16 when an injury occurred?

17 A. Multifactorial but the most reliable way -- people
18 always want to know like from TV what was the exact
19 minute that -- if an injury has been found to have
20 occurred what is the exact minute that it happened.

21 Unfortunately, you can almost never say that unless
22 there was a witness. And in child abuse cases there is
23 frequently no witness.

24 So we go by the history and then we look at what the
25 person tells us and we look at the plausibility related

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 to lab findings, x-ray findings, and see how it is all
2 put together.

3 And if it makes sense then we're able to say this
4 makes sense, it seems plausible and move forward from
5 there. But the whole thing the history is really
6 important for determining time.

7 Q. Okay. And when you're talking about the history
8 explain what that is in the context of your work because
9 I think history is kind of a broad term.

10 A. Yes, it is a broad thing to do so that's what takes
11 most of the time when we're working on these cases and
12 some of these cases take ten to fifteen hours to work on
13 even on the first day.

14 So most of this time is related to pulling together
15 history and trying to figure out -- so if someone is only
16 four months old then you start from when they were born.
17 Was there anything prenatally going on? Once they were
18 born what kind of things happened that could have
19 contributed to what you're seeing now in their consult.
20 You talk to the caregiver who brought them in and find
21 out who was caring for them especially when was that
22 child last well; that's what we always want to know in
23 any case.

24 When was the child last well and who was able to
25 witness that. And we don't count it last well when they

1 were asleep because you could be in a coma or something
2 when you're asleep.

3 So when were they last well and awake. Well not
4 necessarily meaning without symptoms but we like to go
5 back as far as we can with no symptoms.

6 Q. And so for example a skull fracture if you just look
7 at the bone and the images and when you know that
8 particular injury without getting any history you might
9 have a window of time is that correct on when it could
10 have occurred?

11 A. That's correct.

12 Q. And would it be important to know when the child
13 became symptomatic in terms of when it occurred?

14 A. Yes. And symptoms could be how the child -- like if
15 they're crying that's a symptom. But a symptom could
16 also be like a finding -- like if their head feels smoshy
17 over the spot. So there are a lot of skull fractures
18 that you would never know they were there and you find
19 them by accident because there may not be any smoshy
20 spot, which is swelling or blood collection over the area
21 anymore at the time that you see them.

22 And then by looking at x-rays you really have no
23 idea how old that fracture is; you just know less than
24 like six months.

25 Q. So there is a range of severity in skull fractures?

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 A. Sure. Well, sure -- yes. Any problem there is a
2 range; sure.

3 Q. So you just can't time it by looking at the fracture
4 itself. You have to look at the soft tissue damage and
5 when the child was in pain or crying or not acting like
6 they ordinarily would act. Is that true?

7 A. Sure, exactly.

8 Q. In this case did you have -- let me back track just
9 a little; I'm sorry.

10 In your practice do you all have safeguards on when
11 an opinion is given by say a radiologist is there some
12 kind of safeguard in terms of follow up visits just to
13 make sure that a result is agreed upon by everybody that
14 has examined the child?

15 A. Yes. Our goal of course is excellence of care for
16 the family and the child. So what we do -- not just our
17 specialty but other specialties do is whenever you have a
18 case you always try to look at the images yourself. Then
19 we like to go over them with the radiologist so that we
20 can talk about it and see what their findings are and
21 make sure everyone understands; asks questions.

22 Then we usually have a meeting, we call them
23 multidisciplinary team meeting where the people who are
24 actively involved in the case -- say the surgeon is
25 involved and I'm involved as the child abuse physician,

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1 and the radiologist is involved, and maybe a DSS worker
2 is investigating the case and maybe a counselor is
3 involved.

4 We try to get all those people together and then our
5 whole team, our division the child abuse pediatrics team,
6 we're there; there are like four or five of us, and we
7 review the case together and we come up and generate with
8 recommendations trying to find out if there are things we
9 could have left, things that were omitted, records that
10 should have been reviewed that hadn't been reviewed, what
11 does law enforcement have to say about it if they've been
12 involved. And if they're not involved why aren't they?
13 Do they need to be involved? Are we happy about that?

14 And then finally we always have them come for a
15 follow up. So most of the little children if they are
16 under two years old if there is a significant concern
17 it's not infrequent for them to get a follow up x-ray of
18 their bones to make sure that they are okay; especially
19 if they have had an initial fracture.

20 One, to look at the strength of the bones, two, to
21 look at how well the bones healed, and three, to look at
22 -- C I should say -- see how quickly they healed because
23 that helps you know about the quality of the bones. So
24 that follow up skeletal survey and medical visit is
25 important to put the pieces together.

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1 Q. So if you do an x-ray on a child and then later do
2 an MRI two weeks later does that sometimes help your --
3 form your opinion or change your opinion or you know
4 determine what really happened to the child?

5 A. Yes.

6 Q. And all the things you mentioned gathering history
7 from the family, talking to law enforcement, looking at
8 all the clinical tests, talking to other doctors,
9 gathering medical history is that all necessary to form a
10 medical diagnosis in these pediatric child abuse cases?

11 A. Yes. We like to have as many of those pieces as we
12 possibly can. There are times when you can't have all
13 that information and you have to make a recommendation
14 and impression based on the information you have.

15 But you have to qualify it that this is based on
16 this information that I had so...

17 Q. Did you treat a patient named Minor Berke?

18 A. Yes, ma'am.

19 Q. When did you treat her?

20 A. September 6th, 2011.

21 Q. How old was she?

22 A. She was just a couple of days shy of turning 15
23 months old.

24 Q. And how much did Minor weigh at that time?

25 A. She was about eight kilograms, which is something

1 like 17 or 18 pounds.

2 Q. Okay. And was she verbal?

3 A. Her mother reported when I took her history that she
4 had six to ten words. I didn't hear her say anything or
5 I don't remember because it was a while ago.

6 Q. She wasn't able to tell you what happened to her?

7 A. No, ma'am.

8 Q. And where was she in the hospital when you first
9 encountered her?

10 A. She was in the intensive care step down unit, Ward
11 C.

12 Q. And in general what injuries did she have?

13 A. She had a lot of cutaneous bruising on her face and
14 scalp and ears. She had a scalp swelling or hematoma
15 blood collection on the left side of her head over her
16 ear. She had another scalp hematoma over the back of
17 her head on the opposite corner and that was overlying a
18 complicated skull fracture. And she had an old fracture
19 that was seen in her leg and she had what looked like an
20 old fracture in her left arm.

21 Q. And were follow up MRI's done on the child on a
22 later visit?

23 A. Yes. MRI's can be quite difficult sometimes to get
24 in the hospital and she presented not in a coma, awake
25 and not vomiting and so it was difficult to get it.

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1 scheduled because she has to have sedation so the
2 earliest we could get it was as an outpatient. So yes,
3 she had it as an outpatient.

4 Q. And in the follow MRI's were any more subdurals
5 seen?

6 A. Yes. She had -- I didn't actually remember to
7 mention that. She had a subdural on one side and when
8 she came back for the follow up MRI because she had
9 gotten a CAT scan, which is an excellent test but MRI is
10 even better, she had a bilateral frontal small but
11 subdural hemorrhages which are blood collections
12 immediately overlying the brain itself under the skull.

13 Q. I'm going to ask you to...

14 MS. WILLIAMS: Your Honor, may I approach?

15 THE COURT: You may.

16 [Whereupon, the witness is given mannequin head]

17 Q. [Ms. Williams] It's hard for me to visualize where
18 all these child's injuries were. If you could just --
19 we're going to go into some pictures and diagrams -- but
20 if you could just show us on this head where all her
21 injuries were.

22 A. Do you have a marker?

23 Q. Yes.

24 A. So she had a prominent left back eye and I remember
25 it mostly over the eye and kind of all around. She had

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1 kind of a punctate or pinpoint spot where the bruise
2 seemed a little bit darker right over her eyebrow.

3 Then she had kind of -- all kinds of red, purple
4 bruising that extended in the front of her ear and behind
5 her ear [indicates].

6 She had pinpoint purple bruises on the top of both
7 ears. Not pinpoint; they were more like maybe a
8 centimeter, half centimeter on top of her ears. So this
9 [indicates] is all the bruising all over her scalp you
10 could see under her hair.

11 She had kind of a smoshy spot, that boggy spot right
12 here [indicates]. So I just left the kind of bruising in
13 pink and then I'm just going to outline approximate --
14 should I look and see the measurements or is that too
15 exact?

16 Q. Just the points where she had the subdural, the
17 fracture.

18 A. This [indicates] is boggy, smoshy stuff over the
19 front of her head. And then she had more of a palm size
20 one here [indicates] on the back of her head. I'm going
21 to estimate it was right about here [indicates]; it was
22 bigger.

23 I must qualify this to say I am like the worse
24 drawer so I'm trying my best. And then underneath here
25 [indicates] and I can't remember exactly the

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1 configuration of the fractures but she had fractures
2 under here [indicates] kind of like that shaped
3 [indicates].

4 Then she had more bruising behind this ear
5 [indicates] and the front. She has a bruise, a round
6 bruise on her cheek. Her inside of her head she had like
7 these eye frontal subdurals. These [indicates] are the
8 subdurals.

9 Q. And where are those under the -- on top of the brain
10 but beneath the scalp?

11 A. On top of the brain under the skull.

12 Q. Okay.

13 A. I'm writing subdural hemorrhage. That's DH
14 subdural; that's inside the head intracranial. And I
15 think that's it ---

16 Q. --- did she have any other subdurals besides the
17 ones in the front?

18 A. She had it going along the fault [phonetic] which is
19 like the dividing line between the two hemispheres of the
20 brain. There is like -- your brain has special
21 protective membranes that fold over the top of it and the
22 spinal fluid runs in there and so does blood vessels.

23 So those thick dural membrane is there and it rolls
24 down the middle and that forms what is called the fault
25 [phonetic]. o she had blood in there.

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1 Q. Okay. And according to the history that you
2 collected about this child was she normal before she got
3 into the bath with the defendant? When did they report
4 that she was last normal or when she was last okay?

5 A. Well, there is a long answer and a short answer.
6 The long answer was when I first asked the Mother when
7 she was last well she said about a month ago. And then
8 she described -- may I check my notes?

9 Q. Please?

10 [Whereupon, the witness reviews her notes]

11 A. She was last completely well one month ago without a
12 cold or any kind of scrape. So then she said that family
13 members had had some diarrhea illness in the last few
14 days including the Mother herself.

15 And she said that Minor had had a small bruise on her
16 shoulder and she had a bruise on her left cheek. And
17 then she was otherwise fine. She had like an episode of
18 vomiting maybe half a cup of Pedialyte in the afternoon
19 while her Dad was caring for her and then it sounds like
20 she had an episode of vomiting in her crib while her five
21 year old sister was having her bath.

22 But other than that -- and like after eating hotdogs
23 and fries. So other than that she was described as being
24 well.

25 Q. So aside from this small bruise on her cheek and the

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1 bruise on her shoulder the history is that there were no
2 other visible signs of injury before she gets in the bath
3 with Dad?

4 A. Correct.

5 Q. Now what is Dad's story, Mr. Berke, about how this
6 child was injured? Can you demonstrate with that head
7 like what he says happened?

8 A. Okay. I will qualify this by saying that I did not
9 have an opportunity to directly interview Mr. Berke
10 myself.

11 However, we work with a team and the social worker
12 as well as the ER physician, the pediatric emergency
13 medicine physicians interviewed in the ER.

14 Then when I came up to do the consult because I was
15 consulted by both the ER and the ICU doctors of course I
16 reviewed the history with them. So what they told me
17 is that he said that he was bathing the baby, the child
18 Minor That he picked her up and he didn't ever bathe her
19 before. It was his first time; and he had been away
20 deployed for our country.

21 And he came back and said he didn't have a very good
22 bond with her; that he was still working on that. But
23 when he started to bathe her he put her in the tub, she
24 usually has a little trouble with baths.

25 She was enjoying that particular bath until all of a

1 sudden she kind of kicked out.. And he was holding her
2 under her arm and she kicked out and leaned forward and
3 hit her head on this area [indicates] on the faucet of
4 the tub.

5 Q. And did he ---

6 A. --- and he said that he was able to catch her in
7 time to keep her head from hitting the floor of the tub.

8 Q. Okay. And so he said she hit one time above the
9 left eyebrow?

10 A. Yes; and he said that to the ER physician and then
11 he said it to the first social worker who saw -- who had
12 a chance to speak with him and was Mary Elizabeth Gunter.

13 And then our second social worker who works with the
14 inpatient team is Jessica Credeur and he gave the same
15 history to her as well. So pretty consistently.

16 Q. Could all of those injuries ever be caused by his
17 explanation?

18 A. No. There is more that happened.

19 Q. Okay. And even if you took the skull fracture out
20 of the equation, let's just pretend for one second that
21 the skull fracture didn't exist could those injuries
22 minus the skull fracture have been caused by his
23 explanation?

24 A. No.

25 Q. Let's go through each of this child's injuries. I'm

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1 going to show you some photographs. I'm showing counsel
2 State's 2 through 11; I think one -- 12 has already been
3 admitted.

4 [Whereupon, Ms. Williams shows photographs to Mr.
5 Shelton]

6 MR. SHELTON: Your Honor, our only objection is
7 403.

8 THE COURT: Madame Forelady and ladies and
9 gentlemen if you would indulge us for a moment. I need
10 to take something up -- a matter of law outside your
11 presence. It should only take -- it will take less than
12 three minutes. During the break please do not discuss
13 the case and please leave your notepads in your seats.

14 [Whereupon, the jury exits at 2:39 p.m.]

15 MS. WILLIAMS: We originally had more but we took
16 out ---

17 THE COURT: --- I didn't ask for argument now.
18 What is the basis of the objection?

19 MR. SHELTON: Just that the pictures are more
20 prejudicial than probative, Your Honor.

21 THE COURT: Would the State like to respond?

22 MS. WILLIAMS: Yes, Your Honor. The pictures show
23 different views of the injury. We're going to have
24 Doctor Amaya explain what is called tracking, which the
25 defense has already asked some witnesses about, where

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1 blood from in this case a subgaleal bleed seeps into
2 other areas underneath the scalp and in this case was
3 behind her ears and to the base of her skull and across
4 the top of her head.

5 In addition to that we're going to show that the
6 tracking can't be from -- the skull fracture was on the
7 other side of her head. In addition to that we also want
8 to show the difference in the color of the bruise on her
9 cheek that they say she already had with the one over her
10 eye.

11 And in addition to that she had what we call -- what
12 we call -- I don't think doctors call them this -- but
13 battle scars which are the bruising on the tips of the
14 ears, which are very, very usually non-accidental. They
15 are big red flags for non-accidental injuries. We tried
16 to get one view that shows each part of the seeping blood
17 underneath the scalp. There were eight other pictures
18 that we removed when we went over with defense counsel
19 because we agreed that they were duplicative.

20 THE COURT: I've already admitted two of these
21 haven't I?

22 MS. WILLIAMS: Yes, Your Honor, 1 and 12.

23 [Whereupon, the court reviews photographs]

24 THE COURT: The objection is overruled. State's
25 exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 will come in.

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1 They are probative, they are relevant, they do not
2 mislead the jury. Their probative value is outweighed by
3 any possible prejudice to the defendant. In addition
4 they clearly establish one of the elements that the State
5 is required to prove under 16-395.

6 [Whereupon, State's exhibit numbers 2, 3, 4, 5, 6,
7 7, 8, 9, 10, and 11 are entered into evidence by the
8 court]

9 THE COURT: In addition the pictures are not gory
10 and they are an actual depiction of the child's injuries
11 as they existed at the time she presented to the facility
12 for treatment. In addition they also confirm or
13 corroborate the doctor's treatment, assessment, and
14 diagnosis of the child. You may proceed -- actually we
15 need the jury. Do y'all want to take this opportunity to
16 take a restroom break too?

17 MR. GROEBER: Yes, Your Honor.

18 THE COURT: Okay.. As soon as they get done -- if
19 you need to stretch your legs you can but please do not
20 discuss your testimony with anyone during this break.

21 [Whereupon, court is in recess from 2:45 p.m. to
22 2:50 p.m.]

23 [Whereupon, the jury enters at 2:50 p.m.]

24 THE COURT: Ladies and gentlemen we will now resume
25 with the witness's testimony. You may proceed.

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1 MS. WILLIAMS: May I approach?

2 THE COURT: Yes, ma'am.

3 Q. [Ms. Williams] Doctor Amaya, I'm going to show you a
4 stack of pictures. If you could look through the whole
5 stack and tell me if those accurately depict the way Minor
6 Berke looked the day that you saw her when you were
7 treating her.

8 [Whereupon, the witness views photographs]

9 A. Yes ma'am; except for there is ink on this first one
10 on the front. I took these photos.

11 Q. Okay.

12 MS. WILLIAMS: Your Honor, at this time ---

13 THE COURT: --- I've already admitted them. You
14 may proceed.

15 MS. WILLIAMS: May we publish?

16 THE COURT: You may publish.

17 [Whereupon, photographs are shown for the jury]

18 Q. [Ms. Williams] If you could show the jury what is
19 going on -- is this how she looked when you first saw
20 her?

21 A. Yes, ma'am.

22 Q. Okay. And where is that bruising, that red
23 bruising that is going over her eye and on her forehead
24 where is that coming from if you know --

25 A. This [indicates] there are two -- what I'm looking

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1 at there are two different things I see.

2 So the first one is focal bruise right here
3 [indicates] and then there is this more diffused
4 spreading bruise here [indicates] that extends as I was
5 drawing on the mannequin head extends behind the ear and
6 over the scalp.

7 Q. Okay.

8 THE COURT: I need you to make sure you refer to
9 the number of the photo that you're having the doctor
10 describe.

11 MS. WILLIAMS: I'm sorry, Your Honor.

12 Q. [Ms. Williams] It's exhibit number 1, State's 1.
13 And in this photograph when you look at where -- and
14 we're going to go through the other photographs too but
15 is it possible that the redness that we see around the
16 eye is from a separate impact than whatever is causing
17 the bleeding that is under her scalp and other areas?
18 Could it be a separate impact besides the subgaleal
19 muscles?

20 A. If I'm understanding you correctly there is an
21 impact here [indicates] and when I got history from the
22 Mother she told me that the Father brought Minor in to see
23 her on the previous night with a goose egg on her brow.
24 And that to me looks like where that was.

25 And a goose egg could drain and cause a black eye.

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1 It's a little more extensive than I would expect but
2 certainly a goose egg could drain and cause a black eye
3 because that skin is really thin and soft and loose so.

4 Q. Is it possible that she had an impact to her eye as
5 well?

6 A. It's possible.

7 Q. If you could you put up State's 2?

8 [Whereupon, State's exhibit number 2 is shown]

9 Q. Now tell us what this picture shows in terms of
10 where the bruising is spreading to?

11 A. Okay. She has a little round bruise here
12 [indicates] on her cheek with a central clearing. She
13 had some swelling here [indicates] so that her head is
14 kind of football shaped there [indicates] so you can see
15 that there is bruising and swelling spreading over her
16 scalp over her ear.

17 Q. And what are subgaleal muscles or subgaleal bleeds?

18 A. The head has some layers so you know like when
19 you've been working on something all day long and then
20 you have like a headache at the end of the day because
21 you've been frowning and working on something.

22 Well, that frown muscle is called the galea and it
23 attaches here [indicates] on your forehead and extends
24 across the top of your head to the back and it adheres
25 here [indicates].

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1 It has a facial connection called the galea
2 aponeurotica. And there are veins -- emissary veins that
3 come from the skull and from the brain out into that
4 space.

5 And if those veins tear then that space is pretty
6 open and there can be a large amount of bleeding into
7 that space.

8 And that causes this discoloration and this swelling
9 and you can actually lose quite a lot of blood;
10 especially if you're a young person.

11 Q. And in this case do you think some of this bruising
12 and bleeding and tracking is from subgaleal bleeds?

13 A. Yes.

14 Q. And how are those typically -- how do they happen?

15 A. You have to have tearing of the veins. So in order
16 to tear the veins you've got to have some way to tear the
17 veins within that space. So usually there is a shearing
18 [phonetic] injury. Shearing means -- what is a good way
19 -- so like if the skin moves one way this way [indicates]
20 and the other top goes the other way and it -- or that
21 seam stays still and something this way or that can or
22 this [indicates] can stay still and that [indicates]
23 could move.

24 So you have to move it and then all those little
25 vessels underneath would tear. So the classic way, there

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1 are two really common ways for young children to have a
2 subgaleal hemorrhage. The first is newborns. So if --
3 has anyone heard of vacuum extraction?

4 In vaginal delivery or C-section if the OB/GYN has
5 to apply a vacuum to the baby's head to help pull the
6 baby out then that creates traction on the scalp and can
7 tear those veins and that can be a big problem but it's
8 the most common way.

9 The next way is hair-pulling. Sometimes we'll see
10 it when someone is doing a very fancy hairdo and they're
11 braiding the hair really hard and it can get very tight.
12 But it takes quite a bit of traction typically. Those
13 are the most common ways.

14 Q. So pulling hair?

15 A. Yes, ma'am.

16 Q. Pulling the hair?

17 A. Pulling.

18 Q. And what about impact? Can impact cause subgaleal
19 bleeding?

20 A. It is thought that it may especially in older
21 children. There have been a couple of case reports where
22 like if there is enough force that causes the scalp to
23 move on the skull that you could tear the vessels
24 underneath.

25 Q. How do you think this -- what is your medical

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1 opinion about how this subgaleal bleed occurred?

2 A. Well, I wish I had a good history. But what I have
3 is the description is of a father who is handling his
4 child, which was described in an appropriate manner in
5 trying to keep her from hitting the tub.

6 But she hit the forehead on the faucet and that is a
7 very common injury that we see all the time. That's why
8 they sell those tub faucet protectors at Toys R Us and
9 Walmart.

10 And that is very common to cause a little like goose
11 egg but that is not a way that would cause enough --
12 there is not enough force to cause the shearing and the
13 bleeding underneath. So the history that was given did
14 not explain that.

15 Q. So you're saying ---

16 A. --- it took more force than that.

17 Q. So it would either be more force than he described
18 or pulling of the hair?

19 A. Right, pulling of the hair. And then additionally
20 since Minor has, and we'll probably see them in the
21 pictures but she had bruises sort of ecchymotic purpura
22 bruises on the top of her ears. Could ear pulling, ear
23 slash hair pulling have had anything to do with it? So
24 those are possibilities.

25 Q. Okay.

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1 A. The ears don't directly connect to that subgaleal
2 muscle. So that is -- I haven't seen a lot of case
3 reports related to ear pulling. Most of the case reports
4 have to do with hair.

5 Q. Okay. Could it be a combination of both?

6 A. Could be, sure.

7 Q. Tell us what this picture shows.

8 [Whereupon, State's exhibit number 3 is shown]

9 A. This is more -- lifting the hair up you can see that
10 the skin is discolored underneath and it's extending
11 under the hairline and its back behind it.

12 Q. And is that blood tracking ---

13 A. --- and you can't see it very well on the projection
14 but there is also -- I think there is a little bruise in
15 there [indicates].

16 Q. Inside the ear?

17 A. I believe so. I can't see it myself on this image.

18 Q. Okay. Did you note in your report that there was
19 some bruising inside her ears?

20 [Whereupon, the witness reviews documents]

21 A. Ears - both with dark purple bruises on the tops,
22 interior surfaces of both ears. No, I didn't write that
23 -- so maybe not.

24 Q. And so what causes those -- what we're seeing is
25 just red and blue marks all the way around almost like a

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1 helmet around her head. What is causing that?

2 A. That's blood; blood collected under there. So again
3 it's the bleeding all under that layer that it can just
4 freely move underneath the skin in that subgaleal space.

5 Q. Okay.

6 [Whereupon, State's exhibit number 4 is shown]

7 A. And this just shows some more.

8 Q. And this is more toward the top of her head?

9 A. Yes, ma'am. And you can see it spreading at least
10 this far back [indicates] and it's coming across. Here
11 [indicates] you see another little -- there is that more
12 focal bruise that we talked about before. It's a little
13 bit different pattern than this [indicates] kind of
14 confluent discoloration.

15 Q. So all this bleeding can't be from her hitting her
16 head on the faucet?

17 A. Not as described; not as I got the history and the
18 history I reviewed from the ER.

19 Q. And how much blood did Minor lose? Was it
20 significant?

21 A. Yes, she dropped her hematocrit to 8 which is the
22 same -- I'm sorry; her hemoglobin to 8 which is a
23 hematocrit of about 24 and normal at her age then was 12.
24 So she was considerably anemic.

25 Q. Anemic?

1 A. Uh huh.

2 Q. And again this [indicates] is that other side. I
3 know that -- can you age bruises?

4 A. No, ma'am.

5 Q. Okay. Can you tell from discoloration which ones
6 are more acute than others?

7 A. Probably not. It's a very big temptation but it
8 depends a lot on a number of factors. One is the
9 location on the skin.

10 On some of your skin if you cut it like a surgeon
11 some of it is thinner as far as how thick it is laying on
12 the skin than others. So like the back of your head and
13 on your back that skin is really thick.

14 The skin on your face is very thin. So if you have
15 thicker skin it's going to look different; the same
16 amount of bleeding is going to look different. The depth
17 of the bleeding so if it's a very deep injury it's going
18 to look different and it may take longer to resolve
19 because it rises to the surface and then you'll see it
20 resolved later. So it's very difficult.

21 Q. So you can't tell if the bruise on her cheek is
22 older than the other bruises?

23 A. Well, I have history that the Mother gave me that
24 she says that bruise was there earlier that day. So it
25 looks browner so the temptation is to say it's older but

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1 the real test is the Mother said it was there.

2 So if that is true then that would be consistent
3 with her statement and that it looks a little older. But
4 that's very inexact.

5 Q. Okay. State's 6 please?

6 [Whereupon, State's exhibit number 6 is shown]

7 A. Yes. There [indicates] is the bruise on the back of
8 the ear you're talking about.

9 Q. And which ear is that?

10 A. That's the left ear.

11 Q. And State's 7.

12 [Whereupon, State's exhibit number 7 is shown]

13 A. There is also discoloration here [indicates] behind
14 her ear more of that confluent red purple stuff.

15 Q. And which ears?

16 A. This is [indicates] left ear with bruising right
17 there [indicates]. It's very difficult to see in this
18 photo; it's dark but there [indicates] again that
19 confluent purplish red discoloration bruising.

20 Q. And she had these bruises on her ears on both sides
21 of her head both ears?

22 A. Yes, ma'am.

23 Q. What do those types of bruises indicate to you as a
24 child abuse pediatrician?

25 A. Two mechanisms are plausible. One is a direct

1 impact -- so a contact. So getting hit on some kind of
2 contact surface; either the ear hit the surface or the
3 surface hit the ear.

4 When it's just kind of in that spot like that it
5 also looks typically is from pinching; pinching or
6 pulling of the ear by a hand -- so either one of those.

7 Q. And are those ever accidental when you have two on
8 either side or are they typically accidental?

9 A. No, they're not typically accidental. They are
10 uncommon especially bilateral.

11 Q. Would you say they are indicative of abuse when you
12 see ear injuries like that and bruising?

13 A. You have to check them out and figure out what went
14 on there. You can't just say oh, that's nothing. You
15 need to ask some questions. And in a young child who has
16 bruising on the ears its concerning enough that you
17 better think carefully about measuring that head
18 circumference and pursing imaging of the brain especially
19 in kids under two because they could have brain injury.

20 Q. Okay. State's 8?

21 [Whereupon, State's exhibit number 8 is shown]

22 Q. It's hard to see in this picture but what are we ---

23 A. --- it is. Again we're showing there is that way
24 means it is extending at least to here [indicates]. It
25 looks like it is a little more normal skin here

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- 1 [indicates] but its underneath the hair.
- 2 Q. And you think this is from the subgaleal bleeds?
- 3 A. That's subgaleal, yes.
- 4 Q. State's 9.
- 5 [Whereupon, State's exhibit number 9 is shown]
- 6 A. This [indicates] is the right side of the head and
- 7 you can see that the subgaleal bruising is still
- 8 extending here [indicates] and you can't see it very well
- 9 but it's extending here [indicates] and you can see a
- 10 little bit of it there [indicates]. And you can see a
- 11 little bruise at the top of that ear.
- 12 Q. This is the opposite side of her face where that
- 13 little goose egg is, is that correct?
- 14 A. That is correct.
- 15 Q. State's 10?
- 16 [Whereupon, State's exhibit number 10 is shown]
- 17 Q. And what are we looking at here?
- 18 A. This is again, the right side of her face and you
- 19 can see the bruising extending in the front of her ear
- 20 here [indicates].
- 21 Q. And where is the skull fracture like if you could
- 22 point on her head where it is?
- 23 A. It's in the back but it's around here [indicates].
- 24 Q. Okay. Now all of this blood tracking that we are
- 25 seeing sort of like a helmet around her head could it all

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1 be from the skull fracture? Could it have tracked all
2 the way to the front and around the head?

3 A. No, I don't think so. It would be very unusual. I
4 would write it up as a case report. It would be very
5 unusual.

6 Q. Okay. And State's 11?

7 [Whereupon, State's exhibit number 11 is shown]

8 Q. And that is the right ear, the opposite ear?

9 A. Yes.

10 Q. That's blurry but if you could explain to us what
11 that is?

12 A. That is again one of those focal purple bruises on
13 the top of her ear on the right ear --

14 Q. And last is State's 12?

15 [Whereupon, State's exhibit number 12 is shown]

16 A. And there is a little bit of darkening behind the
17 ear too. That subgaleal blood.

18 Q. And this is a picture of what?

19 A. I think that's -- is that the first picture we saw?

20 Q. It's not but it's similar; it's a similar view.

21 A. This is you can see here [indicates] the -- you can
22 see that little punctate spot there of bruising.

23 You see purplish confluent discoloration that goes
24 down her face towards her eye and extends to about here
25 [indicates]. And you see it underlying her hair. And

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1 you can see she is awake, alert, and interactive as well.

2 Q. Okay. Thank you. Now, in the history that you
3 collected another explanation is given for the skull
4 fracture is that correct; that the child fell back or...

5 A. Actually -- well, I don't know if -- at the time I
6 was interviewing the Mother I don't know if she knew
7 about the skull fracture because it looked like reviewing
8 the records in the emergency room the emergency room team
9 and social workers explained to the Father what was going
10 on. The Mother wasn't there.

11 She was at home watching the other children and she
12 was sick. And then they traded; he went home and gave
13 her the car and she came in. So I can't tell you for
14 sure that she knew.

15 As I was taking the history I didn't say oh, do you
16 know what caused the skull fracture. I just said tell me
17 about all past injuries, any other injuries that the
18 child could have had. And the Mother mentioned that
19 three weeks prior that Minor had been climbing up on like
20 a small bench in the kitchen putting her knee up on it
21 and lost her balance and fell back.

22 So a short height on her own weight using the weight
23 of her -- own force of her body and she said there was no
24 goose egg or anything at that point. And that was three
25 weeks prior.

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1 Q. Okay. So three weeks prior could that -- could
2 this skull fracture have happened three weeks prior?

3 A. If she didn't have that smoshy swelling and blood
4 over it then it could be plausible. The fracture itself
5 may have been there but with the swelling and the blood
6 collection over it that's too long.

7 So in fact we saw her back two more weeks -- she
8 came back to our clinic about 17 days after she was
9 discharged from the hospital.

10 One of our nurse practitioners saw her and there was
11 no sign at all of this swelling; it was completely
12 resolved. So it would have been gone and that was less
13 than three weeks.

14 Q. Okay. So just so I'm clear. So this skull
15 fracture, and we're going to look at some views of it in
16 a second, the skull fracture that you see on September
17 6th could not have happened in your medical opinion three
18 weeks before?

19 A. No, it could not.

20 Q. And as far as all the head injuries total is it
21 possible that Minor herself could have fallen in the bath
22 frontwards, backwards, to the side or another child
23 pushed her; could that be a plausible explanation for
24 these injuries as you see them?

25 A. Could another child have pushed her in the bathtub?

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1 Q. Could -- let's start with one thing. Could just
2 Minor have fallen in the bath? Let's say that he just
3 gives a faulty history and his history is not matching up
4 with these injuries.

5 But let's just say Minor herself falls in the bathtub
6 forwards, back, to the side. Could her weight alone have
7 caused these kinds of injuries?

8 A. Not the extent that we see. If she fell forward on
9 her own weight and hit her forehead on the tub edge or
10 the faucet she certainly could have gotten that goose egg
11 that they described. And that could have potentially
12 caused the black -- you know a bit of a black eye.

13 But the rest of it -- if she fell backwards in the
14 tub -- let's say she was pulled to a stand although she
15 was apparently not really standing at that point but if
16 she had pulled to a stand in the tub and she slipped in
17 the water that was there while it was being put in and
18 fell backwards on her own she would not have gotten a
19 complex skull fracture.

20 She might have had -- if she -- when we're in the
21 hospital and children are up on the exam tables, which
22 are about four feet above the floor and they fall onto
23 the concrete linoleum floor they do get about 1 percent
24 of the time they will get what's called a simple linear
25 fracture.

1 But it's in the thinnest part of the bone, which is
2 the side. It's called the parietal bone -- and that's
3 about one out of a 100 times falling from that kind of a
4 surface.

5 If she's falling from her standing height which is
6 like 18 inches because she's little and falls backwards
7 on her head with her own weight which is what did we say
8 18 pounds; some math person told us that, that's not
9 going to generate enough force to cause a compact
10 fracture.

11 Plus the fracture is located on the occipital bone,
12 which is the thickest bone in the skull so it's thicker
13 and it's harder to fracture so it's not going to be
14 enough force.

15 Q. Okay. And you talked a little bit about some of
16 this gushy smoshy part above the skull fracture. And
17 that to you is another piece of the puzzle that says it's
18 happened definitely in a shorter period of time than
19 three weeks.

20 A. Yes.

21 Q. Would that have been obvious to a caregiver like
22 what you observed on the 6th when she comes into the
23 hospital would that soft tissue damage have been obvious
24 to anyone who would have touched her head?

25 A. If they touched her head -- if they never touched

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1 her head they might have missed it. But if they touched
2 her head it was readily apparent immediately.

3 Q. Okay. And would you expect that kind of fracture
4 and that kind of tissue damage to have been painful?

5 A. Yes.

6 Q. So the child would have had some symptoms you would
7 expect a normal child would have felt pain and cried out
8 and the parents might -- whoever was around the child
9 might have known something was wrong?

10 A. Yes.

11 Q. Doctor Amaya, I'm going to show you a couple of
12 pictures up here. Could you put State's 21 up?

13 [Whereupon, State's exhibit number 21 is shown]

14 Q. Now, what is this a picture of?

15 A. This [indicates] is her skull. It's a 3-D
16 reconstruction made from a CT scan of her head on
17 September the 6th.

18 Q. So this is Minor skull?

19 A. Yes, Minor skull.

20 Q. And ---

21 A. --- there [indicates] is the date.

22 Q. Where are the fractures? Show us.

23 A. Let me first explain something called sutures.
24 Babies have sutures. I guess most people have heard
25 about a baby's soft spot.

1 In order for the brain to be as big as it possibly
2 can be at the time that a baby -- that's the human's
3 advantage is a big brain.

4 At the time a baby is born their skull has developed
5 so that it has relieves that are together but they can
6 overlap so that the baby can come out vaginally. As time
7 goes on they fuse.

8 So these [indicates] are the sutures and you can see
9 how they look like sewing like that [indicates]. So
10 those are sutures. Those are normal; they are supposed
11 to be there. This one [indicates] too I believe is a
12 normal suture.

13 This [indicates] is fracture, fracture, fracture; so
14 that's not supposed to be there. So that is called a
15 complex or stellate fracture.

16 Q. What makes it complex?

17 A. Because it's not just -- if it was just a simple
18 line then that would be a simple fracture. If it has
19 multiple fracture lines then it's considered a complex
20 fracture.

21 Q. Can you put up State's 22?

22 [Whereupon, State's exhibit number 22 is shown]

23 Q. And what is this?

24 A. This [indicates] is the skull rotating. So again,
25 this is looking at the straight back of the head. So

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1 this [indicates] is where you lay on your back and these
2 [indicates] are the sutures looks like a lambda suture;
3 lambdoidal suture. This [indicates] is a fracture coming
4 off that suture.

5 Q. And when you talk about there having to be a
6 significant amount of force to crack that part of the
7 skull it's just because the bone is thicker?

8 A. Yes, ma'am. And also for babies their head -- their
9 skull and bones are much more compliant than mine. So
10 I'm 50 years old.

11 If I fell down and came running over here and I fell
12 and smashed the back of my head on the back of that I'm
13 real crispy; I'm going to crack probably.

14 But babies are more bendable and compliant. So it
15 takes more force actually to break a baby's skull than it
16 would to break my skull.

17 Q. Okay. Could you put up State's 25?

18 [Whereupon, State's exhibit number 25 is shown]

19 Q. Now explain to us what this is a picture of?

20 A. This is a CAT scan not in 3-D. So the way the CAT
21 scans work are they are like a cross section of the head.
22 This [indicates] is for example taken so that the person
23 is laying on a bed with their feet coming out towards us
24 and the nose is up here [indicates] at the top.

25 So this [indicates] is the top of the head and the

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1 nose is there [indicates] and then the back of the head.
2 So you can see this [indicates] is the bone, the bright
3 white, this [indicates] is brain -- hello brain -- and
4 this is here [indicates] some soft tissue swelling
5 outside.

6 So this on her -- she is laying towards us and this
7 [indicates] is her right side. This is [indicates] the
8 right swelling towards the back of her head overlying the
9 fracture.

10 And I can't see the fractureline on this particular
11 film but it's somewhere around there [indicates]; you can
12 see a little unevenness there. And then you can see the
13 swelling kind of spreading over the back.

14 There is also this very bright area right here
15 [indicates] in the middle of the head and there is a
16 little bit more of that here [indicates]. That is blood.
17 On CT scan blood is bright and it's bright when it's
18 fresh. So it's usually fresh in CT language is not like
19 a day; it's usually anywhere from three to five days. So
20 we know that it's recent. It can be zero to five days
21 but up to three to five days.

22 And you can see that it's not just here [indicates]
23 on the right side but it extends down in that dividing
24 line where I was drawing it on the mannequin head.
25 That's blood extending into that fault. You can see a

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1 little bit there [indicates] but mostly here in the
2 middle.

3 Q. And we don't have a picture of the MRI I don't think
4 but show us on that head where later if it is visible
5 from this view where else were there subdural bleeds
6 besides that fault?

7 A. On the MRI -- the MRI is more sensitive and you can
8 see blood much better, even thin amounts of collection.
9 It is not as good for bone. So if you're looking for
10 bone injuries the CT is much better because it's easy for
11 any of us, myself included, to see the 3-D skull
12 fracture.

13 This [indicates] on the MRI we could see that there
14 was blood also in this area [indicates] that was assessed
15 by the neuroradiologist as being the same that had been
16 there. It wasn't new blood that had occurred since the
17 baby had left the hospital or was aged back to about the
18 same time as the current blood. And they can look at
19 that because they have certain sequences on MRI's that
20 looks at blood breakdown and so they are able to do some
21 timing assessments on that.

22 Q. And if you could put up 33?

23 [Whereupon, State's exhibit number 33 is shown]

24 Q. This might be the one. Tell us what this is.

25 A. This is [indicates] the fracture. You can see there

1 [indicates] these are sutures. But that's the fracture.
2 And you can see overlying the fracture is this large
3 amount of soft tissue swelling over that right side
4 [indicates].

5 Q. So when we -- if you just looked at the fracture
6 what would the window of time be that you think it could
7 have happened just looking at the fracture?

8 A. The fracture with the swelling?

9 Q. Just the fracture?

10 A. Oh, I have no idea just the fracture alone.

11 Q. Okay. Well what would you say if you didn't have
12 any history just looking at the injury what would the
13 window of time be in terms of when it could have
14 occurred? Do you have any idea?

15 A. I'm sorry; I don't think I understand your question.
16 Including the swelling, the fracture and the swelling?

17 Q. You can't determine it without the swelling?

18 A. No ma'am because some bone like -- I think we are
19 going to see her leg -- some bone reacts and as it heals
20 it has healing tissue, sclerotic [phonetic] tissue or
21 make something called the rib, make something called
22 callous.

23 Like if you've ever broken your leg and you see it
24 and it looks all thick like there is a cloud around the
25 place where it broke that's called callous; it heals, it

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1 remodels.

2 So that's one of the reasons we like to see the kids
3 in follow up -- is so when we see them in follow up with
4 the follow up bone images if there was a like say a rib
5 fracture and we couldn't see it on the fresh film because
6 it's not displaced, it's very small -- it's all this
7 overlying -- findings then when they come back at the two
8 week visit boom; even if you're not a radiologist
9 including myself I can see the area where that kind of
10 cloud sort of like we took a point and made a circle
11 around it. You have to look but you can see it much
12 easier there.

13 So skull does not do that. It's a different kind of
14 bone. It doesn't make that reaction. So when you look
15 at that CT scan I am not able to age it. And when I go
16 with books I have read and when I go and talk with our
17 specialist in radiology they say that they cannot age it
18 unless you have soft tissue swelling. If you have soft
19 tissue swelling then that helps you narrow the time
20 frame.

21 I guess the question would be how long would it take
22 a baby's skull who has a fracture to heal? Okay, maybe
23 four months. So I'm pretty positive that isn't any older
24 than four months old.

25 But that's very vague; it's a very vague answer.

1 But now that I know that there is swelling over there I
2 would say four days at the outset. It could be same day
3 or it could be four days at the outset.

4 Q. But with that kind of fracture and that kind of
5 swelling you would expect the child to have reacted
6 pretty strongly after an injury like that?

7 A. Sure, yes right away. She may not have continued to
8 cry. Like for example we know she still has that injury
9 and when we push on it she didn't like it but she was
10 smiling, she was easily consoled; so it wasn't like she
11 couldn't be happy while she had it.

12 Q. But when it first happened?

13 A. Right. Yes, breaking the bone was painful and then
14 the bleeding was painful.

15 Q. So you would have known. Somebody around her would
16 have known.

17 A. They would have definitely known she cried and cried
18 and was upset. Skull fractures can be a little tricky
19 including the soft tissue overlying it. So once it
20 accumulated -- it can take a little bit. It may take a
21 couple of hours for the soft tissue swelling to
22 accumulate.

23 So once it accumulates she may be fussy, cranky.
24 Why is she still crying? She might have spit up or
25 something even. But then she may -- after that she may

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1 have done better. So once they picked her up and held
2 her and they felt it then they would know.

3 Q. Okay. And the blood that is coming from the
4 subgaleal bleeds how long would it take to be visible
5 would you say like if you could give a range of time?

6 A. A few hours. Definitely obvious within 12, but
7 probably a few hours. It depends on how fast it's
8 bleeding.

9 So initially -- I mean because blood is continuing
10 to accumulate so that's why the child gets admitted. The
11 neurosurgeon sees her, she's got this blood, her
12 hematocrit has dropped.

13 She gets put in the ICU step down unit not because
14 she's having seizures or she's in a coma she is put there
15 because they are worried she is going to bleed out into
16 her soft tissue of her skull. So they're following her
17 to make sure she's staying okay. And she was so then she
18 was able to come out to the floor.

19 Q. And when you collected the history on the child who
20 was caring for the child that evening?

21 Like what does the family tell you in terms of who
22 was caring for the child and what else was going on in
23 terms of illness in the family, where other people were
24 in the house?

25 A. The whole family was there. The whole family that I

1 was aware of was the Mother, the Father, our patient who
2 was almost 15 months old.

3 She has a two-year old brother at the time a two-old
4 year brother and a five year old half sister -- step
5 sister -- half sister -- the Mother's daughter. So they
6 were all there.

7 The Mother was feeling poorly. She said that there
8 was like a diarrhea illness in the family and she also
9 felt bad because of women's issues at the time. So she
10 wasn't feeling well so she was in bed.

11 And the Dad was getting to take care of everybody
12 and feed everybody. The Mother explained that he brought
13 her dinner in bed. I think she described hot dogs and
14 fries and was putting everybody into the bathtub.

15 Q. So he was taking care of the kids?

16 A. He was taking care of the kids.

17 Q. And as part of the history were Minor immunizations
18 up to date?

19 A. No. By their history they told me that -- the
20 Father told the ER and the Mother told me that she had
21 her last shots when she was six months old in Kentucky.

22 Q. Okay. And she was due for shots?

23 A. She should have had shots at 12 months old. You get
24 several shots at 12 months old and now she's almost 15
25 months old so you get another set at 15 months so she was

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1 behind.

2 Q. In fact had she even been to the doctor since they
3 moved to South Carolina?

4 A. By their history, no. They said they didn't have a
5 primary care provider and hadn't been to the doctor.

6 Q. And did you review any of her previous medical
7 records from Kentucky?

8 A. I did.

9 Q. And when was the last time Minor saw a doctor?

10 A. April 2011; and that was in an ER.

11 Q. Okay.

12 A. April 6th.

13 Q. Okay. Did you collect the history of any
14 developmental milestones for Minor

15 A. Yes, I did from the Mother.

16 Q. And what were they?

17 A. She reported -- may I check my notes?

18 Q. Please?

19 A. She reported that Minor was not walking on her own
20 but that she could cruise with her hands held meaning
21 that they could pull her up to a stand and she might take
22 a step or two.

23 She sits on her own, babbled, crawled, she'd point
24 -- cognitive development, she had six to 10 words but she
25 was not pulling to a stand on her own. She would pull to

1 her knees.

2 She would smile, social smile. She would stand when
3 held up and balance briefly according to the Mom. She
4 rolled over.

5 And Mom added that when they were still in Kentucky
6 that Minor was standing but since they moved to South
7 Carolina in the last four months she clarified that Minor
8 stopped standing; stopped pulling to a stand.

9 Q. And as a doctor that deals with child abuse
10 pediatrics is that a red flag for you when a child stops
11 standing?

12 A. It's abnormal to any pediatrician. Losing
13 milestones is a serious thing.

14 Q. Okay. And so when you did review all of the other
15 reports that were done at the hospital did you find
16 anything that was alarming to you in terms of the
17 skeletal survey?

18 A. Yes. She had an old fracture of her right -- sorry,
19 hang on; I have to look. I believe it was her...

20 [Whereupon, the witness reviews documents]

21 A. Her right leg; her right lower leg. Yes, her right
22 lower leg.

23 Q. Okay. Any question that that was a fracture, a
24 healing fracture?

25 A. No. Well, it was -- she had very prominent

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1 periosteal reaction that you could see. And in addition
2 we did a follow up film when she came back.

3 It was almost three weeks when she came back and she
4 still had it. She still had the findings of the
5 periosteal reaction so it was very clear.

6 Q. And did you consult with the radiology department
7 about the healing broken leg?

8 A. Yes.

9 Q. And did they give you an idea of when that could
10 have happened?

11 A. I'm believing that they said two to four weeks. Let
12 me look.

13 [Whereupon, the witness reviews documents]

14 A. I believe it was like two to four weeks old. Enough
15 time for that periosteal reaction to become so prominent.

16 Q. Okay. So four weeks on the outside?

17 A. Yes, ma'am.

18 Q. Initially was there also a finding of a possible
19 healing broken arm?

20 A. Yes.

21 Q. And was there a follow up MRI or CAT scan on that
22 limb?

23 A. It was a plain film. It was part of what we call
24 the skeletal survey. The skeletal just means you take a
25 picture.

1 And there is a designated way that the American
2 College of Radiology says that the images need to be
3 taken for them to be useful and accurate.

4 So you take like arm, arm, hands are separate, chest
5 is separate, spine is separate, couple of views of the
6 skull, legs are -- top leg, bottom leg, feet are
7 separate. So there are a number of images.

8 So yes, we did that film and then followed it up at
9 the two week visit. And it was really not convincing so
10 I can't tell you that there was not an arm fracture but
11 it wasn't -- whether it healed really quickly or it was
12 more healed or it was a milder fracture or there was no
13 fracture at all it was an indeterminate finding to me in
14 the end.

15 Q. So is it fair to say there was a disagreement among
16 all the consults as far as whether or not the arm was
17 fractured or not?

18 A. I don't know that it's a disagreement. I think that
19 it is an evolution. So when they first saw it the child
20 on the initial films had a prominent zone of
21 calcification that was not seen on the opposite side.

22 But on follow up it wasn't there and it looked like
23 the imaging where that extra calcification was was the
24 same and so it was really an equivocal finding.

25 And like I said you can't say that it wasn't a

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1 fracture but it wasn't diagnostic. It wasn't clearly
2 diagnostic that there was for sure a fracture once we saw
3 the follow up film.

4 Q. Okay. But as far as the leg any question in your
5 mind whether she had a healing fracture in her leg?

6 A. No, ma'am. Not to mention that there was clear
7 clinical correlation of her stopping standing -- where
8 she had already pulled to a stand and then she quit
9 standing, which the Mother reported that they had
10 noticed.

11 Q. And in terms of -- you were talking about subgaleal
12 bleeds before have you done any research about how common
13 subgaleal bleeding is in your practice?

14 A. Well, yes they are not very common. Like we were
15 talking about before they are not even very common in the
16 newborn period unless there has been vacuum and not every
17 vacuum ends up in a subgaleal hemorrhage. But like in
18 our own experience at MUSC on all the children that we
19 consult on who had head injuries we've only had two cases
20 in five years where and we're an -- area where lots of
21 children come for a head injury because of a pediatric
22 neurosurgeon and the pediatric neurologist. Not rare but
23 not common.

24 Q. Now did you bring some slides to kind of illustrate
25 to the jury a little bit more about how subgaleal bleeds

1 and how subdural bleeds operate inside the head?

2 A. I did in case the anatomy was confusing.

3 Q. Could we put up Doctor Amaya's demonstrative aids?

4 MS. WILLIAMS: Your Honor, at this time we are
5 going to have Doctor Amaya illustrate with State's 35
6 through 42. We are not offering these into evidence. We
7 are offering these for demonstrative aids only.

8 Q. This is State's 35 if you could just explain to the
9 jury what that is.

10 [Whereupon, State's exhibit number 35 is shown]

11 A. So I think we talked about it a little bit but it's
12 easier to see it I think. So let's start with the skull.
13 This is a drawing, one of those -- drawings.

14 So here's the skull [indicates], here's the brain
15 underneath it [indicates]. And I wanted to show two
16 things here. So the first thing is that here's
17 [indicates] the overlying skin. And then you can see
18 this [indicates] blue dividing line is the galea or that
19 muscle and that aponeurosis that sort of fiber stuff that
20 is on your frown muscles.

21 So when you're saying where the blood is it's not
22 within this skin [indicates], it's not under the skin but
23 it's under the galea but over the bone. That's where the
24 blood collection is.

25 Now the other thing I want to show you on this

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1 picture is the brain has its special covering. It
2 actually has a couple of special coverings, but the one I
3 want to highlight is the dura mater for the mother of all
4 membranes is what that means I guess.

5 And it covers the brain here [indicates] and it's
6 thicker, it's tougher and here's [indicates] where it
7 folds together in the middle and it leaves a little space
8 for the blood vessels to come through.

9 And right underneath it is what would be called
10 subdura. So if there is a subdural blood collection it
11 would be underneath that dura; so right over the brain.

12 Q. And in this case can these injuries -- what is your
13 best explanation for how she obtained these injuries?

14 I know that we only have the one explanation that
15 doesn't fit but are we talking about rotational injuries,
16 several different blows, are there different
17 possibilities?

18 A. Well, we know that there is at least two contacts
19 because there is swelling on two parts of the head. So
20 there is the swelling in the front of the head and there
21 is also swelling and fracture on the back of the head.
22 So we know there are two contact points.

23 In addition she has the subdural bleeding on this
24 side [indicates] and this side [indicates] of the brain
25 in the front, which is distant from where the fracture

1 is.

2 And those you can certainly get subdural bleeding
3 right underlying a fracture because you break a bone, you
4 tear the vessels, there could be blood there. But in
5 this situation it's far away from where the bone is.

6 So typically it takes some kind of shearing force.
7 We're already talking about shearing because we know
8 there was shearing related to the subgaleal to shear and
9 tear those vessels. But there has to be shearing inside
10 the skull as well to tear the veins that are crossing
11 here [indicates] in this area [indicates].

12 So typically the easiest way to do that is some kind
13 of whiplash injury, some kind of rotational injury. So
14 like if the child fell forward and hit her head on the
15 tub then was pushed backward or somehow flown backward I
16 guess and hit and went very rapidly with a lot of force
17 and hit her head backwards, or vice versa, then that
18 rotational component would cause a rotational injury.
19 And the stopping really fast is what is so -- what a
20 brain takes and causes the shearing of those vessels.

21 Q. Okay. Can you put up State's 36?

22 [Whereupon, State's exhibit number 36 is shown]

23 A. This is just another view because sometimes people
24 get confused as to where the blood is. So like when you
25 are a baby and you have kind of boggy swelling in the

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 skull or even like how our child has it's in this
2 [indicates] skin layer. So it's not really called a
3 caput.

4 Now that's when they are a baby and they first come
5 out and they have the swelling from pushing. A
6 cephalohematoma is actually under the layer of the bone.

7 Again, that's more of a neonatal problem. That's
8 not what our child Minor had. A subgaleal hemorrhage was
9 what she had underneath the muscles. And this is
10 [indicates] is what causes an extradural hemorrhage or
11 epidural.

12 That is something that gives Mom's and Dad's
13 nightmares that someone is going to throw a rock at their
14 child while they're riding a bike and then they will be
15 fine and all of a sudden they will collapse and bleed.
16 That's a tearing of an artery -- that's what that famous
17 actress Mary Tileum Neesam [phonetic] died of was the
18 epidural hemorrhage I believe.

19 Q. This is State's 37.

20 [Whereupon, State's exhibit number 37 is shown]

21 A. This is to show you the galea because it's hard to
22 imagine it. So this [indicates] is the galea muscle and
23 the aponeurosis, which is basically another word for --
24 fibrous.

25 And you can see how it connects to the muscle and

1 vessels the neurons themselves they have long axioms,
2 very filamentous small less force is required to tear
3 them.

4 So if you had enough force to tear the blood vessels
5 there is going to be enough force to tear a certain
6 number of neurons. And that's what we really care about
7 is brain injury.

8 Q. State's 40?

9 [Whereupon, State's exhibit number 40 is shown]

10 A. And this [indicates] is a cross section kind of what
11 we did the CT that instead of going across it's going up
12 and down like this [indicates].

13 And this is so you can see an example of blood
14 vessels that have torn right here and then that's blood
15 that is in the subdural space and accumulating in the
16 faults like Minor had. It's a drawing.

17 Q. And State's 41?

18 [Whereupon, State's exhibit number 41 is shown]

19 A. Subdural hematoma. This is an example of a leg, of
20 a tibia bone. So you can see that the bone has the head
21 and the neck and then in the middle part is the place
22 where the bone marrow is, the medullary cavity and there
23 is bone on either side.

24 What this part here is called the periosteum.

25 There is the outside compact bone and then right on the

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 edge is what's called the periosteum. The periosteum
2 can bleed when injured. The next one shows an example of
3 what we see on x-ray but it's a drawing.

4 Q. State's 42?

5 [Whereupon, State's exhibit number 42 is shown]

6 A. So this is an example of not our child but another
7 child. But this child has what is called periosteal
8 reactions. On the x-ray you can see the shadow and the
9 thickening there [indicates].

10 And there is -- the body structure on this child in
11 addition but when the child experienced the stretching or
12 compression or bending of the bone or torsion or twisting
13 it caused a fracture and there is actually bleeding.

14 That's what is showing up is that shadow is that it
15 is the hemorrhage elevating the periosteum. Its right
16 under the blood and it becomes apparent in about a week.
17 But it also helps the radiologist to age the approximate
18 age of the fracture.

19 Q. Okay. Doctor Amaya, is there any indication that
20 any treatment was sought for Minor broken leg?

21 A. No, ma'am.

22 Q. No history given about her going to the hospital for
23 a broken leg?

24 A. No. I asked them and they said they hadn't gone and
25 that she didn't have a primary care doctor established

1 yet since moving to South Carolina.

2 Q. And she stopped standing when she moved to South
3 Carolina?

4 A. Yes, ma'am.

5 MS. WILLIAMS: Your Honor, I'm going to show
6 defense counsel what has been marked as 30 and 34.

7 [Whereupon, Ms. Williams shows photographs to Mr.
8 Shelton]

9 THE COURT: Marked and admitted without objection.

10 [Whereupon, State's exhibit numbers 30 and 34 are
11 entered into evidence by the court]

12 MS. WILLIAMS: May I approach?

13 THE COURT: Uh huh.

14 Q. [Ms. Williams] If you could tell us what this is --
15 these are?

16 [Whereupon, the witness is shown exhibits]

17 A. Okay. These are her fracture -- the picture of her
18 lower leg bones on her right leg on September the 6th.
19 And then another view of it on September the 28th; right
20 leg in both photographs.

21 Q. Okay. If we could put up State's 30 please?

22 MS. WILLIAMS: Oh, we would offer State's 30 and 34
23 into evidence, Your Honor.

24 THE COURT: I believe these are already in.

25 MR. SHELTON: No objection.

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1 THE COURT: Are those different from the ones...

2 MR. SHELTON: No, Your Honor.

3 THE COURT: Okay. I thought you had already
4 agreed to these. I've already moved those in without
5 objection.

6 MS. WILLIAMS: Thank you.

7 Q. [Ms. Williams] So explain to the jury what we're
8 seeing here just as lay people and why this indicates to
9 you on September 6th that this is a healing fracture?

10 A. Can I see the second one on the projection?

11 [Whereupon, the witness views photograph]

12 A. Okay. I just wanted to make sure I knew which one
13 was which. Okay, so here [indicates] is like that
14 drawing I was showing you guys.

15 Now I'm telling you from a pediatrician, child abuse
16 pediatrician standpoint. I think a radiologist would
17 probably tell it to you with a little more exactness and
18 a little more terminology. But what I was looking for
19 was you can see this bone [indicates] looks normal. It
20 has normal borders here [indicates] the same with this
21 bone [indicates] nice clear edges.

22 And then this bone [indicates] has this thickened
23 area with this periosteal elevation especially on this
24 side [indicates]. That's abnormal. That's means that
25 there was a fracture there.

1 Q. State's 34?

2 [Whereupon, State's exhibit number 34 is shown]

3 A. And then at two weeks when she was seen for follow
4 up you could see that there is -- I think there was
5 interval improving but you still see those left kind of
6 outside shadow but there is still this [indicates]
7 periosteal reaction that is prominent along this
8 [indicates] tibia bone but healing.

9 The rest of it has normal bony mineralization so she
10 looks like she's got good bone substance there.

11 Q. Okay. Did you have an opportunity to review some
12 of the therapy records that were -- some diagnostic tests
13 and some progress notes for therapy records for Minor

14 A. Yes, I did.

15 Q. And what did those indicate to you?

16 A. Well, we recommended that she have follow up with
17 Child Find or Early Intervention. And they show that
18 when she came into foster care that she did comply with
19 physical therapy. They were working mostly on gross
20 motor assessment. Occupational therapy tends to work
21 more with the really fine motor stuff and they noticed
22 that she had a number of abnormalities.

23 She had truncal weakness. She was not very
24 coordinated. She was not willing to put her leg down.
25 We actually noticed that when she came back to clinic.

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1 She came twice; she came at a two-week visit and then one
2 week later. And she would avoid putting her leg down
3 even if you were trying to put her in position to put her
4 leg down she would kind of rotate and hold her leg out.
5 So that was something they wanted to work on.

6 She had some delays related to even just kind of
7 standing in place that she didn't want to put her foot
8 down.

9 Q. So can some of the -- you noticed developmental
10 delays with her leg, her walking ---

11 A. --- yes ---

12 Q. --- from those records. And developmental delays
13 did you note any developmental delays just in terms of
14 her progress in doing things? You said truncal weakness.
15 Can any of those things -- is it possible that her brain
16 injury could have caused some of those delays?

17 A. Yes.

18 Q. And is it possible that the broken leg that wasn't
19 treated is the reason why she had to essentially learn to
20 walk again with braces?

21 A. Yes.

22 Q. Now when you reviewed her Kentucky records were
23 there any notes of any delays in those?

24 A. There were only four visits that were noted. Two of
25 them were well child visits; two month old and four

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 months old which documented her shots. I couldn't find
2 the six month well child visit but the Mom had said she
3 had her shots so I'm not sure what happened to that. But
4 there was a six month sick visit and said she was
5 supposed to come the next day for her shots.

6 So I don't know if she got her shots the same day.
7 And that was for having I think a cold and some eczema.
8 And then the next visit was at ten months old where she
9 came presented to the emergency room and she had spitting
10 up and was not drinking her bottle.

11 And only on that visit did they make a comment about
12 her development. And unfortunately that record it was
13 faxed and not a good quality so it was really hard to
14 read any of the writing.

15 The typed information I could read. And it said
16 just listed on the problem list and it listed that she
17 had I forget exactly what it said but is said some gross
18 motor delays.

19 So unfortunately without being able to read more of
20 the information that could have been something as minimal
21 at ten months as not pulling up to a stand yet and that
22 would be a delay versus if she's not even sitting up or
23 rolling over. However at her four month and two month
24 visit and at the six month sick visit it didn't indicate
25 that there were any developmental problems.

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 Unfortunately I wish I had a little more data about that;
2 about the ten month visit.

3 Q. So we really don't know what that is?

4 A. No. However but talking to the Mother she did
5 describe some delays. So like on a fifteen month old you
6 would expect her -- she didn't seem terribly verbally
7 delayed by the Mother's description of six to ten words
8 you would like her to have closer to 20 words or so.

9 But she described that she had already in the past
10 pulled to a stand. And typically that happens around
11 nine, ten, or eleven months.

12 Some children especially first born children may not
13 do it until fifteen months old because people are
14 catering to them and picking them up and helping them.

15 So if it's more than fifteen months old before they
16 pull to a stand and start walking then we're -- of course
17 that's very concerning if they're not walking. They
18 should be pulling to a stand already by then.

19 Q. Okay. So the developmental delays and the problems
20 walking could certainly be attributed to the injuries
21 that you treated her for on September 6th?

22 A. Sure, they could be.

23 Q. And what is battered child syndrome, briefly?

24 A. Battered child syndrome is kind of a historical term
25 that is used to describe a collection of injuries. It's

1 not really a syndrome that you'll pull up a diagnosis
2 book and say they have to have these three things or
3 these four things to meet the qualifications of syndrome.

4 What it means is a description typically of children
5 who have more than one physical finding that is
6 unexplained and discrete.

7 So for example a couple of fractures that may have
8 occurred at a different time, fractures with subcutaneous
9 injuries, soft tissue injuries could be used to describe
10 a child that has battered child syndrome.

11 Battered child syndrome could be a term used to
12 describe those collections of individual findings if
13 there is no explanation for them.

14 Q. And all of the head injuries that you treated Minor
15 for could have happened all in one episode is that
16 correct? Not necessarily the ---

17 A. --- not the leg ---

18 Q. --- no, not the leg the head injuries. Could they
19 have all happened in one episode?

20 A. Yes -- you mean one time frame?

21 Q. Yes?

22 A. Yes ma'am, they could have.

23 Q. The leg is not during that time. That's two weeks
24 before?

25 A. Two to four weeks before yes, ma'am.

(MICHELLE AMAYA - DIRECT BY MS. WILLIAMS)

1 Q. And could Minor fit into the syndrome of battered
2 child syndrome?

3 A. Yes.

4 MS. WILLIAMS: Court's indulgence.

5 [Whereupon, Ms. Williams and Ms. Taylor confer]

6 MS. WILLIAMS: Nothing further.

7 THE COURT: You may proceed.

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(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 CROSS-EXAMINATION

2 BY MR. SHELTON:

3 Q. Doctor Amaya?

4 A. Yes, sir.

5 Q. We talked very briefly in the past.

6 A. Are you Mr. Shelton?

7 Q. I'm Chad, yes, Shelton.

8 A. Nice to meet you in person.

9 Q. Nice to meet you. We talked very briefly on the
10 phone because we had a lot of delays with the ice and all
11 that. A lot of what you come up with in your diagnosis
12 -- come up with treatment you come up with what happened
13 is based off history.

14 A. Yes sir, that's true.

15 Q. Okay. And you rely on honest history.

16 A. Well, you take the history that you have and then
17 you compare it to the findings that you see or that you
18 measure with laboratory or x-rays and you compare them
19 and see how well do they match.

20 And if they match then you feel -- that's reassuring
21 that that fits and that is a plausible mechanism of
22 injury or if it's not an injury you're like okay, that
23 explains that because there is an alternative diagnosis.
24 If it doesn't match then you have to go looking to see
25 well what could have caused this.

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 Q. Okay. What about history that in this case what
2 Sandra gave as to what occurred and what happened the day
3 prior to coming to the hospital? Did you look at that
4 history?

5 A. Well, I think we backed up to about there. She
6 started with there about like lunch and about the kids
7 being there -- them eating the hotdogs and stuff.

8 Q. And actually if you look at her history -- so this
9 is September 6th.

10 A. September 5th -- she comes into the hospital
11 September 6th.

12 Q. And she's giving you the history for September 5th?

13 A. Yes, sir.

14 Q. The day before. And what specifically does she say
15 happened September 5th?

16 A. May I check my notes?

17 Q. Yes, please.

18 [Whereupon, the witness reviews documents]

19 A. She says that on September 5th the Father took
20 Sibling₂ who is the 5 year old, to school. Mom stayed with
21 the children. Mom had been somewhat stressed, had
22 menstruation period and was a little crampy and was tired
23 so she spent a fair amount of time in bed.

24 Q. Okay. Let's stop there; I'm sorry. So that was
25 September 5th she says Chris took Sibling₂ to school.

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 A. Yes, sir.

2 Q. Did you check out what day September 5th was?

3 A. It was Labor Day.

4 Q. So there would never have been any school.

5 A. Well, I wondered about that but I noticed that the
6 gentleman gave the same history when he was interviewed
7 by himself in the emergency room that he gave the history
8 that he took the child to school so.

9 Q. I'm sorry. So you're relying on the social worker
10 Jessica's notes?

11 A. Jessica and Mary Elizabeth Gunter. I work with them
12 a lot.

13 Q. Okay. And can you point out to me where it says on
14 September 5th he took Minor to school -- Sibling2 to school?

15 A. Did you want me to look at on one of your admitted
16 records so it would be -- do you have Jessica Credeur's
17 note?

18 Q. I have your typed up notes. Would that work?

19 A. No, I think it would be on her note. I think I have
20 a copy.

21 [Whereupon, the witness reviews document]

22 A. Okay. I found it. It looks like this [indicates]?

23 Q. Yes. So...

24 A. So about the middle of the page it says I'm going to
25 start with where it says natural Father stated he stayed

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 awake in the living room and continued to check on the
2 patient every hour until he fell asleep around 3 a.m.

3 Natural Father took his five year old stepdaughter
4 to school in the morning and returned to the house around
5 7:30 a.m.

6 Q. And then they called the pediatrician and took her
7 to the hospital.

8 A. Well, it says then he turned on the lights and he
9 checked on the patient again. He saw that the wife was
10 home; she was still asleep. He noted -- he saw the child
11 in her crib in the room that she shares with the five
12 year old who is now at school.

13 He reported he had to wait until 8:30 to call the
14 Air Force Base pediatrician because they didn't open and
15 they couldn't get through so then the Mom called another
16 practice and took them.

17 Q. So that was September 6th because that's when she
18 went to the hospital.

19 A. That's September -- it might be September 6th; hang
20 on.

21 [Whereupon, the witness reviews documents]

22 Q. Because September 6 is when she came to the
23 hospital. So he would have checked on her September 5th
24 the night of.

25 A. Okay.

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 Q. And then September 6th he would have taken Sibling₂ to
2 school in the morning and then noticed the bruise and
3 they would have taken her to the hospital -- to the
4 pediatrician and to the hospital?

5 A. Yes, that's correct.

6 Q. Okay. So he didn't say September 5th he took Sibling₂
7 to school. That comes from Sandra.

8 A. I think that's correct. You can see that I myself
9 am getting a little mixed up with the 5th and the 6th so.
10 But yes she said I interviewed her on the 6th in the
11 evening; it was late in the evening after clinic. And
12 Mom did say that the day before that the Dad had taken
13 Sibling₂ to school and Mom stayed with the children.

14 Q. And the day before was Labor Day.

15 A. Yes sir, I believe it was.

16 Q. The Mother also gives or tries to give an
17 explanation for the injury to the back of the head;
18 possible injury to the back of the head.

19 A. Well to clarify I didn't ask what happened to the
20 back of the child's head. I asked tell me about all the
21 injuries that she has had and then she told me the
22 injuries.

23 Q. And so that is after the Father Chris -- after Chris
24 has been to the hospital he then contacts at some point
25 in time Sandra so they could switch out and Sandra comes

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 and she tells you about the head injury.

2 A. Yes, sir.

3 Q. Chris never gives anything concerning a head injury
4 to medical personnel?

5 A. No ---

6 Q. --- to the back of the head injury; I'm sorry.

7 A. I'll qualify this, the social workers take a little
8 bit more detailed history than the ER physicians. ER
9 physicians are trained to like quickly make assessments
10 are they good enough to go or do they need to stay.
11 Nobody in the hospital except for our team will sit and
12 take a history for three or four hours with a family.

13 So in fairness my history was much more detailed
14 than even the social workers. So they take excellent
15 history and they do spend an amount of time. I
16 unfortunately because the family had switched out I was
17 able to speak to the Mother at length.

18 The social worker who I work with day in and day out
19 who I knew how she worked had taken a thorough history
20 already from the Father so we used each other's history
21 in making assessments. So that is correct what you said.

22 Q. And you're relying on Jessica and...

23 A. Mary Elizabeth ---

24 Q. Ms. Gunter and their history and what they -- or at
25 least what Jessica testified to earlier?

1 A. Yes. But I routinely -- in our protocol for every
2 single one of our faculty members and we train each of
3 our Fellows, we train our nurse practitioners that every
4 person that comes in we ask -- tell me about all the
5 injuries that she's had and then we go through them.

6 I don't know -- I mean that's typically not
7 something that a social worker would necessarily say.
8 They would say tell me what happened that led up to this
9 so...

10 Q. Go ahead.

11 A. So I don't know that he was asked and denied it. It
12 may be that he just wasn't asked.

13 Q. Okay.

14 A. But I wasn't there.

15 Q. Or he didn't know?

16 A. Or he didn't know.

17 Q. And Sandra is the one that tries to give an
18 explanation for the leg injury?

19 A. Well, actually I was talking about developmental
20 history and I was asking what is the child able to do and
21 we were talking about pulling to a stand. So I haven't -
22 -- we're just sitting and going through history.

23 I haven't like told her here are all my concerns
24 tell me what your thought is. I'm just saying what is
25 your child able to do? Does she talk, does she walk,

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 does she sit? And she said well she used to stand up but
2 she doesn't anymore.

3 Q. But this is after they switch out at the hospital
4 Chris and Sandra?

5 A. Yes.

6 Q. Okay.

7 A. When I asked specifically tell me about the injuries
8 of course everybody all parents and caregivers rack their
9 brains and try to think of things -- what she said about
10 the leg is she wondered it's not uncommon for fifteen
11 month olds to stick their foot outside of the crib and
12 she remembered I believe it was in Kentucky; I'd have to
13 check my notes again.

14 But she remembered a time that the child stuck her
15 foot outside of the crib and wondered if that could have
16 caused it and I told her no.

17 Q. The -- and the hospital visit in Kentucky that you
18 reviewed the date on that was April 6th of 2011.

19 A. I believe that's correct.

20 Q. Okay. Do you know the date that Chris got back
21 from Afghanistan?

22 A. I think it's in Jessica's notes -- I knew it was in
23 April but I didn't know what date.

24 Q. If you don't that's okay.

25 A. Okay. I knew it was April and I knew that he had

1 been home about four to five months.

2 Q. And I think you testified to it earlier but there is
3 a goose egg on the top of Minor head -- on the left side
4 of her head?

5 A. By history, yes sir.

6 Q. The goose egg though shows up on the side -- well,
7 the swelling; I'm sorry.

8 A. Okay.

9 Q. So there is some swelling on the side of her head
10 and that swelling and possibly resulting blood to the
11 orbit area could be plausible with falling in the tub?

12 A. Will your say that one more time? Are you -- or may
13 I restate? Did you say that the swelling, that kind of
14 pinpoint area where she hit her forehead on the faucet
15 could that be plausible as causing her black eye?

16 Q. Yes?

17 A. Yes, sir.

18 Q. Okay. And so that swelling pinpoint could be
19 plausible with falling in the tub?

20 A. On like an object like the faucet, yes sir.

21 Q. Okay. As described by Chris?

22 A. Yes, sir.

23 Q. The subgaleal hematoma cannot be dated.

24 A. Well, we can give kind of a range.

25 Q. Okay. And the range is?

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 A. I would say like anywhere from a few hours before
2 she came in to maybe three to four days.

3 Q. Three to four days?

4 A. Maximum.

5 Q. And there is no dating on the skull fracture?

6 A. No, there is no dating on the skull fracture except
7 that she has that overlying boggiess. And that when I
8 said age about the subgaleal that is in the absence of
9 any history or any family members saying when they last
10 saw her well so.

11 Q. But that is based off being told truthful history?

12 A. Well that's why we don't work in isolation. When we
13 have concern the history doesn't map out we're required
14 by state law to ask for help or community resources to
15 investigate and to find out who other people have
16 witnessed it or seen.

17 But we did ask two parents that were saying each
18 pretty much the same story about the tub and that when
19 they went to sleep and the next morning that's when it
20 was first seen and that the Dad was actually the first
21 one to find the bruising.

22 Q. And that's the consistent same story with the tub?

23 A. Yes sir, of the tub falling forward and hitting the
24 faucet.

25 Q. Now the subdurals they are very small.

1 A. They are thin and small.

2 Q. And you can't date those.

3 A. You can't date them exactly but we know they are
4 acute because they are very bright on CT. You get a
5 little bit more dating ability with MRI but right,
6 they're probably like at most three days old.

7 Q. Okay ---

8 A. --- but they could be fresh.

9 Q. Right. Acute medical term is ---

10 A. --- they're not three weeks old or even a week old.

11 Q. But within three days.

12 A. Very likely, yes.

13 Q. And because of the subdural hematomas, and that's
14 the part that is on top of the brain, because they were
15 thin or small it was asymptomatic isn't that true?

16 A. Possibly. It -- sometimes these injuries can be
17 kind of vague. So there is a really important article
18 that was published JAMA by Carol Jennie [phonetic] like a
19 decade ago about missed cases of abuse of head trauma.

20 And a third of the cases of children, young children
21 this similar age as Minor and younger presented to the
22 emergency room a third of them with abusive head trauma
23 were missed when they were initially presented because
24 they had vague findings like a single episode of throwing
25 up or they were fussy.

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 And the only reason they were discovered is they
2 represented again later with more serious injuries and at
3 that time you could look back and say oh, there was an
4 injury already there.

5 So this child it could have been nothing but it's
6 interesting that she had a description -- the Father had
7 given a history that there was a small amount of
8 Pedialyte and that the reason she got put in the tub is
9 because there was some emesis in the bed. Related
10 unrelated; it's really impossible to know. But we do
11 know that she had definitive head injury at the time she
12 came in the next day.

13 Q. So is it possible to know if the vomiting that
14 happened earlier in the day is related to the subdural
15 but it's possible?

16 A. It's possible. Is it likely?

17 Q. It's possible if you look at the history because
18 you're looking at the history right?

19 A. Yes, sir.

20 Q. And the natural Mother Sandra also says that she was
21 a little clingy.

22 A. The baby?

23 Q. On September 5th.

24 A. Yes.

25 Q. That could be a symptom of the subdural?

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 A. Maybe, though when I reviewed the physical therapy
2 notes they said every time she came with the foster
3 Mother, and she came every single month for several
4 months, she was very clingy to the foster Mother too.

5 So it could be but it's again one of those kind of
6 soft signs but it could be just how she is or it could be
7 that she wasn't feeling well because they were saying
8 there was a diarrheal illness in the family and she just
9 wasn't feeling quite well and having cold symptoms and
10 had a little bit of spit up which could have been again
11 GI stuff in the family so.

12 Q. So there is no way to date the back of the head
13 injury and the bruises within 48 hours is that safe to
14 say?

15 A. I wouldn't say no way. I mean the way it is
16 described in the records is that the Father presented to
17 the ER very concerned, very worried about his child, very
18 upset.

19 They talked specifically that he was crying because
20 of his concern. The Mother herself had said that when
21 the Father came to show her the baby's goose egg he said
22 is she going to be all right according to the Mom.

23 So they are all describing like a clear incident
24 that happened that before then she was fine. She was
25 eating French fries, she was happy go lucky and she had a

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 couple little bruises and then she had this obvious
2 event.

3 So I think it sounded like reading the notes and
4 when we were interviewing them that both of the parents
5 were attributing the tub incident to the head injuries.

6 Obviously they did not explain the -- and what made
7 it very concerning that it wasn't just an accidental
8 injury but she had this old unexplained fracture; again
9 giving it additional concern from the hospital
10 standpoint.

11 Q. But in your earlier testimony in the direct is that
12 she could have had an injury to the back or to -- the
13 skull fracture could have happened and she would have
14 been upset and crying and then she might not have had any
15 more symptoms.

16 A. Right, about the skull fracture and the swelling?

17 Q. Right.

18 A. Right. Unless handled, of course. If you handled
19 and mushed her boggy spot she did not like that.

20 Q. So she did have hair back there so it wouldn't be
21 necessarily unless you touched it ---

22 A. --- below the hair; yes.

23 Q. So...

24 A. And I'm so sorry I misspoke a little bit ago when
25 you asked me how long did I think the subgaleal had been

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 there. I was thinking about the fracture with the
2 overlying swelling when I said the four days. I'm very
3 sorry.

4 So to correct that I really think that subgaleal
5 could only have been there a matter of hours. It
6 couldn't have been there that long because obviously she
7 was going to be accumulating blood and bleeding so it
8 would have been apparent to the family within a few
9 hours. And the way they were presenting as concerned
10 they would have brought her -- I would like to believe
11 they would have brought her in.

12 Q. So are you familiar with this?

13 [Whereupon, the witness is shown documents]

14 A. I am very familiar with this? I'm the Fellowship
15 Director at our institution.

16 Q. Okay. So what is this?

17 A. That is the content specification for the American
18 Board of Pediatrics for a subspecialty certification in
19 the area of child abuse pediatrics.

20 Q. This is in layman's terms your Bible?

21 A. No. It is an outline for key things that should be
22 covered, content outline that needs to be covered while
23 training Fellows in order to take and sit for the boards.

24 Q. Okay so you ---

25 A. --- it's just an outline. It's doesn't have a lot

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 of like -- it's not a research you can turn to and say
2 oh, that's the answer.

3 Q. Right ---

4 A. --- key topics.

5 Q. But there are -- you can find articles and such
6 underneath each outline? Maybe not in this but online or
7 be able to -- you need to know everything in here to be
8 familiar with everything in here?

9 A. We strive ever to know. I think even practicing
10 child abuse pediatricians don't probably know everything
11 in there. You need to know enough of that to practice
12 well and to go to look things up and to be aware of those
13 important things and be able to find the answers to it.

14 So yes, those are really important guidelines for
15 the spectrum knowledge that we need to know as child
16 abuse pediatricians in practice.

17 Q. And so this is -- you rely on this?

18 A. Uh huh. But for example I do as a teacher but in
19 practicing pediatrics I think that my other faculty they
20 could exist just fine without ever looking at that
21 document except for the fact that we are busily teaching
22 residents and fellows.

23 So we say when we are crafting our talks or
24 instructing we want to make sure that we cover the
25 guidelines in there so that we are adhering to the

1 structure of the American College of graduate medical
2 education for them and the American Board of Pediatrics.

3 Q. Right. So to be certified to pass the boards you
4 need to know a good deal of this?

5 A. Yes, sir.

6 Q. Okay.

7 A. That's fair.

8 Q. Are you familiar with the part on skull fractures
9 and subgaleal hematomas and what it says?

10 A. Would you like me to read it?

11 Q. Yes.

12 A. To myself or out loud?

13 Q. To yourself.

14 [Whereupon, the witness views documents]

15 A. Okay.

16 Q. So isn't it true it says that signs for subgaleal
17 hematomas over skull fractures can be one, two days old?

18 A. It can take depending on how fast the bleeding
19 accumulates it can take a long time. In fact sometimes
20 they are never found until a -- if a child is unfortunate
21 enough to die with an injury sometimes the subgaleal like
22 not so much the hematoma but there can be an area -- a
23 hematoma means there is an accumulation of an amount of
24 blood, a volume of blood whereas the hemorrhage is sort
25 of like a focal area of bleeding.

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 So when the child dies and the pathologist peels
2 back the skin sometimes they will see a subgaleal
3 hemorrhage there. So in that case that may have never
4 been evident.

5 Q. While we're on that the term that you used the
6 battered child syndrome that is nowhere in there is it?

7 A. It is like I was saying it's a really a historical
8 term that is used -- I mean there are textbooks that are
9 called the battered child syndrome that are like on all
10 of our shelves. I don't know specifically without doing
11 an electronic you know control F to find battered child I
12 can't tell you if it's in here or not. But I wouldn't be
13 surprised if it wasn't.

14 Q. You don't teach it as far for boards or try to learn
15 it as far as taking a course ---

16 A. --- well actually we do because there are centennial
17 articles called the battered child syndrome for the first
18 descriptions. So when we read those early articles by
19 John Caffey et al so we do talk about that topic.

20 Q. And that was I believe in 1964?

21 A. In the old days, yes sir.

22 Q. But that term is not really used anymore.

23 A. Not so much. We were actually talking about that --
24 we had a fellow's session this morning. We were talking
25 about that a little bit. It was really used more in

1 about the '90's or so.

2 Q. Okay. And so we're in the 2000 teens so 20 ---

3 A. --- it's not an invalid term. It's just not a
4 commonly used term. But it's a way to describe a child
5 who presents with multiple physical findings that have
6 been inflicted.

7 Q. Going back to the history that the Mother provided
8 she is the one that provided about the bruise on her
9 face?

10 A. Yes, I think it was on her left cheek.

11 Q. On the cheek, yes. And she says that that came from
12 her brother's room and his rocking chair two to three
13 weeks ago.

14 A. I believe so. I remember about the rocking chair;
15 I'm sorry I would have to look at my notes. But it was
16 definitely there prior to the tub incident.

17 Q. Okay. And she mentions that Minor falls frequently.

18 A. Right, which doesn't really surprise me a fifteen
19 month old not really pulling to a stand when she is
20 trying that would be common; expected.

21 Q. And from a pediatrician's standpoint does it matter
22 that there was a whole bunch of stuff going on in the
23 family for instance moving, new people coming into the
24 family; that sort of thing?

25 A. Well, we like to make an assessment of what is

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 happening in the family's environment because it helps to
2 frame intervention because you want to know -- if I
3 recommend something to a family that has a certain number
4 of circumstances it may be unattainable or not doable for
5 them.

6 So if you have more of a sense of what is going on
7 for a family and their resources then you can tailor
8 better A, what do they need and B, how do you deliver it
9 and make it assessable to them. So it is helpful to know
10 some social history.

11 Q. And sometimes the social history could maybe explain
12 some delays or that sort of thing in a child?

13 A. Sure.

14 Q. Okay. So I think there are a whole bunch of dates
15 going around and times going around but the bruise -- the
16 bruises are within how long?

17 A. Well...

18 Q. You can't date bruises.

19 A. It's difficult to date them exactly. I know that
20 seventeen days later they are completely and totally
21 gone. So I would say with confidence that they are
22 definitely less than two weeks old.

23 As far as you know I have some history from the
24 family members who said that she was well with minimal
25 bruises on the particular day that she presented and had

1 the massive bruises. And as soon as they found the
2 massive bruises the family called.

3 Both the Mother and Father tried to get help -- get
4 appointments to get seen. So it makes it sound like that
5 they were likely there a maximum of 12 to 24 hours;
6 possibly less.

7 Q. Okay. And -- but that's based off the history so
8 if you didn't have the history you would not be able to
9 tell the date of those bruises?

10 A. No, not exact. I'd probably give a range like
11 anywhere from zero to four days or so.

12 Q. And not based off history the skull fracture you
13 couldn't date.

14 A. Well, because she had the overlying blood collection
15 that helps. So we know again that that's probably within
16 three days because of that overlying blood collection.
17 And it's still soft and it hasn't organized at all.

18 Q. Okay, within three days. And the skull bleed -- the
19 scalp bleed that is within 48 hours or three days?

20 A. I'm sorry, which bleed?

21 Q. The subgaleal.

22 A. The subgaleal. Right. I think that one was
23 probably within several hours. That one was probably not
24 more than twelve hours old when she came in; 12-ish
25 hours.

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 Q. But the subgaleal can be from hours to days old?

2 A. It can be depending on the type of subgaleal but
3 this one is like a big one. I mean she's dropped her
4 hemoglobin three points, which is the same as dropping
5 your hematocrit like ten points.

6 So that's a significant blood loss. I don't -- I
7 mean I don't know because I wasn't there but based on the
8 history that I was given that 24 hours prior -- wait a
9 minute. They presented at 1 o'clock or so to the ER so
10 less than 24 hours prior they are saying that she was
11 fine. So 7 p.m. both parents are saying that it wasn't
12 there. So could it have been there and just kind of
13 gradually growing?

14 If it had been there at like 1 o'clock I think they
15 would have seen some evidence of it starting to show by 9
16 o'clock at night; that would give you a good eight hours.

17 Q. Well at 1 o'clock it's possible that there is a
18 symptom of vomiting the day before. That's possibly a
19 symptom?

20 A. Possible. It was not protracted. There was like
21 that single episode of like -- supposedly a small amount.
22 I don't know what that means when parents say a half cup
23 of Pedialyte because to see a blotch there. But there
24 was a small amount of clear emesis so it's possible.

25 Q. Okay. And the small subdural hematomas could not

1 be dated within 48 hours?

2 A. Yes, no they are hard to be exact so 48, 72.

3 Q. Okay. And I think the Solicitor asked you this
4 could have been just one incident but it's possible it
5 was two events because there are two swelling points?

6 A. It's possible. No one has given -- they have given
7 one big -- multiple caregivers -- both caregivers have
8 given like when they came in in crisis saying help me
9 they gave a big history of this big thing that happened.
10 It doesn't mean that something else couldn't have
11 happened. It's just kind of the overwhelming story that
12 was given by both of them individually.

13 Q. And the history that Sandra gives she does mention
14 that Chris is job hunting.

15 A. I believe so. Is that in the social history?

16 Q. Yes.

17 A. I believe that is correct.

18 Q. He is job hunting correct?

19 A. Yes. He was looking for jobs. He was still being
20 paid by the military and was receiving medical services
21 with the Veteran's Administration.

22 Q. Okay. But no one asked Chris what he was doing
23 earlier in the day.

24 A. I believe that the ER when he brought the child to
25 the ER they asked -- they took some history then and the

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 social workers took some history directly from him.

2 Q. Okay. But there is nothing in your notes that says
3 what he was doing during the day of September 5th?

4 A. Again, maybe I'm missing something but I thought
5 that it was explained that he was taking care of all the
6 members of the family because the Mother wasn't feeling
7 well. She was in bed. She had some diarrhea and some
8 other not feeling well and that he was -- he said that he
9 fed the children and then fed them dinner.

10 Q. So he -- there is evidence that he is there at lunch
11 but there is no evidence of what he was doing during the
12 day from him?

13 [Whereupon, the witness reviews document]

14 A. If I can -- I thought that what they said he was
15 there taking care. He left to -- allegedly left to go to
16 the car pool line; I guess that was the day of.

17 Q. That's from the -- yes.

18 A. It just says that natural Father entertained the
19 children. Minor and Sibling¹ napped at 1 o'clock or so, ate
20 chicken nugget lunch. Minor had a clear runny nose. Minor
21 wanted to be held more.

22 The Father picked up Sibling² at 1:30 in the car pool
23 line. They were home by 2:30. Mom stayed in the living
24 room during their naps ---

25 Q. --- I'm sorry. From the natural Father not from the

1 -- not from Chris not from Sandra.

2 A. So this is the history -- I interviewed the Mother
3 so that would be in like one of the social worker's
4 notes.

5 Q. Right.

6 A. So I didn't know if you interviewed them already or
7 if they testified earlier.

8 Q. From your review of the notes there is nothing that
9 Chris said that he was doing on September 5th during the
10 day?

11 A. I would be glad to check just to make sure.

12 [Whereupon, the witness reviews document]

13 A. It looks like the history like you said starts with
14 the evening.

15 Q. Okay. And just to be clear the skull fracture
16 could be all from one event even though there is two
17 fractures or multiple fractures they could all be from
18 one event correct?

19 A. Yes, sir.

20 Q. Okay. You had mentioned in the slide about an
21 extradural?

22 A. Oh, it was -- Minor did not have an epidural.

23 Q. So she did not have that injury?

24 A. No, sir.

25 Q. And the Solicitor had asked you could it have been

(MICHELLE AMAYA - CROSS BY MR. SHELTON)

1 all from the tub going forward then backwards. But as
2 you testified earlier it could have been two separate
3 events.

4 A. It could have been two separate events. And I
5 believe that the context of the question was could she
6 have inflicted it herself forward and backward. She
7 can't generate enough force for the degree of injury.

8 [Whereupon, Mr. Shelton and Mr. Groeber confer]

9 Q. [Mr. Shelton] Immunizations. As a pediatrician some
10 people choose to delay their immunizations is that
11 correct?

12 A. That's true.

13 Q. Some families choose not to vaccinate is that
14 correct?

15 A. That's true.

16 Q. Okay. No further questions.

17 THE COURT: Any redirect?

18 MS. WILLIAMS: Very briefly.

19 THE COURT: You may proceed.

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(MICHELLE AMAYA - REDIRECT BY MS. WILLIAMS)

1 REDIRECT EXAMINATION

2 BY MS. WILLIAMS:

3 Q. Mr. Shelton asked you about what was going on with
4 this family during this period of time is that correct?

5 A. Yes, ma'am.

6 Q. And Mr. Berke actually gave a lot of information
7 about what was going on with him during this time didn't
8 he?

9 A. Yes, ma'am.

10 Q. Did he -- if you would just -- you can ---

11 MR. SHELTON: --- objection, Your Honor.

12 THE COURT: Basis?

13 MR. SHELTON: 404.

14 THE COURT: You went into it a great deal on cross-
15 examination. She's entitled to rebut that testimony and
16 rehabilitate a witness or to clarify and it is relevant.
17 You brought it in to relevance. You may proceed.

18 MS. WILLIAMS: Thank you.

19 Q. [Ms. Williams] In the social worker note what did
20 he tell -- did you review the social worker's note as a
21 part of forming your diagnosis?

22 A. Yes, ma'am.

23 Q. What did he tell the social worker about what was
24 going on with him right around the time of Minor injury?
25 I believe it's on the second page.

(MICHELLE AMAYA - REDIRECT BY MS. WILLIAMS)

1 [Whereupon, the witness reviews document]

2 A. Okay. He as you might imagine was recovering from
3 returning stateside from Afghanistan.

4 He explained that he had experienced combat and
5 direct fire, exposure to a suicide bomber and that he was
6 now having significant sleep disruptions and had multiple
7 incidents where he was woken up by his wife because he
8 had leaped over her and squeezed her in the night.

9 He stated he did not know he was doing it at the
10 time he did it. He had anxiety attacks. He was having
11 problems pacing the room. He described pacing the room
12 and feeling as though he could not calm down.

13 He couldn't sleep. He couldn't sit. He stated he
14 had not been diagnosed with any particular disorder.
15 They said P-T-S-D but reported he had been diagnosed with
16 anxiety.

17 Q. And did he say that he was prescribed medication for
18 the anxiety?

19 A. He said that he had been in the past.

20 Q. And was he taking it at the time?

21 A. He was not per that interview.

22 Q. And they asked you about immunizations. Is it your
23 recommendation as a pediatrician that people get their
24 child immunized on schedule?

25 A. Yes, ma'am. But also those people who don't get

(MICHELLE AMAYA - REDIRECT BY MS. WILLIAMS)

1 immunizations they still bring their child for their well
2 child visits; two, four, six, nine, twelve months,
3 fifteen months for well child evaluations.

4 Q. And these people weren't doing that?

5 A. For whatever reason they were not.

6 Q. Thank you. Nothing further.

7 MR. SHELTON: Just briefly, Your Honor.

8 THE COURT: Very brief. Limited to redirect.

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2 BY MR. SHELTON:

5 MS. WILLIAMS: --- objection.

12 [Whereupon, Mr. Shelton and Mr. Groeber confer]

14 THE COURT: Uh huh.

19 MS. WILLIAMS: --- objection.

21 MR. SHELTON: No more questions.

24 MS. WILLIAMS: None from the State, Your Honor.

303

1 MR. SHELTON: None, Your Honor.

2 THE COURT: Ma'am, you're excused.

3 THE WITNESS: Thank you very much.

4 THE COURT: You're welcome.

5 [Whereupon, the witness is excused and exits the
6 witness stand]

7 THE COURT: Counsel, please approach.

8 [Whereupon, an off the record bench conference is
9 held].

10 THE COURT: The State may proceed.

11 MS. WILLIAMS: Your Honor, at this time the State
12 rests.

13 THE COURT: Madame Forelady and ladies and
14 gentlemen, the State has rested their case. There are
15 some matters of law that I need to take up with the
16 attorneys that will take the remainder of the afternoon.
17 So we're going to break, at least your portion of these
18 proceedings and you all are excused for the evening. We
19 will resume in the morning at 9:30.

20 During this break please do not discuss the case
21 among yourselves or with anyone else. Please do not do
22 any independent research; that includes anything that
23 could be found on the Internet. When you return in the
24 morning please come directly to your jury room as
25 directed by the bailiffs having no contact with anyone in

1 or about the courthouse.

2 And also please do not make any references to your
3 jury service on any social networking sites. If you will
4 leave your notepads in your seats we will secure them
5 during the evening recess. Have a wonderful evening and
6 we will see you in the morning at 9:30.

7 [Whereupon, the jury exits at 4:35 p.m.]

8 THE COURT: The State has rested their case so are
9 there any motions?

10 MOTION FOR DIRECTED VERDICT

11 MR. GROEBER: Yes, Your Honor. At this time we
12 would move for a directed verdict. I would point Your
13 Honor to State v Odoms [phonetic] which is as this case
14 is we believe a circumstantial evidence case. I'm sure
15 the court knows in order to survive a directed verdict
16 motion and in the light most favorable to the State the
17 State has to present substantial circumstantial evidence
18 of Mr. Berke's involvement in any of the crimes charged.

19 As to the Infliction of Great Bodily Injury on a
20 Child there has been no testimony that Mr. Berke
21 inflicted the injuries upon -- that are the subject of
22 this, specifically the skull fracture, the subdural and
23 subgaleal hematomas. I think that covers the tracking if
24 my memory serves me correctly.

25 There is evidence that he was with the child during

1 the time that it's possible the injuries could have
2 happened. There has also been evidence presented that
3 there is time periods where he was not with the child and
4 caring for the child; specifically was the morning of the
5 6th. And if you will give me one second just to see if I
6 can get online. There is also testimony that the
7 children -- the child in question was in the custody of
8 the other parent that was in the house as well. So it is
9 one of those cases similar to some of the homicide by
10 child abuse cases where both parents or both caregivers
11 were charged because both had custody and control of the
12 child. For that reason we would ask you to direct a
13 verdict on the Infliction of Great Bodily Injury on a
14 Child.

15 As for the Unlawful Conduct again, we're talking
16 about a timeframe in which both children -- or both
17 parents were involved with the child and had custody of
18 the child and were involved in the medical treatment.

19 I think all the testimony suggests actually that the
20 Mother -- other than the presentation at the hospital the
21 Mother is the only one who had gotten medical treatment
22 for the child. Part of that was while our client was in
23 Afghanistan.

24 So for those reasons we'd ask that you would direct
25 a verdict on both charges. And if I could just have one

1 more second.

2 [Whereupon, Mr. Groeber and Mr. Shelton confer]

3 MR. GROEBER: I'm just trying to get a few cases,
4 Your Honor if you could give me just one second.

5 [Whereupon, Mr. Groeber reviews records]

6 MR. GROEBER: I know one of the cases Your Honor
7 and I apologize I don't have the site for it but it is
8 fairly recent; it came out in December is State v Hepburn
9 [phonetic]. I'll give you the appellate case number. In
10 that case there were essentially two people who could
11 have killed the child. And both of them -- and they were
12 prosecuted as co-defendants in a joint trial. And what
13 the court ruled was that ---

14 THE COURT: --- are those the facts of that case?
15 I'm not certain it is. I don't believe they tried the
16 other person and basically they said she was the only
17 person in the house and therefore she was the one who did
18 it and it was reversed. And the Supreme Court said there
19 was not substantial circumstantial evidence to prove her
20 guilt by mere presence; if my memory serves me correctly.

21 MR. GROEBER: If you could give me a second I'll
22 look up the site. I just have it printed from the
23 appellate from the advance sheet ---

24 THE COURT: --- it was a Supreme Court case. It
25 was not an Appellate Court ---

1 MR. GROEBER: --- yes, I'm sorry. I meant to say
2 the Supreme Court. The appellate case number was 2011-
3 190695 ---

4 THE COURT: --- there is a more recent case than
5 that -- there is a more recent case than that.

6 MR. GROEBER: The more recent case, Your Honor, may
7 have been referencing is State v Gorman [phonetic]. That
8 one is an Appellate Court case. The Hepburn case is a
9 South Carolina Supreme Court case. The cite on Hepburn,
10 Your Honor -- I have Lexis so I'm not sure if that is ---

11 THE COURT: --- I already have it.

12 MR. GROEBER: Okay.

13 [Whereupon, the court reviews information]

14 THE COURT: Have you completed your argument or is
15 there more?

16 MR. GROEBER: I apologize, Your Honor. I would
17 just point you to the Hepburn case and to the Odoms
18 [phonetic] case. That would be all from us. Thank you.

19 THE COURT: You're welcome. The State may respond.

20 MS. WILLIAMS: Your Honor, in the light most
21 favorable to the State we think there is significant
22 evidence -- circumstantial evidence on the infliction.
23 The defendant himself says that she was -- doesn't give
24 any indication she was injured before. His story is that
25 he gives her a bath and that's when she's injured.

1 There is one story he tells the guardian ad litem
2 that he has her in the kitchen and the Mother walks in
3 from being asleep and goes what happened to Minor which
4 would indicate that she didn't know anything happened to
5 Minor Both their stories change a little bit over time
6 but the one thing everybody is consistent with is that
7 Minor got injured when the defendant was giving her a
8 bath. The only thing that is inconsistent is his
9 explanation of the injuries and he's not a doctor, he
10 doesn't realize she has subdurals so he gives an
11 explanation that is consistent with what he sees on the
12 surface, which is oh, she's got a black eye, she's got
13 some swelling here; she banged her head on the faucet.

14 I think that there is -- that that is significant
15 circumstantial evidence that he caused the injury when he
16 says he is with her when she is injured. As far as the
17 injury being -- Infliction of Great Bodily Injury we had
18 several doctors testify that she was at risk of death.
19 She had protracted loss of her leg. She had protracted
20 loss of her brain because she had developmental delays
21 that at least two of the doctors say could have been
22 caused by the brain injury.

23 With regards to the Unlawful Conduct Towards a Child
24 he is a parent and the statute says it is unlawful for a
25 person who has charge or custody of a child or who is the

1 parent or guardian of the child. He is the parent of the
2 child and he had charge and custody of the child. And
3 he placed the child at unreasonable risk when they didn't
4 have the leg treated, they didn't get her immunizations,
5 and they didn't take her for well visits.

6 THE COURT: Anything further from the defense?

7 MR. GROEBER: Just to point out Your Honor that I
8 think the evidence is fairly incontrovertible that the
9 injury -- what the defendant describes as her hitting her
10 head is not the injury that caused all the damage. Now
11 it may have caused the pinpoint bruise on the forehead
12 and some possible tracking into the orbit of the eye.

13 But I don't think there is evidence that that caused
14 that so the reliance upon his statement that he was with
15 the child when that injury happened is not -- frankly
16 does not go to what -- the injury that actually caused
17 the more significant injuries of the skull fracture
18 hematomas. Thank you.

19 THE COURT: You're welcome. Anything further from
20 the State?

21 MS. WILLIAMS: No, Your Honor.

22 THE COURT: When considering a motion for a
23 directed verdict the Court is required to look at the
24 evidence in the light most favorable to the State. The
25 court should refuse to grant the directed verdict motion

1 when the evidence -- should not refuse to grant the
2 directed verdict motion when the evidence merely raises a
3 suspicion of the accused guilt.

4 Suspicion implies a belief or opinion as to guilt
5 based upon facts or circumstances which do not amount to
6 proof. However a court is not required to find that the
7 evidence infers guilt to the exclusion of any other
8 reasonable hypothesis. When considering a motion for
9 directed verdict the court is not acting as the fact
10 finder, it's not in a posture to weigh evidence or
11 creditability. The motion should be denied if the State
12 presents substantial circumstantial evidence or direct
13 evidence which reasonably tends to prove the defendant's
14 guilt. Then our case law says that the case must go to
15 the jury.

16 I'll start by distinguishing Hepburn which is
17 completely inapposite to this case. In Hepburn a
18 codefendant and defendant were tried. The uncontroverted
19 testimony in the record is that the person who was
20 convicted was asleep at the time the incident occurred
21 other than a codefendant's self-serving testimony that he
22 saw the defendant, the convicted defendant shaking the
23 child and that he later then found the child unresponsive
24 in the crib.

25 And this testimony was largely uncorroborated --

1 well, it wasn't corroborated by anything other than his
2 own self-serving statement that he saw her shaking the
3 child, which is very different from this case. What ties
4 the defendant to the alleged facts and circumstances of
5 this case are his own voluntary statements which put him
6 in the vicinity and within the parameters of the time
7 within which or the timeframe articulated by her treating
8 physician as to when these injuries occurred. The
9 doctors testimony is that the injuries could have
10 occurred as one incident, they could have occurred at
11 several incidents but because of the swelling that was
12 present they definitely occurred within 12 to 24 hours
13 based on the social history that was provided by the
14 family and that the fractures certainly happened within
15 three days, that the smaller hematomas happened within 48
16 hours.

17 When questioned by the defense regarding other
18 possibilities consistent with the defendant's recitation
19 of his belief as to how the events transpired she said it
20 was possible but not likely consistent with his version
21 of the events. What puts this case in a different
22 factual posture than Hepburn is the jury is allowed to
23 consider and weigh the creditability of the defendant's
24 statements.

25 In other words whether he made a full revelation of

1 exactly what happened, whether they believe his version
2 of what happened. They certainly are free to believe
3 that he didn't -- that he caused this goose egg which the
4 doctor says could well have resulted in blood draining
5 below the eye and causing the black eye. The jury could
6 believe that these incidents happened separately, that
7 the injury to her eye is unrelated to the other
8 fractures. But there is a great deal of testimony about
9 this soft mushy spot and how that plays into the timing
10 of these injuries. And the uncontroverted testimony as
11 established by the defendant's own voluntary statement
12 basically says the only person that had access while she
13 was in the tub was him; not his wife and that she was in
14 the bed. And then at some point was in another bathroom
15 attending to another child drying their hair.

16 Now there the jury could very well believe and it
17 certainly would -- is a factual matter that could be
18 sifted out the jury could believe that there is a lapse
19 of time where someone else had access to this child and
20 caused another fracture within this applicable time
21 period. But that's a factual issue that is not for this
22 court to sift out or to weigh the creditability of or to
23 make any factual findings related to it.

24 So the motion for directed verdict as it regards
25 indictment 604, which is Infliction of Great Bodily Harm

1 upon a Child is denied. The facts of Hepburn are not on
2 point with this case. And I agree with Hepburn if in
3 fact the only testimony in this case was from a co-
4 defendant who said she or he saw the defendant shaking
5 the child which in and of itself would have been a self-
6 serving statement uncorroborated. It basically would
7 have just said his mere presence would have found him
8 guilty. And that's basically what they are saying in
9 Hepburn especially when the codefendant was convicted as
10 well I believe if my memory of the facts is correct; if
11 it isn't I stand corrected. But I don't know that it is
12 necessarily germane in the analysis.

13 As in regards to 2013-603, which is Unlawful Conduct
14 Toward a Child the State is only required to prove beyond
15 a reasonable doubt and they are only proceeding under
16 subsection (1) of the statute. They are only required to
17 prove that the defendant had charge of the child, which
18 they have established that during this timeframe that he
19 did. That he was the child's parent or guardian, which
20 they have established. That he was responsible for the
21 child's welfare and that he placed the child at
22 unreasonable risk of harm affecting the child's life,
23 physical or mental health, or safety, which has been
24 established by the child's previous injuries which were
25 not attended to as well as the well visits.

1 Even if we throw out the immunizations because there
2 are many people who philosophically morally now take the
3 position because of additives and other things, the
4 increase in autism; there is a whole growing movement
5 that the level of mercury in immunizations is
6 unacceptable and it is damaging children. There is a
7 whole movement where people are not getting their
8 children immunized and certainly allows them to do that.
9 But even if we take the component out of the
10 immunizations the doctor testified that even those
11 parents who chose that route still take their children
12 for their well visits to make sure that they are meeting
13 the appropriate benchmarks.

14 There is direct and substantial circumstantial
15 evidence in the record that the part of that -- the
16 defendant failed to do that with his child. And those
17 visits fall within and without the time of his
18 deployment. Certainly he cannot be held responsible for
19 when he was deployed. He was not here physically
20 available and did not have access to the child.

21 However there is testimony of times when he was
22 available, was in a primary care giving role, had the
23 ability to observe his child and failed to attend to her
24 needs especially in light of the doctor's testimony
25 regarding her regression from the time period that this

1 leg injury would have occurred where she was no longer
2 pulling up and the way she favored her body as a result
3 of this injury.

4 So there is substantial as well as -- there is
5 direct evidence as well as substantial circumstantial
6 evidence reasonably tending to prove the elements of
7 subsection (1) of Code section 63-570 and the motion for
8 directed verdict is denied. Now, I'm going to save a
9 little time. Sir, if you would stand for me please and
10 raise your right hand to be sworn?

11 [Whereupon, the witness is duly sworn by the Court]

12 THE COURT: Does the defendant have any record that
13 the State would be seeking to introduce to impeach his
14 creditability?

15 MS. WILLIAMS: No, Your Honor.

16 FIFTH AMENDMENT RIGHTS

17 THE COURT: Sir, we are -- in the morning your
18 lawyers will begin your defense in this case. And I'm
19 going to ask you some questions so that you can have a
20 meaningful discussion with them about your rights over
21 the break in the event that you should decide or not
22 decide that you want to testify in this case. And I will
23 complete that questioning at the appropriate time.

24 But at this time I am going to explain to you
25 certain of your rights. If you do not understand

1 anything that I say please let me know if you want me to
2 explain anything in more detail please me know. Do you
3 understand?

4 MR. BERKE: Yes, Your Honor.

5 THE COURT: Sir, we have now reached the stage of
6 the trial where you may present your defense. You have
7 the right to claim the protections given to you by the
8 Fifth Amendment to the Constitution of the United States.
9 And that amendment states in part that no person shall be
10 compelled in any criminal case to be a witness against
11 himself.

12 This means that you cannot be required to testify in
13 this case. You have the right to testify on your own
14 behalf; however no one can make you testify. This is a
15 personal right and no one can waive this right except
16 you. If you decide to testify you will be subject to the
17 same rules that govern other witnesses and you may be
18 examined and cross-examined on any relevant issue in this
19 case.

20 In addition if you have any convictions involving
21 dishonesty or false statements or for crimes punishable
22 by imprisonment for more than one year and this court
23 determines that the probable value of admitting this
24 evidence outweighs it's prejudicial effect to you the
25 Solicitor will be able to introduce your record to

1 impeach your creditability or to attack your
2 creditability.

3 If you decide to testify this decision on your part
4 must be made freely, voluntarily and intelligently with
5 knowledge of the protections given to you by the Fifth
6 Amendment and of your decision to testify. If you decide
7 not to testify I will instruct the jury that they cannot
8 give this fact any consideration whatsoever. I will
9 instruct them that you have no burden of proof; that the
10 burden of proof remains on the State to prove your guilt
11 beyond a reasonable doubt, that you are not required to
12 prove your innocence and that your silence cannot be
13 discussed in any manner whatsoever in their deliberative
14 process and that there is to be no prejudice to you
15 because you did not testify.

16 It is left entirely up to you whether or not you
17 testify. You may speak with your attorney, your family
18 members or friends or anyone else but the final decision
19 is yours. Do you understand your rights as I have just
20 explained them to you?

21 MR. BERKE: Yes, Your Honor.

22 THE COURT: Do you have any questions about your
23 rights as I've explained them to you?

24 MR. BERKE: No, Your Honor.

25 THE COURT: Now I am going to give you some

1 additional time to discuss with your attorneys whether
2 you wish to testify or not and at the appropriate time we
3 will resume questioning. Do you understand?

4 MR. BERKE: Yes, Your Honor.

5 THE COURT: Okay. Is there anything else we need
6 to take up before -- is there anything else we need to
7 take up before we break for the evening from the State?

8 MS. WILLIAMS: No, Your Honor.

9 THE COURT: From the defense?

10 [Whereupon, Mr. Shelton and Mr. Groeber confer]

11 MR. SHELTON: Your Honor, just the bond situation.

12 THE COURT: You know I still haven't gotten an
13 answer so I'm going to let him stay out. I assume -- is
14 your bondsman staying on his bond?

15 MR. SHELTON: He is willing to stay on the bond.

16 That was the letter.

17 THE COURT: What did the letter say?

18 MR. SHELTON: I'm sorry; I gave my last copy...

19 THE COURT: That's okay.

20 MR. SHELTON: Mr. Hamilton was here on Monday.

21 THE COURT: I probably -- I'm going to make a
22 decision tomorrow. What I will probably do is take him
23 into custody at the time we begin deliberations. But I'm
24 having a difficult time finding the statute that I'm
25 looking for. And I don't know if -- it's not in the same

1 -- it's in some innocuous part of the code.

2 I've used it before and I just -- I'm not -- I went
3 to my office last night and forgot to look for it because
4 I was preoccupied with some other things. But hopefully
5 I'll be able to locate it and we'll see where we go from
6 there. The Attorney General's opinion is not on point.
7 That deals with personal recognizance; not when you're
8 posting a surety. There is a statute unless it's been
9 repealed that says when a case is called that the bond
10 obligation concludes and I need to make sure the bondsman
11 knows that if your client absconds that we are going to
12 estreat his bond.

13 MR. SHELTON: Yes, Your Honor.

14 THE COURT: And that's a lot of money.

15 MR. SHELTON: Yes, Your Honor.

16 THE COURT: And I don't want him coming back later
17 saying we can't estreat his bond because he didn't have
18 any obligation. So I'm going to get an answer to my
19 question but sir I will instruct you again that if you
20 fail to appear that you will -- a bench warrant will be
21 issued for your arrest. Do you understand?

22 MR. BERKE: Yes, Your Honor.

23 THE COURT: Do you understand that the trial will
24 continue in your absence?

25 MR. BERKE: Yes, Your Honor.

1 THE COURT: Do you understand that if convicted in
2 your absence that you will be sentenced in your absence
3 and again a bench warrant will be issued and any sentence
4 will simply be pronounced upon being able to locate you?

5 MR. BERKE: Yes, Your Honor.

6 THE COURT: Okay. See you all in the morning at
7 9:30. Have a good evening.

8 MR. GROEBER: Thank you, Your Honor.

9 MS. WILLIAMS: Thank you, Your Honor.

10 THE COURT: You're welcome.

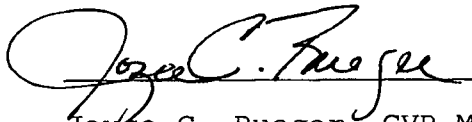
11 [Whereupon, court adjourns at 5:06 p.m.]
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of General Sessions for Berkeley County, South
Carolina on the 4th day of March, 2014.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

April 21, 2014


Joyce C. Rueger, CVR-M
Court Reporter

STATE OF SOUTH CAROLINA

)

COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON

)

DOCKET NO. 2013-GS-08-0603

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2013-GS-08-0604

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STATE OF SOUTH CAROLINA

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vs.

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CHRISTOPHER BERKE

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Defendant

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TRANSCRIPT OF RECORD

March 5, 2014

Moncks Corner, S. Carolina

VOLUME 3 (OF 3)**B E F O R E:**

THE HONORABLE DEADRA L. JEFFERSON, JUDGE

A P P E A R A N C E S:

ANNE WILLIAMS, ESQ.

COLLEEN TAYLOR, ESQ.

Attorneys for the State

CHAD D. SHELTON, ESQ.

CODY GROEBER, ESQ.

Attorneys for the Defendant

JOYCE C. RUEGER, CVR-M
Circuit Court Reporter

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1 PROCEEDINGS

2 THE COURT: All right. Is the State ready to
3 proceed?

4 MS. TAYLOR: Yes, Your Honor. The State is ready
5 to proceed.

6 THE COURT: Is the defense ready to proceed?

7 MR. SHELTON: Yes, Your Honor.

8 THE COURT: Mr. Berke, if you will stand for me
9 please? I'll remind you sir that you are still under
10 oath.

11 [Whereupon, the defendant stands]

12 THE COURT: On yesterday I explained to you certain
13 of your rights concerning your right to testify or not
14 testify. And I recessed that questioning to give you a
15 full opportunity to explore that matter with your
16 counsel. Have you had a full opportunity to discuss with
17 your lawyers whether you should or should not testify?

18 MR. BERKE: Yes, Your Honor.

19 THE COURT: Do you have any more questions of the
20 court regarding your rights as I have already explained
21 them to you on yesterday?

22 MR. BERKE: No, Your Honor.

23 THE COURT: And sir, do you wish to testify or do
24 you not wish to testify?

25 MR. BERKE: I wish to testify, Your Honor.

1 THE COURT: Now, do you have your other witnesses
2 here Mr. Shelton?

3 MR. SHELTON: Yes, Your Honor.

4 THE COURT: And who are those?

5 MR. SHELTON: Doctor Jennifer Canter is the doctor
6 from New York, the expert and then his -- Ronda Illar.

7 THE COURT: And Ms. Illar?

8 MR. SHELTON: It's Illar. Actually it's ---

9 THE COURT: --- Illar. So the S is silent?

10 MR. SHELTON: There is no S, Your Honor that was a
11 misprint.

12 THE COURT: So that's a misspelling. So it's
13 I-L-E-R?

14 MR. SHELTON: I-L-L-E-R.

15 THE COURT: I-L-L-E-R. So it's Iller.

16 MR. SHELTON: It's A-R; I'm sorry.

17 THE COURT: A-R.

18 MR. SHELTON: Yes.

19 THE COURT: Okay, so it's I-I -- I'm confused.
20 Spell it again.

21 MR. SHELTON: I-L-L-A-R.

22 THE COURT: Okay, I got you. Now are there any
23 evidentiary matters we need to take up before we proceed
24 this morning?

25 MS. WILLIAMS: Your Honor, I'm not sure which

1 witnesses he plans to try to put the videos and the
2 pictures in but the State objects to the two photographs
3 that the defendant ---

4 THE COURT: --- can I see the photographs you're
5 referring to?

6 MR. SHELTON: Yes, Your Honor.

7 [Whereupon, Mr. Shelton provides photographs to the
8 court]

9 THE COURT: What would be the basis of the State's
10 objection?

11 MS. WILLIAMS: For the first one she's about a
12 month old. And I don't think that it...

13 THE COURT: You all brought into contention that he
14 didn't bond with his child and that he acted basically my
15 paraphrasing the testimony was that in response to her
16 cries that he was unresponsive; in fact detached and
17 acted in a hostile manner by balling his fists. I think
18 you brought it in. You can't have it both ways.

19 MS. WILLIAMS: Well, I guess the second one then we
20 would say is cumulative.

21 THE COURT: No. Nice try. Overruled.

22 MS. WILLIAMS: Okay. We're moving on Your Honor.

23 THE COURT: 2 and 3 will come in subject to the
24 State's objection.

25 [Whereupon, defendant's exhibit numbers 2 and 3 are

1 entered into evidence by the court]

2 THE COURT: As far as the videos ---

3 THE COURT: --- I don't know what those show. How
4 long are there and how many of them are there?

5 MS. WILLIAMS: There is one video Your Honor that
6 shows him coming back from deployment and he's walking
7 into the house and all the children are there and the
8 wife is waking them up to see him. And I'm not sure what
9 that is relevant to; the children are sleeping, half
10 asleep.

11 THE COURT: How long is that video?

12 MR. SHELTON: A couple of minutes Your Honor at
13 most.

14 THE COURT: And then what's the other one?

15 MS. WILLIAMS: And the other video is she's in
16 foster care and the Mother is holding her and the Father
17 is filming her but ---

18 THE COURT: --- say that one more time. She's in
19 foster ---

20 MS. WILLIAMS: --- the Mother Sandra Berke is
21 holding the child and they are both talking to Minor
22 It's like about three months after she's in foster care
23 and they're filming her. And we think that video is
24 particularly misleading because they had supervised
25 visitation and it doesn't show that. It just looks like

1 they are all back at home, she's healed up and everything
2 is good. And that's not ---

3 THE COURT: --- couldn't you ask -- or wouldn't you
4 ask those questions?

5 MS. WILLIAMS: Pardon me?

6 THE COURT: Wouldn't you ask those questions? If
7 that's your objection then it's not accurate.

8 MS. WILLIAMS: We can ask those questions, Your
9 Honor, but it's just our contention that it is misleading
10 and I don't know what it is relevant to.

11 THE COURT: What's the relevance?

12 MR. SHELTON: Yes, Your Honor ---

13 THE COURT: --- because it's after the fact. It's
14 almost in the nature of -- first it's self-serving.

15 MR. SHELTON: Well, Your Honor ---

16 THE COURT: --- second it's not germane to the time
17 period that this event is alleged to have happened. And
18 in addition to that charges -- it is imposture of all
19 this court involvement and that my behavior is going to
20 be better because people are watching me. It's almost in
21 the nature of a remedial action.

22 MR. SHELTON: It goes to -- it goes to directly the
23 physical therapist and the gross motor skills playing
24 with toys. There is a toy that she is playing with on
25 that and the physical therapist met with her ---

1 THE COURT: --- the physical therapist said it had
2 improved; that's why she would be going to physical
3 therapy. Is it at the time -- does this document when
4 she first saw the physical therapist?

5 MR. SHELTON: It is -- it's -- October 26th is when
6 the physical therapist first saw her. This is November
7 16th.

8 THE COURT: You can improve a lot in 30 days in
9 physical therapy. That's why they -- especially with
10 children; they grow exponentially when attended to unlike
11 adults.

12 MR. SHELTON: And I do think there is a question
13 about her gross ---

14 THE COURT: --- you'd have to have something taping
15 her exactly when they are talking about her skills were
16 delayed or when they're saying it basically was stunted
17 due to lack of attention or lack of nurturing basically.
18 In other words that she really was not being attended to
19 as she should have been in the home.

20 If you have videos during that timeframe that show
21 her gross motor skills were not off or that they were not
22 delayed. But then it's very misleading to show a video
23 after she's had physical therapy, after her needs have
24 now had intervention. To say that her gross motor skills
25 -- that there is not creditability because her gross

1 motor skills are not as they portrayed it because
2 actually it's not accurate. You need something that
3 shows it at the time that -- the timeframe that we are
4 talking about; not subsequent when she's gotten treatment
5 and intervention.

6 MR. SHELTON: I understand. I do think that there
7 is a question of fact as to whether there is gross motor
8 skills and that is because of Mr. Berke. There is
9 question and there is testimony that there is at least a
10 doctor from Kentucky that had worries about gross motor
11 skills before ---

12 THE COURT: --- if you had video from Kentucky I'd
13 be glad to let it in. But you've got a video after she
14 has had physical therapy. I would assume that her gross
15 motor skills have improved exponentially after a month of
16 physical therapy. It's not accurate.

17 MR. SHELTON: I...

18 THE COURT: If you have video from Kentucky I'll be
19 glad to let it in that show her motor skills were not
20 delayed and that she was at her percentiles and at her
21 markings; you know -- I forget what they call it --
22 benchmarks -- that is different. But to now show a video
23 saying well, you know they all said she was delayed and
24 had all these problems and that's not accurate because
25 look at her. She has dexterity with these things but

1 that's after therapy.

2 MR. SHELTON: And it also goes to the Unlawful
3 Conduct that he should have known about the gross motor
4 delays and didn't take her for her visits ---

5 THE COURT: --- if you had a video at the time that
6 they are saying that these things existed that was
7 contrary to what has been testified to, yes.

8 MR. SHELTON: And -- but if the testimony is that
9 it's similar to how she has acted before ---

10 THE COURT: --- that's not the testimony.

11 MR. SHELTON: If they're saying -- well...

12 THE COURT: Not that I heard it ---

13 MR. SHELTON: --- it might be the testimony -- I
14 can proffer that testimony as far as ---

15 THE COURT: --- you need to develop the testimony
16 and I'll see what it is but as of right now I haven't
17 heard anything that would support that theory.

18 MR. SHELTON: Okay.

19 MS. WILLIAMS: And Your Honor from a factual basis
20 I don't -- we disagree that that's what that video shows.
21 But in any sense I also forget to mention for the first
22 video that's five months before the incident in question.
23 And I don't know that his relating to the child five
24 months before ---

25 THE COURT: --- you all presented testimony based

1 on his own words that he never bonded with his child.

2 MS. WILLIAMS: I'm not arguing about the pictures,
3 Your Honor. I'm just arguing about ---

4 THE COURT: --- the video is the same thing; same
5 soup, different bowl.

6 MS. WILLIAMS: I would just ask you to ---

7 THE COURT: --- you can't bring into evidence that
8 he never bonded with his child. That he was cold, he was
9 sterile and was inattentive to her and they have
10 something contrary to that because you didn't confine it
11 to that. You basically presented statements that he
12 basically said I never bonded with my child. I was
13 detached from her from the beginning. I was deployed
14 most of the time. I never had the ability to interact
15 with her. It cuts both ways.

16 They are entitled to present evidence contrary to
17 that because you didn't limit it to the timeframe of when
18 this incident occurred. You said from her birth, you
19 said I never bonded with my child, I never felt an
20 attachment to her. All right. Are we ready to proceed?

21 MR. SHELTON: Yes, Your Honor.

22 THE COURT: I'm letting in the first video subject
23 to the State's objection and that's of course subject to
24 you laying the appropriate foundation for their
25 admissibility.

1 [Whereupon, defendant's exhibit number 4 is entered
2 into evidence by the court]

3 MR. SHELTON: Yes, Your Honor.

4 THE COURT: I'm going to see about that other video
5 but right now the answer is no.

6 MR. SHELTON: And as it goes to the admissibility
7 Your Honor prior to the defendant testifying scheduling
8 wise I'd just ask that we take a break so he does have a
9 chance to review that video again. He gave it to me on a
10 flash drive and I put it on a DVD.

11 THE COURT: Review which video?

12 MR. SHELTON: Both videos just in case -- at least
13 the one that you've allowed in so he can authenticate
14 that the DVD is the same that he provided me on a flash
15 drive.

16 THE COURT: That's fine. Well, why can't you do
17 that right now?

18 MR. SHELTON: I can.

19 THE COURT: Why don't we do that right now ---

20 MR. SHELTON: --- you want me to do that right now?

21 THE COURT: The first one let him look at it and
22 see if he can authenticate it.

23 [Whereupon, Mr. Shelton reviews DVD with Mr. Berke]

24 MR. SHELTON: He was able to authenticate the first
25 one, Your Honor.

1 THE COURT: I have a bunch of pictures. I've
2 already dealt with one of the pictures y'all handed me up
3 yesterday but there are some other pictures as well. Did
4 y'all not object to these?

5 MS. WILLIAMS: We object to all of them, Your
6 Honor, but I think he just pulled out the two ---

7 THE COURT: --- that he planned to use?

8 MS. WILLIAMS: Yes.

9 THE COURT: So you don't plan to use any of these?

10 MR. SHELTON: No, Your Honor.

11 THE COURT: Okay. Now I have three videos.

12 MR. SHELTON: Yes, Your Honor.

13 THE COURT: So you're only intending to use which
14 one? Which one is the short one?

15 MR. SHELTON: He was able to authenticate the first
16 one, Your Honor. He has ---

17 THE COURT: --- I need to know what number it is.

18 MR. SHELTON: Its number 4. So that should be
19 marked as Minor Video 3.

20 MS. WILLIAMS: Is that from April 19th?

21 MR. SHELTON: That's from April 19th.

22 THE COURT: Minor video 3?

23 MR. SHELTON: Yes, Your Honor.

24 THE COURT: Okay. That's the two minute one we
25 talked about.

1 MR. SHELTON: Yes, Your Honor.

2 THE COURT: Okay. That's been marked and admitted
3 as defense whatever number that would be.

4 MR. SHELTON: 4.

5 THE COURT: If you will hand that to Ms. Williams
6 for me because those are her copies?

7 MS. WILLIAMS: Just so I can keep it clear and for
8 the record that's the one where he is coming home from
9 being deployed and the children are asleep and he walks
10 in and she introduces them?

11 MR. SHELTON: Yes.

12 MS. WILLIAMS: Okay.

13 THE COURT: Now I have also -- I don't have any
14 idea what this is [indicates]. It just says it's a copy
15 and then I have Minor video 2. Is that the longer one
16 that we've been discussing?

17 MR. SHELTON: Yes, Your Honor. It's not too much
18 longer.

19 THE COURT: Okay. Now what is this [indicates]?

20 MR. SHELTON: That's another one that I provided to
21 the State.

22 THE COURT: But you don't intend to use it?

23 MR. SHELTON: No...

24 THE COURT: All right. Is the State ready to
25 proceed?

1 MS. WILLIAMS: The State is ready, Your Honor.

2 THE COURT: Is the defense ready to proceed?

3 MR. SHELTON: Yes, Your Honor.

4 THE COURT: Please bring in the jury.

5 [Whereupon, the jury enters at 9:57 a.m.]

6 THE COURT: Good morning ladies and gentlemen. I
7 hope that you all had a pleasant evening. I know this is
8 rough weather today. I know that it was probably like
9 fighting the tide to get up; this is perfect sleep
10 weather.

11 We're happy that everyone arrived safely. We're now
12 going to proceed with the trial. I would ask that you
13 give the attorneys your undivided attention. Mr.
14 Shelton, you may proceed.

15 MR. SHELTON: Thank you, Your Honor. May it please
16 the Court?

17 THE COURT: Yes, sir.

18 MR. SHELTON: The defense calls Jennifer Canter.

19 [Whereupon, Doctor Canter comes forward]

20 [Whereupon, the witness is duly sworn by the Clerk
21 of Court]

22 CLERK OF COURT: Please be seated. State your full
23 name and spell your last name for the record.

24 THE WITNESS: Jennifer C-A-N-T-E-R, Canter.

25 THE COURT: You may proceed.

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1

- - - - -

2

DR. JENNIFER CANTER,

3

Having been first duly sworn,

4

Was examined and testified as follows:

5

DIRECT EXAMINATION

6

BY MR. SHELTON:

7

Q. Doctor Canter, how you doing?

8

A. Good. How are you?

9

Q. Good. What is your occupation?

10

A. I am a child abuse pediatrician.

11

Q. And can you describe to the jury what your

12

educational background is and professional background?

13

A. Yes. I obtained my Bachelor's and Master's Degree,
my Master's in Public Health and Epidemiology at Johns
Hopkins in Baltimore.

16

I completed Medical School at SUNY Buffalo State
University of New York at Buffalo. I completed my
Internship and Residency in Pediatrics at Montefiore
Medical Center in New York.

20

And I completed my Fellowship in -- it was called
Forensic Pediatrics back then -- but Child Abuse
Pediatrics in New Jersey. And then I started my job
twelve years ago.

24

Q. Are you certified in anything?

25

A. Yes.

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 Q. What are your certifications?

2 A. I am board certified in Pediatrics and I am board
3 certified in the subspecialty of Child Abuse Pediatrics.

4 Q. And where do you work right now?

5 A. I am the Director of the Child Abuse Pediatrics
6 Program at New York Medical College and Westchester
7 Medical Center, which is in the Hudson Valley region of
8 New York.

9 Q. Okay. And what's your professional experience?

10 A. I have clinical responsibilities seeing patients at
11 our Children's Hospital in the emergency department and
12 on the floor and in the ICU and an outpatient center for
13 child abuse, mostly sexual abuse that I am Medical
14 Director of.

15 I teach at the Medical School. I teach the
16 residents and fellows. I do some research. I don't
17 always get the papers out but I'm trying. And I do a lot
18 of education in the community.

19 Q. And are you licensed in South Carolina?

20 A. After how nice everybody was I would be but no, I'm
21 not.

22 Q. And how long have you been practicing? How long
23 have you been in your occupation?

24 A. I have -- it will be twelve years in July.

25 Q. Okay. Have you ever testified before?

- 1 A. Yes.
- 2 Q. Have you been qualified as an expert before?
- 3 A. Many times, yes.
- 4 Q. And what have you been qualified as?
- 5 A. An expert in Child Abuse Pediatrics, in Forensic
6 Pediatrics when it was called that, and then in general
7 Pediatrics.
- 8 Q. And just a rough guess how many times have you
9 testified?
- 10 A. About 200.
- 11 Q. Okay. And on that -- when you've testified has it
12 been for the prosecution, defense?
- 13 A. Mostly prosecution. I've only testified in criminal
14 court for defense this is like the third time and I've
15 been doing this for about ten years.
- 16 Q. Okay. And so you've testified in criminal court
17 for defense how many times?
- 18 A. This will be the third time for a physical abuse
19 case. Maybe once in a sex abuse case -- no, two times; I
20 did one about eight years ago and then one when -- for a
21 neglect case.
- 22 Q. And you've written articles and been published?
- 23 A. Yes.
- 24 Q. Do you have any examples of any publications?
- 25 A. My most significant publication was on abusive head

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 trauma, a program that we have in the State of New York
2 that I am one of the what is called a co-principal
3 investigator.

4 Me and another doctor provide education to every
5 baby that's born -- the parents of every baby that is
6 born across the state about the dangers of shaking a
7 baby, slamming a baby, throwing a baby and giving them
8 techniques to manage stress and understand crying.

9 And several years into that program we did an
10 analysis of how things changed since the program was
11 instituted and we wrote an article about it that was
12 published in the Journal of Pediatrics; the Journal
13 called Pediatrics not the Journal of Pediatrics, which is
14 a different thing.

15 MR. SHELTON: At this time, Your Honor, I'd move
16 that Doctor Canter be qualified as an expert in the area
17 of Child Abuse Pediatrics.

18 THE COURT: Any objections or questions?

19 MS. WILLIAMS: No objections from the State, Your
20 Honor.

21 THE COURT: So admitted without objection. You may
22 proceed.

23 Q. [Mr. Shelton] Doctor Canter, when -- obviously we
24 have discussed this case.

25 A. Yes.

1 Q. Have I given you -- what have you reviewed and
2 discussed in this case?

3 A. Medical records, photographs, investigative records.
4 And I asked you and you were nice enough to give me
5 permission to talk to my colleague Doctor Amaya.

6 Q. And are you being paid?

7 A. Yes.

8 Q. What is your rate?

9 A. I am being paid 350 dollars an hour -- not me being
10 paid but my practice, my consulting practice, 350 dollars
11 an hour.

12 Q. And how does this rate compare to other experts in
13 your field?

14 A. I would imagine for this kind of work comparable.
15 I've charged less and I've charged a little more at
16 times.

17 Q. Does that all go to you -- that amount -- in your
18 pocket?

19 A. I wish. No, I have -- some of it does but I have
20 some people that work for me and business expenses and
21 such so.

22 Q. And do you know how you're being paid from us?

23 A. The State is paying me.

24 Q. Okay. And how do you get paid regularly?

25 A. A different state but New York.

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 Q. Through New York?

2 A. Yes, in my regular job the State actually funds the
3 -- I don't know exactly how the money flows but it goes
4 to a county and then the county pays for the program.

5 Q. Does the fact that my office is paying you or the
6 State is paying you in any way influence your expert
7 opinion or findings?

8 A. Well, you're paying me for my time so no, not at
9 all.

10 Q. Okay. In fact what was one of the first
11 conversations that we had and warnings that you gave me?

12 A. I guess I have to tell the truth. I told you fat
13 chance, I won't be testifying. That was my -- that I --
14 based on what you presented to me and what I kind of in a
15 snapshot that I agree with my colleague, Doctor Amaya.

16 Q. And that was when I had asked you about consulting
17 on the case?

18 A. Yes, you ran the case by me. And I like to kind of
19 provide education when somebody calls at the beginning so
20 that they are not expecting something that I couldn't
21 give them and say, look I'm a straight shooter.

22 You're going to get education; I'll help you
23 understand the issues. I insist upon being able to call
24 somebody that saw the patient because we're here to
25 educate. It's not an adversarial thing and you were fine

1 with that so you chose to hire me.

2 Q. And what changed last night?

3 A. Well, you messed me up a little bit with child care
4 but you told me I wasn't going to be coming likely later
5 in the afternoon and then you told me I was. So I have
6 four kids I have to juggle around a little bit there.

7 Q. And did I explain what some testimony was yesterday?

8 A. Well, you told me your interpretation ---

9 MS. WILLIAMS: --- objection.

10 THE COURT: Basis?

11 MS. WILLIAMS: Hearsay.

12 THE COURT: It is hearsay and you're also making
13 yourself a witness. Be very careful. You need to elicit
14 her opinion.

15 Q. [Mr. Shelton] So the -- you've had a chance to
16 review the records ---

17 MS. WILLIAMS: --- objection.

18 THE COURT: Basis?

19 MS. WILLIAMS: Leading.

20 THE COURT: I think it's an appropriate question.
21 Overruled. You may continue your question, Mr. Shelton.

22 Q. [Mr. Shelton] You've had the chance to review all
23 the records in this case.

24 A. Yes.

25 Q. The hospital reports, the CAT scan and MRI's?

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 A. Yes.

2 Q. The pictures?

3 A. Yes.

4 Q. Okay. What can you tell us about subgaleal
5 bleeding?

6 A. Subgaleal bleeding?

7 Q. Yes?

8 A. It's bleeding between layers of deeper scalp tissue
9 that can extend and kind of bleed within your head and
10 scalp so that the blood can -- we call it track -- and it
11 can track to the eye area behind the ears, sometimes into
12 the ear.

13 And it's -- there are two or three kind of ways that
14 it happens. It happens with babies most often when they
15 are born often from vacuum extraction when they help to
16 suck the baby out with a vacuum; not a real vacuum, it's
17 a medical vacuum.

18 And that suction kind of creates this risk for
19 bleeding and those babies can actually get really sick
20 over a few days. They monitor their hemoglobin, their
21 blood levels. And that's one way it happens.

22 It can happen from hair pulling, traumatic hair
23 pulling from abuse. And it can happen -- there is an
24 interesting case report about tight hair braiding and it
25 can also happen from sometimes from trauma as well.

1 Q. And is there -- what is your opinion about dating a
2 subgaleal?

3 A. They are hard to date. There is literature showing
4 that they can show up as late as a couple of days. There
5 is even one case report about it showing up a week later.
6 It could take some time for blood to accumulate in that
7 area.

8 So it doesn't necessarily mean it wasn't there but
9 there are sometimes in some of the ones I've seen you'll
10 notice it sometime later.

11 Somebody might say your head looks kind of weird or
12 you have a bruise on your eye or your ear. One in
13 particular -- well, I'm rambling.

14 Q. That's okay. Is there -- do you have some -- is
15 there a story or tell us about a time there wasn't abuse
16 in your practice?

17 A. Well, as I said before I have a lot of articles I
18 want to publish. We save these interesting case reports
19 so we pull -- we had two kids on the same day come in
20 with subgaleal hematomas which was very weird because
21 although they happen somewhat I would say not frequently
22 but it's a known phenomenon.

23 Not often do they come to the attention of a child
24 abuse pediatrician because a lot of them are babies and
25 there is no concern for abuse.

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 Q. And I'm sorry I want to interrupt you right there.
2 How much -- do you have experience with seeing subgaleal
3 hematomas?

4 A. Oh, yes. I have a kid in the hospital right now
5 with one. I've seen them. They are not an everyday
6 phenomenon but I have seen them.

7 Q. Okay. And your -- over the ten, twelve years that
8 you have been doing this could you give us an estimate of
9 how many you've seen?

10 A. I think it wouldn't be responsible to come up with a
11 number. Not five, not a hundred I would say less than 40
12 or 50 and more than 10 or 20. I don't know; I don't
13 really try to...

14 Q. That you've seen it?

15 A. Yes.

16 Q. Okay. So the example that you had?

17 A. One girl came in -- and as I said it was the same
18 day one was clearly, clearly child abuse and multiple
19 injuries. And I don't recall all the specific injuries
20 and she was maybe two or three.

21 And then this other girl came in and I would almost
22 say I'm probably dating but giving you my age here but
23 Zeus from the Flintstones, the little Martian, this kid's
24 head was swollen like you would not believe. And her
25 history was that she was wrestling with her brother and

1 he clocked her in the head with his foot. And it wasn't
2 until about two days later that the swelling -- it was
3 like what the heck happened to your head -- the Mom.
4 And that was not a child abuse case. It just so happened
5 that that child had reported being hit with a belt also
6 so there were some concerns.

7 But because it was a weird thing we saved those and
8 we did collect some literature on subgaleals and timing
9 and tracking because I was really concerned when I saw
10 the bruising on the eye and the ear.

11 And our prosecutor, you call it the Solicitor I
12 think here, was also worried that maybe the child got
13 punched in the eye. So we looked at the research and our
14 anatomy textbooks and talked to various people in the ENT
15 Ear, Nose, and Throat.

16 And it turned out that the blood can track through
17 the tissues and look like a black eye or an ear from a
18 subgaleal.

19 Q. And that was accidental?

20 A. Well, she said she got clocked in the head by her
21 brother. I think he did it on purpose but it was not a
22 child abuse case. We didn't -- the belt marks were
23 worrisome and we did have concern about that.

24 Q. Was there anything that you looked at or literature
25 that you relied upon prior to coming here today regarding

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 the subgaleal and some bruises?

2 A. Yes.

3 Q. Okay. And it's been marked as defendant's exhibit
4 1 for identification.

5 [Whereupon, the witness is shown exhibit]

6 Q. What is that that you looked at?

7 A. It is just a page from a book, but a good book. I
8 don't believe every word in every book so I make sure to
9 read them carefully.

10 But this is a book on cutaneous or skin
11 manifestations of child abuse and the differential
12 diagnosis, which is really what my job is, is to look
13 through what possible things may explain something which
14 is a differential diagnosis.

15 If you have a headache do you have a brain tumor or
16 did you not get enough sleep. So I liked this summary
17 because it really pulled up some of the good articles on
18 this.

19 And I -- in particular there was a good picture of
20 this it was a witnessed fall in a young kid and two days
21 -- one day prior showed up with really significant
22 tracking.

23 And the article also talks about the fact that it
24 takes time for the bleeding to occur in a space and
25 that's why the delayed presentation of subgaleals. They

1 can appear very shortly after but that we have to be
2 conscious in our -- as child abuse pediatricians we have
3 to kind of take it as a test.

4 And it's one of the points in our training that you
5 can't say very specifically when a subgaleal occurred in
6 isolation.

7 Q. And that's you said delayed presentation. What does
8 that mean?

9 A. That ---

10 Q. --- is that when it shows up?

11 A. Right, but you can have a trauma and not notice the
12 bleeding and bruising, the discoloration in the eye or
13 behind the ear immediately.

14 Q. And there was a picture that was associated with
15 that article?

16 A. Yes. I want to clarify this is a text book and it
17 relies upon articles. So where they took the pictures
18 and this short bit of text here was based on articles.

19 But the picture shows -- the point of it is it says
20 typical distribution of a subgaleal bleed. The bleeding
21 became visible 24 hours after an observed accidental fall
22 on the head.

23 And then they show the child's ear. And this was
24 important to me because ear bruising -- and I actually
25 published an article on this -- ear bruising is a really

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 concerning sign for child abuse. So this was helpful to
2 understand that blood can track.

3 And particularly with this case I went back and said
4 let me just do another look see at what the literature
5 tells us. And I thought this was a good picture and
6 story.

7 Q. Okay.

8 MR. SHELTON: Your Honor, at this time I would like
9 to publish this picture to the jury just as a...

10 THE COURT: Please show it to opposing counsel.

11 [Whereupon, Mr. Shelton provides picture to Ms.
12 Williams for review]

13 MS. WILLIAMS: No objection, Your Honor.

14 THE COURT: You may proceed.

15 [Whereupon, defendant's exhibit number 1 is entered
16 into evidence by the court]

17 MR. SHELTON: May I hand it to the jury, Your
18 Honor.

19 THE COURT: Can you put it up on the Elmo?

20 MR. SHELTON: No.

21 [Whereupon, the photograph is circulated to the
22 jury]

23 Q. [Mr. Shelton] Doctor Canter, you had the chance to
24 go back through the medical reports of Minor

25 A. Yes.

1 Q. Is there -- can you give us a date on the subgaleal
2 hematoma?

3 A. In isolation, no.

4 Q. Okay. And you had a chance to look at hemoglobin
5 counts and anemia?

6 A. Yes.

7 Q. And was there anything that came to mind from that
8 -- came to you from that?

9 A. Yes. She was bleeding into that area. Her
10 hemoglobin was low and the way that the numbers read
11 shows us that it's not like an iron deficiency anemia or
12 another reason. It's a bleeding anemia.

13 But when she was at the hospital it stayed exactly
14 the same for four hours -- I mean for four draws over two
15 days it was like 8 over 25 -- whatever these numbers that
16 were not dangerously low like she needed a transfusion
17 but they were low. And I don't know exactly how to
18 answer because of the -- I don't know how to answer it.

19 Q. So what did that tell you?

20 A. It didn't tell me anything.

21 Q. Okay.

22 A. It doesn't mean anything because it takes time for
23 blood to accumulate into the space so the bleeding alone
24 just tells me she bled into the space which we already
25 know because looking at the CAT scan and looking at her

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 face she obviously bled into the space. But it doesn't
2 tell me -- this doesn't say oh, it happened at this exact
3 time because it's this exact number. So we don't know
4 how long the bleeding took. But she bled; this was a
5 serious injury.

6 Q. And so is it because it was so low is there a
7 possibility that it was an even a longer period of time?

8 A. Longer than what?

9 Q. 24 hours?

10 A. You can't -- it could be 24 hours, it could be --
11 the rule of thumb is hours to days. And by days we mean
12 I wouldn't go more than 48 hours; maybe 72. But hours to
13 days is the way our literature tells us with subgaleals.

14 Q. Okay. And MUSC and Doctor Amaya and the other
15 doctors they didn't do anything wrong.

16 A. I was completely impressed with every single aspect
17 of her medical care. I was very honest with you that
18 every test was done; the documentation was perfect, every
19 single thing about looking at the differential diagnosis
20 and other things that might have caused these findings.

21 And everything -- I was really impressed and have
22 absolutely nothing but concordance, agreement, and
23 compliments; it was very good.

24 Q. And it's fair to say that based off all the notes
25 that it's your opinion that the child was abused?

1 A. It is my opinion this is a child abuse case, yes.

2 Q. Okay. And you had -- how many episodes of trauma
3 do you think occurred -- or could have possibly been with
4 Minor

5 A. At least three.

6 Q. Can you explain?

7 A. Yes. Something happened to her left side of her eye
8 or forehead -- her forehead, that it is my opinion caused
9 all this stuff on the left side. The ear -- I don't
10 think she had an independent black eye; punched in the
11 eye. I think that's one thing.

12 There was some kind of trauma to the right side
13 because the skull fracture and the swelling around there
14 also is in my opinion a separate place she was hurt.
15 It's not just like one place and the blood spread around
16 the whole head because it's a different area in the scalp
17 and pretty isolated on the right side.

18 And then she had an old fracture in her leg, which
19 was definitely older; at least a couple of weeks or maybe
20 a couple of months old. So there are three separate
21 times she was hurt in some way. Three times is a lot for
22 a little girl.

23 Q. Fifteen months old?

24 A. Yes.

25 Q. Is there a possibility that it could have all

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 occurred at one time?

2 A. No, because the leg fracture is so old.

3 Q. What about the skull fracture and the left side?

4 Could that have happened at one time?

5 A. Two impacts at the same time could have happened
6 meaning two things happened. Well, it's two separate
7 impacts. I want to give an analogy that is not what I
8 think happened, but say somebody fell out a window ---

9 MS. WILLIAMS: --- objection ---

10 A. --- and clocked -- oh, sorry.

11 THE COURT: Basis of the objection?

12 MS. WILLIAMS: She's giving an analogy that she
13 doesn't think happened and we don't think it's relevant.

14 THE COURT: She's qualified. Overruled. Ma'am,
15 you may answer the question.

16 A. Well, when you -- I just want to explain one
17 episode. If a child falls out a window and hits their
18 head clock, clock [indicates] on the way down you can
19 have one episode that has two impacts. That's all I was
20 trying to say.

21 Q. [Mr. Shelton] Okay. It also is possible that it
22 could have been more than one episode for the head
23 injuries?

24 A. Yes.

25 Q. And is it also possible it could have been at

1 separate -- it could have been hours apart?

2 A. It could have been.

3 Q. Okay. You also had a chance to review the history
4 that was provided that day that was provided on September
5 6th.

6 A. I reviewed various documents that documented history
7 from various people. But I didn't speak to any of those
8 people myself.

9 Q. And the story about the tub on the left side ---

10 A. --- yes ---

11 Q. --- of the eye. Is that consistent with the tub --
12 with the left side injuries?

13 A. If that's all that there was I still would have been
14 concerned, still would have done the exact workup that
15 was done. I would have made sure the police went to the
16 scene; child protective services did an investigation.

17 And ultimately an impact onto a hard object can
18 cause a subgaleal but that wasn't all she had so that's
19 why I'm concerned.

20 Q. Okay. The skull fracture, is there any way to date
21 the skull fracture?

22 A. You can't date the fracture period because the --
23 just the fracture piece if that was your question --
24 because the type of bone that is the skull bone doesn't
25 heal like other bones that allow us to give rough time

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 frames. So where we can tell you that the leg isn't
2 brand new isn't a week old; it's more like weeks to month
3 old, the skull doesn't have that capability for us
4 looking at x-rays or even on autopsy.

5 I've had cases where we've had that question on
6 autopsy. But the swelling of the tissue outside of there
7 tells me that it is also acute, you know up to 72 hours I
8 would say.

9 If we're associating the two together, which I am, I
10 think it would be kind of weird to have a skull fracture
11 right underneath swelling and not attribute them
12 together. So it's my opinion that that's one injury on
13 one side and the other injury on the other side.

14 Q. And the swelling would that have been noticeable
15 just from looking and observing?

16 A. Well, it could have been. It depends on who is
17 looking. I've had -- the best cases we see in our field
18 are when Mom -- the kid falls off a changing table, gets
19 a knock on the head and the Mom doesn't -- just says oh,
20 he wasn't crying or whatever and then the next day shows
21 up with a big bump and they are freaking out and somebody
22 calls it in and we're able to just give some education
23 you know safety and this and that.

24 So you can notice it but you don't necessarily see
25 it immediately. And does that answer your question?

1 Q. Yes. Are there times that there are skull fractures
2 and there is no explanation?

3 A. In a mobile child meaning a child that walks and
4 moves?

5 Q. Yes?

6 A. I've certainly had many, many cases where a child
7 has a skull fracture and you're kind of left -- and
8 that's all that they have -- and you're kind of left with
9 something traumatic happened.

10 The child is mobile; maybe they fell and hit their
11 head on a coffee table, maybe. But you can't say
12 absolutely it's inflicted trauma. And we just know
13 something traumatic happened.

14 In a baby that doesn't move it's not happening.
15 Once they are cruising I'd feel a little more comfortable
16 but still do a full assessment and be concerned. A skull
17 fracture is no joke. You want to know why it happened.

18 Q. And so you would still be concerned of possible
19 abuse?

20 A. Absolutely.

21 Q. Okay. But the leg injury was there any dating of
22 the leg injury that you could tell -- being able to date
23 the leg injury?

24 A. It's at least several weeks old. I couldn't be
25 exact; several weeks to a couple of months old. The

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1 important thing is that there was cruising -- the baby
2 was cruising and then stopped. So it's my opinion that
3 that history could be why around the time that the
4 fracture happened because it would have hurt her and she
5 wouldn't have wanted to walk.

6 So there is nothing else to explain why she stopped
7 cruising. By cruising I mean pulling up from a chair and
8 learning to walk and then she stopped doing that. So
9 that history helps us too.

10 Q. What about an outward sign of a broken leg? Is
11 there always an outward sign of a broken leg as far as a
12 bruise?

13 A. Not always, no. No, not always. Sometimes, but not
14 always. Sometimes there is swelling, not always.

15 There are certain fractures that you -- like a child
16 is learning to walk and gets a certain kind of fracture
17 and they just say their leg hurts and aren't using it but
18 you don't see anything from the outside. Does that
19 answer -- is that what you're...

20 Q. Yes, absolutely. And in your practice do you always
21 have an opinion on whether there is child abuse?

22 A. Do I always say everything is child abuse?

23 Q. Right, yes?

24 A. Do I say every single patient I see -- I don't
25 understand your question? You can't be possibly asking

1 me ---

2 Q. --- that every that -- what about timing of child
3 abuse?

4 A. I don't always have an opinion if something is
5 accidental or abuse or medical. It's really not the best
6 when I get this opinion but sometimes I can say I just
7 don't know. And in timing sometimes I say I don't know.
8 If we knew it would be a much easier job.

9 Q. Is there anything in the record or in the reports
10 that these injuries could be timed?

11 A. Not exactly, no. She was -- she was -- she had had
12 some symptoms that morning and she was on Pedialyte. I
13 still would like to know why she was on Pedialyte that
14 morning; the morning the day after Labor Day.

15 I mean she vomited once and she vomited right before
16 the bath and got it in her hair and then had the bath and
17 by report was noticed to have a bump which might tell me
18 something about that left side.

19 And then woke up the next morning, and I'm sure
20 you've already heard, noticed all this stuff. So it's
21 hard to say exactly when everything happened based solely
22 on looking at what we know about the injuries in
23 isolation.

24 Q. And so that brings us to the history. History is
25 important.

(JENNIFER CANTER - DIRECT BY MR. SHELTON)

1 A. Very important.

2 Q. What about false history? Is that important?

3 A. Since we don't know if it's true or false that's the
4 bread and butter of our struggle of our job. We try to
5 incorporate history but at least my model of my program I
6 try consciously to just say this is what I know with the
7 science and my clinical experience.

8 You come back to me and ask me a question. I'm not
9 an investigator. I don't postulate mechanisms and say
10 hey; go ask them if they swung on a chandelier -- I say
11 that because I'm looking at one. I say come back to me
12 detective, come back to me C-P-S worker -- what do you
13 call them here?

14 Q. Department of Social Services.

15 A. Okay the Department of Social Services come back to
16 me and ask me a question and I can answer because we
17 don't know if history is reliable or not. So that's all
18 I can do as a physician is tell you yes or no this is --
19 or I don't know.

20 Q. And based off your review of the reports is there a
21 time to tell when the child was well, the last time she
22 was well?

23 A. Well she had been reported to be on Pedialyte.
24 Pedialyte is something that you give to a child who is
25 not -- it's not like an everyday thing you give to a

1 fifteen month old. Maybe she was on it for another
2 reason; I don't know. Pedialyte is something that you
3 give to a child who is not feeling well.

4 And then by report she had vomited that morning and
5 I don't remember if it was Mom or Dad but somebody
6 attributed it in Doctor Amaya's note to -- that she might
7 have eaten too much of it. And then later on before the
8 bath she threw up.

9 Kids throw up so it's very hard to say exactly when
10 she was perfectly well. She certainly by all accounts
11 didn't look well the following day when she went to the
12 hospital.

13 Q. Is there anything else in the history that caused
14 you concern?

15 A. I don't know if I'm allowed to...

16 MS. WILLIAMS: Objection. May we approach, Your
17 Honor?

18 THE COURT: Uh huh.

19 [Whereupon, an off the record bench conference is
20 held]

21 THE COURT: You may proceed.

22 [Whereupon, Mr. Shelton and Mr. Groeber confer]

23 Q. [Mr. Shelton] Thank you, Doctor Canter. I don't
24 have any further questions. Please answer any questions
25 Ms. Williams may have.

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

1 THE COURT: You may proceed.

2 CROSS-EXAMINATION

3 BY MS. WILLIAMS:

4 Q. Good morning.

5 A. Hi.

6 Q. Now Doctor Canter, Doctor Amaya is a colleague of
7 yours, correct?

8 A. Yes.

9 Q. And you respect her work?

10 A. I don't personally know her full body of work.
11 There is absolutely nothing to make me believe that it
12 wouldn't all reflect the good work done on this case.

13 Q. But on this case you respect the work that she did?

14 A. Absolutely.

15 Q. And there is a lot of unknowns in what we used to
16 call Forensic Pediatrics isn't that true.

17 A. Yes.

18 Q. As far as timing and things like that?

19 A. Yes.

20 Q. And that's because kids can't talk.

21 A. Yes.

22 Q. And so you have to look at injuries and the history
23 because you can't time the injuries because there is
24 nobody to tell you well it started hurting then or this
25 person hit me is that correct?

1 A. Correct.

2 Q. So when you are talking about subgaleal bleeds it
3 could have been hours or 48 hours before. But it
4 certainly could have shown up within a few hours isn't
5 that true?

6 A. Oh, yes. The one on the left side it could be that
7 red mark just started bleeding like crazy and led to all
8 that stuff on the left side. It could be, yes.

9 Q. And so when Doctor Amaya opines that in her opinion
10 based on all the history and all the people she talked to
11 that that subgaleal bleed would likely have been present
12 or visible within a few hours that's not necessarily
13 something you disagree with it's just that it's possible
14 it could have been earlier?

15 A. Well, what are a few hours? That's what I -- I mean
16 noticing it the following morning is absolutely makes
17 perfect sense.

18 Q. So if it was inflicted at say 7:30 in the evening
19 and they noticed it the next morning that would make
20 sense?

21 A. If the trauma occurred -- if the child hit her head
22 on the faucet, and we're taking that in isolation without
23 the other injuries, if a child has an impact 12 hours
24 later you could notice that kind of presentation or 24
25 hours later you could notice it. It depends; you just

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

1 don't know.

2 Q. Just depends?

3 A. Yes.

4 Q. So it could be a few hours or it could be 48 hours?

5 A. That's a fair -- yes, I agree.

6 Q. Okay. And could it be that just the head injuries
7 all could have been inflicted in the bathtub by one
8 person but several points of impact?

9 A. Yes.

10 Q. And we were talking about some pictures that were
11 passed around in an article. What book is that did you
12 say?

13 A. The book is called Cutaneous Manifestations of Child
14 Abuse and their Differential Diagnosis.

15 Q. And when was that book published?

16 A. Not too long ago. I don't know exactly when. I
17 should have copied the inside ---

18 Q. --- that's okay ---

19 A. --- it's at least after 2009 or '10 because some of
20 the references are recent so it's not long ago.

21 Q. And did that child have bilateral pinpoint bruises
22 in the ears?

23 A. No, this is a one-sided subgaleal hematoma.

24 Q. Okay. Minor Berke as you're aware had bilateral
25 pinpoint bruises on her ears.

1 A. Yes.

2 Q. And so is that indicative of abuse?

3 A. It -- again taking the injuries in isolation you can
4 -- the whole thing on the left side could be consistent
5 with hitting the head on the faucet as described.

6 You add in the fact that there is a skull fracture
7 on the other side and bruising to the other ear that
8 raises the concern for child abuse.

9 Q. Then you add in the fracture in the back ---

10 A. --- yes ---

11 Q. --- and the broken leg ---

12 A. --- yes.

13 Q. So we have an abuse case?

14 A. It's my opinion that it would be pretty unlikely to
15 have that many serious injuries in a little girl.

16 Q. Now in your practice do you often consult with
17 radiologists when you look at ages of breaks and healing
18 fractures and things like that?

19 A. I have to, yes.

20 Q. That's pretty important isn't it?

21 A. Absolutely.

22 Q. In this case did you look at any follow-up radiology
23 slides of Minor leg?

24 A. I don't remember to be honest with you. I kind of
25 put the leg in the category of its older and I couldn't

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

1 -- I don't remember.

2 Q. Okay. And did you talk to any of the radiologists
3 that examined all of the progression of slides as she
4 went back for follow-up visits and they did another CT of
5 her leg?

6 A. X-ray I believe.

7 Q. Yes. I have a very difficult time discerning
8 between CT's and MRI's and X-rays. I think of X-rays as
9 way back when. But you didn't talk to any of the
10 radiologists did you?

11 A. No, no. I read the reports but I don't remember all
12 the...

13 Q. So if the head of Radiology for MUSC determined that
14 based on her expertise that she thought that the break
15 was four weeks on the outside probably within a two-week
16 range you have no reason to think that that wouldn't be
17 true?

18 A. It's a little tight for a timeframe. It's a little
19 tight to say it happened within that two-week period but
20 it could have.

21 I don't think it's more than a couple of months old.
22 I would base it again on the history of when she was
23 known to be pulling to stand and the regression of her
24 development.

25 Q. And you're referring to the history that once she

1 got to South Carolina she stopped pulling up?

2 A. Yes.

3 Q. Now when we talk about the history and false history
4 and all that good stuff in abuse cases is it common for
5 people to come in and just give a story and hope it
6 works?

7 I mean they come in whether it's an abuse case or an
8 accident case someone comes in and says this is how this
9 happened?

10 A. In my experience there are times when somebody is
11 making up a story and you later find out okay, that
12 wasn't the story.

13 And then there are times when a parent might be just
14 searching for well this happened maybe it's this and
15 maybe it's that and maybe I pulled her too hard when we
16 were crossing the street. You know they come up with
17 things to try to explain something.

18 The hard part is we just often don't know and we are
19 just doing our best job to rely on the evidence and see
20 how -- what we can do to make children -- to keep
21 children safe, which is ultimately our goal.

22 Q. And in your experience have you had parents come in
23 and give a story that might be part of the truth but
24 they're not telling the whole truth and you don't figure
25 that out until after you look at the child and realize

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

- 1 that the injuries are just not consistent with their
2 story?
- 3 A. And correlate that with the investigation, yes.
- 4 Q. Right. And talk to everybody involved?
- 5 A. Yes. It's very important to work with the police
6 and child protective services and really understand they
7 are the investigators. We are not the investigators.
- 8 Q. Right. And in this case did you review any of the
9 follow up MRI's of the subdural bleeds that were found
10 that weren't seen on the CT scans?
- 11 A. We have -- there was bleed on the CT scan.
- 12 Q. That's true. But then did you review the later
13 MRI's that found more bleeds that were not visible at
14 first on the CT scans?
- 15 A. Could you show me what you're talking about?
- 16 Q. Well, we don't have them ---
- 17 A. --- I reviewed everything ---
- 18 Q. --- but I know Doctor Amaya discussed that she had
19 reviewed some later MRI's.
- 20 A. You're going to have to show me because I don't have
21 any recollection of anything new that was seen on the CT
22 -- I mean on the MRI that ---
- 23 Q. --- did you review the MRI's?
- 24 A. Yes.
- 25 Q. Okay. And you reviewed the CT's?

1 A. Yes. And so nothing -- normally you see things on
2 an MRI in a different way than you see it on a CAT scan.
3 So it wasn't as if some magical new thing came up.

4 I have no recollection of the specific what you're
5 talking about. So I guess the answer is I don't know how
6 to answer your question. I looked at everything.

7 Q. Okay. Is it possible that you didn't get the later
8 MRI's?

9 A. It could be but I need to know the date and I could
10 look in my file.

11 Q. I'm just asking what you reviewed.

12 A. It's possible that I didn't get a lot of things. I
13 only have what I have.

14 Q. Okay. When you looked at the images of the head
15 did you review just the fault line bleed if you remember
16 or did you also see the frontal bleeds that were evident
17 later on the MRI's?

18 A. I understand what you're saying. You could see
19 there was a very small amount of blood that was acute
20 that was within 48 hours based on radiology findings.

21 Again, just what we know just from the findings that
22 is further clarified when you do an MRI. It's not a new
23 thing. It's just that -- I like to explain the CAT scan
24 as like seeing the brain through like foggy glasses and
25 then the MRI lets us see it more crisp. There are times

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

1 when additional injuries show up on an MRI. It is my
2 recollection that there were no additional things. It
3 just clarified what was there.

4 Q. Things were -- you were able -- they were able to
5 see more bleeds?

6 A. See it better, yes.

7 Q. Okay ---

8 A. --- no, not more bleeds. You're able to see the
9 bleed better.

10 Q. Are you suggesting that the complex fracture that
11 Minor Berke suffered was not inflicted or that it wouldn't
12 have taken a lot of force for that to occur?

13 A. Something walloped her head.

14 Q. And did you examine Minor Berke?

15 A. No.

16 Q. So you never felt her head?

17 A. No, I only saw the description that was in the chart
18 and I only -- by Doctor Amaya, it was very clearly
19 described, and I also saw some photographs and I saw the
20 films. And you could see it on the films.

21 Q. Okay. So if Doctor Amaya says that it was a very
22 obvious smoshy you know fresh blood right over that that
23 was visible and that you could feel it with your hand you
24 have no reason to think that's not ---

25 A. --- no, that's why she went to the hospital because

1 they noticed her head was -- I don't want to use the
2 medical word I want to say messed up. Yes, they noticed
3 she had something going on with her head that's what
4 brought her to the hospital.

5 Q. It was messed up. And so if Doctor Amaya could feel
6 it with her hand you would think that if someone was
7 washing her hair that you would be able to feel it?

8 A. Well, it takes time for them to emerge. So you
9 can't really say it absolutely -- if, if one makes an
10 assumption that there was some trauma prior to the bath,
11 I'm not saying there was but if you assume that it
12 doesn't mean that you absolutely had to have that boggy
13 area.

14 Doctor Amaya saw the child around 11 p.m. -- I hail
15 to you for going into the hospital that late, that night
16 at least as far as the note was like 11:59 because I
17 thought oh my God it's late -- and the bath was a full
18 like way more than 24 hours before that.

19 So if you're feeling it then I can't say that it
20 definitely would have been palpable during the bath.
21 That would not be responsible of me to say.

22 Q. Okay. But you can't say that it wasn't?

23 A. I can't say that it wasn't either.

24 Q. And if it was there certainly you would be able to
25 feel it if you were washing the child's head?

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

1 A. If it was there to the degree it was there as
2 described by Doctor Amaya the -- so we have 7:30 Monday
3 with the bath and then we have 7:30 Tuesday and then 11
4 p.m. that Tuesday night is my recollection of when Doctor
5 Amaya's note was.

6 It could be that Doctor Amaya saw the patient
7 earlier but wrote the note later but whatever; it was 24
8 hours later.

9 So I can't say that trauma didn't happen after that
10 and I can't say that trauma didn't happen before that
11 because it can take some time for swelling to take place.

12 Q. You're saying the boggy area was 24 hours after the
13 bath?

14 A. No, I didn't say that.

15 Q. Okay. I've gotten lost in the math ---

16 A. --- okay this is what I'm saying. So let's -- may I
17 create a hypothetical? It will help to answer the
18 question?

19 Q. Sure.

20 A. Okay. So say it happened an hour before the bath.
21 It might be that obviously he wouldn't have felt it
22 because it happened an hour -- I'm sorry, an hour before
23 -- wait, let me go up ahead. Say it happened an hour
24 after the bath. Well obviously you wouldn't have felt it
25 because it wasn't there. Say it happened an hour before

1 the bath. You might not have felt it because it didn't
2 have time to start swelling. And since we know that it
3 can take 24 hours -- more than 24 hours for something to
4 show swelling you can't say that it was definitely there
5 at the time of the bath or it was there before.

6 Q. So what we're back to is the history?

7 A. Exactly.

8 Q. So if you're just trying to time it based on the
9 swelling and the fracture it's almost impossible. You
10 have to go by what people say happened.

11 A. You have to -- you have to give an answer that is
12 based -- I like to say ask me a question, I'll give you
13 an answer. But I can't come back and say this is what
14 happened. I wasn't there.

15 That was the first day of my fellowship that was
16 what was you know the tenent of my training; you weren't
17 there. Answer questions; don't come up with what
18 happened.

19 Q. Did you talk to any of the other doctors that saw
20 the child at the emergency room?

21 A. No.

22 Q. Did you talk to any of the social workers?

23 A. No.

24 Q. None of the radiologists?

25 A. No.

(JENNIFER CANTER - CROSS BY MS. WILLIAMS)

1 Q. Did you talk to any of the detectives?
2 A. No. I read their notes, but no.
3 Q. Did you talk to the parents?
4 A. No.
5 Q. Did you talk to any of the DSS workers?
6 A. No.
7 Q. Did you talk to the therapist that treated her
8 after?
9 A. No.
10 Q. And just so I'm clear it's possible that all the
11 head injuries were inflicted in the bathtub at the same
12 time?
13 A. Yes.
14 MS. WILLIAMS: Court's indulgence for just a
15 second.
16 [Whereupon, Ms. Williams and Ms. Taylor confer]
17 Q. [Ms. Williams] Thank you so much, Doctor Canter.
18 THE COURT: Any redirect of the witness?
19 MR. SHELTON: Beg the court's indulgence.
20 [Whereupon, Mr. Shelton and Mr. Groeber confer]
21
22
23
24
25 - - -

1 REDIRECT EXAMINATION

2 BY MR. SHELTON:

3 Q. Doctor Canter, can you still give an opinion even
4 though you didn't examine the child?

5 A. I can answer questions that you ask me based on -- I
6 can't give you an opinion what color her eyes were if I
7 didn't see her face so it depends what the question is.

8 Q. Okay. And I think that earlier testimony was
9 you're not licensed in South Carolina?

10 A. Correct, I am not.

11 Q. So could have cared for the child or met with the
12 child?

13 A. Not unless she was in New York where I'm licensed.

14 Q. Okay. No further questions.

15 MS. WILLIAMS: Just one.

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1 RE CROSS-EXAMINATION

2 BY MS. WILLIAMS:

3 Q. You were able to consult with Doctor Amaya though?

4 A. Yes.

5 Q. Thank you.

6 THE COURT: Anything further from the defense?

7 MR. SHELTON: No, Your Honor.

8 THE COURT: Is there any exception to the witness
9 being excused from the State?

10 MS. WILLIAMS: None from the State, Your Honor.

11 THE COURT: From the defense?

12 MR. SHELTON: None, Your Honor.

13 THE COURT: Doctor, you're excused.

14 THE WITNESS: May I sit in the courtroom?

15 THE COURT: Yes ma'am, absolutely.

16 [Whereupon, the witness is excused and exits the
17 witness stand]

18 THE COURT: Madame Forelady and ladies and
19 gentlemen we're going to take a brief restroom break.
20 During this break please do not discuss the case and
21 please leave your notepads in your seats. We'll be out
22 about ten minutes.

23 [Whereupon, the jury exits at 10:58 a.m.]

24 THE COURT: Is there anything before we take a
25 break from the State?

1 MS. WILLIAMS: Not from the State, Your Honor.

2 THE COURT: From the defense?

3 MR. SHELTON: No, Your Honor.

4 THE COURT: All right. We'll be out about ten
5 minutes.

6 [Whereupon, court is in recess from 11:00 a.m. to
7 11:14 a.m.]

8 THE COURT: Is the State ready to proceed?

9 MS. WILLIAMS: The State is ready.

10 THE COURT: Is the defense ready to proceed?

11 MR. SHELTON: Yes, Your Honor.

12 THE COURT: Who is the State's next witness?

13 MR. SHELTON: Defense, Your Honor.

14 THE COURT: I'm sorry; I apologize.

15 MR. SHELTON: Ronda Illar.

16 THE COURT: Is she present?

17 MR. SHELTON: She in the back ---

18 THE COURT: --- can we go ahead and get her so we
19 don't have to wait?

20 [Whereupon, the jury enters at 11:14 a.m.]

21 THE COURT: Ladies and gentlemen I hope you enjoyed
22 your break. We'll now resume testimony. The defense may
23 proceed.

24 MR. SHELTON: Thank you, Your Honor. May it please
25 the court? The defense calls Ronda Illar.

(RONDA ILLAR - DIRECT BY MR. SHELTON)

1 THE COURT: Ma'am, if you would come forward to be
2 sworn.

3 [Whereupon, Ms. Illar comes forward]

4 [Whereupon, the witness is duly sworn by the Clerk
5 of Court]

6 CLERK OF COURT: State your full name and spell
7 your last name for the record.

8 THE WITNESS: Ronda Louise Illar, I-L-L-A-R.

9 THE COURT: You may proceed.

10 MR. SHELTON: Thank you, Your Honor.

11 - - - - -

12 RONDA ILLAR,

13 Having been first duly sworn,

14 Was examined and testified as follows:

15 DIRECT EXAMINATION

16 Q. Ronda, what do you do?

17 A. I'm a landscaper on my own. I've been doing that
18 about 20 years. I'm an animal rights activist and
19 advocate and I recently became employed at Walgreens.

20 Q. Okay. Do you know Chris?

21 A. Yes.

22 Q. How do you know Chris?

23 A. He is my oldest son.

24 Q. Chris has not always been in South Carolina?

25 A. No, that's correct.

1 Q. When did he move away?

2 A. When he got married and he went into -- first he was
3 in the National Guard and then he went into the Army.

4 Q. And you mentioned he got married.

5 A. Yes.

6 Q. Who is his wife?

7 A. Sandra Berke.

8 Q. Is there any kids, grandkids?

9 A. Yes, there are three. Sibling² is the oldest; she is
10 not my biological granddaughter but I couldn't love her
11 any more if she was mine, and then there's Sibling¹ and then
12 there is Minor

13 Q. And about how long was Chris gone from South
14 Carolina?

15 A. Probably three to four years maybe.

16 Q. Do you remember that something happened with Chris
17 and the family from July ---

18 MS. WILLIAMS: --- objection.

19 THE COURT: Basis?

20 MS. WILLIAMS: Leading.

21 THE COURT: I'm going to hear the full question
22 before I -- it may be necessary to lead a little.

23 Continue with the question please.

24 Q. [Mr. Shelton] Was there something that happened with
25 Chris and the family from July of 2010 to April of 2011?

(RONDA ILLAR - DIRECT BY MR. SHELTON)

1 A. [No response]

2 THE COURT: Ma'am, do you understand the question?

3 THE WITNESS: Yes, I'm just trying to think about

4 dates.

5 THE COURT: Okay.

6 Q. [Mr. Shelton] Was Chris deployed at some point in

7 time?

8 A. Yes, he was deployed twice. He did two tours in

9 Afghanistan.

10 Q. And when did his second deployment end if you

11 remember?

12 A. He came home to Kentucky I believe in April.

13 Q. And at some point in time he moved back to South

14 Carolina?

15 A. Yes. They moved here on July 29th.

16 Q. July?

17 A. I'm sorry, June 29th.

18 Q. And was there something that happened in May of

19 2011?

20 A. I know he had gotten out and he was trying to out

21 process and part of the reason he was coming home was

22 because Sandy had ---

23 MS. WILLIAMS: --- objection.

24 THE COURT: Basis?

25 MS. WILLIAMS: Based on an earlier ruling.

1 THE COURT: Please approach.

2 [Whereupon, an off the record bench conference is
3 held]

4 THE COURT: Ma'am, you may continue your answer.

5 A. Can you repeat the question please?

6 Q. [Mr. Shelton] Was there something that happened
7 shortly after Chris returned from deployment?

8 A. He was trying to out process and Sandy had to have
9 surgery. She was having issues over the past couple of
10 previous years with her thyroid and that was when he came
11 home.

12 Pretty much immediately she had to go and have
13 surgery and they found out she had thyroid cancer or
14 Graves' disease.

15 Q. And you -- when did Chris come back from -- when did
16 he come back to South Carolina?

17 A. They arrived, I have proof on my camera; I've
18 submitted it to everyone. June 29th was when -- I've got
19 pictures of the Budget truck going up to our house.

20 Q. And when they came back June 29th where were they
21 living?

22 A. They stayed with us for a couple of days. And we're
23 blessed with a nice mobile home within -- they stayed
24 with us two maybe three nights and then they moved into
25 their own home.

(RONDA ILLAR - DIRECT BY MR. SHELTON)

1 Q. And did you have an opportunity to observe the
2 family and Minor after they came to South Carolina?

3 A. Yes, I was there.

4 Q. Did you have an opportunity to talk to Chris?

5 A. Yes.

6 Q. Did you stay in contact with Chris throughout?

7 A. Yes.

8 Q. Throughout him being in Afghanistan and Kentucky?

9 A. Yes. I got letters from him, I still have them, and
10 I got a few phone calls from him when he was able to call
11 me. I did not have Skype.

12 Q. Once they returned to South Carolina did you notice
13 anything about Minor that caused you concern?

14 A. No.

15 Q. What about her walking?

16 A. No, actually I was trying to help her learn to walk.
17 I would hold her hands and walk her and she seemed fine.

18 Q. You learned about something that occurred September
19 5th of 2011. Did you learn something had happened
20 September 5th ---

21 A. --- yes, I did. Yes.

22 Q. Okay. Prior to September 5th of 2011 when do you
23 believe approximately the last time you saw Minor

24 A. It was -- it had to have been just a few days before
25 because they had come over to our house a couple of times

1 but mostly we went over there, my husband and I to see
2 the grandchildren.

3 I was excited because they moved home and I wanted
4 to see where they were living; their new place. I
5 remember Chris cooked out one day and we had a nice meal
6 together so. I went over and played with the
7 grandchildren.

8 Q. Was there anything about Minor walking that
9 concerned you at that point in time?

10 A. No.

11 Q. Did Chris ever ask you questions about her walking
12 or seek advice?

13 A. No.

14 Q. So September 5th of 2011 what can you tell us about
15 that day?

16 A. I got a phone call. Chris had been calling me a lot
17 excited you know about Sibling2 going to school and shopping
18 and him looking for a job and their new place. I got a
19 call in the evening. Chris had called me and said that
20 ---

21 MS. WILLIAMS: --- objection?

22 THE COURT: Basis?

23 MS. WILLIAMS: Hearsay.

24 THE COURT: I did not hear what you said.

25 MS. WILLIAMS: She started to say he said ---

(RONDA ILLAR - DIRECT BY MR. SHELTON)

1 THE COURT: --- that's not -- I asked the basis of
2 the objection. I didn't hear you.

3 MS. WILLIAMS: Hearsay.

4 THE COURT: Sustained. She can only say what she
5 did as a result of the conversation; not what someone
6 said to her.

7 Q. [Mr. Shelton] What did you do -- what did you say as
8 a result of the conversation?

9 A. I told Chris to make sure that since Minor had bumped
10 her head that she -- watch her and make sure she didn't
11 go to sleep for possible concussion.

12 You know check for any swelling, put a little bit of
13 ice on it and that I would be there if he needed to call
14 me if he had any other questions.

15 Q. Did Chris ever talk to you about or what do you know
16 about the well visits and pediatrician visits?

17 A. As far as the children when they were in Kentucky I
18 don't really know. I know when they were here I actually
19 went on base with Chris. We took Sibling 1 to his wellness
20 checkup.

21 And I knew he was having issues with trying to get
22 records, the family's medical records transferred from
23 the hospital or base up there to the one here in I guess
24 Charleston was where they were out.

25 Q. And that was for -- who was that for?

(RONDA ILLAR - DIRECT BY MR. SHELTON)

1 A. That was for Sibling¹ his wellness checkup; we went to
2 take him for his.

3 Q. Getting the records, who was that for?

4 A. For Minor and for Sibling² for school.

5 [Whereupon, Mr. Shelton and Mr. Groeber confer]

6 MR. SHELTON: May we approach, Your Honor?

7 THE COURT: Uh huh.

8 [Whereupon, an off the record bench conference is
9 held]

10 THE COURT: You may proceed.

11 [Whereupon, Mr. Shelton and Mr. Groeber confer]

12 MR. SHELTON: No further questions.

13 THE COURT: Any questions for the witness?

14 MS. WILLIAMS: No questions, Your Honor.

15 THE COURT: Any objection to the witness being
16 excused from the State?

17 MS. WILLIAMS: No, Your Honor.

18 THE COURT: From the defense?

19 MR. SHELTON: No, Your Honor.

20 THE COURT: Ma'am, you're excused.

21 [Whereupon, the witness is excused and exits the
22 witness stand]

23 THE COURT: You may call your next witness.

24 MR. SHELTON: Your Honor, at this time we call Mr.
25 Berke.

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 THE COURT: Sir, please come forward to be sworn.

2 [Whereupon, Mr. Berke comes forward]

3 [Whereupon, the witness is duly sworn by the Clerk
4 of Court]

5 CLERK OF COURT: State your full name and spell
6 your last name for the record.

7 THE WITNESS: My name is Christopher William Berke,
8 B, as in boy, E-R-K-E.

9 THE COURT: You may proceed.

10 - - - - -

11 CHRISTOPHER BERKE,

12 Having been first duly sworn,

13 Was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. SHELTON:

16 Q. Chris, how old are you?

17 A. 29.

18 Q. And what's your current occupation?

19 A. A Direct TV install and service technician.

20 Q. Did you serve in the Army?

21 A. I did.

22 Q. And what were those dates?

23 A. I was in the National Guard from August 2006 to June
24 of 2008. And then I went active duty from June of 2008
25 to July 19th -- I'm sorry, July 26th of 2011.

1 Q. And you're married?

2 A. Yes, I am.

3 Q. Any kids?

4 A. Three.

5 Q. What are their names?

6 A. Sibling² Weatherford [phonetic] is the oldest. She

7 will be eight this month. I have a five year old son and

8 Minor

9 Q. And at some point in time in your military career

10 were you deployed?

11 A. Yes, I was.

12 Q. Were you -- what happened after your -- what

13 happened -- what was the date of your first deployment?

14 A. My first deployment was a month after my son was

15 born in December and I got back in May of 2009.

16 Q. And what happened in between your first and second

17 deployment?

18 A. My daughter was born.

19 Q. And that's?

20 A. Minor she was born. We also found out that my wife

21 had thyroid issues due to the pregnancy with Sibling¹ She

22 had hyperthyroid problems. And that's pretty much it.

23 Q. And do you remember -- what was the date of your

24 first deployment -- or second deployment; I'm sorry.

25 A. My second deployment was just over a month after

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 Minor was born. It was July 19th of 2010 and I returned
2 April 19th of 2011.

3 Q. Okay. Let me show you a picture marked as
4 defendant's 2.

5 [Whereupon, the witness is shown photograph]

6 Q. Do you recognize that?

7 A. I do.

8 Q. And what is that?

9 This is a gathering that we had the day we left for
10 Afghanistan. All the soldiers that were leaving it was
11 their final goodbye to the family before we left.

12 Q. And is that a fair and accurate depiction of the
13 scene that day?

14 A. Yes.

15 MR. SHELTON: At this time I'd move...

16 THE COURT: I've already admitted it.

17 Q. [Mr. Shelton] How old was Minor at that time?

18 A. She was just over a month old; a month and nine
19 days.

20 MR. SHELTON: Your Honor, I'd ask to publish this
21 to the jury?

22 THE COURT: You may proceed.

23 [Whereupon, defendant exhibit 2 is shown to the
24 jury]

25 Q. [Mr. Shelton] During your second deployment there

1 was some testimony that you came under fire. Can you
2 explain that?

3 A. That's correct. December 4th of 2010 while working
4 with my supply sergeant a suicide bomber hit our ECP
5 area.

6 It was a bazaar, it's an Afghan shop, and it's like
7 a flea market. Just outside the ECP a suicide bomber hit
8 on December 4th.

9 Q. There has also been some testimony about anxiety or
10 P-T-S-D. Were you -- did you -- were you ever diagnosed
11 with P-T-S-D?

12 A. I was not. The anxiety that I had was -- the
13 military grants you 90 days to out process. And being
14 that I was on deployment they were going to allow us 120
15 days to out process, which I was excited about because it
16 was my oldest daughter's birthday would have fallen right
17 about the time I was supposed to get home. So about a
18 week I told my daughter I was going home and I would be
19 home for her birthday. And I told everybody I was going
20 to be home.

21 Anyway my command told me a week later after I had
22 just told everybody I was coming home for my daughter's
23 birthday that I would not be home that I would have to
24 wait the 90 days.

25 The inner anxiety came from -- it was that mixed

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 with just the excitement of going home. It was two days
2 before I left I had my bags packed and I was ready to go
3 and I was so excited that I threw myself into a panic
4 attack just from sheer excitement.

5 Q. If you were ever diagnosed with P-T-S-D while you
6 were deployed what would happen?

7 A. The military would diagnose it and they would send
8 me back home just due to I could be a risk to other
9 soldiers.

10 Q. And that never happened.

11 A. No.

12 Q. And this is going to sound like a dumb question but
13 just to have it on the record while you were deployed
14 could you do anything about your children's medical care?

15 A. No, I couldn't.

16 Q. And do you remember what day you got back?

17 A. I got back on April 19th of 2011 at 2:30 in the
18 morning.

19 Q. I'll show you a picture of defendant's exhibit 3.
20 Can you tell us what that is?

21 [Whereupon, the witness is shown photograph]

22 A. My wife had gotten Sibling₂ and Sibling₁ up early for a
23 welcome home surprise and she let Minor sleep. And after
24 I had time with Sibling₂ and Sibling₁ my wife was recording and
25 I went into Minor room and held her for the first time

1 in ten months.

2 Q. And is that -- what date was that?

3 A. It was April 19th the day I came home.

4 Q. Of what year?

5 A. 2011.

6 Q. Is that a fair and accurate picture of this?

7 A. Yes.

8 MR. SHELTON: Your Honor, I'd ask to publish
9 defendant's 3 to the jury?

10 THE COURT: You may proceed.

11 [Whereupon, defendant exhibit 3 is shown to the
12 jury]

13 Q. [Mr. Shelton] Let me show you what is marked as
14 defendant's 4. Can you tell me what that is?

15 [Whereupon, the witness is shown C.D.]

16 A. This is the video in reference to the photograph of
17 when I came home.

18 Q. And you've had a chance to review that.

19 A. I have.

20 Q. Is that a fair and accurate description of what
21 happened that day?

22 A. It is.

23 Q. Is there any changes, any edits?

24 A. There's not.

25 Q. And the date on that was?

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 A. That's April 19, 2011.

2 MR. SHELTON: Your Honor, at this time I'd ask that
3 we publish defendant's 4.

4 THE COURT: You may proceed.

5 [Whereupon, the C.D. plays] [Not transcribed]

6 Q. [Mr. Shelton] When you got back from your second
7 deployment did you notice anything about the kids or were
8 you worried in any way?

9 A. No, they were just excited, happy and everything
10 seemed good.

11 Q. Now you've heard some testimony about an ER visit in
12 April of 2011 right before you got back.

13 A. Right.

14 Q. Did you know about that?

15 A. I did not.

16 Q. When was the first time you heard about that?

17 A. It was yesterday.

18 Q. What happened to you shortly after leaving --
19 getting back from deployment in April of 2011?

20 A. Shortly after I returned back I started my
21 integration to being back on state side.

22 Q. And where did that take place?

23 A. Fort Campbell. It was numerous different things we
24 had to do within that two week period.

25 Q. And did you go through any types of classes,

1 training, or anything?

2 A. We did. The very first day when we get back from
3 deployment the military -- it's regulation that you have
4 a post deployment health assessment to see if there is
5 any adverse side effects to deployment, make sure
6 everything is okay, how your visit was with your family
7 and everything is good at home.

8 Q. Is there something that they tell you about your
9 family in the reintegration?

10 A. Actually before you even get home during our
11 deployment right before we left they tell you don't
12 expect anything to be the same as before you left.

13 If you have a spouse and you have children that the
14 spouse is taking the role of both parents while you are
15 away and that they don't live their lives around you; you
16 have to merge in with how things have changed and that is
17 something that you have to expect and realize when you
18 get home.

19 Q. In your case was that able to happen?

20 A. It was.

21 Q. Okay. What about what happened next after?

22 A. After I started my out processing it's a very long
23 process. During that time my out processing was
24 interrupted.

25 We had found out during my deployment my wife had

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 Graves' disease. It's a severe thyroid condition that
2 she had to have her thyroid removed which was around the
3 middle of May 2011.

4 Q. And where did that take place?

5 A. Vanderbilt Hospital in Nashville, Tennessee.

6 Q. How did that surgery affect you?

7 A. I was worried about my wife obviously. Cutting her
8 neck open concerned me. I knew that there were going to
9 be possible complications.

10 We had a babysitter at the time so I was able to
11 stay at the hospital with my wife. But after her surgery
12 I was responsible for helping her take care of the
13 children.

14 Q. So what happened next?

15 A. Her recovery time was a little longer than we
16 anticipated. Her thyroid was a little swollen. It had
17 swollen to the point where it was underneath her
18 collarbone.

19 So they said generally the recovery time is five to
20 seven days most people go to work after the surgery.
21 Hers lasted I think a week and a half to two weeks.

22 So during that time I took the leave that I had;
23 mostly that I had left available and I stayed home with
24 my wife to care for her and to help with the children.

25 Q. And that was where?

1 A. At Fort Campbell.

2 Q. And that's? What state?

3 A. Kentucky.

4 Q. Was -- the physical effects were -- was Sandy able
5 to recover?

6 A. Yes, she was. Not right away. She wasn't able to
7 turn her neck so they weren't allowing her to drive so
8 she was homebound until she had the ability to move her
9 neck.

10 Q. And when would you say she was able to resume normal
11 activities?

12 A. I would say around the beginning of June of 2011.

13 Q. At some point in time did you learn that she had
14 cancer?

15 A. Yes. Shortly after -- I don't know the medical term
16 that they I guess dissected her thyroid gland and found a
17 five millimeter mass in her thyroid gland and said it was
18 cancer.

19 Q. And when was that?

20 A. It was about a week after maybe two weeks after her
21 surgery.

22 Q. Okay. Did she ever undergo treatment for that?

23 A. She had radiation treatment January of 2012.

24 Q. Okay. So it wasn't for another seven months or so?

25 A. Correct. They did want to have her do radiation

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 treatments shortly after but because we were moving and I
2 had out processing and had everything going on that they
3 said whenever we get to where we're going she needs to
4 seek medical care from an endocrinologist to have
5 radiation treatment set up.

6 Q. And so then at some point in time you decided to
7 move back to South Carolina?

8 A. Correct.

9 Q. And why was that?

10 A. We didn't have the funds or the money to make a lot
11 of trips down here. Minor was born at Fort Campbell --
12 actually she was born in Clarksville, Tennessee.

13 My mother had never seen Minor and we wanted to be
14 around family, have the grandparents around the children
15 to help if we needed help, and just to have them spend
16 time with their grandchildren.

17 Q. And during this whole time you were able to -- you
18 talked with your mother?

19 A. Correct.

20 Q. Did you talk with your mother about advice or to get
21 advice?

22 A. Oh, yes I did. On September 5th I called my mother
23 after ---

24 MS. WILLIAMS: --- objection.

25 THE COURT: Basis?

1 MS. WILLIAMS: It calls for hearsay.

2 THE COURT: Sir, you can only say what you did as a
3 result of the conversation. You cannot say what someone
4 said to you. Do you need the question repeated?

5 THE WITNESS: I don't understand what you're
6 saying, Your Honor.

7 THE COURT: Repeat the question.

8 Q. [Mr. Shelton] Did you talk to your mother on
9 September 5th?

10 A. Yes, I did.

11 Q. What did you tell her?

12 A. That Minor had fallen and hit her head in the
13 bathtub.

14 Q. And what did you do after you talked with your
15 mother?

16 A. Basically what she told me to do. I kept an eye on
17 her to make sure everything was okay. And I laid her down
18 in her crib and gave her some Triaminic and that was
19 about it.

20 Q. Did you see anything?

21 A. There was a little bump on her head. I told my wife
22 about it.

23 Q. What about up to September 5th. Did you ever notice
24 anything about Minor walking or any problems with her
25 legs?

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 A. I did not. I tried several times to help with Minor
2 walking. I had her holding my fingers. And we did that
3 several times my wife -- and my sister also came down and
4 spent a lot of time with my daughter. And she also tried
5 helping her with learning to walk.

6 Q. So did you have any concerns about that from her not
7 walking?

8 A. No.

9 Q. Did you notice she stopped doing anything?

10 A. No. She'd pull herself up on the couch; not
11 actually physically on the couch but use the couch to
12 pull herself up.

13 She'd pull herself up in her crib. She would pull
14 herself up -- if we were sitting in a chair she was from
15 what I understood doing everything that she should be
16 doing.

17 Q. And during this time what were you doing from --
18 when you got back to South Carolina what did you do --
19 what were you doing during the day?

20 A. During the day I was out looking for a job. We
21 still had -- I had X amount of leave days. I had over 30
22 days of leave days that the military reimburses you for
23 that money for that time that you have.

24 And being that I got to South Carolina a month
25 before my date to leave the military I continued to get

1 active duty pay.

2 Q. And when was that going to end?

3 A. The 29th of July.

4 Q. Okay. So you were -- were you actively looking --
5 you said you were actively looking for a job. What does
6 that mean?

7 A. I knew the funds weren't going to last forever, the
8 money that we had wasn't going to last. So I would go
9 out every morning or every afternoon and look for a job.
10 Filled out applications, made phone calls and I was
11 trying in the area; we had never been down here so that's
12 what I did basically every day.

13 Q. Did you eventually find a job at some point in time?

14 A. After September -- during September I found a job.

15 Q. Okay. And what was the job you found?

16 A. I was a security officer at the Cummins Plant off of
17 Commerce Parkway [phonetic].

18 Q. But up until September up until you found that job
19 you didn't have a job?

20 A. No, I did not.

21 Q. Okay. September 5th do you remember what day that
22 was?

23 A. It was Labor Day.

24 Q. Do you remember what you did during the day?

25 A. I went out looking for a job and I recall it because

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 my wife had called and said that we need more Pedialyte.
2 The kids were having -- we all had stomach issues over
3 the weekend.

4 And she called and asked if I could pick up more
5 Pedialyte and I said that since I was at Walmart filling
6 out an application and as soon as I was done I would pick
7 up Pedialyte.

8 Q. And you're sure that was September 5th?

9 A. Yes.

10 Q. And why were -- why was everybody on Pedialyte?

11 A. The kids have diarrhea and my wife said that would
12 be the best thing to use for diarrhea would be either
13 Pedialyte or Gatorade depending on the age of the child.

14 Q. And that phone call do you remember what time of the
15 day it was?

16 A. I don't recall.

17 Q. Was it morning or afternoon.

18 A. It was afternoon.

19 Q. Was it after or before lunch?

20 A. It was after lunch.

21 Q. Okay. And at some point in time did you notice
22 that Minor had thrown up?

23 A. Yes.

24 Q. And could you tell us about that.

25 A. I was getting ready to head out the house and I

1 realized that Minor had thrown up in her hair.

2 And I informed my wife Sandra that she had throw up
3 in her hair and asked her if she could wash it out and
4 give her a bath or whatever she felt like she had to do.
5 She said that she had no problem doing that and I left.

6 Q. Okay. Did you take Sibling₂ to school that day?

7 A. Not that day, no.

8 Q. Do you remember exactly where you went to go find a
9 job?

10 A. Honestly the only thing I can remember is Walmart.

11 Q. And that was the Pedialyte pickup?

12 A. Right.

13 Q. Do you remember what time you got back?

14 A. It was later in the afternoon. I would say an
15 application takes a while so I would say probably around
16 2 maybe 3 o'clock.

17 Q. So about how long were you out?

18 A. About an hour and a half, maybe two hours.

19 Q. Up until giving Minor a bath do you remember what you
20 did that day after you got back?

21 A. After I got back I asked the kids what they wanted
22 for dinner and I asked my wife what she wanted for dinner
23 and I made dinner.

24 And I got Sibling₂ her school stuff ready. She always
25 wanted me to do her hair or help her pick out her clothes

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 and get her school stuff ready.

2 Q. So at some point in time you gave -- did you notice
3 something about Minor that she needed a bath?

4 A. After I gave our oldest a bath and went in her room
5 and grabbed the pajamas I realized that Minor had throw up
6 in her hair.

7 Q. And so that's when you gave Minor a bath?

8 A. Right.

9 Q. Talk to us about what happened in the bath.

10 A. Well, I had never given Minor a bath before. Being
11 that my wife my sick I went ahead and decided to give her
12 a bath.

13 I had seen my wife do it plenty of times and it
14 wouldn't be an issue. I sat her in the water and she was
15 fine. Usually she kicks and screams and doesn't tend to
16 like taking a bath. Like I said everything was fine. I
17 washed her hair, washed her while she was sitting down
18 and as soon as I stood her up and went to wash her
19 backside she freaked out. She started screaming and
20 crying and that's when she slipped out of my hand and hit
21 her head on the tub.

22 Q. And what did you do next?

23 A. I quickly wrapped her in a towel and held onto her
24 to make sure she was okay.

25 Q. Did you talk to anybody else about...

1 A. I told my wife what had happened.

2 Q. Did you -- so you noticed something from her hitting
3 her head on the bathtub?

4 A. Correct.

5 Q. Did you notice any other injuries on her?

6 A. No.

7 Q. So what happened after that night?

8 A. After that night I woke up in the morning to get my
9 daughter ready for school; the oldest Sibling₂

10 I quietly walked in the girl's room; Sibling₂ and Minor
11 shared a room. I checked on Minor to make sure she was
12 okay, make sure she was breathing ---

13 Q. --- did you notice anything at that time?

14 A. No. I didn't have the lights on. I had the hall
15 light on just because in case Minor was asleep I wanted to
16 make sure I wasn't waking her up. I got Sibling₂ up quietly
17 and asked her what she wanted for breakfast. She told me
18 that she wanted eggs so I made her eggs for breakfast.

19 After breakfast I got her ready for school. I
20 brushed her hair and put it in a ponytail, got her
21 dressed.

22 And I checked my wife and she was still asleep.
23 Sibling₁ and Minor were still asleep so I walked out the
24 house and I took Sibling₂ to school.

25 Q. Then what happened?

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 A. I came back home and my wife was still asleep.
2 Sibling 1 and Minor were still asleep. I got Sibling 1 up first,
3 sat him down at the table and got him his breakfast. And
4 I got Minor up and sat her at the table.

5 My wife was still asleep. I woke her up and got her
6 her coffee -- I'm sorry -- I got home -- I'm sorry this
7 is over two years and I'm having trouble remembering
8 exactly what happened.

9 I got home and woke my wife up and got her coffee
10 and then I woke up the kids and got them their breakfast.
11 I had noticed there was something wrong with Minor and I
12 proceeded to tell my wife that she had bruising.

13 My wife came into the kitchen and saw what had
14 happened that she had the bruising and the swelling. And
15 I then proceeded to call the Air Force Base to talk to
16 her primary care -- the family care physician.

17 Q. What did you do as a result of talking to them?

18 A. Because Monday was a holiday and soldiers have the
19 weekends off it was a three day weekend so it was -- they
20 said that it was impossible for her to be seen that day
21 because there were so many appointments and so many
22 people coming in that they had to refer us off post.

23 So they said that they would call us back hopefully
24 within 30 minutes and let us know where to take her off
25 post.

1 Q. And is there a reason you called the Air Force Base?

2 A. At the time we still had active duty Tricare. You
3 get to keep it six months after you exit the military,
4 after you leave the military.

5 So because that's where we had the other children's
6 doctors, that's where we decided to take her.

7 Q. So then what happened?

8 A. After that we got the phone call. It was
9 approximately 30 minutes later. I told my wife where the
10 doctor was at and asked her if she wanted me to take her
11 or if she would be willing to take her because she wasn't
12 feeling well.

13 Q. And why was that?

14 A. Because there were going to be a lot of people with
15 Minor like people she didn't know she was -- because I was
16 gone for so long she was more comfortable with my wife.
17 And I wanted her to be as comfortable as possible with
18 going to the doctor.

19 Q. At some point in time did you learn there was
20 something wrong?

21 A. My wife called me from the pediatrician's office and
22 said that they were going to take Minor by ambulance to
23 MUSC.

24 When she got to MUSC she followed behind the
25 ambulance and she said that at first -- the first

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 conversation that everything looked fine and that they
2 would be home soon.

3 Q. What happened after that?

4 A. I got a phone call later on saying that they saw
5 some issues and that I believe she said that there may be
6 social workers coming to talk to her.

7 Q. And did you do something as a result of that?

8 A. I wanted to be with Minor I didn't know what was
9 going on so I asked my wife if she would be willing to
10 come home and I would head back up -- bring the car and I
11 would go spend time with Minor

12 Q. Do you know about what time that was?

13 A. It was after school let out. I picked Sibling2 up so I
14 would probably say around 3 o'clock.

15 Q. And so then -- so you went to the hospital next?

16 A. Correct.

17 Q. Did -- were you told anything?

18 A. I was told that there were some things that were
19 cause for concern. It really wasn't a whole lot of
20 detail that was given.

21 I believe somebody said something about the bump on
22 the side of the head and that was really all that I was
23 told.

24 Q. So when you went to the hospital how many people do
25 you think you talked to?

1 A. A few. I'm not sure the exact number.

2 Q. And how many people asked you about what happened?

3 A. Every person I talked to.

4 Q. Was that frustrating?

5 A. No.

6 Q. Why?

7 A. Because they were doing their job and I understood
8 that.

9 Q. You heard testimony that at some point in time the
10 social worker was asking you questions and you seemed
11 anxious. Can you explain that?

12 A. Anxious to understand what was going on, anxious to
13 know if I could take her home. And I didn't know if I
14 was allowed to hold her. I didn't know what I was
15 allowed to do.

16 Q. And that was -- was that the crying?

17 A. When she started crying I was upset because I didn't
18 know again if I was allowed to pick her up, if I was
19 allowed to hold her.

20 And while she was crying I was being asked questions
21 and I didn't know whether to continue answering the
22 questions or if I could pick her up or both.

23 Q. Were you honest with everybody?

24 A. Yes.

25 Q. At some point in time -- what happened next? What

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 happened next?

2 A. Next I got a call from my wife saying that Sibling2 and
3 Sibling1 especially. Sibling2 wanted me to come home; that she
4 wanted her daddy. She said that it seemed like Sibling2 was
5 afraid that I was leaving again.

6 So I took the car and went home and my wife headed
7 back to the hospital. No that's a mistake -- I took her
8 and the kids back to the hospital and I took Sibling2 and
9 Sibling1 back home.

10 Q. At that point in time did you know a little bit more
11 about what they were saying was wrong?

12 A. I know some of what they were saying that was wrong.
13 I honestly got most of the information from my wife while
14 she was at the hospital with Minor after I took the car
15 back to the house to make sure I could take Sibling2 to
16 school the next day because they said that it was a
17 possibility that somebody would be able to stay the night
18 with Minor

19 Q. And at some point in time did the police arrive at
20 your home?

21 A. They did.

22 Q. And do you remember what time that was?

23 A. It was around 1 or 1:30 in the morning of the 7th.

24 Q. And were you asleep or were you awake?

25 A. I was awake.

1 Q. Why were you awake?

2 A. My wife called and told me that she could not stay
3 with Minor at the hospital that she had to go home and she
4 had no idea how she was to get home because we only had
5 one car and I had the car at the time.

6 So I then called my mother because she told me to
7 call anytime and if I need anything that she would be
8 there for me. So I called my mother and asked her if
9 there was any way she could go pick up my wife from the
10 hospital that she was not allowed to stay overnight.

11 Q. Did the police -- did they ask you a lot of
12 questions?

13 A. They did.

14 Q. Were you honest with them?

15 A. I was.

16 Q. Tell us about what -- did you notice any -- did you
17 notice anything concerning Minor that day; the day before
18 September 5th or the days leading up to that?

19 A. No, everything seemed fine. I had the other kids
20 around me and everything seemed normal besides diarrhea
21 and throwing up but everybody in the house was sick so.

22 Q. What about taking Minor to the doctor? Why didn't
23 you do that?

24 A. Why did I not take her to the doctor?

25 Q. To her well visits?

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 A. It was out processing and the amount of time that it
2 took. We don't go to each individual place. It was
3 separate cars and our own vehicle because there is a
4 bunch of soldiers coming home at one time that we had to
5 meet up somewhere and then we took the bus to whichever
6 building we were going to start the reintegration.

7 Q. Did you know when the last time Minor was taken to
8 the hospital ---

9 A. --- I did not.

10 Q. Did you ever try to take Minor to a doctor when you
11 got to South Carolina for her well visits?

12 A. When we were having issues with the shot records I
13 tried numerous times we went to the Air Force Base and
14 requested Minor medical records because she was seen off
15 post at Fort Campbell they had to transfer via fax or
16 email. I asked them how long it would take and they said
17 it would take approximately two and a half to three weeks
18 to retrieve all the records to come back at a later time.

19 So we came back at a later time and my wife had told
20 them that Minor needed her shots that she needed to be
21 seen. I didn't know as to why that's just what she said.

22 And the doctor then said that she did not feel
23 comfortable giving Minor shots without knowing if she had
24 those shots prior to coming down here.

25 Q. You testified that you called your mother the night

1 of September 5th.

2 A. Right.

3 Q. Was there anybody else that you would generally call
4 about advice?

5 A. I would call my sister. And actually I tried
6 calling her but because of the town she lives in she does
7 not have house phones she has cell phones I couldn't
8 reach her.

9 Q. If you would have known that Minor had a broken bone
10 would you have taken her to the hospital?

11 A. I would.

12 Q. If you would have known that Minor had a broken bone
13 would you have taken her to the hospital?

14 A. Yes, I would.

15 Q. If you would have known that Minor had a skull
16 fracture would you have taken her to the hospital?

17 A. Yes, I would.

18 Q. If you would have known that Minor was in any danger
19 what would you have done?

20 A. I would have prevented it any way possible.

21 Q. Would you have talked to other people?

22 A. I would.

23 Q. Would you have told somebody?

24 A. I would.

25 [Whereupon, Mr. Shelton and Mr. Groeber confer]

(CHRISTOPHER BERKE - DIRECT BY MR. SHELTON)

1 Q. [Mr. Shelton] Chris this happened September 5th,
2 6th, and 7th, 2011?

3 A. Correct.

4 Q. When were you arrested?

5 A. I was arrested on my birthday January , 2013.

6 Q. And year and four months later?

7 A. A year and four months, a year and a half later;
8 somewhere in that time.

9 Q. Do you know how many charges you were arrested for?

10 A. One.

11 Q. No further questions.

12 MS. WILLIAMS: Thank you, Your Honor.

13 THE COURT: You're welcome.
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1 CROSS-EXAMINATION

2 BY MS. WILLIAMS:

3 Q. Good afternoon, Mr. Berke. It sounds like you had a
4 very difficult time when you came back. There was a lot
5 going on in your family.

6 A. Very busy.

7 Q. And you were sort of thrust into a parenting role
8 right away because of Sandra's illness is that correct?

9 A. Correct.

10 Q. When you were taking care of the kids for two weeks
11 in Kentucky was she sleeping or what was she -- had she
12 already -- had they discovered it was cancer yet?

13 A. Not at the time, no.

14 Q. Okay. So she had just had the surgery?

15 A. Correct.

16 Q. Okay. And that was in April?

17 A. The surgery was in May.

18 Q. In May?

19 A. Yes.

20 Q. But y'all were still living in Kentucky?

21 A. We were.

22 Q. And you talked a little bit about the anxiety that
23 you were suffering from. Do you remember telling the
24 social worker that they had given you some medicine for
25 that but that you weren't taking it?

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

- 1 A. I do not.
- 2 Q. Would it refresh your memory to look at the note?
- 3 A. It would.
- 4 Q. I know you've given a lot of statements over a long
5 time ago.
- 6 MS. WILLIAMS: May I approach, Your Honor?
- 7 [Whereupon, the witness reviews document]
- 8 Q. [Ms. Williams] Does that refresh your memory?
- 9 A. That does not.
- 10 Q. You didn't tell the social worker that?
- 11 A. I did tell her that I was on antidepressants while I
12 was deployed but I was never prescribed any when I was at
13 home.
- 14 Q. So you weren't taking them at home at all?
- 15 A. I was not.
- 16 Q. Okay. And did you frequently jump over your wife
17 and squeeze her in the night and then forget about that?
- 18 A. I recall my wife telling me that it would happen and
19 I did not leap over her. I rolled over her and was
20 squeezing her; that did happen from what she says. I
21 don't remember.
- 22 Q. You don't remember it?
- 23 A. No.
- 24 Q. How many times did that happen?
- 25 A. She said it lasted for a couple of weeks.

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

1 Q. And when you were -- fast forward a little bit to
2 September 5th. You were giving Minor a bath. Can you
3 demonstrate to me how that happened with her slipping --
4 would you be comfortable coming out of the...

5 A. Out of here?

6 Q. Yes, if you could just stand up. Were you standing
7 in the bath?

8 A. I was kneeling down.

9 Q. Okay. Can you show us what you did? Don't kneel,
10 you can just stand. We'll use our imagination.

11 [Whereupon, the witness demonstrates]

12 A. I had her under her armpit with my left hand and
13 proceeded to wash her backside and she freaked out and
14 starting crying and screaming and I lost my grip and she
15 slid this way [indicates] and hit her head in this area
16 [indicates] on the faucet of the bathtub.

17 Q. Okay. So were you still holding part of her body?

18 A. I was not.

19 Q. So she was under your arm?

20 A. I was under her arm.

21 Q. So you had her like this [indicates]?

22 A. I had her like this [indicates].

23 Q. Okay. And then she just fell completely out and
24 hit ---

25 A. --- she kicked and it just surprised me. I was not

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

1 expecting that reaction. I knew she cried and screamed
2 but I wasn't expecting that.

3 Q. And then do you remember telling Doctor Jacobsen
4 that you were able to catch her before she hit any other
5 part of her head?

6 A. I did not say that.

7 Q. You didn't say that ---

8 A. --- I said she fell and I don't believe she hit any
9 other part of her head but I couldn't recall.

10 Q. What did you do right after she hit her head; like
11 what position was she in?

12 A. She was in the tub.

13 Q. How was she laying?

14 A. She was laying on her stomach.

15 Q. On her stomach?

16 A. Correct.

17 Q. And do you remember saying that the faucet didn't
18 have a cover?

19 A. It did not.

20 Q. What does that mean? I'm trying to picture that.

21 A. I didn't know until later on that there are bumpers
22 I guess that you can put over the faucet of the tub.

23 Q. So like a child protective cover?

24 A. Correct.

25 Q. Okay. If you're more comfortable you can sit.

- 1 [Whereupon, the witness complies]
- 2 Q. Thank you. And do you remember telling Carlene
- 3 Sessions -- do you know Carlene Sessions?
- 4 A. The guardian ad litem --
- 5 Q. She's the guardian ad litem?
- 6 A. Yes.
- 7 Q. Do you remember telling her that after Minor fell
- 8 forward then she fell off to the side and slid down the
- 9 tub?
- 10 A. I don't recall.
- 11 Q. You've never talked to Carlene Sessions?
- 12 A. No, I don't recall.
- 13 Q. You just don't remember?
- 14 A. Right.
- 15 Q. So you've talked to her?
- 16 A. I talked to her.
- 17 Q. And you've talked to her about this?
- 18 A. Right.
- 19 Q. But you just don't remember saying that?
- 20 A. There's a lot that -- again, it happened a while ago
- 21 so there is a lot of conversations that I just can't
- 22 recall.
- 23 Q. Okay. It's a slightly different version of the
- 24 story.
- 25 A. I guess it would be similar to that...

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

1 Q. And what about Kathleen Spell? Do you know who she
2 is?

3 A. She was the caseworker at the time.

4 Q. And do you remember telling her that Minor fell
5 forward but then she went back and went forward again?

6 A. I did not say that.

7 Q. So have you ever talked to Kathleen Spell about this
8 incident?

9 A. I have.

10 Q. But you just didn't say that?

11 A. I did not say that.

12 Q. But with Carlene Sessions you just don't remember if
13 you said it.

14 A. I remember that -- no, I don't. Honestly, I don't
15 remember saying that.

16 Q. Now after you have this episode in the bath -- well,
17 let me backtrack a little bit. You were saying she was
18 happy in the bath before that right?

19 A. She was quiet, calm.

20 Q. She was enjoying the bath?

21 A. Yes --

22 Q. And you were washing her hair?

23 A. Right.

24 Q. And everything was fine?

25 A. From what I could tell. It was the first time I had

1 given her a bath so I assume so.

2 Q. Okay. It's just when you turned her over to touch
3 her bottom that she got...

4 A. Right.

5 Q. She started freaking out, okay. Then you call your
6 Mom right away?

7 A. It was after. I informed my wife first and then I
8 called my Mother.

9 Q. And your Mom tells you don't let her go to sleep.

10 A. Right; for about an hour.

11 Q. Okay. And then you give her Triaminic.

12 A. Correct.

13 Q. Why Triaminic?

14 A. I assumed Triaminic is a pain reliever and that if I
15 was to hit my head I assume it would hurt.

16 Q. Triaminic is a cold medicine and it makes babies
17 sleepy. Are you aware it makes babies sleepy?

18 A. I am not.

19 Q. You give her some Triaminic and then what happens?

20 A. I laid her in her crib. My wife came in and laid
21 Sibling₂ down. Minor was already in her crib.

22 Q. Okay. And where is your wife during this bath?

23 A. She was laying in the bed in our room.

24 Q. And then you say you sleep on the couch that night?

25 A. I fell asleep for a period. I did not sleep on the

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

1 couch the entire night. I don't -- I have no idea when I
2 came --

3 Q. You have no idea what? I'm sorry.

4 A. I have no idea about how that came about. I know I
5 fell asleep on the couch and I later woke up and went in
6 my room.

7 MS. WILLIAMS: May I approach, Your Honor?

8 THE COURT: You may.

9 Q. [Ms. Williams] May I just grab that back from you?
10 Thank you. Did you check on Minor every half hour?

11 A. Every half hour to an hour.

12 Q. And why was that?

13 A. Just to make sure she was okay. My Mother said that
14 there could be a concussion and I'm not a doctor so I
15 don't know -- she's my daughter.

16 Q. So you were concerned?

17 A. She hit her head.

18 Q. And then you finally go to sleep at what 3 in the
19 morning did you say?

20 A. I fell asleep on the couch and woke up around 3 in
21 the morning and went to my room.

22 Q. So you're checking on Minor every half hour from the
23 time you put her in her crib until about 3?

24 A. Correct.

25 Q. And then you say you go into the bedroom -- this is

1 what you told Mr. Shelton -- and you check on Minor to
2 make sure she was breathing?
3 A. To make sure she's okay.
4 Q. To make sure she's breathing is what you said.
5 A. Breathing, okay...
6 Q. And then you take Sibling2 to school.
7 A. Correct.
8 Q. Okay. And you come back by 7:30?
9 A. I'm not sure exactly what time I came back.
10 Q. Do you remember telling the social worker it was
11 about 7:30?
12 A. It might have been. It was along there.
13 Q. And you go into Minor room and she's still asleep?
14 A. Yes.
15 Q. And where is Sibling1?
16 A. He's in his room.
17 Q. And then what do you do?
18 A. I woke up my wife.
19 Q. And then where are the children?
20 A. They were eating breakfast.
21 Q. Okay. So your wife was still asleep when you came
22 home?
23 A. Correct.
24 Q. And the children are eating breakfast. They're too
25 little to make breakfast themselves so just tell me how

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

- 1 that works. Like do you put them in the kitchen and fix
2 them something or?
- 3 A. Sibling1 has allergies to pretty much everything so it
4 was just cereal and Pedialyte for breakfast due to the
5 diarrhea.
- 6 Q. So everyone had a stomach virus during that period
7 of time?
- 8 A. Yes.
- 9 Q. Your wife, the kids?
- 10 A. Yes.
- 11 Q. So you were kind of left -- were you the only one
12 without the stomach virus?
- 13 A. No, I had it too.
- 14 Q. Oh, you did too?
- 15 A. Yes.
- 16 Q. But you were the one taking care of the kids.
- 17 A. Correct.
- 18 Q. Picking out their clothes?
- 19 A. Uh huh.
- 20 Q. Fixing Sibling2 hair; she likes you to fix her hair.
- 21 A. Right.
- 22 Q. Getting the breakfast, taking Sibling2 to school.
- 23 A. Correct.
- 24 Q. You were kind of the Dad in charge that day?
- 25 A. Right.

1 Q. And you mentioned that y'all never took Minor to the
2 doctor but your Mom said you took Sibling1 to the doctor.

3 A. Right.

4 Q. Were his shot records easier to get?

5 A. He was not seen on post until my second deployment.
6 My wife decided that she would like to go back to Tricare
7 Prime. That's where you can be seen on post but you
8 cannot be seen off post unless you're referred off post.

9 Just for I guess a matter of convenience so Sibling1's
10 shot records and everything were at a different office
11 off post.

12 Q. Okay, I see. And you talked about when you came
13 back you were still getting some compensation from the
14 government.

15 A. Correct.

16 Q. And you still had responsibilities right?

17 A. Correct.

18 Q. But you weren't fulfilling those responsibilities
19 were you?

20 A. What do you mean ---

21 Q. --- you weren't reporting to the Guard like you were
22 supposed to were you?

23 A. To the Reserves?

24 Q. Uh huh.

25 A. At first I was.

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

- 1 Q. But you didn't report in May?
- 2 A. May, no I did not.
- 3 Q. You didn't report in July 2012?
- 4 A. No.
- 5 Q. You didn't report in August?
- 6 A. Of 2012?
- 7 Q. Yes?
- 8 A. Correct.
- 9 Q. You didn't report in September of 2012?
- 10 A. No.
- 11 Q. You didn't report in October?
- 12 A. No.
- 13 Q. You didn't report in November?
- 14 A. Did not.
- 15 Q. You didn't report in February of 2013?
- 16 A. No, I did not.
- 17 Q. And you didn't report in March.
- 18 A. Of 2013?
- 19 Q. Yes.
- 20 A. Correct.
- 21 Q. So you just weren't going?
- 22 A. Right.
- 23 Q. But you were still kind of collecting the money.
- 24 A. I was not collecting money.
- 25 Q. Were you not getting money for school?

1 A. That's separate from going in the Reserves. You get
2 VA benefits from when you complete your contract active
3 duty wise.

4 Q. And they were trying to reach you weren't they?

5 A. I know I received a couple of letters, some
6 certified. I haven't received letters in a while.

7 Q. But you just didn't respond.

8 A. Well, when I left active duty I was talking to my
9 career counselor. I was supposed to fulfill an eight
10 year contract with the military. I had already done
11 five.

12 And there was a little discrepancy with my contract
13 that I misunderstood that -- my unit even said that they
14 misunderstood. I did five years prior to coming down to
15 South Carolina and I had three years left.

16 That's what I was led to believe because my I.D.
17 card expires July of 2014 I was told by my career
18 counselor as far as I understood I had a year to Reserve
19 duty and then after that I was either -- or I was on
20 inactive ready Reserves for the last two years, which
21 would be the 2012 -- the 2012 '13 timeframe.

22 I went up to my unit to get some documents and
23 that's when I was made aware that I still had to do them.
24 And that weekend, it was a Saturday that I was up there
25 so I drove that Sunday like I was supposed to and I had a

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

1 drill again this weekend.

2 Q. But the other eight times you just kind of blew off?

3 A. I didn't blow them off. I wasn't aware that I had

4 to be there.

5 Q. You weren't aware you had to be there?

6 A. Because of the contract.

7 Q. They were sending you letters.

8 A. Correct.

9 Q. And you got the letters.

10 A. Right.

11 MS. WILLIAMS: Court's indulgence.

12 [Whereupon, Ms. Williams and Ms. Taylor confer]

13 Q. [Ms. Williams] And you mentioned that this episode

14 with Minor in the bath was particularly hard for you

15 because it was the first time you gave her a bath.

16 A. Correct.

17 Q. And yet you just testified that you were the sole

18 person taking care of the kids for two weeks in Kentucky.

19 Did Minor just go two weeks without a bath?

20 A. My wife gave her a bath.

21 Q. Oh, so you weren't the only one that ---

22 A. --- I took care of the two older ones. When it came

23 to baths for Minor she said that she would do it.

24 Q. Oh, so you gave baths to the other two but your wife

25 was the only one that gave a bath to Minor

(CHRISTOPHER BERKE - CROSS BY MS. WILLIAMS)

1 A. Correct, because you have to -- even though there
2 was surgery you still have to merge in with their
3 routine. I can't just completely take over. She had her
4 system, her routine as to the way she did things and my
5 role when I got home was to not interrupt that routine as
6 much as possible.

7 Q. And her routine was just to bathe Minor and not the
8 other two?

9 A. No. There has to be some compensation due to the
10 surgery.

11 Q. Okay. Thank you, Mr. Berke.

12 A. You're welcome.

13 THE COURT: Any redirect?

14 [Whereupon, Mr. Shelton and Mr. Groeber confer]
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(CHRISTOPHER BERKE - REDIRECT BY MR. SHELTON)

1 REDIRECT EXAMINATION

2 BY MR. SHELTON:

3 Q. Chris, the Solicitor mentioned the letters that you
4 received in the Reserves. Did you talk to somebody after
5 you received the letters?

6 A. Recently or?

7 Q. Yes. Did you talk to somebody after you received
8 the letters?

9 A. I did.

10 Q. Okay. The Dad in charge; why were you the Dad in
11 charge?

12 A. After her surgery?

13 Q. Yes?

14 A. Because there were some things, some limitations due
15 to her surgery that she just wasn't allowed to do. I
16 didn't want her to overdo anything. I didn't want her to
17 overwhelm herself. I wanted to make sure she was taken
18 care of.

19 Q. Were there some symptoms that occurred because of
20 the surgery?

21 A. Trying to get her thyroid levels balanced out to
22 where it was back to normal, sleepiness, grogginess,
23 depression, mood swings; things like that.

24 Q. And so during Sandra's surgery was there somebody
25 there to help Sandra?

1 A. There was.

2 Q. Who was there?

3 A. I don't recall her name. My wife found some kind of
4 online babysitting service where you can have somebody
5 come over. We interviewed several people.

6 The lady that my wife found one of her family
7 members had thyroid problems, had thyroid surgery, had
8 children that were grown, and that's when my wife decided
9 that she would be the best fit to babysit.

10 Q. No further questions.

11 THE COURT: Sir, you may step down.

12 MS. WILLIAMS: Can I just ask one question?

13 THE COURT: Uh huh.

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1 the State have any rebuttal testimony?

2 MS. WILLIAMS: No, Your Honor.

3 THE COURT: Madame Forelady and ladies and
4 gentlemen, the defense has rested their case. I have
5 some matters of law I need to take up with the attorneys.
6 During this break please do not discuss the case and
7 please leave your notepads in your seats. During this
8 break I'll also make a decision about when we will be
9 breaking for lunch. If you would go with the bailiff
10 please.

11 [Whereupon, the jury exits at 12:32 p.m.]

12 THE COURT: The defense has rested their case. Are
13 there any motions?

14 MS. WILLIAMS: None from the State, Your Honor.

15 MOTION FOR DIRECTED VERDICT

16 MR. SHELTON: Your Honor, we just renew our
17 Directed Verdict motion with the same argument.

18 THE COURT: Does the State want to make any
19 response?

20 MS. WILLIAMS: We stand on our earlier arguments,
21 Your Honor. I don't think there is any new testimony
22 that puts into question anything that wasn't in question
23 before from our perspective.

24 THE COURT: Considering the evidence in a light
25 most favorable to the State the court is only concerned

1 with the existence or non-existence of evidence and not
2 its weight. It's not for the court to weigh
3 creditability or believability. The State has presented
4 both direct and substantial circumstantial evidence on
5 both the elements of 16-395, which is Infliction of Great
6 Bodily Injury Upon a Child as well as Unlawful Conduct
7 Toward a Child.

8 I stand on my previous ruling however I will amend
9 it as follows: That there has been direct evidence of
10 great bodily injury. I don't think the State has to
11 prove that both injuries are attributable to the
12 defendant.

13 Based on the expert testimony of both the State's
14 expert and the defense's expert the injury over the eye
15 which the defendant admits to would meet the element of
16 great bodily injury. The only thing left to the jury's
17 decision or the creditability issue becomes whether it
18 was deliberate or accidental and therefore the motion is
19 denied.

20 Now, does the State plan to open and close?

21 MS. WILLIAMS: Yes, Your Honor.

22 THE COURT: How long is your argument going to be?

23 MS. WILLIAMS: The first one will be ---

24 THE COURT: --- just give me a total.

25 MS. WILLIAMS: A total will be maybe 40 minutes.

1 THE COURT: And how long will the defense closing
2 argument be?

3 MR. SHELTON: I guess around the same time, Your
4 Honor. It's shouldn't be that long.

5 THE COURT: Pardon me, I can't hear you.

6 MR. SHELTON: It shouldn't be that long.

7 THE COURT: I assume there were no requests for
8 instruction as I have not received any up until this
9 point.

10 MS. WILLIAMS: No, Your Honor. We were not aware
11 of any lesser included offenses and we would just ask for
12 the standard charge.

13 MR. GROEBER: I do have a requested list, Your
14 Honor. I apologize ---

15 THE COURT: --- I wish you had given it to me
16 earlier.

17 MR. GROEBER: Well, I didn't -- I apologize for
18 that.

19 THE COURT: You can submit it. I'll look at it.

20 MR. GROEBER: Okay. Thank you.

21 THE COURT: Do you have a copy for the State?

22 MR. GROEBER: I do, Your Honor.

23 MS. WILLIAMS: We haven't seen it yet, Your Honor,
24 so we just...

25 MR. GROEBER: If I could mark it as a court's

1 exhibit?

2 THE COURT: You need to give them to me and then
3 I'll determine how they are marked. Thank you.

4 MR. GROEBER: Thank you.

5 [Whereupon, Mr. Groeber provides documents to the
6 court]

7 THE COURT: Thank you, sir.

8 [Whereupon, the court reviews documents]

9 CHARGE CONFERENCE

10 THE COURT: I will give the jury a general
11 instruction regarding their responsibility and my
12 responsibility, how they are to judge witness
13 creditability and believability. I will give them a
14 general instruction on expert witness testimony.

15 I will give them a general instruction regarding any
16 alleged statements to have been made by the defendant. I
17 will give a general instruction on direct and
18 circumstantial evidence as well as a general instruction
19 that the charge, the arrest, and the indictment are not
20 evidence as well as on the presumption of innocence.

21 I'll charge Victor v Nebraska [phonetic] on
22 reasonable doubt. I will then instruct -- actually I'll
23 go back to that. I will instruct 16-395, which is
24 infliction or allowing Infliction of Great Bodily Injury
25 Upon a Child and actually I will charge that second. I

1 will charge 63-570 which is Unlawful Conduct Toward a
2 Child first, which is the language just straight from the
3 statute. And then I will instruct 16-395, which is the
4 exact language from the statute.

5 I will also give a curative instruction that
6 basically says that the jury has heard testimony about
7 the child having had injuries to her arm and leg, which
8 are unrelated to the charges contained in Indictment 604,
9 which is the charge of Infliction of Great Bodily Injury
10 Upon a Child.

11 I am going to instruct them that the testimony if
12 they conclude it is true may only be considered by them
13 on the question of guilt or innocence of the defendant on
14 Indictment 603, which is Unlawful Conduct Toward a Child
15 and for no other reason and no other purpose.

16 That the evidence has been admitted for a limited
17 purpose and it is not evidence of any of the allegations
18 contained in Indictment 604, which is Infliction of Great
19 Bodily Injury Upon a Child and then it for them to give
20 the evidence the weight, value and effect which they feel
21 it should have on the sole issue of the guilt or
22 innocence of the defendant on Indictment 2012-603, which
23 is Unlawful Conduct Toward a Child.

24 And that they must not consider proof -- evidence of
25 these previous injuries as proof of the defendant's guilt

1 of the charge of Infliction of Great Bodily Upon a Child
2 which is Indictment 604. I will then give a general
3 instruction regarding multiple indictments which means
4 they have to make a decision on each indictment
5 separately and independently based on the law applicable
6 to it.

7 And then instruct on the form of the verdict. The
8 defense has made a request that the court instruct --
9 give an instruction on accident. Is there any exception
10 from the State?

11 MS. WILLIAMS: Yes, Your Honor. We think that that
12 instruction is not only superfluous but misleading. If
13 you look at 16-395 infliction it doesn't say intentional
14 infliction it just says infliction.

15 THE COURT: Well, you're getting a little ahead of
16 yourself. I think -- I'm going to deal with their
17 request about the willful that it is not an element but I
18 think that you all -- there is no difference when
19 somebody shoots a gun and they say I didn't mean to do
20 it.

21 I don't think willful is an element of it. I think
22 it's for the State to argue whether it was intentional --
23 well not intentional whether he -- it's your
24 responsibility to prove that it wasn't an accident. He
25 says that it was an accident that the child flailed about

1 in the tub and that this -- what happened was
2 inadvertent. If it were in fact -- the law that does not
3 charge you for things that are inadvertent that are
4 accidents.

5 MS. WILLIAMS: Right. I understand. I think what
6 my argument is and I'm probably not being very articulate
7 is that it's not the kind of -- when you say accident
8 you're sort of implying that the opposite of that is that
9 he intended to do it. And I think child abuse is
10 different in that it's not something you intend to do.
11 You know he could have been in the bath, he was just
12 giving her a bath and in that minute ---

13 THE COURT: --- I don't think a parent is going to
14 be charged with intentional infliction or the other
15 instruction if you accidentally -- if something
16 accidentally happens. People are human and things
17 happen. I think he can argue that it was an accident
18 that he was ill prepared for what happened in the tub and
19 she flailed about. That's been his whole defense ---

20 MS. WILLIAMS: --- right, and I understand ---

21 THE COURT: --- that this happened accidentally ---

22 MS. WILLIAMS: --- I guess what I'm saying is they
23 can argue that but I think bringing special attention to
24 the fact that we have to prove it's an accident ---

25 THE COURT: --- I think you have to disprove it's

1 an accident.

2 MS. WILLIAMS: Or that we have to disprove it's an
3 accident.

4 THE COURT: It is your burden.

5 MS. WILLIAMS: And it is but we just don't think a
6 charge is necessary ---

7 THE COURT: --- I don't think you have to prove it
8 was willful but I still -- you have to come -- it has to
9 go beyond it accidentally happening.

10 MS. WILLIAMS: I agree with the court. I'm just
11 saying that child abuse is different in that it can
12 happen in a split second. You can get frustrated ---

13 THE COURT: --- I was a Family Court Judge for five
14 and a half years and whether it happened in a split
15 second or not there is something cognitive in the brain
16 of an adult who injures a child.

17 MS. WILLIAMS: I agree with you, Your Honor.

18 THE COURT: And it doesn't happen accidentally.

19 MS. WILLIAMS: I'm not saying that you have to ---

20 THE COURT: --- it is an affirmative act. When you
21 beat a child you make a decision of whether that beating
22 is -- what severity of beating it's going to be. And a
23 parent knows when they've gone overboard. Even if it's a
24 hindsight recollection they know somewhere in their mind
25 that what I'm doing is egregious and I'm going above

1 board and I'm beating this child out of anger. It's
2 probably not the best analogy but that doesn't make it --
3 that doesn't negate that it is child abuse. Child abuse
4 does not happen accidentally.

5 MS. WILLIAMS: I agree with you. Arguing it is
6 just -- I whole heartedly agree with the court and we're
7 not going to get up there and say it could have been an
8 accident but he's still guilty. We're just saying that
9 the charge is not necessary because it's obvious within
10 the statute and it just brings special attention to that
11 aspect of it which is inflicted.

12 THE COURT: I think it's for you to differentiate
13 that. But he has a defense and I can't allow them to
14 argue a defense without giving them some law to guide
15 them about that defense. That's like somebody being able
16 to -- you can't argue a legal concept to a jury without
17 the court addressing it. Otherwise they have no
18 guidance.

19 And he is allowed to raise that defense that it was
20 an accident. It's no different than somebody who shoots
21 a gun and says I ain't really mean to do it. And you
22 certainly can argue that he was negligent and that that
23 still meets the statute. I don't know how you're going
24 to argue it.

25 MS. WILLIAMS: And the other question I had is he

1 requesting -- and I guess I could ask Mr. Groeber A and B
2 or A or B?

3 THE COURT: I would use my standard instruction. I
4 never use a lawyer's summation because I find it is never
5 an accurate statement of the law. It usually comes from
6 dictum and I'm going to use what I have, which is the
7 defendant has raised the defense of accident. An act may
8 be excused on the ground of accident if it is shown that
9 the act was unintentional, that the defendant was acting
10 lawfully and that reasonable care was used by the
11 defendant.

12 And I'm going to have to look at some cases because
13 normally you only charge accident where you are using a
14 deadly weapon. And I have to see if it has been applied
15 in other circumstances. But normally accident is when
16 somebody is lawfully armed in self defense is usually
17 when you instruct accident. And I'm going to study it a
18 little bit over the lunch break to see exactly its
19 applicability. But I think I will probably use some form
20 of something that I write myself, but I'm not going to
21 use what has been submitted.

22 MS. WILLIAMS: Okay.

23 THE COURT: And that the burden is on the State to
24 prove beyond a reasonable doubt that the act was not an
25 accident but was caused by the negligence or carelessness

1 on the part of the defendant or by unlawful activity by
2 the defendant. But again usually the defense of accident
3 is when there has been the use of deadly force and where
4 a weapon has been used. But I'm going to have to look at
5 that over the lunch break.

6 MS. WILLIAMS: And with regard to mere presence,
7 Your Honor, we don't ---

8 THE COURT: --- I'm going to take them one at a
9 time. I don't need y'all jumping off -- stay in your
10 lane. Thank you. All right next the defendant has
11 requested an instruction of mere presence, which I think
12 would be appropriate under the circumstances. I wouldn't
13 use their instruction. I would use my instruction, which
14 is ---

15 MR. GROEBER: --- Your Honor?

16 THE COURT: Yes?

17 MR. GROEBER: I'm sorry to interrupt but I want to
18 go back to the first one. We would object to the
19 terminology of including that he was reckless or
20 negligent.

21 THE COURT: That's what the case law says. And if
22 you want it instructed that's what is going to be
23 instructed. I'm not going to cherry pick out of a case
24 and take it out of context. My charges are a complete
25 and accurate statement of the law. I'm not an advocate;

1 I'm not going to go through a case and pick and choose
2 language that is beneficial to you and then leaves out
3 the rest of the sentence. It's misleading to a jury. If
4 the jury is going to hear the law they are going to hear
5 the accurate statement of it.

6 MR. GROEBER: I understand. And if I may with
7 regards to the Great Bodily Injury the indictment alleges
8 willful, and I know we will get to this with the willful,
9 but ---

10 THE COURT: --- y'all please do not try to control
11 the pace at which I am handling a charge conference.
12 There is a method to everything I do and we will get to
13 it. I haven't asked for argument on that and I will get
14 to that instruction.

15 I've dealt with accident and now we're moving -- and
16 while the first part of the statement of the number 1
17 requested charge is that the State has the burden to
18 prove beyond a reasonable doubt -- actually I'd have to
19 look at that case to see because actually I am not
20 certain that that comes directly from the actual language
21 or whether it has been reworked. And then the other is a
22 statement from State v Brown.

23 Again the court's instruction on accident is an
24 accurate statement of the law. And I'm going to go back
25 and look at the cases factually and see exactly where

1 circumstance is normally instructed and I will tailor the
2 appropriate language which will be an accurate statement
3 of the current and prevailing case law. The next request
4 is mere presence and I need to know if the State has any
5 exception to mere presence.

6 MS. WILLIAMS: We do, Your Honor, and for these
7 reasons. First of all with regard to Unlawful Conduct
8 mere presence is -- you could still be guilty just by
9 being in the home. I mean that's the nature of that
10 charge is that he is in the home, he's a parent, he's in
11 charge and he should ---

12 THE COURT: --- that's not mere presence. Mere
13 presence is when you are just standing idling by. Mere
14 presence is when there is a drug raid and you just happen
15 to come by and visit somebody and everybody else is
16 culpable of some element of the activity.

17 Mere presence in this instance would really only be
18 applicable to the infliction charge. Him simply being in
19 the house and you being able to say well he was there he
20 is the only one that could have done it they are entitled
21 to argue no, that's not accurate. He's not culpable
22 simply because he was there. And if you are going to
23 argue it then I have to address it. And mere presence is
24 something legitimately that needs to be addressed by the
25 court in terms of the law. What you are talking about is

1 how arguments are tailored.

2 MS. WILLIAMS: I guess we would just ask the court
3 to instruct them not to look at mere presence for the
4 other statute.

5 THE COURT: I'm not going to -- I think that comes
6 down to you making a contemporaneous argument. But I
7 think the defense is well aware they can't argue that he
8 was just merely present as a parent. They are co-
9 responsible when it comes to getting your child medical
10 care. They can't say it was her responsibility if he
11 didn't -- if he just stood by and did nothing. I think
12 they know they can't argue that.

13 MS. WILLIAMS: Okay.

14 THE COURT: But it would be up to you to make a
15 contemporaneous objection. The instruction that would be
16 used is mere presence at the scene of is not sufficient
17 to prove someone guilty of a crime. A defendant's
18 presence where a crime is being committed or mere
19 association with a person who commit a crime does not
20 make a defendant an accomplice or an aider and abettor of
21 the person committing the crime.

22 I'm not sure I'm going to use that language. I may
23 use another mere presence charge. The burden is on the
24 State to prove every element of the crime charged. If
25 you find after reviewing all the evidence that the State

1 has proven that the defendant was only present at the
2 scene of a crime and that they have not proved beyond a
3 reasonable doubt any other participation in the crime
4 then you must find the defendant not guilty.

5 The law is that proof at the scene of the crime is
6 not sufficient to find someone guilty. But I'm probably
7 going to redact that language about aiding and abetting
8 because it's just not applicable to this circumstance
9 because we're not talking about a hand of one hand of
10 all. It's more of a civil concept that they both are
11 jointly and severably liable for providing care to their
12 minor child.

13 The next request deals with mental state of mind and
14 I'm not going to instruct that. That is not an element
15 of the offense from the statute. It is not required that
16 it be a willful act. Actually the statute states as
17 follows -- the exact language from the statute is that:

18 The State must prove beyond a reasonable doubt that
19 the defendant inflicted great bodily injury upon a child.
20 Great bodily injury means injury which creates a
21 substantial risk of death or which causes serious or
22 permanent disfigurement or protracted loss or impairment
23 of the function of any bodily member or organ. A child
24 means a person under the age of 18. What is alleged in
25 the statute is not -- what is alleged in the indictment

1 is not what the State is required to prove. There is
2 some superfluous language in the statute. That does not
3 require the court to charge something that is not in the
4 law. And the statute does not impose an element of
5 willfulness and I would not instruct that because that
6 would be adding an element to the statute that is not
7 present.

8 And I am going to make sure that I am accurate. 16-
9 395 the exact language reads as follows: A) It is
10 unlawful to inflict great bodily injury upon a child --
11 and then it talks about the penalty. B) section it is
12 unlawful for a child's parent or guardian, the person
13 with whom the child's parent or guardian is co-habiting
14 or any other person -- oh, that's the part that deals
15 with you allowing somebody else to do it. I apologize.
16 That would not be applicable in this circumstance.

17 And then subsection C) for purposes of this section
18 great bodily injury means bodily injury which creates a
19 substantial risk of death or which causes serious or
20 permanent disfigurement or protracted loss or impairment
21 of the function of any bodily member or organ. And then
22 it talks about the exception for corporal punishment --
23 and then this section does not apply to traffic
24 accidents. And then I went to another portion
25 definitional part of the statute that defines what a

1 child is, which is anyone under the age of 18. So I will
2 note -- I would assume the defense has an exception and I
3 will note that but it is not an element of the offense
4 and I am not going to instruct something that is not an
5 element of the statute because the State can prove he was
6 negligent. They don't have to prove it was willful.
7 It's almost a strict liability statute when you injure a
8 child.

9 Now if you want to argue that you all -- of course
10 it's your defense it was an accident. So in effect what
11 you're saying is that he wasn't negligent, that he
12 exercised all the care a parent would in bathing his
13 child. But it doesn't have to be willful. He doesn't
14 have to have actually had a premeditation to hurt his
15 child. That's not what the statute says.

16 I've found that legislators are very deliberate in
17 the use of their words. Most of them on this committee
18 are lawyers. If they add a word they meant for it to be
19 there. If they left a word out they meant for it to left
20 out. It's only my job to interpret the statute. It's
21 not my job to expand it or to limit it. It says what is
22 says; it's unambiguous.

23 MR. GROEBER: Thank you, Your Honor.

24 THE COURT: And I'll note your exception for the
25 record. I'll use my standard instruction on

1 circumstantial evidence, which is the request number 4.
2 The defense requests a standard instruction on expert
3 witnesses. I will use my standard instruction. Is there
4 any exception -- and they've asked -- well, I'll get to
5 that in a moment. They have asked for a charge on
6 payment of expert witnesses. Is there any exception from
7 the State?

8 MS. WILLIAMS: Yes, Your Honor. We would just ask
9 for the standard instruction on expert witnesses. We
10 don't think that that is necessary. ---

11 THE COURT: -- and this is misleading. I haven't
12 seen this instruction from Judge Anderson but in the case
13 law which is applicable civilly as well as criminally on
14 expert witnesses you can consider for creditability and
15 believability how many times an expert testifies for the
16 defense, how many times they testified for the State or
17 the plaintiff and how they make their money. It is
18 something that can be considered and something they can
19 comment on.

20 And this to me is an impermissible comment on the
21 facts. You all can argue that. You can say you know she
22 said she's fair, she said how many times she's testified
23 for the State or the defense; we believe her testimony
24 should not be considered any less viable or valuable
25 because of that. But for me to interject that they are

1 not to consider how she is paid that's not accurate.

2 MR. GROEBER: And the concern for us, of course is

3 ---

4 THE COURT: --- and this is a 1943 case. There
5 have been at least ten cases that have come out since
6 then that says it is appropriate to consider especially
7 in civil context.

8 MR. GROEBER: I think that the charge as requested
9 does -- the second part of the charge does say you can
10 take into those considerations ---

11 THE COURT: --- except there are cases that have
12 come out since then that says you know -- right on point.
13 You can consider how somebody makes their money, what
14 industry they make it from, how much they generate from
15 it; it all goes to creditability and believability.

16 MR. GROEBER: And I believe the charge as requested
17 does say that the jury can consider that. It's ---

18 THE COURT: --- this is not accurate. There are
19 cases that have come out since this that are more
20 accurate. I think you can argue that she goes to work
21 every day to get paid and you shouldn't hold that against
22 her that people's time is valuable just like a lawyer's
23 time is valuable; it's our stock in trade. I think you
24 can argue all of that but I'm not going to comment on it
25 because I think it gives coming from the court it says to

1 the jury how they are to -- something outside of the
2 standard language in terms of how they are to weight
3 witness creditability and believability. And if I were
4 to instruct something I would instruct what is current
5 and prevailing, which is they can consider it. It goes to
6 creditability and believability. It goes to where your
7 income is generated from.

8 MR. GROEBER: And I did not mean to submit a charge
9 that does suggest that. I just don't think -- I think
10 the charge doesn't have -- I can understand reading it,
11 rereading it now how that could be a concern the way its
12 worded but I took it straight from Anderson.

13 THE COURT: And I like Judge Anderson. He's one of
14 my dearest friends and he's more than competent. But I
15 think there are cases since then -- you know jury charges
16 are instructive. And since then there are cases that
17 have come out -- a whole progeny of cases that say it's
18 appropriate to ask about it and it's appropriate for a
19 jury to consider it.

20 There are some experts that only testify for certain
21 causes. There are some experts who only testify for
22 other causes. There are some experts that generate that
23 is their whole livelihood; how they make a living and the
24 jury can consider all of that. It goes to creditability.

25 MR. GROEBER: And I guess the reason we request it

1 specifically in this instance is that because we are in a
2 situation where we have -- we don't have experts that
3 come and testify for free for us as the State does. That
4 is why we ---

5 THE COURT: --- I don't know if Doctor Amaya
6 charged the State for her time. I have no idea ---

7 MR. GROEBER: --- she is a State employee, Your
8 Honor, and she is part of ---

9 THE COURT: --- that doesn't stop her from
10 charging. MUSC one of the benefits of being a doctor
11 there is you get to be an independent contractor and you
12 get to be their employee. You can have a whole industry
13 going. Did you ask her those questions?

14 MR. GROEBER: Well, she did say that she was part
15 of this team that was ---

16 THE COURT: --- doesn't matter. It's been my
17 experience that they get paid too.

18 MR. GROEBER: I'm sure they do.

19 THE COURT: No, they get paid -- a lot of them have
20 separate consulting situations where they get paid and
21 they have a whole system where the money is paid to the
22 university and then it filters its way back to them. You
23 should have asked the question and you didn't. So I
24 don't know whether she got paid extra money or not.

25 MR. GROEBER: Thank you, Your Honor.

1 THE COURT: It's been my experience however that
2 they are allowed to and that they do because MUSC ain't
3 too fond of letting their employees come spend a lot of
4 time in court and not get paid. Somebody has to
5 reimburse them for their time.

6 Now as it regards character evidence I would not
7 instruct that because there has been nothing raised
8 regarding his character.

9 MR. GROEBER: We would argue that the discussion
10 about the anxiety ---

11 THE COURT: --- that's factual. Character is
12 truthfulness or not truthfulness. And that is the only
13 instruction that would be applicable when you start
14 dealing with character. And that's a reputation for
15 character otherwise it's factual and you can argue that.
16 You can argue that that's really about his state of mind;
17 that's not about his character. And there has been no
18 testimony presented regarding his character.

19 Character testimony is testimony that is presented
20 for purposes of a good reputation whether the person's
21 activities were consistent or inconsistent with that good
22 character and their reputation for truthfulness or
23 otherwise. What you're talking about is his state of
24 mind at the time of the incident and you can argue that
25 many inferences can be drawn from that and in fact your

1 client testified that it was just -- the way he behaved
2 was merely a reaction to the fact that his child had been
3 injured; that's not character. So I will not instruct
4 character and I will note your exception. Your request
5 to instruct will be marked as a court's exhibit.

6 [Whereupon, court's exhibit number 3 is marked by
7 the court reporter]

8 MR. GROEBER: Thank you, Your Honor.

9 THE COURT: Are there any exceptions to the charges
10 proposed or as we've gone over the charge conference that
11 we have not discussed?

12 MS. WILLIAMS: Your Honor, we just have a new one
13 that I know that you're probably not going to do this but
14 if you would just consider over the break -- I'm not
15 being very persuasive am I? We would just ask just like
16 you do in a curative instruction in that they should only
17 consider certain things from one statute that you
18 consider doing a curative instruction on mere presence
19 that they only consider that for the infliction ---

20 THE COURT: --- I think you can argue it. And they
21 are not going to argue the contrary so then there is no
22 ambiguity. But there is ambiguity -- I don't want them
23 saying that because this child had a broken leg that was
24 old and because she had a fracture to her arm that was
25 old that somehow this is a course of conduct towards her

1 and because he may have done that that he did this. That
2 is why I am doing a curative instruction. If it were not
3 -- because with that unlawful conduct charge you don't
4 have to prove who did it but I don't want the jury
5 inferring that somehow he did these acts and therefore he
6 did these other acts because it's not -- it's almost in
7 the nature of prior bad acts. It's a funny thing. You
8 need certain facts to prove the elements of this
9 indictment.

10 But if there were not an indictment they wouldn't
11 come in because they would be considered prior bad acts
12 that are not the subject of the conviction. So I
13 fashioned my own sort of liable curative instructions so
14 that the jury is not confused. That they can only
15 consider those things for him not giving his child
16 treatment but not at all as to whether he in fact
17 committed these offenses that caused either one or two of
18 these fractures to her skull.

19 MS. WILLIAMS: And I appreciate that, Your Honor.
20 I think that that's definitely important because of the
21 basis for the motion being denied on severance. I'm just
22 concerned that mere presence actually -- mere presence
23 for unlawful conduct he would still be guilty just by the
24 fact that he's in the home and he's a parent ---

25 THE COURT: --- that's not mere presence.

1 MS. WILLIAMS: I'll review -- obviously I need to
2 review the mere presence.

3 THE COURT: Yes. That's about how you argue it but
4 that's not mere presence. Are there any other exceptions
5 to the charge as proposed from the State?

6 MS. WILLIAMS: No, Your Honor.

7 THE COURT: From the defense?

8 MR. GROEBER: The only other thing I would add is
9 that we don't think that the curative instruction ---

10 THE COURT: --- I'll take it out if you want.

11 MR. GROEBER: Well, no I think -- I understand why
12 the court would do it considering the earlier ruling on
13 the motion to quash and the severance.

14 THE COURT: That's not why I did it. It's not at
15 all why I did it. I did it because -- I still stand by
16 my earlier decision which is that it's a continuum of
17 events that is part of the res gestae. It's a small
18 snapshot in time and they are not precluded from
19 presenting the same evidence.

20 I did it out of an abundance of caution to your
21 client. I didn't have to do it at all. I just did it
22 because I want to make sure that there is not even a
23 remote risk that he suffers any prejudice as a result of
24 it. But if you want me to take it out I will. It's up
25 to you; I'll give you the option.

1 MR. GROEBER: Can I have one second, Your Honor?

2 THE COURT: Uh huh.

3 [Whereupon, Mr. Groeber and Mr. Shelton confer]

4 THE COURT: Yes sir?

5 MR. GROEBER: I'll try to put it as best as I can,
6 Your Honor.

7 THE COURT: Either it's in or it's out. There is
8 no middle ground. Either you want it in or you don't
9 want it in.

10 MR. GROEBER: We don't believe that it is -- that
11 it cures our earlier objections to the ---

12 THE COURT: --- I'm not rearguing the severance.
13 I've already made a decision on severance; I've moved
14 from that. There are two separate issues. One is that
15 you wanted the charges separate. I denied it. I've
16 already stated the reasons for it.

17 I have fashioned what I believe is the appropriate
18 curative instruction which is separate and apart from the
19 severance because they are other acts that have been
20 introduced into the record and I do not want the jury to
21 believe that they can consider those acts as evidence of
22 any of the elements of the other offense he's charged
23 with, which really it's almost cumulative because I'm
24 going to instruct them on multiple offenses, which is you
25 can only consider the evidence and the law applicable to

1 it on each indictment separate and independent of one
2 another. But out of an abundance of caution I included
3 the curative instruction. If you don't want me to
4 instruct it I won't. It's a yes or no.

5 [Whereupon, Mr. Groeber and Mr. Shelton confer]

6 MR. GROEBER: Your Honor?

7 THE COURT: Yes, sir?

8 MR. GROEBER: I think I've said what I need to for
9 the purposes so we would like the curative instruction.

10 THE COURT: You would or you would not?

11 MR. GROEBER: We would.

12 THE COURT: Okay. Is there anything else we need
13 -- I need you all to look at the verdict forms. I'm
14 going to print those in just a second. Other than that
15 is there anything we need to take up before I send the
16 jury to lunch and before we then commence with closing
17 instruction from the State?

18 MS. WILLIAMS: No, Your Honor.

19 THE COURT: From the defense?

20 MR. SHELTON: No, Your Honor.

21 THE COURT: All right. If y'all will give me one
22 moment because it's a little loud; that's why we waited
23 to print it. As soon as that prints I'll show those to
24 you. How long do y'all need for lunch?

25 MS. WILLIAMS: Maybe an hour and 15 minutes. Would

1 that be okay?

2 THE COURT: Is that enough time for y'all ---

3 MR. SHELTON: --- an hour and a half, Your Honor,
4 an hour and a half.

5 THE COURT: An hour and a half I wouldn't -- if we
6 took an hour and a half I would have to do closing
7 argument and instruction tomorrow. See once you start --
8 I have to calculate my time. If I do an hour and a half
9 that's 2:20 that is then 2:35. You're going to be an
10 hour and she is going to be an hour; that's two hours,
11 that's 4:35. My instructions are then 25 to 30 minutes
12 and we're at 5 o'clock.

13 MR. SHELTON: Our office is not in the courtroom so
14 we ---

15 THE COURT: --- no, if you want to close and charge
16 tomorrow we can do that. But I'm not keeping a jury here
17 after 5 o'clock to deliberate. They have
18 responsibilities at home. They have children and other
19 obligations and responsibilities. I'm not going to have
20 them here all night deliberating either. I'm going to
21 give them an option to go home at 6 o'clock because we
22 don't have anything to feed them but pizza.

23 MS. WILLIAMS: It would just be nice to be done.
24 But we would just prefer to close tonight even if they
25 have to resume deliberations tomorrow assuming they still

1 are. We can make it an hour -- just an hour for lunch.

2 THE COURT: Well, y'all need to have time to
3 prepare for your closing arguments and I don't want you
4 to feel rushed.

5 MR. SHELTON: I do need some time to prepare after
6 testimony today, Your Honor.

7 THE COURT: I'm sorry, I didn't hear you.

8 MR. SHELTON: After testimony today I do need some
9 time to ---

10 THE COURT: --- y'all tell me what you want to do
11 and that's what we will do.

12 [Whereupon, Mr. Shelton and Mr. Groeber confer]

13 MR. SHELTON: Your Honor, an hour and 15 should be
14 all right.

15 THE COURT: Okay. That takes us to then basically
16 2:30.

17 MR. SHELTON: Yes, Your Honor.

18 THE COURT: Well, it would be a little less than an
19 hour and 15. That still takes us to 5. We'll see how it
20 goes.

21 MS. WILLIAMS: Thank you, Your Honor.

22 THE COURT: Please bring in the jury for me.

23 [Whereupon, the jury enters at 1:19 p.m.]

24 THE COURT: Ladies and gentlemen, we appreciate
25 your patience. We needed to go through some matters of

1 law that took a little longer than I anticipated. Both
2 the State and the defense have rested their cases. The
3 next part of the process is closing arguments and the
4 court's instructions.

5 We're going to break for lunch until 2:30, which
6 gives you about an hour and ten minutes. During the
7 break please do not discuss the case among yourselves or
8 with anyone else. Please don't have any interaction with
9 anyone in or about the courthouse when you return and
10 please don't do any independent research on the Internet
11 regarding any issue or matter in this case.

12 You are sworn to be the fact finders in this case
13 which means that you have to do all that you can to
14 protect your impartiality. While you have heard all of
15 the facts in this case you have not heard the arguments
16 of the attorneys nor have you heard the court's
17 instructions on the law. So please guide yourselves
18 accordingly -- govern yourselves accordingly and make
19 sure that your impartiality is not affected in any way
20 during this lunch recess.

21 For your planning purposes I anticipate that closing
22 argument and instruction will take us very close to 5
23 o'clock. If any of you have any challenges with daycare
24 of otherwise please make the bailiffs aware of it meaning
25 if you need to leave right at 5 or 5:30 please let us

1 know. Otherwise what we will probably do is go until
2 about 6 o'clock and then I will allow you all to go home
3 for the evening recess and then we will resume
4 deliberations in the morning so that you can attend to
5 your personal responsibilities.

6 We thank you again for your patience. Enjoy your
7 lunch and we will see you at 2:30. You will come
8 directly to your jury room. And please leave your
9 notepads in your seats.

10 [Whereupon, the jury exits at 1:21 p.m.]

11 THE COURT: If y'all could approach for me and look
12 at this.

13 [Whereupon, an off the record bench conference is
14 held]

15 [Whereupon, court is in recess from 1:21 p.m. to
16 2:35 p.m.]

17 THE COURT: Could you all please go through all the
18 evidence and make sure everything is in place.

19 [Whereupon, counsel reviews the exhibits with the
20 court reporter]

21 THE COURT: Is all the evidence in place from the
22 State?

23 MS. WILLIAMS: Yes, Your Honor.

24 THE COURT: From the defense?

25 MR. SHELTON: Yes, Your Honor.

1 THE COURT: All right. Are we ready to proceed
2 from the State?

3 MS. WILLIAMS: Yes, Your Honor.

4 THE COURT: From the defense?

5 MR. SHELTON: Yes, Your Honor.

6 THE COURT: Please bring in the jury.

7 [Whereupon, the jury enters at 2:40 p.m.]

8 THE COURT: Madame Forelady and ladies and
9 gentlemen both the State and the defense have rested
10 their cases. The next part of this process is closing
11 arguments and the court's instructions. You will hear
12 from the State followed by the defense and then you will
13 have last argument from the State.

14 In our rules of procedure the party who has the
15 burden of proof always gets the right to open and close
16 or have the last say so to speak after which I will
17 instruct you on the law applicable to this case. I would
18 ask that you give the attorneys your attention. The
19 State may proceed when it's ready.

20 MS. WILLIAMS: Thank you, Your Honor. May it
21 please the court?

22 THE COURT: Yes, ma'am.

23 CLOSING ARGUMENT

24 BY MS. WILLIAMS:

25 I first want to thank you for your attention and

1 time. I know sometimes it is excruciating. I'm going to
2 talk to you very, very briefly and then I am going to sit
3 down and Mr. Shelton is going to talk to you. And then I
4 am going to return and try to be as brief as possible.

5 What I am going to tell you right now is really just
6 about the law. And if I say anything that is different
7 from what Your Honor says please defer to her. She is
8 the authority on the law and if anything I say differs
9 from her it's not on purpose I promise.

10 The first thing I wanted to talk to you about is the
11 first charge that the defendant is charged with. This
12 charge is Unlawful Conduct Toward a Child. We have to
13 meet each element of this charge and this is what we have
14 to prove. It is unlawful for a person who is the parent;
15 Mr. Berke is the parent of Minor Berke, or guardian of a
16 child or someone who has the charge or custody of a child
17 to place the child at unreasonable risk of harm affecting
18 the child's life, physical or mental health or safety.

19 And there will be an indictment with that charge
20 when you get it back in the jury room. And we have a
21 very broad range of dates. What we are alleging is that
22 it could have happened anywhere in those dates. It's
23 very difficult to determine when these things happen in
24 terms of neglect because little babies can't talk. So
25 that's why you see such a wide range of dates. We are

1 not with this charge trying to prove that Mr. Berke
2 inflicted anything on Minor Berke. We are simply trying
3 to prove what is in the statute, which is basically that
4 he neglected her. That she had a broken leg that wasn't
5 treated. She probably had a broken arm that wasn't
6 treated. She didn't get her immunizations; she didn't
7 get her well visits. So that's what this charge is all
8 about. And we'll talk a little bit more about that
9 later.

10 The second charge is Infliction of Great Bodily
11 Injury Upon a Child. This charge deals with the head
12 injuries. It is unlawful to inflict Great Bodily Injury
13 Upon a Child. And great bodily injury is going to be
14 defined for you. The definition is bodily injury which
15 creates a substantial risk of death, which causes serious
16 or permanent disfigurement or protracted loss of
17 impairment of the function of any bodily member or organ.

18 So when the doctors say she could have died that's
19 what we're talking about here. When the physical
20 therapist gets up and says that she had delays we're
21 talking about protracted loss of brain development. When
22 she has to relearn to walk with braces that's what we are
23 talking about here. And we have to prove that
24 Christopher Berke inflicted those injuries on Minor Berke.
25 Now reasonable doubt is something that lots of people

1 like to talk about. On television and in the courtroom
2 people get up and give folksy little definitions and
3 stories about reasonable doubt. The Judge is going to
4 make it very, very simple for you. She is going to give
5 you a definition of reasonable doubt.

6 It's not all doubt. We can't prove anything beyond
7 all doubt. Reasonable doubt is a doubt which causes a
8 reasonable person to hesitate to act. It is not every
9 possible doubt. That's not our burden. There are very
10 few things in life that we know with absolute certainty.
11 It is proof that leaves you firmly convinced of the
12 defendant's guilt.

13 When you walked in here on Monday you knew
14 absolutely nothing about this case. If you now think
15 after closing arguments that he did it I would suggest to
16 you that that is because we've proven our case because
17 you've heard all the evidence. So that's reasonable
18 doubt.

19 The last thing I'm going to talk to you about is
20 circumstantial evidence. That's another term we see on
21 television a lot and a lot of us like to talk about it.
22 But there are some illustrations that I can make it very
23 simple for you. It was raining this morning. So if you
24 look out the window and you see it raining that's direct
25 evidence of rain. Or if you go out and you feel it on

1 yourself that's direct evidence of rain. If, for example
2 one juror goes out and none of you see it rain and they
3 come back in with wet clothes that's circumstantial
4 evidence that it rained. You didn't see it rain but it's
5 obvious to you because their clothes are wet and they
6 just went outside and came back in.

7 So in this case you have a lot of circumstantial
8 evidence. It doesn't mean that you can't use it to
9 convict Mr. Berke it's just different type of evidence.
10 And you're going to get an instruction on that. I thank
11 you very much for your time and I will be back to talk to
12 you after Mr. Shelton.

13 THE COURT: You may proceed.

14 MR. SHELTON: Thank you, Your Honor. May it please
15 the court?

16 THE COURT: Yes, sir.

17 CLOSING ARGUMENT

18 BY MR. SHELTON:

19 June 2nd, 2012 Armando Galarraga [phonetic] from the
20 Detroit Tigers was throwing a great game. He's a
21 pitcher. He was one out from a perfect game. Twenty-
22 three times a pitcher in the history of major league
23 baseball has thrown a perfect game. On June 2, of 2012
24 only 20 people had. Jim Joyce first base umpire missed a
25 call; missed a call at first base. The perfect game was

1 over. He called the runner safe and it was clear he
2 wasn't safe. They didn't have replay, they couldn't go
3 back. That was over. He didn't get a chance to go back
4 and get that call right.

5 Luckily Chris has an impartial jury that is going to
6 look at the evidence. Doctor Canter when she talked
7 about a hypothetical of one incident in the tub she
8 mentioned could have hit her head forward and came back
9 and hit her head again. She gave that hypothetical.

10 Where Chris was at that time of the night at that
11 day on September 5th everybody was sick. They are all
12 taking Pedialyte having diarrhea; everybody was. He was
13 looking for a job. He was going out to Walmart. He was
14 picking up supplies. He was making dinner.

15 His wife had thyroid cancer. His wife had thyroid
16 surgery and had mood problems, had other issues, had
17 depression and he had three kids running around and you
18 have a child that's not wanting to take a bath. He saw
19 her hit her head. He told everybody that. That's what
20 he saw.

21 Could she have come back and hit her head on the
22 other side? He said that he saw her hit her head. And
23 you will get in evidence the statement that he told and
24 wrote for Detective Fenton. She started crying and
25 freaking out like normal but then she started kicking and

1 she slipped out my hand and hit the left side of her
2 forehead. That's what he said; that's what he saw.
3 That's all he knew. Chris gets the benefit of the doubt.
4 The benefit goes to Chris.

5 The simplest explanation is always the truth. The
6 ER doctor, the two social workers, two DSS persons, two
7 police officers, Doctor Amaya talked with Sandra. She
8 said that the tub incident was consistent. You heard
9 Doctor Amaya say that. She's the one who talked to
10 Sandra. The tub incident was consistent. She told you.
11 The tub incident could have occurred. You heard the
12 doctors testify to that.

13 Doctor Jacobsen on the left side had the bruise, the
14 pinpoint bruise into her orbit. You had Doctor Cina. He
15 didn't know where they had told him about the bruise but
16 Jacobsen he said that; the bruise where she hit her head
17 Jacobsen said that. Doctor Cina said it looks like it
18 was possibly two events. And Doctor Amaya said that it
19 was consistent.

20 So what did Chris do after the tub incident? He
21 called, he asked for help. He got advice. He saw the
22 next day what happened and saw what condition she was and
23 took her to the hospital. That's what everybody does.
24 That's what every parent does. He told the truth. He
25 told what happened. He can't explain the back of the

1 head. He doesn't know. He saw what happened. The thing
2 he saw was her hitting the front of her head. That's
3 what he saw. He didn't try to make up something about
4 the back of her head because he didn't see that. He
5 didn't see anything that could have caused anything from
6 the back of her head. He saw what he saw and that was
7 the tub incident. That was her hitting her head.

8 So what did the doctors say if it's two separate
9 incidents it didn't happen in the tub? If the back of
10 the head didn't happen in the tub what did the doctor
11 say? It's not dateable. Within 72 hours it's acute.
12 The skull fracture, couple of days, two to three days;
13 possibly longer, the subdurals, the injuries inside on
14 the top of the brain. It's acute; no symptoms. Or were
15 there symptoms, possible symptoms? The throwing up, the
16 vomiting; they were small. The bruises -- you can't date
17 bruises in the subgaleal.

18 The only reason that Doctor Canter came to testify
19 was for the subgaleal. She was brought in to give an
20 unbiased opinion. Doctor Amaya is the home team. She's
21 the home crowd. She's the one begging for those unbiased
22 people to make the decision she made. She's got pride.
23 She doesn't want to be wrong. But it's clear, it's clear
24 from the visibility of bruises, it's clear from the
25 article that you can't date subgaleals. And the anemia

1 and the hemoglobin could have actually made it longer
2 because they would have been bleeding out. It made it
3 clear that you wouldn't see the subgaleal. You might not
4 have seen the subgaleal for a while; for up to a day.

5 But Doctor Amaya has to interact with everybody,
6 part of her victim injured prosecution team; the
7 Solicitor, the police. And you all heard the testimony.
8 It's the best piece of evidence, the testimony, and how
9 the direct questions she would answer from the Solicitor
10 but she would always come up with something different on
11 my direct questions. She'd answer them and come up with
12 some kind of different explanation. There is no
13 evidence, no evidence presented that Chris inflicted an
14 injury. He testified that he didn't. No evidence that
15 he inflicted an injury.

16 And the Solicitor gave you circumstantial evidence.
17 I submit to you when the Judge gives the law she is going
18 to add a word to circumstantial evidence and that is
19 substantial circumstantial evidence.

20 As for the unlawful conduct, the negligence, not
21 taking to the hospital, to the well visits, the
22 immunizations; it's not against the law to not take to
23 the hospital. But you heard Chris's explanation. He
24 just got back. April 19th his wife went through thyroid
25 surgery. They moved back to South Carolina to be closer

1 to family. There was a lot going on, finding a job --
2 trying to find a job. He explained he tried to get his
3 records -- her records, Minor records. He explained
4 that.

5 There was a lot of talk about regression and that
6 the child's gross motor skills were regressing; one that
7 was based all from the history from Sandra. And if you
8 heard April 6th, 2011 Chris got back April 19th, 2011
9 Minor went to the hospital. He didn't know about that
10 until court. Minor went to the hospital and they wrote
11 down gross motor delays. So was there regression? The
12 physical therapist didn't talk about having any of this
13 stuff before; only from the foster mother.

14 So where is Sandra? She was also charged. What
15 about her statements? Were they self-serving. Are they
16 trying to protect her behavior? Two persons believed
17 Chris; Detective Fenton and the social worker. It made
18 sense what she said; he wasn't around. It made sense
19 that he didn't know about what was happening.

20 Detective Fenton said he got the reports, the
21 medical reports, November of 2001 [sic] two months after
22 the incident occurred; two months after they took her to
23 the hospital. They didn't do a warrant for 14 months
24 later after he called the Solicitor. Detective Fenton
25 mentioned that the house was in order. You didn't hear

1 any evidence about other injuries on the other children.
2 There were two other children in the house. Chris told
3 you what he saw and observed concerning Minor He told
4 you that if he saw anything he would have said something.
5 He would have protected her. That's what a Father does.

6 I'm going to talk a little bit about reasonable
7 doubt and I'm going to bring back a little sports
8 analogy. I'm sorry for people who don't like sports; I'm
9 talking about it a lot. But a football field is 100
10 yards long. You've got the ten yard line and that's
11 about probable cause. Fifty one yard line that's --
12 excuse me one second.

13 [Whereupon, Mr. Shelton reviews documents]

14 MR. SHELTON: Preponderance of the evidence -- 51
15 percent is preponderance of the evidence. About the 71
16 yard line that's clear and convincing evidence, the 95
17 yard line is reasonable doubt. I'm not going to say all
18 doubt but it has to be beyond all reasonable doubt.

19 We all are reasonable people and if you hesitate to
20 act there is reasonable doubt. And you're going to get
21 the indictment. The indictment says as I said in my
22 opening December of 2010 -- and you heard Chris testify
23 December 4th of 2010 he undertook gunfire. He fought for
24 our country. At the time that he was under fire she --
25 the Solicitor's office charged him with Unlawful Conduct.

1 He returned April 19th. I'm confident when you look at
2 the evidence as an unbiased jury there is no evidence
3 that Chris committed or inflicted great bodily injury or
4 that he neglected Minor care. And I would ask that you
5 find him not guilty.

6 REPLY-CLOSING ARGUMENT

7 BY MS. WILLIAMS:

8 This isn't a game. I mean I appreciate that you
9 have to make analogies sometimes but this is not a game.
10 This is this kid's life. I mean this isn't a missed
11 play. This isn't a 50 yard line; this is serious stuff.
12 I mean this is important. It's not just important to the
13 defendant it's important to this child. She had her head
14 beat in.

15 There is no witness that you heard from on that --
16 no expert says this wasn't abuse. This was abuse. There
17 are all kinds of complicated arguments going on here. It
18 all happened in the bath; it happened before the bath, it
19 happened after the bath.

20 Let me tell you something. No question it was
21 abuse. Very simple; this was abuse. Everyone agrees.
22 Christopher Berke was with the child when she was
23 injured. How do we know that because he said he was.
24 What else do you have to go on? He said he was with her
25 when she was injured. Obviously he's checking on her

1 every half hour. He's checking to see if she is
2 breathing. He sleeps on the couch until 3 in the morning
3 checking on her. Something bad happened and he's worried
4 about that kid. And these are people that don't even
5 take her to the doctor when she has a broken leg. So
6 something serious is going on and he says it happened in
7 the bath.

8 And then the final thing is nothing he says happens
9 in the bath matches the injury. And that's where he gets
10 messed up because he can't say it didn't happen in the
11 bath because Sandra knows he was in the bath with her.
12 He can't lie about that. There is another person that
13 knows he was in the bath with her. So they just want to
14 throw out these innuendos.

15 He goes to the hospital. He's not a doctor. He
16 doesn't know she has subdural bleeds. He doesn't know
17 that she has a big giant complicated fracture on the back
18 of the head that their expert said she was walloped. So
19 he gives an explanation that makes sense to a lay person.

20 He sees that she's got this going on here and he
21 says well, she just fell forward and she hit her head.
22 And he hopes that that is going to work. Well, it didn't
23 work because there is all kinds of other stuff going on.
24 And that's the truth. You are the sole judges of
25 creditability. You are. You heard him testify. Now, he

1 was not telling the truth, ya'll. He was not telling the
2 truth. He lied about a number of things, stupid things,
3 and that's what screws people up. It's not the big
4 things because they can memorize those stories; it's the
5 little things. He wants you to believe he never gave
6 this child a bath ever. Why he would lie about that I
7 don't know but he's got to stick to it because that's
8 what he said.

9 He's been home with her since April. For two whole
10 weeks Sandra was in bed because she had just had cancer
11 surgery. First he said I was the sole person taking care
12 of the kids but he never gave Minor a bath. That makes no
13 sense. And then when he is challenged about he says well
14 we didn't want to break our routine. And that made no
15 sense either.

16 They want to come out here and wave the American
17 flag. And good for him that he served our country. Good
18 for him. And maybe bad things happened to him over there
19 and that's too bad. But you don't get to come home and
20 you don't get to beat your kids.

21 And they want to talk about all the good things that
22 happened in the service and all the things that happened
23 to him. But he's not even reporting when he comes back
24 for the guard. He's just blowing it off; taking the
25 benefits and blowing it off. Nine times he just doesn't

1 show up. So just consider the whole story when you think
2 about these things because this is serious stuff. This
3 is not about baseball. This is not about football. This
4 is about a little girl. There were so many misstatements
5 up here that I would just like to clarify a few things
6 and then very briefly go through the witnesses with you
7 and then let you go because I know you've got to be tired
8 of hearing about all this stuff.

9 First of all Doctor Amaya did not say that if this
10 child was in the bath and went forward and went back that
11 that could have caused these injuries. Her head cracked
12 on something. And you cannot tell me that this kid was
13 not in pain. That's the other big thing that everyone
14 seems to be ignoring over here is that they would have
15 you believe that somehow this child had all these
16 injuries; ouch, this doesn't hurt? Her whole head was
17 cracked open. That doesn't hurt?

18 They're all in the trailer together him, Sandra, and
19 the little kids and she's knocked all around the head and
20 she's not crying? He doesn't notice? He says while he
21 is giving her a bath before she freaks out because she
22 hates having a bath which he knows even though he's never
23 given her one that she is playing, she is happy. That's
24 what he says. She's all happy; look at his statement.
25 And then all of a sudden she freaks out and she falls

1 forward. Everything that happened to that kid's head
2 happened in that bath. She was not injured beforehand or
3 he would have known it. He was washing her hair. I mean
4 she's a little baby. You don't think that brain bleeds
5 that would have hurt her? I mean she had severe
6 injuries. Now let's go through some of the witnesses
7 because even though it's only been two days I swear it
8 seems like a week.

9 I want to go through some of the evidence that you
10 heard very briefly. First I want to talk about it in
11 terms of a timeline. Let's consider this because I think
12 this is very important. He is deployed. While he is
13 deployed this child is going to the doctor on a fairly
14 regular basis in Kentucky. Very interesting to me that
15 the last time she goes to the doctor is in April of 2011
16 okay.

17 So right before he comes home she goes to the doctor
18 for the last time. They want to make a big deal about
19 the fact that it was the emergency room but Doctor Amaya
20 told you it was because she was spitting up or something.
21 She went to the emergency room because she was sick; no
22 head fractures, no broken bones. She's going to the
23 doctor on a fairly regular basis. In comes Dad and all
24 of a sudden she's not going to the doctor anymore okay.
25 Within that period of time she has an untreated broken

1 leg. She probably had an untreated broken arm but the
2 doctors are being conservative and they're saying we're
3 just not sure about that. But all the emergency room
4 doctors thought she had an untreated broken arm.

5 She has massive head injuries and then she is
6 removed from his care. And voila she is in foster care,
7 no more cracked head, no more broken bones; she's fine.
8 It's interesting that she does have an accident. And
9 this is how it should work when a child has an accident.
10 She jumps off the couch, she chips a bone in her foot and
11 they take her to the doctor right away. They treat her
12 and she gets sent home. That's how it should happen.

13 But while he's gone everything is fine. She's going
14 to the doctor and no serious injuries. While she is with
15 him lots and lots of problems in a very short period of
16 time. Think about all the injuries this kid had within a
17 very short period of time. She is removed from his home
18 and all of a sudden we're no longer at the emergency room
19 all the time.

20 Now, the Unlawful Conduct charge I talked to you
21 about that very briefly. We can argue all day long about
22 whether people should have to take their kids to the
23 doctor, whether people should have to have their kids
24 vaccinated. But I would suggest to you that if you have
25 a child who is pulling up -- and you can use your common

1 experience by the way. Your common sense is the best
2 asset that you bring to this process. Anyone that has
3 had a child you watch the child -- especially when they
4 are little babies you watch them get to their milestones.
5 The child is pulling up and the parents say all of a
6 sudden she stops pulling up.

7 Well, something is going on. And then you find out
8 that two weeks before she goes to the emergency room she
9 had a broken leg; on the outside maybe four weeks. Even
10 their expert said a couple of months, a few months. So
11 she has a sure enough broken leg. They don't treat it.
12 You cannot tell me that that kid would not have been
13 somewhat uncomfortable after she broke her leg. It
14 doesn't matter how she broke it you've got to take her to
15 the doctor. Had they been taking her in for well visits
16 they might have noticed that she had a broken leg.

17 Let's also talk about under the Unlawful Conduct
18 we're not trying to prove under this charge the
19 infliction of the head injuries. But he knew that she
20 had head injuries and yet he waits all night to take her
21 to the hospital. And he knows something is wrong because
22 he beat her head in and also because he is checking on
23 her every half hour. He wants to make sure she is
24 breathing. So it's not just the untreated leg although
25 any of these things on their own would prove this charge.

1 And let me make something else very clear. They can
2 throw around the shadow of Sandra did it. Sandra is
3 going to have her day in court. It's not today but I
4 promise you she is also charged with neglect. She's not
5 charged with the infliction but she is charged with
6 neglect as she should be because they both had an equal
7 responsibility to take care of this child and they
8 didn't. So both parents are charged. They can both be
9 guilty of this charge at the same exact time because its
10 neglect. And she will have her day in court; it's just
11 not today.

12 Now let's go through -- Doctor Jacobsen seems like a
13 long time ago but he was the State's first witness. The
14 defendant tells him that Minor fell forward and he
15 specifically tells him that he caught her before she
16 could hit her head again.

17 Even this doctor knows these injuries are not
18 consistent with this story. And then for some reason the
19 defendant throws in you know she's just never warmed up
20 to me, which I don't know why he says that; it's probably
21 true. But it's interesting about the relationship that
22 he has with Minor

23 Detective Fenton, he did not realize the seriousness
24 until he understood the medical records. That's a very,
25 very honest thing to admit to. This is not a case where

1 you could just look at the kid and know that the story
2 that the defendant gives is not consistent with the
3 medical records. And the fact that the Solicitor's
4 office helped them get the medical records, good for us
5 for helping them get information to help them determine
6 how to do their job in investigating.

7 In a case like this if you have not reviewed the
8 medical records you're not going to be able to make a
9 decision about this case. It's a very technical medical
10 case as evidenced by the fact that both of us felt like
11 we had to have experts here to explain it to y'all.

12 So without looking at the medical records he doesn't
13 know if it's a crime. It sounds like a reasonable
14 explanation, you know. The kid fell; it could have
15 happened. Once the doctors tell him there is no way all
16 of this stuff going on in this kid's head could have been
17 caused by that then he realizes he has probably cause.

18 He also does the drive -- and this is going to be
19 interesting and very, very important later. Remember
20 that the defendant himself tells you that he goes out
21 that whole day for an hour and a half for a job
22 interview. He comes back and from 7 o'clock on, from the
23 bath on, he is home continuously checking on the child
24 every half hour. He then leaves to take Sibling² to school,
25 which that trip takes about 10 minutes and 17 seconds is

1 what the detective told you because he drove it. And
2 that's really the only time he's gone from the house.
3 When he comes back Sandra is still asleep and there is
4 two different stories but Minor is still asleep in both of
5 them. So I guess you would have to believe that Sandra
6 woke up, went in, beat Minor went back to bed and fell
7 asleep and Minor fell back asleep too if it were to happen
8 while he was gone taking Sibling₂ to school because other
9 than that he is home.

10 Deputy Arrington. Deputy Arrington testified that
11 the defendant said he was with Minor when she was hurt.
12 He tells the same story. And he also says -- and at this
13 point they've got information that there is a head
14 fracture in the back. Uh oh, our story is not working.
15 So there is also something back here [indicates]. How
16 are we going to explain that? So they come up with this
17 story well actually Minor fell back off a bench and she
18 hit her head back and that was about three weeks ago.

19 The problem with that is that Doctor Amaya said she
20 doesn't think that could have been three weeks ago
21 because of that boggy area over the fracture. And
22 actually even their expert says that three weeks -- it
23 wouldn't have taken three weeks. It could have taken
24 hours like up to 48 hours for that soft tissue damage but
25 not three weeks for that kind of fracture. And also she

1 says that when the baby falls back off the bench she
2 picks her up and she doesn't even notice a knot or
3 anything on her head. Remember what kind of fracture
4 this was. This was a complex fracture; a very serious
5 fracture. Their expert said that the child got walloped.

6 Now this is -- this big Perry Mason moment about how
7 Sandra must have been lying about the defendant taking
8 Sibling2 to school on Labor Day. You remember that?
9 Actually when you think about it -- Officer Arrington --
10 Deputy Arrington is at the house at 2 a.m. and Sandra is
11 just coming back from the hospital. I think that their
12 expert made the remark that Doctor Amaya was at the
13 hospital past midnight talking to Sandra Berke.

14 So when Sandra Berke is talking to the hospital and
15 telling them the story it's already the next day. So
16 when she says he took Sibling2 to school and all that stuff
17 she's not talking about the 5th -- or the 4th rather,
18 Labor Day. She's not talking about -- I think Labor Day
19 was the 5th.

20 She's talking about the same day he is when he took
21 her to school because it's already -- she's already been
22 at the hospital past midnight and at 2 a.m. So she is
23 just talking about the same day that the defendant is
24 because it's already 2 in the morning. So that's really
25 not as big a deal as it is being made out to be. Doctor

1 Cina. He tells you that Minor could have died had the
2 bleeding on her brain not stopped. Good thing she did
3 finally get to the hospital. He explained how serious of
4 an injury it was and he says the blow to the back of her
5 head required significant force. He also says the
6 defendant's explanation cannot explain these injuries;
7 just adding to the list of other doctors that say,
8 including their expert that his explanation is not
9 consistent with this injury.

10 Elizabeth Harvey. This was heartbreaking testimony
11 because this child has been profoundly affected by these
12 injuries. She's having to have leg braces for a year.
13 She has significant developmental delays and she went
14 through like what age she would have been at for all
15 these delays. And then she says by the time I think a
16 year is up she is almost back on track, which Doctor
17 Amaya says is even more evidence that the delays are
18 caused by the injury because as the brain slowly heals
19 she gets back to where she needs to be.

20 Now Kathleen Spell was the DSS caseworker and
21 Carlene Sessions was the guardian ad litem. They
22 interviewed the defendant much later after the hospital.
23 Now the defendant has more of the information about the
24 injuries and slowly his story evolves just a little bit.
25 They both tell you that whenever they interview the

1 parents that Mr. Berke does most of the talking. He also
2 says that to Carlene Sessions he says that he -- and this
3 is when she is talking to the two of them together so
4 he's got to tell a little bit more of the truth because
5 Sandra is sitting there.

6 So what he says is that he comes back from getting
7 Sibling2 he gets Minor out of her crib. Somehow he doesn't
8 notice that her head is -- you've seen the pictures. He
9 doesn't notice any of this redness. Then he puts her at
10 the kitchen table and her and Sibling1 are having breakfast;
11 still doesn't notice any of the injuries.

12 And then he says Sandra comes out of the bedroom and
13 says what happened to Minor And at that point they
14 decide they have to take her to the doctor. That's not
15 the same story that he tells in his statement but that is
16 a story that he told someone on the stand that somehow he
17 had brought the kids in to have breakfast and then his
18 wife comes out of the bedroom -- he had gotten her
19 coffee.

20 But it's an odd story because you would think he
21 would have noticed the injuries when he took her out of
22 the crib and put her at the breakfast table. In both
23 stories Sandra is asleep. And as soon as Sandra sees
24 this kid's head she realizes something has happened and
25 decides that they've got to take her to the doctor. She

1 takes her to the doctor. She follows the ambulance to
2 the hospital. I already talked to you a little bit about
3 the fact that she did have an accident in foster care and
4 they handled it appropriately. That's why she went home
5 with the foster mother that day.

6 Doctor Amaya was up here for quite some time.

7 Doctor Amaya the defense would have you believe that she
8 is our hired gun. She's not the one who is getting paid
9 all the money their expert is. But they are both good
10 doctors. They are both very, very qualified doctors.

11 Doctor Amaya told you that of the cases that come
12 out of the emergency room, which are only a select few
13 that those doctors suspect abuse, only 50 percent of
14 those she determines are abuse. The others she
15 determines are just accidents. So she doesn't call
16 everything abuse. And his expert had great respect for
17 the way that she handled this case.

18 She says timing depends on when the child was last
19 okay. This is common sense, y'all. Whenever you have
20 something wrong with you you go to the doctor. The
21 doctor usually says when did it start? You can't just
22 look at an organ of the body isolated and know what is
23 going on. The doctor has to ask you questions. If you
24 have a sore throat when did you start having a sore
25 throat? Or if your arm hurts well, were you doing

1 anything yesterday that caused your arm to hurt? If Mr.
2 Shelton came over here right now and took a hammer and
3 slammed my foot and broke a bone and I went to the doctor
4 they might not be able to time my injury just by looking
5 at the bone. They would want to know did anything happen
6 to your foot? And then if I told them this thing
7 happened they would say that's probably when the bone was
8 broken. So its common sense that doctors have to use the
9 information that surrounds the event to determine when
10 something happened.

11 She says the blood would have been visible within
12 hours on a subgaleal bleed. She conceded that it could
13 have been as much as 24 to 48 hours just like his expert
14 said. They both said it could be a matter of hours and I
15 think they both said it could be up to 48 hours. It was
16 Doctor Amaya's opinion because the child had been anemic
17 that it probably was just hours; but that was her
18 opinion.

19 His expert said I just don't think I could say it
20 was just hours. It could be just hours, it could be
21 longer. So they really didn't disagree on that point as
22 much as you have been led to believe. She says the skull
23 fracture could not have been three weeks ago when the
24 child fell off the bench. She also says the child would
25 have been in pain from these injuries. So why is nobody

1 noticing? If the suggestion is that he didn't inflict
2 the wounds he just doesn't notice that this child has a
3 skull fracture and subgaleal bleeds and subdural bleeds
4 on her brain. It just doesn't make sense.

5 She says there are at least two impacts and that's
6 exactly what his expert says. And she thinks there might
7 have been a rotational injury, going back and forth. And
8 then she explained how the sheering of those blood
9 vessels in the brain could have occurred, which makes
10 sense.

11 I think that the evidence was very, very thorough
12 about some of the stressors that Mr. Berke was
13 experiencing. And it does sound like an incredibly
14 stressful situation coming back from being deployed and
15 it sounds like he was just thrown into a caregiver role
16 without any training or any time to adjust.

17 And that is sad but that really is exactly how lots
18 of child abuse cases occur. He is not equipped to deal
19 with the stress of having three children under the age of
20 6 or 7 and having to deal with all of it while they all
21 have a stomach virus; especially with one of them that he
22 says he's never really bonded with. Both experts said it
23 would have taken significant force to crack the skull in
24 the area that it was cracked because it's that real thick
25 part of the bone in the back of the skull. This could

1 not have happened from falling. This child was not tall
2 enough for her to fall far enough to cause this kind of
3 crack in her head or these subdural bleeds. I think Mr.
4 Berke even said he was kneeling when he was giving her a
5 bath so he wasn't even that far from the ground. It's
6 not even like she was from a standing position. He said
7 he was kneeling while he was giving her a bath so it's
8 not like she fell that far.

9 And it could never have caused the injuries that she
10 had. Again, Doctor Amaya says it just couldn't have
11 happened the way that she said it did. She confirmed
12 there was an untreated broken leg, no immunizations after
13 six months. She was due again at 10 months. The last
14 time the child was taken to the doctor is in April. She
15 never goes to the doctor again until this event.

16 Defense expert; she clearly said this is a case of
17 child abuse. This is a serious injury. You can't time
18 injuries in isolation; you must use a history. Ear
19 bruising is a sign of child abuse. And they passed
20 around a picture of a different child from a different
21 case. That child had bruising on one ear, not bilateral
22 bruising on both. So it's not like Minor case. She
23 said she got walloped in the head. At least two separate
24 impacts to the head. The defendant tells you there was
25 only one impact to the head. And she says skull

1 fractures can be explained -- unexplained sometimes in
2 cruising children. Minor wasn't walking so that's not --
3 that doesn't fit that scenario of unexplained fractures.
4 She wasn't walking. She was walking on her knees I think
5 they said.

6 All right, let's talk about the defendant's story.
7 He never says that his wife did it. This cloud has been
8 thrown up here but never has he said in any of his
9 statements or any of his testimony here that his wife
10 struck this child. They just kind of want to throw it
11 out there. This is a small little trailer that they live
12 in. So I guess you're supposed to believe that either a
13 third person came in and beat this child or his wife did
14 it and he just didn't know.

15 He tells Doctor Jacobsen that he caught her before
16 falling. He tells Kathleen Spell that her head went back
17 and forth. He tells Carlene Sessions that she went
18 forward then slid down the side of the tub. But the one
19 consistent thing that he and Sandra said is that he was
20 with the child when she was injured.

21 And he cannot change that because his wife knows it.
22 He wants it both ways. He wants you to say listen to
23 what I said I'm telling you the truth but maybe something
24 else happened. And you just don't have any evidence that
25 anything else happened. The evidence that you have is

1 that what he said he was with the child when she was
2 injured. That's the evidence. He has never told anyone
3 that he noticed an injury or any problem with the child
4 before the bath. His own attorney asked him did you
5 notice if there were any problems with her before she got
6 in the bath. Uh Uh. That's how you know it didn't
7 happen before the bath because with these kinds of
8 injuries she would have been experiencing some pain.

9 We talked about that. Let's talk about when she was
10 hurt. Again, everyone says it was in the bath. She
11 wasn't hurt before the bath. And again, look how he
12 reacts. After the bath he's checking on her every half
13 hour. He's obviously worried. The wife says what
14 happened to Minor and they called the doctor right away,
15 which is not their usual practice.

16 His demeanor and his behavior at the hospital. Now
17 obviously everybody acts differently when they are in
18 stress and when they are worried about their child. But
19 his behavior is odd when he is around his daughter. She
20 says he's about ten feet from the crib where the child is
21 and when the child starts crying he clinches his fists
22 and talks louder like he just can't stand to hear it.
23 That's not typical behavior. That's not behavior in your
24 common experience that you would expect. You child is in
25 the intensive care unit. They are going to keep her at

1 the hospital and yet he doesn't want to comfort her. He
2 doesn't even ask if he can pick her up. When he is with
3 Sandra he does most of the talking. What about this
4 other effect where he wakes up in the middle of the
5 night, jumps on his wife, squeezes her and then he
6 doesn't even remember.

7 I think he says that happens for a week maybe. But
8 even if it just happened once that's odd behavior and if
9 he doesn't remember it -- I don't know what else he
10 doesn't remember. He has anxiety attacks. He told the
11 social worker that he doesn't take his medicine but he
12 says that's not true now. And he says he's never bonded
13 with Minor She has just never warmed up to him.

14 Sandra's story that came out through the hospital
15 workers is that it's the same as the defendant she was in
16 the bath with her. I already talked to you about the
17 Labor Day thing. She comes out and says what happened to
18 Minor And she's asleep when he gets back.

19 So as far as the timeline I think that precludes her
20 from running in there and beating her and then getting
21 back into bed. And as I said before she is also charged
22 with unlawful conduct and she will have her day in court.
23 Please use your common sense in this case. How could he
24 have missed this large squishy area when he was giving
25 her a bath? Obviously that happened in the bath.

1 Something bad happened because of the way that he is
2 behaving afterwards. The defendant's testimony. Like I
3 said you're the sole judges of creditability. You have
4 to judge his creditability. You are the only ones. The
5 fact that he says he never gave her a bath makes
6 absolutely no sense. Most of the time his wife is
7 exhausted and in bed. Thyroid cancer makes you really
8 tired. She probably didn't have any energy and he got
9 stuck with a lot of the childcare tasks, which was very,
10 very stressful.

11 For some reason they give this child Triaminic
12 instead of pain medicine and I'm not really sure what's
13 going on there except that it does make children sleepy.
14 And it's really eerie that he says that he goes in there
15 to make sure she's still breathing. And he said Minor
16 seemed fine before he gave her the bath.

17 Let's look at the timeline from the time that she
18 goes in the bath. He says he gives her a bath at 7:30.
19 She's fussy, he dresses her, he wraps her up and puts her
20 to bed. Between 8 and 3 a.m. he checks on her every half
21 hour. 7:15 he takes Sibling² to school. 7:30 he returns
22 home and Sandra is sleeping and Minor is sleeping. He's
23 feeding them breakfast and Sandra notices the injuries
24 and then Sandra takes the child to the doctor. So from
25 the time that the bath begins until they take her to the

1 doctor he's only been gone for 15 minutes. And during
2 that 15 minutes by his own account his wife was asleep
3 and the baby is asleep.

4 So, what is the defense in this case? Is it that
5 Sandra beat Minor in the head before the bath and no one
6 notices when he gives her the bath? Is that plausible?
7 That's not plausible. He would have noticed the injury
8 while he was giving her the bath. Is this story that
9 Sandra beat Minor in the head after the bath? Well,
10 that's not plausible because by his own account he's
11 never away from Minor. He's checking on her every half
12 hour. That's not reasonable.

13 Is the story that Sandra beat Minor while he was in
14 the carpool? Well that doesn't make any sense because
15 you would have to believe that she beat her so severely
16 to cause these injuries but then the child just went back
17 to sleep and the wife went back to sleep. That's not
18 reasonable either. Did someone else come in a beat Minor
19 That's not reasonable because they both say no one else
20 was in the house.

21 The only other thing that makes sense is that the
22 skull fracture happened three weeks before when she fell
23 off the bench. And Doctor Amaya says that that couldn't
24 have happened. And that also doesn't explain all the
25 subgaleal bleeding. So there just is no other reasonable

1 explanation. And strangely what you are left with is his
2 story. He was with her when she was injured. It really
3 is that simple. It's just that he didn't realize how
4 badly she was injured and that's where he got messed up.

5 You have a huge responsibility, a huge
6 responsibility and I don't envy you. But I'm asking you
7 if you know he did this please have the courage of your
8 convictions and stick by your guns and don't let him get
9 away with it. Not just for justice, because that is
10 enough, but for her because she is counting on it because
11 I'm throwing out a lot of words here ---

12 MR. SHELTON: --- objection.

13 THE COURT: Basis?

14 MR. SHELTON: The golden rule, Your Honor.

15 THE COURT: Sustained. Ladies and gentlemen you
16 are to disregard the Solicitor's last remark and give it
17 absolutely no consideration in your deliberations. You
18 may continue.

19 MS. WILLIAMS: I'm asking you to speak the truth
20 and to do justice in this case because it is important.
21 Thank you.

22 THE COURT: Does anyone need to use the restroom?
23 Is everyone fine?

24 MR. SHELTON: Your Honor, can we approach?

25 THE COURT: Yes.

1 [Whereupon, an off the record bench conference is
2 held]

3 THE COURT: I'll note it and overrule it. Motion
4 for mistrial is denied as there is no basis and the court
5 has given a curative instruction out of an abundance of
6 caution.

7 JURY CHARGE

8 BY THE COURT:

9 Madame Forelady and ladies and gentlemen during the
10 course of this trial you and I both have duties to
11 perform. As the trial judge it is my responsibility to
12 rule upon or pass upon the admissibility of evidence
13 which has been offered during the course of this trial.

14 You are to disregard and disabuse your mind of any
15 testimony or arguments which have been ordered stricken
16 from the record in this case during the progress of this
17 trial if there has been any. You are to consider only
18 the testimony which has been presented from the witness
19 stand together with any exhibits which have been made
20 part of the record in this case.

21 I have the additional duty to charge or instruct you
22 on the law applicable to this case. As the presiding
23 Judge I am the sole Judge of the law of this case. And
24 it is your duty as jurors to accept and apply the law as
25 I now state it to you. If you have a preconceived idea

1 as to what the law is or what the law ought to be in a
2 case or in this case and it should not agree with what I
3 now tell you the law is you are obligated under the oath
4 which you have taken to abandon this preconception on
5 your part because you are sworn to accept the law and
6 apply the law precisely as I now state it to you.

7 In every case tried in this court before a jury the
8 jury becomes the sole and exclusive judges of the facts.
9 You the jury are the judges of the facts in this case.
10 This court is the Judge of the law. The Constitution of
11 our state has declared that a trial Judge shall not
12 intimate, state, comment upon, or make any statement to a
13 trial jury about the facts of a case.

14 Since you the jury are the sole judges of the facts
15 in this case you are not to infer anything from what I
16 have said during the progress of this trial and ruling
17 upon the admissibility of evidence or otherwise or
18 anything that I now say to you during the course of this
19 instruction that I have any opinion about the facts.

20 The law does not permit me to have an opinion about
21 the facts. This is a matter solely for you the jury to
22 determine. As jurors then it is your duty as I have
23 instructed for you to determine the effect, the value,
24 the weight, and the truth of the evidence that has been
25 presented during this trial. Necessarily ladies and

1 gentlemen you must assess the creditability of the
2 witnesses who have testified. Creditability is simply a
3 legalistic term meaning the believability of each
4 witness. It becomes your duty as jurors to analyze and
5 to evaluate the evidence and determine that evidence
6 which convinces you of its truth.

7 Some of the things you may consider as you decide
8 whether or not to believe a witness's testimony about a
9 particular matter include, what was the manner and
10 appearance of the witness who testified? Was the witness
11 hesitant or straight forward in answering? Was the
12 testimony of a witness consistent or inconsistent?

13 How did the witness come to know the facts that he
14 or she testified to or what was his or her ability to
15 know these facts? Is there some reason a witness would
16 want to give testimony which would help or hurt one side
17 or the other. In other words was the witness biased or
18 prejudiced? And was the testimony of a witness
19 strengthened or weakened by other testimony or evidence?

20 I further instruct you that in determining the
21 question of creditability or believability of witnesses
22 who have testified you may believe one witness as against
23 several witnesses or several witnesses as against one
24 witness. You may believe part of the testimony of a
25 witness and reject the remaining part of the testimony of

1 that same witness. If you have a good and sound reason
2 you may believe the testimony of a witness in its
3 entirety or reject the testimony of a witness in its
4 entirety.

5 Again, you may consider whether any witness has
6 exhibited to you any interest, any bias, any prejudice or
7 other motive in this case. You may consider the demeanor
8 of a witness; that is the appearance and manner of the
9 witness from the witness stand. Throughout this process
10 ladies and gentlemen you have but one objective; to seek
11 the truth regardless of its source.

12 I further instruct you that our rules of evidence
13 ordinarily do not permit witnesses to testify to opinions
14 or conclusions. An exception to this rule exists for
15 witnesses we call expert witnesses. A witness who by
16 their education, training, and experience has become an
17 expert in some art, science, or profession, or calling
18 may state an opinion as to relevant and material matters
19 in which the witness claims to be an expert and may also
20 state the reasons for that opinion.

21 You should consider any expert opinion received in
22 evidence in this case like any other evidence; give it
23 the weight you think it deserves. If you decide that the
24 opinion of an expert witness is not based on sufficient
25 education and experience or if you conclude that the

1 reasons given in support of the opinion are not sound or
2 that the opinion is outweighed by other evidence you may
3 disregard the opinion entirely. An expert witness's
4 testimony is to be given no greater weight than that of
5 other witnesses simply because the witness is an expert.

6 Further you are not required to accept an expert's
7 opinion even though it is not contradicted. Ladies and
8 gentlemen, a statement is alleged to have been made by
9 the defendant which has been admitted into evidence in
10 this case. While the court has determined that the
11 statement is admissible I instruct you that you make the
12 ultimate decision of whether or not the defendant
13 actually made the statement.

14 If the defendant did make the statement you must
15 determine whether the statement was made by the defendant
16 voluntarily and of his own free will. This means that
17 the statement was not caused by pressure, force, fear,
18 threats, coercion, or intimidation or by hope or a
19 promise of leniency or a reward of any kind.

20 In determining whether the statement was voluntary
21 you should consider both the characteristics of the
22 defendant and the details of the questioning. Some of
23 the factors you must consider are the age of the
24 defendant, the defendant's education or lack of
25 education, the defendant's mental ability or capacity,

1 the defendant's I.Q. or intelligence, the defendant's
2 background and environment, the place and length of
3 detention, the nature of the questioning, and the advise
4 or lack thereof to the defendant of his constitutional
5 rights including but not limited to the right to remain
6 silent, that any statement could be used against him in a
7 court of law, the right to have a lawyer present, that if
8 he could not afford a lawyer a lawyer would be appointed
9 to represent him without any cost, and that he could stop
10 making a statement at any time.

11 You must carefully consider all the surrounding
12 circumstances before you give any weight to an alleged
13 statement. The State has the burden of proving beyond a
14 reasonable doubt that the alleged statement was
15 voluntary.

16 If you determine it was you may give the statement
17 any further consideration that you deem proper. You then
18 decide what weight if any should be given to the
19 statement. If you decide that the alleged statement was
20 not the free and voluntary statement of the defendant you
21 should not consider the statement at all.

22 Ladies and gentlemen, there are two types of
23 evidence which are presented during any trial; both
24 direct and circumstantial evidence. Direct evidence is
25 the testimony of a person who asserts or claims to have

1 actual knowledge of a fact such as an eye witness.
2 Circumstantial evidence is proof of a chain of facts and
3 circumstances indicating the existence of a fact. The
4 law makes absolutely no distinction between the weight or
5 value to be given to either direct or circumstantial
6 evidence nor is a greater degree of certainty required of
7 circumstantial evidence than of direct evidence.

8 Ladies and gentlemen you should weigh all of the
9 evidence in this case. After weighing all of the
10 evidence if you're not convinced of the guilt of the
11 defendant beyond a reasonable doubt you must find the
12 defendant not guilty. Conversely, if you are convinced
13 of the guilt of the defendant beyond a reasonable doubt
14 then you must find him guilty.

15 I instruct you that the fact that the defendant was
16 arrested, charged, and indicted is not evidence in this
17 case and cannot be considered by you as evidence of guilt
18 in this case nor does it create any presumption or
19 inference of guilt in this case.

20 This documentation, ladies and gentlemen are simply
21 the formal written instruments which contain the charge
22 or charges made against a defendant. They serve as the
23 formal documents by which this case is processed or
24 brought into the court. The defendant has pled not
25 guilty to the indictments and that plea casts the burden

1 on the State to prove the defendant guilty because the
2 person charged with committing a criminal offense in
3 South Carolina is never required to prove himself
4 innocent.

5 I instruct you ladies and gentlemen that it is -- an
6 important rule of the law of evidence that the defendant
7 in a criminal trial no matter what the seriousness of the
8 charge or charges against him -- the charge or charges
9 made against him may be will always be presumed to be
10 innocent of the crimes for which he is indicted unless
11 his guilt has been proven by evidence satisfying you of
12 that guilt beyond a reasonable doubt.

13 This presumption of innocence does not cease when
14 you retire to deliberate regarding this case but it
15 accompanies the defendant from the time of his appearance
16 throughout the trial until you reach a verdict in this
17 case.

18 Our Supreme Court has said that the presumption of
19 innocence is like a robe of righteousness placed about
20 the shoulders of the defendant and it remains with him
21 and assigns him to that class, the innocent, until that
22 presumptive robe of righteousness has been stripped from
23 his person by evidence satisfying you of that guilt
24 beyond a reasonable doubt. Madame Forelady and ladies
25 and gentlemen the presumption of innocence is not mere

1 legal theory. It is not just a legal phrase. It is a
2 substantial right to which every defendant is entitled
3 unless you, the jury, are satisfied from the evidence of
4 his guilt beyond a reasonable doubt.

5 The State has the burden of proving the defendant
6 guilty beyond a reasonable doubt. Some of you may have
7 served as jurors in civil cases where you were told that
8 it is only necessary to prove that a fact is more likely
9 true than not true such as by the greater weight or
10 preponderance of the evidence.

11 In criminal cases the State's proof must be more
12 powerful than that. It must be beyond a reasonable
13 doubt. Proof beyond a reasonable doubt is proof that
14 leaves you firmly convinced of the defendant's guilt.
15 There are very few things we know in this world that we
16 know with absolute certainty.

17 And in criminal cases the law does not require proof
18 that overcomes every possible doubt. If based on your
19 consideration of the evidence you are firmly convinced
20 that the defendant is guilty of the crime charged you
21 must find the defendant guilty.

22 If on the other hand you think there is a real
23 possibility that the defendant is not guilty you must
24 give him the benefit of that doubt and find him not
25 guilty. The defendant is charged with Unlawful Conduct

1 Toward a Child. The State must first prove beyond a
2 reasonable doubt that the defendant had charge or custody
3 of the child, was the parent or guardian of the child, or
4 was responsible for the care and support of the child.

5 A person responsible for a child's welfare includes
6 the child's parent, guardian, or foster parent, an
7 operator, employer, employee or caregiver of a public or
8 private residential home, institution, agency, or child
9 daycare center facility or an adult who has assumed the
10 role or responsibility of a parent or guardian for the
11 child that does not necessarily have legal custody of the
12 child.

13 This does not include a person whose only role is as
14 a caregiver and whose contact is only incidental with the
15 child such as a babysitter. The State must also prove
16 beyond a reasonable doubt that the defendant placed the
17 child at unreasonable risk of harm affecting the child's
18 life, physical or mental health or safety.

19 A child means a person under the age of 18. The
20 defendant is also charged with Infliction of Great Bodily
21 Injury Upon a Child. The State must prove beyond a
22 reasonable doubt that the defendant inflicted great
23 bodily injury upon a child. Great bodily injury means
24 injury which creates a substantial risk of death or which
25 causes serious or permanent disfigurement or protracted

1 loss or impairment of the function of any bodily member
2 or organ. Again, a child means a person under the age of
3 18.

4 Ladies and gentlemen, you have heard evidence that
5 the minor child Minor Berke had injuries to her leg and
6 arm unrelated to the charges contained in indictment
7 2013-604, which is the charge of Infliction of Great
8 Bodily Injury Upon a Child. This testimony, if you
9 conclude it is true, may only be considered by you on the
10 question of the guilt or innocence of the defendant on
11 indictment 2013-603, which is Unlawful Conduct Toward a
12 Child and for no other reason and for no other purpose.

13 This evidence has been admitted for a limited
14 purpose and it is not evidence of any of the allegations
15 contained in indictment 2013-604, which is Infliction of
16 Great Bodily Injury Upon a Child. You may give this
17 evidence the weight, value, and effect if any that you
18 find it should have on the sole issue of the guilt or
19 innocence of the defendant on indictment 2012 [sic] 603
20 which again is Unlawful Conduct Toward a Child.

21 You must not consider evidence of these previous
22 injuries as proof of the defendant's guilt of the charge
23 of Infliction of Great Bodily Injury Upon a Child, which
24 is indictment 2013-604. Ladies and gentlemen I further
25 instruct you that mere presence at the scene of an

1 incident or crime is not sufficient to prove someone
2 guilty of a crime. A defendant's presence where a crime
3 is being committed does not make someone guilty of a
4 crime. The burden is on the State to prove every element
5 of the crime charged.

6 If you find after reviewing all the evidence that
7 the State has proven that the defendant was only present
8 at the scene of a crime and they have not proven beyond a
9 reasonable doubt any other participation in the crime
10 then you must find the defendant not guilty. The law is
11 that proof of at the scene of the crime is not sufficient
12 to find someone guilty.

13 Ladies and gentlemen I further instruct you that the
14 defendant has raised the defense of accident. An act may
15 be excused on the ground of accident if it is shown that
16 the act was unintentional, that the defendant was acting
17 lawfully, and that reasonable care was used by the
18 defendant. The burden is on the State to prove beyond a
19 reasonable doubt that the act was not an accident but was
20 caused by the negligence or carelessness on the part of
21 the defendant.

22 Ladies and gentlemen, there are two separate
23 indictments in this case; 2013-GS-08-603, which is
24 Unlawful Conduct Toward a Child and 604, which is
25 Infliction of Great Bodily Injury Upon a Child. Each of

1 these indictments alleges separate offenses against the
2 defendant. Each indictment charges a separate and
3 distinct offense. You must decide each indictment
4 separately on the evidence and the law applicable to it
5 uninfluenced by your decision as to any other indictment.

6 The defendant may be convicted or acquitted on any
7 or all of the offenses charged and you will be asked to
8 write a separate verdict for each of these indictments.
9 You will be asked to write a separate verdict of guilty
10 or not guilty for each indictment.

11 Ladies and gentlemen, there are two possible
12 verdicts for each of the indictments and I will go
13 through this with you. And these verdict forms will go
14 into the jury room with you so you don't have to try to
15 write any of this down. And also there is no
16 significance whatsoever to the order in which I state
17 these possible verdicts; it is simply that one must be
18 stated first.

19 As to indictment 603, which is Unlawful Conduct
20 Toward a Child the options are as follows: We, the jury
21 by unanimous consent find the defendant guilty of
22 Unlawful Conduct Toward a Child or not guilty. And as to
23 indictment 604 the options are as follows: We, the jury
24 by unanimous consent find the defendant guilty of
25 Infliction of Great Bodily Injury Upon a Child or not

1 guilty. Again, there is absolutely no significance to
2 the order in which I have stated these potential
3 verdicts. It is simply that one must be stated first.

4 Ladies and gentlemen, your verdict must be a
5 unanimous one, which means that all 12 of you must agree
6 in order to reach a verdict on each indictment. Madame
7 Forelady, once the jury has reached a verdict it will be
8 your responsibility to fill out each verdict form, to
9 sign and date the forms, and then knock on the door and
10 advise the bailiffs that the jury has reached a unanimous
11 verdict.

12 Again, ladies and gentlemen your verdict must be
13 unanimous, which means all 12 of you must agree in order
14 to reach a verdict. I'm going to ask that you return to
15 your jury room but do not yet begin your deliberations.
16 I have some matters of law that I need to take up with
17 the attorneys that may require clarity or clarification
18 of an instruction or further instruction.

19 However, if there is no further instruction we will
20 send in the verdict forms and the evidence and your
21 notebooks and at that time you will be allowed to begin your
22 deliberations. Ladies and gentlemen if you have any
23 questions during deliberations I will tell you in advance
24 that there will be a delay in our response; that is
25 because there is a procedure that we must follow in

1 answering your questions. So know that if you have a
2 question there will be a delay because we are following
3 that procedure.

4 And Madame Forelady, if the jury has any questions
5 it is your responsibility to write those questions out
6 and then again knock on the door and advise the bailiffs
7 that the jury has a question. Again, if you will go
8 with the bailiffs and please leave your notepads in your
9 seats. Do not yet begin your deliberations.

10 [Whereupon, the jury exits at 3:54 p.m.]

11 THE COURT: Other than what we've already covered
12 in charge conference are there any exceptions to the
13 charge from the State?

14 MS. WILLIAMS: No, Your Honor.

15 THE COURT: From the defense?

16 MR. GROEBER: Not anything different from what we
17 had requested, Your Honor, and that has been marked.
18 Thank you.

19 THE COURT: You're welcome. Please make sure again
20 the evidence is all in place before we send it back along
21 with the notebooks and the verdict forms.

22 [Whereupon, counsel reviews exhibits with the court
23 reporter]

24 THE COURT: Is all the evidence in place from the
25 State?

1 MS. WILLIAMS: Yes, Your Honor.

2 THE COURT: From the defense?

3 MR. SHELTON: Yes, Your Honor --

4 THE COURT: You want to double check?

5 MR. SHELTON: I'm sorry.

6 THE COURT: That's okay.

7 [Whereupon, Mr. Shelton reviews the exhibits]

8 THE COURT: Yes, sir?

9 MR. SHELTON: Everything is in order.

10 THE COURT: Perfect. Thank you for double checking
11 for me. If you all could go ahead and bring the
12 alternate out to me as the bailiff takes in...

13 [Whereupon, the alternate juror enters the
14 courtroom]

15 THE COURT: Sir, we want to thank you for your time
16 and your attention to this case. You have been
17 attentive, you have been timely. Being the alternate is
18 often thankless because if we need you you are so
19 valuable for us to have when it's necessary for us to
20 have in the event someone is ill or cannot proceed from
21 the regular panel. But now that we have concluded the
22 trial you are welcome to leave, you are welcome to stay.
23 If you would like we will put you in a separate room if
24 you want to see how things turn out. But if you don't
25 you're welcome to be relieved and to go home. I would

1 just need you to call the jury information line after 6
2 o'clock this evening. I would also ask that you not
3 discuss the case with anyone until the entire panel is
4 released on Friday.

5 Often times lawyers will contact you for feedback.
6 You're welcome to discuss the case at that point if you
7 would like to. If someone should exceed your comfort
8 level please let us know so that we can protect your
9 privacy.

10 But again, please don't have any discussions until
11 after Friday. If you want to remain with us just let the
12 bailiffs know and we will make you comfortable but if
13 you'd like to go home you're excused. And you can also
14 destroy your notes or take them with you if you would
15 like or we'll destroy them for you. Thank you so much,
16 sir. You have a great day.

17 [Whereupon, the alternate juror is excused]

18 [Whereupon, evidence is out to the jury at 3:58
19 p.m.]

20 THE COURT: All right. The record should reflect
21 that the jury begun its deliberations at 3:58. And we
22 will be at ease until we get instructions from our panel.

23 [Whereupon, court is in recess]

24 THE COURT: Ladies and gentlemen you may be seated.
25 The jury has reached a verdict. Is there anything before

1 we bring in the jury from the State?

2 MS. WILLIAMS: No, Your Honor.

3 THE COURT: From the defense?

4 MR. SHELTON: No, Your Honor.

5 THE COURT: Please bring in the jury.

6 [Whereupon, the jury enters at 5:25 p.m.]

7 THE COURT: Madame Forelady, has the jury reached a
8 verdict?

9 MADAME FORELADY: Yes, we have Your Honor.

10 THE COURT: If you would give the verdict forms to
11 the bailiff for me please.

12 [Whereupon, the bailiff provides documents to the
13 court]

14 THE COURT: If the defendant would stand for
15 publication of the verdict.

16 [Whereupon, the defendant stands]

17 VERDICT

18 CLERK OF COURT: The State of South Carolina County
19 of Berkeley versus Christopher W. Berke, indictment
20 number 2013-GS-08-604 we, the jury, by unanimous consent
21 find the defendant guilty of Infliction of Great Bodily
22 Injury Upon a Child. Signed by the Foreperson.

23 The State of South Carolina County of Berkeley
24 versus Christopher W. Berke, indictment number 2013-GS-
25 08-0603 we, the jury, by unanimous consent find the

1 defendant guilty of Unlawful Conduct Towards a Child.

2 Signed by the Foreperson March 5th, 2014.

3 Madame Forelady and ladies and gentleman of the jury
4 if I have accurately published your verdict please
5 signify by raising your right hand at this time.

6 [Whereupon, all jurors raise their right hands]

7 THE COURT: You may put your right hands down. Is
8 there any request to poll the jury from the State?

9 MS. WILLIAMS: None from the State, Your Honor.

10 THE COURT: From the defense?

11 MR. SHELTON: Yes, Your Honor.

12 THE COURT: Madame Clerk -- ladies and gentlemen if
13 you would give the Clerk your attention. You may be
14 seated.

15 POLLING OF THE JURY

16 CLERK OF COURT: Juror number 48 Nancy Fabian is
17 this your verdict?

18 MS. FABIAN: Yes, it is.

19 CLERK OF COURT: Is it still your verdict?

20 MS. FABIAN: Yes, it is.

21 CLERK OF COURT: Juror 96 George Leblanc is this
22 your verdict?

23 MR. LEBLANC: Yes, it is.

24 CLERK OF COURT: Is this still your verdict?

25 MR. LEBLANC: Yes, it is.

1 CLERK OF COURT: Juror number 9 Melinda Boggs is
2 this your verdict?

3 MS. BOGGS: Yes.

4 CLERK OF COURT: Is this still your verdict?

5 MS. BOGGS: Yes.

6 CLERK OF COURT: Juror 260 Justin Welch is this
7 your verdict?

8 MR. WELCH: Yes.

9 CLERK OF COURT: Is this still your verdict?

10 MR. WELCH: Yes, ma'am.

11 CLERK OF COURT: Juror 251 Tiffany Smith is this
12 your verdict?

13 MS. SMITH: Yes.

14 CLERK OF COURT: Is this still your verdict?

15 MS. SMITH: Yes.

16 CLERK OF COURT: Juror 108 Peter McFarland is this
17 your verdict?

18 MR. MCFARLAND: Yes.

19 CLERK OF COURT: Is this still your verdict?

20 MR. MCFARLAND: Yes.

21 CLERK OF COURT: Juror 239 Roy Patrick is this your
22 verdict?

23 MR. PATRICK: Yes.

24 CLERK OF COURT: Is this still your verdict?

25 MR. PATRICK: Yes.

1 CLERK OF COURT: Juror 23 Gova Chrobocinski is this
2 your verdict?

3 MR. CHROBOCINSKI: Yes.

4 CLERK OF COURT: Is this still your verdict?

5 MR. CHROBOCINSKI: Yes.

6 CLERK OF COURT: Juror 107 Tammy McCullough is this
7 your verdict?

8 MS. MCCULLOUGH: Yes, ma'am.

9 CLERK OF COURT: Is this still your verdict?

10 MS. MCCULLOUGH: Yes, ma'am.

11 CLERK OF COURT: Juror 115 Louisse Morales is this
12 your verdict?

13 MS. MORALES: Yes.

14 CLERK OF COURT: Is this still your verdict?

15 MS. MORALES: Yes, ma'am.

16 CLERK OF COURT: Juror 51 Millard Fort is this your
17 verdict?

18 MR. FORT: Yes.

19 CLERK OF COURT: Is this still your verdict?

20 MR. FORT: Yes, ma'am.

21 CLERK OF COURT: And juror 161 Daniqua Southerland
22 is this your verdict?

23 MS. SOUTHERLAND: Yes, ma'am.

24 CLERK OF COURT: Is this still your verdict?

25 MS. SOUTHERLAND: Yes, ma'am.

1 CLERK OF COURT: Your Honor, I've polled the jury
2 and the verdict stands.

3 THE COURT: Thank you. Madame Forelady and ladies
4 and gentlemen this will conclude your service as jurors
5 this week. This is the last case that we will try. This
6 of course does not conclude court for the week. There
7 are some other non-jury matters that the court will
8 dispose of for the remainder of the week. However, your
9 service as jurors has concluded.

10 You are welcome to discuss this case if you would
11 like. By the same token you don't have to discuss the
12 case. Often time lawyers will contact you just to get
13 feedback more in the nature of constructive criticism and
14 lay people often look at cases very differently than
15 lawyers do. So often times the lawyers will contact you
16 to get feedback. So don't be surprised if someone should
17 contact you regarding the case.

18 Again, you are free to discuss the case with them if
19 you would like but you don't have to. And if someone
20 should go beyond what you feel is comfortable please make
21 us aware of it so that we can take the appropriate action
22 to protect your privacy. The ninth circuit is one of the
23 busiest judicial circuits in the State. Probably only
24 Richland County which is Columbia, the Capital, as well
25 as Greenville Counties are probably as busy as we are in

1 the ninth circuit. But we hold jury trials every week
2 with the exception of the holidays and again as I've
3 indicated the two weeks during the year that we have
4 mandatory judicial education. As you can well imagine
5 that's a lot of court. But we would not be able to do
6 what we do without you all being willing to volunteer
7 your time to us and to act as the fact finders in cases.

8 As you've already heard me say during qualification
9 that our system is the only kind -- only one of its kind
10 in the world where 12 people from the community listen to
11 a case, decide what the facts are, apply the law to the
12 facts, and then render a verdicts.

13 So I hope that this has been an educational process
14 for you. I hope that you've learned that it is nothing
15 like what you see on television. And I hope you are
16 leaving with an understanding of how very important you
17 are to us and that in some small measure your faith in
18 the system has been reaffirmed and that it is because of
19 your participation in this process.

20 You are welcome to stay with us if you would like
21 for sentencing. You are also welcome to leave if you
22 would like. Again, you are dismissed for the week. If
23 you would like to remain for sentencing please make the
24 bailiffs aware of it and we will bring you back into the
25 courtroom prior to dismissal of the remaining jurors.

1 You are excused with the court's profound thanks.

2 [Whereupon, the jury is excused exits at 5:31 p.m.]

3 THE COURT: We will hear post trial motions and
4 sentencing if y'all get the sentencing sheets for me
5 please.

6 [Off the record momentarily]

7 THE COURT: Ladies and gentlemen, we apologize for
8 the delay. We're waiting on the sentencing sheets.

9 [Off the record momentarily]

10 MS. WILLIAMS: May I approach, Your Honor?

11 THE COURT: Uh huh.

12 [Whereupon, Ms. Williams provides documents to the
13 court]

14 THE COURT: Are there any post trial motions from
15 the State?

16 MS. WILLIAMS: No, Your Honor.

17 THE COURT: I can't hear you.

18 MS. WILLIAMS: No, Your Honor.

19 THE COURT: From the defense?

20 MR. SHELTON: Yes, Your Honor.

21 MOTION FOR DIRECTED VERDICT

22 MR. GROEBER: We would renew our motion for
23 directed verdict --

24 THE COURT: I can't hear you, Mr. Groeber.

25 MR. GROEBER: We would renew our motions for a

1 directed verdict. I guess in the posture of a verdict
2 notwithstanding -- or a motion for dismissal
3 notwithstanding the verdict.

4 In addition we would move for a new trial. The
5 bases would be our previously made motions. I'll mention
6 a few; the severance, the motion to quash, the Golden
7 Rule argument presented in closing, the 404(b) evidence
8 that would be related to the severance motion. If I
9 could have one more second, Your Honor.

10 [Whereupon, Mr. Groeber and Mr. Shelton confer]

11 MR. GROEBER: That would be it, thank you.

12 THE COURT: You're welcome. Would the State like
13 to respond?

14 MS. WILLIAMS: Your Honor, all of those motions
15 have been made and argued at length. We believe that
16 your rulings are proper and we would just ask you to deny
17 their motions.

18 THE COURT: The court will deny the motion for
19 dismissal notwithstanding the verdict as well as for a
20 new trial. The court has already ruled on the motion for
21 severance and made a contemporaneous ruling with the
22 basis -- factual findings as well as case law, as well as
23 the motion to quash. The motion for mistrial, a mistrial
24 is an extreme remedy cautiously invoked and it rarely
25 should be done. It should only be done when there is no

1 other avenue to correct the misstep. And in this
2 instance the court sustained the objection and gave a
3 curative instruction for the jury to disregard the
4 comment therefore there is no necessity for a mistrial.

5 And that motion was dealt with contemporaneously and
6 is not a basis for a mistrial, as well as the court gave
7 a curative instruction regarding the incidents contained
8 in indictment 603 and that they were not to be considered
9 as guilt on indictment 604. So the motion in that regard
10 is denied as well. Now does the defendant have any
11 previous record?

12 MS. WILLIAMS: No, Your Honor, no convictions.

13 THE COURT: I'll be glad to hear from the State.

14 SENTENCING

15 MS. WILLIAMS: Your Honor, there isn't anybody here
16 to talk for Minor because she's a child and she is in
17 foster care. Your Honor, has heard about the horrific
18 injuries that she suffered. She is doing much, much
19 better and we will never know how the brain injury will
20 affect her long term.

21 But I would just plead with the court to give him
22 significant jail time. We're so grateful that her voice
23 was heard today in this trial and we think given the
24 severity of the injuries and the vulnerability of this
25 victim that this is a case that would be worthy of

1 significant jail time. Thank you, Your Honor.

2 THE COURT: You're welcome. She is doing well,
3 however, is she not?

4 MS. WILLIAMS: She is ---

5 THE COURT: --- and there is no evidence of any
6 cognitive delay correct?

7 MS. WILLIAMS: She is not completely on track with
8 her age but she is doing remarkably well and she's
9 walking pretty well. And so she is definitely doing much
10 better.

11 THE COURT: Okay. I'll be glad to hear from the
12 defense.

13 MR. SHELTON: Thank you, Your Honor. May it please
14 the court?

15 THE COURT: Yes, sir.

16 MR. SHELTON: Your Honor, I think at this point in
17 time I would ask that his Mother say a few things.

18 THE COURT: Sure.

19 MR. SHELTON: She would like to address Your Honor.

20 THE COURT: And Ms. Williams we've researched it.
21 604 is not classified as violent.

22 MS. WILLIAMS: Thank you, Your Honor.

23 THE COURT: You're welcome.

24 MR. SHELTON: And I think you heard Ms. Illar
25 testify at trial but I think she would like to address

1 Your Honor as to more of Chris's character.

2 THE COURT: Sure. I'd be glad to hear from her.

3 Yes, ma'am?

4 MS. ILLAR: Hi, Your Honor.

5 THE COURT: Please state your name for the record
6 ma'am?

7 MS. ILLAR: My name is Ronda Illar.

8 THE COURT: Yes, ma'am?

9 MS. ILLAR: And I'm Chris Berke's Mother. You know
10 this has been going on for two and a half years. And as
11 a mother and a grandmother it has been...

12 THE COURT: I would imagine very stressful.

13 MS. ILLAR: Heart wrenching, yes. Christopher has
14 been a very good son. He's been a very loving son. I've
15 had health issues; he calls and checks on me. We talk a
16 lot. He served in the military. He served his country
17 and has been a role model citizen and he's never been in
18 any trouble.

19 And as I stand here before God as my witness in my
20 heart I don't believe he's guilty. And I know from what
21 I saw that he loved his children and his children loved
22 him. And he was an amazing father. He taught them
23 discipline, he taught them love, he played with them; he
24 was just amazing with them, just amazing. I mean he was
25 a great father, he really was a very loving, caring,

1 devoted father; they were his world and he was theirs. I
2 mean he was just a great dad and he's been a very good
3 son.

4 THE COURT: Thank you, ma'am. We appreciate your
5 sharing that with the court.

6 MS. ILLAR: Thank you.

7 MR. SHELTON: Just a couple more things about
8 Chris. Obviously ---

9 THE COURT: --- let me interrupt you just one
10 second because I need to make sure what I said was
11 accurate earlier and I think I was wrong.

12 [Whereupon, the court reviews documents].

13 THE COURT: It is violent. I apologize I was
14 wrong. It is a violent offense. Yes, sir?

15 MR. SHELTON: Your Honor, just I've gotten to know
16 Chris obviously over this time especially preparing for
17 trial and talking about different things. I can tell you
18 that I've asked and I've verified as far as discipline.

19 When Ms. Ronda Illar talks about discipline it
20 wasn't physical discipline. He would take their toys
21 away when they were in trouble and they had to go to
22 timeout. It was that type of discipline she was talking
23 about, Your Honor. And he told me that but I was able to
24 verify that independently without talking about what he
25 said, Your Honor. He did do everything that DSS had

1 asked him to do after this case. Obviously, they took
2 the children away. He was asked to go to parenting
3 classes; he completed those parenting classes. They
4 asked him to do mental health screens. He did his mental
5 health screens with the VA.

6 He continued to go to VA treatment and whatever was
7 needed. He had a lot of health issues associated with
8 his deployment, physical health issues Your Honor in
9 being in the Army. So he followed up with that. He just
10 actually got hurt on work two weeks ago, three weeks ago
11 and so he had some knee and some leg pain from that work,
12 Your Honor.

13 As you heard at trial he did -- was deployed those
14 two times. He has different awards and certifications
15 that he got while being deployed, Your Honor. He
16 received the Afghan Campaign medal with campaign star; he
17 received a joint service achievement medal, his Army
18 achievement medal second award, National Defense service
19 award, global war on terrorism service medal, Army
20 service ribbon, and then a NATO medal, Your Honor.

21 So he did -- he had 13 ribbons. He did a lot of
22 good things while he was in the Army. He did a lot of
23 good things while serving our country, Your Honor. And I
24 do have a copy of some of those if Your Honor would like
25 to see some of those certificates.

1 THE COURT: Your word is sufficient.

2 MR. SHELTON: I think you heard Chris testify. I
3 think you heard what he had to say as far as what he did.
4 I don't know if Chris wants to say anything right now.
5 But Your Honor, I would just ask you to consider the
6 minimum and -- I'd just ask you to consider the minimum,
7 Your Honor.

8 THE COURT: Sir, is there anything you would like
9 to state for the record on your behalf?

10 MR. BERKE: No, Your Honor.

11 THE COURT: You can take your seat. This is an
12 unfortunate incident and I think unfortunate is probably
13 a gross understatement but any other word at this point
14 frankly escapes me.

15 There has been a great deal of talk about what a
16 great person Mr. Berke is, what a great son and father he
17 has been to his children and I have no reason to doubt
18 the veracity of those statements.

19 As we discussed in pretrial motions the statute is
20 almost a strict liability statute. It does not require
21 that someone in a premeditated manner do something to a
22 child. It's not like the Murder statute where you have a
23 component of premeditation, willfulness or an evil
24 intent. It basically holds any adult, or I guess really
25 in Juvenile Court you probably could be charged with some

1 component of the offense, of injuring a child, which in
2 our society is the least of these; the least capable of
3 protecting themselves and the most vulnerable.

4 So having done this now for a very, very long time
5 probably longer than I care to admit I very rarely come
6 across people who are what we would categorize in society
7 as truly evil. As my mentor always says you have to be
8 able to discern the difference between people who are
9 misguided, which means people who have lapses in
10 judgment, versus people who are truly evil and
11 unrepentant of those being without any conscious or moral
12 compass. Probably five percent of what we see fall into
13 that category but the other 95 percent fall into the
14 other category.

15 So this is a very again unfortunate circumstance
16 where a child received really but for the grace of God a
17 catastrophic injury that could have left her really
18 completely incapacitated and she has recovered really
19 amazingly and I'm certain attributable to -- and both
20 experts -- actually the defendant's expert confirmed
21 this, due to the wonderful care provided to her by the
22 team at the Medical University headed by Doctor Amaya and
23 the intervention that they spearheaded that really
24 probably salvaged this young child's ability really to
25 function. And by all indicators she may not have any

1 really long range affects of this injury, however there
2 is really no way to know completely any cognitive
3 deficits or milestone deficits that she may suffer as a
4 result of this injury until she grows and until she gets
5 older.

6 There have been many things said during the course
7 of this case and one of which I am inclined to agree with
8 that being what was articulated both by Ms. Williams in
9 her closing argument and I think echoed by Mr. Shelton
10 that Mr. Berke had been away for an extended period of
11 time on deployment and he really was ill equipped to come
12 back into the family structure.

13 And I do not believe that he had any malicious
14 intent, evil intent, or any real desire to harm any of
15 his children. I wasn't there and that's the deficit of
16 any court hearing cases. The jurors have spoken. I have
17 complete confidence in their verdict. They are 12
18 individuals with an inordinate amount of common sense who
19 have the ability to see a case objectively.

20 But none of us were there. We don't know exactly
21 how this transpired but we certainly can surmise from the
22 evidence as it was presented how this had the potential
23 to have developed and for this child to have been
24 injured. And as I articulated at the directed verdict
25 stage of the trial that either one of these injuries was

1 sufficient to meet the element of great bodily injury
2 required by the statute whether it was the first impact
3 or the second or the first and second combined in
4 combination. As such and based on the totality of the
5 record sir, if you would stand for sentencing.

6 [Whereupon, the defendant stands]

7 THE COURT: The court finds it appropriate sir on
8 2013-GS-08-603 which is the indictment for Unlawful
9 Conduct Toward a Child that you be confined to the State
10 Department of Corrections for a period of five years.
11 You will get credit for any time that you've served to be
12 calculated and applied by the Department of Corrections.

13 On the charge of Inflicting Great Bodily Injury to a
14 Child you are sentenced to the State Department of
15 Corrections for a period of twelve years. These
16 sentences will run concurrent with one another. You'll
17 get credit for any time that you've served to be
18 calculated and applied by the Department of Corrections.
19 Thank you all, very much.

20 MS. TAYLOR: Thank you, Your Honor.

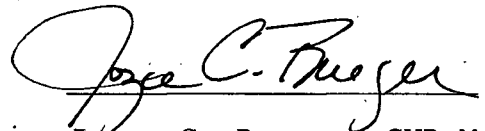
21 [Whereupon, the jury trial concludes at 5:53 p.m.]
22
23
24
25

C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Berkeley County, South Carolina on the 5th day of March, 2014.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 21, 2014



Joyce C. Rueger, CVR-M

Court Reporter

Kwm

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

FILED
14 FEB 28 PM 4:09

IN THE COURT OF GENERAL SESSIONS
FOR THE NINTH JUDICIAL CIRCUIT

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

Case No(s): 2013GS0800603, 2013GS0800604

Warrant No(s): 2013A0810400116;

2013GS0800604; 2013GS0800603

Charge(s): Unlawful Neglect/Child; Abuse/Child
to inflict great bodily injury

STATE OF SOUTH CAROLINA)

vs.)

CHRISTOPHER W BERKE,)

Defendant)

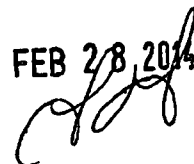
**Motion to Quash Indictment
for Unlawful Conduct**

The Defendant moves, through his attorney, Chad D. Shelton, to quash Indictment number 2013-GS-08000603, on the charge of Unlawful Neglect of a Child. The indictment is insufficient in that it does not state the offense with sufficient certainty and particularity to enable the defendant to know what he is called upon to answer; thus, he cannot make a knowing and intelligent decision as to whether or not he should plead guilty or seek trial. Specifically, the indictment fails for two reasons. First, because the time period covered by the indictment is overly broad. Second, the indictment gives no notice of the specific actions or inactions of the defendant during this broad time frame that would make him guilty of the crime alleged.

Argument

The Court, in *State v. Gentry*, 363 S.C. 93 (2005), cleared up the confusing issue of a circuit court's subject matter jurisdiction and insufficiency of an indictment. Prior to *Gentry*, an insufficient indictment was appealable no matter what occurred in circuit court, based upon the belief that an insufficient indictment took away a circuit court's subject matter jurisdiction. The Court determined that the circuit court would have jurisdiction to hear criminal matters, no

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matter the language of the indictment. *Id.* at 101. The Court separated subject matter jurisdiction and sufficiency of the indictment. If there is question as to the sufficiency of an indictment it must be presented prior to the jury being sworn. *Id.* The Court went on to say.

If the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and [*103] whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. In determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. *Gentry* at 102-103.

The Defendant concedes that the indictment sufficiently apprises him of the elements of the offense that is intended to be charged. The paragraph allegation in the Indictment reads:

Unlawful Conduct Toward a Child, That Christopher W Berke did in Berkeley County, South Carolina, on or between December 1, 2010 and September 6, 2011, have charge or custody of^{Minor} Berke, and did place the child at unreasonable risk of harm affecting the child's life, physical or mental health or safety. This is in violation of Section 63-5-70 of the South Carolina Code of Laws (1976) as amended.

The Defendant alleges that he is unable to determine what he is called upon to answer because of the breadth of the time frame and the statute at issue does not clearly define what actions

constitute a violation of the statute.

A. The Indictment is insufficient because the time frame is overly broad.

The South Carolina Supreme Court has not addressed the issue of determining the sufficiency of an indictment involving an overbroad time period. However, the South Carolina Court of Appeals has. In *State v. Tumbleston*, 376 S.C. 90 (Ct. App. 2007), the appellate court recognized a two prong test: (1) whether time is a material element of the offense; and (2) whether the time period covered by the indictment occurred prior to the return of the indictment by the grand jury. *Tumbleston* at 98-99.

Applying this standard in this case would appear to defeat the Defendant's argument on this issue. However, the argument survives such an analysis for two reasons. First, the South Carolina Supreme Court has yet to adopt this rule. Second, *Tumbleston* can be distinguished. It does not address a statute, such as Unlawful Conduct, that does not clearly define what actions constitute a violation of the statute.

B. The Indictment is insufficient because it fails to clearly define what actions constitute a violation of the Statute.

While the defendant is notified by the indictment what charge he must answer, he is not given any notice of the actions he took or failed to take that gives rise to the charge. *Gentry* made clear that the indictment is a notice document. While several South Carolina cases address the sufficiency of notice of the crime alleged, none after (or before) *Gentry* address the sufficiency of the notice to the defendant of a charge that does not clearly define what actions constitute a violation of the statute. While *Gentry* and its progeny fail to address this issue directly, the Court did provide a helpful reminder about the purpose of the indictment.

"The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation." *Gentry* at 102. It is the nature and scope of the accusation that is at issue in this particular indictment. There is no notice to the defendant about the nature and scope of the accusation.

Tumbleston is instructive to illustrate the difference between statutes that clearly define what actions constitute a violation and those that do not. In *Tumbleston*, the Defendant was charged with sexual abuse of a child over a time period of several years. Sexual Abuse charges are very specific about what acts constitute the criminal violation. In contrast, the Unlawful Conduct statute does not clearly define what actions constitute a violation of the statute.

There are no reported South Carolina cases on the issue, but other courts have held that where an indictment is ambiguous or when the nature and circumstances of the charge cannot be easily understood, the indictment fails. See *Evans v. United States*, 153 U.S. 584, 587 (U.S. 1894) (Even in the cases of misdemeanors, *the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offence intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offence to which the plea relates. (emphasis added)*), and *Russell v. United States*, 369 U.S. 749, 765 (U.S. 1962) ("It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, -- it must descend to particulars. . . . Undoubtedly *the language of the statute*

may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." (emphasis added))

The *Evans* case is a helpful reminder that clear indictments serve two purposes: (1) it provides proper notice to the Defendant about what he must face and (2) it protects the record to show with accuracy what offense upon which the defendant was tried upon or to which pled guilty.

Our neighboring states have also recognized this general principal. See *Roughlin v. State*, 17 Ga. App. 205, 207 (Ga. Ct. App. 1915) ("*If, however, the nature and circumstances of the charge can not be easily understood, a criminal accusation may be defective even though it be stated in the precise language of the statute . . . [W]here the definition of the offense includes generic terms, it is not sufficient that the indictment shall charge the offense in the same terms as in the definition. Likewise, in *Youmans v. State*, 7 Ga. App. 101 (66 S.E. 386), we held that "it has come to be a fixed rule that where a crime can be committed in more ways than one, the defendant must be informed of the manner in which he is charged to have committed the offense named," and that "all the material facts and circumstances embraced in the definition of the statutory offense must be stated, or the indictment will be defective; and no essential element of the crime can be omitted."* (emphasis added)), and *State v. Barnes*, 253 N.C. 711, 717-718 (N.C. 1961) ("This Court said in *S. v. Cox*, supra: "Moreover, while it is a general rule prevailing in this State that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson*, 218 N.C. 373, 11 S.E. 2d 149, the rule is inapplicable where the words of the statute do not in themselves inform the accused of the specific offense of which

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Deadra L. Jefferson, Circuit Court Judge

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APR 27 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

CHRISTOPHER W. BERKE,

APPELLANT

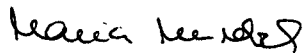
CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of April, 2015.



Brandon Hall
Administrative Specialist

SUBSCRIBED AND SWORN TO before me
this 27th day of April, 2015.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.